THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2018-0268

KENNETH T. RISO & a.

v.

RONALD R. RISO & a.

RESPONDENT'S BRIEF

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QUESTION PRESENTED FOR REVIEW

1. Did the trial court err by ruling that the Respondent forfeited the statute of limitations defense when the Respondent raised the statute of limitations defense in his Answer and then raised the defense again when the Petitioners' Proposed Findings of Fact and Conclusions of Law made clear that the time bar could not be excused by the discovery rule?

   Issue preserved by Answer and Counterclaims (App. at 9-17), Motion for Reconsideration (App. at 86-89), Respondent's Response to Petitioners' Objection to Respondent's Second Motion for Reconsideration After Trial (App. at 97-100), and Order on Respondent's Second Motion to Reconsider (Supp. at 1-4). [1]

[1] Citations to the record are as follows:
"App." refers to the appendix filed with this brief; and
"Supp." refers to the supplement included herewith.

STATUTE AND RULE INVOLVED

STATUTE – RSA 508:4, I:

Except as otherwise provided by law, all personal actions, except actions for slander or libel, may be brought only within 3 years of the act or omission complained of, except that when the injury and its causal relationship to the act or omission were not discovered and could not reasonably have been discovered at the time of the act or omission, the action shall be commenced within 3 years of the time the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, the injury and its causal relationship to the act or omission complained of.

RSA 508:4, I (1997).

RULE – SUPERIOR COURT RULE 9:

(a) An Answer or other responsive pleading shall be filed with the court within 30 days after the person filing said pleading has been served with the pleading to which the Answer or response is made. It shall state in short and plain terms the pleader's defenses to each claim asserted and shall admit or deny the allegations upon which the adverse party relies. If the party is without knowledge or information sufficient to form a belief as to the truth of an allegation, the party shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the allegations denied. A pleader who intends in good faith to deny only a part or a qualification of an allegation shall specify so much of it as is true and material and deny only the remainder. The pleader may not generally deny all the allegations but shall make the denials as specific denials of designated allegations or paragraphs. An Answer, to the effect that an allegation is neither admitted nor denied, will be deemed an admission. All facts well alleged in the Complaint and not denied or explained in the Answer, will be held to be admitted.

In addition, within the same 30 days, the person filing an Answer or other responsive pleading shall also file an appearance in accordance with Rule 17. No attorney, non-attorney representative or self-represented party will be heard until his or her Appearance is so entered.

(b) Instead of an Answer, a person responding to a pleading to which a response is required may, within 30 days after the person has been served with the pleading to which the Answer or response is required file a Motion to Dismiss. If a Motion to Dismiss is submitted and denied, an Answer must be filed within 30 days after the date on the Notice of the Decision finally denying the motion; provided, however, that if a Motion to Dismiss which challenges the court's personal jurisdiction, the sufficiency of process and/or the sufficiency of service of process is filed, an Answer must be filed within the time specified in section (e) of this rule.

(c) To preserve the right to a jury trial, a defendant entitled to a trial by jury must indicate his or her request for a jury trial upon the first page of the Answer at the time of filing. Failure to request a jury trial in accordance with this rule shall constitute a waiver by the defendant thereof.

(d) Failure to plead as affirmative defenses or file a Motion to Dismiss based on affirmative defenses, including the statute of limitations, within the time allowed in section (b) of this rule will constitute waiver of such defenses.

Affirmative defenses include the following:

(1) accord and satisfaction;
(2) arbitration and award;
(3) assumption of risk;
(4) contributory negligence;
(5) duress;
(6) estoppel;
(7) failure of consideration;
(8) fraud;
(9) illegality;
(10) injury by fellow servant;
(11) laches;
(12) license;
(13) payment;
(14) release;
(15) res judicata;
(16) statute of frauds;
(17) statute of limitations; and
(18) waiver.

