RENDERED: OCTOBER 26, 2012; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001566-MR

THE ESTATE OF VIRGINIA M. LAMB,
BY AND THROUGH EILEEN ANNE NIEDT,
ADMINISTRATRIX — APPELLANT

v.

APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE FRED A. STINE, V, JUDGE
ACTION NO. 10-CI-01245

WEHRMAN & WEHRMAN, CHARTERED
AND D. ANTHONY BRINKER — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, LAMBERT AND STUMBO, JUDGES.

STUMBO, JUDGE: The Estate of Virginia M. Lamb, by and through Eileen Anne Niedt, Adminstratrix, appeals from an Order of the Campbell Circuit Court sustaining the motion of Wehrman & Wehrman, Chartered and D. Anthony Brinker to dismiss or alternatively for summary judgment. The Estate argues that

the trial court erred in ruling that the Statute of Limitations in her professional service malpractice action against Wehrman & Wehrman and Brinker commenced at the latest on March 18, 2009, when the Estate became aware that tax returns had not been timely filed. Rather, it maintains that the statutory period for bringing the action commenced at a later date when the amount of damages became fixed and certain. The Estate argues that the court erred in dismissing the action as time-barred. For the reasons stated below, we affirm the Order on appeal.

The facts are not in controversy. Virginia M. Lamb died on June 9, 2004. On or about June 17, 2004, Administratrix Niedt retained the law firm of Wehrman & Wehrman, Chartered, and attorney D. Anthony Brinker. On July 23, 2004, Brinker opened the Estate in Campbell District Court under Case Number 04-P-379. It appears from the record that between July, 2004 and November, 2008, Brinker did not complete the administration of the Estate nor file any required federal or Kentucky income or inheritance tax returns in connection with his handling of the Estate.

In October, 2008, the Estate terminated its relationship with Brinker and retained the law firm of Robbins, Kelly, Patterson & Tucker. The Estate would later allege that due to the Appellees' negligence, the Internal Revenue Service and the Kentucky Department of Taxation levied penalties against the Estate, charged interest and forced it to pay bond premiums. Negotiations with the Internal Revenue Service ensued, and according to the Estate the final and exact amount of damages incurred by the Appellees' negligence did not become irrevocable, non-

speculative and fixed until, at the earliest, December 14, 2009, when the Internal Revenue Service sent its Final Notice to the Estate.

Niedt, through counsel, filed the instant action against the Appellees on August 12, 2010, alleging professional service malpractice, breach of fiduciary duty, and breach of contract. The Appellees responded with an Answer and Motion to Dismiss based on the Estate's alleged failure to comply with the one-year Statute of Limitations for professional service malpractice. As a basis for the Appellees' motion, they cited KRS 423.245 and noted that Niedt retained new counsel in October, 2008 picked up the case file from the Appellees in November 2008, and as such were aware of the alleged malpractice no later than November 2008. In that months the followed, the Estate filed a motion for Summary Judgment.

On May 5, 2011, the circuit court conducted a pre-trial hearing and addressed several pending motions. It determined that the Estate's filing of tax returns and the establishment of an open account for legal services at the Robbins law firm rendered the Estate's damages fixed and certain "at the latest by March 18, 2009." Under the court's reasoning, the Estate was required to file the instant action, if at all, within 12 months of that date or no later than March 18, 2010. The court rendered its written Order on August 1, 2011, granting the Appellees' motion, which it characterized as a "Motion to Dismiss or alternatively for Summary Judgment[.]" This appeal followed.

The Estate now argues that the trial court erred in concluding that the one-year Statute of Limitations for professional service malpractice expired prior to the commencement of the instant action, thereby barring the Estate's claim. Directing our attention to KRS 413.245, the Estate contends that the Statute of Limitations does not commence until the amount of damages becomes fixed and non-speculative. Citing *Michels v. Sklavos*, 869 S.W.2d 728 (Ky. 1994), and *Alagia, Day, Trautwein & Smith v. Broadbent*, 882 S.W.2d 121 (Ky. 1994), the Estate argues that the Statute of Limitations did not commence when it believed or knew that the Appellees had committed professional service malpractice, nor at such time when the Estate retained new counsel and transferred the case file to the new firm. Rather, in the Estate's view, and pursuant to *Alagia*, *supra*, the running of the Statute of Limitations commenced only when the amount of damages became fixed and certain. According to the Estate, the amount of damages herein became fixed and certain on December 14, 2009, when the Internal Revenue Service mailed its Final Notice to the Estate.

