

FILED

AUG 17 2012

CLERK OF SUPERIOR COURT  
STATE OF WASHINGTON

No. 305465

Superior Court No. 05-2-00108-4

IN THE COURT OF APPEALS

FOR THE STATE OF WASHINGTON

DIVISION III

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THELMA, KARL, LORI, and KARIN KLOSTER,  
Appellants and Cross-Respondents,

vs.

SCHENECTADY ROBERTS, et al.,  
Respondents and Cross-Appellants.

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APPELLANTS' OPENING BRIEF

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Lance S. Stryker  
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(509) 493-2997  
Attorney for Appellants and  
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### III. INTRODUCTION

This appeal concerns a flagrant miscarriage of justice to purchasers of a subdivision lot. In creating the subdivision<sup>1</sup> in which the lot was located, the developer did not record the easements against the adjoining property which provided access; consequently, the buyers have been denied access and good title for the past seven and a half years.

The developer and the developer's incorporation of his sole proprietorship which acted as the real estate agent on the sale, the seller, and the title insurer's local agent avoided all liability, and the title insurer nearly so. Worse, the buyers suffered a \$269,918.08 judgment in favor of the seller and the developer's incorporation of his sole proprietorship.

This injustice occurred when the long-time superior court judge, Judge Reynolds, retired and his successor, Judge Altman (trial court), set aside several of Judge Reynolds's earlier summary adjudications and entered summary judgments and judgments as a matter of law dismissing all of the buyers' causes of action against the seller, developer, the title insurer and its local agent. This left only a single claim of negligence against the developer's incorporation of his sole proprietorship before the matter was submitted to the jury. In granting these judgments, the trial court incorrectly made factual

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1. The Pacific Rim Estates subdivision plat is pages 1 and 2 of the Appendix (App).

determinations. Finally, after the jury reached its verdict, in an effort to shape the appeal, the trial court entered findings of fact on substantive issues which were properly the province of the jury.

Plaintiffs, appellants, and respondents Thelma, Karl, Lori and Karin Kloster (the Klosters) are the buyers. Defendant and respondent Schenectady Roberts (Roberts) is the seller. Defendant and respondent Alvin Fred Heany, Jr. (Heany) is the developer. Robert Blades (Blades) is the former business associate of Heany and the present principal of defendant and respondent Pacific Rim Brokers, Inc. (Pacific Rim). Pacific Rim is the incorporation of Pacific Rim Properties, the developer Heany's sole proprietorship. Pacific Rim served as Roberts's real estate agent. Defendant and respondent Ameri-Title, Inc. (Ameri-Title) is the title insurer's local agent. Defendant, respondent and cross-appellant First American Title Insurance Company (First American) is the title insurer.

#### **IV. ASSIGNMENTS OF ERROR**

1. The trial court committed reversible error in granting Roberts's motion for summary judgment dismissing her from the action by 1) wrongly applying **RCW 18.86.090(1)(a)** (App 15) which pertains to real estate brokers' vicarious liability, as abrogating the common law tort of "innocent misrepresentation" for sellers of real property and 2) not recognizing Roberts's liability under the statutory warranty deed when the trial court ruled

after trial that she delivered defective title to the Klosters.

2. The trial court committed reversible error 1) in setting aside Judge Reynolds's CR 56(d) ruling that Pacific Rim is the successor-in-interest to, and has successor liability for, Heany and Pacific Rim Properties, 2) in dismissing the claim of constructive/imputed knowledge arising from Pacific Rim's successor-in-interest status resulting in the violation of its duty to disclose the non-recorded access easements, and 3) in not giving the Klosters's proposed special jury instruction no. 16. (App 3-4)

3. Judge Blaine Gibson, a visiting judge, committed reversible error in granting Heany's motion to quash service, and the trial court subsequently committed reversible error in denying the Klosters's motion to substitute Heany as Doe One where Heany is a necessary and indispensable party.

4. The trial court committed reversible error in setting aside Judge Reynolds's CR 56(d) ruling, as a matter of law, that Ameri-Title was a co-insurer of the Klosters's title.

5. The trial court committed reversible error in concluding pursuant to a CR 50(a) motion that there was an insufficient evidentiary basis for the Klosters's claims that Ameri-Title negligently failed to satisfy an assumed duty to investigate, discover, and note the non-recorded access easements as required by First American.

6. The trial court committed reversible error in concluding pursuant

to a CR 50(a) motion that there was an insufficient evidentiary basis for the Klosters's causes of action against First American for its bad faith breach of 1) its title policy when it refused to cover non-recorded access easements shown on a recorded plat, 2) its duty to defend, 3) the Unfair Claims Settlement Practices Act (UCSPA), 4) the Consumer Protection Act (CPA), and 5) in denying the Klosters's motions for summary judgment for the same.

7. The trial court committed reversible error in concluding, pursuant to a CR 50(a) motion, that there was an insufficient evidentiary basis for the Klosters's cause of action for breach of First American's title policy in light of First American's conflict of interest in issuing title policies to adjoining land owners, one policy showing that it is free of access easements and the other showing access easements over that same property, and acting in bad faith by refusing to defend the Klosters's title and agreeing to defend its other insureds against the Klosters.

8. The trial court committed reversible error in concluding, pursuant to a CR 50(a) motion, that there was an insufficient evidentiary basis for the Klosters's causes of action for breach of both the UCSPA and the CPA in light of evidence that First American 1) had no standards to ensure compliance with either act, 2) refused to investigate the claim that its insureds had no access to their property, and 3) failed to inform the insureds that the insurer's claim investigation showed that the insurer's agent had failed to

research whether the access easements were properly created.

9. The trial court committed reversible error in dismissing all of the Klosters's claims for non-economic damages and all economic damages except "cost of cure" based on the recently discredited "economic loss rule."

10. The trial court committed reversible error when it refused to grant the Klosters's claim for indemnification for the cost of defending their title and obtaining alternate access in light of its determination that the Klosters's title was defective.

11. The trial court committed reversible error in awarding Pacific Rim and Roberts attorney fees pursuant to a Vacant Land Purchase and Sale Agreement (VLPSA) because the actions against them were based in tort, not in contract for breach of the VLPSA, and further, because Roberts gave a statutory warranty deed, the VLPSA merged into the deed, became a nullity, and did not provide a basis on which to award attorney fees.

12. The trial court committed reversible error in denying the Klosters's claim for their full attorney fees from First American because the Klosters did not accept an invalid, vague, and inapplicable CR 68 offer.

13. The trial court committed reversible error in entering findings of fact following the jury's verdict, and compounded this error in particular by making findings 12, 13, 13 [sic] to 22 (App 4-6) and conclusions of law 1 to 6 (App 6) regarding Roberts and Pacific Rim, and findings 1 to 7 (App 7-8)

and conclusions 1 to 4 (App 8) regarding First American which are not supported by the record.

## **V. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

**Issue 1.** Is a seller of real property liable to a buyer for negligent misrepresentation by failing to convey clear title pursuant to a warranty deed because of non-recorded access easements? Assignments of Error 1 and 13.

**Issue 2.** Is a real estate broker, which is the incorporation of a sole proprietor who developed a real estate subdivision, a successor-in-interest 1) subject to successor liability for the sole proprietor's failure to properly record the access easements to property which the real estate broker sold without informing the buyer of the non-recorded access easements and 2) charged with constructive/imputed knowledge of the sole proprietor's failure to record the access easements in violation of its duty to inform the buyer of the non-recorded access easements? Assignments of Error 2 and 13.

**Issue 3.** Is a sole proprietor who developed a subdivision without recorded access easements a necessary and indispensable party? Assignments of Error 3 and 13.

**Issue 4.** Is a title insurer's local agent liable as a co-insurer on a title policy issued in the name of the title insurer where the agent is contractually responsible for the first \$3,500.00 of loss on every title policy which it issues in the name of the title insurer? Assignments of Error 4 and 13.

**Issue 5.** Are a title insurer and its contract agent liable for the agent's failure to satisfy an assumed duty to investigate, discover, and note non-recorded access easements as required by the title insurer? Assignments of Error 5 and 13.

**Issue 6.** Is it a breach of a title insurer's policy to refuse to 1) cover unrecorded access easements shown on a recorded plat, and 2) defend title to property without access easements where it has issued title policies to adjoining land owners and resolves the obvious conflict of interest by defending one insured against the other? Assignments of Error 6, 7 and 13.

**Issue 7.** Is it a breach of the UCSPA and the CPA for a title insurer to 1) have no standards to ensure compliance with the UCSPA, 2) refuse to investigate a claim that an insured has no access, and/or 3) not inform the insured that its claim investigation showed that the claim resulted from the failure of the title insurer's agent to research whether the access easements are properly created? Assignments of Error 8 and 13.

**Issue 8.** Is a buyer of real estate who does not receive clear title because the land does not have its stated access limited to an "economic loss" recovery? Assignments of Error 9 and 13.

**Issue 9.** Is an insured entitled to indemnity from a title insurer for the cost of the insured's defense of title as well as for his/her attempts to obtain alternate access due to the title insurer's refusal to defend? Assignments of

Error 10 and 13.

**Issue 10.** May attorney fees and costs be awarded against a real estate buyer in favor of the seller and the real estate broker pursuant to a VLPSA where the buyer's causes of action against the seller and real estate broker are not based on the VLPSA and also, where the VLPSA has merged into the statutory warranty deed and therefore has become a nullity? Assignments of Error 11 and 13.

**Issue 11.** Is an insured entitled to an award of attorney fees and costs from a title insurer where the title insurer denies the claim and refuses to defend on the basis that the insureds did not accept an invalid, vague, and inapplicable CR 68 offer? Assignments of Error 12 and 13.

## **VI. STATEMENT OF THE CASE**

**A. Procedural History Prior to Trial:** The Klosters alleged causes of action for negligent and intentional misrepresentation in a land purchase and title insurance transaction, bad faith insurance claims practices and claim denial, and violation of the CPA. Specifically, the Klosters claimed that Roberts, Pacific Rim, Ameri-Title, First American, and Michael Moore (Moore) in his capacity as First American's Washington State Underwriter and claims representative, made negligent and intentional misrepresentations and concealed the non-recorded access easements. Additionally, they alleged that Ameri-Title, First American, and Moore breached, and breached in bad

faith, the title policy, violated their duties to defend and indemnify, engaged in bad faith insurance claim practices, and breached the UCSPA and the CPA. (Clerk's Papers (CP) 1-17).

First American counter-claimed against the Klosters for declaratory relief. CP 24-30. Moore was dismissed pursuant to a stipulation which provided that his actions on behalf of First American concerning the Klosters's claim were authorized by, and bind, First American. CP 31-32.

The Klosters served Heany as Doe One. CP 1059-1076. The trial court quashed service of summons on Heany (CP 1083) and subsequently denied the Klosters's motion to substitute Heany as Doe One. CP 1098-1099.

The Klosters's motion for summary judgment against Roberts based on innocent misrepresentation and imputed/constructive knowledge was denied by Judge Reynolds on the basis that there were material questions of fact. CP 1050-1051. Notwithstanding Judge Reynolds's prior ruling, the trial court subsequently granted Roberts's motion for summary judgment of dismissal of all claims against her. CP 1809-1811.

Pursuant to CR 56(d), Judge Reynolds ruled that 1) Ameri-Title acted as one of the Klosters's title insurers (CP 807-809, 1309-1310); 2) Pacific Rim is the successor-in-interest to Heany and his sole proprietorship, Pacific Rim Properties, and therefore has successor liability (CP 1293-1310, 1307-1308); and 3) the title policy is ambiguous as to access coverage and must be

interpreted in favor of the Klosters. CP 1446-1447.

The trial court granted First American's motions which had the effect of setting aside Judge Reynolds's rulings that 1) the access easements are incorporated by reference as part of Schedule A's description of the land insured and made factual findings that the Klosters have physical and legal access (CP 2762); 2) abandoned Judge Reynolds's logic and ruled that "an ambiguity is created, when viewing the contract as a whole, by virtue of the unfortunate plat map appended to the policy" (CP 4613); 3) the average person could reasonably conclude that the title policy covers access outside the plat of Pacific Rim Estates because the policy "references the mistaken easement by attachment and guarantees coverage to 'access'" (CP 4613); and 4) "First American is precluded from arguing coverage to the jury." CP 4614.

Notwithstanding its order precluding First American from arguing coverage to the jury, the trial court permitted First American to argue coverage throughout the trial. RP 445-459.

The trial court orally ruled initially that the plat for Pacific Rim Estates was defective and that it would be up to the jury to determine whether First American breached its duty to defend. RP 14-16, March 7, 2011. The Klosters moved for partial summary judgment that the non-recorded access easements was a defect in title. The trial court denied the motion on the grounds that its previous description of the plat as defective was "not a legal

finding.” Emphasis added, CP 3278-3279.

First American again moved to set aside the title policy ambiguity and coverage ruling and also to dismiss the Klosters’s claims for bad faith and CPA claims. The trial court ruled that “[t]he test is whether First American’s conduct was reasonable. That is for the jury. Motion denied.” CP 3281.

Before trial, the trial court granted the defendants’ motions to limit the Klosters’s damage claims on the basis of the “economic loss rule” to a loss of value or a cost of cure, whichever was less. CP 2753-2759.

**B. Rulings During Trial:** The causes of action for negligent and intentional misrepresentation and concealment against Pacific Rim, Ameri-Title, and First American, and for breach and bad faith breach of the title policy, of the duty to defend, of the UCSPA and of the CPA against Ameri-Title and First American were tried to a jury. At the close of the Klosters’s case, the trial court granted defendants’ CR 50(a) motions setting aside Judge Reynolds’s determinations against Pacific Rim pursuant to CR 56(d) regarding successor-in-interest status and successor liability. RP 1135-1141. In doing so, the trial court improperly made factual determinations.<sup>2</sup>

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2. “**Trial court:** Yes. Rulings were made previously based on a certain status of the file, which, as I indicated earlier, has changed in subtle ways now that we finally have the evidence of live under-oath witnesses. I’m not going to allow Mr. Heany’s error to be attributed to the defendant in this case, so to the extent that that’s a previous ruling based on the facts as I knew them at the time, or Judge Reynolds did, that has changed.” (Emphasis added, RP 1141).

The trial court then dismissed all causes of action against Ameri-Title and First American based on these factual determinations. RP 1152-1154, CP 4205-4206. Consequently, the case went to the jury only on the Klosters's claim of negligent misrepresentation against Pacific Rim. The jury found the Klosters 100% at fault but also determined that the cost of cure for the non-recorded access easements was only \$9,000.00. CP 3714-3716.

**C. Rulings After Trial:** Post trial, the trial court entered judgment against the Klosters for Roberts's and Pacific Rim's attorney fees and costs in the sum of \$269,918.08 (CP 4371-4372); entered judgment in favor of Ameri-Title (CP 4361-4362) and against the Klosters for Ameri-Title's statutory costs of \$200.00 (CP 4421-4422); and entered judgment against First American in favor of the Klosters for \$33,715.65, which included the jury's cost of cure finding of \$9,000.00. Finally, it awarded the Klosters attorney fees and costs of \$25,514.00, and offset First American's award of costs of \$796.65 against the Klosters. CP 4449-4450. In so doing, the trial court entered findings of fact on substantive issues. CP 4363-4370, 4451-4455.

The Klosters filed notice, and amended notices, of appeal. CP 4395-4400, 4423-4430, 4456-4465. First American cross-appealed.

**D. Statement of the Facts:** 1. Heany was a licensed real estate broker (RP 855) and developer (RP 858); he did business as Pacific Rim Properties

as a sole proprietor. RP 854. In 1978, Heany filed a preliminary plat for Pacific Rim Estates with Klickitat County. CP 1937.

2. While the preliminary plat was pending, Heany sold an adjoining parcel, WS-146, to Michael Fester (Fester) (CP 1937) over which access easements for Pacific Rim Estates were to be recorded. CP 1937-1939. The agreement between Heany and Fester (CP 1937, 1942) recited that 1) Fester did not oppose the pending preliminary Pacific Rim Estates plat, and 2) Fester would sign the necessary dedications if requested. CP 1939, 1942.

3. When the final plat for Pacific Rim Estates was recorded with Klickitat County, Fester did not sign it. CP 1939. Consequently, the access easements over WS-146 were invalid. RP 72, 671-672, 674, 678.

4. During this same time period, Blades, a licensed real estate agent, sold properties with Heany doing business as Pacific Rim Properties under Heany's brokerage license. RP 853-854; CP 3584-3585. Blades notarized the land sale agreement between Heany and Fester (RP 863-864) and notarized the plat for Pacific Rim Estates. RP 868-869.

5. Approximately four months after the plat for Pacific Rim Estates was recorded, Heany and Blades incorporated Pacific Rim Properties (RP 857) in Washington as Pacific Rim Brokers, Inc. (RP 568-569, 571; Exhibit (Ex) 137), and qualified it to do business in Oregon. RP 572-573; Ex 138. The incorporation and the Oregon qualification were to "engage in the

general business of brokering and development of real estate.” RP 856-857.

6. Pacific Rim was a continuation of Pacific Rim Properties and Heany’s business. RP 573. Blades and Heany were the sole incorporators of Pacific Rim, its only shareholders, officers and directors. Ex 137. They utilized Pacific Rim Properties’s offices, building, furniture and files, to continue Pacific Rim Properties’s business upon its incorporation as Pacific Rim. RP 857; CP 892-894, 905-909. Blades purchased Heany’s entire interest in Pacific Rim approximately a year later. RP 871-872.

7. Roberts inherited Lots 1 and 2 of Pacific Rim Estates from her father and retained Pacific Rim as her exclusive sales agent. CP 1570. Blades wrote to Roberts that the access road to Lot 1 was hard to locate and that the parcel has a steep ravine running through the west portion which made it harder to develop. RP 879-881; Ex 141.

8. Pacific Rim advertised Lot 1 on a multiple listing by scanning in a copy of the plat map. RP 883-884. Karl Kloster responded to the ad. RP 885. Blades assigned another agent in Pacific Rim’s office, Adrian Palmer (Palmer), to show Karl Lot 1. RP 885. Palmer had previously sold Lot 2 to a different buyer. RP 620, 884.

9. The existing access road to Lots 1 and 2 lies within the non-recorded 30 foot easement. RP 617. Palmer took Karl to Lot 1 along the gravel road within the non-recorded 30 foot easement (RP 622-623) and gave

Karl a copy of the plat map for Pacific Rim Estates. RP 623-624. Palmer told Karl during their first visit that there was an existing 30 foot easement along the entire length of the southern boundary of Lot 1. RP 624-625.

10. Later, Palmer took both Karl and Thelma Kloster to see the property (RP 628-629) and told them that there were access easements on the adjoining property to the south as shown on the plat map. He made this statement notwithstanding the fact that there was a barbed wire fence obstructing the easement. RP 629-630.

11. Palmer had doubts about the easements because of the existence of the barbed wire fence and shared these doubts with Blades. RP 631-632. Blades told Palmer that he would contact the property owners, the Rickeys. RP 632, 886. Blades left the Rickeys a telephone message. RP 631-632, 886.

12. Blades never advised Palmer that he had not talked to the Rickeys. Neither did he tell the Klosters that he tried to contact the Rickeys about the barbed wire fence (RP 887) or about Palmer's concerns. RP 888. Palmer did not tell the Klosters of his conversation with Blades. RP 632, 638.

13. Palmer prepared an earnest money agreement (the VLPSA) for Karl to sign (RP 626, 905-906) with Pacific Rim as the Klosters's agent. RP 625-626. The VLPSA did not contain any reference to the barbed wire fence or the access easements referred to in the plat. RP 626. Pacific Rim contacted Ameri-Title for a preliminary title report. CP 819.

14. Ameri-Title was a licensed agent of First American (RP 655) pursuant to an agency contract which provided that Ameri-Title was responsible for the first \$3,500.00 of any loss on any First American policy issued by Ameri-Title. RP 129, Ex 11. Ameri-Title was instructed by First American to verify whether access easements are properly created for any property on which title insurance was requested (RP 660; Ex 144), and if they were not, to so note in the preliminary commitment and in the title policy by use of a special exception. RP 660-662, Ex 144.

15. Craig Trummel (Trummel), an attorney and Ameri-Title's general manager in White Salmon (RP 652-653), attended seminars given by First American's Moore, one of which was held in the fall of 2003. RP 682. The seminar agenda and notes Moore made at the seminar were admitted into evidence. RP 683, Ex 145. At the seminar, Trummel received a copy of the memo Moore had issued earlier (RP 686-687; Ex 144) and was aware that First American required him to research whether easements are properly created to properties on which preliminary commitments and title policies were to be issued (RP 660) and that this fact was to be noted in a special exception in the preliminary commitment. RP 661-662.

16. Ameri-Title did not determine whether the access easements were properly created for Lot 1 (RP 692-693) and did not note in the preliminary commitment or in the title policy issued to the Klosters that the access

easements for Lot 1 were not recorded against the adjoining property. RP 671-672, 674, 678, 693.

