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Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001088-MR
AND
NO. 2011-CA-001131-MR

BDT PRODUCTS, INC.; AND
BURO-DATENTECHNIK
GMBH & CO, KG — APPELLANTS/CROSS-APPELLEES

APPEAL AND CROSS-APPEAL FROM FAYETTE CIRCUIT COURT
v. HONORABLE ERNESTO M. SCORSONE, JUDGE
ACTION NO. 09-CI-02512

HIGGS, FLETCHER & MACK, LLP — APPELLEE/CROSS-APPELLANT

AND NO. 2011-CA-001475-MR

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MEISENHEIMER, HERRON &
STEELE, A CALIFORNIA
CORPORATION; HERRON &
STEELE, A CALIFORNIA
CORPORATION; MATTHEW
V. HERRON, AN INDIVIDUAL — APPELLEES

OPINION
AFFIRMING IN PART (2011-CA-001475),
REVERSING IN PART AND REMANDING (2011-CA-001131),
AND DISMISSING AS MOOT (2011-CA-001088)

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; MAZE AND NICKELL, JUDGES.

ACREE, CHIEF JUDGE: This opinion addresses two appeals and a cross-appeal from separate rulings from the Fayette Circuit Court, each of which involves the same parties and the same subject matter. We have consolidated these appeals in the interest of judicial economy.

Appellants/Cross-Appellees BDT Products, Inc. and Buro-Datentechnik GMBH & Co., KG (collectively, "BDT") first appeal the circuit court's May 24, 2011 order granting summary judgment in favor of Appellee Higgs Fletcher & Mack, LLP ("Higgs"). BDT contends the circuit court erroneously concluded that the defense of collateral estoppel barred BDT's legal malpractice action against Higgs, and improperly dismissed BDT's complaint as against Higgs with prejudice (2011-CA-001088).

BDT next appeals the circuit court's August 1, 2011 order granting summary judgment in favor of Appellees Meisenheimer, Herron & Steele; Herron & Steele; and Matthew V. Herron (collectively, "Herron"), also on collateral estoppel grounds (2011-CA-001475).

Appellee/Cross-Appellant Higgs protectively cross-appeals the circuit court's May 24, 2011 order in which the circuit court, prior to granting Higgs's

motion for summary judgment on collateral estoppel grounds, declined to dismiss BDT's complaint as time-barred (2011-CA-001131).

Following a careful review, we find the circuit court erred when it concluded that BDT's legal negligence complaint was timely filed within the applicable one-year statute of limitations. Accordingly, we reverse that portion of the circuit court's May 24, 2011 order and remand for entry of an order consistent with this opinion (2011-CA-001131). Likewise, we affirm the circuit court's August 1, 2011 order on statute-of-limitations grounds (2011-CA-001475). Because resolving the cross-appeal is dispositive of all other issues, BDT's remaining direct appeal, 2011-CA-001088, is denied as moot.

I. Facts and Procedure

This legal malpractice action stems from an underlying civil suit between BDT and Lexmark International, Inc. For several years, BDT and Lexmark enjoyed a mutually beneficial and productive business relationship. That relationship waned in 1997 when, by BDT's estimate, Lexmark commandeered propriety information BDT confidentially revealed to Lexmark. The claimed propriety information included a new "revolutionary" paper handling system invented and perfected by BDT; Lexmark supposedly incorporated BDT's paper-tray technology into its line of Optra S printers.

BDT retained Higgs, a California law firm, to protect its interests. Higgs conducted a lengthy, eighteen-month prefiling investigation. Higgs concluded

BDT had at least eight viable causes of action against Lexmark.[1] Upon this advice, BDT authorized Higgs to file suit.

On BDT's behalf, Higgs initiated a misappropriation-of-trade-secrets action against Lexmark in California state court (county of San Diego), asserting all eight causes of action. BDT's complaint was dismissed for improper venue. BDT refiled its complaint in the United States District Court for the Central Division of California. Simultaneously, Lexmark filed a declaration of rights action against BDT in the United States District Court for the Eastern District of Kentucky seeking a determination of its legal rights concerning BDT's claimed printer tray-related trade secrets. Mere hours separated the filing of BDT's California-based trade-secret lawsuit, and Lexmark's Kentucky-based declaratory rights action. A protracted venue battle ensued, concluding in the United States Court of Appeals for the Ninth Circuit. Lexmark prevailed, and BDT's trade-secret action was transferred to the Eastern District of Kentucky.

