

FILED
Court of Appeals
Division II
State of Washington
1/18/2019 12:01 PM

No. 52688-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

WALLACE JOHNSON,
Appellant,

v.

BERNARD McAULEY and LINDA McAULEY,
husband and wife,
Respondents.

BRIEF OF APPELLANT WALLACE JOHNSON

Thomas J. Westbrook,
Washington State Bar No. 5986
Paul J. Boudreaux
Washington State Bar No. 49038
Attorneys for Appellant

Rodgers Kee Card & Strophy, P.S.
324 West Bay Dr NW, Ste. 201
Olympia, WA 98502
(360) 352-8311

TABLE OF CONTENTS

I. INTRODUCTION1

II. ASSIGNMENTS OF ERROR1

 A. Assignments of Error

 No. 1.....1

 B. Issues Pertaining to Assignments of Error

 No. 1.1.....2

 No. 1.2.....2

 No. 1.3.....2

 No. 1.4.....2

III. PROCEDURAL HISTORY.....2

IV. STANDARD OF REVIEW.....3

V. SUMMARY OF ARGUMENT.....4

VI. FACTUAL BACKGROUND.....5

VII. ARGUMENT.....8

 A. THE JOHNSONS DEMONSTRATED A CONTINUING HARM WHICH MEANS THE ONLY THING THE TRIAL COURT SHOULD HAVE LIMITED WAS THE YEARS CLAIMED FOR DAMAGES..8

B.	THE MCAULEYS' OPERATION OF A HORSE BOARDING BUSINESS IS A NUISANCE PER SE AND THE LACK OF ENFORCEMENT BY THE LOCAL COUNTY IS IMMATERIAL UNDER THE FACTS PRESENTED..	10
C.	THE JOHNSONS HAD A CLAIM FOR NUISANCE GENERALLY EVEN IF THERE WAS NOT A NUISANCE PER SE. THE HARM WAS CONTINUING IN NATURE AND THEREFORE ALLOWABLE TO GO TO TRIAL.....	14
D.	THE DOCTRINE OF LACHES IS DISFAVORED IN WASHINGTON AND WAS INAPPROPRIATELY APPLIED IN THIS CASE.....	17
VIII.	CONCLUSION	24

TABLE OF AUTHORITIES

A. TABLE OF CASES

Washington Cases

<i>Arnold v. Melani</i> , 75 Wn.2d 143, 437 P.2d 908 (1968).....	20, 21
<i>Bradley v. Am. Smelting & Refining Co.</i> , 104 Wn.2d 677, 693, 709 P.2d 782 (1985).....	9, 15
<i>Buell v. Bremerton</i> , 80 Wn.2d 518, 522, 495 P.2d 1358, 1361 (1972).....	18
<i>Burton v. Douglas Cnty</i> , 65 Wn.2d 619, 622, 399 P.2d 68 (1965).....	4

<i>Clark Cty. Pub. Util. Dist. No. 1 v. Wilkinson</i> , 139 Wn.2d 840, 848–49, 991 P.2d 1161, 1166–67 (2000).....	22
<i>DePhillips v. Zolt Constr. Co.</i> , 136 Wn.2d 26, (1998).....	4
<i>Doran v. City of Seattle</i> , 24 Wash. 182, 183, 64 P. 230 (1901).....	9, 14
<i>Edison Oyster Co. v. Pioneer Oyster Co.</i> , 22 Wn.2d 616, 157 P.2d 302 (1945).....	20
<i>Farnandis v. City of Seattle</i> , 95 Wash. 587, 590, 164 P. 225, 226 (1917).....	14
<i>Fradkin v. Northshore Util. Dist.</i> , 96 Wn.App. 118, 977 P.2d 1265 (1999).....	9, 15
<i>Great N. Ry. Co. v. Oakley</i> , 135 Wash. 279, 287–88, 237 P. 990 (1925).....	16
<i>Greater Harbor 2000 v. City of Seattle</i> , 132 Wn.2d 267, 279 (1997).....	4
<i>Hill v. Dep't of Transp.</i> , 76 Wn.App. 631, 638, 887 P.2d 476, 481 (1995).....	10
<i>Hollis v. Garwall, Inc.</i> , 137 Wn. 2d 683, 690, 974 P.2d 836, 840 (1999).....	3
<i>Holmberg v. Armbrecht</i> , 327 U.S. 392, 395, 396, 66 S.Ct. 582, 90 L.Ed. 743 (1946).....	17, 22
<i>Hunter v. Hunter</i> , 52 Wn.App. 265, 270, 758 P.2d 1019, 1023 (1988).....	21
<i>In re Marriage of Watkins</i> , 42 Wn.App. 371, 374–75, 710 P.2d 819, 821 (1985).....	19, 20
<i>Island Lime Co. v. Seattle</i> , 122 Wash. 632, 211 P. 285 (1922).....	9, 15, 16
<i>Kitsap Cnty. v. Allstate Ins. Co.</i> , 136 Wn.2d 567, 592, 964 P.2d 1173 (1998).....	14
<i>Krein v. Smith</i> , 60 Wn.App. 809, 811, 807 P.2d 906, <i>review denied</i> , 117 Wn.2d 1002, 815 P.2d 266 (1991).....	4

