

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

ESTATE OF JULIA O. STILES,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 09C-07-198 MJB
	)	
EDWARD M. LILLY, Esquire,	)	
RACHEL MERSKY, Esquire, and	)	
MONZACK MERSKY	)	
MCLAUGHLIN AND	)	
BROWDER, P.A.	)	
	)	
Defendant.	)	

Submitted: July 7, 2011
Decided: October 27, 2011

Following a Bench Trial, **DISMISSED.**

OPINION

Douglas A. Shachtman, Esquire, The Shachtman Law Firm, Wilmington, Delaware, Attorney for Plaintiff.

John A. Elzufon, Esquire, and Gary W. Alderson, Esquire, Elzufon Austin Reardon & Mondell, P.A., Attorneys for Defendants.

BRADY, J.

INTRODUCTION

This legal malpractice action arises out of Plaintiff's claim that Defendants were negligent in failing to timely file federal and state estate tax returns for the Estate of Julia O. Stiles, and in failing to advise Plaintiff that penalties and interests would accrue for late filing. Plaintiff filed this action on July 20, 2009 and seeks damages in the amount of the statutory penalties and interest incurred to the estate, with pre-judgment interest and court costs. Defendants denied liability and raised defenses of comparative negligence and timeliness of filing this action under the relevant statute of limitations. A bench trial was held on November 15 and 16, 2010. The parties submitted post-trial briefing. Defendant's Opening Post-Trial Brief was submitted on February 8, 2011, Plaintiff's Post-Trial Answering Brief was submitted on March 2, 2011, Defendant's Reply Post-Trial Brief was submitted on March 15, 2011, and Plaintiff's Post-Trial Sur Reply Brief was submitted March 21, 2011. On June 15, 2011, the Court ordered the parties provide additional information on the Defendants' need to have power of attorney in order to file an application for extension to the IRS. Defendants provided a submission on June 30, 2011, and Plaintiff submitted its response on July 7, 2011.

FINDINGS OF FACT, APPLICABLE LAW, AND HOLDINGS

Alvin Stiles died on August 10, 1999, leaving everything he owned to his wife, Julia Stiles.¹ Julia Stiles died on July 13, 2002, leaving her property in equal shares to her three children, David Stiles, Cynthia Boyd, and Jennifer Takahashi.² The Register of

¹ See Compl. at ¶ 1.

² Pl.'s Post-Trial Ans. Br. vii; see Pl.'s Ex. 14.

Wills swore in Alvin and Julia's son, David Stiles ("Stiles"), as the executor of Julia's estate on July 23, 2002, after the original executor, Patrick McGrath renounced the title.³

Upon Alvin's death, Julia Stiles retained Rachel Mersky and her law firm, Walsh & Monzack, P.A. to represent Alvin's estate.⁴ Mersky's family was friends with the Stiles family, and David Stiles knew Mersky for about forty years.⁵ Mersky assigned the responsibility to probate the Alvin Stiles Estate to Edward Lilly, an associate at Walsh & Monzack, in 2001.⁶ Mersky primarily practiced commercial business and bankruptcy law,⁷ and Lilly primarily practiced real estate transactions and corporate bankruptcy law.⁸ The Stiles family met with Mersky to discuss minimizing the tax consequences to the estate that would exist upon Julia's death.⁹ The parties discussed a plan consisting of a deed of gift, a disclaimer, and yearly gifting to the children and grandchildren.¹⁰ That plan was carried out.¹¹

Julia Stiles died on July 13, 2002.¹² On July 23, 2002, Mersky accompanied David Stiles to the Register of Wills, where he was sworn in as executor of his mother's estate.¹³ From 2002 to 2005, Stiles distributed money from the estate to himself and his sisters, Cynthia Boyd and Jennifer Takahashi in equal amounts, totaling \$425,000.00 each. Then Stiles made two distributions to himself without telling his sisters, one in

³ Pl.'s Ex. 4.

⁴ Transcript of Record, Nov. 15, 2010, at 74 [hereinafter Nov. 15 Tr.].

⁵ Nov. 15 Tr. at 74.

⁶ *Id.* at 6-8.

⁷ *Id.* at 29-30.

⁸ *Id.* at 5.

⁹ *Id.* at 74-75.

¹⁰ *Id.* at 6-9.

