

**STATE OF MAINE
SUPREME JUDICIAL COURT
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 APPELLEE BARRY J. BROWN

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INTRODUCTION

This is the third appeal involving the Shea Family Living Trust (hereinafter referred to as “Trust”), a revocable trust, funded in part by stock in a private New Hampshire-based bank named Siwoogenock Bank (hereinafter referred to as “Bank”) as well as General Electric stock. The first appeal is *Connary v. Shea*, 259 A.3d 118 (Me. 2021) (hereinafter “*Connary I*”). The second appeal is *Connary v. Shea*, 320 A.3d 429 (Me. 2024) (hereinafter “*Connary II*”). Facts from each Appeal are included in this Introduction.

In 2003 Patricia and William Shea established the Trust partially funded with the Bank stock. The Trust’s distribution plan provided that upon the death of Patricia and William and after payment of legally enforceable debts of the survivor, all the bank stock in the Trust was to be distributed to Patricia’s nieces and nephews (collectively “Connary heirs”), of whom Appellant is one.

In 2006 William died and later in that year the Bank stock was recalled and redeemed. A payment of approximately \$460,000 passed to Patricia as the surviving Trustee from the Bank for the redemption of the Bank’s stock previously held in Trust. Thereafter, the funds received by Patricia as Trustee from the

redemption of the Bank stock were commingled with other funds held in Trust and disbursed in her lifetime pursuant to the terms of the Trust. Patricia died in 2018. At the time of her death the only stock held in Trust was the General Electric stock, which was sold by the succeeding Trustee and the proceeds disbursed evenly to Connary heirs.

In 2019 the Connary heirs commenced a civil action in the Cumberland County Superior seeking in part a declaratory judgment that either: (A) the Trust clearly and unambiguously provides that the Connary heirs are entitled to the “proceeds from the involuntary sale of” the Bank stock, or, if the Trust language is ambiguous, declare “Patricia intended to gift the proceeds from the redemption of the Bank stock” to the Connary heirs; or, (B) reform the Trust to “conform to Patricia’s intentions that the proceeds are to be distributed in equal shares to the Connary heirs.”

The Superior Court determined that the provision in the Trust gifting the Bank stock to the Connary heirs was a specific devise and had adeemed; and, “denied and dismissed” the Connary heirs’ reformation claim. The Connary heirs appealed the determination

that the Trust language created a special devise and adeemed; and, appealed the dismissal of the reformation claim.

In *Connary I* the Maine Supreme Court sitting as the Law Court upheld the trial court's determination that the gifting of the Bank stock was a specific devise and had adeemed. Also, the Law Court granted the appeal of the dismissal of the reformation claim; and, remanded the case for further proceedings concerning reformation.

Upon remand the Superior Court "granted Shea's motion for summary judgment on the ground that the Connary heirs had not marshalled any admissible evidence generating a genuine dispute of fact as to the elements of the reformation claim." The Connary heirs appealed; and, in *Connary II* the Law Court held on alternative grounds from those of the lower court, that because the Connary heirs "proffered evidence, even if admissible, [that] does not raise a fact issue concerning Patricia's *and* William's intent in 2003." (emphasis added).

After the *Connary II* decision, Appellant, one of the Connary heirs, commenced the present action against Appellee Barry Brown, Esquire, who prepared the living trust for Patricia and William; and,

against those who had actually commingled the funds with other Trust investment funds received when the Bank stock was redeemed in 2006.

The Superior Court dismissed the two counts against attorney Barry Brown on two separate and independent grounds, either of which requires denial of Appellant's Appeal: (i) the claims are barred by the statute of limitations; and, (ii) Appellant lacks standing to assert them. The Appellant's brief asks this Court to set both Superior Court's decisions aside by adopting two propositions Maine law does not support: 1) that a legal malpractice claim does not accrue until a revocable trust becomes irrevocable at the settlor's death; and, 2) that the narrow discovery exception for negligently drafted probated wills should be extended to trusts by judicial construction. This Law Court already has rejected the first proposition in substance, and has declined the invitation underlying the second.

The dispositive facts are not in dispute and are fixed in time. Barry Brown drafted the Shea Family Living Trust in 2003. Mr. Shea died in 2006. The event that the Appellant says defeated the intended gift, the recall and redemption of the Bank stock also

occurred in 2006 after Mr. Shea's death. Indeed, in the related litigation that the Appellant's brief relies upon in this Appeal, this Court held that the specific devise of the Bank stock "adeemed in 2006 following its recall and redemption by the Bank." Plaintiffs did not sue Brown until August 2024 roughly eighteen years after the latest act or omission, and well outside the six-year limitations period. The Superior Court judgment should be affirmed.