<i>Lake v. Woodcreek Homeowners Ass'n</i> , 142 Wn.App. 356, 366–67, 174 P.3d 1224, 1229 (2007), rev'd, 169 Wn.2d 516, 243 P.3d 1283 (2010).....	20
<i>Lakes at Mercer Island Homeowners Ass'n v. Witrak</i> , 61 Wn.App. 177, 179, 810 P.2d 27, review denied, 117 Wn.2d 1013, 816 P.2d 1224 (1991).....	3, 4
<i>Lopp v. Peninsula Sch. Dist. No. 401</i> , 90 Wn.2d 754, 759, 585 P.2d 801, 804 (1978).....	18
<i>Mains Farm Homeowners Ass'n v. Worthington</i> , 121 Wn.2d 810, 815, 854 P.2d 1072 (1993).....	3, 4
<i>Mayer v. City of Seattle</i> , 102 Wn.App. 66, 76, 10 P.3d 408, 413 (2000).....	16
<i>McKnight v. Basilides</i> , 19 Wn.2d 391, 143 P.2d 307 (1943).....	17
<i>Metzner v. Wojdyla</i> , 125 Wn.2d 445, 450, 886 P.2d 154 (1994).....	3, 4
<i>Morin v. Johnson</i> , 49 Wn.2d 275, 278–79, 300 P.2d 569 (1956).....	11
<i>Mountain Park Homeowners Ass'n v. Tydings</i> , 125 Wn.2d 337, 341, 883 P.2d 1383 (1994).....	3, 4
<i>Newport Yacht Basin Ass'n of Condo. Owners v. Supreme Nw., Inc.</i> , 168 Wn.App. 56, 76–77, 277 P.3d 18, 30–31 (2012).....	21
<i>Niemann v. Vaughn Cnty. Church</i> , 154 Wn.2d 365, 374, 113 P.3d 463, 467 (2005).....	21
<i>Nishikawa v. U.S. Eagle High, LLC</i> , 138 Wn.2d 841 (2007).....	4
<i>Pac. Sound Res. v. Burlington N. Santa Fe Ry. Corp.</i> , 130 Wn.App. 926, 941, 125 P.3d 981, 989 (2005).....	9
<i>Parry v. Hewitt</i> , 68 Wn.App. 664, 667–68, 847 P.2d 483 (1992).....	3
<i>Petrella v. Metro-Goldwyn-Mayer, Inc.</i> , 572 U.S. 663, 681–82, 134 S.Ct. 1962, 1975, 188 L.Ed.2d 979 (2014).....	17

<i>Pierce v. King Cty.</i> , 62 Wn.2d 324, 331, 382 P.2d 628, 633 (1963).	22
<i>Retail Clerks Health & Welfare Trust Funds v. Shopland Supermarket</i> , 96 Wn.2d 939, 949, 640 P.2d 1051 (1982).	20, 21
<i>Riblet v. Ideal Cement Co.</i> 54 Wn.2d 779, 781, 345 P.2d 173 (1959).	15
<i>Schrock v. Gillingham</i> , 36 Wn.2d 419, 219 P.2d 92 (1950).	17
<i>State ex rel. Burton v. City of Princeton</i> , 235 Ind. 467, 471, 134 N.E.2d 692 (1956).	18
<i>State ex rel. Waller Chemicals, Inc. v. McNutt</i> , 152 W.Va. at 193, 160 S.E.2d 170.	18
<i>Tiegs v. Watts</i> , 135 Wn.2d 1, 13, 954 P.2d 877 (1998).	11
<i>U.S. Life Credit Life Ins. Co. v. Williams</i> , 129 Wn.2d 565, 569, 919 P.2d 594 (1996).	3
<i>Vance v. City of Seattle</i> , 18 Wn.App. 418, 425, 569 P.2d 1194, 1197 (1977).	22
<i>Waldrip v. Olympia Oyster Co.</i> , 40 Wn.2d 469, 477, 244 P.2d 273 (1952).	21

Other Authorities

R. Aldisert, <i>The Judicial Process</i> , 754 (1976), (quoting Edward, <i>Cases and Materials on Equity and Equitable Remedies</i> , 222 (5th Ed.) (1975).	20
<i>I D. Dobbs</i> , <i>Law of Remedies</i> § 2.4(4), p. 104 (2d ed. 1993).	17

Washington Statutes

RCW 7.48.010.14
RCW 7.48.170.16
RCW 46.04.303.8

Local Regulations

TCC 20.03.040(116.5)(b).13
TCC 20.54.010.....12
TCC 20.54.070(16)(b).13

I. INTRODUCTION

Mr. Johnson is a property owner in the 48th Court NW development in Thurston County who amicably attempted to bring his fellow neighbors, Bernard and Linda McAuley, into compliance with the Protective Covenants (the “Covenants”) applicable to their respective properties. The relevant covenants and restrictions in this case were ignored, derided, and willfully violated to the detriment of Mr. Johnson for over a decade. Mr. Johnson exhausted the informal channels of resolution with the McAuleys, including his efforts within the 48th Court NW Homeowner’s Association (HOA). For years, the McAuleys utilized their property to board and house horses they did not own in violation of the Covenants. Further, the barn that housed the unlawfully boarded horses never complied with the terms of the Covenants and the McAuleys’ home itself was of modular construction, which was strictly prohibited by the express terms of the Covenants. Mr. Johnson now requests this court remand this case back to the lower court so Mr. Johnson can prove his damages.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error (AOE)

1. The lower court erred when it dismissed Mr. Johnson’s claims against the McAuleys at Summary Judgment on December 1, 2017.

