ZENO BAKALIAN P.S.

LEGAL AND ESCROW SERVICES

4020 Lake Washington Blvd. NE, Suite 100
Kirkland, Washington 98033

G. Michael Zeno, Jr. (425) 822-1511
Allan B. Bakalian (admitted in WA and OR) (425) 822-1411 (fax)
Aaron M. Neilson (admitted in WA and MT)

2013-2014 REAL ESTATE CASE LAW UPDATE

KING COUNTY BAR ASSOCIATION

MAY 7, 2014

REAL PROPERTY, PROBATE & TRUST LAW SECTION MEETING

PRESENTERS: G. MICHAEL ZENO, JR. AND AARON M. NEILSON

TABLE OF CONTENTS

- Defense of residential foreclosure cases after *Bain v. Metropolitan Mortgage Group*, 175 Wn.2d 83 (2012).

  - *Klem v. Washington Mut. Bank*, 176 Wn.2d 771 (Feb. 2013) (trustee's refusal to continue sale and unqualified commitment to follow lender's instruction a breach of trustee's duty to grantor).

  - *McDonald v. OneWest Bank*, FSB, 929 F.Supp.2d 1079 (W.D. Wash., Mar. 2013) (RCW 61.24.127 means no damages available for DOT act violations if no sale occurs, but CPA and fraud claims may be pursued).

  - *Walker v. Quality Loan Service Corp.*, 176 Wn.App. 294 (Div. 1, Aug. 2013) (loan servicer not noteholder and therefore not beneficiary, hence lacked authority to appoint successor trustee; borrower may recover damages under DOT act, CPA, FDCPA even if foreclosure sale never occurs; contradicts *McDonald's* holding with respect to recovery of damages under DOT act).

  - *Bavaland v. OneWest Bank, FSB*, 176 Wn.App. 475 (Div. 1, Sept. 2013) (loan servicer not noteholder and therefore not beneficiary, hence lacked authority to appoint successor trustee; borrower obtains TRO but fails to make required payments; TRO dissolved and sale occurs; held that sale is void).

  - *Frizzell v. Murray*, 179 Wn. 2d 301 (Dec. 2013) (non-institutional lender; borrower's failure to pay sum that was condition for restraint of sale waives ability to vacate sale later; cf. *Bavaland*).

  - *In re Meyer*, 2014 WL 640981 (Bankr. W.D. Wash, Feb. 2014) (Notice of Default lacked required information and trustee failed to exercise independent judgment to confirm authority of various parties on the lender side, as required by *Klem*; borrower may recover damages under DOT act, CPA, FDCPA even if foreclosure sale never occurs, following *Walker*).

- *Mulcahy v. Federal Home Loan Mortg. Corp.*, 2014 WL 504836 (W.D. Wash., Feb. 2014) (property sold during modification process, despite assurances to the contrary; failure to restrain sale not found to waive a claim to vacate the sale; waiver is equitable in nature).

- *Watson v. Northwest Trustee Services Inc*., 321 P.3d 262 (Wn.App. Div. 1, March 2014) (reversing trial court's grant of summary judgment in trustee's favor where trustee, following borrowers' discharge in bankruptcy, did not issue a new notice of default within 120 days of the initially scheduled trustee's sale and, instead, issued an amended notice of trustee's sale--violating the Foreclosure Fairness Act).

- *Frias v. Asset Foreclosure Services*, case no. 89343-8, pending before Washington Supreme Court; certified by W.D. Wash in Sept. 2013, 2013 WL 6440205 (Q: whether wrongful foreclosure claim can be pursued when foreclosure sale does not occur—see *McDonald, Walker, In re Meyers*).

- Prohibition against nonjudicial foreclosures of agricultural land not waivable.

  - *Schroeder v. Excelsior Management Group, LLC*, 177 Wn.2d 94 (Feb. 2013).

- Guarantor's liability after nonjudicial foreclosure of deed of trust securing commercial loan, where the deed of trust arguably secures both the promissory note and guaranty.

  - *First-Citizens Bank & Trust Co. v. Cornerstone Homes & Development, LLC*, 178 Wn. App. 207 (2013).

  - *Washington Fed. v. Gentry*, 319 P.3d 823 (Wn. App. Div. 1, Feb. 2014) (disagreeing with Div. 2).

- Miscellaneous.

  - *Bert Kuty Revocable Living Trust ex rel. Nakano v. Mullen*, 175 Wn. App. 292 (Div. 2, June 2013) (plaintiff seeks accounting of surplus proceeds where none exist).

  - *Glepco, LLC v. Reinstra*, 175 Wn. App. 545 (Div. 1, July 2013) (reformation of trustee's deed).

  - *First-Citizens Bank & Trust Co. v. Reikow*, 177 Wn. App. 787 (2013) (application of "fair value" provisions of RCW 61.24 to limit guarantor's liability for deficiency).

  - *Worden v. Smith*, 178 Wn. App. 309 (2013) (motion to amend stipulated order authorizing erroneous disbursement of surplus funds granted).

  - *Doughty v. Holder*, 2014 WL 220832 (E.D. Wash., Jan. 2014) (a lender who sues to judicially foreclose its deed of trust and requests a money judgment is not a "debt collector" under the FDCPA where, in the Complaint, the lender waives the right to a post-foreclosure deficiency).

  - *Washington Federal Sav. And Loan Ass'n v. McNaughton Group*, 319 P.3d 805 (Wn. App. Div. 1, Feb. 2014) (addressing whether a commercial lender's deed of trust encumbered the developer's rights to latecomers fees).

  - *In re Trustee's Sale of Real Property of Ball*, 319 P.3d 844 (Wn. App. Div. 2, Feb. 2014) (addressing whether the merger doctrine precludes a junior lienholder from receiving surplus funds from a trustee sale when that same lienholder foreclosed the senior lien and took title at the sale)

2. CONDOMINIUM / HOMEOWNERS' ASSOCIATION CASES ..... PAGES 13-16

- Condominium Lien for Unpaid Assessments.

  - *BAC Home Loans Servicing, LP v. Fulbright*, 174 Wn. App. 352 (Div. 1, April 2013), review granted 178 Wn. 2d 1001 (Sept. 2013) (lender's deed of trust extinguished by condominium's limited-priority lien has no redemption rights—following *Summerhill Village v. Roughley*, 289 P.3d 645 (Wn. App. Div 1, 2012)).

- *Sixty-01 Association of Apartment Owners v. Parsons*, 178 Wn. App. 228 (Div 1., 2013) (no relief for ill-informed purchaser at condominium's lien foreclosure sale).

- Interpretation of CC&Rs.

  - *Saunders v. Meyers*, 175 Wn.App. 427 (Div 1., May 2013) (interpretation of view covenant).

  - *Granville Condominium Homeowners Association v. Kuehner*, 177 Wn. App. 543 (Div. 2, Nov. 2013) (HOA has no direct action against unit owner's tenant for delinquent condominium assessments).

  - *Wilkinson v. Chiwawa Commmunities Ass'n*, 2014 WL 1509945 (Wn.2d, April 2014) (holding short-term rentals are not commercial uses in violation of the CC&Rs that ban commercial uses).

- Road Maintenance Involving Non-Member of Association.

  - *Buck Mountain Owner's Ass'n v. Prestwich*, 174 Wn. App. 702 (April 2013) (in the absence of a road maintenance provision in an easement courts may, in equity, order a neighboring owner--who is not a HOA member--to pay road maintenance assessments levied by the HOA; however, that court order is not a covenant running with the land).

  - *Northwest Properties Brokers Network, Inc. v. Early Dawn Estates Homeowner's Ass'n*, 173 Wn. App. 778 (Feb. 2013) (addressing, in various contexts, when a HOA unreasonably interferes with a non-HOA member's easement rights).

- Equitable Servitude To Mandate Existence Of Non-Association Golf Course. *Riverview Community Group v. Spencer & Livingston*, 173 Wn. App. 568 (Div. 3, Feb. 2013), review granted 178 Wn.2d 1009 (2013) (equitable servitude based on marketing materials and representations to buyers in a golf course community).

3. CONSTRUCTION CASES ..... PAGE 17-18

- *Scott's Excavating Vancouver, LLC v. Winlock Properties, LLC*, 176 Wn.App. 335 (Aug. 2013) (lender's predecessor knew engineer started work before lender's deed of trust was recorded, so mechanic's lien had priority over lender's deed of trust).

- *Donatelli v. D.R. Strong Consulting Engineers, Inc*., 179 Wn. 2d. 84 (Nov. 2013) (independent duty doctrine does not bar a developer's negligence claims against an engineering firm where the parties' contract does not adequately assume or waive the engineering firm's common law tort duties).

- *CalPortland Co. v. LevelOne Concrete LLC*, 2014 WL 1226606 (Wn.App. Div. 2, March 2014) (addressing need to serve process on the landowner when a 'bond in lieu of claim' is recorded under RCW 60.04.161 before the contractor's mechanic's lien lawsuit is filed).

- *Top Line Builders, Inc. v. Bovenkamp*, 320 P.3d 130 (Wn. App. Div. 1, March 2014) (Builder's mechanic's lien attached to the property for the total amount due--above the flat fee contract amount--and was superior to the lender's later-recorded deed of trust where parties' waived contractual requirement for change orders).

4. ADVERSE POSSESSION & PRESCRIPTIVE/IMPLIED EASEMENTS ..... PAGES 19-20

- *Woodward v. Lopez*, 174 Wn. App. 460 (Feb. 2013) (addressing a neighbor's right to an implied easement and right to privately condemn portion of neighbor's land where gaining access otherwise is cost prohibitive).

- *Acord v. Pettit*, 174 Wn. App. 95 (March 2013) (admitting into evidence under ER 804 testimony of plaintiffs' predecessor-in-title from prior lawsuit to establish adverse use of logging land).

- *Gamboa v. Clark*, 2014 WL 1225933 (Wn. App. Div. 3, March 2014) (neighborly accommodation doctrine precluded finding of adverse use and existence of prescriptive easement).

- *Ensberg v. Nelson*, 320 P.3d 97 (Wn. App. Div. 1, Jan. 2014) (Seller of land did not breach warranties against encumbrances or marketability of title by conveying land subject to an HOA's governing documents when a $500,000 judgment against the HOA was not picked up by the title insurer and the evidence did not show the HOA had a right to assess HOA members for payment of the judgment).

- *Jametsky v. Rodney A.*, 179 Wn.2d 756 (Feb. 2014) (a certificate of tax delinquency need not be issued before a property is considered distressed under Washington's Distressed Property Conveyance Act).

- *Town of Woodway v. Snohomish County*, 2014 WL 1419187 (Wn.2d, April 2014) (analyzing when a developer's development rights vest when the development is approved under a county's pland and regulations that are later deemed to have been in violation of SEPA).

FORECLOSURE CASES

TRUSTEE'S DUTY TO CONTINUE SALE

***Klem v. Washington Mut. Bank*, 176 Wn.2d 771 (Dec. 2013).**

-Facts-A Borrower brought breach of fiduciary duty, CPA, and negligence claims, among others, against a deed of trust Trustee after the Trustee refused to postpone a foreclosure sale, resulting in a significant loss of the Borrower's equity. Borrower argued the Trustee breached its duty of care by refusing to continue the foreclosure sale even though the Trustee knew (1) the property's value was much greater than the debt owed, (2) Borrower had entered into a Real Estate Purchase and Sale Agreement to sell the property on terms that would have repaid the loan, and (3) a postponement would not have harmed Lender. Trustee argued it could not postpone the foreclosure sale because Trustee's contract with Lender only permitted Trustee to postpone the sale if Lender gave its permission.

-Issue-Did Trustee and Trustee's notary breach any duty and/or violate Washington's Consumer Protection Act by not continuing the sale and by falsely dating the Notice of Trustee's sale to expedite the foreclosure?

-Holding-Because nonjudicial foreclosures take place outside the courts, trustees have considerable power. The trustee is not an agent of the lender, instead, the trustee has a duty of impartiality to both parties. The trustee must not follow the dictates of the lender without exercising its independent discretion. The Court held (1) the trustee's failure to exercise independent discretion by blindly following the dictates of the lender was an unfair and deceptive act/practice that satisfied the first element of a CPA claim, and (2) the trustee's notary's false dating of a notice of trustee's sale was unfair and deceptive.

MERS CASES AFTER BAIN v. METROPOLITAN MORTGAGE GROUP:

PRE-FORECLOSURE, A BORROWER'S SOLE RELIEF UNDER THE D.T.A. IS TO SUE TO ENJOIN THE SALE

***McDonald v. OneWest Bank, FSB*, 929 F.Supp.2d 1079 (W.D. Wash. Mar. 2013).**

-Facts: Borrower promissory note was secured by a deed of trust against Borrower's home. Pacific Northwest Title Insurance Company was named trustee under the deed of trust, and MERS was identified as the beneficiary and nominee for Lender. Borrower defaulted. On January 12, 2010 Northwest Trustee Services, Inc (NWTS), acting as agent for OneWest Bank (Bank), sent plaintiff a Notice of Default (NOD). The NOD identified Bank as the beneficiary of the deed of trust and servicer of the mortgage. On January 27, 2010, an employee of Bank executed an Assignment of Deed of Trust, as "Assistant Vice President" of MERS, purporting to assign MERS' interest in the deed of trust to Bank. On January 27th Bank also appointed NWTS successor trustee under the deed of trust, declaring under oath that Bank "is the actual holder of the promissory note … or has requisite authority … to enforce said obligation." On February 15, 2010 NWTS issued a notice of trustee's sale, setting a trustee's sale for May 2010. In April 2010 Borrower demanded that Lender and NWTS provide evidence that one of them or their assigns has possession of the original promissory note. Bank informed Borrower Freddie Mac had purchased the note and deed of trust, but declined to provide further information. In October 2010, Bank requested that Deutsche Bank National Trust Co., a document custodian, release the original promissory note to Bank, which it did. NWTS sent out a second notice of trustee's sale on November 1, 2010. On December 3rd, one week before the trustee's sale, Borrower filed suit for damages and to enjoin the sale. The trial court required Borrower to make monthly payments of $2,350 into the registry of the court as a condition to enjoining the sale. The injunction was lifted after Borrower failed to make the requisite payments into the court's registry. The trustee did not request a new sale date; the lawsuit for damages continued without a trustee's sale having occurred. Bank produced the original promissory note to the court on January 31, 2013.

-Issues: (1) Did Bank and NWTS violate Washington's Deeds of Trust Act (Act)? (2) Does Bank have, late in the case, authority to pursue a nonjudicial foreclosure of the deed of trust? (3) If a trustee's sale has not occurred, is Borrower's exclusive remedy for alleged noncompliance with the Act injunctive relief to enjoin the foreclosure? (4) Did Bank and its servicing agent violate RESPA and, if so, what damages is Borrower entitled to? (5) Is Bank and/or NWTS a debt collector subject to the Fair Debt Collection Practices Act (FDCPA)? (6) Did Bank and/or NWTS violate Washington's Consumer Protection Act (CPA)?

-Holdings:

-Issue 1: Yes. Lenders must strictly comply with the procedural requirements of the Act to ensure homeowners are given a meaningful opportunity to correct deficiency and protect themselves from competing claims and additional liabilities. The Act only allows the beneficiary or trustee to issue the NOD. RCW 61.24.030(8). And only the beneficiary can appoint a trustee or successor trustee. RCW 61.24.010(2). A "beneficiary" is "the holder of the instrument or document evidencing the obligations secured by the deed of trust." RCW 61.24.005(2). The issue in this case was whether Bank and/or NWTS were authorized to issue the NOD. Bank argued it was the holder of the note because it had a custodial agreement with Deutsche Bank as of May 2009, which gave Bank the right to request physical possession of the original note. But the facts established that Bank only had actual possession of the original note in October 2010, at the earliest. Bank argued Deutsche Bank was its agent, and because Deutsche Bank had actual possession of the original note—Bank had possession of the original note through its agent—making the original NOD valid. The court disagreed. Citing *Bain*, the court explained that "a prerequisite of an agency is control of the agent by the principal." The custodial agreement only gave Bank a contractual right to obtain the original promissory note upon request—not control over Deutsche Bank. Because Bank did not possess the original note at the time it issued the NOD and appointed NWTS successor trustee, the NOD was defective and NWTS lacked authority to issue the notice of trustee's sale. Bank and NWTS violated the Act.

