IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

CARYL J. CLIFTON, Appellant, v. LINDA ROSS, personal representative of the ESTATE OF WALTER D. JOHNSON, SR., Respondent.	)	No. 29818-3-III UNPUBLISHED OPINION

Kulik, J. — This case is the second appeal involving a 10-foot strip of land sold by Walter Johnson to two different parties, first to Caryl Clifton and later to Majerus Construction. Mr. Clifton failed to record his deed until 2006—more than 30 years after the sale. The dispositive issue is whether the statute of limitations bars Mr. Clifton's claims of equitable indemnity, conversion, unjust enrichment, contribution, and constructive trust.

The statute of limitations began to run when Mr. Clifton had a right to seek relief. That date was no later than August 30, 2006—the day he was served by Majerus with a

complaint to quiet title and for damages.

The quiet title claim was resolved in Majerus's favor after an appeal to this court. In September 2009, over three years after Majerus's suit was filed, Mr. Clifton filed a creditor's claim against Mr. Johnson's estate (the Estate) for $109,976.16. The Estate rejected the claim. On October 30, 2009, Mr. Clifton filed this suit against the Estate. We agree with the trial court that the statute of limitations began to run when Majerus filed suit against Mr. Clifton in 2006. Therefore, we affirm the court's dismissal of all claims as barred by the statute of limitations.

FACTS

In 1972, Caryl J. Clifton purchased a portion of the neighboring property owned by Walter D. Johnson. One year later, Mr. Johnson gave Mr. Clifton a quitclaim deed for an additional strip of land between the two properties. The Johnson-Clifton deed was intended to correct a survey error. Mr. Johnson and Mr. Clifton continued to own properties neighboring the strip of land. On February 25, 2005, Mr. Johnson deeded a portion of his property to Majerus.

Over the next year, Mr. Clifton watched as Majerus began developing the property, but he felt no immediate concern. Majerus sold one of its developed lots to Deirdre Benwell, who staked a new boundary east of where Mr. Clifton thought the

property line should be. Ms. Benwell told Mr. Clifton that she owned the property up to the newly-staked boundary. This exchange caused Mr. Clifton to review his papers, and he realized that the Johnson-Clifton deed did not show any auditor's recording marks. Mr. Clifton recorded the quitclaim deed on June 30, 2006. When Mr. Johnson was first told that the Johnson-Clifton deed had been recorded, he denied signing the deed, but he later admitted that he had signed the deed.

Majerus-Clifton-Johnson Lawsuit. On *August 30, 2006*, Majerus filed suit against Mr. and Ms. Clifton and Mr. Johnson for slander of title and breach of statutory warranties. Together with his answer to the complaint, Mr. Johnson brought a third party complaint against Walla Walla Title Company for failing to except "the boundary dispute that is the subject of this lawsuit." Clerk's Papers (CP) at 177.

Eventually, Mr. Johnson settled with Majerus by paying $38,000. He was then dismissed from the lawsuit. Mr. Clifton chose to litigate his position, but did not file suit against Mr. Johnson. Following the trial, on *September 29, 2008*, judgment was entered against Mr. Clifton quieting title in Majerus and awarding Majerus $63,147.35 for slander of title damages against Mr. Clifton.

Mr. Clifton appealed, and we reversed the judgment of $63,147.35 for slander of title damages. We affirmed the quiet title judgment in Majerus. Our opinion was filed on

April 29, 2010, and the mandate was issued on November 19, 2010.

Clifton v. Estate of Johnson. While Mr. Clifton's appeal remained pending in the Majerus-Clifton-Johnson lawsuit, Mr. Johnson died. In September 2009, over three years after Majerus's suit, Mr. Clifton filed a creditor's claim against the Estate for $109,976.16. 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.

On December 23, 2009, the Estate agreed to a stay of proceedings. Mr. Clifton was appealing the trial court's decision in the Majerus-Clifton-Johnson lawsuit and the Estate was litigating heirship and distribution of Estate assets as well as the designation of the personal representative. 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. After both issues were resolved, the trial court entered a stipulated order lifting the stay.