17. The Klosters closed on Lot 1 (RP 1002; Ex 101) and thereafter began using the road in the non-recorded access easement in order to reach their property. RP 1002-1004. The Rickeys who owned WS-146 at the time objected to the Klosters's use of the road and contacted the Klickitat County Sheriff's Office, seeking to have the Klosters arrested. They also filed complaints against the Klosters with other governmental agencies. RP 1004-1005. Eventually, the Rickeys blocked the Klosters's access to their property via the non-recorded access easements. RP 790, 852, CP 3671. The Klosters have therefore had no access to their property since that time. RP 1005. The Klosters have not built an alternate road because they do not have other legal access meeting Klickitat County requirements. RP 1006-1007.

18. After the Rickeys blocked the Klosters's access to Lot 1, the Klosters contacted Blades at Pacific Rim. RP 888. Blades spoke with Heany who assured Blades "that was the correct easement." RP 889. Blades spoke to Trummel at Ameri-Title who told him that there was no access to Lot 1 over the Rickeys' property. RP 889-890. The Klosters then went to see Trummel who told them to hire an attorney. RP 1082-1083.

19. Upon receipt of a demand letter from the Klosters's attorney, Trummel wrote a memo to Moore at First American. RP 664-665, 743; Ex

149. In his memo, Trummel referred to the properties as being in “armchair subdivisions” and explained the source of the problem. RP 668-669, 674, 678. Trummel’s memo also referenced that the recorded half of the easement on Lot 2 “is almost impossible to use and would need significant excavation due to slope.” Ex 149.

20. First American’s Teresa Beatty (Beatty), a member of First American’s legal department (RP 735), received Trummel’s memo to Moore. RP 742, Ex 149. Beatty utilized that information to generate First American’s first claim report. RP 743-745, Ex 154. In the claim report, Beatty described the claim as a dispute over an easement between two insureds. RP 747. The claim was established under the Rickeys’s policy, not the Klosters’s (RP 747-757), and was described as “Both insureds are making a claim for damages based on the existence (or nonexistence) of the easement.” RP 749, 829-830. First American had no procedures or guidelines, written or unwritten, for handling conflicting claims of insureds. RP 749-750.

21. The claim was denominated as a “title loss” (RP 751) based on the American Land Title Association (ALTA) Claim Codes and Guidelines. RP 751-754, 759; Exs 155 and 156. The responsibility code for the Klosters’s claim was “T-1 Irregularity/Omission Agent” which was utilized for title examiner errors. RP 755. There are codes for non-covered claims but these were not used. RP 755. Beatty stated that there was no allegation in the

Klosters's claim letter that Ameri-Title or Trummel made an error (RP 75) but that based upon Trummel's memo and its enclosures, she determined that "error omission by agent most closely fit the situation" (RP 757) and that the Klosters sought a title defense. RP 758.

22. At the time of the Klosters's claim to First American, that company had no written claim procedures or manuals, held no seminars, classes or presentations regarding the UCSPA and its requirements. RP 736-739, 767-772. Beatty and Moore both testified that First American had no means to ensure compliance or to satisfy its duty of good faith and fair dealing. *Id.* It was stipulated that John Dahl, First American's regional counsel and an attorney licensed in California and Washington (RP 826), would testify as had Beatty and Moore on those same issues (RP 827-829) as well as had Moore regarding the handling of the Klosters's claim. RP 830.

23. Moore provided underwriting advice to First American's agents, handled claims, and made presentations in seminars to agents regarding searching and examining titles. RP 766. Moore authored and sent two underwriting memos to First American's agents in Washington on examining easements. RP 695, 772, 775, 847; Exs 143 and 144.

24. First American's insurance of appurtenant easements for ingress and egress pursuant to its access coverage is undefined in its title policy and is to be interpreted in accord with the understanding of the average person.

RP 773-774. First American interpreted “access” as meaning “reasonable vehicular access.” RP 695, 784; Ex 144.

25. Moore’s underwriting memo regarding examining easements (RP 695; Ex 144) was utilized in his seminars to instruct agents not to issue title insurance on properties which did not have access. RP 776-777. First American also instructed its agents to determine whether the access easements were properly created before issuing any preliminary commitment (RP 779-780) and to make a special exception in the preliminary commitment if the access easements were not properly created. RP 695; Ex 144.

26. When First American makes a determination that an insured lacks a right of access, it may establish access or pay damages. RP 782-783.

27. Moore handled the Klosters’s claim (RP 782) and denied it on the basis that the Klosters did not have an interest in the northern 30 feet of the Rickey’s property (RP 789) even though Moore understood that the Klosters were requesting that First American defend their title to Lot 1, a request which Moore denied. RP 786. Moore did not investigate matters on the ground and, thus, he did not determine whether the Klosters had “reasonable vehicular access.” RP 784-785, 794-795.

28. Moore communicated to the Rickeys’s attorney that First American would defend the Rickeys’s title against the Klosters but never made a note of it in the claim file or anywhere else. RP 790-792. Moore

would have authorized First American to defend the Rickeys if the Klosters had sued to establish the access easements. RP 820.

29. Moore received a request to reconsider First American's denial of the Klosters's claim (RP 793-794) and was provided a copy of a surveyor's report (*id.*, RP 847; Ex 157) which stated that the Klosters's access to Lot 1 was partially obstructed. Moore refused to consider the surveyor's report in any re-evaluation of the Klosters's claim because the report concerned "what was happening on the ground." RP 794-795. Moore did acknowledge, however, that First American would recognize coverage if there was a claim that the access easements were invalid. RP 795-796.

30. Moore stated that even though all easements are excepted under its title policy, those exceptions do not affect First American's coverage for access. RP 799. Moore agreed that the access easements called Heany Drive on the plat for Pacific Rim Estates over WS-146 are covered under First American's policy because that is the manner in which Lot 1 gains access to a public street. RP 800. Nevertheless, Moore determined that those easements were not properly recorded and were not covered. RP 801-803.

## **VII. STANDARDS OF REVIEW**

Questions and conclusions of law are reviewed de novo. **Jackowski v. Bolchelt**, \_\_\_ Wn.2d \_\_\_, 278 P.3d 1100, 1105 (2012); **Edmondson v. Popchoi**, 172 Wn.2d 272, \_\_\_, 256 P.3d 1223, 1226 (2011). Statutory

interpretation is a question of law. *Id.* Orders granting summary judgment are also reviewed de novo, taking all facts and inferences in the light most favorable to the nonmoving party. **Jackowski, *supra*, 278 P.3d at 1105.**

With respect to orders granting CR 50(a) motions, the truth of the opposing party's evidence is admitted, all reasonable inferences are afforded to the opposing party, and no element of discretion is lodged in the trial court. **Brown v. Dahl, 41 Wn.App. 565, 573, 705 P.2d 781 (1985).** They are reviewed de novo. **Burchfiel v. Boeing Corp., 149 Wn.App. 468, 479, 205 P.3d 145, *review denied*, 166 Wn.2d 1038 (2009).**

Trial court rulings regarding indispensable party status are interpretations of court rules and are reviewed de novo. **Burt v. Washington State Dept. of Corrections, 168 Wn.2d 828, 832, 231 P.3d 191 (2010).** The legal basis for awards of attorney fees and costs are likewise reviewed on appeal de novo. **Torgerson v. One Lincoln Tower, LLC, 166 Wn.2d 510, 517, 210 P.3d 318 (2009).**

## **VIII. ARGUMENT**

**Summary of Argument:** Roberts sold real property to the Klosters pursuant to a statutory warranty deed and has personal liability for non-recorded access easements to the property that was sold. This is a defect in title that even the trial court recognized post trial.

At trial, Heany, the developer of Pacific Rim Estates, admitted

personal responsibility for his failure to properly record the access easements. He is therefore a necessary and proper party.

Pacific Rim was the successor-in-interest to Heany and had successor liability for his sole proprietorship business, Pacific Rim Properties, under which Heany developed Pacific Rim Estates. Pacific Rim had successor liability for the sale of the property without the properly recorded access easements. Pacific Rim had imputed/constructive knowledge of Heany's failure to record the access easements and had liability for its failure to disclose the non-recorded access easements.

Ameri-Title is First American's contract agent in White Salmon, and acted as a title insurer based on its agency agreement with First American. Ameri-Title also assumed a duty to research whether the access easements were properly created and to so note in the preliminary commitment and the title policy. Ameri-Title's failure to do so constitutes negligence as a matter of law.

First American's access coverage is undefined and must be interpreted in accord with the understanding of the average person. First American's access coverage is also ambiguous as a matter of law and should be interpreted in favor of the Klosters. All of the Klosters's causes of action against First American should have been decided by the jury, especially because the non-recorded access easements are a covered title defect.

The Klosters's damage claims are not subject to the "economic loss rule" and are not limited to either a cost of cure or a diminution in value. The Klosters's engineer should have been permitted to testify as to his opinion whether an alternate access road is permissible and its cost.

The Klosters's recovery of attorney fees against First American should not have been limited on the basis of an invalid CR 68 offer. First American's refusal to defend the Klosters's title entitles them to indemnity for all of their costs and any liability for their defense of title. Pacific Rim and Roberts are not entitled to attorney fees and costs pursuant to the VLPSA because the Klosters did not sue for its breach and the VLPSA is a nullity because of its merger into Roberts's statutory warranty deed.

**Issue 1. A Seller Of Real Property Is Liable For Negligent Misrepresentation By Failing To Convey Clear Title Because Of Non-Recorded Access Easements**

The Klosters's motion for summary judgment against Roberts (CP 973-985) relied on long-settled Washington common law to the effect that a seller owes a duty to the purchaser to convey clear title to any access easements which the property was represented to possess. **Hoffman v. Connall, 108 Wn.2d 69, 72-75, 736 P.2d 242 (1987)**. When a seller fails to do so, he or she is personally liable for the lack of properly recorded access easements. See **Restatement (Second) of Torts 552C(1) (1977)** (innocent misrepresentation). (App 31) A seller of real property is presumed to know

the basic attributes of the property being sold, including any easements which allow access to it, and that clear title to the property is being warranted under a statutory warranty deed. **RCW 64.04.030**. (App 21) In sales of real property, there is strict liability for innocent misrepresentation. See **Comment c. to Restatement (Second) of Torts 552C(1) (1977)**. (App 32)

Roberts's motion for summary judgment was based on grounds that she did not know that the access easements to Lot 1 are not recorded and did not know that Pacific Rim represented to the Klosters that the access easements existed. CP 1569-1571.

The trial court granted Roberts's motion for summary judgment, indicating it was relying on its understanding of **RCW 18.86.090(1)(a)** (App 15), ruling that Roberts did not "participate" in the statements made by Pacific Rim to the Klosters concerning the alleged existence of the access easements. RP 30, September 1, 2010; CP 1809-1811. To support its legal conclusion, the trial court relied on Professor Stoebuck's views on another statute, **RCW 18.86.030**. (App 14-15) See **Stoebuck, 18 Washington Practice: Real Estate: Transactions (2nd ed.) § 15.10**. RP 29-30, September 1, 2010. (App 32-36)

In sum, the trial court misunderstood Professor Stoebuck's views, as Professor Stoebuck was referencing **RCW 18.86.030** (App 14-15), not the statutory provision that the trial court deemed dispositive to Roberts's "non-

participation.” **RCW 18.86.090(1)(a)**. (App 15) **Stoebuck, 18 Washington Practice: Real Estate: Transactions (2nd ed.) § 15.10**, at p. 210. (App 32-36) In any case, both statutes are inapplicable to the issue of whether Roberts retained an independent common law duty as a seller of real property in Washington to convey clear title with recorded access easements, not as occurred here with non-recorded access easements. Stated differently, **RCW 18.86.030** (App 14-15) involves investigations by real estate agents and **RCW 18.86.090** (App 15) involves vicarious liability for acts of real estate agents. Neither statute pertains to common law personal liability of sellors.

**RCW 18.86.090** (App 15) was enacted by the Washington legislature in 1996, and became effective in 1997. In the recent case of **Jackowski, supra, 278 P.3d at 1106-1108**, the supreme court discussed this statutory change and its impact on Washington common law duties which arise in real estate sales. The supreme court observed that **RCW 18.86.110** (App 15-16) retains the common law to the extent it is not inconsistent with **RCW Chapter 18.86** (App 14) and that the legislature only redefined the duties of real estate brokers, not sellers.

In light of **Jackowski, supra, 278 P.3d at 1108**, it is clear that the Klosters were correct when they argued in support of their own motion for summary judgment and in opposition to Roberts’s later motion that Roberts

violated her common law tort duty to deliver good title with properly recorded easements. The longstanding decision in **Hoffman, supra, 108 Wn.2d at 72-75**, was cited with approval in **Hoel v. Rose, 125 Wn.App. 14, 21, 105 P.3d 395 (2004)** and **Sound Built Homes, Inc. v. Windermere Real Estate/South, Inc., 118 Wn.App. 617, 627, 72 P.3d 788 (2003)** and remains unaffected by the 1996 changes to the statutory scheme involving real estate brokers' liability.

In **Eastwood v. Horse Harbor Found., Inc., 170 Wn.2d 380, 387, 241 P.3d 1256 (2010)**, the supreme court emphasized that tort remedies survive contract remedies to rectify a party's injuries in tort. The irony here is that the trial court ruled post trial that Roberts transferred a defective title to the Klosters (CP 4210) even though she gave the Klosters a statutory warranty deed pursuant to **RCW 64.04.030**. (App 21; Ex 101). That statute provides that a statutory warranty deed must be deemed to convey a fee simple interest which the grantor warrants against all persons claiming otherwise. The non-recorded access easements are a defect in title which provides another basis for Roberts's liability pursuant to **Restatement (Second) of Torts 552C(1) (1977)** (App 31) and the holding in **Hoffman, supra, 108 Wn.2d at 72-75**. See also **Edmonson, supra, 256 P.3d at 1227**.

Even though the case was tried to a jury with Pacific Rim as the only remaining defendant, as noted above, the trial court entered findings of fact

and conclusions of law for what it said was “an inevitable appeal.” RP 1279, 1305, 1306, 1319. Although these findings are a nullity, they are also incorrect. Finding 12 (App 4) stated that the Klosters failed to present any proof in support of their causes of action against Roberts. CP 4365. This is not surprising since the Klosters’s claims against Roberts had already been dismissed and Roberts was not even present at trial.

The bottom line is that there was uncontroverted evidence presented in support of the Klosters’s motion for summary judgment and at trial that 1) the access easements for Lot 1 are unrecorded, 2) Roberts is personally liable for selling Lot 1 without recorded access easements pursuant to **Restatement (Second) of Torts 552C(1) (1977)** (App 31), and 3) Roberts is personally liable for failing to convey good title pursuant to **RCW 64.04.030** (App 21) and **Edmonson, supra, 256 P.3d at 1227**.

Nothing in the recent enactment of **RCW 18.86.090(1)(a)** (App 15) altered the independent common law duty with respect to a real estate seller’s obligation to convey clear title. The trial court should have entered judgment in favor of the Klosters against Roberts or, at the very least, the jury should have been given the opportunity to consider all of these facts and evaluate them under legally correct jury instructions.

**Issue 2. A Real Estate Broker Which Is The Incorporation Of A Sole Proprietor Real Estate Developer Has Successor Liability For The Developer’s Failure To Record Access Easements To The Property**

## **Which It Sells**

**A. Procedural And Factual History:** Pacific Rim's first motion for summary judgment dismissing the Klosters's claims against it (RP 175-187; CP 815-826) was denied by Judge Reynolds based on his determination that material questions of fact existed. RP 184-185. The Klosters had defended at the hearing on the motion, in part, on the basis that Pacific Rim was the successor-in-interest to Heany and Blades in Heany's personal business known as Pacific Rim Properties. CP 905-922. Judge Reynolds agreed that Pacific Rim was the successor-in-interest to Pacific Rim Properties, Heany, and Blades. RP 185-187.

The Klosters later moved pursuant to CR 56(d) (App 30) to formalize Judge Reynolds's oral ruling on successor liability. CP 1103-1128; RP 185-187. Judge Reynolds granted the motion and entered an order indicating that Pacific Rim was the successor-in-interest to Pacific Rim Properties as the continuation and incorporation of the business of Heany and Blades and is thus subject to successor liability. CP 1293-1310, 1307-1308; RP 205-206.

At a pretrial hearing, Pacific Rim moved to set aside the holding on successor liability. RP 43, November 2, 2010. The trial court denied the motion stating that Judge Reynolds's ruling regarding successor liability would stand. *Id.*

The Klosters then moved for partial summary judgment against

Pacific Rim based on Judge Reynolds's holding that it had successor liability for the non-recorded access easements as the successor-in-interest to Pacific Rim Properties. CP 3282-3292. The motion also was based on Heany's declaration that it was his responsibility to record the access easements. CP 1937-1957. The trial court denied this motion. RP 463-464.

Despite Heany's testimony at trial that he was solely responsible for the failure to record the access easements (RP 566-567) and that his written communications with the Klickitat County Planning Department in developing Pacific Rim Estates were on his Pacific Rim Properties letterhead (RP 548-550, Ex 134), the trial court set aside Judge Reynolds's CR 56(d) (App 30) determination that Pacific Rim was a successor-in-interest having successor liability. RP 1135-1136 and 1141.

**B. Argument:** In **Cambridge Townhomes, LLC v. Pacific Star Roofing, Inc.**, 166 Wn.2d 475, 482-483, 209 P.3d 863 (2009) the supreme court held that the continuing business exception to the general rule of non-liability for successor business entities applies to the incorporation of sole proprietorships. Where an incorporation is a mere continuation of a sole proprietorship, the incorporation assumes the sole proprietorship's liabilities under successor liability. **Cambridge Townhomes, LLC, supra**, at 166 Wn.2d at 482-483.

Hence, it is apparent that Judge Reynolds was correct, as well as

judicially prescient, when he concluded that Pacific Rim is the successor-in-interest to Heany and Pacific Rim Properties and, therefore, has successor liability based on the then existing case law.

The determination of successor liability is central to the Klosters's claims against Pacific Rim and Roberts. Based on the holding of successor liability, the Klosters twice moved for a pretrial ruling pursuant to CR 56(d) (App 30) that Pacific Rim has imputed/constructive knowledge of the lack of the access easements. CP 1311-1327, 1323-1327, 3293-3296. These motions were denied. This was error because the business liability of a sole proprietor is coextensive with, and indistinguishable from, the sole proprietor's personal liability. **Freehe v. Freehe**, 81 Wn.2d 183, 184, 500 P.2d 771 (1972).

The fact is that Heany was the progenitor, incorporator, director, and officer of Pacific Rim. His knowledge of, and liability for, the non-recorded access easements must be imputed to Pacific Rim. **Deep Water Brewing, LLC v. Fairway Resources Ltd.**, 152 Wn.App. 229, 215 P.3d 990, 1011, (2009), *review denied*, 168 Wn.2d 1024 (2010); and **Denaxas v. Sandstone Court of Bellevue, LLC**, 148 Wn.2d 654, 666-667, 63 P.3d 125 (2002). The trial court erred when it held that imputed/constructive knowledge is insufficient to hold Pacific Rim liable for failing to disclose the non-recorded access easements even though it found sufficient evidence to show actual knowledge of the non-recorded easements. RP 10-11, December 6, 2010.

Knowledge by Pacific Rim is imputed to Roberts because she was the principal in the sale of Lot 1 to the Klosters and Pacific Rim was acting as her agent. **Coast Trading v. Parmac, Inc., 21 Wn.App. 896, 908, 587 P.2d 1071 (1978)**. Pacific Rim's principal, Blades, wrote to Roberts about the access to Lot 1 and its necessity for Lot 1. Exs 140 and 141.

Although as noted above, the trial court should not have entered findings and conclusions, certain of the trial court's findings and conclusions regarding Pacific Rim and Roberts are incorrect. Findings 13 and 13 (they are mis-numbered) state that the Klosters "failed to present a scintilla of evidence" to demonstrate any knowledge by Pacific Rim of the missing easements. CP 4365-4366. At the end of the Klosters's case, the trial court agreed that the evidence at trial was essentially the same as presented on all of the motions for summary judgment. RP 1135. In one of its orders, the trial court reiterated that Pacific Rim's motion as to intentional torts was defeated by facts which raised the issue of "actual knowledge of the brokers." CP 3275-3281, 3279-3280.

Thus, such evidence did in fact exist and Pacific Rim was legally charged with knowledge of the non-recorded access easements. The trial court should have so instructed the jury. See the Klosters's proposed special jury instruction no. 16 - Constructive or Imputed Knowledge (App 3-4).

Additionally, Blades did not disclose to the Klosters the results of his

investigation of Lot 1 which showed doubt concerning the existence of the non-recorded access easements. RP 877-878. The Klosters's causes of action against Pacific Rim for negligent and intentional misrepresentation and concealment should have gone to the jury based on successor liability and imputed/constructive knowledge of the missing access easements.

Similarly, the trial court's Finding 23 (App 5-6) declared that there was no factual or legal basis for successor liability of Pacific Rim for activities of Heany as a real estate developer. CP 4367-4368. This is not a finding but, rather, a conclusion of law that is not supported by the evidence. Judge Reynolds had earlier adjudicated Pacific Rim's status as the successor-in-interest to Heany, his sole proprietorship of Pacific Rim Properties, and Pacific Rim's successor liability. RP 205-206. This determination was buttressed by the trial testimony of Heany and Blades; Exs 134, 137 and 138; as well as Heany's admission of responsibility. CP 1939, RP 566-567, 1135.

