

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001412-MR

CONNIE MARSHALL

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE TOM MCDONALD, JUDGE
ACTION NO. 03-CI-000550

ARTHUR SAMUEL

APPELLEE

OPINION
VACATING AND REMANDING

** ** * * *

BEFORE: COMBS, CHIEF JUDGE; GUIDUGLI AND KNOPF, JUDGES.

COMBS, CHIEF JUDGE: Connie Marshall, *pro se*, appeals the order of the Jefferson Circuit Court granting the motion of Arthur Samuel for judgment on the pleadings in her professional malpractice action against him. Because we believe the trial court erred as a matter of law, we vacate and remand for further proceedings.

In 2001, Arthur Samuel, an attorney practicing in Louisville, represented Connie Marshall before the Jefferson Family Court. On July 21, 2001, he prepared and filed a

petition for her to gain permanent custody of her three grandchildren.

The petition recited that the children had been committed to the Cabinet for Families and Children in 1997. However, Marshall had served as their custodian for several months in 1999. As Marshall explained, she relinquished custody only when she felt that she could no longer provide adequate care for the children.

The Cabinet sought to terminate the parental rights of the mother of the children and to consider them for adoption placement. The Cabinet strongly resisted Marshall's attempt to intervene and to gain permanent custody of her grandchildren. On January 18, 2002, after concluding that Marshall lacked standing to petition the court for custody of the children, the Jefferson Family Court granted the Cabinet's motion to dismiss the action.

On January 23, 2002, Samuel corresponded with his client by certified mail. He advised Marshall that the Family Court had dismissed her petition for custody. He also explained the nature and importance of her right timely to appeal the decision. Finally, Samuel expressed the following concern:

I feel that since you have repeatedly threatened to file a complaint against me with the Kentucky Bar Association, that it would be in both our interests that you obtain another lawyer to handle the appeal.

It appears to me that you have lost both trust and confidence in me and having new counsel would best serve your interest.

Samuel assured Marshall that he would work with her new counsel to provide him or her with anything in his file as well as any other information concerning the matter. He urged Marshall to retain counsel immediately.

On January 21, 2003, Marshall filed this legal malpractice action against Samuel. Samuel answered the complaint and moved for judgment on the pleadings pursuant to CR¹ 12.03. In his motion, Samuel contended that Marshall's claim was barred by the statute of limitations. The trial court agreed with Samuel's assertion and entered judgment in his favor on June 11, 2003. This appeal followed.

The basis of a motion for a judgment on the pleadings is to test the legal sufficiency of a claim or defense. City of Pioneer Village v. Bullitt Co., Ky., 104 S.W.3d 757 (2003). When a party moves for a judgment on the pleadings, he admits for the purposes of his motion the truth of the nonmovants' allegations of fact and all fair inferences that can flow from those facts. Archer v. Citizens Fidelity Bank & Trust Co., Ky., 365 S.W.2d 727 (1963). We review *de novo* the trial court's order granting judgment on the pleadings.

¹ Kentucky Rules of Civil Procedure.

The trial court correctly concluded that this action is governed by KRS² 413.245, which sets a one-year statute of limitations for professional negligence claims. That statute provides in pertinent part as follows:

[A] civil action . . . 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 sole issue on appeal is: when did the statute begin to run against Marshall's claim?

Samuel contends that the statute began to run prior to January 14, 2002. During the course of the proceedings, Samuel filed a motion with the Family Court on Marshall's behalf requesting a visitation schedule. Although this motion was to be heard on January 14, it was held in abeyance pending the court's decision regarding the standing issue. According to Samuel, this is the "last legal act which [he] performed for [Marshall]."

Marshall, however, contends that the statute did not begin to run before January 18, 2002 -- the date of entry of the court's order granting the Cabinet's motion to dismiss the custody action. January 18, 2003, was a Saturday; the following

² Kentucky Revised Statutes.

Monday, January 20, 2003, was a legal holiday. Therefore, Marshall contends that her complaint (filed January 21, 2003) was timely.

In the context of legal malpractice claims, the statute has been interpreted to mean that an injury is discovered (and that, therefore, the statute of limitations begins to run) only when the legal harm has become "fixed and non-speculative." See Alagia, Day Trautwein & Smith v. Broadbent, Ky., 882 S.W.2d 121 (1994). In Faris v. Stone, Ky., 103 S.W.3d 1 (2003), the Supreme Court of Kentucky reviewed relevant case law and stated the rule as follows:

[I]n malpractice cases in which the underlying negligence occurred during the course of formal litigation, Kentucky decisional law has consistently held that the injury becomes definite and non-speculative when the underlying case is final. At that time, the one-year statute of limitations begins to run.

Since no appeal was filed in the underlying custody matter, the one-year statute of limitations did not begin to run until thirty (30) days after January 18, 2002 -- the date on which Marshall's petition for custody was dismissed by the Family Court and notation was entered on the court's docket. Consequently, Marshall's action, commenced January 21, 2003, was not untimely and the judgment in favor of Samuel must be set aside. Our judgment in no way addresses the merits or the

viability of Marshall's claim. We conclude only that the complaint was filed within the statutory period and that Samuel is not entitled to judgment on the pleadings based on the issue of the statute of limitations.

We vacate the judgment of the Jefferson Circuit Court and remand this matter for additional proceedings.

ALL CONCUR.

BRIEF FOR APPELLANT:

Connie Marshall, *pro se*
Louisville, Kentucky

BRIEF FOR APPELLEE:

Arthur R. Samuel
Louisville, Kentucky