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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001879-MR

WILLIAM C. ERIKSEN, P.S.C. APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE DOUGHLAS M. GEORGE, SPECIAL JUDGE
ACTION NO. 09-CI-02390

KERRICK, STIVERS, COYLE &
VAN ZANT, P.L.C.; D. MICHAEL COYLE;
AND H. BRENT BRENNENSTUHL APPELLEES

OPINION
AFFIRMING

** ** ** ** **

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

NICKELL, JUDGE: William C. Eriksen, P.S.C., filed a legal malpractice complaint against Kerrick, Stivers, Coyle & Van Zant, P.L.C., D. Michael Coyle, and H. Brent Brennenstuhl (collectively "Appellees"), claiming they provided negligent legal representation, committed legal malpractice and breached their

employment contract in resolving a debt dispute with a former Eriksen employee. The Hardin Circuit Court granted Appellee's motion for summary judgment, finding the action was barred by the statute of limitations contained in KRS 413.245.[1] Having reviewed the record, the briefs and the law, we affirm.

THE UNDERLYING ACTION

Eriksen operates a chiropractic practice.[2] Eriksen employed Dr. Michael Elkins in 1999. When Dr. Elkins separated from the practice a few years later, Eriksen expected him to repay loans, a cell phone bill, and overpaid compensation totaling about $45,000.00. When repayment was not forthcoming, Eriksen filed a complaint[3] against Dr. Elkins in May 2004 in Simpson Circuit Court. Dr. Elkins filed a countersuit alleging Eriksen had fraudulently withheld compensation to which he was entitled under a written profit-sharing agreement.

[1] Kentucky Revised Statutes (KRS) 413.245 reads in relevant part:

> 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.

[2] Dr. William C. Eriksen, D.C., is the sole owner of the chiropractic practice that is a party to this action. The current litigation is not brought in his individual capacity, although it was originally filed on behalf of William C. Eriksen, P.S.C. and Dr. William C. Eriksen, D.C. Appellees successfully moved the trial court to dismiss Dr. Eriksen in his individual capacity because he was not a party to the underlying action and was not represented by Appellees.

[3] The complaint was styled *Dr. William C. Eriksen, P.S.C. v. Dr. Michael Elkins,* Simpson Circuit Court Civil Action No. 04-CI-00160. It was filed on Eriksen's behalf by Jerry M. Coleman of Quick & Coleman, PLLC, a law firm headquartered in Elizabethtown, Kentucky. At some point, Appellees assumed representation of Eriksen in the complaint against Dr. Elkins. Only selected portions of the record in the underlying action have been made part of the appellate record. Having only a partial record places us at a disadvantage because the underlying action began in 2004 and the malpractice litigation was not filed until 2009.

Appellees ultimately tried Eriksen's compensation claims against Dr. Elkins on August 29-31, 2006. At the conclusion of trial, jurors awarded damages to neither Eriksen nor Dr. Elkins. A trial order and judgment was entered on September 11, 2006. On September 20, 2006, Eriksen moved the court to award attorneys' fees and alter or amend the trial order and judgment.[4] On October 12, 2006, the Simpson Circuit Court denied the motion, and neither party appealed to this Court. Since no appeal was filed within 30 days as allowed by CR[5] 73.02, the trial order and judgment became final and non-appealable on November 13, 2006.

Eriksen claims as early as August 3, 2006, Appellees were advised grounds existed to sue Dr. Elkins for breach of employment contract as well as breach of fiduciary duty to the practice. However, no amended complaint was filed and no claims of breach were pursued by Appellees in the underlying action. While we have no proof of this in the record, Appellees state in their brief that they ceased representing Eriksen on November 13, 2006. Presumably, any action Appellees took, or failed to take, occurred prior to November 13, 2006.

Represented by new counsel, Eriksen filed a CR 60.02 motion in September 2007 in Simpson Circuit Court, seeking to vacate the jury verdict. This time, Eriksen was represented by Hon. J. Fox DeMoisey. Eriksen argued Dr.

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[4] This motion is not included in the record for our review; however, it is mentioned in the order granting summary judgment. Additionally, the order overruling the motion for attorneys' fees and to alter and amend the trial order and judgment is included in the record. The order was entered October 12, 2006.

