No. 102371-5

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 84007-0-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

MELODY L. PETLIG, an individual,

Appellant / Cross-Respondent,

vs.

THE ESTATE OF GARY WEBB, by and through its administrator, Jessica Webb; and JESSICA WEBB, individually and in her marital community interest;

Respondent / Cross-Appellant.

PETITION FOR REVIEW

M. Owen Gabrielson, WSBA# 34214
Meghan M. Gross, WSBA# 58650
FARR LAW GROUP, PLLC
1110 Stevenson Ave., Ste. 100
P.O. Box 890
Enumclaw, WA 98022
(360) 825-6581
Attorneys for Respondent / Cross Appellant Jessica Webb

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I. INTRODUCTION

A constructive trust is an equitable remedy that does not have its own statute of limitations. Instead, its statute of limitations is gleaned from the underlying substantive claim, which here, was unjust enrichment. In an unpublished opinion, the Court of Appeals reversed the trial court, and applied the discovery rule to Melody Petlig's unjust enrichment and constructive trust claims, and imposed a life estate over real property that Jessica had received as a gift before her father died. This holding is contrary to this Court's and other Court of Appeals' published opinions. The Court of Appeals' decision, while unpublished, has far reaching affect, not only for use in subverting Washington's intestacy laws, or a will, but for any claim of unjust enrichment, which is perhaps one of the most ubiquitous causes of action added to any complaint where one suffers a financial loss, and someone else receives a financial gain. Litigants may now cite the decision under GR 14.1 to argue unjust enrichment no longer accrues when a litigant may

first seek relief in court, but when her claim is known or should have been known. This Court should accept review, and clarify when a claim for unjust enrichment accrues.

II. IDENTITY OF PETITIONER

Jessica Webb asks this Court to review the Court of Appeals, Division I opinion terminating review in this case.

III. COURT OF APPEALS OPINION

The Court of Appeals, Division I, filed its unpublished opinion terminating review in this case on August 14, 2023 (the "Opinion"). A copy of the Opinion is in the Appendix at pages A-1 through A-15.

IV. ISSUES PRESENTED FOR REVIEW

Question Presented: Does the Opinion conflict with a decision of this Court?

Brief Answer. Yes. The Opinion applied the "discovery" rule to determine when the statute of limitations accrued for a constructive trust claim based on unjust enrichment. But this Court previously held that the discovery rule does not apply to

unjust enrichment. *1000 Virginia Ltd. P'ship*, 158 Wn.2d 566, 578, 146 P.3d 423 (2006) (en banc).

Question Presented: Does the Opinion conflict with a decision of this Court?

Brief Answer: Yes, for two reasons. First, Court of Appeals' published decisions also hold that the discovery rule does not apply to unjust enrichment. *Matter of Gilbert Testamentary Credit Shelter Trust v. Estate of Miller*, 13 Wn. App. 2d 99, 107, 462 P.3d 878 (2020); *Eckert v. Skagit Corp.*, 20 Wn. App. 849, 851, 583 P.2d 1239 (1978); *see also Dougherty v. Pohlman*, No. 53746-0-II, 2021 WL 100237 (Wn. App. Jan. 12, 2021) (unpublished) (expressly repudiating the discovery rule for unjust enrichment and *quantum meruit* claims).

Second, enrichment alone is insufficient. *Farwest Steel Corp. v. Mainline Metal Works, Inc.*, 48 Wn. App. 719, 732, 741 P.2d 58 (1987); and courts may not write wills where there is not one. *In re Smith's Est.*, 68 Wn.2d 145, 155, 411 P.2d 879,

corrected, 416 P.2d 124 (1966) ("we do not rewrite wills for testators based upon what relatives think they should have received").

Question Presented: Does the Opinion misapply the law of unjust enrichment and constructive trusts?

Brief Answer: Yes. There must be an agreement implied. The implied agreement, if at all, was with Gary, who breached it when he gifted the property to Jessica.

Question Presented: Does the Opinion present an issue of substantial public interest that should be resolved by this Court?

Brief Answer: Yes. "Statutes of limitations protect defendants—and courts—from the burdens of litigating stale claims by requiring prospective plaintiffs to assert their claims before relevant evidence is lost." *Fowler v. Guerin*, 200 Wn.2d 110, 118-19, 515 P.3d 502 (2022). The Opinion has far reaching affect, not only in estate cases, but in any case involving a claim for unjust enrichment, leaving such claims

open for litigation indefinitely, only to be closed when it is later "discovered." Further, Courts do not write wills. *In re Smith's Est.*, 68 Wn.2d at 155.

V. STATEMENT OF THE CASE

This appeal presents a dispute between mother and daughter over real property in Auburn, Washington (referred to herein as the "Auburn property").

For decades, Jessica Webb's grandfather, Jessie Ray Webb, owned the Auburn property. CP 86; Ex. 7. Jessica's father (Gary Webb) and mother (Melody Petlig), lived there rent-free in a mobile home. CP 87. After Jessie died in 2011, they moved from the mobile home and into Jessie's house, which they called the "Big House." *Id.*

A. The Auburn Property.

Beginning in the 1980's, Melody and Gary moved into the mobile home on the Auburn property, which is near

Coopers Corner in Auburn, Washington. CP 86; RP 234.[1] Gary's father Jessie Webb owned the Auburn property, which consisted of acreage, a house, and a mobile home. CP 86.

In May 1989, Melody and Gary gave birth to their only daughter, Respondent Jessica Webb. *Id.* The family continued to live in the mobile home until Jessie died in 2011, at which point they moved into the "Big House", which is where Jessie lived before he died. CP 86; RP 201.

While Jesse died in 2011, his estate was not immediately probated. CP 86-87; Exs 1, 2, 101. For about five years the home remained vested in the *Estate of Jessie Webb* and Melody and Gary continued to live in the house. *Id.* Jessica lived there too. CP 87.

The trial court found that Melody paid (among other things) $8,800.00 in real estate tax between the years of 2011

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[1] Witness Anthony Ferrari referred to it as "Cooper's Corner" but the transcript reads "Cuckoo's Corner."

and 2017. CP 88. And she paid $5,727.00 for a 2014 roof repair, among other items. CP 91.

In late 2016, Petlig hired the Sosa Law Firm to represent her daughter, Jessica, who was the named personal representative in Jessie's will. CP 91;[2] RP 381, 393. The purpose was for Jessica to administer her grandfather Jessie's estate, and to transfer the Auburn property from Jessie's estate to Gary, as required by Jessie's will. *Id.* And then Gary intended to transfer the property to Jessica. RP 400-01.

The Sosa Law Firm also represented Gary. RP 571. On January 26, 2017, one week after Gary received the Auburn property from his dad's estate, he gifted it to Jessica. Exs 7, 8. Gary did not sign the deed himself. Rather, Melody, acting for Gary, signed it as his attorney-in-fact under a durable power-of-

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[2] Melody paid the attorney. The trial court indicated in its findings (CP 91) that this was for Gary's estate, but the testimony and exhibits clearly show, and it is undisputed, this was for Jessie's estate since the Sosa law firm did not represent anyone in connection with Gary's estate.

attorney. Exs 8, 10. This was done with the Sosa Law Firm's help. *Id.*; Exs 16, 105; RP 381, 393, 400-01; RP 571.

The deed to Jessica states:

> **GARY WEBB PER MELODY PETLIG DPOA FOR GARY WEBB**, as a gift to his daughter and only heir, **JESSICA WEBB, GRANTOR** does hereby devise and quit claim the real property legally described hereinbelow [sic], in fee simple, unto **GRANTEE, JESSICA R. WEBB**, together with all after acquired title of the Grantor herein, the following described property:
>
> [describes real property]
>
> **WITNESS my hand this 25th day of January, 2017.**
>
> s/ Gary R. Webb per authorized DPOA Melody L. Petlig
> **GARY WEBB, PER AUTHORITY OF DPOA MELODY L. PETLIG, ATTORNEY-IN-FACT**

Ex 8 (bold in orig.).

Gary's attorneys—which Melody hired[3]—prepared the deed per Gary's instructions:

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[3] CP 91; RP 381, 393

Q. …was your firm instructed to prepare this deed; do you know?
A. We were.

Q. Okay. And do you know who instructed your firm to prepare the deed?
A. Melody Petlig said that Gary Webb instructed her to do this.

RP 390 (Shelly Sosa testimony).

After the conveyance, attorney Carlos Sosa wrote to both Melody and Jessica to explain the encumbrances on the property; he thought it important that Jessica understand what she received:

Q. [to Carlos Sosa]… what is Exhibit 105?
A. It's a letter that I wrote to Jessica Webb and Melody Petlig on March 21, 2017.

Q. Okay. And can you recall for me why you wrote this letter, or what the purpose of this letter was?
A. Well, we were nearing the end of the probate of Jessie's estate. Jessie was the grandfather, and we had the declaration of completion of probate. Notice of filing of that. Notice of proof of mailing, which are the last documents in an uncontested probate, which this turned out to be. And 30 days after the declaration of completion, if there's no objection, then the probate is administratively closed.

> And it was to talk about that, and also to talk about couple liens that we had discovered and to put Jessica -- again, no disrespect -- to put Jessica -- to make sure she knew that the property she was getting had some encumbrances on them that may come up as a problem later on.

RP 398-99.

Attorney Sosa went on to describe the "plan" to convey the property to Jessica:

> A. … Jessica was the ultimate heir because Gary conveyed the property to her, as was the plan.
>
> Q. Okay. And do you recall who communicated to you that plan?
> A. Well, Melody was the primary communicator of everything. I can't remember how old Jessica was then. She was of age, and she was legal to do what she did. But, you know, Melody to me was the person that was talking about what Gary wanted. And what Gary wanted was based on what the testator wanted, which was to give it to Gary, so...

RP 401; *see also,* RP 437; Ex 2.

B. Gary dies in 2018.

Gary died on March 7, 2018 unmarried and without a

will. CP 92; Exs 9, 104. Jessica was his sole heir. CP 2.

C. Jessica removes Melody from the Auburn property.

Following Gary's death, Jessica and Melody continued to live at the Auburn property together, until Jessica obtained a protection order against Melody, because her mom became abusive. CP 198, 216; RP 72, 196; Ex 110. Melody and Jessica then agreed to a no-contact order. *Id.* A year later—in September 2020—Melody filed a lawsuit in King County and sought, among other things, ownership of the Auburn property. CP 1.

D. The trial court judgment.

The trial court awarded $34,067 to Melody to recompense her for monies she had spent related to the real property.

E. The Opinion.

On August 14, the Court of Appeals reversed the trial court and imposed a constructive trust over a life estate in the

Auburn property. *Petlig v. Estate of Webb*, No. 84007-0-I, 2023 WL 5198290 (Wn. App. Aug. 14, 2023) (unpublished).

The Opinion noted that there was no "separate finding" that Gary intended a life estate for Melody at the time he gifted the Auburn property to Jessica in January 2017; and the record contains no evidence of what Gary's intent was when the deed was delivered/recorded. *Id.* at *6. And indeed, there was no separate or specific finding, but rather a hypothetical finding where the trial court postulated that <u>if</u> Gary intended a life estate as Melody argued, it was not enough to overcome the deed. CP 255, stating:

> The court has considered **but is not persuaded by Melody's argument the Gary [sic] intended to create an oral agreement which should override the written Quit Claim Deed**. This is not to say the court finds Melody's testimony lacks credibility, it does not. However, the court is not persuaded that legally under the circumstances of the case, the intent behind the written document can be overridden by the implied intention of Gary: meaning he intended for Melody to live on the Auburn property as a life estate.

Id. (emphasis added).

The Opinion went on to find that the 2017 gift to Jessica unjustly enriched her (which the trial court never found), and that Jessica later committed a wrongful act by "evicting" Melody.[4] 2023 WL 5198290 at *7. (There was no evidence in the record of any "eviction" proceedings; rather Jessica obtained a restraining order against her mother who was abusive. CP 198, 220.)

The Opinion also held that applicable statute of limitations (apparently for unjust enrichment) began tolling at that point. *Estate of Webb*, 2023 WL 5198290 at *7.

VI. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

This case meets three criteria for this Court's discretionary review under RAP 13.4. The Opinion's erroneous application of the statute of limitations (1) conflicts with decisions of this Court; (2) conflicts with a published Court of

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[4] Appellate courts are not fact finders. *See* note 9, *infra.*

Appeals decision; and (3) involves issues of substantial public interest that this Court should resolve. RAP 13.4(b)(1), (2), & (4). The Opinion also is not supported by substantial evidence and reflects an erroneous application of the law of constructive trusts to the facts of this case. As argued below, not only did the Court of Appeals incorrectly rule, but in so doing, created uncertainty in the law of unjust enrichment and constructive trusts. This Court should settle this.

A. It is settled law in Washington that a constructive trust is a *remedy*; it is dependent on an underlying substantive claim.

The Court of Appeals imposed a constructive trust for Melody based on its own finding that Jessica was unjustly enriched when she received the Auburn property from her father, Gary, in January 2017.

The imposition of a constructive trust and application of a statute of limitations is dependent on the underlying cause of action. *See, e.g.,* David K. DeWolf, Keller W. Allen and

Darlene Barrier Caruso, 25 WASHINGTON PRACTICE, CONTRACT LAW AND PRACTICE § 1:9 (3d ed.), stating:

> A constructive trust may be employed in order to remedy unjust enrichment. Like unjust enrichment, a constructive trust is an equitable remedy that can be used to insure that property is not wrongfully retained. It is most frequently used to remedy fraud, misrepresentation, or overreaching. However, those are not the only claims that will justify the imposition of a constructive trust.
>
> The statute of limitations for a constructive trust is dependent upon the type of claim for which the trust is a remedy.

Id. (emphasis added). *See also Matter of Gilbert Testamentary Credit Shelter Trust v. Estate of Miller*, 13 Wn. App. 2d at 107 (holding that the statute of limitations for constructive trust is the limitations period for the underlying claim).

B. In *Virginia Ltd. P'ship v. Vertecs Corp.* this Court reaffirmed that the discovery rule does not apply to unjust enrichment.

The Opinion conflicts with this Court's opinion in *Virginia Ltd. P'ship v. Vertecs Corp.*, 158 Wn.2d 566, which

explicitly held that with one exception related to construction defects, the discovery rule does not apply to unjust enrichment.

