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DIVISION II

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STATE OF WASHINGTON
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No. 37143-0-II

**DIVISION II, COURT OF APPEALS
OF THE STATE OF WASHINGTON**

EARL E. YATES,

Appellant

v.

JANE C. ELLIS,

Respondent

**ON APPEAL FROM JEFFERSON COUNTY SUPERIOR COURT
(HON. CRADDOCK D. VERSER)
JEFFERSON COUNTY SUPERIOR COURT #04-2-00149-7**

OPENING BRIEF OF RESPONDENT JANE ELLIS

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I.

COUNTER STATEMENT OF ISSUE

This is a lawsuit in which Appellant Earl Yates (“Yates”) seeks reimbursement for funds and labor he allegedly expended on behalf of Respondent Jane Ellis (“Ellis”). The evidence establishes that Yates’ claims accrued more than three years before the date that he filed his lawsuit with the Jefferson County Superior Court. Under these circumstances, under RCW 4.16.080(3) and controlling case law, are Yates’ claims barred by the statute of limitations?

II.

COUNTER STATEMENT OF FACTS

Jane Ellis is a single woman, residing in Jefferson County. CP 37, lines 14-15. In 1991, Ms. Ellis purchased a parcel of waterfront property outside Quilcene. CP 38, lines 13-14. Her purpose was to obtain property on which to retire. CP 39, lines 15-19.

Respondent Earl Yates is an attorney licensed to practice law in the State of Washington. CP 19, lines 15-17. Yates maintained a general law practice that included real estate work. CP 17, lines 5-22. For example, he represented real estate clients involved with home sales and rental properties. CP 18, lines 12-21. In representing these clients he provided advice on statute of frauds issues. CP 19, lines 4-6. In 1998, Yates was

Ms. Ellis' attorney. See, e.g., CP 31, lines 3-17; CP 32, lines 7-24 (providing that Yates prepared legal documents, litigation defense and estate planning documentation for Ms. Ellis). He also was her friend. See CP 24 through CP 27.

Attorney Yates asserts that in January or February, 1998, his client, Ms. Ellis, made an oral promise to give him one-half of her interest in her Quilcene retirement property. Attorney Yates states that this promise was made as follows:

Q. Mr. Yates, can you tell me when defendant made this promise?

A. It would have been the first part of 1998, probably January, February. We were watching Dan Morger, who is the local contractor. He had his backhoe in the center of the footprint. He had cleared the footprint, and the dirt was piled upon the side, and we were watching him, and she brought the subject up. She said, "You know, this is your project too." She said, "I want you involved." And I said, "Well, I don't really think that's a good idea because I'm concerned about my health." And she said, "Oh, that won't be a problem." She said, "I want you to be involved and I'll give you a half-interest in the property." So that's where it sat.

CP 14, line 16 through CP 15, line 6.¹ This was the only time she ever allegedly made this statement. CP 16, lines 11-16 ("[s]he didn't ever say,

¹ Ms. Ellis acknowledges Yates' assertion of this purported "contract" only for purposes of summary judgment. She understood that, consistent with their long history of mutual giving, the monies paid, and
(continued . . .)

‘I promise to give you a half interest’ other than that first conversation in early 1998.”).

Yates made payments on Ms. Ellis’ behalf for some of the construction costs for her Quilcene home in 1998 and 1999. CP 34-35. Beginning in 1999, Yates suddenly began demanding that Ms. Ellis transfer a one-half interest in her retirement property to him:

“Q. So there were many demands made between 1999 and May 15, 2001. Is that your testimony?

A. Yes.”

CP 21, lines 4-6. From 1999, these demands for performance by the tender of a quit claim deed were made “so many times that [Yates] can’t recall any specific dates.” CP 20, line 18 through CP 21, line 3. Yates testified at

