IN THE

Supreme Court of Virginia

RECORD NO. 091659

JOSEPHINE VAN DAM,

Appellant,

v.

GORDON B. GAY,

Appellee.

BRIEF OF APPELLEE

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF VIRGINIA:

COMES NOW the appellee, Gordon Gay, by counsel, and respectfully submits the following brief in support of this Court's affirmance of the lower court's dismissal with prejudice of the action as time barred. The parties are referred to by name, by their designation in the court below or by other descriptive terms.

STATEMENT OF THE CASE

This legal malpractice action arises out of the alleged negligent documentation of an agreement resolving all property issues in a divorce proceeding in 1986. The agreement between the divorcing parties was incorporated in a final decree of divorce entered on November 3, 1986. On January 27, 2009, Josephine Van Dam, the wife in the underlying divorce proceeding, filed the instant lawsuit against Gordon Gay, her attorney in the divorce proceeding. In response to the lawsuit, Gay filed a plea in bar asserting the three-year statute of limitations applicable to legal malpractice cases. On April 29, 2009, the Circuit Court of Stafford County, Judge John E. Kloch presiding, heard oral argument and granted the plea in bar. A

final order of dismissal with prejudice was entered on May 14, 2009. This appeal followed.

QUESTION PRESENTED

> Does a cause of action for legal malpractice related to the drafting of a property settlement agreement accrue upon the termination of the representation in the divorce matter? (Assignment of Error No. 1.)

STATEMENT OF FACTS

In mid-1986, Mrs. Van Dam retained attorney Gay to represent her in a divorce proceeding against her then-husband, Nicholas Van Dam. As part of the divorce proceeding, the divorcing parties, with the assistance of their respective counsel, negotiated the terms of an agreed resolution of the divorce, including the division of all property from the marriage ("the Agreement"). Pursuant to the terms of the Agreement, Mrs. Van Dam was to receive "survivor's benefits from [her] husband's retirement pay." (App. 11.) At the time of the divorce, Mr. Van Dam was receiving retirement benefits from two plans, a military retirement from the United States Marine Corps and a civil service retirement from his employment at the Lorton Reformatory. (App. 5.) At the time of the divorce, Mrs. Van Dam was the designated beneficiary of survivor benefits under both plans.

On September 30, 1986, Mr. and Mrs. Van Dam executed the Agreement. The Circuit Court of Stafford County subsequently ratified and incorporated the Agreement into the final divorce decree on November 3, 1986. (App. 5.) Mr. Gay's representation in the divorce matter ended in 1986.

Mr. Van Dam died on June 22, 2006. (App. 6.) Following Mr. Van Dam's death, Mrs. Van Dam sought payment of the survivor benefits from the Office of Personnel Management ("OPM") for the civil service retirement plan and the Defense Finance Accounting Center ("DFAS") for the military retirement plan. (App. 6.) OPM and DFAS denied Mrs. Van Dam's claim for survivor benefits.[1] (App. 6.)[2] Contrary to Mrs. Van Dam's assertion, the Agreement was not intended to confer to her a right to survivor benefits that right already existed as the Agreement documented the contract negotiated between the divorcing parties for the division of property.

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[1] OPM expressly based its denial on the asserted failure of the divorce decree to comply with the requirements of 5 CFR §838.911, a regulation enacted in 1992.

[2] Limited discovery in the case below revealed that shortly after entry of the divorce decree, Mr. Van Dam contacted OPM and DFAS and eliminated the survivor benefit that had been elected during the marriage and was place at the time of the divorce.

PRINCIPLES OF LAW, ARGUMENT AND AUTHORITIES

I. STANDARD OF REVIEW

The dismissal of Plaintiff's claim for legal malpractice on a plea in bar, which presents solely a question of law, is reviewed *de novo*. *Hilton v. Martin,* 275 Va. 176, 180, 654 S.E.2d 572, 574 (2008). When no evidence is presented to the circuit court to support the plea in bar, the appellate court will only consider the facts as set forth in the plaintiff's pleading. *Schmidt v. Household Fin. Corp, II,* 276 Va. 108, 112, 661 S.E.2d 834, 836 (2008). The party asserting a plea in bar on a limitations issue has the burden of proving that the limitations period has run. *Id.* at 117, 661 S.E.2d at 839.

