

March 9, 2004

SUPREME COURT OF VIRGINIA (2004): WHEN DOES THE STATUTE OF LIMITATIONS ON A PROFESSIONAL LIABILITY ACTION (NON-MEDICAL) BEGIN TO RUN?

On March 5, 2004, the Supreme Court of Virginia issued an important decision affecting professionals faced with malpractice claims (non-medical) in Virginia.

In Shipman v. Kruck, Record No. 030500, ___ Va. ___, ___ S.E.2d ___ (March 5, 2004) (Agee, J.), the Court considered when a cause of action for legal malpractice accrues for purposes of the statute of limitations. The decision will likely apply with equal force to actions brought against other non-medical professionals owing fiduciary duties to their clients.

Facts

On January 16, 1998, Donald L. Shipman and his wife, Kym L. Shipman (collectively, "the Shipmans") hired Frederick H. Kruck, Jr., Esquire ("Mr. Kruck") to defend them in an action brought by one of their creditors. The Shipmans informed Mr. Kruck that shielding their residence from the collection efforts of creditors was their primary objective. The Shipmans also informed Mr. Kruck that the residence was held in trust under a 1984 Declaration of Trust ("the Trust"). Mr. Shipman was the trustee of the Trust, holding legal title to the residence for the benefit of Mrs. Shipman and the Shipmans' children.

On March 9, 1998, Mr. Kruck filed a Chapter 7 Bankruptcy Petition on behalf of the Shipmans in the United States Bankruptcy Court for the Eastern District of Virginia. Certain of the Shipmans' creditors and the Bankruptcy Trustee asserted the Trust was revocable and therefore the Trust's assets were nonexempt property of the Shipmans' bankruptcy estate subject to sale and administration by the Bankruptcy Trustee.

On January 19, 1999, Mr. Kruck withdrew as the Shipmans' counsel and advised them that he would be more valuable as a witness in the bankruptcy proceedings concerning the Trust. The Shipmans promptly hired new counsel to represent them in the bankruptcy proceedings.

During the subsequent bankruptcy proceedings, Mr. Kruck testified that he erroneously assessed the trust documents as establishing an irrevocable trust when he advised the Shipmans to file bankruptcy.

On March 8, 2000, the Bankruptcy Court entered an Order declaring the Trust to be a revocable trust and authorizing the Bankruptcy Trustee to sell the Shipmans' residence as an asset of the bankruptcy estate for the payment of the Shipmans' creditors.

To prevent their residence from being sold to a third party, the Shipmans purchased their residence from the Bankruptcy Trustee on June 29, 2001 for \$427,000.00.

On January 8, 2002, the Shipmans filed a Motion for Judgment against Mr. Kruck in the Circuit Court of the City of Alexandria alleging counts for negligence, breach of contract, and negligent infliction of emotional distress. The Shipmans asserted that Mr. Kruck was negligent in failing to advise them that the Trust was revocable and could be revoked by the Bankruptcy Trustee.

Mr. Kruck filed a demurrer and plea in bar alleging that the Shipmans lacked standing to bring their action, because any claims they might have had now belonged to the bankruptcy estate and must be asserted by the Bankruptcy Trustee.

Before argument on Mr. Kruck's demurrer and plea in bar, the Shipmans requested a nonsuit which the trial court granted on March 12, 2002. The Shipmans then requested and received an Order from the Bankruptcy Court abandoning any interest in an action for malpractice against Mr. Kruck. Armed with that Order, the Shipmans filed a new Motion for Judgment against Mr. Kruck on September 11, 2002.

Mr. Kruck filed another demurrer and plea in bar alleging that the Shipmans' action was barred by the three-year statute of limitations applicable to breach of an oral contract. Mr. Kruck contended that the limitations period had expired on January 19, 2002, three years after his representation of the Shipmans had ended.

The trial court sustained the plea in bar, and the Shipmans appealed.

Analysis

The parties agreed that the alleged negligent act occurred when the Chapter 7 Bankruptcy Petition was filed on March 9, 1998. The parties differed, however, in affixing the date when the statute of limitations on the Shipmans' legal malpractice action accrued.

Noting that a cause of action does not accrue until some injury or damage is sustained – however slight – the Court defined the issue in controversy as whether, on March 9, 1998, the Shipmans sustained injury or damage sufficient to constitute a cause of action.

The Court found that, upon the filing of the Chapter 7 Bankruptcy Petition, the Shipmans did indeed incur a legal injury. Although that injury could not be delineated as a sum-certain or reflected as a final judgment on the merits, the Court concluded that the injury was sufficient to commence a cause of action for legal malpractice.

Having determined that the Shipmans' cause of action existed as of the time the Chapter 7 Bankruptcy Petition was filed, the Court then considered whether, under Va.

Code § 8.01-230, the Shipmans' right of action came into existence simultaneously with their cause of action or whether it accrued at another time.

Va. Code § 8.01-230 states, in pertinent part, that “[i]n every action for which a limitation period is prescribed, the right of action shall be deemed to accrue and the prescribed limitation period shall begin to run . . . when the breach of contract occurs in actions ex contractu and not when the resulting damage is discovered.” The Court explained the difference between a cause of action and a right of action as follows: “[a] right of action is a remedial right to presently enforce a cause of action.” See Stone v. Ethan Allen, Inc., 232 Va. 365, 368, 350 S.E.2d 629, 631 (1986). The Court held that the Shipmans' right of action came into existence and their cause of action accrued contemporaneously with the filing of the Chapter 7 Bankruptcy Petition; thus, the Shipmans could have brought an action against Mr. Kruck at any time after the bankruptcy petition was filed.

Nevertheless, referring to the “continuous representation rule,” the Court concluded that the statute of limitations did not begin to run until Mr. Kruck's representation of the Shipmans with respect to the bankruptcy proceeding has terminated. Under the “continuous representation rule,” when malpractice is claimed to have occurred during the representation of a client by an attorney with respect to a particular undertaking or transaction, the breach of contract or duty occurs and the statute of limitations begins to run when the attorney's services rendered in connection with that particular undertaking or transaction have ended.

Applying the “continuous representation rule” to the facts of the instant case, the Court concluded that, for statute of limitations purposes, the “continuous representation rule” effectively tolled the running of the statute of limitations for the Shipmans' action from the filing of the Chapter 7 Bankruptcy Petition until January 19, 1999, the date Mr. Kruck's representation terminated with respect to the particular undertaking for which he was hired. Therefore, the Court concluded, the trial court correctly sustained Mr. Kruck's plea in bar, as the applicable three-year statute of limitations had run as of the re-filing of the Shipmans' Motion for Judgment.

In so holding, the Court expressly overruled Allied Productions v. Duesterdick, 217 Va. 763, 232 S.E.2d 774 (1977), which stood for the proposition that, in the context of a judgment entered against a client by virtue of the malpractice of that client's attorney, “until the client has made a payment on that debt he has suffered no actual loss or damage.” See id. at 766, 232 S.E.2d at 776.