

Case # 35839-5-II

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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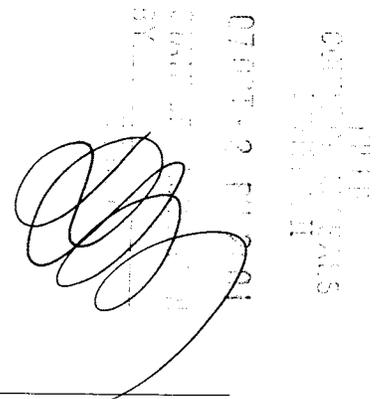
MARK FARHOOD, et al.,

*Appellant,*

v.

JILL D. ALLYN, et al.,

*Respondent.*



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REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

RE-STATEMENT OF THE CASE .....1

ARGUMENT .....2

    I. Standard of Review.....2

    II. None of Plaintiffs’ Claims are Barred by the Applicable Statute of Limitations Because the Wrongful Acts Were Committed Within Three Years of the Commencement of the Action. .....2

        a. The period of limitation is three years.. .....2

        b. All the current causes of action accrued within three years of commencement of this litigation.....2

            i-ii. Introduction .....2

            iii. The fact that Allyn damaged plaintiff in 1999 does not preclude plaintiffs for suing from new new damages arising from new acts undertaken in 2002.....4

            iv. Allyn took steps to execute on the property; these steps were not the inevitable result of the wrongful attachment. ....6

            v. Labels do matter when they reference different torts.....10

            vi. The continuing cause of action doctrine applies by analogy.....12

            vii. The statute of limitations was tolled by necessary proceedings in the Court of Appeals, without which the present case would not have been possible. ....13

    III. Application of judicial estoppel is not appropriate in this case......16

CONCLUSION..... 17

## TABLE OF AUTHORITIES

### CASES

<u>1000 Virginia Ltd. Partnership v. Vertecs Corp.</u> , 158 Wn.2d 566, 146 P.3d 423 (2006) .....	4-5
<u>Burnett v. New York Cent. R.R.</u> , 380 U.S. 424, 13 L. Ed. 2d 941, 85 S. Ct. 1050 (1965).....	16
<u>Connecticut v. Doehr</u> , 501 U.S. 1, 15, 111 S.Ct. 2105 (1991).....	5, 8, 10
<u>Elliott v. Peterson</u> , 92 Wn.2d 586, 599 P.2d 1282 (1979).....	14, 15, 16
<u>Gillis v. F &amp; A Enterprises</u> , 934 P.2d 1253, 1255 (Wyo.,1997) .....	13
<u>Hadley v. Cowan</u> , 60 Wn. App. 433, 804 P.2d 1271 (1991).....	11
<u>Haslett v. Planck</u> , 166 P.3d 866 (Wn. App. 09/11/2007) .....	16, 17
<u>Robinson v. City of Seattle</u> , 119 Wn.2d 34, 830 P.2d 318 (1992) .....	16
<u>Rose v. Rinaldi</u> , 654 F.2d 546 (9th Cir. 1981) .....	6
<u>Schuldes v. National Sur. Corp.</u> 27 Ariz.App. 611, 557 P.2d 543 (1976) .....	8
<u>Shew v. Coon Bay Loafers, Inc.</u> , 76 Wn.2d 40, 51, 455 P.2d 359 (1969) .....	6
<u>Stenberg v. Pacific Power &amp; Light Co.</u> , 104 Wn.2d 710, 709 P.2d 793 (1985) .....	6
<u>In re Use of the Surface Waters of the Yakima River Drainage Basin</u> , 112 Wn. App. 729, 51 P.3d 800 (2002).....	11
<u>Van de Vanter v. Davis</u> , 23 Wash. 693, 63 P. 555 (1901) .....	6, 7, 8, 9

**STATUTES AND RULES**

RCW 6.25.240 .....8  
RCW 6.17.110 *et. seq.* .....9  
CR 18(a).....7

## **RE-STATEMENT OF THE CASE**

Asher (not a party herein) was the original owner of the property that is the subject of this lawsuit. Following a 1998 traffic accident in which he was driving and his passenger died, Asher faced both criminal charges and a civil lawsuit for wrongful death.

