IN THE COURT OF APPEALS

FILED

October 21, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

ELLIOTT B. SMITH, JR., M.D.,	)	GREENE CIRCUIT
	)	C.A. NO. 03A01-9605-CV-00168
Plaintiff-Appellant	)	
vs.	)	HON. JOHN K. WILSON
	)	JUDGE
JERRY L. GOODSON,	)	AFFIRMED AND REMANDED
Defendant-Appellee	)	

RICHARD J. BRAUN, Richard J. Braun and Associates, Nashville, for Appellant.

DAVID E. SMITH and W. TYLER CHASTAIN, Hodges, Doughty & Carson, PLLC, Knoxville for Appellee.

O P I N I O N

McMurray, J.

We are called upon in this appeal to determine whether the trial court erred in dismissing the plaintiff's complaint. Curiously, the plaintiff insists that the trial court dismissed the complaint under the provisions of Rule 12, Tennessee Rules of Civil Procedure, while the appellee insists that the complaint was dismissed on motion for summary judgment. We are unable to ascertain from the record which motion the court sustained, therefore, we have examined both. We affirm the trial court.

The plaintiff, Eliott B. Smith, Jr., M.D., and his wife, Veda Ann Smith, hired the defendant, Jerry L. Goodson, for estate planning services in May 1992. The defendant, a licensed attorney practicing in Greenville, Tennessee, was the brother of Mrs. Smith. Mr. Goodson drafted wills for both Dr. and Mrs. Smith, and they were executed on June 10, 1992. Both Dr. and Mrs. Smith went to Mr. Goodson's office to sign their wills. Dr. Smith read his will, signed it, paid Mr. Goodson and left. Dr. Smith did not read his wife's will. Mrs. Smith executed her will shortly after Dr. Smith left. Dr. Smith alleges that he was under the impression that he and his wife had signed reciprocal wills. However, he later learned that her will was not reciprocal, but in fact devised her estate to her nieces, three of whom are the minor children of the defendant, Mr. Goodson. Approximately one month after the wills were signed, Dr. Smith asked Mr. Goodson to draft a warranty deed transferring ownership of his residence to Mrs. Smith in an effort

to equalize their respective estates so as to minimize estate tax liability. Mr. Goodson drafted the deed, but did not inform Dr. Smith that Mrs. Smith's will did not leave the bulk of her estate to him, and hence was not reciprocal.

Mrs. Smith died on September 12, 1993. Shortly after her death, Dr. Smith learned that her will left the bulk of her estate, including the home that he had transferred to her and a Jaguar he had recently purchased for her, to her nieces, including Mr. Goodson's children.

Dr. Smith filed suit in the Chancery Court for Greene County on September 12, 1994, alleging negligence, breach of contract and breach of fiduciary duty. The defendant answered averring that he prepared a will for Dr. Smith according to his instructions, but denied any knowledge of an agreement between Dr. Smith and his wife pertaining to the contents of their respective wills. Defendant further answered that he specifically drafted Mrs. Smith's will according to her directions. Defendant also filed a motion to dismiss for failure to state a claim for which relief could be granted. The Chancery Court found that the gravamen of the complaint was for legal malpractice and transferred the case to the circuit court for Greene County. After the case was transferred, defendant filed a motion for summary judgment.

We will first address the issue relating to the Rule 12 motion. As noted, plaintiff and defendant disagree over the ultimate disposition of this case by the circuit court. The circuit court heard argument on both motions. The court's order reflects that it was heard on both motions, but is captioned as an order sustaining a motion to dismiss. Affidavits from both parties are included in the record, as well as the deposition of the plaintiff. Plaintiff maintains, however, that the order was one sustaining a motion to dismiss. Giving the plaintiff the benefit of his position on this issue coupled with the failure of the record to demonstrate that the trial court relied on the affidavits and deposition in the record, we will first consider the motion as one to dismiss.[1] A motion to dismiss for failure to state a claim upon which relief can be granted tests the sufficiency of the challenged pleading. It admits as true all relevant and material allegations of fact, but asserts that such facts do not constitute a viable cause of action. Humphries v. West End Terrace, Inc., 795 S.W.2d 128, 130 (Tenn. App. 1990); see also T.R.C.P. 12.02(6). A court when considering a motion to dismiss "should construe the complaint liberally in favor of the plaintiff taking all of the allegations of fact therein as true." Humphries at 130.

