

No. 74546-8-1

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**COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION 1**

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

Appellants,

v.

LORRAINE WALDEN, a single woman,

Respondent

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**RESPONDENT'S REPLY BRIEF**

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## INTRODUCTION

This case arises from a sale of real property in Skagit County, Washington by Respondent to Appellant in October, 2005. Title to a small portion of the 22 acre parcel had been obtained by adverse possession by the neighbor to the south. The period of adverse possession had occurred several decades prior to Appellant's sale of the property. The adverse possessor was in exclusive possession of the adversely possessed property at the time of the sale, and had been before at least 50 years. This action was commenced in March, 2014. The issue is when the warranties of quiet possession and to defend title in a statutory warranty deed are breached, triggering the statute of limitations.

If the land conveyed by general warranty is in adverse possession under paramount title at the execution of the deed, the grantee's eviction dates, and the statute of limitations against an action for breach of warranty runs, from the date of the deed.

The trial court subsequently denied Respondent's motion for attorney's fees.

The trial court acted properly in denying Appellant's motion for summary judgment on his claims regarding warranties of quiet possession and to defend the title, and granting Respondent's motion for summary judgment dismissing all of plaintiff's claims. It was error for the trial court to deny Respondent's motion for attorney's fees.

#### **ASSIGNMENTS OF ERROR**

1. The trial court erred in denying Respondent's motion for attorney's fees.

#### **STATEMENT OF THE CASE**

Lorraine Walden owned a 22 acre property in Skagit County, which she had acquired with her husband in 1967. CP 172-73, 119, and 80. Ms. Walden conveyed her property to Appellant by a statutory warranty deed recorded October 19, 2005. At closing, before the deed was recorded, Ms. Walden and the closing agent called the Appellant's real estate agent to make sure the Appellants knew that the driveway serving the adjoining property to the south, described below, was not part of the sale. CP 83-84. All communication regarding the property was through real estate agents. Ms. Walden never met or talked to Appellant. CP 63-83.

The adjoining property to the south was owned by Gilbert Walden, Ms. Walden's brother-in-law. CP 80, 180. Gilbert Walden owned and lived at his property from 1952 until his death in 2009. CP 87. The Estate of Gilbert Walden (the "Estate") now owns his property. CP 5, 14.

A driveway runs across the disputed area, which is a small triangular portion of the southeast part of the property ("Driveway"). CP 172-73, 182. On the north side of the Driveway there is a ditch separating the Driveway from Ms. Walden's property to the north. CP 88-89. A barbed wire fence adjacent to that ditch to the north remains, although covered with brush. CP 88-89. For many years, the fence enclosed Gilbert Walden's cattle. CP 88-90. The Driveway was the only access to his property. CP 87. Ms. Walden never used the Driveway except to visit Gilbert Walden, she never did any maintenance or repairs, and she has not asserted a right or desire to use the Driveway. CP 81-82, 92-95. No non-family members have ever used the driveway. CP 92. There has been a gate across the Driveway for at least 30 years. CP 89-90. After Gilbert Walden's death, the Estate locked the gate in 2010 to prevent vandals from accessing the Estate's property. CP 88. Gilbert Walden had obtained

title to the driveway by adverse possession long before Appellant purchased the property from Ms. Walden in 2005.

In September, 2012, Appellant received a letter from an attorney representing the Estate, asserting that the Estate owned the Driveway. CP 174, 176. In October, 2012, Appellant sent a letter to Ms. Walden purporting to tender the defense of the Estate's claim to the Driveway. CP 150-59. Appellant sent a second letter to Ms. Walden in November, 2012, again purporting to tender defense of the Estate's claim. CP 160-71. No lawsuit had been filed by the Estate at the time of either letter.

Appellant filed suit against Ms. Walden and the Estate in March, 2014. CP 13-24. Appellant asserted claims against Ms. Walden for unjust enrichment, equitable estoppel, negligent misrepresentation, and equitable indemnity. CP 20-23. Appellant also asserted claims against Ms. Walden for breach of deed warranties, including a covenant of quiet enjoyment and a covenant to defend title. CP 20-24. Still, no suit was pending against Appellant asserting claims by the Estate. Subsequently, the Estate filed a counterclaim against Appellant asserting paramount title to the Driveway by adverse possession. CP 10-11. Among other relief sought by the

Appellant against Ms. Walden was a claim seeking rescission of the 2005 purchase and sale agreement. CP 23-24.

