

**FILED**

SEP 26 2011

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 298183

COURT OF APPEALS,  
DIVISION III  
OF THE STATE OF WASHINGTON

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Caryl J. Clifton, Plaintiff/Appellant,

v.

Linda Ross, Personal Representative of the Estate of  
Walter D. Johnson, Sr., Defendant/Respondent

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BRIEF OF RESPONDENT

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Attorneys for Respondent  
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## **I. STATEMENT OF THE ISSUE**

Whether the trial court properly granted the Estate's motion for Summary Judgment when Carol Clifton's (Mr. Clifton) claims are barred by various equitable defenses and statutes of limitations, and Walter Johnson Sr. (Mr. Johnson) owed no duty to protect Mr. Clifton from third party claims related to the 1973 Quit Claim Deed.

## **II. STATEMENT OF THE CASE**

On November 27, 1973, Mr. Johnson executed a Quit Claim Deed transferring a ten foot strip of land bordering he and Mr. Clifton's properties to Mr. Clifton. Clerks Papers ("CP") 169. Although the 1973 Quit Claim Deed named Mr. Clifton as the Grantee, the transaction actually occurred between Mr. Johnson and a third party who then gave the deed to Mr. Clifton. CP 125 (Clifton Testimony pg 251:2-5); CP 129-130 (Johnson Testimony pg 268:16-269:10). Mr. Clifton testified that the third party may have received the property without even paying any consideration. CP 125, (Clifton Testimony pg 251:2-5). Mr. Johnson did not think much about it at the time, stating, "My fence line I figured was the fence and that was it... I just signed it and that was it." CP 130, (Johnson Testimony pg 269:8-10). Thus, Mr. Johnson was simply attempting to help out a fellow neighbor. Little did he know that his

generosity would cause him to be embroiled in costly litigation nearly 33 years later because the quit claim deed was not recorded.

Thirty-Two (32) years passed and Mr. Clifton still had not recorded the 1973 Quit Claim Deed even though he had been in sole possession of it the entire time. CP 116, (Clifton Testimony pg 214:2-3). In 2005, Mr. Johnson sold Majerus a portion of his property, executing a Statutory Warranty Deed on February 25 (CP 167-168), and Majerus recorded his deed that very same day. CP 167. Unfortunately, a dispute arose as to who owned the ten foot strip of land previously included in the 1973 Quit Claim Deed. CP 167-169. When Mr. Clifton was informed by his neighbor, Ms. Benwell, that she owned the land that he believed to belong to him, and that she intended to put up a fence to enclose that land, Mr. Clifton realized his mistake and recorded his deed on June 30, 2006, nearly thirty-three (33) years after he had received it. CP 115-116 (Clifton Testimony).

Upon discovering Mr. Clifton's newly recorded adverse claim to the strip of land, Majerus took action. First, on July 18, 2006, Majerus contacted Mr. Clifton and asked if he would be willing to sell him the strip of land. CP 207-208. Clifton refused, and Majerus initiated a lawsuit, serving a summons and complaint on August 30, 2006, seeking quiet title and damages for slander of title, and naming Carol Clifton and his wife, as

well as Mr. Johnson, as defendants (the “Majerus-Clifton-Johnson lawsuit”). CP 160. Mr. Johnson filed a third-party lawsuit against Walla Walla Title Company seeking compensation for his damages, including attorney fees and costs. CP 178. Mr. Clifton filed no cross claims or third-party claims seeking any damages.

Eventually Mr. Johnson settled with Majerus, paying \$38,000, and was dismissed from the lawsuit. CP 46, at ¶ 4-5. Mr. Clifton chose to continue to litigate his position and did not file a suit against Mr. Johnson. CP 46. Following trial, on September 29, 2008, judgment was entered against Mr. Clifton quieting title to the disputed property in Majerus and awarding damages of \$63,147.35 against Mr. Clifton for slander of title. CP 26-28. Mr. Clifton appealed, and on April 29, 2010, the Washington State Court of Appeals, Division III (No. 274934) reversed the trial court judgment of \$63,147.35 as to slander of title damages but affirmed as to quiet title. CP 29-37.

While Mr. Clifton’s appeal remained pending in the Majerus-Clifton-Johnson lawsuit, Mr. Johnson died. On September 9, 2009, over three years after discovering Majerus’ claim, Mr. Clifton filed a creditor’s claim against the Estate for \$109,976.16. CP 4. The Estate rejected the claim and Mr. Clifton filed suit against the Estate on October 30, 2009,

claiming equitable indemnity, conversion, unjust enrichment, contribution, and constructive trust. CP 3-9 (Complaint).

On December 23, 2009, the Estate, which at that time was represented by Walter Johnson, Jr. as personal representative, agreed to a stay of proceedings. CP 12. Mr. Clifton was appealing the trial court decision in the Majerus-Clifton-Johnson lawsuit, and the Estate was going through litigation regarding heirship and distribution of Estate assets, as well as who would act as personal representative of the estate going forward. From the Estate's point of view, it did not make sense to proceed with the Clifton matter until it was determined who would be the personal representative of the Estate, and thus have the responsibility of defending the claim. After both issues were resolved, the trial court entered a stipulated order in this matter lifting the stay. CP 14.

Upon the lifting of the stay, the Estate moved for summary judgment against Mr. Clifton. After hearing oral argument the Hon. Judge Acey granted the Estate's motion for summary judgment:

... Mr. Clifton appears to be the author of his own misfortune. If he had gone ahead and recorded the deed when he got it we wouldn't be here talking about this case today, and there wouldn't have been all this litigation.

Even if I look at both Mr. Johnson, Sr. and Mr. Clifton as equally innocent in the matter, who, if anyone, was in a position to avoid the damages and harm that occurred to

the plaintiff? The only person that was in a position to avoid the harm or damage that occurred to Mr. Clifton was Mr. Clifton himself, by filing that deed.

