

NOTICE

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November 28, 2017
Carla Bender
4th District Appellate
Court, IL

2017 IL App (4th) 170164-U

NO. 4-17-0164

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

KEVIN McDERMOTT, Executor of the)	Appeal from
ESTATE OF DAVID McNAUGHT, Deceased,)	Circuit Court of
Plaintiff-Appellant,)	Sangamon County
v.)	No. 16L77
MICHAEL G. BARTON,)	
Defendant-Appellee.)	Honorable
)	John M. Madonia,
)	Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Justices Appleton and DeArmond concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court affirmed, concluding the trial court properly dismissed plaintiff's complaint for legal malpractice when the claim was barred under the statute of repose.

¶ 2 In June 2006, David McNaught and Teri Erschen (now McNaught) entered into a premarital agreement prepared by David's attorney, defendant Michael G. Barton, wherein David promised, prior to his death, to amend his last will and testament to make certain provisions for Teri. However, when David died in June 2013, no changes had been made to his will. As a result, Teri renounced David's will in favor of her statutory spousal share of his estate. In April 2016, plaintiff Kevin McDermott, the executor of David's estate (Estate), filed a negligence claim against defendant for failing to (1) properly draft the premarital agreement and (2) prepare the necessary estate-planning documents in accordance with the premarital agreement.

¶ 3 Defendant filed a motion to dismiss the Estate's claim under section 2-619(a)(5)

of the Code of Civil Procedure (Code) (735 ILCS 5/2-619(a)(5) (West 2016)), asserting the claim was barred by section 13-214.3 of the Code (735 ILCS 5/13-214.3 (West 2016)). The trial court granted defendant's motion to dismiss with prejudice, concluding the claim was barred by the statute of repose under section 13-214.3(c).

¶ 4 On appeal, the Estate asserts the trial court erred in granting defendant's motion to dismiss. We affirm.

¶ 5 I. BACKGROUND

¶ 6 David and Teri were in a lengthy relationship that resulted in the 2000 birth of their only child, a daughter. The couple was not married at the time of their daughter's birth. In July 2003, David executed his last will and testament, which provided, in relevant part,

"(a) Until the first to occur of (i) my daughter attaining the age of eighteen years or (ii) my daughter's death, the trustee shall distribute one-half of the annual income of the trust to my friend, [Teri] provided, however, her right to income shall cease in the event of her marriage, co-habitation with another person[,] or death.

* * *

(c) If my daughter is under age eighteen and living with her mother, then they may occupy rent-free any residential real estate included among the assets of the trust; provided, however, the amount of expenses for utilities, taxes, insurance, and normal maintenance incurred by the trustee with respect to such residence shall reduce the amount of income otherwise payable to my friend,

[Teri], as provided under sub-paragraph (a) above."

¶ 7 Circumstances changed, however, when David and Teri decided to marry. On June 28, 2006, the month prior to their marriage, David and Teri entered into a premarital agreement, which stated, before his death, David "shall provide by Will or a trust document that Teri may continue to live in the same home which was utilized at David's death rent-free and expense-free, except for taxes and utilities, for as long as Teri desires." Additionally, the premarital agreement stated, prior to his death, David "shall provide in his [w]ill or in his trust document that at his death a trust is created and have allocated to it all of David's farm real estate. The trust shall provide at a minimum that at least 50% of the income of the trust will be paid at least quarterly to Teri until the earliest of (a) her death, (b) her remarriage, (c) her cohabitation with a male person or (d) there being no living child of David and Teri under the age of eighteen." In exchange for David's promise to make certain provisions for her, Teri waived her right to renounce his will.

¶ 8 David subsequently died on June 3, 2014, without executing the estate-planning documents contemplated in the premarital agreement. Because David failed to make provisions for Teri as required under the premarital agreement, on February 9, 2015, Teri timely renounced David's last will and testament and demanded one-third of his estate in accordance with section 2-8 of the Probate Act of 1975 (755 ILCS 5/2-8 (West 2014)). The trial court upheld Teri's renunciation of the will in January 2016, and this court subsequently affirmed the trial court's decision. See *In re Estate of McNaught*, 2016 IL App (4th) 160132-U, ¶¶ 13, 31.