(. . . continued)

labor performed, by Yates on her home to be gifts. CP 40, line 24, through CP 41, line 8. During the course of their friendship, Yates and Ms. Ellis would exchange gifts. CP 24, lines 22-24. For instance, Ms. Ellis gave Mr. Yates a car. CP 24, line 25 through CP 25, line 4. She also freely gave her time to Mr. Yates. Her efforts included work on Mr. Yates’ rental home in Ballard, and performing painting and other maintenance work around his home, all without pay. CP 26, lines 8-13; CP 28, lines 2-7. Ms. Ellis also provided support and assistance to Yates following a bypass operation in 1998. CP 28, line 24 through CP 29, line 16. In another example, at attorney Yates’ request, Ms. Ellis helped stain the outside of Yates’ brother’s home in Belfair. CP 30, lines 10-12. All of these efforts were gifts. Yates testified that he and Ms. Ellis “would do things mutually for each other, and I don’t think there was any thought of getting paid.” CP 27, lines 18-20. Yates concedes that he freely gave time and money to Ms. Ellis for her project without any expectation of repayment up to early 1998. Yates’ Opening Brief, at 3.

deposition that Ms. Ellis, on every occasion a demand was made, refused to give a quit claim deed:

“Q. And Ms. Ellis had refused to give you a Quit Claim Deed on every occasion when you had demanded the Deed; isn’t that correct?

A. The result of it was that, yes. I didn’t get a Quit Claim Deed.”

CP 21, lines 7-11. Yates testified that the cycle of demands and rejections was so intense that it would send Ms. Ellis into crying fits. CP 20, lines 2-13. At no point did attorney Yates suggest to his client that she seek independent legal counsel before meeting his demand to sign over a one-half interest in her valuable retirement home. CP 33, lines 1-12.

Yates made no payments on behalf of Ms. Ellis in 2000. CP 35. The last documented payment that is subject of this lawsuit was made on January 10, 2001, in the sum of \$100.00. CP 35. Yates filed his lawsuit for unjust enrichment and reimbursement on May 13, 2004, well beyond three years after his final January, 2001, payment on behalf of Ms. Ellis. CP 35; Jefferson County Superior Court date stamp on Complaint, CP 1.

III.

RESPONSE TO APPELLANT’S STATEMENT OF THE CASE

Throughout his statement of the case, Yates paints a picture of the situation at the Quilcene home that is a distortion of the facts. While the tainted factual assertions, in the main, are not relevant to the issues before the

Court, Yates' assertions regarding the Quilcene property and the interactions between the parties require clarification.

A. Yates' Factual Assertions Regarding Ms. Ellis' Quilcene Retirement Property are Inconsistent with the Record.

In his opening brief, Yates' factual dissertation goes to great length to suggest a meretricious relationship and that the Quilcene property was being built to provide a "joint future" for himself and Ms. Ellis. Yates' Opening Brief, at 2-7; see CP 74. This assertion cannot be reconciled with the undisputed facts. Yates and Ms. Ellis had known each other for an extended time. However, all romantic aspects of their interactions ended long before the alleged promise to transfer an interest in the Quilcene property. Yates testified in his deposition in no uncertain terms that the romantic relationship between him and Ms. Ellis had ended in about 1987. CP 102, lines 12-24. In no sense did Yates and Ms. Ellis live as a "couple". For example, when Yates and Ms. Ellis were on occasion staying in a separate house in the Bridgehaven area, Yates would occupy the downstairs area and Ms. Ellis stayed in the upstairs portion of the house. CP 96. Yates and Ms. Ellis did not share a bed or a bedroom at any time relevant to the construction of the Quilcene home. CP 96.

The suggestion that Yates and Ms. Ellis lived continuously in a trailer on the Quilcene property while the construction was underway is

untrue and not supported by the record. Yates' Opening Brief, at 2. This distortion is continued in the opening brief with the suggestion that the parties were residing together in a permanent residence during the course of construction. Id. at 4. While they occasionally stayed at the same location, the record does not reflect that they resided together and as is clear that there was no romantic relationship between them. CP 102, lines 12-24.

Yates asserts that he intended to live at Ms. Ellis' Quilcene home. Yates' Opening Brief, at 6. The Quilcene home being built by Ms. Ellis, however, had one bedroom. CP 96. Yates' characterization that the home was being built for a "joint future" cannot be made to fit with the fact that there was no place for him to live at the Quilcene house. Id. He asserts that the "smallest detail" of the home was focused on his residing there. Yates' Opening Brief, at 7. Apparently the "smallest detail" did not include a place to live.

