

REAL ESTATE CASE LAW AND LEGISLATIVE UPDATE

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CASE LAW AND LEGISLATIVE UPDATE – SPRING 2011

This summary covers recent developments in real estate case and statutory law for the twelve-month period prior to May 2011. The case law is organized under topical references for the general area of law primarily discussed in the case. This review covers recent decisions by the Court of Appeals starting at Volume 154 through Volume 157 of Washington Appellate Reports (Wn.App.) and Supreme Court Decisions in Volume 168 and Volume 169 of Washington Second Reports (Wn.2d). A summary of new laws enacted during the 2011 Regular and Special Sessions of the Washington Legislature affecting real estate transactions and signed into law through May 31, 2011, follows the case law summary.

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

CASE LAW UPDATE

I. Interests in Land

A. Conveyances/Estates

Erickson v. Chase, 156 Wn.App. 151 (2010)

Facts: Erickson owned two parcels of property in Skamania County, a 9-acre parcel and a 16-acre parcel. Chase owned a 5-acre parcel adjacent to the 16-acre parcel. Two unpaved roads, the Lower Road and the Upper Road, crossed Chase's 5-acre parcel. Erickson used the Lower Road to access the 9-acre parcel and the Upper Road to access the 16-acre parcel. Chase purchased the 5-acre parcel in 2003. It was originally part of a 20-acre parcel Robson owned. Robson sold the 20 acres in 1997 under a real estate installment contract. He subdivided the property and Combs purchased a 5-acre parcel. In December 2003, Robson delivered a statutory warranty fulfillment deed to Combs, and Combs sold the 5-acre parcel to Chase. Shortly after purchasing the 5 acres, Chase instructed Erickson not to use the Upper Road and eventually fenced off the Upper Road. In June 2006, Erickson brought a quiet title action against the Chase to establish prescriptive easements over the Lower Road and Upper Road. The trial court granted the Lower Road easement and denied the Upper Road easement. The court also found Erickson liable for timber trespass for removal of trees from the Upper Road and awarded Chase treble damages amounting to \$15,185.25. Chase tendered defense of the prescriptive easement claims to Combs. Combs denied the tender and, in turn, tendered the defense to Robson. Chase brought a third party action against Combs for breach of warranty, requesting attorney fees and damages for the diminution in value of their property, and moved for partial summary judgment. The trial court granted them attorney fees for defending against Erickson's claims but not for pursuing a breach of warranty claim against Combs. It also ruled that Chase did not present any competent evidence of diminution in value and denied their request for damages. Combs brought a fourth party action against Robson for breach of warranty. Robson and Combs both moved for summary judgment. The trial court granted Robson's motion, ruling that the statute of limitations

began to run from the date of the 1997 by Robson, and thus barred Combs's complaint.

Holding: The Court of Appeals reversed the dismissal of the Combs complaint against Robson. The statute of limitations under a warranty deed only occurs when a third party asserts a lawful claim and there is an actual or constructive eviction under paramount title. The breach of the duty to defend under a warranty deed does not occur until the third party asserts a claim; the grantee makes an effective tender of defense; and the grantor refuses the tender. Robson's breach of the warranty to defend occurred when he refused Combs' tender, and the statute of limitations began to run from that date, not from the date of the original conveyance.

***Edmonson v. Popchoi*, 155 Wn.App. 376 (2010)**

Facts: Kiss, an experienced real estate broker, sold property to Popchoi. Conveyance was by statutory warranty deed. Popchoi intended to develop the land as a single family residence. Edmonson owned adjacent property and asserted a claim of adverse possession for a 165 square foot strip of land that was part of the Popchoi lot. Popchoi tendered the claim to Kiss, who conditionally accepted the tender asserting the right to settle the claim on terms acceptable to Kiss. Popchoi refused to consent to this condition and defended the claim at his own expense, adding Kiss as a third party defendant. Edmonson prevailed, and the trial court entered a judgment against Kiss for Popchoi's damages (\$10,993.63) and attorney fees (\$30,281.90).

Holding: The judgment was affirmed. The Court rejected the argument that the grantor had the absolute right to discharge its covenant of defense of title by settling the claim for encroachment based solely upon the relative cost of defense versus the claimed damages regardless of the merit of the claim. The grantor's duty to defend is antecedent to any duty to indemnify and does not depend upon the merits of the adverse party's claim to a right of possession. The duty to defend is not hinged upon the grantor's potential indemnity liability. Kiss refused to defend a small claim solely because of the cost of defense as compared to the cost of indemnity. In effect, Kiss merged his two covenants into a single financial obligation and sought to minimize the amount of that obligation by placing upon Popchoi the full cost of investigating and prosecuting any possible defense to the Edmonson claim. The Court also rejected the claim that Popchoi had waived the warranty claim by closing the purchase with knowledge of the potential encroachment that was revealed in a survey obtained prior to closing. The duty to defend applies to all third party claims, whether known or unknown. Popchoi's knowledge of the claim was not a waiver and Popchoi had no obligation to reveal the potential defect to Kiss prior to closing.

Estate of Borghi, 167 Wn.2d 480 (2009) – Conversion to community property.
Alby v. Banc One Financial, 156 Wn. 2d 367 (2006) – Fee simple determinable.
Washington State Grange v. Brandt, 136 Wash. App. 138 (2006) – Rule against perpetuities.
In re Marriage of Mueller, 140 Wn.App. 498 (2007) – Characterization of community property.
In re Estate of Borghi, 141 Wn.App. 294 (2007) – Characterization of separate property.
In re Deed to Camp Kilworth, 149 Wn.App. 82 (2009) – Fee simple determinable.
Hosp. Dist. v. Hawe, 151 Wn.App. 660 (2009) – Fee simple determinable.

B. Mining Claims

Saddle Mountain Minerals, LLC v. Santiago Homes, Inc., 146 Wn.App. 69 (2008) – Effect of zoning on claim for wrongful removal.

C. Fixtures

No reported cases within the last five years.

II. Purchase and Sale Transactions

A. Brokers/Brokerage Agreements

Erwin v. Cotter Health Centers, 161 Wn.2d 676 (2007) – Out of state brokerage services.

Erwin v. Cotter Health Centers, Inc., 133 Wn. App. 143 (2006) – Statute of frauds; forum selection clause

Rodriguez v. Windermere Real Estate, 142 Wn.App. 833 (2007) – Agreement to arbitrate commissions.

Boguch v. The Landover Corporation, 153 Wn.App. 595 (2009) – Broker negligence.

B. Claims Against Buyers/Sellers

***S. Tacoma Way LLC v. State*, 169 Wn.2d 118 (2010)**

Facts: The State owned a railroad spur that abutted several properties in Tacoma. One of the property owners, Sustainable Urban Development, contacted DOT about purchasing the property. DOT mistakenly believed that SUD was the only property owner abutting the alley, so DOT followed the procedure for selling surplus property that abutted a single parcel, rather than the procedure for the sale of property that abutted parcels owned by multiple parties. The property was appraised and sold to SUD without notice to the other abutting property owners. South Tacoma succeeded to the ownership interest of one of the other abutting property owners and sued to set aside the sale on the grounds that the sale was *ultra vires* and SUD was not a bona fide purchaser. The trial court dismissed the complaint; the Court of Appeals reversed, voiding the sale on the grounds that DOT failed to comply with the applicable statute.

Holding: The Supreme Court reinstated the trial court dismissal of South Tacoma claims. The Court differentiated between actions that were *ultra vires* – beyond the authority of the governmental agency – and those actions that were conducted in violation of procedural requirements. No one disputed the general authority of DOT to dispose of surplus property. The failure to comply with the required statutory procedure was characterized as a procedural failure. No evidence was presented that the fundamental purpose of the statute to ensure that property was sold at fair market value in an arms-length transaction free from fraud or collusion was violated. A purchaser of land from the State generally has the right to presume that the State had proceeded in accordance with all legal requirements. SUD acquired the property with no knowledge of any procedural irregularity and was entitled to the status of a bona fide purchaser for value.

Renfro v. Kaur, 156 Wn.App. 655 (2010)

Facts: Hothi, Sandhu and Kaur (buyers) entered into an agreement to purchase residential real estate from Renfro on September 5, 2006. The agreement called for three separate earnest money deposits. After the first two deposits were made, the buyers notified the seller that they were rescinding the transactions, claiming that there had been a misrepresentation of the area of the property and the buyers had not received the seller real estate disclosure form. The seller subsequently provided the disclosure form and demanded that the third payment be made. When the buyers failed to make the third deposit, the seller sued. The trial court entered judgment in favor of the buyers, ordering a return of the two deposits that had been made and awarding attorney fees.

Holding: The Court of Appeals affirmed. the dispositive issue was whether there was an express waiver by the buyer of the right to receive the seller disclosure statement as provided in RCW 64.06.020. The Court rejected the argument that the following provision in the agreement constituted a waiver of the right to receive the disclosure statement:

21. Other Conditions:

This Agreement does not include such other and further documentation and disclosure forms as may be required under law for the purchase and sale of real estate in the state of Washington.

The provisions did not reflect an express intent to waive the right to receive the disclosure statement. The seller's argument that the buyer had orally waived the right to receive the statement was also rejected. There was no authority provided to support the claim that an oral statement could satisfy the "express waiver" requirement contained in the statute.

Borish v Russell, 155 Wn.App. 892 (2010)

Facts: Olson owned a house on Horsehead Bay in Pierce County. In October 2004, Olson listed the house for sale. Borish negotiated a purchase agreement with Olson in early 2005 with a purchase price of \$680,000. Borish's obligation to purchase was subject to an inspection and financing. Olson also delivered to Borish a seller's disclosure statement which provided additional information about the house. Olson indicated in the disclosure form that the house was not a manufactured house. Borish had wanted a contingency that made the purchase subject to obtaining approval for remodeling, but Olson did not agree to that provision. Russell was retained by the lender to provide an appraisal, which indicated that the house was a "good quality one story dwelling in good condition" and was not a manufactured home. After reviewing the inspection report and the appraisal, Borish waived the inspection contingency and closed on the purchase. When Borish applied for a remodeling permit, the County required an engineering report on the house. The engineer concluded that the home was a modified manufactured home; the county refused to grant the remodeling permit because the house was structurally unsound. Borish sued Olson and Russell under various theories, including negligent misrepresentation and fraud. The trial court dismissed Russell based on the economic loss doctrine. After a trial, the jury returned a verdict in favor of the Olsons, finding no fraudulent

concealment and although Olson knowingly made a material misrepresentation of fact that were relied upon by Borish, the reliance was not justifiable and the trial judge confirmed that the negligent misrepresentation claims against Olson had previously been dismissed based on the economic loss doctrine. The trial court awarded \$38,000 in attorney fees to Olson.

Holding: The dismissal of the negligent misrepresentation claims against Olson by the court was appropriate. The trial court correctly applied the ruling in *Alejandre* to preclude purely contractual damages sought under the theory of negligent misrepresentation. The Borishes' situation was identical to *Alejandre's* insofar as they were both home purchasers, suing a party with whom they have a contractual relationship, the requested relief involves purely economic damages, and no exception to the economic loss rule existed. The dismissal of Russell, however, was in error. No contractual relationship existed between Borish and Russell, and in order for the economic loss rule to be applied, there must exist a contractual relationship between the parties. Questions of material facts existed as to the nature of the structure as represented by Russell and reliance of Borish on the Russell appraisal, which required further proceedings.

Poulsbo Group v. Talon Dev., 155 Wn.App. 339 (2010)

Facts: Talon and Snowberry were developing neighboring plats in Poulsbo. Some of Snowberry's work including installing infrastructure improvements that would benefit both plats. Talon and Snowberry were unable to agree on any cost sharing arrangement for these improvements, so Snowberry installed them at its cost. Following the approval of the Talon plat, Snowberry applied to the City for a late-comer agreement in order to recover a portion of its costs, and the City granted the application. Poulsbo Group purchased Talon's development and Talon failed to disclose to Poulsbo any of the negotiations or communications concerning Snowberry's claim for compensation. After Poulsbo closed on the purchase, it learned that there was an assessment for over \$85,000 due under the late-comer agreement. Poulsbo sued Talon seeking recovery of this amount under various theories, including intentional and negligent misrepresentation. The trial court dismissed all of the claims.

Holding: The Court of Appeals affirmed the dismissal of the misrepresentation claims. Based on *Alejandre v. Bull, 159 Wn.2d 674 (2007)*, Poulsbo was limited to contract remedies when a loss potentially implicates contract and tort relief. The economic loss rule announced in *Alejandre* barred Poulsbo's intentional misrepresentation claim because contract remedies existed.

Almanza v. Bowen, 155 Wn.App. 16 (2010)

Facts: In early July 2007, Almanza agreed to purchase a home under construction from Bowen. Almanza made an earnest money deposit and conducted a walk-through inspection. In late August, Almanza, through his realtor, notified Bowen that he decided to walk away from the transaction for a variety of reasons, including lack of communication and the fact that Almanza's house was not selling. Bowen refused to release the earnest money deposit. Almanza sued and the trial court order a refund of the deposit to Almanza on the grounds that Bowen had never delivered to Almanza the seller's disclosure statement as required under RCW 64.04.020.

Holding: The judgment was affirmed. RCW 64.04.020 provides a clear, decisive remedy to a prospective buyer who does not receive and has not expressly waived the right to a disclosure statement. The remedy is the right to rescind and to have earnest money returned. And if a seller does not deliver the required disclosure statement, the prospective buyer may exercise the right to rescind until closing. The Court rejected Bowen's arguments that the statute did not apply in those situations in which the rescission was not related to the disclosures and that Almanza had waived the right to rescind by conducting an on-site inspection.

Blakely Commons v. Blakely Comm., 167 Wn.2d 781 (2009) – Compulsory binding arbitration
Torgerson v. One Lincoln Tower, 166 Wn.2d 510 (2009) – Non-refundable deposits.
Pardee v. Jolly, 163 Wn.2d 558 (2008) – Enforcement of option to purchase.
Ross v. Kirner, 162 Wn.2d 172 (2007) – Grant of easements by seller after signing purchase agreement.
Crafts v. Pitts, 161 Wn.2d 16 (2007) – Effect of bankruptcy on right to specific performance.
Alejandre v. Bull, 159 Wn.2d 674 (2007) – Economic loss doctrine and negligent misrepresentation.
Van Dinter v. Orr, 157 Wn.2d 329 (2006) – Duty to disclose encumbrance.
Hornback v. Wentworth, 132 Wn.App. 504 (2006) – Rescission for impossibility of performance.
Ross v. Ticor Title Insurance Company, 135 Wn.App. 182 (2006) – Merger and negligent misrepresentation.
Paradiso v. Drake, 135 Wn.App. 329 (2006) – Specific performance.
Carbon v. Spokane Closing and Escrow, Inc., 135 Wn.App. 870 (2006) – Priority of seller financing.
South Kitsap Family Worship Center v. Weir, 135 Wn.App. 900 (2006) – Merger of agreement into deed.
Bartlett v. Betlach, 136 Wn.App. 8 (2006) – Failure to include legal description.
Evans v. Rauth, 138 Wn. App. 834 (2007) – Failure of inspection condition to closing.
Nishikawa v. U.S. Eagle, 138 Wn.App. 841 (2007) – Seller's refusal to insert legal description.
Ugster v. City of Spokane, 139 Wn. App. 21 (2007) – Right of city to sell garage.
Uznay v. Bevis, 139 Wn. App. 359 (2007) – Failure of all parties to join in extension amendment.
Otis Housing Association, Inc. v. Ha, 140 Wn.App. 470 (2007) – Expiration of option.
Endicott v. Saul, 142 Wn.App. 899 (2008) – Undue influence exerted by broker.
Bloor v. Fritz, 143 Wn.App. 718 (2008) – Rescission for to disclose prior illegal use.
Stieneke v. Russi, 145 Wn.App. 544 (2008) – Misrepresentation as to physical condition.
Home Realty Lynnwood, Inc. v. Walsh, 146 Wn.App. 231 (2008) – Statute of frauds; lack of legal description.
Geonerco v. Grand Ridge Props. IV, LLC, 146 Wn.App. 459 (2008) – Statue of frauds; subsequently inserted legal description.
South Tacoma Way, LLC v. State of Washington, 146 Wn. App. 639 (2008) – Ultra vires sale by state.
King v. Rice, 146 Wn.App. 662 (2008) – Claim for damage to personal property following sale.
Carlile v. Harbour Homes, Inc., 147 Wn.App. 193 (2008) – Ability to assign warranty of habitability and consumer protection act claims.
Jaeger v. Cleaver Constr., Inc., 148 Wn.App. 698 (2009) – Application of comparative negligence and duty to mitigate damages.
Cox v. O'Brien, 150 Wn.App. 24 (2009) – Economic loss doctrine.
Jackowski v. Borchelt, 151 Wn.App. 1 (2009) – Economic loss doctrine and broker liability.
Thompson v. Lennox, 151 Wn.App. 479 (2009) – Damages for failure to build within height restriction.
Waters Edge Homeowners Assoc. v. Waters Edge Associates, 152 Wn.App. 572 (2009) – Reasonableness of settlement of condominium defect claim.
Townsend v. Quadrant, 153 Wn.App. 870 (2009) – Binding arbitration in single family residential construction agreements.

C. Claims Against Third Parties

Preview Props. v. Landis, 161 Wn.2d 383 (2007) – Claim against broker.

Ramos v. Arnold, 141 Wn.App. 11 (2007) – Appraiser liability.

III. Title Insurance

Campbell v. Tigor Title, 166 Wn.2d 466 (2009) – Exclusions for defects not revealed by public records and defects arising after the date of the policy.

IV. Real Property Lending Transactions

A. Usury

Mackey v. Maurer, 153 Wn.App. 107 (2009) – Common law vs. statutory usury.

B. Priority

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

Bank of America v. Prestance Corporation, 160 Wn.2d 560 (2007) – Equitable subrogation

Seattle Mortgage Co. v. Unknown Heirs of Gray, 133 Wn.App. 479 (2006) – Utility service refusal policy.

In re Trustee's Sale of Real Property of Whitmire, 134 Wn.App. 440 (2006) – Attorney lien.

Bank of America v. Owens, 153 Wn.App. 115 (2009) – Effect of divorce decree.

C. Actions to Collect

***McCurry v. Chevy Chase Bank, FSB*, 169 Wn.2d 96 (2010)**

Facts: McCurry borrowed money from Chevy Chase Bank and the loan was secured by a deed of trust on McCurry's residence. When McCurry repaid the loan, the payoff statement included itemized fax charges (\$20) and a notary fee (\$2). McCurry paid these charges. McCurry then sued the Bank, alleging that fees were not authorized by the deed of trust and that the Bank violated the Washington Consumer Protection Act by representing that the payment of these fees were required to secure a reconveyance of the deed of trust. The trial court dismissed the claim on the grounds that federal law regulating federal savings associations preempted state law and the dismissal was affirmed by the Court of Appeals.

Holding: The Supreme Court reversed. Generally applicable state laws that only incidentally affect a bank's lending operations are not preempted by federal statute.

Here, the McCurrys allege that Chevy Chase was precluded from charging fax and notary fees *under the terms of the deed of trust* -a matter of contract law. State contract law does not purport to impose requirements on loan-related fees; state contract law instead requires parties to adhere to the terms of their contracts. Forcing Chevy Chase to adhere to the terms of its contract only incidentally affects the loan-related fees, as permitted under 12 C.F.R. § 560.2(c).

