

No.: 36603-7-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

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DIVISION II
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STATE OF WASHINGTON
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DAVID FRANK,

Appellant,

v.

FRANK FAMILY FOUNDATION,

Respondent.

Appeal from Mason County Superior Court

No.: 05-2-01057-0

APPELLANT'S REPLY BRIEF

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I. The Court Should Reverse The Trial Court's Summary Judgment Dismissal

By virtue of Respondents brief, it is clear that if the Court does overturn the probate decision at No. 36206-6-II on the ademption issue, the trial courts decision regarding standing should be over-ruled as well.¹ Therefore, Appellant sees no further need to brief the ademption argument here. The focus of Respondent's opposition touches on several other issues, and most prominently, a statute of limitations argument which the Trial Court refused to certify for appeal as a final judgment.

A. The Court Should Not Consider and/or Should Uphold The Trial Court's Decision on the Statute of Limitations Issue

Appellant did not expect that the statute of limitations argument would be addressed here as the Trial Court denied the Respondent certification of that order under CR 54(d) and no cross-appeal was filed. The case respondent cites for the proposition that the statute of limitations argument should be considered here does not stand for that proposition. Pursuant to RAP 2.4 this Court will review acts in the proceeding below which if repeated on remand would constitute error prejudicial to the respondent. The Court will grant affirmative relief to the respondent if (1) the respondent also seeks review of the decision by the timely filing of a

¹ The appellant understands that the parties have agreed that this case and the probate cases should be consolidated for purposes of oral argument. A stipulated motion is to be forthcoming.

notice of appeal or a notice for discretionary review (which it did not) or (2) if demanded by the necessities of the case. In this case the Foundation was dismissed from the lawsuit based only on the Court finding that appellant lacked standing. CP 17-21. In granting final judgment the Court stated:

“the Court’s Order granting summary judgment based upon lack of standing is based entirely upon the Court’s decision in the related TEDRA hearing. Should the Court’s decision in the TEDRA matter be over-turned on appeal, the basis for the Court’s Order on lack of standing would necessarily be resolved in favor of the appellant.

CP 17-21.

In a wholly separate motion for summary judgment the Court denied the Foundation’s statute of limitations argument based upon finding genuine issues of material fact for trial. Certainly, pursuant to the case law, the Foundation could have the Court review any rejected theories supporting the standing decision on the motion here under review, see *Peterson v. Hagan*, 56 Wn.2d 48 (1960). However, there exists no case law allowing the Foundation to seek affirmative relief based upon the statute of limitations argument as it is not an argument advancing affirmance of the standing decision, but instead seeks affirmative relief on a wholly separate subject matter and motion for which judgment was not entered. See e.g. *Phillips Building Co. v. Bill*, 81 Wn. App. 696, 700

(1996) citing *Nord v. Phipps*, 18 Wn. App. 262, 266 n3 (1977) and 3 *Lewis H. Orland & Karl B. Tegland*, 3 Wash. Prac. 49 (1991).

In this case, the order denying summary judgment on the statute of limitations issue was neither a final judgment, nor did the Foundation seek discretionary review. As the Court found in *Johnson v. Rothstein*, 52 Wn. App. 303, 306 (Wash. Ct. App. 1988), denials of summary judgment motions are not substitutes for judgments on the merits:

An order denying summary judgment is not a final judgment within the meaning of RAP 2.2(a)(1) because it is irrelevant to a final judgment on a verdict: Summary judgment is not a substitute for a trial; it exists as a mechanism to decide whether there exists any truly disputed material facts. Once the determination is made, rightly or wrongly, that there are issues of fact that can be resolved only after full hearing, the summary judgment procedure has no further relevance[.] *Morgan v. American Univ.*, 534 A.2d 323, 327 (D.C. 1987). Nor is a denial of summary judgment based on a trial court's determination of the presence of material, disputed facts a decision determining the action, defined by RAP 2.2(a)(3) as "[a]ny written decision affecting a substantial right . . . which in effect determines the action and prevents a final judgment or discontinues the action." Rather than preventing final judgment or discontinuing the action, the trial court's decision here ensured resolution of the parties' disputes by a trier of fact.