B. Issues Pertaining to Assignments of Error

Issue 1.1 Does the continuing violation of a restrictive covenant constitute a new and actionable harm each day it occurs? Short answer: Yes. (**Assignment of Error 1**).

Issue 1.2 Does the boarding of horses in violation of local regulations and the restrictive covenants constitute a nuisance per se? Short Answer: Yes. (**Assignment of Error 1**).

Issue 1.3 Does the boarding of horses constitute a nuisance generally? Short Answer: Yes. (**Assignment of Error 1**).

Issue 1.4 Does the disfavored doctrine of laches apply when a member of an HOA has continuous violations of the applicable restrictive covenants? Short answer: No. (**Assignment of Error 1**).

III. PROCEDURAL HISTORY

The complaint in this case was filed on August 12, 2016. CP 1. The answer by Respondents Bernard McAuley and Linda McAuley (henceforth “the McAuleys”) was filed on September 22, 2016. CP 10. A memorandum in support of summary judgment was filed on October 16, 2017 by the McAuleys. CP 262. An *ex parte* order on Respondents’ motion for summary judgment was filed on January 19, 2018. As there were remaining claims against the HOA, an appeal of the McAuley summary judgment order as a matter of right was not an option at the time.

A final agreed order resolving the claims against the HOA was entered on October 18, 2018. With no further claims remaining against any parties to the lawsuit, this case against the McAuleys was appealed on November 1, 2018.

IV. STANDARD OF REVIEW.

When reviewing an order on summary judgment, the appellate court engages in the same inquiry as the trial court. *Mountain Park Homeowners Ass'n v. Tydings*, 125 Wn.2d 337, 341, 883 P.2d 1383 (1994). Summary judgment is appropriate when the pleadings, depositions, admissions, and affidavits, if any, show that no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law. CR 56(c); *Parry v. Hewitt*, 68 Wn.App. 664, 667–68, 847 P.2d 483 (1992). The facts and all reasonable inferences are considered in the light most favorable to the nonmoving party, and all questions of law are reviewed de novo. *U.S. Life Credit Life Ins. Co. v. Williams*, 129 Wn.2d 565, 569, 919 P.2d 594 (1996); *Mountain Park Homeowners Ass'n*, 125 Wn. 2d, at 341; *Hollis v. Garwall, Inc.*, 137 Wn. 2d 683, 690, 974 P.2d 836, 840 (1999).

The court's primary objective in interpreting restrictive covenants is to determine the intent of the parties. *Metzner v. Wojdyla*, 125 Wn.2d 445, 450, 886 P.2d 154 (1994); *Mains Farm Homeowners Ass'n v. Worthington*, 121 Wn.2d 810, 815, 854 P.2d 1072 (1993); *Lakes at Mercer*

Island Homeowners Ass'n v. Witrak, 61 Wn.App. 177, 179, 810 P.2d 27, *review denied*, 117 Wn.2d 1013, 816 P.2d 1224 (1991). In determining intent, language is given its ordinary and common meaning. *Metzner*, 125 Wn.2d at 450; *Mains Farm*, 121 Wn.2d at 815; *Krein v. Smith*, 60 Wn.App. 809, 811, 807 P.2d 906, *review denied*, 117 Wn.2d 1002, 815 P.2d 266 (1991). The document is construed in its entirety. *Mountain Park Homeowners Ass'n, Inc. v. Tydings*, 125 Wn.2d at 344; *Burton v. Douglas Cnty*, 65 Wn.2d 619, 622, 399 P.2d 68 (1965).

A material fact is one of such a nature that it affects the outcome of litigation. *Greater Harbor 2000 v. City of Seattle*, 132 Wn.2d 267, 279 (1997). When reasonable minds could reach two different conclusions from the evidence concerning which claims should prevail, then summary judgment is inappropriate. *DePhillips v. Zolt Constr. Co.*, 136 Wn.2d 26, (1998); *Nishikawa v. U.S. Eagle High, LLC*, 138 Wn.2d 841 (2007). In the case at bar, material disputes of fact existed, and in the light most favorable to appellant, the court erred in dismissing the case at summary judgment.

