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RENDERED: JUNE 11, 2015
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2013-SC-000228-DG
AND
2013-SC-000682-DG

JOHN J. SCOTT
AND WHITLOW & SCOTT — APPELLANTS/CROSS-APPELLEES

ON REVIEW FROM COURT OF APPEALS
V. CASE NOS. 2011-CA-000431-MR AND 2011-CA-000502-MR
HARDIN CIRCUIT COURT NO. 05-CI-00800

TIM DAVIS AND
TIM DAVIS & ASSOCIATES, INC. — APPELLEES/CROSS-APPELLANTS

MEMORANDUM OPINION OF THE COURT

AFFIRMING, IN PART, AND REVERSING, IN PART

This decade-old legal malpractice action is before us on discretionary review for a second time. Tim Davis first brought the underlying suit against John Scott in 2005, but the trial court granted summary judgment in Scott's favor because Davis had illegally assigned his malpractice claim to a third party as a part of a settlement agreement with the third party. We agreed with the trial court that the assignment was illegal and remanded the case to the trial court with directions to dismiss Davis's complaint without prejudice.

Following our decision, Davis filed various post-judgment motions with the trial court and a separate malpractice action, identical in form to his 2005 claim with the exception of the assignment, which Davis asserted had been officially terminated. But the trial court denied Davis's post-judgment

motions in the original action and dismissed the new complaint on statute-of-limitations grounds.

On the second round of appeal, the Court of Appeals held this Court intended to permit Davis to continue prosecuting his malpractice claim rather than have the statute of limitations foreclose it. So the Court of Appeals held the trial court abused its discretion in not permitting post-judgment relief upon Davis's showing the improper assignment had been eliminated. But the Court of Appeals affirmed the trial court's denial of Davis's new complaint. Both Davis and Scott appealed the decision of the Court of Appeals.

On discretionary review, we now face the effect of Davis's illegal assignment in the original suit and the effect of our opinion remanding the case to the trial court directing it to dismiss the action without prejudice.

We hold that the trial court did not abuse its discretion in denying Davis post-judgment relief. Davis simply does not meet the requirements for relief. So we reverse the Court of Appeals on this issue. But we affirm the Court of Appeals with regard to Davis's new complaint. A dismissal without prejudice is as if the suit was never filed in the first place. Accordingly, Davis's separate malpractice action, filed against Scott in 2010, was commenced far outside the one-year statute of limitations and is time barred. We reject Davis's attempt to paint the 2010 complaint as an amended complaint. We hold that relation-back—either as an equitable principle or under CR 15.03(2)—is not appropriate for these circumstances.

I. FACTUAL AND PROCEDURAL BACKGROUND.

The instant case forges another link in the lengthening chain of litigation binding Davis and Scott. Previously, in 2010, Davis and Scott appeared before us over the issue of whether the assignment of a legal malpractice claim is allowed under Kentucky law. In that 2010 opinion, we detailed the facts leading to Scott's alleged malpractice during his representation of Davis. It is unnecessary to provide an extensive description of the facts underlying Davis's malpractice claim. Below is a condensed version of the facts, paraphrased from our 2010 opinion:

> Davis, doing business as Tim Davis & Associates, Inc., a third-party health-care-benefits administrator, negotiated to purchase a competitor in 2002. As a condition of the negotiations, Davis was required to sign a non-solicitation agreement, which prohibited him from communicating with any of the competitor's clients in the event the sale was unsuccessful. The purchase of the competitor ultimately fell through and the non-solicitation agreement was triggered.
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> Shortly after the collapse of the purchase, Global Risk Management acquired the competitor. One of the competitor's clients reached out to Davis and solicited his company's services. Because this was still during the 15-month-period of prohibited solicitation, Davis contacted his lawyer—Scott. The advice Scott provided Davis is somewhat unclear because all parties disagree with regard to its content, but all parties agreed Scott did not expressly advise Davis to cease communication with the competitor's clients. In the end, Davis successfully solicited three of the competitor's clients.
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> Eventually, Global and the competitor sued Davis, alleging he violated the non-solicitation agreement. The parties eventually settled and Davis was required to pay Global $300,000. In addition, the settlement agreement required Davis to pursue a legal malpractice claim against Scott and assign 80% of the proceeds of that claim to Global. The agreement outlined Global's control of Davis's malpractice claim, including hiring counsel on Davis's behalf, prohibiting Davis from settling or abandoning the

