IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

VICTOR ERICKSON and LARRY ERICKSON, Appellants, v. CHARLES W. CHASE and NANCY CHASE, Respondents/Cross-Appellants, LLOYD COMBS and DORIS COMBS, Cross-Respondents/Cross-Appellants, And JAMES ROBSON, Cross-Respondent.	No. 37760-8-II ORDER GRANTING CHASES MOTION FOR RECONSIDERATION; ORDER AMENDING OPINION

The part published opinion in this matter was filed on May 18, 2010. The respondents/cross appellants, Charles W. and Nancy Chase, filed a motion for reconsideration. After review, it is hereby

ORDERED that the Chases motion for reconsideration is granted as to attorney fees for Chases against cross-respondents/cross-appellants, Combs, for appeal of the Ericksons' claim to easement across the Upper Road; it is further

ORDERED that the filed opinion is amended as follows:

On page 15, beginning at line 16, the following text will be deleted:

> Robson and the Chases also request attorney fees on appeal, based on attorney fee provisions in their separate real estate contracts. As neither party prevails, we

decline to award fees.

On page 15, at line 2, the following text is inserted:

A. Attorney Fees at Trial

On page 15, at line 17, the following text is inserted:

B. Attorney Fees on Appeal

The Chases also request attorney fees against Combs on appeal for defending against the Ericksons' appeal and for pursuing a cross-appeal against the Ericksons. "[R]easonable attorney fees expended by covenantees/grantees, in good faith to defend their title, are recoverable against the covenantor/grantor who has notice of the claim against title." *Mellor v. Chamberlin*, 100 Wn.2d 643, 650, 673 P.2d 610 (1983) (Rosellini, J., concurring); *see also Mastro*, 90 Wn. App. at 163. But the grantor is not entitled to recover attorney fees if he or she successfully defended title:

> The rationale is that in such a situation there is no breach of covenant of title which may serve as a basis for the recovery of damages of any kind. . . . If the third party's claim is invalid, then the grantor's warranty of title has not been breached.

Double L. Props., 51 Wn. App. at 156.

Here, the Chases successfully defended against the Ericksons' appeal, confirming that the Ericksons are not entitled to an easement over the Upper Road. But their cross-appeal challenging the Ericksons' easement over the Lower Road was unsuccessful. Thus, the Chases are entitled to attorney fees for unsuccessfully challenging the Lower Road easement because their warranty was in fact breached with respect to the Lower Road. *See Double L Props.*, 51 Wn. App. at 156.

While it may seem odd to award attorney fees only when the grantee has unsuccessfully defended against the third party's claims, Professor Stoebuck explains:

> It is axiomatic that a grantee may not recover from the grantor on any of the covenants [in a warranty deed], 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 a 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.

18 William B. Stoebuck, Washington Practice, Real Estate: Transactions § 14.4 at 125-26 (2d ed. 2004). Accordingly, we grant the Chases' request for attorney fees on appeal, but limit the award of fees incurred in their cross-appeal against the Ericksons.

Finally, Robson also requests attorney fees on appeal. Because Robson did not prevail on appeal, we decline to award fees.

IT IS SO ORDERED.

DATED this _____ day of _____, 2010.

Armstrong, J.

We concur:

Van Deren, J.

Penoyar, C.J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

VICTOR ERICKSON and LARRY ERICKSON,

Appellants,

v.

CHARLES W. CHASE and NANCY CHASE,

Respondents/Cross-Appellants,

LLOYD COMBS and DORIS COMBS,

Cross-Respondents/Cross-Appellants,

And

JAMES ROBSON,

Cross-Respondent.

No. 37760-8-II

PART PUBLISHED OPINION

Armstrong, J. — Victor and Larry Erickson brought a quiet title action against Charles and Nancy Chase to establish prescriptive easements over two unpaved roads on the Chase property, the Lower Road and the Upper Road. The Skamania County Superior Court granted the Lower Road easement, denied the Upper Road easement, and found the Ericksons liable for timber trespass. The Ericksons appeal the trial court's rulings denying the Upper Road easement and awarding treble damages for timber trespass. The Chases appeal the trial court's ruling granting the Lower Road easement.

The Chases brought a third party action against their seller, Lloyd Combs, for breach of warranty to defend title and damages for the diminution in value of their property. The trial court

granted the Chases attorney fees for defending against the Ericksons, but it denied attorney fees for bringing a breach of warranty claim against the Combs. The court also denied their request for damages. The Chases appeal these rulings.

