

Docket Number 74803

In the
SUPREME COURT
For the
STATE OF NEVADA

Electronically Filed
Jun 21 2018 09:55 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

Tae-Si Kim as an individual; and Jin-Sung Hong, as an individual;

Appellants,

v.

Dickinson Wright, PLLC, a Nevada Professional Limited Liability Company; Jodi Donetta Lowry, Esq., an individual; Jonathan M. A. Salls, Esq., an individual; Eric Dobberstein, Esq., an individual; and Michael G. Vartanian, Esq., an Individual

Respondent.

On Appeal from the Granting of Respondents' Dickinson Wright's Motion To Dismiss and Order Denying Appellants' Motion to Reconsider the Order Granting Dickinson Wright's Motion To Dismiss

APPELLANTS' OPENING BRIEF

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IN THE SUPREME COURT OF THE STATE OF NEVADA

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SUPREME COURT CASE
NO. 74803

DISTRICT COURT CASE
NO. A-756785

APPEAL

From the Eighth Judicial District Court, Department XXIV

Clark County, Nevada

Hon. Jim Crockett, District Court Judge

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representation are made in order that the judges of this court may evaluate possible disqualification or recusal:

The Appellants, Tae-Si Kim and Jin-Sung Hong are individuals, there are no parent corporations or publicly held companies owning 10 percent or more of the party's stock.

Since the inception of this case, the Appellants have been represented only by the firms listed below who are expected to appear in this court.

Dated this 6th day of June, 2018.



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I. JURISDICTIONAL STATEMENT

This is an appeal from an order of the Eighth Judicial District Court in and for the City of Las Vegas of Clark County, issued on October 17, 2017, granting Respondents' Motion to Dismiss Complaint. *See* Order Granting Mot. ("Order"), and the Court's Order denying Appellants' Motion to Reconsider the Order Granting the Motion To Dismiss that was entered on December 12, 2017. The district court's Order is appealable pursuant to N.R.A.P. 3A(b)(3). On December 22, 2017, Appellants timely filed and served a notice of appeal, which came after the Order issued by the Court on December 22, 2017 and then filed the Case Appeal Statement on December 28, 2017.

II. ROUTING STATEMENT

This matter is presumptively assigned to the Court of Appeals pursuant to NRAP 17(b)(7), because this case originated in the District Court.

III. STATE OF THE ISSUES

- A.** Whether the District Court erred in its discretion in granting Respondents' Motion to Dismiss based on the Respondents' proposed calculation of the relevant tolling statutes as applied with the statute of limitations.
- B.** Whether the District Court erred in its discretion in granting Respondents' Motion to Dismiss based on the Court finding that the

Attorney Judgment Rule allowed Respondents discretion as to when and upon whom to bring said litigation.

C. Whether the District Court erred in its discretion in granting Respondents' Motion to Dismiss based on Respondent's claim that Appellants' claims against Dickenson Wright were time-barred under NRS 11.207.

IV. STATEMENT OF FACTS

A. Background

Appellants brought the original Complaint against the Respondents following the dismissal of Appellants Federal Court Case in which the Respondents were retained to file a Malpractice Claim against the Attorney Damus for failure to file suit to protect the sale of Appellants Property. The Respondents elected to file the claims against multiple Respondents in Federal Court. However, Defendant Damus filed a Motion for Lack of Jurisdiction and prevailed. Appellants have alleged that such dismissal stopped any tolling statute and the statute of limitations began to run on filing a proper claim against Damus. Ultimately, Respondents never filed any other claim against Damus, terminated their relationship with the Appellants, and left Appellants with the obligation to bring appropriate claims against Damus in District Court, the same claims Respondents were retained to bring. Appellants

contend that they timely brought an appropriate malpractice claim against Respondents for failure to file timely claims against Damus and based on the fact that Respondents violated an Order of the Federal Court that resulted in the dismissal of the Federal action.

B. General Statement of Facts

The recordings, filed documents, and all other notices are identified as follows:

A. Appellants Contracted with the Respondents to Sue Damus.

On August 20, 2009, Appellants retained the legal services of Gibson Lowry Burris LLP (“GLB”), memorialized through a written agreement. In accordance with the terms of the Legal Services Agreement, Appellants were required to and did tender \$30,000.00 with payments to be paid in six (6) equal monthly payments. In accordance with the Agreement the Respondents were to represent the clients in litigation against all defendants named in the action. On May 31, 2012, Appellants entered into an Amended and Restated Legal services Agreement with Dickinson Wright PLLC, (“DW”) which combined practices with GLB. Respondents continued to pursue claims against the remaining defendants in the case. (AA001-AA012).

