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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-003017-MR

HARLEY T. EASTRIDGE

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ERNEST A. JASMIN, JUDGE
ACTION NO. 1992-CI-04263

COMMONWEALTH OF KENTUCKY,
CRIME VICTIMS COMPENSATION
BOARD; DON F. SCHMIDT; AND
DAN E. SIEBERT

APPELLEES

OPINION
AFFIRMING
** **

BEFORE: HUDDLESTON, JOHNSON, AND KNOPF, JUDGES.

KNOPF, JUDGE: Harley Eastridge appeals *pro se* from an October 22, 1997, summary judgment of Jefferson Circuit Court finding him liable to appellee Crime Victims Compensation Board (CVCB or the Board), and from the court's order of the same date dismissing *sua sponte* his third-party complaints against appellees Don Schmidt and Dan Siebert, attorneys who formerly represented him. Eastridge maintains that the trial court misconstrued his statutory obligation to the Board and improperly dismissed his

third-party complaints. For the reasons that follow, however, we affirm the trial court's judgment in its entirety.

This being the second appeal in a matter that arose more than fifteen (15) years ago, a time chart may provide the best initial summary of preceding events:

1984:

January	Eastridge is assaulted by several men at a motel lounge in Shively, Kentucky. He suffers a seriously broken leg and other injuries.
May	Represented by Schmidt, Eastridge brings suit against the alleged perpetrators of the assault and against the owners and managers of the premises where it occurred.
December	Siebert succeeds Schmidt as Eastridge's attorney of record.

1986:

February	Pursuant to KRS Chapter 346, the appellee Board awards Eastridge approximately nine thousand dollars (\$9,000.00) for medical expenses arising from the assault.
June	Eastridge agrees to settle his tort suit against one of the business defendants in exchange for thirty thousand dollars (\$30,000.00).
August	Siebert withdraws as Eastridge's attorney, and he and Schmidt receive about twelve thousand dollars (\$12,000.00) in fees.

1987:

November Represented by new counsel, Eastridge wins a default judgment against two (2) of the alleged perpetrators of the assault and is awarded damages of almost two hundred twenty-five thousand dollars (\$225,000.00). The judgment is unenforced.

1992:

June The Board brings suit against Eastridge for reimbursement of the monies it awarded him in 1986.

October Proceeding *pro se*, Eastridge answers the complaint and claims to have expended the \$30,000.00 settlement in justifiable pursuit of the \$225,000.00 judgment. That judgment remaining unenforced, he contends that his statutory duty to repay the Board upon ultimate recovery from the perpetrators or a collateral source has not arisen.

1994:

May Eastridge files third-party complaints against Schmidt and Siebert. His complaints allege that the two attorneys' negligent representation made his pursuit of the default judgment more expensive than it should have been.

Oct./Nov. Agreeing with Eastridge that the settlement and the default judgment should be considered portions of a single recovery, the trial court dismisses the Board's action against Eastridge, and the Board appeals.

1996:

March

This Court rejects Eastridge's justification defense to the Board's reimbursement claim and remands the matter to the trial court for new proceedings.

1997:

October

In light of this Court's ruling on appeal, the trial court enters summary judgment for the Board on its claim for reimbursement. The trial court also dismisses Eastridge's third-party complaints against Schmidt and Siebert on the ground that the original judgment of October 1994 dismissed those complaints, and, with respect to them, has become *res judicata*.

The October 1997 judgment is the order from which Eastridge has appealed. He contends, apparently, that, even if the Board has a right to seek reimbursement from him, that right is superceded by the Board's duty first to seek reimbursement from the perpetrators of the assault. He also maintains that the trial court erred by dismissing his third-party complaints against Schmidt and Siebert. We are not persuaded that Eastridge is entitled to relief. We disagree with his construction of the Board's authority. Furthermore, although the trial court based its dismissal of Eastridge's complaints against his former attorneys on what may have been a faulty rationale, we believe, for reasons that follow, that the dismissals were nevertheless correct.

We begin by noting the familiar rule that entry of a summary judgment under CR 56.03 is only proper in the absence of a genuine issue of material fact, and only then, of course, if the moving party is entitled to a judgment as a matter of law.

"All doubts are to be resolved in favor of the party opposing the motion. The movant should not succeed unless a right to judgment is shown with such clarity that there is no room left for controversy." 7 W. Clay, *Kentucky Practice*, CR 56.03, Comment 4 (3rd ed. 1974). Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476 (1991). With this standard of review in mind, we turn to Eastridge's allegations of error.

