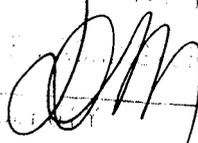


COURT OF APPEALS OF THE STATE OF WASHINGTON
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Case # 35839-5-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

MARK FARHOOD, et al.,

Appellant,

v.

JILL D. ALLYN, et al.,

Respondent.

BRIEF OF APPELLANT

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TABLE OF CONTENTS

| | |
|---|----|
| I. ASSIGNMENT OF ERROR | 1 |
| A. Assignment of Error | 1 |
| B. Issues Relating to Assignment of Error | 1 |
| II. STATEMENT OF THE CASE | 1 |
| III. ARGUMENT..... | 7 |
| A. An Action for Wrongful Execution Is a Separate and Distinct Action than One for Wrongful Attachment..... | 8 |
| B. Farhood’s Cause of Action Did Not Accrue Until the Court of Appeals Ruled on the Quiet Title Action. | 13 |
| C. The “Continuing Tort” Doctrine Provides an Additional Ground for Reversal..... | 15 |
| D. Judicial Estoppel Is Not a Viable Alternative Ground for Dismissal of the Complaint..... | 22 |
| IV. CONCLUSION..... | 23 |

TABLE OF AUTHORITIES

CASES

| | |
|--|------------------|
| <u>Allyn v. Asher</u> , 132 Wn. App. 371, 131 P.3d 339 (2006)..... | 2, <i>passim</i> |
| <u>Bordeaux v. Ingersoll Rand Co.</u> , 71 Wash.2d 392, 429 P.2d 207 (1967) | 14 |
| <u>Connecticut v. Doebr</u> , 501 U.S. 1, 111 S.Ct. 2105 (1991)..... | 10,11 |
| <u>Doran v. City of Seattle</u> , 24 Wash. 182, 64 P. 230 (1901) | 20 |
| <u>Farhood v. Asher</u> , 118 Wn. App. 1050, 2003 WL 22183939 (2003, Nos. 28811-7-II, 29408-7-II) | 2, <i>passim</i> |
| <u>Foley v. Audit Services, Inc.</u> , 214 Mont. 403, 693 P.2d 528 (1985) | 12 |
| <u>Fradkin v. Northshore Util. Dist.</u> , 96 Wn.App. 118, 977 P.2d 1265 (1999) | 20, 21 |
| <u>Gillis v. F & A Enterprises</u> , 934 P.2d 1253, 1255 (Wyo.,1997) | 14 |
| <u>Haas v. Buck</u> , 162 So. 181 (La. 1935) | 12 |
| <u>Island Lime Co. v. Seattle</u> , 122 Wash. 632, 211 P. 285 (1922) | 20 |
| <u>Johnson v. Si-Cor</u> , 107 Wn.App. 902, 28 P.3d 832 (2001)..... | 23 |
| <u>Little v. Sowers</u> , 204 P.2d 605 (Kan. 1949) | 12 |
| <u>Loeper v. Loeper</u> , 81 Wn. 454, 142 P. 1138 (1914)..... | 14 |
| <u>Pay'n Save Corp. v. Eads</u> , 53 Wn.App. 443, 767 P.2d 592 (1989)..... | 11 |
| <u>Read v. Markle</u> , 3 Johns. 523 (N.Y. 1808) | 12 |
| <u>Samuelson v. Freeman</u> , 75 Wn. 2d 894, 454 P.2d 406 (1969) | 19 |
| <u>Steele v. Organon, Inc.</u> , 43 Wn.App. 230, 716 P.2d 920 (1986)..... | 15,16 |

| | |
|---|----|
| <u>Thompson v. DeHart</u> , 84 Wn. 2d 931, 530 P.2d 272 (1975)..... | 11 |
| <u>Wagner Development, Inc. v. Fidelity and Deposit Co. of Maryland</u> , 95 Wn. App. 896, 977 P.2d 639 (1999)..... | 10 |
| <u>Wood v. Currey</u> , 7 P.C.L.J. 238, 57 Cal. 208, (Cal. 1881)..... | 10 |

STATUTES

| | |
|-----------------------|---|
| RCW 4.16.080 | 7 |
| RCW 6.25.030(9) | 2 |
| 42 U.S.C. §1983..... | 8 |

TREATISES

| | |
|--|--------|
| 3 CJS <u>Executions</u> , § 431 Actions (2007); | 12, 22 |
| 30 Am.Jur.2d <u>Executions and Enforcement of Judgments</u> § 621 (1994)..... | 12 |

I. ASSIGNMENT OF ERROR

A. Assignment of Error

The trial court erred in dismissing this case on the Respondents' motion for summary judgment.

