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# Commonwealth of Kentucky

# Court of Appeals

NO. 2010-CA-002093-MR

ROBERT K. HUGHES;
DEEPAK NIJHAWAN; AND
INFOCON SYSTEMS, INC.,
A KENTUCKY CORPORATION — APPELLANTS

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE CHARLES L. CUNNINGHAM, JR., JUDGE
ACTION NO. 08-CI-005736

J. FOX DEMOISEY AND
J. FOX DEMOISEY, PLLC — APPELLEES

AND NO. 2010-CA-002165-MR

J. FOX DEMOISEY — CROSS-APPELLANT

CROSS-APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE CHARLES L. CUNNINGHAM, JR., JUDGE
ACTION NO. 08-CI-005736

ROBERT HUGHES;
DEEPAK NIJHAWAN; AND
INFOCON SYSTEMS, INC.,
A KENTUCKY CORPORATION — CROSS-APPELLEES

AND NO. 2010-CA-002166-MR

J. FOX DEMOISEY APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE CHARLES L. CUNNINGHAM, JR., JUDGE
ACTION NO. 08-CI-005736

ROBERT HUGHES;
DEEPAK NIJHAWAN; AND
INFOCON SYSTEMS, INC.,
A KENTUCKY CORPORATION APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MAZE, STUMBO AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Robert K. Hughes, Deepak Nijhawan and Infocon Systems, Inc. appeal from orders of the Jefferson Circuit Court dismissing their legal malpractice action filed against J. Fox DeMoisey and J. Fox DeMoisey, PLLC, (DeMoisey) based upon the statute of limitations. Also disputed is whether DeMoisey has any remaining claim for punitive damages and whether DeMoisey's claim for *quantum meruit* recovery was properly transferred to federal court. In a protective cross-appeal, DeMoisey argues a settlement agreement in the underlying action precludes a legal malpractice action. DeMoisey filed a separate appeal alleging the trial court erred when it dismissed his claims against Hughes,

Nijhawan and Infocon for breach of contract, unjust enrichment, fraud, and criminal conduct pursuant to Kentucky Revised Statutes (KRS) 446.070.

Hughes and Nijhawan own Infocon, a Louisville-based computer technology business that provides computer products and support services for manufacturing plants. In 1988, Infocon became a "value added reseller" for a software suite produced by Macola, Inc., a company purchased by Exact Software North America, Inc. in 2001. Shortly after that purchase, the business relationship between Exact and Infocon became strained. By 2002, Hughes and Nijhawan believed Macola would no longer honor its contractual obligations to Infocon and contacted DeMoisey for legal representation.

Infocon could not pay DeMoisey an hourly fee for his legal services. As payment, DeMoisey initiated steps to incorporate Alocam, a business that would sell an updated version of the old Macola software and, in which, DeMoisey, Hughes, and Nijhawan would each have a one-third business interest.

In April 2003, Exact filed an action in an Ohio state court seeking $143,000 from Infocon for alleged overdue accounts receivable. Based on diversity jurisdiction, the case was removed to the U.S. District Court for the Northern District of Ohio (the Exact litigation). Represented by DeMoisey, Infocon filed counterclaims against Exact for tortuous interference with its contractual relationships with its customers, fraud and breach of contract and demanded punitive damages, costs, and fees.

As the Exact litigation proceeded, Alocam's net value diminished causing doubt regarding how DeMoisey would be compensated. Although DeMoisey drafted a fee agreement converting his one-third interest in Alocam to a contingency fee for one-third of any recovery from Exact, the draft was not executed.

In the meantime, the Exact litigation action stalled when Exact failed to comply with Infocon's various discovery requests leading the federal district court to warn Exact in August 2006 it might allow Infocon to seek a default judgment. Nevertheless, Exact continued to be in noncompliance with the court's discovery orders and Infocon moved for a default judgment. At that point, Exact terminated its attorney, retained a new attorney and asked the court to delay ruling on the motion.

Having survived the motion for default judgment, Exact began settlement negotiations with Infocon. At Exact's request, a settlement conference was held on February 28, 2007, attended by Exact representatives, including Jim Kent, CEO of Exact's North American operations, Exact's attorneys, and DeMoisey, Hughes and Nijhawan. After Kent and Hughes conferred informally, they announced Exact would pay Infocon $4 million in settlement of its claims against Exact but that the settlement would be finalized in Dallas.

According to Hughes and Nijhawan, DeMoisey was woefully unprepared for the settlement negotiations causing them to orally agree to the $4 million settlement. Nevertheless, prior to the Dallas meeting, they continued to

discuss settlement terms with DeMoisey, including the fee he would receive. Although the parties' version of events differ, it is clear that at this point, the professional relationship between DeMoisey and his clients began to deteriorate.