A cause of action for unjust enrichment accrues and the statute of limitations begins to run when a party has the right to apply to a court for relief. *Haslund v. Seattle*, 86 Wn.2d 607, 547 P.2d 1221 (1976). It is uncontested that the 2017 deed to Jessica contained was unequivocal; it did not reserve a life estate for Melody. *At any time after that deed was signed, delivered, or recorded, Melody had opportunity to apply to a court for relief from the deed.* Instead of measuring the statute of limitations from when Melody could have challenged the deed, the Opinion applied the "discovery rule" by holding that the statute of limitations did not begin running when Jessica was enriched, i.e. when she received the gift, but later, when Jessica obtained a protection order against Melody. The Opinion oddly characterized this as *Jessica's* breach or a "wrongful act," even though there was no evidence, much less a contention that Jessica was a part of any implied agreement

with anyone.[5]

This is contrary to *Virginia Ltd. P'ship v. Vertecs Corp.*, cited *supra.* In *1000 Virginia Ltd. P'ship,* this Court abrogated a Division One opinion, *Architechtonics Constr. Mgmt., Inc. v. Khorram*, 111 Wn. App. 725, 45 P.3d 1142 (2002), which applied the discovery rule to a claim for breach of a construction contract. 158 Wn.2d at 578. This Court reasoned that because "controlling precedent held that a claim arising out of a contract accrued on breach and not on discovery, the Court of Appeals lacked authority to adopt the discovery rule." *Id.* This Court then went on to adopt the discovery rule for unjust enrichment, but expressly limited it to the single context of "actions on construction contracts involving allegations of latent construction defects." *Id.* at 590 (emphasis added). While

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[5] Indeed, the thrust of Melody's briefing and reliance on *Mehelich v. Mehelich,* 7 Wn. App. 545, 500 P.2d 779 (1972) was that a constructive trust could be imposed *without* wrongdoing.

1000 Virginia Ltd. P'ship addressed a construction contract, it also addressed unjust enrichment, and held that with one small exception not applicable here, the discovery rule does not apply. *See, e.g, Stillaguamish Tribe of Indians v. Nelson,* C10-327 RAJ, 2013 WL 1661244, at *13 (W.D. Wash. Apr. 17, 2013) (unpublished) (citing *1000 Virginia Ltd. P'ship*, and stating, "the court will not apply the discovery rule to the Tribe's unjust enrichment claim.")

C. The Opinion conflicts with this Court's opinion in *Virginia Ltd. P'ship v. Vertecs Corp.*

The Opinion conflicts with *1000 Virginia Ltd. P'ship v. Vertecs Corp.* by adopting the discovery rule for unjust enrichment, and then using Melody's discovery to determine accrual of the limitations period for a constructive trust. In doing so, the Opinion relied on dicta[6] in a 1985 case, *Dep't of*

[6] The parties in *Dep't of Revenue v. Puget Sound Power & Light Co.* disputed entitlement to unclaimed utility dividends. It is dicta in this case because this Court never opined on what

Revenue v. Puget Sound Power & Light Co., 103 Wn.2d 501, 509, 694 P.2d 7 (1985), which stated that for a "constructive trust" that statute of limitations begins when a beneficiary "discovers or should have discovered" the wrongful act which gave rise to the constructive trust. *Estate of Webb*, 2023 WL 5198290 at *7.

An earlier Division One case, *Eckert v. Skagit Corp.*, 20 Wn. App. at 851 also held that an unjust enrichment claim accrues not on discovery, but when one may seek relief in court:

> a cause of action accrues and the statute of limitations begins to run when a party has the right to apply to a court for relief. *Haslund v. Seattle*, 86 [Wn].2d 607, 547 P.2d 1221 (1976). An action for unjust enrichment lies in a promise implied by law that one will render to the person entitled thereto

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theory the Department of Revenue claimed the dividends, *i.e.* whether there was an express trust, resulting trust, *or a constructive trust*. 103 Wn.2d at 510 ("We need not determine what type of trust Puget held because under any type of trust the statute of limitations would not have run against the beneficiaries prior to the statutory presumption of abandonment.")

> that which in equity and good conscience belongs to that person. *Hedin v. Roberts*, 16 [Wn.] App. 740, 559 P.2d 1001 (1977). The promise to pay, implied by law, is the promise that was broken. While the record does not reflect the precise time of the "breach," it is clear that the fact that Eckert had not been compensated was susceptible of proof during the first 3 years of Skagit's use of Eckert's invention. The cause of action fully matured at that time. More than 3 years passed between the breach and the commencement of this lawsuit.

Eckert v. Skagit Corp., 20 Wn. App. at 851 (brackets added).

Similar to *Eckert,* even in 2019 when Melody was "evicted," she still had opportunity to apply for relief "during the first 3 years" following the gift that she challenged in this lawsuit, and still was not timely. *Id.*

This new rule, announced in the Opinion, is a substantial deviation from this Court's precedent in *1000 Virginia Lt'd P'ship v. Vertecs*, and now endorses the discovery rule for unjust enrichment (or for constructive trusts in general, uncoupled from any underlying substantive claims), but without any reason—which will no doubt give *carte blanche* to future

litigants to argue what suits them, without standards.

Although the Opinion is unpublished, Washington State Court General Rule ("GR") 14.1 allows parties to cite it and allows Washington appellate courts to rely upon it "as necessary for a reasoned opinion." GR 14.1 (a) and (c). As such, this Court's review and reversal of the Opinion is crucial to ensure the errors in the Opinion do not improperly influence future courts, litigants, and executors and trustees. *See, e.g.*, *Dougherty v. Pohlman*, 2021 WL 100237 (expressly repudiating the discovery rule for unjust enrichment and *quantum meruit* claims).

D. The Opinion conflicts with published Court of Appeals decisions in *Eckert v. Skagit Corp.* and *Estate of Miller*.

As noted *supra,* the Court of Appeals published decision in *Eckert v. Skagit Corp.*, 20 Wn. App. at 851 held that the discovery rule does not apply to claims for unjust enrichment.

Relying on *Eckert*, Division One recently compared and contrasted the applicable statute of limitations for constructive trusts when there is fraud (discovery rule) versus unjust enrichment (no discovery rule). *See Estate of Miller*, 13 Wn. App. 2d at 106-07. The respondent in *Estate of Miller* argued that certain statutory heirs' unjust enrichment claim was time-barred. But since the heirs could not apply to a court for relief until they were legally adjudged to be "statutory heirs," they did not yet have standing to apply to a court for relief. *Id.* at 107. Therefore, the statute of limitations did not accrue earlier, even though the not-yet-statutory-heirs *knew* about the claim. *Id.*

Under *Estate of Miller*, the cause of action for unjust enrichment accrues when one may seek court relief; not on discovery of the claim. The Opinion conflicts.

E. The Opinion muddles the law of unjust enrichment and constructive trusts.

> Enrichment alone will not suffice to invoke the remedial powers of a court of equity. It is critical that the enrichment be unjust both under the

> circumstances and as between the two parties to the transaction. *E.g., McGrath v. Hilding*, 41 N.Y.2d 625, 394 N.Y.S.2d 603, 606, 363 N.E.2d 328, 331 (1977). The general rule applicable in the instant case is as follows:
>
> The mere fact that a third person benefits from a contract between two other persons does not make such third person liable in quasi contract, unjust enrichment, or restitution. Moreover, where a third person benefits from a contract entered into between two other persons, in the absence of some misleading act by the third person, the mere failure of performance by one of the contracting parties does not give rise to a right of restitution against the third person. In other words, a person who has conferred a benefit upon another, by the performance of a contract with a third person, is not entitled to restitution from the other merely because of the failure of performance by the third person.

Farwest Steel Corp., 48 Wn. App. at 732.

The applicable "implied contract" (although the trial court never made any such finding) was alleged to be between Gary and Melody for a life estate, not between Jessica and Melody, or Jessica and Gary. The Opinion correctly recognized that *Gary* gifted the Auburn property to Jessica, without reservation, before he died (and thus there was no CIR claim for

the Auburn property). 2023 WL 5198290 at *4. But there was zero evidence presented to the trial court, much less any scintilla of a finding that *Jessica* was a party. The Opinion nonetheless imposed a constructive trust, but not based on the enrichment that occurred when Jessica received the gift, but *two years later* when Melody was turned away from the property, fantastically *based on the "wrongful" act by Jessica*, whom the trial court never made any findings of wrongfulness, or being a party.

Inexplicably, this wrongful act by Jessica was somehow the triggering event, not the gift that occurred two years earlier—which Melody herself knew of. There is no dispute Melody could have gone to the Court sooner, when the deed was recorded, and if she did not know then, she knew in 2019, when Jessica removed her from the home. By that time the three-year statute of limitations had not yet expired, Melody had counsel, and there was no bar to her making the claim then. CP 220. *Eckert*, 20 Wn. App. at 851 ("it is clear that the fact

that Eckert had not been compensated was susceptible of proof during the first 3 years of Skagit's use of Eckert's invention").

Further, and respectfully, the Opinion is not in accord with *Mehelich v. Mehelich,* 7 Wn. App. 545.

In *Mehelich*, the trial court found an actual agreement—a joint venture—between the husband and wife on one hand, and the husband's parents on the other, to buy a home together with the parents paying for a large portion. In contrast here, the trial court was circumspect regarding the existence of any agreement, especially not one involving Jessica, as evidenced with its questions to Melody's counsel at closing argument. RP 531.[7] Further, and very importantly, the trial court did not find that Jessica agreed to hold the property in trust for Melody or anyone else. *Id.*; Ex. 7; RP 535-36. And Gary did not acquire

[7] Trial court stating, "Exactly. That's my point. You're arguing my point exactly. Like his last wish that we know of was to have the property put in his daughter's name."

the Auburn property for Melody or for anyone else; he inherited it from his father. CP 86-87.

Mehelich is further contrasted in how it addressed the confidential relationship between the son and his parents. There, the son (who gave himself title) managed everything, and the parents trusted him. 7 Wn. App. at 551. Here, *Melody* managed everything. RP 391;[8] 401.[9] In contrast, Jessica

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[8] Shelly Sosa testifying:

> Q. Okay. And do you know who instructed your firm to prepare the deed?
> A. Melody Petlig said that Gary Webb instructed her to do this.
>
> Q. Did she say anything else about it?
> A. Did Melody say anything else about it?
>
> Q. Yeah. Did she explain anything else other than just Gary instructed it or...
> A. Well, I think she said that they wanted the property in Jessica's name.

[9] Carlos Sosa testifying that "Melody was the primary communicator of everything. … you know, Melody to me was the person that was talking about what Gary wanted….").

managed nothing, nor was there evidence Jessica commandeered or abused a relationship with her father. She was not his attorney-in-fact nor did she effect the transfer. *Id.;* Ex 8.

The alleged intent of Gary to leave Melody a life estate to Melody is *insufficient* to impose a constructive trust; and certainly not by clear and convincing evidence. A trust is not imposed as a result of the parties' intent, but because the person holding title to the property would profit by a wrong or would be unjustly enriched if he were permitted to keep the property. *Golberg v. Sanglier*, 96 Wn.2d 874, 887, 639 P.2d 1347, *amended*, 647 P.2d 489 (1982). As noted in *Farwest Steel,* Jessica benefitting from that gift is not sufficient to impose a constructive trust.

According to the legal assistant and attorney who drafted the deed, Melody "ran the show."

Nor may a constructive trust be used to supersede Jessica's right to inherit from Gary under Washington's intestacy law, RCW 11.04.015; *see also,* RCW 11.04.250 (vesting of real property in heirs). Even if it were true Gary did not intend Jessica to inherit *via* intestate succession, the Court of Appeals may not write a will for him. *In re Smith's Est.*, 68 Wn.2d at 155 ("we do not rewrite wills for testators based upon what relatives think they should have received"). The Opinion opens the door for that.

F. Correcting the Opinion matters to every future unjust enrichment case, including those that do not involve a claim of constructive trust.

The Opinion touches every person in this state because every person will someday be a decedent—and while not "precedent" under GR 14.1—it nonetheless guides parties, lawyers and judges. And it is widely known Washington's population is aging. Gene Balk, *Washington's Population is Aging*, SEATTLE TIMES, May 31, 2023, *available at*

https://www.seattletimes.com/seattle-news/data/was-population-is-aging-the-trend-is-most-striking-in-these-counties/.

The irony is that if Gary had never made the 2017 gift, it was Jessica's inheritance as Gary's sole heir under RCW 11.04.015 since Gary never made a will. Ignoring that, the Opinion does not return the Auburn property to Gary's estate, but instead sends it *directly to Melody* in the form of a life estate, based solely on an intent that the Opinion states was never a "separate finding". *Estate of Webb*, 2023 WL 5198290 at *6.

If not reversed, the Opinion will guide trusts and estates litigants—any heir, legatee, or trust beneficiary dissatisfied with an unreceived inheritance—to ignore these details, disregard the Washington's intestacy law, RCW 11.04.015, and/or seek to write wills for decedents based purely on intent—and be able to stretch statutes of limitations, perhaps decades—using the discovery rule. This scheme is unworkable and as argued

above, it conflicts both with this Court's past decisions, and published Court of Appeals decisions, and opens any estate to challenge indefinitely if it is "discovery" of unjust enrichment that controls. This Court should accept review.

VII. CONCLUSION

This Court should accept review, and hold that:

1. Constructive trusts are a remedy; their statutes of limitations depend on the underlying cause of action;

2. The discovery rule does not apply to unjust enrichment; and

3. Gary's failure to perform his end of an implied bargain with Melody, i.e. leave her a life estate, does not entitle Melody to undo his gift to Jessica.

We certify this brief contains 4,982 words in compliance with Rule of Appellate Procedure 18.17(b) and (c)(10).

Respectfully submitted this 13th day of September, 2023.

FARR LAW GROUP, PLLC

By 
M. Owen Gabrielson, WSBA# 34214
Email: MOG@FarrLawGroup.com

And by 
Meghan M. Gross, WSBA# 58650
Email: MMG@FarrLawGroup.com

Farr Law Group, PLLC
1110 Stevenson Ave., Ste. 100
PO Box 890
Enumclaw, WA 98022
Attorneys for Jessica Webb

CERTIFICATE OF SERVICE

I hereby declare, under penalty of perjury of the laws of the State of Washington, that on this day I caused to be served a true and correct copy of the foregoing Petition for Review by the method indicated below, and addressed to each of the following:

Ermin Ciric Regeimbal, McDonald & Young, PLLC 612 South 227th Street Des Moines, WA 98198 T: (206) 212-0220 F: (206) 408-2022 E: ermin.ciric@rm-law.com *Attorneys for Plaintiff Melody Petlig*	___ ___ ___ X	U.S. Mail, Postage Prepaid Hand-Delivered FedEx Electronic Notification

Jonathan B. Collins Smith Goodfriend, P.S. 1619 8th Avenue North Seattle, WA 98109-3007 T: (206) 624-0974 F: (206) 624-0809 E: jon@washingtonappeals.com *Attorneys for Plaintiff Melody Petlig*	___ ___ ___ X	U.S. Mail, Postage Prepaid Hand-Delivered FedEx Electronic Notification

DATED this 13th day of September, 2023, at Enumclaw, Washington.

