

RENDERED: July 17, 1998; 10:00 a.m.
NOT TO BE PUBLISHED

NO. 96-CA-2841-MR

JIMMY PATTERSON

APPELLANT

v.

APPEAL FROM KNOX CIRCUIT COURT
HONORABLE RODERICK MESSER, JUDGE
CIVIL ACTION NO. 96-CI-000002

JOHN K. MILLS, OF
MILLS & MILLS, PSI

APPELLEES

OPINION
AFFIRMING

* * * * *

BEFORE: BUCKINGHAM, EMBERTON and GUIDUGLI, Judges.

GUIDUGLI, JUDGE. Jimmy Patterson ("Patterson") has filed this appeal challenging the Knox Circuit Court's order entered October 1, 1996, dismissing his complaint against John K. Mills ("Mills") on the basis that the action was time-barred. We conclude the applicable statute of limitations does bar this claim. Accordingly, the judgment is affirmed.

Patterson filed suit against Mills on January 2, 1996. Patterson's claims stem from Mills' appointment as guardian ad litem for Patterson in a dissolution of marriage action. At the time of the filing of the dissolution action in January, 1991,

Patterson was serving a twenty-five (25) year sentence in the penitentiary for murder. Pursuant to CR 17.04 Mills was appointed guardian ad litem for Patterson. Mills and Patterson corresponded by letter on several occasions concerning the dissolution petition. As a consequence of this correspondence, Mills filed an answer and report of guardian ad litem on Patterson's behalf in which he requested that the court grant visitation rights with his minor son to Patterson, grant custody of the child to Patterson's sister, and for distribution of marital property after an evidentiary hearing. However, when the trial court entered its decree of dissolution of marriage on December 18, 1991, it declared that "the visitation rights of Respondent [Patterson] are held open until such time as he is no longer incarcerated." The trial court also did not resolve the issues of child support or property distribution. No appeal of this order was filed.

By written correspondence in February, 1992, Mills notified Patterson that he no longer represented him. On February 28, 1992, Mills was appointed district judge, thus terminating his legal practice at that time. There was no additional correspondence between Patterson and Mills after February, 1992, and in Patterson's deposition he admitted that he no longer considered Mills his attorney after that date.

On April 12, 1993, Patterson filed a pro se motion to modify the dissolution decree and grant him visitation rights with his minor son. Patterson alleged that the five (5) visits

he had with his son since December, 1991, were inadequate and he sought a modification to twenty-four visits per year. Patterson relied primarily on KRS 403.320(1) which states in part that a non-custodial parent is entitled to "reasonable visitation unless the court finds after a hearing that the visitation would seriously endanger the child's physical, mental or emotional health." (Emphasis added). When the trial court failed to rule on his motion, Patterson filed a second motion requesting similar relief on August 4, 1994. On August 11, 1994, the trial court granted Patterson's motion for visitation. However, the trial court subsequently rescinded that order, again finding that the visitation issue would only be addressed once Patterson was no longer incarcerated.

As a result of the trial court's refusal to address the merits of his motion, Patterson filed a petition for writ of mandamus in the Court of Appeals on December 5, 1994. This original action sought an order to compel the Knox Circuit Court to schedule a hearing on the visitation issue and to have his court appointed guardian ad litem represent him until the issue of visitation was resolved. On January 19, 1995, the Court of Appeals issued an order granting CR 76.36 relief in part. Pursuant to Smith v. Smith, Ky. App., 869 S.W.2d 5 (1994), the Court held that Patterson had natural and statutory rights to visit with his child and that a non-custodial parent may not be deprived of the right to visit without a hearing. The Court also found Patterson to be entitled to representation by a guardian ad

litem until final disposition in the circuit court. See Davidson v. Boggs, Ky. App., 859 S.W.2d 662 (1993). The ultimate result of Patterson's motion for visitation was that the trial court granted him telephone visitation with his son twice a month and personal visitation every tenth Sunday of every year. This order was entered August 1, 1996.

As previously stated, Patterson filed his legal malpractice action against Mills on January 2, 1996. The trial court, by order entered October 1, 1996, granted Mills' motion for summary judgment finding that "a cause of action for legal malpractice does not exist due to the expiration of the statute of limitations." The trial court denied Patterson's CR 59 motion and this appeal followed.

