2019 IL App (1st) 172916-U

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Appellate Court of Illinois, First District.

ESTATE OF FRANCISCO CONTRERAS by its Special Administrator Rudy Contreras, and RUDY CONTRERAS, AXEL CONTRERAS and FRANCISCO CONTRERAS, Individually as Heirs At Law of Francisco Contreras, a Deceased Person, Plaintiffs-Appellants,
v.
CINDY FLUXGOLD, MICHAEL J. BARON, LORENZO VALLADOLID, and GOLDSTEIN, FLUXGOLD & BARON, P.C., Defendants-Appellees.

No. 1-17-2916
|
March 20, 2019

Appeal from the Circuit Court of Cook County.

No. 17 L 3649

The Honorable Brigid Mary McGrath, Judge Presiding.

ORDER

PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court.

***1** *HELD*: Trial court properly found that section 13-214.3(d) of the Code governing limitations period for actions brought against attorneys in relation to the provision of their professional services was applicable to the instant cause, but improperly applied that statute to the facts presented; therefore, this cause should be reversed and remanded in accordance with our directions herein.

¶ 1 Plaintiffs-appellants the Estate of Francisco Contreras by its Special Administrator Rudy Contreras, and Rudy Contreras, Axel Contreras and Francisco Contreras Individually as Heirs At Law of Francisco Contreras, a Deceased Person (plaintiffs) filed a lawsuit against defendantsappellees Cindy Fluxgold, Michael J. Baron, Lorenzo Valladolid and Goldstein, Fluxgold & Baron, P.C. (defendants) asserting **legal malpractice**. Defendants filed a motion to dismiss and the trial court granted their motion, finding that plaintiffs' suit was time barred pursuant to section 13-214.3(d) of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/13-214.3(d) (West 2016)). Plaintiffs appeal, contending that the trial court applied the wrong statutory section to the cause and that, regardless, the claims period did not run and their complaint was thus timely filed. For the following reasons, we reverse and remand, with directions.

¶ 2 BACKGROUND

¶ 3 *The Parties*

¶ 4 The individual plaintiffs, Rudy Contreras, Axel Contreras and Francisco Contreras (junior), are the adult sons of Francisco Contreras (Francisco). Francisco was married to Sandra Contreras, the individual plaintiffs' step-mother. Francisco and Sandra had a daughter, Sandra Clarisa (a minor at the time of the events herein). Defendants are a law firm and several of its attorneys.

¶ 5 Also listed as a party plaintiff in this appeal is the "Estate of Francisco Contreras by its Special Administrator Rudy Contreras." However, there is nothing in the record in this cause to indicate that Rudy Contreras has been appointed Special Administrator of the Estate of Francisco Contreras. To the contrary, the parties, including Rudy Contreras himself, make clear in their briefs on appeal that this has not occurred and that, as of the date of the filings in this cause, his nomination as such is an open issue pending in probate court. As we will discuss in more detail, while the record on appeal here notes that a motion was filed in probate court to remove the current administrator of Francisco's estate, it has not yet been ruled upon. Thus, we note that plaintiffs have provided us with nothing, and we have found nothing, that would support our taking judicial notice, as plaintiffs urge, of an alleged appointment of Rudy Contreras as special administrator and, as such, we do not consider the "Estate of Francisco Contreras by its Special Administrator Rudy Contreras" as a party plaintiff on appeal at this time.

¶ 6 *The Incident*

¶ 7 Following treatment received at a hospital, Francisco was rendered a quadriplegic. Francisco and Sandra retained defendants to represent them in a lawsuit against the hospital and its staff, with Francisco asserting medical malpractice and Sandra asserting loss of consortium. In April 2011, defendants settled Francisco's lawsuit for $18,750,000.[1]

***2** ¶ 8 Francisco used $6,893,893 of his settlement sum to purchase four annuities for himself two from Prudential Insurance Company of America, one from Metropolitan Life Insurance Company, and one from John Hancock Life Insurance Company. Waterville Advisors, LLC (Waterville) assisted Francisco in his purchase and, as part of the process, provided him with an "Annuitant Checklist." The first section of this form contained blank spaces to fill in Francisco's personal information such as his name, address, date of birth and social security number. There was also a section entitled "Beneficiary Designation," with two boxes. The first box stated, "I elect my 'ESTATE' as my beneficiary;" it was followed by the conjunction "OR," and the second box stated, "My beneficiary designation is as follows:," accompanied by two sets of blank lines to provide the personal information, including names, addresses, dates of birth, social security numbers and relationships to the annuitant, of up to two people. Francisco's personal information was typewritten into the blanks in the first section of the Annuitant Checklist. Francisco left everything else blank, including the Beneficiary Designation section, failing to check either of the two boxes provided appointing his estate or a named person(s) as his beneficiary. Francisco signed the Annuitant Checklist and dated it April 13, 2011. It was submitted to and received by Waterville the following day.

¶ 9 Upon receiving the Annuitant Checklist, Waterville noticed that Francisco had failed to make any choice in the Beneficiary Designation section. Waterville contacted defendants to inquire whether Francisco (who was their client at the time he received the settlement used to purchase the annuities) had intentionally left it blank. Some days later, on April 27, 2011, an Annuitant Checklist was returned to Waterville. This time, in the Beneficiary Designation section, the box which stated "My beneficiary designation is as follows:," was checked; in the primary beneficiary space was handwritten Sandra's name and personal information, and in the secondary beneficiary space was handwritten the name and personal information of Sandra Clarisa (Francisco and Sandra's minor daughter). This copy of the Annuitant Checklist contained Francisco's same signature as well as the same date of April 13, 2011, just as they appeared on the original Annuitant Checklist Francisco had left blank.

¶ 10 *Francisco's Death and Commencement of Probate Action*

¶ 11 On July 25, 2013, Francisco died intestate. Pursuant to the Annuity Checklist, Sandra was the primary beneficiary named on the four annuities. On September 16, 2014, a probate court appointed Sandra as representative of Francisco's intestate estate and issued Letters of Office to her as independent administrator. Additionally, on this date, the probate court entered an Order Declaring Heirship, identifying as Francisco's only heirs Sandra, the individual plaintiffs (Rudy, Axel and Francisco), and Sandra Clarisa.

¶ 12 On November 6, 2014, plaintiffs filed a Petition for Citation to Recover Assets in the probate court. As the basis for the citation, plaintiffs specified the settlement Francisco had received for his medical malpractice action against the hospital, alleging Sandra had exercised undue influence over him and inserted herself as the beneficiary of his annuities over his intention to name no one as his beneficiary. Eventually, the probate court converted Sandra's status as independent administrator of Francisco's estate to one of supervised administration. During the pendency of the probate case, an employee of Waterville was deposed in March 2017, describing what had occurred with respect to the Annuitant Checklist and the alleged discrepancies between the original and the copy.

¶ 13 Then, in April 2017, plaintiffs filed a motion in the probate court to remove Sandra as independent administrator. Similar to their petition for citation to recover assets, plaintiffs in this motion alleged that Sandra exercised undue influence over Francisco and substituted her will to be designated as primary beneficiary of each of the annuities over his decision to not designate any such beneficiary. Plaintiffs also alleged that defendants were negligent and breached their duty owed to Francisco, his estate and heirs by permitting Sandra to exercise her influence over Francisco and by failing to use reasonable care and diligence in several respects, including allowing Sandra to dominate communications with Francisco; completing, or allowing Sandra to complete, the second copy of the Annuitant Checklist without obtaining a new, original signature from Francisco; and submitting this second copy to Waterville. Plaintiffs' motion concluded with a prayer to remove Sandra as independent administrator of Francisco's estate and to have Rudy Contreras or an institution appointed as special administrator to, in turn, prosecute a citation to discover assets against Sandra as well as a **legal malpractice** claim against defendants.

