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WASHINGTON REAL ESTATE LAW

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RECENT DEVELOPMENTS IN CASE LAW AND LEGISLATION

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CASE LAW AND LEGISLATIVE UPDATE – JUNE 2020

The case law in this summary is organized under topical references for the general area of law primarily discussed in the case. The material includes decisions in the past year by the Court of Appeals starting at Volume 7, page 354 through Volume 12, page 432 of Washington Appellate Reports Second (Wn.App.2d) and Supreme Court Decisions in Volume 193, page 194, through Volume 195, page 441 of Washington Reports Second (Wn.2d). Citations to cases within the last five years relating to the same general topic appear at the end of the topical categories, but are not summarized. A summary of new laws enacted during the 2020 Session of the Washington Legislature affecting real estate transactions follows the case law summary.

The case summaries are intended solely to provide an overview of the general subject matter of the case to alert practitioners to recent decisions in the indicated area of law. The actual opinions must be consulted to obtain a complete statement of the facts of the case, the full legal analysis of the court and the precedential effect of the decision. Likewise, the summaries of recent legislation are intended to indicate the general area of application of the legislation and the statute must be reviewed to determine the exact scope and effect of the legislation. The author's discussion of this material is intended only for educational purposes and to promote further analysis and study of Washington law applicable to real estate transactions and does not represent the opinion of the author, Foster Garvey PC or any of their clients as to the precedential value or applicability of any of the cases or statutes discussed to any past, present or future legal controversy.

CASE LAW UPDATE

I. Interests in Land

A. Conveyances/Estates

***Committed Relationship of Amburgey,* 8 Wn.App.2d 779 (2019)**

Facts: Amburgey and Volk lived together from 1994 and January 2014, and raised two children together in a house Volk had purchased before the relationship began. They never married. In November 2013, Amburgey filed a bankruptcy petition. The bankruptcy court issued a discharge in February 2014. In 2016, Amburgey commenced an action seeking an equitable division of property from an alleged committed intimate relationship with Volk. She also filed an amendment to the bankruptcy schedules listing an equitable interest in the residence. The bankruptcy court again issued a discharge without any distribution to creditors. Volk moved to dismiss the action based on Amburgey's initial filing with the bankruptcy court under a theory of judicial estoppel. The motion was denied and Volk sought voluntary review by the Court of Appeals.

Holding: The denial of the motion was affirmed. The doctrine of judicial estoppel did not apply, particularly in light of the amended bankruptcy schedule disclosing the CIR claim. Amburgey had standing to pursue the claim since the CIR action was not property of the bankruptcy estate once the bankruptcy proceeding was closed.

Marriage of Kile, *186 Wn.App. 864 (2015)* – Leasehold constituting separate estate.
WT Properties, LLC v. Leganieds, LLC, *195 Wn.App. 344 (2016)* – Exceptions to the doctrine of merger.
Morgan v. Briney**,** *200 Wn.App. 380 (2017)* – Committed intimate relationship and community property.
Gourde v. Gannam, *3 Wn.App. 520 (2018)* – Objection to property in deed delivered by personal representative.

B. Mining Claims

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

C. Fixtures

No reported cases within the last five years.

II. Purchase and Sale Transactions

A. Brokers/Brokerage Agreements

State v. Yishmael, 195 Wn.3d 155 (2020)

Facts: Yishmael offered instruction to members of the public how they could "homestead" property and acquire ownership through a variety of actions, including occupying abandoned properties, changing locks, filing papers in the recording office and claiming adverse possession. He charged $7,000 to $8,000 for his course. Many of his students lost money and several were arrested for criminal trespass. Yishmael was arrested and charged with the unlawful practice of law. Following a trial, the jury acquitted Yishmael on theft and theft-related charges, but convicted him of the unlawful practice of law. He was sentenced to 364 days in jail, with all but 5 days suspended. He appealed and the court of appeals affirmed. Yishmael petitioned for review.

Holding: The conviction was affirmed. The Court held the unlawful practice of law was a strict liability offense and the State did not have to establish Yishmael acted with knowledge. The argument that using GR 24 to define the practice of law violated the separation of powers was rejected. The statute was not unconstitutionally vague and sufficient evidence had been presented to support the conviction.

***SVN Cornerstone v. N. 807 Inc.,* 10 Wn.App.2d 72 (2019); rev. den. 194 Wn.2d 1018 (2020)**

Facts: Seipp was employed by Cornerstone until April 20, 2015, when he left for employment with Berkshire Hathaway Home Services. A dispute arose over a commission paid to Berkshire from a sale of property with which Seipp had contact while employed at Cornerstone. Cornerstone sued to recover the commission. Ultimately, the lawsuit was stayed and the matter was referred to arbitration in 2017. The matter then settled, with Cornerstone waiving claims against Seipp, but Seipp retaining any claims against Cornerstone and the lawsuit was dismissed with prejudice. During the same time, a potential client approached Seipp concerning Seipp acting as a broker in another transaction. When the potential client learned of the litigation, the individual terminated discussions and employed another broker. Seipp filed an arbitration demand against Cornerstone one month after the dismissal of the lawsuit and claimed damages of $1 million for lost commissions and attorney fees incurred in the previously dismissed lawsuit. Cornerstone then filed suit in superior court alleging breach of the settlement agreement and other claims for relief. In response to multiple motions, the trial court entered a summary judgment in favor of Cornerstone on its claims against Seipp for breach of the settlement agreement, but denied a motion to enjoin the arbitration. Cornerstone appealed.

Holding: The trial court was affirmed. The trial court did not resolve the issue of whether the arbitration complaint seeking payment of commissions was barred under the doctrine of res judicata. This was appropriate in as much as this issue was properly decided in the arbitration. The CBA bylaws required resolution by arbitration of all claims regarding any lost commission "regardless of the legal theory." The superior court was not involved in the resolution of the prior dispute; the matter was resolved by settlement and the trial court had no unique qualification to ascertain the scope and effect of the prior final judgment.

***Beauregard v. Riley*, 9 Wn.App.2d 248 (2019)**

Facts: The Beauregards listed their home with Riley, a realtor with Windermere in Bellevue. Riley communicated the home could be listed at $2,488,000, which was higher than other sales agents interviewed by the Beauregards. Riley was also told that if the home could not be sold for the listing price, the Beauregards were interested in renting it. About a month after signing the listing agreement in November 2015, Riley suggested a lower listing price – between $1,950,000 and $2,150,000. Ultimately, the property was listed for $2,288,000 with a $5,000 paint credit. Multiple showings ensued, but no sales. In April 2016, the listing was terminated. The property was ultimately sold in August 2016 through another agent for $1,850,000. The Beauregards sued Riley claiming various breaches of statutory duties, resulting in the house staying on the market for too long, leading to lower offers and a lower sales price. They also asserted a CPA claim based on the fact one prospective buyer had offered to rent the

property and Riley failed to communicate the offer. The trial court dismissed the claim asserting damages relating to the sale of the house on summary judgment, based on a failure to prove causation. The trial denied Riley's summary judgment on the issue relating to communication of the rental offer on the grounds the failure to communicate violated Riley's statutory duties and could support a CPA claim. Both parties appealed.

Holding: The trial court was partially affirmed and partially reversed. Under the standard announced in *Boguch v. Landover Corp.*, 153 Wn.App. 595 (2009), the Beauregards were required to demonstrate there was a prospective buyer willing to purchase the property but for Riley's negligence. No such evidence was presented. The trial court's finding Riley had a duty to communicate the rental offer was a violation of duty capable of supporting a CPA claim was in error. The duty to communicate offers was applicable only when the broker is acting in the expectation of compensation. Since the listing agreement, and the expectation of payment, related only to the sale of the house and there was no agreement to pay a commission for renting the house, there was no duty to communicate the rental offer.

Wash. Prof'l Real Estate v. Young, *190 Wn.App. 541 (2015)* – Enforceability of tail provision.
Marcus & Millichap v. Yates, Wood, *192 Wn.App. 465 (2016); rev. den. 184 Wn.2d 1041 (2016)* – Applicability of arbitration provision in organizational bylaws.

B. Claims Against Buyers/Sellers

Estate of Carter v. Carden, **11 Wn.App.2d 573 (2019)**

Facts: In 1986, Carter subdivided property in Freeland on Whidbey Island into two lots – A & B. A well system was established serving both lots, with the well located on lot A. Carter recorded an Operation and Maintenance Agreement granting lot B access to the well system and reciting the owners of lots A and B each owned an undivided one-half interest in the system. The Carters built a house on lot B, which was served by the well on lot A. In 2013, the Carter estate (Carter had since died) conveyed lot B and the house to Carden. The Estate represented in the PSA lot B was connected to the well and a shared well agreement was to be recorded prior to closing. Problems arose with the County approving the system as a public water system. Carden retained counsel and sought a new well agreement. During this time, the Estate tried to sell lot A. The sale did not close, in part because the buyer wanted changes to the 2013 well agreement and Carden refused to agree. The Estate sued Carden alleging tortious interference with the sale transaction. Carden counterclaimed based on the Estate's failure to provide a legally approved agreement for the operation of the water system as required in the 2013 PSA. The Estate submitted a new well agreement to Carden in 2017 during the litigation and demanded Carden sign it. Carden refused and the Estate asserted the refusal was a breach of Carden's duty of goof faith and fair dealing. Ultimately, the trial court concluded Carden had no interest in the well and the Estate was entitled to terminate water service to lot B. Carden appealed.

Holding: The trial court was reversed. The 2013 recorded well agreement was not sufficient to fulfill the Estate's obligations under the PSA and the Estate was under an obligation to provide a valid, shared well agreement. Carden had a duty of good faith to cooperate with the Estate to in its efforts to complete its obligations. However, the duty of good faith did not require Carden to agree to the 2017 agreement which contained provisions beyond those agreed to in 2013. The duty of good faith and fair dealing did not require the acceptance of material changes to the terms of an agreement. The trial court erred in concluding the alleged interference with the possible sale of lot A was a breach of the duty of good faith and fair dealing relating to the well agreement. The matter was remanded for further proceedings.

***Borton & Sons v. Burbank Properties,* 9 Wn.App.2d 599 (2019); rev. granted 194 Wn.2d 1016 (2019)**

Facts: Burbank owned 164 acres of farmland in Walla Walla County on which it grew potatoes. Borton owned an orchard on adjacent property. Burbank was in financial distress and offered to sell the property to Borton. The price was $1,550,000. Burbank leased the property for three years – 2016, 2017 and 2018 – with an option to purchase the property for $1,800,000. The option was to be exercised by December 31, 2017 and with closing by December 31, 2018. Burbank exercised its purchase option on January 4, 2018, four days past the deadline. Borton commenced a declaratory judgment action to determine the validity of the exercise. The trial court held the exercise was valid, granting Burbank an equitable grace period due to the potential loss associated with crops growing on the property. Borton appealed.

Holding: The judgment was reversed. Although Washington law recognizes equity may avoid a forfeiture in connection with an untimely exercise of an option, those decisions have all been based upon the option holder having made valuable improvements to the property. The trial court erred in concluding the planted crops constituted improvements constituting an equity value held by Burbank. There was no evidence presented that Burbank suffered an inequitable forfeiture justifying the late exercise of the option.

Shepard v. Holmes, *185 Wn.App. 730 (2015)* – Statute of limitations.

Hoggatt v. Flores, *185 Wn.App. 764 (2015); rev. denied, 183 Wn.2d 1005 (2015)* – Rescission for failure to comply with subdivision statute.

TJ Landco v. Harley C. Douglass, Inc., 186 Wn.App. 249 (2015); rev. denied, 184 Wn.2d 1003 (2015) – Interpretation of contract.

Port Dist. V. Wash. Tire Corp., *187 Wn.App. 222 (2015)* – Anticipatory breach.

Jespersen v. Clark County, *199 Wn.App. 568 (2017)* – Claim of breach of warranty arising from tax foreclosure sale.

Federal Home Loan Bank v. Barclay's Capital, *1 Wn.App.2d 551 (2017)* – Claim arising from sale of mortgage backed securities.

Rowe v. Klein, *2 Wn.App.2d 326 (2018)* – Statute of limitations for breach of warranties under statutory warranty deed.

T&B Washington, Inc. v. Dullanty, *3 Wn.App.2d 447 (2018)* **–** Action to retain earnest money deposit.

Federal Home Loan Bank of Seattle v. RBS Securities, *3 Wn.App.2d 642 (2018); rev. stayed pending decision in Federal Home Loan Bank of Seattle v. Credit Suisse Securities, No. 95420-8, 2018 Wash. LEXIS 678 (2018)* **–** Securities fraud claim on sale of mortgage securities.

C. Claims Against Third Parties

RockRock Grp. v. Value Logic, *194 Wn.App. 904 (2016)* – Claim against appraiser.

Deegan v. Windermere Real Estate, *197 Wn.App. 875 (2017)* – Claim against broker for non-disclosure of airport noise.

State v. LA Investors, LLC, *2 Wn.App.2d 524 (2018)* – CPA violation in marking records search services.

III. Title Insurance

Haley v. Hume, 10 Wn.App.2d 484 (2019); rev. den. 195 Wn.2d 1015 (2020)

Facts: In 1979, the owner of tract A of a Mercer Island short plat granted a 140 x 10 foot easement along the southern edge of tract A to lot B for ingress, egress, parking and utilities. The easement was necessary to provide access over a paved road serving lots C and D; visitors to those lots were cutting across a driveway on lot B to gain access to a paved road. Hume bought lot B in 2000. In 2001, Pugh bought lot D and tract A. As part of the additional improvements on lot D, a new driveway was built and Hume agreed to abandon a portion of the easement on tract A. After 2001, Pugh's improvements made surface use of the easement impossible, although underground utilities remained. In 2005, Haley bought lot B. Title was conveyed by warranty deed and Pacific Northwest Title Insurance insured the title. In 2012, Haley discovered the easement and asked Pugh for permission to widen the driveway on lot B into the easement area. Pugh informed Haley the easement had been abandoned. In a subsequent lawsuit, title to the easement area was quieted in Pugh. Haley, prior to the final judgment quieting title, tendered defense to First American Title (successor to Pacific Northwest). First American rejected the tender. In 2016, Haley sued Hume and First American claiming the abandonment of the easement violated the warranties in the deed. The trial court dismissed Haley's claims and Haley appealed.

Holding: The trial court was affirmed. The claim of breach of warranty of seisin, which was a present warranty, as to the easement was breached at the time the deed was given. Since the deed was delivered more than eleven years prior to the commencement of the suit, the action was barred by the statute of limitations. As to quiet possession, when the Haley bought the property, Pugh was already in possession of the easement area, so Haley was constructively evicted from the easement as of the date of conveyance. The constructive eviction provided notice to Haley of the breach of the warranty of quiet possession and started the running of the six-year statute of limitations. Again, the claim was barred by the statute of limitations. As to the duty to defend, Haley never tendered defense of Pugh's claim to Hume before the matter was

resolved. Similarly, First American had no duty to defend. General Except 3 was applicable to the dispute and resulted in no coverage:

> [t]his policy does not insure against loss or damage by reason of … other matters which would be disclosed by an accurate survey or inspection of the premises.

