

No. 74546-8-I

**COURT OF APPEALS FOR DIVISION I
STATE OF WASHINGTON**

JOSEPH MOJARRAD and NICOLE CHING LIN LU, husband and wife,

Appellants,

v.

LORRAINE WALDEN and JOHN DOE WALDEN, Respondent.

APPELLANTS' OPENING BRIEF

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A. INTRODUCTION

This case turns on when the warranties of quiet possession and to defend title in a statutory warranty deed are breached, thus triggering the statute of limitations:

The warranties of quiet possession and to defend title are future warranties that are breached in the future, after the deed is conveyed, when a third party asserts a claim to paramount title to the property and evicts the grantee from the property. In 2005, Lorraine Walden conveyed her property to Mojarrad by statutory warranty deed, including the Driveway on her property. In 2010, her neighboring relative evicted Mojarrad from the Driveway with a locked gate and asserted ownership to the Driveway. Mojarrad brought suit against Lorraine Walden in 2014. Was the lawsuit brought within the six year statute of limitations?

It was error for the trial court to deny summary judgment for Mojarrad on his warranty of quiet possession claim since there is no dispute the breach occurred within six years of filing suit. For the same reason, the trial court also erred when it completely dismissed all of Mojarrad's claims.

B. ASSIGNMENTS OF ERROR

Assignments of Error

1. The trial court erred in denying summary judgment on Mojarrad's claim for breach of the warranty of quiet possession on grounds it was barred by the statute of limitations.

2. The trial court erred in granting summary judgment dismissing all of Mojarrad's claims as barred by the statute of limitations.

Issues Pertaining to the Assignments of Error

1. The warranty of quiet possession in a statutory warranty deed is not breached until a third party evicts the grantee from possession of the property and asserts a paramount claim to title. Lorraine Walden conveyed her property to Mojarrad by statutory warranty deed in 2005, including a Driveway on that property. In 2010, Lorraine Walden's neighboring relative evicted Mojarrad from using the Driveway and asserted it owned the Driveway. Mojarrad brought suit in 2014 alleging breach of the warranty of quiet possession. Was Mojarrad's lawsuit brought within the six year statute of limitations?

2. The warranty to defend title in a statutory warranty deed is not breached until (1) a third party asserts a paramount claim to the property; (2) the grantee tenders defense of that claim to the grantor; and (3) the grantor refuses the tender. In 2010, Lorraine Walden's neighboring

relative asserted a paramount claim to the Driveway conveyed by deed to Mojarrad. In 2012, Mojarrad tendered defense of that claim to Lorraine Walden, but she never responded. Mojarrad brought suit in 2014 alleging breach of the warranty to defend title. Was Mojarrad's lawsuit brought within the six year statute of limitations?

3. The three year statute of limitations on the causes of action for unjust enrichment, negligent misrepresentation, and equitable indemnity do not begin to run until the causes of action accrue. These claims rely on the allegation that Lorraine Walden misrepresented that she owned the Driveway when she sold her property to Mojarrad in 2005. Mojarrad did not learn that Lorraine Walden knew all along the Driveway was not hers until she revealed that in 2012. Was Mojarrad's suit in 2014 brought within the three year statute of limitations?

C. STATEMENT OF THE CASE

1. Substantive Facts.

Plaintiffs Joseph Mojarrad and his wife Nicole Ching Lin Lu (Mojarrad) are retired and live in Texas. CP 62, 78. In 2005, they were looking to buy property in the natural beauty of Washington on which they could build a house and live out retirement. CP 63.

Mojarrad found for sale a vacant 22 acre property owned by Lorraine Walden in rural Skagit County. CP 172–73. Lorraine Walden acquired the property with her husband in 1967. CP 119. The adjoining property to the south was owned by Gilbert Walden, Lorraine Walden’s brother-in-law. CP 80, 180. Gilbert Walden owned and lived at his property from 1952 until his death in 2009. CP 87. The Estate of Gilbert Walden (the “Estate”) now owns his property. CP 5, 14.

Lorraine Walden’s property was undeveloped except for a gravel driveway that runs across the southeast part of the property “(Driveway)”. CP 172–73, 182. Before making an offer to purchase the property, Mojarrad walked unimpeded down the Driveway almost to the end. CP 63–64, 72. Mojarrad entered into a purchase and sale agreement with Lorraine Walden to purchase her property in September 2005. CP 97–101.

Before the sale closed, Lorraine Walden provided Mojarrad with a seller disclosure statement in which she made the following representations to Mojarrad:

- She had legal authority to sell her property.
- There were NO encroachments, boundary agreements, or boundary disputes.
- There were NO rights of way, easements, or access limitations that may affect the Buyer’s use of the property.

- There was NO study, survey project, or notice that would adversely affect the property.
- There were NO covenants, conditions, or restrictions which affect the property.

CP 139.

She also mentioned there was a boundary survey for the property. *Id.* That survey was provided to Mojarrad before the sale closed. CP 65–66. The survey was commissioned by Lorraine Walden in 1992. CP 145, 149. It showed the Driveway to be within the boundaries of Lorraine Walden’s property. CP 82, 149. The survey did not show anyone else having any interest or claim to the Driveway. *Id.* Mojarrad reviewed both the seller disclosure statement and the survey before closing. CP 65, 173. Since they revealed no issues, the sale closed and Lorraine Walden conveyed the property to Mojarrad by statutory warranty deed on October 19, 2005. CP 137–38.

While Lorraine Walden testified that at closing her real estate agent called Mojarrad’s real estate agent to make sure the buyers knew the Driveway was not part of the sale, there is no evidence that message was relayed to Mojarrad. CP 83–84. Mojarrad did not attend the closing. CP 65. Lorraine Walden never met or talked to Mojarrad. CP 63, 83. He was never told the Driveway was not part of Lorraine Walden’s property. CP 173–74.

After the sale closed, Mojarrad visited the property in 2009 to check on it. CP 72. Mojarrad again walked down the Driveway unimpeded and did not encounter any locked gate blocking the Driveway. *Id.*

Mojarrad visited the property a third time in 2010. CP 70, 73. The purpose of this visit was to flag the property with his wetlands consultant in anticipation of building. CP 43, 73. But on this visit, Mojarrad discovered a locked gate blocking his use of the Driveway. CP 70, 73. The gate ensured the Driveway could only be used by the adjoining property owner to the south—the Estate. CP 173–74. During the 2010 visit, Mojarrad asked Lorraine Walden’s nephew Ron Walden (the personal representative of the Estate) to remove the gate, but Ron Walden refused. CP 75–76, 174. Ron Walden asserted the Estate owned the Driveway. *Id.* He also threatened to call the sheriff to remove Mojarrad from the Driveway. CP 90. During a phone call later in 2010, Ron Walden refused to allow Mojarrad to build a fence south of the Driveway to enclose the Driveway within Mojarrad’s property. CP 91.

Mojarrad visited the property again in 2012. CP 73. And again he found a locked gate blocking the Driveway. *Id.* This time there was also a backhoe digging on and around the Driveway. CP 70–71, 174.

Although Mojarrad did not encounter a locked gate until 2010, Ron Walden testified there had been a gate across the Driveway for at

least 30 years. CP 89–90. But the gate was only closed when Gilbert Walden was gone. CP 90. The gate did not always remain shut. CP 81. Ron Walden testified the purpose of locking the gate in 2010 was to prevent vandals from accessing the Estate’s property. CP 88. However, Mojarrad was never given a key to the gate, so he was blocked from using the Driveway. CP 88–90.

