

APPELLATE UPDATE

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CIVIL

Nichols v. Swindoll, 2023 Ark. 97 [**legal-malpractice; fraudulent concealment; pleading**] The circuit court dismissed appellant's legal-malpractice complaint against her attorneys, the appellees. On appeal, appellant argued that the circuit court abused its discretion in granting the appellees' motion to dismiss and finding that there were no facts in the complaint sufficient to toll the running of the statute of limitations based on fraudulent concealment. To establish fraud there are five elements: (1) a false representation of material fact; (2) defendant knew that the representation was false or that there was insufficient evidence upon which to make the representation; (3) defendant intended to induce action or inaction by the plaintiff in reliance upon the representation; (4) justifiable reliance on the representation; and (5) damage suffered as a result of the false representation. To show concealment, not only must there be fraud, but the fraud must be furtively planned and secretly executed so as to keep the fraud concealed. In order to toll the statute of limitations, the fraud perpetrated must be concealed. Fraudulent concealment consists of some positive act of fraud, something so furtively planned and secretly executed as to keep the plaintiff's cause of action concealed or perpetrated in a way that conceals itself. The absence of any one element of fraud is a sufficient basis for the circuit court to dismiss a claim of fraud. Here, the Supreme Court could not say that appellant sufficiently pleaded that the appellees made a false representation of material fact. Further, even assuming that appellant did sufficiently plead the five

elements of fraud, appellant failed to plead an act of fraud that was furtively planned and secretly executed by the appellees. After reviewing the appellant's complaint, the Supreme Court held that appellant failed to allege something so furtively planned and secretly executed as to keep the plaintiff's cause of action concealed or perpetrated in a way that conceals itself. Absent fraudulent concealment, the statute of limitations was not tolled until March 2020, as the appellant alleged. The statute of limitations began to run in January 2018 and expired three years later in January 2021. Thus, appellant's February 2021 malpractice complaint was untimely filed. Therefore, the circuit court did not err in dismissing appellant's untimely filed malpractice complaint. (Griffen, W.; 60CV-21-1321; 6-8-23; Baker, K.)

Ark. Dep't of Educ. v. Jackson, 2023 Ark. 105 [**temporary restraining order; irreparable harm**] The circuit court entered an order granting a temporary restraining order in favor of appellees in their lawsuit challenging the validity of the emergency clause in Act 237 of 2023. On appeal, appellants argued that the circuit court erred in granting appellees' motion for injunctive relief. In determining whether to issue a temporary restraining order or a preliminary injunction pursuant to Rule 65 of the Arkansas Rules of Civil Procedure, the circuit court must consider two things: (1) whether irreparable harm will result in the absence of an injunction or restraining order and (2) whether the moving party has demonstrated a likelihood of success on the merits. Harm is normally considered irreparable only when it cannot be adequately compensated by money damages or redressed in a court of law. Here, the Supreme Court held that because appellees failed to meet their burden of proving irreparable harm, the circuit court erred in granting the motion for a temporary restraining order. (Wright, H.; 60CV-23-3267; 6-15-23; Hudson, C.)

CRIMINAL

Mitchell v. State, 2023 Ark. 101 [**substitution of counsel**] Appellant was convicted by a jury of first-degree battery and failure to appear on a felony. On appeal, appellant argued that the circuit court erred by denying his motion to substitute counsel. Although a criminal defendant is generally entitled to the counsel of his choice, this right does not extend to defendants who require counsel to be appointed for them. Once a criminal defendant has obtained competent counsel, any request for a change in counsel must be balanced against the public's interest in the prompt dispensation of justice. Relevant factors for the circuit court to consider include whether other continuances have been requested and granted, the length of the requested delay, whether the requested delay is for legitimate reasons, whether the motion for a continuance was timely filed, whether the defendant contributed to the circumstances giving rise to the request for a continuance, whether the reason for the discharge of existing counsel was solely for the purpose of obtaining a continuance, and whether the request was consistent with the fair, efficient and effective administration of justice. Here, the circuit court took the factors into consideration, finding that the imminently scheduled jury trial weighed against granting appellant's request to change counsel, especially considering the number of continuances already granted at both appellant's requests and because of the response to COVID-19. The public defender's office represented

appellant for twenty months until a law firm filed its initial motion to substitute counsel less than six weeks before appellant's scheduled jury trial. The denial of appellant's motion to substitute counsel came at the end of the pre-trial preparation, not the beginning. Even though the circuit court did not explicitly articulate the factors one by one, the circuit court noted several additional problems with appellant's request to change counsel. The circuit court was concerned about a potential ineffective assistance-of-counsel claim arising from the law firm having only six weeks to prepare for a jury trial without any continuances. Appellant never offered any evidence that he was no longer indigent, and the law firm rejected an offer to serve as co-counsel. Because appellant was indigent, he was not entitled to the counsel of his choice, and the circuit court's denial of his motion to substitute counsel was not an abuse of discretion. (Karren, B.; 04CR-19-368; 6-8-23; Womack, S.)

PROBATE

Marcum v. Hodge, 2023 Ark. 103 [**applicable limitation period; statute of nonclaim**] The circuit court entered an order granting the motion to dismiss filed by appellee, the special administrator of the estate of the deceased. On appeal, appellant argued that his claims against appellee were brought within the limitation period set forth in the statute of nonclaim, and the circuit court erred in dismissing his amended complaint by applying the general three-year statute of limitations instead of the statute of nonclaim. Generally, tort claims are subject to a three-year statute of limitations which begins to run when a negligent act occurs. However, the claims in the present case were brought against an estate. The applicability of the statute of nonclaim depends on whether a claim would have been barred pursuant to the generally applicable statute of limitations at the time of the decedent's death. If the claim would not have been barred, then the general statute of limitations yields to the statute of nonclaim, and the claimant must comply with the requirements therein. The statute of nonclaim is the true rule of limitation, as to all claims against the estates of deceased persons. The general statute of limitations was designed to operate upon the rights of parties while living and was not designed to apply after death to claims against the estates of deceased persons, the statute of non-claim, as to such estates, giving the rule of limitation. Here, the automobile accident from which appellant's negligence allegations against the deceased arose occurred on April 15, 2017. Appellant filed her complaint on March 16, 2020, naming the deceased as the sole defendant. On June 9, 2020, appellant filed a motion for extension of time to complete service because she discovered the defendant died. At the time appellant filed the motion, an estate had not been opened for the deceased. The three-year statute of limitations would have expired on April 15, 2020. Because the deceased died only three months after the accident, in July 2017, appellant's claims were not barred by the general statute of limitations at the time of the deceased's death. Consequently, according to the Probate Code, appellant's claims against the deceased's estate are to be governed by the statute of nonclaim and considered timely as long as she either presented the claims to the personal representative of the estate or filed them with the court within six months of the date that the required notice to creditors was first published. Although it was unclear when the appellee first published this notice, appellant served appellee with the amended complaint and filed notice of her claims against the deceased's estate with the court within six

months of the deceased's estate being opened and appellee appointed as special administrator. Based on the foregoing, the statute of nonclaim governs appellant's claims, superseding the general three-year statute of limitations, and her amended complaint was therefore timely filed. Therefore, the circuit court erred in granting appellee's motion to dismiss. (Wright, H.; 60CV-20-2097; 6-15-23; Baker, K.)