V. SUMMARY OF ARGUMENT

The trial court improperly dismissed Mr. Johnson's claims against the McAuleys at summary judgment. The McAuleys knowingly and flagrantly disregarded the restrictive covenants applicable to their home

when they purchased their property. From the inception, the McAuleys violated the Covenants by erecting a modular home on their property, which was strictly prohibited. Further, the McAuleys constructed a barn which was admittedly not in compliance with the applicable HOA provisions. For the last twenty years, the McAuleys have also periodically boarded horses on their property for other owners in violation of the applicable Thurston County regulations, which constitutes a nuisance per se. The nuisance of operating an illegal horse boarding operation was compounded by the traffic in the neighborhood related to the horses owned by third parties. The clear and unambiguous violations of the applicable HOA covenants entitle the Johnsons to a judgment as a matter of law. The McAuleys' assertions that Mr. Johnson's claims are time-barred are without merit because Washington recognizes a continuing harm theory. The trial court erred by summarily relying on the disfavored equitable principle of Laches. Minimally, Mr. Johnson articulated material disputes of fact necessitating resolution via trial.

VI. FACTUAL BACKGROUND

Wallace and Joan Johnson purchased their property subject to restrictive covenants. The covenants for the relevant properties in this case were recorded on August 1, 1994. CP 3. The original covenants were designated to run with the land and are binding on all parties of ownership.

Id. The covenants also restricted the type of structures that could be built on the lots within the subdivision stating, “All structures shall conform to the architectural scheme of the main dwelling on a lot. No mobile homes or modular homes will be allowed.” *Id.*; CP 112. The original covenants also limited the use of properties within the subdivision for business purposes, explicitly stating, “No type of business shall be conducted on any lot or within any dwelling or structure that is visible to the public view.” *Id.*

In spite of clear restrictions, the McAuleys boarded horses they did not own in exchange for reimbursements on and off over the course of 22 years. *Id.*; CP 112-13. Further, the McAuleys violated the covenants by constructing a modular home as their main dwelling unit then subsequently constructing a nonconforming barn which was utilized for the aforementioned boarding. CP 3.

At hearing for summary judgment, the court asked if the doctrine of laches applied to all the claims against the McAuleys. VR 4. The McAuleys argued laches precluded all the claims against them. VR 5-9. They also argued they had been prejudiced over the years due to the opportunity cost of investments they have made on the property. *Id.* The McAuleys asserted that the covenant violations predated the Johnsons’ purchase; therefore they took their property subject to these known

violations. *Id.* The Johnsons clearly rebutted, and the court acknowledged, that purchasing a property when other previous owners are in violations of covenants is not an affirmative defense. VR 9. The Johnsons unambiguously articulated their theory of a continuing violation. Each day the McAuleys were in violation of the covenants was a new violation. VR 10. At the hearing, it was affirmatively observed that no less than four horses owned by individuals other than the McAuleys were boarded on their property over the last two decades. VR 10-13. The contention at the lower court was the McAuleys did not make a profit nor did they advertise, therefore no business had occurred. The Johnsons properly argued that there was an unmistakable exchange of services and the horse business is seldom one that accomplishes a profit. VR 12.

At the conclusion of the summary judgment hearing, the court issued a perplexing finding that dismissed all the claims against the McAuleys without addressing each specific claim. VR 37-38. The court found that the doctrine of Laches precluded the Nuisance claim. *Id.* However, the court did not explicitly state the basis as to why the covenant violations of a modular home being constructed were dismissed. The trial court also failed to articulate why it rejected the Johnsons' argument about the demonstrable continuing violations of the applicable covenants. VR 37-41.

VII. ARGUMENT

A. THE JOHNSONS DEMONSTRATED A CONTINUING HARM WHICH MEANS THE ONLY THING THE TRIAL COURT SHOULD HAVE LIMITED WAS THE YEARS CLAIMED FOR DAMAGES.

At the trial court below, the Johnsons unequivocally demonstrated material disputes of fact precluding summary judgment. First, the McAuleys conceded large portions of their home were built off site from the property in the early 1990's. The McAuleys did not even originally dispute that their house or barn were non-conforming; they merely invoked the disfavored doctrine of laches, which is fully addressed below. CP 264-265. The Johnsons, on the other hand, presented clear evidence of the modular construction of the McAuleys' home. CP 310 – 320. The McAuleys even affirmatively admit the exterior walls of their main residence were pre-fabricated offsite from the building location. CP 341.

As set out in RCW 46.04.303, a “ ‘modular home’ means a factory-assembled structure designed primarily for use as a dwelling when connected to the required utilities that include plumbing, heating, and electrical systems contained therein, does not contain its own running gear, and must be mounted on a permanent foundation. A modular home does not include a mobile home or manufactured home.” Without question, the

McAuleys' home is a modular home that violates the applicable Covenants.

The Johnsons had a continuing harm in violation of the covenants in this case, both by the existence of a modular home and a non-conforming barn. Washington recognizes the theory of continuing torts. 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.” *Id.* at 125. A tort is continuing if the intrusive condition is reasonably abatable and not permanent. *Id.* The tort continues until the intrusive substance or behavior is removed. *Bradley v. Am. Smelting & Refining Co.*, 104 Wn.2d 677, 693, 709 P.2d 782 (1985); *Pac. Sound Res. v. Burlington N. Santa Fe Ry. Corp.*, 130 Wn.App. 926, 941, 125 P.3d 981, 989 (2005).

