

FILED

FEB 24 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

Nos. 301401 & 304833

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

MONTECITO ESTATES, LLC, PRISCILLA TRUJILLO, and
JOHN C. BOLLIGER, Appellants,

v.

DOUGLAS J. HIMSL dba HIMSL REAL ESTATE CO., Respondent.

AMENDED APPELLANTS' OPENING BRIEF

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Attorney for Appellant

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The appellants herein – Priscilla Trujillo (“MS. TRUJILLO”) and Montecito Estates, LLC (“MONTECITO”) and their attorney of record, John C. Bolliger (“Mr. Bolliger”) – present their amended opening brief of appellants. The respondent is Douglas J. Himsl (“MR. HIMSL”).

Appeal No. 301401

I. ASSIGNMENT OF ERROR RE: CR 11 SANCTIONS

The trial court, by and through the Honorable David Frazier, visiting judge of the Benton County Superior Court, erred when it granted MR. HIMSL’S motion for CR 11 sanctions against each of MS. TRUJILLO, MONTECITO, and Mr. Bolliger.

II. STATEMENT OF THE CASE RE: CR 11 SANCTIONS

A. Pertinent Underlying Facts

MONTECITO was a residential subdivision developer and home builder (for the 35-lot Montecito Estates residential subdivision in Prosser), whose realtor was MR. HIMSL. [CP 4, 330-31] After MONTECITO legally terminated the parties’ *Exclusive Sale and Listing Agreement*, [CP 331-33, 336] MR. HIMSL retaliated by placing a lien on each and every one of the 35 lots in the residential subdivision. [CP 25-27, 101-08] MR. HIMSL recorded his 35 liens, purportedly on authority

of RCW chapter 60.42 – the *Commercial Real Estate Brokers Lien Act* [CP 334-35] – even though the property always had been residential property – and never has been commercial property. [CP 328-30] MR. HIMSL recorded his 35 liens, despite the fact he never sold a lot or home in the residential subdivision – and therefore was entitled to not even a single commission under the listing agreement. [CP 331, 333, 338, 341] As a result of MR. HIMSL’S 35 liens, MONTECITO was unable to procure follow-on real estate brokerage [CP 600-03] and financing [CP 631-37] services for the project – which eventually caused MONTECITO to lose the project and the property. [CP 11-12, 16] MONTECITO’S monetary damages exceed nine hundred ninety four thousand dollars (\$994,000.00). [CP 575-78, 622-30]

On December 15, 2010, the trial court entered its *Order Granting the Plaintiffs’ Motion for Declaratory Judgment and Declaratory Judgments*, [CP 302-07] as follows:

ORDER

The Court has treated the plaintiffs’ *Motion for Declaratory Judgment* as a motion for summary judgment. It is hereby ORDERED, ADJUDGED, and DECREED that the plaintiffs’ *Motion for Declaratory Judgment* is GRANTED. The following *Declaratory Judgments* therefore shall be entered in this case.

DECLARATORY JUDGMENTS

The Court hereby DECLARES THE FOLLOWING TO BE THE LAW OF THIS CASE: (1) at all times material to this case, the Montecito Estates residential subdivision was not “commercial real estate” within the meaning of RCW chapter 60.42 and, (2) therefore, the RCW chapter 60.42 liens HIMSL and THE

EVERETTS recorded as to all 35 lots in the Montecito Estates residential subdivision on or about August 2, 2006 were unlawfully recorded pursuant to RCW chapter 60.42.

MR. HIMSL let the appeal period lapse without appealing the foregoing order and declaratory judgments against him.

Despite the trial court's declaratory judgments, on April 1, 2011, the trial court (curiously) entered its *Order Granting Summary Judgment*, with which it dismissed MONTECITO'S five (5) remaining causes of action against MR. HIMSL. [CP 769-75] On April 11, 2011, MONTECITO filed its *Motion for Reconsideration* with respect to those dismissals, [CP 785-811] which the trial court eventually denied. On August 5, 2011, the trial court (even more curiously) entered its *Findings of Fact and Conclusions of Law and Judgment*, with which it imposed CR 11 sanctions against each of MS. TRUJILLO, MONTECITO, and Mr. Bolliger – and from which this appeal has been taken. [CP 849-60]

B. MONTECITO'S *Complaints*

This case consists of a consolidation of the two actions MONTECITO separately filed against MR. HIMSL (and others) in 2008 and 2009.

I. The '08 Case

On **September 25, 2008**, MONTECITO filed its original complaint against MR. HIMSL. [CP 892-914] On **October 29, 2008**, MR. HIMSL set forth the following counterclaim in his answer thereto [CP 916]:

CR 11 Sanctions for Harassment.

[MS. TRUJILLO], individually and on behalf of [MONTECITO], has filed numerous frivolous lawsuits, engaged in harassing behavior toward [MR. HIMSL'S] agents, cost [MR. HIMSL] thousands of dollars in attorney's fees, deliberately interfered with the daily operations of his business, actions which have been brought in bad faith with the intent of harassing [MR. HIMSL].

Clearly, with these conclusory words, **MR. HIMSL did not specify precisely which causes of action he was alleging were being brought by MONTECITO in violation of CR 11.**

On **July 31, 2009**, MONTECITO filed its 1st amended complaint against MR. HIMSL. [CP 918-30] On **August 28, 2009**, MR. HIMSL set forth the following counterclaim in his answer thereto [CP 1832]:

As fourth counterclaim, [MR. HIMSL] alleges that one or more of [MONTECITO'S] claims against [MR. HIMSL] is frivolous, advanced without reasonable cause, and contrary to law on its face, and that under RCW 4.84.185 and/or CR 11, [MR. HIMSL] is entitled to recover reasonable attorney fees, legal expenses, and costs of litigation of [MR. HIMSL] as prevailing party in this action.

Clearly (as with his prior answer), with these conclusory words, **MR. HIMSL did not specify precisely which causes of action he was alleging were being brought by MONTECITO in violation of CR 11.**

ii. The '09 Case

On **October 21, 2009**, MONTECITO filed its 2nd amended complaint. [CP 1-16] This 2nd amended complaint is the most-current version of MONTECITO'S complaint.¹

C. MONTECITO'S *More Definite Statements*

On **December 15, 2009**, MONTECITO filed its original more definite statement, clarifying which causes of action (set forth in its 2nd amended complaint in the '09 case) apply to which defendants, including MR. HIMSL.² [CP 143-50]

On **December 23, 2009**, MONTECITO voluntarily filed its 1st amended more definite statement. [CP 151-58] The clarifications contained in this 1st amended more definite statement did not apply to MR.

¹ MONTECITO has been unable to locate an answer filed by MR. HIMSL to MONTECITO'S 2nd amended complaint the '09 case.

² In **each** version of MONTECITO'S more definite statements, MONTECITO set forth the following as its fn. 1: "The outcome of full discovery in this case may change some of the identifications made herein – one way or another – so, the plaintiffs reserve the right to amend this *More Definite Statement* as required by its developing discovery of facts in this case."

HIMSL at all.

On **June 14, 2010**, MONTECITO voluntarily filed its 2nd amended more definite statement. [CP 159-66] With this 2nd amended more definite statement, MONTECITO voluntarily dismissed the following causes of action named against MR. HIMSL:

- 5.2 Breach of Quasi-Contract,
- 5.3 Promissory Estoppel,
- 5.4 Breach of Express Warranties and Breach of Warranties Implied at Law,
- 5.6 Negligence,
- 5.7 Negligent Misrepresentation,
- 5.8 Intentional Misrepresentation,
- 5.9 Negligent Infliction of Emotional Distress,
- 5.10 Intentional Infliction of Emotional Distress (Outrage),
- 5.12 Intentional Interference with Business Expectancy/Contractual Relations,
- 5.14 Wrongful Initiation of Baseless Civil Proceedings,
- 5.15 Abuse of Process,
- 5.16 Respondeat Superior,
- 5.23 Violation of RCW 4.24.350, and
- 5.24 Negligence per se.

On **December 21, 2010**, MONTECITO voluntarily filed its 3rd amended more definite statement. [CP 308-16] With this 3rd amended more definite statement, MONTECITO voluntarily dismissed the following causes of action named against MR. HIMSL:

- 5.5 Breach of the Implied Warranty of Good Faith and Fair Dealing,
- 5.11 Defamation and/or Trade Libel, and
- 5.18 Breach of the common law fiduciary duties an agent (here, MR. HIMSL) owes to its principal (here, MONTECITO).

On **January 6, 2010**, MONTECITO voluntarily filed its 4th amended more definite statement. [CP 317-25] This 4th amended more definite statement is the most-current version of MONTECITO'S more definite statement. The clarifications contained in this 4th amended more definite statement did not apply to MR. HIMSL at all.

Thus, with two of its more definite statements – its 2nd amended and its 3rd amended – MONTECITO voluntarily dismissed numerous of its causes of action originally named against MR. HIMSL. **MONTECITO'S voluntary dismissal of every one of those causes of action came before any pleading (answer) or dispositive motion from MR. HIMSL expressly addressing an alleged CR 11 problem with any of those specific causes of action.** Moreover, MONTECITO did not decide to voluntarily dismiss any of those causes of action because MONTECITO regarded them as somehow lacking in merit or frivolous; rather MONTECITO decided to dismiss those causes of action merely because they provided only overlapping (redundant) relief as compared with those causes of action MONTECITO decided to preserve.³

Thus, after voluntarily dismissing those causes of action, the 5 remaining triable causes of action with which MONTECITO was

³ That said, as the discussion in Section III below reveals (see pp. 17-18), MONTECITO additionally decided to voluntarily dismiss its “tort” causes of action for a separate reason – also unrelated to a lack of meritoriousness.

proceeding against MR. HIMSL are the following:

- 5.1 Breach of Express Contract,
- 5.13 Civil Conspiracy and/or Concerted Action (relating to defendants MR. HIMSL and THE EVERETTS),
- 5.17 Extortion/Economic Duress/Business Compulsion,
- 5.19 Common law liability on the principal's (here, MR. HIMSL'S) part for the actions of his agent (here, THE EVERETTS), and
- 5.21 Breach of Statutory Duties Set Forth in RCW Chapter 18.86 – including, without limitation, the duties of a licensee pursuant to RCW 18.86.030, the duties of a seller's agent pursuant to RCW 18.86.040, and the duties of a dual agent pursuant to RCW 18.86.060.

D. MR. HIMSL'S *Dispositive Motions*

On **November 2, 2010**, MR. HIMSL filed his 1st motion for summary judgment. With this 1st of his dispositive motions, MR. HIMSL sought relief as stated in his motion as follows:

COMES NOW defendant [MR. HIMSL], through the below-signed counsel, and moves this Court for Partial Summary Judgment; specifically for rulings that 1) the Montecito Estates Property was "commercial real estate" as defined in RCW 60.42.005 at times relevant, 2) that the liens filed by [MR. HIMSL] pursuant to Chapter 60.42 RCW were lawful, and 3) that Chapter 60.42 RCW does not provide for an award of attorney fees to [MONTECITO] in this matter.

Nowhere in MR. HIMSL'S 1st motion for summary judgment (or supporting memorandum of law) did he indicate he was seeking CR

11 sanctions against MS. TRUJILLO, MONTECITO, or Mr. Bolliger with respect to any of MONTECITO'S causes of action against MR. HIMSL. The trial court denied all portions of MR. HIMSL'S 1st motion for summary judgment which MONTECITO opposed.

On **December 23, 2010**, MR. HIMSL filed his 2nd motion for summary judgment. [CP 937-1125] With this 2nd of his dispositive motions, MR. HIMSL sought relief as stated in his motion as follows:

Defendant [MR. HIMSL], by and through the below-signed counsel, hereby moves this court for an Order granting summary judgment in his favor and dismissing all claims against him. This motion is based on CR 56

Nowhere in MR. HIMSL'S 2nd motion for summary judgment (or supporting memorandum of law), either, did he indicate he was seeking CR 11 sanctions against MS. TRUJILLO, MONTECITO, or Mr. Bolliger with respect to any of MONTECITO'S causes of action against MR. HIMSL.

E. MR. HIMSL'S *Motion for Attorneys' Fees Pursuant to CR 11*

On **March 9, 2011** (i.e., more that 2 years and 5 months after this action was originally filed against him), MR. HIMSL filed his motion for attorneys' fees pursuant numerous theories. [CP 1273-1721] That said, in his memorandum of law, **MR. HIMSL devoted only four (4) pages to**

the specific subject of CR 11. [CP 1284-88] With this brief treatment of the issue, as with his aforementioned answers to MONTECITO'S complaint, **MR. HIMSL did not specify precisely which causes of action he was alleging had been brought by MONTECITO in violation of CR 11. Instead, MR. HIMSL merely engaged in falsehoods and generalities.** For example, MR. HIMSL

- falsely asserted that, in the event CR 11 is violated, it is **mandatory** that the court impose sanctions, [CP 1285]
- broadly – and falsely – asserted that MONTECITO produced **no** evidence to support **any** of its causes of action (when, in fact, MONTECITO produced evidence supportive of **every one** of its causes of action), and
- wrongly asserted that Mr. Bolliger failed to conduct reasonable inquiry into MONTECITO'S claims before filing suit.

F. The Trial Court's *Judgment* Imposing CR 11 Sanctions

In its aforementioned *Judgment* imposing CR 11 sanctions against MS. TRUJILLO, MONTECITO, and Mr. Bolliger, the trial court awarded MR. HIMSL “75% of the total attorney fees and costs he is claiming in this motion” (= \$165,011.52), plus 12% interest.

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III. ARGUMENT RE: CR 11 SANCTIONS

- A. **The Causes Of Action Against MR. HIMSL Which MONTECITO Voluntarily Dismissed With Its 2nd And 3rd Amended *More Definite Statements* Were Not Only Not Frivolous, They Were Meritorious – However, No Party Has Provided The Court Any Briefing As To The Merits Of These Specific Causes Of Action – As Such, To The Extent The Trial Court’s Imposition Of CR 11 Sanctions Relates To Any Of These Causes Of Action, The Sanctions Are Not Warranted**

In its *Memorandum Decision*, the trial court concluded as follows with respect to these causes of action [CP 890] (with emphasis added):

It is evident to the court that these claims were not the result of a reasonable inquiry or a good faith belief that they were legally and factually meritorious. It is obvious that these claims were filed vindictively in bad faith, and were advanced for purposes of harassment, nuisance, and spite. These are the types of suits that give lawyers and the legal system a bad name, and these are the types of suits CR 11 sanctions are intended to deter.

These broad-sweeping conclusions are not supported by the record.

The universe of verified and declared **facts** rendering MONTECITO’S causes of action viable against MR. HIMSL and THE EVERETTS is **abundant**. [CP 4-12, 328-62, 645-49] By way of only a very brief summary,

1. MR. HIMSL and THE EVERETTS **filed the 35 unlawful liens** against the Montecito Estates residential subdivision,

2. MR. HIMSL and THE EVERETTS communicated their **ransom demand**: their threat of refusal to release their 35 unlawful liens unless MONTECITO, in exchange, would agree to pay MR. HIMSL \$300,000.00 – even though MR. HIMSL was entitled to **nothing**,
3. after MONTECITO declined to accede to their extortionary demand, MR. HIMSL and THE EVERETTS **refused to release their 35 unlawful liens** until **after** MONTECITO had lost the property as a result of the liens, and
4. MR. HIMSL and THE EVERETTS repeatedly and variously attempted to **cover up** their wrongdoings.

MONTECITO points out the trial court cannot competently conclude MONTECITO averred these specific causes of action without knowing whether they were **legally** grounded – for at least four reasons.

First, via its 2nd and 3rd amended more definite statements,

- MONTECITO **voluntarily dismissed** these specific causes of action against MR. HIMSL and
- MONTECITO did so **before MR. HIMSL filed any dispositive motion relating to any of these specific causes of action (and, thus, before MR. HIMSL made any CR 11 allegations)**.

In other words, the legal merits of these specific causes of action never have been briefed. This is a “double problem”: (1) MONTECITO never had need to provide briefing as to the legal merits of these causes of action (and, therefore, never did so) and (2) MR. HIMSL never provided any briefing to the court which suggests there is an insufficient factual or legal basis for MONTECITO originally to have averred any of these causes of action. For these reasons, the trial court had no justification to impose CR 11 sanctions against MS. TRUJILLO, MONTECITO, and Mr. Bolliger with respect to these voluntarily dismissed causes of action.

Second, MR. HIMSL has the burden of first establishing **precisely which** of MONTECITO’S voluntarily dismissed causes of action it believes are violative of CR 11 and **precisely why**, as follows:

. . . . The burden is on the movant to justify the request for sanctions. . . .

Biggs v. Vail, 124 Wn.2d 193, 202, 876 P.2d 448 (1994). However, in support of his motion for CR 11 sanctions, MR. HIMSL did not even attempt to establish **precisely which** of MONTECITO’S voluntarily dismissed causes of action MR. HIMSL believes are violative of CR 11 and **precisely why**. This issue is more fully discussed further below.

Third, of these causes of action, in its *Memorandum Decision*, the trial court specifically addressed what it perceived was wrong with **only**

one of them: “5.11 Defamation and/or Trade Libel.” [CP 888-89]
MONTECITO already had voluntarily dismissed its defamation cause of
action, via its 3rd amended more definite statement, months before MR.
HIMSL even filed his motion for CR 11 fees – and before MR. HIMSL
filed his motion for summary judgment seeking dismissal of
MONTECITO’S 5 remaining causes of action. So, as an initial point
about this subject, the trial court needn’t even have been talking about
MONTECITO’S defamation cause of action.

