# Mecom v. Vinson & Elkins

2001 | Cited 0 times | Court of Appeals of Texas | May 10, 2001

OPINION

Lannie Mecom filed suit in May 1996 against the law firm of Vinson & Elkins [2] and, six months later, added one of its clients, Morgan Guaranty Trust, [3] as a defendant. Lannie Mecom alleged numerous claims against both defendants. [4] The trial court severed the claims for excessive legal fees and fraud in the inducement, then granted both defendants' motions for summary judgment on the remaining causes of action alleged.

To fully understand the parties' claims, we provide the factual background in some detail that gave rise to the lawsuit that Lannie Mecom (Lannie) filed against Vinson & Elkins (V&E), one of its partners, Wm. Randolph Smith (Smith), and one of the law firm's clients, Morgan Guaranty Trust (the Trust).

I. PRESUIT CHRONOLOGY

Lannie Mecom and her sister, Betsy Mecom Mullins, were the beneficiaries of various testamentary trusts established by their grandparents; their father, John Mecom, Sr.; and their mother for the benefit of their two daughters, Lannie and Betsy, and their son, John, Jr. The substantial property interests that the sisters inherited were virtually identical and included oil and gas royalty income from a ranch near Laredo, Texas.

From the late-1960s, and over the next 20-some years, V&E represented both Lannie and Betsy, jointly and individually, and during their marriages, V&E represented both couples. Smith, along with other V&E attorneys, was involved in the representation of the sisters and their respective spouses.

A. Lannie's Marriage and Personal Finances

In 1967, Lannie married Robert B. Moses, Jr. (Moses). It is undisputed that, throughout the marriage, Lannie deferred to Moses in the couple's financial matters, business ventures, and the management of her separate properties. Without restriction, Lannie fully shared her wealth with Moses, including the income from her separate property. Moses used Lannie's separate property income to purchase stock and real estate, such as three ranches, a resort home in the Bahamas, and a home in River Oaks. He also purchased three airplanes and invested in a Nevada casino and in the commodities market.

Lannie relied on Moses to obtain any necessary legal or tax advice for the couple's financial affairs. In that regard, the record suggests Lannie rarely spoke directly with Smith, or any other V&E attorney whose services Moses engaged from time to time to provide advice or to document their and his business ventures. Instead, with Lannie's knowledge and apparent consent, and with the possible exception of their wills, Moses handled virtually all of the couple's dealings with Smith and other V&E attorneys.

The evidence shows that throughout the couple's marriage, Lannie was aware that many of Moses's investments and business ventures were unsuccessful, caused a reduction in the value of her separate property, and created a substantial amount of debt for the couple. Lannie did not like debt of any kind. However, even when Lannie was unhappy or disagreed with Moses's financial and investment decisions, she did nothing to curtail his activities, nor did she apparently place any restrictions on Moses's use of her separate property. Lannie even personally guaranteed loans and pledged royalties from her separate property, the Laredo Ranch, as security for at least two multi-million dollar loans from First City National Bank.

B. Lannie Sells Her Laredo Ranch Royalty Interests

By 1988, the couple had accumulated a substantial amount of debt, including several million they owed to First City National Bank secured, at least in part, by Lannie's personal guarantee and a pledge of the Laredo Ranch royalty interests. Although the record is unclear about the exact timing or the manner in which it happened, Moses secured Lannie's reluctant agreement to sell her royalty interests and to use the proceeds from the sale to reduce the couple's debts.

On Lannie's behalf, Moses engaged Billy Haskins (Haskins) at First City Energy Financial Advisors to solicit bids for sale of the Laredo Ranch royalty interests. Haskins sent a prospectus to over 100 potential buyers and received 10 or 11 bids. The bids ranged from a low of $4 to 5 million to a high of $14.7 million from Morgan Guaranty Trust. It was Haskins's opinion that the $14.7 million bid was at or above the fair market value of the property. The next highest bid was some several million dollars lower than the $14.7 million.

After Haskins presented the bids to Lannie and Moses, the couple met with Richard Bean (Bean), the accountant who had handled their income tax work since 1976. Bean discussed the tax implications of the sale with Lannie and Moses. Bean also discussed his analysis of the relative value of the lump-sum payment the Trust had offered, compared to the present value of the future cash flow stream to be earned from the royalties, if sold. The discussion encompassed the financial impact on the couple's outstanding debt if some of the proceeds were used to reduce their debt.

On February 28, 1989, Lannie executed a letter agreement to sell the Laredo Ranch royalties to the Trust for $14.7 million. Shortly after Lannie executed the Letter Agreement, Moses contacted Smith at V&E and requested V&E to prepare the formal closing documents based on the parties's

agreement. Smith informed Moses that the Trust was also a V&E client and the Trust had also requested the firm's representation for preparation of the paperwork to complete the transaction.

Those contacts with V&E, initiated separately by Moses and the Trust, were the first time V&E had information about the sale of Lannie's royalty interests. Smith informed Moses that, unless both Lannie and the Trust agreed to waive any potential conflict, V&E could not complete the closing documents for both parties. V&E also advised the senior person in charge of the transaction for the Trust, William Walker (Walker), about the potential conflict.

Moses testified by affidavit that he consulted with Lannie, and then, acting on her behalf, he agreed to waive any potential conflict so V&E could draft the closing documents. On behalf of the Trust, and with the understanding that Lannie had agreed to V&E's dual representation to prepare the paperwork to complete the transaction, Walker also agreed to waive any potential conflict.

An attorney with V&E, James Cuclis, prepared the required documents to satisfy the terms of the Letter Agreement Lannie had executed. Another V&E attorney handled the transaction for the Trust. The record establishes that, although V&E prepared the legal documents necessary to effectuate the terms of the parties's Letter Agreement, the firm was not involved in any other aspect of the parties's transaction, either before or after it took place.

