WASHINGTON REAL ESTATE LAW

RECENT DEVELOPMENTS IN CASE LAW AND LEGISLATION

Prepared
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REAL PROPERTY PROBATE & TRUST SECTION
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CASE LAW AND LEGISLATIVE UPDATE – JANUARY 2017

The case law in this summary is organized under topical references for the general area of law primarily discussed in the case. The material includes decisions in the past year by the Court of Appeals starting at Volume 190 through Volume 196, page 397 of Washington Appellate Reports (Wn.App.) and Supreme Court Decisions in Volume 184 through Volume 186, page 743 of Washington Second Reports (Wn.2d). 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. A summary of new laws enacted during the 2016 Regular and Special Sessions of the Washington Legislature affecting real estate transactions follows the case law summary.

The case summaries are intended solely to provide an overview of the general subject matter of the case to alert practitioners to recent decisions in the indicated area of law. The actual opinions must be consulted to obtain a complete statement of the facts of the case, the full legal analysis of the court and the precedential effect of the decision. The author's discussion of the cases is intended only for educational purposes and to promote further analysis of the case law and does not represent the opinion of the author, Foster Pepper PLLC or any of their clients as to the precedential value or applicability of any of the cases discussed to any legal controversy.

CASE LAW UPDATE

I. Interests in Land

A. Conveyances/Estates

***WT Props., LLC v. Leganieds, LLC,* 195 Wn.App. 344 (2016)**

Facts: In 2006, Prasad conveyed to Rehabitat two parcels, reserving in the deed an easement strip for ingress, egress and utilities from 170th Street for the benefit of two parcels located on the south side of the conveyed property. In May 2007, Prasad and Rehabitat participated in a boundary line adjustment to their adjacent properties. This transaction vested Prasad with title to the easement strip while at the same time, Prasad also held the easement in the easement strip property. At this time, Viking Bank held a deed of trust that encumbered both the easement strip and the property it benefited to the south. The Viking loan became delinquent and Viking foreclosed in 2011. WT Properties bought the property at the foreclosure sale, but did not receive a deed to the easement strip. In 2012, Prasad conveyed title to the easement strip to Leganieds and in February 2014, WT commenced a quite title action to confirm it owned the easement strip with the easement still in effect. Leganieds claimed the doctrine of merger extinguished the easement as a result of the boundary line adjustment in 2007. The trial court ruled in favor of WT.

Holding: The trial court was affirmed. Courts in Washington have recognized the existence of several exceptions to application of the merger doctrine. One of them is the innocent third person exception that prohibits the enforcement of the doctrine if the rights of third parties will be prejudiced. Application of the merger doctrine in this case would prejudice the rights of Viking and its successor in interest WT and eliminate the access easement serving the WT property. In such circumstances the doctrine is not applicable. The Court rejected Leganieds argument the except did

not apply to the holder of a deed of trust; it was well recognized the exception of the merger doctrine acted to preserve the rights of mortgagee.

Newport Yacht Basin Ass'n of Condo. Owners v. Supreme N.W., Inc., *168 Wn.App. 56 (2012)* – Sufficiency of language for conveyance by quitclaim deed.
Edmonson v. Popchoi, *172 Wn.2d 272 (2011)* – Breach of warranty of title.
Ames v. Ames, 184 Wn.App. 826 (2014) – Rights of holder of life estate.
Marriage of Kile, *186 Wn.App. 864 (2015)* – Leasehold constituting separate estate.

B. Mining Claims

Beatty v. Fish & Wildlife Comm'n, *185 Wn.App. 426 (2015)*; *rev. denied, 183 Wn.3d 1004 (2015)* – WDFW review of mining application.

C. Fixtures

No reported cases within the last five years.

II. Purchase and Sale Transactions

A. Brokers/Brokerage Agreements

Marcus & Millichap v. Yates, Wood, 192 Wn.App. 465 (2016); rev. den. 184 Wn.2d 1041 (2016)

Facts: Marcus & Millichap executed an exclusive representation agreement with the Goetzinger Family LLP to sell the Ticino Apartments, located in Seattle. At this time, Yates, Wood & MacDonald, a real estate brokerage and property management firm, was the Property's manager. M&M was successful in its efforts and the property was sold on November 24, 2014. M&M and Yates were both members of the Commercial Brokers Association. On December 9, 2014, Yates, pursuant to a CBA bylaw arbitration provision, initiated arbitration proceedings against M&M, seeking one-half of the commission earned on the sale. Before arbitration commenced, M&M filed a complaint for declaratory judgment against Yates in the King County Superior Court, alleging that no arbitration agreement between the parties existed. The trial court determined the CBA bylaw provision was applicable and granted Yates's motion to compel arbitration and dismissed the suit. M&M appealed.

Holding: The trial court was affirmed. Accordingly, Marcus & Millichap, as a voluntary member of the CBA, sufficiently manifested assent to the CBA arbitration agreement when it was granted CBA membership status in 1993 and continued its membership through the years. Washington has long recognized the principle that voluntary membership in a professional organization gives rise to a corresponding obligation to comply with that organization's bylaws. If those bylaws contain an agreement to arbitrate, a binding agreement to arbitrate is adequately evidenced by proof of membership in the organization; a separate signed agreement is not required. The enactment of the uniform arbitration act did not change this rule. Both M&M and Yates were members of CBA and the trial court correctly applied this rule to determine there existed a valid agreement to arbitrate the underlying commission dispute. The plain language of the bylaw

arbitration provision covered the parties' dispute and M&M was obligated to arbitrate this commission-related controversy with Yates.

***Wash. Prof'l Real Estate v. Young,* 190 Wn.App. 541 (2015)**

Facts: Young entered into a listing agreement with Prudential Almon Realty for the sale of Young's residence in Yakima. The listing agreement expired December 31, 2008. Dr. Place saw the for sale sign at the house while visiting a neighbor. Dr. Place's sister moved to Yakima from Nebraska and in January 2009, after the listing agreement expired, Dr. Place informed his sister about the house, although no information was available through the multiple listing service since the listing has expired. Ultimately, Dr. Place's sister directly contacted Young and agreed to buy the house in late January 2009. Prudential sued for its commission, claiming that the transaction fell within the "tail" provision of the listing agreement. The trial court dismissed the claim because the realtor could not establish that it was the "procuring cause" of the sale, but the court of appeals reversed the dismissal. After remand and a trial, the trial court awarded Prudential the commission plus attorney fees, finding that because the transaction flowed from Dr. Place seeing the Prudential "For Sale" sign, the tail provision applied. Young appealed.

Holding: The judgment was reversed. The tail provision of the agreement provided:

> If the property or any portion thereof or any interest therein is, directly or indirectly, sold, exchanged, leased or is purchased under an option, within 365 days after the expiration of this Agreement to any person with whom a Broker negotiated or to whose attention the Property was brought through the signs, advertising, or any other action or effort of a Broker, Broker's agents, employees or subagents, or on information secured directly or indirectly from or through a Broker during the term of this Agreement, then Seller shall pay Broker the above compensation.

The trial court restated this provision as follows:

> If the property or any portion thereof or any interest therein is, directly or indirectly, sold, exchanged, leased or is purchased under an option, within 365 days after the expiration of this agreement to:
> A. Any person with whom a Broker negotiated or,
> B. (a buyer) to whose attention the Property was brought through the signs, advertising or, any other action or effort of a Broker, Broker's agents, employees, or subagents or,
> C. (to a buyer based upon) information secured directly or indirectly from or through a Broker during the term of this agreement,
> Then Seller shall pay Broker the above compensation.

The trial court concluded that clauses A and B were not applicable, but since Place had seen the "For Sale" sign and told his sister about the house, the transaction came within the terms of clause C. The Court disagreed with the trial court's interpretation for three reasons: (1) the information provided to the buyer came after the expiration of the listing agreement so the clause did not apply; (2) the interpretation of the trial court rendered clauses B and C duplicative thereby not giving effect to each term of the agreement and (3) the trial court's interpretation did not further the purpose of the tail provision. The Court interpreted clause C to require payment of a commission only where a buyer who purchases the listed property during the tail period secured information about the

property from or through the broker in a manner different from the activities addressed by clause B, and secures that information during the period of the listing. Since no information was provided the buyer during the listing period, no commission was due.

State v Kaiser, *161 Wn.App. 705 (2011)* – Violation of Consumer Protection Act by non-disclosure.
Hickethier v. Dept. of Licensing, *159 Wn.App. 203 (2011)* – Revocation of license.
Prof'l Real Estate v. Young, *163 Wn.App. 800 (2011)* – Sale after expiration of listing agreement.
Hanks v. Grace, *167 Wn.App. 542 (2012)* – Provisions releasing broker liability void as against public policy.
Viewpoint-N. Stafford LLC v. CB Richard Ellis, Inc., *175 Wn.App. 189 (2013)* – Claim under securities act.

B. Claims Against Buyers/Sellers

Kofmehl v. Baseline Lake, LLC, *177 Wn.2d 584 (2013)* – Statute of frauds and restitution.
Jackowski v. Borchelt*, 174 Wn.2d 720 (2012)* – Application of independent duty doctrine.
Townsend v. Quadrant Corp., *173 Wn.2d 451 (2012)* – Enforcement of arbitration provision.
The Marina Condominium Homeowners' Ass'c v. The Stratford at the Marina LLC, *161 Wn.App. 249 (2011)* – Breach of implied warranty on condo conversion.
Kelly v. Ammex, *162 Wn.App. 825 (2011)* – Enforcement of right of first offer.
Geonerco v. Grand Ridge Properties IV, *159 Wn.App. 536 (2011)* – Satisfaction of closing conditions.
Kofmehl v. Baseline Lake, LLC, *167 Wn.App. 677 (2012)* – Disposition of deposit when agreement fails to comply with statute of frauds.
Newport Yacht Basin Ass'n of Condo. Owners v. Supreme N.W., Inc., *168 Wn.App. 86 (2012)* – Failure to convey entire property.
Austin v. Ettl, **171 Wn.App.** *82 (2012)* – Claim for failure to disclose future assessment.
Key Dev. Inv. v. Port of Tacoma, *173 Wn.App. 1 (2013)* – Claims for misrepresentation and tortious interference.
Douglas v. Visser, *173 Wn.App. 823 (2013)* – Fraudulent concealment and failure to investigate.
Mukilteo Retirement Apts. LLC v. Mukilteo Investors L.P., *176 Wn.App. 244 (2013)* – Option price dispute.
Canal Station North Condominium Association v. Ballard Leary Phase II, LP, 179 Wn.App. 289 (2013) – Right to demand arbitration.
Houk v. Best Dev. & Constr. Co., Inc., 179 Wn.App. 908 (2014) – Warranty claim against dissolved LLC.
Shepard v. Holmes, *185 Wn.App. 730 (2015)* – Statute of limitations.
Hoggatt v. Flores, *185 Wn.App. 764 (2015); rev. denied, 183 Wn.2d 1005 (2015)* – Rescission for failure to comply with subdivision statute.
TJ Landco v. Harley C. Douglass, Inc., 186 Wn.App. 249 (2015); rev. denied, 184 Wn.2d 1003 (2015) – Interpretation of contract.
Port Dist. V. Wash. Tire Corp., *187 Wn.App. 222 (2015)* – Anticipatory breach.

C. Claims Against Third Parties

RockRock Grp. v. Value Logic, 194 Wn.App. 904 (2016)

Facts: Jeffries acting through Sundevil Development agreed in 2006 to purchase two parcels of property in Airway Heights, Washington – a 51-acre parcel for $475,000 and an adjacent 39-acre property for $300,000. In connection with financing the acquisition of the properties, Sundevil contacted RiverBank for a loan. In September 2006, RiverBank contracted with Value Logic for appraisals on the properties. Value Logic appraised the 51-acre parcel at $4.5 million ($2.00 per square foot) and the 39-acre parcel at $4.25 million ($2.50 per square foot). On October 2, Sundevil sold a 75 percent interest in the larger parcel to RockRock for $1,630,000. RockRock borrowed

$1,025,000 from RiverBank to finance the purchase. In November 2006, Sundevil sold a 75 percent interest in the smaller parcel to RussellRock for $1,630,000 and RussellRock borrowed $990,000 from RiverBank to finance the acquisition. The investors in RussellRock and RockRock were given copies of the Value Logic appraisal. In 2009, RiverBank was informed that Value Logic had incorrectly assumed the entire area of the larger parcel was zone for light industrial use, when in fact a majority of the area was zoned "rural traditional." RiverBank had the properties appraised again in 2010 by a different appraiser who concluded the value of the 51-acre parcel was $1,220,000 and the 39-acre parcel $520,000. On June 16, 2011, RockRock and RussellRock sued Value Logic, claiming it had negligently overvalued the properties in its 2006 appraisal reports, and asserting a right to damages under theories of negligent misrepresentation, negligence, and violation of the CPA. The trial court dismissed the claim on the basis that Value Logic owed no duty to the LLCs and there was no justifiable reliance on the appraisals by the LLCs. RussellRock and RockRock appealed.

Holding: The trial court was affirmed. Washington courts have analyzed appraiser liability in the framework of negligent misrepresentation and have adopted applied Restatement (Second) of Torts, §552 to determine liability. The restatement sets out a six part test, but the Court emphasized that § 552 defined the defendant's liability as being limited to persons for whose benefit and guidance the defendant intended to supply the appraisal report or knew the recipient intended to supply it. In this case, the purpose of the appraisal was to provide RiverBank with a value to serve as a basis to evaluate possible financing. The reports themselves stated they were prepared solely for use by RiverBank and no other party was to rely upon them. While the limiting language was not dispositive, there was no evidence Value Logic intended the appraisals to be used by the LLCs or knew that RiverBank would make them available to other parties. The LLCs failed to establish Value Logic owed them a duty and the claims were properly dismissed.

Lane v. Port of Seattle, *178 Wn.App. 110 (2013)* – Taxpayer claim to invalidate public purchase.

III. Title Insurance

Centurion Properties v. Title Ins. Co., 186 Wn.2d 58 (2016)

Facts: Centurion Properties III LLC bought commercial properties in Richland with a $70.8 million mortgage loan from General Electric Credit Corp. The terms of the loan prohibited the placement of any additional liens on the properties without the consent of GECC. The loan transaction was closed in escrow with Chicago Title Insurance. Following the closing, CTI recorded three additional deeds of trust granted by CPIII and another agreement encumbering CPIII's title. GECC discovered the additional recordings, declared the loan to be in default, imposed default interest and initiated action to foreclose. CPIII declared bankruptcy. CPIII asserted various claims relating to the additional encumbrances, including a claim against CTI asserting it was negligent in recording the prohibited liens causing CPIII damages. The United States District Court dismissed the claim against CTI and CPIII appealed. On appeal, the Ninth Circuit certified the following question to the Washington Supreme Court:

> Does a title company owe a duty of care to third parties in the recording of legal instruments?

Holding: The Supreme Court accepted review and answered the question in the negative. The Court considered the inquiry to raise a question of first impression. The Court reviewed prior case law dealing with the imposition of a duty of care toward third parties and applied the logic, common sense, justice, policy, and precedent of those cases to determine whether a title insurer owed a duty in tort in the context of the facts presented. Based on this analysis, the Court concluded a title insurance company did not owe a duty of care to third parties in the recording of legal instruments.

***Millies v. Landamerica Transnation,* 185 Wn.2d 302 (2016)**

Facts: The Millies bought 75 acres of rural land in Stevens County overlooking Deer Lake in 2006 and obtained an owner's title policy from LandAmerica in the amount of the purchase price, $250,000. After the Millies bought the land, they learned that the property was burdened by a substantial recorded easement authorizing public use of a road bisecting their property, which a neighbor planned to utilize in connection with the development of a 50 condominium. The Millies filed a claim with Transnation. The parties attempted to agree on the property's diminution in value, but were unable to do so. In 2009, Transnation tendered $25,000 to the Millies in payment of the claim, which was rejected. The Millies sued Transnation in 2009 for breach to contract. Transnation asserted an affirmative defense that it had fulfilled its obligations under the policy by tendering the amount determined by a reasonable fair market appraisal. At the conclusion of a jury trial, instructions were given, including a breach of contract instruction that contained the affirmative defense raised by Transaction. The Millies did not object to the form of the instruction. The jury rendered a defense verdict and the trial court refused to grant a new trial. The Court of Appeals affirmed the trial court, holding the Millies had not properly presented whether they were entitled to recover the $25,000 originally offered by Transnation to settle the claim and did not reach the merits. The Millies appealed.

Holding: The Supreme Court affirmed the Court of Appeals. At Transnation's request, the trial court submitted the following jury instruction:

> Defendant has the burden of proving the following affirmative defense:
>
> (1) That Defendant fulfilled the terms of the contract with Plaintiffs by investigating the claim and tendering payment in a timely manner based on a reasonable fair market appraisal.
>
> > If you find from your consideration of all the evidence that this affirmative defense has been proved, your verdict should be for Defendant on this claim. On the other hand, if this affirmative defense has not been proved, then your verdict should be for Plaintiffs on this claim.

On appeal, the Millies contended the instruction was misleading and the affirmative defense only applied to tort claims and not the breach of contract claim. However, the Court concluded the Millies failed to preserve their challenge to the instruction. Similarly, the Court rejected the argument the Millies were entitled to a judgment as a matter of law or a new trial. In light of the instruction, substantial evidence supported the verdict. The jury heard evidence from Transnation about its investigation of the claim and tender of $25,000. Although the parties disputed whether the

$25,000 amount was "reasonable," the jury resolved this dispute and found that it was.

Stewart Title v. Sterling Sav. Bank, *178 Wn.2d 561 (2013)* – Legal malpractice claim by title company against insured's attorney.

Chicago Title Ins. Co. v. Ins. Comm'r, *178 Wn.2d 120 (2013)* – Liability for agent's violation of OIC regulations.

Chicago Title Insurance v. Office of the Ins. Commissioner, *166 Wn.App. 844 (2012)* – Anti-inducement regulations.

Courchaine v. Land Title Ins. Co., *174 Wn.App. 27 (2012)* – Violation of Consumer Protection Act.

C 1031Props., Inc., v. First Am. Title Ins. Co., *175 Wn.App. 27 (2013)* – Constructive vs. actual knowledge of insured.

IV. Real Property Lending Transactions

A. Usury

No reported cases within the last five years.

B. Priority

OneWest Bank v. Erickson, **185 Wn.2d 43 (2016)**

Facts: A somewhat convoluted fact pattern involving McKee and his children resulted in McKee in 2007 (i) granting a quit claim deed to his house in Spokane to his daughter, Erickson, in settlement of a lawsuit against McKee and (ii) being placed in a conservatorship in a proceeding initiated by McKee's son in district court in Idaho. The quit claim deed was not recorded and the conservator was authorized to place a reverse mortgage on the Spokane property. OneWest ultimately acquired the mortgage. After McKee died in 2011, Erickson recorded the quit claim deed. OneWest attempted to foreclose the reverse mortgage. Erickson contended, among other things, the conservator laced authority to grant the mortgage, since the Idaho court could not direct a conservator to affect Washington property when McKee was not an Idaho resident. The trial court rejected Erickson's arguments, determined OneWest was a bona fide mortgage and held Erickson acquired the property subject to the OneWest mortgage. Erickson appealed. In *OneWest Bank FSB v. Erickson,* 184 Wn.App. 462 (2014), the trial court was reversed on the grounds the Idaho court did not have the authority to direct the conservator to encumber the Spokane property. OneWest appealed.

Holding: The Supreme Court reversed. The Washington courts were required to give full faith and credit to the Idaho court orders appointing the conservator for McKee and authorizing the conservator to encumber McKee's property with the OneWest reverse mortgage. The Idaho court considered challenges to McKee's domicile and ruled that it had jurisdiction to appoint a conservator over him. Washington courts were obliged to accept the Idaho court's determination that it had jurisdiction based on res judicata principles. The Idaho court had jurisdiction to order the conservator to enter into the reverse mortgage, as opposed to actually transferring title to the property. OneWest was a bona fide mortgagee. Erickson failed to carry her burden to prove the original mortgagee had constructive knowledge of Erickson's ownership interest in the property. There was evidence presented to the trial court establishing Erickson knew the conservator had

been authorized to obtain the mortgage and she still did not record the quit claim deed prior to the mortgage was granted.

***Wash. Fed. v. Azure Chelan LLC,* 195 Wn.App. 644 (2016)**

Facts: Cole intended to develop a 168-acre tract near the Chelan Public Golf Course. Toward that end, he formed several entities to facilitate the development of the property in two phases. Phase I was started in 2005. In 2007, the investors in the development entities offered to acquire Cole's interest in the project, which was held in Azure Chelan LLC. Azure sold for $5.5 million, represented by a promissory note secured by a deed of trust on Phase II of the development. The project was financed by Horizon Bank, which secured its development loan with a deed of trust on Phases I and II. The developing entity defaulted on its obligations to Azure in 2007. Although Azure sent a notice of default, it did not take any action to foreclose. Eventually, the developing entity defaulted on the Horizon Bank loan, which in the interim had been acquired by Washington Federal as a result of the failure of Horizon. Washington Fed foreclosed on January 4, 2011. In June 2014, Washington Fed commenced a quiet title action against Azure. The trial court ruled in favor of Washington Fed based primarily on RCW 7.28.300, finding Azure's right to collect the note time barred.

Holding: The trial court was affirmed. The Court rejected Azure's argument that Washington Fed was not the "record owner" of the property for purposes of RCW 7.28.300; Washington Fed became the record owner when it purchased the property at the foreclosure sale. Azure asserted the provision in its deed of trust prohibiting further encumbrances of the property rendered the Horizon deed of trust void. The Court rejected this argument, finding the provision not a disabling restraint. Similarly, the Court rejected the argument that the trustee's deed that had a different legal description from the original Horizon deed of trust had no effect on the validity of sale and there was no evidence that the two legal descriptions did not describe the same property. Finally, the notice of default given by Azure in 2007 stated the consequence of default was that "principal amount of $5,500,000, plus all accrued interest and all other amounts that may be owing thereunder are immediately due and payable." This language indicated the balance of the loan had been accelerated in 2007 and enforcement was barred under RCW 7.28.300 in 2014, more than six years from the date of the acceleration.

***Edmundson v. Bank of Am.*, 194 Wn.App. 920 (2016)**

Facts: The Edmundsons obtained a mortgage loan in July 2007 for $313,381.00 to purchase real property. The Edmundsons made the monthly payments on the promissory note through October 2008. They failed to make the November 1, 2008 payment or any of the monthly payments due since then. In June 2009, the Edmundsons filed a petition for relief under the United States Bankruptcy Code. On October 22, 2009, the bankruptcy court confirmed their Amended Chapter 13 Plan. On December 31, 2013, the bankruptcy court discharged their debts, noting certain exceptions to the discharge. Following the discharge, the successor trustee under the deed of trust securing the loan commenced a non-judicial foreclosure and the sale was scheduled for August 28, 2015. In March, 2015, the Edmundsons sued, claiming the deed of trust was no longer a lien on the property. The trial court permanently restrained the sale and awarded attorney fees to the

Edmundsons. The lender appealed.

Holding: The trial court was reversed. The trial court concluded the discharge of the Edmundsons' personal liability on the note in bankruptcy also discharged the deed of trust lien. The bankruptcy discharge was limited to the discharge of personal liability on the promissory note. The lien of the deed of trust securing the promissory note was neither avoided nor eliminated in the bankruptcy proceeding. The trial court also concluded, on state law grounds, the deed of trust became unenforceable once the underlying note that it secured became unenforceable due to the bankruptcy discharge. The Court noted there was simply is no authority for that legal conclusion and it was error. The Court also rejected the argument enforcement was barred by the statute of limitations. The maturity of the note was August 1, 2037. To the extent the trial court ruled that some event during the bankruptcy proceeding triggered the acceleration provision in the note or deed of trust, the trial court was in error. Acceleration under the deed of trust was at the option of the lender and there was no evidence of such an election. The note called for monthly installments and the statute of limitations for each monthly payment accrued as the payment became due.