Further, “[w]hen a tort involves continuing injury, the cause of action accrues, and the limitation period begins to run, at the time the tortious conduct ceases.” Since usually no single incident in a continuous chain of tortious activity can “fairly or realistically be identified as the cause of significant harm,” it is proper to regard the cumulative effect of

the conduct as actionable. *Hill v. Dep't of Transp.*, 76 Wn.App. 631, 638, 887 P.2d 476, 481 (1995).

In the case at bar, there is no denying the McAuleys were out of compliance with the HOA provisions. The only salient argument offered at trial was that the Johnsons had known about these violations for years, and therefore they have waited too long to act. CP 267. However, there existed clear material disputes of facts concerning damages associated with the continued nonconformity with the covenants by the construction of a modular home and the adjacent barn. The Johnsons presented enough evidence to create a material dispute of fact on this issue. CP 445-448. Therefore, summary judgment was improper.

B. THE MCAULEYS' OPERATION OF A HORSE BOARDING BUSINESS IS A NUISANCE PER SE AND THE LACK OF ENFORCEMENT BY THE LOCAL COUNTY IS IMMATERIAL UNDER THE FACTS PRESENTED.

Second, when considered in the light most favorable to the non-moving party at summary judgment, the Johnsons generated material disputes of fact concerning the extent and amount of damages caused by their claims of nuisance. In the case at bar, the McAuleys' actions constituted a nuisance *per se*, which is an act, thing, admission, or use of property which itself is a nuisance and is not permissible or excusable under any circumstance.

In the lower courts, the McAuleys argued that, due to the lack of enforcement by Thurston County, there cannot be a nuisance *per se*. CP 128. However, this is not supported by the law or the record at hand. As previously outlined, horse boarding is a nuisance that is readily abatable, and in fact only occurs when the horses are occupying the property. If the horses leave, the nuisance might be temporarily abated. The McAuleys demonstrated a provable and continuing violation, even if it was periodic in nature. At a minimum, this is a material dispute of fact, which should be determined by a trier of fact at trial.

A violation of a zoning ordinance can be a nuisance *per se*. *Morin v. Johnson*, 49 Wn.2d 275, 278–79, 300 P.2d 569 (1956). “A nuisance *per se* is an act, thing, omission, or use of property which of itself is a nuisance, and hence is not permissible or excusable under any circumstance.” *Tiegs v. Watts*, 135 Wn.2d 1, 13, 954 P.2d 877 (1998). The fact a government agency tolerates a nuisance is not a defense if the nuisance injures adjoining properties. *Id.* Lack of enforcement by Thurston County is not dispositive.

In addition, the McAuleys claimed the nuisance *per se* claim was likewise barred due to the passage of time. Minimally, this argument cannot prevail on appeal because of the mobile and non-permanent nature of horse boarding.

Even if the Johnsons failed to act previously, the boarding of horses without a question is a nuisance which is reasonably abatable and not permanent. *Infra*. Therefore, the statute of limitations accrues anew for each intrusion upon the Johnsons' property rights. Specifically, each time a horse was boarded, a new harm occurred. The only legal limitation may be the assessment of damages.

The Johnsons unquestionably suffered a continuing tort, which means that the statute of limitations continued to run for each successive date in which harm accrued as manifested by actual and substantial damages. The boarding of horses in violation of the covenants and restrictions, as well as the local regulations, is a continuing and intrusive condition which was reasonably abatable and not permanent. The illegal periodic boarding of horses is clearly a condition that caused damages to the land that was reasonably abatable. Therefore, the statute of limitations is not barred. At best, the statute of limitations serves only to limit the damages to those incurred in the three-year period before this suit was timely filed. *Supra*.

In the case at bar, the McAuleys knowingly and purposefully violated the special use provisions of the Thurston County zoning district. Pursuant to TCC 20.54.010 the purpose and intent provided for is:

Each zoning district lists special uses that, because of their special impact or unique characteristics, can have a substantial adverse impact upon or be incompatible with other uses of land. This impact often cannot be determined in advance of the use being proposed for a particular location. Such uses may be allowed to locate within given districts only through the review process of the special use permit and under the controls, limitations and regulations of such permits....

The lower court erred when it ruled the actions of the McAuleys were not a nuisance *per se*. The point is, the McAuleys needed a special use permit to board horses of others and never obtained one. *See*, TCC 20.54.070(16)(b). This provision explicitly states, “Permitted home occupations **do not include** the following: i. Funeral chapel or funeral home; ii. Medical or dental clinic or hospital; iii. **Riding or boarding stable**; iv. Veterinary clinic or hospital.” (*Emphasis Added*).

In the trial court, the McAuleys inappropriately attempted to utilize an allowance for “rural character” as an affirmative defense. *See* TCC 20.03.040(116.5)(b). Attempting to use the definition of “riding stable, arena or academy” is a red herring. That definition has nothing to do with boarding horses; it has only to do with riding. It is a requirement to have a special use permit to board horses whether anyone rides them or not. The McAuleys admitted to boarding horses of others and not having a special use permit. And, there is no requirement that the horse boarding be profitable or even that the landowner charges to board the horses of others.

