

Cause No. 72919-5-1

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IN THE COURT OF APPEALS, DIVISION 1
STATE OF WASHINGTON

SONJA O. BEAL and ROBERT E. BEAL

Respondents,

v.

RICHARD CAMPBELL and REBECCA LEE MARCY

Appellants.

Appeal from King County Superior Court

APPELLANTS' OPENING BRIEF

Richard Campbell
Pro Se
425-241-8663

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1. INTRODUCTION

This case calls for clarification of the legal standards governing a residential real estate purchaser's claims for breach of deed covenants against a seller, specifically the RCW 64.04.030 covenants of seisin, quiet possession, and defense of title.

In 2014, grantee Beal settled a quiet title action with neighbor Lopez, then looked to grantor Campbell, who was defending the action prior to settlement, for damages under the statutory deed. Based on Beal's "losses" from the settlement agreement, the trial court found breach of deed covenants against Campbell and awarded Beal compensatory damages. In finding breach, the trial court erred because deed warranties are limited by statute and case law to lawful claims, and a settlement agreement cannot be used to distinguish a claim as lawful or unlawful. Not only did the trial court err in finding breach, the court compounded the error by then using the terms of the settlement to assess damages, contrary to the terms of the agreement and contrary to ER 408.

Under deed warranties, a grantor is obligated to defend title against lawful claims of a third-party, but there is no such obligation when there is no pending lawsuit or when grantor is denied fair opportunity to defend. Beal improperly tendered defense of the boundary line dispute six months prior to filing the attendant quiet title action. Because there was no

lawsuit to defend, the trial court erred in finding Campbell in breach for failure to defend the pre-litigation dispute. Once litigation commenced and Campbell was defending, Beal settled the case. The trial court erred in finding breach of covenant to defend when fair opportunity to defend was precluded by post-settlement dismissal of the lawsuit.

In determining damages, the trial court erred in applying the wrong legal standards: (i) awarding attorneys' fees that are precluded under the American rule, and (ii) awarding diminution of property value based on an improper hypothetical valuation method.

Campbell appeals the breach of covenant findings and the amount of the damages awarded.

2. ASSIGNMENTS OF ERROR

2.1 Errors

1. The Court erred in granting Beal summary judgment for breach of the deed covenant to defend title because the three necessary elements, (1) eviction of the grantee under third party paramount title, (2) a proper tender of defense, and (3) failure of the grantor to defend title, were not established. CP 710, F/F#12; CP 711, C/L#3; CP 557.

2. The Court erred in granting Beal summary judgment for breach of the deed covenants of quiet possession and seisin because (1) grantee Beal was not evicted under paramount title by a third party claimant, and (2) the

court had essentially denied those breaches when it denied the adverse possession claim of neighbor Lopez. CP 711, C/L#2 & 4; CP 557.

3. The Court erred in awarding Beal attorney fees in the suit against Campbell because each side pays their own fees under the American Rule CP 710, F/F#13; CP 712, C/L#10.

4. The Court erred in applying the wrong legal standard to calculate damages for diminution in property value, using a “hypothetical vacant land” valuation instead of the benefit-of-the-bargain legal standard. CP 709, F/F#6, 9-11; CP 711, C/L#5, 7, 8.

2.2 Issues Pertaining to Assignments of Error

1. Is breach of the RCW 64.04.030 covenants of quiet possession and warranty to defend title refuted by the fact that Beal was not evicted under third party paramount title? (Error 1 & 2)

2. Does the RCW 64.04.030 warranty to defend title include an obligation for grantor to defend a dispute prior to a lawsuit? (Error 1)

3. If required to defend a pre-lawsuit dispute, did Campbell’s actions fulfill RCW 64.04.030 statutory obligations? (Error 1)

4. Was Campbell denied fair opportunity to defend the deed warranties of RCW 64.04.030? (Errors 1 & 2)

5. Does breach of seisin fail at summary judgment for lack of any supporting finding of fact or prima facie evidence? (Error 2)

6. Is the question of seisin irrelevant when no damages are awarded for alleged breach thereof? (Error 2)
7. Does *Mellor v. Chamberlin* still apply that in a lawsuit for breach of title covenants each party pays their own attorney fees? (Error 3)
8. Did the trial court err in awarding block-billed unsegregated fees, when a substantial portion was not recoverable under law? (Error 3)
9. Did the trial court err in using a hypothetical valuation method to calculate damages instead of the benefit-of-the-bargain method? (Error 4)

3. STATEMENT OF THE CASE

3.1 FACT DETAILS

1. Campbell sold a 1.42 acre residential property at 9713 SW 264th St, Vashon Island, Washington to Sonja and Robert Beal (“Beal”) in November, 2011. CP 119.
2. About 14 months later, in about March, 2013 Beal discovered a boundary line dispute with neighbors James Lopez and Tessa Francis (“Lopez”). CP 228.
3. Lopez acquired their neighboring property in 2007 from Ellen and George (Toby) Welch. CP 127.
4. Welches owned what is now the Lopez property from 1997 to 2007.

5. The Welches kept horses on their property and allegedly constructed a containment fence in 1998 that extended onto the neighboring property now owned by Beal. CP 192, 195. That fence delineates the disputed boundary line. CP 197.
6. Lopez has owned their property since acquiring it from the Welches in 2007, but they have not kept horses. CP 189. Under their ownership the disputed property was allowed to “return to a natural pasture” and became overgrown with underbrush, weeds and blackberries. CP 189, L7. Some portions of the fence are so overgrown as to be completely obscured. *See* photos at CP 261-266, 269-286; CP 189.
7. The 10-year vesting period that Lopez ultimately asserted in the adverse possession claim was nine years of Welch ownership from 1998 to 2007 plus one year of Lopez ownership. CP 159, ¶2.
8. From 1998 to 2011 (for the entire period that Lopez asserted adverse possession plus an additional two years) the Beal property was owned by Sally Brown. CP 3.
9. In May, 2011 Richard Campbell acquired what is now the Beal property. CP 390.
10. In November 2011 Campbell sold to Beal, conveying 1.42 acres by statutory warranty deed. CP 119 & Trial Ex. 4.

