IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

VANCE VOLLSTEDT, as Personal Representative of the ESTATE OF MARIE VOLLSTEDT; and VOLLSTEDT FAMILY LLC, Appellants, JELENA NIKIC, as Trustee of the MARIE VOLLSTEDT IRREVOCABLE TRUST; BRUCE MOEN, as trustee of the FRED VOLLSTEDT FAMILY TRUST, Plaintiffs, v. DEYONNE TEGMAN, as Personal Representative of the ESTATE OF CHARLES TED VOLLSTEDT, Respondent.	)	No. 63392-9-I ORDER CORRECTING OPINION

Upon motion of respondent DeYonne Tegman, the panel has determined that the opinion filed April 12, 2010 should be changed to correct two erroneous references to the estate's accountant on page 16 of the opinion as "Smith."

Now, therefore, it is hereby

ORDERED that the two references to "Smith" on page 16 of the opinion be changed to "Roberts." The remainder of the opinion remains unchanged.

Done this _____ day of _____, 2010.

/s/ Ellington

/s/ Dwyer

/s/ Schindler

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Respondent.)
)

Ellington, J. — Marie Vollstedt and her son, Charles (Ted) Vollstedt, engaged in numerous financial and business transactions from the mid-1980s until his death in 2005.[1] Marie died in 2007. Claims were filed by Marie's estate against Ted's estate alleging that Ted breached fiduciary duties in various transactions involving Marie. A similar claim was filed by the Vollstedt Family LLC. The trial court dismissed all the claims as barred by the statute of limitations and/or laches.

We affirm dismissal of the claims brought by Marie's estate. Unresolved issues preclude summary judgment on the LLC's claims.

BACKGROUND

Marie was the widow of Fred Vollstedt. They had three sons, Ted, Vance and James. After Fred's death, Marie made significant gifts to her sons. In addition, she made loans to Ted to help establish various business ventures and for business cash flow. Marie and Ted also engaged in a number of transactions from the mid-1980s until the early 2000s.

Ted was very involved in Marie's affairs. He provided advice, retained attorneys, corresponded with professional advisors on her behalf, and actively managed her financial affairs. Marie had professional advisers as well, including her accountant, Gordon Smith.

In 1995, Marie created the Marie Vollstedt Irrevocable Trust, with Ted as trustee.

[1] We refer to the parties by their given names to avoid confusion. No disrespect is intended.

In 1996, Marie and Ted used assets from that trust and from the Fred Vollstedt Family Trust, of which Marie was both beneficiary and trustee, to establish the Vollstedt Family LLC, which was created to build a house for Marie on property owned by the Fred Trust. Ted was the LLC's sole manager.

In 2005, Ted died. His brother Vance took over as the LLC's manager. Marie experienced financial difficulties, prompting her to consult a lawyer. The lawyer advised Marie she may have claims against Ted's estate based on certain transactions between them. Marie did not act on this advice.

In 2007, at age 90, Marie died. Vance was named personal representative of her estate. Shortly thereafter, Vance, on behalf of Marie's estate and the LLC, and the trustees of the Fred Trust and the Marie Trust sued Ted's estate on claims of breach of contract, negligence, unjust enrichment/constructive trust, and breach of fiduciary/confidential duties, all arising out of Ted's transactions with Marie. They also demanded an accounting.

Ted's estate moved to dismiss certain claims on grounds of statute of limitations and laches, as well as lack of proof. Marie's estate and the other plaintiffs sought to establish that Ted acted in a fiduciary capacity as to all four plaintiffs.

The court dismissed the claims of Marie's estate and the LLC as barred either by the statute of limitations or laches because Marie was aware of all relevant facts but failed to act on them. The order was certified for immediate appeal and the remaining claims of the two trusts were stayed.

Analysis

We apply the usual standard of review on summary judgment.[2]

A. Statute of Limitations

The statute of limitations on a claim of breach of fiduciary duty is three years.[3] The limitations period does not begin to run until the cause of action accrues.[4] Under Washington's discovery rule, a cause of action does not accrue until the plaintiff knows or, through the exercise of due diligence should know, the essential elements of the cause of action.[5] The discovery rule applies to a claim of breach of fiduciary duty.[6]

The key consideration is the factual basis for the claim.[7] A plaintiff must use due diligence in discovering the basis for a cause of action.[8] One who has notice of facts sufficient to create a duty of further inquiry is therefore deemed to have notice of all facts that a reasonable inquiry would disclose.[9] An action accrues when the plaintiff knows or should know the relevant facts supporting it, whether or not the plaintiff knows he or she has a legal cause of action.[10]

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[2] An appellate court reviews summary judgment decisions de novo, viewing the facts and all reasonable inferences from those facts in the light most favorable to the nonmoving party. Overton v. Consol. Ins. Co., 145 Wn.2d 417, 429, 38 P.3d 322, 327 (2002). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. CR 56(c).