***3** ¶ 14 As of the filing of the instant cause, the probate matters, namely, plaintiffs' motion to remove Sandra as independent administrator and appoint a special administrator and their petition for citation to recover assets are still pending in the probate court. On December 4, 2018, an order was entered by the probate court with respect to the citation, stating that "the petition states sufficient facts to justify a citation to discover assets," but that the court was taking the motion under advisement, was allowing Sandra and defendants leave to file additional briefs, and was continuing the matter.

¶ 15 *The Instant Cause and Appeal*

¶ 16 Meanwhile, as matters were being filed and pending in probate court, on April 12, 2017, plaintiffs filed the instant cause in the trial court against defendants. Count I of their three-count complaint alleged "negligence," **legal malpractice**, asserting defendants owed a duty to Francisco and plaintiffs as his heirs to use care and prudence to ensure the Annuity Checklist was prepared and completed to reflect Francisco's intent which, plaintiffs claimed, was not to designate a beneficiary as per the original form he signed and left blank. Plaintiffs insisted that defendants knew or should have known Sandra was exerting undue influence over Francisco, and they breached their duty in several ways, including that either they completed, or they allowed Sandra to fill in, the Designated Beneficiary section on a copy of the original Annuity Checklist without having Francisco complete a new form and without obtaining his signature again following these changes. Count II of plaintiffs' complaint alleged defendants aided and abetted Sandra's breach of fiduciary duty she owed to Francisco, thereby also (and again) breaching their duty to him. And, count III alleged a breach of contract, third party beneficiary, claim wherein

plaintiffs asserted that, because of defendants' breach in allowing a non-original Annuity Checklist to be substituted in lieu of the original as left blank and signed by Francisco, plaintiffs, who were the intended beneficiaries of defendants' advice and counsel to Francisco in preparing the annuities, suffered damages as the annuities were not made part of his estate.

¶ 17 Defendants filed a motion asserting four grounds for dismissal pursuant to section 2619.1 of the Code (735 ILCS 5/2-619.1 (West 2016)). First, and primarily, defendants argued that plaintiffs' claims were barred by the statute of repose for actions against attorneys where the injury does not occur until the death of the person for whom the legal services were rendered as provided by section 13-214.3(d) of the Code (735 ILCS 5/13-214.3(d) (West 2016)). In discussing section 13-214.3(d), defendants insisted that this repose statute referred to the time period to file claims against an estate or a will contest and, under the guidance of section 8-1(a) of the Illinois Probate Act of 1975 (Probate Act or Act) (755 ILCS 5/18-1(a) (West 2016)), this gave plaintiffs "six months from when the letters of office are issued" within which to file their claim. Defendants continued by calculating that, because the letters of office were issued to Sandra on September 16, 2014, "[t]he repose period thus expired on March 16, 2015 [and a]t that point, plaintiffs' claims became barred" and their cause should be dismissed. In addition to this primary ground for dismissal, defendants asserted other grounds, including that the estate was not a proper plaintiff in the suit, defendants owed no duty of care to plaintiffs, and counts II and III were duplicative of the **legal malpractice** (negligence) count.

***4** ¶ 18 In their response to defendants' motion to dismiss, plaintiffs, relying heavily on *In re Estate of Ellis*, 236 Ill. 2d 45 (2009), argued that their complaint was not time barred because neither section 13-214.3(d) of the Code, nor section 8-1(a) of the Probate Act by any reference, applied. Plaintiffs claimed that, instead, either section 13-214.3(b) or section 13-214.3(c) of the Code applied, and those repose periods saved their claim since they did not know of their injury until March 2017 when the Waterville employee was deposed in the probate court. In a footnote, plaintiffs further claimed that, even if section 13-214.3(d) of the Code did apply, Sandra never properly published a notice of claims as she was required to do pursuant to section 18-3(a) of the Probate Act (755 ILCS 5/18-3(a) (West 2016)), so no time period ever commenced so as to bar their complaint. Plaintiff also countered defendants' other grounds for dismissal, arguing that the estate should not be stricken as a party, defendants did owe a duty to plaintiffs as intended beneficiaries, and counts II and III were not duplicative of count I. In their reply to plaintiffs' response, defendants again argued that section 13-214.3(d) of the Code governed, and further addressed plaintiffs' publication argument, asserting that even if their allegations were true, section 18-12(b) of the Probate Act would still bar their complaint.

¶ 19 The trial court held oral argument on defendants' motion to dismiss. Choosing to stand on their briefs, defendants argued only their ground for dismissal focusing on section 13214.3(d). They told the trial court that, under the Probate Act, via its incorporation pursuant to section 13-214.3(d)'s applicability to this matter, once "letters of office are issued, publication is issued, then claimants to the estate have six months to file a claim." Then, in addressing plaintiffs' footnoted publication argument, defendants conceded that the estate's attorney "had not filed a publication," as required by statute. Defendants argued that, however, "regardless of whether there was or was not a letter of office issued, there is a limit of two years to file claims from the date of death," which, in this case, would have been July 25, 2015, long before plaintiffs filed suit in April 2017. Defendants concluded by distinguishing *Ellis*.

¶ 20 In response, plaintiffs argued that *Ellis* was directly on point and applicable, and noted that, while letters of office were issued in September 2014, they only found out about the discrepancies with the Annuitant Checklist in March 2017, so holding them to some six-month, or even two-year, deadline would be unduly harsh, especially since they filed their complaint in April 2017, immediately after their discovery.

¶ 21 Following oral argument, the trial court granted defendants' motion. The court focused principally on section 13-214.3 of the Code, noting that this statute stated it applied in any action "based on tort, contract, or otherwise" for damages against an attorney arising out of an act or omission in the performance of professional services. The court then commented, "[t]hat Act expressly states that 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, [a lawsuit] must be commenced within two years after the date of death." The court further distinguished *Ellis*, finding it to be inapplicable. Then, admitting the result was harsh and suggesting that the cause "might be an interesting one for an appeal," the court nonetheless concluded that "section 13-214.3(d) applies and bars the cause of action."

¶ 22 Before terminating the hearing, and despite declaring that "what was dispositive for the purposes of [its] ruling today

was" the application of section 13-214.3(d), the trial court went on to address hypothetically the other three grounds for dismissal defendants had raised in their motion. The court noted it would have dismissed plaintiffs' complaint, but with leave to replead, to provide plaintiffs the opportunity to attempt to allege defendants owed them a duty. The court also noted it would have stayed the matter to await the probate court's determination on whether Rudy Contreras would be appointed special administrator. And, the court commented that, had it allowed count I to go through, it would not have necessarily dismissed counts II and III as duplicative at this time.

***5** ¶ 23 The trial court then issued its written order on the matter, stating:

> "Defendants' motion to dismiss is granted on Defendants' 735 ILCS 5/13-214.3(d) argument for the reasons stated on the record; for that reason, this case is dismissed with prejudice."

¶ 24 ANALYSIS

¶ 25 The instant cause centers on the interplay between specific statutory sections of the Code and, via incorporation, the Probate Act with respect to the particular facts of the instant cause. The main focus is the applicability of section 13-214.3(d) of the Code.

