FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

JEROME D. PETERSON,

Plaintiff-Appellant,

vs

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

Defendants-Appellees.

Filed November 26, 1985

5-478
85-302

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Appeal from the Iowa District Court for Cherokee County - Richard W. Cooper, Judge.

Plaintiff appeals from an order granting defendants' motion for summary judgment. **AFFIRMED.**

Randy V. Hefner, of Van Warden, Hulse & Hefner, Adel, for plaintiff-appellant.

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

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

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

HACKETT, J.

Elizabeth Sherman died on April 5, 1976. Prior to Sherman's death, Defendant John H. Cook, Sr., an attorney and member of defendant law firm Herrick, Ary and Cook, drew a codicil to Sherman's will. The codicil, after setting forth the legal description of two quarter section tracts, in relevant part provided:

> . . . at my death Jerry Peterson shall be authorized to purchase either or both of the described quarter sections of land at the value as determined for federal estate tax purposes in my estate. I direct that he shall be entitled to make such purchase upon a contract of sale for a period not exceeding ten years with equal annual payments upon the principal due and such election to purchase the premises shall be made within three months of the date of my death and a binding contract of sale shall be entered into within six months of the date of my death.

After Sherman's death on October 4, 1976, Peterson entered into a contract with the estate to purchase the farms. On May 4, 1977, an addendum to the contract was made.

Plaintiff filed a petition on October 4, 1984, praying judgment against defendant John H. Cook, Sr., an attorney and Herrick, Ary and Cook, his law firm, claiming Cook was negligent in drafting a codicil to the last will and testament of Elizabeth Sherman. Plaintiff also claimed judgment against Cook and the Cherokee State Bank, who had served as executors of the Sherman estate, for informing plaintiff interest would occur on the option and in the interest charged. He also makes claims against both defendants contending they made certain false representations as to the value of real estate, had a conflict of interest and breached certain contracts. Defendants moved for summary judgment claiming the plaintiff's action was barred by the statute of limintations.

The trial court sustained the motion for summary judgment holding plaintiff's claims were barred by the statute of limitations. Plaintiff has appealed from this determination.

Plaintiff claims the trial court erred in granting summary judgment because an issue of material fact existed as to when plaintiff's claims occurred. Iowa R. of Civ. P. 237(c) provides that summary judgment will be granted only when there is "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The burden of showing there is no genuine issue of material fact is upon the moving party. In considering such a motion a court is required to examine the record in the light most favorable to the party opposing the motion to determine whether the movant has met his burden. Sandbulte v. Farm Bureau Mut. Ins. Co., 343 N.W.2d 457, 464 (Iowa 1984).

Plaintiff's suit was filed October 4, 1984. Plaintiff first claimed Cook was negligent in drafting Sherman's codicil. Sherman died on April 5, 1976. The will was immediately admitted to probate. Plaintiff was given a copy of the codicil on April 19, 1976. No attorney-client relationship existed between plaintiff and Cook. Plaintiff consulted his own counsel shortly after receiving a copy of the codicil.

As a general rule a tort action for legal malpractice based on negligently drafted or executed wills accrues on the date of death of the testator. Millwright v. Romer, 322 N.W.2d 30, 32 (Iowa 1982). However, in Millwright the Iowa Supreme Court determined the general rule must be modified by the application of the discovery rule which provides the limitation statute or statutes in a malpractice case do not run until the date of discovery or the date when, by the exercise of reasonable care, plaintiff should have discovered the wrongful act. Id. at 32-3.

The court further pointed out in Millwright: "The question in any given case is not: 'What did plaintiff know of the injury done him? but 'What might

he have known, by the use of the means of information within his reach. . .'" (emphasis added). Id. at 33.

We find that plaintiff under the vigilance which the law requires should have discovered any alleged negligence of defendant Cook in drafting the will. The will was filed, a copy was made available to him, he sought independent legal advice, defendant was never plaintiff's attorney, there was no attorney-client relationship, and the plaintiff had the ability to detect any mistake. Plaintiff's negligent will-drafting claim was predicated on Cook's alleged failure to draft an enforceable option without interest or a specified interest rate that was practical and expressed the desires of the decedent. The plaintiff from looking at the option could have determined it did not meet this criteria. He had the opportunity for five years. Even if a legal interpretation were necessary, plaintiff is deemed to have knowledge of the law and to have discovered the defect as of the date of decedent's death. Millwright at 33-4.

The balance of plaintiff's claims against the defendants flow from the alleged misrepresentation made by defendants to plaintiff at the time he entered into the contract for purchase. The option to purchase was drafted by plaintiff's attorney. All events transpired more than five years prior to the date of the filing of the action.

We agree with the trial court in their determination that the claims of plaintiff, if any, were barred by the statute of limitations.

AFFIRMED.