In accordance with the Agreement “Litigation” was defined as an action in a court in Nevada against the Relevant Persons that the Client and the Firm has a good faith belief have perpetrated civil wrongs against the Client(s) in connection with the

Investment and/or breached contractual obligation(s) with respect to Client in connection with the Investment.

In accordance with the Agreement “Relevant Persons” was defined as any Person who solicited (or participated in the solicitation of) the Investment and/or any Person who engaged in effecting the Investment (whether directly or indirectly) during the time period that the Client engaged in activities aimed at securing ownership of the Investment.

In accordance with the Agreement “Defendants” was defined as the Relevant Persons that were named as “Defendants” in the Litigation.

On October 15, 2009, GLB filed a Complaint in the United States District Court, District of Nevada under case No. 2:09-cv-02008-RFB-GWF. On March 2, 2010, GLB filed an Amended Complaint in which additional Respondents were named and additional claims were brought. Specifically, claims against Charles M. Damus, Esq. for legal malpractice and negligent undertaking to perform services. (AA013-AA064).

On December 17, 2008, Appellants had originally retained the services of Charles M. Damus, Esq., to litigate and dispute certain real estate and other related claims regarding real property. Importantly, Damus was retained to prevent the foreclosure of the Property of which Appellants had tendered all payments. On

September of 2009, Appellants terminated Damus due to the fact that no complaint had been filed and the foreclosure had occurred.

In the Amended Complaint it was alleged that Damus committed legal malpractice and negligent undertaking to perform services. In Damus' Motion to Dismiss for Lack of Subject Matter Jurisdiction it was admitted that he attempted to negotiate with Adam Kearney and was aware of the pending foreclosure. (AA065-AA078). After the foreclosure sale, without the filing of case to prevent the foreclosure, Damus was terminated. Since Appellants lost title to the Property and Damus had taken no reasonable steps to prevent the foreclosure sale, malpractice was clear and obvious.

On October 5, 2010, Damus filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction. (AA065-AA078).

On October 22, 2010, the firm Dickinson Wright, PLLC filed Appellants' Response to Defendant Charles M. Damus, Esq.'s Motion to Dismiss for Lack of Subject Matter Jurisdiction. (AA079-AA097).

On November 1, 2010, Damus filed a Reply to the Opposition.

On December 6, 2010, the Court entered an Order Granting Damus' Motion to Dismiss.

The Respondents admitted they never initiated a claim in the District Court

against Damus.

On July 30, 2015, Appellants received an email from Defendant Vartanian acknowledging that no suit had been filed against Damus and that as of the date of that email representation of the Appellants had ended. (AA098-AA99).

An examination of the Civil Docket for Case #: 2:09-cv-02008-RFB-GWF reveals that despite the July 30 claim, the Respondents never filed any pleading with the Court to have themselves removed as attorneys' of record. (AA100-AA152).

On August 6, 2015, the Federal Court issued an Order to Show, which specifically stated, "IT IS FURTHER ORDERED that Plaintiffs Tae-Si Kim and Jin Sung Hong shall show cause, in writing, no later than August 14, 2015, why this case should not be dismissed with prejudice in its entirety in accordance with the Proposed Order included in the parties' Stipulation filed on June 16, 2015." (AA153-AA155).

On September 4, 2015, the Federal Court issued an Order Dismissing Case for failure to respond to the previous Orders. (AA159-AA161).

On June 12, 2017, Appellants filed their Complaint against the Respondents in the Eighth District Court of Nevada, Case No. A-17-756785-C. (AA162-AA172).

The Respondents filed their "Dickinson Wright's Motion to Dismiss" on August 8, 2017. Wherein the Respondents alleged that 28 U.S.C. § 1367(d),

suspended the statute of limitations during the pendency of the federal action. Therefore, Appellants claims should have been brought against Damus and not the Respondents. Additionally, Respondents allege Appellants legal claim against Damus did not accrue until the conclusion of the federal action when their damages became certain. Further, the Respondents argued that their conduct was protected by 28 U.S.C. § 1367(d)'s which made the attorney judgment rule applicable to the instant litigation. (AA173-AA305).

Respondents filed their Opposition on September 7, 2017. Respondents argued that the tolling statutes did not apply to the malpractice claims against Damus as damages against Damus had already been identified when Damus failed to take any action to prevent the foreclosure of their Property. Therefore, when Damus was dismissed from the Federal litigation, with knowledge of the damages, there was duty by the Respondents to file an action in State Court. (AA306-AA322).

On October 17, 2017, an Order was entered granting Respondents Motion to Dismiss (AA323-AA329).