Johnson v. Rothstein, 52 Wn. App. 303, 306 (Wn App 1988).

Nevertheless, if the Court will be entertaining the statute of limitations issue, then the facts and law require that the trial court be upheld. At the trial court level, Appellant set forth in detail the fact and circumstances regarding the discovery rule, briefly summarized below.

1. The Evidence Undermines The Positions Of The Foundations On Appeal

In order to establish a claim of adverse possession, there must be possession for 10 years that is: (1) open and notorious, (2) actual and uninterrupted, (3) exclusive, and (4) hostile. *ITT Rayonier, Inc. v. Bell*, 112 Wn.2d 754, 757 (1989); RCW 4.16.020.

The Foundation asserts that the statute of limitations for adverse possession is the proper statute to apply. Of note, the Respondent does not put forward any evidence or even a claim in a pleading that it had possession, control or even any use of the property at anytime after it obtained colorable title to the property. Only the Appellant put forward evidence of its possession, use, management and control of the property over the last ten years. If the Foundation is seeking to somehow foreclose the Appellant's equitable interest in Cranberry Lake and its equitable claim for a return of the property through the adverse possession statute, the facts set forth below and herein refute such a claim.

In particular as set forth below, Norm Eveleth, the President and director of the Foundation testified that the Franks access to the property was never restricted, CP 118-119; CP 81-82, the Franks actually managed the use of the property and the cabin thereon, CP 84 & 118, and the

Foundation never interfered with that until it learned in 2004 that they had to do so because counsel informed them of IRS regulations. CP 94-95.

In addition to testimony supporting the Franks' possession and control of the property, Norm Eveleth's testimony establishes that the Franks, the Foundation and defendant McClanahan did not discover the facts supporting the basis of the claims against each of the defendants until 2004. CP 94-95, 98-99. First and foremost, Norm Eveleth, the current and only President of the Foundation testified that he had little if no knowledge of what a foundation did or was supposed to do when the Foundation was created. CP 98-99. Second, the foundation did not restrict Ken and Kitty's use of the Cranberry Lake property until February 2003. Moreover, the Foundation was not aware of and did not explain to the Franks a legal basis for restricting the Franks' use and control over the property until they had met for the first time **after January 2004** with counsel (LaVerne Woods) and learned at that time that the Frank's personal use of the property violated IRS regulations. See *CP 119; CP81-82*, wherein Mr. Eveleth explains that he did not understand the requirements and restrictions relating to a Foundation property until meeting with counsel Laverne Woods. Third, prior to retention of counsel by the Foundation, the Franks' retained management responsibility and

control of the Cranberry Lake cabin until February 2003, and had no restrictions on their use of the property:

1 Q. And I have seen a list of rules such as no
2 drinking, no fire arms, no fishing. Is that the sort of
3 list we're talking about?
4 A. Yeah. Yeah. **You see, Ken and Kitty always**
5 **managed the cabin. We didn't.** My understanding is that
6 was wrong, we shouldn't have been doing it that way, but
7 we never interfered with it. So when a family member came
8 or David went out there or whatever, Ken and Kitty were
9 the ones that set the rules. . .

CP 84.

Fifth, as stated in full in the opening brief, the Foundation (including defendant Laurie McClanahan who was one of the directors and was providing estate planning advice to the Franks) never limited the Franks' access to the property despite their being disqualified persons under IRS regulations. *CP 118-119; CP 81-82.* Sixth, Ken Frank maintained the property, clearing brush, cleaning up the property and the cabin. Seventh, only after being finally informed of the legal requirements in 2004 did the Board finally take full control of the property:

We never ever had any reason or wish or desire to infringe upon the Franks or their family members from using the property, and we still feel that way.

CP 94-95.