Cuclis testified that he reviewed the basic terms of the closing documents with Lannie and Moses, as well as discussing the fact that some $4 million of the proceeds would be used to satisfy the liens against the property held by First City National Bank. This payment to the bank was in accord with the couple's expressed intention to use the proceeds to satisfy their outstanding debts and then to invest the balance of the sale proceeds in the securities market.

The transaction was completed and the funds transferred in September 1989. Neither Lannie nor Moses sought advice from V&E about their use of the sale proceeds.

C. In 1989, Betsy Mecom Mullins Sued V&E and Smith

In 1989, Betsy Mecom Mullins, Lannie's sister, filed suit against V&E and Smith alleging they had negligently failed to properly advise and represent her separate property interests in transactions that changed the character of her separate property estate to community property and/or caused an outright loss of her property (the Mullins suit). [5] Betsy also alleged V&E had failed to contest the administration of her separate property by her husband, Don Mullins, resulting in the commingling of her separate property estate with the community estate, and its dissipation or loss. Betsy's suit further alleged V&E had represented her when they knew or should have known of obvious conflicts of interest. Attorney Larry Doherty (Doherty) filed the Mullins suit on Betsy's behalf.

In July 1990, Lannie signed an Agreed Protective Order permitting Doherty's access to the sisters'

joint legal files at V&E. In June 1991, The Houston Post published a lengthy, front-page article describing the factual background underlying Betsy's allegations and describing the lawsuit against V&E.

D. In 1992, Lannie and Moses Separated

In September 1992, while Mullins was still pending, Lannie and Moses separated, [6] but, initially, the couple did not intend to divorce. On September 24, 1992, Smith forwarded to Lannie and Moses a proposed "Marital Agreement" he had prepared pursuant to the couple's instructions. In the cover letter accompanying the Marital Agreement, Smith informed the couple he could not represent either of them further. Both Lannie and Moses signed the Marital Agreement and, then, to effectuate the terms of the agreement, they each engaged other attorneys who were not associated with V&E. [7] Although the record is not completely clear, it appears Lannie waited until sometime in 1993 before engaging William Wilde (Wilde) to represent her.

As Lannie explained the terms of the Marital Agreement to Wilde, the couple intended to partition all of their property 50/50, including all of Lannie's separate property, with the exception of surface rights to the Laredo Ranch. She informed Wilde that, after the couple's property was partitioned into two separate estates, she intended for Moses to continue to manage all of the property for both of them, including any future investments for either of them. This implementation of the terms of the Marital Agreement actually contemplated something similar to a "partnership" between Lannie and Moses after the partition of their property. In his deposition testimony, Wilde stated that Lannie did not discuss or propose any limitations be placed on Moses's management or investment decisions, nor that any type of legal or financial oversight be imposed on any of his decisions. At the beginning of Wilde's representation of Lannie, she did not state any dissatisfaction with Moses's management of the couple's financial affairs. In fact, she indicated to Wilde that Moses had done a good job and she wanted him to continue handling her separate property and investments even after the partition.

Lannie told Wilde the purpose of the 1989 sale of her Laredo Ranch royalty interests had been to liquidate the couple's debts. As Wilde analyzed the couple's assets and liabilities, he concluded that Lannie's separate property estate was entitled to reimbursement by the community estate for the Laredo Ranch royalty interest sale proceeds.

During January and February 1993, three separate conversations took place between Lannie and Betsy about Betsy's allegations against V&E and Smith. One of the conversations took place after Betsy and her personal assistant, Caroline Fox, had attended a deposition where Betsy's claims against V&E had been discussed in detail. According to the deposition testimony of Fox, who was present during all three conversations, Betsy: (1) warned Lannie about protecting Lannie's own separate property estate; (2) told Lannie it had been a bad idea for Lannie to sell her royalty interests under the Laredo Ranch; (3) encouraged, strongly suggested, and urged Lannie to look into, to investigate, whether V&E had provided her with adequate representation, because Lannie might have

the same problems with her separate property as Betsy had; (4) told Lannie she (Betsy) believed that V&E had let her (Betsy) down, had negligently failed to represent her, and had caused or permitted the commingling of her separate property with the community estate; and (5) suggested that V&E might also have caused harm to Lannie's separate property by allowing it to be commingled the way they had allowed Betsy's separate property to be commingled. Further, Betsy suggested to Lannie that she talk with Doherty, the attorney representing Betsy, and even encouraged Lannie to do so.

By February 22, 1994, Wilde had (1) prepared and forwarded to Lannie a draft of the couple's assets and liabilities, including a characterization of the couple's property as separate or community, and (2) informed her that her separate property estate should seek reimbursement from the community estate for the proceeds of the sale of the Laredo Royalty interests. Wilde had also discussed with Lannie the option of litigation, or an injunction, against Moses should he not agree to the proposed reimbursement related to the royalties. By this time, it had become clear to Wilde that he was no longer working on a partition agreement but, instead, the proposed property partition amounted to a property settlement incident to a divorce.

On March 1, 1994, in a telephone conversation arranged by Lannie, Doherty conveyed to Wilde that he had information that would be helpful for Wilde's analysis of the property partition for Lannie and Moses. Doherty also suggested to Wilde that Lannie might be interested in pursuing the same claims against V&E that Betsy had asserted and that he would be interested in handling such a suit for Lannie.

Wilde met with Doherty a day or so later and heard additional information about the facts and circumstances underlying Betsy's lawsuit and why Doherty believed Lannie had the same cause of action against V&E. Doherty gave Wilde two folders of financial information related to the sisters's oil and gas properties that had been prepared for the Mullins litigation. At that time, Doherty again encouraged Wilde to see if Lannie might be interested in employing him to represent her against V&E.

