

64371-1

64371-1

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.

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

BRIEF OF APPELLANT

Daniel R. Laurence
WSBA No. 19697

Gary L. Baker
WSBA No. 16206

1802 Grove Street
Marysville, WA 98270
Telephone (360) 657-5150

2010 MAY 17 PM 1:41

CLERK OF COURT
B

TABLE OF CONTENTS

A. ASSIGNMENT OF ERROR..... 1

1. The trial court erred in entering its oral order of October 9, 2009, and its commensurate written order of October 22, 2009, insofar as those orders granted summary judgment dismissing Appellant Frank Rozzano's claims of misrepresentation, fraud, undue influence, conversion, breach of trust and fiduciary duty, promissory estoppel, negligent infliction of emotional distress and intentional infliction of emotional distress as barred by statutes of limitations..... 1

Issues Pertaining To Assignments Of Error..... 1

1. Does the lack of clear, cogent and convincing evidence of actual or reasonable notice of breaches of duty mean the limitations period did not commence?..... 1

 a. Do the estoppel *in pais* doctrine and confidential relationship doctrine bar Respondents from asserting limitations periods in defense?..... 1

 b. Alternatively, does a genuine issue of material fact exist with respect to whether Appellant had any duty to sue Respondents earlier under the circumstances?..... 1

2. Are remedies other than constructive trust time barred?..... 2

3. Did the trial court misapply the summary judgment standard by failing to recognize disputed issues of material fact and/or by failing to draw all reasonable inferences in favor of Appellant, who was the non-moving party below?..... 2

B.	<u>STATEMENT OF THE CASE</u>	2
	1. Introduction.....	2
	2. Facts.....	5
	a. Background.....	6
	b. Confidential Relationship.....	15
	c. Concealment of Facts.....	19
	d. Harms.....	26
C.	<u>ARGUMENT</u>	27
	1. The Lack of Clear, Cogent and Convincing Actual or Reasonable Notice of Breaches of Duty Means the Limitations Period Did Not Commence.....	29
	a. Limitations defenses are barred by estoppel <i>in pais</i> and the Confidential Relationship Doctrine...	31
	b. Regardless of estoppel <i>in pais</i> , at least a genuine issue of material fact exists with respect to whether Appellant Frank Rozzano had any duty to sue his children earlier under the circumstances.....	34
	2. Remedies Other Than Constructive Trust Are Also Not Time-Barred.....	37
	3. The Trial Court Misapplied the Summary Judgment Standard.....	38
D.	<u>CONCLUSION</u>	42

TABLE OF AUTHORITIES

WASHINGTON STATE CASES

<i>Ameman v. Ameman</i> , 43 Wn.2d 787, 264 P.2d 256 (1953).....	29
<i>Baker v. Leonard</i> , 120 Wn.2d 538, 547-48, 843 P.2d 1050 (1993).....	29
<i>Boardman v. Waterous</i> , 178 Wash. 690, 35 P.2d 1106 (1934).....	29
<i>Brown v. ProWest Transp. Ltd.</i> , 76 Wn.App. 412, 419, 886 P.2d 223 (1994).....	28
<i>Central Heat, Inc. v. Daily Olympian, Inc.</i> , 74 Wn.2d 126, 443 P.2d 544 (1968).....	32
<i>Esmieu v. Schrag</i> , 88 Wn.2d 490, 498, 563 P. 2d 203 (1977).....	32
<i>Estate of Ehlers</i> , 80 Wn.App. 751, 911 P.2d 1017 (1996).....	30
<i>Fleming v. Smith</i> , 64 Wn.2d 181, 185, 390 P.2d 990 (1964).....	28
<i>Folsom v. Burger King</i> , 135 Wn.2d 658, 663, 958 P.2d 301 (1998).....	28
<i>Goodman v. Goodman</i> , 128 Wn.2d 366, 907 P.2d 290 (1995).....	29, 30
<i>Haslund v. City of Seattle</i> , 86 Wn.2d 607, 620-21, 547 P.2d 1221 (1976).....	28
<i>Huber v. Coast Investment Co.</i> , 30 Wn.App. 804, 810, 638 P.2d 609 (1981).....	30
<i>In re Neisz's Estate</i> , 152 Wash. 336, 277 P. 849 (1929).....	31

<i>Int'l Bhd. of Elec. Workers, Local Union No. 46 v. Trig Elec. Constr. Co.</i> , 142 Wn.2d 431, 434-35, 13 P.3d 622 (2000), <i>cert. denied</i> , 532 U.S. 1002 (2001).....	27
<i>LaPlante v. State of Wash.</i> , 85 Wn.2d 154, 159, 531 P.2d 299 (1975).....	28
<i>McCutcheon v. Brownfield</i> , 2 Wn.App. 348, 356-57, 467 P.2d 868 (1970).....	33
<i>Mehelich v. Mehelich</i> , 7 Wn.App. 545, 551, 500 P.2d 779 (1972).....	33
<i>Mostrom v. Pettibon</i> , 25 Wn.App. 158, 162, 607 P.2d 864 (1980).....	29
<i>Peterson v. Groves</i> , 111 Wn.App. 306, 44 P.3d 894 (2002).....	32
<i>Ruff v. County of King</i> , 125 Wn.2d 697, 703, 887 P.2d 886 (1995).....	28
<i>Ryan v. Plath</i> , 18 Wn.2d 839, 140 P.2d 968 (1943).....	31
<i>Security State Bank v. Burk</i> , 100 Wn.App. 94, 102, 995 P.2d 1272 (2000).....	28
<i>Viewcrest Co-op Ass'n v. Deer</i> , 70 Wn.2d 290, 422 P.2d 832 (1967).....	31
<i>Voorde Poorte v. Evans</i> , 66 Wn.App. 358, 361, 832 P.2d 105 (1992).....	28
<i>Wilson v. Steinbach</i> , 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).....	28
<i>Yates v. Taylor</i> , 58 Wn.App. 187, 191, 791 P.2d 924 (1990).....	30

WASHINGTON CIVIL RULES

CR 56(c)..... 28

A. ASSIGNMENT OF ERROR

1. Respondents the Rozzano Children received assets in 1996 from their father, Appellant Frank Rozzano, under circumstances that he contends gave rise to a continuing fiduciary relationship. He contends they breached their fiduciary duties and/or that he was damaged within the applicable limitations period(s). Thus, the trial court erred in entering its oral order of October 9, 2009, and its commensurate written order of October 22, 2009, insofar as those orders granted summary judgment dismissing Frank Rozzano's claims of misrepresentation, fraud, undue influence, conversion, breach of trust and fiduciary duty, promissory estoppel, negligent infliction of emotional distress and intentional infliction of emotional distress as barred by statutes of limitations.

Issues Pertaining To Assignment Of Error

1. Does the lack of clear, cogent and convincing evidence of actual or reasonable notice of breaches of duty mean the limitations period did not commence?
 - a. Do the estoppel *in pais* doctrine and confidential relationship doctrine bar Respondents from asserting limitations periods in defense?
 - b. Alternatively, does a genuine issue of material fact exist with respect to whether Appellant had

any duty to sue Respondents earlier under the circumstances?

2. Are remedies other than constructive trust time barred?
3. Did the trial court misapply the summary judgment standard by failing to recognize disputed issues of material fact and/or by failing to draw all reasonable inferences in favor of Appellant, who was the non-moving party below?