When considering this evidence, it is significant for the Court to keep in mind the evidence of defendant Laurie McClanhan's relationships

to the Foundation and to the Franks, as well as the basis for claims made against her and the Foundation in this lawsuit. The Foundation obtained legal title to the Cranberry Lake property through three deeds received in 1993, 1994 and 1997. The Appellant has claimed and alleged that the creation of the Foundation, including the purported conveyances of the property to it, were the direct and proximate result of Ken and Catherine's material mistakes of law and fact, induced by the Professional Defendants'(including McClanahan's) undue influence, negligent misrepresentations, and professional negligence. See CP 293, Amended complaint ¶ 21.6; see also Id. at ¶21.7. The Appellant has further alleged that CPA McClanahan breached duties to Ken and Kitty by "placing her interests and those of her family ahead of Plaintiffs' interests in her various professional and fiduciary capacities and in her role as a Foundation Director. CP 289, Amended complaint ¶ 18.5.

Therefore, this is negligence, misrepresentation and undue influence case wherein the Foundation was complicit through its director (who induced the creation of the Foundation and transfers to it). During the time from the inception and funding of the Foundation, as well as during the management and control of the property by the Franks, Ms. McClanahan served as the Frank's estate planning adviser, See CP 188 & 190, and also as an organizer and director of the Foundation. CP 189. As

an agent of the Foundation, her knowledge is imputed to the Foundation. *See e.g. Baille Communications, Ltd. v. Trend business Systems*, 53 Wn. App. 77, 85 (1988), *citing* 3 W. Fletcher, *Private Corporations* §§ 796, 799 (1986) (Principal charged with knowledge of agent “whenever and however such knowledge may have been acquired”); *See also* Restatement (2d) of Agency §276. Consequently, the Foundation’s argument that it was not complicit and is simply an innocent third party that should be allowed to avoid the statute of limitations as set forth for actions relating to misrepresentation, constructive trust, mistake etc., should not be given any credence.

Furthermore, Ken and Kitty were not aware of the huge mistake they were induced to make until they (and the Foundation) were told in February 2003 that it would be illegal for them and their family to use, manage and control the Cranberry Lake property. CP 192. Prior to that time and for more than ten years, the Franks had unfettered access to the property, and the Board did not question or attempt to manage or limit that use and control. CP 118-119, CP 81-84. The Franks’ use of the property was consistent with what Laurie McClanahan had told them about creating the Foundation – they could avoid taxes and maintain control of the property. CP 186-197. These facts demonstrate not only that the Franks did not understand the ramifications of placing the property in a

foundation, but that the Foundation itself was unaware of impediments to use and control of the property under the Internal Revenue Code until 2004.

Consequently, the applicable statute of limitations should be deemed to have started to run in February 2003, when the Franks first learned that the advice they received from Laurie about their use of the property was completely false. Further, the acts and knowledge of defendant Laurie McClanahan are attributable to the Foundation/Respondent as a matter of law.

B. The Foundation Mischaracterizes Washington Case Law on the Statute of Limitations Issue

Notwithstanding Respondent's argument for the application of the 10 year statute of limitation, the gravamen of the complaint, rather than the requested relief, determines the applicable statute of limitations.

Respondent suggests that the line of cases which include *Morgan v. Morgan*, 10 Wash. 99 (1894); *Hutchinson Realty Co. v. Hutchinson*, 136 Wash. 184 (1925) and *Deering v. Holcomb*, 26 Wash. 588 (1901), do not support the application of the three year rather than the ten year statute of limitations because in those cases the ten year statute had clearly been met by the plaintiff. See Respondent's Brief, pg. 21. Therefore, it is argued, the courts only have must considered whether the shorter

limitation period had been met, without considering whether the ten year statute applied – apparently making the decisions of the courts dicta. It is said that, therefore, the instant case presents a case of “first impression in Washington.”