Had a survey been obtained, the easement and its location would have been disclosed and exclusive possession of the easement area was with Pugh, or someone other than Hume.

Centurion Properties v. Title Ins. Co., *186 Wn.2d 58 (2016)* – Duty to third parties.
Millies v. LandAmerica Transnation, *185 Wn.2d 302 (2016)* – Damages for breach of policy.
Robbins v. Mason County Title Insurance**,** *5 Wn.App.2d 68 (2018); rev. granted 193 Wn.2d 1012 (2019)* – Duty to defend.

IV. Real Property Lending Transactions

A. Usury

No reported cases within the last five years.

B. Priority

Trustee's Sale of Real Property of Anderson, 8 Wn.App.2d 41 (2019)

Facts: Anderson owned real property in Kent, Washington, subject to two loans obtained from GreenPoint Mortgage in April, 2004; one for $148,000 and one for $27,700, both secured by liens on the property. On November 4, 2010, Umpqua obtained a judgment against Anderson in the amount of $58,874.29 and recorded judgment on March 25, 2011. Anderson died on January 25, 2014 and the first lien position was foreclosed in 2017. The trustee sold the property for $210,200, and satisfied GreenPoint's first position lien. Pursuant to RCW 61.24.080, the trustee deposited the surplus, $39,000 after deduction of costs, with the registry of the court. Umpqua petitioned for disbursement. Global Proceeds, holding the second note and deed of trust originally granted to GreenPoint, objected and sought payment of the balance due on the note of $22,960.51. At a subsequent hearing, the court commissioner granted Umpqua's motion based on the lack of documentation submitted by Global. Global moved for revision, which was denied. Global appealed.

Holding: The trial court was affirmed. Global failed to prove the existence of an enforceable lien; it produced neither the signed note nor the deed of trust signed by Anderson. Umpqua provided definitive evidence to support its judgment lien and Global did not dispute the validity of Umpqua's judgment. Global's evidence did not establish its right to assert the debt or the amount owing on the debt. The commissioner properly ordered disbursement to Umpqua.

OneWest Bank v. Erickson, *185 Wn.2d 43 (2016)* – Priority of loan made by conservator.
City of Kent v. Bel Air & Briney, *190 Wn.App. 166 (2015); rev. denied 185 Wn.2d 1008 (2016)* – Equitable subrogation.
First Bank of Lincoln v. Tuschoff, *193 Wn.App. 413 (2016)* – Effect of assignment of loan.
Edmundson v. Bank of Am.**,** *194 Wn.App. 920 (2016)* – Effect of bankruptcy.
Wash. Fed. v. Azure Chelan LLC, *195 Wn.App. 644 (2016)* – Title following foreclosure.

C. Actions to Collect

Winters v. Quality Loan Servicing Corp. of Washington, **11 Wn.App.2d 628 (2019)**

Facts: Winters obtained a loan secured by a deed of trust to purchase property in Satsop. The lender sold the note to a securitized trust, of which Wells Fargo was the trustee. Winters stopped paying on the note in 2012. Wells Fargo executed a limited power of attorney naming Select Portfolio Servicing to act on behalf of Wells Fargo in connection with the loan, including the power to appoint substitute trustees. SPS appointed Quality Loan Service to act as successor trustee. After an intervening bankruptcy by Winters, the non-judicial foreclosure proceeded and the property was sold in January 2016. Winters sued Wells Fargo, SPS and QLS alleging a failure to comply with the Deeds of Trust Act in conducting the sale and violations of the CPA. The trial court denied QLS' motion for summary judgment to dismiss the claims. QLS sought discretionary review.

Holding: The trial court was reversed. The Court held:

> The uncontroverted record establishes that the actual holder of the note, "Wells Fargo Bank, National Association, as Trustee, on behalf of the registered holders of Morgan Stanley ABS Capital I Inc., Trust 2007-HE4, Mortgage Pass-Through Certificates, Series 2007-HE4" . . . executed a limited power of attorney appointing Select Portfolio Servicing Inc. (SPS) as its attorney-in-fact with authority to execute documents in the nonjudicial foreclosure proceeding. . . . SPS as the attorney-in-fact for Wells Fargo N.A. executed a declaration stating under penalty of perjury that Wells Fargo N.A. was the actual holder of the note and appointed Quality Loan Service Corporation of Washington (QLS) as the successor trustee. Because SPS had the authority to act as the authorized agent of Wells Fargo N.A. and the uncontroverted record establishes QLS complied with the statute that governs qualifications for a successor trustee, we reverse denial of summary judgment. We remand to dismiss the claims against QLS. On remand, the court shall also address the propriety of imposition of expenses under RCW 61.24.090(1)(b).

***Terhune v. N. Cascade Trustee Services,* 9 Wn.App.2d 708 (2019); rev. den. 195 Wn.2d 1004 (2020)**

Facts: In 2008, Terhune borrowed $1,499,999 from Countrywide Bank, secured by a deed of trust on a residence. Terhune stopped paying the loan in early 2009. In connection with the payment default, notices were sent to Terhune stating the loan "will be accelerated" if the payment default was not cured. A trustee's notice of sale was recorded setting the sale for December 3, 2010, showing a $216,000 delinquency. In November 2010, Terhune sued to restrain the sale. The suit was ultimately dismissed; the foreclosure did not proceed. The loan was subsequently assigned to a securitized trust of which U.S. Bank was the trustee. A new non-judicial foreclosure was commenced at the direction of U.S. Bank in October 2016 with a sale date of February 17, 2017. Terhune sued again, claiming the action was barred by the statute of limitations. The trial court dismissed the action on summary judgment. Terhune appealed.

Holding: The dismissal was affirmed. For installment obligations, the statute of limitations accrues for each monthly installment when it becomes due. If the balance is accelerated, the entire remaining balance becomes due and statute of limitations is triggered for all of the installments. The notices sent by the lender did not establish the lender clearly and unequivocally accelerated the loan balance. Terhune also failed to raise an issue of material fact as to whether U.S. Bank was the holder of the note.

***Villegas v. Nationstar Mortgage, LLC,* 8 Wn.App.2d 878 (2019); rev. den. 194 Wn.2d 1006 (2019)**

Facts: In 2006, Villegas refinanced his house with a $552,000 loan from AmericanHomeKey. The loan was secured by a deed of trust. Various assignments of the loan were made and ultimately the loan was held by a securitized trust. Villegas stopped making payments in January 2012. Aurora Bank, the loan servicer, instructed the trustee to foreclose. While the foreclosure was in process, the servicing rights to the loan were transferred to Nationstar Mortgage. Villegas requested mediation under the Foreclosure Fairness Act and Villegas was offered a trial payment plan. Villegas made the payments required under the plan and was then provided loan modification documents. The modification contained a much higher escrow payment and Villegas refused to sign the modification. The mediator closed the mediation and issued a certificate finding Nationstar had not negotiated in good faith. In June 2015, Nationstar commenced a judicial foreclosure and Villegas counterclaimed against the loan servicers and trustee for violations of the CPA and misrepresentation. In October 2015, Villegas sold the home and paid the loan in full. Nationstar dismissed its foreclosure and the trial court then realigned the parties, making Villegas the plaintiff. The trial court in November 2016 dismissed all but the per se violations of the CPA on summary judgment. After a bench trial in May 2017, the trial court dismissed the remaining claims. Although the trial court found Nationstar did not mediate in good faith and

therefore committed a violation of the CPA, Villegas failed to prove any damages from the violation. Villegas appealed, contending his mediation expenses constituted damages.

Holding: The dismissal was affirmed. The claims associated with the propriety of the original non-judicial foreclosure were properly dismissed because Nationstar was in possession of the note and had the authority to maintain the foreclosure. There was no showing the trustee violated its obligations regarding the disclosure of the beneficiary's identity. Villegas presented no evidence the conduct of Nationstar caused any damage or required him to incur any expenses. The bad faith conduct by Nationstar related to its failure to adequately explain the increased escrow amount in the loan modification and this occurred after the mediation was completed. Villegas' mediation expenses were not connected with this conduct and accordingly, did not constitute damages required to support a finding of a violation of the CPA.

***U.S. Bank v. Ukpoma,* 8 Wn.App.2d 254 (2019)**

Facts: Ukpoma defaulted on her home mortgage held by U.S. Bank in October 2007. The servicer sent a notice in February 2008 informing Ukpoma her loan balance was accelerated and the entire amount was immediately due and payable. The notice also said she could reinstate the loan if she paid the delinquent payments plus various charges 11 or more days before an unscheduled trustee's sale. The trustee's sale never occurred. Finally, in on May 13, 2016, U.S. Bank commenced a judicial foreclosure. Ukpoma asserted the action was barred by the statute of limitations. The trial court rejected the defense and entered a judgment of foreclosure in favor of U.S. Bank. Ukpoma appealed.

Holding: The trial court was affirmed. The Court held the notice sent in 2008 was unclear – it was contradictory by claiming acceleration but also informing Ukpoma would reinstate the loan up to 11 days prior to the sale. A subsequent notice of sale indicated the loan had not been accelerated. The 2008 notice was not a clear and unequivocal acceleration of the balance. Accordingly, the balance was not accelerated and the statute of limitations did not run on the entire unpaid balance. Although unnecessary for the resolution of the appeal, the opinion contains a discussion of the issue of whether the commencement of a non-judicial foreclosure proceeding tolls the statute of limitations.

***Cedar W. Owners Ass'n v. Nationstar Mortgage LLC,* 7 Wn.App.2d 473 (2019); rev. den. 193 Wn.2d 1016 (2019)**

Facts: In June 2008, Allen bought a condominium unit in the Cedar West Condominium financed with a loan from Countrywide Bank FSB. Allen defaulted on the payments due Countrywide and also failed to pay condominium dues and assessments beginning in June 2010. The Cedar West Condominium Association foreclosed its assessment lien in April 2015, and acquired the unit. In September 2015, the lender

sent a notice of default asserting delinquent payments of over $71,000, plus additional costs and fees. In July 2016, the loan was assigned to Nationstar Mortgage and Nationstar recorded a notice of sale on October 18, 2016, scheduling the sale from February 24, 2017. On February 10, 2017, the Association filed suit to restrain the sale and quiet title, asserting that since the Notice of Sale was not recorded until October 2016, more than six years after Allen's default in June 2010, the foreclosure was barred by the statute of limitations. The trial court rejected the argument, dismissed the lawsuit and allowed the trustee's sale to proceed. The Association appealed.

Holding: The trial court was affirmed. The Court rejected the Association argument the statute of limitations on the entire obligation began to run when Allen failed to pay the installment due in June 2010. The statute of limitations on an installment obligation accrues for each monthly installment at the time the installment is due. Given the delay of over a year from the date of filing the notice of default and the date of the notice of sale, the Court concluded the statute of limitations was tolled by the filing of the notice of default and Nationstar was entitled to assert of a default in payment for all installments due on or after November 1, 2010.

Shanghai Commercial Bank v. Kung Da Chang, *189 Wn.2d 474 (2017)* – Choice of law in enforcement of foreign judgment lien.

Selene RMOF II REO Acquisitions II, LLC v. Ward, *189 Wn.2d 72 (2017)* – Right of successor in interest to purchaser at non-judicial foreclosure sale to evict occupant.

Jordan v. Nationstar Mortg., LLC, *185 Wn.2d 876 (2016)* – Pre-foreclosure possession by lender.

Brown v. Dept. of Commerce, *184 Wn.2d 509 (2015)* – Right to demand mediation.

Trujillo v. Nw. Tr. Servs., Inc., *183 Wn.2d 820 (2015)* – Required proof of status as beneficiary.

Wash. Fed. v. Harvey, *182 Wn.2d 335 (2015)* – Right to deficiency judgment.

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

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

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

Leahy v. Quality Loan Serv.**,** *190 Wn.App. 1 (2015); rev. denied 185 Wn.2d 1 (2016)* – Failure to seek pre-sale restraint.

Barkley v. Greenpoint Mortg., 190 Wn.App. 58 (2015) – Claim of wrongful foreclosure.

Frontier Bank v. Bingo Investments, *191 Wn.App. 43 (2015)* – Liability of guarantor.

Podbielancik v. LPP Mortg. Ltd.**,** *191 Wn.App.662 (2015)* – Claim of bid irregularity.

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

Deutsche Bank Nat'l Tr. V. Slotke, *192 Wn.App. 166 (2016)* – Right of holder to foreclose.

Blair v. NW. Tr. Servs., Inc., *193 Wn.App. 18 (2016); rev. den. 186 Wn.2d 1019 (2016)* – Trustee's reliance on identity of beneficiary.

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

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

Umpqua Bank v. Shasta Apartments, *194 Wn.App. 685 (2016); rev. den. 186 Wn.2d 1026 (Dec. 7, 2016)* – Effect of sale by receiver.

4518 S. 256th LLC v. Karen L. Gibbon, PS, *195 Wn.App. 423 (2016)* – Statute of limitations and acceleration of debt.

Patrick v. Wells Fargo Bank N.A., *196 Wn.App. 398 (2016); rev. denied 187 Wn.2d 1022 (2017)* – Failure to restrain sale.

Bavand v. OneWest Bank, *196 Wn.App. 813 (2016)* – Identity of holder.

Bucci v. NW. Tr. Servs., Inc., *197 Wn.App. 318 (2016)* – Identity of holder.
Ewing v. Glogowski**,** *198 Wn.App. 515 (2017)* – Award of attorney fees.
River Stone Holdings v. Lopez, *199 Wn.App. 87 (2017)* – Post non-judicial foreclosure action challenging validity of sale.
Schroeder v. Haberthur, *200 Wn.App. 167 (2017)*; review pending en banc hearing, 2018 Wash. LEXIS 96 (2018) – Agricultural property and non-judicial foreclosure.
Timberland Bank v. Mesaros, *1 Wn.App. 602 (2017)* – Failure to timely return report of sale in mortgage foreclosure.
Centrum Financial Services v. Union Bank, *1 Wn.App.2d 749 (2017); rev. den. 190 Wn.2d 1014 (2018)* – Right of second mortgagee to assume defaulted first deed of trust.
Merceri v. Deutsche Bank AG, *2 Wn.App.2d 143 (2018)* – Bankruptcy proceeding tolling statute of limitations.
Singh v. Federal National Mortgage Ass'n, *4 Wn.App.2d 1 (2018)* – Continuation of sale.
Merceri v. Bank of New York Mellon, *4 Wn.App.2d 755 (2018); rev. den. 192 Wn.2d 1008 (2018)* – Claim of acceleration of note upon default.

D. Mortgage Insurance

No reported cases within the last five years.