Any other arguments about the local zoning enforcement are immaterial because the McAuleys explicitly violated the covenants and the aforementioned zoning ordinance. The Johnsons demonstrated a material dispute of fact concerning damages related to this uncontested violation.

**C. THE JOHNSONS HAD A CLAIM FOR NUISANCE
GENERALLY EVEN IF THERE WAS NOT A NUISANCE
PER SE. THE HARM WAS CONTINUING IN NATURE AND
THEREFORE ALLOWABLE TO GO TO TRIAL.**

Washington defines “nuisance” by statute, namely RCW 7.48.010, which provides:

The obstruction of any highway or the closing of the channel of any stream used for boating or rafting logs, lumber or timber, or whatever is injurious to health or indecent or offensive to the senses, or an obstruction to the free use of property, so as to essentially interfere with the comfortable enjoyment of the life and property, is a nuisance and the subject of an action for damages and other and further relief.

In other words, a nuisance is an unreasonable interference with another's use and enjoyment of property. *Kitsap Cnty. v. Allstate Ins. Co.*, 136 Wn.2d 567, 592, 964 P.2d 1173 (1998).

Washington courts are firmly committed to the rule that one suffering from an injury of a continuing nuisance may recover damages as often as he brings action therefor. *Doran*, 24 Wash. at 183; *Farnandis v. City of Seattle*, 95 Wash. 587, 590, 164 P. 225, 226 (1917). Otherwise the

sufferer might be indefinitely denied the full use and enjoyment of his property without any compensation. *Island Lime*, 122 Wash. at 635.

If a condition causing damage to land is reasonably abatable, the statute of limitations does not bar an action. So long as the harm continues, the statute of limitation serves only to limit damages to those incurred in the three-year period before the suit was filed. *Fradkin*, 96 Wn.App. at 122. In *Fradkin*, the court found reasonable steps were available to abate a continuing drainage problem on appellant's property caused by a utility's excavation and placement of a sewer line. *Id.*

Plaintiffs have two years from the time a nuisance action accrues to file a lawsuit. RCW 4.16.130; *Bradley*, 104 Wn.2d at 690. If, however, a nuisance is continuing, the two-year statute of limitations serves only to limit the period for which the plaintiff may collect damages. *Riblet v. Ideal Cement Co.* 54 Wn.2d 779, 781, 345 P.2d 173 (1959).

A nuisance cause of action accrues when the plaintiff initially suffers some actual and appreciable harm or when the plaintiff should have discovered the basis for a nuisance action. The discovery rule will postpone the running of a statute of limitations until the time when a plaintiff, through the exercise of due diligence, should have discovered the basis for the cause of action. *Mayer v. City of Seattle*, 102 Wn.App. 66, 76, 10 P.3d 408, 413 (2000). The possessor of property is liable for a

continuing nuisance, regardless of whether that person created or maintained the nuisance; such continuation constitutes a new, actionable nuisance. *Great N. Ry. Co. v. Oakley*, 135 Wash. 279, 287–88, 237 P. 990 (1925); *See also*, RCW 7.48.170. Consequently, if the nuisance remains, the plaintiff may continue to collect damages for uncompensated harm until the nuisance is abated. *Island Lime Co.*, 122 Wash. at 635.

In the case at bar, the Johnsons' property rights were interfered with because the community was subject to the repeated transfer of horses not owned by the McAuleys. The Johnsons' property existed continually subject to the willful violation of the covenants in place and agreed upon by all home owners. It was the intent of the parties and these covenants to prevent this type of behavior. The decades' worth of transportation to and from the McAuleys property of horses illegally boarded constituted a material interference of the Johnsons' property and was a knowing violation of the relevant covenants. The Johnsons are entitled to a judgment as a matter of law due to these uncontested violations and should be allowed to prove damages at further proceedings before the trial court. Minimally, material disputes of facts existed concerning the alleged discovery and existence of the claim of nuisance.

D. THE DOCTRINE OF LACHES IS DISFAVORED IN WASHINGTON AND WAS INAPPROPRIATELY APPLIED IN THIS CASE.

Both before and after the merger of law and equity in 1938 the United States Supreme Court cautioned against invoking laches to bar legal relief. See *Holmberg v. Armbrecht*, 327 U.S. 392, 395, 396, 66 S.Ct. 582, 90 L.Ed. 743 (1946). Laches is a defense developed by courts of equity; its principal application was, and remains, to claims of an equitable cast for which the Legislature has provided no fixed time limitation. *Id.*; See also, *1 D. Dobbs*, Law of Remedies § 2.4(4), p. 104 (2d ed. 1993) (“laches ... may have originated in equity because no statute of limitations applied, ... suggest[ing] that laches should be limited to cases in which no statute of limitations applies”).

Laches originally served as a guide when no statute of limitations controlled the claim; it can scarcely be described as a rule for interpreting a statutory prescription. *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 681–82, 134 S.Ct. 1962, 1975, 188 L.Ed.2d 979 (2014).

Generally in Washington, laches depends upon the particular facts and circumstances of each case. *Schrock v. Gillingham*, 36 Wn.2d 419, 219 P.2d 92 (1950); *McKnight v. Basilides*, 19 Wn.2d 391, 143 P.2d 307 (1943). Courts in other jurisdictions regard the nature of the case to be one factor to consider when determining whether laches should be applied.