In August of 1999, Asher sold the property to the plaintiffs herein ("Farhood") subject to an attachment that had been obtained by the plaintiff ("Allyn") in the wrongful death lawsuit against Asher.

In August of 2001, Farhood filed a quiet title action against Allyn in Clark County. Allyn prevailed on summary judgment and Farhood appealed. While that appeal was pending, Allyn obtained a judgment against Asher and, in February, 2002, executed on the property that Asher had sold to Farhood.

Allyn purchased the property at the execution sale and entered into possession in August of 2002. She remained in possession until May of 2005, almost two years after this Court

issued its September, 2003 ruling that title be quieted in Farhood.

This instant action was filed in January of 2005.

## ARGUMENT

For the convenience of the Court, this Reply generally tracks the outline of the argument presented in Respondent's brief.

### I. Standard of Review

The parties agree that the standard of review is *de novo*.

### II. None of Plaintiffs' Claims are Barred by the Applicable Statute of Limitations Because the Wrongful Acts Were Committed Within Three Years of the Commencement of the Action.

#### a. The period of limitation is three years.

The parties agree that the applicable statutes of limitation bar the types of actions brought by plaintiff after three years.

#### b. All the current causes of action accrued within three years of commencement of this litigation.

##### i-ii. Introduction.

Respondent Allyn makes a telling admission. She states: "A cause of action accrues when a party has the right to apply to a court for relief . . . This date is most often the time of the act or omission in question." Br. of Resp., p. 8 (emphasis added, citations

omitted). Both parties, therefore, agree that this appeal addresses the question of when Allyn committed the torts for which Farhood seeks redress. Did the cause of action accrue in March, 1999, when Allyn obtained the wrongful writ of attachment, or did the cause accrue later—when she applied for a writ of execution (February 2002), when she purchased the property at the sheriff’s sale (August 2002) and when she wrongfully controlled the property and held its title (2002-2005)?

According to Respondent, because she damaged the plaintiffs by wrongfully attaching the property in 1999, the plaintiffs have no recourse for the later acts. On the most fundamental level, her argument makes little sense. Plaintiffs could not sue for the losses incurred by the physical appropriation of their property until the property was actually taken—such a claim would have been purely speculative. A wrongful attachment does not necessarily lead to a wrongful execution. Each requires the tort-feasor to undertake different acts. Had the Allyn not executed on the writ in 2002, then yes, the statute of limitations for her 1999 wrongful attachment would have run by March of 2002,

three years after she obtained the writ of attachment. *But Allyn did execute on the writ and take possession of the property* and those new acts gave rise to the new tort claims sued upon in January 2005.

**iii. The fact that Allyn damaged plaintiff in 1999 does not preclude plaintiffs for suing for new damages arising from new acts undertaken in 2002.**

Because the plaintiffs could have brought a claim for injuries resulting from the wrongful attachment that accrued in 1999, Allyn concludes that the wrongful attachment statute of limitations also bars subsequent torts that had not yet been performed. Even though, for example, the claim for conversion of the rents and profits of the property did not accrue until after defendants executed upon the property in 2002, Allyn argues that the statute of limitations began to run in 1999. If one were to state this as a rule, it might read as follows:

In disputes between plaintiffs and defendants touching upon real property, the first accrual of a claim has the effect of requiring plaintiffs to file any and all subsequent claims within the time allowed for pursuing the first claim, whether or not the first claim is pursued.

In other words, the statute of limitations acts as a statute of repose, destroying some claims even before they accrue. See, e.g., 1000

Virginia Limited Partnership v. Vertecs Corporation, 158 Wn.2d 566, 146 P.3d 423 (2006) (construction on real property subject to both statute of limitation and statute of repose).

Allyn seems to believe that because a wrongful writ of execution cannot be issued without a wrongful writ of attachment, one tort is equivalent to the other. Imagine that a trespasser stays on the property for a week, and on the last day steals a television. Could it be convincingly asserted that the statute of limitations for trespass applies to the subsequent conversion, merely because the conversion would have been impossible without the trespass? Following Allyn's logic, the two torts merge, and the earlier statute of limitation for trespass would bar an action for the conversion.