(e) A party does not waive the right to file a Motion to Dismiss challenging the court's personal jurisdiction, sufficiency of process and/or sufficiency of service of process by filing an Answer or other pleadings or motions addressing other issues. However, a party who wishes to challenge the court's personal jurisdiction, sufficiency of process, and/or sufficiency of service of process must do so in a Motion to Dismiss filed within 30 days after he or she is served. If a party fails to do so within this time period, he or she will be deemed to have waived the challenge. If the trial court denies the Motion to Dismiss:

(1) The party will be deemed to have waived the challenge if the party does not seek review of the denial by the supreme court within 30 days of the clerk's final written notice of the trial court's decision. If the party does not seek review of the denial by the supreme court, the party must file an Answer within 30 days of the clerk's final written notice of the trial court's decision.

(2) If the party appeals the denial, and the supreme court declines the appeal, the party must file an Answer within 30 days after the date of the supreme court's final written notice declining the appeal. The supreme court's declining to accept the appeal does not preclude a party who has complied with this section from challenging the trial court's ruling on personal jurisdiction, sufficiency of process and/or sufficiency of service of process in an appeal from a final judgment of the trial court.

(3) If the supreme court accepts the appeal and rejects the party's challenge, the party must file an Answer within 30 days after the date of the supreme court's final decision rejecting the challenge.

Sup. Ct. R. 9

STATEMENT OF THE CASE

On or about June 8, 2016, Kenneth T. Riso and Rocco R. Riso, Jr., individually and as Executors of the Estate of Beatrice W. Riso (the "Petitioners"), filed a Petition for Partition of Real Estate and for Related Relief (the "Petition") with the 10th Circuit – Probate Division – Brentwood. App. at 1-8. The Petition named Ronald R. Riso, Carolyn A. Campbell, and Gregory R. Riso as respondents. Id. at 1-2. The Petition sought the partition of a parcel of real property located at 4 Enterprise Way in Raymond (the "Property") and brought claims against Gregory R. Riso (the "Respondent") for breaches of his fiduciary duties in his capacity as Attorney-in-Fact for their mother, Beatrice W. Riso (the "Decedent"), conversion, and fraudulent misrepresentation. Id. at 3-8.

The Respondent filed an Answer and Counterclaims (the "Answer") on or about August 29, 2016. Id. at 9-17. The Answer raised the statute of limitations defense. Id. at 13.

A trial was held in this matter on September 14, 2017. Id. at 18. Following the trial, the Petitioners submitted Petitioners' Proposed Findings of Fact and Conclusions of Law (the "Proposed Findings"). Id. at 18-43. The trial court issued its order after trial on December 4, 2017. Id. at 44-58. In its order, the trial court granted some of the Petitioners' requests for findings of fact and conclusions of law and denied others. Id. at 57-58. Request 83 was not granted. Id.

Both parties filed Motions to Reconsider the trial court's order after trial. Id. at 59-75. On February 20, 2018, the trial court granted such motions in part and denied them in part. Id. at 81-85. The February 20, 2018 order granted request 83 in the Proposed Findings. Id. at 85. The Respondent then filed a second Motion for Reconsideration arguing that the Petitioners' claims were barred by the statute of limitations. Id. at 86-89. Both parties filed pleadings in response to

Respondent's second Motion for Reconsideration. Id. at 90-105. By order dated April 16, 2018, the trial court rejected Respondent's argument and ruled that the Respondent had forfeited the statute of limitations defense. Supp. at 1-4. This appeal followed.

STATEMENT OF FACTS

Following the death of the Decedent on March 10, 2012, disputes arose among her children about the disposition of her assets. App. at 44. The Petitioners opened a probate proceeding for the Decedent's estate in Florida, the state of her primary residence. See id. The Decedent also owned property located at 4 Enterprise Way in Raymond. Id.