[3] RCW 4.16.080(2).

[4] Janicki Logging & Const. Co., Inc. v. Schwabe, Williamson & Wyatt, P.C., 109 Wn. App. 655, 659, 37 P.3d 309 (2001).

[5] Green v. A.P.C., 136 Wn.2d 87, 95, 960 P.2d 912 (1998).

[6] Douglass v. Stanger, 101 Wn. App. 243, 256, 2 P.3d 998 (2000).

[7] Allen v. State, 118 Wn.2d 753, 758, 826 P.2d 200 (1992).

[8] Id.

[9] Green, 136 Wn.2d at 96.

[10] Allen, 118 Wn.2d at 758.

Marie's estate contends that a fiduciary relationship abrogates the due diligence requirement of the discovery rule. This is not correct. "'[E]ven in an action for fraud where a fiduciary relationship exists, the burden is upon the plaintiff to show that the facts constituting the fraud were not discovered or could not [be] discovered until 3 years prior to the commencement of the action.'"[11]

Marie's estate also argues the statute of limitations was tolled under the fraudulent concealment doctrine. But to prove fraudulent concealment, a plaintiff must show he or she exercised due diligence in trying to uncover the facts and that the defendant engaged in affirmative conduct that would lead a reasonable person to believe that no claim for relief existed.[12] Fraudulent concealment cannot exist if a plaintiff has knowledge of the relevant facts.[13]

Finally, Marie's estate argues the statute of limitations was tolled until Ted's death under the continuing relationship rule. Under the common law, the statute of limitations on a breach of fiduciary duty claim brought by a beneficiary against the trustee of an express or resulting trust is tolled until the trust terminated or was repudiated.[14] The rule for express trusts was superseded by former RCW 11.96.060 (1984) (now RCW 11.96A.070), under which an action against the trustee of an

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[11] Douglass, 101 Wn. App. at 256 (alterations in original) (quoting Interlake Porsche & Audi, Inc. v. Bucholz, 45 Wn. App. 502, 518, 728 P.2d 597 (1986)).

[12] August v. U.S. Bancorp, 146 Wn. App. 328, 347, 190 P.3d 86 (2008), review denied, 165 Wn.2d 1034 (2009).

[13] Giraud v. Quincy Farm and Chemical, 102 Wn. App. 443, 455, 6 P.3d 104 (2000).

[14] See Arneman v. Arneman, 43 Wn.2d 787, 797, 264 P.2d 256 (1953) (resulting trust); Gillespie v. Seattle-First Nat'l Bank, 70 Wn. App. 150, 158–59, 855 P.2d 680 (1993) (express trust).

express trust for breach of fiduciary duty must be brought within three years from the earlier of the time the alleged breach was discovered or reasonably should have been discovered or the termination of the trust.[15]

In Hermann v. Merrill Lynch Pierce, Fenner & Smith, Inc.,[16] this court assumed without analysis that the continuing relationship rule applied to a negligence action against a stockbroker.[17] However, we implicitly rejected Hermann's premise when we

[15] Gillespie, 70 Wn. App. at 161; RCW 11.96A.070.

[16] 17 Wn. App. 626, 564 P.2d 817 (1977).

[17] Id. at 630. In Seattle First Nat'l Bank, N.A. v. Siebol, 64 Wn. App. 401, 406–07, 824 P.2d 1252 (1992), Division Three of this court declined to apply the rule to a loan officer-customer relationship.

adopted the continuous *representation* rule in attorney malpractice cases. Under this rule, the statute of limitations on an attorney malpractice claim is tolled "during an attorney's continuous representation of the client in the same matter from which the malpractice claim arose."[18] We declined to extend the rule to an attorney's representation as a whole, rather than to representation on a specific matter.[19] The continuous representation rule was also applied in an accounting malpractice suit.[20]

The continuing relationship rule has thus survived in the case of resulting trusts only. Marie's estate does not claim a resulting trust; the rule is therefore inapposite.

