IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In re the Estate of HERBERT WILLIAMS, Deceased, TOM O'BRIEN, as AdmPR of the Estate of HERBERT aka HUBERT ANTONIO WILLIAMS, Appellant/Cross-Respondent, v. INSLEE BEST DOEZIE & RYDER, P.S., a Washington professional service corporation, and its DOE SUCCESSORS IN INTEREST; JOHN MILLER and JANE DOE MILLER, a marital community; MORROW & OTOROWSKI, LLP, a Washington limited liability partnership and its ROE SUCCESSORS IN INTEREST; and CHRISTOPHER OTOROWSKI and JANE DOE OTOROWSKI, and their marital community; and JOHN and JANE DOE, Respondents/Cross-Appellants.	)	No. 62646-9-I DIVISION ONE UNPUBLISHED FILED: December 28, 2009

Cox, J. — The trial court dismissed this malpractice action against two lawyers and their respective law firms based, in part, on the alleged failure of

statutory beneficiaries of the deceased to timely move to join the case as real parties in interest. These beneficiaries complied with the court's Order Dismissing Case and Allowing Statutory Beneficiaries Leave to Move for Reconsideration. Moreover, the defendants have not shown that they were prejudiced by any lack of timeliness of the statutory beneficiaries when they moved to join as parties. Finally, there are genuine issues of material fact regarding the lawyers' defenses to the action. We reverse and remand for further proceedings.

Herbert Williams (Herbert)[1] died intestate in 1997. His oldest son, Herbert Antonio Williams (Antonio), was appointed the original personal representative of the estate. Five other children survived Herbert: Antoinette Williams, Yvette Williams, Aaron Williams, Ryan Williams, and Taren Talley. As a matter of law, they are all the statutory beneficiaries of Herbert.[2]

Christopher Otorowski of Morrow & Otorowski, LLP, and John Miller of Inslee, Best, Doezie & Ryder, P.S., represented Antonio, the original personal representative. Otorowski represented him in a professional negligence and malpractice action "on behalf of the Estate ***and*** on behalf of Herbert Williams' surviving children, pursuant to RCW 11.28 et seq."[3] against Herbert's doctor,

---

[1] We adopt the parties' use of first and/or middle names for purposes of clarity.

[2] RCW 4.20.020, .046; see also Tait v. Wahl, 97 Wn. App. 765, 769, 987 P.2d 127 (1999), review denied, 140 Wn.2d 1015 (2000) (discussing tiers of beneficiaries under the wrongful death statute).

[3] Clerk's Papers at 88 (emphasis added).

George Dolack, MD, and Valley Internal Medicine, Inc. The complaint sought "all damages recoverable pursuant to wrongful death claims ***and*** the survivorship claim by Herbert Antonio Williams as the personal representative of the Estate of Herbert Williams, ***and*** on behalf of Herbert Williams' surviving children."[4]

The parties settled. The settlement funds were deposited in an unblocked account to which Antonio had unrestricted access. He misappropriated the funds.

On learning of Antonio's misfeasance, the trial court removed him as personal representative and appointed Tom O'Brien as the successor administrator of the estate. It also entered a judgment against Antonio in favor of the heirs of the estate.

O'Brien sued Antonio's lawyers for malpractice. Specifically, O'Brien took issue with the lawyers' failure to seek court approval of the settlement for the two statutory beneficiaries who were minors at the time of the settlement.[5] He also took issue with the lawyers' failure to obtain an allocation of the settlement proceeds, to protect those proceeds for the benefit of the statutory

---

[4] Clerk's Papers at 90 (emphasis added).

[5] See Superior Court Special Proceedings Rules (SPR) 98.16W(a) ("In every settlement of a claim, whether or not filed in court, involving the beneficial interest of an unemancipated minor . . . the court shall determine the adequacy of the proposed settlement on behalf of such affected person and reject or approve it.").

[6] See SPR 98.16W(h) (In settlement of a claim involving the beneficial interest of a minor, "[e]xcept for any structured portion of a settlement, the total judgment or total settlement shall be paid into the registry of the court, or as

beneficiaries,[6] and to obtain authority to disburse the proceeds of the settlement to the beneficiaries.

The lawyers moved for summary judgment, alleging, among other things, that they had no duty to O'Brien or the statutory beneficiaries because the beneficiaries were not the lawyers' clients. They also claimed that the action was barred by the statute of limitations and res judicata. The trial court denied the motions.

The lawyers then moved to dismiss or, in the alternative, to substitute the statutory beneficiaries as the real parties in interest. The trial court entered a series of orders in response to the motion. We discuss these orders with more specificity later in this opinion. Ultimately, the trial court granted the lawyers' motion and dismissed the case.