More than four years after the Decedent's death, and following contentious litigation in the Florida probate proceeding, the Petitioners filed the Petition with the 10th Circuit – Probate Division – Brentwood seeking partition of the Property which was then owned by the Decedent's children. Id. at 1-8. The Petition also sought relief for alleged misconduct by the Respondent. Id. at 5-8. Specifically, the Respondents alleged that a check for $65,000 written by the Respondent from the Decedent's bank account to reimburse himself for expenses he previously incurred amounted to breaches of his fiduciary duties, conversion, and fraudulent misrepresentation. Id. The Respondent's Answer to the Petition included the following language: "This Complaint should be dismissed because it violates the statute of limitations." Id. at 13.

The parties engaged in limited discovery prior to trial. A trial was held on September 14, 2017. Id. at 18. At trial, the Respondent testified that he wrote himself a check for $65,000 prior to the Decedent's death on March 10, 2012, to reimburse himself for expenses he previously incurred. Id. at 50. The Petitioners alleged that the Respondent wrote himself the check in the days following the death of the Decedent on March 10, 2012. Id. at 25. The issue of when Petitioners learned that the Respondent wrote the check was not addressed during discovery or at trial.

Following the trial, the Petitioners submitted the Proposed Findings. Id. at 18-43. Paragraph 83 of the Proposed Findings stated:

> There is no explanation for [the Respondent] not informing Ken and Ron during the dinner meeting on March 12 that he had already written himself the check for $65,000, if in fact that had occurred as he alleges, except that no such check had been written. In fact [the Respondent] never advised anyone that he had already paid himself, and it was not until approximately a year later during the discovery phase of the Florida probate litigation that Ken, in reviewing discovery documents produced by [the Respondent], first learned of the checks.

Id. at 39.

The trial court issued its order after trial on December 4, 2017. Id. at 44-58. Both parties filed Motions to Reconsider the trial court's order after trial. Id. at 59-75. On February 20, 2018, the trial court granted such motions in part and denied them in part. Id. at 81-85. In its February 20, 2018 order, the trial court also granted the Petitioners' request to accept paragraph 83 as a finding of fact and it was then that the evidence disclosed for the first time that the Petitioners' claims were barred by the statute of limitations because they had knowledge of the fact that the Respondent wrote the check in approximately March of 2013, more than three years prior to the filing of the Petition. Id. at 85.

On or about March 1, 2018, the Respondent filed a second Motion for Reconsideration arguing that the Petition should be dismissed and the trial court should vacate its Order After Trial and Order on Motions for Reconsideration because the expiration of the statute of limitations was a bar to the Petitioners' claims. Id. at 86-89. The trial court denied the motion, finding that the Respondent forfeited his statute of limitations defense because he did not assert it in any pleadings filed between the filing of the Answer and the filing of his second motion to reconsider. Supp. at 1-4. However, in denying the Petitioners' request for attorney's fees, the trial court stated as follows:

> I recognize that the petitioners' sought an award of attorneys' fees for having to respond to the respondent's second motion for reconsideration. However, recognizing the lack of clear case law on the forfeiture of affirmative defenses in New Hampshire, I cannot find that the respondent's motion was frivolous or brought in bad faith such that attorneys' fees should be awarded.

Id. at 4.

SUMMARY OF ARGUMENT

The trial court erred in ruling that the Respondent forfeited the statute of limitations defense. The Respondent raised the defense in his initial pleading and raised it again as soon as the evidence disclosed that the Petitioners could not rely on the discovery defense to argue that their claims were brought within the time period allowed by the statute of limitations. App. at 13, 86-89. A fact-specific analysis reveals that the Petitioners were not surprised or unduly prejudiced by the Respondent's method of pleading the statute of limitations and, therefore, the Respondent did not forfeit the defense. To hold otherwise would be contrary to the public policy behind the statute of limitations defense in that it would force the Respondent to unfairly defend himself against stale claims about which memories have faded and evidence has disappeared.

