

FILED

AUG 01 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 298183

COURT OF APPEALS OF THE STATE OF WASHINGTON, DIVISION III

CARYL J. CLIFTON,

Plaintiff/Appellant,

vs.

LINDA ROSS, personal representative of the ESTATE OF WALTER D.
JOHNSON, SR.,

Defendant/Respondent.

BRIEF OF APPELLANT

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INTRODUCTION

Walter Johnson sold the same piece of property twice, although this fact was not immediately apparent to him or the two buyers. This led to a lawsuit between himself and the buyers, Majerus Construction and Caryl Clifton, regarding the extent of property sold to each. In the course of the lawsuit, Johnson settled with Majerus, leaving Clifton to defend his title, even though Johnson believed, and testified under oath, that title to the disputed boundary strip belonged to Clifton. At trial, professional surveyors retained by Majerus and Clifton could not agree regarding the extent of property conveyed to each of them. The superior court resolved the conflicting testimony in favor of Majerus, and the Court of Appeals affirmed.

Between the date of the superior court decision and the date of the Court of Appeals decision in the underlying lawsuit, Clifton filed this lawsuit against Johnson for equitable indemnity for the costs of defending his title, as well as damages for the loss of his property. Clifton and Johnson agreed to a stay of proceedings pending a decision by the Court of Appeals in the underlying lawsuit. After the Court of Appeals rendered its decision, Johnson filed a motion for summary judgment based primarily on the applicable statutes of limitation. The superior court granted summary judgment, essentially concluding

that the causes of action alleged by Clifton accrued before final judgment was rendered in the underlying lawsuit with Majerus. The primary question the superior court summary judgment order presents is whether Clifton was required to have filed suit against Johnson before it was finally determined whether Johnson had in fact sold the same piece of property twice.

ASSIGNMENT OF ERROR

1. The trial court erred by dismissing Caryl J. Clifton's claims against the Estate of Walter D. Johnson on summary judgment.¹

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Johnson sold the same property to Majerus which he had previously deeded to Clifton, but claimed that the two deeds did not overlap. This led to litigation between Majerus, Johnson, and Clifton which ultimately found that the two Johnson deeds did overlap resulting in loss of property by Clifton. **Should the Johnson Estate be liable to Clifton for the damages Clifton suffered including loss of his property and the litigation fees and expenses Clifton incurred in defending his title in the Majerus-Johnson-Clifton Lawsuit?**

2. Johnson took the position in the Majerus-Johnson-Clifton Lawsuit that the deeds did not overlap, that this was a material question of fact that could not be resolved short of trial, and that if he

¹ There are two summary judgment orders which are substantively identical. Although the order at CP 231-32 was not filed until March 23, 2011, it was the original order and was signed by the court on February 8, 2011. The second order, CP 229-30, was created on March 1, 2011 after the clerk's office could not locate the original order. Once the original order was later found and filed, the second order became a duplicative pleading of no real affect. Clifton's appeal is timely under both orders.

was right that there was no overlap then he faced no liability based on the lack of any overlap in deeds. **Should the Johnson Estate be barred from taking the position in this action that Clifton's claims against Johnson accrued *prior* to entry of final judgment in the Majerus-Johnson-Clifton Lawsuit?**

3. Clifton filed his claims while an appeal was pending, before final judgment in the Majerus-Johnson-Clifton Lawsuit, and within four years after he first learned there was any argument made by Majerus that the Johnson-Clifton and Johnson-Majerus deeds overlapped. **Are Clifton's claims barred by the applicable statute(s) of limitation?**

4. An action accrues when each element of the action is susceptible of proof. Actual and appreciable damages are a necessary element of Clifton's claims against the Johnson Estate. Clifton did not suffer any actual loss of property until entry of the final judgment in the Majerus-Johnson-Clifton Lawsuit. **Did all of Clifton's claims accrue when he first learned that Majerus claimed to own a portion of his property or when final judgment was entered in the Majerus-Johnson-Clifton Lawsuit?**

5. Only Majerus and Clifton were parties to the final judgment in the Majerus-Johnson-Clifton Lawsuit. No judgment or settlement was entered resolving any claims between Clifton and Johnson in that action. **Are Clifton's claims in this action barred by the doctrine of *res judicata*?**

6. Clifton did not record the Johnson-Clifton Deed prior to Majerus' recording of the Johnson-Majerus Deed. **Does Clifton's failure to timely record his deed constitute willful misconduct under the clean hands doctrine so that Clifton is barred from seeking equitable relief against Johnston?**

STATEMENT OF THE CASE

A. Background Facts.

On November 27, 1973, approximately one year after Caryl J. Clifton (“Clifton”) purchased his property neighboring the property owned by Walter D. Johnson (“Johnson”), Johnson gave Clifton a quitclaim deed for an additional strip of land.² The Johnson-Clifton Deed was intended to correct a survey error.³ Johnson and Clifton each continued to own properties neighboring that deeded strip of land and became personal friends over the next 30 years.⁴ On February 25, 2005 Johnson deeded a portion of his neighboring property to Majerus Construction, Inc. (Majerus).⁵

Clifton saw Majerus begin developing the property over the next year but had no immediate cause for concern.⁶ Majerus sold one of its developed lots to Ms. Benwell, who had a new property boundary staked in east of what Clifton believed to be the property boundary and she told Clifton that she believed she now owned up to

² CP 169 (Johnson-Clifton Deed); CP 112 (Clifton Testimony).

³ CP 113 (Clifton Testimony).

⁴ CP 45 (Clifton Decl. ¶ 3).

⁵ CP 167-68 (Johnson-Majerus Deed).