Combs brought a fourth party action against his seller, James Robson, for breach of warranty to defend title. The trial court ruled that the statute of limitations barred Combs's claim. Combs also appeals.

We reverse the trial court's ruling that the statute of limitations bars Combs's breach of warranty claim against Robson and remand for disposition on the merits. We affirm all other disputed trial court rulings.

FACTS

The Ericksons own two parcels of property in Skamania County, a 9-acre parcel and a 16-acre parcel. The 9-acre parcel is directly south of the 16-acre parcel. The Chases own a 5-acre parcel adjacent to the 16-acre parcel. Two unpaved roads, the Lower Road and the Upper Road, traverse the Chases' 5-acre parcel. The Ericksons use the Lower Road to access their 9-acre parcel and the Upper Road to access their 16-acre parcel.

The Ericksons have owned the 9-acre parcel since 1986. They purchased the 16-acre parcel in 2003. Joe Zumstein previously owned it through his corporation Buck Mountain Timber. Zumstein sold the 16 acres to the Read Family Trust in 1997, and the Read Family Trust sold it to the Ericksons in 2003.

The Chases purchased the 5-acre parcel in 2003. It was originally part of a 20-acre parcel Robson owned. Robson sold the 20 acres in 1997 under a real estate installment

contract. He subdivided the property and Combs purchased a 5-acre parcel. In December 2003, Robson delivered a statutory warranty fulfillment deed to Combs, and Combs sold the 5-acre parcel to the Chases.

Shortly after purchasing the 5 acres, the Chases instructed the Ericksons not to use the Upper Road. In December 2004, the Ericksons "skinned" a portion of the road, removing brush, vegetation, and at least 15 trees. Clerk's Papers (CP) at 214-15. The Chases confronted the Ericksons again and eventually fenced off the Upper Road.

In June 2006, the Ericksons brought a quiet title action against the Chases to establish prescriptive easements over the Lower Road and Upper Road. The trial court granted the Lower Road easement and denied the Upper Road easement. The court also found the Ericksons liable for timber trespass because they removed trees from the Upper Road and awarded the Chases treble damages amounting to $15,185.25.

The Chases tendered defense of the prescriptive easement claims to Combs. Combs denied the tender and, in turn, tendered the defense to Robson. The Chases brought a third party action against Combs for breach of warranty, requesting attorney fees and damages for the diminution in value of their property, and moved for partial summary judgment. The trial court granted them attorney fees for defending against the Ericksons' claims but not for pursuing a breach of warranty claim against Combs. It also ruled that the Chases did not present any competent evidence of diminution in value and denied their request for damages.

Combs brought a fourth party action against Robson for breach of warranty. Robson and Combs both moved for summary judgment. The trial court granted Robson's motion, ruling that

the statute of limitations barred Combs's complaint.

ANALYSIS

Statute of Limitations

A. Standard of Review

Combs assigns error to the trial court's denial of his motion for summary judgment, arguing that the statute of limitations does not bar his breach of warranty claim against Robson. When reviewing an order for summary judgment, we consider all facts and reasonable inferences in the light most favorable to the nonmoving party and review all questions of law de novo. *Wilson Court Ltd. P'ship v. Tony Maroni's, Inc.*, 134 Wn.2d 692, 698, 952 P.2d 590 (1998).

B. Background Facts

In 1997, Robson sold the 20-acre parcel to David and Connie Rocha under a real estate installment contract. The contract established the purchase price and payment terms and provided: "Upon payment of all amounts due seller, seller agrees to deliver to Buyer a Statutory Warranty Deed in fulfillment of this Contract." CP at 36 In May 1998, the Rochas subdivided the property and sold a 5-acre parcel to Grant and Carolyn Hosea. The Rochas then assigned their seller's interest in the contract back to Robson, and the Hoseas assigned their purchaser's interest to Combs. In December 2003, Robson delivered a statutory warranty fulfillment deed to Combs.

The Ericksons brought a quiet title action to establish prescriptive easements over the 5-acre parcel in June 2006. After Robson rejected his tender of defense, Combs brought a third party action against Robson for breach of warranty to defend title. Robson and Combs submitted cross-motions for summary judgment on the issue of whether the statute of limitations barred

Combs's claim against Robson. The trial court granted Robson's motion, ruling that the statute of limitations began to run when Robson sold the property to the Rochas in 1997.

