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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

DEPUTY

No. D2-513919

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

SHARON L. HARTZELL, a single woman; and
JUDY HARTZELL, a single woman, in her capacity
as the Attorney-in-Fact for Sharon L. Hartzell

Appellants

v.

DOROTHY M. THOMAS, a single woman

Respondent

APPEAL FROM THE SUPERIOR COURT
FOR JEFFERSON COUNTY
THE HONORABLE JEFFREY P. BASSETT, *Visiting Judge*

BRIEF OF APPELLANTS

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I. INTRODUCTION

This appeal presents the question of whether the trial court erred in granting a Motion for Summary Judgment brought by the Defendant/Respondent on statute of limitations grounds.

In considering this appeal, we request that the Court take notice of the recent opinion of Judge Stephen Dwyer of Division I of this Court, in the case of *Kelley v. Tonda*, 198 Wn.App. 303 (2017):

Some cases simply must be tried. In today's legal culture, there seemingly prevails a belief that all lawsuits are somehow, someway subject to resolution by dispositive motion. But that never has been – and never will be -- true. [A] trial is necessary when the material facts are not agreed on.

(198 Wn.App. at 307).

In the instant case, the deposition and declaration testimony of the key participants and eyewitnesses provides numerous examples to show that “the material facts are not agreed upon.” This case presents abundant support for Judge Dwyer’s admonition that “Some cases simply must be tried.”

II. ASSIGNMENTS OF ERROR

- A. **The Trial Court Erred in Granting Summary Judgment Based Upon Statute of Limitation Grounds Despite Numerous Issues of Material Fact Indicating that Plaintiffs Did Not Discover the Facts Giving Rise to Plaintiff's Causes of Action, and, In the Exercise of Reasonable Diligence, Could Not Have Discovered Those Facts, Until Late 2015.**
- B. **The Trial Court Erred by Failing to Apply the Doctrine of Equitable Tolling to the Circumstances of this Case. There is Substantial Evidence of Defendant's Bad Faith, Misrepresentations and Deception, Which, If Believed By the Trier of Fact, Would Justify Application of the Doctrine of Equitable Tolling.**

III. STATEMENT OF THE CASE

A. Statement of Facts.

Sharon Hartzell ("Sharon") is a physically-disabled, 82-year old widow who lives at 728 Walker Street in Port Townsend, a home which she acquired in 1971 ("the Property") (CP 082; CP 038). Unfortunately, one of Sharon's eight children, her daughter Dorothy Thomas ("Dorothy"), the Defendant, has engaged in an underhanded, surreptitious -- and ultimately successful -- effort to steal the Property from Sharon over a period of several years.

Sharon has always told her eight children that, when she dies, she would leave the Property (her only substantial asset) to all eight of her children, not to any one of them. (CP 040; CP 082; CP 090; CP 106). The current assessed value of the Property is \$205,949. (CP 038.). As of

1996, the only encumbrance on the Property was a small mortgage balance of \$2,981, owing to Farmers Home Mortgage (CP 038). Therefore, in 1996, Sharon had a substantial equity in the Property.

Sharon has been legally blind for decades and has no ability to read documents. (CP 037; CP 041; CP 072-074; CP 094-096; CP 115-117). She suffers from Central Retinal Atrophy (CP 041; CP 072-073). Dorothy admits that her mother is legally blind. (CP 023). Sharon is confined to a wheelchair during daytime hours.

In 1996, Sharon realized that her home needed a new roof and some other improvements. (CP 083-085) She contacted her nephew Greg, a contractor, who estimated that the improvements would cost about \$30,000. (CP 085) Sharon did not have sufficient cash resources to finance the improvements. At that point, the Defendant, Sharon's daughter Dorothy, entered the scene and suggested that Sharon get a home improvement loan to finance the improvements. Dorothy offered to co-sign the Note.

Somewhere in this process, Dorothy also persuaded Sharon to agree to borrow a total of \$62,200, not \$30,000, so that Dorothy could also pay off some of her own personal obligations, including a car loan for \$18,026 and a credit card balance of \$1,038. (CP 086; CP 038-039). In other words, Dorothy embarked on a plan to use her mother's home as collateral to refinance Dorothy's existing debts. Dorothy assured Sharon that she would pay off that portion of the loan amount attributable to her

personal obligations and that all Sharon had to pay was the real estate taxes and the insurance – which Sharon did pay. (CP 086-087.)