11. The Beal-Campbell dispute began more than a year after Beal acquired the property. On March 27, 2013, Beal sent Campbell a letter regarding a property line dispute with adjacent landowner, Lopez. CP 33 & Trial Ex. 6. The letter notified Campbell that Lopez was “claiming ownership of a significant portion of the property that you sold to the Beals” and “this letter is a tender of defense.”
12. Over the next six months Campbell and Beal exchanged at least 33 communications for the purpose of researching and resolving the dispute. CP 33-107. Their relationship soon became contentious, however, due to their dispute regarding requirements and obligations of Campbell’s defense of title obligations. CP 102.
13. On September 12, 2013, about 6-months after the tender-of-defense letter to Campbell, Beal filed a Complaint for Breach of Deed Warranties against Campbell and a Complaint to Quiet Title against Lopez. CP 1.

3.2 PROCEDURAL HISTORY

March 27, 2013; Beal sent Campbell a tender of defense letter. CP 128.

September 12, 2013; Beal filed a Complaint for Breach of Deed

Warranties against defendant Campbell and a Complaint to Quiet Title against defendant Lopez CP 1.

September 19, 2013; Lopez filed a counterclaim for adverse possession of the disputed property. CP 8.

October 8, 2013; Campbell filed a summary judgment motion to dismiss Beal's breach of warranty claims. CP 19. Beal responded with a cross-motion for summary judgment against Campbell. CP 112. Both motions were heard and denied on January 24, 2014. CP 203-206.

January 23, 2014; Lopez moved for summary judgment of the adverse possession counterclaim. CP 155. Both Campbell and Beal submitted opposition briefs and argued in open court opposing the Lopez adverse possession motion. CP 251, 259, 267, 287, 316, 341.

February 21, 2014; The court denied the Lopez summary judgment motion for adverse possession. CP 343.

March 25, 2014; The adverse possession claim was settled by stipulated judgment, with Beal preserving the claims against Campbell in their breach of covenant suit. CP 345.

August 29, 2014; The court heard opposing summary judgment motions: Beal for breach of warranties and Campbell for dismissal. CP 351, 362. The court granted Beal's summary judgment on Campbell's breach of three deed covenants: (1) seisin, (2) quiet possession, and (3) warranty to defend. CP 557.

November 24, 2014; The trial court heard oral argument to determine damages. CP 700.

December 19, 2014; The court entered judgment for Beal, awarding \$18,446 for diminution in property value, \$21,310 for attorney fees as damages, \$345 in prejudgment interest and \$565 for attorneys' fees and costs. CP 712.

4. ARGUMENT SUMMARY

4.1 There was no breach of RCW 64.04.030 Warranty to Defend Title

The trial court erred in finding breach of warranty to defend title for lack of all three elements required under *Erickson v. Chase*, 156 Wn. App. 151, 231 P.3d 1261 (2010). These elements are: (1) eviction of the grantee under third party paramount title, (2) proper tender-of-defense of the action, and (3) failure of the grantor to defend the action.

(1) There can be no breach of the covenant of warranty to defend because Beal was not evicted under third party paramount title. In its February 21, 2014 summary judgment ruling the court found that Lopez had not established paramount title.

(2) Beal's tender of defense on March 27, 2013, six months prior to filing the underlying suit to quiet title in September 2013, was premature and therefore improper as explained in *Mastro v. Kumakichi Corp.*, 90 Wn. App. 157, 951 P.2d 817 (1998). Beal's pre-tender of defense was not

only legally improper, it also spawned a dispute between Beal and Campbell that undermined the defense of the later-filed real dispute, the property line dispute with neighbor Lopez.

(3) Campbell did defend title. During litigation, in opposition to Lopez's claim of adverse possession, Campbell filed numerous motions and declarations and argued in open court, with the result that the Lopez adverse possession claim was denied. Pre-litigation, Campbell worked with Beal to research the dispute and develop resolution options.

4.2 No Liability for Covenants of Quiet Possession or Seisin

There was no breach of covenant of quiet possession because, as with duty to defend, eviction under paramount title is required to establish breach. There was no such eviction.

Additionally, when a convenantor is denied fair opportunity to defend there is no liability in the attendant litigation per *Mellor v. Chamberlin*, 100 Wn.2d 643, 673 (1983). Campbell was denied fair opportunity to defend because (1) pre-litigation there was no lawsuit to defend (the tender-of-defense was premature and improper), and (2) after litigation began, Beal continued to deny Campbell opportunity to defend, including settling the case out from under Campbell's defense.

Breach of the covenant of seisin, as with quiet possession, is refuted by the court's denial of adverse possession, although breach is irrelevant

because Beal neither asked for nor was awarded damages for breach of seisin.

4.3 The Court Erred in Awarding Non-Segregated Fees

The trial court erred in awarding non-segregated fees when a portion of the fees are not awardable. For a one-year period, the six months preceding litigation and the first six months after the lawsuit was filed, Beal was pursuing two concurrent disputes, one against Campbell and one against Lopez, but Beal's attorneys block-billed their fees without segregating them to the respective actions. The trial court erred in awarding all of the block-billed fees because a majority of those fees were for Beal's action against Campbell. Beal's fees in pursuing Campbell for breach of warranties are not recoverable under law. The burden of segregating fees rests on the claimant, and Beal did not segregate fees.

4.4 Wrong Legal Standard for Diminution in Property Value

In determining damages for diminution of property value, the trial court erred in using Beal's "hypothetical vacant land" valuation method, which has no basis as a legal standard, instead of using the benefit-of-the-bargain method identified by Campbell which has been an accepted legal standard for over 100 years.

5. ARGUMENT

5.1 The trial court erred n granting summary judgment for breach of RCW 64.04.030 warranty to defend title.

Standard for Review:

“The standard of review of an order of summary judgment is de novo, and the appellate court performs the same inquiry as the trial court.” *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002).

5.1.1 Erickson v. Chase provides the legal requirements to establish breach of warranty to defend title.

A real estate seller’s warranty to defend title arises from RCW 64.04.030 which specifies that the grantor “will defend the title thereto against all persons who may lawfully claim the same.” In *Erickson v. Chase*, 156 Wn.App, 151, 231 P. 3d 1261 (2010) the court enumerated requirements that a grantee must establish in order to establish breach of warranty to defend under the statute:

In short, there are three requirements for establishing a breach and the right to recover under the warranty to defend:

- (1) a third party must assert a superior right to the property, usually through a lawsuit that results in the grantee’s actual or constructive eviction;
- (2) the grantee must properly tender defense to the grantor; and
- (3) the grantor must refuse the tender. [*Id.* at 156].

