

No. 1-16-0747

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

DAVID SHUTACK,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County
)	
v.)	No. 15 L 6946
)	
SIDLEY AUSTIN LLP and SUSAN T. BART,)	The Honorable
)	James N. O’Hara,
Defendants-Appellees.)	Judge Presiding.

JUSTICE PIERCE delivered the judgment of the court.
Presiding Justice Hyman and Justice Neville concurred in the judgment.

ORDER

Held: The circuit court properly dismissed plaintiff’s legal malpractice complaint as barred by the statute of repose. The statute of repose does not violate the equal protection, special legislation, or remedies clauses of the Illinois constitution.

¶ 1 Defendants Susan Bart and Sidley Austin LLP (collectively, defendants) represented John Schutack, plaintiff’s father, for estate planning purposes. After his father died, plaintiff David Schutack filed a legal malpractice claim against defendants. Defendants moved to dismiss plaintiff’s complaint as time barred by the applicable statute of repose. Plaintiff argued that the statute of repose violated the Illinois constitution. The circuit court dismissed the claim as time barred and granted defendants’ motion to dismiss, and plaintiff appeals. Our review is *de novo*. For the following reasons, we affirm.

¶ 2

BACKGROUND

¶ 3 For purposes of this appeal, we recite and accept as true all the well-pleaded facts set forth in the complaint and draw all reasonable inferences from these facts in favor of plaintiff. *Edelman, Combs & Latturmer v. Hinshaw & Culbertson*, 338 Ill. App. 3d 156, 164 (2003). The complaint alleged that plaintiff's father, John Shutack, had an estate plan that provided plaintiff and each of plaintiff's four step-siblings approximately 20% of John's estate. On two separate occasions in 2011, John communicated to Bart, an attorney at Sidley Austin, that he wanted to modify his estate plan so that plaintiff would receive a 50% share of the estate, while plaintiff's four step-siblings would each receive a 12.5% share. In response to both requests, Bart allegedly attempted to dissuade John from modifying his estate plan. Bart did not disclose to John that defendants had previously represented plaintiff's step-sister, Kathleen, for estate planning purposes, and thus owed her fiduciary duties that created a conflict of interest, since Kathleen stood to receive a share of John's estate. John did not change his estate plan. Plaintiff alleged that "[b]ut for defendants' actions, John would have changed his estate plan such that [plaintiff] would have received 50% of the value of the estate." It is uncontested that John died on July 28, 2013. The complaint does not allege what portion of John's estate plaintiff ultimately received, and there were no exhibits attached to the complaint. There is no dispute that the alleged malpractice claim accrued on the date of John's death. Notably, there are no allegations, factual or otherwise, that plaintiff did not know of his claim or was otherwise restricted in filing his malpractice lawsuit against defendants during the period beginning at John's death and ending on March 11, 2014.

¶ 4 Thus, the basic facts are that John Schutack died on July 28, 2013, a probate estate was opened and the deadline for filing claims against the estate was March 11, 2014. Plaintiff filed

his attorney malpractice claim against defendants on July 8, 2015, more than six months after the period for filing claims against the estate expired. Based on these dates, defendants argued that the complaint should be dismissed pursuant to section 2-619(a)(5) of the Code of Civil Procedure (Code) (735 ILCS 5/2-619(a)(5) (West 2014)) because the complaint was barred by the statute of repose set forth in section 13-214.3(d) of the Code (735 ILCS 5/13-214.3(d) (West 2014)) in that plaintiff's legal malpractice complaint was filed on July 8, 2015, well after the deadline for filing claims against the estate, March 11, 2014. Defendants' motion was supported by an affidavit from a Sidley Austin attorney, along with copies of (1) John's death certificate reflecting that John died on July 28, 2013, (2) an order from the circuit court of Cook County's Probate Division admitting John's will to probate on September 5, 2013, and (3) the letters of office that were issued to the Northern Trust Company as Independent Executor of John's estate. The Sidley Austin attorney attested that, in accord with section 18-3(a) of the Probate Act (755 ILCS 5/18-3(a) (West 2012)), a notice was published in the Chicago Daily Law Bulletin on three consecutive weeks, beginning September 10, 2013, informing creditors that the period for filing claims against the estate would expire on March 11, 2014.

