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The Estate of Ralph O. Davis, Sr., or The Ralph O. Davis, Sr., Trust v. Morion Davis and Donna Davis : Brief of Appellee

Utah Court of Appeals

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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.	**BRIEF OF THE APPELLEES, MARION DAVIS and DONNA DAVIS**
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.	Appeal No. 20100176-CA District Court No. 070401549

BRIEF OF THE APPELLEES

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

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JURISDICTION

Appellate jurisdiction is present pursuant to UTAH CODE ANN. § 78A-4-103(2)(j) and Rule 3 of the Utah Rules of Appellate Procedure. UTAH R. CIV. PROC., Rule 3.

ISSUES, STANDARDS OF REVIEW, AND PRESERVATION

ISSUE 1: Did the trial court properly find that plaintiff is barred by the statute of limitations, which began to run in 1980 when plaintiff proposed a division of the property and the defendants rejected the proposal?

STANDARD OF REVIEW AND PRESERVATION: The appellate court reviews a lower court's legal conclusions for correctness. *See Schurtz v. BMW of North America*, 814 P.2d 1108, 1111-1112 (Utah 1991). "The application of a statute of limitations is a question of law." *Arnold v. Grigsby*, 2009 UT 88, ¶ 7, 225 P.3d 192. (citing *In re Hoopiiaina Trust*, 2006 UT 53, ¶ 19, 144 P.3d 1129). Therefore, an appellate court "determine[s] only whether the [lower] court erred in applying the governing law and whether the [lower] court correctly held that there were not disputed issues of material fact." *Salt Lake County v. Holliday Water Co.*, 2010 UT 45, ¶ 14, 234 P.3d 1105. Additionally, the appellate court "may affirm a grant of summary judgment on any ground available to the trial court, even if it is one not relied on below." *Higgins v. Salt Lake County*, 855 P.2d 231, 235 (Utah 1993) (citing *Hill v. Seattle First Nat'l Bank*, 827 P.2d 241, 246 (Utah 1992)). Appellees do not dispute preservation on this issue.

ISSUE 2: Did the trial court properly find that there were no disputed issues of material fact when holding that the plaintiff was barred by the statute of limitations?

STANDARD OF REVIEW AND PRESERVATION: "In considering an appeal from a summary judgment, [the appellate court] view[s] the facts in a light most favorable to the nonmoving party." *Allen v. Prudential Property & Casualty Ins. Co.*, 839 P.2d 798, 799 (Utah 1992) (citing *Blue Cross & Blue Shield v. State*, 779 P.2d 634, 636 (Utah 1989)). Therefore, the appellate court applies the same standard as the lower court. *See Higgins*, 885 P.2d at 233 ("in determining whether to grant a motion for summary judgment, the court should review the facts and all reasonable inferences drawn in the light most favorable to the nonmoving party"). A challenge to a summary judgment presents for review only conclusions of law because, by definition, cases decided on summary judgment do not resolve factual disputes. *Schurtz*, 814 P.2d at 1111-1112. Therefore, the appellate court reviews a grant of summary judgment for correctness and determines "only whether the [lower] court erred in applying the governing law and whether the [lower] court correctly held that there were no disputed issues of material fact." *Holliday Water Co.*, 2010 UT 45 at ¶ 14. Appellees do not dispute preservation on this issue.

ISSUE 3: Was the trial court correct in determining that a constructive trust was not established in 1966?

STANDARD OF REVIEW AND PRESERVATION: The appellate court reviews a lower court's legal conclusions for correctness. *See Schurtz*, 814 P.2d at 1111-1112. Therefore, an appellate court "determine[s] only whether the [lower] court erred in applying the governing law and whether the [lower] court correctly held that there were not disputed issues of material fact." *Holliday Water Co.*, 2010 UT at ¶ 14. Additionally,

the appellate court "may affirm a grant of summary judgment on any ground available to the trial court, even if it is one not relied on below." *Higgins*, 855 P.2d at 235 (citing *Hill*, 827 P.2d at 246). The nonmoving party still has the burden of proving "all elements of [the] cause of action." *Thayne v. Beneficial Utah, Inc.*, 874 P.2d 120 (Utah 1994). Appellees do not dispute preservation on this issue.

ISSUE 4: Did the trial court properly exclude the affidavits of Bette Davis Stratton and Glen Richard Davis on the grounds that they were inadmissible hearsay evidence?

STANDARD OF REVIEW AND PRESERVATION: 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 (quoting *State v. Rhinehart*, 2006 UT App 517, ¶ 10, 153 P.3d 830 (alteration in original) (internal quotation marks omitted)). This issue was not preserved for appeal because the plaintiff first argued that Rule 601(c) of the Utah Rules of Evidence should apply in the Appellant's Brief. The appellate court, therefore, cannot review the lower court's decision for error because the lower court was never given the opportunity to decide on that issue.

STATUTES AND RULES THE INTERPRETATION OF WHICH 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.

Advisory Committee Note: Subparagraph (c) authorizes the admission of a relevant hearsay statement of a deceased when offered in a suit against the estate of the deceased declarant. These two paragraphs have been taken from Sections 1227 and 1261 of the California Evidence Code. They have been placed in Rule 601 because they compensate for the "Dead Man" statute which related to competency and because to place the provisions in the hearsay section of the rules would disturb the correlation between the Utah rules format and the Federal rules. These two hearsay subparagraphs should also be read in connection with the other hearsay exceptions in Article VIII, in that statements not within Rule 601 may otherwise be admissible under other hearsay exceptions.