¶ 26 Plaintiffs' principle contention on appeal is that the trial court erred in dismissing their complaint as untimely after having found that section 13-214.3(d) controlled and, thus, that they had only six months from the issuance of letters of office as directed in section 8-1(a) of the Probate Act in which to file their complaint. Relying wholly on *Ellis*, plaintiffs argue that their tort claim against defendants should be governed by either 13-214.3(b)'s limitations period of two years of 13-214.3(c)'s repose period of six years, under either of which, after considering that they did not find out about the discrepancies in the Annuitant Checklist until March 2017, would render their complaint timely filed. In the alternative, plaintiffs contend that even if the trial court were correct and section 13-214.3(d) did apply, the claims period set forth in that statute has not yet begun to run because Sandra, as administrator of the estate, did not make a proper notice of claims publication as required under section 18-3(a) of the Probate Act, thereby rendering their complaint against defendants timely filed.

¶ 27 Defendants, for their part, contend that the trial court was correct in finding that plaintiffs' complaint was time barred. Deviating a bit from the six-month limitations period they argued before the trial court, defendants insist that plaintiffs had a two-year repose period that ran from Francisco's death pursuant to section 13-214.3(d) of the Code, because letters of office were issued to Sandra. They then supplement this by citing section 18-12(b) of the Probate Act and state that all claims are barred two years after a decedent's death, whether or not letters of office are issued. Distinguishing *Ellis*, they ultimately reason that because Francisco died on July 25, 2013, any claims plaintiffs may have had against them had to be filed by July 25, 2015 and, because plaintiffs did not file the instant suit until April 12, 2017, the trial court properly dismissed it. Alternatively, defendants argue that, were we to disagree that section 13-214.3(d) controls here, this cause should still be affirmed because they owed no duty to plaintiffs which would establish a **legal malpractice** claim, and counts II and III of plaintiffs' complaint are duplicative of the **legal malpractice** action.

¶ 28 Based on our thorough review of the record, as well as of the pertinent statutory provisions, we hold that section 13-214.3(d) of the Code controls the instant cause. However, based on the application of this statute to the facts presented, we cannot conclude, at this time, that plaintiffs' complaint should be dismissed.

¶ 29 *Standard of Review*

***6** ¶ 30 As a threshold matter, we address the standard of review. As noted, defendants' 2-619.1 motion to dismiss was based on four separate grounds. First, and foremost, among these was: "Plaintiffs' claims are barred by the applicable six-month statute [13-214.3(d)] of repose (Section 2-619(a)(5) grounds for relief)." And, it was precisely upon this ground that relief was granted. That is, while the trial court briefly heard argument on all four of defendants' grounds for dismissal and while it commented on how it would have ruled on the other three, it entered its dismissal specifically, and solely, pursuant to its conclusion that plaintiffs' complaint was untimely filed as defendants alleged. The court made this clear when it declared, "what was dispositive for the purposes of my ruling today was the statute," as well as when it wrote in its final order that "Defendants' motion to dismiss is granted on Defendants' 735 ILCS 5/13-214.3(d) argument for the reasons stated on the record."

¶ 31 Accordingly, then, while this appeal is taken from the grant of a section 2-619.1 motion to dismiss, we are called only to review this matter pursuant to section 2-619, and more specifically, to section 2-619(a)(5) an involuntary dismissal allowed under the Code because the cause of action "was not commenced within the time limited by law." 735 ILCS 5/2-619(a)(5) (West 2016); see *Cohen v. McDonald's Corp.*, 347 Ill. App. 3d 627, 632 (2004) (section 2-619.1 motion to dismiss combines section 2-615 motion and section 2-619 motion). A motion to dismiss pursuant to section 2-619 admits the legal sufficiency of the complaint but raises defects or other matters either internal to or external from the complaint that would defeat the cause of action. See *Hermitage Corp. v. Contractors Adjustment Co.*, 166 Ill. 2d 72, 85 (1995); *Jenkins v. Concorde Acceptance Corp.*, 345 Ill. App. 3d 669, 674 (2003). A section 2-619 motion admits all well-pled facts and reasonable inferences therefrom, and a trial court must interpret all pleadings in the light most favorable to the nonmoving party. See *Snyder v. Heidelberger*, 2011 IL 111052, ¶ 8. While dismissing a cause pursuant to section 2-619 efficiently allows for the disposal of issues of law or easily proved facts early in the litigation process (see *Coles-Moultrie Electric Cooperative v. City of Sullivan*, 304 Ill. App. 3d 153, 158 (1999)), a trial court should not grant such a motion unless it is clear that there is no way a plaintiff may recover (see *Ostendorf v. International Harvester Co.*, 89 Ill. 2d 273, 280 (1982)). Accord *Snyder*, 2011 IL 111052, ¶ 8 ("[t]he [section 2-619] motion should be granted only if the plaintiff can prove no set of facts that would support a cause of action"); *Consumer Electric Co. v. Cobelcomex, Inc.*, 149 Ill. App. 3d 699, 703 (1986) ("if it cannot be determined with reasonable certainty that the alleged defense exists, the [section 2-619] motion should not be allowed"). The standard of review employed by this Court over a section 2-619 dismissal and again, more specifically, over a section 2-619(a)(5) dismissal is *de novo*. See *Snyder*, 2011 IL 111052, ¶ 8; accord *M & S Industrial Co., Inc. v. Allahverdi*, 2018 IL App (1st) 172028, ¶ 15.

¶ 32 In line with this, we also note that questions of statutory interpretation and the applicability of a statute to bar a cause of action as untimely, which are involved herein, present legal questions which also employ *de novo* review. See *M & S Industrial*, 2018 IL App (1st) 172028, ¶ 15.

¶ 33 Pursuant to this standard of review, we find, as the trial court did, that section 13-214.3(d) is applicable here, governs the instant cause and controls our review. However, in actually applying that section of the Code, which incorporates sections of the Probate Act, we find that several matters remain which require answers before a decision with respect to the instant suit's viability can be made. Ultimately, it is precisely because we cannot say that plaintiffs here can prove "no set of facts" that would support a cause of action, or that the alleged defense raised by defendants exists with reasonable certainty, that we reverse and remand the trial court's section 2619(a)(5) dismissal.

¶ 34 *Applicability v. Application of Section 13-214.3(d)*

***7** ¶ 35 The key to this cause rests in acknowledging the difference between the applicability of section 13-214.3(d) of the Code and its actual application to the facts presented. Again, and contrary to plaintiffs' contention here, the trial court was correct in its determination that this section applies to the instant cause. However, and contrary to defendants' contention here, the trial court was not correct in how it applied this section to the facts presented.

¶ 36 *Applicability*

¶ 37 Our analysis begins with a close examination of section 13-214.3 of the Code, as well as a reminder of the difference between a statute of limitations and a statute of repose. Article 13 of the Code sets forth limitations periods for various causes of action. See, *e.g.*, 735 ILCS 5/13-101 *et seq.* (West 2016). Section 13-214.3, entitled "Attorneys," sets forth limitations periods for all actions, including **legal malpractice** claims, specifically brought against attorneys in relation to the provision of their professional services. See *Evanston Insurance Co. v. Riseborough*, 2014 IL 114271, ¶ 12 (statute applies to all claims brought against attorneys arising out of actions or omissions in performing their services). In actuality, it sets forth both limitations and repose periods for such claims. See *Doyle v. Hood*, 2018 IL App (2d) 171041, ¶ 18. As our state supreme court has explained, a statute of limitations determines the time within which a lawsuit may be brought after a cause of action has accrued, and can even be tolled depending on, for example, when a party knew or should have known a cause or injury arose. See *Evanston Insurance*, 2014 IL 114271, ¶ 16. In contrast, a statute of repose ends a cause of action after a defined period of time, regardless of when the cause or injury accrued. See *Evanston Insurance*, 2014 IL 114271, ¶ 16. In other words, it begins to run when a specific event occurs, regardless of whether an injury has been discovered or has even resulted. See *Evanston Insurance*, 2014 IL 114271, ¶ 16. While a statute of limitations often allows us to look at what the parties knew at a specific time in order to perhaps extend a period of liability, the purpose of a statute of repose is to " 'terminate the possibility of liability after a defined period of time.' " *Doyle*, 2018 IL App (2d) 171041, ¶ 18 (quoting *Evanston Insurance*, 2014 IL 114271, ¶ 16 ("[a]fter the expiration of the repose period, there is no longer a recognized right of action")).