-Issue 2: For the reasons cited above, Bank lacked authority to conduct a trustee's sale under the original Notice of Default. The court lacked sufficient proof that the Bank had possession of the original note. So it could not determine if the Bank had authority to issue a new NOD and move forward with the foreclosure.

-Issue 3: Yes. Borrower did not cite any statute or case law authorizing statutory or punitive damages for violates of the Act when a trustee's sale has not occurred. Relying on *Vawter v. Quality Loan Serv. Corp. of Wash*., 707 F.Supp.2d 1115 (W.D. Wash. 2010), the court held "a claim for damages arising from violations of the procedures set forth in the DTA does not arise unless and until a foreclosure sale occurs. Until that time, a borrower's only remedy under the DTA is to seek to enjoin the sale." The Court explained, however, that damages may be recoverable otherwise—such as for fraud or for violations of Washington's Consumer Protection Act.

-Issue 4: RESPA was enacted because lenders and servicers were not responding to legitimate inquiries from borrowers. If borrower sends lender and/or servicer a "qualified written request," then lender/servicer has a duty to respond. A "qualified written request" is "a written correspondence, other than notice on a payment coupon or other payment medium supplied by the servicer, that (i) includes, or otherwise enables the servicer to identify, the name and account of the borrower, and (ii) includes a statement of the reasons for the belief of the borrower, to the extent applicable, that the account is in error or provides sufficient detail to the servicer regarding other information sought by the borrower. Actual damages and additional damages of $1,000 for a pattern or practice of noncompliance may be awarded. 12 USC § 2605(f)(1). *If a proper request is made the lender's failure to appropriately respond is not a defense to a foreclosure, but merely a basis for bringing a claim for damages.* Bank's refusal to respond to Borrower's legitimate concerns—and to refrain from reporting Borrower to credit agencies under these facts—was a violation of RESPA. But the court refused to grant Borrower summary judgment on this claim because Borrower (1) failed to prove actual damages, as Borrower did not show Bank's failure to respond caused him to send his payment to the wrong entity, resulting in late fees, interest, etc., and (2) did not show a pattern or practice of wrongdoing—but merely one failure to treat Borrower's letter as a qualified written request.

-Issue 5: No as to Bank; yes as to NWTS. The FDCPA excludes from the definition of "debt collector" "any person collecting or attempting to collect any debt owned or due or asserted to be owed or due another to the extent such activity … concerns a debt which was not in default at the time it was obtained by such person." 15 USC § 1692a(6)(F). This exception applied to Bank because it acquired the servicing rights to Borrower's loan long before Borrower defaulted. NWTS did not become successor trustee until after Borrower defaulted, so this exception doesn't apply to NWTS and NWTS is a debt collector under the FDCPA. NWTS argued it didn't violate the FDCPA because no trustee's sale occurred and Borrower never lost title or possession to the property. But the FDCPA was enacted to protect consumers from abusive debt collection practices, not just to provide a cause of action after one's property is taken from him. By issuing the NOD without legal authority to do so, NWTS violated § 1692f(6)(A) of the FDCPA.

-Issue 6: Bank's misrepresentation in the appointment of successor trustee (that Bank was the servicer and beneficiary under the deed of trust) were deceptive acts that affected the public interest—satisfying the first and third elements of a CPA claim. Regarding the injury element of a CPA claim, "investigation expenses and other costs associated with dispelling the uncertainty created by defendants' deceptive conduct sufficiently establish injury under the CPA." Borrower did not sufficiently prove his actual damages. So the court held that issue open for trial.

PRE-FORECLOSURE, A BORROWER HAS A CLAIM FOR DAMAGES FOR DTA VIOLATIONS
***Walker v. Quality Loan Service Corp*., 176 Wn.App. 294 (Aug. 2013).**

-Facts: Borrower received a $280,000 loan, secured by a deed of trust, from Lender. The Deed of Trust identified MERS as the nominee for Lender and as the beneficiary. Select serviced the loan. Borrower defaulted. In May 2009 a Notice of Default was mailed to Borrower. In May 2009 Select, as the "beneficiary," recorded an Appointment of Successor Trustee, naming Quality Loan Service Corp as the successor trustee. In July 2009 MERS, as nominee for Lender, assigned the Deed of Trust and promissory note to Select. In July 2009, QLSC recorded the Notice of Trustee's Sale. In October 2009 Borrower filed a lawsuit to enjoin the trustee's sale, to quiet title in him, and for monetary damages for wrongful foreclosure. The trial court granted QLSC's and Select's CR 12(c) motion for judgment on the pleadings, concluding Washington law does not recognize a claim for wrongful foreclosure where the trustee's sale has not taken place. Borrower appealed.

-Issues: Did Borrower plead sufficient facts to support a claim (1) for Washington's Deeds of Trust Act violations, (2) for Fair Debt Collection Practices Act violations, (3) for Washington's Consumer Protection Act violations and (4) to quiet title in Borrower?

-Holdings: Yes as to claims (1) – (3). No as to claim (4).

-Claim (1): Relying on *Vawter v. Quality Service Corp. of Washington*, 707 F.Supp.2d 1115 (W.D. Wash. 2010), defendants argued Washington law does not recognize a claim for wrongful foreclosure when the foreclosure sale has not taken place. But *Vawter* was decided before RCW 61.24.127 was adopted and that statute gives a borrower a claim for a trustee's failure to materially comply with provisions of the Deeds of Trust Act even if the trustee's sale has not occurred. The Court of Appeals therefore reversed and remanded because (1) only a lawful beneficiary can appoint a successor trustee, and Borrower alleged sufficient facts that Select did not hold the note when it appointed QLSC as the successor trustee, and (2) only a lawfully appointed successor trustee can issue a notice of trustee's sale, and Borrower alleged sufficient facts that QLSC lacked authority to record the Notice of Trustee's Sale—because Select lacked the authority to appoint QLSC. **But see *Frias v. Asset Foreclosure Services, Inc*., 2013 WL 6440205 (Sept. 2013)** (certifying the following question to the Washington Supreme Court: Is a trustee's sale a predicate to a claim for damages against a trustee under the DTA?) (citing numerous Washington federal district court cases holding the answer is "yes").

-Claim (2): The Fair Debt Collection Practices Act applies to "debt collectors"—entities that regularly collect debts for others; not for themselves. Section 1692e prohibits a debt collector from using a "false, deceptive, or misleading representation or means in collection with collection of any debt." Section 1692f prohibits a debt collector from "unfair or unconscionable means to collect or attempt to collect any debt." QLSC argued it is not a debt collector and initiating a nonjudicial foreclosure does not constitute debt collection. Following the legal trend, the Court of Appeals held a nonjudicial foreclosure only triggers § 1692(f)(6)—

which concerns enforcement of security instruments. Because Borrower alleged sufficient facts that show neither Select nor QLSC had authority to do anything relating to the foreclosure, the Court dismissed all Borrower's FDCPA claims except for the one alleging a violation of § 1692(f)(6).

-Claim (3): To prevail under a private CPA claim, the plaintiff must prove (1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) affecting the public interest, (4) injury to a person's business or property, and (5) causation. The Court held Borrower's investigating expenses, taking time off work, travel expenses, and attorney fees are sufficient to establish an injury under element 4. The Court also held Borrower pled sufficient facts to prove causation, because but for QLSC's and Select's actions he would not have had to take time off work, pay an attorney, etc. Ultimately, the Court held Borrower alleged sufficient facts to support a CPA claim.

-Claim (4): The Court of Appeals affirmed the trial court's dismissal of Borrower's quiet title claim because, under Bain, the Washington Supreme Court concluded that these types of Washington Deeds of Trust Act violations should not result in a void deed of trust, "both legally and from a public policy standpoint" since the borrower admittedly has not paid off his note.

NON-WAIVER OF CLAIM FOR DAMAGES AND CLAIM TO INVALIDATE THE SALE BY NOT RESTRAINING SALE
***Bavaland v. OneWest Bank*, F.S.B., 176 Wn.App. 475 (Sept. 2013).**

-Facts: Borrower executed a promissory note secured by a deed of trust in favor of IndyMac Bank as "lender". Ticor Title was "trustee." MERS was "nominee" and "beneficiary." On 12/15/2010 OneWest Bank executed an Appointment of Successor Trustee, appointing RTS successor trustee. On 12/16/2010 MERS executed an Assignment of Deed of Trust, "as nominee for IndyMac," assigning the Deed of Trust to OneWest Bank. Borrower defaulted and on 1/6/2011 RTS issued a Notice of Trustee's Sale, setting the trustee's sale for 5/13/2011. On 5/5/2011 Borrower sued to restrain the sale and for damages. The trial court granted the TRO on the condition that borrower post a bond. Borrower didn't post the bond, so the trustee's sale took place 6/17/2011. A trustee's deed was recorded, conveying title to Buyer. The trial court granted MERS' and IndyMac's motion to dismiss and RTS' motion to validate the sale based on Borrower's failure to restrain the sale, but denied Borrower's motion to vacate the trustee's sale.

-Issues: Did the trial court err in (1) granting IndyMac's motion to dismiss based on Borrower's failure to restrain the sale, (2) granting RST's motion to validate the sale and denying Borrower's motion to vacate the sale, and (3) dismissing Borrower's CPA claim?

-Holdings: Yes on all issues. An improperly appointed trustee may conduct a nonjudicial foreclosure. And only the true beneficiary can appoint a successor trustee. RCW 61.24.010(2)(2009). RTS was an improperly appointed successor trustee because, at the time OneWest executed the Appointment of Successor Trustee OneWest was not the beneficiary of the deed of trust. MERS, by executing the Assignment of Deed of Trust to OneWest the day after OneWest executed the Appointment of Successor Trustee, did not cure OneWest's defective appointment because MERS was not a lawful holder of the promissory note either. RCW 61.24.005(2) defines a "beneficiary" as the holder of the promissory note. MERS admits it never possessed the promissory note. Therefore MERS was not a lawful beneficiary and lacked authority to appoint RTS successor trustee. The Court of Appeals held the trial court erred in granting MERS and OneWest's motions to dismiss. And because RCW 61.24.040 makes a waiver finding discretionary (by use of the word "may"), the Court refused to find Borrower waived her right to bring a claim under RCW 61.24 by not restraining the sale--"Even where a party fails to timely enjoin a trustee sale under RCW 61.24.130, if a trustee's actions are unlawful, the sale is void."

MERS' being named the beneficiary under the deed of trust without being a lawful beneficiary satisfied the first element of a CPA claim because it had the capacity to deceive a substantial portion of the public. The same is true of OneWest's representation that it was the beneficiary when it appointed RTS successor trustee when, in fact, it wasn't. MERS and OneWest "presumptively" satisfied element two—public interest impact—based on their prevalence in loan and real estate transactions in Washington. There was also enough evidence to present the injury and causation elements to a jury, as Borrower could prove MERS, OneWest and RTS sold her property without proper authority to do so. The Court reversed dismissal of Borrower's CPA claim.

NONJUDICIAL FORECLOSURE—WAIVER OF CLAIMS BY NOT ENJOINING SALE.
***Frizzell v. Murray*, 313 P.3d 1171 (Wn.2d. Dec. 2013).**

-Facts-A hard-money lender made a $100,000 home-secured commercial loan to a susceptible / unsophisticated borrower. The borrower acknowledged she would use the $100,000 loan proceeds for a wheelchair business. Instead, another person—acting as borrower's attorney in fact—invested the loan proceeds in oil stocks, which tanked. After borrower defaulted on the loan, lender started a nonjudicial foreclosure. Borrower sued to enjoin the sale and obtain a money judgment. The day before the sale, borrower obtained a temporary restraining order conditioned on her depositing $15,000 cash in the court registry and posting a bond. Borrower did not satisfy these conditions, so the trustee's sale moved forward. Later, lender moved for summary judgment—arguing borrower waived her post-foreclosure claims for damages and to invalidate the sale by not enjoining the sale.

-Issue-Does a borrower who files a lawsuit after the initiation of a foreclosure, successfully obtains a temporary restraining order, but fails to satisfy the conditions of that restraining order, waive her right to (1) contest the sale, and (2) bring CPA and money-damage claims post-foreclosure?

-Holding-Yes as to issue 1; Maybe as to issue 2.

-Issue 1: Under RCW 61.24.040(1)(f)(IX), a waiver of a post-sale contest occurs where "a party (1) received notice of the right to enjoin the sale, (2) had actual or constructive knowledge of a defense to foreclosure prior to the sale, and (3) failed to bring an action to obtain a court order enjoining the sale." The foreclosure was handled properly --proper notices, etc. Borrower violated RCW 61.24.130 and her failure to satisfy the TRO condition was her own fault. There were no illegal actions by beneficiary or trustee that,

in equity, would justify a post-sale action to invalidate the sale under RCW 61.24.040(1)(f)(IX); *Ortega v. Northwest Trustee Services, Inc.*, 2014 WL 646347 (Wn. App. Div. 1, Feb. 2014) (unpublished opinion) (same).

-Issue 2: Borrower argued her loan was truly a consumer loan, so her post-sale damage claims survive under RCW 61.24.127. There was a factual dispute whether the loan was a commercial or consumer loan. So the Court remanded to the trial court to determine if the loan was a commercial or consumer loan and, in turn, whether Borrower waived her damage claims under RCW 61.24.127 (which doesn't apply to commercial loans) by failing to restrain the sale.

PRE-SALE CLAIM FOR DAMAGES FOR D.T.A. VIOLATIONS ALLOWED

***In re Meyer*, 2014 WL 640981 (Bankr. W.D. Wash., Feb. 2014)** (following *Walker* and *Bavand*, supra, holding borrowers can obtain monetary damages for DTA violations before a trustee's sale occurs; rejecting numerous prior cases holding otherwise; and holding the successor trustee liable for violating the CPA).

WAIVER OF ABILITY TO VOID FORECLOSURE SALE BY FAILING TO RESTRAIN THE SALE

***Mulcahy v. Federal Home Loan Mortg. Corp.*, 2014 WL 504836 (W.D. Wash., Feb. 2014).**

-Facts: Lender sent Borrower the requisite foreclosure notices. However, during the process of negotiating a loan modification Lender repeatedly assured Borrower they had nothing to worry about and that the foreclosure sale had been cancelled. On 12/18/10 Lender sent Borrower a letter stating that the foreclosure sale would proceed if Borrower didn't send Lender certain documents by 12/28/10 (which was one day after the scheduled trustee's sale). However, Borrower had sent Lender the requested documents on 12/17/10 and even called Lender to confirm Lender received the documents; Lender confirmed it had. Despite this, the trustee's sale occurred on 12/27/10 and Lender acquired title to the property. Based on irregularities in the foreclosure process, Borrower sued to invalidate the sale on 12/28/12. Lender moved to dismiss Borrower's claim under Rule 12(b)(6).

-Issue: Did Borrower waive its right to challenge the trustee's sale by not enjoining the sale?

-Holding: Not necessarily. "Failure to bring such a lawsuit [to enjoin a trustee's sale] may result in a waiver …" RCW 61.24.040(1)(f)(IX). In other words, waiver is not automatic. "Waiver is an equitable construct, applicable only where the facts support a finding that the party has knowingly and intentionally relinquished his rights by failing to timely assert them" (citing elements necessary for a finding that pre-sale objections were waived, and factors courts should consider when considering this issue).

