

2005

Michelle Samantha Gatlin Nolan, Successor  
Trustee of the Malualani B. Hoopiiaina Trust aka  
the Larayne J. Hartman Trust, and Michelle  
Samantha Gatlin Nolan, individually v. Cume  
Hoopiiainina, Personal Representative of the Estate  
of Malualani B. Hoopiiaina, Cuma S. Hoopiiaina,  
individually, Marlin M. Forsyth, individually,  
George K. Fadel, individually, Michael Gatlin, IFG  
Resources Inc., Lisa Goodwill, John Doe's 1  
through 10 : Reply Brief

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Nolan Olsen; Olsen & Olsen.

Ralph C. Petty.

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**UTAH SUPREME COURT**

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MICHELLE SAMANTHA GATLIN  
NOLAN, Successor Trustee of the  
MALUALANI B. HOOPIIAINA TRUST  
aka the LARAYNE J. HARTMAN  
TRUST, and MICHELLE SAMANTHA  
GATLIN NOLAN, individually;

Plaintiffs,

vs.

CUMA HOOPIIAINA, Personal  
Representative of the Estate of  
MALUALANI B. HOOPIIAINA, CUMA  
S. HOOPIIAINA, individually, MARLIN  
M. FORSYTH, individually, GEORGE K.  
FADEL, individually, MICHAEL  
GATLIN, IFG RESOURCES INC., LISA  
GOODWILL, John Doe's 1 through 10;

Defendants.

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IN THE MATTER OF:

THE MALUALANI B. HOOPIIAINA  
TRUST, aka THE LARAYNE J.  
HARTMAN TRUST

---

Case No. 20050619-SC

Appellate No. 20040309 CA

Civil No.: 020910872 PR

Probate No. 023901215 TR

**REPLY BRIEF OF APPELLANTS  
CUMA HOOPIIAINA AND MARLIN FORSYTH**

---

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Salt Lake City, Utah 84101

FILED  
UTAH APPELLATE

JAN 10 2006

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**UTAH SUPREME COURT**

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MICHELLE SAMANTHA GATLIN  
NOLAN, Successor Trustee of the  
MALUALANI B. HOOPIIAINA TRUST  
aka the LARAYNE J. HARTMAN  
TRUST, and MICHELLE SAMANTHA  
GATLIN NOLAN, individually;

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S. HOOPIIAINA, individually, MARLIN  
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## **ARGUMENT**

### **POINT I APPELLEES' REPLY BRIEF FAILS TO EXAMINE THE PENDING ISSUES**

#### **A. Recharacterization of Claim**

Appellees seek to recharacterize their causes of action to eliminate their claims for affirmative relief. They now claim that their quiet title action sought to remove a cloud on their title which arose when the personal representative of Malu Hoopiaina's estate conveyed deeds to Appellants. This mischaracterization is exposed when examining the quiet title causes of action in Appellee's Amended Complaint. The Amended Complaint (R.127) seeks to quiet the title in the two parcels and have that Property vested in Appellees. This is more than removing a cloud of title. The third cause of action is for damages for wrongful occupancy, money collected and punitive damages. The fourth cause of action is a claim for other trust assets. Each of these causes of action seeks "affirmative relief" as defined by the Utah Supreme Court in *Branting v. Salt Lake City*, 47 Utah 296, 153 P 995 (1915); *Davidson v. Salt Lake City*, 95 Utah 347, 81 P.2d 374, 376 (1938); *Dow v. Gilroy*, 910 P.2d 1249 (Utah App. 1996); and *American Tierra Corp. v. City of West Jordan*, 840 P.2d 757 (Utah 1992). In this case, Appellees have asked for affirmative relief other than removal of a cloud from their title, by asking that title be vested in their name, invalidating the conveyance of the Property to Appellants in the probate of Malu Hoopiaina, terminating the Lis Pendens filed by Appellants, invalidating the existing leases on the Property, and granting Appellees possession to the Property. (R.132) When Appellees come to the court seeking this redress

against Appellants and seeking court orders to affectuate their demands, the Appellees are seeking “affirmative relief”.

