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COURT OF APPEALS  
DIVISION ONE

71036-2

MAY 19 2014

No. 71036-2

COURT OF APPEALS DIVISION I  
OF THE STATE OF WASHINGTON

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LESLIE BLAKEY SPENCER and TAMMY S. BLAKEY,

Appellants,

v.

NANCY BLAKEY, PERSONAL REPRESENTATIVE OF THE  
ESTATE OF GREG BLAKEY, Respondent,

and GLENDA BLAKEY,

Respondent/Cross-Appellant.

FILED  
COURT OF APPEALS DIVISION I  
MAY 19 2014

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**BRIEF OF RESPONDENT/CROSS APPELLANT  
GLENDA BLAKEY**

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## I. Introduction

Bruce Blakey gave his four adult children lucrative gifts.<sup>1</sup> One gift, in 1992, was a piece of real property on the Duwamish waterway with a warehouse. CP 471, 602.

When gifting the property, Bruce had an attorney draft a Co-Tenancy Agreement, which Leslie, Tammy, Glenda, and Greg each signed. CP 80-107. The agreement recites that it is “a comprehensive agreement.” CP 80. It “sets forth the entire agreement and understanding among the parties.” CP 104. Because the agreement was not negotiated and because each sibling received the property as a gift, the record contains *no* extrinsic evidence. That allowed the superior court, and this court, to interpret the agreement as a matter of law.

In interpreting the agreement, the superior court ultimately determined (1) appellants had no evidence establishing that Glenda breached the agreement, (2) appellants failed to introduce evidence of damage caused by the alleged breach, and (2) paragraph 13 of the agreement permitted Glenda and Greg to sell the property to Manson Construction Company, a third party. CP 2022-23, VRP (9/13/2013 pp. 40-41), 504-506, 507-509, VRP 2/28/2012 (pp. 63-64). This court should

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<sup>1</sup> See, e.g. CP 45 (gifts for the education of Leslie’s grandchildren and “providing the funding” for the mortgage on Leslie’s home).

affirm those rulings because (1) paragraph 19 of the agreement does not require Glenda to vote in favor of leasing the property, (2) even if Glenda breached the agreement, Leslie & Tammy did not introduce any evidence establishing damage caused by the breach, and (3) paragraph 13 of the agreement authorized two of the four co-tenants to accept a third party's offer and sell the property.

For simplicity, this brief will use the following shorthand:

When identified as a group, Tammy, Leslie, Greg, and Glenda will be called "the siblings."

When discussed individually, each sibling will be identified by his or her first name.

The plaintiffs/appellants will frequently be grouped as "Leslie & Tammy."

"Agreement" or "the agreement" refers to the Co-Tenancy Agreement, CP 80-107. The agreement is excerpted as an appendix to this brief.

"The property" refers to the commercial property on the Duwamish waterway gifted to the siblings by Bruce Blakey in 1993. CP 602.

When it assists in clarifying an actor, the various attorneys that represented Leslie & Tammy will be referred to sequentially.

The "first attorney" filed the Complaint in September 2011 and withdrew three months later. CP 1, 2162.

Leslie & Tammy's "second attorney" withdrew in March 2012, shortly after filing a "Notice of Attorney's Claim of Lien (Principal Amount - \$30,361.23). CP 2232, 2235, 2391.

The "third attorney" represented Leslie & Tammy in an interlocutory appeal of the court's order authorizing sale of the property. (no. 68435-3-I; CP 2253)

The “fourth attorney” made a limited appearance to oppose the second attorney’s lien claim. CP 2401, 905.

Leslie & Tammy proceeded *pro se* for several months, after which the “fifth attorney” appeared. CP 2238-39, 2387-2389.

For clarity, this brief will divide the appeal into two distinct parts.

After Glenda’s assignment of error and statement of issue, Section IV will address Leslie & Tammy’s claims that Glenda breached the agreement, and whether the alleged breach caused damage. Section V will address the sale of the property. Each section will start with a factual statement, including the proceedings before the superior court. Each section will then identify the issues, and include argument.

## II. Cross-Appellant’s Assignment of Error

The superior court erred by excluding Tammy’s deposition admission that Glenda Blakey’s refusal to lease was not a breach of the agreement. CP 2025-26.

## III. Issue Pertaining to Assignment of Error

Evidence is admissible if relevant and relevant if it makes any fact of consequence more or less probable. ER 401-402. When a party sues for breach of contract, but admits under cross examination that a particular act is not a breach of contract, should the court consider the evidence?

IV. Allegation: Glenda breached the agreement, thereby causing Leslie & Tammy damage.

A. Alleged breach of agreement: summary of argument

Leslie & Tammy allege that Glenda “refused to lease” the property, that Glenda’s refusal breached paragraph 19, and that Leslie & Tammy suffered lost profits damages.<sup>2</sup> When considering Leslie & Tammy’s breach of contract cause of action against Glenda, there is one, undisputed, consequential *fact*: Leslie & Tammy acknowledge that Glenda was only a co-tenant, with the same limited duties as Leslie and Tammy. When considering Leslie & Tammy’s breach of contract cause of action against Glenda, there are two consequential *parts of the agreement*: paragraph 19 (addressing leasing) and paragraph 17 (an exculpatory clause).

Paragraph 19 gave Leslie, Tammy, Glenda, and Greg one vote each on whether to lease the property. But paragraph 19 prohibited any lease unless three of the four voted to lease:

Unless specific provision thereof is made elsewhere in this Agreement, the Property shall not be sold, encumbered, leased, improved, developed, transferred or disposed of by the Tenancy during the term of this agreement except upon approval by Tenants owning more than fifty percent (50%) of the total undivided interests in the Property. CP 102.

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<sup>2</sup> Glenda will not address causes of action that are solely directed at the Estate of Greg Blakey. For example, Leslie & Tammy argue that Greg’s estate is liable for causing SnoPac to vacate (App. Br. § V.A.2.) and that Greg violated his fiduciary duties as managing tenant (App. Br. § V.A.3.).

In other words, paragraph 19 promoted deadlock. If two co-tenants voted to lease and two voted against, the property could not be leased. CP 102. Here, Glenda did not breach the agreement because paragraph 19 does not require Glenda to vote to lease the property.

When considering Leslie & Tammy's breach of contract cause of action against Glenda, the court will also need to interpret paragraph 17, an exculpatory clause:

No Tenant shall be liable under this Agreement to any other Tenant for the performance of any act or the failure to act so long as such Venturer was not guilty of fraud, gross negligence or bad faith in such performance or failure. CP 101.

Still, Glenda is *not* relying on paragraph 17 in this appeal. Rather, Leslie & Tammy assert that paragraph 17 "imposes a duty on the cotenants to refrain from acting or failing to act." App. Br. At. . 24. Of course, paragraph 17's plain language is for the court to interpret. But even Leslie & Tammy characterize paragraph 17 at one point their brief as a "no liability" provision. App. Br. at p. 19.

The important fact to remember about Leslie & Tammy's breach of contract cause of action against Glenda is that Glenda was a co-tenant with no more contractual duties than Leslie & Tammy. The legal analysis focuses on the plain language of paragraphs 19 and 17. Appellants did not include the full text of paragraphs 19 and 17 in their opening brief; a fair

inference is that the plain language does not support a breach of contract cause of action against Glenda.

