THE IOWA SUPREME COURT

NO 17-0151

MICHELLE R. SKADBURG,

Plaintiff- Appellant,

-vs

GARY GATELY and WHITFIELD & EDDY, P.L.C.

Defendants-Appellees

APPEAL FROM THE IOWA DISTRICT COURT FOR CERRO GORDO COUNTY

THE HONORABLE RUSTIN DAVENPORT, JUDGE

APPELLEES' BRIEF AND ARGUMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other

ROUTING STATEMENT

(Iowa R. App. P. 6.903(2)(d))

Appellant-Plaintiff Michelle Skadburg (Skadburg) appeals from a summary judgment that dismissed, as untimely, her legal malpractice suit alleging claims related to her payment of estate debts with exempt funds. The summary judgment is reviewed for errors of law and requires the application of existing legal principles. The case is appropriate for transfer to the Iowa Court of Appeals. Iowa R. App. P. 6.1101(3)(a).

This case meets none of criteria required for retention by the Iowa Supreme Court. Iowa R. App. P. 6.1101(2). The trial court found that on two separate occasions, Skadburg authored emails that established her actual or imputed knowledge of the alleged error. Skadburg's knowledge of the alleged error triggered the running of the statute of limitations under the discovery rule. The trial court relied on well-defined legal principles to support its finding that Skadburg had actual or imputed knowledge. Iowa R. App. P. 6.1101(3)(a)

Skadburg's supposition, that Supreme Court retention is required because "the impact of the continuous representation rule is uncertain in Iowa", is wrong. The application and impact of the continuous representation doctrine is well established in Iowa. The undisputed facts of Skadburg's case exclude the case from application of the continuous representation doctrine. The trial court correctly found that continuous

representation is inapplicable since Skadburg demonstrated knowledge of the alleged mistake prior to the end of representation. (App.p.56). Further, the undisputed facts establish that Skadburg filed her lawsuit five years and one day after representation ceased. (App.p.1).

Application of the continuous representation doctrine will not alter the fact that expiration of the statute of limitations barred Skadburg's action. Transfer of this case to the Court of Appeals to review for errors of law under existing legal principals is required by Iowa. R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

Corrections to Nature of the Case

Attorneys, Appellees-Defendants, Gary Gately and Whitfield Law Firm, (Gately) and (Whitfield), deny any wrongdoing, malpractice or liability. (App.p.4). Skadburg's recitation of the nature of the case contains her assertion that there is "no evidence that Gately ever advised Skadburg that he was responsible" for her mistake in paying the estate debts with exempt funds. [1] Skadburg's assertion creates misdirection and should be disregarded. The law has never required either an admission or acknowledgment of liability to start the statute of limitations clock. This is especially true when the professional denies any wrongdoing or liability; to hold otherwise would be to create a situation where the statute of limitations would never begin to run against an innocent party.

[1] Reference to Appellant Brief page 4

Addition to Statement of the Facts

Skadburg authored three emails that specifically disclosed her understanding of the alleged mistake involving payment of estate debts. Skadburg reproduced the emails in their entirety in her brief; but she elected to disregard the important admissions contained in each email.

The first email on January 30, 2009 contained the following admission by Skadburg: "I would like to think that I would have done the right thing and paid off her (mother's) debts even if I wasn't legally obligated to". (Emphasis added, App.p. 44). Skadburg's second email was sent on December 30, 2009 and contained this admission of knowledge: "Paying off mom's debts with money that should not have been part of the estate was one issue that has arisen". (App.p.45). Skadburg also proposed that Gately's attorney fees should be adjusted due to this "issue". (App.p.45). The trial court cited the December 30, 2009 email as the first evidence of Skadburg's notice that "she had been given incorrect advice." (App.p. 55)

An additional email was sent by Skadburg on March 26, 2010 in which she asked, "Is any of the money paid to other creditors refundable since those should not have been paid out of the estate assets?" (App.p.9 - Undisputed Fact #9). The trial court found this email also established Skadburg's actual or imputed knowledge of negligence. (App.p.55).

