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Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002017-MR

GARDINER PARK DEVELOPMENT, LLC;
GARDINER DESIGN & DEVELOPMENT, INC.;
and GREGORY S. GARDINER — APPELLANTS

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE F. KENNETH CONLIFFE, JUDGE
ACTION NOS. 01-CI-006541 and 02-CI-002907

MATHERLY LAND SURVEYING, INC.;
ALVA L. MATHERLY; and
CARL DOUGLAS COMER — APPELLEES

CONSOLIDATED WITH AND TO BE HEARD WITH:
NO. 2003-CA-002048-MR

D. SEAN NILSEN and
WOODWARD, HOBSON & FULTON — APPELLANTS

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HON. F. KENNETH CONLIFFE, JUDGE
ACTION NOS. 01-CI-006541 and 02-CI-002907

MATHERLY LAND SURVEYING, INC.;
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GARDINER PARK DEVELOPMENT, LLC;
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and GREGORY S. GARDINER — APPELLEES

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; BARBER, JUDGE; MILLER, SENIOR JUDGE.[1]

BARBER, JUDGE: This case presents the difficult question of determining which statute of limitations is applicable to the claims among the parties. The core issue in the case involves how a professional and professional services are defined under KRS 413.245, the one-year professional malpractice statute. The circuit court found that the services provided were performed by a professional engineer, and, thus, applied the one-year statute of limitations to bar all claims against Matherly Land Surveying, Inc., Alva L. Matherly, and Carl Douglas Comer. We vacate and remand.

In 1997 Matherly Land Surveying, Inc. (MLS) and Gardiner Design & Development, Inc. (GDD) entered into a contract whereby MLS agreed to perform engineering and survey work associated with the development of a subdivision in Jefferson County, Kentucky. During the relevant time period MLS employed three licensed professional engineers, at least part time, and also employed civil engineering technicians and survey technicians. One of the part-time professional engineers

[1] Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

employed by MLS was Carl Douglas Comer (Comer). Alva L. Matherly, the owner and president of MLS, is a land surveyor and was the primary contact for GDD with MLS along with Comer on the project.

Sometime toward the end of 1997 and the beginning of 1998 GDD became dissatisfied with the work being performed by MLS. It is undisputed that MLS and GDD parted ways in August 1998 and that GDD hired two other firms to complete, and in some instances, re-do, the work called for by the contract between MLS and GDD.

MLS and GDD could not resolve their differences over the project and both hired counsel. An agreement to conduct mediation and arbitration of any unresolved issues remaining after mediation was entered into in October 1999. That agreement specifically provided that a demand for arbitration would not be made after any applicable statute of limitations would bar the action. The agreement originally called for mediation to be conducted on or before December 8, 1999, but no mediation was held until May and June 2001.

Prior to the mediation both MLS and GDD made their positions known to the other. MLS claimed it was owed money for work it had performed and GDD filed a "position statement" detailing the damages it had suffered due to the delays and incomplete/incorrect work by MLS. MLS also asserted that KRS

413.245 was the applicable statute of limitations and that any action by GDD on its claims was barred. Unsurprisingly the mediation was not successful.

Until April 2001, just before the mediation, GDD had been represented by Woodward, Hobson & Fulton (WHF), specifically by D. Sean Nilsen (Nilsen). In April 2001 GDD retained other counsel, and, following the unsuccessful mediation, GDD, Gardiner Park Development, LLC (GPD), and, Gregory S. Gardiner (Gardiner)[2] filed two separate cases in Jefferson Circuit Court. The first, filed originally against WHF, Nilsen, and MLS, asked the court to declare what statute of limitations applied to the contract between MLS and GDD and also alleged legal malpractice against WHF and Nilsen. The petition was amended to include Alva L. Matherly (Matherly) and Comer as well as assert a further count of legal negligence. The second action filed involved the same parties and similar allegations and was consolidated with the first suit.

The essential nature of the consolidated suits was that if the one-year statute of limitations in KRS 413.245 applied to GDD, GPD, and Gardiner's claims, as asserted by MLS, Matherly, and Comer, then any action against them was barred. If the court found this to be the case, then there would be no

[2] According to the parties Gardiner Park Development, LLC and Gregory S. Gardiner also have an interest in the subdivision being developed: GPD as owner of the real property and Gardiner as the owner of GDD and GPD.

point in pursuing arbitration and GDD, GPD, and Gardiner would pursue claims of legal malpractice against WHF. Some discovery was taken and then all parties filed briefs on the subject of which statute of limitations applied.

