THE STATE OF NEW HAMPSHIRE

SUPREME COURT

Kenneth T. Riso & a.

v.

Gregory R. Riso & a.

No. 2018-0268

MANDATORY APPEAL PURSUANT TO SUPREME COURT RULE 7 FROM FINAL DECISION OF 10TH CIRCUIT – PROBATE DIVISION – BRENTWOOD

PETITIONERS' BRIEF

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Oral Argument by William F. Gramer, Esq.

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STATUES AND RULES INVOLVED[1]

PROBATE DIVISION RULE 59-A - MOTIONS FOR RECONSIDERATION.

(1) A Motion for reconsideration or other post-decision relief shall be filed within ten (10) days of the date on the Register's written notice of the order or decision, which shall be mailed by the Register on the date of the notice. The Motion shall state, with particularity, points of law or fact that the Court has overlooked or misapprehended and shall contain such argument in support of the Motion as the movant desires to present; but the Motion shall not exceed ten (10) pages. To preserve issues for an appeal to the Supreme Court, an appellant must have given the Court the opportunity to consider such issues; thus, to the extent that the Court, in its decision, addresses matters not previously raised in the case, a party must identify any alleged errors concerning those matters in a motion under this rule to preserve such issues for appeal. A hearing on the Motion shall not be permitted except by order of the Court.

(2) No answer to a Motion for reconsideration or other post-decision relief shall be required unless ordered by the Court, but any answer or objection must be filed within ten (10) days after the filing of the Motion.

(3) If a Motion for reconsideration or other post-decision relief is granted, the Court may revise its order or take other appropriate action without rehearing or may schedule a further hearing.

(4) The filing of a Motion for reconsideration or other post-decision relief shall not stay any order of the Court unless, upon specific written request, the Court has ordered such a stay.

[1] In addition to the Statutes and Rules set forth in the Respondent's brief.

PROBATE DIVISION RULE 62 - STRUCTURING CONFERENCES AND PRETRIAL PROCEDURES.

The Court shall schedule a structuring conference for each contested case entered on the docket. The structuring conference shall occur between sixty (60) and one hundred twenty (120) days after the Return Day or at such other time as the Court may order.

The Pro Se Party or Attorney shall attend the structuring conference and shall be prepared and authorized to discuss the issues and set schedules for discovery and other case preparation, including additional conferences with the Court, Alternative Dispute Resolution, settlement or trial.

Ten (10) days prior to the structuring conference all Pro Se Parties or Attorneys shall file summary statements necessary to support their respective claims, defenses or counterclaims. This summary statement shall be comprehensive and made in good faith, but shall not be admissible at trial. The purpose of this summary statement is to apprise the court of the nature of the claims, defenses, and legal issues likely to arise.

At or immediately after the structuring conference, the Court shall issue a structuring conference order which may include discovery deadlines and dates for an additional conference with the Court, filing of pretrial statements, filing of Motions, filing of requests for findings of fact, rulings of law and memoranda of law, trial management conference, and trial.

If a pretrial statement is ordered it shall include, by numbered paragraphs, a detailed, comprehensive, and good faith statement, setting forth, if applicable:

1. Uncontested issues of fact.
2. Contested issues of fact.
3. Applicable law.
4. Disputed issues of law.
5. Specific claims, objections or position of the contestant.
6. Specific defenses.
7. A list of all exhibits to be offered in the case of each Party. The Pro Se Parties or Attorneys shall bring all exhibits or exact copies to the pretrial conference.

8. A list of all depositions to be read into evidence.

9. A waiver of claims, denials or objections.

10. A list of the names and addresses of all witnesses who may be called.

11. Whether there will be a request for a view and, if so, who shall pay the cost in the first instance.

12. The names and addresses of the trial Attorneys.

Except for good cause shown, only witnesses listed in the pretrial statement will be allowed to testify and only exhibits, so listed, will be received in evidence.

In every case scheduled for trial, the Court may schedule such pretrial conferences as it deems necessary, at which counsel shall have their clients present or available for contact by telephone and shall be prepared to discuss and effectuate settlement and, if necessary, conduct of the trial.

Failure to comply with this Rule shall constitute grounds for sanctions, in the discretion of the Court.

QUESTIONS PRESENTED

1. Whether a party is permitted to advance by way of motion for reconsideration under Probate Division Rule 59-A an affirmative defense which had not been previously advanced during the case for a determination by the Court.

