STATE OF MICHIGAN

COURT OF APPEALS

RONALD B. CHARFOOS and CAROL CHARFOOS TATOR,

Plaintiffs-Appellants,

v

JACK M. SCHULTZ,

Defendant-Appellee.

UNPUBLISHED
November 5, 2009

No. 283155
Oakland Circuit Court
LC No. 2007-084125-NM

Before: Wilder, P.J., and Meter and Fort Hood, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's order granting summary disposition to defendant. We affirm.

This case arises out of the estate of Herbert Charfoos (Herb). Herb died on July 6, 2005, of "multi-infarct dementia." Plaintiffs are Herb's children. Defendant was Herb's attorney and drafted his 2004 will and amendment to his revocable trust agreement. The effect of the 2004 changes was to disinherit plaintiffs of 70 percent of Herb's estate by giving it to his new wife.

Plaintiffs first argue on appeal that the trial court erred when it concluded that plaintiffs were barred from presenting evidence extrinsic to Herb's testamentary documents in order to prove legal malpractice. Plaintiffs contend that defendant had actual knowledge of Herb's mental incompetence at the time the documents were drafted. On appeal, the trial court's decision to grant or deny summary disposition is reviewed de novo. *Kuznar v Raksha Corp*, 481 Mich 169, 175; 750 NW2d 121 (2008). In reviewing a motion for summary disposition under MCR 2.116(C)(8), this Court considers the pleadings alone and accepts the factual allegations of the complaint as true. *Id*. at 176. Summary disposition is proper if the plaintiff's claims are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Id*. (internal quotations omitted).

The Supreme Court declared, in *Mieras v DeBona*, 452 Mich 278, 299; 550 NW2d 202 (1996), that the intended beneficiaries of a will are owed a tort-based duty, as third-party beneficiaries of the contractual relationship between the testator and the attorney contracted to draft the will, by the attorney to draft the document with the "requisite standard of care." The duty is limited to an obligation to fulfill the intent of the testator as expressed in the will. *Id*. at 301. This limitation requires that a party alleging legal malpractice by the drafting attorney is

prohibited from using "extrinsic evidence to prove that the testator's intent is other than that set forth in the will." *Id*. at 303. Further, this prohibition is extended to evidence surrounding the drafting of other testamentary documents – including trust documents, as in this case. *Bullis v Downes*, 240 Mich App 462, 468; 612 NW2d 435 (2000) (no distinction made among varieties of modern estate planning tools).

Here, the trial court prohibited plaintiffs from presenting evidence of Herb's mental competence, and defendant's knowledge thereof, before Herb's execution of his last testamentary documents. Without this evidence, plaintiffs were left with nothing with which to prove their claim.

Plaintiffs acknowledge the rule of *Mieras* but argue that this case differs from the prototypical *Mieras* case because they are arguing that defendant's conduct merely of drafting the testamentary documents, with knowledge of Herb's incapacity, constitutes malpractice. They argue that they do not need to introduce extrinsic evidence regarding the actual content of the documents to demonstrate malpractice. Therefore, they argue that there should be an exception to the rule in *Mieras* if intended beneficiaries seek to use evidence extrinsic to the testamentary documents to demonstrate that an attorney had actual knowledge of a testator's or settlor's incapacity at the time the documents were drafted.

The facts of this case do differ from the facts of *Mieras*. The intended beneficiaries in that case argued that the failure of the decedent's will to provide for a power of appointment was evidence of legal malpractice because it was the decedent's intent to exercise the power. *Mieras*, *supra* at 281. However, because the will contained no reference to the power of appointment, there was nothing intrinsic to the will that indicated a failure of the will to express the decedent's intent. *Id*. at 293, 308. In this case, plaintiffs contend that there could never be any indication of malpractice on the face of the documents because the malpractice occurred as a predicate to drafting the documents.

The Court in *Mieras* declared that intended beneficiaries *should* have the opportunity to challenge the actions of the drafting attorney because the personal representative of the decedent's estate would lack incentive to pursue such an action herself. *Mieras*, *supra* at 290. However, such challenges are limited in terms of permissible evidence because, otherwise, the danger of misinterpreting the decedent's intent in his absence, or of creating an incentive for intended beneficiaries to fabricate evidence, is too high. See *id*. at 304-305. Thus, despite the factual differences, the policy objectives in *Mieras* are mirrored in this case. Because Herb is deceased, the question of his competency at the time the documents were executed must be resolved in his absence. Further, there is a similar incentive on the part of disgruntled beneficiaries to fabricate evidence regarding the decedent's competency. Finally, at its heart, this remains a case about the intent of the decedent. Plaintiffs' claim is structured as a question of Herb's competence and defendant's knowledge of Herb's competence, but their alleged damages would be dependent on the fact that defendant's alleged error thwarted Herb's intent, of which there is no intrinsic evidence.