O'Brien appeals. The lawyers cross-appeal.

REAL PARTIES IN INTEREST

O'Brien argues that the trial court erroneously ordered the statutory beneficiaries to be substituted for him as plaintiffs in the legal malpractice suit against the lawyers. We hold that both the statutory beneficiaries and O'Brien, the successor personal representative, are real parties in interest for purposes of rights to the unallocated proceeds of settlement of the wrongful death and survivorship action.

---

otherwise ordered by the court. All sums deductible therefrom, including costs, attorney's fees, hospital and medical expenses, and any other expense, shall be paid upon approval of the court.").

CR 17(a) generally requires that all actions be brought by and in the name of the real party in interest. The rule provides:

> Every action shall be prosecuted in the name of the ***real party in interest.*** An executor, ***administrator***, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute ***may sue in his own name without joining with him the party for whose benefit the action is brought.*** No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.[7]

RCW 11.48.010 provides that a personal representative:

> [S]hall be authorized in his or her own name to maintain and prosecute such actions as pertain to the management and settlement of the estate, and ***may institute suit to collect any debts due the estate*** or to recover any property, real or personal, or for trespass of any kind or character.[8]

RCW 11.02.005 provides that the terms "personal representative" and "administrator" are interchangeable for purposes of probate law.[9]

"'The wrongful death statute, RCW 4.20.010, provides that when the death of a person is caused by the wrongful act of another, his personal representative may maintain an action for damages against the person causing

---

[7] (Emphasis added.)

[8] (Emphasis added.)

[9] RCW 11.02.005(1) ("'Personal representative' includes executor [and] administrator."), (11) ("'Administrator' means a personal representative of the estate of a decedent and the term may be used in lieu of 'personal representative' wherever required by context.").

the death.'"[1] "Every such action" must be for the benefit of certain statutorily-defined beneficiaries under RCW 4.20.020.[11]

In contrast, Washington's general survival statute, RCW 4.20.046(1), does not create a separate claim for the decedent's survivors, but merely preserves the causes of action a person could have maintained had he or she not died.[12] Therefore, unlike the wrongful death statute, the decedent's personal representative can recover damages under RCW 4.20.046(1) on behalf of the decedent's estate.[13]

Here, there can be no serious dispute that a personal representative of an estate is an "administrator" for purposes of CR 17(a). Likewise, there can be no serious dispute that under the same rule the personal representative may sue in his or her own name, representing those on whose behalf he or she is authorized to act. For example, a personal representative may sue to recover "any debts due the estate."[14] Likewise, a personal representative is the exclusive person entitled to bring a wrongful death action on behalf of statutory

---

[1] Tait, 97 Wn. App. at 768-69 (quoting Long v. Dugan, 57 Wn. App. 309, 311, 788 P.2d 1 (1990)).

[11] RCW 4.20.020; see also Beal v. City of Seattle, 134 Wn.2d 769, 776, 954 P.2d 237 (1998) ("A wrongful death action must be brought by the personal representative of the decedent's estate and cannot be maintained by the decedent's children or other survivors.").

[12] Tait, 97 Wn. App. at 772 (quoting Cavazos v. Franklin, 73 Wn. App. 116, 119, 867 P.2d 674 (1994)).

[13] Id.

[14] RCW 11.48.010.

beneficiaries.[15] The real question is whether both the personal representative as well as the statutory beneficiaries are real parties in interest for purposes of this malpractice action.

The original personal representative sued Dr. Dolack and Valley Internal Medicine for professional negligence and malpractice. The settlement proceeds from that suit were acknowledged to have been received by the original personal representative "as Personal Representative of the Estate . . . ***and*** on behalf of the surviving children of Herbert Williams."[16]

At Miller's direction, Otorowski deposited a check for $221,194.59 in settlement proceeds into the estate's unblocked Bank of America account. Antonio misappropriated this money to which he had unrestricted access.

This record shows that the unallocated settlement proceeds arose from both the wrongful death and survivorship claims. As such, the estate has an undivided interest in these proceeds. O'Brien, as the current personal representative of the estate, accordingly, is a real party in interest who may assert a malpractice claim for the loss of these proceeds by actions or omissions of the lawyers.

The lawyers took the position below that the statutory beneficiaries are also real parties in interest. We agree. They too have an undivided interest in the settlement proceeds to the extent the funds represent amounts due them as

---

[15] RCW 4.20.010, .020.

[16] Clerk's Papers at 103 (emphasis added).

statutory beneficiaries.[17]

Since both O'Brien and the statutory beneficiaries are real parties in interest in this malpractice action, we must next consider whether dismissal of this action was appropriate. For the following reasons, we conclude that it was not.

