

Court of Appeals No. 72655-2-I

**IN THE COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

TAMMY BECK,

Appellant,

v.

DARREN GRAFE and JANE DOE GRAFE

Respondents.

APPELLANT'S REPLY BRIEF

FILED
COURT OF APPEALS DIVISION I
STATE OF WASHINGTON
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I. REPLY IN SUPPORT OF APPELLANT'S OPENING BRIEF

Policy considerations support the imposition of liability upon Grafe for his own negligent acts and omissions, despite the fact that those negligent acts and omissions persisted through Middleton's continued representation of Mr. Goll. The statute of limitations does not bar this claim for several reasons. First, the concurrent negligence of Grafe and Middleton continued through 2008, less than three years from the date this action was commenced. Second, the continuing representation rule applies to toll the statute of limitations to permit Mr. Goll's attorneys to mitigate the issue. Finally, the discovery rule applies in this case, as both attorneys consistently failed to ascertain the appropriate statute of limitations against Prudential, to assist Mr. Goll with the preservation of those third-party claims. Mr. Goll had no way of determining that the legal advice he was being given was erroneous; neither of his attorneys can shift their fiduciary duties to their client.

II. PRIOR COURT OF APPEALS DECISION THAT GRAFE IS NOT ABSOLVED OF LIABILITY DUE TO CONTINUED MALPRACTICE OF MIDDLETON FORECLOSES STATUTE OF LIMITATIONS DEFENSE

This Court has already found that the trier of fact could find that Grafe and Middleton "committed malpractice in a single continuous

course of inaction” and that “[a] jury could find that Grafe should reasonably have foreseen that Middleton would adopt Grafe’s erroneous conclusion and carry on with the case along the path that Grafe had laid out.” Beck v. Grafe, 174 Wash. App. 1034 (Wash. App. Div. 1 2013) review denied, 311 P.3d 27 (Wash. 2013). Consequently, Middleton’s negligence (during representation between 2003 and 2008) does not absolve Grafe from liability for his negligent acts and omissions (during representation between 2001 and 2003).

Grafe’s argument that this legal malpractice case should be dismissed because he withdrew in 2003, more than three years before its filing, completely undermines this Court’s holding that Grafe may also be found liable for his negligence as he failed to “establish as a matter of law that the successor attorney was an intervening, independent cause.” Id. There is no rationale for upholding the legal principle of concurrent liability if the statute of limitations serves to bar the claim against the earliest tortfeasor.

It is well-settled that when a tort involves continuing injury, the cause of action accrues, and the limitation period begins to run, at the time the tortious conduct ceases. Since usually no single incident in a continuous chain of tortious activity can fairly or realistically be identified as the cause of significant harm, it seems proper to regard the cumulative effect of the conduct as actionable. Moreover, since one should not be allowed to

acquire a right to continue the tortious conduct, it follows logically that statutes of limitation should not run prior to its cessation.

Page v. United States, 729 F.2d 818, 882 (D.C. Cir, 1984) (quotations and footnotes omitted).

Because Washington law permits Beck to sue either concurrent tortfeasor for this continuous chain of tortious activity, this claim for legal malpractice that was filed within three years of the termination of that tortious activity (in 2008) is timely.

III. POLICY CONSIDERATIONS REQUIRE CONTINUOUS REPRESENTATION RULE TO APPLY TO PROTECT A CONTINUING CLIENT'S CLAIMS AGAINST TWO NEGLIGENT ATTORNEYS FROM SAME LAW FIRM

Alternatively, the continuous representation rule should apply to toll the statute of limitations because Mr. Goll never stopped retaining the services of Middleton & Associates to defend him in the action brought by Ms. Chrisp. When Grafe left that law firm, Middleton took over representation of the case from his associate. The litigation with Ms. Chrisp continued through the end of Middleton & Associate's representation in 2008.

The policy considerations for the continuous representation rule are best served by applying the rule during representation by attorneys of the same law firm. As set forth by Janicki Logging & Const. Co. v.

Schwabe, Williamson & Wyatt, P.C., 109 Wn. App. 655, 662, 37 P.3d 309 (2001), the first purpose of the rule is to permit the attorney to remedy the mistake. In this case, Middleton took steps to prevail at trial, which appeared to remedy the error of failing to sue a third-party in the underlying litigation (at least until the Court of Appeals reversed the trial court ruling.) The basis for applying the rule did not change because of there was a continued relationship with Middleton, even though Grafe had left his firm.

Once the attorney-client relationship has been broken, much of the reason for the rule is gone—there is no attorney-client relationship to protect, and the allegedly negligent attorney is not trying to remedy his error or show that there was none.

Jacobson v. Haugen, 529 N.W.2d 882, 885 (N.D., 1995).

