IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON
January 11, 2023 Session

TIMOTHY ALLEN PRICE v. JOHN ROBERT HERSHBERGER

Appeal from the Circuit Court for Shelby County
No. CT-000502-16 Robert Samual Weiss, Judge

No. W2021-01431-COA-R3-CV

This is a breach of contract case. It is undisputed that Appellee performed under the parties' contract, and Appellant did not. Appellant raised affirmative defenses, including waiver, anticipatory breach, and laches. The trial court denied the defenses of waiver and anticipatory breach, enforced the contract, and entered judgment against Appellant for the amount due thereunder. The trial court denied Appellee attorney's fees and costs under the contract based on the application of laches. We reverse the trial court's finding of laches. However, because Appellee did not raise an issue concerning the denial of his attorney's fees and costs, we leave undisturbed that portion of the trial court's order. The trial court's order is otherwise affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Reversed in Part, Affirmed in Part, and Remanded

KENNY ARMSTRONG, J., delivered the opinion of the court, in which J. STEVEN STAFFORD, P.J., W.S., and CARMA DENNIS MCGEE, J., joined.

John Robert Hershberger, Germantown, Tennessee, appellant, pro se.

James D. Duckworth, Germantown, Tennessee, for the appellee, Timothy Allen Price.

MEMORANDUM OPINION[1]

[1] Rule 10 of the Rules of the Court of Appeals of Tennessee provides:

> This Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion it shall be designated "MEMORANDUM OPINION", shall not be published, and shall not be cited or relied on for any reason in any unrelated case.

I. Background

Appellant John Robert Hershberger and Appellee Timothy Allen Price were previously law partners in Memphis, Tennessee.[2] In addition to practicing law together, the parties also invested in real estate as Fountainhead Properties, LLC ("LLC"). Under the LLC, the parties, as tenants in common, purchased four properties in Memphis: (1) 2226-2228 Oliver; (2) 2030 Peabody Avenue; (3) 1430 Poplar Avenue; and (4) 65 North Evergreen (together "the properties").

On March 6, 2008, the parties decided to dissolve their real-estate-investment business and entered into a written dissolution agreement, which set out the distribution of assets, including the properties. As is relevant here, the dissolution agreement provided that Mr. Hershberger would purchase all of Mr. Price's interest in the properties. The amount to be paid to Mr. Price for his interest in the properties was contingent on the date of payment. If payment was made on or before June 4, 2008, Mr. Hershberger would pay $50,036.11. If payment was made between June 4, 2008 and March 6, 2009, Mr. Hershberger would pay $53,038.28. Finally, if payment was made between March 6, 2009, and March 6, 2010, Mr. Hershberger would pay $56,220.58. As referenced in the dissolution agreement, there were originally three attachments to the dissolution agreement, which attachments allegedly outlined expenditures made by Mr. Hershberger on the properties and entitled him to offset those expenditures from the purchase prices outlined above. On March 6, 2008, Mr. Price executed quitclaims conveying all of his interest in the properties to Mr. Hershberger. However, Mr. Hershberger failed to make payment to Mr. Price by the March 6, 2010 final deadline set out in the contract.

Although the final deadline for payment under the dissolution agreement was March 6, 2010, Mr. Price did not file the instant breach of contract lawsuit until February 8, 2016 (which was still within the 6-year statute of limitations for breach of contract actions, Tennessee Code Annotated section 28-3-109(a)(3)). Mr. Price did not include the dissolution agreement as an attachment to his original complaint, and Mr. Hershberger filed a Tennessee Civil Procedure Rule 12.02(6) motion to dismiss on the ground that the alleged contract was not included with the complaint as required by Tennessee Rule of Civil Procedure 10.03, *see infra*. In the absence of the disputed contract, Mr. Hershberger asserted that Mr. Price's original complaint did not operate to "commence" the lawsuit and maintained that the statute of limitations for Mr. Price's breach of contract claim expired, and the lawsuit should be dismissed. In response to Mr. Hershberger's motion to dismiss, on April 26, 2016, Mr. Price filed an amended complaint, attaching the dissolution agreement but omitting the attachments referenced therein.

