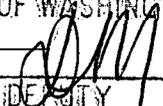


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NO. 46802-6-II

STATE OF WASHINGTON

BY: 
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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

CHRISTOPHER GUEST and SUZANNE GUEST,
Appellants,

v.

DAVID LANGE and KAREN LANGE,
Respondents.

THE COE FAMILY TRUST and MICHAEL COE Trustee et al.
Intervenors,

v.

CHRISTOPHER GUEST and SUZANNE GUEST
Individually and as the Marital Community thereof,
Respondents

APPELLANTS' REPLY BRIEF

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TABLE OF CONTENTS

I. THE LANGES AND TRUST PARTIES
DID NOT APPEAL.....1

II. THE GUESTS PREVAILED AT TRIAL.....3

III. THE TRIAL COURT ERRED AND MISAPPLIED
THE LAW OF THE CASE DOCTRINE.....24

IV. THE LANGES VOIDED THEIR OWN AND THE ‘TRUST’
RELATED PARTIES INTERLOCUTORY ORDERS,
RULINGS AND JUDGMENTS.....32

V. GUEST POST-TRIAL MOTIONS ARE STILL PENDING.....39

VI. THE TRIAL COURT ERRED WHEN IT DENIED
THE GUESTS’ MOTION TO AMEND.....40

VII. THE TRIAL COURT ERRED IN GIVING JURY
INSTRUCTION NO. 17 AND 9, AND FAILING
TO INSTRUCT THE JURY ON THE DEFINITION
OF “GOOD FAITH” AND “FAIR DEALING”.....44.

 i. Standard of Review.....45

 ii. Jury Instruction No. 9 misstated the law.....46

 iii. Jury Instruction No. 17 not only was in error
 and not supported by the evidence, it did not allow the
 Guests to argue their theory of the case.....47

 iv. The omission of the instruction on the implied duty
 of good faith and fair dealing prejudiced the Guests.....48

VIII. THE GUESTS REQUEST AN AWARD OF FEES,
COSTS AND EXPENSES UNDER RAP 4.1 AND 4.2,
RAP 18.1, SECTION D, RCW 64.04.030 AND OTHER
STATUTORY, RULE, CONTRACT AND EQUITABLE
GROUNDS.....50

X.	CONCLUSION.....	50
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I. THE LANGES AND TRUST PARTIES DID NOT APPEAL

Fatally, the Langes and the Trust related parties did not appeal or cross-appeal any issue in this *Guest v. Lange et al.* consolidated appeal of the underlying *Guest v. Lange* ‘Final Judgment’, denial of the Guests’ post-verdict and post judgment motions, the court’s refusal to hear the Guests’ analogous CR 60 motions for relief from judgment, or the automatically vacated CR 54(b) interlocutory Lange and Trust orders, rulings and judgments in this case.¹ See RAP 2.4(a)(barring affirmative

¹ See CP 4912-14; 4916; *Club Envy of Spokane, LLC v. Ridpath Tower Condominium Association*, 84 Wn.App. 593, 337 P.3d 1131 (Wash. App. Div. III 2014)(an Association declaration is like a deed, the declaration’s legal consequences are questions of law that the appellate court reviews de novo, a declaration that is “void ab initio” from its inception resolves and dismisses all claims by those parties relying on the declaration to regulate and restrict property adverse to appellant); *Union Bank, N.A. v. Vanderhoek Associates, LLC.*, ___ Wn. App. ___, ___ P.3d ___, No. 46565-5-II (Wash. Ct. App. December 15, 2015)(errors of law may not be corrected by a CR 60 motion, errors of law must be raised on appeal, **finality must give way to the even more important value that justice be done between the parties**, CR 60 “is the mechanism to guide balancing between finality and fairness”, a party cannot reasonably rely on a judgment when a trial court stated that it was prepared to reverse its decision [as here]); RP May 6, 2013(summary judgment Presentment hearing) at 3: 4 to 4:8; at 5:1 -17; at 6: 5 – 18; at 7:9 to p. 9:6; at 16:24 to p. 19:3 (Judge Culpepper indicated a concern entering an easement summary judgment against the Guests “with prejudice” if it would make it more difficult for the Guests to “undo” the easement and other summary judgments against them based on new facts and evidence that the Guests had included in the Guest May 6, 2013 CR 56(f) Declaration, Motion for a Continuance and for entry of judgment in the Guests’ favor, indicating that the trial court was not going to continue entry of judgment, that the trial court wanted to just enter the judgments **and not get into all the varying interpretation of the facts**, clear notice that summary judgment should never have been entered against the Guests in the Langes’ favor as a threshold matter as the trial court admitted that there were “varying interpretation of the facts” precluding summary judgment against the Guests.

relief to a party in the absence of an appeal or cross appeal), RAP 3.1 (only an aggrieved party may seek or obtain review) and RAP 5.1(d) (a party already a respondent must cross-appeal to obtain any affirmative relief).

The Langes and the ‘Trust’ related parties and their agents² did not appeal or cross-appeal the admission of any dispositive evidence at trial, the dispositive “no Guest trespass” Guest final and enforceable summary judgment dismissal of the Langes’ trespass counterclaim against the Guests with prejudice, or the dispositive admission of the Guests’ true and authentic Lot 5 title and statutory warranty deed admitted as Court Trial Exhibit 28 by stipulation without objection or challenge as the law of this case and as a verity on appeal. The Langes and the ‘Trust’ parties also did not appeal the dispositive fact in the Guests’ favor admitted at trial that the Spinnaker Ridge Development (“SRD”) developer Nu Dawn Homes, Inc. did not own any SRD real property or SRD Lot 5 at any time.³

² Fidelity National Title Insurance Company, the Guests’ Lot 5 title company, insurer and fiduciary, was a Trust agent, as was Fidelity National Title escrow, also the Guests’ fiduciary.

³ See Court Trial Ex. 20 (SRD final Plat) and Guest Reply Appendix Ex. E (copy of November 1, 2004 Trust related parties and ‘Trust’ agent Fidelity National Title’s statutory warranty deed contract, drafted by the Fidelity binding the ‘Trust’ and related parties, submitted to the Guests for review, examination, approval, acceptance and signature/initial as a binding contract to convey the identified title and deed to the Guests in exchange for the Guests’ purchase price, the first and the only Guest statutory warranty title and deed contract, same as Court Trial Exhibit 28. See RP (July 10, 2014) at 101:25 to 103:23. See also *Durant v. HIMC Corp.*, 151 Wn.App. 818, 214 P.3d 189, 196 (2009)(if there is a second contract between the parties, the second contract prevails when

II. THE GUESTS PREVAILED AT TRIAL

Because the developer Nu Dawn Homes Inc. did not own or have title to the SRD real estate or Lot 5, Nu Dawn Homes Inc. did not have standing to prepare, sign or record any Declaration or CC&Rs attempting to regulate, restrict or condition the use of any SRD real property or Lot 5, or any standing, ability or capacity as a matter of law to ‘grant’ any easement of any kind to any person, entity or property on any SRD real property or on any part of Lot 5.⁴

The fact that Nu Dawn Homes, Inc. did not own the SRD real property or Lot 5 as evidenced by the recorded SRD Plat admitted as Court Trial Exhibit 20 and also admitted by the Langes at trial, is dispositive in the Guests’ favor. It is undisputed that the two fee simple

there are no inconsistencies with the first). There was only one Guest signed, examined, approved and accepted SRD Lot 5 statutory warranty deed and title contract, the Guest Lot 5 title and deed admitted as Court Trial Ex. 28, there was no ‘second’ Guest title or deed contract.

⁴ *Restatement of the Law (Third) Servitudes* §2.1 and §6.3 (developer must own the real property to create an association to manage and regulate the real property); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 808, 828 P.2d 549 (1992)(an entity or person who does not own or have title to real property has no standing to convey, grant, assign or take any action with regard to that real property and the grantee and/or assignee receives nothing from the alleged ‘grantor’ and also has no standing); and *Green v. Normandy Park*, 137 Wn.App. 665, 151 P.3d 1038, 1046, ¶37 (2007)(developer has to own the real property to create an association to manage and regulate the real property, or to record any covenants restricting, conditioning or regulating the use of said real property or to provide any successor with any standing or ability to do so), which did not occur here with regard to the Spinnaker Ridge Developer, the Spinnaker Ridge Association or any of the purported Spinnaker Ridge CC&Rs.

titled owners of the SRD real property were (1) “Nu Dawn Homes Limited Partnership” a separate and a distinct entity from “Nu Dawn Homes, Inc.”, and (2) “Seafirst Mortgage Corporation”.⁵ The “no Guest trespass” final enforceable judgment, and the admission of the Guests’ Lot 5 true and authentic statutory warranty deed and Lot 5 deed into evidence at the *Guest v. Lange* trial, voided every Lange and Trust CR 54(b) interlocutory order, ruling and judgment in this multi-party, multi-claim action.⁶

The ‘Trust’ related parties and their agents, collectively referred to below at times for convenience as the “Trust” or “Trust parties”, were and are also obligated to defend and indemnify the Guests under the Guest Lot 5 statutory warranty deed admitted at trial as Court Trial Exhibit 28 under RCW 64.04.030 without reservation as preserved by the Guests below.⁷

⁵ Court Trial Ex. 20, January 31, 1986 certified, recorded SRD final Plat Dedication, Plat page 1; RP (July 10, 2014) at 38: 24 to 40:8 (Karen Lange trial testimony and admission who the two certified, acknowledged and notarized SRD fee simple titled owners were).

⁶ CR 54(b); RCW 7.28.070; CP 3433-3509, 3433-3469 in particular; RCW 64.04.030; *See Newport Yacht v. Supreme Nw, Inc.*, ¶16, 168 Wash.App. 86, 285 P.3d 70, 76 (Wash. App. 2012)(five statutory warranty deed covenants), *also Green v. Normandy Park*, ¶¶52-54, 55, 137 Wn.App. 665, 151 P.3d 1038, 1049 (2007) (a party failed to appear for trial indicating abandonment, the party otherwise abandoned claims), *see also* ¶¶37, 41, 44, pp 1046-1047, the *Normandy Park* developer, in contrast to the SRD developer Nu Dawn Homes Inc., owned and had title to the Normandy Park real estate, therefore, the developer had standing and could record Restrictions and CC&Rs that ‘ran with the land’ because the developer owned the real estate.

