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Court of Appeals  
Division II  
State of Washington  
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No. 53636-6-II

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION TWO

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OTTO GUARDADO

Appellant

v.

DIANA GUARDADO, JAMES KIMBALL d.b.a. REALTY PRO, AND  
MARK AND MICHELLE TAYLOR

Respondents

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ON REVIEW FROM THE SUPERIOR COURT OF THE STATE OF  
WASHINGTON FOR CLARK COUNTY

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APPELLANT'S OPENING BRIEF

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OTTO GUARDADO  
6135 NE 14<sup>th</sup> Ct.  
Vancouver, WA 98665  
360-713-2448

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## I. INTRODUCTION

Back from remand from this Court's previous decision, this case springs from errors made by the Skamania Superior Court. Three years ago, the trial court inappropriately modified an order on real property disposition in one cause using an order in a different cause of action. In a case of first impression, this Court held that the trial court did not have authority to modify the parties' dissolution decree in a breach of contract action.

By the time this Court had published its opinion, the Respondent had moved forward with the trial court's order to sell the Appellant's home at a greatly-discounted price. A third-party buyer made an intervening purchase with the help of the Respondent, a realty agency. The buyer was able to obtain a substantial discount, and the realty agency received a commission from the sale. They both relied on the vacated trial court's order to retain the proceeds from the intervening sale. On remand, the trial court granted dismissal of the Respondent from a restitution and unjust enrichment claim because they were "entitled to be compensated".

But because the Skamania court was not able to hear a dissolution modification within the context of a breach of contract action, it acted without authority, and also lacked subject matter jurisdiction. The order selling the Appellant's home and appointing the realtor is therefore void. Rather than considering whether there were any genuine issues of material fact and if the Respondent was entitled to judgment as a matter of law, the trial court instead made a decision in equity.

Accordingly, this Court should apply the standards of CR 56 to the facts of the case, reverse the decision of the trial court, and remand.

## II. ASSIGNMENTS OF ERROR

1. The court erred by failing to weigh if the original Skamania trial court order was void due to lack of subject matter jurisdiction, authority to enter an order, or both.

2. The court erred by applying the wrong standard of CR 56 by granting summary judgment in favor of James Kimball dba Realty Pro, Inc. (“Realty Pro”).

3. The court erred by making a decision in equity that Realty Pro was “entitled” to be paid for its services.

4. The court erred by solely relying on the Restatement of Restitution §74 (1937) in its interpretation of RAP 12.8.

## III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the original Skamania trial court order lack subject matter jurisdiction or authority that rendered the judgment void?

2. Did the court appropriately apply the standards of summary judgments to the facts filed in this case?

3. Did the court inappropriately make an equitable decision dismissing Realty Pro, when it should have determined if there were any genuine issues of material fact?

4. Did the court appropriately rely on §74 of the Restatement of Restitution in interpreting RAP 12.8, or should it have used a different standard?

#### IV. STATEMENT OF THE CASE

##### *A. Skamania Trial, Subsequent Appeal, and Home Sale*

Due to the numerous cause numbers, a history is provided in the appendix.

Diana Guardado won judgment against Otto Guardado in a breach of contract case (cause no. 14-2-00141-1) in Skamania County Superior Court. CP 7-8. The trial court ordered Otto<sup>1</sup> to sell his home previously awarded to him in the parties' dissolution case (cause no. 08-3-00029-5). CP 17. The subject home is located in Clark County, WA. CP 1. Identical judgments were entered in both cause numbers. CP 26.

Otto's appeal to this Court was perfected June 1, 2016. CP 8. The trial court set a supersedeas bond amount for \$40,000, which Otto could not afford. CP 79, 115-116. A commissioner of this Court set the supersedeas bond at \$10,000. CP 180. Otto posted a bond for \$10,000 (*id.*), but the commissioner later reversed and set the bond back at \$40,000 (CP 181).

Rick Shurtliff, an agent of Realty Pro<sup>2</sup>, was assigned as the selling agent for Otto's home by a special master assigned by the court. CP 177. Shurtliff allegedly signed a contract with the special master, ostensibly for Otto's benefit. CP 236. If so, Mr. Shurtliff owed certain duties to "all parties" to deal in good faith (RCW 18.86.030), and to "tak[e] no action that is adverse or detrimental to the seller's interest" (RCW 18.86.040(1)(a)). No valid contract

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<sup>1</sup> To avoid confusion, first names are used to identify parties. No disrespect is intended.