After the trial court ruled on the competing summary judgments, Ms. Walden moved for an award of attorney's fees based upon the language in the purchase and sale agreement. That motion was denied.

### ARGUMENT

1. *The Statute of Limitations on the Warranty of Quiet Possession expired in October of 2011.*

The warranty of quiet possession is a warranty *in futuro*. The statute of limitations begins to run from the time the warranty is breached. *Whatcom Timber Co. v. Wright*, 102 Wash. 566, 568, 173 P. 724 (1918). Washington law is unequivocal. If at the time the deed is executed the premises are in the possession of third persons claiming under a superior title and grantee cannot be put into possession, the covenant of warranty is broken when made without any further acts of the parties. *Id. Citing Ilsley v. Wilson*, 42 W. Va. 757, 26 S. E. 551. The West Virginia Court had stated in *Ilsley*:

In an action of covenant for breach of warranty, if it appears that a portion of the land conveyed with covenants of general warranty was in the adverse possession of a stranger at the date of the

conveyance, and held by a paramount title, the grantee in such deed will be *held* to be evicted on the day of the execution of said deed, and the statute of limitations will commence to run against the action from that date, and will be barred in 10 years thereafter.

Ilisley v. Wilson, 42 W. Va. 757, 26 S.E. 551 (1896)

The treatises are consistent with this position. In Washington Practice, Professors Stoebuck and Weaver, after noting that the covenant of quiet enjoyment is a “future” covenant that is breached when the third person claiming under a paramount right actually disturbs the grantee in possession, state: “Also, though the covenant is considered a “future” covenant, it may be breached at the moment of conveyance if a third person, such as the holder of an easement *or an adverse possessor who has already perfected title*, is then in possession”. *18 Wash. Prac., Real Estate* § 14.3 (2d ed.). [emphasis added]

The rule that the statute of limitations commences running against an action for breach of the covenant of warranty from the date of eviction or ouster<sup>10</sup> is generally held inapplicable where neither the grantor nor the grantee was in actual or constructive possession of the premises at the time of the conveyance, and limitations are held to have commenced running from the date of the deed.

95 A.L.R.2d 913 (Originally published in 1964)

Then again, when a grantee has never been in possession of the conveyed property, because another party, who claims superior title,

is in possession, the covenant of quiet enjoyment is deemed breached without any other act on the part of either the grantee or the party in possession.

20 Am. Jur. 2d Covenants, Etc. § 104

This position has also been followed by courts in other states more recently, including a 2010 decision in Maine with very similar facts, where it appears that a portion of the property conveyed was claimed to be in the possession of adverse possessors at the time of the conveyance.

When a grantee has never been in possession of the conveyed property, because another party, who claims superior title, is in possession, the covenants are deemed breached without any other act on the part of either the grantee or the party in possession. *See Harrington v. Bean*, 89 Me. 470, 475, 36 A. 986, 987–88 (1897); *see also* 4 Herbert Thorndike Tiffany, *Real Property* § 1013, at 284. In such an instance, the breach of covenant occurs at the time of delivery of the deed. *Cf. Blanchard v. Blanchard*, 48 Me. 174, 177 (Me.1859) (holding that when the plaintiff could not possess property because of an assigned dower, the breach occurred at the time of the conveyance).

Lloyd v. Estate of Robbins, 2010 ME 59, ¶ 21, 997 A.2d 733, 740-41.

Appellant cites numerous cases in support of Appellant's theory that the warranty of quiet enjoyment was breached in 2010, when the Estate first informed him that it owned the driveway. Those cases all cite the general rule regarding eviction, and do not contain the significant

distinction, found here, that the disputed property was in the possession of an adverse possessor whose ownership had ripened into title many years before. The Appellant cites the general rule stated in Washington Practice, but ignores the directly applicable statement in that same section, cited above, which is only two sentences later in the section.

It is uncontested that title to the disputed property, including the Driveway, had been perfected in Gilbert Walden by adverse possession many years before Ms. Walden obtained title to the property, and was in the possession of Gilbert Walden (or subsequently the Estate) at the time of the conveyance and at all times since. The trial court was correct in determining that the statute of limitations commenced with regard to the covenant of quiet enjoyment immediately upon execution and delivery of the deed.

