

**COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT/MIDDLESEX COUNTY**

NO. A.C. 09-P-1152

**DANIEL C. BOUCHIE, INDIVIDUALLY AND AS THE SOLE LEGATEE
OF CLORINDA I. BOUCHIE,
Plaintiff-Appellee**

v.

**DANIEL L. BOUCHIE AND LINDA A. TRICCA, INDIVIDUALLY, AND
JOHN M. BOUCHIE, INDIVIDUALLY AND AS TRUSTEE,
Defendants-Appellants**

**ON APPEAL FROM A JUDGMENT OF THE
MIDDLESEX COUNTY PROBATE AND FAMILY COURT**

BRIEF FOR APPELLANTS

**Robert Deschene, Esquire
95 Church Street
North Attleborough MA 02760
Phone (508)316-3853
BBO # 675186**

Dated: July 20, 2009

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF THE ISSUES 1

STATEMENT OF THE CASE 1

STATEMENT OF THE FACTS 4

SUMMARY OF THE ARGUMENT 10

ARGUMENT 13

I. The trial court erred in its determination that plaintiff’s claim was not barred by laches because he reasonably delayed filing his lawsuit claiming an interest in the Trust for fifteen years..... 14

II. The trial court erred in its determination that plaintiff’s claim was not barred by laches because defendants were not prejudiced by plaintiff’s delay in filing his lawsuit claiming an interest in the Trust

A. Loss of Opportunity to Contest Clorinda’s Will..... 23

B. Claim for Disgorgement of Trust Income ... 29

C. Financial Decisions in Reliance on Continuing Trust Income 30

D. Nonpecuniary Prejudice 38

CONCLUSION 41

ADDENDUM 45

TABLE OF AUTHORITIES

CASES

Massachusetts:

<u>Akin v. Warner</u> , 318 Mass. 669 (1945)	19
<u>A.W. Chesterton Co. v. Mass. Insurers Insolvency Fund</u> , 445 Mass. 502 (2005)	14
<u>Baker v. Comm'r of Corps. & Taxation</u> , 253 Mass. 130 (1925)	38
<u>Building Inspector of Lancaster v. Sanderson</u> , 372 Mass. 157 (1977)	14
<u>Flannery v. McNamara</u> , 432 Mass. 665 (2000).....	25
<u>Garabedian v. Westland</u> , 59 Mass. App. Ct. 427 (2003)	22
<u>Garfield v. Garfield</u> , 327 Mass. 529 (1951)	28
<u>G.E.B. v. S.R.W.</u> , 422 Mass. 158 (1996)	14, 18
<u>Hawkes v. First Nat'l Bank</u> , 264 Mass. 538 (1928)	19
<u>Holsinger v. Holsinger</u> , 357 Mass. 1 (1970)	40
<u>Kuwaiti Danish Computer Co. v. Digital Equip. Corp.</u> , 438 Mass. 459 (2003)	14
<u>Morris Gordon & Son, Inc. v. Totoni</u> , 324 Mass. 182 (1949)	38
<u>O'Rourke v. Hunter</u> , 446 Mass. 814 (2006) ..	26, 27

Peabody v. Flint, 88 Mass. 52 (1863) 39

Polaroid Corp. v. Travelers Indem. Co., 414 Mass. 747 (1993) 13, 32, 38

Randon v. Edstrom, 1 Mass. App. Ct. 796 (1974)..... 22, 36

Richardson v. Lee Realty Corp., 364 Mass. 632 (1974) 18

Shea v. Shea, 296 Mass. 143 (1936) 13, 15, 21

Stewart v. Finkelstone, 206 Mass. 28 (1910) 13, 18

Tetrault v. Mahoney, Hawkes & Goldings, 425 Mass. 456 (1997) 27, 28

W. Broadway Task Force v. Boston Hous. Auth., 414 Mass. 394 (1993) 13

Wigglesworth v. Cowles, 38 Mass. App. Ct. 420 (1995) 22, 41

Woodward v. Comm'r, 435 Mass. 536 (2002)... 27

Other:

Johnston v. Standard Mining Co., 148 U.S. 360 (1893) 19

Coral Springs St. Sys. v. City of Sunrise, 371 F.3d 1320 (11th Cir. 2004) 41

RTC v. Franz, 909 F. Supp. 1128 (N.D. Ill. 1995) 19

Chase v. Chase, 20 R.I. 202 (1897) 38

STATEMENT OF ISSUES

- I. The trial court erred in its determination that plaintiff's claim was not barred by laches because he reasonably delayed filing his lawsuit claiming an interest in the Trust for fifteen years.

- II. The trial court erred in its determination that plaintiff's claim was not barred by laches because defendants were not prejudiced by plaintiff's delay in filing his lawsuit claiming an interest in the Trust.

STATEMENT OF THE CASE

In 1999, Daniel C. Bouchie ("Daniel C.") and his daughter Angela Doucot ("Angela")¹ filed an equity complaint in the Middlesex County probate court against his three other children – Linda A. Tricca ("Linda"), Daniel L. Bouchie ("Daniel L."), and John Bouchie ("John") – seeking, inter alia, a declaration that he, and not defendants, was rightful owner of a one-third interest in their grandmother Angelina's testamentary trust ("the Trust"), having acquired his wife Clorinda's Trust interest as the sole legatee of her 1984 will. RA 1241-50.² In response, defendants

1. The probate court subsequently granted Angela's motion to dismiss herself as a plaintiff in this action.

2. The full transcript of the five-day trial on the laches issue is included in the Record Appendix (RA), in quadrant-page form. For ease of

contended that their mother's beneficial Trust interest passed to them automatically upon her death under the terms of the Trust, and did not become part of her probate estate, and that in any event, Daniel C. was now barred by the equitable doctrine of laches because he unreasonably delayed raising his legal claim to the Trust interest until fifteen years after his wife's death. See infra Addendum to Appellants Brief at 3.

In 2005, the trial court granted final summary judgment for Daniel C. on this claim, and defendants appealed. See infra Addendum at 13-14. The Appeals Court affirmed the summary determinations that, unbeknownst to Clorinda, the Trust had terminated eight years prior to her death, at which time Clorinda's beneficial interest in the Trust res became a legal interest which in 1984 became part of her probate estate as a matter of law, and which passed to Daniel C. under the terms of her will. See infra Addendum at 37-38. The Appeals Court reversed the summary judgment denying defendants' laches defense, however, observing that defendants had generated triable issues of material fact as to whether Daniel C. unreasonably delayed raising this equitable claim to Clorinda's Trust interest for fifteen years, and whether his unjustifiable delay caused defendants injury. See infra Addendum at 39-42.