V. Landlord Tenant

Chong Yim v. City of Seattle, 194 Wn.2d 682 (2019)

Facts: Seattle's tenant screening ordinance was challenged in the U.S. District Court for the Western District of Washington. The plaintiffs contended the ordinance, SMC 14.09.025(A)(2), making it an unfair practice to inquire about, or take adverse action with respect to a prospective tenant based upon any arrest record, conviction record or criminal history. The plaintiffs contended the ordinance violated their federal constitutional right to free speech and due process and their state constitution right to due process. The judge certified the following question to the Washington Supreme Court: (1) "What is the proper standard to analyze a substantive due process claim under the Washington Constitution?" (2) "Is the same standard applied to substantive due process claims involving land use regulations?" and (3) "What standard should be applied to Seattle Municipal Code [chapter] 14.09 ('Fair Chance Housing Ordinance')?"

Holding: As to the first two questions, the Court answered:

> We answer that unless and until this court adopts a heightened standard as a matter of independent state law, article I, section 3 substantive due process claims are subject to the same standards as federal substantive due process claims. The same is true for substantive due process claims involving land use regulations. Our precedent suggesting otherwise can no longer be interpreted as requiring a heightened standard of review as a matter of independent state law.
>
> In answer to the third certified question, we hold that rational basis review

applies to the plaintiffs' state substantive due process challenge to the Fair Chance Housing Ordinance

The Court listed previous decisions no longer interpreted as requiring heightened scrutiny in article I, section 3 substantive due process challenges to laws regulating the use of property.

***Chong Yim v. City of Seattle,* 194 Wn.2d 651 (2019)**

Facts: The City of Seattle enacted, effective January 1, 2017, a "First In Time" rule applicable to landlords renting residential units. Landlords were required to maintain a list recording the order applicants sought to rent a unit. The rule requires the landlord to offer the unit for rent to the first-in-time qualified applicant on the list. See SMC 14.08.050. In August 2017, a group of landlords sued the City, contending the FIT rule was facially unconstitutional, violating the "Takings, Due Process, and Free Speech Clauses in the Washington State Constitution." On cross motions for summary judgment, the trial court ruled in favor of the plaintiffs, finding the ordinance violated article 1, section 18 (takings), section 3 (due process) and section 5 (free speech) of the Washington constitution. The City appealed and the Supreme Court granted direct review.

Holding: The trial court was reversed. The Court found there was no showing the FIT rule was a regulatory taking of property. On its face, the rule only required disclosure of facts. The rule did not result in the property owner sustaining any physical invasion of their property and the plaintiff did not demonstrate any deprivation of the economic use of their property. The Court announced it would follow federal law in determining whether government action constituted a regulatory taking. Applying federal standards, the Court concluded there had not been a showing the FIT rule was facially invalid as a regulatory taking. Similarly, the rule did not facially violate any due process rights of the plaintiffs and the rule was rationally related to a legitimate state issue. The free speech issue was rejected on the basis the speech at issue was commercial in nature and was entitled to deferential scrutiny.

***Northgate v. Geoffrey H. Garrett,* 10 Wn.App.2d 850 (2019)**

Facts: In 2010, Northgate Ventures LLC entered into an eight-year commercial lease with the law firm Geoffrey H. Garrett PLLC. In 2016, Garrett PLLC requested to terminate the lease. Northgate refused and Garrett PLLC defaulted and vacated. Garrett PLLC was dissolved and placed into receivership. Geoffrey Garrett, the principal of Garrett PLLC, created a new law firm and continued to practice law. Northgate sued Geoffrey Garrett to recover the defaulted lease payments, claiming the new law firm was the mere continuations of Geoffrey H. Garrett PLLC and Geoffrey Garrett fraudulently transferred goodwill from Geoffrey H. Garrett PLLC to Geoff Garrett PLLC, a violation of Uniform Fraudulent Transfer Act. The trial court dismissed Northgate's claims on summary judgment. Northgate appealed.

Holding: The dismissal was affirmed. The lease was negotiated between Northgate and a corporate entity. The landlord was on notice the corporate structure of the tenant shielded members from personal liability. Northgate did not seek a personal guaranty, so the landlord was on notice it could not collect if the corporate tenant became insolvent. Northgate failed to prove property was fraudulently transferred from the previous corporate entity to the new entity. The Geoffrey Garrett divested himself of the previous entity upon filing for a receivership and ceased operating the previous entity. All of the property of Garrett PLLC was assigned to the receiver for the benefit of the previous entity's creditors and not transferred to the new entity.

***Silver v. Rudeen Mgmt. Co.,* 10 Wn.App.2d 676 (2019); rev. granted 195 Wn.2d 1018 (2020)**

Facts: Silver rented an apartment from Rudeen. As part of the rental agreement, Silver paid a $300 damage deposit. Silver vacated the apartment on June 30, 2015. He was provided a "Deposit Disposition" statement showing Silver owed $2,516.00 for "excessive wear and tear." After Rudeen tried to collect the claim, Silver sued on August 10, 2017, asserting the existence of a class of plaintiffs owed damages as a result of Rudeen's failure to provide within 21 days a final statement concerning the damage deposit pursuant to RCW 59.18.280. Silver sought the refund each class member's security deposit plus double damages and attorney fees. Rudeen moved for dismissal on the grounds the action was barred by the statute of limitations. Silver contended that his action was subject to the three-year statute of limitations governing recovery of personal property. The trial court concluded that the only cause of action asserted was a violation of the RLTA governed by a two-year statute of limitations. The court granted summary judgment and dismissed the case for untimely filing. Silver appealed.

Holding: The trial court was affirmed. The issue of which statute of limitations applied was a matter of law and review was de novo. When a statute does not contain its own statute of limitations applicable to violations, RCW 4.15.130 applies:

> An action for relief not hereinbefore provided for, shall be commenced within two years after the cause of action shall have accrued.

Silver contended RCW 4.16.080(2) applied, which provided for a three-year limitations period on actions to recover personal property. Silver's complaint specifically alleged a violation of the RLTA, rather than an action for replevin. Since this was an action to enforce duties owed by the landlord under the RLTA, which had no internal statute of limitations, the two-year statue of limitations applied.

***N.W. Alloys v. Department of Natural Resources,* 10 Wn.App.2d 169 (2019); rev. den. 194 Wn.2d 1019 (2020)**

Facts: Alcoa, through its subsidiary N.W. Alloys, leased from DNR state-owned

aquatic lands adjacent to an aluminum smelter on the Columbia River in Longview. The lease was renewed in 2008 with a 30-year term. Consent of DNR was required for any sublease, but the consent was not to be unreasonably withheld. In considering a sublease, DNR was allowed to consider:

> the proposed transferee's financial condition, business reputation and experience, the nature of the proposed transferee's business, the then-current value of the [p]roperty, and such other factors as may reasonably bear upon the suitability of the transferee as a tenant of the [p]roperty."

NWA, with DNR's consent, subleased the aquatic lands to Chinook Ventures. Chinook constructed various improvements without appropriate permits and committed a significant number of environmental violations cited by DOE, ultimately resulting in a default by NWA under the DNR lease. The default was resolved. In 2010, NWA requested DNR's approval of a sublease to Millennium, who was in the process of purchasing Chinook's assets. In response, DNR requested information about Millennium, including financial information and details of its planned business operations. The requested information was not fully provided and DNR deferred its decision until Millennium, who was planning a coal-shipping terminal, obtained required shoreline permits. DNR renewed its requests for information in 2016, none of which were provided. On January 4, 2017, the commission of public lands denied DNR's consent. NWA and Millennium appealed the denial to superior court pursuant to RCW 79.02.030. The trial court concluded the denial was arbitrary and capricious and remanded the matter to the commissioner for further consideration. All parties appealed.

Holding: The trial court was reversed. DNR was acting in its administrative capacity in its review of the proposed sublease. Although it had contractual obligations under the lease, "DNR cannot contract itself out of its statutorily mandated duty to exercise discretion in furtherance of the public trust." Given the financial information available concerning Millennium and its limited operating experience and the fact additional information requested by DNR was not provided, the denial was not arbitrary and capricious. The trial court was instructed to affirm DNR's denial.

Randy Reynolds & Associates v. Harmon**,** *193 Wn.2d 143 (2019)* – Vacating default judgment of unlawful detainer.

Faciszewski v. Brown, *187 Wn.2d 308 (2017)* – Seattle Just Cause Eviction Ordinance.

Western Plaza LLC v. Tison, *184 Wn.2d 702 (2015)* – Mobile Home Landlord Tenant Act.

Segura v. Cabrera, *184 Wn.2d 587 (2015)* – Damages under RCW 59.18.085.

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

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

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

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

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

FPA Crescent Assocs. LLC v. Jamie's LLC, *190 Wn.App. 666 (2015)* – Holdover tenant versus failure to pay rent.

Goodeill v. Madison Real Estate, *191 Wn.App. 88 (2015); rev. denied 185 Wn.2d 1023 (2016)* – Time period to account for security deposit.

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

Kitsap County Consolidated Housing Authority v. Henry-Livingston, *196 Wn.App. 688 (2016)* – Termination of housing authority lease.

R. Thoreson Homes, LLC v. Prudhon, *197 Wn.App. 38 (2016)* – Seattle Just Cause Eviction Ordinance.

Riley v. Iron Gate Self Storage, *198 Wn.App. 692 (2017), rev. den. 189 Wn.2d 1010 (2017)* – Limitations on damages for disposal of personal property.

Narrows Real Estate, Inc., v. Manufactured/Mobile Home Dispute Resolution Program, *199 Wn.App. 842 (2017)* – Dispute over expense reimbursement under MHLTA.

Randy Reynolds & Assocs. v. Harmon, *1 Wn.App.2d 239 (2017)* – Ex parte hearing to stay writ of execution.

Housing Authority v. City of Seattle, *3 Wn.App.2d 532 (2018)* – Entitlement to Section 8 voucher.

Castellon v. Rodriguez, *4 Wn.App.2d 8 (2018)* – Jurisdiction for unlawful detainer proceeding.

Tacoma Pierce County Small Business Incubator v. Jaguar Security, Inc., *4 Wn.App.2d 935 (2018)* – Service accomplished through electronic methods.

Allen v. Dan & Bill's RV Park**,** *6 Wn.App.2d 349 (2018)* – Definition of "park model" under MHLTA.

Bellevue Square v. Whole Foods, *6 Wn.App.2d 709 (2018)* – Continuous operation clause.

VI. Easements/Covenants

Yorkston v. Whatcom County, 11 Wn.App.2d 815 (2020)

Facts: Yorkston owned property in Whatcom County abutting Birch Bay Drive. Over the years, it was assumed Birch Bay Drive was a 60-foot right of way and the County had granted various easements and franchises to utilities occupying the full 60-foot wide right of way. In February 2015, Yorkston filed a declaratory judgment action seeking a determination Birch Bay Drive was only 30 feet wide. The lawsuit was certified as a class action on behalf of all abutting owners. The County maintained the right of way was 60 feet wide and, if not, the County asserted a prescriptive easement over the entire 60-foot width. The trial court held the right of way was 60-feet wide as a result of statutory provisions in effect when the road was established in 1884. Yorkston appealed.

Holding: The trial court was affirmed. The 1884 order establishing the road was valid and at this time beyond challenge. Under the Code of 1881, the County Commission had the authority to establish the road and any road established was 60 feet in width, unless otherwise specified. The trial court found:

> The County Commissioners created a new road, Ferndale and Birch Bay Road, incorporating the entire route from the Ferndale ferry all the way to Bruns's home, did not specify a width for the new road, and therefore the

> default width of sixty (60) feet provided for by statute applies to this new road.

These findings were supported by substantial evidence.

***Cooke v. Chu-Yun Twu,* 10 Wn.App.2d 476 (2019)**

Facts: Cooke and Twu owned adjacent properties overlooking the Columbia River in Camas. A view easement was negotiated to protect the Cooke's view over Twu's downhill property. A dispute arose when Cooke cut down a cherry tree on Twu's property claimed to violate the easement. Cooke then sued for violation of the easement and Twu claimed damages from cutting down the tree. Cooke made an offer of settlement under RCW 4.84.250-300, offering $2,005.00. Twu countered with a slightly smaller sum, but insisted upon resolution of the height of the view easement by lowering the base line. The matter went to trial and the trial court awarded $5,364 in treble damages on Twu's timber trespass claim, but found in favor of Cooke on the interpretation of the baseline height of the view easement. No attorney fees were awarded. Twu appealed the failure to award fees under Chpt. 4.84 RCW.

Holding: The trial court was affirmed. The purpose of Chpt. 4.84 RCW is to promote settlement of lawsuits involving smaller sums of money. There was ample evidence in the record to support a finding Cooke was willing to pay the amount of monetary damages demanded by Twu. The reason why the matter did not settle was Twu insistence on obtaining relief on the height of the view easement:

> What stymied settlement of the damages claim was not an unwillingness to pay on the small claim, but Twu's unwillingness to accept the Cookes' offer to pay unless they would also resolve the rest of the nonmonetary issues in her favor. The Cookes were clear that they could not accept Twu's proposed height restriction, and they prevailed on that issue at trial. It would contradict the purpose of RCW 4.84.260 for Twu to obtain attorney fees and costs where an agreement could have been reached on her damages claim absent her refusal to compromise on an issue on which she ultimately lost.

The trial court properly refused to award fees under these circumstances.

***Public Utility District v. Comcast of Washington,* 8 Wn.App.2d 418 (2019); rev. den. 193 Wn.2d 1031 (2019)**

Facts: Pacific County Public Utility District No. 2 permitted various companies, including Comcast and Charter Communications to attach equipment to the PUD's utility poles. In 2007, the PUD increased rates for use of the poles, which the companies refused to pay. The PUD sued to collect the increased rental alleging various theories, including trespass. The companies contended the PUD calculation did not comply with

RCW 54.04.045(3)(a)-(c) to reach a "just and reasonable" rate. The trial court ruled in favor of the PUD and the companies appealed.

Holding: The trial court was affirmed. The companies contended the PUD abused its discretion when selecting the inputs and data used to calculate the pole attachment rate pursuant to RCW 54.04.045(3) by classifying "safety space"26 on a utility pole as unusable space and by including a return on equity, rate of return for depreciated debt expenses, taxes, and attorney fees as actual expenses. The statutory framework did not specifically define the data and expenses the PUD was to use in calculating the rate. The Court concluded the selection of data and inputs was within the discretion of the PUD and those inputs and data can be applied to the formula in RCW 54.04.045(3). Making that calculation, the Court concluded the rates established by the PUD was below the maximum allowable rate and within the discretion of the PUD to impose on the companies.

***Murphy v. Hendrickson,* 8 Wn.App.2d 150 (2019); rev. den. 193 Wn.2d 1034 (2019)**

Facts: Murphy owned property at 11431 North Dogwood Lane, Woodway, Washington Hendrickson owned nearby (not adjacent) property at 11411 North Dogwood Lane. Both properties were created by a 1978 short plat. Murphy owned lot 2 and Hendrickson owned Lot 4. The plat also created an easement for the benefit of lot 4 for "ingress, egress and utilities" and the easement burdened several lots, including lot 2. As a result of boundary line adjustments, by 2017 the easement provided the sole means of access for lot 2 to a public road; however, lot 4 directly abutted a public street and the portion of the easement located on lot 2 dead-ended within lot 2 and provided no access for lot 4 to a public road or lot 1. The successor in interest to Murphy sued in 2017 to quiet title to the portion of the easement crossing lot 2. The trial court quieted title and Hendrickson appealed.

