ATTORNEYS FOR APPELLANT

M. Patricia Hackett
Sara E. Tumbleson
Anna D. Saar
South Bend, Indiana

ATTORNEYS FOR APPELLEES

Dina M. Cox
J. Neal Bowling
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Amy Osadchuk,
Appellant-Plaintiff,

v.

Charles P. Rice and Boveri Murphy Rice, LLP,
Appellees-Defendants.

January 17, 2023

Court of Appeals Case No. 22A-CT-1068

Appeal from the St. Joseph Superior Court

The Honorable Mark P. Telloyan, Judge

The Honorable Mary Beth Bonaventura, Judge Pro Tempore

Trial Court Cause No. 71D07-2110-CT-387

Altice, Chief Judge.

Case Summary

[1] Amy and David Osadchuk are husband and wife but have a pending 2018 petition for dissolution. The present case involves The David Osadchuk Irrevocable Trust (the Trust), which was created in 2008 and contains funds

that David received from a personal injury lawsuit stemming from a serious auto accident. Attorney Charles P. Rice (Attorney Rice) represented the Osadchuks in the personal injury action and, in 2008, he petitioned for and received court approval to deposit David's settlement proceeds into the Trust. Amy seeks to have the Trust funds considered as marital property subject to division.

[2] The foregoing backdrop brings us to the current proceeding in which Amy filed a complaint in October 2021 against Attorney Rice and his firm Boveri, Murphy, Rice, LLP (n/k/a Murphy Rice, LLP) (f/k/a Boveri, Murphy, Rice & LaDue, LLP) (collectively, the Attorneys), alleging four counts: legal malpractice, fraud, constructive fraud, and attorney deceit and collusion. Amy appeals the trial court's decision to grant the Attorneys' motion for judgment on the pleadings, raising six issues that we consolidate and restate as:

> I. Did the trial court commit reversible error by failing to treat the Attorneys' motion for judgment on the pleadings as a motion for summary judgment?
>
> II. Was Amy's claim for legal malpractice barred by the applicable two-year statute of limitations?
>
> III. Were Amy's three fraud-based claims substantively distinct from her legal malpractice claim and not time barred?

[3] We affirm.

Facts & Procedural History

[4] This case involves four somewhat-intertwined legal proceedings, and we discuss each in turn.

The Personal Injury Lawsuit

[5] On July 6, 2007, David was rear-ended "at a high rate of speed" by a drunk driver and suffered severe injuries that included "a shearing brain injury," rib fractures, and respiratory failure. *See Castillo v. State*, No. 79A02-0803-CR-242, 2008 WL 4938425, at *1 (Ind. Ct. App. Nov. 20, 2008). David was placed in a coma "for a significant period of time" and thereafter required physical, speech, and occupational therapy. *Appellant's Appendix Vol. II* at 64. In April 2008, the Social Security Administration issued a determination that David, age thirty-two, was eligible for monthly disability benefits.

[6] Meanwhile, in late 2007, David and Amy retained Attorney Rice to represent them in a personal injury lawsuit stemming from the auto accident. In January 2008, Attorney Rice filed a complaint on the Osadchuks' behalf in the Tippecanoe Circuit Court (the personal injury lawsuit) against the driver, Castillo, for negligence and against Macaw Enterprises, Inc. and its two shareholders/officers for dram shop claims.

The Trust Proceedings

[7] In September 2008, David and Amy settled the personal injury lawsuit, and, in conjunction therewith, Attorney Rice filed on September 10, 2008, a "Verified Petition for Protective Proceeding Under IC 29-3-4-1" in the St. Joseph

Superior Court (the Trust Proceedings). *Id.* at 55. The petition, signed and submitted by Attorney Rice, stated that Amy "suffered severe emotional distress, loss of consortium and other damages," and David "suffered injuries, incurred medical and hospital expenses for care and treatment, lost wages, lost time, loss of the enjoyment of life and ha[s] suffered and will continue in the future to suffer pain, lost time, loss of the enjoyment of life, lost wages, medical expense and other damages." *Id*. at 56. The petition further stated:

> 15. Although David is competent, he and his wife have self-reported that he has difficulty handling money. . . . For instance, while David can count change, he is unable to pay bills o[r] manage a checkbook. Because of David's need for assistance, it is appropriate for the Court to approve the settlement and Order the payment of the settlement proceeds into an Irrevocable Trust *for David's benefit*.
>
> 16. Pursuant to IC 29-3-4-1, the Court has the ability to order the establishment of a Trust *for the protection of David Osadchuk*.
>
> 17. The Petitioner requests that Wells Fargo Bank of Indiana be appointed the Trustee *of the David Osadchuk Irrevocable Trust*.