As noted above, the trial court found that KRS 413.245 was the correct statute of limitations, thus, all claims against MLS, Matherly, and Comer were barred. In its opinion the circuit court declined to address whether land surveying services qualified as professional services under KRS 413.245. Instead it found that because engineers are considered to be professionals under the statute and Comer was indisputably an engineer, KRS 413.245 applied.

It is undisputed that GDD, GPD, and Gardiner's claims against MLS, Matherly, and Comer are for services that were not timely completed and when completed were allegedly flawed.

At the trial court level the parties apparently made a number of arguments regarding the statute of limitations issue in this case. However, on appeal the parties have presented one issue for decision: whether the one-year statute of limitations for professional malpractice applies or whether the fifteen-year statute of limitations on a written contract applies to all of the claims.

Our standard of review on summary judgment is *de novo*. Scifres v. Kraft, 916 S.W.2d 779, 781 (Ky.App. 1996).

GDD, GPD, and Gardiner have taken the position that they believe the trial court's decision to be correct, but wish to preserve their rights against MLS, Matherly, and Comer if this Court reverses the trial court's determination. Thus, the arguments are, in actuality, between WHF on the one hand and MLS, Matherly, and Comer on the other.

WHF makes several arguments for why the fifteen-year statute of limitations in KRS 413.090(2) applicable to written contracts is the correct statute of limitations in this case. WHF maintains in its first two arguments that the type of damages claimed by GDD, GPD, and Gardiner are for purely economic losses. That is, the damages are for delay produced by the failure of MLS, Matherly and Comer to perform their land surveying duties per the contract in a timely and acceptable manner. Because these claims are ones based strictly on breach of contract, the one-year statute of limitations in KRS 413.245 is inappropriate.

Next WHF argues that the trial court applied the one-year professional malpractice statute of limitations simply because Comer is a professional engineer. WHF maintains that this is an incorrect analysis for a number of reasons.

First, it asserts that the bulk of the claims made by GDD, GPD, and Gardiner are not for negligence in performing engineering services, but for land surveying services. It

argues that the trial court's decision would allow the application of the one-year statue of limitations to nonprofessionals working for a professional company enabling them to claim the benefit of KRS 413.245's shorter statute of limitations.

Secondly, WHF makes clear that it is undisputed that MLS is a professional, licensed engineering firm that employs professionals but states that this is irrelevant to GDD, GPD, and Gardiner's claims since their cause of action is based on deficiencies in the land surveying services which are not professional services. As WHF notes, the circuit court declined to make a finding on this issue, but it argues that such a finding is necessary because, even if land surveying is held to constitute professional services now (the statute relating to land surveying and engineering was amended in 1999), it did not qualify as such in 1997 and 1998 when the relevant circumstances of the dispute occurred.

In response MLS, Matherly, and Comer argue that, by the terms of KRS 413.245, it is irrelevant whether the claims against them are ones sounding in contract or tort. They also assert that the claims by GDD, GPD, and Gardiner are ones based on the engineering services that Comer was to provide through MLS under the contract and that, if there were a trial in this

action, expert testimony would be needed to establish the appropriate duty, standard of care, and any breach.

Further, MLS, Matherly, and Comer maintain that even if the services GDD, GPD, and Gardiner are complaining of are land surveying services, those services were provided incidental to the engineering services that Comer performed, and, thus, still fall under the ambit of "professional services" and in the purview of KRS 413.245.

Finally, MLS, Matherly, and Comer contend that land surveying services are professional services and were considered to be professional services by the legislature prior to 1999 when the statute was amended. Therefore, under any view of the case the statute of limitations in KRS 413.245 applies.

At oral argument WHF raised the further argument that even if KRS 413.245 is the correct statute of limitations in this case, the cause of action has yet to accrue. It bases this stance on Kentucky law such as Alagia, Day, Trautwein & Smith v. Broadbent, 882 S.W.2d 121, 125-126 (Ky. 1994), which essentially holds that the time for bringing a cause of action under KRS 413.245 does not begin to run until the damages are fixed and non-speculative. WHF maintains that, to date, the damages incurred by GDD, GPD, and Gardiner remain uncertain and will continue to be so until the project, Gardiner Park Subdivision, is completed.

