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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000381-MR

ANNA C. PERRY, DMD, AND
MARTIN A. SEGAL & ASSOCIATES,
D/B/A ADVANCED COSMETIC DENTISTRY — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE CHARLES L. CUNNINGHAM, JR., JUDGE
ACTION NO. 04-CI-007015

JOHN WILSON, ATTORNEY AT LAW AND
RUCK, WILSON, HELLINE, AND BROCKMAN, PLLC — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MOORE, NICKELL, AND WINE, JUDGES.

NICKELL, JUDGE: Anna C. Perry, DMD, has appealed from the Jefferson Circuit Court's entry of a summary judgment in her legal malpractice action in favor of John Wilson and his law firm, Ruck, Wilson, Helline and Brockman,

PLLC. After a careful review of the law, the record, and the arguments of the parties, we affirm.

Wilson and his law firm were hired by Cincinnati Insurance Company (CIC)[1] to represent Perry in a dental malpractice action filed against her by Nancy White.[2] White alleged Perry had negligently performed a laser whitening procedure on her teeth resulting in burns to her gums requiring additional medical intervention including gum grafts and root canals. After discovery, the parties entered into a binding arbitration agreement specifying that any award would be final and not appealable. On July 31, 2002, the arbitrator issued its opinion finding Perry had been negligent in her treatment of White and her negligence caused White's injuries. The arbitrator awarded White damages in the amount of $454,073.24. Although Perry and Wilson were "shocked by the amount of the arbitration award," CIC promptly paid the award as required by the arbitration agreement.

Approximately three weeks later, Perry was contacted by one of White's acquaintances and former co-workers, Judy Penrod. Penrod informed Perry that she believed White had undergone unnecessary dental procedures to "beef up" her damages in the dental malpractice action. Penrod also alleged White

[1] CIC was Perry's dental malpractice insurance carrier.

[2] The action also named Perry's business partner, Dr. Martin Segal, and their dental practice, Martin A. Segal & Associates d/b/a Advanced Cosmetic Dentistry, as defendants. The claims against Dr. Segal were ultimately dismissed. Although no separate brief has been filed with this Court on behalf of Advanced Cosmetic Dentistry, Perry advances arguments on its behalf. However, as none of the arguments are specific to that entity, we shall not refer to it separately, only for clarity.

had attempted to bribe her to testify favorably for White in the action. She also told Perry of her interactions with White shortly after the whitening procedure. Penrod said White's gums were black and smelled of burning rubber and that White was in a considerable amount of pain. Perry informed Wilson of the contents of Penrod's conversations with White, but Wilson was suspicious of Penrod's motives. Wilson knew White had fired Penrod for making threats against another co-worker, Penrod had been arrested following the incident, and a no contact order was in place between the pair. Thus, Wilson believed Penrod's statements lacked credibility. Wilson took no action based on Penrod's revelations.

In December 2002, CIC informed Perry her malpractice insurance policy would not be renewed. She also learned of a pending investigation by the Kentucky Board of Dentistry[3] and that her name and the amount of the judgment against her had been published in the National Practitioner's Database for dental professionals. Shortly thereafter, Perry contacted Frank Recker, a dentist/attorney specializing in dental malpractice cases. Perry outlined with specificity how she had been wronged in the dental malpractice action, including her belief that Wilson had mishandled her defense. She supplied Recker with records from the suit and Recker obtained additional documentation from Wilson, CIC, and the expert witness who had testified on Perry's behalf. Following his investigation, Recker opined some "bizarre" things had occurred in the underlying action and some

[3] The investigation was eventually closed with no disciplinary action being taken against Perry.

things "were not right" although he stated Perry "knew that before she called me." Recker advised Perry to seek the assistance of a legal malpractice attorney.

By August 6, 2003, Recker had contacted Louisville attorney Matt Troutman regarding Perry's case. Troutman sent a letter to Recker dated August 23, 2003, declining the matter based on his opinion that Perry had no provable damages against Wilson and his belief that the statute of limitations on Perry's claim had expired. Perry met with Troutman following his letter to discuss his conclusions. Troutman again refused to pursue the matter. Perry then consulted with two additional attorneys and eventually instituted the instant legal malpractice action on August 22, 2004, accusing Wilson of mishandling nearly every aspect of the dental malpractice case. However, the bulk of the accusations leveled against Wilson concerned his failure to procure numerous expert witnesses, failure to present an adequate defense, failure to provide accurate and correct legal advice, and failure to pursue post-arbitration remedies.