[5] Kentucky Rules of Civil Procedure.

Elkins's 2002 federal tax return, recently discovered in a divorce case, proved Dr. Elkins knew he had not been underpaid by the practice at the time of separation. Eriksen requested time and opportunity to depose Dr. Elkins about the tax return, believing it would establish he had committed perjury. Dr. Elkins opposed the motion to vacate, arguing review of the practice's computer files confirmed he had been underpaid. The trial court denied the CR 60.02 motion on October 11, 2007, finding that while the 2002 federal tax return may have helped impeach Dr. Elkins, it was available prior to trial in August 2006, and therefore, was not newly discovered evidence justifying extraordinary relief.

Eriksen appealed the denial of CR 60.02 relief to this Court.[6] On November 14, 2008, we affirmed the trial court order stating in pertinent part:

> Eriksen received a full and fair opportunity to present its case. Eriksen was able to challenge Dr. Elkins's evidence, to undermine his credibility, and to defend against the contentions set out in his counterclaim. Eriksen had superior access to the information concerning its business account, and there is no reason to believe or to assume that it could not have discovered Dr. Elkins's 2002 federal tax return prior to trial. Eriksen was not prejudiced or deprived of any means of pursuing or protecting its interest in this matter.

Next, Eriksen tried to assert the breach of contract claims against Dr. Elkins in a separate action filed in Hardin Circuit Court to compel arbitration[7]

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[6] *Dr. William Eriksen, P.S.C. v. Elkins,* No. 2007-CA-002166-MR, 2008 WL 4889635 (Ky. App. 2008) (unpublished).

[7] The action was styled *William C. Eriksen, P.S.C. v. Elkins,* Hardin Circuit Court, Case No. 09-CI-00730.

under the employment agreement. Dr. Elkins moved to dismiss the action. After a hearing, the action was dismissed on April 23, 2009. The trial court found multiple grounds justified dismissal—insufficient service of process; improper venue; Kentucky's exemption of employment agreements from the original Uniform Arbitration Act under KRS 417.050(1); Eriksen's failure to file an actual breach of contract action; and *res judicata. Egbert v. Curtis,* 695 S.W.2d 123, 124 (Ky. App. 1985) (litigant waives any claim that could have been, but was not, brought in original action). In May 2009, the trial court amended[8] its order of dismissal making it without prejudice.

THE IMMEDIATE ACTION

We turn now to the specific claims made by Eriksen against Appellees. On November 10, 2009, Eriksen filed a complaint in Hardin Circuit Court against Appellees alleging negligence, legal malpractice and breach of contract regarding the allegedly botched debt dispute against Dr. Elkins. Eriksen claimed Appellees: 1) hired a certified public accountant (CPA) to give expert testimony but did not depose him; 2) did not file a valid and timely expert witness list which resulted in exclusion of the CPA's testimony; 3) did not acquire and review Dr. Elkins's tax returns or divorce file; and, 4) did not investigate Dr.

[8] This order is not included in the record provided to us; however, it is referenced in the order granting summary judgment to Appellees.

Elkins's counterclaim. The complaint was filed by Hon. Jonathan D. Boggs as General Counsel for Eriksen.[9]

Appellees answered the complaint on November 24, 2009, denying negligence and asserting Eriksen's claims were barred by the statute of limitations and *res judicata.* Appellees also argued estoppel, waiver, comparative negligence and collateral estoppel. On May 17, 2011, Appellees moved for summary judgment, arguing Eriksen had filed suit outside the one-year statute of limitations stated in KRS 413.245.

After hearing oral argument on July 13, 2011,[10] the trial court entered summary judgment in Appellee's favor on September 13, 2011. Applying the standard recited in *Steelvest, Inc. v. Scansteel Service Center, Inc.,* 807 S.W.2d 476 (Ky. 1991), the trial court found Appellees were entitled to summary judgment as a matter of law because a claim for rendering or failing to render professional services must be filed within one year of the occurrence of the event, or, if later, the date the action was discovered or reasonably should have been discovered by

[9] Boggs moved to withdraw as counsel on August 4, 2010. On November 15, 2010, Hon. Matt McCubbins filed a notice of entry of appearance on Eriksen's behalf.