Nevertheless, the trial court asserted in pertinent part as follows:

. . . . [MS. TRUJILLO’S] depositions were taken on
October 20, 2010 and on December 21, 2010 – more than
two years after one of the consolidated cases had been
commenced, and only a few months before the scheduled
trial. . . . When directly questioned about the cause of
action she had brought against [MR. HIMSL] for
defamation, she could not identify one single statement
made by [MR. HIMSL] that was defamatory. As [MR.
HIMSL’S] attorney argues, this not only illustrates the fact
that there was no legal or factual basis for most of
[MONTECITO’S] claims, it also shows the lack of even a
basic investigation and inquiry on the part of [Mr. Bolliger]
prior to filing the lawsuit.

The pertinent **additional** facts before the trial court, not mentioned by the
trial court in its *Memorandum Decision*, are as follows. [CP 824-26] The
Department of Licensing’s Shannon Taylor interviewed Creekside
Realty’s Christina Hoover (in connection with the Department’s
investigation of MR. HIMSL with respect to the facts of this lawsuit). The
interview occurred long before this lawsuit was initially filed. Ms.

Taylor's written report of that interview states as follows:

The designated broker for Creekside Real Estate, Ms. Hoover, told the investigator she received a call from [MR. HIMSL] advising she needed to run a title search on the property. [MR. HIMSL] advised her he had liens filed against the property and there were other encumbrances making the property less marketable. Hoover advised due to the information regarding the liens and ongoing marketing issues [Creekside] released their listing.

Based upon this written report from the Department's Ms. Taylor, MONTECITO averred its defamation/trade libel cause of action. More than two (2) years later, MR. HIMSL'S attorneys took deposition testimony from MS. TRUJILLO. During that testimony, Mr. Bolliger lodged an objection to the effect of "Objection. Calls for a legal conclusion. Ms. Trujillo does not have the legal training and experience to understand the elements of legal causes of action." (See, e.g., [CP 1083, lines 14-18 and 1085, lines 7-18].) By that time, however, Ms. Taylor's report had long earlier been made a part of the record for this case (a copy of Ms. Taylor's report was attached as Exhibit 14 to MONTECITO'S *Motion for Declaratory Judgment*, [CP 121-25] which had been filed in **early December of 2009**). Thus, it doesn't matter that, at her deposition nearly a year later, MS. TRUJILLO wasn't able to understand MR. HIMSL'S lawyer's phrasing of his question – because the answer to his question was already part of the record for this case – and because Mr. Bolliger's objection to the phrasing of the question was properly lodged by him at the deposition. Moreover, before he filed MONTECITO'S lawsuit

containing the cause of action under discussion, Mr. Bolliger was well aware of what was contained in Ms. Taylor's report, because he already had read that report. Moreover, at Ms. Hoover's deposition – which occurred between MS. TRUJILLO'S two deposition sessions, on **November 12, 2010** – she allowed it “could have been” MR. HIMSL who placed the telephone call to her which she told Ms. Taylor about. [CP 589] These facts demonstrate that MONTECITO'S defamation/trade libel cause of action could be proved to, and accepted by, the jury at trial. More importantly, **these facts demonstrate MONTECITO'S defamation/trade libel cause of action is not sanctionable under CR 11.** Thus, the aforementioned, broad sweeping conclusions of the trial court clearly are unsupportable with respect to MONTECITO'S voluntarily dismissed “Defamation and/or Trade Libel” cause of action. In its *Memorandum Decision*, the trial court identified what it perceived was wrong with **no other** of MONTECITO'S voluntarily dismissed causes of action.

Fourth, MONTECITO'S voluntarily dismissed (yet meritorious) causes of action can roughly be divided into (1) “off the contract” causes of action and (2) “tort” causes of action. The reasons for MONTECITO'S voluntary dismissal of these causes of action are next addressed.

“Off the contract” causes of action. MONTECITO has a “breach of contract” cause of action against MR. HIMSL – based upon the parties'

Exclusive Sale and Listing Agreement. In law school, Mr. Bolliger was taught that, when you aver a “breach of contract” cause of action based upon a written contract, you should also aver related “off the contract” causes of action – e.g., promissory estoppel, unjust enrichment, and breach of warranties (so long as they have an underlying factual basis) – in the event the opposing party successfully attacks the validity of the written contract during the subsequent litigation. Mr. Bolliger averred such causes of action here, as has been his practice when the underlying facts are supportive. However, when, during the course of the subsequent litigation, it became apparent that MR. HIMSL was not attacking the validity of the parties’ contract, MS. TRUJILLO and Mr. Bolliger discussed the matter and decided to voluntarily dismiss the “off the contract” causes of action as no longer necessary, despite their merits. **There is nothing offensive to CR 11 in this scenario.**

“Tort” causes of action. MONTECITO’S voluntary dismissal of these causes of action was addressed in its original motion and its reply brief seeking reinstatement of its tort causes of action against MR. HIMSL. [CP 644-732] To reiterate, sometime after this lawsuit was commenced, MR. HIMSL’S attorney telephoned Mr. Bolliger to inform him that, given the attorney’s interpretation of the “economic loss rule” as discussed in decisions like Alejandre v. Bull, 159 Wn.2d 674, 153 P.3d 864 (2007) and Carlile v. Harbour Homes, Inc., 147 Wn.App. 193, 194 P.3d 280 (2008), MONTECITO’S tort causes of action probably would not be viable for trial. (In this conversation, the attorney made no mention

of CR 11.) Mr. Bolliger promised to research the matter. After doing so, although Mr. Bolliger was not completely persuaded by the attorney's perspective, he did see the complications which were present for MONTECITO'S tort causes of action from the language of these decisions. Mr. Bolliger then discussed the matter with MS. TRUJILLO – and they decided to voluntarily dismiss MONTECITO'S "tort" causes of action. (Later, a pair of decisions issued from the Supreme Court of Washington – Affiliated FM Ins. Co. v. LTK Consulting Servs., Inc., 170 Wn.2d 442, 243 P.3d 521 (Nov. 4, 2010) and Eastwood v. Horse Harbor Foundation, Inc., 170 Wn.2d 380, 241 P.3d 1256 (Nov. 4, 2010) – effectively abandoning the "economic loss rule." In the written words of MR. HIMSL'S attorney, in these newer decisions, "[t]he rewriting of the economic-loss rule abandons its original rationale and probably defeats its application in most cases." [CP 663-64, last sentence] This pair of new decisions was the basis for MONTECITO'S *Motion for Order Reinstating the Plaintiffs' Tort Causes of Action Against Defendant MR. HIMSL.*) Here again, **there is nothing offensive to CR 11 in this scenario.**

Aside from these "off the contract" and "tort" causes of action, MONTECITO voluntarily dismissed only two (2) other causes of action. MONTECITO dismissed "5.16 Respondeat Superior" after deciding that really is a legal doctrine, not an official cause of action. MONTECITO dismissed "5.23 Violation of RCW 4.24.350" – a statute which allows it to be awarded attorneys' fees – because it had sufficient other causes of

action via which it could recover its attorneys' fees. Here again, **there is nothing offensive to CR 11 in these scenarios.**

Based upon the foregoing, the trial court erred when it imposed CR 11 sanctions against MS. TRUJILLO, MONTECITO, and Mr. Bolliger on grounds of MONTECITO'S voluntarily dismissed causes of action.

B. MONTECITO'S 5 Remaining Triable Causes Of Action Against MR. HIMSL Are Not Only Not Frivolous, They Are Meritorious

As mentioned above, after MONTECITO voluntarily dismissed its causes of action addressed in the preceding section, MONTECITO'S 5 remaining triable causes of action against MR. HIMSL were as follows:

- 5.1 Breach of Express Contract,
- 5.13 Civil Conspiracy and/or Concerted Action (relating to defendants MR. HIMSL and THE EVERETTS),
- 5.17 Extortion/Economic Duress/Business Compulsion,
- 5.19 Common law liability on the principal's (here, MR. HIMSL'S) part for the actions of his agent (here, THE EVERETTS), and
- 5.21 Breach of Statutory Duties Set Forth in RCW Chapter 18.86 – including, without limitation, the duties of a licensee pursuant to RCW 18.86.030, the duties of a seller's agent pursuant to RCW 18.86.040, and the duties of a dual agent pursuant to RCW 18.86.060.

In these regards, the trial court stated as follows in its

Memorandum Decision [CP 884]:

. . . the court can certainly see debatable, rational and arguable grounds for bringing a suit relating to [MR. HIMSL'S] performance under the Listing Agreement, for breach of contract, and perhaps for some type of action directly related to the unlawfully filed liens.

Thus, of the 5 remaining causes of action, the trial court regarded MONTECITO'S "breach of contract" cause of action as **not** violative of CR 11; however, the trial court apparently regarded MONTECITO'S other four (4) – cause of action nos. 5.13, 5.17, 5.19, and 5.21 – as having been averred by MONTECITO somehow in violation of CR 11. However, MS. TRUJILLO, MONTECITO, and Mr. Bolliger submit that the extensive briefing and declarations from MONTECITO in this case (setting forth the applicable law and facts) reveal both that (1) all of these causes of action are extremely likely to be found meritorious by the jury and, in any event, (2) certainly these causes of action are not violative of CR 11.

The facts and law justifying these causes of action were set forth in MONTECITO'S (1) *Memorandum of Law in Opposition to Defendant MR. HIMSL's Second Motion for Summary Judgment*, [CP 326-405] (2) *Supplemental Memorandum of Law in Opposition to MR. HIMSL's Second Motion for Summary Judgment*, [CP 638-43] and (3) *Motion for Reconsideration re: Dismissal of MR. HIMSL and the Everetts*. [CP 785-811] These briefings – and MONTECITO'S *Memorandum and Declaration of John C. Bolliger in Opposition to MR. HIMSL's Motion for Attorneys' Fees and Costs* [CP 742-54] – also comprehensively explain why **the trial court's reliance upon the "litigation immunity" doctrine**

in dismissing all of MONTECITO'S causes of action against MR. HIMSL is grossly incorrect – not the least of which because no such doctrine exists in Washington State decisional law. [CP 788-801, 811]

In these briefings, abundant law was discussed supporting each of these causes of action, as follows:

1. Civil Conspiracy and/or Concerted Action (Acting in Concert) – Relating To Defendants MR. HIMSL And THE EVERETTS

MONTECITO'S aforementioned memoranda of law addressing the merits of these causes of action discussed each of the following legal authorities: Woody v. Stapp, 146 Wn.App. 16, 189 P.3d 807 (Div. 3 2008); All Star Glas, Inc. v. Bechard, 100 Wn.App. 732, 998 P.2d 367 (2000); Sterling Business Forms, Inc. v. Thorpe, 82 Wn.App. 446, 918 P.2d 531 (Div., 3 1996); Harrington v. Richeson, 40 Wn.2d 557, 245 P.2d 191 (1952); Kietz v. Gold Point Mines, 5 Wn.2d 224, 105 P.2d 71 (1940); Sova v. First National Bank of Ferndale, 18 Wn.2d 88, 138 P.2d 181 (1943); Lyle v. Haskins, 24 Wn.2d 838, 168 P.2d 797 (1946); 11 Am.Jur. 585 § 56; Accurate Products, Inc. v. Snow, 67 Wn.2d 416, 408 P.2d 1 (1965); Martin v. Abbot Laboratories, 102 Wn.2d 581, 689 P.2d 368 (1984); Restatement (Second) of Torts, § 876(a)-(c) (1977); Felsman v. Kessler, 2 Wn.App. 493, 468 P.2d 691 (Div. 3 1970), rev. den. by 78 Wn.2d 994 (1970) (relying upon United States v. Logan Co., 147 F.Supp. 330 (W.D.Pa. 1957); Subin v. Goldsmith; 224 F.2d 753 (2d Cir. 1955); Hudesman v. Foley, 73 Wn.2d 880, 441 P.2d 532 (1968); and Balise v.

Underwood, 62 Wn.2d 195, 381 P.2d 966 (1963)). [CP 389-95, 805-06]

The foregoing legal authorities establish, inter alia, the following:

- “a conspiracy need not be proved by direct and positive evidence, and a finding that a conspiracy existed may be based on circumstantial evidence,”
- “the entire alleged conspiracy should be placed before the finder of fact, because although the finder of fact must base its decision on clear and convincing evidence, it could find that the [alleged conspirators] participated in a conspiracy. That determination will require weighing of the evidence, credibility determinations and the drawing of legitimate inferences from the facts,”
- the tort of “acting in concert” requires only a showing that the two actors had an “implied” or “tacit” understanding of their tortious conduct, i.e., their understanding need not be “expressed or declared openly,”
- the tort of “acting in concert,” unlike a “civil conspiracy,” need be proved only by a preponderance of the evidence,
- alleged conspiratorial action creates an exception to any defense of “immunity,” even where the alleged conspiracy occurred between the opposing party and his private attorney.

Thus, MONTECITO’S “civil conspiracy” and “acting in concert” causes of action relating to MR. HIMSL and THE EVERETTS should have been decided by a jury. In any event, **they do not justify CR 11 sanctions being imposed against MS. TRUJILLO, MONTECITO, and Mr. Bolliger.**

2. Extortion/Economic Duress/Business Compulsion

MONTECITO’S aforementioned memoranda of law addressing the

merits of this cause of action discussed each of the following legal authorities: State v. Martinez, 76 Wn.App. 1, 884 P.2d 3 (1994); RCW 9A.04.110(27(j)); Barker v. Walter Hogan Enterprises, 23 Wn.App. 450, 596 P.2d 1259 (1979); Sparks v. Field, 198 Wn. 593, 89 P. 2d 513 (1939).
[CP 395-98]

With respect to this cause of action, in its *Memorandum Decision*, the trial court set forth a remarkably backwards argument relating to MR. HIMSL'S attorney's (MR. EVERETT'S) "ransom demand" letter. In that letter, MR. HIMSL, who **admittedly did not earn a single commission** for his work as MONTECITO'S realtor on the project (because MR. HIMSL never sold a single property there – and MR. HIMSL never came forth with any **evidence** in this case showing MONTECITO hindered MR. HIMSL from earning a commission with respect to any alleged prospective buyer), refused to release his unlawful liens on all 35 lots of MONTECITO'S residential subdivision unless MONTECITO first promised to pay MR. HIMSL the princely sum of \$300,000. The trial court stated about this in pertinent part as follows (with emphases added)
[CP 890-91]:

A glaring example of [MONTECITO'S] bad faith and the absurd nature of many of their causes of action is the claim for duress/business compulsion. . . .

While the position taken [in the letter] by [MR. HIMSL] **may have been wrong**, this letter is clearly and obviously a settlement demand of the type typically exchanged between lawyers during the course of a **legitimate legal dispute**.

Yet, [MONTECITO] continually refer[s] to this letter as a “ransom demand” and form of extortion, and [MONTECITO] use[s] it as a basis of the duress/business compulsion cause of action. From an objective standpoint, this is an irrational and unreasonable interpretation of this letter, and it reflects [MONTECITO’S] vindictive motive in bringing many of their unwarranted causes of action.

With all due respect to the trial court, the foregoing scenario would have been a “legitimate business dispute” if, and only if, MR. HIMSL had been entitled to some amount of commission and the parties were merely in reasonable disagreement about how much. Here, however, MR. HIMSL clearly was entitled to **nothing**, and yet he was holding MONTECITO’S entire residential subdivision project hostage in exchange for being paid \$300,000 – obviously, a project-killing sum of money. MONTECITO’S evidence in the case clearly established MR. HIMSL’S refusal to release his unlawful liens caused MONTECITO to lose the residential subdivision property and thereby incur substantial monetary damages. [CP 11-12, 16, 575-78, 600-03, 622-30, 631-37] However, inexplicably, in the trial court’s assessment,

- MR. HIMSL, who had filed his 35 unlawful liens and who was wrong in demanding **any** amount of money from MONTECITO, was merely engaging in a “legitimate legal dispute” by demanding \$300,000 on threat of keeping his 35 unlawful liens encumbering MONTECITO’S property – and, yet,
- MS. TRUJILLO and MONTECITO, who sued MR. HIMSL over this issue, were frivolous in doing so and, therefore, MS. TRUJILLO, MONTECITO, and Mr. Bolliger should pay \$165,011.52, plus 12% interest, to MR. HIMSL as a consequence.