In September 2012, Mojarrad received a letter from an attorney representing the Estate. CP 174. The letter asserted that the Estate owned the Driveway. CP 176. The Estate attached a declaration from Lorraine Walden in support of its claim. CP 177–82. Lorraine Walden stated she never owned the Driveway and that the Driveway was actually owned by Gilbert Walden. *Id.* She knew the survey provided to Mojarrad showed the Driveway within her property. *Id.* But she stated she assumed and agreed that Gilbert Walden owned the Driveway. *Id.*

Deposition testimony proffered during discovery further confirmed that Lorraine Walden knew all along that the Driveway was not hers but belonged to Gilbert Walden. She admits the Driveway has always been Gilbert Walden’s. CP 81–83. She never made any claim to the Driveway. *Id.* She agreed with Gilbert Walden that the Driveway belonged to him. CP 83, 92. She admits she knew the survey given to Mojarrad was incorrect. CP 82–83. When the survey was prepared she asked the

surveyor to correct it, but he never did. *Id.* And she never bothered to ask another surveyor to correct the survey to show the Driveway was not on her property. *Id.*

Other discovery revealed Gilbert Walden obtained title to the Driveway by adverse possession long before Mojarrad's purchase in 2005. Gilbert Walden owned and lived at his property from 1952 until his death in 2009. CP 87. The Driveway was the only access to his property. *Id.* Lorraine Walden never used the Driveway except to visit Gilbert Walden. CP 92. She never did any maintenance or repairs to the Driveway. CP 81–82, 94–95. And she has not asserted a right or desire to use the Driveway. CP 93. Other Walden family members used the Driveway, but only for purposes of visiting Gilbert Walden at his property. CP 92. No non-family members have ever used the Driveway. *Id.* On the north side of the Driveway there is a ditch and there used to be an old barbwire fence separating the Driveway from Lorraine Walden's property to the north. CP 88–89. For years, the old fence kept in Gilbert Walden's cattle. CP 88–90, 96. Only remnants of that fence remain and it is not visible because it is covered with brush. CP 88–89.

Despite knowing the Driveway did not belong to her, when Lorraine Walden sold her property she never asked anyone to make sure the statutory warranty deed to Mojarrad excluded the Driveway. CP 84.

She also never checked the deed herself to make sure it excluded the Driveway. *Id.*

The Driveway is vital to building on Mojarrad's property. It is needed to access the buildable site in the southwest corner of the property. CP 44. Building a new road on Mojarrad's property would be cost prohibitive because it would need to be built through wetlands. *Id.* The only other building site is undesirably right next to the public road. CP 45.

2. Procedural History.

On October 25, 2012, Mojarrad sent a letter to Lorraine Walden tendering defense of the Estate's claim to the Driveway. CP 150–59. The letter identified the Estate's assertion of its claim of paramount title to the Driveway. *Id.* It informed Lorraine Walden that if the Estate prevails on its claim to the Driveway, Mojarrad will look to Lorraine Walden for compensation for Mojarrad's losses. *Id.* The letter stated it was a formal tender of Lorraine Walden's duty to defend Mojarrad's title to the Driveway under her statutory warranty deed. *Id.* The letter also informed Lorraine Walden that she would be bound in any subsequent litigation to the factual determinations necessary to the original judgment. *Id.*

Lorraine Walden did not take any action to defend Mojarrad's title to the Driveway. CP 133. So Mojarrad sent a follow-up letter to Lorraine Walden on November 15, 2012, again tendering defense of the Estate's

claim to the Driveway. CP 160–71. Lorraine Walden still did not take any action to defend Mojarrad’s title to the Driveway. CP 133.

So Mojarrad filed suit in March 2014. CP 13–24. Because the Estate was preventing Mojarrad from using the Driveway and claiming it owned the Driveway, Mojarrad asserted claims against the Estate for trespass, quiet title, ejectment, and declaratory judgment that the Estate had no right to the Driveway. CP 19–20. Mojarrad requested a judgment quieting title and/or establishing whether the Estate had any rights in the Driveway. CP 23. The Estate filed a counterclaim asserting paramount title to the Driveway by adverse possession. CP 10–11.

Mojarrad also asserted claims against Lorraine Walden for breach of deed warranties, unjust enrichment, equitable estoppel, negligent misrepresentation, and equitable indemnity. CP 20–23. Mojarrad requested various relief against Lorraine Walden, including rescission or damages, judgment establishing Lorraine Walden’s duty to defend Mojarrad’s title to the Driveway and indemnity for Mojarrad’s losses for her failure to defend, and for attorney fees and costs. CP 23–24.

Initial written discovery was conducted. *See* CP 126–71. After that, Mojarrad brought a summary judgment motion against Lorraine Walden. CP 252–67. Mojarrad argued Lorraine Walden had breached the warranty to defend Mojarrad’s title in the statutory warranty deed. CP 261–63.

Mojarrad also argued the purchase from Lorraine Walden should be rescinded. CP 263–64. The trial court denied the motion. CP 276–77.

Subsequently, additional discovery was completed, including depositions of key witnesses. CP 59–60. The Estate’s paramount claim to the Driveway through adverse possession was incontestable, and the Estate threatened to seek attorney fees against Mojarrad when it prevailed on its claim. CP 103. So Mojarrad settled with the Estate by agreeing to quiet title in the Driveway in the Estate. Mojarrad provided notice of the proposed settlement and offered Lorraine Walden another chance to step in and defend Mojarrad’s title to the Driveway. CP 106–07. Again, Lorraine Walden did not respond. CP 60. So Mojarrad and the Estate settled and entered into a stipulation quieting title to the Driveway with the Estate. CP 369–75. The trial court entered judgment to that effect. CP 229–31. This resolved the claims between Mojarrad and the Estate. *Id.* Mojarrad’s claims against Lorraine Walden remained pending.

Mojarrad and Lorraine Walden brought cross motions for summary judgment against each other. CP 220–28, 283–300. Mojarrad’s motion sought summary judgment against Lorraine Walden for breach of the warranty of quiet possession. CP 291–95. Mojarrad argued the Driveway was included in the deed conveying title to Mojarrad and the deed warranty of quiet possession to the Driveway was breached when

Mojarrad was prevented from possessing and using the Driveway in 2010. *Id.* Mojarrad argued the appropriate remedy was rescission because Lorraine Walden provided an incorrect survey and said there were no issues with title, yet failed to disclose the Driveway was actually owned by her neighboring relative, which she knew all along. CP 296–99. Lorraine Walden responded by arguing the statute of limitations on the breach of the warranty of quiet possession began to run at the time the deed was conveyed to Mojarrad and Mojarrad knew or should have known of the Estate’s claim to paramount title to the Driveway. CP 242–44. Mojarrad replied that under the law, the statute of limitations on a claim of breach of the warranty of quiet possession does not begin to run until the grantee is evicted from the property and that deed warranties apply to both known and unknown claims to superior title. CP 320–25.

Lorraine Walden’s motion for summary judgment sought dismissal of all of Mojarrad’s claims against her. CP 220–27. She argued the claim for breach of the duty to defend title should be dismissed because there was no duty to defend against valid claims to title brought by third parties. She also argued there was no duty to defend against a third party’s claim to title unless and until that third party files a lawsuit against the grantee. CP 223–26. She also argued the remaining causes of action were barred by the statute of limitations and that Mojarrad was not entitled to attorney

fees. CP 226–27. Mojarrad responded that, under the law, the duty to defend actually applies to *valid* claims, not invalid claims. CP 309–14. He also responded that, under the law, there is no requirement that a third party must sue a grantee before the grantor has a duty to defend title. *Id.* Mojarrad also argued the deed warranties of quiet possession and defense of title are *future* warranties that are breached only when a grantee like Mojarrad is evicted from the property, which occurred here in 2010 when Mojarrad’s access to the Driveway was first blocked. CP 304–07. Finally, Mojarrad argued the statute of limitations on the remaining claims against Lorraine Walden did not begin to run until 2012 when Mojarrad first learned that Lorraine Walden knew all along the Driveway did not belong to her. CP 314–17.

