

STATE OF MICHIGAN
COURT OF APPEALS

MARY K. KELLY, Personal Representative of the
Estate of MARK. W. KELLY, Deceased,

UNPUBLISHED
December 20, 1996

Plaintiff-Appellant,

v

No. 188628

Ingham Circuit Court
Ingham No. 94-50047-VJ
Jackson No. 93-67261-CB

KELLY, KELLY AND KELLY, a partnership, and
WILLIAM J. KELLY, individually,

Defendants-Appellees.

Before: Fitzgerald, P.J., and Holbrook, Jr., and E.R. Post,* JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's grant of defendants' motion for summary disposition based on the statute of limitations, MCR 2.116(C)(7), and the doctrine of laches, MCR 2.116(C)(10), in this case arising out of the dissolution of a partnership in which defendant William Kelly practiced law with his brother Mark Kelly, the decedent. We affirm.

On appeal, plaintiff first claims that the period of limitation for bringing a partnership accounting was tolled as a result of defendant's fraudulent concealment of plaintiff's claim. Because plaintiff's fraudulent concealment argument is raised for the first time on appeal, this Court need not consider it unless it is necessary to a proper determination of the case or manifest injustice would result. *Cramer v Metropolitan Savings Ass'n*, 136 Mich App 387, 405-406; 357 NW2d 51 (1983). Although defendant had a fiduciary duty to account to his deceased partner's estate in good faith, see *Phillipson v Phillipson*, 302 Mich 84, 91; 4 NW2d 477 (1942), there is no case law to support the argument that he was obligated to insist on a formal accounting or to advise the estate to seek a judicial winding up of the partnership. Decedent's wife was clearly aware that she was entitled to payment for decedent's interest and consulted with legal and financial experts before accepting defendant's offer of

* Circuit judge, sitting on the Court of Appeals by assignment.

\$100,000, which she collected over ten years without dispute. Moreover, the record offers no support for plaintiff's argument that the estate's right to an accounting could not have been discovered until December 1991—more than ten years after the decedent's death. Accordingly, we conclude that no injustice will result because of our failure to review this issue.

Plaintiff also argues that the equitable doctrine of laches should not have been applied to bar plaintiff's claim. We need not address this issue given our determination that plaintiff's claim is barred by the statute of limitation. Because laches is considered to be the equitable counterpart to a statute of limitations defense at law, the doctrine is not a defense that ordinarily should be addressed where a claim is time-barred under the applicable statute of limitation. *Eberhard v Harper-Grace Hospitals*, 179 Mich App 24, 35; 445 NW2d 469 (1989). However, to the extent that plaintiff's claim seeks both legal and equitable relief, the trial court did not err in granting summary disposition on the alternative basis of laches. For the reasons outlined above, we find that this case presents the type of compelling equities that justifies application of the doctrine of laches to defeat plaintiff's recovery in either law or equity. *Id.* at 37.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Donald E. Holbrook, Jr.
/s/ Edward R. Post