STATEMENT OF THE CASE

A 60 acre parcel of farmland was obtained by Glen and Lilly Davis before World War II. (R. 390). In 1941, two of their three sons, Sterling Davis ("Sterling") and Ralph O. Davis, Sr. ("Ralph"), entered the military and left Utah. (R. 390). Their brother, Marion J. Davis ("Marion"), stayed in Utah and continued to farm the property and pay the debt incurred by Glen and Lilly. (R. 276, 390). In 1946, Marion satisfied his father's debt on the farm, (R. 276), and Glen and Lilly gave Marion and his wife, Donna Davis ("Donna"), one acre of the property on which to build a home. (R. 390). Several days later, Glen and Lilly transferred the remaining 59 acres to Marion, Sterling, and Ralph, giving each an undivided 1/3 interest. (R. 390). Over the next several years, Marion was

responsible for caring for his aging parents and the farm. (R. 276). For the next 25 years, Marion plowed, harrowed, planted, irrigated, and harvested his father's farm, without ever taking a salary for himself. (R. 276). Despite the fact that his brothers were no longer in Utah to help with the farm, he began sending them each 1/3 of the profits in 1946. (R. 276).

In 1950, Marion and Donna wanted a loan to build a house, so Sterling and Ralph transferred their shares of the 59 acres of property to facilitate Marion's attempt to obtain the loan. (R. 390). Marion obtained the loan and re-conveyed the property to Sterling, Ralph, and their wives in 1951. (R. 390). Over the next few years, Ralph received money from his father three or four times, when he purchased a home and was out of work. (R. 276). The money came from the farm's profits, which Marion was working hard to earn, but Ralph never repaid the money. (R. 276). At some time around 1957, about 10 or 12 years after the brothers received the farm, their father told Sterling and Ralph that the farm wasn't producing and that Marion needed all of the farm's proceeds to support his family, pay the bills on the farm, and pay off the water. (R. 273). At that point, Marion stopped sending each of his brothers 1/3 of the profits. (R. 273).

In 1966, Marion and Sterling both desired to use the property to obtain cash. (R. 282). Without making any written agreement, Sterling, Ralph, and their wives each again conveyed their undivided 1/3 of the property to Marion and Donna to obtain a loan for $7,000. (R. 282). Sterling received $4,000 and Marion and Donna kept the other $3,000. (R. 282). Over the next 14 years, Marion and Donna repaid the loan in its entirety. (R. 281). Glen and Lilly passed away during the 1960's. (R. 281). In 1980, after the loan had

been repaid, Ralph sent Marion a written proposal to divide the property. (R. 279-280). Marion consulted an attorney about the proposal, which he believed was unfair, and didn't respond to Ralph's proposal. (R. 279). Marion didn't discuss the property again with his brothers until 1989. (R. 279).

Sometime in approximately 1989, Marion, Sterling, and Ralph again discussed a division of the property. (R. 279). Sterling refused to take any of the property from Marion, because he had received the $4,000. (R. 388). In March 1990, Marion and Donna sent Ralph a letter explaining why they had rejected Ralph's 1980 proposal and offering Ralph 10 acres instead of the 20 acres Ralph asked for in his 1980 proposal. (R. 245-247). Ralph did not accept this proposal. (R. 388). In 1995, Ralph told Marion and Donna that he and his wife no longer had any interest in the property and that his desire was for Marion and Donna to keep the farm. (R. 219-220). A few years later, Ralph reaffirmed his statement that he no longer claimed any interest in the property. (R. 219-220). Neither Sterling nor Ralph actively took any effort to force a physical division of the property. (R. 388). After his wife's death, Ralph passed away in 2005. (R. 388). Marion has continued to farm or rent the property and has maintained exclusive responsibility for expenses. (R. 388). Ralph's estate filed suit in this matter on May 18, 2007. (R. 35). Marion and Donna filed a motion for summary judgment, which was granted on March 31, 2009. (R. 333-346).

SUMMARY OF THE ARGUMENT

Regardless of whether or not the court might impose a constructive trust, plaintiff's claim is barred by the statute of limitations because Ralph knew in 1980 all of

the facts that would lead him to believe he had a cause of action and there was neither concealment nor exceptional circumstances that would justify applying the discovery rule until 2007. Because constructive trust is an equitable remedy, there is not a preexisting trustee/beneficiary relationship, and therefore no basis on which to judge misconduct or repudiation. Therefore, a *per se* finding of "exceptional circumstances" likely only applies to familial cases in which there is an actual, express, or implied trust. Furthermore, even if the discovery rule applies, the statute of limitations is only tolled until the time at which a party discovered or reasonably should have discovered facts forming the basis for the cause of action. It is, therefore, unnecessary for the Court to determine whether a constructive trust exists because, regardless of whether the discovery rule is applied, the plaintiff is barred by the statute of limitations based on the undisputed fact that Ralph and his heirs knew of the dispute long before this action commenced, and equity favors the diligent.