¶ 5 Plaintiff contends the complaint was timely filed within two years of John's death on July 28, 2013, pursuant to section 13-214.3(c) of the Code, and that section 13-214.3(d) of the Code does not bar his claim because subsection (d) is unconstitutional for various reasons. Plaintiff further argued that applying section 13-214.3(d) of the Code was "premature" since "a number of the trusts at issue appear to be irrevocable trusts and, therefore, [s]ection [sic] 5/13-214.3(c) may not apply." Plaintiff then argued that section 13-214.3(d) of the Code violates the equal protection clause of the Illinois Constitution (Ill. Const. 1970, art. I, § 2), because it is "not rationally related to any conceivable goal and because it treats plaintiffs differently not based on

the merits of their claims, but, rather whether *** a probate estate was filed.” Plaintiff argued that section 13-214.3(d) of the Code violates the remedies clause of the Illinois Constitution (Ill. Const. 1970, art. I, § 12), since “it denied those injured by the poor drafting of trust documents any remedy for legal malpractice.” He further argued that section 13-214.3(d) of the Code violates the special legislation clause of the Illinois Constitution (Ill. Const. 1970, art. IV, § 13), since it applies “to a small class of lawyers solely if they are fortunate enough to have their former client die and his executor open a probate estate.” Finally, plaintiff argued that section 13-214.3(d) of the Code was designed to benefit estate planning attorneys at the expense of their clients.

¶ 6 Defendants replied, in relevant part, that plaintiff had failed to comply with Illinois Supreme Court Rule 19 (eff. Sept. 1, 2016), by failing to give notice to the Attorney General of his constitutional challenges to section 13-214.3(d) of the Code. On the merits, defendants argued that plaintiff’s equal protection argument was considered and rejected in *Poulette v. Silverstein*, 328 Ill. App. 3d 791 (2002), and that plaintiff’s remedies clause argument was contrary to precedent that holds that the application of a statute of repose to bar a cause of action before a party knows of it does not violate the remedies clause.

¶ 7 On February 28, 2016, the circuit court entered a written order finding that, pursuant to section 13-214.3(d) of the Code, plaintiff’s complaint was untimely by more than one year, since John died on July 28, 2013, his will was admitted to probate on September 5, 2013, and the Independent Executor of John’s estate notified creditors starting on September 10, 2013, that any claim against the estate needed to be filed by March 11, 2014, which was also the date by which plaintiff needed to bring any professional negligence claim against defendants. The circuit court

acknowledged that plaintiff raised constitutional challenges, but did not rule on them. The circuit court dismissed plaintiff's complaint with prejudice. Defendant timely appeals.

¶ 8

ANALYSIS

¶ 9

This appeal involves the statute of limitations dealing with attorney malpractice. Generally, an action against an attorney for negligence arising out of an act or omission in the performance of professional services must be filed within two years from the time the person bringing the action knew or reasonably should have known of the injury (735 ILCS 5/13-214.3(b) (West 2014)) and in no event can the claim be filed more than six years after the date of the act or omission (735 ILCS 5/13-214.3(c) (West 2014)). However, where an injury caused by an attorney's act or omission does not occur until the death of the person for whom professional services were rendered, suit may be filed within two years of the client's death, except where letters of office issue or the person's will is admitted to probate, the attorney negligence claim must be filed within the time for filing a will contest or within the time for filing a claim against the estate, whichever is later. 735 ILCS 5/13-214.3(d) (West 2014).

¶ 10

On appeal, plaintiff raises the same constitutional arguments he raised in response to defendants' motion to dismiss. Plaintiff also argues for the first time on appeal that section 13-214.3(d) of the Code violates the equal protection clause of the federal constitution (U.S. Const. art. IV, § 1). Plaintiff's failure to raise his federal constitutional argument in the circuit court results in forfeiture, and we decline to address it. *1010 Lake Shore Ass'n v. Deutsche Bank National Trust Co.*, 2015 IL 118372, ¶ 14. Furthermore, by failing to provide notice to the Attorney General of the constitutional arguments advanced in his response to defendants' motion to dismiss and in his brief to this court, in violation of Supreme Court Rule 19, plaintiff has forfeited all of these arguments on appeal. *U.S. Bank Trust National Association v. Junior*, 2016

IL App (1st) 152109, ¶¶ 24-25. On the other hand, defendants have not pursued the forfeiture argument they raised in the circuit court and instead have addressed plaintiff's constitutional arguments on their merits. We will therefore consider plaintiff's arguments despite his forfeiture. *Poulette*, 328 Ill. App. 3d at 797.

