

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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HARVEY W. FAMBROUGH and PAMELA CADY,

UNPUBLISHED  
January 28, 1997

Plaintiffs-Appellants/Cross-Appellees,

v

No. 185561  
Wayne County  
LC No. 94-425718-NM

CARL L. RHOADS,

Defendant-Appellee/Cross-Appellant.

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Before: Corrigan, P.J., and Jansen and M. Warshawsky,\* JJ.

PER CURIAM.

Plaintiffs appeal as of right from a March 15, 1995, order granting defendant's motion for summary disposition on the basis of res judicata and collateral estoppel. Defendant cross-appeals as of right from the trial court's denial of his motion for summary disposition which was based on a statute of limitations defense. We affirm in part and reverse in part.

This is a legal malpractice case. On May 21, 1991, defendant Carl L. Rhoads, an attorney, drafted a will for Harvey G. Fambrough, plaintiffs' father. Defendant was the personal representative named in the will. Harvey G. Fambrough died on April 1, 1993, and on April 12, 1993, a petition for commencement of proceedings was filed in the Wayne County Probate Court. Administration of the estate was granted to defendant as personal representative. At a June 18, 1993, hearing, the will was admitted to probate and defendant was appointed personal representative of the estate. During the hearing, a dispute arose concerning the interpretation of certain provisions of the will. On July 21, 1993, defendant filed a petition for construction of the will. In connection with the petition for construction, notes of the testator regarding instructions for the will were provided to plaintiffs on September 14, 1993. From these notes, it was determined that there were omissions from the will contrary to the testator's express instructions. During a deposition, defendant admitted that he had made drafting errors in the writing of the will.

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

On March 4, 1994, the probate court entered an order settling the petition for construction of the will. In August 1994, a dispute arose regarding defendant's claims against the estate for services rendered. The probate court ordered the case to mediation regarding fees, and a hearing was held on December 19, 1994. Defendant itemized the fees totaling \$26,883.40. Plaintiffs argued that the fee should be reduced by \$10,000 because of defendant's inadvertence in not including two relevant phrases of instructions from the testator. The mediation panel evaluated the case at \$19,000, and, on January 10, 1995, an order was entered by the probate court awarding defendant \$19,000 in full payment for all services rendered to the estate. The order granting fees also states, "Neither this settlement nor this Order shall be construed to affect the rights of the parties in Wayne County Circuit Court civil action no. 94-425718-NM."

On August 29, 1994, plaintiffs filed an action in the Wayne Circuit Court against defendant alleging legal malpractice. Thereafter, defendant filed a motion for summary disposition on the basis that the statute of limitations had expired. The trial court denied the motion. Defendant filed a second motion for summary disposition on the basis of collateral estoppel and res judicata. The trial court granted the motion, ruling that plaintiffs were precluded from bringing this case on the basis that the parties agreed to settle the will construction claim (the underlying suit). On appeal, defendant argues that the trial court erred in denying his motion for summary disposition on the basis that the claim is time barred. Plaintiffs argue that the trial court erred in granting defendant's motion on the basis of res judicata and collateral estoppel.

We first address plaintiffs' argument that the trial court erred in granting defendant summary disposition on the basis of res judicata and collateral estoppel. Such a motion is properly granted under MCR 2.116(C)(7) (claim is barred because of prior judgment). In deciding a motion brought under MCR 2.116(C)(7), affidavits, depositions, admissions, or any other documentary evidence may be submitted by a party to support or oppose the grounds asserted in the motion. MCR 2.116(G)(2). If such documentary evidence is filed, the court must consider it when ruling on a motion brought under subrule (C)(7). MCR 2.116(G)(5). Here, documentary evidence was submitted by the parties; thus, like the trial court, we consider it when reviewing the motion for summary disposition. *Patterson v Kleiman*, 447 Mich 429; 526 NW2d 879 (1994).