The trial court properly reviewed all the facts and reasonable inferences drawn in the light most favorable to the nonmoving party. The appellate court, applying the same standard, should affirm the trial court's decision because there is no genuine issue as to any material fact. It is undisputed that Marion accepted sole responsibility for maintaining the farm, caring for his aging parents, and paying off their father's loan on the property, all while providing his brothers with their share of the farm's profits. Sterling refused to accept any property because of the money he received and because he recognized Marion's years of hard work in maintaining the property. Although Ralph did not receive any loan proceeds, he still received profits from the farm for a number of

years without providing any support. Marion even offered to deed Ralph 10 acres, despite the fact that Marion had split the profits evenly with his brothers for several years, without paying himself wages for his labor, and after taking on the full burden of satisfying his father's debts. The trial court properly determined that plaintiff's affidavits were inadmissible, because they did not qualify for any of the hearsay exceptions, they do not fall within Rule 601(c), and they lack probative value of material facts. After weighing the undisputed facts, even in a light favorable to the plaintiff, the trial court properly refrained from imposing an equitable constructive trust based on the 1966 conveyance because there was no need to provide a remedy for unjust enrichment.

ARGUMENT

In reviewing a grant of summary judgment, the Utah Supreme Court noted that a challenge to a summary judgment presents for review only conclusions of law because, by definition, cases decided on summary judgment do not resolve factual disputes. *Schurtz*, 814 P.2d at 1111-1112. The Court later explained that "[b]ecause entitlement to summary judgment is a question of law, no deference is due the trial court's determination of the issues presented. However, we may affirm a grant of summary judgment on any ground available to the trial court, even if it is one not relied on below." *Higgins*, 855 P.2d at 235 (citing *Hill*, 827 P.2d at 246). Therefore, this court reviews the lower court's grant of summary judgment for correctness. *Schurtz*, 814 P.2d at 1112.

Under UTAH R. CIV. P. 56(c), a moving party is entitled to judgment as a matter of law if, together with the pleadings, depositions, answers to interrogatories, and admissions on file, that party can show there is no genuine issue as to any material fact.

Id. In determining whether to grant a motion for summary judgment, the court should review the facts and all reasonable inferences drawn in the light most favorable to the nonmoving party, *Lakeside Lumber Products, Inc., v. Evans*, 2005 UT App 87, ¶ 8, 110 P.3d 154 (*citing Higgins*, 885 P.2d at 233), although the nonmoving party still has the burden of proving "all elements of [the] cause of action." *Thayne*, 874 P.2d 120.

According to the Utah Supreme Court's interpretation of UTAH R. CIV. P. 56(e), the [plaintiff] has the burden "to provide some evidence, by affidavit or otherwise, in support of the essential elements of his claim." *Thayne*, 874 P.2d at 124. The Utah R. Civ. P. 56(e) says:

> "when a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

Under this rule, "an affidavit on information and belief is insufficient to provoke a genuine issue of fact." *Treloggan v. Treloggan*, 699 P.2d 747, 748 (Utah 1985). The Utah Supreme Court has held that "an opposing affidavit . . . must be made on personal knowledge of the affiant . . . statements made merely on information and belief will be disregarded." *Id.* at 748.

Here, plaintiff has "failed to identify with specificity any material fact" which would allow plaintiff to survive defendants' motion for summary judgment. *Id.* Neither party disputes that, in 1966, Ralph and Dorothy Davis signed a Warranty Deed conveying their 1/3 interest to Marion and Donna Davis. (R. 389).

Additionally, plaintiff has not provided any evidence, other than general belief or information, that this interest was to be re-conveyed to Ralph, or that upon failure to do so Ralph pursued any cause of action available to him at that time. Therefore, plaintiff's claim is now barred by the statute of limitations, making the trial court's grant of summary judgment in favor of defendants appropriate.

I. REGARDLESS OF WHETHER THE COURT IMPOSES A CONSTRUCTIVE TRUST, THE TRIAL COURT CORRECTLY HELD THAT PLAINTIFF'S CLAIM IS BARRED BY THE STATUTE OF LIMITATIONS.

Plaintiff's claim is barred by the statute of limitations, regardless of whether the Court determines that a constructive trust exists, because (1) there were no exceptional circumstances that would justify applying the discovery rule and (2) plaintiff knew all the facts forming the basis for a possible cause of action as early as 1980. "[A] claim for constructive trust sounds in equity and therefore falls within the catch-all, four year statute of limitations in Utah Code Ann. § 78-12-25(3)." *Nielsen v. Nielsen*, 2000 UT App 37, ¶ 13 (citing *American Tierra Corp. v. West Jordan*, 840 P.2d 757, 761 (Utah 1992) (actions in equity frequently are governed by a state's catch-all limitation statute, and in light of the Utah precedents that have applied our four-year catch-all statute to equitable actions, we are persuaded that the four-year limitation currently prescribed by UTAH CODE ANN. § 78-12-25(3) is the proper limitation period)); *see also Snow v. Rudd*, 2000 UT 20, 998 P.2d 262 (holding that plaintiff's constructive trust claim was barred by the four year statute of limitations in § 78-12-25). The revised UTAH CODE ANN. § 78B-2-307 states in pertinent part that "[a]n action may be brought within four years: . . . (3)

for relief not otherwise provided for by law." The trial court found that "a claim under a constructive trust is subject to the general statute of limitations," but stated that it would be three years as prescribed by UTAH CODE ANN. § 78-12-26(3) (now renumbered to UTAH CODE ANN. § 78B-2-305(3)). (Ruling on Motion for Summary Judgment at R. 338).While this appears to be a mere clerical error, the difference is negligible because plaintiff's claim falls outside the statute of limitations under either statute.