After conducting a five-day trial on remand, RA 1-1230, the

reference, citations in this brief to the transcript (RA 1 - RA 1230) therefore refer to the pagination of the transcript, not to the page of the Appendix. Documents included in the remainder of the Record Appendix are separately paginated as RA 1231 - RA 1250.

trial court found that Daniel C. reasonably delayed asserting his claim for fifteen years because he justifiably had relied in 1984 on the opinion that he sought and received from the trustee John Maccario (“Uncle John”) that the Trust limited beneficiary status to Angelina’s “blood” relatives, so that Daniel C. could not have acquired any interest in his mother-in-law’s Trust. See infra Addendum at 30-31. The court also found that none of the defendants suffered any type of prejudice from their father’s fifteen-year delay in asserting his claim. RA 31-33. Defendants now appeal from this adverse ruling.

STATEMENT OF THE FACTS

In 1968, Angelina Maccario (“Angelina”) died. Her will left valuable commercial and residential real estate in a testamentary trust (“the Trust”) for the benefit of her three adult children: John Maccario (“Uncle John”), Charles Maccario, and Clorinda Bouchie (“Clorinda”). RA 1231. Uncle John was designated by his mother as sole trustee. RA 1231. The Trust provided that Uncle John was to pay annually to the beneficiaries the net income derived from the Trust properties “for a period of five years from the date of approval of the bond of [the] trustee hereunder, and upon the termination of the trust to pay over the trust estate to [the beneficiaries] in equal shares.” RA 1231-32. If one of the three named beneficiaries died before the Trust terminated, their beneficial interest would pass automatically to their issue. RA 1232. Before her death, Angelina repeatedly told her grandchildren (viz., defendants) that she intended that they someday would acquire ownership of their mother Clorinda’s Trust interest. RA 971, 977, 1010.

Uncle John interpreted the Trust provisions to mandate annual income distributions to the beneficiaries during the first five years, but not to mandate the termination of the Trust after five years, and therefore, he did not transfer legal ownership of the Trust res to Charles, Clorinda, and himself in 1976. See infra Addendum at 18. Instead, he chose to continue the Trust and he continued to make the annual income distributions of the Trust income to Charles, Clorinda, and himself. See

infra Addendum at 18.

In 1984, Clorinda's health quickly deteriorated when she was diagnosed with cancer and had her leg amputated. RA 540. Clorinda had a very good relationship with her four children (i.e., Angela and defendants). RA 589. Over the years and up until two days before she executed her will in May 1984, she often had informed Linda, John, and Daniel L., who were bitterly estranged from their father Daniel C. – that their grandmother Angelina had intended to create the Trust as a “bloodline trust,” so that after Clorinda's death, her one-third beneficial interest in the Trust automatically would pass to her four children under the terms of the Trust. RA 181, 261, 272, 384, 680, 971. Clorinda said that her mother Angelina had not liked Daniel C. and did not want any of the Trust property to go to him. RA 68, 184, 550. In her will, Clorinda noted that she intentionally had omitted any provision for her four children “since [she] provided for them during [her] lifetime,” and she named her husband as her sole legatee. RA 278, 1236. When Clorinda died in September 1984, Daniel C. acquired their residence outside probate by right of joint tenancy, RA 271, and also inherited her estate, which contained relatively meager assets.

Angela, who was named as executor of her mother's will, did not list Clorinda's Trust interest as property of the probate estate. See infra Addendum at 19; RA 1181. Because the probate estate was so meager, defendants did not challenge their mother's testamentary

disposition to Daniel C., although they suspected that her illness and medications might have undermined her testamentary capacity or made her vulnerable to Daniel C. or Angela's undue influence, because they believed their grandmother's and mother's testamentary wishes had been respected: Clorinda had "provided for" them during her life because she fully expected that defendants and Angela would acquire beneficial ownership her one-third Trust interest. RA 289, 586, 635, 677, 696, 748, 972, 1011.

After Clorinda's death, Daniel C. asked Angela to inquire of Uncle John whether he might have acquired any legal claim to Clorinda's Trust interest under her will, and with it the right to the annual Trust income that Clorinda was receiving before her death. RA 1172. Angela did consult Uncle John, who informed her (as he had all other family members) that Angelina had designed the Trust as a "bloodline trust," and that upon Clorinda's death, her beneficial one-third interest had passed under the Trust to her issue, and not to her husband under her will. RA 439. Angela, who herself was due to receive a one-fourth share of her mother's annual Trust income, passed this information along to Daniel C. He did not seek advice of independent legal counsel, but accepted Uncle John's opinion. See infra Addendum at 19, 30. From 1984 through 1999, Uncle John continued annually to distribute a total of \$459,570 in Trust income attributable Clorinda's one-third share to her four children in equal shares. See infra Addendum at 20; RA 1240. Over the next

fifteen years, however, Daniel C. continued to express doubts about Uncle John's opinion that he had not acquired his wife's Trust interest, and asked Angela more than a dozen times to reconfirm that opinion with Uncle John. RA 1201.

In 1993, Uncle John hired John Bouchie as the Trust's property manager at an annual salary of \$12,000, with no benefits. RA 566, 569, 700. John worked long hours maintaining and improving the Trust properties, working especially long hours (18-20 hour days) at restoring the properties after a devastating fire in 1995 essentially gutted them. RA 573, 704, 711, 715, 718. Because of John's restoration efforts, the income from the properties increased significantly after 1996. RA 306. In 1996, Uncle John made John Bouchie co-trustee of the Trust. RA 115, 691, 718, 842.

In 1998, Angela brought a copy of the Trust document to an attorney, who advised her of his legal opinion that the Trust had terminated by its express terms in 1976, that in 1976 Clorinda's beneficial interest in the Trust had converted to legal ownership of one-third of the Trust res, and that this legal interest had passed to Daniel C. as sole legatee under her 1984 will. RA 1174-75. Angela conveyed this opinion to her father.