> claim, and essentially vitiating Davis's attorney-client privilege by requiring Global to receive privileged information regarding the claim. Davis demanded $300,000 in damages from Scott. The trial court dismissed Davis's claim because it was an improper assignment of legal malpractice claim; the Court of Appeals affirmed that dismissal.[1]

In our 2010 opinion, we held Davis had illegally assigned his malpractice claim to Global. In this Court's view, the proper remedy for this misstep was to dismiss Davis's claim without prejudice. On remand, the trial court did as we directed[2] and dismissed without prejudice Davis's malpractice claim against Scott.

In an attempt to prove his status as the real party in interest, Davis went to federal court in Tennessee and obtained an order removing the assignment clause from the settlement agreement. With order in hand, Davis returned to the trial court and filed motions under Kentucky Rules of Civil Procedure (CR) 59.05 and 60.02, in his effort to set aside the dismissal and revive the claim with the illegal assignment ostensibly eliminated. But the trial court denied both motions, finding no suitable grounds within the parameters of those rules to grant Davis relief. Davis appealed this ruling to the Court of Appeals.

Almost simultaneously, Davis filed a separate, new malpractice action against Scott, identical in all material respects to Davis's 2005 complaint against Scott. In response to this new action, Scott asserted the one-year

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[1] *Davis v. Scott*, 320 S.W.3d 87, 88-90 (Ky. 2010).

[2] *Id.* at 92 ("We believe the most appropriate solution under these circumstances is to remand the matter to the circuit court with directions to dismiss Davis's complaint without prejudice.").

statute of limitations had expired barring Davis from bringing the claim.[3] The trial court agreed and dismissed Davis's new action with prejudice. Davis likewise appealed this decision to the Court of Appeals.

The Court of Appeals affirmed, in part, and reversed, in part, the trial court's rulings. With regard to the trial court's dismissal of Davis's 2010 complaint as time barred, the Court of Appeals affirmed, relying primarily on a historic case in our dismissal-without-prejudice case law. But the Court of Appeals held the trial court abused its discretion by denying Davis's CR 59.05 and 60.02 motions to have dismissal of the 2005 complaint set aside. The Court of Appeals, more specifically, embraced Davis's view that he was, in fact, now the real party in interest in the action and simply making an amended complaint under CR 15.03(2). So the "amended" complaint related back to the date of the original 2005 complaint, evading the bar existing because of Scott's statute-of-limitations defense.

II. ANALYSIS.

On appeal, we are faced with review of the trial court's motion rulings. Because rulings like these are within a trial court's discretion, our standard of review focuses on whether the trial court abused that discretion.[4] We find

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[3] *See* Kentucky Revised Statutes (KRS) 413.245.

[4] *See Miller v. Eldridge*, 146 S.W.3d 909, 915 (Ky. 2004) ("[A]buse of discretion applies in . . . situations where, for example, a court is empowered to make a decision—of *its* choosing—that falls within a range of permissible options.") (internal quotation marks omitted).

abuse only when a trial court's decision is arbitrary, unreasonable, unfair, or unsupported by sound legal principles.[5]

The crux of this case really focuses on arguably loose language from our 2010 opinion. Specifically, the following passage discusses the effect of Davis's improper assignment:

> We believe the most appropriate solution under these circumstances is to remand the matter to the circuit court with directions to dismiss Davis's complaint without prejudice. As stated above, though Davis has not forfeited his malpractice claim, the current suit, born of the improper assignment, cannot be permitted to continue. Should Davis wish to reassert his claim against Scott, he will be able to do so only upon a showing that the attempted assignment is no longer in place and that he is the real party in interest.[6]

The confusion with this language stems from its alleged tension with our acknowledgement that Davis did not forfeit his malpractice claim because of the invalid assignment. Davis argues now that the Court clearly meant to allow him to bring his claim again after purging the suit of the taint of the illegal assignment. By remanding the case and indicating he could "reassert" the suit, Davis argues that we indicated the statute of limitations should not act as a bar; indeed, Davis argues to read the 2010 opinion otherwise would render it meaningless because he *would* be forfeiting his malpractice claim.

On the other hand, Scott argues our language in 2010 is clear. The trial court's dismissal of Davis's 2005 complaint without prejudice did not forfeit Davis's malpractice claim according to Scott; instead, Scott argues that our

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[5] *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000).

[6] *Davis*, 320 S.W.3d at 92.

language in 2010 simply indicated that Davis could still bring the claim but did not attempt to predict what might be the ultimate result, *e.g.*, barred by the statute of limitations. Because the language in our 2010 opinion was clear and the circumstances do not warrant relief under the guidelines of either CR 59.05 or 60.02, Scott insists that the trial court did not abuse its discretion in denying Davis's motions.

On closer review, we agree with Scott—the language in our 2010 opinion *is* clear and did not result, by itself, in Davis's forfeiting his malpractice claim. We should make clear initially that the instant case does not prompt us to reconsider our adoption of dismissal without prejudice as the remedy for an illegal assignment of a legal malpractice claim, at least in circumstances similar to the case now before us.

For well over one hundred years, the law of this Commonwealth has remained constant regarding the effect of a dismissal without prejudice. In *Magill v. Mercantile Trust Co.*,[7] this law was summarized as follows: "A dismissal without prejudice leaves the parties as if no action had been instituted."[8] This bedrock principle clearly means that Davis's 2010 malpractice action against Scott was a *new* action and time-barred. It is undisputed that Davis became aware of Scott's potential malpractice in

[7] 81 Ky. 129 (1881).

[8] *Id.* at 132.

2004 during settlement negotiations with Global.[9] KRS 413.245, the statute of limitations for professional malpractice claims, provides plaintiffs with one year to bring a claim from either "the date of the occurrence," *i.e.*, the malpractice, or "the date when the cause of action was, or reasonably should have been, discovered by the party injured." So Davis's 2010 malpractice action against Scott was far outside the permitted time for such a claim.

Alternatively, Davis argues the 2010 complaint should relate back to the date of the original filing in 2005, a date within the statute of limitations. While perhaps more inviting, this argument is equally unavailing. At its core, Davis's argument is function over form—his post-judgment motions eliminated the illegal assignment and while not *technically* an amended complaint for purposes of CR 15, Davis's attempt to file the *identical* complaint from 2005 should operate as an amended complaint.

In some ways, Davis's argument is quite appealing. Before and after the assignment, the parties are the same, the issues are the same, and the claim arises out of the same factual scenario. On its face, Davis's 2010 complaint seems to satisfy the requirements of CR 15.03.[10] But Davis's complaint is not

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[9] In fact, Global informed Davis of the alleged malpractice. According to Davis's testimony, until that point, he did not view Scott's counsel as negligent or deficient.

[10] CR 15.03 lists one main requirement: "[T]he claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading . . . ." Considering that Global was never named as a party—despite its role as a de facto plaintiff—the additional requirements of CR 15.03(2), dealing with changing a party, are not necessary. Admittedly, "[t]he important consideration is not whether the amended pleading presents a new claim or defense, but whether the amendment relates to the general factual situation which is the basis of the original controversy." *Underhill v.*

an *amended* complaint for the purposes of CR 15. As previously noted, Davis's original lawsuit was dismissed without prejudice so Davis's 2010 complaint was a brand new lawsuit. And considering our dismissal-without-prejudice case law, there was no claim to which the 2010 complaint could relate back. So the 2010 complaint must stand or fall on its own merits—filed some five years after the statute of limitations expired.