⁷ CR 54(b); RCW 7.28.070; Guest Reply Appendix Ex. E; RCW 64.04.030; *Newport Yacht Basin Assoc. of Condo. Owners v. Supreme Northwest, Inc.*, ¶¶11-13, 17 (by analogy), 168 Wn. App. 56, 277 P.3d 18 (2012), linked appeal to *Newport Yacht v. Supreme Nw, Inc.*, 168 Wash. App. 86, 285 P.3d 70 (Wash. App. 2012)(deeds are construed to give effect to the intentions of the parties, interpretation of a deed is a mixed question of fact and law, the intent of the parties will be discerned from the language of the deed, every word must be given meaning, extrinsic evidence will not be considered

Under the plain, clear and unambiguous words of the Section D Lange insurance contract and policy that the Langes adopted and ratified below and at trial as their own, which Lange appellate counsel admitted by Lange Brief citations to and reliance on numerous Washington insurance stare decisis insurance coverage opinions was an open-ended insurance contract and policy with no exclusions, limits, limitations or reservations⁸, the Langes were and are obligated to defend, fully indemnify, hold the Guests harmless, and pay and compensate the Guests for any Guest loss, damages and/or harm including, but not limited to, any and all fees, costs and expenses arising out of and/or related to the use or utilization (by any person or entity) of the 1987 Recorded Document and/or its ‘easement’ provisions, or the construction and/or use of any Lot 4 Owner deck on any part of Lot 5. There is no “reasonable” Section D insurance contract term, limitation or reservation restricting any Guest Section D recovery.

where the plain language of the deed is unambiguous); *Newport Yacht*, 168 Wash. App. 86, ¶16; *Edmonson v. Popchoi*, 155 Wash. App. 376, 228 P.3d 780 (Wash. App. 2010), *Edmonson v. Popchoi*, 256 P.3d 1223 (Wash. 2011); *Foley v. Smith*, 12 Wn.App. 285, 539 P.2d 874 (1975).

⁸ See *Eurick v. Pemco Ins. Co.*, 108 Wn. 2d 338, 340, 738 P.2d 251 (1987) (when the contract is an insurance contract and policy, all ambiguities if any are resolved in favor of the policyholder, in addition any exclusionary clauses, if any, are to be strictly construed against the insurer [here the Langes and the Trust related parties/ Fidelity National Title]); *E-Z Loader Boat Trailers, Inc. v. Travelers Indem. Co.*, 106 Wn.2d 901, 726 P.2d 439 (1986); *Pacific Indem. Co. v. Bloedel Timberlands Dev., Inc.*, 28 Wn.App. 466, 624 P.2d 734 (1981). See also, *Jones v. Storm Constr. Co.*, 84 Wash. 2d 518, 527 P.2d 115 (1974).

Under the dispositive Section D insurance contract, the Langes have the continuing duty and obligation to release the Guests from **any and all** claims, suits, proceedings and/or judgments of any kind related to and/or arising out of any Lot 4 Owner deck on any part of Lot 5 without exclusion, and pay and satisfy any judgments. Under the Section D insurance contract, the Langes as the Guests' Section D insurers, indemnitors, defenders, fiduciaries and releasers must also release the Guests from any and all of any Lange or any Lot 4 Owner claims or injuries of any kind or nature.

The Langes' obligation to release the Guests from any Lange injury includes the duty under the plain, clear and unambiguous words of the contract to release the Guests from the September 2014 Lange 'Final Judgment' and any and all Lange adverse rulings, orders and/or decisions against the Guests in any proceeding or matter.⁹ In March 2015, the Guests filed two RAP 8.1 Notices of stay and deposited cash supersedeas with the Pierce County Superior Court Clerk staying and superseding any and all Lange and 'Trust' Guest adverse rulings, decisions, orders and/or judgment pending appeal as a matter of right.

⁹ See Guest opening Brief at 29; Respondents' Brief at 30; Court Trial Ex. 15.

Black's Law Dictionary 848 , 886 (10th ed. 2014) defines "hold harmless", "indemnify, and "indemnification", respectively, to mean in pertinent part:

"To absolve (another party) from **any** responsibility for damage or other liability arising from the transaction; INDEMNIFY. – Also termed *save harmless*." (emphasis in bold added)

"To reimburse (another) for a loss suffered because of a third party's or one's own act or default; HOLD HARMLESS...
To promise to reimburse (another) for such a loss...
To give (another) security against such a loss";

and

"indemnification": "The action of compensating for loss or damage sustained".

The indemnity authorities that the Langes cited to and relied on in their Brief are distinguishable and inapposite. For example, the *ProtecoTech* Washington federal opinion by necessity applied Florida indemnity law which is not relevant or applicable here. The 2012 *City of Tacoma* opinion cited by the Langes is also distinguishable, as evidenced by *City of Tacoma* footnote 4. Significantly, after the *City of Tacoma* opinion was issued the Washington Supreme Court denied review of the *Newport Yacht* 2012 Court of Appeals opinion permitting and requiring full indemnity even for an indemnitee's own negligence and/or omissions when the words, provisions and/or terms of an individual indemnity, defense and/or hold harmless contract so dictated and/or required, as here.

The Section D insurance, defense and indemnity contract does not require as a prerequisite or a pre-condition that the Guests must prevail before the Langes' duty and obligation to defend, indemnify and hold the Guests harmless, release the Guests and pay any judgment is triggered.

When the 'Trust' failed to appeal or cross-appeal the admission of the Guests' true and authentic Lot 5 title and statutory warranty deed at trial, stipulated to as true and authentic by the Langes not only prior to trial but also again at trial as well as by the trial court, the 'Trust' related parties were automatically bound by that Lot 5 title and statutory warranty indemnity and defense deed as the law of this case and a verity on appeal. The 'Trust' parties must honor that Lot 5 title and statutory warranty deed without exclusion, exemption, challenge, dispute or defense. The Lot 5 admitted Court Trial Ex. 28 title and deed superseded and automatically voided any prior CR 56(b) interlocutory title or deed rulings, orders and/or judgments in the 'Trust's' favor as a matter of law. Under Court Trial Exhibit 28, the 'Trust' related parties are the Guests' Lot 5 title and statutory warranty deed insurers, defenders, guarantors, fiduciaries, and indemnitors with no standing to defend or to seek and/or obtain any relief,

remedy or recover from the Guests or from any court including this Court on appeal.¹⁰ The ‘Trust’ and then Lange are not aggrieved parties.

The open-ended Section D Lange insurance contract, and the Trust parties’ open-ended Lot 5 statutory warranty deed guaranty and insurance contract, have no policy limits, exclusions, exemptions, limitations, expiration, or any ‘reasonable’ term or reservation. The Langes and the Trust did not reserve any alleged right to challenge, dispute, deny, defend or litigate the scope, extent or the nature of the Section D or the Lot 5 statutory warranty deed and title insurance and guaranty coverages, or the Langes’ and/or Trust’s defense, indemnity, hold harmless and payment duties and obligations.¹¹ As the Guests’ indemnitors, insurers and fiduciaries, the Langes and the Trust and those who act by, through and/or on their behalf, must act for the benefit of the Guests on all matters within the scope of their relationship with the Guests, in accordance with an insurer’s and an indemnitor’s fiduciary good faith duties as further defined

¹⁰ *Proctor v. Huntington*, 169 Wash. 2d 491, 238 P.3d 1117 (2010), *cert. denied*, ___ U.S. ___, 131 S.Ct. 1700, 179 L.Ed.2d 619 (2011), and *Proctor v. Huntington*, 146 Wn. App. 836, 192 P.3d 958, 962, 967 (Wash App. Div. II 2008)(distinguishing between a license and easement, easements must comply with statute of frauds, licenses are permissive, can be oral and by right are revocable at any time); *Edmonson*, 228 P.3d 780, *Edmonson*, 256 P.3d 1223; *Foley v. Smith*; RCW 64.04.030 and *Cedell v. Farmers Ins. Co.*, 176 Wash.2d 686, 295 P.3d 239, 243 (Wash. 2013) (in the context of claim, insurer owes a heightened duty to the insured, a fiduciary duty which by its nature is not, and should not, be adversarial); RAP 2.4(a), RAP 3.1 and RAP 5.1(d).

¹¹ *Eurich* at 340.

by Black's Law Dictionary, *Cedell* and *Expedia*.¹² Specifically, they must exercise a high standard of care to protect and preserve the Guests' property, the Guests' rights and the Guests' money. The Langes and the Trust, and their agents, cannot be adverse to the Guests.¹³

The majority of the Lange restated Statement of Facts were inaccurate or misleading. It was and it is true, however, that the City Planning engineer did notify the Langes before the Langes constructed a non-compliant and unpermitted Lange deck on part of Lot 5 in April 2011 without the Guests' permission or authority (while the Guests were out-of-state) that the Lange deck that had been on Lot 5 was "**in the wrong place**" and also that the 1987 Recorded Document purported 'easement' was also "**in the wrong place**" (no Lot 4 or any Lot 4 Owner structure could be on any part of Lot 5 under the SRD final Plat and SRD "original plan" and "original design"). Most of the inaccurate restated Lange facts have already been corrected by the Guests' citation to the Clerk Papers. The Langes' citation to and reliance on Washington insurance, indemnity, lack of standing, real property, Association, developer and CC&R opinions highlighted the Langes' and the Trust's lack of standing in this

¹² *Cedell* at ¶¶8,18; *see also Expedia, Inc. v. Steadfast Ins. Co.*, ¶17,180 Wash.2d 793, 329 P.3d 59, 64 (Wash. 2014)(it is a cornerstone of insurance law that an insurer may never put its interests ahead of its insured's.); Black's Law Dictionary 743, 744 (10th ed. 2014) definitions of "fiduciary" and "fiduciary relationship".

