

STATE OF MICHIGAN
COURT OF APPEALS

CHARLES ELLIMAN, ETTIE ELLIMAN,
MILDRED ADLER, LILA STONE, SIDNEY
MANN, EDWARD ELLIMAN, MICHAEL
ELLIMAN, NORMAN ELLIMAN,
DOROTHY MINCER, MYRA RUCK, JOY
ORDMAN, ANNIE HAGARD HILLMAN,
BASIL HILLMAN and HARRY JACOBS,

Plaintiffs-Appellants/
Cross-Appellees,

v

ARTHUR RUBINER,

Defendant-Appellee/
Cross-Appellant.

UNPUBLISHED
March 28, 1997

No. 188672
Oakland County
LC No. 94-471323

Before: Cavanagh, P.J., and Gage and D.A. Burrell,* J.J.

PER CURIAM.

Plaintiffs appeal as of right from an order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10) on their claims for negligence and fraud. Defendant filed a cross-appeal in this matter pursuant to MCR 7.207, arguing that the trial court should have granted his MCR 2.116(C)(10) motion for summary disposition on additional grounds. We affirm.

Plaintiffs are the named remainder beneficiaries of the will of Louis Elliman ("decedent"), who died on November 2, 1987. Defendant was the co-personal representative of decedent's estate, and also served as counsel for the estate's personal representatives. The other personal representative was Charles Rubiner ("Rubiner"), defendant's father, who died on February 21, 1991. Rubiner drafted decedent's will and the antenuptial agreement between decedent and his second wife, Mollie Elliman, two documents that are at the heart of the present controversy.

*Circuit judge, sitting on the Court of Appeals by assignment.

On November 8, 1962, decedent and Mollie Elliman executed an antenuptial agreement drafted by Rubiner, whereby Mollie agreed to disclaim her statutory right to take against decedent's will or estate in exchange for a \$100,000 devise. Decedent retained the right to give Mollie additional property during his lifetime or through his will. Attached to the antenuptial agreement was a schedule of decedent's assets and the March 31, 1961 balance sheet for decedent's business, Elliman Steel Company. On June 28, 1983, decedent executed the will that Rubiner had drafted for him. By the terms of the will and its first codicil, Mollie was to receive decedent's personal property and \$1,000,000 to be held in trust for her support. The will referenced the antenuptial agreement and stated that it was "now in full force and effect."

On January 27, 1988, after decedent's death, Mollie filed a petition for declaratory judgment in probate court against defendant and Rubiner as the personal representatives of decedent's estate seeking to void the antenuptial agreement to allow her to exercise her statutory right to take against decedent's will. The probate court agreed with Mollie that decedent did not fully and fairly disclose his assets when they entered into the agreement, and entered an order holding that the antenuptial agreement was not enforceable. Thus, as provided in MCL 700.282(1); MSA 27.5282(1), Mollie elected to take her statutory share against decedent's will and became entitled to \$7,300,000 from decedent's estate.

Plaintiffs allege that the end result of the invalidation of the antenuptial agreement was the reduction of each of the six residuary shares they were to share under the terms of decedent's will from \$1,740,579.12 to approximately \$426,000. They filed the instant action against defendant on February 25, 1994, alleging as pertinent to this appeal that defendant was negligent in failing to file a malpractice claim against Rubiner for his alleged negligence in drafting decedent's antenuptial agreement. The circuit court granted defendant's motion for summary disposition on plaintiff's negligence claim based on the court's finding that the invalidation of the antenuptial agreement was caused by decedent's failure to fully and fairly disclose his assets and not by any negligence in drafting the document. The court found, however, that the claim was not barred by the statute of limitations.

