No. 1-09-3201

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

SIXTH DIVISION
March 31, 2011

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

In re the Estate of John F. Sanfilippo, Deceased	)	Appeal from
David Sanfilippo,	)	the Circuit Court
	)	of Cook County
Petitioner-Appellant,	)	
	)	05 P 04899
v.	)	
	)	Honorable
John E. Sanfilippo and Robert Rothstein,	)	Susan M. Coleman,
	)	Judge Presiding
Respondents-Appellees.	)	

JUSTICE McBRIDE delivered the judgment of the court.
Presiding Justice Garcia and Justice Cahill concurred in the judgment.

O R D E R

HELD: Claim in 2008 that deceased father's attorney committed malpractice in 2002 was time barred after two years, claim that father's other son breached fiduciary duties by converting assets in 2002 was similarly time barred after five years; the trial judge's dismissal of the claims was affirmed.

Petitioner David Sanfilippo brought a legal malpractice claim against his deceased father's former attorney, respondent Robert Rothstein, and a breach of fiduciary duty claim against his brother, respondent John E. Sanfilippo, regarding a family business transaction which closed more than two years before the father died. The circuit court of Cook County dismissed

the claims as time barred under sections 13-214.3(d) and 13-205 of the Code of Civil Procedure. 735 ILCS 5/13-205, 13-214.3(d) (West 1994) (Code). David appeals.

The following facts are alleged in the pleading at issue. We accept these allegations as true for purposes of our review. *Wackrow v. Niemi*, 231 Ill. 2d 418, 420, 899 N.E.2d 273, 275 (2008). David and John E. are the only children and heirs of decedent John F. Sanfilippo who died on December 4, 2004, in Mount Prospect, Illinois. During his lifetime, John F. co-owned at least a dozen businesses and investments with his sons. In the summer of 2000, he gave John E. complete control of the assets and executed a durable power of attorney conveying authority to handle all of his personal and business affairs. In early 2002, however, he was "concerned" about John E.'s "handling of the Companies and their finances" and asked his accountant to conduct an investigation. The accountant reported his findings in a letter that was attached to the pleading at issue. It is alleged that the letter includes the accountant's opinion that John E. "misappropriated funds from [a company known as Palarmo Properties], made material misrepresentations of its assets, and had engaged in otherwise dubious transactions involving [the company]." The letter actually states as follows:

> "To the members of Palarmo Properties, LLC; [*sic*]
>
> This letter is to inform you of our understanding of the terms and objectives of our engagement and the nature and limitations of the services we provided.
>
> We have reviewed the accompanying balance sheet of Palarmo Properties, LLC as of October 13, 2001, and the related statements of income for

the period then ended in accordance with Statements on Standard for Accounting and Review Services issued by the American Institute of CPA's. All information included in these financial statements is the representation of the management of Palarmo Properties, LLC.

A review consists principally of inquiries of company personnel and analytical procedures applied to financial data. It is substantially less in scope than an audit in accordance with generally accepted auditing standards, the objective of which is the expression of an opinion regarding the financial statements taken as a whole. Accordingly, we do not express such an opinion.

Based on our review, we are aware of material modifications that should be made to the accompanying financial statements in order for them to be in conformity with generally accepted accounting principles. These material modifications include but are not limited to; [*sic*]

- Irregularities of financial disclosure,
- Misappropriation of assets,
- Omissions of capital expenditures, revenue and expenses,
- Significant unreconciled differences between estimated project costs and completed project costs,
- laws and regulations that may have a direct effect on financial statements; tax provisions and accruals.

Louis J. Colella & Associates, Ltd.

Independent Accountants

May 16, 2002"

David further alleged upon information and belief that the accountant was concerned about "possible criminal sanctions" which we have construed as an indication the accountant was concerned about repercussions to all the owners of the company. Accordingly, on information and belief, John F. told his sons he wanted to disentangle the complex ownership of the family's assets "with the result being that each son would end up managing his own business(es) and no longer be involved with the other." "Upon information and belief, the Decedent's goal in dividing the family assets was to divest himself of a number of businesses in exchange for cash proceeds from his sons in a manner that would equalize the holdings of the parties."