This faulty reasoning represents a far fetched effort to distinguish cases that otherwise clearly undermine the Respondents proposition that RCW 4.16.020 applies to this case. It is never the case that two different statutes of limitation govern the same action, leaving the courts to apply whichever may not have been met, while ignoring the other. The process always requires that the courts determine which statute of limitations governs an action which is then applied. It is incumbent on the trial court to determine what the gravamen of the complaint is and to apply the appropriate statute of limitations accordingly. *Bradbury v. Nethercutt*, 95 Wash. 670,672 (1917) (while fraud was practiced in creating the title, its operation was not affected thereby); *Aberdeen Federal Savings*, 58 Wash. App. 773, 776 (1990)(three year statute and discovery rule applied). A review of the *Morgan* line of cases demonstrates that this was done in those cases.

The *Morgan* case did not simply put the ten year statute of limitation aside and consider only that of three. In *Morgan* the Court held the statute of limitations for the recovery of real estate has no relation to

an equitable proceeding to set aside a fraudulent deed of real estate when the effect of it is to restore the possession of the premises to a defrauded party. The appellant contended that her claim was an action to recover real estate and that the three year rather than the ten year statute applied. *Id.* at 104. Because of that position, the Court specifically noted that “this brings us to a consideration of the nature of the action.” *Id.* In the course of considering the nature of the action, the Court reasoned as follows:

It appears to us that the cases put here of continuing contracts and of actions for the recovery of real estate, or for the possession of real estate, for its possession, to which the ten years’ statute of limitations would be applicable, are not parallel ones with an action to set aside a deed which immediately divested the title of the grantor upon its execution and delivery... In cases to recover real property, or its possession, to which the ten years’ limitation is applicable, the plaintiff generally at least, has title to, or is the owner of, the property. It seems to us that this question of ownership is the test or distinguishing feature between actions brought to recover real estate, to which the ten year’ limitation is applicable, and actions seeking to recover the same where the title has been parted with in consequence of the fraud of another party, and which determines the latter to be actions for relief upon the ground of fraud rather than for the recovery of real property.

Id. at 105-6.

The analysis continued:

The action must be classed as one for the relief upon the ground of fraud. The deed in question was not void but voidable, at most...The action cannot be classed as one to recover real estate, within the ten year’ limitation statute, although the result might be, in case of a favorable termination of it for plaintiff, to restore her to a portion of the lands quit-claimed to the defendant.

Id. at 108.

This is hardly the reasoning and decision of a court which simply applied whichever statute of limitation was most likely to result in a dismissal of the plaintiff's case. Instead, the Court carefully determined which of the statutes of limitation would apply based on its "consideration of the action." *Id.* at 104. Moreover, the reasons given by the Court as to why the circumstance and facts of that action were not ones to which the ten years' limitation should apply to are exactly the same in the instant case, i.e. this is an action to recover title "where the same has been parted with" as a result of the wrongful conduct "of another party." *Id.* at 106.

Respondent similarly claims that the *Deering* Court applied the three year statute where the land transfer had occurred eight years before, and suggests that it did so because the ten year statute had not been missed. This argument makes no sense here as the Court upheld the lower court's decision that the plaintiff had in fact discovered the cause of action more than three years before suit was brought such that the plaintiff's claim was dismissed based on the three year statute of limitations. Obviously, this circumstance more than supports that the Court directly considered and held that the three year rather than ten year statute applied because as, if the ten year statute applied instead or in addition somehow, the plaintiff's case would have been timely and not dismissed.

The Respondent, claim that *Hutchinson Realty Co. v. Hutchinson*, 136 Wash. 184 (1925) and *Doyle v. Hicks*, 78 Wash.App. 538 (1995) stand for a rule that the three year statute cannot be applied where it is not alleged that the grantee was the party who exercised the undue influence, misrepresentation and or negligence in bringing about the cause of rescission. Respondent's Brief, pg. 14. A review of those cases will not support that distinction. Instead, the courts there looked at the gravamen of the complaints and determined that the gravamen of the complaints were simply deficiencies in the deeds that was the basis of the actions. *Hutchinson Realty v. Huthchinson*, supra. at 190 (no misrepresentation involved in transfer, grantee simply took "title to which she had no legal right" in complicity with her husband); *Doyle v. Hicks*, 78 Wn. App. Supra. at 542 (claim simply one of ownership based on adverse possession).

