

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

SUPERIOR COURT

(FILED: January 8, 2018)

AMBROSE C. MENDES, JR., ET AL.	:	
	:	
v.	:	C.A. No. PP-2009-1820
	:	
ALFRED FACTOR and	:	
KIRSHENBAUM & KIRSHENBAUM	:	

DECISION

KEOUGH, J. This matter is before the Court on Plaintiff Ambrose C. Mendes, Jr.’s (Ambrose¹ or Plaintiff) motion to amend the reason for appeal and to have the Consent Order heard. Alfred Factor (Mr. Factor) and Kirshenbaum & Kirshenbaum, Attorneys at Law, Inc. (K&K) (jointly, Defendants) contend that the new counts alleged in Plaintiff’s motion are barred by *res judicata* and also, in the alternative, by their applicable statute of limitations. Defendants further contend that any allegations of negligence or breach of fiduciary duty stemming from actions prior to 1987 are subject to *res judicata* based on the prior Rhode Island Supreme Court ruling in this case. Ambrose’s siblings, Victor Mendes (Victor) and Madonna Mendes (Madonna) (jointly, Intervenor Plaintiff and Intervenor Plaintiffs), do not object to the instant motion.

¹ All three Mendes children retain the same last name as each other and their deceased father. In order to avoid confusion, the Court will refer to the Mendes children by their first names without meaning any disrespect.

I

Facts and Travel²

Plaintiff's father, Ambrose C. Mendes, Sr. (Mr. Mendes), executed a Last Will and Testament on February 3, 1976. *Mendes v. Factor*, 41 A.3d 994, 997 (R.I. 2012). Under the terms of the will, Rufino Mauricio³ (Mr. Mauricio) and Mr. Factor were appointed as co-executors, and Isidore Kirshenbaum (Mr. Kirshenbaum) of K&K was the successor co-executor. *Id.* Except for his personal residence, the will transferred all of Mr. Mendes' property into a trust, to be managed by the trustee. *Id.* Mr. Mauricio was named as trustee, Mr. Factor as successor trustee, and Mr. Kirshenbaum was named as Mr. Factor's successor trustee. *Id.*

The trust was established for the benefit of Mr. Mendes' three children—Ambrose, Madonna, and Victor—with the net income to be distributed equally between the children. Furthermore, the trust provided that when the youngest child reached age thirty, the trust would terminate and the trust property would be distributed to the children in equal shares. *Id.* In the interim, the will granted the trustee full authority to “manage and control the trust estate.” *Id.*

Mr. Mendes died on September 30, 1976, and his estate was opened in the Providence Probate Court the same year. *Id.* At the time of his death, Mr. Mendes was the principal of Intersection Realty Inc. (Intersection Realty), which owned twenty-three parcels of real estate, including the Mendes Funeral Home, Inc. (Mendes Funeral Home) located at 70 Camp Street in Providence. *Id.*

² For more details, see *Mendes v. Factor*, 41 A.3d 994 (R.I. 2012) and *Mendes v. Factor*, No. PP 2009-1820, 2016 WL 5335453 (R.I. Super. Sept. 20, 2016).

³ Mr. Mauricio died in 2006. *Mendes*, 41 A.3d at 997 n.3.

Plaintiff and Intervenor Plaintiff and Intervenor Plaintiffs alleged in a Verified Complaint that Mr. Mendes, prior to his death, instructed Mr. Factor and K&K to transfer his ownership of both Intersection Realty and the Mendes Funeral Home to his three children. *Id.* They further alleged that the requisite documents of ownership prepared by Mr. Factor and notarized by Mr. Mauricio were to be submitted to the Office of the Secretary of State for validation but that the task was never accomplished. *Id.* Further, Plaintiff and Intervenor Plaintiffs aver that without their knowledge, Mr. Mauricio and Mr. Factor conducted a meeting on May 27, 1977, at which time they appointed Mr. Factor as president, treasurer, and secretary of Intersection Realty. *Id.* On December 4, 1979, the co-executors filed a first accounting with the Probate Court listing fifty-five shares of Intersection Realty with a value of \$276,148, a “received to date” amount of \$570,404.58, payouts in the amount of \$293,198.61, and a remaining balance of \$277,205.97. *Id.* This first accounting was approved by the Probate Court on September 8, 1981. *Id.* at 997-98.