Beal was required at summary judgment to establish all three elements of breach, but they failed to establish any of them. There was no third-party

eviction under superior title, Beal did not properly tender defense, and grantor Campbell did not refuse to defend.

5.1.2 Because Beal was not evicted under paramount title there can be no breach of warranty to defend.

Under *Erickson v. Chase*, the first requirement for establishing breach of the warranty to defend is that “a third party must assert a superior right to the property, usually through a lawsuit that results in the grantee’s actual or constructive eviction.” This requirement follows the RCW 64.04.030 requirement that grantor is only obligated to defend *lawful* claims. In this action, the only assertion of a third-party superior right to property was the Lopez counterclaim for adverse possession. CP 8. But adverse possession was denied at summary judgment on February 21, 2013, and by corollary paramount title was also denied. CP 343.

After arguing successfully at summary judgment that Lopez *did not* have paramount title, Beal was precluded by law from then arguing that Lopez *did* have paramount title in the breach-of-warranty suit against Campbell. The legal standard that precludes such duplicity is a form of a judicial estoppel, as explained by the *Erickson* court:

It is axiomatic that a grantee may not recover from the grantor on any of the covenants [of RCW 64.04.030], including the covenant to defend, unless it is somehow established that the third person who claims a superior right has it. This is simply another way of saying that the grantor is liable only if there is in fact a breach of covenant. Ordinarily, the third person’s

right will be established in a lawsuit in which the third person's superior right is adjudged . . . It is ironic that, to win, the grantee must lose. [156 Wn. App. at 159, quoting William B. Stoebuck, *Washington Practice, Real Estate: Transactions* §14.4 at 125-26 (2d ed. 2004)]

5.1.3 The settlement agreement cannot be used to determine paramount title at time of sale.

Beal argued at summary judgment that even though their settlement with Lopez ended the dispute regarding paramount title, “Beals right to attorney fees is not conditioned on litigating the dispute beyond the point of reason.” CP 378. Beal implies that since they settled, Lopez must have had paramount title. This implication is completely unfounded for two reasons: (1) the use of a settlement agreement as evidence of liability is prohibited by ER 408, and (2) the settlement agreement specifically precludes assignment of liability with the clause, “In the interests of settlement, *but without conceding any claims or counterclaims in the Lawsuit*, Beal and Campbell agree that Lopez owns the Disputed Property.” CP 437, ¶1.

Despite the generous settlement agreement with Lopez, Beal had the upper hand in the adverse possession litigation. Just prior to settling with Lopez, Beal had prevailed against the Lopez motion for adverse possession. CP 343. Additionally, the burden of proof was on claimants Lopez to establish an onerous set of adverse possession criteria

(possession that is actual, hostile, exclusive, open and notorious, and continuous for a 10-year period) in order to prevail at trial. The settlement agreement, even though generous to Lopez, is not evidence of paramount title at the time of sale.

5.1.4 “Inevitable eviction” per *Hoyt v. Rothe* does not apply.

Beal argued at summary judgment that legal action is not required to establish paramount title when eviction by the adverse possessor is inevitable. CP 509-510, L23-2. Beal cites *Hoyt v. Rothe*, 95 Wash. 369, 373, 163 P.925 (1917): “the law does not require the idle and expensive ceremony of being turned out by the legal process, when that result would be inevitable.” But unlike *Hoyt*, the result here was not inevitable; the Court denied adverse possession, and therefore denied paramount title, at summary judgment. CP 343. Furthermore, the *Hoyt* ruling specifically distinguished itself from an action such as Beal’s on the issue of “inevitable eviction”. The court found that when third party possession is not patently obvious at time of sale, inevitable eviction does not apply:

...for our case is entirely different from the case of one who buys a piece of land and goes into possession and *afterwards* finds that some one is asserting a superior title. [95 Wash at 373].

5.1.5 *Mastro v. Kumakichi* is distinguishable and inapposite.

Beal cites *Mastro v. Kumakichi Corp.*, 90 Wn.App, 157, 951 P.2d 817

(1998) as a case in which settlement of a claim prior to determination of paramount title did not preclude an award for breach of warranty to defend. CP 378, ¶3. In *Mastro*, grantor Kumakichi refused to defend Mastro's title against an adverse possession claim. Grantee Mastro, after a trial and an appeal, settled the adverse possession suit, then pursued Kumakichi for damages. The court awarded damages to Mastro, discussing two relevant cases in its decision.

First, the Court noted a distinguishable case, *Marsh v. Commonwealth Land Title Ins. Co.* (1990), in which, pursuant to settlement, damages were not awarded;

because all the circumstances indicated the (claimant) Marshes would have likely prevailed in litigation, the additional settlement costs were merely the result of an independent business decision... [90 Wn. App at 822-823].

Marsh was a case in which damages were not awarded pursuant to settlement on the basis that the settlement was a business decision and not dictated by probability of litigation success.

The *Mastro* court then distinguished that, unlike *Marsh*, Mastro's eviction under paramount title was highly probable, finding:

But unlike *Marsh*, the circumstances here indicate a strong probability that Mastro would not have prevailed if it continued its litigation with Newhall/Jones. [90 Wn. App.at 823].

Because Mastro was almost certain to lose in continued litigation, settling the case was a reasonable alternative that did not preclude a damages award from the non-defending grantor, Kumakichi. The Beal-Campbell case is distinguishable from *Mastro* in two regards; (1) it is not abundantly clear who had paramount title to the disputed Beal property at the time of sale, and (2) Campbell, unlike Kumakichi, was defending in litigation, and the settlement denied Campbell the fair opportunity to continue defending. *Marsh* is more apposite to Beal-Campbell in that settling was a business decision and not driven by inevitable eviction.

The court has clearly established through *Hoyt* and *Mastro* that in order to find breach of warranty third party paramount title must be conclusively established, either by court determination or by overwhelming evidence. Beal has neither. To the contrary, the Lopez summary judgment motion for adverse possession was denied. CP 343. Beal even conceded later at trial that “It’s quite possible that they (Lopez) would not have won that case had it been tried, but the parties decided to settle.” RP 241, L21-23.