On March 2, 2007, DeMoisey, Hughes and Nijhawan met to discuss the proposed terms of any settlement with Exact. During that meeting, DeMoisey presented the tax consequences of a $4 million settlement and recommended settling for at least $5.3 million so that he, Hughes and Nijhawan would each net $1 million from the settlement. Hughes and Nijhawan were unhappy with DeMoisey's recommendation, which included what they believed excessive legal fees and was one that might deter Exact from reaching any settlement at all. Hughes and Nijhawan continued to plan for their trip to Dallas on March 12, 2007, to meet with Exact representatives without DeMoisey.

Before leaving for Dallas, Hughes and Nijhawan conferred with attorney Peter L. Ostermiller to advise them regarding attorney fees owed DeMoisey in the event a final settlement was reached. Additionally, prior to leaving for Dallas, Hughes and Nijhawan opened a checking account that would later be referred to as Infocon's escrow account.

On March 12, 2007, Hughes and Nijhawan met with Jim Kent and Rajesh Patel, CEO of Exact Holdings, N.V., who had authority to approve the settlement. At the Dallas meeting, the parties orally agreed to a settlement amount of $4 million but no formal written agreement was executed.

DeMoisey recalled that on March 13, 2007, Nijhawan informed him Infocon settled with Exact for $4 million but payment would not be made until one year later and no written agreement would be executed until after Exact filed its required corporate fiscal year-end financial report in late July. Two days later, Ostermiller tendered his engagement letter to Infocon and was hired to represent Infocon in any dispute regarding attorney fees and expenses between Infocon and DeMoisey: DeMoisey would not learn of Ostermiller's involvement until August 2007.

From DeMoisey's perspective and as described in an e-mail drafted by Nijhawan, at this point DeMoisey was "in the cage" with little access to information. With a status report due in the federal action, DeMoisey continued to press for information regarding the settlement. Various e-mails between Hughes and Nijhawan expressed their unhappiness with DeMoisey and desire to exclude him from the case.

> On April 4, 2007, Hughes sent DeMoisey the following e-mail:
>
> Jim Kent and I have come to an agreement.
>
> You will need to advise the court that Exact and Infocon have agreed to stay discovery until July 31, 2007.
>
> Exacts' second 6 month reporting period following July, 20, 2007, will allow the Business Solution to proceed.

An e-mail sent by Hughes to Nijhawan contained details not shared with DeMoisey:

> Looks like Jim Kent and Uncle Keith have worked the deal:

1. The deal is structured around the Exact Fiscal Year End July 20, 2007.
2. Nothing will be in writing before referring to a settlement.
3. Jim Kent will call me on July 27, 2007, and say "Hey" what about 4 million.
4. I will say OK Jim that's cool.
5. Infocon will receive the check immediately.

Upon being informed of the plan to delay a formal written settlement agreement until July 2007, DeMoisey expressed concern because Exact's parent corporation was publically traded on the European Stock Exchange and stated he would not make any misrepresentations to the federal court. Despite DeMoisey's reservations, a joint motion was filed in the Exact litigation and the action was stayed.

On July 31, 2007, the federal court entered an order stating the parties indicated they had reached a settlement of all matters in dispute. Just twelve days later, on August 12, 2007, Hughes notified DeMoisey he was terminated.

On August 13, 2007, DeMoisey filed a motion to withdraw as counsel and a "Notice of Charging Lien" to secure payment of his attorney fees and costs. The federal court permitted DeMoisey to withdraw from the Exact litigation. It later ordered Exact and Infocon pay the settlement proceeds into a court registry and transfer $2.5 million to Infocon and $200,000 to DeMoisey, leaving distribution of the balance to be determined. On September 21, 2007, the federal court entered a stipulation of dismissal of all claims in the Exact litigation but retained jurisdiction over the fee dispute.

On May 28, 2008, Hughes, Nijhawan and Infocon filed a legal malpractice action against DeMoisey in the Jefferson Circuit Court seeking $5.4 million in damages. DeMoisey filed counterclaims based on various theories to recover his attorney fees in the state action. Subsequently, DeMoisey advised the federal court of his pending state claim and withdrew his claims from federal court except that based on *quantum meruit*. Ultimately, the federal court ordered a status report filed within two weeks of entry of final judgment in the state action.