B. Yates' Factual Assertions of Demands for a Quit Claim Deed are a Strained Interpretation of the Record.

In his opening brief, Yates attempts to "soften" the demands he made for transfer of the Quilcene property prior to May, 2001. He suggests that he deferred from demanding performance "[b]ecause of his concern for the Defendant's feelings...." Yates' Opening Brief, at 5. Yet the record is clear that Yates badgered and demanded the quit claim deed on a constant basis starting in 1999. Yates clearly and unequivocally testified that he made

countless and continuous demands on Ms. Ellis to sign a quit claim deed well before the May 15, 2001, date he asserts to be the date of accrual in his pleadings:

- Q. You said you've made numerous demands for her to give you a quit claim deed, and that she never gave you a quit claim deed; isn't that correct?
- A. That's correct.
- Q. So I'm trying to pin down when those demands were. Were the demands made in 2000?
- A. Yeah. But you referred specifically to winter of 2001.
- Q. Right. So January, February, March time frame of 2001, had you made demand for a quit claim deed?
- A. I may have. But if I did, I made it so many times that I can't recall any specific dates.
- Q. So there were many demands made between 1999 and May 15th of 2001. Is that your testimony?
- A. Yes.
- Q. And Ms. Ellis had refused to give you a quit claim deed on every occasion when you had demanded the deed; isn't that correct?
- A. The result of it was that, yes. I didn't get a quit claim deed.

CP 20, line 9 through CP 21, line 11. Far from deferring from making demands out of concern for Ms. Ellis' feelings, there were so many demands that he was unable to recall any specific demand dates. Id.

C. Yates' Assertions regarding the Weekend Before May 15, 2001, Distort the Record.

Yates' Statement of the Case at pages 5 through 7 is more argument over what allegedly occurred on May 15, 2001, than a recitation of facts. For example, Yates has asserted in his opening brief that he was working on the Quilcene property right up to May 15, 2001. Yates' Opening Brief, at pages 5-7. This general conclusory statement needs to be reviewed in the context of his very specific sworn deposition testimony. He unequivocally testified that on the Friday before May 15, 2001, he had made one of his numerous demands for a quit claim deed, and that he did not work on the Quilcene home after the Friday before May 15:

May 12 was a Friday. We were staying at the Robin Lane property. I had been over working on the log home. I came home and was sitting the living room when she came home from working at an art supply store, I think, in Silverdale. And that's when I brought the subject up. And that's when she started crying and talking about too much pressure and all of that. That's when I packed up my belongings. Not everything, but I took the immediate things I had brought, and that's when I left. And I spent the weekend preparing this document, Exhibit No. 3. [CP 35].

And I had told her when I was leaving, I said, "Now, I'll work up what I've put into the log home." And then I said, "If you're going to be over on the log home on Monday, I'll come over."

And I came over with my truck, driving my truck, and we had the conversation. And that's when she ordered me off the property, told me to get my belongings, get off the property.

CP 103, line 20 through CP 104, line 13 (reference to record inserted for ease of reference).

Yates's deposition testimony is that he brought this matter to a head on Friday, May 12.² When Ms. Ellis again refused to sign a quit claim deed, he left the house, stating that he now would "work up" what he was owed for his payments toward the Quilcene house. Id. Yates understood that Ms. Ellis would not sign a quit claim deed by the Friday before May 15, and he now would be demanding – not a quit claim deed – but reimbursement.

Yates asserts that he brought this matter to a head and wanted finality on the Friday before May 15, 2001. No money was spent by Yates in 2000 on the Quilcene home, and only \$100.00 was spent in January, 2001. CP 35 and CP 97. The detailed deposition testimony establishes no work was done by Yates after the Friday before May 15 (May 11, 2001). CP 103. Having spent the weekend away from the Quilcene property, he returned on Monday to demand reimbursement. Id.

² The Friday in this period of time of 2001 actually is on May 11, not May 12.

IV.
ARGUMENT

A. Standard of Review.

The Court of Appeals reviews summary judgment orders de novo, engaging in the same inquiry as the trial court. Tornetta v. Allstate Ins. Co., 94 Wn.App 803, 808, 973 P.2d 8 (1999). Rule 56 of the Civil Rules of the Superior Court provides that summary judgment:

... shall be rendered forthwith when the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact as to any matter of law.

