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I. INTRODUCTION.

Plaintiffs (tenants) sued Defendants (landlords) following an incident in which the neighboring tenant crashed her parents' car into the apartment of the Plaintiffs. Plaintiffs sued for general (emotional damage) as well as special damages for damage to the property created by the driver of the vehicle. Pro Tem Judge Marjorie G. Tedrick presided over a jury trial in District Court. Plaintiffs' case was based upon common law negligence, breach of lease, and violation of the Residential Landlord Tenant Act. After the Plaintiffs' case in chief, the trial court dismissed all of Plaintiffs' claims for general damages under all three causes of action. The only damage issue was the reduction in rental value during the time of repair. DMCI attempted to introduce evidence of discussions with the Co-Defendants' (Diels) insurance company. Said discussions delayed repairs for about two plus months. The trial court denied said testimony and the Superior Court reversed this ruling. The jury awarded Plaintiffs \$2,356.00 for reduced rental value. The Superior Court Judge Katherine M. Stolz reversed the trial judge on her decision to dismiss Plaintiffs' claims for general damages. The trial judge also awarded attorney's fees to Plaintiffs, which was reversed by Judge Stolz. Plaintiffs moved for discretionary review of the reversal of the attorney fee award.

Discretionary review on the reversal of attorney's fees was denied by the Court of Appeals Commissioner Eric B. Schmidt.

II. ASSIGNMENTS OF ERROR.

A. Assignments of Error:

Respondents/Cross Appellants:

1. The Superior Court erred in reversing the trial court's dismissal of Plaintiffs' claims for general damages where said reversal implied the trial court abused its discretion in said dismissal.
2. The Superior Court erred in reversing the trial court's dismissal of general damages for emotional injury when no objective symptomology was proved by Plaintiffs.
3. The Superior Court erred in reversing the trial court's dismissal of Plaintiffs' action for general damages when Plaintiffs took no action to mitigate said damages and chose to remain living in the apartment in spite of the damage being patent.
4. The Superior Court erred in reversing the trial court's dismissal of Plaintiffs' cause of action for general damages for emotional distress where there were no physical injuries caused by latent defects in the premises.

Response to Appellants' Assignments of Error:

5. Whether the Superior Court correctly ruled the District Court erred in not allowing conversations by Plaintiffs Hawkins and DMCI's employees with Co-Defendants' insurance adjuster relevant to the cause of delays in repairs to Plaintiffs Hawkins' apartment.
6. Whether the Superior Court correctly reversed District Court's award of attorney's fees not only when the issue became moot, but also because District Court failed to correctly determine who the prevailing party was.

B. Issues Pertaining to Assignments of Error:

1. Plaintiffs claimed emotional injury for Defendants failing to repair the damage to the Plaintiffs exterior wall. Plaintiff provided no medical testimony or any testimony regarding physical injuries or objective symptomology. Plaintiff did not accept Defendant's several offers to move during the time the Plaintiffs' apartment was damaged. Repairs were delayed as a result of the Defendants working with co-Defendants' insurance company and with contractors to effect the repairs. Whether Plaintiffs are entitled to general damages for emotional distress when Plaintiff provided no medical testimony of either physical or emotional injury, no medical evidence in the delay in making repairs caused emotional injury, where Plaintiffs proved no objective symptomology, nor proved any physical injury where the damage to their property was patent, chose to continue to reside in the premises and where Plaintiffs failed to accept Defendants several offers to move while the repairs were being made. (Assignment of Errors 2, 3, and 4).

2. Whether Plaintiffs failed to mitigate their damage by failing to make minor repairs or accepting offers to move until the repairs were made. (Assignment of Error 3).

3. Whether the trial court abused its discretion after listening to the testimony of the Plaintiffs and their witness and reviewing all the evidence determined Plaintiffs had not suffered general damages and failed to mitigate any general damages they may have had. (Assignment of Error 1).

4. Whether the trial court erred when it disallowed testimony regarding Defendants delays in repairing the premises being caused by conversations with co-Defendants' insurance adjuster. (Assignment of Error 5).

5. Whether the trial court erred by determining Plaintiffs prevailed when Defendant prevailed on all causes of action except one portion of one cause and the great majority of Plaintiffs damages claims. (Assignment of Error 6).

III. STATEMENT OF THE CASE.

A. Background Facts. On April 4, 2006, Co-Defendant's 16-year-old daughter drove the family vehicle into the bedroom of Plaintiffs Hawkins' apartment. Nobody was in the bedroom at the time and the only damage created was to the outside bedroom wall.¹ Mr. Hawkins was home at the time in the living room and Mrs. Hawkins was at work.² Dobler Management Company ("DMCI") responded the same evening and placed plastic tarp over the hole while the nose of the car remained in the bedroom overnight. At the time the tarp was placed over the hole, Plaintiffs Hawkins were offered to be put up in a motel/hotel by DMCI employees, an offer which they refused. Diel admitted liability to both Hawkins and DMCI.³ Trial in District Court on the issues began June 3, 2008. Diel, DMCI, and Hawkins submitted trial briefs on or before that date. Both Defendants (Diel and DMCI) moved to dismiss all of Hawkins claims for general damages based upon common law negligence, based upon violation of the Residential Landlord Tenant Act ("RLTA"),⁴ and based upon the residential lease between Hawkins and DMCI.⁵ Diels' motion to dismiss general damages was based solely on Hawkins claim for common law negligence against Diels. DMCI not only

1 AR (06/19/09) Exhibit 1, pp. 0-6.

2 AR (06/19/09) Exhibit 1, pp. 4-12.

3 AR (06/19/09) Exhibit 5 and 6, p. 2.

4 RCW 59.18.

moved to dismiss the common law negligence claim, but also for Hawkins' other basis for general damages for physical injuries. Hawkins' failed to call any medical witnesses to support Hawkins' claims for general damages.⁶ Said motions were renewed following presentation of Plaintiffs' case. The court dismissed all of Hawkins' claims for general damages following presentation of their case. Said decision was based upon the fact Hawkins showed no evidence of general damages, in part as a result of their failure, after being given the opportunity, to mitigate their damages.⁷ District Court left intact the reduction of rental value as the sole measure of damages as a result of the alleged delay in making repairs by DMCI.⁸