*2. Respondent did not breach the covenant to defend the title because the defense was never properly tendered.*

Appellant claims to have tendered the defense of title to Ms. Walden by means of two letters sent by Appellant to Ms. Walden, which were sent before any litigation had been commenced regarding title to the Driveway. In fact, Appellant sued Ms. Walden asserting a breach of the

covenant to defend before the Estate had filed a counterclaim asserting title. No tender was attempted or made after the counterclaim was filed.

An adequate tender of defense requires the grantee to notify the grantor (1) *of the pendency of the suit*; (2) that if liability is found, the grantee will look to the grantor for indemnification; (3) that the notice constitutes a formal tender of the right to defend the action; and (4) that if the grantor refuses to defend, it will be bound in a subsequent litigation between them to the factual determination necessary to the original judgment. *Mastro v. Kumakichi Corp.*, 90 Wn. App. 157, 165, 951 P.2d 817 (1998). The grantee must make an effective “tender of defense” to the grantor before she is entitled to recover under the warranty to defend. *Id.* at 164. On October 15, 2012, November 15, 2012 and April 30, 2013, Appellant sent Ms. Walden letters purporting to tender the defense of claims *which had yet to be brought against them*. In fact, Appellant brought the lawsuit and included in that lawsuit claims for failure of Ms. Walden to defend the Estate’s *anticipated* counterclaim. The only claim that arose against title to the Property was the counterclaim asserted by the

Estate, which occurred several months after the date of all attempts by the Appellant to tender defense to Ms. Walden.

The Court in *Mastro* was unequivocal when stating the requirements to properly tender defense, and the effect of an inadequate tender.

In other words, the grantee must make an effective “tender of defense” to the grantor before she is entitled to recover under the warranty to defend. As we described in *Dixon v. Fiat–Roosevelt Motors, Inc.*, 8 Wash.App. 689, 509 P.2d 86 (1973), this tender of defense:

[I]s equivalent to “vouching in”, a common law device by which a defendant notifies another (1) of the pendency of the suit against him, (2) that if liability is found, the defendant will look to the vouchee for indemnity, (3) that the notice constitutes a formal tender of the right to defend the action, and (4) that if the vouchee refuses to defend, it will be bound in a subsequent litigation between them to the factual determination necessary to the original judgment.

*Id.* at 692–93, 509 P.2d 86 (citations omitted). If such tender of defense is inadequate, a third-party defendant may not be bound.

*Mastro v. Kumakichi Corp.*, 90 Wash. App. 157, 164-65, 951 P.2d 817, 821 (1998)

This case was followed by Division 2 in 2010.

To recover under the warranty to defend, the grantee must make an effective tender of defense to the grantor. *Mastro*, 90 Wash.App. at 164–65, 951 P.2d 817 (citing *Double L. Props., Inc. v. Crandall*, 51 Wash.App. 149, 156, 751 P.2d 1208 (1988)). An effective

tender notifies the grantor that: (1) there is a pending action; (2) if liability is found, the grantee will look to the grantor for indemnity; (3) the notice constitutes formal tender of the right to defend the action; and (4) if the grantor refuses to defend, it will be bound to factual determinations in the original action in subsequent litigation between the grantee and grantor. *Mastro*, 90 Wash.App. at 164–65, 951 P.2d 817 (quoting *Dixon v. Fiat–Roosevelt Motors, Inc.*, 8 Wash.App. 689, 692–93, 509 P.2d 86 (1973)).

*Erickson v. Chase*, 156 Wash. App. 151, 158, 231 P.3d 1261, 1265 (2010)

To hold that Ms. Walden had a duty to defend the Estate’s claim of ownership of the Driveway before the estate filed its counterclaim would require Ms. Walden to do the impossible. It is undisputed that the Estate had perfected title to the Driveway many years before Ms. Walden and her husband acquired their property. She could not obtain title to that property and convey it to Appellant. No demand was ever made for compensation for diminished value, which would have been the only other relief available to the Appellant under a broad reading of the duty to defend.

The language of CR 11 is clear.

A party or attorney, by signing a pleading, motion, or legal memorandum, certifies that (1) it is well grounded in fact; (2) **it is warranted by existing law** or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law; (3) it is not interposed for any improper

purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . .

. . . If a pleading, motion, or legal memorandum is signed in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it . . . an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or legal memorandum, including a reasonable attorney fee.