First, to the extent that defendant argues that he owed plaintiffs no duty because they were not his clients, but only named beneficiaries in the will, we disagree on the basis of our Supreme Court's recent holding in *Mieras v DeBona*, 452 Mich 278; 550 NW2d 202 (1996). Our Supreme Court held that beneficiaries named in a will may bring a tort-based cause of action against the attorney who drafted the will for negligent breach of the standard of care owed to the beneficiary by nature of third-party status. *Id.*, p 308. Thus, defendant in this case owed a duty to plaintiffs in this negligence cause of action.

Turning to the issue of whether plaintiffs are barred by the principles of res judicata and collateral estoppel from bringing the present cause of action, we find that the trial court erred in so ruling. In *Lowman v Karp*, 190 Mich App 448, 452-453; 476 NW2d 428 (1991), this Court held that the plaintiff's settlement of the underlying action does not act as an absolute bar to a subsequent

legal malpractice action. Moreover, the parties in this case, in the order granting fees, stipulated that, “Neither this settlement nor this Order shall be construed to affect the rights of the parties in [this legal malpractice case].” The trial court ruled that the order itself was silent regarding any foreclosure of rights in the present legal malpractice case, and that plaintiffs were estopped from pursuing this case because they could have pursued these claims in the underlying probate court matter. We cannot agree with the trial court’s conclusion in this regard because the stipulation is included in the order and signed by both parties. The stipulation, therefore, is binding because it is in writing and subscribed by the party against whom the agreement is offered. MCR 2.507(H). The trial court erred reversibly in granting summary disposition to defendant on the basis of res judicata and collateral estoppel because the parties stipulated that the settlement of the will construction claim would not affect the rights of the parties in the legal malpractice case.

Defendant attempts to invalidate the stipulation, stating that he did not knowingly agree to such language. However, defendant never raised this issue below and he has attempted to expand the record on appeal by attaching an affidavit to this effect dated September 12, 1995. Because defendant never raised this issue and because this Court’s review is limited to the record developed in the trial court, we will not review this issue. MCR 7.210(A)(1); *Harkins v Dep’t of Natural Resources*, 206 Mich App 317, 323; 520 NW2d 653 (1994).

Last, we address the cross-appeal. Defendant argues that the trial court erred in denying his motion for summary disposition on the basis that the claim was time barred. In *Mieras, supra*, p 301, our Supreme Court stated that “because beneficiaries of a will have no rights under the will before the testator’s death, a disgruntled beneficiary’s cause of action does not ripen until the death of the testator.” The testator in this case died on April 1, 1993, and plaintiffs filed their cause of action on August 29, 1994. Further, in this case, defendant was appointed personal representative of the estate on June 18, 1993. It was not until March 4, 1994, when the probate court relieved defendant of his duties as personal representative.

A legal malpractice claim must be brought within two years after the date the attorney discontinues serving the client, or within six months after the plaintiff discovers or should have discovered the existence of the claim. *Maddox v Burlingame*, 205 Mich App 446, 450; 517 NW2d 816 (1994). A lawyer discontinues serving a client when relieved of the obligation by the client or the court, or upon completion of a specific legal service that the lawyer was retained to perform. *Id.* In this case, defendant was the personal representative of the estate, and was not relieved of that duty until March 4, 1994. Plaintiffs’ claim was filed on August 29, 1994. This is well within the two-year statute of limitations period for an action of legal malpractice. MCL 600.5805(4); MSA 27A.5805(4). Accordingly, the trial court did not err in denying defendant’s motion for summary disposition on the basis that the claim was time barred.

We affirm the trial court’s order denying defendant’s motion for summary disposition on the basis that the claim is not time barred, and we reverse the trial court’s order granting defendant’s motion for summary disposition on the basis of res judicata and collateral estoppel. This case is remanded for further proceedings. Jurisdiction is not retained.

/s/ Maura D. Corrigan  
/s/ Kathleen Jansen  
/s/ Meyer Warshawsky