Wilde's deposition testimony includes his opinion that Lannie was fully aware of Betsy's lawsuit and that the sisters had talked about it on a regular basis. On March 4, 1994, in a face-to-face meeting with Lannie, Wilde reported Doherty's interest in representing her based on Doherty's firm belief she had a cause of action against V&E, and why. Doherty was convinced that the same facts and circumstances were present for Lannie as were present for Betsy. According to Wilde, Lannie had no interest in pursuing litigation against V&E at that time.

E. On March 8, 1994, Betsy and V&E Settled Mullins

The record shows Betsy told Lannie she had settled her case against V&E, however, Betsy could not discuss the details with Lannie because of the terms of the settlement.

F. Lannie Files Suit

In April 1995, Lannie's divorce from Moses became final. On October 10, 1995, Lannie retained Doherty to handle her claims against V&E. Thereafter, on May 21, 1996, Doherty filed Lannie's suit. In that suit, Lannie's claims focused on (1) V&E's representation of her separate property interests during her marriage to Moses (the Marital Claims) and (2) V&E's representation during the sale of her separate property royalty interests under the Laredo Ranch (the Laredo Royalty Claims). [8]

1. The Marital Claims

Lannie alleged, generally, that V&E failed to preserve, protect, and maximize the use and possession of her separate property estate during her marriage, throughout the time V&E represented her. According to Lannie, V&E failed to protect her separate property because, throughout her 28-year marriage to Moses, they did not inform her that Moses's business ventures, many of which failed or lost money, were funded or secured by her separate property assets. Moreover, Lannie contended that V&E should have known Moses's management of the couple's assets, essentially only Lannie's separate property, substantially dissipated the income derived from her separate property and never created a community estate.

Lannie alleged that because V&E improperly allowed the commingling of her separate property estate with the community property estate, this created an ambiguity in the characterization of her separate property, resulting in her separate property becoming liable for Moses's debts. She alleged that the commingling, along with Moses's diversion of funds from her separate property estate, resulted in a substantial devaluation and destruction of her separate property assets, to the extent that by the time of her divorce in 1995, Lannie had been deprived of the majority of her family inheritance.

She alleged further that, because V&E knew her separate property estate was the sole source of funds for Moses and for payment of his legal fees, V&E had enhanced themselves financially and professionally at her expense. Lannie sought $50 million in damages for the lost assets to her separate property estate, allegedly caused by V&E's "valueless estate planning" and the result of the commingling of her separate property with the community property.

2. The Laredo Royalty Claims

Lannie alleged that, unbeknownst to her and in conflict with her interests, at the same time V&E represented her in the sale of the Laredo Ranch royalty interests, they had also represented the Trust as the purchaser of the royalty interests, as well as First City National Bank, the community property estate's primary creditor that received money from the proceeds of the sale to satisfy its liens against the property. She asserted that the use of her separate funds constituted satisfaction of the liens and meant Moses's financial obligations to the bank had been repaid. Lannie sought another $50 million

in damages to her separate property estate for "future lost interest in gas royalties and revenue" caused by V&E's failure to disclose the potential conflicts of interest and failure to obtain her consent while drafting the legal documents to close the sale. Lannie also sought punitive damages.

3. Claims Against Morgan Guaranty Trust

Some six months after Lannie sued V&E, she sued the Trust, the purchaser of the Laredo Ranch royalty interests. Lannie alleged that, in breach of the disciplinary rules applicable to V&E, and in violation of public policy, the Trust had knowingly participated with V&E to acquire her royalty interests. Lannie further alleged that both defendants had conspired to violate the commercial bribery provision of the Penal Code. According to Lannie, the sale was void, and she was entitled to recission, without restitution, and that the Trust was jointly liable with V&E for the loss of revenue from the Laredo Ranch.

II. DEFENDANTS MOVE FOR SUMMARY JUDGMENT

A. Defendants' Grounds for Summary Judgment

Both V&E and the Trust moved for summary judgment. V&E asserted Lannie's Marital Claims (1) were barred by limitations and (2) they did not owe a duty to Lannie to "maximize the use and possession of her separate property." V&E asserted summary judgment was proper against the Laredo Ranch Royalty Claims because: (1) there was no conflict of interest, but even if there was, it had been waived; (2) V&E had not been negligent; (3) V&E's actions or inactions were not the proximate cause of any damages to Lannie; and (4) the claims were barred by limitations.

The Trust's grounds for summary judgment were: (1) there was no basis under Texas law for rescission on the facts; (2) public policy had not been violated by V&E's documentation of the agreement reached between Lannie and the Trust for purchase of the royalty interests; (3) any conflict, if one existed, had been waived, and Lannie had suffered no damages; (4) payment of V&E's legal fees did not equate to a bribe for V&E to breach a fiduciary duty to Lannie; and (5) limitations barred Lannie's claims. Additionally, the Trust adopted and incorporated all of V&E's arguments and evidence from their motion for summary judgment and supplements to it. [9]

B. Defendants' Affirmative Defense-Limitations

V&E argued that, regardless of how Lannie described her claims, they were all for professional negligence and governed by a two-year statute of limitations. See Tex. Civ. Prac. & Rem. Code § 16.003(a) (Vernon Supp. 2001). Relying primarily on recent Texas Supreme Court decisions, V&E contended none of Lannie's claims were "inherently undiscoverable"or "objectively verifiable"; therefore, the discovery rule did not apply and limitations ran from any number of events, all of which happened more than two years before Lannie filed suit on May 21, 1996. Childs v. Haussecker,

974 S.W.2d 31, 40 (Tex. 1998); Murphy v. Campbell, 964 S.W.2d 265, 273 (Tex. 1997); S.V. v. R.V., 933 S.W.2d 1, 15 (Tex. 1996); Computer Assocs. Int'l, Inc. v. Altai, Inc., 918 S.W.2d 453 (Tex. 1996).