There was no defense under existing law or its reasonable extension to the Estate's counterclaim for adverse possession. No later than 1962, five years *prior* to Ms. Walden's ownership of the Property, the Estate's interest had ripened into ownership.<sup>1</sup> No defense could have been advanced in good faith, or in compliance with CR 11. The warranty to defend cannot be used to force a seller to advance frivolous and baseless defenses, thereby subjecting themselves to sanctions by a third party, simply because a plaintiff chose to bring a meritless lawsuit to quiet title long after title to the disputed property had been lost by adverse

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<sup>1</sup> The law is clear that title is acquired by adverse possession upon passage of the 10-year period. The new title holder need not sue to perfect his interest: "[t]he quiet title action merely confirms that title to the land has passed to the adverse possessor." *Halverson v. City of Bellevue*, 41 Wn.App. 457, 460, 704 P.2d 1232 (1985); *Gorman v. City of Woodinville*, 175 Wn.2d 68, 283 P.3d 1082 (2012).

possession (which action did trigger the anticipated counter-claim of ownership by the estate).

Appellant never properly tendered the defense. Further, Appellant has never made a demand for the diminished value of the property that the Appellant purchased, if any was caused by Appellant's failure to receive title to the small portion contained within the disputed area and the Driveway. Thus, Ms. Walden never breached the covenant to defend.

*3. Appellant's claims against Ms. Walden for unjust enrichment, breach of deed warranties, equitable estoppel, negligent misrepresentation, equitable indemnity and contract rescission are barred by the applicable statutes of limitation.*

Unjust enrichment, equitable estoppel, negligent misrepresentation, and equitable indemnification claims have a three year statute of limitation. *RCW 4.16.080; Geranios v. Annex Investments*, 45 Wn.2d 233, 236, 273 P.2d 793 (1954). Actions on a contract have a six year statute of limitation. *RCW 4.16.040*. The purpose of statutes of limitation is to force claims to be litigated while pertinent evidence is still available and while witnesses retain clear impressions of the occurrence. [Washington's] policy is one of repose; the goals are to eliminate the fears and burdens of threatened litigation and to protect a defendant against stale claims.

*Stenberg v. Pacific Power & Light Co.*, 104 Wn.2d 701, 714, 709 P.2d 793 (1985).

With respect to when causes of action begin to accrue, Washington follows the discovery rule. **The plaintiff is charged with what a reasonable inquiry would have discovered.**” *1000 Virginia Ltd. P'ship v. Vertecs Corp.*, 158 Wash.2d 566, 146 P.3d 423, 431 (2006) (citing *Green v. A.P.C.*, 136 Wn.2d 87, 960 P.2d 912, 916 (1998)) (emphasis added). Had the Appellant conducted *any* independent research related to the Property they were purchasing, or had the Appellant returned to their property within four years of purchasing it, their claims would have readily presented themselves. The Estate’s adverse possession and use of the driveway was never concealed. Appellant, for reasons unknown, chose to remain out of the state for four years, during which time the statutes of limitation on their claims expired.

It is uncontested that Ms. Walden and the escrow agent called the Appellant’s real estate broker at closing, before the deed was recorded, to make sure the Appellant knew that the Driveway was not part of the sale. CP 83-84. Appellants argue that this information was not conveyed to

them. However, the broker had a statutory obligation to disclose this information.

(1) Regardless of whether a broker is an agent, the broker owes to all parties to whom the broker renders real estate brokerage services the following duties, which may not be waived:

....

(d) To disclose all existing material facts known by the broker and not apparent or readily ascertainable to a party; provided that this subsection shall not be construed to imply any duty to investigate matters that the broker has not agreed to investigate;

RCW 18.86.030

All of the communication between Ms. Walden and Appellant were through real estate agents. Ms. Walden reasonably relied upon this communication through Appellant's agent to notify Appellant that the Driveway was not included in the sale.

Appellants not only failed to investigate their property prior to, or for four years after their purchase, they failed to act upon the specific communication to their agent.

Ms. Walden sold the Property to Appellants in October, 2005. Appellant's lawsuit was brought in 2014, nine years after the sale and communication through Appellant's agent that the driveway was not included in the sale. Appellant's claims against Ms. Walden for unjust

enrichment, breach of deed warranties, equitable estoppel, negligent misrepresentation, equitable indemnity and contract rescission were properly dismissed by the trial court.