There is no tension between the language we used in the 2010 opinion and the trial court's rulings here. This Court repeatedly acknowledged that Davis could "reassert" his *claim*. But with regard to whether Davis's claim would successfully dodge a limitations defense once reasserted, this Court said nothing. In fact, the statute-of-limitations issue was not before this Court in 2010 so any prognostication would have been advisory. The events below, regardless of how unfortunate for Davis they may be, are not out of alignment with this Court's 2010 holding—Davis did indeed "reassert" his malpractice claim against Scott as the 2010 opinion permitted. In the end, Davis did not "forfeit" his malpractice claim but filed it too late. The trial court committed no abuse of discretion in dismissing Davis's claim because it was outside the statute of limitations.

As for the original malpractice action—the 2005 complaint—we are left with the trial court's decision to deny Davis's CR 59.05 and 60.02 post-judgment motions, a decision that the Court of Appeals held ran contrary to

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Stephenson, 756 S.W.2d 459, 460 (Ky. 1988). But the problem for Davis is that he filed a *new* complaint rather than an *amended* complaint.

this Court's 2010 proclamation thereby violating the law-of-the-case doctrine. We disagree. CR 59.05 deals with motions to alter, amend, or vacate a judgment; and CR 60.02 permits a trial court to relieve a party of a final judgment upon explicit, limited grounds.

Unlike CR 60.02, no specific grounds justifying relief are outlined in CR 59.05. But, in *Gullion v. Gullion*,[11] we outlined four basic grounds upon which a CR 59.05 motion may be granted: (1) "the movant may demonstrate that the motion is necessary to correct manifest errors of law or fact upon which the judgment is based"; (2) "the motion may be granted so that the moving party may present newly discovered or previously unavailable evidence"; (3) "the motion will be granted if necessary to prevent manifest injustice"; and (4) "a [CR 59.05] motion may be justified by an intervening change in controlling law."[12] Davis argues there is newly discovered evidence that warrants relief and manifest injustice is imminent. Specifically, Davis alleges the federal court's order severing the assignment clause from the settlement agreement is "newly discovered." We explicitly rejected this argument in *Gullion*. Newly discovered evidence for purposes of CR 59.05 "must be of facts *existing at the time of trial.*"[13] In fact, it is "improper for a trial court to rely upon evidence of events that occurred subsequent to the trial in

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[11] 163 S.W.3d 888 (Ky. 2005).

[12] *Id.* at 893 (quoting FEDERAL PRACTICE AND PROCEDURE § 28.10.1).

[13] *Id.* at 894 (emphasis added).

ruling on a CR 59.05 motion."[14] Davis's "newly discovered" evidence did not arise from facts that existed at the time of trial; if it did, this Court would not have been forced to deal with the issue of an illegal assignment of a legal malpractice claim because the assignment would not have occurred. Instead, Davis attempts to morph post-hoc events and actions into newly discovered evidence. This is simply not permitted under our case law.

Davis's CR 59.05 motion was likewise rightly denied because no manifest injustice is on the horizon. The trial court acted as this Court directed it to and dismissed Davis's "current suit" because it was "born of the improper assignment [and could] not be permitted to continue" since it was "tainted in some respect."[15] Manifest injustice does not now exist because the trial court refused to vacate a decision mandated by this Court. So the trial court did not abuse its discretion in denying Davis's CR 59.05 motion.