B. Issues Relating to Assignment of Error

1. Where a defendant has 1) obtained a wrongful writ of attachment in 1999 and 2) commenced an execution on the property that resulted in a sale of the property in February 2002, is plaintiff's suit brought in January 2005 for wrongful execution, trespass, conversion of rents and interference with property rights barred by the statute of limitations?

2. Where a lower court has sustained the validity of a writ of attachment and the property owner is therefore collaterally estopped from challenging its validity until the lower court is reversed, does the statute of limitations for bringing an independent wrongful execution action begin to run on the reversal of that judgment?

3. Where claims for wrongful execution, trespass, conversion of rents and interference with property rights are based upon acts committed by the defendant within three years prior to

suit, may the suit proceed under the continuing tort doctrine even though the defendant committed other acts that interfered with plaintiff's property rights over three years prior to commencement of the suit?

II. STATEMENT OF THE CASE

This case arises out of the Respondents Jill D. Allyn (individually and as administrator of the Estate of Joseph S. Allyn) and Eric P. Johnson's (Guardian ad Litem for Joseph B. Allyn) (hereafter "Allyn") actions in 2002 and 2003, when Allyn compelled a public execution sale against Clark County property ("the Property") owned by Appellants Mark S. Farhood, Tee Jay Vaughn, Patricia Vaughn as Trustee of the Vaughn Family Trust (hereafter "Farhood"). Allyn then purchased the Property at the improper sale, interfered with Farhood's landlord-tenant relationships, and collected rents on the Property, causing Farhood substantial damages, including attorneys' fees.

The underlying facts of this case have been discussed in two previous Court of Appeals decisions, Farhood v. Asher, 118 Wn. App. 1050, 2003 WL 22183939 (2003, Nos. 28811-7-II, 29408-7-II) and

Allyn v. Asher, 132 Wn. App. 371, 131 P.3d 339 (2006). As recited in those opinions, Allyn sued Asher (not a party herein) for damages arising out of an automobile accident. Allyn encumbered the Property, (which then owned by Asher) with a prejudgment writ of attachment in March, 1999. Allyn asserted that the attachment was justified pursuant to RCW 6.25.030(9) because “the damages . . . are for injuries arising from the commission of some felony.” Farhood v. Asher, 2003 WL 22183939 at *1 and Allyn v. Asher, 118 Wn. App. at 373-374.

Appellants Farhood purchased the Property in August, 1999, stepping into Asher’s shoes for purposes of challenging the prejudgment writ of attachment. Id. In May of 2000, a jury found Asher not guilty of vehicular homicide and vehicular assault. Id.

Farhood initiated a long series of efforts to remove the attachment. In May of 2001, Farhood attempted to intervene in Allyn’s wrongful death lawsuit, but that motion was denied. Id. In August, 2001, Farhood brought a declaratory judgment action to quiet title. The trial court ruled against Farhood on summary judgment. Id. Farhood appealed that decision.

In November 2001, a jury found Asher negligent and awarded Allyn just over one million dollars. Only about one half of the damages were covered by Asher's insurance policy, leaving an amount owed by Asher to Allyn of just over half a million dollars. Id.

Despite Farhood's 2001 litigation, which surely alerted Allyn of the possibility that the writ was defective, Allyn proceeded as if the attachment were proper. In February 2002, Allyn obtained a writ of execution to compel the sale of the Property. In the summer of 2002 Allyn took Farhood's Property by bidding of \$400,000 of the outstanding judgment debt. Respondents Allyn then treated the Property as their own; negotiating leases, collecting rents, and so forth. And indeed, for about two and a half years—until May 2005 – Allyn held title to the Property. Allyn, 132 Wn. App. at 376-377.