CR 17 provides, in part:

> No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest ***until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of***, the real party in interest.[18]

Here, the lawyers moved to dismiss the case or substitute the statutory beneficiaries as the real parties in interest. The trial court granted the motion to substitute when it entered its order on August 5, 2008. That order required O'Brien to "present as [sic] motion and order substituting the real parties in interest subscribed by them or their guardian ad litem not later than thirty days after the entry of this order." For purposes of our analysis, we assume that the trial court considered 30 days a "reasonable time" under CR 17 for the statutory beneficiaries to take appropriate action.

On August 15, 2008, O'Brien moved for reconsideration and clarification, of the August 5 order. He argued that the court should allow him to remain as a

---

[17] See Tait, 97 Wn. App. at 769 (measure of damages under wrongful death statute is actual pecuniary loss suffered by surviving statutory beneficiaries).

[18] (Emphasis added.)

real party in interest to represent the interests of the estate. The trial court granted this motion when it entered its order on September 5, 2008.

On September 5, the 31st day following entry of the court's August 5 order, O'Brien filed a Motion and Order Re Substitution. The motion states, "Tom O'Brien, AdmPR, hereby moves to substitute the statutory beneficiaries of the late Herbert (Hubert) Williams, as real party-in-interest plaintiffs."[19] The motion contains the signatures of four of the statutory beneficiaries. On September 25, 2008, the trial court entered three orders, two of which are relevant to our analysis. The court vacated its September 5 order granting reconsideration, which had permitted O'Brien to remain as a real party in interest. It appears the court did so because it had failed to request a response from the lawyers before granting reconsideration, as required by King County Local Civil Rule 59(b).

In its Order Dismissing Case and Allowing Statutory Beneficiaries Leave to Move for Reconsideration entered on the same date, the court dismissed the action. The order states, "The statutory beneficiaries may seek reconsideration of this order within 30 days upon presentation of [an] appropriate motion to substitute proper plaintiffs in this action." This order was apparently based on O'Brien's alleged failure to "present as [sic] motion and order substituting the real parties in interest subscribed by them or their guardian ad litem not later than thirty days after the entry of this [August 5] order."

[19] Clerk's Papers at 1544.

We note that nothing in the record satisfactorily explains why the Motion and Order Re Substitution that O'Brien filed on September 5 failed to comply with this last order. That pleading expressly requests substitution of the statutory beneficiaries as plaintiffs. We also note that there is nothing in the record to show whether and why a one day tardy filing of the motion and proposed order was prejudicial to the lawyer defendants or their law firms. At oral argument, the lawyers' attorneys were unable to explain to our satisfaction any specific prejudice.

We are particularly perplexed by the Order Dismissing Case and Allowing Statutory Beneficiaries Leave to Move for Reconsideration since it appears to disregard the Motion and Order Re Substitution that O'Brien had already filed. The order allows an additional 30 days for compliance with something that O'Brien had already done—filing the motion for substitution.[2]

On October 8, 2008, O'Brien again moved for an order substituting the statutory beneficiaries as plaintiffs, pointing out that they had filed a motion to substitute on September 5. He also moved to restore himself as a plaintiff for the estate. The trial court, without explanation, denied these motions on November 3, 2008.

Because O'Brien is a real party in interest as personal representative of

[2] Counsel suggests that some documents may have been misfiled. See Appellants' Opening Brief at 9 n. 1 and 11 n.2. But we are unable to ascertain from the referenced document exactly what took place with respect to the motion and proposed order that neither party disputes was filed on September 5, 2008. In any event, the record reflects that a copy of that document was before the court in a motion for reconsideration.

the estate, the trial court erroneously dismissed his claims against the lawyers on behalf of the estate. Moreover, the statutory beneficiaries, who also are real parties in interest, are entitled to pursue this case for two reasons. First, they complied with the court's Order Dismissing Case, etc., by the filing of the Motion and Order Re Substitution on September 5. It does not matter that the motion was filed by O'Brien on their behalf. Second, that Motion and Order Re Substitution may also be viewed as their ratification of O'Brien's commencement of the action, as CR 17(a) expressly permits.

The lawyers make a series of arguments in opposition to our conclusion that O'Brien is a real party in interest. None of them are persuasive.

They argue that the Motion and Order Re Substitution that O'Brien filed one day late neither purports to substitute the statutory beneficiaries for O'Brien nor was it a notice of appearance by separate counsel for those beneficiaries. They also take issue with the fact that the motion was filed on the 31st day, September 5, but noted for presentation on September 16, 2008. They claim that the trial court's August 5 order required both filing and presentation within 30 days.