The Petitioners will argue that the Respondent should have engaged in discovery to learn of the fact that the Petitioners had discovered the conduct complained of more than three years prior to filing their complaint. This was knowledge squarely in the possession of the Petitioners from the outset of the case. Id. at 39. To find that a plaintiff may knowingly bring a time-barred action and shift the burden to the defendant to discover the facts confirming that the action is time barred would turn the statute of limitations on its head. This would shift to the defendant the precise burdens and expenses that the statute of limitations is intended to avoid. Once the defendant asserts the statute of limitations in a case in which the complaint is on its face time barred, the burden shifts to the plaintiff to prove that he or she can rely on the discovery rule to avoid application of the statute. To place the burden on the defendant to disprove the plaintiff's entitlement to rely on the discovery rule unfairly prejudices the defendant by forcing him or her to incur burdens and expenses that he or she is unlikely to be able to recover following dismissal of the plaintiff's action.

ARGUMENT

1. **The trial court erred by ruling that the Respondent forfeited the statute of limitations defense when the Respondent raised the statute of limitations defense in his Answer and then raised the defense again when the Petitioners' Proposed Findings of Fact and Conclusions of Law made clear that the time bar could not be excused by the discovery rule.**

A. The trial court's ruling in the present case is subject to *de novo* review.

Because the underlying facts in the present case are not in dispute, this Court should review the trial court's decision *de novo*. In re Dufton, 158 N.H. 784, 787-88 (2009) (citing Johnson v. Town of Wolfeboro Planning Bd., 157 N.H. 94, 96 (2008).

B. RSA 508:4, I imposes a three-year statute of limitations on personal actions in New Hampshire.

Statutes of limitations establish the time period, after a cause of action arises, within which a claim or suit must be filed, to enforce the cause of action. Roa et al. v. Roa et al., 985 A.2d 1225, 1231 (N.J. 2010). In New Hampshire:

> Except as otherwise provided by law, all personal actions, except actions for slander or libel, may be brought only within 3 years of the act or omission complained of, except that when the injury and its causal relationship to the act or omission were not discovered and could not reasonably have been discovered at the time of the act or omission, the action shall be commenced within 3 years of the time the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, the injury and its causal relationship to the act or omission complained of.

RSA 508:4, I (1997). Thus, pursuant to New Hampshire law, all personal actions must be commenced within three years of the time when the plaintiff discovers the injury or when, in the exercise of reasonable diligence, the plaintiff should have discovered the injury and its causal relationship to the act or omission complained of. Id.

C. The trial court's ruling is contrary to the primary purposes of the statute of limitations defense.

"The principal purpose of the statute of limitations is to eliminate stale or fraudulent claims." West Gate Vill. Ass'n v. Dubois et al., 145 N.H. 293, 298 (N.H. 2000) (citing Keeton v. Hustler Magazine, Inc., 131 N.H. 6, 14 (N.H. 1988)).

> Statutes of limitations reflect the fact that it becomes more difficult and time-consuming both to defend against and to try claims as evidence disappears and memories fade with the passage of time. Such statutes represent the legislature's attempt to achieve a balance among State interests in protecting both . . . courts and defendants generally against stale claims and in insuring a reasonable period during which plaintiffs may seek recovery on otherwise sound causes of action.

Id. Furthermore, statutes of limitations promote repose by giving security and stability to human affairs. See Roa, 985 A.2d at 1234 (citing Caravaggio v. D'Agostini, 765 A.2d 182 (N.J. 2001)). "Thus, when a plaintiff knows or has reason to know that he has a cause of action against an identifiable defendant and voluntarily sleeps on his rights so long as to permit the customary period of limitations to expire, the pertinent considerations of individual justice as well as the broader considerations of repose, coincide to bar his action." Id. (brackets omitted).

The trial court's ruling in the present case is contrary to the public policy behind the statute of limitations. It would unfairly require the Respondent to defend claims against him after memories have faded and would not give security to potential defendants that they will not be required to defend against stale claims.