4. *Rescission is not an appropriate remedy and was properly denied.*

Rescission must be claimed promptly upon discovery of facts warranting such extraordinary relief. *Bayley v. Lewis*, 39 Wn.2d 464, 469 (1951). Before a party can be granted rescission, he must not only show that the other party is at fault, but that he, himself, is without fault, for the law permits no one to take advantage of his own wrong to terminate a contract which he has knowingly and voluntarily made. *Thomas v. McCue*, 19 Wash. 287, 293, 53 P. 161, 163 (1898).

The *Thomas* Court goes on to state:

[W]here one party to a contract intends to rescind it on account of a breach of it by the other, he must elect to do so speedily on the discovery of such breach. Delay in rescission is evidence of a waiver of the misconduct of the other party, and is itself deemed an election to treat the contract as valid and binding. The rule deduced from the authorities in relation to rescission is . . . as follows: Where a party intends to abandon or rescind a contract on the ground of a violation of it by the other, he must do so promptly and decidedly on the first information of such breach. If, with full knowledge, or with sufficient notice or means of knowledge of his rights and of all the material facts, he lies by for a considerable time, or abstains from impeaching the transaction, so that the other

party is induced to suppose that it is recognized, this will be an acquiescence, and the transaction, although originally impeachable, ceases to become so in equity.

*Id. at 293-94* (internal quotations omitted).

Appellant claims that rescission is appropriate where the seller misrepresented boundaries, or fraudulently failed to disclose material facts which, when undisclosed, induced purchasers to buy the properties. That is not this case here. Ms. Walden never made any statement that the driveway belonged to her. In fact, Ms. Walden communicated to the Appellant, before closing, that the Driveway was not included. Ms. Walden never spoke to the Appellant.

Appellant utterly failed to offer any evidence to show that Ms. Walden was a bad actor or committed fraud, as they must do to be awarded such an extraordinary remedy. Ms. Walden did not conceal anything. She did not act negligently, or dishonestly. Appellant failed to conduct even the simplest investigation into the property they were purchasing, despite being told to do so and that the Driveway was not part of the sale.

Rescission was properly denied.

5. *Defendant Lorraine Walden is entitled to be awarded her reasonable attorney fees and costs in this action.*

The Purchase and Sale Agreement contains a clause entitling the prevailing party to an award of that party's reasonable attorney fees and costs.

RCW 4.84.330 provides:

In any action on a contract . . . where such contract or lease specifically provides that attorneys' fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the *prevailing party*, whether he or she is the party specified in the contract or lease or not, *shall* be entitled to reasonable attorneys' fees in addition to costs and necessary disbursements.

Lorraine Walden is the prevailing party. All of Appellant's claims against her were dismissed with prejudice. She is entitled to an award of her attorneys' fees and costs.

Appellant's rescission claim could not proceed until resolution of each of the additional claims brought against Ms. Walden. The defense of each claim against Ms. Walden was so inextricably intertwined with the rescission claim that it would be unreasonable to apportion fees to defend the rescission claim from

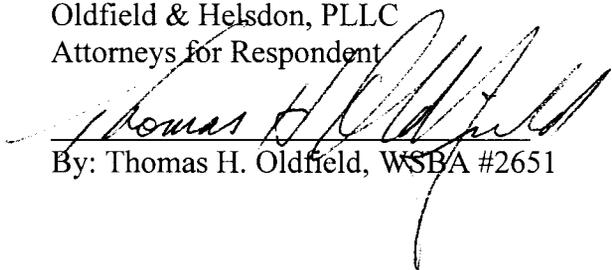
the defense of the other claims. *See Mehlenbacher v. DeMont*, 103 Wn. App. 240, 247, 11 P.3d 871 (2000), (holding that the Mehlenbachers could recover those fees and costs in the misrepresentation claim that were “inextricably intertwined” with their foreclosure claim); *see also CKP, Inc. v. GRS Const. Co.*, 63 Wn. App. 601, 621, 821 P.2d 63 (1991), (“on appeal the court held that the defense of the counterclaims was inextricably intertwined with CKP’s establishment of its lien rights”). Defending the Appellant’s rescission claim required Ms. Walden to defend each of the other claims brought by Appellant to defeat the rescission claim. The trial court should have awarded Ms. Walden her total attorney fees.

### CONCLUSION

The Judgments of the trial court should be affirmed.

Respectfully Submitted,

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