

RENDERED: MARCH 8, 2013; 10:00 A.M.  
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2011-CA-000431-MR

TIM DAVIS AND  
TIM DAVIS & ASSOCIATES, INC.

APPELLANTS

v. APPEAL FROM HARDIN CIRCUIT COURT  
HONORABLE DOUGHLAS M. GEORGE, JUDGE  
CASE NO. 05-CI-00800

JOHN J. SCOTT AND WHITLOW & SCOTT

APPELLEES

AND

NO. 2011-CA-000502-MR

TIM DAVIS AND  
TIM DAVIS & ASSOCIATES, INC.

APPELLANTS

v. APPEAL FROM HARDIN CIRCUIT COURT  
HONORABLE DOUGHLAS M. GEORGE, JUDGE  
CASE NO. 10-CI-02530

JOHN J. SCOTT AND WHITLOW & SCOTT

APPELLEES

OPINION  
REVERSING AND REMANDING APPEAL NO. 2011-CA-000431-MR  
AND  
AFFIRMING APPEAL NO. 2011-CA-000502-MR

BEFORE: CAPERTON, LAMBERT, AND NICKELL, JUDGES.

NICKELL, JUDGE: Tim Davis and Tim Davis & Associates, Inc. (collectively “Davis”) appeal from the February 21, 2011, order of the Hardin Circuit Court that denied Davis’s motion to alter, amend, or vacate the Court’s previous order dismissing, without prejudice, Davis’s legal malpractice lawsuit, Action No. 05-CI-00800 (“first action”), against John J. Scott and Whitlow & Scott (collectively “Scott”). Davis also appeals from the February 21, 2011, order of the Hardin Circuit Court that dismissed, with prejudice, Davis’s second legal malpractice lawsuit against Scott, Action No. 10-CI-002530 (“second action”). We reverse the trial court’s order in the first action and remand for further proceedings. We affirm the trial court’s dismissal of the second action.

Davis’s first action has previously been before both this Court and the Supreme Court of Kentucky. We herein adopt the following history of that action as set out by the Supreme Court:

Appellant, Tim Davis, is the founder and president of Tim Davis & Associates, Inc. (collectively, “Davis”), a third-party health care benefits administrator. In 2002, Davis negotiated to purchase PICA Group Services, Inc., also a third-party administrator. The parties executed a binding letter of intent and a supplemental “non-solicitation” agreement. The non-solicitation agreement prohibited Davis from communicating with or soliciting PICA customers for a period of fifteen months in the event that the purchase did not occur.

Indeed, Davis’s purchase of PICA did fall through. Shortly thereafter, PICA was purchased by Global Risk

Management. Davis learned of Global's purchase in February 2003, when he received a letter from Coal Exclusive, a former client of PICA. In the letter, Coal Exclusive expressed an interest in becoming a client of Davis.

Because the fifteen-month period of the non-solicitation letter was still in effect, Davis contacted his attorney, John Scott, to discuss the enforceability of the agreement in light of Global's purchase of PICA. There is disagreement among Global, Davis, and Scott as to the exact nature of Scott's advice during the phone call, though all agree that Scott did not expressly advise Davis to cease communications with PICA's former clients. Eventually, Davis successfully solicited three former PICA clients.

In April of 2003, PICA notified Davis that he was in violation of the non-solicitation agreement. Davis forwarded the letter to Scott and later had a conversation about it, though neither remembers exactly what was discussed. Several months later, Global and PICA filed suit against Davis in the U.S. District Court for the Middle District of Tennessee, alleging a violation of the non-solicitation agreement.

The following year, as that case continued to proceed towards trial, Davis agreed to settle with Global. He met with Lee Henningsen, Global's president, to discuss the terms. According to Davis, Henningsen opined that Scott had given Davis incorrect advice and suggested Scott had violated the standard of care. Davis testified that he never thought Scott had been negligent prior to his conversation with Henningsen.

Eventually, a settlement was reached whereby Davis would pay Global \$300,000. In addition, the agreement required Davis to pursue a legal malpractice claim against Scott and to assign 80% of the proceeds of that claim to Global.

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The settlement agreement was executed in June of 2004 and approved by the U.S. District Court in Tennessee. In accordance with the agreement, the present action was initiated against Scott, in which Davis alleged malpractice and emotional distress. He sought to recover the \$300,000 he paid to Global, attorneys' fees and costs of both the federal litigation and the malpractice claim, and emotional distress damages. Discovery in the case was conducted for nearly two years.

In 2007, the trial court conducted oral arguments on Scott's motion for summary judgment and numerous motions in limine. Ultimately, the trial court determined that the settlement agreement constituted an improper assignment of a legal malpractice claim and was void as against public policy. It dismissed Davis's legal malpractice claim with prejudice on this basis. However, recognizing the novelty of the issue, the trial court ruled on several remaining issues, including motions to exclude expert witness testimony. Both parties appealed.

