

64371-1

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NO. 64371-1-I

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

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 RON DOERSCH and the marital community thereof;
and DONNA M. ROZZANO WHITE,

Respondents.

BRIEF OF RESPONDENTS

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ORIGINAL

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I. STATEMENT OF THE ISSUES

A. Whether Frank Rozzano's claims against his children, which arise out of facts that occurred more than 14 years ago, are barred by the statute of limitations when Frank Rozzano filed his complaint on July 10, 2008 and he failed to exercise due diligence upon being put on notice of facts giving rise to his claims?

B. Whether Frank Rozzano was put on notice of facts giving rise to his claims before July 10, 2005, which is three years prior to commencement of Frank Rozzano's lawsuit against his children?

C. Did the trial court properly conclude that equitable estoppel does not apply to bar the children from asserting the statute of limitations as a defense?

II. STATEMENT OF THE CASE

A. Procedural History.

Appellant Frank A. Rozzano is an 87-year old man who filed suit against all of his children and their respective spouses, Respondents, to recover property that Frank Rozzano gifted to his children more than 14 years ago. Frank Rozzano filed suit on July 10, 2008 in the Snohomish

County Superior Court¹ alleging seven different causes against his children, including misrepresentation and fraud², undue influence³, conversion⁴, breach of trust and fiduciary duty⁵, promissory estoppel⁶, negligent infliction of emotional distress⁷, intentional infliction of emotional distress⁸ as well as damages⁹. On October 22, 2009, the trial court entered an order granting summary judgment in favor of the children and their spouses to dismiss all of Frank Rozzano's claims and causes of action on the basis that all of the claims are barred by the statute of limitations.¹⁰ The order was filed with the Snohomish County Superior Court on October 26, 2009.¹¹ On October 29, 2009, Frank Rozzano filed a Notice of Appeal to seek review by this Court of the trial court's decision to dismiss Frank Rozzano's claims on summary judgment.¹²

¹ CP 286 (Summons).

² CP 299 (Complaint).

³ CP 299-300.

⁴ CP 300.

⁵ CP 300-301.

⁶ CP 301.

⁷ CP 301.

⁸ CP 301-302.

⁹ CP 302.

¹⁰ CP 38 (Ex-Parte Minutes).

¹¹ CP 22 (Order).

¹² CP 5 (Notice of Appeal).

B. Introduction and Time Line of Events.

This matter concerns property that was gifted by Frank Rozzano (“Frank”) to his children, Theresa Rozzano-Preston, Robert Rozzano, Mara Rozzano and Di’Dionna White Rozzano (“Rozzano Children”) more than 14 years ago on February 10, 1996. For convenience of this Court, the Rozzano Children present the following time line of key events that have taken place over the past 16 years. This time line is followed by a narrative description of the material facts of this matter. Also attached to this brief in the Appendix is a copy of the time line that legal counsel for the Rozzano Children used to facilitate and present oral argument to the trial court.

- January 13, 1994: Death of Frank's former wife, Velda Rozzano¹³
- May 1994: Attorney William Dussault of Seattle, WA prepared and mailed forms to Frank to be used to gift assets to his children¹⁴
- February 10, 1996: Frank gifted assets to the Rozzano Children by signing the Assignment of Interest and the Quit Claim Deeds¹⁵

¹³ CP 201 (Decl. of Robert Rozzano).

¹⁴ CP 108-110 (Declaration of Daniel Laurence, Ex. D).

¹⁵ CP 209-211 (Decl. of Thomas Adams, Ex. A), CP 213-114 (*Id.*, Ex. B), CP 216-217 (*Id.*, Ex. C), CP 219-220 (*Id.*, Ex. D).

- February 25, 1998: The Rozzano Children sold the real property in Seattle, WA (Corliss) and split the net sale proceeds among themselves¹⁶
- March 16, 1999: The Rozzano Children purchased the Garden Grove condominium in Everett, WA¹⁷
- December 25, 2002: The remaining cash held jointly among the Rozzano Children was divided between the children and Frank participated in the delivery of checks to the children¹⁸
- July 10, 2005: Three years prior to commencement of Frank's lawsuit¹⁹
- August 8, 2005: Frank remarried²⁰
- October 2005: Frank hired attorney, Bruce Bell, to inquire about the gifts to his children²¹
- March 25, 2006: The Rozzano Children sold Garden Grove condominium and split net sale proceeds among themselves²²
- July 10, 2008: Frank filed suit against his children

¹⁶ CP 203 (Decl. of Robert Rozzano).

¹⁷ *Id.*

¹⁸ CP 204 (Decl. of Robert Rozzano).

¹⁹ CP 286 (Summons).

²⁰ CP 240 (Decl. of Sarah Duncan, Excerpt 4 citing deposition testimony of Frank Rozzano).

²¹ CP 199 (Decl. of Theresa Rozzano-Preston).

²² CP 203 (Decl. of Robert Rozzano).

and their respective spouses²³

C. History of Velda Rozzano.

Frank is the father of Theresa Rozzano-Preston, Robert Rozzano, Mara Rozzano and Di'Dionna Rozzano-White, whom are referred to herein as the Rozzano Children.²⁴ Frank was formerly married to Velda Rozzano, who was the mother of the Rozzano Children.²⁵ Velda Rozzano passed away on January 13, 1994.²⁶

Prior to the death of Velda Rozzano, Frank and Velda Rozzano met with an attorney named William Dussault in Seattle, Washington to discuss property matters,²⁷ including estate planning, Medicaid, and other health care matters.²⁸ After the death of Velda Rozzano, Frank continued to work with attorney William Dussault to implement a plan to gift assets to his children as originally contemplated by Frank and Velda before Velda passed away.²⁹

²³ CP 286 (Summons).