The trial court’s hearing on the motions for summary judgment was held on December 10, 2015. VRP 1. After argument by the parties, the trial court ruled that the statute of limitations began to run at the time of closing because Mojarrad’s real estate agent was told at closing the Driveway was not part of the sale, which the trial court said put Mojarrad on notice of the Estate’s claim to the Driveway. VRP 30–32. On this basis, the trial court denied Mojarrad’s motion for summary judgment and granted Lorraine Walden’s motion for summary judgment. CP 278–82. All of Mojarrad’s claims were dismissed. CP 282.

D. ARGUMENT

1. Standard of Review.

An appellate court reviews summary judgments de novo and engages in the same inquiry as the trial court. *Heath v. Uruga*, 106 Wn. App. 506, 512, 24 P.3d 413 (2001). Summary judgment is proper only if the pleadings, depositions, answers to interrogatories, and admissions, together with the affidavits, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). Courts view the facts and reasonable inferences in a light most favorable to the nonmoving party. *Michak v. Transnation Title Ins. Co.*, 148 Wn.2d 788, 794, 64 P.3d 22 (2003). If the moving party establishes the absence of an issue of material fact, the nonmoving party must set forth specific facts establishing a genuine issue for trial. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). Summary judgment is appropriate if in view of all the evidence, reasonable persons could reach only one conclusion. *Hansen v. Friend*, 118 Wn.2d 476, 485, 824 P.2d 483 (1992).

2. Deed warranties are an important part of real estate transactions.

“A deed is the most solemn and authentic act that a man can perform with relation to the disposal of his property during his lifetime.”

Moore v. Gillingham, 22 Wn.2d 655, 663, 157 P.2d 598 (1945). “A warranty deed is the customary form of deed used in Washington.” Martin Strelecky, 1 Wash. Real Property Deskbook: Real Estate Essentials § 5.3(2) (Wash. St. Bar Assoc. 4th ed. 2009). Under Washington’s warranty deed statute in RCW 64.04.030, a warranty deed contains the following five warranties:

- (1) that the grantor was seised of an estate in fee simple (warranty of seisin);
- (2) that he had a good right to convey that estate (warranty of right to convey);
- (3) that title was free of encumbrances (warranty against encumbrances);
- (4) that the grantee, his heirs and assigns, will have quiet possession (warranty of quiet possession); and
- (5) that the grantor will defend the grantee's title (warranty to defend).

Newport Yacht Basin Ass'n of Condo. Owners v. Supreme Nw., Inc., 168 Wn. App. 86, 95, 285 P.3d 70 (2012).

Deed warranties are an important part of providing title assurance in real estate conveyances in our society. Roger A Cunningham, William B. Stoebuck, and Dale A. Whitman, *The Law of Real Property* 861 (2d ed. 1993). “[A]ssurance of title is absolutely essential to the effective functioning of any real estate market.” Sheldon F. Kurtz and Herbert Hovenkamp, *American Property Law* 1152 (2d ed. 1993). Title assurances support real property values and help in the free and easy conveyance of

real property. *Id.* at 1151–52. “A purchaser who agrees to buy real property wants assurance that the purchase includes good title, that is, one free from reasonable doubt.” John Edward Cribbet, *Concepts in Transition: The Search for a New Definition of Property*, 1986 U. Ill. L. Rev. 1, 14 (1986). Thus, “[d]eed covenants are the safety nets under purchasers of real estate; put in place to protect them from falls caused by title defects.” Lynn Foster and J. Cliff McKinney, *Deed Covenants of Title and the Preparation of Deeds: Theory, Law, and Practice in Arkansas*, 34 U. Ark. Little Rock L. Rev. 53, 53 (2011).

The vital importance of a purchase’s ability to rely on deed warranties is underscored by the fact that some deed warranties apply forward into the future, like the warranties for quiet possession and to defend title discussed below. These future warranties warrant against breaches that may occur in the future. These are commercially important warranties because they operate over the course of time after a deed is conveyed. This also makes them individually important to those who purchase real property.

3. The warranty of quiet possession is a future warranty that is not breached until the grantee is evicted from the property by a third party who asserts paramount title.

Here, Lorraine Walden warranted to Mojarrad that he would have quiet possession of the entire property conveyed, including the Driveway.

This is a future warranty that was not breached until 2010 when the Estate first prevented Mojarrad from using the Driveway and first asserted its ownership of the Driveway against Mojarrad. The warranty applies to both known and unknown claims, so whether Mojarrad knew or should have known about the Estate's claim before 2010 is not material. The trial court erred in ruling that Mojarrad's alleged knowledge of the Estate's claim triggered the statute of limitations running at the time of conveyance in 2005, rather than in 2010 when Mojarrad was actually evicted.

A. The Driveway is covered by the deed warranties.

First and foremost, the parties do not dispute that the Driveway was within the property described in the statutory warranty deed from Lorraine Walden to Mojarrad. CP 284–86, 240–41. Thus, the warranties in the deed apply to the Driveway.

The parties also do not dispute that the Estate obtained paramount title to the Driveway through adverse possession. CP 221, 224–25, 324, 369. The Estate's title to the Driveway ripened more than 40 years before Mojarrad purchased Lorraine Walden's property. *Id.* Thus, the Estate's paramount claim to the Driveway could breach the deed warranties. The pertinent question is when that breach occurred.

B. The future warranty of quiet enjoyment was breached in 2010 when the Estate first evicted Mojarrad from use of the Driveway and first asserted its claim to the Driveway.

The statute of limitations on breach of deed warranty claims is six years. *Erickson v. Chase*, 156 Wn. App. 151, 157, 231 P.3d 1261 (2010). A statutory warranty deed contains both present covenants that are breached only at the time of conveyance and future covenants that may be breached after conveyance at some point in the future. *Ensberg v. Nelson*, 178 Wn. App. 879, 886, 320 P.3d 97 (2013). The warranty of quiet possession is a future warranty. *Erickson*, 156 Wn. App. at 158. A breach of this future warranty only occurs when a third party asserts a lawful right to the property and there is an actual or constructive eviction under paramount title. *Id.*; *Foley v. Smith*, 14 Wn. App. 285, 291, 539 P.2d 874 (1975). Actual eviction occurs with any actual disturbance of the possession, equivalent to the eviction, by a person who has lawful and paramount title at the time of the execution. *Black v. Barto*, 65 Wn. 502, 503, 118 P. 623 (1911). Constructive eviction occurs when the person asserting paramount title proves it and prevails in an action for possession. *McDonald v. Ward*, 99 Wn. 354, 358, 169 P. 851 (1918); *Foley*, 14 Wn. App. at 291–92. Consequently, a grantee does not have a claim for breach of future warranties against a grantor until the grantee is evicted from the property by a third party. *Jackson v. McAuley*, 13 Wn. 298, 301, 43 P. 41 (1895) (plaintiff claiming breach of the warranty of quiet possession has

“no relief until his possession is disturbed by one claiming under a superior title”); *Barber v. Peringer*, 75 Wn. App. 248, 255, 877 P.2d 223 (1994) (“There was also no breach of the warranty of quiet enjoyment because the [grantees] were not actually or constructively evicted from the disputed portion of the driveway.”).

