

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 15, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP2135

Cir. Ct. No. 2012CV358

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

KATHLEEN J. MILLER,

PLAINTIFF-APPELLANT,

V.

**THE ESTATE OF ARTHUR D. SMITH, SR. C/O CHRIS A. GRAMSTRUP,
PERSONAL REPRESENTATIVE,**

DEFENDANT-RESPONDENT,

ROSE MARIE HOFFMAN,

THIRD PARTY-INTERVENOR-RESPONDENT.

APPEAL from an order of the circuit court for Douglas County:
KELLY J. THIMM, Judge. *Affirmed.*

Before Hoover, P.J., Stark, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Kathleen Miller’s grandmother, Rosie Smith, died in 1987, after telling Miller she would inherit Rosie’s entire estate. Miller did not seek to enforce her perceived right to the real property comprising Rosie’s estate until 2011, after Miller’s father died and it was believed he had fraudulently transferred the real property into his own name. The circuit court concluded the equitable doctrine of laches barred Miller’s efforts to enforce her grandmother’s will and set aside the allegedly fraudulent conveyances. We agree with the circuit court that the undisputed facts establish the elements of laches. Further, we conclude the court did not erroneously exercise its discretion when it applied the doctrine. Accordingly, we affirm.

BACKGROUND

¶2 The following facts are undisputed and are taken from Miller’s complaint. Rosie was Miller’s grandmother. In the summer of 1985, Rosie told Miller she intended to leave Miller her entire estate. On April 23, 1987, Rosie executed a will consistent with her statement to Miller. Rosie died on May 5, 1987.

¶3 After Rosie’s funeral, Miller’s father, Arthur Smith, told Miller he would “take care of everything” regarding Rosie’s estate. He gave Miller a sealed envelope purportedly containing a photocopy of Rosie’s will. Miller did not open the envelope. In 1988, Smith contacted Miller and asserted he had misplaced Rosie’s will. He requested that Miller return her copy so he could administer Rosie’s estate, which she did.

¶4 On March 9, 2004, approximately seventeen years after Rosie’s death, Smith commenced an informal probate proceeding to settle her estate. Smith first asserted Rosie had died intestate, but later submitted a will dated

March 20, 1975, which declared Smith to be the sole heir and beneficiary. The estate consisted primarily of real property valued at approximately \$200,000, which he transferred to his name by quit claim deed.

¶5 Miller was unaware of the probate proceedings. Smith died on April 2, 2011. Miller did not learn Smith had transferred Rosie's estate to himself until mid-May 2011, when she requested information about the parcels from the Douglas County Register of Deeds. After Smith's death, relatives discovered the 1987 will in one of Smith's dresser drawers.

¶6 Miller brought the instant lawsuit against Smith's estate, alleging that Smith committed fraud upon her and upon the court and that he had breached fiduciary duties to Miller. As relief, Miller requested an order enjoining the transfer of any of the estate's assets, placement of the estate's assets in a constructive trust, nullification of the quit claim deeds transferring the real estate to Smith, the reopening of Rosie's estate, and probate of Rosie's will dated April 23, 1987.

¶7 The circuit court determined that, by virtue of the discovery rule, Miller's complaint was not barred by the applicable statute of limitations. Nonetheless, the court determined the doctrine of laches applied to all of Miller's claims. The court concluded each element of laches had been established:

- a) There was unreasonable delay in the filing of Plaintiff's Complaint as the pleadings and affidavits establish that Plaintiff either knew or should have known of any claim well before the filing of the Complaint;
- b) The Defendant[] and Third Party Intervener [Rose Hoffman] were not aware that Plaintiff would assert or claim any right to the assets of the Estate of Arthur Smith, Sr.;

c) The Defendant[] and Third Party Intervener are prejudiced in their defense of the Plaintiff's claim by the unavailability of Arthur Smith, Sr. due to his death[.]

The court entered a final order dismissing the complaint in its entirety. Miller appeals.

DISCUSSION

¶8 “Laches is an equitable doctrine whereby a party that delays making a claim may lose its right to assert that claim.” *Zizzo v. Lakeside Steel & Mfg. Co.*, 2008 WI App 69, ¶7, 312 Wis. 2d 463, 752 N.W.2d 889. The three elements of laches are: “(1) unreasonable delay by the party seeking relief, (2) lack of knowledge or acquiescence by the party asserting laches that a claim for relief was forthcoming, and (3) prejudice to the party asserting laches caused by the delay.” *Id.* All elements must be satisfied for laches to apply. *Sawyer v. Midelfort*, 227 Wis. 2d 124, 159, 595 N.W.2d 423 (1999).

¶9 The reasonableness of the delay, and whether prejudice resulted from the delay, are questions of law based upon factual findings. *Dickau v. Dickau*, 2012 WI App 111, ¶9, 344 Wis. 2d 308, 824 N.W.2d 142. Where the facts are undisputed and there is only one reasonable inference, the court may conclude as a matter of law that the elements have been met. *See Sawyer*, 227 Wis. 2d at 159. However, if the material facts or reasonable inferences are disputed, summary judgment is improper. *Id.* If the facts are sufficient to establish the elements of laches, we review a circuit court's decision to apply the doctrine for an erroneous exercise of discretion. *Dickau*, 344 Wis. 2d 308, ¶9.