In response MLS, Matherly, and Comer argue that the case law WHF relies on is only applicable to "litigation negligence" cases and points out that WHF wrote a position statement on behalf of GDD, GPD, and Gardiner for the anticipated mediation on December 2, 1999, that states in its opening that the full extent of damages had only become known within the past few months.

KRS 413.245 provides as follows:

> Notwithstanding any other prescribed limitation of actions which might otherwise appear applicable, except those provided in KRS 413.140, a civil action, whether brought in tort or contract, arising out of any act or omission in rendering, or failing to render, professional services for others shall be brought within one (1) year from the date of the occurrence or from the date when the cause of action was, or reasonably should have been, discovered by the party injured. Time shall not commence against a party under legal disability until removal of the disability.

"Professional services" is defined in KRS 413.243 as meaning, "any service rendered in a profession required to be licensed, administered and regulated as professions[.]" Obviously the definition of professional services in KRS 413.243 is only marginally helpful.

However, KRS 413.245 is clear that actions based on professional services, whether those claims arise out of a tort or a contract, are subject to a one-year statute of limitations.

Thus, to the extent that GDD, GPD, and Gardiner's claims against MLS, Matherly, and Comer are based on the rendering or failure to render professional services, KRS 413.245 is the correct statute of limitations.

This is true even if one examines GDD, GPD, and Gardiner's claims based on the type of damages sought. WHF's argument that the 15-year statute of limitations for breach of contract in KRS 413.090(2) is applicable because GDD, GPD, and Gardiner are seeking purely economic losses is not persuasive. KRS 413.245 makes no such distinction – the focus of the statute is on the nature of the cause of action, not the type of damages claimed.

WHF also contends that if this case is analyzed under the economic loss rule, it becomes apparent that GDD, GPD, and Gardiner's claims against MLS, Matherly, and Comer are ones for breach of contract, not professional negligence, and should therefore be subject to the longer statute of limitations in KRS 413.090(2). It points to the concurring opinion in Presnell Construction Managers, Inc. v. EH Construction, LLC, 134 S.W.3d 575 (Ky. 2004) for support that the economic loss rule is appropriately applied.

The economic loss rule in a simple and broad formulation prohibits a litigant from recovering in tort for losses that are purely economic. Although the rule is a bit

more limited than this expression, this statement of the rule is how WHF wishes it to be applied. It has most commonly been applied in the context of products liability cases. Id. at 583-584 (Keller, J. concurring).

We believe that the economic loss rule is simply irrelevant to the issues in this case. The authority cited by WHF does not consider the application of the economic loss rule in the context of KRS 413.245. We view the argument as one that mixes apples and oranges – that is, even if the damages sought by GDD, GPD, and Gardiner are for purely economic losses, that is beside the point. KRS 413.245 does not allow for such a distinction. The statute is concerned with whether the claims are ones for rendering or failing to render "professional services" regardless of whether the generation of damages comes from a tort or a breach of contract.

So it is seen that it becomes central to this decision to determine who qualifies as a professional and what constitutes professional services.

An examination of the law on the subject of who or what services qualify as "professional" reveals that the law is unsettled. In Kentucky, most major decisions addressing the issue have been expressed by this Court and, while lending some guidance, have not fully considered the issue.

In Plaza Bottle Shop, Inc. v. Al Torstrick Ins. Agency, Inc., 712 S.W.2d 349 (Ky.App. 1986), this Court considered whether an insurance agent qualified as a professional enabling him to plead the statute of limitations of KRS 413.245. The Court noted that the mere fact that one is required to be licensed by the state does not automatically make the services he or she provides "professional services." Id. at 350-351. Profession has traditionally been defined at common law as consisting of law, medicine, and theology. The Court observed that there was no indication from the legislature that it intended for KRS 413.245 to apply to any calling except the traditional three. Id. at 351. However, it acknowledged that other occupations are generally considered to be professions such as accounting, engineering, and teaching but observed that, "the admission to [the profession] requires higher education, special knowledge and training[.]" Based on the fact that an insurance agent has no need to have obtained any more education than a high school diploma, the Court determined that KRS 413.245 was not intended to apply to claims against insurance agents. Id.

Plaza Bottle Shop suggests that whether a particular vocation is regarded as a profession is dependent upon finding that it requires specialized education, knowledge and training. A license to engage in that vocation is not determinative.