¹³ *Id.*

case below and on appeal and otherwise. Lange citations to and reliance on fee award and damages opinions, and more than one defamation opinion, also support the viability of the Guests' Second Amended Complaint, the Guests' ability to recover for personal injury, property and other damages below on remand, and the Guests' ability to recover fees, costs and expenses both on appeal and below.¹⁴

The Langes and the Trust did not appeal because they could not appeal. They had and have no standing. They are the Guests' indemnitors, insurers, fiduciaries, defenders, payors and releasers. They had no standing to litigate against the Guests as a threshold matter. As a matter of law, they are not and cannot be aggrieved parties who could seek any review in the appellate courts. RAP 3.1.¹⁵ The Lange and the Trust's lack of standing is dispositive as a threshold matter not only below

¹⁴ For example, see *American Legion Post v. City of Walla Walla*, 116 Wn.2d 1, 8, 802 P.2d 784 (1991) (an action must interfere with a legal right or privilege, before a party has standing to challenge the action); *City of Sequim v. Malkasian*, ¶40, 157 Wn. 2d 251, 138 P.3d 943, 954 (2006) (standing requires that the parties are adversarial and have sufficient opposing interests in the matter, under Section D and the Guest Lot 5 Ex. 28 title and deed, the Langes and the Trust related parties and their agent Fidelity National Title cannot be adverse to the Guests, they must act in the Guests' best interests and defend, indemnify and hold the Guests harmless); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn. 2d 801, 808, 828 P.2d 549 (1992)(the private parties lacked standing, they did not own or have any interest in the real property at issue, the assignment, transfer and/or conveyance of property to them by a person/entity who did not own or have title to said real property was of no import or any legal effect, therefore, the purported successor assignees had no standing as a matter of law).

¹⁵ Black's Law Dictionary 1297 (10th ed. 2014) defines an "aggrieved party" (17c) as a "party entitled to a remedy", especially "a party whose personal, pecuniary, or property rights have been adversely affected by another person's actions or by a court's decree or judgment".

but also on appeal in the Guests' favor. Any judgment or order in the Langes' or the 'Trust's' favor was a void judgment or order of no legal effect. A void order or judgment is void from inception as if it never existed.¹⁶ There is no time deadline to vacate a void order or judgment.

If the 2013 "no Guest trespass" final judgment and the Lot 5 title and deed admitted as Court Trial Exhibit 28 as the law of this case and verities on appeal had not negated and automatically voided the Lange and Trust interlocutory orders and judgments, the Trust and Lange orders and judgments would still be interlocutory under CR 54(b), and therefore not final under Washington law in any event. None of the Trust Declaratory Judgment orders or judgments included the required and mandatory Uniform Declaratory Judgment Act findings of facts declaring the rights of the parties in any event and would have to be remanded to the trial court for entry of the required findings before they could be valid or effective (if not already void and voided). *See City of Tacoma* at 1023.

No Lange (or Trust) real property 'order' or 'judgment' complied with the mandatory real property judgment requirements, and the 'Trust' monetary judgment (already void) did not comply with the mandatory and necessary attorney fees findings of fact or conclusions of law required to

¹⁶ *Allstate v. Khani*, 75 Wn.App. 317, 325, 877 P.2d 724 (1994)(a void judgment has no effect, the "parties rights are left as though the judgment had never been entered").

establish a record for an award of fees and costs (the Guests deny that any fees were warranted) as evidenced by the Langes' citation to numerous fee award opinions in their Response Brief, including *Barrett* at 1191-92, and *Day* at 1204. Any money 'judgment' or order in the 'Trust's' favor if any such judgment still exists which the Guests deny is still interlocutory, is not final, and must be vacated and/or remanded to the trial court for the making and entry of the required fee findings of fact and conclusions of law if not already void. *See also Mahler v. Szucs*, 135 Wn.2d 398, 435, 957 P.2d 632 (1998) By definition, any interlocutory judgment or order in any multi-party, multi-claim CR 54(b) action renders all orders, rulings and judgments interlocutory and not final, subject to revision at any time with the exception of the already final and enforceable "no Guest trespass", Lot 5 title and deed, no Nu Dawn Homes Inc. standing judgments, law of this case and verities on appeal.

The Guests filed a written demand for a twelve person jury in the Trust Declaratory Judgment action which was disregarded, particularly with regard to the trial court's summary denial of the Guests' Trust motion for partial summary judgment regarding the Lot 5 statutory warranty deed covenant to defend the Guests and the Guests' Lot 5 title and property without a hearing or any oral argument. Either the orders and judgments are void and invalid, will be void, or they are still interlocutory and are not

yet final requiring remand for findings in this multi-party, multi-claim CR 54(b) case. If the Trust orders and judgments are interlocutory and not final or void *ab initio*, or already voided, neither are any Lange judgments or orders. As above, under CR 54(b) if there is even one interlocutory order or judgment or any claim or defense that has not been finally adjudicated in a multi-party, multi-claim action by necessity (with the exceptions identified above) all orders and judgments are interlocutory and not final.¹⁷

As the Guests' defenders, fiduciaries, insurers, guarantors and indemnitors, the Langes and the Trust had and still have a duty to ensure that the Lange deck on Lot 5 was and is immediately and permanently removed, and that the Langes are permanently ejected, from Lot 5 once the Guests objected, withdrew their permission and/or revoked the Langes' license.¹⁸ To the extent the Guests had or have any liability to

¹⁷ See *City of Tacoma v. City of Bonney Lake*, 174 Wn.2d 584, 269 P.3d 1017, 1023 (2012) (when a trial court makes dispositive findings of fact in a Uniform Declaratory Judgment action dismissal order on the issues presented, the trial court must declare the rights of the parties and enter findings of fact in the order or judgment before dismissal) see also *Day v. Santorsola*, 118 Wn. App. 746, 76 P.3d 1190, 1204 (2003), cited at Respondents' Brief 27, regarding trial court required findings of fact to support any fee and cost award. In this instance, under the Guest Trial Ex. 28 Lot 5 title and deed the Guests could not and do not owe any fees to any Trust related parties or entities or agents, the Trust related parties individually and their agents owe the Guests fees, costs, expenses, indemnity and a defense.

¹⁸ Lange Section D contract; Guest Reply Appendix Ex. E; Black's Law Dictionary definitions of "hold harmless", "indemnity", "indemnification", "indemnify", "fiduciary" and "fiduciary relationship"; Guest recorded the authentic Guest SRD Lot 5 title and deed with the Pierce County Auditor in February 2014 prior to trial (CP 3433-3469); *Day v.*

the Trust, which would be inconsistent with and in direct violation of the Trust contract and duties to the Guests, the Langes would have the Section D duty and obligation not only to defend the Guests against any such claims or liabilities, but also the duty to pay any such obligation and/or order or judgment at the Langes' sole cost and expense under the plain, clear and unambiguous Section D words, terms and language.¹⁹

The Guests prevailed as defendants below. The 2013 “no Guest trespass” final judgment dismissing the Langes’ trespass counterclaim with prejudice controls. In contrast to any Lange and Trust orders or judgments, that judgment is not only final it is enforceable. It was and it is the law of this case and a verity on appeal. The trial court disregarded that final judgment was which, in reality, the law of the case when it entered a ‘Final Judgment’ in the Langes’ favor, and an improper ‘quiet title’ judgment ignoring the Guests’ right to be heard, the Guests’ “no Guest

Santorsola, 118 Wn.Ap. 746, 76 P.3d 1190 (Wash. App. 2003); *State v. Hickman*, 135 Wn.2d 97, 99-102, 954 P. 2d 900, 901-902(1998) and ft. 2 (a party who adopts and ratifies a duty or element of a claim at trial whether or not that element does in fact exist, adopts and ratifies the burdens that go along with that element which then becomes the law of the case and a verity on appeal for that party [here the Langes] which the opposing party can use to bind that party, but any elements not adopted by the opposing party do not bind that party).

¹⁹ *Eurich* at 340 (any ambiguity in an insurance contract or policy, if any, are resolved in favor of the policyholder, any exclusionary clauses are to be strictly construed against the insurer); *Pacific Indem. Co. v. Bloedel Timberlands Development, Inc.*, 28 Wn.App. 466, 467-468, 624 P.2d 734, 735-736 (Wash. App. 1981) (contracts of insurance are construed in favor of the insured and most strongly against the insurer, a plain agreement cannot be made ambiguous and a court may not modify clear and unambiguous language in an insurance policy or revise the contract under the theory of construing it either by adding any words or deleting any words; the interpretation of a term, words or language in an insurance contract is a question of law).

trespass” final judgment and at a minimum the Guests’ ‘quiet title’ counterclaim answer and affirmative defenses. Even if the Lange and Trust orders and judgments are not void, they are stayed and superseded and cannot be enforced because the Guests filed RAP 8.1 Notices of Stay with cash supersedeas bonds in this case.²⁰ When the trial court dismissed the Lange trespass counterclaim in 2013 with prejudice, the court did so because the Guests as the owners of the underlying property beneath the Lange deck on Lot 5 had the legal right to access the Lange deck (or any other structure) on Lot 5, to stand on, remain on and use the Lange deck because the Lange deck was on the Guests’ property.²¹

The trial court denied the Langes’ oral and written motions to reconsider that Judgment notifying the court that the “no Guest trespass” judgment could and/or would be irreconcilably inconsistent with any jury verdict or any final judgment in the case that the Langes and/or that the Langes’ deck were not trespassing on the Guests’ Lot 5 property, or any judgment that the Langes had a right to exclusively use the Lange deck, or any quiet title judgment in the Langes’ favor. Although the Langes stipulated before trial that the Langes would not appeal the “no Guest trespass” judgment after the court denied its motions for reconsideration in

²⁰ See related *Guest v. Lange et al* Division II Lis Pendens appeal, No. 47482-4-II.

²¹ RP (April 19, 2014) at 39, line 9 to page 40, line 6.

any event making that judgment the law of this case and a verity on appeal not only before trial, but also after trial the Langes and the 'Trust' waiving and forfeiting any right to do obtain any affirmative relief, remedy or recovery from this Court or from the Guests. That judgment was not, and cannot be, undone by the trial or by any inconsistent and irreconcilable Lange 'Final Judgment' if any Lange 'Final Judgment' existed, which the Guests deny. As the Langes predicted, the "no Guest trespass" judgment is irreconcilably inconsistent with the Lange 'Final Judgment' and the "no Guest trespass" judgment controls.

The Guests also prevailed on their CC&R claims at trial. At trial, the Langes admitted that the CC&Rs "certainly" bound them, notwithstanding their earlier summary judgment denials that they had any CC&R contract with the Guests, and notwithstanding the interlocutory summary judgment dismissal that they requested of the Guests' CC&R claims on that issue. The Guests challenged the CC&Rs at trial, refused to concede that the CC&Rs were valid or that the CC&Rs applied to the Guests or to the Guests' Lot 5 property under the Guests' stipulated Lot 5 title and deed admitted as Court Trial Exhibit 28 and otherwise.²² The Guests contend that the Langes' admission that the CC&Rs "certainly"

²² RP (July 15, 2014) at 39: 9-25.

bound them automatically “undid” and vacated the interlocutory summary judgment order dismissing the Guests’ CC&R claims and causes of action.