Allyn's argument is wholly inconsistent with the law. Wrongful attachment and wrongful execution are distinct torts. As explained in Farhood's opening brief, a suit for wrongful attachment addresses injuries such as the cloud on title, the impairment of the ability to sell or otherwise alienate the property, and the potential tainting of any credit rating. Connecticut v. Doehr, 501 U.S. 1, 11-12, 111 S.Ct. 2105 (1991). Wrongful execution,

on the other hand addresses actions that result in the actual physical seizure of property. Wrongful execution accrues at the moment of seizure. (Authorities cited at Br. of App., p. 12).

When there is uncertainty as to which statute of limitation governs, the longer statute will be applied. Stenberg v. Pacific Power & Light Co., 104 Wn.2d 710, 715, 709 P.2d 793 (1985) (citing Rose v. Rinaldi, 654 F.2d 546 (9th Cir. 1981); Shew v. Coon Bay Loafers, Inc., 76 Wn.2d 40, 51, 455 P.2d 359 (1969)).

**iv. Allyn took steps to execute on the property; these steps were not the inevitable result of the wrongful attachment.**

Allyn argues that "the damage alleged to stem from the writ of execution is... properly traced to the levy of the writ of attachment." Br. of Resp., p. 14. Her argument is based on RCW 6.25.240 and the 1901 case Van de Vanter v. Davis, 23 Wash. 693, 63 P. 555.

Van de Vanter is inapplicable. It involves the issue of whether or not a sheriff may proceed against an attachment surety bond for coverage where the sheriff had been sued for conversion

due to the sale of wrongfully attached personal property. The bond in question recited that the sheriff would be “indemnify[ied] and save[d] harmless... against all loss and liability which he... shall sustain... by reason of the attachment, seizing, levying, taking or retention by the said sheriff... under said attachment...” Van de Vanter, 23 Wash. at 694. Unsurprisingly, the Court held that the bond provided coverage for the sheriff.<sup>1</sup>

At best, Van de Vanter stands for the principle that because a lien of attachment continues on seized property until the lien is applied in satisfaction of judgment, an attachment lien is not destroyed or nullified by subsequent issuance of execution on judgment. Nowhere does it hold, as implied by Allyn, that a suit for wrongful execution is coextensive with a suit for wrongful attachment.

Indeed, such a result would be a historical impossibility given the fact that the tort of wrongful attachment only came into

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<sup>1</sup> Significantly, the attachment, levy and sale in Van de Vanter related to personal property (lumber), not real property.

existence as a result of modern case law which applied constitutional due process standards to liens obtained *ex parte* and holds that damage is suffered even before the property is taken. Doehr, 501 U.S. at 15, Br. of App., pp. 10-11. Before Doehr, a suit arising out of a wrongful pre-judgment attachment process accrued at the moment of physical seizure of the property. Schuldes v. National Sur. Corp. 27 Ariz.App. 611, 557 P.2d 543, 547 (1976), Br. of App., p. 12. In no way can Van de Vanter stand for the notion that because a plaintiff may (in present times) bring suit for wrongful attachment, the plaintiff may not also or alternatively bring suit for a wrongful execution, occurring years later. Only with Doehr did it become possible to bring a constitutional tort claim for the *ex parte* attachment process alone—and that is not Farhood's claim in this suit.

Allyn attempts to buttress her argument by asserting that Van de Vanter and RCW 6.24.240 state that execution "shall" be the method by which a judgment is satisfied where property has been attached. The argument suggests that execution is the inevitable result of attachment, and therefore damages arising from execution

are indistinguishable from damages arising from the wrongful attachment. The inference is incorrect. No judgment creditor, such as Allyn, is required to apply for a writ of execution. This is an additional act that the creditor may take pursuant to the procedures described in RCW 6.17.110 *et. seq.*.

Van de Vanter emphasizes the mandatory language of the 1901 attachment statute<sup>2</sup> because the sheriff, unlike a judgment creditor, is statutorily compelled to undertake certain steps if a creditor, (such as Allyn), successfully applies to a court for an order directing the sheriff to sell property. The mandatory language in the statute and Van de Vanter does not apply to the voluntary act of a judgment creditor who initiates the process.

Allyn was not in any way compelled to execute on the property. She did so at her own peril – especially in light of the fact that Farhood already had alerted her, with his 2001 quiet title action, to the infirmities of her prejudgment writ of attachment.