***First Bank of Lincoln v. Tuschoff,* 193 Wn.App. 413 (2016)**

Facts: Tuschoff sold a bowling alley in Clarkston, Washington to the Schwab family in 1998. As part of the purchase price, Tuschoff received a note in the amount of $1.1 million, secured by a deed of trust on the property. Tuschoff subsequently borrowed $440,00 from the First Bank of Lincoln to purchase a hotel in Lincoln, Montana in 2011. As additional collateral for the loan, Tuschoff assigned to FBL the Schwab note and deed of trust. In 2013, Schwab sold the bowling alley to Banana Belt. As part of the transaction, Banana Belt paid the outstanding balance of the note and the proceeds were paid to Tuschoff through an escrow handling the sale. Tuschoff subsequently defaulted on the FBL loan. After foreclosing on the hotel, FBL then sued Tuschoff and Banana Belt in Asotin County Superior Court seeking a declaratory judgment that the Tuschoff assignment of the Schwab deed of trust remained a valid lien on the bowling alley property. The trial court dismissed the claim. FBL appealed.

Holding: The trial court was reversed. Schwab sold the bowling alley property subject to the deed of trust because the lien had been assigned to FBL and FBL had not released it. The Court rejected Banana Belt's argument that having paid the note, the deed of trust was satisfied:

> The flaw in Banana Belt's argument is that the Hotel Lincoln note created a separate obligation against the bowling alley property. Although Banana Belt's payment to Tuschoff extinguished Tuschoff's right to foreclose if Schwab failed to pay the Schwab/Tuschoff note, it did not extinguish First Bank's right to foreclose if Tuschoff failed to pay the Hotel Lincoln note—a separate obligation that encumbered the property.

***City of Kent v. Bel Air & Briney,* 190 Wn.App. 166 (2015); *rev. denied* 185 Wn.2d 1008 (2016)**

Facts: Bel Air & Briney loaned $134,000 to Huang Tran and Dun Tram in 2007. The loan was secured by a deed on various properties, including a parcel in the City of Kent. The B&B deed of trust was junior to another mortgage securing payment of $197,000. In 2008, the City of Kent purchased the property for $392,500, but the title commitment issued did not disclose the B&B deed

of trust and the sellers did not disclose the encumbrance. The sale proceeds were used to pay the first mortgage and the balance was paid to Tran & Tram, who then defaulted on the B&B note. B&B learned of the sale in 2012 and contacted the City concerning their mortgage. The City, after tendering the claim to First American Title Insurance, who insured the City's title, commenced a declaratory judgment action seeking equitable subrogation to the lien position of the first mortgagee that had been paid as part of the acquisition. The trial court held that the City was equitably subrogated to the lien of the first mortgagee and allowed the City to foreclose its equitable lien. B&B appealed.

Holding: The ruling of the trial court that granted the City equitable subrogation was affirmed. Washington had adopted the liberal approach concerning equitable subrogation as stated in RESTATEMENT (THIRD) OF PROPERTY MORTGAGES §7.6, which allowed subrogation in this situation. However, the subrogation was limited to the City holding a lien in the amount of the first mortgage, which was the result required to avoid any unjust enrichment to B&B, but did not include the right to foreclose the lien. Upon the sale of the property, the proceeds would be distributed first to the City in the amount of the first mortgage and then to B&B to the extent of its second lien. The Court noted that the ruling did not "address nor foreclose any claims the City may have against its title insurer."

BAC Home Loans v. Fulbright, *180 Wn.2d 754 (2014)* – Redemption rights following condo HOA foreclosure.

Columbia Cmty. Bank v. Newman Park, LLC, *177 Wn.2d 566 (2013)* – Equitable subrogation.

Haselwood v. Bremerton Ice Arena, *166 Wn.2d 489 (2009)* – Lien arising from work commenced prior to recording deed of trust.

First American Title Ins. Co. v. Liberty Capital Starpoint Equity Fund LLC, *161 Wn.App. 474 (2011)* – Equitable subrogation.

Columbia Community Bank v. Newman Park, LLC, *166 Wn.App. 634 (2012)* – Equitable subrogation.

Summerhill Village Homeowners' Assn. v. *Roughley, 166 Wn.App. 625* (2012) – Redemption rights following HOA foreclosure.

Pac. Cont'l Bank v. Soundview 90, LLC, *167 Wn.App. 373 (2012)* – Loss of priority under stop-notice provisions.

BAC Home Loans v. Fulbright, *174 Wn.App. 352 (2013)* – Redemption rights of mortgagee following condominium HOA lien foreclosure.

Washington Federal Savings & Loan Ass'n v. McNaughton Group, *179 Wn.App. 319 (2014)* – Lien on right to receive late comer fees.

Hartford Fire v. Columbia State Bank, *183 Wn.App. 599 (2014)* – Lender's right to receive progress payments after contractor's default.

Onewest Bank v. Erickson, *184 Wn.App. 462 (2014)* – Deed of trust executed by conservator.

C. Actions to Collect

Jordan v. Nationstar Mortg., LLC, 185 Wn.2d 876 (2016)

Facts: Jordan defaulted on a deed of trust held by Nationstar Mortgage and encumbering Jordan's residence. Following the default, Nationstar had the locks changed on the house while Jordan was at work. Nationstar was acting under a provision in the deed of trust purporting to allow the mortgagee to enter the house following default without notice to the borrower. Jordan became the class representative in a class action lawsuit against Nationstar seeking damages on behalf of 3,600 Washington homeowners who were locked out of their homes pursuant to similar

provisions in their deeds of trust with Nationstar. The action was removed to the United State District Court for the Eastern District of Washington. The District Court then certified two questions to the Washington Supreme Court, which were accepted by the Court:

1. Under Washington's lien theory of mortgages and RCW 7.28.230(1), can a borrower and lender enter into a contractual agreement prior to default that allows the lender to enter, maintain, and secure the encumbered property prior to foreclosure?
2. Does chapter 7.60 RCW, Washington's statutory receivership scheme, provide the exclusive remedy, absent postdefault consent by the borrower, for a lender to gain access to an encumbered property prior to foreclosure?

Holding: The Court noted the provisions of the deed of trust authorized the lender to enter and rekey the property solely upon default, regardless of whether the borrower has abandoned the property. Washington case law and RCW 7.28.230 make it clear the lender may not take possession of encumbered property prior to foreclosure and sale. The actions of Nationstar in effect established its control over the house and constituted taking possession of the property. The deed of trust provisions allowing the lender to change locks upon default conflicted with Washington law prohibiting lenders from taking possession of mortgaged property prior to foreclosure and sale and the Court answered the first question in the negative and the deed of trust provisions were unenforceable. The Court concluded there was nothing to support the conclusion that the statutory receivership scheme provided an exclusive remedy for lenders to access property prior to completing foreclosure and answered the second question in the negative. The language of the statute and public policy supported the conclusion the receivership statute was not intended as an exclusive remedy; however, the Court declined to enumerate what alternatives a lender might pursue to gain access prior to foreclosure and sale.

***Brown v. Dept. of Commerce,* 184 Wn.2d 509 (2015)**

Facts: Brown's father borrowed $68,000 from Countrywide secured by a deed of trust on the father's residence in Kennewick. After her father's death, Brown took possession of the house but defaulted on the loan. NWTS sent a notice of default and Brown requested mediation under the Foreclosure Fairness Act. The note had been sold by Countrywide to Freddie Mac, who had transferred the note to M&T Bank to act as the servicer. The Department of Commerce denied the request because it determined that M&T was the beneficiary of the deed of trust, rather than Freddie Mac and M&T was exempt from the mediation requirement. Brown filed a petition for judicial review of DOC's decision under the APA. The trial court affirmed DOC. The Supreme Court accepted a petition for direct review.

Holding: DOC's denial of mediation was affirmed. RCW 61.24.166 provides that federally insured institutions that are not the beneficiary of more than 250 residential deeds of trust during the prior calendar year are exempt from the mediation provisions of the FFA. The Court noted that if Freddie Mac, the owner of the note, was the beneficiary, then clearly the exemption did not apply. However, M&T qualified for the exemption and M&T was the holder of the note. The DTA defined "beneficiary" in RCW 61.24.005(2) as the "holder" of the note. That definition supported

the view of DOC and the Court found persuasive the conclusion that the party that was the actual holder of the promissory note should be the "beneficiary" for determining whether the beneficiary was exempt from the mediation requirement of the FFA.

***4518 S. 256th LLC v. Karen L. Gibbon, PS,* 195 Wn.App. 423 (2016)**

Facts: Puebla and Villalovos obtained a residential loan in the amount of $256,000. The loan was evidenced by a note dated May 25, 2006 and secured by a deed of trust. The note provided for monthly installments and a maturity date of June 1, 2036. The borrowers defaulted in 2008 and a notice of default was issued detailing the amount necessary to cure the default. A notice of trustee's sale was recorded in August 2008 again detailing the amount in default and setting the sale for November 14, 2008. The notice of sale also stated it was necessary to pay the entire unpaid balance of the note if the cure occurred within the 10-day period prior to the sale. The sale never occurred. A second notice of default was sent on October 21, 2014 and a new notice of sale was recorded on February 2, 2015, setting the sale date for June 12, 2015. 4518 S. 256th LLC acquired the property in February 2015 and the LLC sued the lender, successor trustee and others in March 2015 seeking to restrain the sale, quiet title to the property and obtain a declaration the statute of limitations barred enforcement of the note and deed of trust. The trial court dismissed the complaint, concluding the debt had not been accelerated in 2008 and the statute of limitations did not bar enforcement. The LLC appealed.

Holding: The trial court was affirmed. As a preliminary matter, the Court held the LLC had not waived its right to contest the foreclosure and the case was not moot because the non-judicial sale had been conducted following the trial court ruling. The determinative issue was whether the lender accelerated the entire debt in 2008, in which case the statute of limitations would have run in 2014. If the debt was not accelerated, the statute of limitations did not bar enforcement of the deed of trust for each of the monthly installment payments that became due within six years prior to the 2015 nonjudicial foreclosure. The Court concluded that language used in the notices provided the borrower did not evidence the intent of the lender to accelerate the entire balance of the debt. Likewise, the Deeds of Trust Act did not require the acceleration of the entire debt as a condition of conducting the non-judicial sale.

***Umpqua Bank v. Shasta Apartments,* 194 Wn.App. 685 (2016); rev. den. ___ Wn.2d ___ (Dec. 7, 2016)**

Facts: In 2007, Shasta Apartments obtained loan from Evergreen Bank secured by a deed of trust on Shasta's property. The loan was modified several times. In 2009, Johnson guaranteed the loan and a second guaranty was obtained from Callaway Apartments LLC. The Callaway guaranty was secured by a deed of trust on property owned by Callaway. The loan was acquired by Umpqua and in 2011 Shasta defaulted. In March 2012, Umpqua petitioned for a receiver and commenced a judicial foreclosure. A receiver was appointed with the power to sell Shasta's property free and clear of all liens and rights of redemption. Neither Shasta nor either guarantor objected to the receiver. In August 2013, the receiver proposed to sell Shasta's property for $550,000. The court approved the sale; no objection was made by Shasta or the guarantors. On June 13, 2014, Umpqua moved for a default judgment against Shasta and the guarantors for $932,997.22, the amount of the unpaid loan

balance after application of the sale proceeds. Shasta and guarantors appeared in the action and objected to the motion, claiming Umpqua was not entitled to a deficiency judgment as a matter of law. The trial court granted Umpqua's motion, entered judgment for the unpaid loan balance and awarded attorney fees. Shasta and the guarantors appealed.

Holding: The trial court was affirmed. The Court considered the argument that the Receivership Statute precluded the secured debtor from obtaining a deficiency judgment after sale of the debtor's assets. The Court concluded that no provision of Chpt. 7.60 RCW, the Receivership Statute, either expressly permitted or precluded a secured creditor of a commercial loan from pursuing a deficiency judgment against the grantor and/or guarantor after a court-approved receiver sale of the grantor's property securing the loan. The Court declined to interpret the statute to add restrictions not present in the statutory language. The Court also rejected the argument that the sale free and clear was the equivalent of a non-judicial foreclosure, barring a deficiency against the grantor. There was nothing in the record indicating Umpqua commenced a non-judicial foreclosure and the sale by the trustee was a judicial sale, not a foreclosure sale, so the non-deficiency provisions of the Deeds of Trust Act did not apply. The trial court properly granted summary judgment to Umpqua.

***Union Bank v. Blanchard,* 194 Wn.App. 340 (2016)**

Facts: In 2005, Wellington Hills Park LLC obtained a construction loan from Frontier Bank to develop the Wellington Hills Business Campus in Woodinville. The loan was secured by a deed of trust on WHP property and guaranteed by the members of WHP, Randy and Katie Previs and John Blanchard. WHP defaulted on the loan in 2010 when it matured. Frontier failed as a financial institution after the default and its assets, including the WHP loan and guarantees, were purchased by Union Bank from the FDIC. In November 2010, Union obtained an order appointing a receiver for the WHP property. The receivership proved to be contentious. The receiver proposed selling the property for $10,850,00 in 2013. After the court approved the sale, WHP filed for bankruptcy protection. Over the objections of Previs, the trustee sold the property on the same terms as proposed in the receivership. The bankruptcy and receivership proceedings were then closed. On March 29, 2013, while the receivership was pending, but prior to the bankruptcy, Union sued the guarantors on their guarantees. On October 10,2014, the trial court entered a summary judgment in favor of Union and the guarantors appealed.

Holding: The judgment was affirmed. The guarantors contended the guaranties to Frontier were unenforceable because (1) they were procured by fraud; (2) fraudulent inducement to contribute additional funds to the project and (3) misconduct by Union in the receivership and bankruptcy proceedings that reduced the value of the property. The Court concluded these claims were barred by (a) the express terms and waivers contained in the absolute and unconditional guarantees; (b) the application of the statute of frauds, RCW 19.36.110, which bars enforcement of oral agreements to extend, forebear or modify credit arrangements; and (c) the federal *D'Oench Duhme* doctrine as codified at 12 U.S.C. § 1823(e) barring claims against the FDIC and its assignees based on unwritten agreements or schemes entered into by a failed institution. The guarantors failed to present any evidence that contradicted these theories of recovery.

***McAfee v. Select Portfolio Servicing, Inc.,* 193 Wn.App. 220 (2016)**

Facts: McAfee borrowed $920,000 from Bear Sterns Residential Mortgage in January 2007. The loan was secured by property McAfee purchased in Seattle. MERS was the trustee under the deed of trust; the note was endorsed from Bear Sterns to EMC Mortgage and from EMC to Wells Fargo Bank. McAfee defaulted in September 2009. In June 2012, MERS assigned its interest in the deed of trust to Wells Fargo. NWTS, as agent for Wells Fargo, sent a notice of default one day after the assignment. In the notice, Wells Fargo was identified as the owner of the note and JP Morgan Chase the servicer. A beneficiary declaration was executed by Chase, as attorney in fact for Wells Fargo, affirming that Wells Fargo was the holder of the note. NWTS recorded a notice of trustee's sale on January 29, 2013 and shortly before the schedule sale, McAfee filed suit seeking to restrain the sale and alleging other claims including violation of the CPA and breach of contract. The trial court restrained the sale, but required McAfee to make monthly payments and pursue a loan modification. She failed to perform these conditions and NWTS was permitted to record another notice of trustee's sale. All of the defendants were dismissed on summary judgment or by stipulation with McAfee. The property was sold on May 9, 2014; the court granted McAfee a stay of the subsequent unlawful detainer action during the pendency of her appeal.

Holding: The trial court was affirmed. McAfee claimed the notice of default she received was invalid because the assignment by MERS was unlawful since MERS was not a lawful beneficiary. The Court rejected this argument; Wells Fargo, as the holder of the note, was the beneficiary and no issue of material fact was raised to support the claim the MERS assignment was unlawful under the Deeds of Trust Act or Wells Fargo was not authorized to issue the notice of default. MERS did not appoint NWTS as the successor trustee and NWTS issued the notice of default as the agent of Wells Fargo. The CPA and contract claims were related to the allegation that the defendants prevented McAfee from seeking a loan modification in violation of the federal Home Affordable Modification Program and NWTS was improperly named the trustee. However, violations of HAMP do not create a private right of action and Wells Fargo was the beneficiary of the deed of trust at the time it appointed NWTS as the successor trustee. There was no demonstration of a breach of the duty of good faith and fair dealing; McAfee failed to raise an issue of material fact relating to the breach of this duty with respect to the performance of any specific contract term.

***Blair v. NW. Tr. Servs., Inc.,* 193 Wn.App. 18 (2016); rev. den. 186 Wn.2d 1019 (2016)**

Facts: In September 2008, Blair obtained a residential mortgage loan from Countrywide Bank. The deed of trust securing the loan identified Countrywide as the lender, MRS as the beneficiary and LandAmerica as the trustee. The loan was sold to Freddie Mac on September 25, 2008. Freddie Mac retained Bank of America to service the loan, and BofA had physical possession of the note, which was endorsed in blank. Blair defaulted in August 2010. Following the default, MRS assigned all of its rights in the deed of trust to BofA and BofA appointed NWTS as the successor trustee of Blair's deed of trust. Prior to issuing the notice of trustee's sale in April 2012, NWTS received a beneficiary declaration from BofA stating:

> [BofA] is the beneficiary (as defined by RCW §61.24.005(2)) and actual holder of the promissory note or other obligation secured by the deed of trust or has requisite authority

under the RCW 62A.3–301 to enforce said obligation for the above mentioned loan account.

Shortly before the scheduled foreclosure in August 2012, Blair sued to restrain the sale and asserting BofA and NWTS violated the CPA by misrepresenting the status of BofA as the beneficiary and conducting the foreclosure in violation of the Deeds of Trust Act. Blair claimed BofA had no right to appoint NWTS as the successor trustee and the non-judicial foreclosure was invalid. The trial court dismissed the claims in November 2013 after allowing BofA to file a supplemental declaration establishing it had held the note continuously since the appointment of the successor trustee. Blair appealed.

Holding: The Court of Appeals affirmed the result reached by the trial court. BofA had physical possession of the note endorsed in blank at the time NWTS was appointed as the successor trustee, which made BofA the holder of the note even though the note was "owned" by Freddie Mac. The trial court was correct in holding BofA to be the beneficiary under the deed of trust by virtue of its status as the holder of the note. Neither NWTS nor BofA made any misrepresentation concerning the status of BofA as the beneficiary and the trial court properly dismissed Blair's misrepresentation claims. However, NWTS did rely on an improper beneficiary declaration at the time it issued the notice of default, since on its face, the declaration of BofA was ambiguous as to its status as the holder. The trial court erred in excusing this violation of RCW 64.24.030(7)(a) by accepting the supplement declaration made by BofA. This violation did not constitute a violation of the CPA, because Blair was not able to demonstrate any injury arising from the violation:

> Had NWTS complied with RCW 61.24.030(7)(a), it would have learned that BoA was the holder of the note endorsed in blank, and that institution of the nonjudicial foreclosure proceeding was arguably proper. Consequently, NWTS's violation of RCW 61.24.030(7)(a) did not cause a wrongful initiation of foreclosure. Because the initiation of foreclosure was not wrongful, Mr. Blair has failed to establish a causal link between NWTS's wrongful act and his injury. We conclude that Mr. Blair has failed, as a matter of law, to establish the causal link element of his CPA claim against NWTS.

The Court declined to adopt the rule advanced by NWTS requiring borrowers to demonstrate an actual prejudice from the violation of the Deeds of Trust Act as a condition to maintaining a CPA claim.

Deutsche Bank Nat'l Tr. V. Slotke, **192 Wn.App. 166 (2016)**

Facts: Slotke borrowed $253,575 from First NLC Financial Services, LLC, doing business as The Lending Center on May 16, 2006. The loan was evidenced by a promissory note dated May 16, 2006 payable to The Lending Center and secured by a deed of trust encumbering real property owned by Slotke in Pierce County. The Lending Center indorsed the promissory note and assigned the deed of trust to Deutsche Bank on March 3, 2011 and the assignment was recorded on August 5, 2011. Slotke defaulted on her loan obligations on April 1, 2010 by failing to make the payment due under the promissory note. The unpaid balance of the debt was then $247,875.98. Deutsche Bank commenced a judicial foreclosure action in Pierce County Superior Court. On May 27, 2014, Deutsche Bank moved for summary judgment. In support of its motion, Deutsche filed an affidavit attesting to its possession of the note bearing the endorsement by The Lending Center payable to

Deutsche. At the hearing on the motion for summary judgment, Deutsche also produced the original promissory note signed by Slotke for inspection by the court. On September 19, 2014, the trial court entered a judgment and decree of foreclosure in favor of Deutsche, including a monetary judgment against Slotke in favor of the bank, foreclosure of the deed of trust and a sheriff's sale of the property encumbered by the deed of trust, followed by a redemption period of eight months. Slotke appealed.

Holding: The judgment was affirmed. Slotke's argued Deutsche was not entitled to summary judgment and a decree of foreclosure without proving that it owned the note. The court rejected this argument, relying on *John Davis & Co. v. Cedar Glen No. Four, Inc.,* 75 Wn.2d 214 (1969), which held:

> The holder of a negotiable instrument may sue thereon in his own name, and payment to him in due course discharges the instrument. See RCW 62.01.051. It is not necessary for the holder to first establish that he has some beneficial interest in the proceeds.

The Court rejected the argument that RCW 61.24.030 imposed an ownership requirement as a condition of foreclosure. Even if the DTA applied to a judicial foreclosure, the "holder" of the note is entitled to foreclose. Under the UCC, the holder is "the person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession." The Court also rejected arguments that (1) judicial foreclosure of the deed of trust and a simultaneous suit on the note violated the "one action" rule and (2) the transfer of the note to the REMIC trust violated the terms of the trust agreement so Deutsche was not authorized to foreclose.

***Union Bank v. Vanderhoek Assocs.*, 191 Wn.App, 836 (2015)**

Facts: In November 2008, Vanderhoek Associates, LLC borrowed $1.93 million from Frontier Bank, evidenced by a promissory note, secured by a deed of trust and guaranteed by numerous parties. In March 2009, Pacific Bay, Inc. renewed a promissory note by executing a change in terms agreement regarding a $600,000 loan from Frontier the repayment of which was secured by a deed of trust granted by Vanderhoek Associates and guaranteed by the same parties. Vanderhoek and Pacific Bay defaulted. Union Bank, the successor to Frontier, sought to enforce the guaranties and on August 9, 2013, the trial court entered a partial summary judgment against the guarantors on the issue of liability. Following the decision in *First–Citizens Bank & Trust Co. v. Cornerstone Homes and Development, LLC,* 178 Wn.App. 207 (2013), the guarantors sought a revision of the summary judgment, and the trial court granted summary judgment in favor of the guarantors and borrowers on January 31, 2014. Eighteen days later, *Washington Federal v. Gentry,* 179 Wn.App. 470 (2014), was decided and expressly disagreed with *Cornerstone*. *Gentry* concluded that the provision of the DTA relied on in *Cornerstone* did not prohibit deficiency judgments against the guarantors. Union Bank filed a notice of appeal from the trial court's January 31 judgment and then filed a motion to vacate the trial court's January 31 summary judgment order pursuant to CR 60(b)(11) because Division One's decision in *Gentry*, effected a substantial change in the law. The trial court granted Union Bank's motion to vacate subject to Division Two's approval pursuant to RAP 7.2(e) . On October 7, Division Two granted the trial court permission to formally enter its order vacating the January 31 summary judgment order. The trial court did so 10 days later and the guarantors appealed.

