RENDERED: MAY 30, 2008; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001508-MR

MARY ALICE RAISOR — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN K. MERSHON, JUDGE
ACTION NO. 07-CI-002086

WILLIAM R. BURKETT, JR.;
WILLIAM R. BURKETT, III;
HEATHER G. BURKETT; ALLEN P.
DODD, III; AND DODD & DODD
ATTORNEYS, PLLC — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT AND MOORE, JUDGES; BUCKINGHAM, SENIOR JUDGE.[1]

BUCKINGHAM, SENIOR JUDGE: Mary Alice Raisor appeals from an opinion and order of the Jefferson Circuit Court that dismissed her complaint for negligent

[1] Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

or intentional misrepresentation against William R. Burkett, Jr., William R. Burkett, III, Heather G. Burkett, Allen P. Dodd III, and Dodd & Dodd Attorneys, PLLC. As grounds for the dismissal, the circuit court found that the complaint was barred by the operation of res judicata and by the statute of limitations for fraud or mistake. We affirm.

This case has a lengthy history and has been the subject of two prior appeals to this court. The pertinent facts are set forth below.

In 1985, William Burkett, Sr., and his wife, Dorothy, each executed wills, naming the other as the primary beneficiary provided he or she survived the other for 90 days. Otherwise, the estate was to be divided equally among three individuals: William Sr.'s son, William Jr., and William Jr.'s two children, William III (Beau) and Heather.

Then, in 1999, William Sr. purportedly executed another will, leaving virtually his entire estate to Mary Alice Raisor. Raisor had been hired by William Sr. in 1995 to assist with housekeeping and caring for Dorothy who suffered from Alzheimer's disease.

William Sr. died on February 13, 2001, followed less than 90 days later by Dorothy on April 1, 2001. On March 9, 2001, William Jr. filed a Complaint and Petition for Declaratory Judgment in the Jefferson Circuit Court, in which he sought to invalidate the 1999 will. He was represented in the action by Allen P. Dodd III and Dodd & Dodd Attorneys, PLLC, with whom he had entered

into a contingency fee agreement that provided Dodd's fee would equal 50% of William Jr.'s recovery.

About two months later, on May 10, 2001, William Jr. and Raisor entered into a Settlement Agreement, wherein they agreed to submit the 1985 wills to probate and to split the assets of William Sr. and Dorothy equally between themselves. The agreement also provided that it was binding on the parties' heirs, successors, and assigns. The circuit court entered an Agreed Judgment approving the settlement.

Although Beau and Heather became beneficiaries under the terms of the 1985 wills, they had not been made parties to the case and were not involved in the discussions leading up to the Settlement Agreement and the Agreed Judgment. Although they were apparently informed that a settlement had been proposed, they were not aware of its terms. Eventually, Dodd sent them documents that they were requested to sign, granting their powers of attorney to their father and assigning their entire interests in the estates to him.

If Beau and Heather had signed these documents, William Jr. and Raisor each would have received one-half of the assets of the estates, as the agreement provided. Dodd, in turn, would have received one-half of the assets William Jr. received under the terms of the contingency fee contract.

Beau and Heather refused to sign the documents and made a motion to intervene in the suit and have the settlement vacated and their rights under the 1985 wills declared. The circuit court denied their motion. Beau and Heather

appealed, and this court subsequently reversed the circuit court's decision. *See Dodd & Dodd Attorneys, PLLC v. Burkett*, 2003 WL 21511961 (Ky.App. July 3, 2003)(2001-CA-002471-MR). During the pendency of the appeal, Dodd withdrew as counsel for William Jr.

Upon remand, the trial court held that Beau and Heather were each entitled to receive a one-third share of the estate under the 1985 wills, without regard to the Settlement Agreement and Agreed Judgment. It further held that William Jr. and Raisor were still bound by the agreement and judgment and were each entitled to receive 50% of the remaining one-third of the estate. This decision was appealed to this court and was affirmed. The Kentucky Supreme Court denied discretionary review on February 14, 2007, and it ordered the opinion of this court to be published. *See Raisor v. Burkett*, 214 S.W.3d 895 (Ky.App. 2006).

On February 28, 2007, Raisor filed the complaint that is the subject of the present appeal. Therein, she alleged that William Jr., Beau, Heather, and Dodd negligently or intentionally misrepresented facts which caused her to enter into the May 10, 2001, Settlement Agreement. Raisor claimed that Dodd had consistently misrepresented to her that he was acting on behalf of not only William Jr., but also on behalf of Beau and Heather. She further alleged that, shortly after May 11, 2001, the Burketts had some sort of disagreement over the handling of the estate by Dodd or over Dodd's attorney fees. She claimed that this dispute prompted Beau and Heather to file their separate action. Also at that time, she claimed, the Burkett family turned against Dodd, who withdrew from his representation.

Raisor claimed that due to the negligent and/or intentional misrepresentations made by Dodd, or due to the negligent and/or intentional misrepresentations made to Dodd by one, some, or all of the Burkett family (William Jr., Beau, and Heather), she had suffered a great financial loss represented by the difference between the total value of the estate to which she would have been entitled under the 1999 will, the one-half of the estate she assumed she would receive when she signed the Settlement Agreement, and the portion to which she is finally entitled (1/6 of whatever is left in the estate). She contended that she never would have entered into the May 10, 2001, contract with William Jr. but for her reliance on the false or faulty information conveyed to her by Dodd.