Furthermore, it has been evidenced and argued here and to the trial court that while defendant and CPA McClanahan acted on behalf of the Franks as their estate planner engaged in acts of undue influence, misrepresentations and negligence in creating and funding the Foundation, McClanahan was also an organizer, director and executive committee member of the Foundation, and continues to be to the present. Her knowledge is imputed to the Foundation. See App/ Reply Brief at page 8.

This fact precludes the Foundation from arguing it is a mere innocent third party donee that can avoid the three year statute of limitation provisions with discovery rule applicable to the causes of action brought against the professional defendants.

When considering the nature of the instant cause of action, as did *Morgan*, it is evident that the Appellant claims rescission of a gift caused by undue influence, misrepresentation and negligence of the professional defendants, including that of the organizer and director of the Foundation. Based on *Morgan*, this action must be classed as such. Therefore RCW 4.16.080 is the applicable statute of limitations relating to plaintiffs' attempt to recover the donation of the property to the Foundation. RCW4.16.080(4) specifically includes a discovery rule. *Id.*

A cause of action for misrepresentation falls under RCW 4.16.080(4)'s three year statute of limitations and accompanying discovery rule. "Claims for negligent misrepresentation are subject to the three-year statute of limitations for fraud under RCW 4.16.080(4)." *Davidheiser v. Pierce County*, 92 Wn. App. 146, 156, 960 P.2d 998 (1998) (citing *Western Lumber, Inc. v. City of Aberdeen*, 10 Wn. App. 325, 327, 518 P.2d 745 (1973)). *See also Sabey v. Howard Johnson & Co.*, 101 Wn. App. 575, 5 P.3d 730 (2000) ("claims for negligence and negligent

misrepresentation are subject to three-year statutes of limitations” (citing RCW 4.16.080(2); RCW 4.16.080(4)).

Undue influence also is closely related to fraud and is analyzed under the same principles. *See In re Estate of Dand*, 41 Wn.2d 158, 164, 247 P.2d 1016 (1952) (both fraud and undue influence sufficient to invalidate will under RCW 11.24.010); *In re Interest of Perry*, 31 Wn. App. 268, 272, 641 P.2d 178 (1982) (“undue influence and overreaching are species of fraud”). Other jurisdictions agree with this approach as well. *See e.g. McMeens v. Pease*, 878 S.W.2d 185, 189- 190 (Tex. 1994)

The Plaintiffs have alleged that the deeds granting the property to the Foundation were induced by undue influence and misrepresentation the defendants including McClanahan. CP 198-207. Because these allegations of misrepresentation and undue influence fall under RCW 4.16.080(4) 3 year statute of limitation and accompanying discovery rule, RCW 4.16.080(4) applies to the Plaintiffs’ claims to recover the property.

C. Even If the Ten Year Statute Applied Without Benefit Of the Discovery Rule, The Appellant Still Brought the Claim Within the Limitations Period

Even if one was to accept that the ten year’s statute of limitation applied, and without the application of the discovery rule, the Respondent makes huge leaps of logic, unsupported by statute or case law, to assert that the this lawsuit was filed more than ten years after the transfer of the

property. In order to kick the accrual of the ten year limitation back far enough, it has to disregard a transfer of a large part of the land to the Foundation which occurred according to the deed cited, on December 23, 1997, or about eight months before suit was filed on November 4, 2005. That transfer, occurred within the argued for statute of limitation. In order to disregard that transfer, the Respondent asserts that the after acquired title statute found at RCW 64.04.070 applies in such a way that this transfer relates back in time, for purposes of the statute of limitations, to the date on which the Franks obtained the property on January 24, 1995. If the date of the later transfer is kicked back to this date, they assert, the ten year statute of limitation, if it applied, would have been missed by about nine months. However, their legal assumptions stand in the way.