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[1] A trial court can convert a Rule 12.02(6) motion to dismiss into a Rule 56 motion for summary judgment by considering material outside the pleadings. Knierim v. Leatherwood, 542 S.W.2d 806, 808 (Tenn. 1976). A trial court can, however, "prevent a conversion from taking place by declining to consider extraneous matters." Pacific E. Corp. v. Gulf Life Holding Co., 902 S.W.2d 946, 952 (Tenn. App. 1995). There is no indication from the record in the instant case that the trial court considered material outside the pleadings.

Accepting all of the plaintiff's allegations as true, we are of the opinion that the complaint does not state a cause of action for legal malpractice. In a malpractice action against an attorney, the plaintiff has the burden of proving:

1. The employment of the attorney;
2. neglect by the attorney of a reasonable duty; and
3. damages resulting from the neglect.

Jamison v. Norman, 771 S.W.2d 408 (Tenn. 1989); Sammons v. Rotroff, 653 S.W.2d 740 (Tenn. App. 1983).

Plaintiff's complaint does allege employment of the defendant attorney for the purposes of estate planning for Dr. Smith and his wife. However, plaintiff fails to allege the second element — neglect of a reasonable duty.

Plaintiff contends that the defendant neglected his duty in that he violated his fiduciary duty by failing to inform him of his conflicts of interest, and continuing to represent the plaintiff despite having those conflicts of interests. Plaintiff correctly points out that an attorney may not represent conflicting interests or undertake to carry out inconsistent duties to his clients. See American National Bank v. Bradford, 188 S.W.2d 971 (Tenn. 1945); Steinberg v. Morton, 25 Bankr. 162 (Bankr. E.D. Tenn. 1982). Plaintiff alleged in his complaint that the defendant had three conflicts of interest in the course of representing both the

plaintiff and his wife. Plaintiff alleged that defendant's conflicts were:

1. Defendant's children were substantial beneficiaries of the will drafted by defendant for Veda Ann;

2. Defendant had knowledge that Veda Ann had not honored her agreement described in paragraph 8 of this Complaint and knew that Veda Ann's will did not devise to plaintiff the residential real estate; and

3. Defendant knew that Veda Ann was considering obtaining a divorce from plaintiff.

As to the first and second alleged conflicts, if the defendant's actions in drafting a will for a client leaving the bulk of the estate to his children is a conflict of interest, it is a conflict in relation to his representation of the testatrix, Mrs. Smith, rather than the plaintiff. According to plaintiff's complaint, he hired defendant pursuant to an oral contract to provide legal services to plaintiff <u>and</u> to plaintiff's wife. Plaintiff's brief filed with this Court states that the defendant prepared Mrs. Smith's will contrary to the instructions of plaintiff. A careful reading of the complaint reveals otherwise, however. The complaint states that the defendant was to draft a will for plaintiff, and a separate will for plaintiff's wife. It does not state that the defendant was instructed to draft Mrs. Smith's will according to plaintiff's instructions. In any event,

however, an attorney represents the person for whom the work is to be performed, not the person who actually pays for the legal services. See, e.g., Petition of Youngblood, 895 S.W.2d 322 (Tenn. 1995). Thus, defendant could not have drafted a will for Mrs. Smith contrary to her instructions, even if Dr. Smith had requested defendant to do so, which we again emphasize was not alleged in the complaint.

Plaintiff claims in his brief that defendant violated his fiduciary duty by carrying out the wishes of Mrs. Smith. Plaintiff claims that defendant did this out of loyalty to his sister, and his own financial interest in obtaining property for his minor children. We find this argument, which is not supported by the complaint as discussed above, to be inconsistent with plaintiff's acknowledgment that defendant was hired to provide estate planning services to Mrs. Smith. Plaintiff apparently fails to recognize that Mrs. Smith was a client of defendant, and the legal services that are the subject of this suit were performed for Mrs. Smith. defendant performed two services for plaintiff, namely drafting his will and a warranty deed. Yet no allegations are made that either of those two functions was done incorrectly. Rather, plaintiff is attempting to sue over work done for Mrs. Smith. Since Dr. Smith hired the defendant to serve as Mrs. Smith' attorney for purposes of drafting her will, we find no merit in his claim of conflict of

interest as to the disposition of Mrs. Smith's estate to the defendant's children.