²⁴ CP 201 (Decl. of Robert Rozzano).

²⁵ *Id.*

²⁶ *Id.*

²⁷ CP 228 (Decl. of Sarah Duncan, Excerpt 1 citing deposition testimony of Frank Rozzano).

²⁸ CP 202 (Decl. of Robert Rozzano).

²⁹ CP 202 (Decl. of Robert Rozzano); CP 198-199 (Decl. of Theresa Rozzano-Preston).

D. Gift of Assets to the Rozzano Children.

Sometime in May 1994, Dussault prepared and mailed to Frank drafts of the documents that would be necessary to gift Frank's assets to his four children.³⁰ Frank did not execute the documents until nearly three years later.³¹

On February 10, 1996, Frank made arrangements with his daughter, Theresa Rozzano-Preston, to meet him at a local bank near his home in Seattle because he wanted to finally follow through with the plan to gift a portion of his assets, including cash and real property, to his children as proposed by his attorney in 1994.³² At her father's request, Theresa accompanied Frank to the bank where Frank executed the forms originally prepared by his attorney Dussault to make the gifts to his children.³³ After the documents were signed, Frank gave the documents to his daughter and asked her to make arrangements to have the documents recorded.³⁴ Over the next several months, Theresa made arrangements to have the applicable documents recorded in the respective county where

³⁰ CP 108-110 (Declaration of Daniel Laurence, Ex. D).

³¹ CP 209-211 (Decl. of Thomas Adams, Ex. A), CP 213-114 (*Id.*, Ex. B), CP 216-217 (*Id.*, Ex. C), CP 219-220 (*Id.*, Ex. D).

³² CP 198 (Decl. of Theresa Rozzano-Preston).

³³ CP 198 (Decl. of Theresa Rozzano-Preston).

³⁴ *Id.*

each property was located.³⁵ After the documents were recorded, the documents were redirected back to Dussault's law office.³⁶ Dussault acknowledged receipt of the documents after they were recorded³⁷, and continued to correspond with and represent Frank for the next several years.³⁸

The documents that Frank executed on February 10, 1996 include an Assignment of Interest and three (3) Quit Claim Deeds.³⁹ The Assignment of Interest gifted Frank's interest in various real estate contracts as well as bank accounts that were holding the balance of cash collected from the real estate contracts.⁴⁰ The Quit Claim Deeds gifted Frank's interest in real property located in Washington State, particularly, in Seattle, Lynnwood and Whidbey Island.⁴¹

³⁵ *Id.*

³⁶ *Id.*

³⁷ CP 222 (Decl. of Thomas Adams, Ex. E), CP 224 (*Id.*, Ex. F), CP 226 (*Id.*, Ex. G).

³⁸ CP 198-199 (Declaration of Theresa Rozzano-Preston).

³⁹ CP 209-211 (Decl. of Thomas Adams, Ex. A), CP 213-114 (*Id.*, Ex. B), CP 216-217 (*Id.*, Ex. C), CP 219-220 (*Id.*, Ex. D).

⁴⁰ CP 195 (Decl. of Mara Rozzano)

⁴¹ *Id.*

E. No Promises Made by the Rozzano Children.

None of the Rozzano Children made assurances or promises to their father, Frank, that they would hold the gifted assets for his benefit.⁴² While it is undisputed that the Rozzano Children did consider at one time transferring the assets into a trust for their father, it was made very clear to the Rozzano Children by Frank's attorney that they would be "under no legal obligation to do so," and that the gifts from their father "were without legal condition or restriction."⁴³ None of the Rozzano Children executed a trust for the benefit of their father, nor did they promise their father that a trust would be executed for his benefit.⁴⁴

F. No Recollection of Signing Any Documents.

Frank has very little memory or recollection of signing any of the documents on February 10, 1996, nor can Frank recall who was present when he signed the documents or the location of where the signing event took place.⁴⁵ Upon asking Frank during his deposition if he recalled

⁴² CP 196 (Decl. of Mara Rozzano), CP 198 (Decl. of Theresa Rozzano-Preston), CP 203 (Decl. of Robert Rozzano).

⁴³ CP 111 (Decl. of Daniel Laurence, Ex. D), CP 202 (Decl. of Robert Rozzano).

⁴⁴ CP 196 (Decl. of Mara Rozzano), CP 200 (Decl. of Theresa Rozzano-Preston).

⁴⁵ CP 230-237 (Decl. of Sarah Duncan, Excerpt 2 citing deposition testimony of Frank Rozzano).

signing the documents on February 10, 1996, Frank stated that he cannot recall signing the documents,⁴⁶ he cannot recall if he signed them in the presence of his attorney William Dussault,⁴⁷ he cannot recall if he signed them in the presence of his children,⁴⁸ and that he had never seen some of the documents before.⁴⁹ Frank also testified during his deposition that he does not know if any of his children influenced him to sign the documents.⁵⁰

G. Events Surrounding Christmas of 2002.

After the gifts to the Rozzano Children were completed in 1996, the Rozzano Children held the real property jointly between the four of them and held the cash in various accounts owned by them, upon which some accounts were held solely by one of the Rozzano Children and some accounts were held jointly among the Rozzano Children.⁵¹ Around December of 2002, Robert Rozzano was the sole account holder for the remainder of cash that his father had gifted to him and his siblings in

⁴⁶ CP 231, 233, 235, 236 (*Id.*, Excerpt 2 citing deposition of Frank Rozzano).