The Langes’ adoption of the CC&Rs at trial provide the Guests with the right to recover any and all available legal and equitable remedies under the CC&Rs including damages, loss, injury to property, fees, costs and expenses and CC&R injunctions including removal to the Lange deck from Lot 5 not only against the Langes but also against the Association and the Board and members as well as statutory RCW 64.38.050 legal and equitable remedies and relief, along with attorneys fees and costs on appeal and below whether the CC&Rs are valid or not, or apply to or bind the Guests or the Guests’ Lot 5 property or not.²³ Under the CC&Rs, the Guests have the right to sue and to recover not only from the Langes but also from the Association and the Board for breach of the CC&Rs. The Guests have the right to recover the Guests’ damages, fees, costs and expenses not only from the Langes but also from the Association and the Board who are named parties in the Guest proposed Second Amended Complaint, including the right to use Association money and funds to

²³ The Guests also own SR Lot 23. See *State v. Hickman*, at 102.

enforce the CC&Rs not only against the Langes, but also against the Association and the Association Board.²⁴

If the August 1986 and the purported 2007 CC&Rs were valid (which the Guests deny), those CC&Rs expressly provided that in no event “shall” a Lot Owner’s rights be altered in **any** manner by any CC&R “Encroachment Easement” if one existed. Clearly, the Langes breached that CC&R. Further, as a threshold matter, before any August 1986 CC&R “Encroachment Easement” provision or ‘grant’ could exist as a matter of law, the developer Nu Dawn Homes, Inc. who prepared, signed and recorded the CC&Rs would have to have had standing first not only to restrict and/or condition the use of any SRD real property and SR Lots, but also to ‘grant’ any “Encroachment Easement” to one Lot Owner onto another Lot. Nu Dawn Homes, Inc. did not own any SRD real property or any Lots as evidenced by the recorded Plat, Trial Exhibit 20. Therefore, in contrast to the developer in *Normandy Park* who did own the underlying

²⁴ See RP (July 8, 2014) at 30, line 8 to page 31, line 22; see also trial court’s acknowledgment at RP (July 8, 201) at 28, lines 10 : “If there is no easement, there is a trespass”; and Court Trial Exhibits Articles of Incorporation and three sets of SRCA CC&Rs, Trial Ex. 14, 19, 21, 23 and 27, which state that the Guests as SRD Lot Owners can recover damages, losses, fees, costs and expenses from the Langes, the Association, the Board and its members. Also, the Guests are entitled to indemnity from the Association and the use of Association funds to enforce any CC&Rs against another Lot Owner, the Association, the Architectural Control Committee and/or the Board and any Board members. See Guest Proposed Second Amended Complaint, Court Trial Ex. 14, Art. 12, §12.1 (any Lot Owner can enforce any CC&R against any other Lot Owner or the Association or Board, and use Association funds to do so), Ex.21 Art. XII, 12.1 (any Lot Owner can enforce any of the CC&Rs against another Lot Owner or the Association and/or Board to **recover any remedies available at law**), Ex. 19 and Ex. 27.

real estate and, therefore, had standing to create, sign and record CC&Rs regulations, developer Nu Dawn Homes, Inc. here did not have any standing to sign or to record any CC&Rs.

Without title to or any ownership of any SRD real property or any SRD Lot (including Lot 5), developer Nu Dawn Homes Inc. had no standing to restrict, condition or regulate any SRD real property or Lots, or “grant” any Lot Owner or any SRD Lot any “Encroachment Easement” on any other Lot. The Spinnaker Ridge Association corporation did not own any of the SR Lots. Therefore, the Association did not have standing to sign or record any CC&Rs “granting” any “Encroachment Easements” to one Lot Owner onto or on another Lot either. By their terms, all the Association CC&Rs were subject to the January 31, 1986 recorded SRD Plat. As the Langes admitted at trial, Nu Dawn Homes Limited Partnership and Seafirst Mortgage Corporation were the two fee simple titled owners of the SRD real property, **and** there were no SRD Lot easements on any other Lot including, but not limited to, no Lot 4 (or Lot 4 Owner) ‘deck easement’ on Lot 5.²⁵ Not only does the absence of title or ownership prevent a person or an entity from having the necessary standing to convey any interest in real property to another as a matter of law, or the ability, capacity or power to “grant” an easement to another

²⁵ Court Trial Ex. 20, see page 3 in particular; RP (July 10, 2014) at 41:5 to 42:21.

through CC&Rs or otherwise, the purported grantee who obtained any such 'easement' received and obtained nothing. Even if valid, which the Guests deny, if the CC&Rs purportedly 'granted' an amorphous undefined "Encroachment Easement" identified only as an 'easement' for "minor" encroachments without a defined legal description exactly what that "minor encroachment" was or would be by any identified metes and/or bounds or any legal description applicable to each servient estate, any such "minor" 'encroachment easement' would fail as a matter of law in any event to create any valid or any enforceable "easement" as a matter of law for lack of specificity, identity and definitiveness.²⁶ Any reference to the SRD final Plat in this instance would not have assisted the Langes, the Developer or the Association even if any of them had standing as the SRD recorded final Plat (and Gig Harbor Subdivision Ordinance 91) did not permit or allow any SRD Lot or Lot Owner easement of any kind on any other SRD Lot.

²⁶ *Cowiche* at 808; *Green v. Normandy Park* (the developer had standing to sign and record CC&Rs regulating, restricting and conditioning the use of the development land because he owned the estate, and therefore could assign, transfer and convey the land to a successor who then would also have standing); *Berg v Ting*, 125 Wn.2d 544, 551, 562, 886 P.2d 564 (1995) (citing to RCW 64.04.010 and 64.04.020, every conveyance of any interest in land "shall be by deed", and every deed "shall be in writing and signed by the party bound thereby and acknowledged", an easement "is an interest in land", and any grant of an easement must comply with the statute of frauds, a metes and grounds description of the purported easement and/or description incorporating a plat could satisfy the statute of frauds regarding the description of the location, nature and/or scope of an alleged easement).

The Guests also prevailed at trial under their breach of good faith and fair dealing claims and their CC&Rs claims when the Langes admitted that they breached their CC&R and their Section D duties and obligations to the Guests when Karen Lange admitted at trial not only that the Langes failed to comply with the Guests' April 8, 2011 hand-delivered "cease and desist" notice to stop all construction on Lot 5, but that the Langes *accelerated* construction on Lot 5. Karen Lange admitted at trial that the Langes decided that if they did not continue construction on Lot 5 over the Guests' objections that the Langes would be looking at a "hole" in their deck, or alternatively the ground, from April 2011 until trial in 2014 (and through today). Clearly, the Langes put their personal interests over and above the Guests' interests, the Guests' property, personal, privacy and contract rights. The Langes took the calculated risk that they would and that they could get away with building a Lange deck on part of Lot 5 without the Guests' permission or authority while the Guests were out-of-state in deliberate and willful defiance and disregard of the Guests' objections, the Guests' Lot 5 and other rights, and the "cease and desist" notice and demand served on the Langes before the Guests could return to Gig Harbor.²⁷

²⁷ RP (July 10, 2014) at 29, lines 1 to 32, lines 21.

That Lange decision was consistent with the Langes' knowledge in April 2011 and before that the Langes had **no right** to build any deck on any part of Lot 5. As above, they admitted that the City Engineer notified them prior to March 2011 (purportedly in either 2006, 2007 and/or early Winter or Spring 2011, if not at all times and in all years) that the 1987 Recorded Document 'deck easement' area, and any Lot 4 Owner deck on any part of Lot 5 was or would be **"in the wrong place"** according to the SRD recorded final Plat. The Langes notified the Guests, and the trial court, that the City had notified the Langes that the Lange deck on Lot 5 was in the wrong location on Lot 5, not that the City had notified the Langes **that the Langes could not have any Lange deck on Lot 5 at all**. The Lange Brief disclosures and admissions in this "extremely complex" matter on appeal do not 'undo' the damages, losses and harm that the Guests have already incurred related to this matter, including significant attorneys fees, costs and expenses on appeal and otherwise.

The Guests are entitled to recover for their personal, contract, tort, statutory, constitutional and property damages and injuries, for any Guest loss and harm, and for any fees, costs and expenses in this action against not only the Langes but also from the Trust related parties and their agents on a joint and several basis. Because this is an insurance matter, the

Guests are also entitled to recover insurance bad faith, misrepresentation, fraud, breach of fiduciary duties, and breach of the Langes' and the Trust parties and their agents' duty of good faith and fair dealing to the Guests as well the Langes' CC&R breaches, violations and damages, any available statutory treble damages, trespass damages (including continuing trespass damages which need to be asserted on remand), Consumer Protection Act (CPA) damages, fees, costs and expenses, potential sanctions on remand, as well as fees, costs and expenses on appeal.²⁸

III. THE TRIAL COURT ERRED AND MISAPPLIED THE LAW OF THE CASE DOCTRINE

The trial court misapplied the principle and the doctrine of the “law of the case” below at trial, and otherwise. The court ignored and disregarded that CR 54(b) mandates that any order, ruling, decision and/or judgment in any multi-party and multi-claim action is interlocutory and may be changed, altered and revised at any time prior to entry of a final judgment adjudication all the rights and liabilities of all the parties. On the first day of trial, before the jury was impaneled, the trial court acknowledged that this was true, but erroneously stated and ruled that it

²⁸ See *Cowiche* at 822 (a prevailing defendant as well as a prevailing plaintiff can be awarded fees as a “prevailing party”); See *Mayer v. Sto Industries* cited by the Langes in their Response Brief for a general discussion of the availability of CPA fees, damages, costs and expenses to the Guests, including RCW 19.86 Consumer Protection Act (“CPA”) and other damages and/or penalties including, but not limited to, treble damages.

