IN THE COURT OF APPEALS

JACK WILFORD SPEARS,	)	BLOUNT CHANCERY
	)	C. A. NO. 03A01-9705-CH-00157
	)	
Plaintiff-Appellant	)	
	)	
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	)	
	)	
	)	
vs.	)	HON. CHESTER S. RAINWATER
	)	CHANCELLOR
	)	
	)	
	)	
	)	
	)	
OLIVER K. SPEARS, JR., BARBARA SPEARS, AND JOHN ARTHUR SPEARS,	)	AFFIRMED AND REMANDED
	)	
	)	
Defendants-Appellees	)	

BRIAN T. MANSFIELD, Sevierville, for Appellant.

ROBERT N. GODDARD, Goddard & Gamble, Maryville for Appellees.

OPINION

McMurray, Judge

This appeal is from the action of the trial court sustaining a motion for summary judgment in favor of the defendants. For

reasons hereinafter stated, we affirm the trial court's judgment in all respects.

Jack Wilford Spears (plaintiff), Oliver K. Spears, Jr., and John Arthur Spears are brothers, apparently being the only children of the late O. K. Spears, Sr., and wife, Marjorie Blazer Spears. (Oliver K. Spears, Jr. and wife Barbara Spears, and John Arthur Spears will be referred to collectively as defendants)

The plaintiff filed an original complaint, alleging, inter alia, that during his lifetime, his father, O. K. Spears, Sr., began and operated a business in Blount County, Tennessee, known as Spears Furniture Company. In 1957, O. K. Spears, Sr., executed and delivered a deed to the real estate upon which the business was located to his three sons as tenants in common.[1]

To the complaint all defendants filed an answer. Oliver K. Spears, Jr., and Barbara Spears, in addition to their answer, filed a counterclaim wherein they sought a judgment for unpaid rents that were allegedly owed to them by the plaintiff. In their counter-claim, the counter-plaintiffs alleged that the plaintiff occupied a dwelling owned by them from 1989 until 1994. They aver that the plaintiff paid $450.00 per month until the beginning of 1993 but failed to pay rent for the entire year of 1993 and eight months of 1994.

[1]Insofar as we know, the real estate is still owned by the three brothers and a partition suit to divide the property is still pending.

All defendants joined in a motion for summary judgment based on various statutes of limitations and the doctrine of laches. The motion for summary judgment was heard by the court on January 14, 1997. At the conclusion of the arguments on behalf of the respective parties, the court announced his finding and conclusions of law which were transcribed and incorporated by reference into an order sustaining the motion for summary judgment. The court found that the statute of limitations had run (no specific statute was referred to), that the doctrine of laches was applicable, and that the plaintiff's action was time barred. The order sustaining the motion for summary judgment was filed on February 10, 1997. The plaintiff then appealed to this court.

Insofar as we are able to ascertain from the record before us, there was never an answer filed in response to the counterclaim. Further, there is nothing in the record to suggest that the counterclaim has been addressed by the court but, to the contrary, remains pending before the trial court. An interlocutory or extraordinary appeal was not sought in the trial court nor in this court pursuant to Rules 9 or 10, Tennessee Rules of Appellate Procedure. (T.R.A.P.).

Rule 54.02 of the Tennessee Rules of Civil Procedure provides as follows:

> 54.02 Multiple Claims for Relief. When more than one claim for relief is present in an action, whether as a claim, counterclaim, cross-claim, or third party claim,

> or when multiple parties are involved, the court, whether at law or in equity, may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of the judgment adjudicating all the claims and the rights and liabilities of all the parties. The court may tax discretionary costs at the time of voluntary dismissal. [Added July 1, 1979.]

The trial court did not make the judgment sustaining the motion for summary judgment final as provided in the above quoted rule.

> T.R.A.P. 3(a) provides that "every final judgment" is appealable as of right, but that "any order that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties **is not enforceable or appealable** and is subject to revision at any time before entry of a final judgment adjudicating all the claims, rights, and liabilities of all parties." (Emphasis supplied). See Stidham v. Fickle Heirs, 643 S.W.2d 324 (Tenn. 1982). Bush Constr. Co. v. Townsend, an unreported opinion of this court filed at Knoxville April 26, 1985.