When seeking “affirmative relief,” the Appellees’ claims are subject to the statute of limitations. If Appellees have failed to assert their claims before the expiration of the statute of limitations, they are not entitled to have their claims enforced by the courts. This Court is called upon to determine the applicability of the statutes of limitation and to remand the case to the trial court for findings of fact relating to the statutes of limitation.

Appellees assert that the principal purpose of their quiet title action was to “. . . remove the void Personal Representatives’ Deeds and Lis Pendens filed by Appellant.” Response Brief, p. 8. However, there was nothing inappropriate, negative, or sinister about the Appellants’ filing of the Lis Pendens. Under the Utah quiet title statute, lis pendens can be filed by either party:

In any action affecting the title to, or the right of possession of, real property the plaintiff at the time of filing the complaint or thereafter, and the defendant at the time of filing his answer when **affirmative relief** is claimed in such answer, or at any time afterward, may file for record with the recorder of the county in which the property or some part thereof is situated a notice of the pendency of the action, containing the names of the parties, the object of the action or defense, and a description of the property in that county affected thereby. From the time of filing such notice for record only shall a purchaser or encumbrancer of the property affected thereby be deemed to have constructive notice of the pendency of the action, and only of its pendency against parties designated by their real names. [Emphasis added]

Utah Code Ann. § 78-40-2 (1953). Appellants filed an Answer and Counterclaim to Appellees’ Complaint and filed a lis pendens. (R. 200). Appellants’ Counterclaim sought affirmative relief by asking the court to quiet title in the Property in Appellants. Since the

Appellants were specifically authorized by § 78-40-2 to file a lis pendens, there can be no implication of slander of title or any negative implication by such filing.

## **B. Obiter Dictum**

Appellees have ignored the issue of “affirmative relief” in their Response Brief. Appellees have sought to utilize the dictum from the Court of Appeal’s opinion, indicating that the transfer of the Property to Appellants was “void and of no effect.” *Nolan v. Hoopiaina*, 2005 UT App 272, ¶ 16. By relying on the Court of Appeals’ statement, Appellees seek to limit the scope of this Court’s review, by saying that “. . . [T]he issue of whether Plaintiffs’ claims were a Quiet Title Action is now moot . . .” Response Brief ¶.5-6. This Court’s power to review the Court of Appeals’ opinion cannot be limited on the basis of dictum. The Utah Supreme Court has held in *Watkiss & Saperstein v. Williams*, 934 P.2d 840, 850 (1996), “. . . language in an opinion which ‘constitutes obiter dictum, [is] entirely unnecessary for the decision of the case . . . [and has] no effect as indicating the law of the District.’”<sup>1</sup>

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<sup>1</sup> This Court stated in *Helper State Bank v. Crus*, 95 Utah 320, 81 P.2d 359 (1938):

It has been held, many times, that the doctrine of the "law of the case" does not apply to expressions of opinion on questions the determination of which was not necessary for the decision, nor to the reasonings or illustrations in an opinion. Thus, it is said, in *Herriman Irrigation Co. v. Keel*, [25 Utah 96, 69 P. 719] above cited, speaking of the "law of the case":

"It does not apply to expressions of opinions on questions the disposition of which was not necessary for the decision, or to reasoning or illustrations in an opinion. . . . Nothing in a decision which is merely obiter dictum is controlled by the rule. . . . But upon all questions involved in the judgment the decision



The Court of Appeals' statement that the transfer of the Property by the personal representative was "void and of no effect" is entirely unnecessary for the decision and constitutes obiter dictum. The Court of Appeals was requested to determine the appropriateness of the summary judgment ruling entered by Judge Quinn of the Third

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of the appellate court is conclusive."

Further on in the same case the court quoted from *Barney v. Winona Railroad Co.*, 117 U.S. 228, 6 S. Ct. 654, 29 L. Ed. 858 --Mr. Justice Field delivering the opinion, as follows:

"We said, however, that the grant of these additional sections might be regarded as one of quantity,--an inadvertence for which the writer of that opinion, who is also the writer of this one, is alone responsible. The statement was not at all material to the decision, which was that a deduction should have been made by reason of the intersection of the two grants, so far as the prior grant was located within the extension. We recognize the rule that what was decided in a case pending before us on appeal is not open to reconsideration in the same case, on a second appeal upon similar facts. The first decision is the law of the case, and must control its disposition; but the rule does not apply to expressions of opinion on matters the disposition of which was not required for the decision."

