
**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

REPLY BRIEF OF APPELLANT

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Table of Contents

Table of Contents	2
Table of Authorities	3
Argument	4
I. Reply to Brown Brief	4
II. Reply to Financial Defendants' Brief	13
Conclusion	18

Table of Authorities

Constitutions, Statutes, & Rules

14 M.R.S. § 752	8
14 M.R.S. § 753-B	4-9
18-B M.R.S. § 112	4
18-B M.R.S. § 603	15
18-B M.R.S. § 1012(2)	16

Cases

<i>Bouchard v. Frost</i> , 2004 ME 9, 840 A.2d 109	17
<i>Connary v. Shea</i> , 2021 ME 44, 259 A.3d 118	<i>passim</i>
<i>Connary v. Shea</i> , 2024 ME 57, 320 A.3d 429	<i>passim</i>
<i>Estate of Cabatit v. Canders</i> , 2014 ME 133, 105 A.3d 439	10-13
<i>Godsoe v. Godsoe</i> , 2010 ME 42, 995 A.2d 232	14
<i>Nevin v. Union Trust Co.</i> , 1999 ME 47, 726 A.2d 694	6-7, 9-10, 12
<i>Packgen, Inc. v. Bernstein, Shur, Sawyer & Nelson, P.A.</i> , 2019 ME 90, 209 A.3d 116	7-8
<i>Savell v. Duddy</i> , 2016 ME 139, 147 A.3d 1179	12
<i>Portland Co. v. City of Portland</i> , 2009 ME 98, 979 A.2d 1279	14
<i>Keatinge v. Biddle</i> , No. 99-321-P-H, 2000 U.S. Dist. LEXIS 8231 (D. Me. June 8, 2000)	9

Argument

I. Reply to Brown's Brief.

A. Brown negligently drafted Patricia Shea's will *and* trust, which supports application of § 753-B(3). Brown argues that Plaintiff-Appellant Clark asks this Court to “extend” the will-drafting exception contained in 18-B M.R.S. § 112 “from wills to include trusts.” (Brown Br. at 17.) But Plaintiffs have made this argument in the alternative because of the specific facts of this case. A new interpretation of § 112 is not necessarily needed because Plaintiffs' Complaint alleges professional negligence by Brown in the drafting of Patricia Shea's last will and testament. Brown has never disputed that he did indeed draft Aunt Pat's will and trust. And the Complaint competently alleges that Brown “drafted the will documents,” that Brown “also drafted the Shea Family Living Trust,” and that Patricia Shea and her husband “signed the Shea Family Trust on the same day as they signed their wills.” (App. at 42, First Amended Complaint (“F.A.C.”) ¶¶ 16-19.) Brown also notarized Aunt Pat's self-proving certificate. (App. at 56-57, F.A.C. Ex. 1.) Brown was negligent in drafting the will *and* the trust, and the two instruments work as one.

Aunt Pat signed one estate plan consisting of two instruments, and Brown drafted both. In the will, Patricia Shea gifted the residue of her estate to “the SHEA FAMILY LIVING TRUST DATED JULY 3, 2003,” and directed that, if “such

distribution of the residue of my estate is ineffective,” then the residue should pass to the trustees named in that document “to be held in a testamentary trust in accordance with the provisions of” that Trust. (App. at 56.) The Complaint pleads that the trust and the will acted as a single testamentary instrument, and Brown’s negligence infected the estate plan as a whole.

The Complaint clearly pleads Brown’s negligence in drafting the will and trust. For example, Brown “met with Patricia and Jerry Shea but failed to identify Patricia’s valuable personal property in the form of her inherited stock from Uncle Pete or to determine the grantors’ intent in the will or the trust.” (App. at 43, F.A.C. ¶ 21.) The Complaint pleads that the Plaintiffs and their ousines “are beneficiaries of the Will and Trust that Defendant Brown drafted,” that Brown’s work for Aunt Pat was intended to benefit them, and that his work was negligent. (App. at 47-48, F.A.C. ¶¶ 59-72; App. at 51, F.A.C. ¶ 83).¹ Taken as admitted, the allegations in the Complaint sufficiently plead negligence in the drafting of the will as well as the trust, which renders Plaintiffs’ complaint timely under 14 M.R.S. § 753-B(3) even if the Court were to deny the accrual argument presented in Appellant’s main brief. Finally, the will Brown drafted was probated in Cumberland County docket number 2018-1711, satisfying the portion of § 753-B(3) that requires that a will be probated

¹ Unfortunately, as can be seen on pp. 50 and 51 of the Appendix, the First Amended Complaint contains a drafting error such that paragraph numbers 82-84 appear twice.

in order for the limitations period to run from the date that negligence is discovered.

