

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2003-CA-001140-MR

JUNE SMITH PFIESTER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE THOMAS B. WINE, JUDGE  
ACTION NO. 02-CI-004395

AMELIA FRANKLIN ADAMS

APPELLEE

OPINION  
AFFIRMING

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BEFORE: GUIDUGLI, JOHNSON AND MINTON, JUDGES.

GUIDUGLI, JUDGE. June Smith Pfiester ("Ms. Pfiester") appeals from findings of fact, conclusions of law, and order of the Jefferson Circuit Court granting summary judgment in favor of Amelia Franklin Adams ("Adams"). As a basis for the summary judgment, the court opined that Ms. Pfiester failed to prosecute her legal malpractice action against Adams within the one-year statutory period commencing at the time Ms. Pfiester learned of

the alleged malpractice. For the reasons stated herein, we affirm.

Beginning in 1990, Adams, an attorney licensed to practice in Kentucky, represented Ms. Pfiester in a dissolution of marriage proceeding. A property settlement agreement was negotiated between the parties, which provided in relevant part as follows:

The Respondent [Mr. Pfiester] shall receive the Deferred Compensation account valued at approximately \$32,033.10 and the First Credit Union account valued at approximately \$14,087 in return for his equity in the residence and furniture. The Respondent shall continue to carry the Petitioner [Ms. Pfiester] as his beneficiary on the retirement accounts in the event he should predecease her . . . .

Ms. Pfiester executed the agreement on February 13, 1991.

On or about February 20, 1996, Mr. Pfiester wrote a letter to Ms. Pfiester stating that the Kentucky Retirement System had informed him that as a divorced spouse, she would receive no retirement benefits upon his death. Ms. Pfiester contacted the Kentucky Retirement System, which advised her that KRS 61.542(b) dictated that upon Mr. Pfiester's death, any remaining retirement benefits or residuary would go to his estate rather than to Ms. Pfiester.

On July 19, 1996, attorney Leland Howard ("Howard") contacted Adams by way of letter on behalf of Ms. Pfiester.

Adams sought to resolve the issue by filing a Qualified Domestic Relations Order with the circuit court for the purpose of naming Ms. Pfiester as a beneficiary of Mr. Pfiester's retirement plan pursuant to KRS 61.542(5)(b). Relying on KRS 61.542(2)(b), the Kentucky Retirement System rejected the order. On June 18, 2001, Mr. Pfiester died intestate.

On June 11, 2002, Ms. Pfiester filed the instant action against Adams in Jefferson Circuit Court alleging that Adams committed legal malpractice by advising Ms. Pfiester to execute the settlement agreement. Adams moved for summary judgment, claiming that Ms. Pfiester's action was barred by KRS 413.245, the one-year statute of limitation. Adams argued that the alleged malpractice occurred when she advised Ms. Pfiester to execute the settlement agreement in 1991, that it was discovered in 1996, and that any claim for legal malpractice must be brought, if at all, within one year of one of those dates. Upon taking proof, the circuit court determined that by operation of statute Ms. Pfiester was never entitled to claim Mr. Pfiester's retirement benefits. It determined that her damages, if any, occurred when she executed the settlement agreement and unknowingly gave up other property rights because she believed that she would receive Mr. Pfiester's retirement benefits upon his death. The court granted summary judgment in favor of Adams on April 15, 2003, by way of findings of fact,

conclusions of law, and order. Ms. Pfiester's subsequent motion to alter, amend or vacate the order was denied, and this appeal followed.

Ms. Pfiester now argues that the trial court committed reversible error in granting Adams's motion for summary judgment. Her primary argument is that no actual damages were incurred until Mr. Pfiester died, and that accordingly the one-year statutory period for bringing a legal malpractice claim should have commenced on that date. She also argues that summary judgment should not have been rendered until questions concerning a possible waiver of the statute of limitations defense can be resolved. She seeks an order reversing the circuit court's order granting summary judgment, and remanding the matter for further proceedings.