In their motion for summary judgment, Gately and Whitfield argued that under the discovery rule the statute of limitations expired on January

30, 2014 – five years from inquiry notice established by Skadburg's January 30, 2009 email. (App.p.29). The trial court found Skadburg's December 30, 2009 email established inquiry notice and the statute of limitations expired on December 30, 2014. (App.p.55). Alternatively, the trial court found that Skadburg also demonstrated actual or imputed knowledge in her March 26, 2010 email and accordingly the statute of limitations expired on March 26, 2015. (App.p.55). Skadburg's Petition filed on August 19, 2015 was not timely. (App.p.1).

By her own admission, Skadburg was in the office of new counsel by February 12, 2014 when she signed an authorization to obtain records from Whitfield. (App.p.9 - Undisputed Fact #8). In an attempt to avoid deadlines of January 30, 2014, December 30, 2014 or March 26, 2015, Skadburg relies on the continuing representation doctrine.[2]

The trial court rejected Skadburg's contention that the continuing representation doctrine applies to the circumstances in this matter. (App.p.55). Skadburg's argument for continued representation ignores the fact that Gately's and Whitfield's representation ended on August 18, 2010 when the probate court ordered the estate closed. (App.p.47). Even assuming the statute started to run on August 18, 2010, the five year statute expired on August 18, 2015. (App.p.47). The Petition filed on August 19, 2015 was one day too late. (App.p.1).

[2] Reference Appellant Brief page 12

LEGAL ARGUMENT

THE TRIAL COURT'S SUMMARY JUDGMENT WAS APPROPRIATE

Preservation of Error

In view of the Supreme Court's Order denying Gately's and Whitfield's motion to dismiss for lack of jurisdiction, Gately and Whitfield agree that Skadburg has preserved error on the Motion for Summary Judgment.

Standard of Review

Gately and Whitfield agree a summary judgment is reviewed to correct errors of law.

Argument

Introduction

The statute of limitations for Skadburg's claim for alleged legal malpractice is five years. Iowa Code § 614.1(4). Skadburg concedes that her lawsuit was filed over five years after the alleged negligent acts.[3] To excuse her late filing, Skadburg invokes the discovery rule, fraudulent concealment, the continuing representation rule, or an amalgamation of all three theories. None of the theories Skadburg advances excuse her untimely filing of this matter.

[3] Reference to Appellant Brief page 15

Where there is no genuine issue as to any material fact summary judgment is appropriate. Iowa R. Civ. P 1.981(3). There is no factual issue surrounding the application of the statute of limitations to Skadburg's claim.

Skadburg's own emails establish her knowledge of the facts she contends establish negligence as early as January 30, 2009 or as late as March 26, 2010. Her own words in each of the emails demonstrate her knowledge the alleged error upon which she bases her lawsuit:

- On January 30, 2009 she wrote: "I would like to think that I would have done the right thing and paid off her (mother's) debts even if I wasn't legally obligated to". (Emphasis added, App.p.44).
- Again, on December 30, 2009 she acknowledged: "Paying off mom's debt with money that should not have been part of the estate is one issue that has arisen" (App.p.45).
- Finally, on March 26, 2010 she asked: "is any of the money paid to creditors refundable *since those should not have been paid out of the estate assets*? (Emphasis in Ruling, App.p.55).

Without referencing Skadburg's January 30, 2009 email, the trial court found Skadburg's later two emails demonstrated her knowledge of the allegedly incorrect advice. (App.p.55) Skadburg had actual knowledge of the alleged mistake on December 30, 2009 and March 26, 2010.

Applying the discovery rule, the statute of limitations expired five years from the date of any or all of these emails, on January 30, 2014,

December 30, 2014 or March 26, 2015. Even applying Skadburg's continuous representation theory Ms. Skadburg missed the mark by one day. Skadburg's lawsuit, filed on August 19, 2015, was untimely. Under any of the legal theories she suggests, Ms. Skadburg's lawsuit was filed late by either 556 days, 232 days, 146 days or 1 day. The trial court was correct in granting summary judgment and dismissing Skadburg's claim.