These arguments elevate form over substance. Nothing in this record required the statutory beneficiaries to have separate counsel for the motion. In view of the trial court's Order Dismissing Case and Allowing Statutory Beneficiaries Leave to Move for Reconsideration, any further attack on the Motion and Order Re Substitution makes no difference to the correct outcome.

This is particularly true due to the noticeable lack of a showing of prejudice to the lawyers by the one day late filing of the motion and proposed order.

The lawyers also argue, without citation to authority, that the untimely filing of the Motion and Order Re Substitution was due to inexcusable neglect. While inexcusable neglect has a bearing for the concept of relation back under CR 15,[21] the lawyers have not demonstrated any basis to apply that principle here. Again, the lack of a showing of prejudice to the lawyers speaks loudly.

Finally, the lawyers argue that O'Brien "can have no standing under CR 17(a)" because the words "personal representative" do not appear in CR 17. We reject this argument for the reasons we have already discussed in this opinion.

In sum, the trial court's dismissal of the estate's malpractice claim brought by O'Brien was inappropriate. O'Brien, as personal representative, is a real party in interest. Likewise, the statutory beneficiaries of the proceeds of the wrongful death claims are also real parties in interest.

We view the Motion and Order Re Substitution that four statutory beneficiaries signed as their indication that they ratified the commencement of this malpractice action, as CR 17 permits. We also regard their signatures on that pleading as compliance with the trial court's orders permitting them to join the case as real parties in interest. In the context of this record, we also regard

[21] See, e.g., S. Hollywood Hills Citizens Ass'n v. King County, 101 Wn.2d 68, 77, 677 P.2d 114 (1984) (issue of whether an amended pleading naming a necessary party will relate back is decided under CR 15(c) and the doctrine of inexcusable neglect).

their signatures as authorizing O'Brien to act on their behalf, for that motion as well as for subsequent proceedings, including this appeal. Any other view would require us to treat form over substance, something we decline to do.

For the first time at oral argument, the lawyers argued that the statutory beneficiaries are not parties to this appeal, citing RAP 3.1. We disagree.

The rule requires an appellant to be an "aggrieved party."[22] The statutory beneficiaries are aggrieved in the sense of the rule in that their timely action to join and ratify the commencement of this action was, in effect, rejected by the court's dismissal.[23] They are proper parties to this appeal.

DUTY

On cross-appeal, the lawyers argue that the trial court erred in denying their motion for summary judgment because they owe no duty of care to either O'Brien or the statutory beneficiaries. We hold that there are genuine issues of material fact for trial, precluding dismissal of this malpractice action on this alternate ground.

A motion for summary judgment may be granted when there is no genuine issue as to any material fact, and the moving party is entitled to a judgment as a

---

[22] RAP 3.1 ("Only an aggrieved party may seek review by the appellate court.").

[23] See Polygon NW Co. v. American Nat. Fire Ins. Co., 143 Wn. App. 753, 767, 189 P.3d 777, review denied, 164 Wn.2d 1033 (2008) ("'An aggrieved party is one whose proprietary, pecuniary, or personal rights are substantially affected.'" (quoting Cooper v. City of Tacoma, 47 Wn. App. 315, 316, 734 P.2d 541 (1987))).

matter of law.[24] We will not resolve factual issues, but rather must determine if a genuine issue as to any material fact exists.[25] "'A material fact is one upon which the outcome of the litigation depends.'"[26] The moving party has the burden of proving there is no genuine issue of material fact and all inferences are construed in the light most favorable to the nonmoving party.[27] "If the moving party meets its burden, the nonmoving party must then 'set forth specific facts showing that there is a genuine issue for trial.'"[28] Only where there is no genuine issue of material fact and reasonable people could reach "'but one conclusion'" from all of the evidence is summary judgment appropriate.[29]

We review a summary judgment order de novo, viewing the facts and reasonable inferences in the light most favorable to the nonmoving party.[3]

The summary judgment motion at issue here was based solely on the

---

[24] CR 56(c).

[25] In re Estate of Black, 153 Wn.2d 152, 160, 102 P.3d 796 (2004).

[26] Id. (quoting Balise v. Underwood, 62 Wn.2d 195, 199, 381 P.2d 966 (1963)).

[27] Id. at 160-61 (citing Balise, 62 Wn.2d at 199; CR 56(c)).

[28] Id. at 161 (quoting LaPlante v. State, 85 Wn.2d 154, 158, 531 P.2d 299 (1975)); Snohomish County v. Rugg, 115 Wn. App. 218, 224, 61 P.3d 1184 (2002) (stating that a nonmoving party must set forth evidentiary facts, not suppositions, opinions, or conclusions); see also CR 56(e).