On appeal, Patterson admits that a legal malpractice claim is governed by KRS 413.245 which, in part, states:

...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.

Patterson claims that the limitations of action in this case was "tolled from running because the issue of visitation was reserved until such time as appellant [Patterson] is no longer incarcerated. Thus, that litigation was not concluded on December 18, 1991, as posited by Mills." (Emphasis in original). Patterson cites the cases of Michels v. Sklavos, Ky., 869 S.W.2d 728 (1994) and Alagia, Day, Trautwein & Smith v. Broadbent, Ky.,

882 S.W.2d 121 (1994), for the proposition that pursuant to KRS 413.245 the one (1) year does not begin to run until final outcome of a case is decided. The rationale for this holding is that one cannot determine if one has suffered injury until the case becomes final.

The Supreme Court reaffirmed this principle in Meade County Bank v. Wheatly, Ky., 910 S.W.2d 233 (1995) (held that statute of limitations did not begin to run until date of foreclosure sale on property because that was the date bank realized legally compensable damages). In Barker v. Miller, Ky. App., 918 S.W.2d 749 (1996), the Court of Appeals reviewed the history of cases dealing with KRS 413.245. The Court held:

We agree with the appellees that this case is controlled by the "occurrence rule" set forth in Hibbard¹ and its progeny. Any damages Barker suffered as a result of any alleged malpractice of one or more of the appellees became fixed and non-speculative on the day the Kentucky Supreme Court denied discretionary review. Any occurrence happened as the finality date of the litigation.

Barker v. Miller, 918 S.W.2d at 751.

In the case sub judice, the trial court granted summary judgment because it found that Patterson had not filed the malpractice action until January 2, 1996. The court reasoned that the divorce was final December 11, 1991, and Patterson knew or should have discovered within one year thereafter whether he had suffered any injury as a result of Mills' representation.

¹ Hibbard v. Taylor, Ky., 837 S.W.2d 500 (1992)

Patterson was put on notice that the court had held his visitation rights in abeyance until he was no longer incarcerated. We agree that Patterson is foreclosed from proceeding in this matter due to his failure to timely file his cause of action. Whether we utilize the December 11, 1991 date of divorce, or the February 1992 date when Mills informed, and Patterson acknowledged, that his legal representation had terminated, or the April 12, 1993 date when Patterson filed his pro se motion to modify decree and grant visitation rights does not matter. Under these scenarios, Patterson failed to timely comply with KRS 413.245 and is thus precluded from seeking relief in a legal malpractice claim.

The original divorce action was concluded on December 11, 1991. No appeal was prosecuted nor did Patterson request additional services from Mills. Mills' representation of Patterson was subsequently terminated without further contact between the parties. From the record it appears that Patterson was able to visit with his son through a voluntarily arrangement. When he wanted additional visitation he pursued filing his own motion and argued that he was entitled to a hearing. Obviously, by this date (April 12, 1993) he knew or had discovered what he now claims to be the cause of his alleged injury. The "discovery rule" as applied to civil actions filed in a court of law, tolls the running of the statute of limitations only where the cause of action is not reasonably discoverable until the plaintiff knows

or in the exercise of reasonable care should know, that the injury has occurred. Michels, supra at 732.

Patterson argues that the filing of the writ of mandamus tolls the statute until such time as that case was finally resolved. However, such a writ is an original proceeding in the appellate court and thus clearly distinguishes this case from those cases cited by Patterson. Summary judgment was appropriate in this case in that there was no genuine issue as to any material fact and the moving party was entitled to judgment as a matter of law. Old Mason's House v. Mitchell, Ky. App., 892 S.W.2d 304 (1995); Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476 (1991). Patterson could not possibly strengthen his case at trial and, as such, Mills would be entitled ultimately and inevitably to a directed verdict. Old Mason's House, supra. Additionally, it should be pointed out in this case as it was in Meade County Bank, supra, at 234, 235 "that in legal negligence, as in any negligence case, there must have been a 'negligent act or omission and legally cognizable damages.' (Citations omitted). Without damages, there is no ripened claim."

Having decided that Patterson failed to comply with KRS 413.245 in filing his legal malpractice action, his second argument as to the arbitrariness of the trial court's order regarding his response to the summary judgment motion is deemed moot.

For the foregoing reasons, we affirm the Knox Circuit Court order dismissing Patterson's untimely filed action.

ALL CONCUR.

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