

No. 74546-8-I

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

JOSEPH MOJARRAD and NICOLE CHING LIN LU, husband and wife,
Appellants / Cross Respondents,

v.

LORRAINE WALDEN and JOHN DOE WALDEN, Respondent / Cross
Appellant.

AMENDED REPLY BRIEF OF APPELLANTS / CROSS RESPONDENTS

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A. ARGUMENT

1. The warranty of quiet possession was not breached until 2010 when the Estate locked the gate across the Driveway and asserted its claim to the Driveway against Mojarrad.

The question of when the statute of limitations began to run on Mojarrad's claim for breach of warranty of quiet possession turns on the answer to one of two questions. First, when was Mojarrad evicted from possession of the Driveway by the Estate? This did not occur until 2010. Second, was the Estate in adverse possession of the Driveway when the property was conveyed to Mojarrad in 2005? No, because the Estate did not openly and exclusively possess the Driveway against Mojarrad until 2010. Since the operative date in answer to both questions is 2010, that is when the six year statute of limitations began to run. That means the lawsuit was timely filed in 2014.

A. The statute of limitations begins to run when Mojarrad was evicted from the Driveway in 2010.

In deciding when the statute of limitations begins to run on a breach of quiet possession claim, courts look to when the grantee was evicted from possession and use of the property by a third party who then asserts paramount title. The rule is "that a grantee under a deed of general warranty cannot recover unless evicted by one having a paramount title." *Hoyt v. Rothe*, 95 Wn. 369, 372, 163 P. 925, 927 (1917).

“The covenant of warranty *protects only against an ouster from the possession*; and there can therefore be no breach of it assigned without alleging an actual eviction. It is true that evidence of a paramount title in a stranger, and that the warrantee, in consequence, yielded up the possession, will support such an allegation; for the law does not require the idle and expensive ceremony of being turned out by legal process, when that result would be inevitable. Still, however, *an actual ouster must be set out.*”

Id. at 373 (quoting *Clarke v. McAnulty*, 3 Serg. & R. (Pa.) 364-371) (emphasis added). Mojarrad’s opening brief contains citation to many cases focusing on when the grantee was evicted from possession. Appellant’s Opening Brief at 17–22. A case from Mississippi explains that an actual eviction and assertion of paramount title is needed before a grantee has a cause of action for breach of the future warranty of quiet possession: the grantee cannot “be allowed to say, I have discovered an outstanding paramount title, and, although I have not been threatened by it, I abandon all claim to the land, and demand damages for a broken covenant.” *Green v. Irving*, 54 Miss. 450, 459 (1877). Thus, for Mojarrad to have a claim for breach of the warranty of quiet possession the Estate must have asserted its claim to paramount title against him and evicted him from the Driveway.

Even the cases cited by Lorraine Walden acknowledge the question is when the grantee like Mojarrad has been evicted. *Whatcom Timber Co. v. Wright*, 102 Wn. 566, 173 P. 724 (1918), acknowledges the

breach occurs at the time of conveyance only if “the premises are in the possession of third persons claiming under a superior title *and grantee cannot be put into possession.*” *Id.* at 568 (emphasis added). Only a syllabus point is quoted from *Ilisley v. Wilson*, 42 W. Va. 757, 26 S.E. 551 (1896).¹ But the actual opinion in that case focused on the grantee’s possession:

“A breach of this covenant is *proved only by evidence of actual ouster or eviction*, but it need not be with force; or if it appears that the covenantee has quietly yielded to a paramount title, whether derived from a stranger or from the same grantor, either by giving up the possession or by becoming the tenant of the rightful claimant, or has purchased the better title, it is sufficient. *So, if he has been held out of possession* by one in actual possession, under a paramount title, at the time of sale it is said to be a breach.”

Id. at 773 (quoting Greenleaf on Evidence (volume 2, § 241, under the head of “Warranty”)) (emphasis added). Even the Maine case that is cited agrees that the law requires “a grantee to prove eviction in order to recover for breach of the covenants” and provides the statute of limitations only begins to run if the grantee has never been in possession because another party was in possession. *Lloyd v. Estate of Robbins*, 2010 ME 59, ¶ 21, 997 A.2d 733, 740 (Maine 2010).