First, as to the applicability of RCW § 64.04.070 at all, the words of the statute should be considered. The statute refers repeatedly to the scope of transfers to which it applies. In four places, the statute identifies that transactions to which the statute applies are land transfers “sold **and** conveyed.” (emphasis added) It is abundantly clear that the statute only applies to sales of realty. In this case, it is not disputed that the transfers were not sales, and were instead gifts for no consideration or price.

Second, it should be noted that the two transfers from the Franks to the Foundation at issue, on December 28, 1994 and on December 23,

1997, are “Quit Claim Deeds”, which offer no warranties. RCW 64.04.050 provides that quit claim deeds do not extend to after acquired title, unless they the deeds so specify. With or without such a provision, the after acquired title provisions of RCW 64.04.70 do not apply to quit claim deeds, and so does not apply to the deeds here at issue.

Third, it is apparent from the fact the Franks’ lawyer Gentry believed that it was necessary to transfer title on December 23, 1997, and therefore did not believe that the transfer of that property was somehow accomplished already by way of the after acquired title statute. Further clarifying her thinking on this, as the Court may recall, Gentry testified that the will provision regarding the property was made in August of 1996 as a safety net in the event all of the property was not transferred to the Foundation before the Franks died. Obviously, the Franks’ attorney (and therefore the Franks) believed that a necessary and meaningful transfer to the property was needed and occurred on December 23, 1997, within ten years of the filing of the lawsuit. Certainly, the Respondent should not be heard again to argue that the mistaken advices made by the other defendants in this case should be applied in some technical way to thwart the equities due the Franks in this case.

D. The Theories of Constructive Trust and Undue Influence Regarding the Gift of Property Further Support Appellant’s Statute of Limitations Argument.

Because the Franks transferred the property on the basis of mistake, undue influence and misrepresentation, equity converts the Foundation to a constructive trustee in which the Foundation is deemed to hold the property in constructive trust for the benefit of the Franks. In an action to recover property so held, the three year statute of limitations and discovery rule apply.

The principles controlling the application of constructive trusts were set forth in Appellant's opening brief at page 30 quoting *Seventh Elect Church v. First Seattle Dexter Horton Nat'l Bank*, 162 Wash. 437, 440, 299 P. 359 (1931), *Dexter Horton Bldg. Co. v. King County*, 10 Wn.2d 186, 191, 116 P.2d 507 (1941) and Restatement of the Law, *Restitution*, § 167 each of which stand for the proposition that equity will create a constructive trust when a third party receives property through the misrepresentations and/or undue influence of another. Consequently, should plaintiffs successfully prove that the Franks deeded the property to the Foundation based upon undue influence or through the misrepresentations of the professional defendants, the Foundation will be found to hold the property for plaintiffs in constructive trust.

Even third parties who innocently acquire property must sometimes surrender it if the property was fraudulently obtained. *See*

Baile, supra at 84, citing *Restatement of Restitution* §123 (1937); see also *Restatement of Restitution* §§3, 13, 17, 28, 63, 64, 107 (1937). In *Baile*, the plaintiffs were fraudulently induced to co-sign a mortgage which ultimately led to foreclosure of their property. The party who induced them to co-sign and essentially withhold their right to rescind or void the contract, took the mortgage proceeds and gave them to a third party without consideration. *Baile* sued the third party, which claimed to be innocent of the fraud. The Court still found the third party had been unjustly enriched and did so for two separate and distinct reasons, each of which on their own would constitute unjust enrichment. *Baile, Supra* at 85. First, the Court found that Trend College received and retained the proceeds of fraud knowing of the Bailies' rights. Trend knew of the fraud through Trend's president (who committed the fraud) because he was Trend's president and sole shareholder. *Id.*, citing *See 3 W. Fletcher, Private Corporations* §§ 796, 799 (1986). Second, Trend did not pay value for any of the mortgage proceeds. Either of these reasons makes Trend's otherwise lawful acquisition and retention of the proceeds unjust. See *Restatement of Restitution* § 123 (1937), cited in *Baile, supra* at 85.

