RENDERED: JULY 29, 2016; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001086-MR
AND
NO. 2015-CA-001087-MR

WILLIAM G. KNOEBEL,
and KNOEBEL & VICE, PLLC — APPELLANT/CROSS-APPELLEE

v.

APPEAL AND CROSS-APPEAL FROM MASON CIRCUIT COURT
HONORABLE JAY DELANEY, JUDGE
ACTION NO. 14-CI-00223

LEO A. MCKAY — APPELLEE/CROSS-APPELLANT

OPINION
DISMISSING,
VACATING AND REMANDING

** ** ** ** **

BEFORE: ACREE, COMBS AND DIXON, JUDGES.

COMBS, JUDGE: On August 26, 2014, Leo A. McKay filed a complaint for professional negligence against William G. Knoebel and Knoebel & Vice, PLLC (collectively Knoebel). Knoebel sought summary judgment on ground that

McKay's claim was barred by the one-year statute of limitations set forth in KRS[1] 413.245. The trial court determined as a matter of law that the date of discovery had been August 12, 2013. However, it denied Knoebel's motion "as a genuine issue of material fact exists regarding the issue of continuous representation." McKay appeals and contends that the trial court erred in determining that August 12, 2013, was the date of discovery. Knoebel appeals separately[2] and contends that the continuous representation rule does not apply. After our review, we conclude that order denying summary judgment is interlocutory -- despite the finality recital in the trial court's "Final Judgment." Therefore, we must dismiss both appeals.

The surrounding facts are undisputed. McKay engaged attorney Knoebel to represent him in a workers' compensation claim, and Knoebel failed to timely file an application for workers' compensation benefits on McKay's behalf. On August 26, 2014, McKay filed a Verified Complaint for Legal Malpractice against Knoebel in Mason Circuit Court. On October 29, 2014, Knoebel filed a Motion for Partial Summary Judgment contending that McKay's claim for professional negligence was time-barred by the one-year statute of limitations set forth in KRS 413.245. On January 20, 2015, the trial court entered an Agreed Order, reciting "that there existed an attorney/client relationship between [McKay]

[1] Kentucky Revised Statutes.

[2] Although they arise from the same operative set of facts, these are two separate appeals and were not filed as an appeal and cross appeal. For the sake of economy, we are addressing them together.

and [Knoebel] and that there was a deviation from the standard of care. The issues of causation and damages are reserved."

On May 20, 2015, the trial court entered the following Order denying Knoebel's Motion for Summary Judgment:

> On August 12, 2013, Knoebel and McKay met briefly in Knoebel's office at the Mason County Justice Center. At that time Knoebel informed McKay that "I have a problem, we have a problem. You didn't do anything wrong. I made a mistake. Some date has expired. You have to sue me. He said he was sorry and that his insurance carrier would be contacting me." (McKay Depo. Page 54, 3-12). Later that day McKay talked with Attorney John Estill, who had referred McKay to Knoebel, who stated "Well, he was honest with you, he made a mistake. You have to hire an attorney". [sic] (McKay Depo. Page 54, 21-23) McKay later received a letter from Knoebel dated September 10, 2013, which states as follows:
>
> > As you know from our previous conversation a problem has arisen with regard to proceeding with your workers' compensation claim. You reported that an injury occurred on July 21, 2011. However, this injury was denied by the insurance carrier for the City of Maysville. Because temporary total disability benefits were not paid, an application for benefits should have been filed with the Workers' Compensation Board by July 20, 2013. As we discussed this did not occur. Therefore, at this time, I believe if you wish to pursue this matter you should contact a new attorney and discuss your options.
> >
> > I have attempted to determine if there were other options available without success. Since John Estill referred you to my office, I did discuss the situation with him and understand you have already shared this

information with him.

> [T]he Verified Complaint for Legal Malpractice was filed on August 26, 2014. … more than one (1) year from August 12, 2013, the date of the Justice Center meeting between McKay and Knoebel, but less than one-year [sic] from the date of the September 10, 2013 letter from Knoebel to McKay.
>
> The issue before the Court relates to the date of discovery. Knoebel maintains … that the complaint is time barred because it was not filed within **one (1) year from the date when the cause of action was, or reasonably should have been, discovered by the party injured.** [Knoebel] argues that the date of discovery is August 12, 2013, the date of the Justice Center meeting when he informed McKay that he had missed the deadline and that he had to sue him. …

McKay, on the other hand, contends that the date of discovery should be September 10, 2013, the date of the letter from Knoebel to McKay ….

The Court FINDS, as a matter of law, that the date of discovery is August 12, 2013, the date of the Justice Center meeting in which Knoebel informed McKay that he had missed the filing deadline and he needed to sue him. However, the Court also FINDS that there is a factual dispute as to when Knoebel's representation of McKay ended. If that representation ended on September 10, 2013, the continuous representation rule may toll the running of the statute of limitations until that date. …
…

> McKay testified at this deposition that Knoebel told him at the August 12, 2013 meeting at the Justice Center that his insurance company would be getting in touch with him. Moreover, in the September 10, 2013 letter, written approximately a month later, Knoebel stated "Therefore, **at this time** I believe if you wish to pursue this matter you should contact a new attorney and discuss your options". [sic] (emphasis added) The letter also

> stated that "I have attempted to determine if there were other options available without success. …" The nature and timing of the letter suggests ongoing efforts by Knoebel to remedy the situation without success. Unfortunately, the record is void of any direct evidence regarding this issue. The Court must therefore view the record in a light most favorable to the party opposing the summary judgment, and resolve any doubts in their favor. *Steelvest Inc. v Scansteel Service Center*, 207 S.W.2d 476 (1991).
>
> Accordingly, [Knoebel's] motion for summary judgment is OVERRULED, as a genuine issue of material fact exists regarding the issue of continuous representation.