¹ While the West Virginia Supreme Court writes the syllabus points, those points must be read in light of the opinion as a whole. *State v. McKinley*, 234 W. Va. 143, 149, 764 S.E.2d 303, 309 (2014).

Here, there is no dispute Mojarrad was able to possess and use the Driveway multiple times and was not prevented from using the Driveway until 2010. And there is no dispute the Estate did not assert its paramount claim to the Driveway against Mojarrad until 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. Four years later in 2009, Mojarrad checked on the property and was again able to freely access and walk down the Driveway and did not encounter a locked gate. CP 72. It was not until 2010 that Mojarrad was physically prevented (evicted) from using the Driveway when he went to flag the property for wetlands but found a locked gate blocking his use of the Driveway. CP 73, 75–76, 79, 173–74. While the Estate may have acquired title to the Driveway by adverse possession many years before, between 2005 and 2010 the Estate did not physically prevent Mojarrad from accessing and using the Driveway and did not assert its claim to the Driveway against Mojarrad. Having never been prevented from using the Driveway until 2010, and having never been subjected to a claim to paramount title to the Driveway until 2010, Mojarrad had no claim for breach of the warranty of quiet possession until 2010.

The Estate could have chosen to continue to keep the Driveway unblocked and allow Mojarrad to use it. But the Estate chose to block the

Driveway and assert its claim to paramount title in 2010. Only then was the warranty of quiet possession breached. The claim for breach of warranty of quiet possession brought in 2014 was not barred by the six year statute of limitations. So summary judgment should be entered in Mojarrad's favor on this claim.

- B. The statute of limitations did not begin to run when the property was conveyed to Mojarrad in 2005 because the Estate was not adversely possessing the Driveway then.

Lorraine Walden argues that the statute of limitations begins to run on the date of conveyance if the third party is in actual adverse possession of the property at the time of conveyance. But from the time of conveyance, the Estate was not openly and exclusively possessing the Driveway until 2010. So summary judgment in favor of Mojarrad is still required.

The West Virginia case syllabus comment requires the land to be "in adverse possession of a stranger" at the time of conveyance in order for the statute of limitations to begin to run then. *Ilsey v. Wilson*, 42 W. Va. 757, 26 S.E. 551 (1896). Washington Practice also states the breach occurs at the time of conveyance only if "an adverse possessor who has already perfected title, *is then in possession.*" 18 William B. Stoebuck & John W. Weaver, Wash. Practice: Real Estate: Transactions, § 14.3 (2d ed.) (emphasis added). Therefore, a breach could have only occurred at the

time of conveyance if the Estate was adversely possessing the Driveway in 2005.

Possession is only adverse when, among other things, the possession is exclusive, actual and uninterrupted, and open and notorious. *Chaplin v. Sanders*, 100 Wn.2d 853, 857, 676 P.2d 431 (1984). While the Estate's prior possession of the Driveway decades before may have met the standards for adverse possession, the Estate was not adversely possessing the Driveway in 2005.

In 2005, the Estate's possession of the Driveway was not exclusive, actual, and open. There was no locked gate (either in 2005 or 2009) excluding anyone, including Mojarrad, from using the Driveway. CP 63–64, 72. Even the Waldens admitted if there was a gate, it was only closed when Gilbert Walden was gone and did not always remain shut. CP 89–90. A gate was not locked permanently until 2010 to prevent vandals from accessing the Estate property. CP 88. Also, while there was a barbwire fence enclosing the Driveway within the Estate's property back in 1952 when the Estate first acquired its property, after the 1960s that fence was not kept up. CP 87–89. The fence has since grown over with brush and cannot be seen without picking through the brush. CP 89. So in 2005, visitors like Mojarrad could not tell that the Estate was adversely possessing the Driveway. Thus, the Estate's possession of the Driveway,

at least in 2005, was not adverse. The Estate could have kept the Driveway open for Mojarrad to use, in which case there would have been no breach. But the Estate's possession of the Driveway became adverse again in 2010 with the locked gate and excluded Mojarrad from using the Driveway.