The eviction under paramount title issue was brought before the trial court at summary judgment hearing by both Campbell and Beal. CP 496, Issue 2; CP 354, Issues 1 & 5; CP 368, Issue 2. The court made no finding of fact or conclusion of law that Beal was evicted under third party

paramount title, therefore the trial court erred in finding breach of RCW 64.04.030 covenants.

5.1.6 Improper tender of defense precludes breach of warranty.

Under *Erickson v. Chase*, the second requirement for establishing breach of the warranty to defend is that “the grantee must properly tender defense to the grantor.” Beal tendered defense of title to Campbell on March 27, 2013, six month prior to filing suit to quiet title on September 12, 2013. CP 1, CP 33. Beal’s pre-tender of defense was premature and improper because there was no pending legal action to defend at the time of tender, as briefed and argued below. CP 22, Issue 1; CP 357, Issue 3; RP 11, L23.

In *Mastro v. Kumakichi* purchaser Mastro tendered defense of a property dispute to the grantor Kumakichi, and then pursued a breach of the warranty claim when grantor failed to defend. The Court identified the proper elements of a tender of defense as follows;

- (1) of the pendency of the suit against him,
- (2) that if liability is found, the defendant will look to the vouchee for indemnity,
- (3) that the notice constitutes a formal tender of the right to defend the action, and
- (4) that if the vouchee refuses to defend, it will be bound in a subsequent litigation between them to the factual determination necessary to the original judgment. [90 Wn. App. at 164-165]

Three of the four *Mastro* elements specifically list legal action as a requirement for a proper tender. There was no pending legal action at the time Beal tendered defense, therefore Beal's tender of defense was improper under the law.

5.1.7 Grantee must tender defense of a legal action, not a dispute.

Legal action is the remedy available to private property owners to resolve unsettled boundary line disputes. In a typical adverse possession dispute, a lawsuit to resolve the property dispute is the initial focus and determination of liability between grantee-grantor is secondary.

A typical boundary line dispute sequence would be, (1) a lawsuit is filed, (2) grantee tenders defense of the lawsuit to grantor, (3) the boundary dispute is resolved via litigation or settlement, and (4) damages are addressed via lawsuit or settlement.

Beal has turned this orderly sequence on its head by focusing on the liability issue, with adverse possession as a secondary issue. The Beal sequence was: (1) tender defense to Campbell prior to even filing a lawsuit, (2) make settlement offer to Campbell (not to adverse claimant Lopez) prior to even filing a lawsuit; (3) file concurrent lawsuits against both Campbell for damages and Lopez for quiet title, (4) settle the boundary dispute with Lopez, (5) pursue the damages suit against Campbell.

In both sequences above, the court is the appropriate venue for challenging and defending title. Beal has argued for the alternative procedure whereby grantee may tender defense of a boundary dispute outside of litigation -- that their tender to Campbell was not a tender to defend a *lawsuit*, but a tender to defend a *dispute*. This argument is misplaced because grantor is obligated to defend deed covenants, not disputes. In *Hoyt v. Rothe* the Supreme Court explained that a neighborly boundary line dispute by itself is insufficient to effect constructive eviction of the deed holder:

there are many cases which hold that the possession of one who...disputes a boundary line is not such a possession as will work a constructive eviction, and sustain an action upon the covenants of his deed by the grantee. [95 Wash. at 373, CP 373]

Title to property and the associated statutory deed warranties are legal constructs. A challenge to a legal construct must be made and defended in court. It was simply improper as a matter of law and as a matter of equity for Beal to tender defense 6-months prior to the filing of the legal action that was to be defended.

To be clear, the issue before the trial court was pre-litigation defense obligations, not defense obligations once litigation began. This is substantiated by the trial court's finding that Beal's pre-litigation letter of March 27, 2013 was the relevant tender-of-defense document, and by pre-

litigation damages being awarded from the March 27, 2013 onward. CP 710, F/F#12, 13. Per *Erickson v. Chase*, the grantee has the burden of showing proper tender of defense in order to establish breach of warranty. Because Beal's tender of defense was improper the trial court erred in finding breach of warranty.

5.1.8 Beal's pre-tender to defend undermined actual defense once litigation began.

Campbell did defend title during litigation, but by the time litigation began it was too late. The Court found that Campbell's defense was insufficient because he had failed to defend pre-lawsuit and that damages for that pre-litigation breach continued through trial. CP 710, F/F#12, 13. By the time litigation started in September, Beal and Campbell had spent almost six months at odds over exactly how, and even if, Campbell was supposed to defend a pre-litigation dispute. Even five months into litigation, in a February 14, 2014 brief, Beal admitted "it is unclear who is to be defending the Beals' title." CP 321, L5.

When litigation did turn to title issues through the Lopez motion for summary judgment on adverse possession, the first motion in opposition was Campbell's motion for a continuance, followed by Beal's similar motion. CP 207, 322. Both parties requested continuances because neither had properly conducted adverse possession discovery; instead they had

been arguing about duty to defend. Beal's improper pre-tender had substantial ramifications, resulting in six months of pre-litigation arguing followed by ineffective and fractured defense during litigation.

5.1.9 Grantor Campbell's defense of title refutes breach.

Under *Erickson v. Chase*, the third requirement for establishing breach of the warranty to defend title is that "the grantor must refuse the tender." Grantor Campbell did not refuse the tender and in fact did defend title, so Beal has failed to establish the third element of breach.

Campbell defended title during litigation, both in motion practice and oral argument, as briefed and argued in open court. CP 358, Issue 4; CP 20, Issues 2 & 3; RP 11-13. Not only did Campbell defend in litigation, but to a successful end. At the first court hearing on adverse possession, a Lopez motion for summary judgment, Campbell filed a motion for continuance, an opposition memorandum, his own declaration in opposition, and a declaration in opposition by Sonja Beal that Campbell prepared. CP 207, 212, 241, 251, 259, 287. At the hearing Campbell provided oral argument opposing the adverse possession motion, with the result that the motion was denied. CP 343.