Holding: The trial court was affirmed. The easement dead-ended within the boundary of lot 2 and served no useful purpose for lot 4. The change in boundary lines for lot 2 and lot 1 did not alter the description of the easement to extend it to the boundary of the revised lot 2. There was no evidence presented the easement could ever provide utility access to lot 4 or serve any other useful purpose to lot 4. T The Court affirmed citing the rule announced in *Coast Storage Co. v. Schwartz*, 55 Wn.2d 848, 853 (1960):

> An easement is a use interest, and to exist as an appurtenance to land, must serve some beneficial use. An easement terminates as a matter of law when it serves no beneficial use to the dominant estate.

Gamboa v. Clark,* *183 Wn.2d 38 (2015) – Prescriptive easement.
Crystal Ridge v. City of Bothell,* *182 Wn.2d 665 (2015) – Obligation to maintain easement.
Hanna v. Margitan,* *193 Wn.App. 596 (2016) – Effect of filing plat on existing easements.

Tri-City R.R.Co. v. WUTC, *194 Wn.App. 642 (2016); rev. denied, 186 Wn.2d 1029 (Dec. 7, 2016)* – Railroad crossing.

Hood Canal Sand & Gravel v. Goldmark, *195 Wn.App. 284 (2016)* – Authority of DNR to grant easements on public lands.

Boyd v. Sunflower Props. LLC, *197 Wn.App. 137 (2016)* – Implied easement.

Kave v. McIntosh Ridge Primary Road Ass'n, *198 Wn.App. 812 (2017)* – Relocation of easement based on use.

Zonnebloem v. Blue Bay Holdings**,** *200 Wn.App. 178 (2017)* – Obligation of servient estate to cooperate with dominant estate.

Klahanie Ass'n v. Condo Ass'n**,** *1 Wn.App.2 874 (2017); rev. den. 190 Wn.2d 1015 (2018)* – Priority of HOA lien.

Pelly v. Panasyuk, *2 Wn.App.2d 848 (2018)* – Rules of construction of easement.

Byrd v. Pierce County**,** *5 Wn.App.2d 249 (2018)* – Easement for residential access.

Johnson v. Lake Cushman Maintenance Co., *5 Wn.App.2d 765 (2018)* – Easement for exclusive use.

McColl v. Anderson, *6 Wn.App.2d 88 (2018)* – Entitlement to attorney fees in prescriptive easement litigation.

Workman v. Klinkenberg, *6 Wn.App.2d 291 (2018)* – Prescriptive easement.

Tiller v. Lackey, *6 Wn.App.2d 470 (2018)* – Implied easement vs. prescriptive easement.

VII. Liens/Judgments/Attachments

Woodley v. Style Corp., 7 Wn.App.2d 543 (2019)

Facts: Woodley owned a condominium unit in Bellevue Park. The unit, along with others, suffered water damage from a leaking roof in September 2016. Servpro provided repair services, including repairs of damages in the unit. The condominium association failed to pay Servpro, who filed a lien for $183,945.09 naming the association and 20 unit owners whose units were repaired. The lien encumbered the common storage area and the 20 units. Woodley filed an action to dismiss the lien as frivolous and excessive pursuant to RCW 60.04.081. The trial court granted Woodley's motion for summary judgment and dismissed the lien. Servpro appealed.

Holding: The trial court was partially reversed. Reviewing the evidence, the Court determined the lien was not frivolous. Although Woodley contended the lien was untimely, the fact the lien might not be enforceable did not render it frivolous. The lien was, however, clearly excessive as to Woodley's unit, since it was for the entire amount of the repair work for all units and not for the unpaid balance due for work performed to Woodley's unit, which was $6,001.90. The remedy for an excessive lien was not dismissal of the lien, but rather a reduction of the lien amount. RCW 60.04.081(4). Woodley was entitled to attorney fees on appeal pursuant to the statute. The matter was remanded for further proceedings.

Inland Empire Dry Wall Supply Co. v. Western Surety Company, *189 Wn.2d 840 (2018)* – Necessary parties to foreclosure on bond posted to release lien.

Business Services of America v. WaferTech LLC, *188 Wn.2d 846 (2017)* – Proper name for parties to action.

Bankr. Petition of Wieber, *182 Wn.2d 919 (2015)* – Applicability of Washington homestead to property in another state.

N.W. Cascade v. Unique Constr., *187 Wn.App. 685 (2015)* – Property eligible for homestead exemption.

Shelcon Constr. Grp. V. Haymond, *187 Wn.App. 878 (2015)* – Effect of lien waiver.

P.H.T.S. v. Vantage Capital*, 186 Wn.App. 281 (2015)* – Redemption offer pursuant to RCW 6.23.120.

Seven Sales, LLC v. Otterbein, *189 Wn.App. 204 (2015)* – Right to surplus following foreclosure pursuant to RCW 84.64.080.

Performance Constr. v. Glenn, *195 Wn.App. 406 (2016)* – Assignment of redemption rights.

Guillen v. Pearson, *195 Wn.App. 464 (2016)* – Right of individual laborers to assert lien claim.

Ocwen Loan Servicing, LLC v. Bauman, *195 Wn.App. 763 (2016)* – Time period for redemption from foreclosure of delinquent water charges by water utility district.

Viewcrest Condo Ass'n. v. Robertson, *197 Wn.App. 334 (2016)* – Occupancy during redemption period following foreclosure of condo assessments.

Inland Empire Dry Wall Supply Co. v. Western Surety, *197 Wn.App. 510 (2017)* – Necessary parties to lien foreclosure under RCW 60.04.161.

VIII. Homeowners' Associations

Bilanko v. Owners Ass'n, *185 Wn.2d 443 (2016)* – Application of RCW 64.34.264(2).

Filmore LLLP v. Condo. Owners, *184 Wn.2d 170 (2015)* – Approval of leasing restrictions.

Halme v. Walsh, *192 Wn.App. 893 (2016)* – Validity of HOA.

Parker Estates Homeowners Ass'n v. Pattison, *198 Wn.App. 16 (2017)* – Statute of limitations to contest board actions.

Brewer v. Lake Easton Homeowners Ass'n, *2 Wn.App.2d 770 (2018)* – Scope of authority of HOA.

Pritchett v. Picnic Point Homeowners Ass'n, *2 Wn.App.2d 872 (2018)* – Enforcement of view covenant by HOA.

Jevne v. Pass LLC, *3 Wn.App.2d 561 (2018)* – Action in name of association.

Burien Town Square Condominium Association v. Burien Town Square Parcel 1, LLC**, 3 Wn.App.2d 571 (2018); rev. den.** *191 Wn.2d 1015 (2018)* – Statute of limitations applicable to association claims.

IX. Landowner Tort Liability to Others/Insuring Real Property

A. Rules of Liability

Behla v. R.J. Jung, 11 Wn.App.2d 329 (2019); rev. den. 195 Wn.2d 1012 (2020)

Facts: Behla rented a storage shed from Jung. On March 2, 2014, Behla visited the shed. There was about one inch of snow on the ground. Behla went outside of the shed to turn on its interior light. Returning, he fell and suffered injuries. After his fall, he saw a cable running from the shed's breaker box to a recreational vehicle owned by Jung. Behla surmised he tripped on the cable. He sued Jung alleging a failure to use reasonable care in maintaining the rented premises. The trial court dismissed the claim on summary judgment. Behla appealed.

Holding: The trial court was reversed. The trial court concluded Behla's version of the cause of the accident was speculative and other causes were just as likely to have caused the accident. The Court disagreed. In reviewing the conflicting causation

claims the Court applied the following rules to determine whether the claim should be considered "speculative:"

> First, if the plaintiff can rationally rule out other potential causes, the jury should decide if plaintiff's proffered cause constitutes the true cause of harm or rests in speculation. Second, if the plaintiff can show that his offered cause could have caused his injury, the jury should decide whether the plaintiff's proffered cause is based on speculation or if defendant's list of possible causes relies on speculation.

Applying this standard and viewing the evidence most favorably to Behla, the Court concluded an issue of material fact existed as to causation to be resolved by the jury.

***Gerlach v. Cove Apts., LLC,* 8 Wn.App.2d 813 (2019); rev. granted 193 Wn.2d 1037 (2019)**

Facts: Gerlach, while visiting an apartment, fell from a second story apartment balcony with a rotted railing and suffered severe injuries. Gerlach was extremely intoxicated at the time of the fall. Gerlach sued, seeking damages from the property owner and the property manager for breach of contract, violations of the Residential Landlord-Tenant Act of 1973, and negligence. The defendants asserted the affirmative defense of voluntary intoxication. At trial, Cove sought to limit its liability by proving that Gerlach's intoxication was the proximate cause of her damages and that she was more than 50 percent at fault, in accordance with the affirmative defense of voluntary intoxication under RCW 5.40.060(1). The trial court excluded evidence of Gerlach's blood alcohol level. The jury found for Gerlach, awarding approximately $3.8 million in damages, which were reduced by 7%, the amount of contributory negligence the jury attributed to Gerlach. The defendants appealed.

Holding: The verdict was reversed. The trial court abused its discretion by excluding evidence of respondent's blood alcohol level at the time of the accident. The exclusion was prejudicial to the defendants because it affected the landlord's ability to prove Gerlach's intoxication was the proximate cause of her injuries providing a defense RCW 5.40.060(1). The trial court erroneously concluded the admission by Gerlach that she was intoxicated at the time of the accident was sufficient to establish she was under the influence of alcohol as defined by RCW 46.61.506. However, excluding the blood alcohol level deprived the defendants the ability to present evidence to the jury as to the extent of her intoxication.

***Cameron v. Atlantic Richfield Co.*, 8 Wn.App.2d 795 (2019)**

Facts: Gary Cameron died in 2012 of mesothelioma caused by asbestos exposure. His wife sought damages from multiple companies she claimed exposed the decedent to asbestos during the course of his career. One of the defendants, PacifiCorp, sponsored the construction of a steam plant where Cameron worked in

1971 as a boilermaker. Construction of the plant was completed in 1972, but PacifiCorp retained an ownership interest in the plant until 2000. The trial court dismissed the claim against PacifiCorp based on the statute of repose.

Holding: The dismissal was affirmed in part and reversed in part. The dismissal of the claim relating to the construction of the plant was appropriate under RCW 4.16.300, as the statute existed in 1967. The Court rejected the more recent versions of the statute should apply and concluded the statute in effect at the time of substantial completion was applicable. However, PacifiCorp was also sued in its capacity as the owner of the property. The trial court erred in applying the statute of repose to dismiss claims arising out of PacifiCorp's status as the owner of the premises. The matter was remanded for further proceedings.

Lockner v. Pierce County, *190 Wn.2d 526 (2018)* – Recreational Land Use statute.
Jewels v. City of Bellingham, *183 Wn.2d 388 (2015)* – Recreational Land Use statute.
McKown v. Simon Prop. Grp., Inc., *182 Wn.2d 752 (2015)* – Liability for criminal acts.
Hvolboll v. Wolff Co., *187 Wn.App. 37 (2015)* – Duty to remove snow and ice.
Hively v. Port of Skamania County**,** *193 Wn.App. 11 (2016); rev. den. 186 Wn.2d 1004 (2016)* – Recreational land statute.
Lockner v. Pierce County, *198 Wn.App. 907 (2017), rev. granted 189 Wn.2d 1009 (2017)* – Recreational use statute.
Simmons v. City of Othello, *199 Wn.App. 384 (2017)* – Responsibility for lateral sewer line.
Mehlert v. Baseball of Seattle, Inc., *1 Wn.App.2d 115 (2017)* – Slip and fall.
Knutson v. Macy's West Stores**,** *1 Wn.App.2d 543 (2017)* – Operation of escalator as a common carrier.
Acosta v. City of Mabton, *2 Wn.App.2d 131 (2018)* – Municipal liability for blocked sewer.
Phillips v. Greco, *7 Wn.App.2d 1 (2018)* – Injury to guest.

B. Insurance Coverage - Homeowners & Property

W. Beach Condominium v. Commonwealth Insurance Co. of America, 11 Wn.App.2d 791 (2020)

Facts: West Beach Condominiums, a condominium project in West Seattle, discovered water damage behind exterior cladding as a result from an inspection report delivered to the association on September 8, 2015. On September 26, 2016, the association submitted a claim to Commonwealth Insurance Company, who had issued several casualty policies covering the condominium over the years. At the same time, the association filed a complaint to preserve any claims that might become time barred. After conducting an inspection of the condominium, Commonwealth denied coverage in March 2017. In May 2017, the association refilled its complaint, alleging breach of contract, bad faith investigation, CPA violations relating to the handling of the claim and violations of the Insurance Fair Conduct Act (RCW 48.30.015). The trial court dismissed the coverage claims on summary judgment. The other claims were dismissed on a motion at the start of the trial based on the policy provision requiring notice of any claim under the policies to be made within one year of the date of the occurrence. West Beach appealed.

Holding: The trial court was reversed as to the dismissal of the bad faith, CPA and IFCA claims. The internal 1-year statute of limitations in the policies did not apply to claims asserted by West Beach not based on the insurance contract, but rather based on the conduct Commonwealth in handling the claim. The limitation period should not have been applied to the CPA and ICFA claims. Notwithstanding the limitations period in the policies, the trial court erred by dismissing West Beach's claims and not allowing a jury to determine whether the losses were covered by the policies. If there was coverage, the jury could then decide whether denial of coverage was unreasonable and if a violation of the IFCA occurred. If so, West Beach would be entitled to coverage by estoppel.

***Plein v. USAA Casualty Ins. Co.,* 9 Wn.App.2d 407 (2019); rev. granted 194 Wn.2d 1009 (2019)**

Facts: The Pleins suffered fire damage to their home, which was insured by USAA. Repairs were made, but a dispute arose as to whether the contractor retained by USAA properly repaired the house. In November 2017, the Pleins sued USAA, claiming bad faith and breach of contract. Joel Hanson represented them. Two lawyers from another law firm also joined in the representation; however, the law firm had until recently represented USAA in other matters, but that representation had terminated about the same time the Pleins filed their lawsuit. USAA moved to disqualify the firm. The trial court allowed all of the lawyers representing the Pleins to continue. USAA appealed.

Holding: The trial court was reversed. The law firm had a long and extensive relationship with USAA prior to its termination. The Court relied upon the temporal proximity of the prior representation and its extent as reasons to disqualify the counsel from the law firm under RPC 1.9.

***Mt. Zion Church v. Church Ins. Co.*, 8 Wn.App.2d 461 (2019); rev. den. 193 Wn.2d 1040 (2019)**

Facts: On May 7, 2014, a fire substantially damaged the Mount Zion Lutheran Church in Mountlake Terrace. Church Mutual Insurance Company insured the Church and the policy provided the Church could collect the "Actual Cash Value" of the property regardless of whether it chose to repair or rebuild the structure and recover replacement costs even if those were in excess of the ACV. According to CMIC, the ACV was approximately $593,000 and the replacement cost was $729,000. CMIC refused to pay the claimed cost to replace roof beams the Church did not actually perform, but rather spent these sums on modifications to the structure. The Church sued, claiming breach of contract, violations of the CPA and Insurance Fair Conduct Act, RCW 48.30.010-.015. The trial court held the Church was not entitled to the replacement cost associated with any "substituted costs incurred that were unnecessary to repair or replace the lost or damaged portions of the church building." The Church appealed.