FILED
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Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

MELODY L. PETLIG, an individual, Appellant/Cross-Respondent, v. THE ESTATE OF GARY WEBB, by and through its Administrator, Jessica Webb; and JESSICA WEBB, individually and in her marital community interest, Respondents/Cross-Appellants.	No. 84007-0-I DIVISION ONE UNPUBLISHED OPINION

SMITH, C.J. — Gary Webb and Melody Petlig lived together on a property Gary owned. Though not married, they held themselves out as a couple. They had a daughter, Jessica, who lived with them. In 2017, Gary quitclaimed the property to Jessica, intending that Melody would be able to live on the property until her death. Gary died in 2018. A year later, Jessica evicted Melody. Melody sued. The trial court awarded Melody $34,067.00 in damages based on an equitable committed intimate relationship (CIR) theory and taking into account Melody's contributions to the property over the years. But though it found that Gary intended Melody to have an ongoing interest in the property, it concluded that in the face of the property's transfer via quit claim deed, it did not have the legal power to recognize that interest through the recognition of a constructive trust. Melody and Jessica cross-appeal.

We reverse the trial court concerning both its award of equitable damages and its conclusion that Melody had no interest in the property recognizable through a constructive trust. CIR claims allow committed partners to equitably challenge estate distribution decisions within three years of their loved one's death, but the property was not a part of Gary's estate at his death, and was transferred to Jessica more than three years before this lawsuit was filed. However, the equitable power to recognize a constructive trust exists to acknowledge property interests even where formal ownership would preclude that recognition. As a result, the mere existence of a quit claim deed is not dispositive.

FACTS[1]

Melody Petlig and Gary Webb began seeing each other in the early 1980s and though they never married, were in a committed intimate relationship (CIR) when Gary[2] passed away in 2018. For the duration of their relationship, they lived on a property in Auburn, Washington, first in a mobile home and later in the house located on that property. For most of this time, the property was owned by Jessie Webb, Gary's father, and he allowed the couple to live on it rent-free, then Gary inherited it after Jessie's death in 2011. After Gary and Melody's daughter, Jessica, was born in 1989, the three lived together as a family unit. Jessica had

[1] These facts are drawn from the trial court's unchallenged findings of fact unless otherwise stated.

[2] Because many of the individuals in this case share the same last name, we refer to them by their first names to provide clarity.

a son around 2011,[3] who grew up on the property alongside his mother and grandparents.

Though they were never married, Gary and Melody presented themselves to the community as, for all practical purposes, husband and wife. Testimony in the eventual trial in this case from a longtime family friend, Anthony Ferrari, described them as "inseparable." They lived together, raised Jessica together, sometimes shared a joint checking account, and generally pooled their resources. When Gary assigned Melody power of attorney on his behalf, he wrote that "Melody and I have lived together, practically as man and wife, for over 30 years."

Because Melody was the main earner in the relationship—Gary did not have a stable source of income until 2010, when Melody helped him obtain social security disability benefits, nor was Jessica employed through at least 2018—her income provided for most of the family's basic needs. Over the years, Melody not only served as the breadwinner but sold her own property—a Ford Explorer—to pay real estate taxes on the property. Through one means or another, Melody paid property taxes on the property from June 2011, after Jessie's death, until September 2019. She also paid for the majority of costs associated with structural maintenance on and improvements to the house, automobiles, utilities, farm equipment, and Gary's medical expenses and, eventually, funeral expenses. Jessica testified at odds with these findings by the

[3] Jessica's son was ten years old at the time of trial in 2021.

trial court, and the court expressly found Jessica not credible "as to the nature of her parents' relationship [and] the history of the family's finances."

Gary's health worsened as the years passed. By 2015 he was "fully incapacitated" and in 2017 he became completely disabled; Melody stopped working to become his full-time caregiver. After spending some time in a rehabilitation center, Gary resided in the house on the property, where Melody and Jessica cared for him together. He died on March 7, 2018. His death certificate names Melody as his partner.

In January 2017, before Gary died, he had transferred his ownership in the property to Jessica via a quit claim deed executed by Melody, who held his power of attorney. The nuances of his intent in effecting this transfer were the subject of the trial in this case, but no party contests that one of the purposes of the quitclaim was to avoid his and Melody's creditors' ability to get at the property.

Aside from protecting the property from creditors, testimony at trial tended to show that Gary intended that Melody and Jessica would live in the house until their deaths and, indeed, that Melody had some degree of stake in the property even before then, at least in Gary's eyes. Ferrari testified that Gary's lasting hope, and a motivating thought as he had attempted to improve the property, had been that he would leave it to "his girls." Melody testified that Gary had striven to ensure that she would have "a place to stay forever," and promised her the same many times. And a 2012 rental agreement signed by both Gary and Melody to

rent out their mobile home identified them both as the Auburn property's "owners." Melody, not Jessica, collected this rental income after Gary's death.

Melody and Jessica's relationship soured, however. In September 2019, Jessica forcibly evicted her mother from the property. In the time between her eviction and trial in this case, Melody lived a transient lifestyle and experienced homelessness.

Despite these troubles, Melody managed to find an attorney and initiate this lawsuit against Jessica, whom she sued both in her individual capacity and as the executor of Gary's estate. Melody's central goal, as expressed in the various claims she made in her complaint, was to gain recognition of her right to reside in the property, or at least receive equivalent compensation. As articulated at various points, her aim was for the court to recognize a "life estate" in the property.[4]

The matter went to a bench trial. The trial court made a number of findings, and concluded first that Gary and Melody had a CIR, then that Melody had no right to live in the property, and finally that Jessica had unjustly benefitted from the improvements Melody made to the property. The court awarded Melody $34,067.00 in damages.

Both parties appeal.

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[4] A "life estate" is a right to the use and enjoyment of a property, typically to the same extent as an owner in fee simple, save that title of the property is held by a "remainderman," to whom all uses of the property will revert on the death of the one who holds the life estate. Estate of Irwin, 10 Wn. App. 2d 924, 928, 450 P.3d 663 (2019).

ANALYSIS

We are presented with challenges to the trial court's two main rulings: its decision to award Melody damages for her contributions to the property over the years, and its decision to deny her a life estate in the property by way of the creation of a constructive trust. Jessica challenges the first decision; Melody the second. We reverse both, in the process rejecting Jessica's contentions that Melody failed to preserve the argument she now makes on appeal and that Melody's claim is barred by the statute of limitations.

Committed Intimate Relationship Reimbursement

We begin by addressing the trial court's award of reimbursement to Melody for the contributions she made to the property over the years. The trial court awarded Melody $34,367 for these contributions to the community based on her CIR with Gary. Jessica challenges the reimbursement on several grounds, including by contending that no CIR claim could be brought against Gary's estate or Jessica individually and that the statute of limitations on any CIR claim had run by the time this lawsuit was filed. We agree with Jessica that this award is blocked by the relevant statute of limitations.

"The CIR doctrine is a judicially created doctrine used to resolve the property distribution issues that arise when unmarried people separate after living in a marital-like relationship and acquiring what would have been community property had they been married." Matter of Kelly, 170 Wn. App. 722, 731, 287 P.3d 12 (2012). When a CIR ends, the former partners may petition the court for a " 'just and equitable disposition of the property,' " a process analogous

to dissolution.[5] Connell v. Francisco, 127 Wn.2d 339, 347, 898 P.2d 831 (1995) (quoting Latham v. Hennessey, 87 Wn.2d 550, 554, 554 P.2d 1057 (1976)). Similarly, if one partner dies, the other may sue the decedent's estate, ask the court to recognize a CIR, and seek equitable property distribution of whatever the decedent owned. Vasquez v. Hawthorne, 145 Wn.2d 103, 107-08, 33 P.3d 735 (2001). As an equitable cause of action, any claim to property made under a CIR theory must be brought within three years of the time the claim becomes ripe. Kelly, 170 Wn. App. at 735 (citing RCW 4.16.060(3)).

The trial court in this case relied on a CIR theory to award damages to Melody. Citing relevant case law, it concluded that though Melody had no equitable right in ownership of the property itself, she had a "right of reimbursement" for the improvements she had made to the house over the years and property taxes she had paid.

But Gary transferred ownership of the property to Jessica on January 25, 2017. It was not a part of his estate at the time of his death in 2018, and therefore could not have been subject to probate or distributed based on a CIR

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[5] Determination of whether a CIR existed is a fact-intensive process that looks at five factors: (1) whether cohabitation was continuous; (2) the relationship's duration; (3) the relationship's purpose; (4) whether resources were pooled; and (5) the parties' intent. Connell v. Francisco, 127 Wn.2d 339, 346, 898 P.2d 831 (1995). The court applied this analysis to Melody and Gary's relationship and concluded it was a CIR. Neither side challenges this conclusion or its underlying findings.

Until fairly recently, case law referred to CIRs as "meretricious" relationships. E.g., Connell, 127 Wn.2d at 346. "Meretricious" derives from the Latin *meretrix*, meaning prostitute. Peffley-Warner v. Bowen, 113 Wn.2d 243, 246 n. 5, 778 P.2d 1022 (1989). Because of the term's derogatory connotations, "CIR" is now the preferred terminology. Olver v. Fowler, 161 Wn.2d 655, 657, 168 P.3d 348 (2007).

theory. Even assuming for the purposes of argument that Melody had, by virtue of a CIR, some right to challenge the property's transfer and sue Jessica personally, that claim should still have brought within three years of the transfer itself. But this lawsuit was initiated in September 2020, more than three years after Melody executed the quitclaim deed and beyond the statute of limitations that governs CIR claims.

Because no application of the CIR doctrine can support the trial court's reimbursement award, we reverse it.

Creation of a Life Estate

Melody contends that the trial court erred by not recognizing that she is the beneficiary of a constructive trust granting her a life estate in the contested property. We agree and reverse because the trial court found that it was the various parties' intent to create a life estate and, contrary to the trial court's legal reasoning, this intent is not made irrelevant by the formal transfer of the property through a quit claim deed.[6]

[6] Jessica asserts that Melody "never argued entitlement to a life estate over her partner's separate property" at the trial court and so waived her ability to argue it on appeal, correctly pointing out that "[f]ailure to raise an issue before the trial court generally precludes a party from raising it on appeal." New Meadows Holding Co. v. Wash. Water Power Co., 102 Wn.2d 495, 498, 687 P.2d 212 (1984).

Jessica is wrong. In her complaint, one of Melody's pleaded causes of action was that she benefited from the creation of a constructive trust granting her an interest in the property. In pre-trial briefing, Melody wrote: "the family agreement was quite simple: the family home is put in Jessica's name, to avoid creditors or impact on public benefits, but Melody gets a life estate (continue to life in the home until she dies)." In pre-trial discussions, Melody's attorney said: "even if it's separate property, it does not do anything to limit Melody's claim as to her interest regarding use of the property as a potential life estate." And during closing argument, Melody's argument articulated the claim once again, asserting

1. Existence of a Constructive Trust

A constructive trust is an equitable remedy allowing courts to transfer property interests. In the Matter of Gilbert Miller Testamentary Credit Shelter Tr., 13 Wn. App. 2d 99, 106, 462 P.3d 878 (2020). It is " 'the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee.' " Arneman v. Arneman, 43 Wn.2d 787, 800, 264 P.2d 256 (1953) (quoting Beatty v. Guggenheim Expl. Co., 225 N.Y. 380, 386, 122 N.E. 378 (1919)). Though often applied in instances in which property was acquired through fraud or misconduct, "[a] constructive trust may arise even though acquisition of the property was not wrongful. It arises where the retention of the property would result in the unjust enrichment of the person retaining it." Scymanski v. Dufault, 80 Wn.2d 77, 89, 491 P.2d 1050 (1971).

Unjust enrichment exists when three elements are present: "(1) the defendant receives a benefit, (2) the received benefit is at the plaintiff's expense, and (3) the circumstances make it unjust for the defendant to retain the benefit without payment." Young v. Young, 164 Wn.2d 477, 484, 191 P.3d 1258 (2008). The circumstance-dependent nature of the third element of unjust enrichment

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Melody benefited "by way of the oral contract to be enforced through the Court's equitable powers via a constructive trust and for purposes of avoiding unjust enrichment."

Melody consistently presented a theory of her case, from the lawsuit's start to its end, contending that she benefitted from a constructive trust that had created for her a life estate in the property. Jessica's arguments to the contrary are groundless.

means that the context of the ownership of a property interest heavily impacts a court's determination of whether to impose a constructive trust. For instance, "courts have imposed constructive trusts when the evidence established the decedent's intent that the legal title holder was not the intended beneficiary." Baker v. Leonard, 120 Wn.2d 538, 548, 843 P.2d 1050 (1993).

A court sitting in equity may impose a constructive trust based on clear, cogent, and convincing evidence when the basis for the trust's imposition is fraud. Yates v. Taylor, 58 Wn. App. 187, 191, 791 P.2d 924 (1990). But where there is no evidence of fraud and a constructive trust is imposed through a quasi-contract theory such as unjust enrichment—the theory at issue here—only a preponderance of the evidence need be shown. Yates, 58 Wn. App. at 192. On review, the appellate court upholds the trial court's findings if substantial evidence supports them. In the Matter of Estate of Krappes, 121 Wn. App. 653, 665, 91 P.3d 96 (2004). If the findings are supported, whether a constructive trust exists is a question of law reviewed de novo. See In re Marriage of Lutz, 74 Wn. App. 356, 372, 873 P.2d 566 (1994) (treating existence of a constructive trust as a matter of law reviewed de novo).