Even if the Estate was adversely possessing the Driveway in 2005, no breach still occurred until the Estate affirmatively asserted its claim to the Driveway against Mojarrad. No breach of the warranty of quiet possession occurs until there has been some threat that a third party would assert its paramount claim to title. *Leddy v. Enos*, 6 Wash. 247, 249, 33 P. 508, 509 (1893). The Estate could have been okay with Mojarrad using the Driveway, in which case Mojarrad would have no claim for breach of the warranty of quiet possession. Only when the Estate began to assert its claim to prevent Mojarrad from using the Driveway was the warranty breached.

Because the Estate was not adversely possessing the Driveway at the time the property was conveyed to Mojarrad in 2005, the statute of limitations on the claim for breach of quiet enjoyment did not start running then. The statute of limitations did not begin to run until 2010 when the Estate began adversely possessing the Driveway again with the locked gate and when the Estate asserted its claim against Mojarrad. The claim for breach of warranty of quiet possession brought in 2014 was not barred

by the six year statute of limitations. So summary judgment should be entered in Mojarrad's favor on this claim.

- C. At the very least, questions of fact exist about when Mojarrad was evicted from the Driveway and whether the Estate was adversely possessing the Driveway at the time of conveyance to Mojarrad.

The undisputed facts discussed in the section above show Mojarrad was not evicted from the Driveway until 2010 and that the Estate was not adversely possessing the Driveway at the time the property was conveyed to Mojarrad in 2005. However, at the very least, the facts offered by the parties in their briefs show that questions of fact exist on these issues. If the Court denies entry of summary judgment in favor of Mojarrad finding Lorraine Walden liable for breach of the warranty of quiet enjoyment, it should also deny Lorraine Walden's motion for summary judgment and remand this claim for trial.

2. Rescission is the proper remedy because Lorraine Walden knowingly misrepresented the boundaries of her property she sold to Mojarrad.

Lorraine Walden does not dispute that rescission can be a remedy for breach of the warranty of quiet possession. Instead, she argues there is no evidence she made misrepresentations about the property she sold to Mojarrad. That is incorrect. The undisputed evidence shows she knew she

did not own the Driveway. And there is evidence that this was never disclosed to Mojarrad.

It is undisputed that Lorraine Walden knew all along the Driveway belonged to the Estate because she had agreed with the Estate that it owned the Driveway. CP 81–83, 176–82. It is undisputed that she had a survey done and that she knew the survey showed the Driveway was within her property and did not show the Driveway served the Estate’s property. CP 171, 176–82. Knowing the survey was wrong and having done nothing to correct it, it is undisputed that Lorraine Walden gave the incorrect survey to Mojarrad. CP 82-83, 171. Knowing there was a problem with the survey and the boundary lines and that she did not own the Driveway, it is undisputed that Lorraine Walden then 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. It is also undisputed that Lorraine Walden never talked directly to Mojarrad. CP 63, 83. So she never told Mojarrad about the Driveway or the incorrect survey.

Lorraine Walden argues she told Mojarrad’s real estate agent at the closing about the Driveway issue. However, Mojarrad himself did not

attend the closing. CP 65. There is no evidence the real estate agent told Mojarrad about the Driveway issue.² CP 83–84. Mojarrad was, in fact, never told the Driveway was not part of Lorraine Walden’s property. CP 173–74. Everything Mojarrad had been given by Lorraine Walden showed she owned the Driveway and there were no issues with the Driveway. It turns out that was not true and Lorraine Walden knew it was not true. This is the perfect case for rescission.

Lorraine Walden also argues that Mojarrad did not conduct “even the simplest investigation into the property” and for that reason should not be awarded rescission. But Mojarrad is not at fault. He conducted an adequate investigation. When viewing the property before making an offer to purchase, Mojarrad was able to walk down the Driveway unimpeded and did not encounter any gates. CP 63–64, 72. Mojarrad wondered if the property encompassed the Driveway and was told Lorraine Walden had a survey of the property. So Mojarrad requested and was provided with the survey, which Mojarrad reviewed and which showed the Driveway to be within Lorraine Walden’s property.³ CP 65–66, 82, 145, 149. Mojarrad then reviewed Lorraine Walden’s seller disclosure statement, which stated

² While Lorraine Walden testified that Mojarrad’s agent told her that Mojarrad knew about the Driveway issue, this statement is hearsay and not admissible to defeat summary judgment.