On February 1, 2005, Wilson filed a motion for summary judgment alleging Perry's claims were barred by the one year statute of limitations on professional malpractice claims as set forth under KRS[4] 413.245. Wilson contended that since Perry consulted with Recker in December 2002, the limitations period began to run at that time. Wilson alternatively argued the time began running on the date of the arbitration award, the date her name and judgment amount was published in the national register, or from the date CIC cancelled her

[4] Kentucky Revised Statutes.

malpractice insurance policy. He alleged each of these events put Perry on notice that she had been harmed by Wilson's alleged malpractice and her damages caused thereby had been set. The trial court denied the motion holding Perry had brought her action within one year of the date she was told by an attorney she had an actionable claim, stating this was the date of "discovery" of the alleged malpractice. The trial court based its decision regarding the discovery date on similar language contained in *Conway v. Huff*, 644 S.W.2d 333, 334 (Ky. 1982), that "discovery" in legal malpractice actions occurs only when a party learns she has been "poorly or inadequately represented."

Following additional discovery and introduction of additional documentary evidence into the record, Wilson filed a second motion for summary judgment on October 5, 2006, again alleging Perry's claims were barred by the statute of limitations. In support of his motion, Wilson offered Recker's recent deposition and the contents of Recker's file on the matter. The trial court denied the motion for reasons similar to those it had given in denying the first motion.

On September 30, 2008, Wilson filed a third motion for summary judgment. Wilson alleged newly discovered facts which had been uncovered since the denial of his second motion for summary judgment. In particular, Wilson alleged Perry had met with Troutman prior to Troutman's authoring his disengagement letter on August 23, 2003. In a nine-page opinion and order, the trial court granted the third motion for summary judgment. The trial court held that with the completion of discovery it was clear Perry's claims were barred by

the statute of limitations. The trial court noted Perry had expressed concerns with Wilson's poor representation prior to completion of the binding arbitration, her damages were set when she received the arbitrator's award, and Wilson's representation of her ended in mid-December 2002. Thus, the trial court found the statute had run significantly more than one year prior to the filing of the instant suit in August of 2004.

Despite this conclusion, the trial court undertook an analysis of the possibility Perry did not "discover" her claim until some later time. In considering Perry's contention that her claim was timely filed, the trial court held the date she contacted Recker to review the matter and his agreement to investigate triggered the running of the limitations period. That date was set at February 4, 2003, the date Recker requested Perry's file on the matter. The trial court noted this was more than one year prior to the filing of the instant suit.

The trial court rejected Perry's argument that she could not have "discovered" the malpractice until a Kentucky attorney agreed to file the action for her. It held she should have discovered the negligence more than one year prior to filing her suit, and, pursuant to the guidance set forth in *Vanoy v. Milum*, 171 S.W.3d 745 (Ky. App. 2005), knowledge that the negligence was actionable or that an attorney would take the case did not control the start of the limitations period. The trial court stated such an approach would place litigants "or more precisely their lawyers, in control of the statute of limitation." Finding this position to be untenable, the trial court found the law of this Commonwealth is clear that

"knowledge that one has been wronged and by whom starts the running of the statute of limitations for professional malpractice, not the knowledge that the wrong is actionable." *Id*. at 749 (citation omitted). Thus, even assuming *arguendo* that Wilson had been negligent in his representation of Perry, the trial court held summary judgment was proper. This appeal followed and we affirm.

Perry advances three allegations of error in this appeal. First, she contends the trial court erred in finding her action was barred by the statute of limitations. Second, Perry contends there were genuine issues of material fact present and thus, disposition of her claims via summary judgment was improper. Finally, Perry argues the trial court's grant of summary judgment was contrary to the law of the case doctrine and against public policy.