¶ 11 Plaintiff first argues that section 13-214.3(d) of the Code violates the equal protection clause of the Illinois Constitution (Ill. Const. 1970, art. I, § 2). The equal protection clause "guarantees that the State must treat similarly situated persons in a similar manner." *People v. Kimbrough*, 163 Ill. 2d 231, 237 (1994). The state may "classify and draw lines that treat different classes of persons differently," so long as it does not do so arbitrarily. *Id.* If a statutory classification "neither impinges on a fundamental constitutional right nor is based on a 'suspect' class, such as race, a court will use the 'rational basis' test to review the statute's validity." *Id.* The state's classification is constitutional if it "bears a rational basis to a legitimate state interest." *Id.* If any set of facts can reasonably be conceived of to justify the statute, it must be upheld. *People v. Rizzo*, 2016 IL 118599, ¶ 45.

¶ 12 Plaintiff concedes that he is not part of a suspect class. He also concedes that section 13-214.3(d) of the Code does not impinge on a fundamental right, and thus the rational basis test applies. He contends, however, that section 13-214.3(d) of the Code bears no rational relationship to any legitimate legislative purpose, since it is only designed to "benefit a class of estate planning attorneys from being held accountable for their legal malpractice." He complains that section 13-214.3(d) of the Code creates an arbitrary distinction by providing that claims may be filed two years after the testator's death, unless letters of office are issued or the testator's will is admitted to probate, in which case a claim must be brought within the later of the time for filing claims against the estate or contesting the will, thereby benefitting estate planning

attorneys by limiting their exposure to malpractice claims. He concludes that “[t]his confusing, unnecessary and arbitrary set of dates had no rational relationship to any legitimate state interest.”

¶ 13 Plaintiff acknowledges that in *Poulette*, we rejected a nearly identical equal protection challenge to section 13-214.3(d) of the Code. In *Poulette* we found that section 13-214.3(d) of the Code “provides a claimant with a reasonable time after the decedent’s death to pursue a cause of action; it balances the defendant’s right to be free of stale claims; and addresses the need for closure with respect to matters related to a decedent’s estate as necessitated by the Probate Act.” *Poulette*, 328 Ill. App. 3d at 797. Plaintiff contends, however, that *Poulette* was wrongly decided because section 13-214.3(d) of the Code does not provide a reasonable time after the decedent’s death to pursue a cause of action. He claims that section 13-214.3(d) of the Code has “allowed attorneys who were well aware of cases that could have been brought against them for legal malpractice to avoid the ramifications of their negligence.” Plaintiff offers no support for this contention, nor does he provide any support for his assertion that “plaintiffs are often unaware of their injury until after the six month statute of repose has lapsed.” Notably, plaintiff does not claim he was unaware of his alleged injury “until after the six month statute of repose lapsed.”

¶ 14 Plaintiff has not met his burden of demonstrating that section 13-214.3(d) of the Code is not rationally related to a legitimate state interest, and has not supplied us with a persuasive argument or reason to depart from *Poulette*. Instead, plaintiff has presented a set of disagreements with the result of the statute’s application in his case. It is correct that the limitations period in section 13-214.3(d) of the Code may shorten the time in which to bring some claims of legal malpractice when letters of office have issued or a will has been admitted to

probate. *Poulette* expressly acknowledged that when a will is admitted to probate or letters of office are issued, section 13-214.3(d) of the Code provides a party with significantly less time to file their claim, but found that the distinction drawn by subsection (d) was rationally related to a legitimate government purpose. *Poulette*, 328 Ill. App. 3d at 797 (finding that section 13-214.3(d) of the Code “reflects a policy of law intended to balance several different interests: it provides a claimant with a reasonable time after the decedent's death to pursue a cause of action; it balances the defendant's right to be free of stale claims; and addresses the need for closure with respect to matters related to a decedent's estate as necessitated by the Probate Act.”).