B. Statement of the case

In 1993, Bruce Blakey gave his four adult children a piece of commercial property on East Marginal Way South. CP 602, 471, 162. Bruce's attorney drafted a Co-Tenancy Agreement, which each sibling signed. CP 162, 1747, 1766. Regrettably, the Agreement required majority approval to lease the property. CP 102 (¶ 19). Because each sibling was a 25% cotenant, the Agreement made deadlock possible. CP 82 (¶ 4), CP 102 (¶ 19), 167, 1773.

From 1993 through February 15, 2008, the property's only tenant was SnoPac Products. CP 162, 168. SnoPac was also owned by the four siblings, but in unequal shares. CP 162.

In 2001, when the building was already seventy years old, the Nisqually earthquake damaged it. CP 161. The siblings were aware of the damage and looked into repairs, but no one ever hired a contractor and no repairs were made. CP 1749-50, 1758. Nevertheless, SnoPac continued to lease. CP 162.

In 2007, efforts to negotiate a new lease with SnoPac foundered and SnoPac left in early 2008. CP 162. Following SnoPac's departure, the siblings disagreed about whether to sell or lease the property.

- As Leslie put it, “we are at an impasse.” CP 49.
- As Tammy acknowledged, the agreement promoted deadlock, which resulted from a “breakdown” in the siblings relationship. CP 1773. From 2008 through 2012, Tammy did not speak with Glenda about the property. CP 367.
- According to Greg, “we apparently disagree on whether the building should be leased or sold.” CP 1135.

So deadlock ensued.

Recriminations between the siblings continued, culminating in written notices from Tammy and Leslie to Greg asserting Greg violated the agreement by allowing SnoPac to store equipment and subleasing space to Double E Foods. CP 268, 271. Glenda did not use the property. CP 166, 456.

C. Superior court proceedings

Months later, in September 2011, Tammy and Leslie sued Greg and Glenda. CP 1-7. The Complaint alleged that SnoPac’s use and sublease of the property breached the Agreement, and that Glenda was the cotenancy’s “managing tenant.” CP 2-3. Tammy explained that she “included Glenda as a Defendant because at a minimum she authorized SnoPac’s and Manson’s uses of the Property without my approval and failed to cure those breaches.” CP 500.

In November 2012, Glenda and Greg moved for summary judgment to dismiss the claims alleged in the Complaint. CP 1079-1097.

In part, they relied on the exculpatory clause in paragraph 17. As to that defense, the court stated “making such determinations of credibility would require making findings of fact based on credibility. Making such determinations of credibility and deciding whether the facts override the ‘no liability’ standard in paragraph 17 cannot be done on summary judgment.” CP 1522. That same day, the court allowed Tammy & Leslie’s motion to file an Amended Complaint. CP 2255-56. The Amended Complaint alleges that “Glenda breached her duty of good faith and fair dealing under the Co-Tenancy Agreement by failing to consult with Plaintiffs in leasing the property.” CP 1530.

Still, the Amended Complaint made a U-turn on a crucial issue: the Complaint asserted that Glenda was the “managing tenant.” CP 2 (¶ 9). The Amended Complaint concedes that Glenda was not the managing tenant. CP 1525, 1755, 1761.

Leslie & Tammy later stipulated to the dismissal of the second (“Unjust Enrichment”) and fifth (“Breach of Quasi-fiduciary Duties”) causes of action against Glenda in the Amended Complaint. CP 1352-53.

After the parties had eight more months to conduct discovery, Glenda moved for summary judgment. CP 1696-1710. The court

dismissed the remaining allegations against Glenda in the Amended Complaint. CP 2022-23.<sup>3</sup>

D. Counterstatement of issues

1. When no extrinsic evidence exists, contract interpretation is a matter of law. In this case, there is no extrinsic evidence and paragraph 19 of the Agreement allows property to be leased only upon the “approval” of three of four cotenants. Can a cotenant breach paragraph 19 by refusing to approve a lease? What if no lease was ever proposed?
2. There exists no fiduciary or agency relationship between cotenants and a cotenant has no duty to act to the advantage of another cotenant. Can one cotenant sue another for “bad faith” when no duty exists?
3. Paragraph 17 of the co-tenancy agreement is an exculpatory clause: “No Tenant shall be liable under this Agreement to any other Tenant for the performance of any act or the failure to act so long as such Venturer was not guilty of fraud, gross negligence or bad faith in such performance or failure.” Can a clause which exculpates a party from liability somehow create liability?
4. After establishing a breach of contract, a party seeking damages must establish damages caused by the alleged breach. In this case, two cotenants allege damages for a failure to lease commercial property. But they did not introduce evidence of any person willing to lease. Given the absence of any potential lessee, did the superior court

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<sup>3</sup> Glenda’s brief will not address arguments or legal theories advanced by Leslie & Tammy at the superior court but abandoned in this appeal. For example, in the superior court, Leslie & Tammy argued that Glenda breached the agreement by briefly allowing Manson’s environmental subcontractor to park on the property. CP 1528. They also asserted that Glenda breached the agreement by “refusing to fund maintenance.” CP 1787. The superior court dismissed all claims [CP 2022-23] and Leslie & Tammy’s brief does not argue that these claims should not have been dismissed.

properly dismiss appellant's breach of contract cause of action?

E. Argument

1. Because no cotenant had a duty to vote to lease, Glenda did not breach paragraph 19.

a) Cotenants have minimal duties to one another.

Each cotenant holds an undivided interest in the cotenancy's property. "From the concept of undivided interests comes the principle that each co-tenant has the right to possess all parts of the land at all times." 17 Wash. Prac., Real Estate § 1.31 (2d ed.). Along with these overlapping possessory rights come limited duties. Cotenants must share cotenancy income and pay expenses incurred.<sup>4</sup> But they "are not made business partners by their cotenancy relationship."<sup>5</sup> Cotenants also do not owe each other fiduciary duties.<sup>6</sup> And plaintiffs have stipulated that Glenda did not breach any "quasi fiduciary" duty to them. CP 1352-53.

*Donnan v. Atlantic Richfield* involved an assertion by one cotenant that another cotenant should not have established an oil drilling pool without informing them or inviting them to join. The trial court granted summary judgment dismissing the Complaint and the court of appeals affirmed: "There exists no fiduciary or agency relationship between

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<sup>4</sup> 17 Wash. Prac., Real Estate § 1.31 (2d ed.).

<sup>5</sup> 17 Wash. Prac., Real Estate § 1.31 (2d ed.).

<sup>6</sup> *Douglas v. Jepson*, 88 Wash.App. 342, 348, 945 P.2d 244 (1997).

cotenants, or tenants in common, in the absence of an agreement or contract providing for such. There was no duty imposed upon Atlantic to inform the appellants or to join appellants in leasing the property.”<sup>7</sup> “Each cotenant may seek his or her own advantage, owes no duty to act to the advantage of any other cotenant nor to display undivided loyalty toward any other cotenant . . .”<sup>8</sup>

Glenda was merely one cotenant out of four. She has no duty to Leslie or Tammy other than the minimal obligations enunciated in the agreement.

- b) Due to the absence of extrinsic evidence, interpretation of the agreement is a question of law

“If a contract is unambiguous, summary judgment is proper even if the parties dispute the legal effect of a certain provision.”<sup>9</sup> And “a provision is not ambiguous simply because the parties suggest opposing meanings.”<sup>10</sup> Interpretation of a contract provision is a question of law when the “interpretation does not depend on the use of extrinsic

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<sup>7</sup> 732 S.W.2d 715, 717 (Tx. Ct. App. 1987).