“would not” revise the 1987 Recorded Document ‘easement’ judgment (even if the judgment and order was not supported by law or facts). When the Guests tried to notify the court of new information, facts and law that the Guests had discovered that proved that the 1987 Recorded Document ‘easement’ did not exist, the court blocked, barred and prevented the Guests from doing so.²⁹

It was apparent that any attempt by the Guests to revise the 1987 Recorded Document ‘easement’ judgment, or the Court Jury Instruction No 17 was going to be futile. The trial itself would have been futile but for the evidence, admissions, law of the case and the verities on appeal that either existed before trial and/or arose out of the trial that the Guests were able to introduce into evidence and of record and/or obtain and/or achieve.³⁰ Absent stipulation, there is no “law of the case” in a multi-party, multi-claim CR 54(b) case until all of the rights and all of the liabilities of all of the parties are finally adjudicated.³¹

With the opportunity to appear and participate in the 2014 *Guest v. Lange* trial, the Trust parties and their agents made the choice and the decision not to participate in the trial. By failing to participate, the Trust

²⁹ RP (July 8, 2014) at 30, line 6 to page 31, line 22.

³⁰ *Orion Corp. v. State*, 103 Wn. App. 441, 457-58, 693 P.2d 1369 (1985) (a party is not required to exhaust its remedies before appeal if it is apparent and clear that doing so would be futile under factual circumstances [as here regarding the Guests at trial]).

³¹ *State v. Hickman* at 99-102, and 901-902, and ft 2; 18B Fed. Prac. & Pro. Juris. §4478; *Roberson v. Perez*, 156 Wn.2d 33, 123 P.3d 844.

parties and their agents assumed the risk that substantive, evidentiary and legal matters might change, evolve and reverse course at trial and even post trial, and that trial admissions would bind the Trust without any Trust participation as here. By failing to appear and participate at trial, the Trust parties abandoned and waived any rights the Trust might otherwise have had in this matter and/or appeal, if any existed which the Guests deny.³²

This case was a “can of worms”, as Lange trial counsel admitted at trial.³³ The Langes and the Trust related parties and their agents wrongfully failed and refused to defend not only the Guests but also the Guests’ Lot 5 title. It is the expressed Legislative intent that insurance is a matter of public interest and concern, a matter of public policy, subjecting insurance parties, breachers and violators to Washington Consumer Protection Act (“CPA”), RCW 19.86, damages and penalties, including treble damages, along with fee, cost and expense awards to insureds as evidenced by the authorities the Langes cited to and relied upon in their Response Brief. In *Cedell*, the Washington Supreme Court recently confirmed and held that if an insurer engages in a bad faith attempt to

³² *Green v. Normandy Park*, ¶¶51-55.

³³ Lange trial counsel referred to the underlying case as a “can of worms” during the jury deliberation question conference with the trial court on July 16, 2014. RP (July 16, 2014) at 38, lines 19-20.

defeat an insured's meritorious claim, as here, that attempt is "tantamount to civil fraud".³⁴

When the trial court entered the Lange 'Final Judgment' in September 2014 and 'quieted title' in the Langes relying in part on the CC&R "Encroachment Easements" as the law of this case, the court ignored that the "no Guest trespass" judgment was the law of this case and the fact that the CC&Rs, even if valid which the Guests deny, expressly stated that any "Encroachment Easement" could not alter **any** of the Guests' Lot 5 property rights. Those Guest property rights, as recognized by the trial court in 2013 when it entered judgment in the Guests' favor as part of the "no Guest trespass" judgment that became the law of the case before trial and was not appealed, included Guest access, possession, use, control and enjoyment of the entirety of Lot 5.³⁵

Webster's New Third International Dictionary 63 (1981) defined "alter" to mean "to cause to become different in some particular characteristic...".³⁶ There is no "Encroachment Easement" or any alleged good faith "blanket" Lot 'deck easement' of any kind in the original

³⁴ *Cedell v. Farmers Ins. Co.*, ¶18, 176 Wash.2d 686, 700, 295 P.3d 239, 246 (Wash. 2013), citing to *Escalante v. Sentry Ins.*, 49 Wash.App. 375, 394, 743 P.2d 832 (1987).

³⁵ Trial Ex. 14, CP 423-424, 426-428, also Guest Reply Appendix Ex. J and K, RP (July 9, 2014) at 127, line 22 to page 128, line 8; RP (July 15, 2014) at 14, line 8 to p. 15, line 15.

³⁶ *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 813, 828 P.2d 549 (1992), Respondents' Brief at 17, 38.

January 1986 recorded CC&Rs, evidenced and reflected in the original certified SRD plan and design.³⁷ The SRD Developer Nu Dawn Homes, Inc. recorded the original CC&Rs on January 31, 1986 with the Pierce County Auditor *after* the Gig Harbor Town Clerk caused the certified final Plat survey to be filed with the Auditor in accordance with City Ordinance 91 earlier that same day as Document No. 8601310176. The Guests took title to Lot 5 according to the SRD Plat recorded on January 31, 1986 as Pierce County Auditor Document No. 8601310176. The Guests did not take title to Lot 5 subject to the Association or subject to any Association CC&Rs, including any CC&R “Encroachment Easement”, valid or not.³⁸

When the trial court granted the Lange “quiet title” counterclaim in September 2014 without providing the Guests with the opportunity to brief, and without a “quiet title” hearing, it did so in error. threshold matter. The trial court summarily granted “quiet title” to the Langes stating that it was quieting title to the Langes “for the property related to the debt” which made no sense. The Guests did not owe a “debt” to the Langes. The trial court did not define what the undefined and unknown “debt” was. The trial court stated that it based its “quiet title” judgment in

³⁷ Trial Ex. 21, Exh. 20 (SRD recorded final Plat); CP 4860-4883, also Guest Reply Appendix Exh. I (City Subdivision Ordinance 91); RP (July 15, 2014) at 10, line 7 to 11, line 16; RP (July 15, 2014) at 17, lines 2 - 14.

³⁸ Trial Exh. 28; RP (July 10, 2014) at 101 to page 103 line 23; RP (July 14, 2014) at 111, line 17 to page 115, line 14.

the Langes' favor on the "jury's verdict and the finding for the Langes in every respect". The jury, however, was not asked to "quiet title" in the Langes, and the jury did not find that the Langes had exclusive use of any Lange deck on Lot 5. The court failed to reach or even to consider the Guests' "quiet title" defenses, including the Guests' lack of standing defenses. The jury entered a verdict for the Langes as a result of the appealed and objected to Court Jury Instruction No. 17 which prevented the Guests from arguing their theory of the case that there was no Lange or any Lot 4 Owner 'deck easement' on any part of Lot 5. (See below).

When the court entered a "quiet title" judgment in the Langes' favor in September 2014, the court also ignored and disregarded the fact that the Guests' true and authentic Lot 5 title and deed admitted as Court Trial Exhibit 28 was already the law of this case and a verity on appeal negating any Lange 'deck easement' on any part of Lot 5, and further that the Langes had already admitted that the Section D defense and indemnity insurance contract and policy was a valid and an enforceable contract that bound the Langes to the Guests as the Guests' defenders, indemnitors and releasers, and also that the 'Trust' parties were also the Guests' indemnitors, insurers, defenders and releasers under Court Trial Exhibit 28

without reservation or exclusion.³⁹ The trial court notified the Guests that their only option was to appeal.⁴⁰ The trial court summarily denied the Guests the right to bring a motion on the “quiet title” counterclaim post verdict stating that the court did not “see any basis for a post trial motion on an issue that has been decided”, ignoring again that the Guests already had a final and an enforceable “no Guest trespass” judgment negating any “quiet title” judgment in the Langes’ favor.⁴¹

The word “exclusive” does not exist in the Recorded Document. The word “exclusive” could not be added to the Recorded Document by the court or by the Langes. The word “mutual” did exist in the Document with regard to the alleged, but null and void, ‘deck easement’. Black’s Law Dictionary defines “mutual” in pertinent part to mean “reciprocal”, of a right “belonging to two parties; common”.⁴² The court, the jury and the Langes had authority or power to delete the word “mutual” from the 1987 Recorded Document, or to ignore or delete the plain, clear and unambiguous CC&R “Encroachment Easement” words and the Encroachment Easement mandate that no purported ‘encroachment

³⁹ RP (September 19, 2014 at 8, lines 17-23.

⁴⁰ RP (September 19, 2014) at 9, line 3-6.

⁴¹ RP (September 19, 2014) at 11, line 18 to p. 12, line 1.

⁴² Black’s Law Dictionary 1178 (10th ed.), definition of “mutual”.

easement’ “**shall**” alter the rights of any SR Lot Owner, whether the CC&Rs and/or the ‘encroachment easement’ provision was valid or not.⁴³

The trial court granted the Langes’ “quiet title” counterclaim without any consideration of the Guests’ Counterclaim Answer, Affirmative Defenses and Prayer for Relief and that any easement judgment in the Langes’ favor was void *ab initio*.^{44, 45} Contrary to the Langes’ inaccurate Response Brief assertion, there is no Lot 5 Guest deck easement on any part of Lot 6 (a permissive license only). That fact was evidenced not only by the recorded SRD Plat, but also by the failure to include any Lot 6 easement on the Guests’ Lot 5 deed. *See* Court Trial Exhibit 28. The Langes admitted at trial that there was no Lot 5 easement of any kind on any part of Lot 6 on the SRD recorded final Plat, the original design and plan of the SRD property and development, when

⁴³ Trial Ex. 15; *Cowiche* at 808 (the private plaintiffs had no right, title or interest to the real property at issue and, therefore, any person or entity who took an assignment from them took and received nothing and had no standing with regard to the property or any right, title or interest therein), the Langes have no Lange Lot 4 Owner deck easement on any part of Lot 5, Nu Dawn Homes, Inc. did not own Lot 5 in 1987 and, therefore, could not grant any right or interest in Lot 5 to any person or entity as a matter of law; RP (July 15, 2014) at 34 lines 17-25.

⁴⁴ RP (September 19, 2014); CP 4816-4846, Guest Reply Appendix Ex. F.

⁴⁵ Trial Ex. 28; *see also* CP 4902, Guest Reply Appendix Ex. E.; RP (July 10, 2014) at 101, line 25 to 103, line 23; RP (July 14, 2014) at 111, line 17 to 115, line 14. The Guests’ Lot 5 title and deed also does not refer to, include or identify any Lot 5 deck or any other easement on any part of Lot 6. The Guests do not have a Lot 5 deck easement on Lot 6, only a license.

