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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY

DEPUTY

Court of Appeals No. 49007-2-II.
Superior Court No. No. 15-2-02049-0

COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

VINCENT L. BADKIN,
a divorced man,
Appellant/Plaintiff,

v.

SAMANTHA J. BADKIN,
a divorced woman,
and
HOWARD M. ALLEN and
NANCY B. ALLEN,
husband and wife, individually and
the marital community composed thereof,

Respondents/Defendants..

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

A. Assignment of Errors on: ***Findings of Fact, Conclusions of Law and Order of the Court***, dated 01-13-2016. (CP 25-26 – in APPENDIX).

Error 1 on Finding of Fact 1. It was error by the court to find that “*the applicable statute of limitations is no greater than three years*” because, in his Complaint, plaintiff alleged sufficient facts for a prima facie finding that there was a “resulting trust,” himself as a beneficiary, and statute of limitations does not start for a “resulting trust” unless and until trustee repudiates the trust. And no evidence of such a repudiation existed in record. (CP 25).

Error 3 on Finding of Fact 3. It was error by the court to find that “*there is no actionable harm plead in Plaintiff’s Complaint that is based on any action or failure to act that occurred within three years of filing or serving this Complaint.*” because, in his Complaint, plaintiff alleged sufficient facts for a prima facie finding that there was a “resulting trust,” himself as a beneficiary, and statute of limitations does not start for a resulting trust unless and until trustee repudiates the trust. And no evidence of such a repudiation exists in record. (CP 25).

Error 4 on “Finding of Fact and Conclusion of Law 4.” It was error by the court to find and conclude that “*accordingly, there is no basis in law for Plaintiff’s Complaint to proceed*” because in his Complaint, plaintiff alleged sufficient facts for a prima facie finding

that there was a “resulting trust,” himself as a beneficiary, and statute of limitations does not start for a resulting trust unless and until trustee repudiates the trust. No evidence of such a repudiation exists in record. (CP 25).

Error 5 on “Conclusion of Law.” It was an error by the court to conclude that “*Plaintiff’s Complaint should be dismissed*” because in his Complaint, plaintiff alleged sufficient facts for a prima facie finding that there was a “resulting trust,” himself as a beneficiary, and statute of limitations does not start for a resulting trust unless and until trustee repudiates the trust. And no evidence of such a repudiation exists in record. (CP 26).

Error 6 on “Order of Dismissal.” It was an error by the court to order that “*Plaintiff’s Complaint is dismissed with prejudice.*” (CP 26).

B. Assignment of Errors on “Order on Plaintiff’s Motion for Reconsideration,” dated 3-28-2016. (CP 66-68 – in APPENDIX).

Assignment of Error 1. It was error that “*the court treated Defendant’s Motion to Dismiss under CR 12(b)(6) as a motion for summary judgment under CR 56 and, in addition to pleadings and motions in this case, considered the court documents from the dissolution proceedings . . .*” because there are no such documents in record and the defendants failed to Answer and failed to submit any declarations or any evidence for the record. (CP 66).

Assignment of Error 2. It was error by the court to find or conclude that “*the applicable statute of limitations in this case is three years*” because in his Complaint, plaintiff alleged sufficient facts for a prima facie finding that there was a “resulting trust,” himself as a beneficiary, and statute of limitations does not start for a resulting trust unless and until trustee repudiates the trust. And no evidence of such a repudiation exists in record. (CP 67).

Assignment of Error 3. It was error by the court to find or conclude that “*treating of property alleged to be held in trust as if it were the sole property of the alleged trustee repudiates any trust in said property*” because this issue is outside of the scope of defendants’ CR 12(b)(6) motion to dismiss for statute of limitations based on an alleged oral agreement, because there are no allegations or facts in record to suggest that the trustee ever treated the property as trustee’s sole property, in violation of the local rule KCLCR 7(b)(1)(A)), which requires a strictly limited reply. The evidence in record shows that the beneficiaries used the property as their own by living there, by making mortgage payments, property tax payments, maintenance, among others. (CP 67).

Assignment of Error 4. It was error by the court to find or conclude that “*once a beneficiary of a trust has notice of the repudiation of that trust by the trustee, the statute of limitations begins to run against the beneficiary*” because this issue is outside of

the scope of defendants' CR 12(b)(6) motion to dismiss for statute of limitations based on an alleged oral agreement, in violation of the local rule KCLCR 7(b)(1)(A)), which requires a strictly limited reply, because the only evidence submitted in court is the facts in the Complaint and there is no evidence to suggest that there was a repudiation of the trust. (CP 67).

Assignment of Error 5. It was error by the court to find or conclude that “*Defendants Howard and Nancy Allen [the trustees] have been treating the real property in this case as their own as evidenced by Findings of Fact and Conclusions of Law of May 7, 2012, which did not list them as a marital asset of Plaintiff and Defendant Samantha Badkin*” because this issue is outside of the scope of defendants' CR 12(b)(6) motion to dismiss for statute of limitations based on an alleged oral agreement, in violation of local rule KCLCR 7(b)(1)(A)), which requires a strictly limited reply, because there are no allegations or evidence in record to suggest that the trustees ever treated the property as trustee's sole property.

On the contrary, the evidence in record shows that Vincent and Samantha Badkin, as the beneficiaries of trust, used the property as their own by living there, by making the mortgage payments, property tax payments, maintenance, among others. (CP 67).

Assignment of Error 6. It was error by the court to find or conclude that “*the findings of Fact and Conclusions of Law of May 7,*

2012, by not listing any interest in the real property as a marital asset, gave Plaintiff notice that Defendants were treating the property as their own” because this issue is outside of the scope of defendants’ CR 12(b)(6) motion to dismiss for statute of limitations based on an alleged oral agreement, in violation of local rule KCLCR 7(b)(1)(A)), which requires a strictly limited reply, because Howard and Nancy Allen [the trustees] were never involved in the dissolution of marriage proceedings, and as trustees, never gave any kind notice of repudiation of the any interest of Vincent Badkin. A notice of repudiation by the trustee must be plain, strong, and unequivocal.” *Goodman v. Goodman*, 128 Wn.2d 366, 373, 907 P.2d 290 (1995). (CP 67).

Assignment of Error 7. The court erred in finding or concluding that “*more than three years passed from such notice being given to Plaintiff to the time of this suit being filed*” because there is no evidence that [the trustees] were ever involved in the dissolution of marriage proceedings, and as trustees, ever gave any kind notice of repudiation of any interest of Vincent Badkin. A notice of repudiation by the trustee must be plain, strong, and unequivocal.” *Goodman v. Goodman*, 128 Wn.2d 366, 373, 907 P.2d 290 (1995). (CP 67).

Assignment of Error 8. It was error by the court to find or conclude that “*at the time of the filing of this suit, the statute of limitations as to any resulting trust alleged by Plaintiff had already*

run against him” because in his Complaint, plaintiff alleged sufficient facts for a prima facie finding that there was a “resulting trust,” himself as a beneficiary, and statute of limitations does not start for a resulting trust unless and until trustee repudiates the trust. And no evidence of such a repudiation existed in record. (CP 67).

Assignment of Error 9. It was error by the court to find or conclude that “*as to all other causes of action, the statute of limitations had also run*” because there has been no other issues before the court for any issues “*as to all other causes of action.*” (CP 68).

Assignment of Error 10. It was error by the court to order that “*Plaintiff’s complaint is dismissed with prejudice*” and “*Plaintiff’s motion for reconsideration is denied*” because the orders were contrary to the facts of the case and contrary to the law. (CP 68).

Assignment of Error 11. It was error or abuse its discretion by the court when two different times it failed to grant “*Plaintiff’s Motion to Strike*” because the defendants’ responses were outside of the scope of defendants’ CR 12(b)(6) motion to dismiss for statute of limitations based on an alleged oral agreement, in violation of local rule KCLCR 7(b)(1)(A)), which requires a strictly limited reply. (CP 23 and CP 52).

Assignment of Error 12. It was an abuse its discretion by the court when it failed to award reasonable attorneys fees to plaintiff because defendants’ motion to dismiss pursuant to CR 12(b)(6) for

statute of limitations based on an alleged oral agreement and defendants' asking attorneys fees against Vincent with their arguments that the complaint was frivolous and repeatedly changed their response arguments, in violation of local rule KCLCR 7(b)(1)(A)), which requires a strictly limited reply, was itself frivolous and justifies award of attorneys fees to the plaintiff. (CP 23 and CP 52).

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Issues on: *Findings of Fact, Conclusions of Law and Order of the Court*, dated 01-13-2016. (CP 25-26 – in APPENDIX).