Then, while expressly not conceding the applicability of the discovery rule, V&E argued, even if the discovery rule did apply, Lannie's claims were still barred by limitations, because the summary-judgment evidence established numerous dates from which limitations began to run and all of which happened more than two years before she filed suit.

To support their argument that Lannie's claims were barred by limitations, whether or not the discovery rule applied, V&E presented summary judgment evidence to establish the following:

1. Lannie's knowledge of Betsy's suit in 1989 against V&E and Smith alleging the failure to protect her separate property interests and permitting her husband to dissipate and commingle her separate property estate with the community estate-essentially the same allegations Lannie stated in her 1996 suit against V&E and Smith, and filed by the same lawyer, Larry Doherty;

2. Lannie's knowledge throughout her marriage that her separate property was being utilized by Moses for investments and purchases and that those business ventures often were unsuccessful and created debt for the couple, and that she had personally guaranteed substantial loans for his business ventures;

3. the agreed protective order Lannie signed in July 1990 allowing Doherty access to the sisters' legal files at V&E;

4. the June 1991 front page Houston Post article about her sister's allegations against V&E and that Lannie knew about the article;

5. the three conversations between the sisters in early 1993 when Betsy suggested V&E might have caused harm to Lannie's separate property, just the way it had to Betsy's;

6. Lannie's knowledge and agreement in early 1994 for her separate property estate to seek reimbursement from the community estate for the Laredo Royalty sale proceeds;

7. the conversations in February and the first few days of March 1994 between Doherty and Wilde, as Lannie's attorney/agent, when Doherty described why he believed Lannie had the same cause of action against V&E that Betsy had; and

8. Wilde's subsequent discussion with Lannie in early March 1994, relaying Doherty's interest in representing her in a suit against V&E and why Doherty believed Lannie had the same cause of action Betsy had alleged.

According to V&E, these facts showed that Lannie knew V&E, and her own lawyer, Smith, were being sued by her sister for professional negligence, fraud, deceit, and misrepresentation related to the same separate property interests both sisters had inherited in virtually identical separate property. They also contended that Lannie had had the benefit of professional advice from Betsy's lawyer, Larry Doherty, who believed a cause of action existed in Lannie's favor. They asserted that she ignored the advice and refused to do anything to establish whether she had a cause of action against V&E.

C. Trial Court Renders Summary Judgment

After two hearings and extensive briefing, the trial court first ruled all of Lannie's claims in her third amended original petition [10] were properly characterized as legal malpractice claims, irrespective of the label attached to the claims. [11] The court then rendered a take-nothing summary judgment in V&E's favor based on limitations for Lannie's Marital Claims and the Laredo Royalty Claims. The court also rendered a take-nothing summary judgment in the Trust's favor based on limitations for the Laredo Royalty Claims. The court expressly denied all other grounds advanced by either defendant in their motions for summary judgment.

In its summary judgment, the trial court specifically found Lannie's fraud claims were subsumed by her legal malpractice claims, with the exception of the alleged excessive fee claim and fraud in the inducement, if any. Those claims were severed and remain pending in the trial court. [12]

D. Standard of Review

Summary judgment under Texas Rule of Civil Procedure 166a(c) is proper only when the movant establishes there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. Randall's Food Mkts., Inc. v. Johnson, 891 S.W.2d 640, 644 (Tex. 1995). In reviewing a summary judgment, we assume all evidence favorable to the non-movant is true and we indulge every reasonable inference and resolve any reasonable doubt in favor of the non-movant. Science Spectrum, Inc. v. Martinez, 941 S.W.2d 910, 911 (Tex. 1997).

A defendant is entitled to summary judgment by conclusively establishing all elements of an affirmative defense, such as limitations, as a matter of law, but in seeking summary judgment on limitations, he must prove (1) when the cause of action accrued and (2) negate the discovery rule by proving as a matter of law that there is no genuine issue of fact about when the plaintiff discovered, or should have discovered, the nature of the injury. Id.; Burns v. Thomas, 786 S.W.2d 266, 267 (Tex. 1990).

If a movant establishes that limitations bars an action as a matter of law, the non-movant must then adduce summary-judgment proof which raises a fact issue to avoid the statute of limitations. KPMG Peat Marwick v. Harris County Hous. Fin. Corp., 988 S.W.2d 746, 748 (Tex. 1999).

III. DISCUSSION

A. Issues on Appeal

Lannie presents two issues on appeal. First, whether the trial court erred in rendering summary judgment based solely on the two-year statute of limitations, and second, whether the trial court erred when it refused to apply the four-year statute of limitations (as augmented by the discovery rule) to Lannie's fraud claims.

The Trust contends the trial court erred when it denied the alternative, independent grounds it stated in its motion for summary judgment.

B. Trial Court's Characterization of Lannie's Claims

To reach Lannie's issue of whether the trial court correctly applied the two-year statute of limitations, we first review whether the trial court properly characterized all of her claims against V&E as "legal malpractice," irrespective of the label attached to them, and whether the fraud allegations were subsumed under the legal malpractice claim. In other words, did the trial court err when it ruled that all of Lannie's claims, except those it severed, [13] were grounded in professional negligence and her fraud claims were subsumed by the malpractice claim.

1. Lannie Describes Her Claims

In her third amended original petition, Lannie described V&E's conduct as follows: negligent or grossly negligent, breached the fiduciary duties of utmost fidelity, candor and honesty owed your Plaintiff, concealed the representation of adverse interests, overtly misrepresented the quality and nature of legal services provided to Plaintiff, and is considered, at law, to constitute actual and/or constructive fraud.

In paragraph IV, "Negligence, Gross Negligence, and Deceptive Trade Practices," Lannie describes her suit as one brought "to collect money damages because of V&E's fraud, deceit, misrepresentation, neglect, negligence, gross negligence, deceptive trade practices, and legal malpractice, in the handling of her separate property estate." Lannie then lists 17 alleged failures during the time V&E represented her, along with six alleged violations of the Deceptive Trade Practices-Consumer Protection Act (DTPA). See Appendix A.