⁶ CP 114-15 (Clifton Testimony).

the newly staked boundary.⁷ This caused Clifton to review his papers and, when he realized the Johnson-Clifton Deed did not have any auditor's recording marks, he recorded the deed on June 30, 2006.⁸ When Johnson was first told the Johnson-Clifton deed had been recorded he denied having ever signed it,⁹ but he later admitted it was in fact his signature on the Johnson-Clifton deed.¹⁰

B. Majerus-Clifton-Johnson Lawsuit.

Majerus filed suit against Clifton and Johnson seeking to quiet title to the property deeded to him by Johnson, for slander of title, and for breach of statutory warranties in Walla Walla County Superior Court, Cause No. 06-2-00710-8, on August 30, 2006.¹¹ Together with his answer to the complaint, Johnson brought a third-party complaint against Walla Walla Title Co. for failing to except "the boundary dispute that is the subject of this lawsuit."¹²

⁷ CP 115.

⁸ CP 116 (Clifton Testimony); CP 169.

⁹ CP 97 (Dobbins Testimony p. 139:3-139:13) (Johnson claimed he had not signed the deed and "He said [to his realtor] he would beat the crap out of anybody that said he did.").

¹⁰ CP 129 (Johnson Testimony, p. 268:4-268:6).

¹¹ CP 160-65 (Majerus-Clifton-Johnson Lawsuit).

¹² CP 177-78 (Johnson Answer and Third Party Complaint, ¶¶ 7-10).

1. *Johnson and Clifton believed that there was no overlap between the Johnson-Clifton and Johnson-Majerus Deeds.*

Johnson first helped Clifton successfully defend Majerus's motion for summary judgment by agreeing that the true boundary line (and thus whether the deeds overlapped) was a triable issue of fact.¹³ Johnson next moved for partial summary judgment against Majerus and confirmed his position that the actual eastern boundary line of the Johnson-Majerus Deed was a material disputed fact which could only be resolved at trial¹⁴:

6	the motion by letter ruling dated January 24, 2007. Through that motion, it became
7	clear that there is a material question of fact as to where the actual eastern boundary
8	line is located. Majerus has a surveyor that claims it is approximately ten (10) feet
9	east of the disputed fence line. Clifton has a surveyor who states that the correct
10	eastern boundary is located on the disputed fence line.

Johnson recognized the legal description/surveyor dispute was at the heart of the lawsuit¹⁵:

¹³ CP 192 (Majerus claimed Johnson had "actively collaborated with Defendant Clifton to defeat the Plaintiff's quiet title action" and by "in open court...arguing that there were triable issues of fact"); *see also* CP 214 (Majerus contended that Johnson had supported Clifton and opposed Majerus in the dispute over the proper boundary line).

¹⁴ CP 181 (Johnson Memo. Re Summary Judgment, p. 2:6-2:10).

¹⁵ CP 181 (2:11-2:17).

11	Where the correct boundary is located will be resolved at trial. However, the
12	claim against Defendant Johnson is premised on an alleged violation of the statutory
13	warranty deed provided to Majerus. Whether there is a violation or not depends on the
14	finder of fact's determination of where the correct boundary line is located. If
15	Clifton's surveyor is correct then there is no violation of the statutory warranty deed.
16	On the other hand, if Majerus' surveyor is correct, then there may be a violation.
17	

Johnson concluded his memorandum for summary judgment, in relevant part, “[t]here is no question that trial is necessary on the ultimate factual issue of whose survey is correct.”¹⁶

2. Johnson settled with Majerus and was dismissed, but Clifton continued defending the title he received from Johnson through trial and appeal.

Johnson, Majerus, and Clifton attempted to mediate their dispute, but instead Johnson settled with Majerus and left the boundary dispute between Clifton and Majerus unresolved.¹⁷ Despite having been dismissed from the litigation, Johnson continued defending his position that the two deeds only appeared to overlap due to a surveyor’s error but did not in fact overlap.¹⁸

¹⁶ CP 189 (p. 10:7-10:8).

¹⁷ CP 46 (Clifton Decl., p. 2, ¶¶ 4-5); CP 131 (Johnson Testimony, 274:8-274:16).

¹⁸ CP 45-46; CP 129-131 (Johnson-Clifton Deed was for property west of the fence line, and regardless of the survey lines he did not think the survey changed the boundary lines between his property and Clifton’s property).

3. *The Majerus-Johnson-Clifton trial verdict and appeal ruling contradicted Johnson's and Clifton's position and held instead that Johnson's deed to Majerus had included the property Johnson had previously deeded to Clifton.*

Because Johnson had paid Majerus to settle the claims against himself, he was dismissed from the lawsuit and trial proceeded solely between Majerus and Clifton.¹⁹ The boundary and surveyor dispute was the central topic of the trial.²⁰ Following trial, judgment was entered against Clifton quieting title to the disputed property in Majerus and awarding damages against Clifton for slander of title on September 29, 2008.²¹ Clifton appealed, and on April 29, 2010 the Washington State Court of Appeals, Division III (No. 274934) reversed the trial court judgment against Clifton as to slander of title damages but affirmed as to quiet title.²² The mandate certifying the Court of

¹⁹ CP 46, at ¶¶ 4-5.

²⁰ A detailed review of the trial transcript reveals that more than half of the total trial testimony was given by Majerus' surveyor, Butler, CP 83-96, 98-110, 149-151, and Clifton's surveyor, Martinez, CP 131-148; *see generally*, CP 69-151 (testimony portion of Majerus-Johnson-Clifton Lawsuit trial transcript). This does not include the significant portion of both Clifton's and Johnson's testimony which related to the boundary dispute.

²¹ CP 26-28.

