

NO. 64371-1-I

STATE WASHINGTON
COURT OF APPEALS
DIVISION I

FRANK A. ROZZANO, Appellant,

v.

THERESA A. ROZZANO PRESTON and ISAAC PRESTON, and
the marital community composed thereof; ROBERT E. ROZZANO
and LESLIE ROZZANO and the marital community composed
thereof; MARA ROZZANO and DON DERSCH and the marital
community composed thereof; and DONNA M. ROZZANO WHITE,
Respondents.

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On Appeal from the Superior Court of Snohomish County, on
referral to the Superior Court of Skagit County
The Honorable Michael E. Rickert

Snohomish County Superior Court Cause No. 08-2-05863-6

REPLY BRIEF OF APPELLANT

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A. ERRORS AND MISCHARACTERIZATIONS IN RESPONDENTS' FACTS

Upon review of the Rozzano Childrens' Statement of the Case, the following errors and self-serving mischaracterizations are evident, despite the rule that on summary judgment, all facts and reasonable inferences are construed most favorably toward the non-moving party, Frank Rozzano:

1. In Subsection II. D., page 6 at note 30, Respondents are incorrect to contend that any documents would be "necessary" to "gift" Frank's assets. Rather, only deeds were "necessary"; and even they were necessary only to *transfer* real estate assets. See also, Respondents' Brief, §II. D., p. 7 at nn. 39-40. The preparation of a *document* intended to evidence a gift of all property, especially in light of preparation of a simultaneous trust document, suggests a *quid pro quo*, and not an unconditional "gift."

2. In Subsection II. D., page 6 at note 32, Respondents contend Frank Rozzano "wanted to finally follow through with the plan to gift a portion of his assets..." Yet, there are ample facts in the record from which to conclude that there was never any "plan" prior to February 10, 1996 to make an unconditional gift; rather,

every “plan” contemplated either a trust relationship or Frank retaining control over the assets. See Appellant’s Brief at pp. 6-12. Moreover, the Rozzano Children oddly characterize the plan as relating to “a portion” of his assets, which again is inconsistent with the language and title of the so-called “General Assignment of Interest” as planned and as drafted by Mr. Dussault. Frank’s conclusion that his children misled him at the time he executed the so-called General Assignment is at least a triable issue, and more to the point here, is not a basis on which this Court can conclude that Frank’s causes of action had accrued prior to June 10, 2005.

3. In Subsection II. D., page 6 at note 33, Respondents state that Frank “executed the forms originally prepared by his attorney Dussault to make the gifts to his children.” This statement is misleading in two respects. First, Frank did not execute the documents in the form or manner that Mr. Dussault prepared them – neither he nor the children executed the trust document; second, the facts strongly suggest that no unconditional gift was intended, see Appellant’s Brief, pp. 7 at n. 7 – 19 at n. 38.

4. In Subsection II. D., page 7 at note 38, Respondents state Mr. Dussault “continued to correspond with and represent Frank for the next several years.” However, there is no basis in the

summary judgment papers to characterize Frank's relationship with Mr. Dussault as one of continuing or general representation; much less to infer that Mr. Dussault knew what was going on (indeed, the opposite seems true), or that Mr. Dussault advised Frank that he could or should sue his children.

5. In Subsection II. E., page 8 at note 42, Respondents deny making assurances to Frank that they "would hold the gifted assets for his benefit." Yet, this mischaracterization is belied – or at least called into material question – by the evidence recited on pages 11 through 14 of Appellant's Brief.

6. In Subsection II. G., Respondents continue to mischaracterize the 1996 transfers as "gifts" in view of the contrary evidence, and ignore Frank Rozzano's testimony that he was "drunker than a skunk" at Christmas 2002 and does not even remember what happened.¹

7. In Subsection II. H., Respondents utterly ignore the fact that the purchase of the Garden Grove condominium involved the Rozzano Children's representation, through Robert Rozzano, that the buyers were the "Trustees for F.A. Rozzano"².

¹ CP 238 (S. Duncan Decl. at p. 12 lines 15-18).