STATEMENT OF FACTS AND PROCEDURE SPECIFIC TO THIS APPEAL

In 2002 and 2003, Brown provided estate-planning services to Patricia Shea and her husband, William "Jerry" Shea, and drafted the Shea Family Living Trust, a revocable living trust. (A. 26 (Compl. ¶¶ 16-18)). Plaintiffs Eric Clark and James Clark are among Patricia Shea's nieces and nephews, the "Connary heirs" who were named to receive certain stock under the Trust. (A. 23, 25 (Compl. ¶¶ 2-3, 14, 19)).

Jerry Shea died in August 2006. (A. 26 (Compl. ¶ 26)). That same year, the Bank recalled and redeemed its stock, and the Trust received approximately \$460,000 in cash. (A. 26-27 (Compl. ¶¶ 29-30, 42)); *Connary v. Shea*, 2021 ME 44, ¶ 5, 259 A.3d 118. The appellant alleges that Brown was negligent in drafting the gift

language in the Trust; and, after the 2006 redemption, to advise Patricia Shea to amend the Trust. (A. 30-33 (Compl. ¶¶ 56–79)).

Patricia Shea died on November 29, 2018. (A. 24 (Compl. ¶¶ 11)). As described in the Introduction, in subsequent litigation between the Connary Heirs and the Shea family, 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, 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*”).

Plaintiff Eric Clark and his brother filed this action on August 28, 2024. (A. 5).¹ Brown moved to dismiss the two counts against him for attorney malpractice (Count I) and breach of fiduciary duty (Count II) on grounds of standing and the statute of limitations. The Superior Court (O’Neil, J.) granted the motion on both grounds. (A. 18-21 (Order at 6–8)).

¹ Eric Clark’s brother withdrew as a party prior to the filing of the appeal.

STATEMENT OF THE ISSUES

1. Whether the Superior Court correctly dismissed Counts I and II as barred by the statute of limitations, where the acts and omissions alleged against Brown occurred no later than 2006 and suit was not filed until 2024, and where 14 M.R.S. § 753-B(1) fixes accrual at “the date of the act or omission giving rise to the injury, not from the discovery.”

2. Whether the Superior Court correctly dismissed Counts I and II for lack of standing, where Plaintiffs are trust beneficiaries who did not retain Brown and the complaint pleads no facts satisfying the threshold requirement of the third-party-beneficiary test recognized in *Estate of Cabatit v. Canders*.

SUMMARY OF ARGUMENT

The trial court dismissal rests on two independent grounds, and this Court may deny the Appeal on either one.

Statute of Limitation: Under 14 M.R.S. § 753-B(1), a legal malpractice claim accrues “from the date of the act or omission giving rise to the injury, not from the discovery.” The acts and omissions alleged against Brown, drafting the Trust (2003) and failing to advise on the 2006 redemption, were complete in 2006 at the latest. This Court held in *Packgen, Inc. v. Bernstein, Shur, Sawyer & Nelson, P.A.*, 2019 ME 90, 209 A.3d 116, that § 753-B accrual is keyed to the attorney’s singular act or omission and not to the attorney’s ongoing failure to correct that act or omission, and

on that basis rejected the very continuing-representation and continuing-negligence theories the Appellant asserts here. The Appellant's revocable-trust accrual theory also is foreclosed by his own authority: *Connary* I holds that the injury-defeating ademption occurred in 2006. The will-drafting discovery exception in § 753B(3) is limited by its terms to "a last will and testament that has been offered for probate," and this Court in *Nevin v. Union Tr. Co.*, 1999 ME 47, 726 A.2d 694, refused to extend the predecessor exception to estate-planning documents generally. Section 112 of Title 18-B is a rule of construction, not a limitations provision, and does not rewrite § 753-B(3).

Standing: Trust beneficiaries who did not retain the attorney generally lack standing to sue the settlor's lawyer. *Nevin*, 1999 ME 47, ¶ 41, 726 A.2d 694. The narrow third-party-beneficiary exception requires, as a threshold matter, that the plaintiff be foreseeable beneficiaries of the very transaction at issue. The underlying Complaint for this Appeal pleads only the conclusion that Plaintiffs were foreseeable beneficiaries and no facts supporting the Cabatit factors. The Superior Court correctly so held.