Id. at 57 (emphases added). The petition proposed that, after payment of attorney fees and litigation expenses, the settlement proceeds be distributed as follows: 5% of the gross settlement be paid to Amy for her claim and the remainder be paid to Wells Fargo Bank as Trustee of the Trust.

[8] The court held a hearing that same day[1] and thereafter issued an order granting the petition. The court found, in part:

> 15. Although David is competent to understand and execute the Settlement Agreement, he has difficulty managing money, pay[ing] bills or manag[ing] a checkbook without assistance. *Because of David's need for assistance, it is in the best interests of David* for the Court to order the payment of the settlement proceeds into an Irrevocable Trust *for David's benefit*.
>
> 16. The Court directs that an irrevocable trust should be established pursuant to IC 29-3-4-1 *for the protection of David Osadchuk*.
>
> 17. Wells Fargo Bank of Indiana shall be appointed the Trustee of the David Osadchuk Irrevocable Trust. *The proposed terms of the David Osadchuk Irrevocable Trust are determined to be fair and reasonable*.

Id. at 73 (emphases added). The court approved the establishment of the Trust and ordered disbursements consistent with that requested in the petition.

[9] On October 2, 2008, David, as "Donor," executed the Trust.[2] *Id*. at 84. It provided in part:

> 1.2. The Trust created by this agreement shall be irrevocable. I may not revoke or amend this agreement in any way. My

---

[1] According to the court's order, present at the hearing were Amy, David, Attorney Rice, and an attorney for Macaw Enterprises.

[2] A trust officer of Wells Fargo Bank, as Trustee, also signed the Trust.

> Trustee, however, may at any time, or from time to time, amend any administrative provisions of this Trust[.] . . .
>
> 2.1. The Trustee may pay to me or may pay on my behalf as much of the income or principal of the Trust as it shall determine in its sole and nonreviewable discretion to be necessary *for my care and well being*. The Trustee shall arrange for me to have goods and services *to enhance the quality of my life and well-being*, mental, physical, and spiritual, to the greatest extent possible. It is important to me that I maintain a level of human dignity and humane care. The Trustee should bear this in mind when making distributions from the Trust while simultaneously *considering that the Trust is not to be invaded by creditors or subjected to any liens or encumbrances*. The Trustee may make the payments at any time, in any amounts and proportions, and for any purposes as the Trustee considers advisable, taking into account any factors it considers appropriate and having regard for the purposes of the Trust described above. Neither I nor any person acting on my behalf as guardian, conservator, guardian ad litem, attorney, or agent, except for *the Trustee alone, shall have any right, power, or authority to liquidate the Trust, in whole or in part, or to require payments from the Trust for any purpose*. The Trustee is directed to conserve and accumulate the Trust estate to the extent feasible, due to the unforeseeability *of my future needs*. However, accumulation or *use of the Trust is to be determined solely on the basis of my needs*, *without regard to the interests of the remaindermen*. . . . The principal shall be held until the termination of this Trust.

Id. at 76 (emphases added).

The Dissolution Proceeding

[10] Amy was David's primary and full-time caretaker for some years, and they lived off Amy's settlement proceeds as well as disbursements from the Trust, "the corpus of which remains substantial," according to Amy. *Id.* at 11.

Eventually, David's condition improved, and Amy returned to working outside the home. According to Amy, as "David's health improved, their relationship deteriorated," and, in November 2018, she filed a petition for dissolution in Vigo Superior Court (the dissolution proceeding).[3] *Id.* In addition to David, Amy named the Trust as a party to "determin[e] the extent to which, if any, the assets of the Trust constitute marital assets under Indiana law." *Appellant's Appendix Vol. III* at 168. In February 2019, the successor trustee, Shawn P. Ryan (the Trustee),[4] filed a motion to dismiss the Trust from the dissolution proceeding, arguing among other things, that the dissolution court did not have jurisdiction over the Trust/Trustee and could not order payments be made from the Trust. The Trustee further argued that Amy was present at the hearing on the petition that sought approval for the establishment of the Trust, the terms of which provided that it was irrevocable and not to be invaded by creditors or subject to any liens or encumbrances. The dissolution court granted the Trustee's motion and dismissed the Trust in October 2019.[5]

---

[3] The parties do not have children.

[4] As part of her collusion claim, Amy points out that Ryan and Attorney Rice had formerly been law partners in their firm. That partnership "ended in 2003." *Appellant's Appendix Vol. II* at 21.

[5] Amy does not dispute that the dissolution court "lacks jurisdiction over the Trust." *Appellant's Appendix Vol. III* at 134.