Perry first alleges her complaint was timely filed under the applicable statute of limitations. It is undisputed that KRS 413.245 sets forth the controlling limitations period. Under that statute, civil actions for professional malpractice "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." Thus, the statute describes two limitations periods and our analysis of Perry's allegation of error must likewise be two-fold. First, we must determine the date of "occurrence" of the alleged malpractice. *Queensway Financial Holdings, Ltd. v. Cotton & Allen, P.S.C.*, 237 S.W.3d 141, 147 (Ky. 2007). Second, if the instant action was filed more than one year after the occurrence date, we must then determine the date of Perry's actual or constructive

discovery of the cause of action. *Michels v. Sklavos*, 869 S.W.2d 728, 730 (Ky. 1994). If the discovery date was later in time than the occurrence date, and Perry's action was filed more than one year after the discovery date, it will be deemed untimely. We hold the trial court correctly found that Perry's action against Wilson was untimely.

In *Lane v. Richards*, 256 S.W.3d 581, 583 (Ky. App. 2008), we stated:

> [i]n the context of the "occurrence" limitations period, a "cause of action is deemed to accrue in Kentucky where negligence and damages have both occurred. . . . [T]he use of the word 'occurrence' in KRS 413.245 indicates a legislative policy that there should be some definable, readily ascertainable event which triggers the statute."

(quoting *Queensway*, 237 S.W.2d at 147). Claims for professional negligence do not "accrue until there has been a negligent act and reasonably ascertainable damages are incurred." *Pedigo v Breen*, 169 S.W.3d 831, 833 (Ky. 2004). Such damages are not deemed definite and non-speculative until the underlying action becomes final and non-appealable. *Id*. (citing *Hibbard v. Taylor*, 837 S.W.2d 500 (Ky. 1992)). Stated another way, the statute of limitations does not begin to run until there is a final adverse determination of the underlying claim. *Faris v. Stone*, 130 S.W.3d 1, 5 (Ky. 2003). *See also Alagia, Day & Trautwein v. Broadbent*, 664 S.W.2d 121 (Ky. 1994). However, one need not know the specific dollar amount of damages before the statute of limitations begins to run, one must merely know of one's injury. *Matherly Land Surveying, Inc. v. Gardiner Park Development, L.L.C.*, 230 S.W.3d 586, 591 (Ky. 2007) ("The statute of limitations begins to run as soon as the injury becomes known to the injured." (citations omitted)).

There is no dispute that Wilson's allegedly negligent actions occurred prior to and during the arbitration proceeding. There is likewise no doubt Perry was aware of Wilson's alleged poor performance before receiving the arbitrator's award. This is especially evident in light of Perry's communications with CIC wherein she discussed her concerns about Wilson's inadequate performance in her defense. The majority of the claims set forth in the instant complaint center on pre-arbitration activities or failures during the actual arbitration process. Thus, Wilson's acts giving rise to Perry's civil complaint for negligence occurred on or before the date of the arbitrator's award. Any negligence from Wilson's failure to pursue post-decision remedies must have necessarily occurred a short time after entry of the award.

The arbitration award was rendered on July 31, 2002. The award would normally have become final ninety days after Perry received a copy of the decision when the time expired for making application to the circuit court to vacate the arbitrator's decision pursuant to KRS 417.160(2). However, KRS 417.160(2) further provides that when an application to vacate an award is "predicated upon . . . fraud . . . it shall be made within ninety (90) days after such grounds are known or should have been known." Perry admits she was informed of White's possible fraud on August 21 or 22, 2002, effectively closing the ninety-day window on November 20, 2002.

Although the arbitration award was final on November 20, 2002, and Perry's damages were set on that date, we cannot say her cause of action accrued

on that date. Rather, it appears from the record that Wilson continued to represent Perry in some fashion until December 2002. Thus, under the continuous representation rule,[5] the accrual of her cause of action was tolled until the termination of the professional relationship. While the record does not disclose the exact date of Wilson's termination, it is clear from the record that Wilson's representation of Perry must have ended prior to December 31, 2002. Thus, that is the latest date which could properly be utilized under the "occurrence" limitations period. As the instant action was not filed until August 18, 2004, it was clearly filed more than one year after the "occurrence" and was thus untimely under that portion of KRS 413.245.

Next, because the occurrence date was more than one year prior to the Perry's filing of her claim, we must determine when Perry discovered or reasonably should have discovered her cause of action against Wilson. If the discovery date is also more than one year prior to the filing of her complaint, Perry's claims will be deemed time-barred.