<sup>8</sup> A Hess, G. Bogert, *Bogert’s Trusts and Trustees* § 28 (Tenancy in common and joint tenancy). Bogert notes one exception: a cotenant cannot take and retain more than her share of the profits.

<sup>9</sup> *Mayer v. Pierce County Medical Bureau, Inc.*, 80 Wn.App. 416, 420, 909 P.2d 1323 (1996) (affirming summary judgment dismissing breach of contract cause of action).

<sup>10</sup> *Dice v. City on Montesano*, 131 Wn.App. 675, 684, 128 P.3d 1253 (2006) (affirming summary judgment on breach of contract cause of action).

evidence.”<sup>11</sup> Put differently, “contract interpretation is a question of law when, as here, the interpretation does not depend on the use of extrinsic evidence.”<sup>12</sup> Thus, the superior court was obliged to, and this court is obliged to declare the meaning of the agreement.

- c) Paragraph 19 promoted deadlock between the cotenants.

As one of four cotenants, Glenda had one of four votes about whether to lease. But paragraph 19 does not require Glenda to vote “yes.” When Tammy and Leslie expressed an interest in leasing and Glenda and Greg didn’t want to lease, a deadlock resulted. Leslie acknowledged that she and Tammy were “at an impasse with dealing with Greg and Glenda on how to handle the building.” CP 48. That deadlock is a function of paragraph 19, which required three cotenants to “approve” a lease:

Unless specific provision thereof is made elsewhere in this Agreement, the Property shall not be sold, encumbered, leased, improved, developed, transferred or disposed of by the Tenancy during the term of this agreement except upon approval by Tenants owning more than fifty percent (50%) of the total undivided interests in the Property. [CP 102]

Paragraph 19 does not require cotenants to vote one way or the other. It instills each cotenant with the power to cast one vote.

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<sup>11</sup> *Go2Net v. C I Host, Inc.*, 115 Wn.App. 73, 85, 60 P.3d 1245 (2003) (affirming summary judgment on breach of contract cause of action).

<sup>12</sup> *Realm v. City of Olympia*, 168 Wn.App. 1, 5, 277 P.3d 679 (2012).

This case is similar to *Brown v. Safeway Stores*, which involved a commercial lease.<sup>13</sup> When Safeway vacated the premises and subleased to Uwajimaya, the landlord sued for breach of the lease.<sup>14</sup> Yet the lease permitted Safeway to “assign this lease or sublet the whole or any part of the leased premises.”<sup>15</sup> As the court noted, “this provision places no limitations whatsoever on the manner of assignment by the lessee, or on the type of business the lessee may assign or sublet to.”<sup>16</sup> The superior court dismissed the landlord’s complaint and the court of appeals affirmed: “the issue is the right to assign or sublease and the lease itself provides for the unconditional right to sublease.”<sup>17</sup> Just as Safeway had an unfettered right to sublease, Glenda had an unfettered right to vote “yes” or “no” on the issue of whether the lease the property.

The agreement in this case is also similar to a trust interpreted by a Pennsylvania court. The trust corpus was shares of stock in a corporation. The corporate trustee and one other trustee wanted to diversity the trust and urged liquidation of the stock; the other two cotrustees did not agree. The trust had “no provision to break a deadlock that might occur among

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<sup>13</sup> 94 Wn.2d 359, 617 P.2d 704 (1980).

<sup>14</sup> 94 Wn.2d 359, 361.

<sup>15</sup> 94 Wn.2d 359, 370.

<sup>16</sup> 94 Wn.2d 359, 370.

<sup>17</sup> 94 Wn.2d 359, 372.

the four co-trustees.”<sup>18</sup> Ultimately, one cotrustee sued the others for breach of fiduciary duty. The corporate trustee moved for summary judgment, which the court granted: “The problem with Ms. Stein’s argument, however, is that there is no provision within the Trust Agreement that would have provided a means for breaking this deadlock between the equally divided co-trustees. . . . The trust instrument read as a whole, therefore, clearly evidences the settlor’s intent to allow no action to occur in tie vote or deadlock situations.”<sup>19</sup>

The interpretation of paragraph 19 is not ambiguous and there is no extrinsic evidence. Paragraph 19 evidences the parties’ intent that no lease will occur in the event of a deadlock between the cotenants. The court should conclude, as a matter of law, that the Agreement does not require Glenda to agree to a lease. In any event, neither Tammy nor Leslie presented any lease for approval and a “vote” never occurred.

2. The exculpatory clause did not create a duty.

Recognizing the feebleness of a claim based on paragraph 19’s plain language, Leslie & Tammy assert that paragraph 17 “imposes a duty

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<sup>18</sup> *Trust of Rosenfeld*, 2004 WL 3186283 \*1 (Pa. C.P. Phila., May 19, 2004) (Pa.R.A.P. 2133 permits citations to unpublished opinions of Pennsylvania’s lower courts). In accordance with GR 14.1(b), a copy of the opinion is filed herewith).

<sup>19</sup> *Trust of Rosenfeld*, 2004 WL 3186283 \*5 (Pa. C.P. Phila., May 19, 2004).

on the cotenants to refrain from acting or failing to act based on fraud, gross negligence, or bad faith.” Appellant’s Br., p. 24. But paragraph 17 does not *create* a duty. Rather, it is an exculpatory clause:

No Tenant shall be liable under this Agreement to any other Tenant for the performance of any act or the failure to act so long as such Venturer was not guilty of fraud, gross negligence or bad faith in such performance or failure. CP 101.

“An exculpatory clause is a clause in a contract designed to relieve one party of liability to the other for specified injury or loss incurred in the performance of the contract.”<sup>20</sup> When no cause of action exists, a court does not need to evaluate the effect of an exculpatory clause.<sup>21</sup> An exculpatory clause does not create liability and Glenda does not rely on paragraph 17 to exculpate her from liability.

3. The implied covenant of good faith did not create a duty.

Next, Leslie & Tammy argue the implied covenant of good faith and fair dealing imposed a duty on Glenda. App. Br. at p. 24. Because Leslie and Tammy did not advance this argument when responding to Glenda’s summary judgment motion in the superior court, it is waived on appeal.<sup>22</sup> In any event, this argument is rejected by a chorus of case law.

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<sup>20</sup> *Reeder v. Wood County Energy, LLC*, 395 S.W.2d 789, 792-93 (Texas 2013).

<sup>21</sup> *Carvin v. Arkansas Power and Light Co.*, 14 F.3d 399, 406 n. 8 (8<sup>th</sup> Cir. 1993).

<sup>22</sup> CP 1925-1944. RAP 2.5(a).

The duty of good faith and fair dealing that arises out of a contract arises in connection only with the terms agreed to by the parties.<sup>23</sup> This principle is demonstrated by *Johnson v. Yousoofian*, a case with many factual similarities to this case.<sup>24</sup> Johnson leased commercial space from Yousoofian. The lease prohibited an assignment without the landlord's consent: "Lessee shall not ... assign this lease or any part thereof without the written consent of the Lessor, or Lessor's agents."<sup>25</sup> Johnson asked Yousoofian to agree to a lease assignment, Yousoofian refused, and Johnson sued. The superior court held that Yousoofian had no implied duty of good faith or fair dealing because the lease gave him the absolute power to refuse a requested assignment.<sup>26</sup> The appellate court affirmed: "If there is no contractual duty, there is nothing that must be performed in good faith. ... This lease simply does not impose an obligation on the landlord to consent to any assignment sought by the lessees."<sup>27</sup>

Put differently, "the covenant of good faith applies when the contract gives one party discretionary authority to determine a contract

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<sup>23</sup> *Badgett v. Security State Bank*, 116 Wash.2d 563, 569, 807 P.2d 356 (1991) (granting summary judgment because loan agreement did not obligate bank to consider debtor's proposal to restructure a loan).

