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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

RESPONDENT'S BRIEF

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A. ASSIGNMENTS OF ERROR

1. The Trial Court was correct in granting summary judgment based upon Statutes of Limitation when it concluded there were no Issues of Material Fact Indicating that Appellant could not, or should not have discovered the facts giving rise to the Appellant's causes of action.

2. The Trial Court was correct when it did not apply the Doctrine of Equitable Tolling to the facts of this Case. There were no material facts that would justify applying this doctrine given the Appellant's mental acuity and benefit she received from the transfer.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Are Appellant's claims of fraud and/or conversion, based upon conduct that occurred in 1996 and/or 2004, barred by the Statue of Limitations pursuant to RCW 4.16.080(4)?

2. Has Appellant stated any genuine issues of material facts excepting claims from the Statutes of Limitations three year periods?

INTRODUCTION

Appellant's children initiated this lawsuit on behalf of their mother after discovering that she had quit claimed what they believed to be their rightful inheritance to Respondent, Dorothy Thomas (Dorothy). The Trial Court heard evidence and argument and correctly granted Dorothy's motion for summary judgment. The Court properly recognized that even in

the light most favorable to the Appellant, Sharon Hartzell (Sharon) there were no material facts that a reasonable person could conclude that Sharon could not or did not understand the legal consequences and nature of the transfer when she executed two quit claim deeds to her daughter over twenty years ago. Appellant's use of disparaging adjectives to describe Dorothy Thomas and her actions do not change the nature of the issues presented nor the legal result. No facts presented rebut the legal presumption that a competent adult, with no mental deficiencies, cannot transfer her property to her daughter. To claim fraud and conversion over twenty years later when the facts show this was done at the request of Sharon, benefited Sharon, and continues to benefit Sharon, is evidence of regret that does not justify Sharon's request. Sharon should be, and is prevented by the Statutes of Limitations from changing her mind and the Trial Court's decision should be upheld.

B. STATEMENT OF THE CASE

1. SUBSTANTIVE FACTS

Sometime shortly before July of 1996 Sharon attempted to obtain a loan to facilitate improvements to her house. This loan request was denied due to her low income. Sharon reached out to her daughter Dorothy to help her when none of her other children would. (CP 24). On July 24,

1996, Sharon, then 59 years old, executed a quit claim deed giving her daughter, Dorothy a 50% interest in the property located at 728 Walker Street, Port Townsend, WA (hereinafter "residence") as tenants in common. No facts alleged or testified to claim that Sharon was limited in any way by any mental disability. Sharon had cared for herself and handled her finances for many years both before and after her husband died. (CP 113). Shortly prior to this transfer of ownership interest, Sharon and Dorothy had agreed to obtain a mortgage loan to be used in part for improvements to Sharon's home and to allow Dorothy to pay off existing debts. (CP 86). This process was facilitated by a loan officer at the bank. Dorothy agreed to assume all payments on the loan from that day forward and has continued to make those payments. Sharon freely executed the necessary documents with full knowledge and understanding of the transactions and with full mental capacity. Sharon admits in her declaration that the documents were probably read to her. (CP 97). Sharon then states that no matter how many times they were read she claims she did not understand them. (CP 87).

On January 16, 2004, Sharon and Dorothy again refinanced the mortgage, and at that time Sharon executed a Quit Claim Deed granting Dorothy her remaining 50% interest in the residence in exchange for Dorothy's assistance in obtaining the loan and making full repayment of

the loan. Again, Sharon freely executed the necessary documents with full knowledge and understanding of the transactions and with full mental capacity. The Quit Claim Deed was recorded. There are no facts or evidence that this was ever done in secrecy or that any coercion was ever placed upon Sharon.

On May 18, 2015, Sharon appointed as attorneys-in-fact, Dorothy and Judy Hartzell who is also the attorney-in-fact for Sharon in this action. On December 21, 2015, Sharon revoked Dorothy's prior appointment and appointed Judy Hartzell as attorney-in-fact.

C. ARGUMENT

Standard of Review: An Order on Summary Judgment is reviewed De Novo by the Appellate Court.

1. Appellant fails to state any genuine issues of material facts

Sharon's case presents no genuine issue as to any material fact that would support their case. As shown in this brief, even in light of Dorothy's burden as moving party, and when viewed favorably to Sharon, Sharon's filing is long past the statutory limit. Moreover, the lack of evidence of fraud or conversion entitles Dorothy to summary judgment. No facts presented justify a tolling of the Statutes of Limitations.