Additionally, Plaintiff and Intervenor Plaintiffs alleged that Defendants sold the land and building on which the Mendes Funeral Home sat, but not the actual business. *Id.* at 998. They further maintained that between February 3, 1976 and May 1987, Defendants sold many of Intersection Realty’s properties below fair market value, failed to maintain insurance on the properties in their care, and failed to pay taxes on many of the properties—resulting in the government selling the properties at tax sales. *Id.* Moreover, they averred that the co-executors failed to ever create the trust that was called for in Mr. Mendes’ will. *Id.*

No docket entries were recorded at Providence Probate Court regarding the estate from June 2, 1987 until September 8, 2008. On September 8, 2008, Mr. Factor filed an amended second accounting⁴ and also a third and final accounting. *Id.* On September 18, 2008, the Mendes children objected to the entry of these accountings and petitioned the Probate Court for a hearing to challenge the validity of the accountings. *Id.* Thereafter, on March 3, 2009, the Probate Court entered a Consent Order pursuant to G.L. 1956 § 33–23–1(f). *Id.*

In the Consent Order, the parties conceded that the issues presented to the Probate Court could not be resolved there and stipulated to an appeal to the Superior Court. The parties agreed to submit a statement of facts and issues to be decided on appeal, including:

- “a) Whether the fiduciary breached his duties to the beneficiaries of the estate;
- “b) Whether the second and third accountings were properly allowed by the [P]robate [C]ourt;
- “c) Whether the executors had the authority to sell any assets of Intersection Realty Inc.;
- “d) If the executors did have the authority to sell the assets of Intersection Realty Inc., what monies, if any have not been accounted for in the Estate of Ambrose Mendes.” *Id.*

The parties further stipulated that each would be allowed to raise additional claims and defenses in conjunction with the appeal. *Id.* Thereafter, on March 3, 2009, and consistent with the Consent Order, Ambrose filed a claim of appeal with the Probate Court. *Id.* Only Ambrose signed the claim. *Id.* at 999.

On March 31, 2009, the three Mendes children also filed a Verified Complaint in the Superior Court alleging breach of fiduciary duty for failing to follow the trust

⁴ Mr. Factor originally filed a second accounting on November 12, 1981, but that action was never approved by the Probate Court. *Mendes*, 41 A.3d at 998 n.6.

document and negligence for breaching the duty of care owed to the Plaintiff and Intervenor Plaintiffs to carry out the trust document. *Id.* The Defendants subsequently filed a motion to dismiss the probate appeal contending Plaintiff and Intervenor Plaintiffs failed to perfect their appeal. *Id.* Also, Defendants moved to dismiss the Verified Complaint under Rule 12(b)(6) of the Superior Court Rules of Civil Procedure, maintaining that the statute of limitations had expired and therefore barred the claims. *Id.* The motions to dismiss were heard on January 5, 2010 and January 15, 2010. *Id.* Subsequently, the hearing justice dismissed both the probate appeal and Verified Complaint. *Id.* Plaintiff and Intervenor Plaintiffs filed a timely appeal. *Id.* at 999-1000.

On appeal, Plaintiff and Intervenor Plaintiffs challenged the hearing justice's findings that Victor and Madonna failed to perfect their appeals in the Superior Court because their signatures were not included on the claim of appeal and also that the probate appeal was not perfected because the reasons for appeal were not properly filed by them. *Id.* at 1000. Further, they challenged the motion justice's determination that the statute of limitations expired, barring the claims in the Verified Complaint. *Id.*

The Supreme Court first ruled that the hearing judge properly concluded that Victor and Madonna failed to perfect their appeals because their signatures were not included on the claim of appeal. *Id.* at 1001. Therefore, only Ambrose's appeal was perfected. *Id.* Furthermore, the Court found that Ambrose correctly filed the reasons of appeal by including them within the Consent Order. *Id.* at 1003.