¹¹ *See id.* at 114-28.

¹² *Id.* at 121-27.

¹³ *Id.* at 78.

2005 for \$100,000.00 and one in 2006 for \$250,000.00. Stiles distributed a total of \$775,000.00 to himself, and a total of \$1,625,000.00 amongst the three.¹⁴

The Estate of Julia O. Stiles was obligated to file an inventory and accounting with the New Castle County Register of Wills, and file federal estate tax returns with the Internal Revenue Service (“IRS”) and state estate tax returns with the Delaware Division of Revenue (“DDR”).¹⁵ The state and federal estate taxes for her estate were due nine months from the date of Julia’s death, on April 13, 2003.

Defendants did not provide David Stiles a retainer agreement or a letter of engagement or retainer agreement, nor did they communicate with him in writing. Defendants communicated with Stiles primarily on an oral basis.¹⁶

On June 23, 2002, Mersky explained to Stiles that he would need to gather information to conduct an inventory of the estate and told him the estate taxes needed to be paid within a year.¹⁷ At that time, Mersky gave Stiles a blank IRS Form 706 (Estate Tax Return) so he would know what information he needed to gather.¹⁸ Defendants sent Stiles a power of attorney form to be used in connection with the estate in August 2002. Stiles did not sign or return it.¹⁹ Mersky reminded Stiles by phone in September and December of 2002 that Defendants needed, and were waiting for, information concerning the estate assets.²⁰

¹⁴ *Id.* at 121-27; Defs.’ Exs. 21, 22.

¹⁵ Transcript of Record, Nov. 16, 2010, at 59-62 [hereinafter Nov. 16 Tr.].

¹⁶ *See* Nov. 15 Tr. at 39-42.

¹⁷ Nov. 16 Tr. at 22.

¹⁸ *Id.* at 23.

¹⁹ Defs.’ Ex. 1. The cover letter attached to the form was signed by a paralegal for Monzack. *Id.* The letter states, “Per our conversation, please find enclosed a copy for the Power of Attorney and Declaration of Representative tax form 2848 please[sic] sign and return to the above address.” *Id.*

²⁰ Nov. 16 Tr. at 26-29.

In April 2003, Mersky and Lilly told Stiles the tax return was due nine months from the date of his mother's death; Mersky did not provide the exact date,²¹ nor did Defendants provide Stiles any written notice of the deadline.²² Lilly sent Stiles a letter on April 22, 2003, which Stiles claimed at trial not to have received,²³ informing Stiles of the steps necessary to closing the estate, including filing tax returns.²⁴ However, the letter did not include the fact that the state and federal tax returns were due on April 13, 2003, or that the tax returns were overdue.²⁵ In June 2003, Mersky and Lilly each spoke to Stiles again²⁶. On June 13, 2003, Mersky informed Stiles the estate return was late and it was costing the estate money.²⁷ She did not specifically say interest was accumulating or that penalties would be assessed.²⁸

Defendants did not prepare or attempt to prepare the tax returns or applications for extensions of time in which to file the returns by April 13, 2003.²⁹ Filing the applications for extension would automatically have given the parties a six-month extension.³⁰ Defendants conceded at trial they had information from as early as 2002 on the estate's two largest assets – the date of death valuation of the estate from Janney Morgan Scott LLC (\$2.3 million) and the value for which the estate household sold (\$350,000) – from which Defendants could have estimated the taxes the estate owed.³¹ It is unclear, from the record presented, if the Defendants had the legal authority to file the

²¹ *Id.* at 30-31.

²² *Id.* at 91.

²³ Nov. 15 Tr. at 104.

²⁴ Defs.' Ex. 2.

²⁵ *Id.*

²⁶ Nov. 15 Tr. at 123; Nov. 16 Tr. at 31.

²⁷ Nov. 16 Tr. at 33.

²⁸ *Id.* at 30-33.

²⁹ *Id.* at 70-71.

³⁰ Report of Beverly J. Wik, Defs.' Opening Br. App. A135.