¶ 9 On April 8, 2016, the Estate filed a complaint against defendant, alleging his failure to draft the estate-planning documents required under the premarital agreement constituted negligence. Specifically, the complaint alleged defendant (1) "intentionally did not

draft the estate planning documents required by the [premarital agreement] because he thought that the provisions for Teri in [David's last will and testament] satisfied what was required of David under the [premarital agreement]" and (2) "failed to draft a [premarital agreement] that contained the same benefits for Teri as bequeathed to her in David's [last will and testament]." The Estate noted the provisions for Teri under the premarital agreement were substantially less than she received by renouncing the will and claiming her statutory one-third share of the estate. Accordingly, the Estate asked for damages in the amount of \$2 million. Of that amount, \$1.8 million constituted the loss taken by the Estate when Teri claimed her one-third share of the Estate instead of the amount contemplated by the premarital agreement. The remaining damages were for litigation fees associated with Teri's renunciation of the will.

¶ 10 In October 2016, defendant filed a motion to dismiss pursuant to section 2-619(a)(5) of the Code (735 ILCS 5/2-619(a)(5) (West 2016)). Therein, defendant claimed the complaint was time-barred under two alternative provisions. First, defendant asserted the complaint was time-barred under section 13-214.3(d) of the Code (735 ILCS 5/13-214.3(d) (West 2016)) where the Estate failed to bring the action against him within six months of issuing letters of office. Second, defendant asserted the complaint was time-barred under the statute of repose because the alleged negligent act or omission—the drafting of the premarital agreement—occurred more than six years prior to the initiation of the lawsuit. 735 ILCS 5/13-214.3(c) (West 2016).

¶ 11 In February 2017, the trial court denied defendant's motion to dismiss as to section 13-214.3(d) of the Code, but granted the motion to dismiss as it related to section 13-214.3(c), finding more than six years had passed since defendant's alleged negligent act or omission occurred.

¶ 12 This appeal followed.

¶ 13 II. ANALYSIS

¶ 14 On appeal, the Estate argues the trial court erred by granting defendant's motion to dismiss pursuant to section 2-619(a)(5) of the Code. "A motion to dismiss under section 2-619(a) admits the legal sufficiency of the plaintiff's claim but asserts certain defects or defenses outside the pleadings which defeat the claim." *Sandholm v. Kuecker*, 2012 IL 111443, ¶ 55, 962 N.E.2d 418. In ruling on the motion, the court must construe the pleadings and any supporting documentation in the light most favorable to the nonmoving party. *Id.* "The court must accept as true all well-pleaded facts in plaintiff's complaint and all inferences that may reasonably be drawn in plaintiff's favor." *Id.* Our review of a motion to dismiss is *de novo*. *Id.*

¶ 15 A. Section 13-214.3 of the Code

¶ 16 Section 13-214.3 of the Code provides:

"(b) An action for damages based on tort, contract, or otherwise (i) against an attorney arising out of an act or omission in the performance of professional services or (ii) against a non-attorney employee arising out of an act or omission in the course of his or her employment by an attorney to assist the attorney in performing professional 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).

¶ 17 The central issue in this appeal is determining which of these subsections applies to the Estate's claim. Section 13-214.3(b) of the Code provides the general rule for filing a malpractice or negligence claim against an attorney. The general rule provides that an action against the attorney "must be commenced [two] years from the time the person bringing the action knew or reasonably should have known of the injury for which damages are sought." 735 ILCS 5/13-214.3(b) (West 2016). If subsection (b) applies to the present case, the Estate's action would have been timely because, regardless of whether the Estate's injury accrued upon David's death (June 2014) or Teri's renunciation of the will (February 2015), the action was commenced within two years of that injury (April 2016).

¶ 18 However, subsections (c) and (d) provide exceptions to the general rule set forth in subsection (b). Subsection (c), the statute of repose, sets an "expiration date" on legal-

malpractice claims by requiring any action to be filed no more than six years after the act or omission occurred. 735 ILCS 5/13-214.3(c) (West 2016). Subsection (d) is a section that applies specifically "[w]hen the injury caused by the act or omission does not occur until the death of the person for whom the professional services were rendered," at which point the claim against the attorney must be filed either within two years of the person's death, or within the time frame set forth by the Probate Act of 1975. 735 ILCS 5/13-214.3(d) (West 2016).

¶ 19 While the Estate asserts its action was timely filed under the general provision, section 13-214.3(b), defendant argues one of the exceptions—either section 13-214.3(c) or 13-214.3(d) of the Code—applies to the present case.

¶ 20 The trial court ultimately dismissed the complaint as time-barred under section 13-214.3(c) after finding subsection (d) was inapplicable under the present set of facts. The Estate argues neither section 13-214.3(c) or section 13-214.3(d) applies and, therefore, subsection (b)—which allowed it to bring the claim within two years of Teri renouncing the will—was the appropriate period for filing a claim. Accordingly, the Estate argues the trial court erred by finding its action was time-barred by the six-year statute of repose provided under section 13-214.3(c) of the Code. Defendant, in turn, argues the court correctly dismissed the action after applying section 13-214.3(c), but asserts this court could also affirm on the basis that the claim was barred under section 13-214.3(d) of the Code. In the event that neither subsection (c) or (d) applies to the present case, we would apply the general rule set forth under subsection (b) of the Code.

