AFFIRMED and Opinion Filed May 22, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-19-00162-CV

YOUVAL ZIVE, Appellant
V.
JEFFREY R. SANDBERG AND PALMER & MANUEL, P.L.L.C. F/K/A PALMER & MANUEL, L.L.P., Appellees

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On Appeal from the 429th Judicial District Court
Collin County, Texas
Trial Court Cause No. 429-05242-2018

OPINION

Before Justices Bridges, Whitehill, and Nowell
Opinion by Justice Whitehill

Under the *Hughes* tolling rule, "[w]hen an attorney commits malpractice in the prosecution or defense of a claim that results in litigation, the statute of limitations on a malpractice claim against that attorney is tolled until all appeals on the underlying claim are exhausted or the litigation is otherwise finally concluded." *Apex Towing Co. v. Tolin*, 41 S.W.3d 118, 119 (Tex. 2001) (reaffirming *Hughes v. Mahaney & Higgins*, 821 S.W.2d 154 (Tex. 1991)).

In this case, the client, Youval Zive, stopped appealing the adverse judgment in the underlying case once the Texas Supreme Court denied his petition for review, but another party in the same case unsuccessfully pursued a writ of certiorari in the United States Supreme Court. Zive later sued his lawyer in the underlying case for legal malpractice.

No one disputes that the *Hughes* rule tolled limitations for Zive's malpractice claim until Zive's petition for review was finally resolved. The pivotal question is whether *Hughes* continued to toll limitations for Zive until the Supreme Court denied the other party's certiorari petition. We hold that it did not and accordingly affirm the trial court's take-nothing summary judgment against Zive.

I. Background

A. The Underlying Case

We draw the following facts from Zive's live pleading and from appellees' summary judgment evidence, which includes our opinion in the underlying case. *See Grapevine Diamond, L.P. v. City Bank*, No. 05-14-00260-CV, 2015 WL 8013401 (Tex. App.—Dallas Dec. 7, 2015, pet. denied) (mem. op.), *cert. denied*, 137 S. Ct. 250 (2016).

1. Underlying Facts and Trial Court Proceedings

In roughly 2007, Zive invested in real estate in Grapevine, Texas. Grapevine Diamond, L.P. acquired the property, and City Bank loaned the purchase money. Zive guaranteed the loan.

The loan went into default, and the property was sold in a foreclosure sale. Zive alleged that irregularities in the sale caused a sale for substantially less than the outstanding indebtedness.

City Bank sued Zive and another guarantor, Nasser Shafipour, on their guaranties. *Id*. at *2. Shafipour asserted third-party claims against Grapevine Diamond and the property's seller, Jonathan Aflatouni. *Id*. Grapevine Diamond and Aflatouni in turn cross-claimed against City Bank for wrongful foreclosure. *Id*. Aflatouni was represented by appellees Jeffrey R. Sandberg and his law firm. Zive hired appellees to represent him in the litigation as well. Shafipour was eventually dismissed from the suit. *Id*.

A conflict of interest between Aflatouni and Zive arose after a failed mediation, and Sandberg moved to withdraw as Zive's attorney. The trial court granted the withdrawal motion. A few months later, a new lawyer appeared in the case for Zive.

In January 2014, the trial court rendered summary judgment for City Bank. *Id*. Grapevine Diamond, Aflatouni, and Zive appealed to this Court.

2. The Underlying Appeal

In November 2015, we issued an opinion and judgment. On December 7, 2015, we withdrew our opinion and judgment, and we issued a new opinion and judgment affirming the trial court's summary judgment. *Id*. at *1.

Aflatouni timely moved for en banc reconsideration, which we denied.

Zive and Aflatouni filed separate petitions for review in the Texas Supreme Court, both of which the supreme court denied on April 1, 2016.

Zive made no further filings in the underlying case. But Aflatouni filed a certiorari petition in the United States Supreme Court, and the Court denied it on October 3, 2016.

B. Procedural History of This Case

On October 1, 2018, Zive sued appellees for legal malpractice and fiduciary breach based on their conduct in the underlying case. Zive alleged that he lost that case because appellees negligently and improperly (i) responded to City Bank's request for disclosures, (ii) described the deficiencies in the foreclosure, and (iii) prepared Zive's affidavit about the property's value.