¶ 38 The relevant provisions of section 13-214.3 state:

> "(b) An action for damages based on tort, contract, or otherwise *** against an attorney arising out of an act or omission in the performance of profession 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), (c), (d) (West 2016).

***8** Again, section 13-214.3 governs all claims against an attorney arising out of acts or omissions in his performance of his professional services tort, contract, **legal malpractice**, etcetera. See *Evanston Insurance*, 2014 IL 114271, ¶ 23 (statute was intended to apply to all claims against attorneys concerning the provision of their services). And, it does not matter if the party bringing the action is not the attorney's client; this section applies with equal force to plaintiffs who are clients as well as non-clients. See *Evanston Insurance*, 2014 IL 114271, ¶ 19 (section 13-214.3 does not apply only to claims asserted by clients of the attorney; it does not restrict the identity of the plaintiff but focuses instead on the nature of the act or omission).

¶ 39 Section 13-214.3's subsections each present varying factors that affect their applicability and govern the time in which actions against attorneys may be brought. And, their interaction is well established. Section 13-214.3(b) comprises a limitations period; it uses the "discovery rule" to toll its prescribed period of two years to begin when the plaintiff seeking to bring a cause against an attorney knows or reasonably should have known of his injury. See *Doyle*, 2018 IL App (2d) 171041, ¶ 20 (citing *Snyder*, 2011 IL 111052, ¶ 10). Section 13-214.3(c), meanwhile, provides a six-year repose period for such causes of action, and begins to run as soon as an event giving rise to the claim against the attorney occurs, regardless of whether the plaintiff has yet realized his injury. See *Doyle*, 2018 IL App (2d) 171041, ¶ 21 (citing *Lamet v. Levin*, 2015 IL App (1st) 143105, ¶ 20). This subsection does not focus on the injury, but starts the moment of the attorney's act or omission and, once it runs, the plaintiff's right to file suit is barred. See *Doyle*, 2018 IL App (2d) 171041, ¶ 21 (citing *Terra Foundation for American Art v. DLA Piper LLP (US)*, 2016 IL App (1st) 153285, ¶ 44).

¶ 40 Section 13-214.3(d), meanwhile, is a creature of its own. As subsection (c) denotes, subsection (d) is an exception to

both subsections (b) and (c). Similar to subsection (c), it, too, is a repose period, but it applies when the injury caused by the attorney's act or omission during the commission of his professional services occurs upon the client's death. See *Doyle*, 2018 IL App (2d) 171041, ¶ 22; see also *Wackrow v. Niemi*, 231 Ill. 2d 418, 425-26 (2008) ("Section 13214.3(d) looks to 'the death of the person for whom the professional services were rendered.' " [citation omitted]). In such an instance, section 13-214.3(d) prescribes that if no letters of office are issued and no will is admitted to probate, the action must be filed against the attorney within two years of the client's death. See 735 ILCS 5/13-214.3(d) (West 2016); accord *Petersen v. Wallach*, 198 Ill. 2d 439, 446 (2002) (if no letters of office are issued and no will admitted to probate, a plaintiff has a "full two years" from the date of the client's death to file any claim against attorney).

¶ 41 Subsection (d) continues, however, by stating that, if letters of office are issued or the person's will is admitted to probate within two years after the date of his death, the cause of action sought to be brought against the attorney "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(d) (West 2016); accord *Petersen*, 198 Ill. 2d at 445 (if either letters of office are issued or the decedent's will is admitted to probate within two years following the decedent's death, any action against attorney must be commenced in accordance with time limitations set out in Probate Act as incorporated by this statute). In such an instance, then, we find ourselves within the province of the Probate Act. The time for "filing claims against the estate" is governed by section 8-3 of the Probate Act, and the time for filing "a petition contesting the validity of the will of a deceased person" is governed by section 8-1(a) of the Probate Act. See 755 ILCS 5/8-3, 8-1(a) (West 2016); accord *Wackrow*, 231 Ill. 2d at 428; *Jaason v. Sullivan*, 389 Ill. App. 3d 376, 378 (2009).

***9** ¶ 42 It is also important to note that section 13-214.3(d)'s repose period either two years as described therein if no letters of office are issued or no will is admitted to probate, or the time set forth in the Probate Act if letters of office are issued or a will is admitted to probate is not in addition to subsection (b)'s two-year statute of limitations nor to subsection (c)'s six-year statute of repose; rather, it applies instead of these subsections and operates of its own accord. See *Wackrow*, 231 Ill. 2d at 427; see also *Doyle*, 2018 IL App (2d) 171041, ¶ 22. Subsection (d)'s exception, then, may operate to shorten the time period for bringing a claim against an attorney for his acts or omissions in the performance of his professional services because it may well operate to bar a plaintiff's action before he even discovers his injury. See *Doyle*, 2018 IL App (2d) 171041, ¶ 22. Our courts have recognized that this may be a harsh result, but have deemed that, by its very nature as a repose provision, this fact " 'is an accidental rather than necessary consequence.' " See *Doyle*, 2018 IL App (2d) 171041, ¶ 22 (quoting *Wackrow*, 231 Ill. 2d at 427 (quoting *Mega v. Holy Cross Hospital*, 111 Ill. 2d 416, 424 (1986))).

¶ 43 Having set forth these legal principles, we now turn to plaintiffs' main argument on appeal. Again, plaintiffs contend that the trial court incorrectly found that section 13-214.3(d) of the Code applied to the instant cause and, in turn, that their complaint against defendants was untimely under the six-month limitations period of section 8-1(a) of the Probate Act. Relying wholly on *Ellis*, wherein our supreme court held that section 8-1(a)'s six-month limitations period did not apply to a suit asserting a tort claim of intentional interference with an expectancy of inheritance, plaintiffs claim that the instant cause is similar and should be allowed instead to proceed under the two-year limitations period of section 13-214.3(b) (incorporating the discovery rule) or the six-year repose period of section 13-214.3(c). They further note that this is the preferred result, since it was otherwise impossible for them to have asserted a claim against Francisco's estate within six months after his death, as they did not find out about the discrepancies with the Annuitant Checklist until the March 2017 Waterville deposition, long after the time limit of section 13-214.3(d) had passed.

¶ 44 On this point, we hold that plaintiffs are incorrect; neither section 13-214.3(b) nor section 13-214.3(c) apply here, nor does it matter when they found out about their alleged injury. Rather, we find that section 13-214.3(d) of the Code governs the facts presented; in fact, this is the precise situation contemplated by this section of the Code.

¶ 45 Francisco purchased the four annuities in April 2011, after defendants, whom he retained to represent him in the medical malpractice lawsuit, settled that matter for him. He signed the original Annuitant Checklist on April 13, 2011, leaving the beneficiary designation section blank, thereby naming neither his estate nor a particular person as the beneficiary of the annuities. As alleged in plaintiffs' complaint, another Annuitant Checklist (perhaps the same one or a copy of the original) was submitted days later, this time with the box checked designating a particular person as beneficiary and the information of Sandra and Sandra Clarisa written in the blank spaces provided. Francisco died intestate on July 25, 2013. Plaintiffs filed the instant cause against defendants on April 12, 2017, almost four years after his death, asserting **legal malpractice** with respect to their alleged assistance to Francisco in setting up the annuities.