¶ 21 B. Section 13-214.3(d) of the Code

¶ 22 At first glance, it might seem section 13-214.3(d) applies in this instance, as this case revolves around David's death, and subsection (d) applies when the person for whom the

professional services were rendered dies. A closer look at the provision, however, limits this subsection to those circumstances where "the injury caused by the act or omission does not occur until the death of the person for whom the professional services were rendered." 735 ILCS 13-214.3(d) (West 2016). In other words, the question is whether David's death triggered the Estate's injury.

¶ 23 We note the present action does not contest the will that existed at David's death but, rather, arises from defendant's alleged negligence in preparing a June 2006 premarital agreement or in failing to draft estate-planning documents in accordance with the premarital agreement. The Estate commenced this action because Teri renounced the will based on David's failure to comply with the 2006 premarital agreement. In considering the circumstances of this case, the trial court determined the injury to the Estate occurred when Teri renounced the will. See *Pugsley v. Tueth*, 2012 IL App (4th) 110070, ¶ 22, 966 N.E.2d 330. Because the court found David's death did not trigger the Estate's injury, the court found the exception created in subsection (d) does not apply to this case.

¶ 24 We agree with the trial court. Teri's renunciation of the will, not the death of David, caused the injury to the Estate. Had David died and Teri chose to not renounce the will, the Estate could not allege injury. Given our conclusion as to subsection (d), we move on to section 13-214.3(c).

¶ 25 C. Section 13-214.3(c) of the Code

¶ 26 "The purpose of a statute of repose like the one found in section 13-214.3(c) operates to curtail the 'long tail' of liability that may result from the discovery rule." *Snyder v. Heidelberger*, 2011 IL 111052, ¶ 10, 953 N.E.2d 415. This differs from the purpose of a statute of limitations. "A statute of limitations governs the time within which lawsuits may be

commenced *after* a cause of action has accrued. However, a statute of repose extinguishes the action itself after a fixed period of time, regardless of when the action accrued." (Emphasis in original.) *Ferguson v. McKenzie*, 202 Ill. 2d 304, 311, 780 N.E.2d 660, 664 (2001). In other words, "[a] statute of repose begins to run when a specific event occurs, regardless of whether an action has accrued." *Snyder*, 2011 IL 111052, ¶ 10, 953 N.E.2d 415.

¶ 27 Section 13-214.3(c) of the Code allows a person up to six years to bring a claim against an attorney for an act or omission constituting legal malpractice. 735 ILCS 5/13-214.3(c) (West 2016). For purposes of subsection (c), the issue before us is when the act or omission that gives rise to this claim occurred. In its complaint, the Estate makes two allegations against defendant. The first allegation is that defendant intentionally failed to draft the estate-planning documents as required by the premarital agreement. The second allegation is that defendant negligently drafted the premarital agreement. In its brief, the Estate concedes subsection (c) bars their second allegation. We accept this concession and turn to the question of whether the trial court correctly determined subsection (c) bars the second allegation.

¶ 28 According to the trial court, defendant's act or omission stemmed from the premarital agreement executed on June 28, 2006. Thus, the court determined the Estate was required to bring its action within six years—by June 28, 2012. Conversely, the Estate asserts defendant's omission did not occur until June 3, 2014, when David died, as the premarital agreement gave David—and by extension, defendant—up until the time of his death to fulfill his promises under the premarital agreement. If we accept the position of the Estate, the period of repose would begin to run once David died, giving the Estate six years from June 3, 2014, to bring the action.

¶ 29 *Fricka v. Bauer*, 309 Ill. App. 3d 82, 722 N.E.2d 718 (1999), sets forth the general rule for calculating a period of repose. In *Fricka*, Michael Fricka entered into an agreement with his wife, Antoinette, that he would provide certain monies toward refinancing her home and making improvements in her home. *Id.* at 84, 722 N.E.2d at 720. In exchange, on March 3, 1992, Antoinette signed a document transferring future title of the home to both herself and Michael as beneficiaries in joint tenancy. *Id.* However, on March 20, 1992, Antoinette signed a deed prepared by her attorney in February 1992 that transferred future ownership of the property to herself only. *Id.* When Antoinette filed for divorce several years later, Michael learned about the deed, which eliminated his interest in the home. *Id.*

