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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001395-MR

BROOKS COLLINS
and LINDA COLLINS — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARY M. SHAW, JUDGE
ACTION NO. 13-CI-006259

JOSEPH L. WHITE — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: KRAMER, D. LAMBERT, AND MAZE, JUDGES.

KRAMER, JUDGE: Brooks and Linda Collins filed malpractice claims against their former attorney, Joseph L. White, in Jefferson Circuit Court. Perceiving that it lacked subject matter jurisdiction to adjudicate their claims, however, the circuit court entered an order of dismissal. The Collinses have appealed. We now reverse.

By way of background, the Collinses retained White on or about February 1, 2011, to represent their interests in a personal injury action they planned to file against the University of Louisville School of Dentistry and a few of its agents and employees. White filed their action (hereinafter, "13-CI-06259") in Jefferson Circuit Court on May 6, 2011. However, the defendants in that separate matter responded with motions to dismiss based upon the statute of limitations; and the circuit court ultimately granted their motions, holding that the statute of limitations applicable to the Collinses' claims had expired no later than March 1, 2011.

The Collinses thereafter terminated White's employment. They consulted with a second (and their current) attorney, who advised them that the circuit court had correctly disposed of their claims based upon the statute of limitations; an appeal of the circuit court's decision would have lacked merit; and that they had accordingly forfeited an otherwise valid personal injury claim due to White's litigation negligence. Thus, rather than appealing the circuit court's judgment in 13-CI-06259, they instituted the underlying litigation to assert malpractice claims against White.

White subsequently moved to dismiss, asserting the circuit court lacked subject matter jurisdiction over the Collinses' malpractice claims. To explain, White based his reasoning upon his view that only a court of review in a

direct appeal is authorized to state with certainty whether the statute of limitations *truly* expired. Thus, a malpractice action based upon a claim that has been lost due to the statute of limitations can only ever be *ripe* if (1) the lost claim was actually filed in circuit court, and (in the event the lost claim was ultimately dismissed on limitations grounds) and (2) the dismissal was appealed. And, White reasoned, because the Collinses never appealed the circuit court's order of dismissal in 11-CI-03214, it was now *impossible* to determine whether attorney negligence – rather than trial court error – proximately caused the loss of their claims. Consequently, he argued, the Collinses' malpractice claims against him could *never* ripen.

The Collinses disagreed for a variety of reasons which, for the sake of brevity, will be addressed in the context of our analysis below. Ultimately, the circuit court dismissed their malpractice claims for the reasons urged by White.

On appeal, the Collinses contend the circuit court erred by concluding, consistently with White's above-stated argument, that their failure to appeal in 11-CI-03214 divested it of subject matter jurisdiction to resolve their malpractice claims against White. We agree with the Collinses, and for roughly the same reasons they asserted below in opposition to White's motion to dismiss. To review, the circuit court's decision in this matter stands for the following proposition: If an aggrieved client has reason to believe his or her attorney missed the applicable statute of limitations deadline for filing suit, the aggrieved client

must nevertheless – for purposes of preserving the right to assert a subsequent malpractice action against the attorney on that basis – file the suit anyway and maintain it until the conclusion of an appeal. Only then can a suit for legal malpractice be filed.

With that said, there are at least two problems with the circuit court's reasoning. First, it ignores the public policy set forth in Kentucky Rule of Civil Procedure (CR) 11 of discouraging, rather than encouraging, frivolous suits. *See, e.g., Large v. Oberson*, 537 S.W.3d 336, 340 (Ky. App. 2017) (affirming trial court's decision to sanction a litigant pursuant to CR 11 for "unreasonably filing and maintaining a time-barred suit after the affirmative defense of limitations was raised.").

Second, nothing in Kentucky law supports it. To the contrary, Kentucky caselaw illustrates that malpractice suits may be based upon *unappealed* orders of dismissal due to the applicable statute of limitations,[1] or even upon situations where *no complaint was ever filed*.[2] And, this Court has indicated that in such instances the trial court considering the malpractice action and any subsequent courts of review are vested with authority, albeit solely for purposes of

[1] *See, e.g., Osborne v. Keeney*, 399 S.W.3d 1 (Ky. 2012).

[2] *See, e.g., Kendall v. Godbey*, 537 S.W.3d 326 (Ky. App. 2017).

adjudicating the subsequent malpractice action, to resolve any lingering dispute over whether the applicable statute of limitations legally expired.[3]

Indeed, the only authority the circuit court cited in support of its reasoning – namely, *Hibbard v. Taylor*, 837 S.W.2d 500 (Ky. 1992) – *undermines* the circuit court's reasoning. There, the Kentucky Supreme Court explained that when an aggrieved party *chooses to appeal* a trial court's order that dismisses their claim on statute of limitations grounds, that party is effectively representing his or her belief that the dismissal was due to the error of the trial court; thus, until the appeal is resolved, he or she cannot *also* justifiably claim that the dismissal was due to the negligence of his or her attorney, and any such claim is not considered ripe. *Id*. at 502.

