2014 IL App (2d) 131017-U
No. 2-13-1017
Order filed May 21, 2014

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

KENNETH BEAN,	)	Appeal from the Circuit Court
	)	of Kane County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 12-L-253
	)	
NORBERT RITT,	)	
	)	
Defendant-Appellee	)	
	)	Honorable
(Ariano, Hardy, Ritt, Nyuli, Richmond, Lytle,	)	F. Keith Brown,
& Goettel, P.C., Defendant).	)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices McLaren and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: Plaintiff forfeited his contentions by failing to raise them in the trial court, and in any event they lacked merit.

¶ 2 Plaintiff, Kenneth Bean, appeals a judgment dismissing his complaint (see 735 ILCS 5/2-619(a)(5) (West 2012)) against defendant, Norbert Ritt, for legal malpractice. Plaintiff contends that (1) the trial court erred in holding that the complaint was barred by the statute of limitations (735 ILCS 5/13-214.3 (West 1994)); and (2) the statute is unconstitutional. We affirm.

¶ 3 On May 5, 2012, plaintiff filed a complaint against defendant and the law firm of Ariano, Hardy, Ritt, Nyuli, Richmond, Lytle & Goettel, P.C. The firm was later dismissed with prejudice because defendant was not a member when he committed the alleged malpractice. As pertinent to defendant, count I of the complaint alleged as follows. Plaintiff is the son of Donald Bean and the stepson of Antoinette Bean. Both Beans had had children by prior marriages. In October 2000, the Beans met with defendant so that he could prepare estate-planning documents for them. The Beans told defendant that they had agreed to make reciprocal wills to provide that the surviving spouse would have the use of all the marital assets and that, when the surviving spouse died, 50% of the assets would go to Donald's descendants and 50% to Antoinette's descendants. The Beans also intended that the agreement would be irrevocable and that, after one spouse died, the surviving spouse would not be able to amend it. Defendant prepared reciprocal wills for the Beans.

¶ 4 Count I alleged further that Donald died on October 29, 2001. On or about June 27, 2003, Antoinette executed a declaration of trust known as the Antoinette Bean Trust. On or about November 5, 2008, she executed (1) an amendment to the Antoinette Bean Trust and (2) her will. On December 17, 2010, her will was admitted to probate. All three documents were contrary to the reciprocal wills of 2000 and also frustrated Donald's intent to ensure that his estate descend in part to his children, including plaintiff. Defendant had breached his duty of care toward plaintiff, as an intended beneficiary of the reciprocal wills, by failing to advise the Beans "that in order to make their agreement reflected in their reciprocal wills irrevocable and un-amendable [*sic*] it had to be in writing or reflected in the wills in some way." Because defendant had failed to effectuate the Beans' intent to make their reciprocal wills irrevocable and

unamendable, the documents that Antoinette executed after Donald died deprived plaintiff of substantial assets.

¶ 5 Count II of the complaint was entitled "Fraudulent Concealment." See 735 ILCS 5/13-215 (West 2012). It realleged the facts in count I and added the following. The period in which to file claims against Antoinette's estate expired June 17, 2011. In December 2010, plaintiff contacted attorney Rolland Soskin to investigate Antoinette's estate. In February 2011, Karen Kuhn of Soskin's firm asked defendant for information about the preparation of the Beans' wills. Defendant refused to provide any information, citing the attorney-client privilege.

¶ 6 Count II alleged further that, on March 18, 2011, Soskin, on plaintiff's behalf, contacted defendant to discuss how defendant would represent clients in situations similar to that of the Beans in 2000. With the intent to conceal his wrongful actions and deter plaintiff from challenging Antoinette's estate, Ritt provided improper answers to several questions. The complaint alleged specifically:

> "a. Attorney Soskin asked Defendant Ritt if he had written an estate plan in the calendar year 2000, would he likely still have possession of the file from that engagement? Mr. Ritt replied that he would;
>
> b. Attorney Soskin then asked Defendant Ritt, if a second[-]marriage couple each with children from their first marriage had made an agreement that on the death of the second to die everything would be split 50% to the descendants of the husband and 50% to the descendants of the wife, would he have advised them that they needed to either put in writing the fact that their agreement was irrevocable or have advised them that if they did not put it in writing that [*sic*] they were then relying on the survivor of them to honor their agreement. To which Defendant Ritt replied that he absolutely would have advised

a couple under such circumstances that if they did not put specific irrevocability language into their wills or into a separate written agreement, that [*sic*] they would be relying on the survivor to honor their agreement;

c. [Soskin asked defendant] [w]hether if he had done an estate plan for someone in 2000 if [*sic*] his file would contain copies of the wills he had prepared. To which he responded in the affirmative; and

d. Finally the Defendant was asked if based upon his answers to these foregoing questions, if he were the attorney for the plaintiff, did he believe that pursuing an issue such as the one presented would be a waste of the Plaintiff's time. To which he replied that he did not believe that it would be."