<sup>2</sup> James Kimball is the governor and registered agent of Realty Pro, Inc. CP 8.

has ever been filed, and it is unclear if either party produced a valid contract to list the house for sale. CP 211-212.

Mr. Shurtliff was aware of Otto's appeal. CP 87, 189, 199. Mr. Shurtliff wrote a declaration on Diana's attorney's pleading paper alleging misconduct and interference by Otto. *Id.* He suggested to the court that he could sell it to an investor "without them even seeing it" for around \$250,000. CP 88, 200. Otto strenuously denied Mr. Shurtliff's accusations. CP 133-138, 181.

On August 25, 2016, the trial court held Otto on contempt based on Mr. Shurtliff's declaration. CP 202. The court did not make any findings, let alone findings of Otto's alleged misconduct. CP 202. The contempt order made no provisions to purge contempt. *Id.* The order fixed the price of Otto's home at \$240,000. *Id.* The approximate value at the time was \$325,000-\$335,000. CP 8, 31, 92, 122.

Four days later, this Court temporarily stayed the sale of the house (CP 119, 145), but ultimately denied a permanent stay. Mr. Shurtliff reported that both<sup>3</sup> potential buyers were willing to wait until after the stay. CP 146-147.

After the stay lifted, Diana and Realty Pro continued to carry out the judgment. Mr. Shurtliff was given the number for Otto's attorney and asked to call her, but Mr. Shurtliff did not. CP 196, 197, 200. Mr. Shurtliff emailed Diana's attorney on October 13 and 27, 2016, expressed concern that the liabilities on the house exceeded the court's fixed price of \$240,000, and asked

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<sup>3</sup> Brett Lawrence also made an offer on the property at one point, but ultimately withdrew. CP 115, 150; RP 200. He is not a party to this matter.

for his advice. CP 82-83, CP 190. Diana's attorney expressed he was not concerned about other parties outside his client, the realtor, and the special master. CP 82.

Otto's first appellate brief to this court was sent to the Court of Appeals on November 4, 2016 and was filed on November 15, 2016. CP 124. On the same day, Mark Taylor was given notice of Otto's appeal and the legal dispute surrounding the property. CP 70. Mark and Michelle Taylor purchased Otto's home on November 17, 2016 for the fixed price of \$240,000. CP 8. Realty Pro was paid \$10,000 in commissions. CP 8, 41, 168. All costs associated with selling the home were assigned to Otto and taken from his proceeds. CP 38-41.

Post-sale, the court held Otto in contempt. CP 142-143. As with the first contempt order, the court did not make any findings or include a purge clause. *Id.*

This Court reversed the trial court in a part-published opinion. *Guardado v. Guardado*, 200 Wn. App. 237, 402 P.3d 357 (2017).

Pursuant to this Court's opinion, the Skamania court vacated several pleadings in cause numbers 08-3-00029-5 and 14-2-00141-1 under CR 60, including the findings, final judgment, order on supersedeas bond, and two separate contempt orders. CP 26-30.

*B. Change of Venue to Clark County and Motion to Dismiss*

Skamania cause no. 14-2-00414-1 (the breach of contract case) was transferred to Clark County (assigning new cause no. 18-2-00645-1), where the

subject property is located. CP 1-3. Skamania cause no. 08-3-00029-5 (the dissolution case) was not transferred nor consolidated.

Otto opened a separate action against Realty Pro and the Taylor for restitution and unjust enrichment. CP 7-32. His complaint alleged that the home sale was void (CP 9), and that Realty Pro was unjustly enriched by retaining sales commissions (CP 10).

The trial court consolidated the two cases, bringing Diana, the Taylors, and Realty Pro together as the defendants, and Otto as the Plaintiff under Clark cause no. 18-2-01081-4.

Realty Pro and the Taylors moved for dismissal. CP 167-176. 239. The court heard both motions on June 13, 2019. The court granted dismissal for Realty Pro, but denied dismissal for the Taylors. CP 239-241. Otto and the Taylors moved the court for reconsideration. *Id.* Both were denied on June 26, 2019. CP 241.

Otto appeals. CP 242.