WRONGFUL FORECLOSURE FOR FORECLOSURE FAIRNESS ACT VIOLATION

***Watson v. Northwest Trustee Services Inc*., 321 P.3d 262 (March 2014).**

-Facts: Before Washington's legislature passed the FFA Trustee issued a Notice of Default and Notice of Trustee's Sale, setting a 6/24/11 sale date. On 6/20/11 Borrowers filed bankruptcy. On 9/22/11 Borrowers' debts were discdharged in the bankruptcy. On 11/8/11 Truste issued an Amended Notice of Trustee's Sale. The foreclosure went through and a Trustee's Deed recorded on 1/10/12. Borrowers sued Trustee for wrongful foreclosure, to quiet title and for CPA violations--alleging Trustee violated the FFA. The trial court dismissed Borrowers' CPA claim but not their wrongful foreclosure claim for FFA violations.

-Issue: Did Borrower's evidence create a genuine issue of material fact regarding Trustee's purported FFA violation by issuing an Amended Notice of Trustee's Sale without issuing a new Notice of Default along with the requisite letter under the FFA?

-Holding: Yes. RCW 61.24.040(6) allowed a continuance of the initial 6/24/11 sale date for no more than 120 days (until 10/22/11). Because Trustee's "Amended" Notice of Trustee's Sale was dated 11/8/11 (beyond the allowed 120 days), Trustee had to comply with the FFA and issue a new Notice of Default along with the requisite letter under the FFA. It did not. Therefore, the Court remanded the case to the trial court and overturned the trial court's dismissal of Borrowers' CPA claim.

PROHIBITION AGAINST NONJUDICIAL FORECLOSURE OF AGRICULTURAL LAND NOT WAIVABLE

***Schroeder v. Excelsior Management Group, LLC*, 177 Wn.2d 94 (Feb. 2013).**

-Facts- Lender made a loan to an individual borrower that was secured by Borrower's 200-acre ranch. In making the loan Lender relied on an appraisal that described the land as 75% "Ag and Timberland." In his loan application Borrower gave Lender his tax returns, which described his occupation as "Farm/Logging." Borrower kept hundreds of old vehicles, bicycles, bicycle and vehicle parts, tires, household appliances, two dozen cows, several horses, and a large bull on the property. Borrower defaulted. Lender issued a notice of trustee's sale. Borrower and Lender settled that matter, with Lender loaning more money to Borrower and taking back a new deed of trust and a settlement agreement stating that the land was not agriculture land. After Borrower again defaulted, Lender nonjudicially foreclosed its new deed of trust. Borrower did not understand that he agreed his land wasn't agriculture land in the settlement agreement. Lender purchased the land at the trustee's sale, then gave Borrower an additional three weeks to move off the land. Borrower sued for damages and to set aside the sale. Lender argued the settlement agreement barred Borrower's argument that the sale was invalid because the land was agricultural land, and Borrower waived his claims by not restraining the sale. Both the trial court and court of appeals sided with Lender, dismissing Borrower's claims.

-Issues: (1) Is a lender statutorily prohibited from nonjudicially foreclosing a deed of trust on agricultural land if the borrower has expressly granted the lender the right to do so? (2) Did the borrower waive the right to challenge the enforceability of the statutory prohibition by failing to move to restrain the Trustee's Sale?

-Holdings-Yes on issue 1; no on issue 2. Remand to consider Borrower's damages and whether the land was primarily agricultural land.

-Issue 1: RCW 61.24.030 says "It shall be a requisite to a trustee's sale" that if the land is used principally for agricultural purposes on both the day the deed is granted or amended and the day of the trustee's sale, "the deed of trust must be foreclosed judicially." Strict compliance is required. Lender cannot vary the statute's non-agricultural land requirement by agreement.

-Issue 2: Waiver relates to rights and privileges. But RCW 61.24.030 is not a rights or privileges statute. It sets up a list of "requisite[s] to a trustee's sale." The Court therefore refused to enforce the borrower's waiver of a statutory protection in the nonjudicial deed of trust foreclosure statutes; the borrower's property was, in fact, used primarily for agricultural purposes. After ruling that the Trustee lacked the statutory power to foreclose a deed of trust on agricultural land, the Court concluded that the borrower did not waive the right to challenge the Sale by failing to move to restrain the Sale.

GUARANTOR'S LIABILITY AFTER NONJUDICIAL FORECLOSURE OF DEED OF TRUST SECURING COMMERCIAL LOAN, WHERE THE DEED OF TRUST ARGUABLY SECURES BOTH THE PROMISSORY NOTE AND GUARANTY

***First-Citizens Bank & Trust Co. v. Cornerstone Homes & Development, LLC*, 178 Wn.App. 207 (Dec. 2013).**

-Facts: Lender made 3 commercial loans to Borrower, each secured by a deed of trust. Guarantor signed a guaranty as extra security, guaranteeing all three loans. The deeds of trust secured "*payment of the indebtedness*" and "*any and all obligations under ... the Note [and] the Related Documents*." The deeds of trust defined "*Indebtedness*" as "all principal, interest, and other amounts, costs and expenses payable under the Note or Related Documents." The deeds of trust defined "Related Documents" as any "guaranties ... whether now or hereafter existing, executed in connection with the indebtedness." Guarantor's guaranty also defined "Related Documents" as "all promissory notes ... guaranties ... [and] deeds of trust ... whether now or hereafter existing, executed in connection with the Indebtedness." Borrower defaulted. Lender foreclosed its 3 deeds of trust. A $4.2 million deficiency existed following the foreclosures. Lender sued Guarantor for the deficiency. Guarantor argued Lender's deficiency claim failed because (1) the deeds of trust secured the promissory notes and Guarantor's guaranty; therefore, the trustee's sales extinguished Guarantor's debt obligations, and (2) RCW 61.24.100 prohibited a deficiency judgment because the deeds of trust secured the guaranty. The trial court disagreed and awarded Lender a judgment against Guarantor for the $4.2 million deficiency, plus attorney fees. Guarantor appealed.

-Issue: Did the trial court err in awarding a deficiency judgment to lender?

-Holding: Yes. The plain language of the deeds of trust and guaranty showed that the deeds of trust secured all the promissory notes and the guaranty. The general rule is that a commercial lender cannot obtain a deficiency judgment against a borrower or guarantor after foreclosing a deed of trust securing a commercial loan. RCW 61.24.100(1). However, a commercial lender can obtain a deficiency judgment against the guarantor if the guaranty "*was not secured by the deed of trust*." RCW 61.24.100(10). Because Guarantor's guaranty was secured by the deeds of trust, RCW 61.24.100(10) bars Lender's deficiency claim. The Court of Appeals therefore reversed the trial court and awarded Guarantor attorney fees. ***But see Washington Fed. v. Gentry*, 319 P.3d 823 (Wn.App. Div. 1, Feb. 2014) (disagreeing with Div. 2).**

MISCELLANEOUS FORECLOSURE CASES:

DUTY TO ACCOUNT WHEN THERE ARE NO SURPLUS FUNDS.

***Bert Kuty Revocable Living Trust ex rel. Nakano v. Mullen*, 175 Wn.App. 292 (June 2013).**

-Facts: Owner purchased a lot from Seller. In return, Seller took cash and a $56,000 promissory note secured by a deed of trust. Owner later received a home equity line of credit (HELOC) from Lender, which was secured by a deed of trust. Seller subordinated its deed of trust to Lender' deed of trust as part of Lender's loan transaction. Owner defaulted and, at that time, Lender had lent $40,000 on the HELOC loan. Lender sold its loan and assigned its deed of trust to the Hayeses. The Hayeses conducted a nonjudicial foreclosure, taking title to the property via a $63,000 credit bid (no surplus funds). Trustee did not prepare or file a written notice of surplus funds. Owner sued the Hayeses, alleging an equity stripping scheme and demanded an accounting from them. Owners argued they were entitled to an accounting because there was a genuine issue of material fact regarding (1) the value of the Hayeses' promissory note given it had a face value of up to $238,000 (even though only $40,000 was distributed under the HELOC note), and (2) whether the Hayeses submitted the note and deed of trust to the trustee as payment above their credit bid. The trial court dismissed Owners' claims and awarded the Hayeses costs/fees.

-Issue: Did the trial court err in dismissing Owners' claim for an accounting against the Hayeses?

-Holding: No. The Court held the Owners' claim for an accounting failed because (1) RCW 61.24.070 does not authorize tender of a note and deed of trust as a permissible method of payment at a trustee's sale and, because the successful bid was a credit bid with no surplus funds, Owners were not entitled to a surplus, and (2) under RCW 61.24.070 and .080, it is the trustee's duty (not the Hayeses') to account.

REFORMATION OF TRUSTEE'S DEED BASED ON MUTUAL MISTAKE REGARDING LEGAL DESCRIPTION

***Glepco, LLC v. Reinstra*, 175 Wn.App. 545 (July 2013).**

-Facts: In 2003 the Reinstras acquired lots A and B. Later the Reinstras combined the lots into a single lot (the "Combined Lot"). In 2006 the Reinstras borrowed $200,000 from Bank to build a house on former lot B. The promissory note was secured by a deed of trust against the Combined Lot, and the deed of trust referenced the tax parcel number of the Combined Lot. In 2007 Bank assigned the Reinstras' note and deed of trust to Lender. In May 2008 the Reinstras refinanced the loan with Lender. The Reinstras thought the refinance deed of trust encumbered the Combined Lot, as the Reinstras had no discussion with Lender about taking less than the Combined Lot as security. But the legal description in the refinance deed of trust was only of former lot A, not former lot B. The tax parcel number was for the Combined Lot, however. In June 2008 the Reinstras defaulted. In June 2010 a notice of trustee's

sale was recorded. It identified the property as "14022 Dodge Valley Road, La Conner, WA 98257," the address for the house on former lot B. The legal description on the notice of trustee's sale only described former lot A. Before the trustee's sale Buyers checked the county assessor records, which showed (1) the property being 3 acres—the size of the Combined Lot, and (2) a photo of the house on former lot B. Buyers also visited the property, saw the house and outbuilding on it, and saw the property was fenced on all sides except one, which side abutted a street. Buyer made the successful bid at the trustee's sale. The trustee's deed only described former lot A. After Buyers learned the trustee's deed only described lot A they sued to quiet title in Lot B and to reform the trustee's deed to include Lot B. The Reinstras argued reformation was barred by the statute of frauds and RCW 61.24. The trial court granted Buyers summary judgment, order reformation of the trustee's deed, and quieted title in Buyers.

-Issue: Did the trial court err in ordering the deed of trust and trustee's deed to be reformed to include former Lot B?

-Holding: No. Where a legal description is inadequate due to a scrivener's error or mutual mistake, a document is not tested for compliance with the statute of frauds until it is reformed to reflect the parties' intent. Deeds of trust and trustee's deeds are subject to the statute of frauds. The Court found Lender and the Reinstras both intended the refinance deed of trust to encumber the Combined Lot. This was supported by evidence and common sense, as there was no reason why Lender would agree to less security on a refinance loan with a higher principal balance.

DEFICIENCY CLAIM FOLLOWING COMMERCIAL NONJUDICIAL FORECLOSURE.
***First-Citizens Bank & Trust Co. v. Reikow*, 177 Wn. App. 787 (Nov. 2013).**

-Facts: Lender made a $6.7 million business loan to Borrower, an LLC. Guarantor, who owned 50% of LLC, guaranteed the loan. The loan was secured by a deed of trust against Borrower's Development. In the guaranty Guarantor waived "any and all rights or defenses arising by reason of ... any "one action" or "anti-deficiency" law ..." Borrower defaulted. Lender nonjudicially foreclosed its deed of trust. $7.2 million was due on the note at the time of the trustee's sale. Lender submitted the highest bid, credit bidding $5.2 million--leaving a $2 million deficiency. Lender sued Guarantor for the deficiency. Guarantor defended, arguing there was no deficiency as (1) an IRS form prepared by Lender's employee listed the Development's fair value at $7.8 million, (2) county records had $7.5 million as its tax assessed value, and (3) Lender's own appraisal showed its "Prospective Market Value at Stabilation" at $7.8 million. Lender argued (1) Guarantor waived these defenses in his guaranty, and (2) its appraisal established a $6.6 million "As-Is Market Value." The trial court, sua sponte, ordered a fair value hearing to determine the deficiency amount, if any. The trial court concluded the Development's fair value on the date of the trustee's sale was $7.8 million--an amount above what was owed on the note. So the trial court dismissed Lender's deficiency claim.

-Issue: Did the trial court err in (1) ordering a fair value hearing on its own initiative, and (2) finding the fair value of the property was $7.8 million on the date of the trustee's sale?

-Holding: No on both issues. Washington law allows deficiency judgments against a borrower or guarantor following nonjudicial foreclosures of deeds of trust securing commercial loans. RCW 61.24.100(3). The deficiency judgment equals (1) the amount Guarantor owes Lender on the date of the trustee's sale, minus *the greater of* (2) the "fair value" of the property on the date of the trustee's sale, and (3) the sale price at the trustee's sale. RCW 61.24.100(5). "Fair value" presumes "reasonable exposure in the market under conditions requisite to a fair sale," not a price based on duress. RCW 61.24.005(6). The guarantor may request or the judge may order, sua sponte, a hearing to determine the property's fair value on the date of the trustee's sale. *Id.* Even if, for argument's sake, the waiver provision in the guaranty was enforceable, that waiver provision did not preclude the court from ordering a fair value hearing on its own authority.

The commercial lender has the burden of proving the debt balance and the property's fair value. An appellate court won't disturb a trial court's fair value finding unless that finding was an abuse of discretion. Lender argued its appraiser's $6.6 million "As-Is" valuation controlled because it was based on the then-existing tenancy rate at the Development. The Court of Appeals disagreed, holding that the trial court reasonably concluded the fair value was $7.8 million since one reason the Development had a lower tenancy rate was due to the foreclosure proceeding--e.g., duress under RCW 61.24.005(6). The Court of Appeals affirmed an awarded Guarantor costs/fees.

MOTION TO AMEND STIPULATED ORDER AUTHORIZING ERRONEOUS DISBURSEMENT OF SURPLUS FUNDS
***Worden v. Smith*, 178 Wn. App. 309 (Dec. 2013).**

-Facts: In a judicial foreclosure lawsuit filed by the 1st position lender, borrower, 1st position lender and 2nd position lender signed a stipulation for the proceeds to be distributed in the following order: "*as required under RCW 61.12.150:"* (1) $66,000 for real property taxes, (2) $300 for storm water taxes, (3) $935,000 to the 1st position lender, (4) $625,000 to the 2nd position lender. The stipulation was prepared by the 2nd position lender's attorney who—after the proceeds were distributed—discovered the real property and storm water taxes didn't need to be paid off, as they were superior to the lien that was foreclosed. 2nd position lender moved to amend the stipulated order. The buyer at the sheriff's sale argued the stipulated order was binding because (1) it was the "law of the case," (2) it created a contract that the court could not amend, and (3) it was only entered based on the 2nd position lender's unilateral mistake and, therefore could not be amended. The trial court denied the motion to amend and 2nd position lender's motion to be equitably subrogated to the property tax and storm water tax liens.

-Issues: Did the trial court err in denying (1) the motion to amend based on buyer's unilateral mistake argument, and (2) 2nd position lender's motion for equitable subrogation?

-Holdings: Yes.

-Issue 1: A mutual mistake was made, not a unilateral mistake—as the stipulated order stated that the distribution scheme was "required by RCW 61.12.150," which was not true considering by law liens superior to the one being foreclosed are not entitled to

receive foreclosure proceeds. Because the tax liens had priority over 1st position lender's lien, the tax liens should have survived the judicial foreclosure.

-Issue 2: Equitable subrogation can be ordered where one person pays a debt for another which, in equity, should have been discharged by the other person. Buyer should have taken title subject to the tax liens. Therefore it was equitable to subrogate 2nd position lender into the place of the tax liens. The order created an in rem obligation (i.e., only a lien) against Buyer's property. It did not order Buyer to pay; it merely gave 2nd position lender the ability to foreclose its lien.