B. Brown misapplies *Nevin*. Brown relies heavily on *Nevin v. Union Trust Co.*, 1999 ME 47, 726 A.2d 694, but *Nevin* does not support Brown’s argument in the straightforward manner he wishes. Brown contends that this Court “already has refused the appellant’s precise request” in *Nevin*. (Brown Br. at 18.) But this is not the case.

Nevin concerns a law firm’s handling of corporate affairs which the plaintiffs attempt to paint as negligence in drafting a will:

Thus, we cannot, as the plaintiffs urge, construe the law firm’s alleged negligence in its ongoing management and advice concerning the affairs of the Corporation to be negligence in the drafting of Learned’s last will and testament. From all that appears, there was no negligence in the drafting of the will itself.

Nevin, 1999 ME 47, ¶ 33, 726 A.2d 694. This Court’s conclusions in *Nevin* have little or nothing to say regarding the case now before this Court because, as set forth above, Plaintiffs’ Complaint clearly and competently alleges Brown’s negligence in the drafting of Patricia Shea’s will. A reading of Brown’s deposition will remove any doubt regarding whether such negligence occurred. (App. at 81-183.) The type of negligence addressed by § 753-B(3) was absent in *Nevin* but is present here.

Brown also misapplies *Nevin* by omitting relevant sections of sentences. Brown quotes *Nevin* as follows: “[h]ad the Legislature intended that the will drafting exception . . . apply to negligence in drafting estate planning documents . . . it could have said so.” (Brown Br. 18.) That sounds like it is directly on point in this case.

But the *Nevin* Court actually wrote this:

Had the Legislature intended that the will drafting exception to the occurrence rule in section 753-A should apply to negligence in drafting estate planning documents *and* the management of entities created as part of an estate plan, it could have said so.

Nevin, 1999 ME 47, ¶ 35, 726 A.2d 694 (emphasis added). The import of this sentence is clearly that the limitations exception now appearing in § 753-B(3) was absolutely intended to apply to “estate planning documents” but *not* to the “management of entities.” Again, *Nevin* is distinguishable from this case on this basis because the Complaint in this case alleges attorney negligence in drafting estate planning documents where the complaint in *Nevin* did not.

Additionally, the *Nevin* Court never addressed continuing representation as Brown argues because the plaintiffs there “stipulated away any such claims,” and the Court confirmed that it “might apply the continuing representation doctrine in the appropriate case.” *Nevin*, 1999 ME 47, ¶ 37, 726 A.2d 694. More on continuing representation follows below.

C. Brown’s use of *Packgen* is ineffective. Brown argues that *Packgen* requires this Court date the accrual of Plaintiffs’ injuries to 2006 because that is how §753-B(1) was applied in that case. (Brown Br. at 15-17.) Setting aside the above arguments regarding § 753-B(3), *Packgen* still has limited usefulness in deciding this case and is far from controlling. There are two primary problems with Brown’s intended use of *Packgen*.

First, *Packgen* differs materially on the facts. The *Packgen* Court described the negligence in that case as “an isolated mistake severable from the remainder of Bernstein Shur’s representation of Packgen.” *Packgen*, 2019 ME 90, ¶ 33, 209 A.3d 116. The negligent act was a single defective notice of claim served on one day. *Id.* ¶ 36. The Complaint in this case alleges that Brown drafted both testamentary instruments, notarized them, served as counsel to the Trust until Patricia Shea’s death, and represented the successor trustee after her death. (App. at 43, F.A.C. ¶¶ 22-24.) The Complaint describes an in-fact ongoing representation where Brown engaged in repeated consultations with Patricia Shea and she made repeated requests of Brown regarding her estate planning documents. Even if it can be argued that Brown’s ongoing representation of Patricia Shea in her capacity as settlor and trustee is a single, severable act—that is a question of fact the Superior Court should not have resolved at the 12(b)(6) stage. The Complaint pleaded an ongoing representation, and that allegation must be taken as true.