Inexplicably, the documents Sharon was induced to sign for the 1996 loan also included a Quit Claim Deed, dated July 24, 1996 (CP 043), granting Dorothy a 50% tenant-in-common interest in the Property. Sharon did not understand that she was conveying an ownership interest in her Property to Dorothy. She believed that she was only signing documents for a loan. (CP 083; CP 087-088). Dorothy has not provided any credible or admissible evidence that a conveyance of 50% of the Property to her was somehow necessary to obtain a loan.

As it turned out, the improvements only cost about \$28,000, not \$30,000. (CP 039) As indicated above, Dorothy had persuaded Sharon to sign on to a loan in the amount of \$62,200 -- \$19,064 of which was used to pay off Dorothy's car loan and credit card balance – and to mortgage Sharon's home as security for that loan. Dorothy put up no security of her own.

The check for the net loan proceeds in the amount of \$37,069 (CP 044) was delivered to Dorothy, not to Sharon. (CP 086) Those proceeds were \$8,672 more than was necessary to pay for the home improvements and pay off the underlying mortgage. Dorothy pocketed the excess funds and has never accounted for them. (CP 086).

Accordingly, when all was said and done, the \$62,200 loan was distributed as follows:

- (a) \$3,483 to the lender for the loan settlement charges
- (b) \$30,981 to Sharon (\$28,000 for the home improvements + \$2,981 to pay off Farmers); and
- (c) \$27,736 to Dorothy (\$18,026 for the car loan + \$1,038 on her credit card + \$8,672 in cash)

The foregoing figures are all verified by the Closing Statement produced for the loan closing (CP 044).

Although Sharon was aware of the fact that approximately \$19,000 of the loan proceeds would be used to refinance Dorothy's debts, she was not aware of the fact that \$8,672 in cash would be distributed to Dorothy. Most important, however, she was never aware that she was conveying a 50% ownership interest in the Property to Dorothy.(CP 087-088).

Because she was blind, she was simply unable to read such a document and trusted Dorothy who told her what to sign. Obviously, there was no consideration for a transfer of one-half the value of a home then worth somewhere between \$150,000 and \$200,000. Moreover, there was no reason why the lender would have required that the Property be conveyed to Dorothy. The lender was not made more secure by having Dorothy own a 50% interest in the property. Dorothy did not put up any of her own property as security for the loan.

In 2004, Dorothy decided to refinance the 1996 loan, because she had failed to pay off that loan or keep it current. (CP 040) The details of this 2004 loan have never been explained by Dorothy, who claims that she does not even recall the amount of the loan or the use of the proceeds, although she does admit that the balance of the original 1996 loan had

grown far beyond the original \$62,200, because she was not making all the payments that were due on the loan. (CP 040).

At the time that the 2004 loan was executed, Sharon was deceived into signing another Quit Claim Deed, deeding over her remaining 50% interest in the Property to Dorothy. (CP 040; CP 052) Again, Sharon did not understand that she was conveying away her remaining 50% ownership interest in the Property. Because she trusted Dorothy (CP 097), she signed documents which Dorothy asked her to sign, even though she was unable to read or understand them. Dorothy assured Sharon that the documents she was signing would not deprive her of title to her home.

Sharon testified in her deposition (See CP 091-093) that in 2004:

[Dorothy] called me up and said that the loan company wanted her name to be first on the loan. And she said we're going to swap places, it's just on paper, it's not legal. I mean and that's – it was her understanding was that she – the home was still mine, but we had to do it that way so that they, it would satisfy them

The Note and Deed of Trust for the 2004 loan have never been produced by Dorothy, who claims to have discarded them.

Accordingly, after the 2004 loan closing, Dorothy had succeeded in depriving her mother of 100% of the Property. Sharon no longer had any record ownership interest in the Property. Despite demand by Sharon and Judy, Dorothy has never provided any accounting of the proceeds of that 2004 loan – not even the amount of that loan. (CP 040)

In 2007, without any notice to Sharon, Dorothy took out yet another mortgage on the Property, this time borrowing \$170,500 from

Countrywide Bank, close to the full value of the Property. (CP 040; CP 053-064) At that point, Sharon's original equity in the Property had been completely squandered. Dorothy failed to keep the loan current and a foreclosure action was commenced. Since Sharon was no longer a record owner of the Property and was not a party to the 2007 loan, she never received any notice of the 2007 loan or of the fact that it had gone into default. Dorothy kept that secret from Sharon. (CP 093-094). Again, Dorothy has never provided any accounting for what happened to the proceeds of that loan. (CP 040). One can only assume that she spent the money.

