Every month I summarize the most important probate cases in Michigan. Now I publish my summaries as a service to colleagues and friends. I hope you find these summaries useful and I am always interested in hearing thoughts and opinions on these cases.

PROBATE LAW CASE SUMMARY

BY: Alan A. May

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He was selected for inclusion in the 2007 through 2010 issues of *Michigan Super Lawyers* magazine featuring the top 5% of attorneys in Michigan and is listed in the 2011 compilation of *The Best Lawyers in America*. He has been called by courts as an expert witness on issues of fees and by both plaintiffs and defendants as an expert witness in the area of probate and trust law. He is listed by Martindale-Hubbell in the area of Probate Law among its Preeminent Lawyers.

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DT: September 15, 2011

RE: Wayne M. Schultz and Sharon M. Schultz Case
STATE OF MICHIGAN COURT OF APPEALS

MAJOR LEAGUE BASEBALL RULE CHANGES:

Sometimes baseball can't make up its mind. Often there are rule changes as to situations that occur on the field. Sometimes the Rules Committee wants to make the game more interesting or more fair. The following are instances where baseball just couldn't make up its mind.

You're out – you're safe – you're out!

Prior to 1926 if a batter hit a ball which was caught and a runner advanced on any base, even from third base, the batter was not credited with a sacrifice but an at bat and an out. In 1926 the rule was changed so that if a runner advanced from any base, after the ball was caught, the batter was credited with a sacrifice, no at bat and an out.

In 1939 the 1926 rule was amended so that if the runner advanced from third base and scored a run, the batter was credited with a sacrifice and no at bat, but if the runner went from first to second or second to third that was not a sacrifice, merely an at bat and an out. Evidently this wasn't good enough and in 1944 they went back to the pre-1926 rule and the batter received no sacrifice at all and was debited with an at bat. Fourteen (14) years and a World War later, in 1954, baseball went back to the 1939 rule and it continues to this day. If a runner advances from third to home, and scores a run, the batter is not debited with an at bat and it is considered a sacrifice. In all other instances it's an out and a time at bat.

A matter of inches…

Depending on whether baseball wanted batters to get more or less hits the rules were changed. Prior to 1903 a pitcher's mound could be of any height. Keep in mind that the taller the mound the greater the advantage is to the pitcher. In 1950 the strike out zone was the armpit to the top of the knee. In 1963 it was the top of the shoulder to the bottom of the knee. In 1969 the Rules Committee made two changes to help hitters. The strike zone became the armpit to the top of the knee and the mound size was reduced from 15" to 10".

Why Roger Maris doesn't deserve an asterisk*

Prior to 1930, what we would call a ground rule double was a homerun. In 1930 it was still a homerun unless the fences were less than 250 ft. In 1931 the hit became a ground rule double only regardless of fence distance.

In 1927 Babe Ruth had no ground rule doubles, but in 162 game season Roger Maris had two within 154 games. Thus, the number of games should not have been considered when judging Ruth against Maris. Since 1959 the minimum size for a left and right field wall was 325 ft., when Maris got his two ground rule doubles he would have been compliant with the 1927 and 1930 rules.

REVIEW OF CASE:

Reference Files: Scrivener
Legal Malpractice
Third Party Beneficiary
Mieras v DeBona
Statute of Limitations

In order to understand this case one must first refer to the case of *Mieras v DeBona* which says whether in tort or in contract an action alleging lack of due care lies when a Scrivener of a Will breaches that duty and does not carry out the intended wishes of the testator. The *Mieras* court says that it would be unfair to allow that cause of action to end at death, and says that the duty of due care on a third party beneficiary basis extends to the intended beneficiaries as set forth in the Will. This is where *Mieras* stops. At page 8 of the *Mieras*' Opinion, Judge Justin Levin says:

> "There is no authority… the reasons being obvious… for the proposition that a disappointed beneficiary may prove, by evidence totally extrinsic to the will, that testator's intent was other than expressed in the solemn and properly executed will."

As an aside, *Mieras* also says that the estate has no interest in who obtains money. *Mieras* goes on to state that an action cannot be maintained on the basis that the attorney failed to follow clearly communicated oral instructions after the Will was drawn. The *Mieras*' Decision cites *Ginther v Zimmerman*, 195 Mich App 647:

> "Were the intent of the testator as expressed in the testamentary instrument is not frustrated an attorney owes no duty that will give rise to a cause of action to persons not named in the instrument."

