

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2008).*

STATE OF MINNESOTA
IN COURT OF APPEALS
A09-703

In Re WCAL Charitable Trust

Filed December 29, 2009
Affirmed
Larkin, Judge

Rice County District Court
File No. 66-CV-08-3602

Michael W. McNabb, Ames Business Center, 2500 West County Road 42, Burnsville,
MN 55337 (for appellant-SaveWCAL)

Michael R. Cunningham, Robert E. Harding, Sarah Duniway, Abigail S. Crouse, Gray,
Plant, Mooty, Mooty & Bennett, P.A., 500 IDS Center, 80 South Eighth Street,
Minneapolis, MN 55402 (for respondent-St. Olaf College)

Eleasalo V. Ale, Hazen Graves, W. T. Roberts III, Faegre & Benson, LLP, 2200 Wells
Fargo Center, 90 South Seventh Street, Minneapolis, MN 55402-3901 (for respondent-
Minnesota Public Radio)

Lori Swanson, Attorney General, Ann K. Bloodhart, Shannon M. Harmon, Assistant
Attorneys General, 445 Minnesota Street, Suite 1200, St. Paul, MN 55101 (for
respondent-State of Minnesota)

Considered and decided by Schellhas, Presiding Judge; Connolly, Judge; and
Larkin, Judge.

U N P U B L I S H E D O P I N I O N

LARKIN, Judge

Appellant SaveWCAL challenges the district court's grant of summary judgment to respondents St. Olaf College and Minnesota Public Radio (MPR). Because the district court did not abuse its discretion by granting summary judgment based on the doctrine of laches, we affirm.

FACTS

The parties agree that the relevant facts are undisputed. St. Olaf, a long-established and widely respected liberal-arts college located in Northfield, is a non-profit corporation organized under the laws of the State of Minnesota. It is also a tax-exempt organization under Section 501(c)(3) of the Internal Revenue Code. In 1922, the federal government issued a broadcasting license to St. Olaf to operate WCAL Radio (WCAL). When the Federal Radio Commission was created in 1927, one of the first 27 licenses granted was to St. Olaf to operate WCAL on an AM broadcasting frequency. In 1968, the Federal Communications Commission (FCC) issued a license to St. Olaf to operate WCAL at the 89.3 FM broadcasting frequency. In 1998, the FCC issued a license to St. Olaf to operate a translator station at the 88.7 broadcasting frequency to transmit the WCAL signal to southeastern Minnesota.

WCAL was the first listener-supported radio station in the nation. WCAL was a public radio service that was designed to broadcast classical music, public-affairs programs, and religious services to a large metropolitan community outside the academe in a manner that would reflect the intellectual, spiritual, and cultural traditions of St. Olaf.

The broadcasting studios and offices of WCAL were located in the Skifter Building on the St. Olaf campus. The building was built in stages from 1931 through 1991. The costs of construction were paid with charitable contributions from WCAL donors. In 1991, a new broadcasting tower was constructed to transmit the WCAL signal, at a cost of more than \$1 million, on land leased from the University of Minnesota in Rosemount. The cost of construction was paid with charitable contributions from WCAL donors and with a loan from St. Olaf, which was repaid with interest at the rate of seven percent per annum by charitable contributions.

At periodic intervals, St. Olaf renewed its broadcast licenses for WCAL pursuant to the requirements of federal law. In order to renew the licenses, St. Olaf had to demonstrate to the FCC that it was serving the public interest, convenience, and necessity. Over more than 80 years, tens of thousands of individual WCAL donors contributed millions of dollars to support WCAL. Their charitable contributions enabled St. Olaf to serve the public interest, the prerequisite for the renewal of its licenses for WCAL. The individual donors financially supported the radio station and enabled St. Olaf to continue its possession of the licenses and other assets. The support of the individual donors also enabled the college to obtain donations and grants from additional sources.