A summary judgment is proper and "shall be rendered ... if ...there is no genuine issue as to any material fact and [if] the moving party is

entitled to a judgment as a matter of law.” Civil Rule 56(c); *Kruse v. Hemp*, 715 Wn.2d 715, 722, 853 P.2d1373 (1993). The court must consider the facts submitted and all reasonable inferences from those facts in the light most favorable to the nonmoving party. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). A moving defendant may satisfy the initial burden by showing that there is an absence of evidence to support the nonmoving party’s case. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, n. 1, 770 P.2d 182 (1989). The moving defendant need not submit affidavits but may instead support the motion by merely challenging the sufficiency of the Appellant’s evidence as to any material issue. *Young*, 112 Wn.2d at 226.

A party is entitled to summary judgment when, viewing the evidence most favorably to the nonmoving party, “there is no substantial evidence or reasonable inference to sustain a verdict for the nonmoving party.” *Sing v. John L. Scott, Inc.*, 134 Wn.2d 24, 29, 948 P.2d 816 (1997). Substantial evidence is evidence sufficient to persuade a fair-minded rational person that the premise is true. *Wenatchee Sportsmen Ass’n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000).

2. Appellant fails to meet the three year statutes of limitations for an action based upon fraud and/or conversions.

The statutes of limitation for an action for conversion is three years. RCW 4.16.080(4). The statutes of limitations for fraud is three years and begins to run when there is discovery by the aggrieved party of the facts constituting fraud. RCW 4.16.080(4); *Strong v. Clark*, 56 Wn.2d 230,232, 352 P.2d 183(1960.)

The trial court is charged with applying the appropriate statutes of limitation based on the gravamen of the complaint and the evidence relied upon. *Aberdeen Fed. Sav. & Loan Ass'n v. Hanson*, 58 Wn.App. 773, 776, 794 P.2d 1322 (1990); See *G.W. Constr. Corp. v. Prof'l Servs. Indus., Inc.*, 70 Wn.App. 360, 364, 853 P.2d 484 (1993); *Owens v. Harrison*, 120 Wn.App. 909, 915, 86 P.3d 1266 (2004).

It is undisputed that the property transfer underlying Sharon's claim(s) occurred twelve years and twenty years ago. There are no facts alleged that establish a basis for failure to discover those actions by a competent adult. Changing one's mind after twenty years and claiming that you did not know the legal consequences of your action does not waive or toll the Statutes. There must be some facts that support the assertion that Sharon did not know and could not have known what the intent of the quit claim deed was.

3. Appellant fails to state any fact excepting its claim based upon undiscovered fraud.

There are no genuine issues of material fact based upon the ending of the time permitted by law to file suit, as well as the lack of any evidence of fraud or deception, or incompetency of Sharon Hartzell.

It is an undisputed fact that Sharon Hartzell is competent at age 80. No facts have been alleged that she was not competent at age 60 or 68. The alleged fact of Sharon's vision impairment does not establish a basis for a claim of fraud and/or conversion. Sharon submits in her brief that she is "unable to fend for herself in all of her financial dealings." (CP 26). She goes on to argue that there are issues of material fact that her disability could have affected her ability to understand the documents. This argument is without basis and contrary to the undisputed facts. Having a vision impairment does not preclude a competent adult from executing a legal document or understanding it. *Gaines v. Jordan*, 64 Wash. 2d 661, 393 P.2d 629, 630-31 (1964). Sharon has admitted that the document was likely read out loud to her. Knowledge of the contents is bolstered by the fact of the quit claim deeds themselves. The plain wording in the deed executed on July 24, 1996 states that it makes Dorothy and Sharon tenants in common. The Deed executed on January 16, 2004 states in consideration for a gift from mother to daughter. The Notary Signature states that Dorothy and Sharon acknowledge that they signed the instrument as a free and voluntary act and deed for the use

and purposes therein mentioned. Without material facts supporting claims for fraud and/or conversion, there is no legal basis for demanding in this action an accounting from Respondent, Dorothy Thomas.

Throughout the brief, Sharon spins a tale of deceit and fraud, but the facts show that Sharon did not choose to share her intent with her other children. Sharon had every opportunity to speak with her other children about what she was doing. The bank loan, the house improvements, the quit claim deed, Dorothy paying the mortgage, and Sharon's draft of the will were all done in the light of day. The facts do not show a time pressure that precluded Sharon from reaching out to her other children or an attorney. There were bank representatives available to answer questions throughout the process.

Appellant insinuates that the will discovered by Judy was evidence of the fraud. It is actually evidence of intent by Sharon at the time and is a red herring. This will was not kept in secret by Dorothy to be sprung on the other siblings at the time of their mother's death. Not every bequeath in a will is evidence of fraud, and this would not be the first time that children convinced their parent to change their will after they discover the contents. Sharon drafting a new will to include her other children after being confronted by them is evidence only that she changed her mind. Unless there is evidence of unlawful coercion that does not make the will invalid.