<sup>24</sup> 84 Wn.App. 755, 930 P.2d 921 (1997).

<sup>25</sup> 84 Wn.App. 755, 757.

<sup>26</sup> 84 Wn.App. 755, 756.

<sup>27</sup> 84 Wn.App. 755, 762.

term; it does not apply to *contradict* contract terms.”<sup>28</sup> “As a matter of law, there cannot be a breach of the duty of good faith when a party simply stands on its rights to require performance of a contract according to its terms.”<sup>29</sup> Because Glenda is simply requiring performance of the agreement according to its terms, the implied covenant of good faith and fair dealing is not implicated.

Appellants rely upon *In re Estate of Mumby*<sup>30</sup> and *Cherberg v. Peoples National Bank of Washington*.<sup>31</sup> Appellants Br. at p. 24. The *Mumby* opinion addresses a legal principle applicable to will contests: if a will contest is brought “in good faith and with probable cause,” a clause disinheriting a person for contesting the will does not apply.<sup>32</sup> The court held that the person contesting the will did not operate in good faith because she failed to disclose all material facts to her own attorney.<sup>33</sup> The

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<sup>28</sup> *Goodyear Tire & Rubber Co. v. Whiteman Tire, Inc.*, 86 Wn.App. 732, 738, 935 P.2d 628 (1997) (affirming dismissal because dealership contract imposed no implied duty of good faith upon company to refrain from exercising its contractual right to sell tires in dealer’s trade area).

<sup>29</sup> *Badgett v. Security State Bank*, 116 Wn.2d 563, 570. *See also Frank Coluccio Constrc. Co. v. King County*, 136 Wn.App. 751, 766, 150 P.3d 1147 (2007) (identifying obligations to which implied duty applied, including “the duty to adjust claims”).

<sup>30</sup> 97 Wn. App. 385, 982 P.2d 1219 (1999).

<sup>31</sup> 88 Wn.2d 595, 564 P.2d 1137 (1977).

<sup>32</sup> 97 Wn.App. 385, 393, 982 P.2d 1219 (1999).

<sup>33</sup> 97 Wn.App. 385, 394.

*Mumby* case, which appellants did not cite to the superior court, is inapplicable to this case.

*Cherberg* involved a tortious interference claim brought by a restaurant lessee against its commercial landlord.<sup>34</sup> The restaurant asserted that the landlord interfered in its relations with its customers by refusing to repair an exterior building wall.<sup>35</sup> Unlike the restaurant, Leslie & Tammy did not sue for tortious interference. CP 1524-1533. As Greg & Glenda pointed out, any tort claim was barred by the three year statute of limitations. CP 1473-1466, 1567, 1549, 1708.<sup>36</sup> Appellants did not cite the *Cherberg* opinion to the superior court and the *Cherberg* decision is completely inapposite.<sup>37</sup>

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<sup>34</sup> 88 Wn.2d 595, 597, 564 P.2d 1137 (1977).

<sup>35</sup> 88 Wn.2d 595, 604.

<sup>36</sup> When responding to statute of limitations arguments, Leslie & Tammy focused on Greg, as managing tenant, and did not mention Glenda. *See, e.g.* CP 1480 and 1504.

<sup>37</sup> Appellants' Table of Authorities cites twenty two cases. Sixteen of those were not cited by any party to the superior court. Two were cited exclusively by counsel for Greg and Glenda (*Crafts v. Pitts*, 161 Wn.2d 16, 162 P.3d 382 (2007), and *Frank Coluccio Constr. Co.*, 136 Wn. App. 751, 150 P.3d 1147 (2007)). Two apply solely to claims against Greg (*Hetrick v. Smith*, 67 Wash. 664, 122 P. 363 (1912), and *In re Estate of Palmer*, 145 Wn. App. 249, 187 P.3d 758 (2008)). The other two apply only to damage issues (*Obert v. Envtl. Research*, 112 Wn.2d 323, 771 P.2d 340 (1989), and *Wilkins v. Lasater*, 46 Wn. App. 766, 733 P.2d 221 (1987)). Put differently, appellants failed to provide the superior court with the legal authorities upon which they rely before this court.

4. The court should have considered Tammy's admission that Glenda did not breach the agreement.

When asked about Glenda's unwillingness to lease the Property, Tammy Blakey admitted "I don't think it's a violation of the cotenancy agreement." CP 1772. Leslie & Tammy argued that the admission was an "improper legal conclusion" and the court excluded the testimony. CP 1952, 2160-61.

"The prevailing view is that admissions in the form of opinions are competent."<sup>38</sup> "When it is a party who makes such an admission...the courts tend to admit the statement for whatever factual bearing it may have on the case."<sup>39</sup> In other words, the superior court abused its discretion because the objection goes to weight, not admissibility.

Additionally, Tammy opened the door to admission of her testimony. Once a party has "raised a material issue, the opposing party is permitted to explain, clarify, or contradict" that evidence.<sup>40</sup> This 'open door doctrine' guards against leaving a "matter suspending in air at a point markedly advantageous to the party who opened the door, but might well limit the proof to half-truths."<sup>41</sup> "This means that otherwise inadmissible

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<sup>38</sup> Edward Cleary, McCormick's on Evidence § 264 (West 1972).

<sup>39</sup> Karl Tegland, Evidence, Washington Practice 5B, § 801.39 (West 2007).

<sup>40</sup> *State v. Berg*, 147 Wn.App. 923, 939, 198 P.3d 529 (2008).

<sup>41</sup> *State v. Gefeller*, 76 Wn.2d 449, 455, 458 P.2d 17 (1969).

evidence may be admissible if a party first ‘opens the door’ and the inadmissible evidence is relevant to an issue at trial.”<sup>42</sup> Tammy earlier testified that she “included Glenda as a Defendant because at a minimum she authorized SnoPac’s and Manson’s uses of the Property without my approval and failed to cure those breaches.” CP 500. Tammy has been a party in almost twenty lawsuits. CP 38-40. By introducing her own testimony accusing Glenda of breaching part of the Agreement, Tammy opened the door to her admission that another act of Glenda’s was *not* a breach.<sup>43</sup>

5. Leslie & Tammy failed to introduce evidence of damages caused by the alleged breach.

Leslie & Tammy are suing for profits they claim they lost because the property was not leased. But lost profits are recoverable only when they are the “proximate result of defendant’s breach” and “they are proven with reasonable certainty.”<sup>44</sup> Washington’s Supreme Court applied these requirements in *California Eastern Airways, Inc. v. Alaska Airlines, Inc.*<sup>45</sup> When Alaska Airlines returned a leased airplane to California Eastern Airways, it sent a mechanic to remove seats it owned. But California

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<sup>42</sup> *State v. Stockton*, 91 Wn.App. 35, 40, 955 P.2d 805 (1998).

<sup>43</sup> “A party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground.” RAP 2.5(a).

<sup>44</sup> *Larsen v. Walton Plywood Co.*, 65 Wn.2d 1, 15, 390 P.2d 677 (1964).

<sup>45</sup> 38 Wn.2d 378, 229 P.2d 540 (1951).