A. The trial court was correct in finding that Skadburg had notice of her alleged claim under the discovery rule

On appeal Skadburg concedes that she knew that there was a "problem" because she was not legally obligated to pay her mother's debts with funds passing outside the estate. [4] Skadburg argues that before she can be charged with actual or imputed notice that her attorney made a mistake she needed to know the critical element of her claim- that her attorney "breached his duty". Skadburg does not cite authority to support this interpretation of the law.

Knowledge of Negligence

The Iowa Supreme Court's analysis of the knowledge component and application of the discovery rule in medical malpractice cases makes clear that discovery of "negligence" is not required to start the limitations period. Rathje v. Mercy Hosp., 745 N.W.2d 443, 462-63 (Iowa 2008). (Making clear "court's continued adherence to the rule that the plaintiff does not need to discover that the doctor was negligent".) Instead, the statute of limitations begins to run from the plaintiff's discovery of the relevant facts

[4] Reference to Appellant's Proof Brief p. 18

about the alleged injury. *Id. at 462.*

The statute of limitations will not begin to run until the person has actual or imputed knowledge of the facts that support all elements of the action. Franzen v. Deere & Co., 377 N.W.2d 660, 662 (Iowa 1985) The Franzen decision clarified the parameters of the discovery rule with the following language: "It is sufficient that the facts support a cause of action. It is not necessary that the person know that they are actionable. Knowledge of the facts and knowledge they are actionable are distinct and unrelated issues for the purpose of the discovery rule." Id at 662 . The Iowa Supreme Court further indicated "there was no suggestion in any of the leading cases on the discovery rule that the accrual of the cause of action is postponed until plaintiff learns or should learn of state of the law positing a right of recovery upon facts already known or reasonably known to the plaintiff". Id at 662 . Thus, the Court has confirmed that it is unnecessary that the plaintiff have a law school understanding of a potential claim to establish notice required under the discovery rule.

Knowledge of Causation

In Ranney v. Parawax Co, 582 N.W 2d 152, 156 (Iowa 1998) the Iowa Supreme Court determined that actual knowledge of causation was not required to begin the statute of limitation period under the discovery rule noting: "if we adopted Ranney's interpretation of when inquiry notice is triggered, the beginning of the limitations period would be postponed until the successful completion of the plaintiff's investigation". Id at 156. Skadburg's contention that the discovery rule does not apply unless she

"knew the critical element of her claim, specifically that her attorney (allegedly) breached his duty", is essentially the same causation argument previously rejected by the Iowa Supreme Court in Ranney v. Parawax Co, *Id at 156.*[5]

Even assuming that the law requires Skadburg to recognize the "source of the problem" before she is charged with notice under the discovery rule, her emails establish notice and her belief that her attorney had (allegedly) caused a problem. All three emails demonstrate that as early as the January 30, 2009 Skadburg recognized she had paid debts that she was not "legally" required to pay. (App.p.44). Further, her emails of December 30, 2009 and March 26, 2010 show her recognition that the money she used to pay debts was not part of the estate. The undisputed facts support the trial court's finding that Skadburg had actual or imputed knowledge of the claim based on (alleged) improper legal advice.

Knowledge of Injury

In a further effort to circumvent the actual or implied knowledge aspect of the discovery rule, Skadburg argues "it is the nature of the injury that is important in determining whether there was implied notice".[6]

Skadburg argues that "with a physical injury the person knows they have been injured and has a duty to investigate all potential parties who

[5] Reference to Appellant Brief p. 17-18
[6] Reference to Appellant Brief p. 17-18

might be responsible for the injury". [7] Without citing legal authority, Skadburg contends that an adverse economic loss does not put the person on inquiry notice that the reason for the injury is the lawyer's breach of duty, one of the elements the injured party must know for implied notice. [8] Skadburg's argument is contrary to established authority and ignores the undisputed evidence of her knowledge, as shown by the emails. Franzen v. Deere & Co., 377 N.W.2d at 662.

It is not the nature of the injury that triggers the time limitations clock, but rather the claimant's knowledge of a problem. Under the discovery rule the statute of limitations begins to run when the injured person discovers or in the exercise of reasonable care should have discovered the alleged wrong. "The duty to investigate does not depend on exact knowledge of the nature of the problem that caused the injury. It is sufficient that the person be aware that a problem existed". Id at 662. Skadburg's argument that the nature of the injury impacts the determination of "implied notice" is unsupported by the law.

Skadburg's nature of the injury argument also fails because the undisputed facts establish she knew of the problem. On three separate occasions Skadburg's emails referred to the alleged problem. The trial court based its finding of Skadburg's actual knowledge on two of these occasions: The December 2009 and March 26, 2010 emails. (App.p.55).

Under the discovery rule the statute of limitations clock started when

[7] Reference to Appellant Brief p. 17-18
[8] Reference to Appellant Brief p. 17-18

Skadburg demonstrated actual knowledge or inquiry notice of the problem upon which her lawsuit is based. On January 30, 2009, December 30, 2009 and March 26, 2010 Skadburg's emails discussed the problem. The trial court found Skadburg had actual or imputed knowledge of an actual or concrete injury on December 30, 2009 or on March 26, 2010. (App.p.55). This was a correct application of the law to the undisputed facts. The summary judgment should be affirmed.

B. The trial court correctly concluded that Skadburg demonstrated no genuine issue of material fact establishing fraudulent concealment as a viable defense to the statute of limitations.

To extend the five year statute of limitations beyond the date of actual notice as established in her emails, Skadburg alleges "fraudulent concealment by silence". The basis for Skadburg's claim was that Gately "did not advise her that he was at fault in the matter of payment of the debts". [9] The trial court rejected Skadburg's argument that an attorney is required to alert a client to alleged negligence. (App.pp.56-57).

The trial court concluded that Skadburg's emails showed her knowledge of the facts upon which she relies to contend that Gately provided faulty advice. (App.p.57). The trial court correctly distinguished Skadburg's claim from situations involving individuals who were unaware of an alleged harm. (App.p.57). The trial court found Skadburg failed to demonstrate a genuine issue of material fact "establishing that fraudulent concealment by silence would be a viable defense to the statute of

[9] Reference to Appellant Brief p. 20

limitations". (App.pp.56-57). The trial court's ruling is legally correct.

In an effort to satisfy the requirement that there must be temporal separation of the acts of negligence and acts of alleged concealment, Skadburg fashions the theory that Gately "should have told Skadburg that her problems were the result of his bad advice". The trial court "did not find support that in a situation factually similar to [Skadburg's] the attorney would be required to alert his or her client to the attorney's (alleged) negligence". (App.pp.56-57). On appeal, Skadburg does not cite authority to support the legal proposition that unless a professional admits to liability the statute is tolled.

In Van Overbeke v. Youberg, 540 N.W.2d 273, 276-277 (Iowa 1995) the Iowa Supreme Court rejected a patient's attempt to use fraudulent concealment by silence to avoid the statute of limitations in a medical negligence case. Patient, Van Overbeke sued her physician for failure to provide a needed injection. Van Overbeke sought to avoid the statute of limitations, arguing that her doctor's failure to inform her that she needed an injection established fraudulent concealment by silence. The Iowa Supreme Court rejected Van Overbeke's argument because the facts that she alleged constituted fraudulent concealment were not independent of the alleged acts upon which she relied to establish liability. The Court determined that concealment requires acts independent of and in addition to wrongdoing itself. *Id at 276.* The Iowa Supreme Court recognized: "Failure to disclose that need [for injection], as a ground of liability, cannot be the basis for fraudulent concealment. If it could be, there would effectively be no statute of limitations for negligent failure to inform a

patient." *Id at 277.* Without the concept of an independent act and temporal separation from the initial wrongful act, there would be no statute of limitations for negligent failure to inform cases. As the Van Overbeke court noted "... to recognize the concept of fraudulent concealment in that case would effectively wipe out the statute of limitations on the fraud claim." *Id at 276.* By analogy a lawyer's failure to admit liability (causation) for alleged malpractice cannot form the basis for fraudulent concealment in a legal malpractice claim. Skadburg's argument, that an attorney's failure to admit to liability should constitute fraudulent concealment by silence, would effectively eliminate the statute of limitations in malpractice cases. Under Skadburg's analysis, absent an attorney's admission of liability, the statute of limitations would never run.

Skadburg also relies on Pride v. Peterson, 173 N.W.2d 549, 555 (Iowa 1970) to support her proposition that an attorney's failure to confess to alleged negligence will satisfy the affirmative act required under fraudulent concealment. The Pride decision is factually distinguishable. Mrs. Pride was completely unaware of the property sale that formed the basis for her claim of negligence. *Id. at 550-51.* By contrast, Skadburg's emails reveal that she knew that she was not legally required to pay her mother's debts. Skadburg's case is more similar to McClendon v Beck, 569 N.W.2d. 382, 386 (Iowa 1997) in which the Iowa Supreme Court rejected a patient's claim that physicians concealed the true nature of plaintiff's injury where they presented "a hopeful prognosis following surgery". Where the patient had notice of the injury, the patient cannot successfully claim the doctor's silence concealed the injury. *Id. at 386.*

Skadburg had notice of the alleged problem. She cannot refute the language in her emails written between January 2009 and March 2010. On January 30, 2009 Skadburg wrote: "I would like to think I would have done the right thing and paid off her debts even if I wasn't legally obligated to." (App.p.44). On December 30, 2009 Skadburg stated: "It seems that there has been miscommunication in all of this. Paying off mom's debt with money paid to creditors that should not have been paid out of the estate assets". (App.p.45). Skadburg even suggested that the firm consider a reduction of the fees charged for the estate work. (App.p.45). Finally Skadburg's email on March 26, 2010 repeats her reference to "money that should not have been paid out of the estate assets". (App.p.9 –Undisputed Fact # 6). Her own words demonstrate that as early as January 30, 2009 she alleged there was "legal error" involving the payment of her mother's bills. (App.p.44).

The trial court's ruling that Skadburg had not demonstrated genuine issues of material fact to support her claim that the statute of limitations should be tolled due to fraudulent concealment should be affirmed.

C. The trial court correctly refused to apply the doctrine of continuing representation.

The trial court ruled that the continuing representation doctrine was inapplicable to Skadburg's case. (App.pp.55-56). Based on Skadburg's emails, the trial court concluded Skadburg learned of the (alleged) mistake/negligence prior to the cessation of the attorney-client relationship. (App.pp.55-56). The trial court found the continuing representation doctrine does not apply when the individual knows or in the

exercise of reasonable care should have discovered the alleged wrong. (App.pp.55-56). Accordingly, the trial court distinguished Skadburg's claim from situations involving individuals who were unaware of alleged harm until years later. (App.p.56). The trial court's ruling is correct.

To support her contention that the statute of limitations did not begin until after Gately's representation ended[10], Skadburg relies on the Court of Appeals decision in Dudden v. Goodman, 543 N.W.2d 624 (Iowa Ct. App. 1995). The Dudden v. Goodman court acknowledged that the discovery rule, which is based on notice, is still applicable in factual settings where the injured person discovers or in the exercise of reasonable care should have discovered the alleged wrongful act. SEE: Id. at 626 citing Franzen v. Deere & Co., 377 N.W.2d 660, 662 (Iowa 1985).

Mrs. Dudden had no notice there was a problem with the estate taxes, until an accountant advised her of the error. The Court of Appeals distinguished Dudden v. Goodman from Franzen v. Deere stating:

> "The Franzen case is persuasive authority under those factual settings where the injured person discovers or in the exercise of reasonable care should have discovered the allegedly wrong act. We are not convinced Franzen applies to this case. Franzen knew he was injured when his arm was caught in the revolving beater mechanism. He had a duty to investigate once he knew he had been injured. Id. However, the executor in the present case did not know that estate had been injured when the taxes were paid in 1983. There was nothing to put her on notice."
>
> Dudden v. Goodman 543 N.W.2d at 626

[10] Reference to Appellant's Brief p. 20-21

The Court of Appeals' decision in Dudden, did not recognize a continuous representation rule as an exception to the legislatively enacted statute of limitations nor did it not abandon the rule applied in Franzen v. Deere. In this case, Skadburg's emails establish that unlike the plaintiff in Dudden, she had knowledge of the alleged legal error. Therefore, Skadburg's case is subject to the rule in Franzen v. Deere.