Then, in 2009, Dorothy signed a Loan Modification Agreement indicating that the balance had crept up to \$180,369, because she had not been keeping the payments current. (CP 040) The 2004, 2007 and 2009 loans and the foreclosure were completely concealed from Sharon, who no longer owned a record interest in the Property, never received notices from the lender, and never knew that the equity in her house had been completely looted by her daughter. (CP 093-094).

In late 2015, Judy and Shirley Page (one of the other siblings) were visiting Sharon at the home and Shirley asked Sharon if she had ever prepared a Will. Sharon responded by advising that she had executed a Will which Dorothy had drafted for her back in 1997. Neither Judy nor Shirley nor any of the other siblings (except Dorothy) had ever known about the existence of this Will. (CP 041) Sharon looked around the

house, found the Will and showed it to Judy and Shirley. (CP 041, CP 046-051)¹ Judy, Shirley and Sharon were all surprised to discover that the Will left everything in Sharon's Estate to Dorothy, despite Sharon's long-time intention to leave her estate to all of her children. (CP 041; CP 089-090). Sharon firmly stated that this Will, as found, did not state her testamentary intent. (CP 090). The only possible explanation for this discrepancy is that Dorothy had persuaded her blind mother to execute a Will that she could not read.

The circumstances surrounding the discovery of the Will are best described in the deposition of Shirley Page. See CP 109-013. That testimony makes it quite clear that Dorothy's deception was kept secret from everyone who might have been able to do something about it, and that no one knew anything about Dorothy's actions until late 2015.

In her Declaration (at CP 041-042), Judy explained what she did after she and Shirley had discovered the Will and Sharon had stated that it did not express her intent at the time she signed it:

The discovery of the Will prompted me to delve further into Sharon's financial affairs and Dorothy's activities. I checked with the King County Assessor's office and found that Dorothy was now the record owner of 100% of the Property, by virtue of the 1996 and 2004 deeds that Sharon had been induced to sign, and that the Property had been mortgaged up to \$180,000. I immediately asked Sharon about this and she was absolutely astounded to hear that she no longer owned the Property of record. She said that she had never intended to deed any ownership interest in the Property to Dorothy and was completely unaware of

¹ A copy of the Will is found at CP 046-051. The language of the Will, as found in 2015, is only the typewritten text. The handwritten text and cross-outs were written later to create a rough draft of a new Will, leaving all of Sharon's property to all of her children.

the Deeds. She stated that she knew that the Property had been mortgaged to provide security for the 1996 loan, and that Dorothy had assured her that she would pay off the portion of that loan that was used to pay off Dorothy's obligations. But she was completely unaware that Dorothy had mortgaged the Property for \$170,500 in 2007, which was increased to \$180,000 in 2009.

Accordingly, the first time that Sharon, I and my other siblings knew anything about Dorothy's underhanded activities was in December of 2015. We filed this action shortly thereafter.

Neither I nor any of my six other siblings were ever advised by Dorothy that these loans and Property transfers were being made. Shirley's deposition testimony describes the surprise among all of our siblings regarding Dorothy's actions. Given the fact that that Sharon was totally blind, and the fact that she trusted her daughter Dorothy to be honest with her, there was no reason to expect that Sharon would have been put on notice that Dorothy was engaged in the process of stealing the Property from her. The statute of limitations could not have started to run on Sharon's claims until she discovered the basis for the claims in December of 2015.

As indicated above, discovery of the Will prompted Judy to do some further research. She went to the Auditor's office and found copies of the quit claim deeds (CP 043 and CP 052) and deeds of trust (CP 053-064 and CP 065-071) that had been recorded on the Property. This was the first time that Judy and Sharon discovered that Dorothy had engaged in her underhanded behavior and that Sharon's substantial equity in her home had been looted by Dorothy. Sharon advised all of the other siblings about what had happened, and all of them expressed complete surprise about these discoveries. (CP 042).

Sharon has testified that she had no idea that she was conveying to Dorothy any ownership interest in the home. It was her understanding that

Dorothy had obtained a loan on the house for \$62,000 in 1996. She was completely unaware of whether and additional refinancing occurred in 2004 and had no knowledge whatsoever of the refinancings in 2007 and 2009. She was also completely unaware of the fact that the loans had been in default and that a foreclosure had been commenced. (CP 093-094)

It should also be emphasized that Dorothy has never given an accounting for all of the funds she has pocketed from the 2004, 2007 and 2009 loans. One thing is certain, however: she has not spent any of that money for Sharon's benefit. Sharon has testified that Dorothy has never provided her with any assistance whatsoever since 1996. (CP 100).