Petition to Modify Trust

[11] In June 2021, Amy filed, in the Trust Proceedings, a Petition to Modify, Terminate, or Deviate from the Terms of a Trust (Petition to Modify Trust).[6] As is relevant here, Amy asserted:

> The substantive issue which Amy asks this Court to address by this Petition is . . . whether the Trust should be terminated, modified or a deviation from its terms should occur *because when the Trust was created divorce was not contemplated by David and Amy and the Trust is silent on divorce*.
>
> [] If termination, modification, or deviation does not occur, Amy will be divested of her rights in marital property in the circumstance of the current divorce as a purported creditor. This result would be unjust and inconsistent with the circumstances and purposes of the trust and was never intended by Amy, David, or presumably their joint legal counsel.

Appellant's Appendix Vol. III at 135 (emphases added).

[12] Thereafter, David filed a motion for judgment on the pleadings,[7] in which the Trustee later joined. David argued that "nearly thirteen years" after the creation of the Trust and "in the midst of divorce proceedings in Vigo County, Amy objects to the same trust that she and . . . David had petitioned the Court

---

[6] Amy originally filed her Petition to Modify in April 2021 in the St. Joseph Circuit Court, which dismissed the petition on the Trustee's motion.

[7] At that time, David was represented by attorney John LaDue, who Amy points out was a former partner of Attorney Rice. That relationship ended in 2008, when LaDue left Attorney Rice's law firm "five days after the personal injury lawsuit was filed." *Transcript* at 30.

to establish." *Appellant's Appendix Vol. III* at 156. David maintained that the Petition to Modify Trust was waived and time barred and that Amy, who was neither a trustee nor beneficiary under the Trust, lacked standing to file the Petition to Modify Trust.

[13] David also asserted that the petition should be denied on its merits. He argued that, although Indiana allows modification or termination of a trust due to unanticipated circumstances, any such modification or termination must be necessary to accomplish the trust's purpose,[8] and "here, the Osadchuks' divorce was not 'unanticipated.'" *Id.* at 157. David explained,

> The Trust does not mention divorce because David is the only individual who could receive payments, so there was no need to plan for how payments would be divided if David and Amy divorced. And it is unmistakable that *the Trust contemplated the possibility that David and Amy could end up divorced*: Even though David was married to Amy at the time the Trust was created, the provisions of the Trust relating to distributions on David's death only mention David's "spouse" – not Amy specifically. Had divorce not been contemplated, Amy would have been named instead of the generic term "spouse." Accordingly, *the Trust certainly contemplated that David could have divorced Amy* and gotten remarried before his death. . . . [D]ivorce was not an "unanticipated circumstance" in 2008[.]

Id. at 170 (emphases added). David urged that, even if divorce had been unanticipated, Amy's request to modify the Trust would not accomplish the

---

[8] *See* Ind. Code §§ 30-4-3-24.4, -26.

Trust's purpose of protecting assets dedicated to David's health and well-being, and thus did not satisfy the statute's requirements for allowing modification.

[14] Amy filed an opposition, attaching her own affidavit thereto. She averred, among other things: (1) at the time the Trust was created, Attorney Rice never discussed with her what would occur under the Trust in the event of a dissolution of marriage; (2) she never saw any proposed Trust before the court authorized it on September 10, 2008, thus suggesting it did not yet exist on the date that the court approved it; and (3) it was her understanding that the Trust was created not because of David's inability to manage money or pay bills – as she always handled that task – but rather "to protect the proceeds of David's injury settlement from depletion by unknown future medical bills." *Id.* at 93, 94. She also stated that, until the dissolution was filed, she had received regular distributions from the Trust for both household expenses and personal use, such that she effectively had been treated as a beneficiary until she petitioned for dissolution. *Id*. at 94.

[15] In response to Amy's assertion that the Trust did not exist when the court approved and authorized it on September 10, 2008, David submitted the affidavit of Attorney Rice in which he averred to providing a copy of the Trust to the court at the hearing.

[16] Following a January 31, 2022 hearing on David's motion for judgment on the pleadings, the court entered an order recognizing it as "a close call" but denying

the motion. *Id*. (CCS Hearing Journal Entry). The Petition to Modify Trust remains pending.

The Malpractice Lawsuit

[17] This brings us to the instant complaint (the Complaint) that Amy filed on October 21, 2021, in a separate St. Joseph Superior Court, against the Attorneys, alleging four counts: legal malpractice, fraud, constructive fraud, and attorney deceit and collusion. The legal malpractice claims were based on Attorney Rice seeking court approval for a trust that failed to "contemplate" the possibility of a dissolution yet would contain David's settlement proceeds that comprised "nearly the entire [] marital estate of the parties." *Appellant's Appendix Vol. II* at 13. The Complaint also asserted that the Attorneys failed to advise Amy that the trust could effectively "be turned against her" by making her a creditor against her own marital estate. *Id*.

