
**THE SUPREME JUDICIAL COURT
OF
THE STATE OF MAINE
SITTING AS
THE LAW COURT**

Law Court Docket No. CUM-26-122

**ERIC CLARK,
Plaintiff-Appellant**

v.

**BARRY J. BROWN et al.,
Defendants-Appellees**

On Appeal from the Cumberland County Superior Court

BRIEF OF APPELLANT

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Introduction

In this appeal, Appellant Eric Clark argues that the Superior Court erred when it dismissed all of Plaintiffs' claims against Defendants-Appellees Barry J. Brown, Bonnie Faherty, TD Wealth Management Services Inc., and LPL Financial, LLC (the "Financial Defendants"). In its Order on Defendants' Motions to Dismiss (*O'Neil, J.*), the court ignored vast swathes of allegations from the Complaint that should have been taken as true and concluded that Plaintiffs made "no viable claim that [the Financial Defendants] had a fiduciary duty to manage the Shea Trust or its assets" and that Plaintiffs failed to allege particular elements from *Nevin v. Union Trust Co.*, 1999 ME 47, 726 A.2d 694 required to allege the existence of a fiduciary duty. (App. at 4-5.) The court further concluded that Plaintiffs' case was time-barred without addressing Plaintiffs' arguments regarding that issue. (App. at 5.)

Similarly, the court ignored allegations in the Complaint that should have been taken as true when it concluded that Plaintiffs did "not properly allege that Defendant Brown's relationship with Patricia Shea during the 2006 stock redemption was for their benefit" and that, therefore, Plaintiffs lacked standing. (App. at 7.) The court then failed to address any of Plaintiffs' arguments when it concluded that the six-year statute of limitations was applicable to Defendant Brown's obvious professional negligence. (App. at 7.)

The decision of the court on Defendants’ Motions to Dismiss were wrong, and Plaintiffs’ claims should have survived.

Statement of the Case

The Shea Family Living Trust and the intended gift.

In 2002 and 2003, Defendant attorney Barry J. Brown provided estate-planning advice to Patricia C. Shea and her husband, William “Jerry” Shea, and drafted their wills and the Shea Family Living Trust (the “Trust”), a revocable living trust. (App. at 42-43; Compl. ¶¶ 16–23.) Defendant Brown held himself out as competent in estate planning, “including simple and complex wills and trusts, and related matters.” (App. at 40; Compl. ¶ 4.)

Plaintiffs Eric Clark and James Clark are Patricia Shea’s nephews and are among the named beneficiaries of the Trust, collectively known as the “Connary Heirs.” (App. at 40, 42; Compl. ¶¶ 2–3, 14, 20.)

The Trust segregated Patricia Shea’s separately inherited property (consisting of shares of General Electric stock and Siwooganock Bank stock, which the family called “Uncle Pete’s money”), and provided that, upon the death of the survivor of Patricia Shea and Jerry Shea, the stocks would be distributed to Patricia Shea’s nieces and nephews, the Connary Heirs. (App. at 41-44; Compl. ¶¶ 12–20, 25, 35; *Connary v. Shea*, 2021 ME 44, ¶ 4, 259 A.3d 118.) Patricia Shea repeatedly told her

nieces and nephews, including Plaintiff Eric Clark as recently as August 2018, that she intended them to receive Uncle Pete's money. (App. at 43; Compl. ¶ 25.)

Defendant Brown's continuing representation of the Trust, Defendant Faherty's actions, and the 2006 stock redemption.

Defendant Brown served as attorney for the Trust from 2003 until Patricia Shea's death in 2018 and continued to represent the Successor Trustee after her death. (App. at 43; Compl. ¶¶ 22–24.) Defendant Faherty was Patricia Shea's investment advisor in 2006 and earlier, and she continued in that role until Patricia Shea's death; Defendant Faherty was employed by Bancnorth Investment Group, Inc. (now TD Wealth Management Services Inc.) in 2006, and by Pinetree Financial Advisors and LPL Financial, LLC from 2010. (App. at 45; Compl. ¶¶ 39–42.)

