IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT JACKSON

CITICORP MORTGAGE, INC.,	)	
	)	
Plaintiff/Appellant,	)	**Shelby Chancery No. 101815-1 R.D.**
	)	
VS.	)	**Appeal No. 02A01-9608-CH-00196**
	)	
JOHN P. ROBERTS,	)	
	)	
Defendant/Appellee.	)	

FILED

May 27, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

APPEAL FROM THE CHANCERY COURT OF SHELBY COUNTY
AT MEMPHIS, TENNESSEE
THE HONORABLE NEAL SMALL, CHANCELLOR

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REVERSED & REMANDED

ALAN E. HIGHERS, J.

CONCUR:

DAVID R. FARMER, J.

HOLLY KIRBY LILLARD, J.

In this legal malpractice case, Citicorp Mortgage, Inc. (“Plaintiff”) filed suit against

Wilburn Johns ("Johns"); Maddox & Roberts, a Tennessee partnership; Michael Maddox ("Maddox"); John Roberts ("Roberts"); and Shelby Bank for Maddox's failure to make Plaintiff the first lienholder on a certain piece of property. This appeal, however, focuses exclusively on Plaintiff's claim of malpractice against Roberts. In granting summary judgment in favor of Roberts in both his individual and partnership capacities and in certifying its order as a final judgment pursuant to Tenn. R. Civ. P. 54.02, the trial court held that Plaintiff's cause of action was barred by the one-year statute of limitations contained in T.C.A. § 28-3-104. Plaintiff appeals the judgment of the trial court arguing that the trial court erred in granting summary judgment in favor of Roberts because Plaintiff's action against Roberts is not barred by the one-year statute of limitations. For the reasons stated hereafter, we reverse the judgment of the court below.

FACTS

This appeal centers around the closing of a real estate loan for a certain piece of property located at 4262 Poplar in Memphis, Tennessee (hereinafter "the property"). The closing occurred on January 10, 1990.

Johns was the owner of the property. Plaintiff was the lender refinancing the debt encumbering the property. Maddox was the attorney Plaintiff retained to handle the closing, and Roberts was Maddox's law partner.

Maddox allegedly committed legal malpractice as to that closing when he did not ensure that all existing liens on the property were paid and/or released so that Plaintiff would be the holder of the first lien on the property. One of the existing liens on the property was a lien held by Shelby Bank. As part of the closing of the loan on the property, Plaintiff instructed Maddox to obtain and record a release of a deed of trust benefitting Shelby Bank (hereinafter "the Shelby Bank lien"). Contrary to Plaintiff's instructions, Maddox never executed a release of the Shelby Bank lien. Thus, after the refinancing, Shelby Bank held the first lien on the property, superior to Plaintiff's lien.

After Johns defaulted on his indebtedness to Shelby Bank and to the Plaintiff, Plaintiff initiated foreclosure proceedings in September 1991. In October 1991, Dyke Tatum, the attorney representing Plaintiff on the foreclosure, discovered that a release of the Shelby Bank lien had not been filed. When Tatum contacted Maddox, Maddox indicated that an executed release of the Shelby Bank lien existed.

In December 1991, Shelby Bank foreclosed on its deed of trust and sold the property to satisfy Johns' indebtedness to it. The foreclosure wiped out the Plaintiff's lien.

In July 1992, Plaintiff retained David Cocke to determine if an executed release of the Shelby Bank lien existed. On July 22, 1992, Cocke sent a letter to Maddox inquiring about the unrecorded Shelby Bank lien release. On August 5, 1992, Maddox stated that he believed a release of the Shelby Bank lien existed but he was unable to locate it in his files.

On August 14, 1992, Plaintiff filed the present action. The sole basis for Plaintiff's claims against Roberts is his liability as Maddox's partner for Maddox's malpractice.

The applicable dates pertinent to this appeal are:

January 10, 1990	The closing at which Maddox failed to obtain the release of the Shelby Bank lien.
January to March 1990	The audit period in which Plaintiff's auditors should have discovered the absence of the recorded release in the files.
September 1991	Plaintiff's foreclosure begins.
October 1991	Plaintiff's title search reveals that the Shelby Bank lien has not been released of record. Maddox tells Dyke Tatum that the executed release exists.
December 1991	Shelby Bank forecloses its lien, and all other liens, including the Plaintiff's lien, are wiped out.
July 1992 an	Plaintiff employs David Cocke to investigate the existence of executed release of the Shelby Bank lien.
August 1992	Maddox advises Cocke that an executed release of the Shelby Bank lien exists, but the executed release is not produced.
August 14, 1992	The complaint is filed.