Holding: The trial court was affirmed. The Church was not entitled to recover the full amount of the replacement cost value because the policy limited replacement cost payments to those costs incurred for the actual repair of the lost or damaged property. The trial court properly refused to award the Church the cost of replacement of roof beams not actually replaced. CMIC properly considered the various components of the building in calculating replacement costs. There was no obligation to reimburse the Church for remodeled space simply because the space served the same function as the prior space that was damaged.

***Feenix Parkside v. Berkley N. Pac.,* 8 Wn.App.2d 381 (2019); rev. den. 193 Wn.2d 1031 (2019)**

Facts: Feenix Parkside LLC owned a commercial building in Auburn, Washington, built in approximately 1979. A portion of the building's roof truss system failed and the roof collapsed on July 5, 2015. Feenix submitted a claim to Berkley North Pacific, who had issued a property damage policy to Feenix through Continental Western Insurance Company. Feenix contended the collapse was caused by hidden decay. Berkley denied the claim on the basis the collapse was caused by defective methods of construction. Feenix sued and the trial court granted a summary judgment in favor of the insurer. Feenix appealed.

Holding: The trial court was reversed. Feenix contended the loss was covered under the policy provision covering collapse caused by "decay that is hidden from view, unless the presence of such decay is known to an insured prior to collapse." The trial court erroneously construed "decay" to mean only some sort of decomposition of material, rather than accepting a broader definition advanced by Feenix of gradual weakening over time. Feenix presented a genuine issue of material fact as to the cause of the collapse and granting the motion for summary judgment was in error. The Court did reject Feenix's claim of water intrusion causing damage to the "roof system." Applying the doctrine of *ejusdem generis*, the Court concluded in the policy coverage relating to water damage to "systems" such as plumbing, heating and air conditioning did not include the roof.

Zhaoyun Xia v. ProBuilders Specialty Insurance, *188 Wn.2d 171 (2017)* – Interpretation of pollution exclusion.

Kut Suen Lui v. Essex Ins. Co.,* *185 Wn.2d 703 (2016) – Change in conditions; vacant building.

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

Lesure v. Farmers Ins. Co. of Wash.,* *197 Wn.App. 239 (2016) – Law and ordinance coverage.

Baker v. Fireman's Fund,* *5 Wn.App.2d 604 (2018); rev. den. 192 Wn.2d 1016 (2019) – Recovery of attorney fees under Olympic Steamship.

X. Legal Actions

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

***Porter v. Kirkendoll,* 194 Wn.2d 194 (2019)**

Facts: The Kirkendolls hired loggers to harvest trees on their property, but provided erroneous information concerning the location of the property boundary. As a result, the loggers harvested trees belonging to the Zimmers. The Zimmers sued the Kirkendolls and the logging firms. The loggers settled and as part of the settlement, assigned their indemnity and contribution claims against the Kirkendolls to the Zimmers. The trial court dismissed the action against the Kirkendolls on the grounds the settlement agreement with the loggers released the Kirkendolls from liability and there was no valid contribution or indemnity. The Zimmers appealed and the court of appeals reversed, finding the settlement agreement did no release the Kirkendolls and the assignment of the indemnity claim was valid. The assigned contribution claims were held to be invalid and the Zimmers were precluded from recovering under the waste statute because there was adequate relief available under the timber trespass statute. Both parties sought review.

Holding: The court of appeals was affirmed in part and reversed in part. The settlement agreement with the loggers did not release the Kirkendolls, who were directly, as opposed to vicariously, liable to the Zimmers based on the erroneous instructions provided to the loggers. The court of appeals erred in ruling the Zimmers were assigned a valid indemnity claim. Claims for common law indemnification or equitable indemnification were not available. The tort reform act abolished the claim for common law indemnification, but substituted a right of contribution. The tort reform act does not, however, provide a right of contribution for intentional torts, but does allow contribution for strict liability torts. See RCW 4.22.015. Timber trespass in not an intentional tort and liability arises from the injury to trees regardless of negligence or intent to do harm. There was no right to equitable indemnity because the loggers' own conduct exposed them to liability as opposed to a purely passive liability arising from the acts of others. Because the timber trespass statute applied to the conduct of the loggers, the waste statute, RCW 4.24.630(2), did not provide for a duplicate recovery. The matter was remanded to the court of appeals to determine whether the trial court erred in dismissed the assigned contribution claims for failure to hold a reasonableness hearing.

***Spicer v. Patnode,* 9 Wn.App.2d 283 (2019)**

Facts: Spicer was a piano teacher who gave lessons at her home. Patnode, who lived across the street, was unhappy with the conduct of business by Spicer. Patnode sued Spicer, claiming the business violated restrictive covenants applicable to the neighborhood. Patnode lost the suit and as a result was required to pay Spicer $30,000 in attorney fees. Starting in late November 2015 through March 2016, Patnode

repeatedly parked a F-250 Ford pickup next to the sidewalk in front of Spicer's house. Using a remote starter, Patnode started the truck and caused its alarm to sound, startling and frightening Spicer's students on their way to lessons. Spicer sued, claiming harassment, damages and intentional infliction of emotional distress. The trial court found no damage to Spicer's business, but did find the conduct to be outrageous and awarded $40,000 in damages for intentional infliction of emotional distress. Patnode appealed.

Holding: The verdict was affirmed. The conduct of Patnode, occurring repeatedly over several months, exceeded insults, indignities, threats, annoyances and other petty oppressions. The trial of fact could, and did, find as a matter of fact the conduct to be outrageous and "so extreme in degree, as to be utterly intolerable in a civilized community." This finding was supported by substantial evidence and the judgment was affirmed.

***Boyle v. Leech*, 7 Wn.App.2d 535 (2019)**

Facts: Leech owned a residential property on which was located a coastal redwood tree. The tree was entirely on Leech's property and was approximately 80 years old. Boyle, a neighbor, complained wind-blown debris from the tree, such as sap and cones, caused damage and required special cleaning products and power washing. After demanding compensation from Leech for cleaning costs, Boyle sued asserting the tree constituted a nuisance. The trial court dismissed the lawsuit on summary judgment. Boyle appealed.

Holding: The trial court was affirmed. Under RCW 7.48.010, an actionable nuisance must result in an "unreasonable interference with another's use and enjoyment of property." Leech did not act unreasonably in maintaining the tree entirely on the Leech property and was under no obligation to prevent the wind from blowing debris from the tree onto adjacent property:

> Wind blowing natural debris from the Leeches' tree causes staining on the Boyles' property. We decide that this — debris from a tree wholly on another's property — does not constitute a nuisance. Cases from other courts accord with this conclusion.

Ralph v. Weyerhaeuser Co., *187 Wn.2d 326 (2017)* – Proper venue for actions relating to real property damage.

Gunn v. Riely, *185 Wn.App. 517 (2015); rev. denied, 183 Wn.2d 1004 (2015)* – Damages for waste and timber trespass.

Donner v. Blue, *187 Wn.App. 51 (2015)* – Damage caused by tree roots.

Hoover v. Warner**,** *189 Wn.App. 509 (2015); rev. denied 185 Wn.2d 1004 (2016)* – Remedies for water diversion.

MJD Props., LLC v. Haley, *189 Wn.App. 963 (2015)* – "Spite Structure."

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

Buchheit v. Geigere, *192 Wn.App. 691 (2016)* – Anti-harassment order and cognizable claim.
Mustoe v. Xiaoye Ma**,** *193 Wn.App. 161 (2016)* – Tree roots.
Applegate v. Lucky Bail Bonds, *197 Wn.App. 153 (2016)* – Right of bondsman to enter property.
Herring v. Pelayo, *198 Wn.App. 828 (2017)* – Right to trim branches on boundary tree.
Porter v. Kirkendoll, *5 Wn.App.2d 686 (2018); rev. granted 192 Wn.2d 1009 (2019)* – Contribution and indemnity claim in timber trespass.
Regelbrugge v. State, *7 Wn.App.2d 29 (2018); rev. den. 193 Wn.2d 1009 (2019)* – Liability of county for landslide.

B. Eminent Domain

Central Puget Sound Transit Authority v. WR-SRI 120th N. LLC, *191 Wn.2d 223 (2018)* – Condemnation of municipal property.
Transit Authority v. Airport Inv. Co., *186 Wn.2d 336 (2016)* – Award of fees under RCW 8.25.070.
Public Utility Dist. No. 1 v. State*, 182 Wn.2d 519 (2015)* – Condemnation of school lands.
Williams Place LLC v. State ex rel. DOT, *187 Wn.App. 67 (2015); rev. den. 184 Wn.2d 1005 (2015)* – Compensable property interest.
TT Properties LLC v. City of Tacoma, *192 Wn.App. 238 (2016)* – Street closure as a taking.
Tapio Inv. Co. v. State, *196 Wn.App. 528 (2016); rev. denied, 187 Wn.2d 1024 (2017)* – Threatened taking as inverse condemnation.
Thun v. City of Bonney Lake, *3 Wn.App.2d 453 (2018)* – Inverse condemnation claim from downzoning.

C. Adverse Possession/Boundary Disputes

Garcia v. Henley, *190 W.2d 539 (2018)* – Required findings to support order to convey property.
Pendergrast v. Matichuk, *186 Wn.2d 556 (2016)* – Common grantor doctrine.
LeBleu v. Aalgaard, *193 Wn.App. 66 (2016)* – Element of hostility.
Ofuasia v. Smurr, *198 Wn.App. 133 (2017)* – Adverse claimant asserting trespass.

D. Slander of Title

Guest v. Lange, *195 Wn.App. 330 (2016)* – Claim arising from *lis pendens*.

E. Actions Between Partners

No reported cases within last five years.

F. Partition

Overlake Farms v. Farm LLC, *196 Wn.App. 929 (2016)* – Criteria for sale in lieu of partition.

G. Quiet Title

Lundgren v. Upper Skagit Indian Tribe, *187 Wn.2d 857 (2017), reversed 584 S.Ct. ___ (May 21, 2018)* – Jurisdiction over recognized Tribe in quiet title action.
Holmquist v. King County, *192 Wn.App. 551 (2016)* – Damages for breach.

Kelley v. Tonda, *198 Wn.App. 303 (2017)* – Construction of deed as creating determinable interest.

H. Government Forfeitures

Olympic Peninsula Narcotics Enforcement Team v. Real Property, *191 Wn.2d 654 (2018)* – Right to recover attorney fees.

XI. Construction Contracts/Disputes

T-Mobile USA v. Selective Insurance Co., 194 Wn.2d 413 (2019)

Facts: T-Mobile Northeast, a subsidiary of T-Mobile USA, hired a contractor to install a cell tower on a building in New York City. The contractor was required to maintain liability insurance and name TMNE as an additional insured on the policy. The policy was issued by Selective Insurance and contained a provision naming as an additional insured any party the contractor had agreed in a written agreement as an additional insured. The insurance agent issued an ACORD form certificates of insurance over a seven year period showing "T-Mobile USA Inc., its Subsidiaries and Affiliates" as additional insureds. Litigation ensued over the tower and the building owner sued the contractor, TMNE and TMUSA. TMUSA tendered defense to Selective, who declined. TMUSA sued Selective in the U.S. District Court for the Western District of Washington for failing to recognize TMUSA as an additional insured. Selective moved to dismiss the suit on summary judgment, which was granted by the trial court. TMUSA appealed to the Ninth Circuit, who certified the following question to the Washington Supreme Court:

> "Under Washington law, is an insurer bound by representations made by its authorized agent in a certificate of insurance with respect to a party's status as an additional insured under a policy issued by the insurer, when the certificate includes language disclaiming its authority and ability to expand coverage?"

Holding: The Court answered the question in the affirmative. The Ninth Circuit had already determined Selective's authorized agent, acting with apparent authority, had issued the certificates of insurance. The Court rejected Selective's claim the general disclaimers in the certificate rendered the listing of TMUSA as an additional insured ineffective. The specific listing of TMUSA prevailed over the general provisions of the form. The purpose of the certificate was to provide information as to who were additional insureds under policy; accepting the general disclaimers would render issuing the certificate pointless:

> We answer the Ninth Circuit's certified question this way: an insurance company's agent who makes an authoritative representation binds the insurance company, even when that specific representation is transmitted

via a certificate of insurance and accompanied by general disclaimers.

***State Construction, Inc. v. City of Sammamish*, 11 Wn.App.2d 892 (2020)**

Facts: Porter Brothers Construction Co. contracted with the City of Sammamish in 2014 for the construction of a community and aquatic center. State Construction was hired as a subcontractor in June 2014 to perform excavation and utility work. Hartford Insurance provided a $28 million payment and performance bond for the project. Work was substantially complete in April 2016, but Porter was having financial difficulties and abandoned the project at this time. Hartford paid certain unpaid bills for the project. All final items and warranty work were completed by February 2017. On March 27, 2017, State filed a claim against the bond for $250,462.27 and in April 2017, State sued the City, Porter and Hartford. Porter stipulated to a judgment against it for the amount owed. The trial court dismissed the claims against the City. As to the claims against Hartford, the trial court concluded the lien claim was not timely filed and was not enforceable against the retainage. State appealed.

Holding: The trial court was affirmed. RCW 39.08.030(1)(a) required State to file its claim within 30 days after completion and acceptance. The City accepted the project on February 21, 2107 and State filed its claim 34 days later. The Court rejected the argument the project was not complete on the date of acceptance. A public owner's resolution deeming the project complete and accepting the project is legally conclusive absent evidence of fraud or collusion by the public owner in the certification or acceptance process. The Court also rejected State's argument that it substantially complied with the claim statute.

NOVA Contracting v. Olympia, *191 Wn.2d 854 (2018)* – Notice required for change order.

Specialty Asphalt v. Lincoln County, *191 Wn.2d 182 (2018)* – Discrimination in award of public works contract.

King County v. Vinci Construction, *188 Wn.2d 618 (2017)* – Application of *Olympic Steamship* rule in action against sureties.

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

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

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

King County v. Vinci Constr., *191 Wn.App. 142 (2015)* – Changed site conditions.

Homeowners' Ass'n v. Eng'rs NW, *193 Wn.App. 695 (2016)* – Breach of engineer's duty of care.

General Constr. Co. v. Pub. Util. Dist., *195 Wn.App. 698 (2016)* – Doctrine of *quantum meruit*.

Northwest Business Fin. v. Able Contractor, *196 Wn.App. 569 (2016)* – Assignment of right to receive payment.

Nichols v. Peterson NW, Inc., *197 Wn.App. 491 (2016)* – Duty of care of contractor.

Titan Earthwork v. Federal Way, *200 Wn.App. 746 (2017)* – Underground Utility Damage Prevention Act, Chpt. 19.122 RCW.