⁴⁷ CP 232, 234, 235 (*Id.*).

⁴⁸ CP 232, 234, 235, 237 (*Id.*).

⁴⁹ CP 232 (*Id.*).

⁵⁰ CP 234, 235 (*Id.*).

⁵¹ CP 203 (Decl. of Robert Rozzano).

1996.⁵² Upon receiving inquiry from the IRS about the account and subsequently meeting with a tax advisor, Robert was advised by the tax advisor to separate and distribute the remaining cash among his siblings and no longer hold the funds together because of tax complications.⁵³ Since this was the money that was originally gifted to Robert and his siblings by their father, Robert discussed the final division of proceeds with Frank.⁵⁴ Frank told Robert that the money should be divided between Robert and his siblings for their own use and enjoyment as originally intended when the gifts were made in 1996.⁵⁵

Acting in accordance with his father's recommendation, Robert divided the remaining funds held in bank accounts and purchased cashier's checks made payable to each of the respective children.⁵⁶ As a symbolic gesture, Robert gave the checks to Frank to hand out to the children at the Christmas Day celebration in 2002.⁵⁷ Frank proceeded to hand out the checks to his children in a ceremonial fashion and he made a very large

⁵² *Id.*

⁵³ CP 203-204 (Decl. of Robert Rozzano).

⁵⁴ CP 204 (Decl. of Robert Rozzano).

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

presentation in doing so.⁵⁸ Upon asking Frank during his deposition if he recalled discussing the division of cash with Robert and/or handing out checks over Christmas 2002, Frank stated that he recalls being at Robert's house, but that he has no recollection of the discussions with Robert or handing out any checks to his children.⁵⁹

H. Disposition of Assets by the Rozzano Children.

As part of the gifts made on February 10, 1996, Frank gifted his interest in his primary residence in Seattle, Washington, which is referred to as the Corliss Property, to the Rozzano Children as joint tenants in equal shares.⁶⁰ After Frank moved out of the house, the Rozzano Children sold the property on or about February 25, 1998, and split the net sale proceeds among the four of them as consistent with the titling of the Deed.⁶¹ At closing of the sale, the escrow company issued checks to each of the Rozzano Children, which they deposited into their own respective personal accounts.⁶²

⁵⁸ *Id.*, CP 195 (Decl. of Mara Rozzano).

⁵⁹ CP 237-238 (Decl. of Sarah Duncan, Excerpt 3 citing deposition testimony of Frank Rozzano).

⁶⁰ CP 219-220 (Decl. of Thomas Adams, Ex. D), CP 203 (Decl. of Robert Rozzano).

⁶¹ CP 203 (Decl. of Robert Rozzano).

⁶² *Id.*

On or about March 16, 1999, the Rozzano Children purchased a condominium in Everett, Washington which is referred to as Garden Grove, and allowed Frank to live in the condominium rent free.⁶³ Frank continued to reside in the condominium until he married his current wife, Frieda Rozzano, at which such time Frank elected to move out of the condominium to live with his new wife.⁶⁴ The Rozzano Children later sold the condominium on or about March 25, 2006, and split the net sale proceeds among the four of them for their own use.⁶⁵

At present time, the Rozzano Children continue to hold title jointly to the real property in Lynnwood as well as Whidbey Island.⁶⁶ The Rozzano Children rent out the Lynnwood property, and apply the rental proceeds towards the cost of upkeep, maintenance and taxes for the Lynnwood and Whidbey Island properties.⁶⁷

III. ARGUMENT

A. STANDARD OF REVIEW.

On appeal of summary judgment, the standard of review is de novo,

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ CP 195 (Decl. of Mara Rozzano).

⁶⁷ *Id.*

and the appellate court performs the same inquiry as the trial court.⁶⁸ When ruling on a summary judgment motion, the court is to view all facts and reasonable inferences therefrom most favorably toward the non-moving party.⁶⁹ Summary judgment is properly granted when the pleadings, affidavits, and depositions establish that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.⁷⁰

B. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF THE ROZZANO CHILDREN TO DISMISS ALL OF FRANK'S CLAIMS AS BEING BARRED BY THE STATUTE OF LIMITATIONS.

1. All of Frank's Claims Are Subject To The Discovery Rule And, Consequently, Barred By The Statute Of Limitations.

It is undisputed that each of Frank's causes of action set forth in his Complaint are subject to a three-year statute of limitations and that the discovery rule applies to each cause of action. The discovery rule operates to toll the date of accrual until the plaintiff knows or, through the exercise of due diligence, should have known the facts necessary to establish a

⁶⁸ *Lybbert v. Grant County, State of Washington*, 141 Wash.2d 29, 34, 1 P.3d 1124 (2000).

⁶⁹ *Id.* at 34.

⁷⁰ *Id.*, see also CR 56(c).

legal claim.⁷¹ Thus, the limitations period does not begin to run until the plaintiff discovers the facts constituting the claim.⁷² Actual knowledge will be inferred if the aggrieved party, by the exercise of due diligence, could have discovered the facts necessary to give rise to a claim.⁷³

Lack of knowledge of the facts can be excused, but only if the claimant shows impediments to an earlier prosecution of the claim, including the reasons why the claimant did not know of the cause of action, the means used by the culprits to keep him ignorant, and how he first obtained knowledge of the fraud.⁷⁴ The burden is upon the plaintiff to show that the facts constituting the plaintiff's claims were not discovered, or could not be discovered, until within three years prior to the commencement of the action.⁷⁵

For any of Frank's claims to survive being barred by the statute of limitations, Frank would need to prove that the facts constituting his claims were not discovered, or could not be discovered through exercise of

⁷¹ *Allen v. State*, 118 Wash.2d 753, 758, 826 P.2d 200 (1992).