2. Whether the trial court correctly determined that the Respondent forfeited his statute of limitations defense, despite including the defense in his Answer, where he thereafter remained silent and failed to pursue such defense at any point during the litigation by motion or other pleading and then only raised it for the first time in a second motion for reconsideration after a full trial on the merits.

SUMMARY OF THE ARGUMENT

The trial court's decision finding that the Respondent forfeited the statute of limitations defense should be affirmed. Initially, although it was not the basis for the trial court's denial of the Respondent's second motion for reconsideration, the Petitioners argued in opposition to the motion that it was improper for the Respondent to assert for the first time his statute of limitations defense by way of motion for reconsideration under Probate Division Rule 59-A. Motions for reconsideration are intended to present the trial court with a final attempt to address a point of fact or law that the moving party believes was overlooked or misapprehended. It is not intended to allow a party to present new evidence or new arguments that they themselves overlooked. On this basis alone, the trial court's decision to deny the Respondent's motion for reconsideration was proper and can be affirmed.

Notwithstanding the improper use of Rule 59-A by the Respondent, the trial court determined that the Respondent's statute of limitations defense had, in any event, been forfeited by his own conduct during the litigation. Although the Respondent set forth in his Answer the statute of limitations as an affirmative defense, this defense was never pursued during the eighteen (18) months that the matter was litigated, was not asserted in the Respondent's Probate Division Rule 62 Summary Statement, no pre-trial memorandum was submitted raising the issue, and it was not asserted at trial. It was not until the Respondent's second motion for reconsideration that for the first time the Respondent argued that the Petitioners' claim for conversion was all along barred by the applicable three-year statute of limitations.[2] The parties and the trial court endured the time and expense of litigation culminating in a full hearing on the merits and a 14-page written order after trial, with rulings made on the Petitioners' 94 proposed findings of fact and conclusions of law.

[2] It should be made clear that the Petitioners contest whether the claim for conversion was in fact time-barred. No evidence was presented on this issue at any point in time during the case, and the trial court did not make any findings as to the merits of the defense.

Allowing the Respondent to hold the affirmative defense in his back pocket until after trial, surprising both the court and the Petitioners, would amount to the sanctioning of a waste valuable judicial resources and the resources of the Petitioners, and directly contradict the many court rules designed to compel litigants to bring to the court's attention issues and defenses that will help streamline the case, limit discovery or determine whether the case should even continue. None of the judicial system's civil litigation procedural goals are achieved where an affirmative defense, ignored throughout the case by the party who has the burden to prove it applies, is permitted to be raised after trial as a last ditch effort to avoid defeat. The facts in this case as to the Respondent's conduct in never raising the statute of limitations defense are undisputed and the trial court was correct to find the defense was forfeited.

ARGUMENT

I. THE RESPONDENT'S STATUTE OF LIMITATIONS DEFENSE COULD NOT PROPERLY BE RAISED FOR THE FIRST TIME BY MOTION FOR RECONSIDERATION UNDER PROBATE DIVISION RULE 59-A.

As a threshold matter, it is undisputed that the Respondent raised his statute of limitations defense for the very first time by a second motion for reconsideration following trial pursuant to Rule 59-A. The purpose of a motion for reconsideration is for the movant to present points of law or fact that the movant believes were overlooked or misapprehended by the court. Probate Div. R. 59-A; *Farris v. Daigle*, 139 N.H. 453 (1995). The trial court's decision on a motion for reconsideration is to be upheld absent an abuse of discretion. *Id.* (citing *Fortin v. Manchester Housing Auth.*, 133 N.H. 154, 160 (1990)).

Here, the court could not have overlooked or misapprehended the Respondent's statute of limitations defense because such defense was never presented or otherwise brought to the court's attention at any point in time during the eighteen (18) months the case was pending, nor at any time during the trial or before the court rendered its decision on the merits. A motion for reconsideration is not designed, for example, to allow a party

to submit further evidence, "nor is it designed to allow parties to raise issues that *they* overlooked when presenting their original case." *See*, *Farris v. Daigle*, *supra*, at 827 (emphasis in original). Thus, the trial court's decision to deny the motion for reconsideration was proper on this basis alone. By never raising the issue during trial, or even by post-trial memorandum or proposed findings of fact, the Respondent had by that point, if not earlier, forfeited any right to raise the statute of limitations defense.