Hon. Judge Acey Oral Ruling, Report of Proceedings 1 (“RP 1”) at pg 12:14-20.<sup>1</sup>

A later hearing was held to determine a motion for reconsideration and said motion was denied. CP 257-258. The Estate was awarded fees and costs, but the court decided to equitably reduce the fees and costs awarded by \$5,750.00, which was the alleged value of the land in question as asserted by Mr. Clifton, thus offsetting any potential benefit to Mr. Johnson. CP 270-271. Mr. Clifton timely appealed. CP 252-259.

### **III. SUMMARY OF ARGUMENT**

Mr. Clifton was “the author of his own misfortune.” Hon. Judge Acey Oral Ruling, RP 1 at p12:14-4:15. He received a Quit Claim Deed to a 10 foot strip of Mr. Johnson’s property in 1973 and he did not record the deed for thirty-three (33) years. When he discovered Majerus had an adverse claim, he sat on his rights for over three additional years, waited for Mr. Johnson to die, then initiated this lawsuit against the only truly innocent parties in this litigation, the heirs of the estate of Mr. Johnson.

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<sup>1</sup> The Verbatim Report of Proceedings appears to have been transcribed and transmitted to the Court of Appeals as two separate reports dated 01-12-2011 (Summary Judgment Hearing) and 02-08-2011 (Motion for Reconsideration and Order Presentation Hearing). Because pagination is not consecutive for these two transcripts, the Estate will cite to them in the same manner as Mr. Clifton as RP 1 (for transcript dated 01-12-2011) and RP 2 (for transcript dated 02-08-2011).

Fortunately for the heirs, however, the trial court correctly ruled that all of Mr. Clifton's claims are barred.

This case can be easily broken down into two primary claims for relief by Mr. Clifton (1) equitable indemnity and (2) unjust enrichment. All of Mr. Clifton's various theories derive from these two primary requests for relief, both of which are barred for multiple reasons, only one of those reasons need be applied by this court to each of the above two causes of action for this court to affirm the trial court's order on summary judgment.

The most financially significant request for relief from Mr. Clifton is his request for equitable indemnity. However, Mr. Clifton is barred from seeking equitable indemnity because his own conduct caused him to be exposed to and involved in litigation with Majerus. *Tradewell Group, Inc., v. Mavis*, 71 Wn. App 120, 129, 857 P.2d 1053 (1993). To be entitled to equitable indemnity, Mr. Clifton would have to prove that Mr. Johnson was the sole cause of the litigation between himself and Majerus. *Id.* Mr. Clifton's failure to file the 1973 Quit Claim Deed was, at least, a contributing factor to the litigation, and he can not, therefore, prove that Mr. Johnson was the sole cause of the litigation. This court need only find that Mr. Clifton had the smallest of roles in bringing about this litigation to dismiss his claims for equitable indemnity.

Mr. Clifton's other claims are all, at their most basic level, one claim against Mr. Johnson for unjust enrichment. Mr. Clifton knew of this claim on August 30, 2006. He waited more than three years before he filed this lawsuit, and claims for unjust enrichment are subject to a three year statute of limitations. RCW 4.16.080 (3); *Davenport v. Washington Educ. Ass'n*, 147 Wn. App. 704, 737, 197 P.3d 686 (2008). Therefore, Mr. Clifton's claim for reimbursement of the \$5,750 is barred by the statute of limitations.

Although there are multiple legal theories under which this court may affirm the trial court's ruling, the Court need only reach the two arguments listed above to hold that all of Mr. Clifton's claims are barred.

#### IV. ARGUMENT

A. THE TRIAL COURT PROPERLY GRANTED THE ESTATE'S MOTION FOR SUMMARY JUDGMENT BECAUSE ALL OF THE PLAINTIFF'S CLAIMS ARE BARRED BY STATUTES OF LIMITATIONS.

1. The trial court correctly determined that the statutes of limitations on Mr. Clifton's claims accrued no later than August 30, 2006.

The statutes of limitations for Mr. Clifton to file suit against Mr. Johnson began to run no later than August 30, 2006, the day he was served with a Summons and Complaint from Majerus. The statute of limitations for filing a claim begins to accrue when the plaintiff has a right to seek relief in the courts. *Janicki Logging & Constr. Co., v. Schwabe*,

*Williamson & Wyatt, P.C.*, 109 Wn. App. 655, 659, 37 P.3d 309 (2001).

Washington's policy is to favor the enforcement of the statute of limitations so as to shield defendants from stale claims. *Crisman v.*

*Crisman*, 85 Wn. App. 15, 19, 931 P.2d 163 (1997). Courts will not read

into statutes of limitations exceptions not embodied therein. *Rushlight v.*

*McLain*, 28 Wn.2d 189, 201, 182 P.2d 62, 68 (1947). The policy behind

the rule is as follows:

‘When plaintiffs sleep on their rights, evidence may be lost and witnesses' memories may fade.’ Any rule that tolls the statute of limitations is in conflict with these policies. As such, this court recognizes the need to balance the unfairness of cutting off stale claims when the plaintiff would probably not have known he had been injured until the limitations period had run, against assumptions that stale claims are more likely to be spurious and supported by untrustworthy evidence.

*Huff v. Roach*, 125 Wn. App. 724, 732, 106 P.3d 268, 271 (2005) (internal citations omitted).