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[2] Mr. Price was disbarred in 2017. Mr. Hershberger was suspended from the practice of law in 2018.

On September 2, 2016, Mr. Hershberger filed an answer to the amended complaint. Therein, he alleged the following affirmative defenses: (1) that the contract was void (for lack of consideration, lack of good faith and fair dealing, and mutual mistake); (2) expiration of the statute of limitations (Mr. Hershberger asserted that the failure to include the contract as an attachment to the original complaint resulted in the statute of limitations continuing to run until the amended complaint was filed, which was outside the 6-year statute of limitations); (3) anticipatory breach, *i.e*., "Specifically, [Mr. Hershberger] informed [Mr. Price] at some point in 2009 that he was unable to obtain the financing to purchase [Mr. Price's] interest in the properties enumerated in the contract[.] As such, the statute of limitations expired, at its latest, on December 31, 2015"; (4) laches or equitable estoppel. Mr. Hershberger maintained, *inter alia*, that the true and exact dissolution agreement as well as the attachments referenced therein were lost due to Mr. Price's delay in filing the lawsuit. We note at the outset that, at trial, Mr. Hershberger did not pursue the first and second defenses set out above, i.e., that the contract was void, and that the lawsuit was untimely based on Mr. Price's failure to attach the dissolution agreement to his original complaint. From our review of the transcript of the proceedings, *discussed further infra*, there was no evidence concerning these defenses. Furthermore, there is no mention of these defenses in the trial court's order. As such, we consider them waived and will not discuss them.

On October 19, 2016, Mr. Price moved for summary judgment. Following a hearing on December 16, 2016, the trial court denied Mr. Price's motion by order of January 27, 2017. As grounds for denial of the motion for summary judgment, the trial found "that a genuine issue of material fact exist regarding whether [Mr. Hershberger] repudiated the contract."

After discovery, several delays, an attempt at mediation, and a continuance, the case proceeded to hearing on July 6, 2021. By order of November 2, 2021, the trial court found that Mr. Hershberger "breached said contract by failing to make the required payments in the amount of $56,220.58 by March 6, 2010." As to Mr. Price, the trial court found that he "made no attempts at collecting on the judgment over a period of eight (8) years, from the time [the] [c]ontract was entered in 2008 until February, 2016 when the lawsuit was filed." Because Mr. Price "sat on his rights and did not file suit until February 8, 2016, almost six years after the date of breach, the defense of laches applies." Based on its finding of laches, the trial court denied Mr. Price attorney's fees and costs as contemplated in the dissolution agreement. However, the trial court awarded Mr. Price a $56,220.58 judgment against Mr. Hershberger based on Mr. Hershberger's breach of the contract. Mr. Hershberger appeals.

II. Issues

Mr. Hershberger raises the following issues as stated in his brief:

1. After finding facts that supported the affirmative defense of waiver, did the Trial Court abuse its discretion in failing to bar Plaintiff's claims?

2. After proof at trial showing anticipatory breach, repudiation, or actual breach of the contract in question, between February and October, 2009, did the Trial Court abuse its discretion in failing to bar Plaintiff's claims based on the six-year Statute of limitations for contract actions.

3. After finding facts that supported the affirmative defense of laches and determining that the law of laches applied, did the Trial Court abuse its discretion in failing to bar Plaintiff's claims?

Mr. Price raises one additional issue as stated in his brief:

> Whether this Court has appellate subject matter jurisdiction to address arguments (i.e., anticipatory breach) submitted by Appellant that were not properly plead, raised, and adjudicated by the Trial Court.

Concerning Mr. Price's issue, as noted above, from our review of the transcript, it appears that evidence was adduced concerning a possible anticipatory breach or repudiation by Mr. Hershberger. As such, we conclude that the issue was tried, and this Court has subject-matter jurisdiction to address the question, which we do below.

