

STATE OF MICHIGAN
COURT OF APPEALS

WAYNE M. SCHULTZ and SHARON M.
SCHULTZ,

UNPUBLISHED
July 14, 2011

Plaintiffs-Appellants,

v

ROBERT D. SAROW and LEARMAN, SAROW,
BIRCHLER, FITZHUGH & PURTELL, P.L.C.,

No. 298125
Bay Circuit Court
LC No. 09-003909-NM

Defendants-Appellees.

Before: SAAD, P.J., and JANSEN and DONOFRIO, JJ.

PER CURIAM.

Plaintiffs appeal as of right from a circuit court order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(7) on the basis that this legal malpractice action was barred by the statute of limitations. Because plaintiffs brought this legal malpractice action more than two years after defendants discontinued serving Walter Schultz, we affirm.

Plaintiffs brought this action against defendant Robert D. Sarow and his firm for legal malpractice in the drafting of trusts and amendments for the parents of plaintiff Wayne Schultz. Plaintiffs alleged that Sarow failed to properly draft the estate planning documents to effectuate his parents' intent, and thereby breached the standard of care owed to him, as a beneficiary of the trusts. Wayne's mother, Grace M. Schultz, died on May 30, 1999. Sarow last performed legal services for Wayne's father, Walter Schultz, on April 8, 2005. Sarow had no communication with and performed no additional legal services for Walter after that date. Walter died on February 7, 2007. After Walter's death, Sarow performed legal services for Julie A. Schultz, in her capacity as successor trustee of the trusts. Plaintiffs filed this action for legal malpractice on November 25, 2009. The trial court determined that plaintiffs' action was barred by the statute of limitations.

This Court reviews de novo a trial court's grant of summary disposition based on a statute of limitations. *Mayberry v Gen Orthopedics, PC*, 474 Mich 1, 5; 704 NW2d 69 (2005). Questions of statutory interpretation are also reviewed de novo. *Id.*

The parties agree that plaintiffs were required to file this action within two years of the date the claim accrued.¹ MCL 600.5805(6). They also agree that MCL 600.5838(1) governs the accrual of the claim. That statute provides:

Except as otherwise provided in section 5838a, a claim based on the malpractice of a person who is, or holds himself or herself out to be, a member of a state licensed profession 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. [Emphasis added.]

The parties disagree on the application of this statute to plaintiffs' action, which is premised on plaintiffs' status as third-party beneficiaries. According to defendants, plaintiffs' claim accrued when defendants discontinued serving Walter Schultz. Defendants assert that this last service was on April 8, 2005. In contrast, plaintiffs rely on Sarow's representation of the successor trustee to argue that they timely filed this action.

This Court's decision in *Ohio Farmers Ins Co v Shamie (On Remand)*, 243 Mich App 232, 240-241; 622 NW2d 85 (2000), addresses the accrual of a malpractice claim based on a third-party beneficiary theory of liability. In that case, the defendants were accountants who prepared financial reports for their client, Marcelli Construction Company. The plaintiff allegedly relied on these reports in making the decision to provide performance and surety bonds to Marcelli. Marcelli failed to meet its obligations and the plaintiff was required to make payments to its creditors. The plaintiff sued the defendants for accounting malpractice and asserted that it was a third-party beneficiary of the agreement between Marcelli and the defendants. *Id.* at 234-235. This Court recognized that MCL 600.5838 governed the accrual of the accounting malpractice claim. *Id.* at 240. The Court then explained the application of that statute where the plaintiff was relying on its status as a third-party beneficiary of the accountant-client relationship, stating:

In the present case, the determination of when plaintiff's claim accrued is complicated by the fact that plaintiff's claim is based on a third-party beneficiary theory of liability. When a plaintiff sues on such a theory, he "has the same right to enforce said promise that he would have had if the said promise had been made directly to him as the promisee." MCL 600.1405. Accordingly, plaintiff's third-

¹ Plaintiffs do not rely on the six-month discovery provision in MCL 600.5838(2). Defendants submitted evidence that attorneys for plaintiffs presented defendants' attorneys with a copy of a proposed legal malpractice lawsuit on February 20, 2008, more than six months before this action was filed.

party claim accrued at the same time that Marcelli's claim would have accrued, i.e., when defendants discontinued serving Marcelli in a professional capacity with regard to the matters out of which the accounting malpractice claim arose. [*Id.* at 241.]