Rule 2, Tennessee Rules of Appellate Procedure grants to us the authority to suspend the rules for good cause, including the expediting of a decision. While we are reluctant to suspend the rules and consider an order or judgment from which no appeal as of right can be taken, we are of the opinion that, in the interest of judicial economy and the need for an expeditious resolution, this

is a proper case to invoke our authority and suspend the formal requirements of the rules and consider this appeal as an interlocutory appeal.

As hereinbefore noted, the defendants' motion for summary judgment was based upon the expiration of all applicable statutes of limitations and laches. The acts about which the plaintiff complains occurred more than twenty-five years before the institution of this action. The plaintiff in response to the defendants' motion for summary judgment relies upon the "discovery rule" to prevent the statute from running.

Our standard of review of a trial court's action in sustaining a motion for summary judgment is set out in detail in Carvell v. Bottoms, 900 S.W.2d 23 (Tenn. 1995), which provides in pertinent part as follows:

> The standards governing an appellate court's review of a trial court's action on a motion for summary judgment are well settled. Since our inquiry involves purely a question of law, no presumption of correctness attaches to the trial court's judgment, and our task is confined to reviewing the record to determine whether the requirements of Tenn. R. Civ. P. 56 have been met. Cowden v. Sovran Bank/Central South, 816 S.W.2d 741, 744 (Tenn. 1991). Tenn. R. Civ. P. 56.03 provides that summary judgment is only appropriate where: (1) there is no genuine issue with regard to the material facts relevant to the claim or defense contained in the motion, Byrd v. Hall, 847 S.W.2d 208, 210 (Tenn. 1993); and (2) the moving party is entitled to a judgment as matter of law on the undisputed facts. Anderson v. Standard Register Co., 857 S.W.2d 555, 559 (Tenn. 1993). The moving party has the burden of proving that its motion satisfies these requirements. Downen v. Allstate Ins. Co., 811 S.W.2d 523, 524 (Tenn. 1991).

> The standards governing the assessment of evidence in the summary judgment context are also well established. Courts must view the evidence in the light most favorable to the nonmoving party and must also draw all reasonable inferences in the nonmoving party's favor. Byrd, 847 S.W.2d at 210-11. Courts should grant a summary judgment only when both the facts and the conclusions to be drawn from the facts permit a reasonable person to reach only one conclusion. Id.
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> * * * *

More concisely stated when a party files a motion for summary judgment which is supported to such an extent that it satisfies the requirements of Rule 56.03, and that the evidence filed in support of the motion, if unrefuted, entitles that party to a judgment as a matter of law, the burden shifts to the nonmoving party to come forth with countervailing evidence which either directly or from the reasonable inferences to be drawn therefrom shows that there is a genuine issue of a material fact. If the nonmoving party meets this burden, summary judgment is inappropriate. Conversely, if the nonmoving party fails to meet this burden, summary judgment is appropriate.

The defendants' motion for summary judgment in this case is based on the equitable doctrine of laches and various statutes of limitation, specifically T.C.A. §§ 28-3-102 (Actions against a personal representative - seven years), 28-3-105 (Property tort actions - three years), 28-3-109 (Rent -- Official misconduct -- Contracts not otherwise covered -- Title insurance -- Demand notes - six years), and 28-3-110 (Actions on public officers' and fiduciary bonds -- Actions not otherwise covered - ten years).

The defendants' motion for summary judgment is supported by an affidavit of Roy D. Crawford, Jr., County Court Clerk for Blount County. The affidavit states among other things that the records of his office reflect that the will of O. K. Spears was admitted to probate during the January term of court in 1958. Mr. Crawford further testified that letters testamentary were issued to Oliver Kelly Spears, Jr., John Arthur Spears and Jack Wilford Spears (the plaintiff here). He stated that a copy of the Last Will and testament of O. K. Spears was placed in a bound Will Book, Volume 6, page 205.

With regard to the will of Marjorie Blazer Spears, he deposed that her will was admitted to probate during the July term of court in 1968; that Oliver K. Spears, Jr., qualified as executor of the estate; and that a copy of the will was placed in Will Book 9, page 375. He further stated that the original wills had been placed on microfilm and then transferred to a temperature and climate controlled facility in Knoxville for safekeeping. The originals of both wills have now been returned to his office. He concluded his affidavit with a statement that all of the records in his office relative to wills and the probate of estates are public records and are open to public inspection during normal business hours.

As exhibits to his affidavit, Mr. Crawford attached the following:

1. A copy of the minutes of the County Court showing that the Will of O. K. Spears was admitted to probate as stated in the affidavit and that Oliver Kelly Spears, Jr., John Arthur Spears and Jack Wilford Spears qualified as executors.

