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AUGUST 17, 2005 (2004-SC-1041-D)

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001670-MR

RICHARD BOHLINGER; MARY BECKER;
and ESTATE OF WALTER BOHLINGER

APPELLANTS

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
ACTION NO. 00-CI-02623

O'HARA, RUBERG, TAYLOR, SLOAN &
SERGENT; SUE CASSIDY; DONALD J.
RUBERG; and PAUL MARKGRAF

APPELLEES

AND

NO. 2003-CA-001736-MR

O'HARA, RUBERG, TAYLOR, SLOAN &
SERGENT; SUE CASSIDY; and DONALD J.
RUBERG

CROSS-APPELLANTS

v. CROSS-APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
ACTION NO. 00-CI-02623

RICHARD BOHLINGER; MARY BECKER;
and ESTATE OF WALTER BOHLINGER

CROSS-APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: JOHNSON, TAYLOR, AND VANMETER, JUDGES.

VANMETER, JUDGE: This case involves two causes of action against separate sets of attorneys for malpractice. While the claims against the attorneys are distinct, each arises out of the 1996 sale by Gertrude Bohlinger, with the assistance of her son Robert Marshall (Marshall), of \$200,000 worth of Procter & Gamble stock owned by her husband, Walter Bohlinger. The Kenton Circuit Court entered summary judgment in favor of the defendant attorneys. We affirm.

In 1985, Walter Bohlinger and Gertrude Marshall married. Both were elderly and widowed, with children from their respective prior marriages. Prior to their marriage, Walter and Gertrude signed a prenuptial agreement in which each waived any claim to the other's estate at death. Attorney Paul Markgraf, who had represented Marshall previously, prepared the prenuptial agreement. And on the date Walter and Gertrude married, each signed a will drafted by Markgraf which left their respective estates to their respective children.

By all accounts, this marriage was happy and Walter and Gertrude were devoted to each other. By late 1991, however, Walter was showing signs of both Parkinson's and Alzheimer's diseases. On January 8, 1992, Walter signed a power of attorney, prepared by Markgraf, designating Gertrude as his

attorney-in-fact. As attorney-in-fact, Gertrude paid Walter's bills. By 1996, however, Gertrude was experiencing her own health problems and she turned to Marshall for assistance. In the process, Gertrude and Marshall sold approximately 1,500 shares of Walter's Procter & Gamble stock which had an approximate value of \$210,000. While some of the proceeds were used to pay capital gains taxes and medical and living expenses for both Walter and Gertrude, approximately \$160,000 was placed in a bank account in the joint names of Gertrude and Marshall.

By June 1997, through Markgraf, Marshall contacted Walter's children, Richard Bohlinger and Mary Becker, to request that they assume guardianship of Walter due to Gertrude's failing health. In a June 1997 letter addressed to Becker, with a copy to Bohlinger, Markgraf informed Becker and Bohlinger that he had prepared the prenuptial agreement, wills and powers of attorney. Markgraf gave Becker and Bohlinger copies of those documents when they were appointed Walter's guardians by the Kenton District Court in September 1997.

In investigating their father's stock holdings and sales, Becker and Bohlinger discovered the Procter & Gamble stock sales made by Gertrude and Marshall. Walter died in December 1997 and Bohlinger was appointed executor of his will. In April 1998, after the siblings did not receive satisfactory answers regarding the proceeds of the stock sales, they

individually and as executor sued both Gertrude and Marshall, seeking an accounting for their actions under the power of attorney. Becker and Bohlinger's attorneys were appellees Donald Ruberg and Suzanne Cassidy with the firm of O'Hara, Ruberg, Taylor, Sloan & Sergent.¹ Gertrude and Marshall counterclaimed for amounts expended in taking care of Walter, and for Gertrude's necessary expenses under KRS 404.040.

Gertrude died in May 1998. On July 28, 1998, defense counsel's motion to substitute her estate with respect to her counterclaim was granted, although a copy of the court's order does not appear in the record on appeal. One year later, on July 20, 1999, defense counsel filed a motion to dismiss the claims against Gertrude's estate since a motion to revive the action had not been filed within a year as required by KRS 395.278.

Meanwhile, Becker and Bohlinger were apparently becoming unhappy with their representation by the O'Hara law firm, and at some point prior to August 17, 1999, Bohlinger communicated this fact to Ruberg. On August 17, Cassidy sent a letter to Becker and Bohlinger advising them of the motion to dismiss, and stating "[i]t is my understanding through Don that you had decided to retain new counsel to represent you. You should notify him or her of this Motion as soon as possible."

¹ Ruberg, Cassidy and their firm will be collectively referred to as the "O'Hara law firm."

Although the motion to dismiss was docketed for a hearing in August, Cassidy obtained a continuance of the motion and secured an order permitting the O'Hara law firm to withdraw as counsel for Becker and Bohlinger. The trial court's notes on the motion to dismiss indicate that the motion was passed from August 1999 to September 1999, and that attorney David Nelson was substituted as new counsel in the action.

Becker and Bohlinger secured counsel other than Nelson, and the unopposed motion to dismiss was granted in October 1999. The order of dismissal was not appealed. Ultimately, Becker and Bohlinger settled their claims against Marshall in June 2000, with each side essentially dropping its claims against the other. No money exchanged hands as a result of this settlement.