Conversely, the *Hibbard* Court explained that *in the absence of an appeal*, an aggrieved party may justifiably claim that the dismissal was due to the negligence of his or her attorney in at least two circumstances: (1) if, following the dismissal, the aggrieved client's attorney "refused to handle the appeal, indicating to the client that the trial court had ruled correctly;" or (2) if – as is the case here – *the aggrieved client consults with another attorney following the dismissal, and the*

[3] That this is the type of *dispute* that may be litigated in a subsequent malpractice action of this variety (*i.e.*, where no appeal or suit was filed) is implicit from *Godbey*, 537 S.W.3d at 332, wherein this court stated, in the context of a malpractice action involving an attorney's alleged negligence in failing to file *any* lawsuit, that it was "undisputed" that the attorney "missed the one-year statute of limitations in a negligence action."

other attorney advises the aggrieved client that the trial court had ruled correctly. *Id*. The Kentucky Supreme Court further explained that in the absence of an appeal, and for purposes of any subsequent malpractice action, either of those situations could be considered the point at which the *new* statute of limitations – relative to any subsequent malpractice action against the negligent attorney – begins to run. *Id*.; *see also Conway v. Huff*, 644 S.W.2d 333, 334 (Ky. 1982) (explaining statute of limitations for aggrieved client's malpractice action, where no appeal was filed, began to run on the date she consulted with a second attorney, post-judgment, and was advised "that she had been poorly or inadequately represented by" her prior attorney.)

Accordingly, we REVERSE and REMAND for further proceedings not inconsistent with this opinion.

LAMBERT, D., JUDGE, CONCURS.

MAZE, JUDGE, CONCURS WITH SEPARATE OPINON.

MAZE, JUDGE, CONCURRING WITH SEPARATE OPINION: I fully concur with the reasoning and the result of the majority opinion. As the majority correctly notes, Kentucky has never adopted a "*per se*" rule requiring an appeal from the underlying judgment prior to bringing a legal malpractice claim. Rather, the Kentucky cases have held only that a cause of action for legal malpractice does not accrue during the period that an appeal is pending. *Hibbard v. Taylor*, 837 S.W.3d

500, (Ky. 1992), and *Conway v. Huff*, 664 S.W.2d 333 (Ky. 1982). The trial court's reasoning misinterprets the accrual rule as adopting a "*per se*" rule.

While I recognize that this is a case of first impression, I fully agree with the majority that a legal malpractice plaintiff does not have the burden to prove the exhaustion of all avenues of appeal on the underlying claim in order to state a legal malpractice claim. *Bloome v. Wiseman, Shaikewitz, McGivern, Wahl, Flavin & Hesi, P.C.*, 279 Ill. App. 3d 469, 475, 664 N.E.2d 1125, 1129 (1996). Furthermore, I agree with the analysis by the Court of Appeals of New York favoring adoption of the "likely to succeed" standard.

> On balance, the likely to succeed standard is the most efficient and fair for all parties. This standard will obviate premature legal malpractice actions by allowing the appellate courts to correct any trial court error and allow attorneys to avoid unnecessary malpractice lawsuits by being given the opportunity to rectify their clients' unfavorable result. Contrary to defendants' assertion that this standard will require courts to speculate on the success of an appeal, courts engage in this type of analysis when deciding legal malpractice actions generally[.] We reject the nonfrivolous/meritorious appeal standard proposed by defendants as that would require virtually any client to pursue an appeal prior to suing for legal malpractice.

Grace v. Law, 24 N.Y.3d 203, 210-11, 21 N.E.3d 995, 998-99 (2014) (cleaned up).

The focus of the "likely to succeed" standard is on the entry of a final resolution of the underlying case. *Hewitt v. Allen*, 118 Nev. 216, 43 P.3d 345, 349 (2002). In the current case, the underlying matter became final after the circuit

court granted the motion to dismiss based on the statute of limitations and that judgment became final without appeal. The Collinses still bear the ultimate burden of proving that the underlying action was dismissed due to White's alleged negligence, as opposed to either judicial error or other factors. Our holding in this opinion is simply that the filing of an appeal from the underlying judgment is not a jurisdictional prerequisite to bringing a legal malpractice claim. Since the trial court granted White's motion to dismiss based on this reasoning, I fully agree with the majority that this matter must be remanded to the trial court for additional proceedings on the merits of the legal malpractice claim.

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