The second purpose of the rule is to prohibit an attorney from continuing representation until the statute of limitations has run, precluding the client from being able to pursue a legal malpractice action. In this case, Middleton's negligence continued and because there was no affirmative ruling pertaining to Mr. Goll's ability to pursue his claims against Prudential, Mr. Goll did not discover that negligence. Instead, Middleton's representation and efforts on behalf of Mr. Goll continued through 2008, which was well past the statute of limitations to sue third-party Prudential.

The *Gonzalez* rule, which accounts for the client's reasonable expectations, is an appropriate standard to apply because it furthers the stated objective of preventing an attorney from being able to wait out an alleged malpractice claim.

Hipple v. McFadden, 161 Wash. App. 550, 559-60, 255 P.3d 730, 734 (2011).

As Grafe and Middleton committed legal malpractice by consistently and erroneously advising Mr. Goll that he had to wait until the underlying litigation had concluded to sue Prudential, the continuous representation rule applies to protect his legal malpractice claim. The fact that there were *two* attorneys committing continuing negligence, instead of *one*, is a distinction without any meaningful difference. The Supreme Court of Nebraska held that these two factors justify application of the continuous representation rule:

Economy [the client] may not avail itself of the continuous representation rule, as the tort committed was not continuous nor unlikely to be discovered prior to the termination of the professional relationship.

Economy Housing Company, Inc. v. Rosenberg, 475 N.W.2d 899, 900 (Neb., 1991). Unlike the legal malpractice in Economy, the negligence in the instant case was continuous and unlikely to be discovered before the termination of the professional relationship with Grafe and Middleton. Therefore, the application of the continuous representation rule is

appropriate; Grafe cannot escape liability for his own negligence simply because that negligence continued through Middleton's representation. The client, not the negligent attorney, is the party this rule protects.

IV. THE DISCOVERY RULE ALSO APPLIES TO PRESERVE CLAIM FOR LEGAL MALPRACTICE

Regardless, the discovery rule applies to toll the legal malpractice statute of limitations until three years after Mr. Goll **discovered** that the advice his attorneys had been giving him was erroneous. Despite what his attorneys had been telling him to the contrary, Mr. Goll did not have to wait to sue Prudential until after the Chrisp litigation had concluded in order to satisfy the "damages" element to bring a claim against Prudential for its negligence.

The fact that Mr. Goll was aware that no third-party complaint had yet been filed when Grafe withdrew from representation has no bearing on the matter. Both Grafe and Middleton failed to determine that the statute of limitations was running against Prudential, both Grafe and Middleton took no steps to protect Mr. Goll's claims against Prudential although specifically told to do so, and both Grafe and Middleton affirmatively advised Mr. Goll that he could not file a lawsuit against Prudential because he had not yet sustained damages from the underlying lawsuit with Chrisp. Mr. Goll was entitled to rely upon the legal advice given to

him by his attorneys.

The primary reason for extending and applying the [discovery] rule is because the consumer of professional services frequently does not have the means or ability to discover professional malpractice.

...

There are additional compelling reasons for adopting the rule where legal malpractice is involved as exist in the case of other professional malpractice. ... As with other professions, the application of the occurrence rule ignores the fact that ultimately the client has little choice but to rely on the skill, expertise, and diligence of counsel.

Peters v. Simmons, 87 Wn.2d 400, 405-06, 552 P.2d 1053 (1976). As Mr. Goll did not become aware that his two attorneys had breached their duty of care in giving him such legal advice until he obtained new counsel in 2008, the discovery rule permits him to file this action within three years from that date of discovery, which Mr. Goll did.

Similarly, until 2008, Mr. Goll did not recognize that he had sustained any injury resulting from the erroneous legal advice he had been given, because he was still convinced that he could file a claim against Prudential once the Chrisp litigation had concluded. Grafe's billing entries in which he charged for working on a third-party complaint, which was never completed, does not provide Mr. Goll with notice that what Grafe was telling him was erroneous. Mr. Goll did not know the proper legal terms, nor was he responsible for knowing them; instead, he

described the third-party complaint as a “counter suit” against Prudential. CP 191.

Grafe argues that, as a result, Mr. Goll was aware of the “invasion of Mr. Goll’s legal interests sufficient to establish the element of injury.” It is true that Mr. Goll was aware that he was paying Grafe attorneys’ fees for having to defend him in the Chrisp litigation. CP 193. However, if Grafe, as the attorney, failed to recognize that being involved in the litigation with Chrisp and paying attorneys’ fees to defend himself was injurious, it is hard to comprehend how Grafe can argue that the client and non-attorney, Mr. Goll is deemed to have been aware that his legal interests were adversely affected given the wrongful advice, especially since Grafe was *simultaneously* asserting to Mr. Goll that he was not yet injured.