## V. ARGUMENT

### *A. Introduction*

The lower court relied heavily on *Ehsani v. McCullough Family P'ship*, 160 Wn. 2d 586, 159 P.3d 407 (2007) in making its decision on summary judgment in favor of Realty Pro. The court likened Realty Pro's position to the attorney's position in *Ehsani*. But *Ehsani* is not controlling because that case did not involve a void or vacated judgment, nor was any bad faith alleged.

The lower court did not apply the standards of CR 56 to the facts of this case. Had it done so, it would have determined that the Skamania court's lack of authority to enter its judgment was a genuine issue of material fact that potentially rendered it, and the subsequent home sale, void. The court also should have considered if the facts surrounding Realty Pro's agent's conduct exempted it from claiming a defense under the Restatement of Restitution §74, comment h.

*B. Standards of Review*

Realty Pro filed a Motion to Dismiss on May 31, 2019 (CP 167-176) and is therefore the moving party in this matter. Otto is the non-moving party.

A motion to dismiss that is supported by materials outside of the complaint must be treated as a summary judgment motion, even when not designated as such by the moving party. CR 12(c), *also Hope v. Larry's Markets*, 108 Wn. App. 185, 191-192, 29 P.3d 1268 (2001). The burden of proving, by uncontroverted facts, that no genuine issue exists is upon the moving party. *LaPlante v. State*, 85 Wn. 2d 154, 158, 531 P.2d 299 (1975).

For a motion for summary judgment under CR 56, the court views evidence and reasonable inferences in the light most favorable to the nonmoving party. *Keck v. Collins*, 184 Wn.2d 358, 370, 357 P.3d 1080 (2015). Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. CR 56(c). A material fact is one on which the outcome of the litigation depends. *In re Estate of Black*, 153 Wn.2d 152, 160, 102 P.3d 796 (2004).

The appellate courts review summary judgments de novo and perform the same inquiry as the trial court. *In re Marriage of Kastanas*, 78 Wn.App. 193, 197, 896 P.2d 726 (1995).

*C. The Skamania Court order is void and the subsequent sale is also void.*

Because the Skamania Court acted outside statutory proceedings when modifying Diana and Otto's dissolution decree, it did so without authority. The court did not have the ability hear a case that modified a dissolution decree within the context of a breach of contract case. As this Court noted in *Guardado*, the Skamania court acted outside of the statutory proceedings of RCW 26.09.170 (at 244). The jurisdictional limits of courts in statutory proceedings, such as RCW 26.09.170 (divorce modification), is defined by the governing act. *In re Marriage of Soriano*, 44 Wn. App. 420, 421, 722 P.2d 132 (1986). The Skamania court exceeded its jurisdiction and the resulting sale should be deemed void.

A judgment is void when the court does not have personal or subject matter jurisdiction, or "lacks the inherent power to enter the order involved." *Bergren v. Adams County*, 8 Wn. App. 853, 856, 509 P.2d 661 (1973). The remedy of modifying Otto and Diana's dissolution decree was never before the court, and the court reached beyond the scope of its authority when it did so. "Without statutory authority, any action taken is invalid." *Albice v. Premier Mortg. Servs. of Washington, Inc.*, 174 Wn. 2d 560, 568, 276 P.3d 1277 (2012).

The resulting sale is also invalid.. In *Timberland Bank v. Mesaros*, 1 Wn.App. 2d 602, 406 P.3d 719 (2017), this Court held that in a sale occurring

without statutory authority, the resulting sale was void (at 607). Here, the subsequent sale to the Taylors cannot be deemed valid if the judgment giving the sale authority is not valid.

The court did not just lack the authority to enter an order, it lacked the authority to modify the divorce decree altogether. Because a divorce modification is controlled by statute, a court exceeds its authority when stepping outside of this statutory constraint. The Skamania court decided a type of controversy that it had no authority to adjudicate, and therefore lacked subject matter jurisdiction. *Marley v. Dep't of Labor & Indus. of State*, 125 Wn. 2d 533, 539, 886 P.2d 189 (1994) (superseded on other grounds).

The trial court noted that the judgment and order lacked subject matter jurisdiction. CP 240. Even Realty Pro's pleadings seem to acknowledge that the Skamania Court did not have subject matter jurisdiction. CP 209-210. There are no agreements between Otto and Realty Pro to sell his home, and Otto never voluntarily agreed to sell his home. Through the now-vacated judgment, Realty Pro received compensation that it has unjustly retained. When someone receives monies paid pursuant to a void decree, the weight of authority suggests that they should be compelled to return it. *In re Marriage of Hardt*, 39 Wn. App. 493, 499, 693 P.2d 1386 (1985).

