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 RESISTANCE TO APPELLEES' APPLICATION FOR FURTHER REVIEW FROM THE OPINION OF THE COURT OF APPEALS FILED JANUARY 10, 2018

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MICHELLE R. SKADBURG

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Appellees, Gary Gately and Whitfield & Eddy, P.L.C. have stated the issue as follows:

I. **WHETHER THE COURT OF APPEALS ERRED IN USING THE CONTINUOUS REPRESENTATION RULE TO EXTEND THE STATUTE OF LIMITATIONS IN A NON-LITIGATION LEGAL NEGLIGENCE ACTION, (A) WHERE THE PLAINTIFF ADMITTED KNOWLEDGE OF THE PROFESSIONAL ERROR AND WAS ABLE TO QUANTIFY DAMAGES, PRIOR TO THE DATE OF THE FINAL SERVICES PROVIDED BY THE LAWYER; AND/OR (B) BEYOND THE DATE THE COURT TERMINATES THE LAWYER'S RESPONSIBILITY TO THE CLIENT?**

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STATEMENT OPPOSING FURTHER REVIEW

The Court of Appeals decision reversing the grant of summary judgment on the statute of limitations is consistent with prior published Iowa authority addressing the statute of limitations in the context of legal malpractice. This is not the case where the Supreme Court should exercise its discretion under Iowa R. App. P. 6.1103(1)(b) to grant further review.

The statement of the issues by Gately/Whitfield & Eddy is both incomplete and factually incorrect. Gately/Whitfield & Eddy state the Court of Appeals erred in relying on the continuous representation rule where Skadburg "admitted knowledge of the professional error" and "beyond the date the court terminates the lawyer's responsibility to the client." The issues are broader and facts more complex.

The first paragraph of the Court of Appeals' Opinion accurately concludes a genuine issue of material fact "when Skadburg knew of the cause of action," which is when the statute of limitations would begin to run. (Opinion, p. 2) This is completely consistent with Vossoughi v. Polaschek, 859 N.W.2d 643, 649 (Iowa 2009) which recognized the statute of limitations does not begin to run until the

injured party has actual or imputed knowledge of all the elements of the cause of action.

The first question presented by Skadburg's former counsel assumes Skadburg admitting knowledge of the professional error. A clear reading of the email exchanges shows Skadburg believed she was the one who made the mistake. Her attorney failed to tell her of her limited ability to pay estate claims until the publication deadline passed, and in fact told her to pay estate bills out of money that was Skadburg's. The attorney never said anything to correct Skadburg's belief she was at fault. Skadburg knew a mistake was made. She thought it was hers and didn't know the error was Gately's.

The Court of Appeals not only relied on the rule in Vossoughi v. Polaschek that the client has to know that they have a cause of action, but also relied upon the continuous representation rule. The reference to the Court terminating the lawyer's responsibility refers to the Court's Order closing the estate, but the attorney's representation continued after that.

Moreover, the reversal of summary judgment can be independently supported by a ground not considered by the Court of Appeals, specifically fraudulent concealment. Pride v. Peterson, 173

N.W.2d 549, 555 (Iowa 1970) recognized that because of the fiduciary relationship of an attorney, concealment may be alleged and proven by mere silence.

Since the Court of Appeals decision rests on principles clearly stated in published decisions, there is no conflict with published precedent, Iowa R. App. P. 6.1103(1)(b)(1), and the legal principles are established and not changing, Iowa R. App. P. 6.1103(1)(b)(3).

While the issue of the statute of limitations for malpractice may be of broad public importance, the law is well-settled.

BRIEF IN RESISTANCE TO FURTHER REVIEW

FACTUAL BACKGROUND

As a result of the death of her mother, Barbara Haffner, Michelle Skadburg received $20,000.00 of life insurance and $87,054.65 from a 401k. This was her property. Gary Gately from Whitfield & Eddy opened an estate in Cerro Gordo for the late Barbara Haffner and Skadburg designated him as attorney. Iowa Code Section 633.43 is clear that a personal representative's ability to pay claims before four months after the second publication of notice to creditors is circumscribed. Notwithstanding that clear mandate, Gately not only allowed Skadburg to use money that was hers, and not the estate's, to pay the estate bills, but, based on one of Skadburg's emails, Gately told Skadburg to pay the estate bills.