....

The McCurrys' CPA unfair and deceptive practice claim also survives preemption *to the extent* it is a misrepresentation stemming from the contract. The McCurrys allege Chevy Chase fraudulently represented that reconveyance of title was only possible *under the terms of the deed of trust* if the fax and notary fees were paid. A state law that precludes a party from misrepresenting the terms of its contract is one of general applicability, having only an incidental effect on federal loan operations, and is not preempted.

The lower courts erred in focusing on whether federal law permitted the fees, as opposed to focusing on whether the federal regulations preempted state claims arising from the alleged fraudulent misrepresentation of those fees.

Albice v. Premier Mortgage Servs. of Washington, 157 Wn.App. 912 (2010)

Facts: Albice and Tecca owned improved property on Hartstine Island in Mason County. Tecca borrowed \$115,000 from Option One, a subsidiary of H&R Block and the loan was secured by a deed of trust on the property. The loan was serviced by Premier Mortgage, another subsidiary of H&R Block. Tecca defaulted on the loan and a nonjudicial foreclosure was commenced. The parties entered into a forbearance agreement under which additional payments were made by Tecca and the sale was continued for six times. Ultimately, Premier claimed that Tecca failed to make all of the payments due under the forbearance agreement and conducted a nonjudicial sale. The property, which was worth not less than \$750,000, was sold for \$130,000 to Dickinson. Tecca sued to set aside the sale, claiming that it was conducted beyond the 120 day limit on extensions of the original sale date. The trial court dismissed the claim, finding that although the sale was conducted more than 120 days from the original sale date, Dickinson was a bona fide purchaser who was entitled to rely on the recitations in the trustee's deed that the sale was conducted in accordance with applicable law.

Holding: The Court of Appeals reversed. The Court concluded the requirements of RCW 61.24.040(7) that require the trustee's deed to recite facts showing that the sale was conducted in accordance with the requirements of the Deed of Trust Act were not satisfied by merely conclusory statements that the sale complied with applicable law. Since the deed did not comply with the requirements of the Act, Dickinson was not entitled to rely upon the statements in the deed and was not a bona fide purchaser. The sale was conducted 161 days after the date specified in the original notice of sale, which was beyond the 120 day limit imposed by RCW 61.24.040(6) for continuances. After the expiration of the 120 time limit, the trustee had no authority to conduct the sale and it was void. In addition, given Dickinson's status as a sophisticated real estate investor (he had attended approximately 35 foreclosure sales and had purchased 13 properties at foreclosure), the disparity of the purchase price paid for the property compared to its value and Dickinson's knowledge of the original sale date, created a duty to inquire about the circumstances of the sale, which would have revealed that the sale was being conducted contrary to law. The disputed circumstances surrounding a final payment by Tecca under the forbearance agreement required that the trustee provide additional notice of amounts due in order to satisfy the trustee's fiduciary duty to both the borrower and the lender.

Westar Funding, Inc. v. Sorrels, 157 Wn.App. 777 (2010)

Facts: Sorrels sold property in Gig Harbor to Brown in 1992. Part of the purchase price was in the form of a note secured by a deed of trust. The note, in the amount of \$33,167, was due in 1994. Brown defaulted, but Sorrels did not commence a foreclosure. Instead, Brown conveyed the property to Sorrels, as trustee for “The RES Trust,” in 1995. The excise tax affidavit recorded with the deed acknowledged that the conveyance was in lieu of foreclosure. Sorrels then borrowed \$61,500 from Westar Financial, Inc. in 2002. After various defaults and extension agreements on the Westar indebtedness, Westar foreclosed in 2007. Sorrels then attempted to non-judicially foreclose the deed of trust securing the 1992 note. Westar and the buyer at the foreclosure sale sued to quiet title and restrain the sale. The trial court granted summary judgment to Westar, holding that Sorrels was time-barred from foreclosing. Sorrels appealed.

Holding: The Court of Appeals affirmed. The undisputed facts established that the 1992 note matured in 1994 and no action was taken to collect the note until 2007. The applicable statute of limitations, former RCW 4.16.040, required that an action to enforce the note be commenced within six (6) years from the maturity date. Pursuant to RCW 7.28.300, the record owner of the property had a right to quiet title against anyone claiming the right to foreclose the 1992 deed of trust. Sorrels’ argument that the only consequence of the maturity of the note was to change the interest rate to a higher default rate was rejected. Sorrels also contended that the RES Trust had assumed the indebtedness and agreed to extend the maturity date. This argument was rejected based on the Statute of Frauds, RCW 19.36.010(2), which required that all agreements to pay the debt of another must be evidenced by a writing. The Court also affirmed the award of attorney fees to Westar under the 1992 promissory note and held that the appeal was frivolous.

Freestone Capital v. MKA Real Estate, 155 Wn.App. 643 (2010)

Facts: Freestone Capital made various loans to MKA Real Estate. The loans were guaranteed by Michael Abraham and Jason Sugarman. Freestone was located in Seattle; MKA and the guarantors were located in California. There was no choice of law or venue provisions in the guarantees. Following a default, the guarantors were sued in Washington by the lender to collect the debt. The guarantors asserted that the Washington court lacked personal jurisdiction over them and that California law was applicable to interpreting the guarantees. The trial court entered a summary judgment against the guarantors in the amount of the debt plus attorney fees. The guarantors appealed.

Holding: The trial court property exercised jurisdiction over the guarantors under the Washington Long-Arm Statute, RCW 4.28.185. The guarantees were material inducements to the making of the loans, which were controlled by Washington law. The guarantors visited Washington on multiple occasions and had numerous contacts with Freestone’s personnel in Washington. The loans and guarantees were payable at Freestone’s address in Washington. The guarantors acted purposefully to consummate the transaction in Washington and the assertion of

jurisdiction over the guarantors did not offend the Court's notion of fair play and substantial justice. The trial court erred in concluding that as a matter of law, Washington law applied to the interpretation of the guarantees. There was no choice of law provision in the guarantees and the choice of law in the loan documents was not controlling. The guarantees represented separate and distinct obligations for the loan documents. Applying Restatement (Second) of Conflict of Laws, §188, the Court concluded that a question of fact existed as to the most significant relationship with the guarantor transaction that would control whether Washington or California law would apply. The trial court also had to determine whether the application of Washington or California law would in fact result in a different outcome before reaching the significant relationship test.

Alhadeff v. The Meridian on Bainbridge Island, LLC, 167 Wn.2d 601 (2009) – Alleged wrongful draw on letter of credit.

Beal Bank, SSB v. Sarich, 161 Wn.2d 544 (2007) – Right of junior mortgage to collect following non-judicial foreclosure of senior loan.

Udall v. T.D., Escrow Services, Inc., 159 Wn.2d 903 (2007) – Mistaken bid by trustee.

Udall v. T.D. Escrow Services, Inc., 132 Wn.App. 290 (2006) – Deeds of Trust Act and delivery of deed.

CHD, Inc. v. Boyles, 138 Wash. App. 131 (2007) – Application of statute of limitations.

Wachovia v. Kraft, 138 Wash. App. 854 (2007) – Right to recover attorney fees.

Thompson v. Hanson, 142 Wn.App. 53 (2007) – Transfer in fraud of creditors.

Brown v. Household Realty Corp, 146 Wn.App. 157 (2008) – Foreclosure as bar to claims.

CHD Inc. v. Taggart, 153 Wn.App. 94 (2009) – Evidence of amount owed.

D. Mortgage Insurance

No cases in last five years.

V. **Landlord Tenant**

***Eastwood v. Horse Harbor Foundation, Inc.*, 241 P.3rd 1256 (Wash. 2010)**

Facts: Eastwood rented her horse farm to Horse Harbor Foundation that cared for abandoned and abused horses. HHF was a non-profit corporation. HHF failed to maintain the farm in accordance with the requirements of its lease. Eastwood sued for waste and breach of lease. Named as defendants were the paid manager of the HHF and two directors. The trial court found HHF liable for damages and imposed liability upon the manager and directors, finding that they were grossly negligent. The Court of Appeals held that the economic loss doctrine limited Eastwood's damages to those available for breach of lease and that the manager and directors could not be individually liable.

Holding: The Supreme Court reinstated the trial court verdict. A breach of lease that constitutes waste can support a damage claim under the lease as well as a tort action for waste. The economic loss rule was not intended to modify the liability for "independent torts," such as waste. It is settled law in Washington that an employee can be personally liable for tortious activity undertaken in the course of employment, so the award against the manager was appropriate. Similarly, the immunity for directors of non-profit companies provided by RCW

4.24.264(1) did not apply if the conduct of the directors was found to be grossly negligent. The majority opinion was signed by only three justices; six justices concurred by a separate opinions.

Little Mountain Estates Tenants Ass'n v. Little Mountain Estates MHC, LLC, 169 Wn.2d 265 (2010)

Facts: Little Mountain Estates operates a mobile home park intended for the elderly. Spaces were initially leased for a 25-year term, with rental increases limited to increases in the CPI. Upon assignment, the length of the lease was shortened to one or two years. After some tenants assigned their leases, the Tenants Association sued the landlord claiming that the provision shortening the term upon assignment violated the MHLTA and the CPA. The trial court dismissed the claim. The Court of Appeals reversed, finding that the assignment provision violated the MHLTA and remanded the case for further proceedings to determine whether a violation of the CPA had occurred.

Holding: RCW 59.20.090(1) provides that the landlord and tenant may negotiate the term of their rental agreement. In this case, the landlord and tenant expressly negotiated a term of 25 years so long as the original tenant was in occupancy and a shorter term if an assignment occurred. Nothing in the lease prohibited the assignment of the rental agreement and there was no violation of RCW 59.20.060(2) (d), which specifically preserves a tenant's right of assignment. The tenant's claim that the lease was misleading was related to the claimed CPA violation, and that matter was not before the Court for review.

Ledaura, LLC v. Gould, 155 Wn.App. 786 (2010)

Facts: Caruthers, as landlord, entered into a lease with several individuals for two lots and a commercial building in Tacoma. The day after the lease was signed, the same parties entered into an option pursuant to which the tenants were granted an option to acquire the property for \$1,060,000 prior to 2014. The option neither referenced the lease nor referenced any of the lease terms. Certain terms of the lease and option were different, such as the ability to assign. The lease prohibited any assignment without consent; the option allowed the rights to be assigned. After several years, a dispute arose between the landlord and tenant as to the payment of rent. The landlord commenced an unlawful detainer action against the tenant. The tenant then attempted to exercise its option to purchase. During the pendency of an appeal in that action, the landlord commenced a declaratory judgment action seeking to terminate the option based on the default under the lease. The trial court ruled in favor of the landlord on summary judgment and the tenant appealed.

Holding: The Court of Appeals reversed the summary judgment. The lease contained no explicit or implicit reference to the option, and the option contained no reference to the lease. Separate consideration was paid for the option; the lease contained an integration clause. The Court noted that the trial court observed: "The language that would have made it an easy case to resolve is *missing* from the agreements, namely language requiring the lessee to be in compliance with all lease terms in order to exercise the purchase option;" yet the trial court in effect essentially read this missing language into both agreements. A question of material fact

remained as to whether the parties intended the tenant's ability to exercise the option to be dependent upon full compliance with the lease and the record failed to support the trial court's conclusion that both agreements constituted a single unified contract.

Losh Family, LLC v. Kertsman, 155 Wn.App. 458 (2010)

Facts: Losh leased a warehouse to Kertsman in November 2004 for a five year term. In November 2005, Grover bought Kertsman's business and was assigned the lease. The assignment was to Grover and his wife individually, doing business as Grover International, LLC. Losh consented to the assignment. Grover then sold his business to Sushkin and assigned the lease. Sushkin defaulted in October 2006. Losh reclaimed the premises, released them and then sued Kertsman, Grover and Suskin for damages. The trial court awarded Losh \$74,670, including attorney fees against the defendants and Grover was ordered to indemnify Kertsman for the award. Grover appealed.

Holding: Grover contended that even though the assignment of the lease referred to him personally, he signed the assignment as a member of Grover International LLC. The Court of Appeals rejected Grover's argument that this signature created any question concerning personal liability. The assignment in five different places referred to the assignee as Grover as an individual. If Grover did not want to be personally bound, he should have insisted upon the removal of these references. The legal description of the property in the lease was deficient and the lease was unenforceable under the statute of frauds. However, Grover took possession of the premises and his other actions – notably representing to Suskin that there was a five year lease – were sufficient to remove the transaction from the statute of frauds.

Tacoma Rescue Mission v. Steward, 155 Wn.App. 250 (2010)

Facts: Tacoma Rescue Mission owned and operated an apartment complex that was operated under Section 8, Moderate Rehabilitation Program for Single Room Occupancy Dwellings for Homeless Persons, administered by HUD. Stewart rented an apartment in the project. Stewart engaged in inappropriate conduct, including threatening other occupants of the project. In 2007, TRM issued numerous "no cause" termination notices under RCW 59.12.030(2), culminating with a notice on August 1, 2007, demanding that Stewart vacate the apartment by August 31st. Stewart did not comply, and on October 9th, he was served with a three-day nuisance notice, alleging excessive noise and threatening behavior toward other tenants. After Stewart refused to comply, TRM filed an unlawful detainer action under RCW 50.12.030(5) on November 1st and obtained an order directing Stewart to show cause why he should not be evicted. Stewart filed an answer and moved to dismiss for lack of jurisdiction. The trial court granted TRM a writ of restitution based on nuisance. Stewart appealed.

Holding: Stewart's lease, which was drafted to comply with HUD regulations, required that any termination notice state the date on which the tenancy would terminate and the reasons for the termination with "specificity to enable the resident to understand the grounds for termination." The notice from TRM did not state a date on which the tenancy would terminate and the grounds for termination were generalized conclusions that his neighbors were afraid of

him. Because the notice of termination failed to comply with the requirements of Stewart's lease, it was insufficient to maintain an unlawful detainer action against him.

***Hous. Auth. v. Kirby*, 154 Wn.App. 842 (2010)**

Facts: Kirby rented an apartment from the Everett Housing Authority. Kirby failed to pay rent in May 2008, and EHA commenced an unlawful detainer action. The summons that was served on Kirby did not comply with the requirements of RCW 59.18.365. The trial court held that the defective summons deprived it of jurisdiction and dismissed the action without prejudice and refused to award attorney fees to Kirby. Kirby appealed.

Holding: The Court of Appeals affirmed the dismissal without prejudice. Any noncompliance with the statutory method of process prevented the superior court from acquiring subject matter jurisdiction over the unlawful detainer proceeding. Lack of jurisdiction rendered the superior court powerless to rule on the merits of the case, and in such circumstance, dismissal without prejudice was the limit of the relief the court could grant. The Court rejected Kirby's arguments concerning the award of attorney fees under RCW 59.18.290, 4.84.250 and .270, and 4.84.330. Statutory attorney fees of \$200 were appropriate under RCW 4.84.080.

Christensen v. Ellsworth, 162 Wn.2d 365 (2007) – Computation of 3-day notice.

Resident Action Council v. Seattle Housing Authority, 162 Wn.2d 773 (2008) – Right of housing authority to control use.

Thompson v. King Feed & Nutrition, 153 Wn.2d 447 (2005) – Measure of damages for tenant's destruction of leased premises.

Hous. Auth. v. Pleasant, 126 Wn.App. 382 (2005) – Right to a hearing in eviction action.

Negash v. Sawyer, 131 Wn.App. 822 (2006) – Remedies available in default judgment.

Transpac Development, Inc. v. Oh, 132 Wn.App. 212 (2006) – Return of security deposit.

Holiday Resort Community Association v. Echo Lake Associates, LLC, 134 Wn.App. 210 (2006) – Mobile Home Landlord Tenant Act.

Christensen v. Ellsworth, 134 Wn.App. 295 (2006) – Computation of time for summons.

Quality Food Centers v. Mary Jewell T, LLC, 134 Wn.App. 814 (2006) – Attorneys fee provision.

Parker v. Taylor, 136 Wn.App. 524 (2006) – Obligation to store tenant's property.

Truly v. Heuft, 138 Wn. App. 913 (2007) – Failure to provide required summons.

IBF, LLC v. Heuft, 141 Wn.App. 624 (2007) – Notice period required under lease.

Lake Union Drydock Co, Inc. v. State, 143 Wn. App. 644 (2008) – Rent determination for aquatic lands.

West v. Port of Olympia, 146 Wn.App. 108 (2008) – Public disclosure of Port lease negotiations.

Laffranchi v. Lim, 146 Wn.App. 376 (2008) – Party in possession as necessary party.

Little Mountain Estates Tenants Ass'n v. Little Mountain Estates MHC, LLC, 146 Wn.App. 546 (2008) – Enforcement of waivers under MHLTA.

Kaintz v. PLG, Inc., 147 Wn.App. 782 (2008) – Enforcement of mutual attorney fee clause.

Commonwealth Real Estate v. Padilla, 149 Wn.App. 757 (2009) – Acceptance of rent following default.

Leda v. Whisnand, 150 Wn.App. 69 (2009) – Tender of rent following expiration of lease term.

Indigo Real Est. Serv. v. Rousey, 151 Wn.App. 941 (2009) – Right to remove identity from eviction pleadings.

Optimer International Inc v. RP Bellevue, 151 Wn.App. 954 (2009) – Enforcement of arbitration provision in lease.

Dill v. Michelson Realty Co., 152 Wn.App. 815 (2009) – Award for landlord damage to property.

VI. Easements/Covenants

Rainier View Court Homeowners Ass'n, Inc. v. Zenker, 157 Wn.App. 710 (2010)

Facts: Zenker developed a residential subdivision, Rainier View Court, in three phases. The first two phases were 179 single family lots; the third phase was a single, multifamily lot upon which there were to be constructed 64 multifamily units. The preliminary plat for the project contained a “Tract B,” which was designated as a park. The final plat for phase I of the development was recorded in 2002 and contained a dedication of Tract B as a park with a notation that the parcel was to be deeded to the Rainier View Court homeowners association. At the same time, CC&Rs were recorded that created the HOA, but did not reference Tract B. All of the lots in phase I and phase II had been sold by 2005. In 2007, Zenker was planning to develop the multifamily tract and a representative of the HOA contacted the Pierce County Planning Department to register an objection to any future occupants of phase III using the Tract B park. In response to that objection, Zenker, who was still a director of the HOA, granted an easement to use Tract B for the benefit of phases II and III of the development. The HOA commenced a declaratory judgment action alleging that Zenker lacked the authority to grant the easement for the benefit of phases II and III and that phase III residents had no right to use the park tract. The trial court entered a summary judgment in favor of Zenker.

Holding: The Court of Appeals affirmed. The principal issue on appeal was the evidence that was appropriate for the trial court to examine in rendering the summary judgment. The HOA contended that the trial court erred in referring the original hearing examiner record and should have confined itself to the terms of the only recorded dedication of Tract B, which was in the final plat for phase I. In reviewing the language of the dedication, the Court of Appeals found it to be ambiguous and it was appropriate for the trial court to refer to the hearing examiner proceedings to determine the true intent. The claim against Zenker for breach of fiduciary duty was also rejected, since Zenker’s action simply confirmed the original intent of the developer to grant an easement to phase III residents use the park tract.