In September 2003 this Court issued its opinion on Farhood's appeal of the dismissal of his quiet title action. This Court ordered title quieted in Farhood. Farhood, 2003 WL 22183939 at *4. Allyn's invocation of the attachment was a due process violation and the writ was unconstitutionally issued and therefore invalid *ab initio*.

Id. at *3. On remand, the trial court finally quieted title in Farhood on May 10, 2005. However, Allyn continued to resist, unsuccessfully appealing the trial court's order enforcing this Court's mandate. This appeal led to the second Division II opinion relating to this matter. Allyn v. Asher, 132 Wn. App. 371, 131 P.3d 339 (Div. II, 2006, No. 33365-1-II). CP 027-035.

In January of 2005, Farhood brought an action against Allyn for the wrongful execution, trespass, conversion of rents and interference with property rights—all of which took place *fewer than three years earlier*, starting in February of 2002. The Complaint does not seek damages for the 1999 wrongful attachment. Rather, the Complaint specifically avers to events and conduct which occurred well within three years before its filing:

3.1 On February 21, 2002 the defendants, relying upon their defective and tortious pre-judgment attachment, commenced execution proceedings to enforce the judgment in the Tort Action against the Property. At the instance of the defendants pursuant to a Writ issued by this Court the Sheriff of Clark County levied and executed upon the property on February 26, 2002. The Property was sold by the sheriff at a public execution sale on July 12, 2002 to the defendants, who bid \$400,000 of their judgment in the Tort Action.

3.2 The plaintiff Mark Farhood contested the confirmation of the sale. The execution and the sale of the Property was wrongful and without probable cause as a matter of fact and law. The procedure used by the defendants regarding the sale was also improper. The trial court improperly confirmed the sale over objection on August 30, 2002.

4.1 Following the Sheriff's sale, in late July, the defendants, individually or through their agents wrongfully entered upon and took dominion and control of the Property. Two of the parcels constituting the property were occupied by tenants. With respect to these parcels the defendants negotiated or otherwise arranged to have rentals paid to them rather than to the plaintiffs. The rentals so collected were less than the rentals that had been paid to plaintiffs by the same tenants. The defendants negotiated a new tenancy for the vacant parcel.

4.2 The defendants' action with respect to the property, tenants and rentals constituted: (A) trespass; (B) an invasion of plaintiffs' legal ownership interest with respect to portions of the property under tenancies for a term; (C) wrongful interference with those established landlord-tenant relationships with respect to those portions of the property where such relationships existed and (D) conversion of rents from the premises.

CP 005, see also CP 006, 007.

Allyn moved for summary judgment (CP 046-057), asserting that the statute of limitations barred the 2005 action because the writ of attachment was wrongfully obtained in 1999—over three years prior to the commencement of the action. CP 049, ll. 15-18. In his *Response*, Farhood pointed out that that the acts complained of arose out of Allyn's acts beginning in February 2002, when Allyn compelled sale of the Property with a writ of execution, took title and exclusive possession. CP 101. Nonetheless, the trial court held that Farhood's causes of action are barred by the applicable statutes of limitation because the due process violation occurred in March

of 1999, when Allyn obtained the wrongful pre-judgment writ of attachment *ex parte*. CP 148-153.

III. ARGUMENT

In this case, the trial court ruled that Farhood's claims are barred by the applicable statute of limitation of three years.¹ The trial court reasoned that January, 2005 was too late to bring the action because the original due process violation for wrongful attachment was completed in 1999, notwithstanding the fact that the wrongful execution, trespass, conversion and interference with property rights all took place after February, 2002. CP 151. In addition or in the alternative, the trial court also erred when it ignored the continuing tort doctrine and relied on inapposite authority relating to the medical malpractice statute of limitation.

¹ 4.16.080. Actions limited to three years

The following actions shall be commenced within three years:

- (1) An action for waste or trespass upon real property;
- (2) An action for taking, detaining, or injuring personal property, including an action for the specific recovery thereof, or for any other injury to the person or rights of another not hereinafter enumerated; ...

A. An Action for Wrongful Execution Is a Separate and Distinct Action than One for Wrongful Attachment.

The trial court confused an action for wrongful attachment with an action for wrongful execution, incorrectly holding that wrongful execution is merely one aspect of damages flowing from the initial tortious attachment. The trial court's error is summarized at CP 151, where it states that "The fact that more damages were incurred by the loss of rents or costs of execution does not postpone the statute of limitations." In other words, the trial court believed that the 2002 wrongful execution was merely an element of damages that flowed from what it believed to be the actual tort, the 1999 wrongful execution. However, as will be further discussed below, wrongful attachment is a different cause of action than one for wrongful execution, and the cause of action for wrongful execution only occurs at the time of the levy.

The trial court apparently relied on Allyn's erroneous characterization of the Complaint as a 42 U.S.C. §1983 action for due process violations attending the wrongful attachment. CP 048. Allyn asserted that because the 2003 Farhood v. Asher opinion held that there was a due process violation in 1999 and damages at that

time, further claims are barred. CP 049-050. Implicit in this argument is the incorrect assumption that a wrongful execution followed by sale and subsequent possession of the property, are merely damages incident to the 1999 wrongful attachment.

In his *Response to the Motion for Summary Judgment*, Farhood pointed out that neither his quiet title action nor the current action were grounded in 42 U.S.C. §1983. CP 102. Rather, the quiet title action sought a declaration that because Allyn wrongfully obtained the *ex parte* attachment, Allyn received no interest in the property. CP 103, ll. 9-11. The Court of Appeals agreed, holding that the writ “was not effective” upon issuance. Farhood, 2003 WL 22183939 at *3. Therefore, the Allyns never had an interest in the Property (although it took several years for Farhood to establish this fact through court proceedings). As Farhood further noted in his *Response*, the current action seeks redress for “a series of consecutive intentional torts” in 2002 and 2003, such as compelling the execution sale, taking possession of the property and collecting rents. CP 103, 99-101.

As noted above, both Allyn and the trial court apparently assume that the 2002 wrongful execution is merely an additional item of damages resulting from the 1999 wrongful attachment or the 1999 due process violation. This is not the case. A claim for wrongful attachment arises when "the attachment was wrongfully sued out." Wagner Development, Inc. v. Fidelity and Deposit Co. of Maryland, 95 Wn. App. 896, 902, 977 P.2d 639 (1999). This can be proven by establishing that the final judgment was in favor of the owner of the property in the underlying action. Farhood's action is not a standard claim for wrongful attachment for at least two reasons. First, there was never an action against Farhood. Second, the underlying judgment was final against Asher, the previous owner of the Property.

Nor is Farhood's action for attachment obtained in violation of due process rights, as urged by Allyn at CP 048. Wrongful attachment based on constitutional violation is a relatively new species of constitutional tort, evolving out of the movement to protect the rights of property owners against *ex parte* attachments of property absent exigent circumstances. Connecticut v. Doehr, 501

U.S. 1, 15, 111 S.Ct. 2105 (1991), see also Farhood, 2003 WL 22183939 at *3. Doehr established that even the temporary harm caused by wrongful attachment trigger due process protection because it “clouds title; impairs the ability to sell or otherwise alienate the property; taints any credit rating; reduces the chance of obtaining a home equity loan . . .” Doehr 501 U.S. at 11-12. These types of damages, caused by attachment, are distinguished from “complete, physical, or permanent deprivation of real property.” Doehr 501 U.S. at 12.²

While Farhood may have stepped into Asher's shoes for the purpose of claiming title (Farhood, 2003 WL 22183939 at *3), any damages that arose from that temporary interference with Asher's

² It must be noted that before Doehr, Washington law did not even recognize an action for wrongful attachment based upon a violation of due process rights. For example, in the case of Thompson v. DeHart, 84 Wn. 2d 931, 935, 530 P.2d 272 (1975), the Washington Supreme Court held that a prejudgment writ of attachment on real property was a lien fell short of a seizure that is constitutionally prohibited. *Id.*, at 938. For years the courts of this state did not recognize a cause of action for wrongful attachment based on due process violations because there was no “deprivation” of the actual use or possession of the property. Pay'n Save Corp. v. Eads, 53 Wn.App. 443, 451, 767 P.2d 592 (1989). This history establishes that a claim for wrongful attachment is not the same as a claim for wrongful execution, which inarguably deprives the owner of actual use and possession of property.

property rights were personal to Asher. *The current case does not make a claim for those damages, as is evident on the face of the Complaint.* Rather, the claim is for actual complete and physical deprivation of the property arising out of the wrongful execution initiated by Allyn.