Plaintiff asserts that cases of familial constructive trusts create *per se* exceptional circumstances which result in the discovery rule tolling the statute of limitations until a clear repudiation by the trustee. App. Br. at 12. However, the *per se* rule plaintiff describes should apply only to cases in which an actual or express trust exists. See *Snow*, 2000 UT 20.. Even if the discovery rule applies, the statute of limitations is only tolled 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*, 2000 UT at ¶ 19. Tolling the statute of limitations until repudiation of a constructive trust would be problematic because the "trustee" would not know of any duties under the trust until after a court determined that a constructive trust existed. Requiring a party to repudiate a trust the party did not know existed would result in the perpetual tolling of the statute of limitations, and the discovery rule exception would swallow the statute of limitations rule.

Whether or not a constructive trust exists, plaintiff is barred by the statute of limitations based on the undisputed fact that Ralph knew as early as 1980 and again in 1990 all of the facts that formed a potential cause of action. (R. 387-390). No equitable

doctrine requires the court to allow plaintiff to bring suit nearly 30 years after discovering a potential cause of action simply because the dispute involved family members. Rather, equity favors only the diligent, particularly in cases such as this where key parties, "who might have known the facts and testified thereto are now silenced in death." *Ruthrauff v. Silver King Western Min. & Mill. Co.*, 95 Utah 279, 80 P.2d 338, 343 (1938).

A. Discovery Rule

Ralph's heirs knowingly sat on their rights and, therefore, should not benefit from the tolling of the statute of limitations for 27 years after the cause of action arose. Under the equitable doctrine of the discovery rule, a statute of limitations may be tolled 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 53, ¶ 35 (citing *Russell Packard Dev., Inc. v. Carson*, 2005 UT 14, ¶ 21, 108 P.3d 741 (internal quotation marks omitted)). The Utah Supreme Court determined that the statute of limitations is applicable in all cases where constructive or implied trusts arise, and that "the statute begins to run from the time the complaining party discovered the wrongs complained of or when he was apprised of such facts and circumstances with respect thereto as would put a person of ordinary intelligence and prudence upon inquiry." *Jones Min. Co. v. Cardiff Min. & Mill Co.*, 56 Utah 449, 191 P. 426, 429 (1920); *see also Ruthrauff*, 80 P.2d at 343 (stating that with respect to a constructive trust, "[l]imitations and laches begin to run from the time he knew or by reasonable inquiry might have known the relevant facts."); *Auerbach v. Samuels*, 10 Utah 2d 152, 157, 349 P.2d 1112 (1960) (holding that even under the plaintiff's theory of wrongful distribution and constructive

trust, the period within which an action had to be commenced began to run from the time the person entitled to the property knew, or by reasonable diligence and inquiry should have known, the relevant facts.); W.W. Allen, *When statute of limitations starts to run against enforcement of constructive trust*, 55 A.L.R.2d 220 (2007).

Plaintiff asserts that in cases involving familial constructive trusts, *per se* exceptional circumstances require that the statute of limitations be tolled until repudiation of the trust. App. Br. at 13. The equitable discovery rule applies in two situations: "(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." *In re Hoopiiaina Trust*, 2006 UT 53, ¶ 35 (citing *Russell Packard Dev., Inc.*, 2005 UT 14, ¶ 35). Thus, courts apply the discovery rule "only when required by statute, when a defendant has affirmatively concealed a plaintiff's cause of action, or when exceptional circumstances exist." *Snow*, 2000 UT 20, ¶10, (citing *Berenda v. Langford*, 914 P.2d 45, 51 (Utah 1996)). Under the general statute of limitations described in UTAH CODE ANN. § 78B-2-307(3), there is no statutory requirement for the discovery rule, and the undisputed facts show that the defendants never affirmatively concealed the plaintiff's cause of action. (R. 387-390). On the contrary, Ralph and Marion discussed the basis for the dispute as soon as it arose in 1980. (R. 389). Therefore, only exceptional circumstances would trigger application of the discovery rule. To determine whether exceptional circumstances exist, the Court applies "a balancing test to weigh the hardship imposed on the claimant by the application of the statute of limitations against any prejudice to the

defendant resulting from the passage of time." *Snow*, 2000 UT 20, ¶ 11 (quoting *Sevy v. Security Title Co.*, 902 P.2d 629 (Utah 1995)).

Although there is now an alleged hardship to the plaintiff in applying the statute of limitations, it is neither irrational nor unjust because there was no reason for the plaintiff to postpone bringing a claim within the time allowed by the statute of limitations. On the contrary, Ralph knew about the dispute as early as 1980, (R. 389), yet a complaint was never filed until more than two years after Ralph's death in 2005 (R. 35). Furthermore, the 27 year delay has prejudiced the defendant because Ralph and his wife are no longer available to shed light on the intentions of the parties or the nature of the dispute. (R. 388). The fact that Ralph's heirs waited until his death to bring suit further supports Marion's assertion that Ralph, like Sterling, had relinquished any rights to the property and abandoned any intention to pursue a claim. (R. 219-220). Therefore, the trial court properly determined that:

> "there was no basis for Ralph and his wife (or their heirs) to assume that Marion and Donna were merely holding and managing the profit for their benefit as in *Walker* nor, as in *Snow*, is there an equitable reason to allow these potentially aggrieved parties to sit on their rights rather than to seek an immediate determination of their claim. It is, therefore, the conclusion of this Court that the exceptional circumstances rule of discovery under the statute of limitations (U.C.A. 78B-2-305(1)) does not apply to this case."

(Ruling on Motion for Summary Judgment at R. 334).