Realty Pro would like to rely on the original order because they claim that it was "facially valid" to a lay person (i.e. a realty agent). RP 22:16-23; 23:1-6; 23:15-19. But a void order is never valid, regardless of how legitimate it appears to a lay person. This is reinforced by the fact that a challenge to a void

order may be brought at any time. *Matter of Marriage of Leslie*, 112 Wn.2d 612, 618–19, 772 P.2d 1013 (1989).

Because the effect of the sale order was to grant both third parties a financial windfall, it has been hotly contested. Realty Pro was granted a commission by a court that never had authority to do so in the first place. This Court should not allow Realty Pro to profit from a judgment that was subsequently vacated under CR 60. Accordingly, the lower court’s decision to dismiss Realty Pro should be reversed and remanded for further proceedings.

*D. The trial court did not appropriately apply the standards of CR 56 to the facts.*

In light of the reversal and subsequent vacation of the orders, the parties disagree whether the resulting sales contract<sup>4</sup> granting Realty Pro sales commission was valid or not. Summary judgment is appropriate solely when reasonable minds could reach but one conclusion. *Dowler v. Clover Park Sch. Dist. No. 400*, 172 Wn.2d 471, 484, 258 P.3d 676 (2011). Realty Pro has not met its burden that reasonable people could not disagree on the issue of the validity of Realty Pro’s alleged contract. *Youker v. Douglas County*, 178 Wn.App. 793, 327 P.3d 1243 (2014).

Regardless of whether the trial court believed that Realty Pro was “entitled” to be compensated from the sale proceeds, the trial court was required to accept the allegations in Otto’s complaint as true. *Berge v. Gorton*, 88 Wn.2d

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<sup>4</sup> Assuming a valid contract exists. As previously noted, Otto is not aware of any contract between Realty Pro and Otto, or between Realty Pro and the special master, that has been filed or before a court.

756, 759, 567 P.2d 187 (1977) (“Factual allegations of the complaint must be accepted as true for purposes” of reviewing a ruling on a motion to dismiss). Because Otto clearly alleged in his complaint that the Skamania order was void, the court should have considered Realty Pro’s claim in light of a void judgment.

In *Timberland Bank v. Mesaros*, 1 Wn.App. 2d 602, 406 P.3d 719 (2017), this Court examined a sheriff’s sale that was held outside the authorized statutory period. Because the sale occurred “without statutory authority”, it rendered the sale void. *Mesaros* at 607. In the instant case, the Skamania court acted outside of statutory proceedings. *Guardado* at 244. A void sale is a “material fact” that would prevent Realty Pro from prevailing. CR 56.

Instead, it made a decision in equity that Realty Pro “completed their task and was entitled to be compensated from the proceeds”. CP 241. The court did not consider any of the aggravating material factors that weigh against Realty Pro’s position: Are there questions about the validity of the trial court order; was the subsequent sale void; did Mr. Shurtliff act in bad faith (CP 131-138)? Another concern is that the contempt order lowering the sale price was done without any findings or purge clause. Specific findings are required on a civil order on contempt. *State ex rel. Dunn v. Plese*, 134 Wn. 443, 450, 235 P. 961 (1925), accord *State v. Mecca Twin Theater & Film Exchange, Inc.*, 82 Wn.2d 87, 92, 507 P.2d 1165 (1973). The court ignored these concerns and the standards of CR 56 when reaching its decision.

It is clear that Realty Pro's agent had no intention of working cooperatively with Otto. Yet, he accepted financial compensation under the premise that he would execute his duties under RCW 18.86.030, .040. He did not. There is also a question about whether Mr. Shurtliff engaged in bad faith and disloyal conduct by seeking advice from Diana's attorney and writing a critical declaration against Otto. RCW 18.86.040.

It is also clear that Otto never gave his consent for his house to be sold. Whether his consent could be conferred to the special master (and if the special master indeed had a valid contract with Realty Pro) is also a genuine issue that the trial court will have to wrangle with.

Because these present genuine issues of material fact that would determine the outcome of this case, the trial court erred. A genuine issue of material fact exists when reasonable minds could differ on the facts controlling the outcome of the litigation. *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008).