The third party’s claim to paramount title must have existed at the time of conveyance. *Foley*, 14 Wn. App. at 291. But mere existence of a paramount claim does not mean the future warranty is breached at the time of conveyance. There is a distinction between when the third party obtained its paramount title to the disputed property and when the third party actually asserts its claim against the grantee.

The mere existence of a paramount title which has never been asserted generally does not amount to a constructive eviction which will support an action for breach of a general covenant of warranty. Or, as the rule is sometimes stated, there can be no recovery in an action for breach of the covenant if the paramount title has not been hostilely asserted. The mere existence of the paramount title will not ordinarily justify an abandonment of the property by the covenantee and suit by him on his covenants.

20 Am. Jur. 2d, *Covenants, Conditions and Restrictions* § 58 (1965).

“Therefore, while the third person will be someone who claims under a paramount right that existed at the time of conveyance, the covenant is not breached until that person actually disturbs the grantee in possession.” 18

William B. Stoebuck & John W. Weaver, Wash. Practice: Real Estate: Transactions, § 14.3 (2d ed.).

As one Washington Supreme Court case shows, the statute of limitations begins to run when the grantee is evicted, no matter how many years pass between when the deed is conveyed and when the grantee is evicted. *McDonald v. Ward*, 99 Wn. 354, 169 P. 851 (1918). In *McDonald*, the seller conveyed property to the buyer by statutory warranty deed. *Id.* at 354–55. At the time of the conveyance, the tracks of a railroad went across a 16 to 20 foot sliver of the property. *Id.* But 12 to 13 years after the conveyance, the railroad evicted the buyer from a 200 foot strip on either side of the tracks under a superior claim to title. *Id.* at 355. The buyer then brought a claim against the seller for breach of the future warranty of quiet possession.¹ *Id.* at 358. The court ruled the statute of limitations barred any claim regarding that part of the property covered by the railroad tracks at the time of the conveyance because the buyer was effectively evicted from that part of the property from the time of conveyance. *Id.* But as to the 200 feet claimed by the railroad 12–13 years later, the statute of limitations did not begin to run until the buyer was

¹ The court referred to this as the “covenant of warranty.” *Id.* at 358. “Covenant of warranty” is another name for the warranty of quiet possession. 18 William B. Stoebuck & John W. Weaver, Wash. Practice: Real Estate: Transactions, § 14.3 (2d ed.).

denied possession of that property 12–13 years after the deed was conveyed. *Id.*

The same situation is present here. While the deed was conveyed to Mojarrad in 2005, there is no dispute the Estate first prevented Mojarrad from using the Driveway and first asserted its claim to Driveway against Mojarrad in 2010. In 2005, before purchasing the property, Mojarrad was able to freely access and walk down the Driveway and did not encounter a locked gate. CP 63–64, 72. Mojarrad checked on the property four years later in 2009 and was again able to freely access and walk down the Driveway and did not encounter a locked gate. CP 72. While there was testimony from the Waldens that a locked gate always existed across the Driveway, they themselves also testified that the gate was not always shut and Gilbert Walden only shut the gate when he was gone. CP 81, 89–90. It was not until Mojarrad went to flag the property to begin building on it in 2010 that he first encountered a locked gate blocking his use of the Driveway and cordoning off the Driveway for exclusive use by the Estate. CP 79, 73, 173–74. This was the first time the Estate asserted its paramount claim to the Driveway against Mojarrad. CP 75–76, 174. The Estate refused to remove the locked gate and allow Mojarrad to use the Driveway, and threatened to call the sheriff if Mojarrad did not leave the Driveway. CP 75–76, 90, 174. Later in 2010,

Mojarrad called the Estate to discuss putting a fence south of the Driveway to enclose the Driveway within Mojarrad's property, but the Estate refused to allow that. CP 91. There is no evidence that the Estate prevented Mojarrad's use of the Driveway or asserted its claim to the Driveway against Mojarrad any time before 2010.

Thus, it was in 2010 that Mojarrad's use of the Driveway was first denied by the Estate and when the Estate first asserted its claim to the Driveway against Mojarrad. This was the first time the warranty of quiet possession was breached. So Mojarrad's 2014 lawsuit for breach was brought well within the six year statute of limitations. CP 13–24. This claim should not have been dismissed on summary judgment. Instead, summary judgment should have been granted in Mojarrad's favor finding Lorraine Walden liable for breach of the warranty of quiet possession.

C. Deed warranties apply to both known and unknown claims to paramount title.

For over 100 years, Washington courts have continually reaffirmed that deed warranties apply even if the third party's claim to paramount title was known at the time of the conveyance. But here, the trial court ignored this long settled law when it dismissed Mojarrad's claim on the grounds that Mojarrad was put on notice of the Estate's claim when Mojarrad's real estate agent was told at closing that the Driveway belonged to the

Estate. VRP 29–32. This communication was not relayed to Mojarrad. CP 173. But whether it was relayed or not is not relevant to the proper legal determination. So the trial court’s decision was in error.

“In an unbroken line of cases, beginning with *West Coast Manufacturing & Investment Co. v. West Coast Improvement Co.* in 1901, Washington courts have held that the warranty applies to all defects and has refused any invitation to limit its scope based upon the grantee's knowledge.” *Edmondson v. Popchoi*, 155 Wn. App. 376, 389, 228 P.3d 780 (2010). That 1901 decision pronounced that “[k]nowledge, or notice, however full, of an incumbrance, or of a paramount title, does not impair the right of recovery upon covenants of warranty. The covenants are taken for protection and indemnity against known and unknown incumbrances or defects of title.” *West Coast Mfg. & Inv. Co. v. West Coast Improvement Co.*, 25 Wn. 627, 637, 66 P. 97 (1901) (quoting *Copeland v. McAdory*, 13 So. 545 (Ala. 1892)). It is settled that “knowledge on the part of a grantee at the time of the existence of an incumbrance upon the land, or a defect in the grantor's title, does not militate against the covenants in the deed, as such covenants warrant against known as well as unknown defects and incumbrances, and a grantee with knowledge of an incumbrance may rely upon the covenants in the deed for his protection.” *Fagan v. Walters*, 115 Wn. 454, 457, 197 P. 635 (1921). Courts continue

to affirm this long-established law: “Knowledge on the part of the grantees of an outstanding potentially superior claim to the land to which they obtained a deed does not bar their claim for breaches of the covenants of warranty and quiet enjoyment in their deed when they are later evicted from the property by judicial action.” *Foley v. Smith*, 14 Wn. App. 285, 292, 539 P.2d 874 (1975).

Courts have explained the rationale for this rule:

The purpose of the covenant is protection against defects, and to hold that grantees can be protected only against unknown defects would rob the covenant of much of its value and destroy the force of its language.

Id. at 292–93 (internal citations omitted). If the parties want to exclude known claims, courts have provided instruction on how to do so:

If the grantor wishes to exclude known defects or incumbrances from the operation of the covenants, he should do so by incorporating the intended limitation in the covenants themselves. Failing to do so he must be bound by the express words of the covenants, and cannot be permitted to destroy the force of their language by parol. Besides, it does not follow from the fact that the parties had knowledge of a particular incumbrance on the land, or defect in the title, that they intended to exclude it from the protection of the covenants; men often take warranties knowing of defects in the title.

West Coast Mfg., 25 Wn. at 637–38.