The Jefferson Circuit Court granted summary judgment to DeMoisey on the legal malpractice claim based on the expiration of the statute of limitations. It concluded that on March 12, 2007, Infocon and Exact entered into a binding settlement agreement and the legal malpractice claims based on DeMoisey's representation accrued on that date. In a subsequent order, the Jefferson Circuit Court ruled against DeMoisey on all claims but the *quantum meruit* claim because there was no enforceable contingency fee agreement. These appeals followed.

While the appeals were pending, the Jefferson Circuit Court granted DeMoisey's motion to transfer the case to the federal district court to determine the *quantum meruit* value of his services. In December 2011, the federal district court awarded DeMoisey $1.4 million on his *quantum meruit* claim and Infocon appealed. *Exact Software N.A., Inc. v. Infocon, Inc.*, 2012 WL 1142476 (N.D. Ohio 2012). This Court held the appeals in abeyance pending the federal appeal. After the United States Sixth Circuit Court of Appeals affirmed in *Exact Software*

*N.A., Inc. v. DeMoisey*, 718 F.3d 535 (6th Cir. 2013), these appeals were removed from abeyance.

The first issue we address is whether the legal malpractice action is barred by the applicable statute of limitations. To prevail in a legal malpractice action,

a plaintiff is required to prove: 1) an employment relationship with the defendant/attorney; 2) the attorney breached his duty to exercise the ordinary care of a reasonably competent attorney acting in the same or similar circumstances; and 3) the attorney's negligence was the proximate cause of damage to the client. *Daugherty v. Runner,* 581 S.W.2d 12, 16 (Ky.App. 1978). Hughes and Nijhawan allege DeMoisey's negligent representation during the Exact litigation left them no other choice than to settle their claim against Exact for less than the value of their claim. For their action filed on May 28, 2008, to survive, it must have been filed within the applicable statute of limitations.

The statute of limitations for legal malpractice is set forth in KRS 413.245, which provides in part:

> [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.

The statute has been interpreted to set forth two separate statutes of limitations: A statute limiting filing a legal malpractice action to "one year from the date of

occurrence, and then a second statute providing a limit of one year . . . from the date when the cause of action was, or reasonably should have been, discovered by the party injured, if that date is later in time." *Michels v. Sklavos*, 869 S.W.2d 728, 730 (Ky. 1994) (internal quotations omitted). "The discovery provision of KRS 413.245 does not come into play if a suit for legal malpractice was filed within one year from the date of the occurrence. Logically, a party may not "discover" a cause of action that does not yet exist." *Doe v. Golden & Walters, PLLC,* 173 S.W.3d 260, 271 (Ky.App. 2005) (footnote omitted). Therefore, we focus on the term "occurrence."

As used in KRS 413.245, "occurrence" is synonymous with "cause of action." *Michels*, 869 S.W.2d 730. It "indicates a legislative policy that there should be some definable, readily ascertainable event which triggers the statute." *Id*. (quoting *Northwestern Nat. Ins. Co. v. Osborne*, 610 F.Supp. 126, 128 (D.C.Ky. 1985). The statute of limitations for legal malpractice does not begin to run "[u]ntil the legal harm [becomes] fixed and non-speculative." *Alagia, Day, Trautwein & Smith v. Broadbent*, 882 S.W.2d 121, 125-126 (Ky. 1994). KRS 413.245 is a codification of the maxim "[d]*amnum absque injuria,* harm without injury, does not give rise to an action for damages against the person causing it." *Michels*, 869 S.W.2d at 731.

In cases where the alleged malpractice occurred during the course of litigation, "[a]ny alleged injury is merely speculative until the result of the appeal

or the underlying litigation [becomes] final and the trial court's judgment becomes the unalterable law of the case." *Doe*, 173 S.W.3d at 271 (internal quotations omitted). The finality of an appeal or expiration of appeal time is an event which normally triggers the commencement of the statute of limitations for litigation malpractice cases because at that time, the damages caused by the malpractice may be fully ascertained and the damages fixed and non-speculative. However, those same considerations are not present when the parties enter into an enforceable settlement agreement.

A settlement of legal claims is a contract that establishes the rights and obligations of the parties and effectively waives any right to appeal. *See Cantrell Supply, Inc. v. Liberty Mut. Ins. Co*., 94 S.W.3d 381, 384 (Ky.App. 2002) (holding a settlement agreement is a contract subject to the rules of contract interpretation.) Under the unique facts of the present case, the threshold question is: When did any appreciable injury sustained by DeMoisey's alleged malpractice become fixed and non-speculative?

Pursuant to the terms of the settlement agreement, a written settlement agreement was not executed until August 2007, and the stipulation of dismissal not entered in the Exact litigation until September 21, 2007. If the action accrued on either date, the legal malpractice action filed on May 28, 2008, was timely. However, if it accrued on or before March 12, 2007, absent an extension of the one-year time limit by the discovery provision of KRS 413.245, the action is barred.

