



ORIGINAL

NOT FOR OFFICIAL PUBLICATION

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION IV

KASIE MITCHELL, Personal)
 Representative of the Estate of Karla)
 Annett Turner,)
)
 Plaintiff/Appellant,)
)
 vs.)
)
 TOM MARIS CUMMINGS a/k/a)
 TOM M. CUMMINGS,)
)
 Defendant/Appellee,)
)
 and)
)
 MISTY DAWN TURNER, MARVEL)
 E. LEWIS, MARVEL E. LEWIS, P.C.,)
 and DOES 1-10,)
)
 Defendants.)

FILED
COURT OF CIVIL APPEALS
STATE OF OKLAHOMA

FEB 15 2024

JOHN D. HADDEN
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Case No. 121,072

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APPEAL FROM THE DISTRICT COURT OF
OKLAHOMA COUNTY, OKLAHOMA

HONORABLE DON ANDREWS, DISTRICT JUDGE

AFFIRMED

Robert R. Redwine
Oklahoma City, Oklahoma

and

Patricia A. Kirch
Oklahoma City, Oklahoma

and

Joseph C. Schubert
Scottsdale, Arizona

For Plaintiff/Appellant

David B. Donchin
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For Defendant/Appellee

OPINION BY GREGORY C. BLACKWELL, PRESIDING JUDGE:

Appellant and personal representative of the estate of Karla Annett Turner, Kasie Mitchell, appeals the court's order granting summary judgment in favor of defendant and appellee Tom Cummings. The court ruled that Mitchell's claims against Cummings were either barred by the applicable two-year statute of limitations or not viable as matter of law. On review, we affirm the decision of the district court.

BACKGROUND

On January 22, 2015, Karla was seriously injured in an accident when a semi-tractor and trailer rammed the rear end of her vehicle at a high rate of speed. As a result of this collision, Karla suffered temporary and permanent injuries to her neck, spine, legs, and feet, as well as a brain bleed. Karla never fully recovered from the injuries she suffered, and she died in 2018.

Eight days after the accident, Karla's sister, Misty Turner, filed a petition for appointment of special guardianship, seeking appointment as guardian of Karla's person and estate. Cummings agreed to represent Karla and Misty in the guardianship and in the collision litigation. Misty was ultimately appointed Karla's guardian by the court with the consent of Karla's children.

On May 22, 2015, Cummings filed a lawsuit on Karla's behalf for damages sustained in the collision. *See Turner v. Fair*, Oklahoma County Case No. CJ-2015-2952. The case was settled for \$877,000. Cummings did not file or otherwise disclose the nature of the settlement and proposed management of the funds received by Karla to the guardianship court.

On January 31, 2018, Karla died. On February 2, 2018, Karen Cramer, mother to Karla, Misty, and Kasie Mitchell, filed a motion to terminate the guardianship. The application to terminate was granted on February 18, 2018. The stated basis for termination was that Misty had been stealing and embezzling Karla's guardianship funds. Karen was also appointed as the personal representative of Karla's estate. Misty filed her final account as Karla's guardian on December 23, 2019. According to Karen, the final accounting showed Misty made several transactions that were to the material detriment of both the guardianship estate and the probate estate.

On February 3, 2020, Karen, as the initial personal representative of Mitchell's estate, filed this action against Cummings, Marvel E. Lewis, Marvel E. Lewis, P.C., and Misty, alleging embezzlement, professional negligence, breach of fiduciary duty, breach of contract, and more. In her petition, Karen specifically alleged that Misty purchased property in Harrah, Oklahoma, two lots on Lake Eufala, four different trucks, and made multiple cash withdrawals and other purchases from the guardianship account, all of which were to the detriment of the estate. Her claims against Cummings included malpractice, breach of contract, and breach of fiduciary duty.

On July 22, 2021, Karen moved to have Mitchell replace her as personal representative of the estate due to Karen's purportedly declining health and increased stress as a result of this litigation. The court granted the substitution on July 22, 2021.

