RENDERED: March 7, 2003; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-000344-MR

HERMAN J. ERNSPIKER and
CAROL POTTS — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS B. WINE, JUDGE
ACTION NO. 00-CI-006005

ROBERT M. COOTS; McGINNIS
& ASSOCIATES; and JOHN PADDOCK — APPELLEES

OPINION
AFFIRMING IN PART, VACATING IN PART,
AND REMANDING
** ** ** ** **

BEFORE: COMBS and PAISLEY, Judges; and MILLER, Special Judge.[1]

COMBS, JUDGE: Herman J. Ernspiker (Herman), and his daughter, Carol Potts (Potts), in her representative capacity as Herman=s attorney-in-fact, have appealed the judgment of the Jefferson Circuit Court which summarily dismissed Herman=s complaint. Herman had sought $18,813.23 in damages from the appellees for their alleged professional malpractice. We affirm in part, vacate in part, and remand.

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

The salient facts of record follow briefly. In 1991, a small tract of land was conveyed to Herman by Archie Ernspiker (Archie), Herman=s brother and adjoining landowner. The appellee, McGinnis & Associates (McGinnis), an engineering and surveying company, was employed to prepare a minor subdivision plat to be filed with the deed conveying the property. Robert M. Coots, an attorney, was hired to perform the legal work involved in the real estate transaction.

Acting on Herman=s behalf, Potts listed Herman=s property for sale in the fall of 1998, and Herman entered into a contract to sell the property. However, prior to the closing, an apparent defect in his title was discovered, and the closing had to be postponed. Herman learned that the plat prepared by McGinnis in 1991 had not been submitted to or approved by the Jefferson County Planning and Zoning Commission (the Commission) and that the plat would not have been approved even if it had been submitted. Potts then contacted attorney Coots. According to Potts, Coots blamed the County Clerk for allowing the deficient deed and plat to be filed in the first instance.

Believing that the defect could be cured in a relatively short period of time, Herman rented the property to the prospective buyers. Instead of suing Archie (his grantor) for breach of the general warranty provisions of his deed, Herman and Potts undertook the task of correcting the defects in their title. They began by hiring Landmark Land Surveying, Inc.

(Landmark), to prepare a new minor subdivision plat. In early 1999, Potts presented to Archie the preliminary plat prepared by Landmark. Archie did not believe that it accurately depicted the 1991 transaction. He suggested that Potts obtain the services of another attorney to insure that the plat was correct, recommending the appellee, John Paddock, who had performed real estate work for him (Archie)in the past.

Herman=s realtor, Carol Pike, contacted Paddock, who agreed to look at the plat and handle the matter. During the next several months, Potts and Pike were in frequent contact with Landmark and Paddock in their attempts to obtain an accurate plat and to complete the necessary paperwork to submit to the Commission for approval. Included in the paperwork was a certificate of ownership that was required to be executed by Archie. In February 2000, Potts learned that Paddock had advised Archie not to sign the certificate of ownership; she began to suspect that Paddock was not looking after their best interests. Consequently, in March 2000, Potts hired yet another lawyer (the third by now), who sent a letter threatening to sue Archie if he did not sign the certificate. Archie signed the document in April 2000, the Commission=s approval was obtained, and Herman was able to consummate the sale of his property on July 28, 2000.

In September 2000, Herman filed a complaint alleging that McGinnis and Coots were negligent in rendering professional services with respect to the void real estate transaction of

1991. He also alleged professional malpractice on the part of Landmark and Paddock for their failure to perform their professional services initially and to remedy the void transaction in a more timely fashion. Both McGinnis and Coots filed motions to dismiss the complaint pursuant to CR[2] 12.02 based on the one-year statute of limitations contained in KRS[3] 413.245. Paddock filed a motion for summary judgment, contending that he never had an attorney/client relationship with Herman or with Potts C only with Archie. In its answer and a counterclaim, Landmark sought additional compensation for work that it alleged had been caused by the Aexcessive number of phone calls@ it received from Potts.

Although the trial court treated the motions to dismiss filed by McGinnis and Coots as motions for summary judgment, it nonetheless entered its Findings of Fact, Conclusions of Law, and Order on January 23, 2001. It found that at sometime between August 1998 and October 1, 1998, Herman and Potts first learned that the 1991 conveyance from Archie was void; therefore, it held that the complaint, filed in September 2000, was outside the statute of limitations applicable to actions for professional service malpractice. The trial court rejected the appellants= argument that the one-year limitations period had not begun to

[2]Kentucky Rules of Civil Procedure.

[3]Kentucky Revised Statutes.

run until July 2000 C when they learned the exact amount of their damages.

Finding that Paddock had only represented Archie, the trial court also granted Paddock=s motion for summary judgment, holding that APaddock could not represent parties with competing interests.@ It concluded as a matter of law that he had not represented Herman and Potts. The trial court did not address the appellants= alternate theory that Paddock owed them a duty as third-party beneficiaries to perform as a reasonably competent attorney.