Appellant argues that there were no red flags necessary to put Sharon on notice of the property transfer. The biggest red flag would have been the document that Dorothy signed quit claiming her interest in the residence. This would include the language on the quit claim saying she was gifting the property to her daughter. If the aggrieved party could have discovered the fraud by due diligence, actual knowledge will be inferred. *Strong*, 56 Wn.2d at 232. Whether an act of fraud could have been discovered is a question of fact. *Aberdeen Fed. Sav. & Loan*, 58 Wn.App. at 776. One is charged with constructive notice if the fraud could have been discovered by examining the record and if “ordinary prudence and business judgment” required examination of the record. *Hanson*, 58 Wn.App. at 777 (quoting *Irwin v. Holbrook*, 32 Wash. 349, 357, 73 P. 360 (1903)).

In *Strong*, property owners and their tenants entered and recorded a lease agreement with an option to purchase in 1952. *Strong*, 56 Wn 2.d at 231. In that case, in 1956, the tenants exercised the option to purchase the property and the owners accepted payment and executed a deed. *Id.* In 1958, the former owners were adjudicated bankrupts, and in 1959, the bankruptcy trustee, on behalf of the creditors, sued to set aside the deed as a fraudulent conveyance. *Id.* Because the creditors were deemed to have discovered the alleged inadequacy of the consideration in the

contract when it was properly recorded in 1952, thereby giving 'constructive notice to all persons that the owners had given the tenants an option to purchase the property for the consideration specified therein,' the case was properly dismissed as barred by the three year statutes of limitations. *Id.* at 233. 'When the facts upon which the fraud is predicated are contained in a written instrument which is placed on the public record, there is constructive notice of its contents, and the statutes of limitations begins to run at the date of the recording of the instrument.' *Id.* at 232.

When properly recorded, an instrument involving real property provides notice to all the world of its contents. *Allen v. Graaf*, 179 Wash. 431, 439, 38 P.2d 236 (1934). Accordingly, when the facts upon which the fraud is predicated are contained in a written instrument placed on the public record, there is constructive notice of its contents, and the statutes of limitation begins to run as of the date of the recording of the instrument. *Davis v. Rogers*, 128 Wash. 231, 236, 222 P. 499 (1924); *Irwin v. Holbrook*, 32 Wash. 349, 73 P. 360 (1903).

Sharon states in her brief that she convincingly testified in her deposition that she didn't know what she was signing. This does not meet the legal requirement to overcome the Statutes of Limitations. There are absolutely no facts that show Sharon was incapable of understanding the documents she signed. There are absolutely no facts that show Sharon

was coerced into signing the documents against her will. There are absolutely no facts that show Sharon did not have an opportunity to educate herself more about the legal consequences of signing the quit claim which she claimed in her deposition that she didn't understand it at the time. An admission that you signed a legal document twenty and twelve years ago, but did not understand it at the time is not sufficient to toll the Statutes of Limitations. Apparently she did this twice without presuming to understand or bothering to educate herself. Without material facts establishing an exception to the three year statutes of limitation for fraud and conversion, there is no genuine issue based upon delayed discovery. Dorothy Thomas is entitled to summary judgment by law.

4. Appellant fails to state a claim for fraud.

Assuming arguendo that Sharon's claim survives the argument that the action is precluded by the statutes of limitations, her case falls on the failure to state a genuine issue as to any material facts regarding a claim for fraud. To properly state a claim for fraud, an Appellant must plead facts sufficient to support the nine elements of fraud. *Adams v. King County*, 164 Wn.2d 640, 662, 192 P.3d 891 (2008). The nine elements of fraud are: (1) representation of existing fact; (2) materiality; (3) falsity; (4) the speaker's knowledge of its falsity; (5) intent of the speaker that it should be acted upon by the Appellant; (6) Plaintiff's ignorance of its

falsity; (7) Plaintiff's reliance on the truth of the representation; (8) Plaintiff's right to rely on it; and (9) damages suffered by Plaintiff. *Id.*, citing *Stiley v. Block*, 130 Wn.2d 486, 505, 925 P.2d 194 (1996). Failure to plead all nine elements of fraud is grounds for dismissal. *Adams*, 164 Wn.2d at 662. In addition, a Plaintiff claiming fraud must plead with particularity. Civil Rule 9(b). "Particularity requires that the pleading apprise the defendant of the facts that give rise to the allegation of fraud." *Adams*, 164 Wn.2d at 662.