Karen Lange admitted and testified that there were on Lot easements on any of the SRD final Plat Lots on any other Lot.⁴⁶

The Langes finally admitted at trial that their Lot 4 title and deed did not identify, refer to or include any Lot 4 Owner deck or any other easement on any part of Lot 5, a prerequisite under Washington real property law before any Lot 4 Owner and/or Lot 4 express easement could exist as a matter of law on any part of Lot 5.⁴⁷, ⁴⁸ The Lange “quiet title” judgment violated the Guests’ property, personal, contract and constitutional rights.

IV. THE LANGES VOIDED THEIR OWN AND THE TRUST RELATED PARTY INTERLOCUTORY JUDGMENTS

As above, the Langes voided their own and the Trust related parties and their agents’ interlocutory orders, rulings and judgments either before trial in some instances and also at trial through their testimony and trial admissions. Some of those voided orders and

⁴⁶ RP (July 15, 2014) at 36, lines 10 - 17.

⁴⁷ Trial Ex. 5; RP (July 9, 2014) at 21, line 5 to 22, line 5, at 38, line 7 -24, at 112, line 12 to 113, line 24 (the 1987 Recorded Document was not listed as an easement on the Langes’ 1993 Lot 4 deed).

⁴⁸ RP (July 15, 2014) at 39, lines 19-25; CP 4816-4846, also Guest Reply Appendix Ex. F; CP 4860-4883, also Reply Appendix Ex. I, City Ordinance 91, Subdivision Ordinance, page 6, Sections 5.2.2.5, 5.2.3.4, page 9, Section 6.3.1.2, page 10, Section 6.4.8 (setback requirements with respect to all new Lot property lines), page 12, Sections 8.3.5, 8.3.10 and page 17, Section 10.0 (procedure for granting modification and exceptions of any of the Ordinance 91 regulations requires a public hearing (none was held for any SRD Lot decks or any Lot 4 or Lot 4 Owner deck on part of Lot 5)); CP 4902, also Reply Appendix Ex. E; and CP 423-424, 426-428, Lange summary judgment filings, August 1986 recorded CC&Rs, Article 16, Sec. 16.4 and the 2007 purported, but invalid, CC&Rs, Article 15, Sec. 15.4 (the rights..of Owners shall not be altered in any way by said [minor] encroachment...”).

judgments were outlined and identified above including the CC&R summary judgment dismissing the Guests CC&R claims.⁴⁹ The Langes also voided their quiet title judgment at summary judgment below even before trial. In April 2013, the Langes affirmatively explained to the trial court that the Langes were *not* attempting to obtain a fee interest in Lot 5. Instead, the Langes having made a mistake wanted the court to order that the Langes could keep their new deck on Lot 5 *for as long as it lasted*, and exclude the Guests from the deck and from that part of the Guests' Lot 5 property and land. The court did not do so, at least not in entirety given the existence of the partial summary judgment "no Guest trespass" judgment in the Guests' favor. The fact that the Langes asked the court in 2013 to enter an order permitting the Langes to have a deck on part of Lot 5 "as long as it lasted" is a Lange admission that the Langes knew in 2013 more than year before trial that they did not have any express Lange 'deck easement' or any 1987 Recorded Document right to have a Lange deck on Lot 5, or any right to be on Lot 5 at all.⁵⁰ If the Langes believed that they had an express 1987 Recorded Document 'deck easement' into perpetuity, the Langes would not have pleaded with the court to 'quiet title' in the Guests' Lot 5 property to have the deck that the Langes had constructed on Lot 5 in April 2011 last for "as long as their new deck lasted".

⁴⁹ Trial Exh. 28, also Guest Reply Appendix Ex. E; RP (July 14, 2014) at 111, line 17 to 115, line 14; RP(July 10, 2014) at 94, line 18 to 98, line 6; at 101, line 25 to p. 103, line 23.

⁵⁰ RP (April 19, 2013) at 34, lines 11-19.

City Subdivision Ordinance 91, in effect for thirty years from 1966 to 1996, the equivalent of a statute ⁵¹, prohibited the existence of *any* Lot 4 or any Lot 4 Owner patio or deck easement on any part of Lot 5 as a matter of law. ⁵² The Langes admitted that they knew that they did not have any easement on any part of Lot 5, and that they knew where the Lot 4 and Lot 5 boundary and Lot lines were when they purchased Lot 4 in 1993.⁵³ The Langes were not and are not innocent. The Langes did not innocently construct a deck on Lot 5.⁵⁴ Nu Dawn Homes, Inc. and the Association corporation had no standing to grant any easement to any Lot 4 Owner or to Lot 4 to construct or use any deck on any part of Lot 5. Any such ‘easement’ grant was null and void as a matter of law. ⁵⁵

Without any valid or legal interest in any part of Lot 5, the Langes had no standing as Lot 4 Owners in the trial court below or in this Court to defend against the Guests’ claims and causes of action, or to seek any remedy, relief or recovery from either court. *Cowiche* at 808. The Langes had and have “unclean hands”. They cannot recover in equity, or with regard to any ‘quiet title’ claim, notwithstanding all the other reasons and

⁵¹ *Sleasman v. City of Lacey*, 159 Wn.2d 639, 643, 151 P.3d 990 (2007)

⁵² Trial Ex. 20; RP (July 10, 2014) at 42, lines 11-21; Reply Appendix Ex. I, page 2, Sec. 3.0, page 9, Sec. 6.3.1.2, page 10, Sec. 6.4.8 page 12, Secs. 8.3.5, 8.3.10, page 17, Sec.10.0.

⁵³ RP (July 9, 2014) at 46, lines 3-19; at 112, line 12 to page 113, line 1; RP (April 19, 2013) at 57, line 10 to 60, line 14.

⁵⁴ RP (July 10, 2014) at 39, line 7 to 40, line 5 (identifies two fee simple owners of the SRD real property, not Nu Dawn Homes, Inc).

⁵⁵ *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 808,828 P.2d 549 (1992) (a party who does not own real property cannot assign any interest in that property to anyone, and has no standing with regard to that property, any attempt to transfer or convey any interest or rights in that property are of no import and of no effect).

grounds why they cannot defend and cannot seek or obtain any relief, remedy or recovery against the Guests or from the courts, including this Court. In 2013, the Guests notified the Langes in writing that the 1987 Recorded Document was a forgery.⁵⁶ Undeterred, the Langes boldly insisted not only through but also after trial that they still had an express Lot 4 deck easement on Lot 5, and a right to be on and to have a Lange deck on Lot 5 pursuant to that 1987 Recorded Document ‘easement’. The Langes knew they did not have any such right.

Before suit, the Langes asserted that they had an “adverse possession” right to have a Lange deck on Lot 5. An “adverse possession claim” is inconsistent with and contrary to an alleged ‘easement’ right. David Lange continued to assert that the Langes had an “adverse possession” right to part of the Guests’ Lot 5 property even during trial proceedings, however Lange counsel did not plead adverse possession and refused to pursue that claim. Until trial, David Lange took the position that the 1987 Recorded Document ‘easement’ had “nothing to do” with why the Lange deck was on Lot 5. At trial, the Langes abandoned any adverse possession claim, relying entirely and solely on the forged 1987 Recorded Document ‘easement’ document as the sole basis and foundation for any Lange “right” to have a 5’ x 30’ deck on Lot 5, all in direct violation of the Langes’ April 2013 ‘explanation’ to the trial court at summary judgment why the Langes wanted the court to enter a quiet title

⁵⁶ CP 870 -935, in particular 880-935, also Guest Reply Appendix Ex. D.

judgment in their favor.⁵⁷ On the third day of trial, the trial court ruled in open court that there was no Lange adverse possession claim at trial.⁵⁸ Any Lange or Lot 4 “adverse possession” claim against any part of Lot 5 is no longer available to the Langes.

Contrary to the Langes’ restated facts, the Langes did not receive or obtain a legal opinion before the Langes tore their deck down in March 2011 and constructed a deck on Lot 5 in April that they had any express easement right to do so. Instead, the Langes were told that they did not have an express easement to build a deck on Lot 5. An attorney told David Lange about the principles of adverse possession.⁵⁹

By January 2013, the Guests repeated their Section D Lange defense and indemnity demands, tendered their *Guest v. Lange* defense to the Langes again, and demanded that the Langes remove their deck and personal property from Lot 5 and also remove themselves.⁶⁰ The Langes had a duty and obligation under the Section D contract to immediately remove the Lange deck and themselves from Lot 5, but did not do so. Instead, the Langes forced and compelled the Guests to participate in additional years of expensive litigation to the Guests’ continuing damage, loss, harm, cost, fees and expense, a clear violation and breach of the

⁵⁷ *Green v. Normandy Park* (the court will not consider or review abandoned claims).

⁵⁸ RP (July 10, 2014) at 14, line 21-21.

⁵⁹ RP (May 6, 2013) at 9, line 22 to 10, line 16;

⁶⁰ CP 556-558, 603-609, 807-810, also Guest Reply Appendix Ex. C; *Jones v. Strom Constr. Co.*, 84 Wash.2d 518, 527 P.2d 1115 (1974).

Langes' and the Trust parties' indemnity, defense, insurer and fiduciary duties and obligations to the Guests.

At summary judgment, and also at trial, the Langes admitted that the Section D defense, release, hold harmless and indemnity language and words were clear, plain and unambiguous. The Langes stipulated at the summary judgment hearing in open court that there was no need or any requirement to look to or to consider the "intent" behind Section D, that the document spoke for itself.⁶¹ The Langes also told the jury at trial that the Section D words spoke for themselves.⁶² The Langes stipulated in 2013 and again in 2014 as the law of this case, and as a verity on appeal, that the Section D contract was not and is not ambiguous, that it did not need to be interpreted, that the contract spoke for itself, and that no words needed to be added or deleted. There are no "bodily injury" words in Section D restricting, limiting, reserving or excluding coverage, and none can be added to the contract. The interpretation or construction of an insurance contract is a question of law reviewed on a de novo basis.⁶³ These Lange open court and trial CR 2A admissions and stipulations are contracts that the Guests have the right to enforce, as the Guests do here.⁶⁴ The court must enforce the contract as written.⁶⁵

⁶¹ RP (April 19, 2013) at 51, lines 13-16.

⁶² RP (July 16, 2014) at 25, line 6 to 26, line 6, Lange Closing Argument.

⁶³ *Pacific Indem. Co.*, 28 Wn. App. 466, 468, 624 P.2d 734;

⁶⁴ *Smyth Worldwide Movers, Inc. v Whitney*, 6 Wn.App. 176, 491 P.2d 1356 (1971).

