Motion for Rehearing Granted; Affirmed in Part and Reversed and Remanded in Part; Opinion of August 16, 2001 Withdrawn and Substitute Opinion filed September 27, 2001.

In The

Fourteenth Court of Appeals

NO. 14-00-00177-CV

HENRY P. MASSEY AND ANN A. MASSEY, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF COURTNEY S. MASSEY, DECEASED, Appellants

V.

DONALD R. ROYALL AND THE ROYALLS, A.P.C., Appellees

On Appeal from the 55th District Court
Harris County, Texas
Trial Court Cause No. 95-48091

O P I N I O N ON MOTION FOR REHEARING

We grant rehearing, withdraw the opinion of August 16, 2001, in this matter, and substitute the following opinion in its place.

This is an appeal from a summary judgment in favor of appellee, Donald R. Royall and the Royalls, A.P.C. (“Royall”), involving legal malpractice. In three issues, appellants, Henry P. Massey and his daughter Ann Massey, individually and as Administrator of the

estate of Courtney S. Massey ("Henry"), challenge the summary judgment. We affirm in part and reverse and remand in part.

FACTUAL BACKGROUND

Henry retained Royall on June 23, 1988, to represent him in his divorce, and Royall represented Henry throughout the trial. On July 26, 1989, the jury found against Henry. The final decree of divorce was entered on August 8, 1989, and on that day Royall withdrew as counsel with Henry's permission. Henry subsequently retained John Mercer to represent him, and on September 9, 1989, a motion for a new trial was timely filed.

Henry was displeased with Royall's services by August 9, 1989, and he had determined, by September 1, 1989, that Royall's malpractice had caused him damages in the range of $20,000-$30,000. From January 22, 1992, through March 30, 1992, Henry filed 25 grievances with the State Bar of Texas complaining of Royall's representation in his divorce case. Henry appealed the trial court's judgment, and on March 9, 1991, the court of appeals issued an opinion affirming the trial court's judgment. *See Massey v. Massey*, 807 S.W.2d 391 (Tex. App.—Houston [1st Dist.] 1991), *writ denied*, 867 S.W.2d 766 (Tex. 1993). The appeals process ended for the divorce case when the Supreme Court of Texas overruled Henry's motion for rehearing on his application for writ of error on September 29, 1993. *See Massey v. Massey,* 867 S.W.2d 766 (Tex. 1993).

On September 27, 1995, Henry filed the current suit alleging negligence and legal malpractice, breach of contract, breach of fiduciary duties, DTPA violations, and fraud.[1] The trial court granted summary judgment in favor of Royall. Royall's motion for summary judgment presented two grounds supporting the motion: (1) Henry's suit was barred by limitations, and (2) Ann, Henry's daughter, lacks standing to sue Royall because she was not a client. Henry brings this appeal of his malpractice suit arising out of Royall's

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[1] Because Henry's claims accrued before September 1, 1995, and he brought his suit before September 1, 1996, the 1995 amendment to the DTPA barring claims for changes based on the rendering of professional service does not apply to Henry's claims. *Underkofler v. Vanasek*, 44 Tex. Sup. Ct. J. 464, 465 n. 1, 2000 WL 33191375 (March 1, 2001)

representation in the divorce proceeding.

Standard of Review

When reviewing a summary judgment, we follow these well-established rules: (1) the movant has the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law; (2) in deciding whether there is a disputed material fact issue precluding summary judgment, evidence favorable to the nonmovant will be taken as true; and (3) every reasonable inference must be indulged in favor of the nonmovant and any doubts must be resolved in favor of the nonmovant. *Am. Tobacco Co., Inc. v. Grinnell,* 951 S.W.2d 420, 425 (Tex. 1997). Summary judgment for a defendant is proper only when the defendant negates at least one element of each of the plaintiff's theories of recovery, or pleads and conclusively establishes each element of an affirmative defense. *Science Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 911 (Tex. 1997).