Sharon Hartzell, by and through Judy Hartzell, alleges without particularity that the transfer of ownership interest in her home was somehow fraudulent. Sharon fails to identify any false representation of existing fact made by Respondent, Dorothy Thomas. Nor does Sharon state, with any particularity, facts relating to her knowledge or ignorance at the time of the alleged fraudulent transactions or any facts regarding her reliance at the time of the transactions. Allegations pertaining to Sharon's present state of mind about events that occurred twelve and twenty years prior to filing are not relevant to the issue of delayed discovery. The allegations about damages are without particularity and there is not even an allegation that actual damages, a required element of fraud, have been incurred.

At the time the alleged fraud occurred, in 1996 and/or 2004, when Sharon was 59 and 68 years old, respectively, and living independently, even if suffering from an alleged visual impairment, there was no fiduciary relationship, actual, implied, or plead between Sharon and Dorothy. Sharon states no evidence for finding a genuine issue on material facts that shows any special confidential relationship between Sharon and Dorothy twelve and/or twenty years ago. None of the factors listed above have been identified by Sharon. Dorothy Thomas is entitled to summary judgment as a matter of law.

5. Appellant fails to state a claim for conversion.

Again, assuming arguendo that Sharon's claim survives the argument that the action is precluded by the statutes of limitations, her case falls on the failure to state a genuine issue as to any material facts regarding a claim for conversion. Conversion is rooted in the common law action of trover and occurs when a person intentionally interferes with chattel belonging to another, either by taking or unlawfully retaining it, thereby depriving the rightful owner of possession. *Davenport v. Wash. Educ. Ass'n*, 147 Wash.App. 704, 721–22, 197 P.3d 686 (2008); *Lang v. Hougan*, 136 Wash.App. 708, 718, 150 P.3d 622 (2007).

Money may be the subject of conversion if the defendant wrongfully received it. *Davenport*, 147 Wash.App. at 722, 197 P.3d 686; *Westview*

Invs., Ltd. v. U.S. Bank Nat'l Ass'n, 133 Wash.App. 835, 852, 138 P.3d 638 (2006). Sharon alleges no facts suggesting that Dorothy deprived Sharon of possession of the residence. Sharon has never lost possession. Sharon and Judy are both currently in possession of the residence as tenants in common. There are no allegations that Dorothy took funds from Sharon in the sense of conversion. There are no allegations that Sharon did not authorize loans, or that Sharon was deprived of agreed upon loan proceeds. There are no facts that controvert the fact that the loan proceeds have been spent on Sharon's behalf, allowing her to remain in the residence, and allowing Judy Hartzell to now also live in the residence.

The conversion claim consequently does not raise a genuine issue of material fact as to whether Dorothy intentionally interfered with the money obtained as a mortgage loan or her ownership interest in the residence. *Alhadeff v. Meridian on Bainbridge Island, LLC*, 167 Wash. 2d 601, 619, 220 P.3d 1214, 1223 (2009).

6. Tolling – Bad faith, deception and false assurances

Appellant uses supposition and the Appellant's testimony as a basis that the Statute of Limitations be tolled without any evidence to support it. The fact is that Sharon, not Dorothy, came up with the idea to

refinance. (CP 24). Sharon intended for her daughter Dorothy to receive some of the benefit of the refinance. To accomplish that goal both parties agreed to give Dorothy an equity interest in the house. This court should not infer bad faith because Dorothy fell behind in her payment on the mortgage and then took actions to correct the deficiencies.

Sharon's claim now that Dorothy was deceptive is again self-serving and full of supposition. Dorothy had no obligation to inform her siblings what she was doing regarding her mother and her estate. If her mother did not want to tell them then they did not have any business knowing. There is no evidence that Dorothy willfully refused to comply with an accounting of proceeds from many years before.

Lastly, Sharon argues that Dorothy made false assurances to her in order to deprive Sharon of her home. This argument is without fact or evidence. Sharon has lived in her home without mortgage payment since Dorothy assumed the responsibility, and rightly so.

CONCLUSION

Whether from regret, undue influence, mistake or greed, Sharon wishes to undo what she had done decades ago. She attempts to do this by spinning a tale of a greedy and manipulative daughter who sought financial gain at her mother's expense. It is simply not enough that Sharon

now claims she didn't know what she was signing. There are many good reasons that the law does not allow someone to simply change their mind after the fact when they execute a quit claim deed. Sharon initiated the loan modification, and Dorothy Thomas was the only child that agreed to help her. Sharon knew, and accepted that both she and Dorothy would benefit from the proceeds. For all the reasons set forth above, the Trial Court's "Order on Defendant's Motion for Summary Judgment" should be affirmed. Sharon has failed to establish any genuine issues of material fact regarding exceptions to the statutes of limitation based upon delayed discovery, or tolling of the Statute. Sharon has failed to show there is a genuine issue based upon material facts as to alleged causes of action for either fraud or conversion.

Respectfully submitted this 8th day of January, 2018



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