III. Standard of Review

This case was tried by the court, sitting without a jury. The issues raised in this appeal also involve questions sounding in contract. The applicable standard of review was succinctly set out in the case of ***Edmunds v. Delta Partners, LLC, et al.***, 403 S.W.3d 812 (Tenn. Ct. App. 2012):

> This action was tried by the trial court without a jury. As such, we review the trial court's findings of fact *de novo* with a presumption of correctness, unless the evidence preponderates otherwise. Tenn. R. App. P. 13(d). No presumption of correctness, however, attaches to the trial court's conclusions of law and our review is *de novo*. ***Blair v. Brownson***, 197 S.W.3d 681, 684 (Tenn. 2006) (citing ***Bowden v. Ward***, 27 S.W.3d 913, 916 (Tenn. 2000)).
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> For the evidence to preponderate against a trial court's finding of fact, it must support another finding of fact with greater convincing effect. ***4215 Harding Road Homeowners Ass'n v. Harris***, 354 S.W.3d 296, 305 (Tenn. Ct. App. 2011); ***Walker v. Sidney Gilreath & Assocs.***, 40 S.W.3d 66, 71 (Tenn. Ct. App. 2000). Where the trial court does not make findings of fact, there is no presumption of correctness and we "must conduct our own independent review of the record to determine where the preponderance of

the evidence lies." ***Brooks v. Brooks***, 992 S.W.2d 403, 405 (Tenn.1999).

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> The interpretation of a contract is a question of law. ***Guiliano v. Cleo, Inc.***, 995 S.W.2d 88, 95 (Tenn. 1999). Therefore, the trial court's interpretation of a contractual document is not entitled to a presumption of correctness on appeal. ***Angus v. Western Heritage Ins. Co.***, 48 S.W.3d 728, 730 (Tenn. Ct. App.2000). However, the determination of whether a breach has occurred is a question of fact. ***Carter v. Krueger***, 916 S.W.2d 932, 934-35 (Tenn. Ct. App. 1995) ("This is a matter of fact which is properly addressed to the trier of fact.").

Id. at 821-22.

IV. Analysis

The parties do not dispute that Mr. Price quitclaimed all of his interest in the properties to Mr. Hershberger as contemplated in the dissolution agreement. Mr. Hershberger testified, in relevant part:

> Q. Okay. And you agree that Mr. Price did, in fact, convey all of his interest in the four properties to you; correct?
> A. Yes.

Mr. Hershberger also does not dispute that he never paid Mr. Price the amount(s) contemplated in the dissolution agreement, to-wit:

> Q. Right. You admit that you have paid Mr. Price nothing for his interest in the properties; correct?
> A. I have not given him any payment. . . .

As set out above, Mr. Hershberger raised several affirmative defenses in in his answer. These defenses were based on the following allegations: (1) the dissolution agreement attached to Mr. Price's amended complaint does not contain the true and entire agreement between the parties and, specifically, does not include records of certain expenditures Mr. Hershberger allegedly made on the properties, which expenditures were to be offset against the purchase price(s) set out in the dissolution agreement. Based on these offsets, Mr. Hershberger asserts that Mr. Price waived his right to payment under the dissolution agreement; (2) in 2009, Mr. Hershberger repudiated the contract or committed anticipatory breach so that the statute of limitations began to run, at latest, on December 31, 2009, and, as such, the 6-year statute of limitations expired before Mr. Price filed suit on February 8, 2016; and (3) laches based on the allegation that Mr. Price sat on his rights

for such a period of time that vital documents, including records of the offset amounts, were lost.