Lakewood Racquet Club v. Jensen, 156 Wn.App. 256 (2010)

Facts: Over a period from 1964 to 1973, Orr transferred a portion of property that he owned in Pierce County to the Lakeview Racquet Club with the following restriction:

This land and the improvements to be placed thereon shall be used for the purposes of a tennis, swimming, and squash club, and shall be used for no other purpose. No residence shall be erected thereon other than a dwelling and outbuilding for the use of a caretaker, nor shall the land be subdivided and sold in tracts, without the consent of the sellers, their heirs, and assigns.

Orr’s family sold the remaining property after his death. In 2005, the Club requested that Orr’s heirs execute a relinquishment of the restrictive covenant in connection with a development plan for the Club property that contemplated the construction of 24 condominium units. The heirs declined and in 2007, the Club commenced a declaratory judgment against the heirs that they lost

standing to enforce the covenant when the remainder of Orr's property was sold. The trial court entered a judgment in favor of the heirs, declaring that the covenant was still enforceable.

Holding: The Court of Appeals reversed. The issue presented to the Court was one of first impression in Washington – whether an original covenantee could enforce restrictive covenants against the original covenantor when the property to be benefited by the restrictive covenant is no longer owned by the original covenantee. Relying on case law from other jurisdictions, the Court concluded that Orr's heirs were not entitled to enforce the covenants because they no longer retained an ownership interest in the benefited property and therefore had no justiciable interest in enforcing the covenants. The Court rejected the argument that the heirs held the benefits of the restrictive covenant "in gross." The covenantee may only enforce the restrictive covenant if they have a justiciable interest in the enforcement, which generally requires an ownership interest in the benefited property.

Bloome v. Haverly, 154 Wn.App. 129 (2010)

Facts: Haverly bought a house from Bloome that was on Magnolia Bluff in Seattle. Bloome retained another, undeveloped lot that was located below Haverly's parcel. The Haverly house had water views, and as part of the purchase transaction, Bloome agreed to a restrictive covenant that encumbered his lot to protect Haverly's views. At the same time, Haverly agreed to certain development restrictions on his lot that were in the form of a covenant. Bloome intended to build a house on his lot, and his lawyer asked Haverly to confirm that the restrictions that view restrictions did not apply to any building that was constructed on the lot. Haverly refused to confirm that understanding, the Bloome sued Haverly for a declaratory judgment confirming Bloome's right to build. The trial court entered a judgment in favor of Haverly.

Holding: The Court of Appeals reversed. The Court found that the status of the controversy had not matured into a dispute that was suitable for a declaratory judgment action. The only evidence presented related to the intentions of the parties. Since there did not exist a dispute over whether actual building plans satisfied the covenant or of other evidence establishing a necessary minimum degree of interference with the view from the Haverly's property, a declaratory judgment as requested by either party would not conclusively settle the controversy between them. The lack of the ability to reach a conclusive resolution of the dispute required that the declaratory judgment action be dismissed.

Maier v. Giske, 154 Wn.App. 6 (2010)

Facts: Giske owned a parcel of property off the end of Southwest Maury Point Road on Vashon Island. Maier acquired the parcel that was adjacent to the east boundary of Giske's property. Giske's son acquired the property adjacent to the south boundary of Maier's property. Maier's property was conveyed with an easement for access. A driveway linked all three parcels to Southwest Maury Road. Maier's predecessor in interest constructed a fence along the border of the Giske property that was two feet east of the actual boundary line. Giske planted and maintained the two foot strip for a period from 1982 to 2004. Maier replaced the fence and relocated on the survey line. In the process, Maier destroyed Giske's plants. Maier also

removed plants that Giske had placed on her son's property that interfered with Maier's use of the driveway easement. In 2006, Maier sued Giske for nuisance and trespass. Giske counterclaimed for quiet title through adverse possession, asserted that the access easement violated the statute of frauds and sought damages from the removal of shrubs and landscaping. The trial court quieted title in Giske to the two foot strip and awarded damages for the removal of Giske's plants. The trial court rejected Maier's claims concerning interference with the easement, holding that the easement failed to comply with the statute of frauds.

Holding: The Court of Appeals reversed the dismissal of Maier's claims relating to interference with the easement area. The exact location of the easement could be determined by reference to the description in Maier's deed. Because the description was sufficient to allow location without the necessity of extrinsic evidence, it did not violate the statute of frauds. The Court rejected Giske's claim that the statute of frauds required a complete description of the servient estate, since the legal description of the easement was sufficient to allow location, which differentiated this case from prior cases dealing with floating easements over inadequately described property. The adverse possession claim was affirmed – Giske had used the property in a manner that would cause a reasonable person to conclude that she was the owner. Her subjective belief concerning ownership was irrelevant. She treated the land as an owner, which satisfied the "hostility" element of an adverse possession claim. A portion of the damage award relating to plants located on Giske's son's property was reversed, since RCW 64.12.030 allows only the owner of the affected property to assert a claim for damages for intentional removal of trees and other plant material. Giske had also made a claim for damages arising from the removal of lateral support, but Court noted that her testimony on this matter was insufficient to establish by a preponderance of evidence that Maier's actions were responsible for the damage.

Sanders v. City of Seattle, 160 Wn.2d 198 (2007) – Use of public easement.

Heg v. Alldredge, 157 Wn.2d 154 (2006) – Abandonment of an easement.

Viking Props., Inc. v. Holm, 155 Wn.2d 112 (2005) – Severance of covenant.

Kershaw Sunnyside Ranches, Inc. v. Yakima Interurban Lines Ass'n, 156 Wn. 2d 253 (2006) – Scope of railway right of way easement.

Bunnell v. Blair, 132 Wn.App. 149 (2006) – Private easements.

Dickson v. Kates, 132 Wn.App. 724 (2006) – Statute of frauds for covenants.

M.K.K.I., Inc. v. Krueger, 135 Wn.App. 647 (2006) – Amending easement shown on plat.

Wimberly v. Caravello, 136 Wn.App. 327 (2006) – Interpretation of building covenant.

Beers v. Ross, 137 Wn.App. 566 (2007) – Shared driveway.

Green v. Normandy Park, 137 Wn.App. 665 (2007) – Set back covenant.

Bauman v. Turpen, 139 Wn.App. 78 (2007) – Height restriction.

Visser v. Craig, 139 Wn.App. 152 (2007) – Easement by necessity.

Zunino v. Rajewski, 140 Wn.App. 215 (2007) – Necessity of conveyance to create easement.

Save Sea Lawn Acres Ass'n v. Mercer, 140 Wn.App. 411 (2007) – Revocation of covenants.

Noble v. Safe Harbor Family Preservation Trust, 141 Wn.App. 168 (2007) – Easement by necessity.

810 Properties v. Jump, 141 Wn.App. 688 (2007) – Deed reservation.

Gold Creek North L.P. v. Gold Creek Umbrella Association, 143 Wn.App. 191 (2008) – Enforcement of agreement to create easement.

Mack v. Armstrong, 147 Wn.App. 522 (2008) – Height restriction.

Ross v. Bennett, 148 Wn.App. 40 (2009) – Residential use restriction.

Deep Water Brewing, LLC v. Fairway Resources Limited, 152 Wn.App. 229 (2009) – Violation of view easement.

Kalich v. Clark, 152 Wn.App. 544 (2009) – Action to recover maintenance expenses for joint easement.
Snyder v. Haynes, 152 Wn.App. 774 (2009) – Restrictions on use of access easement.

VII. Liens/Judgments/Attachments

***Sherron Associates Loan Fund V (Mars Hotel) LLC v. Saucier*, 157 Wn.App. 357 (2010)**

Facts: Sherron Associates formed Loan Fund V, LLC to loan money to Saucier for the development of the Mars Hotel in Spokane. The loan was not repaid, and Loan Fund obtained a judgment against Saucier in 1998. A certificate of cancellation was filed for Loan Fund in 2002. At the time of dissolution, Loan Fund had only one member, GCA Investments, Inc. and GCA was unaware of the filing of the certificate of dissolution. After the certificate of dissolution was filed, GCA, as the manager of Loan Fund, transferred all of the assets of Loan Fund to Sherron Associates. Sherron Associates then moved to extend the judgment against Saucier for an additional ten years. Saucier objected and contended that since Loan Fund had been dissolved, the assignment of the judgment to Sherron Associates was void. The Superior Court for Spokane County agreed, and refused to extend the judgment.

Holding: The Court of Appeals reversed. Although the Limited Liability Company Act is silent on this point, the Court held that upon dissolution, the ownership of the assets of a limited liability company pass to its members. The effect of the trial court ruling was to treat those assets as if they no longer existed. Since GCA was the sole member of Loan Fund, GCA became the owner of the judgment and had the right to assign it to Sherron Associates and Sherron had the right to extend the judgment.

***Williams v. Athletic Field, Inc.*, 155 Wn.App. 434 (2010)**

Facts: Williams entered into an oral contract with Athletic Field for site work. After paying Athletic \$155,000, Williams ordered Athletic to cease work. Athletic filed a lien for approximately \$275,000, which Athletic claims was the amount due for work performed. Williams disputed this amount. The lien was signed by Rebecca Southern, an employee of LienData USA, what was identified as the authorized agent of Athletic. The acknowledgement of Southern's signature was in the form of an individual attestation. The trial court held that the lien had been improperly executed, ordered the lien released and awarded attorney fees to Williams under the frivolous lien statute, RCW 60.04.081.

Holding: The Court of Appeals agreed that the lien was invalid. The lien statute requires that the lien be signed by the claimant or an authorized agent of the claimant, and that the signature be notarized. The agent executing the lien claim was LienData, not Southern, who was an employee of LienData. The notarization form used should have been the corporate form of acknowledgement specified in RCW 64.08.070. Alternatively, a certificate of acknowledgement in the form set forth in RCW 42.44.100(2) would suffice. The attestation clause signed by Southern did not meet the requirements of either statute, and the lien was invalid. The Court reversed the award of attorney fees under the frivolous lien statute. Just because the lien was invalid did not render the claim frivolous. Athletic was entitled to a trial on the merits

concerning its claims, rather than having all of those claims dismissed upon the finding that the lien was invalid.

Thompson v. Hanson, 167 Wn.2d 414 (2009) – Uniform Fraudulent Transfer Act.

Sorenson v. Pyeatt, 158 Wn.2d 523 (2006) – Forgery.

Allyn v. Asher, 132 Wn.App. 371 (2006) – Writ of attachment.

Camp Finance, LLC v. Brazington, 133 Wn.App. 156 (2006) – Sheriff’s sale statute.

Henifen Construction, LLC v. Keystone Construction, G.W. Inc., 136 Wn.App. 268 (2006) – General contractor as owner’s agent.

Williams v. Athletic Field, Inc., 142 Wn.App. 753 (2006) – Filing by authorized agent.

Van Wolvelaeres v. Weathervane Window Co., 143 Wn.App. 400 (2008) – Failure to timely commence foreclosure.

Campbell Crane & Rigging Servs., Inc. v. Dynamic Int’l AK, Inc., 145 Wn.App. 718 (2008) – Pre-lien notice requirement.

Douglas v. Hill, 148 Wn.App. 760 (2009) – Transfer in fraud of creditors.

Marriage of Baker, 149 Wn.App. 208 (2009) – Property constituting homestead.

VIII. Homeowners' Associations

Lake v. Woodcreek Homeowners’ Association, 168 Wn.2d 694 (2010)

Facts: Lake and Clausing owned neighboring condominium units in the Woodcreek condominium. The units were separated by a small greenbelt. Lake’s unit was originally constructed as a two story unit; Clausing’s unit was originally a one-story unit, but he added a second story after receiving permission from the board of the HOA. Lake objected and sued Clausing and the HOA, seeking to either compel removal of the addition or require an unanimous amendment to the declaration as a condition of maintaining the addition. The trial court dismissed the complaint. The Court of Appeals reversed, holding that the addition incorporated common area airspace into the unit and the result would change the percentage interest of the unit that required an unanimous amendment to the declaration.

Holding: The Supreme Court reversed the Court of Appeals. The Court addressed two issues: (1) Did the Horizontal Property Regimes Act (Chpt. 64.32 RCW) prohibit the division of the condominium’s common area and (2) did the HPRA require the unanimous consent of all members of the condominium association in order to combine a portion of the common area with a private unit. Reading RCW 64.32.050(3) and 64.32.090(10) together, the Court concluded that divisions of the common area were not prohibited by HPRA; the prohibition in RCW 64.32.050(3) was intended to prevent involuntary partitions of the common area, while RCW 64.32.090(10) specifically required that procedures be contained in the declaration for combining and subdividing the common areas. The addition of the space did not change the percentage interests of the units, which were determined arbitrarily by fixing a “value” for the condominium as a whole and each unit in the declaration. The fact that the fair market value of the unit might change was not relevant to whether the unit’s percentage of undivided interest in the common areas and facilities had been changed.

Bogomolov v. Lake Villa Condo. Ass’n., 131 Wn.App. 353 (2006) – Amendment to bylaws.

Ebel v. Fairwood Park II Homeowners’ Association, 136 Wn.App. 787 (2006) – Validity of amendment.

Lake v. Woodcreek Homeowners Association, 142 Wn.App. 356 (2007) – Authority of board to authorize improvements.
Serrano on Cal. Condo. Homeowners Ass’n v. First Pac. Dev., Ltd., 143 Wn.App. 521 (2008) – Effect of dissolution of developer.
Fawn Lake Maint. Comm’n v. Abers, 149 Wn.App. 318 (2009) – Allocations of assessments.

IX. Landowner Tort Liability to Others/Insuring Real Property

A. Rules of Liability

***Curtis v. Lein*, 169 Wn.2d 884 (2010)**

Facts: Lein owned a farm on which there was a pond. Lein constructed a dock over the pond to provide access to a drainage pipe. Lein sold the farm, but continued to live there with their son and his family. Lein also employed a manager, who lived at the farm with his girlfriend and her son. The girl friend, Curtis, walked onto the dock and one of the boards gave way, causing her to fall into the pond and break her tibia. Immediately after the accident, Lein had the dock removed. Curtis sued the farm owner and Lein. The trial court dismissed the claim against Lein, ruling that the doctrine of *res ipsa loquitur* could not be used to establish the negligence of Lein. The Court of Appeals affirmed, although it held that while *res ipsa loquitur* could be used to establish negligence, the theory did not relieve Curtis of the burden of proving that the defect in the dock was undiscoverable to her, which was a prerequisite for establishing liability to Curtis as an invitee.

Holding: The Supreme Court reversed. A plaintiff may rely upon *res ipsa loquitur's* inference of negligence if (1) the accident or occurrence that caused the plaintiff's injury would not ordinarily happen in the absence of negligence, (2) the instrumentality or agency that caused the plaintiff's injury was in the exclusive control of the defendant, and (3) the plaintiff did not contribute to the accident or occurrence. As the Court of Appeals noted, people do not routinely fall through docks in the absence of some negligence in maintenance. The application of the *res ipsa loquitur* created an inference of Lein's knowledge of the defect, and the burden to disprove that inference and rebut the other prerequisites of establishing a breach of duty to Curtis as an invitee shifted to Lein.

***Neil vs. NWCC Investment V, LLC*, 155 Wn.App. 119 (2010)**

Facts: NWCC Investments was the owner of phase five of the Snoqualmie Ridge development. NWCC contracted with B&B Equipment, Construction and Supply for B&B to be the general contractor for the project. NWCC paid most of the constructions expenses directly, rather than reimbursing B&B. NWCC also contracted with Green Valley Drywall to perform drywall installation. One of Green Valley's employees, Romero, fell off of a plank elevated six to eight feet above the floor and sustained serious injuries. Romero sued B&B and NWCC, claiming that each owed him a non-delegable duty to maintain a safe working site. The trial court dismissed NWCC on a motion for summary judgment. B&B settled with Romero prior to trial. Romero appealed the dismissal of NWCC.

Holding: The dismissal was affirmed. RCW 49.17.060(2) imposes on general contractors a non-delegable specific duty to ensure compliance with WISHA for the protection of all of the workers on the jobsite. Although there have been instances in which a similar duty was imposed on jobsite owners, if a jobsite owner does not retain control over the manner in which an independent contractor completes its work, the jobsite owner does not have a duty under WISHA to ensure compliance with WISHA. Romero presented no evidence that NWCC retained control of the manner in which Green Valley or B&B performed their respective work. In the absence of evidence that NWCC retained control over the jobsite, the dismissal was appropriate.

Schmidt v. Coogan, 162 Wn.2d 488 (2007) – Slip and fall.

Gildon v. Simon Property Group, Inc., 158 Wn.2d 483 (2006) – Slip and fall.

Hatch v. City of Algona, 140 Wn.App. 752 (2007) – Sidewalk liability of employer.

Baynes v. Rustler's Gulch Syndicate, 142 Wn.App. 335 (2007) – Landowner duty to prevent drinking.

Nunez v. Am. Bldg. Maint. Co. West, 144 Wn.App. 345 (2008) – Slip and fall with indemnification.

Sourakli v. Kyriakos, Inc., 144 Wn.App. 501 (2008) – Criminal assault in parking lot.

Swinehart v. City of Spokane, 145 Wn.App. 836 (2008) – Recreational use statute.

Wilson v. City of Seattle, 146 Wn.App. 737 (2008) – Municipality duty to maintain.

Van Scoik v. Dept't of Natural Res., 149 Wn.App. 328 (2009) – Immunity under recreational land statute.

Curtis v. Lein, 150 Wn.App. 96 (2009) – Duty owed to invitee.

Wirtz v. Grillogly, 152 Wn.App. 1 (2009) – Assumption of risk.

Gates v. Port of Kalama, 152 Wn.App. 82 (2009) – Requirements for claims against municipality.

B. Insurance Coverage - Homeowners & Property

***Holden v. Farmers Ins. Co. of Wash.*, 169 Wn.2d 750 (2010)**

Facts: Holden purchased a “Broad Form Renters Package Policy” from Farmers Insurance to cover personal property that she owned within a residence that she rented. A fire occurred and Holden suffered damage to some of her property. She submitted a claim for “actual cash value” of the property, which was defined in the policy as the “fair market value of the property at the time of loss.” Holden had also purchased a Contents Replacement Cost Coverage Endorsement with the policy, which provided for reimbursement of the actual cost of replacement the damaged property with new property. In order to qualify for payment under the RCE, it was necessary for Holden to purchase the replacement property and submit invoices for reimbursement. Holden elected to seek payment for ACV because she could not afford to buy replacement property and wait for reimbursement. Farmers paid her \$1,174.41; she requested that the amount include sales tax. Farmers refused to pay any sales tax, taking the position that it was necessary for Holden to make a claim under the RCE in order to be compensated for sales tax. Holden sued for reimbursement. The trial court ruled in favor of Holden, finding that the policy language was ambiguous and must be construed against Farmers. The Court of Appeals reversed the trial court, holding that ACV did not include sales tax since the property was not replaced and therefore replacement cost did not apply.

Holding: The policy defined ACV as fair market value less depreciation. The policy did not define “fair market value,” and the Supreme Court held that this term was ambiguous. The

policy also provided that the payments under the policy would not exceed the “amount necessary to repair or replace the damaged property, or the limit” of the policy, whichever was less. A purchaser of the policy could conclude that the ACV would be determined based on the actual cost of the replacement property, including sales tax, less depreciation. The Court rejected the claim that the amount of reimbursement should be affected by the RCE. The Court reinstated the trial court award.