Much like the decision in *Baile*, here the Foundation had knowledge of the misrepresentations and undue influence perpetrated upon the Franks through Ms. McClanahan, who was the Foundation's

secretary/treasurer, executive board member, and accountant. Second, the Foundation did not pay value for any of the property. Either of these reasons makes the Foundation's otherwise lawful acquisition and retention of the proceeds unjust. See also comment b to Restatement of the Law, *Restitution*, § 167 (donee unjustly enriched if receives transfer through fraud of third person). In short, the Foundation's claim that it can avoid the three year statute of limitations and discovery rule based upon its alleged innocence in the receipt of the property has no basis in any law or treatise as the auspices surrounding its acquisition need not be wrongful for equity to find a constructive trust. *Scymanski v. Dufault*, 80 Wn. 2d 77, 89 (1971). See also *Viewcrest Cooperative Association, Inc. v. G.E. Deer*, 70 Wn.2d 290, 293 (1967). Indeed, Restatement of Restitution §201, *quoted in Hesthagen v. Gunda Harby*, 78 Wn.2d 934, 945 (1971) sets forth Washington States applicable law on the issue; see also *Bryant v. Joseph Tree*, 57 Wn. App. 107 (1990); *Viewcrest Coop, supra*; *Peste v. Peste*, 1 Wn. App. 19 (1969).

In this case, the Foundation did not pay value for the property. Additionally, the Foundation, through its director, secretary/Treasurer Laurie McClanahan had notice of the errors and omissions that caused the Franks to deed the property based on mistake, undue influence and misrepresentation.

Further and regardless of the conduct of the Foundation a constructive trust still arises where the retention of property would result in unjust enrichment of the person retaining it. *Scymanski* at 89; *citing* 5 A Scott, *The Law of Trusts*, §462.2 at 3414 (3d ed. 1967); *see also* Restatement of Restitution §160 (1937). The Foundation has been unjustly enriched for because it received and retained the proceeds of the professional defendants' misrepresentations and undue influence knowing of the Franks' rights. *Baille*, 53 Wn. App at 85.

In an action to recover property being equitably held in a constructive trust, the three year statute of limitations and discovery rule applicable to fraud cases applies. *Arneman v. Arneman*, 43 Wn. 2d 787, 800 (1953); *see also Viewcrest Cooperative Association*, 70 Wn. 2d at 294-295. Since the Franks bought this case within three years of learning that they had negligently been induced to give away their property for no value and no longer had access to the property contrary to the advice they previously received from Laurie McClanahan, the Foundation's motion to dismiss this case based upon the statute of limitations should be denied.

E. The Law Relating to the Rescission of a Gift is Another Factor in Determining Why The Three Year Statute of Limitations Applies.

Gift transfers may be rescinded, particularly when the donee has sacrificed nothing to obtain the bounty it has received. See e.g. Parker,

George E III “*Gifts – Mistake – Rights of Donor, Donee and Their Successors in Interest to Relief*,” 58 Mich. L. Rev. 90, 91-2 (1959). A gift transfer that is occasioned by undue influence, either by the donee, or by a third party, is invalid. See “Gifts,” §33, 38A CJS, p. 211; Gifts,” §35, 38 Am Jur 2d, p 733. . As to third-party undue influence, the consensus among courts and legal scholars is that the right to rescind arises whether or not the actual donee personally exerted the undue influence:

In order to set aside a gift on the ground of undue influence, it is not essential that the donee should have personally had any connection with the transaction; if another employed such influence in behalf of the donee, however innocent, the result will be the same as if it were employed by the donee himself.