Cummings filed a motion for summary judgment on December 20, 2021, arguing, among other things, that the estate's claims were barred by the applicable statute of limitations. The court denied the motion on April 11, 2021. On February 16, 2022, Mitchell dismissed all causes of action against Marvel E. Lewis and Marvel E. Lewis P.C. and, on August 8, 2022, Misty filed a notice of bankruptcy, staying the case against her.

Karen, among other witnesses, was deposed in 2022 and after her deposition, she submitted an errata sheet. Cummings filed two motions to strike the errata sheet, alleging that Karen had made twenty changes that materially altered her testimony. At a hearing on September 8, 2022, Mitchell withdrew the errata sheet. Because of the withdrawal, Cummings renewed his motion for summary judgment, arguing that Karen's testimony from her deposition established that the statute of limitations period began running as early as December 2016.

On November 23, 2022, the court granted summary judgment in favor of Cummings, finding that all claims against him were either barred by the

applicable two-year statute of limitations, or failed as a matter of law. Mitchell appeals.¹

STANDARD OF REVIEW

Summary judgment settles only questions of law. *Pickens v. Tulsa Metro. Ministry*, 1997 OK 152, ¶ 7, 951 P.2d 1079, 1082. The standard of review of questions of law is *de novo*. *Id.* Summary judgment will be affirmed only if the appellate court determines that there is no dispute as to any material fact and that the moving party is entitled to judgment as a matter of law. *Id.* Summary judgment will be reversed if reasonable people might reach different conclusions from the undisputed material facts, or a party is not entitled to judgment as a matter of law. *See Runyon v. Reid*, 1973 OK 25, ¶ 15, 510 P.2d 943, 946. All reasonable inferences are taken in favor of the nonmovant. *Jennings v. Badgett*, 2010 OK 7, ¶ 4, 230 P.3d 861, 864.

ANALYSIS

Documents in the Supplemental Record

We first address Mitchell's motion to strike certain exhibits in Cummings' amended supplement to the record on accelerated appeal. Supreme Court Rule 1.36(c) details which documents may be a part of the record on accelerated appeal.² Mitchell argues that documents 1-4 and 7-11 in Cummings'

¹ This judgment did not adjudicate any of the claims against Misty. This Court, therefore, directed Mitchell to show cause as to why this appeal should not be dismissed for want of a final order. On August 31, 2023, Mitchell voluntarily dismissed Misty from the action. Cummings is therefore the sole defendant and appellee.

² The record for appeals from summary judgment is limited to:

supplemental record should not be part of the record because the court did not consider those materials in granting the motion for summary judgment.³ We agree.

In its journal entry of judgment granting summary judgment in favor of Cummings, the court specifically lists the documents it considered in reaching its decision.⁴ The records submitted as documents 1-4 and 7-11 in the supplemental record were not listed and we find no record these documents were

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- (1) the memorialized order by which summary judgment was entered;
 - (2) pleadings proper as defined by 12 O.S. 2007(A), (petition, answer, etc.);
 - (3) applicable instruments on file, including the motion and response with supporting briefs and attached materials filed by the parties as required by District Court Rules 13(a) and 13(b);
 - (4) any other item on file which, according to some recitation in the trial court's journal entry or in some other order, was considered in the decisional process;
 - (5) any other order dismissing some but not all parties or claims;
 - (6) any transcripts of proceedings on the motion(s);
 - (7) any motions, along with supporting and responsive briefs, for new trial (re-examination) of the summary judgment process;
 - (8) the appearance docket; and
 - (9) a cover page and Index of the record prepared by the party.

Supreme Court Rule 1.36(c)(A)(1-9).

³ Documents 1-4 are defendant's motion to strike errata sheet, plaintiff's objection to the motion to strike the errata sheet, defendant's reply in support of the motion to strike the errata sheet, and defendant's exhibits in support of the motion to strike the errata sheet. Documents 7-11 are defendant's motion to strike plaintiff's sur-response, defendant's motion to strike the errata sheet of Kasie Mitchell, defendant's second motion to strike the errata sheet, defendant's reply to plaintiff's objection to the second motion to strike the errata sheet, and defendant's reply to plaintiff's objection to the second errata sheet of Karen Cramer, exhibit 4 - guardianship docket sheet, and exhibit 5 - neuropsych report.