The Court of Appeals reversal of the dismissal of the Chrisp litigation does not have any connection to the third-party claims that Mr. Goll intended to assert against Prudential. This situation is not at all similar to that of Richardson v. Denand, 59 Wn. App. 92, 795 P.2d 1192 (1990). If the Court of Appeals had affirmatively ruled that Mr. Goll’s claims against Prudential were time-barred, only then would Mr. Goll be put on notice that he might have a claim for legal malpractice at that time in 2005.

There is no competent evidence that Middleton had any knowledge that there had been any legal malpractice. The only evidence is to the contrary – that Middleton adopted and repeated the same erroneous legal advice that Grafe had been giving. Grafe attempts to mislead this Court by removing Ms. Beck’s quote from its context, and by removing a critical portion of her statement in which she speculates about the reason that Middleton was continuing Grafe’s misguided course.¹

David explained that he couldn’t change the course of action that Mr. Grafe had started. I also wanted to know why Mr. Grafe had chosen to go the “earnest money” route instead of trying to get my father out of the lawsuit by explaining that the house did not price out at what Nancy Chrisp was asking and that it would be my father’s sole discretion to back out because of that reason, and not have any consequences come to him. David said that Mr. Grafe had chosen to go that route and that David would have to continue that course. I, again, asked David why we couldn’t sue Prudential and Windermere while we were defending my father and he concluded that we could sue Prudential and Windermere once my father incurred damages. He agreed with Mr. Grafe, that we hadn’t accrued any damages thus far. During the course of the next 6 years, my father, David and I continued to argue over suing Prudential and Windermere. As far as I know, Mr. Grafe had missed the Statute of Limitations prior to David taking over the case, and David continued to cover it up for fear of being sued for Malpractice. I really want to stress

CP 85.

In 2008, Mr. Goll was still waiting for the original lawsuit to finish so that he could sue Prudential and Windermere for all of the attorneys’ fees that had been incurred, as well as for all of the agony Mr. Goll went through because Prudential did not do its job. CP 196. Only because Middleton died, did Mr. Goll retain new counsel and discover that his claims against Prudential were time-barred. Grafe cannot point to

¹ Response, pg. 29.

anything in the record that can trigger the commencement of the limitations period before Middleton's death. Consequently, the discovery rule tolls the statute of limitations for this malpractice claim.

V. GRAFE WAIVED THE DEADMAN'S STATUTE BY FAILING TO INVOKE ITS PROTECTION DURING THE FIRST MOTION FOR SUMMARY JUDGMENT

The testimony of Tammy Beck was submitted in response to Defendant's (First) Motion for Summary Judgment without objection by Defendant. Tammy Beck's declaration is dated February 28, 2011. CP 196. That declaration describes the relationship and interactions between her father, Mr. Goll, and Mr. Grafe, as well as those between Mr. Goll and Mr. Middleton, because Tammy Beck was a witness who participated in each of those meetings. That declaration describes the persistent erroneous legal advice that was given by both Mr. Grafe and Mr. Middleton, namely, that Mr. Goll had to wait until he incurred damages before he could file a third-party claim against Prudential.

Not having objected timely to that testimony that was submitted in response to the first motion for summary judgment, Defendant has waived any objection to that testimony thereafter. Hill v. Cox, 110 Wn. App. 394, 406, 41 P.3d 495, 503 (2002) (deadman's statute waived in connection with summary judgment motion); Herrin v. O'Hern, 168 Wn. App. 305,

317, 275 P.3d 1231, 1237 (2012) (failure to move to strike declaration or address argument at summary judgment made subsequent argument on appeal regarding deadman's statute moot); Estate of Lennon v. Lennon, 108 Wash. App. 167, 176, 29 P.3d 1258, 1264 (2001), as amended on denial of reconsideration (Oct. 2, 2001) (failure to object at first contested hearing waives deadman's statute).

Thus, the testimony of Tammy Beck that is already in the record can be relied upon to defeat this motion for summary judgment, as well as be admitted at trial, as the Defendant failed to object and invoke the protection of the deadman's statute during the first motion for summary judgment, and has now waived any objection to bar any of that testimony.

