DIVISION ONE
FILED: 03/05/2013
RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

JON ROSS WINTERBOTTOM, a single man,	)	No. 1 CA-CV 11-0708
	)	DEPARTMENT A
Plaintiff/Appellant,	)	
	)	**MEMORANDUM DECISION**
v.	)	(Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)
R JOHN LEE and JANE DOE LEE, a married couple,	)	
Defendants/Appellees.	)	

Appeal from the Superior Court in Maricopa County

Cause No. CV 2010-090526

The Honorable Emmet J. Ronan, Judge

AFFIRMED

Jackson White, P.C. Mesa
by Bradley D. Weech
Attorneys for Plaintiff/Appellant

Broening Oberg Woods & Wilson P.C. Phoenix
by Donald Wilson, Jr.
Brian W. Purcell
Attorneys for Defendants/Appellees

S W A N N, Judge

¶1 This appeal arises from a legal malpractice action filed by Jon Ross Winterbottom against attorney R. John Lee.

The superior court granted summary judgment in favor of Lee on the ground that the action was barred by the two-year limitations period set forth in A.R.S. § 12-542. We affirm. Winterbottom's malpractice claim accrued when his settlement in the underlying case became fixed by the entry of a stipulated judgment. His complaint was filed more than two years later, and he failed to present evidence to support his arguments that the limitations period should be tolled.

FACTS AND PROCEDURAL HISTORY

¶2 From 2004 to 2006, Lee defended Winterbottom, an incarcerated felon,[1] in a civil action brought by two of his victims. In June 2006, the court allowed Lee to withdraw as Winterbottom's attorney.

¶3 A year after Lee's withdrawal, on June 15, 2007, the action proceeded to a court-ordered telephonic settlement conference. The victims were represented by counsel and Winterbottom represented himself, with his mother also participating. At the settlement conference, the parties orally agreed to enter a stipulated judgment under which Winterbottom would be liable to the victims for $1,000,000 each, and would be liable for the victims' attorney's fees in the amount of $200,000. The parties further agreed that if Winterbottom paid

[1] Winterbottom remained incarcerated at all times relevant to this appeal.

a certain lesser amount within sixty days of the judgment's entry, the victims would not pursue collection on the balance, "with the exception that in the event [Winterbottom] pursues a legal malpractice claim arising out of this matter that [the victims] will agree to forego collection on the remaining part of the balance . . . in exchange for one-third of any amounts collected from that malpractice case." Both Winterbottom and the victims' counsel confirmed the agreement on the record, and the presiding judge found that the parties had "reached a binding agreement pursuant to Rule 80(d) [of the Arizona Rules of Civil Procedure]."

¶4 In the months following the settlement conference, Winterbottom and the victims' counsel exchanged correspondence regarding drafts of the stipulated judgment and a written settlement agreement. Winterbottom initially wrote that though he wanted to settle, he could not accept the "settlement offer" because it specified that signatories should not be under the influence of drugs, and he was under the influence of medication prescribed to treat mental illness that for years had caused him to be hospitalized. But later, in November 2007, Winterbottom wrote that though his mother did not believe he was legally competent, he was "happy with the settlement agreement and approve[d] of it," pending several specified modifications to the draft stipulated judgment. Accordingly, the victims'

counsel lodged the stipulated judgment, and on January 24, 2008, the court entered it.[2] The victims signed the written settlement agreement the next month. Winterbottom never signed the agreement.

¶5 On January 28, 2010, Winterbottom, through counsel, brought a legal malpractice action against Lee, alleging that Winterbottom was forced to settle because Lee had engaged in professional negligence and breach of fiduciary duty. In November 2010, Lee filed a motion for summary judgment, arguing that Winterbottom's complaint was barred by the two-year limitations period of A.R.S. § 12-542. Winterbottom filed a response and cross-motion for summary judgment, arguing that the limitations period had tolled because he was mentally incompetent. The motions were briefed and, based on Winterbottom's request under Ariz. R. Civ. P. 56(f), the parties were given the opportunity to obtain and file additional evidence regarding Winterbottom's mental health condition. After hearing oral argument, the court found that Winterbottom's claims had accrued on the date of the oral settlement agreement "or, at the latest[,]" when the stipulated judgment was entered on January 24, 2008 -- in either case, more than two years

[2] At oral argument on appeal, counsel for both parties represented that the date of the judgment's entry was unknown. The record shows, however, that the judgment was both signed and stamped as docketed on January 24, 2008.

before he filed his malpractice complaint. The court further found that Winterbottom had "not presented any hard evidence" to support his tolling argument. Accordingly, the court granted Lee's motion for summary judgment and denied Winterbottom's cross-motion.