The bottom line is this: In 1996, Sharon owned a valuable home in which she had a substantial equity. After faithfully paying her mortgage to Farmers Home for many years, a balance of only \$2,981 remained to be paid. In 2015, when she finally discovered Dorothy's misdeeds, the home had an assessed valuation of \$204,000, was 100% owned of record by Dorothy, and was mortgaged to the tune of \$180,000. Sharon's equity in the Property had therefore been destroyed, without her knowledge. She had no knowledge of that fact until 2015. Because Sharon trusted Dorothy, and because Dorothy took steps to conceal her actions, there were no "red flags" that would have put Sharon on notice of Dorothy's wrongdoing until the Will was discovered in late 2015.

B. Procedural History.

Plaintiff filed the Complaint in this action on March 21, 2016 (CP 001-005). Defendant's Answer was filed on May 16, 2016 (CP 008-011) Trial dates have been scheduled on three occasions, but have been "bumped" due to the priority of criminal cases.

Defendant's Motion for Summary Judgment was originally filed on February 8, 2017, but was dismissed for being untimely. Another postponement of the trial date caused by a criminal case enabled Defendant to refile the Summary Judgment for hearing on September 22, 2017.

The only relief sought in the Motion was a summary judgment based upon statute of limitations grounds. (CP 13; "Issues Presented" at CP 14; "Conclusion" at CP 19-20).

Judge Jeffrey P. Bassett of the Kitsap County Superior Court, sitting as a Visiting Judge in Jefferson County, heard oral arguments on the Motion on September 22, 2017, and later granted Defendant's Motion for Summary Judgment in an Order dated October 2, 2017, entitled "Order on Defendant's Motion for Summary Judgment." (CP 127-128). The Order was filed in Jefferson County on October 6, 2017, and simply stated that: "Defendant Thomas's motion for summary judgment is GRANTED." The Order contained no discussion of the facts of the case, no discussion of the evidence submitted by the parties and no rationale for the granting of the motion.

Plaintiffs filed their Notice of Appeal with the Jefferson County Superior Court on October 13, 2017 (CP 130-131) and their Designation of Clerk's Papers on October 23, 2017 (CP 135-136).

One final procedural issue needs to be discussed. During the preparation of this Brief, Plaintiff's counsel noticed that one of the pleadings contained in the Clerk's Papers did not contain all of the attachments that were originally prepared for that pleading. The pleading in question is entitled "Declaration of Malcolm S. Harris in Opposition to Defendant's Motion for Summary Judgment", document no. 30 from the Superior Court file. That document was submitted in response to Defendant's Motion for Summary Judgment and had three exhibits attached to it, labelled A, B and C, which consisted of excerpts from the depositions of Dorothy Thomas, Sharon Hartzell and Shirley Page, respectively.

However, the copy of that Declaration that was filed with the Court did not contain Exhibit "A", the excerpts from Dorothy's deposition. Also missing were three "divider" pages, labelled "Exhibit A", "Exhibit B" and "Exhibit C", which preceded each of the Exhibits. All of the other copies of the Declaration, including the copy delivered to Defendant's Counsel, the copy retained by Plaintiff's counsel, the copy sent to Plaintiffs, and the working copy sent to the Judge who heard the motion, included that Exhibit "A" and the three divider pages. The testimony contained in the Exhibit "A" was also discussed during the oral argument on the Motion.

The Declaration, less the Exhibit “A,” is included in the Clerk’s Papers, and is found at CP 075 through CP 117, inclusive. Exhibit “B” (Sharon) begins on CP 082 and Exhibit “C” (Shirley) begins on CP 102.

Although Exhibit “A” is missing, the Declaration itself contains a description of Dorothy’s relevant deposition testimony at CP 076 and CP 077. Plaintiff’s counsel hereby certifies that the Declaration accurately describes the deposition testimony that was contained in the missing Exhibit “A”.

IV. ARGUMENT

A. **Standard of Review: This Court Reviews the Trial Court’s Order of Summary Judgment *De Novo*.**

The law is clear that appellate courts in Washington review appeals from a summary judgment motion on a *de novo* basis. *Estate of Becker v. Avco Corp.*, 187 Wash. 2d 615, 387 P.3d 1066 (2017); *Parker Estates Homeowners Assoc. v. Pattison*, 198 Wash. App. 16, 391 P.3d 481 (Div. 2, 2016).