The Hawkins testified the damaged wall was protected by a sliding glass window before the accident. They further testified the apartment was secured by DMCI screwing a 3/8" to 3/4" plywood panel over the opening. The trial court heard and considered this testimony and its credibility and determined Hawkins suffered no general damages.⁹ In addition, Mr. Hawkins stated that he informed DMCI that he could fix the hole himself. His complaint was that there were only a handful of screws used to screw the plywood to the wall. He explained that he himself could have put in

5 AR (10/06/08) Exhibit 1.

6 AR (06/19/09) Exhibit 5 and 6, p. 2.

7 AR (06/19/09) Exhibit 14.

8 AR (06/19/09) Exhibit 14.

additional screws to alleviate the Hawkins' insecurities.¹⁰ He further testified DMCI's employee used his screw gun and screws. In addition, Mr. Hawkins testified that it was just a matter of nails and screws that would have enabled him to feel secure.¹¹ The trial court held that Hawkins failed to reasonably mitigate any damages having been offered.¹² DMCI was precluded from presenting evidence either through their own witnesses or through the Hawkins, that the Diels' insurance company would have paid any additional costs,¹³ including the entire reduction in rental value and that the cause of the delay was at least in substantial part due to the demands of the company.

At trial on June 9, 2008, and June 10, 2008, Plaintiffs/Petitioners presented a motion in limine to disallow Defendants from mentioning negotiations with the Co-Defendants Diels' insurance carrier.¹⁴ DMCI offered proof of and reasons for allowing testimony about conversations both DCMI and Hawkins had with Co-Defendants Diels' insurance carriers waiting for the carrier's adjuster to come to the premises and evaluate the extent of the damage and the cost of repairs. DMCI's employees would have

9 AR (06/19/09) Exhibit 14.

10 See Declaration of Jason P. Amala in Support of Petitioner's Response to Cross Motion-Motion for Discretionary Review, filed in the Court of Appeals, Exhibit 3 - VRP (06/10/08), pp. 17 and 33.

11 *Supra*, at p. 35, ll. 8-16.

12 AR (06/19/09) Exhibit 14.

13 VRP (06/10/08) p. 25, ll 4-5.

testified that the Diels' insurance carrier insisted on sending an adjuster to do an analysis of the damage and cost of repairs and that it delayed the repair process for more than two weeks. DMCI's employees would have testified further that after two to three weeks the insurance carrier admitted they could not find an adjuster to visit the premises. As a result, they required DMCI employees to obtain three bids by licensed and bonded contractors instead of hiring the one contractor DMCI would have hired immediately. This requirement took approximately one month in addition to the original two to three-week delay caused by the failure of an adjuster to inspect. DMCI received the best bid in the latter part of May and submitted the bid to the insurance carrier who took approximately another three weeks to approve the bid and another ten days until they approved the contract submitted by the contractor. The contractor's submitted contract was finally approved on June 26, 2006.¹⁵

The Hawkins have stated all repairs were made by DMCI. In fact, the repairs were made by a contractor hired by the Diels through their insurance carrier¹⁶ (evidence precluded as a result of District Court's evidentiary ruling). The Hawkins mentioned the plywood used to cover the hole in the

14 VRP (06/9-10/08), p. 3, ll 2, 3, and 15 and p. 10, ll. 24 through p. 11, ll 12.

15 VRP (06/9-10/08), pp. 3, 10, and 27.

16 VRP (06/09-10/08), pp. 3, 10, and 27.

bedroom wall left two to three inches at the bottom of the plywood. They failed to mention the gap was not between the bottom of the plywood and the floor of the apartment, but between the bottom of the plywood and the dirt outside. The Hawkins have also stated Mr. Hawkins told DMCI repeatedly he could fix the hole and that the request was denied. They did not state that Mr. Hawkins was not a licensed and bonded contractor as legally required to repair structural damage to a building. The Hawkins stated DMCI sent their maintenance crew to fix the hole and that fixing it took a week. As stated before, the repairs were made through the Diels insurance carrier and paid for by them, not by DMCI's maintenance crew. The Hawkins stated DMCI's employees testified that a lack of money caused the delay in making the repairs. That statement is not accurate. DMCI was entitled to be reimbursed by the party creating the damage and eventually were. It was DMCI's position it needed to ensure reimbursement, not that they could not afford the expense. None of the above could be introduced into evidence as a result of the court's evidentiary ruling.¹⁷

B. Procedural Facts. The Hawkins sued DMCI alleging three causes of action. The first cause was for general and special damages resulting from negligent infliction of emotional distress based upon DMCI's breach of duty

¹⁷ VRP (06/09-10/08), pp. 3, 10, and 27.

under the Hawkins' theory of common law negligence.¹⁸ The second cause of action was for breach of the landlord statutory duty under RCW 59.18, again for failure to make repairs in a timely manner. The suit claimed, "Dobler breached the statutory duties and implied warranty of habitability by not keeping the Plaintiffs' apartment in a safe and habitable condition." The Hawkins stated those breaches created an unreasonable risk of harm to them and caused both *general and special damages*. The third cause of action against DMCI brought by the Hawkins was for breach of contract resulting in *general and special damages*. The special damages alleged were lost wages, medical costs, and decrease in rental value of the damaged condition of the Hawkins' apartment. The court dismissed all claims of negligence against DMCI and entered an order stating that the Hawkins proved no evidence of damages resulting from the continued existence of the hole created by the Diels other than possible reduction of rental value in the Hawkins' apartment.¹⁹ The Hawkins claimed at all times the damages were in excess of \$40,000.²⁰

"Our statement of damages has always said that this case was worth over \$40,000.00 given the noneconomic damages."²¹
"I understand the court dismissed those claims."

18 AR 1, pp. 6-8.

19 AR 14.

20 VRP (07/18/08), p. 12, ll. 11-12.

21 VRP (07/18/08), p. 12.

The Court entered its order awarding its attorney's fees to the Hawkins in the amount of \$20,000.00 on October 17, 2008.²² In that decision the court stated on page two that the only liability for DMCI is based upon the contractual relationship. The court dismissed all general damages and reserved only the reduction in rental rate portion of the Hawkins' breach of contract cause of action.

IV. ARGUMENT.

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DISMISSING PLAINTIFFS' CLAIMS FOR GENERAL DAMAGES.

