Brigham Young University Law School
BYU Law Digital Commons

Utah Court of Appeals Briefs

2010

Ralph O. Davis, Sr v. Marion Davis : Brief of Appellant

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca3

 Part of the Law Commons

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.
M. Dayle Jeffs; Liisa A. Hancock; Jeffs and Jeffs; Attorneys for Appellant.
Mark D. Stubbs; Fillmore Spencer; Attorney for Appellees.

Recommended Citation
Brief of Appellant, *Davis, Sr v. Davis*, No. 20100176 (Utah Court of Appeals, 2010).
https://digitalcommons.law.byu.edu/byu_ca3/2202

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH COURT OF APPEALS

THE ESTATE OF RALPH O. DAVIS, SR. or THE RALPH O. DAVIS, SR., TRUST,

Plaintiff and Appellant,

vs.

MARION DAVIS and DONNA DAVIS,

Defendants and Appellees,

MARION DAVIS and DONNA DAVIS,

Counterclaimants and Appellees,

vs.

THE ESTATE OF RALPH O. DAVIS, SR. or THE RALPH O. DA VIS, SR., TRUST,

Counterdefendant and Appellant.

BRIEF OF APPELLANT, THE ESTATE OF RALPH O. DAVIS, SR. or THE RALPH O. DAVIS, SR. TRUST

Appeal No. 20100176-CA
District Court No. 070401549

APPELLANT'S BRIEF

Appeal from Judgment by the Fourth Judicial District Court
The Honorable James R. Taylor

Mark D. Stubbs, #9353
FILLMORE SPENCER, LLC
3301 North University Avenue
Provo, Utah 84604
Attorneys for Appellees

M. Dayle Jeffs, #1655
Liisa A. Hancock, #11244
JEFFS & JEFFS, P.C.
90 North 100 East
Provo, Utah 84603
Attorneys for Appellant

FILED
UTAH APPELLATE COURTS
OCT 1 0 2010

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

IN THE UTAH COURT OF APPEALS

THE ESTATE OF RALPH O. DAVIS, SR. or THE RALPH O. DAVIS, SR., TRUST,

Plaintiff and Appellant,

vs.

MARION DAVIS and DONNA DAVIS,

Defendants and Appellees,

MARION DAVIS and DONNA DAVIS,

Counterclaimants and Appellees,

vs.

THE ESTATE OF RALPH O. DAVIS, SR. or THE RALPH O. DA VIS, SR., TRUST,

Counterdefendant and Appellant.

BRIEF OF APPELLANT, THE ESTATE OF RALPH O. DAVIS, SR. or THE RALPH O. DAVIS, SR. TRUST

Appeal No. 20100176-CA
District Court No. 070401549

APPELLANT'S BRIEF

Appeal from Judgment by the Fourth Judicial District Court
The Honorable James R. Taylor

Mark D. Stubbs, #9353
FILLMORE SPENCER, LLC
3301 North University Avenue
Provo, Utah 84604
Attorneys for Appellees

M. Dayle Jeffs, #1655
Liisa A. Hancock, #11244
JEFFS & JEFFS, P.C.
90 North 100 East
Provo, Utah, 84603
Attorneys for Appellant

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

TABLE OF CONTENTS

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

TABLE OF AUTHORITIES

CASES

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

STATUTES AND RULES

SECONDARY SOURCES

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

JURISDICTION

Appellate jurisdiction is present pursuant to UTAH CODE ANN. § 78A-4-103(1)(j) and Rule 3 of the Utah Rules of Appellate Procedure.

STATEMENT OF ISSUES AND STANDARD OF REVIEW

This case involves an appeal of the trial court's grant of summary judgment in favor of the Defendants/Appellees on the basis that:

Statute of Limitations

(1) The trial court erred when it found that the discovery rule was not met and determined that the statue of limitations commenced in 1980. The appellate court reviews a trial court's "summary judgment determination for correctness, granting no deference to the district court's legal conclusions.

a. **Standard of Review:** [The appellate court] determines only whether the district court erred in applying the governing law and whether the district court correctly held that there were no disputed issues of material fact." *Salt Lake County v. Holliday Water Co.*, 2010 UT, ¶ 14, 234 P.3d 1105 (internal quotation marks and citations omitted). An appeals court also reviews "[t]he applicability of both the statute of limitations and the equitable discovery rule are questions of law, reviewed for correct." *Ockey v. Lehmer*, 2008 UT 37, ¶ 34, 189 P.3d 51; *Colosimo v. Roman Catholic Bishop*, 2007 UT 25, ¶ 11, 156 P.3d 806. The application of the statute of limitations is a question of law. *See Arnold v. Grigsby*, 2009 UT 88, ¶ 7, 225 P.3d 192; *Call v. Keiter*, 2010 UT App 55, ¶¶ 14-15, 230 P.3d 128. As a matter of equity, evidence of facts sufficient to raise the discovery rule is

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

a finding of fact that is reviewed under a clearly erroneous standard. *In re Hoopiiaina Trust*, 2006 UT 53, ¶37, 44 P.3d 1129. In reviewing a grant of summary judgment, the reviewing court "view[s] the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party." *Higgins v. Salt Lake County*, 855 P.2d 231 (Utah 1993).

b. **Preservation for Appeal:** This matter has been preserved for appeal in the Plaintiff's Memorandum of Points and Authorities in Opposition to Defendants' Motion for Summary Judgment. (Record 300-303.)

Improper Weighing of Evidence

(2) The trial court erred when it weighed evidence when considering a motion for summary judgment.

a. **Standard of Review:** The appellate court reviews a trial court's grant of summary judgment for correctness. The appellate court reviews a trial court's "summary judgment determination for correctness, granting no deference to the district court's legal conclusions. [The appellate court] determines only whether the district court erred in applying the governing law and whether the district court correctly held that there were no disputed issues of material fact." *Salt Lake County v. Holliday Water Co.*, 2010 UT, ¶ 14, 234 P.3d 1105 (internal quotation marks and citations omitted). An appeals court also reviews "[t]he applicability of both the statute of limitations and the equitable discovery rule are questions of law, reviewed for correct." *Ockey v. Lehmer*, 2008 UT 37, ¶ 34, 189 P.3d 51; *Colosimo v. Roman Catholic Bishop*, 2007 UT 25, ¶ 11, 156 P.3d 806. In reviewing a

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

grant of summary judgment, the reviewing court "view[s] the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party." *Higgins v. Salt Lake County*, 855 P.2d 231 (Utah 1993).

b. **Preservation for Appeal:** This matter has been preserved for appeal in the March 31, 2009 Ruling and January 19, 2010 Judgment. (Record 332-346 and 382-391.)

No Determination of Constructive Trust

(3) The trial court erred when it determined that a constructive trust was not established in 1966.

a. **Standard of Review:** The appellate court reviews a trial court's "summary judgment determination for correctness, granting no deference to the district court's legal conclusions. [The appellate court] determines only whether the district court erred in applying the governing law and whether the district court correctly held that there were no disputed issues of material fact." *Salt Lake County v. Holliday Water Co.*, 2010 UT, ¶ 14, 234 P.3d 1105 (internal quotation marks and citations omitted). The proper standard of review for matters both in equity and at law is a 'clearly erroneous' standard. *RHN Corp. v. Veibell*, 2004 UT 60, ¶35, 96 P.3d. 935. In reviewing a grant of summary judgment, the reviewing court "view[s] the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party." *Higgins v. Salt Lake County*, 855 P.2d 231 (Utah 1993).

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

b. **Preservation for Appeal:** This matter has been preserved for appeal in the. (Record 340 and 385-86.)