The entire purpose of a CR 56 summary judgment hearing is “to examine the sufficiency of the evidence behind the Plaintiff’s formal allegations in the hope of avoiding unnecessary trials where no genuine issue as to a material fact exists.” Zobrist v. Culp, 18 Wn.App. 622, 637, 570 P.2d 147 (1977). Pursuant to CR 56, the moving party bears the initial burden of showing the absence of an issue of material fact. If the moving party is a Defendant and meets this initial showing, then the inquiry shifts to the party with the burden of proof at trial, the Plaintiff. Young v. Key Pharmaceuticals, Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989). If, at this point, the Plaintiff fails to make a showing sufficient to establish the existence of an element essential to that party’s case and on which that party

will bear the burden of proof at trial, then the trial court should grant the motion. Id. at 225.

Plaintiff's case must be based on more than mere speculation and conjecture. Kristjanson v. City of Seattle, 25 Wn.App. 324, 326, 606 P.2d 283 (1980); Daugert v. Pappas, 104 Wn.2d 254, 260, 704 P.2d 600 (1985). Ultimate facts, conclusions of fact, or conclusory statements of fact are insufficient to raise a question of fact. Grimwood v. University of Puget Sound, Inc., 110 Wn.2d 355, 359-360, 753 P.2d 517 (1988). Mere allegations are not sufficient to avoid summary judgment; specific facts must show an issue of material fact. Dicomes v. State, 113 Wn.2d 612, 631, 782 P.2d 1002 (1989). In this case, there are no material issues of fact in dispute and the Superior Court's entry of summary judgment should be affirmed as a matter of law.

B. Yates' Claim for Reimbursement Accrued at the Time of Payment and is Barred by the Statute of Limitations.

Washington's statutes of limitation are set forth in RCW Chapter 4.16. The statutory scheme outlines the limitation periods for various types of actions. RCW 4.16.080 provides a list of actions limited to three years. Included within the three year limitation period is:

[A]n action upon a contract or liability, express or implied, which is not in writing, and does not arise out of any written instrument. ...

RCW 4.16.080(3).

Washington's appellate courts have imposed this three-year statute of limitations on claims for unjust enrichment. For example, in Halver v. Welle, 44 Wn.2d 288, 266 P.2d 1053 (1954), the Supreme Court examined a situation in which a claim for reimbursement of an overpayment on a contract was at issue. The Court held that the case was a claim for unjust enrichment. Id., 44 Wn.2d at 295. While the Court found that there may have been an implied liability associated with a requirement to repay "an unjust and unmerited enrichment", the Court held that "unfortunately for appellants, such an action in this case is barred by the three-year statute of limitations." Id. See also, Seattle Professional Engineering Employees Ass'n v. Boeing Co., 139 Wn.2d 824, 838, 991 P.2d 1126 (2000) (holding "that Washington case law has applied a three-year statute of limitations to claims involving unjust enrichment" under RCW 4.16.080(3)).

Yates mischaracterizes Ms. Ellis' summary judgment motion. Yates' Opening Brief, at 12 – 13. Her assertion is quite simple. Yates' claim for unjust enrichment accrued when the payment was made or labor performed. Having filed his lawsuit more than three years after these events, his claim is barred under RCW 4.16.080(3).

In the case before this Court, Plaintiff seeks reimbursement from Defendant for the funds and labor he asserts he expended on her home. During the course of his deposition he was asked to provide a summary of

these asserted expenses, and identified Exhibit 4 to his deposition (CP34-35) as his list of alleged payments. The second page of the Exhibit outlines funds “Paid Out for Log Home”. With a single exception, all alleged expenditures that have a date associated with the asserted payment were made in 1998 and/or 1999. No payments were made in 2000. A single payment of \$100.00 is identified as having occurred in January, 2001. As set forth, supra, at pages 8 - 10, no work was performed after May 11, 2008.

Yates concedes that claims for unjust enrichment carry a three-year statute of limitations and that the cause of action for unjust enrichment begins to run “at such time as the Plaintiff has the right to apply to the Court for relief.” Yates’ Opening Brief at 11 (emphasis added); see Eckert v. Skagit Corp., 20 Wn.App. 849, 851, 583 P.2d 1239 (1978).

Mr. Yates made his last payment on behalf of Ms. Ellis on January 10, 2001, and performed no labor at the Quilcene home after May 11, 2001. Here, all of the elements of unjust enrichment as outlined by Yates in his opening brief at pages 10 and 11 were susceptible to proof on the date that Yates made any payment or performed any labor. He had a commensurate right to seek judicial relief. More than three years having passed before the filing of his lawsuit, Yates’ claims are time barred.