¶ 7 Count II alleged that, based upon defendant's answers to Soskin's questions, plaintiff was confident that he would be able to obtain a copy of Antoinette's 2000 will "evidencing that the terms were reciprocal" with those of Donald's 2000 will and that defendant had advised the Beans that they needed "to either express the irrevocability in writing" or to acknowledge to him that each was relying on the surviving spouse to honor their agreement. However, on October 11, 2001, in a deposition in a suit that plaintiff had filed challenging Antoinette's revised will, defendant testified inconsistently with what he had told Soskin: he stated that he would have discussed the matter of irrevocability only had his clients asked about it.

¶ 8 Count II alleged that defendant had engaged in fraudulent concealment by (1) using the attorney-client privilege to thwart plaintiff's attempts to challenge Antoinette's testamentary documents; (2) intentionally misleading Soskin by telling him that he would have discussed irrevocability with the Beans, then testifying inconsistently with this representation after the limitations period had run; and (3) failing to notify plaintiff timely of the errors that he had made

and the resultant "legal issues." As a result of defendant's fraudulent concealment, plaintiff had lost substantial assets and had been forced to hire additional counsel at further expense.

¶ 9 Count III of the complaint, entitled "Lack of Informed Consent," reiterated the factual allegations of count I and contended that defendant had negligently failed to inform the Beans that they had a conflict of interest or that the surviving spouse could "change the terms of the wills" and thereby cut out the other spouse's descendants.

¶ 10 Defendant moved to dismiss the complaint. As pertinent here, he contended that the complaint was untimely under the attorney-malpractice statute, which, in relevant part, reads:

> "(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." 735 ILCS 5/13-214.3(b)(i), (c), (d) (West 1994).

¶ 11 As pertinent here, defendant's motion alleged the following facts, with documentation. On May 3, 2011, in case No. 10-P-624, In re Estate of Antoinette Bean, plaintiff filed claims against the estate and a petition contesting the will. On June 7, 2011, the period for filing claims against Antoinette's estate expired. On June 29, 2011, plaintiff subpoenaed defendant for Antoinette's testamentary documents. On July 14, 2011, defendant provided plaintiff a copy of Antoinette's 2000 will. On July 22, 2011, the probate court ruled that the attorney-client privilege did not apply to plaintiff's claims and petition. On September 22, 2011, plaintiff subpoenaed defendant for additional documents and for his deposition. On September 30, 2011, defendant provided plaintiff copies of everything in his file relating to the Beans' estate planning. On October 11, 2011, defendant gave his deposition. On May 10, 2012, plaintiff filed his complaint against defendant.

¶ 12 Defendant's motion argued that plaintiff's complaint was untimely, for the following reasons. Subsection (d) of the statute applied here, because plaintiff's injury did not occur until September 7, 2010, when Antoinette died and her testamentary documents took effect. Her will was admitted to probate on December 17, 2010. Therefore, under subsection (d) of the statute, plaintiff had to file his complaint by June 17, 2011, six months after the will was admitted to probate (six months being the time in which to file either claims against the estate or a petition contesting the will). However, he filed the complaint on May 10, 2012.

¶ 13 Defendant's motion argued further that plaintiff's allegation of fraudulent concealment was unsound as a matter of law. First, the attorney-client privilege survived Antoinette's death (see *Hitt v. Stephens*, 285 Ill. App. 3d 713, 717-18 (1997)) and thus barred defendant from revealing the information from his file that Kuhn sought in February 2011. Only as of May 3, 2011, when plaintiff filed his petition contesting Antoinette's will, did the privilege cease to

restrict defendant's disclosure of information. See *id.* At that point, plaintiff had more than a month to file his malpractice complaint. He did not do so. On July 22, 2011, the court in the probate case ruled that the attorney-client privilege no longer applied to the facts surrounding the preparation of the Beans' reciprocal wills. Defendant provided his file and testified at a deposition. In sum, defendant had done nothing to lull plaintiff into delaying his complaint or to prevent plaintiff from discovering his claim.