⁴ The trial court reviewed defendant Cummings' motion for summary judgment, plaintiff's response and objection to defendant's motion for summary judgment, defendant's reply in support of his motion for summary judgment, and plaintiff's sur-response and objection to defendant's reply in support of motion for summary judgment.

ever considered by the trial court in granting summary judgment. Therefore, we will not review them now.

Mitchell also requests us to strike Document 5 of Cummings's supplement, a one-page "Exhibit 18" titled "text message of Connie Bassett." Exhibit 18 was part of Cummings' summary judgment motion but was missing from the record transmitted; therefore, Cummings added it by a supplement.⁵

Mitchell concedes that this one-page text message was before the court as Exhibit 18, and that it was part of the summary judgment motion she was served with, but states that that the Exhibit 18 she received contained an additional 243 pages that were not before the trial court. She asks this Court to strike Exhibit 18 or alternatively require Cummings to supplement the record with the entirety of the exhibit as it was served on counsel.

However, even if 243 extra pages of the exhibit were served upon the plaintiff, only one page was before the trial court, and this was the only evidence it considered.⁶ Further, we find no indication that Mitchell raised any issue in opposition to summary judgment that was based upon anything contained in the additional pages. Hence, we will consider the text message actually

⁵ Because many documents were sealed, the motion itself has only Exhibits 2, 3, 5, 10, 11, 13, and 14 attached. Sealed Exhibits 1, 4, 6, 7, 8, 9, 12, 15, 16, 17, 19, 20, and 21 were separately attached under seal. One exhibit is missing—Exhibit 18, described as "text message of Connie Bassett." This is the Exhibit 18 that Cummings added as a supplement.

⁶ The record does not show exactly what documents were served on the plaintiff around December 2021. If the plaintiff believed any discrepancy between what she was served and what was filed was material to the grant of summary judgment, she had ample opportunity to raise this matter with the trial court.

submitted to the trial court in the motion for summary judgment. We note, however, that we do not rely on Exhibit 18 in any way in our analysis.

Statute of Limitations

On appeal, Mitchell argues that the trial court erred in holding the two-year statute of limitations for all of her tort-based claims expired on January 24, 2020. She also alleges that the trial court erred in holding that the estate had no claim against Cummings for breach of contract or breach of fiduciary duty. However, upon review, we find that all of Mitchell's tort claims against Cummings are barred by the applicable two-year statute of limitations. Additionally, the trial court correctly determined there was no breach of contract and Cummings did not owe a fiduciary duty to Karla to oversee the guardianship.

Oklahoma law provides that an action for legal malpractice, "though based on a contract of employment, is an action in tort and is governed by the two-year statute of limitations This limitation period begins to run from the date the negligent act occurred or from the date the plaintiff should have known of the act complained of." *Funnell v. Jones*, 1985 OK 73, ¶ 6, 737 P.2d 105, 107 (citations omitted). The injury must be certain, meaning the party must know that damages have been sustained, and are not merely speculative. *Marshall v. Fenton, Fenton, Smith, Reneau & Moon, P.C.*, 1995 OK 66, ¶ 6, 899 P.2d 621, 623. "The 'certainty' requirement of this rule refers to the fact that damages have been sustained and not to the amount of damages." *Id.* Accordingly, the estate need not have known the full extent of Cummings' alleged negligence for statute

of limitations purposes. Instead, they need only be aware that Cummings may have acted negligently and caused some damage to the estate.