Plaintiff asserts that the Utah Supreme Court's decision in *Snow* requires a *per se* finding of exceptional circumstances in familial trust cases. App. Br. at 12. However, the Court stated that a finding of *per se* exceptional circumstances only applies "in the categories of cases involving beneficiaries' claims of *trustee misconduct* (emphasis

added)." *Snow*, 2000 UT 20, ¶11. In *Snow*, a beneficiary of a trust suspected in 1985 that a trustee (her sister) had sold trust property in breach of trust duties. *Id.* The Court determined that because of the trustee's misconduct in breaching her duties under the trust, and because of the close familial relationship involved, it was "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.* Even after applying the discovery rule, the Court held that the beneficiary was barred by the statute of limitations because she had knowledge of all facts necessary to put her on notice to inquire as to whether a breach of the trust had occurred. *Id.* at ¶13.

Therefore, while the language cited by plaintiff appears to suggest that a *per se* discovery rule applies in familial trust cases, it does not go as far as to require a clear repudiation by a trustee of a constructive trust. Instead, applying the discovery rule based on *per se* exceptional circumstances likely only occurs in familial cases in which there is an actual express trust, like in *Snow*. A *per se* discovery rule that tolled the statute of limitations until a clear repudiation of the trust would be problematic in constructive trust cases because a constructive trust is an equitable remedy of the court, so no clear trustee-beneficiary relationship exists. Therefore, there would be no basis on which to judge trustee misconduct, because any alleged wrong-doing would be merely a dispute.

B. Repudiation

Furthermore, requiring "clear repudiation" by a trustee of a constructive trust is also problematic because there is no specific agreement or trust instrument to repudiate.

Plaintiff asserts that repudiation is required because of the general rule that statute of limitation defenses are not available to trustees against beneficiaries. App. Br. at 15 (quoting *Child v. Child*, 8 Utah 2d 261, 270-271, 332 P.2d 981 (1958)). However, the Utah Supreme Court specifically held that "[statute of limitations defenses] are, as a general rule, not available to a trustee against a beneficiary *while the latter is in possession of the property*, nor until the trustee definitely repudiates the trust and this is made plain to the beneficiary." *Child,* 8 Utah 2d at 270-271. (emphasis added). The court in *Walker* explained the distinction by pointing out that, where one brother had raised the money to redeem the property, but the property continued to be used by all family members for various family enterprises, "there wouldn't be anything strange or unreasonable about the [siblings] assuming, as they say they did, that the [brother] was holding the property for the family until after the death of their mother, so that she would be provided with a home; and that after her death, their father's estate would be settled and each would receive his share." *Walker v. Walker*, 17 Utah 2d 53, 59, 404 P.2d 253 (1965). In that case, the court emphasized that the fact that some members of the family remained in the property made clear repudiation of the trust necessary to give notice to the beneficiaries of a potential cause of action against the trustee. *Id.*

This case can be distinguished from *Walker* because none of the alleged beneficiaries occupied the property after 1941. (R. 390). Marion was the only son to live on and farm the land. (R. 390). Unlike the siblings in *Walker* who occupied and were evicted from the family land, Ralph and Sterling never occupied the farm after 1941. (R. 390). Although Marion did all of the farm work and supported his parents until their

death, he provided 2/3 of the farm's profits to Sterling and Ralph, without even reserving a farming salary for himself. (R. 276). Plaintiff's only justification for a constructive trust claim is a verbal agreement at the time of the 1966 deed to Marion and Donna. App. Br. at 7. When the loan was paid in 1980, the three brothers discussed a physical division of the property, and Marion rejected Ralph's written proposal because he felt it was different from the brothers' verbal agreement and failed to account for Marion's years of hard work on the farm. (R. 388). Unlike in *Walker*, it would be unreasonable for Ralph to believe that Marion continued to hold the property for the brothers, especially since it had been years since their parents' deaths, Sterling had declined any share of the property, and Marion had rejected Ralph's proposal. (R. 388). Finally, if repudiation is required, Marion satisfies that requirement because he did everything that could reasonably be expected of him to declare that he did not intend to hold 20 acres for Ralph. He rejected Ralph's proposal, consulted an attorney, made a counteroffer, and continued to farm the land and keep the profits. (R. 388-389). Unlike the brother in *Walker*, Marion gave his brothers no reason to believe that he was holding the property for them.

Consequently, plaintiff's claim is barred by the statute of limitations, regardless of whether the discovery rule applies, because Ralph knew or should have known in 1980 that Marion did not intend to deed the 20 acres to Ralph. (R. 389). Accordingly, the statute of limitations began to run in 1980, which was the time at which a Ralph "discovered or reasonably should have discovered facts forming the basis for the cause of action." *In re Hoopiiaina Trust*, 2006 UT 53, ¶ 35 (citing *Russell Packard Dev., Inc.*, 2005 UT 14, ¶ 21 (internal quotation marks omitted)). Even if the court determines, after

construing all facts and inferences in favor of the plaintiff, that Ralph had some reason to believe that Marion was still holding the property for him, Marion's letter in 1990 would further refute that belief and make it unreasonable for Ralph not to investigate a possible cause of action. (R. 245-247). In any case, no relevant fact came to light after 2003that would make this claim fall within the general statute of limitations. Therefore, this Court should affirm the lower court's grant of summary judgment in behalf of the defendant.

II. THE TRIAL COURT PROPERLY REVIEWED ALL THE FACTS AND REASONABLE INFERENCES DRAWN IN THE LIGHT MOST FAVORABLE TO THE NONMOVING PARTY.