In its November 2, 2021 order, the trial court found a valid contract, *i.e.*, "[o]n March 6, 2008, the parties entered into a written contract in which Mr. Price conveyed his entire interest in the jointly held real property to Mr. Hershberger in exchange for buying him out of his interest." The trial court briefly addressed the waiver argument by noting that, "Mr. Hershberger raises questions regarding the completeness of the document and denies that it was the final version," and "Mr. Hershberger was under the belief that Mr. Price was waiving his interest in the funds pursuant to the Contract in exchange for Mr. Hershberger being responsible for certain debts related to the properties and their law partnership." Finally, the trial court held that Mr. Hershberger "breached said contract by failing to make the required payments in the amount of $56,220.58 by March 10, 2010." Implicit in this holding is the trial court's denial of Mr. Hershberger's arguments concerning repudiation or anticipatory breach, the missing attachments, and waiver. So, in awarding Mr. Price a judgment of $56,220.58 for Mr. Hershberger's breach of the dissolution agreement, the trial court ostensibly found that: (1) the document attached to Mr. Price's amended complaint was a valid and enforceable contract, and Mr. Price did not waive his right to recover under the agreement based on any offsets due to Mr. Hershberger; (2) Mr. Hershberger did not repudiate or anticipatorily breach the contract in 2009 such that the statute of limitations would bar Mr. Price's lawsuit. However, (3) the trial court did find laches and used the doctrine as grounds to deny Mr. Price attorney's fees and costs under the dissolution agreement. We now turn to address these findings.

A. Complete Contract with No Waiver

In his brief, Mr. Hershberger argues that the trial court's judgment was based on the doctrine of unjust enrichment as opposed to breach of contract. This is not what the trial court found in its November 2, 2021 order. Therein, the trial court specifically found that, "[o]n March 6, 2008, the parties entered into a written contract . . . ." Having found a valid contract, the trial court went on to find that Mr. Hershberger "breached said contract by failing to make the required payments in the amount of $56,220.58 by March 6, 2010." "[A] Court speaks through its orders . . . ." ***Palmer v. Palmer***, 562 S.W.2d 833, 837 (Tenn. Ct. App. 1977). In its order, the trial court makes no mention of unjust enrichment. Rather, it is clear that the trial court's award of damages was based solely on its finding that Mr. Hershberger breached the dissolution agreement. Furthermore, based on the fact that the trial court awarded Mr. Price the full amount contemplated in the dissolution agreement, *i.e.*, $56,220.58, it is implicit that the trial court denied Mr. Hershberger's waiver argument. Having clarified the trial court's ruling, we now turn to Mr. Hershberger's remaining arguments.

Mr. Hershberger first contends that the dissolution agreement Mr. Price attached to his amended complaint does not constitute the true and exact agreement by and between

the parties. Mr. Hershberger's argument is based on two theories. First, he contends that the parties drafted several versions of the dissolution agreement, and the one attached to Mr. Price's amended complaint is not the final, true, and exact version. Second, Mr. Hershberger argues that the purchase amounts contemplated in the dissolution agreement are not correct. Specifically, he maintains that he paid expenses for the properties, which expenses were to offset the purchase price under the contract. According to Mr. Hershberger, the true contract and the documentation evidencing the alleged expenditures were not attached to Mr. Price's amended complaint because Mr. Price intentionally omitted them, or because the documentation was lost. Mr. Hershberger maintains that the loss of such documents was the fault of Mr. Price based on his delay in filing suit. The evidence, however, does not support Mr. Hershberger's contentions.

There is no dispute that Mr. Price attached a dissolution agreement to his amended complaint. Tenn. R. Civ. P. 10.03 ("Whenever a claim or defense is founded upon a written instrument other than a policy of insurance, a copy of such instrument or the pertinent parts thereof shall be attached to the pleading as an exhibit . . . ."). This agreement was signed by both parties. Notwithstanding any affirmative or equitable defenses to negate the prima facie elements of contract, if Mr. Hershberger was of the opinion that the attachment did not contain the true or entire agreement by and between the parties, it was incumbent on him to produce some evidence to that effect. However, during cross-examination, Mr. Hershberger testified, in relevant part, as follows:

> Q. You say that the—the contract attached to the amended complaint is not a true and accurate copy of the contract entered into by the parties; correct?
> A. That's what I said, yes.
> Q. Okay. Where is that contract?
> A. I don't have any idea.
> Q. Okay. You didn't keep a copy of it?
> A. Well, I had a copy of it at some point and—and he [*i.e.*, Mr. Price] did too. I mean, we had—we had each signed an original and we each had copies of all of the amendments, and they were in big fat manila folders; They were, I mean substantial. It was probably 50 pages all together.
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> Q Well, but again, you don't have that document [i.e., the final dissolution agreement that Mr. Hershberger claims differs from the one attached to Mr. Price's amended complaint, or the documents showing amounts paid by Mr. Hershberger, which amounts were to be offset from the purchase price]; right?
> A. Well, no, and you don't either.
> Q. Well, that's right, because we claim it doesn't exist. We produced a signed copy of a contract.