Upon the lifting of the stay, the Estate moved for summary judgment against Mr. Clifton. The trial court granted the Estate's motion for summary judgment. The trial court concluded that "[t]he 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."

Report of Proceedings (Jan. 12, 2011) (RP) at 22.

The trial court awarded the Estate attorney fees and costs of $11,500, but the court equitably reduced this amount by $5,750, which Mr. Clifton alleged was the value of the land in question. This offset any potential benefit to Mr. Johnson. Mr. Clifton appeals.

ANALYSIS

Summary judgment is proper when the pleadings and the evidence show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c). When reviewing a summary judgment, the appellate court must consider the facts and all inferences therefrom in the light most favorable to the nonmoving party. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

The Estate moved for summary judgment based on its affirmative defenses. The Estate then bears the burden of proof. *Brown v. ProWest Transp. Ltd.*, 76 Wn. App. 412, 419, 886 P.2d 223 (1994). "We review grants of summary judgment de novo." *Veit v. Burlington N. Santa Fe Corp.*, 171 Wn.2d 88, 98, 249 P.3d 607 (2011).

Statutes of Limitations. The trial court determined that Mr. Clifton was put on notice of his claim in 2006 when the Majerus-Clifton-Johnson lawsuit was filed. In the court's view, "Mr. Clifton appears to be the author of his own misfortune" because he

failed to file the quitclaim deed for over 30 years. RP at 21. The court concluded that all of the statutes of limitations had run on Mr. Clifton's claims. In the court's view, several different statutes of limitations apply to the causes of action in this case. The dispositive question is when those causes of action accrued.

Mr. Clifton argues that the causes of action accrued when the final mandate was issued in the Majerus-Clifton-Johnson case—November 19, 2010. The Estate contends that the causes of action accrued when Mr. Clifton had the right to seek relief in the courts, a date no later than August 30, 2006, when Majerus initiated the Majerus-Clifton-Johnson lawsuit.

Statutes of limitations begin to run once the cause of action has accrued. *Pietz v. Indermuehle*, 89 Wn. App. 503, 511, 949 P.2d 449 (1998). A cause of action only accrues once the plaintiff has a right to seek relief. *Id.* "[T]he right to apply to a court for relief requires each element of the action be susceptible of proof." *Haslund v. City of Seattle*, 86 Wn.2d 607, 619, 547 P.2d 1221 (1976). "[A]n essential element of a cause of action based upon negligence or 'wrongful' acts, as alleged in respondents' complaint, is actual loss or damage." *Id.*

Both parties rely on *Mellor v. Chamberlin*, 100 Wn.2d 643, 673 P.2d 610 (1983). *Mellor* considered the issue of res judicata in the context of an encroachment dispute. *Id.*

at 647. Two lawsuits arose out of the same sale of property. The Chamberlins sold land improved by two office buildings. Mary Buckman owned the adjoining property. Prior to the sale, the Chamberlins leased this property as a parking lot. After the Chamberlins sold the property to Mr. Mellor, Ms. Buckman informed Mr. Mellor of the encroachment, and he agreed to lease the land. In the first action, Mr. Mellor alleged the Chamberlins misrepresented the parking lot as being part of the sale. *Id.* at 644.

Meanwhile, Mr. Mellor completed payment of the real estate contract and received a warranty deed with three covenants of title: indefeasible fee simple, free of encumbrances, and quiet and peaceful possession. Subsequently, Ms. Buckman informed Mr. Mellor that she wanted to settle the encroachment. Mr. Mellor had the land surveyed and discovered that his buildings encroached by less than two inches. Mr. Mellor paid Ms. Buckman to sell him a two-foot strip bordering the buildings. She quitclaimed the property to him. *Id.* at 645. Mr. Mellor then brought the second suit against the Chamberlins, alleging breach of the covenant of warranty and peaceful possession.