The Court of Appeals affirmed, agreeing that an improper assignment of a legal malpractice claim had occurred. The panel observed that "neither a legal malpractice claim nor the proceeds from such claim can be assigned to an adversary in the same litigation that gave rise to the alleged malpractice." Concerning the viability of Davis's malpractice claim, the Court of Appeals determined that the trial court is without jurisdiction to invalidate the settlement agreement and allow Davis to proceed because the settlement agreement is "a product of the federal litigation." As such, the Court of Appeals concluded that summary judgment and dismissal with prejudice was proper in this case, rendering all other issues discussed in the summary judgment order moot.

*Davis v. Scott*, 320 S.W.3d 87, 88-90 (Ky. 2010).

Thereafter, discretionary review was granted by the Supreme Court, which rendered its Opinion on August 26, 2010, affirming this Court's Opinion in part,

reversing in part and remanding to the trial court. More precisely, the Supreme Court agreed an improper assignment of a legal malpractice claim had occurred, but clarified that Davis had not forfeited his claim against Scott. Accordingly, the Supreme Court held the proper remedy was to dismiss Davis's complaint without prejudice. Although the Supreme Court held the first action was "born of the improper assignment, [and] cannot be permitted to continue," it further stated that "[s]hould Davis wish to reassert his claim against Scott, he will be able to do so only upon a showing that the attempted assignment is no longer in place and that he is the real party in interest." *Id.* at 92.

On November 12, 2010, the trial court, acting in conformity with the Supreme Court opinion, dismissed the first action without prejudice. On November 17, 2010, an agreed order severing the assignment clause between Davis and Global was entered in the United States District Court, Middle District of Tennessee. Thereafter, on November 19, 2010, Davis filed a motion to alter, amend, or vacate the trial court's order dismissing the first action without prejudice. Additionally, Davis filed a new complaint with the trial court on November 22, 2010, initiating the second action. The complaint in the second action contained the same allegations as the first action. In response to Davis's new complaint, Scott filed a motion to dismiss the second action as untimely based on the applicable statute of limitations. On February 21, 2011, an order denying Davis's motion to alter, amend, or vacate was entered in the first action. An order granting Scott's motion to dismiss was entered that same day in the second action,

citing the statute of limitations as cause. These appeals followed and were subsequently consolidated by order of this Court.

Davis argues the trial court's orders in both actions violated the Supreme Court's mandate and the law of the case doctrine. By failing to allow him to pursue his lawsuit, he argues the trial court only partially complied with the Supreme Court's instructions. We agree.

The Supreme Court clearly stated:

If an assignment is invalid or incomplete, the assignor may still maintain a suit in his or her name. Thus it would follow that Davis can pursue his malpractice claim as the real party in interest, as opposed to simply a nominal plaintiff.

*Id.* at 91-92 (citation omitted). Legal malpractice claims are to be brought within one year from when the cause of action was, or should have been, discovered.

KRS<sup>1</sup> 413.245. If we were to interpret the Supreme Court's language as permitting Davis to proceed with his claim in a second action, then we must also interpret it to mean that the statute of limitations period has been tolled by his filing of the first action. However, such an interpretation would directly conflict with well-established precedent that timely-filed actions, which are later dismissed without prejudice, do not serve to toll the statute of limitations. *Magill v. Mercantile Trust Co.*, 81 Ky. 129, 132 (1883) (holding a dismissal without prejudice leaves the parties as if no action had been instituted).

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<sup>1</sup> Kentucky Revised Statutes.

Our best understanding of the Supreme Court's intention is that Davis should be permitted to pursue the first action by showing the assignment no longer exists and he is the real party in interest. There is no disagreement that, by order of the United States District Court, Middle District of Tennessee, the assignment no longer exists. The question thus becomes: how can Davis successfully show that he is now the real party in interest?

Upon concluding that an assignment had occurred between Davis and Global, the Supreme Court cited numerous factors that together established Davis was not the real party in interest. In particular, the Court noted:

Global selected and retained Davis's counsel in the malpractice action and bore the financial responsibility for the cost of suing Scott. Because Davis is obligated to bring the action, he may not withdraw the suit. Davis is not permitted to settle the malpractice claim without Global's express written consent. Davis agreed to share privileged, attorney-client information with Global. Global retained control over the initiation, continuation and/or dismissal of the malpractice claim.

*Davis*, 320 S.W.3d at 91. Therefore, if Davis can show these factors are no longer present, Global is in no other way involved in the legal proceedings, and Global no longer retains an interest in the outcome of the lawsuit, he succeeds in showing he is the real party in interest and the first action is thus no longer tainted. Upon these showings, the lawsuit should continue. However, if he is unable to prove to the trial court that he is, in fact, the real party in interest, then the order denying Davis's motion to alter, amend, or vacate its previous order dismissing the case was appropriate.

For the foregoing reasons, the February 21, 2011, order dismissing Action No. 10-CI-002530 is affirmed. Additionally, the February 21, 2011, order of the Hardin Circuit Court denying Davis's motion to alter, amend, or vacate in Action No. 05-CI-00800 is reversed and remanded for additional proceedings consistent with this Opinion.

ALL CONCUR.

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