Although not legally obligated to defend pre-litigation, Campbell did defend. Campbell made clear in communications and more importantly by actions that he was not rejecting the tender. CP 71, 74, 64, 69, 100. In

the six months between tender and lawsuit Campbell and Beal exchanged at least 33 communications, with the purpose of investigating the conflict and discussing possible courses of action and/or settlement. CP 33-107.

Edmonson v. Popchoi 155 Wn. App. 376 (2010) is instructive on the appropriate elements for defending title. The *Edmonson* court established that an important part of defending title is to investigate the challenge against it:

In the context of the warranty to defend, a grantee does not receive the full benefit of performance *unless the grantor both conducts a reasonable investigation*, through formal and informal means, into the merits of the tendered claim to determine whether a good faith defense exists and makes an informed decision about how to proceed after taking into consideration the investigation results. [*Id.* at 382].

The trial court erred at summary judgment in finding breach of warranty to defend in light of Campbell's investigative efforts, especially since this investigative period was the 6-month period prior to filing of the lawsuit, a period when there was no definitive title challenge to defend.

5.2 The trial court erred in granting summary judgment as to liability for breach of the RCW 64.04.030 covenants of quiet possession and seisin.

Standard of Review: Summary Judgment standard (per brief Sec 6.1).

5.2.1 Beal was not evicted under paramount title so there was no breach of the covenant of quiet possession.

As with warranty to defend, “a grantee may not recover from the grantor on any of the covenants [of RCW 64.04.030], including the covenant to defend, unless it is somehow established that the third person who claims a superior right has it.” *Erickson*, 156 Wn. App. at 159.

In *Beal v. Lopez* there was certainly no actual eviction at the time of conveyance. It was over one year before either property owner even realized there was a dispute. In litigation, Lopez moved the court to evict Beal via adverse possession but their motion was denied. CP 342. Demands by Lopez for Beal to stay off the disputed land “is not such a possession as will work a constructive eviction”. *Hoyt*, 95 Wash. at 373]. The trial court made no finding or conclusion that Beal was evicted from the disputed property under paramount title, therefore the trial court erred as a matter of law in granting breach of covenant of quiet possession.

5.2.2 When covenantor is denied fair opportunity to defend there is no liability.

Without proper tender of defense there can be no award for breach of any deed covenants, including quiet possession and seisin, since the grantor was not afforded proper opportunity to defend. Instructive case law on this issue is *Mellor v. Chamberlin*, 100 Wn.2d 643, 673 (1983). Grantee Mellor settled a title dispute then sued grantor Chamberlin for breach of deed warranties. Similar to *Beal-Campbell*, in *Mellor* the

grantor had no fair opportunity to defend in the settled property dispute, and similar to Beal-Campbell the trial court awarded damages for breach of warranties. Chamberlin appealed and the Supreme Court reversed, holding;

Here, the Chamberlins were neither notified of the settlement nor given an opportunity to defend. Generally, a covenantee may not recover damages against a covenantor for breach if no notice is given, as the latter is deprived of a fair opportunity to defend title. [Id. at 648, citing *Cullity v. Dorffel*, 18 Wash. 122, 124, 50 P.932 (1897)].

5.2.3 Campbell's execution of the settlement agreement does not refute fair opportunity to defend.

The Beal-Campbell dispute does differ from *Mellor* with respect to notification because, unlike Chamberlin, Campbell was aware of and a co-signer of the boundary line settlement agreement. CP 438. Beal argued at trial that Campbell's signing of the settlement agreement was evidence of a fair opportunity to defend, but that argument fails because the substantive terms between Beal and Lopez had been agreed prior to Campbell's involvement. CP 324, L1-2; 325-327. All parties concurred that although Campbell was being asked to sign the agreement, he had "no standing to contest settlement between Lopez and Beal, and therefore no objection to the boundary line adjustment" of the settlement. CP 436, ¶E. Campbell's signature was requested by last-minute by Lopez to insure that

Campbell would not continue the defending title after the parties had settled the dispute. CP 324, L1-2; 327, L5-13; 331.

5.2.4 Denied fair opportunity to defend, Campbell has no liability in the attendant litigation.

Beal denied Campbell fair opportunity to defend in three phases: (1) pre-litigation Beal improperly tendered defense prior to filing the lawsuit to defend; (2) during litigation Beal refused to enable Campbell's pro se defense under the theory that only an attorney could defend title [CP 511, L17-23]; and (3) Beal settled the adverse possession claim with Lopez-Francis, denying any opportunity to continue defense [CP 345]. The trial court was briefed at summary judgment on the issue of fair opportunity to defend and erred in assigning underlying liability and awarding associated damages. CP 515.

5.2.5 Breach of seisin fails for lack of evidence.

The covenant of seisin affirms that grantor is seized of the entire property at the time of sale. If breached, it is breached at the time of sale *See Double L Properties v. Crandall*, 51 Wn. App. 149, 153, 751 P.2d 1208 (1988). The trial court made no finding or conclusion that third party challenger Lopez was seized of the property at the time of Beal's purchase, and prime facie possession by Lopez was refuted by the Court's denial of adverse possession. CP 343. The party claiming adverse

possession “has the burden of establishing the existence of each element,” *ITT Rayonier, Inc. v. Bell*, 112 Wn.2d at 754, 757, 774 P.2d 6 (1989) and Lopez clearly did not establish possession of the disputed land at the time of Beal's acquisition. The trial court was briefed on this issue but erred in finding breach of seisin when it had not been established. CP 498, Issue 3; CP 360, Issue 5.

5.2.6 Seisin is irrelevant because there was no eviction and no associated damages.

Whether breach of seisin fails for lack of evidence is irrelevant because Beal neither asked for nor was awarded damages for breach of seisin. In *Double L. Properties*, as in the Beal-Lopez action, a third party possessor's claim of adverse possession was denied and the trial court granted breach of seisin. The Court explained that upon breach of seisin the remedy is reimbursement of eviction expenses;

Further, a vendee who successfully ejects such a claimant is entitled to recover from his vendor his expenses of ejectment, provided he gave prior notice to his vendor and demanded that the vendor prosecute the action. [*Double L* at 156].