[18] The allegations of fraud, constructive fraud, and attorney deceit and collusion were based on what Amy suggests was information that came to light only after she filed her Petition to Modify Trust in 2021. Specifically, the Complaint alleged that the Attorneys committed fraud because they "never advised [Amy] . . . that David, or that they as her attorneys, were contemplating divorce at the time of the protective proceeding and creation of the Trust" in 2008 and instead advised her that the Trust was a way to protect both her and David from creditors "which was false given David's or her attorneys' contemplation of divorce[.]" *Id*. at 14. Amy asserted that the Attorneys "made such representations . . . with either knowledge . . . or with reckless ignorance that

divorce was contemplated." *Id*. The claim for constructive fraud was similarly based on the Attorneys' failure to inform Amy "that divorce was contemplated" and alleged that the Attorneys, as David's "agents," gained an advantage at the expense of Amy "by attempting to shield assets from division in their divorce." *Id*. at 15-16. Amy's claim for attorney deceit and collusion, brought under Ind. Code § 33-43-1-8,[9] asserted that the Attorneys caused her to believe the trust was for her benefit but in fact intended "to treat [Amy] as a creditor in the circumstance of divorce and divest her of the marital estate." *Id*.

[19] The Attorneys filed a Motion for Judgment on the Pleadings (MJOP), contending that the Complaint, their Answer, and other matters of which the court could take judicial notice,[10] showed that they were entitled to judgment on several bases. They argued that the legal malpractice claim accrued in 2008 when the Trust was created or, at the latest, when the personal injury claim was concluded and dismissed in 2009, and thus the legal malpractice claim was barred by the applicable two-year statute of limitations.

[20] The Attorneys urged that the three fraud-type claims all stemmed from alleged failures to properly advise Amy during the creation of the Trust and, thus, were merely a re-labeling of the legal malpractice claim, which Indiana does not

---

[9] I.C. § 33-43-1-8 provides that one who is guilty of deceit or collusion commits a Class B misdemeanor and permits one injured to bring a civil action for treble damages.

[10] The Attorneys attached seven exhibits to their motion: the 2008 Verified Petition for Protective Proceedings and its three attachments; the court's order thereon; the Trust; and four CCS dockets, one each from the four related proceedings.

permit to avoid application of the statute of limitations. Further, they argued, even if the fraud-related claims were not a re-do of the legal malpractice claim, they failed on their merits: As to fraud, the Attorneys asserted that Amy did not identify any misrepresentation of past or existing fact and, as stated in their Answer, the Attorneys "had no knowledge about either David or Amy [] contemplating divorce at any time and thus did not offer advice thereon." *Id*. at 25. As to constructive fraud and attorney deceit and collusion, they argued that Amy failed to allege that the Attorneys "benefited from their supposed fraud." *Id.* at 33.

[21] Amy filed a brief in opposition, urging, first, that the MJOP relied on matters outside the pleadings, and thus should be treated as a motion for summary judgment, and, second, that the Attorneys were not entitled to judgment on the Complaint. She argued that her claims were not time barred because her action did not accrue in 2008 because a reasonable person in her circumstance would not have discovered the malpractice when the Trust was created or funded. Rather, Amy argued, "the earliest that the statute of limitations arguably might have started running was the date the Trust was dismissed from the parties' divorce proceeding in Vigo County." *Appellant's Appendix Vol. III* at 18. She also suggested that the statute of limitations was tolled by the Attorneys' "ongoing wrong" of failing to tell her at any time since 2008 that dissolution was contemplated when the Trust was created and continuing to oppose her attempts to modify the Trust. *Id*. at 19.

[22] As to the fraud-based claims, Amy asserted that they were substantively distinct from the malpractice claim – and not time barred – because they were based on information that she discovered in September 2021 in the Trust Proceedings, namely that the Attorneys knew in 2008, but did not disclose to her, that David contemplated divorce at the time the Trust was created. She argued that, at a minimum, "a material issue of fact exists whether [A]ttorney Rice's actions in creating and funding a trust silent on divorce was negligent or malicious." *Id.* at 20.