²² CP 29-37 (unpublished opinion); *see also* CP 38-39 (opinion reconsidered and amended on June 8, 2010 without substantive change to the holding).

Appeals opinion and terminating review of the Majerus-Clifton-Johnson Lawsuit was entered November 11, 2010.²³

C. Procedural History.

While Clifton's appeal remained pending in the Majerus-Clifton-Johnson Lawsuit, Johnson died and Clifton timely filed a creditor's claim against the Estate of Walter D. Johnson ("Johnson Estate")²⁴ on September 9, 2009 to satisfy estate administration statutory deadlines.²⁵ The Johnson Estate rejected Clifton's creditor's claim, and on October 30, 2009 Clifton filed suit against the Johnson Estate for equitable indemnity, conversion, unjust enrichment, contribution, and constructive trust in Walla Walla Superior Court, Cause No. 09-2-00945-8.²⁶ There is no dispute as to venue, jurisdiction, or personal service in this case.²⁷

²³ CP 40.

²⁴ Through the remainder of Clifton's brief, "Johnson" and the "Johnson Estate" will be used interchangeably based on context. No legal distinction is intended since the liability of the Johnson Estate will follow directly the liability of Johnson for his past acts and omissions.

²⁵ CP 4; *see also* CP 20 (Admitted by Johnson Estate as being filed and served timely by Johnson Estate).

²⁶ CP 3-9 (Complaint).

²⁷ CP 10.

By stipulated order, Clifton and the Johnson Estate agreed on December 23, 2009 that all "procedural deadlines, formal discovery, and all other substantive matters" in the case would be stayed until after a final resolution was reached in the Washington State Court of Appeals Division III Appeal No. 274934."²⁸ In that same stipulation, both parties acknowledged that the appeal pending between Majerus and Clifton (No. 274934) would "likely have significant impacts on the present action."²⁹ This was because Clifton continued to believe Johnson had correctly testified that the two deeds did not in fact overlap and he continued defending that position throughout the trial and appeal.³⁰ After the amended appellate court opinion was issued, the trial court entered a stipulated order lifting the prior stay because "the previously pending TEDRA action and appeal have now been resolved sufficiently to proceed with the present action."³¹

The Johnson Estate next moved for summary judgment against Clifton based on the affirmative defenses of statute of limitations, *res*

²⁸ CP 12.

²⁹ CP 11.

³⁰ CP 46-47 (Clifton Decl., ¶ 6).

³¹ CP 14.

judicata, and the doctrine of clean hands.³² The trial court granted the Johnson Estate’s motion because “all of the statutes of limitations [had] run” and Clifton’s claims were barred by either estoppel or the doctrine of unclean hands because he had not recorded the Johnson-Clifton Deed until after the Johnson-Majerus Deed was recorded.³³ The Johnson Estate was also awarded fees and costs, but based on equitable considerations the trial court reduced the Johnson Estate’s award of fees by a pro-rata share of the proceeds Johnson received from selling Clifton’s property to Majerus.³⁴ Clifton timely appealed.³⁵

³² RP 1, at p. 4:10-4:12 (Summary Judgment Hearing); CP 18-19 (Johnson Estate’s Motion). The Verbatim Report of Proceedings appears to have been transcribed and transmitted to the Court of Appeal as two separate reports dated 01-12-2011 (Summary Judgment Hearing) and 02-08-2011 (Motion for Reconsideration and Order Presentment Hearing). Because pagination is not consecutive for these two transcripts, they will be cited as RP 1 (for transcript dated 01-12-2011) and RP 2 (for transcript dated 02-08-2011).

³³ RP 1, at p. 13:5-13:14; RP 2, at p. 7:14-7:24.

³⁴ CP 270-71 (“equitable” reduction found at 271, ¶ 5).

³⁵ CP 252-259 (Clifton’s Notice of Appeal).

ARGUMENT

A. The standard of review is *de novo*.

Superior court summary judgment orders are reviewed *de novo*. Veit ex rel. Nelson v. BNSF, 171 Wn.2d 88, 98-99, 249 P.3d 607 (2011) (citation omitted). Because the Johnson Estate has moved for summary judgment and on the basis of its affirmative defenses, the Johnson Estate has the burden of proof. Brown v. ProWest Transport Ltd., 76 Wn. App. 412, 419, 886 P.2d 223 (1994) (citation omitted). Because the Johnson Estate is the moving party and has the burden of proving its affirmative defenses under Brown, the Johnson Estate must satisfy its initial burden to show that there are no material facts in dispute necessary to its affirmative defenses. Young v. Key Pharms., Inc., 112 Wn.2d 216, 225, 770 P.2d 182, 187 (1989), overruled on other grounds, Young for Young v. Key Pharms., Inc., 130 Wn.2d 160, 922 P.2d 59 (1996).

“Facts and all reasonable inferences therefrom must be considered in the light most favorable to the nonmoving party, and summary judgment should be granted only if a reasonable person would reach but one conclusion.” *Int’l Ass’n of Firefighters, Local 1789 v. Spokane Airports*, 146 Wn.2d 207, 223, 45 P.3d 186, 194 (2002) *amended on denial of reconsideration*, 50 P.3d 618 (2002).

B. Clifton has proven his prima facie case.

Clifton's claims against the Johnson Estate all relate to the same three facts: first that based on the verdict and appellate ruling it is now a matter of law that Johnson deeded the same property to both Clifton and later to Majerus; second that Johnson refused to hold in trust and later pay to Clifton the pro-rata amount Johnson received from selling Clifton's property; and third that Johnson's wrongful transfer of the same real property to both Clifton and Majerus directly caused Clifton to become embroiled in the Majerus-Johnson-Clifton Lawsuit. Under these circumstances, Johnson is obligated to equitably indemnify, contribute, and reimburse Clifton for his legal fees and costs and the loss of his property.