The complaint against Landmark and Landmark=s counterclaim are still pending and, therefore, they are not parties to this appeal. However, the judgment in favor of the remaining defendants was made final and appealable by the inclusion of CR 54.02 recitals. This appeal followed.

As a preliminary matter, we note the stringent standard for summary judgment in this jurisdiction. Summary judgment is proper only where the pleadings, affidavits, and other proof submitted Ashow that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.@ CR 56.03; see also, Toyota Motor Manufacturing, U.S.A., Inc. v. Epperson, Ky., 945 S.W.2d 413, 414 (1996). In deciding a motion for summary judgment, the trial court is required to view the evidence in the light most favorable to the nonmoving party, and any and all doubts are to be resolved in

favor of that party. Steelvest, Inc. v. Scansteel Services Center, Inc., Ky., 807 S.W.2d 476, 480 (1991). Summary judgment may be entered only where it would be impossible for the non-moving party to prevail at trial. Id. We review the trial court=s grant of summary judgment *de novo*, giving no deference to the trial court=s findings of fact. Goldsmith v. Allied Building Components, Inc., Ky., 833 S.W.2d 378, 381 (1992).

Having reviewed the record, we do not agree with the trial court=s conclusion that the claims of Herman and Potts against McGinnis and Coots are time-barred. The deficient state of Herman=s title (regardless of whether it was or was not attributable to the professional negligence of McGinnis and/or Coots) did not become manifest until the fall of 1998. That defect in the title prevented them from consummating the sale of the property to Herman=s buyers and caused them to re-commence the process of conveying the property from Archie to Herman. They acted promptly to remedy the defect and to consummate the final sale by July of 2000.

The appellants do not dispute that the one-year statute of limitations in KRS 413.245 is applicable to their malpractice claims. However, they argue that the statutory period did not begin to run until July 28, 2000 C the date on which they contend that they learned from the closing attorney that Athe losses they had endured were likely the result of [Coots=s and McGinnis=s] negligence.@ They also contend that it was not until

the July 2000 closing date that they were able to know the exact amount of their damages. Additionally, they argue that both McGinnis and Coots are estopped from asserting a statute-of-limitations defense because Coots led them to believe that the County Clerk was responsible for Herman=s title problems. Finally, they maintain that the judgment was prematurely granted prior to their opportunity to conduct discovery.

The circumstances of this transaction have persuaded us that the appellants are not time-barred from bringing this action. Under the provisions of KRS 413.245, a civil action arising out of the rendition of professional services must 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.

This statute has been interpreted to mean that it is the knowledge that one has been wronged C and the discovery of the identity of the wrongdoer C which activate the running of the statute of limitations. Graham v. Harlin, Parker & Rudloff, Ky.App., 664 S.W.2d 945 (1983), *overruled on other grounds by* Alagia, Day Trautwein & Smith v. Broadbent, Ky., 882 S.W.2d 121 (1994). The appellants contend that they did not learn of their cause of action until the date of the closing. The appellees observe that this reasoning is identical to the argument rejected in Conway v. Huff, Ky., 644 S.W.2d 333 (1982), where the Supreme Court defined the date on which the statute begins to run:

> [It] obviously. . . must be with the discovery that a wrong has been committed and not that the party may sue for the wrong.

Id. at 334.

In this case, the appellants learned of the fact of their injury due to the alleged misfeasance of McGinnis and Coots in the fall of 1998 upon discovering that Herman could not convey a marketable or insurable title to his buyers and that the plat attached to his deed was not sufficient to meet the requirements of the Planning and Zoning Commission. We agree with appellees that this information alone would suffice under Conway to put a reasonable person on notice of the alleged engineering and legal malpractice.

However, more recent cases have refined Conway and have re-defined date of discovery of injury as being closely dependent upon ascertainment of the amount of damages. In arguing that the limitations statute did not start to run until July 2000, the appellants rely on Michels v. Sklavos, Ky., 869 S.W.2d 728 (1994), in which the Court determined that the statute of limitations did not begin to run until the outcome of the underlying case was known. Michels involved a cause of action for litigation negligence; *i.e.*, Athe attorney=s negligence in the preparation and presentation of a litigated claim resulting in the failure of an otherwise valid claim.@ Id. at 730. In a litigation claim, the occurrence of an injury is necessarily dependent on the outcome of the underlying case. Until the final

result is obtained, the amount of any damages is speculative, thereby precluding the existence of a Acause of action@ within the meaning of KRS 413.245. Id.