KRS Chapter 346 authorizes the Crime Victims Compensation Board to disburse state funds to certain needy victims of crime. Section 346.170 of that chapter provides as follows:

(1) No right of action at law against a person who has committed a criminal act for damages as a consequence of such act shall be lost as a consequence of receiving benefits under the provisions of this chapter. In the event any person receiving benefits under this chapter additionally seeks a remedy for damages from the person or persons who have committed the criminal act resulting in damages, then and in that event the board shall be subrogated to and have a lien upon any recovery so made to the extent of the payments made by the state to or on behalf of such person under this chapter.

(2) If compensation is awarded, the state is subrogated to all the claimant's rights to receive or recover benefits or advantages, for economic loss for which and to the extent only that compensation is awarded from a source which is, or, if readily available to the victim or claimant would be, a collateral source.

The Board claims to be entitled under this statute to reimbursement from Eastridge's settlement monies. This Court, upholding that claim, expressly rejected Eastridge's argument (and the trial court's initial ruling) that, because the settlement money had been spent in pursuit of further compensation, it had merged, in effect, with the unenforced default judgment. To the extent that Eastridge's current appeal is based on a reiteration of this argument and the trial court's initial ruling, the short answer is that the decision in the first appeal declared that argument invalid and is now the law of the case.

Eastridge also seeks to bolster his former argument by noting that KRS 346.180 provides in part as follows:

(1) Any payment of benefits to or on behalf of a victim under this chapter creates a debt due and owing to the state by any person found to have committed such criminal act in either a civil or criminal court proceeding in which he is a party.

Eastridge correctly asserts that this statute renders the two (2) men adjudged to have assaulted him indebted to the state for the amount of Eastridge's benefit award. The trial court did not err, however, by rejecting Eastridge's contention that their indebtedness supercedes his own.

As noted above, eligibility for crime victim compensation awards is limited to "needy" victims. Hulsey v. Commonwealth, Crime Victims Compensation Board, Ky. App., 628 S.W.2d 890 (1982). KRS Chapter 346 also evinces a clear intent that victims not recover twice for a single loss. Lynch v. Commonwealth, Crime Victims Compensation Board, Ky. App., 748

S.W.2d 160 (1988). To further these purposes, both of which tend to preserve the Board's operating fund, KRS 346.170 and 180 give the Board a right of reimbursement against a victim/beneficiary who has since recovered from another source as well as a subrogated right of recovery against anyone determined to have caused the compensated loss.

The Board, of course, cannot recover more than one reimbursement for any given award, but that does not mean, as Eastridge suggests, that it may not pursue recovery simultaneously against anyone and everyone liable for reimbursement under KRS 346.170 and 180. On the contrary, the statutes are clearly intended to maximize the Board's chances of recovery, and that intent is furthered if the Board may pursue recovery wherever it believes that success is likely. The construction suggested by Eastridge, by limiting the Board's ability to seek recovery in appropriate cases, would tend to frustrate the statutes' plain intentions that perpetrators compensate their victims, that the Board's assistance be limited to needy victims' most pressing expenses, that victims be discouraged from seeking windfalls, and that the Board's resources be carefully conserved so as to be available to as many eligible victims as possible. The trial court did not err, therefore, by rejecting Eastridge's construction of the statutes and granting the Board's motion for summary judgment.

Nearly two (2) years after the Board filed suit against Eastridge, he filed third-party complaints against the attorneys, Schmidt and Siebert, who had represented him during the initial

phases of his suit for damages. Siebert in particular had been of record in the case both at the time of the Board's award and during the negotiations that culminated in the thirty thousand dollar (\$30,000.00) settlement. Pursuant to a contingent fee arrangement, Eastridge paid Schmidt and Siebert about twelve thousand dollars (\$12,000.00) (40%) from the settlement proceeds.

The settlement terminated Eastridge's claim against only one of the defendants. He still hoped to recover from the second business defendant and from the perpetrators. These other cases, however, were not going well. The second business defendant entered bankruptcy, and neither Eastridge, his attorneys, nor the police had obtained evidence showing conclusively who was directly responsible for Eastridge's injuries. Frustrated with the apparent lack of progress, Eastridge began to suspect that the police were not investigating as diligently as they could have. These suspicions were made worse when someone who had been at the motel the night of the assault and had told Eastridge that a former police officer had been among the assailants changed his account and denied having seen the policeman. Eastridge concluded from this change of stories that the investigating officers were protecting their former colleague. Siebert, apparently, refused to share Eastridge's suspicions, and Eastridge resented what he regarded as Siebert's lack of loyalty and support. There were words between them to this effect. Soon thereafter, Siebert withdrew his representation.

The record makes clear that, from the time he received his award from the CVCB, Eastridge was aware of his duty to repay the Board should he ever recover from the tortfeasors. Nevertheless, following Siebert's withdrawal, Eastridge more than once employed new counsel on an hourly basis to continue the case against the perpetrators of the assault and, before finally winning his default judgment, consumed the balance of the settlement. When the Board then demanded repayment, Eastridge brought third-party actions against Schmidt and Siebert and alleged that their termination of the contingent-fee arrangement had been wrongful and had injured him by necessitating a large amount of additional attorney fees and other litigation expenses.