After this order was entered, the court granted plaintiffs' motion to amend their pleadings. In their amended complaint, plaintiffs added a claim of negligence for defendant's failure to file suit against Rubiner for negligently drafting decedent's will and a claim of fraud for defendant's alleged double-billing of the estate for legal and fiduciary services. Plaintiffs' negligence claims and their fraud claim were disposed of pursuant to the circuit court's award of summary disposition in defendant's favor pursuant to MCR 2.116(C)(10). The grant of summary disposition on these claims are the subject of this appeal.¹

I

Plaintiffs first argue that the circuit court erred in granting defendant's MCR 2.116(C)(10) motion for summary disposition as to their negligence claim concerning the drafting of decedent's will. We disagree.

A motion for summary disposition brought under MCR 2.116(C)(10) tests the factual support for a party's claim. *Rice v ISI Mfg, Inc*, 207 Mich App 634, 635-636; 525 NW2d 533 (1994). The trial court should grant such a motion when, except as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law. *Nicita v City of Detroit (After Remand)*, 216 Mich App 746, 751; 550 NW2d 269 (1996). This Court reviews the grant or denial of a motion pursuant to MCR 2.116(C)(1) de novo, using the same standard required of the trial court, giving the benefit of any reasonable doubt to the nonmoving party to determine whether a record might be developed which might leave open an issue upon which reasonable minds could differ. *Jackhill Oil Co v Powell Production, Inc*, 210 Mich App 114, 117; 532 NW2d 866 (1995).

To establish a prima facie case of negligence, plaintiffs were required to establish: (1) that defendant owed them a duty; (2) that defendant breached that duty; (3) that defendant's breach of duty was a proximate cause of plaintiffs' damages; and (4) that plaintiffs suffered damages. *Baker v Arbor Drugs, Inc*, 215 Mich App 198, 203; 544 NW2d 727 (1996). The circuit court concluded in its grant of summary disposition to defendant that the antenuptial agreement was not invalidated because of Rubiner's negligent drafting but because of his client's failure to fully disclose his assets. The court further found that the statement in the will that the antenuptial agreement was "in full force and effect" was also incorrect because of decedent's failure to fully disclose his assets and not because of Rubiner's drafting. Because Rubiner did not commit legal malpractice in preparing the agreement and the will, the circuit court concluded, defendant cannot be found negligent for failure to bring an action against him.

Plaintiffs now repeat the argument they made to the circuit court that Rubiner breached a duty owed to them as named residual beneficiaries of the will when he drafted the erroneous statement that the antenuptial agreement was "in full force and effect." Plaintiffs further argue that Rubiner had a duty to review the antenuptial agreement and its schedules at the time he drafted the will to determine whether the agreement was in fact "in full force and effect" under Michigan law.

We first note that plaintiffs do not contend that Rubiner failed to advise decedent to make a full and complete disclosure of his assets when he drafted the antenuptial agreement. Further, we do not now know what was advised or said by Rubiner and decedent. Although plaintiffs argue that "some commentators" believe that an attorney drafting an antenuptial agreement has a duty to ensure that their client makes full disclosure of their assets, they cite no Michigan case or statute that establishes this duty.

We agree with the circuit court's holding that it was decedent's failure to fully disclose his assets that rendered the antenuptial agreement unenforceable and affected the complained-of statement in his will, rather than any negligence committed by Rubiner. Where the attorney's actions are not the cause of the plaintiff's injury, there is no malpractice cause of action. *Schlumm v O'Hagan*, 173 Mich App 345, 360-361; 433 NW2d 839 (1988). Because plaintiffs could not maintain a malpractice action against Rubiner, the circuit court did not err in granting summary disposition to defendant on plaintiffs' claim that he was negligent in failing to file such an action.²

Defendant further argues on cross-appeal that the circuit court should have granted his motion for summary disposition on the additional basis that plaintiffs failed to establish they were the intended third-party beneficiaries of the antenuptial agreement that Rubiner drafted for decedent and Mollie, and therefore Rubiner did not owe them a duty of care. Because we have decided that, regardless of the duty that Rubiner may have owed to plaintiffs, decedent's failure to fully disclose his assets was the cause of any injury suffered by plaintiffs, there is no need to address this issue.