II. THE TRIAL COURT CORRECTLY HELD THAT THE RESPONDENT'S CONDUCT CONSTITUTED A FORFEITURE OF THE STATUTE OF LIMITATIONS DEFENSE.

a. The trial court's decision should not be overturned unless clearly erroneous or an abuse of discretion.

Assuming that the Respondent could properly raise the statute of limitations defense for the first time by way of a Rule 59-A motion for reconsideration after trial, the parties disagree as to the standard of review to be applied as to the denial of such motion. The Respondent asserts that a review of the trial court's decision should be on a *de novo* basis because the underlying facts are not in dispute. However, this Court has previously held that as to affirmative defenses the issue of "[w]aiver is a question of fact", with such determination not to be overturned unless "clearly erroneous." *In re Estate of Shaw*[3], No. 2015-0312, 2016 N.H. Lexis 139 (Sup. Ct. March 18, 2016), (citing *Bartlett v. Commerce Ins. Co.*, 167 N.H. 521, 528 (2015)). Likewise, in *Eddie Nash & Sons v. Switser*[4], where this Court reviewed the trial court's decision which found under Superior Court Rule 28 that the defendant waived the statute of limitations defense, this Court stated that the trial court had "broad discretion in applying and enforcing its rules", and would "affirm the trial court's application of Rule 28 unless we find that it committed an unsustainable exercise of discretion." *Eddie Nash & Sons v. Switser*, No. 2007-0670, 2008 N.H. Lexis 179, *1-2 (Sup. Ct. October 9, 2008) (citing *Tsiatsios v. Tsiatsios*, 144 N.H. 438, 443 (1999)). "To show that the trial court's decision is unsustainable, the

[3] Non-precedential order per Supreme Court Rule 12(d).
[4] Non-precedential order per Supreme Court Rule 12(d).

defendant must demonstrate that the court's ruling was clearly untenable or unreasonable to the prejudice of her case." *Id.* (citing *State v. Lambert*, 147 N.H. 295, 296 (2001); *See also, Axenics, Inc. v. Turner Construction Co.*, 164 N.H. 659, 666 (2013) (in the context of determining whether a contract had been abandoned, stating: "Abandonment of a contract is a mixed question of law and fact; what constitutes an abandonment is a matter of law, and whether there has been an abandonment is a question of fact. We will not overturn the trial court's ruling on a mixed question unless it is clearly erroneous. If the court misapplies the law to its factual findings, however, we will review the matter *de novo*.") (internal citations omitted). Here, the trial court was called upon to determine whether the Respondent's failure to pursue the statute of limitations defense amounted to a "forfeiture", rather than a "waiver", given that the affirmative defense had been asserted in his answer. Whether deemed a "waiver" or "forfeiture"[5], the same standard of review should be applied in deciding whether a defendant has preserved its right to argue the merits of an affirmative defense.

The question before this Court is whether the trial court correctly determined that the statute of limitations defense was forfeited based upon the Respondent's conduct during the course of the litigation. The trial court is in the best position to know the impact of a defendant's conduct, through review of the pleadings, summary statements, pre-trial memorandum as well as statements of counsel made during the case, in determining whether the untimely assertion of an affirmative defense is prejudicial to the plaintiff and deemed to have been waived, abandoned or forfeited. Even the Respondent concedes in his brief that the determination of whether a defense is forfeited "requires a fact-specific analysis of both parties' conduct during the subsequent proceedings in order to determine whether there has been delay by the defendant that has surprised or unduly

[5] In the case law cited throughout, the term "waiver" appears to be used where a party fails to assert the affirmative defense in its initial pleading, whereas the terms "forfeited" or "abandoned" are used where the affirmative defense is asserted but then not pursued over the course of the litigation.

prejudiced the petitioner." Resp. Br.[6], at 14. Such a fact-specific, or case-by-case, analysis is the type of matter within the trial court's discretion. *See also, Sundell v. New London*, 119 N.H. 839, 847 (1979) ("The rule in this State is that a statute of limitations is a matter of procedure, the interpretation and application of which is traditionally within the province of the court in cases of this nature.")