Am. Best Food, Inc. v. Alea London, 168 Wn.2d 398 (2010)

Facts: CafeArizona (“CA”) was sued by Dorsey, who claimed that actions of the restaurant’s employees exacerbated an injury and that the restaurant failed to take responsible steps to protect Dorsey from an assault that occurred on the premises. CA tendered the claim to its insurer, who denied coverage and refused to defend based upon the exclusion in the policy for injury arising out of assault or battery. CA sued the insurer, claiming bad faith and wrongful refusal to defend. The trial court dismissed the claims. The Court of Appeals partially reversed, finding that there was duty to defend and that there was insufficient evidence to support the summary dismissal of the issue of coverage.

Holding: The Supreme Court affirmed. The insurer was under a duty to defend CA even though there might be some doubt as to whether there was coverage. The allegations in the complaint asserted that the injury resulted from a failure to render post-assault assistance, which arguably was not excluded by the assault or battery exclusion. Negligent acts following an excluded act exacerbating the injury were covered under Washington law.

Cedell v. Farmers Ins. Co. of Washington, 157 Wn.App. 267 (2010)

Facts: Cedell suffered fire damage to his home that was insured by Farmers Insurance. After waiting a year for payment, Cedell sued Farmers alleging various acts of bad faith. The trial court held that Farmers was not entitled to assert the attorney-client privilege to withhold information in its claims file. Following an *in-camera* review of the file, the trial court ordered its entire contents revealed to Cedell and imposed sanctions on Farmers. Farmers sought discretionary review in the Court of Appeals.

Holding: The trial court was reversed. A first party insurer is entitled to assert the attorney-client privilege in bad faith litigation. In order for the insurer to lose the privilege, there must be a demonstration of fraud, not merely bad faith on the part of the insurer. The trial court must determine if there is a factual showing of wrongful conduct sufficient to invoke the fraud exception to the privilege; if a factual basis exists, the trial court may then conduct an *in-camera* review. The trial court abused its discretion in conducting the examination in the absence of any facts to support a claim of fraud.

Underwriters v. Valiant Ins. Co., 155 Wn.App. 469 (2010)

Facts: GCG Associates hired Stratford Constructors as the general contractor for the construction of a retirement center in Lynnwood, Washington. After completion, the owner

noticed several recurring water leaks. After further study, it was determined that there were several construction defects that resulted in water intrusion. GCG sued Stratford and various subcontractors. The action was settled by Stratford's insurer for over \$5 million. The insurer, Underwriters, sued Zurich for equitable contribution. Two Zurich affiliates had insured Stratford for three successive years and Underwriters had insured Stratford for two successive years. Zurich had contributed \$1 million to the settlement, which was the policy limit for one of its affiliated insurers for one occurrence. The trial court dismissed the action, ruling that the anti-stacking provision in the Zurich policies limited its obligation \$1 million.

Holding: The Zurich policies contained an "anti-stacking" provision that limited recovery to one policy limit per occurrence when the insured held one or more policies issued by companies affiliated with Zurich. This provision was unambiguous and enforceable. The policy defined "occurrence" as "accident, including continuous and repeated exposure to substantially the same general harmful conditions." The Court held that the continuous and repeated exposure of building to harmful moisture that gradually intruded through the building envelope over a five year period from different sources was a single occurrence within this definition.

***NW Bedding v. Nat'l Fire Ins.*, 154 Wn.App. 787 (2010)**

Facts: National Insurance insured Northwest Bedding under an all-risk commercial property and general liability insurance policy. Following a heavy snow fall, the Department of Transportation diverted snowmelt through trenches in the vicinity of NW Bedding's property. The water overflowed the trenches and caused damage to NW Bedding's buildings and property within the buildings. NW Bedding made a claim on its insurance policy; National Insurance denied the claim, asserting that the damage was the result of surface water or flood, both excluded perils under the NW Bedding policy. NW Bedding sued and the trial court dismissed the claim on summary judgment.

Holding: The Court of Appeals affirmed. NW Bedding argued that the loss was caused by the trenches which channeled water onto its property. However, the fact that the water may have been channeled onto the property did not change the fact that the loss was caused by surface water. The policy excluded losses from flood and surface water, and giving those terms their plain meaning, the Court concluded that the loss was excluded.

Mut. of Enumclaw Ins. Co. v. USF Ins. Co., 164 Wn.2d 411 (2008) – Application of selective tender and late tender rules.

Mutual of Enumclaw v. Paulson Constr., 161 Wn.2d 903 (2007) – Coverage for construction defects.

State Farm Fire & Cas. Ins. Co. v. Piazza, 132 Wn.App. 329 (2006) – Coverage exclusion for rental use.

Equilon Enter. LLC v. Great Am. Alliance Ins. Co., 132 Wn.App. 430 (2006) – Scope of general commercial liability policy.

Mut. of Enumclaw Ins. Co. v. Dan Paulson Constr., Inc., 132 Wn.App. 803 (2006) – Coverage by estoppel.

Nationwide Mutual Insurance Company v. Hayles, Inc., 136 Wn.App. 531 (2006) – Definition of accident and occurrence.

MacLean Townhomes, LLC v. American States Insurance Company, 138 Wn.App. 186 (2007) – Failure to provide timely notice of claim.

City of Oak Harbor v. St. Paul Mercury Ins. Co., 139 Wn. App. 68 (2007) – Exclusion for faulty workmanship.

Martin v. Johnson, 141 Wn.App. 611 (2007) – Reasonableness of settlement for tank removal.

State Farm Fire & Cas. Co. v. Ham & Rye, L.L.C., 142 Wn.App. 6 (2007) – Arson constituting an “accident.”

Lipscomb v. Farmers Ins. Co. of Washington, 142 Wn.App. 20 (2007) – Agent’s duty to advise on policy limits.

Holden v. Farmers Ins. Co. of Wash., 142 Wn.App. 745 (2008) – Definition of actual cash value excluding sales taxes.

Polygon Northwest Co. v. American National Fire Insurance Co., 143 Wash. App. 753 (2008) – Multiple insurers for construction defects.

Baldwin v. Silver, 147 Wn.App. 531 (2008) – Judicial estoppel as bar to claim.

Walla Walla Coll. v. Ohio Cas. Ins., 149 Wn.App. 726 (2009) – Loss outside policy period.

Ledcor Indus. v. Mut. Of Enumclaw, 150 Wn.App. 1 (2009) – Recoverable damages from bad faith refusal to defend.

Peterson v. Big Bend Ins. Agency, 150 Wn.App. 504 (2009) – Breach of duty of care by insurance agent.

X. Legal Actions

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

***Clipse v. Michaels Pipeline Constr.*, 154 Wn.App. 573 (2010)**

Facts: A contractor employed by King County entered onto the Clipse property to rehabilitate side-sewer pipes. The work resulted in gravel being deposited in a clean-out pipe, which caused a water back-up into the Clipse house. Clipse asserted that the work was commenced without authorization to enter onto the property and sued for damages under RCW 4.24.630. The trial court rejected Clipse argument that statutory trespass was established by the unauthorized entry onto the property, and found that factual disputes as to the elements of statutory trespass required a trial. The trial court then certified the issue of interpretation of the statute for appeal.

Holding: The Court of Appeals reversed the trial court. RCW 4.24.630 provides:

(1) Every person who goes onto the land of another and who removes timber, crops, minerals, or other similar valuable property from the land, or *wrongfully causes waste or injury* to the land, or wrongfully injures personal property or improvements to real estate on the land, is liable to the injured party for treble the amount of the damages caused by the removal, waste, or injury. *For purposes of this section, a person acts " wrongfully " if the person intentionally and unreasonably commits the act or acts while knowing, or having reason to know, that he or she lacks authorization to so act.* [Emphasis added]

The Court held that under the statute a person does not act wrongfully unless he or she acts intentionally, unreasonably, **and** while knowing or having reason to know he or she lacks authorization to so act. The trial court had erroneously read the phrase "commits the act or acts while knowing" as though a comma separated " act" and " or acts," making " act" a noun and "

acts" a verb. Under that interpretation, the contractor would have been liable if it committed an intentional and unreasonable act *or* if it acted while knowing or having reason to know it lacked authorization to do so. The case was remanded for further proceedings.

Woldson v. Woodhead, 159 Wn.2d 215 (2006) – Continuing trespass.

Davis v. Taylor, 132 Wn.App. 515 (2006) – Right-to-form ordinance exception to nuisance.

Kempter v. City of Soap Lake, 132 Wn.App. 155 (2006) – *Res ipsa loquitur*.

Womack v. Von Rardon, 133 Wn.App. 254 (2006) – Statutory waste.

Wallace v. Lewis County, 134 Wn.App. 1 (2006) – Inverse condemnation.

Happy Bunch, LLC v. Grandview North, LLC, 142 Wn.App. 81 (2007) – Timber trespass.

Fitzpatrick v. Okanogan County, 143 Wash. App. 288 (2008) – Inverse condemnation action for redirecting river flow.

Rosengren v. City of Seattle, 149 Wn.App. 567 (2009) – Duty of care to maintain trees.

Trotzer v. Vig, 149 Wn.App. 594 (2009) – Statute of limitations and proof of willful trespass.

Vance v. XXXL Dev., LLC, 150 Wn.App. 39 (2009) – Effect of sale of property on right to maintain nuisance action.

Grundy v. Brack Family Trust, 151 Wn.App. 557 (2009) – Proof of intentional trespass.

Cogdell v. 1999 O'Ravez Family, LLC, 153 Wn.App. 384 (2009) – Necessity of remedy for encroachment.

B. Eminent Domain

***Fitzpatrick v. Okanogan County*, 169 Wn.2d 598 (2010)**

Facts: Following a rain storm, the Methow River washed away a substantial portion of various owners' property abutting the river, including improvements. The owners sued the Okanogan County and the State, claiming that the damage was the result of a dike maintained by the County and State that diverted the flow of the river. The owners asserted that the diversion constituted a taking by inverse condemnation. The trial court dismissed the claim on summary judgment based on the common enemy doctrine and various statutes granting immunity for government flood-control activity. The Court of Appeals reversed on the grounds that the common enemy doctrine would not apply if the dike resulted in a change in course of the river from its natural channel, and the owners had presented evidence supporting this theory that prevented the entry of a summary judgment.

Holding: The Court of Appeals was affirmed. The statutory immunity granted under former RCW 86.12.037 (1921) and RCW 86.16.071 did not apply to claims of inverse condemnation, which arise solely under article I, section 16 of the Washington Constitution. The common enemy doctrine did not bar the inverse condemnation claim, because, based on the evidence presented by the owners, there was a material question of fact as to whether the doctrine applied. The owners presented evidence that the dike interfered in natural overflow channels and forced water into the main channel and onto the owners' property. The natural watercourse rule prevents interference with the natural flow of a waterway; a party is not protected by the common enemy doctrine if water is diverted from a natural watercourse and damages other property. A material question of fact existed as to whether the damage to the owners' property was caused by a diversion of water in a natural watercourse (in which case there would be liability under the natural watercourse doctrine) or by channeling surface water

by the dike (in which case the common enemy doctrine would shield the County and State from liability).

Noble v. Safe Harbor Family Pres. Trust, 167 Wn.2d 11 (2009) – Right to attorneys fees.

Public Utility District No. 2 of Grant County v. North American Foreign Trade Zone Industries, LLC, 159 Wn.2d 555 (2007) – Adequacy of notice of taking.

Central Puget Sound Regional Transit Authority v. Miller, 156 Wn.2d 403 (2006) – Determination of necessity.

Yakima County v. Evans, 135 Wn.App. 212 (2006) – Public purpose.

Central Puget Sound Regional Transit Authority v. Heirs and devisees of Eastey, 135 Wn.App. 446 (2006) – Damage to the remainder.

Clear Channel Outdoor v. Seattle Popular Monorail Authority, 136 Wn.App. 781 (2006) – Compensation for month-to-month tenancy.

HTK Management, L.L.C. v. Rokan Partners, 139 Wn.App. 772 (2007) – Abandonment by condemning authority.

Galvis v. State Dept. of Transp., 140 Wn.App. 693 (2007) – Designation under Highway Access Management Act.

King County v. Seawest Inv. Assocs., LLC, 141 Wn.App. 304 (2007) – Reasonableness of attorney fees.

Cowlitz County v. Martin, 142 Wn.App. 860 (2008) – Taking in excess of authorized resolution.

Spokane Airports v. RMA, Inc., 149 Wn.App. 930 (2009) – Improper delegation of authority to condemn.

Union Elevator v. State of Washington, 152 Wn.App. 199 (2009) – Calculation of interest and attorney fees under Washington Relocation Assistance Act.

C. Adverse Possession/Boundary Disputes

***Proctor v. Huntington*, 169 Wn.2d 491 (2010)**

Facts: Huntington owned a 27-acre parcel and Proctor owned an adjacent 30-acre parcel in Skamania County. The boundary between the properties was not marked, although there was an old survey pin that had been set to regulate logging activities that had been conducted on the parcels. Proctor and Huntington mistakenly believed that the pin was at the northwest corner of the Huntington parcel, when in fact the actual boundary was approximately 400 feet to the east. In 1995, the Huntington's began construction of a house, garage and well in the area west of the actual boundary line. In 2004, Proctor had the property surveyed and discovered that all of Huntington's structures were on the Proctor parcel. When the parties could not agree upon an amicable solution, Proctor sued to eject Huntington; Huntington counterclaimed to quiet title under theories of adverse possession and estoppel *in pais*. The trial court rejected Huntington's theories, but ordered Proctor to sell Huntington one acre of property which included the improvements and access for \$25,000, which was the fair market value of the land. The Court of Appeals affirmed the trial court.

Holding: The Supreme Court affirmed. After reviewing prior case law concerning remedies for encroachment, the Court noted that the common law had moved away from an absolute right to a permanent injunction as a remedy for encroachment. The more modern view was that in appropriate cases, a damage remedy would be applied. An ejectment order was inappropriate if the following conditions were met:

[A] mandatory injunction can be withheld as oppressive when, as here, it appears ... that: (1) The encroacher did not simply take a calculated risk, act in bad faith, or negligently, willfully or indifferently locate the encroaching structure; (2) the damage to the landowner was slight and the benefit of removal equally small; (3) there was ample remaining room for a structure suitable for the area and no real limitation on the property's future use; (4) it is impractical to move the structure as built; and (5) there is an enormous disparity in resulting hardships.

The Court noted that the one-acre parcel represented just slightly more than 3% of the area of Proctor's parcel and did not affect Proctor's use of the property. The cost of moving the residence was in excess of \$300,000. The equitable remedy imposed by the trial court was appropriate under the circumstances and reflected a flexible approach in the enforcement of property rights.

***Merriman v. Cokeley*, 168 Wn.2d 627 (2010)**

Facts: Kosenski and Willits owned adjacent water front lots. In 1993, Willits had the boundary surveyed. The surveyors placed three stakes on the boundary line – one at the road, one on the bluff overlooking the water and one in between the other two stakes. Willits placed wooden posts next to the stakes. The line was not changed from 1993 to 2002, and during that period, the area between the properties became overgrown with bushes. In 2002, Willits installed a barb wire fence along the line. Kosenski sold to Merriman in 1996; Willits sold to Cokeley in 2004. Cokeley had the property surveyed again in 2006. The new survey determined that the prior boundary line was improperly located, thus creating a small triangular piece of property that the Merrimans thought they owned, but was really part of the Cokeley parcel. Both parties sued to quiet title under various theories, including mutual recognition and acquiescence. The trial court ruled in favor of Cokeley; the Court of Appeals reversed, holding that the existence of the survey stakes and posts adequately established a boundary line by mutual recognition.

Holding: In a *per curiam* opinion, the Supreme Court reinstated the trial court judgment. A party claiming title to land by mutual recognition and acquiescence must prove (1) that the boundary line between two properties was certain, well defined, and in some fashion physically designated upon the ground, *e.g.*, by monuments, roadways, fence lines, etc.; (2) that the adjoining landowners, in the absence of an express boundary line agreement, manifested in good faith a mutual recognition of the designated boundary line as the true line; and (3) that mutual recognition of the boundary line continued for the period of time necessary to establish adverse possession (10 years). These elements must be proved by clear, cogent, and convincing evidence. This standard of proof means that the evidence must show the facts to be highly probable. Since the barb wire fence was erected within the ten year adverse possession period, the relevant inquiry focused on the physical condition of the boundary line prior to the erection of the fence. The existence of a three posts amid over-grown bushes and weeds did not meet this standard of proof and failed to establish a line by mutual recognition.

***Teel v. Stading*, 155 Wn.App. 390 (2010)**

Facts: Teel moved onto a 5.1 acre parcel of property in 1989 or 1990. The adjacent property was owned by the Stading Family Trust, which held its property for future development. In July 1990, Teel installed a fence that enclosed approximately 1.3 acres of the Stading property. In January 2006, Teel commenced a quiet title action seeking to quiet title in the enclosed area under the theory of adverse possession. The trial court ruled in favor of Teel after a trial. Stading appealed, claiming that Teel had failed to establish the required element of “hostile use.”

Holding: The Court of Appeals reversed. The trial court entered the following finding of fact that was undisputed:

After moving onto the property, [Mary] **Teel** ran into Mr. Ralph J. Stading on the Stading property north of the Teels [sic] and asked permission to ride and graze horses on the Stading property. Mr. Stading gave his permission but stated that he was not giving up one square inch of his property.

This finding of fact established that the use by Teel was permissive, and as such could not ripen into adverse possession. The fact that Teel and Stading may not have had the same understanding of the extent of the permission was not relevant; Stading granted a license to use the property which was valid until revoked. Teel failed to carry the required burden of proof to establish that the permissive use was terminated as the result of assertion of a hostile right or the servient estate changed hands as the result of death or alienation.

Harris v. Urell, 133 Wn.App. 130 (2006) – Elements of adverse possession action.
Campbell v. Reed, 134 Wn.App. 349 (2006) – Paying taxes under color of title.
Draszt v. Naccarato, 146 Wash. App. 536 (2008) – Mutual recognition and acquiescence.
Proctor v. Huntington, 146 Wash. App. 836 (2008) – Remedies for structure encroachment.
Green v. Hooper, 149 Wn.App. 627 (2009) – Doctrine of mutual recognition and acceptance.
Smale v. Noretap, 150 Wn.App. 476 (2009) – Effect of sale of property during trial.
Merriman v. Cokeley, 152 Wn.App. 115 (2009) – Mutual recognition and acquiescence.

D. Slander of Title

No reported cases in last five years.

E. Actions Between Partners

J & J Celcom v. AT&T Wireless Servs., 162 Wn.2d 102 (2007) – Dealings with affiliate.
Bishop of Victoria Corporation Sole v. Corporate Business Park, LLC, 138 Wn.App. 443 (2007) – Partner as lender.
Noble v. A & R Envtl. Servs., LLC, 140 Wn.App. 29 (2007) – Dissolution and distribution of assets.
Partnership of Rhone, 140 Wn.App. 600 (2007) – Meretricious relationship.
Skinner v. Holgate, 141 Wn.App. 840 (2007) – Failure to identify partnership interest in bankruptcy.
Simpson v. Thorslund, 151 Wn.App. 276 (2009) – Final accounting as condition for action between partners.

F. Partition

No reported cases in last five years.