¶6 Winterbottom timely appeals. We have jurisdiction under A.R.S. § 12-2101(A)(1).

DISCUSSION

¶7 Winterbottom contends that the superior court erred because his claims did not accrue until February or March 2008. He alternatively contends that the limitations period was tolled because his mental illness made him legally incompetent, and also because the equitable tolling doctrine applied. We review the grant of summary judgment in favor of Lee de novo, viewing the facts in the light most favorable to Winterbottom. *Andrews v. Blake*, 205 Ariz. 236, 240, ¶ 12, 69 P.3d 7, 11 (2003).

I. WINTERBOTTOM'S LEGAL MALPRACTICE CLAIM ACCRUED ON JANUARY 24, 2008.

¶8 In Arizona, legal malpractice actions are subject to A.R.S. § 12-542, which provides that an action must be commenced within two years after claim accrual. *Long v. Buckley*, 129 Ariz. 141, 143, 629 P.2d 557, 559 (App. 1981). A legal malpractice claim "accrues when the malpractice plaintiff knows, or in the exercise of reasonable diligence should have known, of

the [attorney's] negligent conduct," and has sustained actual damages. *Amfac Distribution Corp. v. Miller*, 138 Ariz. 152, 153-54, 673 P.2d 792, 793-94 (1983), *approving and supplementing* 138 Ariz. 155, 673 P.2d 795 (App. 1983). When professional negligence results in no immediate harm, a cause of action does not accrue until the plaintiff suffers actual harm. *Comm. Union Ins. Co. v. Lewis & Roca*, 183 Ariz. 250, 254, 902 P.2d 1354, 1358 (App. 1995). Though the malpractice plaintiff need not sustain all or even most of his damages to start the clock, the damages must be irrevocable and irremediable. *Id.* at 254, 902 P.2d at 1358. In some circumstances, damages may not be fully ascertainable until appellate remedies are exhausted or waived by a failure to appeal. *Althaus v. Cornelio*, 203 Ariz. 597, 600, ¶ 11, 58 P.3d 973, 976 (App. 2002). But when the case is resolved by settlement, damages may be fixed at the time of settlement because settlement "effectively waives any appeal therein and, thus, eliminates any possibility of the malpractice damages changing." *Id.; see also Ariz. Mgmt. Corp. v. Kallof*, 142 Ariz. 64, 67-68, 688 P.2d 710, 713-14 (App. 1984).

¶9 Here, it is apparent that Winterbottom knew or should have known of Lee's alleged negligence and breach of fiduciary duty by June 15, 2007, because the potential malpractice claim was expressly made part of the oral settlement agreement.

Winterbottom contends, however, that he did not sustain any actual damages until much later. The superior court found that Winterbottom's damages were ascertainable as of either the date of the oral agreement (June 15, 2007), or the date the stipulated judgment was entered (January 24, 2008).

¶10 As an initial matter, we reject Winterbottom's contention that the court's "either-or" finding acknowledged the existence of a question of fact that would preclude summary judgment. Summary judgment is inappropriate only when there is an issue of *material* fact (or, as here, a mixed issue of fact and law). Ariz. R. Civ. P. 56(a).[3] Winterbottom's complaint was untimely under either of the accrual dates the superior court identified, and the finding therefore did not acknowledge a material issue.

¶11 We conclude that Winterbottom's claim accrued when the stipulated judgment was entered. In some circumstances, a settlement agreement may immediately fix the rights and obligations of the parties thereto, making damages immediately ascertainable for purposes of a legal malpractice claim. *See Kallof*, 142 Ariz. at 67, 688 P.2d at 713; *Althaus*, 203 Ariz. at 600-01, ¶¶ 12, 15, 58 P.3d at 976-77. But here, the June 15, 2007 agreement was an agreement to stipulate to the entry of

[3] At the time of the superior court's ruling, Ariz. R. Civ. P. 56(c)(1) set forth the standard for granting summary judgment.

judgment. The judgment's entry on January 24, 2008 was the event that fixed the rights and obligations of the parties thereto. Winterbottom's damages, if any, from Lee's alleged negligence became irrevocable and irremediable as of that day.