2. A copy of the letters testamentary issued to Oliver Spears, Jr., John Arthur Spears and Jack Wilford Spears.

3. A copy of the Last Will and Testament of O. K. Spears.

4. A copy of the minutes of the County Court reflecting that the Will of Marjorie Blazer Spears was admitted to probate as stated in the affidavit and that Oliver K. Spears, Jr., was named as executor.

5. A copy of the minutes of the September 1968 term of the County Court reflecting that Oliver K. Spears, Jr., qualified as executor of the estate.

6. A copy of the Last Will and Testament of Marjorie Blazer Spears.

The plaintiff responded to the motion for summary judgment with a legal argument that the statutes of limitation were inapplicable; that if the statutes or either of them were applicable, they did not commence to run until the cause of action accrued in 1994 when the plaintiff became aware of the facts, arguing that the defendants had concealed the true facts and made misstatements to him which "lulled any suspicions" he may have had with respect to his interest in Spears Furniture Company. He further argued that a continuing trust relationship existed between the parties. He further asserted as a matter of law that the equitable doctrine of Laches was inapplicable for the same reasons.

In his response, the plaintiff also filed his affidavit in which he stated that following his father's death in 1958 and his mother's death in 1968, he was unaware that he had a "continuing ownership interest in Spears Furniture Company"; that he was lead to believe by the defendants that he had no interest in the company and had no reason to question that belief. He further deposed that he did not participate in the probate of his father's will even though the record reflects that he qualified as a co-executor. He likewise states that he was unaware of the contents of the wills even though both were on file "at the courthouse." He made the conclusory statement that "I was not alerted to any misrepresentations or breach of duties on the part of the defendants and therefore was not compelled to independently research the wills."

Thus was the state of the record when the chancellor heard arguments on the motion for summary judgment. As hereinbefore noted, the chancellor sustained the motion on both statutory grounds and on the doctrine of laches.

We will begin our examination by first looking to the question of when a statute of limitations begins to run. The wellspring of our present day rules of law relating to when a cause of action accrues and a statute of limitations begins to run is Teeters v. Currey, 518 S.W.2d 512 (Tenn. 1974). Teeters was a medical malpractice case, however, the principle enunciated there has grown to the extent that it is almost universally applied in all types of

cases. In Teeters, our Supreme Court adopted the following basic principle:

> We adopt as the rule of this jurisdiction the principle that in those classes of cases where medical malpractice is asserted to have occurred through the negligent performance of surgical procedures, the cause of action accrues and the statute of limitations commences to run when the patient discovers, or in the exercise of reasonable care and diligence for his own health and welfare, should have discovered the resulting injury. All cases contra are overruled.

Teeters, supra, at page 517.

The Supreme Court extended the principle to tort actions in McCroskey v. Bryant Air Conditioning Co., 524 S.W.2d 487 (Tenn. 1975). In McCroskey, the court made the following observation:

> We hold that in tort actions, including but not restricted to products liability actions ('conceived in an illicit intercourse of tort and contract') predicated on negligence, strict liability or misrepresentation the cause of action accrues and the statute of limitations commences to run when the injury occurs or is discovered, or when in the exercise of reasonable care and diligence, it should have been discovered. All cases contra are overruled. (Footnotes omitted).

McCroskey, page 491.

Further, in Burks v. Stein, 1996 Tenn. App. Lexis 690, this court in addressing the issue pointed out the following:

> ... [O]nce a cause of action accrues the statute of limitations begins to run when the injury occurs, or when in the exercise of reasonable care and diligence the injury should have been discovered. As for the application of the discovery rule, our supreme court in Potts v.

Celotex Corp., 796 S.W.2d 678, 680 (Tenn. 1990) stated as follows:

> The discovery rule applies only in cases where the Plaintiff does not discover and reasonably could not be expected to discover he had a right of action. Furthermore, the statute is tolled only during the period when the plaintiff had no knowledge at all the wrong had occurred and, as a reasonable person, was not put on inquiry. Id., at 680-681.

The law in Tennessee, with respect to fraudulent concealment of a cause of action was set forth by the Supreme Court in Soldano v. Owens Corning Fiberglass Corp., 696 S.W.2d 887 (Tenn. 1985).