[10] The record contains a video recording log showing this hearing lasted approximately 35 minutes. However, the hearing was not designated for inclusion in the appellate court record. CR 75.01(1) places responsibility for filing the designation of record on the appellant, or counsel for the appellant, if any. No designation of record was filed in this case. CR 98(3) places a responsibility on the appellant, or counsel for the appellant, if any, to "provide the clerk with a list setting out the dates on which video recordings were made for all pre-trial and post-trial proceedings necessary for inclusion in the record on appeal." *Steel Technologies, Inc. v. Congleton*, 234 S.W.3d 920, 926 (Ky. 2007), confirms it is the "appellant's duty to present a complete record on appeal." No designation of record having been filed, and an incomplete record having been provided, we assume any omissions in the record support the circuit court's findings and grant of summary judgment. *Commonwealth v. Thompson*, 697 S.W.2d 143, 145 (Ky. 1985).

the injured party. The trial court found Eriksen's complaint had been filed more than *two years after* either date and thus, was untimely.

Specifically, the trial court found the trial order and judgment became final and appealable on October 12, 2006. Since no appeal was filed, it became final thirty days later. According to the trial court's calculation, the window for filing a legal malpractice claim against Appellees closed one year later, on November 13, 2007. This was a critical finding because under KRS 413.245, the "occurrence" date coincides with the date damages in the underlying action become final and non-appealable. *Hibbard v. Taylor,* 837 S.W.2d 500 (Ky. 1992). Here, that date was November 13, 2006, nearly three years *before* the malpractice complaint was finally filed on November 10, 2009. Additionally, the trial court found the date of "discovery" for filing a legal malpractice claim is calculated from the time Eriksen learned it "may have been poorly or inadequately represented"—not when Eriksen learned Appellee's alleged error was actionable. *Conway v. Huff,* 644 S.W.2d 333, 334 (Ky. 1982).

As a result of these two findings, the trial court concluded Eriksen knew at the end of trial on the underlying action on August 31, 2006, that no breach of contract claim had been asserted—something Eriksen alleged Appellees had been directed to pursue as early as August 3, 2006. Furthermore, Eriksen knew when his new attorney filed the motion to vacate in September 2007 that Appellees had not used Dr. Elkins's 2002 tax return at trial and may have been unaware of it. Eriksen having failed to file the malpractice complaint within the

one-year window set forth in KRS 413.245, the trial court awarded summary judgment to Appellees and dismissed Eriksen's claims with prejudice. This appeal followed.

ANALYSIS

We review a trial court's grant of summary judgment *de novo* as only questions of law are involved. *Hallahan v. The Courier Journal*, 138 S.W.3d 699, 704–05 (Ky. App. 2004). Once the movant convinces us no genuine issue of fact is disputed, the burden shifts to the non-movant to offer "at least some affirmative evidence showing there is a genuine issue of material fact for trial." *Steelvest*, 807 S.W.2d at 482. The sole question here is whether the complaint alleging legal malpractice was timely filed. Both parties agree KRS 413.245 states the applicable statute of limitations for filing a legal malpractice claim—one 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." Thus, there are two potential dates on which the statute of limitations begins to run. Eriksen claims the missed breach of contract claims were timely under both the "occurrence" and "discovery" windows, and the failure to find and use the 2002 tax return was timely filed under the "discovery" window.

To understand how these two windows operate, we quote *Queensway Financial Holdings Ltd. v. Cotton & Allen, P.S.C.,* 237 S.W.3d 141, 147-48 (Ky. 2007):

[KRS 413.245] actually provides two different limitations periods: one year from the date of the "occurrence," and one year from the date of the actual or constructive discovery of the cause of action. *Michels v. Sklavos*, 869 S.W.2d 728, 730 (Ky. 1994).

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 negligence and damages have both occurred. . . . [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.' " *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 negligence 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.