Statute of Limitations

We begin with the rule that a two-year statute of limitations governs legal-malpractice claims, whether they sound in tort, contract, or other theory. *Apex Towing Co. v. Tolin*, 41 S.W.3d 118, 120 (Tex. 2001). This rule is set out in Section 16.003(a) of the Civil Practice and Remedies Code. TEX. CIV. PRAC. & REM. CODE ANN. § 16.003(a) (Vernon Supp.2001). Limitations generally begin to run when the cause of action accrues, which occurs when facts have come into existence that authorize a claimant to seek a judicial remedy. *Ape*x *Towing*, 41 S.W.3d at 120.

The supreme court has determined that where a person is prevented from exercising his legal remedy by the pendency of legal proceedings, the time during which he is thus prevented should not be counted against him in determining whether limitations have barred his right. *Hughes v. Mahaney & Higgins*, 821 S.W.2d 154, 157 (Tex. 1991); *see Cavitt v. Amsler*, 242 S.W. 246, 249 (Tex. Civ. App.—Austin 1922, writ dism'd) (limitations on suit for dividends tolled while suit to determine ownership of stock was being appealed). That rationale is also appropriate when a client's cause of action for malpractice arises during the

attorney's prosecution or defense of a claim which results in litigation. *Hughes*, 821 S.W. 2d at 157. Limitations are tolled for the second cause of action because the viability of the second cause of action depends on the outcome of the first. *Id*. The foregoing tolling rule applies to suits against an attorney for malpractice. When an attorney commits malpractice in the prosecution or defense of a claim that results in litigation, the statute of limitations against the attorney is tolled until all appeals on the underlying claim are exhausted. *Id*. In *Hughes,* the tolling period ended when the supreme court overruled the Hugheses' motion for rehearing on their application for writ of error. *Id*. at 158. That was the last action the Hugheses could and did take on the underlying case. *Id*. at n.6. The supreme court instructed courts to apply the *Hughes* tolling rule to legal-malpractice cases encompassed within its definition. *Apex Towing*, 41 S.W.3d at 122.

Is Henry's Case Barred by Limitations?

Henry brought two types of claims against Royall. First, his common law claims alleged negligence and legal malpractice, breach of contract, breach of fiduciary duties, and fraud. Second, he brought a DTPA claim, a statutory claim.

In *Underkofler v. Vanasek*, the supreme court held that the Legislature had established only two exceptions to the limitations applicable to DTPA claims, the discovery rule and the fraudulent concealment rule. 44 Tex. Sup. Ct. J. 464, 465, 2000 WL 33191375 (March 1, 2001). The court therefore declined to rewrite the statute to add the *Hughes* tolling rule as a third. *Id*. Thus, the *Hughes* tolling rule does not apply to DTPA claims. *Id*. at 466. That tolling rule does, however, apply to common law claims. *Id.* (citing *Apex Towing Company*, 41 S.W. 3d at 123). Because the *Hughes* tolling rule applies to Henry's common law claims, his claims are not barred by the two year statute of limitations applicable to legal-malpractice suits.

However, we must apply the limitations section of the DTPA to Henry's DTPA claims to determine if those claims were timely filed. Claims brought under the DTPA are subject

to the following two-year statute of limitations:

> All actions brought under this subchapter must be commenced within two years after the date on which the false, misleading, or deceptive act or practice occurred or within two years after the consumer discovered or in the exercise of reasonable diligence should have discovered the occurrence of the false, misleading, or deceptive act or practice.

TEX. BUS. & COM. CODE ANN. § 17.565 (Vernon 1987).

Limitations generally begins to run when the cause of action accrues, which has been determined to mean when facts have come into existence that authorize a claimant to seek a judicial remedy. *Apex Towing*, 41 S.W. 3d at 120. The discovery rule applies to legal-malpractice cases, so that in such cases, limitations does not begin to run until the client discovers or should have discovered through the exercise of reasonable care and diligence the facts establishing the elements of a cause of action. *Id*. at 121. Accordingly, we will apply the discovery prong of the limitations section of the DTPA.