Conversely, the Appellees argue that KRS 413.245 would be eviscerated by any holding that the Statute of Limitations did not begin to run at the time when the Estate became aware of the delinquent taxes, penalties and interest owed by the Estate. According to the Appellees, when Niedt retained new counsel, she knew there had been a delay in administering the estate and was advised by new counsel that the returns were not timely filed and that interest and penalties were due.

Thus, the Appellees maintain that the harm was fixed and non-speculative when new counsel verified that the tax returns had not been filed.

KRS 413.245 states that,

> 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.

Thus, there are two standards which may apply. First, the action may be brought, if at all, within one year of the act or omission in rendering, or failing to render, professional services. In the alternative, and signified by the usage of the disjunctive "or," the action may be brought within one year from date the action was, or reasonably should have been, discovered by the party injured. At issue herein is whether the date of discovery occurred when the Internal Revenue Service transmitted to the Estate a recital of the actual damages, as the Estate contends, or as the Appellees contend and the trial court so found, whether the date of discovery was when Niedt retained new counsel, learned that the Appellees allegedly failed to file the Estate tax returns in a timely manner, and/or filed tax returns and made the payment.

In determining that this action was not commenced within one year of the date on which Niedt knew that an act of professional service malpractice had

occurred, i.e., when the Estate learned that it had suffered irrevocable, non-speculative injury, the court relied in part on *Queensway Financial Holdings, Ltd. v. Cotton & Allen, P.S.C.*, 237 S.W.3d 141, 147 (Ky. 2007). *Queensway* held in relevant part that,

> The "occurrence" limitation period begins to run upon the accrual of the cause of action. *Id.* The accrual rule is relatively simple: "'[A] cause of action is deemed to accrue in Kentucky where service malpractice and damages have both occurred.... [T]he use of the word "occurrence" in KRS 413.245indicates a legislative policy that there should be some definable, readily ascertainable event which triggers the statute.'" *Id.* at 730 (quoting *Northwestern Nat. Ins. Co. v. Osborne,* 610 F.Supp. 126, 128 (E.D.Ky.1985)) (alterations in original). Basically, "a 'wrong' requires both a negligent act and resulting injury. *Damnum absque injuria,* harm without injury, does not give rise to an action for damages against the person causing it." *Id.* at 731. The difficult question when applying the rule is usually not whether service malpractice has occurred but whether an "'irrevocable non-speculative injury'" has arisen. *Id.* at 730(quoting *Northwestern Nat. Ins. Co. v. Osborne*, 610 F.Supp. 126, 128 (E.D.Ky.1985)).
>
> The second or "discovery" limitation period begins to run when the cause of action was discovered or, in the exercise of reasonable diligence, should have been discovered. *Id.* at 730. This rule is a codification of the common law discovery rule, *id.* at 732, and often functions as a "savings" clause or "second bite at the apple" for tolling purposes.

Id. at 147-48. Thus, the second or "discovery" limitation period begins to run "when the cause of action was discovered[.]" *Id.*

The issue before us is not the occurrence date of the alleged service malpractice (thus invoking the first prong of KRS 413.245), but rather the date of

discovery (thereby invoking the second prong). We characterize the issue as follows: for the purpose of determining the discovery date under KRS 413.245, is the date the plaintiff discovers the *cause of action* or the *amount of fixed damages* controlling? We conclude that the date the *cause of action* was discovered is controlling, and find that the circuit court did not err in so concluding. We first note that KRS 413.245 states in unambiguous terms that the controlling date is the date the *cause of action* was, or should have been, discovered. "[A] civil action . . . arising out of any act or omission in rendering . . . professional services . . . shall be brought within one (1) year . . . from the date when *the cause of action* was, or reasonably should have been, discovered by the party injured." KRS 413.245. (Emphasis added). We find as persuasive the Appellees' assertion that, based on everything that Niedt knew, one may look for the earliest date on which the Estate could have maintained an action against the Appellees for professional service malpractice - and it is this date upon which the Estate can reasonably be said to have discovered the cause of action.