In 1999, Daniel C. and Angela filed suit against Uncle John (in his capacity as trustee) and defendants (as Trust beneficiaries) alleging, inter alia, that (1) Clorinda's legal interest in the Trust passed

under her will to Daniel C. in 1984, entitling Daniel C. to recover all of the Trust income paid to defendants since 1984; (2) Uncle John had breached his fiduciary duties as trustee;³ and (3) defendants were liable for conversion by their receipt of the Trust income from 1984 to 1999. RA 1241-50. The court ordered that the annual Trust income which would have been distributed to defendants and Angela after 1999 be placed in escrow pending the outcome of this case. See infra Addendum at 20; RA 727. In due course, the claims for breach of fiduciary duty and conversion were dismissed. See infra Addendum at 14. The parties cross-moved for summary judgment on the remaining claim, defendants arguing that the Trust did not terminate in 1976, and that even if it did, Daniel C. was barred under the doctrine of laches because he unreasonably delayed asserting his claim for fifteen years, during which time defendants reasonably relied on an uninterrupted future stream of annual Trust income. See infra Addendum at 4-5. Daniel C. waived his right to recover retroactively for Trust income defendants and Angela received from 1984 to 1999, and the trial court granted him summary judgment. See infra Addendum at 13-14.

On appeal, the Appeals Court affirmed the determination that the Trust had terminated in 1976, but found that defendants had generated triable issues of material fact on the laches defense, and

3. Uncle John died in 2000 during the pendency of the case.

remanded for trial on that issue. See infra Addendum at 39-42.

On remand, the trial court conducted a five-day trial, ultimately finding that Daniel C. reasonably had relied in 1984 on the Uncle John's opinion that he had acquired no legal interest in the Trust under Clorinda's will, and that defendants had suffered no injury from their father's fifteen-year delay in asserting his claim. See Addendum at 30–33. Defendants now appeal from this adverse judgment.

SUMMARY OF THE ARGUMENT

The trial court erred in finding that Daniel C., instead of promptly seeking advice from independent legal counsel in 1984, reasonably relied on Uncle John's opinion that Daniel C. had acquired no interest in the Trust property under Clorinda's will. Daniel C. knew that, if he had any right to the Trust property, he acquired it no later than 1984. Daniel C.'s putative legal claim to Clorinda's Trust interest necessarily depended on a threshold legal interpretation of the beneficiary-designation provisions of the Trust document, and Uncle John was not an attorney licensed to give such an informed or definitive legal opinion. Further, once Uncle John effectively disclaimed that Daniel C. had any interest in the Trust, he likewise disclaimed that he owed any fiduciary obligation to Daniel C. as a Trust beneficiary. At that juncture, Daniel C. reasonably should have realized that Uncle John was not purporting to act in his behalf as his fiduciary, that Angela herself had a

vested interest in not challenging Uncle John's opinion so that she could receive her own share of the annual Trust income, and that he needed to consult independent legal counsel to protect his own legal rights. Daniel C.'s frequently expressed doubts about Uncle John's opinion over the years from 1984 to 1999 further confirm that he subjectively did not believe or trust Uncle John's opinion. In these circumstances, Daniel C. did not exercise any diligence – let alone due diligence – to discover whether or not he had a viable legal claim to the Trust, and equity demands that he now be held accountable for the consequences of his long acquiescence.

The trial court also erred in its counterintuitive finding that defendants suffered no cognizable injury at all during the fifteen years that Daniel C. unreasonably slept on his rights. Defendants adduced ample evidence of injury: (1) they refrained from contesting their mother's will in 1984, (2) they received and expended the \$459,570 in Trust income, exposing themselves to potential future equitable disgorgement of those funds, (3) they made countless pivotal financial decisions over the years based on a reasonable expectation that they – and not their father – would receive the continuing stream of substantial Trust income and benefit from any intervening improvements to the Trust properties, and (4) they suffered extreme emotional distress on account of their own sister Angela's belated maneuvering to divest them of property and income which their grandmother and mother manifestly intended her to share

equally with defendants, and to acquire the entire Trust interest for a father from whom they were bitterly and justifiably estranged, and ultimately, for herself as her father's sole legatee.

Daniel C.'s claim to the Trust interest is a claim in equity. The trial court's rejection of defendants' laches defense flies in the face of the maxims that equity must look to substance over form, disregard unjust technicalities, eschew game-playing, and regard as done that which ought in fairness to have been done. By reversing the trial court's judgment, this court can return the parties to the equitable status quo: defendants and Angela will share equally in their mother Clorinda's one-third interest in Angelina's Trust, just as their grandmother and mother manifestly intended.

ARGUMENT

The doctrine of laches operates in equity as an affirmative defense against a plaintiff whose unreasonable delay in bringing an equitable claim caused defendant some injury or prejudice. W. Broadway Task Force v. Boston Hous. Auth., 414 Mass. 394, 400 (1993).

"Unreasonable delay" will be found if plaintiff knows of his legal rights, "does not seasonably avail himself of means at hand for their enforcement," or "refus[es] to embrace the opportunity to ascertain facts" which would confirm the existence of his legal claim. Stewart v. Finkelstone, 206 Mass. 28, 36 (1910).

Mere delay is not enough, however, and plaintiff's unreasonable delay must also have "induc[ed] a change of position of the defendant or injuriously affect[ed] his legal rights." Shea v. Shea, 296 Mass. 143, 148-149 (1936); see Polaroid Corp. v. Travelers Indem. Co., 414 Mass. 747, 759-60 (1993) (requiring proof of "some injury" to defendant). Defendants bear the burden of proving the laches defense. G.E.B. v. S.R.W., 422 Mass. 158, 166 (1996).

The laches determination "requir[es] a consideration of all the circumstances" of the particular case, Shea, 296 Mass. at 147, and ordinarily presents a question of fact for the judge, which will not be reversed on appeal unless clearly erroneous. A.W. Chesterton Co. v. Mass. Insurers Insolvency Fund, 445 Mass. 502, 517 (Mass. 2005):

[O]ur duty is to examine the evidence and decide the case according to our own judgment, accepting the findings of the trial judge, whether based wholly or partly upon oral testimony, as true, unless they are shown to be plainly wrong, and finding for ourselves such other and additional facts as we deem to be justified by the evidence.

Building Inspector of Lancaster v. Sanderson, 372 Mass. 157, 161 (1977); Mass. R. Civ. P. 52(a). Appellate review of all distinct questions of law is de novo. Kuwaiti Danish Computer Co. v. Digital Equip. Corp., 438 Mass. 459, 470 (Mass. 2003).