And in *Potter v. Ajax Mining Co.*, 22 Utah 273, 61 P. 999, this court said:

". . . . But this rule does not apply to the argument, or to expressions or illustrations in the argument that are obiter, and not pertinent nor required for a disposition of the particular question arising and decided in the case. The reasoning and illustrations do not constitute the decision."

Judicial District Court. There was no cross-appeal by Appellants pending before the Court of Appeals. The statement by the Court of Appeals that the transfer of the Property by the personal representative was “void and of no effect” was not a necessary ruling to the issue of the statute of limitations. The Court of Appeals’ ruling that the statute of limitations does not apply to quiet title actions is the holding of the case and is the basis for this appeal

The appeal process is very strict about the questions that will be entertained on appeal. These questions must be raised in the Notice of Appeal or the docketing statement. This court, in *Herriman Irrigation Company v. Keel*, 25 Utah 96, 69 P. 719, 721 (1902), stated:

“On appeal, all questions to be determined must be raised by assignments of error, and in the appellate court only questions so raised can be presented and determined. . . . Before the appellate court can review the action of the trial court to determine a question such question must be raised by an assignment of error. . . . It is a general rule of practice in this court that all errors assigned, but not insisted upon in the appellant’s brief, will be disregarded, and considered as waived and as raising no question for determination. Only such questions, therefore, . . . as are raised by assignment of error, and presented in the appellant’s brief, are before the supreme court for determination.”

The Court of Appeals’ decision goes beyond the stated issues pending on appeal. In Appellees’ Docketing Statement, they list the issues pending on appeal as follows:

1. Whether the Court erred by granting Summary Judgment in favor of Defendants where there were genuine issues of material fact as to when Plaintiffs had actual knowledge of the existence of the two Trusts.
2. Whether the District Court erred in determining that the statute of limitations had expired on Plaintiffs’ Complaint by reason of Utah Code Ann. § 75-3-1006 or § 78-12-25(3)(3 year statute of ‘imitations) or § 78-12-25 (4 year statute of limitations), and whether the District Court erred in applying the “Discovery Rule” relating to when Plaintiffs had actual knowledge of the Trusts and whether Defendants had concealed Plaintiffs’ cause of action.

Appellees' Brief to the Court of Appeals never requested a finding that the personal representatives' deeds were null and void, that the Trusts were valid, that the Appellees were the owners of the Property, or whether Malu repudiated or breached the trust. None of these opinions were necessary for the Court of Appeals' decision and therefore, are dictum and are not binding on this Court or the trial court upon remand.

### **C. Stale Claim**

Appellees assert that the Appellants' deed and possession of the Property constitutes a "stale claim." This characterization, however, is inappropriate. It is Appellees whose claim is stale. A stale claim is defined as follows:

A demand or claim that has long remained unasserted, one that is first asserted after an unexplained delay which is so long as to render it difficult or impossible for the court to ascertain the truth of the matters in controversy and do justice between the parties or as to create a presumption against the existence or the validity of the claim, or a presumption that the claim has been abandoned or satisfied. [Authority Omitted] . . . It implies a greater lapse of time than is necessary to "laches." [Authority Omitted] . . . The doctrine is purely an equitable one, and arises only when, from lapse of time and laches of Plaintiff, it would be inequitable to allow a party to enforce his legal rights. [Authority Omitted].