³¹ Nov. 15 Tr. at 44.

taxes or applications for extension.³² Defendants could have prepared estimated returns or applications for extension and forwarded them to Stiles for signature, but did not.³³

Lilly reminded Stiles throughout 2003 and 2004 that he needed to gather the information to file the tax returns.³⁴ Lilly even offered to go through all the records Stiles had, but Stiles declined to send the records to Defendants.³⁵ Lilly sent Stiles two letters, one in November 2005 and one in May 2006, reminding him he had yet to provide the necessary documents to close the estate, that he swore to the Register of Wills that he would take the necessary steps to file an inventory and accounting of the estate, and that Defendants were willing to assist him.³⁶ The letters additionally threatened that Defendants would withdraw as counsel from the matter if there was no compliance with these obligations. Neither letter specifically stated that the state and federal estate taxes were overdue. In 2007, when Mary Beth Browder took over the matter for Mersky and Lilly, she demanded Stiles bring her boxes of records he claimed he had, and he delivered five pieces of paper, which were statements from two of the estate's accounts, dated in 2007.³⁷ At trial, Stiles claimed the boxes of documents disappeared.³⁸

³² Nov. 16 Tr. at 70. The Federal Form 4768 called "Application for Extension of Time To File a Return and/or Pay U.S. Estate (and Generation-Skipping Transfer) Taxes" calls for the signature of the executor of the estate or a person "authorized by an executor to file this application." Letter from John A. Elzufon, Esq., counsel for defendants, to Hon. M. Jane Brady Ex. C (June 30, 2011). As Defendants concede elsewhere, they did, in fact, represent Stiles, it is not clear to the Court they could not be authorized, by that representation, to execute the documents.

³³ Nov. 15 Tr. at 44-49.

³⁴ Nov. 16 Tr. at 61-62.

³⁵ *Id.* at 67.

³⁶ Defs.' Opening Br. App. A118, A119; Nov. 16 Tr. at 62-62-63.

³⁷ Nov. 16 Tr. at 83-85.

³⁸ Nov. 15 Tr. at 162.

The federal and state estate tax returns were filed on April 22, 2008.³⁹ The estate was obligated to pay significant penalties and interest.⁴⁰ Stiles filed this action on July 20, 2009.⁴¹

Stiles claimed because he had never acted as the personal representative of an estate before being appointed executor for Alvin Stiles' estate, had no legal training, and had not prepared his own tax returns,⁴² that he did not know what information Defendants needed from him, that he was unaware of the deadline for filing estate taxes, and that he was unaware until 2007 that interests and penalties are associated with late filing returns.⁴³ However, he knew the estate had incurred penalties and interest from information contained in fiduciary income tax returns as early as 2005.⁴⁴ Seitz & Sublett sent Stiles the originals and copies of the tax returns containing statements of the penalties and interest incurred as a result of late filing with a letter dated June 13, 2005.⁴⁵ Additionally, in 2006, Stiles wrote to his sister Cynthia Boyd, informing her that he could not distribute any more money from the estate because the taxes would need to be paid soon.⁴⁶ In that letter, Stiles also estimated the taxes to amount to about 40% of the estate after deduction of the first \$1 million.⁴⁷ Stiles admitted at trial that he knew of that estimate for a long time prior to writing the letter.⁴⁸

³⁹ See Pl.'s Exs. 32 & 33.

⁴⁰ See Pl.'s Exs. 34 & 36.

⁴¹ See Compl.; Pl.'s Ex. 50.

⁴² Nov. 15 Tr. at 73-74.

⁴³ *Id.* at 159.

⁴⁴ Defs.' Opening Br. App. A144, A152-53.

⁴⁵ *Id.* at A143.

⁴⁶ *Id.* at A120.

⁴⁷ *Id.*

⁴⁸ Nov. 15 Tr. at 124-25.

The statute of limitations for legal malpractice actions in Delaware is three years.⁴⁹ A legal malpractice claim begins accruing at the time of the alleged malpractice.⁵⁰ While ignorance of the facts is not an obstacle to the operation of the statute,⁵¹ the “discovery exception” tolls the three-year period “where the injury is inherently unknowable and the claimant is blamelessly ignorant of the wrongful act and the injury complained of.”⁵² In such an instance, the statute commences running “upon the discovery of facts constituting the basis of the cause of action *or* the existence of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery of such facts.”⁵³ Such facts should be “observable or objective factors that would alert laymen to the problem.”⁵⁴ As the Court has observed, “the statute should not run against an ignorant plaintiff”⁵⁵

In order to determine whether this action was timely filed under 10 *Del. C.* § 8106, the Court must determine when the statute of limitations began running, either the time of the alleged malpractice, or when Stiles discovered or should have discovered the facts constituting the cause of action here. In order to determine whether the statute was tolled, the Court must first determine whether the claimed injury here was inherently unknowable to Stiles and whether he was blamelessly ignorant of the wrongful act and injury complained of.