¶ 15 When letters of office are issued or a will is admitted to probate, the administration of the decedent’s estate begins. If letters of office issue, the estate’s representative must publish notice for three consecutive weeks and mail or deliver notice to known or reasonably ascertainable creditors indicating that any claims may be filed by a specified date not less than six months from date of first publication or three months from the date of mailing or delivery. 755 ILCS 5/18-3 (West 2014). Similarly, any interested person seeking to file a will contest must do so within six months of the will being admitted to probate. 755 ILCS 5/8-1(a) (West 2014). The purpose of the filing deadlines is to “limit the time within which the validity of a will may be questioned and to create stability in the administration of estates.” *Robinson v. First State Bank of Monticello*, 97 Ill. 2d 174, 185 (1983). Both of these provisions promote stability in administering estates by providing a reasonable opportunity to a party to pursue their rights to a portion of an estate or to test the validity and enforceability of the will. Because the failure to assert ones rights within the timeframe provided by the Probate Act results in a claim being barred, the legislature could reasonably conclude that professional negligence claims against attorneys involved with the estate planning documents needed to be asserted within the same

time period as other estate-related claims in order to promote orderly administration of the estate, finality, and to guard against stale claims. This is hardly arbitrary. These were the conclusions reached by the court in *Poulette*, and plaintiff offers no compelling argument to cause us to find otherwise, especially where he does not allege any facts that indicate he was unaware of or that he was unable to file his claim before March 11, 2014.

¶ 16 Plaintiff advances two additional arguments related to his equal protection claim. First, he argues that section 13-214.3(d) of the Code results in an aggrieved party having to pursue their claims in the probate action while also filing a separate legal malpractice action against the drafting attorneys. He argues that this “unfair burden” may run afoul of Illinois Supreme Court Rule 137 (eff. July 1, 2013), since the party may not have all of the facts necessary to support their legal malpractice claim. Second, plaintiff argues that we must consider the “incorrect and harsh consequences for clients who have suffered damages as a result of [an] attorney’s professional negligence *** in determining whether disparate and beneficial treatment should be given to estate planning attorneys.” These are speculative arguments because they are not advanced in relation to the facts applicable to the plaintiff’s claim.

¶ 17 Plaintiff makes no effort to explain how his Rule 137 argument, which he did not advance in the circuit court, results in section 13-214.3(d) of the Code violating the equal protection clause of the Illinois constitution. Furthermore, under the rational basis test, our job is to inquire “whether the method or means employed in the statute to achieve the stated goal or purpose of the legislation is rationally related to that goal.” *Jacobson v. Department of Public Aid*, 171 Ill. 2d 314, 320 (1996). The rational basis test does not look to the consequences that flow from a particular set of facts, but instead looks at the purpose of the statute and whether it is related to its stated goal. Plaintiff’s equal protection challenge to section 13-214.3(d) of the Code

fails to establish that the limitations period provided by the legislature is not rationally related to the goal of orderly administration of an estate, finality, and to guard against stale claims.

¶ 18 Next, plaintiff argues that section 13-214.3(d) of the Code violates the special legislation clause of Illinois constitution, which provides: “The General Assembly shall pass no special or local law when a general law is or can be made applicable. Whether a general law is or can be made applicable shall be a matter of judicial determination.” Ill. Const. 1970, art. IV, § 13.

“Special legislation confers a special benefit or privilege on a person or group of persons to the exclusion of others similarly situated.” *Chicago National League Ball Club, Inc. v. Thompson*, 108 Ill. 2d 357, 687 (1985). “It discriminates in favor of a select group without a sound, reasonable basis.” *Id.* “[A] claim that the special-legislation provision has been violated is generally judged by the same standard that is used in considering a claim that equal protection has been denied.” *Id.*

¶ 19 Plaintiff contends that estate planning attorneys are provided a special benefit without any reasonable basis where their deceased clients’ wills are admitted to probate or where letters of office are issued. Section 13-214.3(d) is applicable to actions against all attorneys regardless of their area of practice so the convenient characterization of the argument as one that applies only to estate planning attorneys is disingenuous at best. As explained above, section 13-214.3(d) of the Code bears a rational relationship to a legitimate state interest. The legislature’s determination that when a will is admitted to probate or letters of office issue, where a legal negligence claim accrues upon death, the claims against any attorney must be brought within the same time period as set for contesting the will or filing claims against the estate is not arbitrary and is unquestionably within the prerogative of the legislature. Section 13-214.3(d) applies to all legal negligence actions regardless of the area of practice involved. Furthermore, it is rationally