In granting defendants' motion for summary judgment, the trial court properly determined that there was no genuine issue of material fact, even when viewing the facts and inferences in favor of the plaintiff. "In determining whether to grant a motion for summary judgment, the trial court should review the facts and all reasonable inferences drawn in the light most favorable to the nonmoving party." *Higgins,* 885 P.2d at 233.

Plaintiff asserts that the trial court erred by weighing evidence regarding the existence of a constructive trust and whether repudiation occurred. App. Br. at 18. Plaintiff argued that "because [repudiation] is a highly-fact [sic] 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." App. Br. at 18. Although repudiation can at times be fact intensive, the trial court was correct in granting summary judgment because, to the extent that there were any disputed facts, they were immaterial for purposes of summary judgment.

The trial court did not err in granting summary judgment based on a finding that the statute of limitations had run because of the undisputed fact that Ralph and his heirs knew long before 2003 that Marion did not intend to re-convey 20 acres to Ralph. (R. 387-390). Plaintiff's Memorandum of Points and Authorities in Opposition to Defendants' Motion for Summary Judgment states: "In March of 1990 Marion sent a response to Ralph acknowledging that Ralph possessed rights to the property. Enclosed with the letter was a Warranty Deed purporting to transfer to Ralph and Dorothy only 10 acres of land, but burdened with various restrictions, rather than either the one-third undivided interest owed to Ralph or the proposed compromise of a divided 20 acres." (R. 309). Based on this statement alone, plaintiff concedes that it was proper for the court to hold that the statute of limitations had run under the correct legal standard. This statement also makes the question of repudiation an undisputed one.

Although plaintiff is correct that the trial court failed to account for certain disputed facts such as the original intent of the three brothers, Ralph's state of mind at the time of the 1980 proposal, whether Marion and Donna believed Ralph had a continuing interest in the property in 1980, etc., these facts are not material facts for purposes of summary judgment. This is particularly true in regards to the court's determination that the statute of limitations had run. The only material fact for the court to consider is when the plaintiff "discovered the wrongs complained of or when he was apprised of such facts and circumstances with respect thereto as would put a person of ordinary intelligence and prudence upon inquiry." *Jones Min. Co.*, 191 P. at 429. Plaintiff repeatedly states and acknowledges that Ralph knew about and was upset by Marion's refusal to re-convey the

20 acres and his alternative proposal to return only 10 acres to Ralph. (R. 309). Even if the court finds in favor of the plaintiff on every other issue, the undisputed facts show that the statute of limitations had long since run by the time plaintiff brought this action.

Even the plaintiff's proffered affidavits, which the trial court properly excluded as inadmissible hearsay, acknowledge that Ralph's children knew of the dispute. (R. 259-271). The affidavits reveal that Ralph's daughter was present in 1980 when Ralph asked to have the property returned to him and that Ralph had asked her to get a fair division of the property, as well as that Ralph expressed disappointment with Marion's 1990 offer of ten acres. (R. 264, 269). Even if the court had ruled in plaintiff's favor and found these affidavits to be admissible, these statements prove that plaintiff knew about a possible claim long before bringing this claim and simply chose to postpone any action until after the statute of limitations had run. The trial court reviewed the facts and all reasonable inferences drawn in the light most favorable to the nonmoving party and properly found that there was no genuine issue of material fact that would preclude a grant of summary judgment in favor of the defendants.

III. THE TRIAL COURT PROPERLY REFRAINED FROM IMPOSING AN EQUITABLE CONSTRUCTIVE TRUST BASED ON THE 1966 CONVEYANCE BECAUSE THERE WAS NO NEED TO PROVIDE A REMEDY FOR UNJUST ENRICHMENT.

A constructive trust is different from a written trust document because, simply stated, the doctrine of constructive trust is a matter of equity "usually imposed where injustice would result if a party were able to keep money or property that rightfully belong[s] to another." *Wilcox v. Anchor Wate Co.*, 2007 UT 39, ¶ 34, 164 P.3d 353. A

constructive trust is a "remedial device created by courts of equity to compel one who unfairly holds a property interest to convey that interest to another to whom it justly belongs." *ARM, INC., v. Terrazas*, 539 P.2d 915, 916-917 (Arizona 1975). In *Wilcox*, the Utah Supreme Court refused the defendant's claims that money the plaintiff insurance company received from its reinsurers as a result of defendant's claim was merely being held in constructive trust for the defendant. 2007 UT 37. In that case, the court listed the elements necessary for a court to create a constructive trust: "(1) a wrongful act, (2) unjust enrichment, and (3) specific property that can be traced to the wrongful behavior." *Id.* at ¶ 34. The trial court applied the *Wilcox* test and refrained from deciding whether a constructive trust should be imposed. (Ruling on Motion for Summary Judgment at R. 338). In regards to the question of constructive trust, it stated: "To prevail in this motion Marion and Donna have to establish, as a matter of law, that their conduct in refusing to return the property was not active or egregious misconduct." (Ruling on Motion for Summary Judgment at R. 338).