⁴⁹ 10 *Del. C.* § 8106; *Sammons v. Andersen*, 968 A.2d 492 (Del. 2009).

⁵⁰ *Sammons*, 968 A.2d 492 (citing *Oropeza v. Maurer*, 860 A.2d 811, 2004 WL 22154292, at *1 (Del. 2004)).

⁵¹ *Id.*

⁵² *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 860 A.2d 312, 319 (Del. 2004).

⁵³ *Id.* (citing *Coleman v. Pricewaterhousecoopers, LLC*, 854 A.2d 838, 842 (Del. 2004)).

⁵⁴ *Island Farm, Inc. v. Master Sidlow & Assoc., P.A.*, CIV.A. 06C-03-206PLA, 2007 WL 2758775, at *2 (Del. Super. 2007).

⁵⁵ *Isaacson, Stolper & Co. v. Artisans' Sav. Bank*, 330 A.2d 130, 133 (Del. 1974).

The wrongful act alleged in the Plaintiff's Complaint is that Defendants failed to timely file estate tax returns for Julia Stiles' estate, resulting in penalties and interest to the estate. Defendants argue that the statute of limitations commenced running on April 13, 2003, and no later than June 18, 2003,⁵⁶ when Defendant Mersky, as she testified, told Stiles that the estate tax return was overdue and costing the estate money.⁵⁷ Plaintiff contends that the discovery rule applies and tolled the statute of limitations, causing the statute began running on June 8, 2009,⁵⁸ when penalties and interests for late filing were imposed upon the estate.⁵⁹

For reasons stated herein, the Court finds that the discovery exception applies to this case. The discovery rule does not, however, toll the statute of limitations until June 8, 2009, as Plaintiff contends. Based on the testimony presented at trial, the Court finds Stiles knew or should have known by June 18, 2003 that the estate taxes were overdue and the consequences included financial penalties to the estate. "[F]acts constituting the basis of the cause of action *or* the existence of facts sufficient to put a person of ordinary intelligence and prudence on inquiry, which if pursued, would lead to the discovery of such facts" became apparent to Stiles on June 18, 2003, when Defendant Mersky informed Stiles that the estate return was late and was costing the estate money.⁶⁰ Mersky testified that by June 18, 2003, she had spoken to Stiles on many occasions to request he provide her office with information necessary to file the estate taxes.⁶¹ Each time Mersky spoke to Stiles, he politely assured her he had the necessary information and

⁵⁶ Defs' Opening Br. 12.

⁵⁷ Nov. 16 Tr. at 27-33.

⁵⁸ Pls.' Answering Br. 8-9.

⁵⁹ See Pl.'s Ex. 50.

⁶⁰ Nov. 16 Tr. at 33.

⁶¹ *Id.* at 22-31.

would provide it.⁶² On June 18, 2003, Mersky, upset that her office did not have the information and the taxes had not been filed, spent an hour-and-a-half on the phone with Stiles.⁶³ She testified “I said that the estate return was late and it was costing the estate money. That’s what I said, costing the estate money.”⁶⁴ In typical fashion, Stiles responded that “he knew. He apologized. He said assorted other things interfered and that he would get right to it, that he had everything”⁶⁵ However, after his conversation with Mersky on June 18, 2003, Stiles did not provide Defendants the information they repeatedly requested.⁶⁶

However, even if Stiles was not on notice by June 18, 2003, he was on notice no later than June 13, 2005, when he received fiduciary income tax returns and copies of the returns from Seitz & Sublett. Those returns contained statements of interests and penalties imposed as a result of filing the returns over one year late. These events warrant any person who has assumed responsibility for the estate and its assets to conduct an inquiry. If Stiles had pursued an inquiry on or shortly after June 18, 2003 or June 13, 2005, he would have discovered the alleged wrongful act of failing to file the state and federal estate tax returns timely. The three-year statute of limitations for a legal malpractice action relating to the failure to timely file the estate tax returns expired as early as June 18, 2006, but no later than June 13, 2008.