The question here, therefore, is whether the claims are viable under the discovery rule. Exactly when a claimant knew or should have discovered the elements of a cause of action is ordinarily a question of fact.[21] Where the evidence is undisputed or reasonable minds cannot differ, however, summary judgment may be proper.[22]

The undisputed evidence is that Marie was an independent person, alert until almost the end of her life, who did not hesitate to voice her opinions and who made decisions for herself. She was not interested in the details of her investments and transactions, and sometimes did not understand all the complexities they involved. Her estate therefore characterizes her as financially unsophisticated and reliant on Ted's

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[18] Janicki Logging & Const. Co., Inc. v. Schwabe, Williamson & Wyatt, P.C., 109 Wn. App. 655, 658, 37 P.3d 309 (2001).

[19] Cawdrey v. Hanson Baker Ludlow Drumheller P.S., 129 Wn. App. 810, 819–20, 120 P.3d 605 (2005).

[20] See Burns v. McClinton, 135 Wn. App. 285, 295, 143 P.3d 630 (2006).

[21] See Gillespie v. Seattle-First Nat'l Bank, 70 Wn. App. 150, 170–71, 855 P.2d 680 (1993); Allen v. State, 118 Wn.2d 753, 760, 826 P.2d 200 (1992) (analysis of due diligence raises issues of fact).

[22] Gillespie, 70 Wn. App. at 170; Allen, 118 Wn.2d at 760.

advice. But the authorities relied upon by the estate involve experts or other professional advisers in situations where

> [i]t would be illogical to require a . . . person who must necessarily rely upon the expertise of his or her own trustee or attorney or accountant or other professional advisor for complex financial, legal, accounting or other professional advice, to consult with a competing expert simply because he or she has been supplied with reams of complex written materials which, if fully analyzed by a competing expert, might reveal a cause of action for professional malpractice.[23]

In such circumstances, no obligation of due diligence arises until something happens "to cause the one who justifiably relies upon his or her own expert reasonably to suspect that malpractice may have occurred."[24]

Ted was not a professional adviser. But even in cases involving professional advisers, a claimant who possesses enough information to put him or her on inquiry notice of a possible cause of action must exercise due diligence in discovering the claim.[25]

We discuss each challenged transaction below.

The 108th Street Property. The Vollstedt family home was located on a large lot on 108th Street in Bellevue. Marie tried unsuccessfully to sell the property, and in 1987, her accountant, Gordon Smith, suggested a tax-saving, like-kind section 1031 exchange[26] by which Marie would transfer her 108th Street property to Ted in exchange

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[23] Gillespie, 70 Wn. App. at 171 (breach of fiduciary duty action between beneficiaries of testamentary and de facto trusts and bank trustee); see also August v. U.S. Bancorp, 146 Wn. App. 328, 345–46, 190 P.3d 86 (2008) (breach of fiduciary duty action between beneficiary of two estates and two testamentary trusts and bank personal representative and trustee), review denied, 165 Wn.2d 1034 (2009).

[24] Gillespie, 70 Wn. App. at 171.

[25] Id. at 171–73.

for property of Ted's in Maltby. Smith estimated the two properties to be of approximately the same value. The Maltby property was leased to East Teak Trading Group, one of Ted's companies, and the rental income would help pay the mortgage.

In 1988, the 108th Street property was subdivided into three lots, with the family home on lot 3. Ted entered into a joint venture to develop lots 1 and 2; Marie was not part of the venture. On December 23, 1988, Marie signed two sets of warranty deeds transferring the three lots to Ted. One set recited the consideration as "Ten Dollars, plus other valuable consideration"; the second, for "love and affection."[27] Also on December 23, Ted quitclaimed Lot 1 of his Maltby property to Marie.

On December 28, Marie pledged Lots 1 and 2 of the 108th Street property as collateral for a construction loan taken by Ted and a partner. Marie informed the bank that "I have exchanged my interest in these properties to Charles T. Vollstedt in an income tax-free exchange by warranty deeds."[28] Correspondingly, Marie represented on her 1988 tax return that she disposed of her property in a section 1031 like-kind exchange. Ted eventually filed the "love and affection" deeds. For a while (it is unclear for how long), Ted paid Marie rent for Maltby 1. On May 30, 1990, Marie quitclaimed Maltby 1 to the Fred Trust.