Jerry Shea died in August 2006. (App. at 43; Compl. ¶ 27.) Later that year, Siwooganock Bank recalled its stock in preparation for the sale of the bank, and Patricia Shea was forced to redeem her shares involuntarily, receiving a cash payment of \$460,281.25 in October 2006. (App. at 44-45; Compl. ¶¶ 30-31, 43.) On Defendant Faherty's advice, Patricia Shea reinvested the cash proceeds in managed mutual-fund accounts. (App. at 45, 52-53; Compl. ¶¶ 45, 95-98.) Defendant Faherty knew the Trust existed and that the bank stock was a Trust asset, but she never advised Patricia Shea to replace the stock with a like-kind investment to preserve the gift, nor did she advise that the Trust might need to be amended to account for the

change in the asset. (App. at 45, 52-53, ; Compl. ¶¶ 45-46, 91-93, 95–98.) Defendant Brown likewise never advised Patricia Shea, after the 2006 redemption, that the Trust should be amended or modified to address the change. (App. at 49-50; Compl. ¶¶ 78-79.)

Patricia Shea’s death and subsequent litigation.

Patricia Shea died on November 29, 2018. (App. at 41, 44; Compl. ¶¶ 11, 32.) The Successor Trustee, Richard Shea, claimed to the beneficiaries that the bank stock had been sold in 2006 and therefore was no longer in the Trust. (App. at 44; Compl. ¶ 34.) The Connary Heirs sued the Trustee and the Shea beneficiaries to construe and reform the Trust. *See Connary v. Shea*, No. PORSC-CV-2019-39. This Court affirmed that the bank-stock gift was a specific devise that “adeemed in 2006 following its recall and redemption by the Bank,” *Connary v. Shea*, 2021 ME 44, ¶¶ 9 and 25, 259 A.3d 118 (“*Connary I*”), and later affirmed the denial of reformation, *Connary v. Shea*, 2024 ME 57, ¶¶ 22–23, 320 A.3d 429 (“*Connary II*”).

Before bringing this action, the Plaintiffs demanded that Richard Shea, as Trustee and Personal Representative of Patricia Shea’s estate, pursue the claims alleged here against Defendant Brown and the Financial Defendants, but he refused. (App. at 46; Compl. ¶ 51.)

This action and this appeal.

Plaintiffs filed this action on August 28, 2024 and filed the First Amended Complaint on January 17, 2025. The Complaint pleads three counts: Count I, Attorney Malpractice against Defendant Brown and Brown and Kelly, LLC; Count II, Breach of Fiduciary Duty against Defendant Brown and Brown and Kelly, LLC; and Count III, Negligence by an Investment Advisor against Defendants Faherty, TD Wealth Management Services Inc., LPL Financial, LLC, and Pinetree Financial Advisors (collectively, the “Financial Defendants”). (App. at 46-54; Compl. ¶¶ 52–102.)

Defendant Brown moved to dismiss Counts I and II, and the Financial Defendants moved to dismiss Count III. In its Order on Defendants’ Motions to Dismiss (the “Order”) docketed on December 15, 2025, the Superior Court (O’Neil, J.) granted both motions. As to Count III, the Court held the claim was barred by the six-year statute of limitations, 14 M.R.S. § 752, reasoning that the claim arose from the 2006 stock transfer and that the discovery rule did not apply because the Clarks did not allege the Financial Defendants owed a fiduciary duty to manage the Trust. (Order at 4–6.) As to Counts I and II, the Court held that the Clarks lacked standing to sue Defendant Brown as beneficiaries and, alternatively, that the claims were time-barred under 14 M.R.S. §§ 752 and 753-B because Defendant Brown’s alleged

acts and omissions occurred in 2003 and 2006. (Order at 6–8.) Appellant Clark alone timely filed this appeal.