B. STATEMENT OF THE CASE

1. Introduction¹

Appellant Frank A. Rozzano commenced this lawsuit against the Respondents, who are his adult children (“Rozzano Children”) and their spouses, on July 10, 2008, claiming they breached their duties arising from an agreement dating from the 1990s, by which he would transfer all of his assets to them and, in return, they would administer those assets for his benefit during his lifetime. The suit relies on two general factual premises:

First, it is undisputed that Frank (a/k/a “Art”) did not transfer all of his assets to them, even though he signed what purported to be a so-called “General Assignment of Interest” and associated quit claim deeds to his children. The Rozzano Children never received

¹ In light of this introduction, a summary of argument is not presented.

or asserted dominion or control over Frank's corporate shares (worth an estimated value of \$1 million) and associated dividends, his Social Security income, his annuity income, his motor vehicles, and his other personal property.² This fact, and others described below, lead to a reasonable inference that the parties did not intend a complete and unconditional gift of all of Frank's assets. Rather, the 1996 transfers were intended to begin the process of transferring assets into a *de facto* trust for Frank's benefit.

Second, the assets transferred to Frank's children were not administered in proper fiduciary fashion for his benefit. The Rozzano Children commingled transferred property and proceeds with their own, used those assets to benefit themselves, substituted their whims for Frank's, and ignored his requests for an accounting and for appropriate disbursements even within the limitations period. Thus, the children harmed him.

Frank Rozzano specifically revoked the General Assignment of Interest on January 24, 2007.³ On July 10, 2008, he

² See generally, CP 35-37 (Order on Plaintiff's Motion for Partial Summary Judgment Re: Shares in Greenwood Shopping Center, Inc.) and other papers cited therein; CP 7-19 (Summary Judgment Order on Defendants' Motion to Dismiss Plaintiff's Claims); RP 4 line 3 – RP 7 line19.

³ CP 157 (D. Laurence Decl. Ex. P).

commenced this lawsuit contending that his children's failures to recognize that they had trust obligations and to act in accordance with them gave rise to causes of action for fraud, misrepresentation, undue influence, conversion, breach of trust/fiduciary duty, promissory estoppel and negligent and intentional infliction of emotional distress. He seeks an accounting, a declaration of his ownership of the assets and voiding of the General Assignment and/or a declaration of a constructive trust, removal of the children as trustees, and/or an award of damages, attorney's fees and costs.⁴

The Rozzano Children brought a motion for summary judgment, in which they contended that his claims are barred by applicable limitations periods. Frank opposed the motion. He pointed out that his children failed to demonstrate conclusively that he was obliged to commence suit earlier than he did, because (a) the facts do not clearly show that he had actual notice of the harms and their causes, or reasonably could have discovered them, more than three years prior to suit was commenced, and/or (b) he was misled by the children into believing that the transferred assets were being administered for his benefit, such that their limitations

⁴ See generally, CP 288-353 (Complaint).

defenses are barred under the doctrine of estoppel *in pais* and/or the confidential relationship doctrine.

Every judge on the Snohomish County Superior Court exercised self-recusal, and thus the motion was referred to the Skagit County Superior Court for determination. The motion was granted. Frank appealed. (The order affirming his interest in the family corporation stock was not cross-appealed.)

In the trial court and on appeal, Frank Rozzano contends that, with respect to all harms occurring after July 10, 2005 (which is three years prior to the commencement of this action), this suit is timely. With respect to prior harms, there is at least a genuine issue of material fact with respect to whether limitations periods expired more than three years prior to suit; and whether the Rozzano Children should be estopped from asserting the limitations periods because they were in a confidential relationship with their father and acted during that time to conceal material facts.

2. Facts

The presentation below provides general background, followed by specific facts pertaining to Frank Rozzano's contentions that he and his children were in a confidential relationship, and they concealed information from him, so as to estop the children from

asserting limitations defenses. The facts end with a synopsis of the harms at issue.

a. Background

It is not disputed that the notion of whether to transfer Frank Rozzano's assets to his four children – Di'Donna Rozzano White, Theresa ("Tassi") Rozzano-Preston, Robert ("Ned") Rozzano, Mara Rozzano – and/or Frank's grandchildren, and to establish a trust was initially raised by Frank and his first wife (the children's mother), Velda. Frank, Velda, Robert and Mara met with attorney William Dussault to discuss estate planning for Frank and Velda.

As Robert testified:

Q And what was your purpose in attending that meeting with Mr. Dussault?

A Mr. Dussault was advising us of what my dad and mom had decided on bringing us in. And the way it was explained to us, the monies were going to be put in a trust in our names as our inheritance and as a way to keep from having it taken away if it got into long-term convalescent or healthcare problems.⁵

⁵ CP 72 (Declaration of Daniel R. Laurence in Support of Frank Rozzano's Opposition to Defendant's Motion for Summary Judgment ("D. Laurence Decl.") Ex. A (Robert Rozzano Deposition ("R. Rozzano Depo.)) at p. 13 lines 18-24); & CP 92 (D. Laurence

For reasons that are somewhat unclear, the planning was not completed before Velda's death on January 13, 1994.⁶

It is undisputed that in early 1994, William Dussault sent out a letter to Frank describing the proposed assignment of interest and a draft letter to the Rozzano Children describing the proposed living trust agreement.⁷

The matter of the trust arrangement languished for about two years. On January 23, 1996, Theresa Rozzano-Preston wrote a letter to Mr. Dussault in which she posed a series of questions.⁸ The first question concerned whether in-laws could access the assets. Theresa testified that her father Frank's concern was to keep the assets in the blood family.⁹ The second question sought an update on whether the trust would not be regarded as a fraudulent transfer for purposes of securing government benefits. The third question was whether Frank's children could leave his companion the financial burden of caring for him, including medical

Decl. Exh B (Theresa Rozzano-Preston Deposition ("T. Rozzano-Preston Depo.)) at p. 63 at lines 1-6)).

⁶ CP 106 (D. Laurence Decl. Ex. C).

⁷ CP 108-114 (D. Laurence Decl. Ex. D).

⁸ CP 116-117 (D. Laurence Decl. Ex. E).

⁹ CP 91 (D. Laurence Decl Ex. B (T. Rozzano-Preston Depo.) at p. 58 line 24 – p. 60 line 16).

expenses. The fourth question asked about consequences if Frank were to get married. The fifth question asked, “Is it possible to make my father one of the trustees, so that he may have some say in the control of the trust?” Theresa testified that she also wanted Frank involved, but that Mr. Dussault made clear that this would be impossible, because it would invalidate the trust.¹⁰

In mid-January 1999, Mr. Dussault sent Frank and his children a draft Living Trust Agreement.¹¹ It provided that property (to be itemized in a schedule in the future) belonging to Frank’s children would be placed in a trust, of which Frank would be the primary beneficiary. It provided, more specifically, that for the first 36 months, the trust would pay “as much of the income generated by the Trust as is requested by the beneficiary,” or if no such requests were made, “as much as the Trustees determined to be necessary and appropriate to maintain the beneficiary [Frank] in reasonable health and comfort,” as well as discretionary distributions they deemed “necessary and desirable to provide for [Frank’s] care, support, maintenance and health.” After the initial

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

¹¹ CP 67 & 119-129 (D. Laurence Decl. Ex. A (R. Rozzano Depo.) at pp. 16-17 & Ex. F).

three-year period, if Frank were not disabled, the trustees could disburse the trust's principal for these same purposes, but only to the extent they did not make Frank ineligible for disability benefits and programs. On the other hand, if Frank were to become disabled, the trust allowed distributions only from trust asset income; not principal; but again, only to the extent that such distributions would not make Frank ineligible for government or private benefits. The trust provided expressly that nothing in the trust would prevent the trustees from "purchasing those services and items which promote the disabled beneficiary's happiness, welfare and comfort, including but not limited to vacation and recreation trips away from places of residence, expenses for a traveling companion if requested or necessary, entertainment expenses, and transportation costs."