⁷² *Sherbeck v. Estate of Lyman*, 15 Wash.App. 866, 868, 552 P.2d 1076 (1976).

⁷³ *Id.* at 868-869.

⁷⁴ *Douglass v. Stanger*, 101 Wash.App 243, 256, 2 P.3d 998 (2000) (citing *In re Estate of Sackman*, 34 Wash.2d 864, 869, 210 P.2d 682 (1949)).

⁷⁵ *Id.* at 256 (citing *Interlake Porsche & Audi, Inc. v. Bucholz*, 45 Wash.App. 502, 518, 728 P.2d 597 (1986)).

due diligence, until July 10, 2005, which is three years prior to the commencement of the action. Frank cannot meet that burden because the record clearly shows that Frank was aware of the facts necessary to establish all of his alleged claims well before July 10, 2005. Furthermore, there is no evidence in the record to support Frank's contention that the Rozzano Children concealed information from him, which prohibited him from taking action in a timely manner.

a) There Is No Genuine Issue Of Material Fact That Frank Was Aware Of The Facts Giving Rise To All Of His Claims Before July 10, 2005.

The record contains ample evidence that Frank was aware of the facts necessary to establish his claims before July 10, 2005, which is three years prior to the commencement of Frank's suit. Based on unrefuted, direct testimony of Frank himself, Frank was aware of the facts giving rise to his claims as early as 1994 when his wife died to as late as 2005 when he remarried. First, Frank testified during his deposition that he believed that his children misrepresented him at the time his first wife, Velda Rozzano, passed away,⁷⁶ which was January 13, 1994.⁷⁷ Frank attempted

⁷⁶ CP 239 (Decl. of Sarah Duncan, Excerpt 4 citing deposition testimony of Frank Rozzano).

⁷⁷ CP 201 (Decl. of Robert Rozzano).

to clarify further that he did not know when he discovered that his children misrepresented him, but "probably towards the end before I got married again."⁷⁸ Frank married his current wife, Frieda, on or about August 8, 2005.⁷⁹ Based on this testimony, Frank admits he was aware of the alleged misrepresentation in 1994 when his wife died and also prior to his second marriage in August 2005.

Second, Frank testified during his deposition that he was aware that the money he gifted to his children was gone at the time the condominium in Everett was purchased in 1999.⁸⁰ Frank also acknowledged that his requests for money were turned down by his children at that same time when the condominium was purchased.⁸¹ The Rozzano Children purchased the Everett condominium on or about March 16, 1999.⁸² Based on Frank's testimony, Frank was aware that the money he gifted to his children was gone and that his children did not comply with his requests for money around the date the condominium was

⁷⁸ CP 239-240 (Decl. of Sarah Duncan, Excerpt 4 citing deposition testimony of Frank Rozzano).

⁷⁹ CP 240 (*Id.*).

⁸⁰ CP 240-241 (Decl. of Sarah Duncan, Excerpt 5 citing deposition testimony of Frank Rozzano).

⁸¹ CP 241 (Decl. of Sarah Duncan, Excerpt 6 citing deposition testimony of Frank Rozzano).

⁸² CP 203 (Decl. of Robert Rozzano).

purchased in 1999.

Third, Frank testified during his deposition that he was supposed to receive rental proceeds from his children from the houses he gifted to them, but that his children never gave him any of the rental proceeds.⁸³ Frank said that he discovered he was not receiving the rental proceeds about three or four years after his wife died.⁸⁴ Based on this testimony, Frank was aware that he was not receiving rental proceeds in 1997 or 1998, which is about three or four years after Velda Rozzano died.

Fourth, at the latest, Frank was put on notice of the facts giving rise to his claims around the Christmas holiday of 2002, when the remaining cash that was gifted to the Rozzano Children in 1996 was divided among the children and checks were passed out by Frank himself in a symbolic fashion on Christmas Day 2002.⁸⁵ There is no doubt that Frank was aware at that time that a trust did not exist and that the money was not being held for his benefit. Frank did not contest handing out the checks among his children, and in fact, Frank appeared proud to be able to take part in the exchange. All of the facts presented above are supported

⁸³ CP 242 (Decl. of Sarah Duncan, Excerpt 7 citing deposition testimony of Frank Rozzano).

⁸⁴ *Id.*

⁸⁵ CP 204 (Decl. of Robert Rozzano).

by the record and, more importantly, they are not otherwise refuted by Frank to prove that he was aware of the facts necessary to establish his claims before July 10, 2005.

2. The Rozzano Children Are Not Estopped From Asserting The Statute Of Limitations As A Defense To Frank's Claims.

Frank contends that the Rozzano Children are estopped from asserting the limitations periods because they were in a confidential relationship with Frank and acted during that time to conceal material facts from Frank.⁸⁶ The basis for Frank's argument is not supported by the record or the law regarding equitable estoppel, and, consequently, fails.

a) The Mere Existence Of A Confidential Relationship Does Not Bar The Rozzano Children From Asserting The Statute Of Limitations As A Defense.

Frank argues that a confidential relationship existed between Frank and his children, and therefore, a genuine issue of material fact exists as to whether the Rozzano Children are estopped from asserting a limitations defense.⁸⁷ Frank cites and relies on the case of *Mehelich*⁸⁸ to support his assertion that the Rozzano Children are barred from asserting a limitations

⁸⁶ Appellant's Brief, Pg. 5.