Higgs continued to represent BDT.[2] However, at Higgs's behest, BDT also retained Herron, another California law firm, to assist in the litigation. Herron conducted a second independent review of the matter. Based on that investigation, Herron advised Higgs to remove from the complaint excessive factual statements, and to eliminate certain causes of action. Herron advised Higgs to amend BDT's

[1] Those causes of action included: (1) breach of implied-in-fact contract; (2) breach of implied-in-law contract; (3) misappropriation of trade secrets; (4) fraud and deceit; (5) unfair business practices; (6) tortious interference with a business relationship; (7) breach of fiduciary duty; and (8) breach of confidence.

[2] Higgs was admitted to practice in Kentucky *pro hac vice*.

complaint to include only one claim – a violation of Kentucky's Uniform Trade Secret Act (KUTSA), Kentucky Revised Statutes (KRS) 365.880, *et seq*.; Higgs disagreed. Ultimately, Higgs filed an amended complaint, on BDT's behalf, asserting five claims: (1) breach of implied-in-fact contract; (2) breach of implied-in-law contract; (3) misappropriation of trade secrets; (4) unfair competition; and (5) breach of confidence.

In March 2003, the district court issued a memorandum and opinion in which it concluded Kentucky law applied and dismissed BDT's second, fourth, and fifth causes of action, finding the KUTSA preempted these California common-law claims. Shortly thereafter, Lexmark filed successive motions for summary judgment. On July 31, 2003, the district court issued a second memorandum and opinion granting Lexmark's motions and disposing of BDT's remaining two claims – breach of implied-in-fact contract and misappropriation of trade secrets. *BDT Products, Inc. v. Lexmark Int'l, Inc.*, 274 F. Supp. 2d 880 (E.D. Ky. 2003). The district court concluded: (1) the parties did not have an implied-in-fact contract;[3] (2) BDT's paper-tray designs were not trade secrets; and (3) even if they were, Lexmark was contractually entitled to use them without restriction.

[3] A BDT employee claimed that prior to disclosing its confidential printer tray-related information to Lexmark, BDT and Lexmark entered into a "two-way" confidentiality agreement which prevented Lexmark from revealing or otherwise using BDT's propriety technology. This confidentiality agreement formed the basis of BDT's "implied in fact" breach-of-contract claim. However, as noted by the circuit court in its July 2003 and June 27, 2008 opinions, this confidentiality agreement was never produced and Lexmark, as well as other BDT employees, did not recall such an agreement.

BDT appealed the district court's July 2003 order to the United States Court of Appeals for the Sixth Circuit. By opinion dated February 11, 2005, the Sixth Circuit affirmed the district court's decision. *BDT Products, Inc. v. Lexmark Int'l, Inc.*, 124 Fed. Appx. 329 (6th Cir. 2005), *rehearing en banc denied* April 25, 2005. The Sixth Circuit's reasoning was three-fold: (1) through a series of one-way confidentiality agreements between BDT and Lexmark, which afforded Lexmark unrestricted use of information BDT imparted to Lexmark, BDT had contracted away any rights it had against Lexmark's disclosure of BDT's information; (2) unprotected disclosures of its tray-related technology to other companies rendered BDT's alleged "trade secrets" no longer secret even before BDT disclosed that information to Lexmark; and (3) whatever trade secret may have existed had already become public information when Hewlett Packard introduced the same printer tray in 1994, more than two years before Lexmark released its line of Optra S printers. *Id.* at 331-34, 336. The United States Supreme Court denied BDT's petition for writ of certiorari on October 3, 2005. *BDT Products, Inc. v. Lexmark Int'l, Inc.*, 126 S.Ct. 384 (2005).

Following dismissal of BDT's trade-secret action, Lexmark moved for an award of costs and attorney's fees as monetary sanctions against BDT, Higgs, and Herron under KRS 365.886, 29 United States Code (U.S.C.) § 1927, and the district court's inherit powers. Lexmark's motion was held in abeyance pending appeal of the district court's order dismissing BDT's trade-secret action; the stay was lifted in June 2005 when the Sixth Circuit rendered its opinion.

