

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Appellate Case No. 2012-212110
Horry County Case No. 2011-CP-26-7104

Jeremiah DiCapua,

Appellant,

v.

Thomas D. Guest, Jr.,

Respondent.

FINAL BRIEF OF RESPONDENT

- December 5, 2012

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STATEMENT OF ISSUE ON APPEAL

- I. DID THE CIRCUIT COURT PROPERLY DISMISS WITH PREJUDICE THE APPELLANT'S LEGAL MALPRACTICE CLAIM AGAINST RESPONDENT BECAUSE APPELLANT'S CLAIM WAS BARRED BY EITHER THE STATUTE OF LIMITATIONS OR BY APPELLANT'S FAILURE TO FILE AN AFFIDAVIT OF AN EXPERT WITNESS WITH THE COMPLAINT IDENTIFYING A NEGLIGENT ACT OR OMISSION AND ITS FACTUAL BASIS.

STATEMENT OF THE CASE

Respondent was appointed to represent Appellant in defense of criminal charges for distribution of crack cocaine and possession with intent to distribute crack cocaine. At trial, the jury found Appellant guilty of the charges; however, the day after the trial the trial judge vacated the verdict *sua sponte* primarily because he believed the admission of videotape evidence of the drug deal was inappropriate. The trial judge had denied Appellant's pre-trial motion to suppress the videotape.

The Court of Appeals reversed the Order vacating the guilty verdict, and the Supreme Court affirmed the Court of Appeals. Appellant has been incarcerated since April 26, 2007 for the guilty verdict. Appellant's Complaint alleges a cause of action for legal malpractice against Respondent arising out of two distinct events; the trial in January 2005, and the sentencing hearing on June 6, 2007. Respondent moved to dismiss the Complaint on the grounds it was barred by the statute of limitations and by South Carolina Code section 15-36-100, which requires a Plaintiff to file with the Complaint an affidavit of an expert witness identifying one negligent act by the Defendant and the factual basis of the act. The Circuit Court dismissed the Appellant's case against Respondent with prejudice because it was barred by the statute of limitations and S.C. Code § 15-36-100 *et seq.* Appellant is appealing the dismissal.

FACTS

Appellant filed a Complaint against Respondent on August 24, 2011 alleging legal malpractice arising out of Respondent's court-appointed representation of Appellant after Appellant was arrested for distribution of crack cocaine and possession with intent to distribute crack cocaine on October 16, 2003. (Complaint, R. pp. 8-29) Respondent answered the Complaint and denied any liability to Appellant. (Answer, R. pp. 30-31; Amended Answer, R. pp. 46-54) At the same time Respondent filed his Answer, he filed a Motion to Dismiss on the grounds that the action was barred by the Statute of Limitation and Appellant's failure to file an affidavit of an expert with the complaint that identified a negligent act or omission by Respondent. (Motion to Dismiss, R. pp. 32-34) On April 9, 2012, the Court heard arguments from counsel for Respondent in support of the Motion to Dismiss and from Appellant in opposition to the motion, and the Court ordered the dismissal of the case on April 30, 2012. (Order, R. pp. 1-7) Appellant served the Notice of Appeal on May 28, 2012.

Following Appellant's arrest on October 16, 2003, an Horry County Grand Jury indicted him in January 2004 on the charges of distribution of crack cocaine and possession with intent to distribute crack cocaine. (Complaint, R. p. 11, ¶ 13, lines 11-15) Appellant's criminal trial began on January 10, 2005, and the jury reached a guilty verdict on January 13, 2005. (Complaint, R. p. 12, ¶¶ 14, 17) Respondent represented Appellant at trial, and the first of Appellant's two allegations of legal malpractice in the Complaint arises out of alleged actions or omissions of Respondent during that trial. (Complaint, R. pp. 12-13, 17)

On January 14, 2005, Judge Baxley, the presiding judge at trial, after the jury returned a guilty verdict against Respondent, issued an *sua sponte* Order vacating the guilty verdict and sentence because he believed it was error to allow into evidence a videotape of the drug

transaction involved in Appellant's arrest. (Complaint, R. pp. 13-14) At trial, Judge Baxley denied Appellant's pre-trial motion to suppress the videotape evidence, and Respondent and the Appellant did not object to the introduction of the videotape when it was presented during the trial. (Complaint, R. pp. 12-14) In this case, Appellant alleges it was malpractice for Respondent not to renew the objection to the admission of the videotape when the prosecution moved to enter it into the record as evidence.