Perry first contends she did not discover, and could not have reasonably discovered, any actionable claim until her present attorneys told her in July 2004 that Wilson had provided negligent representation and that this

[5] For an in-depth discussion of the history and purposes of the continuous representation rule and its application in legal negligence cases, see *Broadbent* and the cases cited therein. However, for purposes of our decision today, such a detailed discussion is unwarranted. Suffice it to say that due to the fiduciary relationship between attorney and client, there is a presumption of reliance by a client on her attorney's advice, and a cause of action based on allegedly faulty or negligent representation does not accrue until the relationship ends as no cognizable claim has yet appeared.

negligence was the ultimate cause of her damages. However, as noted earlier, knowledge that one has an actionable claim has no bearing on the date the statute of limitations begins to run. *Vannoy*, 171 S.W.3d at 749. *See also Conway v. Huff*, 644 S.W.2d 333 (Ky. 1982). Perry's argument to the contrary is without merit. Thus, we reject Perry's contention that her cause of action did not accrue under the discovery rule until July 2004.

Alternatively, Perry contends she did not discover all of the elements of her cause of action until she received Troutman's non-engagement letter dated August 23, 2003. She argues that *Conway* stands for the proposition that a party must be advised by a legal professional "that their previous attorney represented them poorly or inadequately" before the statute of limitations begins to run. Having carefully reviewed *Conway* and its progeny, we are unable to locate any support for Perry's contention.

The decision in *Conway* stands for the proposition that the statute of limitations begins to run when one discovers "that a wrong has been committed and not that the party may sue for the wrong." 644 S.W.2d at 334. Conway had represented Huff in her divorce action. Huff, although dissatisfied with the result reached by Conway in the action, was unaware she had been poorly represented until she conferred with a subsequent attorney. It was the receipt of the knowledge she had been wronged that triggered the running of the statute of limitations, not the fact that such knowledge had come from an attorney.

Perry's contention to the contrary is based on a hyper-technical and illogical reading of the plain language of the *Conway* opinion. Subsequent cases relying on *Conway* have not modified the holding as Perry urges. Further, "[t]he discovery rule focuses not on when a plaintiff has actual knowledge of a cause of action, but whether a plaintiff acquired knowledge of existing facts sufficient to put the party on notice." *Blanton v. Cooper Industries, Inc.*, 99 F.Supp.2d 797, 802 (E.D.Ky. 2000).

Here, Perry was aware of her damages, the reasons for them, and who caused them shortly after the arbitration award was entered and certainly no later than early 2003 when she consulted with Recker and informed him of all of Wilson's failings in his representation of her in the underlying action. Further, Perry had expressed concerns to CIC regarding Wilson's allegedly deficient performance well before the completion of the arbitration process. This information, taken as a whole, was clearly sufficient to charge Perry with at least constructive knowledge of her legal negligence claim in excess of one year prior to the instant filing. We are unable to conclude the trial court erred in so finding.

Perry's second contention is that the trial court improperly granted summary judgment in favor of Wilson as there were genuine issues of material fact on the statute of limitations issue which should have been presented to a jury. We disagree.

In reviewing a trial court's grant of a summary judgment, we must determine whether the trial court correctly found there was no genuine issue as to

any material fact and that the moving party was entitled to judgment as a matter of law. CR[6] 56.03. "[T]he proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor." *Steelvest v. Scansteel Service Center, Inc.,* 807 S.W.2d 476, 480 (Ky. 1991). "The standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft,* 916 S.W.2d 779, 781 (Ky. App. 1996).

The trial court had significant amounts of evidence before it upon which to base its decision. Although the parties contested the application of the law and the statute of limitation to the facts, the facts themselves were largely undisputed. When taken in the light most favorable to Perry, the non-moving party, as *Steelvest* mandates, the record supports the trial court's ruling. Perry was damaged, she was aware of her damages, and she was aware of the likely cause of those damages immediately upon entry of the arbitration award. She began investigating her ability to recover for her injury nearly simultaneously with her discharge of Wilson from her employ. Nothing in the record indicates a true dispute as to any relevant date, save Perry's self-serving affidavit that she was unaware of her damages until advised in 2004 that she could maintain an action for legal malpractice.