On June 27, 2008, the district court granted Lexmark's sanctions motion.[4] The district court opinion reveals it very closely reviewed each party's actions, culminating in the filing, and subsequent dismissal, of BDT's trade-secret complaint. The district court ultimately found BDT, Higgs, and Herron pursued a meritless "lawsuit that should have never been brought, and in which no attorney should have persisted." The district court, in considering the "relative responsibility of the parties," reasoned:

> BDT, as the party-in-suit, bears primary responsibility. BDT knew about its disclosures of its technology, the nature of the protections afforded to it by virtue of its confidentiality agreements (or the absence thereof) with various entities, as well as the public sale of that technology by HP. BDT knew it had failed to obtain a licensing agreement for its product with Lexmark. Worse still, BDT misrepresented and obfuscated the truth about its agreements with Lexmark from day one – referencing agreements that never existed and arguing for relief based on others that it could never obtain on the facts in its possession. Accordingly, the BDT entities shall be jointly and severally responsible for 50% of all fees and costs awarded under the court's inherent power.
>
> [Higgs,] having conducted the pre-filing investigation and being aware of all dispositive facts (namely the public disclosure of the technology, the absence of any agreement to license or protect, and the existence of written agreements that permitted the use of BDT technology), advised the client of the available causes of action which made this bad faith suit possible, drafted and filed the Verified Complaint, engaged in a protracted venue dispute, litigated an interlocutory appeal before the Ninth Circuit Court of Appeals, was heavily involved in the drafting of the Amended Complaint, and set the overall tone of the proceedings before withdrawing at the

[4] The district court's order followed a three-day evidentiary hearing.

> conclusion of 2002. As such, [Higgs] shall be responsible for 30% of the award. . . .
>
> [Herron,] who inherited this lawsuit and litigated it to the bitter end, including an appeal of the judgment, notwithstanding the dispositive facts of which he was aware when he became counsel of record for BDT, shall be responsible for 20% of the award.

Herron alone appealed the district court's sanctions order. By opinion dated April 21, 2010, the Sixth Circuit reversed the district court's imposition of sanctions against Herron, concluding "there was not sufficient evidence in the record demonstrating [Herron] acted in bad faith or with improper purpose[,]" an indispensable prerequisite before a court may impose sanctions under its inherent powers.[5] *BDT Products, Inc. v. Lexmark Int'l, Inc.*, 602 F.3d 742 (6th Cir. 2010).

On May 13, 2009, while review of the district court's sanctions award was pending before the Sixth Circuit, BDT filed a legal malpractice action against Higgs and Herron in Fayette Circuit Court. In its complaint, BDT alleged that Higgs and Herron committed legal negligence when they (1) conducted their investigations; (2) advised BDT to pursue worthless claims; (3) advised BDT against settling the trade-secret action; (4) advised BDT to continue pursuing worthless claims; and, in the alternative, (5) prepared a defective complaint which caused valuable claims to be lost, and (6) filed the complaint in the wrong venue which caused valuable claims to be lost when the action was subsequently

[5] The Sixth Circuit further concluded the district court erred by imposing sanctions against the Herron law firms pursuant to 28 U.S.C. § 1927 because this statute "does not authorize the imposition of sanctions on law firms," but only against individual attorneys. *BDT Products*, 602 F.3d at 751.

transferred to Kentucky. Higgs and Herron answered asserting, *inter alia*, BDT's claims were barred by both the applicable statute of limitations, and the doctrines of res judicata and/or collateral estoppel.

BDT, Higgs, and Herron then filed competing motions for summary judgment. BDT's partial motion for summary judgment sought adjudication of Higgs's and Herron's res judicata and collateral estoppel defenses. In their respective cross-motions for summary judgment, Higgs and Herron asserted BDT's legal malpractice claim should be dismissed because (1) the doctrine of issue preclusion prohibited BDT from establishing proximate causation for its malpractice claim, and (2) BDT filed its complaint outside the one-year statute of limitations.

By interlocutory order entered December 13, 2010, as amended April 4, 2011, the circuit court denied BDT's motion for partial summary judgment, denied Herron's cross-motion for summary judgment,[6] and declined to dismiss BDT's complaint as time-barred, but granted Higgs's summary judgment motion on collateral estoppel grounds. The circuit court concluded that Higgs "may invoke collateral estoppel as a full defense to claims asserted by [BDT]." The circuit

[6] The circuit court found that BDT's malpractice claim was not barred by the doctrine of collateral estoppel, as against Herron, because, by virtue of the Sixth Circuit's opinion reversing the imposition of sanctions against Herron, Herron was not a "losing litigant" in the underlying action.

court's interlocutory order was reduced to a final judgment entered May 24, 2011.[7] BDT timely appealed, and Higgs timely cross-appealed.