A case analogous to this appeal and relied on heavily by Melody illustrates the creation of a constructive trust in practice: Mehelich v. Mehelich, 7 Wn. App. 545, 551, 500 P.2d 779 (1972). Joseph and Helen Mehelich purchased a house intending "to provide [Joseph's] parents with a place to live the rest of their lives, after which the property would belong to" Joseph and Helen. Mehelich, 7 Wn. App. at 548. After the purchase, the parents lived in the property, made

substantial improvements, paid real estate taxes and insurance, and did not pay and were not asked to pay rent to Joseph. Mehelich, 7 Wn. App. at 551. No contract governed the implicit terms of the family members' agreement. Mehelich, 7 Wn. App. at 551. Instead, the parents trusted their son to handle the matter in accordance with their shared understanding of the arrangement. Mehelich, 7 Wn. App. at 551. Given those facts, this court concluded that "to hold otherwise than [that a constructive trust ought to be imposed to the extent of a life estate in the father] would be to allow the unjust enrichment of [Joseph and Helen] at the expense of [Joseph's father]." Mehelich, 7 Wn. App. at 551.

The facts of this case are on all fours with those of Mehelich, and the trial court's unchallenged findings[7] support the imposition of a constructive trust granting Melody a life estate in the property as a matter of law. The transfer of title of the property from Gary to Jessica via quitclaim deed easily satisfies the first element of unjust enrichment: the defendant receiving a benefit. Equally easily satisfied is the second element—that the benefit came at the plaintiff's expense—since the findings indicate that Melody had for years borne the brunt of

[7] Unchallenged findings are verities on appeal. Robel v. Roundup Corp., 148 Wn.2d 35, 42, 59 P.3d 611 (2002). A conclusion of law erroneously denominated a finding of fact will nonetheless be reviewed de novo. Robel, 148 Wn.2d at 43. Jessica nominally challenges the "Corrected Findings of Fact and Conclusions of Error" as a whole. But to be effective, challenges to findings of fact must be made by reference to the specific number of the finding, and with a different assignment of error for each finding contested. RAP 10.3(g). Jessica has not done so, nor does she argue about the sufficiency of the evidence supporting various findings in her briefing, nor does she, in her reply brief, contest Melody's contention that she has failed to make a proper challenge to individual findings. We therefore treat the trial court's findings of fact as verities.

the burden of the property's ownership and upkeep and also indicate that she continued to after the transfer.

The third element—whether circumstances make it unjust for the defendant to retain the benefit without payment—requires a more detailed analysis of the trial court's ruling. As established by Baker and Mehelich, this element depends in part on the intent of the transferor of the property and the shared understandings of others involved in that transfer. Most relevant to our analysis is the trial court's Conclusion of Law 3, which, despite its title, consists mainly of factual findings:

> As previously discussed, it undisputed using her authority as Gary's Attorney-in-fact, Melody executed a Quit Claim Deed transferring the Auburn Property solely to Jessica on January 25, 2017. The court has considered but is not persuaded by Melody's argument the Gary intended to create an oral agreement which should override the written Quit Claim Deed. This is not to say the court finds Melody' s testimony lacks credibility, it does not. However, the court is not persuaded that legally under the circumstances of this case, the intent behind the written document can be overridden by the implied intention of Gary: meaning he intended for Melody to live on the Auburn Property as a life estate. Gary' s clear intention for the execution of the Quit Claim Deed, which unconditionally assigns all property rights to Jessica, was to avoid his and Melody's creditors. This assertion is uncontested.

Though not included as a separate finding, the trial court found that Gary's intent at the time he transferred the property to Jessica was for Melody to continue living there, essentially holding a life estate. Supporting this understanding of the trial court's finding is its much clearer finding that Melody's testimony about Gary's intent was credible. However, despite its finding, the trial court did not impose a constructive trust because it did not believe that Gary's

intent to create a life estate could "legally" coexist with his parallel intent to avoid Melody's creditors.

We disagree. In the first place, these intents are not—as Jessica contends and as the trial court apparently believed—truly at odds. Jessica asserts that life estates may be subject to levy by creditors, and thus that any intent to create a life estate would be logically inconsistent with a transfer to avoid liability to creditors. But this confuses the intent behind actions with their legal impact. Secondly, this argument assumes that the "unconditional[] assign[ment]" of property rights to Jessica cannot coexist with an intent to create a life estate. This conclusion appears to rely on the unqualified text of the quitclaim deed itself, but that text has only minimal bearing on whether a constructive trust exists. Constructive trusts, by their nature, exist at odds with written indications of property ownership. The doctrine would otherwise serve no purpose.

We therefore rely on the trial court's finding that Gary intended to create a life estate to conclude that Jessica would be unjustly enriched if no constructive trust were recognized. As in Mehelich, Jessica's possession of title in the property came into existence alongside Melody's possession of a life estate. That this understanding was shared among the various parties is reflected in Melody's continued custodianship of the property—collecting rents and paying taxes—as well as Jessica's tacit allowance of the same activities. And there is no indication that Jessica ever attempted to charge Melody or Gary rent on

receiving ownership of the property.[8] Given that the facts are unchallenged and the trial court's hesitation was legal in nature, we conclude that the court erred as a matter of law.

2. Statute of Limitations

Finally, Jessica contests that even if it may have merit, Melody's constructive trust claim is barred by the relevant statute of limitations. We disagree.

Which statute of limitations governs a constructive trust claim depends on the substantive claim underlying the action. Gilbert Miller, 13 Wn. App. 2d at 107. "The statute of limitations applicable to a common law cause of action for unjust enrichment is three years under RCW 4.16.080(3)." Gilbert Miller, 13 Wn. App. 2d at 108. "For a constructive trust the statute of limitations begins to run when the beneficiary discovers or should have discovered the wrongful act which gave rise to the constructive trust." Dep't of Revenue v. Puget Sound Power & Light Co., 103 Wn.2d 501, 509, 694 P.2d 7 (1985).

Here, the wrongful act giving rise to the constructive trust was Jessica's eviction of Melody. The statute of limitations on Melody's constructive trust claim therefore began running at that time. The eviction occurred in September 2019. This lawsuit was initiated in September 2020. The lawsuit consequently falls within the three-year period prescribed by the statute of limitations.

[8] Melody's opening brief and reply/response brief make this claim more directly, asserting that Jessica did not charge rent, but it does not appear to be stated so explicitly anywhere in the record. Conversely, no evidence exists that Jessica *did* seek to charge Melody or Gary rent, and Jessica's briefing never rebuts the claim.

DISPOSITION

We reverse and remand for entry of new conclusions of law consistent with this opinion and for the trial court's determination of the appropriate remedy to enforce Melody's life estate in the property.

We take a moment to clarify the disposition of the mobile home located on the property. What is denominated the trial court's fourth conclusion of law indicates that "the entire family considered the mobile home unit as part of the Auburn Property." We treat this as a factual conclusion. In light of Gary's intent to award Melody a life estate in the property as a whole, we conclude that her corresponding property interest encompasses the mobile home.

We note that our reversal does not impact the court's eighth conclusion of law, awarding Melody ownership of a collection of personal property under a CIR theory. Nor does it impact the court's division, in the same conclusion, of certain community property—a tractor and car—acquired during the relationship, which the trial court ordered sold and the proceeds split between the parties. The parties did not assign error to these decisions.

Reversed and remanded.

Smith, C.J.

WE CONCUR:

Díaz, J.

Mann, J.

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NOTE: UNPUBLISHED OPINION, SEE WA R GEN GR 14.1

Court of Appeals of Washington, Division 2.

David J. DOUGHERTY,
an individual, Appellant,
v.
Samantha R. POHLMAN, in her capacity as personal representative of the Estate of Raven J. Dougherty, Respondent.

No. 53746-0-II
|
Filed January 12, 2021

Appeal from Pierce County Superior Court, Docket No: 18-2-10282-6, Honorable Shelly Speir, Judge

Attorneys and Law Firms

Scott David Winship, Vandeberg Johnson & Gandara, 1201 Pacific Ave. Ste. 1900, Tacoma, WA, 98402-4391, Daniel C. Montopoli, Attorney at Law, 1201 Pacific Ave #1900, P.O. Box 1315, Tacoma, WA, 98401-1315, for Appellant.

Charles Tyler Shillito, Smith Alling PS, 1501 Dock St., Tacoma, WA, 98402-3209, Matthew Clark Niemela, Attorney at Law, 717 W Sprague Ave. Ste. 1200 Spokane, WA, 99201-3905, for Respondent.

UNPUBLISHED OPINION

Glasgow, J.

***1** David J. and Raven J. Dougherty dissolved their marriage in 2005 but remained in a relationship until 2015. In the dissolution, Raven[1] was awarded as her separate property a piece of undeveloped land in Buckley, Washington. David, a general contractor, helped design and construct a home on Raven's property that was completed in 2008. Raven and David lived together in the completed home until they ended their relationship.

In 2015, David sent a demand letter to Raven, alleging that she had orally agreed to compensate him for working on the house but recently refused to do so. Raven denied an agreement existed, claimed David owed her money under the prior dissolution decree, and refused to compensate him. Raven died in 2018.

In 2018, David sued Raven's estate and the parties proceeded to trial on his unjust enrichment and quantum meruit claims. At the close of David's case, Raven's estate brought a CR 41(b)(3) motion to dismiss, arguing that David's claims were untimely under the three-year statute of limitations. The trial court granted the motion to dismiss, and we affirm.

FACTS

David and Raven's marriage was dissolved in 2005 in Illinois. Raven owned undeveloped property in Buckley, and the court awarded it to her as separate property. Despite ending their marriage, David and Raven remained in a relationship and lived together until separating in 2015.

David was a general contractor who built houses and owned an overhead door installation business. From 2005 to 2008, David and Raven spent summers in Illinois and winters in Washington. While in Washington, they lived in a motor home on Raven's Buckley property while building a house there. David designed the house with the assistance of an architect friend. David constructed many portions of the house and supervised subcontractors who completed specialized tasks.

Raven kept a handwritten journal during the construction process. The journal chronicled the progress of the house and included photographs of David working on the house.

The house was completed in 2008. David and Raven then periodically lived in it together. David continued to split his time between Washington and Illinois, and he lived in the completed Buckley house for multiple months-long stretches until 2015.

Raven was diagnosed with terminal cancer in 2014. In 2015, David and Raven separated and ended their relationship. In December 2015, David hired an attorney who sent a demand letter to Raven asserting that she had orally agreed to grant David a 50 percent ownership interest in the property and "to secure that interest by deed" in exchange for construction work David performed. Clerk's Papers at 330. The letter indicated that Raven refused to do so for the first time in 2015.

Raven's counsel responded, arguing that David had no right to an ownership interest in the property or monetary payment. Instead, the letter asserted that David still owed Raven money under the dissolution decree.

***2** In 2017, David and Raven filed cross motions for civil contempt in Illinois to enforce provisions of the 2005 dissolution decree. During the contempt hearing, David testified about his work on the Buckley house and argued that he and Raven had orally agreed that the value of the time and labor he put into the Buckley house offset most of the money he owed Raven under the dissolution decree. David did not file any express or implied contract claims in conjunction with his cross motion for contempt. The Illinois court denied both motions, finding that neither party established willful noncompliance.

In 2018, Raven died from cancer. Samantha R. Pohlman, Raven's daughter from a prior marriage, was appointed personal representative of Raven's estate. David filed a creditor's claim against Raven's estate seeking $208,372.43, the amount he said Raven owed him for his work on the house. The estate rejected David's creditor's claim.

Later in 2018, David filed a complaint in the Pierce County Superior Court against Raven's estate to enforce the alleged oral agreement to give him a 50 percent ownership interest in the property, bringing multiple causes of action including unjust enrichment and quantum meruit. The trial court dismissed several claims on summary judgment, but David's claims for unjust enrichment and quantum meruit survived. The parties proceeded to trial on the unjust enrichment and quantum meruit claims only.

After David's case in chief, the estate moved to dismiss under CR 41(b)(3), arguing in part that David's claims were barred by the three-year statute of limitations. The estate contended that David could have filed his unjust enrichment and quantum meruit claims as early as 2008, when he finished constructing the house, meaning his claims accrued in 2008. Because David waited until 2018 to file his claims, the estate argued that the statute of limitations had expired.

David responded that his implied contract claim did not begin accruing until 2015, when he alleged Raven first unequivocally refused to convey to him a 50 percent ownership interest in the property. David's counsel explained, "Prior to [2015] ... based on his belief that there had been an oral agreement or an agreement with Raven, [David] believed there was an actual contract at the time. It was [not] until that belief was rebutted that he was able to ... pursue" his unjust enrichment and quantum meruit claims. Verbatim Report of Proceedings (VRP) (July 31, 2019) at 109.

The trial court granted the estate's CR 41(b)(3) motion and dismissed David's remaining claims based on the statute of limitations. The trial court held that no evidence admitted in David's case in chief established that his claims accrued any later than 2008 when the construction was complete.

David appeals the trial court's CR 41(b)(3) ruling dismissing his unjust enrichment and quantum meruit claims based on the statute of limitations.[2]

ANALYSIS

David contends that the trial court erred by dismissing his claims as untimely under the three-year statute of limitations because he claims that the statute of limitations did not begin running until 2015 when, he says, Raven first told him she would not give him an interest in the real property. David argues that an unjust enrichment claim cannot accrue until the unjust retention of a benefit is "unequivocal," and the 2015 letter would have established that this did not occur until 2015. Br. of Appellant at 16-19.

***3** The estate responds that a cause of action accrues when a party has the right to bring a claim for relief in court. The estate argues that David worked on the house from 2005 to 2008, and he could have brought an unjust enrichment or quantum meruit claim well before he did so in 2018, a decade after he completed the work in question.

To grant a motion to dismiss as a matter of law under CR 41(b)(3), a trial court must "view the evidence in the light most favorable to the plaintiff and rule as a matter of law that the plaintiff has failed to establish a prima facie case." *Hendrickson v. Dep't of Labor & Indus.*, 2 Wn. App. 2d 343, 352, 409 P.3d 1162 (2018). We review such dismissals de novo "viewing the evidence in the light most favorable to the plaintiff." *Rufin v. City of Seattle*, 199 Wn. App. 348, 357, 398 P.3d 1237 (2017). The application of a statute of limitations is also a question of law that we review de novo. *In re Miller Testamentary Credit Shelter Tr.*, 13 Wn. App. 2d 99, 104, 462 P.3d 878 (2020).