A. You produced something.
Q. My point is you have no documents to refute--
A. I don't. I suppose if you wait another 15 years and ask me for some documents that I've got now, I probably won't have those either.

Later in his testimony, Mr. Hershberger appears to contradict his statement that there were written records evidencing the expenses he allegedly paid for the properties. In this portion of his testimony, he indicates that the setoffs were discussed but not reduced to writing, to-wit:

> I [Mr. Hershberger] said these are all the things that are the setoffs, and he [Mr. Price] said that was fine, and—well, he didn't say it was fine. He asked me some questions about it and stuff, but he said he understood what I was saying, and he didn't ask me about—you know, he didn't ask me to write out any kind of a—you know, an accounting of it or anything like that.

So, although Mr. Hershberger testified that there were other versions of the dissolution agreement and records of the expenditures he made on the properties, he did not produce any such alternate version(s) or records to contradict the dissolution agreement that Mr. Price attached to his amended complaint, nor did Mr. Hershberger provide any evidence to support his claim for offsets. However, if other versions of the dissolution agreement and/or records of expenditures did exist, based on the foregoing testimony, Mr. Hershberger was, at one time, in possession of those documents. So, although Mr. Hershberger asserts that Mr. Price's delay in filing his lawsuit resulted in the loss of these documents, it must be noted that Mr. Price filed suit within the 6-year statute of limitations (*see further discussion regarding laches infra*). Mr. Hershberger is not an unsophisticated litigant. In fact, as noted above, he practiced law for several years before his license was suspended. As such, Mr. Hershberger knew or should have known that any contract could be sued upon within 6 years of breach, yet he did not maintain a record of the contract between himself and Mr. Price. We acknowledge Mr. Hershberger's testimony that there were many upheavals in his life after the parties entered their dissolution agreement; however, it was incumbent on him to maintain his records, or to attempt to reproduce any documents to support his claim for offset. Yet, when Mr. Hershberger was asked directly whether he attempted to procure tax or bank records to show that he made expenditures on the properties, he testified:

Q. Where are those tax bills?
A. I had a whole pack of them, but a lot of stuff in my home office was damaged. And then I've had documents, you know, lost and taken at other places, so I don't know where they were. They were fairly substantial.
Q. Did you try to retrieve copies of them from the Department of Revenue?
A. You can't—I don't think you can retrieve them from the Department of Revenue. You mean for Tennessee?

Q. Yeah.
A. No, I don't—
Q. These were property taxes; correct?
A. Yes.
Q. Paid to whom?
A. The City Treasurer and the Shelby County Trustee.
Q. Did you go to either of those and try to get copies of the tax bills?
A. They don't maintain copies after a certain amount of time. The—well, there are two things that happen. One is when they—when they send new bills out, the existing one disappears, so you can't actually see the versions of the things that were sent, but also you can only go back a certain amount of time, and even at the time that we—that the lawsuit was filed, I couldn't go back enough years to get the copies of the things.

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Q. Did you pay by check?
A. I don't remember. Probably.
Q. Couldn't [you] go to your bank and get a copy of the check?
A. No. How long does your bank keep records?
Q. Forever.
A. Well, that's not true.
Q. Yeah.
A. It may be true, it may be what you think, but it's not true.