Plaintiffs presented the entirety of their case including all damages, special and general, to the jury. Upon the completion of Plaintiffs' case the trial court dismissed all claims for general damages.²³ The court cited two bases for its ruling. First, Plaintiffs did not prove general damages and secondly, Plaintiffs failed to reasonably mitigate their damages. Both rulings were based upon factual findings. The Court of Appeals in *Segaline v. State of Washington Department of Labor and Industries and Croft*, 144 Wn.App. 312, 182, P.3d 480 (2008) determined under traditional negligence principals that the duty owed to Plaintiffs is a question of law and depends on mixed considerations of logic, common

22 AR 34.

23 AR (06/19/09) Exhibit 14.

sense, justice, policy, and precedence. The trial court in this case stated Plaintiffs provided no proof that threat of intrusion with the premises being boarded up was no greater than if Plaintiffs' window had been fully intact. The trial court's dismissal of Plaintiffs' action for general damages is reviewed for abuse of discretion.²⁴ The trial court heard the testimony of the Plaintiffs and observed the Plaintiffs during their testimony and exercised its discretion in not allowing the claim for general damages to continue following their case in chief. The case of *Jaeger v. Cleaver Construction, Inc.*, 148 Wn.App. 698, 201 P.3d 1028 (2009) dealt with an issue of the mitigation of damages. In that case the Court of Appeals determined that the court did not abuse its discretion in denying a mitigation of damages instruction. The Court held that a trial court has considerable discretion in deciding what specific instructions to give. The abuse of discretion will only be found if a trial court decision is manifestly unreasonable or based upon untenable grounds or reasons.²⁵ The trial court determined Plaintiffs' claim for general damages based upon emotional distress was not rational and not proved.

B. PLAINTIFFS HAWKINS DO NOT HAVE A CAUSE OF ACTION FOR GENERAL DAMAGES SUCH AS EMOTIONAL INJURY WHEN THEY SUFFERED NO OBJECTIVE SYMPTOMOLOGY FROM THE ACCIDENT.

²⁴ *Hill v. Jawanda Transport Ltd.*, 96 Wn.App. 537, 983 P.2d 666 (1999).

²⁵ *Conrad v. Alderwood Manor, et al.*, 119 Wn.App.275, 78 P.3d 177 (2003).

District Court found Hawkins, in their case in chief, proved no objective or reasonable subjective general damages resulting from the length of time taken to make repairs to Hawkins' apartment. There were not only no physical injuries from the accident itself, but none from the delay in making repairs.²⁶ The court further held as a matter of law the only evidence of damages resulting from the continued existence of the hole was the possible reduction of rental value in Hawkins' apartment.²⁷ From the testimony of Hawkins, the Court concluded Hawkins had an obligation to mitigate their damages by accepting DMCI's offer of a hotel room and subsequent relocation to another apartment during the period of time to make repairs. Hawkins refusal to mitigate and any testimony regarding loss of enjoyment or emotional distress resulting from the delay in making repairs was not reasonable under the circumstances.²⁸ As a result, the sole damages from the loss of enjoyment of the premises claimed by Hawkins to be caused reduction in rental value, which the jury and the court determined was caused by DMCI was \$2,355.²⁹ Hawkins wished to present general damages to the jury in the form of "loss of enjoyment, inconvenience, annoyance, mental anguish, and

26 AR (06/19/09) Exhibit 14.

27 *Supra*.

28 *Supra*.

29 AR (06/19/09) Exhibit 16, pp. 2-3

emotional distress.”³⁰ The Hawkins are not seeking general damages for medical damages or physical injury.³¹ The Hawkins continue their quest for general damages based upon DMCI’s negligence, breach of RLTA, and DMCI’s breach of its lease. Objective symptomology is required to support a claim for negligent infliction of emotional distress.³² The court in *Smith v. Rodene*, stated:

We think that a fair summary of the holdings in such cases is as follows: (1) where plaintiff suffers mental or emotional distress, which is caused by some negligent act of the defendant, there is no right of action, even though the mental condition in turn causes some physical injury; unless the act causing the mental fright or emotional distress also threatens ... immediate bodily harm.”³³

Said rule was clearly laid out again in *Orin v. Barclay*, 272 F.3d 1207 (9th Cir. 2001) and *Strong v. Terrell*, 147 Wash.App. 376, 195 P.3d 977 (2008).

To establish negligent infliction of emotional distress under Washington law, Orin must show that defendants breached a legal duty thereby causing Orin to suffer objective symptoms of emotional distress. ... Such symptoms must be “susceptible to medical diagnosis and proved through medical evidence.”³⁴

Finally, to establish a case of negligent infliction of emotional distress, a claimant must prove that her emotional distress is accompanied by objective symptoms and the “emotional

30 CP 39-56.

31 CP 39-56.

32 *Brower v. Ackerly*, 88 Wn.App. 87, 943 P.2d 1141 (1997); and *Smith v. Rodene*, 69 Wn.2d 482, 418 P.2 741 (1966).

33 *Smith v. Rodene*, *supra*.

34 *Orin v. Barclay*, 272 F.3d 1207 at 1219 (9th Cir. 2001).

distress must be susceptible to medical diagnosis and proved through medical evidence.”³⁵

The only time emotional distress would not require objective symptomology is if a defendant intentionally caused whatever emotional distress was suffered by the plaintiff.³⁶ There is no exception to the requirement of objective symptomology on the basis of breach of contract or violation of the RLTA. There is no claim in this case that any delays in this case were intentionally done to cause emotional distress on the part of Hawkins.³⁷ The court’s decision that emotional distress (whether it is called that or called loss of enjoyment, mental anguish, inconvenience, or annoyance), did not occur in the circumstances in this case where no objective symptomology was proven was reasonable and within the trial court’s discretion.

The Hawkins have never explained how loss of enjoyment, mental anguish, inconvenience, and annoyance differ from either emotional distress or reduction in rental value. The District Court correctly dismissed Hawkins’ case for negligence and general damages and the Superior Court should be reversed in its ruling that the issue of general damages should be remanded for a new trial in District Court. There is a practical reason why objective symptomology is required in alleged injuries resulting from what is solely a

³⁵ *Strong v. Terrell*, 147 Wash.App. 376, 195 P.3d 977 (2008).

³⁶ *Kloepfel v. Baker*, 149 Wn.2d 192, 66 P.3d 630 (2003).

³⁷ AR (06/19/09) Exhibit 1, pp. 4-12.

contractual relationship. RCW 59.18 requires a landlord to make general repairs upon demand by a tenant within ten days of written notice by the tenant to the landlord. Rhetorically speaking, can you imagine the floodgate of litigation that would result if the landlord did not make said repairs within ten days if the tenant could sue the landlord for the emotional distress or loss of enjoyment of the premises if objective symptomology based upon medical testimony were not required?