In the months following the trial court's ruling, the Utah Supreme Court clarified the applicability of the *Wilcox* rule, limiting the requirement for a "wrongful act" to the unique considerations present in preferential transfer cases or closely analogous cases. *Rawlings v. Rawlings*, 2010 UT 52, fn. 62, 240 P.3d 754. This ruling simplifies the court's inquiry in familial constructive trust cases by allowing the court to focus solely on providing an equitable remedy for unjust enrichment. In this case, even construing the facts and inferences in favor of the plaintiff, the court should not find unjust enrichment. Marion, by himself and at his expense, has farmed and improved the property for over

sixty years. (R. 387-390). He supported his parents until their death. (R. 280-281). He was solely responsible for paying off all encumbrances on the property, including the original debt incurred by his father. (R. 390). Finally, he even shared 2/3 of the farm's income with his brothers for many years. (R. 390). Both brothers declared their intentions to abandon efforts to reclaim an interest in the property. (R. 219-220, 388). The only unjust enrichment in this case would be to allow Ralph's heirs to wait until their parents' deaths and then attempt to profit from their uncle's years of hard work. This Court should, therefore, affirm the lower court's grant of summary judgment.

A. Intent

"Section 160 of the Restatement of Trusts presents the broadest possible application of a constructive trust. It provides 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 . . . .'" *Parks v. Zions First Nat'l Bank*, 673 P.2d 590, 599 (Utah 1983). A constructive trust has also been described as follows: "constructive trusts include all those instances in which a trust is raised by the doctrines of equity for the purpose of working out justice in the most efficient manner, where there is no intention of the parties to create such a relation, and in most cases contrary to the intention of the one holding the legal title, and where there is no express or implied, written or verbal, declaration of the trust." *Id.* Thus, "constructive trusts generally are not based upon the 'intention' of the parties. Indeed, the most notable distinction between constructive trusts and other types of trusts, such as express and resulting trusts, is generally the 'intention' element." *Id* at 598.

Plaintiff argues that a constructive trust should be imposed because the parties intended in 1966 for Marion to re-convey the property upon payment of the loan. App. Br. at 32. Because constructive trusts are not based on the intention of the parties, but rather as a remedy for unjust enrichment, the parties' intentions in 1966 are irrelevant. The fact that Marion continued to be solely responsible for maintaining the farm and satisfying the debts, while sharing the profits with his brothers, is a legitimate reason for the original intentions of the parties to change over the course of the following fourteen years. Consequently, the trial court was correct in focusing on the circumstances as they existed in 1980. Because, as the trial court found, "no one has pled or argued a theory of implied trust," the trial court was correct in finding that a constructive trust was not established in 1966. (Ruling on Motion for Summary Judgment at R. 340).

B. Unjust Enrichment

"Equity imposes a constructive trust to prevent one from unjustly profiting through fraud or the violation of a duty imposed under a fiduciary or confidential relationship." *Hawkins v. Perry*, 123 Utah 16, ¶ 23, 253 P.2d 372 (1953). A constructive trust "arises whenever a person acquires the legal title to property of another by means of an intentional false or fraudulent verbal promise to hold the same for a certain purpose, and, having thus obtained the title, retains and claims the property as his own." *Id.* "It is now well recognized that actual fraud is not necessary, but may be presumed where there is a relationship of confidence between the parties to a transaction and there are 'other circumstances tending to show that some advantage had been taken by the dominant party with a consequent abuse of confidence.'" *Id.* (*quoting Renshaw v. Tracy Loan &*

Trust Co., 87 Utah 364, 367, 49 P.2d 403 (1935)). This is not a particularly high bar, because "[t]he abuse of the confidential relation consists merely in the failure of the transferee to perform his promise." *Hawkins,* 123 UT at ¶¶ 23-24 (*quoting Haws v. Jensen*, 116 Utah 212, 217, 209 P.2d 229 (1949)).

Although these are the traditional rules for imposing a constructive trust, the courts have applied the doctrine more broadly. *Parks*, 673 P.2d at 599. A court of equity in decreeing a constructive trust, is bound by no unyielding formula, but is free to effect justice according to the equities peculiar to each transaction wherever a failure to perform a duty to convey property would result in unjust enrichment. *Haws*, 116 Utah at 217. However, a constructive trust is not imposed where a plaintiff fails to prove unjust enrichment. *See Parks*, 673 P.2d at 599. In this case, plaintiff argues that a constructive trust is appropriate because equity requires that the property be transferred back to Ralph according to the terms of their original agreement, and to avoid the unjust enrichment of Marion and Donna Davis. App. Br. at 31-32. Although the existence of a confidential relationship is not required under a broad application of constructive trust doctrine, defendants dispute that a confidential relationship existed. *See Bradbury v. Rasmussen*, 16 Utah 2d 378, 383, 401 P.2d 710 (1965) ("while kinship may be a factor in determining the existence of a legally significant confidential relationship, there must be a showing, in addition to the kinship, a reposal of confidence by one party and the resulting superiority and influence on the other party."). Regardless of whether a confidential relationship existed between the parties, imposing a constructive trust is not appropriate in the instant case because it is not required by equity. Marion and Donna have not been unjustly

enriched due to all of the work that Marion performed on the land, including his satisfying his father's original debt on the land, without taking out wages for himself, and because Ralph relinquished any claim in the property and intended for Marion and Donna to keep the property for their retirement. (R. 387-390). These circumstances seriously undermine the imposition of a constructive trust.

IV. THE TRIAL COURT PROPERLY DETERMINED THAT THE AFFIDAVITS OF BETTE DAVIS STRATTON AND GLEN RICHARD DAVIS WERE INADMISSIBLE HEARSAY EVIDENCE.