I. The trial court erred in its determination that Daniel C.'s claim was not barred by laches because he reasonably delayed filing his lawsuit claiming an interest in the Trust for fifteen years.

The trial court held that Daniel C. did not unreasonably delay asserting his claim for fifteen years after Clorinda's death because he – like all other members of Clorinda's family – reasonably relied on Uncle John's opinion as trustee that Daniel C. could not be a Trust beneficiary under the terms of this "bloodline trust." The trial court rested its determination on a single case authority, which is both legally and factually inapposite.

In Shea v. Shea, 296 Mass. 143 (1936), John Shea acted as a trustee for the property of his brother Michael and wife Sarah. Id. at 144. John Shea eventually told Michael and Sarah that he had lost the entire trust res through bad investments. Id. at 145-46. Six years after Michael's death, however, Sarah learned that John had misappropriated the trust money for his own use and was hiding it in a safe deposit box. Id. at 146. John raised the laches defense to Sarah's suit for an accounting of the trust. Id. at 147. In rejecting that defense, the court noted that Sarah reasonably delayed bringing suit because John's statement that he had lost the trust res was a deliberately false factual statement in furtherance of his fraudulent purpose of misappropriating his brother's money to his own use, and Michael and Sarah had no reason at

the time to disbelieve John's statement, since John had dealt honestly with them for over thirty years, and also told them (again falsely) that he had lost his own money in the same bad investment scheme. Id. at 148-49.

Shea refutes, rather than supports, the trial court's determination that Daniel C. reasonably delayed bringing suit against the Trust for fifteen years. First, unlike John Shea's statements about losing the trust res through bad investments, Uncle John's statements to Angela and Daniel C. were not factual representations concerning his own fiduciary actions in administering the Trust, but were opinions offered by a layman concerning the threshold legal question of which persons the Trust document designated as trust beneficiaries. Trustees need not be attorneys, and even though Uncle John went to law school, he was not an attorney admitted to practice law. RA 1184. Only a licensed Massachusetts attorney could have answered Daniel C.'s particular threshold inquiry definitively, and inexplicably, Daniel C. sought no such independent legal advice at all from 1984 through 1998.

Second, unlike John Shea, Uncle John did not make a patently false statement with the fraudulent purpose of depriving Daniel C. of his undisputed beneficial interest under the Trust. In 1976, eight years before Clorinda became terminally ill and willed her residual property to Daniel C., Uncle John had taken the position that the Trust document mandated him to make annual income distributions for five years, or until

1976, but did not mandate the termination of the Trust after five years. Even if Uncle John's good-faith layman's interpretation later proved to be incorrect as a matter of law, it was not designed to misappropriate funds to his own use, since Uncle John's own one-third share of the Trust remained unaffected regardless of his answer to Daniel C.'s inquiry. The record is devoid of any evidence that Uncle John, like John Shea, acted out of any bad or fraudulent purpose.

Third, unlike John Shea's hiding of the trust property in a safe deposit box of which Sarah Shea had no knowledge and to which she (or any attorney she consulted) would have no possible means of access, Uncle John concealed nothing from Daniel C. Even though Daniel C. was on speaking terms with Uncle John, RA 950, neither Daniel C. nor Angela ever asked Uncle John in 1984 to see a copy of the Trust document. Although Uncle John offered his own layman's opinion concerning the Trust's designation of beneficiaries, the testamentary Trust document was a matter of public record on file as part of Angelina's 1971 probate case, and was freely accessible to any person interested in learning of its contents. See, e.g., Richardson v. Lee Realty Corp., 364 Mass. 632, 634 (Mass. 1974) ("The interest which the demandants assert in the premises came to them by the terms of wills which are matters of public record in appropriate registries of probate."). In the 1980's, for

example, Daniel L. had obtained a copy of the Trust document from the probate registry, RA 985, and in 1998, Angela herself obtained the Trust document so she could bring it to an attorney for an independent legal interpretation. There is no apparent reason why Daniel C. or Angela could not have easily obtained a copy of the Trust document in 1984 – either through the probate registry or simply by asking Uncle John for a copy – and brought it to an attorney for verification of Uncle John’s lay opinion that Daniel C., as a non–“blood relative,” was excluded as a Trust beneficiary. Laches requires that plaintiff promptly take advantage of any reasonably available opportunity to acquire facts pertinent to the determination whether he has a viable legal claim. G.E.B., 422 Mass. at 166 (“So long as there is no knowledge of the wrong committed and no refusal to embrace opportunity to ascertain facts, there can be no laches.”) (quoting Stewart v. Finkelstone, 206 Mass. 28, 36 (1910)) (emphasis added); Hawkes v. First Nat’l Bank, 264 Mass. 538, 544 (1928) (“[T]he essence of laches is . . . acquiescence in the alleged wrong or lack of diligence in seeking a remedy.”) (emphasis added); see Johnston v. Standard Mining Co., 148 U.S. 360, 370 (1893) (“[T]he law is well settled that, where the question of laches is in issue, the plaintiff is chargeable with such knowledge as he might have obtained upon inquiry, provided the facts already known by him were such as to put upon a man of ordinary intelligence the duty of inquiry.”). Fourth, whereas it was undisputed that Michael and Sarah Shea were Trust beneficiaries to

whom John Shea qua trustee unquestionably owed a fiduciary duty (as well as a familial duty of loyalty), see RTC v. Franz, 909 F. Supp. 1128, 1135 (N.D. Ill. 1995) (noting that, for laches purposes, the duty to exercise reasonable diligence in investigating a legal claim “is excused where there is a relation of trust and confidence, rendering it the duty of the party committing the fraud to disclose the truth to the other”), Uncle John expressly advised Daniel C. that he was not a Trust beneficiary because he was not a “blood” relative.” See, e.g., Akin v. Warner, 318 Mass. 669, 676 (1945) (“Delay which might otherwise be found to be unreasonable does not constitute laches so long as there has been no repudiation of the trust with knowledge of the beneficiary”). Unlike John Shea, Uncle John expressly disclaimed any responsibility qua trustee to exercise any fiduciary duty toward Daniel C., excluding Daniel C. from Trust ownership. Indeed, Daniel C. himself implicitly acknowledged his likely non-beneficiary status when he decided not to approach Uncle John directly, but only through Angela, who was considered at the time an undisputed Trust beneficiary. Like Angela, all of Clorinda’s three other children accepted Uncle John’s opinion, at least in part, because they were undisputed Trust beneficiaries to whom Uncle John unquestionably owed a fiduciary duty as trustee. Similarly, Sarah Shea reasonably believed for six years that John Shea was not concealing his misdeeds, but was exercising his fiduciary duty to her as a trust beneficiary. By stark contrast, Daniel C. unjustifiably assumed that Uncle John qua

trustee purported to protect the financial interests of a proclaimed non-beneficiary like himself. Since no one else was advocating for his rights, Daniel C. should have asked for or obtained a copy of the Trust document and/or consulted his own attorney.