The trial court and the Court of Appeals dealt with this case primarily under the discovery rule. They addressed the accrual issue, but did so in terms of the discovery rule. Citing *Perkins v. Northeastern Log Homes*, 808 S.W.2d 809 (Ky. 1991), they held that a cause of action accrues when it is discovered or becomes discoverable. But under the professional malpractice statute of limitations, mere knowledge of some elements of a tort claim, such as negligence without harm, is insufficient to

> begin running the limitations period where the cause of action does not yet exist. *Michels*, 869 S.W.2d at 731–32. In this respect, the approach employed by the lower courts is improper under the professional malpractice statute, in that it collapses the accrual rule into the discovery rule when the two are analytically distinct. Admittedly, *Perkins* does say that a cause of action will not accrue until the plaintiff discovers or reasonably should have discovered that he is injured and that the injury was caused by the defendant, *id*. at 819, but in so doing it is describing how the common law discovery rule works under the general limitations statute to extend the tolling of the limitations period, which the general statute describes as running only upon accrual of the cause of action. The fact that the language employed in *Perkins* discusses a cause of action accruing under the discovery rule does not remove the distinction between it and the accrual rule where the malpractice limitation statute expressly includes both.
>
> The distinction between the two rules is important because, when properly applied, the accrual rule means that the limitations period does not even begin to run until the cause of action accrues. Until that time, no cause of action yet exists, meaning a lawsuit would be premature and should be dismissed.
>
> Where a plaintiff claims that its suit was filed within the limitations period under both the accrual and discovery rules, as in this case, analyzing a claim only under the discovery rule does not make sense because, by its very nature, the discovery limitations period cannot begin to run until the accrual period begins. Addressing the discovery rule first, and then addressing the accrual rule in terms of discovery, further turns the required analysis on its head. Instead, the plaintiff's statute of limitations claim must be evaluated separately under both the accrual and discovery rules. Moreover, it makes sense to begin with the accrual limitation period.

Using *Queensway* as our guide, we analyze both of Eriksen's claims—failure to use Dr. Elkins's 2002 tax return and failure to allege breach of contract and

fiduciary duty claims against Dr. Elkins—to determine the date on which these actions "occurred" and then the dates on which they were "discovered." If all the relevant dates fall outside the one-year window, summary judgment was properly granted and will be affirmed.

NONUSE OF 2002 TAX RETURN

We begin with Dr. Elkins's 2002 tax return which was found by an Eriksen employee while researching a divorce case between August 31, 2006, and March 7, 2007. Also found in the divorce file was a Commissioner's Report dated June 28, 2004, showing the parties agreed a marital debt was owed to Eriksen. From the November 14, 2008, opinion issued by a panel of this Court, which was not challenged and is therefore, law of the case, we know the 2002 tax return was available prior to trial of the underlying action. Moreover, Eriksen knew when trial ended on August 31, 2006, that the tax return had not been used during trial.

When legal malpractice is alleged to have occurred during formal litigation, our Supreme Court has held "the injury becomes definite and non-speculative when the underlying case is final." *Pedigo v. Breen,* 169 S.W.3d 831, 833 (Ky. 2005) (citing *Hibbard,* 837 S.W.2d 500). Eriksen's damages became fixed and final on November 13, 2006, when the time for filing an appeal of the trial order and judgment of the underlying action expired. Filing the CR 60.02 motion in September 2007 did not extend the window for filing the malpractice

complaint. *Faris v. Stone,* 103 S.W.3d 1, 3 (Ky. 2003). Eriksen concedes Appellee's nonuse of the 2002 tax return happened outside the "occurrence" window.

We now consider whether the claim about the tax return fell within the "discovery" window. According to Eriksen, he was aware of the tax return by March 7, 2007. On September 10, 2007, he filed a CR 60.02 motion seeking to reopen the underlying action due to the recent discovery of the 2002 tax return. In light of these two facts, it is clear from the record that Eriksen was sufficiently on notice in September 2007 to start the one-year "discovery" window running. Being generous, one would say the "discovery" window closed September 11, 2008, well before the complaint was filed on November 10, 2009. We reject Eriksen's argument that he did not have sufficient knowledge to trigger the running of the statute of limitations until a panel of this Court told him on November 14, 2008, that the tax return was available for use at trial—he claims it was only then that he realized he had an actionable claim. As explained in *Blanton v. Cooper Industries, Inc.,* 99 F.Supp.2d 797, 802 (E.D.Ky. 2000):