II

Next, plaintiffs argue that the trial court erred in granting defendant's MCR 2.116(C)(10) motion for summary disposition as to their claim for fraud. We disagree.

In Count IV of their first amended complaint, plaintiffs alleged that defendant had fraudulently misrepresented the amount of fees to which he was entitled as counsel to the personal representatives of decedent's estate. Defendant moved for summary disposition as to this claim, arguing that the orders of the probate court authorizing payment of his fees from the assets of decedent's estate precluded plaintiffs on the basis of res judicata from claiming that he fraudulently misrepresented the amount of money to which he was entitled. The circuit court disagreed with defendant's contention on the res judicata issue, but nonetheless held that plaintiffs failed to submit documentary evidence to support their action for fraud. The court, therefore, granted defendant's MCR 2.116(C)(10) motion for summary disposition as to Count IV of plaintiffs' first amended complaint.

We find that the circuit court did not err in granting defendant's MCR 2.116(C)(10) motion for summary disposition. Plaintiffs were obliged to submit documentary evidence to support their claim that defendant falsified his billing statements. *Skinner v Square D Co*, 445 Mich 153, 160; 516 NW2d 475 (1994). They did not. Although plaintiffs assured the circuit court and this Court that evidence of defendant's fraud could be found in the files of the Oakland County Probate Court, this amounts to a mere promise to offer factual support for their claim at trial, which is insufficient to successfully oppose a motion for summary disposition brought pursuant to MCR 2.116(C)(10). *Cox v Dearborn Heights*, 210 Mich App 389, 398; 534 NW2d 135 (1995). Therefore, the trial court was correct in granting defendant's MCR 2.116(C)(10) motion for summary disposition as to plaintiffs' claim of fraud.

III

Lastly, defendant argues on cross-appeal that the circuit court should have granted his motion for summary disposition as to plaintiffs' claim concerning the drafting of the antenuptial agreement on the alternative ground that the claim was barred by the applicable statute of limitations. We disagree.

Generally, an action for malpractice must be commenced within two years of when the claim accrued. The statute of limitations applicable to an action for legal malpractice is two years or within six months after a plaintiff discovers or should have discovered the existence of a claim. MCL 600.5805(1), (4); MSA 27A.5805(1), (4), MCL 600.5838; MSA 27A.5838. Plaintiffs' complaint is based on defendant's alleged negligence during his service to the estate, which ended

on February 26, 1992. Plaintiffs filed the instant action on February 25, 1994. Therefore, plaintiffs' claim was timely filed.

Affirmed.

/s/ Mark J. Cavanagh

/s/ Hilda R. Gage

/s/ Daniel A. Burress

¹ Plaintiffs' complaint and amended complaint also alleged that defendant was negligent in undercounting the decedent's Exxon stock in preparing the estate's tax return, which caused damages in the form of penalties and interest charged against the estate. Defendant twice moved for summary disposition on this count, first arguing that the determination of federal and state authorities not to penalize the estate for the undercounting of the stock defeated plaintiffs' negligence claim, and then arguing that the claim was barred by collateral estoppel. The circuit court, however, twice denied summary disposition on this issue, finding that "whether plaintiffs can prove damages is an issue of fact," and the claim was not barred by collateral estoppel. Defendant did not appeal the denial of summary disposition on this claim.

² Plaintiffs vigorously argue that *Mieras v DeBona*, 204 Mich App 703; 516 NW2d 154 (1994) establishes the duty of care owed by an attorney to third party beneficiaries of a will. We note that this opinion was reversed by the Michigan Supreme Court in 452 Mich 278; 550 NW2d 202 (1996). Moreover, because we find that decedent's failure to fully disclose his assets caused the antenuptial agreement to fail, rather than any negligence committed by Rubiner, we do not need to discuss the standard of care Rubiner owed to plaintiffs.