

IN THE COURT OF APPEALS OF IOWA

No. 1-060 / 10-1225
Filed March 21, 2011

TRACY TRACY,
Plaintiff-Appellant,

vs.

PETER M. SOBLE, P.C.,
Defendant-Appellee.

Appeal from the Iowa District Court for Scott County, Gary D. McKenrick,
Judge.

Tracy Tracy appeals from the district court's grant of summary judgment in
favor of Peter Soble. **AFFIRMED.**

William J. Bribiesco and Anthony Bribiesco of William J. Bribiesco &
Associates, Bettendorf, for appellant.

Jack L. Brooks of Brooks & Trinrud, P.C., Rock Island, Illinois, for
appellee.

Considered by Vogel, P.J., and Doyle and Tabor, JJ. Mansfield, J., takes
no part.

TABOR, J.

Plaintiff Tracy Tracy appeals from the district court's grant of summary judgment in favor of Peter Soble, the attorney who represented her in a workers' compensation action against her former employer. Tracy filed suit against Soble, alleging that he breached their contract and engaged in negligent or fraudulent misrepresentation. She sought damages for "emotional distress and discomfort" under both causes of action. The district court concluded that any claims seeking damages for emotional distress were time barred by Iowa Code section 614.1(2) (2009). The court allowed the remainder of the contract and misrepresentation claims to proceed. Because Tracy fails to show that her personal injury claims should be accorded a longer statute of limitations, we affirm the district court's grant of summary judgment.

I. Background Facts and Proceedings

On September 29, 2002, Tracy retained Soble to file a workers' compensation claim related to injuries she received while on the job for ITW Fluids. They entered a contingent fee agreement, providing that the client would pay the attorney one-third of the net received from the compensation benefits. Under this agreement, Soble received \$449.61 on October 1, 2004, and \$2403.71 on October 11, 2004. Soble ended his representation of Tracy on June 16, 2005. The next month, he filed an attorney lien in regard to the workers' compensation matter.

In April 2007, Tracy hired a different lawyer, who requested an itemization of Soble's alleged attorney lien. Soble provided a list of costs and fees in

addition to those previously charged by way of the contingency agreement, totaling \$4327.50, based on an hourly rate of \$390.

On December 7, 2007, Tracy filed a petition for declaratory judgment, alleging that Soble was not entitled to the additional hourly fees he sought and asking the court to declare the lien invalid. Soble moved to dismiss the action, asserting that he was willing to release his attorney fee lien against Tracy. The court granted the motion on October 6, 2008.

On January 15, 2009, Tracy filed a petition at law and jury demand, alleging Soble breached their written contract for legal services and negligently or fraudulently supplied her information regarding how the attorney fees would be charged. The petition claimed that Soble's breach of contract and misrepresentations harmed her in three ways: (1) requiring her to hire an attorney to file the declaratory judgment action, (2) requiring her to incur costs associated with that action, and 3) causing her "unnecessary emotional distress and discomfort."

Soble moved for summary judgment on April 28, 2010, asserting that Tracy did not disclose any harm she suffered and that her claims should be dismissed under the doctrine of res judicata. Soble supplemented that motion on May 18, 2010, adding a statute-of-limitations claim. He filed a combined and recast motion for summary judgment on June 7, 2010. That motion asserted that Tracy's petition was subject to the doctrine of claim preclusion and her claims were barred by the two-year statute of limitations at section 614.1(2).

After a June 10, 2010 hearing, the district court concluded the doctrine of “res judicata/claim preclusion is not implicated in this matter.” But the district court did grant Soble summary judgment “on any claim for damages for emotional distress under the breach of contract claim set forth in Count I of the Petition.”

The court reasoned:

Emotional distress is clearly a personal injury, and as such, falls within the ambit of §614.1(2). Accordingly, Plaintiff was required to initiate any claims for emotional distress based on the agreement within two years of the date that Plaintiff should have known or had reason to inquire into the potential claim against Defendant. The Court finds that event occurred on the date Defendant filed his attorney lien, which was July 13, 2005. Any claim for emotional distress damages must have been filed on or before July 13, 2007.

By the same token, the court concluded that claims for emotional distress damages under count II of the petition were filed outside the two-year limitations period prescribed by section 614.1(2). Tracy appeals those conclusions in the summary judgment order.

We note that the summary judgment order did not dispose of the entire case.¹ The court determined that Tracy’s breach of contract claim regarding costs and attorney fees is covered by the ten-year statute of limitations at section 614.1(5). The court also ruled that the negligent or fraudulent misrepresentation

¹ The parties do not discuss whether this partial summary judgment may be deemed a final order for purposes of a direct appeal. When an order disposes of less than the entire case, it may still be considered “final” if it completely disposes of one or more claims which are distinct and separable from the undecided claims. *McGuire v. City of Cedar Rapids*, 189 N.W.2d 592, 596–97 (Iowa 1971). We believe this case falls under the *McGuire* rule because the emotional distress damage claims are distinct and separable from the surviving claims that enjoy longer limitation periods.

claims not involving emotional distress damages to a person were subject to the five-year statute of limitations at section 614.1(4).