Having closely examined the record, the law, and the written arguments, we find no error in the order granting summary judgment. KRS 413.245 sets forth the statutory period during which a civil action must be brought to recover damages for professional service malpractice. It states that,

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.

Clearly, the statute directs one to the date of the occurrence or the date when the cause of action was, or should have been, discovered.

The dispositive issue, then, is whether the circuit court properly concluded that 1) the date of the occurrence was when Adams advised Ms. Pfiester to execute the settlement agreement, and 2) that the date of discovery was in 1996 when she learned that the Kentucky Retirement System would deny benefits to her if Mr. Pfiester pre-deceased her. The question may also be stated in terms of whether the circuit court properly rejected Ms. Pfiester's assertion that the statutory period actually began when Mr. Pfiester died and she allegedly suffered actual pecuniary damages.

We believe these questions must be answered in the affirmative. There seems to be little question but that the date of discovery for purposes of KRS 413.245 was in early 1996 when Ms. Pfiester was made aware that the Kentucky Retirement System intended to deny any future claim for benefits if Mr. Pfiester pre-deceased her. As to the question of when Ms. Pfiester suffered the alleged damages, we agree with Adams and the circuit court in that the alleged damages were incurred, if at all, when Adams advised Ms. Pfiester to execute the settlement agreement rather than when Mr. Pfiester died. As the circuit court properly noted, Ms. Pfiester was never entitled to

receive Mr. Pfiester's retirement benefits if he pre-deceased her. As such, Ms. Pfiester suffered no pecuniary damages when he died because she was never entitled to receive the benefits.

Ms. Pfiester asserts that her damages were speculative until Mr. Pfiester died. She contends that if she had brought the instant action in 1996 upon learning that she was not entitled to the benefits at issue, it would have been proper to dismiss the action because the damages were speculative. For example, she notes that if she pre-deceased Mr. Pfiester, there would be no damages at all.

We are not persuaded by this argument for the above-stated reasons. Again, Ms. Pfiester was never entitled to Mr. Pfiester's retirement benefits, irrespective of the advice she received from Adams, and irrespective of who died first. By virtue of this fact, her only damages could have been the loss of her ability to negotiate a more favorable property settlement in lieu of the settlement she executed. Thus, she was allegedly damaged at the time she executed the settlement agreement and not when Mr. Pfiester pre-deceased her. As between the date of injury and the date of discovery, the date of discovery in 1996 was the latter and represented the date at which the statutory period commenced. The circuit court properly so found, and we find no error on this issue.

Ms. Pfiester also argues that the entry of summary judgment was premature because a genuine issue of material fact remained on the question of whether an agreement was entered into by the parties, the effect of which was to toll the running of the statute of limitations. After the motion for summary judgment had been tendered, but before the motion had been granted, Adams testified that a tolling agreement was prepared by her counsel and sent to Ms. Pfiester's attorney. Ms. Pfiester contends that an issue of fact remains as to whether this agreement operates to affect the issues at bar, and she argues that a resolution of this issue necessarily must precede the entry of summary judgment.

We are not persuaded by Ms. Pfiester's argument on this issue. Though Adams did testify that her counsel sent a tolling agreement to Ms. Pfiester's counsel, she went on to state that Ms. Pfiester's counsel never signed and returned it, and that nothing became of it. There is no affirmative evidence in the record supportive of the assertion that an enforceable tolling agreement ever existed, and we cannot conclude that the trial court erred in failing to characterize it as a genuine issue of material fact. Ms. Pfiester contends that more discovery is needed to resolve the issue, but the burden was on her to raise it in response to Adams's motion for summary judgment and to show that a genuine issue existed. The record

contains no evidence that a tolling agreement was executed, and as such there is no genuine issue of material fact on this issue.

For the foregoing reasons, we affirm the findings of fact, conclusions of law, and order of the Jefferson Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Joseph Michael Kelly  
Louisville, KY

BRIEF FOR APPELLEE:

Elizabeth Ullmer Mendel  
Mark B. Wallace  
Louisville, KY