Second, § 751-B(1) is limited by the phrase “except as provided in this section or as the statute of limitations may be suspended by other laws.” 14 M.R.S. § 753-B(1). Plaintiffs’ accrual argument is based on other law that clearly suspends the statute of limitations in §§ 752 and 753-B(1). The statute of limitations clearly cannot begin to run until a judicially cognizable injury has occurred, so whenever an attorney’s negligence does not immediately result in a judicially cognizable injury,

as is the case here, the action of § 753-B(1) is suspended by that much larger and more important jurisdictional rule. If the legislature had intended to snuff out claims of persons twelve or fifteen years before they could act on them in a court, then the legislature would have so indicated, but they did not.

D. Brown’s use of *Nevin* on standing fails. Brown argues that *Nevin* stands for the proposition that “[t]rust beneficiaries who did not retain the attorney generally lack standing to sue the settlor’s lawyer.” (Brown Br. at 12.) However, the Court’s ruling is narrower than Brown asserts:

Accordingly, we conclude 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, 1999 ME 47, ¶ 41, 726 A.2d 694 (emphasis added); *Keatinge v. Biddle*, No. 99-321-P-H, 2000 U.S. Dist. LEXIS 8231, at *5 n.2 (D. Me. June 8, 2000) (applying *Nevin*). Both conditions must be satisfied for a court to apply *Nevin* in this fashion. The reasoning of the *Nevin* court is that “[w]hen there is a personal representative to assert the financial claims on behalf of the estate,” it is better not to allow multiple beneficiaries to assert multiple claims asserting potentially conflicting interests against the attorney. *Nevin*, 1999 ME 47, ¶ 41, 726 A.2d 694.

Plaintiffs did not retain Brown, so the first of the two conditions in *Nevin* is satisfied, but, as for the second condition, there is no personal representative to assert Plaintiffs’ claims. First, Plaintiffs’ claims are not necessarily identical to the claims

of Patricia Shea. Plaintiffs allege they sustained independent injuries as third-party beneficiaries of Brown's work. Brown certainly committed malpractice against Patricia Shea, but the personal representative refused when asked to bring any claims, whether for the estate or for the beneficiaries. (App. at 46, F.A.C. ¶ 51 ("Prior to bringing this action, Plaintiffs demanded that the Trustee and Personal Representative of Patricia Shea's estate pursue the claims alleged herein, but he and his Counsel refused to protect Plaintiffs' and the other Connary Heirs' interests.").) In *Nevin* the personal representative brought the suit. Here, the personal representative refused to act. And, at present, the statute of limitations has indeed run, and the estate can never assert claims for Plaintiffs or the estate. There is nothing in *Nevin* that forecloses Plaintiffs' claims in the manner that Brown argues.

E. *Cabatit* does not apply as Brown argues it does. Brown cites *Cabatit* as authority on an issue that the *Cabatit* court expressly declined to decide. (Brown Br. at 21-24.) Joseph Cabatit "initially filed the complaint both as personal representative of the Estate and individually as a beneficiary" but did "not appeal the Superior Court's judgment as to his interest as a beneficiary," so the Court addressed "the appeal only as to his status as personal representative." *Estate of Cabatit v. Canders*, 2014 ME 133, ¶ 6 n.1, 105 A.3d 439. The *Cabatit* court repeats the point later: "Because he does not appeal that portion of the court's judgment entered against him individually, we need not evaluate Joseph's standing to sue as a

beneficiary.” *Id.* ¶ 12 n.4. Thus, *Cabatit* does not foreclose Plaintiffs’ claims simply because they are beneficiaries.

The *Cabatit* Court also stated what normally follows its adoption of the third-party beneficiary test: “In light of our adoption of the multifactor third-party beneficiary test, we would normally remand the case to the trial court. In this case, however, no remand is necessary because there are no disputed facts to be decided.” *Id.* ¶ 22. The *Cabatit* parties had stipulated facts on summary judgment. *Id.* No such stipulation of facts exists here. Many facts remain to be decided, even though the Complaint alleges all of the facts necessary to meet to the third-party beneficiary test in *Cabatit*. The Superior Court ignored almost all of the First Amended Complaint and its exhibits when it ruled otherwise, and Brown simply repeats that statement without really supporting it.