[23] In addition to not being time barred, Amy maintained that her Complaint sufficiently pled her claims to survive judgment as a matter of law, noting that a failure to disclose may constitute a misrepresentation of material fact for fraud purposes and that the Attorneys personally benefitted, as is required for constructive fraud, by virtue of their agent status for David. With regard to collusion, she highlighted that LaDue, a former partner, was David's attorney in opposing her Petition to Modify Trust and that Ryan, also a former partner, was the successor Trustee. Amy attached eighteen exhibits to her opposition to the MJOP. Among other things, she attached her own affidavit and Attorney Rice's affidavit, each of which were submitted in the Trust Proceedings as exhibits to pleadings.

[24] On April 1, 2022, the court held a Zoom hearing on the Attorneys' MJOP. The Attorneys closed by arguing,

> [A]ll the arguments raised [by Amy] about the equitable division of assets in a trust, . . . those are for the divorce court to decide

> and for the trust court to decide. What is before this Court is a legal malpractice complaint that is [] more than a decade too old, and is barred by the statute of limitations.
>
> * * *
>
> Amy knew about an irrevocable trust because she attended a hearing and heard the terms of the trust explained to [the court], and so at that point in time knew or should known [sic] that David's portion of the settlement funds would be put in an irrevocable trust. . . .
>
> There is zero basis for a claim of fraud here. . . . [T]he only basis for a claim of fraud is to try to weave together this conspiracy theory that because David has argued in [the Trust Proceedings], being represented by attorneys that have nothing to do with my client, that divorce was contemplated[.]
>
> * * *
>
> So the trust and how it's interpreted, that's for a different court to decide, and I wish Amy Osadchuk the best of luck in opening up that trust. It has nothing to do with the case that we're here about today[.]

Transcript at 29, 30, 31.

[25] The trial court took the matter under advisement and, thereafter, issued an order summarily granting the MJOP. Amy now appeals. Additional facts will be supplied as necessary.

Discussion & Decision

[26] An Ind. Trial Rule 12(C) motion for judgment on the pleadings is to be granted "only where it is clear from the face of the complaint that under no circumstances could relief be granted." *Consol. Ins. Co. v. Nat'l Water Servs., LLC*, 994 N.E.2d 1192, 1196 (Ind. Ct. App. 2013), *trans. denied*. We review de novo a trial court's ruling on a T.R. 12(C) motion for judgment on the pleadings. *Murray v. City of Lawrenceburg*, 925 N.E.2d 728, 731 (Ind. 2010).

[27] When reviewing a T.R. 12(C) motion, we may look only at the pleadings, with all well-pleaded material facts alleged in the complaint taken as admitted, supplemented by any facts of which a court may take judicial notice. *Waldrip v. Waldrip*, 976 N.E.2d 102, 110 (Ind. Ct. App. 2012). "Pleadings" consist of a complaint and an answer, a reply to any counterclaim, an answer to a cross-claim, a third-party complaint, and an answer to a third-party complaint. *Consol. Ins. Co.*, 994 N.E.2d at 1196. "Pleadings" also consist of any written instruments attached to a pleading. *Id.*; *see also* Ind. Trial Rule 10(C) ("A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.") and Ind. Trial Rule 9.2 ("When any pleading allowed by these rules is founded on a written instrument, the original, or a copy thereof, shall be included in or filed with the pleading. Such instrument, whether copied in the pleadings or not, shall be taken as part of the record.").

[28] Amy argues that the Attorneys' MJOP "violates the requirements of T.R. 12(C) by improperly relying on matters outside the pleadings" and that the trial court

committed reversible error by failing to treat it as an Ind. Trial Rule 56 motion for summary judgment. *Appellant's Brief* at 19. The Attorneys maintain that all the documents they attached were matters of which the court could take judicial notice and thus consider under T.R. 12(C).

[29] While a court may judicially notice the existence of "records of a court of this state," *see* Ind. Evidence Rule 201(a)(2)(C), (b)(5), judicial notice of court records is not without limitation. We have held that Evid. R. 201 "does not provide for notice of all facts contained within a court record." *Matter of D.P.*, 72 N.E.3d 976, 983 (Ind. Ct. App. 2017). That is, "[e]ven if court records may be judicially noticed, 'facts recited within the pleadings and filings that are not capable of ready and accurate determination are not suitable for judicial notice.'" *Id*. We have recently reaffirmed that "'[u]nless principles of claim preclusion apply, judicial notice should be limited to the fact of the record's existence, rather than to any facts found or alleged within the record of another case.'" *In re P.B.*, -- N.E.3d --, 2022 WL 17098090, at *4 (Ind. Ct. App. Nov. 22, 2022) (quoting *D.P.*, 72 N.E.3d at 983).