Again, *Mieras* limits the standing of intended beneficiaries to sue for legal malpractice where there is no evidence in the testamentary documents indicating that the testator's or settlor's intent may not have been expressed. *Mieras*, *supra* at 308. The Court cited the following statement from a Florida case: "'We adhere to the rule that standing in legal

malpractice actions is limited to those who can show that the testator's intent *as expressed in the will* is frustrated by the negligence of the testator's attorney.'" *Id*. at 305, quoting *Espinosa v Sparber*, 612 So 2d 1378 (Fla, 1993) (emphasis in original). We conclude that the Court in *Mieras* anticipated the instant factual circumstances and the trial court did not err in concluding that the rule in *Mieras* is applicable to this case.

Plaintiffs next argue that defendant was negligent for failing to adhere to Michigan Rule of Professional Conduct (MRPC) 1.14(b). MRPC 1.14 provides: "A lawyer may seek the appointment of a guardian or take other protective action with respect to a client only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest." However, defendant correctly notes that MRPC 1.0 states:

> Failure to comply with an obligation or prohibition imposed by a rule is a basis for invoking the disciplinary process. The rules do not, however, give rise to a cause of action for enforcement of a rule or for damages caused by failure to comply with an obligation or prohibition imposed by a rule.

Thus, regardless of whether defendant violated MRPC 1.14(b), the violation would not give rise to a legal malpractice action. Cf. *Evans & Luptak v Lizza*, 251 Mich App 187, 192-193; 650 NW2d 364 (2002) (MRPC may provide evidence of ethical standards for lawyers but does not give rise to an independent cause of action). Plaintiffs contend that this alleged rule violation could be *evidence in support of* a malpractice claim. However, there is simply no valid malpractice claim here to which to apply this "evidence."

Plaintiffs also argue that the trial court erred when it concluded that plaintiffs' claim was barred by the applicable statute of limitations. In reviewing a motion for summary disposition under MCR 2.116(C)(7), this Court accepts the plaintiff's well-pleaded allegations as true unless affidavits or other documents specifically contradict them. *Kuznar*, *supra* at 175-176. Further, this Court reviews all the evidence presented to the trial court and if the evidence demonstrates that one party is entitled to judgment as a matter of law, or that there is no genuine issue of material fact regarding the running of the period of limitations, summary disposition is appropriate. See *id*. at 175. Additionally, questions of statutory interpretation are reviewed de novo. *Id*. at 176.

Plaintiffs contend that the limitations period on their claim did not begin to run until defendant's legal relationship with Herb ended upon Herb's death on July 6, 2005, because defendant continued to provide services for Herb until his death. Specifically, plaintiffs argue that defendant continued to provide estate-related legal services to Herb until the time of his death. Defendant counters that the services from which the instant claims arose were completed when the documents in question were executed, in May 2004.

This Court's primary goal when considering statutory language is to give effect to the intent of the Legislature. *Alvan Motor v Dep't of Treasury*, 281 Mich App 35, 39; 761 NW2d 269 (2008). If the statutory language is unambiguous, no judicial construction is required and the plain meaning of the language must be applied. *Id*.

MCL 600.5838 governs the time for bringing a claim for legal malpractice:

> [A] claim . . . accrues at the time that person discontinues serving the plaintiff in a professional or pseudoprofessional capacity as to the matters out of which the claim for malpractice arose, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim. [See also *Kloian v Schwartz*, 272 Mich App 232, 237; 725 NW2d 671 (2006).]

Further, a legal malpractice claim must be brought within two years of the date the claim accrues, or within six months after the existence of the claim is discovered. MCL 600.5805(6); MCL 600.5838(2). It is the two-year period that is in dispute in this case.

In an ongoing attorney-client relationship, courts have generally found that a claim accrues when the attorney is relieved of his obligations by the client or a court. *Kloian*, *supra* at 237. However, this rule may be limited by the qualification of MCL 500.5838 that the relevant professional relationship is that "out of which the claim for malpractice arose," depending on the factual circumstances. *Id*. at 237-238. For instance, where the attorney is retained for a discrete legal service, any claim arising from that service accrues upon its completion. *Id*. at 238.