[29] Id. (quoting Barrie v. Hosts of Am., Inc., 94 Wn.2d 640, 642, 618 P.2d 96 (1980)).

[3] Khung Thi Lam v. Global Med. Sys., 127 Wn. App. 657, 661 n.4, 111 P.3d 1258 (2005) (citing Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982)).

legal question of whether the lawyers who performed services on behalf of the original personal representative owed any duty to the plaintiffs, who were not lawyers' clients.

The general rule is that only an attorney's client may bring an action for attorney malpractice.[31] "But an attorney may owe a nonclient a duty even in the absence of this privity."[32]

In Trask v. Butler,[33] our supreme court established the following multi-factor balancing test to determine whether an attorney owes a duty to a nonclient:

> (1) the extent to which the transaction was intended to benefit the [nonclient] plaintiff;
>
> (2) the foreseeability of harm to the plaintiff;
>
> (3) the degree of certainty that the plaintiff suffered injury;
>
> (4) the closeness of the connection between the defendant's conduct and the injury;
>
> (5) the policy of preventing future harm; and
>
> (6) the extent to which the profession would be unduly burdened by a finding of liability.[34]

The analysis of these factors necessarily involves an individualized factual

---

[31] Strait v. Kennedy, 103 Wn. App. 626, 630, 13 P.3d 671 (2000) (citing Trask v. Butler, 123 Wn.2d 835, 839-40, 872 P.2d 1080 (1994)).

[32] In re Guardianship of Karan, 110 Wn. App. 76, 81, 38 P.3d 396 (2002) (citing Stangland v. Brock, 109 Wn.2d 675, 680, 747 P.2d 464 (1987)).

[33] 123 Wn.2d 835, 872 P.2d 1080 (1994).

[34] Id. at 843.

determination of each case.[35]

"The first of the six [Trask] factors is the threshold inquiry; if the representation was not intended to benefit the nonclients, they have no standing to sue for malpractice."[36] "An 'intended beneficiary' of the transaction under Trask means just that the transaction must have been intended to benefit the plaintiff, it is not enough that the plaintiff may be an incidental beneficiary of the transaction."[37]

In Trask, the supreme court held that an attorney hired by the personal representative of an estate did not owe a duty to the estate or its beneficiaries, finding that the estate and its beneficiaries were only incidental beneficiaries of the attorney-personal representative relationship.[38] The legal malpractice claim there alleged that the attorney's advice to a personal representative on several matters depleted the assets of the estate.[39]

Here, Otorowski, representing the original personal representative, filed a complaint against Dr. Dolack and Valley Internal Medicine "on behalf of the Estate ***and*** on behalf of Herbert Williams' surviving children."[4] This is consistent

---

[35] Id. at 845.

[36] Leipham v. Adams, 77 Wn. App. 827, 832, 894 P.2d 576 (1995) (citing Trask, 123 Wn.2d at 842-43).

[37] Strait, 103 Wn. App. at 631 (citing Trask, 123 Wn.2d at 845).

[38] Trask, 123 Wn.2d at 845.

[39] Id. at 839.

[4] (Emphasis added.)

with the personal representative's role under the law for wrongful death and survivorship claims.[41] As our supreme court explained in Gray v. Goodson,[42]

> The right of [wrongful death] action "vests" in the personal representative only in a nominal capacity since the right is to be asserted in favor of the members of the class of beneficiaries. Clearly, at the time of the wrongful death when the cause of action accrues, the beneficiaries are then "vested" with the right to the benefit of the cause of action.[43]

We also note that the settlement funds were received by the original personal representative "as Personal Representative of the Estate . . . ***and*** on behalf of the surviving children of Herbert Williams."[44]

Taken together, the implication is that, in the wrongful death context, the statutory beneficiaries are intended, not merely incidental, beneficiaries of the attorney-personal representative relationship. Accordingly, it is appropriate for the statutory beneficiaries to seek recovery from the lawyers who allegedly were negligent in dealing with settlement funds obtained for the beneficiaries' benefit. They were the intended beneficiaries of those funds based on the transaction that we have just described: the receipt of funds on behalf of the estate and the

---

[41] See RCW 11.48.010 (personal representative authorized to maintain and prosecute actions that pertain to the management and settlement of the estate, and may institute suit to collect any debts due the estate or to recover any property); RCW 4.20.046 (cause of action survives to personal representatives); Beal, 134 Wn.2d 769 (under RCW 4.20.020, wrongful death action must be brought by personal representative of decedent's estate and cannot be maintained by decedent's children or other survivors).

[42] 61 Wn.2d 319, 378 P.2d 413 (1963).