The law that knowledge of a potential claim does not bar deed warranty claims goes hand-in-hand with the law that the statute of limitations does not begin to run until the grantee is evicted from the

property. *Foley v. Smith*, 14 Wn. App. 285, 539 P.2d 874 (1975), provides a good example. Foley conveyed property to Smith by statutory warranty deed in 1965. *Id.* at 287. Soon after that, a third party sued both Foley and Smith claiming Foley had previously sold the property to it and seeking specific performance of that prior sale. *Id.* The third party's claim was finally adjudicated in 1971, six years after Foley's deed to Smith, resulting in Smith's eviction from the property. *Id.* In 1972, more than six years after the deed, Smith sued Foley for breach of the deed warranties. *Id.* at 288. Foley argued the claims were barred by the statute of limitations. *Id.* The court of appeals ruled Smith's knowledge of the outstanding claim did not matter: "The fact that the Smiths, as grantees under the deed, had knowledge at the time of the execution of the conveyance of an allegedly outstanding superior claim of title, does not bar their right to recover for breaches of the covenant arising from their subsequent eviction." *Id.* at 292. The court also ruled that the six year statute of limitations did not begin to run until 1971 because that was when Smith was evicted from the property by the final decree awarding the property to the third party. *Id.* at 293.

Some covenants in deeds are deemed to operate in the present and to be breached, if at all, when made, while others are prospective in operation and are not breached until an eviction or its equivalent.

As expressed above, the covenants of warranty and of quiet enjoyment were not broken in the present case until the eviction by the decree of specific performance. Accordingly, the statute of limitations on the Smiths' claim for breaches of those covenants did not commence running until they, as covenantees, were evicted or ousted, either actually or constructively from the premises conveyed.

....

The counterclaim by the Smiths was brought well within 6 years of the decree in the specific performance action becoming final. It was, therefore, not barred by RCW 4.16.040.

Id. at 293–94 (internal citations omitted). The same result is mandated here.

Whether Mojarrad knew of the Estate's outstanding claim to the Driveway is not material. Even if Mojarrad knew of the Estate's claim, which he did not, Lorraine Walden still warranted that Mojarrad would have quiet possession of the Driveway into the future. Mojarrad was entitled to rely on that warranty as protection against claims of ownership to the Driveway asserted against him in the future. The warranty was eventually breached when the Estate evicted Mojarrad from the Driveway in 2010. Before that, Mojarrad had no claim for breach because he was able to use the Driveway up until 2010. Thus, the trial court erred in dismissing Mojarrad's breach of deed warranty claims.

Finally, assuming *arguendo* that knowledge of the Estate's claim to the Driveway is material to when the breach of warranty claim arose, which it is not, Mojarrad's claims for breach of deed warranties should not

have been dismissed at summary judgment. This is because, at the very least, questions of fact existed as to whether Mojarrad knew (or should have known) about the Estate's claim to the Driveway before 2010.

Lorraine Walden testified that at closing, her real estate agent called Mojarrad's real estate agent and said the Driveway was not part of the sale. CP 83–84. However, there is no testimony or other evidence that Mojarrad's real estate agent ever informed him of this. *Id.* Mojarrad was not at the closing. CP 65. Lorraine Walden never met or talked to Mojarrad. CP 63, 83. Mojarrad testified that he was never told that the Driveway was not part of the sale. CP 173–74. So a question of fact exists as to whether Mojarrad was ever notified of the Estate's claim to the Driveway. There is also a question as to whether anything on the ground should have put Mojarrad on notice of the Estate's claim to the Driveway. Mojarrad did not encounter a locked gate when he visited the property in 2005 and 2009. CP 63–64, 72. Further, there was no fence enclosing the Driveway within the Estate's property. All that remained was remnants of an old barbed wire fence north of the Driveway that was overgrown with brush and out of sight. CP 88–89. Plus, the survey given to Mojarrad showed the Driveway within Lorraine Walden's property. CP 171. And Lorraine Walden represented in her disclosures that there were no boundary, encroachment, or access issues with her property. CP 166.

Given all this and viewing all reasonable inferences in the light most favorable to Mojarrad, questions of fact exist as to whether Mojarrad knew (or should have known) about the Estate's outstanding claim to the Driveway at the time of the conveyance in 2005. Thus, at the very least, Mojarrad's claims for breach of deed warranties should not have been dismissed in their entirety on summary judgment.

But summary judgment should have been granted in Mojarrad's favor on the breach of warranty of quiet possession claim. There is no question the Driveway was included in the property conveyed. There is no question the Estate's claim to the Driveway was paramount. There is no question the Estate's claim existed at the time of the conveyance. And there is no question the Estate first evicted Mojarrad from the Driveway and asserted its ownership of the Driveway in 2010.

- D. A grantee has no duty to force a third party to evict the grantee from the property or force the third party to assert its paramount claim to the property.

Lorraine Walden argued that Mojarrad had some sort of duty to affirmatively discover the Estate's claim to the Driveway before 2010. CP 233–35. Mojarrad had no such duty for several reasons.

First, this argument assumes knowledge of an outstanding claim is relevant. But as explained above, warranties apply to known claims, as well as unknown claims. What matters is when the third party asserts its

claim against the grantee and evicts the grantee from the property. Mojarrad could not control when, or if, the Estate asserted its claim to the Driveway. He also could not control when, or if, the Estate tried to evict him from the Driveway. The Estate could have decided never to assert its claim or evict him, in which case there would have never been a breach. It was not Mojarrad's fault that he encountered no locked gate on his visits in 2005 and 2009. Mojarrad could not control that the gate was not kept shut at all times. CP 81, 90. It was up to the Estate to choose if or when to assert its claim to the Driveway. When it did so in 2010, that is when the future warranties were breached.

Second, acceptance of Lorraine Walden's argument would completely undermine the purpose of the deed warranties. Lorraine Walden warranted that Mojarrad would have quiet possession of the Driveway and not be disturbed in the future by any outstanding claim existing at the time of the conveyance. Mojarrad was entitled to rely on that warranty and look to Lorraine Walden if it was ever breached by Mojarrad being evicted. Lorraine Walden cites no authority that these future warranties only last for a limited amount of time before expiring. She also cites no authority that these future warranties are contingent upon the grantee conducting certain investigations into any outstanding third party claims. The warranties provide an important form of title assurance

so that buyers do not have to conduct expensive and time-consuming investigations in search of any and all outstanding claims. If buyers could not rely on the warranties, real estate transactions would be much more expensive, uncertain, and time consuming. Luckily, the warranty of quiet possession is unequivocal. Having been given this future warranty, Mojarrad was free to rest easy knowing that if the warranty was breached in the future if a third party asserted a superior claim, he could look to Lorraine Walden to remedy the breach. Ruling any other way would eviscerate the meaning and effect of the future warranties that have long been integral to statutory warranty deeds.

Third, Lorraine Walden blindly cites the discovery rule to support her argument. “Under the discovery rule, a cause of action accrues when the plaintiff knew or should have known the essential elements of the cause of action.” *Allen v. State*, 118 Wash. 2d 753, 757–58, 826 P.2d 200 (1992). But no Washington court has ever applied the discovery rule to a breach of deed warranty case. Lorraine Walden provided no citation to any such case. Applying the discovery rule to a breach of the future warranties would contradict the long settled law that future warranties are not breached until a third party evicts the grantee from the property and asserts its claim to paramount title. If the discovery rule applied, a grantee would be forced to bring a claim before the third party evicted the grantee and

before the third party asserted its claim to paramount title. The discovery rule would also contradict the long settled law that warranties apply to known and unknown claims. Grantees would be forced to sue for breach as soon as they learn of potential outstanding claims held by third parties, whether or not those third parties have asserted their claims and evicted the grantee. These results would completely eviscerate the *future* nature of the future warranty of quiet possession.