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[26] A section 1031 exchange, also known as a tax deferred exchange, occurs when an owner sells her real estate trade, business, or investment property, then with the proceeds of the sale acquires a replacement "like kind" property. The exchange must follow certain timelines. The owner must identify the replacement property within 45 days from the day of selling the relinquished property and the owner must receive the replacement property within 180 days after the day of selling the relinquished property (with some exceptions). See 26 U.S.C. § 1031, 26 C.F.R. § 1.1031(k).

[27] Clerk's Papers at 2268–73.

[28] Clerk's Papers at 806.

The estate claims that Ted's recording of the "love and affection" deeds creates an issue of fact as to whether he actually transferred Maltby 1 to Marie. But the record clearly shows that Ted transferred Maltby 1 to Marie, that Marie received rent for Maltby 1, and that she further transferred Maltby 1 to the Fred Trust. On this record, the recording of the "love and affection" deeds does not create an issue as to whether the transfer occurred.

The estate also claims the transaction did not qualify as a section 1031 exchange because it failed to meet the statutory timelines, and that Marie never knew this, as showed by her reporting a section 1031 exchange on the 1988 tax return. But whether the exchange met the section 1031 timelines was easily ascertainable by Marie or her accountant. She was directly involved in the transaction and had knowledge of all relevant facts, including the dates when the transfers took place. Whether the transaction met Internal Revenue Service requirements is not pertinent to whether Marie received value for the exchange or knew the relevant facts.

Reasonable minds could not differ. Marie knew all the facts relevant to these claims at the time the transaction occurred in December 1988. The statute of limitations has therefore long expired as to any claim arising therefrom.

Loans to East Teak Trading Group. Between 1988 and 2004, Marie transferred significant sums to Ted and one of his companies, East Teak Trading Group. The monies were used to cover payroll and cash shortages. Marie's estate contends she was an investor in the business, but that Ted and East Teak treated most of the funds as unsecured loans and often rolled the loans into new ones rather than repay them at

maturity. The estate's forensic accounting expert, Steve Roberts, estimated that $3,826,423 in profits were attributable to alleged investments by Marie and the other plaintiffs.

The record shows, however, that Ted and Marie memorialized these transactions in promissory notes. By agreement, some of the notes were amended, the terms were extended and the interest rates adjusted. Sometimes new notes were drafted after the balance reached a certain amount. All the loans were fully repaid with interest. According to Marie's longtime accountant Smith, both Marie and Ted considered the transactions to be loans, and he recorded the payments from East Teak to Marie as interest. East Teak controllers Pattie Bridges and James Brown explained that, based on information from Ted, they treated the loans from Marie as short-term liabilities and never as capital contributions. According to Brown, East Teak paid Marie a higher interest rate than it paid the bank on its line of credit. Ted stopped accepting loans from Marie after Brown advised him to "keep business business and family family."[29]

Had Marie believed her money represented capital contributions, she had notice that she was not recognized as an investor from the simple facts of memorialization of the transactions as loans and repayment of the loans. Moreover, Marie had been a shareholder in another of Ted's companies, East Teak Lumber Company, between 1982 and 1986, and knew the difference between lender and shareholder.

The estate relies upon Roberts' declaration that he and his team required

[29] Clerk's Papers at 2975.

hundreds of hours to unravel Ted's and his companies' finances, and contends Marie could not reasonably have known whether she had been benefited or harmed by these transactions. But inquiry notice does not require unraveling a whole network of related companies. The complexity of Ted's and his company's financial situations does not change the fact, clearly known to Marie, that she was treated as a lender, not an investor, and was repaid in full.

The statute of limitations bars this claim as well.

5914 Lake Washington Boulevard Property. Ted owned a piece of property at 5914 Lake Washington Boulevard in Kirkland, which he rented as office space to East Teak Trading Group. As part of Ted's divorce, his former wife, Carol Boswell, received a lien on the property for $156,000. On April 30, 1993, Marie wrote a check to Boswell for $156,000. In an unsigned letter dated the same day, Ted informed Boswell's attorney he was enclosing the check for $156,000 and that he was selling the property to Marie.