⁶⁵ *Oliver v. Flow Intern. Corp.*, 137 Wn. App. 655, 155 P.3d 140, 143 (Wash. App. 2006), citing to *Hearst*, 154 Wash,2d at 504, 115 P.3d 262.

It is the Court's duty to uphold and apply the law, and to enforce lawful agreements and contracts that the parties have brought before the Court. The Court cannot rewrite the Section D contract, add words to the contract or delete words.⁶⁶ The Guests have a federal and a Washington State constitutional right to have their Lange and Trust contracts enforced as written.⁶⁷ If "reasonableness" had been a justiciable question, which the Guests deny, a jury would have had to decide whether the Section D contract was reasonable, not the court.⁶⁸ The Guests also had an inviolate right to have a jury decide any matter properly before a jury, including the Trust Declaratory Judgment action. The Guests filed a jury demand for the Declaratory Judgment action, which the trial court did not adhere to, a right that the Guests can assert for the first time on appeal.⁶⁹

The Langes and the Trust parties have no standing under their Section D and the Guest Lot 5 title and deed contracts, and on other grounds including "unclean hands" and the fact the Langes had no legal interest in any part of Lot 5. Whether a party has standing is a threshold

⁶⁶ *Hearst Communications v. Seattle Times Co*, 154 Wn. 2d 493, 115 P.3d 262, 271 (2005) (generalized public policy concerns cannot be used to rewrite a clear and lawful contract, the courts "will not, under the guise of public policy, rewrite a clear contract"; strong public policy cannot be a basis to rewrite the contract, out duty is clear, "[t]hat duty is to uphold the law and to enforce lawful agreements parties bring before us").

⁶⁷ U.S.CONST. Art. I, § 10, WASH CONST, art. I, Declaration of Rights, § 23 (no law impairing the obligations of contracts shall ever be passed), preserved below.

⁶⁸ *Green v. Normandy Park*, at ¶65, 1052.

⁶⁹ *Wilson v. Horsley*, 137 Wn.2d 500, 974 P.2d 316 (1999).

jurisdiction question and issue reviewed de novo by this Court with no deference to the trial court's decision.⁷⁰

V. GUEST POST-TRIAL MOTIONS ARE STILL PENDING

On October 29, 2014, the trial court denied the Guests' CR 59(a) Motion for Reconsideration as an "untimely filing" after the Guests had filed their October 20, 2014 notice of appeal. The Guests' CR 59 Motion for Reconsideration filing also included separate motions including a motion for a Lange full indemnity order. There was also a separate motion to vacate the Lange Final Judgment and any and all related orders, rulings, and decisions adverse to the Guests, a motion to amend *and* a Motion for mandatory injunctions based in large part on Lange trial and other admissions.⁷¹ See Guest Appendix, Ex. A. Although not denominated CR 60 motions, in reality the motions were and/or could be considered CR 60 motions, including motions based on new evidence. CR 60 motions are not reconsideration motions, and are not subject to a ten day filing period.⁷² There is no deadline, or any time limit, to file a CR

⁷⁰ *Cowiche* at 808; *Fergen v. Sestero*, 174 Wash.App. 393, 298 P.3d 782, 785 (Wash. App. 2013)(Supreme Court opinions and holding are stare decisis for the Court of Appeals and trial courts); *Green v. Normandy Park*, 137 Wn.App. 665, 151 P.3d 1038, 1051(Wash. App. 2007) (once the Supreme Court has decided an issue of state law, that interpretation is binding until the Court overrules it, it is stare decisis for the lower courts).

⁷¹ CP 4912-4939; also Guest Reply Appendix Ex. A.

⁷²RAP 1.2(a) and (c).

60(b)(5) motion to vacate a void judgment. A void judgment may be vacated at any time, including on appeal.⁷³

Although the trial court did not want to wait to enter the summary judgment orders in May 2013, with knowledge of the existence of the May 2013 Guest CR 56(f) Declaration and that the Guests had learned new facts just days before, it is not correct that the May 6, 2013 CR 56(f) Guest Declaration, with the admissible ER 901 documentary evidence that “John Tynes” did not sign the 1987 Recorded Document and that Nu Dawn Homes, Inc. did not own Lot 5 were not brought to the trial court’s attention before trial.⁷⁴ The Trust referred to the May 6, 2013 Declaration in its *Guest v. Lange* filings, and the Guests brought the May 2013 Declaration evidence to the trial court’s attention prior to trial in that portion of the case. The court ignored and disregarded that evidence.

VI. THE TRIAL COURT ERRED WHEN IT DENIED THE GUESTS’ MOTION TO AMEND

The trial court erred and/or abused its discretion in denying the Guests’ motion to amend their complaint. The timing of a motion to amend pleadings may result in prejudice, but otherwise timing is not

⁷³ *Allstate Ins. Co. v. Khani*, 75 Wn.App. 317, 325,877 P.2d 724 (1994) (a void judgment has no effect, the “parties’ rights are left as though the judgment had never been entered”).

⁷⁴ ER 901, self authenticating and admissible evidence, not requiring a handwriting expert, *see* ER 901(a) (witness with knowledge), and ER 901(b)(1), (3) and (7).

dispositive.⁷⁵ Similarly, the fact that material in the amended pleading could have been included in the original pleading will not preclude amendment, absent prejudice to the nonmoving party.⁷⁶ In all cases “the touchstone for denial of an amendment is the prejudice such amendment would cause the nonmoving party.”⁷⁷ There was no prejudice to the Langes, and could not be as the Guests’ indemnitors and insurers, and none properly asserted. The proposed Second Amended Complaint was further and additional notice to the Langes of the scope and the extent of the Guests’ damages requiring defense and indemnity.⁷⁸ As the Guests’ fiduciaries, the Langes had the duty and obligation to consent to the amendment which would have removed the decision from the trial court.

Although the trial court denied the Guests’ Motion, the parties briefed the statute of frauds, license and other amended complaint issues in their summary judgment filings. They also litigated those issues at the summary judgment hearings. Pursuant to CR 15(b) and (c), those issues, allegations, claims, issues and amendments, including the fact that the 1987 Recorded Document ‘easement’ did not exist, were automatically and mandatorily amended by CR 15(b) as a matter of law, retroactive to December 2011, the date of the first Complaint filing. In this instance, CR

⁷⁵ *Caruso v. Local Union No. 690 of Int’l Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of Am.*, 100 Wn.2d 343, 349 – 50, 670 P.2d 240 (1983) (the purpose of pleadings is to “facilitate a proper decision on the merits”).

⁷⁶ *Herron v. Tribune Pub. Co., Inc.*, 108 Wn.2d 162, 166, 736 P.2d 249 (1987).

⁷⁷ *Herron*, 108 Wn.2d at 166.

⁷⁸ CP 1186-1239, 4912-4939, also Guest Reply Appendix Ex. A.

15(b) and CR 15(c) are deemed the equivalent of a mandatory statute.⁷⁹ The court did not have the discretion to deny the Guests' CR 15(b) and (c) mandatory amendments before, or or even after trial CR 15(b) and (c) or CR 54(b). CR 15(b) and CR 54(b) have fewer requirements to amend or revise than CR 15(a), merely a request to revise and good cause in the interest of justice and the truth, and so that an action can be determined on the true merits.

The Langes relied on *Wallace v. Lewis County*⁸⁰, but *Wallace* supports the Guests.⁸¹ There was no final judgment at the summary judgment stage. An action for injury to real property is subject to a two year statute of limitations, subject to Washington's injury to real property "discovery rule", met by the Guests in January 2013. *Wallace* ¶29. The court concluded in *Wallace* that the trial court did not abuse its discretion when it denied the *Wallace* motion to amend when they had waited to file it shortly before a dispositive motion after waiting for more than a year to do so, not the situation here.⁸² The Langes were required to show prejudice to *themselves*, which they could not do, not to others. They failed to demonstrate how adding new parties would prejudice them.

⁷⁹ *Sleasman* at 643.

⁸⁰ 134 Wn. App. 1, 137 P.3d 101 (2006).

⁸¹ Respondents' Brief at 22 – 23.

⁸² *Wallace*, 134 Wn. App. at 26.

The Langes' reliance on *Donald B. Murphy Contractors*,⁸³ a King County case, is misplaced. Pierce County has a local rule permitting the joinder of claims and parties after filing a confirmation of joinder "for good cause and subject to such conditions as justice requires."⁸⁴ The Langes' untimely discovery responses hindered the Guests' ability to file the amended complaint earlier.⁸⁵ *Donald B. Murphy Contractors*' reliance on the filing of a confirmation of joinder in a King County matter does not apply to this Pierce County case.⁸⁶ The *Murphy* case, however, is instructive that a contract that unambiguously reflects an intent to preclude any and all direct claims by one party against another, such as any Lange claims against the Guests under Section D, will be enforced by the Washington courts.⁸⁷ It was not until the Langes produced their untimely discovery did the Guests find, and obtain, the evidence to support the scope of the amended complaint.⁸⁸ The Guests acted diligently with the information disclosed to them. The Langes should not have been permitted to benefit from their untimely discovery responses.

⁸³ *Donald B. Murphy Contractors, Inc. v. King Cnty.*, 112 Wn. App. 192, 49 P.3d 912 (2002).

⁸⁴ PCLR 19(b); Compare LCR 4.2. There is no LCR 19 in King County governing joinders.

⁸⁵ CP at 213 – 14; 287

⁸⁶ 112 Wn. App. at 199 – 200.

⁸⁷ *Donald B. Murphy*, at 913.

⁸⁸ CP at 287, 295 – 97.

The proposed Second Amended Complaint also involved parties and entities who were not before the court whose liability to the Guests had not been adjudicated yet. The Langes incorrectly argued nothing that supported any cause of action for any Lange breach of contract for the Langes' alleged violation of the alleged Encroachment Easement, a breach the Guests proved at trial through the evidence admitted.⁸⁹ The Langes also incorrectly argued that the Guests were not entitled to sue to enforce the CC&Rs against the Langes because the Guests would be entitled to injunctive relief only, not damages.⁹⁰ That is incorrect.⁹¹ A Guest mandatory injunction also entitles the Guests to damages and an award of fees, costs and expenses.⁹²

VII. THE TRIAL COURT ERRED IN GIVING JURY INSTRUCTION NO. 17, NO. 9, AND FAILING TO INSTRUCT THE JURY ON THE DEFINITION OF “GOOD FAITH” AND “FAIR DEALING”⁹³

⁸⁹ Respondents' Brief at 5, 26 – 27; *see above* for discussion regarding the Langes violations of the alleged “Encroachment Easements”.