For example, Brown argues that the first *Cabatit* factor is a threshold Clark cannot satisfy, ending the inquiry. (Brown Br. at 21-24.) But the *Cabatit* court set a low bar. Only “some minimum benefit to the plaintiff” need have been intended before a court weighs the remaining five factors. *Cabatit*, 2014 ME 133, ¶ 19, 105 A.3d 439. Brown drafted instruments naming Plaintiffs to receive identified stock—their names are in the estate planning documents he drafted. Brown’s argument that the representation undertaken to create these estate planning documents was not intended to benefit the beneficiaries of them beggars belief. Plaintiffs also allege

Brown owed a duty “to the Connary Heirs.” (App. at 47, F.A.C. ¶ 55; App. at 51, F.A.C. ¶ 83.) Brown makes much of dismissing allegedly conclusory statements, but there is no heightened pleading standard required here. *Nevin* discusses factors required to prove a claim. It does not establish a heightened pleading requirement. At any rate, the Complaint sets forth all of the facts needed to satisfy the *Cabatit* factors at the pleading stage—Brown and the Superior Court just prefer not to read the Complaint and claim that it does not.

Additionally, whether a professional relationship exists “is a question of fact.” *Savell v. Duddy*, 2016 ME 139, ¶ 21, 147 A.3d 1179. Brown asks this Court to decide that factual question against Plaintiffs. The Complaint is to be taken as admitted and it clearly alleges a duty running from Brown to Plaintiffs. Brown further argues that an attorney never owes a duty to a nonclient where that duty would conflict with obligations to the client. *Cabatit*, 2014 ME 133, ¶ 21, 105 A.3d 439; *Savell*, 2016 ME 139, ¶ 30, 147 A.3d 1179. But nothing in the Complaint suggests such a conflict. Brown’s duty to draft with care served Patricia Shea and her beneficiaries. Both wanted the estate planning documents to provide for Patricia’s assets to go to her relatives, and not to the unrelated sons of her husband. Competent drafting by Brown would have achieved that aim.

Brown finally argues that “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.” (Brown Br. at 24.) *Connary II* affirmed a summary judgment denying reformation because Connary failed to produce admissible evidence raising “a fact issue concerning Patricia’s and William’s intent in 2003.” *Connary v. Shea*, 2024 ME 57, ¶ 22, 320 A.3d 429. Plaintiffs’ Complaint asserts claims based on a duty running to them as third-party beneficiaries of Brown’s legal work. Whether Brown also injured Patricia is a different question, as discussed above. Further, the *Cabatit* court never required a third-party beneficiary to prove the attorney’s negligence to his client before a duty could extend to a third-party beneficiary. *Cabatit*, 2014 ME 133, ¶¶ 19 & 21, 105 A.3d 439. And, of course, Plaintiffs did allege negligence affecting the Sheas. But Brown follows the Superior Court in ignoring 99.5% of the allegations in the Complaint and then making sweeping and incorrect generalizations about what is and is not alleged there.

II. Reply to the Financial Defendants’ Brief.

A. The Financial Defendants muddle the earlier cases involving Plaintiffs and their relationship to this case. The Financial Defendants insist that *Connary I* and *Connary II* have already determined that Plaintiffs “did not have a right to the proceeds arising from the Bank’s redemption of stock.” (Financial Br. at 24.) They take this conclusion to foreclose Plaintiffs’ claims here and made this same argument in their motion to dismiss.

But it is obvious that it was necessary for Plaintiffs to seek interpretation and reform of the Trust before professional negligence could be established. If the *Connary* matter had fixed the problem, Plaintiffs would have lacked standing to file the instant action because they would have no injury. If Plaintiffs had not sought relief in *Connary*, no doubt the Financial Defendants would have argued that their suit against Brown was premature because it is not at all clear that the stock gift is specific. Plaintiffs did not have a right to the proceeds of the stock sale because this Court determined that the stock gift was specific and had adeemed when Patricia Shea did not replace the recalled stock with other stock or otherwise amend the trust to address Brown's failure of drafting. All of that happened because Brown and the Financial Defendants were negligent. The *Connary* matter has no preclusive effect on this case no matter how much the Financial Defendants wish that were the case.

B. Collateral estoppel does not apply. Collateral estoppel “prevents the relitigation of factual issues already decided if the identical issue was determined by a prior final judgment.” *Godsoe v. Godsoe*, 2010 ME 42, ¶ 18, 995 A.2d 232 (cleaned up); *accord Portland Co. v. City of Portland*, 2009 ME 98, ¶ 22, 979 A.2d 1279. No prior judgment resolves any issue about Bonnie Faherty's or Brown's advice or negligence. The *Connary* cases involved different defendants and different issues. That suit did not even involve the same claims, and as explained above seeking interpretation and reform are logical prerequisites to the current claims. Collateral

estoppel applies only to an issue actually litigated and determined, and the courts have never decided any of the central issues raised by this litigation.