H. Black, Blacks Law Dictionary, (1968), p.1575-6. Appellees seek to utilize their mischaracterized classification of "stale claim" as a basis for the argument that the statute of limitation should not apply to quiet title actions because it ". . . would render property unmarketable if the apparent or stale claims could not be removed." Response Brief, p.6. Appellees make this comment without authority. However, the Court in *Branting* refutes these bare allegations which seek to undermine the applicability of the statute of limitations:

. . . If it be held that this is merely an action to remove a cloud from the title or to quiet the title to real estate, then respondent's counsel have found an easy way to avoid the plea of the statute of limitations as to all actions in which the plaintiff's real estate or some lien thereon may either directly or indirectly be involved. In other words, every kind or character of affirmative relief may be prayed for and obtained by a plaintiff or counterclaimant if such relief in some way affects his rights in or title to his real estate. There can be no doubt that this action was commenced for the purpose of invoking the aid of a court of equity to declare certain proceedings whereby a certain tax was assessed and levied against respondent's property void and of no effect and to annul said proceedings. . . .

Now, it must seem clear, to all who have given or will give the matter any consideration whatever, that if section 2883 [Utah Code Ann. § 78-12-25] be denied application to a case like the one at bar, then the statute is practically repealed. That section applies to all actions for relief that is not otherwise covered by any other section. Where therefore affirmative relief is sought, as in this case, that section applies with full force. If that were not so, then all actions wherein it is sought to set aside any proceedings, judicial or otherwise, or any judgment of any court which may be a lien upon real property, may be prosecuted regardless of any statute of limitations. Although the respondent has, as a part of his prayer, asked to have removed the so-called cloud from his title, yet, as we have seen, the action was brought to annul certain proceedings, . . .

*Branting v. Salt Lake City*, 47 Utah 296 153 P. 995, 1000 (1915). Plaintiffs cannot avoid the statute of limitations by simply claiming that they are not seeking affirmative relief. There can be no doubt that Appellees initiated this action to have the court declare the personal representatives' deeds invalid, to change possession of the Property, and to issue deeds or orders vesting title of the Property in Appellees. These are each "affirmative relief" Appellees seek from the courts. Such affirmative relief requires the imposition of the statute of limitations.

#### **D. Applicability of “Affirmative Relief” Cases**

Appellees’ position is that “. . . [t]he cases set forth by Appellants in their argument had no precedential relevance to the action before the court. . . . All other cases set forth by Appellants have no relevance to the statute of limitations on quiet title actions.” Brief of Respondents, p.9. Appellees dismiss the precedent set forth in *Branting*, *Davidson*, *Dow*, and *American Tiara* and ignore the “affirmative relief” standard. The “affirmative relief” standard is the measure established by the Supreme Court to determine whether the statute of limitations applies in quiet title actions. To ignore this standard denies the Appellants the measured consistency of Utah Supreme Court rulings. It appears in this case that the Court of Appeals exceeded the scope of its task and rather than simply focusing on the issues pending on appeal, the appropriateness of the summary judgment entered by Judge Quinn in the Third District Court, sought to resolve legal issues and make a determination that would dispose of the entire case. Rather than address the issues of the statutes of limitations which was the basis of the trial court’s summary judgment, the Court of Appeals negated the statutes of limitations issues and addressed legal issues not briefed or presented to them. In this appeal, Appellees have assumed a position similar to the Court of Appeals’, ignoring the statute of limitations and seeking to limit the scope of this appeal by claiming that opinions expressed by the Court of Appeals in dictum constitute the law of the case. Appellees have failed to distinguish the cases establishing “affirmative relief” as the trigger for the statute of limitations. Appellees seem to assert that since the “principle purpose” of their actions was not to obtain some “affirmative relief,” and therefore “affirmative relief “ standard is

inapplicable. However, Appellees' discussion of the causes of action asserted in their Amended Complaint verify and reinforce that Appellees' purpose in bringing the action was not simply to remove a cloud against the title of the Property, but was to change the possession and title owner of the Property. Appellees' desire for an accounting of Appellants' receipt and disbursement of income from the Property constitutes "affirmative relief." Likewise, the return of personal property, or payment of its value, is affirmative relief, not simply "seeking to avoid apparent or stale claims." Appellees' claims have always sought the intervention of the court, on their behalf, to validate their claim to the Property, to grant them possession, to give them an accounting, and to return or pay for personal property. Every one of these claims seeks "affirmative relief" from the courts. It is clear that the principle purpose for the Appellees' action was for "affirmative relief." The cases cited by Appellants are binding on the adjudication of these issues and the statutes of limitation apply.