Holding: The trial court was affirmed. The trial court did not abuse its discretion in vacating its January 31 judgment, which inadvertently dismissed the borrowers, whose dismissal was not sought or the subject of any briefing. Similarly, the trial court did not abuse its discretion in vacating the judgment in favor of the guarantors. CR 60(b)(11) allows the court may relieve a party from a final judgment for "[a]ny other reason justifying relief from the operation of the judgment" if the case involved 'extraordinary circumstances,' which constitute irregularities extraneous to the proceeding, such as a change in law. Faced with *Gentry*, the trial court had conflicting appellate decisions and apparently anticipated that Division One's resolution of *Gentry* would be favored by our Supreme Court. The trial court's decision to vacate its January 31 judgment based on its own evaluation of the divisional split caused by *Gentry* was tenable and not an abuse of discretion.

***Podbielancik v. LPP Mortg. Ltd.*, 191 Wn.App.662 (2015)**

Facts: Podbielancik took out a loan secured by a deed of trust on her home. She defaulted on the loan. At the time of the default and foreclosure proceedings, LPP Mortgage, Ltd. was the holder of the note. LPP appointed Northwest Trustee Services, Inc., as trustee. NWTS recorded a notice of trustee's sale that scheduled the sale of the property at 10:00 a.m. on January 4, 2013. The Notice stated the principal balance of the loan as $404,832.95 and the amount of default as $74,077.16. LPP authorized the loan servicer to enter a step-bid to purchase the property at the trustee's sale, with an opening bid at $280,000 and incremental increases until $500,428.67, the total amount due, was reached. The minimum bid for the property was published as $500,429.00. Podbielancik attended the sale on January 4, 2013. The property was not offered for sale at 10:00 a.m. and no announcement was made concerning the sale of the property. NWTS had postponed the sale until after 2:00 p.m. to review the lender's instructions. LPP purchased the property for its opening bid of $280,000 shortly after 2:00 p.m. Podbielancik sued LPP, NWTS, MERS, the servicer and sub-servicer asserting various claims. The trial court dismissed all of the claims, concluding that the trustee acted lawfully. Podbielancik appealed.

Holding: The dismissal was affirmed. Podbielancik was correct that the postponement of the sale violated RCW 61.24.040(6)(a) because there was no announcement of the continuance. However, there was no showing that she was prejudiced by the continuance, so the trial court properly refused to set aside the sale. The step-bid process was not misleading – LPP had determined that it would bid up to the amount of its debt, which was the published minimum bid, and the fact that the lender proceeded in increments did not prejudice the borrower. Podbielancik's claim that NWTS breached the trustee's duty of good faith and the claims for intentional misrepresentation, negligent misrepresentation, and negligence, were all based on the false minimum bid and were correctly dismissed. The lender, LPP, was entitled to recover its attorney fees pursuant to the attorney fee provision in the deed of trust that allowed recovery of fees in any action to "construe or enforce" the deed of trust.

***Frontier Bank v. Bingo Investments,* 191 Wn.App. 43 (2015)**

Facts: Starting in 2006, Bingo Investments and affiliated entities entered into various loan agreements with Frontier Bank pursuant to which Frontier made several loans for development of property. The loans were guaranteed by various individuals who were owners of the entities

borrowing the funds and the loans were secured by deeds of trust on the development property in Kitsap Count. The borrowers defaulted and Frontier commenced collections actions against the guarantors. Frontier became insolvent prior to completing its action against the guarantors and Union Bank, which had purchased Frontier's assets from the FDIC, was substituted in the actions. The trial court granted Union summary judgment on the guaranties for approximately $40,000,000 plus attorney fees. The guarantors appealed, claiming that the guaranties were void or voidable.

Holding: The judgment was affirmed. The guarantees were unconditional guaranties of payment. Upon default under the notes, the guarantors were obligated to pay the note balances. The guarantors raised three affirmative defenses: (1) Frontier fraudulently induced the guarantors to sign the guarantees; (2) Frontier acted in bad faith in attempting to collect and (3) Union bank was not entitled to the benefit of state and federal statutes that barred consideration of oral agreements that were alleged to be part of the borrower-guarantor-lender arrangement. The court rejected all of these defenses. The Washington statute of frauds at RCW 19.36.110 applied to the loan transactions and rendered the alleged oral agreements to forebear unenforceable. The evidence presented failed to show the existence of any genuine issue of material fact to support the claim of fraudulent inducement. Finally, the guarantors' claims were barred under 12 U.S.C. §1823(e) and the *D'Oench Duhme* doctrine that prohibits a party from asserting a cause of action against the FDIC or its assignees based upon unwritten agreements or other schemes alleged to be entered into by a failed bank. The defenses of waiver and breach of the covenant of good faith and fair dealing were also rejected.

***Barkley v. Greenpoint Mortg.,* 190 Wn.App. 58 (2015)**

Facts: Barkley obtained a $291,200 mortgage loan in 2002 from Greenpoint Mortgage. The deed of trust securing the loan named MERS as the beneficiary. The loan was eventually assigned to U.S. Bank. In 2010, Barkley defaulted on the loan. A notice of default was sent to Barkley in January 2011, but a foreclosure sale did not occur as a result of that notice. On November 7, 2012, another notice of default was sent by NWTS scheduling a sale in March 2013. At the request of Barkley's counsel, the sale was continued and on May 22, 2013, Barkley filed suit against Greenpoint, U.S. Bank, J. P. Morgan Chase (the servicer), NWTS, and MERS, alleging wrongful foreclosure, violations of the DTA, the CPA, and the Criminal Profiteering Act. The trial court dismissed Barkley's claims on summary judgment in May 2014. Barkley appealed.

Holding: The dismissal was affirmed. Since no foreclosure sale occurred, Barkley's claims for wrongful foreclosure were properly dismissed. Barkley did not allege any per se violations of the CPA and the general statements concerning the possibility of a violation occurring as a result of MERS identification as the beneficiary did not support any claim of unfair or deceptive act. Similarly, the record had no evidence supporting a claim under the Criminal Profiteering Act. In general, the Court agreed with the observation of the trial court:

> It is not enough to simply raise arguments and ask questions. And the Court finds that that is pretty much all that was done in this case on the plaintiff's part to try to—try to convince the Court that there is a genuine issue of material fact. In the Court's view there is not.

***Leahy v. Quality Loan Serv.*, 190 Wn.App. 1 (2015); *rev. denied* 185 Wn.2d 1 (2016)**

Facts: In September 2006, Leahy borrowed $320,000 from Washington Mutual Bank, secured by a deed of trust on residential property. In 2008, JPMorgan Chase Bank bought the Leahy loan. On March 1, 2009, Leahy defaulted on the loan. On April 9, 2010, Quality Loan Service Corporation of Washington provided a notice of default to Leahy on behalf of Chase and a notice of trustee's sale was issued on July 14, 2010. The sale was continued several times and finally on September 18, 2012, Quality Loan issued a third notice of trustee's sale. The sale date was January 18, 2013. On January 16, 2013, Leahy filed suit against Quality Loan asserting violations of the Consumer Protection Act, chapter 19.86 RCW, and intentional infliction of emotional distress and requesting a temporary restraining order to stop the sale. Leahy did not obtain an order restraining the sale and on January 18, 2013, the property was sold to a third party at the trustee's sale. In response to a motion by Quality Loan, the trial court dismissed Leahy's claims on April 28, 2014. Leahy appealed

Holding: The judgment was affirmed. The Court rejected the argument that Quality Loan was required to issue a new notice of default in connection with the new notice of trustee's sale. No such requirement existed in the Deeds of Trust Act and a new notice of default was not set forth in RCW 61.24.030 as a prerequisite for the trustee's sale. Leahy also alleged various defects in the notice of sale and procedural deficiencies in the sale. However, since Leahy did not seek to restrain the sale, these claims were waived upon the conduct of the sale and the trial court properly dismissed these claims.

Trujillo v. Nw. Tr. Servs., Inc., *183 Wn.2d 820 (2015)* – Required proof of status as beneficiary.
Wash. Fed. v. Harvey, *182 Wn.2d 335 (2015)* – Right to deficiency judgment.
Lyons v. U.S. Bank NA, *181 Wn.2d 775 (2014)* – Tort and CPA claims arising from foreclosure.
Frias v. Asset Foreclosure Servs., *181 Wn.2d 412 (2014)* – Wrongful foreclosure and CPA claim.
Frizzell v. Murray, *179 Wn.2d 301 (2013)* – Failure to restrain sale.
Schroeder v. Excelsior Mgmt Grp. Llc., *177 Wn.2d 94 (2013)* – Attempt to non-judicially foreclose against agricultural property.
Klem v. Washington Mut. Bank, *176 Wn.2d 771 (2013)* – Claim against trustee for violations of duties to grantor.
Bain v. Metropolitan Mortgage Group, *175 Wn.2d 83 (2012)* – Qualification of beneficiary to foreclose.
Albice v. Premier Mortgage Services of Washington, *174 Wn.2d 560 (2012)* – Action to set aside nonjudicial foreclosure.
In Re Receivership of Tragopan Properties, LLC, *164 Wn.App. 268 (2011)* – Acknowledgement of debt after statute of limitations.
The Bank of New York v. Hooper, *164 Wn.App. 295 (2011)* – Application of RCW 7.28.300.
Washington Federal Savings & Loan v. Alsager, *165 Wn.App. 10 (2011)* – Duty to read loan documents.
In re Trustee's Sale of Real Property of Brown, *161 Wn.App. 412 (2011)* – Homestead exemption.
Silverhawk, LLC v. Keybank, NA, *165 Wn.App. 258 (2011)* – Liability for termination of interest rate swap.
Boeing Employee Credit Union v. Burns, *167 Wn.App. 265 (2012)* – Rights of second mortgagee.
Peterson v. Kitsap Community Federal Credit Union, *171 Wn.App. 404 (2012)* – Action to recover improper fees charged on reconveyance.
Deer Credit v. Cervantes Nurseries, LLC, *172 Wn.App. 1 (2012)* – Application of one-action rule.
Bert Kuty Revocable Living Trust v. Mullen, *175 Wn.App. 292 (2013)* – Effect of full credit bid.
Gardner v. First Heritage Bank, *175 Wn.App. 650 (2013)* – Right of lender to non-judicially foreclose on multiple parcels.
Walker v. Quality Loan Service Corp., *176 Wn.App. 294 (2013)* – Right of action for violations of Deed of Trust Act in non-judicial foreclosure process.

Bavand v. OneWest Bank, FSB, *176 Wn.App. 475 (2013)* – Improper appointment of successor trustee.

Rucker v. NovaStar Mortg., Inc., *177 Wn.App. 1 (2013)* – Sale conducted by improperly appointed successor trustee.

Washington Fed. Sav. v. Klein, *177 Wn.App. 22 (2013); rev. denied 179 Wn.2d 1019 (2014)* – Failure to file creditors claim upon death of grantor.

First-Citizens Bank & Trust Co. v. Reikow, *177 Wn.App. 787 (2013)* – Determination of fair value for deficiency judgment.

First-Citizens Bank & Trust Co. v. Cornerstone Homes & Development, LLC, *178 Wn.App. 207 (2013)* – Obligations of guarantor secured by deed of trust.

Worden v. Smith, *178 Wn.App. 309 (2013)* – Calculation of redemption price.

Washington Federal v. Gentry, *179 Wn.App. 470 (2014); rev. granted, 180 Wn.2d 1021 (2014)* – Post-foreclosure guarantor liability.

In re Trustee's Sale of Real Prop. of Ball, *179 Wn.App. 559 (2014)* – Right to surplus funds.

Watson v. N.W. Trustees Serv., *180 Wn.App. 8 (2014), rev. denied, 181 Wn.2d 1007 (2014)* – Retroactive application of Foreclosure Fairness Act.

Washington Federal v. McNaughton, *181 Wn.App. 281 (2014), rev. den. 181 Wn.2d 1011 (2014)* – Determination of fair value of foreclosed property.

Trujillo v. NW Tr. Servs., *181 Wn.App. 484 (2014)* – Trustee authority.

First-Citizens Bank v. Harrison, *181 Wn.App. 595 (2014); rev. denied 181 Wn.2d 1015 (2014)* – Exempt tribal property.

Mellon v. Reg'l Servs. Corp., *182 Wn.App. 476 (2014)* – CPA violation.

Jackson v. Quality Loan Serv. Corp.*, 186 Wn.App. 838 (2015); rev. denied, 184 Wn.2d 1011 (2015)* – failure to seek restraint of sale.

Merry v. NW. Tr. Servs., Inc., *188 Wn.App. 174 (2015)* – Failure to seek restrain of sale.

Fed. Nat'l Mortg. Ass'n v. Ndiaye, *188 Wn.App. 376 (2015)* – Failure to seek restraint of sale.

D. Mortgage Insurance

No reported cases within the last five years.

V. Landlord Tenant

Western Plaza LLC v. Tison, 184 Wn.2d 702 (2015)

Facts: Tison entered into a lease for a mobile home lot in October 2001 for a one-year term. The lease provided for $345 monthly rent, with the proviso "Every other year, rent will be raised no more than $10.00 for remaining tenancy." Western Plaza LLC purchased the mobile home park in February 2008. At that time, Tison's monthly rent was $375. In March 2009, WP sent Tison a notice that her rent would be increased to $405 starting in July 2009. Tison began paying $385 per month, consistent with the rent cap provision. In June 2011, WP informed Tison that her rent would increase to $495 starting in October 2011. Relying on the rent cap provision, Tison attempted to pay the $395 she believed was due. WP rejected her payments and initiated an unlawful detainer action. The trial court ruled in favor of WP; the Court of Appeals reversed, finding the rent cap provision applied so long as Tison was a tenant, even after the expiration of the original term of the lease.

Holding: The Court of Appeals was affirmed. The Court rejected the argument that the MHLTA restricted the enforcement of the rental cap provision in Tison's lease. RCW 59.20.090(2) provided a three month notice provision prior to the effective date of rental increases; the statute limited rent increases rather than created a right to increase. The parties to an individual lease were

free to set further limits. The provision did not violate the MHLTA statute of frauds, RCW 59.20.060, which required only a writing for a lease of a mobile home lot, rather than an . The requirement of an acknowledgement in RCW 59.20.040 applied only to rental agreements for mobile home lots; RCW 59.20.060 required only a writing to satisfy the statute of frauds for mobile home lot leases as opposed to the acknowledgement requirement imposed by RCW 59.04.010 and 64.04.010. The only way to reconcile the varying requirements was to apply each statute to the transactions which they controlled: RCW 64.04.010 applied to the transfer of title regardless of the duration of the conveyance; RCW 59.04.010 applied to tenancies generally over one year in duration; and RCW 59.20.060 applied specifically to mobile home lots validating leases over one year so long as they are in writing. The Court also concluded the rend cap provision was binding on WP as the successor in interest to the original landlord.

***Segura v. Cabrera,* 184 Wn.2d 587 (2015)**

Facts: On July 3, 2011, Cabrera leased an unpermitted basement dwelling unit to Segura for one year at $600 per month with a $600 security deposit and $150 electric utility service deposit. Five days later, the city of Pasco Code Enforcement Office inspected the property and found the basement unit was uninhabitable and ordered Segura to vacate. Segura sued Cabrera for damages on July 26th and the trial court awarded $1,200 for the first month's rent and security deposit, $150 for the utility deposit, $2,000 in relocation assistance and $200 in gas expense for moving. The trial court refused to grant $1,000 in damages claimed for emotional distress, finding that the relationship between the parties was contractual and did not support an award of damages for an intentional tort. The Court of Appeals affirmed the trial court and refused to award emotional distress damages because a landlord could violate RCW 59.18.085(3)(a) by conduct not amounting to an intentional tort.

Holding: The denial of emotional distress damages was affirmed. The statutory scheme in RCW 59.18.085 was intended to provide relief to tenants and assign responsibility to landlords for expenses arising from leasing rental units that are not permitted or uninhabitable. The amount recoverable by tenants forced to vacate substandard units was specified in RCW 59.18.085(3)(e):

> Displaced tenants shall be entitled to recover any relocation assistance, prepaid deposits, and prepaid rent required by (b) of this subsection. In addition, displaced tenants shall be entitled to recover any actual damages sustained by them as a result of the condemnation, eviction, or displacement that exceed the amount of relocation assistance that is payable. In any action brought by displaced tenants to recover any payments or damages required or authorized by this subsection (3)(e) or (c) of this subsection that are not paid by the landlord or advanced by the city, town, county, or municipal corporation, the displaced tenants shall also be entitled to recover their costs of suit or arbitration and reasonable attorneys' fees.

The Court concluded the provisions of the statute taken together entitled the tenant to receive the relocation assistance amounts as calculated in subsection (3)(b) plus the tenant's actual costs of relocation that exceed the relocation assistance amount as calculated in subsection (3)(b). The statute simply did not encompass emotional distress damages.

***Faciszewski v. Brown,* 192 Wn.App. 441 (2016); rev. granted 185 Wn.2d 1040 (2016)**

Facts: Brown and Wahleithner rented a house from Faciszewski. In February 2014, an issue arose between the landlord and tenant concerning parking. In July 2014, the landlord attempted to serve the tenants with a notice terminating their tenancy; when service was not available, the notice was taped to the front door of the house. The tenants did not vacate on July 31, 2014, the date specified in the notice for the termination of the lease and the landlord commenced an unlawful detainer action. The trial court issued a writ of restitution, finding service and contents of the notice of termination sufficient under the just cause provision of SMC 22.206.160(C). The landlord was awarded unpaid rent through the date of the writ of restitution, attorney fees and costs. The tenants appealed.

Holding: The trial court was affirmed. The tenants raised two issues: First, they claimed service of the notice was improper since they were present in the house, so they could have been personally served as opposed to leaving the notice on the front door; Second, they contested the truthfulness of the landlord's statement of the cause of the termination as the occupancy of the house by a family member of the landlord. The Court rejected both of these claims. The alternative means of service under RCW 59.12.040 were all equal alternatives and the option of service by posting the notice on the door was available even though the tenants were allegedly present in the house. The reason given for the termination in the notice was sufficient, even though it simply recited the provisions of the ordinance concerning the occupancy of the premises by a member of the landlord's family. The Court rejected the tenants' argument that the trial court should have allowed an inquiry into the truthfulness of the landlord's stated reason for termination. The tenants had demanded a certification of the reason for termination, which was provided. The tenants' remedy following the certification was a claim for damages if the termination had been improperly obtained as opposed to a right to contest the eviction:

> With SMC 22.206.160, the city provides tenants added protections not available to them under Washington law. The city has adopted substantive provisions and procedures applicable to the eviction process and safeguards to ensure landlord compliance. The city also has provided remedies for a tenant who questions the landlord's intent or compliance with Seattle's ordinance. The tenant can demand a certification of the reason for termination. The landlord's failure to provide the certification provides a defense to an eviction action. The landlord's failure to carry out the reason stated in the certification provides the tenant with a claim for damages up to $2,000. We decline the Tenants' request that we rewrite the ordinance to provide another remedy.

***Goodeill v. Madison Real Estate,* 191 Wn.App. 88 (2015); *rev. denied* 185 Wn.2d 1023 (2016)**

Facts: In November 2011, Goodeill entered into a seven-month lease agreement for a home at 1502 West Cora Court in Spokane. Goodeill paid $750.00 per month for rent, a $750.00 damage security deposit, and a $50.00 pet deposit. Madison acquired the company that managed the house during Goodeill's tenancy. The lease was extended and Goodeill then occupied the house on a month-to-month tenancy. On August 5, 2013, Goodeill gave Madison the requisite 20–day notice to terminate the tenancy and finished moving out on August 27th. The last keys were returned to Madison on September 3rd due to the Labor Day Holiday. When no accounting for the security

deposit had been given by September 23rd, Goodeill sued Madison in small claims court to recover the security deposit plus a penalty equal to her security deposit, as permitted by RCW 59.18.280 . On October 9—43 days after Goodeill vacated the house rental and 36 days after Goodeill returned the last two keys to Madison—Madison sent Goodeill a statement as contemplated by RCW 59.18.280: Madison applied a credit of $845.00, which represented the $800.00 security deposit and a $45.00 prepayment credit against charges of $557.09; the difference was $287.91, which Madison refunded to Ms. Goodeill with the October 9 notice. The small claims court ruled in Ms. Goodeill's favor, and substantially awarded her requested relief. Madison sought review in the superior court, which reversed the small claims court award and dismissed Ms. Goodeill's claim, finding that Madison "was prevented from sending a full and specific statement within 14 days because of circumstances beyond their control." Goodeill appealed.

Holding: The trial court was reversed. The material facts concerning the surrender of the premises and the subsequent actions by Madison were not in dispute. The court also noted that the conclusion by the trial court that "circumstances beyond the control" of Madison delayed delivery of the statement was a conclusion of law rather than of fact. For these reasons the court reviewed the matter de novo. The Court concluded Madison could not avail itself of RCW 59.18.280 's exception to the requirement of delivery of an accounting for the deposit within fourteen (14) days unless it accounts for any active or passive delay sufficient to show that it made a conscientious attempt to comply with the statutory 14 day notice. Madison made no such showing and in fact, the evidence indicated that had Madison proceeded with diligence, the 14-day time period could have easily been satisfied. Goodeill was awarded $1,600 plus attorney fees.

***FPA Crescent Assocs. LLC v. Jamie's LLC,* 190 Wn.App. 666 (2015)**

Facts: FPA Crescent leased commercial space to Jamie's LLC in the Crescent Building in Spokane. The lease contained a provision that allowed the landlord to terminate the lease upon "any event of default." After taking possession in February 2014, Jamie's failed to pay a portion of the rent due May 1, 2014. FPA served Jamie's a notice of termination of lease on May 9, 2014 and demanded the immediate surrender of the premises. Jamie's attempted to pay the past due rent amount twice, but FPA refused to accept the tendered payments. On May 28, 2014, FPA commenced an unlawful detainer seeking a writ of restitution arguing that Jamie's continued to occupy the premises after the end of the term of the lease. The trial court granted the writ and entered summary judgment in favor of FPA. Jamie's appealed.

Holding: The trial court was reversed. FPA had proceeded under RCW 59.12.030(1) which applies to a holdover tenant. FPA's theory was that once the lease was terminated by notice, Jamie's became a holdover tenant. The court rejected this argument and held that .030(1) was applicable only after the expiration of the fixed term as specified in the lease agreement. FPA should have proceeded under RCW 59.12.030(3), which requires written notice and an opportunity to cure the payment default. Since FPA failed to provide the notice in the form required by the statute, the issuance of the writ of restitution was in error and the trial court should have declined to consider the case. The matter was remanded to the trial court to consider Jamie's remedy for the dismissal of the unlawful detainer action.

Hundtofte v. Encarnacion,* *181 Wn.2d 1 (2014) – Redaction of court records.

Resident Action Council v. Seattle Hous. Auth., *177 Wn.2d 417 (2013)* – Disclosure of public housing tenant grievance decisions.

Optimer Intern., Inc. v. RP Bellevue LLC*, 170 Wn.2d 768 (2011)* – Arbitration clause.

Lamar Outdoor Advertising v. Harwood, *162 Wn.App. 385 (2011)* – Right to terminate lease on sale of property.

Columbia Park Golf Course, Inc. v. City of Kennewick, 160 Wn.App. 66 (2011) – Damages for breach of lease.

Dutch Village Mall vs. Pelletti, *162 Wn.App. 531 (2011)* – Representation of corporate tenant in unlawful detainer.

Housing Authority of the City of Seattle v. Bin, *163 Wn.App. 367 (2011)* – Award of attorney fees.