In *Double L*. the vendee was able to recover eviction costs from the vendor, but in the Beal-Lopez case, there was no eviction and no award for breach of seisin. Beal's damage award consisted of (1) diminution of property value due to adverse possession, and (2) attorney fees as damages

for breach of duty to defend. CP 712, C/L#8, 10. Whether Lopez possessed the property at the time of sale in 2011 played no part in the award because the alleged adverse possession claim vested three years earlier in 2008. CP 160, ¶1. The trial court was briefed regarding the proper remedy for breach of seisin. CP 498, Issue 4. Even if Lopez was in possession, that was not a cause of any damages because Beal incurred no eviction expenses.

5.3 The trial court erred in awarding attorneys' fees in the Beal-Campbell lawsuit.

Standard of Review: Questions of law and conclusions of law are reviewed de novo. *Veach v. Culp*, 92 Wn.2d 570, 573, 599 P.2d 526 (1979). “The burden of segregating, like the burden of showing reasonableness overall, rests on the one claiming such fees.” *Loeffelholz, et. al v. Citizens for Leaders with Ethnic and Accountability Now (C.L.E.A.N)*, 119 Wn. App. 665, 690, 82 P.3d 1199 (2004).

5.3.1 *Mellor v. Chamberlin* requires that each side pays their own fees in the Beal-Campbell lawsuit.

The Court erred as a matter of law in awarding fees in the Beal-Campbell breach of covenant suit, as briefed at CP 567, because those fees are not recoverable under *Mellor v. Chamberlin*, 100 Wn.2d 643, (1983). In *Mellor*, the Court distinguished between attorney fees incurred in

defending title (*i.e.* the *Beal v. Lopez* action), which are recoverable as damages, and attorney fees incurred in prosecuting the breach of covenant claim (*i.e.* the *Beal v. Campbell* action), which are not recoverable. The *Mellor* Court explained:

The statute, RCW 64.04.030, requires grantors to defend title; it does not provide attorney fees to grantees who bring suit [to enforce the statutory covenant]. The award of attorney fees [for prosecuting the breach of covenant claim] is reversed. [100 Wn. 2d at 649.]

Justice Rosselini concurred with the eight justice majority, clarifying the difference between fees incurred in defending title and fees incurred in prosecuting a breach of statutory covenant claim:

The law is well established that reasonable attorney fees are recoverable as damages against the grantor of a warranty deed when those fees are incurred by the grantee in defending title and where the grantor has had notice of the pending action and has refused to defend. This award of attorney fees is limited to an action to cure or defend title, and the covenantee/grantee is not entitled to an additional award of attorney fees incurred in an action against the covenantor/grantor for breach of covenant. [Id]

Washington appellate courts have followed this unanimous holding of the Supreme Court. For example, in *Barber v. Peringer*, 75 Wn. App. 248, 254, 877 P.2d 223 (1994), the appellate court concluded “This statute [RCW 64.04.030] does not authorize an award of attorney fees to a grantee who prevails in an action against a grantor for damages resulting

from a breach of any of the covenants contained in a statutory warranty deed,” citing *Mellor* as controlling authority.

5.3.2 Beal admits fees were segregable but they did not segregate.

Beal was prosecuting two concurrent actions in the period from March 27, 2013 through March 25, 2014, one against Lopez for quiet title and one against Campbell for breach of covenants. During that period Beal incurred \$21,310 in fees for the two lawsuits, but refused to segregate the fees at trial. CP 710, F/F#13; RP 229, L16-20.

At trial, attorney Mary Holleman testified regarding attorney fees incurred in Beal’s lawsuits. She admitted there were two distinct actions, that at times effort was devoted to only to one action, that her firm did not segregate the fees in their billings, and that to do so now would be “impossible.” Specifically, in a question and answer exchange between Campbell’s attorney John Phillips and Beal’s attorney Mary Holleman:

Q ...you didn’t, in fact, bill separately for the breach of statutory covenant action against Campbell and the adverse possession quiet title action against Lopez and Francis did you?

A No, I think that would be impossible to do so. [RP 229, L16-20]

Holleman testified that “No,” they did not segregate fees, yet in further questioning, she admitted there were two distinct actions and identifiable hours to each action. Holleman was asked about a December 2013

summary judgment motion that Beal had filed specifically against Campbell regarding duty to defend title:

Q: Okay. And that motion did not have anything to do with trying to establish whether or not Lopez and Francis have or have not adverse possession to this disputed parcel, did it?

A: I do not believe so.

Q: In fact, it was focused entirely on the legal question of whether or not-

A: It was-

Q: - Mr. Campbell-

A: I believe it was about his duty to-

Q: To-

A: -defend.

Q: Duty to defend and breach of statutory covenants-

A: Yes. RP 235, L10-23.

Beal's counsel testified that some of their time was devoted solely to their breach of covenant dispute regarding Campbell's duty to defend, not regarding actual defense of title against Lopez. The burden of segregating fees rests on one claiming such fees, but Beal failed to do so.

5.3.3 *Buck Mountain* does not overturn *Mellor* as the controlling authority.

The trial court apparently relied on *Buck Mountain Homeowner's Ass'n v. Prestwich*, 174 Wn. App. 702, 308 P.3d 644 (2013), argued by Beal, as overriding *Mellor*. The trial court concluded that the fees in the Beal-Campbell action could be characterized as defense-of-title fees

because they were “proximately caused” by Campbell. RP 259, L7-10; *cf.* *Buck Mountain*, 174 Wn. App. At 731 (a covenantee may recover “in the context of warranty to defend, attorney fees proximately caused by the breach.”) The trial court’s interpretation is legally untenable for two reasons.

First, an intermediate appellate decision such as *Buck Mountain* cannot overrule Washington Supreme Court authority such as *Mellor*. Thus, the phrase “proximately caused” in *Buck Mountain* must be read in light of *Mellor*, which means that fees proximately caused by breach of a statutory duty to defend are those expended in defending title, not in pursuing the grantor.

Second, the question whether a covenantee may recover fees in prosecuting a breach of statutory covenant claim was not even addressed in *Buck Mountain*. The only fees at issue in *Buck Mountain* were fees in related to defense of title, and even those fees were denied the covenantee under the facts of that case. *Buck Mountain* cannot support the broad reading adopted by the trial court here..

5.3.4 The court erred in awarding non-recoverable fees.

The Washington Supreme Court has clearly held that under the American Rule, attorney fees and costs for prosecuting a breach of covenant claim under RCW 64.04.030 are not recoverable. None of Beal’s

fees devoted to the breach of covenant claim against Campbell are recoverable and the court erred in awarding such fees.