The relevance of Gately/Whitfield & Eddy on the statute of limitations defense rests on a number of emails from Skadburg to Gately. Because those emails are significant, and must be read in their entire context, those emails follow:

Gary Gately

From:	Rod and Michelle Skadburg [mskadburg@jumpgate.net]
Sent:	Friday, January 30, 2009 5:53 PM
To:	Gary Gately
Subject:	Barbara Haffner Estate

Gary, I apologize if I sounded down today on the phone. I know it may seem minor to you to worry about our tax liability, but it is just the last straw in a long list of things. My husband had a kidney transplant last year after spending several years very sick and off work. He is also waiting for another transplant. We just found out today that his lupus is acting up and attacking the new kidney which means more chemo for him in the upcoming months. My daughter was hit in a hit and run accident on Friday (thankfully not hurt) that totaled her car so we have to replace that now. We are doing ok, but financially things are tight for us. Medical bills for my husband and my son. We are paying off my oldest son's funeral as he didn't have life insurance when he died. (this is the case that Tom is working on for us – and also incurring large expenses as we move ahead on that). (sic)

Anyway, this news today was kind of sickening for me. 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, but for just a moment I imagined a life without financial worry – paying off our medical debts and catching up for the first time in 4 years would have been a huge burden off our shoulders. Just the thought of the difference between getting a few thousand in tax refund to possibly owing some was just a downer today.

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. Anyway, it was her money and her debt and no use second guessing now as they have been paid and that is that. We will figure out who has to claim what on what taxes and go from there. I came home and had a good cry and I hope that things will seem better tomorrow.

I just wanted you to understand that I wasn't trying to be…I don't even know what the word is, but I am sure worrying about my tax liability seemed silly to you, but I just have a lot of worry and that was one more thing.

I appreciate all of your help with this estate and like I said, hopefully things will seem better tomorrow. Hopefully, Tom will be successful with our lawsuit and that will ease some of our burden. I did just want you to know 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 this!

Have a good weekend. Michelle Skadburg

App. 44.

Gary Gately

From: Rod and Michelle Skadburg [mskadburg@jumpgate.net]
Sent: Wednesday, December 30, 2009 5:03 PM
To: Tom Reavely; Gary Gately
Subject: Barbara Haffner estate

Hello! Just wondered where we are at with things.

Gary – I emailed you that I did not receive the tax forms, but haven't heard in response or new forms. Have you sent those?

What else do we need to do to close this estate?

Tom – Dianna had mentioned that you wanted a conference call, but I didn't hear back as to when.

I would really like to get this estate closed as I am sure you would. Please advise what needs to be done – email is best way to reach me probably. I check it every evening.

As far as the fees, Tom had told me when this started that he would charge me $200 - $300 to do this. I do realize there has been more work involved so I am willing to negogiate on this, but I will be honest, not willing to pay the usual fee. The reduced rate is why we decided to handle this with your firm and not stay local. We really needed just an estate opened to close her bank account and to handle Disney. We hired a Florida attorney to handle the Disney stuff. It seems there has

been miscommunication in all of this. Paying off mom's debt with money that should not have been part of the estate was one of the issues that has arisen. Gary and I have talked through this and what is done is done, but please take these kinds of things into consideration when setting the fee.

Again, I just want to get this done and completed. Please advise what is needed to get this closed!

Thanks so very much to both of you in advance for your assistance in getting this closed up.

Michelle Skadburg

In the March 26, 2010 email, Skadburg asked Gately:

-is any of the money paid to other creditors refundable since those should not have been paid out of the estate assets? Please advise if there is a process to get those Debt written off and pursue a refund of that money paid.