C. **Alternatively, Yates' Claim Accrued When Ms. Ellis Failed to Tender a Quit Claim Deed as Demanded.**

Yates' attempts to enlarge the relevant statute of limitations by arguing that the asserted oral contract precludes the accrual of one of the three elements of his unjust enrichment claim.³ He argues that he was unsure of his right to sue until May 15, 2001. However, Washington courts have held that "traditionally, a statute of limitations begins to run upon the accrual of a cause of action regardless of the plaintiff's knowledge of the

³ Not only did this purported "contract" violate Washington's Statute of Frauds, RCW 64.04.010, but it also violated the Rules of Professional Responsibility which applied to this alleged agreement. RPC 1.8 requires a lawyer knowingly acquiring an ownership interest in a client's property to provide the client with a writing outlining the essential terms of the agreement, advising the client in writing of the desirability of seeking independent legal counsel and providing a reasonable opportunity to do so. See RPC 1.8. Washington courts have held that purported contracts such as the one asserted by Yates are "prima facie fraudulent." Valley/50th Ave., L.L.C. v. Stewart, 159 Wn.2d 736, 745, 153 P.3d 186, 190 (2007). The Supreme Court in Valley/50th Ave., set forth that, to overcome the finding of a fraudulent contract, the attorney must establish (1) there was no undue influence, (2) he or she gave the client the exact same information and advice as would have been given by a disinterested attorney, and (3) the client would receive no greater benefit had he or she dealt with a stranger. Id. There also must be a full opportunity to consult with independent counsel. Id. Not only did attorney Yates fail to meet his ethical responsibilities, in no sense can the terms Yates wished to impose on his client be construed as fair or reasonable, and no opportunity was given to consult with independent counsel. CP 33, lines 1-12. Here, Yates is seeking to use a prima facie fraudulent "contract" to bootstrap his way into an expansion of the limitations period.

right to sue. . . . Moreover, exceptions to statutes of limitations ‘are strictly construed’, and cannot be enlarged for the considerations of ‘hardship or inconvenience’”. O’Neil v. Estate of Murtha, 89 Wn.App. 67, 73, 947 P.2d 1252 (1997) (citing Rushlight v. McLain, 28 Wn.2d 189, 199, 182 P.2d 62 (1947)).

In Eckert v. Skagit Court, supra, the Court considered a claim for unjust enrichment brought by an employee against an employer. In Eckert, the employee, who had developed a special device, sought recovery for 18 years worth of use associated with the device by the employer. Id., 20 Wn.App. at 850. The Court upheld the summary dismissal of the Eckert’s unjust enrichment claims. The Court found that the company had been using the device for a period of years, and that it was clear to Mr. Eckert that he had not been compensated for such use during the “first three years of Skagit’s use of Eckert’s invention.” Id., at 851. The “breach” of any implied agreement to pay for the use of the device was matured. Given that the fact that he had not been compensated was susceptible to proof, the cause of action accrued at the three-year point.

Similarly, in Hart v. Clark County, 52 Wn.App 113, 758 P.2d 515 (1988), an appellant sought to overturn a summary judgment in which the superior court had barred his claims for unjust enrichment. He asserted that the superior court erred in concluding that statute of limitations began to run

at the time he had made payment for taxes. He argued that, instead, the statute should not begin to run until parties discover that they have a cause of action. Id., 52 Wn.App at 117. The Court summarily rejected this argument, holding that the right to relief accrued when the original payments were made. The Court held that “the payment gave them the right to bring an action . . . based on theories of an implied contract or unjust enrichment.” Id., 52 Wn.App. at 118.

Just as was the case in Eckert, Mr. Yates’ claims are barred by the statute of limitations. As in Eckert, the cause of action accrued when Mr. Yates had a right to apply to the Court for relief. Here, he asserts that he is entitled to relief because Ms. Ellis failed to tender a quit claim deed. Just as in Eckert, he was clearly aware that he had not received the quit claim deed in 1998 through the early days of 2001. He acknowledges in his deposition that he repeatedly and continuously demanded the quit claim deed starting in 1998. As in Eckert, the fact that he had not received the quit claim deed was susceptible to proof in 1999, and the cause of action accordingly accrued no later than that time. His demands demonstrate that Yates considered Ms. Ellis to be retaining benefits under inequitable circumstances.