Becker and Bohlinger filed these actions against Markgraf and the O'Hara law firm on December 22, 2000. Their allegation against Markgraf was that he failed to properly advise Walter that Gertrude could use the power of attorney to sell assets and make gifts, thereby frustrating Walter's estate plan. Their allegation against the O'Hara law firm was that it failed to timely revive the original action against Gertrude's estate, such that they lost their claim against her estate and thereby also lost their ability to prosecute effectively their claim against Marshall in that action. The trial court granted

summary judgment in favor of Markgraf, ruling that the claim was barred by the statute of limitations. The court also ruled in favor of the O'Hara law firm, holding that based on admissions by Becker and Bohlinger, no evidence existed that Gertrude or her estate committed any wrongdoing. The court found that Becker and Bohlinger would not have prevailed, even if the O'Hara law firm had not committed malpractice.²

Cause of Action Against Markgraf

Becker and Bohlinger's claim against Markgraf is that he failed to advise Walter that the power of attorney in favor of Gertrude was so broadly written as to enable Gertrude to frustrate Walter's estate plan, *i.e.*, leaving his estate to his children. Even assuming this claim to be true, the question we must address is at what point the statute of limitations began to run.

KRS 413.245 explicitly 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. Time shall not commence against a party under legal disability until removal of the disability.

² The trial court discussed revival and whether revival was necessary. The court seems to have stated that had it been aware of the case law concerning revival, it would have permitted additional time to file a revival motion or would have overruled the motion to dismiss. However, the court deemed the issue moot due to its view of lack of causation.

Markgraf persuasively argues that by the time of their September 1997 appointment as guardians for Walter, Becker and Bohlinger were aware of Walter's will, the prenuptial agreement, and the power of attorney, as well as the fact that Markgraf had prepared each document. They were also aware at this time that they had considered Walter incompetent by the time he signed the power of attorney in January 1992. And, after their investigation of Walter's stock holdings, they knew by December 1997 that a large quantity of Procter & Gamble stock had been sold and that Marshall would not be forthcoming with any more information.

Becker and Bohlinger argue that they did not know of Markgraf's failure to properly advise Walter until Markgraf's deposition was taken on February 16, 2000. However, a cause of action for professional malpractice begins to run on the date the cause of action was, or reasonably should have been, discovered. Bohlinger, in his deposition, testified that prior to August 17, 1999, attorney Larry Holbrook advised him the power of attorney and prenuptial agreement should be investigated as to their legality. Becker and Bohlinger therefore knew, or should have known, of the cause of action against Markgraf no later than August 1999. As this action was

not filed until December 22, 2000, it was barred under the one year statute of limitations.

Cause of Action Against the O'Hara Law Firm

To state a cause of action against an attorney for malpractice, a client must prove 1) an employment relationship with the defendant/attorney; 2) the attorney failed to exercise ordinary care; and 3) the attorney's negligence was a substantial factor in causing damages to the client. *Stephens v. Denison*, Ky. App., 64 S.W.3d 297, 298-99 (2001); *Daugherty v. Runner*, Ky. App., 581 S.W.2d 12, 16 (1978). Becker and Bohlinger's sole claim against the firm is that the O'Hara firm failed to file a revival of the claim against Gertrude's estate within a year of her death, as required by KRS 395.278. As a malpractice claim involves a case within a case, Becker and Bohlinger must show that a revival of the claim was necessary.

While true that the trial court dismissed the claims against Gertrude's estate for failure to file a revival, the O'Hara law firm's employment was also terminated before the firm had an opportunity to respond to the motion. In fact, no one responded to the motion to dismiss, and it essentially was granted by default. The salient facts are, however, that Gertrude's estate had previously filed its motion to revive its counterclaim against Becker, Bohlinger, and Walter's estate, and that motion had been granted.

KRS 395.278 provides that "[a]n application to revive an action in the name of the representative or successor of a plaintiff, or against the representative or successor of a defendant, shall be made within one (1) year after the death of a deceased party." Also, CR 25.01(1) states:

If a party dies during the pendency of an action and the claim is not thereby extinguished, the court, within the period allowed by law, may order substitution of the proper parties. . . . The motion for substitution may be made by the successors or representatives of the deceased party or by any party"

The purpose of revival is "to bring before the court parties in interest who are not already before the court."

Perry v. Covington Savings Bank & Trust Co., 195 Ky. 40, 50, 241 S.W. 850, 855 (1922) (quoting *Larrabee v. Larrabee*, Ky., 71 S.W. 645, 647 (1903)). The effect of revival is that the personal representative of the deceased is substituted as the real party in interest. See *Snyder v. Snyder*, Ky. App., 769 S.W.2d 70, 72 (1989). And, "[t]he substituted party, as a general rule, takes up the litigation with all of its benefits and with all of its burdens just where the predecessor dropped it." *Citizens Bank & Trust Co. v. McEuen*, 281 Ky. 113, 117, 134 S.W.2d 1012, 1014 (1939).

In this case, Gertrude's estate filed a motion to revive her claim, and that motion was granted. Clearly, her estate was before the court. It would therefore seem somewhat

illogical to advance an argument that her estate was before the court for her claim but not for any other purpose. Having subjected Gertrude's estate to the jurisdiction of the court for purposes of her counterclaim, the estate was before the court for all related purposes, including defending against Becker and Bohlinger's claim. No additional revival on the part of Becker and Bohlinger was necessary.

The O'Hara law firm was in the process of researching and responding to the motion to dismiss at the point Becker and Bohlinger terminated the firm's employment. The O'Hara law firm advised Becker and Bohlinger, as well as the attorney the firm assumed would be continuing the representation, of the pending motion. The failure to follow through in opposing the motion therefore is not attributable to the O'Hara law firm.

The judgment of the Kenton Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS/CROSS
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BRIEF FOR APPELLEES/CROSS-
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