Issue 1. Did the trial court err when it ordered that “*the applicable statute of limitations is no greater than three years*” when, in his Complaint, plaintiff alleged sufficient facts for a prima facie finding that there was a “resulting trust,” himself as a beneficiary, and statute of limitations does not start for a resulting trust unless and until trustee repudiates the trust. And no evidence of such a repudiation existed in record. (CP 25). (Error on Finding of Fact 1.)

Issue 3. Did the trial court err when it ordered that “*there is no actionable harm plead in Plaintiff's Complaint that is based on any action or failure to act that occurred within three years of filing or serving this Complaint,*” while, in his Complaint, plaintiff alleged sufficient facts for a prima facie finding that there was a “resulting trust,” himself as a beneficiary, and did the statute of limitations end for

a resulting trust without a repudiation of the trust. Was there any evidence for such a repudiation in record. (CP 25). (Error on Finding of Fact 3). (Error on Finding of Fact 3.)

Issue 4. Did the trial court err when it ordered that “*accordingly, there is no basis in law for Plaintiff’s Complaint to proceed*” when in Complaint, plaintiff alleged sufficient facts for a prima facie finding that there was a “resulting trust,” himself as a beneficiary, and the statute of limitations start to run for a resulting trust only after the trustee repudiates the trust.

Did the defendants meet their **burden of demonstrating “beyond doubt”** that the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief when the trial court ordered that “*Plaintiff’s Complaint is dismissed with prejudice.*” *Bravo v. Dolsen Companies*, 125 Wn.2d 745, 750, 888 P.2d 147 (1995). Was there any evidence of trustee’s repudiation of the trust. (CP 25). (Error 4 on Finding of Fact and Conclusion of Law 4.)

Issue 5. Did the trial court err when it ordered that “*Plaintiff’s Complaint should be dismissed*” when in his Complaint, plaintiff alleged sufficient facts for a prima facie finding that there was a “resulting trust,” himself as a beneficiary, and statute of limitations does not start for a resulting trust unless and until trustee repudiates the trust. Is there any evidence of such a repudiation in record.

Did the defendants meet their burden of demonstrating “beyond

doubt” that the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief when the trial court ordered that “*Plaintiff’s Complaint is dismissed with prejudice.*” *Bravo v. Dolsen Companies*, 125 Wn.2d 745, 750, 888 P.2d 147 (1995). (CP 26). (Error 5 on “Conclusion of Law”).

Issue 6 (on Order of Dismissal). Did the defendants meet their burden of demonstrating “beyond doubt” that the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief when the trial court ordered that “*Plaintiff’s Complaint is dismissed with prejudice.*” *Bravo v. Dolsen Companies*, 125 Wn.2d 745, 750, 888 P.2d 147 (1995). (Error 6 on “Order of Dismissal”).

B. Issues on “Order on Plaintiff’s Motion for Reconsideration,” dated 3-28-2016. (CP 66-68 – in APPENDIX).

Issue 1. Did the trial court err when “*the court treated Defendant’s Motion to Dismiss under CR 12(b)(6) as a motion for summary judgment under CR 56 in addition to pleadings and motions in this case, considered the court documents from the dissolution proceedings . . .*” while the defendants filed no Answer, no declarations, and no such documents were in the record. (CP 66). (Assignment of Error 1).

Issue 2. Did the court err when it found or concluded that “*the applicable statute of limitations in this case is three years*” because in

his Complaint, plaintiff alleged sufficient facts for a prima facie finding that there was a “resulting trust,” himself as a beneficiary, and statute of limitations does not start for a resulting trust unless and until trustee repudiates the trust. And no evidence of such a repudiation exists in record. (CP 67). (Assignment of Error 2).

Issue 3. Did the court err when it found or concluded that *“treating of property alleged to be held in trust as if it were the sole property of the alleged trustee repudiates any trust in said property”* because this issue is outside of the scope of defendants’ CR 12(b)(6) motion to dismiss for statute of limitations based on an alleged oral agreement, because there are no allegations or facts in record to suggest that the trustee ever treated the property as trustee’s sole property, in violation of the local rule KCLCR 7(b)(1)(A)), which requires a strictly limited reply. The evidence in record shows that the beneficiaries used the property as their own by living there, by making mortgage payments, property tax payments, maintenance, among others. (CP 67). (Assignment of Error 3).

Issue 4. Did the court err when it found or concluded that *“once a beneficiary of a trust has notice of the repudiation of that trust by the trustee, the statute of limitations begins to run against the beneficiary”* because this issue is outside of the scope of defendants’ CR 12(b)(6) motion to dismiss for statute of limitations based on an alleged oral agreement, in violation of the local rule KCLCR 7(b)(1)(A)),

which requires a strictly limited reply, because the only evidence submitted in court is the facts in the Complaint and there is no evidence to suggest that there was a repudiation of the trust. (CP 67). (Assignment of Error 4).

Issue 5. Did the court err when it found or concluded that “*Defendants Howard and Nancy Allen [the trustees] have been treating the real property in this case as their own as evidenced by Findings of Fact and Conclusions of Law of May 7, 2012, which did not list them as a marital asset of Plaintiff and Defendant Samantha Badkin*” because this issue is outside of the scope of defendants’ CR 12(b)(6) motion to dismiss for statute of limitations based on an alleged oral agreement, in violation of local rule KCLCR 7(b)(1)(A)), which requires a strictly limited reply, because there are no allegations or evidence in record to suggest that the trustees were ever treating the property as their sole property; and because the evidence in record shows that Vincent and Samantha Badkin, as the beneficiaries of trust, used the property as their own by living there, by making the mortgage payments, property tax payments, maintenance, among others. (CP 67). (Assignment of Error 5).

Issue 6. Did the court err when it found or concluded in “*the findings of Fact and Conclusions of Law of May 7, 2012, by not listing any interest in the real property as a marital asset, gave Plaintiff notice that Defendants were treating the property as their own*”

because this issue is outside of the scope of defendants' CR 12(b)(6) motion to dismiss for statute of limitations based on an alleged oral agreement, in violation of local rule KCLCR 7(b)(1)(A)), which requires a strictly limited reply, because Howard and Nancy Allen [the trustees] were never involved in the dissolution of marriage proceedings, and as trustees, never gave any kind notice of repudiation of any interest of Vincent Badkin, and a notice of repudiation by the trustee must be plain, strong, and unequivocal." *Goodman v. Goodman*, 128 Wn.2d 366, 373, 907 P.2d 290 (1995). (CP 67). (Assignment of Error 6).

Issue 7. Did the court err when it found or concluded that "*more than three years passed from such notice being given to Plaintiff to the time of this suit being filed*" because there is no evidence in record that [the trustees] were ever involved in the dissolution of marriage proceedings, and as trustees, ever gave any kind of notice of repudiation of any interest of Vincent Badkin. And because a notice of repudiation by the trustee must be plain, strong, and unequivocal." *Goodman v. Goodman*, 128 Wn.2d 366, 373, 907 P.2d 290 (1995). (CP 67). (Assignment of Error 7).

Issue 8. Did the court err when it found or concluded that "*at the time of the filing of this suit, the statute of limitations as to any resulting trust alleged by Plaintiff had already run against him*" because in his Complaint, plaintiff alleged sufficient facts for a prima facie finding that there was a "resulting trust," himself as a beneficiary,

and statute of limitations does not start for a resulting trust unless and until trustee repudiates the trust, and because no evidence of such a repudiation existed in record. (CP 67). (Assignment of Error 8).

Issue 9. Did the court err when it found or concluded that “*as to all other causes of action, the statute of limitations had also run*” because there has been no *other issues “as to all other causes of action”* before the court for any issues. (CP 68). (Assignment of Error 9).

Issue 10. Did the court err when it ordered that “*Plaintiff’s complaint is dismissed with prejudice*” and “*Plaintiff’s motion for reconsideration is denied*” because the orders were contrary to the facts of the case and contrary to the law. Did the defendants meet their burden of demonstrating “beyond doubt” that the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief when the trial court ordered that “*Plaintiff’s Complaint is dismissed with prejudice.*” *Bravo v. Dolsen Companies*, 125 Wn.2d 745, 750, 888 P.2d 147 (1995). (CP 68). (Assignment of Error 10).

Issue 11. Did the court err or abuse its discretion when two different times it failed to grant “Plaintiff’s Motion to Strike” because the defendants’ responses were outside of the scope of defendants’ CR 12(b)(6) motion to dismiss for statute of limitations based on an alleged oral agreement, in violation of local rule KCLCR 7(b)(1)(A)), which requires a strictly limited reply? (CP 23 and CP 52). (Assignment of

Error 11).