Finally, an easy remedy exists if a grantor like Lorraine Walden does not want to be subject to future liability if the grantee is evicted from the property. Grantors can convey title by another form of deed that does not include future warranties, like a quitclaim deed that contains no warranties. Or grantors could expressly exclude known claims from the warranty. Lorraine Walden did neither of these things.

E. Rescission is the only appropriate remedy given Lorraine Walden's misrepresentations about owning the Driveway.

Since there has unquestionably been a breach of the warranty of quiet possession, the next question is the appropriate remedy for that breach—rescission or damages. Lorraine Walden does not dispute that rescission can be a remedy for breach of the warranty of quiet possession. And the undisputed facts show rescission is the only proper remedy given Lorraine Walden's misrepresentations about owning the Driveway.

Courts are free to grant rescission of real property transactions. “[C]ourts exercising equity powers have full jurisdiction to grant relief by ordering rescission, cancellation, or delivery up of deeds, mortgages, contracts, and other written instruments, and that the granting of such relief is controlled by equitable principles.” *Hesselgrave v. Mott*, 23 Wn.2d 270, 283, 160 P.2d 521 (1945). “The remedy [of rescission] is not one of absolute right, however, but rests in the sound discretion of the court, to be exercised in accordance with what is reasonable and just under the particular circumstances.” *Id.* Since rescission is an equitable remedy, a court has broad discretion in fashioning its remedy to restore the parties to the positions they were in prior to the rescinded contract. *Reeves v. McClain*, 56 Wn. App. 301, 310, 783 P.2d 606 (1989).

There are many examples of courts granting rescission of a real estate transaction under circumstances applicable here. Rescission can be awarded when the seller makes incorrect representations about the boundaries of property. *Algee v. Hillman Inv. Co.*, 12 Wn.2d 672, 674–75, 123 P.2d 332 (1942). Rescission can be awarded when the seller makes representations that the property faces a public street when in fact there is no means of access, even if an investigation might have disclosed the truth. *Connell v. McGill*, 124 Wn. 350, 214 P. 1 (1923). Rescission may also be awarded where fraud entered into the making of the contract.

French v. C. D. & E. Inv. Co., 114 Wn. 416, 421, 195 P. 521 (1921). Purchases can also be rescinded when one party is mistaken due to the other party's concealment of material facts, and the complaining party would not have entered into the agreement if such facts had been disclosed at the time of the transaction. *Davis v. Pennington*, 24 Wn. App. 802, 604 P.2d 987 (1979).

The undisputed facts show circumstances exist making rescission the appropriate remedy here. Lorraine Walden knew all along the Driveway belong to her brother-in-law Gilbert Walden. She also agreed with him that the Driveway belonged to him. CP 81–83, 176–82. But she also knew the survey showed the Driveway was within her property. CP 176–82. The survey did not show the Driveway served the Estate's property. CP 171. Knowing the survey was wrong and having done nothing to correct it, she gave the incorrect survey to Mojarrad. CP 82-83, 171. She then also affirmatively disclosed to Mojarrad that there were no “encroachments, boundary agreements, or boundary disputes”; no “rights of way, easements, or access limitations that may affect” Mojarrad's use of the property; no survey that adversely affected the property; and no restrictions affecting the property. CP 139. And when Mojarrad viewed the property before the sale he was able to freely walk down the Driveway and did not encounter a locked gate. CP 63–64, 72.

Lorraine Walden never met or talked to Mojarrad directly. CP 63, 83. At the closing, she did nothing to make sure the Driveway was excluded from the deed. CP 84. And while she says she told her agent at closing that the Driveway was not part of the sale, CP 83–84, Mojarrad was not at the closing and there is no evidence this was relayed to Mojarrad. CP 65. It was only in 2012, after Mojarrad was excluded from using the Driveway by the Estate in 2010, that Lorraine Walden revealed to Mojarrad that she knew all along the Driveway belonged to the Estate. CP 176–82. Adding insult to injury, rather than defend Mojarrad’s title to the Driveway, she actively worked to support the Estate’s claim to the Driveway. *Id.* Her actions constitute knowing misrepresentations about the boundaries and access to the property and concealment of the actual ownership of the Driveway, making rescission the only appropriate remedy.

Lorraine Walden does not dispute rescission can be a remedy under these circumstances. Instead, she argues Mojarrad waited too long to bring his rescission claim. CP 244-46. Mojarrad did not delay in bringing his action for rescission once he learned that Lorraine Walden knew all along she did not own the Driveway. A party must elect to rescind a contract “speedily on the discovery of such breach.” *Thomas v. McCue*, 19 Wn. 287, 53 P. 161 (1898). “Delay in rescission is evidence of

a waiver of the misconduct of the other party.” *Id.* Here, Mojarrad was never told that Lorraine Walden did not own the Driveway. CP 63, 65, 83, 173. He had no way of knowing that she knew she did not own the Driveway. The first he learned of the Estate’s claim was when the Estate first excluded him from using the Driveway in 2010. And the first he learned that Lorraine Walden knew all along she did not own the Driveway was from her declaration in support of the Estate’s claim in September 2012. CP 176–81. Upon learning this, Mojarrad promptly tendered defense of his title to Lorraine Walden in October and November 2012. CP 150–51, 160–61. Having received no response from Lorraine Walden, Mojarrad brought suit only a year and a half later in March 2014. CP 13–24. After learning he had grounds for rescission, Mojarrad did not delay in seeking to rescind the transaction.

Lorraine Walden also argues that Mojarrad cannot seek rescission because he should have known she did not own the Driveway. CP 244–46. But there are no facts that lead to that conclusion. The Driveway was not enclosed within the Estate’s property by a fence. Only remnants of an old barbed wire fence existed north of the Driveway, but it could not be seen because it was buried by brush. CP 88–89. When Mojarrad visited the property, he never encountered a locked gate preventing his use of the Driveway until 2010. CP 63-64, 70, 72-73. He was given a survey

showing the Driveway was part of the property he was purchasing. CP 65–66, 171. And he was told there were no encroachments or other access issues with the property. CP 139. Mojarrad was not a mind-reader. He had no indication that Lorraine Walden had agreed with her brother-in-law that he owned the Driveway. Rescission is the only proper remedy.

After ordering summary judgment finding Lorraine Walden liable on the breach of the warranty of quiet possession, this court should instruct that rescission be the remedy on this claim. Alternatively, the court should remand the case for further proceedings on the appropriate remedy.

4. The warranty to defend title is not breached until a third party asserts a paramount claim to title and the grantor refuses tender of the defense of title.

Like the warranty of quiet enjoyment, the warranty to defend title is a future warranty. It can only be breached when a third party asserts a superior claim to title, defense of title is tendered to the grantor, and the grantor refuses the tender. Contrary to Lorraine Walden’s argument, this warranty only applies to valid claims asserted by third parties, like those brought by the Estate. A grantor has no duty to defend title against invalid claims. And contrary to Lorraine Walden’s other argument, this warranty can apply whether the grantee is a defendant or a plaintiff in an action to resolve a competing claim to title.

- A. The warranty to defend title is a future warranty that is not breached until the tender of defense is refused.

The warranty to defend title is also a future warranty. *Erickson v. Chase*, 156 Wn. App. 151, 158, 231 P.3d 1261 (2010). This warranty “requires that the grantor provide a good faith defense to title.” *Edmonson v. Popchoi*, 172 Wn.2d 272, 283, 256 P.3d 1223 (2011). The statute of limitations on a breach of the warranty to defend does not begin to run until (1) a third party asserts a superior claim to the property; (2) the grantee tenders defense of that claim to the grantor; and (3) the grantor refuses the tender. *Erickson*, 156 Wn. App. at 158–59.