Judge Reynolds's determination of successor liability is in accord with the decision in **Cambridge Townhomes, LLC, *supra*, 166 Wn.2d at 482-483**. Consequently, the trial court erred by 1) setting aside Judge Reynolds's finding of successor liability, 2) not permitting the jury to decide the issue, and 3) substituting its determination of the facts for the jury's.

**Issue 3. A Sole Proprietor Developer Who Failed To Record Access Easements Is An Indispensable Party**

When Judge Reynolds considered Pacific Rim's motion for summary judgment, he questioned why Heany was not a party. RP 185. In response the Klosters then personally served Heany as Doe One. Heany filed a motion to quash based on CR 19 and 20. CP 1056-1058. The motion was granted. CP 1083.

CR 19 and 20 (App 28-30) do not provide any basis for the trial court's order quashing service of summons. CR 19 is titled "Joinder Of Persons Needed For Just Adjudication" and requires that a court join all necessary and/or indispensable parties. **Harvey v. Board of County Com'rs of San Juan County, 90 Wn.2d 473, 475, 584 P.2d 391 (1978)**. CR 20 is entitled "Permissive Joinder Of Parties" and permits the joinder of all parties where the right to relief arises out of the same occurrence or series of occurrences.

Heany is a necessary party under CR 19 (App 28) whose presence is indispensable to provide the Klosters with complete relief. **Burt, supra, 168 Wn.2d at 833-834**. Heany's presence is necessary because he is responsible for the failure to record the access easements. It is the incorporation of Heany's sole proprietorship (Pacific Rim Properties) into Pacific Rim which sold Lot 1 to the Klosters as Roberts's agent. In **Burt, supra, 168 Wn.2d at 834**, the supreme court said that a decision will be overturned where another party is prejudiced by the absence of a necessary party. Here, the Klosters

were unable to proceed directly against the person who admitted responsibility (RP 566-567) even though that person was available, had been served, and should have been made a party. **Gildon v. Simon Property Group, Inc.**, 158 Wn.2d 483, 499-500, 145 P.3d 1196 (2006).

The Klosters's motion to substitute Heany as Doe One (CP 1084-1097) likewise should have been granted. CR 10(a)(2) (App 27) permits the use of fictitiously named defendants to designate unknown possibly responsible parties. To litigate against someone by a fictitious name, all of the elements of the cause of action must be known before any limitation applies -- the "discovery rule." **Orear v. International Paint Company**, 59 Wn.App. 249, 254-56, 796 P.2d 759 (1990), *review denied*, 116 Wn.2d 1024. A cause of action does not accrue until the plaintiff discovers, or ought to have discovered, all the essential elements of his possible cause of action. **North Coast Air Servs., Ltd. v. Grumman Co.**, 111 Wn.2d 315, 318-326, 759 P.2d 405 (1988).

As set forth in the declaration accompanying the motion to substitute Heany as Doe One, Heany was not interviewed before the action was filed. CP 1089-1090. It was not until Pacific Rim filed its motion for summary judgment that Heany's involvement became apparent. CP 1090, 1094-1096. The Klosters realized that Pacific Rim is the continuation of Heany's sole proprietor real estate developer and brokerage business, is his successor-in-

interest and is liable for his prior actions. CP 1091-1093.

CR 10(a)(2) (App 27) must be read in conjunction with CR 15(c) (App 27) and should be liberally construed to allow relation back of an amendment if the defendant will not be disadvantaged. **Kiehn v. Nelsen's Tire Company, 45 Wn.App. 291, 295-96, 724 P.2d 434 (1986)**. CR 15(c) (App 27) requires that the party to be brought in has received notice such that he will not be prejudiced in defending on the merits and knew or should have known, but for a mistake of the identity of the proper party, that the action would have been brought against him.

Heany knew of the pendency of the action sometime after it was filed when he told the Klosters that he believed the easement was recorded and valid, and he repeated this claim to the Klosters's counsel. (RP 597-598).

The trial court erred in granting Heany's motion to quash service of summons and denying the Klosters's motion to substitute Heany as Doe One in order to litigate their claims against him as a party defendant as Judge Reynolds originally questioned. **Burt, supra, 168 Wn.2d at 834**.

**Issue 4. A Title Agent Is A Co-Insurer Of Title Where The Title Agent Is Contractually Responsible For The First \$3,500.00 Of Loss On Every Title Policy Which It Issues In The Title Insurer's Name**

**A. Procedural and Factual History:** When Ameri-Title's motion for partial summary judgment was argued, the Klosters defended against Ameri-Title's assertion that it was not a proper party based upon the agency

agreement between it and First American. RP 129, Ex 11. The agreement provided that Ameri-Title is responsible for the first \$3,500.00 paid on any title policy which it issued in First American's name. RP 129. Judge Reynolds agreed with the Klosters, ruling pretrial that Ameri-Title acted as a title insurer to the Klosters under RCW title insurance provisions because it insures the first \$3,500.00 of loss and is an agent operating under First American's license. RP 173, CP 807-809. The Klosters's CR 56(d) motion to confirm the foregoing as a matter without substantial controversy was granted. CP 1293-1310.

After Judge Reynolds retired, First American and Ameri-Title moved to revise and/or reverse certain of his CR 56(d) (App 30) rulings. They requested the newly appointed trial court judge to set aside the finding that Ameri-Title acted as a title insurer. CP 2277-2281. The trial court had stated that it did not consider Judge Reynolds's CR 56(d) rulings to be final adjudications of the issues addressed and that it intended to revisit all of Judge Reynolds's orders. RP 40-42, November 2, 2010.

Even though summary judgment is precluded when there are factual issues, the trial court made certain factual findings concerning Ameri-Title's status as an agent of First American and set aside Judge Reynolds's ruling that Ameri-Title acted as a title insurer. CP 2760-2764. The trial court did not address the fact that Ameri-Title was a co-insurer on every policy of title

insurance which it issues in First American's name. CP 2760-2764.

Pursuant to the agency agreement between First American and Ameri-Title (Ex 11), Ameri-Title bears the first \$3,500.00 of loss on every policy of title insurance which it issues in First American's name and keeps 90% of the premium. RP 662; CP 715-716, Deposition 42, 45.

**B. Argument: RCW 48.29.170** (App 17) exempts licensed title insurance agents from the title insurer's licensing requirements of **RCW 48.17.180**. (App 17) These statutes exempt Ameri-Title from the requirement to have its own title insurance license and brought Ameri-Title "under the umbrella of a title insurance company" according to Judge Reynolds. RP 173.

**RCW 48.01.040** (App 16) defines insurance as "a contract whereby one undertakes to indemnify another or pay a specified amount upon determinable contingencies." **RCW 48.01.050** (App 16-17) defines an insurer as including "every person engaged in the business of making contracts of insurance." **RCW 48.01.070** (App 17) defines "person" as any individual, company, insurer, association, organization, reciprocal or inter-insurance exchange, partnership, business trust, or corporation. Ameri-Title qualifies under these definitions.

**RCW 48.01.030** (App 16) specifies that the business of insurance is affected by the public interest and requires that all persons so engaged "must act in good faith, abstain from deception, and practice honesty and equity" in

all insurance matters. Based on this and other relevant statutes, the Washington Insurance Commissioner adopted **WAC Chapter 284-30** (App 21), the UCSPA.

In addition to qualifying as an insurer under the RCW, Ameri-Title qualified pursuant to the applicable WAC regulations. **WAC 284-30-310** (App 22) defines its scope as applying to all insurers, to all insurance policies and insurance contracts, and non-exclusive in that other acts may also be deemed to be violations of specific provisions of the insurance code or other regulations. **WAC 284-30-320** (App 22-23) defines insurer as any legal entity “engaged in the business of insurance, authorized or licensed to issue or who issues any insurance policy or insurance contract in this state.” Ameri-Title was engaged in the business of insurance, was authorized and licensed to issue and did issue insurance policies. Ameri-Title was an insurer as defined by the UCSPA and the RCW. The trial court erred when it set aside Judge Reynolds’s ruling that Ameri-Title was a co-insurer of the Klosters’s title.

**Issue 5. A Title Insurance Agent Is Liable For Its Failure To Research Access Easements As Directed By The Title Insurer**

**A. Procedural and Factual History:** Ameri-Title had authority to act on First American’s behalf and was authorized to issue preliminary commitments and title policies without prior approval of First American. It also had a duty to disclose the fact that access easements were not recorded.

Statement of the Facts (SF) ¶¶ 14-15. Indeed, the record shows that First American directed all branch managers and agents to research access in every transaction and to determine whether the appurtenant easements were properly created, a requirement of which Trummel, Ameri-Title's general manager in White Salmon, was aware. SF ¶¶ 14-15, 23-25.

**B. Argument:** First American's requirement that Ameri-Title investigate whether access easements were properly created and, if not, to so note in the preliminary commitment and in the title policy is an assumed duty analogous to that delineated in **Sheridan v. Aetna Casualty & Surety Company, 3 Wn.2d 423, 439, 100 P.2d 1024 (1940)**. There, a third party was injured when Aetna's agent failed to properly inspect an elevator in a building which was owned by an insured. In concluding that Aetna was liable for the third party's injury, the supreme court determined that the action was maintainable, not by virtue of any obligation imposed by the policy of insurance, but because of the legal responsibility attaching to Aetna's voluntary assumption of the duty to inspect and report to the city. *Id.* at 439.

That is essentially what happened here. First American directed Ameri-Title to investigate access easements. Any discrepancies in the creation of access easements were required to be noted as an exception in the preliminary commitment and the title policy. The record showed that no exception was included in the Klosters's preliminary commitment or title

policy. Whether there was a failure to disclose was for the jury to determine. See also **Burg v. Shannon & Wilson, Inc.**, 110 Wn.App., 798, 808-809, 43 P.3d 526 (2002); **Brown v. MacPherson's, Inc.**, 86 Wn.2d 293, 298-300, 545 P.2d 13 (1975).

First American and Ameri-Title asserted at trial that the preliminary commitment cannot be the subject of a cause of action because **RCW 48.29.010(3)(c)** (App 17) provides that a preliminary commitment is not a representation of the condition of title but rather is a statement of the terms and conditions upon which the issuer is willing to issue its title policy. They cited **Barstad v. Stewart Title Guar. Co.**, 145 Wn.2d 528, 39 P.3d 984 (2002) for that proposition. CP 1516-1521. Their reliance on **Barstad, supra**, is misplaced because although the supreme court declined there to find a general duty of disclosure in preliminary commitments, it noted that instances may arise when a duty to disclose may exist. **Barstad, supra**, 145 Wn.2d at 543-544. Ameri-Title failed to satisfy its assumed duty and is thereby liable to the Klosters. **Sheridan, supra**, 3 Wn.2d at 439; Ex. 144. The trial court erred when it dismissed Ameri-Title from the action pursuant to CR 50(a) (App 30) instead of allowing the jury to decide the issue of its liability.

**Issue 6. A Title Insurer Breaches Its Policy, Its Duty To Defend, The UCSPA, The CPA, And Acts In Bad Faith Where It Refuses To Cover Non-Recorded Access Easements Which Preclude Clear Title**

**A. Procedural and Factual History:** First American's title policy

mentions access coverage twice without defining what it is. Ex 95. In two underwriting bulletins, First American's Moore informed its local agents, including Ameri-Title, that its title policy automatically extended coverage for access easements, that access coverage was undefined, and that First American interpreted access to mean reasonable vehicular access. SF ¶¶ 23-24. Moore directed each First American agent to determine if access easements were properly created before issuing a title commitment. SF ¶ 25.

In First American's electronic claim report on the Klosters, the cause of the "RICKEY/KLOSTER EZ DISPUTE" was "IRREGULARITY-OMISSION - AGENT," not a lack of coverage. Ex 154.

Prior to trial, Judge Reynolds ruled that 1) First American's access coverage is undefined and must be interpreted in accordance with the understanding of the average person (CP 1296); 2) the property described in the title policy included all of the attributes of the plat of Pacific Rim Estates, including the easements shown on the plat (CP 4524-4525); 3) the plat shows all of the easements as a matter of public record (CP 1302); and 4) Schedule A of the title policy describes the easements insured by incorporation by reference. CP 4524-4525. See **Santos v. Sinclair, 76 Wn.App. 320, 322, 324-328, 884 P.2d 941 (1994)**.

Schedule A of the Klosters's title policy provides that the land referred to in the policy was Lot 1, Pacific Rim Estates, according to the

recorded plat. Ex 95. There was no need to purchase a rider on a title policy to cover access easements because once the easements were shown of record, the title policy covered them. **Santos, supra, 76 Wn.App. 327-328.**

Easements in a recorded plat are valid even though they are not described in actual “words” or in terms of “metes and bounds.” Easements shown on the Pacific Rim Estates plat constituted an “exact legal description” sufficient for legal recognition under **RCW Chapter 58.17**. (App 19) The purpose of **RCW Chapter 58.17** is to provide a standardized means to subdivide property and to establish the legality of the platting system. **RCW 58.17.020(2), (3) and (5)**. (App 19) **RCW 58.17.030** (App 19) requires that every subdivision satisfy all of the chapter’s provisions, and **RCW 58.17.250** (App 20) requires that every subdivision and its plat be surveyed and certified by a registered surveyor. **RCW 58.17.160(1)** (App 20) requires that the plat be approved by the licensed county road engineer. Once these provisions are satisfied, **RCW 58.17.290** (App 20) requires the admission in evidence of copies of any such plat.

Dedicated easements on a subdivision plat become property rights which cannot be altered without written approval of all subdivision property owners. **RCW 58.17.218** (App 20) and **RCW 64.04.175**. (App 21) Easements shown on a plat constitute an exact legal description sufficient for legal enforcement. **Wilhelm v. Beyersdorf, 100 Wn.App. 836, 842, 999**

**P.2d 54 (2000).** A graphically described easement in a recorded plat is an exact legal description which is entitled to legal enforcement. **RCW 58.17.320.** (App 20)

Prior to trial, Judge Reynolds granted First American's motion that the Schedule B, section 2 exceptions in its title policy exclude from coverage easements contained in both plats for WS-146 and Pacific Rim Estates. CP 4524-4525. These exceptions created an ambiguity in First American's access coverage in that, on the one hand, the Klosters have access coverage for easements shown on the plat and, on the other, all easements are excluded from coverage.

Significantly, Judge Reynolds ruled on a CR 56(d) motion that the Klosters's title policy was ambiguous as a matter of law as to access coverage and must be interpreted in the Klosters's favor. RP 245-246; CP 1446-1447. First American moved several times to set aside Judge Reynolds's ruling that its access coverage was ambiguous. On the first motion, the trial court not only set aside Judge Reynolds's ruling that the access easements were incorporated by reference as part of Schedule A's description of the land insured but also made factual determinations that the Klosters have physical and legal access. The ambiguity ruling however was left intact. CP 2762.

On the next motion, the trial court abandoned Judge Reynolds's logic and ruled that "an ambiguity is created, when viewing the contract as a

whole, by virtue of the unfortunate plat map appended to the policy.” CP 4613. The trial court ruled that the average person could reasonably conclude that the title policy covers access outside the plat of Pacific Rim Estates because the policy “references the mistaken easement by attachment and guarantees coverage to access.” CP 4613. The trial court ordered “that First American is precluded from arguing coverage to the jury.” (CP 4614).

Despite that ruling, the Klosters’s motion to preclude First American from arguing coverage to the jury was denied. RP 458-459. First American argued the issue of coverage throughout the trial.

The trial court later stated from the bench that the plat for Pacific Rim Estates was “defective.” RP 15, March 7, 2011. Based on this statement, the Klosters moved for partial summary judgment that the non-recorded access easements constituted a defect in title. CP 2914-2919. Surprisingly, the trial court denied the motion on the grounds that its previous description of the plat as defective was “intended as a general description, as in ‘problematic, faulty, deficient, not all it’s cracked up to be’ -- not a legal finding.” Emphasis added, CP 3278-3279.

First American again moved to set aside Judge Reynolds’s ruling that the title policy was ambiguous and to dismiss the Klosters’s claims for bad faith and CPA claims. The trial court denied the motion and ruled that whether First American’s conduct was reasonable was for the jury. CP 3281.

At the close of the Klosters's case, the trial court dismissed all of the Klosters's causes of action against First American and Ameri-Title even though it had ruled previously that these causes of action had a factual basis and were for the jury to decide. RP 1152-1154, CP 4205-4206. After the jury returned a finding for a cost of cure, the trial court entered a judgment in favor of the Klosters and against First American for the cost of cure. The trial court also awarded a minor portion of their attorney fees and costs that they sought based on its post trial ruling that the cost of cure constituted a loss attributable to the defective title "for which there was coverage." CP 4210.

**B. Argument: 1. Ambiguous Coverage:** Judge Reynolds's pretrial ruling regarding the ambiguity of the access coverage was correct. Where a provision in a policy of insurance is capable of two meanings or constructions, the meaning or construction most favorable to the insured must be employed. **Shotwell v. Transamerica Title Ins. Co., 91 Wn.2d 161, 167-168, 588 P.2d 208 (1978)**. This rule applies with added force to exceptions and limitations to a policy's coverage. **Witherspoon v. St. Paul Fire & Marine Ins. Co., 86 Wn.2d 641, 650, 548 P.2d 302 (1976)**. When the title policy is ambiguous and/or has a factual disparity, the exclusionary language must be interpreted most favorably for the insured. **Morgan v. Prudential Ins. Co. Of America, 86 Wn.2d 432, 434-435, 545 P.2d 1193 (1976)**.

**2. Illusory Coverage:** The title policy's access coverage was also

illusory. On the one hand, access was a specified and enumerated coverage and on the other, the means by which such access was created and existed -- easements -- were not. The exclusion swallowed all covered occurrences, making the policy illusory. **Taylor v. Shigaki**, 84 Wn.App. 723, 730, 930 P.2d 340, (1997), review denied, 132 Wn.2d 1009. Such contracts must be construed to avoid rendering contractual obligations illusory. **Quadrant Co. v. American States Ins. Co.**, 154 Wn.2d 165, 184, 110 P.3d 733 (2005). In light of the trial court's ruling that there was coverage, it was error to dismiss the Klosters's causes of action for breach of the policy and bad faith at the close of the Klosters's case. Ironically, prior to trial, the trial court refused to permit the Klosters to argue to the jury that Lot 1 is unmarketable by claiming that they do not have good title. RP 494.

**3. Duty To Defend:** First American insured both the Klosters's title to Lot 1 and the Rickeys's title to the property immediately to the south, WS-146. When the Klosters and the Rickeys each presented a claim for defense of their respective titles, First American informed the Rickeys that it would defend their title but refused to defend the Klosters's title. SF ¶¶ 20, 27-28.

This was a conflict of interest. First American had the same legal duty to defend the Klosters's title as it did the Rickeys's. In **Campbell v. Tigor Title Ins. Co.**, 166 Wn.2d 466, 470-471, 209 P.3d 859 (2009), the supreme court held that **RCW 48.01.030** (App 16) and the decision in **Tank v. State**

**Farm Fire & Cas. Co., 105 Wn.2d 381, 386-389, 715 P.2d 1133 (1986)**, concerning an insurer's duty to defend, applies to title insurance. The supreme court held that the duty to defend is broader than the duty to indemnify, citing **Woo v. Fireman's Fund Ins. Co., 161 Wn.2d 43, 52-54, 164 P.3d 454 (2007)** and noting that the duty to defend is triggered if the insurance policy conceivably covers the allegations in the complaint. The duty to defend arises whenever superior title is claimed, not just when an action is filed as the trial court noted in its order. CP 3277. **Lawyers Title Ins. Co. v. McKee, 354 S.W.2d 401, 407-408 (Tex.Civ.App., 1962)**.<sup>3</sup>(App 37-44)

The lack of the access easements was a defect in the Klosters's title, as the trial court ultimately ruled. CP 4210. A warrantor or guarantor of title, which is what First American and/or a title insurer is, has a duty to defend an insured's title. **Erickson v. Chase, 156 Wn.App. 151, 158-159, 231 P.3d 1261 (2010)**. This defense is required when someone claims superior title, whether or not a complaint is ultimately filed.

First American made a determination that its policy interpretation was correct and failed to give consideration to the Klosters's tender and interpretation of coverage. Due to the inherent ambiguity in First American's

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3. To the best of the Klosters's counsel's research, this issue is undecided in Washington. **Lawyers Title Ins. Co., supra**, appears to be the lead case nationally on this issue.

title policy, the Klosters's interpretation of coverage is paramount to First American's. By refusing to give the Klosters the benefit of the doubt, First American breached its title policy by refusing to defend. **American Best Food, Inc. v. Alea London, Ltd., 168 Wn.2d 398, 408, 411, 413, 229 P.3d 693 (2010)**. First American's refusal to defend was a bad faith breach of its title policy as a matter of law. (*Id.* at 413).

The trial court appeared to agree with this perspective in its ruling from the bench. RP March 7, 2011, 14-16. The Klosters's motion for partial summary judgment regarding First American's failure to defend their title (RP 374-378; CP 2936) was denied by the trial court on the grounds that it was "a question of fact for the jury as to whether First American acted in bad faith refusing to defend." Emphasis added, CP 3278.

Nevertheless, the trial court dismissed the Klosters's causes of action against First American for breach and bad faith breach of the duty to defend at the close of the Klosters's case. RP 1152-1154. These breaches should have been decided in favor of the Klosters as a matter of law, **American Best Food, Inc., supra, 168 Wn.2d at 413**. Alternatively, the jury should have decided the issue as the trial court previously ruled. This clear legal error constituted an egregious violation of the Klosters's rights to due process.