Finally, unlike Sarah Shea, who never doubted for six years her brother-in-law's statements, Daniel C. demonstrated by his own conduct after 1984 that he subjectively did not believe that Uncle John's opinion about his rights under the Trust was accurate or definitive. Throughout the years from 1984 to 1999, Daniel C. frequently and repeatedly told Angela that, despite Uncle John's representations, he still believed that he had a right to Clorinda's share in the Trust. RA 1201. Daniel C. also had good reason to doubt Angela's ulterior motives, since she had a vested interest in accepting Uncle John's opinion confirming her status as a designated Trust beneficiary entitled to receive annual Trust income. Despite his own continuing doubts, Daniel C. took no additional steps for fifteen years to ascertain from independent legal counsel whether Uncle John's interpretation of the Trust document's beneficiary-designation provision was accurate.

“[G]ood faith requires vigilance in asserting one's rights.” Shea, 296 Mass. at 148 (citation omitted). Daniel C. did not exercise any diligence, let alone due diligence, under the circumstances because (1) Uncle John was not a licensed attorney qualified to answer the particular legal question of how to interpret the Trust document's

beneficiary-designation provisions; (2) Uncle John's statements on the subject, even if incorrect, were not made for any fraudulent purpose, such as to misappropriate funds; (3) at all times, it was within Daniel C.'s own power to obtain a copy of the Trust document from the probate registry or from Uncle John, and either review it himself or seek legal counsel concerning its proper interpretation; (4) Daniel C. knew that Uncle John was disclaiming any fiduciary duty toward Daniel C. because he did not consider him a Trust beneficiary; and (5) between 1984 and 1999, Daniel C. subjectively did not believe that Uncle John's opinion was accurate or definitive.

In these particular circumstances, the trial court's determination of that Daniel C.'s fifteen-year delay was "reasonable" is clearly erroneous. See Randon v. Edstrom, 1 Mass. App. Ct. 796, 798 (1974) (finding laches where plaintiff "was aware that the disputed property stood in the respondent's name to his exclusion but never made claim to it [for twenty-three years]") (emphasis added); see also, e.g., Garabedian v. Westland, 59 Mass. App. Ct. 427, 437 (2003) ("The trial judge found that the neighbors had slept on their rights for eleven years before filing a complaint."); Wigglesworth v. Cowles, 38 Mass. App. Ct. 420, 430 (1995) ("Pervading this proceeding is the silence of the heirs for over twenty-five years.").

II. The trial court erred in its determination that Daniel C.'s

claim was not barred by laches because defendants were not prejudiced by plaintiff's delay in filing his lawsuit claiming an interest in the Trust.

A. Loss of Opportunity to Contest Clorinda's Will

The trial court based its determination that defendants suffered no adverse change of position on account of Daniel C.'s failure timely to raise his claim to Clorinda's Trust interest on defendants' purported failure at trial to explain precisely how they could have contested Clorinda's will in 1984 if they had known then of Daniel C.'s claim. See infra Addendum at 31.

The trial court first noted that "Daniel C., as sole legatee of the will, did not have any obligation to file a claim to Clorinda's interest in the Trust." Although an accurate description of general probate practice, this simply begs the question whether Daniel C. had the affirmative equitable obligation, in order to fend against the laches defense in this action, affirmatively to raise his legal claim before defendants suffered any prejudice. Daniel C's claim to the Trust interest arose, if at all, by operation of the terms of the Trust. If the Trust terminated in 1976, he inherited Clorinda's share. If it did not terminate in 1976, he did not. While there now may no longer be a dispute that Daniel C. took the vested Trust interest automatically by operation of Clorinda's will, that was a matter of genuine legal dispute in 1984, and the equitable principles of

laches required more than Daniel C.'s mere silence and acquiescence during the probate case. If Daniel C. unreasonably sat on his rights while defendants were injured, equity denies him the right to assert his claim now even though Clorinda's Trust interest technically passed to him under her will.

The trial court likewise erred in faulting defendants for their purported failure to explain at trial how they could have contested Clorinda's will if they had known of Daniel C.'s claim. At trial, the court ruled out only one particular ground for "challenging" Clorinda's will: Clorinda's will likely could not have been reformed on the ground that she mistakenly had believed that her beneficial Trust interest had not converted to legal ownership prior to her death, but would pass automatically on her death to defendants and Angela under the terms of her mother's Trust. See Flannery v. McNamara, 432 Mass. 665, 673 (2000) ("Reformation of wills [based on the testator's unilateral mistake] is presently prohibited in Massachusetts."); RA 344-64. If will reformation had been available as a remedy, defendants might have recovered the full value of Clorinda's Trust interest.

To prove "injury" for laches purposes, however, defendants did not need to show that they could have recovered the full value of Clorinda's Trust interest by reforming her will, but only that Daniel C.'s unreasonable silence and acquiescence in the Trust interest's exclusion

from Clorinda's probate estate reasonably persuaded them to forego any other available legal avenue by which they might have succeeded in inheriting at least some portion of Clorinda's estate. See Bouchie v. Bouchie, No. 05-P-1362, at 5 (Mass. App. Ct. Nov. 6, 2006) (reversing summary judgment on laches defense, and noting defendants' attestations that they "did not contest Clorinda's will or their omission from her will"); see infra Addendum at 41. Defendants need only show that they did not contest Clorinda's will – not because they did not believe such viable alternative grounds existed – but because her probate estate contained such meager assets that a will challenge would not have been cost-effective, and because they reasonably believed that Clorinda had excluded them from her will because they were already amply "provided for" by the Trust. Knowing that their mother wished them to be "provided for" after her death, defendants surely would have taken legal steps to see that their mother's wishes were respected if Daniel C. had asserted his legal claim to her Trust interest in 1984. Defendants would have sought their own legal counsel to determine if and how they could challenge their complete exclusion from Clorinda's will. At trial, for example, defendants noted that they might have contested the will on grounds of Clorinda's lack of testamentary capacity, based on her deteriorating health and use of pain medications,⁴ or based on Daniel C.'s exertion of undue influence,

4. To establish lack of testamentary capacity, "[t]he critical

in light of Daniel C.'s history of intimidating his wife and preventing her children from visiting her.⁵ RA 586, 635, 677, 696, 748, 972, 1011; see infra Addendum at 29 (“Defendants would have contested the will based on grounds of fraud.”).