[30] Here, the Attorneys attached seven exhibits to their MJOP, including several from the Trust Proceedings: the Verified Petition for Protective Proceeding, the order thereon, and the Trust.[11] In addition to those matters, the Attorneys ask us to take judicial notice of the contents of the dissolution petition "to be fully

[11] Amy referred to the Trust in the instant Complaint but did not attach it.

apprised of the relevant factual background." *Appellant's Brief* at 14 n.51. Amy attached eighteen exhibits to her opposition to the Attorneys' MJOP. We conclude that where, as here, both parties relied on various pleadings and exhibits, many of which were filed in one of the other several related lawsuits, and the trial court did not exclude any of those submitted materials, the court should have treated the MJOP as a motion for summary judgment. However, the trial court's failure to do so does not constitute reversible error, and we may treat the MJOP as a motion for summary judgment.[12] *See Holmes v. Celadon Trucking Servs. of Ind.*, 936 N.E.2d 1254, 1256 (Ind. Ct. App. 2010) (appellate court, on appeal from grant of motion for judgment on the pleadings, treating motion as one for summary judgment).

[31] Our standard of review for summary judgment is well settled:

> Summary judgment is appropriate only where the evidence shows there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. All facts and reasonable inferences drawn from those facts are construed in favor of the nonmoving party. To prevail on a motion for summary judgment, a party must demonstrate that the undisputed material facts negate at least one element of the other party's claim. Once the moving party has met this burden with a prima facie showing, the burden shifts to the nonmoving party to

[12] Amy also asserts that the trial court committed reversible error by granting the MJOP "since it failed to address the viability of each of Amy's claims as presented in the Complaint." *Appellant's Brief* at 18. Specifically, she argues that "[b]y not including any analysis or rationale in its Order, it is clear that the trial court did not address the viability of each of Amy's claims as presented in the Complaint." *Id*. at 19. We reject this argument as there is no preclusion against summarily granting a MJOP (or a motion for summary judgment).

> establish that a genuine issue does in fact exist. The party appealing the summary judgment bears the burden of persuading us that the trial court erred.

Id. "[I]f the moving party asserts that the claim is time barred by the applicable statute of limitations, the non-movant has the burden of establishing an issue of fact material to a theory that overcomes the affirmative defense." *Id*.

Legal Malpractice Claim

[32] To prove a legal malpractice claim, the plaintiff-client must show: (1) employment of the attorney (the duty); (2) failure of the attorney to exercise ordinary skill and knowledge (the breach); (3) proximate cause (causation); and (4) loss to the plaintiff (damages). *CRIT Corp. v. Wilkinson*, 92 N.E.3d 662, 669 (Ind. Ct. App. 2018). To establish causation and the extent of harm, the client must show that the outcome of the underlying litigation would have been more favorable but for the attorney's negligence. *Id*. at 669-70. The statute of limitations for a claim of legal malpractice is two years. *Saylor v. Reid*, 132 N.E.3d 470, 473 (Ind. Ct. App. 2019) (citing Ind. Code § 34-11-2-4), *trans. denied*. Amy argues that, given the summary nature of the court's order, it is not clear on which basis the court made its decision, but "[t]o the extent the trial court granted [the Attorneys'] motion [] based on the statute of limitations [], reversible error occurred." *Appellant's Reply* at 11. We disagree.

[33] Legal malpractice actions are subject to the "discovery rule," which provides that the statute of limitations does not begin to run until such time as the plaintiff knows, or in the exercise of ordinary diligence could have discovered,

that she had sustained an injury as the result of the tortious act of another. *Saylor*, 132 N.E.3d at 473. For purposes of the discovery rule, reasonable diligence "'means simply that an injured party must act with some promptness where the acts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist.'" *Id.*; *see also Myers v. Maxson*, 51 N.E.3d 1267, 1276 (Ind. Ct. App. 2016) (under the "discovery rule," the claim accrues when the plaintiff knows, or in the exercise of ordinary diligence could have discovered, that he had sustained an injury as the result of the tortious act of another), *trans. denied*. The standard applied to determine when a plaintiff exercising ordinary diligence could have discovered the potential damage resulting from another's conduct is an objective one, based upon "what a reasonable person would have done." *Martin Oil Mktg. Ltd. v. Katzioris*, 908 N.E.2d 1183, 1188 (Ind. Ct. App. 2009).