With respect to the dismissal of the Verified Complaint, the Court confirmed the decision of the hearing justice, holding that Plaintiff and Intervenor Plaintiffs' claim for breach of fiduciary duty was barred by the ten-year statute of limitations pursuant to G.L.

1956 § 9-1-13(a),⁵ and that the negligence claim was barred by the three-year limitation for legal malpractice, as set forth in § 9-1-14.3.⁶ *Id.* Specifically, the Court determined that

“[a]ll the facts set forth in the complaint that Plaintiff and Intervenor Plaintiffs use to support their allegations of breach of fiduciary duty and negligence allegedly occurred between February 3, 1976, and May 1987. Although the complaint asserts that Factor ‘continued to act in some legal capacity, either as fiduciary of [the] estate, officer of Intersection Realty [or] attorney for the [p]laintiffs’ and that he presented an amended second, and third and final accounting in 2008, it does not refer to any specific wrongful conduct by him after 1987.” *Id.* at 1004.

Additionally, the Court held that the continuing representation doctrine has not been adopted in Rhode Island and that even if it had, the doctrine would not apply in this case because the allegedly actionable conduct occurred more than twenty years before the suit was filed. *Id.* at 1005. Finally, the Court determined that the discovery-rule exception to the statute of limitations did not apply because Plaintiff and Intervenor Plaintiffs were aware of each allegation before 1987 and were not required to wait until the final accounting to file a claim for wrongdoing against the trustees. *Id.* at 1005-6. Ultimately, the Court affirmed the dismissal of Intervenor Plaintiff and Intervenor Plaintiffs’ probate appeal and the Verified Complaint, but allowed Ambrose’s probate appeal to continue and remanded the record of the case to the Superior Court. *Id.* at 1006.

⁵ G.L. 1956 § 9-1-13(a) states: “Except as otherwise specially provided, all civil actions shall be commenced within ten (10) years next after the cause of action shall accrue, and not after.”

⁶ Section 9-1-14.3 states, in pertinent part: “[A]n action for legal malpractice shall be commenced within three (3) years of the occurrence of the incident which gave rise to the action.”

Following the Supreme Court's decision, Ambrose, the sole remaining Plaintiff, continued his probate appeal *pro se* for several years. *Mendes v. Factor*, No. PP 2009-1820, 2016 WL 5335453, at *3 (R.I. Super. Sept. 20, 2016). Plaintiff later retained an attorney who filed the Amended Reasons for Appeal, which contained three counts: I) Accounting; II) Breach of Fiduciary Duty; and III) Negligence. (Amended Reasons for Appeal). Subsequently, Defendants filed a motion for partial summary judgment alleging that Counts II and III were the very same counts in the Verified Complaint that were previously dismissed by the lower court and affirmed by the Supreme Court. *Mendes*, 2016 WL 5335453, at *3

The motion, which was scheduled originally to be heard on January 13, 2016, was set down for hearing on April 5, 2016. *Id.* Prior to the hearing, the Court became aware of a letter sent to the Court by Ambrose informing the Court that Ambrose was not satisfied with his attorney's representation and wished to have him withdraw his appearance. *Id.* The Court again continued the hearing until June 21, 2016, with instructions for Ambrose to find another attorney, mend relations with his current attorney, or be prepared to argue *pro se*. *Id.* In a second letter dated May 2, 2016, Ambrose pleaded with the Court for help because he disagreed with his current attorney's representations, but he could not locate or afford another lawyer. *Id.* at 4. The Court permitted the withdrawal of his attorney and Ambrose ultimately elected to represent himself. *Id.*

On May 11, 2016, Plaintiff's former attorney filed a motion to intervene on behalf of Intervenor Plaintiff. The Court heard arguments on the motion on June 20, 2016 but reserved judgment. The hearing justice indicated, however, that he would allow