STANDARD OF REVIEW

This Court reviews the grant of a motion to dismiss de novo, viewing the material allegations of the complaint as admitted and in the light most favorable to the plaintiff, to determine whether the complaint states a claim entitling the plaintiff to relief on some legal theory. *20 Thames St. LLC v. Ocean State Job Lot of Me. 2017 LLC*, 2021 ME 33, ¶ 14, 252 A.3d 516. Dismissal is proper where it appears beyond doubt that the plaintiff is entitled to no relief under any set of facts that might be proven in support of the claim.

Dragomir v. Spring Harbor Hosp., 2009 ME 51, ¶ 15, 970 A.2d 310.

Although the material allegations of a complaint are regarded as admitted on a motion to dismiss, the court is not bound to accept the complaint's legal conclusions. *Seacoast Hangar Condo II Ass'n v. Martel*, 2001 ME 112, ¶ 16, 775 A.2d 1166 (quoting *Bowen v. Eastman*, 645 A.2d 5, 6 (Me. 1994)). Allegations that, "even if factually true, are conclusory and legally deficient" because the pleader "does not provide enough facts to support each element of the cause of action," do not defeat dismissal. *Carey v. Bd. of Overseers of the Bar*, 2018 ME 119, ¶ 23, 192 A.3d 589.

ARGUMENT

I. The Claims Against Brown Are Barred By The Statute Of Limitations, An Independent And Sufficient Ground For Affirming The Order Of The Superior Court.

The Superior Court held that, even assuming Brown owed Plaintiffs a duty, the malpractice and breach-of-fiduciary-duty claims are time-barred. (A. 20 (Order at 7)). That holding is correct and, by itself, requires denial of this Appeal.

A. Section 753-B(1) fixes accrual for an action for malpractice at the date of the act or omission, which was 2006 at the latest.

Civil actions in Maine must be commenced within six years after the cause of action accrues. 14 M.R.S. § 752. For claims against attorneys, the Legislature has specified when accrual occurs:

“In actions alleging professional negligence, malpractice or breach of contract for legal service by a licensed attorney, 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, negligence or breach of contract”

14 M.R.S. § 753-B(1). The statute thus codifies an occurrence rule, not a discovery rule, subject only to the enumerated exceptions in subsections (2) and (3). *Id.* The acts and omissions alleged against Brown all occurred no later than 2006. Brown drafted the Trust in

2003. (A. 25 (Compl. ¶¶ 16–18)). The only post-drafting malpractice conduct alleged is that Brown did not amend the successor trustee in 2006 as allegedly requested by Patricia Shea after Mr. Shea’s death but before the redemption of the bank stock. (A. 26 (Comp. ¶¶ 27-28)). There is no allegation that Brown knew about the bank stock redemption at any time. (A. 30-33 (Compl. ¶¶ 56-78)). Both the drafting and the alleged failure to amend were complete by 2006 at the latest. The Superior Court so found, concluding that “[a]t the latest, these events started to run the statute of limitations in 2006.” (A. 20 (Order at 7)).

That conclusion is confirmed by this Court’s decision in the related litigation. In *Connary I*, this Court held that the specific devise of the bank stock “adeemed in 2006 following its recall and redemption by the Bank.” *Connary v. Shea*, 2021 ME 44, ¶ 9, 259 A.3d 118; see *id.* ¶ 25 (the Bank stock “had adeemed”). The event that defeated the intended gift and therefore caused the injury the appellant complains he suffered occurred in 2006. Suit was not filed until August 2024, roughly eighteen years later. The claims are time-barred.

B. *Packgen* forecloses the appellant’s continuing representation and continuing-negligence theory.

The appellant seeks to defer accrual of the cause of action against Brown to Patricia Shea's death in 2018 on the theory that Brown's representation, and his asserted negligence, "continued" until then. This Court rejected materially the same theory in *Packgen, Inc. v. Bernstein, Shur, Sawyer & Nelson, P.A.*, 2019 ME 90, 209 A.3d 116. There, the plaintiff argued that "the doctrines of continuing representation and continuing negligence operate to extend the limitations period." *Id.* The Court disagreed, holding that the Legislature "intended to limit the accrual of a cause of action for attorney negligence or malpractice to the 'act or omission giving rise to the injury'; that is, the attorney's singular act or omission that proximately caused the harm to the client . . . and not to the attorney's ongoing failure to correct that singular act or omission." *Id.* ¶ 36.

That reasoning controls here. Brown's alleged "singular act or omission", the drafting of the gift as a specific devise, and the failure to advise on the consequences of the 2006 redemption was complete in 2006. The appellant's contention that Brown's continued status as the Trust's attorney, or his continued failure to

revisit and correct the drafting, tolled accrual until 2018 is precisely the “ongoing failure to correct” theory *Packgen* rejected.