¶ 46 Based on these facts, this cause most certainly falls within the auspices of section 13214.3(d). It is this section, and not section 13-214.3(b) nor section 13-214.3(c), which specifically applies when the injury at the center of the lawsuit brought against an attorney arising out of his acts or omissions in rendering his professional services does not occur until the death of the person for whom those services were rendered. As we have discussed, subsection (b) provides a limitations period of two years incorporating the discovery rule and is measured from the time the person bringing the action knew or should have known about his injury, and subsection (c) provides a repose period of six years from the date on which the act or omission occurred. But, and again as subsection (c) denotes, section 13-214.3(d) provides an exception to both of these. That is, in the particular circumstance when the injury does not occur until the *death* of the person for whom the attorney's services were rendered, subsection (d), and its regulations, apply.

***10** ¶ 47 In the instant cause, the person for whom the professional services at issue were rendered, *i.e.*, assistance with setting up the annuities, including the annuitant checklist, was Francisco. From the moment he purchased these until the moment he died, he could have easily modified the checklist at any point to add beneficiaries, remove beneficiaries, or change beneficiaries. Thus, any injury to plaintiffs, which they claim arose because the estate was not named beneficiary to the annuities as Francisco intended, did not occur until Francisco's death. It is this fact that moves this cause under the application of section 13-214.3(d), and removes it from consideration under subsections (b) and (c) which, simply, do not deal with death.

¶ 48 Plaintiffs' unstinting reliance on *Ellis* does little to support their contention on appeal that section 13-214.3(d) does not apply here. To the contrary, while *Ellis*' facts at first glance appear similar to the instant cause, several circumstances presented therein quickly render that case wholly distinguishable.

¶ 49 In *Ellis*, a woman executed a will in 1964 naming her elderly parents as the primary beneficiaries of her estate and designating her descendants and a charitable hospital as contingent beneficiaries. Many years later, the woman joined a church and eventually gave its pastor over $1 million of her assets, as well as other gifts and powers of attorney over her health care and property. In 1999, the woman executed a new will designating the pastor as the sole primary beneficiary of her estate. She then died in 2003, leaving no direct descendants, and that same year, the 1999 will was admitted to probate; the pastor was named independent executor of her over $2 million estate. The hospital did not become aware of its interest in the 1964 will until 2006, following the filing of some legal issues involving the estate. The hospital immediately filed a three-count petition to contest the will that had been admitted to probate. See *Ellis*, 236 Ill. 2d at 48. In count III, the one at issue on appeal, the hospital presented a tort claim for intentional interference with an expectancy of inheritance against the pastor.[2] See *Ellis*, 236 Ill. 2d at 49. It asserted that he knew of the prior will and schemed to interfere with the hospital's expectancy by abusing his position of trust and unduly influencing the woman to execute a new will, thereby violating "his fiduciary duty" to her; the hospital also insisted that, but for the pastor's actions, it would have received the bequest as she had intended in her first will. *Ellis*, 236 Ill. 2d at 49. The pastor filed a motion to dismiss, relying on section 8-1(a) of the Probate Act and stating that the hospital's petition was time barred because it was filed more than six months after the 1999 will was admitted to probate. See *Ellis*, 236 Ill. 2d at 49 (section 8-1(a) of the Probate Act allows six months from the admission of a will to probate for someone to contest the validity of that will). The trial court agreed and dismissed the petition, and the reviewing court affirmed, holding that the petition was properly dismissed as time-barred under section 8-1 of the Probate Act. See *Ellis*, 236 Ill. 2d at 49-50.

¶ 50 Our state supreme court, however, reversed. Finding that the "sole issue" was the timeliness of the hospital's tort claim, that court observed that there is a "distinct" difference between a petition to contest the validity of a will and a tort action for intentional interference with inheritance the former looks to whether the writing produced the will of the testator and seeks to set aside the will; the latter, meanwhile, looks to the actions of an alleged tortfeasor and seeks a personal judgment against him. *Ellis*, 236 Ill. 2d at 50, 51-52. In examining this difference, the *Ellis* court noted that although some of the evidence may overlap when considering a petition to contest a will and a tort claim for intentional interference with an expectancy to inherit, these clearly were not the same cause of action. See *Ellis*, 236 Ill. 2d at 52. Accordingly, it concluded, because the six-month time frame outlined in section 8-1 of the Probate Act applied specifically, and only, to a petition to contest a will, it could not, and should not, be applied to bar the hospital's different, and distinct, tort claim for intentional interference against the pastor. See *Ellis*, 236 Ill. 2d at 56-57.

***11** ¶ 51 We find no problem with the holding of *Ellis*. It clearly sets forth that will contest petitions and tort claims are

different and that the timeliness of each is governed by different statutory guidelines, *i.e.*, the former by the Probate Act and the latter by tort limitations periods. And, we acknowledge that, at first glance, the facts of *Ellis* appear similar to those of the instant cause: potential beneficiaries discover that a third party allegedly may have exerted undue influence upon the decedent in an effort to intentionally interfere with their expectancy of inheritance, leaving them with nothing, in contradiction of what they believed was the decedent's true intent.

¶ 52 However, that is where any apparent similarity between *Ellis* and the instant cause ends. *Ellis* is wholly distinguishable, for many reasons. Chief among these is the cause of action alleged. In *Ellis*, the hospital asserted a tort claim against the pastor, which was the third count of a three-count petition to contest the decedent's will. As the *Ellis* court declared, the "sole issue" was whether the Probate Act (and its six-month time-bar for will contests) applied, or whether the tort portion of the hospital's claim against the pastor should be separated out and allowed to proceed since it was a different and distinct type of claim. Naturally, and just as the *Ellis* court found, will contests should be governed by section 8-1 of the Probate Act and tort matters should be governed by tort statutes.

¶ 53 Here, however, there are two very different, and determinative, facts. One, we must remember that Francisco died intestate. Thus, section 8-1(a) of the Probate Act, which was discussed throughout *Ellis* as part of the will contest, has no bearing on this cause. Plaintiffs here did not intertwine a tort claim with a petition to contest a will, as did the hospital in *Ellis*. Unlike the decedent in *Ellis*, Francisco never had a will, so no such will was ever admitted to probate. Section 8-1(a) of the Probate Act, and the six-month time period it provides someone to contest a will that has been admitted to probate, simply has no relevance to the instant cause.

¶ 54 Even more crucial, the second different, and determinative, fact that renders *Ellis* completely inapposite to the instant cause is that plaintiffs here brought a **legal malpractice** action *against defendants-attorneys* following Francisco's death based on the services they allegedly rendered to him in purchasing the annuities. Unlike the hospital in *Ellis* that sued the pastor, this very fact brings this instant cause immediately under section 13-214.3 of the Code the section that governs actions for damages asserted against attorneys arising out of an act or omission in the performance of their professional services. And, more specifically, it brings this cause under subsection (d) of section 13-214.3, which applies when the alleged injury as asserted against the attorney does not occur until the death of the person who received his services. While it was correct for the *Ellis* court to remand the tort claim and allow it to proceed in the courts below because the general tort limitations period had not expired, the same result would be incorrect here where we are dealing with a **legal malpractice** claim against attorneys where the alleged injury did not occur until the death of the client a situation clearly, and specifically, governed by its own particular statute: section 13-214.3(d).