St. Olaf solicited donations and grants to provide for the operating costs, the capital assets, and the WCAL endowment. The donors to WCAL included corporations, foundations, the Corporation for Public Broadcasting (CPB), St. Olaf itself, and tens of thousands of individuals. St. Olaf solicited donations based on its representation that

charitable gifts would “help guarantee the future of Classical 89.3 for generations to come.”

In 2004, WCAL had 8,000 devoted listener-members and a weekly audience of 80,000 listeners. The broadcast signal reached the Twin Cities metropolitan area and southeastern Minnesota. More than three million listeners could access WCAL programming with a radio. At the same time, St. Olaf considered the station’s relevance to the college’s educational mission to have become increasingly tenuous. After evaluating WCAL against other programs more directly related to St. Olaf’s educational mission, the board of regents questioned whether continued operation of the radio station was in the college’s best interest. When the opportunity arose to sell St. Olaf’s FCC license and associated equipment for a reasonable price and to use the proceeds to advance St. Olaf’s primary mission of educating students, the board of regents determined that closing the radio station and selling the associated assets was in the best interests of St. Olaf and its students.

MPR is a non-profit corporation organized under the laws of the State of Minnesota. It is also a tax-exempt organization under Section 501(c)(3) of the Internal Revenue Code. Its principal place of business is in St. Paul. In November 2003, MPR submitted a multi-million dollar offer to St. Olaf for the assignment of the broadcasting licenses for 89.3 FM and 88.7 FM; the purchase of the Rosemount broadcasting tower; the assignment of the lease on which the tower is located; all other real property used in connection with the operation of WCAL; the purchase of personal property, including

most of the music library used in connection with the operation of the station; and the goodwill and going-concern value of the station.

MPR communicated the offer to the president of St. Olaf. The president turned the offer over to a vice president of St. Olaf and the chair of the finance committee of the board of regents of St. Olaf for evaluation. The finance committee chair was also a member of the board of trustees of MPR and the board of directors of Piper Jaffray & Co. St. Olaf and MPR did not notify the Attorney General of the State of Minnesota of the offer, nor did either party seek judicial approval for the sale.

On August 9, 2004, four days after St. Olaf accepted the MPR offer, the college informed the board of directors of WCAL of the MPR offer for the first time. The WCAL board of directors was established in 1979. The board was intended to serve as the community advisory board required by federal law as a condition to the receipt of federal funds. The purpose of the community advisory board is to enable the public to participate in significant policy decisions. Two of the WCAL directors were also members of the board of regents of St. Olaf. Neither director informed his or her fellow directors on the WCAL board of the MPR offer prior to August 9.

On August 30, St. Olaf and MPR submitted an application to the FCC for the assignment of the broadcast licenses for 89.3 FM and 88.7 FM.

SaveWCAL was organized on September 3, 2004, as a non-profit corporation under the laws of the State of Minnesota. It is also a tax-exempt organization under Section 501(c)(3) of the Internal Revenue Code. The purpose of the corporation, as expressed in its articles of incorporation, is to preserve WCAL. After St. Olaf announced

the sale of WCAL to MPR on August 10, SaveWCAL posted an electronic petition to demonstrate the listeners' fervent support for preservation of the radio station. More than 5,500 persons signed the petition by the end of 2004.

On October 5, the general counsel for SaveWCAL submitted a request to the attorney general of the State of Minnesota to exercise his statutory responsibility for supervision of charitable trusts by investigating the St. Olaf-MPR transaction. The request stated, in part, that "the proceedings before the FCC and the CPB will not provide a forum for the determination of compliance with the provisions of state law on charitable trusts." In a written response dated October 19, 2004, the attorney general refused to commence an investigation.

On November 15, the FCC approved the assignment of the broadcast licenses for 89.3 FM and 88.7 FM to MPR, and on November 19, 2004, the St. Olaf-MPR transaction closed. St. Olaf received \$10.5 million in cash from MPR plus promotional announcements for the college, to be broadcast on MPR. The parties agreed that the promotional announcements had a value of \$1.3 million. In December 2004, St. Olaf announced that the \$10.5 million in cash received from MPR would be added to the general endowment for the college. The income from that additional investment would be used to repair the organ in the college chapel and to endow four faculty chairs. MPR has used the assets of WCAL for its own purposes, including broadcasting its own programming (alternative rock music) on 89.3 FM since January 24, 2005.