VI. DEADMAN'S STATUTE DOES NOT BAR BECK'S TESTIMONY WHICH RELATES SOLELY TO HER ROLE AS A WITNESS

Alternatively, the deadman's statute, RCW 5.60.030, does not serve as a sweeping tool to exclude the testimony of a witness; its application is quite the opposite. "The general purpose of the enactment of RCW 5.60.030, cf. Rem.Rev.Stat., § 1211, was to abolish the exclusion of witnesses on the ground of interest, and to permit their interest to be shown for the purpose of affecting their credibility." Only very specific testimony is to be excluded. "The purpose of the dead man's statute is to

prevent interested parties from giving self-serving testimony regarding conversations and transactions with the deceased because the dead cannot respond to unfavorable testimony. Parks v. Fink, 173 Wn. App. 366, 375, 293 P.3d 1275 (2013), *review denied*, 177 Wn.2d 1025, 309 P.3d 504 (2013).

In this case, Plaintiff Tammy Beck is suing in her capacity as the personal representative of the estate of her father, Claud Goll, so the deadman's statute may apply, but only regarding transactions *between* Plaintiff Beck and Mr. Goll.

The deadman's statute, RCW 5.60.030, bars testimony by a "party in interest" regarding "transactions" with the decedent or statements made to him by the decedent. A "party in interest" under RCW 5.60.030 is "one who stands to gain or lose in the action in question." A "transaction" under the deadman's statute is broadly defined as " 'the doing or performing of some business between parties, or the management of any affair.' " " '[T]he matter concerning which the testimony is given must involve some act by and between the parties for the benefit or detriment of one or both of the parties.' " The test of a "transaction" is whether the deceased, if living, could contradict the witness of his own knowledge. When it appears that there was a personal transaction with the deceased and the testimony offered tends to show either what did or did not take place between the parties, it must be excluded so long as it concerns the transaction or justifies an inference as to what it really was. However, the deadman's statute does not prevent an interested party from testifying regarding his or her own feelings or impressions.

Estate of Lennon v. Lennon, 108 Wn. App. 167, 174-75, 29 P.3d 1258, 1263 (2001), as amended on denial of reconsideration (Oct. 2, 2001) (footnotes omitted). The very purpose of the deadman's statute is to avoid the inequity of allowing self-serving testimony by the surviving party to a transaction while the lips of the other party to that transaction are sealed by death or incompetency.” Lasher v. U. of Washington, 91 Wn. App. 165, 170, 957 P.2d 229 (Wash. App. Div. 1, 1998)

Tammy Beck may testify as a witness in this case; her testimony is admissible and is not barred by the deadman’s statute. “The deadman's statute does not bar testimony which relates solely to the acts of the witness and not to a transaction with the incompetent person.” Lasher v. University of Washington, 91 Wn. App. 165, 169, 957 P.2d 229, 231 (1998). Tammy Beck may testify as to what occurred during the legal representation of her father; she was present during each and every meeting between her father and his counsel. Tammy Beck may testify as to what Mr. Grafe told her father. Tammy Beck may testify about what her father told Mr. Grafe. Tammy Beck may testify as to the reason that her father wanted to pursue a claim against Prudential. Tammy Beck may testify as to the fact that she observed her father paying Defendant Grafe legal fees, and that he was unhappy about paying those fees because of Prudential’s negligence. Tammy Beck may testify about the emotional

distress that she observed her father suffer because of his being brought into the litigation with Nancy Chrisp, his frustration with Defendant Grafe, and subsequently, with Middleton. “[T] estimony which relates solely to the conduct of the witness is admissible...” Thor v. McDearmid, 63 Wn. App. 193, 201, 817 P.2d 1380, 1386 (1991).

Defendant has not cited any *transaction* between Tammy Beck and her father that is relevant to this legal malpractice case. None of the deposition excerpts quoted by Defendant in his Motion for Summary Judgment are barred by the deadman’s statute. The trial court did reach this issue during oral argument, it just completely dismissed the argument as being without merit.

VII. CONCLUSION

Beck timely filed this claim for legal malpractice against Grafe, whose erroneous legal advice persisted through the representation of Middleton when he took over the matter because his associate left the law firm. The statute of limitations for legal malpractice does not provide Grafe with immunity under this set of facts.

Respectfully submitted this 27th day of May, 2015.

SINGLETON & JORGENSEN, INC. PS

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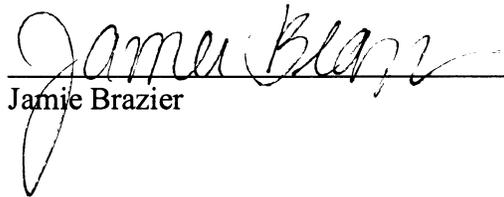
CERTIFICATE OF SERVICE

Jamie Brazier declares: I am a citizen of the United States and of the State of Washington; that I am over the age of 18 years and competent to be a witness in this cause. That on May 27, 2015, I delivered one copy of the APPELLANT'S REPLY BRIEF, to the address(es) listed below by messenger service:

Joel Wright
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed at Renton, Washington, on: May 27, 2015.



Jamie Brazier

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