NO. 4-10-0621 Order Filed 3/18/11

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

JOHN SUNDERLAND and REBECCA MUELLER, Co-Personal Representatives of the Estate of MARY E. SUNDERLAND, Deceased, Plaintiffs-Appellants, v. ANITA COOPER and COOPER & McDONALD, LLP, Defendants-Appellees.	Appeal from Circuit Court of Jersey County No. 09L31 Honorable Eric S. Pistorius, Judge Presiding.

JUSTICE TURNER delivered the judgment of the court. Justices Appleton and Pope concurred in the judgment.

ORDER

Held: (1) Where the decedent held a testamentary power of appointment over a one-half interest in real estate held in her husband's trust, the decedent's transfer of that one-half interest into her trust, which resulted in her owning 100% of the property, did not cause her to lose a fractional discount for estate-tax-valuation purposes.

(2) Where the attorney's alleged malpractice resulted in an increase in valuation of property for estate-tax purposes, the date of any injury occurred on the date of the decedent's death, and thus section 13-214.3(d) of the Limitations Act applied.

In October 2009, plaintiffs, John Sunderland and Rebecca Mueller, as co-personal representatives of the estate of Mary E. Sunderland, deceased, filed a legal-malpractice complaint against defendants, Anita Cooper and her law firm Cooper & McDonald, LLP. In January 2010, defendants filed a motion for summary judgment, asserting plaintiffs' complaint was time barred under section 13-214.3(d) of the Limitations Act (735 ILCS 5/13-214.3(d) (West 1994)). In July 2010, the Jersey County circuit court granted defendants' motion. Plaintiffs appeal, asserting the court erred by granting the summary-judgment motion because the date of injury is a disputed issue of material fact. We affirm.

I. BACKGROUND

Mary, the decedent, was married to Lloyd Sunderland, and they had five children. Plaintiffs are two of their children. In 1993, Mary and Lloyd owned 8.9 acres of improved land (Property). At that time, Mary and Lloyd retained Cooper to prepare revocable living trusts for each of them. Cooper did so, and Lloyd and Mary executed the trusts on September 30, 1993. Mary and Lloyd then transferred an undivided one-half interest in the Property to each of their revocable living trusts.

Lloyd passed away on September 16, 2002. According to Cooper's affidavit, Lloyd's living trust provided that, upon his death, a marital trust would be set up and include his one-half interest in the Property. (Plaintiffs agreed with that fact in their February 25, 2010, memorandum.) Cooper's affidavit further stated that, under the terms of the marital trust, Mary had a general power of appointment over all of the property and income in the marital trust. A copy of Lloyd's living trust is not included in the record on appeal.

In May 2003, Mary executed an amended and restated revocable living trust that was prepared by Cooper. In the restated trust, Mary was cotrustee of the trust with plaintiffs. On June 18, 2004, Mary exercised her power of appointment in Lloyd's trust (plaintiffs' complaint states the power was in Lloyd's living trust, and Cooper's affidavit states it was in the marital trust) and conveyed the one-half interest in the Property held by Lloyd's trust to herself, as trustee of her own living trust. Cooper prepared and recorded the deed. After the transfer, Mary's living trust owned all of the Property.

Mary died on January 9, 2007. Neither Cooper nor her firm represented Mary's estate. In October 2007, Mary's estate filed a federal estate-tax return, which listed the Property's appraised value as $1,523,000. The return then took a 50% discount for Mary's one-half interest and a 20% fractional-interest discount for a value of $609,200. The return listed the other one-half interest in the Property as being owned through Lloyd's marital trust and also having a $609,200 value. The return reported a total taxable estate of $3,584,680 with an estate tax of $713,106.

The Internal Revenue Service (IRS) audited Mary's estate-tax return and issued a report in August 2009. In the IRS's report of estate-tax-examination changes, it added "Lloyd'-

s" one-half interest in the Property and took away the fractional discounts, which resulted in a $913,800 increase in the value of the taxable estate. The IRS report noted Mary had a general power of appointment during her lifetime and a testamentary general power of appointment exercisable at her death over the Property interest contained in Lloyd's marital trust. The report also noted Mary's transfer of Lloyd's one-half interest in the Property to her trust. The report further stated the two one-half interests had to be aggregated for estate-tax-valuation purposes, and thus a fractional discount did not apply. The IRS referred to an opinion by the United States Tax Court, which held, that for estate-tax-valuation purposes, the stock of a company owned by a decedent outright had to be aggregated with the company stock in a trust over which the decedent had a general testamentary power of appointment. See *Estate of Fontana v. Commissioner of Internal Revenue*, 118 T.C. 318, 322 (2002). The IRS made other changes to Mary's estate-tax return, and the overall increase in the value of the taxable estate was $674,908, which resulted in additional $178,411 in estate taxes.

On October 7, 2009, plaintiffs filed their complaint against Cooper and her law firm, alleging legal malpractice based on defendants' failure to advise Mary about (1) the use of the general power of appointment to convey the undivided one-half interest to her living trust and (2) the fractional interest discount that her estate would be entitled to if she did not convey the one-half interest in Lloyd's trust. Plaintiffs also alleged defendants failed to disclose and concealed from them the aforementioned breaches and negligent acts. In November 2009, defendants filed their answer and affirmative defenses. The next month, defendants filed an amended answer, specifically alleging the complaint was time barred by section 13-214.3(d) of the Limitations Act.