In the 1994 order that disposed of this case initially, the trial court did not mention Eastridge's third-party claims. Whether it thought that the judgment in Eastridge's favor against the Board rendered those claims moot, or whether it meant to dismiss them on their merits does not appear. Upon remand from the Board's successful appeal, however, the trial court ruled that the original dismissal had been on the merits of the third-party claims. Eastridge's failure to appeal from the adverse judgments rendered them *res judicatae* and thus precluded their being reconsidered. Eastridge maintains that he should be permitted to go forward against Schmidt and Siebert. We disagree.

¹Siebert and Schmidt both preserved this affirmative defense by raising it in their original motions to dismiss Eastridge's third-party complaints.

If the premise of the trial court's ruling is correct (*i.e.*, if the original decision can be construed to have reached the merits of Eastridge's third-party complaints), then the trial court's conclusion is also correct. Brown v. Barkley, Ky., 628 S.W.2d 616 (1982). By the same authority, however, if the original decision did not decide Eastridge's third-party actions, there was nothing for him to appeal and so no bar resulted from his "failure" to do so. The remand of the Board's claim against him would, in that case, merely have reinstated his claims against Schmidt and Siebert. *Id.*; Miller v. Miller, Ky., 335 S.W.2d 884 (1960). It is by no means clear from the record that the trial court's 1994 judgment intended to dismiss Eastridge's third-party claims on their merits. We need not delve into this issue, however, for it is apparent that, even if the trial court misconstrued the earlier judgment, Eastridge's claims against Schmidt and Siebert are time barred and could have been dismissed on that alternative ground.²

As our Supreme Court has observed, under KRS 413.245 (the statute of limitations applicable to actions for legal malpractice),

there are actually two periods of limitation, the first being one year from the date of the occurrence and the second being one year from the date of *discovery* if it is later in time.

²For the same reason, we need not rule on the merits of the motions by appellees Siebert and Schmidt to have the appeals against them dismissed. As did the trial court in its order, Siebert and Schmidt predicate their motions on *res judicata*. In light of our alternative reason for affirming the trial court's order, however, we hereby deny Siebert and Schmidt's motions as moot.

Alagia, Day, Trautwein, & Smith v. Broadbent, Ky., 882 S.W.2d 121, 125 (1994) (emphasis in original). Eastridge claims to have been injured by Siebert's wrongful withdrawal of representation. He does not explain why the withdrawal was wrongful³, but assuming that it was, the cause of action⁴ must have accrued by October 1987, when Eastridge's tort claims concluded, and should have been reasonably discovered at the very latest by June 1992, when the Board filed its claim for reimbursement. Eastridge's complaints against Schmidt and Siebert, however, were not filed until May 1994. They were thus untimely, and the trial court did not err by dismissing them.

In sum, although we sympathize with crime victims whose physical injuries must go uncompensated because the perpetrator cannot be found or when found cannot afford to pay, and whose dignitary interests must go unvindicated because the legal assistance necessary to assert them is too expensive, we are not persuaded that Eastridge is entitled to relief. As clearly contemplated under KRS Chapter 346, Eastridge's settlement

³Eastridge is convinced that Shively police officers obstructed both the criminal and civil investigations of the assault. He seems to contend that Siebert should have added a claim against the police officers to Eastridge's complaint against the perpetrators and that, had he done so, the contingent fee contract between Eastridge and Siebert would have remained in effect, with the result that pursuing the default judgment would not have required the expenditure of so much of his settlement money. Even if Siebert owed some such duty to Eastridge as Eastridge claims, Siebert's purported breach of that duty has no bearing on Eastridge's duty to repay the Board. Furthermore, as explained in the text below, any claim Eastridge may have had against Siebert for that breach (we need hardly add that we believe he had no such claim) has long since expired.

⁴'Cause of action' is synonymous with 'occurrence.' *Id.* at 125.

enabled him and therefore obligated him to repay the benefits he had received from the Crime Victims Compensation Board. He was fully aware of this obligation, and the facts that he had other compelling uses for his settlement money, that the Board is authorized to seek payment from others, or that others might now be able to afford the debt more easily than he can, do not excuse it. In particular, there is nothing in the record to suggest that Eastridge's plight should be attributed to the attorneys who secured his settlement, and, even if there were, Eastridge waited too long to assert such a claim.

For these reasons, we affirm the October 22, 1997, judgment of Jefferson Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Harley T. Eastridge, *pro se*
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BRIEF FOR THE CRIME VICTIMS
COMPENSATION BOARD:

Adele Burt Brown
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BRIEF FOR DON F. SCHMIDT:

James R. Miller
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