³ Presumably any new survey conducted by Mojarrad would have revealed the same thing.

there were no issues with the Driveway. CP 139. And the purchase and sale agreement called for Lorraine Walden to convey the property by statutory warranty deed with all its warranties of title, which she did. CP 97–101, 137–38. That was sufficient to put any reasonable purchaser at ease that there were no issues. If any issues arose they would be warranted by the seller. Given Lorraine Walden’s representations and promises about her property, no more investigation was required by Mojarrad.

There is no dispute Lorraine Walden knew about the Driveway issue and failed to disclose it. So if the Court awards summary judgment to Mojarrad finding Lorraine Walden liable on the claim for breach of the warranty of quiet possession, it should also enter summary judgment awarding rescission as the proper relief.

3. The warranty to defend title was breached because the warranty applies broadly to defending title, not just defending against a lawsuit if/when a lawsuit is brought.

Lorraine Walden argues the claim for breach of the warranty to defend title fails because there was no proper tender of defense since Mojarrad was never sued by the Estate. Her argument assumes that there must be a lawsuit brought by a third party against the grantee in order for there to be a breach of the warranty to defend title. As pointed out in Mojarrad’s opening brief, this assumption is incorrect for many reasons.

And Lorraine Walden has failed to address those reasons in her response brief.

First, Mojarrad pointed out that her argument reads the duty to defend too narrowly. Appellant's Opening Brief at pp.42-45. The duty to defend is not merely a duty to defend against a *lawsuit* brought against a grantee. Rather, the duty is to defend the grantee's *title* to the property conveyed. This is made clear by both statute and case law. RCW 64.04.030; *Edmonson v. Popchoi*, 172 Wn.2d 272, 283, 256 P.3d 1223 (2011). Lorraine Walden offers no response to this argument.

Second, Mojarrad pointed out that the primary case relied upon by Lorraine Walden did not hold 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. *Mastro v. Kumakichi Corp.*, 90 Wn. App. 157, 951 P.2d 817 (1998). This was not an issue in that case. Lorraine Walden also relies on *Erickson v. Chase*, 156 Wn. App. 151, 231 P.3d 1261, 1265 (2010). But that case also did not hold or address the issue of whether 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. In fact, both *Mastro* and *Erickson* indicate no such lawsuit is required. As Mojarrad mentioned, *Mastro* noted the third party's claim is usually established in a lawsuit "between" the grantee and the third party. *Mastro*,

90 Wn. App. at 163. That means a lawsuit over who has paramount title could be brought by either the third party or the grantee. Likewise, *Erickson* notes that “a third party must assert a superior right to the property, usually through a lawsuit that results in the grantee's actual or constructive eviction.” *Erickson*, 156 Wn. App. at 158 (emphasis added). But *Erickson* did not say a lawsuit by a third party is the only way a third party could assert a superior right to the property. Lorraine Walden offers no response to these arguments.

Third, Mojarrad showed that treatises state that there are situations where a duty to defend title can arise before a third party files a lawsuit against the grantee. 18 William B. Stoebuck & John W. Weaver, Wash. Practice: Real Estate: Transactions, § 14.4 (2d ed.). One of those situations is where the third party physically evicts the grantee from possession of the property and then controls the property, which is what happened here. Lorraine Walden offers no response to this authority.

Fourth, Mojarrad pointed out the absurd and dangerous consequences that would result from a requirement that a grantee be sued by a third party before a duty to defend arises. When a third party takes occupation of the property and excludes the grantee, such as here when in 2010 the Estate utilized a locked gate to exclude Mojarrad from use and enjoyment of the Driveway, the grantee like Mojarrad would have no

choice but to take whatever actions were necessary to provoke the third party into filing a lawsuit against the grantee. Such self-help measures would have grave consequences and have no place in our society today.⁴ Lorraine Walden offers no response to this argument. And she offers no suggestions of the actions Mojarrad should have taken against her relatives the Estate to provoke the Estate into suing Mojarrad.