Issue 12. Did the court err or abuse its discretion when it failed to award reasonable attorneys fees to plaintiff because defendants' motion to dismiss pursuant to CR 12(b)(6) for statute of limitations based on an alleged oral agreement and defendants' asking attorneys fees against Vincent with their arguments that the complaint was frivolous and repeatedly changed their response arguments, in violation of local rule KCLCR 7(b)(1)(A)), which requires a strictly limited reply, was itself frivolous and justifies award of attorneys fees to the plaintiff. (CP 23 and CP 52). (Assignment of Error 12).

III. STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Vincent Badkin, the appellant/plaintiff ("Vincent") and **Samantha Badkin**, the respondent/defendant, were married to each other until May 7, 2012. On that date, Samantha Badkin obtained a default "dissolution of marriage" from Vincent while she failed to disclose to the court that their family home, where they had been living, was their community property, being purchased jointly by herself and Vincent Badkin – even though it was in her parents' name.

The court made no findings as to any community property or separate nature of the family home and made no division of the community property interests in it. (CP 28-29).

Howard and Nancy Allen, (respondents/defendants) are the

parents of Samantha Badkin. And the family home had been conveyed to their names for ease of its financing and they are referred here as the TRUSTEES” of the subject family home, while Vincent and Samantha Badkin are the beneficiaries of the trust. Vincent and Samantha Badkin made their home there before they were separated and Vincent moved out and Samantha Badkin still lives in the house.

The **Complaint** was filed on 10-06-2015, for a ruling for a “resulting trust” in the family home and for division of equity between the beneficiaries of the resulting trust (Vincent and Samantha Badkin). And on 1-13-2016, Vincent filed his Amended Complaint (CP 27-31), which was followed by his Second Amended Complaint. (CP 58-64).

In his **Amended Complaint**, in “Section III -- Statement of Facts,” the facts were summarized:

Vincent and Samantha were married on October 14, 1995 . . . On or about August 25, 2004, Vincent and Samantha purchased their subject real property family home . . . The family home was purchased in the names of Howard and Nancy Allen, Samantha’s parents, for ease of financing, with Nancy Allen making the down-payment as a gift to Vincent and Samantha. However, it was intended by all parties that Vincent and Samantha would make and did make the mortgage payments and all equity in the property belonged only to the marital community of Vincent and Samantha. **(CP 28)**.

. . .
Vincent and Samantha Badkin resided at the family home, made the mortgage payments, insurance payments, property taxes, utilities payments, and Vincent made all repairs and upkeep of the house with the belief that the house was their own community property . . . On May 23, 2008, Vincent and Samantha were permanently separated and Vincent moved out of the family home . . . while Samantha continued and continues

to reside there. On May 7, 2012, Vincent and Samantha were divorced in Kitsap County Superior Court after a “default trial,” during which Samantha testified but concealed from the court the fact that the family home was their community property. The court divided Vincent’s and Samantha’s community assets but did not address and did not divide the family home. (CP 29).

In his Amended Complaint, as a cause of action based on those summary of the facts, Vincent asked for a recognition of a “**resulting trust**” over the family home, with **Howard and Nancy Allen as the trustees** and **Vincent and Samantha Badkin as the beneficiaries of the trust**. After Vincent moved out, Samantha Badkin remained there living in the family home. (CP 29-31).

Defendants’ CR 12(b) Motion to Dismiss: The defendants never filed an **Answer** to the Complaint but moved with their “Motion for and Order Dismissing Matter Under CR 12(b)(6)” with their only argument that the alleged agreement among the parties for a resulting trust must have been an oral agreement and that the statute of limitations for an oral agreement was three years and that it had expired under RCW 45.16.080(3). (CP 8-11).

Response of Vincent: In “**Plaintiff’s Response to Defendants’ Motion to Dismiss,**” Vincent noted:

In the case of a resulting trust, the statute of limitations begins to run **only if and when the trustee repudiates** the trust and notice of such repudiation is brought home to the beneficiary. *State, Dept. of Revenue v. Puget Sound Power & Light Co.*, 103 Wn.2d 501, 509, 694 P.2d 7 (1985) (citing *Arneman v. Arneman*, 43 Wn.2d 787, 797, 264 P.2d 256 (1953)). 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. *Goodman v. Goodman*, 128 Wn.2d 366, 373, 907 P.2d 290 (1995) (citing *O’Steen v. Estate of Wineberg*, 30 Wn. App. 923, 932, 640 P.2d 28, review denied, 97 Wn.2d 1016 (1982)). **The repudiation must be plain, strong, and unequivocal.** *Id.* The defendants have failed to provide any evidence of a plain, strong, and unequivocal repudiation of the resulting trust by the trustees to the plaintiff-beneficiary. (CP 14 l. 19-23; CP 15 l.1-4).

In addition, in his same **Response**, Vincent also noted:

1. The statute of limitations is an affirmative defense and the defendants have the burden to prove that it applies here in their favor. *Haslund v. Seattle*, 86 Wn.2d 607, 620–621, 547 P.2d 1221 (1976) (citing CR 8(c) and *Olpinski v. Clement*, 73 Wn.2d 944, 949–50, 442 P.2d 260 (1968)); *Kim v. Lee*, 174 Wn. App. 319, 323, 300 P.3d 431 (2013) (citing *Haslund*). The defendants have failed to meet their burden.

2. A dismissal for failure to state a claim under CR 12(b)(6) is appropriate only if the defendants meet their burden of demonstrating “beyond doubt” that the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief. *Bravo v. Dolsen Companies*, 125 Wn.2d 745, 750, 888 P.2d 147 (1995) (citing *Haberman v. WPPSS*, 109 Wn.2d 107, 120, 744 P.2d 1032, 750 P.2d 254 (1987) and *Orwick v. Seattle*, 103 Wn.2d 249, 254, 692 P.2d 793 (1984)); *Fondren v. Klickitat County*, 79 Wn. App. 850, 854, 905 P.2d 928 (1995). Accordingly, CR 12(b)(6) motions should be granted only sparingly and with care. *Id.* Any hypothetical situation conceivably raised by the complaint defeats a CR 12(b)(6) motion if it is legally sufficient to support the plaintiff’s claim. *Id.* (quoting *Halvorson v. Dahl*, 89 Wn.2d 673, 674, 574 P.2d 1190 (1978)). (CP at 14 l. 1-12).

In “**Reply to Plaintiff’s Response to Defendants’ Motion to Dismiss**” defendants finally admitted the applicable law that, for a resulting trust, the “statute of limitations did not begin running until

[the trustee] repudiates that trust . . .” (CP 18, l. 21-23).

However, in their same Reply, the defendants abandoned their issue of statute of limitations based on an alleged “oral agreement” for a resulting trust, but submitted new arguments not within the scope of a “**strict reply**,” alleged new facts without any declarations (still without filing their Answer), tried to raise new legal arguments in contradiction to their original CR 12(b)(6) motion to dismiss -- in violation of the local rule KCLCR 7(b)(1)(A)), which requires a strictly limited reply. (CP at 19-20).

Motion to Strike: Vincent moved to strike the arguments in defendants’ Reply, which was not a part of the record and the issues not raised by the defendants with their original motion to dismiss. (CP at 23-24). Please see also Clerk’s Minutes. (CP at 22).

Hearing on the motions: At the end of the hearing on defendants’ motion to dismiss and Vincent’s motion to strike, the trial court expressed no opinion, made no rulings but took it under advisement, and asked for proposed orders from both sides. (CP at 22).

Findings of Fact, Conclusions of Law and Order of the Court: The trial court apparently signed the defendants’ proposed order, which did not include any of the material facts of the Complaint, but simply stated that the applicable statute of limitations is no greater than three years and dismissed Vincent’s Complaint. (CP 25-26).

Motion for Reconsideration: Vincent timely filed “Plaintiff’s

Motion for Reconsideration” pursuant to CR 59(a)(7) and (8) together with his argument that there was “no evidence or reasonable inference from the evidence to justify the decision and it was contrary to law.” (CP 32-38).

In his motion for reconsideration, Vincent argued:

The facts from the Plaintiffs complaint (and the amended complaint) should have been taken as true by the Court for the purpose of ruling on the Defendants' CR 12(b)(6) motion to dismiss, *Trujillo v. Northwest Trustee Services, Inc.*, 183 Wn.2d 820, 830, 355 P.3d 1100 (2015); (CP 32 l. 22-23).

Defendants cited no case law in support of their CR 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted, based on the statute of limitations pursuant to RCW 4.16.080(3); (CP 33 l. 15-21).