(Emphasis original).

The parties subsequently entered into a "high/low settlement." *Black's Law Dictionary*, 8th ed. (2004), defines a high/low agreement as "a settlement in which a defendant agrees to pay the plaintiff a minimum recovery in return for the plaintiff's agreement to accept a maximum amount regardless of the outcome of the trial." In the case before us, the settlement agreement recites that Knoebel had filed a Motion for Summary Judgment on the grounds that McKay's claim was barred by the statute of limitations. That motion was overruled by the trial court. It was agreed that the parties "will jointly request that the Mason Circuit Court … make [that] Order …'Final and Appealable as there is no just reason for delay', [sic] pursuant to KY Civil Rule 54.02. … [and that Knoebel] will thereafter appeal." The sum agreed upon for settlement, determined by whether Knoebel or McKay prevailed, was to be paid to McKay "[a]t the completion of the appellate process, …."

On July 6, 2015, the trial court entered a "Final Judgment," which states in its entirety as follows:

> WHEREAS the parties having advised the Court that all matters in controversy have been resolved by the parties, with the amount of the settlement being determined to a "high/low" at the conclusion of the appellate process;
> IT IS HEREBY ORDERED AND ADJUDGED that the Order of May 20, 2015 be and hereby is final and appealable and there is no just cause for delay.

(Emphasis original). On July 13, 2015, McKay and Knoebel filed separate Notices of Appeal from the Orders of May 20, 2015, and July 6, 2015.

KRS 413.245 is the statute of limitations governing attorney malpractice claims. *Abel v. Austin*, 411 S.W.3d 728, 738 (Ky. 2013). It provides in relevant part:

> [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. ...

In addition to the date of discovery itself, the concept of continuous representation must be addressed.

> The continuous representation rule is a branch of the discovery rule. In substance, it says that by virtue of the attorney-client relationship, there can be no effective discovery of the negligence so long as the relationship prevails.

Alagia, Day, Trautwein & Smith v. Broadbent, 882 S.W.2d 121, 125 (Ky. 1994).

Thus, the facts of every case create a unique nuance as to the actual date of discovery for purposes of the running of the pertinent statute of limitations. The language of the trial court's order of May 20, 2015, contains equivocal and contradictory findings. McKay contends that the trial court erred in determining that the date of discovery of the legal malpractice was August 12, 2013, the date of his conversation with Knoebel at the Mason County Justice Center.

However, McKay relies on subsequent language in that same order reciting that Knoebel's letter of September 10, 2013, suggested "ongoing efforts by Knoebel to remedy the situation without success." The effect of this language is to focus upon the continuous representation rule without resolving whether or not it applies in this case. Despite the recitation of finality in its Order of July 6, 2015, it appears to this Court that the underlying conflict in the Order of May 20, 2015, denying summary judgment was **never decided** by the trial court.

It is incumbent upon this Court "to raise a jurisdictional issue on its own motion if the underlying order lacks finality." *Tax Ease Lien Investments 1, LLC v. Brown*, 340 S.W.3d 99, 101 (Ky. App. 2011).

> The general rule under CR 56.03 is that a denial of a motion for summary judgment is, first, not appealable because of its interlocutory nature and, second, is not reviewable on appeal from a final judgment where the question is whether there exists a genuine issue of material fact. ...
>
> However, there is an exception to the general rule …. The exception applies where: (1) the facts are not in dispute, (2) the only basis of the ruling is a matter of law, (3) there is a denial of the motion, and (4) there is an

> entry of a final judgment with an appeal therefrom. Then, and only then, is the motion for summary judgment properly reviewable on appeal ….

Transp. Cabinet, Bureau of Highways, Com. of Ky. v. Leneave, 751 S.W.2d 36, 37 (Ky. App. 1988) (citations omitted).

No exception exists in this case that would allow us to deviate from the general rule. Although the trial court determined the date of discovery as a matter of law, it denied the motion for summary judgment because "a genuine issue of material fact exists regarding the issue of continuous representation."

> Before the processes of CR 54.02 may be invoked for the purpose of making an otherwise interlocutory judgment final and appealable, there must be a final adjudication upon one or more of the claims in litigation. The judgment must conclusively determine the rights of the parties in regard to that particular phase of the proceeding. … [T]he judgment … was interlocutory and this status was not altered by an attempted compliance with CR 54.02.

Hale v. Deaton, 528 S.W.2d 719, 722 (Ky. 1975). The trial court never determined the ultimate issue in this case: namely, whether or not McKay's claim against Knoebel is time-barred. That issue is yet to be decided. Therefore, the order denying Knoebel's Motion for Summary Judgment is interlocutory, and the inclusion of a finality recital in the trial court's "Final Judgment" does not alter the reality of that status. "[T]he fact that the Circuit Court's Order recites that it is 'final and appealable' does not make it so." *Com. ex rel. Stumbo v. Phillip Morris, USA*, 244 S.W.3d 116, 120 (Ky. App. 2007).

We are compelled to dismiss both appeals. We vacate the orders of the trial court and remand these cases to the trial court for additional proceedings.

ALL CONCUR.

BRIEF FOR APPELLANT/CROSS-APPELLEE, WILLIAM G. KNOEBEL AND KNOEBEL & VICE, PLLC:

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BRIEF FOR APPELLEE/CROSS-APPELLANT, LEO A. MCKAY:

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