² CP 143 (D. Laurence Decl. Ex. K).

B. REPLY ARGUMENT

The Rozzano Children have the burden to prove their limitations defense, *Brown v. ProWest Transp. Ltd.*, 76 Wn.App. 412, 419, 886 P.2d 223 (1994) (citing *Haslund v. City of Seattle*, 86 Wn.2d 607, 620-21, 547 P.2d 1221 (1976)). Therefore, for Frank Rozzano to survive their summary judgment challenge, he need only establish a genuine issue of material fact with regard to a single element of the defense. See *Young v. Key Pharms.*, 112 Wn.2d 216, 225-26, 770 P.2d 182 (1989) (summary judgment proper only if there is insufficient evidence to support every element of claim).³ Where the discovery rule with regard to a limitations defense is at issue, “[t]he question of due diligence is ordinarily a question of fact.” *Douglass, id.* Although the question can sometimes be resolved as a matter of law, the presumption is

³ This is so even though Frank Rozzano may have the burden, with respect to the allegation of fraud in a fiduciary relationship, to show that the facts constituting the fraud were not discovered or could not be discovered until within three years prior to the commencement of the action. *Douglass v. Stanger*, 101 Wn.App. 243, 256, 2 P.3d 998 (2000) (citations omitted). But remember, to establish a right to a constructive trust, fraud need not be shown; rather, it need only be shown that the Rozzano Children were not his intended beneficiaries with respect to at least some of the property. *Mehelich v. Mehelich*, 7 Wn.App. 545, 551, 500 P.2d 779 (1972).

clearly otherwise. See *id.* Here, there is ample evidence to support the conclusion that Frank Rozzano did not have sufficient information regarding the absence and/or abuse of a trust relationship more than three years prior to filing suit, particularly in light of the confidential relationship the parties shared and the high burden of producing clear, cogent and convincing evidence of fraud, to trigger a duty to commence litigation.

1. There is at least a genuine issue of material fact whether Frank Rozzano had notice, more than 3 years prior to commencing suit, of facts giving rise to his claims.

It is ironic that the Rozzano Children were less than forthcoming with their father concerning their claims of unconditional right in his property, and yet now argue that he should have known the information they failed to provide.

The facts on which the Rozzano Children rely to argue that Frank was “on notice” prior to July 10, 2005 that a trust did not exist are not conclusive. They appear to rely on the following facts, which neither alone, nor in combination, warrant summary judgment on the question of whether Frank Rozzano’s claims accrued more than three years prior to filing suit. See Respondents’ Brief at pp. 15-18 & 25-28.

1. 1998 Disposition of the Corliss Property

Robert Rozzano's declaration⁴ does not state that he advised his father that the proceeds of the Corliss Property sale had been split among the children, or that they would use it exclusively for their own benefit. It is not clear what evidence the children rely upon to assert that he was "aware of these facts," Resopndents' Brief at p. 29, or when he allegedly became aware of them.

2. 1999 Requests for Money

Even if Frank made requests for money turned down at the time the Garden Grove condominium was purchased, such rejections are not necessarily inconsistent with trust obligations. Moreover, financing of the condominium was at the same time represented to be by Frank's "trustees". The import of these facts on Frank's obligation to sue is a triable issue. *See also*, Appellant's Brief at pp. 34-37.

3. Rental Proceeds

See Appellant's Brief at pp. 36-37.

⁴ CP 203.

4. Correspondence from Mr. Dussault advising Frank Rozzano that the express trust document was not executed.

Mr. Dussault's advice in 2000 to Frank Rozzano that the trust he had drawn up had not been executed is not necessarily inconsistent with a reasonable belief on Frank's part that his children were holding assets for his benefit. After all, they arranged for execution of the 1996 General Assignment and associated deeds without telling Mr. Dussault, and they made repeated assurances to Frank and at least one third party in conjunction with the Garden Grove condominium sale that the assets were in trust.