**Issue 7. A Title Insurer Violates The UCSPA And The CPA Where It Has No Compliance Standards, Refuses To Investigate A Claim And Does Not Tell Its Insured That Its Title Agent Is Responsible**

**A. Violations of the UCSPA:** The UCSPA's (**RCW 48.30.010** (App 18-19) and **WAC 284-30-300** through **WAC 284-30-380**), (App 21-27) most basic requirement is that insurers "adopt and implement reasonable standards for the prompt investigation of claims." **WAC 284-30-330(3)**. (App 23) As Moore and Beatty testified, First American's employees had only fleeting knowledge of the UCSPA's existence and no knowledge of its requirements. SF ¶ 22. First American did not have any standards to assure compliance with the UCSPA, and it did not train its employees to comply with the Act. It basically ignored the provisions of UCSPA. *Id.*, SF ¶ 22.

**WAC 284-30-370** (App 26) "Standards for Prompt Investigation of Claims," mandates that insurers fully investigate all claims within 30 days of notification. **WAC 284-30-380(3)** (App 26-27) mandates that if a claims investigation remains incomplete after 30 days, within 45 days the insurer must notify the claimant of the reasons additional time is needed for investigation.

In his report to First American's Moore, Ameri-Title's Trummel stated that the Klosters have no effective vehicular access to Lot 1. Ex 149.<sup>4</sup>

Pacific Rim's Blades testified about a conversation with Ameri-Title's Trummel wherein Trummel stated that based upon Trummel's review

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4. "Access is technically available on the north 30 feet of the easement. I have been told that on the ground, the 30 feet on the north side of the line is almost impossible to use and would need significant excavation due to slope."

of the records, the Klosters have no access. SF ¶ 18. At trial, in lieu of reading the Rickeys's deposition testimony, the parties stipulated that the Rickeys blocked the Klosters's access to Lot 1 for as long as the Rickeys owned WS-146. RP 852; CP 3671. The only established road to Lot 1 lies within the easements located on the Rickeys' property. SF ¶ 9.

The trial court declined to admit Trummel's full claim report into evidence. RP 666. It redacted the sentence concerning the inability to use the remaining half of the access easements on the grounds that the statement was "triple hearsay." RP 831-834. The redacted sentence was not hearsay because it was not offered for the truth of the matter stated. Rather, it was offered to show that First American was on notice of a matter which was legally required to be part of its claim investigation. The trial court erred in redacting that sentence from the report. RP 831-834.

Because Moore stated in his underwriting bulletins and at trial that "access" was interpreted by First American to mean "reasonable vehicular access," the Klosters's access to Lot 1 was an issue which any reasonable claims person would have to investigate to determine whether Lot 1 had "reasonable vehicular access."

**WAC 284-30-330(1)** (App 23) prohibits the misrepresentation of pertinent facts or insurance policy provisions to a claimant. It was not until April 27, 2006, that First American revealed its electronic claim report of

March 25, 2005, wherein the cause of the “RICKEY/KLOSTERS EZ DISPUTE” was determined to be “IRREGULARITY/OMISSION - AGENT.” RP 4, 6, Ex 154. Beatty did not determine that there was a lack of coverage. *Id.* The Guidelines For Using ALTA Claim Codes and the ALTA Claim Codes (Exs 155 and 156) have codes for determinations of non-coverage, but they were not used. Ex 154.

In sum, the record was clear that First American improperly denied the Klosters’s claim, refused to investigate their claim in accord with the UCSPA, and failed to even acknowledge the UCSPA’s requirements. Each of these are violations of **RCW 48.01.010** (App 16) and **48.01.030** (App 16) as well as **WAC 284-30-330(1), (4), (7), ( 13)**; (App 23-25) **WAC 284-30-350 (1) and (2)** (App 25); and **WAC 284-30-370.** (App 26)

**B. Violations of the CPA:** The aforementioned violations of the RCW and of the WAC by First American were also violations of the CPA, **RCW 19.86.20.** (App 16) **International Ultimate v. St. Paul Fire & Marine, 122 Wn.App. 736, 756, 87 P.3d 774, review denied, 153 Wn.2d 1016 (2004).** It was error for the trial court to dismiss the Klosters’s causes of action based thereon.

**Issue 8. A Real Estate Buyer Who Does Not Receive Clear Title Because Of Non-Recorded Access Easements Is Not Limited To An “Economic Loss” Recovery**

**A. Introduction:** The supreme court recently made clear that the term

“economic loss rule” was a misnomer and is actually the independent duty doctrine. **Jackowski, *supra*, 278 P.3d at 1105-1106; Eastwood, *supra*, 241 P.3d at 1259.** The trial court erred when it limited the Klosters’s damage claims to forms of “economic loss.” CP 2244-2247.

**RCW 4.56.250** (App 9-10) -- without its unconstitutional damage limitation -- authorizes the recovery of both economic and non-economic damages. The Klosters suffered both economic and non-economic damages -- squarely within the province of the jury to decide (**Sofie v. Fibreboard Co., 112 Wn.2d 636, 638, 645, 780 P.2d 260 (1989)**) -- especially the Klosters’s non-economic damages which are particularly within the scope of constitutional protection. **Sofie, *supra*, 112 Wn.2d at 648.**

**B. Non-Economic Damages and the “Economic Loss Rule:”** Under long-settled case law based on the insurers’ statutory duty of good faith (**RCW 48.01.030**, App 16), the courts have ruled numerous times that emotional distress is a recoverable item of damage against insurers for breach of that duty. See **Mason v. Mortgage America, Inc., 114 Wn.2d 842, 849-850, 854-855, 792 P.2d 142 (1990); Kirk v. Mt. Airy Insurance Company, 134 Wn.2d 558, 560, 951 P.2d 1124 (1998).**

The trial court granted First American’s and Pacific Rim’s motions to dismiss all of the Klosters’s claims for emotional distress, including those of Karl Kloster. RP 10, March 7, 2011, CP 2753-2759. The record showed

that Karl suffered an industrial accident in 1994 and was disabled. RP 32, November 2, 2010, CP 1866-1870. He suffered from general anxiety disorder (GAD) as a result of being disabled and unemployable. RP 33, November 2, 2010, CP 1866-1870, 1975-1979. His counselor and her records showed an increase in his symptoms in the months after the Klosters's purchase of Lot 1 and the ensuing litigation CP 2014-2049, 2037, 2043-2048, a compensable damage because Karl was an "egg shell" plaintiff. **State v. Hiatt, 154 Wn.2d 560, 572, 115 P.3d 274 (2005)**. One behavioral characteristic of GAD sufferers is their inability or unwillingness to discuss the source or cause of their anxiety. RP 34-36, November 2, 2010; CP 2047-2048.

In dismissing the claims for emotional distress, the trial court mistakenly relied on the decisions in **Hunsley v. Giard, 87 Wn.2d 424, 435, 553 P.2d 1096 (1976)** and **Hegel v. McMahon, 136 Wn.2d 122, 134-135, 960 P.2d 424 (1998)** in granting Pacific Rim's motion to dismiss the Klosters's and Karl's emotional distress claims on the grounds 1) that Karl's medical records and health care providers did not disclose the cause or source of his anxiety or its aggravation and 2) that the other Klosters did not seek medical care for their emotional distress. RP 33-35, November 2, 2010. This was legal error.

In **Herring v. Department of Social and Health Services, 81 Wn.App. 1, 24-25, 914 P.2d 67 (1996)**, the court held that emotional distress

is a compensable damage where an intentional tort is committed. The court determined that where emotional distress is asserted, a distinction must be drawn between what is required for a finding of liability and the recoverable damages resulting from an injury. *Id.* Similarly, in **Cagle v. Burns and Roe, 106 Wn.2d 911, 920, 726 P.2d 434 (1986)**, the supreme court emphasized that once a plaintiff proves a defendant's intentional wrongful conduct, a plaintiff is only required to prove emotional distress to recover damages attributable to the wrongful act. **Nord v. Shoreline Sav. Ass'n, 116 Wn.2d 477, 483-484, 805 P.2d 800 (1991)**. The objective symptom requirement applies only where negligent infliction of emotional distress is asserted and goes to proof of liability, not damages. *Id.* at **485**.

The Klosters's claims for humiliation and mental anguish arose from the adjoining property owners having reported the Klosters to various public agencies for alleged trespass and related matters. CP 2460-2476. The Klosters were confronted by public officials and by the adjoining property owners several times, either in the presence of public officials or independently. CP 2460-2476.

The jury may award damages for humiliation and mental anguish based on these occurrences. Washington has long recognized the right of persons subjected to abuse by unwarranted claims of illegal conduct and encounters with police and other governmental agencies to recover damages

for humiliation and mental anguish suffered as a result, especially in alleged cases of trespass. **Wilson v. Walla Walla**, 12 Wn.App. 152, 153-155, 528 P.2d 1006 (1974); **Wood v. Rolfe**, 128 Wn. 55, 57, 221 P. 982, (1924). At the beginning of trial, the trial court improperly precluded Karl and Lori Kloster from putting on any evidence of their loss of consortium. RP 593.

The Klosters suffered further non-economic damages resulting from 1) the denial of a proper claim investigation, 2) the wrongful denial of title insurance coverage, 3) the bad faith treatment of them by First American and 4) its violations of the UCSPA and of the CPA.

**C. Economic Damages:** The Klosters also suffered consequential economic damages. These damages resulted from the loss of clear title and on-going costs of ownership. In **Denny's Restaurants, Inc. v. Security Union Title Ins. Co.**, 71 Wn.App. 194, 210-211, 859 P.2d 619 (1993), the court determined that loss of a utility easement which is within the unrecorded access easements and is itself unrecorded, loss of use of property, the on-going cost of ownership such as annual property taxes and homeowner's dues, as well as the cost to build alternate equivalent access are all recoverable damages in litigation involving title insurers.

All of the Klosters's claims for consequential economic damages are permitted under Washington law: 1) loss of use of property and title, and CPA damages (**Mason, supra**, 114 Wn.2d at 849-850, 854-855); 2) recovery

of financial and emotional damages (**Anderson v. State Farm, 101 Wn.App. 323, 330-331, 2 P.3d 1029 (2000)**); and 3) loss of use of money (**Griffin v. Allstate Ins. Co., 108 Wn.App. 133, 147-149, 29 P.3d 777 (2001)**).

Pretrial, the trial court ruled that the Klosters's expert, Darrin O. Eckman, an engineer, could testify as a fact witness concerning the cost of constructing an alternate access road. RP 485-486. At trial, however, the trial court refused to allow Eckman to testify as to the required construction standards and cost of a replacement roadway. RP 950, 954-958, 961-962. It further refused to permit Eckman to explain the basis for his opinion to the trial court. RP 951. Eckman was instead directed by the trial court to testify regarding construction of a "driveway" and its cost rather than the cost of a "roadway." RP 961-962. The limitations imposed on Eckman by the trial court regarding the kind and cost of alternate access are contrary to the Klickitat County construction requirements and standards and contrary to Eckman's opinion of the true cost of alternate access. Ex 158. The trial court's directive to Eckman regarding his testimony was another violation of the Klosters's rights to due process and a fair trial.

**Issue 9. A Real Estate Buyer Who Does Not Receive Clear Title Because Of Non-Recorded Access Easements Is Owed A Defense Of Title**

The trial court held that the missing access easements were a defect in title "for which there was coverage." CP 4210. The duty to defend is

broader than the duty to indemnify. **Campbell, *supra*, 166 Wn.2d at 470-471; Woo, *supra*, 161 Wn.2d at 52.** Because the Klosters were entitled to coverage and a defense, First American must indemnify them for all costs incurred in defending title and attempting to obtain the non-recorded access easements. **American Best Food, *supra*, 168 Wn.2d at 408, 411, 413; Axess Int'l v. Intercargo Ins., 107 Wn.App. 713, 720-721, 30 P.3d 1 (2001).**

**Issue 10. A Real Property Seller And Her Real Estate Agent Are Not Due Attorney Fees Under VLPSA Where The Claims Against Them Were Not Based On VLPSA And Where VLPSA Merged Into The Deed**

The Klosters's causes of action against Pacific Rim and Roberts alleged negligent and intentional misrepresentation and concealment, not any contractual breach of the VLPSA. CP 1-17. According to the jury instructions proposed by Pacific Rim and read to the jury, the action against Pacific Rim was for professional negligence and violation of its statutory duties under **RCW 18.86.030.** (App 14-15) CP 3684-3713. Jury Instructions Nos. 6, 6A, 6B, 6B-1 and 6C. (App 3) CP 3691-3695. The Klosters sued Roberts for personal liability under **Restatement (Second) of Torts 552C(1) (1977)** (App 31) and the holding in **Hoffman, *supra*, 108 Wn.2d at 72-75,** for innocent misrepresentation. RP 26, September 1, 2010. The basis for trial court's summary judgment in favor of Roberts was **RCW 18.86.090(1)(a)** (App 15) -- a lack of vicarious liability. RP 26-29, September 1, 2010.

Under **Boguch v. Landover Co., 153 Wn.App. 595, 609-610, 618-**

**19, 224 P.3d 795 (2009)**, there is no right to recover attorney fees based on contract when the claim is based on negligence. The trial court's order for the Klosters to pay attorney fees and costs to Pacific Rim and Roberts mirrored the language from **Boguch, supra, 153 Wn.App. at 618-619**, but it inexplicably reached the opposite conclusion. (See CP 4208-4209).

The trial court's conclusion that the misrepresentation and concealment causes of action arose out of the VLPSA (CP 4208) was erroneous because it was the unrecorded access easements which form the basis for the tort causes of action -- the access easements were not set forth in the VLPSA. The Klosters never claimed that the VLPSA was violated as required by **Boguch, supra, 153 Wn.App. at 618-619**.

Another basis for invalidating the trial court's award of attorney fees to Pacific Rim and Roberts is that the statutory warranty deed which Roberts gave the Klosters superceded the VLPSA. The VLPSA is merged into the statutory warranty deed and was extinguished -- as was the enforceability of the attorney fee clause. **Barber v. Peringer, 75 Wn.App. 248, 251-254, 877 P.2d 223 (1994)**. In sum, the award of attorney fees and costs against the Klosters was clearly erroneous on two separate grounds and must be reversed under both **Boguch, supra**, and **Barber, supra**.

**Issue 11. A CR 68 Offer Has No Application To The Determination Of An Attorney Fee Award Against An Insurer**

**A. Inapplicability:** In *Hodge v. Development Services of America*, 65 Wn.App. 576, 580-581, 828 P.2d 1175 (1992), the court stated that a CR 68 offer (App 30-31, 45-48) only affects the right to recover attorney fees as costs when fees as costs are permitted by statute. Thus, attorney fees and costs under *Olympic S.S. Co. v. Centennial Ins. Co.*, 117 Wn.2d 37, 52-53, 811 P.2d 673 (1991) are not affected by a CR 68 offer because they are permitted by case law, not by statute. Acceptance or rejection of a CR 68 offer can have no impact on whether an insured is entitled to recover attorney fees and costs under *Olympic S.S. Co.*, *supra*, 117 Wn.2d at 52-53.

In *Edmonson*, *supra*, 256 P.3d at 1229, the supreme court -- relying on well established "good faith" law -- held that whenever a warrantor or guarantor breaches its duty to defend, the warrantor or guarantor is obligated to pay the costs incurred in defense. The trial court erred in using the CR 68 offer to limit the Klosters' award of attorney fees against First American.

**B. Invalidity:** In addition to being inapplicable, the CR 68 offer (CP 4225, App 45-48) was not valid. The CR 68 offer was drafted by Calliste J. Korach, former counsel for Pacific Rim. It attached and incorporated two letters, one from First American's counsel, Mr. Courser, and one from Ms. Korach. (App 46-48) The offer's elements were the recordation of the missing access easements over WS-146, payment of \$40,000.00 to the Klosters, and the execution of mutual releases, including the Klosters's

promise to forego any complaints to any real estate ethics boards. CP 4226. The formal CR 68 offer was “inclusive of taxable costs and attorney’s fees accrued” (CP 4225, App 45) and Mr. Courser’s letter stated that “each of the parties to pay their own attorney’s fees and costs.” CP 4226. (App 46)

First, it is undisputed that the defendants never had the legal right to offer the unrecorded access easements in settlement -- the very heart of the settlement offer. In a declaration by the Klosters’s counsel, he recounted a telephone conversation he had with the then owner of the property who said that although he orally agreed to sell the non-recorded access easements for \$25,000.00, he had not signed an agreement to do so and again had changed his mind as he had when he was offered \$10,000.00 for the access easement from the defendants. CP 4345-4348. There was no declaration, evidence or even argument before the trial court which contradicted the Klosters’s counsel’s declaration that the non-recorded access easements could not be provided. RP 1337.

Second, the CR 68 offer also was not a valid settlement offer. It was ambiguous as to whether attorney fees were included and therefore must be construed against the defendants. **Seaborn Pile Driving Co., Inc. v. Glew, 132 Wn.App. 261, 269, 131 P.3d 910 (2006), review denied, 158 Wn.2d 1027; and Hodge, supra, 65 Wn.App. At 580-581.**

Third, the CR 68 offer also was not a valid settlement offer because

it was not sufficiently definite to determine whether the recovery against First American was more favorable than the joint offer. The joint offer on behalf of all five defendants, when considered individually, was less than the amount awarded against First American. The “cost of cure” was \$9,000.00 and First American’s one-fifth share of the offer was \$8,000.00.

Fourth, the trial court concluded that \$300 per hour was a reasonable hourly rate for defense counsel. CP 4369. If the Klosters’s award of attorney fees had been calculated at this rate for 168 hours, their attorney fees would be \$50,400.00 and their total recovery would be in excess of the CR 68 offer, thus invalidating it.

Fifth, the CR 68 offer also was not a valid settlement offer because it was against public policy; namely, the Klosters’ agreement not to make any complaints regarding Pacific Rim, Blades or Palmer to any real estate ethics boards. This conflicts with **RCW 18.85.361** (App 11-14) and **RCW 9A.72.090** and the Legislative Comment to **RCW 9A.72.090**. (App 10-11)

**C. Erroneous Calculation Of Attorney Fees:** Based on its post-trial ruling that the non-recorded access easements were a defect in title and covered under the title policy, the trial court awarded the Klosters the right to recover attorney fees and costs from First American pursuant to **Olympic S.S. Co., supra, 117 Wn.2d at 52-53**. CP 4210. Prior to November 7, 2011, the Klosters’s counsel spent in excess of 1,747 hours litigating this matter.

The Klosters's counsel estimated that 1,088 of these hours were spent litigating coverage and related issues involving First American and Ameri-Title. CP 4082-4083. However, based on the inapplicable and invalid CR 68 offer, the trial court limited the Klosters's attorney fees to 168 hours. How the trial court calculated this very limited number of hours related to coverage issues incurred before January 21, 2008 -- the date on which the CR 68 offer expired -- was never made clear. RP 1336-1339. The trial court's calculation of the award of the Klosters's attorney fees and its use of the CR 69 offer were both erroneous.

#### **IX. ATTORNEY FEES AND COSTS ON APPEAL**

The Klosters respectfully request that this court award them attorney fees and costs on appeal pursuant to **Rap 18.1(b)** (App 31) not only against First American pursuant to **Olympic S.S. Co., *supra*, 117 Wn.2d at 52-53; Axess Int'l, *supra*, 107 Wn.App. At 720-721; Erickson, *supra*, 156 Wn.App. at 158-159; and American Best Food, Inc., *supra*, 168 Wn.2d at 408, 411, 413**, but also against Roberts pursuant to **RCW 64.04.030** (App 21) and **Edmonson, *supra*, 256 P.3d at 1229** for her failure to defend the Klosters's title.

The Klosters have pursued this appeal to obtain full title insurance coverage and to defend their title to Lot 1. First American and Roberts have the responsibility to indemnify them for all costs and expenses incurred based

on First American's refusal to provide coverage for the Klosters's claim, and along with Roberts, for their bad faith refusal to defend the Klosters's title.

## **X. CONCLUSION**

The Klosters request that the following orders of the trial court be reversed:

1) the orders granting Roberts's motions for summary judgment and for an award her attorney fees and costs, and the order denying the Klosters's motion for summary judgment against Roberts;

2) the orders granting Pacific Rim's motions for judgment as a matter of law, for an award of its attorney fees and costs, and to set aside Judge Reynolds's CR 56(d) rulings that Pacific Rim had successor-in-interest status and liability, and the orders denying the Klosters's motions for summary judgment against Pacific Rim;

3) the order granting Heany's motion to quash service of summons, and the order denying the Klosters's motion to substitute Heany as Doe One;

4) the orders granting Ameri-Title's motions for judgment as a matter of law and to set aside Judge Reynolds's CR 56(d) ruling that Ameri-Title acted as an insurer of the Klosters's title, and the order denying the Klosters's motion for summary judgment against Ameri-Title;

5) the order granting First American's motion for judgment as a matter of law, and the orders denying the Klosters's motions for summary

judgment against First American and for an award against First American of all of their attorney fees and costs in the underlying action and for indemnification for any award against them by Roberts, Pacific Rim, and Heany;

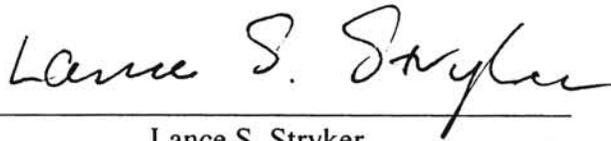
6) the orders granting the defendants' joint and several motions for summary judgment dismissing the Klosters' claims for emotional distress and consequential damages, and the orders granting the defendants' joint and several motions limiting the Klosters's expert's testimony and redacting the claim report by Trummel of Ameri-Title to First American.