G. Quiet Title

Smith v. Monson, 157 Wn.App. 443 (2010)

Facts: Ed and Colleen Smith wanted to obtain a loan to purchase a mobile home to be located on property that they owned in Goldendale. The bank refused to lend them, but the Smiths transferred land to the Monsons, Ms. Smith's aunt and uncle, who were able to obtain the loan. The understanding was that the Monsons would convey the property back to the Smiths with the loan was repaid. The loan was repaid, but the Monsons conveyed the property to the Masons, Ms. Smith's sister and brother-in-law, ostensibly for the sole purpose of allowing them to have access to the property. Ms. Smith then sued to compel the transfer of the property to her. By the time a hearing for summary judgment was scheduled, both of the Monsons had died. The trial court dismissed the action on the grounds that Ms. Smith had no standing to contest the conveyance from the Monsons to the Masons.

Holding: The nature of Ms. Smith's claim was that her transaction with the Monsons created an equitable mortgage and the Monsons had no authority to convey the property. Her claimed interest in the property gave her standing to maintain the action. "Ultimately, this is an action in equity. And so standing follows the right to assert the equitable claim."

Tae T Choi vs. Sung, 154 Wn.App. 303 (2010)

Facts: After retiring as a senior minister of a church, Sung sought to reclaim his position. He caused the church property to be transferred to a new church entity that he controlled and attempted to exclude certain members of the congregation. The national church body to which Sung's church belonged, investigated the dispute and concluded that the property should be returned to the existing church members and that Sung was not to be the senior minister of the church. Sung refused to comply with this request and the church sued Sung to recover the property. The trial court deferred to conclusion of the national church organization and ordered Sung to convey the property to the existing church.

Holding: The trial court was affirmed. In analyzing the structure and governance of the church, the Court of Appeals concluded that its organization was hierarchal in nature. As such, the decision of the national organization was to be accorded deference, and the order to Sung to convey the church property back to the existing congregation was correctly enforced by the trial court.

Young v. Young, 164 Wn.2d 477 (2008) – Division based on unjust enrichment.

In re Ocean Shores Park, Inc., 132 Wn.App. 903 (2006) – Transfer to attorney.

Washington Sec. & Inv. Corp. v. Horse Heaven Heights, Inc., 132 Wn.App. 199 (2006) – Abandonment

MacKenzie v. Barthol, 142 Wn.App. 235 (2007) – Enforcement of Canadian decree.

City of Spokane Valley v. Spokane County, 145 Wn.App. 825 (2008) – Reversion of highway and road easements.
In re Estate of Frank, 146 Wn.App. 309 (2008) – Reversion to estate and lack of remedy.

H. Government Forfeitures

Task Force v. Real Property, 150 Wn.App. 387 (2009) – Sufficiency of notice of claim of ownership.
Regional Task Force v. Real Prop., 151 Wn.App. 743 (2009) – Rights of heirs in forfeited property.

XI. **Construction Contracts/Disputes**

***Affiliated FM Ins. Co. v. LTK Consulting Services*, 243 P.3rd 521 (Wash. 2010)**

Facts: In 2004, a fire occurred on the Seattle monorail. The monorail was operated by SMS pursuant to a concession agreement with the City of Seattle. SMS was responsible for emergency repairs, but the City retained the right for regular maintenance and repairs. SMS was required to maintain a fire policy on the system. LTK Consulting was retained by the City to conduct periodic inspections and recommend repairs. Affiliated FM Insurance paid SMS over \$3,000,000 in business interruption expenses and was subrogated to the rights of SMS. AFM sued LTK claiming that LTK was negligent in changing the electrical grounding system for the trains. LTK removed the case to federal district court. The trial court dismissed AFM's claim, holding that the claim was barred by the economic loss doctrine. On appeal to the Ninth Circuit, the following question was certified to the Washington State Supreme Court:

May party A (here, SMS, whose rights are asserted in subrogation by AFM), who has a contractual right to operate commercially and extensively on property owned by non-party B (here, the City of Seattle), sue party C (here, **LTK**) in tort for damage to that property, when A(SMS) and C(**LTK**) are not in privity of contract?

Holding: The Court held that AFM, through subrogation, had the right to recover against LTK. There was an independent duty of care owed by LTK as a professional engineer to SMS and that duty was not limited by the contract that existed between LTK and the City. The measure of reasonable care for an engineer undertaking engineering services is the degree of care, skill, and learning expected of a reasonably prudent engineer in the state of Washington acting in the same or similar circumstances. SMS was within the class of persons to whom this duty of care was owed and the damages suffered by SMS were of the type that could be proximately caused by LTK's negligence. The majority opinion had one justice concurring; a separate concurring opinion was joined by four justices; three justices dissented.

***McGuire v. Bates*, 169 Wn.2d 185 (2010)**

Facts: McGuire hired Bates to remodel a kitchen. McGuire discovered defects in the construction and demanded that Bates repair them. When Bates refused, McGuire hired another contractor and then sued Bates to recover \$2,166, which was the cost of the repairs. Following an arbitration, McGuire accepted an offer to settle all claims for \$2,180. She then sought recover

of attorney fees under RCW 18.27.040(6). The arbitrator denied the request on the basis that the matter had been settled. McGuire brought a motion for fees in superior court, and the court awarded fees to her as the “prevailing party.” Bates appealed, and the Court of Appeals affirmed the trial court.

Holding: The Supreme Court reversed. The parties agreed to settle all claims pursuant to RCW 4.84.250-280, and the phrase “all claims” encompasses the claims for attorneys fees that were made in McGuire’s complaint and asserted at the arbitration.

Mattingly v. Palmer Ridge Homes LLC, 157 Wn.App. 376 (2010)

Facts: On January 12, 2006, the Mattinglys signed a construction contract with Palmer Ridge to erect a residence on a lot which the Mattinglys had purchased. The contract was negotiated between the parties and contained several express warranties, including:

6.1 All work shall be in accordance to the provisions of the plans and specifications. All systems shall be in good working order.

6.2 All work shall be completed in a workman like manner, and shall comply with all applicable national, state and local building codes and laws.

The contract also provided that at the end of the construction, the contractor would provide a one-year warranty and the warranty would bar litigation between the parties after the expiration of the warranty period. The Mattinglys applied for enrollment in the “2-10 HBW” warranty program after the commencement of construction. The warranty program provided a one-year warranty and also contained an arbitration provision. A copy of the warranty provisions was not provided to the Mattinglys at the time of the application and was not provided until after the completion of construction. On April 1, 2007, the Mattinglys executed a certificate of substantial completion, which provided in part:

The work performed under the Contract Documents for the before mentioned project, has been reviewed and found to be substantially complete. The owner and contractor further acknowledge and agree as follows:

....

3. An Inspection Check List of items to be completed on the project has been listed by the Owner and is attached to this document. . . . Except as noted on the Inspection Check List, the owner accepts the project as is and understands from now on the owner will not have a claim against the contractor for overlooking any item that was not listed that could have been seen during the owner's inspection.

4. The owner understands that the duration of all implied warranties has been limited to one (1) year from the date of final payment or the date of occupancy, whichever comes first. The owner understands that no warranties are being made

by the contractor, except those in the written Limited Warranty provided by the contractor as part of the Contract Documents . . .

5. The date of Substantial Completion is hereby established as: **March 30th, 2007** which is also the date of all applicable warranties required by the Contract Documents, except as stated below. . . .

At the same time, a punch list was prepared, which detailed various items to be completed or corrected. Following repeated attempts to complete the punch list, the Mattinglys hired an inspecting engineer to review the condition of the home. The engineer concluded that the home was not constructed in accordance with applicable codes; was not constructed in a workmanlike manner and not all of the operating systems of the home were functional. Mattingly sued Palmer Ridge on October 17, 2008. The trial court dismissed the action based on the one-year warranty limitation and the terms of the 2-10 HBW warranty. The Mattinglys appealed.

Holding: The Court of Appeals, relying on cases from Nevada and California, found that the provisions of the 2-10 HBW warranty that restricted the remedies available to the homeowner were procedurally unconscionable and unenforceable. The arbitration provisions in the warranty were part of a contract of adhesion and not binding. The one-year limitation on actions was part of an agreement that had been negotiated between the Mattinglys and the contractor and was enforceable. However, the one-year period commenced from the “completion” of the house. The contractor’s position that “completion” meant substantial completion was rejected. The appropriate interpretation of “completion” was the point in time that the house was complete and all items on the punch list had been completed. The disclaimer of implied warranties under the contract was effective and the Mattinglys were not entitled to maintain any action on implied warranties after April 23, 2007, which was one-year following the date of final payment for the house. However, the certificate, with a recitation that the house was sold “as is” was ineffective to disclaim the express warranties contained in the contract. The case was remanded to the trial court with instructions that the Mattinglys could maintain an action for breach of express warranties so long as the action was commenced within one year following the cessation of punch list work on the house by the contractor.

Chul Mo Kim v. Moffett, 156 Wn.App. 689 (2010)

Facts: Kim acquired two parcels of property in California. Through various transfers, ownership was ultimately transferred to his children, who then placed the property under the ownership of JME, a Washington limited partnership by deed dated December 30, 2002. In 2001, Kim contracted with Moffett for architectural services in connection with the planned development of the property. Moffett performed some design work and then informed Kim that since Moffett was moving to California, another architect would have to finish the project. The second architect performed unsatisfactorily, resulting in delays in the project. In 2006, Kim sued Moffett asserting damages for breach of the 2001 contract. JME was later added as a plaintiff. The trial court dismissed Kim’s claim on the grounds that Kim was not the real party in interest and also dismissed the JME claim. The Kim children, who were the actual owners of the property at the time the contract was signed, then filed an amended complaint seeking damages,

which was also dismissed on the grounds that the children were undisclosed principals on a personal services contract and could not assert a claim for damages.

Holding: The trial court correctly ruled that JME was not a third party beneficiary of the contract between Kim and Moffett. JME did not exist at the time the contract was executed. However, the trial court erred in concluding that Kim could not enforce the contract that he executed. As a party to the contract, Kim had standing to assert a breach, even though the Court of Appeals expressed some skepticism as to Kim's ability to prove damages. The Kim children were also properly dismissed. A personal services contract, such as a contract for architectural services, cannot be assigned without the consent of the person providing the services. The rationale for that rule is that the assignment of a personal services contract necessarily changes the nature of the services to be rendered. Similarly, an undisclosed principal may not enforce a personal services contract, since doing so would materially alter the obligations of the contracting party.

Hosea v. Griffin, 156 Wn.App. 263 (2010)

Facts: Toth and Hosea both filed claims against Griffin, a contractor, and Old Republic Insurance Company, who had issued a \$6,000 specialty contractor bond provided by Griffin pursuant to the contractor registration statute. In January 2008, Toth obtained an order of default and entered a default judgment of \$16,000 in February 2008. In May 2008, Hosea and Old Republic entered into a stipulation pursuant to which Old Republic paid the bond proceeds into the registry of the court. In July, Toth moved for disbursement of all of the proceeds in partial satisfaction of his judgment. Hosea objected, but Toth asserted that since he had obtained a judgment, he was entitled to disbursement. The trial court agreed and ordered the funds disbursed to Toth. Hosea subsequently obtained a default judgment against Griffin for approximately \$44,000. Hosea appealed the disbursement of the funds.

Holding: The Court of Appeals rejected Toth's argument that since RCW 1827.040(4), which controls actions against the contractor and its bond, did not address priority between claims within the same class of claimant, the rule of "first in time, first in right" applied. Under RCW 18.27.040(4), if multiple claims exceeding the amount of the bond are "commenced and pending" and the bond is "unimpaired," the claims are satisfied from the bond according to the priority order set forth in the statute. The plain language of the statute does not impose a first to judgment rule for the disbursement of the bond proceeds. In keeping with the purpose of the statute to provide relief to all those injured by the contractor, where multiple claimants of the same priority tier have actions commenced against the surety bond, the claimants are entitled to a pro rata distribution of the bond proceeds.

Aecon Bldgs. v. Vandermolen Constr, 155 Wn.App. 733 (2009)

Facts: Aecon Buildings was the general contractor for the construction of the Quinault Beach Resort for the Quinault Indian Nation. Chinook Builders was a subcontractor that was responsible for framing the project. After completion, the owner complained of various defects, principally related to water intrusion. The dispute between Aecon and the owner was arbitrated,

and Aecon agreed to pay over \$3 million in damages. Aecon sued various subcontractors, including Chinook, alleging their defective work was responsible for the damage. Chinook did not respond to any demands, but its insurer, The Hartford, did contact Aecon seeking information. Aecon ultimately sued Chinook, but did not notify The Hartford. A default judgment was entered against Chinook. The insurer ultimately discovered the existence of the lawsuit and then attempted to vacate the order of default. The trial court denied the motion and following a hearing in which expert testimony was presented concerning the allocation of damages to Chinook, entered a default judgment in excess of \$1.7 million.

Holding: The Court of Appeals affirmed. The contractor was not required to inform the insurer of the existence of the lawsuit. The contractor did not hide the fact that the suit was pending; it simply did not inform the insurer and the contractor was under no duty to do so. The expert testimony was sufficient for the trial court to base its judgment concerning the allocation of damages to Chinook.

Carpenter v. Remtech, Inc., 154 Wn.App. 619 (2010)

Facts: Remtech, owned by the Carpenters, and Dustcoating, owned by the Johnsons, were contractors that worked together on several projects. On May 20, 1999, the Carpenters signed an indemnity agreement in connection with a payment bond issued by Hartford on a job in Oregon. Dustcoating was not involved on that job, and the Johnsons did not sign the indemnity. On June 8, 1999, the Johnsons and the Carpenters both signed an indemnity agreement with Hartford to enable Remtech to get a bond on another job on which Dustcoating was expected to be a subcontractor. That job never materialized. On the first job, Remtech failed to pay certain bills and the Hartford paid under the payment bond. Hartford then sued the Carpenters to recover. The Carpenters sued the Johnsons for contribution, claiming that under the indemnity that they had signed, the provision that provided that the Johnsons " will indemnify ... from all loss ... because of having furnished any Bond" created an indemnity obligation, notwithstanding the fact that not payment had been made by Hartford under the indemnity agreement signed by the Johnsons. The trial court ruled in favor of the Carpenters.

Holding: The Court of Appeals reversed. The suit for contribution was an equitable action that supposedly arose from joint liability on the same debt. The obligation what the Carpenters paid arose from the first indemnity agreement with Hartford, and since the Johnsons were not parties to that agreement, there was no right of contribution. To require that the Johnsons contribute to the payment of an obligation which they had no legal obligation to pay would not be equitable.

Underwriters v. Valiant Ins. Co., 155 Wn.App. 469 (2010)

Facts: Stratford Contractors constructed a senior living retirement center in Lynnwood. After construction, numerous water leaks developed. The owner sued the contractor, who in turn made claims against various subcontractors. The defendants tendered the claims to their respective insurers. The claims were ultimately settled for approximately \$5 million, with funds advanced from some of the insurance companies. Zurich, one of the insurers, had issued

multiple policies to Stratford, but claimed that it owed only the policy limits from one policy based upon a \$1 million per occurrence liability cap. One of the other carriers that had contributed more to the settlement sued Zurich for additional funds under the theory of equitable contribution. The trial court dismissed the claim on summary judgment.

Holding: The dismissal was affirmed. The Zurich policies limited recovery to one policy limit for each occurrence. The Court of Appeals rejected the claim that a jury could find more than one occurrence that caused the damage and thereby avoid the result of the anti-stacking provision in Zurich policy. The policies defined occurrence as an "accident, including continuous and repeated exposure to substantially the same general harmful conditions." The continuous and repeated exposure of the building to moisture that gradually intruded through the building envelope over a five-year period from different sources fits the definition and constituted a single occurrence.

- Cambridge Townhomes, LLC v. Pac. Star*, 166 Wn.2d 475 (2009) – Successor liability for construction defects.
- Owners Ass'n v. FHC, LLC*, 166 Wn.2d 178 (2009) – Effect of dissolution of company.
- Mut. of Enumclaw v. T&G Constr., Inc.*, 165 Wn.2d 255 (2008) – Collateral attack on matters considered in reasonableness hearing.
- American Safety Casualty Insurance Co v. City of Olympia*, 162 Wn.2d 762 (2007) – Failure to follow claim procedures.
- Colorado Structures, Inc. v. Insurance Co. of the West*, 161 Wn.2d 577 (2007) – Claim on performance bond.
- Belfor USA Group, Inc. v. Thiel*, 160 Wn.2d 669 (2007) – Right to recover attorney fees.
- Silverstreak, Inc. v. Washington State Department of Labor and Industries*, 159 Wn.2d 868 (2007) – Prevailing wage and public works.
- Davis v. Baugh Industrial Contractors, Inc.*, 159 Wn.2d 413 (2007) – Liability to third parties for negligent construction.
- Cosmopolitan Engineering Group, Inc. v. Ondeo Degremont, Inc.*, 159 Wn.2d 292 (2006) – Right to recover attorney fees from bond.
- 1000 Virginia Limited Partnership v. Vertecs Corp.*, 158 Wn.2d 566 (2006) – Statute of repose (RCW 4.16.326) and application of discovery rule.
- Lakemont Ridge Homeowners Assoc. v. Lakemont Ridge Ltd. P'ship*, 156 Wn.2d 696 (2006) – Prelitigation notice Constructive Defect Claims Act.
- Mayer v. Sto Industries, Inc.*, 156 Wn.2d 677 (2006) – Stigma damages.
- AAA Cabinets & Millwork, Inc. v. Accredited Surety & Casualty Co.*, 132 Wn.App. 202 (2006) – Joint check rule.
- Am. Safety Cas. Ins. Co. v. Olympia*, 133 Wn.App. 649 (2006) – Waiver of lawsuit limitation provision.
- MacLean Townhomes, L.L.C. v. America 1st Roofing Builders, Inc.*, 133 Wn.App. 828 (2006) – Subcontractor's indemnification provision.
- Westview Investments, Ltd. V. U.S. Bank Nat'l. Ass'n.*, 133 Wn.App. 835 (2006) – Express trust for benefit of subcontractors created by general contract.
- Diamaco, Inc. v. Mettler*, 135 Wn.App. 572 (2006) – Recovery of attorneys fees.
- Smith v. Preston Gates Ellis, LLP*, 135 Wn.App. 859 (2006) – Duty to advise as to risk.
- Keystone Masonry, Inc. v. Garco Construction, Inc.*, 135 Wn.App. 927 (2006) – Venue selection.
- Frank Collucio Construction Company, Inc. v. King County*, 136 Wn.App. 751 (2006) – Failure of owner to purchase insurance.
- Coronado v. Orona*, 137 Wn. App. 308 (2007) – Landscape architects as contractors.
- Tacoma Narrows Constructors v. Nippon Steel-Kawada Bridge, Inc.*, 138 Wn.App. 203 (2007) – Requirement to arbitrate.