C. Statute of Limitations for Warranty to Defend

An action based on a contract or written agreement is subject to a six-year statute of limitations. RCW 4.16.040(1). The written agreement that Combs relies on is the warranty deed.

The statute of limitations does not necessarily begin running from the date of the written agreement. It begins running when the cause of action accrues, meaning when a party has the right to apply to the court for relief. RCW 4.16.005; *Haslund v. Seattle*, 86 Wn.2d 607, 619, 547 P.2d 1221 (1976); *Campbell v. Loftus*, 36 Wn. App. 678, 679, 676 P.2d 1025 (1984). A cause of action for breach of warranty accrues when the warranty is breached. *See Whatcom Timber Co. v. Wright*, 102 Wash. 566, 568, 173 P. 724 (1918). The controlling question, therefore, is when was the warranty at issue broken. *See Whatcom Timber*, 102 Wash. at 568.

A warranty deed contains both present and future warranties. *See* RCW 64.04.030; *Mastro v. Kumakichi Corp.*, 90 Wn. App. 157, 162-63, 951 P.2d 817 (1998); 18 William B. Stoebuck, Washington Practice, Real Estate: Transactions § 14.2, at 115 (2d ed. 2004). A present warranty, such as the warranty of seisin, can be breached only at the time of conveyance. *See Mastro*, 90 Wn. App. at 162-63; 18 Stoebuck, *supra*. But a future warranty can be breached after conveyance. *See Mastro*, 90 Wn. App. at 162-63; 18 Stoebuck, *supra*. The warranty to defend is a future warranty that no lawful, outstanding claims against the property exist. *Mastro*, 90 Wn. App. at 164.

A breach of the warranty to defend occurs only when a third party asserts a lawful right to

the property and there is an actual or constructive eviction under paramount title. *Mastro*, 90 Wn. App. at 164 (citing *Foley v. Smith*, 14 Wn. App. 285, 539 P.2d 874 (1975)). The third party's claim is usually established in a lawsuit between the grantee and the third party. *Mastro*, 90 Wn. App. at 164.

To recover under the warranty to defend, the grantee must make an effective tender of defense to the grantor. *Mastro*, 90 Wn. App. at 164-65 (citing *Double L. Props., Inc. v. Crandall*, 51 Wn. App. 149, 156, 751 P.2d 1208 (1988)). An effective tender notifies the grantor that: (1) there is a pending action; (2) if liability is found, the grantee will look to the grantor for indemnity; (3) the notice constitutes formal tender of the right to defend the action; and (4) if the grantor refuses to defend, it will be bound to factual determinations in the original action in subsequent litigation between the grantee and grantor. *Mastro*, 90 Wn. App. at 164-65 (quoting *Dixon v. Fiat-Roosevelt Motors, Inc.*, 8 Wn. App. 689, 692-93, 509 P.2d 86 (1973)). Obviously, the grantor must refuse this tender to breach the warranty to defend. *See Mastro*, 90 Wn. App. at 166 (holding where a grantee properly tendered defense of a third party's adverse possession claim to the grantor, the grantor "breached the warranty to defend *in refusing this tender of defense*.") (emphasis added).

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.

The parties here do not dispute that (1) the Ericksons asserted an outstanding right to a

prescriptive easement over the 5-acre parcel that resulted in the Chases' constructive eviction from exclusive possession of their property; (2) Combs made an effective tender of defense to Robson; or (3) Robson refused the tender. Accordingly, Robson breached the warranty to defend when he refused Combs's tender of defense and the statute of limitations began running from that date. The 6-year statute of limitations does not bar Combs's cause of action against Robson.

D. Quit Claim Assignment

Robson also argues that Combs accepted the property without any warranties, because his assignment agreement stated that the Hoseas "convey and quit claim" their interest in the 5-acre parcel to Combs. Respondent Br. of Robson at 5-6; CP at 52. A quitclaim deed simply conveys, without warranty, whatever interest the grantor may have in the property. *See Crafts v. Pitts*, 161 Wn.2d 16, 21 n.2, 162 P.3d 382 (2007). The Hoseas' interest in the 5-acre parcel, which was limited to their rights under the real estate contract, included the right to receive a statutory warranty deed once the property was paid in full. The "quit claim" language in the assignment agreement could not extinguish future warranties arising under that deed.