On appeal, the Plaintiff asserts that the trial court erred in holding that Plaintiff's action against Roberts is barred by the one-year statute of limitations. Plaintiff contends that his cause of action did not accrue until December 1991 when Shelby Bank foreclosed on the property, wiping out the Plaintiff's lien.

LAW

The three issues before this Court are:

> 1) Whether the trial court erred in granting the Defendant, John Roberts', motion for summary judgment holding that Plaintiff's claims against Roberts are barred by the one year statute of limitations contained in T.C.A. § 28-3-104.
>
> 2) Whether the trial court erred in determining that Plaintiff sustained a legally cognizable injury in January 1990; and
>
> 3) Whether the trial court erred in determining that the alleged fraudulent concealment of the legal malpractice did not delay the accrual of Plaintiff's claim against the Defendant, Roberts.

The standards governing our 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 Tenn. R. Civ. P. 56 have been met. Carvell v. Bottoms, 900 S.W.2d 23, 26 (Tenn. 1995); Cowden v. Sovran Bank/Central South, 816 S.W.2d 741, 744 (Tenn. 1991); Foley v. St. Thomas Hosp., 906 S.W.2d 448, 452 (Tenn. Ct. App. 1995); Brenner v. Textron Aerostructures, A Division of Textron, Inc., 874 S.W.2d 579, 582 (Tenn. Ct. App. 1993). Tenn. R. Civ. P. 56.03 provides that summary judgment is appropriate only where (1) there is no genuine issue of material fact relevant to the claim or defense contained in the motion, and (2) the moving party is entitled to a judgment as a matter of law on the undisputed facts. Carvell, 900 S.W.2d at 26; Byrd v. Hall, 847 S.W.2d 208, 210 (Tenn. 1993); Anderson v. Standard Register Co., 857 S.W.2d 555, 559 (Tenn. 1993). The moving party has the burden of proving that the motion satisfies these requirements. Downen v. Allstate Ins. Co., 811 S.W.2d 523, 524

(Tenn. 1991).

While the summary judgment procedure is not a substitute for trial, it goes to the merits of the complaint and should not be taken lightly. Byrd, 847 S.W.2d at 210; Jones v. Home Indem. Ins. Co., 651 S.W.2d 213, 214 (Tenn. 1983); Fowler v. Happy Goodman Family, 575 S.W.2d 496, 498 (Tenn. 1978); Foley, 906 S.W.2d at 452. It has been repeatedly stated by the appellate courts of this state that the purpose of a summary judgment proceeding is not the finding of facts, the resolution of disputed factual issues or the determination of conflicting inferences reasonably to be drawn from the facts. Bellamy v. Federal Express Corp., 749 S.W.2d 31, 33 (Tenn. 1988). Rather, the purpose of summary judgment is to resolve controlling issues of law. Id.

In evaluating the propriety of a motion for summary judgment, we view the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in the nonmoving party's favor. Byrd, 847 S.W.2d at 210-11. A motion for summary judgment should only be granted when both the facts and the conclusions drawn from the facts permit a reasonable person to reach only one conclusion. Id.

As set forth in T.C.A. §§ 28-3-104 (1980) and 29-26-116(a)(1) (1980), the statute of limitations for malpractice actions is one year. However, in the event that the alleged injury is not discovered within the stated one-year period, the limitations period is one year from the date on which the plaintiff discovers his or her injury. T.C.A. § 29-26-116(a)(1) (1980). The determination of when a legal malpractice cause of action accrues for statute of limitations purposes is, therefore, governed by a specific formulation of the "discovery rule" applicable to such actions. Carvell, 900 S.W.2d at 26.

In legal malpractice cases, the discovery rule is composed of two distinct elements: (1) the plaintiff must suffer an 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 the defendant's negligence. Carvell, 900 S.W.2d at 28; See

also Chambers v. Dillow, 713 S.W.2d 896 (Tenn. 1986); Security Bank & Trust Co. v. Fabricating, Inc., 673 S.W.2d 860 (Tenn. 1983); Ameraccount Club, Inc. v. Hill, 617 S.W.2d 876 (Tenn. 1981); Caledonia Leasing & Equip. Co. v. Armstrong, Allen, Braden, Goodman, McBride & Prewitt, 865 S.W.2d 10, 13 (Tenn. Ct. App. 1992); Batchelor v. Heiskell, Donelson, Bearman, Adams, Williams & Kirsch, 828 S.W.2d 388, 393 (Tenn. Ct. App. 1991).