Eastern withheld the seats, asserting that Alaska owed money. When California Eastern sued for breach of the lease, Alaska counterclaimed for lost profits based on the withholding of seats. But Alaska did not demonstrate that it would have been able to fill those seats with paying customers. The trial court awarded Alaska \$1 and Washington's Supreme Court affirmed: "Loss of profits, in this case, must be based on loss of business. Appellant, in not showing any such loss, failed in its proof of damages."<sup>46</sup> The court reached the same result *National School Studios, Inc. v. Superior School Photo Service*,<sup>47</sup> and *Carlson v. Leonardo Truck Lines, Inc.*<sup>48</sup>

In this case, Leslie & Tammy alleged that Glenda refused to lease. But Leslie & Tammy did not establish damage caused by the alleged breach because they never found a lessee, presented a lease, or introduced testimony that a lessee could have been found. CP 1013, 427, 1024, 12. Because Leslie & Tammy did nothing to procure a lease, they failed to establish that any act or omission by Glenda caused them damage, and Judge Yu correctly concluded that "Plaintiffs have not shown how the

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<sup>46</sup> 38 Wn.2d 378, 380.

<sup>47</sup> 40 Wn.2d 263, 275-76, 242 P.2d 756 (1952) (plaintiff failed to introduce "reasonably certain proof" of net profits).

<sup>48</sup> 13 Wn.App. 795, 803, 538 P.2d 130 (1975) (plaintiffs "failed to establish, with reasonable certainty, that they had suffered a loss of profits, or the amount thereof, because of the defendants' breach of the contract").

failure to lease, refusal to lease, or the use of the premises by one Tenant has caused actual damage to the other.” CP 2020.<sup>49</sup>

6. Alleged breach of agreement: conclusion.

The court should reverse the superior court’s exclusion of Tammy Blakey’s admission. The court should affirm the superior court’s dismissal of Leslie & Tammy’s claim against Glenda for breach of the agreement.

V. Sale of the property

A. Sale of the property: Summary of Argument

The second part of the appeal concerns sale of the property. This requires the court to interpret paragraph 13.

Paragraph 13 addresses an offer from a third party to buy the property. Any sibling who received a third party’s offer was obligated to notify the other siblings. ¶ 13.1/CP 97. The siblings would vote, and under paragraph 13.2, if the vote was two to two, the offer was *accepted*; an offer would be rejected only if three or four siblings voted to reject:

If Tenants owning more than fifty percent (50%) of the total Undivided Interests properly reject the Purchase Offer, the Purchase Offer shall be deemed rejected by the Tenancy and shall be of no further effect. If Tenants owning more than fifty percent (50%) of the total Undivided Interests fail to reject the Purchase Offer as provided in this subparagraph 13.2, the Purchase Offer shall be deemed accepted by the Tenancy, subject, however to the rights described in subparagraph 13.3 below of those

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<sup>49</sup> Glenda also incorporates the damage arguments raised in the brief submitted by Greg’s estate. See Respondent Greg Blakey’s brief, § A(5).

Tenants rejecting the Purchase Offer (the “Rejectors”) to purchase the interests of those Tenants willing to accept the purchase offer (the “Acceptors”). [¶ 13.2/CP 97-98]

Thus, paragraph 13.2 provided a safety valve from a deadlock created by paragraph 19. If the parties were not able to agree to lease, but a third party subsequently offered to purchase the property, a two to two vote on whether to sell compelled the sale.

The final clause in paragraph 13.2 (in the block quote above) conferred an option on a rejector. The rejector could offer to purchase the property from the accepting co-tenants:

Each Rejector shall specify in his notice rejecting the Purchase Offer the percentage, if any, of the aggregate Undivided Interests of the Acceptors that such Rejector is willing to purchase in the event that the Purchase Offer is not rejected by the Tenancy as provided in subparagraph 13.2. [¶ 13.3/CP 98]

Still, the rejector’s offer had to be a mirror image of the third party’s purchase offer:

In the event that any Rejectors shall purchase the Undivided Interests of the Acceptors, the price to be paid to each Acceptor shall be equivalent in amount and method of payment to the amount and method which would have been received by such Acceptor upon the sale of the Property by the Tenancy had the Purchase Offer been accepted and the sale of the Property consummated. Any such purchase of the Acceptors' Undivided Interests by the Rejectors shall be upon the same terms and conditions as the proposed sale of the Property which was rejected by the Tenancy, provided, however, that the purchase price shall be proportionately adjusted to reflect any differences in the interests subject to the respective sales, and provided further, that if part or all

of the consideration to be paid for the Property as stated in the Purchase Offer is other than money, the Rejectors shall have the right to substitute money equivalent to the fair market value of such property in the calculation of the purchase price to be paid for the Undivided Interests of the Acceptors. [¶ 13.3/CP 98-99]

The agreement functioned exactly as designed. In 2008, the parties could not agree on whether to lease, so no lease resulted. CP 162. The property was listed for sale in 2009. CP 474. In December 2011, a third party finally offered to buy the property. CP 310-326. Again, the parties divided two to two about whether to sell. CP 305. The court allowed the two rejectors an opportunity to match the price and terms. CP 505. When the rejectors were unable to do so, the court specifically enforced the sale provisions in paragraph 13. CP 508. The court's order effectuated paragraph 16 of the agreement:

In the event of any sale or other transfer of any interest in the Property or the Tenancy or of any other action taken pursuant to the terms of this Agreement, each Tenant shall take any and all steps, execute and deliver any and all documents, and do any and all acts necessary or convenient to consummate and effectuate such sale, transfer or action. [¶ 16/CP 101]

The legal analysis of the property sale focuses on the plain language of paragraphs 13 and 16. Appellants did not include the full text of paragraphs 13 and 16 in their opening brief; a fair inference is that the plain language supports the superior court's orders. The important facts to remember are (1) the court gave Leslie & Tammy's an opportunity to buy,

(2) the court determined that Leslie & Tammy's offer was not equivalent to the third party's, and (3) although Leslie & Tammy sought review in the court of appeals, they did so without obtaining CR 54(b) findings and never invoked the supersedeas procedure in RAP 8.1 to stay enforcement of the sale.

B. Chronology of events.

See chart on following page.

### Sale of the property – chronology

- December 8, 2011 — Greg and Glenda send Manson's \$1,000,000 cash offer with unlimited environmental indemnity to Leslie & Tammy. CP 138-139. [For Purchase & Sale Agreement, see CP 310-326.]
- February 24, 2012 — Court Order: Greg and Glenda are authorized to sell to Manson "unless Tammy & Leslie elect to match the offer & proceed to provide proof of actual ability to do so as one would be required to do in any other bona fide offer." CP 505.
- February 28, 2012 — Leslie testimony establishes only \$16,218.98 in credit [CP 2302], \$8,941.85 in liquid stocks [CP 2304], illiquid assets (real estate & IRA), and a conditionally approved loan. CP 2291-2337.
- March 2, 2012 — Court Order: Greg and Glenda "are authorized, on behalf of all parties, to close the proposed sale." CP 508 (See also VRP 2/28/2012, p. 63)
- March 2, 2012 — Notice of Appeal. CP 2220-21.
- April 17, 2012 — Court of Appeals ruling (case no. 68435-3-I): "Plaintiffs have not argued for discretionary review. If review is to go forward at this time, plaintiffs must obtain CR 54(b) findings. Reviewed will be dismissed unless they have done so by May 18, 2012."
- May 21, 2012 — Leslie & Tammy file motion to "vacate" Purchase & Sale Agreement. CP 510-521.
- May 23, 2012 — Greg and Glenda file motion for order authorizing them to sign closing documents. CP 522-525.
- May 23, 2012 — Court authorizes Greg and Glenda "to execute such documents" required to close the sale. CP 818. Court denies Leslie & Tammy's motion to vacate. CP 815-16.
- June 8, 2012 — Court of Appeals notation ruling (case no. 68435-3-I): "Review is dismissed." CP 2253.
- June 25, 2012 — Leslie admits "there was no evidence before the Court to show that we were able to match Manson's offer." CP 913.
- June 28, 2012 — Property sale closes. CP 1014, 918.