King County v. Coluccio Construction, *3 Wn.App. 504 (2018); rev. den. 192 Wn.2d 1005 (2018)* – Venue in public works contract action.

Puente v. Resources Conservation Company Int'l, *5 Wn.App.2d 800 (2018); rev. den. 192 Wn.2d 1021 (2019)* – Application of the statute of repose.

XII. Building Permits and Platting Regulations

Church of the Devine Earth v. Tacoma, 194 Wn.2d 132 (2019)

Facts: The Church of the Devine Earth applied for a permit to build a parsonage on its property in the City of Tacoma on September 20, 2013. The City issued the permit, subject to a number of conditions, including a requirement to dedicate a 30-foot wide strip of land for improvements to the street abutting the property. The Church was successful in removing most of the conditions, except for the right-of-way dedication. The Church appealed the condition to the hearing examiner, who upheld the condition. The Church filed a LUPA petition and sought damages under RCW 64.40.060. The trial court determined the dedication requirement was invalid, but denied any damages to the Church. The Church appealed to the court of appeals and the trial court was affirmed. The Church petitioned for review.

Holding: The matter was remanded for trial on the issue of damages. The issue framed by the Court was whether the Church was entitled to damages under RCW 64.40.060 for an attempted exaction of land imposed by an unlawful permit condition. The trial court erred in considering evidence justifying the dedication requirement not considered by the City in its formulation of the permit conditions. In fact, the City's decision was based on its desire to create a uniform street width and was not related to any impact created by the project. The court of appeals applied the wrong standard of review of the damage claim by basing its decision on what the City reasonably believed was the legality of the dedication requirement rather than the objective standard required by the statute – the defense available to the City under the stature was whether reasonable minds could conclude the dedication requirement was reasonable, not the City's subjective belief. Because of these errors, the matter was remanded for trial:

> On remand, the trial court should confine its review addressing the propriety of the dedication to evidence relevant to the hearing examiner's final decision. In deciding whether damages are justified, the court must determine whether the Church proved the City knew or should reasonably have known its permit condition for a dedication of land was unlawful.

Top Cat Enters., LLC v. City of Arlington, 11 Wn.App.2d 754 (2020)

Facts: Two competing firms, Top Cat Enterprises and 172nd Street Cannabis, sought a license to sell cannabis products in Arlington. 172nd proposed a location at lot 500B on the Arlington Municipal Airport property. Weston High School was located at lot 301 on the airport. The WSLCB concluded the high school was 1,600 feet from the 172nd location. Since the minimum separation was 1,000 feet, the WSLCB concluded the location was acceptable and granted the license to 172nd. This was the only license available in Arlington. Top Cat sought a hearing, contending the 172nd location violated

the 1,000-foot rule. An administrative law judge affirmed the WSLCB determination. Top Cat sought review by the superior court, which affirmed the WSLCB order. Top Cat appealed.

Holding: The WSLCB determination was affirmed. The Court rejected Top Cat's argument that the high school was located on a larger parcel and the boundary of the larger parcel was only 120 feet from the 172nd location. RCW 69.50.331(8)(a) prohibited any cannabis retail outlet from being within 1,000 feet of the grounds of any secondary school. The WSLCB adopted WAC 314-55-050(10) which provided the distance was to be measured "as the shortest distance from the property line of the proposed building/business location to the property line" of the school. The WSLCB interpretation of "property line" was it is the line separating the lot from the adjoining lots or street. The Court accepted that definition and rejected Top Cat's assertion the legal boundary of the larger parcel should be used.

***Fuller Style, Inc. v. City of Seattle,* 11 Wn.App.2d 501 (2019)**

Facts: Fuller Style and Steady Floats applied for permits to replace floats on three floating on-water residences in Seattle. The applications indicated the permits were exempt from the requirement to obtain a substantial shoreline development permit under the City's Shoreline Master Plan because the replacements were normal maintenance and repair. The Seattle Department of Construction and Inspection denied all three permits and required a SSDP because SDCI concluded the float replacement was not a common method of repair for FOWRs. The applicants filed a LUPA petition. The trial court upheld the SDCI determination and Fuller Style and Steady Floats appealed.

Holding: The determination of SDCI was upheld. The City determined the exemption for normal repair and replacement under SMC 23.60A.020(C)(1) & (2) was not applicable and the float replacements were substantial developments. The replacements required exterior alteration for the FOWRs. See SMC 23.60A.908. The replacement structures differ substantially from the existing FOWR – they were taller, larger and shaped differently. These structures met the definition of "development" as substantial construction, exterior alteration, or obstruction of public use. SDCI was correct in its application of the SMC to require SSDPs for the replacement FOWRs.

***Miller v. City of Sammamish,* 9 Wn.App.2d 861 (2019); rev. den. 194 Wn.2d 1024 (2020)**

Facts: Miller bought 2.29 acres in the City of Sammamish in 1999. The property had wetland areas. In 2016, the City investigated a complaint Miller was filling the wetlands on the property and determined Miller was filling and clearing the property without a permit. Miller took no action to obtain the required permits and in February 2017, the property was posted with a stop work order and the City fined Miller $500. Miller continued to take no action. The City then assessed a $15,000 fine for

environmental damage. Miller appealed this notice to the hearing examiner, who upheld the fine, concluding Miller had filled wetlands without required permits. Miller sought review by the superior court and the fine was affirmed. Miller appealed.

Holding: The fine was affirmed. The Court rejected Miller's claims of violation of due process. Miller was afforded a hearing and opportunity to present witnesses and contest the fine. Miller's claim the filling was merely a maintenance of a non-conforming pasture use was rejected since Miller did not present evidence to support his actual use of the property as a pasture. The notice was not unconstitutionally vague and the hearing examiner's conclusions were supported by substantial evidence.

***RST Partnership v. Chelan County,* 9 Wn.App.2d 169 (2019)**

Facts: RST owned an industrial building in Monitor and leased the property to NSJB for a cannabis growing and processing business. On February 10, 2017, the Chelan County Department of Community Development issued RST a "Notice and Order to Abate Zoning and Building Code Violations Pursuant to Chapter 16.06 Chelan County Code" relating to NSJB's operation. RST and NSJB appealed the notice to the Chelan County hearing examiner. Following an adverse result, counsel for RST and NSJB each filed a LUPA petition and agreed to effect service on each other through electronic means. Chelan County then moved to dismiss the petitions on the grounds RST and NSJB had not timely served one another. The trail court agreed and dismissed the action. RST and NSJB appealed.

Holding: The trial court was reversed. The Court held RST and NSJB perfected service on one another on the day when their respective counsel accepted service on behalf of their clients via email. RCW 36.70C.040 permits counsel to accept the petition on behalf of the client. Since this occurred within the time limit required for the filing of the LUPA petition, the hearing examiner's decision was timely appealed and remanded for further proceedings.

***Petition of Kittitas County,* 8 Wn.App.2d 585 (2019); rev. den. 193 Wn.2d 1032 (2019)**

Facts: In December 2015, Kittitas County notified the Liquor and Cannabis Board of the County's objection to a proposed licensee based on the location of the operation. The Board granted the license and held it could not base a denial based on the County's zoning law. The County appealed the Board's decision. The trial court reversed the Board and ordered the Board to "only approve those licenses which are in compliance with local zoning. The Board appealed.

Holding: The trial court was reversed and the Board's order was reinstated. The County's zoning code did not provide grounds for the Board to deny the applicant a marijuana producer/processer license because neither the Growth Management Act nor Washington's marijuana licensing laws required that licenses be issued in conformity

with local zoning laws. RCW 36.70A.103 did not require agencies to adhere to local zoning restrictions when determining the appropriateness of a state license. A marijuana license did not authorize the siting of a marijuana business. The Board did not fail to comply with RCW 36.70A.103 by conferring marijuana licenses without regard to zoning restrictions.

***Greensun Group, LLC v. City of Bellevue,* 7 Wn.App.2d 754 (2019); rev. den. 193 Wn.2d 1023 (2019)**

Facts: Following the passage of I-502 legalizing the recreational possession of marijuana, Greensun leased space in Bellevue to operate a retail marijuana store and was designated by the Liquor Control Board as a qualified applicant. Based on an ordinance imposing a minimum distance between marijuana retailers, the City denied. Greensun sued Bellevue in November 2014, alleging various claims. Although dismissed at by the trial court, the Court of Appeals reversed finding the separation ordinance had been improperly adopted by the City. On remand, Greensun amended its complaint to allege damages from tortious interference. The trial court again dismissed the claims on summary judgment. Greensun appealed.

Holding: The dismissal was reversed. Viewing the evidence most favorably to Greensun, it established it had a valid business expectancy and not just a wishful thinking of profit. The City had knowledge of the expectancy; the City wrongfully and improperly denied the application; arguably used improper means to interfere with Greensun's application; and Greensun suffered damages from the City's actions. The Court rejected the City's arguments its actions were privileged as a matter of law or privileged based on the theory of discretionary immunity. The matter was remanded for further proceedings.

Community Treasures v. San Juan County, *192 Wn.2d 47 (2018)* – Action to recover permit fees under LUPA.

Maytown Sand & Gravel v. Thurston County, *191 Wn.2d 393 (2018)* – Recovery under 42 U.S.C. § 1983 for delay in issuing permit.

Schnitzer v. City of Puyallup, *190 Wn.2d 568 (2018)* – Applicability of LUPA to City Council decision.

University of Washington v. City of Seattle, *188 Wn.2d 823 (2017)* – Applicability of municipal landmark preservation ordinance to University property located within the municipality.

Total Outdoor v. City of Seattle, *187 Wn.App. 337 (2015); rev. den. 184 Wn.2d 1014 (2015)* – Non-conforming use versus non-conforming structure.

Burlington v. Liquor control Bd., *187 Wn.App. 853 (2015); rev. denied 184 Wn.2d 1014 (2015)* – City challenge to relocation of liquor store.

Woods View v. Kitsap County, *188 Wn.App. 1 (2015); rev. denied 184 Wn.2d 1015 (2015)* – Claims related to denial of permit and statute of limitations.

Klineburger v. King County, *189 Wn.App. 153 (2015)* – Flood plain designation and failure to exhaust administrative remedies.

Alliance Inv. Group v. Ellensburg, *189 Wn.App. 763 (2015)* – Vested rights.

Dep't of Transportation v. City of Seattle, *192 Wn.App. 824 (2016)* – Exemption from grading permit.

Airway Heights v. Hr'gs Bd., *193 Wn.App. 282 (2016); rev. den. 186 Wn.2d 1020 (2016)* – Restrictions on incompatible development near military installations.

Thompson v. City of Mercer Island, *193 Wn.App. 653 (2016); rev. den. 186 Wn.2d 1013 (2016)* – Failure to exhaust administrative remedies.

Emerson v. Island County, *194 Wn.App. 1 (2016); rev. denied, 186 Wn.2d 1004 (2016)* – Failure to exhaust administrative remedies and 42 U.S.C. §1983 claim.

Kindereace LLC v. City of Sammamish, *194 Wn.App. 835 (2016)* – Buffer restrictions.

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

Schnitzer West, LLC v. City of Puyallup, *196 Wn.App. 434 (2016); rev. granted 187 Wn.2d 1025 (2017)* – Actions subject to LUPA.

Chumbley v. Snohomish County, *197 Wn.App. 346 (2016)* – Actions subject to LUPA.

Kitsap County v. Kitsap Rifle & Revolver Club**,** *1 Wn.App.2d 393 (2017); rev. den. 190 Wn.2d 1015 (2018)* – Requirement of shooting club to obtain permit to operate.

Union Gap v. Printing Press Properties, *2 Wn.App.2d 201 (2018)* – Definition of land use dispute for purposes of LUPA.

RMG Worldwide LLC v. Pierce County, *2 Wn.App.2d 257 (2017)* – Substantial evidence supporting abandonment of application and application of vested rights doctrine.

Emerald Enterprises v. Clark County**,** *2 Wn.App.2d 794 (2018)* – Right of county to regulate location of stores selling marijuana.

Church of the Devine Earth v. City of Tacoma, *5 Wn.App.2d 471 (2018); rev. granted 192 Wn.2d 1022 (2019)* – Damage claim under RCW 64.40.020.

Aho Construction, Inc. v. City of Moxee, *6 Wn.App.2d 441 (2018)* – Exhaustion of remedies as a condition to LUPA petition.

XIII. Land Use/SEPA

Association of Washington Business v. Department of Ecology, 195 Wn.2d 1 (2020)

Facts: Relying on the Washington Clean Air Act, Chpt. 70.94 RCW, DOE promulgated a clean air rule at chpt. 173-442 WAC in 2016. The Rule sought to regulate greenhouse gas emissions from various enterprises, including those engaged in the sale of gas and oil. Various trade organizations, including the Association of Washington Business, and utility companies, sought review of the Rule under the APA. The trial court ruled DOE exceeded its authority in promulgating the rule and the authority of DOE was limited in regulating only those entities introducing contaminants in the air, not entities selling commodities. The trial court invalidated the entire rule. DOE and other interested parties participating in the proceeding sought direct review.

Holding: The trial court was partially affirmed. The Court found the plain meaning of the Clean Air Act limited the authority of DOE to establish emission standards only for those entities actually emitting air pollutants. However, the Court found those portions of the Rule exceeding the authority of DOE were severable. The trial court erred in invalidating the entire Rule, rather than striking those portions of the Rule setting emission standards for entities not actually emitting pollutants. The Rule was invalidating only to the extent applicable to non-emitting entities.

***Stickney v. Central Puget Sound Growth Management Hearings Bd.,* 11 Wn.App.2d 228 (2019)**

Facts: The City of Sammamish adopted a comprehensive plan in October 2015. The plan included a housing element, which showed a growth target of 4,640 housing units for 2015 – 2035. Stickney and Birgh appealed the plan, claiming it did not make adequate provisions for all economic segments of the community. As a result of the appeal, the City revised the housing element in December 2016 to include additional affordable housing projections and other changes. In March 2017, the Growth Management Hearings Board held the amended plan complied with the GMA. Stickney and Birgh appealed the Board's decision. The trial court affirmed the decision. Stickney and Birgh appealed.

Holding: The Board's decision was affirmed. In revising the housing element, the City reviewed relevant data. The housing element identified housing needs for affordable housing, which included requirements for the three lowest income levels. The current inventory was identified and the percentage and number of housing units the City contemplated being developed for all income levels was also identified. This analysis showed how the City intended to meet housing needs for all income levels and provided the number of housing units required to meet the projections across income levels. This analysis met the GMA requirements.

***Clark County v. Hearings Bd.,* 10 Wn.App.2d 84 (2019); rev. den. 194 Wn.2d 1021 (2020)**

Facts: Clark County updated its comprehensive land use plan in 2916, making several changes. Various public interest groups petitioned the Growth Management Hearings Board to review the changes for compliance with GMA. The Board found certain areas of non-compliance and the County made some revisions. Ultimately, the Board issued a final compliance order on March 23, 2017. The parties sought direct review, which was granted. The County emailed its petition for review the Board and the AG on April 24 and mailed the petition on the same day. 3B, another party to the Board hearing, sent its petition for review via federal express on April 24th and the petition was received the next day. All parties appealed.