Seashore Villa Ass'n v. Hugglund Family Ltd. Partnership, *163 Wn.App. 531 (2011)* – Maintenance obligations under MHLTA.

In the Estate of Earls, *164 Wn.App. 447 (2011)* – Deceased guarantor.

Recreational Equipment, Inc. v. World Wrapps NW, *165 Wn.App. 553 (2011)* – Exercise of option.

Hawkins v. Diel, *166 Wn.App. 1 (2011)* – Duty to repair.

Speelman v. Bellingham/Whatcom County Hous. Auths., *167 Wn.App. 624 (2012)* – Due process requirement for Sec. 8 housing.

Angelo Property v. Hafiz, *167 Wn.App. 789 (2012)* – Jurisdiction in unlawful detainer proceeding.

Trinity Universal Ins. Co. of Kan. v. Cook, *168 Wn.App. 431 (2012)* – Insurer's subrogation rights in residential landlord-tenant arrangements.

MHM&F, LLC v. Pryor, *168 Wn.App. 451 (2012)* – Claimed defect in summons under unlawful detainer statute.

Indigo Real Estate Services v. Wadsworth, *169 Wn.App. 412 (2012)* – Right to terminate Sec. 8 tenancy.

Landis & Landis v. Nation, *171 Wn.App. 157 (2012), rev. den. 177 Wn.2d 1003 (2013)* – Implied warranty of habitability.

Nichols v. Seattle Hous. Auth., *171 Wn.App. 897 (2012)* – Claim for rent under Section 8 housing program.

Schreiner Farms v. Am. Tower, *173 Wn.App. 154 (2013)* – Right to assign.

Country Manor MHC, LLC v. Doe, *176 Wn.App. 601 (2013)* – Consent to assignment under MHLTA.

Tafoya v. Human Rights Comm'n, *177 Wn.App. 216 (2013)* – Applicability of Law Against Discrimination to lease transactions.

Martini v. Post, *178 Wn.App. 153 (2013)* – Condition of premises contributing to injury.

Hall v. Feigenbaum, *178 Wn.App. 811 (2014)* – Adequacy of service under commercial unlawful detainer.

***Segura v. Cabrera, 179 Wn.App. 630 (2014), rev. granted 181 Wn.2d 1006 (2014)* – Right to relocation payments.**

4105 1st Avenue South Investments, LLC v. Green Depot WA Pacific Coast, LLC, *179 Wn.App. 777 (2014)* – Prevailing party attorney fees.

Western Plaza LLC v. Tison, *180 Wn.App.17 (2014), rev. granted, 181 Wn.2d 1022 (2014)* – MHLTA limitations on rent increase.

Peyton Building LLC v. Niko's Gourmet, *180 Wn.App. 674 (2014)* – Assignment of lease guarantee.

Old City Hall v. AIDS Foundation, *181 Wn.App. 1 (2014)* – Constructive eviction.

Fedway Marketplace W. v. State, *183 Wn.App. 860 (2014)* – State right to terminate lease.

Viking Bank v. Firgrove Commons, *183 Wn.App. 706 (2014)* – Triple net lease.

Learner Family Trust v. Wilson, *183 Wn.App. 494 (2014)* – Right to attorney fees.

Estate of Hayes, *185 Wn.App. 567 (2015)* – Prohibition against assignment.

Barr v. Young, *187 Wn.App. 105 (2015)* – Proceedings following abandonment of unlawful detainer.

Lang Pham v. Corbett, *187 Wn.App. 816 (2015)* – Relocation assistance under RCW 59.18.085.

Handlin v. On-Site Manager, Inc., *187 Wn.App. 841 (2015)* – Claim for inaccurate tenant screening report.

Burgess v. Crossan, *189 Wn.App. 97 (2015)* – Tenancy as community property versus tenants in common.

VI. Easements/Covenants

Hood Canal Sand & Gravel v. Goldmark, 195 Wn.App. 284 (2016)

Facts: Hood Canal Sand & Gravel owned land on the shoreline of Hood Canal abutting tidelands. HCSG planned to develop its property and the adjacent tidelands into a marine load-out facility with a 1,000-foot pier into Hood Canal. In 2003, HCSG filed various applications for the project and submitted a Joint Aquatic Resources Permit Application to DNR to use state-owned aquatic lands. While these applications were pending, DNR and the US Navy began discussing an easement arrangement limiting uses in Hood Canal incompatible with the Navy's operations, and specifically to block HCSG's proposed development. DNR granted the Navy an easement in 2014 designed to accomplish the Navy's goals by granting the Navy rights over the aquatic lands HCSG required for its project and promote conservation objectives of DNR. HCSG ultimately sued DNR in Jefferson County and the Navy in federal district court. The state action sought a declaratory judgment that DNR lacked the authority to execute the easement to the Navy, the easement violated state and federal law and was void and HCSG should have been a party to the easement. The trial court dismissed all of the claims. HCSG appealed.

Holding: The dismissal was affirmed. The Court concluded DNR had the authority under RCW 79.36.355 to grant easements over public lands, including an easement to the Navy. Granting the easement did not exceed DNR's statutory authority. The trial court properly dismissed HCSG's requests for writs of prohibition, mandamus, statutory certiorari, declaratory judgment, and injunctive relief because they were not appropriate means for review of DNR's action and since HCSG failed to show any genuine issue of material fact DNR acted illegally in granting the easement, there was no basis for a constitutional writ of certiorari. The Court rejected HCSG's claim that it had a preferred right to lease the easement area granted to the Navy. DNR was permitted to lease bedlands to abutting owners under RCW 79.130.010(1), but does not require it to do so. HCSG had no right to compel a lease of the bedlands for its project.

Tri-City R.R.Co. v. WUTC, 194 Wn.App. 642 (2016); rev. denied, ___ Wn.2d ___ (Dec. 7, 2016)

Facts: In 2013, Kennewick petitioned the Washington Utilities and Transportation Commission for permission to install an at-grade railroad crossing connecting two streets. It proposed to install advanced signage, flashing lights, an audible bell, automatic gates, and a raised median strip designed to prevent drivers from going around lowered gates. The City of Richland intervened, supporting Kennewick's position. Tri-City Railroad operated trains on the two tracks that were to be crossed and TCRR opposed the petition, claiming it would interfere with its operations. An administrative law judge initially heard the petition and recommended denial, finding the public need did not outweigh the inherent risks presented by the at-grade crossing. The cities appealed to the full commission, which granted the petition "considering the broader public policy context that give a degree of deference to local jurisdictions in the areas of transportation and land use planning." TCRR petitioned for judicial review and the trial court affirmed the WUTC. TCRR appealed.

Holding: The commission was affirmed. TCRR contended that unless there was a net improvement in public safety, the at-grade crossing petition must be denied. The Court reviewed the statutory language concerning the authority of the WUTC, the history of the statutory scheme and legislative history to interpret the appropriate standard to review the actions of the WUTC. Considering these factors, by broadly charging the commission to "regulate in the public interest" and assigning it the standardless authority and responsibility to grant or deny petitions for at-grade crossings, the legislature implicitly delegated to the commission the responsibility to interpret "public interest" in the first instance. In light of all of the factors presented to the WUTC, its conclusion as to what constituted the public interest was reasonable.

***Hanna v. Margitan,* 193 Wn.App. 596 (2016)**

Facts: Prior to 2000, various easements were granted encumbering property owned by Bond, including a switchback road easement to various property owners that used an improved road on the property and water storage easements in favor of Avista Corp (f/k/a Washington Water Power). In 2000, Bond short platted the property creating three parcels and the short plat was recorded in 2002. The short plat did not show any of the prior easements, other than a 40 foot road easement serving the parcels. Margitan bought parcel 1 (the southernmost) in 2002 and Bond granted two private road easements over parcels 2 and 3 for the benefit of parcel 1. Hanna bought parcel 2 in 2002 and the title report indicated the parcel was encumbered by various easements, including the switchback road easement, the Avista easements and the two easements in favor of Margitan. Hanna acquired parcel 2 in 2002 and granted Inland Power and Light an easement to construct an electrical system. Margitan acquired parcel 3 in 2010 and sought a building permit to construct a residence on the parcel. In 2012, Hanna filed a quiet title complaint against Margitan seeking a declaration that the Margitans' two private road easements along the switchback road were invalid, either because they did not show a present intent to convey property, or because they were ineffective attempts to alter the short plat without formal amendment, as required by RCW 58.17.215. Ultimately, Hanna sought to invalidate the Inland Power and Avista easements. The trial court dismissed the claims and awarded attorney fees pursuant to 4.84.185. Hanna appealed.

Holding: The trial court was affirmed, except as to its award of attorney fees. Hanna presented no authority for the proposition the filing of the short plat extinguished any easement. The Court held the filing of a sort plat did not extinguish any previously granted easements not disclosed on the face of the short plat and the claims against the benefited parties of the switchback road easement were properly dismissed. Similarly, the easement granted to Avista was valid. The easement granted by Hanna to Inland Power was not an amendment to the short plat and was valid. The two easements granted to Margitan were granted with language virtually identical to the easements invalidated in *Zunino v. Rajewski*, 140 Wn.App. 215 (2007) as not evidencing a present intent to grant. The Court held the extrinsic evidence surrounding the executing of the easements supported the finding there was a present intent to grant the two easements. Zunino was overruled to the extent it held the language unambiguously failed to create an easement. The Court reversed the award of attorney fees to Inland Power and Margitan, finding the claims were not frivolous. Attorney fees on appeal were denied to all parties on the same rationale.

Gamboa v. Clark,* *183 Wn.2d 38 (2015) – Prescriptive easement.
Crystal Ridge v. City of Bothell,* *182 Wn.2d 665 (2015) – Obligation to maintain easement.

Riverview Community Group v. Spencer & Livingston, *181 Wn.2d 888 (2014)* – Equitable servitude.
Wilson & Son Ranch, LLC v. Hintz, *162 Wn. App. 297 (2011)* – Change in scope.
Jensen v. Lake Jane Estates, *165 Wn. App. 100 (2011)* – Restriction on subdivision.
Jones v. Town of Hunts Point, *166 Wn.App. 452 (2012)* – Restriction on lot division.
Greenbank Beach and Boat Club, Inc. v. Bunney, *168 Wn.App. 517 (2012)* – Height limitation.
Riverview v. Spencer & Livingston, *173 Wn.App. 568 (2013)* – Imposition of servitude to operate golf course.
Brokers Network v. Homeowners' Ass'n, *173 Wn.App. 778 (2013)* – Access gate as interference with use of easement.
Woodward v. Lopez, *174 Wn.App. 460 (2013)* – Easement by implication.
Buck Mt. Owners' Ass'n v. Prestwich, *174 Wn.App. 702 (2013)* – Contribution for maintenance.
Saunders v. Meyers, *175 Wn.App. 427 (2013)* – View easement.
Gamboa v. Clark, *180 Wn.App. 256 (2014),* ***rev. granted*** *181 Wn.2d 1001 (2014)* – Prescriptive easement.

VII. Liens/Judgments/Attachments

Ocwen Loan Servicing, LLC v. Bauman, 195 Wn.App. 763 (2016)

Facts: On June 20, 2008, the Bonvicinis purchased property located in Woodinville, financed with a loan from Evergreen Moneysource, secured by a deed of trust in favor of MERS. On November 9, 2009, Turner purchased property located in Snohomish, financing his purchase with a loan from Golf Savings Bank, secured by a deed of trust also in favor of MERS. Both the Bonvicinis and Turner failed to pay their water service charges imposed by Cross Valley Water District. The liens arising from the delinquency were foreclosed and each order specified the property was to be sold "to the highest and best bidder for cash as provided by RCW 84.64.080 and RCW 57.20.135 ." Each judgment also stated that the property was subject to a two-year postsale right of redemption under RCW 35.50.270 , a statute that governs foreclosures to collect local improvement assessments as opposed to liens for water service. Bauman bought both properties at public auction on March 13 2012. Ocwen claimed the right to enforce the deeds of trust encumbering the properties and notified Bauman of its intent to redeem both properties more than one year after the foreclosure sale. On March 11, 2014, Ocwen filed two lawsuits against the Bauman, claiming a right to redeem the properties under the Bonvicini and Turner deeds of trust. Bauman moved to dismiss the actions. The trial court held RCW 35.50.270 applied only to foreclosures to recoup local improvement assessments and did not apply in the case of foreclosure of liens for water service. However, it concluded it would be inequitable to impose a shorter redemption period than that stated in the orders . However, the trial court also concluded that Ocwen lacked standing to exercise any redemption right for either property because it did not show that it had a qualifying interest by the relevant date, March 13, 2014 and dismissed both cases. Both parties appealed.

Holding: The dismissal was affirmed on other grounds. The Court rejected Bauman's argument that there were no redemption rights from a foreclosure of water district liens. Bauman had argued the District had the power to foreclose as a county government in the same manner as foreclosing property taxes with no redemption rights. The only authority for the District to proceed was the authority granted under RCW 57.08.081(4) and that statute also provided in water district foreclosures, the laws "shall control as in other actions." The Court held this meant the statutes governing the sale of real property to satisfy a judgment and corresponding statutory redemption

rights applied. Assuming Ocwen was a qualified redemptioner, the redemption must occur within one year after the foreclosure sale. RCW 6.23.020(1). The trial court erred in creating an "equitable" right to redeem beyond the statutory time period. Ocwen's declaratory judgment action was commenced more than year after the foreclosure sale and was properly dismissed.

***Guillen v. Pearson,* 195 Wn.App. 464 (2016)**

Facts: Milestone constructed apartment buildings on land it owned in Puyallup. ABSI was the framing subcontractor. Laborers claimed ABSI failed to pay them and filed liens in the amount of wages claimed on May 27, 2014. On June 4, 2014, the laborers commenced a lien foreclosure. After the complaint was filed, Milestone transferred a portion of the property to other entities, who were added to the foreclosure action through a supplemental complaint filed November 12, 2014, with service completed on January 27, 2015. The trial court dismissed the lien claims, finding ABSI was not Milestone's construction agent and the action against the subsequent owners was not timely commenced. The laborers appealed.

Holding: The trial court was reversed. It was undisputed the laborers furnished labor for the improvements constructed on Milestone's property. The Court rejected Milestone's contention that only licensed contractors who contract to perform work on real property have construction lien rights under RCW 60.04.021. Similarly, the Court found a subcontractor was included within the definition of construction agent in RCW 60.04.011(1) and it was not necessary to demonstrate ABSI had control of the entire improvement as a condition of finding ABSI to be Milestone's construction agent. Finally, the Court rejected the argument the action was untimely as to the subsequent owners. The additional owners were added to the suit within 8 months of filing the lien and service of process was completed within 90 days of filing the complaint.

***Performance Constr. v. Glenn,* 195 Wn.App. 406 (2016)**

Facts: On June 12, 2013, the Brookwood Place Condominium Association commenced a lien foreclosure action pursuant to chapter 61.12 RCW and chapter 64.34 RCW against a condominium unit owed by Slighter Property II LLC to collect delinquent monthly condominium assessments. Greenpoint Mortgage and Nationstar Mortgage were also named a defendants based on liens they held on the condo unit. Both lenders failed to appear in the action. The trial court entered a judgment of $20,772.04 in favor of Brookwood and a decree of foreclosure. The foreclosure sale occurred on January 3, 2014 and D & J Shires LLC was the highest bidder at $36,000. Keene, a members of Shires LLC, acquired by assignment all of Slighter's redemption rights on January 30, 214 and the trial court confirmed the sale on January 31, 2014. Based on an affidavit from Keene attesting there were no redemptioners with a right of redemption, the trial court ordered the sheriff to issue its sheriffs deed free and clear of all redemption rights, which the sheriff did on April 14, 2014. Glenn bought the condo from Shires in May 2014 for $175,000. Cobalt Mortgage financed the purchase. On January 3, 2015, Performance Construction delivered to Glenn an offer to purchase the unit under RCW 6.23.120 and offered $92,500. Glenn refused and Performance sued. The trial court on the cross motions for summary judgment: (1) voided the order for issuance of the sheriff's deed; (2) voided the sheriff's deed; (3) declared that Performance did not make a qualifying offer under RCW 6.23.120 because the unit was not listed for sale as

required by the statute; and (4) declared that Glenn was a bona fide purchaser and was entitled to have title to the condo unit quieted in her name. Performance appealed.

Holding: The trial court was affirmed. The assignment of the Slighter redemption rights received by Shires was ineffective since it was not in deed form. The court erred by concluding there were no redemptioners at the time the sheriff's deed was issued and the trial court, having concluded the sheriff's deed was issued prior to the end of the redemption period was correct in ruling the deed was void. No parties sought to or redeemed during the redemption period, so Shires would have been entitled to a sheriff's deed and absolute title of the unit at the end of one year. Glenn succeeded to Shires' interest in the unit, so Glenn held that inchoate interest in the unit at the end of the redemption period. She was therefore entitled to the sheriff's deed unless Performance properly invoked the exception under RCW 6.23.120. The Court held because the condo unit was owned by Slighter LLC at the time of the foreclosure, it was not property that the owner was using as a residence. Consequently, it was not property in which the owner would be entitled to claim a homestead and RCW 6.23.120 did not apply to the unit.

Bankr. Petition of Wieber, *182 Wn.2d 919 (2015)* – Applicability of Washington homestead to property in another state.
Sixty-01 Ass'n of Owners v. Parsons, *181 Wn.2d 316 (2014)* – Confirmation of sheriff's sale.
W. G. Clark v. Reg'l Council, *180 Wn.2d 54 (2014)* – Lien for health and welfare contributions.
Bank of America v. Owens, *173 Wn.2d 40 (2011)* – Priority of judgment liens.
Williams v. Athletic Field, Inc., *172 Wn.2d 683 (2011)* – Form of claim of lien.
Colorado Structures, Inc. dba CSI Construction Company v. Blue Mountain Plaza, LLC, *159 Wn.App. 654 (2011)* – Requirement that owner request work.
Gray v. Bourgette Construction, LLC, *160 Wn.App. 334 (2011)* – Owner's agent and frivolous claim.
Stonewood Design, Inc. v. Heritage Homes, Inc., *165 Wn.App. 720 (2011)* – Claim against release bond.
Business Servs. of Am. v. WaferTech, LLC, *159 Wn.App. 591 (2011)* – Dismissal for want of prosecution.
Zervas Group Architects V. Whidbey Island Bank, *161 Wn.App. 322 (2011)* – Priority of architect's lien.
Blue Diamond Group, Inc. v. KB Seattle 1, Inc., *163 Wn.App. 449 (2011)* – Nature of services giving rise to lien.
Casterline v. Roberts, *168 Wn.App. 376 (2012)* – Priority of equitable lien.
Olson Eng'g, Inc. v. KeyBank, NA, *171 Wn.App. 57 (2012)* – Effect of posting bond.
Scott's Excavating Vancouver LLC v. Winlock Properties, LLC., *176 Wn.App. 335 (2013), rev. denied 179 Wn.2d 1011 (2014)* – Priority of engineering lien.
Bank of Am., NA v. Owens, *177 Wn.App. 181 (2013)* – Priority of equitable lien.
Sixty-01 Ass'n of Apart. Owners v. Parsons, *178 Wn.App. 228 (2013)* – Priority of assessment liens.
Top Line Builders v. Bovenkamp, *179 Wn.App. 794 (2014)* – Lien for quantum meruit.
N.W. Cascade v. Unique Constr., *187 Wn.App. 685 (2015)* – Property eligible for homestead exemption.
Shelcon Constr. Grp. V. Haymond, *187 Wn.App. 878 (2015)* – Effect of lien waiver.
P.H.T.S. v. Vantage Capital*, 186 Wn.App. 281 (2015)* – Redemption offer pursuant to RCW 6.23.120.
Seven Sales, LLC v. Otterbein, *189 Wn.App. 204 (2015)* – Right to surplus following foreclosure pursuant to RCW 84.64.080.

VIII. Homeowners' Associations

Bilanko v. Owners Ass'n, 185 Wn.2d 443 (2016)

Facts: Barclay Court was a 28-unit condominium project in Seattle established in 2001. The original declaration stated there was "no restriction on the right" of owners to rent their units. In 2008, the association voted to amend the declaration to provide not

more than seven units in the condominium could be rented at any one time. The amendment was recorded November 3, 2008. Bilanko subsequently purchased a unit and tried to lease it, notwithstanding the fact there were seven other units already being leased in the condominium. Bilanko sued the owners' association in 2014, claiming the amendment was invalid since it was approved by only 67% of the ownership interests (the percentage required to impose restrictions on leasing units) instead of 90% (the percentage required to change restrictions on the uses of units). The trial court rejected the Association's defense that the one-year statute of limitations in RCW 64.34.264(2) barred the action, and invalidated the restriction. The Association appealed and the Supreme Court accepted direct review.

Holding: The trial court was reversed. The plain language of RCW 64.34.264(2) bars challenges to the validity of any amendment brought more than one year following the recording of the amendment. The Court interpreted challenges to "validity" to include any claims relating to the binding nature or legal sufficiency of the amendment, which included Bilanko's challenge. The trial court erred in relying on *Club Envy of Spokane, LLC v. Ridpath Tower Condo. Ass'n,* 184 Wn.App. 593 (2014). The Court concluded the *Club Envy* decision was based upon the court's equitable power to void amendments procured under circumstances amounting to fraud. In the absence of fraud, conduct seriously offending public policy or action exceeding legal authority, the statute was applicable to bar challenges to the effectiveness of an amendment commenced more than one year after recording.

***Filmore LLLP v. Condo. Owners,* 184 Wn.2d 170 (2015)**

Facts: Centre Pointe Condominium, a residential development in Bellingham, was formed in May 2003. As of 2011, CPC consisted of three buildings with 97 units and a clubhouse. Filmore bought the unfinished portion of the project that was part of the original development and subject to the condominium declaration. In October 2011, the owners of CPC holding at least 67% of the voting interest approved the amendment of the declaration to restrict leasing within CPC to not more than 30% of the units. In October 2012, Filmore sued to set aside the amendment, alleging the amendment violated RCW 64.34.264(4) and Section 17.3 of the declaration. The trial court agreed with Filmore and declared the amendment invalid; the Court of Appeals affirmed.

Holding: The trial court was affirmed. Since CPC was formed after July 1, 1990, the Washington Condominium Act (WCA), Chpt. 64.34 RCW, governed the declaration. Under RCW 64.34.264(1), a condominium declaration may be amended by the vote or agreement of owners to which at least 67 percent of the voting interest. An exception to this rule was provided in RCW 64.34.264(4), requiring the vote or agreement of the owner of each unit particularly affected and the owners of units to which at least 90 percent of the voting interest for an amendment that "may create or increase special declarant rights, increase the number of units, change the boundaries of any unit, the allocated interests of a unit, or ***the uses to which any unit is restricted***." (Emphasis added). The CPC declaration mirrored the WCA language. Section 17.1 of the declaration provided a 67 percent vote was generally sufficient to amend the declaration and Section 17.3 mirrored RCW 64.34.264(4), requiring "the vote or agreement of the Owner of each Unit particularly affected and his or her Mortgagee and the Owners of Units to which at least ninety percent (90%) of the votes in

the Association are allocated" for certain changes, including any change to "the uses to which any Unit is restricted." The Court rejected the association's position that leasing was not a "use" as contemplated by the declaration. Referring to Section 9.1 of the declaration, which defined "Permitted Uses" of the complex, the Court found leasing to be identified as a "use" of units within the complex. Since leasing was a "use" under the declaration, an amendment changing that use required approval of 90% of the voting interest of the condominium.