MS. TRUJILLO, MONTECITO, and Mr. Bolliger respectfully submit the trial court's analysis is backwardsly flawed. This cause of action clearly should have been one for the jury to decide. In any event, **this cause of action does not properly subject MS. TRUJILLO, MONTECITO, and Mr. Bolliger to CR 11 liability.**

3. Common Law Liability on the Principal's (Here, MR. HIMSL'S) Part for the Actions of His Agent (Here, THE EVERETTS)

MONTECITO'S aforementioned memoranda of law addressing the merits of this cause of action discussed each of the following legal authorities: Client Responsibility for Lawyer Conduct: Examining the Agency Nature of the Lawyer-Client Relationship, 86 Neb.L.Rev. 346; Washington Pattern Jury Instruction WPI 50.03; Titus v. Tacoma Smeltermen's Union Local No. 25, 62 Wn.2d 461, 383 P.2d 504 (1963); King v. Riveland, 125 Wn.2d 500, 886 P.2d 160 (1994). [CP 399-400] These authorities support this cause of action being decided by a jury – **such that the trial court's imposition of CR 11 sanctions against MS. TRUJILLO, MONTECITO, and Mr. Bolliger is erroneous.**

4. Breach of Statutory Duties Set Forth in RCW Chapter 18.86 – Including, Without Limitation, the Duties of a Licensee Pursuant to RCW 18.86.030, the Duties of a Seller's Agent Pursuant to RCW 18.86.040, and the Duties of a Dual Agent Pursuant to RCW 18.86 060

MONTECITO'S aforementioned memoranda of law addressing the

merits of these causes of action discussed each of the following legal authorities: Boguch v. Landover Corporation, 153 Wn.App. 595, 224 P.3d 795 (2009); Jackowski v. Borchelt, 151 Wn.App. 1, 209 P.3d 514 (2009), review granted by 168 Wn.2d 1001 (2010); Boor v. Fritz, 143 Wn.App. 718, 180 P.3d 805 (2008); Preview Properties, Inc. v. Landis, 161 Wn.2d 383, 165 P.3d 1 (2007); RCW 18.86.030(1)(a); RCW 18.86.030(1)(b); RCW 18.86.040(1)(a); RCW 18.86.060(2)(a); RCW 18.86.040(1)(e); RCW 18.86.030(2)(e); McKee v. American Home Prods. Corp., 113 Wn.2d 701, 782 P.2d 1045 (1989); 5B Wash.Prac., Evidence Law and Practice, § 704.7 (5th ed.). [CP 401-02, 639-40, 803-05] These authorities support these causes of action being decided by a jury – **such that the trial court’s imposition of CR 11 sanctions against MS. TRUJILLO, MONTECITO, and Mr. Bolliger is erroneous.**

C. Before The Trial Court, MONTECITO Properly Argued In The Alternative For An Extension Or Modification Of What The Trial Court Perceived Existing Law To Be

In its *Memorandum and Declaration of John C. Bolliger in Opposition to MR. HIMSL’s Motion for Attorneys’ Fees and Costs*, MONTECITO argued as follows (with emphasis added) [CP 759]:

That said, in the event the Court for some reason is inclined not to regard the denial of MR. HIMSL’S motion for summary judgment as warranted by existing law, MONTECITO respectfully requests that **the Court deny MR. HIMSL’S motion for attorneys’ fees and costs pursuant to CR 11 on grounds that MONTECITO’S good faith arguments, set forth herein and in its prior**

briefings, warrant the extension or modification of what the Court perceives existing law to be. CR 11.

The trial court gave this issue no apparent consideration in erroneously imposing CR 11 sanctions against MS. TRUJILLO, MONTECITO, and Mr. Bolliger. “Because CR 11 sanctions have a potential chilling effect, the trial court should impose such sanctions only when it is **patently clear** that a claim has **absolutely no chance of success.**” Building Industry Ass’n of Washington v. McCarthy, 152 Wn.App. 720 (2009), with emphases added.

D. MR. HIMSL Failed To Mitigate The Amount Of Fees He Incurred In This Case Allegedly On Grounds Of CR 11 Violations

MR. HIMSL did not first file his motion for attorneys’ fees pursuant to CR 11 until **March 9, 2011** – i.e., more that 2 years and 5 months after this action was originally filed against him. In Biggs v. Vail, supra, at 198, the Supreme Court of Washington held in this regard as follows (with emphases added):

. . . . Normally, such late entry of a CR 11 motion would be impermissible, since without prompt notice regarding a potential violation of the rule, the offending party is given no opportunity to mitigate the sanction by amending or withdrawing the offending paper. See Bryant, 119 Wn.2d at 228, 829 P.2d 1099 (Andersen, J., concurring in part, dissenting in part). Prompt notice of the possibility of sanctions fulfills the primary purpose of the rule, which is to deter litigation expenses.

[Deterrence] is not well served by tolerating abuses

during the course of an action and then punishing the offender after the trial is at an end. A proper sanction assessed at the time of a transgression will ordinarily have some measure of deterrent effect on subsequent abuses and resultant sanctions. . . . (Rule 11 sanctions must be brought as soon as possible to avoid waste and delay). Both practitioners and judges who perceive a possible violation of CR 11 must bring it to the offending party's attention as soon as possible.^{FN2} **Without such notice, CR 11 sanctions are unwarranted.** Bryant, 119 Wn.2d at 224, 829 P.2d 1099.

FN2 We adopt as our own the advice of the Advisory Committee that, in most cases, "counsel should be expected to give informal notice to the other party, whether in person or by a telephone call or letter, of a potential violation before proceeding to prepare and serve a [CR 11] motion." Such informal notice is not a substitute for a CR 11 motion, but **evidence of such informal notice, or lack thereof, should be considered by a trial court in fashioning an appropriate sanction.**

In the instant case, again, MR. HIMSL did not file his motion for CR 11 attorneys' fees until **March 9, 2011** – i.e., more than 2 years and 5 months after this action was originally filed against him – and he gave no earlier informal notice expressing CR 11 issues with respect to any of MONTECITO'S causes of action. Indeed, MR. HIMSL'S filing of his CR 11 motion did not come until **after** the trial court had summarily dismissed MONTECITO'S 5 remaining causes of action with its **February 28, 2011 Memorandum Decision**. [CP 2445-54] Indeed, his CR 11 motion failed to provide the specificity required by Biggs v. Vail, *supra* – a subject which is more fully discussed in the next section.

Because MR. HIMSL utterly failed to provide MS. TRUJILLO,

MONTECITO, and Mr. Bolliger specific information (addressed in the next section) early on in this case (indeed, he still has not done so), “CR 11 sanctions are unwarranted.” Biggs v. Vail, *supra*, at 198, 876 P.2d 448 (1994).

E. **MR. HIMSL And The Trial Court Did Not Analyze Or Specify (1) Which Of MONTECITO’S Causes Of Action Allegedly Violated CR 11, (2) How Each Such Cause Of Action Allegedly Constituted A CR 11 Violation, (3) What Precise Fees MR. HIMSL Actually Incurred In Specifically Responding To MONTECITO’S Allegedly Violative Causes Of Action, And (4) The Effect Of MR. HIMSL’S Failure To Mitigate The Amount Of Fees He Incurred In This Case – As Such, The Trial Court’s CR 11 Sanctions Constitute An Impermissible Fee-Shifting Mechanism**

In Biggs v. Vail, *supra*, at 201-02, the Supreme Court of Washington also held as follows (with original emphases in underline and emphases added in bold):

Moreover, **there was no consideration of mitigation.** Bryant, at 229, 829 P.2d 1099 (Andersen, J., concurring in part, dissenting in part). Cf. Scott Fetzer Co. v. Weeks, 122 Wn.2d 141, 859 P.2d 1210 (1993) (fees under RCW 4.28.185(5) should be limited to **no more than necessary to compensate for added litigative burdens**). Should a court decide that the appropriate sanctions under CR 11 is an award of attorney fees, **it must limit those fees to the amounts reasonably expended in responding to the sanctionable filings. Generally, this award of reasonable fees should not exceed those fees which would have been incurred had notice of the violation been brought promptly.** Cf. Fetzer, at 148-53, 859 P.2d 1210 (discussing factors to be used in deciding on reasonable attorneys fees under RCW 4.28.185(5)). It is clear from the record that the trial court’s primary goal in entering these sanctions was to compensate Vail, whereas Bryant makes clear that CR 11 sanctions should be

limited to the minimum necessary, and should not be used as a fee-shifting mechanism. Bryant, 119 Wn.2d at 220, 225, 829 P.2d 1099.

Finally, in imposing CR 11 sanctions, **it is incumbent upon the court to specify the sanctionable conduct in its order.** The court must make a finding that either the claim is not grounded in fact or law and the attorney or party failed to make a reasonable inquiry into the law or facts, or the paper was filed for an improper purpose. CR 11. See, also, Bryant, at 219-20, 829 P.2d 1099. In this case, there were no such findings.

Accordingly, we must remand this case once again to the trial court to: **(1) make explicit findings as to which filings violated CR 11, if any, as well as how such pleadings constituted a violation and (2) impose an appropriate sanction for any such violation, which may include the amount of Vail's attorney fees incurred in responding specifically to the sanctionable conduct.**^{FN3} The burden is on the movant to justify the request for sanctions. . . .

FN3 Further, if the trial court finds that attorney fees are appropriate, **they are to be limited to at most the fees actually expended in responding to the sanctionable conduct, and should be further limited by the apparent absence of any attempts at mitigation on the part of Vail.**

In the instant case:

- In his inadequate motion for CR 11 sanctions, [CP 1284-88] MR. HIMSL utterly failed to specify precisely **which** of MONTECITO'S causes of action allegedly violated CR 11. As discussed above, in its *Memorandum Decision*, the trial addressed a grand total of only two of MONTECITO'S original causes of action (and those both wrongly).
- In his inadequate motion for CR 11 sanctions, MR. HIMSL utterly failed to specify precisely **how** each of MONTECITO'S allegedly violative causes of action actually violated CR 11. In its *Memorandum Decision*, the trial court did not address this requirement, either.
- In his inadequate motion for CR 11 sanctions, MR. HIMSL utterly

failed to identify **what precise fees** he actually incurred in specifically responding to MONTECITO'S individual, allegedly violative, causes of action; instead, MR. HIMSL merely submitted his total cost bill for the entire case.

- In his inadequate motion for CR 11 sanctions, MR. HIMSL utterly failed to address the issue of **the effect of MR. HIMSL'S failure to mitigate** (as evidenced by his not even first filing his motion for attorneys' fees pursuant to CR 11 until **March 9, 2011** – i.e., more than 2 years and 5 months after this action was originally filed against him). In its *Memorandum Decision*, the trial court also did not address this requirement; instead, the trial court merely awarded CR 11 sanctions to the extent of 75% of MR. HIMSL'S total cost bill for the entire case. In this final regard, again, "CR 11 is not meant to act as a **fee shifting mechanism**, but rather as a **deterrent** to frivolous pleadings. . . . In deciding upon a sanction, the trial court should impose the **least severe sanction** necessary to carry out the [deterrence] purpose of the rule. Bryant, at 225, 829 p.2d 1099." Biggs v. Vail, *supra*, at 197, 876 P.2d 448 (with emphases added).

These errors & omissions by MR. HIMSL and the trial court demonstrate that the trial court's imposition of CR 11 fees against MS. TRUJILLO, MONTECITO, and Mr. Bolliger actually constitute an impermissible **fee-shifting** mechanism for the benefit of the prevailing party at the trial-court level, MR. HIMSL. (This conclusion is reinforced by the fact that, earlier in its *Memorandum Decision*, [CP 880-84] the trial court ruled it could not impose attorneys' fees against MS. TRUJILLO or Mr. Bolliger on grounds of the parties' contract – and it could not impose fees against MS. TRUJILLO, MONTECITO, or Mr. Bolliger on grounds of RCW 4.85.185.⁴)

⁴ In other words, the only entity against whom the court awarded non-CR 11 attorneys' fees was MONTECITO – and that was pursuant to the parties' *Exclusive Sale and Listing Agreement*. The problem this presents for MR. HIMSL is that, as a result of MR. HIMSL'S 35 unlawfully filed liens, MONTECITO is now insolvent. Thus, as a practical matter, MR. HIMSL is never going to get any attorneys' fees from MONTECITO. As such, in order to provide MR. HIMSL the attorneys' fees it deemed MR. HIMSL should get (from either or both of MS. TRUJILLO and Mr. Bolliger, both of whom work), the trial court engaged in impermissible **fee shifting**, ostensibly on grounds of CR 11.

F. In Imposing CR 11 Sanctions, The Trial Court Failed To Reduce The Amount Of The Sanction Imposed On Grounds Of MONTECITO'S Voluntarily Dismissed Causes Of Action – Which Voluntary Dismissals Were Entered By MONTECITO Months Before MR. HIMSL Ever Filing A CR 11 Motion With Respect To Those Causes Of Action

In Biggs v. Vail, supra, at 199-200, the Supreme Court of Washington also held as follows (with emphasis added):

The violation of Rule 11 is complete upon the filing of the offending paper; hence, an amendment or withdrawal of the paper, or even a voluntary dismissal of the suit, does not expunge the violation, **although such corrective action should be used to mitigate the amount of sanction imposed.** See Cooter & Gell, 496 U.S. at 395, 110 S.Ct. at 2455-56. . . .

Moreover, the following was held in Biggs v. Vail, at 203 (Andersen, C.J., dissenting):

I agree with the majority opinion that a trial court may, in some circumstances, impose sanctions under CR 11 even after a judgment has been entered. See Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990), holding the trial court had jurisdiction to impose sanctions pursuant to Fed.R.Civ.P. 11 (Rule 11) after the action was voluntarily dismissed, where defendant had filed a motion for Rule 11 sanctions prior to dismissal. Here, however, the motion for sanctions in issue was not even brought until nearly 5 years after the offending pleading was filed. . . .

Similarly, in the instant case, MR. HIMSL'S CR 11 motion was not filed until **March 9, 2011** – nearly 2½ years after MONTECITO'S complaint was filed – and not until **months after** MONTECITO had voluntarily

dismissed its causes of action with its 2nd and 3rd amended more definite statements. In its *Memorandum Decision*, the trial court failed to give these facts any mitigating consideration.

G. Neither MS. TRUJILLO Nor MONTECITO Was Ever Responsible For Any Filings In This Case – As Such, CR 11 Sanctions Should Not Be Imposed Against Them

Usually, CR 11 sanctions are imposed against an attorney, not the attorney's client(s). That said, the following was held in Cooke v. Burgner, 93 Wn.App. 526, 969 P.2d 127 (Div. 3 1999):

. . . . Rule 11 sanctions should be imposed directly on the party if the party is responsible for the frivolous filing. See Chevron, U.S.A., Inc. v. Hand, 763 F.2d 1184, 1187 (10th Cir. 1985); see also 5A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE §1336 (2D ED. 1990).

Here, leaving aside the material fact that MR. HIMSL identified no offending pleading with any particularity, neither MS. TRUJILLO nor MONTECITO ever was responsible for any filings in this case. MR. HIMSL has not demonstrated otherwise. As such, CR 11 sanctions should not have been imposed against either of MS TRUJILLO or MONTECITO.

H. Imposition Of Sanctions In The Event Of A CR 11 Violation Is Permissive, Not Mandatory

As mentioned above, when MR. HIMSL finally got around to seeking CR 11 sanctions in this case, MR. HIMSL argued in his briefing

as follows (with emphases added) [CP 1285]:

1. [MONTECITO’S] pleadings clearly violated CR 11, so that imposition of sanctions is **mandatory**.

.... Once a CR 11 violation occurs, the imposition of sanctions is **mandatory**. Miller[v. Bagley, 51 Wn.App. 285, 753 P.2d 530 (1988)] at 300.

Here, MR. HIMSL falsely represented the law to the trial court. See, e.g., Biggs v. Vail, supra, fn. 1, in which the Supreme Court observed as follows:

CR 11 was recently amended to change the mandatory “shall impose” language to the more permissive “may impose.” 122 Wn.2d 1102 (1993).

This was a material misrepresentation on MR. HIMSL’S part because the trial court adopted the misrepresentation. In its *Memorandum Decision*, [CP 886] the trial court incorrectly stated as follows (with emphasis added):

.... Once a court determines that CR 11 has been violated, the imposition of sanctions is **mandatory**. Miller v. Bagley, supra.

Thus, despite MR. HIMSL’S false “mandatory” assertion (citing a case which pre-dated the pertinent revision to CR 11 over eighteen years ago), CR 11 does not require the trial court to impose CR 11 sanctions in this – or any other – case.

I. MR. HIMSL Should Not Be Awarded CR 11 Attorneys' Fees With Respect To The Significant Amount Of Time He Spent In His Losing Efforts In This Case

MR. HIMSL spent an enormous amount of time (including by engaging in extensive discovery⁵) in his losing effort to defeat MONTECITO'S *Motion for Declaratory Judgment*, in which, as mentioned above, the trial court ultimately ruled "(1) at all times material to this case, the Montecito Estates residential subdivision was not "commercial real estate" within the meaning of RCW chapter 60.42 and, (2) therefore, the RCW chapter 60.42 liens MR. HIMSL and THE EVERETTS recorded as to all 35 lots in the Montecito Estates residential subdivision on or about August 2, 2006 were unlawfully recorded pursuant to RCW chapter 60.42." MR. HIMSL'S substantial efforts in this regard included his unsuccessful bringing of his cross motion for summary judgment with respect to MONTECITO'S successful *Motion for Declaratory Judgment*. However, there is no indication in the trial court's *Memorandum Decision* that MR. HIMSL is unentitled to the substantial amount of attorneys' fees he expended in his losing effort concerning these issues which are fundamental to the case.

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⁵ Mr. Bolliger originally calendared MONTECITO'S *Motion for Declaratory Judgment* for hearing in **mid-December of 2009**. [CP 17-18] However, MR. HIMSL'S attorneys successfully persuaded the trial court to de-calendar that motion until the **November 30, 2010** hearing, so MR. HIMSL'S attorneys could engage in the extensive discovery they claimed they needed to engage in – in order to be able to oppose MONTECITO'S *Motion for Declaratory Judgment*. During the ensuing 11½ months, MR. HIMSL'S attorneys did, indeed, engage in extensive discovery against MONTECITO.

