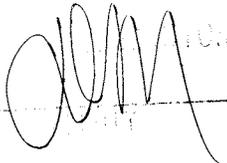


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STATE OF WASHINGTON  
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No. 40219-0-II

**IN THE COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

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**JAMES BRETT CULPEPPER,  
Plaintiff- Appellant**

VS

**FIRST AMERICAN TITLE INSURANCE COMPANY,  
and HOLLIS MITSUNAGA, a single individual,  
Defendants- Appellees**

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**APPEAL FROM THE SUPERIOR COURT OF THE STATE OF  
WASHINGTON FOR THURSTON COUNTY**

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**THE HONORABLE THOMAS McPHEE**

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**REPLY BRIEF OF APPELLANT**

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### STATUTES

## **ARGUMENTS AND REPLY**

This Reply Brief is submitted in response to the Brief of Respondent Hollis Mitsunaga and the Brief of Respondent First American Title Insurance Company.

A. THERE WAS NO ACCORD AND SATISFACTION BECAUSE THERE WAS NO CLAIM OR BONA FIDE DISPUTE UPON WHICH THE CLAIM OF ACCORD AND SATISFACTION COULD REST.

In his opening brief Mr. Culpepper (hereinafter "Culpepper") asserted that there was no claim to be settled between himself and Hollis Mitsunaga (hereinafter "Mitsunaga") which would support an accord and satisfaction. Mitsunaga, in her brief has argued that in fact there was a bona fide dispute between Mitsunaga and Culpepper. However, review of the transcript and the evidence produced at time of trial clearly shows that there was no claim existing until Culpepper discovered that First American Title Insurance Company had erroneously included Mitsunaga's name on title to the real property at issue in this case.

There is no citation to the report of proceedings or exhibits that does or could establish an existing claim. There is no evidence nor testimony on behalf of Mitsunaga that at any time she and Culpepper had entered into any kind of an

agreement by which she would be paid for her efforts in improving the real property purchased by Mr. Culpepper.

It is submitted that without an existing claim preceding the discussions between Mitsunaga and Culpepper to clear title to the real property there could be no accord and satisfaction derived from Mitsunaga's claims of money to participate in selling the property. Mitsunaga's demand for money was in return for her cooperation in selling the real property (CP 11-page 3; Finding #15)The mistake of First American Title Insurance Company in wrongfully including Mitsuanaga's name on title to the real property turned out to be fortuitous for Mitsuanaga. Without that mistake Mitsunaga had nothing to claim, there was no agreement to be paid or compensated for the work she had done. There is no evidence that there was any such agreement made or entered into prior to discovery of the defective title to the real property.

In *Kibler vs Frank L. Garrett & Sons, Inc*, 73 Wn. 2d 523, 539 P.2d 416 (1968) the Supreme Court reversed a finding of the Superior Court that there had been an accord and satisfaction between the plaintiff and the defendants. A comment by Justice Rosellini writing for the majority of the court is appropriate in this action. He stated "It is true that the courts look with favor on compromise, but this means genuine compromise, arrived at through mutual agreement, and not compromise fallen into inadvertently."

It is Mr. Culpepper's contention in this appeal and in the case at trial that Mitsunaga simply took advantage of the mistake made by First American Title

Insurance Company. Prior to discovery of the mistake in title to the real property there was no claim which existed between Mitsunaga and Culpepper. Therefore there can be no accord and satisfaction.

B. MITSUNAGA WAS UNJUSTLY ENRICHED.

In her responding brief, Ms. Mitsunaga claims that she was not unjustly enriched because (1) the payment [by Culpepper] was not coerced by her; and (2) she was entitled to payment for the work she did.

Mitsunaga did coerce Culpepper, forcing him to make the payment in order to complete the sale of the property. Had he not sold the property he would have had to continue maintaining the purchase of two separate residences plus paying rental on a third (RP 88).

There was unjust enrichment because Mitsunaga was not entitled to payment for the work that she did relating to the real property. There had been no agreements, expressed or implied, at any time that she would be entitled to payment for the work. Again, it was simply a fortuitous chain of events which lead to the fact that she was wrongfully on title to the real property which had been purchased by Culpepper and therefore allowed her to use her position to coerce him into paying her.

C. MR. CULPEPPER'S CLAIM AGAINST FIRST AMERICAN TITLE INSURANCE COMPANY WAS CLEARLY ESTABLISHED.

As described and set forth in plaintiff's appellant brief, the record clearly establishes that First American Title Insurance Company breached its contract

with Mr. Culpepper in closing the purchase of certain real property by him incorrectly. See generally Findings of Fact 4, 5, 6, 7, 8, 9, 10, and 13. (CP 11- pages 2 and 3) Contrary to the contention of First American Title Insurance Company, the trial court did not rule that Mr. Culpepper's case against First American Title Insurance Company was not established as to the underlying liability. Rather, the court concluded that plaintiff's breach of contract claim against First American Title Insurance Company was not established as to the amount of damage.

It is Mr. Culpepper's contention now and at time of trial that the amount of damage was clearly established. Mr. Culpepper's damage was and is the amount of \$55,000 which he was forced to pay to Ms. Mitsunaga in order to clear title to real property he was selling. In fact, it was the payment of \$55,000 that was demanded by Mitsunaga "...in order for her to cooperate in the sale of the property and to sign off on sale documents." (CP 11- page 3) This amount of money is the damage incurred by Culpepper and should be paid by First American Title Insurance Company to Culpepper because of its breach of contract.