Over the years, St. Olaf had established an endowment for WCAL with some of the charitable contributions from WCAL donors. In March 2004, the value of the

endowment was approximately \$2.94 million. Between November 2004 and December 2006, St. Olaf withdrew approximately \$1.6 million from the WCAL endowment, including a gift from a senior regent valued at \$1 million. The value of the charitable gifts in the WCAL endowment after the withdrawals was approximately \$1.36 million.

In December 2006, St. Olaf filed a petition in Rice County District Court requesting approval to use the charitable gifts remaining in the WCAL endowment. St. Olaf designated three major categories of donations: (1) restricted endowment gifts, valued at approximately \$401,600 as of April 2006; (2) restricted non-endowment gifts, valued at approximately \$651,000 as of April 2006; and (3) undocumented gifts, valued at approximately \$230,000 as of April 2006. St. Olaf requested the district court to approve the use of the restricted endowment gifts for activities it defined as “core WCAL activities.” St. Olaf also requested the district court to declare that there were no longer any restrictions on use of the restricted non-endowment gifts and the undocumented gifts.

The attorney general responded to the petition in the form of a letter memorandum. SaveWCAL also responded to the petition in the form of a letter memorandum, but SaveWCAL did not file a petition or cross-petition. Hearings on the petition were held in Rice County District Court in March, April, and May 2007. On June 20, the attorney general filed a memorandum of law expressing her official position. In July, the district court appointed a senior district court judge as a special master.

St. Olaf represented to the district court that it had obtained the consent of living donors to withdraw the \$1.6 million from the WCAL endowment between November 2004 and December 2006 and that therefore there were no longer any restrictions on the

use of those donations. The senior regent whose gift was valued at \$1 million denied this representation in a letter submitted to the court, in which he declared that St. Olaf had never contacted him about withdrawal of his gift and had not obtained his consent.

In March 2008, the special master submitted his report. On June 10, the district court issued its order regarding St. Olaf's petition. The order granted St. Olaf's request to use the restricted endowment gifts for "core WCAL activities." The order restricted the use of the senior regent's gift that is valued at \$1 million to the same purpose. The order denied the petition with respect to the restricted non-endowment gifts and the undocumented gifts.

On September 24, 2008, nearly four years after the sale closed, SaveWCAL filed a petition pursuant to Minn. Stat. § 501B.16, subd. 19 (2008) and Minn. Stat. § 501B.31 (2008) "to redress a breach of a charitable trust" by St. Olaf, concerning its sale of WCAL to MPR. In its petition, SaveWCAL asserted that individual and corporate donors contributed millions of dollars to support WCAL and that those donations were for a charitable purpose: "the operation and perpetuation of a public radio station." SaveWCAL contended that the act of making those donations created a charitable trust under Minnesota law. SaveWCAL alleged that St. Olaf and MPR breached the alleged charitable trust and requested that the district court issue a judgment declaring the sale of WCAL void. In the alternative, SaveWCAL requested a judgment declaring that the sale did not terminate the "WCAL Charitable Trust" and that the assets of the trust include the current value of the \$10.5 million cash payment received from MPR, the current value of the \$2.96 million WCAL endowment, and the Skifter Building. SaveWCAL also

requested that the district court remove St. Olaf as trustee based on “its attempt to liquidate the WCAL Charitable Trust without notice and without judicial approval and for its attempt to convert the assets of the trust to its own purposes.” SaveWCAL stated that monetary damages were an inadequate remedy for the alleged breach and that “[a] judicial declaration that the St. Olaf–MPR transaction is void is the only adequate remedy for the breach of the WCAL Charitable Trust.”