In January 2010, defendants filed a motion for summary judgment based on section 13-214.3(d), asserting the injury occurred on the date of Mary's death. In support of their motion, they filed a memorandum and Cooper's affidavit. While defendants' memorandum stated the docket sheets for Mary's probate case (In re Estate of Sunderland, No. 07-P-29 (Jersey Co. Cir. Ct.)) were also attached to it, the record on appeal does not contain any docket sheets for the probate case. In response to the summary-judgment motion, plaintiffs filed a memorandum, asserting the injury occurred at the time of the conveyance and the discovery rule applies. Plaintiffs attached (1) the June 2004 warranty deed in trust, (2) Mary's estate-tax return, and (3) the IRS's report that noted the changes made after its audit and examination. Defendants filed a reply and attached Mary's amended and restated living trust.

On March 1, 2010, the trial court commenced a hearing on the summary-judgment motion. After hearing the parties' arguments, the court asked the parties to brief the issue of whether a transfer after the June 2004 transfer but before Mary's death would have been effective. The parties filed supplemental memoranda and replies. In June 2010, the court heard further arguments on the summary-judgment motion. On July 13, 2010, the court filed its written order, granting defendants summary judgment. The court found the date of injury was Mary's death because Mary could have transferred Lloyd's share up to her death and thus corrected the problem. On August 10, 2010, plaintiffs filed their notice of appeal in compliance with Illinois Supreme Court Rule 303 (eff. May 30, 2008), and thus this court has jurisdiction under Illinois Supreme Court Rule 301 (eff. Feb. 1, 1994).

II. ANALYSIS

A. Standard of Review

A grant of summary judgment is only appropriate when the pleadings, depositions, admissions, and affidavits demonstrate no genuine issue of material fact exists and the movant is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2008); *Williams v. Manchester*, 228 Ill. 2d 404, 417, 888 N.E.2d 1, 8-9 (2008). With regard to analyzing summary-judgment motions, our supreme court has stated the following:

> "In determining whether a genuine issue

> as to any material fact exists, a court must construe the pleadings, depositions, admissions, and affidavits strictly against the movant and liberally in favor of the opponent. A triable issue precluding summary judgment exists where the material facts are disputed or where, the material facts being undisputed, reasonable persons might draw different inferences from the undisputed facts. Although summary judgment can aid in the expeditious disposition of a lawsuit, it remains a drastic means of disposing of litigation and, therefore, should be allowed only where the right of the moving party is clear and free from doubt." *Williams*, 228 Ill. 2d at 417, 888 N.E.2d at 9.

Additionally, a reviewing court "may affirm a grant of summary judgment on any basis appearing in the record, regardless of whether the lower court relied upon that basis." *Salerno v. Innovative Surveillance Technology, Inc.*, 402 Ill. App. 3d 490, 496, 932 N.E.2d 101, 108 (2010). We review *de novo* the trial court's grant of a motion for summary judgment. See *Williams*, 228 Ill. 2d at 417, 888 N.E.2d at 9.

B. Date of Injury

The provisions of section 13-214.3 of the Limitations Act (735 ILCS 5/13-214.3 (West 1994)) at issue here provide the following:

> "(b) An action for damages based on tort, contract, or otherwise (i) against an attorney arising out of an act or omission in the performance of professional services *** must be commenced within 2 years from the time the person bringing the action knew or reasonably should have known of the injury for which damages are sought.
>
> (c) Except as provided in subsection (d), an action described in subsection (b) may not be commenced in any event more than 6 years after the date on which the act or omission occurred.
>
> (d) When the injury caused by the act or omission does not occur until the death of the person for whom the professional services were rendered, the action may be commenced within 2 years after the date of the person's death unless letters of office are issued or the person's will is admitted to probate within that 2 year period, in which case the

> action must be commenced within the time for filing claims against the estate or a petition contesting the validity of the will of the deceased person, whichever is later, as provided in the Probate Act of 1975."

See *Petersen v. Wallach*, 198 Ill. 2d 439, 443 n.1, 764 N.E.2d 19, 21 n.1 (2002) (explaining why the 1994 version of the statute is the applicable one).

Plaintiffs argue the injury occurred when Mary transferred Lloyd's one-half interest in the Property to her living trust in June 2004, which they did not discover until the IRS denied the fractional discount in August 2009. Thus, their October 2009 complaint was timely under both sections 13-214.3(b) and 13-214.3(c) of the Limitations Act. Defendants contend the injury occurred at Mary's death, and thus under section 13-214.3(d) of the Limitations Act, plaintiffs' complaint is untimely as it had to be filed at the latest by January 9, 2009. We note the parties appear to agree Mary's probate case did not extend the time for filing the action beyond two years.