Improper Exclusion of Evidence

(4) The Trial Court's Determination that the Affidavits of Bette Davis Stratton and Glen Richard Davis were Inadmissible Hearsay Evidence was Made in Error and Constitute Material Issue of Fact Precluding Summary Judgment.

a. **Standard of Review**: The "standard of review on the admissibility of hearsay evidence is complex, since the determination of admissibility often contains a number of rulings, each of which may require a different standard of review. Legal questions regarding admissibility are reviewed for correctness, and questions of fact are reviewed for clear error. And, [f]inally, we review the district court's ruling on admissibility for abuse of discretion." *Salt Lake City v. George*, 2008 UT App 257, ¶ 5, 189 P.3d 1284. The appellate court reviews a trial court's grant of summary judgment for correctness. The appellate court reviews a trial court's "summary judgment determination for correctness, granting no deference to the district court's legal conclusions. [The appellate court] determines only whether the district court erred in applying the governing law and whether the district court correctly held that there were no disputed issues of material fact." *Salt Lake County v. Holliday Water Co.*, 2010 UT, ¶ 14, 234 P.3d 1105 (internal quotation marks and citations omitted). An appeals court also reviews "[t]he applicability of both the statute of limitations and the equitable discovery rule are questions of law, reviewed for correct."

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

Ockey v. Lehmer, 2008 UT 37, ¶ 34, 189 P.3d 51; *Colosimo v. Roman Catholic Bishop*, 2007 UT 25, ¶ 11, 156 P.3d 806. In reviewing a grant of summary judgment, the reviewing court "view[s] the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party." *Higgins v. Salt Lake County*, 855 P.2d 231 (Utah 1993).

b. **Preservation for Appeal:** This matter has been preserved for appeal in the March 31, 2009 Ruling and January 19, 2010 Judgment. (Record 387, 341-42).

STATUTES AND RULES WHOSE INTERPRETATION IS DETERMINATIVE ON APPEAL

UTAH RULES OF EVIDENCE, RULE 601(C)

> (1) Evidence of a statement is not made inadmissible by the hearsay rule when offered in an action upon a claim or demand against the estate of the declarant if the statement was made upon the personal knowledge of the declarant at a time when the matter had been recently perceived by the declarant and while the declarant's recollection was clear.
>
> (2) Evidence of a statement is inadmissible under this section if the statement was made under circumstances such as to indicate its lack of trustworthiness

STATEMENT OF THE CASE

The present case involves a dispute between siblings (individually and via their estate) over 59 acres of family property located in Genola, Utah. (Record at 34, 390.) In 1938, Glen and Lilly Davis purchased 120 acres of property in Genola, Utah. In August of 1946, Glen and Lilly Davis transferred to their three sons, Ralph Sr., Marion, and Sterling, an undivided 1/3 interest in 59 acres of property as tenants in common. (Record

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

at 313, 390.) A separate and independent one acre parcel of property was transferred to Marion in his individual capacity. (Record at 390.) Marion remained on the property and did most of the farming that was conducted on the property. (Record at 390.) In the late fall of 1950, Marion Davis and his wife Donna Davis requested permission of Marion's brothers, Ralph Davis ("Ralph, Sr.) and Sterling Davis, to use the 59-acre farm property as security for a loan so that Marion and Donna could build a home on the separate one acre parcel they owned with the agreement that title to the property would be transferred back to all three brothers as before when the loan was paid off. (Record at 273-286, 310, 390). Ralph, Sr. and Sterling agreed to the request and on December 11, 1950, Ralph, Sr. and his wife deeded, as an accommodation to his brother Marion Davis, their1/3 interest in the 59-acre parcel to allow Marion to use the property as security for his home loan. (*Id*) (Record at 136). Sterling and his wife did the same. (*Id*). All parties understood that the deeds were not to convey ownership to Marion Davis, but only to allow him to mortgage the 59 acres to secure the home loan. (*Id*). After the loan was obtained on June 5, 1951, in compliance with the accommodation agreement, Marion and Donna Davis reconveyed by warranty deed the 1/3 interest in the 59 acres back to Ralph O. and Dorothy Ruth Davis even though the mortgage on the property was not paid off at that time. (*Id*) (Record at 132). The same was accomplished for Sterling and his wife. (*Id*).

In August of 1966, Marion and Donna Davis again requested Ralph, Sr. and Sterling to allow them to use the 59 acres as security for another loan, under the same terms as accomplished in 1950. (Record at 268-270, 281-282, 310, 389-90). On or about August 29, 1966, Ralph, Sr. and Dorothy Davis signed a warranty deed, recorded in October 1966, conveying their 1/3 interest in the 59 acres to Marion and Donna Davis to

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR may contain errors.

accommodate their loan for the addition to their home. (Record at 249-250, 310, 389). Sterling did the same. (*Id.*) At the same time, Sterling received some of the proceeds from the loan. (*Id.*) The purpose of the transfer was not to convey ownership to Marion and Donna, but was to afford them the ability to pledge the 59 acres for the loan for the addition to their home, which could not otherwise been accomplished without the generosity of Marion's brothers. (Record at 263-266, 268-270, 280-282, 310). Ralph, Sr. received no proceeds from loan. (*Id*). After obtaining the loan, Marion and Donna did not re-convey the 1/3 interest back to Ralph and Sterling Davis as had been done in the first loan. (Record at 388-89, 307-09). The loan obtained by Marion and Donna was paid off in approximately 1980. (Record at 238-243, 309, 389). After paying off the loan, Marion and Donna Davis failed to reconvey to Ralph and Dorothy Davis the 1/3 interest in the property. (Record at 388-89, 307-09). On or about October 3, 1980, Ralph, Sr. sent a letter to Marion and Donna proposing a resolution to transfer title to Ralph, Sr. and Dorothy of their 1/3 interest in the 59 acres by a partition of the property. (Record at 238-243, 313-14, 309, 389). Marion and Donna Davis did not respond to this letter. (Record at 389). In February 1990, Marion and Donna Davis sent a letter to Ralph, Sr. and enclosed an executed Warranty Deed purporting to transfer 10 acres to Ralph, Sr. and Dorothy Davis not to be recorded until after Marion's death. (Record at 245-247, 313-14, 309, 389). The letter and the deed acknowledged Marion and Donna's obligation to transfer title of Ralph and Dorothy's 1/3 interest in the property back to them. (Record at 245-247, 309, 388-89). The deed and the letter were an attempt to satisfy Ralph, Sr. and Dorothy with 10 acres of property instead of the 20 acres to which they had a right. (*Id.*)

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

Ralph, Sr. continued to make statements reaffirming his interest in the property until his death in 2005. (Record at 307-313, 309; 268-71; 263-266; 258-61).

Dorothy Davis died on March 17, 2000. (Record at 388). Ralph Davis, Sr. died on February 25, 2005. (Record at 388). The Estate of Ralph O. Davis filed suit in this matter on May 18, 2007. (Record at 35). After discovery Marion and Donna filed a motion for summary judgment arguing that the statute of limitations had run for asserting constructive trust and that the discovery rule did not apply. (Record at 235). The Estate of Ralph O. Davis responded to the Defendants' summary judgment motion. (Record at 314). The trial court granted the Marion and Donna's summary judgment motion. (Record at 346).

SUMMARY OF ARGUMENT

The trial court erred when it found that the discovery rule was not applicable and determined that the statute of limitations commenced in 1980. The trial court erred in this respect by failing to recognize and to apply the discovery rule applies in familial trust cases. In cases involving claims of familial constructive trusts, the statute of limitations is tolled because the matter is automatically considered to fall within the "exceptional circumstance" prong of the discovery rule. The statute of limitations in familial constructive trust claims is does not begin to run until after a determination that a repudiation of the trust has occurred. Finally, without a finding of repudiation of the trust, the statute of limitations cannot begin to run.