J. With Respect To Each And Every Cause Of Action MONTECITO Filed Against MR. HIMSL, Neither MONTECITO'S Sole Principal (MS. TRUJILLO), Nor Mr. Bolliger, Ever Had Any Intention In This Case Of Filing Those Claims Against MR. HIMSL Vindictively In Bad Faith – Or To Advance Those Claims Against MR. HIMSL For Purposes Of Delay, Harassment, Nuisance, Or Spite

The trial court conclusorily stated as follows in its *Memorandum Decision* [CP 890]:

. . . . It is obvious that these claims were filed vindictively in bad faith, and were advanced for purposes [of] harassment, nuisance, and spite. . . .

There is not a scintilla of evidence in this case to support this “obvious” conclusion by the trial court. Indeed, from the moment MONTECITO’S sole principal, MS. TRUJILLO, first made contact with Mr. Bolliger about this case, neither of them has ever communicated with each other about having any such motivation (nor delay) for suing MR. HIMSL or for naming any causes of action against him. [CP 841] Moreover, in performing his strategy-planning duties as MONTECITO’S lawyer throughout this case, Mr. Bolliger never has so much as contemplated any such motive in formulating any strategy against MR. HIMSL. [CP 841] The trial court’s aforequoted conclusion is absolutely, positively incorrect and without any evidentiary basis.

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K. Bolliger Law Offices Has Expended Considerable Time And Expenses On This Case – Time And Expenses His Law Office Would Not Invest For Purposes Of Bad Faith, Delay, Harassment, Nuisance, Spite, Or Vindictiveness

Bolliger Law Offices is a corporate entity: “Bolliger Law Center, Inc. dba Bolliger Law Offices” – a three-attorney office. To date, Bolliger Law Offices has expended upwards of one hundred sixty nine thousand seven hundred eighty three dollars (\$169,783) of attorney time in this case – and it has advanced upwards of nineteen thousand nine hundred fifty one dollars (\$19,951) in expenses for this case. [CP 841-42] Moreover, from month to month, Bolliger Law Offices averages (not “profits”) only about twenty thousand dollars (\$20,000) in its bank account (after payment of all its business expenses). Mr. Bolliger would not invest so much of Bolliger Law Office’s time and money for purposes of delay, harassment, nuisance, spite, or vindictiveness – not in this, or any other, case. The imposition of \$165,011.52, plus 12% interest, in CR 11 sanctions against Mr. Bolliger would effectively **put Bolliger Law Offices out of business, put its six (6) employees out of work, and cause its clients to have to seek other representation.**

L. There Is No Evidence That Either Mr. Bolliger Or MS. TRUJILLO Ever Advanced Any Falsehood In This Case

No facts verified by MS. TRUJILLO in any of her signed pleadings or declarations have been shown to be false. No facts asserted by MS. TRUJILLO in either of her two deposition sessions have been shown to be

false. No facts asserted by Mr. Bolliger in any of his declarations have been shown to be false. To Mr. Bolliger's knowledge, none of those facts is false. Both MS. TRUJILLO and Mr. Bolliger have always been truthful in this case. As such, the imposition of CR 11 sanctions against either of them – or MONTECITO – is not justified on grounds of their respective veracities in this case.

M. Any Sanctions Imposed Against MONTECITO'S Attorneys In This Case Would Have To Be Imposed Against "Bolliger Law Center, Inc. dba Bolliger Law Offices" – Not Against Mr. Bolliger Personally

As mentioned, Mr. Bolliger's law practice is a corporate entity: Bolliger Law Center, Inc., dba Bolliger Law Offices. The corporation was formed on **February 25, 2008** – a full seven (7) months before the corporation filed the original complaint for MONTECITO in the '08 case. [CP 842] Ever since the inception of the corporation, like the other attorneys in the office, Mr. Bolliger has been an **employee** of Bolliger Law Offices. All acts and omissions attributable to Mr. Bolliger in this lawsuit were engaged in by Mr. Bolliger only in his capacity as an employee-attorney of the corporate-entity law practice – not in his individual or personal capacity. [CP 843] There are no facts present which would justify piercing the corporate veil of Bolliger Law Center, Inc. dba Bolliger Law Offices. Accordingly, any sanctions imposed against MONTECITO'S attorneys in this case would have to be imposed against "Bolliger Law Center, Inc. dba Bolliger Law Offices" – not against Mr.

Bolliger personally. However, the trial court's aforementioned *Judgment* imposes CR 11 sanctions against Mr. Bolliger personally.

N. Any Sanctions Imposed Against Mr. Bolliger's Client In This Case Would Have To Be Imposed Against MONTECITO – Not Against MS. TRUJILLO Personally

At all times material to this case, MONTECITO has been an LLC: Montecito Estates, LLC. All acts and omissions attributable to MS. TRUJILLO in this lawsuit were engaged in by MS. TRUJILLO only in her capacity as the managing member of MONTECITO – not in her individual or personal capacity. There are no facts present which would justify piercing the corporate veil of Montecito Estates, LLC. Accordingly, any sanctions imposed against Mr. Bolliger's client in this case would have to be imposed against "Montecito Estates, LLC" (i.e., MONTECITO) – not against MS. TRUJILLO personally. However, the trial court's aforementioned *Judgment* imposes CR 11 sanctions against MS. TRUJILLO personally.

O. In His 19 Years Of Law Practice, Neither Mr. Bolliger Nor Any Of His Clients Has Ever Had CR 11 Sanctions Imposed Against Them

Mr. Bolliger has been practicing law for over 19 years – since 1992. Mr. Bolliger is admitted to the practice of law in five states: CA, CO, ID, OR, and WA – having passed the bar exam in every one of those states except CO (where he was "waived in on motion" by the Colorado

Supreme Court, because of his high test score on the CA bar exam). In those 19 years, opposing attorneys have averred a CR 11 claim in pleadings against Mr. Bolliger and his clients many times. (The Court can take judicial notice of the fact that CR 11 sanctions are often averred and moved for by litigants. Indeed, in this case, defendants THE EVERETTS, THE CURNUTTS, and CHICAGO TITLE each averred CR 11 sanctions against MS. TRUJILLO, MONTECITO, and Mr. Bolliger. The trial court denied the same with respect to THE EVERETTS and THE CURNUTTS. MONTECITO and CHICAGO TITLE settled this case as between themselves, so CHICAGO TITLE'S CR 11 issue never was litigated.)

Never once has any court, federal or state, ever imposed CR 11 sanctions against Mr. Bolliger or any of his clients. Mr. Bolliger does not claim he is always perfect, only that he always strives to be very careful in implementing his litigation strategies.

Clearly, Mr. Bolliger is not the kind of lawyer against whom CR 11 sanctions most often lie: the “vexatious lawyer.”

P. Mr. Bolliger Had A Duty To Avoid Committing Malpractice And A Duty To Avoid Ethical Violations In Initially Setting Forth MONTECITO'S Causes Of Action Against MR. HIMSL; Now, The Trial Court's Imposition Of CR 11 Sanctions Place MS. TRUJILLO, MONTECITO, And Mr. Bolliger In An Untenable Position With Respect To Appealing MONTECITO'S Meritorious Causes Of Action Dismissed By The Trial Court

As the foregoing discussions demonstrate, MS. TRUJILLO,

MONTECITO, and Mr. Bolliger had both facts and law on their side when they originally filed all their causes of action against MR. HIMSL. In fact, as for Mr. Bolliger, he would have been committing not just malpractice (under the doctrine of res judicata), but also ethical violations, had he not initially named all causes of action which MONTECITO meritoriously could bring in this suit against MR. HIMSL. See, e.g., RPC 1.1 (“Competence”) and RPC 1.3 (“Diligence”).

Because of the “chilling effect” of the trial court’s imposition of CR 11 sanctions against MS. TRUJILLO, MONTECITO, and Mr. Bolliger – after those sanctions were imposed – Mr. Bolliger initially felt inclined to withdraw from representing MS. TRUJILLO and MONTECITO any further in this case. However, the aforementioned legal and ethical requirements militate against Mr. Bolliger just “pulling the plug” on his clients and withdrawing from representing them any further. (A case of this magnitude and complexity cannot merely be “handed off” to some new lawyer for appeal and follow-on proceedings.) Mr. Bolliger therefore regards himself as obligated to appeal the trial court’s imposition of CR 11 sanctions and the dismissal of MR. HIMSL from this lawsuit – yet, in so doing, Mr. Bolliger must take the risk that further sanctions will be lodged against MS. TRUJILLO, MONTECITO, and himself for doing so.

Ironically, because Mr. Bolliger was duty bound to have named all the causes of action which meritoriously could have been brought against MR. HIMSL (to avoid committing malpractice and ethical violations), the

trial court's imposition of CR 11 sanctions against MS. TRUJILLO and MONTECITO has given breath to a malpractice claim of MS. TRUJILLO and MONTECITO against Mr. Bolliger. (Indeed, for the first time in his 19+ years of practice, Mr. Bolliger has had to put his E&O carrier on notice of the trial court's \$165,011.52, plus 12% interest, judgment against MS. TRUJILLO and MONTECITO.) Thus, it fairly can be said that the trial court's imposition of CR 11 sanctions against MS. TRUJILLO and MONTECITO needlessly has resulted in Mr. Bolliger being caught between a malpractice rock and a malpractice hard place. Mr. Bolliger respectfully submits **that is not an intended purpose of CR 11.**

Q. The Trial Court Committed Error In Awarding Fees, In Favor Of MR. HIMSL And Against MONTECITO, On Grounds Of The Parties' Exclusive Sale And Listing Agreement

With its *Memorandum Decision* and subsequent *Judgment*, the trial court imposed attorneys' fees and costs against MONTECITO, and in favor of MR. HIMSL, pursuant to the parties' *Exclusive Sale and Listing Agreement*. [CP 880-82] Moreover, in the *Findings of Fact and Conclusions of Law*, [CP 849-57] the trial court certified not only the CR 11 issue – but this issue, too – for an immediate appeal.

In the briefing relating to the consolidated appeal, infra, MONTECITO will establish the trial court's dismissal of its breach of contract cause of action was erroneous. As such, this Court should reverse

the trial court's award of attorneys' fees, in favor of MR. HIMSL and against MONTECITO, on grounds of the parties' *Exclusive Sale and Listing Agreement*.

R. With Respect To What This Appeal Is All About – The Trial Court's Wrongful Imposition Of CR 11 Sanctions Against MS. TRUJILLO, MONTECITO, And Mr. Bolliger – They Request An Award Of Attorneys' Fees On Appeal Pursuant To RAP 18.1, The *Exclusive Sale and Listing Agreement*, and CR 11

Paragraph 12 of the parties' *Exclusive Sale and Listing Agreement* [CP 71] contains a prevailing-party attorneys' fees clause. Besides that, the title to this section speaks for itself.

IV. CONCLUSION RE: CR 11 SANCTIONS

The trial court had no justification whatsoever to impose CR 11 sanctions with respect to MONTECITO'S voluntarily dismissed causes of action – because the merits (let alone the frivolousness) of those causes of action never have been briefed by MONTECITO or by MR. HIMSL.

After declaring as a matter of law that MR. HIMSL unlawfully recorded his 35 liens against the chain of title to MONTECITO'S residential subdivision property, it was erroneous for the trial court to dismiss MONTECITO'S 5 remaining causes of action seeking redress for MR. HIMSL'S unlawful actions – particularly where, as here, the jury easily could find MR. HIMSL recorded his 35 unlawful liens only for

retaliatory and extortionary purposes (because he was not entitled to even a single commission with respect to the project). It then was doubly erroneous for the trial court to impose CR 11 sanctions against MS. TRUJILLO, MONTECITO, and Mr. Bolliger on account of four (4) of those 5 remaining causes of action. The point is that, even though the instant appeal is not the place to demonstrate the abundant merits of MONTECITO'S 5 remaining causes of action, it should be clear from the briefing above that none of them is violative of CR 11.

Based upon the foregoing, MS. TRUJILLO, MONTECITO, and Mr. Bolliger respectfully request that the Honorable Court of Appeals (1) reverse the trial court's imposition of CR 11 sanctions against each of them and (2) reverse the trial court's imposition of fees against MONTECITO on grounds of the parties' contract – and award them the attorneys' fees and costs they have had to incur in connection with this appeal.

MS. TRUJILLO, MONTECITO, and Mr. Bolliger further submit the Court should not remand any CR 11 issue to the trial court. MR. HIMSL already had his bite at the apple in terms of trying to perfect his motion for CR 11 sanctions in accordance with the legal authorities discussed above – and he clearly failed to do so.⁶ The Court should deem

⁶ Indeed, it was MR. HIMSL – not MONTECITO – who drafted the form of the *Findings of Fact and Conclusions of Law* at issue, which contains the words “. . . there is no just reason for delay in entering final judgment on this award of attorney fees, as provided by CR 54(b)” – thereby requiring MS. TRUJILLO, MONTECITO, and Mr. Bolliger to immediately appeal the CR 11 sanctions.

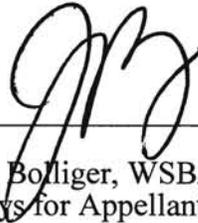
MR. HIMSL'S failure in this regard as a waiver. MS. TRUJILLO, MONTECITO, and Mr. Bolliger should not have to be subjected to further litigation on this (itself frivolous) issue. Alternatively – and for the same (waiver) reason – if the Court deems it preferable to remand the CR 11 issue, the Court should direct that the trial court, on remand, must not allow any new filings on the subject – and, instead, apply the above-mentioned principles of law to the record as it presently exists.

Thank you for your time.

DATED this 23 day of February, 2012.

BOLLIGER LAW OFFICES

By: _____



John C. Bolliger, WSBA No. 26378
Attorneys for Appellants

V. ASSIGNMENT OF ERROR RE: LAWSUIT DISMISSAL

The trial court, by and through the Honorable David Frazier, visiting judge of the Benton County Superior Court, erred when it granted MR. HIMSL'S motion for summary judgment, thereby dismissing MONTECITO'S following causes of action:

- breach of contract and
- breach of statutory duties of a real estate agent under RCW chapter 18.86, including, without limitation, the duties of a licensee pursuant to RCW 18.86.030, the duties of a seller's agent pursuant to RCW 18.86.040, and the duties of a dual agent pursuant to RCW 18.86.060.⁷

⁷ As mentioned in the briefing relating to the CR 11 issues, *supra*, with its voluntary dismissal of certain of its causes of action, MONTECITO preserved only 5 causes of action against MR. HIMSL. The trial court dismissed those 5 causes of action on summary judgment. It originally was MONTECITO'S intention to appeal the dismissal of all 5 of those causes of action. However, Mr. Bolliger knew the briefing on all 5 (and other matters mentioned below) would exceed the 50-page limit, stated in the rules of appellate procedure, for an appellants' opening brief. For this reason, a couple of months ago, Mr. Bolliger initiated a telephone conference with the Honorable Renee S. Townsley, Clerk of the Court. Mr. Bolliger inquired whether there was some mechanism of the Court's rules or practice by which he, at that time, could alert the Court that this appeal would likely require upwards of 100 pages for the appellants' opening brief – and thereby seek up-front approval to file such a lengthy brief. Ms. Townsley informed Mr. Bolliger that there was no such rule or practice of the Court – and that the only way to seek leave to file an overlength brief was to file a motion therefor along with the appellants' opening brief itself (a motion which, of course, might be denied). Ms. Townsley elaborated that, very recently before the telephone conference, the Honorable Judges of the Court had provided her a memo to the effect of stressing the importance of her office enforcing the page limitations set forth in the rules. Based upon this discussion, Mr. Bolliger and MS. TRUJILLO decided not to pursue those 3 causes of action (of MONTECITO'S remaining 5 against MR. HIMSL) which involve associated wrongdoing on the part of MR. HIMSL'S original attorneys in this case, THE EVERETTS – so that MONTECITO would be able to adequately brief the main 2 causes of action against MR. HIMSL within the 50-page limit. This is why MONTECITO is here appealing the dismissal of only 2 of its remaining causes of action against MR. HIMSL, rather than all 5 of them. This decision has nothing whatsoever to do with any perceived lack of merits regarding MONTECITO'S other 3 causes of action against MR. HIMSL.

Because of the page limitation issue just discussed, MONTECITO also has had to abandon on appeal its original desire to get its "tort" causes of action reinstated. Here, too, this decision has nothing whatsoever to do with any perceived lack of merits regarding MONTECITO'S "tort" causes of action against MR. HIMSL.

Because of the page limitation issue just discussed, MONTECITO also had to abandon its desire to appeal the

VI. STATEMENT OF THE CASE RE: LAWSUIT DISMISSAL⁸

On **June 10, 2004**, MS. TRUJILLO formed MONTECITO in order to develop and improve the Montecito Estates residential subdivision. MONTECITO fully developed the Montecito Estates residential subdivision property. This included getting the 35 lots surveyed and defined, installing electrical service, water service, sewer service, storm drains, telephone service, tv service, streets, sidewalks, street lighting, and etc. for the residential subdivision and its 35 lots. It necessitated MONTECITO widening the SR-22 highway to create an off-ramp from the highway to access the residential subdivision. It also necessitated MONTECITO installing a sanitary sewer pipeline underneath the SR-22 highway. MONTECITO obviously had to undertake an abundance of coordination, and obtain an abundance of approvals, from the Washington State Department of Transportation to accomplish these latter two installations involving SR-22. By the time MONTECITO lost the project and property because of the actions of MR. HIMSL here sued upon, MONTECITO already had built four (4) new homes in the residential subdivision.

trial court's summary dismissal of THE CURNUTTS.