[34] Here, Amy alleges that the Attorneys committed legal malpractice when they sought court approval to deposit David's settlement proceeds, "which constitute[d] nearly the entire [] marital estate of the parties," into a trust "that did not contemplate the parties' divorce[.]" *Appellant's Appendix Vol. II* at 13. And they committed further malpractice "when they advised [Amy] that she, as well as David, would be best protected from creditors, especially future medical creditors" but "never advised [Amy] that the marital estate was being placed in a Trust which could be turned against her" by making her "a creditor against her own marital estate." *Id.*

[35] We find that the exercise of ordinary diligence would have enabled Amy to become aware, if she was not, of the terms of the Trust at the time of its creation in 2008, including that it was created solely for David's benefit and that it was irrevocable. She clearly understood that the Trust was being funded with David's portion of the proceeds from the personal injury settlement, which by her own account was the most substantial asset that either she or David owned. She received advice that the Trust was the best way to protect both her and David from creditors or encumbrances. Attorney Rice averred that he presented the proposed trust to the court at the hearing, which Amy attended according to the court's ensuing order, and that the court found the terms fair and reasonable. Attorney Rice brought the Trust to their home, where David subsequently executed it; Amy was not a donor, beneficiary, or trustee under the Trust. In short, she either knew or, in the exercise of ordinary diligence should have known, the basis for her legal malpractice claims in 2008, and thus her claim is time barred.

[36] Amy argues that "the earliest that the statute of limitations arguably might have started running was the date the Trust was dismissed from the parties' dissolution proceeding in Vigo County, on October 22, 2019, since it was on that date that she discovered that the Trust was no longer part of the divorce proceeding unless further action was taken by her in St. Joseph County." *Appellant's Brief* at 27. To that argument, we find our decision in *Ickes v. Waters*, 879 N.E.2d 1105, 1109 (Ind. Ct. App. 2008), *clarified on reh'g*, *trans. denied*, to be instructive.

[37] There, a husband and wife created an estate plan for their marital assets after consulting with an attorney who recommended an *inter vivos* trust that would become irrevocable upon husband's death. The couple executed trust documents and funded the trust with the bulk of their marital assets. After the death of the husband, the wife brought a legal malpractice action against the attorney, alleging that he failed to exercise ordinary skill in counseling her and preparing their estate plan, and the trial court granted summary judgment for the attorney on the basis that the statute of limitations had run. On appeal, the wife argued that the statute of limitations did not begin to run until her husband died, while the defendant attorney argued it began to run when the trust was funded years prior. This court held that because the wife lost control of the property when she transferred it to the trust without retaining any power to revoke or amend, her injury, if any, occurred at that time, and thus, her legal malpractice claim, filed four years later, was time barred.

[38] Amy suggests that *Ickes* is not controlling or relevant, arguing that it "had nothing to do with divorce," and further, unlike her, the wife in *Ickes* "knowingly transferred her joint property to the trust" whereas she "only understood that the Trust would protect against medical creditors[.]" *Appellant's Brief* at 25, 26. We find, however, that, as in *Ickes*, any injury Amy may have suffered occurred when Attorney Rice created the Trust and placed the settlement proceeds therein and that Amy knew or in the exercise of reasonable diligence should have known at that time that she had no control of the funds placed into the irrevocable Trust. *See Ruckelshaus v. Cowan*, 963 F.3d

641, 644 (7th Cir. 2020) (affirming summary judgment for lawyer who drafted trust dissolution documents in 2000 and rejecting claimant's argument that she could not have known about alleged malpractice until the 2015 death of a person with a life estate, who claimant expected to inherit from). Thus, any malpractice claim that Amy may have had against the Attorneys accrued at the time the Trust became operative, and it expired two years later.

[39] Finding no genuine issue of material fact as to whether the legal malpractice claim was filed beyond the two-year statute of limitations,[13] we affirm the trial court's judgment in the Attorneys' favor on this claim.

Fraud, Constructive Fraud, Attorney Deceit and Collusion

[40] The Attorneys argue, as they did below, that the claims of fraud, constructive fraud, and attorney deceit and collusion are likewise time barred because, under Indiana case law, "where the limitations period has expired on a legal malpractice claim, a plaintiff cannot salvage her claim by relabeling it." *Appellees' Brief* at 26. Amy maintains that her fraud-type claims "are substantively distinct" from the malpractice claim and that the applicable statute of limitations[14] has not expired and to the extent that the trial court found otherwise, it erred. *Appellant's Brief* at 28.

---

[13] We reject Amy's suggestion that the limitations period was tolled because the Attorneys committed "ongoing wrong" in the Trust Proceedings by opposing her efforts "to open the Trust for equitable division" and by seeking to stay discovery. *Appellant's Brief* at 13, 15, 27.