The trial court erred when it weighed evidence when considering a motion for summary judgment. This requirement is underscored by the fact that repudiation of a constructive trust is fact sensitive and precludes summary judgment. Because the trial

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

court erred by improperly weighing facts at the summary judgment stage and because there were material issues of disputed fact as to whether a constructive trust existed, summary judgment should have been denied by the trial court.

Finally, the trial court erred when it determined that a constructive trust was not established in 1966.

In making these determinations, the trial court erred by determining that the affidavits of Bette Davis Stratton, Ralph Davis, Jr. and Glen Richard Davis were inadmissible hearsay evidence.

ARGUMENT

Because the granting of a motion for summary judgment deprives the non-moving party of their day in court, the appellate courts in Utah have on many occasions described the limited inquiry the trial court must make before the granting of such motion:

> Summary judgment is proper only if the pleadings, depositions, affidavits and admissions show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.

In re Williams' Estate, 10 Utah 2d 83, 348 P.2d 683 (1960).

> A summary judgment movant must show both that there is no material issue of fact and that the movant is entitled to judgment as a matter of law.

Orvis v. Johnson, 2008 UT 2, ¶ 6, 177 P.3d 600 (emphasis added).

As set forth below, there are issues of law and material issues of fact which preclude a finding of summary judgment in this matter

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

I. THE TRIAL COURT ERRED WHEN IT FOUND THAT THE DISOVERY RULE WAS NOT APPLICABLE AND DETERMINED THAT THE STATUTE OF LIMITATIONS COMMENCED IN 1980.

The trial court erred in its grant of summary judgment in favor of Marion and Donna, because there were issues of law applied by the trial court that prevented the correct determination of how the discovery rule and the tolling of the statute of limitations works in constructive trust cases involving family relations. *See*, *Orvis v. Johnson*, 2008 UT 2, ¶ 6.

It is commonly understood that statute of limitation issues in constructive trust actions are complicated and fact-intensive, especially in those actions involving family members. *See*, *Acott v. Tomlinson*, 9 Utah 2d 71 (Utah 1959), 337 P.2d 720; *Walker v. Walker*, 17 Utah 2d 53, 404 P.2d 253 (1965); and *Rawlings v. Rawlings*, 2010 UT 52, -- P.3d --.

In this case, the trial court erred in its interpretation and application of the law with regards to statute of limitations in trust cases. (Record 333-341). While the trial court determined that it could not make a decision on whether a constructive trust existed in 1980, the trial court's holding that the purpose of the conveyance was met when the mortgage was paid off and that the statute of limitations began to run, is a holding that the 1966 deed from Ralph to Marion formed a constructive trust, despite the court's statement otherwise and the court was required to apply the discovery rule, which the court did not. (Record at 384-5). Instead, the trial court erroneously determined that constructive trust ceases to run when the purpose of the trust has been completed. (Record at 385). Additionally, the determination that the statute of limitations begins to

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR may contain errors.

run when the purpose of the trust is completed in a trust claims case is not the established law regarding statute of limitations in trust claims cases as set forth more fully below.

A. The Trial Court Erred by Failing to Recognize and to Apply the Discovery Rule in Familial Trusts Cases.

The discovery rule is an equitable doctrine that tolls the statute of limitations when a person lacks knowledge of the facts giving rise to the cause of action.

> While a statute of limitations generally begins running when a plaintiff has a completed cause of action, the discovery rule may nonetheless operate to toll a statute of limitations until the time at which a party discovered or reasonably should have discovered facts forming the basis for the cause of action.

In re Hoopiiaina Trust, 2006 UT at ¶35.

> [T]here are two situations in which an equitable discovery rule will operate to toll a statute of limitations: (1) where a plaintiff does not become aware of the cause of action because of the defendant's concealment or misleading conduct, and (2) where the case presents exceptional circumstances and the application of the general rule would be irrational or unjust.

Id. at ¶ 35 (citations and original quotation marks omitted). Generally, the concealment prong of the discovery rule requires the party relying on the discovery rule to show that "he neither discovered nor reasonably should have discovered the facts underlying the cause of action before the limitations period expired due to the defendant's concealment." *Id.* at ¶ 36. The court usually then conducts a balancing test to determine whether the rule applies. *Id.*

In cases involving a trust, however, the balancing test has already been applied and the discovery rule applies. *Snow v. Rudd*, 2000 Utah 20, ¶ 10, 998 P.2d 262 ("In *Acott* and *Walker* we found, in substance, that to not apply the discovery rule would lead

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

to unjust results because of the close familial relationship involved."); *See*, *Acott*, 337 P.2d at 724; *Walker*, 404 P.2d at 257.

In the instant matter, the trial court failed to recognize that the discovery rule applies in familial trust cases. (Record at 385-86, 334-338).

i. In cases involving claims of familial constructive trusts, the statute of limitations is tolled because the matter is automatically considered to fall within the "exceptional circumstance" prong of the discovery rule.

The statute of limitations is tolled until the trustee has made a clear repudiation of his responsibilities as a holder of the trust property is even heightened where the claim involves familial relations and constructive trusts. *Walker*, 404 P.2d at 257. "Where a near relative is involved courts are less inclined to find a repudiation. This is so because of the greater likelihood that the beneficiaries have reposed confidence in him; and also, they would have a natural reluctance to sue him unless circumstances forced them to do so." *Id*. Consequently, the matter is automatically considered to be an "exceptional circumstances" requiring that the statute of limitations be tolled until repudiation occurs. *Snow*, 2000 UT at ¶ 11.

In *Snow*, the Utah Supreme Court emphasized and clarified that a familial trust is automatically an "exceptional circumstance" requiring application of the discovery rule:

> [W]here a trustee is sued by a beneficiary or claims a violation of trust, it constitutes an "exceptional circumstance" calling for application of the discovery rule. We have held that under certain "exceptional circumstances" we will find that a rigid application of the statute of limitations may be "irrational and unjust" and thus make the discovery rule available. To determine when this is the case, we apply a balancing test to weigh the hardship imposed on the claimant by the application of the statue of limitations against any prejudice to the defendant resulting from the passage of time. In the categories of cases involving beneficiaries claim of trustee misconduct, we have in effect, already conducted this balancing test. In *Acott* and *Walker* we found, in substance, that to not apply the discovery

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

> rule would lead to unjust results because of the close familial relationship involved. In such a situation, the beneficiary will be less likely to question the motives of the trustee and less likely to sue. Therefore, it is appropriate to protect the interests of a beneficiary by applying the discovery rule to toll the statute of limitations until the beneficiary knows or should know of the alleged breach or repudiation.

Id. (internal quotation marks and citations omitted)(emphasis added).

The trial court's finding on page 12 and 13 of its Ruling and in ¶ 15 of its Judgment directly contradicts the language in *Snow* that an exceptional circumstance applies, in that the trial court explicitly stated that no exceptional circumstance existed in the instant matter – even though this is clearly a case involving a claim of a constructive trust, and additionally, a familial constructive trust. Once a determination of whether an exceptional circumstance exists, as applies in familial constructive trust cases, then the court's next question is whether repudiation of the trust occurred. Consequently, the court erred when it determined that the discovery rule did not apply. The question, then, is not whether the exception rule applied, but whether repudiation occurred barring the tolling of the statute of limitations, as discussed more fully below requiring a finding of repudiation, which finding the court did not make and which finding requires a weighing of material facts as set forth more fully below.

ii. The statute of limitations in familial constructive trust claims does not begin to run until after a determination that a repudiation of the trust has occurred.

Although, the balancing rule generally applies, in the case of a trust and a familial trust, because the exceptional circumstances automatically applies, "a trustee [or alleged trustee] cannot take advantage of a statute of limitations defense until something has occurred to give the beneficiary a 'clear indication' that a breach or repudiation has

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

occurred, or alternatively, the circumstances must be such that the beneficiary must be charged with knowledge of such a repudiation or breach." *Snow*, 2000 UT ¶ 10.