¶10 All of Miller's appellate arguments are directed at the first element, requiring unreasonable delay by the party against whom laches is asserted. She

first argues that delay induced by fraud and concealment is not to be counted against the party opposing laches. Second, Miller asserts the circuit court should have used its application of the discovery rule as the linchpin of its laches analysis. We reject both arguments.

¶11 We first address Miller’s argument that fraud and concealment create a per se bar to the application of the laches doctrine.¹ Miller draws this rule from *Dickau*, in which a marital settlement agreement directed the husband, Glen, to allocate forty percent of his pension benefits to his former spouse, Georgianne. *Id.*, ¶3. Without Georgianne’s knowledge, Glen was involved in litigation that resulted in lifetime duty disability payments in lieu of pension payments. *Id.*, ¶¶4-5. Approximately sixteen years after the divorce and eight years after the conclusion of the litigation, Georgianne brought a motion to enforce the divorce judgment, against which Glen raised the doctrine of laches. *Id.*, ¶¶5-6. We concluded that, as a matter of law, Georgianne’s delay in bringing the action to enforce the divorce judgment was reasonable “in the context of Glen’s lengthy and intentional failure to tell Georgianne of the significant change he had caused in his financial circumstances.” *Id.*, ¶12.

¶12 While *Dickau* arguably suggests that delay induced by fraud or concealment is not attributable to the party opposing laches, that rule is simply not implicated by the undisputed facts here. Miller had notice she would be receiving her grandmother’s entire estate in 1985. Upon her grandmother’s death in 1987, Miller was, or should have been, aware that she was entitled to property under her

¹ Miller does not reply to Smith’s and Hoffman’s arguments to the contrary. Generally, arguments not refuted are deemed conceded. See *Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

grandmother's will. She did nothing until 2012, when she filed suit to, in effect, enforce the will. Regardless of any intervening fraudulent activity by her father, Miller's attempt to enforce rights she had at least constructive knowledge of in 1985 comes far too late.² Miller cannot show, as a matter of law, that the delay was attributable to that fraud, and therefore reasonable.

¶13 Miller also asserts the circuit court reached inconsistent conclusions when it determined the discovery rule tolled the applicable statute of limitations but nonetheless dismissed her complaint based on the doctrine of laches. Miller apparently believes that once the circuit court determined the discovery rule applied, it should have automatically rejected the defendant's laches defense. To address this assertion, we briefly summarize the discovery rule and its relationship with laches.

¶14 The discovery rule arose out of the harsh results that occurred when the statute of limitations was applied to bar claims by those who either did not know they had been wronged or did not know the identity of the person who wronged them. See *Pritzlaff v. Archdiocese of Milwaukee*, 194 Wis. 2d 302, 315-16, 533 N.W.2d 780 (1995). The discovery rule tolls the statute of limitations until the plaintiff discovers or should have discovered in the exercise of reasonable diligence that he or she suffered actual damage due to wrongs committed by a particular, identified person. *Id.* at 315. Similarly, the first element of laches is established by proof that there was unreasonable delay in the filing of the

² Miller's brief asserts she had no actual or constructive knowledge of the contents of her grandmother's will. This assertion cannot be taken seriously in light of her amended complaint's allegation that "on or about the summer of 1985, Rosie Smith told Plaintiff that she intended to leave her entire estate to Plaintiff." The most that can be said is Miller failed to open the envelope her father gave her, which purportedly contained a copy of the 1987 will.

plaintiff's complaint because the plaintiff knew or should have known of any claim well before its filing.

¶15 The intersection between the discovery rule and the laches defense was addressed in *Sawyer*. There, the Sawyers, individually and on behalf of their daughter's estate, filed claims against two therapists who had allegedly caused their daughter to develop false memories of sexual and physical abuse by her father. *Id.* at 132-33. The Sawyers first learned that their daughter believed she had been sexually abused in 1985, but did not file suit until they accessed her medical records following her death in 1995. *Id.* at 131-33.

¶16 The supreme court first considered the application of the discovery rule to the Sawyers' claim for negligent infliction of emotional distress. The court concluded the defendants were not entitled to summary judgment because a factual issue existed regarding whether a reasonable person in the Sawyers' position could have done more to discover the party responsible for their injuries. *Id.* at 158. It was unclear if the Sawyers knew in 1985, or could have discovered through the exercise of reasonable diligence then, that the therapists were allegedly responsible for their daughter's beliefs. *Id.*

¶17 Separately, the defendants argued the doctrine of laches entitled them to summary judgment on all of the Sawyers' claims. *Id.* at 158-59. The court concluded summary judgment was inappropriate. With respect to the Sawyers' individual claims, the court adhered to its statute of limitations analysis. The court concluded that it was not possible to determine whether there was unreasonable delay until it was first determined when their claims accrued—a question for the fact-finder. *Id.* at 159-60.