Baddeley v. Seek, 138 Wn. App. 333 (2007) – Negligent design claim.
Floor Express, Inc. v. Daly, 138 Wn. App. 750 (2007) – Prime contractor standing to sue subcontractor.
Satomi Owners Ass’n v. Satomi, LLC, 139 Wn. App. 175 (2007) – Requirement to arbitrate.
Maple Street Condo v. Roosevelt, LLC, 139 Wn.App. 257 (2007) – Dissolution of developer.
Chadwick Farms Owners Ass’n v. FHC, LLC, 139 Wn. App. 300 (2007) – Dissolution of developer.
Jacob’s Meadow Owners Assn. v. Alpine Indus., Inc., 139 Wn.App. 743 (2007) – Claim against subcontractor.
Fluor Enters., Inc. v. Walter Constr., Ltd., 141 Wn.App. 761 (2007) – Judgment on settlement agreement.
DBM Consulting Engineers, Inc. v. United States Fidelity and Guaranty Company, 142 Wn.App. 37 (2007) – Bond securing lien claim.
D.W. Close Co. v. Labor & Industries, 142 Wn.App. 177 (2008) – Wage and hour act.
Harmony at Madrona Park Owners Ass’n v. Madison Harmony Development, 143 Wn. App. 345 (2008) – Application of statute of repose.
Mutual of Enumclaw Insurance Co. v. T&G Construction, 143 Wn.App. 667 (2007) – Effect of dissolution of contractor.
Matia Contractors, Inc. v. City of Bellingham, 144 Wn.App. 445 (2008) – Notice of claim as condition precedent to action against city.
Bordeaux, Inc. v. Am. Safety Ins. Co., 145 Wn.App. 687 (2008) – Obligation to pay self-insured retention.
Heights at Issaquah Ridge Owners Ass’n v. Wakefield I, LLC, 145 Wn.App. 698 (2008) – Reasonableness of settlement.
Hartford Ins. Co. v. Ohio Cas. Ins. Co., 145 Wn.App. 765 (2008) – Effect of dissolution of insured.
Westlake View Condo. Ass’n v. Sixth Ave. View Partners, LLC, 146 Wn.App. 760 (2008) – Scope of implied warranty of habitability.
McGuire v. Bates, 147 Wn.App. 751 (2008) – Effect of offer of settlement.
Owners Ass’n v. Burton Landscape, 148 Wn.App. 400 (2009) – Authority of arbitrator.
S. D. Deacon Corp. v. Gaston Bros., 150 Wn.App. 87 (2009) – Application of frivolous lien claim statute.
S&S Constr., Inc., v. ADC Props., Inc., 151 Wn.App. 247 (2009) – Challenge to arbitration award.
AWR Construction, Inc. d/b/a Comet Roofing v. Washington State Department Of Labor & Industries, 152 Wn.App. 479 (2009) – Violation of RCW 18.27.114(1).

XII. Building Permits and Platting Regulations

***Segaline v. State, Dept. of Labor and Industries*, 169 Wn.2d 467 (2010)**

Facts: Segaline, an electrical contractor in East Wenatchee, was alleged to have engaged in abusive behavior toward employees of the local office of the Department of Labor & Industries. Ultimately, the employees had Segaline arrested when he refused to leave the L&I premises. No charges were brought against Segaline, and he sued L&I and the employee who had called the police, alleging a violation of his civil rights and intentional infliction of emotional distress. The trial court dismissed the claims, holding that RCW 4.24.510 granted L&I immunity from suit and the claims against the employee were time-barred. The Court of Appeals affirmed.

Holding: RCW 4.24.510 immunizes a “person” from civil liability arising from communications with governmental agencies. The Supreme Court concluded that for application of this statute, “person” did not include governmental agencies, since the purpose of the statute was to protect the First Amendment rights of an individual. A governmental agency does not have First Amendment rights, so it made little sense to interpret the definition of “person” for purposes of RCW 4.24.510 to include L&I. The trial court’s dismissal of the civil rights claim

under 42 U.S.C. §1983. The applicable period was three years from the date Segaline knew or should have known of the injury that is the basis for the action. In this case, Segaline was served with a “no trespass” notice in June 2003, since the gravamen of Segaline’s complaint was that the L&I employee deprived him of his right to be present in a public place. The addition of the L&I employee as a defendant in the lawsuit by amendment to the complaint in August, 2006, did not relate back to the date of the original complaint and consequently the claim against the employee was time-barred.

Lawson v. City of Pasco, 168 Wn.2d 675 (2010)

Facts: Lawson owned a mobile home park in Pasco, Washington. He was cited for violated PMC 25.40.060, which prohibits recreational vehicles from occupying spaces within a residential mobile home park. The trial court ruled that the MHLTA (Chpt. 59.20 RCW) pre-empted the city ordinance. The Court of Appeals reversed and reinstated the violation notice.

Holding: The Supreme Court, in an opinion signed by four justices, affirmed the Court of Appeals. The MHLTA did not pre-empt the entire field of regulation of residential mobile home parks and the Pasco ordinance was not irreconcilably in conflict with the MHLTA. A concurring opinion noted that the MHLTA had been amended in 2009 in a manner that did in fact pre-empt the Pasco ordinance and would render it ineffective. Four justices dissented, asserting that the effect of the 2009 statutory amendments should have been considered by the majority, since the majority opinion created a ruling that now had no effect on the parties.

Lauer v. Pierce County, 157 Wn.App. 693 (2010)

Facts: Garrison submitted a building permit application for the construction of a waterfront home on Henderson Bay in Gig Harbor. The permit was granted. During the course of construction, several disputes arose with neighbors concerning the building process, culminating in a stop-work order issued by the County. Garrison then applied for a fish and wildlife variance that would allow construction to proceed within a stream buffer. The hearing examiner granted the variance and a neighbor filed a LUPA appeal. The trial court reversed the hearing examiner on the grounds that the 2004 building application was incomplete and therefore later rules that were more restrictive should apply to the variance request.

Holding: The Court of Appeals reversed. The Court held that the LUPA appeal was untimely, but since Garrison had not raised this issue at the first hearing, the issue had been waived pursuant to RCW 36.70C.080. The Court determined that applying RCW 36.70B.070, the building permit application was complete because the County never informed Garrison that there was any deficiency in the application. In fact, the County issued the permit based on the application. The neighbor’s contention that inaccuracies in the permit application should deprive Garrison of the benefit of the vested rights doctrine because of “unclean hands” was rejected by the Court. The County was aware of the exact physical condition of the Garrison property and factors applicable to the variance at the time of the 2004 application were the same irrespective of the contents of the permit application.

Pacific Topsoils, Inc. v. The Washington State Dept. of Ecology, 157 Wn.App. 629 (2010)

Facts: Pacific Topsoils, Inc. owned property on Smith Island (which was described in the proceedings as a “mosaic of wetlands”) on which it conducted a soils processing business. PTI places approximately 12 acres of fill material on its property without any permits. PTI received two citations from DOE; one cited PTI for discharging fill material into a wetland and the other levied a fine of \$88,000 for illegally filling a wetland. PTI appealed to the Pollution Control Hearings Board. The Board, following a hearing, affirmed both citations. PTI appealed to the superior court, which affirmed the Board’s order and also rejected PTI’s claims of lack of due process and unconstitutionality of the applicable statutes and regulations for vagueness.

Holding: The Board and trial court was affirmed. The Court rejected PTI’s claim that DOE lacked statutory authority to regulate wetlands. DOE was acting within its authority to regulate “waters of the state” when it regulates wetlands. The Court also rejected PTI’s claim that the statutes regulating “pollution” were void for vagueness. The citations issued by DOE were specific in their references to the violations alleged and satisfied due process requirements. The hearing procedures of the Board did not violate the due process rights of PTI. All of the Board’s findings of fact were supported by substantial evidence.

Kelly v. County of Chelan, 157 Wn.App. 417 (2010)

Facts: Roeckl applied to Chelan County for a development permit to construct townhouses and a marina on the southwest shore of Lake Chelan in 1989. Over the years, Roeckl’s plans changed and various development schemes were presented to the County. In 2005, Roeckl sought a conditional use permit for a final development scheme. The hearing examiner held that Roeckl’s development rights vested in 1998, prior to a change in the County zoning in 2000 that would have substantially downsized the proposed development. Several neighbors objected to the development and appealed. The trial court reversed the hearing examiner and revoked the conditional use permit.

Holding: The original application was filed in 1989, and the hearing examiner held that it was deemed complete in April, 1994. However, in 1994, the developer’s plan did not comply with the underlying comprehensive plan, so the issuance of a conditional use permit at that time would have been inappropriate. Each version of the plan submitted was incompatible with the comprehensive plan in effect prior to 2000, because the proposals always exceeded the limitation of one dwelling unit per acre which was in the comprehensive plan in effect prior to 2000. Since the applications never complied with existing codes, the development rights never vested.

Holiday v. City of Moses Lake, 157 Wn.App. 347 (2010)

Facts: The Holidays parked vehicles and boats on a vacant lot adjacent to their residence in Moses Lake. In 2006, they were cited by the city for violation of a city ordinance that required the vehicles to be parked on a driveway or improved parking surface. The infraction was dismissed. In March and April, 2007, additional citations were issued for improper storage of vehicles. The city then sued the Holidays to collect a \$5,000 fine. The Holidays successfully

sued the city challenging the citations and obtained a writ of prohibition in January, 2008, prohibiting the city from seeking penalties against the Holidays for the use of their vacant lot. In April, 2009, the city issued two more citations for improper parking. The Holidays sought a contempt order against the city, and the city sued to impose fines. The trial court dismissed both actions and both parties appealed.

Holding: The trial court was affirmed. The city failed to appeal the writ of prohibition and by its plain language, the 2009 enforcement actions were prohibited. The refusal to find the city in contempt was not an abuse of the trial courts discretion. The Court of Appeals found the city's appeal to be frivolous because it was a transparent attempt to invalidate a judicial order after the appeal period had lapsed. The city was ordered to pay the Holidays' attorney fees on appeal.

Deer Creek Developers, LLC v. Spokane County, 157 Wn.App. 1 (2010)

Facts: Deer Creek proposed to develop 280 residential units in 23 buildings on property located near the Spokane International Airport. The project was planned for two phases. In 2006, Deer Creek submitted an environmental checklist and SEPA review documents for the entire project. The project was located on property that was zoned for light industrial use, although in 2006 that zoning designation also permitted the construction of residential structures. Building permits for the first phase were issued in 2006, along with certain other infrastructure improvements that would support both phases. In January, 2008, the County Commissioners amended the LI zoning designation to prohibit residential structures. Deer Creek applied for a condition use permit to construct phase II of the project in February 2008. An MDNS was issued, but the hearing examiner denied the application. Deer Creek appealed to the superior court under LUPA. The trial court affirmed the hearing examiner.

Holding: The Court of Appeals affirmed the trial court. The Court rejected the developer's claim that the development rights to phase II had vested. The SEPA checklist and other environmental review documents submitted at the time of the development of the first phase did not constitute a "project permit" application under Spokane County Code and case law defining the "date certain" when development rights vest. There was sufficient evidence to support the hearing examiner's conclusion that the conditional use permit should not be issued because the development would be detrimental to the public health and general welfare. The project potentially conflicted with possible expansion of the airport and changes in mission to Fairchild Air Force Base could adversely affect the residents of the project.

Friends of Cedar Park v. Seattle, 156 Wn.App. 633 (2010)

Facts: Widgeon LLC applied for plat approval dividing a 40,000 square foot parcel into four lots in the Cedar Park neighborhood in northeast Seattle. The site contained some areas of steep slopes and environmentally critical areas, but each proposed lot exceed the minimum lot area of 9,600 square feet. The City of Seattle issued a DNS in connection with the plat and approved the subdivision. A neighborhood association appealed the decision to a hearing examiner, who affirmed the approval of the subdivision with some modifications to the drainage

plan. The association then filed a LUPA action challenging the approval. The trial court affirmed the hearing examiner. The principal contention of the association was that the finding that drainage for the plat was adequately addressed was not supported by substantial evidence. The association appealed the trial court decision.

Holding: The Court of Appeals affirmed. The findings of the hearing examiner were not clearly erroneous. The hearing examiner relied on a drainage study and testimony from the City's geotechnical engineers in reaching its conclusion. The association presented only lay-witness testimony from residents in the area concerning their observations of drainage. Substantial evidence supported the DPD approval, although the hearing examiner did order some modification of the drainage plan in response to the association's objections. The Court also rejected the argument that the lot sizes were inadequate because they failed to deduct the area that was required for a vehicular turn-around area. The record supported the method of calculation of the lot sizes and also rejected the argument that the lot configuration was not in the public interest.

Tobin v Worden, 156 Wn.App. 507 (2010)

Facts: Tobin made a public records request of the King County Department of Development and Environmental Services for a copy of any complaints made against property that she owned on Vashon Island. DDES sent her a copy of a handwritten complaint that had some information redacted. She subsequently learned that an anonymous letter had been sent to a code enforcement official concerning neighboring property and she requested a copy of that letter. Although DDES produced a record of an anonymous phone complaint, it never produced the letter and finally asserted that it had been lost. In October 2005, based on the anonymous complaint, DDES issued an administrative finding of a code violation against Tobin. She appealed to the hearing examiner and again requested production of the letter. DDES contended that the letter had been lost, and the hearing examiner dismissed the violation in 2007 in part as a sanction against DDES for losing the complaint. Tobin then filed suit against the County alleging violations of the Public Records Act. The trial court dismissed the action as time barred.

Holding: The trial court was reversed. The one-year statute of limitations under the PRA as stated in RCW 42.56.550(6) commences on the date that the agency claims an exemption or the last date that the agency produces a record on a partial or installment basis. The County never claimed an exemption, so that portion of the statute was inapplicable. Tobin had requested a copy of a letter which constituted the entire record to be produced. DDES never produced any portion of that record; hence the one-year statute of limitations did not commence to run and Tobin was entitled to maintain her suit.

Curhan v. Chelan County, 156 Wn.App. 30 (2010)

Facts: Curhan and Guimond/Kasper owned adjacent lots abutting Lake Wenatchee in Chelan County. Guimond/Kasper applied for a building permit to construct a deck. County ordinance required that the deck not be located waterward of the common line setback, which was calculated with reference to the ordinary high water mark of the lake. After Curhan objected

to the permit that was issued based on an OHWM of 1,871 feet, Guimond/Kasper obtained a second permit based on the OHWM of 1,875 feet, which was the determination asserted by Curhan. Curhan then changed positions and asserted that the prior determination was correct and objected to the second permit. The trial court dismissed Curhan's LUPA petition, finding that the determination of the county was supported by substantial evidence.

Holding: The dismissal was affirmed. The county ordinance prohibited construction on the water side of the common line setback. The setback calculated in the second permit would not result in any building on the water side of the setback line determined using the greater OHWM asserted by Curhan, so the location of the deck did not violate the county ordinance. The court refused to award attorney fees to Guimond/Kasper, finding that the position of Curhan, although somewhat inconsistent and confused, was not frivolous.

West v. Stahley, 155 Wn.App. 691 (2010)

Facts: Weyerhaeuser sought to lease property from the Port of Olympia for the operation of a log yard and to construct related buildings. Various objections were made to the proposed project, but the City of Olympia issued an engineering permit to the Port to allow construction of the buildings on September 5, 2007, and entered the permit in the public records on October 9th. West, one of the opponents of the project, had actual notice of the permit by October 10th. West raised objections to the permit in one of the lawsuits pending in connection with the project, but did not file an administrative appeal until October 30th. The hearing examiner dismissed the appeal as untimely, since it was filed more than 14 days after the date the permit was issued of record, as required by City ordinance. The trial court found that West failed to exhaust administrative remedies and dismissed the LUPA action which West filed.

Holding: The Court of Appeals affirmed. It was undisputed that West failed to timely exhaust his administrative remedies. The exhaustion of administrative remedies is an absolute prerequisite to bring a LUPA petition, and accordingly, West was barred from challenging the issuance of the permit.

Woodfield Homeowner's Ass'n v. Graziano, 154 Wn.App. 1 (2010)

Facts: Graziano applied for a permit to build a home on a parcel of property that he purchased at a Pierce County tax foreclosure sale. His application was opposed by the Woodfield Neighborhood Homeowner's Association, d/b/a English Gardens Homeowner's Association, which sued to prevent the issuance of the permit. The trial court ruled on summary judgment that the parcel was restricted to recreational and park use. Graziano appealed, arguing that the language on the face of the plat did not evidence a present intent to create a restrictive covenant

Holding: The Court of Appeals held that Pierce County was a necessary party to the action, since Graziano's prayer for relief sought invalidation of all restrictions on the face of the plat and the restrictions imposed by reference to the plat in the County treasurer's deed. Since the County approved the plat based upon the restrictions contained on the face of the plat, it was

a necessary party to the action and the matter was remanded to the trial court for further proceedings.

Kelly v. Chelan County, 167 Wn.2d 867 (2010) – Time limit under building permit.
Post v. City of Tacoma, 167 Wn.2d 300 (2009) – Due process challenge to fines.
Abbey Road Group, LLC v. City of Bonney Lake, 167 Wn.2d 242 (2009) – Vested rights doctrine.
City of Woodinville v. Church, 166 Wn.2d 633 (2009) – Building restrictions applied to church.
Griffin v. Thurston County Bd. of Health, 165 Wn.2d 50 (2009) – Septic requirements for small lots.
Am. Legion Post No. 149 v. Dept. of Health, 164 Wn.2d 570 (2008) – Non-smoking areas.
Sleasman v. City of Lacey, 159 Wn.2d 639 (2007) – Definition of “undeveloped” property.
Cingular Wireless v. Thurston County, 131 Wn.App. 756 (2006) – Cell tower permit.
Asche v. Bloomquist, 132 Wn.App. 784 (2006) – Time limits under LUPA.
Northlake Marine Works, Inc. v. State Department of Natural Resources, 134 Wn.App. 272 (2006) – Permits in waterway areas.
Saben v. Skagit County, 136 Wn.App. 869 (2007) – Arbitrary and capricious action.
Zink v. City of Mesa, 137 Wn. App. 271 (2007) – Improper termination of permit.
Griffin v. Thurston County, 137 Wn. App. 609 (2007) – Substandard lot size.
City of Woodinville v. United Church of Christ, 139 Wn.App 639 (2007) – Right to jury trial.
Post v. City of Tacoma, 140 Wn.App. 155 (2007) – LUPA time limits.
Westmark Dev. Corp. v. City of Burien, 140 Wn.App. 540 (2007) – Damages for wrongful denial of permit.
Abbey Road Group, LLC v. City of Bonney Lake, 141 Wn.App. 184 (2007) – Vested rights.
Keep Watson Cutoff Rural v. Kittitas County, 145 Wn.App. 31 (2008) – Appeal of conditional use permit.
Kelly v. Chelan County, 145 Wn.App. 166 (2008) – Litigation delay affecting time duration of permit.
Milestone Homes, Inc. v. City of Bonney Lake, 145 Wn.App. 118 (2008) – Density requirements for plats.
Humbert v. Walla Walla County, 145 Wn.App. 185 (2008) – Invited error doctrine.
First Pioneer Trading v. Pierce County, 146 Wn.App. 606 (2008) – Non-conforming use.
Heller Building, LLC v. City of Bellevue, 147 Wn.App. 46 (2008) – Appeal of revocation of permit.
Isla Verde Int’l Holdings, Ltd. v. City of Camas, 147 Wn.App. 454 (2008) – Unlawful imposition under RCW 82.02.020.
Bonneville v. Pierce County, 148 Wn.App. 500 (2008) – Violation of conditional use permit.
Sylvester v. Pierce County, 148 Wn.App. 813 (2009) – Reasonable use exception to wetlands regulation.
Gig Harbor v. N. Pac. Design, 149 Wn.App. 159 (2009) – Open space requirement for conditional use permit.
Belleau Woods v. Bellingham, 150 Wn.App. 228 (2009) – Change in impact fees following building permit application.
Stanzel v. Pierce County, 150 Wn.App. 835 (2009) – Administrative appeal of water service application.
Fire Dist v. Whatcom County, 151 Wn.App. 601 (2009) – Adequate fire service.
Harlan Claire Stientjes Family Trust v. Via-Fourre, 152 Wn.App. 616 (2009) – Attempt to appeal non-final order.
Hoggart v. Flores, 152 Wn.App. 862 (2009) – Cure for illegal subdivision.
Citizens v. Yakima County, 152 Wn.App. 914 (2009) – Land exchange with city.
Nickum v. City Of Bainbridge Island, 153 Wn.App. 366 (2009) – Challenge to communications tower.
Conner v. City Of Seattle, 153 Wn.App. 673 (2009) – Challenge to landmark designation.