Mr. Clifton incorrectly argues that his claims did not accrue until the final judgment was entered in the Majerus-Clifton-Johnson lawsuit on September 29, 2008. Mr. Clifton cites *Mellor v. Chamberlin*, 100 Wn.2d 643, 647, 673 P.2d 610 (1983) for the proposition that mere knowledge of a property line dispute does not cause actionable damages, and that “... 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”. Appellant Brief at 21. As an initial matter, there is no discussion of indemnification in *Mellor* that would support this argument. *See Mellor*. Second, *Mellor* indicates that a right of action accrues when an adverse party, such as Majerus, attempts to enforce a claim. *Id.*

The *Mellor* court considered an issue of res judicata in an encroachment dispute. *Id.* One of the parties to a prior lawsuit, Buckman, refrained from asserting a potential encroachment claim against the other party, Mellor, in the prior suit. *Id.* at 645. Because the claim had not been asserted by Buckman in the prior lawsuit, the court found that Mellor had not been damaged, and thus any potential claim, at least for the purposes of res judicata, had not ripened at that time. *Id.* at 647. Later, Buckman wrote Mellor a letter seeking to enforce the encroachment claim that she had not previously pursued. *Id.* at 645. The matter was settled, and no lawsuit was filed by Buckman. *Id.* The court stated that Buckman’s mere act of attempting to enforce her claim caused Mellor’s claim to accrue:

“It was over a year after the settlement of the misrepresentation claim that Buckman decided to enforce her encroachment claim. Until that time, Mellor’s lawsuit was not ripe.”

*Id.* at 647 (emphasis added).

Rather than supporting Mr. Clifton’s position, *Mellor* actually supports the Estate’s position that Mr. Clifton’s claims accrued when

Majerus initiated the lawsuit, and Mr. Clifton was forced to defend himself against said lawsuit.

The day Mr. Clifton discovered that Majerus had an adverse claim over the land deeded to Mr. Clifton under the 1973 Quit Claim Deed, Mr. Clifton was aware of his alleged cause of action against Mr. Johnson and had a right to seek enforcement. On August 30, 2006, Mr. Clifton was aware of all of the facts upon which the present lawsuit is based. On that date, Mr. Clifton was aware of the Majerus claims against him for slander of title and quiet title. CP 160. On that date, Mr. Clifton knew, through Ms. Benwell's statements and actions, that she intended to move the fence onto land that Mr. Clifton considered to be his property. CP 115 (Clifton Testimony, pg 209:21). On that date, Mr. Clifton was aware that Majerus and Ms. Benwell intended to enforce their rights to possession of the land that Mr. Clifton considered to be his property. CP 115; CP 160. On that date, Mr. Clifton knew that the competing claims of both he and Majerus derived from deeds executed by Mr. Johnson. CP 160. Finally, on that date, Mr. Clifton knew that the Majerus claim would without question result in the damages which are the basis of this present lawsuit, because, win or lose, if he decided to defend his alleged property rights against the actions of Majerus, he would incur attorney's fees and costs. These are the undisputed facts upon which Mr. Clifton now asserts his claim, and Mr.

Clifton has been aware of every single one of them since at least August 30, 2006. If Mr. Clifton has ever had the right to pursue the claims he now pursues against the Estate, his right to pursue those claims accrued no later than that date.

2. The trial court correctly determined that the statutes of limitations on all of Mr. Clifton's claims had expired, thus barring his various claims.

Washington State law requires that claims not filed within specified time limits be barred from future actions. "For the purpose of tolling any statute of limitations an action shall be deemed commenced when the complaint is filed or summons is served whichever occurs first." RCW 4.16.170. Mr. Clifton's claim for contribution is barred by a one year statute of limitations, and the remainder of his claims are barred by three year statutes of limitations.

- a. *Mr. Clifton's claim for contribution is barred by a one year statute of limitations.*

The trial court correctly ruled that Mr. Clifton's claim for contribution is barred. Actions for contribution must be commenced within one (1) year after the judgment becomes final. RCW 4.22.050 (3). The Final Judgment in the Majarus-Clifton-Johnson lawsuit was entered on September 29, 2008. CP 28. Mr. Clifton did not file his complaint or serve his summons on the Estate until October 30, 2009. CP 1-3. An action is "deemed commenced when the complaint is filed or the

summons is served”. RCW 4.16.170. Because the complaint was filed and the summons was served over one year after the final judgment was entered, Mr. Clifton’s claim for contribution is barred by the statute of limitations.

b. *Mr. Clifton’s claim for conversion is barred by a three year statute of limitations.*

The remainder of Mr. Clifton’s claims are subject to three year statutes of limitations.

The trial court correctly ruled that Mr. Clifton’s claim for conversion is barred. Actions for conversion must be commenced within three (3) years. RCW 4.16.080. Mr. Clifton was served a summons and complaint by Majerus on August 30, 2006. Mr. Clifton did not file his complaint or serve his summons on the Estate until October 30, 2009. Because the complaint was filed and the summons was served over three years after Mr. Clifton discovered the facts leading to his cause of action, Mr. Clifton’s claim for conversion is barred by the statute of limitations.

c. *Mr. Clifton’s claims for Equitable Indemnity and Equitable Reimbursement for Legal Expenses are barred by three year statutes of limitations.*

Mr. Clifton’s argument for a six year statute of limitations on his equitable claims is flawed. Under *Davenport v. Washington Educ. Ass’n* the statute of limitations applicable to the equitable common law causes of

action for unjust enrichment, restitution, and implied in law contract is governed by RCW 4.16.080 (3), and is three years. *Davenport* at 737.

Mr. Clifton's equitable claims for indemnity are essentially just claims seeking restitution and compensation for legal costs of defense. They are actions "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). For Mr. Clifton's purposes, the fact that Mr. Johnson gave him a quit claim deed in 1973 is irrelevant. His claims are not based on said deed, but on various theories of equity independent of the document itself because the quit claim deed contains no warranties upon which any claims may be based.