In paragraph V, "Disciplinary Rules/Negligence Per Se and Public Policy," Lannie contends V&E violated the canons of ethics, the disciplinary rules, and the Texas disciplinary rules of professional conduct, and such violations constitute negligence, gross negligence, negligence per se, and breach of fiduciary duty. Alternatively, Lannie contends these rules are evidence of the standard of care of reasonably prudent lawyers. [14]

In paragraph IX, "Fraud and Fraudulent Concealment," Lannie alleges V&E's conduct constituted (1) fraud, deceit, and misrepresentation; (2) affirmative misrepresentations; and (3) concealment of facts they were bound to disclose due to the fiduciary duties they owed Lannie throughout the time they provided legal services to her. She also alleges that V&E, the Trust, and others, conspired to drain her separate property estate.

In her response to the defendants's motions for summary judgment, Lannie stated the following:

Overall, Defendants' representation of your plaintiff, their unidentified conflicts of interest, and their valueless estate planning, fell below the standard of care required of attorneys providing such services, and forms the basis of your Plaintiff's causes of action herein. (Emphasis added).

To further illustrate why summary judgment should not be rendered, Lannie quoted the primary objectives of estate planning found in a legal textbook authored by an attorney. The objectives were described as the "standard of care" for attorneys engaged in such representation since the inception of V&E's estate planning for her.

2. Lannie's Expert Describes Her Claims

As expert evidence to defeat summary judgment, Lannie relied on Patrick Moran, an attorney, who testified by affidavit about the duties an attorney owes a client and the standard of care for estate planning, especially for separate property interests, oil and gas, and business transactions. It was Moran's opinion that V&E's representation during the Laredo Royalty sale was improper because conflicts of interest existed that were not disclosed to Lannie. He also stated that Lannie's separate property interests were in conflict with the community property interests and it was V&E's duty to preserve, protect, and maximize her separate property estate. Moran was of the opinion that V&E "failed to discharge this duty of care." Overall, Moran's opinion was that V&E breached the standard of care and the duties they owed to Lannie, their client, during the time they represented her for estate planning and for the Laredo Royalty sale.

Moran's statements in his affidavit are essentially duplicative of Lannie's core complaints that V&E failed to provide her with adequate legal representation, thus, (1) failing in the duties they owed her as a client to protect and maximize her separate-property estate, (2) failing to disclose conflicts of interest, and (3) failing to prevent the dissipation and commingling of her separate property estate with the community estate.

3. Lannie's Fraud Allegations

An examination of Lannie's fraud allegations supports the conclusion that they are essentially a repetition of her complaints that, during the time she entrusted her legal affairs to V&E, they: (1) failed to protect and maximize her separate property estate; (2) failed to disclose and concealed

conflicts of interest that existed in their handling of adverse transactions, such as the Laredo Royalty sale; and (3) allowed Moses to dissipate and commingle her separate property with the community estate. All of these alleged failures arise from the attorney-client relationship and the duties attorneys owe a client.

Based on the record, we conclude that Lannie's fraud allegations are not independent of her other allegations but are another attempt to accomplish a means to an end, that is, the imposition of liability against V&E for their alleged breach of the duties attorneys owe a client. Greathouse v. McConnell, 982 S.W.2d 165, 172 (Tex. App.-Houston [1st Dist.] 1998, pet. denied).

We further conclude the trial court properly characterized all of Lannie's claims as legal malpractice because, regardless of how she described them, her complaints are focused on V&E's actions or inactions in their representation of a client, the attorney-client relationship, and the duties owed to a client by attorneys. We are supported in this conclusion by decisions from other courts. [15]

Our conclusion that this is a legal malpractice action is further supported by Lannie's own description of her claims and her expert's testimony that V&E breached their duties and the standard of care as attorneys representing her generally and specifically, with regard to the sale of her royalty interests.

We have concluded that Lannie's allegations sound in professional negligence and, because her fraud allegations fall within the ambit of a claim for legal malpractice, we hold that this is a tort suit governed by the two-year statute of limitations. Apex Towing Co. v. Tolin, 44 Tex. Sup. Ct. J. 470, 471 (Mar. 1, 2001) (two-year statute of limitations governs legal malpractice claims, whether they sound in tort, contract, or other theory) (citing Willis v. Maverick, 760 S.W.2d 642, 644 (Tex. 1988) (legal malpractice claims are governed by two-year statute of limitations)).

We overrule issue two complaining that the trial court erred when it applied the two-year statute of limitations to all of Lannie's claims, including her fraud allegations, except those claims severed by the court.

C. Lannie's Defenses to Limitations

Lannie filed suit on May 21, 1996; therefore, the accrual date for her cause of action could be no earlier than May 21, 1994, or her claims would be barred by limitations. In issue one before this Court, Lannie contends the trial court erred in rendering summary judgment based solely on the two-year statute of limitations, because V&E continued to represent her into 1995; thus, she claims the suit she filed in May 1996 was timely. Lannie also contends that the discovery rule applies to her claims.

1. The Hughes' Tolling Rule

Lannie's contention that limitations did not begin to run until after she discharged V&E in 1995 appears to be an attempt to invoke the tolling rule found in Hughes v. Mahaney & Higgins, 821 S.W.2d 154, 157 (Tex. 1991). Recently, in Apex Towing Co. v. Tolin, the Texas Supreme Court re-examined the Hughes rule and reaffirmed that when an attorney commits malpractice in the prosecution or defense of a claim that results in litigation, the statute of limitations on the malpractice claim against the attorney is tolled until all appeals of the underlying claim are exhausted. 44 Tex. Sup. Ct. J. at 471. Under those circumstances, the legal injury and discovery rules can force the client into adopting inherently inconsistent litigation postures in the underlying case and in the malpractice case. Therefore, limitations are tolled for the malpractice suit as its viability depends on the outcome of the first. Hughes, 821 S.W.2d at 156.