***Halme v. Walsh,* 192 Wn.App. 893 (2016)**

Facts: In June 1990, the owners of lots within an area known as Nosko Tract - Phase Two in Clark County adopted a Road Maintenance Agreement. The purpose of the agreement was to accept the dedication of a private road serving the nine lots in the area and provide for maintenance. The RMA allocated maintenance costs, provided for annual payments, called for the election of a manager to supervise the road maintenance and allowed for amendments to the annual contributions to be adopted by 80% of the lot owners. The Walshes and the Hasselbachs, who owned six of the lots, and Halme, who owned one lot, disagreed over the use of the road and other issues relating to the use and enjoyment of the property. In the summer of 2014, the Walshes and Hasselbachs called a meeting of the lot owners pursuant to the RMA and, at that meeting, organized a homeowners association, adopted bylaws, adopted CCRs purporting to control the use of off-road vehicles, storage of personal property and adopting a schedule of fines for violating the restrictions imposed by the CCRs. Halme was informed his conduct violated the newly adopted regulations and he would be fined if he did not change his behavior. Halme sued to invalidate CCRs and for a declaration the newly formed HOA did not legally exist. In the trial court, it was conceded the new CCRs were not binding, but the Walshes and Hasselbachs asserted the right to amend the RMA to regulate activity on the lots and adopt a schedule of fines for violations. The trial court ruled in favor of Halme and awarded $15,000 in attorney fees. The Walshes and Hasselbachs appealed.

Holding: The trial court was affirmed. Under RCW 64.38.010(11) a valid HOA must satisfy three requirements: (1) there must be "a corporation, unincorporated association, or other legal entity," (2) each member of the entity must be an owner of residential real property within the entity's jurisdiction as described in its governing documents, and (3) members must be obligated to "pay real property taxes, insurance premiums, maintenance costs, or for improvement of real property" that the member does not own. Although arguably the RMA satisfied the second and third requirement, the RMA did not purport to create any unincorporated or incorporated entity. The RMA was a covenant running with the lots within Nosko Tract – Phase Two. There were no provisions within the RMA concerning amendment, other than the adjusting of annual contributions. In order to adopt an amended to the RMA, the owners of all of the lots encumbered by the RMA must consent. In the absence of unanimous consent, the purported amendments were ineffective. The award of attorney fees was affirmed based on an attorney fee provision in the RMA.

Wilkinson v. Chiwawa Cmtys. Ass'n, *180 Wn.2d 241 (2014)* – Approval of leasing restrictions.
Roats v. Blakely Island Maintenance Com'n, *169 Wn.App. 243 (2012)* – Authority of board.
Bellevue Pac. Ctr. V. Owners Ass'n, *171 Wn.App. 499 (2012)* – Control of limited common area.
Fairway Estates Ass'n of Apartment Owners v. Unknown Heirs, Devisees of Young, *172 Wn.App. 168 (2012)* – Extent of lien for unpaid assessments.

Granville Condominium Homeowners Ass'n v. Kuehner, *177 Wn.App. 543 (2013)* – Personal liability for payment of assessments.

Alexander v. Sanford, *181 Wn.App. 135 (2014)* – Statute of limitations and the doctrine of adverse domination.

Casey v. Sudden Valley Cmty. Ass'n, *182 Wn.App. 315 (2014)* – Approval of budgets.

Waltz v. Homeowner's Ass'n, *183 Wn.App. 85 (2014)* – Standard of care for directors.

Filmore LLLP v. Unit Owners Ass'n, *183 Wn.App. 328 (2014)* – Approval of leasing restrictions.

Club Envy v. Condo. Ass'n, *184 Wn.App. 593 (2014)* – Contesting invalid amendment.

IX. Landowner Tort Liability to Others/Insuring Real Property

A. Rules of Liability

Hively v. Port of Skamania County, 193 Wn.App. 11 (2016); rev. den. 186 Wn.2d 1004 (2016)

Facts: Hively visited Teo Park, owned by the Port of Skamania and located in Stevenson, Washington. Hively walked down an asphalt path leading to a restroom. He tripped on a pothole, fell and suffered injuries. He sued the Port for negligence, alleging a failure to properly maintain the path. The trial court dismissed the claim, holding the Port was immune from liability under RCW 4.24.210, the Recreational Land Use statute.

Holding: The trial court was affirmed. The Court rejected Hively's argument that the path was part of the fee generating area of Teo Park that was rented to groups and a pier that was rented to cruise boats and thus immunity was not available under RCW 4.24.210. There was no genuine issue of material fact that the path or the restroom were an integral part of the Port's fee-generating areas and the trial court properly granted summary judgment to the Port.

Jewels v. City of Bellingham, *183 Wn.2d 388 (2015)* – Recreational Land Use statute.

McKown v. Simon Prop. Grp., Inc., *182 Wn.2d 752 (2015)* – Liability for criminal acts.

Camicia v. Howard S. Wright Const. Co., *179 Wn.2d 684 (2014)* – Recreational land statute.

Cregan v. Fourth Memorial Church, *175 Wn.2d 279 (2012)* – Recreational land statute.

Mavis v. King County Hosp. Dist. No. 2, *159 Wn.App. 639 (2011)* – Claim against municipal owner.

Smith v. Stockdale, *166 Wn.App. 557 (2012)* – Injury on adjacent property.

Hymas v. UAP Distribution, Inc., *167 Wn.App. 136 (2012)* – Owner control of job site.

Ganser-Heibel v. Chavallo Complex, LLC, *173 Wn.App. 148 (2013)* – Claim against municipality.

Jessee v. City Council, *173 Wn.App. 410 (2013)* – Assumption of risk.

Tavai v. Walmart, *176 Wn.App. 122 (2013)* – Slip and fall.

Barrett v. Lowe's Home Centers*, *179 Wn.App. 1 (2013);* ***rev. denied *181 Wn.2d 1016 (2014)* – Duty owed to invitee.

Kok v. Tacoma School District No. 10, *179 Wn.App. 10 (2013); rev.* ***denied*** *181 Wn.2d 1016 (2014)* – Liability for criminal acts.

***McDonald v. Cove to Clover*, *180 Wn.App. 1 (2014)* – Slip and fall.

Jewels v City of Bellingham*, *180 Wn.App. 605 (2014),* ***rev. granted, *181 Wn.2d 1001 (2014)* – Recreational land statute.

***Lee v. Metro Parks Tacoma*, *183 Wn.App. 961 (2014)* – Pre-claim statute.

Hvolboll v. Wolff Co., *187 Wn.App. 37 (2015)* – Duty to remove snow and ice.

B. Insurance Coverage - Homeowners & Property

***Kut Suen Lui v. Essex Ins. Co.,* 185 Wn.2d 703 (2016)**

Facts: Lui owned a commercial building with various tenant spaces. The last tenant vacated the building in the first week of December 2010. On January 1, 2011, a frozen pipe burst in the building, causing extensive damage. Lui filed a claim with Essex Insurance Co., who had insured the building. Essex denied the claim based on the provisions of a Change of Conditions Endorsement, which provided in part:

> Coverage under this policy is suspended while a described building, whether intended for occupancy by owner or tenant, is vacant or unoccupied beyond a period of sixty consecutive days, unless permission for such vacancy or unoccupancy is granted hereon in writing and an additional premium is paid for such vacancy or unoccupancy.
>
> Effective at the inception of any vacancy or unoccupancy, the Causes of Loss provided by this policy are limited to Fire, Lightning, Explosion, Windstorm or Hail, Smoke, Aircraft or Vehicles, Riot or Civil Commotion, unless prior approval has been obtained from the Company.

Lui sued Essex to recover damages totaling $758,863.31. The trial court concluded in response to a motion for summary judgment by Essex the policy and endorsement were ambiguous and the "Vacancy Provisions" of the policy controlled. These provisions of the policy excluded water damage only if the building was empty for a period of 60 consecutive days. Essex sought a review of the trial court's order, which was certified by the trial court for review. The Court of Appeals in an unpublished opinion reversed the trial court and directed judgment in favor of Essex. Lui appealed.

Holding: The Supreme Court affirmed the judgment in favor of Essex. The Court concluded the policy language, including the endorsement, was unambiguous and it did not cover the claimed water damage. The average person reading the endorsement would conclude (1) the endorsement's terms superseded the terms of the underlying policy, (2) the endorsement's first paragraph excluded all coverage after 60 days of vacancy, and (3) the endorsement's second paragraph provided only limited coverage from when the building first became vacant up until 60 days of that vacancy.

Queen Anne Park Homeowners Ass'n v. State Farm Fire & Cas. Co., *183 Wn.2d 485 (2015)* – Definition of "collapse."

Underwriters v. ABCD Marine, *179 Wn.2d 274 (2013)* – Policy issued to partnership.

Weidert v. Hanson, *178 Wn.2d 462 (2013)* – Arbitration in crop insurance.

Cedell v. Farmers Ins. Co. of Wash., *176 Wn.2d 686 (2013)* – Claim of privilege.

No Boundaries, Ltd. v. Pacific Indemnity Company, *160 Wn.App. 951 (2011)* – Applicable ordinance for application of law and ordinance endorsement.

Allemand v. State Farm Ins. Cos., *160 Wn.App. 365 (2011)* – Law and ordinance coverage.

Community Association Underwriters of America, Inc. v. Kalles, *164 Wn.App. 30 (2011)* – Tenant as implied co-insured in connection with subrogation claim.

Unigard Ins. Co. v. Mutual of Enumclaw Ins. Co., *160 Wn.App. 912 (2011)* – Evidence to support amount of recovery under policy.

Certain Underwriters at Lloyds' London v. Travelers Property Cas. Co. of America, *161 Wn.App. 265 (2011)* – Conditions to payment under umbrella policy.

Baldwin v. Silver, *165 Wn.App. 463 (2011)* – Proof of damage from failure of insurer to pay.

Lake Chelan Shores Homeowners Ass'n v. St. Paul Fire & Marine Ins. Co., *167 Wn.App. 28 (2012)* – Rot versus collapse.

Wellman & Zuck v. Hartford Fire, *170 Wn.App. 666 (2012)* – Duty to defend.

Capitol Specialty Ins. Corp. v. JBC Entm't Holdings, *172 Wn.App. 328 (2012)* – Firearms exclusion.

Lake Chelan Homeowners Ass'n v. St. Paul Ins., *176 Wn.App. 168 (2013)* – Damage from collapse.

American States Insurance Co. v. Delean's Tile & Marble, LLC, *179 Wn.App. 27 (2013)* – Exclusion for damage to multi-unit building.

Lewark v. Davis Door, *180 Wn.App. 239 (2014),* ***rev. denied*** *180 Wn.2d 1026 (2014)* – Status as additional insured.

Western Nat'l Assur. v. Shelcon Constr. *182 Wn.App. 256 (2014)* – Exclusion for damages arising from operations.

Espinoza v. Am. Commerce Ins. Co., *184 Wn.App. 176 (2014)* – Misrepresentation in application.

X. Legal Actions

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

***Mustoe v. Xiaoye Ma*, 193 Wn.App. 161 (2016)**

Facts: Mustoe purchased the real property in Rainier, Washington in 2006. Ma owned the neighboring property to the south. Mustoe had two large Douglas fir trees located entirely on her property, about 2.5 feet from the property line. In October 2013, Jordan, who lived with Ma, while digging a ditch on Ma's property along the border of Mustoe's lot exposed and removed tree roots, leaving the fir tree roots to extend only 3–4 feet from the trunks. This resulted in a loss of nearly half of the trees' roots, creating a high risk the trees would fall on Mustoe's house. Mustoe had them removed and sued claiming Jordan and Ma had negligently, recklessly, and intentionally excavated and damaged her trees, along with other property and emotional distress damages. The trial court dismissed Mustoe's claims on summary judgment. Mustoe then appealed.

Holding: The dismissal was affirmed. The Court, relying on Gostina v. Ryland, 116 Wash. 228, 199 P. 298 (1921), recited the Washington rule that an adjoining owner may cut branches or roots at the property line. Mustoe claimed that since this right did not extend to removing the tree itself, it was required that a property owner in exercising self-help, owed a duty of care to prevent damage to the trees themselves. The Court declined to extend Washington law as proposed by Mustoe. The Court also rejected the argument that Jordan and Ma owed a general duty of care in performing their work not to cause harm to Mustoe's property. Mustoe's nuisance claim was similarly rejected. Where the alleged nuisance is a result of the alleged negligent conduct, the rules of negligence are applied. Mustoe's nuisance claim was the result of an alleged breach of duty, and since that claim failed, the nuisance claim must also fail. The timber trespass claims asserted by Mustoe were properly dismissed since there was no showing Jordan and Ma acted unlawfully in removing the roots encroaching on the Ma property.

***Buchheit v. Geigere,* 192 Wn.App. 691 (2016)**

Facts: Geigere and Buchheit bought adjacent lots on Lake Stevens from Withrow; Buchheit acquired Lot 2, the waterfront lot and Geigere acquired Lot 1, the upland lot. Buchheit's lot was unimproved. Geigere began crossing Buchheit's property to gain access to the lake, install a dock and store personal items. After repeated requests to stop using the property, Buchheit sought an antiharassment order pursuant to Chpt. 10.14 RCW, alleging refusal to stop trespassing and aggressive and intimidating behavior by Geigere. At the hearing concerning the issuance of the order, Geigere contended a document existed creating an easement for the benefit of Lot 1 over Lot 2. The commissioner reviewed the purported easement, but determined it was not valid and issued the order. Geigere appealed.

Holding: The Court of Appeals reversed. The discretion of the commission to issue an antiharassment order is limited by RCW 10.14.080(8):

> The court in granting an ex parte temporary antiharassment protection order or a civil antiharassment protection order, shall not prohibit the respondent from the use or enjoyment of real property to which the respondent has a cognizable claim unless that order is issued under chapter 26.09 RCW or under a separate action commenced with a summons and complaint to determine title or possession of real property.

The Court determined a "cognizable claim" to be "one that would survive a motion to dismiss under CR 12(b)(6) if pleaded in an ordinary civil action." Reviewing the terms of the purported easement, the Court concluded Geigere would be able to state a valid claim for relief to establish the easement over Lot 2 and the commission erred in issuing the order.

> Although the commissioner said he could not interpret the easement "in this forum," the commissioner did in fact interpret the easement as being invalid . . . The commissioner's conclusion that Geiger has no right to use lot 2 was the primary basis for issuing the antiharassment order. The commissioner allowed that the order could be changed if Geiger obtained a favorable ruling on the easement from some other forum. It is not clear, however, that in some other forum, Geiger would be able to avoid the collateral estoppel effect of the commissioner's determination that the easement gives him no right in the property. With the legal uncertainty that hangs over the easement, this seems to be exactly the kind of situation the legislature intended to avoid by adopting the "cognizable claim" limitation in RCW 10.14.080(8).

***Wal-Mart v. United Food Union,* 190 Wn.App. 14 (2015); *rev. denied* 185 Wn.2d 1013 (2016)**

Facts: In 2012 and 2013, two unions picketed Wal-Mart stores in Washington. The demonstrations included activities within the stores. Wal-Mart filed an unfair labor practice charge against the unions with the NLRB and in April 2013 filed a trespass action in Pierce County against one the unions, UFCW. The union responded with an ant-SLAPP motion. The trial court dismissed the trespass action and denied the UFCW motion.

Holding: The trial court was affirmed. The trespass action was preempted by the National Labor Relations Act. The trial court correctly concluded that it did not have jurisdiction over the

dispute between Wal-Mart and the UFCW. Since the trial court did not have jurisdiction over the underlying trespass action, it correctly declined to rule on the union's anti-SLAPP motion.

***Ralph v. Dept. of Natural Res.**, 182 Wn.2d 242 (2014)* – Proper venue for actions relating to damage to real property.
***Moore v. Steve's Outboard Serv.,** 182 Wn.2d 151 (2014)* – Nuisance *per se*.
***Lakey v. Puget Sound Energy,** 176 Wn.2d 909 (2013)* – Electro-magnetic trespass.
***Broughton Lumber v. BNSF Ry. Co.,** 174 Wn.2d 619 (2012)* – Claim of timber trespass from spreading fire.
***Jongeward v. BNSF Ry. Co.,** 174 Wn.2d 586 (2012)* – Spreading fire as trespass.
***McCoy v. Kent Nursery, Inc.,** 163 Wn.App. 744 (2011)* – Claim for drainage trespass.
***Marshall v. Thurston County,** 165 Wn.App. 346 (2011)* – Claim arising from repeated flooding.
***Lord v. Pierce County,** 166 Wn.App. 812 (2012)* – Common enemy doctrine.
***Crystal Lotus Enterprises v. City of Shoreline,** 167 Wn.App. 501(2012)* – Claim from improper drainage.
***Wolfe v. Dep't of Transp.,** 173 Wn.App. 302 (2013)* – Change of stream flow as inverse condemnation.
***Ralph v. Dep't of Natural Res.,** 171 Wn.App. 262 (2012)* – County in which action to be maintained.
***Keene Valley Ventures v. Richland,** 174 Wn.App. 219 (2013)* – Burden of proof.
***Jackass Mt. Ranch, Inc. v. S. Columbia Basin Irrigation Dist.,** 175 Wn.App. 374 (2013)* – Liability for landslide.
***Hurley v. Port Blakely Tree Farms,** 182 Wn.App. 753 (2014)* – Application of the doctrine of strict liability.
***Gunn v. Riely,** 185 Wn.App. 517 (2015); rev. denied, 183 Wn.2d 1004 (2015)* – Damages for waste and timber trespass.
***Donner v. Blue,** 187 Wn.App. 51 (2015)* – Damage caused by tree roots.
***Hoover v. Warner,** 189 Wn.App. 509 (2015); rev. denied 185 Wn.2d 1004 (2016)* – Remedies for water diversion.
***MJD Props., LLC v. Haley,** 189 Wn.App. 963 (2015)* – "Spite Structure."

B. Eminent Domain

Transit Authority v. Airport Inv. Co., 186 Wn.2d 336 (2016)

Facts: Sound Transit Authority sought two easements over property owned by Airport Investment Company in 2012. One easement was a permanent guideway easement along the western boundary of the AIC property; the other was a temporary construction for a three year period allowing STA to use up to 3,882 square feet of AIC's property. STA and AIC were unable to agree upon a value and, 30 days prior to the scheduled trial, STA made a written offer of $463,500 for both easements. AIC rejected the offer. After jury selection, but prior to opening statements, STA reduced the scope of the temporary easement to approximately 1,000 square feet and provided exclusive use of the area was reserved for only 160 days during the 3-year period. At trial, STA valued both easements at $165,000; AIC claimed $1.7 million, with the primary difference being severance damages. The jury awarded $225,000 for both easements. AIC sought an award of attorney fees under RCW 8.25.070(1)(a) and RCW 8.25.075(1)(b), contending the revision of the scope of the temporary construction easement at trial either nullified STA's offer or constituted an abandonment of the condemnation proceeding. AIC also sought a new trial, contending testimony of its president as to her belief of the value of the easements was improperly admitted. The trial court refused to award fees or grant a new trial; the Court of Appeals affirmed the trial court at *Cent. Puget Sound Reg'l Transit Auth. v. Airport Inv. Co.*, 185 Wn.App. 1033 (2015).

Holding: The Supreme Court affirmed decision. The Court rejected the argument AIC was entitled to fees because the written offer did not correspond to the "precise interest in the property" ultimately condemned by STA. Under RCW 8.25.070(l)(a), a condemnee is entitled to attorney fees

only if the condemnor fails to make *any* written offer in settlement at least 30 days before trial to fix compensation. Sound Transit made a timely written settlement offer to AIC for $463,500 and, under the plain language of the statute, AIC had no claim for attorney fees. Similarly, the Court rejected the argument the condemnation was abandoned, noting the argument was contradicted by the fact the condemnation trial was actually conducted. The oral testimony of the president of the company as to her belief of the value of the easements was properly admitted as a statement of a party opponent.

***TT Properties LLC v. City of Tacoma,* 192 Wn.App. 238 (2016)**

Facts: TT Properties owned two properties in Tacoma, one located on Pacific Avenue and the other located on C Street. In 2009, Sound Transit began a project to connect the Sounder commuter rail service to a new station in Lakewood. As part of the project, it entered into an agreement with Tacoma to use some of the City's right of ways. As part of the work a portion of Delin Street was closed eliminating access to the Pacific Property from Delin Street. Access to the Pacific Property remained via Pacific Avenue and 27th Street. Sound Transit placed a "utility bungalow" abutting an alley near the C Street Property. The bungalow encroached about one foot into the alley, but the encroachment was enough to make it difficult for trucks to swing wide across the right of way to reach the C Street Property. TTP sued the City for taking its property in connection with both the Pacific Property and the C Street Property. The trial court dismissed the claim on summary judgment on the basis that there was no compensable taking and therefore no standing to sue the City. TTP appealed.

Holding: The trial court was partially reversed. The Court rejected TTP's argument that there was a *per se* taking resulting from the Delin closure. In order to establish a taking, there must be a demonstration of substantial impairment to access. TTP did raise a genuine issue of material fact as to whether the access to the Pacific Property was substantially impaired. TTP provided evidence that the removal of Delin Street had a significant impact on the value of the Pacific Property. Viewing this evidence in a light most favorable to TTP raised a factual question as to whether the removal of Delin Street substantially impaired TTP's access to the Pacific Avenue property. The trial court was correct in dismissing the claim as to the C Street Property. The utility bungalow encroached just over one foot into a 20–foot–wide alleyway, and there was no showing how this encroachment substantially diminished its right of access to the C Street Property. The evidence presented by TTP also raised a question of fact as to whether the City participated in the taking by allowing Sound Transit to use the City's right of ways. The evidence suggested that the City was acting in its proprietary capacity rather than merely exercising regulatory authority over the project.

***Public Utility Dist. No. 1 v. State**, 182 Wn.2d 519 (2015)* – Condemnation of school lands.
***Ruvalcaba v. Kwang Ho Baek,** 175 Wn.2d 1 (2012)* – Private way of necessity.
***Goldmark v. McKenna,** 172 Wn.2d 568 (2011)* – Condemnation of school lands.
***Union Elevator & Warehouse Co. v. State ex rel. Dep't of Transp.,** 171 Wn.2d 54 (2011)* – Interest on condemnation award.
***Ruvalcaba v. Kwang Ho Baek,** 159 Wn.App. 702 (2011)* – Private way of necessity.
***Tom v. State,** 164 Wn.App. 609 (2011)* – Inverse condemnation.
***City of Puyallup v. Hogan,** 168 Wn.App. 406 (2012)* – Allocation of award between landlord and tenant.

Pub. Util. Dist. No. 1 of Okanogan County V. State, *174 Wn.App. 793 (2013)* – Condemnation of school trust lands.

Richert v. Tacoma Power Utility, *179 Wn.App. 694 (2 2014)*; ***rev. den.*** *181 Wn.2d 1021(2014)* – Inverse condemnation from release of water.

Admasu v. Port of Seattle*, 185 Wn.App. 23 (2014); rev. denied, 183 Wn.2d 1009 (2015)* – Taking caused by additional airport runway.

***Bellevue v. Pine Forest Props., 185 Wn.App. 244 (2014); rev. denied, 183 Wn.2d 1016 (2015)* – Public use and necessity.**

Williams Place LLC v. State ex rel. DOT, *187 Wn.App. 67 (2015); rev. den. 184 Wn.2d 1005 (2015)* – Compensable property interest.