On October 20, St. Olaf filed a motion for dismissal for failure to state a claim pursuant to Minn. R. Civ. P. 12.02(e), or, in the alternative, a motion for summary judgment pursuant to Minn. R. Civ. P. 56. On October 21, MPR filed a similar motion for dismissal or, in the alternative, for summary judgment. The district court granted the motions for summary judgment and dismissed SaveWCAL’s petition on the merits. This appeal follows.

D E C I S I O N

On appeal from summary judgment, an appellate court determines (1) whether there are any genuine issues of material fact and (2) whether the district court erred in its application of the law. *Olmanson v. LeSueur County*, 693 N.W.2d 876, 879 (Minn. 2005).

The district court’s grant of summary judgment was based on its conclusions that WCAL Radio itself is not a charitable trust, but rather an asset of St. Olaf; SaveWCAL lacks standing to enforce the alleged breach of the charitable trust; SaveWCAL’s action is barred by the doctrine of laches; and the actions of St. Olaf and MPR did not violate Minnesota statutes. We will affirm an award of summary judgment if it can be sustained

on any ground. *Winkler v. Magnuson*, 539 N.W.2d 821, 828 (Minn. App. 1995), *review denied* (Minn. Feb. 13, 1996). Because we conclude that the district court did not err by granting summary judgment based on its conclusion that SaveWCAL waited too long to assert a claim to set aside the sale of WCAL, we limit our review to the district court's application of the doctrine of laches.

Statute of Limitations

Minn. Stat. § 541.05, subd. 1(7) (2008), provides that an action to enforce a trust shall be commenced within six years. The parties agree that SaveWCAL filed its petition within the applicable limitations period. But the district court concluded that because SaveWCAL seeks an equitable remedy, the statute of limitations does not apply. SaveWCAL contends that this conclusion is erroneous and argues that the defense of laches does not apply to an action that is governed by an express statute of limitations. Thus, we first consider whether the doctrine of laches may be asserted against SaveWCAL, in light of the agreement that the petition was filed within the statutory limitations period.

The supreme court has consistently held that when an action is governed by a statute of limitations the doctrine of laches does not apply. *M.A.D. v. P.R.*, 277 N.W.2d 27, 29 (Minn. 1979); *Aronovitch v. Levy*, 238 Minn. 237, 241, 56 N.W.2d 570, 574 (1953). This rule applies to equitable actions *unless* it can be shown that the delay would result in substantial injury to innocent parties. *Aronovitch*, 238 Minn. at 241, 56 N.W.2d at 574. “A court of equity will not bar a claim . . . for a delay of less than the statutory period, at least, unless it be shown that the enforcement of the claim will result in

substantial injury to innocent parties.” *Id.* (quoting *McRae v. Feigh*, 143 Minn. 241, 246, 173 N.W. 655, 657 (1919)). We therefore turn our analysis to the exception to the general rule, applicable in cases involving equitable actions, and consider whether it can be shown that enforcement of SaveWCAL’s claim would result in substantial injury to innocent parties.

SaveWCAL agrees that its action lies solely in equity.¹ *See In re Ruth Easton Fund*, 680 N.W.2d 541, 547 (Minn. App. 2004) (recognizing that a district court’s jurisdiction over a charitable trust is equitable); *Restatement (Second) Trusts* § 392 (1959) (“The remedies for the failure of the trustees of a charitable trust to perform their duties under the trust are exclusively equitable.”). But SaveWCAL argues that the “innocent-party” exception does not apply because St. Olaf and MPR are not innocent parties but rather “co-conspirators in the breach of a charitable trust.” SaveWCAL offers several arguments in support of this contention but fails to address the impact of its requested relief on parties other than St. Olaf and MPR.