The Respondent is correct that the facts are not in dispute, namely, that except for generally asserting the statute of limitations as a defense in his answer, the Respondent thereafter failed to conduct discovery on that issue, failed to file any motions to dismiss or for summary judgment arguing that the Petitioners' claims were time-barred, failed to alert the Court to the potential statute of limitations defense in either his Rule 62 Summary Statement or by submitting a pre-trial memorandum, and failed to object or otherwise raise the issue at trial or by post-trial memorandum with proposed findings and conclusions. After litigating for eighteen (18) months and conducting a full hearing on the merits, which resulted in an order in favor of the Petitioners, the Respondent for the first time argued the statute of limitations defense by way of a second motion for reconsideration. Thus the trial court's findings, undisputed by the Respondent, cannot be "erroneous" and the decision to find that the affirmative defense was forfeited should be affirmed absent an abuse of discretion.

b. The Respondent had the burden of proof to establish that the statute of limitations would bar the Petitioners' claims.

The Respondent argues that the trial court's ruling improperly and unfairly shifted the "burdens of discovery" and burden of proof upon him, claiming that the Petitioners knew their claim was time barred and therefore should have presented evidence to defeat the defense. It is clear under New Hampshire law, however, that the statute of limitations is an affirmative defense with the defendant bearing "the burden of proving that it applies in a given case." *Glines v. Bruk*, 140 N.H. 180, 181 (1995); *Sundell v. New London*, 119

[6] Respondent's Brief

N.H. 839 (1979) ("We have recently reiterated that the burden of proving the bar of the statute of limitations rests with the party asserting it."). Only when the defending party has "***established*** that the statute of limitations would bar the action, [does] the plaintiff [have] the burden of raising and proving that the discovery rule is applicable to an action otherwise barred by the statute of limitations." *Glines v. Bruk*, *supra*, at 181 (emphasis added). Here, the Respondent never established the statute of limitations as a viable defense – indeed, it was never raised at all.

The mere fact that the Respondent listed the statute of limitations as a defense in his answer is not sufficient to shift the burden to the Petitioners. Under New Hampshire's liberal pleading rules, a defendant is allowed to allege any and all affirmative defenses, no matter how tenable, under a "raise it or lose it" policy, and then "develop those defenses as the case progresses." *See*, *Penney v. Baum Hedlund*, No. 04-C-047, 2008 N.H. Super. Lexis 17, *4 (Belknap Super. Ct. May 17, 2008). The rules of civil procedure are structured such that a defendant after serving an answer may move to dismiss a plaintiff's claims on one or more of the asserted affirmative defenses. *See,* Super. Ct. Rule 12(d).

Moreover, the Respondent's argument that shifting the burden of proof to the Petitioner is necessary to avoid incurring "burdens and expenses that he otherwise could have avoided and will unlikely be able to recover" is without merit. Resp. Br., at 17. The Respondent's position as set forth in his answer and throughout the litigation was that the disputed checks were written at the express direction of his mother, Beatrice Riso. (Resp. Answer, at 11, ¶27-28). The Respondent never denied writing the checks, and in fact produced copies of the checks during the discovery phase of his mother's contested probate proceeding in Florida. Thus the Respondent was in the best position to file a motion asserting facts within his own knowledge, without any discovery needed at all, in support of his statute of limitations defense thereby shifting the burden of proof over to the Petitioners to argue otherwise.

The Respondent's argument that it was not until Petitioner's Proposed Finding of Fact No. 83 was deemed "found" by the trial court that "the evidence disclosed for the

first time that the Petitioner's claims were barred by the statute of limitations" is implausible. Resp. Br., at 9. Again, the timing of when the checks were written and when the check copies were provided to the Petitioners was information squarely within the Respondent's knowledge and he was free to raise the merits of his statute of limitations defense at any time. Moreover, the Petitioner's proposed finding No. 83 is not determinative of the issue. Indeed, this is the crux of the argument that the statute of limitations defense was forfeited because the Respondent never pursued it so as to give the Petitioners the chance to rebut it. If the Respondent had pursued proving the merits of the affirmative defense, the Petitioners would have had the opportunity to present evidence in response, such as when they knew or should have known that funds were improperly taken from the estate. The fact that Ken Riso "first learned of the checks" (A. 39) approximately a year after Beatrice Riso's death does not mean that the statute of limitations began to run at that time. In fact, proposed finding No. 83 is written in the context of demonstrating evidence that the Respondent had back-dated the disputed checks and is unrelated the issue of when the statute of limitations might have begun to run.