The draft trust document named Frank's grandchildren as the secondary beneficiaries. They were to be entitled to receive discretionary distributions of income or principal for post-secondary education or emergency needs. Upon Frank's death, the trust principal was to be distributed equally among Theresa, Robert, Mara, and Di'Donna. The draft trust document states that Frank's children recognize their possible conflicts of interest, but that they

have “full faith and trust in [themselves] ... to act in the best interest of the primary beneficiary, FRANK ROZZANO.” It should be noted that the trust language does not specifically clarify whether the “secondary” beneficiaries were not to receive benefits unless and until Frank were dead or otherwise ineligible to receive benefits (for example, in a situation where Frank’s receipt of such benefits would make Frank ineligible for Medicaid).

The draft trust document provided for an annual accounting to Frank by the trustees.¹²

None of the children except Theresa could fully articulate why the trust agreement was never signed. Theresa testified, however, that it was not signed because of concerns that placing the assets into a trust would subject them to higher taxes and everyone’s management concerns (though it is unclear what these were).¹³

She also testified that the children (without Frank present) had discussed alternative options, including placing the assets into a partnership. She had gone to see a tax advisor, by herself, who had told her that a partnership would subject the children to liability

¹² CP 126-127 (D. Laurence Decl. Ex. F) at pp. 8-9.

¹³ CP 93 (D. Laurence Decl Ex. B (T. Rozzano-Preston Depo.) at p. 66 line 9 – p. 67 line 1).

if something happened on one of the properties, and that a trust would raise taxes on the assets. She said she was particularly concerned about taxes because she knew she would be moving to Virginia, a state with an income tax. She also discussed her concerns with an attorney in Seattle, Tim Burkhart.¹⁴

On February 10, 1996, Frank executed the Assignment of Interest and quit claim deeds to Frank's children for the three properties at his residence on Corliss Avenue in Seattle, an investment property at Motor Place in Lynnwood, and an undeveloped plot on Whidbey Island.¹⁵

Robert Rozzano testified:

Q What did your father tell you about why he had executed the assignment of interest in February of '96?

A Just to facilitate the process of the trust. He was placing our inheritance and monies and properties into a trust that he wanted us to have.¹⁶

¹⁴ CP 89 (D. Laurence Decl Ex. B (T. Rozzano-Preston Depo.) at p. 47 line 20 – p. 52 line 4).

¹⁵ CP 131-132 (D. Laurence Decl Ex. G).

¹⁶ CP 66 (D. Laurence Decl. Ex. A (R. Rozzano Depo.) at p. 12 line 23; p. 13 line 2).

Mara Rozzano's answer to Frank Rozzano's interrogatory number 20¹⁷ states:

The property was given to me and my siblings with the understanding that it would be placed in a trust the beneficiaries of which would be my father and the grandchildren. My father would be limited to the income from the trust and the principle [*sic*] would be maintained for the benefit of the grandchildren to help pay for college expenses.

In February 1998, the children sold the family home on Corliss Avenue house in Seattle, split the proceeds among them, and deposited the money into their personal bank accounts.¹⁸ In October and December 1998, the children provided Frank two copies of a written statement, each entitled "ACCOUNT ACTIVITY FOR TRUST." Above the title on the statement, there is a note that states, "*Grandpa – FYI – here is a 'running update' on what is going on with your stuff*"¹⁹ (Emphasis added). These statements refer to income from real estate contracts, bank transactions, a cleaning bill relating to sale of the Corliss house, money paid to the Rozzano Children for labor they performed on the Motor Place property that

¹⁷ CP 134 (D. Laurence Decl. Ex. H).

¹⁸ CP 203 (Declaration of Robert Rozzano in Support of Defendants' Motion for Summary Judgment ("R. Rozzano Decl.") ¶7).

¹⁹ CP 137-138 & 140-141 (D. Laurence Decl. Exs. I & J).

had been quit claimed to them in 1996, reimbursement of \$18,000 to Frank for a boat purchased with his “personal funds” and \$5,000 he had paid to a contractor for work on the Motor Place property.

In 1999, Robert Rozzano bought a condominium in Everett in a complex called Garden Grove for his father, Frank, to live in rent-free if Frank would pay for maintenance.²⁰ In his counteroffer on the condo, Robert Rozzano represented:

The Trustees for F.A. Rozzano will apply for a loan from Seafirst and this offer is contingent on the Trustees getting this loan by 3/1/99.”²¹

(Emphasis added).

In 2005, Frank Rozzano met with Everett attorney Bruce Bell. In her declaration, Theresa states she talked to attorney Bell in October or November of that year and thereafter never heard from him again.²²

When the condo was sold in March 2006, the children again split the sale proceeds equally among the four of them for their own use.²³

²⁰ CP 203 (R. Rozzano Decl. ¶8).

²¹ CP 143 (D. Laurence Decl. Ex. K).

²² CP 199 (T. Rozzano-Preston Decl. ¶7).

²³ CP 203 (R. Rozzano Decl. ¶8).

The four Rozzano children also received income from various real estate contracts on properties that had been owned and sold by Frank Rozzano.²⁴ The children took withdrawals from the proceeds of these contracts and/or the sale of the Corliss property, which Robert characterized as “loans” from the money, and which they had treated as loans, until Christmas 2002.²⁵

On February 12, 2007, Frank Rozzano’s counsel, the undersigned, began to write letters to his children.²⁶ The first letter articulated his concerns regarding his finances, a fishing trip, and a loan to Robert. It transmitted a Termination and Revocation of Assignment of Interest, which Frank had executed on January 24, 2007, and which terminated and revoked the February 10, 1996 General Assignment of Interest.²⁷ That letter also demanded disbursement and an accounting. The subsequent letters articulated further concerns and requested resolution of them through various means, including sale of the real properties, a

²⁴ CP 93-94 (D. Laurence Decl Ex. B (T. Rozzano-Preston Depo.) at p. 69 line 14 - p. 72 line 4).

²⁵ CP 75-76 (D. Laurence Decl. Ex. A (R. Rozzano Depo.) at p. 80 line 16 – p. 85, line 12).

²⁶ CP 145-155 (D. Laurence Decl. Ex. L-O).

²⁷ CP 157-159 (D. Laurence Decl. Ex. P).

written proof disavowing any interest in Frank's shares in Greenwood Shopping Center and general mediation.