From Mr. Hershberger's testimony, it is apparent that he made no efforts to procure any documents that might show he paid the claimed expenses on the properties. From the record, if such documentation ever existed, Mr. Hershberger lost it and never tried to recreate it. It is, therefore, disingenuous for Mr. Hershberger to lay the blame for the loss of his records at the feet of Mr. Price, who, in fact, filed his lawsuit within the statutory period. Indeed, at trial, Mr. Price maintained that he never waived or voided the contract based on any payments Mr. Hershberger made on the properties, to-wit:

Q [to Mr. Price]. Okay. Did you ever tell [Mr. Hershberger] in writing or orally, did you ever tell him, hey, I'm voiding this contract, your obligation is null and void?
A. No.

Regardless of Mr. Price's testimony, the fact remains that Mr. Hershberger failed to provide any evidence to contradict the validity of the dissolution agreement that Mr. Price proffered. Accordingly, we conclude that the trial court did not err in treating Mr. Price's document as the parties' entire agreement.

B. Repudiation or Anticipatory Breach

Mr. Hershberger claims that, sometime in 2009, he informed Mr. Price that he was unable to purchase the properties because he could not secure financing and was "basically [] bankrupt." Mr. Hershberger maintains that his actions constituted an anticipatory breach of the dissolution agreement that began the running of the statute of limitations. As such, he asserts that the statute of limitations on Mr. Price's breach of contract claim expired, at latest, on December 31, 2015, *i.e.*, before Mr. Price filed suit on February 8, 2016.

This Court recently explained that:

> Anticipatory breach is a recognized defense to a breach of contract action. *See* ***Mid-S. Indus., Inc. v. Martin Mach. & Tool, Inc.***, 342 S.W.3d 19, 25-26 (Tenn. Ct. App. 2010). Our courts will find repudiation when one party to the contract has done or said something that "amount[s] to a total and unqualified refusal to perform." ***UT Med. Grp., Inc. v. Vogt***, 235 S.W.3d 110, 120 (Tenn. 2007) (quoting ***Wright v. Wright***, 832 S.W.2d 542, 545 (Tenn. Ct. App. 1991)). Repudiation can also be established with proof that a contracting party has performed a "voluntary act which renders the party unable or apparently unable to perform the contract." ***Id***. (quoting ***Wright***, 832 S.W.2d at 545). In either case, the non-breaching party may choose to "treat the repudiation as an immediate breach by bringing suit or changing position in some way." ***Id***.

Hicks v. Chears, No. M2019-01428-COA-R3-CV, 2021 WL 3200830, at *5 (Tenn. Ct. App. July 29, 2021). Our courts have held that a breach-of-contract cause of action accrues "as of the date of the breach" or, in the case of anticipatory breach, "when the acts and conduct of one party shows an intention to no longer be bound by the contract." ***Greene v. THGC, Inc.***, 915 S.W.2d 809, 810 (Tenn. Ct. App. 1995); ***Coleman Mgmt., Inc. v. Meyer***, 304 S.W.3d 340, 348 (Tenn. Ct. App. 2009) ("A cause of action for breach of contract accrues on the date of the breach or when one party demonstrates a clear intention not to be bound by the contract."). However, "[i]n order to serve as an anticipatory breach of contract or repudiation, the words and conduct of the contracting party must amount to a total and unqualified refusal to perform the contract." ***Wright***, 832 S.W.2d at 545 (citing ***Ky. Home Mut. Life Ins. Co. v. Rogers***, 270 S.W.2d 188 (Tenn. 1954); ***Brady v. Oliver***, 147 S.W. 1135 (Tenn. 1911)).

In enforcing the dissolution agreement, the trial court implicitly denied Mr. Hershberger's anticipatory breach defense. Turning to the record, Mr. Hershberger testified that, in or around October 2009, he and Mr. Price had the following conversation:

> We talked again, and [Mr. Price] said during that conversation, you know, well, when do you think you're going to be able to pay me this—you know,

> the stuff from the dissolution agreement, and I said that I—I didn't think I was ever going to be able to pay him. I mean, I—at that point, I even said specifically this, that basically I'm bankrupt right now.

In his testimony, Mr. Price denied the foregoing conversation:

> Q [to Mr. Price]. Did you ever have a conversation with Mr. Hershberger prior to this note being due on the final date where he told you that he could not pay you for this?
> A. No.