Because of the page limitation issue just discussed, MONTECITO also had to abandon its desire to appeal the trial court's summary dismissal of THE EVERETTS.

⁸ Except where noted otherwise, all facts set forth in this section are taken from MONTECITO'S *Memorandum of Law in Opposition to Defendant Himsl's Second Motion for Summary Judgment*. [CP 328-62, 575-78]

At all times material hereto, MR. HIMSL has been a licensed residential real estate broker. On **December 6, 2005**, MONTECITO contracted with MR. HIMSL to provide real estate brokerage services to MONTECITO – to sell the homes MONTECITO was building in the Montecito Estates residential subdivision. The term of the contractual relationship between MONTECITO and MR. HIMSL was to run through December 31, 2006 (i.e., just over one year). A copy of the 12/6/05 *Exclusive Sale and Listing Agreement* between MONTECITO and MR. HIMSL is attached as [CP 69-72]. As Exhibit A to the *Exclusive Sale and Listing Agreement* reveals, the parties agreed MR. HIMSL would be entitled to the following commission rates for his sales of homes in the Montecito Estates residential subdivision (with original emphases):

1. 5% ON ALL **“MERLOT HOME PACKAGES.”**
2. 4.5% ON ALL **“SAVIGNON HOME PACKAGES.”**
3. 4% ON ALL **“CABERNET HOME PACKAGES.”**
4. 3.5% ON ALL **“PINOT HOME PACKAGES.”**
5. 3.5% ON ALL **“ZINFANDEL HOME PACKAGES.”**
6. 3.5% ON ALL **“CHARDONNAY HOME PACKAGES.”**

On **May 1, 2006** – apparently anticipating MONTECITO was going to fire him for his inadequate performance under his 12/6/05 *Exclusive Sale and Listing Agreement* with MONTECITO (which firing subsequently occurred, as discussed more fully in the following paragraph) – MR. HIMSL sought advice on the subject from the Legal Assistance Hotline of the Washington Association of Realtors (“the Hotline”). MR. HIMSL’S 5/1/06 e-mail message to the Hotline asked “Can a seller

unilaterally terminate a listing agreement?" In its 5/1/06 e-mail response, the Hotline answered MR. HIMSL in pertinent part as follows: [CP 87-89]

. . . . The answer to this question must be thought of in two phases: the listing agreement is (1) a contractual obligation that [MONTECITO] cannot unilaterally terminate[] and (2) an agency relationship that [MONTECITO] can terminate.

[MONTECITO has] a contractual obligation to pay a commission to [MR. HIMSL] if the[] property sells during the term of the listing agreement. [MONTECITO] cannot unilaterally terminate that contractual obligation.

However, [MONTECITO does] have the right to terminate [its] agency relationship with [MR. HIMSL] if [it] choose[s] to do so. That ability, however, is rather hollow. It does not terminate the contractual obligation to pay a commission if the property sells. Accordingly, if [MR. HIMSL] agreed to terminate the agency relationship with [MONTECITO], as he would be obligated to do upon [MONTECITO'S] request, and still the property sold during the term of the original listing or safe harbor period, [MONTECITO] would owe a commission to [MR. HIMSL]. . . .

On **May 8, 2006**, finding itself extremely dissatisfied with MR. HIMSL'S inadequate performance under the parties' 12/6/05 *Exclusive Sale and Listing Agreement*, MONTECITO wrote MR. HIMSL an e-mail message, [CP 90-91] effectively terminating MR. HIMSL'S agency relationship with respect to the Montecito Estates residential subdivision, with the following words:

. after much consideration, I am canceling our contract dated 12-6-2005 due to unsatisfactory performance and your agencies limited experience in marketing and new home sales.

Also on **May 8, 2006**, MR. HIMSL wrote a responsive letter to MONTECITO, [CP 92-93] in which MR. HIMSL stated in pertinent part as follows (with original emphases):

If you are wishing to terminate the **Agency relationship** with this company, then I will comply, however the **contractual obligation** to pay commission will be in force through December 31, 2006.

I will remove signs and cease all advertising.

On **August 2, 2006**, MR. HIMSL caused an 8-page lien package to be recorded on the chain of title to **each** of the 35 lots in the Montecito Estates residential subdivision [CP 100-08] – purportedly under authority of RCW chapter 60.42, the *Commercial Real Estate Broker Lien Act*, even though the Montecito Estates residential subdivision is **residential** real estate, not **commercial** real estate. As that lien package reveals, the amount of the lien claimed against each of the 35 lots is “5% of total purchase price of home package.”

On **December 31, 2006**, the 12/6/05 *Exclusive Sale and Listing Agreement* between MONTECITO and MR. HIMSL expired by its own terms. By that date, **not a single home had sold, and no home presently was under contract to sell, in the Montecito Estates residential subdivision – i.e., MR. HIMSL was not entitled to receive a commission with respect to any home in the 35-lot residential subdivision.** Despite this fact – and despite the fact that MONTECITO up

to that date, and on several subsequent occasions, demanded that MR. HIMSL do so, MR. HIMSL unlawfully refused to release the 35 liens on the Montecito Estates residential subdivision until after MONTECITO had lost the property on 11/5/07 as discussed below.

Although the 12/6/05 *Exclusive Sale and Listing Agreement* between MONTECITO and MR. HIMSL expired by its own terms on **December 31, 2006**, it contains the following provision in its ¶ 3 (titled “COMMISSION”) (with emphasis added):

If (a) Broker procures a Buyer on the terms in this Agreement, or on other terms acceptable to Seller; or (b) Seller directly or indirectly or through any person or entity other than Broker, during the term hereof, sells the Property; then seller will pay Broker [the agreed-upon] commission **Further, if Seller shall, within ___ days (180 days if not filled in) after the expiration of this Agreement, sell the Property to any person to whose attention it was brought through signs, advertising or other action of Broker, or on information secured directly or indirectly from or through Broker, during the term of this Agreement, then Seller will pay Broker the above Commission.**

Thus, MONTECITO **potentially** could have owed MR. HIMSL a commission if any house sold within 180 days after December 31, 2006 – i.e., on or before **June 29, 2007**. That said, even by that date, **still it was the case that not a single home had sold, and no home presently was under contract to sell, in the Montecito Estates residential subdivision – i.e., MR. HIMSL was not entitled to receive a commission with respect to any home in the 35-lot residential subdivision.** Despite this

fact – and despite the fact that MONTECITO up to that date, and on several subsequent occasions, demanded that MR. HIMSL do so, MR. HIMSL unlawfully **still refused** to release the 35 liens on the Montecito Estates residential subdivision until after MONTECITO had lost the property on 11/5/07 as discussed below.

On **July 3, 2007**, MR. HIMSL’S attorney wrote Mr. Bolliger a letter, [CP 418-20] which asserted the following (with emphasis added):

... It should be clear my client has an open and shut case for breach of contract by [MS. TRUJILLO].” ...⁹

I have calculated out a reasonable expectation of profit for [MR. HIMSL], making certain assumptions. If we assume that [MR. HIMSL] sold all 35 lots at the same \$256,000 purchase price as the parties agreed to in [THE CURNUTTS’] sale we can figure his maximum and minimum commissions. Factoring those numbers at 5% per home site gives us a total of \$448,000 owed to [MR. HIMSL]. If we instead use 3.5% per home site we have a total of \$313,600 owed. Now obviously these numbers assume that each sale would have been for \$256,000 rather than the much higher prices [MS. TRUJILLO] had listed with various agents around the valley.

In an effort to avoid the costs of litigation, and in hopes to not delay any sales, **we will be willing, for settlement purposes only, to accept a settlement of \$300,000** with an agreement denying fault for all parties.

In other words, with this letter from his attorney, MR. HIMSL communicated his **ransom demand**: his refusal to release his 35 unlawful

⁹ This assertion clearly is a **falsehood** by MR. HIMSL’S attorney because MR. HIMSL was entitled to **no commissions** with respect to the project – because **not one home site ever sold** while MONTECITO owned the Montecito Estates residential subdivision.

liens unless MONTECITO, in exchange, would agree to pay \$300,000.00 – even though MR. HIMSL was entitled to **nothing**.

On **November 5, 2007**, MONTECITO was forced to exercise a *Deed in Lieu of Foreclosure* in favor of its lender – Specialty Services, Inc. – for the project. [CP 131-34] This is because – as a direct result of the 35 liens MR. HIMSL unlawfully recorded on, and unlawfully refused to release from, the residential subdivision – MONTECITO was unable to procure follow-on real estate brokerage services [CP 600-03, 622-30, 575-78] and follow-on financing [CP 631-37, 622-30, 575-78] for the project. MR. HIMSL did not release his 35 unlawful liens until he accomplished his objective, i.e., until **after MONTECITO lost the entire property and project** via the aforementioned *Deed in Lieu of Foreclosure*. [Undisputed] By this time, MONTECITO already had built four (4) homes in the subdivision. [Undisputed] As a consequence of losing the property and project, MONTECITO has incurred damages “of between nine hundred ninety four thousand dollars (\$994,000) and one million four hundred thousand dollars (\$1.4M).” [CP 622-30]

On **December 10, 2010**, the trial court entered its *Order Granting The Plaintiffs’ Motion for Declaratory Judgment and Declaratory Judgments*, which reads as follows:

////

ORDER

The Court has treated the plaintiffs' *Motion for Declaratory Judgment* as a motion for summary judgment. It is hereby ORDERED, ADJUDGED, and DECREED that the plaintiffs' *Motion for Declaratory Judgment* is GRANTED. The following *Declaratory Judgments* therefore shall be entered in this case.

DECLARATORY JUDGMENTS

The Court hereby DECLARES THE FOLLOWING TO BE THE LAW OF THIS CASE: (1) at all times material to this case, the Montecito Estates residential subdivision was not "commercial real estate" within the meaning of RCW chapter 60.42 and, (2) therefore, the RCW chapter 60.42 liens MR. HIMSL and THE EVERETTS recorded as to all 35 lots in the Montecito Estates residential subdivision on or about August 2, 2006 were unlawfully recorded pursuant to RCW chapter 60.42.

MR. HIMSL let the appeal period lapse without appealing the foregoing order and declaratory judgments.

Later, despite having held MR. HIMSL'S 35 liens were unlawful, the trial court dismissed on summary judgment MONTECITO'S breach of contract and statutory (RCW chapter 18.86) causes of action which are the subject of this appeal.

To this very day, MR. HIMSL continues to enjoy the listings for the Montecito Estates residential subdivision because – after causing MONTECITO to lose the property with his filing of his 35 unlawful liens – MR. HIMSL has procured those listings from subsequent owners of the property. [Undisputed]

VII. ARGUMENT RE: LAWSUIT DISMISSAL

A. **The Trial Court Erred When It Dismissed MONTECITO'S Breach Of Contract Cause Of Action, Which Is Based Upon The Parties' *Exclusive Sale And Listing Agreement***

1. **The Parties' *Exclusive Sale And Listing Agreement* Imposes Contract Duties Upon MR. HIMSL¹⁰**

First, MR. HIMSL twice answered MONTECITO'S complaint in this case: (1) one answer filed by his former attorneys and (2) another filed by his current attorneys. In **both** of those answers, **MR. HIMSL failed to state any affirmative defense with respect to this contractual "duty" element under the parties' contract.** CR 8(d), titled "Effect of Failure to Deny," sets forth in pertinent part as follows (with emphases added):

Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

Of course, MR. HIMSL is required to meet each and every averment of MONTECITO'S complaint in their answer to that complaint. See CR 7(a) ("There shall be a complaint and an answer") and CR 8(b) ("Denials shall

¹⁰ Again, the *Exclusive Sale and Listing Agreement* appears in the record at [CP 69-72]. All the arguments set forth in this section were provided to the trial court. [CP 373-89]

fairly meet the substance of the averments denied”). Indeed, decisional law states this requirement in different ways: see, e.g., Haslund v. Seattle, 86 Wn.2d 607, 547 P.2d 1221 (1976) (a party is not entitled to an instruction relating to an affirmative defense which he failed to plead as required by CR 8), Lord v. Miller, 86 Wn. 436, 150 P. 631 (1914) (special matters in defense must be affirmatively pleaded, and cannot be introduced under the general denial), and Bickford v. Seattle, 104 Wn.App. 809, 17 P.3d 1240 (2001), reconsideration denied, review denied by 144 Wn.2d 1019, 32 P.3d 284 (affirmative defenses are waived unless they are (1) affirmatively pleaded, (2) asserted in a motion to dismiss, or (3) tried by the express or implied consent of the parties). Because MR. HIMSL failed (or declined) to assert an affirmative defense as to this contractual **duty** element, MR. HIMSL has **waived** that defense.

Second, the Bickford decision just referred to indicates an affirmative defense still can pertain if it is “asserted in a motion to dismiss.” However, in MR. HIMSL’S motion for summary judgment, he again failed (or declined) to allege or discuss this contractual **duty** element at all (e.g., by denying he had any contractual **duty** under the parties’ contract). As such, for that reason, too, MR. HIMSL has **waived** that defense.

Third, in his motion for summary judgment, MR. HIMSL acknowledges he has a contractual **duty** of good faith and fair dealing with

respect to the parties' contract as follows (with emphases added): [CP 960]

There is in every contract an implied **duty** of good faith and fair dealing. This duty obligates the parties to cooperate with each other so that each may obtain the full benefit of performance. Metropolitan Park Dist. v. Griffith, 106 Wn.2d 425, 436, 723 P.2d 1093 (1986). The **duty** of good faith does not “inject substantive terms into the parties contract.” Rather, it requires only that the parties perform in good faith the obligations imposed by their agreements. Barret v. Weyerhaeuser Co. Severance Pay Plan, 40 Wn.App. 630, 635 n. 6, 700 P.2d 338 (1985).

....

Fourth, this **duty** element usually is given little – or no – discussion in the decisional law beyond acknowledging a valid contract exists between the parties. For example, in the Northwest Independent Forest Manuf's v. L&I, 78 Wn.App. 707, 899 P.2d 6 (1995) decision cited by MR. HIMSL for setting forth the three elements for a breach of contract action (“duty,” “breach,” and “damages”), the Court cursorily dealt with the contractual **duty** element as follows (with emphases added):

We turn first to duty. NIFM asserted before the Board and the superior court that DLI had a duty to administer the retrospective rating program in accordance with recognized insurance principles. **It asserts now that DLI's duty was . . . contractual by virtue of the contract formed in June or July 1985 We assume, without so holding, that these assertions are correct, and that NIFM established duty.** [fn. omitted]

Id. at 713. The real focus in decisional law generally is the second (“breach”) and third (“damages”) Northwest Independent elements.

Fifth, the parties' contract contains a contractual **duty** for MR. HIMSL "to make a bona fide continuous effort to procure a purchaser" because MR. HIMSL had an "exclusive" listing. Dixon v. Gustav, 51 Wn.2d 378, 318 P.2d 965 (1957).

Sixth, the expiration date set forth in ¶ 3 of the parties' contract was **December 31, 2006**. That said, the agreement went on to provide as follows (with emphasis added):

Further, if [MONTECITO] shall, within _____ days (180 days if not filled in) after the expiration of this Agreement, sell the Property to any person to whose attention it was brought through the signs, advertising or other action of [MR. HIMSL], or on information secured directly or indirectly from or through [MR. HIMSL], **during the term of this Agreement**, [MONTECITO] will pay [MR. HIMSL] the above commission.

In other words, if a sale occurred any time up to (and including) **June 29, 2007** – wherein the buyer was led to the sale by the stated efforts of MR. HIMSL which **occurred on or before December 31, 2006**, MR. HIMSL would be entitled to his commission for that sale. About this, the following is set forth in 18 Wash. Prac., Real Estate, § 15.6 (2d ed.) (with emphasis added):

Listing agreements often contain a clause providing that, for a further period of time after the duration of the listing, such as for an additional 90 days, the broker is entitled to a commission if a sale is made to a buyer whom the broker introduced during the listing period. . . . They are enforceable in Washington. [fn. omitted] To identify

without cavil those persons whom the broker has located, the clause should provide that the broker shall have made their identity known to the seller before expiration of the listing period.

Thus, because MR. HIMSL is claiming (via counterclaim) in this lawsuit he lost commissions on purchasers he allegedly procured during the 180-day, post-expiration period, MR. HIMSL had a contractual **duty** to make those purchasers' identities known to MONTECITO before the expiration of the listing agreement at the end of **December 31, 2006**.

Seventh, the parties' contract contains a contractual **duty** for MR. HIMSL not to assert a right to a commission regarding THE CURNUTTS' aborted purchase (by filing his RCW chapter 60.42 lien against the MONTECITO lot THE CURNUTTS had intended to buy). In 18 Wash. Prac., Real Estate, § 15.8 (2d ed.), the following is stated:

. it is clear that if the earnest money agreement contains a condition to closing, such as the familiar clause allowing a buyer to terminate if he cannot obtain certain financing, and the buyer rightfully refuses to close because this condition cannot be met, **then the broker is not entitled to a commission.**

The *Real Estate Purchase and Sale Agreement* between THE CURNUTTS and MONTECITO contains several "contingency" clauses. MR.

