

FILED

MAR 31 1986

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

CLARENCE J. DAU and
GERALDINE DAU,

)

Plaintiffs-Appellants,

)

vs.

)

JOHN H. COOK, SR.: HERRICK,
ARY & COOK: and CHEROKEE
STATE BANK,

)

Defendants-Appellees.

)

Filed March 31, 1986

5-548
85-300

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Appeal from the Iowa District Court for Cherokee County (CL 1341) -

Richard W. Cooper, Judge.

Plaintiffs appeal from summary judgment for defendants in a tort and contract action. **AFFIRMED.**

Randy V. Hefner, of Van Werden, Hulse & Hefner, Adel, Iowa for plaintiffs-appellants.

Marvin F. Heidman, of Eidsmoe, Heidman, Redmond, Fredregill, Patterson & Schatz, Sioux City, Iowa for defendants-appellees Cook.

Marvin J. Klass, of Klass, Whicher & Mishne, for defendant-appellee bank.

Heard by Oxberger, C.J., and Donielson and Sackett, JJ.

Oxberger, C.J.

The fact situation involved in this appeal reaches this court for the second time. The plaintiffs have appealed from the trial court's ruling granting summary judgment in favor of the defendants. We affirm.

On March 29, 1976, defendant attorney Cook drafted a codicil executed by decedent testatrix granting plaintiffs a testamentary option to purchase farmland "at the value as assessed for federal estate tax purposes." The codicil was silent concerning the amount of interest, if any, to accrue on the unpaid balance of the purchase price. In April, 1976, following the death of the testatrix, defendant bank became executor of the estate. In June, 1976, Cook, acting as attorney for the bank, advised plaintiffs that if they exercised the option, interest on the unpaid balance would accrue at a rate of between seven and nine percent. Plaintiffs decided that they could not afford to exercise the option after Cook computed annual payments incorporating an interest rate of eight percent. The plaintiffs then arranged to lease the portion of land from the bank and have done so for each crop year between 1977 and 1982.

The plaintiffs received notice that the farm tenancy would be terminated and in January of 1983 they consulted with legal counsel. They discovered that the statements made to them regarding the rate of interest were wrong. Rather than providing for an interest of between seven and nine percent, the rate should have been five percent.

Petition was filed in district court on February 10, 1983, seeking specific performance of the option. The estate had been closed on February 14, 1978, but they asked it be opened to enable them to exercise the option. The district court refused to reopen the estate, a decision appealed to this court. We found that the appropriate rate of interest was the statutory rate of five percent

and that plaintiffs' failure to timely exercise the option was not excused on the ground of mutual mistake. In re Estate of Sherman, no. 5-90/84-733 (Iowa Ct. App. filed April 30, 1985)(application for further review denied).

On June 29, 1984, plaintiffs filed a four-count petition which is the subject of this appeal. Two counts alleged that Cook and his firm were negligent in drafting the codicil. The third count alleged that all defendants were negligent with regard to representations as to interest and failure to submit the question of interest to a court for determination. The fourth count alleged against all defendants that they falsely represented the value of the property and that there was a conflict of interest. The court sustained defendant's separate motions for summary judgment, finding first that the action was barred by the five-year statute of limitations even when the discovery rule was applied. The claims based on fraud were found to be barred by claim and issue preclusion as a result of the Sherman litigation. The bank as executor was a party in Sherman, and its motion for summary judgment was sustained on an additional ground of res judicata.

The plaintiffs assert the discovery rule should apply to prevent the statute of limitations bar and that the claim was fraudulently concealed from them, also tolling the statute of limitations. If this court accepts its arguments, the plaintiffs further argue that res judicata is also not a bar to its action. We find that the statute of limitations applies to bar plaintiffs' claims and that the discovery rule and fraudulent concealment exception do not save plaintiffs' cause of action. As a result of our holding, we do not find it necessary to address the appeal regarding issue or claim preclusion.

There is little dispute as to when the statute of limitations began running. Claims of negligent drafting of a will or codicil begin running from the date

of the death of the testator. Millwright v. Romer, 322 N.W.2d 30, 32⁴⁸ (Iowa 1982). As appellee points out, and the district court found, any conversations on the subject of interest must have occurred in May and June, 1976. Negligence on the part of the Bank which might have occurred would have been prior to the closing of the estate on February 14, 1978. Plaintiffs testified in their prior case that alleged representations concerning the real estate value were made in 1976. Negligence actions resulting in damage to property must be brought within five years of the alleged acts. Iowa Code § 614.1(4)(1985). Therefore, Count I and II must have been brought by the plaintiff by October 4, 1981, five years from the testator's death. Count III must have been brought by June 1976 and Count IV brought by February 14, 1983.