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<sup>2</sup> The language is quoted by Allyn at page 14 of her brief. It is the last sentence of the indented quote.

**v. Labels do matter when they reference different torts.**

Allyn argues that because the Court of Appeals found that an injury was complete upon the levy of the writ of attachment, there is no separate cause of action for wrongful execution. In its earlier decision, this Court did not address wrongful execution. It referenced the nascent injuries (first recognized in Doehr) caused by wrongful attachment, not the actual deprivation of property caused by execution.

Allyn is making, *sub silencio*, a novel and wholly unsupported legal argument. Although Allyn does not dispute that there exist causes of action for trespass, conversion, and wrongful execution that are distinct from wrongful attachment, she suggests that if Farhood had one cause of action against Allyn that is time-barred (the wrongful attachment), then all other causes of action that could have been brought by Farhood are also time-barred, even if they did not accrue until a later date.

Allyn's position is at odds with established rules of pleading. The Superior Court Civil Rules address the joinder of

claims:

A party asserting a claim to relief as an original claim, counterclaim, cross claim, or third party claim, may join, either as independent or as alternate claims, as many claims, legal, equitable, or maritime, as he has against an opposing party.

CR 18(a). The Washington Court of Appeals has held that joinder is permissive, not mandatory:

CR 18(a) permits (i.e., does not require) joinder of all claims. Thus, judgment on one claim does not preclude suit on another independent claim, even though the actions could have been joined.

Hadley v. Cowan, 60 Wn. App. 433, 441 n. 11, 804 P.2d 1271 (1991).

Allyn cites no authority for the result she urges in this case, *i.e.*, that a time-bar to one cause of action is a time-bar as to all causes of action between the parties. Authority is to the contrary:

While it is often said that a judgment is *res judicata* of every matter which could and should have been litigated in the action, this statement must not be understood to mean that a plaintiff must join every cause of action which is joinable when he brings a suit against a given defendant. CR 18(a) permits joinder of claims. It does not require such joinder.

In re Use of the Surface Waters of the Yakima River Drainage Basin,

112 Wn. App. 729, 51 P.3d 800 (2002).

Notably, Allyn nowhere disputes that plaintiffs have

pleaded causes of action that are recognized in law and supported by the facts of this case. Nowhere does she contest that the facts support causes of action for wrongful execution, trespass, and conversion. Nowhere does she challenge the conclusion that these claims would ordinarily accrue after Allyn's application for a writ of execution in February of 2002. Allyn does not explicitly admit the matter, but she never actually disputes that plaintiffs have pleaded what are good and timely claims but for the 1999 wrongful writ of attachment that she obtained.

**vi. The continuing cause of action doctrine applies by analogy.**

Allyn asserts that the continuing cause of action theory is not applicable here. Certainly Farhood agrees that this is not his best argument. A more accurate analysis of this case is that Allyn committed a series of torts that gave rise to a series of claims assertable by Farhood. Allyn, however, insists on collapsing all the causes of action into a single one for wrongful attachment. She cites cases involving single acts of negligence, not cases involving a series of acts that give rise to a series of claims and/or continuing claims, as in the present case.

If this court were to conclude that indeed there is a single cause of action, the continuing cause doctrine applies, at least by analogy, because the interference with Allyn's property rights continued from 1999 to 2005.

**vii. The statute of limitations was tolled by necessary proceedings in the Court of Appeals, without which the present case would not have been possible.**

Prior to this court's 2003 ruling in the quiet title action, the present lawsuit could not have been brought. Allyn had a facially valid judgment dismissing Farhood's quiet title action that could (and no doubt would) have been pled to deny that Farhood had any interest in the property. Allyn now argues that the statute of limitations has run while the appeal of the quiet title action was pending.

Allyn's reliance on Gillis v. F & A Enterprises, 934 P.2d 1253 (Wyo. 1997) is unconvincing. Gillis, as noted by Allyn, holds that "the cause of action [for wrongful execution] accrues on the date of the wrongful levy." Br. of Resp., p. 18. As explained repeatedly in this Reply and in the original Brief, in this case the wrongful levy

occurred starting in February, 2002.

