

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-7053

September Term, 2015

FILED ON: MARCH 30, 2016

NIEVES ROCHA, AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF
OSCAR ROCHA, DECEASED,
APPELLANT

v.

BROWN & GOULD LLP, ET AL.,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 1:14-cv-01136)

Before: TATEL, *Circuit Judge*, and SENTELLE and RANDOLPH, *Senior Circuit Judges*.

J U D G M E N T

This appeal was considered on the record from the United States District Court for the District of Columbia and on the briefs and arguments of the parties. The Court has accorded the issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. CIR. R. 36(d). For the reasons stated below, it is

ORDERED and ADJUDGED that the judgment of the district court be affirmed.

In 2009, Nieves Rocha sued several companies for the wrongful death of her husband from mesothelioma, “a fatal cancer of the lining of the lung or abdominal cavity.” *Norfolk & W. Ry. Co. v. Ayers*, 538 U.S. 135, 142 (2003). He had worked as a “carpenter and painter in the Virginia and D.C. area,” *Rocha v. Brown & Gould, LLP*, 101 F. Supp. 3d 52, 56 (D.D.C. 2015), and had come into contact with asbestos, a “fibrous, inorganic, silicate mineral[]” that can cause mesothelioma, *Indus. Union Dep’t, AFL-CIO v. Hodgson*, 499 F.2d 467, 471 (D.C. Cir. 1974). Mrs. Rocha hired two law firms to represent her – Brown & Gould, LLP, and Lipman Law Firm – and filed suit in Washington, D.C. along with a backup suit in Virginia. Her attorneys were concerned that Rocha’s D.C. claims might be time-barred, *see* D.C. CODE § 12-311 (1987) (amended 2011, 2012), so they convinced the city council to amend District law to “expand the period of time in which plaintiffs may sue to recover for asbestos injuries.” *Rocha*, 101 F. Supp. 3d at 60. Unfortunately for Rocha,

-2-

the D.C. Superior Court determined that the amendments did not apply retroactively to her case. Via separate orders on January 10, 2011, and April 26, 2011, the court dismissed Rocha's claims against all defendants.

Rocha brought this action against her attorneys for legal malpractice and for breach of contract related to the attorneys' lobbying efforts with the city council. As the district court noted, Rocha shifted the liability theory of her latter claim from breach of contract to a negligent voluntary undertaking. *See Rocha*, 101 F. Supp. 3d at 78-80. The district court dismissed both claims as time-barred, *see* D.C. CODE § 12-301(8), and on their merits. *Rocha*, 101 F. Supp. 3d at 66-89. As to the merits of the malpractice claim, the court found that Rocha had conceded that her attorneys were protected by "judgmental immunity," *id.* at 75 (citing *Encyclopaedia Britannica, Inc. v. Dickstein Shapiro, LLP*, No. 10-0454, 2012 WL 8466139, at *17 (D.D.C. Feb. 2, 2012)), and did not proximately cause her harm by failing to respond to the defendants' arguments regarding those two issues. *Id.* at 77-78 (citing *Chase v. Gilbert*, 499 A.2d 1203, 1211 (D.C. 1985)). As to the negligence claim, the court decided that the attorneys were not liable because their legislative efforts did not cause or increase Rocha's risk of physical harm. *Id.* at 88 (citing Restatement (Second) of Torts § 323). We agree that Rocha conceded proximate cause for her malpractice claim and that her negligence claim is time-barred, and we therefore affirm.

Rocha argues that her attorneys committed malpractice "by failing to file [her] action in Maryland." Appellant Br. at 1. We need not decide this issue because Rocha has forfeited any argument that the attorneys' alleged malpractice was the proximate cause of her alleged injuries. To succeed on a legal malpractice claim in the District, a plaintiff must show that her attorneys' actions were "the proximate cause of . . . [her] loss or damages." *Martin v. Ross*, 6 A.3d 860, 862 (D.C. 2010). Here, Rocha needed to show that "but for" her attorneys' failure to file in Maryland, the Maryland courts would have deemed her suit timely and that she would have won the wrongful death suit. *Hobley v. Law Office of S. Howard Woodson, III*, 983 A.2d 1000, 1002 n.3 (D.C. 2009). The district court found that Rocha "ignor[ed]" the defendants' argument that her claim failed for lack of proximate cause and that, in doing so, she effectively "concede[d]" that element of her claim. *Rocha*, 101 F. Supp. 3d at 77. She does not challenge this finding on appeal and has therefore forfeited any contrary argument. *See Zevallos v. Obama*, 793 F.3d 106, 118 (D.C. Cir. 2015).

Rocha also argues that her attorneys are liable under the District's "voluntary undertaking doctrine" for their legislative efforts because they negligently "failed to include a retroactive provision . . . that would have assured the legislation's application to [her] case . . ." Appellant Br. at 33; *see, e.g., Haynesworth v. D.H. Stevens Co.*, 645 A.2d 1095 (D.C. 1994). The district court found that this claim is time-barred, and we agree. Voluntary undertaking, or "Good Samaritan," claims are subject to the District's three-year limitations period, which accrues "upon the date that injury results from the negligence." *Capitol Place I Assocs. L.P. v. George Hyman Constr. Co.*, 673 A.2d 194, 198 (D.C. 1996); *see* D.C. CODE § 12-301(8). Rocha concedes that the limitations period began to run no later than April 26, 2011, the date the D.C. Superior Court dismissed her suit, and that she filed her voluntary undertaking claim more than three years later, on June 9, 2014. Nevertheless, she argues that the limitations period was tolled under the District's "continuous

-3-

representation rule” until June 28, 2011, because her attorneys continued to represent her through that date. *R.D.H. Commc’ns, Ltd. v. Winston*, 700 A.2d 766, 768 (D.C. 1997). However, that rule applies only when “the particular matter in issue” is part of the ongoing representation, and Rocha’s attorneys’ legislative efforts were separate from their legal representation of her. *Id.* at 768. Therefore, any continued representation did not affect the limitations period for her voluntary undertaking claim.¹

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or rehearing *en banc*. See FED. R. APP. P. 41(b); D.C. CIR. R. 41(a).

Per Curiam

FOR THE COURT:

Mark J. Langer, Clerk

BY: /s/

Ken Meadows

Deputy Clerk

¹ We do not decide whether legislative lobbying could be sufficiently related to legal representation to trigger the continuous representation rule. We simply hold that the rule does not apply when a plaintiff disclaims any connection between those two actions, as Rocha did through her expert’s deposition.