Accordingly, this Court should reverse and remand.

*E. The trial court inappropriately relied only on the Restatement of Restitution §74 in determining summary judgment.*

The Court relied heavily on *Ehsani v. McCullough Family Partnership* for proof that Realty Pro was not liable for restitution, particularly the *Ehsani* court's statement that "appropriate circumstances" for restitution under RAP 12.8 "may" be identified by the Restatement of Restitution §74 (at 590). This Court apparently construed that *Ehsani* prescribes *only* §74 for interpretation

of RAP 12.8; *Ehsani* does not preclude the use of other authority, and in fact, encourages it (at 590).

In *Ehsani*, this state's Supreme Court held that RAP 12.8 is ambiguous because the phrase "in appropriate circumstances" is not defined therein or in any related statute, so requires judicial construction based on other authorities. At 590. They held that "appropriate circumstances" for providing restitution under RAP 12.8 "may" be identified by examining the Restatement of Restitution §74. *Id.* The use of the word "may" is permissive. See *Rudolph v. Empirical Research Sys., Inc.*, 107 Wn. App. 861, 866, 28 P.3d 813 (2001). The *Ehsani* court never intended or held that the Restatement of Restitution §74 encompassed *all* the remedies under RAP 12.8.

Realty Pro argued that it was appropriate to interpret RAP 12.8 solely in light of the Restatement of Restitution §74, and not §73. RP 22:10-15. The trial court apparently agreed. RP 24:19-20. Realty Pro also incorrectly argued that "no Washington case cit[es] Restatement of Restitution, Section 73". RP 22:1-6. In fact, *Malo v. Anderson*, 76 Wn. 2d 1, 454 P.2d 828 (1969) (a pre-RAP restitution case) turned on Restatement of Restitution §73, comment e (at 5). The court should have reasoned that §73 could potentially apply under Otto's arguments. RP 20:16-25.

The application of the various sections is broad. We can look at the Restatement of Restitution itself. §72, comment b, states how to apply the different restitution sections:

Type of judgment	§72	§73	§74
1. Valid in all respects			
2. Valid until appeal taken	X		X
3. Valid except subject to attack by proceedings in equity	X		X
4. Void		X	X

Assuming, without deciding, that Otto’s claim that the Skamania order and/or the resulting house sale is void, the court could appropriately also look at §73 for support. Even if the court felt the judgment was “valid except subject to attack by proceedings in equity” (type 3, above), it would still have to examine §72. Accordingly, the court erred by too narrowly examining the authority on restitution.

Further, as the *Ehsani* court pointed out, §74 of the Restatement applies to “valid execution sales[s] upon a judgment which is not void” (at 592). Here, there was no execution sale, and Otto argues and asserted in his complaint (at CP 9) that the judgment *is* void.

The sale here carried none of the characteristics of an execution sale, such as: notice (RCW 6.21.030); requirement to sell to the highest bidder (RCW 6.21.100); or a confirmation of sale (RCW 6.21.110). The trial court seemed to agree that this was not an execution sale. RP 25:25-26:3. Yet, the trial court ignored that §74 would not apply in this situation.

Also relevant is that Restatement of Restitution §74, comment h applies to an “attorney or agent of the judgment creditor”. Here, Diana is the judgment creditor. Realty Pro is not an attorney or agent of Diana.

Comment h also states an exception if the attorney or agent had any knowledge of fraud in the transaction. The word “fraud” is not ambiguous in this situation. Restatement of Restitution §8 defines “fraud” within the context of the Restatement as “misrepresentation”, “concealment”, and “non-disclosure”. It further defines “misrepresentation” in comment b and defines “fraud” in comment c. It does not define “fraud” as a formal legal action, but as an act of bad faith.

Mr. Shurtliff’s August 5, 2016 declaration (CP 199-200) grossly misrepresented facts (CP 133-138), and the court relied on this declaration to hold Otto in contempt and force a write-down of the sale price of his home. He persuaded the trial court to lower the price of Otto’s home so that it would be more attractive to a buyer. Consequently, the buyers abandoned their normal prudence in the transaction due to the discounted price. Mr. Shurtliff’s actions were not harmless to Otto or to the Taylors.