The district court properly considered the impact of SaveWCAL’s requested relief on parties other than St. Olaf and MPR. For example, the district court noted that St. Olaf has reasonably relied on the finality of the sale of WCAL and has made financial investments that benefit its students and faculty. The district court also noted that MPR has reasonably relied on the finality of the sale and has begun broadcasting *The Current* and that to void the sale would affect *The Current*, its employees, subscribing members,

¹ Indeed, at oral argument before this court WCAL’s counsel specifically stated that WCAL seeks only equitable relief and not monetary damages.

and contract partners. MPR employs 14 full-time employees and 6 part-time employees to operate The Current. The Current has an audience in excess of 156,000 listeners, and it sponsors or co-sponsors large-scale community activities such as *Rock the Cradle* and *Rock the Garden*, which together draw attendance of over 18,000 adults and children.

The district court’s application of the doctrine of laches was based on its consideration of the interests of innocent parties—St. Olaf students and faculty and The Current’s employees, members, and contract partners—and on its implicit determination that these innocent parties would suffer substantial injury if the sale of WCAL were voided four years after its finalization. We agree that the “innocent-party” exception to the general rule applies. Even though the district court may have erroneously concluded that the statute of limitations has no application in this case,² the district court’s ultimate decision to apply the doctrine of laches was sound.

Laches

We next review the district court’s application of the doctrine of laches to the undisputed facts. “Laches is an equitable doctrine applied to prevent one who has not been diligent in asserting a known right from recovering at the expense of one who has been prejudiced by the delay.” *Winters v. Kiffmeyer*, 650 N.W.2d 167, 169 (Minn. 2002) (quotation omitted). The doctrine is intended to “promote vigilance and to discourage

² While the district court’s supporting memorandum is thorough and well reasoned, it does not expand on the district court’s conclusion that “because SaveWCAL seeks an equitable remedy, the statute of limitations does not apply.” Thus, we do not know whether the district court concluded that the applicable statute of limitations was irrelevant to its laches analysis or instead concluded that laches applies, despite the unexpired statute of limitations.

delay.” *Sawyer v. Mangni*, 231 Minn. 457, 468, 43 N.W.2d 775, 781 (1950). “It operates to cut off stale claims of those who have procrastinated unreasonably and without excuse.” *Id.* A decision to apply the doctrine of laches is a preliminary matter that must be determined before making a decision on the merits. *Jackel v. Brower*, 668 N.W.2d 685, 690 (Minn. App. 2003) (citing *Melendez v. O’Connor*, 654 N.W.2d 114, 117 (Minn. 2002)), *review denied* (Minn. Nov. 25, 2003). The decision whether to apply laches in a summary judgment proceeding lies within the district court’s discretion and will be reversed only for an abuse of that discretion. *Id.*; *see also In re Marriage of Opp*, 516 N.W.2d 193, 196 (Minn. App. 1994) (“The standard of review of the district court’s decision on an issue of laches is whether the court abused its discretion.”), *review denied* (Minn. Aug. 24, 1994). A district court has abused its discretion when its decision is arbitrary, capricious, or not in conformity with law. *Ruth Easton Fund*, 680 N.W.2d at 547 (citing *Plunkett v. Lampert*, 231 Minn. 484, 492, 43 N.W.2d 489, 494 (1950)).

“Application of the doctrine of laches depends on a factual determination in each case.” *Harr v. City of Edina*, 541 N.W.2d 603, 606 (Minn. App. 1996). When determining whether the doctrine of laches bars a claim, a court must determine “whether there has been such an unreasonable delay in asserting a known right, resulting in prejudice to others, as would make it inequitable to grant the relief prayed for.” *Id.* (quoting *Fetsch v. Holm*, 236 Minn. 158, 163, 52 N.W.2d 113, 115 (1952)). The courts must consider the following factors when deciding whether the doctrine of laches applies: (1) the availability of the defense as determined by the nature of the action, (2) the

reasons for the delay, (3) prejudice, and (4) policy considerations. *M.A.D.*, 277 N.W.2d at 29.