In State ex rel. Cardin v. McClellan, 85 S.W. 267 (Tenn. 1905), the defendant, a register of deeds, failed correctly to register a conveyance of land made by vendor to vendee. The defendant certified that the deed had been registered in a certain deed book in his office, yet the description of the land conveyed was incorrectly copied. Defendant's description of the land was so inaccurate that it did not describe any land, and the premises conveyed could not be identified from an inspection of the defendant register's books. After the conveyance of land from vendor to vendee and the subsequent registration of the land, creditors of the vendor obtained a judgment against the vendor and had the land levied upon and sold. Vendee thereupon purchased the land a second time in order to protect his title and sued the defendant recorder for the cost of having to repurchase the land. In discussing when the vendee's cause of action accrued against the defendant register, the supreme court stated:

> [A] breach may not inflict any immediate wrong on an individual, but neither his right to a remedy, nor his liability to be precluded by time from its prosecution, will commence until he has suffered some actual inconvenience. . . it may be stated as an invariable rule that when the injury, however slight, is complete at the time of the act, the statutory period then commences, but, when the act is not legally injurious until certain consequences occur, the time commences to run from the consequential damage.

Id. at 270. In holding that the vendee's cause of action accrued when his property was levied upon and not when defendant negligently failed correctly to register his deed, the supreme court stated as follows:

> [The vendee] was not injured by the failure to correctly register his deed. It was good, without registration, between him and his vendor and subsequent purchasers with notice. If his vendor had not become indebted, or if he had paid his debts, it is probable that no injury would have happened. In other words, the only effect of the register's negligence was that

> complainant's deed was not effectual as against creditors or subsequent innocent purchasers from his grantor. If his grantor had either contracted no debts, or paid them himself, so far as appears in this record, the register's mistake would have been innocuous; and, as complainant's right of action, both at common law and under the statute, depends on his sustaining injury by the officer's breach of duty, his cause of action could not and did not accrue until his property was levied upon and subjected to the payment of another's debt.

Id. at 273.

In Prater v. Fidelity Trust Co., 34 S.W.2d 205 (Tenn. 1930), Prater procured a mortgage loan of $6,500 from the Fidelity Trust Company ("Trust Company") on property already encumbered by a mortgage securing a note for $5,000. The Trust Company and Prater both knew of the existence of the mortgage, and it was understood that the mortgage note was to be paid first out of the proceeds of the loan. The Trust Company paid the mortgage without requiring the surrender of the note, and the note later turned up in the hands of an innocent purchaser. The innocent purchaser thereafter sued Prater for the value of the note and recovered the $5,000 value of the note plus interest from Prater. Prater then sued the Trust Company for the value of the note, and the Trust Company raised the statute of limitations as a defense. Id. at 206. Relying on State ex rel. Cardin v. McClellan, 85 S.W. 267 (Tenn. 1905), the supreme court held that Prater's cause of action against the Trust Company did not accrue until the judgment was rendered against him because no loss to Prater occurred until the rendition of the adverse judgment. Id. at 206. Thus, the Trust Company's negligent failure to obtain the surrender of the note and/or to obtain the extinguishment of the lien did not amount to an injury for statute of limitation purposes.

In Ameraccount Club, Inc. v. Hill, 617 S.W.2d 876 (Tenn. 1981), the plaintiff corporation hired the defendant attorneys to register plaintiff's service mark and logo with the United States Patent Office. The defendants submitted plaintiff's application in December 1974 and learned on March 3, 1975 that the application was incomplete due to the insufficient number of copies of the logo that had been submitted. On March 13, 1975, defendants corrected their error by submitting additional copies of the logo as required.