We review a trial court’s grant of summary judgment *de novo* and engage in the same inquiry as the trial court. *Lauritzen v. Lauritzen*, 74 W.App. 432, 437-38, 874 P.2d 861 (citing *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982, review denied, 125 Wn.2d 1006 (1994)). “Summary judgment is properly granted when the pleadings, affidavits, depositions and admissions on file demonstrate that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.” *Lauritzen*, 74 Wn.App. at 437 (citing CR56(c); *Kesinger v. Logan*, 113 Wn.2d 320, 325, 779 P. 2d 263 (1989)). We consider all facts and reasonable inferences in the light most favorable to the nonmoving party, and uphold the grant of summary judgment only if, given all of the evidence, reasonable persons could reach but one conclusion.

Lauritzen, 74 Wn.App. at 438 (citing *Scott v. Pacific W. Mountain Resort*, 119 Wn.2d 484, 502-503, 834 P.2d 6 (1992); *Kesinger*, 113 Wn 2d at 325).

Appellants submit that there was ample evidence before the Trial Court to demonstrate that there was a material issue of fact and that “reasonable persons” could reach the conclusion that Plaintiff was not aware, and could not have become aware, of the facts giving rise to her causes of action against Dorothy until late 2015, and that the applicable statutes of limitation did not commence to run until that date.

Furthermore, the facts before the Court demonstrate that there were ample grounds for invoking the doctrine of equitable tolling, or, at a minimum, that a trial is necessary to determine whether that doctrine should be invoked.

This appellate review should be limited solely to the Trial Court’s decision to grant summary judgment on statute of limitations grounds, which was the only relief requested in Defendant’s Motion.

B. The Trial Court Erred in Granting Summary Judgment Based Upon Statute of Limitation Grounds Because There Are Numerous Issues of Material Fact Regarding When Sharon Discovered or Should Have Discovered the Facts Giving Rise to Her Causes of Action. There is Substantial Evidence that Sharon Had No Knowledge of Those Facts Until Late 2015 or Early 2016.

The Trial Court did not give any explanation for its decision to grant Defendant’s motion. Therefore we can only conclude that the Trial Court determined that the discovery rule should not apply in this case, which was the principal argument set forth in Defendant’s Motion. Plaintiff believes

that the Court erred because there are numerous issues of material fact regarding Plaintiff's entitlement to invoke the discovery rule.

Plaintiff's action was commenced on March 21, 2016. The unlawful acts performed by Dorothy were performed on several occasions:

1. 1996 (the first Quit Claim Deed, CP 043);
2. 2004 (the second Quit Claim Deed, CP 052);
3. 2007 (the \$170,000 deed of trust, CP 053-064); and
4. 2009 (the \$180,389 deed of trust, CP 065-071)

Plaintiffs admit that Dorothy's actions all occurred at least six years prior to the commencement of this lawsuit. If the Plaintiff had been aware of those actions at the time they occurred, legal claims based upon such actions would now be barred by any applicable statute of limitation.

Plaintiffs contend, however, that none of the limitation periods applicable to Plaintiffs' claims began to run until late 2015 because, until that date, (1) Sharon did not know any of the facts which formed the basis of her claims, (2) Sharon was not put on notice that such facts might exist, and (3) and nothing occurred which would have prompted Sharon to make any due diligence investigations.

1. Plaintiffs' Claims Are Not Barred By Any Applicable Statute of Limitations, Due to the "Discovery Rule." Sharon Did Not Know of the Facts Providing a Basis for Her Claims Until December of 2015.

The law is clear in Washington that statutes of limitation do not start to run until a plaintiff has knowledge of the facts and circumstances which give rise to the Plaintiff's cause of action against the Defendant.

This “discovery rule” is enunciated in *Estates of Hibbard*, 118 Wn.2d 737 (1992), as follows:

Recognizing our prior decisions and the policy behind the discovery rule, we conclude that, in this case, a correct formulation of the rule is that a cause of action accrues when a claimant knows, or in the exercise of due diligence should have known, all the essential elements of the cause of action, specifically duty, breach, causation and damages.