C. Adverse Possession/Boundary Disputes

***Pendergrast v. Matichuk,* 186 Wn.2d 556 (2016)**

Facts: In 2006, Matichuk bought two lots in Blaine, Washington from Conine, one with a small house and the other unimproved. Five months later, Pendergrast purchased an adjoining lot from Conine, improved by a home constructed in 1907. A six-foot fence constructed prior to 2006 separate the Matichuk and Pendergrast properties. Matichuk had the property surveyed in 2008 in contemplation of development and discovered the fence encroached several feet onto his property. He informed Pendergrast that he intended to move the fence to the property line and remove a cherry tree located in the encroachment area. Over Pendergrast's objections, Matichuk removed the fence and cut down the tree in 2009. Pendergrast sued to quiet title to the encroachment area and sought damages for trespass and timber trespass. The trial court quieted title in Pendergrast and, following a jury trial, Pendergrast was awarded $5,200 in economic damages and $75,000 in non-economic damages on the trespass claim and $3,310 in economic damages and $40,000 in non-economic damages on the timber trespass claim. The economic damages for timber trespass were trebled, but the trial court declined to treble the non-economic portion of the timber trespass award. Matichuk appealed. The Court of Appeals at *Pendergrast v. Matichuk*, 189 Wn.App. 854 (2015) affirmed the order quieting title based on the theory of a boundary line established by a common grantor, but held the non-economic damages awarded for timber trespass must also be trebled. Matichuk appealed.

Holding: The Supreme Court affirmed. The common grantor doctrine has been recognized in Washington case law since 1910. The Court rejected Matichuk's arguments (i) the doctrine conflicted with RCW 64.04.010; (ii) it was necessary to prove the knowledge of the grantee that the boundary had been changed; and (iii) Pendergrast's claim was barred because she never informed Matichuk she believe the fence was the actual boundary. The evidence supported the trial court's determination the common grantor established on the ground a binding boundary line different from the description in the deeds to Matichuk and Pendergrast. Damages for emotional distress are recoverable for timber trespass and RCW 64.12.030 required the non-economic damages be trebled.

***LeBleu v. Aalgaard,* 193 Wn.App. 66 (2016)**

Facts: In September 1991, Deno purchased approximately 20 acres of property in Chattaroy. In June 1993, the same seller sold his remaining parcel north of the Deno property (also approximately 20 acres) to Aalgaard. Shortly thereafter, Deno and Aalgaard walked and measured

their respective properties and established a boundary line that Mr. Deno described as running down the center of a gully dividing the parcels. Aalgaard then constructed a home and other improvements on the property on his side of the mutually agreed boundary. In 2012, LeBleu bought the property formerly owned by Deno and had a survey of the property. The survey established the Aalgaard home, barn, and shed were located on the LeBleus' property. LeBleu brought suit seeking possession of all the property to which LeBleu held record title and an injunction requiring the removal of all improvements. The Aalgaard counterclaimed for an order quieting title based on variety of theories including oral agreement, acquiescence, and adverse possession. The trial court granted a summary judgment to LeBleu on the basis that Aalgaard could not establish the element of hostility since the property had been used with Deno's permission. Aalgaard appealed.

Holding: The trial court was reversed. LeBleu conceded that Aalgaard had satisfied all elements of adverse possession, except for the element of hostility. The Court construed the agreement between Deno and Aalgaard as not one granting revocable permission to occupy property that was not owned, but rather as an agreement for "adverse use." Deno's agreement that Aalgaard owned whatever fell on one side of the agreed property line did not negate the element of hostility; if anything, it strengthened the adverse possession claim since Aalgaard was occupying and dealing with the property as an owner as opposed to someone occupying under a temporary grant of permission. The matter was remanded to the trial court for determination of the boundary of the property acquired by Aalgaard.

Gorman v. City of Woodinville, *175 Wn.2d 68 (2012)* – Claim arising prior to municipal ownership.
Kiely v. Graves, *173 Wn.2d 926 (2012)* **–** Claim against public lands.
Proctor v. Huntington, *169 Wn.2d 491 (2010)* – Equitable remedy ordering sale.
Merriman v. Cokeley, *168 Wn.2d 627 (2010)* – Mutual recognition and acquiescence.
Teel v. Stading, *155 Wn.App. 390 (2010)* – Permissive use.
Gorman v. City of Woodinville, *160 Wn.App. 759 (2011)* – Claim against municipal property.
Nickell v. Southview Homeowners Ass'n, *167 Wn.App. 42 (2012)* – Sufficiency of evidence.
Karlberg v. Otten, *167 Wn.App. 522 (2012)* – Application of res judicata.
Herrin v. O'Hern, *168 Wn.App. 305 (2012)* – Revocation of permissive use.
Acord v. Pettit, *174 Wn.App. 95 (2013), rev.denied 178 Wn.2d 1005 (2013)* – Sufficiency of evidence.
Bevan v. Meyers, *183 Wn.App. 177 (2014)* – Application of anti-SLAPP statute.
Pendergrast v. Matichuk, *189 Wn.App. 854 (2015); rev. granted 185 Wn.2d 1002 (2016)* – Boundary established by common grantor; timber trespass damages.

D. Slander of Title

Guest v. Lange, 195 Wn.App. 330 (2016)

Facts: Guest and Lange were neighbors in a residential development. Lange had a 5 x 12 foot easement to maintain a deck on Guest's property by virtue of recorded CCRs and a Patio Deck Easement recorded by the original developer. In 2001, Lange wanted to rebuild the deck and asked Guest for permission to do so. Guest refused, but Lange rebuilt the deck without consent. Guest sued, claim various damages. Lange counterclaimed to quite title to the easement. As part of the action, Guest filed a lis pendens on Lange's property. After a jury trial returned a verdict in favor of Lange, on September 19, 2014, the trial court filed an order dismissing all of Guest's claims with prejudice, awarded judgment to Lange on the quiet title claim and awarded Lange $565 in attorney

fees. Guest filed a notice of appeal on October 20th. On February 26, 2015, Lange filed a motion to cancel the lis pendens, arguing the action had been "settled, discontinued, or abated." Guest opposed the motion arguing the action had not been "settled, discontinued or abated" because the Guests intended to file a supersedeas bond under RAP 8.1(b) with the trial court to stay enforcement of the Langes' judgment, and did file a cash bond on March 5th. Lange objected to the bond amount, citing the effect of the lis pendens on the ability to refinance Lange's house. The trial court cancelled the lis pendens and set the supersedeas bond at $4,000. Guest appealed.

Holding: The trial courts cancellation of the lis pendens was reversed. RCW 4.28.320 set forth three conditions for the cancellation of a lis pendens: (1) the action must be settled, discontinued or abated; (2) an aggrieved party must move to cancel the lis pendens; and (3) the aggrieved party must show good cause and provide proper notice. The Court observed the last two conditions were satisfied. Whether the filing of a lis pendens deprives the court of the authority to cancel the lis pendens was an issued of first impression for the Washington court. The Court held filing the bond rendered the action not settled, discontinued or abated and the court erred in cancelling the lis pendens. The matter was remanded to the trial court with instructions to reinstated the lis pendens and also to ensure the amount of the bond is sufficient to protect Lange from damages that might be suffered from the lis pendens and the pursuit of the appeal.

Lane v. Skamania County, *164 Wn.App. 590 (2011)* – Claim arising from *lis pendens*.

E. Actions Between Partners

Humphreys Indus., Ltd. v. Clay St. Assocs., *176 Wn.2d 682 (2013)* – Entitlement to attorney fees.

F. Partition

Kelsey v. Kelsey, *179 Wn.App. 360 (2014)* – Discretion in award.

G. Quiet Title

Holmquist v. King County, **192 Wn.App. 551 (2016)**

Facts: The Holmquists and Kaseburg owned houses on either side of a street end abutting Lake Washington. They filed a lawsuit against King County to quiet title to the street end, asserting their predecessors in title came into ownership when King County vacated the NE 130th Street right-of-way in 1932. The City of Seattle intervened in the action. On May 23, 2013, the trial court entered judgment quieting title against King County and the City and in favor of the owners, each for one-half of the former street end property. The City appealed and filed notice of supresedeas without a bond pursuant to RCW 4.96.050 and RAP 8.1(b)(2)&(f). On appeal, the trial court was affirmed and the case was ultimately mandated on February 13, 2015. During the pendency of the appeal, the City continued to encourage public use of the street end as a lakefront neighborhood park. After the mandate issued, the owners sought an award of damages against the City for depriving them of the exclusive use and enjoyment of the property during the 21 months in which the City's appeal was pending. As a measure of damages, the owners advanced the City's own calculation of the price per square foot charged by the City to private parties to lease comparable

waterfront street end properties. The trial court denied the motion and the owners appealed.

Holding: The trial court was reversed. Based on *Norco Construction, Inc. v. King County,* 106 Wash.2d 290 (1986), the Court concluded the City was liable for any damages suffered by the owners during the appeal resulting from the suppression of the enforcement of the judgment as provided under RAP 8.1(b)(2). Although the trial court's rationale for refusing to award damages was not clear, to the extent it was based on the conclusion the City was not subject to liability for superseding the judgment, it was in error. As a result of the supersedeas, the owners were denied the exclusive use of the property. The denial of the right to exclusive used resulted in damage. The Court rejected the City's arguments that (1) there was not damage because the owners could use the property along with members of the general public; (2) the rental value was not the property measure of damages because the property could not be rented; and (3) the award of damages was unfair because the owners had not told the City they would seek damages. The matter was remanded to the trial court to enter a judgment for damages based on the comparable rental schedule for waterfront property utilized by the City, which was approximately $74,520.

GLEPCO, LLC V. Reinstra, *175 Wn.App. 545 (2013), rev. denied 179 Wn.2d 1006 (2013)* – Reformation of legal description in trustee's deed following foreclosure.
Holmquist v. King County**,** *182 Wn.App. 200 (2014)* – Rights in vacated street.

H. Government Forfeitures

No reported cases within the last five years.

XI. Construction Contracts/Disputes

General Constr. Co. v. Pub. Util. Dist., **195 Wn.App. 698 (2016)**

Facts: Grant County PUD awarded a 430-page construction contract to General Construction to construct the Wanapum Future Unit Fish Bypass, a fish ladder to be installed at the Wanapum dam. The project encountered delays, many changes and plan revisions. After completion of the project, GCC sued to recover damage claims the parties had not been able to negotiate to a conclusion. The trial court, after several years of litigation, issued several summary judgments in favor of the PUD and denied others. The trial court also rejected GCC's claim the PUD had waived compliance with the contract's notice provisions. The trial court certified the rulings for appeal in an attempt to resolve the legal issue concerning waiver of notice requirements under Washington law. The PUD and GCC both appealed.

Holding: The trial court was affirmed. The Court framed the issue on appeal to be whether the doctrine of *quantum meruit* recognized in *Bignold v. King County,* 65 Wn.2d 817 (1965), still had application after the decision in *Mike M. Johnson, Inc. v. County of Spokane*, 150 Wn.2d 375 (2003) which upheld and enforced contractual notice and waiver provisions in government construction contracts to defeat a claim for extra compensation. The Court concluded (1) for work within the specified scope of the contract, the terms of the contract must be complied with unless there is evidence that PUD waived compliance with the notice and claim requirements; and (2) for work beyond the scope of the contract, and changed work within the scope of the contract where GCC

satisfied the contractual notice and claim provisions, the theory of *quantum meruit* applied and entitled GCC to additional compensation. The case was remanded for further proceedings.

***Homeowners' Ass'n v. Eng'rs NW,* 193 Wn.App. 695 (2016)**

Facts: Dodson-Duus LLC developed The Pointe, a high-end condominium in Westport in 2007-2008. Engineers Northwest provided structural engineering services. The condominium suffered from both design and construction defects, some of which related to seismic requirements. In August 2011, the HOA sued the developer for construction defects and incomplete construction under the Condominium Act, Chpt. 64.34 RCW, among other matters. The HOA then added claims against ENW, the general contractor and the framing subcontractor asserting negligent design, negligent construction and misrepresentation. The developer cross-claimed against all of the defendants and named the project architect as an additional defendant. Prior to trial, the developer settled with the HOA and, as part of the settlement, assigned claims against the contractors and ENW to the HOA. The general contractor also settled. The jury found that both ENW and the framing contractor had been negligent and that their negligence caused the defects in the Building, resulting in damages of $1,149,332, for which ENW was 97.5 percent at fault and the contractor was 2.5 percent at fault. It also found that the project architect had breached its contract with Dodson–Duus, and that the resulting damages were $100,000. The trial court entered judgment against ENW for the full amount of the negligence claim on the basis of joint and several liability. After losing various post-trial motions, ENW appealed.

Holding: The trial court rulings and verdict were affirmed. The primary argument raised by ENW was it owed no duty of care to the HOA and the negligence claims should have been dismissed as a matter of law. The Court disagreed. The independent duty doctrine, previously known as the economic loss rule, barred recovery in tort for economic losses suffered by parties to a contract unless the breaching party owed a duty in tort independent of the contract. An engineer's duty of care included the prevention of safety risks, even if the safety risks do not cause consequential damage to persons or property. Where an engineer's design services ultimately result in the construction of an unsound structure, the engineer has breached his duty of care. ENW owed an independent duty to the developer and to members of the HOA, as holders of property interests in condominium, to take reasonable care to design a building that did not present safety risks to its residents or their property.

***King County v. Vinci Constr.,* 191 Wn.App. 142 (2015)**

Facts: In 2006, King County hired a joint venture of three firms identified as VPFK to construct portions of the tunneling work for the Brightwater Project, a wastewater treatment facility serving King and Snohomish Counties. The contract was for a fixed price and was to be performed within a specified time frame. VPFK obtained a bond for the over $200 million project from five surety companies. The project was not trouble-free and significant delays were experienced. Finally, the County retained another contractor to complete one of the tunnels and the County sued VPFK and the sureties for default. VPFK counterclaimed asserting various breaches by County. The trial court ruled in favor of the County on three summary judgment motions, dismissing two of VPFK's claims concerning differing site conditions and defective specifications. The remaining issues were

subject to a three month jury trial. The jury found VPFK and the sureties jointly and severally liable for the County's single claim of default, awarding the County $155,831,471.00 in damages. The jury also awarded VPFK $26,252,949.00 in damages on claims VPFK submitted to the jury. The trial court awarded the County attorney fees and costs. All parties appealed.

Holding: The judgment was affirmed. The Court affirmed the trial court's denial of VPFK's summary judgment motions asserting a right to recover for varying site conditions and defective specifications. On the site conditions claim relating to excessive changes from plastic to nonplastic soil conditions, VPFK was not able to establish that the County had represented that any specific number of transitions existed, so the claim failed. Similarly, VPFK presented no evidence that the specifications prepared by the County were defective. The trial court did not err is refusing to give certain instructions requested by VPFK concerning the County's implied warrant of adequacy of plans. The fact that the contract allowed for liquidated damages did not preclude the County from recovering actual damages incurred in completing the work. Attorney fees were justified under the rule announced in *Olympic Steamship v. Centennial Ins. Co.,* 117 Wn.2d 37 (1991) and *Colorado Structures v. Insurance Co. of the West*, 161 Wn.2d 577 (2007) – fees are available when the insurer or surety unsuccessfully denies coverage.

Donatelli v. Consulting Eng'rs, *179 Wn.2d 84 (2013)* – Claim for professional negligence.

Washington State Major League Baseball Stadium Pub. Facilities Dist. v. Huber, Hunt & Nichols-Kiewit Constr. Co., *176 Wn.2d 502 (2013)* – Statute of repose.

Elcon Construction v. Eastern Washington University, *174 Wn.2d 157 (2012)* – Application of independent duty doctrine and right to terminate.

Michaels v. CH2M Hill, Inc., *171 Wn.2d 587 (2011)* – Application of immunity statute for engineers.

Harmony at Madrona Park Owners Assn. v. Madison Harmony Development, Inc., *160 Wn.App. 728 (2011)* – Allocation of damages between contractors.

Bird v. Best Plumbing, *161 Wn.App. 510 (2011)* – Reasonableness hearing on settlement.

Cummings v. Budget Tank Removal & Environmental Services, LLC, *163, Wn.App. 379 (2011)* – Affirming arbitration award.

Donatelli v. D.R. Strong Consulting Engineers, Inc., *163 Wn.App. 436 (2011)* – Application of independent duty doctrine to claim.

Spradlin Rock Products v. P.U.D. No.1 of Grays Harbor County, *164 Wn.App. 641 (2011)* – Enforcement of oral contract.

Mark Brotherton, et ux v. Kralman Steel Structures Inc., *165 Wn.App. 727 (2011)* – Breach of warranty of workman like construction.

River House Dev., Inc. v. Integrus Architecture, PS, *167 Wn.App. 221 (2012)* – Waiver of right to arbitration.

Realm, Inc., v. City of Olympia, *168 Wn.App. 1 (2012)* – Termination of contract.

Skyline Contractors v. Hous. Auth., *172 Wn.App. 193 (2012)* – Bid protest.

Berschauer Phillips Constr. Co. v. Mut. of Enumclaw Ins., Co., *175 Wn.App. 222 (2013)* – Claim against insurance policy for defects.

Shepler Constr., Inc. v. Leonard, *175 Wn.App. 239 (2013)* – Waiver of right to arbitrate.

Mut. Of Enumclaw v. Gregg Roofing, *178 Wn.App. 702 (2013)* – Subrogation claim for defects and counterclaim for lost profits.

Dania v. Skanska USA Bldg., *185 Wn.App. 359 (2014)* – Statute of repose/limitations.

Hayfield v. Ruffier, *187 Wn.App. 914 (2015)* – Right to attorney fees under RCW 19.122.040(4).

Montgomery v. Engelhard, *188 Wn.App. 66 (2015); rev. denied* 184 Wn.2d 1025 (2015) – Implied warranty of habitability.

SAK & Assocs. v. Ferguson Constr., *189 Wn.App. 405 (2015)* – Termination for convenience.

XII. Building Permits and Platting Regulations

Sun Outdoor v. Dep't of Transp., 195 Wn.App. 666 (2016)

Facts: In 2014, Sun Outdoor applied for a permit from the Washington Department of Transportation to erect a billboard in Okanogan County along State Route 97 in a location that was part of a designated "scenic system" with a designated zoning of "Minimum Requirement District." WSDOT denied the permit, finding the proposed location was not zoned for "predominantly commercial or industrial uses," which was an exception allowing location of billboards in designated scenic systems. Sun sought judicial review the decision and the trial court affirmed WSDOT. Sun appealed.

Holding: The trial court was affirmed. The Court noted the term "predominantly" was not defined in RCW 74.42.020(9)(c) and adopted the dictionary definition as "predominant" or "controlling, dominating, prevailing." The MRD zoning allowed a wide variety of uses and prohibited few uses, there was no particular category of use that predominates. In light of the lack of the demonstration of a predominate commercial or industrial use under the MRD zoning, WSDOT committed no error under APA standards of review and the denial was affirmed.

Kindereace LLC v. City of Sammamish, 194 Wn.App. 835 (2016)

Facts: Starting in 2001, Lynn LLC and SR Development began the development of the Plateau Professional Center in Sammamish. Ultimately, a detention pond was located on part of the project designated as Parcel 9032. After development of the center was substantially complete, in 2006 the developer sought a reasonable use exemption from stream buffers imposed on Parcel 9032 so it could be developed. The City refused, finding the parcel was already being used as a detention pond facility as part of the larger development. In 2009, the developer completed a boundary line adjustment to modify the boundaries of Parcel 9032, placing the detention pond onto an adjacent lot, Parcel 9058. By design, new Parcel 9032 was completely constrained by stream, wetlands, and buffers. The developer renewed the request for a RUE for Parcel 9032. The City again refused, finding the parcel had already been extensively developed in conjunction with the larger project. The developer appealed and the hearing examiner affirmed the City's position. The developer then filed a LUPA petition and also asserted Parcel 9032 had been subject to a regulatory taking. The trial court dismissed the action.

Holding: The dismissal was affirmed. The facts did not support a claim the City's environmental regulations deprived Parcel 9032 of all economically viable use. But for the use of the parcel as a storm detention facility, the larger, very valuable development could not have been completed. The trial court properly considered the configuration of the parcel at the time the challenged regulations were enacted. The Court rejected the claim the developer can use a boundary line adjustment to isolate the portion of its already-developed property that was entirely constrained by critical areas and buffers, and then claim the regulations deprived isolated parcel of all economically viable use. The City's approval of the boundary line adjustment was not a City determination the re-configured lot was legally entitled to be developed separately from the larger parcel of which it was once a part.

***Emerson v. Island County,* 194 Wn.App. 1 (2016); rev. denied, 186 Wn.2d 1004 (2016)**

Facts: In August 2010, Emerson, a candidate for Island County commissioner, started construction of a sunroom to his Camano Island home without obtaining a permit. The County planning department issued a stop work order. Emerson applied for an after-the-fact building permit from Island County on August 31, 2010. Emerson and the County became involved in a protracted dispute over whether wetlands existed on the Emerson property. In June 2013, Emerson and the County executed a settlement agreement under which fines levied by the County were set at $5,000 and Emerson agreed to submit a wetland report complying with DOE standards. Emerson paid the fine and submitted the report. The County raised certain additional questions and Emerson sued the County in November 2013 seeking damages, injunctive relief and alleging a breach of the settlement agreement. In October 2014, while the suit was still pending, the County examined the property, determined no wetlands were present and issued the permit. The trial court by summary judgment dismissed all of the claims asserted by Emerson, except for the breach of contract claim, which was submitted to arbitration. Emerson appealed.

Holding: The trial court was affirmed. Emerson contended the claims for damages under RCW 64.40.020, the takings clause of the Washington constitution, 42 U.S.C. §1983, and common law fraud should not have been dismissed. The trial court correctly dismissed the claim under RCW 64.40.020 since Emerson had not exhausted all of the administrative remedies available for denial of the building permit. The settlement agreement did not eliminate the need to pursue administrative remedies. As to the takings claim, Emerson presented no evidence to create a question of material fact supporting the claim; similarly, no facts were presented supporting any claim of misrepresentation or denial of due process.

***Thompson v. City of Mercer Island,* 193 Wn.App. 653 (2016); rev. den. 186 Wn.2d 1013 (2016)**

Facts: On the Rock, LLC, owned two lots on Mercer Island created by a 2009 short plat. In 2013, OTR sought to amend the short plat to relocate an access easement, the area of which consisted entirely of impervious surface. The effect of the amendment allowed OTR to construct a larger residence on the lot on which the easement had been located, since the impervious surface area of the easement would no longer be considered in determining whether the developed lot complied with the City's limitation of the portion of the gross area of the lot comprised of impervious surface to 35%. On August 14, 2014, Two neighbors filed a LUPA petition challenging the planning commission approval OTR's proposal. The trial court dismissed the action on the grounds the neighbors lacked standing to file the petition. The neighbors appealed.

Holding: The trial court was affirmed in part. The Court held one of the neighbors, Misselwitz, who spoke at the hearing only as a member of the general public and not an appellant, failed to use the administrative process to protest the application – namely, submitting written comments on the application and appealing the approval to the planning commission. Misselwitz failed to exhaust the available administrative remedies and had no standing to appeal. Although the other neighbor, Thompson, had exhausted the available administrative remedies, it was still necessary to demonstrate the protested approval created some injury in fact. Although Thompson argued the approval violated the City's code and comprehensive plan, there was no allegation or

proof of specific injury and the Court refused to presume harm to adjacent property from an alleged violation of law. The successor-in-interest to OTR, GIB Development, was substituted in the proceedings and was awarded attorney fees under RCW 4.84.370.

***Airway Heights v. Hr'gs Bd.,* 193 Wn.App. 282 (2016); rev. den. 186 Wn.2d 1020 (2016)**

Facts: The city of Airway Heights adopted new ordinances allowing conditional use permits for the construction of multi-family residential developments in the vicinity of Fairchild Air Force Base and Spokane International Airport. The adoption of the ordinances followed an extensive period of study of the potential impacts of development on the two facilities conducted by various public entities. The conditional use permit process was potentially available to allow the construction of additional phases of an existing multi-family project. The city of Spokane, SIA and Spokane County petitioned the Growth Management Hearing Board to invalidate the ordinances as inconsistent with the GMA. The Board issued an opinion finding the ordinances in violation of the GMA. The City appealed and the GMA was reversed by the Spokane County Superior Court.