1. Johnson is liable to Clifton for selling the same property twice which forced Clifton to defend his title in litigation with Majerus.³⁶

"[W]hen the natural and proximate consequences of a wrongful act by defendant involve plaintiff in litigation with others, there may, as a general rule, be a recovery of damages for the reasonable expenses incurred in the litigation, including

³⁶ Because the elements of equitable reimbursement of legal costs pursuant to *Wells v. Aetna Ins. Co.*, 60 Wn.2d 880, *inter alia*, closely parallel those required for equitable indemnity and equitable contribution, discussion and analysis of those claims has been consolidated.

compensation for attorney's fees." *Wells v. Aetna Ins. Co.*, 60 Wn.2d 880, 882, 376 P.2d 644 (1962). "[A]ctions by a third person subjecting a party to litigation" under *Wells v. Aetna* are recognized as one of Washington's four explicit exceptions to the American rule on attorneys' fees. *City of Seattle v. McCready*, 131 Wn.2d 266, 274, 931 P.2d 156 (1997).

Equitable indemnity arises "when one party incurs a liability the other party should discharge by virtue of the nature of the relationship between the two parties." *Cent. Washington Refrigeration, Inc. v. Barbee*, 133 Wn.2d 509, 513, 946 P.2d 760 (1997) (citations omitted). *Barbee* held that, in spite of the U.C.C. statute of repose, a commercial sales transaction was a sufficient basis to hold a seller responsible under equitable indemnity principles for payments made by a buyer to third parties as compensation for defective products.

Here, the facts as admitted by the Johnson Estate and as found by the trial appellate court establish that Johnson's sale of the real property to Majerus was wrongful in that he sold property he had already deeded to Clifton. The natural, proximate, and entirely foreseeable consequence of deeding the same property twice is to cause litigation between those innocent parties. Johnson

compounded what might have been an innocent mistake by repeatedly assuring Clifton that the deeds did not in fact overlap. Based on these assurances, Clifton was essentially forced to defend Johnson's position in order to defend his own title long after Johnson had extricated himself from the litigation leaving Clifton alone to face Majerus. Johnson's actions require that he be held responsible for Clifton's litigation expenses and fees.

2. *Johnson converted Clifton's property by keeping the proceeds from his wrongful sale of Clifton's property.*

Conversion is "the unjustified, willful interference with a chattel which deprives a person entitled to the property of possession." *In re Marriage of Langham & Kolde*, 153 Wn.2d 553, 564, 106 P.3d 212 (2005) (citation omitted). Johnson was holding the proceeds he received by wrongly selling Clifton's property to Majerus in a constructive trust up to the time Clifton demanded those proceeds in September 2009. At that point the Johnson Estate committed conversion by willfully interfering with Clifton's right to the money Johnson received from selling Clifton's property.

3. *Johnson received a benefit from selling Majerus property that belonged to Clifton, and keeping that benefit constituted unjust enrichment once the court ruled that Johnson had in fact sold Clifton's property to Majerus.*

Unjust enrichment allows Clifton to recover the value of his property that Johnson retained despite the fact that in justice and equity that property belonged to Clifton. *Young v. Young*, 164 Wn.2d 477, 484, 191 P.3d 1258 (2008) (citation omitted). To prevail on this claim, Clifton must show (1) a benefit conferred upon Johnson, (2) an appreciation or knowledge by Johnson of the benefit, and, (3) acceptance or retention by Johnson of that benefit under circumstances which make it inequitable for Johnson to have retained the benefit without payment of its value to Clifton. *Id.* (citations omitted).

The undisputed facts establish that the Johnson Estate has been unjustly enriched to Clifton's detriment. First, Johnson benefitted from receiving payment from Majerus which included, in part, payment for real property that belonged to Clifton. Second, although this may have been disputed during pendency of the Majerus-Johnson-Clifton Lawsuit, once final judgment in that action was entered Johnson (and the Johnson Estate) knew he had benefitted by selling Clifton's property. Third, equity demands that a person

cannot sell property that belongs to another without paying the value of said property to its true owner.

4. Johnson was required to hold the sale proceeds he received from selling Clifton's property to Majerus in constructive trust for Clifton's benefit.

"A constructive trust is imposed in order to prevent unjust enrichment, where it is against equity that one who holds certain property should retain it." *Ryan v. Plath*, 18 Wn.2d 839, 864, 140 P.2d 968 (1943) (citations omitted). The "imposition of a constructive trust is but a recognition that the money they received is not theirs and that it must be returned." *Betchard-Clayton, Inc. v. King*, 41 Wn. App. 887, 894-95, 707 P.2d 1361 (1985).

The money Johnson accepted from Majerus for selling Clifton's property did not belong to him and was later transferred by operation of law to the Johnson Estate. That money should have been returned to Clifton but it was not. A constructive trust will need to be imposed to ensure that Clifton receives these funds from the Johnson Estate.

C. All of Clifton's claims were timely filed.

Clifton's claims are not barred by the applicable statutes of limitation because this action was filed before review was terminated in the underlying Majerus-Johnson-Clifton Lawsuit which gave rise to Clifton's damages in this action.

Clifton and the Johnson Estate agree that the statute of limitations for a contribution action is one year and that the statute of limitations for conversion and unjust enrichment claims are both three years. The applicable limitations period for Clifton's equitable reimbursement, indemnity, and contribution claims arising from rents and profits of real property is six years.³⁷ Furthermore, contrary to the Johnson Estate's most recent litigation position, Clifton's claims did not accrue until final judgment was entered in the Majerus-Johnson-Clifton Lawsuit.