C. HAWKINS ASSUMED THE RISK OF ANY INJURY RESULTING FROM FAILURE TO REPAIR DAMAGE TO THEIR APARTMENT AS A RESULT NOT MITIGATING ALLEGED INJURIES.

A landlord is liable to a tenant only for harm caused by a latent or hidden defect in their leasehold.³⁸ The Hawkins chose to remain in their apartment until the repairs were completed even though the defect in the apartment was patently obvious.³⁹ As a result they assumed the risk of general damage from remaining in the apartment. This evidence clearly supported the trial court's finding Hawkins failed to mitigate their damages and as a result DMCI was not responsible for any general damages.

D A LANDLORD WILL BE RESPONSIBLE TO A TENANT ONLY FOR PHYSICAL INJURIES RESULTING FROM LATENT DEFECTS IN THE PREMISES.

³⁸ *Frobig v. Gordon*, 124 Wash.2d 732, 881 P.2d 226 (1994).

³⁹ AR (06/19/09) Exhibit 14.

The case of *Tucker v. Hayford*⁴⁰ requires physical harm caused by a latent defect causing injury to a tenant. *Tucker v. Hayford*⁴¹ cites the Restatement (Second) of Property⁴² that applies to the Washington RLTA. The Restatement (Second) of Property states:

A landlord is subject to liability for *physical harm* caused to the tenant and others upon the leased property with the consent of the tenant or his subtenant 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 duty of habitability; or
- (2) a duty created by a statute or administrative regulation. (*Emphasis added*).

Tucker v. Hayford involved physical harm and a dangerous condition as a result of the tenant's entire family getting sick as a result of drinking contaminated well water that the landlord had a statutory duty to have tested on an annual basis. Said defect was a latent defect unknown to the tenants and resulted in physical injury. The case of *Dexheimer v. CDS, Inc.*⁴³ previously ruled special and general tort damages were not available to a tenant in a negligence action against the landlord to recover for personal injuries as the tenants sole remedies under the RLTA were limited to those set forth therein. Since the RLTA made no provision for general monetary

40 *Tucker v. Hayford*, 118 Wn.App. 246, 75 P.3d 980 (2003).

41 *Supra*.

42 Restatement (Second) of Property, Section 17.6 (1977).

damages, the tenant was unable to recover the same. *Tucker v. Hayford* overruled *Dexheimer v. CDS, Inc.*, allowing general damages only to the extent of physical harm caused by unknown latent and dangerous defects that were known or should have been known to the landlord. *Lian v. Stalick*⁴⁴ also limits recovery for general damage to tenant's physical injuries. The balance of the rule in *Dexheimer* restricting damages to those given in RCW 59.18 still stands. This statute does not allow general damages for emotional distress. In the case at hand, the defect was patently obvious and there was no dangerous condition once Diels' car crashed into Hawkins' apartment and as conceded by Hawkins no claim for physical injuries or medical damages are being made. As a result any loss of enjoyment, mental anguish, inconvenience, or annoyance is limited to reduction in rental value.

E. THE SUPERIOR COURT CORRECTLY RULED THE DISTRICT COURT ERRED IN NOT ALLOWING CONVERSATIONS BY PLAINTIFFS HAWKINS AND DMCI'S EMPLOYEES WITH CO-DEFENDANTS' INSURANCE ADJUSTER RELEVANT TO THE CAUSE OF DELAYS IN REPAIRS TO PLAINTIFFS HAWKINS' APARTMENT.

The Hawkins' position that insurance is never admissible to show reasonableness is refuted by one of three cases dealing with the issue of other purposes allowed under ER 411 to bring in evidence of insurance. The case of

⁴³ *Dexheimer v. CDS, Inc.*, 104 Wn.App. 464, 17 P.3d 641 (2001).

⁴⁴ *Lian v. Stalick*, 106 Wn.App. 811, 25 P.3d 467 (2001).

Kubista v. Romaine,⁴⁵ is not misplaced as the Hawkins insist. Both this case and *Kubista* deal with issues of failure to mitigate damages. *Kubista* dealt with the issue of a party delaying in finding an employment due to conversations with the opposing party's insurance company. The case at hand deals with Defendant DMCI delaying making repairs as a result of conversations with the Diels' insurance company. The carrier promised to get an adjuster to the scene, insisted upon three contractors to evaluate and bid on the work to be done, and insisted on approval of the bid chosen by Defendant DMCI.⁴⁶ The Hawkins insist in their Superior Court briefs that on "at least ten occasions" Defendant DMCI is citing bad law to support its position. ER 411 and *Kubista v. Romaine* are the law, whether the Hawkins feel it is bad law or not. DMCI did not seek to introduce the conversations with the Co-Defendant Diels' insurance carrier for purposes of showing the Hawkins or the Diels were negligent. It only sought to introduce the evidence to explain the cause of the delays in making repairs. The jury had a duty to determine the reasonableness of the delay. The jury, was denied material facts as to the extent of the delay caused by DMCI. Defendant DMCI had a right to mitigate damages by ensuring payment by the Co-Defendants Diel to reimburse the cost of repairs. Defendant DMCI was precluded from doing exactly that.

⁴⁵ *Kubista v. Romaine*, 14 Wn. App. 58, 538 P.2d 812 (1975).

⁴⁶ VRP (06/09-10/08).

The court in issuing its decision stated,

You may talk about reasons why you think your delay was reasonable without mentioning the fact that it was pursuant to an adjuster's insurance quotes, so that means no use of the word adjuster no use of the word insurance, anything connected to that idea that it was insurance. You certainly can talk about getting bids, if that's what you choose to do, or waiting for contractors, or the kind of thing that -- you said that I'm going to err on the side of safety after looking at this rule and looking at Tegland.⁴⁷

During the course of argument the Court stated to Plaintiff's counsel:

"And so I guess my question to you counsel, would be, how in the world, if reasonableness in the IM-in the delay would be in defense to the common lawsuit your -- your -- arguing how in the world would Dobler be able to defend it if they could not discuss the reason for that delay in whether or not it was reasonable or not, as opposed to negligent? Mr. Amala: That's-that's the bummer for Dobler."⁴⁸

The Hawkins claim DMCI was allowed by the court to present testimony regarding its efforts to find contractors and make the repairs.⁴⁹

What Plaintiffs do not explain is how that would do DMCI any good when it cannot explain it was waiting for Diels' insurance adjuster to evaluate the damage. DMCI was not even allowed to state its own conversations with the Hawkins or the Diels regarding Deils' obligation to pay for the damage.