Questions Presented

1. Whether the Superior Court The Superior Court erred in dismissing Count III because Plaintiffs’ claims were not time-barred where Plaintiffs sustained no judicially cognizable injury until the Settlor’s death in 2018..

2. Whether The Superior Court erred in dismissing Counts I and II against Defendant Brown for lack of standing and being time-barred because the Complaint clearly established that Defendant Brown owed Plaintiffs a duty of care, and their Complaint was timely filed.

Standard of Review & Issue Preservation

The standards of review is de novo, and the issues raised have been preserved. “We review the grant of a motion to dismiss de novo[.]” *Gorham v. Androscoggin Cty.*, 2011 ME 63, ¶ 9, 21 A.3d 115. “A court deciding a motion to dismiss does not adjudicate facts but must evaluate the complaint’s allegations.” 20 *Thames St. LLC v. Ocean State Job Lot of Me. 2017 LLC*, 2021 ME 33, ¶ 14, 252 A.3d 516 (cleaned up). “Consequently, when we review a judgment granting a motion to dismiss, we consider the facts stated in the complaint as if they were admitted and examine the complaint in the light most favorable to the plaintiff to determine whether it sets forth elements of a cause of action or alleges facts that

would entitle the plaintiff to relief pursuant to some legal theory.” *Id.* “Although the general preference is for cases to be resolved on the merits, a motion to dismiss should be granted when it appears beyond a doubt that the plaintiff is not entitled to relief under any set of facts that he might prove in support of his claim.” *Id.*

Each issue raised in this appeal has been preserved. “An issue is raised and preserved if there was a sufficient basis in the record to alert the court and any opposing party to the existence of that issue.” *Verizon New Eng. v. PUC*, 2005 ME 16, ¶ 15, 866 A.2d 844. The record demonstrates that Appellant raised each of the issues presented in this appeal in Plaintiffs’ Objections to Defendants’ Motions to Dismiss.

First Question Presented

The Superior Court erred in dismissing Count III because Plaintiffs’ claims were not time-barred where Plaintiffs sustained no judicially cognizable injury until the Settlor’s death in 2018. The court did not address Plaintiffs’ argument that the statute of limitations did not begin to run on Defendant Faherty’s continuing tort of professional negligence until Patricia Shea’s death in 2018, but it is clear from the Complaint, the allegations of which the court was required to take as true, that Defendant Faherty failed to competently advise the Trust on the reinvestment of proceeds from the involuntary recall of the Siwooganock bank stock from 2006 until Patricia Shea’s death in 2018. Because Plaintiffs had no judicially

cognizable interest prior to Patricia Shea’s death, the limitations period did not begin to run until that time, and their Complaint was filed timely.

Maine’s general limitations statute provides that “all civil actions shall be commenced within 6 years after the cause of action accrues and not afterwards . . . and except as otherwise specially provided.” 14 M.R.S. § 752. “[T]he accrual of a cause of action occurs at the time a judicially cognizable injury is sustained.” *Dugan v. Martel*, 588 A.2d 744, 746 (Me. 1991). Plaintiffs’ claims accrued only at “the point at which a wrongful act produce[d] an injury for which [they were] entitled to seek judicial vindication.” *Dugan*, 588 A.2d at 746.

The court overlooked the fact that the Shea Family Living Trust was revocable and remained so until the death of Patricia Shea in 2018. (App. at 23, 58, 64.) Under the Maine Uniform Trust Code, “[t]o the extent a trust is revocable, rights of the beneficiaries are subject to the control of, and the duties of the trustee are owed exclusively to, the settlor.” 18-B M.R.S. § 603(1). Thus, while Patricia Shea was alive, Plaintiffs had no enforceable interest and could sustain no judicially cognizable injury.