Plaintiff contends Stiles did not know of Defendant’s negligence in failing to file estate tax returns until a date less than three years prior to the filing of this action.

⁶² *See id.*

⁶³ *Id.* at 32.

⁶⁴ *Id.* at 33.

⁶⁵ *Id.*

⁶⁶ *See id.* at 33, 59-69-, 82-84; Nov. 15 Tr. at 160-61.

Plaintiff argues that no observable or objective factors, or a “red flag,”⁶⁷ existed to place Stiles on notice that Defendants had not timely filed the estate’s tax returns before June 9, 2008, when the IRS imposed penalties and interest upon the estate.⁶⁸ Plaintiff claims Stiles relied upon the Defendants’ expertise to effect timely filing of tax returns or requests for extension of time to file, because he lacked knowledge regarding estates and estate tax law, had not personally acted as an executor before being appointed replacement executor to his father’s estate, and even failed to understand or appreciate the terminology use by Defendants to inform him.⁶⁹ Additionally, Plaintiff argues Defendants led Stiles to believe Seitz & Sublett, the accounting firm that prepared the fiduciary income tax returns, was preparing the estate taxes, because Defendants did not inform Stiles of the difference between the two types of taxes.⁷⁰ Plaintiff contends that since it deferred to Defendants’ expertise,⁷¹ there was no “red flag” to alert Stiles that the estate taxes had not been paid and were incurring interest and penalties,⁷² and Stiles believed the estate tax obligations were being met on time.⁷³ The Court finds otherwise.

This Court has acknowledged the reliance of laypersons upon accounting professionals and attorneys.⁷⁴ The Court has long-recognized that “legal consumers rely on a lawyer’s expertise precisely because they need answers beyond their lay

⁶⁷ “Red flag” is the term Delaware courts use to refer to a fact or event that “clearly and unmistakably would have led a prudent person of ordinary intelligence to inquire” so as to find a defendant’s wrongful conduct. *Coleman v. Pricewaterhousecoopers, LLC*, 854 A.2d 838, 843 (Del. 2004).

⁶⁸ Pl.’s Answering Br. 9; Pl.’s Ex. 50.

⁶⁹ Pls.’ Answering Br. 9-11, 13. Plaintiff further argues that David did not understand that an estate “inventory” refers to all the assets of the state, rather than the contents of the estate household, that Defendants and the estate’s accountant handled different types of tax returns, the deadlines for those returns, and whether the estate, through Defendants and the accountant met or missed those deadlines. *Id.* 12-14.

⁷⁰ *Id.* 13.

⁷¹ *Id.* 9.

⁷² *Id.*

⁷³ *Id.* 13.

⁷⁴ *See Isaacson, Stolper & Co. v. Artisans’ Sav. Bank*, 330 A.2d 130, 132 (Del. 1974).

knowledge.”⁷⁵ Given this dependent relationship, Delaware courts apply the discovery rule to toll the statute of limitations so that a plaintiff may bring a cause of action within three years of either the occurrence of the wrongful act or the time of plaintiff’s discovery of the wrongful act.⁷⁶ The discovery rule “requires the plaintiff to show the ‘inherent unknowability of the injury’ and her own ‘blameless reliance on the professional skill of the wrongdoer.’”⁷⁷

In *Coleman v. Pricewaterhousecoopers, LLC*,⁷⁸ the Delaware Supreme Court set forth the inquiry to determine the existence of a “red flag.”⁷⁹ The Court considered whether an email that instructed the seller of a business to take an aggressive accounting approach to attain extraordinary gains “was sufficient to impose upon the plaintiffs a duty to conduct a further investigation.”⁸⁰ The Court’s decision makes clear that a “red flag” must lead a “prudent person of ordinary intelligence to inquire” whether the defendant acted negligently, so that the aggrieved party may conduct a diligent inquiry that could lead to the discovery of facts sufficient to assert a malpractice claim.⁸¹

Here, Stiles was aware that the estate’s tax returns had not been filed from the time of Julia Stiles’ death and failed to inquire of the Defendants as to whether the returns were overdue for filing under circumstances in which a prudent person of ordinary intelligence in his position would have so inquired.

