



summary disposition. WIS. STAT. RULE 809.21 (2015-16).<sup>1</sup> Considering the undisputed facts and the applicable law, we conclude that the circuit court erroneously granted summary judgment to Kwik Trip on the ground of laches because the record demonstrates that Kwik Trip cannot satisfy two of the three elements of laches. Therefore, we reverse and remand for further proceedings consistent with this opinion and without further consideration of Kwik Trip's laches defense.

The following facts are undisputed. The grocery store and Kwik Trip are located in a shopping center. The shopping center is subject to a "Declaration of Cross-Easements, Covenants, and Restrictions" (the declaration). Kwik Trip, which began operating in 1995, was subject to the 1994 declaration; Convenience Store Investments, a predecessor in interest vis-à-vis the Kwik Trip property, was a party to the declaration.<sup>2</sup> In October 2008, Kwik Trip began expanding its store from 3121 square feet to 4448 square feet. However, despite expanding to over 4000 square feet and operating at 4448 square feet since May 2009, Kwik Trip continued to sell grocery-type items barred by Article II, sec. 2.03.05 of the declaration for an establishment exceeding 4000 square feet.

In an October 27, 2011 letter from its counsel, the grocery store informed Kwik Trip that it was in violation of the declaration due to its ongoing sale of grocery items prohibited in a store exceeding 4000 square feet. The letter cited the declaration's enforcement provisions, Article VI, sec. 6.01 (in the event of any violation of the declaration, owners and their successors and

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

<sup>2</sup> Kwik Trip does not argue on appeal that it is not subject to the declaration.

assigns have the right to equitable relief and damages). In February 2015, the grocery store sued Kwik Trip to enforce the declaration and recover damages. As an affirmative defense, Kwik Trip asserted laches.

Both parties sought summary judgment. After concluding that there were no genuine factual disputes and that Kwik Trip's laches defense prevailed as a matter of law, the circuit court granted summary judgment to Kwik Trip. The court determined that the grocery store and Kwik Trip were subject to the declaration. Until Kwik Trip expanded in 2008-09, it operated at 3121 square feet, the expansion put Kwik Trip at 4448 square feet, and Kwik Trip was selling items not permitted in an establishment exceeding 4000 square feet. The construction was open and obvious, the grocery store owners (the Semrads) knew that the declaration imposed restrictions on the Kwik Trip property, they witnessed the construction, but they did not inquire about its extent or purpose. The grocery store did not contact Kwik Trip about the expansion until October 27, 2011, when the grocery store's counsel raised issues about Kwik Trip's compliance with the declaration.

The circuit court concluded that the elements of laches were satisfied because the grocery store had constructive notice of building activity on Kwik Trip's site, the grocery store unreasonably delayed in making the October 2011 demand and filing the February 2015 suit, Kwik Trip did not have knowledge that the grocery store would seek to enforce the declaration until October 2011, and Kwik Trip was prejudiced by the delay because Kwik Trip's expansion had concluded in 2009.

On appeal, the grocery store argues that its October 27, 2011 letter timely informed Kwik Trip of its position that Kwik Trip was in violation of the declaration, and Kwik Trip had actual and

constructive knowledge of the provisions of the declaration. Kwik Trip argues that the circuit court correctly applied laches to bar the grocery store's claim.

We perform the summary judgment analysis de novo, applying the same method employed by the circuit court. *Brownelli v. McCaughtry*, 182 Wis. 2d 367, 372, 514 N.W.2d 48 (Ct. App. 1994). Summary judgment is only appropriate when undisputed facts show that a party is entitled to judgment as a matter of law. *Lambrecht v. Estate of Kaczmarczyk*, 2001 WI 25, ¶24, 241 Wis. 2d 804, 623 N.W.2d 751.

The equitable defense of laches can prevail on summary judgment only if all of its elements are satisfied in the summary judgment record. *Schafer v. Wegner*, 78 Wis. 2d 127, 132-33, 254 N.W.2d 193 (1977). The party asserting laches must prove that (1) the claimant unreasonably delayed in bringing the claim, (2) the defense lacked knowledge that the claimant “would assert the right on which the suit is based,” and (3) the defense was prejudiced by the claimant's delay. *Sawyer v. Midelfort*, 227 Wis. 2d 124, 159, 595 N.W.2d 423 (1999). If any laches element is not satisfied, laches will not lie. *Id.* Whether the elements of laches are satisfied on the record before this court presents a question of law that we decide independently of the circuit court. *Zizzo v. Lakeside Steel & Mfg. Co.*, 2008 WI App 69, ¶6, 312 Wis. 2d 463, 752 N.W.2d 889.

Kwik Trip charges the grocery store with knowledge of the nature, size and purpose of its expanded store and the declaration's applicable provisions. Yet, Kwik Trip ignores the actual and constructive notice and knowledge attributable to it regarding the same. The knowledge attributable to Kwik Trip is relevant to the laches analysis. See *State ex rel. Coleman v. McCaughtry*, 2006 WI 49, ¶29, 290 Wis. 2d 352, 714 N.W.2d 900.

It is undisputed that the grocery store gave notice in October 2011 that Kwik Trip was in violation of the restrictions.<sup>3</sup> However, prior to October 2011, Kwik Trip had actual and constructive notice of the existence of the declaration and its provisions, including the restrictions applicable to its property relating to square footage and permitted sale items. Kwik Trip also had constructive notice<sup>4</sup> of the likelihood that the grocery store would seek to enforce the declaration. Kwik Trip proceeded with the expansion and subsequent prohibited retail sales at its own risk. Put another way, Kwik Trip cannot satisfy either the second element of laches (lack of knowledge that the grocery store would seek to enforce the restrictions) or the third element (prejudice) because Kwik Trip acted at its own risk in expanding and operating in violation of the restrictions applicable to its larger store. Kwik Trip's laches defense does not survive in the case as a matter of law.

We reverse and remand for further proceedings consistent with this opinion and without further consideration of Kwik Trip's laches defense.

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily reversed pursuant to WIS. STAT. RULE 809.21, and the cause is remanded with directions.

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<sup>3</sup> On summary judgment, the grocery store cannot be charged with having notice of Kwik Trip's violation of the declaration until 2011 when the grocery store claims it learned about the declaration violation and sent the October 27, 2011 letter from counsel. See *Lambrecht v. Estate of Kaczmarczyk*, 2001 WI 25, ¶23, 241 Wis. 2d 804, 623 N.W.2d 751 (on summary judgment, the evidence is viewed most favorably to the party opposing summary judgment).

<sup>4</sup> Constructive notice of the existence of a claim can bar a laches defense against a later-filed claim. *Mutual Fed. S. & L. v. American Med. Servs.*, 66 Wis. 2d 210, 219 & n.8, 223 N.W.2d 921 (1974).

IT IS FURTHER ORDERED that this summary disposition order will not be published and may not be cited except as provided under WIS. STAT. RULE 809.23(3).

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*Sheila T. Reiff*  
*Clerk of Court of Appeals*