Appellees answered and moved for summary judgment, arguing that Zive's claims were barred by limitations and Zive's fiduciary breach claim was also barred by the anti-fracturing rule.

Zive responded without filing any summary judgment evidence.

After a hearing, the trial court rendered a take-nothing summary judgment against Zive, and he timely appealed.

II. ISSUES PRESENTED

Zive presents two issues:

1. Was the statute of limitations tolled during the pendency of the petition for writ of certiorari filed by Appellee on behalf of another party to the same judgment as Appellant, since the relief

> sought in such petition would have vacated the judgment which was adverse to both parties?
>
> 2. Does application of the *Hughes* rule turn on whether or not the plaintiff which was the victim of the legal malpractice is continuing to pursue the litigation himself, or does it apply as long as any party [is] continuing to prosecute the case in a manner that will also benefit the malpractice plaintiff?

(Footnote omitted.) Zive argues the issues together, and they distill to a single question: Did appellees conclusively prove that Zive's legal malpractice claim was time-barred despite the *Hughes* rule where a different party continued his case to a conclusion less than two years before Zive sued appellees?

Zive's brief doesn't mention Zive's fiduciary breach claim or address the independent summary judgment ground attacking it, so we affirm the judgment as to that claim. *See Ontiveros v. Flores*, 218 S.W.3d 70, 71 (Tex. 2007) (per curiam); *Malooly Bros., Inc. v. Napier*, 461 S.W.2d 119, 121 (Tex. 1970).

III. ANALYSIS

A. Standard of Review

We review a summary judgment de novo. *Knopf v. Gray*, 545 S.W.3d 542, 545 (Tex. 2018) (per curiam).

When we review a traditional summary judgment in favor of a defendant, we determine whether the defendant conclusively disproved an element of the plaintiff's claim or conclusively proved every element of an affirmative defense. *Ward v. Stanford*, 443 S.W.3d 334, 342 (Tex. App.—Dallas 2014, pet. denied). If a summary judgment motion is based on limitations, the defendant must conclusively establish

every element of that defense, including when the claim accrued. *Schlumberger Tech. Corp. v. Pasko*, 544 S.W.3d 830, 833–34 (Tex. 2018) (per curiam). The defendant must also conclusively negate application of the discovery rule and any pled tolling doctrines. *Erikson v. Renda*, 590 S.W.3d 557, 563 (Tex. 2019).

We take evidence favorable to the nonmovant as true, and we indulge every reasonable inference and resolve every doubt in the nonmovant's favor. *Ortiz v. State Farm Lloyds*, 589 S.W.3d 127, 131 (Tex. 2019).

B. Applicable Law

The statute of limitations is an affirmative defense. TEX. R. CIV. P. 94. To avoid the defense, the plaintiff must file suit within the limitations period and use due diligence to have the defendant served with process. *See Gant v. DeLeon*, 786 S.W.2d 259, 260 (Tex. 1990) (per curiam). The primary purpose of limitations statutes is to prevent litigation of stale or fraudulent claims. *Erikson*, 590 S.W.3d at 569. Because it is the legislature's prerogative to establish limitations statutes, "judicial exceptions to limitations statutes cannot be undertaken lightly." *Id.*

Legal malpractice claims have a two-year limitations period. *Willis v. Maverick*, 760 S.W.2d 642, 644 (Tex. 1988). The discovery rule applies to legal malpractice claims, so such a claim accrues when the claimant discovers or reasonably should have discovered the facts establishing the claim's elements. *Id.* at 643.

In 1991, the supreme court adopted a tolling rule for some legal malpractice claims: "[W]hen an attorney commits malpractice in the prosecution or defense of a claim that results in litigation, the statute of limitations on the malpractice claim against the attorney is tolled until all appeals on the underlying claim are exhausted." *Hughes v. Mahaney & Higgins*, 821 S.W.2d 154, 157 (Tex. 1991).

The *Hughes* court identified two policy reasons for its tolling rule.