D. The Respondent properly raised the statute of limitations defense.

As a general rule, a violation of the statute of limitations must be properly raised by the party asserting the affirmative defense or it is waived. Rule 9 of the Rules of the Superior Court of New Hampshire requires a party to plead affirmative defenses, including the statute of limitations, in the answer or file a motion to dismiss based on affirmative defenses. See Rule 9,

Rules of the Superior Court of the State of New Hampshire. The Respondent in the instant case properly raised the statute of limitations defense in his initial pleading with the court. App. at 13.

E. Because the Respondent raised the statute of limitations defense in the Answer and the Petitioners were not surprised or unduly prejudiced by the Respondent's delay in pressing the statute of limitations defense, the trial court improperly ruled that the defense had been forfeited.

If a defendant raises the affirmative defense of a violation of the statute of limitations in his or her answer, the analysis of whether he or she has forfeited the defense requires a fact-specific analysis of both parties' conduct during the subsequent proceedings in order to determine whether there has been a delay by the defendant that has surprised or unduly prejudiced the petitioner. In the present case, the answer is no.

Courts in other jurisdictions have held that where a defendant has included the statute of limitations defense in an answer or initial pleading, the defendant's delay in raising the defense does not result in waiver if the plaintiff is not surprised or unduly prejudiced. Furthermore, many courts have held that the act of including the statute of limitations defense in an answer, even using boilerplate language, is sufficient to put the plaintiff on notice and, therefore, the plaintiff has the opportunity to present evidence to defeat any argument that the statute of limitations defense bars his or her claims.

In 2011, the federal district court in the Southern District of Mississippi held that a defendant who raises the statute of limitations defense in his or her answer does not waive it for failing to timely pursue it so long as it is raised at a pragmatically sufficient time, and the plaintiff is not prejudiced in its ability to respond. See Bryant v. Wyeth, Inc. et al., 816 F. Supp.2d 329, 332-33 (S.D. Miss. 2011) (citing Lucas v. United States, 807 F.2d 414, 418 (5th Cir. 1986)). In that case, a defendant raised the statute of limitations defense in its answer but actively participated in the litigation process for over eight years before filing a motion for

summary judgment based on the statute of limitations. Id. at 332. Despite the eight-year delay, the Bryant court ruled that the defendant did not forfeit the statute of limitations defense because the plaintiff was unable to demonstrate that the delay had adversely affected its ability to fully and adequately respond to the motion. Id. at 333.

Similarly, in Daingerfield Island Protective Soc'y, et al. v. Babbitt, 40 F.3d 442, 444-45 (D.C. Cir. 1994), the Circuit Court for the District of Columbia held that a defendant who included "boilerplate" statute of limitations language in his answer satisfied the Federal Rules of Civil Procedure, put the plaintiff on notice of the affirmative defense, and afforded the defendant the opportunity to respond. In that case, the court relied heavily on the fact that the defendant included the statute of limitations defense in his answer, and refused to find that his failure to raise it again until the case was on appeal resulted in an abandonment of the statute of limitations defense. Id.

The Georgia Court of Appeals has reached the same conclusion. In a 1990 case, that court held that a defendant had not waived the statute of limitations defense even though the defendant engaged in discovery, arbitration and the resolution of substantive issues on summary judgment, and waited over a year to press the defense. Wright v. Food Giant, Inc., 394 S.E.2d 610, 611 (Ga. Ct. App. 1990). In so holding, the court determined that even though the defendant delayed in pressing the defense, it properly raised the defense in its answer and there was no harm that could not have been avoided by the plaintiff. Id. The court noted that the plaintiff was timely notified of the defense and the statute of limitations problem was obvious on the face of the record. Id.