Significantly, there is nothing in the record to show Gately responded. It is clear that Skadburg believes she was at fault for paying the bills. Gately never said anything to disabuse her.

The Order closing the estate was entered August 18, 2010, App. 47. Whitfield & Eddy's billing records show Gately provided services for the estate through at least August 30, 2010 when he forwarded the Order approving the Final Report, App. 14/17-18.

LEGAL ARGUMENT

I. WHETHER THE COURT OF APPEALS ERRED IN USING THE CONTINUOUS REPRESENTATION RULE TO EXTEND

THE STATUTE OF LIMITATIONS IN A NON-LITIGATION LEGAL NEGLIGENCE ACTION, (A) WHERE THE PLAINTIFF ADMITTED KNOWLEDGE OF THE PROFESSIONAL ERROR AND WAS ABLE TO QUANTIFY DAMAGES, PRIOR TO THE DATE OF THE FINAL SERVICES PROVIDED BY THE LAWYER; AND/OR (B) BEYOND THE DATE THE COURT TERMINATES THE LAWYER'S RESPONSIBILITY TO THE CLIENT?

Vossoughi v. Polaschek, 859 N.W.2d 643, 649 (Iowa 2015) recognized claims based on negligence not accrued, the statute of limitations does not begin to run until the injured party has actual or imputed knowledge of all the elements of the action. Vossoughi v. Polaschek recognized the injured party may have actual or imputed knowledge of the elements of the claim, and cited Franzen v. Deere & Co., 377 N.W.2d 660, 662 (Iowa 1985) on the question of imputed knowledge or inquiry notice.

It is significant that Franzen v. Deere & Co. involved a physical injury. For that reason, Dudden v. Goodman, 543 N.W.2d 624, 626 (Iowa App. 1995) recognized this distinction in the context of a legal malpractice. The Court recognized a party who is injured has a duty to investigate once they knew they were injured. However, Dudden recognized an estate Executor would not know about the injury and, citing Millwright v. Romer, 322 N.W.2d 30, 34 (Iowa 1982),

recognized the client has the right to rely on the superior skill and knowledge of the attorney.

Pride v. Peterson, 173 N.W.2d 549 (Iowa 1970) recognized the duty of disclosure of an attorney:

> An exception exists, however, where a confidential or fiduciary relationship is present. The requirement that affirmative acts of concealment be alleged and proven is supplied by mere silence and diligence in discovering the fraud complained of is, likewise, greatly relaxed.

Iowa has long recognized the idea of continuous representation. Dudden v. Goodman, 543 N.W.2d 624, 627-8 (Iowa App. 1995); Neylan v. Moser, 400 N.W.2d 538, 542 (Iowa 1987) and Vossoughi v. Polaschek, 859 N.W.2d 643, 650 (Iowa 2015).

CONCLUSION

In this case, the attorney failed to advise the personal representative she could not pay estate claims until after the second publication and in fact, told her to pay her mother's bills. The client used money that was hers that she could have kept to pay estate claims. Reviewing the emails in their totality makes clear Michelle Skadburg, the client, thought she was at fault, and her lawyer, who she was entitled to rely on, never mentioned he shared responsibility.

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CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION

1. 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) or (2) because:

☒ this brief has been prepared in a proportionally spaced typeface using Microsoft Word in size 14 Font Arial and contains 2,040 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1) or

☐ this brief has been prepared in a monospaced typeface using [state name of typeface in [state font size] and contains [state the number of] lines of text, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(2).

Dated this 27th day of February, 2018.

Peter C. Riley

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the preceding Appellee's Resistance to Application for Further Review was served on the 27th day of February, 2018, upon the Clerk of the Supreme Court and the following by electronic filing:

Nick Critelli
Lylea Dodson Critelli
317 Sixth Avenue, Ste. 950
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Phyllis Ditch

CERTIFICATE OF FILING

The undersigned hereby certifies that the preceding Appellee's Resistance to Application for Further Review was filed with the Supreme Court of Iowa by the EDMS system on the 27th day of February, 2018.

Phyllis Ditch