Because the record in this case does not involve prior litigation, Lannie's contention does not satisfy the requirements necessary to invoke the Hughes tolling rule. We overrule issue one to the extent it complains the summary judgment was improperly rendered because V&E continued to represent her into 1995 and she filed suit in 1996.

2. Discovery Rule

In issue one, Lannie also argues that her suit is not barred by the two-year statute of limitations, because she did not discover she had a cause of action against V&E until after she discharged them as her attorneys in early 1995.

A plaintiff's invoking the discovery rule is recognized as a plea in confession and avoidance which avows and confesses the truth in the averments of fact in the petition, either expressly or by implication, but then proceeds to allege new matter which tends to deprive the facts admitted of their ordinary legal effect, or to obviate, neutralize, or avoid them. Woods v. William M. Mercer, Inc., 769 S.W.2d 515, 517 (Tex. 1988).

Generally, a cause of action accrues when a wrongful act causes some legal injury, even when the fact of injury is not discovered until later, and even if all of the resulting damages have not yet occurred. S.V., 933 S.W.2d at 4. A cause of action for negligence accrues at the moment that the plaintiff is entitled to sue the defendant for damages caused by the negligent acts or omissions of the defendant. Willis, 760 S.W.2d at 644. "Damages" have been defined as "legal injuries" which are any invasions of the plaintiff's legally protected interest. Zidell v. Bird, 692 S.W.2d 550, 557 (Tex. App.-Austin 1985, no writ).

In a legal malpractice case, the attorney's conduct must raise only a risk of harm to the client's legally protected interest for the tort to accrue, but the harm need not be finally established or an inevitable consequence of the conduct. Id. The fact that a plaintiff's actual damages may not be fully known until much later does not affect determination of the accrual date for alleged legal malpractice. Murphy, 964 S.W.2d at 272-73.

## Mecom v. Vinson & Elkins

2001 | Cited 0 times | Court of Appeals of Texas | May 10, 2001

Limitations generally begins to run when the cause of action accrues, which means, according to the Texas Supreme Court, when facts have come into existence that authorize a claimant to seek a judicial remedy. Apex, 44 Tex. Sup. Ct. J. at 471; Johnson & Higgins of Tex., Inc. v. Kenneco Energy, Inc., 962 S.W.2d 507, 514 (Tex. 1998). The limitations period for a negligence cause of action begins to run as soon as the plaintiff discovers or should have discovered any harm, however slight, resulting from the negligence of the defendant. Zidell, 692 S.W.2d at 555. The Texas Supreme Court recently has restated that 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. Apex, 44 Tex. Sup. Ct. J. 472.

The discovery rule is an exception to the general accrual rule. It is a legal principle used to determine when a cause of action accrues in cases in which a claimant was unable to know of an injury at the time it occurred. Robinson v. Weaver, 550 S.W.2d 18, 19 (Tex. 1977). The discovery rule operates to toll the statute of limitations until the plaintiff discovers, or by exercising reasonable care and diligence should have discovered, the nature of the injury. S. V., 933 S.W.2d at 15.

To invoke the discovery rule, a plaintiff's claim must be "inherently undiscoverable" and "objectively verifiable." Id. An injury is "inherently undiscoverable" if, by its nature, it is unlikely to be discovered within the prescribed period, despite due diligence. This does not mean the injury is absolutely impossible to discover. Id. at 7. Discovery of a particular injury is dependent not solely on the nature of the injury, but on the circumstances in which it occurred, and the plaintiff's diligence as well. Id. "Objectively verifiable" has been interpreted to require direct evidence of the injury, or that the alleged injury was indisputable. Expert testimony will not supply the objective verification of wrong and injury. Id.

We recognize that a fiduciary's misconduct has been held to be inherently undiscoverable in some circumstances. Willis, 760 S.W.2d at 645 (facts which might ordinarily require investigation likely may not excite suspicion when fiduciary relationship is involved). Nevertheless, while a person to whom a fiduciary duty is owed may be relieved of the responsibility of diligent inquiry into the fiduciary's conduct so long as the relationship exists, when the fact of misconduct becomes apparent, it can no longer be ignored, regardless of the nature of the relationship between the parties. S.V., 933 S.W.2d at 8. Thus, when the discovery rule applies, and even in instances involving a fiduciary relationship such as between an attorney and client, limitations still begins to run when 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. Apex, 44 Tex. Sup. Ct. J. at 472; Childs, 974 S.W.2d at 40.

Inquiries involving the discovery rule usually entail questions for the trier of fact. Childs, 974 S.W.2d at 44. However, it is well- established that the commencement of the limitations period may be determined as a matter of law if reasonable minds could not differ about the conclusion to be drawn from the facts in the record. Id.; Commercial Standard Ins. Co. v. Davis, 137 S.W.2d 1, 2 (Tex. 1940).

V&E argues the discovery rule does not apply on this record, because Lannie's claims were neither inherently undiscoverable or objectively verifiable. However, we recognize that the discovery rule can apply to legal malpractice claims. We also recognize that the DTPA has its own two-year statute of limitations with two exceptions, a discovery rule and a fraudulent concealment rule. Tex. Bus. & Com. Code Ann. §17.565 (Vernon 1987) [16] Apex, 44 Tex. Sup. Ct. J. at 472; Underkofler v. Vanasek, 44 Tex. Sup. Ct. J. 464, 465 (Mar. 1, 2001) (court refused to extend Hughes tolling rule to legislature's express statement of only two exceptions to limitations, thus, DTPA claims were barred by two-year statute of limitations).

