IN THE SUPREME COURT OF IOWA

NO. 17-0151

MICHELLE R. SKADBURG,
Plaintiff-Appellant,

vs.

GARY GATELY and WHITFIELD & EDDY, P.L.C.
Defendants-Appellees.

APPEAL FROM THE DISTRICT COURT IN AND FOR CERRO GORDO COUNTY
THE HONORABLE RUSTIN DAVENPORT, JUDGE

APPELLANT'S REPLY BRIEF

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ROUTING STATEMENT

The Routing Statement of Plaintiff-Appellant Skadburg contains an error where it is stated the appeal was appropriate for "retention." It should have stated appropriate for "transfer" and the cited rule, which immediately follows the error, Iowa R. App. P. 6.1101(3), provides criteria for transfer.

STATEMENT OF THE CASE

RESPONSE TO CORRECTIONS TO NATURE OF THE CASE

Plaintiff-Appellant Michelle Skadburg (Skadburg) must respond to the "corrections" of Defendants-Appellees Gary Gately (Gately) and Whitfield & Eddy, P.L.C. (Whitfield & Eddy). Gately/Whitfield & Eddy take exception to Skadburg's statement "There is no evidence Gately advised Skadburg he was responsible for her mistake in paying estate debts with exempt funds." (Brief, p. 2) Gately/Whitfield & Eddy then assert the law does not require an admission or acknowledgment of liability. Pride v. Peterson, 173 N.W.2d 549, 555 (Iowa 1970) recognized the fiduciary relationship present in an attorney-client relationship fraudulent concealment may be supplied by mere silence.

This is particularly appropriate here. The first communication in the record from Skadburg and Gately shows Skadburg apologized to Gately for being upset, and states:

> I should have given you the entire list of debts and asked for more specific advice on what to do, but I just took you at your word to pay the debts and did that.
>
> ...
>
> ...I know you have done the best you could for us and all of my issues piling up are not your fault, so I apologize if I seemed out of sorts about all of thsi! (sic)

January 30, 2009 email. (App. 44)

RESPONSE TO ADDITION TO STATEMENT OF FACTS

Gately/Whitfield & Eddy deny any liability, Brief, p. 2. There is negligence where the attorney not only fails to inform the personal representative of the statutory limitiation prohibiting her payment of claims, but affirmatively tells her to pay the claims. The fact that Gately told Skadburg to pay the claims is not merely something Skadburg now alleges as part of this litigation. It was specifically stated in the January 30, 2009 email. (App. 44)

Gately/Whitfield & Eddy suggest Skadburg disregards some of the statements in her emails. (Brief, p. 13) Because either side can quote excerpts to their purpose, Skadburg provided the entire verbatim contents in her brief. While Skadburg learned she wasn't legally obligated to pay her mother's debts with Skadburg's money doesn't mean she knew Gately's

representation was the cause of her damages. That portion must be read in the context of Skadburg's apology and acceptance of responsibility.

The reference, Brief p. 3, to the adjustment of attorney fees should be read in the context of the entire December 30, 2009 email that also referred to the initial promise by the Whitfield & Eddy attorney already representing Skadburg, stating the cost to probate the estate. Skadburg's March 26, 2010 inquiry, Brief pp. 3-4, whether she could get the money back can be read in the context of Skadburg wondering if she could try and correct what she had already said was her mistake.

Skadburg's email communications to Gately must be read in their entirety, and her state of mind understood in that entire context.

The statement, Brief p. 4, that the representation ended August 18, 2010 is disputed. Whitfield & Eddy was still recording time through August 30, 2010, App. 18, and advised Skadburg by letter of August 31, 2010 the estate was closed, App. 17.

. WHETHER THE TRIAL COURT ERRED IN DISMISSING SKADBURG'S MALPRACTICE CLAIM BASED ON THE STATUTE OF LIMITATIONS?

ARGUMENT

RESPONSE TO INTRODUCTION

Gately/Whitfield & Eddy again refer to selected portions of the emails from Skadburg to Gately. This has already been addressed.

A. Notice of Claim.

Vossoughi v. Polaschek, 859 N.W.2d 643, 649 (Iowa 2009) recognized the Statute of Limitations does not begin to run until the injured party has actual imputed knowledge of all the elements of the action. Vossoughi v. Polaschek further noted a person is placed on inquiry notice when a person gains sufficient knowledge of facts that would put the person on notice of the existence of a problem or a potential problem. 859 N.W.2d at 652. The only reasonable interpretation of these two statements is the person must know there is a potential problem that the lawyer is responsible for. Adverse results can occur that are not caused by a lawyer's negligence.

Knowledge of Negligence.

Gately/Whitfield & Eddy argue, Brief, pp. 8-10, that the Statute of Limitations begins to run when a plaintiff discovers relevant facts about the alleged injury. Gately/Whitfield & Eddy cite Rathje v. Mercy Hosp., 745 N.W.2d 443, 462-63 (Iowa 2008) that the discovery of negligence is not required. Rathje v. Hosp. stated that in a medical malpractice case, the plaintiff does not need to discover the doctor was negligent. Rathje v. Hosp.

also made clear the statute begins to run only when the injured party's actual or imputed knowledge of the injury and its cause reasonably suggests an investigation is warranted. 745 N.W.2d at 461-61. Here, Skadburg knew there was a problem, but she thought she was at fault, apologized for not providing her attorney with the information and specifically stated "...I know you have done the best you could for us..." (App. 44)

Knowledge of Causation.