The children did not answer any of these letters. The reasons they give were legalistic. Theresa claims the demands made in the February 12, 2007 letter were "past the statute of limitations," and she didn't take them seriously. With regard to the May 30, 2007 and July 26, 2007 letters offering to sell GSC stock, she testified she was not interested and didn't think people would buy it. She testified she feels no fiduciary duty to her father. With respect to the November 21, 2007 letter, Theresa testified she felt her father had "no authority" to demand sale of Whidbey Island and Motor Place. With regard to the May 5, 2008 letter, Theresa testified "we felt it was not our obligation to provide accountings."²⁸

b. Confidential Relationship

Throughout the time period covered by the foregoing background presentation, the parties to this action were in a confidential relationship. Frank Rozzano is the father of Di'Donna, Robert, Theresa and Mara.²⁹ After Velda died, Mara lived with her

²⁸ CP 100-101 (D. Laurence Decl. Ex. B (T. Rozzan-Preston Depo.) at p. 94 line 2 – p. 100 line 7).

²⁹ CP 197 (Declaration of Theresa Rozzano-Preston in Support of Defendant's Motion for Summary Judgment ("T. Rozzano-Preston

father to look after him, and Theresa visited him, and during this time developed concerns about his consumption of alcohol.³⁰ Theresa and Mara are licensed attorneys³¹, and therefore have professional duties to avoid conflicts of interest and to be careful in dealing with unrepresented people, even (and perhaps especially) family members. Robert is a Snohomish County Deputy Sheriff.³² As described in more detail below, the children were involved in estate planning discussions; were involved in receiving income from real estate contracts, and communicating about them with their father; and were involved in handling bank accounts and communicating about them with their father. The children are shareholders in Greenwood Shopping Center, Inc.³³ Theresa Rozzano-Preston is also a member of the Board of Directors of that

Decl.”) ¶3); CP 194-195 (Declaration of Mara Rozzano in Support of Defendant’s Motion for Summary Judgment (“M. Rozzano Decl.”) ¶3); CP 201 (Declaration of Robert Rozzano in Support of Defendant’s Motion for Summary Judgment (“R. Rozzano Decl.”) ¶3).

³⁰ CP 85 (D. Laurence Decl. Ex. B (T. Rozzano-Preston Depo.) at p. 27 line 22 – p. 28 line 14); CP 86 (D. Laurence Decl. Ex. B at p. 30 lines 14-21); CP 103-104 (D. Laurence Decl. Ex. B at p. 117 line 1 – p. 118 line 3).

³¹ CP 161-162 (D. Laurence Decl. Ex. Q).

³² CP 65 (D. Laurence Decl. Ex. A (Robert Rozzano Depo.) p. 4, line 23 - p. 5, line 1).

³³ CP 79 (D. Laurence Decl. Ex. A (R. Rozzano Depo.) at p. 100 lines 5-6); CP 88 (D. Laurence Decl. Ex. B (T. Rozzano-Preston Depo.) at p. 40 lines 13-24).

corporation.³⁴ Di'Donna Rozzano testified in her deposition that she told her father she would take care of him.³⁵ Theresa Rozzano-Preston testified that she understood her father thought they would take care of him “no matter what” out of the love they had for him.³⁶

The following exchange during Theresa's deposition demonstrates their close relationship, and the tenor of the relationship that Frank is contending he relied upon in transferring assets to his children:

Q Did Mr. Dussault ever tell you that if you received a request from your father for payment out of those assets that you could not make that payment to him or on his behalf?

A Why would he -- I don't think he would tell us what we could or couldn't do, no.

Q Did Mr. Dussault tell your father that if the children wanted to, they could spend money to take care of him or to meet his requests out of the assets that were being transferred to him?

³⁴ CP 83 (D. Laurence Decl. Ex. B (T. Rozzano-Preston Depo.) at p. 14 line 19 – p. 18 line 24); CP 87-88 (D. Laurence Decl. Ex. B at p. 37 line 25 – p. 38 line 14).

³⁵ CP 62 (D. Laurence Decl. Decl. ¶20).

³⁶ CP 92 (D. Laurence Decl. Ex. B (T. Rozzano-Preston Depo.) at p. 64 lines 8-12).

A I don't recall any statements like that. I really don't recall what Mr. Dussault said to my father about could or couldn't or whatever. I do recall him saying very clearly that once the money passed, they could turn their backs on you and walk away, and there's nothing that can be done. And you understand that? I think he was trying to make a point with my father.

Q Was that your intention, to turn your backs on your father and walk away?

A Of course not. We were a very strong family, very loving family. And the love and concern we have for each member of our family would never allow any of us to turn and walk away from any one of our members. And, in fact, it hurts me a great deal that I can't call my father and talk to him at times.³⁷

When the General Assignment of Interest and quit claim deeds were executed in 1996, it was Theresa who took it upon herself to selectively complete the forms provided by attorney Dussault, decided to disregard the trust aspect of his plan without consulting the attorney further, decided to allow her father to fill out the paperwork and took her father to the notary to execute the

³⁷ CP 93 (D. Laurence Decl. Ex. B (T. Rozzano-Preston Depo.) at p. 68 line 9 – p. 69 line 5).

documents without discussing with him at that time the trust aspect of the plan:³⁸

c. Concealment of Facts

A review of the correspondence from Frank's attorney to his children and their counsel demonstrates the lack of information he had about the children's intentions and behavior in regard to his assets.

Even while the Frank was participating in the estate planning effort with attorney Dussault directed to establishing an express trust, Theresa Rozzano-Preston's testimony reveals that the siblings were looking for ways to avoid having to create a trust, but did not involve their father in gathering that information. They rejected the option of a partnership because, while they wanted to enjoy the fruits of the assets, they did not want the management hassles or tax and personal liability that might come with a trust.³⁹ Although they sought financial advice, Frank was excluded from the meeting:

³⁸ CP 95-98 (*See generally*, D. Laurence Decl. Ex. B (T. Rozzano-Preston Depo.) at p. 75 line 18 – p. 86 line 9).

³⁹ CP 89 (D. Laurence Decl. Ex. B (T. Rozzano-Preston Depo.) at p. 47 line 20 – p. 49 line 21); CP 90 (D. Laurence Decl. Ex. B at p. 52 line 13 – p. 53 line 20).

Q Who else went to this meeting with the financial planner? Was it just you?

A My infant Natasha –

Q Anyone else?

A -- much to their dismay. No. I was the only one.

Q Did you invite your father to attend?

A No.

Q Why not?

A I think it was too complicated for him to understand.

Q Did you discuss that with him?

A No. Not that I recall. I don't know. I don't remember.⁴⁰

In 1996, Theresa did not execute the plan prepared by attorney Dussault. Instead, she allowed Frank to execute only the half of it that favored her and her siblings; namely the General Assignment. Neither she nor any of the other siblings returned the favor to Frank. Moreover, she had Frank execute the assignment without telling him that she would *not* execute a trust. (Of course, there is no provision in the Medicare law or any other law that

⁴⁰ CP 89-90 (D. Laurence Decl. Ex. B (T. Rozzano-Preston Depo.) at p. 49 line 22 – p. 50 line 7).

would have bared her or any of her siblings from being that open and direct with Frank.) Theresa testified:

Q Did your father ever tell you that he did not want these assets placed into an express trust?

A You mean directing me not to put it into a trust?

Q Correct.

A No.

Q Did your father ever tell you that he did not want these assets administered for his benefit?