Whether common-law or statutory, the discovery rule expressly requires a plaintiff to use reasonable diligence to investigate his injury. Childs, 974 S.W.2d at 47; Tex. Bus. & Com. Code Ann. § 17.565 (Vernon 1987). Moreover, the discovery rule's requirement of reasonable diligence means that tolling of the applicable statute of limitations ends when the person claiming the benefit of the rule acquires knowledge of facts, conditions, or circumstances that would cause a reasonable person to make an inquiry leading to the discovery of the concealed cause of action. Bayou Bend Towers Council of Co-Owners v. Manhatten Constr. Co., 866 S.W.2d 740, 747 (Tex. App.-Houston [14th Dist.] 1993, writ denied). The question is not whether a plaintiff has actual knowledge of the particulars of a cause of action, rather, it is whether the plaintiff has knowledge of facts which would cause a reasonable person to diligently make inquiry to determine her legal rights. That knowledge triggers the period of time within which the plaintiff must investigate and determine whether to file suit. Bell v. Showa Denko K.K., 899 S.W.2d 749, 754 (Tex. App.-Amarillo 1995, writ denied); Arabian Shield Dev. Co. v. Hunt, 808 S.W.2d 577, 583 (Tex. App.-Dallas 1991, writ denied).

Here, even in the context of the undisputed fiduciary relationship existing between Lannie and V&E, we believe the record shows Lannie possessed sufficient information by the first few days of March 1994, at the latest, to mandate the use of reasonable care and diligence to investigate and discover the facts establishing the elements of her cause of action. By then, Wilde had reported his conversation with Doherty to Lannie concerning Doherty's belief that she had a cause of action, and why. By then, an attorney who was familiar with her finances and legal representation had suggested to Lannie, through her own attorney hired independently of V&E, that she might have a cause of action, yet she refused to investigate. Bell, 899 S.W.2d at 755 (under discovery rule, user's cause of action arose when she was told by physicians she possibly had a disease and should investigate further). The record shows that Lannie employed Doherty in October 1995; this suit was filed in May 1996, two years and two months after her conversation with Wilde in early March 1994.

We overrule issue one to the extent it relies on the discovery rule to complain the trial erred in applying the two-year statute of limitations to bar her suit.

3. Fraudulent concealment

Lannie contends that fraudulent concealment estops V&E from asserting limitations, because it

concealed its wrongful conduct when it was under a fiduciary duty to disclose the conflicts of interest in the sale of her royalty interests. We address this contention as an affirmative defense, and because fraudulent concealment is an express exception to the discovery rule found in the DTPA.

The doctrine of fraudulent concealment, based on equity principles can operate to defer the accrual of a cause of action in a proper case. The Texas Supreme Court has defined the doctrine as follows:

Where a defendant is under a duty to make disclosure but fraudulently conceals the existence of a cause of action from the party to whom it belongs, the defendant is estopped from relying on the defense of limitations until the party learns of the right of action or should have learned thereof through the exercise of reasonable diligence. Borderlon v. Peck, 661 S.W.2d 907, 908 (Tex. 1983).

The estoppel effect of fraudulent concealment is not permanent; rather, it merely tolls or suspends the statute of limitations until the time the plaintiff learns of facts that give rise to his cause of action, or should learn of the facts in the exercise of reasonable diligence. Altai, 918 S.W.2d at 456. Once the plaintiff knows, or should know of the deceit, reliance on any failure to disclose is no longer reasonable, and the tolling effect ends. Once on notice of the deception, a plaintiff must act diligently and file suit. Id.

Because fraudulent concealment is in the nature of an affirmative defense to a claim of limitations, Lannie could only defeat summary judgment with sufficient evidence to raise a fact question for each of the elements of the defense. Earle v. Ratliff, 998 S.W.2d 882, 888 (Tex. 1999). Thus, Lannie was required to come forward with proof raising an issue of fact that V&E had: (1) actual knowledge of the wrong; (2) a duty to disclose the wrong; and (3) a fixed purpose to conceal the wrong. Id.; Casey v. Methodist Hosp., 907 S.W.2d 898, 903 (Tex. App.-Houston [1st Dist.] 1995, no writ) (once defendant establishes affirmative defense of limitations, burden rests with plaintiff to raise fact issue regarding fraudulent concealment). Id.

Although Lannie pleaded fraudulent concealment, the evidence in the record does not support her claim. Her affidavit statements that she did not know until 1995 that any action taken by either defendant caused her harm are conclusory and not supported by the record. Brownlee v. Brownlee, 665 S.W.2d 111, 112 (Tex. 1984) (conclusory affidavit statements are not enough to raise fact issues). Instead, the summary judgment evidence establishes that the potential conflict posed for V&E by representing both its clients in the conclusion of the sale of the royalty interests in the Laredo Ranch was disclosed by V&E to both the Trust and to Lannie through her husband to whom she had entrusted handling the royalty sale on her behalf, and that both parties waived the potential conflict.

We overrule issue one to the extent Lannie relies on fraudulent concealment to toll limitations.

We hold that Lannie failed to present controverting evidence raising a fact issue to preclude summary judgment on limitations. We hold further that the trial court did not err when it rendered

summary judgment to V&E on limitations.

Because we have concluded limitations bars Lannie's suit against V&E, we also conclude limitations bars her suit against the Trust for the 1989 purchase of the Laredo Ranch royalty interests and do not address any of the alternative, independent grounds for summary judgment the Trust asserted.

The judgment of the trial court is affirmed.