> Mere ignorance and failure of the plaintiff to discover the existence of a cause of action is not sufficient to toll the running of the statute of limitations. There is an exception to this rule. Fraudulent concealment of the cause of action by the defendant tolls the statute of limitations. It begins to run as of the time of the discovery of the fraud by the plaintiff. To come within this exception, the plaintiff must prove that the defendant took affirmative action to conceal his cause of action and that he, the plaintiff, could not have discovered his cause of action despite exercising reasonable diligence ...
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> Moving one step further:
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> [I]f the suit seeks to recover damages for injuries to the plaintiff's property, the applicable limitations period is three years as found in Tenn. Code Ann. § 28-3-105. Alexander v. Third National Bank, 1994 Tenn. App. LEXIS 440, *2, 1994 WL. 424287, *3 (Tenn. App. 1994). An "injury to property" need not be physical however, just as an injury to the person is not limited to bodily injury. Id. ...

Keller v. Colgems - EMI Music, Inc., 924 S.W.2d 357 (Tenn. App. 1996).

The review of these authorities brings us one conclusion. The plaintiff in this case, in order to rely upon fraudulent concealment, misrepresentation, positive or otherwise, or failure to account by the co-executors or executor, to toll the statute of limitations must demonstrate that he did not know of the true facts and that under the circumstances, using due diligence could not have discovered the true facts. Stated otherwise, the plaintiff is chargeable with knowledge of his cause of action or knowledge that would have been acquired in the exercise of reasonable care or due diligence after having been put upon reasonable inquiry.

Everyone is presumed to know the law. Davis v. Metropolitan Government of Nashville, 620 S.W.2d 532 (Tenn. App. 1981). Thus, the plaintiff is charged with knowledge that upon the death of his father or mother, as natural issue, he was entitled to a portion of either or both estates unless he had been disinherited by will. As a reasonable and prudent person, he is, therefore, chargeable with the knowledge that a reasonable inquiry would have revealed. He failed to make even the most perfunctory inquiry and, under the law, must suffer the consequences of his own action or inaction.

Giving the plaintiff the benefit of any doubt, we hold that by limiting our consideration to the statute of limitations that grants the longest period of time to bring his action (T.C.A. § 28-3-110 (10 years)), the plaintiff's claim is time barred.

Our opinion that the plaintiff is time barred by the statute of limitations, pretermits the question of laches. Nevertheless, we feel compelled to briefly address the issue. Gibson's Suits in Chancery (Inman, 7th ed. 1988) defines the equitable defense of laches as follows:

> The neglect of a person to make complaint, or bring action in due season, he being sui juris and knowing the facts, or having the means of knowledge, is called laches. Where there had been gross laches in prosecuting rights, or long and unreasonable acquiescence in adverse rights, Courts of Equity refuse to interfere ... The Court never lends its aid to one who, with knowledge of his rights and with opportunity to assert them, delays unreasonably so to do. Equity aids those who are vigilant, not those who sleep upon their rights, and always discourages stale demands.
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> * * * *

In Galyon v. First Tenn. Bank Nat'l Association, 803 S.W.2d 218 (Tenn. 1991), our Supreme Court stated: "[w]e observe that had the doctrine of laches been a matter for consideration, it could have been resolved under Tenn.R.Civ.P. 56.04." In this case, the doctrine of laches was under consideration and was properly applied.

We affirm the judgment of the trial court in all respects. Costs of this appeal are taxed to the appellant and the case is remanded to the trial court for final disposition of any remaining issues under the counterclaim.

_____
Don T. McMurray, Judge.

CONCUR:

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Herschel P. Franks, Judge

_____
William H. Inman, Senior Judge

IN THE COURT OF APPEALS

JACK WILFORD SPEARS, Plaintiff-Appellant	)	BLOUNT CHANCERY C. A. NO. 03A01-9705-CH-00157
vs.	)	HON. CHESTER S. RAINWATER CHANCELLOR
OLIVER K. SPEARS, JR., BARBARA SPEARS, AND JOHN ARTHUR SPEARS, Defendants-Appellees	)	AFFIRMED AND REMANDED

JUDGMENT

This appeal came on to be heard upon the record from the Chancery Court of Blount County, briefs and argument of counsel. Upon consideration thereof, this Court is of opinion that there was no reversible error in the trial court.

We affirm the judgment of the trial court in all respects. Costs of this appeal are taxed to the appellant and the case is remanded to the trial court for final disposition of any remaining issues under the counterclaim.

PER CURIAM