In The

Supreme Court of Virginia

RECORD NO. 091659

JOSEPHINE VAN DAM,

Appellant,

v.

GORDON B. GAY, ESQUIRE,

Appellee.

BRIEF OF APPELLANT

Adam T. Kronfeld (VSB No. 71167)
THE DUFF LAW FIRM
A Professional Corporation
11320 Random Hills Road, Suite 630
Fairfax, Virginia 22030
(703) 591-7475 (Telephone)
(703) 273-4537 (Facsimile)
akronfeld@dufflawfirm.com

Counsel for Appellant

THE LEX GROUP ♦ 1108 East Main Street ♦ Suite 1400 ♦ Richmond, VA 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3660 ♦www.thelexgroup.com

SUBJECT INDEX

Page

TABLE OF CITATIONS ii

ASSIGNMENT OF ERROR 1

NATURE OF THE CASE AND MATERIAL PROCEEDINGS IN THE TRIAL COURT 1

QUESTION PRESENTED 2

1. Where it is contended that the Appellant's attorney committed legal malpractice in his drafting of an instrument granting the Appellant survivor benefits arising from her then-husband's retirement plans, does a cause of action for legal malpractice arise upon the drafting of such instrument, or at some later date? 2

STATEMENT OF FACTS 2

PRINCIPLES OF LAW, ARGUMENT AND AUTHORITIES 5

1. The applicable statute of limitations does not preclude Appellant's claims of legal malpractice against her counsel, as her cause of action did not accrue, and the statute of limitations did not begin to run, until she actually survived the former husband 5

CONCLUSION 12

RULE 5:26(d) CERTIFICATE 14

TABLE OF CITATIONS

Page(s)

CASES

Oleyar v. Kerr,
217 Va. 88, 225 S.E.2d 398 (1976) 6

Rutter v. Jones, Blechman, Woltz & Kelly, P.C.,
264 Va. 310, 568 S.E.2d 693 (2002) .....*passim*

Shipman v. Kruck,
267 Va. 495, 593 S.E.2d 319 (2004) 7, 8, 9, 10

Stone v. Ethan Allen, Inc.,
232 Va. 365, 350 S.E.2d 629 (1986) 7

STATUTES

Va. Code § 8.01-230 6

Va. Code § 8.01-246 6

ASSIGNMENT OF ERROR

1. The trial court erred in sustaining the Appellee's plea in bar to the Appellant's legal malpractice claim, and dismissing the same, upon a finding that such claim is barred by the statute of limitations.

NATURE OF THE CASE AND MATERIAL PROCEEDINGS IN THE TRIAL COURT

On January 27, 2009, your Appellant (hereinafter referred to as "Van Dam"), who was the Plaintiff below, filed a Complaint against the Appellee (hereinafter referred to as "Gay"), who was the Defendant below (App. 4-8). Van Dam's Complaint alleged that Gay, who was Van Dam's former divorce attorney, had committed legal malpractice in his drafting of an Agreement resolving property issues arising from her marriage. Gay filed a plea in bar to Van Dam's legal malpractice claim, asserting that the claim was time-barred (App. 16-17). The judges of the Stafford County Circuit Court recused themselves from hearing the matter, and set the same to be heard by a substitute or visiting judge. The plea in bar was argued in open court before Judge John E. Kloch, retired, in the Stafford County Circuit Court on April 28, 2009. Judge Kloch sustained Gay's plea in bar, and dismissed Van Dam's claims by Order entered May 22, 2009 (App. 72-73). This appeal followed.

QUESTION PRESENTED

1. Where it is contended that the Appellant's attorney committed legal malpractice in his drafting of an instrument granting the Appellant survivor benefits arising from her then-husband's retirement plans, does a cause of action for legal malpractice arise upon the drafting of such instrument, or at some later date? (This Question relates to Assignment of Error #1).