¶ 14 Defendant argued specifically that he concealed nothing when he spoke to Soskin on March 18, 2011. On that date, defendant was not allowed to discuss the specifics of the Beans' wills, and he simply answered a hypothetical question: he said that, if a married couple asked him about reciprocal wills, he would advise them of the need to include specific language making the wills irrevocable. Until May 3, 2011, defendant could not tell plaintiff about the alleged errors in drafting Antoinette's will. From May 3, 2011, plaintiff could have obtained whatever documents he needed relating to the preparation of the Beans' wills, but he made no further inquiry until June 29, 2011 (after the statutory period had run), when he requested copies of Antoinette's testamentary documents. Plaintiff had had ample time to discover defendant's alleged malpractice and file a complaint, but he failed to do so.

¶ 15 Defendant's motion to dismiss attached a copy of the deposition that he gave on October 11, 2011, in the will-contest case. Plaintiff's attorney and defendant had the following exchange:

> "Q. *** [Y]ou would certainly advise a couple that if they want to be sure their plan was followed by the survivor that they need you to put their agreement in writing not to change the plan or they'd have to trust their spouse to honor their agreement?
>
> A. We would have tried to provide what the client was requesting.

Q. But you would have had to advise them that if they wanted to be sure that their surviving spouse didn't change it that they either had to make it irrevocable in writing either in the will, in a separate writing, or they would have had to trust their spouse not to change their agreement; is that correct?

A. The—yeah, had the clients asked those questions."

¶ 16 In response to the motion to dismiss, plaintiff argued that defendant had fraudulently concealed plaintiff's cause of action by knowingly making misrepresentations to him, intending to deceive him into delaying his suit until after June 17, 2011. Specifically, on March 18, 2011, Soskin asked defendant whether, in a hypothetical case similar to the Beans' situation, he would have advised a couple to put an irrevocability clause into both wills; defendant replied that he " 'absolutely would have so advised.' " Thus, defendant led Soskin and plaintiff to believe that he had in fact so advised the Beans about the need for an irrevocability clause. However, after the limitations period ran, defendant testified in his deposition that he would have given clients in the Beans' situation such advice only "had the clients asked those questions." Plaintiff noted that he had conceded in his complaint, and still conceded, that the statutory period had expired on June 17, 2011. However, he argued, under section 13-215 of the Code of Civil Procedure (735 ILCS 5/13-215 (West 2010)), the period had been extended by five years.

¶ 17 The trial court granted defendant's motion to dismiss, reasoning as follows. Because the alleged injury to plaintiff did not occur until the death of Antoinette, for whom defendant rendered his services, subsection (d) of the statute applied. Antoinette died on September 7, 2010, and her will was admitted to probate on December 17, 2010, within two years of her death. Thus, as plaintiff had conceded, absent fraudulent concealment, he had to file his complaint by June 17, 2011, the last day on which to file either a petition contesting the validity of the will

(see 755 ILCS 5/8-1(a) (West 2010)) or a claim against the estate (see 755 ILCS 5/18-3(a) (West 2010)). Plaintiff did not file his complaint until May 10, 2012.

¶ 18 The court then addressed plaintiff's contention that the statutory period had been extended by fraudulent concealment. The court reasoned as follows. Concealment consists of affirmative acts or representations that are calculated to lull or induce a claimant into delaying the filing of his claim or to prevent the claimant from discovering his claim. Plaintiff relied on defendant's refusal to answer Kuhn's request for documents in February 2011 and his allegedly misleading answers to Soskin's hypothetical question in March 2011. However, in February and March 2011, the privilege barred defendant from honoring Kuhn's request or from discussing the circumstances of the making of the Beans' wills. Not until May 3, 2011, when plaintiff filed his challenge to the documents that Antoinette had executed after Donald's death, did the privilege end. Plaintiff had supplied no facts to suggest that, between May 3, 2011, and June 17, 2011, defendant had invoked the attorney-client privilege or refused to supply any documents to plaintiff. Insofar as defendant's answer was a misrepresentation, any reliance on it was not reasonable, given that other avenues could have been explored to obtain documents or deposition testimony that would have revealed the alleged cause of action. After May 3, 2011, plaintiff had more than a month to obtain the information needed to support his cause of action. Yet he did nothing until after the statutory period expired. Plaintiff timely appealed.

¶ 19 On appeal, plaintiff argues that the trial court erred in dismissing his complaint. Because the trial court did so under section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619 (West 2012)), our review is *de novo*. See *Van Meter v. Darien Park District*, 207 Ill. 2d 359, 368 (2003). Plaintiff contends that (1) the trial court erred in holding that the six-month period of subsection (d) of the statute (735 ILCS 5/13-214.3(d) (West 1994)) applied to plaintiff's

complaint; and (2) alternatively, subsection (d) is unconstitutional because it arbitrarily provides one class of attorney-malpractice plaintiffs a shorter period in which to file their claims (six months) than that provided other attorney-malpractice plaintiffs (two years) (see 735 ILCS 5/13-214.3(b) (West 1996)). We address these contentions in turn.