A I don't think he said one way or the other.⁴¹

Di'Donna expressly assured him she would take care of him. Even Theresa admitted he felt the "love." Under these circumstances, it is reasonable to conclude that Frank was led to believe that he would have the benefit of his assets for whatever he could reasonably request.

Mara also testified that as early as 1999, she began to be concerned about whether her father, Frank, was experiencing mental deterioration, particularly when drinking alcohol frequently. She felt then that he was beginning to show signs of dementia.

⁴¹ CP 98 (D. Laurence Decl. Ex. B (T. Rozzano-Preston Depo.) at p. 86 lines 2-9).

She testified that he telephoned her husband on his 45th birthday three times asking the same questions. She said that generally after things were explained to Frank, he would ask the same questions again. She says he could not recall his grandchildren's names.⁴² The children's perception of his mental condition gave them a heightened duty to keep him advised of their intentions for the management of the assets they had received and his right to challenge those decisions, in court if necessary, including any issue regarding limitations periods.

At Christmas 2002, if the children are to be believed, Frank made a very proud show of giving away money. And yet, according to them, he had already done so in 1996! Yet this apparent inconsistency did not lead them to think that Frank may not have fully appreciated what he was doing.⁴³ Instead, they were content to accept the money without question or risking him changing his mind: They did not offer to accept less at Christmas, and let him

⁴² CP 62-63 (D. Laurence Decl. ¶ 21).

⁴³ A more cynical but rational interpretation is that Frank thought he was giving away money during Christmas 2002, but the "give away" was a sham event engineered by the children either to make their unsuspecting father think he was making a generous gift in order to humor his view that he had control over money they already considered the money theirs; or, more cynical still, in order to create a defense in the event he ever questioned their activities.

think about it a while. They did not advise him to seek legal advice, financial advice or tax advice. Of course, if Frank is to be believed, he was “drunker than a skunk” at the time and does not even remember what happened.⁴⁴ Both Mara and Robert testified that they have known their father to drink excessively. In part, they denied him funds for a new car because they were concerned he would drive while drunk.⁴⁵

In the 2004-2005 time frame, Frank had a mild stroke. Robert knew about it.⁴⁶

After Frank married Frieda in 2005, the children became concerned about Frank’s alcohol abuse, which had been a lifelong issue for him.⁴⁷ At the same time, Frank was asking them questions: “Why didn't we -- why didn't we put this into like a partnership or a trust? Why didn't -- why did I have to transfer this over? What assets were there transferred over? Whatever

⁴⁴ CP 238 (S. Duncan Decl. at p. 12 lines 15-18).

⁴⁵ CP 69 (D. Laurence Decl. Ex. A (R. Rozzano Depo.) at p. 31 lines 11-17); CP 70 (D. Laurence Decl. Ex. A at p. 36 line 10 – p. 37 line 3).

⁴⁶ CP 81 (D. Laurence Decl. Ex. A (R. Rozzano Depo.) at p. 118 lines 18-24).

⁴⁷ CP 69 (D. Laurence Decl. Ex. A (R. Rozzano Depo.) at p. 32 line 14 – p. 33 line 7); CP 70 (D. Laurence Decl. Ex. A at p. 36 line 16 – p. 38 line 10); CP 102 (D. Laurence Decl. Ex. B (T. Rozzano-Preston Depo.) at p. 106 lines 11-16); CP 62-63 (D. Laurence Decl. ¶20).

happened to my IRA accounts?”⁴⁸ Theresa assured him there was no reason for concern. They told him “Dad, you know why this was done. You and mom were the ones who instigated it.” And they went through an undescribed “scenario, the history of what happened,” to which he would say “Oh, yeah. Yeah. Yeah.”⁴⁹ Yet this was a deceptive explanation, because Frank was telling her he did *not* know why there was no trust, and the plan he and Velda had planned had *included* an express trust. It is noteworthy, too, that Theresa knew her father to be “easily persuaded by people.”⁵⁰ Moreover, the children did not write out an explanation in case he had further concerns or future questions. They did not provide him an accounting.⁵¹

Also in 2005, when Frank attempted to get legal advice from attorney Bruce Bell concerning the transfers of wealth to his children, Theresa spoke “briefly” with his lawyer. Although exactly what was said in that conversation is unclear, attorney Bell sent her

⁴⁸ CP 98 (D. Laurence Decl. Ex. B (T. Rozzano-Preston Depo.) at p. 88 lines 6-9).

⁴⁹ CP 98 (D. Laurence Decl. Ex. B (T. Rozzano-Preston Depo.) at p. 88 lines 14-19).

⁵⁰ CP 99 (D. Laurence Decl. Ex. B (T. Rozzano-Preston Depo.) at p. 92 line 4).

⁵¹ CP 98 (D. Laurence Decl. Ex. B (T. Rozzano-Preston Depo.) at p. 86 line 10 – p. 89 line 13).

a letter revoking her power of attorney.⁵² Mr. Bell did not pursue further additional remedial action. Even so, Theresa did not confer with all of her siblings regarding what to say to Mr. Bell and the children did not all respond to Mr. Bell's inquiry⁵³. Clearly, they did not encourage a thorough investigation of the facts, and did not offer any kind of accounting or written explanation.

Indeed, the Rozzano Children's same blank refusal to respond to inquiries short of what may be compelled in litigation is evident in the course of Mr. Laurence's numerous attempts to get information and resolve this matter.⁵⁴

Therefore, throughout the period since the General Assignment of Interest was executed, the Rozzano Children have abused their confidential relationship with Frank Rozzano to lull him into a false sense of security that his "former" assets would be used primarily for his benefit while he was alive, ignored their fiduciary duty, and in that context acted to conceal matters that could have led him to file suit earlier.

⁵² CP 80 (D. Laurence Decl. Ex. A (R. Rozzano Depo.) at p. 107 line 8 – p. 108 line 10).

⁵³ CP 80 (D. Laurence Decl. Ex. A (R. Rozzano Depo.) at p. 107 line 8 – p. 108 line 10).

⁵⁴ See CP 145-155 (D. Laurence Decl. Exs. L-O).

d. Harms

Frank was harmed by his children's behavior with respect to the assets in question, both before and after the three year mark preceding the commencement of this action on July 10, 2008.

Frank was harmed because his children used assets that should be available to him for their own purposes. The Rozzano Children's position in this lawsuit is that the assets allegedly conveyed to them by way of the General Assignment of Interest and associated quit claim deeds are all theirs. At Christmas 2002, they split up the proceeds of Frank's real property holdings. It is uncontested that that even before then, they had spent that money on various personal items, such as Mara's home, Robert's vacation home in Chelan, Di'Donna's child's divorce, Theresa's children's education, and other things.

Similarly, in 2006, the children distributed the proceeds from the sale of the Garden Grove Condominium to themselves.

Frank Rozzano was also harmed because some requests he made within the last three years for funds were denied. Specifically, his children refused to pay for some items that would promote Frank's happiness, welfare and comfort as contemplated by the trust agreement attorney Dussault drew up; such as refusing

to pay for Frank's wife, Frieda, to accompany him on a fishing trip, and the purchase of a car.