[14] The statute of limitations for fraud and constructive fraud is six years, Ind. Code § 34-11-2-7, and is two years for attorney deceit for breach of fiduciary duty. I.C. § 33-43-1-8 (attorney deceit statute and action for

[41] As she argued below, Amy's position is that the fraud-based claims are distinct from the malpractice claim because, unlike the malpractice claim, the fraud-type claims are based on information she discovered in 2021, namely, that David and the Attorneys "contemplated divorce at the time the Trust was created," yet the Attorneys "never advised" her at that time or thereafter "that David was contemplating divorce[.]" *Id*. And "[i]nstead, [A]ttorney Rice advised [her] that the Trust was a way to protect the settlement funds for both Amy and David, which was false given David's contemplation of divorce, the irrevocability of the Trust, and the failure to provide for how the proceeds of the Trust would be divided in the event of divorce." *Id*. at 30. Amy alleges that Attorney Rice made such representations with either knowledge or reckless ignorance of the falseness and that, at a minimum, a question of fact exists on whether Attorney Rice's actions were "negligent" or were "malicious," thereby precluding summary judgment. *Id*. at 29. We are not persuaded.

[42] First, contrary to Amy's assertion that the Attorneys' pleadings in the Trust Proceedings revealed that "David was contemplating divorce," *id.* at 30, said pleadings did not state that *David* was contemplating – in the sense of currently considering, intending, or planning for – divorce. Rather, the Attorneys argued that the language of *the Trust* contemplated – that is considered or addressed the possibility of – dissolution, such that it was not an "unanticipated"

---

treble damages); *Browning v. Walters*, 616 N.E.2d 1040, 1047 (Ind. Ct. App. 1993) (stating statute of limitations for treble damages is two years).

circumstance, as is statutorily required for modification of a trust. There is no evidence in the record that David was, at that time, presently "contemplating" a divorce from Amy or, more importantly, that the Attorneys knew it but failed to tell Amy. Indeed, the Attorneys' Answer states that they "had no knowledge about either David or Amy Osadchuk contemplating divorce at any time[.]" *Appellant's Appendix Vol. II* at 25.

[43] Second, the underpinning of each of the fraud-based claims is essentially the same as that of the legal malpractice claim, i.e., that Attorney Rice did not properly advise Amy at the time of the Trust's creation and/or failed to include language in the Trust about what happens in the event of dissolution. In *Shideler v. Dwyer*, 275 Ind. 270, 417 N.E.2d 281 (Ind. 1981), the Court examined various claims brought against an attorney who had drafted a will, and the Court determined that the substance of a claim, not its label, controls for purposes of determining a limitations period.

[44] In *Shideler*, the probate court determined that the will contained an unenforceable clause, which it voided. As a result, the beneficiary lost anticipated benefits. The beneficiary filed suit against the drafting attorney, asserting claims of breach of contract, negligence, fraud, constructive fraud, and breach of fiduciary duty. The Court determined that the legal malpractice two-year statute of limitations applied to all the claims, explaining:

> [T]hough parties confronted with a limitations problem often attempt, as Plaintiff has attempted here, to evade such difficulties by reliance upon pleading technicalities, the courts have

> consistently rebuffed these efforts in favor of substantive analysis. . . . With respect to the Complaint herein, the number and variety of Plaintiff's technical pleading labels and theories of recovery cannot disguise the obvious fact . . . that this is a malpractice case, and hence is governed by the statute of limitations applicable to such actions.

417 N.E.2d at 286; *see also Saylor*, 132 N.E.3d at 473-74 (finding that although plaintiff "mentioned" fraud, forgery, fraudulent misrepresentation, and negligence, the allegations "substantively constitute or are a part of his claim of legal malpractice" such that the two-year statute of limitations applied); *Myers,* 51 N.E.3d at 1277 n.10 (noting that individual's allegations of constructive fraud and intentional infliction of emotional distress against his attorney were substantively part of his legal malpractice claim).

[45] We likewise find that Amy's fraud, constructive fraud, and attorney deceit and collusion claims are, at their core, based on the same alleged errors and omissions that form the basis of the legal malpractice claim, *i.e.* failures to properly advise and draft, and, consequently, they are time barred.

[46] Discerning no genuine issue of material fact to preclude summary judgment on the fraud, constructive fraud, and attorney deceit and collusion claims, we affirm the trial court's judgment in the Attorneys' favor on those claims.[15]

---

[15] Finding as we do that the three fraud-type claims are untimely and barred, we do not reach the parties' respective arguments as to whether the Complaint sufficiently pled the existence of a material misrepresentation of past or existing fact or the gaining of an advantage by the Attorneys by virtue of an agency relationship with David, as necessary to support the fraud and constructive fraud claims, respectively.

[47] Judgment affirmed.

Brown, J. and Tavitas, J., concur.