II. MRS. VAN DAM'S CAUSE OF ACTION ACCRUED IN 1986 AND IS TIME BARRED

The purpose of limitations provisions is to compel a plaintiff to exercise her right to bring suit within a reasonable time, and to avoid surprising the adverse party. *Richmond Redev. & Hous. Auth. v. Laburnum Const. Corp.,* 195 Va. 827, 839, 80 S.E.2d 574, 581 (1954). As this Court has noted, after the time period of the statute of limitations has run, evidence may be lost, both parties' and witnesses' recollection of events may become weak, and witnesses may have died or disappeared. *Id.* In the instant case, filed more than twenty

years after the events transpired, much of the documentary evidence is lost and one of the key witnesses has died.

The parties to this legal malpractice action agree as to the applicable three-year limitations period. However, the parties diverge on the date of accrual of the cause of action. Relying on clear legal precedent, attorney Gay contends that the cause of action accrued in 1986 when the Agreement was drafted, the divorce decree entered and the attorney-client relationship ended. Mrs. Van Dam, conversely, contends that the cause of action did not accrue until 2006, twenty years after the representation ended, her ex-husband died and she was denied payment of survivor benefits in place in 1986 when the Agreement was prepared and executed.

A. A BREACH OF CONTRACT ACTION ACCRUES WHEN THE BREACH OCCURS.

Under Virginia law, actions for legal malpractice sound in contract and are thus governed by the statute of limitations for breach of contract. *Oleyar v. Kerr,* 217 Va. 88, 90, 225 S.E.2d 398, 400 (1976). Pursuant to Virginia Code § 8.01-246, the limitations period for breach of contract is three years for an unwritten contract and five years for a written agreement. As a general rule, the limitations period begins to run from the moment the cause of action accrues

and not from the time it is ascertained that damage has been sustained. *Richmond Redev. & Hous. Auth. v. Laburnum Const. Corp.,* 195 Va. 827, 838, 80 S.E.2d 574, 580–81 (1954). The Virginia Code explicitly states that the right of action for a breach of contract is deemed to have accrued and the prescribed limitations period shall begin to run from the time of the breach and not when the resulting damage is discovered. Va. Code § 8.01-230.

According to this Court's decision in *Shipman v. Kruck,* 267 Va. 495, 593 S.E.2d 319 (2004), Virginia follows the general rule that the limitations period begins to run "from the moment the cause of action arises rather than from the time of discovery of injury or damage, and . . . difficulty in ascertaining the existence of a cause of action is irrelevant." *Id.* At 503, 593 S.E.2d at 323 (quoting *VMI v. King,* 217 Va. 751, 759, 232 S.E.2d 895, 900 (1977)); *Richmond Redev. & Hous. Auth.,* 195 Va. at 838, 80 S.E.2d at 580 – 81. In order for the limitations period to begin to run, the injury need not be a quantifiable sum certain, but may also be a legal injury. *Id.*

In legal malpractice cases, the limitations period begins to run from the time the attorney's services in a particular undertaking have terminated. *MacLellan v. Throckmorton,* 235 Va. 341, 345, 367

S.E.2d 720, 722 (1988). This Court has stated that "the running of the limitations period will not be tolled by the fact that the actual or substantial damage did not occur until a later date." *Shipman v. Kruck,* 267 Va. at 503, 593 S.E.2d at 323.

B. MRS. VAN DAM'S CAUSE OF ACTION ACCRUED IN 1986 WHEN THE BREACH OCCURRED AND THE LEGAL REPRESENTATION ENDED.

In this case, Mrs. Van Dam alleges that she lost a property right – survivor benefits from her former husband's retirement plans – due to the negligent documentation of the property settlement agreement by her counsel. If Mrs. Van Dam's allegation is correct, she lost that property right in 1986 and her cause of action accrued in 1986 upon the termination of the representation.