"DEBT COLLECTOR" UNDER FDCPA—JUDICIAL FORECLOSURE WHEN DEFICIENCY WAIVED
***Doughty v. Holder*, 2014 WL 220832 (E.D. Wash., Jan. 2014).**

-Issue: Is a lender seeking to judicially foreclose its deed of trust a "debt collector" under the Fair Debt Collection Practices Act when, in the complaint, lender asserts a judicial foreclosure claim and a claim for moneys due, but waives the right to a post-foreclosure deficiency?

-Holding: No. Even though the lender asserted a claim for moneys due, the lender is not a "debt collector" under the FDCPA because the lender waived its right to a deficiency judgment. "A 'foreclosure judgment,' even though it involves a monetary amount, is for the purpose of enforcing the creditor's security interest through a foreclosure. It is *quasi in rem*. The monetary amount establishes the bid parameters for the foreclosure sale. On the other hand, a deficiency judgment follows foreclosure of the security interest. It is not for the purpose of enforcing the security interest, but for seeking payment of funds to make up a shortfall between the proceeds obtained from the foreclosure sale and the amount of the foreclosure judgment. It is an action to collect a debt. It is in *personam*."

BUYER AT FORECLOSURE SALE'S RIGHT TO PRIOR OWNER'S "LATECOMER FEES"
***Washington Federal Sav. And Loan Ass'n v. McNaughton Group*, 319 P.3d 805 (Wn. App. Div. 1, Feb. 2014).**

-Facts: TMG, a developer, agreed to construct and transfer sewer facilities to the Water and Sewer District in exchange for those facilities servicing a residential development owned by TMG. TMC construed the facilities, transferred them to the District, and in exchange received a right to future "latecomers fees" from the District. TMG had a loan from Bank, secured by a Deed of Trust against the residential development. TMG defaulted and Bank acquired the development at a foreclosure sale. Bank sued for a declaration that it acquired the rights to the latecomers fees by operation of the foreclosure. The trial court dismissed Bank's action. Bank appealed.

-Issue: Did TMG's deed of trust with Bank encumber TMG's rights to the latecomers fees?

-Holding: No. A security agreement must reasonably identify the collateral it covers. RCW 62A.9A-108. It can do this by category, type or "any other method, if the identity of the collateral is objectively determinable." Id. The Court of Appeals ultimately concluded the latecomers fees were not (1) proceeds encumbered by the deed of trust because TMG contracted to convey the sewer facilities to the District before the deed of trust was even executed—e.g., TMG could not offer the latecomers fees [as proceeds related to the sewer facilities] as collateral because TMG was contractually obligated to convey the Facilities to the District when construction was complete, and (2) "rights relating to" or "benefits derived from" the development property because latecomers fees are not inextricably linked to the real estate—they are intended to reimburse one who develops the facilities, and this person need not be the property's fee owner; (3) rents or profits because they do not derive from the actual use of the land; instead, they derive from one's right to reimbursement for constructing sewer facilities on the land.

JUNIOR LIENHOLDER'S RIGHT TO SURPLUS FUNDS IN LIGHT OF MERGER DOCTRINE
***In re Trustee's Sale of Real Property of Ball*, 319 P.3d 844 (Wn. App. Div. 2, Feb. 2014).**

-Facts: Ball took out a first-position secured loan from Bank and a second-position HELOC from the same Bank. Ball died. Ball's estate defaulted on the loans. Bank foreclosed on its first-position deed of trust, taking title to the property. There was ~$30,000 of surplus funds after the trustee sale. Ball's Estate moved for disbursement of the surplus funds to it, arguing Bank's right to the surplus funds was prohibited under the merger doctrine. The trial court concluded the merger doctrine didn't apply and awarded the surplus funds to Bank. Estate appealed.

-Issue: Does the merger doctrine preclude a junior lienholder from receiving excess funds from a trustee sale when the same entity also was the senior lienholder and was the successful bidder at the sale?

-Holding: No. Once the trustee sale occurred Bank acquired title to the property via the trustee's deed. Simultaneously, Bank's second-position deed of trust was extinguished. Thus, there was no time in which Bank held both fee title to the property and a security interest in that same property. The merger doctrine doesn't apply here; affirming the trial court.

CONDOMINIUM/HOMEOWNERS ASSOCIATION CASES

CONDOMINUM LIEN FOR UNPAID ASSESSMENTS:

REDEMPTION RIGHTS--JUDICIAL FORECLOSURE OF HOA'S LIEN FOR ASSESSMENTS

***BAC Home Loans Servicing, LP v. Fulbright,* 174 Wn. App. 352 (April 2013), review granted 178 Wn.2d 1001 (Sept. 2013).**

-Facts: The homeowners association's (HOA) CC&Rs were recorded in 2006. Lender's deed of trust was recorded in 2007. In May 2008 the unit owner became delinquent on her condo assessments. In 2009 the HOA filed a lawsuit to judicially foreclose its lien for unpaid assessments. In June 2009 a default judgment decree of foreclosure was entered against all defendants, including Lender. Mr. Fulbright was the highest bidder at the Sheriff's sale. In June 2010 an order confirming the Sheriff's sale was entered. In April 2011 (before the redemption period expired), Lender notified the Sheriff's office of its intent to redeem the unit. Mr. Fulbright objected and the Sheriff's office refused to issue a redemption certificate to Lender. Lender then filed a declaratory action, seeking authorization to redeem the unit. Mr. Fulbright counterclaimed for an order quieting title to the unit in him. The trial court dismissed Lender's claim and quieted title in Mr. Fulbright. Lender appealed.

-Issue: May a Lender redeem a condo unit following the sheriff's sale when (1) the Association's CC&Rs were recorded before Lender's deed of trust was recorded, but (2) the unit owner became delinquent on her assessments after the Lender's deed of trust was recorded?

-Holding: No. An "association has a lien on a unit for any unpaid assessments levied against a unit *from the time the assessment is due*." The HOA's lien existed as of May 2008 (when the unit owner first became delinquent). Lender's deed of trust was recorded in 2007. Lender lost its redemption right because Lender's deed of trust was not subsequent in time to the HOA's lien. *See* RCW 6.23.010(2) and *Summerhill Vill. Homeowners Ass'n*, 289 P.3d 645 (Wn. App. 2012).

CONFIRMATION OF SHERIFF'S SALE AFTER FORECLOSURE OF HOA LIEN FOR UNPAID ASSESSMENTS.

***Sixty-01 Association of Apartment Owners v. Parsons,* 178 Wn. App. 228 (Oct. 2013).**

-Facts: Parsons and Mallarino owned separate condominium units. After falling behind on assessments, the Association filed suit to foreclose its lien for unpaid assessments against both units. Bank of America (BOA) held a deed of trust against each unit. The Notice of Sheriff's Sale was sent to all interested parties, including BOA. Association obtained default judgments in both matters, and the default judgments in both matters read: "All … lien[s] … of the Foreclosed Defendants … in and to the Property or any part thereof is inferior and subordinate to Plaintiff's lien and is hereby foreclosed." On the day before the Sheriff's Sales the Association stipulated that BOA's deeds of trust would not be foreclosed by the Sheriff's sales, and filed the stipulation in court. Both units were auctioned on March 9, 2012. Pashniak was the successful bidder at both sales. Pashniak was unaware of BOA's deeds of trust and the filed stipulations when he made his bids. On March 16th the returns of sale were filed and posted to the court's docket, and the court clerk mailed the notices of return of the sheriff's sale. Association moved to confirm the sales. Pashniak objected to the confirmation of the sheriff's sales because, he claimed, the orders of sale and complaint were confusing as to whether the sheriff's sales rendered the units free of all encumbrances. The trial court vacated the sales because Pashniak was not on inquiry notice of the stipulations, as the stipulations were filed on the day before the sheriff's sale and they would not be viewable on the court's electronic docket for 24 to 48 hours after filing.

-Issues: Did the trial court err in vacating the sheriff's sales because the stipulations were filed the day before the sale and the stipulation were not viewable on the court's electronic docket for 24 to 48 hours after filing?

-Holdings: Yes. Per RCW 6.21.110, a court is required to confirm a sheriff's sale unless there are substantial irregularities in the sheriff's sale proceeding to the probable loss or injury to the objecting party. This statute does not entitle an investor to renege on a bid because of his failure to exercise due diligence. It was of no consequence that Pashniak didn't have notice of the stipulation before submitting his bids. Had Pashniak exercised due diligence, he would have discovered BOA's deeds of trust. Because there were no procedural irregularities in the sheriff's sale process, let alone substantial irregularities, the Court of Appeals held Pashniak was on constructive notice of BOA's deeds of trust.

INTERPRETATION OF CC&Rs.

VIEW PROTECTION PROVISION IN CC&RS

***Saunders v. Meyers*, 175 Wn. App. 427 (May 2013).**

-Facts: HOA was formed in 1967. The development oversaw Seattle, Mercer Island, Lake Washington and the Olympic Mountains. In 1970 the Meyers bought lot 117, which had a 70' tall and 30' wide maple tree on it. In 1973 the Saunders bought a lot uphill of the Meyers' lot. In the 1970s, '80s, and '90s the Saunders asked the Meyers to trim the maple tree. In 1997 the O'Briens bought a lot also uphill of the Meyers' lot. The O'Briens also asked the Meyers to trim the tree. During the '90s and early 2000s, the Meyers routinely trimmed the tree, even reducing its height to 63 feet. HOA's CC&Rs give HOA's Covenant Review Committee (CRC) authority to enforce the view protection provision in the CC&Rs. CC&R ¶10 reads: "No trees of any type, other than those existing at the time these restrictive covenants … are filed, shall be allowed to grow more than twenty (20) feet in height, provided **they** do not unnecessarily interfere with the view of another residence." After receiving 11 complaints about the Meyers' tree, the CRC investigated the issue. The maple tree had grown, and doubled in width from 30' to 60'. The Meyers believed their tree was grandfathered in and not subject to ¶ 10. The neighbors disagreed, and argued the tree unnecessarily interfered with their views. The CRC sided with the neighbors and ordered the Meyers to reduce the tree's width to 30' and, if doing so affected the tree's health, to remove the tree. The Meyers ignored the CRC. So the neighbors filed a lawsuit for breach of the CC&Rs and for injunctive relief.

The trial court ordered the Meyers to comply with the CRC's demands and to pay their neighbors nearly $70,000 in costs and attorneys' fees.

-Issue: Did the trial court properly interpret the CC&Rs?

-Holding: No. Courts first look to the clear and unambiguous CC&R language to determine the drafter's intent. If the language is ambiguous, courts look to extrinsic evidence to determine the drafter's intent—placing special emphasis on the homeowners' collective interests. The Meyers argued the word "they" in CC&R ¶ 10 relates only to new trees. This interpretation would mean the view protection provision would not apply to grandfathered-in trees, like the Meyers' maple. The neighbors' argued "they" referred to all trees—which interpretation would mean the CRC would have to determine view protection on a tree-by-tree basis. The Court of Appeals ultimately concluded:

- "No trees" and "they" in ¶ 10 encompassed every tree, including grandfathered-in and new trees. The developer easily could have changed ¶ 10 to exclude existing trees. It didn't. So ¶ 10 applied to all trees.
- Other CC&R provisions show the developer's intent to protect views. Plus, the developer's project manager testified that people moved to the development for the views—not the trees.
- "Unnecessary interference" in ¶ 10 depends on the balancing of rights. The burden is on the party seeking to enforce the CRC's decision to demonstrate that decision does not exceed what is authorized by the CC&Rs. The Court held "the portions of the tree necessary to its survival are a necessary interference with the view of another residence." As such, the Court overturned the portion of the trial court's order that required the Meyers to cut down their tree if reducing its width from 60' to 30' feet would harm the tree's health. The Court also held the Meyers, not the neighbors, were entitled to an award of costs.

TENANT'S OBLIGATION TO PAY LANDLORD'S HOA ASSESSMENTS.

***Granville Condominium Homeowners Association v. Kuehner*, 177 Wn. App. 543 (Nov. 2013).**

-Facts: Tenant loaned Owner $100,000 for a business project. Owner defaulted and, as part of the settlement deal, Owner agreed to let Tenant live in Owner's condo unit for free. Tenant and Owner neither executed a settlement agreement nor a lease. At the time of Tenant and Owner's agreement the HOA had already recoded a Notice of Lien for $3,555 in unpaid assessments. Tenant did not know of the HOA's lien. A HOA board member gave Tenant keys and a garage door opener for Owner's unit but did not discuss Tenant's obligation to pay assessments. A few months later the HOA board member approached Tenant about the unpaid assessments, claiming that utilities would be shut off if not enough owners paid. Tenant then made a few voluntary partial payments. In November 2011 the HOA filed a lawsuit for $5,671 in unpaid assessments against Tenant (not owner), for assessment coming due during Tenant's possession of the unit. The HOA argued, argued (1) the CC&Rs is a recorded document that put Tenant on notice of their obligation to pay monthly assessments, (2) that under RCW 64.34.364(12), Tenant and Owner are jointly liable for unpaid assessments, and (3) Tenant are liable for unpaid assessments under principals of quantum meruit. Tenant argued (1) the CC&Rs does not create a contractual relationship between the HOA and Tenant, and (2) per RCW 64.34.364(10), the HOA's sole remedy against Tenant is to move for the appointment of a receiver to collect Tenant's rents. The trial court granted Tenant's motion to dismiss.

-Issue: Did the trial court err in holding that Tenant, as a tenant-at-will, was not liable for the condo unit owner's unpaid assessments?

-Holding: No.

-The pertinent CC&R provisions were: ¶ 16(f) ("Each Unit Owner shall be obligated to pay Assessments …"), ¶ 11(b) ("Each lease or rental agreement shall be in writing and by its terms shall provide that the terms of the lease or rental agreement are subject in all respects to the provisions of this Declarations and the Bylaws of the Association, and all rules and regulations promulgated thereunder."), and ¶ 16(k) ("If a Unit is rented by its Owner, the Board may collect and the Tenant shall be obligated to pay over to the Board so much of the rent for such Unit as is required to pay any amounts due the Association."). Applying these paragraphs, the Court concluded 16(f) did not require a tenant to pay the owner's assessments, ¶ 11(b) did not apply because there was no written lease, and ¶ 16(k) did not apply because Tenant paid no rent—e.g., there was no rent to collect.

-RCW 64.34.364(12) says "in a voluntary conveyance, the grantee of a unit shall be jointly and severally liable with the grantor for all unpaid assessments against the grantor up to the time of the grantor's conveyance …" The statute does not define "voluntary conveyance." However, in the context of RCW 64.34.364 the meaning is clear and "conveyance" only includes a conveyance of title—not a conveyance of right to possess. RCW 64.34.364(12) did not apply.

-"Quantum meruit is the method of recovering value of services provided under a contract implied in fact." The elements of a contract implied in fact are (1) the defendant requests work, (2) the plaintiff expects payment for the work, and (3) the defendant knows or should know the plaintiff expects payment for the work. The HOA failed to present evidence of its and Tenant's mutual intent to contract for unpaid assessments. Nor did the HOA cite any legal authority that holds a tenant-at-will liable for a unit owner's unpaid assessments under a theory of quantum meruit. So the court affirmed.

RESTRICTION ON SHORT-TERM TENANCIES IN CC&Rs

***Wilkinson v. Chiwawa Communities Ass'n*, 2014 WL 1509945 (Wn.2d, April 2014).**

-Facts: Association's original CC&Rs restrict the use of lots to "single family residential use" and prohibits "industrial or commercial use." In 2011 a majority of the Association's members voted to amend the CC&Rs to bar all rentals of less than six months as prohibited commercial uses. The Wilkinsons sued to invalidate the rental restriction. The trial court held the 2011 amendment unenforceable, finding the original CC&Rs "contemplated that there could be rentals" and that "there were no limitations on those rentals, and concluded (1) residential rentals do not constitute a prohibited commercial use, and (2) a simple majority of the

Association's members cannot amend the CC&Rs to prohibit short-term vacation rentals that conflict with the general plan of the development. Association appealed.