Therefore, John E. engaged the services of attorney Rothstein who agreed to represent John F. and John E. in the negotiation, drafting, and execution of a set of contracts that would become known as the Family Settlement Agreement or FSA. David was represented by separate counsel. The FSA required the "exchange and transfer of business interests, cash [tenders], formation and cancellation of notes, assignments of obligations, [and steps to minimize the tax obligations associated with these transactions]." Rothstein's escrow company acted as the escrow agent for the multilayered transaction that closed on October 12, 2002.

The record shows that after John F's death in late 2004, his will was admitted to probate and letters of office were issued to an independent executor on July 29, 2005.

David began the proceedings at issue by filing petitions for discovery citations against his

brother on November 1, 2006 and against the attorney on September 14, 2007. He filed petitions to convert the discovery citations to recovery citations on April 22, 2008 and June 18, 2008. The pleading at issue on appeal is David's two-count second amended petition for issuance of recovery citations, in which he claimed Rothstein committed malpractice and John E. breached fiduciary duties. David is not the executor or representative of his father's estate. His claims are based on his personal interest in the estate as a co-heir and beneficiary.

In Count I of the petition at issue, David alleged Rothstein was under a conflict of interest when he simultaneously represented John F., John E., and the attorney's escrow company in the FSA transaction. Rothstein "breached his duty to provide competent legal representation" to John F. by not (1) notifying John F. of the conflict, advising him to seek independent counsel, and obtaining a written waiver of the conflict, (2), communicating directly with John F. to learn "his concerns, goals or directions" for the FSA, (3) advising John F. of "his options in negotiating, reviewing, or approving the FSA," and (4) then signing FSA documents on John F.'s behalf without the man's "knowledge or permission." David further alleged that if his father had the benefit of an independent review, then he would have learned that the FSA distributed at least $50,000 less "than he had expected." It is unclear from the pleading why John F. had this "expect[ation]." David also alleged that Rothstein owed a duty to David as an intended beneficiary of his father's estate to "see to it the entirety of Decedent's estate and property passed to [the two sons]." However, due to Rothstein's ineffective representation, John F. did not follow through on his FSA obligation to transfer unspecified property, and instead retained it for two additional years before giving it to John E. David did not make an issue of his father's gift

giving in 2004, but contended Rothstein's conduct in 2002 deprived the estate of assets that would have been split equally between his co-heirs. David, however, "first learned of the potential negligence and wrongdoing of Mr. Rothstein in August 2007 and December 2007 when John E. Sanfilippo and Rothstein gave depositions pursuant to these citation proceedings." It is unclear from the pleading what David learned from the depositions; transcripts were not made part of the record on appeal.

In Count II, David alleged that John E. breached his fiduciary duty to his father by not explaining Rothstein's conflict of interest or the specifics of the FSA, by executing FSA documents on their father's behalf without his knowledge or approval, by engaging in numerous cash transactions that were not properly documented, and by converting unspecified funds "by fraud and breach of fiduciary duty" for himself, or his spouse and children. "By his intentional conduct, John E. Sanfilippo continuously between August 18, 2000 and continuing through the execution of the FSA and thereafter engaged in willful and wanton conduct to the benefit of himself and to the detriment of the Decedent resulting in gross violation of duties as a fiduciary and damages in excess of $50,000." David, however, "did not discover the wrongdoing *** until depositions were taken in 2007." Again, it is unclear from the pleading what David learned from the depositions.

Rothstein and John E. filed separate motions to dismiss the recovery petition as time barred. The circuit court found the arguments compelling and dismissed the petition with prejudice. The court found that with respect to Rothstein, there were no facts showing that John F. did not discover the purported malpractice before his death and there was no indication

Rothstein owed any duty to David. With respect to John E., the court found there were no facts showing a late discovery of the purported breach of fiduciary duty and/or fraudulent concealment, and that the petition for recovery citation did not relate back to the petition for discovery citation which contained no allegations of wrongdoing.