“Mere delay does not constitute laches, unless the circumstances were such as to make the delay blamable.” *Elsen v. State Farmers Mut. Ins. Co.*, 219 Minn. 315, 321, 17 N.W.2d 652, 656 (1945) (quotation omitted). A claimant has knowledge of the right to make a claim when the claimant has actual notice of the claim or, in the exercise of proper diligence, ought to have discovered the claim. *Steenberg v. Kaysen*, 229 Minn. 300, 309, 39 N.W.2d 18, 23 (1949).

[L]aches is not, like limitation, a mere matter of time; but *principally a question of the inequity* of permitting the claim to be enforced, [] an inequity founded upon some change in the condition or relations of the property or the parties. . . . [Laches may be applied] where a court of equity finds that the position of the parties has so changed that equitable relief cannot be afforded without doing injustice, or that the intervening rights of third persons may be destroyed or seriously impaired. . . .

Kahnke v. Green, 695 N.W.2d 148, 152-53 (Minn. App. 2005) (quoting *Ward v. Sherman*, 192 U.S. 168, 177, 24 S. Ct. 227, 230 (1904)).

The district court concluded that SaveWCAL unreasonably delayed bringing its petition for relief, relying on the following undisputed facts. The board of directors of WCAL was informed of the MPR purchase offer in August 2004. SaveWCAL formed in early September 2004, approximately two and one-half months before the sale was finalized. By letter dated October 5, 2004, SaveWCAL notified the attorney general of the proposed sale, alleged that the sale constituted a breach of a charitable trust, and urged an investigation into the sale. On October 19, the attorney general responded to

SaveWCAL's request, declining to intervene. Despite its notice that the attorney general would not intervene to prevent the sale, SaveWCAL did not initiate legal action to pursue its breach-of-charitable-trust theory prior to finalization of the sale. In fact, SaveWCAL did not participate in any legal proceeding related to the sale until 2007 and did not file the petition that is the subject of this lawsuit until four years after the sale closed.

When St. Olaf filed a petition in district court in December 2006, seeking instruction with regard to certain endowments and other restricted gifts designated by donors to support WCAL, SaveWCAL opposed the petition. However, SaveWCAL did not file a petition for relief asserting its breach-of-charitable-trust theory. Instead, SaveWCAL submitted a letter to the district court in February 2007 in response to the petition, asserting that a breach of charitable trust had occurred, and requested that the district court expand the scope of the proceeding to include a review of the entire St. Olaf-MPR transaction. At a hearing on March 8, 2007, the district court stated to SaveWCAL's counsel: "Cut to the core of this whole thing. If I do allow you to ask questions, you are not going to get into the sale of the radio station, are you? That is done, over and done with as far as I'm concerned." And the district court's analysis in its memorandum supporting its final order on St. Olaf's petition begins: "The [c]ourt recognizes that the sale of WCAL is neither before the [c]ourt at this time nor has it ever been before the court." These statements indicate that the district court was not going to entertain arguments regarding the validity of the sale itself, nor arguments to set aside the sale, because that issue was not before the district court. Yet SaveWCAL did not file a motion, petition, or pleading requesting that the district court set aside the transaction

based on its breach-of-charitable-trust theory until September 2008, nearly four years after the sale closed.

SaveWCAL did not provide the district court with an explanation for its significant delay. The district court noted that SaveWCAL possessed knowledge of the sale, and had formulated its breach-of-charitable-trust theory, in the fall of 2004 and concluded that SaveWCAL's unexplained delay was unreasonable. This conclusion was not arbitrary or capricious. At oral argument before this court, SaveWCAL explained that it did not affirmatively pursue equitable relief on its breach-of-charitable-trust theory until nearly four years after finalization of the sale because it lacked financial resources to bring suit. This explanation, offered for the first time, does not change our view of the district court's conclusion. "Poverty alone is not a legally cognizable excuse for failure to initiate suit." *Altech Controls Corp. v. E.I.L. Instruments, Inc.*, 33 F. Supp. 2d 546, 554 (S.D. Tex. 1998).