¶ 20 Plaintiff's first contention is forfeited. In his complaint, he conceded that, under subsection (d) of the statute, his complaint was tardy, but he asserts that the limitations period was extended by defendant's fraudulent concealment of the cause of action. In responding to defendant's motion to dismiss, plaintiff reiterated his concession and again relied entirely on fraudulent concealment. On appeal, however, plaintiff has abandoned any claim of fraudulent concealment and now asserts that subsection (d) of the statute may not be used to shorten the period that he had, after he discovered his cause of action, in which to file his complaint.

¶ 21 An appellant may not obtain the reversal of a judgment on a theory that he did not present to the trial court. *Haudrich v. Howmedica, Inc.*, 169 Ill. 2d 525, 536 (1996); *Campbell v. White*, 187 Ill. App. 3d 492, 505 (1989). Plaintiff's argument is forfeited.

¶ 22 We note briefly that, even were we to reach the merits of plaintiff's argument, we would reject it. Plaintiff surveys much case authority, without coherently explaining how it supports his contention that subsection (d) should apply only if it extends the limitations period beyond the period set by subsection (b) (two years from the date of the discovery of the cause of action). Moreover, plaintiff concedes—as indeed he must—that our supreme court has held that subsection (d) applies to all cases in which the alleged injury does not occur until the death of the person for whom the legal services were rendered and that, when it applies, it does so "*instead* of the two-year statute of limitations [in subsection (b)] and the six-year statute of repose [in subsection (c)]." (Emphasis in original.) *Wackrow v. Niemi*, 231 Ill. 2d 418, 427 (2008). The

Wackrow court explicitly stated that "the section 13-214.3(d) exception may shorten the limitation period for legal malpractice complaints." *Id.* Thus, plaintiff's first argument is both forfeited and unsound.

¶ 23 Plaintiff argues that this case is analogous to *Pugsley v. Tueth*, 2012 IL App (4th) 110070. He does not explain *why Pugsley* supports his contention that his injury did not occur on the date that Antoinette died. In *Pugsley*, the plaintiffs alleged that the defendant attorney failed to draft documents that would follow their mother's wish to deed certain property to them at some point. The mother held some of the property in fee simple and the rest in joint tenancy with her husband. She died a few months after her meeting with the defendant. Her will was admitted to probate, but her husband renounced it. The appellate court held that the alleged injury to the plaintiffs occurred either before the mother died or when the husband renounced the will, depending on whether or to what extent (1) the mother had intended to confer an immediate benefit on the plaintiffs by an immediate gift of property or (2) the mother's will had conferred a benefit that the husband's renunciation eliminated. *Id.* ¶¶ 23-24.

¶ 24 Suffice it to say that the complex and unique facts of *Pugsley* bear no significant resemblance to the facts here, where there is no dispute that the alleged negligence occurred in the drafting of Antoinette's will. Plaintiff has never alleged that defendant's clients intended to confer a benefit on him within their lifetimes. He has never contended that her will conferred a benefit that was negated by an action that someone took after the will was admitted to probate. At the trial level, plaintiff never contended that his injury occurred at any time other than the date that Antoinette died and her will thus took effect. No such contention would have made sense.

¶ 25 We turn to plaintiff's second argument on appeal. He contends that subsection (d) is unconstitutional because it creates an arbitrarily short limitations period for any case in which the

injury does not occur until the client's death and, within two years afterward, letters of office are issued or the client's will is admitted to probate. Plaintiff argues that the disparity between the six-month period for some attorney-malpractice suits and the two-year period for others violates our state constitution's equal protection clause (Ill. Const. 1970, art. I, § 2) and its prohibition of special legislation (Ill. Const. 1970, art. IV, § 13).

¶ 26 Plaintiff has forfeited his argument by failing to raise it at the trial level. See *Forest Preserve District of Du Page County v. First National Bank of Franklin Park*, 2011 IL 110759, ¶ 27. We recognize that we may disregard forfeiture when the issue raised is one of law and the parties have fully briefed it. *Id.* ¶ 28; *Poullette v. Silverstein*, 328 Ill. App. 3d 791, 797 (2002). However, we decline to do so here as, in *Poullette*, the fourth district rejected a similar argument. The court explained that subsection (d) has a rational basis in the need to protect defendants from stale claims and the need to promote closure in matters relating to decedents' estates. *Poullette*, ¶ 15.

¶ 27 The judgment of the circuit court of Kane County is affirmed.

¶ 28 Affirmed.