Lastly, the Respondent's argument that he learned for the first time during trial that Petitioners "were vulnerable" to a statute of limitations defense contradicts the Respondent's position that he should be permitted to raise the affirmative defense because it was asserted in his Answer. The Respondent cannot have it both ways. By asserting the affirmative defense in his Answer, the Respondent represented that such defense was brought in good faith and supported by facts (per Probate Division Rule 15), in which case the Respondent was aware and should have conducted discovery or filed a motion to dismiss early on in these proceedings if the defense had merit or he otherwise wished to pursue it.

c. The Respondent's own conduct established that he forfeited the statute of limitations defense.

As noted above, the underlying facts as to the Respondent's conduct during the litigation are not in dispute. The Respondent does not dispute the trial court's findings that following the filing of his answer, "there was no further specificity to the affirmative defenses, nor were any motions filed with the court seeking a ruling on either affirmative defense"; that his "[Rule 62] summary statement made no mention of a statute of limitations defense"; that he "did not raise the statute of limitations defense at the structuring conference hearing"; that "he failed to conduct any discovery on the issue"; that he failed to submit a pretrial memorandum as directed in the trial court's structuring order; and that in connection with 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" even after "being given ample time to review the information from the trial and to make his legal arguments to the court." Order[7], at 2-3. "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." *Id.*

In its decision in *American International Ins. Co. v. Seuffer*, 468 Mass. 109 (2014), the Massachusetts Supreme Judicial Court ("SJC"), citing to other Federal and State courts to have addressed this exact issue, held that a defendant who pled in his answer the affirmative defense of lack of personal jurisdiction nevertheless forfeited (or constructively waived) such defense by actively participating in the litigation over the next eighteen (18) months, including engaging in discovery as to the merits and without ever filing a motion to dismiss. It was not until the defendant filed a motion for summary judgment that the lack of personal jurisdiction argument was made. The SJC upheld the trial court's conclusion that while in fact it lacked personal jurisdiction over the defendant for lack of minimum contacts, the defendant's conduct in the case amounted to a forfeiture of the defense.

In a lengthy analysis of the argument in favor of holding that forfeiture of the affirmative defense occurred, the SJC explained that the defense of lack of personal

[7] Order on Respondent's Second Motion to Reconsider

jurisdiction "is a potentially dispositive procedural defect", and it is therefore "particularly desirable to resolve a defect in personal jurisdiction prior to engaging in substantive litigation." *American International Ins. Co. v. Seuffer*, 468 Mass, at 117. "[F]airness to the other litigants and to the court dictates that [the defendant] seek to resolve the matter expeditiously, insofar as is feasible." *Id.* To hold otherwise would "permit a party to keep the defense of lack of personal jurisdiction in its back pocket, even while engaging in conduct signaling that it is submitting to the court's jurisdiction." *Id.*, at 118. Accordingly, because of the "substantial time, expense, and effort" of litigation, the SJC reasoned as had other courts that a defendant seeking to assert the defense of lack of personal jurisdiction should be obligated to "press the point fairly" in order to put "the court and the other litigants on notice that the issue is contested and should be resolved, thereby promoting judicial economy and efficiency." *Id.*

Whether a party has forfeited an affirmative defense requires analysis on a case-by-case basis, with relevant factors being "the amount of time that has elapsed, as well as the changed procedural posture of the case, in the period between the party's initial and subsequent assertion of the defense; the extent to which the party engaged in discovery on the merits; and whether the party engaged in substantive pre-trial motion practice or otherwise actively participated in the litigation." *Id.*, at 119-120.

The SJC's holding and analysis in *American International Ins. Co. v. Seuffer* was similarly applied by the Massachusetts Appeals Court in *Liptak v. Belisle*, No. 16-P-656, 2017 Mass. App. LEXIS 597 (May 31, 2017), this time as to the statute of limitations affirmative defense, a similar procedural defect that should be asserted and resolved as early as possible. The purpose of a statute of limitations is to establish a deadline after which a Respondent may have peace of mind and recognizes that after a certain time period it is inequitable to require a Respondent to attempt to mount a defense to an old claim. *Desaulnier v. Manchester School District*, 140 N.H. 336, 338 (1995). In *Liptak v. Belisle*, the defendant "engaged in litigation on the merits for approximately three years and then participated in a three-day bench trial before pursuing any dispositive

affirmative defenses." *Liptak v. Belisle*, *supra*, at *4. The court held that based on such conduct the statute of limitations defense was forfeited. *Id.*