Intervenor Plaintiff and Intervenor Plaintiffs' attorney to argue, as an *amicus*, the motion for partial summary judgment scheduled for the following day.⁷

In support of their motion for partial summary judgment, Defendants argued that the doctrine of *res judicata* prohibited Counts II and III of the Amended Reasons for Appeal as they had already been litigated and dismissed by both the Superior and Supreme Courts. *Id.* at 5. Moreover, Defendants also argued that even if Plaintiff added more allegations past 1987, *res judicata* still barred the claims because they could have been litigated before. *Id.*

In turn, Plaintiff maintained that the Amended Reasons for Appeal were proper because the dismissed claims that were part of the previous lawsuit only included allegations up until 1987. *Id.* Accordingly, Plaintiff argued that the Supreme Court's prior decision concerned different allegations than those brought in the present suit; namely, allegations of negligence and breach of fiduciary duty relating to the 2008 accounting. *Id.* As such, Plaintiff claimed that the allegations brought in the present suit could properly be brought alongside those claims that had survived from the probate appeal. *Id.*

Ultimately, the Court found that "*res judicata* does not apply because there is no identity of issues." *Id.* at 6. In reaching this conclusion, the Court opined as follows:

"It is clear that the Amended Reasons for Appeal do not incorporate claims that were previously dismissed by the Supreme Court. . . . As articulated in the *Mendes* Supreme Court decision, the Verified Complaint alleged facts constituting breach of fiduciary duty and negligence that

⁷ Victor and Madonna's motion to intervene was ultimately granted. In so doing, the Court found that Victor and Madonna, as one-third beneficiaries of the estate, had a stake in the outcome of the proceedings, as they would be entitled to one-third each of any potential judgment. The Court further found that Ambrose, proceeding as a *pro se* litigant, could not adequately represent the interests of his two siblings in this litigation. *Mendes*, 2016 WL 5335453, at *8.

‘occurred between February 3, 1976, and May 1987’ although the facts continued through 2008. . . . The Amended Reasons for Appeal allege a breach of fiduciary duty and negligence regarding the failure of the Defendants to render a proper accounting—which will not go into the underlying alleged wrongdoings dismissed by our Supreme Court. Instead, if the trier of fact finds that Defendants in fact improperly performed the accounting of the estate, then the Plaintiff can seek additional damages for breach of fiduciary duty in regards to their performance to render a proper accounting, not in relation to the underlying claims. The amicus attorney explained that the issue moving forward is that ‘there were X number of dollars missing. We don’t care where they came from, didn’t come from, why it’s missing, why it’s not missing.’ . . . Rather, the fact that there is money missing from the trust is the root of the action for the breach of fiduciary duty. As such, as this case proceeds, there will not be relitigation of issues already decided by our Supreme Court. Therefore, the Amended Reasons for Appeal are not part of the same transaction as the previous claims dismissed by the Supreme Court.” *Id.* (Internal citations omitted.)

The Court also found that there was no merit to Defendants’ assertion that the claims in the Amended Reasons for Appeal could have been brought previously. *Id.* In reaching this conclusion, the Court opined that the Rhode Island Supreme Court had determined that Ambrose’s probate appeal survived summary judgment and that the Consent Order allowed for additional claims and defenses to be raised on appeal. *Id.* Therefore, the Court held that because Plaintiff’s first motion to amend the reason for appeal had been granted by the Court, it was still part of the same litigation and, thus, did not have to be brought earlier. *Id.*

Thereafter, Ambrose filed his second motion to amend the reason for appeal, which is the instant motion before this Court. Specifically, Ambrose seeks to the amend the reasons for appeal to include four new counts; specifically, Unlawful Conversion [sic] of Trust and Personal Assets and Property; Misrepresentation of a Material Fact;

Fraudulent Misrepresentation of a Material Fact; and Fraud. (Plaintiff's Motion to Amend the Reason for Appeal). The Defendants have objected.