Later in his testimony, Mr. Hershberger conceded that he did not tell Mr. Price that he unequivocally did not intend to pay for the properties:

> A [by Mr. Hershberger]. . . . He [*i.e.*, Mr. Price] asked the question [*i.e.*, when Mr. Hershberger was going to pay for the properties as contemplated under the dissolution agreement,] and I tried to respond to the question and told him about what it was that was going on and my ability to pay, and I had told him that . . . I didn't think I was going to have any way to pay him—and that also—that I'd paid out all this other stuff [*i.e.*, expenses on the properties] and I felt like it was a wash considering, you know, what I had paid and then also considering what he had agreed to pay on our law firm credit card.
> Q. But you did not say I am not going to pay you?
> A. No, I said I was basically bankrupt, I think is the exact terminology.

As discussed above, to constitute an anticipatory breach or repudiation of the contract, "the words and conduct of the contracting party must amount **to a total and unqualified refusal to perform the contract**." ***Wright***, 832 S.W.2d at 545 (citation omitted) (emphasis added). By his own testimony, Mr. Hershberger's statements and actions did not rise to the level of an "unqualified refusal to perform the contract." Accordingly, the trial court did not err in denying Mr. Hershberger's defense of anticipatory breach or repudiation.

C. Laches

As noted above, a breach of contract action, such as the one at bar, is subject to a statutory, 6-year statute of limitations. Tenn. Code Ann. § 28-3-109(a)(3). Generally, the doctrine of laches applies to actions not governed by a statute of limitations. ***Dennis Joslin Co. v. Johnson***, 138 S.W.3d 197, 201 (Tenn. Ct. App. 2003). However, it may be applied even where the action is governed by a statute of limitations when the plaintiff is guilty of gross laches. ***Id.*** Because this breach of contract action is governed by the applicable statute of limitations, the doctrine of gross latches, as opposed to ordinary latches, applies.

Whether gross or ordinary, the equitable doctrine of laches must be based on a finding of inexcusable negligent, or unreasonable delay on the part of the party asserting the claim. ***Archer v. Archer***, 907 S.W.2d 412, 416 (Tenn. Ct. App. 1995). It is an equitable defense, which requires the finder of fact to determine whether it would be inequitable or unjust to enforce the claimant's rights. ***Id***. Gross laches occurs where there has been a "long and unreasonable acquiescence in adverse rights." ***John P. Saad & Sons, Inc. v. Nashville Thermal Transfer Corp.***, 715 S.W.2d 41, 46 (Tenn. 1986) (quoting ***Ledford v. Lee***, 200 S.W.2d 393, 398 (Tenn. Ct. App. 1946)), *perm. app. denied* (Tenn. 1947) (quoting Gibson's Suits in Chancery, § 70, p. 87)). Further, gross laches requires prejudice to the defendant such as the loss of evidence and witnesses. ***Dennis Joslin Co.***, 138 S.W.3d at 201.

Turning to the trial court's November 2, 2021 order, we first note that the trial court appears to have applied ordinary laches as opposed to gross laches. Specifically, the trial court set out the applicable law as follows:

> 22. The defense of laches is based on the doctrine of equitable estoppel, and is only applied where the party invoking it has been prejudiced by the delay. [citation omitted].
> 23. The defense of laches presents a mixed question of law and fact. Two essential elements of fact are negligence and unexcused delay on the part of the complainant in asserting his alleged claims, which result in injury to the party pleading laches. [citation omitted].
> 24. The question whether in view of the established facts, relief is to be denied—that is, whether, it would be inequitable or unjust to the defendant to enforce the complainants' right—is a question of law. [citations omitted].

Even if we overlook the fact that the trial court failed to apply gross laches, the trial court's factual findings simply do not justify the application of the doctrine. In its order, the trial court made the following findings:

> 20. The parties had limited communication for the years following the entry of the Contract and Mr. Price made no attempts at collecting on the judgment over a period of eight (8) years, from the time of the Contract was entered in 2008 until February, 2016 when the lawsuit was filed.
> 21. Mr. Hershberger testified as to the loss of relevant exculpatory evidence which was lost due to the passage of time.
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> 25. The Court also finds that because the Plaintiff sat on his rights and did not file suit until February 8, 2016, almost six years after the date of breach, the defense of laches applies.