In his motion for summary judgment, Cummings argued there were four specific events that triggered the statute of limitations in this case: (1) Karen testified in her deposition that as early as December 2016 Karla told her she thought Misty was “cheating and stealing” from her, (2) Karen also testified that she and Karla talked more in depth regarding Misty’s misappropriation of funds in December 2017 and early January 2018, (3) Karen testified in her deposition that as a result of their conversations in December 2017 and early January 2018, Karen took Karla to attorney Aaron Gwartney’s office on January 5, 2018, seeking to remove Misty as guardian, and (4) Mr. Gwartney testified in his deposition that on January 24, 2018, he received a bank statement from the guardianship bank account and the guardianship docket sheet which caused him to suspect Cummings’ or Misty’s negligence for failure to report the collision settlement to the guardianship court.⁷

The court, in granting the motion for summary judgment, found that the plaintiff and representative of the estate had notice that the guardianship estate had incurred damages “as late as” January 24, 2018, prior to filing the application to terminate the guardianship. We agree.

Mitchell does not dispute that she and Mr. Gwartney had the docket sheet and bank statement in their possession as of January 24, 2018. Rather, she

⁷ According to 30 O.S. § 4-702, guardians have a duty to report settlements to the guardianship court for approval.

argues that these items were insufficient to put them on notice that Cummings did not obtain approval of the collision settlement or the attorney fees he received as a result of that litigation.

Mr. Gwartney admitted that he received a bank statement from the guardianship bank account as well as the guardianship docket sheet. *Defendant's Motion for Summary Judgment*, Exhibit 5, pg. 36. Mitchell provided Mr. Gwartney with the bank account statement, and Mr. Gwartney had been granted permission to see the guardianship file via a court order. *Id.* at 80. Mr. Gwartney testified that his "first suspicion" that Cummings failed to disclose the collision settlement was on January 24, 2018, when he reviewed these documents. *Id.* at 37. In his deposition, Mr. Gwartney was specifically asked if there were indications on the bank statement, given to him by Mitchell, that gave rise to sufficient grounds to allege embezzlement or conversion by Misty. *Id.* Mr. Gwartney responded in the affirmative. *Id.* Therefore, Mr. Gwartney and the estate were clearly aware that Misty had not only mishandled Karla's money, but also that Cummings had failed to detect the misappropriation of funds as of January 24, 2018.

Additionally, the guardianship docket also revealed the failure to file any accountings.⁸ Therefore, based on Mr. Gwartney's own testimony, both he and Mitchell were aware that Cummings may have acted negligently by January 24,

⁸ We agree with Mitchell's argument that docket sheets do not always accurately portray all litigation events in a particular case. However, the absence of *any* accountings for the guardianship for more than one year and the absence of the collision settlement are enough to put an attorney on notice that Misty or Cummings had acted improperly.

2018. Mitchell had two years from that date, January 24, 2020, to file a petition on behalf of the estate. However, she waited until February 3, 2020, which is outside the prescribed two-year limitation.⁹

Breach of Fiduciary Duty

Mitchell also argues that the trial court erred in determining Cummings did not breach his fiduciary duty to Karla and Misty. We agree with the trial court's ruling that while Oklahoma law provides generally that the fiduciary relationship between an attorney and client may be breached,¹⁰ *see Graves v.*

⁹ The court found, and we agree, that January 24, 2018, was the *latest* possible date that the statute of limitations began to run. Because the Mitchell's petition was not filed until February 3, 2020, this is all that is necessary. We note, however, there is substantial evidence that the statute began to run as early as December 2016. Karen testified on multiple occasions that she and Karla had talked about Misty stealing, embezzling, and otherwise mishandling the guardianship funds. Karla wrote a letter to Karen on December 1, 2016, detailing her concerns that she "had no money" and that Misty would get angry if Karla asked about money. *Defendant Tom Maris Cummings' Motion for Summary Judgment*, Exhibit 3, pg. 144. Karen gave numerous answers during deposition indicating that she had knowledge that Misty was misusing funds before January 24, 2018, and then attempted to materially change these answers via an "errata sheet" that was eventually withdrawn. By example, when asked if the reason Karen took Karla to a lawyer in early January 2018 was because she knew Misty was stealing from her and wanted her replaced as guardian, Karen answered an unequivocal "[y]es." *Id.* at 181. This answer was later changed to "Karla wanted Misty replaced because she didn't trust Misty and because she wanted to live with Brianna and Misty wouldn't let her." *Plaintiff's Response and Objection to Defendant Tom Maris Cummings' Motion for Summary Judgment and Brief in Opposition*, Exhibit 10, pg. 3. Finally we note that, in its petition, the estate lists a variety of purchases made by Misty that it deemed to be to the material detriment of the estate. For example, the Harrah property listed in the petition as an improper purchase was purchased by Misty with Karla's money for Karla's son and his family to live on. Misty also used guardianship funds to pay for work that needed to be done on the land for Karla's son. Additionally, Misty purchased three different trucks for Karen, Karen's husband (Karla's stepdad), and Mitchell herself. It seems likely that Mitchell and Karen knew or should have known that those purchases were an abuse of Misty's power as guardian at the time they were made.