C. Superior court proceedings

In a counterclaim, Greg and Glenda asked the court to specifically enforce paragraph 13 of the agreement and allow sale of the property. CP 13. Greg and Glenda moved the court for an order of specific performance as a matter of law. CP 16-36. The court granted specific performance and authorized Greg and Glenda to sell the property to Manson Construction Manson “unless Tammy & Leslie elect to match the offer & proceed to provide proof of actual ability to do so as one would be required to do in any other bona fide offer.” CP 505.

On February 28, 2012, the court decided that Leslie & Tammy’s proposal was not equivalent to the Manson Purchase and Sale Agreement: “There’s such a radical difference in real and in financial documents or financial statements between conditional approval, real assets that are not put on the market and a real cash offer that’s on the table.” VRP (2/28/2012), p. 63. Because Leslie & Tammy did not match the Manson offer, the court authorized Greg and Glenda, “on behalf of all parties, to close the proposed sale.” CP 508.

Leslie & Tammy appealed the court’s orders to the court of appeals. CP 2220-21. A third attorney appeared for the appeal.<sup>50</sup> The court

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<sup>50</sup> The Court of Appeals cause no. is 68435-3-I. Leslie & Tammy’s third attorney filed the Notice of Appearance on March 30, 2012.

commissioner noted that appellants did not argue for discretionary review; the court gave Leslie & Tammy a month to obtain 54(b) findings or have the appeal dismissed.<sup>51</sup> When no 54(b) findings arrived, the court of appeals dismissed the appeal. CP 2253. Leslie & Tammy never invoked RAP 8.1(b)(2), which would have allowed them to obtain a stay of the property sale by posting a bond.

At the superior court level, Leslie & Tammy's second attorney filed a thirty thousand dollar lien claim against Leslie & Tammy for not paying him, and then withdrew. CP 2232-2236, 2391. Leslie & Tammy's fourth attorney appeared for the limited purpose of opposing the attorney lien. CP 905, 2401-02.

Appearing pro se, Leslie & Tammy moved the court to vacate the Manson Purchase and Sale Agreement. CP 510-521. Among other things, Leslie & Tammy alleged that the Manson Purchase and Sale Agreement did not "comport with the actual appraised value of the property," and "in light of evidence illegally not submitted by Plaintiffs' [second attorney]." CP 511. Leslie & Tammy submitted no evidence in support of their motion. The court denied Leslie & Tammy's motion, and later denied a motion for reconsideration. CP 815-16, 933.

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<sup>51</sup> Court of Appeals no. 68435-3-I (April 17, 2012 notation ruling, p. 2).

At the same time, Greg and Glenda moved the court for an order authorizing them to execute the closing documents. CP 522-525. The court granted the motion. CP 818. The property sale closed in late June 2012. CP 918, 934, 1212 (n. 4), 1221. Although the property had been available for sale since early 2008, the only purchase offer was the late 2011 Manson Construction Purchase and Sale Agreement. CP 633.

D. Counterstatement of issues

1. Paragraph 13 of the agreement allows sale of the property to a third party. Still, cotenants who do not want to sell can buy out the other cotenants if they make an “equivalent” offer. Here, Manson Construction offered \$1,000,000 in cash, \$30,000 in earnest money, and an unlimited environmental indemnity. Did the court correctly conclude that Leslie & Tammy did not match Manson’s offer when (1) neither one offered cash, (2) neither offered earnest money, and (3) neither had sufficient assets to meaningfully indemnify the other co-tenants?
2. Appellants conceded to the superior court that the property was a superfund site and the cotenants faced environmental liabilities. Then, months after the property sale, appellants’ fifth attorney asserted that the cotenants did not face CERCLA liability. Did the appellants’ failure to make various arguments to the trial court preclude this court from considering them?
3. In March 2012, Leslie & Tammy appealed the court’s orders selling the property. But they failed to obtain CR 54(b) findings or invoke RAP 8.1. The property sale closed in June 2012. Did the failure to take action to forestall the sale constitute a failure to mitigate, precluding appellants’ claim?
4. Relying on paragraph 13 of the agreement, the superior court ordered the sale of the property, after which the

property sale closed. If the court's order is affirmed, can appellants maintain a cause for breach of the agreement while alleging a "fire sale"?

E. Argument

1. The Superior Court properly authorized Glenda and Greg to sell the property.

In early December 2011, Manson offered \$30,000 earnest money and to buy the property for \$1,000,000 "all cash at closing with no financing contingency." CP 310. Manson's audited financial statements, introduced into evidence, showed that Manson had in excess of \$26,000,000 in cash and total assets exceeding \$367,000,000. CP 2181-2195. Manson's initial offer included a \$1,500,000 environmental indemnity. CP 284-300. Glenda and Greg expressed an interest in the offer, but only if Manson assumed full responsibility for all environmental issues. CP 302. In an addendum to the Purchase and Sale Agreement, Manson offered an unlimited indemnity. CP 326. Manson agreed to pay all costs to investigate, remediate, and respond to requests, including attorney fees and other consultant fees. CP 326. Thus, the Manson offer was (i) \$1,000,000 all cash at closing with no financing contingency, (ii) \$30,000 in earnest money, and (iii) an unlimited environmental indemnity.

Leslie & Tammy rejected the Manson offer on December 6, 2011. CP 305. The court hearing to determine whether Leslie & Tammy satisfied paragraph 13.3 was convened on February 28, 2012. VRP (2/28/2012).

Thus, Leslie & Tammy had more than two and a half months to match Manson's offer.

2. The court properly concluded that Leslie & Tammy failed to make an offer matching the Purchase and Sale Agreement signed by Manson.

The court framed the issue narrowly: by February 28, 2012, had Leslie and Tammy given Glenda and Greg a mirror image offer? VRP (2/28/2012), pp. 64-65. For multiple reasons, the court answered "no." Leslie & Tammy did not have the cash, they did not offer earnest money, and they did not offer an unlimited environmental indemnity.

- a) No cash offer.

The agreement allowed Leslie or Tammy, as "rejectors," to buy the property for an "equivalent in amount and method of payment." ¶ 13.2. The agreement also expressed this concept as a purchase "upon the same terms and conditions as the proposed sale of the Property which was rejected by the Tenancy." Yet Leslie & Tammy never made a written offer to buy the property. CP 1200, 1013. Rather, on February 21, 2012, each submitted sworn testimony: "If the Sale Provision is applicable, together with Leslie, I intend to purchase Defendants' entire interests in the Property under the Default Provision. I would purchase 50% of Defendants' interests." CP 501; see also CP 503. Because they collectively

owned fifty percent of the property, Leslie and Tammy each needed to offer \$250,000 in cash.