Shortly after Plaza Bottle Shop this Court again considered the question of who is a professional, this time in the context of a licensed civil engineer who operated his own business. In Vandevelde v. Falls City Builders, Inc., 744 S.W.2d 432 (Ky.App. 1988), this Court held that a licensed civil engineer is a professional under KRS 413.245. Id. at 433. In doing so the Court stated:

> That an activity can be performed by a variety of people can be said for virtually any of the professions. . . . The issue is the status of the person performing the particular activity. We believe that setting aside those activities or trying to determine which of those activities could be performed by a lay person, renders the statute ineffective. Clearly the legislature intended to limit actions against professionals for duties performed in the course of their professional activities. Since the appellant is a professional and was performing a duty consistent with his profession, even though it might have been done by a client or another layman, we hold that it is the type of duty envisioned by KRS 413.245.

Id. The case has been taken, and indeed has been argued here, as creating a bright line rule that the only relevant factor for determining whether KRS 413.245 is applicable is based upon the status of the person providing the services. We do not believe the case can be read so broadly.

Finally, in Old Mason's Home of Kentucky, Inc. v. Mitchell, 892 S.W.2d 304 (Ky.App. 1995), we held that an

architect providing services pursuant to a contract was "certainly a professional and it is not disputed that he was performing duties consistent with his profession." Id. at 306. No analysis of why an architect is considered to be a professional appears in the opinion save for the citation to Vandevelde, supra, and Plaza Bottle Shop, supra.

The Kentucky Supreme Court has not issued any published opinions that address the issues presented by this case. When it has considered the application of KRS 413.245, it has, for the most part, been in the context of legal malpractice; although it has held that a claim against a nurse fell within its purview. See Underhill v. Stephenson, 756 S.W.2d 459, 460 (Ky. 1988).

In another instance, the Sixth Circuit Court of Appeals certified to the Kentucky Supreme Court questions involving the liability of a subcontractor's engineers on a construction project to the general contractor when the general contractor had been found liable. The engineers argued, in part, that any claims against them were governed by the one-year statute of limitations in KRS 413.245 because the claims were ones for substandard engineering services; *i.e.*, professional services. The Kentucky Supreme Court rejected this argument stating:

> The primary focus of the current matter before this Court does not involve the professional status of the parties. It is a case about indemnity.

Affholder, Inc. v. Preston Carroll Co., Inc., 27 F.3d 232, 234 (6th Cir. 1994).

Again, we believe it is illustrated by the Kentucky Supreme Court's statements in Affholder that more than simply the status of the person performing the services is relevant to determining whether KRS 413.245 is appropriately applied.

The legislature has also made further indications of what it considers to be a professional and what constitutes professional services in KRS 275.015. Although the statute relates to definitions used in a chapter concerning business entities, in subsection 19 it defines a professional limited liability company as one that is formed for purposes including the rendering of professional services. KRS 275.015(20) defines "professional services" as those services:

> [R]endered by physicians, osteopaths, optometrists, podiatrists, chiropractors, dentists, nurses, pharmacists, psychologists, occupational therapists, veterinarians, engineers, architects, landscape architects, certified public accountants, public accountants, physical therapists, and attorneys.

While we do not believe KRS 275.015(19) & (20) can be used to define who is a professional and what constitutes professional services for purposes of KRS 413.245, the

provisions do support the notion echoed in the cases that a "professional" in Kentucky is defined more broadly than at common law and the services provided by those professionals, if incident to their profession, are also considered "professional services."

However, the definitions and analysis in our case law and statutes at present are insufficient. They do provide a starting point, but more is needed we think because, utilizing the case law as it stands under Plaza Bottle Shop, Vandevelde, and Old Mason's Home, there is no real distinction among a trade or occupation versus a profession. Clearly the legislature intended for there to be a distinction among these categories since it enacted a different statute of limitations to apply to professionals.

Other states have similarly struggled, and continue to struggle, with the question of how to define a professional and/or professional services.