The defendants offered no evidence to prove that the resulting trust:
was plainly, strongly, and unequivocally repudiated by the trustees and notice of such repudiation is brought home to the beneficiary. *State, Dept. of Revenue v. Puget Sound Power & Light Co.*, 103 Wn.2d 501, 509, 694 P.2d 7(1985) (citing *Arneman V. Arneman*, 43 Wn.2d 787, 797, 264 P.2d 256 (1953)); *Goodman v. Goodman*, 128 Wn.2d 366, 373, 907 P.2d 290 (1995) (citing *O'Steen v. Estate of Wineberg*, 30 Wn. App. 923, 932, 640 P.2d 28, review denied, 97 Wn.2d 1016 (1982)). (CP 34 l. 1-7).

Vincent argued:

The statute of limitations for his claim for a resulting trust did not begin to run because no evidence was presented that the trust had been plainly, strongly, and unequivocally repudiated by [the trustees] and that notice of such a repudiation had been given to [Vincent]. (CP 34 l. 5-7).

Vincent further argued:

The Defendants have the burden of proving that the statute of limitations applies: The **statute of limitations** is an **affirmative defense** and the Defendants have the burden to prove that it applies here in their favor. *Haslund v. Seattle*, 86 Wn.2d 607, 620-621, 547 P.2d 1221 (1976) (citing CR 8(c) - statute of limitations is an affirmative defense - and *Olpinski v. Clement*, 73 Wn.2d 944, 949-50, 442 P.2d 260 (1968) (party asserting an affirmative defense has burden of proof)); *Kim v. Lee*, 174 Wn. App. 319, 323, 300 P.3d 431 (2013) (citing *Haslund*). (CP 35 l. 4-9).

A motion to dismiss under CR 12(b)(6) should be granted only sparingly and with care: A dismissal for failure to state a claim under CR 12(b)(6) is appropriate only if the Defendants meet their burden of demonstrating "beyond doubt" that the Plaintiff can prove no set of facts, consistent with the complaint, which would entitle the Plaintiff to relief. *Bravo v. Dolsen Companies*, 125 Wn.2d 745, 750, 888 P.2d 147 (1995) (citing *Haberman v. WPPSS*, 109 Wn.2d 107, 120, 744 P.2d 1032, 750 P.2d 254 (1987) and *Orwick v. Seattle*, 103 Wn.2d 249, 254, 692 P.2d 793 (1984)); *Hoffer v. State*, 110 Wn.2d 415, 420, 755 P.2d 781 (1988); *Fondren v. Klickitat County*, 79 Wn. App. 850, 854, 905 P.2d 928 (1995). (CP 35 l. 10-16).

The Plaintiffs **factual allegations must be taken as true** and **all reasonable inferences from the factual allegations must be drawn in the Plaintiffs favor**. *Trujillo v. Northwest Trustee Services, Inc.*, 183 Wn.2d 820, 830, 355 P.3d 1100 (2015). A CR 12(b)(6) motion may be granted only where there is not only an absence of facts set out in the complaint to support a claim of relief, but there is no hypothetical set of facts that could conceivably be raised by the complaint to support a legally sufficient claim. *Worthington v. WestNET*, 182 Wn.2d 500, 505-506, 341 P.3d 995 (2015). Accordingly, CR 12(b)(6) motions should be granted only "sparingly and with care." *Id.* (quoting *Orwick*, 103 Wn.2d at 254.) (CP 35 l. 17-23).

The Plaintiff's complaint states a cause of action for a resulting

trust: "**A resulting trust is a trust raised by implication of law and presumed to exist from the supposed intention of the parties and the nature of the transaction.**" *Carkonen v. Alberts*, 196 Wash. 575, 578, 83 P.2d 899 (1938). (CP 36 l. 1-3).

A resulting trust may be declared under a variety of circumstances, the most common of which pertains **to the purchase of property**. When title to property is taken in the name of a grantee other than the person advancing the consideration, the one in whose name title is taken is a resulting trustee for the person who paid the purchase price, in the absence of evidence of a contrary intent. *Arneman v. Arneman*, 43 Wn.2d 787, 796, 264 P.2d 256 (1953) (citing *Donaldson v. Greenwood*, 40 Wn.2d 238, 249, 242 P.2d 1038 (1952)). (CP 36 l. 1-8).

The **trust arises the moment record title is first passed to the grantee**. *Donaldson*, 40 Wn.2d at 249 (citing *Mouser v. O'Sullivan*, 22 Wn.2d 543, 546, 156 P.2d 655 (1945)). "[B]y definition, **an action for a resulting trust seeks only to convey legal title to property that the claimant [] already beneficially owns.**" *Dacey v. Taraday*, 196 Cal. App. 4th 962 (2011) (citing *Estate of Yool*, 151 Cal. App. 4th 867, 874-876, 60 Cal. Rptr. 3d 526 (2007)). (CP 36 l. 8-12).

The facts alleged in the Plaintiffs amended complaint constitute a resulting trust for the family home with the Plaintiff and Defendant Samantha as the beneficiaries and Defendants Allens as the trustees. (CP 36 l. 12-14).

The statute of limitations for a **resulting trust only begins to run in limited circumstances**: In the case of a resulting trust, the statute of limitations begins to run only if and when the trustee repudiates the trust and notice of such repudiation is brought home to the beneficiary. *State, Dept. of Revenue v. Puget Sound Power & Light Co.*, 103 Wn.2d 501, 509, 694 P.2d 7(1985) (citing *Arneman v. Arneman*, 43 Wn.2d 787, 797, 264 P.2d 256 (1953)). "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. The repudiation must be plain,

strong, and unequivocal." *Goodman v. Goodman*, 128 Wn.2d 366, 373, 907 P.2d 290 (1995) (emphasis added) (citing *O'Steen v. Estate of Wineberg*, 30 Wn. App. 923, 932, 640 P.2d 28, review denied, 97 Wn.2d 1016 (1982)). "Whether the statute of limitations bars a suit is a legal (CP 36 l. 15-23) question, but the jury must decide the underlying factual questions unless the facts are susceptible of but one reasonable interpretation." *Id.* (citing *Washburn v. Beatt Equip. Co.*, 120 Wn.2d 246, 263, 840 P.2d 860 (1992) and *Richardson v. Denend*, 59 Wn. App. 92, 95, 795 P.2d 1192 (1990), review denied, 116 Wn.2d 1005, 803 P.2d 1309 (1991)). (CP 37 l. 1 - 3).

The Court's order of dismissal is contrary to the controlling case law on resulting trusts and there is no evidence or reasonable inference from the evidence to justify the Court's order of dismissal: The Plaintiff has not alleged that the Defendants-trustees Allens plainly, strongly and unequivocally repudiated the trust and gave notice to the Plaintiff-beneficiary, and the Defendants have not provided any evidence of such a repudiation and notice. Thus, under the controlling case law, the statute of limitations never began to run for the Plaintiffs cause of action for a resulting trust. *Puget Sound*, 103 Wn.2d at 509 (citing *Arneman*, 43 Wn.2d at 797; *Goodman*, 128 Wn.2d at 373 (citing *O'Steen*, 30 Wn. App. at 932). Accordingly, the Defendants failed to meet their burden of proving beyond doubt that the Plaintiff can prove no set of facts consistent with the complaint which would entitle the Plaintiff to relief. *Bravo*, 125 Wn.2d at 750. Therefore, there is no evidence or reasonable inference from the evidence to justify the Court's order of dismissal, and it is error and contrary to law. CR 59(a)(7), (8). (CP 37 l. 4-14).

Vincent submitted his proposed order to the court. (CP 40-43).

The trial court agreed to reconsider and asked for a response from the defendants.

Response of Defendants: In "Defendants' Response to Plaintiff's Motion for Reconsideration," in their alleged "Statement of

Facts,” the defendants **omitted most of the legally significant facts of the Complaint** which were essential for a “resulting trust” and transferred some statements from “Causes of Action” section of the Complaint to the Statement of Facts section. (CP at 45).

In their same response, defendants again failed to comply with the “Strict Reply” requirements of local rule KCLCR 7(b)(1)(A)), which required a strictly limited reply. The defendants abandoned their original and only issue of alleged expiration of statute of limitations of three years, pursuant to RCW 45.16.080(3) – based on their own alleged oral agreement, and changed their focus to their new efforts to argue that there was no resulting trust – while they omitted (skipped over) most of the legally essential facts of the complaint. The defendants never filed an Answer to the Complaint and never submitted their own affidavits in support of their arguments.

