

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

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RICHARD G. SMITH, JR.,

Plaintiff-Appellant/Cross Appellee,

v

DOUGLAS C. SMITH, Individually, as Trustee,  
and as Personal Representative of the Estate of  
Joyce Smith, SARAH J. SMITH-LUBARSKY,  
CARL H. SMITH III, THE ESTATE OF  
RICHARD G. SMITH, SR., RICHARD G.  
SMITH REVOCABLE TRUST, JOYCE SMITH  
REVOCABLE TRUST, THRUSHWOOD-SMITH  
FAMILY JOINT TRUST; and WEE HOUSE-  
SMITH FAMILY JOINT TRUST,

Defendants-Appellees,

ALBERT C. HICKS, and SMITH & BROOKER,  
P.C.,

Defendants-Appellees/Cross  
Appellants.

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UNPUBLISHED

April 19, 2005

No. 251773

Bay Circuit Court

LC No. 03-003286-CZ

Before: Murray, P.J., and Markey and O'Connell, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's grant of summary disposition to defendants under MCR 2.116(C)(7) for his failure to bring his claims within the time allotted by the relevant statutes of limitations. We affirm.

This case is essentially a dispute between plaintiff and his siblings over two pieces of property their parents owned and that we will collectively refer to as Thrushwood. Plaintiff claims that his siblings, his now-deceased mother, and his father's estate-planning attorney knowingly conspired to persuade his incompetent father to sign a few key documents, and then fraudulently concealed the documents from him. He claims that if these documents were properly undone, he would have received one-quarter of his father's share of the properties according to his father's desire as expressed in the father's original estate trust. Plaintiff also claimed that the personal representative of his father's estate, defendant Douglas, breached his

fiduciary duty by executing Thrushwood's sale to his mother, who then sold the property to plaintiff's siblings for the amount of the sale's proceeds. Plaintiff claimed that all of these transactions demonstrated fraud on the part of his siblings and his mother. Defendant siblings argued that plaintiff's share of the property's proceeds was correctly offset against an \$807,000 debt he owed the parents. They argued that a trust amendment required the trustee to account for the debt before disbursing the father's property from the trust. The trial court did not pass judgment on the merits of the parties' arguments, but rather dismissed the claims as untimely.

Plaintiff argues that the trial court erred when it granted defendants' motion for summary disposition based on the expiration of the relevant periods of limitations. We disagree. We review de novo a trial court's decision to grant summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

Plaintiff's claims for breach of fiduciary duty are easiest to dispose of. A plaintiff must bring a claim for breach of fiduciary duty against the personal representative in an independent probate proceeding within six months after the estate is closed. MCL 700.3956. The estate was closed on March 11, 2002, and plaintiff did not bring his suit until April 21, 2003. Therefore, plaintiff's claims for breach of fiduciary duty against Douglas are barred by the statute of limitations.

Before discussing the fraud claims, it is important to understand that plaintiff points to three incidents as fraudulent in his complaint. First, plaintiff claims that the defendants committed fraud by inducing his incompetent father to sign the trustee resignation and the supplement to his durable power of attorney. The facts underlying this alleged fraud occurred in September 1996. He next claims that these fraudulent actions led to the further fraud of establishing the QPRTs based on his mother's supplemented durable power of attorney. The facts underlying this alleged fraud occurred on February 20-21, 1997. The third alleged fraud was the transfer of plaintiff's share of the properties to his siblings through the series of real estate sales. These sales occurred in December 1999 as part of the probate administration.