⁸⁷ Appellant's Brief, Pg. 34.

⁸⁸ *Mehelich v. Mehelich*, 7 Wash.App 545, 500 P.2d 779 (1972).

defense because of their alleged confidential relationship with Frank.⁸⁹ Contrary to Frank's application of the facts of *Mehelich* to this matter, *Mehelich* does not apply because *Mehelich* is an analysis of whether the laches doctrine should be invoked, not the statute of limitations. The Rozzano Children have not asserted laches as a defense. The Rozzano Children have only asserted the defense of statute of limitations, which is significantly different from the defense of laches. Unlike the statute of limitations defense, laches is implied waiver arising from knowledge of existing conditions and acquiescence in them, and generally depends upon the particular facts and circumstances of each case, by which a court considers many factors in its application of the defense of laches.⁹⁰ The case of *Mehelich* merely supports the contention that the existence of a confidential relationship is just one factor in a court's analysis of whether the defense of laches can be asserted. The existence of a confidential relationship has no bearing on this Court's analysis of whether the statute of limitations has run. The discovery rule is the proper application for this Court to consider for statute of limitations defenses.

⁸⁹ Appellant's Brief, Pg. 33.

⁹⁰ *Lopp v. Peninsula School District No. 401*, 90 Wash.2d 754, 759, 585 P.2d 801 (1978).

With respect to Frank's estoppel argument, the existence of a close family relationship has been held to be an important factor as a basis for reliance.⁹¹ However, the mere existence of a family relationship, without more, is insufficient to establish a confidential relationship between parties to justify application of equitable estoppel.⁹² Here, this Court should give no consideration as to whether a confidential relationship existed nor give consideration to an estoppel argument because there is no testimony offered by Frank to support his contention of a confidential relationship. Furthermore, there is no testimony from Frank, or other evidence in the record for that matter, to support alleged representations made by the Rozzano Children to Frank, of which he relied. For those reasons alone, Frank's estoppel argument fails.

b) Because Frank Failed To Exercise Due Diligence And Slept On His Rights, The Doctrine Of Equitable Estoppel Does Not Bar The Rozzano Children From Asserting Statute Of Limitations As A Defense.

Frank cannot use estoppel to bar the Rozzano Children from asserting statute of limitations defenses because Frank offers no evidence in the record to support a promise or act by any of the Rozzano Children,

⁹¹ *Peterson v. Groves*, 111 Wash.App 306, 311, 44 P.3d 894 (2002).

⁹² *Id.* at 312.

which induced Frank to not bring suit until July 10, 2008. Furthermore, the evidence is clear that Frank failed to exercise any due diligence at all to investigate matters until he met with an attorney in October 2005.

The equitable doctrine of estoppel *in pais* is applicable in a proper case to prevent a fraudulent or inequitable resort to the statute of limitations as a defense.⁹³ The gravamen of equitable estoppel with respect to the statute of limitations is that the defendant made representations or promises to perform, which lulled the plaintiff into delaying timely action.⁹⁴ While the Court in *Peterson* found that the existence of a confidential relationship coupled with evidence suggesting a promise to act is sufficient to overcome summary judgment on the issue of equitable estoppel, the analysis of estoppel does not end there. Estoppel to plead the statute of limitations does not last forever, and that the plaintiff must act within a reasonable time after discovering that the promises relied on were false.⁹⁵ Thus, in *Peterson*, the Court affirmed the trial court's grant of summary judgment to dismiss plaintiff's claims on the basis of statute of limitations because plaintiff had not shown due

⁹³ *Central Heat, Inc. v. Daily Olympian, Inc.*, 74 Wash.2d 126, 134, 443 P.2d 544 (1968).

⁹⁴ *Peterson* at 311.

⁹⁵ *Id.* at 314.

diligence in filing suit after the estoppel period ended.⁹⁶

The Court has made it clear that the facts and circumstances which create an estoppel at one point in time do not justify an unreasonable suspension of the statute of limitations.⁹⁷ A party claiming estoppel to prevent an inequitable resort to the statute of limitations may not sleep on his rights.⁹⁸ The Court further felt inclined to add that, "Where the inducement for delay or hindrance to the commencement of an action has ceased to operate before the expiration of the limitations period, so as to afford the plaintiff ample time thereafter in which to institute his action prior to the running of the statute of limitations, he cannot excuse his failure to do so on the ground of estoppel."⁹⁹

There is no evidence in the record to support Frank's contentions that his children made representations or promises to him, of which he relied, and of which lulled him into delaying timely action to file suit against them. Estoppel requires proof of an admission, statement or act by the Rozzano Children, and proof of reliance thereof by Frank. The record is absent of any promise made by the Rozzano Children to Frank, and any

⁹⁶ *Id.* at 316.

⁹⁷ *Central Heat, Inc.*, at 135.

⁹⁸ *Id.*

⁹⁹ *Id.*

inference of a promise and reliance thereof drawn in favor of Frank are also not supported by the record. Rather, the evidence supported by the record is that the Rozzano Children made no assurances to their father to hold property for his benefit,¹⁰⁰ the Rozzano Children never executed a trust for Frank's benefit,¹⁰¹ and that Frank was aware that a trust relationship did not exist well before the commencement of his action.