The claim in this case arose out of the drafting of the amendments to Herb's trust agreement and will. The documents were executed on May 14, 2004. Taking plaintiffs' allegations as true, defendant continued to provide additional legal services to Herb after this date, up to the date of Herb's death on July 6, 2005. Plaintiffs erroneously treat the attorney-client relationship between defendant and Herb as analogous to a case of ongoing representation, such as during litigation. See, e.g., *Gebhardt v O'Rourke*, 444 Mich 535, 541, 543-544; 510 NW2d 900 (1994) (accrual when criminal representation terminated). In this case, however, defendant provided a series of discrete legal services for Herb – drafting a prenuptial agreement, estate planning documents, etc. Moreover, plaintiffs' claim arose out of only one specific legal service provided by defendant and not, as they claim, from an ongoing relationship of estate planning services. Thus, the trial court did not err when it granted summary disposition to defendant on the ground that plaintiffs' claim was barred by the statute of limitations.

Plaintiffs also argue that the running of the limitations period was tolled for one year following Herb's death because of his mental disability. Regardless of Herb's capacity, plaintiffs misapprehend the disability rules for statutes of limitations. MCL 600.5851(1), cited by plaintiffs, provides:

> [I]f the person first entitled to make an entry or bring an action under this act is under 18 years of age or insane at the time the claim accrues, the person or those claiming under the person shall have 1 year after the disability is removed through death or otherwise, to make the entry or bring the action although the period of limitations has run.

Plaintiffs erroneously read this statute to mean that the claim may be brought for one additional year after the period of limitations runs. Instead, a plain reading of the statute provides that Herb's estate would have one year following *his death* to bring an action for legal malpractice, even if the period of limitations had run at that point. Plaintiffs brought their complaint on July 3, 2007, almost two years after Herb's death. This argument is meritless.

Plaintiffs finally argue that the trial court erred when it denied their motion to amend the complaint to add a count of intentional interference with a right of inheritance. This Court reviews a trial court's denial of a plaintiff's motion to amend her complaint for an abuse of discretion. *Dorman v Clinton Township*, 269 Mich App 638, 654; 714 NW2d 350 (2006).

The trial court denied plaintiffs' motion because it concluded that Michigan courts do not recognize a cause of action for intentional interference with a right of inheritance. On appeal, the parties cite competing unpublished opinions of this Court for their respective positions on this issue. In *In re Green*, unpublished opinion per curiam of the Court of Appeals, issued August 16, 1996 (Docket No. 173335), slip op, p 2, a panel of this Court stated:

> We expressly recognize this tort and join the numerous jurisdictions which have defined its elements as: (1) the existence of an expectancy; (2) intentional interference with that expectancy; (3) the interference involved conduct tortious in itself such as fraud, duress or undue influence; (4) a reasonable certainty that the devise to the plaintiff would have been received had the defendants not interfered; and (5) damages.

In a later case, another panel of this Court responded directly to *Green*:

> While the *Green* decision is well reasoned and persuasive, it is not binding precedent, MCR 7.215(C)(1). Furthermore, as thought provoking as [plaintiff's] argument may be, judicial restraint causes us to refrain from specifically recognizing this tort until the Michigan Legislature codifies this tort, or upon appropriate judicial review and expression of our Supreme Court. [*Dickshott v Angelocci*, unpublished opinion per curiam of the Court of Appeals, issued June 17, 2004 (Docket No. 241722), slip op, p 18.]

Neither of these unpublished opinions is binding on this Court. MCR 7.215(C)(1). Thus, because we find no published case law or statutory provision for plaintiffs' proposed cause of action, we conclude that Michigan courts have not yet recognized intentional interference with an expected inheritance as a valid cause of action in this state. See, e.g., *Livonia Bldg Materials Co v Harrison Constr Co*, 276 Mich App 514, 520; 742 NW2d 140 (2007) (looking to statute instead of to a nonbinding case); *Ensink v Mecosta County Gen Hosp*, 262 Mich App 518, 531 n 9; 687 NW2d 143 (2004) (Legislature creates cause of action); and *Reeves v Kmart Corp*, 229 Mich App 466, 474-476; 582 NW2d 841 (1998) (examining jurisprudence for recognition of a cause of action).

A trial court abuses its discretion when its decision falls outside the range of principled outcomes. See *Taylor v Mobley*, 279 Mich App 309, 315; 760 NW2d 234 (2008). The trial court's conclusion did not fall outside the range of principled outcomes because there is no binding authority recognizing the cause of action plaintiff sought to add.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Patrick M. Meter
/s/ Karen M. Fort Hood