If those will challenges had proved successful, and the will was voided, Clorinda’s estate likely would have been distributed under the intestacy statute, in which case defendants would have received some share of the estate property, including a share of her Trust interest. See Woodward v. Comm’r, 435 Mass. 536, 542 (2002) (noting that intestate share is due to decedent’s “issue”); RA 264. Because Daniel C. unreasonably delayed in asserting any claim to that Trust res, however, defendants did not seek legal counsel to explore these possible will

question is whether the testator was of sound mind at the time the will was executed. It has been held that, “a person may possess testamentary capacity at any given time and lack it at all other times.” The proponent has the burden of proof on the issue of testamentary capacity.’ In sustaining that burden, he is aided by a presumption that the testator had the requisite testamentary capacity. However, the presumption has effect only until evidence of want of capacity appears.” O’Rourke v. Hunter, 446 Mass. 814, 827 (2006) (citations omitted).

5. To establish undue influence, defendants would have needed to show “that an (1) unnatural disposition has been made (2) by a person susceptible to undue influence to the advantage of someone (3) with an opportunity to exercise undue influence and (4) who in fact has used that opportunity to procure the contested disposition through improper means.” O’Rourke, 446 Mass. at 827-828; Tetrault v. Mahoney, Hawkes & Goldings, 425 Mass. 456, 464 (1997) (“Undue influence involves some form of compulsion which coerces a person into doing something the person does not want to do.”).

challenges, and mounted no will contest of any kind. Instead of a chance to recover a fair share of Clorinda's estate, they received nothing, an inequitable result which obviously was never the intention of either their grandmother or their mother. See Tetrault, 425 Mass. at 464 (noting that an "unnatural disposition" may be evidence of undue influence).

Fifteen years on, defendants are time-barred from raising these will challenges, and due to the unreasonable passage of time, any potential witnesses (e.g., Uncle John, who died in 2000) and evidence necessary to establish the viability of their claims of lack of testamentary capacity or undue influence are now practicably irretrievable. See Garfield v. Garfield, 327 Mass. 529, 534 (1951) (noting that plaintiff's delay was prejudicial because "[v]irtually all of the witnesses who could have shed any light on the original transaction . . . have died."). We cannot know at this late date if defendants' plausible challenges to Clorinda's will would have proved successful, and so prejudice should be presumed in light of Daniel C.'s unreasonable fifteen-year delay in raising his claim to his wife's Trust interest.

Because this lost-opportunity "injury" alone is sufficiently dire, the trial court's prejudice determination was clearly erroneous, and should be vacated, and judgment entered for defendants.

B. Claim for Disgorgement of Trust Income

In his original complaint, Daniel C. sought to recover all of

the Trust income received by defendants and Angela from 1984 to 1999. RA 1249. The trial court simply presumed that, because Daniel C. later decided to voluntarily disclaim any entitlement to be reimbursed retroactively for the \$459,570 in Trust income, defendants did not suffer any prejudice of disgorging those amounts. Neither the trial court nor plaintiff cites any case authority for this legal proposition, and in effect, it permits a defendant who unreasonably delayed raising his legal claim strategically to “cure” any laches problem by unilateral disclaimer.

Daniel knew that Clorinda was receiving substantial annual Trust income before her death, and that this income would be paid to defendants and Angela after Clorinda’s death for every year that he delayed in raising his claim. See infra Addendum at 18-20. Absent Daniel C’s voluntary and fortuitous disclaimer of his claim to this past Trust income, defendants and Angela presumably would have been legally obligated to disgorge \$459,570 that they received and spent from 1984 to 1999, reasonably believing that they were entitled to the unfettered use of that income. Whatever defendants’ present financial condition, that substantial disgorgement obviously would be a huge financial burden, requiring them to liquidate substantial assets and investments. Even if defendants’ initial receipt of the annual Trust income arguably might not be sufficient to show “injury,” their year-after-year expenditure of such a large amount of money without fear of the legal threat of future disgorgement surely should qualify as

detrimental reliance for laches purposes. That Daniel C. voluntarily chose to forego this legal remedy to disgorgement, for strategic reasons, should not alter that prejudice analysis.

C. Financial Decisions in Reliance on Continuing Trust Income

The trial court held that none of the defendants had proven that they detrimentally relied on the Trust income that they received from 1984 to 1999 because they failed to prove that they had undertaken any financial commitments in specific reliance on their expectation of receiving that continuing extra income. See infra Addendum at 31-33.

In real terms, the fifteen-year receipt of trust income of \$459,570 was obviously significant to defendants and Angela, and it strains credulity to suppose that, in not even one instance over these years, did defendants ever make a predictive financial decision at least in partial reliance on the continuity of this hefty stream of Trust income. Starting in 1984, they reasonably counted on this uninterrupted stream of additional income, and the trial court placed too high an evidentiary burden on them to reconstruct with certitude how many of their intervening financial decisions were undertaken and colored by that expectation. In light of Daniel C.'s unreasonable delay in asserting his claim for fifteen years and the large amount of Trust income received by defendants and

Angela, defendant's detrimental reliance should be rebuttably presumed. At the very least, the trial court should have given far more deference to defendants' credible testimony of their reliance.

1. Linda Tricca

The trial court held that Linda Tricca suffered no detrimental reliance from her father's fifteen-year delay because her and her husband's plans to retire in 2006 were not altered by the abrupt loss of the Trust income stream in 1999, the Trust income that she received from 1984 to 1999 was "a small percentage of [her] annual income," she did not "rely solely on the income from the Trust for [her] retirement," and her and her husband's post-1999 income had increased so dramatically that she could have financed her original retirement plans even without the Trust income. See infra Addendum at 33. This finding was clearly erroneous.