Instead, Lorraine Walden cites CR 11 and claims she had no duty to defend against the Estate's claim to the property because there was no valid defense. Hiding behind CR 11 misses the point about exactly what Lorraine Walden had a duty to defend. It was not a duty to defend a lawsuit, it was a duty to defend Mojarrad's title against claims to superior title asserted by third parties against Mojarrad. That is exactly what occurred here when the Estate blocked Mojarrad from the Driveway and asserted it owned the Driveway. If Lorraine Walden felt the Estate's claim to the Driveway was valid and could not be challenged in court, there were a multitude of things she could have done. She could have purchased the Driveway from the Estate for Mojarrad to remedy her breach of the deed warranties. She could have offered to compensate Mojarrad for damages incurred because of her breach of the deed warranties. She could have

⁴ Courts strongly disfavor resorting to self-help in resolving property disputes. *Akers v. D.L. White Constr., Inc.*, 156 Idaho 37, 49, 320 P.3d 428, 440 (2014).

attempted to settle the dispute between the parties in some fashion, such as trying to obtain an easement for Mojarrad over the Driveway. But instead, Lorraine Walden did nothing. Thus, she is liable for any damages incurred by Mojarrad because of her failure to do anything to defend Mojarrad's title. Those damages are the fees and costs Mojarrad incurred in attempting to defend his title to the Driveway himself. *Mastro v. Kumakichi Corp.*, 90 Wn. App. 157, 163, 951 P.2d 817 (1998).

Finally, Lorraine Walden's position would completely eliminate the warranty to defend title. As Mojarrad explained, the warranty to defend title only applies to valid claims. Appellant's Opening Brief at pp.38–42. Lorraine Walden does not dispute this. Lorraine Walden's argument is that there is no duty to defend against valid claims. So the warranty applies to valid claims to title but then the grantor has no duty to defend against those valid claims. That makes no sense. Such a ruling would completely eliminate the statutory deed warranty to defend title that has existed for ages.

For these reasons, Mojarrad's claim for breach of the warranty to defend title is valid and should not have been dismissed by the trial court.

Even if Lorraine Walden is correct that tender of defense of title can only be proper after there is a lawsuit brought against Mojarrad, Mojarrad was relieved from any requirement to tender defense of the

Estate's claims after the Estate asserted its counterclaim. Lorraine Walden argues no tender was made after the Estate filed its counterclaim against Mojarrad. Respondent's Brief at p.12. But such a tender would have been futile, so it was not required. The law does not require someone to do a useless act. *Moratti v. Farmers Ins. Co. of Wash.*, 162 Wn. App. 495, 504–05, 254 P.3d 939, 943 (2011). “A tender to one who announces in advance that the tender will not be accepted is ordinarily unnecessary.” *Jacobs v. Office of Unemployment Comp. & Placement*, 27 Wn.2d 641, 657, 179 P.2d 707, 716 (1947). “[P]roof of tender will not be required where it appears that it would have been futile.” *Ballard v. Cox*, 193 Wn. 299, 306, 75 P.2d 126, 129 (1938). A failure to respond constitutes a refusal to defend. *Mastro v. Kumakichi Corp.*, 90 Wn. App. 157, 166, 951 P.2d 817 (1998). Here, Mojarrad sent two tender letters to Lorraine Walden in October and November 2012 before any lawsuit was filed. CP 150–51, 160–61. Lorraine Walden did not respond to either letter. CP 133. That is a refusal to accept tender of the Estate's claim. Thus, it would have been futile and useless to have sent another tender letter to her after the Estate filed its counterclaim. Assuming tender is only proper after a legal claim is actually filed in court against a third party, Mojarrad was relieved from any such tender given Lorraine Walden's rejection of the previous tenders.

4. The statute of limitations did not begin to run on the claims for unjust enrichment, negligent misrepresentation, and equitable indemnity until 2012 when Mojarrad was told directly by Lorraine Walden that she knew she did not own the Driveway.