5. Christmas 2002

Again, what Frank may have done at Christmas 2002 is less important here than why and how he did it, viewed the context of his children's fiduciary obligations to him. See, e.g., Appellant's Brief at pp. 22-23 & 41. In addition, though Robert claims Frank told him the money should be divided between Robert his siblings for their own use and enjoyment "as originally intended when the gifts were made in 1996," Robert's credibility on this point should be subject to cross-examination at trial; particularly given that Frank's intent in 1996 with regard to the 1996 transfer is in clear dispute. Moreover, a pre-gift discussion regarding Frank's intent does not

conclusively prove his intent at the time of the alleged “gift” or its legitimacy; especially given that he had no right to make a gift under Respondents’ theory that he had *already* given away his assets, and given his mental impairment, being drunk on Christmas day, as well as the other relevant history and circumstances.

2. The Rozzano Children are Estopped From Asserting a Limitations Defense.

The Confidential Relationship Doctrine bars the limitations defense. This Court cannot preclude Frank Rozzano’s reliance on estoppel *in pais* without answering questions of material fact. Whether he exercised due diligence and timely filed suit depends upon questions of material fact. There is a genuine issue of material fact regarding whether he received notice that a trust relationship does not exist. The trial court misapplied the summary judgment standard.

a. The Confidential Relationship Doctrine bars the limitations defense.

The Rozzano Children’s argument that the Confidential Relationship Doctrine as described in *Mehelich v. Mehelich*, 7 Wn.App. 545, 551, 500 P.2d 779 (1972) does not apply because it is in the context of a laches defense rather than the assessment of

“due diligence” in the limitations context, see Respondents’ Brief at pp. 18-19, is unsupported by logic or law. To the contrary: A defendant relying upon the limitations defense can be estopped. See Appellant’s Brief at pp. 31-32 (citing cases). A confidential relationship such as the one demonstrable here can give rise to such an estoppel. See *generally* Appellant’s Brief at pp. 32-36. As with laches, the confidence inspired by the close familial relationship admitted by the Rozzano Children, see Appellant’s Brief at pp. 15-18, reduces the expectation that Frank Rozzano should scrutinize his children’s activities with as much “diligence” as he might a stranger’s. The facts that establish the nature of this relationship, and the extent of its influence on Frank, are disputed issues for trial.

b. This Court cannot preclude Frank Rozzano’s reliance on estoppel *in pais*, without answering questions of material fact.

The Rozzano Children erroneously postulate that the doctrine of estoppel *in pais* requires some kind of express promise. Instead, the confidential relationship and any representations that justifiably lull the plaintiff to into refraining from prosecution of his or her rights should suffice. See Appellant’s Brief at pp. 31-32 (citing cases). Nevertheless, the children told Frank they would take care

of him^{5,6}; they made representations to him in writing that the assets are “your stuff”⁷; Robert and Donna understood Frank’s intention to create a trust^{8,9}; Theresa conveyed to Mr. Dussault (Frank’s lawyer) in writing the concern that he remain in control of the assets¹⁰; and Robert represented in the Garden Grove condominium purchase that a trust actually existed¹¹. If these were not promises, they were close enough.

While the period of estoppel does not last forever, its proper length of time depends upon the circumstances in each case. *Peterson v. Groves*, 111 Wn.App. 306, 314, 44 P.3d 894 (2002). Here it lasted long enough. Alternatively, the nature and import of the events the Children rely upon to claim the end of any estoppel period (notably, Christmas 2002) are legitimately disputed. The breaches of the Rozzano Children’s promises to administer Frank’s assets transferred in 1996 (and allegedly in 2002) was not

⁵ CP 62 (D. Laurence Decl. Decl. ¶20).

⁶ CP 92 (D. Laurence Decl. Ex. B (T. Rozzano-Preston Depo.) at p. 64 lines 8-12).

⁷ CP 137-138 & 140-141 (D. Laurence Decl. Exs. I & J).

⁸ CP 66 (D. Laurence Decl. Ex. A (R. Rozzano Depo.) at p. 12 line 23; p. 13 line 2).

⁹ CP 134 (D. Laurence Decl. Ex. H).

¹⁰ CP 93 (D. Laurence Decl. Ex. B (T. Rozzano-Preston Depo.) at p. 67 line 2 – p. 68 line 5).