In *MacLellan v. Throckmorton,* this Court addressed a case with facts similar to those at issue here. In *MacLellan,* the plaintiff retained counsel to represent him in divorce proceedings. The parties negotiated a property settlement agreement and the plaintiff advised his counsel that he would only enter into the agreement if the spousal support provisions could later be modified upon proof of a change of circumstances. The plaintiff's counsel erroneously advised the plaintiff that the provisions could be modified. Several years

later, the plaintiff filed a malpractice action against his attorney when he was unable to modify the provisions of the property settlement agreement. This Court concluded that the limitations period began to run from the time the representation ceased, upon entry of the divorce decree. *MacLellan,* 235 Va. at 345, 367 S.E.2d at 722.

As in *MacLellan*, the cause of action in the instant litigation arose at the time the divorce decree was entered on November 3, 1986, and the representation ended. The alleged act of malpractice is the attorney's failure to draft a provision of the property settlement agreement that would comply with future (as yet unwritten) regulations and be acceptable to the federal government more than twenty years later. Even if the ex-husband breached the property settlement agreement and failed to continue to provide for survivor benefits to his former wife, any alleged breach by the attorney is independent of the ex-husband's actions and occurred in 1986 when the Agreement was drafted. Mrs. Van Dam's claim for legal malpractice is thus time-barred and the trial court's ruling should be upheld.

C. THE LIMITATIONS PERIOD WAS NOT TOLLED BY THE CONTINGENT NATURE OF SURVIVOR BENEFITS.

In an attempt to circumvent the running of the statute of limitations, Mrs. Van Dam argues that she did not have a cause of action until 2006. Specifically, Mrs. Van Dam claims that until her former spouse died and she survived him, she did not suffer an injury. This argument presumes that the only injury giving rise to a cause of action is a present and non-contingent right to the survivor benefit. However, as stated in *Shipman v. Kruck,* an injury need not be a presently quantifiable (or a non-contingent) property interest but may also be a legal injury. 267 Va. 495, 503, 593 S.E.2d 319, 323 (2004).

1. The Rutter Case is not Applicable.

In support of her argument that she did not suffer an injury until 2006, Mrs. Van Dam cites to *Rutter v. Jones, Blechman, Woltz & Kelly, P.C.,* 264 Va. 310, 568 S.E.2d 693 (2002). However, the *Rutter* case is not dispositive on the facts of this case. In *Rutter,* the plaintiff sued the decedent's attorney for negligently drafting testamentary instruments which resulted in substantial tax liability to the estate following the death of the client/decedent. On the question of whether the cause of action survived the death of the client/

decedent, this Court ruled that the cause of action accrued at the death of the decedent, when the tax liability was incurred, and thus did not survive the decedent's death.

The instant case is fundamentally different from *Rutter.* The documents at issue in the *Rutter* case were testamentary documents. Testamentary documents, unlike contracts, take effect upon the death of the testator. *See Voigt v. Selander,* 190 Va. 638, 646, 58 S.E.2d 25, 29 (1950). Contracts, in contrast, take effect upon execution.

The document at issue in this litigation is a property settlement agreement – a contract – between Mrs. Van Dam and her former husband. The Agreement took effect when signed and, if negligently drafted, immediately resulted in a legal injury to Mrs. Van Dam if it failed to effectuate the agreement of the parties.

2. Mrs. Van Dam had an Enforceable Legal Right in 1986.

Following the execution of the Agreement and entry of the divorce decree, Mrs. Van Dam had an enforceable property right. Mrs. Van Dam's argument that the survivor benefits are contingent in nature overlooks this right and the immediate legal injury in 1986. Mrs. Van Dam's argument focuses, instead, on the subsequent

monetary payment of the survivor benefits. However, the legal and contractual right to be the named beneficiary of the benefits under the terms of the property settlement agreement was a vested legal right, enforceable in court and/or through the entities managing the retirement benefits.

Under Virginia law, interests in pensions are considered to be property whether vested or not. *See* Va. Code § 20-107.3; *Holmes v. Holmes,* 7 Va. App. 472, 478, 375 S.E.2d 387, 391 (1988) (concluding that the trial judge properly found a military pension to be personal property subject to distribution). While pensions and survivor benefits awarded under property settlement agreements "do not have the normal attributes of assets" they are still deemed to be property rights under the law and an individual may enforce those rights in the courts of the United States. *Sawyer v. Sawyer,* 1 Va. App. 75, 78, 335 S.E.2d 277, 279 (1985) (citing to Va. Code § 20-107.3). Rights to benefits are also enforceable through the entity managing the benefits.[3]

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[3] The Armed Forces Survivor Benefit Plan, 10 U.S.C. § 1450(f), specifically provides for the forced election of benefits if the former spouse sends the appropriate secretary a written request and a copy of the court order within one year of the date of the order.