Frank continues to take no responsibility for his actions over the past 14 years, or for his failure to act timely. Despite the fact that Frank offers no direct testimony that his children made promises to him and otherwise concealed information from him, and instead relies on unsupported assertions and argument to unreasonably infer such concealment and reliance, the evidence in the record is clear that Frank slept on his rights and he should not be permitted to excuse his failure to act timely on the grounds of estoppel.

3. The Discovery Rule Requires Frank To Exercise Due Diligence And Timely File Suit, Both Of Which Frank Failed To Do.

Frank asserts that there is a genuine issue of material fact with

¹⁰⁰ CP 196 (Decl. of Mara Rozzano), CP 198 (Decl. of Theresa Rozzano-Preston), CP 203 (Decl. of Robert Rozzano).

¹⁰¹ CP 196 (Decl. of Mara Rozzano), CP 200 (Decl. of Theresa Rozzano-Preston).

respect to whether Frank had a duty to file suit against his children before July 10, 2005.¹⁰² Frank is incorrect. The law governing the discovery rule makes it clear that Frank did have a duty to exercise due diligence and timely file suit upon the discovery of facts giving rise to his claims,¹⁰³ and thus, there is no dispute with respect to whether Frank had a duty to file suit against his children before July 10, 2005. Frank clearly had a duty to exercise due diligence, of which he failed to do.

The discovery rule requires a plaintiff to use due diligence in discovering the basis for the cause of action.¹⁰⁴ Frank never exercised due diligence to investigate matters until he consulted with attorney Bruce Bell in Everett sometime in late 2005 after Frank remarried,¹⁰⁵ at which such time Frank still delayed to file suit until nearly three years later. Even if Frank argues that he was not aware of the facts giving rise to his claims until he met with counsel in 2005, the discovery rule will infer actual knowledge to a time well before 2005 because Frank was put on notice of relevant facts that a trust relationship did not exist, that property was not being held for his benefit by his children, and that his children were

¹⁰² Appellant's Brief, Pg. 34.

¹⁰³ Allen at 758.

¹⁰⁴ *Id.*

¹⁰⁵ CP 199 (Decl. of Theresa Rozzano-Preston).

exercising full control of the property that Frank gifted to them in 1996. Frank was put on notice of these facts, but he failed to exercise due diligence to further investigate.

4. Frank Failed To Timely File Suit Upon Notice That A Trust Relationship Does Not Exist.

Frank contends that a constructive trust claim applies because the Rozzano Children were unjustly enriched by the gifts of property to them in 1996,¹⁰⁶ and that Frank did not have knowledge of sufficient facts necessary to discover that a trust relationship did not exist, or that an alleged trust relationship was terminated by his children.¹⁰⁷ Frank further contends that if clear, cogent and convincing evidence is required to establish a constructive trust, then the same high level notice must be evident to Frank before a duty to file suit is triggered to commence the limitations period.¹⁰⁸ This interpretation of the law should be completely disregarded by this Court. There is nothing in the law which supports Frank's interpretation, nor does Frank cite case law to such effect. Such case law does not exist. Nonetheless, the record contains ample evidence that Frank was put on notice that a trust relationship did not exist well

¹⁰⁶ Appellant's Brief, Pg. 30-31.

¹⁰⁷ Appellant's Brief, Pg. 31.

¹⁰⁸ Appellant's Brief, Pg. 30.

before the commencement of his action.

a) The Application Of A Constructive Trust Does Not Apply Because Gifts To The Rozzano Children Are Not Unjust Enrichment.

Frank's gifts to his children were not unjust enrichment to give rise to a constructive trust. A person is unjustly enriched when he profits or enriches himself at the expense of another contrary to equity.¹⁰⁹ Enrichment alone will not suffice to invoke the remedial power of a court of equity.¹¹⁰ It is critical that the enrichment be unjust both under the circumstances and as between the parties to the transaction.¹¹¹ While it is undisputed that the gifts to the Rozzano Children were enrichment, the gifts were not unjust. Nothing on the face of the Deeds or the Assignment of Interest that Frank signed in 1996, which were prepared by his own attorney, suggest anything other than an unconditional gift of his love and affection to his children as the Deeds and Assignment state directly on their faces "for and in consideration of love and affection."¹¹² Furthermore, there is nothing in the record that supports a factual

¹⁰⁹ *Farwest Steel Corp. v. Mainline Metal Works, Inc.*, 48 Wash.App 719, 731-732, 741 P.2d 58 (1987).

¹¹⁰ *Id.* at 732.

¹¹¹ *Id.*

¹¹² CP 210 (Decl. of Thomas Adams, Ex. A), CP 213 (*Id.*, Ex. B), CP 216 (*Id.*, Ex. C), CP 219 (*Id.*, Ex. D).

conclusion other than one of unconditional gifts to the Rozzano Children from Frank. Frank offered no testimony that his children made promises or assurances to him at the time he gifted the properties to them, or that he gifted the property under conditional circumstances that they would hold the property for his benefit or in a trust. In fact, the advice dictated by Frank's counsel near the time of the actual gifts in 1996 supports the conclusion that the gifts to his children were unconditional, and that the children could use the gifted properties for their own use as they pleased. In a draft letter dated May 1994 that was prepared by Frank's attorney to the Rozzano Children, Frank's counsel states:

“We have been advised by Frank A. Rozzano that he has told you he retained us to prepare the documents necessary to gift the majority of his assets to the four of you as joint tenant. We wish to clarify at this time that we are employed by your father, and that any assistance we render you is given at his specific request.