A. Elements of David's Claims and Their Three-Year Statute of Limitations

To prove unjust enrichment, the plaintiff must establish three elements: "(1) the defendant receive[d] a benefit, (2) the received benefit is at the plaintiff's expense, and (3) the circumstances make it unjust for the defendant to retain the benefit without payment." *Young v. Young*, 164 Wn.2d 477, 484-85, 191 P.3d 1258 (2008). "Unjust enrichment is the method of recovery for the value of the benefit retained absent any contractual relationship because notions of fairness and justice require it." *Id.* at 484. To prove quantum meruit, the plaintiff must establish the existence of a contract implied in fact and must prove that (1) the defendant requested work, (2) the plaintiff expected payment for the work, and (3) the defendant knew or should have known the plaintiff expected payment for the work. *Id.* at 484-85.

Under RCW 4.16.080(3), "an action upon a contract or liability, express or implied, which is not in writing, and does not arise out of any written instrument" must be "commenced within three years" of accrual. "[T]he statute of limitations applicable to a common law cause of action for unjust enrichment ... is equivalent to a cause of action for ... implied in law [contract and] ... is three years." *Davenport v. Wash. Educ. Ass'n*, 147 Wn. App. 704, 737, 197 P.3d 686 (2008).

Here, both parties agree that the applicable statute of limitations period for both claims is three years, but they dispute when the three-year period accrued. The parties do not dispute that David last performed work on the home on Raven's property in 2008, and Raven did not pay him money or deed him an interest in the property at or after that time.

B. Unjust Enrichment

In *Eckert v. Skagit Corp.*, the plaintiff was a machinist who had developed a device on his own time that the defendant, Skagit Corporation, had been using for about 18 years before Eckert filed his complaint for unjust enrichment. 20 Wn. App. 849, 850, 583 P.2d 1239 (1978). Eckert claimed use of the device had resulted in significant cost savings to the corporation and the corporation had been unjustly enriched. *Id.*

The *Eckert* court explained, "Generally, a cause of action accrues and the statute of limitations begins to run when a party has the right to apply to a court for relief." *Id.* at 851. The court agreed that the promise to pay implied in law based on "equity and good conscience" was broken. *Id.* While the record did not reflect a precise time when the claim for unjust enrichment accrued, it was "clear that the fact that Eckert had not been compensated was susceptible of proof during the first [three] years of [the corporation's] use of Eckert's invention. The cause of action fully matured at that time." *Id.* The applicable statute of limitations was three years, and more than three years passed between accrual and commencement of the lawsuit. *Id.*

***4** As in *Eckert*, David's cause of action fully matured when he completed his work on the home because it was susceptible of proof then. Because Raven had neither transferred a property interest to David nor paid him for his work on the property, David could have argued in 2008 when he completed work on the house that (1) he had conferred a benefit on Raven, (2) he did so at his expense, and (3) it was unjust for Raven to retain that benefit without compensating him.

David argues that under *Dragt v. Dragt/DeTray, LLC*, 139 Wn. App. 560, 576, 161 P.3d 473 (2007), an unjust enrichment claim requires the *unjust* retention of a benefit, and Raven did not unjustly retain the benefit of his work until she expressly refused to pay him in 2015. But the *Eckert* court did not require that the time of accrual be precisely defined where it was clear that more than three years had passed between the time when the claim was susceptible to proof and the complaint. In this case, David went uncompensated for several years after he became entitled to compensation because he had completed his work on the property in 2008.

We also reject David's assertion that unjust retention and repudiation must be unequivocal and that this did not happen until Raven responded to his attorney's letter in 2015. David cites *Alaska Pacific Trading Co. v. Eagon Forest Products, Inc.*, 85 Wn. App. 354, 365, 933 P.2d 417 (1997), for this proposition, but this case is not applicable because it addresses contractual repudiation, not unjust enrichment. *Alaska Pacific* thus does not support a requirement that the unjust retention of a benefit be unequivocal. Similarly, David's reliance on *Wallace Real Estate Investment, Inc. v. Groves*, 124 Wn.2d 881, 898, 881 P.2d 1010 (1994), is misplaced because *Wallace* deals with anticipatory breaches, not unjust enrichment.

David's unjust enrichment claim accrued more than three years before David brought his unjust enrichment claim.

C. Quantum Meruit

Like his unjust enrichment claim, David's quantum meruit claim was susceptible to proof and also accrued no later than 2008. David could have argued in 2008 that (1) Raven solicited David's construction of the house, (2) David expected to be compensated for it, and (3) Raven knew David expected to be compensated.

David argues that he was incapable of pursuing any quantum meruit claim until 2015, when Raven allegedly first refused to convey to him a 50 percent ownership interest in the property under the alleged oral agreement. David argued at trial that "[p]rior to [2015] ... based on his belief that there had been an oral agreement or an agreement with Raven, [David] believed there was an actual contract at the time. It was [not] until that belief was rebutted that he was able to then pursue" his implied contract claim. VRP (July 31, 2019) at 109.

We reject this argument because an implied contract claim begins to accrue when the evidence of the claim is sufficiently matured to establish the elements in court, not the date when the plaintiff realizes they could bring a claim. *See 1000 Virginia Ltd. P'ship v. Vertecs Corp.*, 158 Wn.2d 566, 575-76, 590, 146 P.3d 423 (2006). Contract claims like the one here do not "accrue[ ] when the plaintiff *learns* that [they have] a legal cause of action; rather, the action accrues *when the plaintiff discovers the salient facts underlying the elements of the cause of action*." *Id.* at 576 (emphasis added). Even if David believed Raven would compensate him at some point with a 50 percent ownership interest in the property, the salient facts underlying his implied contract claim rested on knowledge David already had in 2008—that he had constructed a house for Raven believing he would be compensated, yet he did not receive compensation.

***5** In sum, we affirm the trial court's dismissal of David's claims because he did not bring them within the three-year statute of limitations. David's argument that the statute of limitations should have been tolled because he believed until 2015 that Raven would compensate him for his work on the property, is incorrect under the proper analysis of accrual for unjust enrichment and quantum meruit claims.

Because we hold that the three-year statute of limitations for David's claims had expired by the time he filed his lawsuit, the parties' arguments as to the admissibility of the contents of the letters exchanged in 2015, as well as their arguments regarding the admissibility of other evidence, are irrelevant. We therefore do not address any of the remaining arguments.

CONCLUSION

We affirm the trial court's CR 41(b)(3) dismissal of David's claims because the statute of limitations had run before David filed his complaint and they were untimely.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

We concur:

Sutton, A.C.J.

Cruser, J.

All Citations

Not Reported in Pac. Rptr., 16 Wash.App.2d 1008, 2021 WL 100237

Footnotes

1 We use the parties' first names for clarity.

2 David also challenges several of the trial court's evidentiary rulings, including the trial court's exclusion of the contents of the 2015 letters between David's and Raven's counsel. And the estate raised several alternative arguments in support of affirming the trial court's dismissal. Because the statute of limitations issue is dispositive and does not rely on the contents of the 2015 letters, we do not reach any of these arguments.

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United States District Court, W.D. Washington, at Seattle.

The STILLAGUAMISH TRIBE OF INDIANS, Plaintiff,

v.

David L. NELSON, et al., Defendants.

No. C10–327 RAJ.
|
April 17, 2013.

Attorneys and Law Firms

Barry Neal Mesher, Sedgwick LLP, Gabriel Baker, Jennifer Sheffield, Lane Powell PC, Rob Roy Smith, Kilpatrick Townsend & Stockton LLP, Seattle, WA, for Plaintiff.

Andrew David Shafer, James A. Jackson, Simburg, Ketter, Sheppard & Purdy, LLP, Seattle, WA, Chris C. Cramer, Richard R. Beresford, Beresford, Booth, Demaray & Tingstad, Edmonds, WA, for Defendants.

Sara M. Shroedl, Phoenix, AZ, pro se.

ORDER

RICHARD A. JONES, District Judge.

I. INTRODUCTION

***1** This matter comes before the court on motions for summary judgment by defendants David and Michele Nelson ("Nelson") (Dkt.# 283) and defendant Nathan Chapman (Dkt.# 296).[1] The Tribe opposes the motions. The remaining claims against Nelson and Chapman (collectively, "Defendants") are (1) conspiracy to violate the Racketeer Corrupt and Influenced Organizations Act ("RICO") (second cause of action[2]); (2) violation of RICO section 1962(c) (third cause of action); (3) conspiracy to violate RICO section 1962(c) (fourth cause of action[3]); (4) breach of fiduciary duties and violation of statutory obligations (seventh cause of action); (5) fraud and/or negligent misrepresentation (ninth cause of action); (6) civil conspiracy (tenth cause of action); and (7) unjust enrichment (eleventh cause of action). Dkt. # 190 (Third A m. Compl. "TAC").[4]

Chapman argues that the Tribe lacks standing to bring the RICO claims and that once the RICO claims fail, so do the remaining claims. Dkt. # 283. Nelson argues that the Tribe lacks standing to bring the RICO claims, that the statute of limitations bars each remaining claim, and that a failure of proof requires dismissal on each remaining claim. Dkt. # 296. On January 31, 2013, the court ordered the parties to provide the court with a spreadsheet identifying the evidence in the record that supported various arguments made by the parties. Dkt. # 381.

Having considered the memoranda, declarations, exhibits, spreadsheets, oral argument and the record herein, the court GRANTS in part and DENIES in part Defendants' motions for summary judgment.

II. BACKGROUND

Defendants became acquainted with Edward Goodridge Sr. and Edward Goodridge Jr. in 2001, when Goodridge Sr. was the Chairman of the Tribe's Board of Directors and Goodridge Jr. was the Tribe's Executive Director. Nelson and Chapman were involved in various transactions, either as investors, agents, or otherwise, involving real estate, methadone clinics, and the smoke shop.

With respect to the real estate transactions, in 2001, the Tribe executed a retainer agreement with Towne or Country Real Estate that identified Nelson and Chapman as the Tribe's real estate agents. Dkt. # 344–4 at 4–5 (Ex. 25 to Baker Decl.). In 2002, the Tribe and Tribal Consulting LLC, of which Nelson and Chapman were managing members, entered into an agreement to consult with respect to zoning ordinances, acquiring investors, and various ventures related to land acquisitions. *Id.* at 7–25 (Ex. 26 to Baker Decl.). As the Tribe's real estate agents, Nelson and Chapman worked with the Tribe, typically through Goodridge Jr., to find and purchase various properties. The sales prices of the various properties were allegedly in an amount greater than the assessed value of the property. Nelson and Chapman also allegedly charged excessive commissions with respect to the MacWhyte and Morehouse properties, and allegedly failed to disclose their own interests with respect to the Nelson, Schmidt, RAD and Pi lchuck properties. Dkt.344–1 at 28, 30 (Ex. 2 to Baker Decl., Dreger Depo. 220:8–221:9, 288:7–13); 344–4 at 70

(Ex. 39 to Baker Decl.); 344–4 at 75 (Ex. 40 to Baker Decl.); 344–5 at 46, 48 (Exs. 44 & 45 to Baker Decl.).

***2** With respect to the methadone clinic, in February 2003, the Tribe and IC Holdings L L C (signed by Chapman and Nelson) entered into an agreement whereby IC Holdings loaned the Tribe the funds needed to start up the Island Crossing Counseling Services Clinic ("ICCS" or the "Methadone Clinic") in exchange for a share of the revenue of the Methadone Clinic. Dkt. # 340–2 at 2–25 (Ex. I to Baker declaration in support of opposition to Ashley's Motion for Summary Judgment ("Baker ISO Ashley MSJ")). In December 2004, the Tribe and Native Health Systems, LLC ("NHS") entered an agreement allowing NHS to use Thomas Ashley to open methadone clinics for other tribes in exchange for a share of the revenue. Dkt. # 340–2 at 38–42 (Ex. O to Baker ISO Ashley MSJ).

With respect to the smoke shop, in March 2003, Goodridge Sr. and Nelson executed a loan agreement, whereby Nelson agreed to loan $100,000 to Goodridge Sr. to allow him to operate a smoke shop on Tribal land in exchange for a share of the profits. Dkt. # 344–2 at 52–70 (Ex. 13 to Baker Decl.).[5] Goodridge Jr. and Chapman executed a similar loan, whereby Chapman loaned Goodridge Jr. $50,000 for a share of the revenue in the smoke shop. Dkt. # 344–3 at 2–13 (Ex. 14 to Baker Decl.). Goodridge Jr. formed Native American Ventures LLC ("NAV") to operate the smoke shop as a private business (*see* Dkt. # 344–3 at 63 (Ex. 20 to Baker Decl.)), and Goodridge Sr., Goodridge Jr., and Sara Schroedl operated the smoke shop. The smoke shop sold contraband cigarettes, and the Tribe did not enter into a compact with Washington State to legally operate the smoke shop until 2009.

In May 2007, the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") raided the smoke shop. Dkt. # 342 (Yanity Decl .) ¶ 2. As a result, the Tribe began an investigation of the business transactions involving Goodridge Sr., Goodridge Jr., Schroedl, Nelson and Chapman. *Id.* ¶ 3. In November 2008, Goodridge Sr. and Goodridge Jr. were placed on administrative leave from their leadership positions with the Tribe. *Id.* ¶ 6. Also in November 2008, Goodridge Sr., Goodridge Jr., and Schroedl pled guilty to violating the Cigarette Trafficking Act ("CCTA," 18 U.S.C. §§ 2341–2346) and to laundering of money (18 U.S.C. § 1957) they obtained from the trafficking scheme. Dkt. # 344–3 at 23–50 (Exs. 17 & 18 to Baker Decl.). In early 2009, the Tribe terminated the business relationships between the Tribe and Nelson and Chapman. Dkt. # 342 (Yanity Decl.) ¶ 9.

III. ANALYSIS

A. Legal Standard

Summary judgment is appropriate if there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(a). The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Where the moving party will have the burden of proof at trial, it must affirmatively demonstrate that no reasonable trier of fact could find other than for the moving party. *Calderone v. United States,* 799 F.2d 254, 259 (6th Cir.1986). On an issue where the nonmoving party will bear the burden of proof at trial, the moving party can prevail merely by pointing out to the district court that there is an absence of evidence to support the non-moving party's case. *Celotex Corp.,* 477 U.S. at 325. If the moving party meets the initial burden, the opposing party must set forth specific facts showing that there is a genuine issue of fact for trial in order to defeat the motion. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The court must view the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in that party's favor. *Reeves v. Sanderson Plumbing Prods.,* 530 U.S. 133, 150–51, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000).