II

Standard of Review

The statute with respect to reasons of appeal provides that:

“Within thirty (30) days after the entry of the order or decree, the appellant shall file, in the superior court, a certified copy of the claim and the reasons of appeal specifically stated, to which reasons the appellant shall be restricted, unless, for cause shown, and with or without terms, the superior court shall allow amendments and additions thereto.” G.L. 1956 § 33-23-1(a)(2).

The Court has power to grant such an amendment, but “it would not do so if the reasons of appeal, as amended, would not state a case.” *Batley v. Mathewson*, 23 R.I. 474, 474, 51 A. 102, 102 (1902). “[T]here is not an unlimited right of amendment at the pleasure of the appellant, and that the words ‘for cause shown’ require the court to determine among other questions the materiality or the immateriality of the amendment proposed.” *Fletcher v. Bd. of Aldermen of Newport*, 33 R.I. 388, 388, 81 A. 193, 193 (1911). Further, “the superior court should refuse to permit an amendment constituting an immaterial reason of appeal to be made.” *Id.* at 388, 81 A. at 193-94. “The jurisdiction to permit such an amendment being granted only ‘for cause shown,’ the granting of such permission is an adjudication by the court that in its opinion such an amendment constitutes, if sustained, a valid and legal ground of appeal.” *Id.* at 388, 81 A. at 194. As such, while it is clear that the Court has the power to permit amendment of the reasons of appeal, “this power must not be exercised arbitrarily.” *Spooner v. Tucker*, 86 R.I. 266, 272, 134 A.2d 403, 406 (1957).

III

Analysis

A

Res Judicata

Res judicata “relates to the effect of a final judgment between the parties to an action and those in privity with those parties.” *E.W. Audet & Sons, Inc. v. Fireman’s Fund Ins. Co. of Newark, N.J.*, 635 A.2d 1181, 1186 (R.I. 1994) (citing *Providence Teachers Union, Local 958—Am. Fed’n of Teachers, AFL–CIO v. McGovern*, 113 R.I. 169, 172, 319 A.2d 358, 361 (1974)). “The doctrine serves as a bar to a second cause of action where there exists: (1) ‘identity of parties’; (2) ‘identity of issues’; and (3) ‘finality of judgment in an earlier action.’” *IDC Props., Inc. v. Goat Island S. Condo. Ass’n, Inc.*, 128 A.3d 383, 389 (R.I. 2015) (quoting *Huntley v. State*, 63 A.3d 526, 531 (R.I. 2013)). “The principle underlying the rule of [*res judicata*] *** is that a party who once has had a chance to litigate a claim before an appropriate tribunal usually ought not to have another chance to do so.” *Id.* (quoting *Huntley*, 63 A.3d at 532). Our Supreme Court has stated that, “[o]ur jurisprudence on this issue is quite firm. ‘*Res judicata* bars the relitigation of any issue that could have been litigated in a prior proceeding, including a direct appeal, that resulted in a final judgment between the same parties, or those in privity with them.’” *Martinez v. State*, 128 A.3d 395, 396 (R.I. 2015) (quoting *Hall v. State*, 60 A.3d 928, 932 (R.I. 2013)); *Plunkett v. State*, 869 A.2d 1185, 1188 (R.I. 2005) (claim preclusion precludes relitigation of *all* issues that were tried or might have been tried in the original suit).

