

IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT NASHVILLE

FILED

August 16, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

ZOLTAN BOKOR,

Plaintiff/Appellant

v.

WILLIAM BRUCE and BRUCE,
WEATHERS, ET. AL.,

Defendants/Appellees

) Davidson Circuit No. 94C-2327

) Appeal No. 01A01-9603-CV-00119

APPEAL FROM THE CIRCUIT COURT OF DAVIDSON COUNTY
AT NASHVILLE, TENNESSEE
THE HONORABLE WALTER C. KURTZ, JUDGE

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AFFIRMED and REMANDED.

WILLIAM H. INMAN, SENIOR JUDGE

CONCUR:

W. FRANK CRAWFORD, JUDGE

ALAN E. HIGHERS, JUDGE

OPINION

This action for damages alleging malpractice by the defendant law firm was dismissed on motion for summary judgment. We agree that the one-year statute of limitations, TENN. CODE ANN. § 28-3-104, bars the action.

The plaintiff alleged that he employed the defendant Bruce to represent him in a dispute with an architect, Rains, with whom he had worked on certain housing projects. One of these projects was located in Huntsville, Alabama. The fee for the project was \$250,000.00, to be divided equally between the plaintiff and Rains.

Disagreements arose, resulting in the plaintiff employing the defendant Bruce to file suit against Rains to protect, or collect, his share of the Huntsville fee. This suit was filed February 8, 1991 and dismissed on March 24, 1992 for failure to prosecute. Two days later, the Huntsville project was closed and the entire \$250,000.00 was disbursed to Rains, who failed to remit one-half to the plaintiff.

The plaintiff thereupon employed another attorney who filed a motion to set aside the order of dismissal. This motion was granted August 25, 1992. The case was heard and judgment entered against Rains for \$114,174.50 on July 28, 1993.

Rains then filed a petition in bankruptcy. Owing to a change in address, the plaintiff had no notice of the bankruptcy until February 1, 1994. The plaintiff's judgment was discharged.

The plaintiff then turned his attention to Mr. Bruce by filing this action on July 24, 1994, in which he alleged that the negligence of Mr. Bruce in failing to prosecute the action against Rains was the direct and proximate cause of his loss.

The defendants moved for summary judgment alleging the action accrued in March 1992 when it was dismissed for failure to prosecute. The plaintiff responded that his damages accrued as of August 30, 1993 when he learned of Rains' bankruptcy which rendered his judgment worthless.

The trial judge ruled that the statute "began to run in March of 1992 and certainly by May of 1993" and granted the defendants' motion for summary judgment. This appeal ensued.

Our Supreme Court has ruled that it is no longer necessary for the plaintiff to suffer an "irremediable" injury before a cause of action for legal malpractice will

accrue.

Although the “tolling” argument pressed by the plaintiffs has been accepted in some jurisdictions, it is not supported by our cases. In *Security Bank*, we held that the plaintiffs had suffered an “irremediable injury” when the bonds defaulted; and we specifically rejected the plaintiff’s contention that the injury was not irremediable until the suit against the guarantors of the bonds was concluded. Similarly, in *Chambers*, we held that the plaintiff had suffered an irremediable injury, in the form of court costs, delays, and additional attorney’s fees, when his lawsuit against Washington County was dismissed. We made this determination without regard to “whether or not the Washington County lawsuit had reached the irremediable stage.” *Chambers*, 713 S.W.2d at 899. Since our cases establish that the injury need not be “irremediable” in the sense urged by the plaintiffs, we reject their argument. Furthermore, we can no longer even approve of the usage of the adjective “irremediable” in this context: this term, which was first used in pure dicta by the *Ameraccount* court, has caused confusion from its inception and serves no useful purpose. Therefore, to avoid further confusion, we conclude that henceforth the term “legally cognizable injury” or “actual injury” should be used in this context.

Carvell v. Bottoms, 900 S.W.2d 23, 29-30 (Tenn. 1995)

Therefore, a cause of action for legal malpractice accrues when the following events occur:

- (a) The plaintiff becomes aware of the alleged negligence of the attorney;
- (b) The plaintiff suffers a legally cognizable injury or an actual injury.