What good is it to explain the difficulty in obtaining three bids if you could not explain the reason why three bids were necessary? What good is it to

⁴⁷ VRP (06/9-10/08), page 13, lines 13-21.

⁴⁸ Supra.

explain the contractor who is hired delayed five weeks after they were chosen if you could not explain it took several weeks for the insurance carrier to approve the contractor and the bid? DMCI reasonably believed in order to get reimbursed for the work done, Co-Defendant Diels' insurance carrier had a right to evaluate the damage and review the bid. As noted in Petitioners'/Hawkins' brief, the jury awarded one week reduced rent to the Diels and three additional months to DMCI. The gravamen of Petitioners' position is that evidence of the conversations with the insurance carrier is introduced for the purpose of absolving DMCI from negligence. Such is absolutely not the case. As can be seen in the complaint, the actual reason for introducing the evidence was to support its cross claim against the Co-Defendants Diel for the sole purpose of showing DMCI was not the cause of the delay in part or whole and to defend against Plaintiffs' damages pursuant to their causes of action for breach of contract and for violation of the Residential Landlord Tenant Act (RLTA).⁵⁰ The damages awarded by the jury were based upon breach of contract and not upon negligence.⁵¹ It was always the position of DMCI at trial that it acted reasonably under the circumstances. If Defendant DMCI had been able to rely on the insurance carrier's promise to pay after inspection of the premises and further the Diels'

49 CP 60, II. 12-13.
50 RCW 59.18.

insurance carrier's insistence upon three bids to make the repairs, the jury likely would have ruled in favor of Defendant DMCI regarding the reduction in rental value against Plaintiffs Hawkins. The Co-Defendants Diel admitted the repairs to the premises were their obligations as well as any delays in the repair of the premises.⁵² As Plaintiffs Hawkins claim, the jury was angry with DMCI. It is DMCI's position the jury's anger was solely based upon DMCI's not being allowed to explain the reason for their delay.

Plaintiffs Hawkins state in the procedural history the jury held the driver liable for one week's worth of rent and held DMCI liable for the remainder. This fact shows how greatly prejudiced DMCI was by not allowing the reasons for the delay. The prejudice to DMCI was enormous when one realized the Hawkins stated in their responsive brief that they beat the offer of judgment.⁵³ What they do not state is that the offer of judgment was exceeded by \$256. The prejudice to DMCI was enormous in that it also prevented another basis for attorney's fees being asked by DMCI and being denied to Hawkins. The issue becomes doubly important because the attorney fee award granted by District Court to the Hawkins was based upon their prevailing on the breach of contract issue. Co-Defendants Diel admitted to liability for both

51 CP 81-82.

52 AR 5 and 6; and Declaration of Jason Amala dated 11-30-09, Exhibit 7, p. 72 (VRP 06-10-08).

53 CP 72, 1. 1.

the cost of the repairs and the reduced value of the rental.

The Hawkins cite the cases of *Kappelman v. Lutz*,⁵⁴ *Goodwin v. Bacon*,⁵⁵ *Carle v. Earth Stove, Inc.*,⁵⁶ *Todd v. Harr*,⁵⁷ and *Jaeger v. Cleaver Construction Inc.*,⁵⁸ as authority to support the position that the conversations DMCI's employees had with the Diels' insurance carrier are not admissible. The Hawkins also cite ER 411 to support their position. ER 411 states:

Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

The cases cited by the Hawkins primarily deal with personal injury cases and whether or not the party at fault has insurance to cover the costs. Liability insurance, as a rule, has virtually no relevance to the issue as to whether or not a party caused injury to the opposing party. The case of *Kappelman v. Lutz* cited by the Hawkins involved a passenger on a motorcycle suing the driver of the motorcycle for negligently causing her personal injuries when the driver went out of control and hit a deer. Obviously whether or not the driver was insured had nothing to do with the ultimate question as to whether

54 *Kappelman v. Lutz*, 141 Wn.App. 580, 170 P.3d 1189 (2007).

55 *Goodwin v. Bacon*, 127 Wn.2d 50, 896 P.2d 673 (1995).

56 *Carle v. Earth Stove, Inc.*, 35 Wn.App. 904, 670 P.2d 1086 (1983).

57 *Todd v. Harr, Inc.*, 69 Wn.2d 166, 417 P.2d 945 (1966).

58 *Jaeger v. Cleaver Construction, Inc.*, 148 Wn.App. 698, 201 P.3d 1028 (2009)

the driver was at fault for the accident. An interesting quote from *Kappelman* dealt with a different admissibility issue (i.e., whether the driver had the proper motorcycle license endorsement). The court disallowed that evidence under the following reasoning:

“Ultimately the question is whether the accident would have happened if Mr. Lutz had a proper license... whether he had the piece of paper.”

In the case at hand, DMCI is not attempting to show Hawkins or Diels had insurance that could cover the damage to the building. They were not attempting to introduce the conversations with the adjuster for the purpose of showing the Hawkins were at fault for any delays in the time it took to make the repairs. The fault in this case for the damage was admitted by the Diels.⁵⁹

DMCI wished to elicit the testimony not for the purpose of showing who was at fault for the hole in the wall, but for the purpose of showing the insurance carrier was substantially in control of the timing of making the repairs and there were reasonable reasons why the repairs were not immediately made.

Applying the same question in the case at hand, the question this Court could ask would be:

Ultimately, the question is whether the damages attributed to DMCI because of the delay in making repairs would have been as great if DMCI could introduce evidence it did not have sole discretion and control over the timing of repairs.

⁵⁹ AR 5 and 6.

Interestingly, the attorney for the insured parties did not object to the testimony being that they already admitted fault for the entire length of time it took to make the repairs. They disputed only the amount of rent reduction the Hawkins were entitled to.

The following cases cited by the Hawkins do not support their position. The case of *Goodwin v. Bacon*,⁶⁰ was an action by a farmer against a herbicide manufacturer for failure to warn the farmer for the dangers of the herbicide. Evidence of liability insurance of the defendant manufacturer was not relevant to the issue of whether there was a failure to warn by the manufacturer. The court in *Goodwin* cited ER 411 as follows:

Evidence of insurance is inadmissible on the issue of negligence pursuant to ER 411 unless relevant to an issue other than fault such as proof of agency, ownership, or *control*, or bias or prejudice of a witness. A court may allow testimony regarding insurance to overcome the bar of ER 411 only for a proper purpose such as to *rebut an element of a claim* (*Kubista v. Romaine*, 87 Wn.2d 62, at 69, 549 P.2d 491 (1976) or to show bias by advising the jury of a witness relation to an interest in the case (citing *Moy Quon v. Furuya Co.*, 81 Wash. 526, 531-32, 143 P. 99 (1914). (*Emphasis added*).