⁷⁵ *Shuttleworth v. Lynch*, CIV. A. 94C-08-124, 1995 WL 339071, at *3 (Del. Super. 1995).

⁷⁶ *Id.* at *3.

⁷⁷ *Id.* (quoting *Pioneer Nat. Title Ins. Co. v. Sabo*, 382 A.2d 265, 267 (Del. Super. 1978)).

⁷⁸ 854 A.2d 838, 842 (Del. 2004).

⁷⁹ *Id.* at 842-43.

⁸⁰ *Id.* at 843. The Court could not determine from the facts of the record whether the email was sufficient to impose a duty to conduct a further investigation upon the plaintiffs because “a person of ordinary prudence and intelligence could draw competing inferences from the e-mail,” the email would direct the plaintiff to accounting entries that were not *per se* forbidden, and an expert testified the email alone would not arouse suspicion. *Id.* Therefore, no “red flag” existed to “clearly and unmistakably” lead a prudent person of ordinary intelligence to inquire as to the alleged wrongful acts. *Id.*

⁸¹ *Id.*

Stiles testified at trial that he knew as of 2002 that estate taxes would have to be paid in addition to the yearly fiduciary income taxes,⁸² but he made no affirmative efforts to pay those taxes or learn of the deadlines by which they should have been paid.

It should be noted that had Defendants provided a retention agreement, outlined the specific tasks they agreed to undertake, the relevant deadlines or obligations either party was to meet, prepared estimated taxes for Stiles to sign, prepared an application of extension of time for Stiles to sign,⁸³ or explicitly notified Stiles the deadline by which to file the estate taxes was April 13, 2003,⁸⁴ this matter may not have come to this point. Although Stiles knew estate taxes would need to be filed, the record is devoid of specific information that he was aware that the deadline for filing estate taxes was April 13, 2003, until following the phone conversation with Mersky on June 18, 2003, and the manner in which that information was communicated was verbal, not in writing.

When Stiles was sworn in as the executor of the Estate of Julia Stiles, he took an oath to follow the law and do as his mother requested in her will.⁸⁵ Julia Stiles' will directed that all state and federal estate, inheritance, transfer, or other taxes or death duties be paid by the executor out of the principal of her residuary estate.⁸⁶ Stiles assumed an affirmative obligation and should, upon discovery that the fiduciary income tax returns were filed late and subject to penalties and interest, have inquired as to the deadline for filing the state and federal estate taxes.

⁸² Defs.' Responding Br. 3; Nov. 15 Tr. at 106. Stiles affirmed at trial that he was aware in 1999, after Alvin Stiles died, that eventually there might be tax on his mother's estate when she would die. *See id.* at 75.

⁸³ Nov. 15 Tr. at 43-46.

⁸⁴ Nov. 16 Tr. at 27-33; Nov. 15 Tr. at 80, 91.

⁸⁵ Nov. 15 Tr. at 99-100.

⁸⁶ *Id.* at 99-100.

Mersky's June 18, 2003 telephone call to Stiles, informing him that the estate tax returns were late and costing the estate money, constitutes a discovery of fact that put Stiles on inquiry notice.⁸⁷ Stiles's June 13, 2005 receipt of returns including statements detailing how the fiduciary income tax returns incurred interest and penalties to the estate for late filing is a further discovery of fact that put Stiles on inquiry notice.⁸⁸ A reasonably prudent person of ordinary intelligence in Stiles's position would have inquired on or shortly after June 18, 2003, and no later than on or shortly after June 15, 2005, when the estate taxes were due so as to avoid penalties and interest. Therefore, the statute of limitations for a legal malpractice action as to any alleged negligence in failure to file estate tax returns or requests for extensions of time in which to file estate tax returns began running on June 18, 2003, or no later than June 13, 2005. Since the statute of limitations for a legal malpractice action is three years, the statute of limitations expired on June 18, 2006, or alternatively June 13, 2008. Either way, this action was not timely filed, and must be **DISMISSED**.

CONCLUSION

The Court finds the Defendants have established, by a preponderance of the evidence, that this matter was not timely filed, and the matter is **DISMISSED**.

IT IS SO ORDERED.

M. Jane Brady
Superior Court Judge

⁸⁷ Nov. 16 Tr. at 31-33.

⁸⁸ Defs.' Opening Br. App. A143-155.