To establish laches, Linda only needed to prove "some injury." Polaroid Corp., 414 Mass. at 759-60. Linda and her husband both testified that, in 2004, they would not have had to sell their Yarmouthport, Massachusetts residence if she had continued to receive the Trust income after 1999. RA 63. In rejecting their testimony, the trial court merely noted that Linda and her husband "did not rely solely" on the Trust income in making their plans for retirement in 2006, and opined that her and her husband's non-Trust income from 1999 to 2007 had increased substantially enough that they should have been able to keep

the condo even without the Trust money.

Linda did not have to demonstrate that she relied solely on the Trust income, however, but only that the abrupt loss of that extra income caused her “some injury,” i.e., the inability to afford her original retirement plan of simultaneously maintaining a “summer” residence in Massachusetts and a “winter” retirement residence in Florida, and the additional expenses attendant on that type of dual living arrangement. RA 72, 74, 303, 311-12. Whether or not Linda and her husband’s other non-Trust income was substantial is irrelevant, since they used it for other purposes, such as maintaining and reinvesting in her husband’s business operations, which they needed to retain precisely because their original retirement plans for 2006 had been derailed and postponed. RA 152, 169, 315. This does not undercut Linda’s contention that the substantial “extra” Trust income that she expected to receive after 1999 would have been enough to permit her to maintain dual residences after 2006. In effect, the trial court’s finding inequitably punishes Linda and her husband for their relative overall business success, rather than focusing on the probable effect of losing the substantial amount of annual Trust income from 1999 through 2004, when she testified (without contradiction) that she was forced to sell the Yarmouthport residence that she loved. RA 322, 416, 429-30, 489.

2. John Bouchie

The trial court held, inter alia, that John’s decision in 1994 to

take the job as the Trust's property manager at a mere \$12,000 annual salary with no benefits was not proof of any detrimental reliance, even though he testified that he would not have taken the position if he had known in 1994 that he had no interest in the Trust. The court rejected this evidence because it was not the "sole basis" for John taking the job, and because John since has inherited a twenty percent share of his Uncle John's Trust interest. See infra Addendum at 32. This finding was clearly erroneous.

The trial court apparently inferred that John would have taken the job as property manager in 1994 for only \$12,000 per year and no benefits, even if he had known that he owned no interest in the Trust, because he needed a job after eighteen months of unemployment. The trial court found: "[John] claims that the only reason he switched careers (from banking to property management in 1994) was because of his interest in the Trust realty, and had he known that he had no legal stake in the property, he would have returned to banking." See infra Addendum at 26.

The trial court seriously mischaracterizes John's trial testimony. John previously had worked until 1991 as a bank officer at a salary of \$50,000. RA 698. John testified that he felt able to take a low-paying position because his wife Helen was working full time in 1993. RA 717. John was seeking another position in the banking industry, but he testified that he would not have taken the physically-demanding,

low-paying property manager position if he had known that he had no personal stake in the Trust's financial success, RA 702, 717, 963, but more importantly, if he had known that his efforts in improving the Trust properties were going to enure to the benefit his father:

Q: Had you known [in 1994] that your father claimed to be the owner of all the trust property would you have done any of these acts or works?

A: No.

RA 746. Rather than return to the banking industry, RA 746, John accepted the low salary (i.e., \$12,000 annual salary with no benefits) in the hope of later recouping the difference by way of higher levels of Trust income, but he also stated unambiguously that he would have taken no job rather than a job that would benefit his father, from whom he was bitterly estranged and "deadly afraid," due his father's past mistreatment of him as a child. RA 649, 652, 678, 893. In reliance on the fact that his father had no financial stake in the Trust, John took the property manager job at a meager salary, worked long hours (e.g., 18-20 hour days after the fire) to improve the Trust properties and rehabilitate them after the fire, and increased their value and income production significantly (i.e., from \$220,000 in 1994 to \$550,000 in 1998), thereby increasing the amount of the annual Trust distributions. RA 704, 711, 715, 718, 1240.

It is hard to conceive of a clearer instance of detriment than John's years of investment – viz., his under-compensated services to the

Trust – in reliance on Daniel C.’s unreasonable delay in asserting his legal claim to Clorinda’s Trust interest. See Randon v. Edstrom, 1 Mass. App. Ct. 796, 798 (1974) (finding laches where plaintiff “was aware that the disputed property stood in the respondent’s name to his exclusion but never made claim to it [for twenty-three years],” and “[d]uring this period, the respondent bore the expenses of ownership, including . . . maintenance expenses.”) (emphasis added).⁶ If Daniel C. prevails in this case, he – and not John – unjustly will reap the benefit of John’s rehabilitative efforts.

3. **Daniel L. Bouchie**

The trial court held that Daniel L. did not rely on the continued stream of Trust income when he purchased his residence in 1996 because “as a result of buying this house, [he] has profited by an increase in the value of the house of in excess of \$300,000.” See infra Addendum at 32. This finding is clearly erroneous.

Whether or not Daniel L. ultimately realizes a \$300,000 profit from the 1996 purchase (a dubious conclusion given the recent deterioration in the local housing market) is irrelevant to the question whether, in 1996, he relied on the receipt of Trust income both to qualify

6. The court’s finding that John was not prejudiced because he acquired a 20% share of his Uncle John’s Trust interest in 2000 is immaterial to whether John detrimentally relied by working for the Trust from 1994 to 2000. Uncle John’s estate is still in probate. RA 965.

for the mortgage, and thereafter to maintain the ongoing mortgage payments. The trial court noted, but did not discredit, Daniel's undisputed testimony that he could and would not have purchased the house if he had not been receiving the Trust income, and that he experienced difficulty making his mortgage payments without the Trust income. RA 974-75, 1012; see infra Addendum at 27-28. Daniel bought the house for \$232,000 with a mortgage of \$207,000, at a time when his adjusted gross annual income was only \$42,794. See infra Addendum at 27. His Trust income was twenty-two percent of his 1996 income. His annual mortgage payments totaled \$20,412, or nearly fifty percent of his gross annual income. RA 973. Subsequent appreciation in the value of the residence is not relevant to his initial reliance in 1996 on continued receipt of the Trust income to qualify for the mortgage, or to maintain the ongoing mortgage payments. Daniel's testimony about his straitened financial condition in 1996, which is fully corroborated by trial exhibits, and which the trial court did not discredit, conclusively establishes prejudice for laches purposes.