Wrongful execution is a different and independent claim from wrongful attachment. Wrongful execution that addresses the defendant's participation in the physical seizure of property through the writ of execution process. See, e.g., Foley v. Audit Services, Inc., 214 Mont. 403, 693 P.2d 528 (1985). For this reason, the authorities are uniform in holding that the action accrues *at the time of the levy*. See, e.g., Read v. Markle, 3 Johns. 523 (N.Y. 1808); Wood v. Currey, 7 P.C.L.J. 238, 57 Cal. 208, (Cal. 1881); Haas v. Buck, 162 So. 181 (La. 1935); Little v. Sowers, 204 P.2d 605, 608 (Kan. 1949); 3 CJS Executions, § 431 Actions (2007); 30 Am.Jur.2d Executions and Enforcement of Judgments § 621 (1994). Because the claim accrues at the levy, it is clear that the claim is founded in the execution procedure, not the earlier attachment procedure. In the instant case, Allyn forced the property into the execution process in

February 2002 and further interfered with the Property in August of 2002, when Allyn took possession of the Property.

Because wrongful attachment redresses the physical deprivation of property, the appropriate remedies are related to, or concomitant with, trespass or conversion (trover). 33 C.J.S. Executions § 431. Indeed, Farhood specifically pleaded both trespass and conversion in his Complaint. CP 005, 007-008. The trial court did not address those torts in its opinion. Interestingly, a previous decision by the same trial court in this case held—wholly inconsistently with the order on summary judgment—that the trespass, conversion, and wrongful interference claims “could not arise until the attachment was ruled invalid” and therefore those claims survive. CP 098. This decision was apparently forgotten as the entire case was forced into the rubric of a “wrongful attachment” claim.

B. Farhood’s Cause of Action Did Not Accrue Until the Court of Appeals Ruled on the Quiet Title Action.

Where a cause of action for conversion or wrongful execution arises from the reversal of judgments upon which valid execution sale was conducted, the cause of action does not accrue until the

reversal of the judgments. Gillis v. F & A Enterprises, 934 P.2d 1253, 1255 (Wyo.,1997). Gillis notes that claims on such actions are premature while there is an apparently valid trial court ruling in favor of the persons who secured the writ. Following Gillis, Farhood's wrongful execution claim did not accrue until *September 2003*, when the Court of Appeals reversed the trial court's ruling against him on the quiet title action. Gillis' reasoning is consistent with Washington law: A question decided by a court of competent jurisdiction is finally decided until reversed upon appeal or otherwise set aside. Loeper v. Loeper, 81 Wn. 454, 457, 142 P. 1138 (1914). It was not only impossible for Farhood to bring the current action against Allyn prior to Allyn's actions in 2002, it would have been barred by the doctrines of *res judicata* and collateral estoppel. Bordeaux v. Ingersoll Rand Co., 71 Wn. 2d 392, 395-96, 429 P.2d 207, 209 (1967)(*Res judicata* and collateral estoppel are kindred doctrines designed to prevent re-litigation of already determined causes and curtail multiplicity of actions and harassment in the courts).

C. The “Continuing Tort” Doctrine Provides an Additional Ground for Reversal.

An alternative basis for reversing the trial court is the fact that Allyn’s actions constituted a series of wrongful acts. Under the continuing tort doctrine the statute of limitations is triggered with each new interference with property.

In his Response to the Motion for Summary Judgment, Farhood pointed out that the January 6, 2005 Complaint is based upon acts committed by Allyn after February 22, 2002, when Allyn first attempted to levy execution on the property by securing a writ, and that this was a “pattern of continuing wrongful conduct.” CP 100, 101, 103. Nonetheless, the trial court held that the current cause of action accrued, and the statute of limitations began to run, in March of 1999 when Allyn secured the wrongful attachment. CP 150.