1. *None of the limitation periods on Clifton's claim accrued until he suffered actual damages and had a right to seek relief.*

Statutory time limits only begin to run once the cause of action has accrued. *Pietz v. Indermuehle*, 89 Wn. App. 503, 511, 949 P.2d 449 (1998) (citation omitted). A cause of action only accrues once the plaintiff has a right to seek relief. *Id.*

Clifton had no cause of action against Johnson until he suffered actual damages.

"[T]he right to apply to a court for relief requires each element of the action be susceptible to proof. In *Gazija*,

³⁷ RCW 4.16.040 (6-year limitation period for actions related to rents and profits of real property). The Johnson Estate is expected to dispute this limitation period, but has yet to argue the specific limitation period it contends should apply to these claims.

we recognized that an essential element of a cause of action based upon negligence or ‘wrongful’ acts, as alleged in respondents’ complaint, **is actual loss or damage.**”

Haslund v. City of Seattle, 86 Wn.2d 607, 619, 547 P.2d 1221 (1976) (emphasis added) *citing Gazija v. Nicholas Jerns Co.*, 86 Wn.2d 215, 219, 543 P.2d 338 (1975). The damages caused by a boundary line encroachment do not arise by mere knowledge of a dispute or claim to the property. *See Mellor v. Chamberlin*, 100 Wn.2d 643, 647, 673 P.2d 610 (1983). Likewise, a claim against the property seller for indemnification against the damages caused by such an encroachment accrues when damages are suffered rather than when the encroachment dispute is first known. *Id.*

In effect, in the prior case the state allowed Johnson’s wrongful sale of Clifton’s property to a third party to be enforced under Washington’s recording-notice statutes for the purpose of providing stable and predictable property transfers. Clifton was an innocent victim in this transaction in the same way that a person receiving a check from someone with insufficient funds in the bank is a victim. But until the check is negotiated and payment is refused, its payee has not been damaged. Similarly, in this case, Clifton was not damaged until the deeds were judged to overlap and title was quieted in favor

of Majerus. The Johnson Estate contends that Clifton's claims all accrued when Clifton first became aware that Majerus claimed its deed included portions of Clifton's property.³⁸ However, under *Haslund* the true accrual date could not have been prior to the date Clifton suffered an actual loss of property, which did not occur until final judgment was entered.

Because statutes of limitation are rarely amended, they must be delicately adjusted by the court balancing the practical purposes and effects of its decisions including a need to "relieve [the courts] of the burden of adjudicating inconsequential or tenuous claims...".

Haslund, 86 Wn.2d at 620.

Whether the legal descriptions in two deeds overlap was not and could not have been known to Clifton until, at the earliest, the trial court determined which surveyor's interpretation of the legal descriptions was correct. The difficulty inherent in a layperson's interpretation of legal descriptions was made far more difficult in this case because the person who wrote and signed both deeds, Johnson,

³⁸ Although the Johnson Estate has never identified any specific date it alleges as the accrual date, presumably the Johnson Estate contends this is either June 30, 2006, the date Clifton recorded the Johnson-Clifton Deed shortly after Ms. Benwell informed him that she thought she owned part of his property, or August 30, 2006, the date Majerus filed suit against Johnson and Clifton.

assured Clifton there was no overlap, and because multiple licensed professional surveyors could not agree on whether there was an overlap.

Forcing a litigant to bring crossclaims based on such a speculative possibility of future damages would add unnecessary complexity, cost, and delay to a wide range of lawsuits. Litigants should not be required to sue on speculative claims where they have not yet suffered actual damages. Clifton's claims could not have accrued until he suffered actual damages, and this did not occur until judgment was final in the Majerus-Johnson-Clifton Lawsuit.

2. Clifton's equitable reimbursement, indemnification, and contribution claims and constructive trust claims are timely because their applicable limitation period is six years.

Indemnity actions are distinct, separate causes of action from the underlying wrong and are governed by separate statutes of limitations. It is settled law that indemnity actions accrue when the party seeking indemnity pays or is legally adjudged obligated to pay damages to a third party. The statute of limitations on the indemnity action therefore begins to run at that point.

Cent. Washington Refrigeration, Inc. v. Barbee, 133 Wn.2d at 517.³⁹

³⁹ See also *Pietz v. Indermuehle*, 89 Wn. App. at 511 (citing *Barbee* rule as controlling both indemnity and contribution actions).

The shortest statute of limitation that could apply to these claims is the six year limitation period because this action constitutes an “action for the rents and profits or for the use and occupation of real estate.” RCW 4.16.040.

“If it were questionable which of the two statutes applied, the rule is that the statute applying the longest period is generally used. In *Hughes v. Reed*, 46 F.2d 435, 440 (10th Cir. 1931), the court cites cases from many states in support of the proposition that ‘(w)here doubt exists as to the nature of the action, courts lean toward the application of the longer period of limitations.’

Shew v. Coon Bay Loafers, Inc., 76 Wn.2d 40, 51-52, 455 P.2d 359 (1969) (internal citation omitted). Thus, even if more than one limitation period could potentially apply, *Coon Bay* holds that the longer period is the appropriate period and that six-year period has not run even if it accrued at the inception of the Majerus-Johnson-Clifton Lawsuit.

3. Clifton's constructive trust claim is timely because the Johnson Estate first breached its duties under the trust by refusing to pay Clifton his pro-rata share of the Johnson to Majerus property sale price.