CURNUTT explains the following in his **January 2, 2011** declaration:

[CP 2460]

6. The Purchase and Sale Agreement had a number of contingencies that were never met, and so we elected under the terms of the Agreement to terminate the Agreement. The contingencies that were not met were:

- a. We were unable to sell our residence in Idaho Falls.
- b. Financing at the identified rate was not available.

As THE CURNUTTS' agent for the planned purchase, MR. HIMSL knew, of course, that THE CURNUTTS were claiming these two contingencies failed to materialize. As such, MR. HIMSL would not have been entitled to a commission on THE CURNUTTS' rescinded purchase – and MR. HIMSL therefore had a contractual **duty** not to assert a right to a commission (by unlawfully filing his RCW chapter 60.42 lien against the MONTECITO lot THE CURNUTTS had intended to buy).

Eighth, MR. HIMSL had a contractual **duty** not to commit any unlawful acts in his performance of the parties' contract. See, e.g., Calhoun, Denny & Ewing v. Whitcomb, 90 Wn. 128, 155 P. 759 (1916). In Calhoun, the following jury instruction was given by the trial court, excepted to on appeal, and approved by the Supreme Court of Washington (with emphases added):

If there appears in the case any claim that there was anything in connection with **the carrying out of the written [broker agreement] which would have involved any fraudulent or unlawful act**, there are two principles of law to be remembered in this connection. One is that **the law always presumes that a contract is to be carried out lawfully if a lawful performance** is possible, and therefore will not adjudge a contract unlawful **unless its performance necessarily involves an illegal or**

fraudulent act, or the evidence shows that an illegal or fraudulent act was intended, the presumption being in favor of the lawfulness and bona fides of contracts and transactions. The other principle is that a broker employed as a middleman between two parties and who renders the agreed service is entitled to his commission even though the parties to the main transaction, or either of them, contemplate a violation of the law or the commission of a fraud, **unless the broker or middleman knowingly participated in some way in the illegality or fraud.**

Thus, MR. HIMSL had a contractual **duty** not to commit any unlawful acts in his performance of the parties' contract.

Based upon the foregoing, MR. HIMSL owed numerous contract duties to MONTECITO pursuant to the parties' *Exclusive Sale and Listing Agreement*.

2. MR. HIMSL Breached Every On Of His Aforementioned Contract Duties

MR. HIMSL breached his foregoing duties prior to getting fired by MONTECITO by failing "to make a bona fide continuous effort to procure a purchaser" (see, Dixon v. Gustav, *supra*), e.g., by **unreasonably**

- refusing to have a weekly sales meeting with MONTECITO,
- refusing to put out any signs at the Montecito Estates residential subdivision for the first several months,
- refusing to adequately make the floor-plan flyers,
- refusing to adequately staff the model home,

- stalling in getting the artwork to the designer for the website, and
- after MS. TRUJILLO executed the *Exclusive Sale and Listing Agreement* with MR. HIMSL, his demeanor worsened and he became very argumentative about everything – to the point it became nearly impossible for MS. TRUJILLO to have a conversation with him about anything. [CP 378-79, 575-78]

Whereas the foregoing breaches certainly serve to justify MONTECITO’S firing of MR. HIMSL, it bears recalling here that – pursuant to both the Hotline’s advice to MR. HIMSL and RCW 18.86.070, titled “Duration of agency relationship” – MONTECITO could terminate its agency relationship with MR. HIMSL **without needing any justification therefor.**¹¹

MR. HIMSL continued to breach his foregoing duties after getting fired by MONTECITO, e.g., by

- unlawfully filing an RCW chapter 60.42 lien against THE CURNUTTS’ lot on **August 2, 2006**, a lot for which he was not entitled to a commission, because THE CURNUTTS’ canceled their purchase contract on account of their failed contingencies (see 18 Wash. Prac., Real Estate, § 15.8 (2d ed.), supra),
- unlawfully filing the RCW chapter 60.42 liens against all 35 lots in the Montecito Estates residential subdivision on **August 2, 2006**,

¹¹ RCW 18.86.070 states in pertinent part as follows (with emphasis added):

(1) The agency relationships set forth in this chapter commence at the time that the licensee undertakes to provide real estate brokerage services to a principal and continue until the earliest of the following:

....
 (d) **Termination of the relationship by notice from either party to the other.** However, such a termination does not affect the contractual rights of either party.

A copy of RCW 18.86.070 is set forth in the Appendix hereto.

- unlawfully refusing to release those liens by **December 31, 2006**,
- failing to inform MONTECITO by **December 31, 2006** the identity of any prospective purchasers he potentially had procured up to that point (see 18 Wash. Prac., Real Estate, § 15.6 (2d ed.), supra),
- unlawfully refusing to release those liens by **June 29, 2007**, and
- unlawfully refusing to release those liens until after MONTECITO lost the property to the *Deed in Lieu of Foreclosure* on **November 5, 2007**

– all so that, after MONTECITO fired him, MR. HIMSL could extort his aforementioned \$300,000.00 ransom demand from MONTECITO, cause MONTECITO to lose the properties, and be able to continue to market the properties for their subsequent owners.

Thus, MR. HIMSL breached each of the aforementioned contract duties he owed to MONTECITO pursuant to the parties' *Exclusive Sale and Listing Agreement*.

3. MR. HIMSL'S Breaches Caused MONTECITO To Suffer Substantial Monetary Damages

a. MONTECITO'S Evidence Of Its Inability To Obtain Follow-On Financing And Follow-On Real Estate Brokerage Services

After MR. HIMSL filed his 35 unlawful liens against the Montecito Estates residential subdivision on **August 2, 2006**, MONTECITO found itself unable to obtain follow-on financing and

follow-on real estate brokerage services. With respect to MONTECITO'S inability to obtain **follow-on financing**, see, e.g.,

- the **January 6, 2011 Declaration of Norman J. McDonald re: Financing for the Montecito Estates Residential Subdivision**, in which Mr. McDonald declares as follows (with emphases added):

2. Priscilla Trujillo approached me **in or around November of 2006**, seeking additional financing for her Montecito Estates residential subdivision located in Prosser, Washington. At that time, I was employed by IRA Network, LLC as a consultant.

3. **I informed Ms. Trujillo we could not stay involved with her project because of all the liens recorded against the project.** [CP 631-32]

- the **January 6, 2011 Declaration of John Merchant in Opposition to Defendants' Motions for Summary Judgment**, in which Mr. Merchant declares as follows (with emphases added):

2. I am a long-retired attorney and have for some years made my living as a real estate broker and commercial mortgage broker in Tacoma, WA – working through my company, MesaRoya Properties, LLC and, more recently, Real Property Services, Inc. (a Washington corporation which does mortgage and deed of trust foreclosures and real estate contract forfeitures). As a mortgage broker, I work for private borrowers to find them private money for their real estate purposes – acquisitions, refinancing, construction, development, and etc. I also work for those investors with money to lend on real estate projects that appear to have more merit than risk.

3. Several years back, probably **in mid-2007**, Ms.

Trujillo contacted me, seeking my assistance in helping her and her company – Montecito Estates, LLC (“Montecito”) – find financing to pay off other financing she had, plus completion money to fund her completion of her residential subdivision project in Prosser, WA known as Montecito Estates.

4. I looked through my paper files for paperwork relating to Ms. Trujillo/Montecito. I could not locate, and probably long ago discarded, the same. That said, I do remember the following. **I submitted Ms. Trujillo’s/Montecito’s information to a number of private investors who had previously told me they wanted good, “hard money” (high interest yielding, non-consumer) loans. None of them was willing to get involved as a secondary lender on the Montecito Estates project because they each believed the property was over-encumbered – with liens being recorded against each of the lots in that subdivision, with an apparent risk of insufficient remaining equity in the property with which to secure new, “hard money” financing.**

5. In this “hard money” type of loan area, private lenders frequently focus primarily on the value of the security property and its potential profit to them should they be forced to foreclose and take the property through legal action. Frequently, the lenders don’t look at a borrower’s credit. [633-37]

- the **September 21, 2009** deposition testimony from Ronald Reibman, President of Specialty Services, Inc. (MONTECITO’S earlier \$1.1M lender with respect to developing the infrastructure for the residential subdivision), in which the following testimony took place:

By Mr. Bolliger: **Okay, If you were lending money on a project like this . . . , would you lend when all 35 lots had already had a lien placed on them, the extent of each individual lien as being unknown?**

A: I have no knowledge.

By Mr. Downer: I'll object to the form but go ahead.

A: I don't mean to clutter the cage here, but when I loaned Priscilla the money originally Michael Conan had a lien on the property. That's who she originally borrowed the money from. That didn't bother me because I was prepared to pay it off. **If I was going to come into a new lender with the lien on all the lots, I probably would not do it.**

By Mr. Bolliger: **Why is that?**

A: **It just clutters the situation.**

Q: **Perhaps exposes you to some litigation you wouldn't be interested in?**

A: **Probably that, too. [CP 542-46]**

- ¶ 9 of the *Declaration of Terry L. Phillips in Opposition to Defendants' Motions for Summary Judgment*, in which MONTECITO'S real estate developer expert states as follows (with emphasis added):

9. It is my understanding the evidence will show that MR. MR. HIMSL filed his liens against all 35 lots in the Montecito Estates residential subdivision (1) to secure payment of a commission to him for a home sale in which the buyers – THE CURNUTTS – had previously backed out of the deal (i.e., no sale actually occurred) and (2) to secure payment of his “anticipated” commissions with respect to future sales (which also never occurred while MONTECITO still owned the property). **In all my years of developing residential property and building homes, I have never experienced – or even heard of – a realtor filing liens against a residential subdivision for either of these purposes. In my opinion, encumbering all of the lots in a residential subdivision with a “realtor’s lien” – before any homes have yet sold in the subdivision – could have disastrous effects on the project. For**

example, it could adversely affect sales and money flow for the project by crippling the home builder's borrowing power. Once the money flow is stilted, mechanics's lien naturally would appear on the home sites – and the money-flow problem would feed on itself. The liens also could adversely affect the home builder's ability to persuade a follow-on real estate broker to sign up for the project for the purpose of selling the home sites. It is my understanding the evidence will show all of these things happened to MONTECITO. [CP 627-28, 575-78]

With respect to MONTECITO'S inability to obtain **follow-on real estate brokerage services**, see, e.g.,

- the **January 4, 2011 Declaration of Jeff Thompson re: Realtor Services for the Montecito Estates Residential Subdivision**, in which Mr. Thompson declares as follows (with emphases added):

2. Priscilla Trujillo approached me **in or around September of 2006**, seeking realtor services for her Montecito Estates residential subdivision located in Prosser, Washington. At that time, I was employed by Windermere Real Estate Tri Cities as a Sales Manager.

3. **I informed Ms. Trujillo we could not get involved with her project because of liens HIMSL Real Estate Co. had recorded against all 35 lots in the project.** [CP 602-03]

- the **January 5, 2011 Declaration of W. Scott Kiehn re: Realtor Services for the Montecito Estates Residential Subdivision**, in which Mr. Kiehn declares as follows (with emphases added):

2. Priscilla Trujillo approached me **in or around**

late September/early October of 2006, seeking realtor services for her Montecito Estates residential subdivision located in Prosser, Washington. At that time, I was employed by Windermere Real Estate as a Sales Agent.

3. I informed Ms. Trujillo we could not get involved with her project because HIMSL Real Estate was already the listing broker and I could not move forward unless that relationship was terminated. It is also my belief that if HIMSL Real Estate was not the broker of record, I still would not have taken the listing due to attached liens. [CP 600-01]

- ¶ 9 of the declaration of MONTECITO'S real estate developer expert, Terry Phillips, quoted above. [CP 627-28, 575-78]
- Deposition testimony from Christina Hoover, former broker for Creekside Realty – MONTECITO'S short-lived follow-on real estate broker, as follows (with emphases added): [CP 411-14]

By Mr. Bolliger: **And let me ask that the other way around. If the problems with [MS. TRUJILLO] that you're [a]lluding to had all mysteriously vanished but you had all these encumbrances on all these lots, would you have stayed on the project?**

A: **No.**

Q: **What is it about all the encumbrances that makes it so unpalatable to remain a broker for the project?**

A: **You're not going to get paid**

Thus, MONTECITO has ample evidence for the jury to find that MR. HIMSL'S 35 unlawful liens caused MONTECITO to be unable to

procure follow-on real estate brokerage services and follow-on financing – which directly caused MONTECITO to lose the project and property.

b. MONTECITO’S Evidence Of The Monetary Amount By Which It Was Damaged

With respect to MONTECITO’S monetary damages, see ¶¶ 3-8 of the declaration of MONTECITO’S real estate developer expert, Terry Phillips, in which he states as follows (with emphases added):

3. I presently am the President/CEO of Ocean West, NV Corp. located in Scottsdale, AZ – a land development and construction company. **I have been in the commercial and residential land development business since 1961 (nearly 50 years).** In that time, I have developed commercial and residential property – and constructed commercial and residential buildings – in the following states: AZ, CA, HI, ID, MT, ND, NM, NV, OR, TX, UT, WA, and WY.

4. **For example, I developed the Mountain View Estates residential subdivision in approximately 1994 to 2007.** (I originally purchased the property as an individual, then quit-claimed it to the company I later formed for that project: Hillside Development Corp.) **Mountain View Estates is a 46-lot subdivision located only about three (3) miles from the Montecito Estates residential subdivision in Prosser; both subdivisions are located on the hillside on the South end of Prosser. In developing Mountain View Estates, I installed all its infrastructure,** as follows: secured all the required permits and governmental authorizations, had the 46 lots surveyed and defined, installed electrical service, water service, sewer service, storm drains, telephone service, tv service, streets, sidewalks, street lighting, and etc. for the development. **In addition, I built nine (9) homes in the subdivision. The homes I built there are comparable in size, prices, and quality of construction with the homes MONTECITO began building in the Montecito Estates subdivision. Because of this experience, I am very familiar with the Prosser real estate market for new homes, particularly around the time frame pertinent to this lawsuit.**

5. I reviewed the following documents in preparation for rendering my opinions set forth below; these documents were provided by Mr. Bolliger as exhibits to his November 4, 2010 and December 8, 2010 letters to me:

- Exhibit 1: the plaintiffs' *Second Amended Complaint for Money Damages* – filed October 21, 2009,
- Exhibit 2: the *Real Estate Purchase and Sale Agreement* – dated July 29, 1996 – which indicates Ms. Trujillo then purchased the property for forty eight thousand dollars (\$48,000),
- Exhibit 3: the cost breakdown from Culbert Construction, Inc., which indicates a grand total for the “sitework” land-development costs of five hundred sixty nine thousand and thirty eight dollars (\$569,038),
- Exhibit 4: the cost breakdown and *Promissory Note* with Montecito Estates, LLC’s lender (Specialty Services, Inc.) – both dated in May of 2005 – which indicate a grand total for all the land-development costs (including the portion for “sitework” set forth in Exhibit 3) of one million ninety one thousand and thirty two dollars (\$1,091,032),
- Exhibit 5: Montecito Estates, LLC’s brochure titled *Introducing the Wine Country Collection*, which indicates the following models and prices for the homes at Montecito Estates, LLC:

| <u>Model</u> | <u>Square Footage</u> | <u>Starting Price</u> |
|----------------|-----------------------|-----------------------|
| The Merlot | 2,284 | \$ 281,000 |
| The Sauvignon | 2,376 | \$ 287,000 |
| The Cabernet | 2,612 | \$ 291,000 |
| The Pinot | 2,915 | \$ 303,000 |
| The Zinfandel | 3,200 | \$ 323,000 |
| The Chardonnay | 3,900 | \$ 403,000, |

- Exhibit 6: the *Promissory Note Amortization Ledger* from

Montecito Estates, LLC's lender (Private Lenders Group), which indicates the house-construction costs for Lot 4 (a **Cabernet** model) was one hundred ninety five thousand dollars (\$195,000),

Exhibit 7: the *Promissory Note Amortization Ledger* from Montecito Estates, LLC's lender (Private Lenders Group), which indicates the house-construction costs for Lot 23 (a **Merlot** model) was one hundred eighty five thousand dollars (\$185,000),

Exhibit 8: Exhibit A to the *Exclusive Sale and Listing Agreement* between Montecito Estates, LLC and its real estate broker, MR. HIMSL Real Estate Company ("MR. MR. HIMSL") – dated December 6, 2005 – which sets forth the commission Montecito Estates, LLC would pay for the sale of each of the different home models (ranging from 3.5% to 5%, depending upon the model),

Exhibit 9: the *Montecito Estates Business Plan* – dated January 30, 2007 – which indicates (on its p. 21) Montecito Estates, LLC's cumulative "net profit" over five (5) years was expected to be eight million five hundred eighty eight thousand eight hundred sixty nine dollars (\$8,588,869), and

Exhibit 10: a document titled *Title Comparison*, which Mr. Bolliger subsequently told me I can ignore – so I did,

Exhibit 11: The drawings for the **Merlot** house model (reduced to 8½ x 11 size),

Exhibit 12: The drawings for the **Cabernet** house model (reduced to 8½ x 11 size), and

Exhibit 13: The drawings for the **Chardonnay** house model (reduced to 8½ x 11 size).