The concurring justices in *Mieras*, although they agree with the lead opinion in terms of result, criticize the lead opinion for opening the door to extrinsic evidence to prove whether there is a violation of due care. Keep in mind that there are six concurring justices.

In the instant case, emanating out of a malpractice action in the Circuit Court and posted on E-Journal under the title of 'Malpractice,' the Defendant was requested by Decedent to draw his Trust. Plaintiff was a Trust beneficiary; Defendant post mortem represented Plaintiff in her capacity as Successor-Trustee. Plaintiff claimed Defendant did not draw the Trust to comport to the client's intent. Plaintiffs sued in court as third-party beneficiaries.

The Court of Appeals affirmed the status of the Plaintiffs as being intended beneficiaries under *Mieras v DeBona*, but because the action was brought more than two years from the termination of legal services to the Decedent, the Court of Appeals affirmed the dismissal of Plaintiff's case on the basis of the statute of limitations.

The fact that the Defendant represented the Plaintiff, in her capacity as Successor-Trustee, was not relevant because representing her as Successor-Trustee was not representing the Decedent. The malpractice arose out of services rendered to the Decedent and not the Plaintiff in capacity as Successor-Trustee.

By implication, the court is saying that even though the action is based in contract and brought on the basis of third-party beneficiaries' status, because the action is one for malpractice, the two year statute of limitations applies rather than a greater statute of limitations for breach of contract.

Going back to *Mieras*, Plaintiff in *Mieras* forgot to bring a claim in contract, but her action was sustained because she also brought the action in tort. The sixth member concurrence said, at page 11 of *Mieras*:

> "If our inquiry were to end at this point plaintiff's claims would fail because neither count of the complaint was a claim in contract; both were grounded solely in tort principles. But this conclusion overlooks the tort based liabilities that developed as a result of a contractual relationship when the professional services are the product contracted for."
>
> "…by nature of the named beneficiary status as third-party beneficiaries of the contract between attorney and the testator, the attorney <u>also</u> owes the beneficiary a tort based duty to draft the document with the requisite standard of care. Thus there can be an independent duty owed to the beneficiaries the breach of which is grounded in tort." {emphasis added}

Thus, in *Mieras* there is a break given to the Plaintiff who forgot to plead contract but pleaded tort.

It appears from page 1 of the *Schultz* Opinion that the action was brought only in tort, but suppose it had brought the action in contract – wouldn't a contract statute of limitations lie because of the word "also" mentioned above in *Mieras*? (See above)

The reader is directed to *Rinaldo's Construction Corporation v Michigan Bell*, 454 Mich 65 (1997). In that case the Supreme Court said:

> "Misfeasance or negligent affirmative conduct in the performance of a promise generally subjects the actor to tort liability as well as contract liability for physical harm to persons and tangible things." {emphasis added}

The reader is alerted to *Cook v Little Caesars*, 972 F.sup 400, argued by Irwin Alterman of this office. Cited in the *Cook* case there is language that if the Plaintiff cannot maintain an action on the express contract then he cannot maintain an action on the implied contract. Thus, emphasis is placed more on the contract than on the tort. *Cook* goes on to say:

> "Furthermore, Michigan courts have held that to maintain a cause of action for tortuous inference, the Plaintiff must establish that Defendant was a third party to the contract or business relationship."

Again, emphasis upon contract.

Query: What happens if Plaintiff(s) start bringing actions based on contracts that are beyond the two year statute of limitations?

I would appreciate your comments.

AAM:jv:696821v2
Attachment

STATE OF MICHIGAN

COURT OF APPEALS

WAYNE M. SCHULTZ and SHARON M. SCHULTZ,

Plaintiffs-Appellants,

v

ROBERT D. SAROW and LEARMAN, SAROW, BIRCHLER, FITZHUGH & PURTELL, P.L.C.,

Defendants-Appellees.

UNPUBLISHED
July 14, 2011

No. 298125
Bay Circuit Court
LC No. 09-003909-NM

Before: SAAD, P.J., and JANSEN and DONOFRIO, JJ.

PER CURIAM.

Plaintiffs appeal as of right from a circuit court order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(7) on the basis that this legal malpractice action was barred by the statute of limitations. Because plaintiffs brought this legal malpractice action more than two years after defendants discontinued serving Walter Schultz, we affirm.