Holding: The decision of the GMA was reinstated. RCW 36.70A.530 provides that "it is a priority of the state to protect the land surrounding our military installations from incompatible development" and comprehensive plans adopted by municipalities "should not allow development in the vicinity of a military installation that is incompatible with the installation's ability to carry out its mission requirements." The Board properly defined "incompatible development" as a development incompatible with the current and future mission of the military installation. The was adequate evidence presented to the Board to support its conclusion the City's ordinances would in fact permit incompatible development and the Board was correct in invalidating the ordinances for this reason.

***Dep't of Transportation v. City of Seattle,* 192 Wn.App. 824 (2016)**

Facts: On February 14, 2014, the Seattle Department of Planning & Development issued a correction notice to WSDOT concerning its master use permit application for construction of approaches to the SR 520 floating bridge. The notice informed WSDOT of the requirement to obtain grading permits for property serving a construction support and staging areas. WSDOT objected to the requirement for grading permits, but submitted an application to avoid delay. The City issued the permits on May 30, 2014. WSDOT then filed a LUPA petition on June 17, 2014, challenging the requirement to obtain the permits. The trial court agreed with WSDOT, granted the petition and invalidated the permits. The City appealed.

Holding: The trial court was affirmed. The Seattle grading code, SMC 22.170.060(A)(1)(d), which required a grading permit for changes to existing grade or grading if "excavation, filling, and other movement of earth material exceeds 500 cubic yards" expressly exempted construction by WSDOT for state highway right-of-way in SMC 22.170.060(B)(14), subject to compliance with certain run-off requirements applicable to the Puget Sound. The City's interpretation of the exemption restricted it to applying only to "a strip of land, any portion of which is open as a matter of right to public vehicular travel" and claimed the exemption was not applicable to temporary construction easements not open to public vehicle travel. The Court found this interpretation did

not give effect to the plain language of the exemption and was "stained." Under state law, "right-of-way" was not limited to "a strip of land, any portion of which is open as a matter of right to public vehicular travel." RCW 47.14.020(1) broadly defines "right-of-way" to mean "the area of land designated for transportation purposes. " Similarly, throughout Title 47 RCW, "right-of-way" is used to refer to areas outside a traveled roadway. The City's requirement to obtain grading permits for work bridges to access and construct the SR–520 approaches was a clearly erroneous application of the grading code exemption to the facts. The undisputed record established construction of the work bridges on the temporary easements was necessary to access and construct the SR–520 approach and the trial court was correct in granting the WSDOT petition and invalidating the grading permits.

Durland v. San Juan County, *182 Wn.2d 55 (2014)* – Lack of notice of building permit.
Knight v. City of Yelm, *173 Wn.2d 325 (2011)* – Standing to challenge municipal code.
Lauer v. Pierce County, *173 Wn.2d 242 (2012)* – GMA challenge.
Thun v. City of Bonney Lake, *164 Wn.App. 755 (2011)* – Exhaustion of remedies.
Brotherton v. Jefferson County, *160 Wn.App. 699 (2011)* – Application of LUPA to permit violation citation.
City of Federal Way v. Town and Country Real Estate, *161 Wn.App. 17 (2011)* – Authority of hearing examiner.
Fishburn v. Pierce County Planning and Land Services Dept., *161 Wn.App. 452 (2011)* – Claim against municipality for negligence.
McMilian v. King County, *161 Wn.App. 581 (2011)* – Non-conforming use.
Julian v. City of Vancouver, *161 Wn.App. 614 (2011)* – Short plat application.
Vogel v. City of Richland, *161 Wn.App. 770 (2011)* – Date of final determination for LUPA appeal.
Pierce v. Yakima County, *161 Wn.App. 791 (2011)* – Claim against municipality for faulty inspection.
City of Seattle v. Sisley, *164 Wn.App. 261 (2011)* – Municipal court jurisdiction for housing code violations.
KS Tacoma Holdings, LLC v. Shorelines Hearing Bd., *166 Wn.App. 117 (2012)* – Standing to contest permit.
Applewood Estates Homeowners' Ass'n v. City of Richland, *166 Wn.App. 161 (2012)* – Time for LUPA appeal.
Rosema v. City of Seattle, *166 Wn.App. 293 (2012)* – Non-conforming use.
Cradduck v. Yakima County, *166 Wn.App. 435 (2012)* – Construction within flood plain.
Catsiff v. McCarty, *167 Wn.App. 698 (2012)* – Sign ordinance and First Amendment.
Birnbaum v. Pierce County, *167 Wn.App. 728 (2012)* – Issuance of permit as bar to claim against the municipality.
Dept. of Ecology v. City of Spokane Valley, *167 Wn.App. 952 (2012)* – Application of SMA to application for dock construction.
Ferguson v. City of Dayton, *168 Wn.App. 591(2012)* – Determination of date of final decision.
Patterson v. Segale, *171 Wn.App. 251 (2012)* – Standing to sue.
Families of Manito v. City of Spokane, *172 Wn.App. 727 (2013); rev. den. 177 Wn.2d 1025 (2013)* – Conditional use permit.
Durland v. San Juan County, *174 Wn.App. 1 (2012)* – Applicability of LUPA to compliance plan.
City of Seattle v. Davis, *174 Wn.App. 240 (2012)* – Adult entertainment zones.
Coy v. City of Duvall, *174 Wn.App. 272 (2013), rev.den. 178 Wn.2d 1007 (2013)* – Damages under RCW 64.40.020.
Northshore Investors v. Tacoma, *174 Wn.App. 678 (2013), rev. denied 178 Wn.2d 1015 (2013)* – Failure to timely serve under LUPA.
Durland v. San Juan County, *175 Wn.App. 316 (2013)* – Final determination for purposes of LUPA.
Prosser Hill Coalition v. County of Spokane, *176 Wn.App. 280 (2013)* – Notice of decision.
Mangat v. Snohomish County, *176 Wn.App. 324 (2013); rev. denied 179 Wn.2d 1012 (2014)* – Right to use submissions for plat approval.
Shaw v. Clallam County, *176 Wn.App. 925 (2013)* – Scope of trial court review.
Ahmad v. Town of Springdale, *178 Wn.App. 333 (2013)* – Action for compel adoption of ordinance.

Libera v. City of Port Angeles, *178 Wn.App. 669 (2013)* – Claim for damages for failure to issue permit.
Fabre v. Town of Ruston, *180 Wn.App. 150 (2014)* – Change of zoning and public duty doctrine.
Cannabis Action Coalition v. City of Kent, *180 Wn.App. 455 (2014)*, ***rev. granted,*** *181 Wn.2d 1022 (2014)* – Prohibition of communal marijuana gardens.
Potala Village Kirkland LLC v. City of Kirkland *183 Wn.App. 191 (2014)* – Vested rights doctrine.
Johnson v. City of Seattle, *184 Wn.App. 8 (2014)* – Non-conforming use.
Friends v. Spokane County, *184 Wn.App. 105 (2014)* – Challenge to permit based on deed restriction.
Kitsap County v. Kitsap Rifle and Revolver Club, *184 Wn.App. 252 (2014)* – Expansion of non-conforming use.
Dept. of Ecology v. Wahkiakum County, *184 Wn.App. 372 (2014)* – Pre-emption by state law.
Naumes, Inc. v. City of Chelan, *184 Wn.App. 927 (2014)* – Right to compel arbitration under agreement with City.
City of Bonney Lake v. Kanany, *185 Wn.App. 309 (2014); rev. denied, 183 Wn.2d 1020 (2015)* – Challenge to fines for violation.
Total Outdoor v. City of Seattle, *187 Wn.App. 337 (2015); rev. den. 184 Wn.2d 1014 (2015)* – Non-conforming use versus non-conforming structure.
Burlington v. Liquor control Bd., *187 Wn.App. 853 (2015); rev. denied 184 Wn.2d 1014 (2015)* – City challenge to relocation of liquor store.
Woods View v. Kitsap County, *188 Wn.App. 1 (2015); rev. denied 184 Wn.2d 1015 (2015)* – Claims related to denial of permit and statute of limitations.
Klineburger v. King County, *189 Wn.App. 153 (2015)* – Flood plain designation and failure to exhaust administrative remedies.
Alliance Inv. Group v. Ellensburg, *189 Wn.App. 763 (2015)* – Vested rights.

XIII. Land Use/SEPA

Whatcom County v. Hr'gs. Bd., 186 Wn.2d 668 (2016)

Facts: Several residents and a public interest group contested the adequacy of the Whatcom County comprehensive plan in connection with its provisions designed to protect surface and groundwater resources. The residents appealed the validity of the County comprehensive plan provisions to the Western Washington Growth Management Hearings Board. The Board concluded the County failed to comply with the GMA, specifically with the requirement to protect surface water and groundwater resources pursuant to RCW 36.70A.070(5)(c) . The Board's conclusion that the comprehensive plan did not protect water availability was based on the Board's finding the provisions of the comprehensive plan did not require the County to make a determination of the legal availability of groundwater in a basin where instream flows are not being met. Specifically, the Board was presented with evidence that most of the water in the Nooksak water shed had already been legally appropriated and water levels in the Nooksak River fell below minimum instream flows at least 100 days a year, but the County had nevertheless approved over 1,600 permit-exempt well applications since 1997. In effect, the Board determined water was not presumptively available for permit exempt withdrawals. The Board remanded the ordinance to the County for corrective action. Both the challengers and the County appealed. The Court of Appeals affirmed the Board in part, and the parties appealed to the Supreme Court.

Holding: The Board was affirmed. The County contended the comprehensive plan protected available water because the County will only approve permit applications supported by permit-exempt wells if the well is not within an area DOE has determined by rule did not have sufficient water for development. The result of this was the delegation of the decision on water

availability to DOE's Nooksack Rule contained in chapter 173–501 WAC, which established minimum flow requirements for most of the County. However, the County contended the closures and minimum flow requirements established by the rule are not applicable to permit-exempt wells in the County and water was presumptively available in the County for permit-exempt wells. The Court rejected the County's position. The GMA placed an independent responsibility on the County to ensure water availability and the County could not delegate the responsibility for that decision to DOE. The Board properly concluded the comprehensive plan failed to comply with the GMA because the County was not required to make its own determination as to water availability in connection with each permit application, including those relying on permit exempt wells and the comprehensive plan did not protect water availability because it allowed permit-exempt wells to impede minimum flows; i.e. senior appropriation rights.

***Citizens Alliance v. San Juan County,* 184 Wn.2d 428 (2015)**

Facts: In 2010, San Juan County started the process to update its critical area ordinances as required by the GMA, which was then four years overdue. A CAO Team was an informal group that met from time to time to discuss how to implement the CAO update. The team met 26 times between 2010 and 2012 and during the same time, the San Juan County Council met at least 70 times to discuss the CAO. In April 2012, the SJC prosecuting attorney advised the SJCC that any meeting involving at least three members of the SJCC should comply with the Open Public Meetings Act; the CAO Team ceased meeting after that date. The CAO update process was completed in December 2012 when the SJCC adopted four separate ordinances. Before the ordinances were adopted, the Citizens Alliance for Property Rights sued the County, three SJCC members that attended the CAO Team meetings and other members of the CAO Team alleging violations of the OPMA. The trial court dismissed the claim. The Court of Appeals affirmed the dismissal because there was no evidence the majority of the SJCC attended the meetings or that the CAO Team acted on behalf of the SJCC.

Holding: The dismissal was affirmed and the Court adopted the rationale of the Court of Appeals. The Court concluded that the OPMA did not apply to the CAO Team meetings. The OPMA applies only to meetings of governing bodies, such as the SJCC, and committees when the committee acts on behalf of the legislative entity. None of the CAO team meetings constituted meetings of the Council itself under the OPMA because none of the meetings included a majority of council members. CAPR produced no evidence indicating that the Council created the CAO Team or recognized any of its activities. The CAO Team also never "acted on behalf of" the Council and thus could not have constituted a "governing body" under the OPMA even if the Council had created it.

***Chelan Basin Conservancy v. GBI Holdings,* 194 Wn.App. 478 (2016); rev. granted, ___ Wn.2d ___ (Dec. 8, 2016)**

Facts: GBI Holdings acquired the Three Fingers property abutting Lake Chelan in 1961. Over the next year, GBI filled the property with material from a nearby road construction project and extended the property 250 to 300 feet into the lake. After completing the fill, the property was no longer submerged during the peak water level months. In 2010, GBI sought approval to

subdivide the Three Fingers fill into six lots. The City of Chelan approved a proposed short plat subject to the establishment of a part and granting access to the lake. Chelan Basin Conservancy, a local interest group, opposed the plan. Both GBI and CBC appealed to the hearing examiner, but after the hearing examiner ruled the City did not have the authority to order the removal of the fill, CBC withdrew the appeal and then sued GBI seeking removal of the fill, alleging the Three Fingers fill (1) constituted a trespass against the public right of access to Lake Chelan, (2) violated the public rights of navigation, and (3) violated rights to use and enjoy the waters of Lake Chelan as protected by the public trust doctrine. After several years of litigation, the trial court ruled in favor of CBC on a summary judgment motion and ordered the abatement of the fill.

Holding: The trial court was reversed. The Court reviewed the history of the public trust doctrine in Washington jurisprudence, culminating with *Wilbour v. Gallagher,* 77 Wash.2d 306 (1969), which, in turn, was one of the motivating forces behind the passage of the Shoreline Management Act in 1971. To address development that had taken place prior to the SMA, the legislature adopted the savings clause in RCW 90.58.270(1) granting consent to the maintenance of fills and shoreline developments undertaken prior to the date of the *Wilbour* decision, except for "any structures, improvements, docks, fills or developments placed in tidelands, shorelands, or beds underlying said waters which are in trespass or in violation of state statutes." CBC asserted the fill violated the public nuisance statute and therefore was not exempt from removal under the SMA savings provision. The Court disagreed. In order for this exception to apply, a fill must deviate in some way from its initial authorization and there was no proof of this. The Court also rejected the claim the savings clause itself violated the public trust doctrine. Relying on *Caminiti v. Boyle*, 107 Wash.2d 662 (1987), the Court concluded the burden was on CBC to establish the savings clause as a whole throughout the state was invalid in order to invalidate the application of the clause under the public trust doctrine. The Court concluded CBC had failed to carry this burden and reversed the trial court.

***Snohomish County v. Pollution Control Hr'gs Bd.,* 192, Wn.App. 316 (2016), rev. granted 185 Wn.2d 1026 (2016)**

Facts: Pursuant to delegation from the EPA, the Department of Ecology promulgated standards for the issuance of discharge permits under the Clean Water Act. In August 2012, DOE issued the 2013–2018 Phase I Municipal Stormwater Permit. The 2013–2018 Permit authorizes and regulates the discharge of stormwater to surface waters and to ground waters from large and medium municipal separate storm sewer systems. Condition S5.C.5 of the permit focused on preventing and controlling stormwater runoff from new development, redevelopment, and construction activities. This condition stated a long list of minimum performance measures applicable to site and subdivision development. The conditions specified the applicability to proposed developments:

> The local program adopted to meet the requirements of S5.C.5.a.i through ii shall apply to all applications submitted after July 1, 2015 and shall apply to projects approved prior [to] July 1, 2015, which have not started construction by June 30, 2020.

Snohomish, King, Pierce and Clark Counties and Building Industry Association for Clark County appealed the 2013-18 Permit to the Hearings Board, contending the conditions to the permit violated Washington vested rights laws. DOE contended the regulations were environmental regulations, not land use provisions and the vested rights doctrine did not apply. The Board agreed with DOE and the various challenging parties appealed.

Holding: The Court of Appeals reversed the Board. Relying on *Westside Business Park, LLC v. Pierce County,* 100 Wn.App. 599, 607 (2000), the Court concluded the regulations were land use regulations and not merely environmental matters. Because development rights vested upon filing a completed building or land division application, condition S5.C.5.a.iii conflicted with the vested rights doctrine as stated in RCW 19.27.095(1) and RCW 58.17.033(1) because it could require a permitting authority to enforce regulations adopted after development rights had been vested. The Court held the condition to be invalid. The Court also rejected DOE's argument that the CWA preempted state law. The condition stated in S5.C.5.a.iii of the 2013–2018 Permit was invalid.

***Concerned Citizens v. Ferry County,* 191 Wn.App. 803 (2015)**

Facts: Under GMA, Ferry County was required to designate agricultural resource lands. After adopting an ordinance in 2001 designating ARL, various environmental groups challenged the ordinance before the Growth Management Hearings Board. A series of Board decisions resulted in the County adopting a new system for designation of ARL in 2013. That scheme contemplated a scoring system that assigned points to various parcels to determine whether the parcel would be classified as ARL. Applying the new criteria, the County designated 479,373 acres as ARL, of which 459,545 were federal grazing allotments, 19,423 acres were state lands leased for grazing and 405 acres were subject to conservation easements. The County identified 2,826 acres as qualifying for ARL designation under the criteria, but failed to designate these parcels as ARL. The Board determined that the County was in compliance with GMA, but Futurewise petitioned for review and direct review by the Court of Appeals was granted.

Holding: The Board was affirmed as to the finding that the ordinance adopted by the County creating criteria for the designation of ARL complies with GMA. However, the ordinance was remanded by the court for designation of the 2,816 acres as ARL since the County had no explanation as to why this property was excluded from designation. Futurewise raised various objections to the scoring system adopted by the County, all of which were rejected by the Court. The court noted that the point system adopted by the County was not inconsistent with GMA. However, the Court found that the finding that hay production was not commercially significant was not supported by substantial evidence. The exclusion of hay producing areas resulted in the failure to designate 2,816 acres of land as ARL that otherwise met the County's requirements. The areas that were designated as ARL were largely beyond the control of the County (federal lands) and not suitable for crop production (state grazing lands):

> For unknown reasons, the County designated none of the over 2,816 acres qualifying under its criteria and instead designated land more than 99 percent of which is not suitable for hay production, as far as the record shows. The 405 acres prescriptively designated as containing conservation easements may or may not be suitable for hay

production, but those lands did not qualify under the measure most suited to determine long-term productivity, the County's own criteria.

The Board's decision was reversed and the matter remanded to the County to designate ARL in a manner consistent with the GMA and the County's own criteria.

***Quinault Indian Nation v. Imperium,* 190 Wn.App. 696 (2015); *rev. granted* 185 Wn.2d 1017, 369 P.3d 500 (2016)**

Facts: Westway owned a terminal facility in the Port of Grays Harbor in the City of Hoquiam for storing methanol. Imperium operated a similar facility adjacent to Westway. Imperium and Westway applied for substantial shoreline development permits to expand their operations in late 2012 and early 2013. At the same time, USD proposed to develop a new terminal facility. The applications contemplated new storage tanks and increased rail activity. DOE and the City acted as co-leads on the SEPA review and issued an MDNS for the two projects. In reviewing the Westway and Imperium applications, the co-leads did not consider the cumulative impact of the projects combined with the USD proposal. The City issued permits for Westway and Imperium. The Quinault Indian Nation and other environmental groups objected to the permits and appealed to the Shorelines Hearings Board, arguing the MDNS were invalid because (1) there was a failure to adequately consider the cumulative impacts of three proposed crude-by-rail terminals in Grays Harbor, (2) they failed to require demonstrations of financial responsibility under RCW 88.40.025 , and (3) they failed to consider the federal Ocean Resources Management Act. The Board agreed with Quinault on the cumulative impact issue but rejected the other claims. Quinault sought direct review under RCW 34.05.518.

Holding: The Board's determination was affirmed. The Court held RCW 88.40.025 required Westway and Imperium to demonstrate financial responsibility in their oil spill prevention plans prior to beginning operation but not during the threshold determination phase or before permits may be issued. The proposals did not involve ocean uses regulated by ORMA. Under ORMA's implementing regulations the Westway and Imperium proposals were not "ocean uses. As defined by WAC 173–26–360(3), "ocean uses are activities or developments involving renewable and/or nonrenewable resources that occur on Washington's coastal waters." Westway's and Imperium's proposals involved the construction of new storage tanks and pipelines for crude oil and other bulk liquids and the expansion of the adjoining railroad facilities to receive the crude oil, all of which are located on land and did not occur on coastal waters. Nor were the proposals related to off-shore or near shore facilities. The Court refused to address the argument of Westway and Imperium that the Board's conclusion concerning cumulative impacts was in error. Since the Board's decision, the permits had been withdrawn, the co-leads had issued a declaration of significance and an EIS was being prepared. The cumulative issue was now moot.

Save Our Scenic Area v. Skamania County, *183 Wn.2d 455 (2015)* – Applicable statute of limitations to contest comprehensive plan provisions.

Cannabis Action Coal. v. City of Kent, *183 Wn.2d 219 (2015)* – Prohibition of marijuana cultivation.

Town of Woodway v. Snohomish County, *180 Wn.2d 165 (2014)* – SEPA and vested rights.

Ellensburg Cement Products, Inc. v. Kittitas County, *179 Wn.2d 737 (2014)* – Requirements for SEPA appeal process.

Friends of Columbia Gorge, Inc. v. State Energy Facility Site Evaluation Council, *178 Wn.2d 320 (2013)* – Energy facilities siting.

Clark County v. Western Washington Growth Management Hearings Board, *177 Wn.2d 136 (2013)* – Scope of issues on appeal.

Stafne v. Snohomish County, *174 Wn.2d 24 (2012)* – Challenge to failure to amend comprehensive plan.

Citizens for Rational Shoreline Planning v. Whatcom County, *172 Wn.2d 384 (2011)* – Challenge to SMA ordinance as tax.

Feil v. E. Wash. Growth Mgmt. Hearings Bd., *172 Wn.2d 367 (2011)* – Jurisdiction of hearings board.

Mellish v. Frog Mountain Pet Care, *172 Wn.2d 208 (2011)* – Time period for filing LUPA action.

Kittitas County v. E. Wash. Growth Mgmt. Hearings Bd., *172 Wn.2d 144 (2011)* – Challenge to county growth management plan.

Phoenix Dev., Inc. v. City of Woodinville, *171 Wn.2d 820 (2011)* – Application for rezone.

Whatcom County Fire Dist. No. 21 v. Whatcom County, *171 Wn.2d 421 (2011)* – Fire protection concurrency.

Advocates for Responsible Development v. Western Washington Growth Management Hearings Bd., *170 Wn.2d 577 (2011)* **–** Frivolous appeal.

Brinnon Group v. Jefferson County, *159 Wn.App. 446 (2011)* – Challenge to changes in comprehensive plan.

Davidson Serles v. City of Kirkland, *159 Wn.App. 616 (2011)* – Challenge to adequacy of EIS.

Kitsap Alliance of Property Owners v. Central Puget Sound Growth Management Hearings Bd., *160 Wn.App. 250 (2011)* – Validity of retroactive amendments to GMA.

Spokane County v. Eastern Washington Growth Management Hearings Bd., *160 Wn.App. 274 (2011)* – Hearings Board jurisdictions over challenges to comprehensive plan.

City of Federal Way v. Town & Country Real Estate, LLC, *161 Wn.App. 17 (2011)* – Traffic mitigation fee.

Clark County v. Western Wash. Growth Mgmt Hearings Bd., *161 Wn.App. 204 (2011)* – Challenge to comprehensive plan amendments.

Clallam County V. Dry Creek Coalition, *161 Wn.App. 366 (2011)* – Challenge to density allowed under comprehensive plan.

McMillan v. King County, *161 Wn.App. 581 (2011)* – Non-conforming use.

Julian v. City of Vancouver, *161 Wn.App. 614 (2011)* – Application of vested rights doctrine to establish buffer areas.

Olympic Stewardship Foundation V Western Wa Growth Mgt Hearings Bd., *163 Wn.App. 12 (2011)* – Challenge to critical area ordinance.