Plaintiffs contend the discovery rule applies to their claim. Pursuant to this rule the cause of action is not accrued until the plaintiff discovers his injury. Iowa Code § 614.4 (1985). This rule applies when there is an allegation of fraud, mistake, or trespass. Id. The discovery rule has also been applied to actions involving legal malpractice claims. Millwright, at 32. The trial court implied in its ruling that the discovery rule applied here. While we are not certain the rule applies to the "legal malpractice" claim of the plaintiffs, since no attorney-client privilege existed between the attorney and plaintiffs, we find the plaintiffs could have discovered their cause of action more than five years before their lawsuit was brought.

In Millwright the court found that the discovery rule did not toll the statute of limitations because the plaintiffs were charged with knowledge of the law. Id., at 33. The beneficiaries of a will had brought a legal malpractice action against the attorney who had drafted the will. Id., at 31. The Iowa Supreme Court held the statute of limitations had run even though the plaintiffs

claimed they did not discover until long after the decedent's death that a trust on their behalf violated the rule against perpetuities. Id., at 34. The court stated, "We find that plaintiffs, under the vigilance which the law requires of them, should have known that the will violated the rule against perpetuities. Every citizen is assumed to know the law and is charged with knowledge of the provisions of statutes....Since the plaintiffs are charged with knowledge of the statutory rule against perpetuities, they are deemed to have knowledge of and to have discovered the drafting defect as of the date of testator's death." Id., at 33-34. The relationships of plaintiffs and defendants in Millwright are the same as here; the attorney sued was acting on behalf of the testator, and there was no attorney-client relationship between the parties. Id. Relying on this case, the trial court here found that the plaintiffs were aware of the contents of the codicil and were only mistaken as to its legal effect. Since they are charged with the knowledge of the law, their claims are barred.

We agree with the trial court's assessment. We find that Millwright applies to this case. Plaintiffs claim this renders the discovery rule moot, since all plaintiffs will be charged with knowledge of the law and will not be able to rely on the rule. This extends the holding of Millwright beyond its scope. The court there noted that the purpose of providing a discovery rule exception to the statute of limitations in a legal malpractice case is that a client should be allowed to rely on the expertise of his or her attorney in interpreting the law. Id., at 34. When no attorney-client relationship is involved, the plaintiff cannot claim he justifiably relied upon the attorney's expertise. Instead, he will be charged with recognizing the error and with knowledge of the law. That is also the situation here, where Cook was not an attorney of the plaintiffs nor was the Bank acting on their behalf.

We also agree with the trial court that the doctrine of *fraudulent concealment* does not apply. The court has discussed the doctrine in a case involving similar circumstances. In Schnebly v. Baker, 217 N.W.2d 708, 723 (Iowa 1974), the court found the defendant doctor did not have a duty to tell the plaintiffs that he was negligent and they had a cause of action against him. Neither can we find the defendants lawyer or bank had a duty to tell plaintiffs they might have a cause of action against them.

Finally, the plaintiffs ask this court to accept the doctrine of "equitable tolling." The plaintiffs cite to several California cases adopting this doctrine which provides that the statute of limitations tolls when one of several legal remedies are being pursued. E.g., Collier v. City of Pasadena, 142 Cal. App.3d 917, 931, 191 Cal. Rptr. 681, 684 (2d Dist. App. 1983). According to this doctrine, plaintiffs say, the second lawsuit they brought in 1984 is really a continuation of the first lawsuit brought February 10, 1983. This lawsuit was brought within the applicable statute of limitations, they continue, and so the statute should be tolled regarding the claims against the Bank. We do not accept or reject the doctrine, finding instead that the cases hold the statute is tolled only if the plaintiff's delay is made in good faith. Collier v. City of Pasadena, at ,191 Cal. Rptr. at 691Q. We agree with the trial court that all of the present parties could have been joined in the first case and all the issues were thoroughly tried in the first action. Unlike the Collier case the plaintiff here did not file the second claim within a "reasonable time" after tolling concluded and instead brought it five years after the latest date involved. Id.

We find the plaintiffs are prevented from pursuing their action because of the applicable statute of limitations and affirm the trial court's ruling.

AFFIRMED.