Under RCW 4.16.080 (3) and *Davenport*, Mr. Clifton's claims of equitable indemnity and equitable reimbursement for legal expenses each have a three year statute of limitations, and the trial court correctly ruled that they are therefore barred.

d. *Mr. Clifton's claim for Unjust Enrichment is barred by a three year statute of limitations.*

The trial court correctly ruled that Mr. Clifton's claim for unjust enrichment is barred. This claim is also governed by RCW 4.16.080 (3) as an 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); *Davenport* at 737. The statute of limitations for claims governed by RCW 4.16.080 (3) is three years. Mr. Clifton knew of his potential claim on August 30, 2006, and did not make his claim of unjust enrichment within three years. His claim is therefore barred.

e. *Mr. Clifton's claim for constructive trust is barred by a three year statute of limitations.*

Mr. Clifton's claim of a Constructive Trust is essentially the same claim as his claims for conversion and unjust enrichment. A constructive trust is an equitable remedy imposed by a court. *See In re Estate of Krappes*, 121 Wn. App 653, 664, 91 P.3d 96 (2004). Mr. Clifton attempts to assert that a constructive trust arose when the Majerus-Clifton-Johnson court quieted title in the property to Majerus. CP 7. However, constructive trusts don't just arise by themselves, and there was no order entered by the court imposing a constructive trust for the benefit of Mr. Clifton. Even if there was a constructive trust, it would have arisen at the time Mr. Johnson received the profits from the sale to Majerus, and the trial court was correct in ruling that it is barred by the statute of limitations because Mr. Clifton discovered this potential cause of action on August 30, 2006, and waited more than three years to file his claim. As asserted by Mr. Clifton, his claim for constructive trust is essentially identical to his claims for conversion and unjust enrichment, and if it arose at all, it

arose no later than August 30, 2006, and is barred by the same three year statute of limitations as unjust enrichment. *Davenport* at 737.

3. The trial court correctly ruled that Mr. Clifton's claims were not equitably tolled or prohibited by judicial estoppel.

Mr. Clifton cites *Millay v. Cam*, 135 Wn.2d 193, 206, 955 P.2d 791 (1998) for the proposition that he is entitled to an equitable tolling of the statutes of limitations on his various claims. However, *Millay* had a very narrow holding specifically limited to the 60 day statutory redemption period for junior lien creditor's whose liens have been extinguished by the sale of property under a foreclosure execution. *Id.* at 198. Significantly, under *Millay*, the plaintiff must have been induced through fraud or oppression into waiting to bring a claim. *Id.* at 205. The court's holding in *Millay* does not support Mr. Clifton's argument that his claims were equitably tolled:

We hold the statutory redemption period may be equitably tolled when the redemptioner in possession submits a grossly exaggerated statement of the sum required to redeem and the prospective redemptioner cannot with due diligence ascertain the sum required to redeem within the time remaining. This rule requires more than good faith on the prospective redemptioner's part. Moreover the prospective redemptioner must file the declaratory action within the redemption period for tolling to apply.

*Id.* at 206.

*Millay* is also inapplicable because Mr. Johnson did not use fraud or oppression to induce Mr. Clifton into waiting to bring a claim. Mr. Clifton contends that Mr. Johnson induced him into delaying his claim by asserting that the boundary lines did not overlap. However, Mr. Clifton does not argue that this claimed inducement was based on grounds of fraud or oppression, as is required under *Millay*. Mr. Johnson was not a professional land surveyor and Mr. Clifton had no right to rely on Mr. Johnson's opinion as to where the property line was located. Mr. Clifton had a duty to investigate for himself where the line was located, and determine if he had a claim against Mr. Johnson. Mr. Clifton knew there was no certainty that he would be successful in defending the Majerus-Clifton-Johnson lawsuit. Knowing this, he should have made any potential claims against Mr. Johnson within the statutory period of time. Mr. Clifton failed to do so, and there are no equitable considerations which entitle him to a tolling of the statute.

There was no positive rule of law preventing Mr. Clifton from making any claims against Mr. Johnson. Although he cites *Seamans v. Walgren*, 82 Wn.2d 771,775, 514 P.2d 166 (1973) for the proposition that he is entitled to a tolling of the statute of limitations because he was legally estopped from bringing a claim, *Seamans* does not support his argument. In *Seamans* the defendant was a member of the legislature who

held a privilege under the Washington State Constitution which prevented him from being sued while the legislature was in session. *Id.* at 773.

When Mr. Seamans was sued, and he claimed a defense of the statute of limitations, the plaintiff argued that the statute of limitations was tolled during the time that Mr. Seamans was immune from lawsuit. *Id.* The *Seamans* court agreed, stating that the primary rationale for tolling the statute of limitations was to protect plaintiffs who were unable to properly serve a defendant who was either out of the state or in hiding. *Id.* at 776. Here, it is not disputed that Mr. Johnson was available to be served at all relevant times had Mr. Clifton determined to do so. Therefore, Mr. Clifton is not entitled to a tolling of any of his statutes of limitations.

Finally, judicial estoppel did not prevent Mr. Clifton from making a cross claim against Mr. Johnson.

A pleading may state as a cross claim by one party against a coparty arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action. Such cross claim may include a claim that the party against whom it is asserted is or may be liable to the cross claimant for all or part of a claim asserted in the action against the cross claimant.

CR 13 (g).

“CR 13 (g) permits the assertion of cross claims against a coparty and is liberally construed in order to resolve as many related claims as possible

in a single action.” *Bennett v. Dalton*, 120 Wn. App. 74, 78, 84 P.3d 265 (2004). The statute of limitations on a defendant’s cross claim against a codefendant is not tolled by the commencement of the plaintiff’s lawsuit. *Id.* at 86.