The district court also reasoned that both St. Olaf and MPR are significantly prejudiced by SaveWCAL's delay in bringing its petition for relief. The district court noted that in the nearly four years between the sale and the filing of the petition, St. Olaf and MPR made significant financial decisions and undertook and implemented major programmatic actions based on the reasonable belief that the multi-million dollar sale was final. MPR made \$270,000 in improvements to its building and to studio, recording, and interconnection equipment to support The Current. It also invested \$400,000 in marketing and advertising, including outdoor billboard campaigns. MPR's operating expenditures for The Current during the period from November 2004 to June 2008 were

\$14.3 million, and during that period, it paid \$1.5 million in financing costs related to its acquisition of the stations. “It is a circumstance of importance, in determining whether a plaintiff has been guilty of laches, that the situation of the parties has changed” *Aronovitch*, 238 Minn. at 243, 56 N.W.2d at 574 (quotation omitted).

And the district court correctly reasoned that innocent parties, who are the beneficiaries of the actions of St. Olaf and MPR, such as St. Olaf’s students and faculty and The Current’s employees, members, and contract partners, are similarly prejudiced by SaveWCAL’s delay. For example, in January 2005, MPR sold the WCAL call letters to the Student Association of California University of Pennsylvania to be used for its radio station, WCAL 91.9 FM, California, Pennsylvania. One reason why equity discourages stale claims is because the lapse of time may be prejudicial by reason of “the intervening of equities in favor of innocent persons.” *Bausman v. Kelley*, 38 Minn. 197, 208, 36 N.W. 333, 337 (1888).

Finally, the district court cited *Carlson T.V. v. City of Marble*, 612 F. Supp. 669 (D. Minn. 1985), a decision written by then United States District Judge Diana E. Murphy, a widely-respected jurist. In *Carlson*, a city rejected Carlson’s bid to construct a cable television system and awarded the bid to Thomas at a public city council meeting on October 11, 1982. *Id.* at 670. Carlson was aware that the contract was awarded to Thomas at that time, and Carlson was notified in October 1982 that construction of the project would begin in November. *Id.* The system was operational as of April 1, 1983. *Id.* Thomas was paid in excess of \$108,000 for its work on the project. *Id.* In March 1984, Carlson filed an action against the city and Thomas claiming, in part, violations of

the Minnesota public bidding statute. *Id.* The court held that Carlson’s action was barred by the defense of laches. *Id.* at 672.

Carlson notes that there are two criteria for dismissal for laches: unreasonable delay in bringing the suit and prejudice to the defendant caused by such delay. *Id.* The court held that Carlson’s delay in bringing suit was unreasonable and prejudicial to the defendants because the bid award was finalized and the construction was undertaken. *Id.* at 673. “By the time the action was filed the system was fully operational, Thomas’ role was long completed, and the bid procedure could not be undone.” *Id.* The district court here similarly and correctly reasoned that St. Olaf and MPR fully completed the performance of the sales agreement years ago. The district court’s implicit conclusion that the sales transaction cannot be undone at this late date is sound.

The district court appropriately considered the unexplained reason for SaveWCAL’s delay, the prejudice to St. Olaf, MPR, and innocent third-parties, and policy considerations related to vacating a multi-million dollar sales transaction fully completed over four years earlier and decided that “[r]egardless of the merit of SaveWCAL’s position, because SaveWCAL waited nearly four years after the closing of a well-publicized, FCC approved, multi-million dollar transaction, to the prejudice of MPR, St. Olaf and others, laches bars the granting of equitable relief.” This decision is not arbitrary or capricious. To the contrary, it is supported by the uncontested facts and in conformity with law. Accordingly, we hold that the district court did not abuse its discretion by granting summary judgment in favor of St. Olaf and MPR based on its determination that SaveWCAL’s petition for relief is barred by the doctrine of laches.

Unclean Hands

SaveWCAL cites the doctrine of unclean hands and argues that the defense of laches is unavailable to St. Olaf and MPR, because they are co-conspirators in the alleged breach of trust. Specifically, SaveWCAL argues that St. Olaf violated federal and state law by diverting the assets of the purported charitable trust, and the proceeds from the sale of those assets, from the charitable purpose intended by the donors. SaveWCAL also argues that MPR failed to satisfy its duty to inquire regarding the nature of the trust and that MPR is liable for the unlawful conduct of St. Olaf under a conspiracy theory.