STATEMENT OF FACTS

In 1986, the Appellant, Josephine Van Dam (hereinafter referred to as "Van Dam") was party to a divorce action in the Circuit Court for Stafford County, in which she was represented by the Appellee, Gordon B. Gay, Esquire (hereinafter referred to as "Gay") (App. 5).[1] On September 30, 1986, Van Dam and her then-husband reached an agreed settlement of all matters at issue in their divorce (App. 5). On that same date, Gay drafted an Agreement memorializing the settlement made by the parties, which each party signed (App. 9-13). The Agreement provided that "The wife shall receive…survivor's benefits from the husband's retirement pay" (App. 11). The Agreement made no further reference to the husband's retirement plans, and did not identify either such plan by name. A *Decree a Vinculo*

[1] Because the Plaintiff's Complaint was dismissed as a matter of law, and no evidence was taken by the trial court, references made to facts in the Appendix are references to the allegations contained in the Plaintiff's Complaint.

Matrimonii incorporating the Agreement was entered on November 3, 1986 (App. 14-15).

On June 22, 2006, Van Dam's former husband died. (App. 6). Thereafter, Van Dam contacted the administrators of the former husband's retirement plans, presented them with the September 30, 1986, Agreement and November 3, 1986, Decree, and requested that they commence payment of survivor benefits to her (App. 6). The plan administrators rejected the instruments as being too vague as a matter of law to permit them to pay any funds whatsoever to Van Dam (App. 6).

On January 27, 2009, Van Dam commenced a civil lawsuit against Gay alleging legal malpractice arising from his negligent drafting of the September 30, 1986, Agreement (App. 4). In such suit, Van Dam alleged that Gay had failed to properly draft the September 30, 1986, Agreement such that its language complied with requirements of law, and thus failed to preserve Van Dam's ability to receive survivor's benefits under the retirement plans of her former husband upon his death (App. 7). Van Dam further alleged in her suit that, but for such failure by Gay, she would have received survivor benefits arising from her former husband's retirement plans (App. 8).

Gay thereafter filed a plea in bar, contending that Van Dam's legal malpractice claim was time-barred by the applicable statute of limitations (App. 16). Gay contended that Van Dam's cause of action had accrued, and the applicable statute of limitations began to run, at the time that Gay negligently drafted the Agreement. Van Dam contended that she did not sustain any injury until the death of the former husband, and so her cause of action did not accrue, and the applicable statute of limitations did not commence to run, until that date.

Following argument in open court on April 28, 2009, the trial court sustained Gay's plea in bar to the legal malpractice claim. The court ruled that the damage to Van Dam occurred at the time that the defective instrument was drafted, rather than at any future date. Thus, Van Dam's cause of action accrued and the statute of limitations began to run in 1986, and had long since expired. An Order memorializing these rulings by the trial court was entered on May 22, 2009 (App. 72).

PRINCIPLES OF LAW, ARGUMENT AND AUTHORITIES

1. The applicable statute of limitations does not preclude Appellant's claims of legal malpractice against her counsel, as her cause of action did not accrue, and the statute of limitations did not begin to run, until she actually survived the former husband.

The trial court sustained Gays plea in bar Van Dam's claim for legal malpractice. The court found that Van Dam:

> "as she anticipated the [settlement agreement] being drafted, she had a right at that moment when that right would be collected was dependent upon the death of her husband, but she had the right to whatever retirement benefits he had." (App. 63, L. 10-15).

The trial court further held that what Van Dam lost was:

> "a contingent right but an absolute contingent right. It was not a possible contingent. It was an absolute. It was only contingent upon the former husband's death, which is inevitable." (App. 66, L. 6-10).

Thus, the trial court held that, at the time that she entered into her Agreement with her former husband, Van Dam received a present right to future payment, even if her receipt of that payment was contingent upon a later-occurring event, namely, the husband's death. That being the case, the trial court further reasoned that if the instrument drafted by Gay was

insufficient to confer upon Van Dam that present right, then any injury to Van Dam occurred contemporaneously with Gay's negligent drafting of the September 30, 1986, Agreement.

It is submitted that the trial court's reasoning was erroneous, and that its ruling should be reversed.

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, 399-400 (1976). The limitation period for breach of contract is three years for breach of an oral contract, and five years for breach of a written contract. Va. Code § 8.01-246. Under Va. Code § 8.01-230, "[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."