Finally, the Klosters request that this matter be remanded to the trial court for trial against Heany and for a jury's determination of the Klosters's damages against Roberts, Heany, Pacific Rim, Ameri-Title and First American.

August 15, 2012

Respectfully Submitted,

Lance S. Stryker, WSBA No. 35005



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Lance S. Stryker  
Attorney for Appellants and Cross-Respondents

PROOF OF SERVICE

The undersigned certifies that he served a true copy of the APPELLANTS' OPENING BRIEF by placing the same in an envelope which was sealed and thereafter deposited in the United States mail with first class postage thereon fully prepaid; such deposit taking place at White Salmon, Washington, on the date set forth below, and addressed as follows:

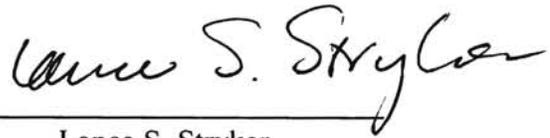
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111 North Grant Street  
Goldendale, WA 98620

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

Executed on August 15, 2012, in White Salmon, Washington.



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Lance S. Stryker

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**COVENANTS AND RESTRICTIONS**

1. THE PLAT HEREIN IS SUBJECT TO THE COVENANTS AND RESTRICTIONS OF THE COLUMBIA RIM OWNERS ASSOCIATION, A NON-PROFIT WASHINGTON CORPORATION (ARTICLES OF INCORPORATION FILED NOVEMBER 21, 1970 WITH THE SECRETARY OF STATE), SAID BY-LAW AND RECORDER UNDER AUDITORS FILE # 181157 AND THESE AGREEMENTS, PROTECTIVE COVENANTS AND TERMS THEREOF AS RECORDED UNDER AUDITORS FILE # 183507, 107977 AND 107076.
2. THE GRANTOR, ALVIN FRED HEAVEN JR. HEREBY DECLARES EASEMENTS FOR EGRESS, UTILITIES, AND UTILITIES AS SHOWN NOTED ON THIS PLAT AND NOTED IN THE ARTICLES HEREBIN. UNLESS OTHERWISE NOTED THE EASEMENTS SHALL BE PERPETUAL, UNREVOCABLE AND ASSIGNABLE IN WHOLE OR IN PART AND SHALL BE APPURTENANT TO SAID LOT WITH THE REAL PROPERTY, UTILITY EASEMENTS FOR THE PURPOSE OF EXTENDING UTILITIES FROM THIS PLAT TO PROPERTY OUTSIDE THE COLUMBIA RIM'S LEGAL DESCRIPTION (AUDITORS FILE # 183507) SHALL NOT BE GRANTED WITHOUT THE CONSENT OF ALVIN FRED HEAVEN JR. OR THE COLUMBIA RIM OWNERS ASSOCIATION.
3. THE GRANTOR HEREBY RESERVES AND DECLARES EASEMENTS FOR DRAINAGE AND ADJACENT UTILITIES ONCE SAID EASEMENTS ARE MADE A PART OF LAND (S) FEET IN WIDTH PARALLEL TO AND ON THE INTERIOR SIDE OF THE EXTERIOR BOUNDARIES OF EACH PARCEL HEREBY CONVEYED.
4. THE GRANTOR HEREBIN RESERVES CERTAIN VIEW EASEMENTS FOR THE BENEFIT OF THE HEREIN DESCRIBED PLATED LOTS. THE VIEW EASEMENTS AND TERMS THEREOF ARE DESCRIBED UNDER AUDITORS FILE # 107076.
5. THE GRANTOR, ALVIN FRED HEAVEN JR. DOES HEREBY AND BY THESE PRESENT ARTICLES AND PLAT TO THE FOLLOWING BUILDING AND USE RESTRICTIONS: NO MOBILE HOME SHALL BE PERMITTED AS A PERMANENT RESIDENCE WHICH IS LESS THAN 24 FEET IN WIDTH. MOBILE HOME SHALL MEASUREMENTS, BUT DESIGNED TO BE TRANSPORTABLE UPON THE PUBLIC HIGHWAYS OR HIGHWAYS AND CERTIFIED AS SUCH BY THE STATE OF WASHINGTON DEPT. OF LABOR AND INDUSTRIES. A MOBILE HOME SHALL BE USED AS TEMPORARY RESIDENCE FOR UP TO 18 MONTHS WHILE A PERMANENT RESIDENCE IS BEING BUILT. IN ADDITION TO THIS PERIOD ANY MOBILE HOME SHALL BE REMOVED FROM THE EXTENSION.
6. THESE RESTRICTIONS SHALL BE DEEMED TO BE FOR THE PROTECTION AND FOR THE BENEFIT OF EACH OF THE OWNERS OR OCCUPANTS OF ANY PORTION OF THE PROPERTY DESCRIBED IN THIS PLAT AND IS INTENDED THAT EACH LOT BENEFITING FROM SAID EASEMENTS AND COVENANTS SHALL HAVE THE RIGHT TO PROSECUTE SUCH PROCEEDINGS AT LAW OR IN EQUITY AS MAY BE APPROPRIATE TO ENFORCE THE RESTRICTIONS HEREBIN SET FORTH.
7. THESE RESTRICTIONS SHALL RUN WITH THE LAND AND SHALL BE BINDING ON THE OWNER OR TRUSTEE OF ANY OR ALL OF SAID LAND AND ALL PERSONS CLAIMING BY, THROUGH, OR UNDER UNTIL JANUARY 1, 1980, AT WHICH TIME SAID COVENANTS SHALL BE AUTOMATICALLY EXTENDED FOR SUCCESSIVE TEN (10) YEAR PERIODS. HOWEVER, THE COVENANTS CAN BE MODIFIED OR AMENDED AS FOLLOWS: AT ANY TIME PRIOR TO JANUARY 1, 1984, 5% OF THE 6 LOT OWNERS OR 75% MUST APPROVE OF THE CHANGE. AFTER JANUARY 1, 1984, 5% OF THE 6 LOT OWNERS OR 62.5% MUST APPROVE THE CHANGE.

8. INVALIDATION OF ANY ONE OF THESE FOREGOING COVENANTS, RESTRICTIONS, OR CONDITIONS, OR ANY PORTION THEREOF, BY COURT ORDER, JUDGMENT OR DECREE SHALL IN NO WAY AFFECT ANY OF THE OTHER REMAINING PROVISIONS THEREOF WHICH SHALL, IN SUCH CASE, CONTINUE TO REMAIN IN FULL FORCE AND EFFECT.

**DECLARATION**

WE, ALVIN FRED HEAVEN JR., JOHN H. AND MARGA E. DANIELSON, MARGA E. AND MARY J. DOYLE, DONALD B. AND LEONORA M. RAMBOY AS OWNERS IN FULL OF THE LAND SHOWN ON THE ABOVE PLAT AND HEREBY PARTICULARLY DESCRIBED IN THE SCHEDULES CERTIFICATE HEREBY INTO ATTACHED HEREBIN APPROVE THE ABOVE COVENANTS, EASEMENTS, AND RESTRICTIONS AS INDICATED UNDER ITEMS 1 THROUGH 8.

Alvin Fred Heaven Jr. KNOWN TO ME, DID PERSONALLY APPEAR, ALVIN FRED HEAVEN JR. WHO BEING FIRST SIGNED, SAY THAT HE DID SIGN THIS INSTRUMENT OF HIS OWN FREE AND VOLUNTARY ACT ON THIS 21<sup>st</sup> DAY OF July, 1981. Robert R. Blodgett NOTARY PUBLIC, STATE OF Washington, MY COMMISSION EXPIRES August 28, 1984.

John H. Danielson AND Marga E. Danielson KNOWN TO ME, DID PERSONALLY APPEAR, JOHN H. DANIELSON AND MARGA E. DANIELSON WHO BEING FIRST SIGNED, SAY THAT THEY DID SIGN THIS INSTRUMENT OF THEIR OWN FREE AND VOLUNTARY ACT ON THIS 9<sup>th</sup> DAY OF July, 1981. Robert R. Blodgett NOTARY PUBLIC, STATE OF Washington, MY COMMISSION EXPIRES August 28, 1984.

Alvin Fred Heaven Jr. AND Mary J. Doyle KNOWN TO ME, DID PERSONALLY APPEAR, ALVIN F. DOYLE AND MARY J. DOYLE WHO BEING FIRST SIGNED, SAY THAT THEY DID SIGN THIS INSTRUMENT OF THEIR OWN FREE AND VOLUNTARY ACT ON THIS 20<sup>th</sup> DAY OF July, 1981. Robert R. Blodgett NOTARY PUBLIC, STATE OF Washington, MY COMMISSION EXPIRES August 28, 1984.

Donald B. Rambo AND Leonora M. Rambo KNOWN TO ME, DID PERSONALLY APPEAR, DONALD B. RAMBOY AND LEONORA M. RAMBOY WHO BEING FIRST SIGNED, SAY THAT THEY DID SIGN THIS INSTRUMENT OF THEIR OWN FREE AND VOLUNTARY ACT ON THIS 21<sup>st</sup> DAY OF July, 1981.

THIS PLAT AND ACCOMPANYING DOCUMENTS EXAMINED AND APPROVED AS TO (A) SURVEY DATA (B) LAYOUT OF BOUNDS AND EASEMENTS (C) ROAD NAMES AND NUMBERS ON THIS 17<sup>th</sup> DAY OF May, 1981.  
Edward C. Spang  
COUNTY ENGINEER

THIS PLAT EXAMINED AND CERTIFIED ON THIS 17<sup>th</sup> DAY OF May, 1981 FOR COMPLIANCE WITH STATE AND COUNTY HEALTH REQUIREMENTS.  
Robert F. Haggart  
COUNTY SANITARIAN

THIS PLAT EXAMINED AND CERTIFIED ON THIS 19<sup>th</sup> DAY OF May, 1981 FOR CONFORMANCE WITH COMPREHENSIVE PLAN.  
John A. ...  
COUNTY PLANNING DIRECTOR

THIS PLAT EXAMINED AND CERTIFIED ON THIS 18<sup>th</sup> DAY OF May, 1981 THAT ALL ASSESSMENTS AND TAXES DUE HEREON HAVE BEEN FULLY PAID.  
Richard ...  
COUNTY TREASURER

THIS PLAT EXAMINED AND APPROVED ON THIS 21<sup>st</sup> DAY OF May, 1981.  
Earl Nally  
BY COMMISSIONERS QUINTERVAL  
John M. ...  
COUNTY COMMISSIONER  
R. P. ...  
COUNTY COMMISSIONER

181115  
COUNTY COMMISSIONER  
FILED FOR RECORD THIS 15<sup>th</sup> DAY OF DECEMBER, 1981 IN VOLUME 5, PAGE 31-32 AT THE REQUEST OF SHERIFF GARY HARRINGTON COUNTY.

PACIFIC RIM ESTATES  
S.W. 1/4, 18N 1/4 SEC. 21, TEN. 15E. W. 1/4  
KLUCKWANT COUNTY, WASHINGTON  
SCALE 1" = 100'

**Trial Court's Jury Instructions:**

**Jury Instruction No. 6:** Negligence is the failure to exercise ordinary care. It is the doing of some act that a reasonably careful person would not do under the same or similar circumstances or the failure to do some act that a reasonably careful person would have done under the same or similar circumstances.

**Jury Instruction No. 6A:** A real estate licensee owes a duty to disclose all existing material facts only if they are known by the licensee and not apparent or readily ascertainable to a party. A real estate licensee does not have a duty to investigate matters that the licensee has not agree to investigate.

**Jury Instruction No. 6B:** Unless otherwise agreed, a licensee owes no duty to conduct an independent inspection of the property and owes no duty to independently verify the accuracy or completeness of any statement made by either party or by any source reasonably believed by the licensee to be reliable.

**Jury Instruction No. 6B-1:** Whether a real estate agent or broker has acted negligently depends on whether he has exercised the degree of skill, care and learning expected of a reasonably prudent real estate agent or broker in the State of Washington acting in the same or similar circumstances at the time of the real estate transaction in question. Failure to exercise such skill, care, and learning constitutes a breach of the standard of care and is negligence.

The degree of care actually practiced by members of the real estate profession is evidence of what is reasonably prudent. However, this evidence alone is not conclusive on the issue and should be considered by you along with any other evidence bearing on the question.

**Jury Instruction No. 6C:** A real estate agent or broker does not guarantee the results of the real estate brokerage services he has rendered.

A poor result arising out of those real estate brokerage services is not, by itself, evidence of negligence.

**The Klosters Jury Instruction No. 16: Constructive or Imputed Knowledge:** Constructive or imputed knowledge is knowledge which a person does not actually know but objectively should know or has reason to know. If a person exercising reasonable care could have known a fact, he or

she is deemed to have had knowledge of that fact.

**Findings Of Fact Regarding Pacific Rim and Roberts:**

12. Plaintiffs alleged causes of action against Defendant Raney that ultimately failed. The court dismissed all causes of action against Defendant Raney on summary judgment because plaintiffs failed to present any proof of any of their causes of action against her.

13. Plaintiffs alleged causes of action against Pacific Rim Brokers that ultimately failed. The court dismissed plaintiffs' claims of fraudulent concealment and fraudulent misrepresentation at trial at the close of plaintiffs' case because plaintiffs failed to present even a scintilla of evidence to show any knowing or intentional representation of material fact or knowing or intentional concealment of existing fact. Although Pacific Rim Brokers had moved for summary judgment of dismissal of those claims, and although the court had denied that motion, it was reasonable for Pacific Rim Brokers to incur that legal expense in light of the absence of any serious proof of intentional torts of Pacific Rim Brokers.

13. The jury ultimately found, for Pacific Rim Brokers in several respects, finding that plaintiffs failed to prove any difference in market value of the subject real property and failed to prove any out-of-pocket expenses as damages, finding that Pacific Rim Brokers had not committed negligent misrepresentation, and finding that plaintiffs were 100% at fault for their alleged damages. Although Judge Thompson Reynolds previously denied Pacific Rim Brokers' first motion for summary judgment, which included a request for dismissal of plaintiffs' claim of negligent misrepresentation against Pacific Rim Brokers, and although this court denied Pacific Rim Brokers' motion to dismiss the negligent-misrepresentation claim at the end of plaintiffs' case, the jury's findings show that it was reasonable for Pacific Rim Brokers to have incurred the legal expense of that summary judgment motion.

14. Plaintiffs alleged hundreds of thousands of dollars in damages for alleged emotional distress. This court dismissed those damage claims on summary judgment because they were entirely without factual support.

15. Plaintiffs alleged \$1,911.70 in damages for "cost of acquisition of the property." This court dismissed those damage claims on defendants' motions for summary judgment because Washington law does not permit them.

16. Plaintiffs alleged an indeterminate amount in damages for the "ongoing cost of ownership." This court dismissed those damage claims on defendants' motions for summary judgment because Washington law does not permit them.

17. Plaintiffs alleged \$2,500 in damages for "time and expense of property location." This court dismissed those damage claims on defendants' motions for summary judgment because Washington law does not permit them.

18. Plaintiffs alleged an indeterminate amount in damages for "loss of interest on funds to purchase property." This court dismissed those damage claims on defendants' motions for summary judgment because Washington law does not permit them.

19. Plaintiffs alleged \$180,000 in damages for "loss of business opportunity in property purchase," including \$40,000 on land purchase/sale and approximately \$120,000 on building construction development/sale. This court dismissed those damage claims on defendants' motions for summary judgment because they were entirely without factual support.

20. Plaintiffs alleged \$5,750 in damages for "loss of time and expense in attempts in develop property," including \$3,250.00 for 50 hours of skidder use and approximately \$2,500.00 for labor for 100 hours of land clearing and preparation. This court dismissed those damage claims on defendants' motions for summary judgment because they were entirely without factual support.

21. Plaintiffs alleged \$25,000 per person for "being defrauded into purchase of property." This court dismissed those damage claims on defendants' motions for summary judgment because Washington law does not permit them.

22. Plaintiffs alleged loss of consortium. This court dismissed those damages on the first day of trial because they were entirely without factual support.

23. Plaintiffs pursued legal theories and engaged in motion practice that was expensive and proved to be ultimately futile. In particular, plaintiffs vigorously pursued a theory of successor liability of Pacific Rim Brokers, Inc. for the conduct of Pacific Rim Properties, a sole proprietorship. Mr. Heany was the proprietor of Pacific Rim Properties, but contrary to plaintiffs' assertions throughout this action, there was no factual or legal basis for

successor liability of Pacific Rim Brokers, Inc. for activities of Mr. Heany as a real estate developer. Plaintiffs forced Pacific Rim Brokers, Inc. to a significant amount of time and legal expense in defending against this successor liability issue. There ultimately was no substantial evidence for the court to present to the jury on any theory of successor liability.

**Conclusions of Law Regarding Pacific Rim and Roberts:**

1. The above-quoted attorney-fee provision in the VLPSA applies to all claims against Defendants Roberts and Pacific Rim Brokers, Inc. All of plaintiffs' claims against Defendants Roberts and Pacific Rim Brokers, Inc. constitute an action is on that contract, because this action arose out of that contract, and the contract is central to the dispute.
2. Defendants Roberts and Pacific Rim Brokers, Inc. are prevailing parties in this action. All plaintiffs are non-prevailing parties. Under the VLPSA, plaintiffs are liable to Defendants Roberts and Pacific Rim Brokers, Inc. for their reasonable attorney fees and legal expenses.
3. The court must award Defendants Roberts and Pacific Rim Brokers, Inc., and assess against plaintiffs, attorney fees based on a reasonable hourly rate and a reasonable number of hours for the defense of those defendants in this action.
4. The hourly rates charged by all attorneys who defended Defendants Roberts and Pacific Rim Brokers, Inc. in this action were reasonable. Indeed, those hourly rates are significantly below the rates that other similarly experienced attorneys in the State of Washington reasonably charge. Because the hourly rates that counsel for Defendants Roberts and Pacific Rim Brokers, Inc. actually charged are substantially below reasonable rates, the court concludes that \$300 per hour is a reasonable hourly rate.
5. The number of hours worked by all attorneys for Defendants Roberts and Pacific Rim Brokers, Inc. was reasonable in the circumstances in this case.
6. Even if segregation of legal expenses for unsuccessful or unproductive efforts were required, such segregation is not practicable in the circumstances of this case. The successful versus unsuccessful efforts by counsel for Defendants Roberts and Pacific Rim Brokers, Inc. are so interrelated that no reasonable segregation can be made.

### **Findings Of Fact Regarding First American:**

1. The jury's verdict found a "cost of cure" for the non-recorded access easements of \$9,000.00, a real, actual loss.
2. The "cost of cure" is a covered loss under First American's title policy issued to the Klosters because the title policy is a contract of indemnity which insures against actual loss from the existence of a title defect.
3. The Defendants collectively made a valid CR 68 offer which expired on January 21, 2008, which the Klosters did not accept.
4. The Klosters are entitled to attorney fees and costs incurred under Olympic S.S. Co. v. Centennial Ins. Co., 117 Wn.2d 37, 52 - 53, (1991), for litigating coverage matters up to January 21, 2008, the date the CR 68 offer expired.
5. First American is entitled to recover its costs incurred after January 21, 2008, the date the CR 68 offer expired, in the sum of \$796.65.
6. The hard thing for the court to determine and the area where the court spent several hours on was how to sort through Mr. Stryker's submissions and come up with a reasonable basis for awarding earned fees where the court wasn't just guessing. And Mr. Courser did an admirable job on showing show difficult that is. The court is not allowed to speculate.

After viewing Mr. Courser's submissions, it's clear that First American's position is that with all these flaws in the way that that these bills were submitted, that taking almost any of the theories, that Mr. Stryker can't be awarded any fees because the court has no basis to award them. Again, the court has narrowed this down to not awarding fees for unsuccessful motions, the torts that didn't succeed, the Consumer Protection Act that didn't succeed, the mediation that occurred, block billing that was indecipherable to the court cannot succeed, and then the overall determination, of course, the global view of how much they asked for, a million dollars versus how much they got, and in addition to ultimately not adopting the plaintiffs' theory.

In that context, the court went through both Mr. Stryker's and Mr. Courser's version of Mr. Stryker's fees line by line, block by block, and the court found what the court believes to be a number of hours that are not reasonably subject to speculation, that were coverage or inter-mingled with Ameri-Title issues in a way that cannot be appropriately segregated, and the court doesn't

believe have to be, but that were clearly not related to the Pacific Rim issues nor any of these unsuccessful motions.

Naturally, the submissions made it very difficult to do that with any absolute accuracy. Nevertheless, the court has a number of hours that the court is confident reasonably approach what the Klosters had to pay for coverage up until the date in 2008, and that is 168 hours. 168 hours was spent on coverage. The court is using its calculator right now to double check the court's math. That's \$25,200.00. \$25,200 is the award of fees to Mr. Stryker under Olympic Steamship.