The district court did not determine whether the doctrine of unclean hands bars the defense of laches, presumably because SaveWCAL's argument on this issue was limited to an endnote in its memorandum in opposition to the motions to dismiss. In a section of its memorandum entitled "Statute of Limitations," SaveWCAL argued that the defense of laches does not apply to an action governed by an express statute of limitations. SaveWCAL noted the innocent-party exception to the general rule and argued that the exception would not "avail either St. Olaf or MPR," because they were "co-conspirators in the breach of a charitable trust." Near the end of its argument, SaveWCAL references an endnote that states: "The separate doctrine of unclean hands would render the defense of laches unavailable to St. Olaf and MPR even in the absence of an express statute of limitations." But the text of SaveWCAL's memorandum does not address this argument.³

³ SaveWCAL also referenced the endnote in a letter that it submitted to the district court in response to the reply memoranda of St. Olaf and MPR, stating: "The separate doctrine

Similarly, SaveWCAL did not analyze application of the unclean-hands doctrine to the undisputed facts of this case in its primary appellate brief. SaveWCAL merely included a footnote stating: “The separate doctrine of unclean hands would render the defense of laches unavailable to St. Olaf and MPR even in the absence of an express statute of limitations.” This footnote, like the identical endnote in SaveWCAL’s district court memorandum, contains citation to legal authority, but SaveWCAL did not provide any supporting legal argument or analysis until the submission of its reply brief. While SaveWCAL discussed the alleged transgressions of St. Olaf and MPR in its primary brief, arguing that they are not innocent parties, SaveWCAL did not provide any legal analysis regarding application of the unclean-hands doctrine.

Generally, we will not consider matters not argued to and considered by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). And an assignment of error in a brief based on “mere assertion” and not supported by argument or analysis is waived unless prejudicial error is obvious on mere inspection. *State v. Modern Recycling, Inc.*, 558 N.W.2d 770, 772 (Minn. App. 1997) (quoting *Schoepke v. Alexander Smith & Sons Carpet Co.*, 290 Minn. 518, 519-20, 187 N.W.2d 133, 135 (1971)) (declining to address an issue raised by appellant when appellant did not provide any analysis or argument to support appellant’s position on the issue). Finally, issues not raised or argued in a primary brief cannot be revived in a reply brief. *McIntire v. State*,

of unclean hands would render the defense of laches *unavailable* to St. Olaf and to MPR even in the absence of an express statute of limitations.” Again, SaveWCAL did not offer any legal argument or analysis in support of this statement.

458 N.W.2d 714, 717 n.2 (Minn. App. 1990), *review denied* (Minn. Sept. 28, 1990). For all of these reasons, SaveWCAL's argument regarding the doctrine of unclean hands is waived. And because St. Olaf, MPR, and the State of Minnesota were not given the opportunity to brief the issue, we will not apply the exception that allows us to consider an issue for the first time on appeal when the issue is plainly decisive of the entire controversy and the lack of a district court ruling causes no possible advantage or disadvantage to either party. *See Watson v. United Servs. Auto. Ass'n*, 566 N.W.2d 683, 687-88 (Minn. 1997) (applying the exception and deciding a new issue on appeal when the issue was raised prominently in the appellate briefs).

Conclusion

We acknowledge and respect the loyalty and devotion that SaveWCAL has shown to this radio station. We also recognize that our decision may be unpopular. Nevertheless, we are obligated to follow the law. The district court did not abuse its discretion by concluding that even if SaveWCAL's breach-of-charitable-trust claim had merit and SaveWCAL had standing to pursue the claim, SaveWCAL waited too long to commence an action to set aside the sale of WCAL. Accordingly, we affirm.

Affirmed.

Dated:

Judge Michelle A. Larkin