On June 7, 2011, Herron asked the circuit court to reconsider its December 13, 2010 interlocutory order in which the circuit court concluded Herron could not avail itself of the defense of collateral estoppel and, in turn, denied Herron's cross-motion for summary judgment. On August 1, 2011, the circuit court granted Herron's motion, amended its prior interlocutory orders to reflect that the defense of collateral estoppel applied equally to Higgs and Herron, and dismissed BDT's malpractice complaint as against Herron. BDT timely appealed from this order.

II. Standard of Review

"The standard of review on appeal of summary judgment is whether the trial court correctly found there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *Carter v. Smith*, 366 S.W.3d 414, 419 (Ky. 2012). Likewise, whether an action is time-barred by the statute of limitations is a legal, not factual, inquiry. *Ragland v. DiGiuro*, 352 S.W.3d 908, 912 (Ky. App. 2010). Our review is *de novo*. *Id.*; *Mitchell v. University of Kentucky*, 366 S.W.3d 895, 898 (Ky. 2012).

III. Analysis

[7] The May 24, 2011 judgment disposed of all claims against Higgs, and included finality recitations. It was properly made "final and appealable." Kentucky Rules of Civil Procedure (CR) 54.01.

We first address the statute-of-limitations argument raised by Higgs on cross-appeal, and adopted by Herron in its response,[8] because it is dispositive of BDT's direct appeals. Higgs and Herron assert that BDT's malpractice action is time-barred because BDT filed its complaint outside the one-year statute of limitations for professional negligence claims prescribed by KRS 413.245. Under this statute:

> [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.

Id.

Construing KRS 413.245, our Supreme Court has explained that it encompasses two separate statutes of limitation: "The first is the date of the occurrence, and the second is the date of discovery, if it is later in time." *Pedigo v. Breen*, 169 S.W.3d 831, 833 (Ky. 2004). BDT fittingly concedes "[t]his case is an 'occurrence' case." (Consolidated Cross-Appellee/Appellant Reply Brief at 5).

"Occurrence," as used in KRS 413.245, is synonymous with "cause of action[.]" *Doe v. Golden & Walters, PLLC*, 173 S.W.3d 260, 271 (Ky. App.

[8] Unlike Higgs, Herron did not file a cross-appeal, but raised a statute-of-limitations argument in its responsive brief as an alternative ground upon which this Court may affirm the circuit court's August 1, 2011 order dismissing BDT's legal malpractice complaint against Herron. "Where the prevailing party seeks only to have the judgment affirmed, it is entitled to argue without filing a cross-appeal that the trial court reached the correct result for the reasons it expressed and for any other reasons appropriately brought to its attention." *Fischer v. Fischer*, 348 S.W.3d 582, 592 (Ky. 2011) (citation omitted).

2005). An "occurrence" legal malpractice claim is ripe, and a cause of action has accrued, when both negligence and "reasonably ascertainable" damages have occurred. *Pedigo*, 169 S.W.3d at 833; *Michels v. Sklavos*, 869 S.W.2d 728, 730 (Ky. 1994). "[T]he use of the word 'occurrence' in KRS 413.245 indicates a legislative policy that there should be some definable, readily ascertainable event which triggers the statute." *Michels*, 869 S.W.2d at 730. The so-called "triggering event" is "the date of 'irrevocable non-speculative injury.'" *Id.* (citation omitted).

When, then, is an injury fixed and non-speculative? Our Supreme Court has answered this question. When, as alleged in this case, the legal malpractice claim is based on "litigation negligence,"[9] our Supreme Court has held "that the injury becomes definite and non-speculative when the underlying case is final" and non-appealable. *Pedigo*, 169 S.W.3d at 833; *Michels*, 869 S.W.2d at 730 ("[W]hether the attorney's negligence has caused injury necessarily must await the final outcome of the underlying case."). The premise underlying this rule of finality is that there is a theoretical possibility that the injured party may "be fully restored" by virtue of the appeals process "to the position that he occupied before the negligent act or omission." *Doe,* 173 S.W.3d at 272. The Kentucky Supreme Court's reasoning in *Hibbard v. Taylor*, 837 S.W.2d 500 (Ky. 1992), is particularly enlightening.