We begin with the settled rule that oral settlement agreements are binding and enforceable. *Motorists Mut. Ins. Co. v. Glass,* 996 S.W.2d 437, 445 (Ky. 1997). "It has long been the law of this Commonwealth that the fact that a compromise agreement is verbal and not yet reduced to writing does not make it any less binding." *Id.*

> Where all the substantial terms of a contract have been agreed on and there is nothing left for future settlement, the fact alone that the parties contemplated execution of a formal instrument as a convenient memorial or definitive record of the agreement does not leave the transaction incomplete and without binding force in the absence of a positive agreement that it should not be binding until so executed.

*Dohrman v. Sullivan,* 310 Ky. 463, 467, 220 S.W.2d 973, 975 (1949). "It is valid if it satisfies the requirements associated with contracts generally; *i.e.,* offer and acceptance, full and complete terms, and consideration." *Cantrell Supply, Inc.,* 94 S.W.3d at 384.

We have no difficulty in concluding an enforceable oral settlement agreement was entered into on March 12, 2007. The federal district court and Sixth Circuit Court of Appeals reached an identical conclusion. The district court specifically rejected Hughes's and Nijhawan's contrary contention:

> Despite the subsequent disclaimers by Nijhawan and Hughes, I find that they, in fact, settled the case with Kent on March 12, 2007. While the parties appear to have understood that there would be some delay in finalizing the timing of the $4 million payment, Nijhawan and Hughes never expressed any doubt, either at the evidentiary hearing or otherwise that they knew

> payment in full would be forthcoming. As of March 12, 2007, this lawsuit, so far as it involved Infocon and Exact, was over. Later testimony by Nijhawan and Hughes to the contrary was not truthful.

*Exact Software N.A., Inc.,* 2012 WL 1142476 at *4 (n. 4). The Sixth Court of Appeals likewise noted Infocon "formalized the settlement with Exact on March 12[.]" *Exact Software N.A. Inc*., 718 F.3d at 538.

We find Hughes and Nijhawan's position in this appeal that a settlement was not reached on March 12, 2007, equally incredulous. Although there was disagreement regarding the allocation of the settlement payment to the alleged malpractice of Exact's former counsel and the timing of payments to Infocon, there is no dispute the parties agreed to settle the Exact litigation for $4 million at the Dallas meeting. Moreover, and crucial to our analysis by the terms of the agreement itself, a formal written settlement was delayed as part of the "deal." Any doubt that a settlement was reached on March 12, 2007, is resolved by the e-mails written among the parties. Moreover, consistent with that agreement, the Exact litigation was delayed and not dismissed until September 2007. A court will not overlook a party's actions in conformity with the existence of an oral agreement. *Snowden v. City of Wilmore*, 412 S.W.3d 195 (Ky.App. 2013).

> A party's mental reservations and unexpressed intentions will not supersede outward expressions of assent or override objective and unequivocal manifestations of assent to terms of the settlement agreement. Rather, in deciding whether [a] settlement agreement has been reached, the court looks to the objectively manifested intentions of the parties.

*Id*. at 207 (quoting 15B Am.Jur.2d *Compromise and Settlement* § 7).

The rule governing the enforcement of oral settlement agreements does not require all terms be agreed upon but only material terms. In this case, the dollar amount and the delay in reducing the settlement to writing and publically announcing its terms were the material terms of the settlement.

In a cursory manner and without citation to authority, Hughes, Nijhawan and Infocon allege the oral settlement agreement could not be performed within one year because it provided for the release of all past, present and future claims between Exact and Infocon and, therefore, is not enforceable under Kentucky's statute of frauds. KRS 371.010. "In construing the Statute of Frauds, the general rule is that, if a contract may be performed within a year from the making of it, the inhibition of the Statute does not apply, although its performance may have extended over a greater period of time." *Williamson v. Stafford,* 301 Ky. 59, 62, 190 S.W.2d 859, 860 (1945). We are not persuaded the statute has any application to the executed and fully performed settlement agreement reached between Exact and Infocon.

We hold the legal malpractice action accrued on March 12, 2007, when Exact and Infocon entered into an oral settlement of the Exact litigation. At that time, a readily ascertainable event occurred for purposes of any alleged malpractice committed by DeMoisey in the Exact litigation, and any injury became fixed and non-speculative regardless of the delay in executing a formal written

settlement agreement or dismissing the Exact litigation. Having concluded the action accrued on March 12, 2007, the malpractice action was not timely filed unless the discovery provision of KRS 413.245 applies.