Mr. Clifton’s claims against Mr. Johnson did not require him to contradict any assertions he was making in his defense of the Majerus suit. Mr. Clifton primarily requests reimbursement for his loss of the land in questions as well as attorney’s fees incurred in defending his position. He states that due to judicial estoppel, “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.” Appellant Brief at 29 (emphasis in original). However, Mr. Clifton was well within his rights to sue Mr. Johnson as an alternative argument in the event that the property line was determined to be where Majerus contended. CR 8.

Mr. Clifton is essentially arguing that, because he thought Mr. Johnson was correct, he could not bring suit against him. This argument makes little sense because it relies on the supposition that Mr. Clifton had the right to rely on Mr. Johnson’s opinion regarding the boundary line. Had Mr. Clifton made an alternative cross claim against Mr. Johnson, the liberal rules of cross pleading would have allowed him to pursue his claims in spite of the fact that he agreed with Mr. Johnson’s opinion on

where the property line was located. He is not now entitled to an equitable tolling of the statute of limitations simply because he failed to make said claim.

B. MR. CLIFTON HAS FAILED TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED.

Mr. Clifton has failed to meet the necessary elements for each of the claims for which he has sought relief.

1. Mr. Clifton is not entitled to equitable indemnity for legal costs.

The rule in Washington is that absent a contract, statute, or recognized ground of equity, attorney fees will not be awarded as part of the costs of litigation. *Tradewell Group, Inc.*, 71 Wn. App. at 126. One of the recognized equitable grounds under which fees can be awarded is the theory of equitable indemnity. *Id.* Under this theory, the court may award fees where the natural and proximate consequences of a defendant's wrongful act put the plaintiff in litigation with others and the action generating the expense is instituted by a third party not connected with the original transaction. *Id.* The damages must involve a breach of duty by A which exposes B to litigation with C, a third person who was a stranger to the event involving A and B. *Manning v. Loidhamer*, 13 Wn. App. 766, 769, 538 P.2d 136 (1975). In general, three elements are necessary to create liability:

(1) a wrongful act or omission by A toward B; (2) such act or omission exposes or involves B in litigation with C; and (3) C was not connected with the initial transaction or event, Viz., the wrongful act or omission of A towards B.

*Id.*

A plaintiff must meet all three elements to obtain his or her requested relief for equitable indemnity. *Id.* Without conceding the first element, the Estate will address elements two and three because they are so clearly lacking in this case, and by themselves, serve as a bar to Mr. Clifton's claim for equitable indemnity.

- a. *Mr. Clifton is barred from seeking equitable indemnity because Mr. Johnson's actions were not the sole cause of the litigation between Majerus and Mr. Clifton.*

"...[T]he critical inquiry under the causation element of equitable indemnity is whether apart from A's actions, B's own conduct caused it to be 'exposed' or 'involved' in litigation." *Tradewell Group, Inc.* at 128.

Washington State Courts have consistently held that a party may not recover attorney fees under the theory of equitable indemnity if, in addition to the wrongful act or omission of A, there are other reasons why B became involved in litigation with C. *Id.*; see also *Stevens v. Security Pac. Mortg. Corp.*, 53 Wn. App 507, 768 P.2d 1007 (1989) (where lender had breached its contract with the investor, the lender could not recover its attorney fees from the third party broker based on equitable indemnity

because “[The lender] was exposed to the litigation not only by [the broker’s negligent] conduct, but by its own refusal to replace the loan which constituted a breach of contract” ); *see also Western Community Bank v. Helmer*, 48 Wn. App 694, 740 P.2d 359 (1987).

In *Western Community Bank*, the plaintiff was denied equitable indemnity because her own inactions exposed her to the litigation. *Id.* at 701. Ms. Helmer and Mr. Arsenault had been involved in a relationship, and when the relationship dissolved, they made an agreement that Mr. Arsenault would pay Ms. Helmer a monthly allowance, as well as co-sign on a loan to purchase her a home through Western Community Bank (“Bank”). *Id.* at 695. Ms. Helmer was primarily responsible on the loan, and was to use a portion of her monthly allowance to make payments. *Id.* Mr. Arsenault eventually stopped paying the monthly allowance causing Ms. Helmer to stop making payments on the loan. *Id.* The Bank started a foreclosure action against Ms. Helmer and Mr. Arsenault. *Id.* Mr. Arsenault confessed judgment to the bank resulting in the dismissal of the Bank’s actions against Ms. Helmer and Mr. Arsenault. *Id.* Ms. Helmer then sued Mr. Arsenault for equitable indemnity for the costs of the litigation with the Bank, alleging that his failure to pay her the monthly allowance was a breach of contract and the primary cause of the foreclosure action. *Id.* at 700. The Appellate Court refused to allow fees

because, “Ms. Helmer was directly liable on the mortgage and her nonpayment of the mortgage led to the foreclosure action. Therefore, we cannot say that Mr. Arsenault’s failure to pay Ms. Helmer was the sole reason Ms. Helmer was involved in the litigation.” *Id.* at 701 (emphasis added).

Mr. Clifton is barred from bringing an action for indemnity because, like Ms. Helmer, his own conduct caused him to be exposed and involved in the litigation with Majerus. Like Ms. Helmer’s failure to pay her mortgage, Mr. Clifton’s failure to timely record the 1973 Quit Claim Deed, which he was in sole possession of at all relevant times, was a primary factor leading to the litigation with Majerus. Had he simply recorded the deed when he received it, or at any point during the 32 years thereafter, there would have been no litigation with Majerus.