This Court has also stated that a cause of action for legal malpractice requires "the existence of an attorney-client relationship which gave rise to a duty, breach of that duty by the defendant attorney, and that the damages claimed by the plaintiff client must have been proximately caused by the defendant attorney's breach." *Rutter v. Jones, Blechman, Woltz & Kelly, P.C.*, 264 Va. 310, 313, 568 S.E.2d 693, 695 (2002). In the absence of any

injury or damage, there is no cause of action. *Id*. This Court has distinguished a "right of action" from a "cause of action," defining the former as "a remedial right to presently enforce a cause of action," and stating that "[t]here can be no right of action until there is a cause of action." *Stone v. Ethan Allen, Inc.*, 232 Va. 365, 368, 350 S.E.2d 629, 631 (1986).

The questions before the trial court upon Gay's plea in bar, and now before this Court, are when the "injury or damage" to Van Dam occurred, when the cause of action against Gay arose, and thus when the prescribed period of limitation began to run against Van Dam's claim for legal malpractice. The two decision of this Court which appear to be most relevant to this analysis are *Rutter v. Jones, Blechman, Woltz & Kelly, P.C.*, 264 Va. 310, 313, 568 S.E.2d 693, 695 (2002), and *Shipman v. Kruck*, 267 Va. 495, 593 S.E.2d 319 (2004).

The facts of the instant case are most analogous to those of *Rutter*. There, the executor of a decedent's estate sued the decedent's former attorney for legal malpractice, alleging that negligently-drafted estate planning instruments caused the estate to sustain an avoidable tax liability. In dismissing the executor's claim, this Court held, in relevant part, that the injuries proximately caused by the attorney's legal malpractice were not

incurred until after the decedent's death, and thus no cause of action for legal malpractice accrued until that time.

In the instant case, as in *Rutter*, Gay negligently drafted a legal instrument, the purpose of which was to confer a specific benefit, but only in the future, and only upon the occurrence of a particular contingency. In *Rutter*, the benefit was estate tax avoidance upon the testator's death. Here, the benefit was receipt by Van Dam of survivor benefits in her spouse's retirement accounts, upon his death and upon her predeceasing him. In each case, the instrument drafted was insufficient to achieve its intended purpose, and the negligent drafting did not cause injury contemporaneously, but only at some future date, upon the occurrence of some contingency.

In *Rutter*, the Court held that until the testator died and her estate incurred the tax liability that her testamentary instruments were meant to avoid, no injury had been sustained. So, too, in the instant case, until the former spouse died and Van Dam actually survived him, Van Dam had not sustained any injury.

Gay and the trial court have analogized the instant case to this Court's decision in *Shipman v. Kruck*, 267 Va. 495, 593 S.E.2d 319 (2004). There, plaintiffs sued their former attorney for legal malpractice, based

upon his erroneous advice that a purported irrevocable trust into which they had conveyed their primary residence would protect the same if they filed for voluntary petition for bankruptcy. Contrary to the attorney's advice, however, after the plaintiffs filed for Chapter 7 bankruptcy, the bankruptcy court held that the trust was revocable, rather than irrevocable, and thus the assets therein entered the bankruptcy estate. As a consequence, the plaintiffs could only regain ownership of the residence by purchasing the same from the bankruptcy trustee.

In *Shipman*, this Court was faced with the question of when the plaintiffs' statute of limitations against their former attorney began to run. The plaintiffs argued that they had no cause of action and the statute of limitations could not begin to run until the bankruptcy court finally adjudicated that their trust was revocable. However, this Court held that the injury to the plaintiffs occurred, and thus their cause of action accrued, at the very instant that they filed their petition in bankruptcy, as that was the point in time at which they lost the legal right to and their control of their residence to the bankruptcy trustee, and thus sustained an injury.

The trial court appears to have relied on this Court's decision in *Shipman*, particularly in stating that, "as [the Appellant] anticipated the [settlement agreement] being drafted, she had a right…. [W]hen that right

would be collected was dependent upon the death of her husband, but she had the right to whatever retirement benefits he had." (App. 63, L. 10-15). The trial court further distinguished *Shipman* and the instant case from *Rutter*, stating that:

> "This was something that [Appellant's former husband] could not have changed. It was a contract right. In your situation, it was a testamentary right, and as we know, testamentary rights are a whole different animal. They can be changed at any moment. At any time a person wants to change it, they can do that, and I think that's why you have to wait for some damages because they may never occur.
>
> In this case, the damages were going to occur at some point, and that being so, it's contingent, but it's an absolute contingency, only contingent on an event which cannot be changed." (App. 68, L. 14 – App. 69, L. 8)

The trial court reasoned that what Van Dam lost was "a contingent right but an absolute contingent right…only contingent upon the former husband's death, which is inevitable." (App. 66, L. 6-10). However, to the contrary, Van Dam's right to receive survivor benefits from the former husband's retirement plans was not an "absolute contingent right," the

husband's death was not inevitable, and the damages were not necessarily going to occur at some point.