Rothstein and John E's motions were based on section 2-619(a)(5) of the Code. 735 ILCS 5/2-619(a)(5) (West 2000) (providing for the dismissal of untimely suits). A section 2-619 motion admits as true all well-pled facts and all reasonable inferences that can be drawn from those facts. *Wackrow*, 231 Ill. 2d at 422, 899 N.E.2d at 276. In a section 2-619 proceeding, the court interprets all pleadings and supporting documents in the light most favorable to the non-moving party. *Wackrow*, 231 Ill. 2d at 422, 899 N.E.2d at 276. On appeal, the matter is considered *de novo*. *Wackrow*, 231 Ill. 2d at 422, 899 N.E.2d at 276.

We first address the timeliness of the malpractice claim against attorney Rothstein.

Section 13-214.3 of the Code specifies the limitations period for bringing attorney malpractice claims. 735 ILCS 5/13-214.3 (West 1994). Subparagraph (b) indicates that generally attorney malpractice claims "must be commenced within 2 years from the time the person bringing the action knew or reasonably should have known of the injury." 735 ILCS 5/13-214.3(b) (West 1994). Subparagraph (d) specifies, however, that in cases in which the injury "does not occur until the death of the person for whom the professional services were rendered," the malpractice suit must either be filed within two years of the death of the person; or if within those two years letters of office are issued or the person's will is admitted to probate, then the malpractice limitations period is the later of time for filing claims against the estate or

contesting the will. 735 ILCS 5/13-214.3(d) (West 1994).

In this case, David argues subparagraph (b) is controlling and that the pleading factually indicated his father "never knew and did not discover the negligence of Rothstein prior to his death" and that David reasonably discovered the purported negligence while deposing his brother in August 2007 and his father's attorney in December 2007. Thus, according to David the two-year window for filing a claim was triggered in August or December 2007, and his original petition to convert the discovery citation to a recovery citation was timely filed on April 22, 2008. David concludes the dismissal order should be reversed and the cause remanded for a trial on the merits. Rothstein responds that subparagraph (d) is controlling because the claimed loss is one of value to an estate that came into existence on John's death, based on the probate proceedings the undisputed deadline for filing a claim against the estate was February 18, 2006[1], and the untimely claim is barred on limitation grounds. Rothstein contends this court should affirm the holding of the circuit court.

Even if we assume for the purposes of argument that subparagraph (b) is controlling, we do not find David's argument compelling. The pleading lacks facts showing John F. "never knew and did not discover" the purported malpractice. David parses through the allegations of his petition, however, they indicate merely that Rothstein did not communicate certain facts directly to John F. and did not ask John F. to review the specific language of the FSA documents. The allegations do not preclude the possibility that John F., who was alive for more than two

[1] This date does not appear in the record on appeal and we have not independently calculated whether it is the correct deadline for filing a claim controlled by subparagraph (d).

years after the FSA closed, was aware of Rothstein's roles and conduct regarding the FSA. The allegations are not a basis for tolling the statute of limitations until such time as David, the purported third-party beneficiary of Rothstein's representation, could become aware of the purported misconduct and file a malpractice action. The principle that all pleadings and supporting documents must be construed in a light most favorable to the nonmoving party (*Advocate Health and Hospitals Corp. v. Bank One, N.A.*, 348 Ill. App. 3d 755, 759, 810 N.E.2d 500, 505 (2004)), is not a substitute for the need to provide adequate facts.

Furthermore, David failed to establish that he may sue as a third-party beneficiary of the FSA. He emphasizes his allegations that Rothstein was "advised that David Sanfilippo was an intended beneficiary of the estate of the Decedent along with his brother" and Rothstein "owed a duty to David Sanfilippo as an intended beneficiary of Decedent to see to it the entirety of Decedent's estate and property passed to [the two sons]." He cites *Ogle v. Fuiten*, 102 Ill. 2d 356, 466 N.E.2d 224 (1984), for the proposition that a third-party beneficiary may state a negligence claim against an attorney who prepares a will which does not fulfill the testator's intentions.