D. FIRST AMERICAN TITLE INSURANCE COMPANY IS NOT ENTITLED TO THE BENEFIT OF ANY ACCORD AND SATISFACTION FOUND EXISTING BETWEEN MR. CULPEPPER AND MS. MITSUNAGA.

In its appellant brief, First American Title Insurance Company argues that Culpepper's payment to Mitsunaga resolved all of Culpepper's claims against

Mitsunaga and First American Title Insurance Company. Its contention is that the defense of accord and satisfaction extends to First American Title Insurance Company. Culpepper contends that if in fact an accord and satisfaction exists between he and Mitsunaga, First American Title Insurance Company is not entitled to the benefit of that to eliminate its liability for breach of contract.

First American Title Insurance Company cites *Oregon Mutual Ins. Co. v. Barton*, 109 Wn. App. 405, 413, 36 P.3d 1065 (2001) in support of its contention that it benefits from any accord and satisfaction between Culpepper and Mitsunaga. *Oregon Mutual* involved a dispute between an insurance company and its insured. The Court of Appeals wrote:

An accord and satisfaction is a new contract—a contract complete in itself. (Citations omitted.) Its enforceability does not depend on the validity of the antecedent claim. Each party's promise in the new agreement is supported by an entirely new consideration—the return promise of the other. (Citation omitted.) And so the accord is enforceable as a contractual agreement in its own right. (Citation omitted.) **It cuts off all defenses and arguments based on the underlying contract.** (Citation omitted.)

*Oregon Mutual Ins.*, 109 Wn. App. at 413-414, 36 P.3d 1065 (emphasis added).

In this case, the only possible “underlying contract” was the payment of \$55,000 in return for Ms. Mitsunaga’s signature on a quit claim deed. The action against First American Title Insurance Company is based on another contract, the escrow contract. Thus, the defense of Accord and Satisfaction asserted by Mitsunaga is not available to First American Title Insurance Company.

The second case quoted by First American Title Insurance Company is *Keane v. Fidelity S&L Assn.*, 173 Wn. 199, 208, 22 P.2d 59 (1933): “The general rule that the discharge of one joint debtor discharges his co-joint debtors is applicable to a discharge of one joint debtor by way of accord and satisfaction.” In that case, the *Keane* court wrote, “[Keane] was either jointly liable with McDonald [the owner] or [Keane] was a guarantor.” Citing *Keane*, the Supreme Court wrote in *Kitsap County Credit Bureau, Inc. v. Richards*, 52 Wn.2d 381, 382, 325 P.2d 292 (1958), that the rule is “a creditor’s unconditional release of the principal debtor discharges the guarantor.”

First American is **not** a “joint debtor” with Mitsunaga -- at this point, First American Title Insurance Company is not even a debtor of Culpepper. A “debtor” is “one who owes an obligation to another, esp. an obligation to pay money.” Black’s Law Dictionary (7<sup>th</sup> ed. 1997), page 411. A “joint debtor” is one of two or more debtors jointly liable for the same debt.” *Id.* at page 412.

First American Title Insurance Company is not a guarantor of any debt owed by Mitsunaga to Culpepper; Mitsunaga and First American Title Insurance Company are not partners; and Mitsunaga and Culpepper did not both sign a contract promising the same performance to Culpepper. *See Seafirst Center Ltd. Partnership v. Kargianis, Austin & Erickson*, 73 Wn. App. 471, 474-475, 866 P.2d 60 (1994). Mitsunaga and First American Title Insurance Company are not spouses. *See Ewing v. Van Wagenen*, 6 Wn. 39, 48, 32 P. 1009 (1893). Mitsunaga and First American Title Insurance Company are not joint venturers.

*See Public School Employees of Wash. v. Crowe*, 88 Wn. App. 161, 165, 943 P.2d 1164 (1997). There is no basis to find that First American Title Insurance Company and Mitsunaga are now or will be in the future “joint debtors” to Culpepper.

First American Title Insurance Company may be found liable for its own breach of contract because it did not follow escrow instructions, which resulted in Mr. Culpepper paying \$55,000 to Mitsunaga. However, First American Title Insurance Company’s breach of its own contract with Culpepper is separate and distinct from Culpepper’s claims against Mitsunaga.

Culpepper’s claim of unjust enrichment against Mitsunaga is not based on First American Title Insurance Company’s breach of contract, but on the doctrine of “quasi contract,” an “obligation[ ] created by the law when money or property has been placed in one person's possession, under such circumstances that in equity and good conscience, he ought not to retain it.” *Bill v. Gattavara*, 34 Wn.2d 645, 650, 209 P.2d 457 (1949).

Even if there was an accord and satisfaction between Mitsunaga and Culpepper, there has been no accord and satisfaction of Culpepper’s claim against First American Title Insurance Company because the two defendants are not “joint debtors.”

Respectfully Submitted,



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Attorney for Plaintiff

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BY: DM

**IN THE COURT OF APPEALS, DIVISION II  
COUNTY OF PIERCE, STATE OF WASHINGTON**

JAMES BRETT CULPEPPER,  
Plaintiff,  
  
vs  
FIRST AMERICAN TITLE INSURANCE  
COMPANY, and HOLLIS MITSUNAGA, a  
single individual,  
Defendants.

APPEAL NO. 40219-0-II

CERTIFICATE OF SERVICE

Pursuant to the laws of the State of Washington, the undersigned certifies under penalty of perjury that a true and correct copy of the **REPLY BRIEF OF APPELLEE, and this certificate of service** were on this date, sent out for service to the following:

via Regular US Mail:

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Signed at Tacoma, Washington this 24<sup>th</sup> day of August, 2010.

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