Moreover, our Supreme Court has held that it has adopted the Restatement's broad approach to *res judicata*, finding that the preclusive effect of the *res judicata* doctrine should be applied to "all or any part of the transaction, or series of connected transactions, out of which the action arose." *ElGabri v. Lekas*, 681 A.2d 271, 276 (R.I. 1996) (quoting 1 Restatement (Second) *Judgments* § 24) (internal quotation marks omitted); *Ritter v. Mantissa Inv. Corp.*, 864 A.2d 601, 605 (R.I. 2005). In determining "[w]hat factual grouping constitutes a 'transaction,' and what groupings constitute a 'series,'" the Court should be "pragmatic[], giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations * * *." *Ritter*, 864 A.2d at 605 (quoting *Manego v. Orleans Bd. of Trade*, 773 F.2d 1, 5 (1st Cir. 1985)). Also, the Court has found that "claims that 'could have been brought' are claims in existence at the time the original complaint is filed or claims actually asserted by supplemental pleadings or otherwise in the earlier action." *Belliveau Bldg. Corp. v. O'Coin*, No. C.A. NO. 90-2812, 1997 WL 839893, at *5 (R.I. Super. Feb. 19, 1997) (quoting *Manning v. City of Auburn*, 953 F.2d 1355, 1360 (11th Cir. 1992)); *Bossian v. Anderson*, 991 A.2d 1025, 1027 (R.I. 2010) ("The transactional rule provides that 'all claims arising from the same transaction or series of transactions which could have properly been raised in a previous litigation are barred from a later action.'" (quoting *DiBattista v. State*, 808 A.2d 1081, 1086 (R.I. 2002))).

Accordingly, the first element that this Court must examine is whether the parties to the second action are identical to or in privity with the parties involved in the first action. A party to an action has been defined as "[a] person who is named as a party to an

action and subjected to the jurisdiction of the court***.” 1 Restatement (Second) *Judgments* § 34(1). In the case at bar, identity of parties cannot be disputed. At all stages of this litigation Ambrose has been a Plaintiff and Mr. Factor, as well as K&K, have been the Defendants. Ambrose was a party to this dispute when it was first appealed to the Superior Court from the Providence Probate Court. He was also a party to the Verified Complaint filed in Superior Court and the subsequent dismissal of that Verified Complaint. Ambrose was a party to the appeal heard by the Supreme Court and has remained a party at all times up until the filing of this instant motion to amend the reason for appeal. Likewise, Mr. Factor and K&K have also been Defendants throughout the entirety of this litigation. Therefore, this Court finds that there is clear identity of parties.

The second element is identity of the issues. Unlike Ambrose’s prior motion to amend the reason for appeal, which did not go into the underlying alleged wrongdoings dismissed by our Supreme Court and was granted in September 2015, the present motion makes numerous allegations of wrongful conduct on the part of Mr. Factor and Mr. Mauricio that occurred prior to 1987; namely, that “defendants had sold off 4 of the properties Decedent had owned prior to 1982, and in 1985 Defendants’ [sic] started selling property off in whole lots from the remaining 23 properties.” (Pl.’s Mot. to Amend the Reason for Appeal, ¶ 27.) Further, the present motion alleges that:

“[o]n or about May 27, 1977, without notice to the principals of the Mendes Funeral Home Inc. and Intersection Realty [sic] Inc., Defendants’ [sic] Factor and Mauricio called a meeting of these two entities, falsely proclaiming that the late Mr. Ambrose C. Mendes was the ‘Sole Stockholder’ of Mendes Funeral Inc. and Intersection Realty [sic] Inc. Alfred Factor, falsely and fraudulently made himself President, Secretary and Treasurer of Intersection Realty Inc.” (*Id at* ¶ 42.)

These very issues were addressed in the prior rulings of both the Superior and Supreme Court. Our Supreme Court unequivocally ruled that any claims for negligence or breach of fiduciary duty in relation to these actions are time barred. Therefore, the Amended Reasons for Appeal sought by the instant motion currently before this Court are part of the same transaction as the previous claims dismissed by the Supreme Court. Thus, there exists a clear identity of the issues.