> 26. While the Court finds that the Contract is enforceable Plaintiff's claims for attorney's fees and prejudgment interest should be denied.

Tennessee Rule of Civil Procedure 52.01 requires that, "[i]n all actions tried upon the facts without a jury, the court shall find the facts specially . . . ." As discussed above, gross laches requires prejudice to the defendant such as the loss of evidence and witnesses. ***Dennis Joslin Co.***, 138 S.W.3d at 201. Although the trial court found that Mr. Price "sat on his rights" and noted that "Mr. Hershberger **testified** as to the loss of relevant exculpatory evidence that was lost due to the passage of time," the trial court made no actual finding that the loss of such evidence worked any prejudice to Mr. Hershberger. (Emphasis added). As stated in the order, the trial court merely noted that Mr. Hershberger "testified" to that effect. A trial court's findings should be based on the testimony and any reasonable inferences therefrom; however, the mere notation that a party testified to something is not a finding as contemplated and required under Tennessee Rule of Civil Procedure 52.01.

Having failed to apply gross laches, and having failed to make sufficient findings to support a finding of even ordinary laches, we reverse the trial court's holding that laches applies in this case. We note, however, that Mr. Price did not raise a specific issue concerning the trial court's denial of his attorney's fees and costs. In fact, in the argument section of his brief, Mr. Price states that, "The Trial Court properly exercised its discretion in applying the defense of gross laches only to Mr. Price's claims for attorney's fees and prejudgment interest." In short, Mr. Price fails to address whether the trial court's denial of his attorney's fees under the doctrine of laches should be overturned if this Court reverses, as it has, the trial court's application of laches. "Appellate review is generally limited to the issues that have been presented for review." ***Hodge v. Craig***, 382 S.W.3d 325, 334 (Tenn. 2012) (citations omitted). This Court has noted that:

> To raise an issue as an appellee, a party must include the issue and argument in its brief. [citation omitted]. When a brief fails to include an argument satisfying Tennessee Rule of Appellate Procedure 27(a)(7) or fails to designate an issue in accordance with Tennessee Rule of Appellate Procedure 27(a)(4), the issue may be waived. [citation omitted]; *see also* ***Vazeen v. Sir***, No. M2018-00333-COA-R3-CV, 2018 WL 6419134, at *5 (Tenn. Ct. App. Dec. 5, 2018) (holding that an appellee waived consideration of a separate issue by adopting appellant's statement of the issues). We have often held that an appellee waives a request for attorney's fees by not designating this request as an issue on appeal. *See, e.g.,* ***Apexworks Restoration v. Scott***, No. M2019-00067-COA-R3-CV, 2019 WL 5448698, at *8 (Tenn. Ct. App. Oct. 24, 2019); ***Akard v. Akard***, No. E2013-00818-COA-R3-CV, 2014 WL 6640294, at *9 (Tenn. Ct. App. Nov. 25, 2014) (citing ***Forbess v. Forbess***, 370 S.W.3d 347, 357 (Tenn. Ct. App. 2011) (holding that an appellee seeking affirmative relief in the Court of Appeals

must raise the issue in a Statement of the Issues section of his or her brief)).

Wheeler v. Wheeler, No. M2019-01016-COA-R3-CV, 2020 WL 2893435, at *6 (Tenn. Ct. App. June 30, 2020). Accordingly, we leave undisturbed the portion of the trial court's order denying Mr. Price his attorney's fees, costs, and interest.

V. Conclusion

For the foregoing reasons, we reverse the trial court's finding of laches. Otherwise, the trial court's order is affirmed, and the case is remanded for such further proceedings as may be necessary and are consistent with this opinion. Costs of the appeal are assessed to the Appellant, John Robert Hershberger, for all of which execution may issue if necessary.

S/ Kenny Armstrong
KENNY ARMSTRONG, JUDGE