The first alleged fraud involves all the defendants, including the attorney and his firm, because plaintiff claims that they all participated in the fraud or relied on and benefited from it later. Plaintiff's prayer for relief requests restitution of an undivided one-eighth interest in the properties to him, but the rest of his complaint and all his arguments focus on fraud.<sup>1</sup> Therefore, plaintiff does not merely claim a right to a portion of the property, but fraudulent conversion through the illicit use of documents signed by a known incompetent. Therefore, the six-year statute of limitation for fraud in MCL 600.5813 applies, rather than the fifteen-year limitations period for recovering land in MCL 600.5801(3) and the accrual period in MCL 600.5829. The six-year limitations period for fraud begins to run as soon as the wrongful fraudulent act is committed. MCL 600.5827; *Boyle v General Motors Corp*, 468 Mich 226, 227; 661 NW2d 557

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<sup>1</sup> Any action by plaintiff to assert plainly these property rights would be dismissed on the basis of res judicata because as an interested party with notice, he had an opportunity to present these issues in the probate proceedings. *Banks v Billups*, 351 Mich 628, 634-635; 88 NW2d 255 (1958). Therefore, plaintiff relies on his fraud claims to overcome any res judicata issues.

(2003). In this case, the first two wrongful acts claimed fall outside the limitations period because they were allegedly committed on September 26, 1996, and on February 20-21, 1997, more than six years before plaintiff filed his suit for fraud.

Nevertheless, plaintiff claims that the fraudulent concealment statute extended his time for bringing the fraud claims by two years, beginning on September 17, 2002, the date he claims he first learned of the fraudulent signatures on his father's trust resignation and the supplement to the durable power of attorney. The fraudulent concealment statute states that if a potential defendant conceals a claim, then suit "may be commenced at any time within 2 years after the [potential plaintiff] discovers, or should have discovered, the existence of the claim . . . ." MCL 600.5855.

In this case, plaintiff should have discovered his claim to the property by May 11, 2000, when plaintiff had actual notice that the property had been sold to the mother; that the sales proceeds, rather than the property, had fallen through from the will to the trust; and that his portion of the proceeds were offset against his debt to his father. On this date, plaintiff was also provided with a copy of the will, which explained that if the property were left in the estate, it would fall through to the trust. When this did not happen, as plaintiff's complaint claimed he anticipated, he should have suspected a serious circumvention of his rights and followed up on it. Therefore, plaintiff should have known of any fraudulent activity (even without knowledge of the power of attorney supplement and resignation) by the middle of May 2000, when he was first alerted that Douglas had executed the series of real estate transactions that completely divested him of any interest in the properties. "The question when a cause of action accrues for statute of limitations purposes is not whether the plaintiff has knowledge of sufficient facts to prevail on a claim, but whether the plaintiff has knowledge of sufficient facts to cause a reasonable person to pursue an investigation that could uncover the evidence needed to lead to an ultimate victory." *Moll v Abbott Laboratories*, 444 Mich 1, 21, n 25; 506 NW2d 816 (1993). Because plaintiff received notice of his unexpected divestment more than two years before he brought suit, the fraudulent concealment statute does not assist him.

Finally, because the allegedly fraudulent transfer to the mother occurred in the context of a court proceeding containing the same parties, plaintiff's independent fraud claims based on the probate transactions must fail. A person alleging fraud during a completed court proceeding must move the court to set aside the judgment and, essentially, reopen the case. MCR 2.612(C)(1)(c). Such a claim must follow within a reasonable time and, in case of fraud, no later than one year after the final judgment. MCR 2.612(C)(2). In this case, plaintiff failed to bring the immediate action within one year following the closing of the probate estate, and he did not even bring it in the right county. Under these circumstances, the trial court correctly granted defendants' motion for summary disposition. Moreover, plaintiff at one point asked the Bay Circuit Court to reopen the probate case, but of course, the court had no jurisdiction over the Emmet County matter. When a plaintiff who alleges fraud could have resolved the issue in the original proceedings or through MCR 2.612, the court will not allow any independent action for fraud to proceed. *Daoud v De Leau*, 455 Mich 181, 200; 565 NW2d 639 (1997). Therefore, the trial court could have rested its opinion on this alternative basis, and did not err when it granted defendants' motion for summary disposition.

Affirmed.

/s/ Christopher M. Murray

/s/ Jane E. Markey

/s/ Peter D. O'Connell