XIII. Land Use/SEPA

***Shaw Family LLC v. Advocates For Responsible Development*, 157 Wn.App. 364 (2010)**

Facts: The Shaw Family owned a parcel of land in Mason County for over 100 years. The parcel was over 90 acres and zoned “Long-Term Commercial Forest.” Shaw petitioned for a

rezone to allow development of the land. Although the staff recommended against the rezone, the County approved a change to the comprehensive plan that would facilitate the rezone. Advocates for Responsible Development, an unincorporated non-profit association, through its president, John Diehl, opposed the comprehensive plan amendment and appealed the County's decision to the Western Washington Growth Management Hearings Board. Shaw was not a party to the appeal, but later intervened in the proceeding after receiving notice of the appeal. The WWGMHB found that the amendment violated the GMA and another County planning policy requirement that applicants for changes to the comprehensive plan's future land use map must be able to demonstrate that the property can no longer be used as a commercial forest. ARD and Shaw filed separate appeals to the superior court. The trial court issued rulings in both cases simultaneously that affirmed the WWGMHB.

Holding: The Court of Appeals affirmed. The Court rejected Shaw's argument that the WWGMHB did not have subject matter jurisdiction over the rezone. The WWGMHB has jurisdiction over challenges to a county's comprehensive plan and amendments with respect to compliance with GMA; the WWGMHB did not have jurisdiction over site specific rezones. In the case of the Shaw parcel, the rezone was accomplished with an amendment to the comprehensive plan and accordingly the WWGMHB had jurisdiction over a challenge to the amendment based on a violation of GMA. The Court also affirmed other orders of the trial court relating to the inability of Diehl, who was not an attorney, to represent ARD in the judicial proceedings.

Chinn v. City of Spokane, 157 Wn.App. 294 (2010)

Facts: West Central Development sought to rezone eight square blocks in Spokane from "Office" to "Office-Retail." The area was surrounded by small scale offices, many located in former residences. The hearing examiner denied the request because Office-Retail was a higher intensity office use and because the area was not within the city center, the rezone was inconsistent with the City comprehensive plan. West appealed to the City Council, which reversed the hearing examiner. Chin, a resident of the area adjacent to the rezone appealed to the superior court. The trial court reinstated the hearing examiner's decision. West appealed.

Holding: The Court of Appeals upheld the hearing examiner. The Council failed to consider the retail aspect of the new zoning designation. Under the SMC, certain retail uses, such as free-standing restaurants and retail activities are appropriate in office areas designated for higher intensity. The Council failed to consider that the retail aspect of the rezone resulted in a change in the underlying use of the property which rendered the proposed rezone inconsistent with SMC requirements. The Court determined that the Council erroneously applied the law by misinterpreting the uses allowed under the "office-retail" designation.

Suquamish Tribe v. Hearings Bd., 156 Wn.App. 743 (2010)

Facts: Kitsap County completed a 10-year update of its comprehensive plan in 2006 in accordance with the requirements of the Growth Management Act. The plan had various elements and also included a Rural Wooded Incentive Program that allowed development of

rural wooded land with densities of one unit per five acres in exchange for setting aside 75% of the land for open space. Various interest groups objected to parts of the comprehensive plan and petitioned the Central Puget Sound Growth Management Hearings Board review. After remands to the County to modify certain aspects of the comprehensive plan, the Board approved the plan. The citizen groups appealed to Thurston County Superior Court, which affirmed the Board's orders.

Holding: The Court of Appeals reversed. The Board erred in creating a bright-line rule to approve minimum urban density, calculate land capacity and approve appropriate rural density. The Board cannot use bright line rules, because to do so violates restrictions against the Board making public policy. Substantial evidence did not exist to support the Board's approval of the Rural Wooded Incentive Program and its finding that the program would protect rural areas. Finally, the Court concluded that the Board did not address all of the issues raised by the citizen petition and remanded the matter for further proceedings.

Stafne v. Snohomish County, 156 Wn.App. 667 (2010)

Facts: Snohomish County established an annual review program for considering changes to land use designations for property consistent with the Growth Management Act. Stafne owned a parcel of land in excess of 20 acres a portion of which was designated Commercial Forest Land and Forest Transition Area, and the remainder was designated Low Density Rural Residential. Stafne submitted a docket proposal to the County to change the land use designation for the entire parcel to LDRR. On June 16, 2008, the County adopted a resolution which failed to include Stafne's request on the County docket for review. Stafne filed a LUPA petition combined with actions seeking declaratory relief, a writ of mandamus and a writ of prohibition challenging the County's decision not to docket his rezone request. The trial court dismissed all of the actions on the grounds that Stafne had not exhausted his administrative remedies and the LUPA petition was untimely.

Holding: The Court of Appeals reversed the trial court ruling on exhaustion of administrative remedies, but affirmed the dismissal of the LUPA action as untimely. The Growth Management Hearings Board had previously ruled that it had no jurisdiction to review a decision not to docket a proposed zoning change, so Stafne was not required to pursue an administrative appeal to that body. The decision not to docket Stafne's request was clearly a land use decision. The final decision was made on June 16, 2008, and any LUPA petition was required to be filed within 21 days of that date. Since Stafne failed to file within that time period, his LUPA action was barred. Because Stafne's remedy was to pursue a LUPA petition, the trial court correctly dismissed the actions seeking a declaratory judgment, a writ of mandamus and writ of prohibition.

Mercer Island Citizens v. Tent City, 156 Wn.App. 393 (2010)

Facts: The City of Mercer Island entered into a temporary use agreement with the Methodist Church and Tent City for location of an encampment on church property for the homeless. Notice of the intent to enter into the agreement was published and a hearing on the

agreement was conducted on June 16, 2008 by the City Council. At the conclusion of the meeting, the council unanimously approved the agreement. On July 10, 2008, a citizens group challenged the agreement and asserted claims against the City for violations of civil rights under 42 U.S.C. Section 1983. The trial court dismissed the claims as being time barred under LUPA because the action had not been commenced within 21 days of the date the agreement was approved by the City.

Holding: The Court of Appeals affirmed. The temporary use agreement was a land use decision as defined by RCW 36.70C.020(2). As a land use decision, any objection had to be filed within 21-days from the date of approval by the City. Since the citizens' suit was filed more than 21 days after June 16, 2008, it was barred under LUPA. The associated claims for damages and violations of civil rights were also barred, since all of these actions were simply other challenges to the land use decision.

Chuckanut Conservancy v. Natural Res., 156 Wn.App. 274 (2010)

Facts: DNR adopted a plan for the management of Blanchard Forest, which is located south of Bellingham and west of Interstate 5. The plan contemplated four distinct areas of use – a core zone for conservation, a zone consisting of scattered areas for habitat conservation, a zone to be logged subject to mitigation and a general management zone to be managed for revenue production. DNR concluded that the plan was a non-project action that would generate no environmental impacts, and issued a declaration of non-significance under SEPA. Two public interest groups sued DNR, contending that an EIS was required since the plan would result in continued logging of the forest. The trial court agreed and ordered DNR to prepare an EIS before adopting the plan.

Holding: The Court of Appeals reversed. An EIS was not required in those instances in which neither the current use of the property nor the impact of that use is being changed. Under the current statutory schemes governing DNR's management of Blanchard Forest, the property must be logged on a sustainable basis unless there is compensation paid to the beneficiaries of the trust in which the forest land is held. Compensation is a matter for the legislature to appropriate and is not within the discretion of DNR. Since the forest constituted trust lands was continuously logged on a sustainable basis, the plan made no change in the current use and impact of the property, DNR was correct in concluding that no EIS was required.

Citizens For Rational Shoreline Planning V. Whatcom County, 155 Wn.App. 937 (2010)

Facts: Whatcom County a shoreline management plan that imposed buffer zones applicable to shoreline lots and imposed building restrictions on non-conforming lots. Several interested parties contested these regulations, asserting that they violated RCW 82.02.020, which prohibits local planning authorities from imposing direct or indirect taxes on development. The trial court dismissed the action because the SMP was the product of state regulation to which RCW 82.02.020 did not apply.

Holding: The Court of Appeals affirmed the dismissal. The purpose of RCW 82.02.020

prohibited *local governments* from imposing the general societal costs of development on developers and did not apply to actions by the state. The trial court correctly concluded that the SMP was required by the state and was effective only upon state approval. The SMP was not a local regulation subject to the prohibitions of RCW 82.02.020.

Advocates v. Hearings Bd., 155 Wn.App. 479 (2010)

Facts: Advocates for Responsible Development challenged ordinances passed by Mason County as contrary to the growth management act. Diehl, the president of ARD (an unincorporated association), wrote letters to the county objecting to the ordinances and then represented ARD in front of the Western Washington Growth Management Hearings Board. The WWGMHB ruled that the ordinances did violate the GMA, but also ruled that Diehl had no standing to object to the ordinances. Diehl and ARD appealed, and in the superior court, Diehl represented ARD. The trial court ruled that Diehl could not represent ARD in court and affirmed the WWGMHB ruling that Diehl had no standing to object to the ordinances.

Holding: The Court of Appeals affirmed the trial court. Non-attorney litigants may not represent other litigants. The fact that Diehl represented ARD before the hearings board did not change the fact that Diehl, a non-lawyer, could not represent ARD in court. All of Diehl's actions objecting to the ordinances were on behalf of ARD, and he took no action to object to the ordinances in his personal capacity. The ruling that he had no standing to object to the ordinances was correct.

Planning Council v. Seattle, 155 Wn.App. 305 (2010)

Facts: The City of Seattle intended to acquire the former army reserve center property at Fort Lawton. As part of that process, the City adopted a "Fort Lawton Redevelopment Plan" that included the proposed development of part of the property as mixed-income neighborhood. The City did not complete an environmental impact statement in connection with the FLRP and noted that an EIS would be completed at the time applications were made for zoning and building permits. A community group challenged the adoption of the FLRP. The trial court ruled that the City was required to comply with SEPA before adopting the FLRP ordinance.

Holding: The Court of Appeals rejected the City's argument that the community group did not have standing to challenge the FLRP. The trial court correctly concluded, the FLRP fell under the definition of "project actions" as a decision on a specific construction project, located in a defined geographic area. It was also an agency decision to purchase, sell, lease, transfer, or exchange publicly owned land because the plan is to develop the property into market rate housing. Since this was a project action, compliance with SEPA was required. The trial court's ruling that the City must as part of the SEPA review evaluate whether the FLRP complied with a previously adopted master plan covering former Fort Lawton property was in error.

Phoenix Dev. v. Woodinville, 154 Wn.App. 492 (2009)

Facts: Phoenix applied to the City of Woodinville to rezone two parcels from R-1 (one unit per acre) to R-4 (four dwelling units per acre). The preliminary plat applications proposed subdividing each parcel into 66 single-family residential lots and included the transfer of 19 density credits from the larger parcel to the smaller to achieve the desired number of lots on the smaller parcel. Because only nine density credits could be transferred, the number of lots in the smaller parcel proposal was reduced to 56. Following the preparation of a final EIS, the City staff concluded that the proposal met the criteria for a rezone, with the exception of satisfying a “demonstrated need.” The staff deferred to the hearing examiner for this determination. The hearing examiner recommended approval. The City council denied the application, finding that the proposal was inconsistent with the comprehensive plan; the proposal satisfied no demonstrated need; and the proposed rezone did not bear a substantial relationship to the health, safety or morals of the public. Phoenix appealed to the superior court, which dismissed the action, affirming the City denial.

Holding: The Court of Appeals reversed. Woodinville Municipal Code §21.04.080 required approval of the rezone application unless adequate services could not be provided. The record established by the hearing examiner showed that adequate services were available. There is a demonstrated need for additional R-4 zoning and the proposals were consistent with the comprehensive plan and bear a substantial relationship to the public health, safety, morals, and welfare. The rezones were also consistent and compatible with uses and zoning of the surrounding properties, and the property was practically and physically suited for the uses allowed in the proposed zone reclassification, as required by WMC 21.44.070.

Lanzce G. Douglass v. Spokane Valley, 154 Wn.App. 408 (2010)

Facts: Douglass applied to the City of Spokane Valley to subdivide two parcels of property comprising 45 acres into residential plats that would support 181 single family residences. The property was located in the Ponderosa area, which was a three square mile area that had suffered wild fires in the past. The Ponderosa Neighborhood Association opposed the development. Douglass submitted an environmental checklist to the City in March, 2007, and the City issued a mitigated determination of non-significance. PNA appealed the approval of the project, and the hearing examiner determined that the MDNS was clearly erroneous because the project was likely to have more than a moderate adverse effect on the environment. The hearing examiner reversed the approval and remanded the matter back to the City with an order to prepare an EIS. Douglass appealed and the trial court reversed the hearing examiner, finding that hearing examiner erred in imposing a time limit for evacuation in the event of fire and had no authority to order the preparation of an EIS.

Holding: The finding of the hearing examiner that the project would add a significant volume of traffic to an already inadequate community egress from the Ponderosa area in the event of fire or other emergency and that this condition would likely lead to more than a moderate adverse effect on the quality of the environment was supported by substantial evidence and was logically correct. The finding that the development would mean that the area could not

be evacuated within 30 minutes was not a legal conclusion or legal requirement, but a finding of fact. The proposal was remanded back to the City so that this fact and other traffic impacts could be considered in an EIS. There was no authority provided that the hearing examiner, after hearing a SEPA appeal, could not reverse a threshold determination.

Mellish vs. Frog Mountain Pet Care, 154 Wn.App. 395 (2010)

Facts: Frog Mountain sought a permit to enlarge its pet care facility. Mellish, who owned adjacent property, objected to the plans. A hearing examiner approved Frog Mountain's request for a conditional use permit on June 20, 2007. Mellish filed a motion for reconsideration with the County on June 28th, and the motion was denied on July 21st. Mellish then filed a LUPA petition on August 10, 2007, which was within the 20-day appeal period specified by LUPA from the date the motion for reconsideration was denied, but 50 days after the original decision by the hearing examiner. Frog Mountain moved to dismiss the petition on the grounds that it was untimely filed. The trial court denied the motion and ultimately ruled in favor of Mellish on the merits.

Holding: The trial court was reversed. The hearing examiner's decision was a final determination. The trial court was in error in concluding that the motion for reconsideration tolled the running of the time for appeals under LUPA. Mellish's petition was untimely and should have been dismissed.

- Gold Star Resorts, Inc. v. Futurewise, 167 Wn.2d 723 (2009)* – Restriction on rural development.
- Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Council, 165 Wn.2d 275 (2009)* – Pre-emption by Energy Facilities Site Location Act.
- City of Arlington v. Cent. Puget Sound Growth Mgmt. Hearings Bd., 164 Wn.2d 768 (2008)* – Challenge to amendment to comprehensive plan under GMA.
- Thurston County v. Bldg. Indus. Ass'n of Wash., 164 Wn.2d 329 (2008)* – Challenge to update of urban growth area boundary.
- Futurewise v. W. Wash. Growth Mgmt. Hearings Bd., 164 Wn.2d 242 (2008)* – Jurisdiction of SMA versus GMA.
- Twin Bridge Marine Park, LLC v. Dept. of Ecology, 162 Wash.2d 825 (2008)* – County versus DOE enforcement of SMA.
- Biggers v. City of Bainbridge Island, 162 Wn.2d 683 (2007)* – Right of city to regulate shorelands.
- Woods v. Kittitas County, 162 Wn.2d 597 (2007)* – Collateral attack on comprehensive plan.
- Tribal Cmty. v. Hearings Bd., 161 Wn.2d 415 (2007)* – Protection of critical areas.
- 1000 Friends of Washington v. McFarland, 159 Wn.2d 165 (2006)* – Right to referendum for GMA ordinances.
- Interlake Sporting Ass'n v. Wash. State Boundary Review Board for King County, 158 Wn.2d 545 (2006)* – Authority of Boundary Review Board.
- Lewis County v. Western Washington Growth Management Hearings Board, 157 Wn.2d 488 (2006)* – Designation of agricultural lands under GMA.
- Olympia v. Drebeck, 156 Wn.2d 289 (2006)* – Transportation impact fees.
- Washington Shell Fish, Inc. v. Pierce County, 132 Wn.App. 239 (2006)* – Geoduck harvesting.
- Peste v. Mason County, 133 Wn.App. 456 (2006)* – Challenge of development regulations under GMA.
- Preserve Our Islands v. Shorelines Hearings Bd., 133 Wn.App. 503 (2006)* – Deference to SMA board.
- Mason v. King County, 134 Wn.App. 806 (2006)* – Boundary line adjustment.
- Richards v. Pullman, 134 Wn.App. 876 (2006)* – Necessity of LUPA action.

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

Alpine Lakes Protection Society v. Washington State Forest Practices Board, 135 Wn.App. 376 (2006) – Authority of DOE.

Alexanderson v. Board of Clark County Commissioners, 135 Wn.App. 541 (2006) – Amendment of comprehensive plan.

Thompson v. State Department of Ecology, 136 Wn.App. 580 (2006) – Ordinary high water mark.

Public Util. Dist. No. 1 of Clark County v. Pollution Control Hearings Bd., 137 Wn. App. 150 (2007) – Reasonable alternatives.

Clallam County Citizens for Safe Drinking Water v. City of Port Angeles, 137 Wn.App. 214 (2007) – Categorical exemption.

Thurston County v. Western Washington Growth Management Hearings Board, 137 Wn.App. 781 (2007) – Challenge to urban growth boundary.

City of Arlington v. Central Puget Sound Growth Management Hearings Board, 138 Wn.App. 1 (2007) – Re-designation of agricultural land.

Swinomish Indian Tribal Cmty v. Skagit County, 138 Wn. App. 771 (2007) – Standing to challenge GMA.

Kitsap County v. Central Puget Sound Growth Management Hearings Board, 138 Wn.App. 863 (2007) – Challenge to urban growth boundary.

Quality Rock Prods., Inc. v. Thurston County, 139 Wn. App. 125 (2007) – Development approval denied for substantial harm to environment.

Echo Bay Comm. Ass’n v. Wash. Dep’t of Nat. Resources, 139 Wn. App. 321 (2007) – Aquaculture use.

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

MT Dev., LLC v. City of Renton, 140 Wn.App. 422 (2007) – Improper denial of sewer service.

Gold Star Resorts, Inc. v. Futurewise, 140 Wn.App. 378 (2007) – Zoning compliance with GMA.

Futurewise v. Central Puget Sound Growth Management Board Hearings, 141 Wn.App. 202 (2007) – Designation of agricultural lands.

J.L. Storedahl & Sons, Inc. v. Clark County, 143 Wn. App. 920 (2008) – Challenge to rezone approval under LUPA.

Gebbers v. Okanogan County Pub. Util. Dist. No. 1, 144 Wn. App. 371 (2008) – Cumulative impact analysis under FEIS.

Coffey v. City of Walla Walla, 145 Wn.App. 435 (2008) – Jurisdiction of superior court versus grow managements hearings board.