II. Standard of Review

The district court may dispose of a claim barred by the applicable statute of limitations by granting summary judgment. *Stahl v. Preston Mut. Ins. Ass'n*, 517 N.W.2d 201, 202 (Iowa 1994). We review orders granting summary judgment for correction of errors at law. *Rucker v. Humboldt Cmty. School Dist.*, 737 N.W.2d 292, 293 (Iowa 2007). Summary judgment is appropriate only when the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits reveal no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. *Hegg v. Hawkeye Tri-County REC*, 512 N.W.2d 558, 559 (Iowa 1994). On appeal of a summary judgment ruling, we must decide whether a genuine issue of material fact exists, and if the district court correctly applied the law. *Id.*

III. Analysis

This appeal requires us to decide which statute of limitations governs Tracy's claims for emotional distress damages related to her attorney's alleged breach of contract and misrepresentation.

The district court decided her claims alleging personal injury in the form of emotional distress were time barred under section 614.1(2), which provides:

Actions may be brought within the times herein limited, respectively, after their causes accrue, and not afterwards, except when otherwise specially declared:

. . . .
2. Injuries to person or reputation—relative rights—statute penalty. Those founded on injuries to the person or

reputation, including injuries to relative rights, whether based on contract or tort, or for a statute penalty, within two years.

On appeal, Tracy contends that her claims were timely because they fell under the five-year statute of limitations in section 614.1(4), which provides:

Actions may be brought within the times herein limited, respectively, after their causes accrue, and not afterwards, except when otherwise specially declared:

.....

4. Unwritten contracts—injuries to property—fraud—other actions. Those founded on unwritten contracts, those brought for injuries to property, or for relief on the ground of fraud in cases heretofore solely cognizable in a court of chancery, and all other actions not otherwise provided for in this respect, within five years, except as provided by subsections 8 and 10.

Tracy relies on *Venard v. Winter*, 524 N.W.2d 163, 166 (Iowa 1994), which held that subsection four applied to a legal malpractice case because the cause of action “arose out of a relationship between Venard and Winter that was created pursuant to an oral unwritten agreement for services.” She acknowledges that *Venard* “may appear to be limited to oral attorney-client relationships,” but asks that we adopt a “bright-line rule” applying section 614.1(4) to all legal malpractice claims.

In determining the appropriate statute of limitations for a specific cause of action, we must examine “the *foundation* of the action. This means that the appropriate statute of limitations is to be ascertained by characterizing the actual nature of the action.” *Sandbulte v. Farm Bureau Mut. Ins. Co.*, 343 N.W.2d 457, 462 (Iowa 1984) (*overruled on other grounds by Langwith v. Am. Nat’l Gen. Ins. Co.*, 793 N.W.2d 215 (Iowa 2010)). Our supreme court has further described the phrase “actual nature of the action” as “the rights sued upon and not the

elements of relief sought for the claim.” *Venard*, 524 N.W.2d at 165 (citing with approval *Barrett v. Burt*, 250 F. Supp. 904, 905 (S.D. Iowa 1966) (“An inquiry regarding the appropriate statute of limitations to be applied must be premised upon the real nature of the action rather than the theory of recovery.”)). At least one commentator has highlighted the sometimes difficult task of divining the “actual nature” of claims for purposes of determining the proper statute of limitations: “To say that the substance or nature of the claim determines the applicable limitations period, however, is merely to beg the question: the nature of what aspect of the claim?” EJ Richardson, *Eliminating the Limitations of Limitations Law*, 29 Ariz. St. L.J. 1015, 1030 (Winter 1997).

When our supreme court has been called upon to pinpoint “the actual nature of the action” it has looked to what harm the plaintiff has alleged in the suit. See, e.g., *Vernard*, 524 N.W.2d at 166 (finding no basis to apply two-year statute of limitations because injury related to plaintiff’s loss of his property and not personal injury); *Franzen v. Deere & Co.*, 334 N.W.2d 730, 733 (Iowa 1983) (finding two-year limitations period applied because breach of implied warranty claims were “founded on injuries to the person”); *Clark v. Figge*, 181 N.W.2d 211, 213–16 (Iowa 1970) (finding five-year statute of limitations applied where plaintiff did not allege he sustained physical injury or emotional distress as a result of defendant’s alleged interference with business relationships).

In her petition, Tracy sought damages for “emotional distress and discomfort.” The district court was correct in finding that the “actual nature” of these actions fell into the category of “injuries to the person” under section

614.1(2). See *Borchard v. Anderson*, 542 N.W.2d 247, 249 (Iowa 1996) (noting limitations period for claims of emotional distress is two years). Tracy's attempt to label her entire suit as a legal malpractice action does not bring her under the holding of *Vernard*. Vernard's cause of action fell within the five-year statutory provision because it was "founded on unwritten contracts" and was "brought for injuries to property." *Vernard*, 524 N.W.2d at 166. The district court parsed out those claims brought by Tracy which were "founded on injuries to the person" and properly dismissed them as untimely.

Tracy alleges for the first time in her reply brief that even if the district court properly applied section 614.1(2), "her claim is still not barred by it because a reasonable juror could find that at least two acts of Soble's negligence occurred within the two-year statute of limitations." Because she did not advance this issue in her opening appellant's brief, we decline to consider it now. See *Young v. Gregg*, 480 N.W.2d 75, 78 (Iowa 1992) (reiterating that issue cannot be raised for the first time in a reply brief).

The district court was correct in granting summary judgment on the emotional distress claims.

AFFIRMED.