No. 94132-7

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Court of Appeals No. 74744-4

CONNIE POTTER,
trustee of the Amended and Restated Fredrick O. Paulsell, Jr. Living Trust dated December 22, 2002,

Petitioner,

v.

JOSEPH MICHAEL GAFFNEY and JANE DOE GAFFNEY, his wife, and DORSEY & WHITNEY, LLP, a Minnesota Limited Liability Partnership,

Respondents.

REPLY TO CROSS-PETITION

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INTRODUCTION

Defendants have filed a cross-petition. It argues that if the Court grants Plaintiff's petition on the ABC Rule, it should also review the Court of Appeals' ruling that Plaintiff's claim for breach of fiduciary duty is not time-barred as a matter of law.

The cross-petition should be denied. The Court of Appeals' ruling on timeliness does not conflict with any other published Court of Appeals decision.

BACKGROUND

Plaintiff asserts a claim for breach of fiduciary duty against Defendants Joseph Gaffney and his firm, Dorsey & Whitney (together, "Gaffney"). The claim is based on Gaffney's breach of his ethical duties.

The simple will that Fred Paulsell Jr. ("Fred Jr.") executed in 2002 stated that Susan was to "inherit all my material possessions[,] including all properties, stocks, furnishings, cars, etc." CP 100. When Gaffney drafted a binding trust agreement to replace that will later that same year, *see* Pet. for Review at 3, he represented both Susan Paulsell ("Susan") and Fred Paulsell III ("Fred III"). CP 79, ¶ 6; CP 456 at 14:7–16; CP 457 at 15:4–7. The gist of Plaintiff's claim for breach of fiduciary duty is that this

representation constituted a concurrent conflict of interest for which Gaffney received no waiver.[1] *See* Br. of Appellants at 40–41.

As a remedy for this breach of fiduciary duty, Plaintiff seeks disgorgement of fees paid to Gaffney. *See Eriks v. Denver*, 118 Wn.2d 451, 462–63, 824 P.2d 1207 (1992) (recognizing that when attorneys breach their ethical duties, disgorgement of fees is an available remedy). Plaintiff as trustee seeks this remedy on behalf of the Trust that Gaffney created in 2002, because the fees were paid out of the Trust. Gaffney himself noted that his fees were paid out of the assets of Fred Jr.'s estate, *see* CP 318, and, under the trust agreement, the Trust and the estate were one. That agreement provided that all estate assets would be included in the Trust, CP 105, effective from the date of Fred Jr.'s death, CP 148.

ARGUMENT

I. The Court of Appeals' ruling on timeliness comports with existing law.

The statute of limitations for breach of fiduciary duty is three years. *See* slip op. 8. But when the same attorney continuously represents the wronged client in the same matter, the statute of limitations begins to run only when that representation ends. *Janicki Logging & Constr. Co. v.*

[1] On appeal, Gaffney has not contested the merits of this claim; at issue in the cross-petition is merely its timeliness.

Schwabe, Williamson, & Wyatt, P.C., 109 Wn. App. 655, 661, 37 P.3d 309 (2001). This is the continuous-representation rule.

The rule is fact-intensive, so its resolution depends on the facts and circumstances of each case: "As there is no bright-line rule for determining when representation ends, particular circumstances most often present an issue of fact." *Hipple v. McFadden*, 161 Wn. App. 550, 558, 255 P.3d 730 (2011). Because this is an appeal from a summary-judgment ruling, the question here is simply whether there is a genuine issue of fact on whether Gaffney's representation was continuous.

Here, Gaffney was told in July 2009 to withdraw from representing Susan, CP 249, ¶ 8, although he continued to bill her through October 2009, CP 406. This action was filed in March 2012, CP 1, so even though Plaintiff's claim for breach of fiduciary duty relates to Gaffney's actions in 2002, the claim is timely if the continuous-representation rule applies.

And the continuous-representation rule *does* apply, because Gaffney's representation from 2002 to 2009 was in the same matter. The work he performed in 2008 and 2009 involved administration of Trust—specifically, an accounting of the Trust's receipts and disbursements in which he incorrectly determined that Susan owed the Trust over $3 million. *See* Pet. for Review at 3. The work he performed *before* then—which Defendants agree constituted one matter, *see* Cross-Pet. at 20—also

included administration of the Trust. In 2005, for example, Gaffney advised Susan on the amount of Trust assets she could use for her "general living expenses." CP 82, 169. And he opined at some length on trust administration, telling Susan and Fred III that "a reconciliation will have to occur" and that it might be "possible . . . that Susan should repay the trust for any over-distribution of living expenses." CP 82, 169. This is the very accounting that Gaffney performed in 2008. Indeed, his words in 2005 preview the same (erroneous) conclusion that he reached in 2008: that Susan owed the Trust money. As the Court of Appeals concluded, a reasonable factfinder could easily conclude that Gaffney's work between 2002 and 2007 was "sufficiently related to" his work in 2008 and 2009 to constitute "the same matter." Slip op. 9.

Defendants point out that the work in 2008 and 2009 was "billed and paid separately" (i.e., under a separate matter number) from the work in 2002 through 2007. Answer at 20. But the opening of a new matter number cannot be dispositive as a matter of law, since it would allow canny attorneys to easily avoid the continuous-representation rule.

Defendants also claim that the Court of Appeals' ruling conflicts with *Cawdrey v. Hanson Baker Ludlow Drumheller, P.S.*, 129 Wn. App. 810, 120 P.3d 605 (2005). This is not remotely true. There, the attorney represented the client in two distinct matters. Included in the first matter

were business transactions involving the partnership of which the client was a partner. *See id.* at 813–14. The second matter involved solely the drafting of a codicil to the client's will. *See id.* at 814, 819. This estate planning bore "no relationship" to the business transactions. *Id.* at 820. Here, by contrast, Gaffney's pre-2008 representation was not merely *related* to his 2008 and 2009 representation—it actually involved the *same subject* of his 2008 and 2009 representation: the proper administration of the Trust.

CONCLUSION

The cross-petition should be denied.

RESPECTFULLY SUBMITTED this 27th of April, 2017.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury of the laws of the State of Washington that on April 27, 2017, I caused a true and correct copy of the foregoing REPLY TO CROSS-PETITION to be served on the following via email, pursuant to RAP 18.5(a) and CR 5(b)(7):

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