[43] Id. at 326-27.

[44] (Emphasis added.)

statutory beneficiaries.

The lawyers argue that the statutory beneficiaries are "at best incidental beneficiaries to the attorney-personal representative relationship." On these facts, we disagree.

In Strait v. Kennedy,[45] the plaintiffs filed a legal malpractice claim against the attorney who represented their mother, Anne Marie Ishmael, in a dissolution action.[46] Ishmael had executed a will prior to her marriage leaving her entire estate to her two daughters.[47] Ishmael died before the dissolution was finalized, which resulted in Ishmael's husband receiving his intestate share of the estate.[48] The daughters alleged that the attorney's failure to timely finalize the dissolution caused them to lose significant portions of their mother's estate.[49] With respect to the first Trask factor, the court considered "whether the attorney's services were intended to benefit the plaintiffs as heirs apparent of their mother's estate."[5] "[I]f Kennedy's representation of Ms. Ishmael in the marital dissolution was not intended to preserve and protect the daughters' expectancies under the will Ms. Ishmael executed in 1980, the daughters' claims must fail as a matter of law."[51]

---

[45] 103 Wn. App. 626, 13 P.3d 671 (2000).

[46] Id. at 629.

[47] Id.

[48] Id. at 628.

[49] Id. at 629.

[5] Id. at 631.

[51] Id. at 632.

The court concluded that the daughters failed to show that their mother's marital dissolution action was intended to benefit them as heirs apparent.[52]

Here, unlike the situation in Strait, it is apparent from the documentation we cited previously in this opinion that Otorowski's representation of Antonio in the wrongful death suit was intended to benefit the statutory beneficiaries as well as the estate. Likewise, the receipt of settlement funds was also for those beneficiaries. Strait does not control.

The inquiry under Trask does not end here. We must still consider the remaining five factors.

The lawyers did not argue either in their brief[53] or at oral argument why we should view factors two through four in their favor. From the facts of this case, we conclude that those factors weigh in favor of O'Brien and the statutory beneficiaries. The loss of funds from an unblocked account was foreseeable. There is no doubt that the estate and the statutory beneficiaries suffered injury. There is also a close connection between the injury and the alleged acts and omissions of the lawyers.

We now consider factors five and six. Under factor five, the court considers the policy of preventing future harm.[54] The Trask court considered the opportunity for remedy as discussed in an earlier case, Stangland v. Brock.[55] In

---

[52] Id. at 638.

[53] See Joint Brief of Respondents/Cross-Appellants at 24-35 (contesting Trask factors one, five, and six).

[54] Trask, 123 Wn.2d at 843.

Stangland, the court acknowledged the right of an estate beneficiary to bring a cause of action against an attorney for errors in drafting a will, recognizing that if the beneficiaries could not recover for the attorney's alleged negligence, no one could.[56]

Here, providing notice of the settlement of the wrongful death action would have, at a minimum, put the statutory beneficiaries on notice so that they could potentially take action to protect their interests. Had the attorneys complied with SPR 98.16W, the minor statutory beneficiaries' portion of the settlement would have presumably been placed in a blocked account and those funds would not have been misappropriated.

Significantly, the statutory beneficiaries' ability to sue the personal representative for breach of fiduciary duty does not appear, on this record, to have provided them with a meaningful remedy. A court commissioner, sua sponte, entered an Order on Civil Motion[57] upon discovery of the misappropriation of funds by Antonio, the original personal representative. The order provides for a $250,000 judgment against the original personal representative "to protect heirs." But the order further provides that he is to

---

[55] Id. (citing Stangland v. Brock, 109 Wn.2d 675, 747 P.2d 464 (1987)); see also In re Estate of Treadwell v. Wright, 115 Wn. App. 238, 245-46, 61 P.3d 1214 (2003) (citing In re Guardianship of Karan, 110 Wn. App. 76, 85-86, 38 P.3d 396 (2002) (discussing availability of meaningful remedy with respect to Trask factor five)).

[56] Id. (quoting Stangland, 109 Wn.2d at 681).

[57] Clerk's Papers at 1345-350.

provide the names of lenders with liens on his home. Finally, the order directs the recording of a lis pendens, but stays any execution on the lien without court approval.

While it appears that the judgment against Antonio in favor of the "heirs" provides a remedy for the claims the statutory beneficiaries assert against the lawyers, that remedy is likely more illusory than real. For example, the request for a list of lenders with liens against Antonio's home strongly suggests that the judgment lien on his home created by the court commissioner's order is subordinate to those prior liens of undetermined amount. If so, the judgment against Antonio would not provide any realistic relief. Moreover, it is unclear whether and to what extent the court would provide relief from its stay against execution on the lien of this judgment. For these reasons, this alternative remedy appears to be more illusory than real.