In this case, plaintiffs acknowledge that their malpractice claim is premised on their standing as third-party beneficiaries. They rely on *Mieras v DeBona*, 452 Mich 278; 550 NW2d 202 (1996), and *Bullis v Downes*, 240 Mich App 462; 612 NW2d 435 (2000). In *Mieras*, the Court addressed the basis for allowing a beneficiary of a will to bring an action for malpractice against the attorney who drafted it, stating:

An attorney's primary duty in drafting a will is to draft a document that legally accomplishes the testator's intent regarding disposition of the testator's property. Drafting a document that fulfills the testator's desire to transfer property to named beneficiaries, however, creates a corresponding duty to the named persons because of their third-party beneficiary status. This is a contractual duty that gives rise only to contractual remedies.

If our inquiry were to end at this point, plaintiffs' claims would fail because neither count of the complaint was a claim in contract; both were grounded solely in tort principles. But this conclusion overlooks the tort-based liabilities that develop as a result of the contractual relationship when professional services are the product contracted for.

Typically, in contracting with the testator to draft a will, an attorney implicitly agrees to draft the will in accordance with the standard of care applicable in that field.

* * *

By nature of the named beneficiaries' status as *third-party beneficiaries of the contract between the attorney and the testator*, the attorney also owes the beneficiaries a tort-based duty to draft the documents with the requisite standard of care. Thus, there can be an independent duty owed to the beneficiaries, the breach of which is grounded in tort. [*Mieras*, 452 Mich at 299.]

In *Bullis*, 240 Mich App at 467-468, this Court explained that *Mieras* was not limited to beneficiaries of a will. The *Bullis* Court stated:

After all, the contractual promise *between an attorney and a decedent* that underlies a negligence action is the promise to establish a testamentary scheme by which the decedent's intended disposition of property will be accomplished. That might entail the drafting of a single document, or it might require the establishment of more complex testamentary design. [*Id.* at 468 (emphasis added).]

The foregoing authorities support the trial court's decision to grant defendants' motion. *Ohio Farmers Ins Co*, 243 Mich App at 241, indicates that a plaintiff's malpractice claim that is

based on a third-party beneficiary theory of liability accrues at the same time that the promisee/client's claim would have accrued. i.e., when the defendants discontinued serving that client in a professional capacity with regard to the matters out of which the malpractice claim arose. *Mieras* and *Bullis* indicate that the malpractice action in circumstances such as these arises from the promise between the attorney and the decedent. Thus, plaintiffs' claim accrued when defendants discontinued serving Walter Schultz with respect to the matters out of which the claim for malpractice arose. MCL 600.5838(1). Contrary to plaintiffs' argument, defendants' representation of the successor trustee after Schultz's death has no effect on the accrual of the claim.

With respect to when defendants discontinued serving the decedent, Walter Schultz, "[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." *Balcom v Zambon*, 254 Mich App 470, 484; 658 NW2d 156 (2002) (citation omitted). Defendants provided specific legal services for Walter Schultz and presented evidence that they did not provide any legal services for Walter after April 8, 2005. Plaintiffs do not dispute this evidence, but instead incorrectly rely on defendants' services for the successor trustee. Because plaintiffs do not contest that the last service provided to Walter was more than two years before they filed the action, the trial court correctly granted defendants' motion for summary disposition.

In any event, even if this Court were inclined to treat defendants' representation of the trust as part of defendants' representation of the Schultzes, *Ohio Farmers Inc Co*, 243 Mich App at 241-243, suggests that the claim would still be untimely because the "matters out of which the claim for malpractice arose" involved the drafting of the trust documents, which were complete in 2005. In *Ohio Farmers Inc Co*, at least one of the accountants continued to perform services for Marcelli even up to the time that the plaintiff filed the complaint. *Id.* However, this Court explained that the allegations of malpractice concerned the reports for the years 1991 through 1995, and concluded that the defendants "discontinued professional services 'as to the matters out of which the claim of malpractice arose'" at some point before March 28, 1996. *Id.* Thus, the Court viewed "the matters out of which the claim of malpractice arose" as the allegedly deficient reports. In the present case, plaintiffs' action is premised on alleged deficiencies in the trust documents and amendments. Those are "the matters out of which the claim of malpractice arose," not defendants' representation of the successor trustee after Walter Schultz's death. *Id.*

Plaintiffs' second stated issue challenges the trial court's denial of plaintiffs' motion for reconsideration. However, plaintiffs do not offer any additional argument on that point. They simply incorporate their arguments with respect to the order granting summary disposition. Because we have concluded that the trial court correctly granted defendants' motion for summary disposition, we likewise conclude that the trial court did not abuse its discretion when it denied plaintiffs' motion for reconsideration. *Corporan v Henton*, 282 Mich App 599, 605,

609; 766 NW2d 903 (2009).

Affirmed. Defendants, being the prevailing parties, may tax costs pursuant to MCR 7.219.

/s/ Henry William Saad

/s/ Kathleen Jansen

/s/ Pat M. Donofrio