Among the states that have considered the question of whether the professional malpractice statute of limitations applies to particular vocations or services there appear to be three main approaches and other approaches peculiar to the jurisdictions. The first adopts the view of the common law and restricts the statute's application only to those engaged in the professions of law, medicine, or divinity. A second approach

simply defines a professional and professional services as all licensed occupations. The third approach follows what has been termed the "dictionary" definition of professional. Jilek v. Berger Electric, Inc., 441 N.W.2d 660, 662 (N.D. 1989). Yet a fourth approach appears to be followed by Florida where that state's Supreme Court has created a bright-line test requiring that any vocation that wishes to be considered a profession must require, at a minimum, a four-year college degree before licensing. If alternative methods may be used to practice the vocation it is not a profession. Garden v. Frier, 602 So.2d 1273, 1275 (Fla. 1992).

Some courts have also utilized the definitions and analyses contained in 29 U.S.C. §152(12) defining professional employee (Lewis v. Rodriguez, 107 N.M. 430, 432-433, 759 P.2d 1012, 1014-1015 (N.M.App. 1988)) and the Restatement (Second) of Torts §299A comment b discussing the undertaking of services in the practice of a profession or trade. Jilek v. Berger Electric, Inc., 441 N.W.2d 660, 663 (N.D. 1989)(noting that §299A maintains a distinction between a profession and a trade).

A law review article on the subject discusses these various approaches and notes:

> In summary, courts have generally declined to clearly define who is a professional and who is not. Instead, they have sometimes decided that no liability existed based strictly on policy grounds.

> Other times they have concluded that the defendant is or is not a professional with little or no reasoning in support. Sometimes, as in cases involving physicians and lawyers, the decision simply rests on precedent. What is missing in most decisions is a clear identification of professional occupations for purposes of malpractice litigation.

Who's On First, and What's a Professional?, 33 USFLR 205, 217 (1999). The thesis of the article and its message to the judiciary is that the "central criterion" of whether a particular occupation should qualify as a profession should be dependent on whether the vocation has a "credible code of fiduciary ethics that is effectively enforced." Id. at 227.

In general courts appear to recognize law, medicine, divinity, engineering, architecture, teaching, and accounting as professions. But, as could be expected from the varying state of the law, decisions about who and what services are "professional" in nature have been all over the map.

Beyond those categories noted in the previous paragraph courts have held that certified financial planners are not professionals. Kuntz v. Muehler, 603 N.W.2d 43, 47 (N.D. 1999). Soil testing for the construction of a silo is professional. Bottineau Farmers Elevator v. Woodward-Clyde Consultants, 963 F.2d 1064, 1070 (8th Cir. 1992). An insurance agent is not a professional. Chase Scientific Research, Inc. v. NIA Group, Inc., 96 N.Y.2d 20, 30, 749 N.E.2d 161, 167, 725

N.Y.S.2d 592, 598 (N.Y.App. 2001). A polygrapher is a professional. Lewis v. Rodriguez, 107 N.M. 430, 434, 759 P.2d 1012, 1016 (N.M.App. 1988). A land surveyor is a professional. Landmark Engineering, Inc. v. Cooper, 222 Ga.App. 752, 753, 476 S.E.2d 63, 64 (Ga.App. 1996). A land surveyor is not a professional. Garden v. Frier, 602 So.2d 1273, 1277 (Fla. 1992). A blood bank provides professional services. Advincula v. United Blood Servs., 176 Ill.2d 1, 25, 678 N.E.2d 1009, 1021, 223 Ill.Dec. 1, 13 (Ill. 1996). An electrician is not a professional. Jilek v. Berger Electric, Inc., 441 N.W.2d 660, 663 (1989).

The list could go on, but our point is simply that many different, and sometimes opposing, outcomes have been reached in the cases considering the question of what constitutes a professional or professional services for the purposes of a malpractice statute of limitations.

The difficulty, we believe, comes from the underlying policy considerations that overlay a particular state's statutory scheme and case law. At the heart of making a distinction between who is a professional and who is not are concerns such as those voiced by the Arizona Supreme Court in Rossell v. Volkswagen of America, 147 Ariz. 160, 165, 709 P.2d 517, 522 (Ariz. 1985). There, the Court did not allow Volkswagen to be treated as a professional so as to require the

plaintiff to present expert proof as to its failure to adequately design a component of its vehicle. Although not involving a statute of limitations question, the Court disallowed the argument observing that professionals often set their own standards that they are judged by, and, in general, industries are not permitted to do likewise. Id. 147 Ariz. at 165, 709 P.2d at 522.