To support this conclusion, the trial court cited to Steele v. Organon, Inc., 43 Wn.App. 230, 716 P.2d 920 (Div. III 1986), a *medical malpractice* case which holds that the statute of limitations begins to run when the plaintiff is both aware of each of the elements comprising the negligence (duty, breach, causation and

damages). In Steele, the Plaintiff was harmed in 1973 by the excessive administration of a prescription drug. She became aware of the negligence, and its probable connection to certain symptoms, by February, 1975. 43 Wn.App. at 232. She elected not to sue, but changed her mind after she suffered a heart attack in 1981. Citing to the former medical malpractice statute of limitations (RCW 4.16.350), the Court held that the statute of limitations does not run until the plaintiff "suffer[s] actual and appreciable harm," but "if the plaintiff is aware of some injury, the statute begins to run even if he does not know the full extent of his injuries." 43 Wn.App. at 234.

Steele is inapplicable to the case at bar. In Steele, the physician committed a single tortious act in 1973 which caused, according to the plaintiff, serious ramifications years later. In this case, Respondents Allyn undoubtedly committed a tortious act in 1999, when they improperly obtained the writ of attachment against the Property. But they did not stop there. According to the allegations in the Complaint, Allyn elected to continue to interfere with the Farhood's property rights over Farhood's objections and

despite his attempts to remove the attachment through legal action.

The additional tortious acts—all of which occurred within three years of the date of the Complaint—are recited in the Complaint.

Among other acts, Allyn:

(1) Commenced execution proceedings against the property to enforce the judgment against Asher on February 21, 2002. CP 005, ¶3.1.

(2) Caused the Sheriff of Clark County to levy and execute upon the property on February 26, 2002. CP 005, ¶3.1.

(3) Caused the sale of the property in a public execution sale on July 12, 2002. CP 005, ¶3.1.

(4) Purchased the property for themselves in July, 2002. CP 005, ¶3.1.

(5) Compelled Farhood to object to the confirmation of the sale in August, 2002. CP 005, ¶3.2.

(6) Resisted Farhood's objection to the confirmation of the sale, thereby increasing Farhood's fees and expenses. CP 005, ¶3.1.

(6) Took possession and controlled the Property commencing in July, 2002 and continuing until September, 2003. CP 005, ¶4.1.

(7) Negotiated different, and less favorable rental terms with the tenants at the Property commencing in August, 2002. CP 005, ¶¶4.1, 6.4.

(8) Accepted and converted the rental amounts paid by the tenants from August, 2002 to September, 2003. CP 007, ¶¶4.2, 6.1.

(9) Failed to restore to Farhood the total fair value of rentals during the period that Allyn controlled the property (an omission that continues to this day). CP 007, ¶6.2.

(10) Compelled Farhood to appeal the August, 2002 confirmation order, CP 006, ¶5.2; (Div. II, 2003, No. 28811-7-II).

(11) Compelled Farhood to appeal, in May of 2002, the April 2002 summary judgment of dismissal of Farhood's quiet title action. CP 005, ¶3.1; Farhood v. Asher, (Div. II, 2003, 29408-7-II).

(12) Compelled Farhood to incur attorney's fees and costs, exclusive of the current action and appeal, of over \$43,000.³ CP 006 ¶5.6.

This array of wrongs and damages is in sharp contrast to the physician in Steele who committed a single negligent act that happened to cause additional symptoms years later. While Allyn's additional torts would not have been possible in the absence of the original wrongfully obtained writ, Allyn's 2002 and 2003 acts did not inevitably flow from the original tortious act of obtaining the writ of attachment. They were additional independent transactions that Allyn was not compelled to perform and resulted in the

³ In addition, and after the Complaint was filed, the Appellants were compelled to defend Allyn's unsuccessful appeal to this Court of the trial court's May, 2005 decision quieting title in Farhood in conformance with the remand from this Court. See, Allyn v. Asher, 132 Wn. App. 371, 131 P.3d 339 (Div. II, 2006, No. 33365-1-II).

interference with Farhood's possessory interest in the Property. Had Allyn stopped at obtaining the wrongful writ of attachment, Farhood would not have suffered the additional damages caused by the events listed above.

If a medical malpractice holding were at all pertinent to this case, a more similar case might be that of a doctor who, over three years prior to suit commits a negligent act, and then in the subsequent years carries out additional negligent actions that exacerbate the original harm. Samuelson v. Freeman, 75 Wn. 2d 894, 454 P.2d 406 (1969). In such a case, the plaintiff is entitled to seek damages for the original act that took place over three years before.