Clifton’s constructive trust claim accrued on either the date of his payment demand to the Johnson Estate or the date of final judgment in the Majerus-Johnson-Clifton Lawsuit. If Clifton had attempted to bring a constructive trust claim earlier than that, his

claim would properly have been dismissed because “there must be ‘some element of wrongdoing’ in order to impose a constructive trust. *Baker v. Leonard*, 120 Wn.2d 538, 548, 843 P.2d 1050 (1993) (citation omitted).

Clifton’s constructive trust limitation period therefore accrued when the Johnson Estate breached its trust by refusing to comply with Clifton’s September 9, 2009 demand for payment of his pro-rata share of the proceeds Johnson had obtained by selling Clifton’s property to Majerus. Up to that point, Johnson’s failure to pay those proceeds to Clifton had not been wrongful, because no demand had been made. Furthermore, the judgment ruling that Johnson had, as a settled matter of law, sold Clifton’s property to Majerus was not yet final.

4. Clifton’s contribution claim is timely because final judgment in the Majerus-Johnson-Clifton Lawsuit was not entered until more than one year after Clifton had already filed his contribution suit.

Judgment becomes final, if an appeal is filed, “when the appellate court issues its mandate “disposing of the direct appeal.” *In re Skylstad*, 160 Wn.2d 944, 948, 162 P.3d 413 (2007) (citation omitted) (addressing deadline for collateral attack of a criminal case judgment “one year after the judgment becomes final”), *citing* RCW 10.73.090. The text of the statutory contribution limit period

applicable in this case is nearly identical to that cited by *Skylstad*: “the action for contribution must be commenced within *one year after the judgment becomes final*.” RCW 4.22.050(3) (italics added).

“Washington has already adopted the federal court's approach to finality for purposes of collateral review: A judgment is not final when the appellate court remands for further proceedings.” *State v. Kilgore*, 167 Wn.2d 28, 50, 216 P.3d 393 (2009) (unless remanded solely for a “ministerial duty”) *citing In re Skylstad*, 160 Wn.2d at 946.

Final judgment in the Majerus-Johnson-Clifton Lawsuit was not entered until November 12, 2010.⁴⁰ Clifton filed this action on October 30, 2009.⁴¹ Clifton’s contribution claim satisfied the statute of limitations because it was filed *before* the statutory period began to run.

D. Limitations periods were tolled, and the Johnson Estate should be barred by equitable principles from contradicting Johnson’s prior litigation position that whether the deeds overlapped could only be known after a trial.

Even if Clifton’s claims are ruled to have accrued in June or August 2006, the Johnson Estate gave up whatever right it had to make that argument when Johnson helped convince Clifton to

⁴⁰ CP 40 (Mandate).

⁴¹ CP 3 (Clerk-Stamped Complaint).

continue defending the Majerus suit. At the same time, Johnson insulated himself and isolated Clifton by settling in a two-party agreement with Majerus.

1. The limitations periods should be equitably tolled to prevent the Johnson Estate from gaining an unfair litigation advantage by contradicting the prior false assurances that Johnson made to Clifton.

A statute of limitation may be equitably tolled when a defendant has deceived or given false assurances to the plaintiff, and the plaintiff has been diligent in pursuing his rights. *Millay v. Cam*, 135 Wn.2d 193, 206, 955 P.2d 791 (1998). *Millay* dealt with the redemption period for real property sold at an execution sale. *Id.* *Millay* reversed the court of appeals and remanded with instructions to equitably toll the redemption period if the trial court found that the redemption amount had been grossly exaggerated so that the debtor could not have determined the correct amount owed within the normal redemption period. *Id.* at 207-8.

In this case it is undisputed that throughout the prior litigation and even through trial, Johnson assured Clifton and testified that there was no overlap between the two deeds and therefore no damage to Clifton. Despite this assurance, Clifton ultimately filed suit to satisfy statutory probate deadlines once Johnson passed away

while the appeal of the judgment remained pending. In that appeal Clifton continued to defend Johnson's contention that the deeds did not overlap. The Johnson Estate and Clifton agreed to stay this action during the appeal's pendency, because both continued to believe and argue that the deeds did not overlap.

Clifton has never slept on his rights in this case. At the first instant his property was lost due to the quiet title judgment becoming final, this action was already pending. The undisputed fact in the record is that any undue delay in this action was caused by Johnson's repeated assurances to Clifton and to the court that there was no overlap between the deeds he had granted to Clifton and to Majerus. Under these circumstances, justice requires the tolling of any limitations period to the extent necessary to keep the Johnson Estate from using delays *caused by* Johnson to its advantage.

2. All limitation periods were tolled because Clifton was prevented from exercising his legal remedies by positive rule of law.

"When a person is prevented from exercising his legal remedy by some positive rule of law, the time during which he is prevented from bringing suit is not to be counted against him in determining whether the statute of limitations has barred his right even though the statute makes no specific exception in his favor in such cases."

Seamans v. Walgren, 82 Wn.2d 771, 775, 514 P.2d 166 (1973). While certain latitude is allowed for parties to bring alternative claims, this is not without limit:

A party is not permitted to maintain inconsistent positions in judicial proceedings. It is not as strictly a question of estoppel as it is a rule of procedure based on manifest justice and on a consideration of orderliness, regularity and expedition in litigation.

Mueller v. Garske, 1 Wn. App. 406, 409, 461 P.2d 886 (1969) *citing* 28 Am. Jur. 2d, *Estoppel and Waiver* § 69 at 696 (1966).

Under the rules set forth by *Haslund* and *Mueller*, Clifton was prevented by positive rules of law, including judicial estoppel, from maintaining his present causes of action against Johnson during the pendency of the Majerus-Johnson-Clifton Lawsuit. Clifton believed the claims made by Johnson and his own surveyor that the deeds did not overlap and defended Johnson's position through trial and appeal. He could not have simultaneously argued both that the deeds did not overlap *and* that Johnson had acted wrongfully by executing the Johnson-Majerus Deed. These are not alternative theories; they are *inconsistent* and directly opposite theories.