¶ 30 On March 18, 1998, Michael filed a lawsuit against the attorney, alleging the attorney committed negligence in preparing the deed. *Id.* at 85, 722 N.E.2d at 720. The trial court granted the attorney's motion to dismiss pursuant to section 2-619(a)(5) of the Code, finding Michael's claim was precluded by the statute of repose set forth in section 13-214.3(c). *Id.* at 85, 722 N.E.2d at 721. The court found the repose period began to run in February 1992, when the attorney completed his work on the deed. *Id.* After comparing the statute of repose for legal-malpractice claims to the statutes of repose for claims of medical malpractice or negligence in construction, the appellate court agreed with the trial court's determination, stating:

"We hold that the attorney malpractice period of repose similarly begins to run on the last date on which the attorney performs the work involved in the alleged negligence. Although omissions may cause the injury, those omissions must occur in the context of some affirmative acts of representation. When the acts of representation end, the period of repose must begin, even if the continuing

omissions may contribute to injury." *Id.* at 86-87, 722 N.E.2d at 722.

¶ 31 Because the appellate court concluded the attorney's act of representation ended in February 1992, Michael's complaint, filed in March 1998, was outside the six-year period of repose. *Id.* at 88, 722 N.E.2d at 723.

¶ 32 The Estate argues *Fricka* is distinguishable because the attorney in *Fricka* had completed his work—preparing the deed—in February 1992. Conversely, in this case, the Estate argues defendant never completed the work because he had an ongoing obligation to create the necessary estate-planning documents prior to David's death in conformance with the premarital agreement.

¶ 33 Defendant argues he last performed an "affirmative act of representation" associated with the alleged negligence in June 2006, when he prepared the premarital agreement. Even though the Estate's injury would not be realized until at least June 3, 2014—the date of David's death—defendant asserts the period of repose continued to run from June 2006 because the continuing omission resulted from defendant's last action, which was drafting the premarital agreement the parties signed in June 2006. Under the reasoning set forth in *Fricka*, defendant asserts the Estate's claim, filed nearly 10 years later, was outside the six-year period of repose and, thus, barred.

¶ 34 We agree with defendant. *Fricka* provides, "Although omissions may cause the injury, those omissions must occur in the context of some affirmative acts of representation. When the acts of representation end, the period of repose must begin, even if the continuing omissions may contribute to injury." *Id.* at 87, 722 N.E.2d at 722. Here, the Estate's claims arise

out of defendant's work on the premarital agreement and his ongoing obligation to update David's estate-planning documents.

¶ 35 Defendant points to *O'Brien v. Scovil*, 332 Ill. App. 3d 1088, 1089, 774 N.E.2d 466, 467 (2002), for further support. In *O'Brien*, the plaintiff filed a complaint against her attorney on January 31, 2001, for failing to secure her interest in her ex-husband's pension during their divorce proceedings, which deprived her from benefitting from the pension upon his death. The attorney filed a motion to dismiss, asserting he informed the plaintiff in April 1994 that he was no longer acting on her behalf due to unpaid invoices. *Id.* The attorney thereafter wrote off the plaintiff's account on January 31, 1995, for failure to pay. *Id.* The trial court granted the attorney's motion to dismiss pursuant to section 13-214.3(c) of the Code, and the appellate court affirmed. *Id.* at 1091, 774 N.E.2d at 468. The appellate court held that the attorney last appeared as the plaintiff's counsel in April 1994, and she was therefore obligated to file any malpractice claims by April 2000. *Id.* In so finding, the court stated, "the last act of representation with regard to the omission upon which the malpractice is founded is the critical date that triggers the statute of repose." *Id.* at 1090, 774 N.E.2d at 468. The court reasoned, "Because the statute of repose was designed to place an outer limit on the time in which claims may be brought, it is immaterial that [the plaintiff] did not discover her injury before it was barred." *Id.* at 1091, 774 N.E.2d at 468. The court then noted, "While we lament that this holding seems harsh, we must point out that we do not make the laws. We must interpret them as written." *Id.*

¶ 36 According to the Estate, *O'Brien* is distinguishable because the attorney's representation clearly ended in April 1994, whereas the attorney in the present case continuously represented David until his death in June 2014. However, as noted in *Fricka*, any omission must occur in the context of some affirmative acts of representation. *Fricka*, 309 Ill. App. 3d at 87,

722 N.E.2d at 722. Moreover, "the statute of repose is not tolled merely by the continuation of the attorney-client relationship." *Lamet v. Levin*, 2015 IL App (1st) 143105, ¶ 20, 39 N.E.3d 136.