The record does not indicate, however, that the FSA was an estate planning document. The FSA was not styled as a will and it is not alleged to have been executed in conjunction with a will or other estate planning documents. In fact, John F.'s will is part of the record on appeal and indicates it was prepared by another attorney, "Andrew J Kelleher, Jr. (currently of Kelleher & Buckley, LLC, Attorneys at Law, 231 West Main Street, Barrington, Illinois)." Moreover, a review of the will indicates it directed the transfer of any assets remaining in John F.'s name at

his death into a previously-established trust known as "The John F. Sanfilippo Trust Dated August 18, 2000." This date in 2000 predates Rothstein's retention as counsel in 2002. Furthermore, according to David's own allegations, the FSA was motivated by John F.'s desire to avoid "criminal sanctions" that might result from John E.'s "dubious transactions" in the management of a family-owned business or businesses. David alleged these concerns motivated his father to disentangle the ownership of various "family Companies, with the result being that [he would receive cash and] each son would end up managing his own business(es) and would no longer be involved with the other." Thus, by David's own account, the FSA was not a component of John F.'s estate plan, and David's citation to *Ogle*, 102 Ill. 2d 356, 466 N.E.2d 224, is unavailing.

We also note that David was himself a party to the FSA and was represented by his own attorney in the negotiation, drafting, and performance of its final terms. He argues Rothstein owed a duty "to inform David Sanfilippo that the manner in which the documents were prepared and transactions executed had the effect of depriving David Sanfilippo [a third party beneficiary] of his fair share of the assets he was to receive from his father." There is no legal principal, however, that an attorney who is negotiating the terms of a contract owes a duty to advise and advocate for the interests of one of the other contracting parties, particularly when that party is represented by other counsel.

Finally, David cannot reconcile the fact that his claim of loss of value to his father's estate is a claim of injury occurring upon his father's death and that an injury which "does not occur until the death of the person for whom the professional services were rendered," is plainly

within the scope of subparagraph (d) of the statute of limitations. 735 ILCS 5/13-214.3(d) (West 1994). The plaintiff in *Wackrow* also argued that because legal services were rendered on her behalf as a third-party beneficiary of a trust document, and because she was still alive, section 13-214.3(d) could not apply and render her claim untimely. *Wackrow*, 231 Ill. 2d at 425, 899 N.E.2d at 278; 735 ILCS 5/13-214.3(d) (West 1994). The supreme court flatly rejected this argument:

> "There is no merit to this claim. As discussed, section 13-214.3(d) applies to plaintiff's claim because the injury caused by defendant's legal malpractice did not occur until the death of Woods. Section 13-214.3(d) looks to 'the death of the *person* for whom the professional services were rendered.' (Emphasis added.) 735 ILCS 5/13-214.3(d) (West 1994). Woods was the *person* for whom the professional services were rendered." *Wackrow*, 231 Ill. 2d at 425, 899 N.E.2d at 278.

Furthermore:

> "As defendant notes, to accept plaintiff's argument would eviscerate the repose provision set forth in section 13-214.3(d). Applying plaintiff's reasoning, no claim against an estate would be barred until the death of each intended beneficiary of a will or trust. Such a result would be contrary to the legislative intent behind a statute of repose. A 'period of repose gives effect to a policy different from that advanced by a period of limitations; it is intended to terminate the possibility of liability after a defined period of time, regardless of a potential

> plaintiff's lack of knowledge of his cause of action.' [Citation.] A period of repose is not intended to expand the possibility of liability indefinitely." *Wackrow*, 231 Ill. 2d at 426, 899 N.E.2d at 278.

Thus: "Based upon the plain language of the statute, the injury caused by defendant's legal malpractice in this case occurred upon the death of Woods, and not when plaintiff's claim against Woods' estate was denied." *Wackrow*, 231 Ill.2d at 426, 899 N.E.2d at 278.

Therefore, all of David's argument fail and we find the circuit court properly dismissed the untimely claim against attorney Rothstein.