A more analogous case to Farhood v. Allyn is that of Elliott v. Peterson, 92 Wn.2d 586, 588-89, 599 P.2d 1282 (1979). In Elliott, a dental malpractice case, the Washington Supreme Court considered the case of a plaintiff who had, in his first appeal, successfully challenged the trial court's (i) denial of a voluntary nonsuit and (ii) granting of dismissal with prejudice. Shortly after the trial court was reversed, the trial court granted the plaintiff's motion for voluntary nonsuit. Within a few days, plaintiff commenced a second action. The new complaint alleged essentially the same facts as those in the former complaint.<sup>3</sup> The defendants promptly moved for summary judgment, asserting the case was barred because the period of limitations expired long before the appeal was decided. Defendant's motion was denied, and a second appeal followed. The Washington Supreme Court refused to deny plaintiff the benefit of his earlier appeal:

In order to accord to the plaintiff the full benefit of that

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<sup>3</sup> Farhood's case is even stronger: He is not asserting the same causes of action in this suit as he did in his August 2001 quiet title action.

right, it must be held that his right to file a new suit based on the same claim is also fixed as of that moment. An important aspect of that right is the period of time remaining before the expiration of the statute of limitation. Accordingly, when the right to a nonsuit is erroneously denied, and it is so held on appeal, a plaintiff is entitled to an equal period of time, after the remittitur, within which to file a new action. **Otherwise, the right is but a delusion in all cases where the statute of limitation expires pending appeal.**

Elliott v. Peterson, 92 Wn.2d 586, 588-89, 599 P.2d 1282 (1979) (emphasis added). In this case, were this Court to hold that the statute of limitations expired during the first and/or second appeals, Farhood's victories would be but a delusion. (Note: This argument is presented in the alternative. Farhood contends that the torts he is suing for occurred in 2002-2005, and therefore the pendency of the earlier appeals should be irrelevant).

Elliott's result is in keeping with the principle supporting statutes of limitation. "The policy behind statutes of limitation is to ensure essential fairness to defendants and to bar plaintiffs who have 'slept on [their] rights.'" Robinson v. City of Seattle, 119 Wn.2d 34, 89, 830 P.2d 318 (1992) (quoting Burnett v. New York Cent. R.R., 380 U.S. 424, 428, 13 L. Ed. 2d 941, 85 S. Ct. 1050 (1965)). In the present case, the Farhood has vigorously and timely pursued

their rights. Allyn is not suddenly surprised by the new claims because title to the property was contested for years. There is no unfairness to Allyn, whose unsuccessful legal arguments in the quiet title action gave her the opportunity to commit the next wave of torts because, while the quiet title was being appealed, she elected to seize Farhood's property.

**III. Application of judicial estoppel is not appropriate in this case.**

The application of judicial estoppel is not automatic. A recent appellate decision rejected application of the doctrine in a suit for personal injuries that had not been scheduled in plaintiff's bankruptcy two years earlier:

To determine whether estoppel is justified in a particular case, the Washington Supreme Court has identified three "core factors":

(1) whether a "party's later position" is "'clearly inconsistent' with its earlier position"; (2) whether "judicial acceptance of an inconsistent position in a later proceeding would create 'the perception that either the first or the second court was misled'"; and (3) "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped."

(citations omitted). These factors are not exhaustive, and "'additional considerations'" may also guide a trial court's

decision. (citations omitted).

Haslett v. Planck, No. 25467-4-III (Wn. App. 09/11/2007).

In the present case, plaintiff Mark Farhood, the owner of a twenty percent undivided interest in the property, listed the Allyn's lawsuit against Asher and stated that the property had been wrongfully attached. That was not conduct which is "clearly inconsistent" with the position that plaintiffs take now, which is that the original attachment was wrongful and that post-bankruptcy acts by defendants have given rise to new claims and new damages. Neither court can fairly be said to have been misled. Furthermore, plaintiffs are not benefited and Allyn has not been harmed. Under the analysis in Haslett, judicial estoppel is not appropriate in the present case.

#### CONCLUSION

For the reasons given above, this court should reverse the trial court's summary judgment and reinstate plaintiffs' case against defendants.

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RESPECTFULLY SUBMITTED this 30th day of September 2007.

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CERTIFICATE OF SERVICE

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

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