¶ 37 Defendant also finds support in *Terra Foundation for American Art v. DLA Piper LLP*, 2016 IL App (1st) 153285, ¶ 3, 61 N.E.3d 202. In *Terra Foundation*, the plaintiff filed an October 2014 claim against a law firm for negligent representation in drafting a real estate purchase agreement. *Id.* ¶ 8. The parties made a number of amendments to the June 2005 purchase agreement—including a May 2007 amendment affecting the plaintiff's interests—before the final closing in February 2013. *Id.* ¶ 19. The trial court granted the law firm's motion to dismiss under section 2-619(a)(5) due to the statute of repose running pursuant to section 13-214.3(c) of the Code. *Id.* ¶ 24.

¶ 38 The appellate court rejected the plaintiff's argument that the statute of repose began running when the parties closed on the property in February 2013, the date the law firm last represented the plaintiff on the sale. *Id.* ¶ 30. Instead, the court held, "[t]he statute of repose in a legal malpractice case begins to run as soon as an event giving rise to the malpractice claim occurs, regardless of whether plaintiff's injury has yet been realized." (Internal quotation marks omitted.) *Id.* ¶ 31. The court explained, "A statute of repose is intended to place a limit on the period of time for commencing suit regardless of a potential plaintiff's lack of knowledge of his cause of action." (Internal quotation marks omitted.) *Id.* ¶ 29.

¶ 39 According to the *Terra Foundation* court, "The acts and omissions of [the law firm] as to the drafting and execution of the first amendment gave rise to this claim, and the statute of repose was not tolled by any failure to include the exclusionary language in [later agreements]." *Id.* ¶ 51. Thus, because the first amendment to the purchase agreement

constituted the single overt act constituting malpractice, the statute of repose began on the date of the first amendment to the purchase agreement in May 2007. *Id.* ¶ 32. The court stated, "[W]here there is a single overt act from which subsequent damages may flow, the statute begins to run on the date the defendant invaded the plaintiff's interest and inflicted injury, and this is so despite the continuing nature of the injury." (Internal quotation marks omitted.) *Id.* ¶ 51. Because the plaintiff filed its complaint more than six years later—in October 2014—the appellate court affirmed the trial court's dismissal of the claim. *Id.* ¶ 60.

¶ 40 The Estate argues *Terra Foundation* is distinguishable because the negligent drafting and execution of the purchase agreement fixed the parties' legal relationship and changed their legal positions whereas, here, the signing of the premarital agreement did not alter the parties' legal positions. Instead, the Estate contends the premarital agreement promised future changes to be made at some unspecified time prior to David's death. Similar to *Terra Foundation*, defendant's allegedly negligent act or omission arose from the premarital agreement, and it therefore constitutes "a single overt act from which subsequent damages may flow." *Id.* ¶ 51.

¶ 41 The underlying theme in cases resolved under section 13-214.3(c) of the Code is that the statute of repose begins to run from the date of an affirmative act of representation, regardless of whether the injury has been realized. See, e.g., *Lamet*, 2015 IL App (1st) 143105, ¶ 20, 39 N.E.3d 136; *O'Brien*, 332 Ill. App. 3d at 1091, 774 N.E.2d at 468; *Fricka*, 309 Ill. App. 3d at 86-87, 722 N.E.2d at 722; *Terra Foundation*, 2016 IL App (1st) 153285, ¶ 51, 61 N.E.3d 202. This is done for the purpose of limiting the period of time in which to pursue an action against an attorney. *Snyder*, 2011 IL 111052, ¶ 10, 953 N.E.2d 415. As noted in *O'Brien*, the results of

applying the statute of repose may sometimes seem harsh, but it is our role only to interpret the laws, not to make them. *O'Brien*, 332 Ill. App. 3d at 1091, 774 N.E.2d at 468.

¶ 42 We note that one of the executor's primary duties to an estate is to carry out the decedent's wishes. *In re Karavidas*, 2013 IL 115767, ¶ 42, 999 N.E.2d 296. In this respect, the executor is an extension of the decedent, carrying on in the decedent's stead after the decedent's death. The point is that David, prior to his death, could have ensured his promises under the premarital agreement were fulfilled or filed a legal malpractice action against his attorney, thus precluding an issue such as this, where the Estate is scrambling to preserve his beneficiaries' interests after his death.

¶ 43 We conclude the Estate's complaint is barred by section 13-214(c) of the Code because more than six years have elapsed since the drafting of the premarital agreement. The trial court therefore properly granted defendant's motion to dismiss under section 2-619(a)(5) of the Code.

¶ 44 III. CONCLUSION

¶ 45 For the foregoing reasons, we affirm the trial court's judgment.

¶ 46 Affirmed.