But even Samuelson does not fully illustrate the conceptual error made below. A better analogy might be the case of a doctor who, over three years prior to suit commits a negligent act in surgery, and then in a subsequent year vastly overcharges the patient for that surgery, and then fends off the patient's suit for restitution on grounds that the malpractice occurred over three years before.

But ultimately the medical malpractice cases are simply inapplicable because Washington recognizes the theory of continuing torts—particularly where property rights are involved. One who takes the property of another, or exercises dominion over it without right, has committed a tortious act. Where real property is concerned, the repetition of such torts renders the tortfeasor liable for acts that were taken within the statute of limitations, even if recovery for the initial act would be excluded by the statute of limitations. See Island Lime Co. v. Seattle, 122 Wash. 632, 211 P. 285 (1922) (nuisance); Doran v. City of Seattle, 24 Wash. 182, 183, 64 P. 230 (1901) (negligence); Fradkin v. Northshore Util. Dist., 96 Wn. App. 118, 977 P.2d 1265 (1999) (trespass).

When a tort is continuing, the “**statute of limitations runs from the date each successive cause of action accrues as manifested by actual and substantial damages.**” Fradkin, 96 Wn. App. at 125 (emphasis added). In Fradkin, the plaintiff became aware of a trespass in 1992, which was drainage into his back yard, which was causing it to become boggy. Despite several complaints, defendant failed to fix the project that was causing the problems.

The Court held that Fradkin was aware of the elements of the claim by 1992. *Id.* at 122. Nonetheless, the Court reaffirmed the continuing trespass doctrine, which permits recoveries for injuries suffered within the limitations period that are caused “by successive actions until the wrong or nuisance shall be terminated or abated.” *Id.* at 124. and suffered his “initial injury” over six years before he brought suit. Fradkin, 96 Wn. App. at 124. This result pertains because a trespasser is under a continuing duty to remove the intrusive substance or condition—just as Respondents Allyn were under a duty to desist from interfering with Farhood’s property rights. Fradkin, 96 Wn. App. at 126.

Respondents Allyn executed on the property, took possession of it, and treated it as their own for over a year. Farhood’s Complaint seeks damages, including attorneys’ fees, for this second wave of tortious acts. Allyn committed a continuing and additional interference with the property rights vested in Farhood. Allyn’s acts took place within the three years before Appellants filed suit. Even were this Court to tie them to the

original 1999 wrong, the continuing torts doctrine allows Farhood to recover the damages they incurred after January 6, 2002.

D. Judicial Estoppel Is Not a Viable Alternative Ground for Dismissal of the Complaint.

The trial court briefly suggests, at CP 151, that “judicial estoppel would appear to be an applicable bar” to the Complaint. While this comment appears to be dicta, it is briefly addressed here. The judicial estoppel argument presented by Allyn is the claim that Mark Farhood failed to list the claim for “violation of due process rights” on a petition for bankruptcy that he filed in April of 2002. CP 053.

No judicial estoppel applies. First, the unrebutted evidence establishes that Mr. Farhood did in fact disclose the pending litigation on his Statement of Financial Affairs, filed in the Bankruptcy Court. CP 113. Second, the gravamen of the wrongful acts complained of in the Complaint –the seizure of the property– took place in August 2002, after the Trustee had abandoned any claim to the property. CP 100. Third, Mr. Farhood did not make any affirmative inconsistent statement regarding the validity of the claim against Allyn. Therefore, judicial estoppel does not apply.

CP 106, Johnson v. Si-Cor, 107 Wn.App. 902, 28 P.3d 832 (2001).

Finally, Mark Farhood is only a twenty percent owner of the Property; even if judicial estoppel applied in his case, it does not affect the claims of the remaining four owners of the property.

IV. CONCLUSION

The trial court's ruling is erroneous as a matter of law. For the reasons set forth above the decision of the superior court must be reversed and remanded for further proceedings and trial on the merits.

RESPECTFULLY SUBMITTED this 17th day of July 2007.

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CERTIFICATE OF SERVICE

The undersigned certifies that on the date written below, true and correct copies of this *Brief of Appellant* was served by either first class mail or hand delivery on each of the parties below:

Via mail to:

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DATED this 17 th day of July, 2007

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