***3** However, the court need not, and will not, "scour the record in search of a genuine issue of triable fact." *Keenan v. Allan,* 91 F.3d 1275, 1279 (9th Cir.1996); *see also, White v. McDonnel–Douglas Corp.,* 904 F.2d 456, 458 (8th Cir.1990) (the court need not "speculate on which portion of the record the nonmoving party relies, nor is it obliged to wade through and search the entire record for some specific facts that might support the nonmoving party's claim").[6]

B. Evidentiary Analysis

In resolving a motion for summary judgment, the court may only consider admissible evidence. *Orr v. Bank of America,* 285 F.3d 764, 773 (9th Cir.2002). At the summary judgment stage, a court focuses on the admissibility of the evidence's content, not on the admissibility of the evidence's form. *Fraser v. Goodale,* 342 F.3d 1032, 1036 (9th Cir.2003).

Chapman moves to strike the Tribe's proffered proof of damages regarding the real property transactions. Dkt. # 350–

1 at 3. Chapman argues that excerpts from the expert witness reports are inadmissible and that an expert report cannot be used to prove the existence of facts set forth therein. *Id.* In response to the motion to strike, the Tribe, without seeking leave, filed a supplemental brief and declarations from its expert witnesses. The court will accept the belatedly filed expert declarations that authenticate the expert reports. However, an expert report cannot be used to prove the existence of the facts set forth therein. *In re Citric Acid Litigation,* 191 F.3d 1090, 1102 (9th Cir.1999). Accordingly, the court has considered the expert reports consistent with applicable case law and Federal Rule of Evidence 702.

Nelson also asks the court to strike the Yanity declaration as a sham. Dkt. # 351 (Reply) at 5. Nelson argues that paragraph 11 contradicts Yanity's deposition testimony. To the extent that paragraph 11 contradicts his deposition testimony, the court has disregarded paragraph 11. *Compare* Dkt. # 342 (Yanity Decl.) ¶ 11 *with* Dkt. # 352 (Supp. Shafer Decl.), Ex. 2 (Yanity Depo. at 187:9–15, 218:7–219:11).

After oral argument, Nelson filed a motion to exclude two documents referenced by the Tribe during oral argument (Dkt.# 396) and a motion to strike the Tribe's opposition to its motion to strike the Yanity declaration (Dkt.# 401). With respect to the latter, the notice of opposition to the motion to strike, filed approximately seven months after the request to strike, is not timely, and the court has not considered it. With respect to the former, Nelson argues that the Tribe used two documents that were not part of plaintiff's opposition papers. However, Nelson has also used documents that were not part of its papers in response to the court's questions. Dkt. # 383–4 at 1 (citing Dkt. 340–1, 340–2). The documents cited by the Tribe (340–2 at 62 and 64) and the documents cited by Nelson in his spreadsheet are all part of the record and were provided to the court in response to the court's questions. Accordingly, Nelson's motion to exclude is DENIED.

***4** The court notes that Nelson has provided the court with an exhibit that summarizes the 23 closed property transactions, which include closing dates for various properties. Dkt # 297 (Nelson Decl.) ¶ 6, Ex. 24. The Tribe has not objected to this document on any grounds. Accordingly, the court has considered it.

C. RICO and Conspiracy to Violate RICO (second, third and fourth causes of action)

RICO provides a private cause of action for any person injured in his business or property by reason of a violation of RICO's criminal provisions, 18 U.S.C. § 1962. 18 U.S.C. § 1964. Section 1962(c), which the Tribe invokes here, makes it "unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect interstate ... commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." 18 U.S.C. § 1962. "[R]acketeering activity" is defined to include a long list of state and federal crimes, including violation of the CCTA, money laundering, mail fraud (18 U.S.C. § 1341) and wire fraud (18 U.S.C. § 1343). Additionally, it is "unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section." 18 U.S.C. § 1962(d). For purposes of a RICO conspiracy, a conspiracy may exist even if a conspirator does not agree to commit or facilitate each and every part of the substantive offense. *Salinas v. United States,* 522 U.S. 52, 63, 118 S.Ct. 469, 139 L.Ed.2d 352 (1997). "One can be a conspirator by agreeing to facilitate only some of the acts leading to the substantive offense." *Id.* at 65. "The interplay between subsections (c) and (d) [of section 1962] does not permit [the court] to excuse from the reach of the conspiracy provision an actor who does not himself commit or agree to commit the two or more predicate acts requisite to the underlying offense." *Id.*

To have standing under section 1964(c), a civil RICO plaintiff must prove that (1) defendant participated in an enterprise that (2) engaged in a pattern of racketeering activity that (3) caused plaintiff an (4) injury to its business or property. *See Canyon County v. Syngenta Seeds, Inc.* 519 F.3d 969, 972 (9th Cir.2008). RICO confers standing only on a person injured in his business or property by reason of a violation of the statute. 18 U.S.C. § 1964(c). With respect to causation, the plaintiff must show that a RICO predicate offense not only was a "but for" cause of his injury, but was the proximate cause as well. *Hemi Group, LLC v. City of N.Y.,* 559 U.S. 1, 130 S.Ct. 983, 989, 175 L.Ed.2d 943 (2010). Proximate cause requires " 'some direct relation between the injury asserted and the injurious conduct alleged.' " *Id.* A link that is too remote, purely contingent, or indirect is insufficient. *Id.* In the RICO context, "the focus is on the directness of the relationship between the conduct and the harm." *Id.* at 991. "When a court evaluates a RICO claim for proximate causation, the central question it must ask is whether the alleged violation led directly to plaintiff's injuries." *Anza v. Ideal Steel Supply Corp.,* 547 U.S. 451, 461, 126 S.Ct. 1991, 164 L.Ed.2d 720 (2006).

***5** Nelson argues that the Tribe lacks standing because, although a "person" for purposes of RICO, it is acting in its sovereign capacity. The court has already held that "the Tribe does not seek to vindicate its sovereign rights, but rather seeks to assert a right available that RICO makes available to every 'person,' the right to recover damages caused by an injury to business or property ." Dkt. # 65 at 12; *see also* 18 U.S.C. § 1961(3) ("Person" includes "any individual or entity capable of holding a legal or beneficial interest in property."). *Canyon County v. Syngenta Seeds, Inc.*, on which Nelson relies, is therefore distinguishable. 519 F.3d 969 (9th Cir.2008) (a sovereign acting in a *parens patriae* capacity lacks RICO standing).

Chapman argues that the Tribe lacks standi ng[7] because the Tribe cannot prove causation with respect to the real estate transactions, the methadone clinics, or the smoke shop. Dkt. # 283 at 5–10. Nelson argues that the Tribe has failed to demonstrate proximate causation with respect to the smoke shop. Dkt. # 296 at 3–4.

a. Smoke Shop

With respect to the smoke shop, the Tribe has identified a loss of approximately $15 million from the "opportunity to legally operate the smoke shop from 2003 to 2009." Dkt. # 341 at 8. However, in order to legally operate the smoke shop, the Tribe would have had to enter a compact with the State of Washington. While it did so in 2009 after the raid, the court has already held that the assumption that the Tribe would have entered a compact with the State ignored numerous uncertainties, including whether the Tribal Board would have voted to enter a compact, even without the self-interest of Goodridge Sr., Goodridge Jr., and Schroedl, who were on the Board. Dkt. # 65 at 14.

During oral argument, the Tribe identified the following as evidence that it could have legally and profitably operated the smoke shop: (1) Yanity's declaration at page 1, (2) the victim impact statement that identifies a letter from former Governor Gary Locke, (3) Goodridge Sr.'s plea agreement, and (4) an expert report by Knowles. With respect to the Yanity declaration, he states that the Tribe discovered after the raid that the "benefits of compacting with the state of Washington had not been explained to the Board of Directors previously." Dkt. # 342 (Yanity Decl.) ¶ 2. "As a result, the Tribe began negotiating a compact with the state of Washington." *Id.* With respect to the victim impact statement and the plea agreement, the Tribe apparently offers these documents for the truth of the matters asserted therein. The fact that Governor Locke sent a letter to the Tribe, and the fact that he offered to enter into a compact is hearsay.[8] Fed.R.Evid. 801. Surprisingly, the Tribe has not provided the court with a copy of this letter.[9] Similarly, statements agreed to by Goodridge Sr. in his plea agreement regarding the $25 million in tax revenue that Washington was deprived appears to be offered for the truth of that statement.[10] Even if the court considered these hearsay statements, there is no evidence that the Tribal Board would have voted to enter into a compact even had Goodridge Sr., Goodridge Jr. and Schroedl not been motivated by a desire to further the trafficking scheme. Nor is there evidence that the other Tribal board members would have voted to enter the compact.

***6** Given the uncertainty and the lack of evidence, the court concludes that the predicate acts of cigarette trafficking, money laundering, mail and wire fraud were not the proximate cause of the Tribe's lost opportunity to legally and profitably operate the smoke shop.

b. Real Estate Transactions and Methadone Clinic

With respect to the real estate transactions, the Tribe identifies three types of injuries: (1) damages resulting from the pending property transactions, (2) damages resulting from the closed property transaction, and (3) damages resulting from excessive commissions. Dkt. # 341 at 15–16. Chapman argues that independent, intervening factors present in the real estate market defeat the Tribe's RICO claims related to the real estate purchases. Dkt. # 283 at 5.

With respect to the closed property transactions, the court finds that a number of steps separate the alleged predicate acts from the asserted injury of paying "inflated" prices. *See Hemi*, 130 S.Ct. at 992 ("multiple steps ... separate the alleged fraud from the asserted injury"). For instance, several individual sellers dictated the sales price and were unwilling to sell for less. *See* Dkt. # # 285–89, 291–92, 294–95.[11] Additionally, the Tribe found certain property to be more valuable than others because of the ability to put the property into trust or because of cultural significance. Dkt. # 344–1 at 21 (Ex. 2 to Baker Decl., Dreger Depo. at 104:10–22, 105:8–18); Dkt. # 321 (Shafer Decl.), Ex. 1 (Yanity Depo.) at 153:22–154:22.

During oral argument, the Tribe identified the following evidence to support its argument that the Tribe could have actually purchased the various real estate properties at a price less than the sales price or at fair market value, as

assumed by the experts: (1) the Yanity declaration at page 2, and (2) Jody Soholt's testimony as the Tribe's 30(b)(6) witness at Dkt. # 321–3. The only statement in Yanity's declaration relevant to the closed property transactions is that the "Tribe's investigation concluded that the past transactions and many pending transactions were overpriced and/or did not sufficiently benefit the Tribe." Dkt. # 342 (Yanity Decl.) ¶ 8. The remaining statements in paragraphs 9 and 10 only deal with the pending property transactions. The fact that the Tribe re-negotiated favorable terms on one pending property transaction (Dabestani) that later closed is not evidence that the Tribe could have actually purchased any of the 23 closed property transactions at a lower price than the sales price. With respect to Ms. Soholt's testimony, she was asked whether, with 20/20 hindsight, there were any properties that she wished the Tribe had not purchased. She responded that she wished the Purdy estate had not been purchased because it was of no use. Dkt. # 321–3 at 6–7 (Ex. 3 to Shafer Decl ., Soholt 30(b)(6) Depo. 77:8–78:11). Nothing in Ms. Soholt's testimony at Dkt. # 321–3 even suggests that the Tribe could have purchased any of the closed property transactions for less than the sales price. The Tribe has not presented any evidence that it actually could have purchased the various properties at fair market value, or at any price less than the sales price, especially where the sellers ultimately decided whether and at what price they would sell. *See* Dkt. # # 285–89, 291–92, 294–95.

***7** Accordingly, the court finds that the Tribe has failed to create a genuine issue of material fact with respect to whether the alleged predicate acts of mail and wire fraud were the proximate cause of the damages incurred from the overpriced closed property transactions.

With respect to the pending property transaction damages, the Tribe has presented evidence that to avoid further injury, the Tribe "walked away" from various properties that had been negotiated by Defendants, and lost its earnest money deposits. Dkt. # 342 (Yanity Decl.) ¶ 9. However, the Tribe has failed to present evidence that creates a genuine issue of material fact that the loss of the earnest money was a direct result of the predicate acts, as opposed to market conditions, a seller's inflated sales price, or the Tribe's own subjective value of the property.

With respect to the excessive commissions, the Tribe has presented evidence that the Tribe paid commissions in excess of industry standards or the stated contract price with respect to the MacWhyte and Morehouse properties. Dkt. # 344–5 at 48 (Ex. 45 to Baker Decl.). However, there is no evidence that creates a genuine issue of material fact that the predicate acts of mail and wire fraud proximately caused the injury of excess commission payments.

With respect to the methadone clinics, the Tribe claims two types of injuries: ICCS damages and NHS damages.[12] Chapman argues that the damages related to the financing and operation of the methadone clinics are entirely speculative. Dkt. # 283 at 15. Specifically, Chapman argues that inquiry into whether more conventional financing was available and what financing the Tribal Board would have selected absent alleged wrongdoing is speculative and uncertain. The Tribe has presented evidence that individual members of the Tribe would have provided financing for the Methadone Clinic. Dkt. # 343 (Claxton Decl.) ¶¶ 6–10. However, the Tribe has not presented any evidence regarding whether the Tribal Board would have selected a member-financed option over the financing it received,[13] or evidence that alternate bank-financing was available for the Methadone Clinic.[14] Additionally, there simply is no evidence that creates a genuine issue of material fact that the predicate acts of mail and wire fraud led directly to the cost of "exorbitant" financing from defendants. Accordingly, the court finds that these alleged damages are speculative and uncertain.

Chapman also argues that there is no way for the court to determine whether the Tribe has lost any "good will and good name" as a result of the Defendants' RICO predicate acts, or if such loss is the result of independent factors like the Tribe's own business practices in the Methadone Clinic. D kt. # 283 at 16. The court agrees.[15] The court also believes that it will be difficult to ascertain whether the Tribe's claimed loss of 5 percent of the income of the other clinics, or a portion of that loss, is attributable to Defendants' alleged misuse of the Tribe's good will and intellectual property, or to some other source, such as the operation and management of those methadone clinics by different tribes. Additionally, the Tribe has not presented any evidence that the loss of 5 percent of the income is directly attributable to Defendants' predicate acts.

***8** Accordingly, the court finds that the Tribe has not presented evidence that raises a genuine dispute of material fact as to whether the alleged predicate acts proximately caused its damages with respect to the property transactions and the methadone clinics.