¹¹ CP 143 (D. Laurence Decl. Ex. K).

reasonably evident to Frank until after he found out that his children had spilt up the proceeds of the March 2006 sale of the condominium and considered it exclusively theirs, and subsequently as they continued to refuse his requests and began to more openly assert discretionary control of the assets. All of this occurred well within three years prior to commencement of this action on July 10, 2008; Respondents' arguments to the contrary notwithstanding, see Appellant's Brief at pp. 34-37. In this regard, the reasonableness of Frank's behavior involves genuine issues of material fact for trial.

c. Whether Frank Rozzano exercised due diligence and timely filed suit depends upon questions of material fact.

The Rozzano Children's argument that Frank's meeting with attorney Bruce Bell in late 2005 was his first act of due diligence is irrelevant, because it is well within the 3-year limitations period. Moreover, there is little competent evidence on the record of the content of Frank's attorney-client discussions with Mr. Bell. There is no evidence that he was "aware of facts giving rise to his claims" when he met with Mr. Bell; contrary to the children's suggestion, Respondent's Brief at p. 24. Regardless of what Mr. Bell may have told him, the facts *as Mr. Rozzano knew them* prior to that time did

not give rise to a duty to sue. “[S]omething first must happen to cause one who justifiably relies upon his or her own expert reasonably to suspect that [a breach of fiduciary duty] may have occurred.” *Gillespie v. Seattle First Nat’l Bk*, 70 Wn.App. 150, 171, 855 P.2d 680 (1993), *rev. denied*, 123 Wn.2d 1012 (1994). In other words, to trigger the limitations period, visiting a lawyer would not be enough; rather, the facts would have to suggest that (1) a lawyer needs to be seen; and (2) the lawyer should advise the client that rights had been breached. Here, none of the post-October 25, 2005 breaches had yet occurred when Frank Rozzano visited with Mr. Bell, and the prior breaches were not reasonably evident to Frank in light of the confidential relationship and representations and manipulations made within it.

The real importance of Frank’s meeting with Mr. Bell is that it is evidence of the continuing pattern of manipulation to which Frank was subjected by his children. Around this time, Frank suffered from a stroke, alcohol abuse, and confusion. The reasonable inferences to be drawn from Theresa Rozzano’s projection of herself into Frank’s relationship with Mr. Bell as well as her mollifying but false assurances to Frank that the prior asset transfers were part of the original gift-and-trust plan Frank and

Velda had worked out at the time they were working with Mr. Dussault support Frank's estoppel *in pais* argument. See Appellant's Brief at pp. 23-25.

d. There is a genuine issue of material fact regarding whether Frank Rozzano received notice that a trust relationship does not exist.

If Frank Rozzano's burden is to produce clear, cogent and convincing evidence in support of a constructive trust, then as a matter of logic and justice, the Court must apply that standard in determining the level of information that he must have or be able to discover to trigger his obligation to sue. If the Court were not to do so, then it would encourage potentially frivolous, or at least premature, lawsuits, and deprive legitimate plaintiffs of a remedy.

A cause of action accrues for limitations purposes when the plaintiff knew "the essential elements of the cause of action – duty, breach, causation and damages." *Green v. A.P.C.*, 136 Wn.2d 87, 95, 960 P.2d 912 (1998) (citing cases). "[A] cause of action may accrue for purposes of the statute of limitations if a party *should have discovered salient facts* regarding a claim." *Id.* (underline added). "The statute does not begin to run until the cause of action accrues – that is, when the plaintiff *has a right to seek relief in the courts.*" *Sabey v. Howard Johnson & Co.*, 101 Wn.App. 575, 592-

93, 5 P.3d 730 (2000) (emphasis added). “To apply for relief, each element of the cause of action must be susceptible of proof.” *Haslund v. City of Seattle*, 86 Wn.2d 607, 619, 547 P.2d 1221 (1976); *Gausvik v. Abbey*, 126 Wn.App. 868, 107 P.3d 98 (2005).