related to the legitimate state interests of providing a reasonable time after the decedent's death to pursue a cause of action, balancing the right of every attorney to be free of stale claims, and addressing the need for closure with respect to matters related to a decedent's estate as necessitated by the Probate Act. See *Poulette*, 328 Ill. App. 3d at 797. Again, plaintiff has not demonstrated why we should depart from the reasoning of *Poulette* or that section 13-214.3(d) of the Code is arbitrary or not rationally related to a legitimate state purpose, and therefore his special legislation argument fails.

¶ 20 Next, plaintiff claims that section 13-214.3(d) of the Code violates the remedies clause of the Illinois constitution. The remedies clause of the Illinois constitution provides: "Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation." Ill. Const. 1970, art. I, § 12. The remedies clause is "merely an expression of a philosophy and not a mandate that a certain remedy be provided in any specific form." (Internal quotation marks omitted.) *Folta v. Ferro Engineering*, 2015 IL 118070, ¶ 49. Our supreme court has found that "the legislature 'may restrict the class of potential defendants from whom a plaintiff may seek a remedy' without violating the certain remedy clause." *Id.* (quoting *Bilyk v. Chicago Transit Authority*, 125 Ill. 2d 230, 246 (1988)).

¶ 21 The court has also recognized that section 13-214.3(d) of the Code may shorten the time in which to bring a legal malpractice complaint, but "the fact that a repose provision 'may in a particular instance, bar an action before it is discovered is an accidental rather than a necessary consequence.' " *Wackrow v. Niemi*, 231 Ill. 2d 418, 427 (2008) (quoting *Mega v. Holy Cross Hospital*, 111 Ill. 2d 416, 424 (1986)). The court in *Wackrow* then cited with approval the statement in *Poulette* that "where a will has been admitted to probate or letters of office are issued, the legislature intended to terminate the possibility of liability after a defined period,

regardless of whether plaintiff's cause of action has accrued." *Wackrow*, 231 Ill. 2d at 427 (quoting *Poulette*, 328 Ill. App. 3d at 796). Here, plaintiff appears to suggest that the fact that section 13-214.3(d) of the Code renders his claim time barred leaves him with no remedy means that section 13-214.3(d) of the Code violates the constitution. That is simply not the case. He has no remedy because he did not file his claim for legal malpractice within the time provided by section 13-214.3(d) of the Code and, where he alleged no facts to support a claim that he was unable to do so, he fails to present a compelling reason for us to depart from the precedent established in *Poulette* and to accept his argument. We reject plaintiff's request to overrule *Poulette* and to ignore *Wackrow*. Finally, our analysis is further supported by the fact that the legislature is presumably aware of the decisions in *Poulette* and *Wackrow* and has not taken the opportunity to amend section 13-214.3(d) to extend the limitations. The complaint was properly dismissed by the circuit court.

¶ 22 Finally, plaintiff has raised no argument that his complaint was timely under section 13-214.3(d) of the Code. The circuit court correctly dismissed plaintiff's complaint pursuant to section 2-619(a)(5) of the Code, as the complaint was barred by the statute of repose.

¶ 23 CONCLUSION

¶ 24 Plaintiff forfeited his claims that section 13-214.3(d) of the Code is unconstitutional by failing to comply with Supreme Court Rule 19, and we will not consider plaintiff's equal protection claim under the federal constitution because he raised that challenge for the first time on appeal. Forfeiture aside, section 13-214.3(d) of the Code is rationally related to the legitimate state interests of providing a reasonable time after a decedent's death to pursue a cause of action for legal malpractice against attorneys who represented the decedent in estate planning matters, balancing an attorney's right to be free of stale claims, and the need for closure with respect to

matters related to a decedent's estate as required by the Probate Act and consistent with our decision in *Poulette*. Plaintiff's claim that section 13-214.3(d) of the Code violates the remedies clause of the Illinois constitution is contrary to well-settled law that a statute of repose may operate to extinguish a cause of action before it accrues. The circuit court properly dismissed plaintiff's complaint as time-barred.

¶ 25 For the foregoing reasons, the judgment of the circuit court is affirmed.

¶ 26 Affirmed.