Do not publish. Tex. R. App. P. 47

APPENDIX A

1. Failure to preserve and protect her separate property estate;

2. failure to separate properties and monies due Plaintiff out of her separate property estate;

3. failure to contest Robert Moses dissipation of her separate property estate;

4. failing to fully investigate her separate property estate;

5. failure to maintain Lannie's separate property estate interest in property belonging to Lannie's separate estate;

6. failure to properly handle Lannie's separate property;

7. failure to perform as fiduciary;

8. conflicts of interest adverse to Lannie's separate property estate;

9. failing to disclose V&E's conflicting interests and/or failing to obtain Lannie's full informed, effective consent to engage in transactions that would or could diminish her separate property estate;

10. assisting in conversion and/or diversion of Lannie's separate property estate;

11. failing to prevent the loss or change of Lannie's separate property estate;

12. assisting in the loss of Lannie's separate estate;

14. Misrepresenting services, quality and/or need for legal services;

15. failure to keep Lannie fully, completely and/or properly informed as to matters pertaining to the

separate property;

16. failing to maximize Lannie's separate property estate's value; and,

17. engaging in false, misleading, and deceptive trade practices in violation of the Deceptive Trade Practices Act in six ways:

1. causing confusion or misunderstanding as to the source, sponsorship, approval or certification of services;

2. causing confusion or misunderstanding as to affiliation, connection or association with another;

3. representing that services have sponsorship, approval, characteristics, ingredients, uses, benefits, or qualitites which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection which he does not have;

4. representing that services are of a particular standard, quality or grade, or that goods are of a particular style or model, if they are of another;

5. representing that an agreement confers or involves rights, remedies, or obligations which it does not involve, or which are prohibited by law; and

6. failure to disclose information concerning goods or services which was known at the time of the transaction if such failure to disclose such information was intended to induce the consumer into a transaction which the consumer would not have.

1. The Honorable Jackson B. Smith, Jr., retired Justice, Court of Appeals, First District of Texas at Houston, participating by assignment.

2. Vinson & Elkins, a partnership of lawyers, now known as Vinson & Elkins, L.L.P., and Wm. Randolph Smith. Smith represented Lannie from 1969-1991. In amended petitions, Lannie sued other V&E attorneys, J. Evans Atwell, Harry M. Reasoner, and James L. Cuclis.

3. Morgan Guaranty Trust Company of New York, as Trustee under Declaration of Trust dated November 10, 1982, as amended, for the Commingled Pension Trust Fund (Petroleum II) a/k/a Commingled Pension Trust Fund (Petroleum II) by and through Morgan Guaranty Trust Company of New York as Trustee under Declaration of Trust dated November 10, 1982, as amended.

4. Plaintiff's original petition described the suit as one to collect money damages because of fraud, deceit, misrepresentation, neglect, negligence, gross negligence, deceptive trade practices, and legal malpractice in the handling of plaintiff's separate property estate and negligence per se for violations of the canons of ethics, disciplinary rules, and

rules of professional conduct. By time of trial, plaintiff had added claims for excessive fees based on breach of contract, over-reaching, fee churning, and conversion.

5. Mullins v. Vinson & Elkins, a Partnership, & Wm. Randolph Smith, 98-044248 (334th Dist. Ct., Harris County, Tex., 1989).

6. Lannie and Moses were married June 10, 1967, separated in the fall of 1992, and divorced in April 1995.

7. Lannie was represented by William Wilde at Bracewell & Patterson; Moses was represented by Timothy Brown at Brown, Parker & Leahy.

8. The parties have termed Lannie's claims against V&E, "the Marital Claims" and the "Laredo Royalty Claims." The Laredo Royalty Claims were also later asserted against the Trust. Our discussion utilizes, generally, the terminology and division of the claims as presented in the parties's pleadings and briefs.

9. For clarity, reference to V&E in our discussion below in regard to limitations and the summary judgment evidence will encompass the Trust, unless we specify otherwise.

10. Shortly before the summary judgment hearing, Lannie filed a third amended original petition listing her claims as negligence, gross negligence, deceptive trade practices, violations of the disciplinary rules, negligence per se, fraud, fraudulent concealment, negligent supervision, vicarious liability, conspiracy, over-reaching, fee churning, and conversion. In the third amended original petition, she also sought damages and forfeiture of legal fees based on breach of fiduciary duty and breach of contract.

11. The order granting the motion for summary judgment lists malpractice, negligence, negligence per se, neglect, gross negligence, breach of fiduciary duty, fraud, fraudulent concealment, misrepresentation, deceit, DTPA, conflict of interest, conspiracy, and conspiracy to defraud.

12. The trial court's summary judgment references the petition's parts XIV, breach of contract and XV, over-reaching, fee churning, and conversion.

13. The claims related to excessive fees and fraud in the inducement, if any.

14. We note that a private cause of action is not created by a violation of the State Bar Rules, the disciplinary code or the Texas Disciplinary Rules of Professional Conduct. We do not discuss these allegations further. Polland & Cook v. Lehmann, 832 S.W.2d 729, 736 (Tex. App.-Houston [1st Dist.] 1992, writ denied); Dyer v. Shafer, Gilliland, Davis, McCollum & Ashley, Inc., 779 S.W.2d 474, 479 (Tex. App.-El Paso 1989, writ denied); Martin v Trevino, 578 S.W.2d 763, 770 (Tex. Civ. App.-Corpus Christi 1979, writ ref'd n.r.e.).

15. Kahlig v. Boyd, 980 S.W.2d 685, 689 (Tex. App.-San Antonio 1998, pet. denied); Jim Arnold Corp. v. Bishop, 928 S.W.2d 761 (Tex. App.-Beaumont 1996, no writ); Burnap v. Linnartz, 914 S.W.2d 142, (Tex. App.-San Antonio 1995, writ denied).

16. In 1995, the legislature amended the DTPA to exclude claims for damages based on the rendering of a professional service, the essence of which is the providing of advice, judgment, opinion, or similar professional skill. Tex. Bus. & Com. Code Ann. § 17.49(c) (Vernon Supp. 2001). However, because Lannie's claims would have accrued before September 1, 1995, the effective date of the amendment, and she filed suit in 1996, the amendment does not apply to those claims. See Act of May 19, 1995, 74th Leg., R.S., ch. 414, § 20(b), 1995 Tex. Gen. Laws 2988, 3004.