On November 6, 2017, the Appellants filed a Motion to Reconsider the Granting of Respondents' Motion to Dismiss. Appellants argued there was no underlying action in which the malpractice could have occurred by Damus as Damus had failed to file any action. Appellants argued that the only underlying action in

which malpractice occurred was when the Respondents failed to file an action against Damus. Further, Appellants argued that Plaintiffs' damages, or claims, against Damus were recognized when he failed to file the action preventing the foreclosure. Finally, Appellants argued that the Attorney Judgment Rule was Not Applicable. Simply because the Respondents elected to wait until the conclusion of the Federal Court to file an action against Damus, does not mean that such course of action did not violate the statute of limitations as it applied to the claims against Damus. (AA330-AA339).

Respondents Motion to Reconsider was denied. The corresponding Order was entered on December 12, 2017. (AA340-AA346).

V. SUMMARY OF ARGUMENT

Appellants position is straightforward and simple. The Appellants retained attorney Damus on December 17, 2008. The retention was to prevent the foreclosure of certain real property owned by the Appellants. Damus failed to file any action and the Property was foreclosed upon. Damus failed to file any action to set aside the foreclosure and the Appellants terminated his services.

The Appellants originally retained Gibson Lowry Burris, LLP to bring a malpractice claim against Damus, which said claims of malpractice were asserted in the Appellants Federal Amended Complaint filed on March 2, 2010. Damus filed a Motion to Dismiss that was granted and entered on December 6, 2010.

Pursuant to Nevada Revised Statute 11.207, a malpractice claim must be filed within two (2) years of the last date of representation. Appellants claim that Respondents had to bring a State Court claim against Damus by a date certain in 2011. Respondents never brought any claim against Damus. By failing to bring a cause of action in State Court, Appellants contend that Respondents committed malpractice by failing to timely bring an action against Damus.

VI. STANDARD OF REVIEW

Questions of law are reviewed de novo.” *Labor Comm’r of Nev. v. Littlefield*, 123 Nev. 35, 39, 153 P.3d 26, 28 (2007). “Factual determinations will be set aside only when clearly erroneous or not supported by substantial evidence.” *Univ. & Cmty. Coll. Sys. of Nev. v. Nevadans for Sound Gov’t*, 120 Nev. 712, 721, 100 P.3d 179, 187 (2004). In a facial challenge to a statute, the plaintiff “bears the burden of demonstrating that there is no set of circumstances under which the statute would be valid.” *Deja Vu Showgirls v. Nevada Dep’t of Taxation*, 130 Nev. Adv. Op. 73, 28, 334 P.3d 392, 398 (2014).

VII. ARGUMENT

The District Court granted Respondents Motion primarily based on the following legal arguments:

(a) Under 28 U.S.C. § 1367(d), the statute of limitations against Damus was suspended during the pendency of the Federal action, which occurred on September 4, 2015.

(b) That Appellants claims against Damus did not accrue until the conclusion of the federal action. Thus Appellants should have brought a claim against Damus directly no later than September 4, 2017.

(c) Further, even if such conduct did result in violations of the statute of limitations, Respondents' conduct was protected by the attorney judgment rule.

A. Appellants' Claims Against Damus Were Not Tolloed During the Federal Action.

Both Parties recognize the impact of *Brady, Vorwerck, Ryder & Caspino v. New Albertson's Inc.*, 130 Nev. Adv. Op. 68, 333 P.3d 229 (August 7, 2014), on the instant litigation. However, the Parties disagree as to the application of *Brady*. The *Brady* Court held that the statute of limitations for attorney malpractice is tolled against an action for attorney malpractice pending the outcome of the underlying suit **in which the malpractice allegedly occurred**. This is a critical distinction that must be recognized as Respondents confuse the highlighted portion of the *Brady* decision.

First, there is no dispute between the Parties that the allegations originally claimed that Damus had committed malpractice. The malpractice of Damus was committed during his representation of the Appellants. As Damus never filed any claim on behalf of the Appellants there was no litigation to toll the statute of limitations against Damus. Thus, *Brady* was not applicable to the claims of malpractice against Damus.

Second, even at the latest date, when Appellants retained GLB on August 20, 2009, it was clear that Appellants and their counsel recognized the malpractice claims against Damus. (The actual date was likely the date of termination, which occurred in 2008). Thus, Respondents should have filed any claim against Damus for malpractice no later than August 20, 2011. Respondents filed the action in the Federal Court against Damus on March 2, 2010. Approximately nine (9) months after retaining the Respondents. Damus was dismissed due to the lack of jurisdiction held by the Federal Court over state claims by parties domiciled in the same state, Nevada.