E. Binding Factual Determinations

Robson argues that, if we reverse, he is not bound by the trial court's determinations and the court must remand for a new trial. If a grantor refuses a tender of defense under a warranty to defend title, he will be bound by factual determinations from the original litigation in subsequent litigation between the grantee and grantor. *Mastro*, 90 Wn. App. at 164. Robson is therefore bound by the trial court's factual determinations in the quiet title action between the Ericksons and the Chases.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

I. Prescriptive Easements

A. Standard of Review

The Ericksons argue that the trial court erred by denying them a prescriptive easement over the Upper Road. The Chases argue that the trial court erred by granting a prescriptive easement over the Lower Road. A prescriptive easement presents a mixed question of law and fact. *Lee v. Lozier*, 88 Wn. App. 176, 181, 945 P.2d 214 (1997). We review the trial court's factual findings for substantial evidence. *Lee*, 88 Wn. App. at 181. Whether those facts establish a prescriptive easement is a question of law that we review de novo. *Lee*, 88 Wn. App. at 181. The Ericksons do not assign error to any of the trial court's findings of fact. Unchallenged findings of fact are verities on appeal, and our review is then limited to determining whether the findings support the conclusions of law. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 808, 828 P.2d 549 (1992).

B. The Upper Road

To establish a prescriptive easement, the Ericksons had to prove that their use of the Upper Road was adverse, open, notorious, continuous, and uninterrupted over a 10-year period. *810 Properties v. Jump*, 141 Wn. App. 688, 700, 170 P.3d 1209 (2007). The trial court's findings of fact support the conclusion that prescriptive use of the Upper Road was not continuous. It found that Zumstein constructed the Upper Road shortly after obtaining a logging

permit for the 16-acre parcel in December 1994. Prescriptive use began in January 1995, when Zumstein began using the road to remove logs from his property. But when the Read Family Trust purchased the property in 1997, they used the Upper Road only "sporadically." CP at 214. The road became substantially overgrown from disuse. Occasional acts of trespass do not constitute continuous use for the purpose of establishing a prescriptive easement. *See Downie v. City of Renton*, 167 Wash. 374, 382-83, 9 P.2d 372 (1932).

Additionally, the findings support the conclusion that prescriptive use was interrupted before the 10-year period elapsed. In December 2004, after the skinning incident, Nancy Chase instructed Victor Erickson to "get off of the Upper Road . . . along with his bulldozer," and Victor Erickson complied. CP at 214. A verbal protest by the landowner is sufficient to interrupt the prescriptive period if it causes at least a temporary cessation in use. *See Huff v. N. Pac. Ry. Co.*, 38 Wn.2d 103, 113-14, 228 P.2d 121 (1951).

C. The Lower Road

1. Vacant Lands Doctrine

The Chases argue that the Ericksons' use of the Lower Road was permissive because the five-acre parcel was vacant forest land until approximately 1998. We presume that the use of vacant, open, and unimproved land is permissive. *Nw. Cities Gas Co. v. W. Fuel Co.*, 13 Wn.2d 75, 85-86, 123 P.2d 771 (1942). But a claimant may overcome this presumption by presenting evidence that his use was adverse and hostile to the owner's rights. *Nw. Cities*, 13 Wn.2d at 87.

In *Todd v. Sterling*, 45 Wn.2d 40, 273 P.2d 245 (1954), the appellant attempted to establish a prescriptive easement over vacant land by showing that settlers, hunters, and fishermen

had used the road since 1907. *Todd*, 45 Wn.2d at 41-42. The Supreme Court of Washington held that this evidence was insufficient to rebut the presumption of permissive use:

> Mere travel over the unenclosed land is all that [the] plaintiff has shown to establish his right. This is insufficient. Travel over wild, unoccupied land is not notice to an absent owner, and cannot be relied upon to change a use regarded as permissive in its inception, to one which can be said to be adverse to the owner, in support of the establishment of a roadway by prescription.

Sterling, 45 Wn.2d at 44.

In contrast, the appellants in *Mountaineers v. Wymer*, 56 Wn.2d 721, 355 P.2d 341 (1960), attempted to establish a prescriptive easement over vacant land by showing that they had (1) used the road since 1918 to access their camping facilities; (2) marked the road's entrance with "no trespassing" signs; and (3) installed a padlocked gate. *Mountaineers*, 56 Wn.2d at 722-23. The Supreme Court held that these acts were sufficient to rebut the presumption of permissive use and fulfill the hostility requirement. *Mountaineers*, 56 Wn.2d at 723-24.