There is no dispute that the plaintiff became aware of the alleged negligence of Mr. Bruce in March of 1992 when he learned that the lawsuit had been dismissed and that the funds had been disbursed to Rains. Therefore, the question before the Court is whether the plaintiff suffered a “legally cognizable injury or an actual injury” more than one year before the date on which Bokor filed suit.

The closing occurred and the entire fee was disbursed to Rains in March of 1992. Therefore, the plaintiff suffered a legally cognizable or actual injury in March of 1992, more than two years before suit was filed. Accordingly, the plaintiff’s claim for legal malpractice is barred by the statute of limitations, TENN. CODE ANN. § 28-3-104.

But the plaintiff contends that he could not have suffered any injury “prior to determining his interest, if any, in the funds which were disbursed as a result of Mr. Bruce’s negligence.” This argument is without merit because the plaintiff had *at*

least a contingent interest when the funds were disbursed in March of 1992.

Moreover, the trial court's Memorandum Opinion and Order of June 3, 1993 in the underlying lawsuit held that the plaintiff was entitled to a judgment in the amount of \$114,174.50 against Rains, thus settling the issue that the plaintiff had an interest in the funds which had been disbursed to Rains. This was more than one year before Bokor filed suit for legal malpractice.

Directly on point is *Chalmers v. Dillow*, 713 S.W.2d 896 (Tenn. 1986) where another lawyer allowed a lawsuit to be dismissed for failure to prosecute. The client then hired a second lawyer who was able to reinstate the lawsuit. However, the reinstated lawsuit was then dismissed because it had not been initially filed by the first lawyer within the statute of limitations. The client then filed a legal malpractice action against the first lawyer. The legal malpractice action was dismissed as time-barred even though it was filed within one year from the time that the underlying lawsuit was ultimately dismissed on the merits. The Tennessee Supreme Court explained in holding that the client had suffered injury as soon as he learned of the dismissal for failure to prosecute:

[A]ssuming that the full extent of his damages were not ascertainable at the time, we have held that a plaintiff cannot be permitted to wait until he knows all of the injurious effects as consequences of an actionable wrong. *Security Bank and Trust Co. v. Fabricating Inc.*, 673 S.W.2d 860 (Tenn. 1983); *Taylor v. Clayton Mobile Homes, Inc.*, 516 S.W.2d 72 (Tenn. 1974). Plaintiff was liable for the court costs of his dismissed lawsuit, he had suffered a lengthy delay in the progress of his case, even if it be assumed it was subject to revival, and at a minimum had lost the interest on the use of an anticipated money recovery. Also he was immediately faced with the necessity to incur additional attorney's fees, all as a direct result of Frost's negligence. Those damages, which had matured in March 1982, together with his full knowledge of Frost's negligence, were sufficient *injury* to trigger the accrual of plaintiff's cause of action without regard to whether or not the Washington County lawsuit had reached the irremediable stage.

713 S.W.2d at 898-899.

In the case at bar, the plaintiff "was liable for the court costs of his dismissed lawsuit," "had suffered a lengthy delay in the progress of his case," and "had lost the interest on the use of an anticipated recovery."

The plaintiff contends that he "was not injured until such time as he learned

that he was unable to collect the funds from Mr. Rains.” This argument runs counter to the rationale of *Chambers* because the plaintiff suffered injury as soon as his lawsuit against Rains was dismissed for failure to prosecute and the funds were disbursed to Rains. Significantly, the plaintiff received a financial statement from Rains during settlement discussions in early May of 1993 which revealed that Rains was insolvent. It is perfectly clear that the plaintiff knew he had been damaged to some extent, even if the full extent of his damages were not ascertainable at that time. As stated in *Chambers*, “a plaintiff cannot be permitted to wait until he knows all of the injurious effects as consequences of an actionable wrong.”

From all of which we are satisfied that the motion was correctly granted. We do not presume the correctness of the trial court’s judgment, and have made a fresh determination as to whether the requirements of RULE 56, TENN. R.CIV. P. , have been satisfied. *Gonzales v. Alman Const. Co.*, 857 S.W.2d 42 (Tenn. Ct. App. 1993).

The judgment is affirmed at the costs of the appellant.

William H. Inman, Senior Judge

CONCUR:

W. Frank Crawford, Judge

Alan E. Highers, Judge