First, denying tolling in the *Hughes* situation could "force the client into adopting inherently inconsistent litigation postures in the underlying case and in the [legal] malpractice case." *Id*. at 156. Consistent with this policy, the supreme court has further observed that "attorney–client trust would be eroded if the client had to scrutinize every stage of the case for possible misstep[s]." *Erikson*, 590 S.W.3d at 565 (footnote omitted).

Second, the legal malpractice claim's viability depends on the underlying case's outcome. *Hughes*, 821 S.W.2d at 157.

In *Apex Towing*, the supreme court later held that *Hughes* tolling does not end simply because the client hires new counsel or settles the case. 41 S.W.3d at 121–22. *Apex Towing* also clarified that the tolling period lasts "until all appeals on the underlying claim are exhausted *or* the litigation is otherwise finally concluded." *Id*. at 119 (emphasis added). It further held that the *Hughes* rule applies to all cases factually matching the *Hughes* paradigm, regardless of whether the underlying policy reasons are implicated in the particular case. *Id*. at 122.

C. Does *Hughes* tolling continue after the legal malpractice claimant stops prosecuting appeals in the underlying case if another party continues to appeal?

No, because (i) once the client stops prosecuting the underlying case there is no longer any danger that the client must take inconsistent positions in the underlying case and the legal malpractice case and (ii) the other party's continuing appeal generally will not affect the legal malpractice claim's viability.

Zive does not dispute that his claims accrued more than two years before he sued appellees. He argues only that the *Hughes* doctrine tolled limitations until Aflatouni's certiorari petition was resolved.

We start with the language of *Hughes* and *Apex Towing*, *see Erikson*, 590 S.W.3d at 566 (although we do not usually parse judicial opinions like statutes, the exercise is useful in applying the *Hughes* doctrine), neither of which involves our specific facts. *Hughes* says that tolling lasts "until all appeals on the underlying claim are exhausted." 821 S.W.2d at 157.

Here, Zive argues that Aflatouni's certiorari petition was such an appeal because Aflatouni sought to set aside the judgment that injured Zive. But *Hughes*'s reference to "the underlying claim" more reasonably means the underlying claim *asserted by or against the legal malpractice plaintiff*, in which case Aflatouni's certiorari petition would not toll limitations because it was not an appeal "on [City Bank's] underlying claim" against Zive. This reading is supported by footnote six, in which the *Hughes* court held that tolling ended when the supreme court overruled

the Hugheses' motion for rehearing "because the last action of right that they could take *and did take* on the underlying case was concluded on that date." *Id.* at 158 n.6 (emphasis added). Here, the last action that Zive took in the underlying case was filing a petition for review, which the Texas Supreme Court denied more than two years before Zive sued appellees.

Apex Tolling added a new part to the *Hughes* rule: tolling lasts "until all appeals on the underlying claim are exhausted *or the litigation is otherwise finally concluded*." 41 S.W.3d at 119 (emphasis added). Although one could argue that the entire underlying case was not finally concluded until the Supreme Court denied Aflatouni's certiorari petition, our fact pattern was not before the *Apex Towing* court, and Zive's case ended when he did not timely file a rehearing motion in the Texas Supreme Court or a certiorari petition in the United States Supreme Court.

And it appears from context that the *Apex Towing* court added the new part to the *Hughes* rule to address a different question: when does tolling end if a case settles on date one but is not formally resolved by judgment or dismissal until subsequent date two? The court noted that the parties actually disputed the settlement's date, *id*. at 122, and it adopted the seemingly bright-line rule of when the litigation is "finally concluded," *id*. at 119. But it had no reason to decide, and did not explicitly address, whether litigation is "finally concluded" as to a party for *Hughes* purposes when that party abandons further appeals despite another party's

decision to fight on. Thus, we do not read *Apex Towing* to settle the question in Zive's favor.

Finding no other authorities on point, we consider the policy rationales for the *Hughes* rule for guidance.[1]

The first policy reason is that a client should not be forced into the untenable position of suing its attorney while potentially still defending the attorney's conduct in the underlying case. *See Hughes*, 821 S.W.2d at 157. This reason evaporates once the client has stopped prosecuting the underlying case, since the client then becomes free to sue its lawyer without fear of self-contradiction. The related policy of freeing the client from the need to scrutinize its attorney at every stage of the underlying case for possible missteps, *see Erikson*, 590 S.W.3d at 565, likewise disappears once the client stops prosecuting the underlying case. So the first policy reason does not support applying the *Hughes* rule to this case's facts.