The Ericksons' use of the Lower Road is more similar to *Mountaineers* than *Sterling*. They have used the Lower Road to access a mine on their 9-acre parcel and haul away rocks in dump trucks since 1987. They average 700 trips per year over the Lower Road and periodically maintain it by clearing brush, adding rock, and grading the road. While the Ericksons did not prevent others from using the road, they did more than merely travel over vacant forest land—they used and maintained the road as an owner would. These facts are sufficient to overcome the presumption of permissive use and establish that the Ericksons' use of the Lower Road was hostile to the true owner's rights.

2. Open and Notorious

The Chases also argue that the Ericksons' use of the Lower Road was not open and notorious. First, the Chases rely on a short plat application for the 9-acre parcel. The Ericksons submitted the application in 1993, and a copy was mailed to surrounding property owners in 1994. The application stated that access to the 9-acre parcel would be from the south rather than from the north across the Lower Road. The Chases argue that "even if the owner of the 20 acres had had any inkling that Erickson might be adversely using the Lower Road, the filed short plat documents confirmed officially that the access to the 9 acres was not across the Lower Road." Opening Br. of Chase at 26.

Second, the Chases argue that it was impossible to tell whether the Ericksons were using the Lower Road to access the 9-acre parcel or the 16-acre parcel. In 1994, Robson and Zumstein entered into a cross-access easement agreement and Robson granted Zumstein an easement over the Lower Road for access to the 16-acre parcel. The Chases argue that after this agreement, it was impossible to tell whether the Ericksons were legally using the Lower Road to access the 16-acre parcel or, instead, illegally using the Lower Road to access the 9-acre parcel.

Use of another's land is "open and notorious" when a reasonably diligent owner would discover the usage. *See Nw. Cities*, 13 Wn.2d at 87; 17 William B. Stoebuck, Washington Practice: Property Law § 2.7, at 101 (2d ed. 2004). A reasonably diligent owner would have discovered that the Ericksons had been driving dump trucks over the Lower Road approximately 700 times per year since 1987. Furthermore, the owner in this case had actual knowledge. Robson owned the 20-acre parcel in 1994, after the short plat application and the easement exchange, and Robson testified that he knew the Ericksons were using the Lower Road to access

their 9-acre parcel. The Chases' knowledge is irrelevant because the Ericksons' prescriptive use began in 1987 and the 10-year prescriptive period expired before the Chases purchased the property in 2003. Thus, the trial court did not err by concluding that the Ericksons' use of the Lower Road was open and notorious.

II. Timber Trespass

A. Standard of Review

The Ericksons argue the trial court erred by awarding treble damages for timber trespass. We review damage awards for abuse of discretion, and we will not disturb an award unless it is outside the range of substantial evidence in the record, shocks the conscience, or appears to be the result of passion or prejudice. *Mason v. Mortgage Am., Inc.*, 114 Wn.2d 842, 850, 792 P.2d 142 (1990).

B. Measure of Damages

The Ericksons argue that the measure of damages for timber trespass is based on inadmissible hearsay testimony from Charles Chase. Charles testified at length to the replacement cost. His assessment was based, in part, on information he gathered from nurseries and equipment rental companies. The Ericksons argue that Charles lacks expertise to testify to the value of the removed trees and that his testimony is based on inadmissible hearsay evidence.

It is longstanding and well-established law that an owner is qualified to testify to the value of his property—no further expertise is required. *See McCurdy v. Union Pac. R.R. Co.*, 68 Wn.2d 457, 468-69, 413 P.2d 617 (1966); *Wicklund v. Allraum*, 122 Wash. 546, 547-48, 211 P. 760 (1922).; *State v. Hammond*, 6 Wn. App. 459, 462, 493 P.2d 1249 (1972). An owner's

knowledge about the value of his property may come from many sources, including inquiries and comparisons. *Wicklund*, 122 Wash. at 547. The source of an owner's knowledge may affect the weight of his testimony but not its admissibility. *Wicklund*, 122 Wash. at 547; *McInnis & Co. v. W. Tractor & Equip. Co.*, 67 Wn.2d 965, 969-70, 410 P.2d 908 (1966).