Other factors include the circumstances, if any, justifying the delay, the relief demanded, and the question of whether the rights of a defendant or other persons, such as the public, will be prejudiced by the maintenance of the suit. *State ex rel. Burton v. City of Princeton*, 235 Ind. 467, 471, 134 N.E.2d 692 (1956); *State ex rel. Waller Chemicals, Inc. v. McNutt*, 152 W.Va. at 193, 160 S.E.2d 170; *Lopp v. Peninsula Sch. Dist. No. 401*, 90 Wn.2d 754, 759, 585 P.2d 801, 804 (1978).

In the case at bar, there is no implication to the rights of the public, which distinguishes this case from cases cited in briefing to the lower court.

Buell v. Bremerton, 80 Wn.2d 518, 522, 495 P.2d 1358, 1361 (1972) sets forth the general elements of laches. The elements of laches are: (1) knowledge or reasonable opportunity to discover on the part of a potential plaintiff that he has a cause of action against a defendant; (2) an unreasonable delay by the plaintiff in commencing that cause of action; (3) damage to defendant resulting from the unreasonable delay. *Id.* None of these elements alone raises the defense of laches. *Id.* Laches is an implied waiver arising from knowledge of existing conditions and acquiescence in them. *Id.*

The party who asserts laches has the burden of proving that: (1) the plaintiff had knowledge of the facts constituting a cause of action or a

reasonable opportunity to discover such facts; (2) there was an unreasonable delay in commencing the action; and (3) there is damage to the defendant resulting from the delay. *In re Marriage of Watkins*, 42 Wn.App. 371, 374–75, 710 P.2d 819, 821 (1985).

In the case at bar, the McAuleys failed to affirmatively establish exactly when the Johnsons became aware of the defects. The mere pre-existence of an HOA violation does not prove actual knowledge by the Johnsons. Additionally, Mr. Johnson's delay is not unreasonable under all of the given circumstances. Mr. Johnson exhausted every non-judicial avenue before instituting the current litigation. Mr. Johnson is not naturally a litigious person and attempted to work out the issues with the community members. Mr. Johnson was maligned personally, and was told the covenants "were not worth the paper they were written on". CP 282. In order to add legitimacy to the applicable HOA, Mr. Johnson undertook a concerted effort to help establish and incorporate the Home Owners Association. After taking steps to formally incorporate the HOA, Mr. Johnson again exhausted the informal channels of resolution among his fellow board members. However, there was an unending lack of consensus and infighting which precluded a non-judicial resolution. See CP 288; CP 313-319. Even the commission of a neutral third party to make

recommendations was futile. *Id.* Many of the owners simply wanted to pretend the covenants did not exist.

Fundamentally, the McAuleys were never able to articulate their damages. Damage to a defendant can arise either from acquiescence in the act about which plaintiff complains or from a change of conditions. *See Arnold v. Melani*, 75 Wn.2d 143, 437 P.2d 908 (1968); *Edison Oyster Co. v. Pioneer Oyster Co.*, 22 Wn.2d 616, 157 P.2d 302 (1945). It is the defendant's burden to show whether and to what extent he or she has been prejudiced. *Lake v. Woodcreek Homeowners Ass'n*, 142 Wn.App. 356, 366–67, 174 P.3d 1224, 1229 (2007), rev'd, 169 Wn.2d 516, 243 P.3d 1283 (2010). The McAuleys never demonstrated prejudice they suffered or a relevant change in position. They failed to meet their high burden under the standard of clear and convincing evidence.

“The heart of equity may be said to be the exercise of a wise and just discretion in the granting or withholding of equitable relief.” R. Aldisert, *The Judicial Process*, 754 (1976), (quoting Edward, *Cases and Materials on Equity and Equitable Remedies*, 222 (5th Ed.) (1975)). *In re Marriage of Watkins*, 42 Wn.App. at 374–75.

Moreover, the delay required can only be considered unreasonable if it occurs “under circumstances permitting diligence”. *Retail Clerks Health & Welfare Trust Funds v. Shopland Supermarket*, 96 Wn.2d 939,

949, 640 P.2d 1051 (1982). Finally, more than an unreasonable delay is required: there must also be an intervening change of position on the part of the defendant, making it inequitable to enforce the claim. *Arnold*, 75 Wn.2d at 147–48; *see also Hunter v. Hunter*, 52 Wn.App. 265, 270, 758 P.2d 1019, 1023 (1988).

“To constitute laches there must not only be a delay in the assertion of a claim but also some change of condition must have occurred which would make it inequitable to enforce it.” *Waldrip v. Olympia Oyster Co.*, 40 Wn.2d 469, 477, 244 P.2d 273 (1952). “[W]hen asserted in opposition to the interest of a landowner, [laches] must be proved by clear and convincing evidence.” *Arnold*, 75 Wn.2d at 148. The question of whether a particular case is one to which a grant of equitable relief, in some form, is appropriate is subject to de novo review. *Niemann v. Vaughn Cnty. Church*, 154 Wn.2d 365, 374, 113 P.3d 463, 467 (2005); *Newport Yacht Basin Ass'n of Condo. Owners v. Supreme Nw., Inc.*, 168 Wn.App. 56, 76–77, 277 P.3d 18, 30–31 (2012).