¶ 55 Our determination that section 13-214.3(d) applies to the instant cause, and that the holding of *Ellis* does not, becomes clearer when we examine case law that is more on point with the facts presented cases that explicitly involve lawsuits brought against attorneys based on services they rendered to a decedent-client prior to death. For example, in *Wackrow v. Niemi*, 231 Ill. 2d 418 (2008), an attorney drafted a trust for a man to include that certain real estate was to be given to the man's sister upon the man's death. However, the attorney allegedly failed to discover that a land trust, and not the man himself, was the true owner of that property. The man later died in August 2002, and letters of office were issued and his will was admitted to probate in October 2002. In December 2004, following a failed attempt to obtain the property in probate court, the sister filed a **legal malpractice** claim against the attorney based on his acts and omissions in the performance of the professional services he provided for the man, namely, his assistance in preparing the trust. The attorney filed a motion to dismiss, arguing that the complaint was time-barred by section 13-214.3(d) of the Code because it was not brought within the time for filing claims against the estate or contesting the will, as prescribed in that section once letters of office have been issued. See *Wackrow*, 231 Ill. 2d at 420-21.

***12** ¶ 56 In a very instructive decision, our supreme court agreed that section 13-214.3(d) barred the sister's **legal malpractice** claim against the attorney. First, the *Wackrow* court found that section 13-214.3(d), and not subsections (b) or (c) as the sister contended (similar to plaintiffs here), clearly governed the matter; it explained that this section of the Code applied to all cases when the alleged injury caused by the attorney's acts or omissions does not occur until the death of the person for whom the professional services were rendered. See *Wackrow*, 231 Ill. 2d at 423-24. Because the man could have revoked the amendment to his trust or changed his beneficiary any time prior to his death, the injury did not occur until he died and section 13214.3(d) applied. See *Wackrow*, 231 Ill. 2d at 425 (citing *Petersen*, 198 Ill. 2d at 446, and stating that "the lone inquiry made by a court when determining whether section 13-214.3(d) is applicable is simply whether the injury caused

by the malpractice occurred upon the death of the client"). Next, the *Wackrow* court explained the relationship between subsections (b), (c), and (d) of section 13-214.3, noting that (b) and (c) did not incorporate the fact of death and that subsection (d) was an exception, applying not in addition to subsection (b)'s two year statute of limitations or subsection (c)'s six-year statute of repose but, instead, standing on its own as a statute of repose. See *Wackrow*, 231 Ill. 2d at 427. Finally, the *Wackrow* court recognized that the effect of section 13-214.3(d) may shorten the limitation period for **legal malpractice** claims and could very well mean that a plaintiff's action could be barred before she even learns of her injury. It declared, however, that this potentially harsh result was part and parcel of the nature of section 13-214.3(d). See *Wackrow*, 231 Ill. 2d at 427 (this is an " 'accidental consequence' " [citation omitted]). Ultimately, and based on the particular circumstances presented, the *Wackrow* court held that because letters of office had been issued, the sister was required under section 13-214.3(d) of the Code to file her complaint within the time for filing claims against the estate or the time for filing a petition contesting the validity of the will. See *Wackrow*, 231 Ill. 2d at 428-29. Since the man had a will, and since that will had been admitted to probate in October 2002, this meant within six months thereafter pursuant to section 8-1(a) of the Probate Act (or no later than April 2003); her December 2004 claim was too late and its dismissal was proper. See *Wackrow*, 231 Ill. 2d at 428-29.

¶ 57 Following our supreme court's reasoning, we reached the same conclusion concerning the applicability of section 13-214.3(d) with respect to similar facts in the more recent decision of *Mosier v. Molitor*, 2015 IL App (1st) 142239. There, just as in *Wackrow*, a woman settled a trust in June 1990 and, at the same time, conveyed certain real estate located in Evanston to it. She amended the trust several times with respect to what percentage of the trust's residue each of her two nephews, Charles and Thomas, were to receive until finally, her last amendment provided a portion to Thomas but none to Charles. Later, the woman retained a different attorney, Molitor, to prepare a living trust for herself, which was executed on October 22, 2001. This trust named Charles as the sole successor trustee upon her death and included all her accumulated income and real property, but did not mention the Evanston property or the 1990 trust. The woman died on December 21, 2006. Charles assumed that, pursuant to the 2001 trust, he owned the Evanston property. Thomas, however, disputed this and, following a lawsuit, a trial court held that Thomas, as trustee of the 1990 trust, held sole title to the Evanston property. See *Mosier*, 2015 IL App (1st) 142239, ¶¶ 4-13.

¶ 58 On June 14, 2012, Charles filed a **legal malpractice** action against attorney Molitor, alleging that, in drafting the 2001 trust, he had failed to inquire how title in the Evanston property was held and, thus, had failed to convey it into that trust and had wrongfully dispossessed him of it, contrary to the woman's intent. See *Mosier*, 2015 IL App (1st) 142239, ¶ 14. Molitor filed a motion to dismiss, asserting Charles' claim was time-barred. Charles, however, argued that either section 13-214.3(b) or section 13-214.3(c) of the Code applied to save his claim. See *Mosier*, 2015 IL App (1st) 142239, ¶¶ 19-20. Following argument, the trial court dismissed the cause, finding that it was, indeed, time-barred pursuant to section 13-214.3(d), which governed the matter. See *Mosier*, 2015 IL App (1st) 142239, ¶ 25.

¶ 59 Upon review, our court agreed. We began by noting that, because this cause comprised a **legal malpractice** action against an attorney, section 13-214.3 of the Code was to operate. See *Mosier*, 2015 IL App (1st) 142239, ¶ 30. We then examined the interplay of that section's subsections (b), (c), and (d), noting that the last of these was unique in that it looks to the death of the person for whom the professional services were rendered, it determines whether that was the time of injury, and its repose period provides an exception to the other subsections that stands on its own. See *Mosier*, 2015 IL App (1st) 142239, ¶¶ 34-38. Applying this statute to the facts of the cause, we concluded that section 13-214.3(d) controlled and barred Charles' claim. The legal services were rendered to the woman, and the alleged injury was triggered when she died, since she could have modified the 2001 trust anytime before her death. We found this to be the classic section 13-214.3(d) situation. See *Mosier*, 2015 IL App (1st) 142239, ¶¶ 42-43. Under that section, then, the time for Charles' **legal malpractice** claim began to run at the moment of the woman's death on December 21, 2006, and, because no letters of office were filed and no will was admitted to probate, it expired two years later, on December 21, 2008. See *Mosier*, 2015 IL App (1st) 142239, ¶ 41. Accordingly, and although we acknowledged some sympathy based on the harshness of the result, we nonetheless held that Charles' June 2012 filing was time-barred. See *Mosier*, 2015 IL App (1st) 142239, ¶¶ 46-47 (citing *Wackrow*, 231 Ill. 2d at 426, and noting that the intent of this, and any, statute of repose is to terminate the possibility of liability after a specific period of time, regardless of a potential plaintiff's lack of knowledge of his injury). See, *e.g.*, *Doyle*, 2018 IL App (2d) 171041 (trustee's **legal malpractice** lawsuit against attorney and firm that prepared trust which took effect upon decedent-client's death was time barred pursuant to section 13-214.3(d); because letters of office were never issued and will was not admitted to probate, trustee's May 2017 suit was filed long past two years from date of death of decedent, which was January 2012, and this section of the Code operated to bar it); *Petersen*, 198 Ill. 2d 439 (because 13-214.3(d)

"unambiguously supports its application to all cases when the alleged injury caused by the attorney's act or omission does not occur until the death of the person for whom the professional services were rendered," and because no letters of office were issued and no will was admitted to probate, daughter had, under that statute, two years from the date of her mother's death to file malpractice lawsuit against the attorney who provided estate planning advice to decedent-mother).