William Jr., Beau, Heather, and Dodd sought dismissal of Raisor's complaint, arguing that her claims were barred by the operation of the doctrine of res judicata or issue and claim preclusion. Dodd also argued that the complaint was barred by the statute of limitations for fraud as well as by her election of remedies and that the Settlement Agreement prohibited her from relying on earlier representations. Raisor opposed the dismissal, arguing that this was a new and distinct lawsuit that was timely filed.

The circuit court first ruled that Raisor's claims were barred by the operation of the doctrine of res judicata. The court stated that "[s]ince the two suits concern the same controversy and the previous suit is deemed to have adjudicated every matter which was or could have been brought in support of the

cause of action, Ms. Raisor's present action is barred by the doctrine of res judicata."

As a further basis for its ruling, the court found that, although Raisor had discovered the alleged fraud by June 2001, she had failed to bring her claims within the five-year limitations period specified in Kentucky Revised Statutes (KRS) 413.120(12) for actions for fraud or mistake. Because the court found that her claim was barred on these two grounds, it did not address the remaining arguments regarding election of remedies or the parol evidence rule. This appeal by Raisor followed.

On appeal, Raisor first argues that the circuit court erred in relying on the statute of limitations because she could not have filed this action before February 14, 2007 (when the Kentucky Supreme Court denied discretionary review in the second appeal) because neither the claim nor the damages was ripe or finalized until that time. She maintains that if the appellate courts had sided with her and set aside the Settlement Agreement based on Dodd's misrepresentations, she would not have had a claim for misrepresentation and the will contest would have started over again. Alternatively, she contends that if the appellate courts had upheld the Settlement Agreement (based on Dodd's agency for all three Burketts), she would not have had a claim for misrepresentation.

In our view, this matter was correctly resolved by the circuit court's reliance on the statute of limitations for fraud or mistake. Raisor has nonetheless urged us to apply the standard for legal malpractice actions. Under KRS 413.245,

an action for malpractice must be brought within one 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." In construing the statute, and in particular the meaning of "discovered" in the legal malpractice context, the Kentucky Supreme Court in *Hibbard v. Taylor*, 837 S.W.2d 500 (Ky. 1992), held that the appellee "discovered his cause of action when he reasonably should have – when the result of the appeal became final and the trial court's judgment became the unalterable law of the case." *Id*. at 502. The court reasoned that

> [o]nly then was [the appellee] put on notice that the principal damage (the adverse judgment) was real; but more importantly, only then could he justifiably claim that the entire damage was proximately caused by counsel's failure, for which he might seek a remedy, and not by the trial court's error, for which he would have none.

Id. This interpretation of the statute was reaffirmed in *Michels v. Sklavos*, 869 S.W.2d 728 (Ky. 1994), where the court noted that when a claim for legal malpractice is based on

> "litigation" negligence, meaning the attorney's negligence in the preparation and presentation of a litigated claim resulting in the failure of an otherwise valid claim, whether the attorney's negligence has caused injury necessarily must await the final outcome of the underlying case.

Id. at 730.

But, this is not a legal malpractice case. In *Safeway Managing General Agency, Inc. v Clark & Gamble*, 985 S.W.2d 166 (Tx.Ct.App. 1998), the

Texas Court of Appeals distinguished negligent misrepresentation from legal malpractice as follows:

> A negligent misrepresentation claim is not equivalent to a professional malpractice claim. Under a negligent misrepresentation theory, liability is not based on professional duty; instead, liability is based on an independent duty to avoid misstatements intended to induce reliance.

Id. at 169 (citations omitted). Raisor's causes of action fall squarely within the latter category. The rules developed by our courts regarding the accrual of legal malpractice actions are specific to that tort alone, and we decline to extend them to misrepresentation actions.

Actions for fraud are governed by KRS 413.120(12), which provides that actions for relief or damages on the ground of fraud or mistake must be brought within five years after the cause of action accrued. The cause of action "shall not be deemed to have accrued until the discovery of the fraud or mistake." KRS 413.130(3).

Raisor does not dispute the circuit court's finding that she became aware of the alleged misrepresentations by June 2001, when Beau and Heather intervened to prevent the enforcement of the Settlement Agreement. We conclude that her causes of action for misrepresentation accrued at that time.

We also agree with the circuit court that Raisor's cause of action is barred by claim preclusion. In *Yeoman v. Commonwealth, Health Policy Board*, 983 S.W.2d 459 (Ky. 1998), the Kentucky Supreme Court held:

> The key inquiry in deciding whether the lawsuits concern the same controversy is whether they both arise from the same transactional nucleus of facts. If the two suits concern the same controversy; then the previous suit is deemed to have adjudicated every matter which was or could have been brought in support of the cause of action.

Id. at 465. *See also Jellinick v. Capitol Indemnity Corporation*, 210 S.W.3d 168, 172 (Ky.App. 2006).

The matter is stated clearer in *Eversole v. Webb*, 243 S.W.2d 490 (Ky. 1951), where Kentucky's highest court stated:

> Where a matter is in litigation the parties to it are required to bring forward their whole case. The plea of res judicata applies not only to the points placed in issue by the parties upon which the court is required to pronounce judgment but to every point which properly belonged to the subject of litigation and which the parties by reasonable diligence might have brought forward at that time.

Id. at 492. *See also Louisville Trust Company v. Smith*, 330 F.2d 483, 486 (6th Cir. 1964).

Raisor could have litigated her claim for negligent or intentional misrepresentation in the original action, but she did not do so. Thus, she is precluded from doing so in this new action.

The opinion and order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT

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NO BRIEF FILED FOR APPELLEES WILLIAM R. BURKETT III AND HEATHER BURKETT