The Rozzano Children failed to honor their father's Termination and Revocation of General Assignment of Interest issued to them in early 2007, and refused to honor their father's request to disavow in writing any interest in Frank's Greenwood Shopping Center stock. The latter refusal apparently contributed to the difficulty Frank had attempting to sell his shares to generate cash, because the only inquiry he received in response to his notice of willingness to sell was from a fellow shareholder who asked, "Will the shares be taken out of Trust once transferred?"; apparently expressing some nervousness about Frank's title to the shares. Yet, the letter Frank sent out advising of Frank's interest in selling did not mention a trust.⁵⁵

C. ARGUMENT

Summary judgment orders are reviewed *de novo*. *E.g.*, *Int'l Bhd. of Elec. Workers, Local Union No. 46 v. Trig Elec. Constr. Co.*, 142 Wn.2d 431, 434-35, 13 P.3d 622 (2000), *cert. denied*, 532 U.S. 1002 (2001). Summary judgment is proper where there is no genuine issue of material fact and the moving party is entitled to

⁵⁵ CP 164 & 62 (D. Laurence Decl. Ex. R & ¶19).

judgment as a matter of law. CR 56(c).⁵⁶ Because the statute of limitations is an affirmative defense, the Rozzano Children are in the position of having to prove an absence of a genuine issue of material fact on each consideration relevant to the defense. The Rozzano Children here have the burden of proving that the limitations period has run. *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)). The court "must deny a motion for summary judgment if the record shows any reasonable hypothesis that entitles the non-moving party to relief."

⁵⁶ Although the Court is surely familiar with the rules on summary judgment, the following principles are particularly applicable here: When deciding a summary judgment motion, "[t]he court must consider all facts submitted and all reasonable inferences from the facts in the light most favorable to the nonmoving party"; here, Frank Rozzano. *E.g.*, *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998); *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). "Any doubts as to the existence of a genuine issue of material fact are resolved against the moving party." *Voorde Poorte v. Evans*, 66 Wn.App. 358, 361, 832 P.2d 105 (1992). Summary judgment is not proper "if reasonable minds could draw different conclusions" from the evidence. *Security State Bank v. Burk*, 100 Wn.App. 94, 102, 995 P.2d 1272 (2000). The court is not permitted to weigh the evidence or resolve any factual issues in ruling on a motion for summary judgment. *Fleming v. Smith*, 64 Wn.2d 181, 185, 390 P.2d 990 (1964). In tort actions, issues of negligence and causation are questions of fact not usually susceptible to summary judgment. *Ruff v. County of King*, 125 Wn.2d 697, 703, 887 P.2d 886 (1995) (citing *LaPlante v. State of Wash.*, 85 Wn.2d 154, 159, 531 P.2d 299 (1975)).

Mostrom v. Pettibon, 25 Wn.App. 158, 162, 607 P.2d 864 (1980).

When the summary judgment standard is applied, the only possible conclusion here is that the Rozzano Children's motion must be denied, because they have not met their burden to prove an un rebuttable affirmative defense based on the pertinent statutes of limitations and the absence of a genuine issue of material fact.

1. **The Lack of Clear, Cogent and Convincing Actual or Reasonable Notice of Breaches of Duty Means the Limitations Period Did Not Commence**

Fraud, misrepresentation, bad faith, or mere overreaching that leads to unjust enrichment forms the basis of a constructive trust claim. *Baker v. Leonard*, 120 Wn.2d 538, 547-48, 843 P.2d 1050 (1993); *see also*, *Boardman v. Waterous*, 178 Wash. 690, 35 P.2d 1106 (1934); *Arneman v. Arneman*, 43 Wn.2d 787, 264 P.2d 256 (1953); *Goodman v. Goodman*, 128 Wn.2d 366, 907 P.2d 290 (1995). A wrongful act occurs when the trustee unequivocally denies the existence of the trust and claims the trust property as his own. *Goodman*, 128 Wn.2d at 373. Still, a constructive trust may arise even though acquisition of the property is not wrongful at all, such as where a legal title holder is not an intended beneficiary of the grantor. *Mehelich v. Mehelich*, 7 Wn.App. 545, 551, 500 P.2d 779 (1972) (citation omitted). A constructive trust will be found

when property is acquired under any circumstances such that the holder of legal title would be unjustly enriched at the expense of another party. *Huber v. Coast Investment Co.*, 30 Wn.App. 804, 810, 638 P.2d 609 (1981).

The limitations period on a constructive trust action does not begin to run until the purported beneficiary discovers or should have discovered the wrongful act (or adverse claim to the property at issue) which gives rise to the right to seek a constructive trust. *Goodman*, 128 Wn.2d at 373 n.2. *See also, Estate of Ehlers*, 80 Wn.App. 751, 911 P.2d 1017 (1996) (accounting is due to any beneficiary of a trust if trust assets remain, regardless of when trust was created or trust assets were distributed). Once there are sufficient facts to create reasonable notice of termination or repudiation of the trust, the plaintiff has three years in which to sue. *Goodman*, 128 Wn.2d at 373. If “clear, cogent and convincing” evidence is required to establish a constructive trust, *Baker*, 120 Wn.2d at 547⁵⁷, then, Frank Rozzano contends, that same high level of notice must be evident to the plaintiff, or reasonably

⁵⁷ *But see Yates v. Taylor*, 58 Wn.App. 187, 191, 791 P.2d 924 (1990) (it is not necessary to prove a constructive trust by clear, cogent and convincing evidence unless the underlying theory – such as fraud – requires such proof).

discoverable by him, before the plaintiff is required to trigger a duty to sue sufficient to commence the limitations period.

Here, Frank Rozzano did not have sufficient facts to create reasonable notice of termination or repudiation of the trust relationship because his children's actions and omissions led him to believe the property he had transferred to them was being held for his benefit. Thus, they are estopped from asserting a limitations defense.

a. Limitations defenses are bared by estoppel *in pais* and the Confidential Relationship Doctrine

A defendant that conceals facts or otherwise induces a plaintiff not to bring suit within the applicable limitations period is estopped from asserting the defense of the statute of limitations. *See, e.g., In re Neisz's Estate*, 152 Wash. 336, 277 P. 849 (1929)(claim for constructive trust arose on minor reaching age of majority after self-dealing by guardian); *Ryan v. Plath*, 18 Wn.2d 839, 140 P.2d 968 (1943)(claim for constructive trust arose after facts of negotiations between estate and administrator's corporation came to light showing self-dealing by estate administrator); *Viewcrest Co-op Ass'n v. Deer*, 70 Wn.2d 290, 422 P.2d 832 (1967)(limitations period would not begin to run on claim for

constructive trust in absence of evidence that plaintiff discovered or through reasonable diligence could have discovered facts showing fraudulent conduct); *Central Heat, Inc. v. Daily Olympian, Inc.*, 74 Wn.2d 126, 443 P.2d 544 (1968)(claim for promissory estoppel); *Peterson v. Groves*, 111 Wn.App. 306, 44 P.3d 894 (2002)(claim for promissory estoppel).