Accordingly, known facts are “salient” when they are sufficient, or in combination with facts that can be reasonably discovered *at the time* would be sufficient, to permit the plaintiff to *prove a cause of action*. Until that time, no right to judicial relief exists, and thus it cannot expire. If the proof required is clear, cogent and convincing, then that is the level of proof that must be known or discoverable before the cause of action can accrue.

This rule prevents “the unconscionable result of barring an aggrieved party's right to recovery before a right to judicial relief even arises.” *First Maryland Leasecorp. v. Rothstein*, 72 Wn.App. 278, 283, 864 P.2d 17 (1993).

Viewed another way: Parties do not discover “facts” as such; rather, they discover *evidence* of facts. In order for evidence to be salient, it must meet the standard of proof giving rise to the claim. Evidence insufficient to prove or lead to proof of a claim is not salient. Similarly, “Knowledge of potential liability is not the equivalent of actual harm,” and does not trigger the limitations

period. *E.g.*, *Sabey* 101 Wn.App. at 595. Therefore, if imposition of a constructive trust requires clear, cogent and convincing proof, then accrual of the claim for limitations purposes can only occur when the plaintiff has evidence or can reasonably discover evidence that rises to that level.

Beard v. King County, 76 Wn.App. 863, 866-68, 889 P.2d 501 (1995) held that the discovery rule does not “toll the commencement of the limitation period after the injured party has specifically alleged the essential facts but does not yet possess proof of those facts.” Thus, *Beard* is distinguished on its procedural facts: The plaintiff in that case commenced an action in 1989, alleging all of the essential facts supporting his claim. The court later dismissed his action because the plaintiff could not prove those facts. After obtaining additional evidence, the plaintiff commenced a second action more than three years after commencing the first action. Here, Frank Rozzano never, prior to this action, commenced an action for against the Rozzano Children or otherwise alleged all of the facts essential to his claims. Although he may have suspected something was amiss, he did not know the factual basis of his claim because he did not have clear, cogent and convincing evidence that the assets were not being

administered for his benefit at least until he learned that the Children distributed the Garden Grove Condominium proceeds exclusively to themselves.

Moreover, *Beard* is distinguishable from this case because there, the court held only that the level of proof required for the action to accrue need not be “conclusive.”

A smoking gun is not necessary to commence the limitation period. An injured claimant who reasonably suspects that a specific wrongful act has occurred is on notice that legal action must be taken. At that point, the potential harm with which the discovery rule is concerned—that remedies may expire before the claimant is aware of the cause of action—has evaporated. The claimant has only to file suit within the limitation period and use the civil discovery rules within that action to determine whether the evidence necessary to prove the cause of action is obtainable.

76 Wn. App. at 868. By contrast, here, the Rozzano Children have not provided this Court with sufficient facts from which to conclude as a matter of law that Frank Rozzano had sufficient information about “wrongful acts” such that he should have, and could have, used the discovery rules to uncover the evidence needed to prove the causes of action he now asserts. Here, prior to June 10, 2005,

Frank Rozzano could not have discovered the distribution of the Garden Grove condominium proceeds, which occurred later, or the subsequent denials of requests to pay for his wife's vacation and a car. See Appellant's Brief at p. 14 at n. 26, p. 23 at n. 45 & p. 26-27. Nor does it appear conclusively that he should have, or could have, compelled his children to claim exclusive rights in the assets transferred before June 10, 2005.

i. Whether transfers to the Rozzano Children were "gifts" depends upon resolution of genuine issues of material fact.

The Rozzano Children's argument that the transfers they characterize as unconditional gifts are not unjust enrichment is tautological. There is a genuine issue of material fact regarding the character of the transfers. There is sufficient evidence to try the issue of whether the 1996 Assignment of Interest and deeds were contemplated as a *quid pro quo*, and whether the 2002 Christmas transfer was a competent gift by Frank Rozzano or something a little less overt.