The Patent Office assigned the latter date of March 13, 1975 as the filing date of plaintiff's application. On August 13, 1975, the Patent Office notified the defendants that an application for registration of a similar logo had been filed on February 28, 1975, which had precedence over the plaintiff's application. After receiving this information, the plaintiff's shareholders concluded at a shareholder's meeting in mid-August that the defendants had been negligent in handling the registration of plaintiff's logo. On April 27, 1976, the Patent Office finally refused to register the plaintiff's logo, and on August 27, 1976, the plaintiff sued the defendants for legal malpractice. In discussing when plaintiff's cause of action for legal malpractice accrued, the supreme court stated as follows:

> The Court of Appeals erred in holding that the plaintiff's cause of action accrued and the statute of limitations began to run when the plaintiff became aware of the negligence of the defendant attorneys; still more is required, viz., damage or injury to the plaintiff resulting from that negligence. . . Although the plaintiff may have been aware of the defendant attorneys' "negligence" as early as August 18, 1975, or September 2, 1975, no damage or injury resulted to the plaintiff by reason of that "negligence" until on or about April 27, 1976, when the United States Patent Office rejected plaintiff's application.

Id. 878. Thus, the supreme court in Ameraccount held that the plaintiff's cause of action for legal malpractice did not accrue until April 27, 1976, when the Patent Office rejected plaintiff's application.

In Security Bank & Trust Co. v. Fabricating, Inc., 673 S.W.2d 860 (Tenn. 1983), the plaintiffs, who were representatives of a class of bondholders of the Town of Grand Junction, Tennessee, filed suit against the defendant attorneys, who served as special bond counsel, for legal malpractice in the performance of their duties as bond counsel. Half of the bonds were issued in October 1972 and the other half of the bonds were issued in November 1972. The default on the bonds occurred on October 1, 1974. On November 24, 1976, Plaintiffs filed suit for legal malpractice. Plaintiffs alleged that the defendant attorneys should have discovered the many varied deficiencies of the bond issue in question. In holding that plaintiffs' cause of action for legal malpractice accrued not at the time of the alleged negligent act by the defendant attorneys but rather at the time of default on the bonds, the supreme court stated as follows:

> Obviously, negligence without injury is not actionable; hence,

> the statute of limitations could not begin to run until the attorney's negligence had resulted in injury to the plaintiff. In the instant case, the injury to the bondholders occurred on October 1, 1974, *when the bonds defaulted*. There is not merit whatever in the plaintiffs' argument that their injury did not occur until the suit against the guarantors in Texas was concluded.

Id. at 864 (emphasis in original).

Finally, in Carvell v. Bottoms, 900 S.W.2d 23, 28 (Tenn. 1995), the plaintiffs sued their attorney for the preparation of a defective warranty deed. In drafting the warranty deed, defendant specifically failed to indicate the existence of an easement. A closing on the property later occurred, and plaintiffs transferred the defective warranty deed to the purchaser of the property. Over four years after the sale of the property, purchaser sued the plaintiffs for breach of warranty of good title because the deed did not disclose the existence of the easement. Purchaser recovered a judgment of $15,000 against the plaintiffs. Plaintiffs thereafter brought a malpractice action against their attorney, the defendant. In holding that plaintiff's cause of action for legal malpractice accrued when the purchaser sued the plaintiffs, the supreme court stated that the plaintiffs suffered actual injury when the plaintiffs were forced to defend their deed in court. Thus, once again, the plaintiffs' cause of action accrued not when the negligent act was committed, but rather when the consequential injury from the negligent act occurred.

In accordance with the foregoing authorities, Plaintiff, in the present case, did not suffer an actual injury until Shelby Bank foreclosed upon its lien, thereby wiping out all other liens, including the Plaintiff's lien. Before Shelby Bank's foreclosure, Plaintiff had not suffered an injury as a result of Maddox's negligent failure to retain a release of the Shelby Bank lien. Although Maddox committed the negligent act in January 1990, this act did not become legally injurious until certain consequences occurred, i.e. when Shelby Bank foreclosed upon its lien in December 1991. If Johns had paid Shelby Bank, as he agreed to do, Plaintiff would not have suffered any injury from Maddox's negligent act. Thus, because Plaintiff filed this cause of action within one year of the date of his injury, Plaintiff's present action for legal malpractice is not barred by the applicable one-year statute of

limitations.

Because of our disposition of the foregoing issue, we need not address the remaining issues on appeal.

The judgment of the trial court is hereby reversed as to the Defendant both in his individual and partnership capacities, and the matter is remanded to the trial court for further proceedings. Costs on appeal are taxed to the Defendant for which execution may issue if necessary.

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HIGHERS, J.

CONCUR:

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FARMER, J.

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LILLARD, J.