#### **E. Presumption of Application of Statute of Limitations**

Based on the statutes of limitation and case law, there appears to be a presumption that the statute of limitations applies to all actions in the state of Utah. By its terms, Utah Code Ann. §78-12-25(3) states that "an action may be brought within four years for relief not otherwise provided by law." The negative implication of this statute is that if any action which is not specifically provided for in another statute of limitations, is brought more than four years after the cause of action accrues, the action is barred by §78-12-25(3). The

presumption that the statute of limitations applies all cases is further supported by this

Court's holding in *American Tierra*:

Having concluded that the subdividers' claims are equitable and not barred for failure to comply with the Utah Governmental Immunity Act, we must determine whether they are nonetheless barred by a statute of limitation. Historically, courts of equity were not bound by statutes of limitation. See, e.g., *Patterson v. Hewitt*, 49 L. Ed. 214, 195 U.S. 309, 317, 25 S.Ct. 35 (1904). Today, however, many jurisdictions have commingled legal and equitable remedies in one form of action. In these jurisdictions, "the applicability of statutes of limitation to equitable proceedings appears to be unquestioned." 27 Am. Jur. 2d Equity § 157 , at 693 (1966). Utah is one of those jurisdictions that long ago commingled legal and equitable actions. See *Borland v. Chandler*, 733 P.2d 144, 146 (Utah 1987) (citing Utah R. Civ. P. 2). Moreover, years before Utah merged its legal and equitable systems, Utah applied statutes of limitation to equitable actions. See, e.g., *Fullerton v. Bailey*, 53 P. 1020, 17 Utah 85 (1898). We therefore must determine which statute of limitation applies to this action.

Frequently, actions in equity are held to come within the scope of the statutory provision that establishes a time limit applicable to all causes of action for which a specific limit is not otherwise provided. 27 Am. Jur. 2d Equity §157 , at 693 (1966). Utah's catch-all provision places a four-year limitation period on actions "not otherwise provided for by law." Utah Code Ann. §78-12-25(3) .

This court previously has applied the predecessor of §78-12-25(3) to equitable actions. For instance, in *Branting v. Salt Lake City*, 47 Utah 296, 153 P. 995 (Utah 1915), the plaintiff brought an equitable action seeking nullification of a municipal ordinance that ordered the construction of a sewer and the assessment of a special tax on abutting property. 153 P. at 996. As a defense, the city interposed section 2833 of the Compiled Laws of 1907, which required, "An action for relief not herein before provided for must be commenced within four years after the cause of action shall have accrued." 153 P. at 1000. We concluded that section 2833 applied to all actions, both legal and equitable, in which affirmative relief is sought. Because more than four years had elapsed since the claim accrued, the catch-all provision barred the claim. See 153 P. at 1001; accord *Fullerton v. Bailey*, 17 Utah at 93. Again, in *Brown v. Cleverly*, 93 Utah 54, 70 P.2d 881 (Utah 1937), we applied Utah's four-year catch-all statute of limitation to preclude a claim for an equitable lien. 70 P.2d at 885. Before applying the catch-all statute to this

case, however, we must satisfy ourselves that Utah's current statutes of limitation do not contain a more specific provision that should cover the instant case.

*American Tierra Corp. v. City of West Jordan*, 840 P.2d 757, 760 (1992). It appears that this Court and the Utah statutes presume that the statutes of limitations are applicable in all actions brought before Utah courts. In the case of quiet title actions, there is an exception when the plaintiff seeks only to clear an apparent or stale claim where no affirmative relief is sought.

Since the Appellees in this case are seeking “affirmative relief,” the statute of limitations is applicable to determine the timeliness of Appellees’ filing of their quiet title actions. The Appellees therefore have the burden of overcoming the presumption that the statute of limitations applies to their claim by demonstrating that they do not seek “affirmative relief.”