Sharon has convincingly testified in her deposition (CP 087-088) that she was never advised and never understood that the loan documents she signed in 1996 included a Quit Claim Deed which transferred a 50% interest in her Property to Dorothy. She was aware that a loan was taken out in 1996 and that her property was being mortgaged as security for that loan, and was assured by Dorothy that Dorothy would make most of the payments owing on that loan. However, she states that there was no discussion of a 50% interest in the Property being transferred to Dorothy. She trusted Dorothy to advise her what to sign, because she could not read the documents for herself.

On the other hand, Dorothy says that Sharon knew that she was transferring a 50% interest in the Property to Dorothy. Dorothy has argued that the Bank insisted on Dorothy having a 50% interest in the Property as a condition of making the 1996 loan. (CP 024) Dorothy has supplied absolutely no evidence to support that hearsay statement. Dorothy’s contention is also nonsensical, since there would be no reason for the Bank to levy such a requirement. The Bank’s security position in

the Property was not enhanced by having two 50% co-owners sign a deed of trust rather than a single 100% owner. Either way, the Bank would have a deed of trust on 100% of the Property. And, because Dorothy co-signed the Note, the Bank had both borrowers committed on the Note.

Needless to say, there are serious material issues of fact regarding the circumstances under which the 1996 Quit Claim Deed was executed.

When the second Quit Claim Deed was requested in 2004, Sharon has testified that Dorothy told her not to worry about what she was signing and that the documents had no legal effect and the Property would still belong to Sharon. (CP 088-090). Again, Sharon obviously trusted her daughter and was fully justified in believing her own daughter's assurances that nothing was being done to deprive her of ownership of her Property. Again, there is a material issue of fact about what Sharon knew and understood at the time the second Quit Claim Deed was executed in 2004. Sharon's testimony that she was deceived is especially credible given the fact that she was blind and trusted her daughter to honestly tell her what she was signing.

There is no dispute whatsoever – not even an issue of fact -- that Judy, Shirley and the other siblings were never advised of the execution of the deeds from Sharon to Dorothy. They were completely unaware of the transactions until December of 2015. Dorothy concealed this information from them. (CP 042; CP 087-088; CP 091-092, CP 109-113).

Accordingly, there is no dispute about the fact that the siblings had no

knowledge about Dorothy's deceptive acts until 2015 and could not have put Sharon on notice of a problem.

The Declaration of Judy and the Deposition testimony of Sharon and Shirley are completely consistent that the first discovery of the facts which gave rise to Sharon's claims against Dorothy arose in December of 2015. Sharon, Shirley and Judy were meeting at the Property and Shirley asked Sharon if she had ever made a Will. She said that Dorothy had prepared one for her back in 1997. The Will was found at the house and was read by Shirley and Judy. All three were "appalled" to discover that the Will had left 100% of Sharon's Estate to Dorothy, a provision that was completely contrary to Sharon's statements, made over decades, that the property would go to all eight of her children. Upon hearing the Will read to her, she immediately advised Judy and Shirley that the Will did not express her intentions.

Discovery of the Will prompted Judy to make further inquiries and she found the records at the County Auditor which are attached to her Declaration. The Deeds and Deeds of Trust indicated that Dorothy was then in sole record title to the Property. These discoveries, in December, 2015 and early 2016, were the first inkling anyone had that Dorothy had taken serious advantage of her mother.

2. In Determining Whether Sharon Had a Duty To Undertake Any Due Diligence or Investigation, the Trial Court Would Have to Consider Whether There Were Any “Red Flags” That Indicated the Need to Investigate. There Is No Evidence That Such “Red Flags” Existed.

The due diligence aspect of the discovery rule assumes that a party has been put on notice that there is some issue which needs to be diligently investigated. In other words, the diligence that is required is the diligence that is “due” under the circumstances.

A cause of action accrues when the plaintiff knew or should have known all the facts underlying the essential elements of the action.

Reichelt v. Johns-Manville Corp., 107 Wn.2d 761 (1987); *1000 Virginia Ltd Partnership v. Vertecs Corp.*, 158 Wn.2d 566 (2006). In Washington, the general rule is that when a plaintiff is placed on notice by some appreciable harm occasioned by another’s wrongful conduct, the plaintiff must make further diligent inquiry to ascertain the scope of the actual harm. *Green v. A.P.C.*, 136 Wn.2d 87 (1998); *Aventa Learning, Inc v. K12, Inc.*, 830 F.Supp.2d 1083 (W.D.Wash., 2011).