Despite this representation, on May 1, Ted signed a demand note for $156,000 payable to Marie. A summary of Marie's 1993 loans to Ted includes the $156,000 payment to Boswell, as well as loans consisting of amounts paid by Marie on the mortgage for the Lake Washington property for May, June, and July 1993. Around the same time, East Teak Trading Group made several payments to Marie as rent for the Lake Washington property.

On May 5, Marie signed an agreement to pay $2,045 "as a commission for services rendered in the purchase of 5914 Lk. Wash. Blvd. Kirkland, WA."[30]

On October 1, 1993, Marie paid off Ted's mortgage on the property in the amount of $40,287.40. The same day, Ted signed a demand note for $40,290.04 payable at Marie's order. Marie assigned the balance on the two notes to the Marie Trust as of January 1, 1995. In 1996, Ted sold the Lake Washington property for $416,000.

Based on the above events, Marie's estate claims that Ted and Marie agreed Marie would buy the property but Ted did not fulfill his obligation to transfer title. The estate therefore claims Marie was entitled to the profits from the eventual sale, about which she allegedly did not know.

But the record shows clearly that Marie was a lender, not a buyer. Whether or not the parties ever contemplated that Marie would become the owner of the property, the transaction itself was clearly a loan. Marie accepted and assigned the promissory notes, which were paid. Reasonable minds cannot differ that Marie had all necessary information to act on in the event her expectations were at odds with the transaction.

The statute of limitations bars this claim as well.

Brighton East Acquisition. On October 25, 1993, Marie loaned East Teak Trading Group $200,000. The promissory note was due on December 31, 1993 and carried eight percent interest. On December 31, 1993, East Teak settled the loan by transferring to Marie a furniture division called Brighton East.

On March 1, 1994, Marie sold Brighton East for $89,099.94, with $60,000 payable in three days and the balance payable in two years. The note was paid in full

[30] Clerk's Papers at 2425.

in 1996. As part of the agreement, Marie retained certain inventory, the Caldwell Design Line, which the buyer agreed to continue selling on a consignment basis. During 1994 and 1995, Marie was paid approximately $50,000 from sales of the Caldwell Design Line. On July 1, 1995, East Teak bought the remaining Caldwell inventory for $64,752.76, ensuring that Marie recovered all of her initial $200,000.

Marie's estate claims Ted breached his alleged fiduciary duty to Marie because "[t]here is no evidence that Ted disclosed to Marie that Brighton East was a failed company, that East Teak needed to get it off its books, or that it was an imprudent investment for a retired person of her age."[31]

However, as owner of Brighton East, Marie had full access to the company's books and records and could have ascertained its financial situation. Further, Marie was put on inquiry notice when she sold the company for less than $100,000 three months later and had to retain one of the two furniture lines as part of the deal. Finally, Marie knew that she recovered her $200,000 two years later than planned and with no return on the loan. From this succession of events, any reasonable person would have been put on notice to inquire further about the transaction. The claim is barred.

Vollstedt Family LLC's Claims. The LLC claims Ted breached his fiduciary duties as its sole manager by making several loans of LLC funds to East Teak Trading Group and a business associate in 1997 and 1998. The LLC does not claim the loans were not repaid. Rather, it claims Ted did not issue an accounting and did not disclose his alleged acts of self dealing to Marie in her position as trustee of the Fred Trust, one

[31] Appellant's Br. at 10–11.

of the two members of the LLC. Ted's estate counters that the loans were recorded on the LLC's books, to which Marie had access, and therefore she could have discovered the loans with due diligence.

The exact injury alleged here is unclear. But absent proof that Marie had enough information to put her on inquiry notice, we hold there is an issue of fact as to whether her failure to consult the LLC's books amounts to failure to exercise due diligence in discovering the alleged breach of fiduciary duty. The court erred in dismissing the LLC's claims on statute of limitations grounds.[32]

B. Laches

Laches is an equitable defense based upon estoppel. A defendant asserting the doctrine of laches must affirmatively establish: "(1) knowledge by the plaintiff of facts constituting a cause of action or a reasonable opportunity to discover such facts; (2) unreasonable delay by the plaintiff in commencing an action; and (3) damage to [the] defendant resulting from the delay."[33]

The purpose of laches is to prevent injustice and hardship.[34] The principal consideration in applying laches is the prejudice and damage likely to result from the untimely action.[35] Unavoidable loss of defense evidence establishes material prejudice.[36] In deciding whether laches applies, courts assess the inherent equities of

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[32] In view of our holding, it is unnecessary to address Marie's estate's arguments that the adverse domination doctrine, the continuous relationship rule, and the fraudulent concealment doctrine tolled the statute of limitations on the LLC's claims.