On December 10, 2008, the Estate's substitute counsel called the Kentucky Department of Revenue to determine the amount of penalty and interest on the Kentucky delinquent inheritance taxes. That same day, counsel wrote Niedt regarding "tax issues." Additionally, the Estate paid more than $20,000 in March, 2009, to satisfy delinquent taxes and interest, again demonstrating that Niedt, through counsel, knew or reasonably should have known of the Appellees' alleged professional service malpractice at that time.

An examination of *Michels* and *Alagia* is also helpful. In *Michels*, the Kentucky Supreme Court addressed the scenario where - during the course of litigation - the represented party concludes that his counsel has engaged in professional misconduct. The question addressed in *Michels*, then, is whether that party may wait for the ongoing litigation to reach an unfavorable conclusion before the statutory period begins to run. In answering this question in the affirmative, the Court noted that the cause of action for professional service malpractice does not accrue until the ongoing litigation has concluded. The Estate seeks to characterize this result as holding that the statutory period does not commence until the *amount* of fixed damages is determined. Our reading of *Michels*, though, leads us to conclude that in ongoing litigation scenarios, the plaintiff may wait - and in fact must wait - for actual damages to accrue before commencing a malpractice action. It does not hold that the cause of action commences only when the *amount* of actual damages is known. Additionally, *Michels* is distinguishable from the instant matter in that the occurrence rule rather than the discovery rule was applied. "[*Michels*] resolved on the occurrence rule by which the commencement of the statutory period was postponed until finality of the underlying litigation, when the injury had become irrevocable and non-speculative." *Alagia*, 882 S.W.2d at 125.

That same year, the Kentucky Supreme Court rendered its opinion in *Alagia*. The analysis in *Alagia* is also distinguishable, as it - like *Michels* - addressed the occurrence date rather than discovery date ("[T]his case must be decided on the

occurrence rule as discussed in *Michels*." *Id.*). The Court in *Alagia*, which like the matter at bar was a tax claim, held in relevant part that "the statute was tolled until the subsequent law firm and the IRS settled the claim." The Estate relies on this language for the proposition that the statute does not begin to run until settlement has reached finality. We do not agree with this reading. "Fixed and non-speculative" in the context of *Alagia* refers to the first time at which there is objective evidence that the plaintiff was damaged, and not a determination of the fixed amount of damages. When the subsequent law firm settled with the IRS in *Alagia*, that event was the occurrence and not the discovery, as it was the first date upon which which the plaintiff could be said to have suffered damages. Contrast that with the facts at bar, wherein the Estate suffered damages when it paid delinquent taxes and interest in March 2009. And again, the *Alagia* Court stated without ambiguity that its controversy was decided by application of the occurrence rule rather than the discovery rule.

And finally, *Alagia* is factually distinguishable as that case involved a tax shelter. In *Alagia*, the shelter was not deemed invalid until all appeals with the IRS were exhausted. As such, the date those appeals were resolved was the first date the injury can be said to have occurred, as it was possible that the IRS would have ruled in the plaintiff's favor. Contrast that with the matter at bar, wherein the injury occurred on the day the initial tax return was not properly filed, and the damage was discovered no later than March 18, 2009, when the Robbins law firm filed the delinquent tax return.

The circuit court found that the Estate, through Niedt, was aware at the earliest by September 15, 2008, that the Appellees had not timely completely the administration of the Estate. It was at this time, and for this reason, that Niedt contacted the Robbins law firm. The court also found that the Estate incurred damages, at the latest, by March 2009, when it filed federal and state income and inheritance tax returns. We do not conclude that these findings are clearly erroneous. Based on *Michels*, *Alagia* and *Queensway*, we find no error in the circuit court's conclusion that this action was not commenced within one year of the date on which the Estate knew that an act of professional negligence had occurred.

The Estate, through Niedt, also contends that the circuit court erred in denying its Motion for Summary Judgment. The Estate contends that it established that no genuine issue of material fact remained as to whether the Appellees were professionally negligent, breached a fiduciary duty, and breached the contract of representation thereby entitling the Estate to a Judgment as a matter of law. Given the circuit court's ruling on the Statute of Limitations issue, and our affirmation thereof, we find as moot the Estate's argument that it was entitled to Summary Judgment.

For the foregoing reasons, we affirm the Order of the Campbell Circuit Court granting the Appellees' motion to dismiss.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Richard O. Hamilton, Jr.
Cincinnati, Ohio

BRIEF FOR APPELLEE:

Gary J. Sergent
Benjamin T. D. Pugh
Covington, Kentucky