Taking all of this into consideration as well as our own case law and statutes, we believe the following can be said about this issue in Kentucky: The legislature clearly intended for professionals providing professional services to be subject to a one-year statute of limitations whether the claim was one based on tort or contract. KRS 413.245. However, as was stated in Plaza Bottle Shop, supra, there is no indication that it meant to include any professions except law, medicine, and divinity. But, the legislature has enacted other statutes defining profession and professional services more broadly than the traditional three. Therefore, while the law of this jurisdiction does not limit the application of KRS 413.245 to only the traditional three "professions," we conclude that it should still be construed narrowly to effectuate the intent of the legislature that there is a distinction between professions and other occupations.

Secondly, the case law, as we stated above provides a starting point but is insufficient. The guidance from our cases is that licensing is not determinative; specialized education, knowledge and training are important. Plaza Bottle Shop, supra. The status of the person performing the services and whether those services are professional in nature or are consistent with the duties of that profession are important to determining whether KRS 413.245 applies. Vandevelde, supra. The nature of the claims between the parties is also important. Affholder, supra.

Having examined the case law of other jurisdictions outlined above and other sources of legal persuasion, we believe Jilek, supra, and Chase Scientific Research, Inc., supra, contain a clear, well-fleshed-out framework for deciding whether a particular occupation should be considered to be a profession within the malpractice statute of limitations. We would make clear that their statements add to, rather than replace, the established statutory and case law in this jurisdiction.

Thus, for instance, in Jilek, the Court described several different dictionary definitions of profession -- all of which referred to advanced education and training and involved labor that is predominantly intellectual and mental in nature. It also noted that one of the hallmarks of a profession as distinguished from a trade or occupation is (ordinarily) the

requirement of a college degree in that specific field. Jilek, 441 N.W.2d at 662-663.

In Chase Scientific Research, Inc., supra 96 N.Y.2d at 29, 749 N.E.2d at 166, 725 N.Y.S.2d at 597, the Court of Appeals of New York observed that there were relatively few categories such as doctors, attorneys, accountants, architects, and engineers considered to be "professional" and pointed out that:

> The qualities shared by such groups guide us in defining the term "professional." In particular, those qualities include extensive formal learning and training, licensure and regulation indicating a qualification to practice, a code of conduct imposing standards beyond those accepted in the marketplace and a system of discipline for violation of those standards . . . . Additionally, a professional relationship is one of trust and confidence, carrying with it a duty to counsel and advise clients (citations omitted).

Turning to the case at hand, it is clear that professional engineers may claim the application of KRS 413.245. Vandevelde, supra. We also believe that a business, such as MLS, may argue for the one-year statute of limitations in KRS 413.245 to be applied to its contracts involving professional services. All of this Court's cases cited herein have applied KRS 413.245 in the context of an individual performing services through a company or corporation. Further, the legislature has enacted statutes pertaining to the formation of professional

limited liability companies suggesting that it regards the business entity the same as an individual. See KRS Chapter 275.

Therefore, GDD, GPD, and Gardiner's claims against MLS, Matherly, and Comer are barred by the one-year statute of limitations contained in KRS 413.245 to the extent that the services about which GDD, GPD, and Gardiner complain involve the performance of professional engineering services or services incident to professional engineering.

The real twist comes in determining what comprises services incident to professional engineering. At the time of the contract and the performance of the duties under the contract (1997 and 1998) the statute defining "engineering" specifically excluded "work embraced within the practice of land surveying" from the definition of engineering. KRS 322.010(3) (1997 and 1998 versions). And, although the statute also defines land surveying and refers to the practice of land surveying as the "performance of any professional service included in subsection (5) of this section" the fact that the word "professional" is used is not determinative. KRS 322.010(7) (1997 and 1998 versions).[3]

[3] The newest version of KRS 322.010 includes certain land surveying services as incident to the practice of engineering and excludes certain land surveying activities from the practice of engineering. KRS 322.010(4)(a)5.

Therefore, we agree with WHF that a determination of whether land surveying constitutes professional services is necessary.

At the time of the contract and its performance (1997 and 1998) we believe that it is clear that land surveying services were not considered professional services and claims for such services are not subject to the one-year statute of limitations in KRS 413.245 for two reasons. First, KRS 322.010(3) excluded land surveying from professional engineering services. Secondly, although not a model in drafting, KRS 413.243 is clear that licensure is required for any service to be considered "professional" under KRS 413.245. Until 1999 land surveyors were not required to be licensed.