[33] Davidson v. State, 116 Wn.2d 13, 25, 802 P.2d 1374 (1991).

[34] Brost v. L.A.N.D., 37 Wn. App. 372, 376, 680 P.2d 453 (1984).

[35] Citizens for Responsible Government v. Kitsap County, 52 Wn. App. 236, 240, 758 P.2d 1009 (1988).

a particular case.[37] "Since laches is an equitable defense, it cannot successfully be urged by those who withhold information which would have prompted action at an earlier time."[38]

With these principles in mind, we turn to the remaining claims in this case.

East Teak Lumber Company Stock. East Teak Lumber Company was a company through which Ted did business in the 1980s. Marie was a shareholder. On July 1, 1986, Marie redeemed her 195 shares for a total of $144,295.26. The price was the book value discounted by 20 percent. Marie was to be paid $28,859.06 within 30 days, and the balance of $115,436.26 in monthly installments, over 84 months, with 10 percent per year interest. The note was paid in full January 30, 1990.

Also on July 1, 1986, another shareholder, Ted's ex-wife Carol Boswell, redeemed her 45 shares at book value discounted by 15 percent. The total of $35,380 was paid in 36 monthly installments, with 12 percent per year interest. A merger of various East Teak entities into East Teak Trading Group was apparently planned for that same day. One benefit of the merger was that shareholders would own shares in an integrated organization with potential for growth, as opposed to owning shares in smaller companies with no real value.

Marie's estate argues Ted breached his fiduciary duty by paying Marie less per share than he paid Boswell and less than what the shares would have been worth post-

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[36] Davidson, 116 Wn.2d at 26.

[37] Brost, 37 Wn. App. at 376.

[38] Retail Clerks Health & Welfare Trust Funds v. Shopland Supermarket, Inc., 96 Wn.2d 939, 949, 640 P.2d 1051 (1982).

merger. The estate also claims Marie never learned about these events, and that there was nothing to place her on inquiry notice.

The record belies these claims. Marie's $20,000 investment in 1982 became over $144,000 by 1986. Marie nonetheless repeatedly expressed dissatisfaction about the deal almost until her death. The merger had been in the works for a year before Marie redeemed her shares and was not kept secret. Marie did business with the new entity, East Teak Trading Group, lending it money and even acquiring Brighton East from it. Marie had inquiry notice regarding the circumstances surrounding the stock redemption agreement.

But even if Marie had inadequate notice of the difference in share values, two decades is an unreasonable delay. It deprived Ted's estate of potential defense evidence in the form of both Ted's and Marie's testimony as to how much information Marie had and when she learned it. To allow the claim to proceed now would be inequitable.

Marie's estate argues that application of laches is precluded by Ted's unclean hands, specifically his alleged failure to disclose to Marie the salient facts regarding the redemption of her stock. The estate relies entirely on its accounting expert's declaration to that effect. But Roberts has no personal knowledge of whether and what Ted disclosed to Marie. Roberts was retained only for purposes of this litigation and never knew either of them.

The estate's argument serves to underscore the inequity of allowing the claim to proceed. The best and perhaps only way to clarify the issue was Ted's and Marie's

testimony. The court did not err in concluding that laches precludes Marie's estate's claim regarding the East Teak Lumber Company stock.

Vollstedt Family LLC Claims. As explained above, there is an issue of fact as to whether Marie should have discovered Ted's loans to East Teak Trading Group and a business associate by consulting the LLC books before Ted's death. We cannot say that, as a matter of law, the subsequent two year delay in filing this action was unreasonable. Ted, the one person with most knowledge of the loans, had already died. By delaying the filing of the suit, the LLC deprived Ted's estate of potential defense evidence in the form of Marie's testimony. But we are unable to tell from the record whether at the time the claims were discovered Marie would have been competent to testify.

Considered in the light most favorable to the LLC, the record creates unresolved issues of fact regarding the reasonableness of the delay in filing its lawsuit. The court erred in summarily dismissing the LLC's claims on laches grounds.

The court's summary judgment dismissal is reversed as it concerns the LLC's claims and is affirmed in all other respects.

WE CONCUR: