

IN THE SUPREME COURT OF THE STATE OF NEVADA

FERRILL JOSEPH VOLPICELLI,

Appellant,

vs.

SCOTT EDWARDS,

Respondent.

Supreme Court No. 56747

District Court No. CV0903442

Due Date: 10/13/2010

FILED

OCT 06 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *R. Malone*
DEPUTY CLERK

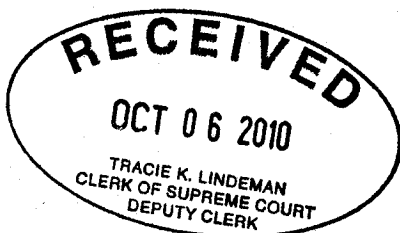
CIVIL PROPER PERSON APPEAL STATEMENT

Ferrill Joseph Volpicelli
Lovelock Correctional Center
1200 Prison Road
Lovelock, NV 89419
Appellant, in proper person

David C. Creekman
Washoe County District
Attorney/Civil Division
PO Box 30083
Reno, NV 89520

Appellants:
Ferrill Joseph Volpicelli

Respondents:
Scott Edwards



CIVIL PROPER PERSON APPEAL STATEMENT

INSTRUCTIONS: You must complete and file this Appeal Statement with the Nevada Supreme Court on or before **01/01/10**.

HOW TO FILL OUT THE FORM: The form must be typed or clearly handwritten. Write only in the space allowed on the form. **Additional pages and attachments are not allowed.** The Nevada Supreme Court prefers short and direct statements. You do not need to refer to legal authority or the district court record.

WHERE TO FILE THE FORM: You may file your form in person or by mail.

To file your form in person: Bring the form to the Clerk's Office at the Supreme Court of Nevada, [NVSupremeCourtAddress1Line]. You can file your form Monday through Friday, 8:00 a.m. to 4:00 p.m.

To file your form by mail: Mail the form to the Clerk of the Supreme Court of Nevada, [NVSupremeCourtAddress1Line]. Your form must be postmarked by the due date.

You must file the original form and 1 copy with the Clerk of the Nevada Supreme Court. If you want the clerk to return a file-stamped copy of your form, you must submit the original form and 2 copies and include a self-addressed, stamped envelope. Forms cannot be faxed or e-mailed to the Nevada Supreme Court Clerk's Office.

Copies of the completed form must be mailed or delivered to the other parties to this appeal or to the parties' attorneys, if they have attorneys. You must also fill out the certificate of service that is attached to the form. The Nevada Supreme Court may return any document that does not meet these requirements.

Judgment or Order You Are Appealing. List the judgment or order that you are appealing from and the date that the judgment or order was filed in the district court.

Filed Date	Name of Judgment or Order
09/09/2010	Order dismissing case

Notice of Appeal. Give the date you filed your notice of appeal in the district court: 09/02/2010

Related Cases. List all other court cases related to this case. Provide the case number, title of the case and name of the court where the case was filed.

Case No.	Case Title	Name of Court
CR98-2160	State v. Volpicelli	Second Judicial District
CR02-0147	State v. Volpicelli	Second Judicial District
CR03-1263	State v. Volpicelli	Second Judicial District

Issues on Appeal. Does your appeal concern any of the following issues? Check all that apply:

- | | | |
|--|---|---|
| <input type="checkbox"/> divorce | <input type="checkbox"/> child custody/visitation | <input type="checkbox"/> child support |
| <input type="checkbox"/> relocation | <input type="checkbox"/> termination of parental rights | <input type="checkbox"/> attorney fees |
| <input type="checkbox"/> paternity | <input type="checkbox"/> marital settlement agreement | <input type="checkbox"/> division of property |
| <input type="checkbox"/> adoption | <input type="checkbox"/> prenuptial agreement | <input type="checkbox"/> spousal support |
| <input checked="" type="checkbox"/> other—briefly explain: <u>legal malpractice / tort</u> | | |

Statement of Facts. Explain the facts of your case. (Your answer must be provided in the space allowed.)

Appellant VOLPICELLI filed an action naming appellee EDWARDS, a private attorney, in claims for legal malpractice and various state torts. EDWARDS contended that the Second Judicial District Court of the State of Nevada, in and for the County of Washoe lacked subject matter jurisdiction because VOLPICELLI had failed to meet the applicable statutes of limitation.

The District Court dismissed the action, ruling that VOLPICELLI was outside the statutes of limitation and that, therefore, the Court had no jurisdiction over the action.

VOLPICELLI appeals, contending that:

The District Court erred:

1) in holding that VOLPICELLI failed to meet the applicable statutes of limitation and that, therefore the Court lacked subject matter jurisdiction;

2) the District Court failed to hold EDWARDS to his burden of proof on the affirmative defense of statute of limitation; and

3) the District Court erred as a matter of law when it failed to, *sua sponte*, disqualify the Washoe County District Attorney from representing EDWARDS in this case based on a clear conflict of interest and a breach of confidentiality.

VOLPICELLI seeks REVERSAL of the District Court's dismissal order, with REMAND to the lower court.

Statement of District Court Error. Explain why you believe the district court was wrong. Also state what action you want the Nevada Supreme Court to take. (Your answer must be provided in the space allowed).

The District Court erred in ruling that Appellant VOLPICELLI failed to meet the applicable statutes of limitation, and that, therefore, the court lacked subject matter jurisdiction. Appellee EDWARDS claimed that the District Court lacked subject matter jurisdiction because each of VOLPICELLI's claims was subject to a two-year limitation period. NRS 11.207(1). Statutes of limitation is an affirmative defense (NRCP 8(c)) which must be proved by clear and convincing evidence. *Robt. A. Pierce v. Sherman Gardens*, 82 Nev. 395 (1966). Here, EDWARDS failed to carry his burden of proof. Moreover, NRS 11.207(2) is applicable to VOLPICELLI's case in that EDWARDS concealed acts upon which the action is founded; which therefore tolled the time limitation for the period of concealment. An element of VOLPICELLI's malpractice claim is that EDWARDS wrote a letter to another inmate which (1) labeled VOLPICELLI as a "friend" to a child molester, (2) caused VOLPICELLI to be viewed as a child molester, (3) caused VOLPICELLI to be placed in danger of physical harm, and caused VOLPICELLI to be involved in several altercations with other prisoners. The letter was sent by EDWARDS to another inmate in 2007, unbeknownst to VOLPICELLI; VOLPICELLI did not learn of the letter until January 2008. VOLPICELLI filed his complaint on 12/15/09, within 2 years after discovery of the letter which constitutes part of the malpractice claim. NRS 11.207(2) (time limitations tolled during concealment of evidence). Additionally, legal malpractice claims arising from representation on criminal charges do not accrue until the Supreme Court grants or denies postconviction relief, regardless of defendant's prior assertions of ineffective assistance at sentencing hearing and on direct appeal, thus a malpractice claim filed within FOUR YEARS of Supreme Court's order is within

statute of limitations. NRS 11.207; Clark v. Robinson, 113 Nev. 949 (1997). Here, the Supreme Court denied VOLPICELLI's postconviction relief by order dated 03/05/08. See Order of Affirmance, Nevada Supreme Court, Dkt. No. 50595 (03/05/08). Therefore, VOLPICELLI had until 2012 to file his malpractice claim, but did so in 2009. KJB, Inc. v. Drakulich, 107 Nev. 367 (1991). Further, claims against attorney who acted outside scope of an attorney-client relationship (EDWARDS' letter to another prisoner), attorney may not claim protection of the legal malpractice statute because the basis for a legal malpractice action is a claim of professional negligence. Quintilliani v. Mannerino, 72 Cal Rptr 2d 359 (Ct App 1998).

THE DISTRICT ERRED, THEREFORE, IN FINDING THAT VOLPICELLI FAILED TO MEET THE APPLICABLE STATUTES OF LIMITATION, AND THAT THE COURT LACKED SUBJECT MATTER JURISDICTION.

The District Court failed to hold EDWARDS to his burden of proof on the defense of statute of limitations. Statute of limitations is an affirmative defense and the burden falls upon the party asserting that defense to prove it by clear and convincing evidence. MRCP 8(c); Pierce v. Sherman Gardens, 82 Nev. 395 (1966). In his suggestion of lack of subject matter jurisdiction, EDWARDS asserted that the Complaint must be dismissed because VOLPICELLI had not met the applicable statutes of limitation. However, EDWARDS offered no proof whatever, aside from citing a couple dates; only bare assertions. The lower court, in a terse order, dismissed the case based SOLELY on EDWARDS' inadequate assertion of the statute of limitation defense; without determining whether EDWARDS had carried his burden of proof. THE DISTRICT COURT ERRED IN DISMISSING THE CASE WITHOUT HOLDING EDWARDS TO HIS BURDEN OF PROVING THE ASSERTED DEFENSE OF STATUTE OF LIMITATION, BY CLEAR AND CONVINCING EVIDENCE.

The District Court erred as a matter of law when it failed to, sua sponte, disqualify the Washoe County District Attorney's office from representing EDWARDS.

in this action. VOLPICELLI as the plaintiff/appellant is also a Nevada state prisoner. EDWARDS, the defendant/appellee, is a private attorney who was appointed to represent VOLPICELLI on criminal charges in Washoe County; ultimately leading to his present incarceration; such representation being the genesis of the instant action filed by VOLPICELLI against EDWARDS. Richard A. Gammick and David C. Creekman, Washoe County District Attorney and Deputy District Attorney, respectively, represent EDWARDS in this civil action. This obvious conflict of interest between the District Attorney's office prosecuting VOLPICELLI on criminal charges then representing his defense counsel in this civil action, was highly prejudicial to VOLPICELLI; that is, the DA's office had direct access to VOLPICELLI's criminal file and this civil file, with both files being essential and vital to this civil action. Moreover, the DA's office gained access to EDWARDS' criminal file on VOLPICELLI thereby learning of confidential communications between VOLPICELLI and EDWARDS, information that undoubtedly will be utilized by the District Attorney should VOLPICELLI ever get his criminal case reversed and remanded and returns for a new trial. The United States District Court, District of Nevada, discussing appearance on behalf of a private party in civil action as being unauthorized, held that nothing in NRS 252.110 (duties of district attorney) can be read as authorizing the district attorney of a county, in his capacity as district attorney, to appear on behalf of a private party in a civil suit, either generally or because the county has some sort of general interest in the litigation. *Duval Ranching Co. v. Glickman*, 930 F.Supp 467 (D. Nev. 1996). THE DISTRICT COURT FAILED TO ACT, SUA SPONTE, ON A CLEAR CONFLICT OF INTEREST THAT WAS, AND POTENTIALLY WILL BE IN THE FUTURE, HIGHLY PREJUDICIAL TO VOLPICELLI, IN THIS CASE AS WELL AS IN HIS CRIMINAL CASE. FOR THE FOREGOING REASONS, THE DISTRICT COURT'S ORDER OF DISMISAL SHOULD BE REVERSED AND REMANDED for further proceedings.

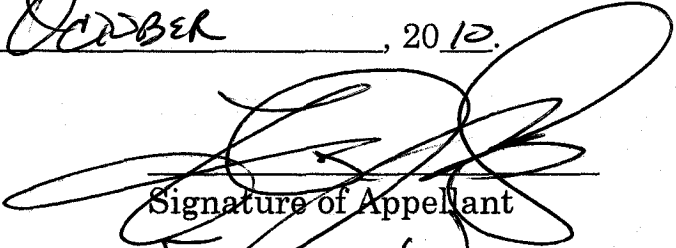
CERTIFICATE OF SERVICE

I certify that on the date indicated below, I served a copy of this completed appeal statement upon all parties to the appeal as follows:

- By personally serving it upon him/her; or
- By mailing it by first class mail with sufficient postage prepaid to the following address(es) (list names and address(es) of parties served by mail):

DAVID C. CREEKMAN
Deputy District Attorney
P O Box 30083
Reno, NV 89520-3083

DATED this 4th day of DECEMBER, 2010.



Signature of Appellant

Ferruccio Coricelli 79525
Print Name of Appellant

1200 PRISON RD
Address

LOVELAND, NV 89409
City/State/Zip

/
Telephone