Faherty’s role as manager of the Trust assets and her negligent conduct was continual from before 2006, when she failed to competently advise Patricia Shea as Settlor and Trustee of the Trust on the proper reinvestment of the proceeds of the bank stock and continued, until 2018, when Plaintiffs’ injury finally accrued because

Patricia Shea died on November 29, 2018, and Plaintiffs’ revocable expectancy ripened into a fixed (and, as it turned out, defeated) right. (Compl. ¶¶ 11, 32, 40, 94–95.) At that point, Plaintiffs’ claims against the Financial Defendants accrued and the limitations period began to run. At any point prior to Patricia Shea’s death, Defendant Faherty could have advised her Settlor/Trustee client to amend the Trust or to reinvest the proceeds of the forced sale so as to preserve the gift to Plaintiffs.

The Complaint was filed on August 28, 2024, five years and nine months after Plaintiffs’ claims accrued and comfortably within the six-year limitations period set forth in § 752. Count III is timely on the face of the Complaint, and the Court did not need to assess the applicability of the discovery rule at all.

The court’s decision confused the time of the bank stock recall and Defendant Faherty’s initial failure to advise her client competently with the accrual of Plaintiffs’ claim. The court based its decision entirely on the discovery rule, ignoring Plaintiffs’ argument that their claims did not accrue until Patricia Shea’s death in 2018. No claim can accrue before the plaintiff has sustained a judicially cognizable injury, and, as set forth above, Plaintiffs had none until 2018. The court’s analysis would start the limitations clock years before Plaintiffs had a right that the law could protect. This Court should reverse that decision.

Second Question Presented

The Superior Court erred in dismissing Counts I and II against Defendant Brown for lack of standing and being time-barred because the Complaint clearly established that Defendant Brown owed Plaintiffs a duty of care, and their Complaint was timely filed.

A. Duty of care. While an attorney generally owes a duty of care only to his or her client, this Court has held that “in limited and rare situations, when an attorney’s actions are intended to benefit a third party and where policy considerations support it, [the Court] may recognize a duty of care by that attorney to a limited class of nonclients.” *Estate of Cabatit v. Canders*, 2014 ME 133, ¶ 21, 105 A.3d 439. To determine whether such a duty exists, the Court adopted a multifactor third-party-beneficiary test from *Trask v. Butler*, 123 Wash. 2d 835, 872 P.2d 1080 (1994), which balances: (1) the extent to which the transaction was intended to benefit the plaintiff; (2) the foreseeability of harm to the plaintiff; (3) the degree of certainty that the plaintiff suffered injury; (4) the closeness of the connection between the defendant’s conduct and the injury; (5) the policy of preventing future harm; and (6) the extent to which finding liability would unduly burden the legal profession. *Estate of Cabatit v. Canders*, 2014 ME 133, ¶ 18, 105 A.3d 439.

Estate planning is the paradigmatic setting in which a client’s “sole purpose in retaining the attorney is to benefit the nonclient directly,” and it is clear from the Complaint that the portions of Patricia Shea’s Trust that Defendant Brown negligently drafted and his failure to advise Patricia Shea of the effect of the bank stock recall were both transactions intended to benefit Plaintiffs. *Id.* ¶ 17. As pleaded in the Complaint, the object of Defendant Brown’s trust drafting work was to ensure that Patricia’s stocks would pass to her specifically-named family members.

The Complaint further makes clear that the harm to Plaintiffs from Defendant Brown’s negligent drafting was plainly foreseeable. Indeed, any competent lawyer could have foreseen that a specific gift mistakenly created in the place of a general or demonstrative gift would be likely to result in injury to beneficiaries, especially where the lawyer did not even advise their client on the meaning and effect of the two types of gifts. Plaintiffs suffered a concrete, ascertainable loss of the inheritance they did not receive when the stock gift adeemed against Patricia Shea’s express wishes. The allegations in the Complaint tie that loss closely and directly to Brown’s drafting of the gift as a specific devise susceptible of ademption, contrary to Patricia Shea’s intent. As for policy, recognizing a duty here does not unduly burden the legal profession because it imposes only a basic level of estate-planning competence and serves the admirable aim of preventing negligent estate planning from defeating the wishes of clients seeking to benefit their chosen beneficiaries.