Mr. Clifton was in a better position to help prevent the litigation with Majerus than Ms. Helmer was to help prevent the litigation with the Bank. Mr. Arsenault’s failure to make the monthly payments to Ms. Helmer was a significant reason that Ms. Helmer was unable to make her mortgage payments, even so, the court held that Mr. Arsenault’s actions could not be considered the sole cause of the litigation. *Id.* at 701. Ms. Helmer had an independent duty to protect her interest in the home by making her payments on time. *Id.* Here, there was nothing preventing

Mr. Clifton from recording his deed and protecting his interest in the property, yet he failed to do so. Like Ms. Helmer, Mr. Clifton had an independent duty to protect his own interest in his property, and because he failed to do so it cannot be said that Mr. Johnson was the sole cause of the litigation between Majerus and Mr. Clifton, and Mr. Clifton is therefore not entitled to equitable indemnity and reimbursement for attorney's fees and costs.

- b. *Mr. Clifton fails to meet the third element for equitable indemnity because Majerus was involved in the allegedly wrongful transaction.*

In addition to failing the second prong of the test for equitable indemnity, Mr. Clifton's claim fails to meet the third prong because Majerus was deeply involved in the wrongful act complained of. *Manning* at 769. The alleged wrong complained of was Mr. Johnson's sale of Mr. Clifton's property to Majerus. Under the third prong of the test, Majerus must not be connected with the initial wrongful transaction or event. *Id.* Here, Majerus bought Mr. Clifton's property, and it therefore cannot be said that Majerus was not connected with the transaction.

2. There has not been a constructive trust established for the benefit of Mr. Clifton.

A constructive trust is an equitable remedy imposed by a court. *See In re Estate of Krappes* at 664. It is "used in equity to compel those who unfairly hold a property interest which they obtained or retain by

reason of unjust or unconscionable means to convey that interest to, or to hold it for, another to whom it justly belongs...” *Humphries v. Riveland*, 67 Wn.2d 376, 389, 407 P.2d 967 (1965). Here, no court has imposed a constructive trust against Mr. Johnson for the benefit of Mr. Clifton. See CP. 26-28. Prior to this lawsuit, Mr. Clifton has made no claim against Mr. Johnson for unjust enrichment, which would be the only basis upon which a court might impose a constructive trust against Mr. Johnson. Mr. Clifton’s claim of unjust enrichment has been dismissed by the trial court in this matter, and there is no judgment imposing the remedy of a constructive trust against Mr. Johnson for the benefit of Mr. Clifton.

3. Mr. Clifton has failed to establish the necessary elements to prove his claim for conversion.

Conversion is the act of willfully interfering with any chattel, without lawful justification, whereby any person entitled thereto is deprived of the possession of it. *Public Utility Dist. No. 1 of Lewis County v. Washington Public Power Supply System*, 104 Wn.2d 353, 378, 705 P.2d 1195 (1985). Money, under certain circumstances, may become the subject of conversion. *Id.* However, there can be no conversion of money unless it was wrongfully received by the party charged with conversion, or unless such party was under obligation to return the specific money to the party claiming it. *Id.*

Mr. Clifton claims that there was a constructive trust established by the ruling in the Majerus-Clifton-Johnson lawsuit, and that Mr. Johnson has committed conversion by refusing to turn funds over to Mr. Clifton. CP 7. However, there was no constructive trust established under that ruling. CP 26-28. Because Mr. Johnson does not hold funds in a constructive trust for the benefit of Mr. Clifton, Mr. Johnson has not deprived Mr. Clifton of any chattel. Without such a deprivation of chattel, Mr. Clifton has no claim for conversion.

4. Mr. Clifton has failed to meet the necessary elements to prove his claim for unjust enrichment.

The three elements necessary to sustain a claim based on unjust enrichment are (1) a benefit conferred upon the defendant by the plaintiff; (2) an appreciation or knowledge by the defendant of the benefit; and (3) the acceptance or retention by the defendant of the benefit under such circumstances as to make it inequitable for the defendant to retain the benefit without the payment of its value. *Young v. Young*, 164 Wn.2d 477, 484, 191 P.3d 1258 (2008). But enrichment alone will not trigger the doctrine; rather, the enrichment must be unjust under the circumstances and as between the two parties to the transaction. *Cox v. O'Brien*, 150 Wn. App. 24, 37, 206 P.3d 682 (2009) (no unjust enrichment when purchasers of structurally unsound home failed to protect themselves by

inspecting the home, and there was no evidence that sellers were aware that the home was structurally unsound).

Mr. Clifton's claim does not meet the elements of unjust enrichment. First, Mr. Clifton conferred no benefit upon Mr. Johnson. To the extent that Mr. Johnson received a benefit, that benefit was received from Majerus, not Mr. Clifton. Second, Mr. Johnson did not have knowledge or appreciation that he was selling property to which Mr. Clifton had a claim. Mr. Clifton had not recorded the 1973 Quit Claim Deed and none of the professional surveyors or title companies which Mr. Johnson relied upon for the transaction had any notice that Mr. Clifton had a claim to the property. To the extent that Mr. Johnson received a benefit from Majerus, he received that benefit because Mr. Clifton had failed to record his deed. Third, Mr. Johnson did not retain a benefit conferred by Mr. Clifton. After awarding attorney's fees and costs to the Estate in the amount of \$11,500.00, the trial court equitably reduced the fees by \$5,750, which is the amount that Mr. Clifton alleges Mr. Johnson unjustly benefited from the sale of the property, thus eliminating any benefit which may have been conferred on Mr. Johnson. Here, the elements necessary to establish the equitable principal of unjust enrichment have not been met.

5. Mr. Clifton has no claim for contribution.

A claim for contribution arises when a judgment is entered against one party to an action, and that party claims that comparative fault requires a third party to pay an equitable share of the obligation. RCW 4.22.050. The only judgment rendered in the Majerus-Clifton-Johnson suit against Mr. Clifton was \$63,147.35 for slander of title. CP 28. This judgment was overturned by the appellate court and Mr. Clifton was not obligated to pay any damages to Majerus. CP 37. Therefore, it is irrelevant whether or not Mr. Clifton would have been entitled to receive an equitable reimbursement from Mr. Johnson under a theory of contribution because there is no judgment for which Mr. Clifton may pursue contribution from Mr. Johnson.