C. Treble Damages

The Ericksons also argue that the trial court erred by awarding treble damages. RCW 64.12.030 mandates treble damages for timber trespass, but RCW 64.12.040 provides, "[If] the defendant had probable cause to believe that the land on which [timber trespass] was committed was his own . . . judgment shall only be given for single damages." The Ericksons argue that they reasonably believed that they had acquired a prescriptive easement over the Upper Road.

The trial court found that the Upper Road was approximately 15 feet wide and when the Ericksons "skinned" the road, they cleared an area approximately 50 to 60 feet wide. CP at 214-15. It concluded that the Ericksons knew or should have known that widening the road to that extent exceeded any potential easement they had acquired. Based on these findings, the trial court did not abuse its discretion in ruling that the Ericksons failed to establish mitigating circumstances under RCW 64.12.040.

III. Diminution in Value

A. Standard of Review

The Chases assign error to the trial court's ruling that they did not present any competent evidence of diminished value. We review damage awards for abuse of discretion. *Mason*, 114 Wn.2d at 850.

B. Lack of Credible Evidence

The fact of loss must be established with sufficient certainty to provide a reasonable basis for estimating that loss. *Mason*, 114 Wn.2d at 849-50. Mathematical precision is not required. *Mason*, 114 Wn.2d at 850. But the evidence must afford a reasonable basis for estimating the

loss and must not subject the trier of fact to mere speculation or conjecture. *Eagle Point Condo. Owners Ass'n v. Coy*, 102 Wn. App. 697, 703-04, 9 P.3d 898 (2000).

Nancy Chase testified that she believed the prescriptive easement over the Lower Road diminished the property value by $40,000. The trial court found that this testimony was not credible because there was no evidence that the estimate was based on any sort of factual information. An expert witness testified that the diminution in value was $27,000. But the trial court found that the expert's testimony was not credible either because he failed to take into account major factors affecting the property value.[1]

Credibility determinations are for the trier of fact and are not subject to review on appeal. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004). The Chases argue that their testimony was sufficient to establish diminution in value because an owner is competent to express an opinion on the value of his or her own property. *Wicklund*, 122 Wash. at 547. While an owner's opinion on the value of his property is *admissible*, the trier of fact is still entitled to determine whether the testimony is *credible*. *See McInnis*, 67 Wn.2d at 968-70 (stating the source of the owner's knowledge may affect the weight of his testimony). Here, the trial court did not find any credible evidence establishing a reasonable basis for calculating diminishment in value and it properly denied the Chases' request for damages.

[1] The Chases' property was already burdened with an easement over the Lower Road for the 16-acre parcel from the Robson/Zumstein easement exchange in 1994. The expert was not aware of the pre-existing easement and did not factor it into his calculation. Also, he based his estimate on an easement of 60 feet wide, but the trial court granted an easement of only 17 feet wide.

IV. Attorney Fees

The Chases also assign error to the trial court's partial denial of their summary judgment motion, arguing that they are entitled to attorney fees against Combs under the purchase and sale agreement. But the Chases did not properly raise this argument at trial. Failure to present an issue, theory, or argument to the trial court precludes a party from raising it on appeal. RAP 2.5(a); *Lindblad v. Boeing Co*., 108 Wn. App 198, 207, 31 P.3d 1 (2001).

The Chases moved for summary judgment, arguing that they were entitled to attorney fees against Combs under the statutory warranty deed. They first raised the purchase and sale agreement as an alternative ground for awarding attorney fees in their reply memorandum. The moving party must raise in its summary judgment motion all of the issues on which it believes it is entitled to summary judgment. *White v. Kent Med. Ctr., Inc.*, 61 Wn. App. 163, 168, 810 P.2d 4 (1991); *see also R.D. Merrill Co. v. Pollution Control Hearing Bd.*, 137 Wn.2d 118, 147 n.10, 969 P.2d 458 (1999). "Allowing the moving party to raise new issues in its rebuttal materials is improper because the nonmoving party has no opportunity to respond." *White*, 61 Wn. App. at 168.

Robson and the Chases also request attorney fees on appeal, based on attorney fee provisions in their separate real estate contracts. As neither party prevails, we decline to award fees.

We reverse the trial court's ruling that the statute of limitations bars Combs's breach of warranty claim against Robson, and we remand for disposition on the merits. We affirm all other disputed trial court rulings.

Armstrong, J.

We concur:

Van Deren, C.J.

Penoyar, J.