The court denied the Chamberlins' motion for summary judgment based on res judicata and entered a damages judgment for Mr. Mellor. *Id.* In discussing the denial of the motion for summary judgment, the court explained that in the misrepresentation claim, Mr. Mellor had not suffered damages from the encroachment and he was under no

obligation to insist that Ms. Buckman enforce her rights. The court concluded that "[i]t was over a year after the settlement of the misrepresentation claim that [Ms.] Buckman decided to enforce her encroachment claim. Until that time, [Mr.] Mellor's lawsuit was not ripe." *Id.* at 647.

Mellor is a title warranty cause of action and, as such, is somewhat similar to an indemnity cause of action. Although both parties rely heavily on *Mellor*, *Mellor* supports the Estate's position rather than Mr. Clifton's position.

Under *Mellor*, Mr. Mellor's lawsuit was not ripe because he "had neither suffered damages from the encroachment *nor* was he under an obligation to insist [Ms.] Buckman enforce her rights." *Id.* (emphasis added). The court in *Mellor* concluded that Mr. Mellor's action became ripe when Ms. Buckman decided to enforce her encroachment claim. *Id.* In other words, the court did not make a determination that Mr. Mellor had suffered damages until Ms. Buckman had tried to enforce her claim.

Here, Majerus had an adverse claim over the land deeded to Mr. Clifton under the 1973 quitclaim deed. On August 30, 2006, Mr. Clifton became aware of the Majerus claims when Majerus sued to enforce its claims by filing an action against Mr. Clifton for slander of title and quiet title. On that date, Mr. Clifton knew that Ms. Benwell intended to move the fence onto land that Mr. Clifton considered to be his property. On that date,

Mr. Clifton was aware that Majerus and Ms. Benwell intended to enforce their rights to possession of land that Mr. Clifton considered his property.

Mr. Clifton argues that the Estate has failed to address *Haslund*, which states that the right to apply to a court requires that each element of the action must be susceptible of proof, including "actual loss or damage." *Haslund*, 86 Wn.2d at 619. Mr. Clifton maintains that he did not suffer actual damages until the judgment was final in the Majerus-Clifton-Johnson lawsuit. But *Mellor* suggests that an action in a title warranty cause of action is ripe when damages can be shown or when a party seeks to enforce his or her encroachment claim.

Mr. Clifton also argues that his claims for equitable reimbursement, indemnification, and contribution are separate and distinct from the underlying cause of action and did not accrue until entry of the final judgment in the Majerus-Clifton-Johnson lawsuit. Mr. Clifton relies on *Central Washington Refrigeration, Inc. v. Barbee*, 133 Wn.2d 509, 517, 946 P.2d 760 (1997), which states:

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

(Footnote omitted.)

Presumably, Mr. Clifton applies this rule to claims for equitable reimbursement, indemnification, and contribution. Mr. Clifton argues that the accrual date is the date of the entry of the final mandate—November 19, 2010. But Mr. Clifton was adjudged and obligated to pay damages to Majerus when the trial court entered its judgment on September 29, 2008.

We conclude that Mr. Clifton's causes of action accrued on August 30, 2006, and, thus, are barred by the statutes of limitations. We affirm the summary judgment dismissal in favor of the Estate. Because our decision on the statutes of limitations is dispositive, we need not address the remaining issues raised by Mr. Clifton.

Attorney Fees. Both parties request attorney fees and costs on appeal under RAP 14.2 and RAP 18.1(a). Under RAP 14.2, the party that substantially prevails on appeal is entitled to an award of costs. The prevailing party may also be granted fees on appeal if they are allowed under the relevant authorities. RAP 18.1(a).

The parties point out that attorney fees are authorized under Washington's probate code, both under the creditor's claim section, RCW 11.40.080(2), and the relevant provision of the Trust and Estate Dispute Resolution Act, RCW 11.96A.150, which provides authority for a discretionary award of fees.

We affirm the award of attorney fees to the Estate and award it fees on appeal.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Kulik, J.

WE CONCUR:

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Sweeney, J. Brown, J.