***13** ¶ 60 From all this, it is undoubtedly clear to us that section 13-214.3(d) governs the instant cause of action and not, as plaintiffs contend, subsections (b) or (c). Plaintiffs are asserting an alleged injury based on defendants-attorneys' acts or omissions in assisting Francisco with the annuities, specifically, in designating his beneficiaries which, they claim, Francisco intended to be his estate (of which they are part) and not only Sandra and Sandra Clarisa. Because Francisco, the person for whom the legal services were rendered, could have changed his beneficiary designation anytime until his death, plaintiffs' alleged injury did not occur until his death. This is the clear trigger for section 13-214.3(d)'s applicability.

¶ 61 *Application*

¶ 62 Having concluded that section 13-214.3(d) is applicable to the instant cause,[3] we must now turn to that section's actual application to the facts before us. In doing so, we become embroiled in several sections of the Probate Act. And, in doing so, we find that several critical, unanswered questions arise.

¶ 63 Again, section 13-214.3(d) of the Code states that when the alleged injury caused by the act or omission of an attorney in rendering his professional services does not occur until the death of the person for whom the 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." 735 ILCS 5/13-214.3(d) (West 2016).

¶ 64 What section 13-214.3(d) does, then, is provide two different avenues to determine the time bar for such claims. That is, and as we touched upon earlier, the first avenue operates when letters of office are not issued or the decedent's will is not admitted to probate within two years after the date of the decedent's death. In these circumstances, the action against the attorney must be filed within two years after the date of the decedent's death, as prescribed in the first portion of section 13-214.3(d) of the Code itself. See 735 ILCS 5/13-214.3(d) (West 2016); *Petersen*, 198 Ill. 2d at 446. Without the need for further discussion, this first avenue under section 13-214.3(d) does not apply here. The parties agree and the record evidences that letters of office were issued to Sandra on September 16, 2014.

***14** ¶ 65 In contrast, the second avenue presented by section 13-214.3(d) to determine the time bar for claims against attorneys is the one that applies here. Section 13-214.3(d) goes on to describe that if letters of office *are* issued or the decedent's will *is* admitted to probate within two years after the decedent's death, then the time frame is governed by certain provisions of the Probate Act. See 735 ILCS 5/13-214.3(d) (West 2016); *Petersen*, 198 Ill. 2d at 445. That is, in these circumstances, the second portion of section 13-214.3(d), *i.e.*, as denoted in this statute's clause beginning with the word "unless" and continuing with "in which case," directs us away from the Code and to the Probate Act, namely, to those sections of that Act that prescribe the time for either "filing claims against the estate or a petition contesting the validity of the will of the deceased person, whichever is later." See 735 ILCS 5/13-214.3(d) (West 2016). As section 13214.3(d) states, this is the time within which "the action" against the attorney "must be commenced." See 735 ILCS 5/13-214.3(d) (West 2016).

¶ 66 Moving to the Probate Act, then, section 8-1(a) states that "a petition contesting the validity of a will" must be filed within six months of the will's admission to probate. See 755 ILCS 5/8-1(a) (West 2016). Yet, the record in this cause is clear that Francisco died intestate. He never had a will that could have been admitted to probate and, in turn, a petition contesting the validity of a will could never have been filed here. Thus, section 8-1(a) of the Act, or any provision or time limitation set forth in section 13-214.3(d) of the Code focusing on a will's admission to probate, for that matter, is irrelevant

and cannot be the applicable measure of time in the instant cause.

¶ 67 With that in mind, it is here where we run into our first open question in this cause. As noted earlier, the first, and primary, ground defendants asserted in their motion to dismiss and the very distinct ground upon which the trial court explicitly granted its section 2-619(a)(5) dismissal was that "[p]laintiffs' claims are barred by the applicable six-month statute [13214.3(d)] of repose (Section 2-619(a)(5) grounds for relief)." Defendants repeatedly cited and relied upon section 8-1(a) of the Probate Act in its arguments before the trial court, stating that, via section 13-214.3(d)'s incorporation of the Probate Act, it was this section of the Probate Act and its six-month time period "for contesting the validity of the will" of a deceased person that was the measure of time here and, specifically, that, since letters of office were issued on September 16, 2014, defendants had until March 16, 2015 within which to file a complaint against them. But this ground for dismissal, and the trial court's acceptance of it, cannot stand. If, as the record clearly notes and the parties clearly concede, Francisco died intestate, then, as we have repeatedly pointed out, he did not have a will and section 13-214.3(d)'s incorporation of a time frame in the Probate Act referencing the time for filing "a petition contesting the validity of the will of the deceased person," which section 8-1(a) states is six months after the admission of a will to probate, has no application here. In simple terms, because Francisco died intestate, the ground defendants asserted, and the trial court accepted, for dismissal six months under section 8-1(a) of the Probate Act which references only the admission of a will to probate is a significant miscalculation.

¶ 68 With letters of office having been issued, but without a will admitted to probate, what we are left here with, after applying section 13-214.3(d), is that portion of the second avenue thereunder that specifies that an action against an attorney must be commenced "within the time for filing claims against the estate *** as provided in the Probate Act." 735 ILCS 5/13-214.3(d) (West 2016). The question becomes, then, whether plaintiffs' **legal malpractice** action against defendants was commenced "within the time for filing claims against the estate" as provided in the Probate Act via incorporation by section 13-214.3(d). Having mistakenly accepted defendant's argument that the measure of time was six months under section 8-1(a) of the Probate Act based on a will that never existed, and failing to interpret the second avenue provided in section 13-214.3(d) of the Code dealing with intestate decedents and the time for filing claims against an estate as provided in the Probate Act, the trial court never discussed this.

***15** ¶ 69 And, based on the facts presented, at this point in time, we simply cannot be sure when that time commenced.

¶ 70 Plaintiffs' alternative argument in this cause has always been that, even if section 13214.3(d) of the Code governs, a problem arises with applying any limitations period it may reference from the Probate Act because Sandra never publicized a notice of claims as required by section 18-3(a) of that Act. Plaintiffs are correct.

¶ 71 Pursuant to section 18-3(a) of the Probate Act, the representative of an estate has the duty to publish and to mail or deliver to each creditor of the decedent a notice stating the death of the decedent, the name and address of the representative, and that claims against the estate may be filed on or before the date stated in the notice a date that "shall be not less than 6 months from the date of the first publication or 3 months from the date of mailing or delivery, whichever is later." 755 ILCS 5/18-3(a) (West 2016). This duty of publication, then, governs when "the time for filing claims against the estate," as specified in section 13-214.3(d) of the Code, begins. See *Jaason*, 389 Ill. App. 3d at 380 (when representative has been appointed, time for filing claims against estate begins to run on date stated in notice representative is required to publish under Act); see also *Estate of Oliver v. Wildermuth*, 50 Ill. App. 3d 1, 3 (1977) (failure of creditor to present a timely claim against estate after letters of office were issued did not bar the claim where notice to creditors, as required by statute, was not published).

¶ 72 Plaintiffs in the instant cause have consistently argued that Sandra, who was made representative of Francisco's estate via the letters of office issued on September 16, 2014, never fulfilled her duty of publication under section 18-3(a) of the Probate Act. Initially, defendants disputed this point but, at oral argument on their motion to dismiss before the trial court, they conceded the point and in their brief on appeal, they allude that plaintiffs are, indeed, correct with respect to this fact: Sandra did not fulfil her duty of publication under section 18-3(a) of the Probate Act.