The other policy reason for *Hughes* tolling is that "the viability of the [legal malpractice] cause of action depends on the outcome of the first," i.e., the underlying litigation. *Hughes*, 821 S.W.2d at 157. Zive argues that this policy is implicated here because Aflatouni's Supreme Court appeal, if successful, would have benefited

[1] Although *Apex Towing* instructs us not to consider these policy rationales in determining whether the *Hughes* rule applies, *see* 41 S.W.3d at 122, it does not forbid us from considering those policies when determining how the *Hughes* rule applies once it has been triggered. *Cessante ratione legis, cessat ipsa lex*. *Wright's Adm'x v. Donnell*, 34 Tex. 291, 306 (Tex. 1871) ("[W]hen the reason of the rule fails, the rule itself should cease.").

Zive by voiding the foreclosure sale and reversing the adverse summary judgment and damages that appellees' malpractice allegedly caused.[2] In other words, he contends that his legal malpractice claim's viability depended on the outcome of Aflatouni's Supreme Court appeal.

Appellees dispute Zive's contention, noting the general rule that an appellate reversal favoring an appealing party does not justify reversing the judgment as to other parties who did not appeal. *See, e.g.*, *Plas-Tex, Inc. v. U.S. Steel Corp.*, 772 S.W.2d 442, 446 (Tex. 1989). But there is an exception to that rule when the rights of the appealing and non-appealing parties are so intertwined or dependent on each other as to require the entire judgment be reversed. *Id*.

Because a party who does not appeal generally does not benefit from a reversal favoring some other party, another party's appeal generally will not affect the viability of the non-appealing party's legal malpractice claim.[3] Accordingly, we conclude that the second *Hughes* policy generally does not justify extending *Hughes* tolling through appeals pursued by other parties after the client stops appealing the underlying case.

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[2] Appellees argue that Zive forfeited this specific argument by not raising it in the trial court. We disagree. Zive's summary judgment response argued that *Hughes* tolling applies to these facts. He is allowed to present new arguments on appeal supporting that position. *See Greene v. Farmers Ins. Exch.*, 446 S.W.3d 761, 764 n.4 (Tex. 2014).

[3] Here, although Aflatouni and Zive were aligned on the question of whether the foreclosure sale was proper, *see Grapevine Diamond*, 2015 WL 8013401, at *1, they were attempting to protect separate and independent interests that were allegedly damaged by the sale, so this does not seem to be an exceptional case in which Aflatouni's certiorari petition could have benefited Zive.

Finally, the *Hughes* doctrine is intended to be a "narrowly defined rule with established boundaries," *Erikson*, 590 S.W.3d at 564, so we seek a bright-line rule that can be applied generally. That is achieved by holding that *Hughes* tolling stops once the client stops appealing the underlying case.

For all these reasons, we hold that *Hughes* tolling stopped when the Texas Supreme Court denied Zive's petition for review in the underlying case.

Based on our holding, we further hold that appellees conclusively proved that Zive's legal malpractice claim was time-barred. Accordingly, we overrule Zive's issues.

IV. DISPOSITION

We affirm the trial court's judgment.

/Bill Whitehill/
BILL WHITEHILL
JUSTICE

Schenck, J., dissenting from decision not to consider this case en banc

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

YOUVAL ZIVE, Appellant	On Appeal from the 429th Judicial District Court, Collin County, Texas
No. 05-19-00162-CV V.	Trial Court Cause No. 429-05242-2018.
JEFFREY R. SANDBERG AND PALMER & MANUEL, P.L.L.C. F/K/A PALMER & MANUEL, L.L.P., Appellees	Opinion delivered by Justice Whitehill. Justices Bridges and Nowell participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that appellees Jeffrey R. Sandberg and Palmer & Manuel, P.L.L.C. F/K/A Palmer & Manuel, L.L.P. recover their costs of this appeal from appellant Youval Zive.

Judgment entered May 22, 2020