The second alleged conflict of interest that plaintiff raises is that defendant had knowledge that Veda Ann Smith had not honored her agreement to leave her estate to her husband. Dr. Smith states in his complaint that he and his wife had entered into an agreement whereby each would leave the other his or her respective estate. However, Dr. Smith nowhere in his complaint alleges that he hired the defendant to draft reciprocal wills. Plaintiff does not state in his complaint that he ever informed defendant that he and his wife wished him to draft reciprocal wills. Plaintiff does state in paragraph 9 of the complaint that the defendant had knowledge of the contents of Mrs. Smith's will, and did not advise him that it deviated from the agreement reached between Dr. and Mrs. Smith.[2] We think it important to note that the alleged agreement, which we must assume as true for purposes of a Rule 12.02(6) motion, was between the plaintiff and his wife, not between the plaintiff and the defendant. Plaintiff does not state in his complaint what instructions were given to defendant for drafting the two wills, and we can not infer from the complaint that defendant was instructed to draft reciprocal wills. As we stated earlier, plaintiff has conceded in his brief that the circuit court disposed of this matter by a motion to dismiss. The standard of review for

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[2]In any event we would question the propriety of disclosing to Dr. Smith the provisions of Mrs. Smith's will without her consent.

a motion to dismiss prevents us from examining the affidavits of the plaintiff, absent an indication from the Trial Judge that he relied upon them in making his determination. There is no indication in the record that the Trial Judge relied on any other information. Therefore, on addressing the motion to dismess, we are limited an examination of the pleadings. The complaint does not allege that the plaintiff instructed the defendant to draft reciprocal wills. We conclude that no duty was owed to inform the plaintiff of the contents of his wife's will. A trial court must not, and this Court will not read allegations into a complaint that are not there.

As to the final alleged conflict of interest, plaintiff claims that the defendant was required to withdraw as counsel because he knew that Mrs. Smith was considering divorcing her husband. Plaintiff cites no cases that would support this as being a conflict of interest under the circumstances of this case, nor has our research revealed any. We find this allegation to be without merit.

For the reasons set forth above, we find that the complaint of the plaintiff fails to state a cause of action against the defendant, and, therefore, hold that the circuit court of Greene County was correct in dismissing the claim.

Notwithstanding our decision to treat the case at the urging of the plaintiff, as having been disposed of pursuant to the provisions of Rule 12, T.R.C.P., from an abundance of caution, we will also address the motion for summary judgment.

The standards governing an appellate court's review of a trial court's action on a motion for summary judgment are well settled. Since our inquiry involves purely a question of law, no presumption of correctness attaches to the trial court's judgment, and our task is confined to reviewing the record to determine whether the requirements of T.R.C.P. 56 have been met. Cowden v. Sovran Bank/Central South, 816 S.W.2d 741, 744 (Tenn. 1991). T.R.C.P. 56.03 provides that summary judgment is only appropriate where: (1) there is no genuine issue with regard to the material facts relevant to the claim or defense contained in the motion, Byrd v. Hall, 847 S.W.2d 208, 210 (Tenn. 1993); and (2) the moving party is entitled to a judgment as matter of law on the undisputed facts. Anderson v. Standard Register Co., 857 S.W.2d 555, 559 (Tenn. 1993). The moving party has the burden of proving that its motion satisfies these requirements. Downen v. Allstate Ins. Co., 811 S.W.2d 523, 524 (Tenn. 1991). Carvell v. Bottoms, 900 S.W.2d 23 (Tenn. 1995).

In an amended answer the defendant was allowed to plead the statute of limitations contained in T.C.A. § 28-3-104 as an

affirmative defense. The defendant's motion for summary judgment was based upon the running of the statute of limitations. In support of his motion for summary judgment, the defendant filed his affidavit which, among other things stated:

> That at a deposition at which I was present, the plaintiff, Elliott B. Smith, Jr., testified that in August or September of 1992, he had discussed the terms of Veda Ann Smith's will with her. That she had told him that she had made a will leaving everything to her nieces and that he had told her that she needed to change the will. At that time, nor at any time subsequent to that, did Eliott B. Smith, Jr., discuss with me the original will of June 10, 1992, or whether Veda Ann Smith had made a new will with a different provision, nor did we have any discussions about her will.