Our second consideration is the timeliness of the allegations against John E. Pursuant to section 13-205 of the Code, a breach of fiduciary duty claim must be brought within five years after the cause of action accrued. 735 ILCS 5/13-205 (West 2002); *Armstrong v. Guigler,* 174 Ill.2d 281, 296-97, 673 N.E.2d 290, 298 (1996); *Luminall Paints, Inc. v. La Salle National Bank,* 220 Ill. App.3d 796, 803, 581 N.E.2d 191, 195 (1991).

Taking the allegations of the petition as true for purposes of this review, John F. was on notice upon receiving the accountant's letter in May 2002 that his son John E. had "engaged in dubious transactions" with Company funds, and yet, instead of suing John E. for breach of fiduciary duty, John F. instigated the FSA. David contends the claim he asserted against John E. on John F's behalf was nonetheless timely because (1) David's original discovery citation was filed within five years on November 1, 2006, and the subsequent recovery citation related back to that filing, (2) David did not discover John E.'s wrongdoing until deposing him in August 2007, or (3) John E. engaged in a continuous tortious conduct. We are unpersuaded by these

arguments.

David supports his relation-back argument with *In Re Estate of Chernyk*, 138 Ill. App. 3d 233, 485 N.E.2d 1169 (1985), which is distinguishable. In that case, the court reasoned that if an original pleading makes the defendant aware of all the facts necessary to prepare his defense to a claim subsequently asserted, the defendant is not prejudiced by an amended pleading relating to the same transaction or occurrence filed after the statute of limitations expires. *Cherynk*, 138 Ill. App. 3d at 235-26, 485 N.E.2d at 1171. A widow filed a citation to discover information and to compel production of books, documents, papers, and records which might lead to the discovery of estate assets from the drafters and beneficiaries of a document " 'purportedly' " executed by her husband which " 'purport[ed]' " to create a trust from which she took nothing. *Chernyk*, 138 Ill. App. 3d at 234, 485 N.E.2d at 1170. After a citation hearing, she was given leave to amend her citation to discover to a citation to recover estate assets which called into question the validity of the trust agreement. *Chernyk*, 138 Ill. App. 3d at 234, 485 N.E.2d at 1170-71. The court determined that the original citation petition which sought discovery of information about the drafting of the document sufficiently informed the recipients that the widow was challenging the legitimacy of the trust document and gave them "adequate opportunity to investigate the factors upon which their liability may be based without being prejudiced by the filing of the amended petition." *Chernyk*, 138 Ill. App. 3d at 236, 485 N.E.2d at 1172. Here, however, David's original request for "information and knowledge about the existence of location of assets" was merely a broad request to ask questions. The request did not call into question the adequacy of John E.'s explanation of Rothstein's conflict of interest or the specifics of the FSA,

challenge John E.'s authority to execute FSA documents on the father's behalf, or suggest John E. engaged in undocumented self-dealing with family assets which were pocketed by himself, his spouse, or their children.

The relation-back argument is inconsistent with David's next contention that he made a late discovery of the necessary facts when conducting the depositions in 2007. This second argument fails because David has provided no explanation as to why his discovery of alleged wrongdoing has any bearing on a claim belonging to his father.

We also reject his reliance on the continuing tort or continuing violation rule under which the limitations period does not begin to run until the date of the last injury or the date the tortious acts cease when a tort involves a continuous or repeated injury. *Feltmeier v. Feltmeier*, 207 Ill. 2d 263, 278, 798 N.E.2d 75, 85 (2003). David alleged John E. engaged in "dubious transactions" which provoked the FSA and that his conduct regarding the FSA itself was lacking, but he did not allege his brother engaged in any specific misconduct after the FSA transaction closed in October 2002. David's argument hinges on his concluding allegation that his brother "continuously between August 18, 2000 and continuing through the execution of the FSA *and thereafter* engaged in willful and wanton conduct." Emphasis added. However, "thereafter" is not an allegation of a tortious act and it does not trigger application of the continuing tort rule.

Accordingly, we conclude David's claims against his father's former attorney and his brother were untimely claims. For the reasons stated, we affirm the judgment of the circuit court dismissing those claims on statute of limitations grounds.

Affirmed.