Where a confidential relationship exists between the parties, it is not necessary to show fraud to establish a bar to the limitations defense in a constructive trust case. This is because a constructive trust will arise on the basis of unjust enrichment, regardless of whether a fraud was perpetrated in the securing of the riches. Where one holds property for the benefit of another, there is a fiduciary relationship, such that fiduciary has duty to inform the beneficiary of all facts that would aid the beneficiary in protecting his interest. *Esmieu v. Schrag*, 88 Wn.2d 490, 498, 563 P. 2d 203 (1977). But in the context of limitations analysis, even in the absence of a traditional fiduciary relationship, such as lawyer and client (though some of the defendants here are lawyers), a confidential relationship may exist where one pe

erson has gained the other's confidence and purports to act or advise with the other's interest in mind, and give rise to a similar

duty to inform the other of all facts material to the enforcement of his legal rights against that person. *McCutcheon v. Brownfield*, 2 Wn.App. 348, 356-57, 467 P.2d 868 (1970). A confidential relationship is especially likely to exist between family members. *McCutcheon*, 2 Wn.App. at 357 (citations omitted). A person's breach of that duty will bar that person from asserting a limitations defense.

A particularly appropriate example is *Mehelich v. Mehelich*, 7 Wn.App. 545, 500 P.2d 779 (1972). There, a father and son (joined by the son's wife) disputed the ownership of proceeds from the sale of property on which the father lived since 1949. The father believed he was buying the property, not renting it, from the son, and so paid fire insurance and taxes on it, and in 1958 paid off a mortgage taken out by the son. But the son contended the son owned it and the father only had a life estate. The Court of Appeals held that a father was not time-barred by laches from asserting a constructive trust, even though his son had, in 1958, refused to give him a deed on demand. The court reasoned that the two parties were in a confidential relationship, and because the father's son had refused to give him a deed on demand which would have disclosed the son's position as to ownership of the property, and

thus given notice to the father of the title dispute and his right to seek a legal remedy, the son was equitably estopped from asserting a limitations defense.

Here, as described in detail above, Frank Rozzano and his children were in a confidential relationship, and the children had fiduciary duties to Frank. There is at least a genuine issue of material fact with regard to whether their behavior should estop them from claiming that Frank should have acted earlier than he did to pursue his rights in court.

b. Regardless of estoppel *in pais*, at least a genuine issue of material fact exists with respect to whether Frank Rozzano had any duty to sue his children earlier under the circumstances.

Even if the doctrine of estoppel *in pais* were inapplicable here to bar the Rozzano Children's limitations defense, this Court should not conclude as a matter of law that Frank Rozzano knew or should have known all the elements of his causes of action before July 10, 2005.

The Rozzano Children's summary judgment motion argues that Frank discovered in 2005 that his children had made misrepresentations to him at the time of his first wife Velda's death,

which was in January 1994.⁵⁸ But the Rozzano Children's argument does not appear to apply to any misrepresentations that may have occurred after January 1994, and thus is largely irrelevant to the claims in this lawsuit.

The Rozzano Children's motion argues that Frank knew that his children had fleeced him as early as the time he bought the condo. They rely on the following exchange in his deposition:

Q But you can't recall ever making any gifts to your children?

A Any gifts?

Q Correct.

MR. LAURENCE: Any gifts of any kind? Vague and ambiguous with regard to scope.

Q (By Ms. Duncan) Gifts of property or money?

MR. LAURENCE: At any time in the history?

Q (By Ms. Duncan) In the last -- since 1996.

A The money was gone. I knew that when I bought the condo.⁵⁹

It is unclear from the transcript what Frank meant by his remark. Also, he never bought the condo; Robert did in 1999. It is

⁵⁸ See CP 239-240 (S. Duncan Decl. at pp. 13-14).

⁵⁹ CP 240-241 (Declaration of Sarah E. Duncan in Support of Defendant's Motion for Summary Judgment ("S. Duncan Decl."), p. 14 line 23 – p. 15 line 6 (F. Rozzano Depo. p. 53 lines 2-10)).

also unclear what Frank meant by “gone”: A reasonable interpretation of the meaning of his answer is that they already had the money so he could not gift what was in their possession: That is the extent of any reasonable inference from this testimony. The testimony does not necessarily mean that he knew they were asserting exclusive rights to “the money,” whatever money that may be. Summary judgment law does not permit the Rozzano Children to draw such a self-serving inference. Neither do the facts: The purchase documentation for the condo states that it is being purchased by his “Trustees”. He was allowed to live there rent-free while paying expenses⁶⁰; facts consistent with having an equitable interest in the condominium and, *ipso facto* under the circumstances, the money used to purchase it. Moreover, the Frank Rozzano’s insistence that Frank gave away substantial sums of money to his kids in 2002 contradicts their position that he knew in 1999 that he had no right to it.

The Rozzano Children’s motion also argues that Frank realized he was not receiving “rental” proceeds from the Motor Place property about three or four years after his first wife, Velda,

⁶⁰ CP 80 (D. Laurence Decl. Ex. A (R. Rozzano Depo.) at p. 106 lines 14-24).

died.⁶¹ Yet, the Rozzano Children contend that the rental proceeds barely cover the maintenance expenses of Motor Place, the Whidbey Island property and the Garden Grove condo, and have thrown off very little extra cash – a few hundreds of dollars that were used for a family dinner and Robert’s daughter’s wedding dress.⁶² So, at least insofar as dinner and condo expenses were concerned, and with regard to the properties insofar as he felt he had an equitable interest in them, Frank was getting a benefit from that money, despite what he may have thought, and if he had looked into it, that fact would have militated against initiating a lawsuit; at least would have muddied the waters with regard to whether a legal claim with respect to administration of Motor Place was ripe at that point.

2. Remedies Other than Constructive Trust are Also Not Time-Barred.

Even if the Court eventually were to find no unjust enrichment and thus, no need to impose a constructive trust, other remedies for the causes of action – fraud, misrepresentation, undue influence, conversion, breach of trust/fiduciary duty, promissory

⁶¹ CP 242 (S. Duncan Decl. at p. 16).

⁶² CP 73 (D. Laurence Decl. Ex. A (R. Rozzano Depo.) at p. 61 lines 10-14); CP 77-78 (D. Laurence Decl. Ex. A at p. 87 line 8 – p. 90 line 9).

estoppel and negligent and intentional infliction of emotional distress – and their associated remedies are available. As the Rozzano Children acknowledge, those theories are all subject to a discovery rule in respect to the beginning of the applicable limitations period. For the same reasons discussed above, Frank Rozzano could not have reasonably discovered the facts necessary to discover the breaches, and thus start the running of those periods more than three years before suit was filed.

3. The Trial Court Misapplied the Summary Judgment Standard.

In general, the trial court improperly ignored and discounted facts and inferences favoring Frank Rozzano's arguments.⁶³

The trial court concluded that it is beyond reasonable dispute that more than three years to filing this suit, Frank Rozzano knew or could reasonably have discovered facts to put him on notice of his potential claims. The trial court reasoned that because Frank did not sign the documents Mr. Dussault prepared in 1994, and Mr. Dussault sent a letter addressed to Frank in 2000, Frank therefore knew "hard and fast" that the assets he transferred under the

⁶³ In addition to the briefs and records cited, see *generally* Frank Rozzano's counsel's oral argument to the court. RP 37-56.