The Estate did not assert its claim to the Driveway against Mojarrad until 2010. Mojarrad then tendered defense of his title to Lorraine Walden in two letters sent in 2012. CP 150–71. Lorraine Walden did not respond to the letters. CP 133. So Mojarrad filed suit against Lorraine Walden for breach of the warranty to defend title in 2014. This suit was brought well within six years from the time the Estate first asserted its claim to the Driveway in 2010 and from the time defense was tendered to Lorraine Walden in 2012. Thus, the claim for breach of the warranty to defend title should not have been dismissed at summary judgment.

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- B. The warranty to defend title applies to valid claims to paramount title asserted by third parties.

Lorraine Walden argued the claim for breach of warranty to defend title should be dismissed because a grantor has no duty to defend title against a valid claim brought by a third party. CP 224–25, 235–36. She cites no case or other legal authority holding that the duty to defend only applies to invalid claims by third parties, and not valid claims. That is because long settled law is actually the opposite—the duty to defend title only applies to valid claims and does not apply to invalid claims.

Lorraine Walden’s position is only supported by her reliance on general obligations of litigants under CR 11. CP 224–25, 235–36. But this confuses the issue. The warranty is not a warranty to defend a lawsuit, but a warranty to defend the grantee’s title to the property. The deed statute provides that a grantor “will defend the title.” RCW 64.04.030. It does not limit defenses to defense of a lawsuit only. Case law also provides that a grantor cannot just throw their hands up and do nothing in the face of a claim to title asserted by a third party. “Such indifference to the dispute and out-of-hand dismissal of the duty to defend simply cannot be characterized as satisfying the warranty to defend.” *Edmonson v. Popchoi*, 172 Wn.2d 272, 281, 256 P.3d 1223 (2011).

Based on a plain reading of the statute and the implied duty of good faith, we hold that the warranty to defend means that, upon

proper tender, a grantor is obligated to defend in good faith and is liable for a breach of that duty. . . . The plain meaning of “defend” means something more than complete concession to another party's claim. Black's Law Dictionary 482 (9th ed. 2009) (defining to “defend” as “[t]o deny, contest, or oppose (an allegation or claim)”). An interpretation of the warranty to defend that includes mere concession to another's claim to title, regardless of the merits, would render the warranty to defend superfluous in the statute. A grantee can already recover for the diminished title under the warranties that the estate is “free from all encumbrances” and of “quiet and peaceable possession of [the] premises.” RCW 64.04.030. The duty to defend must mean something more. This is especially important in light of the unique character of real property because the tract of land, title to which needs defending, may be of greater value to the grantee than its monetary value reflects. . . . As with any covenant of any contract, we read a duty of good faith into the warranty to defend. Accordingly, the promise that a grantor will defend against all other claims to title must mean something more than that the grantor will do nothing but concede such claims.

Id. at 279–80. So Lorraine Walden could not sit back and do nothing in response to the Estate's assertion of its claim to the Driveway. She warranted that she would defend Mojarrad's title. She could have fulfilled her warranty by mounting a defense to the Estate's claim herself, or agreeing to pay for Mojarrad to defend himself against the claim. She also could have attempted to work out a resolution between Mojarrad and the Estate over ownership and use of the Driveway. But instead she chose to do nothing, and doing nothing is a breach of the warranty to defend title for which she is liable for damages.

Legal treatises also explain that the duty to defend applies to valid

claims asserted by third parties, not invalid claims. American Jurisprudence instructs the warranty to defend title is a warranty that the grantor “will defend and protect the covenantee against the *rightful* claims of all persons thereafter asserted.” 20 Am. Jur. 2d, *Covenants, Conditions and Restrictions* § 54 (emphasis added). “[T]he showing of a superior outstanding title in a third party is essential to mature the right of action for a breach of the warranty.” *Id.* at § 56. “[T]he warrantor is not bound to protect his grantee against a mere trespasser or against an unlawful claim of title.” *Id.* “In other words, a covenant of warranty of title does not extend to apparent but unfounded titles in the land, but only against hostile titles, superior in fact to that of the grantor.” *Id.*

If a third person having no legal or equitable claim to land conveyed with covenants of title brings suit against the grantee, the grantor is not liable for the expenses incurred by the grantee in successfully defending such unfounded action, the foundation of this rule being that in such a case there is no breach of covenant which may serve as a basis for the recovery of damages of any kind. Thus, . . . the covenantee is not entitled to demand of his covenantor expenses incurred in the defense of a suit which sustains the title as valid.

20 Am. Jur. 2d, *Covenants, Conditions and Restrictions* § 151. Powell’s real property treatise also agrees: “[I]f a claim is validly asserted against the property . . . the covenantor is liable. . . . The covenant is merely a guarantee that there are no valid claims outstanding against the property conveyed. If an invalid or inferior claim is asserted, the covenantor has no

liability.” Richard R. Powell, Real Property ¶ 900[2] at 81A-141–42 (1993). Lorraine Walden has not cited a single Washington case or any other legal authority in support of her argument that the warranty to defend title only applies to invalid claims.

That is likely because her version of the law would lead to absurd results. Under her version of the law, grantors like Lorraine Walden would have to defend against *any* claim to title asserted by a third party against the grantee, no matter how specious. That would vastly expand the number of claims against which grantors must defend. To avoid having to defend against every invalid claim, grantors would have a strong incentive to side with third parties to show the claim is valid, so that the grantor would have no duty to defend. Incentivizing grantors to capitulate to every claim brought by a third party would completely undermine the deed warranties and completely eliminate the role of deed warranties in providing title assurance to buyers.

Instead, the law should remain that a grantor has a duty to defend against valid claims to title asserted by third parties against the grantee. If a grantor like Lorraine Walden breaches this warranty to defend title, the grantor is liable for breach. Damages for a grantor’s breach are the fees and costs that the grantee incurred in defending title. *Mastro v. Kumakichi Corp.*, 90 Wn. App. 157, 163, 951 P.2d 817 (1998).

The law is well established that reasonable attorney fees are recoverable as damages against the grantor of a warranty deed when those fees are incurred by the grantee in defending title and where the grantor has had notice of the pending action and has refused to defend. This award of attorney fees is limited to an action to cure or defend title, and the covenantee/grantee is not entitled to an additional award of attorney fees incurred in an action against the covenantor/grantor for breach of covenant.

Mellor v. Chamerlin, 100 Wn.2d 643, 650, 673 P.2d 610 (1983). So with Lorraine Walden having breached the warranty to defend title, Mojarrad is entitled to damages against her in the form of reasonable attorney fees and costs he incurred in defending his title against the Estate's claim himself.

- C. The warranty to defend title applies whether the grantee is the plaintiff or the defendant in a dispute over title to the property.

Lorraine Walden argued that the warranty to defend title claim should be dismissed at summary judgment because Mojarrad was not a defendant in a lawsuit brought by the Estate asserting its claim to the Driveway. CP 225–26, 235. Yet no Washington case has ever ruled that the warranty to defend title only applies if the grantee has been named as a defendant in a lawsuit brought by a third party claiming paramount title. A grantor can breach the duty to defend title and thus be liable for fees and costs incurred by the grantee in defending title, whether the grantee was a plaintiff or defendant in an action involving a third party's claim to title.