The court agrees with Mr. Courser's position on the costs and the costs to Mr. Stryker's clients will be \$314. After sorting through the Klosters' attorney time and cost entries, the Court has identified 168 hours of attorney's time expended on coverage matters and \$314.00 in costs.

7. The reasonable value of such attorney's time is \$25,200.00.

8. First American's costs will be off-set against the Klosters' judgment for "costs of cure," attorney fees and costs.

**Conclusions of Law Regarding First American:**

1. The Klosters have coverage under First American's title policy issued to them for the non-recorded access easements for which the jury found \$9,000.00 as a "cost of cure."

2. The Klosters are entitled to judgment against First American for the "cost of cure" of \$9,000.00 as found by the jury.

3. The Klosters expended 168 hours of attorney's time litigating coverage issues of the reasonable value of \$25,200.00 and incurred \$314.00 in costs litigating coverage issues which the Klosters are entitled to recover Against First American pursuant to Olympic S.S. Co. v. Centennial Ins. Co., 117 Wn.2d 37, 52 - 53, (1991).

4. First American is entitled to its costs of \$796.65 incurred after January 21, 2008, the date the CR 68 offer expired.

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**Statutes:**

**RCW 4.56.250 - Claims for non-economic damages - Limitation**

(1) As used in this section, the following terms have the meanings indicated unless the context clearly requires otherwise.

(a) "Economic damages" means objectively verifiable monetary losses, including medical expenses, loss of earnings, burial costs, loss of use of property, cost of replacement or repair, cost of obtaining substitute domestic services, loss of employment, and loss of business or employment opportunities.

(b) "Noneconomic damages" means subjective, nonmonetary losses, including, but not limited to pain, suffering, inconvenience, mental anguish, disability or disfigurement incurred by the injured party, emotional distress, loss of society and companionship, loss of consortium, injury to reputation and humiliation, and destruction of the parent-child relationship.

(c) "Bodily injury" means physical injury, sickness, or disease, including death.

(d) "Average annual wage" means the average annual wage in the state of Washington as determined under RCW 50.04.355.

(2) In no action seeking damages for personal injury or death may a claimant recover a judgment for noneconomic damages exceeding an amount determined by multiplying 0.43 by the average annual wage and by the life expectancy of the person incurring noneconomic damages, as the life expectancy is determined by the life expectancy tables adopted by the insurance commissioner. For purposes of determining the maximum amount allowable for noneconomic damages, a claimant's life expectancy shall not be less than fifteen years. The limitation contained in this subsection applies to all claims for noneconomic damages made by a claimant who incurred bodily injury. Claims for loss of consortium, loss of society and companionship, destruction of the parent-child relationship, and all other derivative claims asserted by persons who did not sustain bodily injury are to be included within the limitation on claims for noneconomic damages arising from the same bodily injury.

(3) If a case is tried to a jury, the jury shall not be informed of the limitation

contained in subsection (2) of this section.

**RCW 9A.72.090 - Bribing a witness**

(1) A person is guilty of bribing a witness if he or she offers, confers, or agrees to confer any benefit upon a witness or a person he or she has reason to believe is about to be called as a witness in any official proceeding or upon a person whom he or she has reason to believe may have information relevant to a criminal investigation or the abuse or neglect of a minor child, with intent to:

(a) Influence the testimony of that person; or

(b) Induce that person to avoid legal process summoning him or her to testify;  
or

(c) Induce that person to absent himself or herself from an official proceeding to which he or she has been legally summoned; or

(d) Induce that person to refrain from reporting information relevant to a criminal investigation or the abuse or neglect of a minor child.

(2) Bribing a witness is a class B felony.

**Legislative Comment to RCW 9A.72.090**

The legislature finds that witness intimidation and witness tampering serve to thwart both the effective prosecution of criminal conduct in the state of Washington and resolution of child dependencies.

Further, the legislature finds that intimidating persons who have information pertaining to a future proceeding serves to prevent both the bringing of a charge and prosecution of such future proceeding. The legislature finds that the period before a crime or child abuse or neglect is reported is when a victim is most vulnerable to influence, both from the defendant or from people acting on behalf of the defendant and a time when the defendant is most able to threaten, bribe, and/or persuade potential witnesses to leave the jurisdiction or withhold information from law enforcement agencies.

The legislature moreover finds that a criminal defendant's admonishment or demand to a witness to "drop the charges" is intimidating to witnesses or

other persons with information relevant to a criminal proceeding.

The legislature finds, therefore, that tampering with and/or intimidating witnesses or other persons with information relevant to a present or future criminal or child dependency proceeding are grave offenses which adversely impact the state's ability to promote public safety and prosecute criminal behavior.

### **RCW 18.85.361 - Disciplinary action - Grounds**

In addition to the unprofessional conduct described in RCW 18.235.130, the director may take disciplinary action against any person engaged in the business or acting in the capacity of a real estate broker, managing broker, designated broker, or real estate firm, regardless of whether the transaction was for the person's own account or in a capacity as broker, managing broker, designated broker, or real estate firm, and may impose any of the sanctions and fines specified in RCW 18.235.110 for any holder or applicant who is guilty of:

- (1) Violating any of the provisions of this chapter or any lawful rules made by the director pursuant thereto or violating a provision of chapter 64.36, 19.105, or 18.235 RCW or RCW 18.86.030 or the rules adopted under those chapters or section;
- (2) Making, printing, publishing, distributing, or causing, authorizing, or knowingly permitting the making, printing, publication or distribution of false statements, descriptions or promises of such character as to reasonably induce any person to act thereon, if the statements, descriptions, or promises purport to be made or to be performed by either the licensee or his or her principal and the licensee then knew or, by the exercise of reasonable care and inquiry, could have known, of the falsity of the statements, descriptions or promises;
- (3) Knowingly committing, or being a party to, any material fraud, misrepresentation, concealment, conspiracy, collusion, trick, scheme, or device whereby any other person lawfully relies upon the word, representation or conduct of the licensee;
- (4) Accepting the services of, or continuing in a representative capacity, any broker or managing broker who has not been granted a license, or after his or her license has been revoked or during a suspension thereof;

(5) Conversion of any money, contract, deed, note, mortgage, or abstract or other evidence of title, to the person's own use or to the use of that person's principal or of any other person, when delivered in trust or on condition, in violation of the trust or before the happening of the condition; and failure to return any money or contract, deed, note, mortgage, abstract, or other evidence of title within thirty days after the owner thereof is entitled thereto, and makes demand therefor, is prima facie evidence of such conversion;

(6) Failing, upon demand, to disclose any information within the person's knowledge, or to produce any document, book, or record in the person's possession for inspection by the director or the director's authorized representatives acting by authority of law;

(7) Continuing to sell any real estate, or operating according to a plan of selling, whereby the interests of the public are endangered, after the director has, by order in writing, stated objections thereto;

(8) Advertising in any manner without including the real estate firm's name or assumed name as licensed in a clear and conspicuous manner in the advertisement; except, that real estate brokers, managing brokers, or firms advertising their personally owned real property must only disclose that they hold a real estate license;

(9) Accepting other than cash or its equivalent as earnest money unless that fact is communicated to the owner before the owner's acceptance of the offer to purchase, and such fact is shown in the purchase and sale agreement;

(10) Charging or accepting compensation from more than one party in any one transaction without first making full disclosure in writing of all the facts to all the parties interested in the transaction;

(11) Accepting, taking, or charging any undisclosed commission, rebate, or direct profit on expenditures made for the principal;

(12) Accepting employment or compensation for appraisal of real property contingent upon reporting a predetermined value;

(13) Issuing a report on any real property in which the broker, managing broker, or real estate firm has an interest unless that interest is clearly stated in the report;

(14) Misrepresentation of membership in any state or national real estate association;

(15) Discrimination against any person in hiring or in real estate brokerage service activity, on the basis of any of the provisions of any local, county, state, or federal antidiscrimination law;

(16) Failing to keep an escrow or trustee account of funds deposited relating to a real estate transaction, for a period of three years, showing to whom paid, and other pertinent information as the director may require, such records to be available to the director, or the director's representatives, on demand, or upon written notice given to the bank;

(17) In the case of a firm and its designated broker, failing to preserve records relating to any real estate transaction for three years following the submission of the records to the firm;

(18) Failing to furnish a copy of any listing, sale, lease, or other contract relevant to a real estate transaction to all signatories thereof within a reasonable time following execution;

(19) In the case of a broker or managing broker, acceptance of a commission or any valuable consideration for the performance of any acts specified in this chapter, from any person, except the licensed real estate firm with whom the broker or managing broker is licensed;

(20) To direct any transaction involving his or her principal, to any lending institution for financing or to any escrow company, in expectation of receiving a kickback or rebate therefrom, without first disclosing the expectation to his or her principal;

(21) Buying, selling, or leasing directly, or through a third party, any interest in real property without disclosing in writing that the person is a real estate licensee;

(22) In the case of real estate firms, and managing and designated brokers, failing to exercise adequate supervision over the activities of their brokers and managing brokers within the scope of this chapter;

(23) Any conduct in a real estate transaction which demonstrates bad faith, dishonesty, untrustworthiness, or incompetence;

(24) Acting as a vehicle dealer, as defined in RCW 46.70.011, without having a license to do so; or

(25) Failing to ensure that the title is transferred under chapter 46.12 RCW when engaging in a transaction involving a mobile or manufactured home as a broker, managing or designated broker, or firm.

## **RCW Chapter 18.86 - Real estate brokerage relationships**

### **RCW 18.86.030 - Duties of licensee**

(1) Regardless of whether the licensee is an agent, a licensee owes to all parties to whom the licensee renders real estate brokerage services the following duties, which may not be waived:

(a) To exercise reasonable skill and care;

(b) To deal honestly and in good faith;

(c) To present all written offers, written notices and other written communications to and from either party in a timely manner, regardless of whether the property is subject to an existing contract for sale or the buyer is already a party to an existing contract to purchase;

(d) To disclose all existing material facts known by the licensee and not apparent or readily ascertainable to a party; provided that this subsection shall not be construed to imply any duty to investigate matters that the licensee has not agreed to investigate;

(e) To account in a timely manner for all money and property received from or on behalf of either party;

(f) To provide a pamphlet on the law of real estate agency in the form prescribed in RCW 18.86.120 to all parties to whom the licensee renders real estate brokerage services, before the party signs an agency agreement with the licensee, signs an offer in a real estate transaction handled by the licensee, consents to dual agency, or waives any rights, under RCW 18.86.020(1)(e), 18.86.040(1)(e), 18.86.050(1)(e), or 18.86.060(2)(e) or (f), whichever occurs earliest; and

(g) To disclose in writing to all parties to whom the licensee renders real

estate brokerage services, before the party signs an offer in a real estate transaction handled by the licensee, whether the licensee represents the buyer, the seller, both parties, or neither party. The disclosure shall be set forth in a separate paragraph entitled "Agency Disclosure" in the agreement between the buyer and seller or in a separate writing entitled "Agency Disclosure."

(2) Unless otherwise agreed, a licensee owes no duty to conduct an independent inspection of the property or to conduct an independent investigation of either party's financial condition, and owes no duty to independently verify the accuracy or completeness of any statement made by either party or by any source reasonably believed by the licensee to be reliable.

#### **RCW 18.86.090 - Vicarious liability**

(1) A principal is not liable for an act, error, or omission by an agent or subagent of the principal arising out of an agency relationship:

(a) Unless the principal participated in or authorized the act, error, or omission; or

(b) Except to the extent that:

(i) The principal benefitted from the act, error, or omission; and

(ii) the court determines that it is highly probable that the claimant would be unable to enforce a judgment against the agent or subagent.

(2) A licensee is not liable for an act, error, or omission of a subagent under this chapter, unless the licensee participated in or authorized the act, error or omission. This subsection does not limit the liability of a real estate broker for an act, error, or omission by an associate real estate broker or real estate salesperson licensed to that broker.

#### **RCW 18.86.110 - Application**

This chapter supersedes only the duties of the parties under the common law, including fiduciary duties of an agent to a principal, to the extent inconsistent with this chapter. The common law continues to apply to the parties in all other respects. This chapter does not affect the duties of a licensee while engaging in the authorized or unauthorized practice of law as determined by

the courts of this state. This chapter shall be construed broadly.

**Chapter 19.86. Unfair business practices - Consumer Protection Act (CPA)**

**RCW 19.86.020 - Unfair competition, practices, declared unlawful.**

Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

**RCW 48.01.010 - Short title**

Title 48 RCW constitutes the insurance code.

**RCW 48.01.030 - Public interest**

The business of insurance is one affected by the public interest, requiring that all persons be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters. Upon the insurer, the insured, their providers, and their representatives rests the duty of preserving inviolate the integrity of insurance.

**RCW 48.01.040 - "Insurance" defined**

Insurance is a contract whereby one undertakes to indemnify another or pay a specified amount upon determinable contingencies.

**RCW 48.01.050 - "Insurer" defined**

"Insurer" as used in this code includes every person engaged in the business of making contracts of insurance, other than a fraternal benefit society. A reciprocal or interinsurance exchange is an "insurer" as used in this code. Two or more hospitals that join and organize as a mutual corporation pursuant to chapter 24.06 RCW for the purpose of insuring or self-insuring against liability claims, including medical liability, through a contributing trust fund are not an "insurer" under this code. Two or more local governmental entities, under any provision of law, that join together and organize to form an organization for the purpose of jointly self-insuring or self-funding are not an "insurer" under this code. Two or more affordable housing entities that join together and organize to form an organization for the purpose of jointly self-insuring or self-funding under chapter 48.64 RCW

are not an "insurer" under this code. Two or more persons engaged in the business of commercial fishing who enter into an arrangement with other such persons for the pooling of funds to pay claims or losses arising out of loss or damage to a vessel or machinery used in the business of commercial fishing and owned by a member of the pool are not an "insurer" under this code.

**RCW 48.01.070 - "Person" defined**

"Person" means any individual, company, insurer, association, organization, reciprocal or inter-insurance exchange, partnership, business trust, or corporation.

**RCW 48.17.180. Doing business under any name other than legal name**

An insurance producer or title insurance agent doing business under any name other than the insurance producer's or title insurance agent's legal name is required to register the name in accordance with chapter 19.80 RCW and notify the commissioner before using the assumed name.

**RCW 48.29.010(3)(c) - Definitions**

(3) For purposes of this chapter, unless the context clearly requires otherwise:

(c) "Preliminary report," "commitment," or "binder" means reports furnished in connection with an application for title insurance and are offers to issue a title policy subject to the stated exceptions in the reports, the conditions and stipulations of the report and the issued policy, and other matters as may be incorporated by reference. The reports are not abstracts of title, nor are any of the rights, duties, or responsibilities applicable to the preparation and issuance of an abstract of title applicable to the issuance of any report. The report is not a representation as to the condition of the title to real property, but is a statement of terms and conditions upon which the issuer is willing to issue its title policy, if the offer is accepted.

**RCW 48.29.170. Agents - Separate licenses for individuals not required**

Title insurance agents are exempt from the provisions of \*RCW 48.17.180(1) that require that each individual empowered to exercise the authority of a licensed firm or corporation must be separately licensed.

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**RCW 48.30.010 Unfair practices in general -- Remedies and penalties.**

(1) No person engaged in the business of insurance shall engage in unfair methods of competition or in unfair or deceptive acts or practices in the conduct of such business as such methods, acts, or practices are defined pursuant to subsection (2) of this section.

(2) In addition to such unfair methods and unfair or deceptive acts or practices as are expressly defined and prohibited by this code, the commissioner may from time to time by regulation promulgated pursuant to chapter 34.05 RCW, define other methods of competition and other acts and practices in the conduct of such business reasonably found by the commissioner to be unfair or deceptive after a review of all comments received during the notice and comment rule-making period.

(3)(a) In defining other methods of competition and other acts and practices in the conduct of such business to be unfair or deceptive, and after reviewing all comments and documents received during the notice and comment rule-making period, the commissioner shall identify his or her reasons for defining the method of competition or other act or practice in the conduct of insurance to be unfair or deceptive and shall include a statement outlining these reasons as part of the adopted rule.

(b) The commissioner shall include a detailed description of facts upon which he or she relied and of facts upon which he or she failed to rely, in defining the method of competition or other act or practice in the conduct of insurance to be unfair or deceptive, in the concise explanatory statement prepared under RCW 34.05.325(6).

(c) Upon appeal the superior court shall review the findings of fact upon which the regulation is based de novo on the record.

(4) No such regulation shall be made effective prior to the expiration of thirty days after the date of the order by which it is promulgated.

(5) If the commissioner has cause to believe that any person is violating any such regulation, the commissioner may order such person to cease and desist therefrom. The commissioner shall deliver such order to such person direct or mail it to the person by registered mail with return receipt requested. If the person violates the order after expiration of ten days after the cease and desist order has been received by him or her, he or she may be fined by the

commissioner a sum not to exceed two hundred and fifty dollars for each violation committed thereafter.

(6) If any such regulation is violated, the commissioner may take such other or additional action as is permitted under the insurance code for violation of a regulation.

### **RCW Chapter 58.17. Plats - Subdivisions - Dedications.**

#### **RCW 58.17.020 (2), (3) and (5) - Definitions**

(2) "Plat" is a map or representation of a subdivision, showing thereon the division of a tract or parcel of land into lots, blocks, streets and alleys, or other divisions and dedications.

(3) "Dedication" is the deliberate appropriation of land by an owner for any general and public uses, reserving to himself or herself no other rights than such as are compatible with the full exercise and enjoyment of the public uses to which the property has been devoted. The intention to dedicate shall be evidenced by the owner by the presentment for filing of a final plat or short plat showing the dedication thereon; and, the acceptance by the public shall be evidenced by the approval of such plat for filing by the appropriate governmental unit.

A dedication of an area of less than two acres for use as a public park may include a designation of a name for the park, in honor of a deceased individual of good character.

(5) "Final plat" is the final drawing of the subdivision and dedication prepared for filing for record with the county auditor and containing all elements and requirements set forth in this chapter and in local regulations adopted under this chapter.

#### **RCW 58.17.030 - Subdivisions to comply with chapter, local regulations**

Every subdivision shall comply with the provisions of this chapter. Every short subdivision as defined in this chapter shall comply with the provisions of any local regulation adopted pursuant to RCW 58.17.060.

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**RCW 58.17.160(1) - Requirements for each plat or replat filed for record**

Each and every plat, or replat, of any property filed for record shall:

(1) Contain a statement of approval from the city, town or county licensed road engineer or by a licensed engineer acting on behalf of the city, town or county as to the layout of streets, alleys and other rights-of-way, design of bridges, sewage and water systems, and other structures;

**RCW 58.17.218 - Alteration of subdivision - Easements by dedication**

The alteration of a subdivision is subject to RCW 64.04.175.

**RCW 58.17.250 - Survey of subdivision and preparation of plat**

The survey of the proposed subdivision and preparation of the plat shall be made by or under the supervision of a registered land surveyor who shall certify on the plat that it is a true and correct representation of the lands actually surveyed.

**RCW 58.17.290 - Copy of plat as evidence**

A copy of any plat recorded in the manner provided in this chapter and certified by the county auditor of the county in which the same is recorded to be a true copy of such record and the whole thereof, shall be received in evidence in all the courts of this state, with like effect as the original.

**RCW 58.17.320. Compliance with chapter and local regulations - Enforcement**

Whenever land within a subdivision granted final approval is used in a manner or for a purpose which violates any provision of this chapter, any provision of the local subdivision regulations, or any term or condition of plat approval prescribed for the plat by the local government, then the prosecuting attorney, or the attorney general if the prosecuting attorney shall fail to act, may commence an action to restrain and enjoin such use and compel compliance with the provisions of this chapter or the local regulations, or with such terms or conditions. The costs of such action may be taxed against the violator.

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**RCW 64.04.030. Warranty deed - Form and effect**

Warranty deeds for the conveyance of land may be substantially in the following form, without express covenants:

The grantor (here insert the name or names and place or residence) for and in consideration of (here insert consideration) in hand paid, conveys and warrants to (here insert the grantee's name or names) the following described real estate (here insert description), situated in the county of . . . . ., state of Washington. Dated this . . . . day of . . . . ., 19. . .

Every deed in substance in the above form, when otherwise duly executed, shall be deemed and held a conveyance in fee simple to the grantee, his heirs and assigns, with covenants on the part of the grantor: (1) That at the time of the making and delivery of such deed he was lawfully seized of an indefeasible estate in fee simple, in and to the premises therein described, and had good right and full power to convey the same; (2) that the same were then free from all encumbrances; and (3) that he warrants to the grantee, his heirs and assigns, the quiet and peaceable possession of such premises, and will defend the title thereto against all persons who may lawfully claim the same, and such covenants shall be obligatory upon any grantor, his heirs and personal representatives, as fully and with like effect as if written at full length in such deed.

**RCW 64.04.175 - Easements established by dedication - Extinguishing or altering**

Easements established by a dedication are property rights that cannot be extinguished or altered without the approval of the easement owner or owners, unless the plat or other document creating the dedicated easement provides for an alternative method or methods to extinguish or alter the easement.