D. Nonpecuniary Prejudice

The trial court confined its prejudice analysis to defendants' loss of legal and pecuniary interests, eschewing all evidence concerning the intra-family antipathies that arose in the course of this legal

proceeding. No case authority barred the court from considering non-pecuniary harm, or other equitable considerations. See Polaroid Corp., 414 Mass. at 759-60 (noting that plaintiff's delay must have caused "some injury"). Indeed, in this equity case, it was essential that the court move beyond the cold financial equations, and consider the emotional harm to defendants caused by Daniel C.'s and Angela's belated claims to Clorinda's Trust interest. See, e.g., Chase v. Chase, 20 R.I. 202, 204-205 (1897) ("The disadvantage [for laches purposes] may come from loss of evidence, change of title, intervention of equities and other causes, but when a court sees negligence on one side and injury therefrom on the other, it is a ground for denial of relief.") (emphasis added). It is not disputed that Angelina and Clorinda both expected that defendants and Angela – and not Daniel C. – would acquire the Trust interest. RA 68, 184, 550. "[E]quity regards that as done which ought to have been done." Morris Gordon & Son, Inc. v. Totoni, 324 Mass. 182, 185-186 (1949); Baker v. Comm'r of Corps. & Taxation, 253 Mass. 130, 133 (1925) ("[T]he maxim that equity regards that as done which ought to be done. Resort is had to it in order to work out the intent of the parties and accomplish a result which ought to be accomplished on principles of fair dealing."). Even if Clorinda's Trust interest technically passed to Daniel C. in her will, equity abhors a technicality which works to defeat the parties' reasonable expectations. Peabody v. Flint, 88 Mass. 52, 57 (1863) ("[E]quity does not suffer technicalities to stand in its way, but

seizes upon the substance of the case, and holds all parties to their just responsibility.”).

This dispute did not arise in a purely arms-length business context, but in the context of a family. Defendants are long estranged from their father Daniel C., who mistreated them when they were children.

RA 372-73. On the other hand, their sister Angela has long acted as the father’s agent and power of attorney. RA 1189. In 1984, Angela, even while acting as executor of Clorinda’s will, acquiesced in her three siblings’ mutual understanding of their grandmother’s and mother’s intent, sharing from 1984 until 1999 in one-quarter interest in the substantial Trust income with her three siblings. In 1999, after fifteen years, Angela unexpectedly and abruptly moved to cut off the interest of defendants, and to acquire the whole. If Daniel C. acquires Clorinda’s Trust interest in this case, Angela is due to inherit that entire interest through her father’s will. RA 1177. In May 1998, Daniel C. also put his residence, which he acquired outside probate upon Clorinda’s death, in Angela and her husband’s name. RA 1186. Thus will complete Angela’s acquisition of all of her father’s and mother’s estate to the total exclusion of defendants. See Holsinger v. Holsinger, 357 Mass. 1, 3 (1970) (party seeking relief in equity must “come into Court with clean hands”).

Defendants testified that this mercenary financial maneuvering by their sibling, upon whom they were good terms, understandably has caused them years of extreme emotional distress.

RA 322, 622, 979. Although they would have been distressed even if Daniel C. had raised his claim back in 1984, his fifteen-year delay has exacerbated their feelings of family betrayal. Daniel C.'s and Angela's initial complaint even accused defendants of conversion, RA 64, and shockingly, sought retroactively to make them disgorge all past Trust income distributions that they (including then-plaintiff Angela) had received. RA 72, 310. Defendants, who had a good relationship with their sister Angela prior to this lawsuit, RA 626, remain willing to continue sharing the Trust income in equal shares with her. Defendants reasonably resent the fact that Angela shared the Trust income for fifteen years, without investigating whether her father had any viable legal claim in 1984, and now seeks to cut them off entirely from the inheritance promised by their grandmother and mother. "[I]t is always open to a court of equity in its discretion to do what justice and fair dealing require as to delay in making claims." Wigglesworth v. Cowles, 38 Mass. App. Ct. 420, 430 (1995) (citation omitted). "[C]ourts of equity are loath to allow loopholes, technicalities, or game-playing to dictate results when those results would violate basic notions of equity and fair play." Coral Springs St. Sys. v. City of Sunrise, 371 F.3d 1320, 1340 (11th Cir. 2004). Even if Clorinda's Trust interest technically passed to Daniel C. under her will, the laches defense is the appropriate equitable mechanism that should preclude Daniel C. and Angela from attaining what would be a demonstrably unjust outcome.

CONCLUSION

For the foregoing reasons, defendants respectfully ask this court to reverse the trial court's judgment disallowing their affirmative defense of laches, and to enter judgment for defendants on plaintiff's complaint in equity.

Respectfully submitted,
Daniel L. Bouchie, Linda A.
Tricca, and John M. Bouchie,
By their attorneys

Robert Deschene, Esquire
95 Church Street
North Attleboro MA 02760
Phone (508)316-3853
BBO # 675186

David G. Thomas
Greenberg Traurig
One International Place
Boston MA 02110
Phone 617-310-6000
BBO # 640854

Dated: July 20, 2009

CERTIFICATION PURSUANT TO MASS. R. APP. P. 16(K)

I, Robert Deschene, certify that this brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to: Mass. R. A. P. 16(a)(6) (pertinent findings or memorandum of decision); Mass. R. A. P. 16(e) (references to the record); Mass. R. A. P. 16(f) (reproduction of statutes, rules, regulations); Mass. R. A. P. 16(h) (length of briefs); Mass. R. A. P. 18 (appendix to the briefs); and Mass. R. A. P. 20 (form of briefs, appendices, and other papers).

—

Robert Deschene

CERTIFICATE OF SERVICE

I, Robert Deschene, attorney for defendants-appellants Daniel L. Bouchie, Linda A. Tricca, and John M. Bouchie, hereby certify that I have served two copies of this brief by first class mail, postage prepaid, to:

Michael L. Altman
Altman Riley Esher LLP
100 Franklin Street
Boston MA 02110

Signed under pains and penalties of perjury this 20th day of July, 2009.

Robert Deschene

ADDENDUM TO APPELLANTS' BRIEF

Judgment on Complaint in Equity (Bouchie v. Bouchie, No. 99-E-0187 (Prob. Ct. Mar. 27, 2009) 1

Memorandum and Order (Bouchie v. Bouchie, No. 05-P-1362 (App. Ct. Nov. 6, 2006) 35