In other words, in cases involving trusts, the statute of limitations[1] will be tolled until the trustee has made a clear repudiation of his responsibilities as a holder of the trust property. Thus, the determinative question in determining whether the statute of limitations is tolled in a trust matter is whether the trust has been repudiated and not whether the purpose of the trust has been fulfilled, and then, if material issues of fact exist regarding this determination, summary judgment is not granted.

The trial court's finding in ¶ 15 of its judgment and page 13 of its ruling shows that it based whether the statute had tolled from the time that it believed that the purpose of the trust had run and not from any determination that a repudiation of the trust occurred, in fact, the court made no such analysis or consideration of whether a repudiation had occurred, thus prohibiting a finding of summary judgment on the issue of a tolling of the statute of limitations. (Record at 334, 385). Because the trial court failed to apply the appropriate discovery rule, the summary judgment determination should be overturned.

---

[1] Additionally, in this matter, the judgment as issued by the trial court shows confusion on which statute of limitations should be applied. Throughout its findings and its order, the court sites to three different statutes of limitations, all with different requirements that must be met before they could be applied: U.C.A. 78-12-26(3)(now renumbered to 78B-2-305(3); U.C.A. 78B-2-304(1); and U.C.A. 78B-2-305(1). From *Hoopiiaina,* we know that a four-year statute of limitations and not a three-year statute of limitations is applied in constructive trust cases after the repudiation. 2006 UT 53.

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

iii. Without a finding of repudiation of the trust, the statute of limitations cannot begin to run.

Furthermore, the requirement of a finding of a repudiation of trust, whether it is an express, constructive, or other type of trust, is significant because if a repudiation of the trust does not occur, the trust is ongoing and the statute of limitations cannot attach. This is reflected in the general rule regarding statute of limitation defenses, which, as set forth above, defense, "[is], as a general rule, not available to a trustee against a beneficiary . . . until the trustee definitely repudiates the trust and this is made plain to the beneficiary." *Child v. Child*, 332 P.2d 981 (Utah 1958).

Consequently, in the instant case, because the trial court failed to make a determination of whether a repudiation of the trust had occurred, the statute of limitations could not begin to run until such repudiation was found and the trial court made its determination on the tolling of the statute of limitation in error. Furthermore, because the trial court found that there were material issues of fact as to whether a constructive trust even was in existence, it could not reach a determination on whether a constructive trust had been repudiated. Without a trust, there can be no determination as to whether repudiation occurred, and consequently, the trial court put the cart before the horse in attempting to make a decision as to the tolling of the statute of limitations when it could not make a decision at the summary judgment level as to whether a constructive trust existed. Consequently, as a matter of law, the summary judgment decision by the trial court should be overturned.

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

II. THE TRIAL COURT ERRED WHEN IT WEIGHED EVIDENCE WHEN CONSIDERING A MOTION FOR SUMMARY JUDGMENT

It is well-established that Summary judgment is only properly awarded when there are no issues of material fact. *Orvis*, 2008 UT at ¶ 6In making an evaluation of whether factual issues exist, "a trial court should not weigh disputed evidence and its sole inquiry should be whether material issues of fact exist." *Kilpatrick v. Wiley, Rein & Fieldings*, 909 P.2d 1283 (Utah App. 1996)(quoting *Draper City v. Estate of Bernardo*, 888 P.2d 1097, 1101 (Utah 1995)(emphasis added).

The *Kilpatrick* Court further noted that the Supreme Court's ruling in the *Draper* case clearly established that:

> [i]t is not the purpose of the summary judgment procedure to judge the credibility of the averments of the parties, or witnesses, or the weight of the evidence. Neither is it to deny parties the right to a trial to resolve disputed issues of fact. Its purpose is to eliminate the time, trouble[,] and expense of trial when upon any view taken of the facts as asserted by the party ruled against, he would not be entitled to prevail.
>
> [*Draper City v. Estate of Bernadro*, 888 P.2d 1097, 1101 (Utah 1995)] (quoting *Holbrook Co. v. Adams*, 542 P.2d 191, 193 (Utah 1975). Moreover, "*it only takes one sworn statement under oath to dispute the averments on the other side of the controversy and create an issue of fact.*" *Id.* (quoting *Holbrook*, 542 P.2d at 193)(emphasis added).

Id. at 1292 (changes and emphasis in the original).

In *Bowen v. Riverton City*, the Supreme Court further reasserted the common requirement that,

> If there is any doubt or uncertainty concerning questions of fact, the doubt should be resolved in favor of the opposing party. Thus, the court must evaluate all the evidence and all reasonable inferences fairly drawn from the evidence in a light most favorable to the party opposing summary judgment. *Durham v. Margetts*, Utah 571 P.2d 1332 (1977); *Thompson v. Ford Motor Co.*, 16 Utah 2d 30, 395 P.2d 62 (1964).

656 P.2d 434, 436 (Utah 1982).

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

Because a constructive trust is a creature of equity, the imposition of a constructive trust is a highly fact-dependent arrangement and requires that the trial court consider all of the evidence before it can make a determination of the application of the statute of limitations. *Golden Meadows Properties, LC v. Strand*, 2010 UT App 257, ¶ 26, --- P.3d ---.

Because a constructive trust is extremely fact-sensitive, summary judgment should not be granted if there are any issues of material fact that require weighing before a resolution can be determined. This is true because the 'discovery rule' tolls the statute of limitations until repudiation of the trust is heightened in cases involving family members who often innately trust each other, and often to their detriment. *Walker*, 404 P.2d at 257. Answering the questions as to whether repudiation has occurred requires fact findings, which findings are inappropriate at the summary judgment stage if there are material facts in dispute, such as in the instant matter. *Orvis*, 2008 UT at ¶ 6

In this matter, not only was the trial court precluded from granting summary judgment in Marion and Donna's favor as a matter of law as set forth above when it applied the wrong law to determine if the statute of limitations was tolled, the trial court was also precluded from granting summary judgment as to whether the statute of limitations should be tolled because there were material issues of fact. The trial court then erred by weighing the facts and by failing to consider the facts in the light most favorable to the estate of Ralph, Sr., the non-moving party. Consequently, summary judgment was erroneously granted at the summary judgment stage.

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

A. Repudiation of a Constructive Trust is Fact Sensitive and Precludes Summary Judgment.

The determination of whether repudiation has occurred is highly fact sensitive and "the statute of limitations will not commence running until the date the plaintiff possesse[s] actual or constructive knowledge of the facts forming the basis of his or her action." *Hoopiiaina*, 2006 UT at ¶36 (internal quotation marks and citations omitted); *Acott*, 9 Utah 2d 71; and *Walker*, 17 Utah 2d 53. What this means, is that because it is a highly-fact sensitive matter summary judgment is generally not appropriate unless it is clear that there are no material issues of fact or the parties have stipulated to a set of undisputed facts for the purpose of determining summary judgment. *See*, *Id.* Neither scenario has occurred in the instant matter.

In this instance, the court failed to determine whether or when a repudiation occurred because, as set forth above, it applied the wrong standard when determining the application of the discovery rule. Even if the trial court had addressed the question of repudiation by Marion and Donna, however, it was required to make this decision by considering the facts in the light most favorable to the non-moving party, which it did not do. *See*, *Ryan v. Dan's Food Stores, Inc.*, 972 P.2d 395, 399 (Utah 1998). A consideration of facts under this standard would have at the very least resulted in a determination by the trial court that there were material issues of fact in dispute regarding whether a repudiation had occurred, and thus, precluding any grant of summary judgment. *See also*, George G. Bogert & George T. Bogert, *The Law of Trusts and Trustees*, section 951 (2d ed. 1995)("Whether a given act is consistent with the continuance of a trust, or indicates

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

an intent to repudiate the trust and claim aversely is a question of fact for the determination of the court in each individual case.").

Prior to setting forth the facts that were weighed, it is important to again note that the trial court itself noted that it could not determine that there was a determination of a trust in 1980. Yet, the court, it turned on itself by finding essentially that a trust existed when it determined, applying the wrong standard, that the purpose of the trust had been completed in 1980. A holding that the purpose of the conveyance was completed when the mortgage was paid off necessarily is a holding that the 1966 deed was done in trust, contrary to the trial court's holding.

Next, if the trial court had looked at the question of repudiation, looking at the facts in the light most favorable to the nonmoving party, the Appellant, would have required a finding that there are issues of fact that preclude a determination of repudiation. Some of these facts were recognized explicitly by the trial court. First, the trial court recognized that in 1980, when it determined that the purpose of the trust was completed, that "the three brothers discussed a physical division of the property" instead of returning to a co-ownership as previously done. (Record at 344-45). When looked at in the light most favorable to the Appellant, this statement shows that the parties recognized that even though title was in Marion and Donna's name, all the brothers still recognized that they all three continued to co-own the property. The only question was whether they would continue co-owning the property or divide it among themselves. (Record at 309, 389). Shortly after any discussion by the brothers, Ralph, Sr. reconfirmed the brothers' understanding that the property was co-owned by all the brothers and proposing a physical division of the property instead as discussed by the parties.

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR may contain errors.

(*Id.*)(Letter of Ralph, Sr. to Marion Davis). Consequently, when looked at in the light most favorable to the Estate of Ralph Davis, there was no "clear repudiation" of a trust and nothing to indicate that such a repudiation was contemplated. Although Marion and Donna state that they and their attorney believed that the proposal was unjust, they provided no indication of that state of mind to either Ralph, Sr. or Sterling in 1980. (*Id.*). Because these facts demonstrate that there was no repudiation in 1980, or at least that material issues of fact existed, the finding that the statute of limitations being to run in 1980 was in error and if the trial court considered repudiation, no such finding could be made under the summary judgment standards.

Questions of material issue of fact would also preclude any finding of repudiation by Marion and Donna after 1980. Instead, there are material issues of fact that, when viewed in the light most favorable to the Estate of Ralph Davis, seem to suggest an affirmation of a trust rather than a repudiation. Specifically, the letter sent by Marion via Donna in 1989 affirmed that they understood that Ralph, Sr. had a continuing interest in the property. (Record at 245-247, 309, 388-89). It is important that this letter recognizes that Marion and Donna still believed that Ralph should receive property. (*Id.*) At this time, Sterling determined that because he had received a portion of the loan proceeds and had not paid those proceeds back, that he did not have an interest in the property. (Record at 388). Other material facts showing a dispute include the fact that Ralph, Sr. never received any proceeds from the loan or compensation for the property. (Record at 388-390). There is a dispute because at this time, it appears that Marion and Donna believed that because they had worked the land and paid the taxes that they deserved compensation for that upkeep. (Record at 309, 388-89). This belief by Marion and

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

Donna, however, does not constitute a repudiation of the trust. Additionally, a trustee is required to do what is necessary to maintain the property for the beneficiaries. *Walker*, 404 P.2d at 256 ("It is generally recognized that where one co-owner does something for the protection of their common property, it is presumed that his action was to preserve it for the benefit of all unless some indication to the contrary plainly appears."); *See also*, *Sweeney Land Co v. Kimball*, 786 P.2d 760 (1990). There are questions of material fact as to whether the letter affirmed, rather than repudiated the trust, particularly as Marion and Donna offered a portion of the land to Ralph, Sr. to satisfy his claims under the trust. It was clear that they understood that the land was still being held for Ralph, Sr. If they did not believe they were holding the land for him, there would have been no need to send the letter.

Additionally, the parties operated the management of the property similarly as to the first transfer of title occurred in 1950. (Record at 310). At a minimum these establish questions of material fact that when viewed in the light most favorable to the Estate of Ralph Davis preclude a finding of summary judgment that repudiation occurred. It was clear from the letters, that Ralph, Sr. and Marion and Donna understood that Ralph, Sr. still maintained an interest in the property as held by Marion and Donna.

This case in not unlike *Walker* and *Acott*, in both of these cases, family members transferred title to the property owned by the family members to a specific individual in order to achieve a specific purpose. 404 P.2d 253; 337 P.2d 720. In *Acott*, title was transferred on two different occasions. 337 P.2d 720. Similar to this case, the second transfer was made based on the success and trust of the prior transfer. *Id.* (Record 308-310). On the second transfer, the family in *Acott* and Ralph, Sr. in this case had no reason

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR may contain errors.

not to trust the sibling and transfer title to that family member as based on their prior experience and knowledge that the property was being held by that member for them. *Id.* The fact that there was no immediate resolution as to how and when the property would be returned after the purpose of the initial transfer occurred was not a signal of a problem and in *Acott* and similarly could not be a signal of a problem initiating the application of the statute of limitation in this matter, because they reasonably knew and there were reasonable inferences that the property would be returned at some point. *Id.*

In *Walker*, the family member claimed that the property was not held in trust because of the improvements and payment of taxes that he had made on the property. 404 P.2d 253. In this instance, the court's findings of fact show that the court ascribed to the defendant's argument in *Walker* that was deemed not determinative of whether repudiation of the trust had occurred. *Id.* and (Record at 333-338). Similarly, in this matter, the working of the land and the payment of the taxes by Marion are not determinative of repudiation, particularly when such actions occurred during the prior 1950 trust, when the property was returned to Ralph, Sr. and Sterling. *Id.* (Record at 389-90). Instead, in looking at the facts in the light most favorable to the non-moving party, because the title was transferred twice and Marion and Donna continued to pay taxes and to operate the land in both instances, it cannot be determinative as a repudiation and sets forth a material fact that should not be weighed by the trial court, because there was no change in how Marion and Donna operated between the first time title was transferred and the second time that title was transferred. Again, in *Walker*, it was stated that "[i]t is generally recognized that where one co-owner does something for the protection of the

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

property, it is presumed that his action was to preserve it for the benefit of all unless some indication to the contrary occurs." 404 P.2d at 256.

Consequently, because there are material issues of facts regarding whether a repudiation occurred, summary judgment should not have been granted by the trial court.

B. The Trial Court Erred by Improperly Weighing Facts at the Summary Judgment Stage.

Arguably, the court addressed repudiation on page 12 and 13 of its decision when it determined that the exception rule did not apply. (Record 334-35). If the trial court did address repudiation without naming what it was addressing, it impermissibly weighed the material issues of fact in opposition to the requirements at the summary judgment stage.

Specifically, the trial court weighed facts when it determined that "Ralph and his wife knew there was a dispute almost immediately when there was a discussion and a proposal to divide the land in 1980." (Record at 334). This determination was an improper weighing of facts. First, in 1980, the brothers discussed whether the property should be divided physically among the brothers rather than co-owned by all three brothers. (Record at 344-45). Ralph, Sr. sent a letter proposing how the split should occur and that the land should be leased back to Marion so that he could continue to use the land as he had. (Record at 238-243, 309, 389). Marion and Donna never replied to this letter until 1990. (Record at 308-309). The fact that the brothers discussed physically dividing the property rather than co-owning the property is not indicia that there was a dispute regarding the ownership of the property sufficient to establish repudiation by Marion. Consequently, the court improperly weighed the evidence to determine that Ralph, Sr. should have known that there was a dispute.

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR may contain errors.

The trial court then determined, that "[a]lthough there was a counter-proposal and further discussions in the years that followed, no additional material facts came to light or became known to any of the principal parties to this case." (Record at 334). Instead of refuting the fact that the property was being held for his brother, the "counter-proposal" or letter sent in 1990 by Marion via Donna to Ralph, Sr. was a reaffirmation that he understood that the property was being held in trust for his brother. (Record at 245-247, 309, 388-89). This was a material fact that the court weighed that signified a continuance of the trust rather than a repudiation.

Finally the trial court determined that because "[t]he purpose for leaving title effected in 1966 was satisfied in 1980 and there was no further purpose for leaving title in the name of Marion and Donna unless Marion and Donna claimed ownership of all of the property to the exclusion of the other property members." Regardless of whether the title was left in Marion and Donna's name after the purpose of the trust was completed, the fact that Marion and Donna retained the property created a trust under the unjust enrichment theory of constructive trust as set forth and recognized in the recent Utah Supreme Court case of *Rawlings*; 2010 UT 52. Consequently, even though the trial court determined that it couldn't decide if there was a trust in 1980, because there were material issues of fact, it issued its decision as if it had determined that there was a trust in 1980 and that because the purpose of the trust was fulfilled, the statute of limitations ran and the Plaintiff was barred from pursuing its claim. This decision was in error because it was an improper weighing of facts at the summary judgment stage and consequently should be overturned.

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

C. Because There Were Material Issues of Disputed Fact as to Whether a Constructive Trust Existed, Summary Judgment Should Have Been Denied.

In the instant matter, there were material issues of disputed fact regarding the creation of a trust and the application of the statute of limitations, which required that the trial court deny the Appellees motion for summary judgment.

First, there are material issues of fact as to whether a trust was created in 1966. In 1950, Marion asked Ralph, Sr. and Sterling to transfer title to Marion and Donna for the purpose of securing a loan to finance the building of a home on Marion and Donna's one acre of land, with the agreement that Marion would convey the property back to Ralph and Sterling after the loan was in place. (Record at 282, 310). Pursuant to the parties understanding, Marion and Donna reconveyed Ralph's interests back to Ralph and Dorothy Davis in June of 1951. (Record at 252, 310).

In August of 1966, Marion asked Ralph, Sr. again to allow Marion to convey title to Marion and Donna so that Marion could use Ralph's interest as security in order to get another loan for Marion and Sterling. (Record 281, 310). Ralph agreed and both Ralph and Marion understood that Ralph's one-third interest in the property would be conveyed back to him similar to what happened with the 1950 conveyance. (Record 281-285, 310). When looked at in the light most favorable to the non-moving party, or in this case the Estate of Ralph Davis, these facts at least create material issue of fact as to whether a constructive trust was created in 1966 under the unjust enrichment creation of constructive trust as set forth in the recent Utah Supreme Court case of *Rawlings* and more fully discussed below. 2010 UT 52.

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR may contain errors.

Instead, the trial court in making its decision that a constructive trust was not in existence in 1966 improperly weighed facts in dispute. In its memorandum decision determination that there was "no basis for imposition of a constructive trust commencing 1966," the only fact that the trial court considered was that "the transfer to Marion and Donna of legal title to the 59 acres in 1966 was with the full understanding and cooperation of Ralph, Sterling and their wives." (Record 331-38). The trial court failed to consider and did not set forth in its analysis that the parties also understood that Ralph's one third interest was to be conveyed back to him. *Id.* The trial court did not note that Sterling had received a portion of the proceeds from loan, and thus, was partially reimbursed for his interest. *Id.* The trial court did not note that Ralph, Sr. received nothing from the transaction. *Id.* Consequently, the trial court looked at only those facts in favor of Marion and Donna and failed to consider the countervailing facts that clearly showed that all parties understood that one-third of the property was being held in trust for Ralph, Sr. The court made its decision regarding the existence of a trust by clearly weighing the evidence and determining what factors were important and excluding those it determined were not and by viewing the facts in the light most favorable to the moving party rather than the non-moving party. If the trial court had reviewed all of the facts in the light most favorable to the Estate of Ralph, Sr. under the appropriately applied law as recently clarified in *Rawlings* and set forth above, the trial court would at the least have been required to determine that there were material issues of fact as to whether a constructive trust existed in 1966.

Second, the trial court itself, in ¶ 12 of its judgment, determined that material issues of fact existed that precluded a finding or denial of a constructive trust after 1966:

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

"[t]his Court still cannot say, as a matter of law, that a constructive trust should be imposed." At this point, because there were material issues of fact and law precluding the imposition of a trust, the trial court should have denied summary judgment. (Record at 386).

Despite this determination, that it could not determine if a trust existed, the trial court then found that the if a trust had existed, its purpose was completed in 1980 when Marion and Donna paid off the loan that the land was used to obtain, even though there were material issues of fact demonstrating that a trust, if it existed, would have continued for years after 1980. (Record at 386-89). The court then erred by determining that the "exception clause" of the discovery rule did not apply in this instant and that the statute of limitations in a trust claim began to ran when the purpose of the trust was completed and determined that "this action should have been brought within 3 years of the completion of the purpose for the transfer of title to Marion and Donna, which occurred in 1980." *Id.* Essentially, the court determined that the trust automatically terminated when the purpose of the trust was repudiated, which, as set forth above, is not the standard for determining when the trust was completed. Additionally, if the court could not determine if a trust was ongoing in 1980, it could not apply the statute of limitations, because if the trust was ongoing, the statute of limitations would not apply until the trust was repudiated. The trial court recognized that the brothers discussed how the property would be returned in 1980. (Record at 389). The trial court recognized that this discussion occurred after the purpose of the trust was complete, and thus, indicated a recognition that the trust was ongoing. (Record at 386-87). The letter sent by Marion via Donna in 1990 also reaffirmed that the property had been held in trust. (Record at 245-247). At the

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR may contain errors.

very least, these are all material issues of fact demonstrating that there was a question as to whether a trust existed, whether the trust was ongoing, and whether the statute of limitation should be applied under any theory.

Because the trial court put the cart before the horse in attempting to make a decision on the discovery rule and tolling of the statute of limitations when it became clear that it could not make a decision on whether a constructive trust existed, the court erred by granting summary judgment because there were disputed facts.

Consequently, because there are material issues of fact as to whether a constructive trust existed in 1966, 1980 and beyond; because there are material issues of fact as to whether a repudiation of the trust occurred and because these are all fact-sensitive determinations that are more appropriately left to the trier of fact to determine and are not appropriately weighed at the summary judgment stage, the trial court's summary judgment should be overturned at this time and this case should be remanded.

III. THE TRIAL COURT ERRED WHEN IT DETERMINED THAT A CONSTRUCTIVE TRUST WAS NOT ESTABLISHED IN 1966.

The trial court erred in determining that a constructive trust in favor of Sterling and Ralph, Sr. did not arise in 1966 when the title to the property was transferred by the brothers to Marion and Donna, because "there was no wrongful act alleged in 1966." (Record at 340). In making this decision, the trial court erred by determining that a wrongful act is necessary before a constructive trust can be applied. (Record at 340-41). This decision was based on a misapprehension that the types of trusts are finite and easily classified.

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

The Utah Supreme Court in the recent *Rawlings v. Rawlings* case, disabused this attempt to restrict trusts by stating: "First, we affirm our prior statement that the forms and varieties of these trusts are practically without limit. 2010 UT 52, ¶ 24 (internal quotation marks and citations omitted)[2]. The *Rawlings* court continued by noting that "in cases involving transfer of land, imposing a constructive trust will often alter a deed or other writing which is regular in form and is presumed to convey a clear and unambiguous title." *Id.* In *Rawlings*, the Supreme Court specifically recognized that a court "incorrectly determine[s] that [family members] must succeed or fail based solely on the intent underlying [another family member's] transfer of land. *Id.* at ¶ 25. In the instant matter, the trial court incorrectly required Marion and Donna to have some sort of mal-intent in 1966 before a constructive trust could be applied, and thus, determined that a constructive trust did not exist in 1966. The court, however, concluded that there were material issues of fact precluding a determination as to whether a constructive trust existed sometime after 1966.

In *Rawlings*, however, the Supreme Court broadened the requirements for a constructive trust to be found. First the court set forth characteristics of a constructive trust. Specifically, the court stated that, oral trusts "are the manifestation of a settlor's intent with regard to property. The main characteristic is the imposition of obligations on a trustee 'to act for the benefit of [beneficiaries] as to matters within the scope of the

---

[2] It is important to point out that *Rawlings v. Rawlings* was not issued until September 2010, many months after the briefing and the decision at the trial court level in this case had been accomplished. Consequently, this is the first time that *Rawlings* could be applied to this current case. 2010 UT 52. The principles in *Rawlings*, however were set forth and applied in the *Parks v. Zions* case, the seminole case on constructive trusts as cited to in the trial court briefing by the Appllant. 673 P.2d 590; (Record at 295-314).

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR may contain errors.

[trust].'" *Id.* at ¶ 26 (quoting Restatement (Second) of Trusts § 2 cmt. b (1959))(alterations in orginal). The Supreme Court emphasized that an oral (or constructive) trust "aris[e] as a result of a manifestation of an intention to create it and subjecting the person in whom the title is vested to equitable duties to deal with it for the benefit of others." *Id.* at ¶ 26

The Court then stated that "a constructive trust may arise where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it." *Id.* at ¶ 29. The court stated that "[n]othing about the constructive trust does anything to preclude the imposition of a constructive trust as a remedy to prevent unjust enrichment" and that "both types of constructive trust" are available and may be pursued within the same lawsuit. *Id.* at 31.

Finally, in order for a constructive trust to be found under the unjust enrichment principles, the requesting party must establish the following requirements of unjust enrichment:

> (1) a benefit conferred on one person by another; (2) an appreciation or knowledge by the conferee of the benefit; and (3) the acceptance or retention by the conferee of the benefit under such circumstances as to make it inequitable for the conferee to retain the benefit without payment of its value.

Id. at ¶ 29 (quoting *Jeffs v. Stubbs*, 970 P.2d 1234, 1247-48 (Utah 1998)(quoting *Am. Towers Owners Ass'n v. CCI Mech., Inc.*, 930 P.2d 1182, 1192 (Utah 1996)).

Finally, *Rawlings* Court disavowed that a "wrongful act" is the all-determinative requirement for a finding of a constructive trust as assumed by the trial court in the instant case. "The requirement of a 'wrongful act' was a response to the unique nature of

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

the claims in that case, and the concession that unjust enrichment arguably occurs whenever a debtor's obligation are discharge by operation of law. . . . Without the unique considerations present in a preferential transfer case, or a closely analogous case, we reaffirm our position that unjust enrichment, in the traditional sense of an inequitable retention of benefits, will support imposition of a constructive trust, even absent wrongful conduct." *Id.* at ftnt 62.

Because the trial court in the instant matter determined that it had to find a "wrongful act" before it could apply the remedy of a constructive trust in 1966, this Court should reverse this portion of the trial court's decision to determine whether a constructive trust arose in 1966 under the clarified unjust enrichment type of constructive trust as newly clarified in *Rawlings*.

At the very least, as set forth above, there are issues of material fact which would preclude the trial court from finding that a constructive trust did not exist in 1966 (as it has currently found) at the summary judgment stage. Specifically, the evidence provides (and as recognized by the trial court) that Marion and Sterling both wanted to use the property at issue as a means to obtain cash. (Record at 390). The transfer of the property mirrored the transfer of the property in 1950, where Sterling and Ralph transferred title to the property to Marion and Donna so that Marion and Donna could obtain a loan and construct a home on their property. (*Id.* and Record at 307-312). Title was later returned back to Ralph and Sterling. During this first transfer of title, Marion and Donna continued to work the land, pay taxes on the land, and otherwise maintain the land for all of the co-owners. (*Id.*) From reasonable inference, Sterling and Ralph, Sr. had no reason not to believe that this would not occur when the transferred title again in 1966.

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR may contain errors.

The facts surrounding the second transfer clearly satisfy the requirements of a constructive trust under an unjust enrichment theory. The transfer of the title to the property was for the clear benefit of Marion and Donna to be able to use the property to obtain a loan in their favor, from which Ralph, Sr. received no compensation. Some of the loan money was sent to Sterling. (Record at 307-312). Marion and Donna manifested an appreciation or acknowledgment of the transfer via their use of the property to obtain the loan. (*Id.*)

The acceptance and, later, the retention by Marion and Donna of the land was under circumstances that a failure to return the property would result in an inequitable division of the property among the brothers when Ralph, Sr. received no other compensation. Not only did Marion and Donna obtain the monetary value of the land, they also retained the nostalgic value of the land as part of family land to be passed on to later generations as a memorial of the family. It does not matter that Marion and Donna continued to work the land, pay taxes on the land, and otherwise keep up the land, as it was their duty as trustees of the land to maintain the land for the beneficiaries, Sterling and Ralph, Sr. *See*, *Walker*, 404 P.2d 253. Further, Marion and Donna recognized that they were holding the property for their brothers, when they discussed distribution of the property after the loan was repaid and when Sterling recognized that he had received value from the use of the land for the loan and did not require a return of the land to himself. (Record at 238-243, 307-312). Marion and Donna also did not require Sterling to repay the amount that he borrowed from the loan but allowed him the loan even though they paid the taxes and worked the land. It was recognized that this loan money was in the place of his continuing interest in the property. (Record at 245-247). Ralph, Sr.,

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

however, did not receive any benefit that was due to him from the land. Sterling received money from the loan. Marion and Donna have title to the property. Without the return of the property, Ralph, Sr. took nothing from the trust, but allowed his inheritance to be used to fund the aspirations of his siblings. He took no money from the loan and has received no payment or property from Marion and Donna as a return of the trust. Marion and Donna, however, believe that they should be reimbursed for their upkeep of the land. These facts demonstrate that there are material issues of fact as to whether a trust should have been determined to exist or not exist in 1966 under a theory of unjust enrichment. Consequently, a finding that a constructive trust did not exist in 1966 by the trial court was premature because there are material issues of fact precluding such decision.

This case is similar to *Rawlings*. In *Rawlings*, the father transferred title to one of the sons, Donald, for the purpose of facilitating his eligibility for welfare assistance. (*Rawlings* at ¶ 6). In the instant case, the brothers all acknowledged that the property was being transferred to assist Sterling and Marion to achieve loan money from the property. (Record 307-312). In *Rawlings*, the Court referred to this transfer: "If Arnold [the father] intended that Donald take the land as trustee, then it was both inequitable and a violation of the intended trust for Donald to retain for himself benefits that should have flowed to the trust." *Id.* at ¶ 35 (emphasis in the original). In the instant case, the similar situation is true, because Sterling and Ralph, Sr. intended that Marion and Donna take the land as a trustee, it is both inequitable and a violation of the intended trust for Marion and Donna to retain the land when it was intended by all of the parties to be held by Marion and Donna in trust for the other siblings. (Record at 307-312).

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

IV. The Trial Court's Determination that the Affidavits of Bette Davis Stratton and Glen Richard Davis were Inadmissible Hearsay Evidence was Made in Error and Constitute Material Issue of Fact Precluding Summary Judgment.

In its decision, the court precluded consideration of statement made by Bette Davis Stratton ("Bette"), Ralph Davis, Jr. (Ralph, Jr.) and Glen Richard Davis ("Glen"), children of Ralph, Sr., on the basis that they were inadmissible hearsay under Rules 801 and 804 of the Utah Rules of Evidence. Such determination by the court was in error, because these statements are admissible under Rule 601(c) of the Utah Rules of Evidence.