Nor has this Court ever adopted the continuing-representation doctrine. In *Nevin*, the Court considered the doctrine but expressly declined to decide whether it would ever apply, noting that “[e]ven if we might apply the continuing representation doctrine in the appropriate case,” the plaintiffs there had waived any such claim. *Nevin v. Union Tr. Co.*, 1999 ME 47, ¶37, 726 A.2d 694. The appellant thus asks this Court to recognize, for the first time, a tolling doctrine the Court has twice declined to embrace; and, to do so contradicting the *Packgen*’s holding that § 753-B fixes accrual at the singular act or omission. The Court should decline.

C. The will-drafting discovery exception in § 753-B(3) does not apply, and 18-B M.R.S. § 112 does not change that.

Recognizing that § 753-B(1) sets an occurrence rule, the appellant turns to the statute’s sole estate-planning exception, § 753-B(3), and asks the Court to extend it from wills to include trusts. That subsection provides: “In 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). By its

terms, the exception is confined to negligence in drafting “a last will and testament” that “has been offered for probate.” The instrument at issue here is a revocable living trust, not a will offered for probate. The exception does not apply on its face.

This Court already has refused the appellant’s precise request. In *Nevin*, the plaintiffs urged the Court to read the will-drafting exception in the predecessor statute, 14 M.R.S.A. § 753-A(B), to reach negligence “in drafting estate planning documents.” The Court declined, reasoning that “[h]ad the Legislature intended that the will drafting exception . . . apply to negligence in drafting estate planning documents . . . it could have said so,” and that the enumerated exceptions “implicitly den[y] the availability of any other.” *Nevin*, 1999 ME 47, ¶¶ 34–35, 726 A.2d 694. The Court also refused to “judicially construct a discovery rule for actions against estate planning lawyers,” because where “the Legislature has given explicit directions as to when a statute of limitations begins to run, we are not free to re-define the term by the creation of a discovery rule.” *Id.* ¶ 34 (quotation marks omitted). The same statute, now renumbered as § 753-B, carries forward the identical operative

language; and, *Packgen* confirms its continued force. The Appellant offers no reason this Court should now reverse course.

The Appellant's reliance on 18-B M.R.S. § 112 does not avoid *Nevin*. Section 112 provides 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." By its plain terms, § 112 is a rule of construction. It governs how the terms of a trust are interpreted. It is not a statute of limitations and says nothing about when a malpractice claim accrues or when the limitations clock begins to run. It does not, and cannot, amend the express terms of § 753-B(3), which the Legislature confined to wills offered for probate.

That § 112 is a construction rule, not a limitations provision, is confirmed by the appellant's own authority. In *Connary I*, this Court used § 112 for exactly what it is, a tool for interpreting the Trust's terms, invoking it to apply the will-construction rules governing specific devises and ademption to the Trust. *Connary v. Shea*, 2021 ME 44, ¶¶ 13–14, 19, 259 A.3d 118. Section 112 did not alter any limitations period there, and it does not do so here. To

the contrary, the canon that a specific statutory provision controls over a general one confirms that § 753-B(3)'s specific reference to a "last will and testament that has been offered for probate" governs, not § 112's general interpretive directive.

Finally, the appellant's own framing defeats the argument. He contends the will here "did nothing" and that the trust was the operative instrument. But § 753-B(3) keys its discovery exception to a will "offered for probate", not to a revocable trust. On the appellant's own account, the instrument he says was negligently drafted is one the exception does not reach. Because no exception applies, § 753-B(1)'s occurrence rule governs, the claims accrued in 2006, and they are time-barred.

II. Plaintiff Lacks Standing To Sue Brown, A Second Independent Ground to Affirm The Order Of The Superior Court.

The dismissal is independently supported by the Superior Court's standing ruling. (A. 19-20 (Order at 6–7)). The Court need not reach this ground if it affirms on limitations, but it provides a separate and sufficient basis to deny this Appeal.

A. The general rule denies trust beneficiaries standing to sue the settlor's attorney.

An attorney ordinarily owes a duty only to the client. In the estate context, this Court has held that “individual beneficiaries do not have standing to sue estate planning attorneys for malpractice when they are not the client who retained the attorney and when the estate is represented by a personal representative who stands in the shoes of the client.” *Nevin v. Union Tr. Co.*, 1999 ME 47, ¶ 41, 726 A.2d 694. The complaint here does not allege that Plaintiffs retained Brown for any purpose, and it alleges that the Trust has a trustee. (A. 29; Compl. ¶¶ 49–50.) Under *Nevin*, Plaintiffs, beneficiaries who were not Brown’s clients, lack standing to sue him.