**POINT II**  
**CERTIORARI WAS GRANTED ON THE ISSUE OF**  
**THE STATUTE OF LIMITATIONS, INCLUDING ITS**  
**APPLICABILITY TO THE TRUST**

Appellees have assert that the Writ of Certiorari granted by this Court does not extend to the issue of an irrevocable trust who breaches his trust. Appellants have briefed the applicability of the statute of limitations to the breaching trustee believing that the statute of limitations applies as part of the quiet title action. There is no separate cause of action relating to the trustee’s breach and repudiation of the irrevocable trust. Appellees assert two causes of action for quiet title. The Court of Appeals found that the Appellees “. . . were primarily seeking to remove the cloud of Cuma’s deed of the real property . . .” *Nolan v.*



*Hoopiaina*, 2005 UT App. 272, ¶19. To Appellants, this action is a quiet title action. Quieting title in Appellees was a condition precedent for the pursuit and effectuation of the other causes of action. There is no separate cause of action relating to the trustee's breach and the trustee's breach arises incidental to the quiet title claim. On this basis, Appellants believe that the applicability of the statute of limitations to a trustee breaching his irrevocable trust is part and parcel of the overriding quiet title action. Therefore, Appellant briefs the statute of limitations issue as it applies to a breaching trustee of an irrevocable trust.

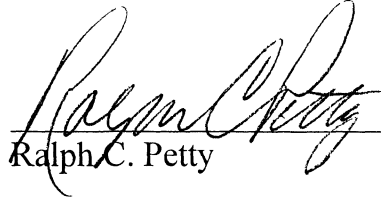
Appellees have chosen not to address this issue in their reply brief. Nevertheless, the Court of Appeals' conclusion that the trustee "had no power to revoke the trusts and deal with the trusts' assets as provided in the trust instruments," *Nolan*, at ¶15, is legally unsustainable because it fails to recognize the well-established doctrines of repudiation and breach of the trust by the trustee. When the quiet title claim of the beneficiaries is against third parties, not members of the trust, then the statute of limitations is applicable to the quiet title action. *Jenkins v Jenkins*, 24 Utah 108, 66 P.773, 778 (1901) ("the rule that the statute of limitations does not bar a trust estate holds only between *cestui que* trust and trustee, not between *cestui que* trust on one side, and strangers on the other; for that would make the statute [of limitations] of no force at all . . ."). The Court of Appeals decision ignores Appellant's assertion of repudiation and breach of irrevocable trust which directly affects the Appellant's rights in the quiet title action. If Malu's breach of the irrevocable trusts occurred with the knowledge of the Trustees, the Appellees' quiet title action may be barred. Appellees have not had the opportunity to develop the factual issues relating to repudiation

and breach of trust and as defenses to Appellees' quiet title action. The Appellants should be able to assert repudiation and breach of the trust agreement as defenses in any further proceedings of this case.

### **CONCLUSION**

Appellees' response brief is based on avoidance and denial. This Court has established the "affirmative relief" standard to determine whether the statute of limitations applies in quiet title actions. Appellees' Complaint and Amended Complaint seek "affirmative relief" in every cause of action asserted. The Appellees seek to have the courts invalidate the personal representatives' deeds conveying the property to Appellants, vest the title of the property in Appellees, grant possession of the property to Appellees, invalidate the leases on the Property, receive an accounting from Appellants of income and distributions relating to the Property, and account for trust property or its equivalent value. These remedies each constitute "affirmative relief" and require affirmative orders and action from the courts. In this case, the Supreme Court is not limited in its decision by the dictum of the Court of Appeals. The "affirmative relief" standard established by this Court in *Branting* is still the measure of whether the statute of limitations is applicable in quiet title actions. Because the Appellees seek "affirmative relief," the statute of limitations is applicable. In this quiet title action, the statute of limitations is also applicable to the trustee's repudiation and breach of an irrevocable trust. This Court should remand this quiet title action case to the trial court mandating the applicability of the statute of limitations.

DATED this 9 day of January, 2006.

  
\_\_\_\_\_  
Ralph C. Petty

**MAILING CERTIFICATE**

I hereby certify that on this \_\_\_\_\_ day of January, 2006, I mailed, postage prepaid, two true and correct copies of the foregoing to the following:

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Midvale, UT 84047

  
\_\_\_\_\_