¶18 Determining whether laches applied to the estate’s claim required a different focus. However, the court determined it was still one that implicated the discovery rule. *Id.* at 160-61. “While the doctrine of laches is a defense apart from the statute of limitations, we believe that the discovery rule of the latter defense provides a helpful analysis for the application of the former defense.” *Id.* at 161. Because the estate’s claim was premised on the notion that the daughter lacked knowledge that she was being treated negligently, the estate’s cause of action did not accrue until it gained access to her treatment records. Thus, the delay was reasonable. *Id.*

¶19 *Sawyer*’s upshot is that the discovery rule provides a “helpful analysis” regarding the application of the doctrine of laches, but does not control the inquiry. Generally, a party who is found to have acted within the applicable statute of limitations by virtue of the discovery rule will also be found to have timely brought suit such that laches will not bar their claim. However, “unreasonable delay” is not coterminous with the statute of limitations. *See Schafer v. Wegner*, 78 Wis. 2d 127, 132, 254 N.W.2d 193 (1977) (“Unreasonable delay, and mere lapse of time, independently of any statute of limitations, constitute a defense in a court of equity.”) (citation omitted).

¶20 Thus, as *Sawyer* acknowledged, the statute of limitations and the doctrine of laches are distinct defenses. Because the running of the statute of limitations extinguishes the cause of action, laches cannot be applied to a time-barred claim. *See Heifetz v. Johnson*, 61 Wis. 2d 111, 115, 211 N.W.2d 834 (1973). We see no reason why a party can be found to have acted within the applicable statute of limitations for a specific claim, yet also be found to have waited too long to enforce his or her rights if the relief requested had long been available. *See Zizzo*, 312 Wis. 2d 463, ¶7 (“Laches is distinct from a statute of

limitations and may be found where the statute of limitations has not yet run.”). A timely filed claim does not conclusively demonstrate the claim was diligently pursued.

¶21 In this case, for example, the complaint’s allegations establish Miller was aware she was likely entitled to an inheritance as early as 1987, when her grandmother died. The record shows she did nothing with that knowledge for years. Her claims are based on her father’s covert transfer of the property, which was not discovered until later and therefore tolled the statute of limitations applicable to her claims for fraud. However, the remedy she seeks—enforcement of the will—was always available provided she undertook reasonable steps to accomplish that end.

¶22 The respondents persuasively rely on *Schafer*, which we conclude is analogous to the present case. There, a woman brought suit in 1973 seeking to enforce her original 1957 divorce judgment and subsequent court orders. *Schafer*, 78 Wis. 2d at 130. She sought to recover household furnishings awarded to her in the divorce judgment and an equitable lien on real property alleged to have been fraudulently conveyed by her ex-husband to their daughter. *Id.*

¶23 The supreme court concluded both claims were barred by laches despite the fact that they were or may have been timely commenced under the applicable statutes of limitation. The plaintiff unreasonably delayed bringing her claim for the household furnishings because until she filed suit, the record was “barren of any steps taken by the appellant to have the furniture removed” following a 1960 order authorizing the furnishings’ removal. *Id.* at 133. The court also concluded the plaintiff had waited too long to seek an equitable lien on her ex-husband’s real property. Relying on *Cooch v. Grier*, 59 A.2d 282 (Del.

1948), the court noted the alleged fraudulent transfer had taken place long before the plaintiff attempted to enforce her rights. *Schafer*, 78 Wis. 2d at 135-36. In the interim, the grantor had died. *Id.* “If the action had been timely pursued the grantor would have been able to testify concerning the transfer and the allegation that it was made with intent to defraud creditors.”³ *Id.* at 136.

¶24 Here, we are faced with a similar situation. Miller wishes to undo allegedly fraudulent transfers that had no bearing upon her failure for many years to seek enforcement of a will under which she should have known she was entitled to an inheritance. The undisputed evidence was sufficient to establish unreasonable delay. Further, the evidence of prejudice is particularly strong. Miller’s father is dead. If there was a reasonable explanation for the events of the preceding decades, it is now lost and potentially unrecoverable.

¶25 Accordingly, there is no basis to conclude the circuit court erroneously exercised its discretion. We are mindful of the apparently harsh result in this case, but that is not sufficient reason for reversal. The circuit court, in the exercise of its discretion, may reasonably reach a conclusion that another judge or court might not reach. *Hartung v. Hartung*, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981). “A reviewing court may not substitute its discretion for that of the circuit court.” *State v. Rhodes*, 2011 WI 73, ¶26, 336 Wis. 2d 64, 799 N.W.2d 850. Because the court, using a demonstrated rational process, reached a reasonable decision based upon the facts and law, we must affirm. *See Hartung*, 102 Wis. 2d at 66.

³ The plaintiff was a creditor and had obtained judgments beginning in 1963 for alimony arrearages. *Schafer v. Wegner*, 78 Wis. 2d 127, 133-34, 254 N.W.2d 193 (1977). The plaintiff apparently alleged the property had been transferred to avoid enforcement of those judgments.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE
809.23(1)(b)5.