Similar to Mass. R. Civ. P. 12(b), the New Hampshire Rules of the Superior Court, Civil Rules, provide that failure to plead an affirmative defense or to file a Motion to Dismiss on affirmative defenses, "including the statute of limitations", will constitute a waiver of such defenses. N.H. Super. Ct. R. 9(d). The Massachusetts rules provide that the enumerated affirmative defenses "shall be heard and determined before trial." Mass. R. Civ. P. 12(d). Likewise, the comment to New Hampshire Superior Court Rule 9(d) provides that such rule is intended to "give the opposing party and the court sufficient information to determine whether the claim or defense is sufficient in law ***to merit continued litigation***." N.H. Super. Ct. R. 9 (emphasis added).

New Hampshire law is already clear that raising an affirmative defense is a procedural matter and can be waived, and there is no reason not to extend the analysis to "forfeiture" of an affirmative defense. While this Court does not appear to have addressed this precise issue of "forfeiture" on a set of facts as presented here, New Hampshire law is consistent with the jurisdictions who have on the concept of waiver and the "raise it or lost it" policy. It is apparent that New Hampshire's civil procedural rules favor, if not expressly require, that affirmative defenses be raised and pursued early in the litigation and most certainly before trial. This allows the court the opportunity to determine the merits of such defenses as it may avoid the time, cost and expense of litigation to all parties and the court. Indeed, the comment to New Hampshire Superior Court Rule 9 expressly states:

> "Pleadings which notify the opposing party and the court of the factual and legal basis of the pleader's claims or defenses better define the issues of fact and law to be adjudicated. This definition should give the opposing party and the court sufficient information to determine whether the claim or defense is sufficient in law to merit continued litigation. Pleadings should assist in setting practical limits on the scope of discovery and trial and should give the court sufficient information to control and supervise the progress of the case.

In addition, Probate Division Rule 62, concerning structuring conferences and pre-trial procedures, requires the parties to file with the court a summary statement to support "their respective claims, ***defenses*** or counterclaims." N.H. Prob. Div. R. 62. (emphasis added). "The purpose of this summary statement is to apprise the court of the nature of the claims, defenses, and legal issues likely to arise." *Id.*

Here, although the Respondent plead the statute of limitations defense in his answer to the petition, he never moved to dismiss the Petitioners' claim on the basis of the statute of limitations, did not assert the defense in his Rule 62 Summary Statement nor raise the issue at the Structuring Conference, did not engage in discovery on the issue, did not file a motion for summary judgment, did not seek to present evidence at trial on the issue, and did not argue the issue in his post-trial submissions. A defendant wishing to argue the merits of an affirmative defense should not be permitted to ignore all of the rules requiring that such an issue be brought to the attention of the court and the opposing party, only to raise the matter for the first time after a trial on the merits is conducted.

Except for asserting the statute of limitations defense in his answer, the Respondent failed to mention the statute of limitations as a defense at any point during the 18 months that this case was pending. In *American International Ins. Co. v. Seuffer*, supra, the defendant's affirmative defense was deemed forfeited even though raised before trial by motion for summary judgment, whereas the Respondent herein raised the defense even later in these proceedings, i.e., after a decision had been rendered on the merits.

Indeed, whether the affirmative defense is raised before or after trial, and whether a plaintiff has an opportunity to respond, are the factors that appear to be given the most weight, and the factors that distinguish this case from those cited by the Respondent in his brief. In *Eddie Nash & Sons v. Switser*, 2008 N.H. Lexis 179, this Court reversed the trial court's decision to preclude the defendant from arguing the statute of limitations defense. The defendant had initially appeared *pro se* and filed an answer citing the incorrect statute of limitations under the Uniform Commercial Code. Six days before

trial, the defendant retained counsel who filed a pre-trial statement asserting a different (and correct) statute of limitations defense. This Court held that the pre-trial statement, albeit six days before trial, was adequate notice to the plaintiff and afforded him an opportunity to rebut the defense at trial – in fact the plaintiff presented evidence at trial addressing the affirmative defense and thus the Court found there was no prejudice. Here, unlike the plaintiff in *Switser*, the Petitioners were given no notice (nor was the trial court) that the statute of limitations defense would be pursued by the Respondent, and no evidence was submitted at trial addressing the defense. The statute of limitations defense was not raised until after trial.