During oral argument, the Tribe reiterated its position that the conspiracy involved the same group of people who tried to get their hands into any business venture, and that the enterprise as a whole was implanted through predicate acts. The Tribe also argued that an actor in a conspiracy does not shield himself from liability by keeping himself clean and removed from transactions. The court agrees with the Tribe that Section 1962(d) liability does not require that the defendant commit or agree to commit two or more predicate acts. *Salinas v. United States,* 522 U.S. 52, 65, 118 S.Ct. 469, 139 L.Ed.2d 352 (1997). It is sufficient that a conspirator "adopt the goal of furthering or facilitating the criminal endeavor" that, if completed, would satisfy all elements of the substantive offense. *Id.* Thus, under *Salinas,* Nelson and Chapman need not have committed the predicate acts themselves, so long as they knew about and agreed to facilitate the scheme. However, the conspiratorial acts that cause the injury must still be an act of racketeering as defined by section 1961(1). *See Reddy v. Litton Indus., Inc.,* 912 F.2d 291, 295 (9th Cir.1990) (holding "that the district court did not err in dismissing Reddy's § 1962(d) claim on standing grounds because the act of terminating Reddy's employment is not a predicate act as defined by § 1961(1), ..."), *cert denied,* 502 U.S. 921, 112 S.Ct. 332, 116 L.Ed.2d 272 (1991); *see also Beck v. Prupis,* 529 U.S. 494, 505, 120 S.Ct. 1608, 146 L.Ed.2d 561 (2000) (concluding that an "injury caused by an overt act that is not an act of racketeering or otherwise wrongful under RICO ... is not sufficient to give rise to a cause of action under § 1964(c) for a violation of § 1962(d)."). Since the Tribe does not have standing under the section 1962(c) claim, the Tribe has not created a genuine issue of material fact that its injury was caused by a conspiracy to commit a predicate RICO violation. *Reddy,* 912 F.2d 295.

D. Breach of Fiduciary and Statutory Duties (seventh cause of action)

To support a claim for damages for breach of fiduciary duty under Washington law, the Tribe must show (1) the existence of a duty owed to it, (2) a breach of that duty, (3) a resulting injury, and (4) that the claimed breach was the proximate cause of the injury. Dkt. # 283 at 17, # 341 at 20; *Miller v. U.S. Bank of Wash., N.A.,* 72 Wash.App. 416, 426, 865 P.2d 536 (1994). A proximate cause is one that in natural and continuous sequence, unbroken by an independent cause, produces the injury complained of and without which the ultimate injury would not have occurred. *Attwood v. Albertson's Food Ctrs., Inc.,* 92 Wash.App. 326, 330, 966 P.2d 351 (1998). A plaintiff need not establish causation by direct and positive evidence, but only by a chain of circumstances from which the ultimate fact required is reasonably and naturally inferable. *Id.* at 331, 966 P.2d 351. However, evidence establishing proximate cause must rise above speculation, conjecture, or mere possibility. *Id.* Generally, the issue of proximate cause is a question for the jury. *Id.* at 330, 966 P.2d 351. However, when the facts are undisputed and the inferences therefrom are plain and incapable of reasonable doubt or difference of opinion, it may be a question of law for the court. *Id.*

***9** Chapman challenges the proximate cause element. The Tribe identified the following injuries: (1) the difference in costs from the sales price of the completed property transactions and the "best possible purchase price" (Dkt. # 341 at 21), (2) lost earnest money from transactions that were not in the Tribe's best interest (Dkt. # 382–1 (Ex. 1) at 3), (3) the cost of certain properties or lost earnest money that the Tribe would not have otherwise purchased or contracted for had they known of Defendants' conflicts of interest (Dkt. # 341 at 23), and (4) the excess commissions (Dkt. # 382–1 (Ex. 1) at 4).

The court finds that the Tribe has failed to demonstrate a genuine issue of material fact of proximate cause with respect to the first and second injury. The failure to obtain the "best possible purchase price" is entirely speculative and uncertain. The undisputed evidence demonstrates several independent causes that caused the injury of the difference in cost between the best possible price and the sales price, including market conditions, the sellers' list price, or the Tribe's own value in certain properties for location or cultural significance. *See* Dkt.285–89, 291–92, 294–95; Dkt. # 344–1 at 21 (Ex. 2 to Baker Decl., Dreger Depo. at 104:10–22, 105:8–18); Dkt. # 321 (Shafer Decl.), Ex. 1 (Yanity Depo.) at 153:22–154:22. The Tribe has not presented evidence from which the court could naturally and reasonably infer that a breach of fiduciary duty proximately caused the injury.[16] With respect to the second injury, the only evidence presented by the Tribe to support proximate causation is the second page of Yanity's declaration. Dkt. # 382–1 (Ex. 1) at 3 (identifying p. 2 of Yanity Decl.). The fact that the Tribe concluded that various transactions were not in the Tribe's best interest and the Tribe decided to "walk away" (*see* Dkt. # 342 (Yanity Decl.) ¶¶ 7–9) does not create a genuine issue of material fact that a breach of fiduciary duties proximately caused the lost earnest money as opposed to market conditions, a seller's inflated sales price, or the Tribe's own valuation of various properties based on location and cultural significance.

With respect to the third injury, the Tribe has presented evidence that it would not have assumed payments on a specific property had Nelson disclosed the fact that his son lived there. Dkt. # 344–1 at 30 (Ex. 2 to Baker Decl., Dreger Depo. at 288:7–22). The Tribe has also presented evidence that Nelson failed to disclose to the Tribe his personal involvement in various transactions or groups that sought to sell land to the Tribe.[17] *Id.* at 28, 966 P.2d 351 (220:8–221:9) (identifying RAD and Pi lchuck Group as properties purchased by investment group of which Nelson was a party, and the residence in which his son was living). The Tribe also identifies lost earnest money deposit on the Schmidt and Nelson property.[18] Although the relevant contracts provide evidence of Nelson's familiar relationship to Schmidt (Dkt. # 344–4 at 63 (Ex. 38 to Baker Decl.)), and lists Nelson as the seller (Dkt. # 344–4 at 70 (Ex. 39 to Baker Decl.), the Tribe has presented evidence, although disputed, that the Board frequently approved transactions without having the sales contract and other relevant documents before it (Dkt. # 344–1 at 22, 29–30, 42 (Ex. 2 (Dreger Depo. at 112:12–113:5, 285:13–21) and Ex. 3 (Goodridge Jr. Depo. at 150:22–151:8) to Baker Decl.)). With respect to the fourth injury, the Tribe has presented evidence that it paid commissions in excess of the agreement and/or industry standard with respect to the MacWhyte and Morehouse properties. Dkt. # 344–5 at 46, 48 (Exs. 44 & 45 to Baker Decl.).

***10** The court finds that the inferences drawn from these facts make summary judgment inappropriate with respect to the damages proximately caused by defendants' failure to disclose material facts or conflicts of interest and charging excessive commissions.

However, Nelson argues that the statute of limitations bars this claim in its enti rety.[19] The statute of limitations for breach of fiduciary duty is three years, and it accrues when plaintiff knows or has reason to know the essential elements of the claim. RCW 4.16.080(2); *see Hudson v. Condon,* 101 Wash.App. 866, 873–75, 6 P.3d 615 (2000) (applying discovery rule to breach of fiduciary duty claim). Here, if the statute of limitations accrued prior to February 25, 2007, the claim will be time-barred.

With respect to the property in which Nelson's son was living and the Pilchuck, RA D, Nelson and Schmidt properties, Defendants have failed to present any evidence that the claim accrued before February 25, 2007. *See* Dkt. # 383–3, Ex. 2 (identifying dates of purchase options as April 1, 2008).[20]

In July and October 2006, the Tribe and Nelson executed an agreement indicating the amount of commissions that would be paid upon closing of the Morehouse and MacWhyte properties. Dkt. # 344–5 at 46, 48 (Exs. 44, 45 to Baker Decl.). The MacWhyte property closed on August 9, 2006. Dkt. # 297–1 (Ex. 24 to Nelson Decl.). It is unclear to the court when the Morehouse property closed or when these commissions were paid by the Tribe. The court finds that the Tribe should have known about the excessive commissions charged at a minimum after the closing of these properties when the commission was paid. On the record before it, only the excessive commission with respect to the MacWhyte property is time-barred.

Accordingly, the Tribe's breach of fiduciary duty claim may go forward with respect to the failure to disclose material facts and/or involvement with respect to the Nelson property in which his son lived, the RAD, Pi lchuck, Schmidt and Nelson transactions, and the excessive commission paid on the Morehouse property.

E. Fraud and Negligent Misrepresentation (ninth cause of action)

To recover for fraud, the Tribe must present clear, cogent and convincing evidence of a(1) representation of existing fact (2) that is false and (3) material (4) that defendant knew to be false or was ignorant of its truth, (5) defendant intended to induce reliance, (6) plaintiff did not know the fact was false, (7) plaintiff relied on the truth of the fact and (8) had a right to rely on it, and (9) that results in damages. *See Baertschi v. Jordan,* 68 Wash.2d 478, 482, 413 P.2d 657 (1966). The absence of any of the nine elements is fatal to the Tribe's claim. *Id.* To recover for negligent misrepresentation, the Tribe must present clear, cogent and convincing evidence that (1) defendant supplied information for the guidance of others in their business transactions that was false, (2) defendant knew or should have known that the information was supplied to guide the plaintiff in his business transactions, (3) defendant was negligent in obtaining or communicating the false information, (4) plaintiff relied on the false information, (5) plaintiff's reliance was reasonable, and (6) the false information proximately caused the plaintiff damages. *Ross v. Kirner,* 162 Wash.2d 493, 499, 172 P.3d 701 (2007).

***11** During oral argument, the Tribe identified four facts that it claims were misrepresented and/or false: (1) the Methadone Clinic was a high risk transaction; (2) alternate financing was

not available for the Methadone Clinic; (3) the true fair market value of real estate transactions; (4) the financial interests of Defendants and/or lack of identification of the true owners of some properties.

With respect to the first, the Tribe argued during oral argument that Nelson conceded that there was no real risk involved in providing financing for the Methadone Clinic because they had guaranteed mechanisms that he and other investors would be repaid, citing Dkt. # 344–1 at 65. The court has reviewed Nelson's deposition transcript. The "guaranteed mechanism" referenced by counsel was a contingency upon nonapproval if the Tribe did not obtain all governmental approvals, which would trigger the Tribe's obligation to reimburse IC Holdings the advances from the investors. Dkt. # 344–1 at 64 (Ex. 5 to Baker Decl., Nelson Depo. 180:10–182:11). Even if the court could reasonably infer that this statement is false, the Tribe has not directed the court to any evidence that Nelson or Chapman made the representation of the high risk transaction to the Tribe.

With respect to the second, the Tribe has presented evidence that individual tribal members would have provided financing for the Methadone Clinic. Dkt. # 343 (Claxton Decl.) ¶¶ 6–10. However, the Tribe has not directed the court to any evidence that Nelson or Chapman made the representation of the lack of alternate financing to the Tribe.

With respect to the third, the Tribe argued during oral argument that as real estate agents, defendants had an independent obligation to get the best possible price for the Tribe.

The economic loss rule[21] "applies to hold parties to their contract remedies when a loss potentially implicates both tort and contract relief." *Alejandre v. Bull,* 159 Wash.2d 674, 681, 153 P.3d 864 (2007). The rule prohibits plaintiffs from recovering in tort economic losses to which their entitlement flows only from contract because tort law is not intended to compensate parties for losses suffered as a result of a breach of duties assumed only by agreement. *Id.* at 682, 153 P.3d 864. However, an injury is remediable in tort if it traces back to the breach of a tort duty arising independently of the terms of the contract. *Eastwood,* 170 Wash.2d at 389, 241 P.3d 1256. "When no independent tort duty exists, tort does not provide a remedy. *Id.*

Here, while Nelson and Chapman had independent duties because they were real estate agents (RCW 18.86), one of those independent duties was not to get the best possible price. Rather, that "duty" is found in the consulting agreement. Dkt. # 344–4 at 9 (Ex. 26 to Baker Decl.) ("Negotiate with landowners on behalf of the Tribe to secure the lowest possible land prices and to secure land contract terms that are acceptable to the Tribe."). Accordingly, the independent duty rule bars this claim to the extent it relies on Defendants' contract obligation to get the best possible price.

***12** With respect to the fourth, Nelson and Chapman had independent duties to disclose all material facts known by them and not apparent or readily ascertainable to a party, to be loyal to the buyer by taking no action that is adverse or detrimental to the buyer's interest, and, among others, to timely disclose to the buyer any conflicts of interest. RCW 18.86.030(1)(d), 18.86.050(1)(a), (b); *see Jackowski v. Borchelt,* 174 Wash.2d 720, 735, 278 P.3d 1100 (2012) ("common law tort causes of action remain the vehicle through which a party may recover for a breach of statutory duties set forth in chapter 18.86 RCW."). The court has already held that a disputed issue of material fact exists with respect to whether Nelson and Chapman failed to disclose to the Tribe their financial interests or familial relationships with respect to the property in which Nelson's son resided, and the RAD, Pi lchuck, Schmidt and Nelson property transactions. *See* Dkt. # 344–1 at 28, 30 (Ex. 2 to Baker Decl., Dreger Depo. at 220:8–221:9, 288:7–22); # 344–1 at 22, 29–30, 42 (Ex. 2 (Dreger Depo. at 112:12–113:5, 285:13–21) & Ex. 3 (Goodridge Jr. Depo. at 150:22–151:8) to Baker Decl.).

Accordingly, the Tribe may proceed on its fraud and negligent misrepresentation claims with respect to the failure to disclose material facts. *See Van Dinter v. Orr,* 157 Wash.2d 329, 333, 138 P.3d 608 (2006) ("If a party has a duty to disclose information, the failure to do so can constitute negligent misrepresentation.").

F. Civil Conspiracy (tenth cause of action)

To establish civil conspiracy, the Tribe must prove by clear, cogent and convincing evidence that (1) two or more people combined to accomplish an unlawful purpose, or combined to accomplish a lawful purpose by unlawful means, and (2) the conspirators entered into an agreement to accomplish the object of the conspiracy. *Wilson v. State,* 84 Wash.App. 332, 350–51, 929 P.2d 448 (1996). Mere suspicion or commonality of interests is insufficient to prove conspiracy. *Id.* at 351, 929 P.2d 448.