When a fact-specific analysis is applied to the present case, it is clear that the Petitioners were not surprised or unduly prejudiced by the Respondent's methods of pleading the statute of

limitations defense. The Defendants knew that they could not rely on the discovery rule when they filed their action. App. at 39. The Petition, on its face, violated the statute of limitations because it was filed more than three years following the act complained of. Id. at 1-8. Most importantly, the Respondent properly raised the statute of limitations defense by asserting in his Answer that the Petition should be dismissed because it violated the statute of limitations. Id. at 13. Thus, the Petitioners were put on notice of the statute of limitations defense at the earliest stage possible and they failed to present any evidence to assert their entitlement to rely on the discovery rule because they had no such evidence.

The statute of limitations issue was obvious from the face of the record. The Decedent died on March 10, 2012. Id. at 44. The present action was not opened until June 8, 2016. Id. at 1-8. Although the exact timing of when the Respondent wrote himself a check for $65,000 was contested at trial, the Petition was filed more than four years after the Decedent's death, making the statute of limitations issue obvious from the face of the record. See id.

Because the Petitioners knew they could not rely on the discovery rule, they waited until after the trial had concluded to first admit that they learned they had possible claims against the Respondent in approximately March of 2013, more than three years prior to the filing of the Petition. Id. at 39. When the Respondent realized that the Petitioners could not rely on the discovery rule exception to the statute of limitations, he promptly filed a Motion to Reconsider with the court in which he pressed the statute of limitations defense and argued that the trial court should vacate its order. Id. at 86-89.

The trial court's rejection of the statute of limitations defense contradicts the purposes of the statute and puts the Respondent in the position of defending claims against him after much time has passed and memories have faded. Moreover, since the Petitioners knew their claims

against the Respondent were barred by the statute of limitations defense from the outset, the trial court's ruling improperly and unfairly shifts to the Respondent the burdens of discovery and defending claims against him that the statute of limitations is meant to protect against. Placing the burden on the Respondent to disprove the Petitioners' entitlement to rely on the discovery rule unfairly prejudiced the Respondent by forcing him to incur burdens and expenses that he otherwise could have avoided and will unlikely be able to recover.

In issuing its order, the trial court acknowledged that there is a lack of clear case law on the forfeiture of affirmative defenses in New Hampshire. Supp. at 4. However, based on the authorities cited above, this Court should hold that the trial court erred in ruling that the Respondent forfeited the statute of limitations defense by not pressing it until the later stages of the case since it was raised in the Respondent's Answer and the Petitioners were not surprised or unduly prejudiced.[2]

[2] In addition to the existence of the line of cases described above, there is also authority for the proposition that even if a defendant fails to raise the statute of limitations defense in his or her answer, the defense is not waived or forfeited if it is raised as soon the evidence discloses that the matter is barred by the applicable statute of limitations. In 1995, the Georgia Court of Appeals held that although the statute of limitations defense should generally be included in the initial pleading, it is not required to be raised prior to a time when the evidence discloses that the matter is barred. See Hosley v. Computer Transport of Georgia, Inc., 463 S.E.2d 526, 529 (Ga. Ct. App. 1995) (citing House v. Echota Cotton Mills, 199 S.E.2d 585, 587 (Ga. Ct. App. 1973)). The California Appellate Court reached the same holding in Schuman et al. v. Ignatin et al., 191 Cal.App.4th 255, 266 (Ca. Ct. App., 2nd Dist., 4th Div. 2010). In that case, the statute of limitations was not an issue in the trial on the merits but when it became an issue following the trial, the appellate court held that the trial court could permit a late assertion of the statute of limitations defense any time prior to entry of final judgment if circumstances permit. Id.

CONCLUSION

Because the Petitioners were not surprised or unduly prejudiced by the Respondent's method of pleading the statute of limitations defense and because the trial court's decision unfairly shifts the burden of discovering facts confirming that the Petitioners' action was time barred to the Respondent, the trial court erred in ruling that the Respondent forfeited the statute of limitations defense and this Court should vacate the trial court's order on his second Motion for Reconsideration and dismiss the Petitioners' claims against him.