First, Lorraine Walden's argument again misreads the statute from which the warranty to defend title arises. RCW 64.04.030 is not couched in terms of the grantor merely warranting to defend against a lawsuit. Rather, the statute reads that the grantor warrants to "defend the title" to the property conveyed in the deed. Defending title to property can often require bringing a lawsuit against a third party who takes possession of the property and will not relinquish it.

Second, case law agrees "the warranty to defend in a statutory warranty deed, RCW 64.04.030, requires that the grantor provide a good faith *defense to title*." *Edmonson v. Popchoi*, 172 Wn.2d 272, 283, 256 P.3d 1223 (2011) (emphasis added). Lorraine Walden relies on *Mastro v. Kumakichi Corp.*, 90 Wn. App. 157, 951 P.2d 817 (1998), but that case did not rule that the grantee was required to be a defendant in a lawsuit brought by a third party before the warranty to defend title could be breached. Instead, the court stated a "third person's claim of superior right is usually established in a lawsuit *between* the grantee and the third party." *Id.* at 163 (emphasis added). A lawsuit can be "between" the grantee and third party whether the grantee is the plaintiff or defendant. Another case bears this out even more clearly. When talking about attorney fees as damages for breaching the warranty to defend title, the court stated an award of fees "is limited to an action *to cure* or defend title." *Mellor v.*

Chamerlin, 100 Wn.2d 643, 650, 673 P.2d 610 (1983) (emphasis added).

An action to “cure” title recognizes that grantees may need to bring suit against a third party to determine who has paramount title.

Legal treatises acknowledge the duty to defend title can arise when the grantee is forced to bring suit against the third party who is in possession of the property at issue.

One who has a dispute with another over his title and brings an action to settle the title question might be said to be defending “title,” even though he is not defending the lawsuit. There can be circumstances, such as when a neighbor who claims title is occupying part of the land the grantor purported to convey to the grantee (the actual fact in *Mellor*), when a grantee is practically forced to come forward as plaintiff to contest title with the neighbor; otherwise, the neighbor will continue to occupy and may well gain title by adverse possession if he does not already have it. The writers' view is that, at least where he reasonably may be prejudiced by not doing so, it would be a “defense of title” for the grantee to commence an action as plaintiff.

18 William B. Stoebuck & John W. Weaver, Wash. Practice: Real Estate: Transactions, § 14.4 (2d ed.). Commencing an action against the Estate is exactly what Mojarrad needed to do after it blocked his access to the Driveway with the locked gate in 2010. CP 70, 73, 75–76, 90–91, 173–74.

A law that the warranty to defend title only arises if the grantee is sued by a third party would encourage parties to take matters into their own hands. When a third party takes possession of the property, the grantee would then have to goad the third party into suing the grantee.

That might be hard to do. A grantee could attempt to physically remove the third party from possession in hopes that prompts the third party to sue the grantee. For example, in this case the Estate locked a gate across the Driveway and threatened to call the sheriff if Mojarrad did not leave the Driveway. CP 70, 73, 90, 173–74. Mojarrad could have taken matters into his own hands and removed the Estate’s gate and put up his own locked gate and fence excluding the Estate from the Driveway. That might have been enough to provoke the Estate into suing Mojarrad. But it also could have provoked the Estate into retaliating and escalating the situation to an unknown degree. Instead of using this sort of vigilante self-help justice, Mojarrad chose to defend his claim to title to the Driveway by starting a lawsuit against the Estate and having the issue of paramount title decided by our court system in a civilized way. The law should not penalize Mojarrad for this sound and safe approach to resolving ownership of the Driveway.

5. The statute of limitations on Mojarrad’s remaining claims did not begin to run until 2012 when Lorraine Walden first revealed to Mojarrad the she knew all along the Driveway did not belong to her.

Finally, the trial court erred in dismissing Mojarrad’s other causes of action for unjust enrichment, negligent misrepresentation, and equitable indemnity on grounds they were barred by the statute of limitations. VRP

29–33. This was in error because these claims did not arise until 2012 when Lorraine Walden first revealed to Mojarrad that she knew all along the Driveway was not hers.

“A person has been unjustly enriched when he has profited or enriched himself at another's expense, contrary to equity.” *Cox v. O'Brien*, 150 Wn. App. 24, 37, 206 P.3d 682 (2009). A claim for unjust enrichment does not accrue, and a plaintiff has no right to seek relief, until unjust circumstances arise. *Geranios v. Annex Invest.*, 45 Wn.2d 233, 235–36, 273 P.2d 793 (1954); *Pietz v. Indermuehle*, 89 Wn. App. 503, 511, 949 P.2d 449 (1998). Here, Lorraine Walden’s unjust enrichment did not become apparent until 2012 when she revealed to Mojarrad that she did not own the Driveway and executed a declaration under oath supporting her relative’s claim to the Driveway in order to defeat Mojarrad’s claim to the Driveway. The lawsuit filed in 2014 was brought within three years of the unjust enrichment being revealed.

Similarly, the three year statute of limitations on negligent misrepresentation claims does not begin to run until the plaintiff, using reasonable diligence, discovered the cause of action. *Hart v. Clark County*, 52 Wn. App. 113, 117, 758 P.2d 515 (1988). Mojarrad had no way of knowing Lorraine Walden misrepresented the Driveway was hers and that she knew all along it was not. No one told him this. The facts on the

ground did not reveal this. And his unimpeded use of the Driveway did not reveal her knowledge. Instead, Lorraine Walden first revealed to Mojarrad that she did not own the Driveway in 2012. The lawsuit filed in 2014 was brought within three years of her misrepresentation being revealed.

Likewise, “[i]t is settled law that [equitable] indemnity actions accrue when the party seeking indemnity pays or is legally adjudged obligated to pay damages to a third party.” *Parkridge Assocs. v. Ledcor Indus.*, 113 Wn. App. 592, 603, 54 P.3d 225 (quoting *Central Washington Refrigeration, Inc. v. Barbee*, 133 Wn.2d 509, 517, 946 P.2d 760 (1997)). The elements of equitable indemnity are (1) A wrongful act or omission by A toward B, (2) such act or omission exposes or involves B in litigation with C, and (3) C was not connected with the initial transaction or event. *Tradewell Group, Inc. v. Mavis*, 71 Wn. App. 120, 126, 857 P.2d 1053 (1993). Here, Mojarrad did not become involved in litigation with the Estate until after Lorraine Walden revealed her misrepresentations and supported the Estate’s claim in 2012. CP 13–24. Mojarrad did not lose legal title to the Driveway until 2015. So the lawsuit filed in 2014 was brought within three years of Mojarrad incurring any liability to the Estate due to Lorraine Walden’s actions.

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E. CONCLUSION

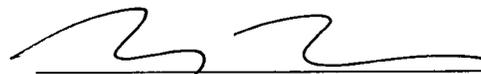
Future warranties in a statutory warranty deed are called that for a reason—they can be breached in the future. Whether the Estate's ownership of the Driveway was known or not, Lorraine Walden warranted to Mojarrad that, into the future, he would have quiet possession of the Driveway and that she would defend his title to the Driveway. Although the deed was conveyed in 2005, these warranties were not breached until the Estate began blocking Mojarrad's use of the Driveway and began to assert its ownership to the Driveway in 2010. Mojarrad's claims for breach in 2014 were brought within the six year statute of limitations.

This Court should reverse the trial court's grant of summary judgment for Lorraine Walden that dismissed all of Mojarrad's claims. This court should also reverse the trial court's denial of Mojarrad's summary judgment motion and rule that Lorraine Walden breached the warranty of quiet possession and ordering rescission as the remedy.

DATED this 21st day of March 2016.

Respectfully submitted,

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