Plaintiffs brought this action against defendant Robert D. Sarow and his firm for legal malpractice in the drafting of trusts and amendments for the parents of plaintiff Wayne Schultz. Plaintiffs alleged that Sarow failed to properly draft the estate planning documents to effectuate his parents' intent, and thereby breached the standard of care owed to him, as a beneficiary of the trusts. Wayne's mother, Grace M. Schultz, died on May 30, 1999. Sarow last performed legal services for Wayne's father, Walter Schultz, on April 8, 2005. Sarow had no communication with and performed no additional legal services for Walter after that date. Walter died on February 7, 2007. After Walter's death, Sarow performed legal services for Julie A. Schultz, in her capacity as successor trustee of the trusts. Plaintiffs filed this action for legal malpractice on November 25, 2009. The trial court determined that plaintiffs' action was barred by the statute of limitations.

This Court reviews de novo a trial court's grant of summary disposition based on a statute of limitations. *Mayberry v Gen Orthopedics, PC,* 474 Mich 1, 5; 704 NW2d 69 (2005). Questions of statutory interpretation are also reviewed de novo. *Id.*

The parties agree that plaintiffs were required to file this action within two years of the date the claim accrued.[1] MCL 600.5805(6). They also agree that MCL 600.5838(1) governs the accrual of the claim. That statute provides:

> Except as otherwise provided in section 5838a, a claim based on the malpractice of a person who is, or holds himself or herself out to be, a member of a state licensed profession accrues at the time that person *discontinues serving the plaintiff* in a professional or pseudoprofessional capacity as to the matters out of which the claim for malpractice arose, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim. [Emphasis added.]

The parties disagree on the application of this statute to plaintiffs' action, which is premised on plaintiffs' status as third-party beneficiaries. According to defendants, plaintiffs' claim accrued when defendants discontinued serving Walter Schultz. Defendants assert that this last service was on April 8, 2005. In contrast, plaintiffs rely on Sarow's representation of the successor trustee to argue that they timely filed this action.

This Court's decision in *Ohio Farmers Ins Co v Shamie (On Remand),* 243 Mich App 232, 240-241; 622 NW2d 85 (2000), addresses the accrual of a malpractice claim based on a third-party beneficiary theory of liability. In that case, the defendants were accountants who prepared financial reports for their client, Marcelli Construction Company. The plaintiff allegedly relied on these reports in making the decision to provide performance and surety bonds to Marcelli. Marcelli failed to meet its obligations and the plaintiff was required to make payments to its creditors. The plaintiff sued the defendants for accounting malpractice and asserted that it was a third-party beneficiary of the agreement between Marcelli and the defendants. *Id.* at 234-235. This Court recognized that MCL 600.5838 governed the accrual of the accounting malpractice claim. *Id.* at 240. The Court then explained the application of that statute where the plaintiff was relying on its status as a third-party beneficiary of the accountant-client relationship, stating:

> In the present case, the determination of when plaintiff's claim accrued is complicated by the fact that plaintiff's claim is based on a third-party beneficiary theory of liability. When a plaintiff sues on such a theory, he "has the same right to enforce said promise that he would have had if the said promise had been made directly to him as the promisee." MCL 600.1405. Accordingly, plaintiff's third-

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[1] Plaintiffs do not rely on the six-month discovery provision in MCL 600.5838(2). Defendants submitted evidence that attorneys for plaintiffs presented defendants' attorneys with a copy of a proposed legal malpractice lawsuit on February 20, 2008, more than six months before this action was filed.

party claim accrued at the same time that Marcelli's claim would have accrued, i.e., when defendants discontinued serving Marcelli in a professional capacity with regard to the matters out of which the accounting malpractice claim arose. [*Id.* at 241.]

In this case, plaintiffs acknowledge that their malpractice claim is premised on their standing as third-party beneficiaries. They rely on *Mieras v DeBona*, 452 Mich 278; 550 NW2d 202 (1996), and *Bullis v Downes*, 240 Mich App 462; 612 NW2d 435 (2000). In *Mieras*, the Court addressed the basis for allowing a beneficiary of a will to bring an action for malpractice against the attorney who drafted it, stating:

> An attorney's primary duty in drafting a will is to draft a document that legally accomplishes the testator's intent regarding disposition of the testator's property. Drafting a document that fulfills the testator's desire to transfer property to named beneficiaries, however, creates a corresponding duty to the named persons because of their third-party beneficiary status. This is a contractual duty that gives rise only to contractual remedies.
>
> If our inquiry were to end at this point, plaintiffs' claims would fail because neither count of the complaint was a claim in contract; both were grounded solely in tort principles. But this conclusion overlooks the tort-based liabilities that develop as a result of the contractual relationship when professional services are the product contracted for.
>
> Typically, in contracting with the testator to draft a will, an attorney implicitly agrees to draft the will in accordance with the standard of care applicable in that field.
>
> * * *
>
> By nature of the named beneficiaries' status as *third-party beneficiaries of the contract between the attorney and the testator*, the attorney also owes the beneficiaries a tort-based duty to draft the documents with the requisite standard of care. Thus, there can be an independent duty owed to the beneficiaries, the breach of which is grounded in tort. [*Mieras*, 452 Mich at 299.]

In *Bullis*, 240 Mich App at 467-468, this Court explained that *Mieras* was not limited to beneficiaries of a will. The *Bullis* Court stated:

> After all, the contractual promise *between an attorney and a decedent* that underlies a negligence action is the promise to establish a testamentary scheme by which the decedent's intended disposition of property will be accomplished. That might entail the drafting of a single document, or it might require the establishment of more complex testamentary design. [*Id.* at 468 (emphasis added).]

The foregoing authorities support the trial court's decision to grant defendants' motion. *Ohio Farmers Ins Co*, 243 Mich App at 241, indicates that a plaintiff's malpractice claim that is

based on a third-party beneficiary theory of liability accrues at the same time that the promisee/client's claim would have accrued. i.e., when the defendants discontinued serving that client in a professional capacity with regard to the matters out of which the malpractice claim arose. *Mieras* and *Bullis* indicate that the malpractice action in circumstances such as these arises from the promise between the attorney and the decedent. Thus, plaintiffs' claim accrued when defendants discontinued serving Walter Schultz with respect to the matters out of which the claim for malpractice arose. MCL 600.5838(1). Contrary to plaintiffs' argument, defendants' representation of the successor trustee after Schultz's death has no effect on the accrual of the claim.

With respect to when defendants discontinued serving the decedent, Walter Schultz, "[a] lawyer discontinues serving a client when relieved of the obligation by the client or the court, or upon completion of a specific legal service that the lawyer was retained to perform." *Balcom v Zambon,* 254 Mich App 470, 484; 658 NW2d 156 (2002) (citation omitted). Defendants provided specific legal services for Walter Schultz and presented evidence that they did not provide any legal services for Walter after April 8, 2005. Plaintiffs do not dispute this evidence, but instead incorrectly rely on defendants' services for the successor trustee. Because plaintiffs do not contest that the last service provided to Walter was more than two years before they filed the action, the trial court correctly granted defendants' motion for summary disposition.

In any event, even if this Court were inclined to treat defendants' representation of the trust as part of defendants' representation of the Schultzes, *Ohio Farmers Inc Co,* 243 Mich App at 241-243, suggests that the claim would still be untimely because the "matters out of which the claim for malpractice arose" involved the drafting of the trust documents, which were complete in 2005. In *Ohio Farmers Inc Co*, at least one of the accountants continued to perform services for Marcelli even up to the time that the plaintiff filed the complaint. *Id.* However, this Court explained that the allegations of malpractice concerned the reports for the years 1991 through 1995, and concluded that the defendants "discontinued professional services 'as to the matters out of which the claim of malpractice arose'" at some point before March 28, 1996. *Id.* Thus, the Court viewed "the matters out of which the claim of malpractice arose" as the allegedly deficient reports. In the present case, plaintiffs' action is premised on alleged deficiencies in the trust documents and amendments. Those are "the matters out of which the claim of malpractice arose," not defendants' representation of the successor trustee after Walter Schultz's death. *Id.*

Plaintiffs' second stated issue challenges the trial court's denial of plaintiffs' motion for reconsideration. However, plaintiffs do not offer any additional argument on that point. They simply incorporate their arguments with respect to the order granting summary disposition. Because we have concluded that the trial court correctly granted defendants' motion for summary disposition, we likewise conclude that the trial court did not abuse its discretion when it denied plaintiffs' motion for reconsideration. *Corporan v Henton,* 282 Mich App 599, 605,

609; 766 NW2d 903 (2009).

Affirmed. Defendants, being the prevailing parties, may tax costs pursuant to MCR 7.219.

/s/ Henry William Saad
/s/ Kathleen Jansen
/s/ Pat M. Donofrio