Irondale Community Action Neighbors v. Western Washington Growth Management Hearings Bd., *163 Wn.App. 513 (2011)* – Challenge to urban growth area designation.

Stevens County v. Hearings Bd., *163 Wn.App. 680 (2011)* – GMA challenge to ordinances.

BD Lawson Partners v. Hearings Bd., *165 Wn.App. 677 (2011)* – Failure of ordinances to comply with GMA.

Olympic Stewardship Found. v. W. Wash. Growth Mgmt. Hearings Bd., *166 Wn.App. 172 (2012)* – Critical areas.

Yakima County v. E. Wash. Growth Mgmt. Hearings Bd, *168 Wn.App. 680 (2012)* – Critical areas and streams.

Town of Woodway v. Snohomish County, *172 Wn.App. 643 (2013)* – Vested rights.

Schlotfeldt v. Benton County, *172 Wn.App. 888 (2013)* – Sufficiency of evidence to support decision.

Chinn v. City of Spokane, *173 Wn.App. 89 (2013)* – Height variance.

Spokane County v. Eastern Washington Growth Management Hearings Bd., *173 Wn.App. 310 (2013)* – Rezone and traffic impact.

Manna Funding v. Kittitas County, *173 Wn.App. 879 (2013), rev. den. 178 Wn.2d 1007 (2013)* – Claim for delay damages under RCW 64.40.010.

Kittitas Cty. V. Kittitas County Conservation Coalition., *176 Wn.App. 38 (2013)* – Comprehensive plan amendment and SEPA.

Int'l Longshore and Warehouse Union, Local 19 v. City of Seattle, *176 Wn.App. 512 (2013)* – Final action and SEPA.

Spokane County v. Eastern Washington Growth Management Hearings Bd., *176 Wn.App. 555 (2013); rev. denied 179 Wn.2d 1015 (2014)* – Jurisdiction of hearings board.

Lands Council v. Washington State Parks & Rec. Comm'n, *176 Wn.App. 787 (2013)* – Standing to challenge SEPA determination.

In re Expansion of Urban Growth Area, *181 Wn.App. 369 (2014),* ***rev. denied*** *181 Wn.2d 1010 (2014)* – Designation of urban growth boundary.

Citizens Alliance v. San Juan County, *181 Wn.App. 538 (2014);* ***rev. granted*** *181 Wn.2d 1013 (2014)* – Application of Open Public Meetings Act.

Ferry County v. Hearings Board, *184 Wn.App. 685 (2014)* – Critical areas and best available science.

Concrete Nor'west v. Hr'gs Bd., **185 Wn.App. 745 (2015);** ***rev. denied*****, 183 Wn.2d 1009 (2015) – Designation of mineral resource lands.**

Peninsula's Future v. Hr'gs Bd.*, 185 Wn.App. 959 (2015)* – Voluntary Stewardship Program and critical areas.

Whatcom County v. Hr'gs Bd.*, 186 Wn.App. 32 (2015); rev. granted, 183 Wn2d 1008 (2015)* – Protection of water resources.

Spokane County v. Hr'gs Bd., *188 Wn.App. 467 (2015)* – Growth projections as amendment to comprehensive plan.

Puget Soundkeeper Alliance v. Pollution Control Hr'gs Bd., *189 Wn.App. 127 (2015)* – NPDES permit.

Columbia Riverkeeper v. Port, *189 Wn.App. 800 (2015); rev. granted 185 Wn.2d 1002 (2016)* – Energy Facility Site Evaluation Council.

XIV. Governmental Regulation

A. Hazardous Waste

ABC Holdings v. Kittitas County, 187 Wn.App. 275 (2015); *rev. denied* 184 Wn.2d 1014 (2015)

Facts: Chem-Safe Environmental was issued a notice of violation and abatement by Kittitas County for operating a moderate risk waste storage facility. CSE appealed the NOVA. The hearing examiner upheld the citation, including the $500 fine and the abatement measures specified by the County. CSE appealed to the superior court, which upheld the citation. CSE then appealed to the court of appeals. Several other procedural matters related to CSE attempting to delay the abatement requirement resulted in two other appeals, including an appeal of a contempt citation.

Holding: The orders were all affirmed. CSE contended on appeal that its operations did not require a permit since it had a federal permit to transport the MRW. This argument was not raised below and the court rejected it. The record was clear that CSE required a County permit. The court also rejected the argument that the NOVA was improper because CSE's operation did not constitute a nuisance. Non-compliance with the permitting requirements constituted a public nuisance under the County's ordinances. The appeal of the contempt citation was held to be moot since CSE had taken the actions necessary to purge the contempt.

Lemire v. Dep't of Ecology, *178 Wn.2d 231 (2013)* – Livestock pollution.

King County Dep't of Dev. & Envtl. Servs. v. King County, *177 Wn.2d 636 (2013)* – Definition of recycling facility.

Hulbert v. Port of Everett, *159 Wn.App. 389 (2011)* – Contribution claim under MTCA.

Skagit County v. Skagit Hill Recycling, *162 Wn.App. 308 (2011)* – Violation of landfill permit.

Dep't of Ecology v. Tiger Oil Corp., *166 Wn.App. 720 (2012)* – Failure to comply with consent decree.

Rosemere Neighborhood Ass'n v. Clark County, *170 Wn.App. 859 (2012)* – Storm water discharge.

K.P. McNamara Northwest, Inc. v. Washington Department of Ecology, *173 Wn.App. 104 (2013); rev. denied 177 Wn.2d 1023 (2013)* – Citation under Waste Management Act.

Gull Indus. v. State Farm, *181 Wn.App. 463 (2014)* – Duty to defend remediation claim.

B. Water Rights

***Foster v. Dept. of Ecology,* 184 Wn.2d 465 (2015)**

Facts: Yelm filed an application with DOE for a new municipal water permit to meet the water needs of its growing population. DOE conditioned the approval on an extensive mitigation plan since the appropriation would impair minimum flows of waterways connected to the Deschutes and Nisqually Basins. Even with the mitigation measures, however, the approved plan impaired the minimum flows. Foster appealed the Yelm permit to the Pollution Control Hearings Board, which affirmed DOE's actions. An appeal to the Thurston County Superior Court followed, which also affirmed DOE. Direct review of the trial court was granted by the Supreme Court.

Holding: DOE's approval of the permit was reversed. Washington followed the "first in time, first in right" approach to water law, which does not permit any impairment, even *di minimis*, of a senior water right. Minimum flows established for streams constituted appropriations with the exception that minimum flows can be impaired for overriding considerations of the public interest. The OCPI exception is contained in RCW 90.54.020. The Court concluded that the OCPI exception did not apply to Yelm's application based on the different interpretation of the concepts of "appropriation" and "withdrawal" in the water code. Reading the language of the OCPI exception together with the emergency drought provision in RCW 43.83B.410 , the Court concluded: (1) when the legislature intended the establishment of a permanent water right, the term "appropriation" was used; temporary uses of water are characterized as a "withdrawal;" and (2) statutory scheme as a whole protected minimum flows/essential minimums by not permitting the temporary withdrawal of water that impacted minimums even in the case of drought. The OCPI exception did not allow the permanent impairment of minimum stream flows and DOE erroneously issued the Yelm permit.

***Environmental Law & Policy v. Ecology,* 196 Wn.App. 360 (2016)**

Facts: Public Utility District No. 1 of Okanogan County desired to make the Enlow Dam on the Similkameen River operational. The dam ceased producing electricity in 1958. The project involved diverting water from the reservoir behind the dam through a new powerhouse and returning the water to the river 370 feet downstream. Above the return point, approximately 350 feet below the dam, there was a natural waterfall. DOE issued a Report of Examination ordering the approval of the water right required to divert the water. The ROE included a condition that the PUD would ensure the minimum flows in the 370 stretch below the dam would be the same as those found to be adequate to protect aesthetic values as determined by a future study. Several public interest groups appealed the issuance of the ROE on the grounds issuance was improper prior to the completion of the study. The Pollution Control Hearings Board affirmed DOE. The PCHB decision was appealed to Thurston County Superior Court, which affirmed the PCHB.

Holding: The PCHB was affirmed. The Court characterized the ultimate issues as (1) whether DOE had the authority to issue to issue the ROE ordering the approval of an inchoate water right subject to the condition that it be potentially later revised to adhere to stream flows

deemed sufficient by a future aesthetic study and (2) was there an abuse of discretion by DOE in the exercise of this authority. The Court concluded DOE had the authority to issue a ROE, and water permit, which was subject to a condition to ascertain information that was not available prior to proceeding with the Project. Ecology did not abuse its discretion in determining that the PUD's water permit should issue subject to the stated conditions. The challengers to the permit did not carry their burden to demonstrate the ROE violated the instream flow rule and there was no error in dismissing the challenge.

***Fox v. Skagit County*, 193 Wn.App. 254 (2016)**

Facts: In March 2014, Fox submitted a building permit application to construct a single-family house near Sedro–Woolly, Washington. Skagit County determined the building permit application was "incomplete" because the Foxes failed to demonstrate that they had access to an adequate and reliable source of water for the proposed home. The home was to be served by a well with hydraulic continuity to the Skagit River. The Skagit regularly fell below minimum stream levels and WAC 173-503 generally curtails the exercise of water rights if minimum stream flows are not met. Fox contended the proposed well was exempt from permitting requirements under RCW 90.44.050 since it was only for domestic use not to exceed 5,000 gallons per day. In May 2014, Fox filed a petition for a writ of mandamus seeking to compel the County to issue the building permit. On February 2, 2015, the trial court entered its order denying relief to Fox. The trial court held the instream flow rule under WAC 173–503 governed permit-exempt groundwater use that is in hydraulic continuity with the Skagit River, including proposed well.

Holding: The trial court was affirmed. The Court concluded the prior appropriation doctrine was applicable to a well exempt from the permitting procedure to withdraw public groundwater under RCW 90.44.050. Under this doctrine, although the well is exempt and has a right to withdraw water "equal to that established by permit," that right is subject to the rights of senior rights holders under the general rule of "first in time, first in right." The right of Fox to withdraw water was subject to the superior rights protected by the 2001 instream flow rule adopted by DOE. It was up to Fox to demonstrate to the County there was water legally available to the Fox lot, which required an analysis of senior water rights.

***Singh v. Covington Water Dist.*, 190 Wn.App. 416 (2015)**

Facts: Singh intended to develop a 30-lot subdivision in Covington. As part of the development process, Singh needed to confirm the availability of water service by the Covington Water District. In May 2005, Singh applied for a "Water Availability Letter" from the District and paid a non-refundable fee required by the application. The application was extended several times, resulting in additional fees. Singh also entered into a "Service Extension Agreement" with the District that contemplated the construction of facilities necessary to extend water service to the lots. The SEA also required payment of connection fees by the developer. In October 2011, Singh informed the District that the project was being abandoned and Singh sought a refund of $74,800 that had been paid under the WAL and SEA applications. The District refused, noting that all of the payments were, by the terms of the applications executed by Singh, nonrefundable. Singh sued to recover the fees in 2013 and the trial court dismissed the claim.

Holding: The dismissal was affirmed. Referring to Singh's arguments as overlapping and "at times confusing" the Court rejected claims that (1) the District lacked the statutory authority to collect the fees; (2) the fee policy was arbitrary; (3) the fee policy was an abuse of the District's monopoly power; (4) the policy was an unlawful tax; (5) the fee policy violated public policy and (6) the fees provided an unlawful windfall to the District. The District had statutory authority to charge nonrefundable incremental connection fees and acted lawfully in adopting the fee policy; Singh entered into an enforceable contract with the District that provided the fees were nonrefundable and the trial court properly granted the District summary judgment.

Cornelius v. Dep't of Ecology, *182 Wn.2d 574 (2015)* – Reclassification of uses under Municipal Water Law.
Tribal Cmty., v. Dep't of Ecology, *178 Wn.2d 571 (2013)* – Authority of DOE to allocate water rights.
In re Determination of Rights to Use of Surface Waters of Yakima River Drainage Basin, *177 Wn.2d 299 (2013)* – Adjudication of water rights.
Five Corners Family v. State, *173 Wn.2d 296 (2011)* – Withdrawal for stock-watering.
Squaxin Island Tribe v. Ecology, *177 Wn.App. 734 (2013)* – Right to refuse in rule making.

C. Irrigation/Diking Districts

Gabelein v. Diking District, *182 Wn.App. 217 (2014)* – Assessment formula.

D. Archeological Lands

No reported cases within the last five years.

E. Mortgage Broker Practices/Appraisers

Porter Law Ctr. v. Dep't of Financial Institutions, **196 Wn.App. 1 (2016)**

Facts: Dean Douglas Porter was licensed to practice law in Ohio and owned Porter Law Center LLC, an Ohio limited liability company located in South Carolina. PLC provides nationwide foreclosure defense services including bankruptcy, loan modification, and debt settlement. Porter was not licensed to practice law in Washington. After investigating a complaint related to solicitation to provide services to persons seeking mortgage modifications, DFI charged Porter with violations of RCW 19.146.200(1) of the Mortgage Broker Practices Act by acting as a mortgage broker without a license and engaging in unfair and deceptive practices. After a hearing before an administrative law judge, Porter was found to have violated the MBPA, ordered Porter to refund $28,886.87 and pay $24,000 in fines and investigative fees. Porter appealed and the superior court affirmed the ALJ order. Porter appealed again.

Holding: The judgment was affirmed. Porter contended the attorney exemption to the MBPA applied to his activities and substantial evidence did not support the ALJ's findings. The attorney exemption applied to attorneys licensed in Washington in connection with activities incidental to the practice of law. Porter was not licensed in Washington and there was no evidence the activities of his firm were supervised by a Washington attorney. Unchallenged findings supported the conclusion the mortgage broker services were not incidental to other legal services provided clients. The findings of the ALJ were supported by substantial evidence and were not

arbitrary and capricious. The Court also rejected Porter's claim the DFI proceedings violated the separation of powers doctrine by attempting to regulate the practice of law.

Jametsky v. Olsen, *179 Wn.2d 756 (2014)* – Action under Distressed Property Conveyance Act
Ameriquest Mortg. Co. v. Office of Attorney Gen., *177 Wn.2d 467 (2013)* – Obligation to disclose public records.
Collings v. City First Mortg. Servs., *177 Wn.App. 908 (2013)* – Vicarious liability for broker acts.

F. Forest Practices

Nat. Res. V. Pub. Util. Dist., *187 Wn.App. 490 (2015); rev. denied 184 Wn.2d 1006 (2015)* – Applicability to public utility districts.

XV. Taxation

A. General Real Estate Taxes

United Airlines v. King County, 194 Wn.App. 384 (2016); rev. denied, 186 Wn.2d 1022 (2016)

Facts: United Airlines leased property from the Port of Seattle at the Seattle-Tacoma International Airport. UAL owed real estate taxes on the leasehold calculated in accordance with RCW 84.40.030(2). In 2006, the Department of Revenue changed the method by which it calculated the value of the airline leaseholds at SeaTac from an imputed value approach to a residual value method. The change resulted in significantly higher valuations and taxes. After the airlines objected, DOR revised the method to a modified imputed value approach, which lowered values. UAL requested an administrative refund of taxes paid from 2006 through 2011, the years during which time the residual value approach to valuation had been utilized. The County denied the request. UAL sued the County in December 2013 seeking a refund. DOR intervened to defend the County. The trial court dismissed UAL's claim and UAL appealed.

Holding: The dismissal was affirmed. The Court noted the difference between seeking an administrative refund of taxes as opposed to challenging a tax as unlawful. To challenge a tax as unlawful or excessive, a taxpayer must pay the tax under written protest and then file suit. RCW 84.68.020. UAL paid the taxes, but not under protest. UAL did not file suit to challenge the tax as unlawful or excessive. An error in the valuation of the property cannot be the basis for a request for an administrative refund. RCW 84.69.020. UAL based its request for a refund on RCW 84.69.020(2). Under this subsection, taxes must be refunded if they were paid "as a result of manifest error in description." Manifest error does not include errors involving a revaluation of property." UAL was seeking a refund based upon a challenge to the value of the property. UAL should have utilized the procedure under RCW 84.68.020 requiring the payment of taxes under protest followed by a suit as opposed to seeking an administrative refund.

Tiger Oil v. Yakima County, *158 Wn.App. 553 (2010)* – Effect of contamination on value.
Harley H. Hoppe & Associates, v. King County, *162 Wn.App. 40 (2011)* – Obligation of DOR to produce information for tax appeal.

B. LID's, Assessments & Utility Fees

***City of Spokane v. Horton,* 196 Wn.App. 85 (2016)**

Facts: In November 2014, the voters in Spokane approved a "levy lid lift" for street improvements. The effect of the levy was to increase property taxes for approximately 5,500 senior citizens and disabled persons. The City Council passed an ordinance exempting senior citizens and disabled persons from the tax, but the County Assessor refused to implement the ordinance. The City sought a writ of mandamus to compel the County to mail tax statements compliant with the ordinance. The County joined DOR in the action and both asserted the ordinance was unconstitutional. The trial court disagreed and issued the writ. DOR and the County appealed.

Holding: The trial court was reversed. The Washington Constitution, article vii, section 9 vested municipalities with the power to assess and collect property taxes for local improvements, but all taxes had to be uniform in respect to persons and property. DOR claimed the ordinance violated the uniformity requirement of section 9 by applying two different regular property tax rates to real property in the City and by creating different assessment ratios between real property owned by its exempted citizens and real property not owned by its exempted citizens. While the City acknowledged the nonuniformity, it claimed article vii, section 10 allowed nonuniform rates for retired persons. The Court rejected the City's argument noting City was not able to justify the nonuniform rates for other than retired persons and the City did not address the point that article 10 required action by the legislature. The ordinance was found to violate the uniformity requirement of the article vii, section 9.

Carey v. Mason County, *173 Wn.2d 697 (2012)* – Invalidity of assessment.
Hook v. Lincoln County Noxious Weed Control Bd., *166 Wn.App. 145 (2012)* – Weed control assessments.
Shoulberg v. Public Utility Dist. No. 1 of Jefferson County, *169 Wn.App. 491 (2012)* – Duplication of city provided services.
City of Tacoma v. City of Bonney Lake, *173 Wn.2d 584 (2012)* – Allocation of costs between municipalities.
Hasit LLC v. City of Edgewood, *179 Wn.App. 917 (2014)* – Challenge to assessment.

C. Excise Taxes

***Dep't of Revenue v. FDIC,* 190 Wn.App. 150 (2015)**

Facts: Cowlitz Bank obtained a stipulated judgment in connection with a $13 million defaulted loan secured by deeds of trust on several parcels. Before completing the foreclosure sale, Cowlitz was declared insolvent and its assets were assigned to the FDIC. Rather than proceed with the foreclosure in a serial fashion against all of the properties securing the loan, the FDIC had a general receiver appointed in King County with the power to dispose of the property. The order appointing the receiver stated that any sales by the receiver would be exempt for real estate excise tax. The receiver agreed to sell one of the parcels in September 2013, and the court approved the sale with a ruling that the transaction was exempt from excise tax. The Department of Revenue objected, but the trial court The court ruled that "the sale of the Property shall be considered an order of sale by the Court to execute upon a judgment for purposes of [former] RCW 82.45.010(3)(i) and therefore the sale is exempt from real estate excise taxes." DOR appealed.

Holding: The trial court was reversed. FDIC contended that sale by the receiver was "to give effect to the judgment" as provided in RCW 7.60.050(10) and that qualified for an exemption to the imposition of the real estate excise tax for "[a]ny transfer or conveyance made pursuant to a deed of trust or an order of sale by the court in any mortgage, deed of trust, or lien foreclosure proceeding or upon execution of a judgment, or deed in lieu of foreclosure to satisfy a mortgage or deed of trust." Former RCW 82.45.010(3)(i). The court rejected this argument. Clearly the sale by the receiver was not a foreclosure sale. The sale by a received to give "effect to a judgment" was not the same transaction as a sale upon execution of a judgment, which contemplated a sale by writ of execution under chapter 6.17 RCW.

Cashmere Valley Bank v. Revenue, *181 Wn.2d 622 (2014)* – Interest exemption for B&O taxes.
State, Dept. of Revenue v. Nord Northwest Corp, *164 Wn.App. 215 (2011)* – Taxation of construction service payments.
Crystal Mountain Inc. v. State Dept. of Revenue, *173 Wn.App. 925 (2013)* – Leasehold interest tax.
Cashmere Valley Bank v. Dep't of Revenue, *175 Wn.App. 403 (2013)* – Deduction for mortgage interest.
Bravern Residential v. Revenue, *183 Wn.App. 769 (2014)* – Speculative builder B&O tax exemption.

STATUTORY UPDATE

The 2016 Regular Session of the State Legislature adjourned *sine die* March 10, 2016 and was immediately called into first special session from March 10, 2016 to March 29, 2016. The number of measures passed affecting real estate ownership and transactions was relatively small. Below is a brief summary of the legislation enacted during the session. Unless otherwise noted, all measures passed during the regular session are effective June 9, 2016 and those measures passed during the special session are effective June 28, 2016. The exact language of the bill should be consulted to determine the effect of the legislation.

Laws of 2016, ch. 7 (SB 6282): **Mortgage Fraud Prosecution Account.** The mortgage fraud prosecution account is extended for five years from June 30, 2016 to June 30, 2021.

Laws of 2016, ch. 63 (SSB 6337): **Tax Foreclosed Property – Use as Affordable Housing.** RCW 36.35.150 is amended to allow cities the opportunity to buy tax foreclosed property from the county prior to other disposition by the county.

Laws of 2016, ch. 66 (ESB 6413): **Tenant Screening Reports and Deposit Refunds.** The RLTA is amended to require certain notices from landlords to tenants concerning the acceptability of reusable screening reports, including disclosures on websites. Courts may order limited dissemination of information concerning prior unlawful detainer under certain circumstances (addressing the result in ***Hundtofte v. Encarnacion,*** *181 Wn.2d 1 (2014).*

Laws of 2016, ch. 98 (HB 2457): **Electric Utilities – Recorded Interest in Easements**. RCW 36.35.290 is amended to provided that utility easements survive tax foreclosure proceedings.

Laws of 2016, ch. 138 (EHB 2971): **City and County Regulation – Real Estate Transactions.** Various statutes are amended to require Cities and counties adopting an ordinance, resolution or policy imposing certain requirements on landlords or sellers must provide, within 90 days of the effective date of the bill, a summary of the ordinance, resolution or policy to be posted with the MRSC. In addition to the summary, a link to the actual ordinance, resolution or policy must also be posted. MRSC is required to post a summary of the ordinance and provide an Internet link to the relevant material.

Laws of 2016, ch. 144 (SSB 5597): **Real Estate Appraisers.** RCW 18.140.010 and .140 are amended to modify the requirements for appraisers licensed in other states to obtain a license in Washington.

Laws of 2016, ch. 174 (SHB 2539): **Real Estate Excise Tax – Inheritance Documentation.** The provisions of RCW 82.45.197 are amended to clarify the procedure for recording deeds and qualifying for the exemption from real estate excise tax for transfers occurring by operation of law.

Laws of 2016, ch. 196 (SHB 2876): **Foreclosure Fairness Account.** Provisions within Chpt. 61.24 RCW dealing with the allocation of funds received from the $250 fee paid in connection with non-

judicial foreclosures are modified and DFI will not longer receive any funds for outreach and education.

Laws of 2016, ch. 209 (SB 5635): **Uniform Power of Attorney Act.** Modifies various statutes and repeals Chpt. 11.94 RCW concerning creation of a power of attorney, duties of agents and other matters.

Laws of 2016, ch. 215 (SSB 6179): **Water Banking Information.** RCW 90.42.130 is amended to require DOE to maintain water banking information.

TABLE OF CASES