The Horry County Solicitor appealed Judge Baxley's Order vacating the verdict. On April 23, 2007, the Court of Appeals reversed the Order, reinstating the jury's guilty verdict against Appellant. (Complaint, R. pp. 14-15) In the Complaint, Appellant quoted part of the Court of Appeals Opinion, which states, "As the record reflects, DiCapua's sole objection to the videotape came in the form of a motion in limine to suppress the videotape because of its lack of audio. Once the State moved to enter the videotape into evidence and publish it to the jury, however, DiCapua's counsel specifically stated he had 'no objection.' We find this amounted to a waiver of any issue DiCapua had with the videotape." (Complaint, R. p. 14, lines 1-8) Shortly after the Court of Appeals reversed the Order, Appellant was arrested and placed in prison for a parole violation.¹ (Complaint, R. pp. 14-15, ¶ 23) Appellant filed a petition for rehearing with the Court of Appeals, which was denied, and the Supreme Court of South Carolina ultimately upheld the Court of Appeals' reversal of Judge Baxley's Order reinstating the guilty verdict. (Complaint, R. pp. 14-15, 18)

The second act or omission Appellant alleges was legal malpractice by Respondent involves a June 6, 2007 hearing. (Complaint, R. pp. 15-17) After the Court of Appeals reversed

¹ The Complaint states that Appellant was arrested on April 26, 2007 and placed in the state penitentiary on May 21, 2007.

Judge Baxley's Order, Appellant appeared in Court for sentencing. (Complaint, R. pp. 16-17) Appellant claims Respondent failed to object to an improper sentencing or "re-sentencing" process in which Appellant received a more severe sentence than he had at trial. (Complaint, R. pp. 16-17)

ARGUMENT

I. Appellant's legal malpractice claim is barred by the Statute of Limitations.

In South Carolina, the statute of limitations for civil actions is three years from the date of accrual. S.C. Code Ann. §§ 15-5-530. Tort actions, of which this claim of professional negligence is one, are governed by §§ 15-3-530(5) and 15-3-535, which both establish the "discovery rule" for determination of the date of accrual for a cause of action. The date of accrual for a cause of action is the time when "the person knew or by the exercise of reasonable diligence should have known that he had a cause of action." *Id.* The test is whether a person of common knowledge and experience should have known the operative facts, and the test is an objective one. Wilson v. Shannon, 299 S.C. 512, 386 S.E.2d 257 (Ct. App. 1989).

It has been stated that "South Carolina's statute of limitations requires 'very little to start the clock.'" Maier v. Tietex Corp., 331 S.C. 371, 500 S.E.2d 204 (Ct. App. 1998). Whether the Plaintiff understands the full extent of the damages is immaterial to the issue of whether the statute begins to run. Dean v. Ruscon Corp., 321 S.C. 360, 468 S.E.2d 645 (1996). Furthermore, the statute begins to run on the date the Plaintiff discovered or should have discovered the injury, not on the date that the Plaintiff discovers the identity of the wrongdoer. Tollison v. B & J Machinery Co., Inc., 812 F. Supp. 618 (D.S.C. 1993).

In professional negligence and breach of contract cases, the Court has rejected the "continuous representation" and "continuous treatment" theories to toll the statute of limitations.

Epstein v. Brown, 363 S.C. 372 (2005); Harrison v. Bevilacqua, 354 S.C. 129 (2003). Instead, the court has applied the discovery rule to determine when the statute first begins to run, regardless of any continued representation or treatment after the action has first accrued. Epstein, 363 S.C. 372; Harrison, 354 S.C. 129. In Epstein, the court held that an action for legal malpractice first arose at the conclusion of trial, even though the attorney in question continued to represent the appellant through the appellate process. The Court held that it was not necessary for a final decision to be made by the appellate court for the cause of action to accrue. Id.

In the Complaint in this case, which was filed on August 24, 2011, Appellant complains of two specific and distinct events during which he alleges Respondent acted or failed to act, causing injury to Appellant. The first event was Appellant's trial on charges for possession of crack cocaine and possession with intent to distribute crack cocaine, which was held January 10-13, 2005. The second event was a sentencing hearing on June 6, 2007 after the Court of Appeals reversed Judge Baxley's *sua sponte* Order vacating the verdict. In both instances, Appellant was aware of, or Appellant should have been aware of, the acts or omissions giving rise to his claims well before the running of the three year statute of limitations applicable to this case. As such, the Circuit Court properly dismissed the Complaint with prejudice.