¶12 We reject Winterbottom's arguments in favor of a later accrual date. Winterbottom first contends that accrual could not occur until the victims signed copies of the written settlement agreement in February 2008. He essentially argues that there was no enforceable agreement before then because the parties did not intend their oral agreement to be binding, and the written agreement added additional material terms. But the parties' agreement did not require a writing to be enforceable. *See* A.R.S. § 44-101 (enumerating types of agreements that must be in writing to be enforceable); Ariz. R. Civ. P. 80(d) (agreements "made orally in open court, and entered in the minutes" may be binding); *Canyon Contracting Co. v. Tohono O'Odham Housing Auth.*, 172 Ariz. 389, 391, 837 P.2d 750, 752 (App. 1992) ("Rule 80(d) does indeed apply to settlement agreements."). And by the time the stipulated judgment was entered, the parties had agreed in binding fashion to all material terms and fixed their rights and obligations.[4]

[4] We reject Winterbottom's contention that the written agreement added material terms concerning his inheritance and his contact with the victims. Winterbottom's inheritance was mentioned only as a potential source of funds that would not be pursued if

Winterbottom has failed to identify any facts in the record to suggest that the agreement was unenforceable until the victims signed a written form.[5] Winterbottom's argument is also undercut by the fact that he never signed the agreement. If a signed writing were essential to enforceability, then the settlement would still not be complete. Winterbottom makes no such claim, and we conclude that in these circumstances it would not have merit.

¶13 Winterbottom next contends that even if the relevant document is the stipulated judgment, the accrual date was extended past the judgment's entry date under three alternative

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Winterbottom availed himself of the early payment option. And to the extent the written agreement imposed a prohibition against perpetrator-victim contact broader than the protections afforded by Ariz. Const. art. II, § 2.1 and A.R.S. § 13-4401 *et seq.*, this was not a new material term.

We do agree with Winterbottom that interest was an additional material term not made part of the oral agreement. *See* Black's Law Dictionary 1510 (8th ed. 2004) (defining "material term" as "[a] contractual provision dealing with a significant issue such as . . . payment"). But Winterbottom approved the draft written agreement and agreed to the stipulated judgment (which includes the interest rate) before the judgment's entry.

[5] Winterbottom asserts that both he and the victims dispute the enforceability of agreements predating the February 2008 signatures, and that the victims' attorney was not authorized to settle the dispute on their behalf. But Winterbottom fails to support these assertions with any citations to the record as required by ARCAP 13, and our review of the record does not reveal facts supporting his argument.

theories. First, Winterbottom argues that we must account for the time it took the judgment to be mailed and received. We reject this argument. Mailing time generally does not extend the time in which a party may seek relief from the entry of judgment. Ariz. R. Civ. P. 6(e), 58(e). Winterbottom agreed to the lodging of the judgment, and has not suggested that he did not receive a copy of the signed judgment within a reasonable time of its entry.[6] In these circumstances, extending the accrual date to account for mailing time would be contrary to Rules 6(e) and 58(e), and therefore unwarranted.

¶14 Next, Winterbottom argues that we must account for an appeal period following the judgment's entry. We reject this argument as well. Stipulated judgments may be appealed only in limited circumstances, "such as where there is lack of consent to the judgment or lack of jurisdiction over the subject matter, or where the judgment was obtained by fraud, collusion or mistake, or where the judgment adversely affects the public interest." *Cofield v. Sanders*, 9 Ariz. App. 240, 242, 451 P.2d 320, 322 (1969). In all other circumstances, an attempted appeal from a stipulated judgment will be summarily dismissed. *Id.* Though it is theoretically possible that Winterbottom could

[6] Winterbottom speculates that a mailing certificate on the judgment that reads "January 7, 2008" is an error suggesting that the judgment signed and entered on January 24 was probably mailed to him on February 7. This speculation is not evidence.

have relied on his history of mental illness to raise a claim of lack of consent by reason of incompetency, the argument would fail here because Winterbottom has presented nothing more than a basis for speculation concerning his mental condition. There is no judicial finding -- for example, a tribunal's evidentiary determination under Ariz. R. Crim. P. 11 or A.R.S. § 14-5303 -- to support a contention of legal incompetency.[7] And appellate courts are unable to make factual determinations on competency. *State v. Ferguson*, 26 Ariz. App. 285, 286, 547 P.2d 1085, 1086 (1976) ("Since competency to stand trial is essentially a factual question to be decided on a case by case basis, our role as an appellate court is merely to determine whether the trial court's finding is supported by reasonable evidence."). There is no legal basis upon which we can extend the accrual date to account for an appeal right that never existed. Similarly, there is no authority supporting the notion that the accrual date must be extended to account for a hypothetical motion for

[7] Winterbottom asserts that the judge who presided over the victims' action for damages found that Winterbottom was not competent to represent himself. This assertion is unsupported by the record. The minute entry on which Winterbottom relies includes no such finding. We note also that the general power of attorney that Winterbottom's mother purportedly held at all relevant times has no bearing on the issue of Winterbottom's competence. Even assuming that the power of attorney was valid and effective during the relevant period, it was nothing more than Winterbottom's own authorization of an agency relationship that in no way restricted his ability to act on his own behalf.

new trial under Ariz. R. Civ. P. 59 (an argument that Winterbottom raises for the first time in his reply brief), or to account for the potentially indefinite availability of a motion to set aside under Ariz. R. Civ. P. 60(c)(6).