Holding: The Court of appeals dismissed the petitions of the County and 3B as untimely. A petition must be filed within 30 days after service of the final order. RCW 34.05.542(2) (thirty days from March 23rd, was April 22nd, so the last date for permissible service was Monday, April 24th). Under RCW 34.05.542(4), a petitioner must serve the agency issuing the order by delivery to the director's office or serving the agency's attorney of record. The Court rejected the County's claim the email transmission constituted actual service on the agency. The Board had not authorized electronic service, so the County's petition was untimely and the Court lacked jurisdiction hear the petition. Similarly, 3B's petition was not actually received by the

agency until one day after the expiration of the 30-day period. Other challenges to the Board's order related to the designation of Urban Growth Areas. However, prior to the entry of the Board's order, the disputed areas were annexed into the cities of La Center and Ridgefield. All three GMA hearings boards have held once land is annexed by a city, it is no longer within the jurisdiction of the county. Accordingly, the challenge to the annexed UGAs was moot. The Court also affirmed the Board on evidentiary and procedural issues.

***Futurewise v. Snohomish County,* 9 Wn.App.2d 391 (2019); rev. den. 194 Wn.2d 1010 (2019)**

Facts: Snohomish County updated its regulations designating and protecting critical areas, including geologically hazardous areas, following the Oso landslide. Various interest groups contended the regulations failed to meet the requirements of the GMA. Futurewise appealed the new regulations to the Growth Management Hearings Board, which dismissed the claims. Futurewise contended the regulations fail to protect the public health and safety from geologically hazardous areas as required by the GMA. Futurewise sought review by the Thurston County Superior Court, which affirmed the Board's decision. Futurewise appealed.

Holding: This dismissal was affirmed. The GMA does not require local governments to consider public health and safety when enacting critical area relations affecting development. RCW 36.70A.172 (1) sets forth the requirements for municipalities in passing regulations. This statute does not require the municipality to consider health and safety in its formulation. Although the definition of "geologically hazardous areas" refers to health and safety, long standing Board precedent held GMA definitions did not, without other statutory directions, create any GMA duties. The Court declined to overturn this precedent.

***Puyallup v. Pierce County,* 8 Wn.App.2d 323 (2019); rev. den. 193 Wn.2d 1030 (2019)**

Facts: On November 26, 2014, Knutsen Farms and Running Bear Development sought a permit from Pierce County to develop a warehouse and distribution complex consisting of 2.6 million square feet in seven warehouses, plus parking lots and related facilities. The project site was in unincorporated Pierce County, but bordered the Puyallup city limits, was within the City's growth area, the City's sewer area and the City's water service area. The site was also adjacent to the Puyallup River. Various parties sought to participate in the permitting process. The City of Puyallup offered to serve as the lead agency under WAC 197-11-944 and the County planning director declined the offer. In April, 20178, the County issued a MDNS, which included a condition certain roads in the City were required to be improved. The City then issued a "Notice of Assumption of Lead Agency Status" pursuant to WAC 197-11-948 and 985, a Determination of Significance and a request for comments on the scope the EIS. The

County ignored the City's action and issued a permit for the project. The City sued to resolve the jurisdictional dispute. The trial court ruled the City was not authorized to assume lead agency status. The City appealed.

Holding: The trial court was reversed. The City could assume lead agency statues under WAC 197-11-948 because it had jurisdiction over and approval authority for roadwork and over at least some or all of the water and sewer services required for the proposal. Even though the roadwork was specified as a mitigation measure, it was, nevertheless, part of the project. The city could assume lead agency status following the county's issuance of the MDNS. The MDNS is a type of DNS and the plain language of WAC 197-11-948 allows the City to assume lead agency status:

> An agency with jurisdiction over a proposal, upon review of a DNS (WAC 197-11-340 or WAC 197-11-350) may transmit to the initial lead agency a completed 'Notice of assumption of lead agency status.'

***American Waterways Operators v. Dept. of Ecology*, 7 Wn.App.2d 808 (2019)**

Facts: Washington State Department of Ecology applied to the United States Environmental Protection Agency for permission to engage in rule making to prohibit marine vessel sewage discharge into Puget Sound. A portion of the application claimed that Puget Sound required greater environmental protections than the federal standards provided. The American Waterways Operators appealed that portion of the petition to the Pollution Control Hearings Board. The Board accepted Ecology's argument asserting the Board did not have jurisdiction and dismissed the appeal. The Operators appealed to the superior court. The superior court reversed and Ecology appealed.

Holding: The trial court was reversed. The Court held the Board did not have jurisdiction to hear the Operators' appeal of a portion of the petition and the dismissal of the Operator's challenge by the Board was appropriate. The petition was part of DOE's rule making activity and not subject to Board review.

Spokane County v. Fish & Wildlife, *192 Wn.2d 453 (2018)* – DOE authority over hydraulic projects.

Puget Soundkeeper Alliance v. Dept. of Ecology, *191 Wn.2d 631 (2018)* – Selection of method to monitor PCBs.

Chelan Basin Conservancy v. GBI Holding Co., *190 Wn.2d 249 (2018)* – Applicability of public trust doctrine to improvements within SMA "savings clause."

Columbia Riverkeepers v. The Port of Vancouver, *188 Wn.2d 421 (2017)* – Challenge to oil terminal lease granted by port under Open Meetings Act.

Columbia Riverkeeper v. Port of Vancouver, *188 Wn.2d 80 (2017)* – Challenge to port lease for oil terminal under SEPA.

Quinault Indian Nation v. Imperium, *187 Wn.2d 460 (2017)* – Application of Ocean Resources Management Act to facilities siting.

Snohomish County v. Pollution Control Hrgs. Bd., *187 Wn.2d 346 (2017)* – Storm water regulations in determining vested rights.

State ex rel. Banks v. Drummand, *187 Wn.2d 157 (2017)* – Right of County to retain separate land use counsel.

Whatcom County v. Hirst, *186 Wn.2d 648 (2016)* – County's obligation to determine water availability as condition to building permit.

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

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

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

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

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

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

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

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

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

Quinault Indian Nation v. Imperium, *190 Wn.App. 696 (2015); rev. granted 185 Wn.2d 1017, 369 P.3d 500 (2016)* – Application of RCW 88.40.025 and financial responsibility.

Concerned Citizens v. Ferry County, *191 Wn.App. 803 (2015)* – Designation of agricultural resource lands.

Snohomish County v. Pollution Control Hr'gs Bd., *192, Wn.App. 316 (2016), rev. granted 185 Wn.2d 1026 (2016)* – Vested rights versus storm water regulations.

Chelan Basin Conservancy v. GBI Holdings, *194 Wn.App. 478 (2016); rev. granted, 186 Wn.2d 1032 (2016)* – Application of Public Trust Doctrine.

de Tienne v. Shorelines Hearings Bd., *197 Wn.App. 248 (2016)* – Denial of SMA substantial development permit due to adverse impacts.

Maytown Sand & Gravel v. Thurston County, *198 Wn.App. 560 (2017), rev. granted 189 Wn.2d 1015 (2017)* – Claim for damages under 14 U.S.C. §1983 for denial of permit.

Cave Properties v. City of Bainbridge Island, *199 Wn.App. 651 (2017)* – Right to protest utility latecomer agreement under LUPA.

Olympic Stewardship Foundation v. Environmental and Land Use Hearing Office, *199 Wn.App. 668 (2017), rev. den. 189 Wn.2d 1040 (2018)* – Challenge to approval by Growth Management Hearings Board of county master plan.

Honeywell v. Dep't of Ecology, *2 Wn.App.2d 601 (2018); rev. den. 190 Wn.2d 1011 (2018)* – Challenge to fine imposed by Shoreline Hearings Board for illegal removal of trees.

Heritage Baptist Church v. The Central Puget Sound Growth Management Hearings Board, *2 Wn.App.2d 737 (2018)* – Appeal of Growth Management Hearings Board invalidation of rezone ordinance.

XIV. Governmental Regulation

A. Hazardous Waste

***Port of Anacortes v. Frontier Indus.,* 9 Wn.App.2d 885 (2019); rev. den. 195 Wn.2d 1005 (2020)**

Facts: The Port of Anacortes acquired an upland and aquatic facility in 1965, including marine terminal and log handling facility. In 2008, DOE required the Port to conduct testing of the log-handling facility to determine environmental risk. Based on the results, DOE named the Port as a potentially liable party responsible for remediation of contamination from various industrial waste products. The Port agreed to remediate the site. In July 2016, the Port sued various companies who had leased the facilities and conducted log-handling operations on the site. The Port sought contribution for remediation costs under MTCA. The defendants moved for summary judgment on the grounds wood waste was not a hazardous substance. The trial court denied the motion and the defendants appealed.

Holding: The trial court was affirmed. The evidence in the record established wood waste resulted in the release of hazardous substances as it decomposes in a marine environment. Liability under MTCA can be established by any release, intentional or unintentional, of hazardous substances and, viewing the evidence most favorably to the Port, the trial court correctly concluded there was an issue of material fact as to whether the hazardous substances were released during the time the defendants leased the site.

***Kittitas County v. Allphi,** 190 Wn.2d 691 (2018)* – Discovery of DOE materials in enforcement action.

***Douglass v. Shamrock Paving, Inc.,** 189 Wn.2d 733 (2017)* – Scope of activity included within "remedial action" under MTCA.

***ABC Holdings v. Kittitas County,** 187 Wn.App. 275 (2015); rev. denied 184 Wn.2d 1014 (2015)* – Fine for failure to obtain permit.

***Pope Resources v. Dep't of Nat. Resources,** 197 Wn.App. 409 (2016)* – Lessor as owner/operator.

***Friends of Moon Creek v. Diamond Lake Improvement Ass'n,** 2 Wn.App.2d 484 (2018)* – Adequacy of notice for weed control action under RCW 17.10.170.

B. Water Rights

***Center for Environmental Law & Policy v. Dept. of Ecology,* 9 Wn.App.2d 746 (2019); rev. granted 194 Wn.2d 1016 (2020)**

Facts: In 2015, DOE adopted an administrative rule establishing a minimum instream flows of 850 cubic feet per second (cfs) for the lower reach of the Spokane River during the summer. The rule was adopted to protect and preserve fish habitat in the river. Several environmental organizations, include the Center for Environmental Law & Policy, appealed the rule, contending DOE exceeded its authority since instream

flows were to be established to protect multiple environmental concerns, not just fish habitat, and the rule violated the public trust doctrine. CELP petitioned DOE to change the rule and DOE declined. Suit was then filed under the APA. The trial court dismissed the challenge to the rule and CELP appealed

Holding: The trial court was reversed and the rule was invalidated. The Water Resource Act, Chpt. 90.54 RCW, required DOE to consider multiple instream values. DOE exceeded its legislative authority in establishing the rule by disregarding all of the other instream values identified in the WRA. The Court rejected CELP's public trust claim on the basis that DOE did not have the authority to assume any public trust duties.

***Bassett v. Department of Ecology,* 8 Wn.App.2d 284 (2019)**

Facts: In November 2012, DOE filed the Dungeness Rule, effective January 2, 2013. The Dungeness Rule established minimum instream flows for the Dungeness River and its tributaries and regulated access to surface water and groundwater in the basin. Bassett, who owned property in Clallam County, and the Olympic Resource Protection Council objected to the Rule. As a result of the Rule, Bassett was unable to obtain a water right, depreciating the value of Bassett's property. ORPC objected to the procedure and analysis used by DOE in adopting the Rule. In December 2014, Bassett and ORPC filed a declaratory judgment action challenging the Rule. The trial court dismissed the action in December 2016. Bassett and ORPC appealed.

Holding: The trial court was affirmed. The Court upheld the findings DOE did not exceed its statutory authority and did not violate any rulemaking procedures. Bassett and ORPC failed to establish the Rule was arbitrary and capricious. The Court rejected the claim DOE improperly used the overriding considerations of public interest exception to create reserves of water and Washington law required DOE to apply either a maximum net benefits test or a four-part test for new water appropriations to establish MIFs.

***Crown W. Realty, LLC v. Pollution Control Hearings Board,* 7 Wn.App.2d 710 (2019); rev. den. 193 Wn.2d 1030 (2019)**

Facts: Crown Realty was the successor in interest to an industrial park in Spokane County and related water permits and certificates issued in connection with wells on the property drilled in the 1940s. The water certificates were issued in 1970 and 1971. In 2016, Crown West applied to change the water rights to facilitate the transfer to the State's trust water program. The transfer results in the rights being held in trust by DOE without the donor risking relinquishment for lack of use. As a condition of the transfer, an examination of the use of the water right is undertaken to confirm no five-year period occurred without use of the water as stated in the permit or certificate. Crown West also sought to amend the certificates, which required a determination of the extent and validity of the original certificate. Crown West initiated the application

with the Chelan County Water Conservancy Board, which would issue a record of decision for review by DOE. Approval of the application would allow Crown West to place 5,874-acre fee into trust and use a small portion of this amount for irrigation around an industrial facility in Chelan County. The Board, after investigation, recommended approval, concluding no portion of the rights had been relinquished or abandoned and the right qualified for the municipal exception to relinquishment. In September 2016, after reviewing the Board's findings, DOE denied all of the applications and found Crown West failed to demonstrate the water rights qualified as serving municipal supply purposes and the Board had erroneously assessed the validity and extent of the water rights. Crown West appealed to the Hearings Board and DOE was affirmed. Crown West sought, and received, direct review of the decision by the Court of Appeals.

Holding: The Hearings Board was affirmed. The Court upheld the finding the water rights may have initially been used for a municipal purpose, but the more recent use by Crown West did not qualify and the Conservancy Board erred in allowing a transfer of 5,874 AFY of unused water into the trust program. The statutory framework required the determination of the status of the holder of the water right as a municipal supplier to be made as of the date the application for change of use or transfer and not as of the date the right was originally granted. As of the date of application, Crown West failed to establish the use of the water as of the date the application was filed in 2016 qualified as a municipal system as defined by RCW 90.03.015(4) and the Conservation Board's determination was erroneous.

Foster v. Dept. of Ecology, *184 Wn.2d 465 (2015)* – Priority of senior water rights.

Cornelius v. Dep't of Ecology, *182 Wn.2d 574 (2015)* – Reclassification of uses under Municipal Water Law.

Singh v. Covington Water Dist.*, 190 Wn.App. 416 (2015)* – Vested rights for service extension fees.

Fox v. Skagit County**,** *193 Wn.App. 254 (2016)* – Prior appropriation doctrine.

Environmental Law & Policy v. Ecology, *196 Wn.App. 360 (2016)* – Authority to issue report on examination to approve water right.

Hamilton v. Pollution Control Hearings Board, *5 Wn.App.2d 271 (2018)* – Final decision appealable to PCHB.

C. Irrigation/Diking Districts

No reported cases within the last five years.

D. Archeological Lands

No reported cases within the last five years.