In any event, the lawyers had the burden, as the moving parties, to establish that this issue of alternative relief was not a genuine issue of material fact for purposes of their motion. Having failed to do this, the burden of going forward on this issue never shifted to the non-moving party, O'Brien. Accordingly, that part of the rationale of Trask is inapplicable to this case. Thus, this case is more in line with the rationale of In re Guardianship of Karan.[58]

[58] 110 Wn. App. 76, 79-80, 86, 38 P.3d 396 (2002) (ward of guardianship sued guardian's attorney for failing to ensure that guardian posted bond or deposited funds in blocked account as required by statute; court recognized, under fifth Trask factor, that direct action for breach against the guardian was likely to be an "empty remedy" absent a bond).

We come to factor six. We must consider the extent to which the profession would be unduly burdened by a finding of liability.[59] Under the facts here, we conclude that the profession would not be unduly burdened.

In evaluating this issue, the court in Trask observed, "The policy considerations against finding a duty to a nonclient are the strongest where doing so would detract from the attorney's ethical obligations to a client. This occurs where a duty to a nonclient creates a risk of divided loyalties because of a conflicting interest or of a breach of confidence."[6]

But here, the potential for a conflict of interest to arise is mitigated by the limited duties asserted by O'Brien. O'Brien does not assert that the lawyers owed a general duty to the statutory beneficiaries. Instead, the duties claimed are more limited. O'Brien claims that the lawyers had a duty to notify the statutory beneficiaries of the settlement of the wrongful death suit and to comply with existing court rules concerning approval, depositing, safekeeping, and disbursement of the settlement proceeds. The imposition of a duty to notify the other statutory beneficiaries of the settlement and to comply with SPR 98.16W may burden the legal profession, but not ***unduly*** so.

In Estate of Treadwell v. Wright,[61] this court, after examining the Trask factors, held that a guardian's attorney owed a duty to the ward, consistent with

---

[59] Trask, 123 Wn.2d at 843.

[6] Id. at 844.

[61] 115 Wn. App. 238, 61 P.3d 1214 (2003).

relevant statutes, to ensure that an adequate bond or blocked account was in place.[62] In doing so, the court stated, "we do not hold that a guardian's attorney owes a duty to the ward for all purposes or for all transactions during the pendency of the guardianship. Rather, the trial court should apply the Trask test and determine whether such a duty exists as each type of transaction is put before it."[63]

Similarly, here, we do not hold that a personal representative's attorneys owe a duty to the statutory beneficiaries for all purposes or for all transactions. Instead, looking at the narrow scope of duties asserted here, we agree with O'Brien that the interests of the estate and the statutory beneficiaries were not adverse to each other when considering the limited transactions of the initial receipt and handling of settlement funds by the personal representative on behalf of the statutory beneficiaries and estate.

The parties may ultimately disagree about the allocation of the settlement funds. If so, there may be a conflict of interest that arises at that time. But at the relevant stages here, their interests do not appear to have been adverse. Thus, there was no undue burden on counsel at the stages that are critical to this analysis.

STATUTE OF LIMITATIONS

The lawyers also argue that the claims against them were barred by the

[62] Id. at 247.

[63] Id.

statute of limitations. Accordingly, they argue that the trial court erred in denying their motion to dismiss the case on summary judgment. We disagree.

The statute of limitations for legal malpractice is three years.[64] Generally, the statute of limitations accrues when the plaintiff has a right to seek relief in the courts.[65]

The discovery rule applies in legal malpractice actions.[66] Under this rule, the statute of limitations does not accrue until the client discovers, or in the exercise of reasonable diligence should have discovered, the facts that give rise to his or her cause of action.[67] The rule does not specifically require knowledge of the existence of a legal cause of action.[68] Instead, the statute of limitations begins to run when the plaintiff knew or should have known all of the essential elements of the cause of action.[69]

Here, legal malpractice refers to negligence. The elements of negligence are duty, breach, causation, and injury.[7]

The application of the discovery rule generally is a question of fact.[71]

---

[64] Huff v. Roach, 125 Wn. App. 724, 729, 106 P.3d 268 (2005) (citing RCW 4.16.080(3)).

[65] Id.

[66] Id.

[67] Id.

[68] Id.

[69] Id.

[7] Keller v. City of Spokane, 146 Wn.2d 237, 242, 44 P.3d 845 (2002).

[71] Matson v. Weidenkopf, 101 Wn. App. 472, 482, 3 P.3d 805 (2000).