> The discovery rule focuses not on when a plaintiff has actual knowledge of a legal cause of action, but whether a plaintiff acquired knowledge of existing facts sufficient to put the party on inquiry. "Reasonable diligence" is required of plaintiffs. Kentucky courts have not precisely defined this term in the discovery rule context but have interpreted identical statutory language to represent "a degree between absolute inaction and an extreme effort undertaken against apparent futility[;] it must be more than merely perfunctory." *Gray v. Sawyer*, 247 S.W.2d 496, 498 (Ky. 1952). One court applying Kentucky law

> has noted that "[a]ny fact that should excite his suspicion is the same as actual knowledge of his entire claim . . . [and] the means of knowledge are the same thing in effect as knowledge itself." *Hazel v. General Motors Corp.*, 863 F.Supp. 435, 440 (W.D.Ky. 1994) (citations omitted).

Based on the foregoing, the tax return claim against Appellees was not timely filed.

NOT PURSUING BREACH CLAIMS

Eriksen argues the breach of contract claims did not "occur" until April 23, 2009, when the Hardin Circuit Court rendered an opinion saying these claims were barred by several grounds including *res judicata* because they were not originally brought in the underlying action. Eriksen maintains that until receipt of this ruling, it had fifteen years to file a breach of contract suit against Dr. Elkins under KRS 413.090(2).

Eriksen's premise is mistaken. First, as pointed out by Appellees, *res judicata* was only one of many grounds mentioned by the trial court warranting dismissal. Second, it appears inconsistent to us that Eriksen would be sophisticated enough to know about the fifteen-year statute of limitations for filing a contract action, but not know piecemeal litigation is prohibited and all claims from a common event must be brought in a single action. As expressed in *Wilson v. Paine,* 288 S.W.3d, 284, 286 (Ky. 2009), ignorance of one's rights does not toll the running of a statute of limitations.

Eriksen acknowledges telling Appellees via an e-mail dated August 3, 2006, "leave no stone unturned when it comes to this case" and faults Appellees

for not amending the complaint to allege claims of breach. The guiding consideration is not, however, when Eriksen knew he had an actionable claim, but when he had sufficient facts to be placed on notice of a problem. *Pedigo.* On May 12, 2005, Eriksen deposed Gail Williams. In the portions of her deposition provided to us, Ms. Williams describes Dr. Elkins's destruction of patient records, failure to charge for services rendered, taking of office supplies, and refusal to treat a long-term patient—all of which could be deemed a breach of the employment contract. Dr. Eriksen attended trial in August 2006. Nowhere do we see any mention by Eriksen that it inquired about the absence of the claims of breach before, during, or even after trial. At the end of trial, Eriksen knew it had not won on a claim of breach against Dr. Elkins and knew jurors had not been asked to find in Eriksen's favor on such a claim because Appellees had not raised the claim. Thus, on August 31, 2006, Eriksen knew it had been wronged by Appellees and the claim accrued on that date. *Perkins,* 808 S.W.2d at 819. Under the "occurrence" rule, any legal malpractice claim had to be filed one year from the date the trial order and judgment became final and non-appealable which was November 13, 2006. The malpractice claim, therefore, should have been, but was not, filed by November 13, 2007.

We turn now to the "discovery" window. The moment Eriksen knew, or by exercising due diligence should have known, it had been injured by Appellees' action or inaction, the time for filing a malpractice complaint began to run. In this scenario, Eriksen knew, or should have known, of a problem as early

as August 2006 when trial occurred. It then had one year from finality of the trial order and judgment (November 13, 2006) to file the malpractice claim. By not filing the complaint until November 10, 2009, Eriksen was well outside the statute of limitations expressed in KRS 413.245.

For the foregoing reasons, the order of the Hardin Circuit Court awarding summary judgment in favor of Appellees is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Matt McCubbins
Louisville, Kentucky

BRIEF FOR APPELLEE:

Joe B. Campbell
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