Mr. Shurtliff also never disclosed to Otto or the Taylors about his concerns that the selling price of \$240,000 would not appropriately cover the liabilities of the house. CP 82-83, CP 190. The Restatement of Restitution §8 defines “non-disclosure” as “a failure to reveal facts” (at comment b).

Therefore, because of Mr. Shurtliff’s action and knowledge of bad faith, Restitution §74, comment h does not apply to Realty Pro. His actions fall within the definition of “fraud” in the Restatement of Restitution.

The trial court erred by not examining if Realty Pro fell under the exemptions in §74.

## VI. CONCLUSION

The trial court did not appropriately examine Realty Pro's claim for dismissal under the correct standards of CR 56. Instead of examining if the facts lent themselves to "no genuine issue", the court simply reasoned that Realty Pro was "entitled" to be compensated. It did not account for a potential void sale, subject matter jurisdiction, or weigh at all the fact that the orders were themselves vacated. The court did not even consider if there was even a valid contract between Otto and Realty Pro that entitled them payment.

It also applied the Restatement of Restitution under the wrong authority. Filings suggest that Mr. Shurtliff fell under the definition of "fraud" under the Restatement of Restitution and that §74 did not even apply to Realty Pro. It is also possible to evaluate Otto's claims under §73, which is what he argued in the summary judgment hearing.

Otto should not have his day in court shut down prematurely by summary judgment based on the facts and procedures present in this case. Accordingly, this Court should reverse and remand.