In response to the defendant's motion for summary judgment, the plaintiff, Elliott B. Smith, Jr., filed his affidavit. In the affidavit, the plaintiff deposed, among other things, as follows:

> In or about July, 1992, I asked Veda Ann about her will, and she told me that the will had been completed. She told me that she had left her estate to her nieces, Goodson's daughters. I told Veda Ann that this was not what we had discussed and that she needed to change her will. She agreed. Approximately one week later, I asked her about the will again, and Veda Ann told me that she had changed the will so that her estate (except for the jewelry) would go to me. I believed this statement because Goodson had not advised me that Veda Ann had failed to honor our agreement and because I believed that Goodson had a duty to advise me in the event Veda Ann did not honor the agreement.

In addition to the affidavit, in his deposition the plaintiff was asked the following questions and responded with the following answers:

Q. You don't know if you saw her will at any time?

A. Oh, I never saw Vita's [sic] will.

Q. Did you ever ask her to see it?

A. I asked her about it at one time.

Q. When was that?

A. I don't remember, Maybe August or September.

Q. That would be 1993?

A. Two.

Q. Two. Oh, okay. What was the reason for your asking her about the will?

A. I asked her if she got the will completed. She said yes. And I asked her what did she put in the will, and she said that she left everything to her nieces. And I said, "Vita, [sic] honey, that's not what we discussed." I said, "you need to change the will." Two weeks later I asked her again and she said she changed it. I never asker her about it again.

Q. Did you ever talk to Mr. Goodson about the fact that she told you she'd left everything to her nieces?

A. No, huh-uh. She told me she had changed it.

It seems abundantly clear that the plaintiff had knowledge of the provisions of his wife's will no later than August or September, 1992. This action was instituted in the Chancery Court on

September 12, 1994, obviously outside the one-year statute of limitations provided for in T.C.A. § 28-3-104. Thus, we must look to the rules of law relating to the time the statute of limitations begins to run.

In Carvell v. Bottoms, supra, the Supreme Court clarified the rules relating to the running of the statute of limitations in legal malpractice actions. In Carvell, the court citing Ameriсcount Club, Inc. v. Hill, 617 S.W.2d 876 (Tenn. 1981) and Chambers v. Dillow, 713 S.W.2d 896 (Tenn. 1986) stated that the "legal malpractice discovery rule" is composed of two distinct elements: (1) the plaintiff must suffer, pursuant to the Americcount dicta, an "irremedial injury" as a result of the defendant's negligence; and (2) the plaintiff must have known or in the exercise of reasonable diligence should have known that this injury was caused by defendant's negligence.

The Court in Carvell stated its disapproval of the term "irremedial" because of the confusion brought about by the unfortunate use of that term in Americcount. The court restated the rule to substitute "legally cognizable injury" or "actual injury" for "irremedial."

Applying the Americcount rule as modified by Carvell, it is incomprehensible that the plaintiff was not on notice of the acts

of the defendant, about which he complains, more than one year before the institution of this action. If there was a cause of action, which we do not concede, the plaintiff knew of the perceived wrongdoing of the defendant no later than September 1992. At that time he knew or in the exercise of reasonable diligence should have known that he had suffered a "legally cognizable injury" due to the defendant's negligence.

On the issue of the statute of limitations, we find that there is no genuine issue of a material fact and that the defendant is entitled to a judgment as a matter of law.

We affirm the judgment of the trial court. Costs are taxed to the appellant and this case is remanded to the trial court for the collection thereof.

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Don T. McMurray, J.

CONCUR:

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Houston M. Goddard, Presiding Judge

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Herschel P. Franks, J.

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	)	C.A. NO. 03A01-9605-CV-00168
Plaintiff-Appellant	)	
vs.	)	HON. JOHN K. WILSON
	)	JUDGE
JERRY L. GOODSON,	)	AFFIRMED AND REMANDED
Defendant-Appellee	)	

ORDER

This appeal came on to be heard upon the record from the Circuit Court of Greene County, briefs and argument of counsel. Upon consideration thereof, this Court is of the opinion that there was no reversible error in the trial court.

We affirm the judgment of the trial court. Costs are taxed to the appellant and this case is remanded to the trial court for the collection thereof.

PER CURIAM