The Johnson Estate claims Clifton could and should have brought a cross-claim against Johnson in the Majerus-Johnson-Clifton

Lawsuit before Johnson settled and was dismissed, but that would have required Clifton making claims in the same lawsuit both that (1), the two deeds had no overlap and (2), that Johnson somehow committed a wrongful act in executing the Johnson-Majerus deed. To prove one of these positions would necessarily have *disproved* the other. These two conflicting positions could not have been maintained within the same lawsuit without Clifton having violated the *Mueller* rule against taking inconsistent positions in judicial proceedings. The limitations periods were tolled by positive rule of law until final judgment was reached in the Majerus/Clifton lawsuit.

3. *All limitation periods were tolled by the discovery rule.*

Where the delay was not caused by the Plaintiff sleeping on his rights, the discovery rule tolls the statutes of limitation until the plaintiff knows or, through the exercise of due diligence, should have known all the facts necessary to establish a legal claim. *Crisman v. Crisman*, 85 Wn. App. 15, 21, 931 P.2d 163 (1997). "This rule is a court doctrine designed to balance the policies underlying statutes of limitations against the unfairness of cutting off a valid claim where the plaintiff, due to no fault of her own, could not reasonably have discovered the claim's factual elements until some time after the date of the injury." *Id.* at 20. Where Johnson consistently took the position

and testified that he had not wrongfully sold property already given to Clifton and the expert surveyors hired could not agree on whether this had in fact occurred, through no fault of Clifton's he could not reasonably have brought these claims until, at the earliest, the trial court's ruling in October 2008.

E. The Johnson Estate has failed to prove its statute of limitations affirmative defense because it has failed to prove the date Clifton suffered actual and appreciable damages was outside of the applicable time limits.

"The determination of the time at which a plaintiff suffered actual and appreciable damage is a question of fact." *Haslund*, 86 Wn.2d at 620. "Whether the statute of limitations bars a suit is a legal question, but the jury must decide the underlying factual questions unless the facts are susceptible of but one reasonable interpretation." *Goodman v. Goodman*, 128 Wn.2d 366, 373, 907 P.2d 290 (1995) (citations omitted).

Where a part of plaintiff's claim for damages is barred by the statute of limitations and a part of it is not, the defendant pleading the statute as an affirmative defense has the burden of specifically proving which portion of plaintiff's damages are barred by the statute. Failure to so prove will result in a complete failure of the affirmative defense.

Henderson v. Pennwalt Corp., 41 Wn. App. 547, 555, 704 P.2d 1256 (1985). The facts raised by Clifton's declaration⁴² raise a genuine issue of material fact as to the time when he suffered actual and appreciable damage from Johnson's wrongful acts. Because the Johnson Estate has failed to prove that there are no triable issues of fact as to its affirmative defenses, Clifton's claim cannot be dismissed on summary judgment.

Furthermore, Clifton did not suffer any loss of property until entry of the final judgment and his cause(s) of action for that damage therefore did not accrue until final judgment. Under *Henderson v. Pennwalt*, unless the Johnson Estate can specifically prove which portion of Clifton's damages, if any, arose prior to that date the entire affirmative defense fails.

F. *Res judicata* does not shield the Johnson Estate because the prior judgment was between different parties and involved different subjects and legal claims.

Res judicata is only applied when there is a concurrence of identity between the pending and the prior action in four independent respects: (1) subject matter, (2) cause of action, (3) persons and parties, and (4) the quality of persons for or against whom the claim is

⁴² CP 45-47

made. *Mellor v. Chamberlin*, 100 Wn.2d 643, 645, 673 P.2d 610 (1983) (citation omitted). “(A) person relying upon the doctrine of *res judicata* as to a particular issue involved in the pending case bears the burden of proving, by competent evidence consistent with the record in the former cause, that such issue was involved and actually determined, where it does not appear from the record that the matter as to which the rule of *res judicata* is invoked as a bar was necessarily adjudicated in the former action.” *Meder v. CCME Corp.*, 7 Wn. App. 801, 807, 502 P.2d 1252 (1972) (citation omitted) (cited with approval by *Mellor v. Chamberlin*).

In *Mellor*, the defendants sold land through a real estate contract with office buildings which used a leased adjacent property as a parking lot. *Mellor*, 100 Wn.2d at 644. One of the office buildings also encroached onto the neighboring property. *Id.* The seller/defendants failed to tell the buyers about either the lease or the encroachment. *Id.* Six years later, the buyers learned that the parking area needed to be leased and the buildings encroached neighboring property after their neighbor had a survey conducted. *Id.* The buyers agreed to lease the parking lot from their neighbor and sued the seller/defendants for misrepresenting the parking lot as having been

included in the sale of property. *Id.* This suit for misrepresentation was settled and the lawsuit was dismissed with prejudice. *Id.* Just three months before the misrepresentation suit was settled, the real estate contract payments were completed and the seller/defendants executed a warranty deed for the property. *Id.* at 645. Approximately three years after settling the misrepresentation suit, the buyers settled the encroachment dispute with their neighbor and brought a second lawsuit against the seller/defendants for breach of the covenant of warranty and peaceful possession. Because the two causes of action were distinct in both subject matter and legal causes of action and the “quality” of the parties differed by virtue of the different roles they played in the two lawsuits, the court ruled that the second action was not barred by *res judicata*. *Id.* at 646. The court also stated, possibly as dicta, that “*res judicata* principles are less strictly adhered to in the case of covenants of title.” *Id.* (citations omitted).