-Issues: (1) Are vacation rentals commercial uses inconsistent with single-family residential use? (2) Can a simple majority of the members approve a rental restriction amendment that is inconsistent with the general plan of the development.

-Holding: No as to both issues.

-Issue 1: "If a vacation renter uses a home 'for the purpose of eating, sleeping, and other residential purposes,' this use is residential, not commercial, no matter how short the rental duration." And "the owner's receipt of rental income either from short- or long-term rentals in no way detracts or changes the residential characteristics of the use by the tenant … [n[or does the payment of business and occupation taxes or lodging taxes …"

-Issue 2: "When the general plan of development permits a majority to change the covenants but not create new ones, a simple majority cannot add new restrictive covenants that are inconsistent with the general plan of development or have no relation to existing covenants."

ROAD MAINTENANCE INVOLVING NON-MEMBER OF ASSOCIATION.

***Buck Mountain Owner's Ass'n v. Prestwich*, 174 Wn. App. 702 (April 2013).**

-Facts: In a seller-financed transaction Initial Owners conveyed 1,200 acres to Developer, retaining 30 acres and a 50-foot-wide access easement ("1977 Easement"). The 1977 Easement did not say who was responsible for road maintenance. In 1981 Developer defaulted on its payment obligations to Initial Owners. Developer executed a deed in lieu of foreclosure to Initial Owners, conveying to them two lots that were part of the originally-conveyed 1,200 acres. As part of the deed in lieu, the parties executed a declaration of easement (replacing the 1977 Easement) that established in perpetuity a non-exclusive road easement (the "1981 Easement"). Like the 1977 Easement, the 1981 Easement did not address road maintenance. In 1983 Developers formed Association. Initial Owners' property was subdivided, with lots sold, one to Trust. Initial Owners' lots were not subject to the Association's CC&Rs. But the Association entered into separate agreements with various owners of Initial Owners' lots, requiring that they collectively pay 62.5% of the road maintenance expenses. Trust did not have a separate agreement with the Association. For four years the trustees of the Trust also owned property subject to the CC&Rs, during which time they paid road maintenance assessments. Trust knew when it purchased its lot that its predecessor-in-interest paid road maintenance assessments. Shortly after purchasing its lot Trust received a letter from the Association demanding payment of road maintenance assessments. Trust refused to pay 62.5% because its property was not subject to the CC&Rs and it had not signed a separate agreement. Trust offered to pay 7%. Association sued Trust to collect unpaid assessments. Trust counterclaimed for malicious prosecution, and filed a third-party complaint against Initial Owners for breaching the warrantees under the statutory warranty deed. The trial court (1) ordered Trust to sign an agreement that required Trust to pay 62.5% of the road maintenance expenses, and (2) concluded that the Association had a lien against the Trust's property if Trust did not pay the road maintenance expenses, which lien the Association could foreclose like a mortgage, (3) declared the agreement would run with the land—e.g., making it a covenant, and (4) declared Initial Owners did not breach their warrantees under the statutory warranty deed.

-Issues: Did the trial court err when it ordered Trust—which owns property that isn't subject to the CC&Rs or a separate agreement with the Association—to (1) pay past-due and future road maintenance assessments, (2) execute a covenant that encumbered the land in perpetuity. And (3) did the trial court err when it held Initial Owner did not breach their warranties under the statutory warranty deed?

-Holdings: No as to issue 1. Yes as to issue 2. No as to issue 3.

Issue 1: Even in the absence of an express easement that addresses responsibility for payment of road maintenance expenses, a property owner who uses a particular road may be ordered, in equity, to pay road maintenance assessments levied by an Association the owner is not a member of, following Restatement (Third) of Property: Servitudes § 4.13(3) (1998).

Issue 2: The Association cited no legal authority authorizing the Court to order a party to sign a covenant that would bind their property in perpetuity. So the Court concluded the trial court erred in requiring Trust to execute a road maintenance agreement that would run with the land as a covenant.

Issue 3: A grantee may not recover damages against a grantor for breach of warranty if insufficient notice is given of grantor's duty to defend. Under the "Mastro criterion," to adequately tender a defense the grantee must notify the grantor (1) of the pendency of the lawsuit, (2) that if grantee is held liable, grantee will look to grantor for indemnification, (3) that the notice is a formal tender of the right to defend the action, and (4) if the grantor refuses to defend, grantor will be bound in subsequent litigation between them to the factual findings in the original lawsuit. Initial Owners' Third-Party Complaint did not adequately inform Initial Owners they (1) had a duty to defend, and (2) would be bound by the decisions in the lawsuit. So the Court affirmed dismissal of the warranty claim.

***Northwest Properties Brokers Network, Inc. v. Early Dawn Estates Homeowner's Association*, 173 Wn. App. 778 (Feb. 2013).**

-Facts: Neighbor purchased land adjacent to the HOA's property in 2000. A road services both Neighbor's property and the HOA's property. As part of his purchase Neighbor acquired an easement for "ingress, egress and utilities" over the road. The easement was silent as to road maintenance. City required Neighbor to execute a road maintenance agreement binding all owners of his 4 lots before the City would approve Neighbor's plat. Neighbor created the agreement, which required all owners of the 4 lots to either (1) perform the maintenance themselves, (2) pay a subcontractor to maintain the road, or (3) pay the HOA assessment so the HOA could maintain the road. Later HOA installed an electronic gate on the road because the HOA had issues with trespassers. Eventually trespassers figured out how to break into the gate's electrical box to open the gate. So the HOA put a lock on the electrical

box. HOA members could open the gate (1) with a remote, (2) by using the gate's keypad, (3) by calling someone on the HOA directory, who could buzz them in, and (4) by turning off the gate's power, which required a key to the locked electrical box. Neighbor didn't have a cell phone and regularly worked outdoors, making it impractical (in his opinion) for guests to call him and open the gate. The HOA refused to give Neighbor a key to the electrical box, as it was concerned that prolonged periods of time with an open gate would subject HOA members to trespassers, thieves, burglars, etc. But the HOA did give Neighbor a remote and a code for guests to open the gate. Neighbor didn't like to giving his code to guests and contractors, as he believed it compromised his and others' safety. The HOA also wouldn't let Neighbor put business signs on the gate. For two years Neighbor paid the HOA assessment. Eventually Neighbor stopped paying the HOA assessment because he was not a member of the HOA, he didn't have a road maintenance agreement with the HOA, and the HOA was unreasonably restricting his easement rights. Neighbor sued the HOA for unreasonable interference with his easement rights. The HOA counterclaimed for delinquent assessments and for an order requiring Neighbor to pay assessments in the future. The trial court ruled (1) Neighbor was responsible for his 1/37th prorata share of HOA expenses for road/gate maintenance and repair, but was not required to pay $250 per month in assessments to the HOA, and (2) the HOA unreasonably interfered with Neighbor's easement rights.

-Issues: (1) Did the trial court err in ordering Neighbor to pay 1/37th of HOA's road/gate expenses, but not declaring the HOA's CC&Rs bind Neighbor? (2) Did the trial court err in holding the HOA unreasonably interfered with Neighbor's easements rights?

-Holdings: No as to issue 1; Yes and no as to issue 2.

-Issue 1: The Court of Appeals refused to declare the HOA's CC&Rs bound Neighbor. But it held the trial court acted within its equitable discretion in ordering Neighbor to pay 1/37th of the HOA's expenses to repair and maintain the road and gate (37 units in the HOA and Neighbor's subdivision).

-Issue 2 Gate: Neighbor's easement did not mention the gate. When an easement is silent on an issue, "the rules of construction call for examination of the situation of the property, the parties, and the surrounding circumstances." When determining if a gate unreasonably interferes with easement rights courts consider (1) the increased burden on the servient estate, (2) whether the gate restrictions are reasonably necessary for protection, and (3) the degree to which the gate interferes with the dominant owner's use. Because of the HOA's frequent issues with trespassers and the gate was installed to deal with trespassers, the HOA's gate rules did not unreasonably interfere with Neighbor's easement rights. Neighbor was still able to open the gate at will--he simply was not allowed to keep it open for lengthy periods of time.

-Issue 2 Signs: HOA argued that because Neighbors' short plat and the HOA's CC&Rs ban business signs, Neighbor should not be able to post the sign on the gate directory. However, the Court of Appeals rejected this argument and affirmed the trial court because Neighbor's easement gave him ingress rights. The Court defined "ingress" to include a guests ability to look at a business' sign on a directory, punch in the numbers, then gain entry access for ingress to Neighbor's property.

EQUITABLE SERVITUDE TO MANDATE EXISTENCE OF NON-ASSOCIATION GOLF COURSE.

***Riverview Community Group v. Spencer & Livingston*, 173 Wn. App. 568 (Feb. 2013), review granted 178 Wn.2d 1009 (2013).**

-Facts: In the early 1990s Developer owned two developments (Development 1 and Development 2), each consisting of two plats. In 1994 Developer opened a golf course. Development 1's lots were located to the north of the golf course; Development 2's lots otherwise surrounded the golf course. Of the four plats, only one noted the presence of a golf course. The lots were sold from the mid 1990s to the late 1990s. The golf course closed in 2009. As a result, a Nonprofit Corporation was formed by the various lot owners, with owners of roughly 100 of the 500 lots joining as members of the corporation. On behalf of the lot owners, the Nonprofit Corporation filed a lawsuit for the recognition of an equitable servitude requiring restoration and continued operation of the golf course by Developer. Nonprofit Corporation's case was premised on the property being marketed to lot owners—by promotional materials and representations by Developer and its real estate agents—as a golf course community. Developer moved for summary judgment, arguing equitable servitudes are not recognized in Washington unless they were created in a written document. The trial court agreed and dismissed Nonprofit Corporation's lawsuit.

-Issue: Did the trial court err in holding Washington law does not recognize equitable servitudes without a writing, based on the statute of frauds?

-Holding: Yes. Generally, the following four elements must be satisfied to find an equitable servitude in the context of a subdivision: (1) a promise, in writing, which is enforceable between the original parties, (2) which touches and concerns the land, (3) which is sought to be enforced by an original party or a successor-in-interest against an original party or a successor-in-interest in possession, (4) who has notice of the covenant. Nonprofit Corporation urged the Court of Appeals to adopt the liberal position of Restatement (Third) of Property § 2.9, Illustration 10 (giving the example of a purchaser who purchased a lot based on representations that he was buying into a golf course community that would continue to be maintained as a basis for finding an equitable servitude). The Court of Appeals held "an implied covenant in a subdivision need not comply with the Statute of Frauds." However, it also concluded Nonprofit Corporation's relief--a permanent servitude requiring operation of the golf course in perpetuity--was not equitable, citing *Mountain High Homeowners Ass'n v. J.L. Ward, Co.*, 228 Or.App. 424 (2009) (where an order requiring only part of the golf course be maintained, for a limited duration of 15 years, and only by the original developer for the benefit of the then-existing lot owners). It would be irrational to require Developer to rebuild and continue operate the golf course--a failed business. Therefore the Court dismissed Nonprofit Corporation's claim for an equitable servitude, but on different grounds than the trial court.

CONSTRUCTION CASES

LIEN PRIORITY—MECHANIC'S LIEN vs. DEED OF TRUST

***Scott's Excavating Vancouver, LLC v. Winlock Properties, LLC,* 176 Wn. App. 335 (Aug. 2013).**

-Facts: Developer planned to develop 50 acres of vacant land into a 200-lot subdivision. In July 2005 Developer signed a contract with Engineering Firm. It was a 5-phase project. The contract contained a provision that read: "Following completion of the Final Design Phase Services, and after receipt of written authorization from [Developer], [Engineering Firm] shall prepare an amendment to this Agreement for completion of the construction phase and operational phase services. …" Venture Bank knew Engineering Firm began working on the project before Venture Bank approved the $3.7 million construction loan. Venture Bank's deed of trust was recorded **January 10, 2006**. Venture Bank did not obtain a subordination agreement from Engineering Firm. In April and September 2006 Developer and Engineer executed amendments to the contract, changing the scope of work. Developer made only one payment to Engineering Firm after October 2006. Every few weeks Developer assured Engineering Firm it was working on financing and would soon pay Engineering Firm. On February 4, 2008 Engineering Firm stopped work for lack of payment. On **March 7, 2008** Engineering Firm recorded a Claim of Lien for $155,000 in unpaid fees. On July 18, 2008 Engineering Firm filed a lawsuit to judicially foreclose its mechanic's lien. At this point Developer had defaulted on its loan from Venture Bank. On August 31, 2009 a trustee's deed was recorded, conveying title to the development to Venture Bank. As part of a receivership proceeding, Venture Bank conveyed title to the development to First-Citizens Bank (Bank). Bank then substituted Venture Bank in Engineering Firm's lawsuit. Bank defended, arguing Engineering Firm's mechanic's lien was inferior to Venture Bank's foreclosed deed of trust and Enginering Firms' claims were barred by the doctrines of laches, failure to mitigate, offset, and the statute of limitations. The trial court held Engineering Firms' mechanic's lien was superior to Venture Bank's deed of trust.

-Issues: Did the trial court err in holding (1) Engineering Firms' lien was superior to Venture Bank's deed of trust, and (2) Engineering Firm mitigated its damages by continuing its work after Developer stopped paying?

-Holdings: No.

-Issue 1: Mechanic's liens "shall be prior to any … deed of trust … which attached to the land after or was unrecorded at the time of commencement of labor or professional services … by the lien claimant." RCW 60.04.061. Mechanic's liens "create an 'off-the-record' interest that may be senior to interests actually recorded before the [Claim of Lien] was recorded but after commencement of work on the project." Engineering Firm's mechanic's lien was superior to Venture Bank's deed of trust even though the deed of trust was recorded before the Claim of Lien because Venture Bank's predecessor-in-interest knew Engineering Firm began its work before the deed of trust was recorded. Because all Engineering Firm's work was performed under a single contract, all the work related back to the date it began work in 2005. Engineering Firm's entire lien was superior to Venture Bank's deed of trust.

-Issue 2: The doctrine of mitigation of damages prevents an injured party from recovering damages that could have been avoided through reasonable efforts. Engineering Firm mitigated its damages because (1) it continued working because, had it stopped working, the project very likely would have been unsellable, and (2) Developer assured Engineering Firm it was close to obtaining additional financing to pay Engineering Firm and would sell completed lots and use those proceeds to pay Engineering Firm.

INDEPENDENT DUTY DOCTRINE.

***Donatelli, v. D.R. Strong Consulting Engineers, Inc*., 179 Wn. 2d. 84 (Nov. 2013).**

-Facts: Owners hired Engineer to help them develop property into 2 short plats. Engineer allegedly orally agreed to help Owners with permitting and management of the project until the 2 short plats were recorded. Engineer allegedly said it could get the project done in 1.5 years or sooner, for no more than $50,000. In October 2002 Engineer sent Owners a written contract, estimating its fees at $33,150. The contract did *not* say Engineer would manage the project, and it contained a $2,500 liquidated damages provision. Engineer nonetheless managed the project from October 2002 to October 2007, charging Owners $120,000. In October 2007 the preliminary plat approval expired and the project was not yet complete. Engineer's employees apologized, promising to obtain a new preliminary plat approval. At that point Owners had suffered substantial monetary damages, so they sued Engineer, alleging $1.5 million in damages. Engineer argued the economic loss rule barred Owners' negligence claims. On summary judgment the trial court held professional negligence claims can survive when there is a contract and it is not clear what duties the engineering firm assumed. The Court of Appeals affirmed. Engineer appealed.

-Issue: Does the economic loss rule (n/k/a the independent duty doctrine) bar negligence claims when the evidentiary record does not definitively establish what duties the engineering company assumed?