Apparently, MS. TRUJILLO was unable to locate the drawings for the **Sauvignon, Pinot, and Zinfandel** house models, but I was able to make reasonable assumptions and extrapolations about the construction costs for those models from Exhibits 5-7 and 11-13. I also assumed MS. TRUJILLO would have built 6 Merlots, 6 Sauvignons, 6 Cabernets, 6 Pinots, 6 Zinfandels, and 5 Chardonnays. **This assumption is not vitally important to my**

analysis because the profit margin for each home would be substantially close to each other, anyway.

6. It is my understanding that the \$8,588,869 projected-profit figure set forth in MONTECITO'S business plan (Exhibit 9) was based not only on the Montecito Estates residential subdivision, but also MONTECITO'S anticipated construction of other projects, including a luxury hotel. In performing my analysis for this case, I have ignored those other projects and focused only upon the Montecito Estates residential subdivision.

7. It is my understanding the evidence will show that, although Ms. Trujillo had prior experience in both the land development, home building, and home selling industries, the Montecito Estates residential subdivision was MONTECITO'S first residential-subdivision-construction project as an owner. It is also my understanding the evidence will show that, after fully developing the Montecito Estates residential subdivision site, MONTECITO constructed four (4) homes there – and that MONTECITO'S builder for those homes was her brother, Joel (Joel's Construction, Inc.), who was a licensed general contractor in Washington State. It is also my understanding the evidence will show those 4 homes are contrasted with the other homes (a later homebuilder built in the subdivision, after MONTECITO lost the property) in at least the following ways: exterior stucco (rather than cheaper, less esthetic, siding), clay tile roofing, with a lifetime warranty (rather than composition roofing), rounded wall corners (rather than sharp wall corners), ceramic tile floors (rather than linoleum or vinyl floors), ceramic tile counter tops (rather than vinyl or formica counter tops), and, on average, more square footage.

8. Based upon the foregoing, as well as my training and experience, it is my opinion that, despite the fact the Montecito Estates residential subdivision was MONTECITO'S first project, MONTECITO was capable, by using her licensed general contractor, of building nice homes in the subdivision. **It is also my opinion that MONTECITO would have made a net profit for the entire 35-lot subdivision of between nine hundred ninety four thousand dollars (\$994,000) and one million four hundred thousand dollars (\$1.4M).** I derive the higher figure from the MONTECITO materials provided me as described above. I derive the lower figure by making some additional, very conservative, assumptions – which my training and experience would lead me to make if I was the Montecito Estates home builder (I tend to plan my business undertakings around some conservatively-based scenarios): I would assume higher costs for MONTECITO for engineering and survey costs, legal costs, and interest rates; also, I

think MONTECITO'S stated sale prices are between 5% and 15% high for the Prosser market; also, I did not see in the materials any provision for sales and closing costs – which I typically experience are about 7½%. **Further, given my experience with the Prosser real estate market for new homes, it is my opinion MONTECITO could have realized its aforementioned net profit in approximately a 5-year period from when it started building its first home in early 2006.** [CP 623-27, 575-78]

Based upon the foregoing, MONTECITO respectfully requests that the Honorable Court hold the trial court erred when it summarily dismissed MONTECITO'S breach of contract cause of action against MR. HIMSL. That cause of action should be decided by the jury at trial.

B. The Trial Court Erred When It Dismissed MONTECITO'S Statutory Causes Of Action Under RCW Chapter 18.86¹²

In his summary judgment moving brief, MR. HIMSL postulated – **without citation to any decisional law which so holds** – that no private right of action exists against a realtor under RCW chapter 18.86. [CP 970-72] On the contrary, decisional law specifically allows private rights of action brought against realtors pursuant to RCW chapter 18.86. See, e.g., Boguch v. Landover Corporation, 153 Wn.App. 595, 224 P.3d 795 (2009) (holding that real estate seller's suit against real estate brokerage firm and two real estate agents properly stated a private right of action for the realtors' violation of RCW 18.86.040); Jackowski v. Borchelt, 151 Wn.App. 1, 209 P.3d 514 (2009), review granted by 168 Wn.2d 1001 (2010) (holding that the economic loss rule did not bar real estate

¹² All the arguments set forth in this section were provided to the trial court. [CP 401-02, 639-40]

purchaser's private right of action against realtors for violation of RCW 18.86.030 and RCW 18.86.050); Boor v. Fritz, 143 Wn.App. 718, 180 P.3d 805 (2008) (holding that real estate purchaser's suit against realtor properly stated a private cause of action for realtor's violation of RCW 18.86.030, for failing to disclose to purchaser the history of illegal drug manufacturing on the property); and Preview Properties, Inc. v. Landis, 161 Wn.2d 383, 165 P.3d 1 (2007) (holding that real estate seller's counterclaim, against interpleader plaintiff realtor, properly stated numerous private causes of action for violation of RCW 18.86.030). Thus, MR. HIMSL'S theory – that no private right of action exists against a realtor under RCW chapter 18.86 – is just plain wrong.

In its complaint, MONTECITO averred MR. HIMSL'S violations of RCW 18.86.030, RCW 18.86.040, and RCW 18.86.060. These statutory provisions impose upon MR. HIMSL the following **non-waivable** duties to his client, MONTECITO:

- to exercise reasonable skill and care (RCW 18.86.030(1)(a)),
- to deal honestly and in good faith (RCW 18.86.030(1)(b)),
- to be loyal to the seller by taking no action that is adverse or detrimental to the seller's interest in a transaction (RCW 18.86.040(1)(a) and (RCW 18.86.060(2)(a)), and
- to make a good faith and continuous effort to find a buyer for the property (RCW 18.86.040(1)(e) and (RCW 18.86.030(2)(e)).

A copy of each of RCW 18.86.030, .040, and .060 is set forth in the Appendix hereto.

In his summary judgment reply brief, MR. HIMSL advanced another false argument, as follows: [CP 1152]

The standard of care of a professional in Washington, or a violation of that standard, must be established by the testimony of a professional in the same field. McKee v. American Home Prods. Corp., 113 Wn.2d 701, 706, 782 P.2d 1045 (1989) (“[t]he duty of physicians must be set forth by a physician, the duty of structural engineers by a structural engineer . . .”). [MONTECITO has] put forth no evidence or testimony from anyone qualified as a real estate agent or broker to show that [MR. HIMSL] breached any of a real estate agent or broker’s duties. Because they have not, this cause of action must be dismissed.

In his oral argument on MR. HIMSL’S behalf on February 1, 2011, his attorney stated the same thing – and also asserted MONTECITO’S causes of action against MR. HIMSL for breach of his statutory duties under RCW chapter 18.86 constitute actions for “professional negligence.”

MONTECITO does not have a cause of action against MR. HIMSL for “professional negligence.” (MONTECITO originally did aver such a cause of action against MR. HIMSL but, on June 14, 2010, MONTECITO voluntarily dismissed that cause of action via its 2nd amended more definite statement.) As such, McKee, supra – a medical negligence case – is inapposite. Rather, MONTECITO’S causes of action against MR. HIMSL under RCW chapter 18.86 are based upon MR. HIMSL’S “breach

of his statutory duties.” A duty arising under a “professional negligence” cause of action – and a duty arising pursuant to a statute – are two entirely different things.

The correct standard for the Court to apply to this issue is set forth in 5B Wash. Prac., Evidence Law and Practice, § 704.7 (5th ed.) as follows (with original emphasis and emphasis added):

Violation of statute, ordinance, or regulation.

Occasionally a civil case will involve the question of whether a party (typically the defendant) violated a statute, ordinance, or administrative regulation. For example, in a civil case, a defendant’s violation of an applicable statute is usually admissible to show negligence, or that a product was unsafe, thus making it necessary for the jury to decide whether the statute was violated. [Fn. omitted.]

In this sort of situation, the courts will normally refuse to allow an expert to express an opinion on whether a party violated a statute, ordinance, or regulation. The proper procedure is to provide the jury with the facts – through an expert if necessary – and then to instruct the jurors on the [statute, ordinance, or administrative regulation]. The jurors are then instructed that they should apply the facts to the [statute, ordinance, or administrative regulation] and, as part of their deliberations, decide whether the party complied with the [statute, ordinance, or administrative regulation]. [Fn. omitted.]

In other words, the facts are to be presented to the jury – along with the text of the portions of RCW chapter 18.86 which MONTECITO asserts MR. HIMSL violated (breached) – and the jury is to decide whether the breach occurred. “Expert testimony” not only is not required – but normally is prohibited – to prove breach of a statutory duty.

Based upon the foregoing, MONTECITO respectfully requests that the Honorable Court hold the trial court erred when it summarily dismissed MONTECITO'S statutory (RCW chapter 18.86) causes of action against MR. HIMSL. Those causes of action should be decided by the jury at trial.

C. The Trial Court's Decision To Dismiss MR. HIMSL From MONTECITO'S Lawsuit On Grounds Of "Litigation Immunity" Was Erroneous¹³

1. The Doctrine Of "Litigation Immunity" Never Has Been Discussed In Washington State Decisional Law Or In The Washington Practice Volumes

MR. HIMSL induced the trial court to wrongly embrace dismissal of MONTECITO'S breach of contract and RCW chapter 18.86 causes of action against him on grounds of the "litigation immunity" doctrine. In this regard, in its February 28, 2011 *Memorandum Decision* dismissing all claims against MR. HIMSL, the trial Court stated as follows (with emphases added) [CP 2450-51]:

- "[MR. HIMSL'S] first argument in support of summary judgment is that the doctrine of **litigation immunity** requires dismissal of [MONTECITO'S] claims as a matter of law. . . ."
- "The doctrine of **litigation immunity** is **well established** in the common law. . . ."
- ". . . As such, the doctrine of **litigation immunity** requires

¹³ All the arguments set forth in this section were provided to the trial court. [CP 742-54]

dismissal of all of these claims as a matter of law.”

On March 15, 2011, MONTECITO’S attorney typed in the phrase “litigation immunity” – in Westlaw’s “Washington Cases” and “Washington Practice” databases – with the result being “[t]here are no documents that satisfy your search.” [CP 768] Thus, a doctrine of “litigation immunity” never has been discussed in Washington State decisional law or in the Washington Practice volumes – and, therefore, not only is it not “well established,” it has not even been “established” at all.

2. The 3 Cases Relied Upon By The Trial Court As Purported Authority For The Doctrine Of “Litigation Immunity” Are Inapposite

In its discussion in its February 28, 2011 *Memorandum Decision* about “litigation immunity,” the trial court relied only upon the following 3 cases: Gold Seal Chinchillas, Inc. v. State, 69 Wn.2d 828, 420 P.2d 698 (1966), McNeal v. Allen, 95 Wn.2d 265, 621 P.2d 1285 (1980), and Bruce v. Byrne-Stevens & Associates Engineers, 113 Wn.2d 123, 776 P.2d 666 (1989). [CP 2450] As the discussion in the preceding subsection demonstrates, **the phrase “litigation immunity” appears nowhere in any of those 3 cases.** In any event, all 3 of those cases are inapposite.

Gold Seal Chinchillas, supra, is inapposite because it involves **only a defamation cause of action and, yet, MONTECITO is not suing MR. HIMSL for defamation.** Gold Seal Chinchillas sued the state Attorney

General's office for defamation relating to a press release made by that office. The issue in the case was only whether, under the law of defamation, the defendant had an "absolute privilege to defame." That issue is irrelevant to this case because, again, MONTECITO is not suing MR. HIMSL for defamation. Moreover, because the defendant in the case was a government executive official, in upholding the trial court's dismissal of Gold Seal Chinchillas' defamation claim against the State, the Supreme Court of Washington announced the following policy considerations supporting its holding (with emphases added):

. . . . But a counterbalancing interest of the public involves the free and uninhibited dissemination of **information about government activities**. Without delving specifically into the numerous federal and other state jurisdiction cases which have dealt with the problem of the **defense of absolute privilege in suits against government executive officials**, suffice it to say that the overwhelming majority of cases have struck the balance in favor of encouraging **public officials** to speak with complete candor – and without fear of legal recourse with respect to their **official duties**. . . .

It should be stating the obvious that the instant case does not involve (1) any "defamation" cause of action, (2) any suit involving a "press release," (3) any claim against a "public official" or a "government executive official," (4) any issue about the "official duties" of a public official, or (5) any issue about "government activities." Simply stated, MR. HIMSL is not a "government executive official" for whom the trial court in this case needed to concern itself with MR. HIMSL being able to engage in the "free and uninhibited dissemination of information about government

activities.” Gold Seal Chinchillas does not involve any so-called “litigation immunity”; rather, it involves only the issue of an “absolute privilege to defame”; yet, MONTECITO is not suing MR. HIMSL for defamation. Clearly, then, Gold Seal Chinchillas is inapposite.

McNeal v. Allen, *supra*, also is inapposite. Mr. McNeal sued Mr. Allen for medical malpractice, setting forth in his complaint the damages he was seeking in the amount of \$500,000. Mr. Allen counterclaimed against Mr. McNeal, alleging **defamation** and **emotional distress** resulting therefrom, based upon the \$500,000 figure set forth in Mr. McNeal’s complaint. The issue in the case involved whether Mr. McNeal’s complaint violated RCW 4.28.360 – which specifies in pertinent part as follows:

In any civil action for personal injuries, the complaint shall not contain a statement of the damages sought but shall contain a prayer for damages as shall be determined. . . .

The trial court held RCW 4.28.360 is procedural, rather than substantive, and reveals no legislative intent to abrogate the common law rule that allegations in pleadings are absolutely privileged and cannot form the basis for a **defamation** action. In so holding, the trial court dismissed Mr. Allen’s counterclaim. The Supreme Court of Washington affirmed on that very basis, as follows:

The trial court correctly held that the statute is procedural, rather than substantive, and reveals no legislative intent to abrogate the common law rule that allegations in pleadings are absolutely privileged and cannot form the basis for a damage action.

Id. at 267. McNeal is inapposite for at least three reasons. **First**, in the instant case, MONTECITO is not suing MR. HIMSL for either **defamation** or its resulting **emotional distress**. **Second**, in the instant case, MONTECITO has not sued MR. HIMSL over anything he averred in a pleading in the case. (Of course, at the time MONTECITO filed this lawsuit, MR. HIMSL hadn't yet had an opportunity to previously file **any** pleadings in this case.) **Third**, as revealed above, the McNeal decision was decided solely on the issue of whether a cause of action pursuant to RCW 4.28.360 can exist against a defendant; however, in the instant case, MONTECITO has averred no cause of action pursuant to RCW 4.28.360. McNeal does not involve any so-called "litigation immunity"; rather, it involves only the issue of an "absolute privilege to defame" (including the defamation's alleged resulting emotional distress); yet, MONTECITO is not suing MR. HIMSL for defamation or its resulting emotional distress. Clearly, then, McNeal is inapposite.

Bruce v. Byrne-Stevens also is inapposite. In a prior litigation, Mr. Bruce had sued his neighbor after the neighbor conducted excavation work on his property, causing subsidence of the soil on Mr. Bruce's property. In that prior litigation, Mr. Bruce had hired Byrne-Stevens & Associates Engineers ("Byrne-Stevens") as his expert witness to calculate and testify

as to the cost of stabilizing the soil on his land. Byrne-Stevens provided its testimony at the prior trial, and Mr. Bruce received a judgment against his neighbor for that amount in the prior litigation. Later, the cost of restoring lateral support to Mr. Bruce's property ended up being approximately double the amount of Byrne-Stevens' estimate at trial. Mr. Bruce then sued Byrne-Stevens, contending that Byrne-Stevens was negligent in preparing its analysis and testimony and that, but for Byrne-Stevens' low estimate of the cost of restoring lateral support, Mr. Bruce would have obtained judgment against his neighbor for the true cost of the restoration. The issue in the case was whether a plaintiff may sue the expert witness he had hired to testify at a prior trial – for negligence in the performance of the duties the expert was hired to perform at the prior trial. The lead decision in the case invoked the “witness immunity” doctrine (not any “litigation immunity” doctrine) – and answered that question “no.” Bruce clearly is inapposite because, in the instant case, **(1) MONTECITO had not hired MR. HIMSL to be an expert witness in any prior trial and (2) MONTECITO is not suing MR. HIMSL for negligence in the performance of his duties as a expert witness at any prior trial.** In other words, whereas MONTECITO does not quarrel with the “witness immunity” doctrine as a well-established doctrine in Washington State common law, MONTECITO most emphatically asserts the “witness immunity” doctrine has no relevance to its case against MR. HIMSL whatsoever.

Another significant problem exists with the trial court's reliance upon Bruce: its correct holding cannot be ascertained. The lead decision involved 4 justices of the Supreme Court. A 5th justice "ANDERSON, J., concurs in the result only." From this, it appears Justice Anderson – who's vote caused a majority "in the result only" – did not adopt the "witness immunity" analysis engaged in in the lead opinion. Stated another way, **if** Justice Anderson **was** adopting the "witness immunity" analysis engaged in in the lead opinion, he would not have "concur[red] in the result only" – instead, he would have signed the lead opinion. The other 4 justices all signed a single, dissenting opinion, as follows (with emphases added):

I dissent. The question in this case is not whether an expert witness is immune from subsequent suit for **defamatory** statements made in a court of law. That question is well settled. **Rather, today we are asked whether a professional's act of malpractice outside the courtroom is somehow immunized by the subsequent articulation of that negligently formed opinion in a judicial proceeding.** Neither the law of absolute immunity nor sound public policy dictates the result reached by the majority. **I would hold that a client's action for malpractice is not barred by the defense of absolute immunity merely because the professional subsequently publishes his or her opinion in a court of law at the client's request.** Accordingly, I would affirm the unanimous decision of the Court of Appeals.