General Assignment of Interest were not in trust.⁶⁴ This conclusion is improper. Frank's receipt of Mr. Dussault's 2000 letter, which advised Frank that the trust document had not been executed, has yet to be proved. It was apparently sent to an address in Bothell, a city in which Frank never lived.⁶⁵ The only reasonable inferences from the fact that Mr. Dussault drew up and mailed the letter are (a) that Mr. Dussault may have known that the agreement for an express trust document that *he* drew up was not executed; and (b) that he did not know what the Rozzanos were doing. The existence and mailing of the letter, without proof of receipt, do not preclude an inference that Frank thought that the trust document had been executed or that the assets would be treated as being in trust independent of such a document. (After all, the General Assignment of Interest was executed without Mr. Dussault's involvement and there are numerous references to the existence of a trust prior to 2000 in the record. Nor does the 2000 letter conclusively preclude the inference that imposing a constructive trust would be equitable based on Frank's discoveries, within three years prior to filing suit, that his children were not willing to use the

⁶⁴ See RP 60 line 20 – RP 62 line 21.

⁶⁵ See RP 43 lines 1-23.

assets for his benefit in the manner he saw fit. Moreover, the trial court's reliance on the 2000 letter to prove that the 1996 General Assignment of Interest and quit claim deeds were "as a gift not in trust"⁶⁶ is nonsensical; if the trial court is postulating that is reasonable to infer that Frank did not learn until 2000 that there was no trust, that fact does not preclude the conclusion that he must have intended the 1996 transfers to be part of a trust (again, for which there is ample suggestion in the Rozzano Children's various admissions).

The trial court also apparently reasoned that no trust existed or should exist because Frank did not receive rents or payments on the transferred real properties.⁶⁷ However, Frank's non-receipt of such funds is also consistent with the inference that he believed the children holding the money and property as trustees. Paradoxically, even the trial court notes that the Rozzano Children used some of the money to purchase a condominium in which he lived rent-free (using documentation stating that it was being purchased by the "Trustees for F.A. Rozzano"⁶⁸); again consistent with recognition of

⁶⁶ RP 62 lines 20-21.

⁶⁷ RP 62 line 22 – RP 63 line 5.

⁶⁸ CP 143 (D. Laurence Decl. Ex. K).

a trust for his benefit.⁶⁹ Thus, non-distribution should not necessarily alarm a beneficiary to the point of filing suit.

Next, the trial court relied upon the events of Christmas 2002. While acknowledging Frank's argument that it makes no sense to view his actions at that time as making a "gift" if there was already a completed gift (as distinct his children contend), the court nevertheless – without overt reasoning – chose to simply call the Christmas event a "re-gift".⁷⁰ This conclusion ignores the admissions by Frank's children that they told him his assets were in trust, the testimony that he was intoxicated at Christmas, and the reasonable inference (in light of all the other facts) that Frank was being manipulated at that time. The law does not permit the court to ignore such facts and inferences on summary judgment.

Curiously, the trial court goes so far as to state "We're talking about whether or not there are material facts at issue, not whether there are material inferences at issue. That's not the standard."⁷¹ Based on that erroneous statement of the law, the trial court concluded that Frank's October 25, 2005 visit with attorney Bruce Bell, the substance of which is not in the record, and which

⁶⁹ RP 63 lines 5-10.

⁷⁰ RP 63 lines 11-24.

⁷¹ RP 64 lines 6-9.

resulted in Frank's daughter Theresa speaking alone with Mr. Bell and later resigning as his attorney in fact⁷², is not a fact from which one might reasonably infer that she had talked Frank out of suing her. Frank contends the opposite is true.

The trial court concluded by remarking that Mr. Rozzano did not present any material facts by virtue of his own testimony or evidence.⁷³ This is plainly not so. His pertinent deposition testimony was quoted to the court as it is above. Moreover, there are plenty of other facts, including without limitation documents and opponents' admissions, and reasonable inferences drawn from those facts, that support his claims.

Fundamentally, the trial court improperly undertook to find facts, rather than to acknowledge Frank's side of the story and send the matter to trial as it should have done.

E. CONCLUSION

The Rozzano Children have not met their burden to show the absence of a genuine material factual issue on each element of their affirmative defense with respect to each of Frank Rozzano's liability theories. There are numerous genuine issues of material

⁷² CP 80 (D. Laurence Decl. Ex. A (R. Rozzano Depo.) at p. 107 line 8 – p. 108 line 10).

⁷³ RP 64 line 12 – RP 65 line 5; RP 66 lines 4-9.

fact with respect to whether the Rozzano Children, in light of their confidential relationship with Frank Rozzano, acted in such a manner as to be estopped from asserting a limitations defense. That is sufficient reason to deny their motion. In the alternative, there is at least a genuine issue of material fact with respect to whether Frank Rozzano had sufficient knowledge to commence the running of the limitations periods.

From 1996 to 2002, Frank and his children spoke and interacted with each other as if they had created a trust, despite the fact that no express trust document was signed. At the same time, the four Rozzano children claimed and used at least some of those assets for their own purposes. There is a genuine factual dispute regarding Frank's state of mind and intentions during the distribution of Christmas 2002. The children since Christmas 2002 treated all property received from Frank specifically described in the General Assignment of Interest (real properties, income from real properties, and loan receivables), and the proceeds thereof, as theirs alone in right. Yet, since then, they also continued to lull Frank with the mixed message that they will care for him while refusing to send him his money or otherwise honor his requests for

assets, for an accounting, or even for a serious conversation directed to explaining and mediating the issues.

Within the three years prior to commencement of this action, the children distributed the Garden Grove condominium proceeds to themselves, refused to acknowledge a fiduciary duty, refused to honor Frank's requests to pay reasonable vacation expenses and car expenses, refused to provide an accounting, apparently harmed Frank's ability to sell his Greenwood Shopping Center shares, and refused to honor his Termination and Revocation of Assignment of Interest.

The plan as attorney Dussault presented in 1994 was a *quid pro quo*: An assignment, and a trust in return. The children, contrary to the advice of Mr. Dussault, misled their father into doing his part, and they never did theirs. Worse, they concealed their intentions: They never clearly warned Frank that they did not intend to put his assets into trust or manage them for his benefit, or confer with him with regard to each withdrawal of those assets for their own purposes while he was alive, and that he would lose all real discretion with regard to how that money would be spent. It is easy to infer from the facts that he certainly would not have given it all away had he known that it would not be used for his benefit and

at his direction. If Frank ever decided that not having the assets in an express trust was acceptable to him, he never disavowed the idea that the assets would be administered primarily for his benefit while he was alive. Indeed, it is reasonable to infer that if he discarded the idea of an express trust whether before or after executing the General Assignment, he did so in part because he had been advised that placing the assets in an express trust would prohibit him from administering them.

In light of the confidential relationship and concealments described above, at least on summary judgment, it is reasonable to infer that Frank's children impaired Frank's ability to investigate and seek a remedy, and failed to advise their father as they should have of his rights, and thus should not be granted dismissal at this stage based on their limitations defenses.

Frank Rozzano respectfully requests that this Court reverse the decision of the Superior Court to the extent it dismissed his claims on limitations grounds, and remand the matter for further proceedings consistent with such an order.

DATED: May 17, 2010.

Respectfully submitted,

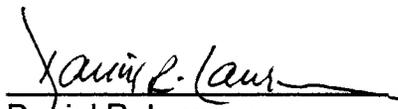
A handwritten signature in black ink, appearing to read "Daniel R. Laurence", is written over a solid horizontal line.

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.

DATED: May 17, 2010, at Marysville, Washington.


Daniel R. Laurence
WSBA No. 19697

2010 MAY 17 PM 1:41