**Regulations:**

**WAC Chapter 284-30. Unfair Claims Settlement Practices Act (UCSPA)**

**WAC 284-30-300 - Authority and purpose.**

RCW § 48.30.010 authorizes the commissioner to define methods of competition and acts and practices in the conduct of the business of insurance

which are unfair or deceptive. The purpose of this regulation, WAC § 284-30-300 through § 284-30-410, is to define certain minimum standards which, if violated with such frequency as to indicate a general business practice, will be deemed to constitute unfair claims settlement practices.

**WAC § 284-30-310 - Scope.**

This regulation applies to all insurers and to all insurance policies and insurance contracts. This regulation is not exclusive, and acts performed, whether or not specified herein, may also be deemed to be violations of specific provisions of the insurance code or other regulations.

**WAC 284-30-320 - Definitions.**

When used in this regulation:

(1) “Agent” means any individual, corporation, association, partnership or other legal entity authorized to represent an insurer with respect to a claim;

(2) “Claimant” means either a first party claimant, a third party claimant, or both and includes such claimant’s designated legal representative and includes a member of the claimant’s immediate family designated by the claimant;

(3) “First party claimant” means an individual, corporation, association, partnership or other legal entity asserting a right to payment under an insurance policy or insurance contract arising out of the occurrence of the contingency or loss covered by such policy or contract;

(4) “Insurance policy” or “insurance contract” mean any contract of insurance, indemnity, suretyship, or annuity issued, proposed for issuance, or intended for issuance by any insurer;

(5) “Insurer” means any individual, corporation, association, partnership, reciprocal exchange, inter-insurer, Lloyds insurer, fraternal mutual insurer, fraternal mutual life insurer, and any other legal entity engaged in the business of insurance, authorized or licensed to issue or who issues any insurance policy or insurance contract in this state. “Insurer” does not include health care service contractors, as defined in RCW § 48.44.010, and health maintenance organizations, as defined in RCW § 48.46.020;

(6) "Investigation" means all activities of an insurer directly or indirectly related to the determination of liabilities under coverages afforded by an insurance policy or insurance contract;

(7) "Notification of claim" means any notification, whether in writing or other means acceptable under the terms of an insurance policy or insurance contract, to an insurer or its agent, by a claimant, which reasonably apprises the insurer of the facts pertinent to a claim; and

(8) "Third party claimant" means any individual, corporation, association, partnership or other legal entity asserting a claim against any individual, corporation, association, partnership or other legal entity insured under an insurance policy or insurance contract of an insurer.

**WAC 284-30-330 - Specific unfair claims settlement practices defined.**

The following are hereby defined as unfair methods of competition and unfair or deceptive acts or practices in the business of insurance, specifically applicable to the settlement of claims:

- (1) Misrepresenting pertinent facts or insurance policy provisions.
- (2) Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies.
- (3) Failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies.
- (4) Refusing to pay claims without conducting a reasonable investigation.
- (5) Failing to affirm or deny coverage of claims within a reasonable time after proof of loss statements have been completed.
- (6) Not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear. In particular, this includes an obligation to effectuate prompt payment of property damage claims to innocent third parties in clear liability situations. If two or more insurers are involved, they should arrange to make such payment, leaving to themselves the burden of apportioning it.
- (7) Compelling insureds to institute or submit to litigation, arbitration, or

appraisal to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in such actions or proceedings.

(8) Attempting to settle a claim for less than the amount to which a reasonable man would have believed he was entitled by reference to written or printed advertising material accompanying or made part of an application.

(9) Making claims payments to insureds or beneficiaries not accompanied by a statement setting forth the coverage under which the payments are being made.

(10) Asserting to insureds or claimants a policy of appealing from arbitration awards in favor of insureds or claimants for the purpose of compelling them to accept settlements or compromises less than the amount awarded in arbitration.

(11) Delaying the investigation or payment of claims by requiring an insured, claimant, or the physician of either to submit a preliminary claim report and then requiring subsequent submissions which contain substantially the same information.

(12) Failing to promptly settle claims, where liability has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage.

(13) Failing to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement.

(14) Unfairly discriminating against claimants because they are represented by a public adjuster.

(15) Failure to expeditiously honor drafts given in settlement of claims. A failure to honor a draft within three working days of notice of receipt by the payor bank will constitute a violation of this provision. Dishonor of any such draft for valid reasons related to the settlement of the claim will not constitute a violation of this provision.

(16) Failure to adopt and implement reasonable standards for the processing and payment of claims once the obligation to pay has been established.

Except as to those instances where the time for payment is governed by statute or rule or is set forth in an applicable contract, procedures which are not designed to deliver a check or draft to the payee in payment of a settled claim within fifteen business days after receipt by the insurer or its attorney of properly executed releases or other settlement documents are not acceptable. Where the insurer is obligated to furnish an appropriate release or settlement document to an insured or claimant, it shall do so within twenty working days after a settlement has been reached.

(17) Delaying appraisals or adding to their cost under insurance policy appraisal provisions through the use of appraisers from outside of the loss area. The use of appraisers from outside the loss area is appropriate only where the unique nature of the loss or a lack of competent local appraisers make the use of out-of-area appraisers necessary.

(18) Failing to make a good faith effort to settle a claim before exercising a contract right to an appraisal.

(19) Negotiating or settling a claim directly with any claimant known to be represented by an attorney without the attorney's knowledge and consent. This does not prohibit routine inquiries to an insured claimant to identify the claimant or to obtain details concerning the claim.

**WAC 284-30-350 - Misrepresentation of policy provisions.**

(1) No insurer shall fail to fully disclose to first party claimants all pertinent benefits, coverages or other provisions of an insurance policy or insurance contract under which a claim is presented.

(2) No agent shall conceal from first party claimants benefits, coverages or other provisions of any insurance policy or insurance contract when such benefits, coverages or other provisions are pertinent to a claim.

(3) No insurer shall deny a claim for failure to exhibit the property without proof of demand and unfounded refusal by a claimant to do so.

(4) No insurer shall, except where there is a time limit specified in the policy, make statements, written or otherwise, requiring a claimant to give written notice of loss or proof of loss within a specified time limit and which seek to relieve the company of its obligations if such a time limit is not complied with unless the failure to comply with such time limit prejudices the insurer's

rights.

(5) No insurer shall request a first party claimant to sign a release that extends beyond the subject matter that gave rise to the claim payment.

(6) No insurer shall issue checks or drafts in partial settlement of a loss or claim under a specific coverage which contain language which release the insurer or its insured from its total liability.

(7) No insurer shall make a payment of benefits without clearly advising the payee, in writing, that it may require reimbursement, when such is the case.

**WAC 284-30-370 - Standards for prompt investigation of claims.**

Every insurer shall complete investigation of a claim within thirty days after notification of claim, unless such investigation cannot reasonably be completed within such time. All persons involved in the investigation of a claim shall provide reasonable assistance to the insurer in order to facilitate compliance with this provision.

**WAC 284-30-380 - Standards for prompt, fair and equitable settlements applicable to all insurers.**

(1) Within fifteen working days after receipt by the insurer of properly executed proofs of loss, the first party claimant shall be advised of the acceptance or denial of the claim by the insurer. No insurer shall deny a claim on the grounds of a specific policy provision, condition, or exclusion unless reference to such provision, condition, or exclusion is included in the denial. The denial must be given to the claimant in writing and the claim file of the insurer shall contain a copy of the denial.

(2) If a claim is denied for reasons other than those described in subsection (1) and is made by any other means than writing, an appropriate notation shall be made in the claim file of the insurer.

(3) If the insurer needs more time to determine whether a first party claim should be accepted or denied, it shall so notify the first party claimant within fifteen working days after receipt of the proofs of loss giving the reasons more time is needed. If the investigation remains incomplete, the insurer shall, within forty-five days from the date of the initial notification and no later than every thirty days thereafter, send to such claimant a letter setting

forth the reasons additional time is needed for investigation.

(4) Insurers shall not fail to settle first party claims on the basis that responsibility for payment should be assumed by others except as may otherwise be provided by policy provisions.

(5) Insurers shall not continue negotiations for settlement of a claim directly with a claimant who is neither an attorney nor represented by an attorney until the claimant's rights may be affected by a statute of limitations or a policy or contract time limit, without giving the claimant written notice that the time limit may be expiring and may affect the claimant's rights. Such notice shall be given to first party claimants thirty days and to third party claimants sixty days before the date on which such time limit may expire.

(6) No insurer shall make statements which indicate that the rights of a third party claimant may be impaired if a form or release is not completed within a given period of time unless the statement is given for the purpose of notifying the third party claimant of the provision of a statute of limitations.

#### **Court Rules:**

##### **CR 10(a)(2) - Unknown Names.**

When the plaintiff is ignorant of the name of the defendant, it shall be so stated in his pleading, and such defendant may be designated in any pleading or proceeding by any name, and when his true name shall be discovered, the pleading or proceeding may be amended accordingly.

##### **Rule 15(c) - Relation Back of Amendments.**

Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

## **CR 19 - Joinder of Persons Needed for Just Adjudication**

**(a) Persons To Be Joined if Feasible.** A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (A) as a practical matter impair or impede his ability to protect that interest or (B) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

**(b) Determination by Court Whenever Joinder Not Feasible.** If a person joinable under (1) or (2) of section (a) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: (1) to what extent a judgment rendered in the persons absence might be prejudicial to him or those already parties; (2) the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; (3) whether a judgment rendered in the persons absence will be adequate; (4) whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

**(c) Pleading Reasons for Nonjoinder.** A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons joinable under (1) or (2) of section (a) hereof who are not joined, and the reasons why they are not joined.

**(d) Exception of Class Actions.** This rule is subject to the provisions of rule 23.

**(e) Husband and Wife Must Join--Exceptions.** (Reserved. See RCW 4.08.030.)

## **CR 20 - Permissive Joinder of Parties**

**(a) Permissive Joinder.** All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of these persons will arise in the action. All persons may be joined in one action as defendant if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

**(b) Separate Trials.** The court may make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom he asserts no claim and who asserts no claim against him, and may order separate trials or make other orders to prevent delay or prejudice.

**(c) When Husband and Wife May Join.** (Reserved. See RCW 4.08.040.)

**(d) Service on Joint Defendants; Procedure After Service.** When the action is against two or more defendants and the summons is served on one or more but not on all of them, the plaintiff may proceed as follows:

(1) If the action is against the defendants jointly indebted upon a contract, he may proceed against the defendants served unless the court otherwise directs; and if he recovers judgment it may be entered against all the defendants thus jointly indebted so far only as it may be enforced against the joint property of all and the separate property of the defendants served.

(2) If the action is against defendants severally liable, he may proceed against the defendants served in the same manner as if they were the only defendants.

(3) Though all the defendants may have been served with the summons, judgment may be taken against any of them severally, when the plaintiff would be entitled to judgment against such defendants if the action had been against them alone.

**(e) Procedure To Bind Joint Debtor.** (Reserved. See RCW 4.68.)

**CR 50 - Motion for Judgment as a Matter of Law in Actions Tried by Jury**

**(a) Judgement as a Matter of Law.**

**(1) Nature and Effect of Motion.** If, during a trial by jury, a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find or have found for that party with respect to that issue, the court may grant a motion for judgment as a matter of law against the party on any claim, counterclaim, cross claim, or third party claim that cannot under the controlling law be maintained without a favorable finding on that issue. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment. A motion for judgment as a matter of law which is not granted is not a waiver of trial by jury even though all parties to the action have moved for judgment as a matter of law.

**(2) When Made.** A motion for judgment as a matter of law may be made at any time before submission of the case to the jury.

**CR 56(d) - Case Not Fully Adjudicated on Motion.**

If on motion under the rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action, the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

**Rule 68 - Offer of Judgment.**

At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in

his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the court shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

#### **RAP 18.1(b) - Argument in Brief.**

The party must devote a section of its opening brief to the request for the fees or expenses. Requests made at the Court of Appeals will be considered as continuing requests at the Supreme Court, except as stated in section (j). The request should not be made in the cost bill. In a motion on the merits pursuant to rule 18.14, the request and supporting argument must be included in the motion or response if the requesting party has not yet filed a brief.

#### **Text Authorities:**

**Restatement (Second) of Torts, Section 552C(1).**

#### **Misrepresentation in Sale, Rental or Exchange Transaction**

(1) One who, in a sale, rental or exchange transaction with another, makes a misrepresentation of a material fact for the purpose of inducing the other to act or to refrain from acting in reliance upon it, is subject to liability to the other for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation, even though it is not made fraudulently or negligently. (2) Damages recoverable under the rule stated in this section are limited to the difference between the value of what the other has parted with and the value of what he has received in the transaction.

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### COMMENT c.

**Sale, rental or exchange.** The cases to which the rule of strict liability for innocent misrepresentation stated in this Section has been applied thus far have generally been confined to sale, rental or exchange transactions between the plaintiff and the defendant. This includes any sale, rental or exchange of land, chattels, securities or anything else of value, such as copyrights, patents and other valuable intangible rights. As to possible application of the rule to other types of business transactions, see the Caveat, and Comment g below.

### **Stoebuck, 18 Wash. Prac., Real Estate § 15.10 (2d ed.) - Broker's liability to buyer**

In this section we assume the usual case in which a real estate broker is employed under contract as an agent of the seller. As we have seen previously in this chapter, the broker may be liable to the seller for breach of contract or breach of fiduciary duty. It is also possible for a broker to become personally liable to a buyer with whom he deals on behalf of the seller. Since the broker usually has no contractual or agency relationship with the buyer, such liability as he may have lies in tort, more specifically for some kind of misrepresentation, the precise nature of which we will explore in a moment. Of course, as we have seen, within the scope of his agency authority, a broker may create liability for the seller to the buyer.[FN1] But, aside from such liability as the broker may create for the seller, we are at this point interested in the broker's own liability to the buyer.

While a broker is not, we suppose, agent for the buyer, he is a licensed professional, and this seems to have something to do with a duty not to misrepresent the land to the buyer. [FN2] It is clear that a broker may be liable to the buyer in any jurisdiction for damages caused by an intentional, fraudulent misrepresentation. [FN3] However, in Washington and increasingly in other jurisdictions, a broker may *be* liable to the buyer for negligent misrepresentation that does not amount to fraud. The definitive Washington rule, as contained in *Hoffman v. Connall*, [FN4] is that a broker is liable to a buyer for "negligent" misrepresentations, which means statements whose falsity the broker, as a skilled professional, could, by reasonable effort, have determined were false. The broker is held to a standard of professional malpractice. In *Hoffman* a broker was held not liable for pointing out erroneous boundaries to the buyer when the seller had pointed out those boundaries to the broker, and they seemed plausible; it was held reasonable for the broker to pass on this information without having a

professional survey made.

Several decisions from the Washington Court of Appeals have considered whether a broker reasonably could have determined the falsity of a false but innocent statement made to a buyer. In line with Hoffman, the broker was held not liable for a statement that a mobile home did not contain formaldehyde insulation when the sellers had assured her it did not and she could not reasonably inspect to verify their assurances. [FN5] *Tennant v. Lawton* [FN6] is the best known decision in which liability was held to exist. The broker's salesperson falsely represented that the land in question had been approved for septic tanks, based upon her mistakenly reading a septic tank permit for adjoining land as applying to the land being sold. In *First Church of the Open Bible v. Cline J. Dunton Realty, Inc.*, [FN7] the broker's cross-listing broker, being a subagent, was held liable for representing to the purchaser that parcels A, B, and C were included when the legal description of the land included only parcel C.

A 1999 Washington Court of Appeals decision held a broker liable to a buyer for fraudulent *concealment*, thus going beyond former decisions that had held brokers liable only for fraudulent or negligent *misrepresentations*. However, the facts were strongly in favor of the plaintiff buyer, and it seems possible the court did not realize it was entering new legal territory. In *Svensden v. Stock*, [FN8] when the broker's agent was taking the listing, the sellers asked her if they should disclose on Form 17, the statutory disclosure form, that their land had previously flooded when a nearby county drain had plugged. The county had fixed it, but, taking the facts most favorably to the plaintiffs, the agent had independent knowledge of the flooding and had reason to suspect it might occur again. She advised the sellers not to list the problem, they did not, and the buyers did not learn of it until, after they purchased, their land flooded from the same cause. The court of appeals affirmed a judgment against the agent and her broker for the purchasers' damages, including their cost of building a water drainage system on their own land.

On those few occasions in which a broker has an agreement to represent a buyer in finding real estate, then of course liability may lie in breach of contract. *Edmonds v. John L. Scott Real Estate*, a 1997 decision by Division I, Washington Court of Appeals, brings this out forcefully. [FN9] A broker who represented the buyer showed her a house *the* broker had listed. The listing card showed the basement was dry, but when the buyer signed an earnest money agreement, the agent, knowing this was false, added language that the broker would get assurances from the seller that drainage work had

been done. When water problems continued to show up, the buyer notified the broker she was terminating the earnest money agreement and demanded back her earnest money. After consulting the broker's attorney, who made no investigation of the water problem, the broker followed its standard practice in such cases and refunded half the earnest money. In the buyer's suit against the broker, the court of appeals affirmed a judgment awarding the plaintiff damages for breach of fiduciary duty, plus fees under the attorneys fees clause in her listing agreement. And, since the broker's practices were standard practices, capable of being repeated, she also was awarded treble damages for a violation of the Consumer Protection Act, RCWA Chapter 19.86.

In 1996 the Legislature enacted RCWA Chapter 18.86 and it became effective in 1997. It appears to alter, if not nullify, the rules adopted in *Hoffman v. Connall* and the other cases cited in this section. See especially, RCWA 18.86.030 (2) which provides: "Unless otherwise specified a licensee [which includes brokerage agents for either buyer or seller] owes no duty to make an independent inspection of the property or to conduct an independent investigation of either party's financial condition and owes no duty to independently verify the accuracy or completeness of any statement made by either party or by any source reasonably believed by the licensee to be reliable." [FN10]

A broker may have liability to the buyer that grows not of misrepresentations with regard to the land or the financial condition of a party, but with regard to other representations. It is clear that a broker would not impliedly represent to a buyer that the broker has authority to bind the broker's principal because that is beyond the scope of the broker's normal authority. In *Sound Built Homes v. Windermere Real Estate/South*, a buyer who lost a deal because the principal's employee had forged the principal's signature to an agreement, sought liability against the broker on the basis of an implied warranty that the signature was genuine. The issue was not decided because of issue preclusion in a prior case. [FN11]

Attorneys for buyers who have been wronged in real estate transactions by brokers should consider the possibility that the broker has violated the Washington Consumer Protection Act, RCWA Chapter 19.86. Our purpose in mentioning this is only to flag the possibility of such a violation, for we will not attempt systematic coverage of that Act. At one time decisions of the Washington State Court of Appeals suggested that a violation of the broker's regulatory statute, RCWA Chapter 18.85, might be a per se violation of the Consumer Protection Act. [FN12] However, in *Sato v. Century 21 Ocean*

Shores Real Estate [FN13] the state supreme court held that a violation of the brokers' statute, RCWA Chapter 18.85, is not automatically a violation of the Consumer Protection Act. The plaintiff must specifically prove that certain acts directly violated the latter act.

[FN0] Judson Falknor Professor of Law Emeritus, University of Washington, Of Counsel, Karr Tuttle Campbell, Member of the Washington Bar.

[FN1] Professor of Law, Seattle University, Member of the Washington Bar.

[FN1] See § 7 of this chapter.

[FN3] See R. Kratovil & R. Werner, Real Estate Law § 10.24 (9th ed. 1988); 7 R. Powell & P. Rohan, Powell on Real Property 11938.19(7)(a) (1992 rev. ed.). Cf. Sing v. John Scott, Inc., 134 Wn.2d 24, 948 P.2d 816 (1997). Plaintiff, a potential buyer, made an offer, less than the listed price, to the broker, who represented the seller and passed the offer on to the seller. Before the seller accepted this offer, a second buyer contacted the broker, who disclosed the amount of the first offer to him, and the second buyer made a higher offer, which the seller accepted. The Washington State Supreme Court held the broker's disclosure to the second buyer was no breach of duty to the plaintiff because the broker's duty was to obtain as high a price as possible for its principal, the seller. Svendsen v. Stock, 143 Wn.2d 546, 23 P.3d 455(2001) (while real estate broker or agent is not liable for giving buyer false information on disclosure statement required by chapter 64.06 RCWA, he or she may be liable under Consumer Protection Act, chapter 19.86 RCWA, for fraudulently giving buyer false information).

[FN4] Hoffman v. Connall, 108 Wn.2d 69, 736 P.2d 242 (1987).

[FN5] Brock v. Tarrant, 57 Wn.App. 562, 789 P.2d 112 (1990).

[FN6] Tennant v. Lawton, 26 Wn.App. 701, 615 P.2d 1305 (1980).

[FN7] First Church of the Open Bible v. Cline J. Dunton Realty, Inc., 19 Wn.App. 275, 574 P.2d 1211 (1978).

[FN8] Svendsen Stock, 98 Wn.App. 498, 979 P.2d 476 (Div. 1, 1999).

[FN9] 87 Wn.App. 834, 942 P.2d 1072 (Div. 1, 1999).

[FN10] See Janda v. Brier Realty Company, 97 Wn.App. 45, 984 P.2d 412 (Div. 1, 1999) (Buyer could not recover damages against seller's broker for negligent misrepresentation about the cost of developing land when buyer resold land at a substantial profit. The case arose before the effective date of RCWA 18.86).