-Holding: No. To determine what duties arise independent of the contract courts first determine what duties were assumed in the contract. Engineers owe clients tort-based duties to (a) act with reasonable care and (b) avoid making misrepresentations that induce a party to enter into a contract. These tort duties may be assumed in the contract. But if the contract is ambiguous and does not expressly assume these tort duties, as in this case, courts must determine the parties' intent—in part, by their conduct. Because the contract was ambiguous and the parties actons established duties beyond the contract, the Court held the independent duty doctrine did not bar Owners' negligence claims.

-Dissent (Madsen, Wiggins, Johnson, Johnson): These justices dissented for two main reasons. First, in the contract Owners waived claims for "*any* injury or loss on account of any error, omission, or other professional negligence" and limited Engineer's liability to "liability … arising out of the performance of its professional services." Based on this contractual language, the dissenting justices concluded the contract assumed the tort-based duties and waived Owners' negligence claims. Second, Owners asserted no tort-based damage to person or property.

WHO TO SERVE WITH SUMMONS & COMPLAINT WHEN G.C. POSTS BOND IN LIEU OF CLAIM.
***CalPortland Co. v. LevelOne Concrete LLC*, 2014 WL 1226606 (Wn. App. Div. 2, March 2014).**

-Facts: Subcontractor did not pay Material Supplier for materials it supplied to Sub for construction of Owner's commercial building. Material Supplier recorded a lien against Owner's property. But before Material Supplier filed its lawsuit the General Contractor recorded a bond in lieu of claim under RCW 60.04.161, releasing the lien from Owner's property. After the bond was recorded Material Supplier filed suit, serving the GC (not the Owner) with the Summons and Complaint. The trial court dismissed Material Supplier's lawsuit because it did not serve the Owner per RCW 60.04.141, entering judgment in GC's favor.

-Issue: Did Material Supplier have to serve Owner with the Summons and Complaint?

-Holding: No. The bond replaced the Owner's property as the property encumbered by Material Supplier's lien. The bond named GC, not Owner, as principal. Thus, Owner had no interest in any property subject to the Material Supplier's lien. RCW 60.04.141 requires service on "the owner of the subject property"—here, GC under the bond. Material Supplier properly served GC. It didn't need to serve Owner. The Court of Appeals therefore reversed the trial court's grant of summary judgment to GC.

MECHANIC'S LIEN FOR REASONABLE PRICE OF EXTRA WORK UNDER QUANTUM MERUIT
***Top Line Builders, Inc. v. Bovenkamp*, 320 P.3d 130 (Wn. App. Div. 1, March 2014).**

-Facts: Landowner entered into flat-fee construction contract with Builder that required change orders for additional work/charges. Later, after Builder had started its work, Landowner obtained a loan from Bank. Landowner, Builder and Bank entered into a contract requiring Landowner and Builder to execute change orders for costs beyond the approved loan amount ($995,000). Landowner and Builder never executed change order despite additional work being performed by Builder. When work was substantially complete Landowner owed Builder $25,000 under the fixed-fee contract, and Builder argued Landowner owed Builder another $85,000 for orally agreed-upon work. Builder filed a mechanic's lien for $110,000. Builder sued Landowner and Bank—for the unpaid $25,000 under the written contract, and the unpaid $85,000 under a quantum meruit claim—to foreclose Builder's lien. Bank acknowledged Builder had a superior interest in the first $25,000, but claimed Bank's deed of trust was prior to Builder's lien for the $85,000 based on the flat-fee contract and the requirement in both contracts for written change orders. The trial court held Builder's lien for the entire $110,000 was superior to Bank's lien because Builder and Landowner had waived the change order requirement, finding Builder's quantum meruit award was secured by its mechanic's lien. Bank appealed.

-Issue: (1) Does Builder's mechanic's lien attach to the amount it is due under a quantum meruit claim? (2) Did Landowner and Builder waive the change order requirement by their conduct?

-Holding: Yes as to both issues.

-Issue 1: RCW 60.04.021 says a builder has a lien against the owner's property "for the contract price …" RCW 60.04.011(2) (1991) defined "contract price" as "the amount agreed upon by the contracting parties, or if no amount is agreed upon, then the customary and reasonable charge therefor." The trial court acted within its discretion in finding the $25,000 due under the written contract was secured by Builder's lien, and in finding the orally agreed-upon $85,000 was too. This is especially true because the provision in the contract with the Bank requiring change orders existed to protect Bank from cost overruns exceeding the loan ($995,000) not the contract price ($845,000).

-Issue 2: "A contract condition requiring that extra work be approved in writing may be waived by the parties' conduct," and "waiver can be shown by evidence that the owner authorized, permitted, and/or directed the contractor to perform the [extra] work." Builder and Landowner clearly waived the change order requirement. Bank argued it did not. Because the provision in the Bank's contract existed to ensure cost overruns didn't exceed the approved loan amount, the Court of Appeals concluded Bank had no right to object to additional funds above the contract price but below the approved loan amount.

***ADVERSE POSSESSION & PRESCRIPTIVE/IMPLIED EASEMENT CASES ***

IMPLIED EASEMENT / PRIVATE CONDEMNATION BY NECESSITY

***Woodward v. Lopez,* 174 Wn. App. 460 (Feb. 2013).**

-Facts: In 1945 Ford owned a large piece of land. In 1946 Ford conveyed a piece of that land to a third party, excepting by deed a 30' strip of land running along the eastern portion of the conveyed land. In 1977 Ford subdivided the remainder of her land into two subdivisions (Subdivisions 431 and 432), each containing four lots. The subdivision application for Subdivision (SD) 431 said that each of its four lots came "together with and subject to easements per sketch," which sketch included a 60' wide easement along the east boundary of the four lots. The subdivision application for SD 432 did not mention or depict any easement. But a 1995 survey conducted by Ford depicted the 60' wide easement benefiting the SD 431 and 432 lots. In 2007 Ellwanger obtained title to all four lots in SD 432. The Lopezes owned the SD 431 lots. When Ellwanger began to develop SD 432 she tried to lay utilities lines through the Lopezes' property. But the Lopezes' refused, so Ellwanger sued to quiet title in a 30' wide strip, a declaration that SD 432 was entitled to use the 60' wide easement, and money damages. The Lopezes argued no express easement existed, Ellwanger cannot establish an implied easement or private condemnation by necessity because the SD 432 lots can be reached by a different road (Alternate Road). A wetland expert testified that the Alternate Road would be cost prohibitive because wetland separated the Alternate Road from the SD 432 lots. Creating a road over that wetland would cost Ellwanger ~$200,000 per acre. The trial court granted the Lopezes' motion and dismissed Ellwanger's claims.

-Issues: Were there genuine issues of fact on these issues: (1) Does Ellwanger have an easement by implication? (2) Does Ellwanger have the ability to privately condemn the road by necessity?

-Holdings: Yes.

-Issue 1: Easements by implication arise by intent of the parties, which is shown by facts and circumstances surrounding the conveyance. The relevant factors are (1) former unity of title and subsequent separation, (2) prior apparent and continuous quasi-easement, and (3) a certain degree of necessity for the continuation of the easement. The first factor MUST be established. Factors 2 and 3 are helpful, but not conclusive. Absolute necessity is not required to establish an implied easement. The test is whether one, at reasonable cost, can create an alternative route without trespassing onto his neighbor's land. Prior use is a factor to consider. Factor 1 was established because Ford once owned all the land, then subdivided and sold it. The Lopezes argued factor 2 was not satisfied because one of the SD 432 lots was fenced in for 30 years by barb wire, evidencing its non-use. Ellwanger challenged this evidence with a declaration that Ford had used the easement road continuously. The Lopez also argued factor 3 was not satisfied because access to SD 432 could be reached by the Alternate Road. But Ellwanger's wetland expert's testimony ($200,000 per acre to extend that road over wetland) created a genuine issue of material fact. Because courts must construed facts on summary judgment in the non-movant's favor, the Court of Appeals remanded the issue for trial.

-Issue 2: RCW 8.24.010 authorizes a landowner to condemn a private way of necessity over another's land if it is necessary for proper use and enjoyment of his land. Absolute necessity need not be shown. Ellwanger's wetland expert's testimony created an issue of fact regarding necessity.

ADVERSE POSSESSION

***Acord v. Pettit,* 174 Wn. App. 95 (March 2013).**

-Facts: This case involved title to a 100' strip of forestland between Acord's and Pettit's properties. The Acords purchased 180 acres in September 1991. The Pettits purchased 20 acres of land abutting the Acords' property in August 2000. In 2005 the Acords logged trees up to a fence. The Pettits believed a portion of the trees cut was on their land, so they filed a stumpage lien and sued to recover the value of the logs. The Acords counter-sued to quiet title in the 100' strip of land at issue by adverse possession. To support their adverse possession claim, the Acords presented trial transcripts from 1996 that contained testimony from Fred Chandler, the Acords' predecessor in interest, who had since died. In the 1996 trial Mr. Chandler testified he installed the fence on the border of the property in 1974 and regularly maintained it. The Pettits argued that testimony was inadmissible hearsay because they were not given an opportunity to cross-examine Mr. Chandler. Despite this, the trial court quieted title in the Acords and released the Pettits' stumpage lien. The Pettits appealed.

-Issue: Did the Acords make a sufficient showing to support their adverse possession claim?

-Holding: Yes. To establish ownership by adverse possession one must prove (1) possession for 10 years that was (2) exclusive, (3) actual and uninterrupted, (4) open and notorious, and (5) hostile. An adverse possessor may "tack" the possession of a predecessor-in-interest to establish these elements. Mr. Chandler's testimony was admissible even though the Pettits did not have a chance to cross-examine him. Per ER 804(b)(1), former testimony of an unavailable witness is admissible if the party against whom it is offered or their predecessor-in-interest "had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination" when the witness testified. The "predecessor-in-interest" language in ER 804 has been interpreted broadly. A previous party having like motive to develop the testimony by cross-examination about the same matter is a predecessor in interest. The issues lawsuits need not be identical. The defendant in the 1996 lawsuit was the Pettit's predecessor-in-interest. Even though that adverse possession case dealt with a different section of the land at issue in this case, the issue in that case, like this one, was whether the construction of and location of the fence proved the adverse possession elements. The testimony was admissible and the trial court's ruling correct.

PRESCRIPTIVE EASEMENT - NEIGHBORLY ACCOMMODATION DOCTRINE
***Gamboa v. Clark*, 2014 WL 1225933 (Wn. App. Div. 3, March 2014).**

-Facts: For 16 years the Gamboas used a gravel road on their neighbors', the Clarks, property. The Gamboas did not build the road, but they occasionally maintained it, never improved it, and never interfered with the Clarks' use of the road. The Gamboas used the road as their driveway, but nothing prevented the Gamboas from laying a road to their home on their own property. The Clarks did not use the road as a driveway, but they used it for their farming operations. A fight between neighbors about their dogs turned into a fight about the roadway, which turned into a lawsuit. The trial court found the Clarks gave the Gamboas neither express nor implied permission to use the roadway and, therefore, concluded the Gamboas' use of the roadway was adverse and concluded the Gamboas had a nonexclusive prescriptive easement over the roadway. The Clarks appealed.

-Issue: Did the trial court err in finding the Gamboas established the existence of a prescriptive easement?

-Holding: Yes. "Evidence that supports a reasonable inference of neighborly accommodation or that demonstrates no more than a claimant's noninterfering use in common of a road constructed by this neighbor (or the neighbor's predecessor) will prevent a shift from the initial presumption of permissive use to adverse use." The parties were neighbors who had no dispute regarding the road until 2008; both parties used the road; the Gamboas didn't build it; the Clarks used it for their farming operations; the Gamboas didn't improve it. Because there were no findings that overcome the presumption of permissive use under a neighborly accommodation, the Court of Appeals overturned the trial court's judgment in favor of the Gamboas.

LANDLORD-TENANT CASES

LANDLORD'S CONSENT TO ASSIGNMENT OF MOBILE HOME LAND LEASE.
***Country Manor HMC, LLC v. Doe*, 176 Wn. App. 601 (Sept. 2013).**

-Facts: Landlord leased lots to owners of mobile homes. The Cliftons owned a mobile home, leasing Lot 5. In August 2011 the Cliftons sold their mobile home without notifying Landlord of their intent to sell, in violation of RCW 59.20.073(2). In September 2011 Baum, another tenant, gave Landlord a Notice of Intent to Sell her mobile home on Lot 15, identifying the Cliftons as the purchaser. The Cliftons did not submit tenancy applications for Lot 15 to Landlord, in violation of RCW 59.20.073(6). Landlord told the Cliftons they needed to submit tenancy applications. The Cliftons did not comply, so Landlord served the Cliftons with a 3 Day Notice to Quit, asking them to vacate Lot 15. The Cliftons did not respond, so Landlord filed an unlawful detainer action. At the show cause hearing the Cliftons cited RCW 59.20.020 and .073(5), arguing Landlord had not acted reasonably or in good faith by requiring them to submit new applications before they could occupy Lot 15. Relying on RCW 59.20.073(2)&(6), Landlord argued that the Clifton's failure to comply with the application and notice requirements was dispositive, making a good faith/reasonableness finding unnecessary. The trial court rejected Landlord's strict compliance argument and gave the Cliftons a chance to cure their default by submitting new tenancy applications. The Cliftons did so, but Landlord rejected their applications because of their credit, criminal and eviction history. This prompted more hearings. The trial court upheld Landlord's denial of the Cliftons' application, issued a writ of restitution, and granted Landlord a judgment for costs and past due rent.

-Issues: Does a mobile home tenant's failure under RCW 59.20.073(6) to obtain prior approval from landlord of the assignment of the land lease make a reasonableness/good faith analysis under RCW 59.20.020 and 59.20.073(5) unnecessary?

-Holdings: No. Generally a tenant is free to assign or sublet his lease. But an exception exists in Washington's Mobile Home Landlord Tenant Act, which restricts a selling tenant from assigning his land lease without Landlord's consent. RCW 59.20.073(2). Landlord's consent may not be unreasonably withheld. RCW 59.20.073(5). Landlords must also act in good faith. RCW 59.20.020. The Court ultimately affirmed, concluding the trial court did not err in giving the Cliftons time to cure their default or in allowing for an extended evidentiary hearing to determine if Landlord acted reasonably and in good faith in rejecting the Cliftons' application.

RESIDENTIAL LANDLORD-TENANT. SEXUAL DISCRIMINATION.
***Tafoya v. State Human Rights Com'n*, 177 Wn. App. 216 (Nov. 2013).**

-Facts: Tenant, a single female, rented a home from Landlords, husband and wife. Landlords' home was next door to Tenant's rental. Tenant filed a complaint with WA's Human Rights Commission (HRC) after several months of Landlord-husband's inappropriate comments and actions. The HRC investigated and filed a claim against Landlords for unfair practices in a real estate transaction. The Administrative Law Judge (ALJ) held Landlord-husband sexually harassed Tenant, Landlord-wife aided and abetted her husband, and Landlords retaliated against Tenant. The ALJ awarded Tenant $3,500 in actual damages, $10,000 in compensatory damages for humiliation and emotional distress, and a $10,000 civil penalty. Landlords appealed to superior court, which affirmed.

-Issue: Did the ALJ properly conclude that sexual harassment by a landlord toward a tenant is discriminatory conduct that interferes with the terms, conditions, or privileges associated with renting property, in violation of Washington's Law Against Discrimination (WLAD)?