As opposed to *Goodwin v. Bacon*, the purpose in this case of the proffered testimony was not to show plaintiff or co-defendant was negligent, but to rebut an element of plaintiff's claim for damages resulting from defendant's

alleged breach of contract. The entirety of the cases showing liability insurance is inadmissible deal with one party's claim against the other for negligence. There could be in the case at hand no purpose of the introduction of such evidence to show that the Hawkins were somehow at fault for causing the hole in the wall in the first place or causing the delay. Since that cannot be the purpose, there is no reason to keep the evidence out. The element of the claim DMCI was asserting the testimony was the cause of the damage to the Hawkins or lack thereof and that the control over said damage belonged to the Diels. The case of *Carle v. Earth Stove, Inc.*⁶¹ is an action by property owners against a stove manufacturer whereby the stove manufacturer was awarded a judgment for attorney's fees. The reference to liability insurance evidence not being allowed was dicta in a case involving only the Court of Appeals ruling that an insurance company could be an added third-party following the judgment where the insurance company during the case in chief was in continuous control of the entire lawsuit. The case of *Todd v. Harr, Inc.*⁶² was a personal injury lawsuit brought by a tenant to recover for injuries she suffered when she tripped and fell on a common area stairway. The liability insurance policy of the landlord was irrelevant to the issue of whether or not the defendant was negligent in maintaining the stairway as opposed to

60 *Goodwin v. Bacon*, supra.

61 *Carle v. Earth Stove, Inc.*, supra.

the facts of the case at hand. The existence or nonexistence of an insurance policy had nothing to do with whether the defective stairway caused plaintiff's injuries or to the extent of plaintiff's injuries.

The case of *Jaeger v. Cleaver Construction Inc.*,⁶³ involved a case brought by a property owner against a developer for damages to the owner's property caused by a landslide. In ruling that plaintiffs were partially responsible for their failure to repair (mitigate), the court correctly ruled plaintiffs lack of insurance had nothing to do with their responsibility to repair. In other words, the lack of insurance was proffered to prove plaintiffs were not at fault for their own damages. Again (and this is repetitive), DMCI was not proffering the testimony for the purpose of showing the Hawkins were the cause of creating the hole in the wall or that the Hawkins were at fault for causing the delay in repairs. The Diels admitted they were the cause of both. DMCI was only trying to show the reasons for the delay. Cause is but an element of the damages claimed by Plaintiffs Hawkins. At the very least Diels had a right to view and evaluate the damage. It was nearly three weeks before the insurance company advised DMCI they had no adjuster to perform said evaluation. Even two extra weeks attributed to Diels would have brought the damages to under the offer of settlement of \$2,100.

⁶² *Todd v. Harr, Inc.*, supra.

⁶³ *Jaeger v. Cleaver Construction, Inc.*, supra.

F. ATTORNEY FEE ARGUMENT

1. THE ISSUE OF WHO IS THE PREVAILING PARTY DOES NOT DEPEND UPON WHO SOLELY PREVAILS ON CAUSES OF ACTION INVOLVING ATTORNEY'S FEES.

The Hawkins claim that the only reason DMCI prevailed on its attorney fee argument in Superior Court was because the reversal on the evidentiary ruling made the attorney fees issue moot. Therefore, if the Court of Appeals reverses the evidentiary ruling regarding negotiations, Plaintiffs believe the attorney fee award will automatically be reinstated. However, there were other reasons for reversing the attorney fees award by the District Court. In the letter decision issued by the District Court, Judge Tedrick awarded the Hawkins \$20,000.00 in attorney's fees for obtaining a judgment in the amount of \$2,356.⁶⁴ The decision was made by District Court without oral argument even though argument was requested in the hearing regarding attorney's fees heard September 19, 2008. District Court asked for further memorandums and the decision was made without prior warning. The gravamen of District Court's decision was that Defendant DMCI did not prevail on the cause of action for breach of contract (which was the sole cause in Plaintiffs' complaint), which allowed for attorney's fees.⁶⁵ The Hawkins sued for general and special damages under the theory of common

64 AR 34.

law negligence. The Hawkins also sued for general and special damages claiming Defendant DMCI violated the Residential Landlord Tenant Act. The Hawkins also sued for general and special damages claiming Defendant breached its contract (lease).⁶⁶ The District Court during trial dismissed all claims against Defendant DMCI under the theory of common law negligence and violation of the Residential Landlord Tenant Act. The District Court also dismissed claims for general damages under the Hawkins' theory Defendant DMCI breached its lease contract with Hawkins.⁶⁷ The District Court also dismissed all special damages regarding lost wages and medical costs incurred by the Hawkins under all three causes of action as well as dismissing the general damages under the breach of contract cause of action. The only issue of damages not dismissed was the Hawkins' claim for reduction in rental value during the period of time that it took Defendant DMCI to repair the damage to the Hawkins' apartment.⁶⁸ As stated before, Plaintiffs' counsel stated the general damages were always stated to be in excess of \$40,000.⁶⁹

Prevailing party does not mean the party prevails on the cause of

65 AR 34.

66 AR 1.

67 AR 14.

68 AR 14 and VRP (07/18/08) page 12, line 12 and 22 quoting Plaintiffs' counsel on p. 12, l. 25 through p. 13, l. 2.

69 VRP (07/18/08), p. 12, ll. 11-12.

action in which attorney's fees are allowed. On November 4, 2008, Division Three of the Court of Appeals published the case of *Guillen, City of Sunnyside v. Contreras*.⁷⁰ While the Court of Appeals discussed the term "substantially prevailing," it came to the conclusion that the term means the same as "prevailing party" and that all statutes involving attorney fees to the prevailing party require the prevailing party to substantially prevail. The claim in *Guillen* involved three items of personal property. The first was \$9,342.00 in cash; the second was for a BMW vehicle; and the third was for \$57,990. The claimants prevailed on the return of the BMW and \$9,342.00 cash. The defendants prevailed on the issue of the return of \$57,990.00 in cash. The Court determined neither party was the prevailing party or the substantially prevailing party. The Court of Appeals explains in numerous places in their decision the reasoning for denying attorney's fees.