¹⁰ Oklahoma law has recognized that a lawyer's highest fiduciary duty is when a legal practitioner is entrusted with a client's funds. *State ex rel. Oklahoma Bar Ass'n v. Busch*, 1998 OK 103, ¶42, 976 P.2d 538, 554. Actions that violate this duty typically include commingling of funds, conversion, misappropriation, and more. *State ex rel. Oklahoma Bar Ass'n v. Farrant*, 1994 OK 13, ¶ 8, 867 P.2d 1279, 1284. The only funds Cummings was ever in possession of were the settlement funds, which he distributed to Karla as they

Johnson, 2015 OK CIV APP 81, 359 P.3d 1151, it does not provide for a duty on the part of the attorney to oversee the actions of a guardian. Further, the claim for breach of fiduciary duty is based on Cummings's failure to monitor the guardian and failure to monitor the guardianship funds, acts that were known more than two years before suit. Therefore, even if Cummings had breached his fiduciary duty, such a claim would also be barred by the two-year statute of limitations.

Breach of Contract

Finally, Mitchell maintains that the court should not have granted summary judgment on her breach of contract claim. We note, as the trial court did, that an action against an attorney alleging that he or she failed to meet professional norms and duties sounds in negligence, not in contract. *Funnell v. Jones*, 1985 OK 73, ¶ 6, 737 P.2d 105, 107. We find no reported Oklahoma case holding that acts normally considered legal malpractice can be re-characterized as a breach of contract to obtain a longer limitations period.¹¹

The contract between Misty and Cummings explicitly provides that he would represent Karla in the collision litigation and the guardianship. Cummings

agreed. While Mitchell had conversion and misappropriation claims against Misty, none of the claims against Cummings relate to his handling of client funds.

¹¹ Other jurisdictions recognize the same distinction. *See, e.g., Philidor RX Servs. LLC v. Polsinelli PC*, 22-2836, 2023 WL 6290746, at *5 (3d Cir. Sept. 27, 2023) (inadequate trial representation did not breach contract to “provide legal counsel” and hence constituted legal malpractice rather than breach of contract); *Aldred v. O'Hara-Bruce*, 184 Mich. App. 488, 490, 458 N.W.2d 671, 672-73 (1990) (“[C]laims against attorneys brought on the basis of inadequate representation sound in tort and are governed by the malpractice statute of limitations, even though a plaintiff may assert that the attorney’s actions breached a contract.”).

did both. The estate appears to read into the contract some language specifically requiring Cummings to monitor Misty's spending, check her reporting, and more. We find no such language in the contract and therefore cannot find that Cummings breached the agreement in any way. Instead, as caselaw suggests, Mitchell's breach of contract claim is rooted in what she believes is Cummings' failure to prevent Misty from misusing the guardianship funds, which sounds in negligence. Therefore, the two-year statute of limitations for torts, not contracts, applies to this claim and Mitchell is barred from bringing it.

CONCLUSION

Ultimately, the trial court was correct in granting summary judgment in favor of Cummings on all claims. We find that the statute of limitations on all claims began to run—at the latest—on January 24, 2018, although the clock likely started as early as 2016. Accordingly, Mitchell was barred from bringing her claims against Cummings, and Cummings was entitled to judgment as a matter of law.

AFFIRMED.

HUBER, P.J., and HIXON, J., concur.

February 15, 2024