The Iowa Supreme Court has declined to apply the continuous treatment rule to toll the statute of limitations in medical malpractice cases when the plaintiff had notice of negligence prior to the termination of treatment stating: "If there is actual proof that the patient knows or reasonably should know of the injury or harm before termination of medical treatment, the statute of limitations is not tolled." Ratcliff v. Graether, 697 N.W.2d 119, 125 (Iowa 2005) See also Cedar Rapids Lodge & Suites, LLC v. JFS Dev., Inc., 789 F.3d 821, 826 (8th Cir. 2015) (in which the federal court opined that the Iowa courts' approach to continuous representation would mirror the application of the continuous treatment rule and the statute of limitations would not be tolled where there was actual proof that the patient or client knew or reasonably should have known of the injury or harm prior to the termination of the treatment or representation.)

Vossoughi v. Polaschek, 859 N.W. 2d 643 (Iowa 2015) also fails to support Skadburg's position regarding the continuing representation rule. In Vossoughi v. Polaschek, the Court addressed the discovery rule within the context of when actual injury occurred in a legal malpractice case: "The core teaching of Neylan is that speculative injury does not give rise to a

legal malpractice claim.[Internal cite omitted] An injury arising from legal malpractice is actionable when it is actual but not when it is merely potential" . *Id at 649*. The court determined that while Vossoughi may have known of a problem, any injury or damage resulting therefrom was merely "speculative" thus the statute was tolled until Vossoughi actually suffered damages. *Id at 655* . Hence the discovery rule was unnecessary to extend the time for filing because Vossoughi sued within five years after the actual damage occurred. *Id at 655*. By contrast, Skadburg's three emails demonstrated both notice of the alleged mistake and her recognition that she had suffered alleged damage, in that she paid debts with exempt funds. Unlike Vossoughi, Skadburg failed to sue within five years of the date that she was aware of both the alleged mistake and was allegedly damaged.

The undisputed facts establish that Skadburg is not entitled to rely on the doctrine of continuing representation to extend the time for filing her claim. The trial court concluded that Skadburg knew sufficient facts to put a reasonable person on inquiry notice of a potential problem that would require further investigation. (App.pp.55-56). The trial court correctly determined Dudden v. Goodman does not apply when an individual knows or in the exercise of reasonable care should have discovered the alleged wrong. (App.pp.55-56).

D. Skadburg's claim was filed five years and one day after representation terminated and was untimely.

Even assuming *arguendo* that the continuous representation doctrine extended Skadburg's date for filing her suit, Gately's and Whitfield's

representation of Ms. Skadburg ended on August 18, 2010 the day the probate court closed the estate. (App.pp.47-48) Skadburg's lawsuit, filed on August 19, 2015, was one day too late.

Skadburg argues that Gately's representation ended on August 31, 2010 the date on a transmittal letter containing a time stamped copy of the order that closed the estate. The undisputed facts establish that on July 26th 2010, Skadburg signed a supplemental final report acknowledging that "all claims" have been paid and requesting that the estate be finally settled and closed. (App.p.46) The Order closing the estate was filed on August 18, 2010. (App.p.47). The letter that Skadburg contends extends representation to August 31, 2010 states:

> "Enclosed for your records is the Order of the Court Approving the Final and Supplemental Final Reports and discharging Administrator. In essence, this is the final step and the estate is now closed and you are discharged as the Administrator." [11]

There is nothing in the transmittal letter to support Skadburg's argument that the transmittal letter terminated representation. On the contrary, the letter directed her attention to the "enclosed order" that closed the estate on August 18, 2010. (App.p.47). Gately represented the Estate; there was no estate to represent after it was closed on August 18, 2010.