The relevant grounds for which relief may be provided under CR 60.02 are: "the judgment is void, or has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application" and "any other reason of an extraordinary nature justifying

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[14] *Id.* "A party cannot invoke CR 59.05 to raise arguments and to introduce evidence that should have been presented during the proceedings before the entry of the judgment." *Id.* at 893. Considering there was clear case law regarding the impropriety of assigning legal malpractice claims, *see Coffey v. Jefferson Cnty. Bd. of Educ.*, 756 S.W.2d 155 (Ky.App. 1988), perhaps Davis should have presented evidence indicating his status as real party in interest *before* the trial court dismissed his original claim in 2005.

[15] *Davis*, 320 S.W.3d at 92.

relief."[16] Davis argues he has satisfied the judgment by obtaining proof he is now the real party in interest, the judgment is no longer equitable because he is essentially forfeiting his claim, and the loss of his claim contrary to his reading of our 2010 opinion is a reason of extraordinary nature. We disagree.

In 2010, we directed the trial court simply to dismiss Davis's suit without prejudice. We did not qualify that directive except to say that *if* Davis wishes to reassert his claim, he must show proof he is the real party in interest. Davis presenting the federal court order does little to "satisfy" the trial court's order; indeed, there was nothing to satisfy. Presenting the federal court order as proof of Davis's status as plaintiff only satisfies this Court's prerequisite for Davis to reassert his claim, not the trial court's dismissal without prejudice. The trial court's judgment dismissing Davis's original suit remains equitable because that suit was "tainted in some respect."[17] As we said in 2010, to allow Davis to continue with the "tainted" suit "would be to wink at the rule against assignment of legal malpractice actions."[18] Finally, Davis's claim being subject to a limitations defense is not of the extraordinary nature pondered by CR 60.02. The fact that this Court has previously found not extraordinary the loss of a party's appeal because of failing timely to file a notice of appeal, illustrates that Davis's claim being outside the statute of limitations is not

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[16] CR 60.02

[17] *Davis*, 320 S.W.3d at 92.

[18] *Id.* (quoting *Botma v. Huser*, 39 P.3d 538, 542 (Ariz. 2001).

extraordinary.[19] So the trial court did not abuse its discretion in denying Davis's CR 60.02 motion.

Before concluding, we pause to highlight how unique the instant circumstances truly are. Of note, a cursory review of other jurisdictions indicates we are in the minority with our treatment of invalidly assigned legal malpractice claims. Most states—as well as our analogous historic common law, *e.g.*, champerty—simply void the illegal assignment and proceed accordingly with the underlying malpractice claim. To a certain degree, this case presents a jurisdictional wrinkle that mandated our decision to adopt the dismissal-without-prejudice approach in 2010. The assignment was part of a settlement agreement in a federal case, approved by a federal judge with proper jurisdiction. In order for the trial court to void the assignment, it would have had to sever the assignment from the settlement agreement—an agreement, at least arguably, it had no jurisdiction to alter. And, as a result, few options were available. Whether dismissal without prejudice is the appropriate remedy in all improper assignments of legal malpractice claims is an issue we do not deal with today.

III. CONCLUSION.

This Court spoke with sufficient clarity in 2010. The trial court was directed to dismiss without prejudice Davis's suit, which was born of an improper assignment of a legal malpractice claim. In accordance with general

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[19] *See United Bonding Ins. Co., Don Rigazio, Agent v. Commonwealth*, 461 S.W.2d 535, 536 (Ky. 1970).

assignment law, Davis's underlying malpractice claim remained valid despite the void assignment. So Davis was permitted to reassert his claim. That is all this Court said in 2010. Whether the reasserted claim would be time barred was not before this Court, and this Court did not opine on it. As it stands now, the trial court did not abuse its discretion, neither by following this Court's directive nor by dismissing Davis's 2010 claim against Scott. The facts of this case are highly unique and unlikely to be replicated. The proper remedy for an improper assignment in a situation where no jurisdictional quirks are lurking remains for another day.

All sitting. All concur.

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