REQUEST FOR ORAL ARGUMENT

The Respondent requests oral argument before the full court.

CERTIFICATION OF DECISION BEING APPEALED

The undersigned hereby certifies that the decision being appealed in the present case was in writing and is appended to this brief.

CERTIFICATE OF SERVICE

I hereby certify that I have sent by U.S. Mail two copies of the foregoing Respondent's Brief and the Appendix to counsel for the Petitioners.

Jan P. Myskowski

Respectfully submitted by,

GREGORY R. RISO

By his attorneys,

MYSKOWSKI & MATTHEWS, PLLC

Date: July 30, 2018

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SUPPLEMENT

THE STATE OF NEW HAMPSHIRE

JUDICIAL BRANCH

NH CIRCUIT COURT

ROCKINGHAM COUNTY

10th CIRCUIT – PROBATE DIVISION - BRENTWOOD

Kenneth T. Riso, et al

v

Ronald R. Riso, etc.

Case No. 318-2016-EQ-00807

ORDER ON RESPONDENT'S SECOND MOTION TO RECONSIDER

After the trial of this matter I issued an order dated December 4, 2017 granting the petition for the partition and sale of the property at issue, but finding that the respondent Greg Riso was not entitled to receive any proceeds from the sale of the property for his ownership interest. Both the petitioners and the respondent filed motions to reconsider that order. After reviewing my order, the motions, and the relevant exhibits, the motions to reconsider were granted in part.

Upon the receipt of my order granting the motions to reconsider in part, the respondent filed a second motion for reconsideration relying on a statute of limitations defense raised in his answer. For the reasons set forth below, that motion for reconsideration is denied.

In my order on the motions to reconsider filed by both parties, I found that the petitioners were entitled to recover damages as a result of the respondent's breach of his fiduciary duties as the agent under the power of attorney given to him by his mother, Beatrice Russo. This relief had been sought by the petitioners since the filing of their petition in June, 2016. That petition sought the partition of property located in Raymond, New Hampshire (Count I), and also contained claims for breach of fiduciary duty (Count II), conversion (Count III), and fraudulent misrepresentation (Count IV).

The respondent's answer denied most of the factual allegations, and included three counterclaims (one for breach of contract and two for unjust enrichment). The answer also asserted two affirmative defenses. The first affirmative defense sought dismissal alleging a failure to state a claim upon which relief could be granted. The second affirmative defense sought dismissal asserting that the "Complaint" violated the statute of limitations.

There was no further specificity to the affirmative defenses, nor were any motions filed with the court seeking a ruling on either affirmative defense.

After his answer, the respondent filed a summary statement under Rule 62 of the Probate Division Rules of the Circuit Court. Pursuant to Rule 62, the respondent's summary statement was to contain information "necessary to support ...[his] claims, defenses or counterclaims." It was to "be comprehensive and made in good faith." Moreover, the Rule provides that the purpose of the summary statements is "to apprise the court of the nature of the claims, defenses, and legal issues likely to arise." Yet, the respondent's summary statement made no mention of a statute of limitations defense. Thereafter, the respondent did not raise the statute of limitations defense at the structuring conference hearing.

After the structuring conference, I issued an order requiring the parties to submit any pretrial memoranda of law at least 10 days prior to trial. None were submitted. The only subsequent submissions by the parties were the petitioners' post-trial request for findings and rulings of law, and the respondent's post-trial memorandum of law. As with all of his prior pleadings, the respondent's memorandum of law did not raise a statute of limitations defense to any of the plaintiff's claims.

The only time the respondent addressed the statute of limitations in his post-trial memorandum was to respond to an argument made by the petitioners at trial. The petitioners had asserted at trail that the respondent's counterclaims were barred by the statute of limitations. The respondent argued that the petitioners should not be allowed to raise the statute of limitations defense in part because the petitioners had failed to raise the defense either in their answer, or in their summary statement under Rule 62.