5.4 The trial court applied the wrong legal standard to evaluate diminution of property value.

Standard of Review: “On appeal from a bench trial, conclusions of law are reviewed de novo.” *Edmonson v. Popchoi* 155 Wn.App. at 382. “...the measure of damages is a question of law. Thus, a trial court necessarily abuses its discretion if it awards damages based upon an improper method of measuring damages.” *Farmer v. Farmer*, 172 Wn. 2d 616, 625, 259 P.3d 256 (2011) (citations omitted).

5.4.1 Beal and Campbell proposed different legal standards by which to determine diminution of property value; the “hypothetical vacant land” method, and the benefit-of-the-bargain method.

Having assigned liability to Campbell for breach of the deed covenant of quiet enjoyment, associated damages were determined at trial. Beal and Campbell agree that damages for loss of a portion of property to adverse possession are measured as the diminution of value of the retained parcel. CP 583, L12-15; 572, L12. Beal and Campbell presented evidence and argument, with Beal arguing diminution of about \$18,000 by the “hypothetical vacant land” valuation method and Campbell arguing about \$3,000 by the benefit-of-the-bargain method. CP 581, L19; 572; RP 246.

The difference between Beal’s \$18,000 valuation and Campbell’s \$3,000 valuation was not due to differing appraisal values; rather it was due to a dispute about the proper legal method to apply in appraising diminution in property value. The debate about the proper legal standard was summarized at trial in an exchange between Campbell and Beal; Campbell stating “It wasn’t the appraisal that was the issue blocking us; it was the legal standard of how to evaluate the loss,” and Beal concurring “for what it’s worth, that’s the question today to a large extent.” RP 192, L7-13. And that is the question here on appeal: what is the appropriate legal standard to evaluate diminution in property value? Is it the “hypothetical vacant land” appraisal method identified by Beal, or the benefit-of-the-bargain legal standard identified by Campbell?

5.4.2 A “hypothetical vacant land” value is not market value and is not an appropriate legal standard.

The method adopted by the court to determine diminution of land value was the “hypothetical vacant land” valuation method presented by Beal’s expert witness, real estate appraiser Brenda Sestrap. RP 256, L7-8. Under this method, the appraiser makes the hypothetical assumption that the property is vacant, stripped of all structures and improvements. Trial Ex. 23, ¶2; Ex. 24, p1 “Comments and Conditions of Appraisal”, near bottom.

In trial testimony, under questioning by Campbell's attorney John Phillips, appraiser Sestrap admitted that she performed a hypothetical appraisal at the behest of Beal's lawyers:

Q: Okay. So, what you were asked to do by the lawyers for the Beals was to do a hypothetical appraisal of something that was contrary to fact, correct?

A: They did not ask me in those specific words to do a hypothetical appraisal.

Q: But, you understood that when they asked you to do a bare land appraisal, since the Beals' property is not a bare land piece of property –

A: Correct.

Q: -that you would be doing a hypothetical appraisal.

A: Correct. [RP 49-50]

Based on hypothetical conditions, Sestrap made the assumption that each square foot of property is homogeneous and valued at about \$2.04 per square foot. Trial Ex. 23, ¶2. By this hypothetical-homogeneous assumption, the unused land of the adverse possession dispute is of the same value as the land upon which the house (in reality) sits. In actuality, of course, the value of unused land is a fraction of the value of the land supporting the house, so the "hypothetical vacant land" assumption wildly distorts the true value of developed property and does not represent the true condition or true market value of the property.

Not one case was cited at trial in which a hypothetical condition was selected over the actual market value condition in determining diminution of property value. The courts have established that "The opinion of an

expert must be based on facts,” [*Theonnes v. Hazen*, Wn.App. 644, 648, 681 P.2d 1284 (1984)] therefore expert testimony based on hypothetical conditions are invalid as was the court’s selection of the “hypothetical vacant land” valuation method as the appropriate legal standard.

5.4.3 “Benefit of the Bargain” value is a market value and is an appropriate legal standard.

In opposition to Beal’s hypothetical valuation method, Campbell cited the benefit-of-the-bargain method as the appropriate legal standard. RP 246; CP 572, L21.

The “benefit of the bargain” measure of damages is defined in *Johnson v. Brado* 56 Wn.App. 163, 166, 783 P.2d 92 (1990):

The measure of those damages is the difference between the market value of the property had it been as represented and the market value of the property as it actually was at the time of the sale.”

The benefit of the bargain method relies on the market value of the property as it actually exists, not on hypothetical conditions.

In contrast to the complete lack of authoritative case law supporting “hypothetical vacant land” valuations, there is a plethora of authoritative case law dating back over 100 years establishing the benefit-of-the-bargain method as an appropriate legal standard. In addition to *Johnson v. Brado*, see also:

- *Friebe v. Supancheck*, 98 Wn.App, 1014, 1018, 992 P.2d 1014 (1999)

- *Bennett v. Maloney*, 63 Wn.App, 180, 185, 817 P. 2d 868, (1991)
- *Lyall v. DeYoung*, 42 Wn.App. 252, 259, 711 P. 2d 356 (1985)
- *Tenant v. Lawton*, 26 Wn. App. 701, 703, 615 P.2d 1305 (1980)
- *Alexander Myers & Co. v. Hopke*, 88 Wn.2d 449, 158, 565 P.2d 80 (1977)
- *Murphree v. Rawlings* 139 Wn.App, 880, 883, 479 P.2d (1970)
- *Weinstein v. Sprecher*, 2 Wn. App. 325, 330, 467 P.2d 890 (1970)
- *Platts v. Arney*, 50 Wn.2d 42, 46, 309 P.2d 372 (1957)
- *Salter v. Heiser*, 39 Wn.2d 826, 832, 239 P.2d 327 (1951)
- *Dixon v. MacGillivray*, 29 Wn.2d 30, 185 P.2d 109 (1947);
- *Hardinger v. Till*, 1 Wn.2d 335, 339, 96 P.2d 262 (1939)
- *Grosgebauer v. Schneider*, 177 Wash. 43, 31 P.2d 941 (1934)
- *Hunt v. Allison*, 77 Wash. 58, 137 P. 322 (1913)

At trial, Campbell presented the benefit-of-the-bargain method to the court as the appropriate method to calculate the value of the disputed land, agreeing to apply values from Beal’s appraiser, Brenda Sestrap, in the calculations.¹ CP 572, L21; 573, ¶2.