We understand it is your intent to gift the assets you have received from your father to a Living Trust for his benefit. **You are under no legal obligation to do so. We also wish to confirm that your father's gift to you of these assets is without legal condition or restriction. The assets gifted to you will become yours to do with as you please**, subject of course to the life estates your father is retaining in the real properties.”¹¹³ [emphasis added]

Because there is no evidence in the record to conclude or infer

¹¹³ CP 111 (Decl. of Daniel Laurence, Ex. D).

unjust enrichment giving rise to a constructive trust, this Court should not consider inferences raised by Frank that unjust enrichment is an issue and that a constructive trust applies. A gift is not unjust enrichment. A constructive trust claim cannot apply.

b) Prior To July 10, 2005, Frank Was Put On Notice That A Trust Relationship Does Not Exist.

If this Court does find unjust enrichment to be an issue thereby giving rise to an issue of material fact regarding imposition of a constructive trust, Frank's argument still cannot defeat the defense of statute of limitations because Frank failed to timely file suit upon being put on notice that a trust relationship does not exist. Frank was clearly put on notice on many occasions prior to July 10, 2005 that a trust relationship did not exist, or in the alternative, that any alleged trust relationship was otherwise repudiated. A repudiation occurs when the trustee by words or other conduct denies there is a trust and claims the trust property as his or her own.¹¹⁴ The Rozzano Children disposed of properties and cash that were originally gifted to them by Frank and used the funds for their own purposes as early as 1998 when the Corliss property was sold.¹¹⁵ Frank

¹¹⁴ *Goodman v. Goodman*, 128 Wash.2d 366, 373, 907 P.2d 290 (1995).

¹¹⁵ CP 203 (Decl. of Robert Rozzano).

was aware of these facts, but did nothing. Frank received correspondence from his own attorney that a trust was never executed by his children up until as late as March 30, 2000,¹¹⁶ but again, Frank did nothing. And, lastly, the Rozzano Children divided the remaining cash held between them during Christmas of 2002 and instead of objecting to the division of remaining monies, Frank participated in the exchange of funds¹¹⁷ and encouraged his children to spend the money in whatever fashion they desired.¹¹⁸ These are all facts that clearly put Frank on notice that the property was not being held for his benefit, and that a trust relationship did not exist. Frank was put on notice well before July 10, 2005, but failed to investigate and failed to timely take action.

5. The Trial Court Properly Applied The Appropriate Summary Judgment Standard Granting The Rozzano Children's Summary Judgment Motion to Dismiss All Of Frank's Claims As Being Barred By The Statute Of Limitations.

Frank contends that the trial court misapplied the summary judgment standard by ignoring and discounting facts and inferences in

¹¹⁶ CP 57 (Decl. of Sarah Duncan).

¹¹⁷ CP 204 (Decl. of Robert Rozzano).

¹¹⁸ CP 195 (Decl. of Mara Rozzano).

favor of Frank's arguments.¹¹⁹ In an attempt to support Frank's contention that the trial court erred, Frank raises inferences that he believes should have been drawn in his favor. The inferences raised by Frank are not based on facts supported by the record, are unreasonable, and should not be considered by this Court.

a) The Trial Court Properly Granted Summary Judgment In Favor Of The Rozzano Children Because There Is No Evidence In The Record To Support The Facts, Opinions and Inferences Raised In Frank's Argument.

There is no evidence in the record to support the alleged facts, opinions, conclusions and inferences raised in Frank's argument to give rise to a genuine issue of any material fact in this matter. CR 56(e) specifically states that "when a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denial in his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial."¹²⁰ Once a moving party has made an initial showing that there are no genuine issues of material fact, the nonmoving party must demonstrate the existence of a material fact by

¹¹⁹ Appellant's Brief, Pg. 38.

¹²⁰ CR 56(e)

setting forth specific facts; unsupported allegations are insufficient.¹²¹ The facts must be based on personal knowledge admissible at trial and not merely on conclusory allegations, speculative statements or argumentative assertions.¹²² Unsupported conclusory statements will not be considered by the court on a motion for summary judgment.¹²³

Frank's argument to this Court is riddled with alleged facts, opinions and conclusions that are not supported by the record and should not be considered by this Court. Without belaboring this Court with identifying the numerous unsupported allegations and conclusions raised by Frank, a few worth noting are highlighted as follows and should not be considered by this Court.

1. Concealment. Frank alleges and concludes that the Rozzano Children concealed information from him that prohibited from timely filing suit,¹²⁴ yet there is nothing in the record to support Frank's opinion that information was concealed from him, or to support or identify what information was concealed, how the information was concealed, the

¹²¹ *Brame v. St. Regis Paper Co.*, 97 Wash.2d 748, 752, 649 P.2d 836 (1982).

¹²² *Las v. Yellow Front Stores, Inc.*, 66 Wash.App 196, 198, 831 P.2d 744 (1992).

¹²³ *Kirk v. Moe*, 114 Wn.2d 550, 557, 789 P.2d 84 (1990).

point in time that Frank did discover the alleged concealment, and most importantly, there is nothing in the record to support Frank's conclusion that he otherwise delayed taking action because of the concealment. Any of Frank's references to concealment is an unsupported conclusory statement that should not be considered by this Court.

2. Harms. Frank alleges and concludes that he has been harmed by the Rozzano Children before and after the date of July 10, 2005,¹²⁵ yet there is nothing in the record to support Frank's 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. Frank merely alleges in his brief that he was harmed before and after the date of July 10, 2005, which is nothing more than a conclusory statement that is not supported by the record.