Finally, in regard to the third element of whether there is a final judgment, “[t]he burden is upon the party asserting *res judicata* to prove that the prior judgment on which it is relying was final.” *Huntley*, 63 A.3d at 532 (quoting 47 Am. Jur. 2d *Judgments* § 648 at 222 (2006) (internal quotation marks omitted)). When a case is dismissed because the statute of limitations expired, there is a question as to whether this is an adjudication on the merits. 2 *Civil Actions Against State & Local Gov’t* § 12:19 (“Some jurisdictions consider a dismissal for failure to satisfy a statute of limitations to be an adjudication on the merits for purposes of claim and issue preclusion, while others do not.”). Our Supreme Court has not yet reached this issue; however, the majority view is that a judgment dismissing a claim for the statute of limitations running will have preclusive effect. 50 C.J.S. *Judgments* § 1344 (“Dismissals on various grounds have been held generally to have preclusive effect, such as failure to prosecute, failure to state a claim upon which relief can be granted, lack of standing, and statute of limitations.”(internal quotation marks omitted); see *Huntley*, 63 A.3d at 532 (“the plain language of Rule 41(b) does not require that the merits of a claim be reached in order for a dismissal to operate[] as an adjudication on the merits. Instead, what is required is that the party had an opportunity to be heard.”) (internal quotation marks omitted)).

In the present case, this Court is satisfied that Ambrose has had more than a sufficient opportunity to be heard on the issues that he now seeks to raise via the instant motion. The conduct set out in the instant motion was also the central focus of the Verified Complaint, which was dismissed by the Superior Court and affirmed by the Supreme Court. Ultimately, both courts found that the conduct giving rise to the negligence and breach of fiduciary duty claims occurred beyond the scope of the applicable statute of limitations. Ambrose now seeks to use virtually the same facts that gave rise to support new claims with different names. Ambrose had his opportunity to be heard regarding the conduct he seeks to again allege.

Therefore, this Court finds that there exists an identity of parties, an identity of issues, and a finality of judgment in an earlier action. As such, the doctrine of *res judicata* applies to all of the allegations raised in the instant motion and bar their reassertion.

B

Statute of Limitations

Even if the doctrine of *res judicata* alone did not serve as a basis to deny Plaintiff and Intervenor Plaintiff's motion, this Court finds that the new claims are independently barred by their respective statutes of limitation.

Section 9-1-13(a) states that “[e]xcept as otherwise specially provided, all civil actions shall be commenced within ten (10) years next after the cause of action shall accrue, and not after.” Similarly, § 9-1-14.3 sets forth a three-year statute of limitations for legal malpractice claims. *See Sharkey v. Prescott*, 19 A.3d 62, 66 (R.I. 2011). Our Supreme Court has found that a claim for fraud that arises out of a professional

relationship with an attorney will be subject to the three-year statute of limitations for legal malpractice. *Behroozi v. Kirshenbaum*, 128 A.3d 869, 873 (R.I. 2016).

Ambrose's proposed Amended Reasons for Appeal reassert many of the same facts that supported the claims in the prior Verified Complaint that were deemed to be time barred by the Supreme Court. The majority of the allegations of fraud, mismanagement, and breach of fiduciary duties set out in Plaintiff's motion to amend the reason for appeal stem from actions or omissions that occurred from 1976 to 1987.

Regardless of whether the three-year statute of limitation for a legal malpractice claim or the ten-year statute for civil actions is applied in this case, the result is the same. The time in which the Plaintiff could have brought the claims stemming from the alleged mismanagement set forth in the motion to amend the reason for appeal has long since expired. As such, Ambrose's motion to amend the reason for appeal should be denied because the claims that it seeks to raise are time barred, and therefore, the reasons for appeal if allowed to again be amended would not state a case.

IV

Conclusion

For the above-stated reasons, Plaintiff's motion to amend the reason for appeal is DENIED because the claims are barred by *res judicata* and, in the alternative, are also barred independently by their respective statutes of limitations. The case should proceed under the current operative pleading, the 2015 Amended Reasons for Appeal.

Counsel shall submit the appropriate order for entry.



RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

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CASE NO: **PP-2009-1820**

COURT: **Providence County Superior Court**

DATE DECISION FILED: **January 8, 2018**

JUSTICE/MAGISTRATE: **Keough, J.**

ATTORNEYS:

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Patrick J. McBurney, Esq.**

For Defendant: **Robert M. Brady, Esq.
Joseph F. Penza, Jr., Esq.**