-All of RCWA 18.86.030 should be read by any attorney who is considering an action against a broker. While negligent misrepresentation may no longer be available as a theory of liability, a broker is, for instance, obligated to reveal all material facts to a buyer. See, Bloor v. Fritz, 143 Wash.App. 718, 180 P.3d 805 (Div. 2, 2008).

[FN11] Sound Built Homes, Inc. v. Windermere Real Estate/South, Inc., 118 Wn.App. 617, 72 P.3d 788 (Div. 2, 2003).

[FN12] Nuttall v. Dowell, 31 Wn.App. 98, 639 P.2d 832 (1982); Wilkinson v. Smith, 31 Wn.App. 1, 639 P.2d 768 (1982).

[FN13] Sato v. Century 21 Ocean Shores Real Estate, 101 Wn.2d 599, 681 P.2d 242 (1984); Harstad v. Frol, 41 Wn.App. 294, 704 P.2d 638 (1985), which follows Sato.

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**354 S.W.2d 401 (Tex.Civ.App. Fort Worth 1962)**

**LAWYERS TITLE INSURANCE CORPORATION, Appellant,**

**v.**

**William R. McKEE, Appellee.**

**No. 16284.**

**Court of Civil Appeals of Texas, Fort Worth**

**February 2, 1962**

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Rehearing Denied March 2, 1962.

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Lefkowitz, Green, Ginsberg & Eades and Jack D. Eades, Dallas, for appellant.

Bowyer, Thomas, Crozier & Harris, William W. Sweet, Jr., and Robert H. Thomas, Dallas, for appellee.

MASSEY, Chief Justice.

From a judgment in favor of William R. McKee, as plaintiff policyholder, against defendant Lawyers Title Insurance Corporation, the latter appealed.

Judgment reformed and affirmed.

In 1880 a tract of land in Tarrant County, Texas, of rectangular shape but with the eastern boundary a meander line following a ravine, was owned by one Wiggins. The property was known as the Hudgins Homestead. Total acreage of the tract comprised some 72 acres, more or less.

Through a trade with one Nash, his neighbor, Wiggins conveyed approximately 2 acres out of said tract to Nash. By the deed of conveyance the eastern boundary of Wiggins' land became what may be considered as a straight line on the high ground immediately west of the ravine, the ravine

passing to Nash, and Wiggins' remaining land comprised some 70 acres. Nash never recorded his deed, but began to run livestock on the 2 acres purchased, as have his heirs since that time.

Subsequently, Wiggins sold the 70 acres remaining to one Wilson. Chain of title thereto from Wilson ultimately passed to the plaintiff in this case. Wilson conveyed the land to one McGinnis, and in the deed the land conveyed was described as though it was the entire original Wiggins tract, the Hudgins Homestead, with the eastern boundary line given in metes and bounds as though it followed the meanders of the ravine, with the following additional language, 'except a small tract of one acre conveyed to John W. Nash, by J. S. Wiggins, and wife, \* \* \*.'

McGinnis conveyed to one Coburn, and in the deed the land was described by metes and bounds identical to the description of the original Wiggins tract, with eastern boundary line the 'meanderings of the ravine', and with the further recitation: 'It being 78 acres more or less of the Thomas Easter 480 acre survey and known as the W. Hudgins homestead, and being the same land that was conveyed to Jack McGinnis by Jassie E. Wilson by deed dated 8th day of November 1930 and shown or record in Vol. 1102 page 635 Deed records of Tarrant County Texas.'

Coburn conveyed to one Tibbits, likewise describing the land by metes and bounds, with the further recitation: 'And being the same property described in warranty deed from Jack mcGinnis and wife, Corine McGinnis, to R. Lee Coburn and wife, Aline Coburn, dated December 30, 1943, \* \* \*.'

Tibbits conveyed to plaintiff McKee. The tract conveyed was described as 'Being a 73.45 acre tract located about 2 miles Southwest from the Town of Grapevine, Texas, being out of the THOMAS EASTER 480-Acre SURVEY, Patent #792, Volume 9, dated July 10, 1855, known as the W. Hudgins Homestead, described by metes and bounds as follows:' (here followed metes and bounds description in which instead of language as to the eastern boundary as 'THENCE North 542 varas with meanderings of the ravine', the calls of the meanderings of such ravine were given according to a survey along same), with the further recitation: 'It being the intention of the Grantors herein to convey to Grantee herein the same land described in Deed from R. Lee Coburn and wife, Aline Coburn to Robert Eugene Tibbits and wife, Helen Elizabeth Tibbits, by Deed dated February 12, 1948, filed for record March 16, 1948 \* \* \*.'

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Pursuant to his purchase plaintiff McKee contracted with defendant company, subject to its examination of title, to insure his title to the property. It is not an issue and is undisputed that plaintiff believed he was purchasing land, the eastern boundary of which followed the meanders of the ravine, i. e., that the land included the 2 acres Wiggins had conveyed to Nash. He caused a survey of the land, including the 2 acres, to be prepared and furnished to the company.

The company issued to plaintiff, on September 12, 1953, the same date as plaintiff's deed from

Tibbits was filed for record, its policy of title insurance. Thereby the company guaranteed to plaintiff, his heirs, executors and administrators that he had good and indefeasible title to the following real property: 'Situated in Tarrant County, Texas, being a 73.45 acre tract located about 2 miles Southwest from the Town of Grapevine, Texas, being out of the THOMAS EASTER 480-Acre SURVEY, Patent #792, Volume 9, dated July 10, 1855, known as the W. Hudgins Homestead, described more fully by metes and bounds in Warranty Deed referred to below: \* \* \*.' The deed was that to plaintiff from Tibbits, material language from which has been heretofore quoted.

After entering into possession, and using the land extending to the ravine, plaintiff discovered that the heirs of Nash were claiming the 2 acres deeded to Nash by Wiggins. Plaintiff called upon the company to clear his title, but the company did nothing. Plaintiff then filed a trespass to try title suit to settle the title to the 2 acres. Prior to such time plaintiff placed the company on notice that the Nash heirs had declared that they would defend their title in such suit. At all material times the company was kept informed, with continuous demands that it defend plaintiff's title. Even after trial of the suit and after judgment was entered, but in time for steps preparatory for an appeal to be taken therefrom, plaintiff continued to call upon the company to take such measures as it might deem appropriate to defend plaintiff's title. The company chose to do nothing, but to defer any action until judgment in the trespass to try title suit had become final.

The judgment in the trespass to try title case recited that plaintiff was a remote grantee, that he was on constructive notice of the fact of prior conveyance to Nash although the deed was not filed of record, by reason of mention made thereof in deeds in his chain of title, and that the Nash heirs were at all material times in continuous, open and notorious possession of the approximate 2 acres. The judgment divested plaintiff of his claim of title, and was dated November 30, 1959.

Plaintiff then brought his suit under the policy, seeking to recover the sum to which he was thereunder entitled, plus attorney's fees and expenses necessary to be expended in the trespass to try title suit. Trial was to a jury. The company did not except to the charge and there were no specially requested issues which appear to have been refused. Upon jury findings made the court entered a judgment in favor of the plaintiff and against the company for the sum of \$6,000.00, being the difference in market value of the whole tract, or 72 acres, at \$36,725.00, and the tract as reduced by the 2 acres as to which title failed at \$30,725.00, as of the date of the trespass to try title judgment,--plus the sum of \$2,200.00 as reasonable value of attorney's services in defending plaintiff's title in the trespass to try title suit, plus the sum of \$52.10 as the reasonable expenses incurred in the same suit, or a total of \$8,252.10.

In resolving points of error presented on appeal we will handle by stating questions, the answers we believe proper, and a discussion.

First Question: Is the company liable to plaintiff under the provisions of the policy because his title failed as to the 2 acres? We have concluded that the company is liable therefor.

Propriety of our answer basically depends upon the determination of whether

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the property designated by the title insurance policy as that as to which title was guaranteed, included the 2 acres, or whether the company guaranteed the ravine as the eastern boundary.

Were this a suit on a warranty by plaintiff against his grantor, and even had therein been a reference to a prior deed for all purposes, the metes and bounds description would control. As notice in and of itself such a reference would have no standing to impair grantee's title where reference to it would not be necessary in the determination of the identity and boundary of the land conveyed. Where conveyance is specific, as by metes and bounds, there can be no mistake and no necessity for invoking the aid of a general description and the specific description would control. See 19 Tex.Jur.2d, p. 473 et seq., 'Deeds', secs. 155 'Election by grantee', 156 'General description', and 157 'Particular description' (14-B Tex.Jur., p. 696, secs. 235, 236); 19 Tex.Jur.2d, p. 437, 'Deeds', sec. 131, 'Stating metes and bounds'.

Such being the case in a suit against a grantor under a warranty, certainly would an insurer of the title, privileged to pass upon and actually designating the description of property it insures by its written contract of insurance, be bound under similar rules of construction, even without reference made to those additional rules of construction applicable to insurance contracts.

A situation or condition to which the protection of the policy was made subject, and as to which coverage was specifically excluded, was any instance where there might be 'Any discrepancies, conflicts, or shortages in area or boundary lines, or any encroachments or any overlapping of improvements which a correct survey would show.' The company contends that a 'correct survey' would have shown that the land received by plaintiff did not include the 2 acres, but that the eastern boundary of the land was west of the ravine. Because thereof, says the company, the 2 acres were excluded as subject of insurance under the policy. No authority is cited by the company in support of the contention.

There is no merit to the contention of the company. As applied to the land intended to be insured by plaintiff and the company, the survey which showed the eastern boundary thereof at the ravine, and including the 2 acres in question, was a 'correct survey' within the purport and intent of the policy. *Houston Title Guaranty Co. v. Fontenot*, 1960 (Tex.Civ.App., Houston), 339 S.W.2d 347, writ refused, n. r. e.; *Chanoux v. Title Ins. Co.*, 1953 (Tex.Civ.App., El Paso), 258 S.W.2d 866, writ refused, n. r. e.

Second Question: If the company is liable under the policy of insurance because of the failure of title in plaintiff to the 2 acres, is the liability of the company controlled by provisions of the policy so that it would be an amount less than the actual difference in the value of the property as and when

received (or at time loss should properly be deemed to have been sustained) and as it would have been but for the failure of title as and when the property was received (or at time failure of title should be deemed to have been sustained)? Our holding is that the liability of the company is so controlled. Provisions of the policy under which the amount of liability is limited must be honored in calculation and computation of the amount recoverable in the event of partial failure of title.

The policy contains a provision reading as follows: if " \* \* such adverse claim or right shall have been held valid by a court of last resort to which either litigant may apply, and, if such adverse claim or right so established shall be for less than the whole of the property, then the liability of the Company shall be (1) only such part of the whole liability limited above as shall bear the same ratio to the (2) whole liability that the (3) adverse claim or right established may bear to the

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(4) whole property.' (Addition of the numbers and brackets supplied.)

The words following the numbers in the brackets in the above paragraph, which we have added for explanatory purposes, may be clarified when their proper interpretation is recognized. To us (1) means the value of that part of the property as to which title failed; (2) means the amount of the whole or maximum liability of the company if the entire title failed; (3) means the value of the right or property as to which title failed; and (4) means the value of the whole property had there been no failure of title. The whole liability, or maximum liability, would of course be the maximum amount payable under the policy, in this instance the sum of \$18,362.50, the amount plaintiff paid for the property at the time of its purchase.

By calculation made from answers returned by the jury the value of the property as to which title failed was \$6,000.00 on date the judgment was entered divesting plaintiff of his claim on the title to the 2 acres, and was \$3,000.00 on the date the property was deeded to plaintiff. From other answers it is further more determinable that the value of the property as it would have been had there been no failure of title was \$36,725.00 on date the judgment was entered divesting plaintiff of his title claim, and was \$18,362.50 on the date the property was deeded to him. As already mentioned the whole liability under the policy was \$18,362.50.

With such information a formula by which the monetary amount of the company's liability may be calculated would be:

(1) : (2) = (3) : (4), or  $X : \$18,362.50 = \$6,000.00 : \$36,725.00$ ,  $X$  (company's liability) = \$3,000.00.

In other words, the liability under the policy was limited to the sum of \$3,000.00, although the actual monetary loss sustained, calculated as of the date of the judgment in the trespass to try title case, was \$6,000.00. Texas Standard Form policies for title insurance, issued beginning at a time subsequent to the issuance of the instant policy, prescribe that the values for application to such a

formula shall be taken as of the date any particular policy is issued, and were this done in the instant case the amount of the company's liability would be the identical figure, \$3,000.00. For our discussion and example we have taken the values as of the date the judgment was entered in the trespass to try title suit; however, it not being necessary to the decision in this case we do not pass upon whether this, or the date the policy was issued, was the proper date for liability calculation purposes.

Third Question: In the Title Company obliged, in an instance where its insured files a trespass to try title suit to recover the title to real estate which is covered by its policy of title insurance, to furnish at its own cost the expense necessarily incident to the prosecution of the suit as 'a defense of the assured on a claim against or right to said land, or a part thereof, adverse to the title guaranteed'? We hold that it is ordinarily so obliged, and was in the instant case.

A provision of the policy in question reads as follows: 'Said Company \* \* \* shall, at its own cost, defend said assured in every suit or proceeding on any claim against or right to said land, or any part thereof, adverse to the title hereby guaranteed, provided the party or parties entitled to the defense shall, within a reasonable time after the commencement of such suit or proceeding, and in ample time for defense therein, give said Company written notice of the pendency of the suit or proceeding, and authority to defend, and said Company shall not be liable until such adverse claim or right shall have been held valid by a court of last resort \* \* \*.'

The circumstances giving rise to the necessity for plaintiff's filing of the trespass to try title case have been stated. Therefrom it is made plain that plaintiff at all material times attempted to get the company to defend his title. There is no question but that

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his right to title was cast in issue the moment the defendants in said suit filed their answer and plead 'not guilty'. Plaintiff, being out of possession, stood in peril of losing the title by limitations if he did nothing, and was compelled to prosecute the suit so filed by bringing it to trial and obtaining an adjudication of his title. This was also necessary if plaintiff was to lay a predicate for his suit against the company under the policy, unless he was willing to forget his trespass to try title suit and in suit against the company assume the burden of proving that the Nash heirs' title was superior to his own. Possibly the plaintiff would have incurred attorney's fees and expenses at his peril if the company had come forward and confessed that his title had failed for all purposes of the policy of insurance, and admitted liability (except possibly the monetary extent thereof), etc. This the company did not do, but instead chose to wait watchfully in the apparent hope that plaintiff would prevail in the trespass to try title case.

Coverage of the policy being established in the trial between plaintiff and the company, all the benefits thereof were and are property rights to which plaintiff has shown himself entitled. The company was obligated by the policy to furnish, at its own expense, the legal services and

expenses in court costs, witness fees and miscellaneous incidental expenses. In this the company defaulted, making it necessary for the plaintiff to furnish them at his own expense. Those reasonable and necessary fees and expenses supplied the measure of actual damages plaintiff sustained from the company's breach of contract in this particular, and such damages were properly awarded to him by the judgment. *Fidelity Union Casualty Co. v. Wilkinson*, 1936 (Tex.Civ.App., Dallas), 94 S.W.2d 763, affirmed and opinion adopted at 131 Tex. 302, 114 S.W.2d 530.

Fourth Question: In testing the application of statutes of limitation as applied to plaintiff's suit against the company, is the policy provision relative to the time for any suit brought thereunder controlling over the general rules for application of statutes of limitation in suits on contract? Our holding is that the policy provisions control.

The policy contains a provision that the 'Company shall not be liable until such adverse claim or right shall have been held valid by a court of last resort'. The adverse claim or right referred to, as applied to the instant case, would be the claim of the Nash heirs, litigated in the trespass to try title suit.

From the foregoing policy provision it would appear that plaintiff and the company contracted upon the matter of the date of the accrual of the company's liability thereunder, at least as applied to instances where an adverse claim or right is actually determined by a court of last resort. This is a matter upon which the parties could validly contract.

No appeal was taken from the judgment of the trial court, a Judicial District Court of Texas. That judgment became final. The company was afforded notice and reasonable opportunity to appeal the judgment in the trespass to try title case, which opportunity was declined. Under the construction proper to be given under these circumstances, the District Court was a court of last resort. Under principles of estoppel the company cannot be heard to contend to the contrary. Furthermore, its conduct amounted to a denial of liability under the policy and from and after the time liability was denied the policy clause under consideration was not one upon which the company was entitled to rely.

Since no statutory limitation period could be applicable to the instant case, suit on the policy filed less than one year from the date that judgment in the trespass to try title case became final upon failure of any party thereto to perfect an appeal, there was never raised for determination any issue of limitation and none need have been submitted to the jury. Even had the jury answered

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the issues thereon which were submitted in favor of the company, which was not the case, the answers could have been disregarded for the matter is resolved as a matter of law. The company's contentions upon the matter of limitation are overruled.

Judgment is reformed so as to award plaintiff William R. McKee judgment for \$3,000.00 as the part of his loss recoverable under the policy, rather than the \$6,000.00 awarded by the trial court. Judgment in other respects, for attorney's fees and expenses, is not disturbed.

As so reformed, the judgment is affirmed. Costs are adjudged against the company, Lawyers Title Insurance Corporation.





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November 14, 2007

D. JEFFREY COURSER  
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VIA EMAIL AND  
FIRST CLASS MAIL

FOR SETTLEMENT PURPOSES ONLY

Lance Stewart Stryker  
Attorney at Law  
40 Palos Verde  
White Salmon WA 98672-8941

Re: *Kloster v. Roberts, et al.*  
Klickitat County Superior Court Cause No. 05-2-00108-4

Dear Mr. Stryker:

This letter follows the parties' October 25, 2007 mediation with Judge James Ladley and I write on behalf of all defendants, including Fred Heany, Jr.

At the mediation, defendants tendered a cash offer of \$40,000 in settlement, but, at the time of the mediation, defendants were not able to offer a 30 foot easement across the northern boundary of the former Rickey parcel (now Rohan) for ingress, egress and utilities. Today, we are able to clarify defendants' offer of settlement under the following terms:

1. Defendants will make a lump sum payment in cash to the Klosters of \$40,000.
2. Defendants will facilitate, at their expense, execution and recordation of a 30 foot easement across the northern portion of Lot 2, WS-146 (the former Rickey parcel, now Rohan) for the benefit of the Klosters for ingress, egress and utilities.
3. The parties will execute mutual general releases, including all matters related to any claims that were asserted or could have been asserted in the litigation, including, without limitation, initiation of any claims before governmental or quasi-governmental agencies related to the purchase/sale of the subject property. This specifically includes any claims before the Washington State Department of Licensing or any real estate ethics boards.
4. The litigation would be dismissed with prejudice, with each of the parties to pay their own attorneys' fees and costs.

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EXHIBIT     A      
PAGE     1    

Oregon  
Washington  
California  
Utah  
Idaho  
Colorado  
Montevideo



Lance Stryker  
November 14, 2007  
Page 2

Defendants are pleased to be able to offer the cash tender and easement to the Klosters. The above offer shall remain open until the end of business on November 26, 2007, after which it shall lapse on its own terms. We ask that a copy of this letter be provided to each of the Klosters so they may have a full and fair opportunity to review the terms of the offer. In the event the Klosters reject this offer, we will be preparing a Rule 68 offer of judgment reflecting these terms.

We await the Klosters' response.

Very truly yours,

D. Jeffrey Courser

cc: Cally Korach  
Jeff Baker  
L. Eugene Hanson

Cally J. Korach  
cjk@hhw.com  
Admitted in Oregon and Washington

Twentieth Floor  
1000 S.W. Broadway  
Portland, Oregon 97205  
Phone (503) 222-4499  
Fax (503) 222-2301

November 19, 2007

CONFIDENTIAL SETTLEMENT COMMUNICATION

VIA FACSIMILE ONLY

Lance Stewart Stryker, Esq.  
40 Palos Verde  
White Salmon, Washington 98672-8941

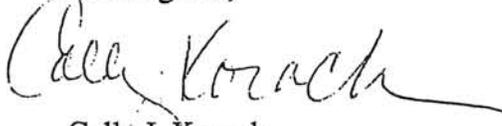
Re: ***Kloster v. Pacific Rim Brokers***  
Klickitat County Case No. 05 2 00108-4  
Claim No. : RE-524133-KW  
File No. : CN 17339

Dear Lance:

Jeff Courser forwarded your letter of November 16, 2007 to defense counsel. In response to your inquiry, the second half of paragraph 3 in Jeff's letter dated November 14 relates to any potential claims by any of the parties against Mr. Palmer, Mr. Blades and/or Pacific Rim Brokers related to the subject transaction. This provision is intended to clarify the effect of any full, mutual release executed in this matter should the parties reach an agreement. If you have further questions concerning this portion of Jeff's letter, please let me know.

As for an extension to respond to the Jeff's letter, you did not propose a new date. The defendants are comfortable in allowing an extension to respond to the letter to the close of business on Friday, November 30, 2007. Please advise of your clients' response to the clarification of defendants' settlement offer, reflected in Jeff's 11/14/07 letter before that time. Thank you.

Best regards,

  
Cally J. Korach

CJK:sem  
Enclosure  
cc(w/o encl.): Bob Blades  
Adrian Palmer  
Gene Hanson

Jeff Baker  
Donald J. Courser

EXHIBIT     B      
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