Although Appellant's cause of action arising out of the 2005 trial arguably accrued on January 14, 2005, the date Judge Baxley issued the *sua sponte* Order vacating the verdict due to the admission of the videotape evidence, Appellant was on notice of the facts allegedly giving rise to this claim of professional malpractice by Respondent absolutely no later than April 23, 2007, when the Court of Appeals issued its decision finding that the failure to renew the objection to the admission of the videotape amounted to a waiver. As such, at the very latest, Appellant's legal malpractice cause of action against Respondent accrued on April 23, 2007,

which was four years, four months and one day before Appellant filed the Complaint, a clear violation of the applicable statute of limitations based on the facts alleged by Appellant in the Complaint.

Appellant's claim for professional negligence involving the June 6, 2007 hearing arose immediately after the hearing. Appellant was given his sentence at that hearing, and he was clearly aware of the circumstances that led to his incarceration and the role, if any, that Respondent played in attempting to prevent the incarceration. Further, Appellant had been in prison since the Court of Appeals reversed Judge Baxley's Order, and he went back to prison immediately after the June 6, 2007 hearing. Accordingly, Appellant's legal malpractice cause of action accrued on June 6, 2007, which was four years, two months and 18 days before he filed the Complaint in this case.

Therefore, because the facts, as pled by the Appellant in the Complaint, establish that Appellant failed to assert the allegations of professional negligence against Respondent within the applicable statute of limitations, the Circuit Court properly found that the Complaint should be dismissed with prejudice.

II. Appellant's claim for legal malpractice is barred because he failed to file with the Complaint an affidavit from an expert that identifies at least one act or omission of Respondent that constitutes a breach of the standard of care.

S.C. Code Ann. § 15-36-100(b), provides that "[i]n an action for damages alleging professional negligence against a professional licensed by... the State of South Carolina..., the Plaintiff must file as part of the complaint an affidavit of an expert witness which must specify at least one negligent act or omission claimed to exist and the factual basis for each claim based on the evidence at the time of the filing of the affidavit." The statute specifically applies to actions

alleging legal malpractice against attorneys. S.C. Code Ann. § 15-36-100(G)(2). A complaint failing to meet this requirement is subject to dismissal for failure to state a claim under Rule 12(b)(6) of the South Carolina Rules of Civil Procedure. S.C. Code Ann. § 15-36-100(C)(1) (“[i]f an affidavit is not filed... and the Defendant against whom an affidavit should have been filed alleges, by motion to dismiss filed contemporaneously with its initial responsive pleading that the Appellant has failed to file the requisite affidavit, the complaint is subject to dismissal for failure to state a claim”). S.C. Code Ann. § 15-36-100 is effective for causes of action arising after July 1, 2005.

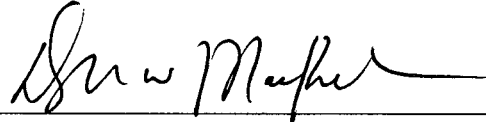
The Complaint alleges a cause of action for legal malpractice against Respondent. Thus, S.C. Code Ann. § 15-36-100 applies, unless the cause of action arose prior to July 1, 2005. Appellant did not file with the Complaint an affidavit of an expert witness specifying any negligent act of Respondent. The two instances of alleged legal malpractice in the Complaint occurred on or about January 10, 2005 and June 6, 2007. For Appellant to state a claim for legal malpractice arising out of the sentencing hearing on June 6, 2007, an expert affidavit is required, and the Court properly found that Appellant’s failure to file an expert affidavit entitled Respondent to a dismissal with prejudice as to any claim related to that event.

As for the alleged legal malpractice arising out of the trial that began on January 10, 2005, the issue is when the cause of action arose. The Court properly found that an exact determination of when the cause of action arose was not required to dismiss this case. If the legal malpractice cause of action arose prior to July 1, 2005, no expert affidavit is required; however, the claim is clearly barred by the statute of limitations. If the cause of action arose after July 1, 2005, an expert affidavit is required, and the Appellant failed to satisfy this requirement. Thus, dismissal with prejudice was appropriate.

CONCLUSION

For the reasons stated herein and those presented at oral argument, Respondent respectfully requests that this Court affirm the Circuit Court's dismissal of Appellant's Complaint with prejudice.

This 5th day of December, 2012.



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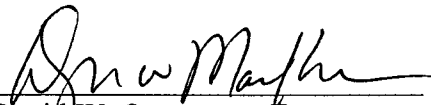
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CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

December 5, 2012



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PROOF OF SERVICE

I certify that I have served the Final Brief of Respondent on Jeremiah DiCapua by depositing a copy of it in the United States Mail, postage prepaid, on December 5, 2012, addressed to him at McCormick Correction Institution, J4B-214, Inmate No. 00105096, 386 Redemption Way McCormick, South Carolina 29899.

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