In other words, the duty to exercise due diligence and investigate only arises when the Plaintiff has been “placed on notice” by the discovery of some wrongful conduct by the defendant. Defendant has not put any evidence before the Court that Sharon ever had any reason to distrust her daughter Dorothy during the period from 1996 to 2015. The testimony of Sharon, Judy and Shirley firmly establishes how surprised Sharon was in December of 2015 when she first discovered Dorothy’s actions. She never

received any notices from the lenders regarding missed loan payments, defaults under the loan documents or even the foreclosure proceeding, for the obvious reason that, after 2004, Dorothy was listed as the sole owner of the property and such notices would not have been sent to Sharon. Sharon's success in deluding her mother and concealing her wrongdoing for nine years should not form the basis for invoking a statute of limitations defense.

If it is Defendant's position that Sharon failed to exercise due diligence, then Defendant is, in effect, arguing that Sharon should have been inherently suspicious and distrustful of Dorothy and should have been regularly "checking up" on whether her daughter was stealing from her. There is no evidence that Sharon should have been suspicious or untrusting of her daughter Dorothy – until late 2015.

Once Sharon and Judy were put on notice, by discovering the language in the Will in December of 2015, they immediately exercised due diligence to uncover the additional evidence of Dorothy's wrongful conduct. There is no basis for asserting that those due diligence efforts should have been undertaken at an earlier date.

Sharon's state of mind about the Property is perhaps best illustrated by the fact that, as late as June of 2015, Sharon listed her Property as an asset in her Will, which clearly shows that she had no notice that the Property had been transferred to Dorothy.

3. Sharon's Disability Prevented Her From Perceiving or Understanding the Fraud Which Had Been Perpetrated Upon Her.

There is no dispute about the following facts:

- (1) Sharon is 82 years old
- (2) Sharon is confined to a wheelchair most of her waking hours.
- (3) Sharon is blind and has been blind for decades. She is completely unable to read documents.

For those reasons, the Court should bear in mind that Sharon was particularly vulnerable and unable to fend for herself in all of her financial dealings. She was obviously unable to read the documents that memorialize the transactions which are the subject of Sharon's claims. There are issues of material fact regarding the question of whether Sharon's disability affected her ability to understand the documents by which Dorothy accomplished her takeover of Sharon's Property.

C. The Trial Court Erred by Failing to Apply the Doctrine of Equitable Tolling to the Circumstances of this Case. There Is Substantial Evidence Which, if Believed by the Trier of Fact, Would Justify Application of That Doctrine. Whether to Apply That Doctrine is a Decision that Should Be Made By the Trier of Fact.

Washington recognizes the Doctrine of Equitable Tolling, which should be applied in the circumstances of this case. As observed in *Stueckle v. Sceva Steel Bldg., Inc.* 1 Wn.App. 391, 461 P.2d 555 (1969),

The statute of limitations may be tolled by the concealment of material facts, misrepresentations, or a promise to pay in the future.

Division II of this Court has also specifically recognized the doctrine of equitable tolling in the case of *Thompson v. Wilson*, 142 Wn.App. 803, at 814 (2008).

Washington “allows equitable tolling when justice requires.” *Millay v. Cam*, 135 Wn.2d 193 (1998). Equitable tolling is permitted where there is evidence of bad faith, deception, or false assurances by the defendant and the exercise of diligence by the plaintiff. “In Washington equitable tolling is appropriate when consistent with both the purpose of the statute providing the cause of action and the purpose of the statute of limitations.: *Millay*, 135 Wn.2d at 206.

In *Thompson*, this Court tolled the running of a two year statute of limitation governing the time within which to challenge the findings of an autopsy, because the coroner had failed to respond to several demands for meetings by the relatives of the deceased, and “justice required” that the statute be tolled.

The *Millay* case (at 135 Wn.2d 207) confirms the propriety of leaving to the trier of fact the decision whether to apply the doctrine of equitable tolling:

We reverse the Court of Appeals and remand for a factual determination of whether equitable tolling applies.

Another important Washington case on the subject of equitable tolling is *Finkelstein v. Security Properties*, 76 Wn.App. 733, 888 P.2d 161 (1995), in which the Court held that:

Equitable tolling is granted by the courts when justice requires. The predicates for an equitable tolling of the statute of limitations are either bad

faith, deception, or false assurances by the defendant, and the exercise of due diligence by the plaintiff. *See Douchette v. Bethel Sch. Dist.* 403, 117 Wn.2d 805, 812, 818 P.2d 1362 (1991). Courts have determined that equitable tolling is appropriate when consistent with both the purposes of the statute providing the cause of action and the purpose of the statute of limitations. *Douchette*, 117 Wn.2d at 812.