3. Christmas 2002. Frank attempts to allege and imply that his children created a "sham event" over the Christmas celebration in 2002 to make him believe he was giving away his own money to his children,¹²⁶ yet this allegation is not supported by the record. In fact, this allegation is

¹²⁴ Appellant's Brief, Pg. 25.

¹²⁵ Appellant's Brief, Pg. 26.

¹²⁶ Appellant's Brief, Pg. 22.

contrary to the record before this Court as Frank testified during his deposition that he does not recall the events that transpired over the Christmas holiday of 2002.¹²⁷ Frank does not remember having any discussions with his son, Robert, nor does he remember handing out any checks to his children.¹²⁸ If Frank cannot recall the events surrounding Christmas in 2002, then no other opinions of Frank can be considered from that event.

4. Undue Influence. Frank alleges that Frank's daughter, Theresa, "took it upon herself to selectively complete" the transfer documents on February 10, 1996, "decided to disregard the trust aspect of the plan" when Frank signed the documents in 1996, "decided to allow her father to fill out the paperwork" before a notary public "without discussing with him at that time the trust aspect of the plan."¹²⁹ None of these allegations and inferences are supported by the record. With respect to Frank's state of mind on this day, the only evidence in the record concerning Frank is that he does not recall the events surrounding his signing of the documents. Frank does not recall signing the documents, he

¹²⁷ CP 238 (Decl. of Sarah Duncan, Excerpt 3 citing deposition testimony of Frank Rozzano)

¹²⁸ *Id.*

¹²⁹ Appellant's Brief, Pg. 18-19.

does not recall where he signed the documents, nor does he recall if any of his children influenced him in any way to sign the documents.¹³⁰ The unrefuted facts supported by the record are that Theresa accompanied Frank to the bank on February 10, 1996 at Frank's request, told her father that it is entirely his decision to gift assets to his children, and made no assurances to Frank that the assets would be held for his benefit or transferred into a trust.¹³¹

5. Quid Pro Quo Arrangement. Frank alleges and concludes that the plan as attorney Dussault presented in 1994 was a *quid pro quo*: an assignment, and a trust in turn,¹³² yet this conclusion is unsupported by the record. The evidence before the Court shows the exact opposite of a quid pro quo arrangement as the legal advice of Dussault states that the "gift is without legal condition or restriction. The assets gifted to you [the children] will become yours to do with as you please."¹³³

Here, as the trial court correctly concluded, the Rozzano Children submitted affidavits and other factual evidence supported by the record to

¹³⁰ CP 230-237 (Decl. of Sarah Duncan, Excerpt 2 citing deposition testimony of Frank Rozzano).

¹³¹ CP 198 (Decl. of Theresa Rozzano-Preston).

¹³² Appellant's Brief, Pg. 44.

¹³³ CP 111 (Decl. of Daniel Laurence, Ex. D).

show that Frank was aware of the facts giving rise to his claims before July 10, 2005, and therefore, Frank's claims are barred by the statute of limitations. Frank presented no factual evidence to counter these facts or show that a genuine issue of material fact exists. The inferences that Frank argues should have been drawn in his favor are clearly unreasonable and not supported by facts in the record. What Frank alleges are inferences reasonably drawn from the evidence are merely nothing more than speculation and conjecture. As previously noted, the facts required to defeat a summary judgment motion must be based on more than mere possibility or speculation.¹³⁴ Conclusory statements of fact will not suffice.¹³⁵ By granting summary judgment in favor of the Rozzano Children to dismiss all of Frank's claims as barred by the statute of limitations, the trial court properly determined that the inferences drawn by Frank were unreasonable and not supported by the record. The decision of the trial court should be affirmed.

IV. CONCLUSION

Frank's claims concern property that he gifted to his children more than fourteen (14) years ago. Preventing the need to defend against

¹³⁴ *Las* at 198.

¹³⁵ *Kirk* at 557.

Frank's claims which arise out of facts that occurred more than fourteen years ago is exactly why the statute of limitations exists, which, here in this case, is to shield the Rozzano Children and the judicial system from stale claims. The trial court correctly identified the issue at the heart of this matter when the trial court made its oral decision granting the Rozzano Children's motion for summary judgment. The trial court stated as follows:

*"The question is did Mr. Rozzano have notice prior to July 10, 2005? Were there facts that he knew of or should have known of prior to that date that would have placed him on notice that, again, in a nutshell, the children were in charge of the purse strings, and that there was no trust. I think the answer that was yes, he did."*¹³⁶

There is no dispute that Frank was aware of the facts giving rise to his claims well before July 10, 2005, which is three years prior to the commencement of Frank's suit against his children. Instead, Frank slept on his rights, failed to exercise due diligence, and, consequently, all of Frank's claims are barred by the statute of limitations.

The Rozzano Children respectfully request that this Court affirm the decision of the trial court granting the Rozzano Children's summary judgment motion to dismiss all of Frank's claims and causes of action set

¹³⁶ RP 60, Lines 13-19.

forth in Frank's Complaint as being barred by the statute of limitations.

Respectfully submitted the 16th day of June, 2010.

ADAMS, DUNCAN & HOWARD, INC., P.S.

By: _____

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DECLARATION OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, I caused a true and correct copy of this document to be delivered via legal messenger to counsel for Appellant:

Daniel Laurence
Gary Baker
1802 Grove Street
Marysville, WA 98270

DATED the 16th day of June, 2010 at Everett, Washington.


ANGELA K. WRIGHT

V. APPENDIX

Appendix 1 (A-1): *Time Line of Events*, which was used by legal counsel for the Rozzano Children to facilitate and present oral argument to the trial court.