Rule 601(c) of the Utah Rules of Evidence states as follows:

> (1) Evidence of a statement is not made inadmissible by the hearsay rule when offered in an action upon a claim or demand against the estate of the declarant if the statement was made upon the personal knowledge of the declarant at a time when the matter had been recently perceived by the declarant and while the declarant's recollection was clear.

In the instant matter, the statements made by Bette, Ralph, Jr., and Glen regarding their father's acknowledgment that he continued to own the interest in the property up until his death are admissible under Rule 601(c). Specifically, the Rule 601(c) requirement that the statement be made "in an action upon a claim or demand against the estate of the declarant" is satisfied in this case, because Marion and Donna are claiming that the Estate of Ralph, Sr. is not entitled to his original 1/3 interest in the property. This case specifically involves claims regarding and affecting the Estate of Ralph Davis as required for the application of Rule 601. (See Record at 307-313, 387-391). In the instant matter, the claims by Marion and Donna that Ralph, Sr. no longer has a 1/3 interest in the property is a "claim or demand against the estate of the declarant", Ralph, Sr.

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

The statements made by Ralph, Sr. To Bette, Ralph, Jr., and Glen were statements made "upon the personal knowledge of the declarant." Ralph, Sr. was the holder of the 1/3 interest in the property. (Record at 308, 390). He is the best person to have knowledge as to whether he was maintaining his interest and whether he believed that the interest was ongoing despite all actions by Marion and Sterling. (Record at 307-13, 263-66, 258-61, 268-71).

Finally, The statements made to Bette, Ralph, Jr. and Glen, were statements made when Ralph, Sr. was "perceiving" and discussing his understanding of his interest in the property and at times when his interest was clear. For example, Bette was present during the meeting of the three brothers in 1980 and has first-hand knowledge of the discussions that took place in 1980 relating to the reconveyance of her father's interest in the property. (Record 309; 268-71). Glen had regular conversations with his parents about the status of their claim, which occurred after 1997-1998. (Record at 308; 263-266). Ralph, Jr. Spent approximately eight weeks with his father prior to his death on February 25, 2005 discussing the property and his father's belief that the property would be returned to him. (Record at 307-08, 258-61).

The statements, then made to Bette, Ralph, Jr., and Glen by Ralph, Sr., therefore provide additional material statements of fact that should have been determined by the court to preclude a finding that the statute of limitations should be applied and that a repudiation had not occurred or had not been made clear to Ralph, Sr. Specifically, Glen testified that in 1980, his mother and father understood that the property was still co-owned by all three brothers, but that they expressed a desire for its physical division instead of a co-ownership. (Record at 308; 263-266). Glen stated his father's

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR may contain errors.

understanding that Marion should continue to use the property so long as Ralph, Sr. didn't have a use for it, but did not express a disavowal of his interest in the property. (Record at 308;263-266). Ralph, Jr. testified that his father continued to affirm his interest in the property just prior to his death in February 2005 and his belief that his brother was still intending to return the property to him. (Record at 307-08; 258-61). Bette testified that after the funeral that her father attended with his brothers, that he never talked of any intent to turn his interest in the farm over to Marion and that he never after that his interest in the farm, but believed that he still held it. (Record at 307, 268-71). Although Marion asserts that Ralph, Sr. relinquished any claim, these statements demonstrate that Ralph, Sr. understood that no repudiation occurred and that his interest continued. (Record at 370, 220).

Consequently, the statements by Bette, Ralph, Jr., and Glen should have been allowed in by the trial court. Additionally, these statements create additional issues of material fact demonstrating that Ralph, Sr. never perceived a repudiation of the trust by Marion and Donna, which preclude a grant of summary judgment.

CONCLUSION

Pursuant to Rule 56 of the Utah Rules of Civil Procedure, a summary judgment decision in favor of the moving party may only be made when there are no issues of material fact and when judgment is required as a matter of law. In the instant matter, there are, first, material issues of law that precluded the grant of summary judgment to the Appellee, including, the trial court's narrow interpretation and application of what constitutes a constructive or oral trust; the court's failure to recognize the application of the exceptional circumstance in familial constructive trust claims and the application of

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

the discovery rule; the court's determination that the statute of limitations runs after the purpose of the trust has been resolved rather than after a clear repudiation of the trust. There are also material issues of fact precluding summary judgment that preclude a finding that no trust existed in 1966 under the *Rawlings* standard; and that preclude a finding a repudiation occurred. Because there are issues of law and of fact that are not properly resolved at the summary judgment stage, this Court should overturn the trial court's finding that no trust existed in 1966 and that the statute of limitations bars the Plaintiff's prosecutions of its claims.

DATED and SIGNED this 18th day of October, 2010.

JEFFS & JEFFS, P.C.

M. Dayle Jeffs

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

CERTIFICATE OF SERVICE

I hereby certify that the original Brief of Plaintiff, Apellant, and Counterdefendant, The Estate of Ralph O. Davis, Sr. or The Ralph O. Davis, Sr., Trust, together with required copies, was hand delivered to the Clerk of the Court, in the Utah Court of Appeals and two copies mailed to the below named party by placing the same in the United States mail, postage prepaid, this 18th day of October, 2010, addressed as follows:

Mark D. Stubbs
FILLMORE SPENCER, LLC
3301 North University Avenue
Provo, Utah 84604

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR may contain errors.

FILED
UTAH APPELLATE COURTS

OCT 19 2010

M. Dayle Jeffs, #1655
Randall L. Jeffs, #12129
JEFFS & JEFFS, P.C.
90 North 100 East
P.O. Box 888
Provo, UT, 84603
Telephone: (801) 373-8848
Facsimile: (801) 373-8878

Attorneys for Appellant

IN THE UTAH SUPREME COURT

THE ESTATE OF RALPH O. DAVIS, SR. or THE RALPH O. DAVIS, SR., TRUST,

Plaintiff and Appellant,

vs.

MARION DAVIS and DONNA DAVIS,

Defendants and Appellees.

MARION DAVIS and DONNA DAVIS,

Counterclaimants and Appellees,

vs.

THE ESTATE OF RALPH O DAVIS, SR. or THE RALPH O. DAVIS, SR., TRUST,

Counterdefendant and Appellant.

CERTIFICATION OF NO ADDENDUM NECESSARY

Appellate No.: 20100176
District Court No.: 070401549

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

Pursuant to Rule 24(a)(11) of the Utah Rules of Appellate Procedure, Appellant the Estate of Ralph O. Davis, Sr. or the Ralph O Davis, Sr. Trust, by and through counsel M. Dayle Jeffs of the law firm Jeffs & Jeffs, P.C., and certifies to the Court that no addendum is necessary to the principal brief filed herein.

DATED and SIGNED this 19th of October, 2010.

JEFFS & JEFFS, P.C.

/s/ Dayle Jeffs

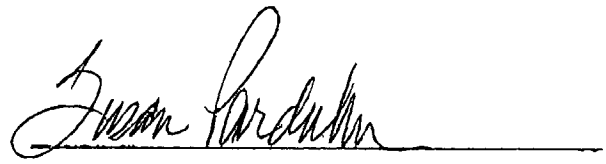
M. Dayle Jeffs

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 19th day of October 2010, I mailed and sent by facsimile the foregoing Certification that no Addendum is Necessary to the Utah Supreme Court, 450 South State Street, Salt Lake City, Utah, and served a true and correct copy of the same by depositing the same in the United States mail, first-class postage prepaid, addressed as follows:

Mark D. Stubbs
FILLMORE SPENCER, LLC
3301 North University Avenue
Provo, Utah 84604



Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.