After this court's trial order was issued, the parties filed their motions to reconsider. As with all of his prior pleadings after his answer, the respondent again made no mention of a statute of limitations defense. The first and only time the defense was raised – other than the general statement in the respondent's answer – was in the second motion for reconsideration.

In the petitioners' objection to the respondent's second motion for reconsideration, they rely on the case of *Am. Int'l Ins. Co. v. Robert Seuffer GMBH & Co.*, 468 Mass. 109, 2014 WL 1887541 (2014). In that case, the Supreme Judicial Court of Massachusetts found that a party may forfeit its lack of personal jurisdiction defense by failing to act on the

defense for 18 months after raising it in its answer. The petitioners further rely on the case of *Liptak v. Belisle*, No. 16-P-656, 2017 Mass. App. LEXIS 597 (May 31, 2017) which found that a defendant who had engaged in litigation on the merits for three years, including a three day bench trial, had forfeited the ability to pursue any dispositive affirmative defenses, including the statute of limitations.

In this matter, the respondent filed a response to the petitioners' objection to the second motion for reconsideration. In that response, the respondent argues that neither party engaged in "significant" discovery, and that all exhibits were introduced by agreement at trial. The respondent further claims that he learned "for the first time at trial" that the petitioners could not overcome a statute of limitations defense by arguing that they did not discover the causes of action until well after the actions at issue occurred.

Curiously, the respondent does not indicate why he did not raise the statute of limitations defense in his memorandum of law filed on September 28, 2017, two weeks after the conclusion of the trial. Although the defense was raised in his answer, the respondent conducted no discovery related to that issue and did not raise it in any other pleadings or at trial. His arguments imply that due to the small amount at stake and his lack of resources he did not have to pursue his affirmative defense. He also places much weight on an argument that the petitioners knew their claims were barred by the statute of limitations defense, but pursued them anyway.

The respondent's arguments are not persuasive. The respondent raised the defense in his answer and then chose not to pursue it in any way. Even accepting the respondent's statement that he was not aware of the statute of limitations defense until trial, he failed to raise it in his post-trial memorandum after having two weeks to review the issue.

Based on the pleadings, it is clear that the respondent raised the defense in his answer without knowing if he had grounds to pursue it. He then failed to conduct any discovery on the issue, failed to raise the issue with the court in any pretrial pleadings or at trial, and then failed to raise the issue in his post-trial memorandum of law after being given ample time to review the information from the trial and to make his legal arguments to the court. In addition, in paragraph 6.c of his post-trial memorandum of law, the respondent relies on Probate Division Rule 62 regarding summary statements as grounds

to deny the statute of limitations defense asserted by the petitioners at trial. He should not be allowed to ignore that rule now.

I find the reasoning of the case law cited by the petitioners to be persuasive. When that reasoning is applied in the context of the rules of this court that require the parties to raise any defenses in their summary statements, and the failure of the respondent to pursue the statute of limitations defense in any way until his filing of a second motion for reconsideration, I find that the respondent forfeited the statute of limitations defense.

Moreover, I must also find that the respondent has failed to raise any points of law or fact that were "overlooked or misapprehended" in my order, as required by Probate Division Rule 59-A. Indeed, the issue of the statute of limitations was not addressed because it was not raised by the respondent in its summary statement, at trial, or in its post-trial memorandum of law.

Given all of the above, the respondent's second motion for reconsideration is denied.[1]

SO ORDERED.

Dated: 4/16/18

Mark F. Weaver, Judge

[1] I recognize that the petitioners' sought an award of attorneys' fees for having to respond to the respondent's second motion for reconsideration. However, recognizing the lack of clear case law on the forfeiture of affirmative defenses in New Hampshire, I cannot find that the respondent's motion was frivolous or brought in bad faith such that attorneys' fees should be awarded.