More persuasive is appellants= reliance upon Alagia, Day, Trautwein & Smith v. Broadbent, Ky., 882 S.W.2d 121 (1994). In Alagia, the injured plaintiffs received advice on estate planning that was subsequently proved to be erroneous and resulted in a costly assessment by the Internal Revenue Service. The clients ultimately obtained separate counsel. After they settled with the IRS, they sued the Alagia law firm. Our Supreme Court held there was no occurrence within the meaning of KRS 413.245 to commence the running of the statute of limitations until the Adamages were fixed by the final compromise with the IRS.@ Id. at 126. (Emphasis added.)

In Meade County Bank v. Wheatley, Ky., 910 S.W.2d 233 (1995), the Court was presented with the issue of when the statute of limitations began to run against a real estate attorney with respect to his defective title opinion. The title opinion had failed to disclose a recorded mortgage, which did not surface until foreclosure on the property. The court held that until the foreclosure, the damages from the attorney=s negligent act were not Afixed and non-speculative.@ Id. at 234.

> Prior to [the date of the foreclosure sale], Appellants had only a fear that they would suffer a loss on the property. Their fear was not realized as damages until the sale of the property in June of 1992. At that time,

> what was merely probable became fact, and thus commenced the running of the statute.

Id. at 235. (Emphasis added.)

In the case before us, there is no question that Herman was damaged in 1991 when the attempt to convey real estate to him was not accomplished. But only in 1998 did Herman learn of the cloud on his title and of the failure of the plat and deed prepared in 1991 to accomplish the transfer of Archie=s property to him. However, like the situations in Broadbent and Wheatley, supra, Herman=s damage when discovered was speculative and could not be accurately ascertained until the process to remedy the defect had been completed. We agree with appellants that the statute of limitations did not begin to run until the actual damages were known and fixed.

The appellants also contend that both McGinnis and Coots should be estopped from asserting the defense of statute of limitations because Coots had attempted to circumvent his responsibility by blaming the County Clerk for allowing the documents to be recorded without the Commission=s approval. However, they have never alleged that McGinnis was even remotely involved in any attempt to circumvent responsibility for the problem by placing it elsewhere. We cannot agree that McGinnis can be held accountable for Coots=s alleged behavior on this point. Because we have held that the action is not time-barred based on ascertainability of damages, the estoppel argument is

moot with respect to Coots and irrelevant with respect to McGinnis.

Finally, the appellants argue that they were denied the opportunity to conduct discovery. However, they have failed to state where in the record this issue was raised or preserved for review as required by CR 76.12(4)(c)(iv). Our review of the record indicates that no issue relating to discovery was raised before the trial court. Nor did appellants= responses to the motions filed by the appellees mention a need for additional time to conduct discovery. We decline to review issues not raised below. Regional Jail authority v. Tackett, Ky., 770 S.W.2d 225, 228 (1989). We find no clear error on this point to justify our scrutiny C much less reversal.

Next, we address the error alleged as to entry of summary judgment in favor of attorney Paddock. The trial court dismissed the claim against Paddock because it believed that the appellants failed to establish the existence of an attorney/client relationship. In their motion for summary judgment, they did not raise any of the other elements necessary for establishing legal malpractice (*e.g.*, an attorney=s neglect of his duty to exercise the care of a reasonably competent attorney resulting in damage to his client). Nor did the trial court allude in its judgment to any ground other than the attorney-client relationship. See, Daugherty v. Runner, Ky.App., 581 S.W.2d 12,16 (1978). Thus, we need address only the nature

of the relationship between the appellants and Paddock rather than the merits of the underlying claim.

Paddock was originally retained by Herman at the suggestion of Archie. It was Herman rather than Archie who assumed the burden of clearing the title problem created by the attempted conveyance in 1991. It was Herman=s real estate agent, Pike, who initiated contact with Paddock, taking the new plat to Paddock for his opinion as to whether it accurately depicted the land being transferred. At the time Paddock was contacted by Herman=s agents for assistance, there was no apparent conflict between Archie and Herman. Presumably the brothers wanted to remedy the problem in a manner consistent with their 1991 attempt to convey title. Thus, even if a jury would believe that Paddock had an ongoing professional relationship with Archie, it very likely could view the existence of an attorney/client relationship between Paddock and Herman to be logically consistent and compatible with the existence of such a relationship between Paddock and Archie. We find no error in the trial court=s entry of summary judgment releasing Paddock for any liability with respect to his representation of Herman and/or Archie as no conflict was manifest.

In summary, we hold that the trial court erred in granting summary judgments against the appellants by finding the claims as to Coots and McGinnis to be time-barred. We hold that the statute of limitations with respect to their alleged

professional malpractice did not begin to run until the damages became fixed and ascertainable. Finally, we hold that the court did not err in granting summary judgment as to attorney Paddock.

The judgment of the Jefferson Circuit Court is affirmed in part, vacated in part, and remanded for further proceedings consistent with this opinion.

MILLER, SPECIAL JUDGE, CONCURS.

PAISLEY, JUDGE, CONCURS IN RESULT.

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