The Complaint clearly sets forth facts that make out a *prima facie* case meeting the *Cabatit* factors and capable of surviving a motion to dismiss. Whether Plaintiffs can ultimately prove those factors, and how they may be balanced and resolved by the factfinder on a more developed record, are questions the Plaintiffs' should be allowed to answer.

B. Statute of Limitations. Maine law provides that, for legal-malpractice claims, “the statute of limitations starts to run from the date of the act or omission giving rise to the injury, not from the discovery of the malpractice.” 14 M.R.S. § 753-B(1). Plaintiffs do not ask this Court to graft a general discovery rule onto § 753-B because this Court declined to do so in *Packgen, Inc. v. Bernstein, Shur, Sawyer & Nelson, P.A.*, 2019 ME 90, ¶¶ 27–33, 209 A.3d 116. Plaintiffs instead argue that Defendant Brown engaged in a continual representation of Patricia Shea as Trustee and Settlor of the Trust until her death in 2018. His negligence continued through that date, which is also, for the same reasons argued above, the date on which Plaintiffs' claims accrued.

Packgen is materially different. There, the negligent act was a discrete, completed transaction that injured the client at the time. Here, the Trust was revocable, and Defendant Brown's representation of the Trust continued until Patricia's death. Until Patricia died, the alleged drafting defect and the failure to amend remained fully correctable. All Defendant Brown needed to do was to advise

his client on reinvestment of the proceeds or amendment of the Trust. The “omission giving rise to the injury” was not complete and the injury to Plaintiffs did not arise until Patricia Shea’s death on November 29, 2018, when the Trust could no longer be amended or revoked. Plaintiffs’ claims were filed within six years of Patricia Shea’s death and are timely.

Additionally, Section 753-B(3) provides that “[i]n an action alleging professional negligence in the drafting of a last will and testament that has been offered for probate, the statute of limitations starts to run on the date the negligence is discovered.” 14 M.R.S. § 753-B(3). That discovery exception should govern here because this case deals with an estate-planning instrument, namely pour-over will and revocable living trust that were the centerpiece of a complete estate plan. The will, in essence, did nothing, and the Trust performed the function of Patricia Shea’s will, directing the disposition of all of Patricia’s property at her death. The Maine Uniform Trust Code confirms the equivalence that Plaintiffs urge here, providing that “[t]he rules of construction that apply in this State to the interpretation of and disposition of property by will also apply as appropriate to the interpretation of the terms of a trust and the disposition of the trust property.” 18-B M.R.S. § 112. Treating a will-substitute trust differently from the will it replaces, for limitations purposes, elevates form over substance and defeats the express legislative policy of treating the two alike as set forth in § 112.

Plaintiffs recognize that *Nevin* declined to extend the will-drafting exception in § 753-B(3) to other estate-planning documents, *Nevin*, 1999 ME 47, ¶ 35, 726 A.2d 694. But *Nevin* was decided before the enactment of the Maine Uniform Trust Code and its instruction in § 112 that trusts be construed in the same manner as wills, and it did not involve a revocable living trust paired with a pour-over will that was, in substance, the sole testamentary instrument. Plaintiffs therefore urge the Court to hold that, under these circumstances, the discovery exception of § 753-B(3) applies to trusts; and that, pursuant to that statute, Plaintiffs' claims, brought within six years of their December 2018 discovery that the gift had failed, are timely.

Conclusion

For the foregoing reasons, Appellant Eric R. Clark respectfully requests that this Court vacate the Superior Court's Order dismissing Counts I, II, and III of the Complaint and remand this matter to the Superior Court for further proceedings.

Respectfully Submitted,

Dated: June 12, 2026

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CERTIFICATE OF SERVICE

I, Jeremy W. Dean, attorney for the Appellant, certify that on this date I have served two paper copies of the foregoing document by first class mail and an electronic copy of the same by email on Appellees' attorneys and on the unrepresented parties by regular mail.

Dated: June 12, 2026

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