Even after the statutory scheme was amended in 1999, we believe that taking the factors from Kentucky case law and other factors identified from our sister states, land surveying cannot be considered "professional services" if not provided incident to professional engineering services.

Here, there is no dispute that the status of the person performing the services, Comer, is that of a professional. There is a dispute among the parties about whether these services were professional engineering services or land surveying services. At the time of the contract the statute excluded land surveying services from professional

engineering. KRS 322.010(3). Clearly specialized knowledge and training are needed to perform land surveying services, but it appears that no special educational background is necessary.

There is no evidence that a code of conduct "imposing standards beyond those accepted in the marketplace" exists for land surveyors. Chase Scientific Research, Inc., supra. Nor is there any evidence of a system of discipline for violating a code of conduct. Finally, there is no evidence that the relationship between a land surveyor and his or her client is one of trust or confidence, and there is certainly no evidence that a land surveyor has a fiduciary duty to advise his or her client.

For these reasons a land surveyor cannot be considered a professional under KRS 413.245 even after the revamping of KRS 322.010 in 1999 unless those services are provided incidental to professional engineering as defined in KRS 322.010.

WHF's argument that any claims GDD, GPD, and Gardiner may have against MLS, Matherly, and Comer have not accrued because the damages have yet to become fixed and non-speculative also must fail. However, we do not agree with MLS, Matherly, and Comer that there is necessarily a distinction between the accrual of a cause of action for "litigation negligence" and other professional malpractice actions.

Cases such as Alagia, Day, Trautwein & Smith v. Broadbent, 882 S.W.2d 121, 125-126 (Ky. 1994) and Stephens v. Denison, 64 S.W.3d 297, 299 (Ky.App. 2001) hold that a cause of action for professional negligence cannot accrue until "the legal harm [becomes] fixed and non-speculative . . . ." Broadbent, supra at 125-126. But, this does not mean, as argued by WHF, that an ascertainable sum certain amount of money damages must be known. The law, as acknowledged in Broadbent is simply that "[a] cause of action does not exist until the conduct causes injury that produces loss or damage." Broadbent, supra at 126 (quoting Saylor v. Hall, 497 S.W.2d 218, 225 (Ky. 1973)). This legal principle is equally applicable to cases of what MLS, Matherly, and Comer have referred to as "litigation negligence" and all other cases of professional negligence.

The conduct that causes injury and reasonably ascertainable damages is what triggers the one-year statute of limitations in KRS 413.245. Accrual of the cause of action may be measured from the date of the occurrence or the date of discovery depending on the case. KRS 413.245; Faris v. Stone, 103 S.W.3d 1 (Ky. 2003).

Here, there is ample evidence in the record that GDD, GPD, and Gardiner were well aware of their injuries at least by December 2, 1999, when Nilsen authored the mediation position statement. We do not view the statements in that correspondence

that the damages were known, etc., to be determinative since the letter was drafted in preparation for a proceeding that was aimed to settling the dispute.

However, there is in the record other correspondence from Gardiner himself to Matherly that arguably indicates GDD, GPD, and Gardiner had knowledge of the fact of injury as well as their damages earlier than December 2, 1999. The parties made this argument at the circuit court level in some detail as is observed through a review of the motions and cross-motions for summary judgment. The circuit court considered all of the evidence and found that GDD, GPD, and Gardiner knew no later than December 2, 1999 that MLS, Matherly, and Comer had caused them damage. We cannot see the error in this based on the evidence in the case and the principles that determine when a cause of action accrues under KRS 413.245.

In conclusion, the claims of GDD, GPD, and Gardiner against MLS, Matherly, and Comer are not barred by the one-year statute of limitations in KRS 413.245 to the extent that they relate to land surveying services rendered.

However, the parties are in disagreement about whether the services GDD, GPD, and Gardiner complain are those of a professional engineer or those of a land surveyor. This, in our view, is a question to be determined by the trial court. Therefore, the judgment of the Jefferson Circuit Court is

vacated and the case remanded to the circuit court for a determination of what services are professional engineering versus land surveying. To the extent that the claims relate to professional engineering, they are subject to the one-year statute of limitations in KRS 413.245 and should be dismissed with respect to MLS, Matherly, and Comer. To the extent that the claims relate to land surveying, they are not subject to the statute of limitations in KRS 413.245.

ALL CONCUR.

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