Third, there was no underlying action in which Damus committed malpractice. The litigation tolling rule does not apply against claims against Damus as his malpractice had already been recognized by the Appellants and the Respondents. Therefore, Respondents were required to bring the claims against

Damus prior to August 20, 2011, the latest possible date. Respondents failed to ever bring any action against Damus.

Fourth, the *Brady* decision applies not to Damus, but to the exact conduct of the Respondents. Appellants allegation is that when the Respondents failed to file the appropriate claims against Damus prior to August of 2011, malpractice by the Respondents had occurred. Since, the malpractice occurred during the litigation, a claim of malpractice against the Respondents was tolled until the litigation was closed. Appellants Federal Complaint was dismissed on September 4, 2015.

Therefore, Appellants cause of action was tolled until September 4, 2017.

Appellants filed the Complaint at issue in this case timely on June 12, 2017.

Appellants' argument is supported by *Semenza v. Nev. Med. Liab. Ins. Co.*, 104 Nev. 666, 668, 765 P.2d 184, 186 (1998). The Court in *Semenza*, again detailed that a claim of malpractice is speculative when the underlying case is still pending.

In applying that same reasoning to the instant matter, this Court must determine whether Appellants' claims against Damus were speculative, even though there was no underlying action, essentially, could Damus cure his malpractice by resolution of the case. The answer to the question is a resounding, negative. The claims against Damus were realized in that Appellants had lost their property to foreclosure by failure of Damus to timely file suit to protect their interest.

B. Appellants Claims Against Damus Never Tolled.

In *Fritzeen v. Gravel*, 175 Vt. 537, 830, A.2d 49, 52, 54 (2003) the Court found that the discovery of an injury triggers the statute of limitation, even though the extent of the damages is unsettled.

The Court in *Amfact Distribution Corp.*, 673 P.2d at 796, found that the end of the litigation in which the malpractice took place triggers the statute of limitations.

Again, as pointed out in both of these cases, the key issues was that the tolling rule only applied to cases where the malpractice occurred. This is factually distinguishable from the current litigation. Damus' malpractice occurred prior to any litigation. The damages arising from Damus' malpractice were recognized when Appellants lost their real property.

Appellants' damages were realized thereby setting in motion the malpractice claims against Damus. This is a critical factor in Appellants' claims against the present Respondents. In *Brady* and *Semenza*, the Courts focused on the fact that the plaintiffs therein had speculative damages because the underlying case was not procedurally completed and there were still reasonable alternatives for resolution of the matters. Those factual matters are in contrast to the Appellants' claims against Damus. The claims against Damus were valid as the malpractice had been committed and the statutory time to cure that malpractice had run. Since,

Appellants' could no longer reacquire their real property, their damages were realized. Therefore, Appellants' claims for malpractice against Damus were valid and not speculative. Respondents confuse this matter by claiming the underlying action was the Federal suit. Damus did not commit malpractice during the Federal suit as he did not represent the Appellants during that action. The only malpractice claims that could be tolled during the Federal action would be claims against the present Respondents.

C. Attorney Judgment Rule is Not Applicable.

Respondents claim that they informed Appellants that they could sue Damus at the conclusion of the Federal Action. Respondents allege that they reviewed the alleged relevant statutes and concluded that Appellants could bring their claims against Damus at the conclusion of the Federal Action. Unfortunately, as Appellants allege, Respondents misconstrued when the malpractice was committed.

Based the cases, as referenced above, it is clear that since there was no underlying action, the claims against Damus should have been brought prior to the conclusion of the Federal action. Further, as Appellants' alleged in the Complaint, malpractice was committed when Respondents brought suit against Damus in Federal Court. The Federal Court had no jurisdiction over Damus based on the

state law claims of malpractice and unjust enrichment and the lack of diversity between the parties.

VII. CONCLUSION

Based on the foregoing, Appellants respectfully request that this Court overturn the District Court's decision granting Respondents' Motion to Dismiss.

DATED this 6TH day of June, 2018.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Opening Brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirement of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

This Opening Brief has been prepared in a proportionally spaced typeface using Times New Roman in 14 font size;

2. I further certify that this brief complies with the page -or- type volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

Proportionately spaced, has a typeface of 14 points or more and contains 4,158 words; and does not exceed 30 pages.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompany brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 6th day of June, 2018.

BRANDON L. PHILLIPS, ATTORNEY AT LAW, PLLC

A handwritten signature in black ink, appearing to read 'B. Phillips', written over a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the Nevada Supreme Court by using the appellate CM/ECF system on June 7, 2018.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that I am not aware of any of the participants in the case that are not registered CM/ECF users.

DATED this 7th day of June, 2018.

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