B. The complaint fails the threshold requirement of the Cabatit third-party-beneficiary test.

This Court has recognized that “in limited and rare situations, when an attorney’s actions are intended to benefit a third party and where policy considerations support it,” a duty of care may be owed “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 the multifactor third-party-beneficiary test from *Trask v. Butler*, 123 Wash. 2d 835, 872 P.2d 1080 (1994), balancing: (1) the extent to which the transaction was intended to

benefit the plaintiff; (2) the foreseeability of harm; (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 the profession would be unduly burdened by a finding of liability. *Savell v. Duddy*, 2016 ME 139, ¶ 29, 147 A.3d 1179; *Cabatit*, 2014 ME 133, ¶¶ 16, 18, 105 A.3d 439.

The threshold inquiry under the *Cabatit* test is whether the plaintiff is an intended beneficiary of the very transaction at issue; if not, the inquiry ends. The Superior Court correctly found that the complaint “does not properly allege that Defendant Brown’s relationship with Patricia Shea during the 2006 stock redemption was for their benefit” and “do[es] not adequately plead any other factors” of the test. (A. 28 (Order at 7)). The complaint pleads only the conclusion that Plaintiffs were foreseeable beneficiaries. The complaint does not allege facts establishing foreseeability, certainty of injury, the closeness of the connection between Brown’s conduct and the asserted harm, or the policy factors. A bare legal conclusion restating the ultimate question does not satisfy the pleading standard, even under the deferential motion-to-dismiss test.

That conclusion holds even taking a complaint's well-pleaded facts as true, because the Court is "not bound to accept the complaint's legal conclusions." *Seacoast Hangar Condo. II Ass'n v. Martel*, 2001 ME 112, ¶ 16, 775 A.2d 1166; see *Carey v. Bd. of Overseers of the Bar*, 2018 ME 119, ¶ 23, 192 A.3d 589 (allegations that are "conclusory and legally deficient" for lack of facts supporting each element do not survive dismissal). The allegation that Plaintiffs were "intended beneficiaries" of Brown's representation states the very legal conclusion the *Cabatit* test exists to resolve; it is not a fact the Court must accept. Once that conclusion and the complaint's other conclusory assertions of duty, breach, and causation are set aside, the remaining pleaded facts describe only Brown's drafting of the Trust and the advice he did or did not give Patricia and William Shea his clients and do not establish that his representation was intended to benefit Plaintiffs. The standing dismissal should be affirmed.

The appellant's characterization of estate planning as the "paradigmatic" setting for the exception does not help him. *Cabatit* itself arose in the estate context and nonetheless affirmed that the attorney owed no duty to the beneficiary/successor personal

representative, because it was not one of the “limited and rare” cases in which a nonclient duty arises. *Cabatit*, 2014 ME 133, ¶¶ 21–23, 105 A.3d 439. The default in this setting is no duty to beneficiaries, and the complaint pleads no facts bringing this case within the narrow exception. The Superior Court’s Order of dismissal should be affirmed.

Appellant does not address the conclusion in *Connary II* that the legal analysis must consider both Patricia and William Shea in a claim for reformation of the Trust. Likewise, in considering malpractice by Attorney Brown concerning the drafting of the Trust, the Court must consider whether there are any allegations of legal malpractice by Attorney Brown harming both Patricia and William. The same legal conclusion in *Connary II* concerning reformation must also now deny this Appeal because there are no allegations whatsoever that Attorney Brown committed legal malpractice against Patricia and William Shea.

CONCLUSION

For the foregoing reasons, the judgment of the Superior Court dismissing Counts I and II against Barry Brown should be affirmed. Either ground, the statute of limitations or the absence of standing,

independently sustains the dismissal, and the court need not reach the Appellant's invitation to extend § 753-B(3) or to recognize a continuing-representation rule, because § 753-B(1)'s plain text and the 2006 redemption fixed by Appeal II bar the claims.

Dated: July 27, 2026

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Mark A. Kearns, attorney for Appellee Barry J. Brown, certify that on this date I caused one copy of the foregoing Brief of Appellee to be served upon counsel of record and any unrepresented parties in the manner required by the Maine Rules of Appellate Procedure.

Dated: July 27, 2026

/s/Mark A. Kearns

Mark A. Kearns, Esq.