E. Mortgage Broker Practices/Appraisers

***Federal Home Loan Bank v. Credit Suisse*, 194 Wn.2d 253 (2019)**

Facts: The Federal Home Loan Bank of Seattle bought $248 million of residential-mortgage-backed securities from Credit Suisse in 2005 and 2007. FHLBS bought $660 million RMBS from Barclays in 2007 and 2008. FHLBS suffered financial losses from the securities and sued Credit Suisse and Barclays for making untrue and misleading statements in connection with the sale of the securities in violation of Washington Securities Act, RCW 21.20.010(2). The trial court dismissed the claims on summary judgment. The court of appeals affirmed the dismissal on the grounds FHLBS failed to demonstrate it reasonably relied on any untrue or misleading statements. FHLBS petitioned for review.

Holding: The dismissals were reversed. The Court held the plain language of RCW 21.20.010 does not require proof of reasonable reliance in order to support a recovery. The concept of reliance was not present in the statute. The Court rejected the argument the interpretation of the statute must follow the interpretation of Rule 10-5 under the Federal Securities Act, since the statute and rule were almost identical. The Court also rejected the argument the interpretation of the RCW 21.20.010 would lead to excessive litigation. The statute requires proof of an untrue statement of a material fact or the omission of a material fact. "This materiality requirement prevents the creation of openended liability for any misstatement of fact by the defendant." The matter was remanded to the trial court for further proceedings.

***Washington State Housing Finance Commission v. Nat'l Homebuyers Fund, Inc.*, 193 Wn.2d 704 (2019)**

Facts: The Washington State Housing Commission was established the Commission in 1983 for the purpose of making "additional funds available at affordable rates to help provide housing throughout the state." RCW 43.180.010. As part of these efforts, the Commission assists low-income and first-time home buyers by lending funds required for a down payment on a no-interest or low interest basis, with repayment upon sale of the house or the payment of the primary mortgage. The National Homebuyers Fund was formed by several counties in California and provides down payment assistance through grants to low and middle income homebuyers throughout the United States. The Commission sued NHF in 2015 in a declaratory judgment action asserting NHF was misrepresenting is governmental authority and was interfering with the Commissions mission and seeking declaration these activities were unlawful. The trial court ruled in favor of the Commission and ruled the NHF's "housing activities in the State of Washington are prohibited by law." NHF sought review and the court of appeals reversed on the grounds the Commission lacked standing to bring the action, but did not reach the merits of the claim. The Commission petitioned for review.

Holding: The court of appeals was reversed. Standing to bring a declaratory judgment was described as a two part test: (i) is the interest sought to be protected within the zone of interests to be protected or regulated by statute or the constitution; and (ii) has the challenged action caused injury in fact. The court of appeals was in error in concluding the Commission did not meet either of these tests.

> The statute that authorizes the Commission to exercise governmental authority also confers an interest against interference from unauthorized actors that purport to exercise similar governmental authority. The Commission has also alleged injury related to that interest sufficient for standing. Since the Commission satisfies our standard two part test for standing, there is no need to resort to the more liberal approach to standing we reserve for matters of substantial public importance. However, such an approach would be justified in this case.

The matter was remanded to the court of appeals to consider the remaining issues raised on the original appeal.

Jametsky v. Olsen, *179 Wn.2d 756 (2014)* – Action under Distressed Property Conveyance Act
Porter Law Ctr. v. Dep't of Financial Institutions, *196 Wn.App. 1 (2016)* – Mortgage Broker Practices Act.

F. Forest Practices

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

XV. Taxation

A. General Real Estate Taxes

End Prison Industrial Complex v. King County, *192 Wn.2d 560 (2018)* – Levy lid challenge.
City of Spokane v. Horton**,** *189 Wn.2d 696 (2017)* – Uniformity of taxation under article IV, section 9 of Washington constitution and senior discounts for property taxes.
City of Snoqualmie v. Constantine, *187 Wn.2d 289 (2017)* – Payment in lieu of taxes applicable to Tribal property.
City of Spokane v. Horton, *196 Wn.App. 85 (2015)* – Application of art. vii, set. 9 of Washington Constitution to levy lid lift exemption.
United Airlines v. King County, *194 Wn.App. 384 (2016); rev. denied, 186 Wn.2d 1022 (2016)* – Failure to object to payment of leasehold tax.
End Prison Int'l v. King County, *200 Wn.App. 616 (2017); rev. granted 190 Wn.2d 1007 (2018)* – Proper computation of levy limits under RCW 84.55.050.

B. LID's, Assessments & Utility Fees

Hamilton Corner I v. Napavine, *200 Wn.App. 258 (2017)* – Challenge to assessment amount based on quality of water provided.
Ferlin v. Chuckanut Community Forest Part Dist., *1 Wn.App.2d 102 (2017); rev, den. 190 Wn.2d 1005 (2018)* – Challenge to formation of park district and levy.

C. Excise Taxes

Dep't of Revenue v. FDIC, *190 Wn.App. 150 (2015)* – Sale by receiver and excise tax.

STATUTORY UPDATE

The 2020 Regular Session of the State Legislature commenced January 13, 2020 and adjourned *Sine Die* on March 12, 2020. This was one of the first sessions of the legislature not consumed with educational funding issues. In terms of real estate related legislation, the focus of the Legislature remained on housing issues. Below is a brief summary of enacted bills having some impact on real estate transactions in the state. Everyone should review the summary of all enacted legislation prepared by House of Representatives Office of Program Research found at http://leg.wa.gov/House/Committees/Documents/sinedie2020.pdf. It provides a look into the priorities of the elected representatives of the state. Unless otherwise noted, all measures passed during the regular session are effective 90 days following adjournment of the session, or June 11, 2020. The exact language of the bill should be consulted to determine the effect of the legislation.

Chapter 10, Laws of 2020 (ESHB 1261) - DISCHARGES INTO WATER: Amends RCW 77.55.011 and .021 and adds a new section to chpt. 90.48 RCW to prohibit motorized or gravity siphon aquatic mining or discharge of effluent from such an activity within the ordinary high water mark of certain waters of the state designated as critical habitat areas for salmon, steelhead or bull trout.

Chapter 20, Laws of 2020 (SHB 2246) - ENVIRONMENTAL HEALTH LAW REORGANIZATION: Recodifies a variety of statutes relating to environmental health to create a new title for environmental and hazardous material laws, Title 70A

Chapter 25, Laws of 2020 (SHB 2295) – Small Claims Court Judgments – Enforcement: Amends RCW 12.40.105 to provide garnishment and filing transcript of judgment with superior court for creation of lien is available if small claims court judgment is not paid within 30 days.

Chapter 40, Laws of 2020 (HB 2617) - LEASE OR RENTAL OF SURPLUS SCHOOL DISTRICT PROPERTY: Amends RCW 28A.335.040 and adds a new section to allow the lease or rental of school district property without the inclusion of a recapture provision if the land is used for affordable housing purposes.

Chapter 46, Laws of 2020 (EHB 2819) - CERTAIN PUMPED STORAGE AREA: Amends RCW 43.157.019 and .020 to include pumped storage water mandated by the Legislature to be designated as projects of statewide significance.

Chapter 87, Laws of 2020 (SHB 2673) - INFILL DEVELOPMENT – STATE ENVIRONMENTAL POLICY ACT: Amends RCW 43.21C.229 to change the standard for qualification as infill development to include areas where the population is equal to projections, rather than less than projections.

Chapter 91, Laws of 2020 (SHB 2868) - HISTORIC PROPERTY SPECIAL VALUATION – EXTENSION: Amends chpt. 84.26 RCW to allow for two, seven-year extensions of the special property valuation for historic properties in certain cities.

Chapter 109, Laws of 2020 (HB 2229) - LAND DEVELOPMENT AND MANAGEMENT SERVICES – TAXATION: Amends RCW 82.04.051 to exempt certain construction management and land development fees from construction-related activities subject to retail sales tax.

Chapter 123, Laws of 2020 (HB 2601) - PARKS AND RECREATION COMMISSION – LEASE APPROVAL: Amends RCW 79A.05.025 and .030 to increase the maximum permissible length of state park properties from 50 to 80 years and reducing the number of commission members required to approve leases over 20 years from unanimous to five members.

Chapter 140, Laws of 2020 (ESB 5457) - PUBLIC WORKS CONTRACT BIDDING – NAMING SUBCONTRACTORS: Amends RCW 39.30.060 to require prime contractors to name subcontractors for structural steel installation and rebar installation on public works construction projects expected to cost over $1 million, within 48 hours after the published bid submittal time.

Chapter 149, Laws of 2020 (SB 6090) - FIRE PROTECTION SERVICE AGENCIES – DETECTION DEVICE LIABILITY: Adds a new section to chpt. 4.24 RCW to provide liability exemption to fire districts and firefighters in connection with the installation of smoke detectors.

Chapter 153, Laws of 2020 (SB 6170) – PLUMBING PROFESSION – VARIOUS PROVISIONS: Amends various provisions of chpts. 18.106, 18.27, and 19.28 RCW concerning licensing requirements for plumbers, creates a residential plumbing certificate and other modifications affecting regulation of the profession.

Chapter 156, Laws of 2020 (SSB 6257) - UNDERGROUND STORAGE TANK REINSURANCE – EMERGENCY PROGRAM: Amends various sections of chpt. 70.148 RCW to establish an emergency program for UST owners who lose insurance in the event private insurers withdraw from the market.

Chapter 162, Laws of 2020 (SB 6420) - UNDERGROUND UTILITIES – VARIOUS PROVISIONS: Amends various sections in chpt. 19.122 RCW clarifying facility operators are not required to indicate the depth of utility lines when marking underground facilities and requiring notification procedures for excavators damaging underground utility facilities.

Chapter 169, Laws of 2020 (EHB 1694) - TENANTS – PAYMENTS IN INSTALLMENTS: Amends RCW 43.31.605 and RCW 59.18.253 and adds a new section to chapter 59.18 requiring landlords to permit tenants to pay deposits, nonrefundable fees and last month rent deposits in installments. Landlords are permitted under certain circumstances to seek reimbursement from the Landlord Mitigation Program.

Chapter 173, Laws of 2020 (SHB 2343) - URBAN HOUSING SUPPLY: Amends a variety of statutes in chpt. 36.70A RCW to modify the list of actions municipalities are encouraged to undertake to promote and enhance residential building capacity

Chapter 175, Laws of 2020 (HB 2512) - MOBILE HOMES – PROPERTY TAX DISTRAINT: Amends 84.56.070 to allow collection by distraint of starting three years after the first delinquency of personal property taxes.

Chapter 177, Laws of 2020 (ESHB) - PAST DUE RENT – TENANT GRACE PERIOD: Amends RCW 59.18.170 and 59.18.230 to provide tenants with a grace period of 5 days before late fees can be charged on delinquent rent.

Chapter 204, Laws of 2020 (2SSB 6231) - PROPERTY TAX EXEMPTION – SINGLE FAMILY DWELLING IMPROVEMENTS: Amends RCW 84.36.400 and adds new sections to exempt the value of new accessory dwelling units from property taxes for three years.

Chapter 209, Laws of 2020 (SSB 6319) - SENIOR PROPERTY TAX EXEMPTION – VARIOUS PROVISIONS: Amends various sections in chpt. 84.36 RCW to change the requirements to submit an application for the senior citizen property tax exemption, modifies the residency requirement and makes other changes.

Chapter 214, Laws of 2020 (ESSB 6574) - GROWTH MANAGEMENT HEARINGS BOARD – VARIOUS PROVISIONS: Amends various sections in chpt. 36.70A RCW and RCW 43.21B.005 to reduce the number of members on the GMHB from seven to five members; modifies the duties of the chair of GMHB and the director the Environmental Land Use Hearing Office and requires the chair of the GMHB to be an attorney.

Chapter 217, Laws of 2020 (ESSB 6617) - ACCESSORY DWELLING UNITS – OFF-STREET PARKING: Adds new sections to chpt. 36.70A RCW prohibiting municipalities required to plan under GMA from imposing off-street parking requirements for accessory dwelling units after July 1, 2021.

Chapter 220, Laws of 2020 (ESHB 1023) – ADULT FAMILY HOMES – EIGHT-BED CAPACITY: Amends chapter 70.128 RCW to increase their capacity from 6 beds to 8 beds, subject to certain conditions.

Chapter 222, Laws of 2020 (HB 1590) - AFFORDABLE HOUSING SALES AND USE TAX: Amends RCW 82.14.530 to allow county and city legislative authority to impose sales and use taxes for housing and related purposes.

Chapter 223, Laws of 2020 (ESHB 1754) - RELIGIOUS ORGANIZATIONS – HOSTING THE HOMELESS: Amends RCW 36.01.290, 35.21.915 and 35A.21.360 to place new limits on the ability of municipalities to regulate homeless encampments sponsored by religious organizations and requires religious organizations to comply with regulations relating the sex offenders, vehicle information and homeless client management information.

Chapter 237, Laws of 2020 (SHB 2950) - MULTI-FAMILY HOUSING TAX EXEMPTION – EXTENSION: Amends 84.14.020 and .100 extending the property tax exemption, until December 31, 2021, for properties currently receiving a 12-year exemption under the multifamily property tax exemption (MFTE) that is set to expire after the effective date of the bill, but before December 31, 2021.

Chapter 253, Laws of 2020 (SB 6212) - AFFORDABLE HOUSING PROPERTY TAX LEVY – EXPANSION: Amends RCW 84.52.043 and .105 to allow municipalities to exceed their statutory property tax limitations to fund low income housing.

Chapter 272, Laws of 2020 (HB 2230) - INDIAN TRIBES – ECONOMIC DEVELOPMENT: Removes expiration of the property tax exemption for property owned by a federally recognized Indian tribe that is used for economic development purposes.

Chapter 273, Laws of 2020 (SHB 2386) - NON-PROFIT ORGANIZATIONS – PROPERTY TAX EXEMPTION: Amends chpt. 84.36 RCW to continue the property tax exemption for nonprofits providing housing for very low-income households and expands the definition of qualifying households as of July 2021 to including those at or below 60 percent of median income for the county in which the housing is located.

Chapter 280, Laws of 2020 (HB 2497) - DEVELOPMENT OF PERMANENTLY AFFORDABLE HOUSING: Amends RCW 39.89.020; 39.102.020 and 39.104.020 to add permanently affordable housing to public improvements eligible for community revitalization financing, local infrastructure financing tool, and local revitalization financing.

Chapter 300, Laws of 2020 (SB 5613) - COUNTY ROAD VACATION – CERTAIN ROADS: Amends RCW 36.87.130 to authorize the vacation of road abutting the Lewis River providing access to a railroad bridge where several fatalities had occurred.

Chapter 315, Laws of 2020 (ESSB 6378) - RESIDENTIAL TENANTS – VARIOUS PROVISIONS: Amends various provisions in chpt. 59.18 RCW and RCW 43.31.605 to change the form of notice to pay rent or vacate; prohibit threatening eviction for failure to pay certain charges; modify the provisions relating to attorney fees and addressing issues related to cash payments. Changes made to content of 14-day notice to pay rent or vacate.

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