As enforceable property rights, pensions and survivor benefits are included in property settlement agreements. Even when a pension is an expectancy due to the fact that the individual, at the time of divorce, has not worked the requisite number of years for the employer, Virginia courts have determined that it is appropriate to award benefits under a property settlement agreement to be paid when received. *Cook v. Cook,* 18 Va. App. 726, 728–29, 446 S.E.2d 894, 895 (1994).

In the instant case, Mrs. Van Dam had an enforceable property right in Mr. Van Dam's retirement plans at the time of her divorce. Specifically, Mrs. Van Dam could have sought enforcement of the Agreement in a circuit court or with DFAS and OPM. Thus, although Mrs. Van Dam would not have received the monetary return on the survivor benefit until Mr. Van Dam predeceased her, she had an enforceable right at the time the Agreement was entered. Any purported loss of that right constitutes an injury giving rise to a cause of action. The mere fact that Mrs. Van Dam did not discover the full effect of the injury until twenty years later does not negate the existence of a legal injury in 1986. The cause of action and right of action thus existed in 1986 and the three-year limitations period

expired in 1989. The claim for legal malpractice was not timely filed and the ruling of the trial court should be upheld.

III. ALLOWING MRS. VAN DAM TO PURSUE HER MALPRACTICE CLAIM TWENTY YEARS AFTER THE LEGAL REPRESENTATION ENDED IS CONTRARY TO PUBLIC POLICY

The seminal purpose of limitations periods is to compel a plaintiff to exercise her right to bring suit within a reasonable time, and to avoid surprising the adverse party. *Richmond Redev. & Hous. Auth. v. Laburnum Const. Corp.,,* 195 Va. 827, 80 S.E.2d 574, 581 (1954). This Court has described statutes of limitation as,

> statutes of repose, the object of which is to compel the exercise of a right of action within a reasonable time. They are designed to suppress fraudulent and stale claims from being asserted after a great lapse of time, to the surprise of the parties, when the evidence may have been lost, the facts may have become obscure because of defective memory, or the witnesses have died or disappeared.

Id. quoting *Street v. Consumers Mining Corp.,* 185 Va. 561, 39 S.E.2d 271 (1946).

The establishment of an exception to the general rule, as espoused by Mrs. Van Dam, to allow potential plaintiffs to file suit for claims arising out of property settlement agreements when they

discover a specific injury would allow potential claims to ferment for decades. Indeed, a divorce attorney would only be free from potential claim upon his own death. A divorcing couple in their twenties could have as much as 75 years to file suit against an attorney for claims arising out of the drafting of a property settlement agreement. Such an application of the statute of limitations would undermine the very foundation and reasoning behind limitations periods.

CONCLUSION

Based on the foregoing, Mrs. Van Dam's cause of action, if any, arose in 1986. The fact that she allegedly did not discover, for twenty years, that her former husband had, post-divorce, eliminated the survivor benefits in his retirement plans has no bearing on the accrual date of the cause of action. The cause of action for legal malpractice accrued in 1986 and the three-year limitations period expired in 1989. Mrs. Van Dam's claim for legal malpractice against her former attorney is thus time barred.

Gordon Gay has met his burden and requests this Court to affirm the ruling of the trial court. If this Court determines that the plea in bar should be denied at this stage of the case, Mr. Gay

requests that the plea in bar be denied without prejudice to Mr. Gay's right to assert the statute of limitations defense in any further responsive pleadings.

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CERTIFICATE

I HEREBY CERTIFY that on this 30th day of December, 2009, I have complied with Rule 5:26(d) by filing fifteen (15) copies of the foregoing Brief of Appellee with the Office of the Clerk of the Supreme Court of Virginia by hand delivery and an electronic copy via email, and by serving three (3) copies of the foregoing Brief of Appellee by mail, first-class postage prepaid, to:

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