Stevens County v. Loon Lake Prop. Owners Ass’n, 146 Wn.App. 124 (2008) – Designation of critical areas.

Stevens County v. Futurewise, 146 Wn.App. 493 (2008) – Designation of critical habitat areas.

Yakima County v. Hearings Bd., 146 Wn.App. 679 (2008) – Re-designation of agricultural lands.

Spokane County v. City of Spokane, 148 Wn.App. 120 (2009) – Challenge to GMA Hearings Board ruling.

Samson v. City of Bainbridge Island, 148 Wn.App. 952 (2009) – Restriction on dock construction.

Herman v. Shoreline Hearings Bd., 149 Wn.App. 444 (2009) – Penalties for violation of SMA.

Cmty. Ass’n v. Ecology, 149 Wn.App. 830 (2009) – NPDES permit for animal waste.

KAPO V Central Puget Sound Growth Mgmt Hrsg Board, 152 Wn.App. 190 (2009) – SMA conflict with GMA for shoreline buffers.

Kailin v. Clallam County, 152 Wn.App. 974 (2009) – Jurisdiction of GMA hearings board.

Robertson v. May, 153 Wn.App. 61 (2009) – Permit for dock construction.

Feil v. Eastern Washington Growth Management Hearings Board, 153 Wn.App. 394 (2009) – Recreational use overlay district.

XIV. Governmental Regulation

A. Hazardous Waste

Taliesen Corporation v. Razore Land Company, 135 Wn.App. 106 (2006) – Compliance with MCTA standards.

State v. Douma, 147 Wn.App. 143 (2008) – Dairy waste as pollutant.

B. Water Rights

Fort v. Dept. of Ecology, 133 Wn.App. 90 (2006) – Futile call doctrine.

Creveling v. Wash. State Dep't of Fish and Wildlife, 142 Wn.App. 827 (2007) – Water diversion.

City of Union Gap v. Ecology, 148 Wn.App. 519 (2008) – Expiration for non-use.

Pac. Land Partners v. Ecology, 150 Wn.App. 740 (2009) – Non-use following foreclosure.

C. Irrigation Districts

No reported cases in last five years.

D. Archeological Lands

No reported cases in last five years.

E. Mortgage Broker Practices/Appraisers

***Ameriquist Mortgage Co. v. Washington State Office of Atty. Gen.*, 241 P.3rd 1245 (Wash. 2010)**

Facts: The Washington Attorney General obtained loan files from Ameriquist Mortgage in connection with an investigation into alleged mortgage fraud. The AGO received a FOI request to turn over the information that it accumulated from Ameriquist, including an analysis of the information. The AGO notified Ameriquist of the FOI request and the intention of the AGO to comply. Ameriquist sued to enjoin the release of the information. The trial court refused to enter an injunction, although restraining the release of the documents until certain personal information was redacted. The Court of Appeals reversed, holding that the state FOI Act was preempted by the federal Gramm-Leach-Bliley Act (GLBA), 15 U.S. C. §§ 6801-6809, and the relevant Federal Trade Commission rule.

Holding: The Supreme Court affirmed the Court of Appeals. The Court concluded that the restrictions on disclosure in GLBA applied to the AGO. The release of non-public personal information by the AGO was prohibited. The nondisclosure rules of the GLBA and the FTC rule are incorporated as an exemption to the PRA through RCW 42.56.070(1). The only disputed information that is not subject to the federal nondisclosure rule is " [i]nformation that does not identify a consumer, such as aggregate information or blind data that does not contain personal identifiers such as account numbers, names, or addresses." [citing GLBA] The AGO may not redact or repackage the information in its possession to create information that would constitute

blind data and this information can only be disclosed if it had already been created by Ameriquest.

Nationscapital Mortgage Corp. v. State Dept. of Fin. Inst., 133 Wn.App. 723 (2006) – Investigation under MBPA.

Ameriquest Mortgage v. Attorney Gen., 148 Wn.App. 145 (2009) – Disclosure of mortgage files.

F. Forest Practices

Dept. of Natural Res. v. Browning, 148 Wn.App. 8 (2008) – Failure to appeal violation orders.

XV. Taxation

A. General Real Estate Taxes

Citizens Action v. State, 162 Wn.2d 142 (2007) – Constitutionality of limitation on property taxes.

Northwest Pipeline Corp. v. Adams County, 132 Wn.App. 470 (2006) – Income approach to value.

Welch Foods, Inc. v. Benton County, 136 Wn.App. 314 (2006) – Burden of proof.

Spokane Research & Def. Fund v. Spokane County, 139 Wn. App. 450 (2007) – Municipal property exempt from taxation.

Washington Beef v. County of Yakima, 143 Wn.App. 165 (2008) – Appeal of assessor's determination of value.

Citizens' Alliance for Property Rights v. Sims, 145 Wn.App. 649 (2008) – Application of RCW 82.02.020.

Homeowners Solutions v. Nguyen, 148 Wn.App. 545 (2009) – Failure to give property notice of foreclosure.

Stephenson v. Pleger, 150 Wn.App. 659 (2009) – Right to excess sale proceeds.

Grays Harbor Energy v. County, 151 Wn.App. 550 (2009) – Assessed valuation of power company property.

B. LID's, Assessments & Utility Fees

***Carlisle v. Columbia Irrigation Dist.*, 168 Wn.2d 555 (2010)**

Facts: Residents of Belmont challenged the formation of an LID which included the Belmont area by the Columbia Irrigation District. Belmont had been annexed into the CID and thereafter, CID formed an LID to pay for the installation of a pressurized water system to serve Belmont. The residents claimed that the annexation and LID formation violated various provisions of the Washington Constitution. The trial court dismissed the claims on a summary judgment.

Holding: The dismissal was affirmed. The addition of the property to the CID did not constitute a taking of property interests without compensation. The fact that the annexation created the possibility that CID would levy assessments did not constitute a deprivation of property rights. Prior to any imposition of an assessment, the property owners were entitled to a hearing, which satisfied due process requirements. The objecting landowners were also unable to demonstrate that any petitions seeking annexation were improperly executed or that CID was

legally prevented from accepting the petitions. The annexation procedure did not violate the Constitutional requirement for fair elections.

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

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

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

Sewer Dist. v. Home Bldg., 155 Wn.2d 858 (2005) – Obligation to pay service charges.

Tiffany Family Trust v. City of Kent, 155 Wn.2d 225 (2005) – Failure to protest.

Cary v. Mason County, 132 Wn.App. 495 (2006) – Challenge to conservation special assessment.

Adams v. City of Spokane, 136 Wn.App. 363 (2006) – Taxes included in rate-base.

Storedahl Props., LLC v. Clark County, 143 Wn. App. 489 (2008) – Clean water fee as a regulatory fee versus tax.

Palermo at Lakeland, LLC v. City of Bonney Lake, 147 Wn. App. 64 (2008) – Connection charge as a tax.

Parrell-Sisters MHC, LLC v. Spokane County, 147 Wn.App. 356 (2008) – Sewer capital facilities charges applied to mobile home parks.

C. Excise Taxes

Homestreet, Inc. v. Dep't of Revenue, 166 Wn.2d 444 (2009) – Taxation of mortgage servicing fees.

STATUTORY UPDATE

The 2011 Regular and Special Sessions of the State Legislature were dominated by budget concerns and, in the area of real estate, continued to focus on the current adverse economic conditions affecting the residential real estate market in Washington. Below is a brief summary of the legislation that may potentially affect real estate transactions, development and ownership passed during the sessions and signed by the Governor as of May 31, 2011. Unless otherwise noted, all measures are effective July 22, 2011.

ESHB 1055; Chapter 15, Laws of 2011: **Contractor Appeals.** Amends Chpt. 18.27 RCW increasing the time period in which a contractor may appeal infractions and eliminates separate appeals for penalties.

ESB 5058; Chapter 34, Laws of 2011: **Receiverships.** Amends Chpt. 7.60 RCW concerning receivers. The definitions of when a judicial and nonjudicial foreclosure proceedings (including foreclosure proceedings related to HOA liens) are amended for purposes of determining when the appointment of a receiver may be requested. A receiver appointed in a general receivership may be granted the power to sell property free and clear of liens if the property is the type the debtor intended to sell in the ordinary course. The appointment of a receiver does not stay foreclosure proceedings if the party seeking the appointment is the party foreclosing. Changes are made in priority of creditors and time for filing reports.

SSB 5115; Chapter 36, Laws of 2001: **Private Transfer Fee Obligation Act.** *Effective 4/13/2011.* A new chapter is added to Title 64 that prohibits the enforcement of transfer fee obligations payable to the original seller of real property upon subsequent sales by purchasers. Real estate commissions are exempted from the definition of transfer fees.

SB 5224; Chapter 48, Laws of 2011: **Condominium resale certificates.** The reasonable charge for resale certificates is increased to \$275 from \$150.

SB 5295; Chapter 50, Laws of 2011: **Irrigation District Property.** RCW 87.03.136 is amended to allow irrigation districts to lease property for terms determined by their boards, as opposed to only year to year leases.

SB 5388; Chapter 53, Laws 2011: **Recreational Use Immunity Statute.** Amends RCW 4.24.210 to include hydroelectric project owners and recreational activity conducted upon water, such as canoeing and kayaking, within the scope of the statute.

SSB 5574; Chapter 57, Laws of 2011: **Collection Agency Practices.** Amends RCW 19.16.250 and 19.16.500 to change the prohibited practices of collections agencies, adds standards for collection agency contact through telephones and cell phones and prohibits a collection agency from commencing an action on a debt it knows or should know is barred by the applicable statute of limitations.

2SHB 1362; Chapter 58, Laws of 2011: **Homeowner Assistance and Protection Act.** Amends the previously enacted Homeowner Assistance and Protection Act in various respects, including (i) repeal of expiration date on the obligation of the lender to “meet and confer” and making this applicable to all residential mortgages irrespective of date, except for those transactions exempted from the statute; (2) establishes a foreclosure mediation process; (3) requires certain payments to the Department of Commerce by beneficiaries; (4) amends violations of Consumer Protection Act relating to residential mortgage transactions; and (5) additional procedural changes were made to the Deed of Trust Act.

HB 1012; Chapter 59, Laws of 2011: **Planning Commissions.** RCW 35.63.030 is amended to authorize four year terms for planning commissioners.

ESHB 1492; Chapter 74, Laws of 2011: **Article 9 of UCC.** *Effective date 7/1/2013.* Chpt. 62A.9A RCW is amended to incorporate the 2010 amendments to Article 9 proposed by the NCCUSL. The changes affect (1) rules of perfection for goods moving to new jurisdictions; (2) control of electronic chattel paper; (3) sufficiency of the debtor’s name; and (4) other miscellaneous changes. The model act provisions defining “person related to” were amended to include state registered domestic partners and persons who are related by law.

ESHB 1826; Chapter 84, Laws of 2011: **Property Tax Appeals.** RCW 84.40.038 is amended to allow taxpayers to petition for revaluation within a reasonable time after the July 1st deadline if the taxpayer had not received a notice of revaluation and the valuation of the property was not changed.

HB 1937; Chapter 85, Laws of 2011: **Innovation Partnership Zones.** RCW 35.43.040 is amended to added biotech facilities as approved uses for LIDs funding local innovation partnership zones.

SB 5033; Chapter 90, Laws of 2011: **Sale of Sewer District Property.** RCW 57.08.016 is amended to allow private sales of property valued at under \$5,000.

SB 5241; Chapter 97, Laws of 2011: **Lake Tapps Watershed Management.** Amends RCW 39.34.215 to change the requirements for the exercise of eminent domain by a watershed management partnership in cities in the Lake Tapps area and changes the statutory process for resolving claims by cities in the Lake Tapps area concerning the impact on water supply operations.

SSB 5359, Chapter 101, Laws of 2011: **Contiguous Land Valuation.** Amends RCW 84.34.020, 84.33.035, 84.33.07 and 82.04.333 to provide a definition of the term “contiguous” in various open-space taxation statutes.

SSB 5364; Chapter 102, Laws of 2011: **Public Water Systems.** RCW 70.119A.110 is amended to revise the method of establishing fees for Group A public water systems.

ESSB 5555; Chapter 112, Laws of 2011: **Transfer of Water Rights.** RCW 90.03.380 is amended to require that DOE provide notice of proposed interbasin water rights transfers to county commissions in affected counties prior to issuing the authorization for transfer.

SSB 5635; Chapter 117, Laws of 2011: **Surface Water Permits.** Amends RCW 90.03.397 to allow a point of diversion of water from the Columbia River that is more advantageous to state owned lands.

HB 1191; Chapter 129, Laws of 2011: **Mortgage Fraud.** Amends RCW 43.320.140 and 36.22.181 to extend the term of the mortgage lending fraud prosecution account to June 30, 2016.

EHB 1223; Chapter 130, Laws of 2011: **Street Vacation.** Amends RCW 35.79.030 to allow street vacation hearings to be conducted by a hearing examiner.

HB 1239; Chapter 131, Laws of 2011: **Lien for Delinquent Taxes.** Amends Chpt. 82.32 RCW to allow DOR to file a lien against specific property for unpaid taxes rather than file a tax warrant.

SHB 1226; Chapter 132, Laws of 2011: **Landlord Tenant Act.** Amends various sections in Chpt. 59.18 RCW, the Landlord-Tenant Act, including (i) jurisdiction over out-of-state landlords; (ii) tenant remedies for defective conditions; (iii) landlord's right of entry; (iv) treatment of security deposits and deposits to hold units; (v) disposition of abandoned property; (vi) damages available to tenant for landlord violations; and (vii) other miscellaneous changes.

SHB 1502; Chapter 158, Laws of 2011: **Manufactured Housing.** Amends various statutory provisions to (i) change the name of the Office of Manufactured Housing to "Office of Mobile/Manufactured Home Relocation Assistance;" (ii) revise the use of title transfer fees; and (iii) prohibits jurisdictions from prohibiting the entry, or requiring removal, of mobile homes permitted under the Manufactured/Mobile Home Landlord Tenant Act.

SHB 1861; Chapter 161, Laws of 2011: **State Railroad Property.** Amends RCW 47.76.280 and 290 to allow sale or lease of surplus railroad property not essential to rail service and grants certain preferential rights of acquisition or lease to abutting land owners. Special rules apply to the disposition of sale or lease revenues received in connection with the Palouse River and Coulee City rail lines.

ESHB 1864; Chapter 162, Laws of 2011: **Debt Collection Practices.** Amends RCW 6.15.010, 6.15.020, 48.18.430, 6.27.140, and 6.27.140 and reenacts and amends RCW 19.16.250 relating to various debt collection practices; the values of certain types of personal property exempt from execution is increased; notice requirements for debt collectors are modified, including a requirement to identify the original creditor.

SB 5035; Chapter 168, Laws of 2011: **Mobile Home Landlord Tenant Act.** Amends Chpt. 59.20 RCW to require that landlords provide written receipts for cash payments and a receipt for all other payments if requested by the tenant.

2SSB 5024; Chapter 214, Laws of 2011: **Private Wastewater Infrastructure.** Amends Chpts. 80.04 and 80.28 RCW to regulate private wastewater companies and requiring UTC approval of rate changes.

ESHB 1421; Chapter 216, Laws of 2011: **Community Forest Trust.** DNR is authorized to create and manage a Community Forest Trust from non-fiduciary lands managed by DNR. The purpose of the trust is to promote forest conservation and preserve land as a working forest.

ESHB 1509; Chapter 218, Laws of 2001: **Forestry Riparian Easements.** Chpt. 76.13 RCW dealing with the acquisition of riparian easements from qualifying small forest landowners are modified in various respects, including the definition of forest landowners eligible to participate in the program.

ESHB 1026; Chapter 255, Laws of 2001: **Adverse Possession.** A new section is added to Chpt. 7.28 RCW allowing the award of attorney fees to the prevailing party in adverse possession cases and requiring reimbursement for taxes paid with respect to the property that is acquired through adverse possession.

SHB 1061; Chapter 256, Laws of 2001: **On-Site Wastewater Designers.** Chpt. 18.210 RCW concerning the licensing of individuals that design on-site wastewater systems is amended to eliminate “practice permits” for individuals, specify certain areas of responsibility retained by local health authorities and modify other provisions.

EHB 1409; Chapter 259, Laws of 2001: **Sale of Land to Indian Tribes.** RCW 39.33.010 is amended to permit the sale of land by the state or municipality to federally recognized Indian tribes.

E2SHB 1634; Chapter 263, Laws of 2001: **Underground Utilities.** Chpt. 19.122 RCW relating to the installation of underground utilities is amended in various respects, including the requirement that underground facilities operators subscribe to a one-number locator service, a requirement that all damage to underground utilities be reported to the UTC and various provisions intended to promote safety in the installation and operation of underground utilities.

SSB 5192; Chapter 277, Laws of 2001: **Shoreline Management Permits.** Chpt. 90.58 RCW concerning approval of shoreline master programs is amended to clarify the effective date of the program after approval by DOE, to require the filing of notice of approval and notification of local governments of approval, and requiring appeals to be filed within 14 days following adoption.

SSB 5350; Chapter 279, Laws of 2001: **Illegal Dumping.** RCW 7.95.240 concerning fines for illegal dumping is amended with respect to the disposition of fines paid and adding a

requirement that the enforcing authority must attempt to identify the person responsible for the dumping before ordering the landowner to cleanup the site.

HB 1407; Chapter 285, Laws of 2001: **Transfer of Water Systems.** RCW 54.16.180 is amended to allow a water district in a county with a population of more than 650,000 but less than 750,000 that borders Puget Sound to transfer water systems to cities with a population of less than 65,000 without the approval of voters (i.e. Snohomish County and Marysville).

ESSB 5253; Chapter 318, Laws of 2001: **Tax Increment Financing.** The transfer of development rights to certain cities from agricultural lands located in certain counties is established as a method of financing certain local infrastructure improvements.

SB 5083; Chapter 322, Laws of 2011: **Real Estate Brokers B&O Tax.** RCW 82.04.255 is amended to clarify the basis upon which real estate brokers must compute B&O tax. The tax is to be paid only upon the respective share of the commission received by the brokerage at closing.

SSB 5451; Chapter 323, Laws of 2011: **Shoreline Management Structures.** The SMA is amended to allow DOE approved new or amended master programs on or after September 1, 2011, to include provisions authorizing:

- qualifying residential structures and appurtenant structures to be considered conforming structures; and
- redevelopment, expansion, change with the class of occupancy, or replacement of the residential structure if it is consistent with the master program.

Appurtenant structures are defined to mean garages, sheds, and other legally established structures. The act does not restrict the ability of a master program to limit redevelopment, expansion, or replacement of over-water structures or structures located in hazardous areas.

SHB 1084; Chapter 355, Laws of 2011: **Board of Geographical Names.** The Board of Geographical Names is reestablished.

SSB 5590; Chapter 364, Laws of 2011: **Approval of Short Sales.** The Deed of Trust Act, Chpt. 61.24 RCW, is amended to provide that a lender must respond within 120 days to written proposed short sales. If the lender fails to respond, the borrower may sue for damages resulting from the failure of the short sale to be consummated.

SSB 5658; Chapter 376, Laws of 2011: **Disposition of DOT Property.** DOT is authorized to remove surplus property from auction for sale to specified organizations only if the organization posts a deposit equal to the lesser of 10% of the value of the property or \$5000. If the sale is not closed in 60 days, the property will be auctioned.

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