Gately/Whitfield & Eddy, Brief p. 9, cite Ranney v. Parawax Co., 582 N.W.2d 152, 156 (Iowa 1998) as rejecting the notion an injured party does not have knowledge of causation until confirmed by an investigation the defendant's negligence. Skadburg does not suggest that the Statute of Limitations does not begin to run until an investigation has been completed. That would be inconsistent with imputed knowledge based on knowing the facts that would establish the elements of the cause of action. Skadburg claims she did not know Gately was the cause of her damages as required by Rathje v. Mercy Hosp., 745 N.W.2d 443, 462-63 (Iowa 2008)

The facts in Ranney, a workers compensation case, are significant Plaintiff Ranney claimed he was not on inquiry notice until 1991 when a physician confirmed his disease was caused and connected to his work with

toxic chemicals. Ranney, in 1985, was diagnosed with Hodgkin's Disease. The 1985 doctor's notes show he associated his chemical exposure at work to his health. No later than 1988, when Ranney's wife started law school, Ranney and his wife started to discuss possible exposure to toxic materials may have caused his condition. In 1991, Ranney asked a new physician whether there was a causal link and the diagnosis was confirmed. His workers compensation case was filed in 1992.

Knowledge of Injury.

Gately/Whitfield & Eddy argue, Brief, pp. 10-11, Skadburg's argument the nature of the injury is important and there is a difference between physical and non-physical injuries is improper. Gately/Whitfield & Eddy do not suggest there is no authority for that position, but then state Skadburg's contention that Skadburg's argument adverse economic loss does not put the person on notice of the potential cause of action is made without citing authority.

Clearly Dudden v. Goodman, 543 N.W.2d 624, 626 (Iowa Ct. App. 1995) clearly distinguished Franzen v. Deere & Co., 377 N.W.2d 660 (Iowa 1985) and noted the significance of the difference between a physical injury and an economic loss. For instance, an estate could suffer an investment loss and the personal representative would know an injury was sustained,

but would not realize an attorney or other professional was responsible if they failed to exercise their duty to advise the personal representative as to what investments were appropriate for an estate. Knowledge of an economic loss is not knowledge of damages, let alone causation.

B. Fraudulent Concealment.

There was genuine issue of material fact on fraudulent concealment. Gately/Whitfield & Eddy argue, Brief, pp. 11-15, that Skadburg is arguing the Statute of Limitations is tolled until the professional admits to liability. (Brief, p. 12) This oversimplifies the argument Skadburg properly relied on the duty of disclosure required of persons holding a fiduciary duty in connection with fraudulent concealment. This is appropriate under the facts of this case.

Pride v. Peterson, 173 N.W.2d 549, 555 (Iowa 1970) recognized that because of the fiduciary relationship of an attorney to a client, acts of concealment can be supplied by mere silence, and that discovering the fraud complained of is greatly relaxed.

The discussion in Van Overbeke v. Youberg, 540 N.W.2d 273, 276-77 (Iowa 1995) did note that the concealment must be independent of the negligence. Here, Gately's negligence was the failure to advise Skadburg she could not pay bills until the claims deadline passed and instead telling

her to pay bills with exempt proceeds. The concealment was the failure to disclose his responsibility, after the January 30, 2009 email where Skadburg took the responsibility. Gately's silence provided a basis for fraudulent concealment. Because the Trial Court failed to consider fraudulent concealment may be acknowledged by silence Skadburg felt it necessary to seek an enlargement of findings. However, Skadburg always argued that the concealment was the separate issue from his failure to tell his client that she was not to blame but that he had responsibility.

C. Continuous Representation Applies.

Gately/Whitfield & Eddy argue, Brief pp. 15-18, the continuous representation rule does not apply when a party has notice of the claim. To the extent that that may be true, the argument that Skadburg knew that she had a claim has been discussed in the context of whether her knowledge that something had happened put her on notice that the reason why it happened was the attorney she expressly absolved of responsibility, was the cause.

D. Representation Did Not Terminate When the Estate Was Closed.

As attorney for the personal representative, Gately and his firm represented Skadburg. Gately was required to advise her that the estate

was closed. This was done on August 31, App. 18. Whitfield & Eddy's time records show they continued to record time through that date, App. 17.

CONCLUSION

The first question in this case is whether a client who knows she sustained a loss, but believed the problem was her fault, told her lawyer she believed the lawyer had done his best, has notice she has a cause of action against the attorney. The second question is where the fiduciary duty governing attorneys requires an attorney to disclose to the client the attorney had some, if not all, responsibility for the client's problems when the client thinks it is the client's fault.

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CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION FOR BRIEFS

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Dated this 7th day of August, 2017.

Peter C. Riley

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the preceding Appellants' Reply Brief was served on the 7th day of May, 2017, upon the Clerk of the Supreme Court and the following by electronic filing:

Nick Critelli
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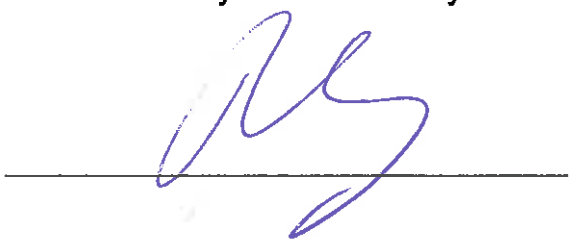
CERTIFICATE OF FILING

The undersigned hereby certifies that the preceding Appellants' Reply Brief was filed with the Supreme Court of Iowa by the EDMS system on the 7th day of August, 2017.



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The undersigned hereby certifies that the preceding Appellant's Brief was produced at a cost of $ -0-.