C. The Financial Defendants’ irrevocability arguments misrepresent the trust’s nature. The Financial Defendants argue that Article Three, § C of the Trust made Clark’s interest irrevocable. (Financial Br. at 17.) The Financial Defendants never address Article One, § J, under which the grantors reserved for life “the exclusive right to the use and benefit of the income and the assets of this trust,” leaving the beneficiaries “the assets then remaining” at the survivor’s death. (App. at 59-60.) the language in the trust stating it is irrevocable as to the gifts in Article Two means nothing in light of the fact that the survivor of the settlors could use all of the assets in the Trust for their own benefit. Moreover, there are no limitations on amendment set forth in Article Two. Thus, either survivor could amend the trust up to the point of total revocation. If the trust had indeed been truly irrevocable on the death of William Shea, then the Connary Heirs would have argued in the *Connary* matter that the stock gift could not adeem because Patricia Shea had no right to amend or revoke the gift by commingling the proceeds with other trust property. But the trust was not irrevocable—and the Financial Defendants make far too much of the poor drafting of Brown that creates some ambiguity. 18-B M.R.S. § 603(1), under which “rights of the beneficiaries are subject to the control of, and the duties of the trustee are owed exclusively to, the settlor” while a trust remains revocable.

Until Patricia Shea died, she could have revoked the Trust, spent every asset, or amended it to remove Plaintiffs as beneficiaries. Plaintiffs held an expectancy, not a right, and an expectancy the settlor may destroy at will never supports a cause of action. A limitations period cannot run before a claim accrues.

In *Connary I*, the Court fixed the determination of Plaintiffs' entitlement at the settlor's death. A specific devisee takes "as much of the devised securities as is a part of the estate at the time of the testator's death," and the Court held the stock adeemed "[b]ecause no shares of the Bank stock remained in the Trust at the time of Patricia's death." *Connary I*, 2021 ME 44, ¶ 25, 259 A.3d 118. Plaintiffs' claims only arose and failed when the gift and injury to them accrued at Patricia's death. Alleging an earlier date of irrevocability while ignoring most of the language in the trust does not change this fact as the Financial Defendants wish it would.

D. No alternative ground supports affirmance on this record, because each requires facts the Superior Court never considered and which Plaintiffs have pleaded. The Financial Defendants argue duty and causation as alternative grounds for affirmance, and both require proof of facts: whether Faherty knew of the Trust, whether she dealt with the trustee "in good faith" within the meaning of 18-B M.R.S. § 1012(2), and whether her advice caused the loss. All are factual matters to be proven. Plaintiffs' Complaint pleads facts in Plaintiffs' favor on each point, and those facts must be taken as true at this stage of the litigation. (App. at 46, F.A.C. ¶

47; App. at 53 F.A.C. ¶¶ 95-97.) By arguing what the evidence *would* show, the Financial Defendants concede that factual questions exist. Their arguments related to those factual issues do not bear on this appeal.

On duty, causation, and collateral estoppel, the Financial Defendants cite *Bouchard v. Frost*, 2004 ME 9, ¶ 8, 840 A.2d 109 as their authority. (Financial Br. 22.) *Bouchard* decided a different question on a different record. The *Bouchard* Court substituted sovereign immunity, a pure question of law, for the District Court’s equitable estoppel rationale, and did so after that court took testimony, weighed credibility, and made findings. *Id.* ¶¶ 7-8. On the fact-bound question in the same appeal, the Court deferred, holding that the District Court “did not commit clear error or act beyond its discretion.” *Id.* ¶ 16. The Superior Court never took evidence, never made findings, and decided nothing about these questions: “The court does not reach Movants’ arguments for failure to state a claim or collateral estoppel.” (App. at 18, Order at 5.) The record is not ripe for determinations on these points, and Plaintiffs have pleaded all that is required to survive a motion to dismiss based on these theories.

In a footnote, the Financial Defendants assert that any claim against TD Wealth expired by 2016 and that LPL Financial “cannot be held liable” for conduct predating 2010. (Financial Br. at 15 n.4.) Both assertions depend on when the claim accrued, and both fail for the reason stated above. The LPL assertion also argues

vicarious liability rather than timeliness, and the Superior Court decided neither question.

Conclusion

For the foregoing reasons and those stated in his opening brief, Appellant Eric R. Clark respectfully requests that the 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: August 21, 2026

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CERTIFICATE OF SERVICE

I, Jeremy W. Dean, attorney for the Appellant, certify that on this date I have served a paper copy 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: August 21, 2026

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