6. Mr. Johnson owed no duty to protect Mr. Clifton's rights against the claims of Majerus under the 1973 Quit Claim Deed.

Mr. Johnson does not owe Mr. Clifton any duty to protect his claim from third parties under the 1973 Quit Claim Deed. A properly executed quit claim deed conveys and quitclaims to the grantee only the then existing legal and equitable rights of the grantor in the premises therein described. *See* RCW 64.04.050. In Washington State, "a quitclaim deed is just as effectual to convey the title to real estate as any other deed, and a grantee of a quitclaim deed has the same rights as the grantee of a

warranty deed, with the exception that he is given no warranties.” *McCoy v. Lowrie*, 44 Wn.2d 483, 486, 268 P.2d 1003 (1954) (emphasis added).

An unrecorded deed may be effective as between the grantor and grantee, but an unrecorded deed does not protect the grantee’s interest against third parties:

A conveyance of real property, when acknowledged by the person executing the same (the acknowledgment being certified as required by law), may be recorded in the office of the recording officer of the county where the property is situated. Every such conveyance not so recorded is void as against any subsequent purchaser or mortgagee in good faith and for a valuable consideration from the same vendor, his heirs or devisees, of the same real property or any portion thereof whose conveyance is first duly recorded.

RCW 65.08.070 (emphasis added)

The general purpose of recording a deed is to place subsequent purchasers on notice of property’s transfer from one owner to another. *Udall v. T.D. Escrow Services, Inc.*, 132 Wn. App 290, 299, 130 P.3d 908 (2006).

All of Mr. Clifton’s claims presuppose that Mr. Johnson owed Mr. Clifton a duty to protect his interest in land from subsequent third party claimants. However, the unrecorded 1973 Quit Claim Deed did not establish a duty on the part of Mr. Johnson to protect Mr. Clifton’s interest from third parties. The purpose of our recording statutes is to provide purchasers with a means of perfecting their interest against subsequent purchasers of the same land. *Udall* at 299. Although the 1973 Quit Claim

Deed transferred title in the land to Mr. Clifton, in order to ensure that his rights were protected from subsequent purchasers, Mr. Clifton had a duty to record the deed. Had he recorded the deed, Majerus, the surveyors, and the title company would have all been on notice that Mr. Clifton held title to the land. Mr. Clifton failed to do so, and Mr. Johnson had no duty to protect Mr. Clifton's rights against third party claimants.

In addition, the 1973 deed between Mr. Johnson and Mr. Clifton was a Quit Claim Deed. That is a deed without any warranties of title or duties to protect title against third parties. *Muscatel v. Storey*, 56 Wn.2d 635, 639, 354 P.2d 931 (1960). The 2005 deed between Mr. Johnson and Majerus was a Statutory Warranty Deed which required Mr. Johnson to protect the title transfer against claims of others, including Mr. Clifton. RCW 64.04.030. When the dispute arose between Mr. Clifton and Majerus, Mr. Johnson was obligated to defend Majerus against Mr. Clifton's claim. Mr. Clifton is now asserting that Mr. Johnson also had a duty to defend Mr. Clifton against the claim of Majerus. To hold that Mr. Johnson owed a duty to defend both the 1973 Quit Claim Deed and the 2005 Warranty Deed, would achieve an absurd and unjust result that would force Mr. Johnson to defend a lawsuit against himself. Mr. Johnson had no duty to defend Mr. Clifton's title under the 1973 Quit Claim Deed because the deed contained no warranties of any kind.

C. MR. CLIFTON'S CLAIMS ARE BARRED BY THE  
EQUITABLE DOCTRINE OF LACHES.

Laches is an “inexcusable delay in asserting a right; an implied waiver arising from knowledge of existing conditions and an acquiescence in them; such neglect to assert a right as, taken in conjunction with lapse of time more or less great, and other circumstances [sic] covering prejudice to an adverse party, operates as a bar in a court of equity; such delay in enforcing one’s rights as works disadvantage to another.” *Edison Oyster Co. v. Pioneer Oyster Co*, 22 Wn.2d 616, 628, 157 P.2d 302 (1945). The elements of laches are:

- (1) knowledge or reasonable opportunity to discover on the part of a potential plaintiff that he has a cause of action against a defendant;
- (2) an unreasonable delay by the plaintiff in commencing that cause of action [and];
- (3) damage to [the] defendant resulting from the unreasonable delay.

*Carlson v. Gibraltar Savings of Washington*, 50 Wn. App. 424, 429, 749 P.2d 697 (1988).

In *Carlson*, under the doctrine of laches the plaintiff was barred from bringing a claim. *See id.* The court found that the plaintiff had notice of his potential cause of action more than three years before he brought the claim; that instead of bringing his claim immediately, the plaintiff waited to see if another lawsuit would resolve his potential claim, in the process allowing the defendant to come to a settlement and believe that all potential claims against him had been resolved; and that the

plaintiff then filed suit causing the defendant to incur additional litigation expenses when the defendant had a right to believe that all the issues had been resolved by the prior lawsuit. *Id.*

The court found that the plaintiff had “simply rested on his rights for more than 3 years because he assumed that [the plaintiff in the prior action] would protect those rights for him.” *Id.* at 431. The court went on to state the following:

It is not reasonable for a potential plaintiff to delay in asserting his legal rights merely because he hopes or expects that someone else’s lawsuit will, as an incidental matter, achieve the results he desires. It is even less reasonable to watch one’s ally settle a lawsuit, wait out the option period, and then, determining that the settlement was not advantageous after all, reinstate litigation of the very matters previously settled.