In this case, Van Dam's receipt of survivor benefits was contingent not only upon the former husband's death, but also upon Van Dam's actual survival of the former husband. Until Van Dam survived the former husband, she could not claim a right to his survivor benefits, and, unlike the death of the former husband, this contingency was not inevitable. Had Van Dam predeceased the former husband, she never would have been entitled to survivor benefits, and would not have incurred any damage. The question of whether Van Dam had or would survive her former husband was not a fact which was known or which could be known at the time of that the Agreement was negligently drafted by Gay. Thus, until the former husband actually died before Van Dam, and both stated contingencies were thus met, Van Dam could receive no right in the husband's survivor benefits and she could not be injured by her failure to receive them. Indeed, as the trial court said in describing *Rutter*, she had "to wait for some damages because they may never occur."

CONCLUSION

Gay committed legal malpractice in negligently drafting a settlement agreement that purported to grant Van Dam survivor benefits arising from her former husband's federal government retirement plans, but which contained insufficient language to be accepted by the administrators of the said plans. Upon the husband's death, Van Dam was denied those benefits, and only then did Van Dam incur the injury that was proximately caused by Gay's legal malpractice. Only upon sustaining that injury did Van Dam's cause of action against Gay for legal malpractice accrue, and only then did the applicable statute of limitations commence to run. The trial court committed reversible error in finding otherwise, and in sustaining the Gay's plea in bar.

Accordingly, your Appellant, Josephine Van Dam, requests the following specific relief:

1. That the Order of May 22, 2009, be reversed; and, this case be remanded to the trial court for further proceedings.

Respectfully submitted,

JOSEPHINE VAN DAM
By Counsel

THE DUFF LAW FIRM
A Professional Corporation
11320 Random Hills Road
Suite 630
Fairfax, VA 22030
(703) 591-7475 (telephone)
(703) 273-4537 (facsimile)
akronfeld@dufflawfirm.com (email)

By: _____
Adam T. Kronfeld (VSB #71167)
Counsel for Appellant, Josephine Van Dam

RULE 5:26(d) CERTIFICATE

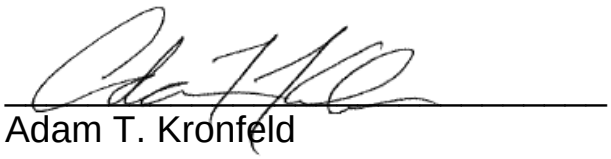
1. Appellant's Name: JOSEPHINE VAN DAM

   Appellant's Counsel: Adam T. Kronfeld, Esquire
   THE DUFF LAW FIRM
   A Professional Corporation
   11320 Random Hills Road
   Suite 630
   Fairfax, VA 22030
   (703) 591-7475 (telephone)
   (703) 273-4537 (facsimile)
   akronfeld@dufflawfirm.com (email)

   Appellee's Name: GORDON B. GAY, ESQUIRE

   Appellee's Counsel: Carol T. Stone, Esquire
   JORDAN COYNE & SAVITS, LLP
   10509 Judicial Drive
   Suite 200
   Fairfax, VA 22030
   (703) 246-0900 (telephone)
   (703) 591-3673 (facsimile)
   c.stone@jocs-law.com (email)

2. I do hereby certify that fifteen (15) paper copies and one (1) electronic copy on CD of the foregoing *Opening Brief of Appellant and Appendix* have been hand-filed with the Clerk of this Court, and that three (3) paper copies of the same have been served, via U.S. Mail, postage prepaid, upon opposing counsel, Carol T. Stone, Esquire, at JORDAN COYNE & SAVITS, LLP, 10509 Judicial Drive, Suite 200, Fairfax, VA 22030, this 8th day of December, 2009.



Adam T. Kronfeld