Assuming, for purposes of this motion, that in 1998 the passing reference to convey one-half of her property to Yates occurred, Ms. Ellis’ years of refusals to meet a demand for a quit claim deed shows that a

“breach” of this purported agreement occurred well before May, 2001. The gravamen of Yates’ opening brief is that he understood the purported “contract” with Ms. Ellis to require her to issue a quit claim deed to him beginning at least in 1999. Yates was Ms. Ellis’ attorney. Surely, he cannot argue that he was demanding that his client, Ms. Ellis, deliver a quit claim deed to him before she was contractually obligated to do so. The numerous and uncountable demands for performance by Ms. Ellis simply cannot be reconciled with his position that she did not breach the “contract” until some time in May, 2001.

Yates aggressively pursued his “right” to demand performance by Ms. Ellis starting in 1999. He would have a commensurate right to seek judicial intervention in 1999. In other words, he had the right to apply to the Court for relief. The statute of limitations would begin to run at this time. See Eckert, supra, 20 Wn.App. at 851. Mr. Yates cannot have it both ways – he cannot have a right to demand contractual performance by Ms. Ellis while at the same time avoid the “accrual” of his statute of limitations period.

D. Yates’ Actions Demonstrate Claim Accrual no later than May 11, 2001.

There is no question that it was clear to Yates that Ms. Ellis would not provide him with a quit claim deed at least by the Friday before May 15. He testified that, as of this May 11 date, he was no longer going to be demanding a quit claim deed. Instead, he now was going to “work up what

I've into the log home." CP 104, lines 6-9. After the weekend, instead of demanding a quit claim deed, he made a demand on Ms. Ellis to pay him for what he alleged he had put into the property.

In other words, the purported contract between Yates and Ms. Ellis was to give him a quit claim deed for one-half of her property. As of Friday, May 11, Mr. Yates was under no illusion that Ms. Ellis was going to give him the quit claim deed. Accordingly, thereafter his demand was for payment, not a deed. The presence of any "inequity" in retaining the benefit of payments or labor was certainly apparent by such time.

E. The Case Law Offered by Yates Does not Address the Issues Before the Court.

1. **This is not an "Anticipatory Breach" Case.** The first set of cases offered by Yates in his opening brief, Wallace⁴ and Lovric⁵, address matters involving anticipatory breach of a contract. The questions answered in these cases in no way relate to the statute of limitations issues here. The focus of Wallace and Lovric, instead, is whether performance by one party is excused by the anticipatory breach of the agreement by the other party. Wallace, 124 Wn.2d at 899; Lovric, 18 Wn.App. at 279. In other words, if the time for performance has not yet occurred, does the second party to a

⁴ Wallace Real Estate Inv., Inc. v. Groves, 124 Wn.2d 881, 881 P.2d 1010 (1994).

⁵ Lovric v. Dunatov, 18 Wn.App. 274, 567 P.2d 678 (1977).

contract have to fulfill its contract obligation in the face of a repudiation of the first party to the contract.

These are not the facts present at bar. Here, Yates asserts that he performed his part of the contract by providing money and services, and asserts Ms. Ellis breached the agreement to transfer title to her Quilcene home. This is not a case in which Yates seeks to excuse performance on his part as was the circumstance in Wallace and Lovric.

Further, the undisputed facts are that Yates understood and intended that the time for performance by Ms. Ellis was at least in 1999 - - the time when attorney Yates began demanding the delivery of his client's quit claim deed. The "anticipatory breach" line of cases proffered by Yates does not change the fact that by 1999 Yates believed that Ms. Ellis was retaining the "benefit" of his money and labor under circumstances which would make it inequitable for her to do so.

2. Yates Misinterprets Washington Partnership Law. The "partnership" cases offered by Yates in support of his "accrual" position also are of no assistance in deciding this matter. The first case, Laue v. Estate of Elder, 106 Wn.App. 699, 25 P.3d 1032 (2001), simply does not stand for the "accrual" proposition asserted by Yates. The court in Laue set forth that claims associated with distribution of assets in a dissolved partnership are subject to a three-year statute of limitations. Id., 106 Wn.App. at 710-11.