But neither Leslie nor Tammy offered cash. Leslie's testimony demonstrated that Leslie had only \$25,160.83 in credit and liquid assets, and that computation includes Leslie maxing out her existing line of credit.<sup>52</sup> In short, Leslie did not offer \$250,000 in cash because she did not have \$250,000 in cash. Far from offering \$250,000 in cash, Leslie offered a contingent loan; she had "conditional approval," but the loan was contingent upon the bank's approval of an appraisal, title, and insurance. CP 2296. Even if she had obtained the loan, she likely would not have had \$250,000 in cash. That is because the \$250,000 conditional loan was a line of credit and presumably the bank would have required Leslie to pay off the \$33,894 on her existing line of credit before giving her new credit. And none of this accounted for a \$50,000 debt Leslie owed to her mother; the court had received evidence about Leslie's \$50,000 debt in January 2012, just prior to its decision that Leslie had not matched Manson's offer. CP 47, 2291.

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<sup>52</sup> Leslie had a line of credit for \$50,000, on which she had already drawn out \$34,894.51. CP 2302. Thus, the available credit was \$16,218.98. She also had stocks worth \$8,941.85. CP 2304. Leslie's total liquid assets were \$25,160.83. CP 2291-2304.

If she liquidated several investments, Tammy could have come up with \$250,000 cash. But she didn't offer to do so. Rather, Tammy offered proceeds from a loan application, which again was pending and conditional. CP 2291 (¶ 2).

Thus, the court correctly held that Leslie & Tammy's respective offers of \$250,000 *if* their loans were approved, was not equivalent to Manson's cash offer. VRP (2/28/12), p. 63.

b) No earnest money.

Leslie and Tammy did not offer \$30,000 in earnest money. Leslie & Tammy's "offer" was in the form of testimony: "If the Sale Provision is applicable, together with Tammy, I intend to purchase Defendants' entire interests in the Property under the Default Provision. I would purchase 50% of Defendants' interests." CP 503, 502. Neither Leslie nor Tammy ever promised \$30,000 in earnest money.<sup>53</sup>

c) No comparable environmental indemnity.

Leslie & Tammy conceded that the Duwamish waterway, including the property, was a superfund site. VRP (2/28/2012) at p. 59; CP 150-52. Uncontroverted expert testimony calculated the *environmental* cleanup cost to be \$1,418,000 - \$1,695,000. CP 67. This \$1,556,000

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<sup>53</sup> The record is sufficiently developed to determine whether Leslie & Tammy offered earnest money. RAP 2.5(a). *See* CP 141-42, 451, 501, 503, 2291-2337, 2338-2360.

median *environmental* cleanup cost does not include attorney and expert consultant fees that would be incurred over the years during which environmental liabilities were evaluated, debated, and ultimately resolved. CP 64-67, 152.

Leslie & Tammy argued that the four siblings might end up paying less than \$1,556,000 because “previous owners, operators, producers, and transporters” might be allocated some responsibility. CP 2278. But Leslie & Tammy made this argument without submitting any testimony and without citation to legal authority. CP 2278.

Manson’s indemnity is unlimited, and the court received evidence about Manson’s financial wherewithal. CP 2178-82. Manson’s audited financial statements demonstrated cash and equivalents exceeding \$26,000,000 and assets exceeding \$367,000,000. CP 2182.

The court also received evidence about the dubious value of Leslie and Tammy’s proposed indemnities. CP 2291-94, 2338-2340. Leslie’s testimony about her assets and finances made her indemnity of modest or no value; Leslie had two pieces of real property, one encumbered by a mortgage, and together worth perhaps \$600,000. CP 2291-94. Tammy owned more properties, but each was of relatively small value. CP 2238-40. Thus, the cost of executing on an indemnity would be burdensome. And of course, Leslie & Tammy were suing Glenda at the time they were

promising an indemnity. Glenda could have justifiably concluded that indemnities from Leslie & Tammy were less valuable because Leslie & Tammy are litigious. (Tammy has been a party to approximately twenty lawsuits. CP 38-40.) With a list of legal citations, Greg and Glenda suggested that Leslie & Tammy obtain a performance bond to secure the indemnity; Leslie & Tammy refused. CP 2198, 2200, 992. Thus, the court properly concluded that Leslie & Tammy's indemnities were not "equivalent" to Manson's indemnity.

- d) Leslie later admitted that she & Tammy failed to match Manson's offer.

In later sworn testimony, Leslie admitted that she and Tammy failed to "match the Manson offer." Leslie's fourth attorney introduced this testimony in opposition to the attorney lien foreclosure pursued by Leslie & Tammy's second attorney.

Attached hereto, marked as Exhibit 1 and incorporated by reference, is a true and accurate copy of the January 23, 2012 letter from the Defendants' attorney by which the Defendants offered to allow us to match the Manson offer and sell us Defendants' interest in the property if we provided written evidence of our ability to perform prior to January 27, 2012 – this was the deadline by which Defendants had stated their intent to file a motion for summary judgment. Mr. Turner forwarded that letter to us at lunch time on January 24, 2007 merely mentioning that he was "forwarding this correspondence from Jim Fowler for your consideration," but did not discuss it with us and did not explain its legal significance, or any material effect on issues relative to a potential summary judgment. *We*

*could have matched the Manson offer prior to any summary judgment filings, had we understood what we needed to do.* [CP 910, ¶ 3]

Leslie's declaration admitted that appellants accepted their second attorney's advice to not submit expert witness testimony at the time of the court's hearing on the property sale. CP 910-911, ¶ 6-7. Leslie admitted that her second attorney had declined or failed to introduce evidence about Tammy's finances because he wanted to "keep the information in his back pocket." CP 912, ¶ 11. Leslie admitted that Leslie & Tammy's attorney had told defense counsel that Leslie & Tammy would "not encumber any of our assets to secure the indemnity as part of our offer." CP 912, ¶ 14. Leslie testified that her second attorney "mistakenly informed" defense counsel about the indemnity issue, made an "untrue" and "damaging statement," and did not present the evidence to [sic] the court required." CP 913, ¶ 15. Leslie's testimony admitted "there was no evidence before the Court to show that we were able match Manson's offer." CP 913, ¶ 15.

- e) Leslie & Tammy's fifth attorney raised the CERCLA argument months after the court's decision.

In a February 28, 2013 written submission, Leslie & Tammy's second attorney acknowledged that the siblings faced CERCLA liability. CP 2278. Yet Leslie & Tammy now argue that "the cotenants were not

liable [] as a matter of law because they did not pollute the property.” Br. of Appellants, p. 2.

This argument was first raised by Leslie & Tammy’s fifth attorney on November 19, 2012, five months after the property sale closed. CP 1213, 1371. Because the argument contradicted the position taken by Leslie & Tammy’s second attorney and because the argument was made months after the court’s orders and after the property sale closed, it was untimely and this court should not consider it.

3. Leslie & Tammy cannot recover damages for a sale authorized by the court.

Leslie & Tammy’s claim that they can recover for a “fire sale” is based on the same faulty reading of paragraph 17 as addressed above. Paragraph 17, an exculpatory clause, does not impose a duty on Glenda. The claim is also premised on an alleged error by the superior court in authorizing the sale. In other words, if the superior court properly authorized the sale, there can be no cause of action arising out of the sale.

What is more, Leslie & Tammy acknowledged to the superior court that paragraph 13 allowed a property sale at “well below market value:”

Simply presenting the other tenants with a purchase offer triggers a chain of events that cannot be undone without extraordinary efforts. The tenant(s) not desiring to sell must secure three out of four votes to veto the purchase offer. *Id.*

at 13.2. If the dissenting tenant(s) cannot secure three out of four votes, then their only option to veto the sale is to match the third-party-purchase offer. *Id.* If the dissenting tenant(s) cannot match the third-party-purchase offer, then the sale goes through *even if the purchase price is well-below market value for the Property.*” CP 1212-13 (emphasis in original).