5.4.4 The trial court erred in selecting the “hypothetical vacant land” method over the benefit-of-the-bargain method as the legal standard.

¹ The appropriate land appraisal value needed to calculate diminution by benefit-of-the-bargain is already contained in Sestrap’s “hypothetical retroactive appraisal”. That value is the “site adjustment” value of \$15,000 per acre from the Sestrap appraisal [Trial Exhibit 24, p2, ‘Comments’ section, line 9]. Applying Sestrap’s site adjustment value of \$15,000 per acre to the 0.178 acre of disputed land area gives a diminution value of \$2,670. This value of \$2,670 is market value difference in Beal’s property due to loss the disputed land, thus it is the benefit-of-the-bargain value. The “hypothetical vacant land” value of \$18,446 is an order of magnitude higher.

The trial court rejected the benefit-of-the-bargain method and selected the “hypothetical vacant land” valuation method. Judge Lum explained, “I find Ms. Sestrap’s methodology more persuasive,” despite argument at trial that Ms. Sestrap is not qualified to opine on a question of law. RP 256, L7-8; 247, L12.

The trial court erred as a matter of law in selecting the hypothetical vacant land valuation as “more persuasive,” apparently ignoring the fact that it has no legal basis. Not one case was cited to establish the “hypothetical vacant land” valuation method as a legal standard. In fact, not even one case was cited in which a hypothetical condition was selected over an actual condition in appraising property value. In contrast, the benefit-of-the-bargain method has a 100-year track record and numerous appellate and Supreme Court decisions that establish it as not only “persuasive,” but also legally appropriate.

5.4.5 The court’s reliance upon appraiser Sestrap’s selection of the “Hypothetical Vacant Land” valuation method was improper because Sestrap has no expertise in law.

The trial court seemed to be heavily influenced by the expertise of appraiser Brenda Sestrap in selecting the “hypothetical vacant land” valuation method, explaining “I find Ms. Sestrap’s methodology more persuasive.” RP 256, L7-8.

The credit given by the trial court to appraiser Sestrap for her methodology was misplaced, not only because Ms. Sestrap has no legal expertise to opine on selection of a legal standard, but also because it was not Ms. Sestrap's methodology, it was Beal's methodology. Sestrap only used the hypothetical valuation method because Beal specifically asked her to do so. Sestrap's "Land Appraisal Report" notes that "The appraiser has been asked to determine the value of the site under the hypothetical condition that the site is vacant." Trial Ex. 23, p3, ¶3. At trial Sestrap testified that she generated a hypothetical vacant land appraisal because Beal had requested it. RP 50, L2-7.

The court mistook the benefit-of-the-bargain approach as "Mr. Campbell's methodology" when in fact it is actually a legal standard established by the courts through case law. RP 256, L5-6. The court erred in mischaracterizing and rejecting the benefit-of-the-bargain legal standard, and in selecting a hypothetical valuation method that has no legal basis.

6.0 CONCLUSION / REQUESTED RELIEF

Campbell asks the Court for the following relief:

1. Reverse the trial court finding of breach of deed covenants of quiet possession, seisin and warranty to defend.

2. Reverse the following awards: damages of \$39,756.52, pre-judgment interest of \$344.56, post-judgment interest of \$67.78, filing fee of \$240, service of process fee of \$125, and statutory attorney fees of \$200 for a total of \$40,733.86.
3. Award Campbell costs on appeal pursuant to RAP 14.2.
4. Remand the case to the trial court for award of fees to Campbell as prevailing party pursuant to RCW 4.84.080, RCW 4.84.280, and RCW 4.84.300.

Dated: 3/20/2015

By: Richard Campbell
Richard Campbell, Pro Se

APPENDIX – RCW 64.04.030

Warranty deeds for the conveyance of land may be substantially in the following form, without express covenants:

The grantor (here insert the name or names and place or residence) for and in consideration of (here insert consideration) in hand paid, conveys and warrants to (here insert the grantee's name or names) the following described real estate (here insert description), situated in the county of, state of Washington. Dated this day of, 19. . .

Every deed in substance in the above form, when otherwise duly executed, shall be deemed and held a conveyance in fee simple to the grantee, his or her heirs and assigns, with covenants on the part of the grantor:

- (1) That at the time of the making and delivery of such deed he or she was lawfully seized of an indefeasible estate in fee simple, in and to the premises therein described, and had good right and full power to convey the same;
- (2) that the same were then free from all encumbrances; and
- (3) that he or she warrants to the grantee, his or her heirs and assigns, the quiet and peaceable possession of such premises, and will defend the title thereto against all persons who may lawfully claim the same, and such covenants shall be obligatory upon any grantor, his or her heirs and personal representatives, as fully and with like effect as if written at full length in such deed.

[2012 c 117 § 186; 1929 c 33 § 9; RRS § 10552. Prior: 1886 p 177 § 3.]

COURT OF APPEAL, DIVISION 1
STATE OF WASHINGTON

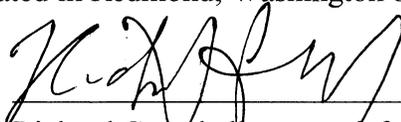
SONJA O. BEAL and ROBERT E. BEAL)	Cause No. 72919-5-1
Respondents,)	
v.)	DECLARATION OF SERVICE
RICHARD D. CAMPBELL & REBECCA)	
LEE MARCY,)	
Appellants)	

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2015 MAR 23 AM 10:49

I, Richard Campbell, am over the age of 18 years and state that on March 20, 2015 I caused to be served upon the below named counsel for Beals, by email (per agreement between the parties) at the addresses below a true and correct copy of Appellants' Opening Brief, and the Record of Proceedings, Vol. 1 & 2.

J. B. Ransom, Winslow Law Group, PLLC; bill@winslowlawpllc.com
Ashton T. Rezayat, Winslow Law Group, PLLC; ashton@winslowlawpllc.com

I certify, under penalty of perjury, under the laws of the State of Washington, that the foregoing is true and correct. Dated in Redmond, Washington on March 20, 2015.



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