-Holding: Yes. RCW 49.60.030 guarantees the right to be free from sexual discrimination, including the right to engage in a real estate transaction free from such discrimination. It is an unfair practice "to discriminate against a person in the terms, conditions, or privileges of a real estate transaction or in the furnishing of facilities or services in connection therewith" or "to discriminate in the sale or rental, or to otherwise make unavailable or deny a dwelling, to any person. RCW 49.60.222(1)(b),(f). A "real estate transaction" includes a residential lease. There are no Washington cases dealing with sexual harassment in the context of a real estate transaction. Therefore, the Court relied on the Fair Housing Amendments Act (FHAA), 42 USC Ch. 45 and Washington cases establishing the elements of a sexual discrimination claim. Landlords argued the WLAD should be construed narrowly, only allowing a recovery for discrimination at the lease's inception, not during the lease term. The Court dismissed this argument, citing its policy of construing the WLAD broadly in order to eliminate and prevent discrimination. Under the FHAA "sexual harassment must be unwelcome and sufficiently severe or pervasive so as to interfere with or deprive [the tenant] of her right to use or enjoy her home." Washington case law requires a showing that (1) Landlord-husband's conduct was unwelcome, (2) Landlord-husband's conduct was because of Tenant's sex, (3) Landlord-husband's conduct affected the terms, conditions and privileges of the rental property, including Tenant's use and enjoyment of the property, and (4) the harassment was imputable to the landlord. Because Landlord-husband engaged in at least 14 instances of inappropriate behavior, the Court affirmed the ALJ's ruling.

LANDLORD/TENANT--WARRANTY OF HABITABILITY.
***Martini v. Post*, 178 Wn. App. 153 (Nov. 2013).**

-Facts: Tenant, husband and wife, rented a home from Landlord. During the initial walk-through Tenant noticed several of the windows were sealed shut. From the inception of the tenancy, and on several occasions during the lease term, Tenant asked Landlord to fix the windows. A fire broke out in the home. Husband and their three children escaped. Wife was trapped in a second-floor bedroom and died of smoke inhalation. Husband sued Landlord for failing to fix the windows. Landlord moved for summary judgment, arguing Tenant could not prove Landlord's failure to fix the windows was the cause-in-fact of Wife's death. The trial court granted Landlord's motion and dismissed Tenant's negligence claim. Shortly thereafter Tenant learned a fire investigation revealed the

presence of handprints on the window. With this new evidence Tenant moved for reconsideration. The trial court denied Tenant's motion for reconsideration. Tenant appealed.

-Issues: (1) Did Landlord owe Tenant a duty with respect to the defective windows? (2) Did the trial court err in denying Tenant's motion to reconsider based on the new evidence?

-Holding: Yes as to both issues.

-Issue 1: A tenant's claim against a landlord for personal injuries may be based on the lease, common law, or Washington's Residential Landlord Tenant Act (RLTA). There was no basis for liability under the lease. Under the common law a landlord is liable for harm to the tenant caused by (1) latent or hidden defects in the leasehold, (2) that existed at the commencement of the leasehold, (3) of which the landlord had actual knowledge, and (4) of which the landlord failed to inform the tenant. Tenant's common law claim failed because Tenant could not satisfy element four--as Tenant knew from the lease's inception the windows were inoperable. Because Tenant had no other theory of landlord liability in this case, the Court of Appeals held Landlord owed Tenant a duty of care under the test in *Lian v. Stalick*, 115 Wn.App. 590 (2003) and Restatement (Second) of Property § 17.6. That restatement section subjects a landlord to liability for physical harm to tenants caused by "a dangerous condition existing before or arising after the tenant has taken possession, if he has failed to exercise reasonable care to repair the condition and the existence of the condition is in violation of (1) an implied warranty of habitability, or (2) a duty created by statute or administrative regulation."

-Issue 2: The handprint evidence from the fire investigation created an issue of fact regarding causation.

NOTICE REQUIREMENTS IN COMMERCIAL UNLAWFUL DETAINER ACTION.

***Hall v. Feigenbaum*, 178 Wn. App. 811 (Jan. 2014).**

-Facts: Tenant operated a nightclub. The lease required 20 days' notice before either party could initiate a lawsuit. Tenant stopped paying rent and operating his business. On 11/5/2010, Landlord served Tenant with a 3 Day Notice to Pay or Vacate. On 12/1/2010, Landlord filed an unlawful detainer action, obtaining an ex parte TRO and order to show cause why a writ of restitution should not be issued. The return date for both orders was 12/17/2010. After several unsuccessful attempts at personal service, Landlord obtained a court order authorizing him to serve the summons and complaint by mail and posting them at the nightclub. The summons and complaint were mailed on 12/6/2010 and posted on 12/7/2010. Tenant admits receiving the summons and complaint on 12/9/2010. To stop the eviction the court required Tenant to deposit $14,400 of late rent into the registry of the court, and pay monthly rent to the court thereafter. Tenant deposited the $14,400 but stopped paying rent to the court. The court then issued a writ of restitution on 1/7/2011. On 8/30/2011 Landlord leased the property to a new tenant (Tenant II). The unlawful detainer action was converted to a standard civil action for damages and, in April 2012, Landlord moved for summary judgment for (1) unpaid rent through the time Tenant II took possession, (2) decreased rent from Tenant II's possession through the termination date of Tenant's lease, (3) costs and attorney fees. The trial court granted the motion and awarded Landlord a $180,000 judgment.

-Issues: (1) Was Landlord's service of a 3 Day Notice to Pay or Vacate insufficient per the 20 day notice provision in the lease, thereby depriving the court of jurisdiction? (2) Because Tenant was served with the summons and complaint by mail, was Tenant entitled to 90 days to answer the complaint?

-Holdings: No to both issues.

-Issue 1: The 20 day lease provision did not relate to the 3-day notice to pay or vacate, but merely to the waiting period before Landlord could commence a lawsuit. Because more than 20 days passed between service of the 3 Day Notice and service/filing of the Summons and Complaint, Landlord complied with the lease's 20 day notice provision.

-Issue 2: When unlawful detainer statutes conflict with the civil rules, the statutes trump the rules. See CR 81(a). RCW 59.12.070 says the return date for an unlawful detainer summons "shall not be less than seven nor more than thirty days from the date of service." Tenant admitted he received the summons and complaint on 12/9/2010. The return date was 12/17/2010—eight days later—in compliance with RCW 59.12.070. Tenant did not have 90 days to answer the complaint.

DE FACTO COMMERCIAL LANDLORD'S ABILITY TO ENFORCE LEASE AND LEASE GUARANTEE

***Peyton Building LLC v. Niko's Gourmet, Inc*., 2014 WL 1632243 (Wn. App. Div. 3, April 2014).**

-Facts: In May 2002 Corporation entered into 10-year commercial lease with Restaurant and Restaurant's Owners guaranteed the lease. LLC later acquired Corporation but did not obtain an assignment of the lease or guarantee. In February 2011 Restaurant defaulted on the lease and, in March 2011 vacated the premises. LLC then sued Restaurant and its Owners for breach of the lease and the guarantee, and to foreclose LLC's landlord's lien against Restaurant's equipment and fixtures. The trial court ruled in LLC's favor, awarding LLC a $100,000 judgment. Restaurant and its Owners appealed.

-Issues: Did LLC have standing, as the real party in interest, to sue Restaurant and Owner?

-Holding: Yes as to Restaurant; No as to Owner. "Where a landlord conveys a reversionary estate in leased premises without contractually assigning rights under the lease, the grantee may enforce solely those lease covenants running with the land." The benefits of a lease covenant run with the land "if they are connected with the use and enjoyment of the estate, being so related as to enhance the value of and confer a benefit upon the estate." Restaurant's promise to pay rent is incidental to, and therefore touches and concerns the reversionary interest, therefore LLC had the right to enforce the lease against Restaurant even though the lease was not assigned to LLC. However, LLC cannot enforce the guarantee against the Owners because the guarantee, as a promise to pay money, does not "restrict the use of the funds to the benefit of the property."

TITLE INSURANCE CASES

TITLE INSURANCE vs. ABSTRACT OF TITLE; TITLE INSURER'S DUTIES.
***Courchaine v. Commonwealth Land Title Insurance Company*, 174 Wn.App. 27 (March 2013).**

-Facts: Purchasers bought a lot with a home on it and enough land to build a duplex where Purchasers' parents would live. Before closing, Purchasers ordered a preliminary commitment from Commonwealth. After the deed was recorded Purchasers learned Power Company held an unused 75' wide easement for transmission lines across their property. This easement resulted in the denial of Purchasers' permit to build the duplex. Purchasers tendered a claim to Commonwealth, who originally accepted the claim. But the claim was later reassigned to Fidelity Insurance, Commonwealth's parent company, who denied coverage because the legal description in the preliminary commitment referenced a plat that referenced the easement. Purchasers filed suit and the trial court ruled Commonwealth and Fidelity breached the title policy and violated WA's Consumer Protection Act.

-Issues: (1) What was Commonwealth's duty in issuing the title policy with respect to the easement, and did Commonwealth breach that duty? (2) Was Fidelity liable on a title policy it did not issue? (3) Were Commonwealth and Fidelity liable under the CPA?

-Holdings: Yes as to issue 1. No as to issues 2 and 3.

-Issue 1: Commonwealth's duty in issuing the title policy was NOT to except every limitation on title. Its duty was to indemnify against any limitation on title that it did not except. Commonwealth did not have a duty to except the easement from coverage, but it did have a duty to indemnify Purchasers from actual loss as a result of the easement as Commonwealth did not except it. Commonwealth breached its duty to indemnify by wrongfully denying coverage.

-Issue 2: No legal or factual support was given for Fidelity's liability on a Commonwealth-issued policy, so the Court overturned Fidelity's liability under the title policy.

-Issue 3: Commonwealth's nondisclosure of the easement in the preliminary commitment is not an unfair or deceptive act. And Purchasers' confusion about who was handling the claim—given the back-and-forth between Commonwealth and Fidelity—did not, by itself, constitute a CPA violation. But, the Court held Fidelity's unreasonable justification for denying coverage was made in bad faith.

LAW FIRM'S DUTY TO TITLE INSURER THAT HIRES FIRM TO REPRESENT INSURED.
***Stewart Title Guar. Co. v. Sterling Sav. Bank*, 178 Wn.2d 561 (Oct. 2013).**

-Facts: Insurer hired Law Firm to represent Insured (a lender) in a lien dispute with a construction company. Insured filed a claim with Insurer after the construction company filed a lawsuit to foreclose its mechanic's lien. In that lawsuit Law Firm stipulated that the construction company's lien had priority over lender's deed of trust and reached a quick settlement with the construction company. After the stipulated order was entered Insurer hired a New Law Firm. New Law Firm moved to dismiss the stipulated order, arguing Lender was equitably subrogated to the lien it paid off. The trial court denied that motion, concluding the stipulated order was binding. Insurer then sued Law Firm for malpractice, arguing Law Firm breached a duty of care to Insurer by failing to raise equitable subrogation as a defense. Law Firm argued insured was its client, not Insurer, therefore Law Firm owed Insured no duty. Insurer argued its retention letter with Law Firm obligated Law Firm to keep Insurer informed about the litigation, and the duty to inform was part-and-parcel to the duty of care. The trial court held Law Firm owed Insurer a duty of care, but nonetheless dismissed Insurer's lawsuit because equitable subrogation would have failed.

-Issues: Did Law Firm owe Insurer a duty of care and, if so, did it breach the duty?

-Holdings: No. Law Firm owed no duty to Insurer. Citing *Trask v. Butler*, 123 Wn.2d 835 (1994), the Court referenced the following multi-factor test for analyzing whether an attorney may be liable for malpractice to nonclient third parties: (1) the extent to which the transaction was intended to benefit the nonclient third party, (2) the degree of certainty that the nonclient third party suffered injury, (3) the closeness of connection between the attorney's conduct and the purported injury, (4) the policy of preventing future harm, and (6) the extent to which the profession would be unduly burdened by a finding of liability. Under this test, "the threshold question is whether the [nonclient third party] is an intended beneficiary of the transaction to which the advice pertained." If the answer to that question is no, no further inquiry need be made. The Court held Law Firm owed no duty of care to Insurer because (1) finding otherwise would conflict with RPC 5.4(c), which prohibits a lawyer from allowing a nonclient third-party payor of the lawyer's fees to direct or regulate the lawyer's professional judgment in rendering those legal services, and (2) Law Firm's duty to inform Insurer does not mean Law Firm's representation of Insured was intended to benefit Insurer. Alignment of Insurer's interest with Insured--based on the insurance policy--was insufficient to find Law Firm owed duty of care to Insured.

MISCELLANEOUS CASES

VALIDITY OF QUIT CLAIM GIFT DEED WITH NO CONSIDERATION RECITED; REQUIRED PROOF—PURPORTED ORAL CONTRACT TO DEVISE REAL PROPERTY.
***Bale v. Allison*, 173 Wn. App. 435 (Feb. 2013), reconsideration granted (Mar. 12, 2013).**

-Facts: Bob owned a cabin. He had two nephews (John and Robert). During his life Bob regularly took his nephews to the cabin. Bob married Edna in 1971. Edna had two adult sons (Dennis and Allen) who regularly used and made improvements to the cabin. Edna disliked John and Robert, so from 1971 until Edna died in 1999 John and Robert stopped visiting the cabin. In 2003 Bob executed a will, declaring his intent that the cabin be conveyed to Dennis and Allen on his death. In 2008 Bob was diagnosed with lung cancer and invited John and Robert over for lunch. During lunch Bob told John and Robert that he wanted them to have the cabin. John then found a quit claim deed form online. Bob filled it out, but left the lines after "in consideration of" and "quit claims to" blank. But he did put John and Robert's names in the grantee section of the deed's caption. On the real estate excise tax form (and the supplemental statement) Bob also indicated there was no debt on the cabin and that he was gifting it to John and Robert. The deed was recorded Dec. 19, 2008. Bob died in April 2009. Dennis and Allen sued for specific performance, damages, and equitable relief—based on the will and Bob's purported oral agreement to devise the cabin to them. The trial court quieted title to the cabin in Dennis and Allen, holding (1) the deed was incomplete and, therefore invalid because it failed to state what consideration passed, and therefore (2) the will controlled.

-Issues: (1) Is a gift deed that recites no consideration invalid? (2) Did Dennis and Allen fail to prove an oral agreement to devise the cabin—using a "clear, cogent, and convincing" evidentiary standard?

-Holdings: No as to issue 1. Yes as to issue 2.

-Issue 1: "Recital of consideration is not required to effectively gift real property." RCW 64.04.050 says "Quitclaim deeds *may* be in substance in the following form: …" The statutory form includes a space to recite consideration. But a quitclaim deed need not precisely match the statutory form.

-Issue 2: Bob's will and promises to give his cabin to Dennis and Allen did not rebut the strong contrary evidence of Bob's intent to gift the property to John and Robert via the quit claim deed.

BUYER BEWARE—THE DUTY TO INQUIRE
***Douglas v. Visser*, 173 Wn.App. 823 (Feb. 2013).**

-Facts: After Buyers submitted an offer to purchase Sellers' house, Sellers gave Buyers a Form 17 Disclosure Statement. Sellers answered "don't know" to almost every question. Buyers sent Sellers a list of follow-up questions based on Sellers' inadequate responses. Buyers also requested a copy of Sellers' inspection report. Sellers never gave it to them. Later, during an inspection, Buyers discovered a small area of rot/decay near the roof line, along with some caulking that suggested a previous roof leak. Buyers did not discuss their inspector's report or the rot issue with Sellers. Instead, they closed the seller-financed transaction. After moving in Buyers noticed a damp smell, potato bugs around the house's perimeter, failing ceiling tiles, etc. Buyers got a quote from a mold abatement company, which company could not guarantee removal of all the mold. Buyers elected to take no action. In July 2008, with the balloon payment coming due, Buyers requested an additional month to investigate the mold problem. The home was uninhabitable at this point. Two mold experts determined (1) 50-70% of the mold could not been seen from the crawl space without removing the insulation, (2) siding had been installed in the 2 years before the sale, (3) whoever installed the siding and insulation had to know of the extensive mold problem, and (4) insulation around the joists may have been installed to hide the mold problem. Buyers sued Sellers for fraudulent concealment, breach of contract, CPA violations. The trial court found Sellers fraudulently concealed the mold and awarded Buyers $103,000 to tear down and build a new house, $1500 in moving expenses, $12,000 in emotional distress, $25,000 as treble damages under their CPA claim, and $50,000 in attorney fees.