"In light of the fact that the Legislature used a "substantially prevailing" standard, we do not see legislative intent to award attorney fees to any claimant who prevails in some small part. When the Legislature has wanted to do so in other circumstances, it has written statutes to ensure that the attorney fees are awarded when a party prevails *in any degree*. For instance, in the Industrial Insurance Act, the Legislature has provided in RCW 51.52.130(1) for injured workers to receive complete attorney fees when they prevail to the extent of confirming their right to relief, even if they lose the majority of their claims."⁷¹ (*Emphasis added.*)

⁷⁰ *Guillen, City of Sunnyside v. Contreras*, 166 Wash.2d 1018, 217 P.3d 782 (2008).

⁷¹ *Guillen, City of Sunnyside v. Contreras*. *supra*, Page 9.

By its reliance on the time-tested “substantially prevailing party” standard, we do not believe it intended to allow forfeiture claimants to recover attorney fees unless they prevailed on all the major issues in the case.⁷²

While they prevailed on the two smaller claims, they did not prevail on the most significant claim.⁷³

In the case at hand, the Hawkins prevailed on “some small part” while Defendant DMCI prevailed on “all the major issues in the case.” Other cases also deal with the issue of the definition of the term of “prevailing party.” The statute involved in the award of attorney’s fees in the present case is RCW 4.84.330. It uses the term “prevailing party” as opposed to the terms “substantially prevailing party” as referenced in the statute in the *Guillen, City of Sunnyside v. Contreras* case. *Guillen, City of Sunnyside v. Contreras* cites a litany of cases holding when both parties win significant issues, neither is a “prevailing party” entitled to an award of attorney’s fees under RCW 4.84.⁷⁴ The term “prevailing party” in the cases cited do not discuss whether some of the issues in the case involve an award of attorney’s fees and other issues do not. A prevailing party is a prevailing party regarding all the issues in the case. Just because DMCI could not be the prevailing party for

⁷² *Guillen, City of Sunnyside v. Contreras*. supra, Page 9-10.

⁷³ *Guillen, City of Sunnyside v. Contreras*. supra, Page 10.

⁷⁴ *Am. Nursery Prods., Inc., v. Indian Wells Orchards*, 115 Wn.2d 217, 234-235, 797 P.2d 477 (1990); *McGary v. Westlake Investors*, 99 Wn.2d 280, 288, 661 P.2d 971 (1983); *Puget Sound Serv. Corp. v. Bush*, 45 Wn.App. 312, 320-321, 724 P.2d 1127 (1986); *Tallman v. Durussel*, 44 Wn.App. 181, 189, 721 P.2d 985, review denied, 106 Wn.2d 1013 (1986); and *Rowe v. Floyd*, 29 Wn.App. 532, 535-536, 629 P.2d 925 (1981).

the purpose of being awarded attorney's fees against the Hawkins does not mean they cannot be the prevailing party to prevent an attorney fee award against them.

The rule is similar under Chapter 4.84. At least a dozen provisions of that chapter award costs or attorney fees under varying circumstances to the 'prevailing party.' In those cases, also, when both parties win significant issues, then neither is a prevailing party.⁷⁵

RCW 4.84.330 and *Hertz v. Riebe*⁷⁶ define a prevailing party as "the party in whose favor final judgment is rendered." That definition has been interpreted to mean the party who substantially prevailed.⁷⁷ As a result, if both parties prevail on a major issue neither is a prevailing party.⁷⁸ The case of *Hertz v. Riebe*⁷⁹ further interprets the definition of prevailing party. *Hertz* indicates that the statute does not define the prevailing party as one who prevailed on a claim which authorized attorney's fees. The statute and cases focus rather on the relief afforded to the parties for the entire suit whether or not the underlying claim provides for fees.⁸⁰

Statute providing for award of attorney fees to the prevailing party does not define prevailing party as one who prevailed on a claim which authorized attorney fees; rather, statute focuses on relief afforded to the parties for the entire suit *whether or*

⁷⁵ *Guillen, City of Sunnyside v. Contreras*, supra.

⁷⁶ *Hertz v. Riebe*, 86 Wash.App. 102, 936 P.2d 24 (1997).

⁷⁷ *Marine Enters, Inc. v. Security Pacific Trading Corp.*, 50 Wn.App. 768, 750 P.2d 1290 (1988).

⁷⁸ *Wesch v. Martin*, 64 Wn.App. 1, 822 P.2d 812 (1992).

⁷⁹ *Hertz v. Riebe*, supra.

⁸⁰ *Hertz v. Riebe*, supra; and *Rowe v. Floyd*, supra.

*not the underlying claim provides for fees.*⁸¹ (Emphasis added.)

Hertz v. Riebe was a case involving real estate in which purchasers defaulted on the issue of the return of earnest money and the sellers prevailed on their claim for unpaid rent and expenses. The earnest money agreement allowed attorney's fees to the prevailing party and the claim for unpaid rent and expenses had no attorney fee provision. The Court determined both parties prevailed and neither one was entitled to attorney's fees.

In the case at hand, there is no question Defendants DMCI and UC LLC prevailed on the major issues of damages under common law negligence, the Residential Landlord Tenant Act, and a substantial portion of the damages under the lease agreement. Hawkins prevailed under one comparatively minor issue of reduction in rental value. Even that award was substantially awarded on DMCI's erroneously not being allowed to introduce evidence regarding conversations with Co-Defendants Diels' insurance carrier. The District Court made a grievous error in awarding any attorney's fees to the Hawkins for a \$2,356.00 judgment against DMCI.

2. PLAINTIFFS DID NOT PREVAIL ON THEIR CLAIM FOR BREACH OF CONTRACT NOR DID THEY PREVAIL ON ANY OF THEIR OTHER CLAIMS.

⁸¹ *Hertz v. Riebe*, *supra*.