Needless to say, the facts established in the Declarations and Deposition testimony before the Court show that there is substantial evidence of Dorothy's bad faith, deception and concealment.

Accordingly, there are issues of material fact as to whether the doctrine of equitable tolling should be applied. The facts presented to the trial court in opposition to the motion for summary judgment showed substantial evidence that Dorothy had engaged in a pattern of behavior which included all three of the alternative grounds for application of the doctrine: bad faith, deception and false assurances.

Bad faith. From the very beginning of this whole affair, Dorothy sought to use her mother's valuable real property, which was almost debt-free, as security for a loan to pay off Dorothy's personal obligations, namely a car loan and a credit card balance. She did not put up any of her own property as security for the loan and seemed to have no qualms asking her blind and disabled mother to mortgage the family home as security for Dorothy's debts. Sharon's testimony makes it clear that, although she understood that her property was being mortgaged for a

home improvement loan, she had absolutely no idea that she was signing a Quit Claim deed that conveyed a 50% interest in the property to Dorothy.

Although Dorothy promised to make payments on her share of the loan balance, she failed to do so, and by 2004, the loan balance had increased substantially, requiring successive refinancings in 2004, 2007 and 2009, which consumed all of the equity in the Property.

Deception. On both occasions when the Quit Claim Deeds were executed, (1996 and 2004), there is substantial evidence that Dorothy engaged in deceptive practices in persuading Sharon to sign those deeds. In 1996, there is no proof that the Deed was necessary to obtain the loan. Dorothy's testimony to the contrary is hearsay and is also non-sensical.

Dorothy failed to advise any of her siblings about her activities with the Property, and also failed to advise them about the Will which she had drafted and persuaded Sharon to sign, leaving all Sharon's estate to Dorothy.

Despite demand by Sharon and Judy, Dorothy has steadfastly refused to supply any accounting of the proceeds of the 2004, 2007 and 2009 loans.

False Assurances. In 2004, when the second Quit Claim Deed was executed, Dorothy assured Sharon that the document she was signing would not deprive her of ownership of the Property. Dorothy also assured Sharon that she would pay off the first loan as it became due. Obviously, that never occurred and, without Sharon's knowledge, the principal kept growing and

required refinancing due to Dorothy's failure to make regular payments on the loan.

Bearing in mind Dorothy's egregious behavior, Sharon's vulnerable and disabled condition and the major economic blow which Dorothy has inflicted upon Sharon, this case clearly meets the test for invoking the doctrine of equitable tolling "when justice requires."

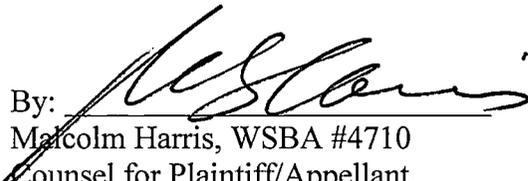
V. CONCLUSION

The trial court erred in granting Defendant's Motion for Summary Judgment on statute of limitation grounds . There is substantial evidence before the Court which, if believed by the trier of fact, would justify application of the discovery rule and/or the doctrine of equitable tolling. Plaintiff therefore filed this action in a timely manner, less than four months after discovering the facts upon which her claims are based.

The Trial Court's "Order on Defendant's Motion for Summary Judgment" should be vacated, and this case should be remanded to the Jefferson County Superior Court for trial.

Respectfully Submitted this 6th day of December, 2017.

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DIVISION II

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STATE OF WASHINGTON

BY _____
DEPUTY

IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION II

SHARON L. HARTZELL, a single woman;
JUDY L. HARTZELL, a single woman, in her
capacity as the Attorney-in-Fact for Sharon L.
Hartzell,

Appellant,

vs.

DOROTHY M. THOMAS, a single woman,

Respondent

No. 513919

DECLARATION OF SERVICE

Malcolm S. Harris hereby declares as follows:

I am the attorney for the Appellants herein.

On December 6, 2017, I e-mailed a copy of the Brief of Appellants to Noah Harrison, the attorney for Respondents. I also deposited a copy of the Brief of Appellants in the mail to Mr. Harrison, at the following address:

Noan Harrison, Esq.
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1 I declare under penalty of perjury under the laws of the State of Washington, that the
2 foregoing statements are true and correct.

3 Signed at Seattle this 7th day of December, 2017.

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6 _____
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23 **DECLARATION OF SERVICE - 2**

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