[9] "Litigation negligence" is defined as "the attorney's negligence in the preparation and presentation of a litigated claim resulting in the failure of an otherwise valid claim[.]" *Michels*, 869 S.W.2d at 730.

In *Hibbard*, our Supreme Court explained that a client's legal malpractice claim accrues:

> when the result of the appeal became final and the trial court's judgment became the unalterable law of the case. Only then [is the client] put on notice that the principal damage (the adverse judgment) was real; but more importantly, only then could he justifiably claim that the entire damage was proximately caused by counsel's failure, for which he might seek a remedy, and not by the trial court's error, for which he would have none.

Id. at 502.

The fundamental point of contention in the case before us is this: when did the underlying case become final, thereby triggering the statute of limitations? Higgs and Herron maintain the underlying case became final, and the one-year statute of limitations began to run, on October 3, 2005, the date the United States Supreme Court denied BDT's petition for writ of certiorari challenging the district court's order dismissing BDT's trade-secret action. As a result, Higgs and Herron argue, the limitations period expired October 3, 2006, and BDT's legal malpractice action, commenced on May 13, 2009, was filed outside the statute of limitations. In response, BDT asserts the underlying case did not become final, and therefore KRS 413.245 was not triggered, until June 27, 2008, the date the district court issued its opinion leveling sanctions against BDT, Higgs, and Herron. BDT vehemently argues Lexmark's sanctions motion was part of the underlying litigation because it resolved issues central to the litigation; therefore, the

underlying litigation was ongoing, and BDT's damages were not yet definite and non-speculative.

We reject BDT's argument that Lexmark's sanctions action rendered the underlying trade-secret case non-final. We do so for two reasons.

First, we find the sanctions proceeding was collateral to, and did not affect the finality of, the underlying trade-secret action. Contrary to BDT's position that the trade-secret action and the sanctions action cannot be separated, "the determination of whether the judgment is final when the amount of the attorney fees has not been resolved . . . rest[s] on whether attorney fees were part of the claim or whether they were collateral to the merits of the action[.]" *Mitchell v. Mitchell*, 360 S.W.3d 220, 223 (Ky. 2012) (citation omitted). In *Mitchell*, our Supreme Court found a party's claim for attorney's fees to be collateral to the merits of underlying action because the "request for attorney fees was made in an entirely separate motion by a party opposed to the initial action." *Id.* Similar to *Mitchell*, Lexmark, a party opposed to BDT's initial trade-secret action, sought attorney's fees as monetary sanctions by way of a separate motion filed after the trade-secret action had concluded. Lexmark's sanctions request and the proceedings relevant thereto were collateral to BDT's trade-secret action.

Second, in ascertaining whether the "underlying case" is final, we look to the "termination of the proceeding *on which the malpractice action is based*." *Michels*, 869 S.W.2d at 730 (emphasis added; internal quotation marks omitted). BDT's legal malpractice complaint belies any argument that the proceeding upon

which the malpractice action is based is anything other than the trade-secret action. A review of BDT's complaint reveals that BDT plainly and solely bases its legal malpractice upon actions Higgs and Herron took while representing BDT in the trade-secret action. As referenced, those actions include Higgs's and Herron's failure to investigate, identify, and pursue viable causes of actions; failure to adequately advise BDT concerning the continuing viability of its pleaded claims and Lexmark's settlement offer; and failure to prepare and properly file a non-defective complaint. BDT does not base its legal malpractice suit on any actions Higgs and Herron took during the sanctions proceedings.

BDT further contends its "damages" were not fixed and definite until the circuit court rendered its sanctions opinion. Its position is two-fold: (1) until the circuit court imposed sanctions on June 27, 2008, BDT did not have a viable cause of action against Higgs and Herron because no damages flowed from their alleged negligence; and (2) "while BDT might arguably have known that [Higgs and Herron] had been negligent when it lost its underlying case, it certainly did not know the extent of the negligence, nor that it would, years later, be assessed millions of dollars in sanctions as a result of [Higgs's and Herron's] acts of negligence." (Consolidated Cross-Appellee/Appellant Reply Brief at 9).

We agree with Higgs and Herron that there was a definite point when BDT should have known that damages would flow from Higgs's and Herron's alleged negligence. That "point" was when the United States Supreme Court denied BDT's petition for writ of certiorari, thereby making final the district

court's July 2003 order dismissing BDT's trade-secret complaint. We continue our analysis in this vein by again referencing BDT's legal negligence complaint.