“Gifts,” §33, 38A CJS, p. 213. See also Restatement (3d) of Property: Wills & Other Donative Transfers, §8.3; *See also* Restatement (2d) of Property, § 34.7. Appellant set forth the various reasons as to why the gift was the result of undue influence in the Declarations of Gerry Treacy (CP 202-207) and the Declarations of David Frank (CP 188-195). *See also* Restatement (Second) of the Law of the Trusts, §366 and comment c (“a charitable trust can be rescinded or reformed on the same grounds as those upon which a private trust can be rescinded”). See also “Gifts.” §33, 38 CJS, p 211-12, *citing Peters v. Skalman*, 27 Wn. App. 247 (1980). Ultimately the existence of undue influence is a factual question, *see*

Pederson v. Bibioff, 64 Wn. App. 710, 720 (1992), which is normally not determined on summary judgment.

Since the Franks had a confidential relationship with McClanahan as their CPA and as director of the entity she had the Franks gift their property to, the evidence to sustain this gift must show that the gift was made freely, voluntarily and with a full understanding of the facts. *Pederson v. Bibioff*, 64 Wn. App. at 720. As was set forth here and in the opening brief, the gift in this case was not so made as neither the Franks nor the Foundation knew of the ramifications of gifting the property to it, including that they would be banned from the property. CP 186-197; 198-207. The following other facts demonstrate that undue influence of professional defendants lead to this gift: (1) the Franks were elderly and ailing, (2) the creation of the Foundation did not supply the tax benefits they sought in their estate planning. *Id.*, (3) Ken and Kitty Frank were unsophisticated as to foundations and the tax consequences of charities as evidenced by Ms. Frank's deposition wherein she admitted they had no idea what a foundation was and that they signed whatever McClanahan put before them. *Id.*, (4) the transfer of their largest asset was made for no consideration. *Id.*, and (5) the transfer of the property to the Foundation was not a transfer to the natural object of the Franks' affection - family. (*Id.*). Additionally, Ms. Frank testified that they placed the property in the

Foundation so they could leave it for their son and grandson. McClanahan, however, failed to set the Foundation up in a manner which would maintain familial control. CP 202-207. That Ms. Frank believed they needed the Foundation in order to ensure their son and grandson would get the property, further shows the influence McClanahan exerted. Consequently, the Foundation cannot maintain possession of the mistakenly gifted property under the auspices of the 10 year statute of limitations it asks the Court to apply. Once the Franks were ousted from the property, this lawsuit soon followed as the Franks both expressed a desire to have the property returned to them. *CP 168*.

There is ample evidence in the record that the Foundation had knowledge of the misrepresentation, undue influence and misrepresentation as one of the Foundation directors was advising the Franks regarding the decision to gift property and other funds to the Foundation. The Foundation is charged with the full knowledge of McClanahan, its director and secretary/treasurer, regarding the reasons the Franks decided to gift the property.

F. If By Chance the Ten year Statute of Limitations Were To Apply to a Non-Adverse Possession Case Such as This One, A Discovery Rule Should Apply

To the extent this Court may apply the 10 year statute of limitations, the Court should also apply the discovery rule such that the

cause did not accrue until February 2003 when the Frank's were told for the first time they would be banned from the property. The case on which Respondent relies to argue that the discovery rule does not apply to RCW 4.16.020, *Doyle v. Hicks, supra.*, is clearly and obviously addressing discovery of adverse possession rather than the discovery rule as applied to statutes of limitation.

The Franks were induced through undue influence and misrepresentation to gift property, while maintaining the right to use and manage the property. *See* CP 188-195; CP 202-207. Prior to February 2003, the Franks used the property for personal use and control without interference of the Foundation "leadership." *See* CP 188-195; *supra*; Deposition of Catherine Frank, *supra*. They had no reason to know that they loose that control as they had relied on the negligent advices of McClanahan (advisor and director) who told them they would maintain use and control of the property in perpetuity.

DATED this 23th day of January 2008.

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CERTIFICATE OF SERVICE

The undersigned certifies that on this day he/she caused to be served in the manner noted below, a copy of the document to which this certificate is attached, as on the following:

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct this 23th day of January 2008.



William Keller