The trial court properly determined that plaintiff's affidavits were inadmissible, because they did not qualify for any of the hearsay exceptions, they do not fall within Rule 601(c), and they lack probative value in regards to proving material facts. The trial court correctly pointed out that these affidavits are "problematic." (Ruling on Motion for Summary Judgment at R. 342). The affidavit of Bette Davis Stratton states, among other things, that her parents had expressed their expectation that the property would be transferred back to their names, that she heard Ralph and Sterling ask to have the property returned to them, and that her father had asked her to continue discussions with Marion about getting a fair division of the property. (R. 269-270). The affidavit of Glen Richard Davis states, in part, that Ralph always expressed his intention to leave the property to his children, that Ralph said he wanted Marion to use the property as long as he had no plans for it, and that he was disappointed with Marion's 1990 offer of ten acres. (R. 263-266). These statements are inadmissible hearsay because they are neither against the interest of the declarant (Ralph) nor are they admissions of a party opponent. (Ruling on Motion for Summary Judgment at R. 342).

Plaintiff argues, for the first time on appeal, that these statements should have been admissible under Rule 601(c) of the UTAH RULES OF EVIDENCE, which creates an exception for hearsay that is offered in an action upon a claim against the estate of the declarant. App. Br. at 34. Plaintiff asserts that the affidavits qualify under this rule because Marion and Donna are claiming that Ralph's estate is not entitled to the disputed 20 acres. App. Br. at 34. Plaintiff argument relies on a misinterpretation of the rule. The Advisory Committee Note identifies this rule as one that compensates for the "Dead Man" statute. Generally, "Dead Men's Statutes" prevent interested parties from testifying as to statements of a deceased person whose estate is at issue. *See Del Porto v. Nicolo*, 27 Utah 2d 286, 289, 495 P.2d 811 (1972) (abrogated on other grounds by *RHN Corp. v. Veibell*, 2004 UT 60, 96 P.3d 935). The Utah Supreme Court explained the purpose of the statute: "We have heretofore recognized that it has the salutary purpose of protecting the estate of a deceased person against a claim which might be spurious and which the deceased person, if alive, would be able to refute." *Id.* Rule 601(c) relates to the same purpose and, therefore, applies only to claims against the estate of the deceased. In this case, the dispute is merely a property dispute, not a claim on Ralph's estate. This is evidenced by the fact that the dispute began with Ralph and Marion and continued for several years between the two until Ralph's death. Ralph's estate is only affected by the dispute because Ralph failed to bring a claim within his lifetime, not because of any claim against his estate. Therefore, Rule 601(c) does not apply to plaintiff's affidavits.

Finally, to the extent that plaintiff's affidavits contain any nonhearsay evidence, it should be excluded for lack of probative value. Each of the affidavits contains multiple

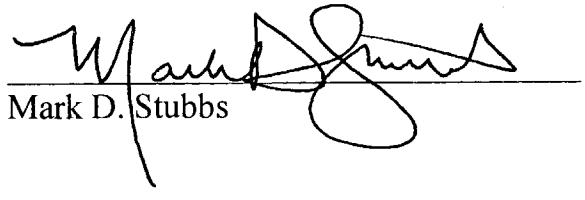
assertions about what Ralph did not say about the property in dispute. (R. 259-271). The affidavits assert that Ralph never told his children that he had relinquished any interest in the farm property and that "it would be contrary to [Ralph's] character and purpose to withhold or fail to inform his children, the trustees, of such a significant material occurrence." (R. 260). The affidavit of Glen Richard Davis states: "My father and mother never explicitly stated or gave me any impression that they were inclined to give up their interests in the farm property. If they had, they would have discussed it with me and my siblings first, as our expectations were always that it would come to us when they died." (R. 263). Finally, Bette Davis Stratton simply states that her father "never mentioned any intention to give the farm to Marion and Donna." (R. 270). Although these statements may not be hearsay because there is no statement or assertion being offered, they present other credibility problems. Plaintiff offers these statements about a conversation that did not occur in one instance in order to prove that the conversation never occurred in any other instance. The statements, therefore, lack probative value because they attempt to prove a positive by asserting a negative. Not only do the affidavits lack probative value, but they also have no real inherent value for truthfulness. The rules of evidence are designed to admit evidence that has some likelihood of being accurate. These statements, on the other hand, lack any circumstantial guarantee of trustworthiness and should, therefore, be excluded as evidence. For all of these reasons, the trial court properly determined that plaintiff's affidavits were inadmissible. (Ruling on Motion for Summary Judgment at R. 342).

CONCLUSION

This Court should affirm the trial court's grant of summary judgment in favor of defendants because Marion and Donna have not been unjustly enriched by Ralph's failure to bring a timely claim for property that Marion has maintained for nearly 70 years. Additionally, if plaintiff believed there was unjust enrichment, the time to act on that belief was at least 20 years ago, when Ralph knew that he and Marion disagreed about the division of the farm. All of the undisputed evidence suggests that Ralph recognized Marion's sacrifices to maintain the farm and, like Sterling, relinquished any interest he once had in the property. The fact that Ralph's children, through his estate, waited until after his death to bring this claim only further supports the theory that Ralph's children are attempting to circumvent their father's wishes by seizing valuable property that rightly belongs to Marion and Donna. The constructive trust doctrine is a means for remedying unjust enrichment, not for effecting it. For these reasons, the Court should affirm the grant of summary judgment.

DATED and SIGNED this 22nd day of December, 2010.

FILLMORE SPENCER, LLC



Mark D. Stubbs

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of December, 2010, I served two true and correct copies of the foregoing, via U.S. First Class Mail, postage prepaid, upon the following:

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