Chapman argues that this claim must fail because there are no underlying illegal acts that can be proven against him. Nelson agrees, and also argues that this claim is time-barred. During oral argument, the Tribe essentially conceded that its civil conspiracy claim was dependent on its conspiracy to violate RICO claims. The court finds dismissal of the Tribe's civil conspiracy claim proper since the court has dismissed the Tribe's RICO conspiracy claims.

G. Unjust Enrichment (eleventh cause of action)

"Unjust enrichment is the method of recovery for the value of the benefit retained absent any contractual relationship because notions of fairness and justice require it." *Young v. Young,* 164 Wash.2d 477, 484, 191 P.3d 1258 (2008). Three elements must be met for an unjust enrichment claim: (1) a benefit conferred upon the defendant by plaintiff, (2) an appreciation or knowledge by the defendant of the benefit, and (3) the acceptance or retention by the defendant of the benefit under such circumstances as to make it inequitable for the defendant to retain the benefit without the payment of its value. *Id.*

***13** Unjust enrichment actions have a three-year statute of limitations. *Eckert v. Skagit Corp.,* 20 Wash.App. 849, 850, 583 P.2d 1239 (1978). "An action for unjust enrichment lies in a promise implied by law that one will render to the person entitled thereto that which in equity and good conscience belongs to that person." *Id.* at 851, 583 P.2d 1239. Generally, a cause of action accrues and the statute of limitations begins to run when a party has the right to apply to a court for relief. *Id.*

The Tribe argues that the court should apply the discovery rule to its unjust enrichment claim. The Tribe has not cited, and the court is not aware of, any published Washington legal authority applying the discovery rule to an unjust enrichment claim. However, the Washington Supreme Court abrogated a Division One opinion on which the Tribe relied, *Architechtonics Constr. Mgmt., Inc. v. Khorram,* 111 Wash.App. 725, 45 P.3d 1142 (2002),[22] that applied the discovery rule to a claim for breach of construction contract. *1000 Virginia Ltd. P'ship v. Vertecs Corp.,* 158 Wash.2d 566, 578, 146 P.3d 423 (2006) (en banc). The Washington Supreme Court reasoned that because "controlling precedent held that a claim arising out of a contract accrued on breach and not on discovery, the Court of Appeals lacked authority to adopt the discovery rule." *1000 Virginia,* 158 Wash.2d at 578, 146 P.3d 423. The Washington Supreme Court then went on to adopt the discovery rule in the limited context of "actions on construction contracts involving allegations of latent construction defects." *Id.* at 590, 146 P.3d 423.

During oral argument, the Tribe relied on a 2003 unpublished opinion from Division One that applied the discovery rule to an unjust enrichment claim. *In re Estate of Ginsberg,* 119 Wash.App. 1068 (2003) (unpub.). This case has no precedential value. RCW 2.06.040. Additionally, it preceded the Washington Supreme Court's holding that claims arising out of a contract accrue on a breach, not on discovery. *1000 Virginia,* 158 Wash.2d at 578, 146 P.3d 423. The only evidence cited by the Tribe for the conferred benefits arise out of various contracts.[23] Dkt. # 382–1 at 9. Accordingly, the court will not apply the discovery rule to the Tribe's unjust enrichment claim.

During oral argument, the Tribe also identified four benefits that the Tribe conferred on Defendants: (1) the percentage of smoke shop profits received by Defendants in exchange for the initial loans between the Goodridges and Defendants, (2) the excessive commissions from the agreements on the MacWhyte and Morehouse properties between the Tribe and Defendants, (3) the percentage of revenue Defendants received from financing the Methadone Clinic pursuant to the investment agreement between the Tribe and IC Holdings, and (4) five percent of the profits from other methadone clinics pursuant to the investment agreement between the Tribe and N HS.

With respect to the smoke shop profits retained by Defendants, the statute of limitations accrued, at the latest, when Defendants received and retained a percentage of the revenue from operation of the smoke shop. The smoke shop opened and operated beginning in 2003. However, Defendants have not directed the court to evidence regarding when they received and retained the profits. Dkt. # 383–5 at 1–2.

***14** With respect to the excessive commissions from the MacWhyte and Morehouse properties, the statute of limitations accrued upon closing when the commissions were paid. The MacWhyte property closed on August 9, 2006. Dkt. # 297–1 (Ex. 24 to Nelson Decl.). Defendants have not directed the court to evidence demonstrating when the Morehouse property closed.

With respect to the percentage of revenue from the methadone clinics, the claim accrued, at the latest, when Defendants received and retained payment. However, the Defendants

have not directed the court to evidence demonstrating when they received and retained any of the revenue. Dkt. # 383–4.

Accordingly, on the record before the court, the Tribe's unjust enrichment claim is only barred with respect to the MacWhyte property commissions.

IV. CONCLUSION

For all the foregoing reasons, the court GRANTS in part and DENIES in part defendants' motions for summary judgment. The Tribe has not presented any evidence with respect to Mrs. Nelson. Accordingly, she is DISMISSED from the case with prejudice. The Clerk is DIRECTED to terminate all pending motions, and to enter an amended case schedule with a trial date of September 23, 2013. The court notes that the only remaining defendants are Nelson, Chapman, Sara Schroedl, Dean Goodridge, and Towne or Country Smokey Point, Inc.[24] The claims alleged against Ms. Schroedl are RICO and conspiracy to violate RICO with respect to the smoke shop (claims 1 and 2), civil conspiracy (claim 10), unjust enrichment (claim 11), and usurpation of corporate authority (claim 13). The Tribe is ORDERED to SHOW CAUSE no later than May 10, 2013, why the court's ruling with respect to the RICO claims and civil conspiracy (claims 1, 2, and 10) should not also be applied to Ms. Schroedl.

All Citations

Not Reported in F.Supp.2d, 2013 WL 1661244, RICO Bus.Disp.Guide 12,341

Footnotes

1 The Nelson Defendants and Chapman have each filed a notice of joinder in the other's summary judgment motion. Such joinder is an apparent attempt to circumvent this District's 24–page limit rule on motions for summary judgment. Local Rules W.D. Wash. CR ("LCR") 7(e)(3). Nevertheless, the court did grant plaintiff The Stillaguamish Tribe of Indians' (the "Tribe") motion for leave to file one consolidated 40–page opposition, as opposed to two 24–page oppositions. Even though neither Nelson nor Chapman filed a motion for leave to file excess pages, given the overlapping facts, the court will allow the joinder this time. Such attempts to exceed the page-limits in the future will not be entertained. The court declines the Nelsons' attempt to incorporate by reference arguments made in their motion to dismiss. Dkt. # 296 at 1.

2 The first and second causes of action for violation of RICO and conspiracy to violate RICO arise from defendants' operation of the smoke shop.

3 The third and fourth causes of action for violation of RICO and conspiracy to violate RICO arise from defendants' conduct in the real estate transactions and methadone clinics.

4 During oral argument, the Tribe repeatedly emphasized its theme of the case of one overarching scheme to use tribal members' leadership positions and non tribal members to deprive the Tribe of money and opportunity that should have gone to the Tribe. The problem with this theory of the case is that the RICO and conspiracy to violate RICO causes of action are split into essentially two schemes in the TAC: 1) the scheme to deprive the Tribe of the opportunity to operate the smoke shop (claims 1 and 2) (Dkt.# 190(TAC) ¶¶ 4.1–5.8); and (2) the scheme to deprive the Tribe of money, property, and intangible right to honest services with respect to the real estate transactions and methadone clinics (claims 3 and 4) (Dkt. # 190 ¶¶ 6.1–7.9. The Tribe cannot credibly argue that the predicate acts of cigarette trafficking and money laundering, that were only pled with respect to claims 1 and 2, were predicate acts for claims 3 and 4. Indeed, the only predicate acts pled in support of claims 3 and 4 are mail and wire fraud. *Id.* (¶¶ 6.6–6.8, 7.6–7.8).

5 On January 22, 2007, Goodridge Sr. and Nelson entered into an addendum that "they will share 50/50 in net profits of all companies that were originated from the roots of the original investment covered" by the original loan. Dkt. # 344–2 at 68 (Ex. 13 to Baker Decl.). Included are "all profits after return of investment capital in" NHS, smoke shops, and other businesses.

6 This court has spent an inordinate amount of time hunting through the voluminous record for the evidentiary basis of the Tribe's claims and Defendants' statute of limitations defense. When the court could not find the evidentiary basis, it required the parties to provide the court with a spreadsheet identifying the evidentiary basis. Dkt. # 381. Following review of the spreadsheets, the court identified 26 questions for the parties to address during oral argument, which included

requiring the parties to cite to the record and provide relevant legal authority, even if not previously provided. Dkt. # 390. The court held oral argument on March 28, 2013 for approximately 4 hours. Even after the court reviewed the evidence identified in the spreadsheets and identified by the Tribe during oral argument, the Tribe has not provided the court with sufficient information to withstand summary judgment on its RICO claims.

7 The Tribe conflates the relevant standard for a motion to dismiss and motion for summary judgment. *See* Dkt. # 341 at 9 n. 35. While the court found that the Tribe's allegations in its TAC were sufficient to withstand dismissal on a Rule 12(b)(6) motion, on summary judgment, the Tribe must present evidence that raises a genuine dispute of material fact as to whether the alleged predicate acts proximately caused an actionable injury. *See Bhatia v. Wig,* 479 Fed. Appx. 768, 768–69 (9th Cir.2012) (unpub.). During oral argument, the Tribe argued that the court previously ruled that the court need not consider the superfluous mail and wire fraud predicate acts. The court did so hold in ruling on Schroedl's motion to dismiss, among others, the first and second causes of action. Dkt. # 65 at 11. However, that ruling did not address the third and fourth causes of action regarding the real estate transactions and methadone clinics because Schroedl is not a named defendant in those claims. *See* Dkt. # 65 at 3:14–19. Those claims only allege the predicate acts of mail and wire fraud.

8 When asked for the basis for the admissibility of this document during oral argument, the Tribe responded that it could be authenticated at trial. However, authentication does not solve the hearsay problem.

9 It is unclear to the court how the Tribe expects the court to rely upon the accuracy of a document without the benefit of reviewing the letter.

10 Goodridge Sr. is no longer a party.

11 With respect to the declaration of Mr. Hayes, the property description and details do not match the allegations in the amended complaint as one of the 23 properties sold at allegedly inflated prices. Dkt. # 290. With respect to the declaration of Ms. Morehouse, the property described is included in the TAC with respect to overbilled commissions, not one of the 23 properties that were sold at allegedly inflated prices. Dkt. # 293.

12 With respect to the ICCS damages, the Tribe argues that its damages are the additional cost of the predatory financing where there was alternate financing available for the Methadone Clinic. Dkt. # 341 at 16–17. With respect to the NHS damages, the Tribe argues that it was deprived of its promised 5% of the income of clinics when Defendants, via NHS, misused the Tribe's employees, intellectual property, good will and good name in order to convince other native groups to retain them as consultants in connection with methadone clinics. *Id.* at 18.

13 The court notes that there is no evidence that Tribal members could have or would have provided 100 percent of the financing, which would have eliminated the need for bank fi nanci n.

14 Evidence that the bank would have financed other projects is not evidence that alternate financing was available for the Methadone Clinic.

15 During oral argument, the Tribe conceded that it had not presented any bribery or kickback evidence, which is required for honest services fraud under section 1346. *See Skilling v. United States,* ——U.S. ——, ——, 130 S.Ct. 2896, 2933, 177 L.Ed.2d 619 (2010) (holding that honest services fraud does not encompass conduct more wide-ranging than bribes and kickbacks).

16 The Tribe has not directed the court to any legal authority that would require a real estate agent to use a straw buyer as part of its fiduciary duties.

17 Defendants have presented evidence that they disclosed their various conflicts, which creates an issue of fact for the jury to resolve. Dkt. # 344–1 at 58 (Ex. 5 to Baker Decl., Nelson Depo. 79:1–81:13); # 344–4 at 63, 81 (Exs. 38, 40 to Baker Decl.).

18 It is unclear to the court whether the property in which Nelson's son lived is the same as the Nelson property or the Schmidt property.

19 The court has already disposed of the claim based on the first two injuries of best possible price and lost earnest money from transactions not in the Tribe's interest. Accordingly, the court will only address the statute of limitations with respect to the breach of fiduciary claim based on the latter two injuries.

20 The court notes that Defendants have not directed the court to any evidence regarding when Defendants provided the purchase options to the Tribe. The court also notes that the RAD purchase agreement did not disclose the conflicts identified by the Tribe.

21 The Washington Supreme Court has noted that the term "economic loss rule" has proved to be a misnomer, and has opted for the term independent duty rule. *Eastwood v. Horse Harbor Found., Inc.,* 170 Wash.2d 380, 387, 241 P.3d 1256 (2010).

22 Dkt. # 341 (Opp'n) at 37, n. 94.

23 The Tribe identified the following evidence: (1) Loan agreements for financing the smoke shop in exchange for a share of the net income between Goodridge Sr. and Nelson, and between Goodridge Jr. and Chapman (Dkt. # 344–2 at 52–70, # 344–3 at 1–17 (Exs 13–14 to Baker Decl.)); (2) unexecuted Consulting agreement for investing in the Methadone Clinic between Chapman and Goodridge Jr. (Dkt. # 344–3 at 21 (Ex. 16 to Baker Decl.)); (3) Consulting agreement between the Tribe and Tribal Consulting LLC, of which Nelson and Chapman are members (Dkt. # 344–4 at 7–25 (Ex. 26 to Baker Decl.)); (4) Agreement between NHS and the Tribe for a share of the revenue of methadone clinics opened for other tribes (*see* Dkt. # 340–2 at 38–42 (Ex. O to Baker ISO Ashley MSJ)); (5) Agreement to pay excessive commissions on Morehouse and MacWhyte properties (Dkt. # 344–5 at 46, # 344–5 at 48 (Exs. 44 & 45)); and (6) Agreement between the Tribe and IC Holdings for reimbursement of investment plus revenue share on Methadone Clinic (Dkt. # 344–1 at 65 (Ex. 5 to Baker Decl., Nelson Depo. at 182:12–184:18); *see* Dkt. # 340–2 at 2–25 (Ex. I to Baker ISO Ashley MSJ)).

24 Although the court has entered default against Dean Goodridge and Towne or Country Smokey Point, Inc. (Dkt.144, 149), the Tribe has not moved for default judgment.

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