*Id.*

Thus, according to the court, under the doctrine of laches the appellant was not permitted to sit on his rights for over three years in the hopes that another lawsuit would resolve the issues, let the defendant enter into a settlement agreement by which he thought he had settled the matter entirely, and then later bring a claim. *See id.*

Like the claims in *Carlson*, Mr. Clifton’s claims are equitably barred under the doctrine of laches. First, like *Carlson*, Mr. Clifton knew of his potential claim against Mr. Johnson on August 30, 2006, more than three years prior to bringing suit against the Estate. Second, like

*Carlson*, his delay of more than three years was unreasonable because Mr. Clifton delayed bringing suit in the hope that the Majerus-Clifton-Johnson lawsuit would achieve the results he was after; and because he allowed Mr. Johnson to settle the prior lawsuit and believe that he had resolved all potential claims. Third, like *Carlson*, Mr. Clifton's delay has caused Mr. Johnson to incur damages defending against essentially the same claim that he settled prior to his death.

Mr. Johnson had a reasonable expectation to rely on the fact that Mr. Clifton should have brought any claim he may have had against Mr. Johnson in the prior lawsuit. Instead, Mr. Clifton sat on his claim, allowing Mr. Johnson to settle with Majerus and eventually die before Mr. Clifton brought the present action. All of the necessary elements of laches are met; it would be unjust not to bar Mr. Clifton's current claims against the Estate.

D. MR. CLIFTON'S CLAIMS HAVE BEEN PREVIOUSLY LITIGATED AND ARE THEREFORE BARRED BY THE DOCTRINE OF RES JUDICATA.

Res judicata, or claim preclusion, bars the relitigation of claims and issues that were litigated, or might have been litigated, in a prior action. *Pederson v. Potter*, 103 Wn. App. 62, 69, 11 P.3d 833 (2000). Application of the doctrine requires identity between a prior judgment and a subsequent action as to (1) persons and parties, (2) cause of action, (3)

subject matter, and (4) the quality of persons for or against whom the claim is made. *Id.* Res judicata also requires a final judgment on the merits. *Id.* at 67.

The policy behind the doctrine of res judicata, broadly stated, is to prevent repetitive litigation of the same matters. *Id.* at 71. There are two primary policy considerations supporting this goal. The first policy consideration supporting this goal is to maintain the integrity of the legal system in which there is no assurance that a second or third decision on a claim would be more reliable than the first decision. *Id.* The second policy consideration supporting this goal is the necessity of achieving finality in a given matter. *Id.* Not only is it costly and inefficient to repetitively try the same matter time and again, third parties, successors in interest, creditors, and other members of the community should be able to proceed with some assurance that they may rely on a previously entered judgment. *Id.* The Court in *Pederson* said it most succinctly when it stated, “The successful party should not be subjected to the vexation and exhaustion of resources that repetitive litigation may entail.” *Id.*

Here, every element of res judicata has been met. Mr. Clifton and Mr. Johnson were co-parties to the prior litigation involving the same real estate transactions as the present case. Mr. Clifton had every conceivable opportunity to make a claim against Mr. Johnson at that time. Mr. Clifton

chose not to make a claim against Mr. Johnson when such a claim was required, instead waiting to make his claim for relief until well after the litigation had concluded. By failing to bring an action before Mr. Johnson's death, Mr. Clifton has materially prejudiced Mr. Johnson and his estate. This case is an excellent example of why our courts adopted the doctrine of res judicata.

E. THE ESTATE REQUESTS ATTORNEY'S FEES AND COSTS ON APPEAL.

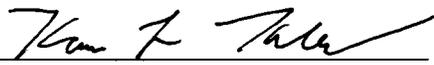
Should the Estate prevail on appeal, the Estate requests that it be awarded its fees and costs. The party that substantially prevails at appeal shall be entitled to an award of costs. RAP 14.2. The prevailing party may also be granted fees on appeal if they are allowed under relevant authorities. RAP 18.1 (a).

Here, attorney's fees are authorized under RCW 11.96A.150, and RCW 11.40.080(2). The Estate was awarded fees at trial, and may therefore recover fees on appeal as well. *Landberg v. Carlson*, 108 Wn. App. 749, 758, 33 P.3d 406 (2001). The Estate has been forced to defend a lawsuit which it defeated on Summary Judgment. Mr. Clifton continues to pursue his claims on appeal, and his pursuit of those claims has caused the Estate to incur significant attorney's fees. It is now equitable to award the Estate attorney's fees for defending against this appeal.

## VI. CONCLUSION

Mr. Clifton was the author of his own misfortune. He received a Quit Claim Deed in 1973 but he failed to record it for over 33 years, and this delay was the primary cause of the ensuing litigation. Now he is pursuing this claim against the only truly faultless parties involved in this lawsuit, the heirs of the Estate of Walter Johnson, Sr. Based on the foregoing legal arguments, the Estate requests that the Court of Appeals uphold the trial court's decision to dismiss all of Mr. Clifton's claims and award the Estate its fees and costs for this appeal.

HELSELL FETTERMAN LLP

By:   
Kameron L. Kirkevold, WSBA No. 40829

**CERTIFICATE OF SERVICE**

I, Michelle Wimmer, hereby declare and state as follows:

1. I am over the age of majority, competent to testify and make the following statements based upon my own personal knowledge and belief.

2. I am now and at all times herein mentioned employed by the offices of Helsell Fetterman LLP, 1001 4<sup>th</sup> Avenue, Suite 4200, Seattle, WA, 98154; and did on September 23, 2011 (1) cause to be filed with this court; (2) and cause to be delivered via Email and US Mail. to Appellant's counsel, Matt Albrecht, Ahrend Law Firm PLLC, 100E. Broadway Avenue, Moses Lake, WA 98837, the Respondent's Brief.

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.

DATED: September 23, 2011

  
Michelle Wimmer