⁹⁰ Respondents' Brief at 27; 17 Stoebuck & Weaver, WASH. PRAC., REAL ESTATE: PROPERTY LAW, §3.9 (2nd ed. 2014)(real covenants are the creations of the court of common law, therefore, the usual common law remedy, damages, must be available when breached).

⁹¹ CP at 39, ¶ 4.3 (Plaintiffs' breach of contract claims “entitle Plaintiffs to any and all injunctive or equitable relief as is deemed just and equitable”); *State v. Hickman*, at 102.

⁹² Section D contract; CP 4912 -4939; *Proctor v. Huntington*, 169 Wash.2d 491, 238 P.3d 1117 (2010).

⁹³ Respondents' Brief at 5-6. 41.

i. Standard of Review

This Court review[s] jury instructions de novo where an instruction contains an erroneous statement of applicable law. An instruction that contains an erroneous statement of law is reversible error where it prejudices a party.”⁹⁴ The Langes argued that the issue is whether the trial court properly gave a particular instruction, and thus that the appropriate standard of review is abuse of discretion.⁹⁵ However, that was not a complete or an accurate characterization of the Guests’ arguments. First, before a trial court can give a jury instruction there must be substantial evidence in the case supporting the instruction.⁹⁶

Whether to give a certain jury instruction is within the trial court’s discretion, but legal errors in jury instructions are reviewed de novo.⁹⁷ The Guests argued that Jury Instruction No. 9 misstated the law because justifiable reliance is not a form of consideration.⁹⁸ Additionally, the Guests argued that Jury Instruction No. 17 was an error of law because it erroneously instructed the jury that, as a matter of law, the Langes had the right to build a deck on part of Lot 5 and also to use the area identified and covered by the 1987 Recorded Document ‘easement’ area, when under the evidence they did not. The Guests argued that the court’s failure to give the Guests’ good faith and fair dealing instruction that the trial court ruled

⁹⁴ *Hudson v. United Parcel Svc., Inc.*, 163 Wn. App. 254, 261, 258 P.3d 87 (2011) (quoting *Thompson v. King Feed & Nutrition Serv., Inc.*, 153 Wn.2d 447, 453, 105 P.3d 378 (2005)).

⁹⁵ Respondents’ Brief at 41.

⁹⁶ *Fergen v. Sestero*, 174 Wash. App. 393, 396, 298 P.3d 782 (Wash. 2013).

⁹⁷ *Fergen v. Sestero*, 182 Wn.2d 794, 802 – 03, 346 P.3d 708 (2015).

⁹⁸ Appellants’ Brief at 33 – 34.

that it was going to give was prejudicial error as a matter of law.⁹⁹ These issues are reviewed de novo.

ii. *Jury Instruction No. 9 misstated the law.*

Jury Instruction No. 9 misstated the law to the Guests' prejudice which continues to this date. The trial court acknowledged that the Guests' theory was not just that they relied on the Langes' promises, but that the Guests had also refrained from taking an action the Guests were allowed to take.¹⁰⁰ The Guests' proposed instruction encompassed both arguments – reliance and refraining from taking an action.¹⁰¹ The instruction the trial court gave did not mention forbearance of a legal right, focusing instead on justifiable reliance. As explained in the Guests' opening Brief, justifiable reliance is not a form of consideration.¹⁰² It is disingenuous to claim that the instruction the trial court gave was “based on” WPI 301.04, which simply encourages parties to outline the relevant facts and then state that this could be consideration.¹⁰³ Jury Instruction No. 9 did not fulfill that requirement, it did not identify any facts, just a legal theory that did not and does not constitute consideration. The Guests were prejudiced by the incorrect instruction.

⁹⁹ Appellants' Brief at 32.

¹⁰⁰ RP (July 15, 2014) at 102 – 03.

¹⁰¹ CP at 4619, *see also*, Guest Reply Appendix Ex. G.

¹⁰² Appellants' Brief at 34 – 35.

¹⁰³ Respondents' Brief at 43.

iii. *Jury Instruction No. 17 did not allow the Guests to argue their theory of the case.*

The Guests were not able to argue their claims and theories of the case, which included that the 1987 Recorded Document ‘easement’ was null, void and invalid.¹⁰⁴ The Guests presented evidence to this effect and repeatedly asked the trial court to revisit the issue which, as explained above, had not been finally decided and could have been reconsidered at any time under CR 54(b), including at and during trial, and any time prior to entry of a final judgment adjudicating all the rights, claims and liabilities of all of the parties. When the trial court sensed on the second day of trial that evidence was being introduced and admitted that was contrary to the Court Jury Instruction that the court notified the parties that it was going to give the jury at the end of the case, the court excused the jury and warned, cautioned and admonished the Guests to refrain from introducing any further evidence at trial that would in any way be contrary to Court Jury Instruction No. 17. The Court expressly, and explicitly, prohibited and precluded the Guests from arguing their case or introducing their theories at trial.¹⁰⁵

By giving Court Jury Instruction No. 17, the trial court gave unwarranted and prejudicial judicial credibility to the Langes’ actions and theories.

¹⁰⁴ It is incorrect to say that the Guests have “always” argued that “despite the Langes’ right to rebuild, the Langes agreed with the Guests to give up that right.” Respondents’ Brief at 42. The Guests strongly dispute the Langes’ had any right to build their deck on Lot 5, or to be on Lot 5.

¹⁰⁵ RP (July 9, 2014) at 114, line 2 to 116, line 2.

The Guests were further prejudiced by the Langes' closing argument when the Langes told the jury to disregard the Guests' evidence because of Jury Instruction No. 17.¹⁰⁶ The Langes claim that the Guests were able to argue their theory of the case, but submitted evidence identifying the many types of evidence that the Guests were not allowed to present to the jury on this issue.¹⁰⁷ Court Jury Instruction No. 17 incurably prejudiced the Guests, requiring that the Guests receive a new trial in the absence of a full Judgment in favor of the Guests with remand for a Guest damages trial only.

iv. *The omission of the duty of good faith and fair dealing instruction prejudiced the Guests.*

The omission of the instruction on the implied duty of good faith and fair dealing prejudiced the Guests. The trial court left out the Guests' proposed Jury Instruction No. 7 regarding the implied duty of good faith and fair dealing that the trial court had agreed to give. Jury Instruction No. 7 was based on WPI 302.11, a pattern instruction. The trial court stated on the record at the jury instruction conference that there was sufficient evidence at trial that the instruction should be given, necessarily finding that the Guests had introduced sufficient evidence at trial that a contract existed and that the Langes had breached their duties of good faith and fair dealing.¹⁰⁸ Both counsel for the Langes and counsel for the Guests

¹⁰⁶ RP (July 16, 2014) at 11.

¹⁰⁷ Respondents' Brief at 24 – 43 n.95.

¹⁰⁸ RP (July 15, 2014) at 103 – 04.

including Mrs. Guest confirmed that Jury Instruction No. 7 was included and part of the Court's Jury Instruction packet before the Court read the Jury Instructions to the jury, but that the court did not read the good faith Instruction to the jury. When the jury clearly needed the definition of good faith and fair dealing as their jury deliberation question evidenced.¹⁰⁹ When the trial court suggested that the jury be instructed to "Use the ordinary definition," the Guests pointed out that a good faith and fair dealing instruction had been given. The trial court erroneously stated that there was not a good faith and fair dealing instruction, and again suggested using the "ordinary definition language and denied that there was any pattern instruction, only instructing the jury that "Words are to be given their ordinary meaning."¹¹⁰, ¹¹¹ The lack of instruction prejudiced the Guests, as evidenced by the jury's confusion on this issue. It is not a moot issues, this Court can provide a remedy.¹¹² This matter should this be remanded for a new trial under the Guests' Second Amended Complaint and for judgment in the Guests' favor, with entry of judgment in the Guests' favor in this Court on all issue before the Court including the easement issue, the Langes (and the Trust parties) lack of standing, the Section D contract and the Langes and Trust parties breaches , with entry

¹⁰⁹ RP (July 16, 2014) at 42 – 43.

¹¹⁰ RP (July 16, 2014) at 42.

¹¹¹ RP (July 16, 2014) at 42 – 43; *see also* Guest Reply Appendix Ex. G.

¹¹² *City of Sequim v. Malkasian*, 157 Wn.2d 251, 138 P.3d 943, 947-948 (an issue is moot if the matter is "purely academic", an issue is not moot if a court can provide any effective relief).

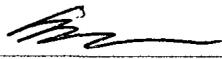
of judgment in the Guests' favor on the easement issue, the Langes' lack of standing and and/or entry of judgment in the Guests' favor.

VIII. THE GUESTS REQUEST AN AWARD OF FEES, COSTS AND EXPENSES UNDER RAP 18.1, SECTION D, RCW 64.04.030, RCW 4.24.630, RCW 64.38.050 AND OTHER STATUTORY, RULE, CONTRACT AND EQUITABLE GROUNDS

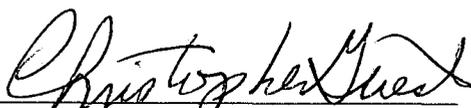
The Guests request an award of fees and costs pursuant to RAP 18.1 and RAP 14 as the prevailing party, and also under their Section D and Lot 5 Court Trial Exhibit 28 insurance, defense and indemnity contracts on a joint and several basis from the Langes and from the 'Trust', also under RCW 64.04.030, RCW 4.24.630 which also permits recovery of investigation expenses and costs on appeal and otherwise for injury and damage to real property, under RCW 64.38.050 for any and all relief available under law and equity as an entitlement for the Langes' breaches of the CC&Rs and the provisions of the Homeowners Association Act including but not limited to RCW 64.38.020(9) and also under the Consumer Protection Act as well as under the *Olympic* insurance case and *Cedell*, as well as *Strom Construction* and *Newport Yacht* and against the Langes pursuant to RCW 4.84.185 for being forced and compelled to litigate to obtain their rights.

X. CONCLUSION

The Guest request a judgment in their favor for the relief requested, vacation of all Lange and 'Trust' orders and fees and cost

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