"Whether the statute of limitations bars a suit is a legal question, but the jury must decide the underlying factual questions unless the facts are susceptible of but one reasonable interpretation."[72]

The lawyers cite limited evidence to support their position that the claims were time-barred. They cite portions of the record that show that the statutory beneficiaries were aware of the wrongful death suit and settlement in July 2002 and February 2004. They claim that this satisfied the discovery rule, triggering the running of the statute of limitations no later than February 2004. O'Brien filed the case on March 13, 2007, more than three years after February 2004.

This evidence does not, however, show that any plaintiff or potential plaintiff discovered, or in the exercise of reasonable diligence should have discovered, the facts giving rise to a negligence claim.[73] It merely shows that some of the statutory beneficiaries were aware of the wrongful death suit and settlement, and that they had concerns about Antonio's continuing role as personal representative. It does not show that they knew, or should have known, that Antonio had actually taken the settlement money or that the lawyers had failed to take actions to protect it. Instead, the evidence shows that the statutory beneficiaries took steps to look into what had happened to the settlement funds.

Summary judgment dismissal is only appropriate where there is no

---

[72] Goodman v. Goodman, 128 Wn.2d 366, 373, 907 P.2d 290 (1995).

[73] See Huff, 125 Wn. App. at 729.

genuine issue of material fact and the moving party is entitled to judgment as a matter of law.[74] At a minimum, the facts cited by the lawyers are susceptible to more than one reasonable interpretation.[75] Because factual questions remained about the date the plaintiffs discovered, or should have discovered, the cause of action, the trial court did not err in denying summary judgment on this issue.

RES JUDICATA

Lastly, Miller argues that the claims against him are barred by the doctrine of res judicata. We again disagree.

"Res judicata, or claim preclusion, prohibits the relitigation of claims and issues that were litigated, or could have been litigated, in a prior action."[76] Application of the doctrine requires identity between a prior judgment and a subsequent action as to (1) persons and parties, (2) cause of action, (3) subject matter, and (4) the quality of persons for or against whom the claim is made.[77] Res judicata also requires a final judgment on the merits.[78] The res judicata test is conjunctive, requiring satisfaction of all four elements.[79]

---

[74] CR 56(c).

[75] See Goodman, 128 Wn.2d at 373 (trier of fact must make factual determinations that relate to statute of limitations unless the facts are susceptible to only one reasonable interpretation).

[76] Pederson v. Potter, 103 Wn. App. 62, 67, 11 P.3d 833 (2000) (citing Loveridge v. Fred Meyer, Inc., 125 Wn.2d 759, 763, 887 P.2d 898 (1995)).

[77] Id.

[78] Id. (citing Schoeman v. New York Life Ins. Co., 106 Wn.2d 855, 860, 726 P.2d 1 (1986)).

[79] Hisle v. Todd Pacific Shipyards Corp., 151 Wn.2d 853, 866, 93 P.3d

The party asserting the defense of res judicata bears the burden of proof.[8]

Miller argues that the judgment against Antonio precludes O'Brien's action against him. He also appears to argue that because O'Brien did not challenge the probate court's award of fees in 2004, all of O'Brien's later claims against Miller are barred by res judicata.

Miller argues that the requirement of identity of subject matter is met because "[t]he subject involves the same money that [Antonio] embezzled." But the same subject matter is not necessarily implicated in cases involving the same facts.[81] Here, the order Miller relies upon shows a $250,000 judgment against Antonio and orders the estate to pay fees to Inslee Best. He has not shown that the issue of the ethical conduct of Miller or the Inslee firm was before the probate court at that time. Instead, the focus of the March 23, 2004 order was resolving claims against Antonio.

Because the res judicata test requires satisfaction of all four elements, we need not inquire further. Miller has not shown that res judicata applies.

To summarize, the trial court improperly dismissed the action because both the statutory beneficiaries and the successor personal representative are real parties in interest. On this record, it appears that the statutory beneficiaries

---

108 (2004).

[8] Id. at 865.

[81] Id. at 866 (finding different subject matter in cases involving wage disputes where the initial case challenged procedures used to adopt collective bargaining agreement and the second case presumed validity of the agreement and sought to apply the minimum wage act).

have authorized the personal representative and his lawyer to represent their interests. When and if this changes, the parties will have the opportunity to bring that issue before the court on remand. None of the claims asserted in the lawyers' motion for summary judgment alternatively support dismissal on the grounds asserted.

We affirm the order denying summary judgment. We reverse the order dismissing the case and the order directing substitution of the statutory beneficiaries for the personal representative. We remand for further proceedings.

Cox, J.

WE CONCUR:

Dwyer, A.C.J.

Appelwick, J.