The statements of Frank's counsel William Dussault to the effect that the children could use the transferred properties as they pleased are not dispositive statements of the law; rather, they may

be construed as one opinion of the law made in the context of the information he had and that time; as a warning; or as an effort by the lawyer (who clearly had drafted transfer and trust documents suggesting a *quid pro quo*) to protect himself and/or his client from possible future allegations that they could be facilitating a violation of Medicaid rules. These are reasonable inferences from the fact that favor Frank, because they suggest the transfer of assets was being contemplated with something like a “wink and a nod”, and was not the clear abandonment of all legitimate interests by Frank that the Rozzano Children now suggest.

Theresa Rozzano’s own letter to Mr. Dussault questioned whether Frank Rozzano would have to relinquish control if his assets were placed in trust. See Appellant’s Brief at p. 7 n. 10. The question suggests his reluctance to enter into such a relationship. Even so, and despite what Mr. Dussault had said with respect to the plan that was never completed, his children convinced Frank later that he had already decided to transfer his assets to them, while they were assuring him that they would take care of him. Later they disclaimed any legal obligation to support him or honor his wishes. The trier of fact should be allowed to

determine whether they led him into a trap baited with “love and affection.”

ii. Whether Frank Rozzano had sufficient notice prior to July 10, 2005 that “a trust relationship does not exist” depends upon resolution of genuine issues of material fact.

See Subsection B.1., above.

e. The trial court misapplied the summary judgment standard.

The Rozzano Children fail to respond to Frank Rozzano’s critique of the trial court’s misapplication of the summary judgment standard set forth in Subsection C.3. of Appellant’s Brief. Instead, they choose to address other issues. Thus, no further briefing on Frank Rozzano’s argument in that regard appears necessary.

Nevertheless, the following points dispose of the issues the Rozzano Children choose to address instead:

1. Concealment. The Rozzano Children’s various concealments of information are set forth in Appellant’s Brief.

2. Harms. The Rozzano Children contend, “There is *nothing in the record* to support Franks’ opinion that he has been harmed, the extent of the harm, the duration of the harm, or *the time frame that he discovered the harm.*” This may be an argument

for trial, but is not proper in the context of asserting a limitations defense: The alleged harms are described in the Complaint as well as Appellant's Brief at pp. 26-27. If the Rozzano Children cannot show when Frank actually discovered or should have discovered them (*i.e.*, that such harms were discovered or discoverable more than three years prior to commencing suit), then their limitations defense is not provable.

3. Christmas 2002. The Rozzano Children are wrong that "Frank cannot recall the events surrounding Christmas in 2002." He remembers he was "drunk as a skunk." Again, not only the events of that day but also the surrounding circumstances including the confidential relationship of the parties are important to determining the significance of that day.

4. Undue Influence. Theresa's testimony and Frank's inability to recall the events at his deposition merely help show the confidential relationship of the parties. They must be viewed in context of all the other events that show his confusion and his children's improper methods of persuasion.

B. CONCLUSION

The Rozzano Children siphoned a huge share of their father Frank's lifelong estate. They used the language of trust, but abused

the concept. They engaged in self-dealing. They failed to account, to honor requests for funds, and even to respond to requests to discuss the matter with counsel present. Many of these things were done within three years prior to commencement of this lawsuit. Whatever occurred before was simply did not constitute a sufficiently overt claim of right on their parts to trigger an obligation on Frank's part to sue. Their limitations defense is no "slam dunk" under the undisputed facts; and even if it were, their confidential relationship with Frank estops them from invoking it.

This Court should reverse the decision of the Superior Court to the extent it dismissed Frank's claims on limitations grounds, and remand the matter for further proceedings consistent with such an order.

DATED: July 16, 2010.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Daniel R. Laurence", is written over a horizontal line.

Daniel R. Laurence
Attorney for Appellant
WSBA No. 19697

CERTIFICATE OF SERVICE

I, Daniel R. Laurence, certify that on the date signed below, I caused to be served by personal delivery a true and correct copy of the foregoing Brief of Appellant on (1) co-counsel for Appellant: Gary L. Baker, 1802 Grove St., Marysville, WA 98270, and (2) counsel for Respondents: Adams, Duncan & Howard, Inc., P.S., 3128 Colby Ave., Everett, WA 98201.

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