Id. at 138. Thus, whereas 4 justices in Bruce believed the case to be one in which "witness immunity" was involved, 4 other justices clearly did not. It most definitely cannot be said that the 5th justice – Justice Anderson –

believed the case to be one in which “witness immunity” was involved because he did not sign onto the lead opinion; rather, he “concurring in the result only.” Without writing an opinion as to **why** he “concurring in the result only,” we cannot know why Justice Anderson “concurring in the result only.”

Based upon the foregoing, it is not possible to ascertain the correct holding of the Bruce case. See Wolfe v. Legg, 60 Wn.App. 245, 249, fn. 2, 803 P.2d 804 (1991), in which the Court stated as follows (with emphasis added):

An argument was also presented to the trial court and on appeal that Legg’s counterclaim was totally devoid of merit as a result of the decision in Bruce v. Byrne-Stevens & Assoc., 113 Wn.2d 123, 776 P.2d 666 (1989), in which absolute immunity was extended to expert witnesses in regard to claims based on activities in conjunction with their trial testimony. **However, Bruce was the result of a plurality decision with the fifth vote, concurring in the result only, being unaccompanied by an opinion. We therefore do not find it possible to assess the correct holding of the case.** See In re Jeffries, 114 Wn.2d 485, 499-500, 789 P.2d 731 (1990) (Brachtenbach, J., concurring in part, dissenting in part). Because we decide the current case without addressing the issue of the merit of the counterclaim, we need not address the question of the application of Bruce.

Because it is not possible to assess the correct holding of the Bruce case, in the instant case, the trial Court should not have cited to it or “relied” upon it.

Still another problem exists with the trial Court's reliance upon Bruce, as stated in Dexter v. Spokane County Health District, 76 Wn.App. 372, 376, fn. 2, 884 P.2d 1353 (Div. 3 1994), as follows (with emphases added):

Babcock [v. State, 116 Wn.2d 596, 809 P.2d 143 (1991)] is a retreat from Bruce in one respect. In Bruce, landowners commissioned an engineering firm to estimate repair costs occasioned by an adjoining landowner's construction project. The engineer arrived at estimates, testified to them at trial, and the landowners won judgments in the amounts testified to. The estimates later proved to be too low and the landowners sued the engineer for malpractice. Bruce held the engineer immune from suit both for his testimony and his work product in framing the testimony. Bruce, at 136, 776 P.2d 666. In Babcock, claims were allowed against [DSHS] caseworkers for negligently processing child placements. **Babcock distanced the caseworkers negligence from their participation in judicial proceedings.** Babcock, at 603, 809 P.2d 143. As observed by the dissent, however, Bruce involved the same issue of whether the **basis** of courtroom testimony can be differentiated from the giving of the testimony and held it cannot. Babcock, at 630, 809 P.2d 143. One court has commented "[w]e therefore do not find it possible to assess the correct holding of the [Bruce] case." Wolfe v. Legg, 60 Wn.App. 245, 249 n. 1, 803 P.2d 804 (1991). In any event, this case is neither Bruce nor Babcock. The **basis** of Mr. Dixon's testimony, which previous was litigated, is not at issue, only the testimony itself.

In Babcock, the issue was stated as follows (with emphasis added):

We must decide whether the **absolute immunity granted judges** under state common law should extend to caseworkers. . . .

Id. at 606. The Supreme Court also stated as follows with respect to

Babcock’s lawsuit against the caseworkers (with emphasis added):

The gravamen of this complaint is **negligent investigation**.

....

None of these issues pertain to the instant case. The Supreme Court held in Babcock that the caseworkers were not accorded “absolute immunity granted judges” with respect to their negligence in the case, notwithstanding the fact they were testifying witnesses in the case – and, therefore, the doctrine of “witness immunity” was held inapplicable to the caseworkers. Id. at 628-32, 809 P.2d 143 (Andersen, J., concurring in part and dissenting in part). As described above, then, this holding contradicts the lead opinion in Bruce (from two years earlier), which was relied upon by the trial court in the instant case. As such, it was error for the trial court to rely upon Bruce in dismissing MONTECITO’S causes of action against MR. HIMSL on grounds of “litigation immunity” (assuming the trial court meant “witness immunity” when it invariably employed the phrase “litigation immunity” in its *Memorandum Decision* – an assumption which is compelled by the trial Court’s citation to Bruce).¹⁴ The bottom-line facts are (1) “witness immunity” is not “litigation immunity” (because “litigation immunity” does not exist as a doctrine) and, (2) in any event, the doctrine of “witness immunity” – although it is a well-established doctrine – has no relevance to this case whatsoever.

¹⁴ See, also, Barr v. Day, 124 Wn.2d 318, 331, 879 P.2d 912 (1994) (holding that guardians ad litem in guardianship proceedings involving court approval of settlements of civil claims of incompetence act as an arm of the court, and are therefore entitled to quasi-judicial immunity from civil liability, as follows: “While we agree [GAL] Stocker is immune, we believe his immunity is better conceived as a branch of quasi-judicial immunity rather than witness immunity.”)

In sum, MR. HIMSL induced the trial court to invoke a “litigation immunity” doctrine – a doctrine which doesn’t exist. MR. HIMSL did so by using the phrase “litigation immunity,” yet discussing defamation decisions where the issue was whether there was a “privilege to defame.” However, MONTECITO was not suing MR. HIMSL for defamation. Accordingly, the trial court’s dismissal of MR. HIMSL on grounds of “litigation immunity” clearly was erroneous. If MR. HIMSL is “immune” from suit in this case, then – by extension – nobody would ever be able to sue anybody for anything.

D. The Trial Court’s Alternative Decision To Dismiss MR. HIMSL From MONTECITO’S Lawsuit On Grounds Of “No Legal Remedy For Improperly Filed Liens” Constitutes Error As A Matter Of Law¹⁵

In its February 28, 2011 *Memorandum Decision* dismissing all claims against MR. HIMSL, aside from the “litigation immunity” basis, the trial court stated an alternative basis for dismissing MR. HIMSL from MONTECITO’S lawsuit: “the undisputed fact remains that [MONTECITO] is seeking damages for unlawfully filed liens, and that such relief is not afforded under the law.” [CP 2453] That conclusion insists that, when an underlying statute (which does not itself express a legal-damages remedy) is **violated**, that **violation** cannot possibly constitute a basis of liability under either of the following of MONTECITO’S legally-recognized causes of action:

¹⁵ All the arguments set forth in this section were provided to the trial court. [CP 760-62]

- breach of contract and/or
- breach of duties of a real estate agent under RCW chapter 18.86.

In other words, according to the trial court, a plaintiff cannot pursue any of those causes of action – based upon a violated underlying statute – unless the underlying statute **itself** expresses a legal-damages remedy (despite the fact the underlying statute here at issue, RCW chapter 60.42, expresses **no prohibition** against an aggrieved plaintiff seeking legal damages). The trial court previously declared MR. HIMSL'S 35 liens were **unlawfully filed** pursuant to RCW chapter 60.42. The trial court's dismissal of MR. HIMSL fails to appreciate that (1) MR. HIMSL'S unlawful violation of RCW chapter 60.42 is the wrongful action and (2) MONTECITO'S aforementioned causes of action are available legal mechanisms via which MR. HIMSL may be found liable by the jury for his wrongful action. It makes absolutely no sense to conclude that MR. HIMSL'S statutorily-unlawful action cannot constitute the basis for MONTECITO'S aforementioned causes of action – and MONTECITO **cannot locate any decisional law or other legal authority which supports such a conclusion**. The trial court therefore erred in reaching that conclusion.

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E. The Trial Court's Alternative Decision To Dismiss MR. HIMSL From MONTECITO'S Lawsuit On Grounds Of "Lack Of Prima Facie Proof Of Claims" Constitutes Error As A Matter Of Law¹⁶

In its February 28, 2011 *Memorandum Decision* dismissing all claims against MR. HIMSL, aside from the "litigation immunity" and "no legal remedy for unlawfully-filed liens" bases, the trial court stated an alternative basis for dismissing MR. HIMSL from MONTECITO'S lawsuit: that MONTECITO failed to present prima facie proof with respect to any of its causes of action. [CP 2453] Given the plethora of facts presented by MONTECITO in this case, such an assertion is manifestly unjustifiable. Besides, it is the exclusive province of the jury, not the court, to perform the fact finding for the case. The reality is, MONTECITO presented prima facie evidence (facts) supporting **all** its causes of action against MR. HIMSL. MONTECITO is astonished that the trial court claims to be unaware of any of those facts.

F. MONTECITO Requests An Award Of Attorneys' Fees On Appeal Pursuant to RAP 18.1 And The Prevailing-Party Attorneys' Fees Clause Set Forth In The Parties' *Exclusive Sale And Listing Agreement*

Paragraph 12 of the parties' *Exclusive Sale and Listing Agreement* [CP 71] contains a prevailing-party attorneys' fees clause. Besides that, the title to this section speaks for itself.

¹⁶ All the arguments set forth in this section were provided to the trial court. [CP 762]

VIII. CONCLUSION RE: LAWSUIT DISMISSAL

The trial court entered declaratory judgments declaring that MR. HIMSL'S 35 liens were unlawfully filed by him against the Montecito Estates residential subdivision. MR. HIMSL did not appeal those declaratory judgments.

The trial court later dismissed MONTECITO'S breach of contract cause of action and its statutory causes of action under RCW chapter 18.86 based upon the following three, alternative theories:

- a non-existent "litigation immunity" doctrine,
- an incorrect theory that MR. HIMSL'S 35 unlawful liens cannot possibly be the basis for a breach of contract cause of action or causes of action for violations of RCW chapter 18.86, or
- an unjustifiable contention that MONTECITO has proffered no evidence whatsoever in support of its breach of contract and RCW chapter 18.86 causes of action.

In each of these regards, the trial court committed error.

MONTECITO established above (and to the trial court) its legal and factual entitlement to put its breach of contract and RCW chapter

18.86 causes of action before a jury for determination.

Based upon the foregoing, MONTECITO respectfully requests that the Honorable Court of Appeals reverse the trial court's summary dismissal of MONTECITO'S breach of contract and RCW chapter 18.86 causes of action, remand the same for trial, and award MONTECITO the attorneys' fees and costs it has had to incur in connection with this appeal.

Thank you for your time.

DATED this 23 day of February, 2012.

BOLLIGER LAW OFFICES

By: _____



John C. Bolliger, WSBA No. 26378
Attorneys for Appellants

I swear under penalty of perjury under the laws of the state of Washington the facts set forth above are true and correct.

DATED this 23 day of February, 2012.

Kennewick, WA
City, state where signed



John C. Bolliger

DECLARATION OF SERVICE

STATE OF WASHINGTON)
COUNTY OF BENTON) ss.

I, John C. Bolliger, declare as follows:

On the date set forth below, I caused a true and correct copy of this document to be sent to the following persons and entities in the manner shown:

Jeffrey P. Downer/Dan J. Von Seggern [X] regular mail
Lee Smart [] e-mail no. dvs@leesmart.com
1800 One Convention Place [] facsimile no. (206) 624-5944
701 Pike Street [] Pronto Process & Messenger Service, Inc.
Seattle, WA 98101-3929 [] hand-delivery by John C. Bolliger
Federal Express

I swear under penalty of perjury under the laws of the state of Washington the foregoing is true and correct.

DATED this 23 day of February, 2012.

Kennawick, WA
City, state where signed

Signature [Handwritten Signature]

Appendix

Archive

Washington Statutes

Title 18. Businesses and professions

Chapter 18.86. Real estate brokerage relationships

Current through Chapter 9, 2011 Second Special Session

§ 18.86.030. Duties of licensee

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

(a) To exercise reasonable skill and care;

(b) To deal honestly and in good faith;

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

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

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

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

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

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

History. 1996 c 179 § 3.

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Washington Statutes

Title 18. Businesses and professions

Chapter 18.86. Real estate brokerage relationships

Current through Chapter 9, 2011 Second Special Session

§ 18.86.040. Seller's agent-Duties

(1) Unless additional duties are agreed to in writing signed by a seller's agent, the duties of a seller's agent are limited to those set forth in RCW 18.86.030 and the following, which may not be waived except as expressly set forth in (e) of this subsection:

(a) To be loyal to the seller by taking no action that is adverse or detrimental to the seller's interest in a transaction;

(b) To timely disclose to the seller any conflicts of interest;

(c) To advise the seller to seek expert advice on matters relating to the transaction that are beyond the agent's expertise;

(d) Not to disclose any confidential information from or about the seller, except under subpoena or court order, even after termination of the agency relationship; and

(e) Unless otherwise agreed to in writing after the seller's agent has complied with RCW 18.86.030(1)(f), to make a good faith and continuous effort to find a buyer for the property; except that a seller's agent is not obligated to seek additional offers to purchase the property while the property is subject to an existing contract for sale.

(2)(a) The showing of properties not owned by the seller to prospective buyers or the listing of competing properties for sale by a seller's agent does not in and of itself breach the duty of loyalty to the seller or create a conflict of interest.

(b) The representation of more than one seller by different licensees affiliated with the same broker in competing transactions involving the same buyer does not in and of itself breach the duty of loyalty to the sellers or create a conflict of interest.

History. 1997 c 217 § 2; 1996 c 179 § 4.

Note:

Real estate agency pamphlet -- 1997 c 217 §§ 1-6: See note following RCW 18.86.120.

Effective date -- 1997 c 217 §§ 1-6 and 8: See note following RCW 18.86.020.

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Washington Statutes

Title 18. Businesses and professions

Chapter 18.86. Real estate brokerage relationships

Current through Chapter 9, 2011 Second Special Session

§ 18.86.060. Dual agent - Duties

(1) Notwithstanding any other provision of this chapter, a licensee may act as a dual agent only with the written consent of both parties to the transaction after the dual agent has complied with RCW 18.86.030(1)(f), which consent must include a statement of the terms of compensation.

(2) Unless additional duties are agreed to in writing signed by a dual agent, the duties of a dual agent are limited to those set forth in RCW 18.86.030 and the following, which may not be waived except as expressly set forth in (e) and (f) of this subsection:

(a) To take no action that is adverse or detrimental to either party's interest in a transaction;

(b) To timely disclose to both parties any conflicts of interest;

(c) To advise both parties to seek expert advice on matters relating to the transaction that are beyond the dual agent's expertise;

(d) Not to disclose any confidential information from or about either party, except under subpoena or court order, even after termination of the agency relationship;

(e) Unless otherwise agreed to in writing after the dual agent has complied with RCW 18.86.030(1)(f), to make a good faith and continuous effort to find a buyer for the property; except that a dual agent is not obligated to seek additional offers to purchase the property while the property is subject to an existing contract for sale; and

(f) Unless otherwise agreed to in writing after the dual agent has complied with RCW 18.86.030(1)(f), to make a good faith and continuous effort to find a property for the buyer; except that a dual agent is not obligated to: (i) Seek additional properties to purchase while the buyer is a party to an existing contract to purchase; or (ii) show properties as to which there is no written agreement to pay compensation to the dual agent.

(3)(a) The showing of properties not owned by the seller to prospective buyers or the listing of competing properties for sale by a dual agent does not in and of itself constitute action that is adverse or detrimental to the seller or create a conflict of interest.

(b) The representation of more than one seller by different licensees affiliated with the same broker in competing transactions involving the same buyer does not in and of itself constitute action that is adverse or detrimental to the sellers or create a conflict of interest.

(4)(a) The showing of property in which a buyer is interested to other prospective buyers or the presentation of additional offers to purchase property while the property is subject to a transaction by a dual agent does not in and of itself constitute action that is adverse or detrimental to the buyer or create a conflict of interest.

(b) The representation of more than one buyer by different licensees affiliated with the same broker in competing transactions involving the same property does not in and of itself constitute action that is adverse or detrimental to the buyers or create a conflict of interest.

History. 1997 c 217 § 4; 1996 c 179 § 6.

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Washington Statutes

Title 18. Businesses and professions

Chapter 18.86. Real estate brokerage relationships

Current through Chapter 9, 2011 Second Special Session

§ 18.86.070. Duration of agency relationship

(1) The agency relationships set forth in this chapter commence at the time that the licensee undertakes to provide real estate brokerage services to a principal and continue until the earliest of the following:

- (a) Completion of performance by the licensee;
- (b) Expiration of the term agreed upon by the parties;
- (c) Termination of the relationship by mutual agreement of the parties; or

(d) Termination of the relationship by notice from either party to the other. However, such a termination does not affect the contractual rights of either party.

(2) Except as otherwise agreed to in writing, a licensee owes no further duty after termination of the agency relationship, other than the duties of:

- (a) Accounting for all moneys and property received during the relationship; and
- (b) Not disclosing confidential information.

History. 1997 c 217 § 5; 1996 c 179 § 7.

Note:

Real estate agency pamphlet -- 1997 c 217 §§ 1-6: See note following RCW 18.86.120.

Effective date -- 1997 c 217 §§ 1-6 and 8: See note following RCW 18.86.020.

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