Unlike *Mellor*, where only three of the four *res judicata* elements were missing, in this case all four elements fail. Initially, the record is clear that Johnson was not a party to the prior lawsuit’s final judgment and that Clifton was not a party to the Johnson-Majerus

settlement. There is no concurrence in the identity of the parties or the quality of the parties.

The subject matter of the two lawsuits is also different. The Majerus-Clifton-Johnson Lawsuit dealt with establishing a disputed boundary and quieting title in Majerus. Because the prior lawsuit dealt primarily with whether there had been any overlap in the two deeds, that lawsuit did not deal with the subject matter of any disputes between Johnson and Clifton. Even if the subject matter were defined broadly so as to include both actions, *res judicata*

...does not mean the subject-matter of a cause of action can be litigated but once. It may be litigated as often as an independent cause of action arises which, because of its subsequent creation, could not have been litigated in the former suit, as the right did not then exist. It follows from the very nature of things that a cause of action which did not exist at the time of a former judgment could not have been the subject-matter of the action sustaining that judgment.

Mellor v. Chamberlin, 100 Wn.2d at 647, quoting *Harsin v. Oman*, 68 Wash. 281, 283-84, 123 P. 1 (1912).

Finally, the causes of action in the Majerus-Johnson-Clifton Lawsuit and this action are entirely distinct and exclusive. None of the causes of action in this case were previously litigated. There is no mechanical test for similarity of causes of action, but where “different

proofs would be required to sustain the two actions, a judgment in the one is no bar to the other.” *Meder*, 7 Wn. App. at 806 (citation omitted). “A judgment in a former action concludes only those matters that were in issue, actually litigated in, or necessarily involved in, the determination.” *Id.* The Majerus-Johnson-Clifton Lawsuit resolved two primary questions: the disputed boundary was settled and title was quieted in Majerus, and Clifton was ruled to have slandered Majerus’ title (slander of title was reversed on appeal). In contrast, this action seeks to hold Johnson responsible to Clifton for equitable indemnity/reimbursement of legal costs, conversion, constructive trust, contribution, and unjust enrichment.

“Neither the doctrine of *res judicata* nor collateral estoppel are intended to deny a litigant his day in court.” *Meder*, 7 Wn. App. at 803. Clifton cannot be barred by *res judicata* or collateral estoppel where the prior action involved different parties, subject matter, and legal causes of action.

G. The clean hands doctrine does not bar Clifton’s claims because Clifton has not committed any willful misconduct.

The Johnson Estate has claimed that Clifton’s claims should be barred by the clean hands doctrine, but has failed to prove the *willful*

misconduct which is required as a prerequisite to application of this doctrine, which is only applied in very limited circumstances:

The principle does not repel all sinners from courts of equity, nor does it disqualify any claimant from obtaining relief there who has not dealt unjustly in the very transaction concerning which he complains. The inequity which will repel him must have an immediate and necessary relation to the equity for which he sues. It must be understood to be willful misconduct in regard to the matter in litigation, and not to misconduct, however gross, which is unconnected therewith, and with which the opposite party in the cause has no concern.

J. L. Cooper & Co. v. Anchor Sec. Co., 9 Wn.2d 45, 73, 113 P.2d 845 (1941). In *J. L. Cooper*, the trial court's dismissal of the plaintiff's case based on the clean hands doctrine was reversed because there was "no evidence of deceit, false representations, or dishonest behavior on the part of appellant." *Id.* at 75.

Similarly to the plaintiff in *J. L. Cooper*, there is no evidence that Clifton committed any act of deceit, false representation, or dishonesty. At worst, Clifton failed to take advantage of every procedure he could possibly have used to prevent Johnson's misconduct, which does not rise to the level of willful misconduct required by *J. L. Cooper*. In addition, even if it were applied in this

case, the clean hands doctrine is only relevant in the context of Clifton's equitable claims and has no impact on his legal claims.

H. Clifton requests attorneys' fees and costs on appeal.

Should he prevail, Clifton requests that he be awarded his fees and costs on appeal and that the trial court's order and judgment regarding fees to the Johnson Estate be vacated. The party that substantially prevails at appeal shall be entitled to an award of costs. RAP 14.2. The prevailing party may also be granted fees on appeal if they are allowed under relevant authorities. RAP 18.1(a).

This appeal and lawsuit arose under Washington's probate code, and both the creditor's claims section, RCW 11.40.080(2), and the relevant portion of the Trust and Estate Dispute Resolution Act, RCW 11.96A.150, provide authority for a discretionary award of fees. If Clifton would have been allowed attorney fees at the trial court, he may recover on appeal as well. *Landberg v. Carlson*, 108 Wn. App. 749, 758, 33 P.3d 406 (2001). If Clifton prevails in this appeal, the previous award of fees to the Johnson Estate should be reversed and Clifton should be awarded his fees and costs on appeal.

CONCLUSION

Based on the foregoing argument and authorities,
Plaintiff/Appellant Caryl J. Clifton respectfully asks the Court to grant
the following relief:

1. Reverse the trial court's summary judgment dismissal;
2. Vacate the order and judgment for attorneys' fees and costs entered by the trial court against Clifton; and
3. Award Clifton his fees and costs for this appeal.

Submitted this 29th day of July, 2011.



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CERTIFICATE OF SERVICE

I certify under oath and penalty of perjury of the laws of the State of Washington that I caused a copy of the foregoing brief to be served on the 29th day of July 2011 by email and U.S. First Class Mail pursuant to an agreement to accept electronic service to the following address:

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Signed at Moses Lake, Washington, this 29th day of July, 2011.



Matthew C. Albrecht