The Hawkins claim in their brief that Defendant DMCI's attorney lacks understanding and misapplies Washington case law regarding legal fees. They first claim that the Hawkins prevailed on their claim for breach of contract. The Hawkins admit they were awarded only the special damages based upon loss of rent. They were denied special damages based upon lost wages and all general damages alleged under their complaint.⁸² Their second argument is that they were entitled to attorney's fees because they prevailed on the only cause of action allowing attorney's fees. Plaintiffs Hawkins feel that all other causes of action not allowing attorney's fees should be ignored when determining who is the prevailing party. Defendant DMCI prevailed on the general damages claim under the breach of contract theory, which fact was ignored totally by the trial court. DMCI also prevailed on the Hawkins' claims for lost wages and medical costs on their breach of contract theory. While Defendant DMCI prevailed on all other causes of action, Plaintiffs Hawkins totally ignore that the driving force of this case was their claim for general damages (common sense belies any claim that this case would have been in any way brought against Defendant DMCI if not for the claim for general damages, especially where the Co-Defendants Diel admitted they were responsible for all damages actually suffered and proved by Plaintiffs Hawkins).

82 AR 1.

Plaintiffs Hawkins rely heavily on the cases of *Marassi v. Lau*,⁸³ *Transpac Development, Inc. v. Oh*,⁸⁴ and *JDFJ Corp v. International Raceway, Inc.*,⁸⁵ to support their position. *Transpac Development Inc., v. Oh* and *JDFJ Corp v. International Raceway, Inc.*, cite *Marassi v. Lau* and in doing so criticized *Hertz v. Riebe*. It is interesting to note that *Marassi v. Lau* did not mention *Hertz* and rightfully so. *Marassi v. Lau, Transpac Development, Inc., v. Oh*, and *JDFJ Corp. v. International Raceway, Inc.*, all involve causes of action for breach of contract. They did not involve (as we do in this case) any claim for general damages nor did they involve any claim for common law negligence or breach of the Residential Landlord Tenant Act. On the other hand, *Hertz v. Riebe*, included a non-attorney fee cause of action against one contractual cause of action that did allow for attorney's fees. *Hertz* stated in that case the other cause of action that had no attorney fee provision should be considered in determining who the prevailing party is. *JDFJ Corp, Marassi*, and *Transpac* all included only attorney's fees allowed causes of action. In those cases and those cases alone, the proportionality approach to attorney fees should be applied. Even if the Hawkins were correct, the District Court in this case did not apply the proportionality approach required by *Marassi v. Lau* and followed in *Transpac* and *JDFJ Corp*. As Plaintiffs Hawkins state in their

83 *Marassi v. Lau*, 71 Wn. App. 912, 859 P.2d 605 (1993).

84 *Transpac Development, Inc. v. Oh*, 132 Wn.App. 212, 130 P.3d 892 (2006).

brief, the District Court spent time distinguishing what portion of the attorney's fees was allotted to the case against Defendant DMCI and which was allotted against Co-Defendants Diels. The trial court did not consider Defendant DMCI's defeating a substantial portion of the Plaintiffs' breach of contract cause of action. In *Marassi v. Lau* the court stated,

In some, we hold that when several distinct and severable breach of contract claims are at issue, the Defendant should be awarded attorney's fees for those claims it successfully defends, and the Plaintiff should be awarded attorney's fees for the claims it prevails upon and the award should then be offset.⁸⁶

This proportionality analysis was ignored by the District Court in its award of attorney's fees and not reached by the Superior Court when it decided the attorney fee issue was moot.

Plaintiffs also want to claim that the case of *Guillen, City of Sunnyside v. Contreras* actually supports Plaintiffs' claim for attorney's fees more than Defendant DMCI's position that neither party is the prevailing party. *Guillen*⁸⁷ cites many cases for the position that where one party prevails on only a marginal issue it is not a prevailing party and states, "When both parties win significant issues, then neither is the prevailing party." *Guillen, City of Sunnyside v. Contreras* in footnote three on page eight supports Defendant

85 *JDFJ Corp v. International Raceway. Inc.*, 97 Wn. App. 1, 970 P.2d 343 (1999).

86 *Marassi v. Lau*, *supra*.

87 *Guillen, City of Sunnyside v. Contreras*. *supra*, Page 8.

DMCI's position that the cases cited by the Hawkins apply the proportionality rule only on cases "where both parties prevail on discrete contractual issues" and cited *Hertz* that declined to follow *Marassi* where both contractual and non-contractual claims apply. The case at hand is a *Hertz* case, not a *Marassi* case. *Guillen* is the first case to apply the distinction at the same time it is distinguishing that case with *Marassi v. Lau*, *Transpac v. Oh*, and *JDFJ Corp. v. International Raceway*. *Hertz*, *Guillen*, and the litany of cases stating that neither side is the prevailing party when both parties win significant issues should apply to the case at hand, whether on the proportionality analysis regarding the breach of contract cause of action as in *Marassi* or on the totality of the issues in this case (as in *Hertz* and *Guillen*).

V. CONCLUSION.

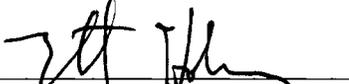
This Court should modify the summary judgment order to uphold the trial court's ruling dismissing Hawkins' cause of action for negligence and general damages based upon negligence, breach of contract and violation of the Residential Landlord Tenant Act. The Court should affirm the Superior Court's reversal of the District Court's evidentiary ruling and

award of attorney fees.

Respectfully submitted,

DATED:
August 26, 2010

EVERETT HOLUM, P.S.

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FILED
COURT OF APPEALS

10/12/07 AM 11:08

STATE OF WASHINGTON

BY _____
CJDN

IN THE COURT OF APPEALS

STATE OF WASHINGTON

DIVISION II

DON HAWKINS and GERI
HAWKINS,

Appellants,

vs.

DOBLER MANAGEMENT
COMPANY, INC. dba UNIVERSITY
COMMONS apartment complex,

Respondents/Cross
Appellants.

NO. 39993-8-II

DECLARATION OF
SERVICE

Everett Holum states:

I am the attorney for Respondents/Cross Appellants in the above-entitled cause of action, over 18, competent to testify on the matters stated herein and do so based on personal knowledge.

On August 27, 2010, I delivered one original and one true and correct copy of Respondents'/Cross Appellants' Opening Brief and Responsive Brief to Appellants' Opening Brief and Declaration of Service by personally delivering the same to *The Court of Appeals of the State of Washington, 950 Broadway, Suite 300, Tacoma, Washington 98402*. In addition, I delivered one true and correct copy of Respondents'/Cross Appellants' Opening Brief and Responsive Brief to Appellants' Opening Brief and Declaration of Service by personally delivering the same to *Mr. Jason P. Amala 911 Pacific Ave Ste 200 Tacoma WA 98402-4413*.

I hereby declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED at Tacoma, Washington, on August 27, 2010.



Everett Holum, WSBA #700