-Issue: Did the trial court err in awarding judgment in Buyers' favor?

-Holding: Yes. "Where an actual inspection demonstrates some evidence of water penetration, a buyer must make inquiries of the seller" unless that inquiry would be fruitless. Buyers "cannot succeed when the extent of the defect is greater than anticipated, even when it is magnitudes greater." After learning of the rot issue from the inspection, Buyers did not inquire further. This precludes Buyers' claims.

RIGHT TO EARNEST MONEY WHEN REAL ESTATE CONTRACT IS VOID PER S.O.F.
***Kofmehl v. Baseline Lake, LLC*, 177 Wn.2d 584 (June 2013).**

-Facts: Seller and Buyer entered into a real estate contract. The purchase price was $1.65 million, with $50,000 of earnest money. Buyer's offer described the land as "approximately 30.12 acres of vacant land" within Farm Unit 182. But the legal description was incomplete because it did not include a metes and bounds description, and the property had not been short platted. However, the agreement authorized the real estate brokers to attach a correct legal description. The Agreement was contingent on preliminary plat approval and "accessibility of city sewer." Seller's survey map separated the land into three separate lots: (1) one was 17.4 acres, listed at $935,000, (2) one 12.72 acres, listed at $750,000, and (3) one 3.93 acres, labeled "EXCLUDED" on Seller's survey map. These three lots add up to 34.05 acres. But all told, Farm Unit 182 was 43.1 acres. There was thus 9.04 acres of unaccounted-for land. The later-created preliminary plat established 3 lots: (1) Lot 1, a 30.13 acre lot that comprised the same land on the survey map that Seller marked as for sale, (2) Lot 2, the 3.93 acres Seller marked as "EXCLUDED" on his survey map, and (3) Lot 3, the remaining 9.04 acres. Buyer did not object to the preliminary plat, and it was finalized. But Buyer refused to sign the closing documents because the land conveyed only included Lot 1 (not the 3.93 acres) and Lot 1 was not connected to the sewer line.

Buyer sued and Seller counterclaimed. The trial court held the real estate contract violated the statute of frauds and ordered, in equity, that the parties be returned to their pre-sale condition--awarding Buyer $88,000 as restitution for the earnest money, engineering fees, title fees, costs and attorney fees. The Court of Appeals affirmed regarding the statute of frauds, but overturned Buyer's restitution award.

-Issue: Did the appellate court err in overturning Buyer's restitution award?

-Holding: No. For a buyer to recover his earnest money in a real estate transaction where the contract violates the statute of frauds, the buyer must prove seller was not ready, willing, and able to perform seller's contract obligations. Buyer claimed he was promised the 3.93 acre lot in addition to the 30.13 acre lot, making the land to be conveyed ~34 acres. The Court dismissed this argument and dismissed Buyer's restitution award because (1) the Agreement said buyer would receive 30.12 acres, not 34 acres, and (2) the agreement was ambiguous and Buyer had not proved Seller was not ready, willing and able to perform.

EQUITABLE SUBROGATION—THE "PROTECT SOME INTEREST" RULE.

***Columbia Community Bank v. Newman Park, LLC*, 177 Wn. 2d 566 (June 2013).**

-Facts: LLC was owned by 11 individuals and 1 company ("Company"). Company was solely owned by Mr. Sturtvant. In 2004 LLC borrowed $400,000 from Lender. That loan was secured by a deed of trust against the LLC's real property. In 2008 Sturtvant, without the other LLC's members' knowledge, applied for a $1.5 million refinance loan with Bank. Company was the borrower on the loan from Bank. Bank required Company to pay off Lender's deed of trust so Bank's deed of trust would be the first position lien against the LLC's property. But Company owned just 39% of the LLC and the LLC's operating agreement required 80% of its members to approve a loan. Sturtvant had no authority to sign the deed of trust associated with Bank's loan. Sturtvant got around this by submitting a forged operating agreement to Bank with his loan application. The forged operating agreement showed Company as the LLC's sole member. Bank made the refinance loan in reliance on the forged operating agreement. Bank discovered the forgery a year later, and instituted nonjudicial foreclosure proceedings. LLC objected sued to enjoin the foreclosure, arguing it never authorized the loan. Bank sought a declaration that its deed of trust was valid and that it was equitably subrogated to Lender's deed of trust. The trial court and appellate court held Bank's deed of trust was invalid but nonetheless ordered that its deed of trust was equitably subrogated to Lender's deed of trust.

-Issue: Does the "volunteer rule" bar Bank's equitable subrogation claim?

-Holding: No. Under the "volunteer rule" a Bank who pays off another Lender's lien cannot be equitably subrogated when the payment was voluntarily made. Adopting Restatement (Third) of Property: Mortgages §7.6, the Court rejected the strict "volunteer rule" in the refinance context and explained that for a refinance lender's lien to be equitably subrogated (1) the refinance lender must pay off another lender's secured debt, and (2) subrogation must be equitable. The Court equitably subrogated Bank's deed of trust to Lender's deed of trust because (1) Bank was tricked into making its loan because Sturtvant forged the LLC's operating agreement, and (2) no one was prejudiced, as the LLC's debt was merely transferred from Lender to Bank.

EQUITABLE LIEN IN DISSOLUTION DECREE VS. WRIT OF ATTACHMENT

***Bank of America, N.A. v. Owens*, 177 Wn. App. 181 (Oct. 2013).**

-Facts: Husband and Wife owned Property as community property. In 2/2001 Husband and Wife filed a dissolution petition. In 1/2002 Husband filed for bankruptcy. In 2/2002 Wife filed for bankruptcy. Bank had made a business loan to Wife's business, which wife guaranteed. Bank filed a claim in Husband's bankruptcy. The automatic stay was later lifted and, in 6/2002, the dissolution decree was entered—but property distribution issues were reserved until the bankruptcy cases were resolved. In 4/2004 the bankruptcy trustee in Husband's bankruptcy entered into a settlement agreement, agreeing to quit claim Husband's interest in the Property to Wife in exchange for $215,000—making the Property Wife's separate property. Husband bankruptcy was closed in 3/2005, eliminating his debt obligations to the Bank. In 5/2006 the court in the dissolution action entered a Supplemental Decree that ordered the Property sold and awarded Husband 50% of the net proceeds. The court also awarded Husband various money judgments for Wife's wrongful conduct in the case. Husband recorded the judgments and Supplemental Decree in 10/2006. In 7/2006, Bank filed a lawsuit against Wife and moved for a writ of attachment against the Property. The writ of attachment issued in 12/2006, and a $600,000 judgment was entered in the Bank's favor in 12/2006. In light of conflicting claims arising from the dissolution, the Bank's lawsuit and the bankruptcy actions, Husband and Wife and Bank entered into a trust agreement to facilitate the sale of the Property. In 5/2007 the Property sold for $1.1 million. The Bank then filed a declaratory judgment action, seeking an order regarding relative priority and rights to the sales proceeds. The trial court entered an order establishing priority in the sales proceeds as follows: (1) $40,000 to Wife, per her homestead exemption, (2) money to husband to satisfy judgment recorded on 10/27/2006, (3) money to the bank, per its writ of attachment, (4) money to Husband for judgments recorded after the Bank's writ of attachment, and (5) any leftover, to Husband and Wife per the terms of the Supplemental Decree. Husband appealed, but at the time of the appeal the trial court had not decided the Bank's in rem claim against the Property for Wife's separate property transfer to Husband. On appeal, both the Court of Appeals and the WA Supreme Court held the Supplemental Decree created an equitable lien against the Property, and remanded to the trial court to re-address priority to the sales proceeds. On remand, the Bank argued its in rem claim had priority over Husband's equitable lien under the Supplemental Decree. Husband argued the trial court lacked discretion to vary from the Appellate Court's and Supreme Court's order. The trial court held the Bank's judgment was superior to Husband's interest in half the proceeds under the Supplemental Decree. Husband again appealed.

-Issue: Did the trial court abuse its discretion by not following the Court of Appeals' and Supreme Court's orders that stated Husband had an equitable lien in the Property per the Supplemental Decree?

-Holding: Yes. Under the "law of the case doctrine," an appellate court's holding binds the parties, the trial court, and subsequent appellate courts until the holding is authoritatively overruled. The Bank argued because the Supreme Court did not expressly order entry of judgment in Husband's favor the trial court was free to resolve the Bank's previously undecided in rem claim and give the Bank priority over Husband's equitable lien. The Court of Appeals disagreed, holding that because the first appeal of the trial court's grant of summary judgment to the Bank was de novo, the Bank should have raised its in rem claim on appeal. Bank's failure to do so operated to waive the Bank's in rem claim. Having waived its in rem claim, the trial court was not free to decide that claim on remand.

Following the first-in-time, first-in-right rule, the Court held Husband's equitable lien trumped the Bank's writ of attachment because the Supplemental Decree was recorded before the Bank's writ of attachment was issued.

IMPUTED KNOWLEDGE OF EQUITY STRIPPING SCHEME PRECLUDES B.F.P. FINDING.
***Collings v. City First Mortg. Services, LLC*, 177 Wn. App. 908 (Nov. 2013).**

-Facts: Husband and Wife owned a home worth ~$510K. While in financial trouble they received a flier from Lender. They applied for a loan with Lender and were told they were approved. Weeks later they were told they were not approved. Lender's Managers proposed the following deal to Husband and Wife: Managers would buy the home for $510K, lease it back to Husband and Wife, giving Husband and Wife an option to repurchase the home in the next 3 years for $510K, and Husband and Wife would pay Managers a $79K fee. Husband and Wife agreed. The lease required the couple's rent payments be applied to Managers' mortgage payment [rent was sufficient to cover the monthly mortgage payment]. Later Husband and Wife received a foreclosure notice. They called Managers to find out why their rent payments had not been applied to the mortgage. In response, Managers threatened to evict Husband and Wife if they didn't pay more. Husband and wife sued to enjoin the foreclosure (Bank held the note and deed of trust) and sued Managers and Lender for their illegal equity stripping scheme. Bank argued its deed of trust was superior to Husband and Wife's equitable interest in the property. The trial court disagreed, quieted title in Husband and Wife, declared Bank's deed of trust void, and permanently enjoined the foreclosure.

-Issues: Was Bank, which acquired Manager's loan from Lender, a bona fide purchaser (BFP) whose deed of trust encumbered the property free-and-clear of Husband and Wife's equitable interest?

-Holdings: No. A party is not a BFP if it has actual knowledge or information that would cause an ordinarily prudent person to inquire further (using reasonably diligent efforts) to discover the title defect or equitable rights of others. Bank purchased the loan from Lender (Managers' employer), so the lease had to be in the loan file. The court imputed knowledge of the lease's contents to Bank and affirmed.

WARRANTY AGAINST ENCUMBRANCES AND MARKETABILITY OF TITLE
***Ensberg v. Nelson*, 320 P.3d 97 (Wn. App. Div. 1, Jan. 2014).**

-Facts: For cash and $55,000 promissory note secured by a second-position deed of trust, Seller conveyed a vacant lot to Buyer via a statutory warranty deed. At the time of the conveyance the lot was part of a homeowner's association and a $500,000 judgment had been entered against the HOA and recorded with the county. In the transaction between Seller and Buyer the title insurer didn't pick up the judgment. Years later when Buyer tried to re-sell the land the judgment became an issue and the prospective buyers walked away from the deal. Buyer defaulted on his first-position loan and that lender foreclosed its lien and sold the land. At that time Seller had not been paid in full on the note (which was extinguished by the foreclosure), so he sued Buyer. Buyer counterclaimed for breach of the warranty against encumbrances and the warranty of marketability of title. The trial court held the warranties were breached, awarded judgment in Buyer's favor, and dismissed Seller's breach of note claim for lack of consideration.

-Issue: Did Seller breach the warranties against encumbrances and marketability of title?

-Holding: No. Because the HOA didn't own the land the judgment against the HOA was not a lien against the property. The Court of Appeals dismissed Buyer's argument that Seller nonetheless breached these warranties because the HOA could, at some point, assess a portion of the judgment to the HOA members--including Buyers. However, because the HOA's governing documents were not in the evidentiary record and nothing proved the HOA would have a right to do so, the Court of Appeals held Seller did not breach these warranties, dismissed Buyer's claim, and awarded Seller attorneys' fees under the promissory note.

DISTRESSED PROPERTY CONVEYANCE ACT
***Jametsky v. Rodney A.*, 179 Wn. 2d 756 (Feb. 2014).**

-Facts: Jametsky, an uneducated man with learning disabilities with an inability to read or understand legal documents, unknowingly deeded his home to Flynn, an unscrupulous private lender who told Jamestsky he was receiving a $100,000 loan to help Jamestky avoid a tax foreclosure on a home Jamestky inherited from his grandfather. In reality, Jametsky deeded his home to Flynn for $100,000 ($130,000 less than its FMV), leasing the home back from Flynn. Flynn did this days after Jametsky's son was murdered. After realizing what happened, Jametsky sued to quiet title and for DPCA violations, among other claims. The trial court dismissed Jametsky's claims, holding Jametsky's home didn't meet the definition of "distressed home" under the DPCA because a certificate of tax delinquency had not been issued. The appellate court affirmed. Jametsky appealed.

-Issue: Must a certificate of delinquency be issued before a property is considered distressed under RCW 61.34.020(2)(a)?

-Holding: No. A "distressed home" is one that is "in danger of foreclosure or at risk of loss due to nonpayment of taxes." The DPCA is a remedial consumer protection statute that Courts must construe liberally in favor of consumers. The statutory language "at risk of loss" does not expressly require the issuance of a certificate of delinquency. Therefore, the trial court and appellate court treating that as a determinative fact was in error. Instead, courts must consider the following factors when deciding if

property is a distressed home: (1) the total amount owed the county; (2) the total number of delinquent payments and when the foreclosure could occur; (3) the financial ability of the homeowner to meet or cure the debt obligation at the time of the allegedly deceptive transaction; and (4) any discrepancy between the sale price and the FMV of the property. The Washington Supreme Court remanded the case to the trial court to weigh these factors.

LAND USE—VESTING OF DEVELOPMENT RIGHTS WHEN DEVELOPMENT PROPOSAL IS APPROVED UNDER A COUNTY'S PLANS AND REGULATIONS ARE LATER DEEMED TO VIOLATED S.E.P.A.

***Town of Woodway v. Snohomish County*, 2014 WL 1419187 (Wn. 2d, April 2014).**

-Facts: BSRE owns 60 acres of waterfront land used for industrial purposes. In 2006 BSRE asked Snohoomish County to amend its comprehensive plan and zoning regulations to accommodate a mixed-use development of BSRE's property. The Town of Woodway opposed the project. From 2009-2010 the County adopted ordinances that amended its comprehensive plan and zoning regulations to accommodate BSRE's development. The Town petitioned the growth management hearings board to review the County's ordinances, setting a 3/2/11 hearing. On 2/14/11 BSRE filed its first permit application. On 3/4/11 BSRE filed its second permit application. The County noted that BSRE's applications were complete. On 4/25/11 the growth board ruled that the County's ordinances violated SEPA. The Town then sued for a declaration that BSRE's were void. The trial court concluded BSRE's applications violated SEPA, making them void. BSRE appealed and the appellate court overturned the trial court. Town appealed.

-Issue: Does Washington's "vested rights doctrine" apply to permit applications filed under plans and regulations later deemed to violate SEPA?

-Holding: Yes. Under Washington's vested rights doctrine, developers are entitled "to have a land development proposal processed under the regulations in effect at the time a complete … permit application is filed, regardless of subsequent changes in zoning or other land use regulations." Relying on that doctrine and RCW 36.70A.302(2), the Washington Supreme Court held a determination that the County's ordinances violated SEPA did not change the fact that BSRE's rights to proceed under those ordinances vested when they submitted complete applications; affirming the appellate court.