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Missed deadline could cost \$100M

FORMER CALDWELL & WATSON CLIENTS sue firm for missing appeal deadline in challenge to uncle's will

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A MALPRACTICE LAWSUIT filed last week against Atlanta firm Caldwell & Watson and three of its lawyers claims a missed appeal deadline may have cost the firm's former clients more than \$100 million.

The three plaintiffs, siblings who had hired the firm to challenge a will of their uncle that purported to disinherit them, claim lawyers at the firm told them they had a strong case if they appealed a probate judge's order. Their complaint says the firm simply forgot to file the appeal, with firm partner Harry MacDougald admitting to one of them he "counted the days wrong."

"It's a fairly typical legal malpractice case where someone misses a filing deadline," said Atlanta lawyer Edwin Schklar, who filed the malpractice suit on behalf of the three siblings. "Those are the most common legal malpractice cases."

The lawsuit, filed Sept. 19 in Fulton County Superior Court, names Caldwell & Watson, MacDougald and his partners Harmon

Caldwell Jr. and Robert Carlson as defendants. The firm handles estate planning, divorce and other litigation matters.

Carlock, Copeland & Stair partner Johannes Kingma, who will defend Caldwell & Watson and its lawyers in the lawsuit, acknowledged his clients missed the appeal deadline. But he said the appeal "was probably not a winner" and the damages claim of the Caldwell firm's former clients is speculative.

The plaintiffs—John Appleby, Elizabeth Appleby and Corinne "Kinsey" Appleby Harper—say they were told by their uncle, Roy Dorsey, who had no children, that they would inherit his 1,500 shares in Four Plus Corp., a real estate investment company founded by the siblings' great-grandfather. That was the plan under a will Dorsey signed in 2001.

But when Dorsey died in 2012, the siblings discovered that a new will, dated Aug. 11, 2005, left them out entirely. They point out that one of Dorsey's executors, a woman whom they say Dorsey had hired to help him with administrative tasks, inherited more than \$1 million under the new will. Noting that Dorsey was diagnosed with dementia in 2001, the plain-



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Edwin Schklar, who filed the plaintiffs' suit, said it was a "fairly typical legal malpractice case."

tiffs claim the woman "preyed upon" Dorsey's lack of mental capacity for her own benefit.

The Applebys say lawyers at Caldwell & Watson spoke to them about two possible legal routes. First, the lawyers said the Applebys could pursue a breach of contract lawsuit, but, according to the Applebys'

complaint, the lawyers said they didn't think they could prove that Dorsey and his wife, who died in 1999, had formed a contract with one another to bequeath the Four Plus shares to the Applebys.

The other option was to challenge the will itself in probate court on the ground that Dorsey had been unduly influenced. The Applebys claim that Caldwell and MacDougald told them they would have a very good probate case.

In September 2012, the Caldwell & Watson lawyers filed a breach of contract action against Dorsey's estate in Fulton County Superior Court, naming the three executors of Dorsey's 2005 will as defendants. The following year, they filed a petition in Fulton Probate Court to set aside the order admitting the 2005 will to probate. A probate judge denied that petition in August 2013.

A few days later, the Caldwell lawyers recommended that the Applebys obtain a stay of the breach of contract case while pursuing an appeal of the probate court ruling. The Applebys agreed to the appeal, but the lawyers failed to file it, the complaint says. "To his credit," the complaint says, MacDougald owned up to the error, told the Applebys the missed deadline could give rise to claims against him and the firm and encouraged them to consult with another lawyer.

The Applebys obtained new counsel, Schklar and Maggie Heim at Schklar & Heim, to represent them in the breach of contract case, as well as any claims against the Caldwell & Watson lawyers.

In November 2013, the Applebys dismissed the breach of contract action, while leaving open the option of refileing it. They say that when the other side threatened to file a motion for attorneys' fees and expenses for litigating the case in bad faith, their

new lawyers negotiated a settlement under which the Applebys agreed to release the executors from the claims the Applebys had asserted against them, in return for the executors' agreement that they wouldn't file any attorneys' fees claim. The Applebys say that protected the Caldwell lawyers from an attorneys' fee claim by the executors, too.

The lawsuit against the Caldwell lawyers asserts among other things claims for malpractice, breach of contract, breach of fiduciary duty and unjust enrichment. The Appleby siblings contend that, given the Caldwell lawyers' prior representations about the strength of the Applebys' claims, they shouldn't be allowed to argue now that the Applebys would not have prevailed in their appeal.



In this case it was just an honest mistake. People sometimes make honest mistakes.

—Edwin Schklar,
counsel for the plaintiffs

The required expert affidavit accompanying the complaint is provided by Thelma Wyatt Moore, who left the bench for private practice at the end of 2008 after serving as a chief judge on the Fulton Superior Court. She says "there should not be any controversy in this action" that the missed deadline "constitutes the quintessential example of the breach of the standard of care by an attorney."

The complaint says the Applebys' damages include the loss of their ability to recover the 1,500 Four Plus shares through a will contest, more than \$170,000 in attorneys' fees and litigation expenses they paid their

former lawyers "for naught," and additional fees and expenses they incurred to mitigate their losses and pursue their malpractice claims. They say their damages amount to "tens of millions of dollars, perhaps more than \$100 million." The complaint says a purchase of 225 shares of Four Plus earlier this year by one of the plaintiffs mitigated the plaintiffs' damages.

Schklar, the Applebys' attorney, said his clients "feel like their damages were rather monumental." He said the amount of damages depends on the value of the Four Plus stock, which the plaintiffs will need an expert to prove.

The case has been assigned to Judge Robert McBurney.

Kingma, who is representing the Caldwell lawyers in the suit, indicated his clients have defenses. "We think [the plaintiffs'] damages are speculative, and we haven't seen proof of what they say," he said.

"We also think that the underlying case was probably not a winner," Kingma added. He said a review of the file would show "many suggestions" that the probate challenge "was not a strong one."

Schklar said it was "a little melancholy and regrettable that a lawsuit has to be filed," saying Caldwell & Watson has "very fine lawyers."

"In this case it was just an honest mistake," he said. "People sometimes make honest mistakes."

The case is *Appleby v. Caldwell & Watson*, No. 2014CV251687. 