¶15 Winterbottom finally argues that we must account for what he terms the sixty-day "triggering event." This argument refers to the victims' agreement that if Winterbottom paid a certain portion of the judgment within sixty days after its entry, the victims would not pursue collection on the balance. But this early payment option did not affect the damages Winterbottom allegedly suffered as a consequence of legal malpractice. Winterbottom became liable under the judgment when it was entered. The early payment option provided him an opportunity to lessen the amount of his damages, but it did not change the fact of damages. Indeed, any judgment debtor may have the opportunity to reduce the amount he pays by paying early. The early payment option therefore had no effect on the accrual date for his malpractice claims.[8] *Comm. Union Ins. Co.*, 183 Ariz. at 254, 902 P.2d at 1358.

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[8] Were we to adopt Winterbottom's argument, then no settlement agreement could serve as a trigger for accrual until it had been fully performed. In view of the large number of settlement agreements that envision payments over time, the prepayment of which may reduce interest or eliminate other forms of liability, we conclude that such a rule would create uncertainty contrary to the purpose of A.R.S. § 12–542.

¶16 Winterbottom knew or should have known of Lee's alleged negligence and breach of fiduciary duty before January 24, 2008, and he sustained ascertainable damages on that day. His legal malpractice claim therefore accrued on January 24, 2008.

II. THE LIMITATIONS PERIOD WAS NOT TOLLED.

A. Winterbottom Failed To Present Evidence of "Unsound Mind" To Toll the Limitations Period.

¶17 Winterbottom contends that the limitations period should have been tolled because his mental illness made him incompetent. Under A.R.S. § 12-502, "[i]f a person entitled to bring a cause of action . . . is at the time the cause of action accrues . . . of unsound mind, the period of such disability shall not be deemed a portion of the period limited for commencement of the action." A plaintiff is of "unsound mind" for purposes of § 12-502 if he is either unable to manage his daily affairs, or unable to understand and pursue his legal rights. *Doe v. Roe*, 191 Ariz. 313, 326, 328, ¶¶ 42, 48, 955 P.2d 951, 964, 966 (1996). Generic "mental illness" does not suffice: to show unsound mind, the plaintiff must set forth "specific facts" or "hard evidence" concerning his condition at and after the time of accrual. *Id.* at 326, 330, ¶¶ 42, 53, 955 P.2d at 964, 968. Conclusory allegations are insufficient. *Id.* at 326, ¶ 42, 955 P.2d at 964.

¶18 Here, Winterbottom presented evidence that he was diagnosed with mental illness upon his incarceration in 2000, and that the Arizona Department of Corrections provided him medical and psychological treatment for his illness from 2000 to 2010. He presented no evidence, however, that the mental illness rendered him unable to manage his daily affairs or understand and pursue his legal rights at and after the time his legal malpractice claim accrued. The superior court did not err by ruling as a matter of law that the limitations period was not tolled on grounds of unsound mind.

B. The Equitable Tolling Doctrine Does Not Apply.

¶19 Winterbottom next contends that the equitable tolling doctrine applied to his claim. Because Winterbottom did not raise this argument in the proceedings below, we do not consider it. *Richter v. Dairy Queen of S. Ariz., Inc.*, 131 Ariz. 595, 596, 643 P.2d 508, 509 (App. 1982). We further note that our review of the record reveals no evidence of the type of conduct (e.g., fraudulent concealment) required for application of the equitable tolling doctrine. *See Walk v. Ring*, 202 Ariz. 310, 319, ¶¶ 34-35, 44 P.3d 990, 999 (2002).

CONCLUSION

¶20 The superior court properly concluded that Winterbottom's legal malpractice action against Lee was time-barred under A.R.S. § 12-542. We affirm the court's order

granting summary judgment in favor of Lee. We deny Winterbottom's request for attorney's fees and costs. Lee requests attorney's fees as a sanction under ARCAP 25; we deny that request as well. As the prevailing party, Lee is entitled to an award of costs upon compliance with ARCAP 21.

/s/
_____
PETER B. SWANN, Judge

CONCURRING:

/s/
_____
PATRICIA A. OROZCO, Presiding Judge

/s/
_____
PAUL F. ECKSTEIN, Judge *Pro Tempore**

*The Honorable Paul F. Eckstein, Judge *Pro Tempore* of the Court of Appeals, Division One, is authorized by the Chief Justice of the Arizona Supreme Court to participate in the disposition of this appeal pursuant to the Arizona Constitution, Article 6, Section 3, and A.R.S. §§ 12-145 to -147 (2003).