The case of Malnar v. Carlson, 128 Wn.2d 521, 910 P.2d 455 (1996) provides that actions for an accounting of partnership affairs accrues at the dissolution of the partnership.

Neither case suggests or holds that a partner has “no right of action” until the dissolution of the partnership. In fact, this assertion is completely contrary to Washington law. Under Washington law, a partner has a cause of action against his partners and/or the partnership at any time. The Revised Uniform Partnership Act §405 was adopted by Washington in its entirety as RCW 25.05.170. The Act and statute specifically provide that a partner may maintain an action against the partnership or another partner for legal or equitable relief, with or without an accounting as to partnership business, to enforce the partner’s rights against another partner or under the partnership agreement. RCW 25.05.170(2)(a).

The Official Comments to Section 405 of the Revised Uniform Partnership Act outline the clear right of one partner to bring an action against another partner during the course of the partnership:

[The Act] provides that, during the term of the partnership, partners may maintain a variety of legal or equitable actions. Partners should have access to the courts during the term of the partnership to resolve claims against the partnership and the other partners, leaving broad judicial discretion to fashion appropriate remedies... Claims barred by a statute of limitations are not revived by reason of the partner’s right to an accounting upon dissolution. The effect of [the Act] is to compel partners to litigate their claims during the life of the partnership or risk losing them.

Uniform Partnership Act, Rev., §405 (2007 ed.) (Official Comments, emphasis added); see Fike v. Ruger, 754 A.2d 254, 263 – 64 (Del. Ch. 1999) (under Revised Uniform Partnership Act a cause of action arising during the life of a partnership that is barred by statute of limitations is not revived by a dissolution).

Washington law bars causes of action by one partner against another partner for failure to bring a timely case against the partner and/or the partnership before the partnership is dissolved. RCW 25.05.170(3). Contrary to the assertion made by Yates, claims in a partnership for breach of agreements accrue during the course of the partnership and not on dissolution.

In this case, Mr. Yates asserts that he and Ms. Ellis had an “agreement” that she would transfer one-half interest in her retirement home to him. Application of partnership law, RCW 25.05.170(2)(a), would provide an immediate right to assert a cause of action for breach of such agreement. There is a right to proceed at the time of any claim of breach of the partnership agreement.

Contrary to the argument asserted in his opening brief, Yates testified to a long and continuous history of refusals by Ms. Ellis to meet demands he made for conveyance of her retirement property. This occurred “so many times that [he] can’t recall any specific dates.” CP 21. Here, just

as under partnership law, Yates had the legal “right” to seek redress in the courts at such time as Ms. Ellis “breached” the purported agreement. Based on Yates’ testimony, this happened at least by 1999.

V.

SUMMARY

Mr. Yates concedes in his materials that his claims are subject to a three-year statute of limitations. He made no payments after January 10, 2001, and performed no labor after May 11, 2001. And he unequivocally acknowledged that he had demanded on countless occasions that Ms. Ellis transfer a one-half interest in her property to him between 1999 and 2001. Yates had a right to seek judicial relief and his claims “accrued” more than three years before he filed suit on May 13, 2004. Accordingly, his claims for unjust enrichment are barred, and the Court is asked to affirm the order of summary judgment by the Jefferson County Superior Court.

RESPECTFULLY SUBMITTED this 30th day of August, 2008.

By



Richard B. Shattuck

WSBA No. 15588

Attorney for Respondent, Jane Ellis

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STATE OF WASHINGTON
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No. 37143-0-II

DIVISION II, COURT OF APPEALS
OF THE STATE OF WASHINGTON

EARL E. YATES,)
)
 Appellant,)
)
 vs.)
)
 JANE C. ELLIS,)
)
 Respondent.)

**DECLARATION OF
SERVICE BY MAIL**

DECLARATION

1. DIANE SHROPSHIRE, under penalty of perjury under the laws of the State of Washington, declares and states as follows:
2. On the 2nd day of September, 2008, I served the Opening Brief of Respondent Jane Ellis by mailing postage pre-paid in Silverdale, Washington, to the following:

John Frawley
Attorney at Law
5800 236th Street SW
Mountlake Terrace, WA 98043

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

Signed this 2 day of September, 2008, at Silverdale, Washington.


DIANE SHROPSHIRE