The date that Skadburg received notice of the closing did not start the statute of limitations clock. Under the Neylan v. Moser, 400 N.W.2d 538, 542 (Iowa 1987) "the date of injury in a legal malpractice case coincides

[11] Defendant's Reply Brief Ex D page 1.

with the last possible date when the attorney's negligence becomes irreversible". Even if Skadburg's claim was subject to the continuous representation doctrine, her final opportunity to remedy the alleged mistake terminated the day the probate court closed the estate, August 18, 2010. *Id at 542.* There are no facts to support Skadburg's proposition that representation continued after the estate closed on August 18, 2010.

Skadburg's reliance on the continuous representation theory is also defeated by her acquiring new counsel during the five year period following August 18, 2010. On February 12, 2014, Skadburg signed an authorization for her trial counsel to obtain her file from Whitfield.[12] On March 13, 2014, Skadburg's trial counsel transmitted her request. [13] (App.pp.9-10- Undisputed Facts #8-10; App.p.14- Admissions 8-10). It is undisputed that Skadburg was consulting with trial counsel over one year prior to August 18, 2015. Even if Skadburg did not know that representation ended with the Order of the probate court, her new attorney was charged with this knowledge. Since Skadburg consulted her new counsel within the five years following August 18, 2010; the continuing representation rule does not excuse her late filing. See: Millwright v. Romer, 322 N.W.2d 30, 34 (Iowa 1982) ("The use of a new attorney for probate was an opportunity for discovery. [Internal cite omitted] The opportunity lasted for at least five years."). Dudden v. Goodman, 543 N.W.2d at 628, the Court of Appeals distinguished Millwright noting that: "Finally, as was not the case in Millwright, the executor did not have a separate attorney to detect any

[12] Reference to Appellant's Brief page 12
[13] Reference to Appellant's Brief page 12; and Skadburg's Response to Defendants' Statement of Undisputed Facts, ¶7, 8, 9, and 10 (SEE: App.p.14)

mistake made by Goodman."

Skadburg had "a new attorney" and received Gately's file on May 20, 2014. (App.p.10-Undisputed Fact #10, App.p.14 Admission #10) On that date, if one were to measure the five year statute of limitations from Skadburg's March 26, 2010 email, her case was still live and would remain so for another 310 days. Likewise, if one were to measure the five year statute of limitations from the August 18, 2010 order closing the estate, her case was still alive on May 20, 2014 and would remain so for another 1 year, 2 months and 29 days.

Finally, the conclusion section of Skadburg's brief alludes to Skadburg's representation by Gately's partner. This reference should be ignored since Skadburg failed to make a factual record to support such an inference that Gately or Whitfield's representation extended beyond August 18, 2010. The trial court was correct in dismissing Skadburg's claim for failure to file within five years.

CONCLUSION

"Error of law" is the standard of review. As shown above, the trial court applied the correct law to the facts as disclosed by Skadburg's own emails. The limitations period expired prior to the date Skadburg filed her Petition. Skadburg failed to establish, as genuine issue of fact, any exception to the limitations period. There was no error of law in the trial court's summary judgment ruling dismissing the claim on the basis of statute of limitations. Summary judgment should be affirmed.

REQUEST FOR ORAL ARGUMENT

If the Court grants Appellant's request for oral argument, Appellee will appear and participate in the oral argument.

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CERTIFICATES OF COMPLIANCE, FILING AND SERVICE

CERTIFICATE OF COMPLIANCE WITH TYPEFACE AND TYPE-VOLUME REQUIREMENTS

This brief complies with the typeface requirements and type-volume limitation of Iowa R. App. P. 6.903(1)(d) and 6.903(1)(g)(1) this brief has been prepared in a proportionally spaced typeface using Microsoft Word in size 14 Font Georgia and contains 5475 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

CERTIFICATE OF FILING

We certify that this Appellees' Brief was filed with the Clerk of the Iowa Supreme Court by EDMS filing on August 3, 2017.

CERTIFICATE OF SERVICE

We certify that this Appellees' Brief was served upon Peter Craig Riley, Attorney for the Appellant by EDMS filing on August 3, 2017.

August 3, 2017.

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