¶ 73 What is more, we cannot ignore what is currently pending in the probate court in this cause. Plaintiffs are directly challenging the propriety of Sandra's appointment as representative of Francisco's estate. They have filed a motion to remove her as independent administrator, attacking her appointment as improper and alleging that she violated a fiduciary duty she owed to Francisco by exerting undue influence and imposing her will over his with respect to designating a beneficiary for

the annuities. This motion, which seeks to remove Sandra as administrator and appoint a special administrator for the estate, as well as plaintiffs' petition for citation to recover assets asserting the same undue influence argument, are still pending. Incidentally, the probate court only recently concluded that plaintiffs' petition for citation to recover assets does, indeed, state "sufficient facts to justify a citation to discover assets," and placed the matter under advisement, continuing it for further briefing.

***16** ¶ 74 With all of this, the point here is that the trial court's dismissal of the instant cause has completely put the cart before the horse. With the pending matters in the probate court, too many questions remain unanswered. For example, if the probate court determines that Sandra has violated her duty to Francisco and his estate and heirs and decides to remove her, then what? A new appointment would most certainly be required. Yet, what would be the effect of this? This would mean that the assumption of an appropriately-appointed representative underlying the **legal malpractice** claim is a nullity. Would the "time for filing claims against the estate" under the Probate Act now change? If so, this would directly impact when plaintiffs were required to file their claim, in turn, against defendants under section 13-214.3(d) of the Code? Or, for example, regardless of whether Sandra is replaced as representative, the issue of publication remains; proper publication and notice to the creditors of Francisco's estate which presumably would include plaintiffs was not accomplished in this cause. Would that have to be completed now by Sandra at this late date, or via a new representative, if one is appointed? Does this restart the clock for section 13-214.3(d) of the Code's "time for filing claims against the estate," which references the Probate Act?

¶ 75 Though always insisting that the trial court completely resolved any issue here by properly applying section 13-214.3(d) of the Code, defendants provided their answer to plaintiffs' section 18-3(a) publication argument by citing section 18-12(b) of the Probate Act. That section states that "all claims which could have been barred under this Section are, in any event, barred 2 years after decedent's death, whether or not letters of office are issued upon the estate of the decedent." Defendants categorize this as a jurisdictional catch-all, insisting that, no matter what, no court may hear any case regarding an estate after two years have passed from the date of the decedent's death. This provision may well apply here but, at the same time, it may not. Would it trump a finding by the probate court that Sandra violated her fiduciary duty to Francisco and his estate and heirs, or her duty as representative regarding the requisite statutory publication of notice to creditors? Or would it truly bar any and all claims after two years, regardless of a lack of notice? The facts here are too unique for any sort of general answer.

¶ 76 These are only a few of the multitude of questions some that cannot even yet be contemplated that remain in this cause due to the matters pending in the probate court. At this time, with a direct challenge to the propriety of the opening of Francisco's estate still in the air, how can we decide, at this point, when the "time for filing claims against the estate" commenced or ended? The answer is, we cannot. It is simply impossible for us now, and it was impossible for the trial court here below, to do so until the probate court resolves the question of whether Sandra was properly appointed back when letters of office were issued to her on September 16, 2014.

¶ 77 Incidentally, we note that even though the trial court granted defendant's motion to dismiss based solely on their section 13-214.3(d) argument, the trial court took its time to examine the other grounds defendants had posited for dismissal. One of these was defendants' insistence that the estate should be stricken because a special administrator had not been appointed. After considering this, the trial court commented that, had it reached this issue, it would have "probably stay[ed]" the matter to "wait and see what the probate court did." We feel that the trial court, in voicing this, was on the right path and should have applied this same reasoning to this matter as a whole.

¶ 78 Ultimately, a section 2-619 dismissal is a drastic measure. It is, at its core, a declaration that, even accepting every well-pled fact and reasonable inference asserted by the nonmoving party in the light most favorable to it, that party can prove no single set of facts that would allow it to recover under the law and/or that the defense raised totally, and undeniably, exists. See *Snyder*, 2011 IL 111052, ¶ 8; *Ostendorf*, 89 Ill. 2d at 280. We have been cautioned not to make that declaration unless it is clearly borne out with "reasonable certainty." See *Consumer Electric Co.*, 149 Ill. App. 3d at 703. Based on the record before us, and particularly on the many unresolved questions that arise due to the pendency of the matters directly impacting this cause that are still in the probate court, we cannot say, upon our review, that the requisite "reasonable certainty" was present here, at the time this cause was brought to the trial court, to justify the dismissal of plaintiffs' complaint against defendants with prejudice.

¶ 79 CONCLUSION

***17** ¶ 80 Accordingly, we hold that while the trial court was correct in finding that section 13214.3(d) of the Code applies to the instant cause, we conclude that its actual application of that section, and of the Probate Act via its reference in that section of the Code, to the particular circumstances presented herein was both inappropriate (as it mistakenly invoked section 8-1(a) of the Probate Act although the decedent died intestate) and premature (as relevant matters are still pending in the probate court). Therefore, we reverse the dismissal of plaintiffs' complaint against defendants at this time and remand the cause to the trial court with directions to reassess defendants' section 2-619 dismissal, and the grounds upon which it is based, only after the probate court resolves the matters pending before it.

¶ 81 Reversed and remanded, with directions.

Justices Howse and Cobbs concurred in the judgment.

All Citations

Not Reported in N.E. Rptr., 2019 IL App (1st) 172916-U, 2019 WL 1308246

Footnotes

1 The record reflects that Sandra received a settlement of $300,000 on her claim.

2 Counts I and II of the hospital's petition contested the validity of the 1999 will based on undue influence and mental incapacity. However, on appeal after the dismissal of its petition, the hospital challenged only the dismissal of Count III, the tort claim against the pastor. See *Ellis*, 236 Ill. 2d at 49.

3 Even in presenting their alternative argument that were section 13-214.3(d) to apply their complaint should still not be dismissed, plaintiffs cling in their brief to their assertion that either subsection (b) or subsection (c) should really govern this case to save their complaint since they did not discover their alleged injury until the March 2017 Waterville deposition. We commented on this earlier, and we reiterate our sentiments. We do recognize that the effect of section 13214.3(d)'s exception and its nature as a statute of repose may shorten the period for **legal malpractice** complaints. However, so is the essence of repose statutes; their results may seem harsh and unfair, but they are precisely meant to serve as a limit to liability and, with particular respect to section 13-214.3(d), a limit to liability upon attorneys who are providing their professional services. Accordingly, although plaintiffs again raise the argument that subsection (b) or subsection (c) of section 13-214.3 should govern here to save their claim, and this time couch it in a consideration of sympathy, we again find that it cannot stand. See *Wackrow*, 231 Ill. 2d at 427; *Petersen*, 198 Ill. 2d at 446-47 (discussing section 13-214.3(d)'s repose nature and stating that "[t]he possibility of an unjust or absurd result is generally not enough to avoid the application of a clearly worded statute"); *Mosier*, 2015 IL App (1st) 142239, ¶ 47 ("[a]lthough we are not without sympathy ***, this court can only go where the statute [section 13-214.3(d)] and our supreme court's rulings take us"); see also *Doyle*, 2018 IL App (2d) 171041, ¶ 22 (that this may be the result of an application of section 13-214.3(d) is an accidental rather than a necessary consequence).