The cases cited by the Respondent in his brief similarly can be distinguished by whether the defense was raised before or after trial. For example, in *Bryant v. Wyeth, Inc.*, 816 F. Supp. 2d 329 (S.D. Miss. 2011), cited by the Respondent, the court granted summary judgment to the defendant on its statute of limitations defense even though seven years had passed since commencement of the action. The U.S. District Court for the Southern District of Mississippi determined that the motion arguing the statute of limitations defense was still filed well in advance of trial, which was not expected to occur for another year under the court's structuring order. The court also found that Federal law, not Mississippi state law, applied and that "a defendant does not waive an affirmative defense if it is raised at a pragmatically sufficient time, and the plaintiff [is] not prejudiced in its ability to respond." *Bryant v. Wyeth, Inc.*, 816 F. Supp., at 332. Central to the court's analysis was whether the plaintiff was unfairly surprised or could adequately confront and defend against an affirmative defense. *Id.*, at 333.[8]

Likewise, in *Daingerfield Island Protective Soc'y v. Babbitt*, 40 F.3d 442 (D.C. Cir. 1994), the Court of Appeals for the District of Columbia affirmed the lower court's

[8] The U.S. District Court also noted the Plaintiff's citation to several Mississippi state court decisions which hold "that a defendant's failure to timely and reasonably raise ***and pursue the enforcement of*** any affirmative defenses or other affirmative matter or right which would serve to terminate or stay the litigation, coupled with active participation in the litigation process, will ordinarily serve as a waiver." *Id.*, at 332, citing to Meadows v. Blake, 36 So.3d 1225, 1232 (Miss. 2010) (quoting Mississippi Credit Center, Inc. v. Horton, 926 So.2d 167, 180 (Miss. 2006)) (emphasis added).

finding that a statute of limitations defense had not been waived where it was raised in a motion for summary judgment *before trial*. The Respondent's characterization that the defense was allowed to be raised even after the case "was on appeal", implying it was raised after trial, is incorrect. The facts of the case show that the defendant first filed a motion for summary judgment on the ground of laches and mootness which motion was granted. On appeal of the grant of summary judgment, the Court of Appeals reversed and remanded following which the defendant filed a second motion for summary judgment asserting the statute of limitations defense. The Court of Appeals held that the defendant had not "abandoned" its statute of limitations defense, which was asserted in its answer, by failing to assert it in the first summary judgment motion.[9]

Finally, in the Georgia case cited by the Respondent, *Wright v. Food Giant*, 195 Ga.App. 677 (1990), the defendant was permitted to raise the statute of limitations defense late in the litigation by motion for summary judgment – again, prior to trial. In addition, the court held that the plaintiff failed to act diligently to effect service of the complaint prior to expiration of the limitations period.

CONCLUSION AND REQUEST FOR RELIEF

For the reasons set forth above, the Petitioners respectfully request that this Court affirm the decision of the trial court.

REQUEST FOR ORAL ARGUMENT

The Petitioners request fifteen minutes for oral argument to be argued by William F. Gramer, Esquire.

[9] In a dissenting opinion, Justice Wald argued for holding that the defendant did waive the statute of limitations defense, stating: "In sum, [the defendant's] overall strategy of totally ignoring any further reference to the statute of limitations until after remand from a court of appeals rejection of its primary laches defense five years later, did amount to a waiver of the limitations at bar. That strategy, moreover, indicates too cavalier an approach toward the judicial process *and the resources of the court* to pass muster." Wright v. Food Giant, 195 Ga. App., at 448 (emphasis added).

Respectfully submitted,

Kenneth T. Riso and Rocco R. Riso, Jr.,
Individually and as Executors of the
Estate of Beatrice Riso, Petitioners,

By their Attorneys,

DEVINE, MILLIMET & BRANCH,
PROFESSIONAL ASSOCIATION

Dated: August 30, 2018

By: _____

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CERTIFICATION OF SERVICE

On the 30 day of August, 2018, I hereby certify that two (2) copies of the foregoing Petitioners' Brief has this day been forwarded by U.S. mail, postage prepaid, to Jan P. Myskowski, Esq., counsel for the Respondent, Gregory R. Riso.

_____

William F. Gramer, Esquire