Fatal to the McAuleys' claim of laches is the failure to identify by clear and convincing evidence a change in position which would be inequitable to enforcement. In short, the McAuleys have always operated under the erroneous paradigm that the HOA agreement was not “worth the paper it was written on”. CP 282. The McAuleys even attempted to lobby

the managers of the HOA to illegally grandfather in their noncompliance. CP 453. There is no inequity to the McAuleys by holding them to the valid and binding provisions of the restrictive covenants under which they knowingly purchased their home. The fact that the McAuleys have expended funds on their illegally maintained barn and boarding service is immaterial because this is a harm of their own creation.

Further, in determining whether the delay was inexcusable, a court may look to a variety of factors including similar statutory and rule limitation periods. But the main component of the doctrine is not so much the period of delay in bringing the action, but the resulting prejudice and damage to others. *See Pierce v. King Cty.*, 62 Wn.2d 324, 331, 382 P.2d 628, 633 (1963); *see also Vance v. City of Seattle*, 18 Wn.App. 418, 425, 569 P.2d 1194, 1197 (1977) (noting that laches is an equitable doctrine and its application does not depend solely upon the passage of time alone, but also upon the effects of delay upon the relative positions of the parties) (*quoting Holmberg v. Armbrecht*, 327 U.S. at 392. A court will not presume prejudice merely from the fact of a delay. *Vance*, 18 Wn.App. at 425. The burden is on the defendant to show whether and to what extent he or she has been prejudiced by the delay. *Id.* ; *Clark Cty. Pub. Util. Dist. No. 1 v. Wilkinson*, 139 Wn.2d 840, 848–49, 991 P.2d 1161, 1166–67 (2000).

The lower court erred when it applied the disfavored doctrine of laches. The McAuleys never proved that they changed their position in any way that was prejudicial to them. The McAuleys purposefully and willfully violated the restrictive covenants of their own accord.

The Complaint in this case was filed on August 12, 2016, less than three (3) years after the HOA refused to declare a violation of the Covenants by the McAuleys and less than three (3) years from the time the HOA unlawfully amended the Covenants. CP 1-9.

From the time he and his wife built their home on Lot 9 and he discovered the Covenant violation of the McAuleys, Wally Johnson did not unreasonably delay in taking action about the McAuleys' failure to conform to the Covenants. He tried to work it out face to face with McAuley, who refused to comply. Then he took the issue to the HOA where it languished for years and the HOA refused to make McAuley comply. Only after an exhaustive attempt to resolve this case did the Johnsons turn to the courts. Even if damages are limited, they should not be summarily precluded by the disfavored and largely unjustified doctrine of laches.

V. CONCLUSION

Below, the trial court erred in various ways by entering summary judgment. First, the Johnsons suffered a continuing harm due to the violations of the Covenants in this case. There existed material disputes of fact concerning the modular nature of the home built on the McAuleys' property, the nonconformity of the exterior barn, and the damages accompanying these violations. Second, the McAuleys boarded horses in violation of the relevant covenants and local zoning requirements. This either constituted a nuisance per se, or generally. Finally, the disfavored laches doctrine should not have been applied in this case because of the continuing nature of the violations, and the clear intent of the covenants to prevent the actions the McAuleys took. Appellant, Wallace Johnson, respectfully requests this case be remanded to the trial court for further proceedings.

Respectfully submitted this 18th day of January, 2019.



Thomas J. Westbrook, WSBA#4986
Paul J. Boudreaux, WSBA#49038
Attorney for Appellant Johnson

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on the below date, I caused delivery, as noted below, of a true and correct copy of the foregoing document to:

Jason Zittel *via email*
Attorney at Law
Jay Goldstein Law Office
1800 Cooper Point Rd SW, No. 8
Olympia, WA 98502
Jason@jaglaw.net

DATED at Olympia, Washington, this 18th day of January, 2019.

Catherine Hitchman
Catherine Hitchman

RODGERS KEE & CARD, P.S.

January 18, 2019 - 12:01 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 52688-3
Appellate Court Case Title: Wallace Johnson, Appellant v. 48th Court NW Homeowners Assoc., Respondent
Superior Court Case Number: 16-2-03206-8

The following documents have been uploaded:

- 526883_Briefs_20190118120037D2413352_4760.pdf
This File Contains:
Briefs - Appellants
The Original File Name was johnson app br 526883.pdf

A copy of the uploaded files will be sent to:

- jason@jaglaw.net
- paul@buddbaylaw.com
- slydon@bpmlaw.com

Comments:

Sender Name: Cathy Hitchman - Email: cathy@buddbaylaw.com

Filing on Behalf of: Thomas Jay Westbrook - Email: tjw@buddbaylaw.com (Alternate Email:)

Address:
324 West Bay Dr NW
Ste. 201
Olympia, WA, 98502
Phone: (360) 352-8311

Note: The Filing Id is 20190118120037D2413352