Mojarrad's claims of unjust enrichment, negligent misrepresentation, and equitable indemnity turn on whether Lorraine Walden knew that she did not own the Driveway at the time she sold her property to Mojarrad. Questions of fact exist about whether Mojarrad knew or should have known that Lorraine Walden knew the Driveway did not belong to her when she sold her property to him. There are facts and reasonable inferences that Mojarrad did not know what Lorraine Walden knew until 2012 when Mojarrad received a letter informing him that Lorraine Walden knew the Estate always owned the Driveway.

Under the discovery rule, a cause of action does not accrue until a party knew or should have known the essential elements of the cause of action. *Green v. A.P.C.*, 136 Wn.2d 87, 95, 960 P.2d 912, 915 (1998). Here, there are facts showing Mojarrad did not learn of Lorraine Walden's misrepresentation until 2012.

It is undisputed that Lorraine Walden and Mojarrad never talked directly. CP 63, 83. It is also undisputed that Lorraine Walden provided Mojarrad with a survey showing the Driveway was within the property she was selling. CP 173. It is also undisputed that Lorraine Walden made statement in the seller disclosure statement that there were no boundary

line or access issues. CP 139–43. Lorraine Walden claims to have told Mojarrad’s real estate agent at closing about the Driveway issue. But that was never communicated to Mojarrad. CP 173–74. Mojarrad disputes that he was ever told about the Driveway issue. *Id.* The real estate agent may have had a duty to disclose this information per RCW 18.86.030, but that does not mean he actually did disclose it.

Being from Texas and not attending the closing in person, CP 65, Mojarrad had no idea what Lorraine Walden knew about the Driveway. He did not find out that Lorraine Walden knew all along the Driveway was not hers until 2012 when he received a letter containing a declaration from Lorraine Walden admitting she knew she did not own the Driveway. CP 177–79. Then, and only then, did Mojarrad realize he had been duped by Lorraine Walden, who during the sale represented that she owned the Driveway. Before 2012, Mojarrad had no way of knowing Lorraine Walden had knowingly made misrepresentations about her property during the sale. Questions of fact exist about what Mojarrad knew and when he knew them about Lorraine Walden’s knowledge of the Driveway. These claims should not have been dismissed on summary judgment.

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Third, on the underlying merits of the alleged right to fees, neither party is entitled fees and costs against the other. Lorraine Walden argues she is entitled to fees and costs because of Mojarrad's request for rescission as relief. It is true Mojarrad requests rescission. The breach of deed warranty of quiet possession provides the grounds for rescission. CP 295–99, CP 431–33, Appellant's Opening Brief at pp.31–36. The warranty deed did not contain an attorney fee provision. CP 137–38. Under the law, the prevailing party on a breach of deed warranty claim has no right to fees against the other, either under the deed itself or the deed warranty statute. RCW 64.04.030; *Mellor v. Chamberlin*, 100 Wn.2d 643, 650, 673 P.2d 610 (1983); *Barber v. Peringer*, 75 Wn. App. 248, 251–52, 877 P.2d 223 (1994). Just as Mojarrad will not be entitled to fees and costs against Lorraine Walden if he prevails on the breach of deed warranty claims, Lorraine Walden is also not entitled to fees and costs on those claims if she prevails. The trial court's decision to deny fees and costs should be affirmed.

B. CONCLUSION

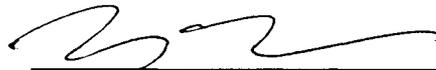
This Court should reverse the trial court's grant of summary judgment for Lorraine Walden that dismissed all of Mojarrad's claims. This Court should also reverse the trial court's denial of Mojarrad's

summary judgment motion and rule that Lorraine Walden breached the warranty of quiet possession and order rescission as the remedy. But at the very least, the Court should deny both parties' motions for summary judgment and remand to the trial court for trial on the issue of liability and appropriate relief. The Court should also affirm the trial court's denial of Lorraine Walden's motion for attorney fees.

DATED this 27th day of May 2016.

Respectfully submitted,

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