[6] Kentucky Rules of Civil Procedure.

As we have previously stated, knowledge one may sue has no bearing on the running of the statute of limitations. *Vannoy*. We are unable to conclude from the record before us that Perry presented evidence of any genuine issue of material fact sufficient to overcome a motion for summary judgment. Contrary to Perry's suggestion, the mere fact that two circuit court judges[7] reached opposite conclusions does not, in itself, create a factual dispute. Perry cites us to no authority supportive of her contention and we are convinced none exists. Thus, we hold the trial court correctly granted summary judgment in favor of Wilson.

Finally, Perry contends the trial court's grant of summary judgment was contrary to the law of the case doctrine and against public policy. Again, we disagree. First, the law of the case doctrine has no application to the matter at bar. "The law of the case doctrine is 'an iron rule, universally recognized, that an opinion or decision of an appellate court in the same cause is the law of the case for a subsequent trial or appeal however erroneous the opinion or decision may have been.'" *Brooks v. Lexington-Fayette Urban County Housing Authority*, 244 S.W.3d 747, 751 (Ky. App. 2007) (quoting *Union Light, Heat & Power Co. v. Blackwell's Adm'r,* 291 S.W.2d 539, 542 (Ky. 1956)). There has been no prior appellate adjudication in this case.

[7] Judge Denise Clayton was the original presiding judge in this action. Upon her appointment to this Court in 2008, Judge Charles L. Cunningham was appointed as her successor on the Jefferson Circuit Court bench. Judge Cunningham ruled on the third motion for summary judgment which is at issue in this appeal.

Nevertheless, in the context of rulings made in the trial court, the doctrine creates a presumption that rulings will be adhered to throughout the litigation. However, as Perry concedes in her brief, trial courts have the discretion to revisit prior rulings if reasonable convictions exist that the prior ruling was incorrect or if subsequent events demonstrate that the prior ruling was incorrect. *Davidson v. Castner-Knott Dry Goods Co., Inc.*, 202 S.W.3d 597, 602 (Ky. App. 2006). Further, a trial court's denial of a motion for summary judgment does not foreclose its ability to grant a subsequent motion for summary judgment under the law of the case doctrine. *See Hallahan v. The Courier-Journal*, 138 S.W.3d 699, 706 n.4 (Ky. 2004) (citing *Fisher v. Trainor*, 242 F.3d 24, 29 n.5 (1st Cir. 2001)). This is particularly true when additional discovery discloses the absence of any genuine factual disputes.

Here, the second motion for summary judgment was made almost two years after the first. The third motion followed the second by nearly twenty-one months. Much discovery took place in the interim which clarified the activities precipitating this civil action. In addition, between the second and third motions for summary judgment, the Supreme Court of Kentucky rendered its opinions in *Matherly* and *Queensway*, and this Court rendered its opinion in *Lane*, all of which sought to clarify the law applicable to professional malpractice actions and the statute of limitations set forth in KRS 413.245. Thus, the legal and factual landscape had changed dramatically during the intervening twenty-one months between the second and third motions. Therefore, the trial court's decision to

revisit its prior rulings on Wilson's motions for summary judgment was entirely proper. We hold the trial court did not abuse its discretion and did not violate the law of the case doctrine.

Although Perry alleges "there is a compelling public policy argument to be made to preclude such rulings when no new facts exist or are argued," she advances no such argument nor does she provide citation to authority supportive of her position. On the contrary, as previously stated, our review of the record indicates new facts did exist and were argued in the third motion for summary judgment. Absent any support for her contention, we conclude the argument is without merit. Further, we decline the opportunity Perry urges upon us to adopt a standard similar to that of the federal courts whereby a denial of a summary judgment motion bars consideration of subsequent motions unless different issues, grounds, facts, or precedents are cited. We know of no compelling reason to adopt such a standard at this juncture as our jurisprudence is clearly contrary to such a position.

Therefore, for the foregoing reasons, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

Donald M. Heavrin
Chris C. Hodge
Louisville, Kentucky

BRIEF FOR APPELLEES:

Elizabeth Ullmer Mendel
Louisville, Kentucky