Similarly, Vincent provided authorities that statute of limitations begin only if and when the trustee repudiates the trust. However, in page 4 of their Response, defendants submitted new arguments and alleged new imaginary “facts” which were not supported by any evidence. Contrary to defendants’ arguments, (at CP 48 l. 10-12) there are no facts in the pleadings that “during the dissolution defendants Badkin and Allen colluded and acted fraudulently to conceal his interest in the family home.” Those are not pleaded facts and they were not in the “Facts” section of the Complaint. They used to

be listed in the section as a possible cause of action, not as pleaded facts, in case later discovery showed their existence. Moreover, for clarity, those “cause of action” words of “colluded” or “fraudulently” were deleted in the **“Second Amended Complaint” (CP 58-61)**.

The arguments of the defendants in their response on “oral agreements,” “parol agreements” for formation of resulting trust are misplaced and erroneous. (CP 47). Vincent Badkin did NOT allege that the parties had made an oral agreement to form a “resulting trust.” A resulting trust is formed by operation of the law under circumstances and facts of the case at the moment the title is conveyed to the trustees. The trust arises the moment record title is first passed to the grantee. *Donaldson v. Greenwood*, 40 Wn.2d 238, 249, 242 P.2d 1038 (1952) citing *Mouser v. O'Sullivan*, 22 Wn.2d 543, 546, 156 P.2d 655 (1945)).

In addition, those arguments in defendants’ response are in violation of the local rule KCLCR 7(b)(1)(A)), which requires a strictly limited reply and must be stricken. (CP 48 l. 11-13).

Similarly, the defendants’ new arguments in pages 5 through 7 of defendants’ response, (on statute of frauds, oral agreements, etc.) are outside of the scope of their original motion, not in strict reply and should be stricken (CP 48-50).

Reply of Vincent: In “Plaintiff’s Reply in Support of Motion for Reconsideration,” Vincent argued:

At the outset, the Court should be mindful that the Defendants have a heavy burden of demonstrating **“beyond doubt”** that

Vincent can prove no set of facts, even hypothetical facts conceivably raised by the complaint, that would justify relief. *Bravo v. Dolsen Companies*, 125 Wn.2d 745, 750, 888 P.2d 147 (1995); *Worthington v. WestNET*, 182 Wn.2d 500, 505–506, 341 P.3d 995 (2015). The Defendants have in no way met their burden. (CP 51 l.16-20).

Motion of Vincent to Strike: In his same Reply, Vincent objected defendants’ new arguments in their response and asked the trial court to strike. (CP 52 l. 9-10) and (CP 65 - Clerk’s Minutes).

In his **same Reply**, Vincent continued to Reply some of the new arguments of defendants “**in the alternate**” **only** to his motion to strike (CP 52 l. 10-11), and replied over the issue of down payment for purchase of the house:

The Defendants have overlooked the fact that Vincent and Samantha at the time of purchase **took on an obligation to pay the rest of the purchase price and** did in fact do so by making the mortgage payments. This situation is mentioned in the pertinent portion of *Carkonen* cited by the Defendants. (CP 53, l. 7-10).

The authorities are uniform, however, that it is necessary in the creation of a resulting trust that the principal must have paid over his money at or before the execution of the conveyance from the vendor to the agent, or that the principal incur, at that time, an absolute obligation to pay as part of the original consideration of the purchase. *Carkonen v. Alberts*, 196 Wash. 575, 578–579, 83 P.2d 899 (1938). (CP 53 l. 11-14).

This rule is further explained in the Restatement (Second) of Trusts § 456, Purchase on Credit:

Where a transfer of property is made to one person, and another person at the time of the transfer undertakes an

obligation to pay the purchase price, a resulting trust arises in favor of the latter person, unless he manifests an intention that no resulting trust should arise.

...
d. Purchase on credit of transferee, purchaser agreeing to exonerate him. The rule stated in this Section is applicable where the transferee undertakes an obligation to the vendor to pay the purchase price, but another person at the time of the purchase agrees with the transferee to pay the purchase price to the vendor. The situation is similar to that in which the transferee pays the purchase price in cash by way of loan to the other person. See § 448. The difference is that the transferee instead of lending cash is lending his credit. **The real purchaser in each case is the borrower.**

Restatement (Second) of Trusts § 456, Purchase on Credit. (CP 53 l. 11-23) and (CP 54 l.1-2).

In his **same Reply**, Vincent continued to Reply some of the new arguments “**in the alternate**” to his motion to strike:

This is precisely the situation applicable in this case. Defendants Howard and Nancy Allen obtained financing to purchase the family home by making a down payment and taking on a mortgage, with the intent of all parties that Vincent and Samantha would make the mortgage payments as well as pay all other expenses, and only Vincent and Samantha would have the beneficial interest in the family home. (Pl.’s Amended Compl. at 2.) Accordingly, Vincent and Samantha resided in the family home and made the mortgage payments, insurance payments, property taxes, utilities payments, and Vincent made all repairs and upkeep of the house with the belief that the house was their own community property. (Id. at 3.) As stated in the rule above, Defendants Allens effectively loaned their credit to Vincent and Samantha, and it does not matter that the Allens put their own names on the mortgage — the real purchasers were Vincent and Samantha. (CP 54 l. 2-9).

This rule was recently cited by the Vermont Supreme Court in *Gregoire v. Gregoire*, 987 A.2d 909 (Vt. 2009), where “a classic case of a resulting trust” for real property was found. Id. at 912.

Although the trustee had signed the mortgage, “there was no intent or expectation that he would ever make the payments on the notes. That obligation was assumed entirely by [the beneficiary].” Id. at 913. In such circumstances, “the trustee’s theoretical financial obligation does not defeat the resulting trust.” Id. (citing many authorities, including *Restatement (Second) of Trusts* § 456). “[T]he obligation of the trustee is the equivalent of a loan of credit by the grantee for the benefit of persons paying for the purchase.” Id. at 914 (internal quotes omitted). “That loan may affect the obligations between the parties, but does not prevent the application of a resulting trust.” Id. (CP 54 l. 10-17).

The Defendants’ argument that Vincent’s complaint on its face alleges that the trust was repudiated more than three years ago fails because no facts were alleged in Vincent’s Complaint that there was a plain, strong, and unequivocal repudiation of the trust by [the trustee]. (CP 54 l. 18-20).

The defendants’ argument that when Vincent received notice of the allegation that Howard and Nancy Allen [the trustees] were acting in concert with Samantha to conceal Vincent and Samantha’s interest in the family home fails because there is no such allegation made by anyone other than as a possible cause of action (not allegation of any facts) in the complaint if a later discovery showed such acts. Such a cause of action (not as facts) had been listed originally but deleted in the Second Amended Complaint. (CP 60-61) and (CP 54 l. 21-23.)

As to the defendants’ other arguments regarding repudiation, . . . Defendants have provided no evidence regarding Samantha’s nor the TRUSTEES’ alleged repudiation of the trust. The Defendants are relying solely on the allegations in Vincent’s original complaint. Accordingly, **all reasonable inferences from the factual allegations must be drawn in Vincent’s favor**, and the Defendants **must demonstrate “beyond doubt”** that there is no hypothetical set of facts conceivably

raised by the complaint that would entitle Vincent to relief. *Bravo v. Dolsen Companies*, 125 Wn.2d 745, 750, 888 P.2d 147 (1995); *Worthington v. WestNET*, 182 Wn.2d 500, 505–506, 341 P.3d 995 (2015). (CP 55 l. 8-13).

Firstly, Vincent’s allegation that Samantha concealed her interest in the family home from the divorce court is not equivalent to a plain, strong, and unequivocal repudiation of the trust [by the trustees]. (CP 55 l. 14-20.)

Secondly, the Defendants’ argument that Vincent “was excluded from” the family home (Defs.’ Response at 5) is not actually alleged in Vincent’s complaint — Vincent voluntarily moved out of the family home when he and Samantha permanently separated (Pl.’s Amended Compl. at 3). Vincent was not required to reside in [the family home to retain his beneficial interest in it]. (CP 56 l. 4-7).

If Vincent had been excluded from the family home other than the reason of his dissolution of marriage, the statute of limitations for adverse possession would have been **10 years**. *Peters v. Skalman*, 27 Wash.App. 247, 617 P.2d 448 (1980).

Where spouses or ex-spouses are treated as tenants in common, one spouse must oust the other from their joint property. See *Peters*, 27 Wash.App. at 251-54, 617 P.2d 448. If that happens, the ousted spouse must exercise his or her property rights within the applicable statute of limitations. See *id.* In the case of personal property, the three-year statute of limitations would apply. See RCW 4.16.080(2). **In the case of real property, the ten-year statute of limitations would apply. See RCW 4.16.020(1).**

Thirdly, the Defendants’ argument that Vincent “was offered no share of [the family home] in the divorce proceedings” (Defs.’ Response at 5) ignores that the divorce court neither addressed nor divided the family home (Pl.’s Amended Compl. at 3). Community property that is not disposed of by the divorce court

continues to be held in equal share by the parties as tenants in common. *Marriage of Monaghan*, 78 Wn. App. 918, 929, 899 P.2d 841 (1995). (CP 56 l. 7-11).

In order for the statute of limitations to begin accruing, notice of repudiation by the trustees must have been brought home to the beneficiary. *State, Dept. of Revenue v. Puget Sound Power & Light Co.*, 103 Wn.2d 501, 509, 694 P.2d 7 (1985) (citing *Arneman v. Arneman*, 43 Wn.2d 787, 797, 264 P.2d 256 (1953)).

Vincent's complaint does not allege anything as to when he would have discovered that the Defendants-trustees Allens were acting in concert with Samantha to conceal their marital community's interest in the family home. Hypothetically, Vincent could have discovered only within the last three years of the filing of the complaint that the Allens were acting in concert with Samantha or could never discover that such a fraud occurred.

As stated previously, **for a CR 12(b) motion to dismiss, the Court is obligated to entertain hypothetical facts conceivably raised by the complaint and to draw all reasonable inferences from the factual allegations in Vincent's favor.** *Bravo v. Dolsen Companies*, 125 Wn.2d 745, 750, 888 P.2d 147 (1995); *Worthington v. WestNET*, 182 Wn.2d 500, 505-506, 341 P.3d 995 (2015).

Furthermore, the pleadings are supposed to be construed liberally, so "as to do substantial justice." CR 8(f). Accordingly, Vincent's complaint neither alleges a plain, strong, and unequivocal

repudiation of the trust by Defendants-trustees Allens, nor alleges that Vincent was given notice of such a repudiation within the last three years of the filing of the complaint. What the Defendants are seeking is to have the Court construe Vincent's complaint hyper-technically against him, in order to obtain an extraordinary dismissal without presenting any evidence or even answering the complaint. Such action is contrary to the court rules and controlling case law, and would work an injustice. The Defendants are free to present at trial any evidence they might have of a repudiation of the trust.

In his same Reply, Vincent notified the court of his **Second Amended Complaint** and its attached the letters as Exhibits from defendant Samantha Badkin acknowledging community property nature of the family home. (CP 52 l. 17-22 and CP 58-64 and CP 63-64). In the attachment letters, Samantha Badkin is thanking her mother (the trustee/defendant) Nancy Allen for her help for them to purchase the family home. (CP 63 and CP 64).

The Court's Order on Motion for Reconsideration: At the end of the hearing on motion for reconsideration, the court again made no rulings nor expressed an opinion and asked for proposed orders from both sides. (CP 66-68).

Apparently the court signed the proposed "Order on Plaintiff's Motion for Reconsideration" Findings and Conclusions" by the defendants and again dismissed Vincent's Complaint while, at the same

time affirming its previous order. (CP 66-68). Now, both orders provide dismissal of the same complaint.

IV. ARGUMENT

The summary of facts and legal arguments in Section III above, presented at the trial court are incorporated in here by reference.

Standard of Review

The trial court's grant of CR (12(b)(6) motion to dismiss or grant of a summary judgment is reviewed denovo. Vincent's summary of the facts and the arguments provided in above sections were taken from parts of material submitted in the trial court and incorporated in here by reference. Defendants have a heavy burden of demonstrating "**beyond doubt**" that Vincent can prove no set of facts, even hypothetical facts conceivably raised by the complaint, that would justify relief. *Bravo v. Dolsen Companies*, 125 Wn.2d 745, 750, 888 P.2d 147 (1995); *Worthington v. WestNET*, 182 Wn.2d 500, 505-506, 341 P.3d 995 (2015). The Defendants have not met their burden. (CP 51 l.16-20).

The statute of limitations is an affirmative defense and the defendants have the burden to prove that it applies here in their favor. *Haslund v. Seattle*, 86 Wn.2d 607, 620-621, 547 P.2d 1221 (1976) (citing CR 8(c) and *Olpinski v. Clement*, 73 Wn.2d 944, 949-50, 442 P.2d 260 (1968))

In this case, the defendants did not even file an answer to the

Complaint and, in their trial court briefs, have been omitting and misquoting the significant facts provided in the Complaint. The burden is on the party moving for summary dismissal or a summary judgment to demonstrate there is no genuine dispute as to any material fact.

Folsom v. Burger King, 135 Wn.2d 658, 663, 958 P.2d 301 (1998).

When making this determination, the Court considers all facts and makes all reasonable, factual inferences in the light most favorable to the nonmoving party. *Scrivener v. Clark College*, 181 Wn.2d 439, 444, 334 P.3d 541 (2014).

The Facts and Arguments Summarize in Section III above, in the Statement of the Case and Procedural History are incorporated in here by reference:

A. Argument on Issues on “Findings of Fact, Conclusions of Law and Order of the Court,” dated 01-13-2016. (CP 25 – in the APPENDIX):

Argument on Issue 1. The trial court erred when it ordered that “*the applicable statute of limitations is no greater than three years*” when, in his Complaint, plaintiff alleged sufficient facts for a prima facie finding that there was a “resulting trust,” himself as a beneficiary, and statute of limitations does not start for a resulting trust unless and until trustee repudiates the trust. And no evidence of such a repudiation existed in record. (CP 25).

The defendants originally filed their CR 12(b)(6) motion to dismiss based on their misunderstanding of the law on resulting trusts, cited RCW 4.16.080 for expiration of a three years statute of limitations for their alleged oral agreement, and in their motion to dismiss clearly stated “**Evidence Relied Upon**” . . . “**upon the allegations in the**

Complaint . . .” (CP 10 l. 9). In their same motion to , the defendants claimed “there is absolutely no legal grounds” for the legal action and asked for award of attorneys fees. (CP 11, l. 9).

Once they reviewed the plaintiff’s response and legal authorities on Resulting Trusts, the defendants finally admitted the applicable law that, for a resulting trust, the “statute of limitations did not begin running until [the trustee] repudiates that trust . . .” (CP 18, l. 21-23).

Since the defendants did not file an Answer, and no affidavits were submitted, the only evidence they must rely upon (as their motion to dismiss admits) is the facts in the complaint, which states:

Amended Complaint, in “Section III -- Statement of Facts,” the facts were summarized:

Vincent and Samantha were married on October 14, 1995 . . . On or about August 25, 2004, Vincent and Samantha purchased their subject real property family home . . . The family home was purchased in the names of Howard and Nancy Allen, Samantha’s parents, for ease of financing, with Nancy Allen making the down-payment as a gift to Vincent and Samantha. However, it was intended by all parties that Vincent and Samantha would make and did make the mortgage payments and all equity in the property belonged only to the marital community of Vincent and Samantha. (CP 28).

. . .
Vincent and Samantha Badkin resided at the family home, made the mortgage payments, insurance payments, property taxes, utilities payments, and Vincent made all repairs and upkeep of the house with the belief that the house was their own community property . . . On May 23, 2008, Vincent and Samantha were permanently separated and Vincent moved out of the family home . . . while Samantha continued and continues to reside there.

On May 7, 2012, Vincent and Samantha were divorced in Kitsap County Superior Court after a “default trial,” during which Samantha testified but concealed from the court the fact that the family home was their community property. The court divided Vincent’s and Samantha’s community assets but did not address and did not divide the family home. (CP 29).

These facts constitute a “resulting trust” under the law. A resulting trust may be declared under a variety of circumstances, the most common of which pertains to the purchase of property. When title to property is taken in the name of a grantee other than the person advancing the consideration, the one in whose name title is taken is a resulting trustee for the person who paid the purchase price, in the absence of evidence of a contrary intent. *Arneman v. Arneman*, 43 Wn.2d 787, 796, 264 P.2d 256 (1953) (citing *Donaldson v. Greenwood*, 40 Wn.2d 238, 249, 242 P.2d 1038 (1952)). (CP 36 l. 1-8).

The trust arises the moment record title is first passed to the grantee. *Donaldson*, 40 Wn.2d at 249 (citing *Mouser v. O’Sullivan*, 22 Wn.2d 543, 546, 156 P.2d 655 (1945)). “[B]y definition, **an action for a resulting trust seeks only to convey legal title to property that the claimant [] already beneficially owns.**” *Dacey v. Taraday*, 196 Cal. App. 4th 962 (2011) (citing *Estate of Yool*, 151 Cal. App. 4th 867, 874-876, 60 Cal. Rptr. 3d 526 (2007)). (CP 36 l. 8-12).

In the case of a resulting trust, the statute of limitations begins to run only if and when the trustee repudiates the trust and notice of such repudiation is brought home to the beneficiary. *State, Dept. of Revenue v. Puget Sound Power & Light Co.*, 103 Wn.2d 501, 509, 694 P.2d 7(1985) (citing *Arneman v. Arneman*, 43 Wn.2d 787, 797, 264

P.2d 256 (1953)). "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. The repudiation must be plain, strong, and unequivocal." *Goodman v. Goodman*, 128 Wn.2d 366, 373, 907 P.2d 290 (1995) (emphasis added) (citing *O'Steen v. Estate of Wineberg*, 30 Wn. App. 923, 932, 640 P.2d 28, review denied, 97 Wn.2d 1016 (1982)).

Therefore, the trial court erred when it ordered that "*the applicable statute of limitations is no greater than three years*"

Argument on Issue 3. The trial court erred when it ordered that "*there is no actionable harm plead in Plaintiff's Complaint that is based on any action or failure to act that occurred within three years of filing or serving this Complaint.*"

The arguments and legal authorities **in Issue 1**, above, are incorporated in here by reference.

Argument on Issue 4. In Finding of Fact and Conclusion of Law the trial court erred when it ordered that "*accordingly, there is no basis in law for Plaintiff's Complaint to proceed*" when in Complaint, plaintiff alleged sufficient facts for a prima facie finding that there was a "resulting trust," himself as a beneficiary, and the statute of limitations start to run for a resulting trust only after the trustee repudiates the trust.

The defendants did not meet their burden of demonstrating "**beyond doubt**" that the plaintiff can prove no set of facts, consistent

with the complaint, which would entitle the plaintiff to relief. *Bravo v. Dolsen Companies*, 125 Wn.2d 745, 750, 888 P.2d 147 (1995). Was there any evidence of trustee's repudiation of the trust. (CP 25).

A motion to dismiss under CR 12(b)(6) should be granted only sparingly and with care: A dismissal for failure to state a claim under CR 12(b)(6) is appropriate only if the Defendants meet their burden of demonstrating "beyond doubt" that the Plaintiff can prove no set of facts, consistent with the complaint, which would entitle the Plaintiff to relief. *Bravo v. Dolsen Companies*, 125 Wn.2d 745, 750, 888 P.2d 147 (1995) (citing *Haberman v. WPPSS*, 109 Wn.2d 107,120, 744 P.2d 1032, 750 P.2d 254 (1987) and *Orwick v. Seattle*, 103 Wn.2d 249, 254, 692 P.2d 793 (1984)); *Hoffer V. State*, 110 Wn.2d 415, 420, 755 P.2d 781 (1988); *Fondren v. Klickitat County*, 79 Wn. App. 850, 854, 905 P.2d 928 (1995). (CP 35 l. 10-16).

The Plaintiffs factual allegations must be taken as true and all reasonable inferences from the factual allegations must be drawn in the Plaintiffs favor. *Trujillo v. Northwest Trustee Services, Inc.*, 183 Wn.2d 820, 830, 355 P.3d 1100 (2015). A CR 12(b)(6) motion may be granted only where there is not only an absence of facts set out in the complaint to support a claim of relief, but there is no hypothetical set of facts that could conceivably be raised by the complaint to support a legally sufficient claim. *Worthington v. WestNET*, 182 Wn.2d 500, 505-506, 341 P.3d 995 (2015). Accordingly, CR 12(b)(6) motions should be

granted only "sparingly and with care." Id. (quoting Orwick, 103 Wn.2d at 254.) (CP 35 l. 17-23).

Argument on Issue 5. On Conclusions of Law. The trial court erred when it ordered that "*Plaintiff's Complaint should be dismissed*" when in his Complaint, plaintiff alleged sufficient facts for a prima facie finding that there was a "resulting trust," himself as a beneficiary, and statute of limitations does not start for a resulting trust unless and until trustee repudiates the trust. Is there any evidence of such a repudiation in record.

The arguments and legal authorities **in Issue 1, 3, and 4**, above, are incorporated in here by reference.

Argument on Issues 6. On Order of Dismissal. The trial court erred when it ordered that "*Plaintiff's Complaint is dismissed with prejudice.*" The defendants did no meet their burden of demonstrating "beyond doubt" that the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief when *Bravo v. Dolsen Companies*, 125 Wn.2d 745, 750, 888 P.2d 147 (1995).

The arguments and legal authorities **in Issues 1, 3, and 4**, above, are incorporated in here by reference.

B. Argument on Issues on "Order on Plaintiff's Motion for Reconsideration," dated 3-28-2016. (CP 66-68 – in the APPENDIX).

Argument on Issue B 1. The trial court erred when "*the*

court treated Defendant's Motion to Dismiss under CR 12(b)(6) as a motion for summary judgment under CR 56 in addition to pleadings and motions in this case, considered the court documents from the dissolution proceedings . . ." while the defendants filed no Answer, no declarations, and no such documents were in the record. (CP 66).

The arguments and legal authorities **in Issue 1, 3, 4, 5, and 6**, above, are incorporated in here by reference.

Argument on Issue B 2. The court erred when it found or concluded that *"the applicable statute of limitations in this case is three years"* because in his Complaint, plaintiff alleged sufficient facts for a prima facie finding that there was a "resulting trust," himself as a beneficiary, and statute of limitations does not start for a resulting trust unless and until trustee repudiates the trust. And no evidence of such a repudiation exists in record. (CP 67).

The arguments and legal authorities **in Issue 1, 3, 4, 5, and 6**, above, are incorporated in here by reference.

Argument on Issue B 3. The court erred when it found or concluded that *"treating of property alleged to be held in trust as if it were the sole property of the alleged trustee repudiates any trust in said property"* because this issue is outside of the scope of defendants' CR 12(b)(6) motion to dismiss for statute of limitations based on an alleged oral agreement, because there are no allegations or facts in record to suggest that the trustee ever treated the property as trustee's

sole property, in violation of the local rule KCLCR 7(b)(1)(A)), which requires a strictly limited reply. The evidence in record shows that the beneficiaries used the property as their own by living there, by making mortgage payments, property tax payments, maintenance, among others. (CP 67).

Argument on Issue B 4. The court erred when it found or concluded that “*once a beneficiary of a trust has notice of the repudiation of that trust by the trustee, the statute of limitations begins to run against the beneficiary*” because this issue is outside of the scope of defendants’ CR 12(b)(6) motion to dismiss for statute of limitations based on an alleged oral agreement, in violation of the local rule KCLCR 7(b)(1)(A)), which requires a strictly limited reply, and because the only evidence submitted in court is the facts in the Complaint and there is no evidence to suggest that there was a repudiation of the trust. (CP 67).

Argument on Issue B 5. The court erred when it found or concluded that “*Defendants Howard and Nancy Allen [the trustees] have been treating the real property in this case as their own as evidenced by Findings of Fact and Conclusions of Law of May 7, 2012, which did not list them as a marital asset of Plaintiff and Defendant Samantha Badkin*” because this issue is outside of the scope of defendants’ CR 12(b)(6) motion to dismiss for statute of limitations based on an alleged oral agreement, in violation of local rule KCLCR

7(b)(1)(A)), which requires a strictly limited reply, because there are no allegations or evidence in record to suggest that the trustees were ever treating the property as their sole property; and because the evidence in record shows that Vincent and Samantha Badkin, as the beneficiaries of trust, used the property as their own by living there, by making the mortgage payments, property tax payments, maintenance, among others. (CP 67).

Argument on Issue B 6. The court erred when it found or concluded in “*the findings of Fact and Conclusions of Law of May 7, 2012, by not listing any interest in the real property as a marital asset, gave Plaintiff notice that Defendants were treating the property as their own*” because this issue is outside of the scope of defendants’ CR 12(b)(6) motion to dismiss for statute of limitations based on an alleged oral agreement, in violation of local rule KCLCR 7(b)(1)(A)), which requires a strictly limited reply, because Howard and Nancy Allen [the trustees] were never involved in the dissolution of marriage proceedings, and as trustees, never gave any kind notice of repudiation of any interest of Vincent Badkin, and a notice of repudiation by the trustee must be plain, strong, and unequivocal.” *Goodman v. Goodman*, 128 Wn.2d 366, 373, 907 P.2d 290 (1995). (CP 67).

Argument on Issue B 7. The court erred when it found or concluded that “*more than three years passed from such notice being given to Plaintiff to the time of this suit being filed*” because there is no

evidence in record that [the trustees] were ever involved in the dissolution of marriage proceedings, and as trustees, never gave any kind notice of repudiation of any interest of Vincent Badkin. And because a notice of repudiation by the trustee must be plain, strong, and unequivocal." *Goodman v. Goodman*, 128 Wn.2d 366, 373, 907 P.2d 290 (1995). (CP 67).

Argument on Issue B 8. The court erred when it found or concluded that "*at the time of the filing of this suit, the statute of limitations as to any resulting trust alleged by Plaintiff had already run against him*" because in his Complaint, plaintiff alleged sufficient facts for a prima facie finding that there was a "resulting trust," himself as a beneficiary, and statute of limitations does not start running for a resulting trust unless and until trustee repudiates the trust, and because no evidence of such a repudiation existed in record. (CP 67).

Argument on Issue B 9. The court erred when it found or concluded that "*as to all other causes of action, the statute of limitations had also run*" because there has been no *other issues* "*as to all other causes of action*" before the trial court for any other issues. (CP 68).

Argument on Issue B 10. The court erred when it ordered that "*Plaintiff's complaint is dismissed with prejudice*" and "*Plaintiff's motion for reconsideration is denied*" because the orders were contrary to the facts of the case and contrary to the law. The defendants did not

meet their burden of demonstrating “beyond doubt” that the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief when the trial court ordered that “*Plaintiff’s Complaint is dismissed with prejudice.*” *Bravo v. Dolsen Companies*, 125 Wn.2d 745, 750, 888 P.2d 147 (1995). (CP 68).

Argument on Issue B 11. The court erred or abuse its discretion when two different times it failed to grant “Plaintiff’s Motion to Strike” because the defendants’ responses were outside of the scope of defendants’ CR 12(b)(6) motion to dismiss for statute of limitations based on an alleged oral agreement, in violation of local rule KCLCR 7(b)(1)(A)), which requires a strictly limited reply? (CP 23 and CP 52).

V. ATTORNEYS FEES:

Argument on Issue B 12. The trial court erred or abused its discretion when it failed to award reasonable attorneys fees to the plaintiff because defendants’ motion to dismiss pursuant to CR 12(b)(6) for statute of limitations based on their alleged oral agreement and defendants, themselves, asking attorneys fees against Vincent with their arguments that the complaint was frivolous while the defendants repeatedly changed their responsive arguments in the trial court proceedings, in violation of local rule KCLCR 7(b)(1)(A)), which requires a strictly limited reply, was itself frivolous and justifies award of attorneys fees to the plaintiff. (CP 23 and CP 52).

The Court of Appeals should award reasonable attorneys fees to

the plaintiff because the defendants arguments at the trial court has been frivolous and time consuming. It is only fair that the plaintiff is awarded reasonable attorneys fees for work at the trial court level and in the appeal in the Court of Appeals.

VI. CONCLUSION

For the reasons stated above, the Court of Appeals should strike defendants's material not in "strict reply" of their CR 12(b)(6) motion to dismiss for alleged expiration of the statue of limitations, reverse the trial court' orders and award reasonable attorneys fees the plaintiff.

Respectfully submitted on this 18th day of July, 2016



Ahmet Chabuk (WSBA No. 22543)
Attorney for Appellant
11663 Ivy Lane NW, Silverdale, WA 98383
(360) 692-0854

APPENDIX

1. "Findings of Fact, Conclusions of Law and Order of the Court," dated 01-13-2016.
2. "Order on Plaintiff's Motion for Reconsideration," Dated 3-28-2016.

DECLARATION OF SERVICE:

I certify that on July 18, 2016, I mailed a true copy of this document to Mr. Ronald D. Richmond, Attorney at Law, 1521 Piperberry Way SE #135 Port Orchard WA 98366.



JAN 13 2016

DAVID W. PETERSON

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6 SUPERIOR COURT OF WASHINGTON
COUNTY OF KITSAP

7 VINCENT L. BADKIN, a divorced
8 man,
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Plaintiff,

No. 15-2-02049-0

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND ORDER OF THE COURT

vs.

SAMANTHA J. BADKIN, divorced
woman; HOWARD M. ALLEN and
NANCY B. ALLEN, husband and wife,
individually and the martial
community composed thereof,

Defendants.

THIS MATTER having come before this Court for regular hearing on Defendants' Motion to Dismiss; this Court having reviewed the pleadings and the file, and heard the argument of counsel, and being fully advised in the premises;

NOW THEREFORE, this Court makes the following

FINDINGS AND CONCLUSIONS

1. The applicable Statute of Limitations is no greater than three years.
2. The discovery rule has not been asserted and therefore does not apply.
3. There is no actionable harm plead in Plaintiff's Complaint that is based on any action or failure to act that occurred within three years of filing or serving this Complaint.
4. Accordingly, there is no basis in law for Plaintiff's Complaint to proceed.



MAR 28 2016

DAVID W. PETERSON

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5 SUPERIOR COURT OF WASHINGTON
6 COUNTY OF KITSAP

7 VINCENT L. BADKIN, a divorced
8 man,
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Plaintiff,

No. 15-2-02049-0

ORDER ON PLAINTIFF'S MOTION FOR
RECONSIDERATION

vs.

SAMANTHA J. BADKIN, divorced
woman; HOWARD M. ALLEN and
NANCY B. ALLEN, husband and wife,
individually and the martial
community composed thereof,

Defendants.

THIS MATTER having come before the court on Plaintiff's Motion for Reconsideration under Civil Rule 59 of this court's Findings of Fact, Conclusions of Law, and Order of the Court of January 13, 2016; this court having reviewed the pleadings and the file, and heard the argument of counsel, and being fully advised in the premises;

Now, therefore, this court makes the following

FINDINGS AND CONCLUSIONS

The Court treated Defendants' Motion to Dismiss under CR 12(b)(6) as a Motion for Summary Judgment under CR 56 and, in addition to the pleadings and motions in this case, considered the court documents from the dissolution proceedings, Kitsap County Case No. 10-3-00847-6, as follows:

- 1 • Findings of Fact and Conclusions of Law, May 7, 2012.
- 2 • Decree of Dissolution, May 7, 2012.
- 3 • Order on Respondent's CR 60(b) Motion for Relief from Judgment or Orders, June 28,
- 4 2012.
- 5 • Amended Findings of Fact and Conclusions of Law, August 3, 2012.
- 6 • Mandate from the Court of Appeals, July 28, 2015.
- 7 • Order on Remand, September 21, 2015.
- 8

9 The appropriate statute of limitations in this case is three years.

10 Treating of property alleged to be held in trust as if it were the sole property of the alleged
11 trustee repudiates any trust in said property.

12 Once a beneficiary of a trust has notice of the repudiation of that trust by the trustee, the
13 statute of limitations begins to run against the beneficiary.

14 Defendants Howard and Nancy Allen have been treating the real property in this case as
15 their own as evidenced by the Findings of Fact and Conclusions of Law of May 7, 2012, which did
16 not list them as a marital asset of Plaintiff and Defendant Samantha Badkin.

17 The Findings of Fact and Conclusions of Law of May 7, 2012, by not listing any interest in
18 the real property as a marital asset, gave Plaintiff notice that Defendants were treating the
19 property as their own.
20

21 More than three years passed from such notice being given to Plaintiff to the time of this
22 suit being filed.

23 At the time of the filing of this suit, the statute of limitations as to any resulting trust
24 alleged by Plaintiff had already run against him.
25

1 As to all other causes of action, the statute of limitations had also run.

2 ~~Plaintiff's original complaint and motion for reconsideration were not well grounded in law~~
3 ~~or fact in violation of Civil Rule 11.~~ *KDR*

4 ~~It is appropriate for Plaintiff to pay the reasonable attorney fees and costs of Defendants.~~ *KDR*

5 ORDER

6 Plaintiff's complaint is dismissed with prejudice.

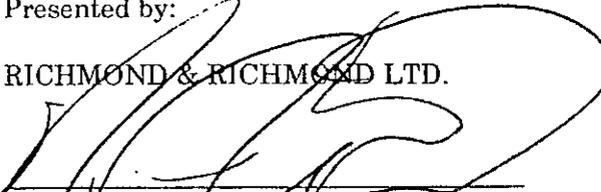
7 Plaintiff's motion for reconsideration is denied.

8 ~~Defendants are awarded fees in the amount of \$4,524.62.~~ *KDR*

9 Entered this *28th* day of March, 2016.

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11 
12 JUDGE KEVIN D. HULL

13 Presented by:

14 
15 RICHMOND & RICHMOND LTD.

16
17 [] KAREN RICHMOND WSBA 31618
18 [X] RONALD D. RICHMOND WSBA 42438
19 Attorney for Defendants

20 Copy Received:

21
22 AHMET CHABUK WSBA 22543
23 Attorney at Plaintiff