In contrast to the occurrence limitation period, the discovery limitation period does not necessarily commence at the time of the negligence and resulting damages. Simply stated, the cause of action for legal malpractice begins when it is discovered an attorney provided poor or inadequate representation. *Conway v. Huff*, 644 S.W.2d 333, 334 (Ky. 1982). "It presumes that a cause of action has accrued, i.e., both negligence *and* damages has occurred, but that it has accrued in circumstances where the cause of action is not reasonably discoverable, and it tolls the running of the statute of limitations until the claimant knows, or reasonably should know, that injury has occurred." *Michels,* 869 S.W.2d at 732.

> The continuous representation rule is a branch of the discovery rule: In substance, it says that by virtue of the attorney-client relationship, there can be no effective discovery of the negligence so long as the relationship prevails. This recognizes the attorney's superior knowledge of the law and the dependence of the client, and protects the client from an unscrupulous attorney.

*Alagia,* 882 S.W.2d at 125. The rule is as practical as it is just:

> In a proper case, a negligent attorney may be able to correct or mitigate the harm if there is time and opportunity and if the parties choose such a course. Without it, the client has no alternative but to terminate the relationship, perhaps prematurely, and institute litigation. Finally, without the continuous representation rule, the client may be forced, on pain of having his malpractice claim become time-barred, to automatically accept the advice of a subsequent attorney, one who may

> be mistaken, over the advice of the current attorney. In such a circumstance, the client may be without any assurance that the latter attorney's views are superior to those of the former, but must nevertheless choose between them.

*Id*.

Based on the facts and arguments presented, an extensive analysis regarding the application of the discovery limitations period is unnecessary. Hughes, Nijhawan and Infocon allege DeMoisey's negligent representation left no recourse against Exact other than to enter into the settlement agreement on March 12, 2007. Therefore, their cause of action is premised on their knowledge of any alleged legal malpractice on March 12, 2007.

Nor can Hughes and Nijhawan rely on the continuous representation rule. The unusual events in this case leave us attempting to apply a rule adopted for the purpose of protecting clients placed in a position of dependence on the legal knowledge of their attorneys when that is simply not the situation. Before entering into the settlement agreement with Exact on March 12, 2007, Hughes and Nijhawan were in an active fee dispute with DeMoisey and had contacted Ostermiller to advise them regarding DeMoisey's fee. Just two days after the settlement was reached, Ostermiller tendered his engagement letter to Infocon. Thereafter, DeMoisey would be "in the cage" with little information regarding the progress of executing a formal written settlement agreement. As evidenced by the protracted state and federal actions, the dispute was no longer between Infocon and Exact but was an active dispute regarding DeMoisey's fee. Although DeMoisey

was not formally terminated until August 12, 2007, the underlying trust and confidence of the attorney-client relationship had ceased at least by April 2007. The continuous representation rule is not applicable.

We conclude the trial court properly granted summary judgment in DeMoisey's favor in the legal malpractice action. We easily dispose of the remaining issues presented.

In its interlocutory consolidated order entered on August 4, 2010, the trial court indicated a claim by DeMoisey remained for punitive damages. However, in its final and appealable order transferring DeMoisey's *quantum meruit* claim for attorney fees to the federal court, the trial court ruled "all matters between the parties pending in this Court" are resolved. This would include any claim for punitive damages.

Finally, we conclude the remaining arguments in both appeals are moot. Although Hughes and Nijhawan contend the claim for *quantum meruit* should not have been remanded to the federal court presiding over the Exact litigation, no *writ* was filed to prevent the federal court from acting. Moreover, it is well established that "[d]etermining the legal fees a party to a lawsuit . . . owes its attorney, with respect to the work done in the suit being litigated, easily fits the concept of ancillary jurisdiction." *Jenkins v. Weinshienk*, 670 F.2d 915, 918 (10th Cir. 1982).

DeMoisey's appeal from the trial court's dismissal of his counterclaims is likewise moot by virtue of his recovery on his *quantum meruit* claim in federal court. Without detailing each claim, we agree with the trial court that those claims

are premised on the existence of a contingency fee agreement. By electing to remove the case to federal court and recover on the basis of *quantum meruit*, DeMoisey elected that remedy and waived claims related to the existence of a contingency fee contract. *See Fruit Growers Exp. Co. v. Citizen Ice & Fuel Co*., 271 Ky. 330, 112 S.W.2d 54 (1937) (holding there can be no recovery based on an express contract and *quantum meruit*).

This case has been extensively litigated and the issues resolved by state and federal courts. The orders of the Jefferson Circuit Court are affirmed.

ALL CONCUR.

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