In that complaint, BDT alleged that Higgs's and Herron's litigation negligence caused BDT injury when it resulted in: (a) the "loss of viable claims estimated to be worth $30,000,000.00"; (b) the loss of an opportunity to settle the trade-secret action; and (c) the loss of attorney's fees and costs associated with both the prefiling investigation and the practice of the trade-secret action. Those injuries became fixed and non-speculative when BDT exhausted all avenues of appellate review, and the circuit court's July 2003 order became the "unalterable law of the case." *Hibbard*, 837 S.W.2d at 502; *Barker v. Miller*, 918 S.W.2d 749, 751 (Ky. App. 1996) (explaining any damages allegedly suffered because of legal malpractice "became fixed and non-speculative on the day the Kentucky Supreme Court denied discretionary review" of the underlying case in which the malpractice purportedly occurred). Stated differently, once finality was fixed, there was no longer the theoretical possibility that BDT could recover the amounts it theorized could be reaped by successful, *i.e.*, non-negligent, legal representation and litigation; the conclusion of the appeals process foreclosed that possibility.

As for the second facet of BDT's argument, *i.e.*, that it was unaware of the extent of Higgs's and Herron's negligence until the district court issued its sanctions opinion, BDT effectively concedes only the *amount* of damages remained at issue, not the core fact that it was indeed injured. "Kentucky law has never required a specified dollar amount be known before the statute of limitations

can run." *Matherly Land Surveying, Inc. v. Gardiner Park Dev., LLC,* 230 S.W.3d 586, 591 (Ky. 2007); *Bd. of Educ. of Estill County, Kentucky v. Zurich Ins. Co.*, 180 F. Supp. 2d 890, 893 (E.D. Ky. 2002) ("Whatever it means, 'fixed and non-speculative' does not mean that damages, to trigger the initiation of the limitations period, must be translatable into a specified dollar amount." (Interpreting Kentucky law)). Instead, "[t]he statute of limitations begins to run as soon as the *injury* becomes known to the injured." *Matherly Land Surveying, Inc.,* 230 S.W.3d at 591 (emphasis added). When BDT exhausted all appellate review options, it was "put on notice that the *principal damage (the adverse judgment)* was real." *Hibbard*, 837 S.W.2d at 502 (emphasis added). At that point, even though BDT may not yet have known the full extent of its damages in terms of the precise dollar amount of its damages, the fact of injury was certainly "irrevocable" and "non-speculative."

Furthermore, while the district court's sanctions ruling certainly illuminated the manner and degree of Higgs's and Herron's possible legal malpractice, the sanctions ultimately imposed directly upon BDT did not result from Higgs's and Herron's alleged negligence, but from BDT's own wrongdoing. The district court carefully crafted its sanctions order to impose sanctions against BDT only to the extent of its relative responsibility for the proclaimed meritless suit. To that extent, the sanctions damages suffered by BDT did not flow from its attorney's negligence, but from its own malfeasance. *See Michels*, 869 S.W.2d at

730 (indicating damages must flow from the attorney's "negligence, if any there was").

We are cognizant that statutes of limitation are, at times, "arbitrary and unfair, but they" also "represent a policy decision made by the legislative branch of government that after the passage of specified periods of time, claims are not viable[.]" *Faris v. Stone*, 103 S.W.3d 1, 4 (Ky. 2003) (citing *Barker*, 918 S.W.2d at 751.).

In sum, we find the statute of limitations governing BDT's legal negligence action began to run on October 3, 2005, and expired October 3, 2006. BDT filed its legal malpractice complaint on May 13, 2009. BDT's complaint was not filed within one year as required by the statute of limitations provided in KRS 413.245. The circuit court's dismissal of BDT's complaint as time-barred was required by law; the circuit court erred in concluding otherwise.

IV. Conclusion

For the foregoing reasons, in case number 2011-CA-001131, we reverse the circuit court's May 24, 2011 order and remand for entry of an order dismissing BDT's malpractice action as against Higgs on statute-of-limitations grounds. Likewise, in case number 2011-CA-001475, we affirm the circuit court's August 1, 2011 order dismissing BDT's malpractice action as against Herron, *albeit* on different, statute-of-limitations grounds. We deny as moot BDT's direct appeal in case number 2011-CA-001088.

ALL CONCUR.

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