Plaintiffs' argument is premised on the fact Mary's estate was entitled to fractional discounts on the two separate one-half interests in the Property without the June 2004 warranty deed. However, in 2002, the United States Tax Court held that, when a decedent holds a testamentary general power of appointment, the share of property subject to the testamentary general power of appointment must be aggregated with the share of property the decedent owned outright. *Fontana*, 118 T.C. at 322. While the record on appeal lacks a copy of Lloyd's living trust, the IRS's explanation of its changes stated Mary held a testamentary general power of appointment over Lloyd's one-half interest in the Property. In their reply brief, plaintiffs state Lloyd's trust gave Mary a general power of appointment exercisable at her death. Thus, even if the one-half interests had remained separate at Mary's death, Mary would not have been entitled to take fractional discounts on the separate one-half interests because, under *Fontana*, they had to be aggregated, making Mary a 100% owner of the Property. Accordingly, based on the relevant undisputed facts, Mary's estate was not injured by the 2004 warranty deed as the deed did not alter the valuation of the Property for estate-tax purposes.

Assuming *arguendo* Mary's estate was injured by the 2004 warranty deed or some other act or omission by Cooper that failed to provide the fractional discounts, defendants argue any claim would be time barred under section 13-214.3(d) of the Limitations Act. When determining whether section 13-214.3(d) is applicable, a court's sole inquiry is whether the injury caused by the malpractice occurred upon the client's death. *Fitch v. McDermott, Will & Emery, LLP*, 401 Ill. App. 3d 1006, 1022, 929 N.E.2d

1167, 1182 (2010).

In *Wackrow v. Niemi*, 231 Ill. 2d 418, 425, 899 N.E.2d 273, 278 (2008), the supreme court found section 13-214.3(d) applied to a legal-malpractice claim based on the drafting of an amendment to the decedent's trust document. The plaintiff claimed she did not receive the decedent's residence under the trust document because the defendant-attorney failed to perform a title search, which would have shown the residence was owned by another trust and not the decedent. *Wackrow*, 231 Ill. 2d at 420-21, 899 N.E.2d at 275-76. The supreme court found it was clear the injury did not occur until the decedent's death because the decedent could have revoked the amendment or changed the beneficiary prior to his death. *Wackrow*, 231 Ill. 2d at 425, 899 N.E.2d at 278.

Plaintiffs assert this case is distinguishable from *Wackrow* because Mary could not have undone the June 2004 conveyance and thus any tax benefits were lost. However, *Wackrow* does not require the ability to remedy the error for the injury to have occurred at the decedent's death. In fact, the *Wackrow* court pointed out the actions the decedent could have taken that would have resulted in the plaintiff not receiving his residence and not the decedent's ability to correct the defendant-attorney's error that would have allowed the plaintiff to receive the residence as intended. *Wackrow*, 231 Ill. 2d at 425, 899 N.E.2d at 278. As the *Wackrow* court highlights, remedying an error is not the only way in which a potential injury does not become an actual injury until the decedent's death.

We recognize our interpretation of *Wackrow* is contrary to the Second District's statement the animating principle in *Wackrow* is that, "as long as the client who had intended to convey an interest to the plaintiff was still alive, the attorney's error could be remedied at any time, by the drafting of a deed or other conveyance that effectuated his intent." *Snyder v. Heidelberger*, 403 Ill. App. 3d 974, 978, 933 N.E.2d 1235, 1238 (2010). However, only the author in *Snyder* agreed with the aforementioned statement. See *Snyder*, 403 Ill. App. 3d at 983, 933 N.E.2d at 1242 (O'Malley, J., dissenting) (commenting on his agreement with Justice Jorgensen's special concurrence on a different interpretation of why the injury did not occur until the decedent's death).

In this case, the alleged error resulted in an increase in the valuation of the Property for estate-tax purposes. Under the Internal Revenue Code, the value of a decedent's gross estate is determined by the value of all property in the estate at the time of the decedent's death. 26 U.S.C. §2031(a) (2006). An alternative valuation date is available (26 U.S.C. §2032 (2006)), but plaintiffs did not elect that in this case. Thus, the critical moment for estate-tax-valuation purposes is the moment of death. *Fontana*, 118 T.C. at 322. Accordingly, an injury, if any, was sustained at Mary's death since that was the date used for determining the value of the Property for estate-tax purposes. Only a potential for injury existed before her death. We point out the law and IRS policy on fractional discounts applicable to Mary's estate could have changed until her death, the valuation date. The following example also illustrates how any injury could not have occurred until Mary's death. Under article VIII of her restated living trust, Mary had the ability to sell the entire Property to anyone for full consideration before her death without raising any tax-avoidance issues with the IRS. If she would have done so, then the value of the Property at her death would not have been an issue and no injury would have occurred. Thus, as in *Wackrow*, the date of injury, if an injury occurred, was at Mary's death. We note plaintiffs' contentions regarding death-bed transfers and whether Mary did have a general power of appointment to convey Lloyd's interest are irrelevant and do not create an issue of material fact as to when any injury occurred.

Accordingly, the trial court properly found section 13-214.3(d) of the Limitations Act applies, and plaintiffs' complaint was untimely.

III. CONCLUSION

For the reasons stated, we affirm the Jersey County circuit court's judgment.

Affirmed.