Leslie & Tammy cannot now take a completely contrary position to one they espoused in the superior court.

Finally, Leslie & Tammy waived their right to recover damages from the property sale. Although Leslie & Tammy filed a notice of appeal of the superior court’s orders [CP 2220-21], they failed to post a bond and seek a stay under RAP 8.1(b)(2). Then, they failed to satisfy the Commissioner’s request that they obtain CR 54(b) findings. Hence, Leslie & Tammy failed to mitigate and cannot bring a claim. Restatement (Second) of Contracts § 350(1).

## VI. Conclusion

*“Don’t look a gift horse in the mouth.”*

Bruce Blakey gave his children a piece of commercial property. CP 602. While paying almost no expenses, the four siblings divided \$1,363,200 in rent paid by SnoPac. CP 473, 370, 168. Then, in 2012, Manson bought the property for \$1,000,000 in cash. CP 310. Thus, each sibling received a \$590,800 gift from dad. Because there is no allegation that Glenda received anything more than her one quarter, Leslie &

Tammy's lawsuit against Glenda was unjustified. The court should affirm the orders granting specific performance of paragraph 13 of the agreement and affirm the court's summary judgment dismissing Leslie & Tammy's breach of contract claim against Glenda.

Respectfully submitted this 19th day of May, 2014.

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LLP



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**CERTIFICATE OF SERVICE**

The undersigned certifies that on May 19, 2014, I caused to be served via email and first class mail a true and correct copy of the foregoing Brief of Respondents to:

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

DATED at Seattle, Washington on May 19, 2014.

*Rosanne Wanamakers*

**APPENDIX**  
**Co-Tenancy Agreement (excerpts) [CP 80-107]**

Recitals

B. The Tenants desire to execute a comprehensive agreement setting forth the nature of their interests in, and of the relationship among themselves as to, the Property.

Agreement

1. Tenancy. The terms of this Agreement shall govern the relationship of the Tenants among themselves as to any and all interests which they now have or may hereafter acquire in and to the Property.

...

**[CP 97]** 13. Sale of Property.

13.1 Offer. If any Tenant, acting individually or jointly with the other Tenants, shall make or receive a bona fide offer (the "Purchase Offer") in writing to purchase the Property, such Tenant shall promptly deliver a copy of the Purchase Offer, together with the completed terms and conditions of the proposed sale and financial and other pertinent information concerning the prospective purchaser or purchasers, as the case may be (the "Purchase Offeror"), to each of the other Tenants.

13.2 Rejection or Acceptance. Each Tenant shall, within thirty (30) days after delivery of the Purchase Offer deliver notice of his or her acceptance or rejection of the Purchase Offer to the Purchase Offeror and copies thereof to all of the Tenants. If no such notice is delivered to the Purchase Offeror within such time by any Tenant, the Purchase Offer shall be deemed to have been accepted by such Tenant. If Tenants owning more than fifty percent (50%) of the total Undivided Interests properly reject the Purchase Offer, the Purchase Offer shall be deemed rejected by the Tenancy and shall be of no **[CP 98]** further effect. If Tenants owning more than fifty percent (50%) of the total Undivided Interests fail to reject the Purchase Offer as provided in this subparagraph 13.2, the Purchase Offer shall be deemed accepted by the Tenancy, subject, however to the rights described in subparagraph 13.3 below of those Tenants rejecting the Purchase Offer (the "Rejectors") to purchase the interests of those Tenants willing to accept the purchase offer (the "Acceptors").

13.3 Rights of Rejectors. Each Rejector shall specify in his notice rejecting the Purchase Offer the percentage, if any, of the aggregate Undivided Interests of the Acceptors that such Rejector is willing to purchase in the event that the Purchase Offer is not rejected by the

Tenancy as provided in subparagraph 13.2. If the Purchase Offer is not rejected by the Tenancy as provided in subparagraph 13.2 and the aggregate Undivided Interests of the Acceptors which the Rejectors have expressed a willingness to purchase are less than the aggregate Undivided Interests of the Acceptors, the Purchase Offeror shall immediately deliver notice thereof to all of the Rejectors, which notice shall specify the amount of the difference. If, within twenty (20) days after delivery of such notice by the Purchase Offeror, the Rejectors do not deliver a supplemental notice expressing a willingness to purchase such difference, then the original Purchase Offer shall be deemed accepted by the Tenancy. If the Purchase Offer is not rejected [CP 99] by the Tenancy as provided in subparagraph 13.2 and the aggregate Undivided Interests of the Acceptors which the Rejectors have expressed a willingness to purchase are equal to or in excess of the aggregate Undivided Interest of the Acceptors, each Rejector shall then purchase that portion (referred to herein as his "percentage portion") of the aggregate Undivided Interests of the Acceptors which bears the same proportion to the aggregate Undivided Interests of the Acceptors as that Rejector's Undivided Interests bears to the aggregate Undivided Interests of all of the Rejectors, provided, however, that such portion shall in no event exceed the percentage which such Rejector has expressed a willingness to purchase. If any Rejector has not expressed a willingness to purchase his entire percentage portion of the aggregate Undivided Interests of the Acceptors, each Rejector who has expressed a willingness to purchase more than his percentage portion shall purchase his percentage portion of the excess provided, again, that the portion to be purchased by any Rejector shall in no event exceed the percentage which such Rejector has expressed a willingness to purchase. This procedure for allocating the purchase of the Undivided Interests of the Acceptors among the Rejectors shall be continued until the purchase by the Rejectors of all of the Undivided Interests of the Acceptors has been provided for. In the event that any Rejectors shall purchase the Undivided Interests of the [CP 100] Acceptors, the price to be paid to each Acceptor shall be equivalent in amount and method of payment to the amount and method which would have been received by such Acceptor upon the sale of the Property by the Tenancy had the Purchase Offer been accepted and the sale of the Property consummated. Any such purchase of the Acceptors' Undivided Interests by the Rejectors shall be upon the same terms and conditions as the proposed sale of the Property which was rejected by the Tenancy, provided, however, that the purchase price shall be proportionately adjusted to reflect any differences in the interests subject to the respective sales, and provided further, that if part or all of

the consideration to be paid for the Property as stated in the Purchase Offer is other than money, the Rejectors shall have the right to substitute money equivalent to the fair market value of such property in the calculation of the purchase price to be paid for the Undivided Interests of the Acceptors.

...

**[CP 101]** 17. Liability of Tenants. No Tenant shall be liable under this Agreement to any other Tenant for the performance of any act or the failure to act so long as such Venturer was not guilty of fraud, gross negligence or bad faith in such performance or failure.

...

**[CP 102]** 19. Sale, Improvement, Etc. Unless specific provision thereof is made elsewhere in this Agreement, the Property shall not be sold, encumbered, leased, improved, developed, transferred or disposed of by the Tenancy during the term of this agreement except upon approval by Tenants owning more than fifty percent (50%) of the total undivided interests in the Property.

...

**[CP 104]** 25. Modification; Entire Agreement. This Agreement shall not be changed, modified or amended in any way except in writing signed by the party or parties to be bound thereby. This Agreement sets forth the entire agreement and understanding among the parties as to the subject matter treated in this Agreement and merges and supersedes all prior or contemporaneous discussions, agreements and understandings of every kind and nature among them. The headings of the various paragraphs are for convenience only and shall not affect the meaning or effect of any provision.