In *Underkofler*, the movant for summary judgment established that throughout the spring and fall of 1991, Vanasek was aware of and expressed his specific complaints about Underkofler's representation, which complaints formed the basis of his DTPA claims. *Underkoffler*, 44 Sup. Ct. J. at 466. Underkofler was entitled to summary judgment on proof that Vanasek did not file his lawsuit within the statutory limitations period. *Id*. However, Vanasek delayed filing his malpractice claims until April 6, 1994. *Id*. Therefore, under the DTPA two year statute of limitations, the supreme court held summary judgment on Vanasek's DTPA claims was proper. *Id*.

Similarly, here, Henry was aware that he was not happy with Royall's representation in August, 1989. The summary judgment proof submitted by Royall consists of Henry's deposition in which he repeatedly states he came to the realization, in August or September, 1989, that Royall's failure to follow Henry's instructions was going to cost Henry between $20,000 and $30,000. Indeed, Henry stated he terminated Royall's contract of representation during August, 1989. However, Henry did not file his original petition asserting DTPA

claims against Royall until September 27, 1995, six years after Henry began having complaints about Royall. Accordingly, applying the two year statute of limitations to Henry's DTPA claims, summary judgment for Royall on those claims was proper.

Was Ann One of Royall's Clients?

In a summary judgment case, the issue on appeal is whether the movant met his summary judgment burden by establishing that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c). In deciding whether there is a material fact issue precluding summary judgment, all conflicts in the evidence will be disregarded and the evidence favorable to the nonmovant will be accepted as true. *Harwell v. State Farm Mut. Auto. Ins. Co.,* 896 S.W.2d 170, 173 (Tex. 1995). Evidence that favors the movant's position will not be considered unless it is uncontroverted. *Great Am. Reserve Ins. Co. v. San Antonio Plumbing Supply Co.*, 391 S.W.2d 41, 47 (Tex. 1965).

Royall asserts, as a ground supporting his motion for summary judgment, that Ann was not his client in the divorce proceeding, and therefore she had no standing to file suit against him. As summary judgment proof of that ground, Royall submitted the following: his affidavit stating that neither he nor anyone in his firm represented Ann Massey. He also submitted, in an attachment to his reply to Henry's response to the summary judgment, excerpts from the affidavit of Ann Massey addressing the issue of whether or not Royall represented her in the underlying divorce proceeding.

In response to the motion for summary judgment, Henry submitted his affidavit stating "Royall represented me and the interests of my children Ann Massey and Courtney Massey through the trial of the divorce case."

These competing affidavits raise a genuine issue of material fact regarding the question of whether Royall did in fact represent Ann. Royall is not entitled to summary judgment on the ground that he did not represent Ann inasmuch there is summary judgment

proof in the record that an attorney-client relationship existed between Royall and Ann in the divorce proceeding. Based on Henry's controverting affidavit, Royall failed to satisfy movant's summary judgment burden of showing there is no genuine issue of material fact and that he is entitled to judgment as a matter of law. *Great Am. Reserve Ins. Co.*, 391 S.W.2d at 47 (holding burden of proof is on movant and all doubts as to existence of a genuine issue as to a material fact are resolved against him).

Royall was not entitled to summary judgment on any of the common law malpractice claims presented by Henry, or on the ground that Ann was not his client. Royall was, however, entitled to summary judgment as to Henry's DTPA claims. Therefore, we affirm the summary judgment as to Henry's DTPA claims, reverse the judgment as to Henry's remaining claims and remand those claims to the trial court for further proceedings.

/s/ John S. Anderson
Justice

Judgment rendered and Opinion filed September 27, 2001.

Panel consists of Justices Anderson, Hudson, and Seymore.

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