Respectfully submitted December 9, 2019,



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Otto Guardado, Appellant

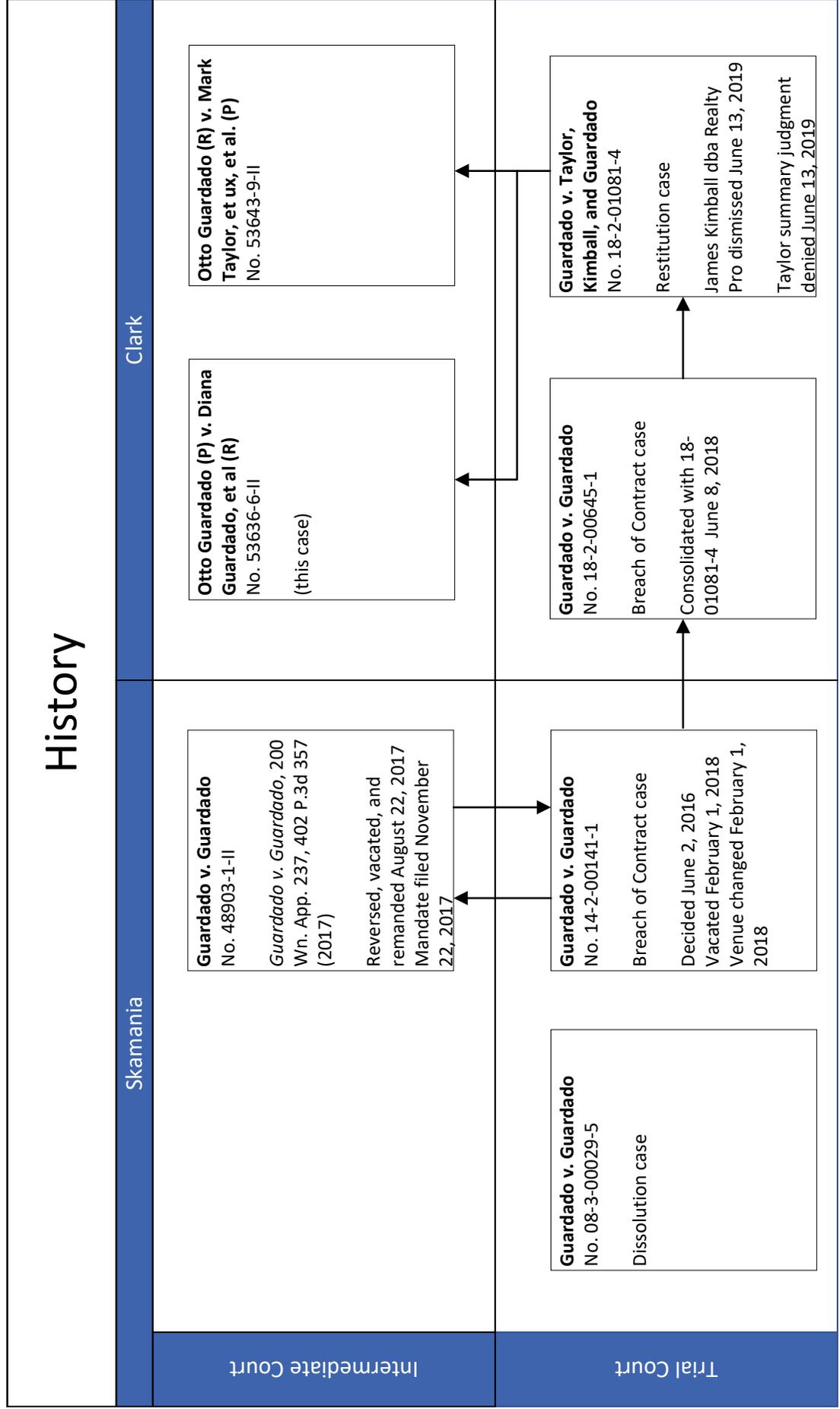
VII. INDEX TO APPENDIX

*Otto Guardado v. Diana Guardado, et al.*

Court of Appeals, Division Two, No. 53636-6-II

<u>Number</u>	<u>Description</u>
A	Table 1- <i>History of this case to present</i>

Appendix A: Table 1



COURT OF APPEALS OF THE STATE OF WASHINGTON  
 DIVISION TWO

OTTO GUARDADO,  
 Plaintiff

v.

DIANA GUARDADO, an  
 individual; MARK AND  
 MICHELLE TAYLOR, husband  
 and wife, and their marital  
 community; JAMES KIMBALL  
 dba REALTY PRO, INC.  
 Defendants

Clark County No. 18-2-01081-4  
 Court of Appeals No. 53636-6-II

CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on the date below, I arranged for service of:

- Appellant’s Opening Brief
- Report of Proceedings

to the parties as follows:

Brian Wolfe, attorney for Mark and Michelle Taylor Riverview Tower, Ste 1010 900 Washington St Vancouver, WA 98660 bwolfe@bhw-law.com	<input type="checkbox"/> Facsimile <input type="checkbox"/> Personal <input type="checkbox"/> U.S. Mail (home) <input type="checkbox"/> U.S. Mail (work) <input type="checkbox"/> E-Mail (home) <input checked="" type="checkbox"/> E-mail (work)
Brian C. Hickman, WSBA No. 50089 9755 SW Barnes Rd., Suite 650 Portland, OR 97225 (503) 242-2922	<input type="checkbox"/> Facsimile <input type="checkbox"/> Personal <input type="checkbox"/> U.S. Mail (home) <input type="checkbox"/> U.S. Mail (work) <input type="checkbox"/> E-Mail (home)

bhickman@gordon-polser.com	<input checked="" type="checkbox"/> E-mail (work)
Thomas Foley, attorney for Diana Guardado 1111 Broadway St Vancouver, WA 98660 thomas@thomasfoleypc.com	<input type="checkbox"/> Facsimile <input type="checkbox"/> Personal <input type="checkbox"/> U.S. Mail (home) <input type="checkbox"/> U.S. Mail (work) <input type="checkbox"/> E-Mail (home) <input checked="" type="checkbox"/> E-mail (work)
Shellie McGaughey and Michael Kylo 3131 Western Ave. suite 410 Seattle, WA 98121 shellie@mcbdlaw.com mike@mcbdlaw.com	<input type="checkbox"/> Facsimile <input type="checkbox"/> Personal <input type="checkbox"/> U.S. Mail (home) <input type="checkbox"/> U.S. Mail (work) <input type="checkbox"/> E-Mail (home) <input checked="" type="checkbox"/> E-mail (work)

SIGNED at Vancouver, WA on December 9, 2019,



Otto Guardado  
 6135 NE 14th Ct.  
 Vancouver WA 98665  
 360-713-2448  
 oguardado@gmail.com

**OTTO GUARDADO - FILING PRO SE**

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**Appellate Court Case Title:** Otto Guardado, Appellant v. Diana Guardado, et al, Respondents  
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- thomasfoleypc@hotmail.com

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Sender Name: Otto Guardado - Email: oguardado@gmail.com  
Address:  
6135 NE 14th Ct  
Vancouver, WA, 98665  
Phone: (360) 713-2448 EXT 360

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