2019 IL App (2d) 190020-U
No. 2-19-0020
Order filed September 20, 2019

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

ANNE M. ANDERSON, f/k/a Anne M Hewson,	)	Appeal from the Circuit Court of McHenry County.
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	No. 16-LA-410
	)	
DENISE M. KUZNIEWSKI,	)	Honorable
	)	Thomas A. Meyer,
Defendant-Appellee,	)	Judge.

JUSTICE McLAREN delivered the judgment of the court.
Presiding Justice Birkett and Justice Spence[1] concurred in the judgment.

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[1] Justice Spence resigned from this court effective September 12, 2019. Prior to his resignation, Justice Spence fully participated in the decision of the court. See *Proctor v. Upjohn Co.,* 175 Ill.2d 394, 396-97, 222 Ill.Dec. 384, 677 N.E.2d 918 (1997) (holding that departure of appellate judge prior to filing of decision does not affect decision's validity as long as the remaining two panel members agree upon a disposition); *Cirro Wrecking Co. v. Roppolo,* 153 Ill.2d 6, 17-19, 178 Ill.Dec. 750, 605 N.E.2d 544 (1992) (holding that departure of appellate judge prior to the date the clerk of the court enters disposition does not affect the disposition's validity where three judges participated in the decision and remaining two judges agree on

ORDER

¶ 1 *Held:* The trial court properly granted defendant summary judgment on plaintiff's legal-malpractice claim, as the two-year limitations period began no later than when plaintiff consulted a new attorney to inquire about seeking relief from the allegedly unjust settlement that defendant had negotiated.

¶ 2 Plaintiff, Anne M. Anderson, f/k/a Anne M. Hewson, filed a first amended complaint against defendant, Denise M. Kuzniewski, for legal malpractice. The trial court granted defendant summary judgment (735 ILCS 5/2-1005(c) (West 2018)), holding that the action was barred by the two-year statute of limitations (*id.* § 13-214.3(b)). Plaintiff appeals, contending that the court erred in holding as a matter of law that her cause of action accrued more than two years before she filed her original complaint. We affirm.

¶ 3 BACKGROUND

¶ 4 On December 21, 2016, plaintiff filed her original complaint. On May 11, 2017, she filed her first amended complaint, which alleged as follows. Defendant is an attorney. Plaintiff had been married to Steven Hewson (Hewson), and they had five children. During the marriage, she had been a registered nurse and he had worked for Underwriters Laboratories (UL). As of early 2009, his yearly income included a base salary of more than $249,996, plus substantial deferred compensation, and far exceeded plaintiff's income. In 2009, Hewson petitioned to dissolve the marriage. Plaintiff consulted defendant and on May 9, 2009, they signed a retainer agreement.

¶ 5 The first amended complaint alleged that, after signing the agreement, defendant began investigating the parties' assets and liabilities, child support, and other matters. However, she spent little if any time investigating Hewson's employment or deferred compensation. She conducted no discovery at all against UL and failed to depose Hewson, relying on documents

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disposition).

that he furnished in discovery. Defendant failed to inform plaintiff of these shortcomings in her preparation. Finally, defendant negotiated a settlement that included five years' nonmodifiable maintenance. She assured plaintiff that the settlement was the best available option and that going to trial would be very costly and produce a far worse outcome. These statements in effect coerced plaintiff into entering into the settlement.

¶ 6 The first amended complaint continued as follows. The settlement's maintenance award, $2630.36 a month for five years plus 18% of Hewson's net income over his base salary, was insufficient given the near 30-year duration of the marriage and Hewson's actual income. Not only did he claim $249,996 a year in base salary, but he could minimize the net of his deferred payments in order to lessen his maintenance obligation. Further, the child support award, $2923 monthly, based on Hewson's net income, was calculated incorrectly by defendant and was insufficient. Permanent maintenance would have been expected in light of rulings in comparable cases. Plaintiff could easily have received an additional 10 years of maintenance or more than $250,000 and at least $30,000 more child support. Further, the settlement did not facilitate monitoring Hewson's future deferred compensation, as there was no way to receive documents directly from UL.

¶ 7 The first amended complaint continued as follows. The dissolution judgment was entered January 24, 2011. Thereafter, plaintiff repeatedly spoke to defendant, asking about the correctness of the maintenance award and advising her that she did not think that the case had been handled correctly. Defendant consistently assured plaintiff that she had gotten the best deal possible, but she did not tell her that she had done little or no discovery or trial preparation. Despite her fiduciary duty to plaintiff, defendant remained silent about her handling of the case, making it impossible for plaintiff to learn that she had a cause of action for malpractice. Finally,

in November or December 2015, plaintiff's new attorney informed her that she might want to consult an experienced malpractice attorney to ascertain whether she had a cause of action against defendant. The attorney himself did not express an opinion. Only in January 2016 did she receive an opinion that malpractice had occurred.

¶ 8 The first amended complaint alleged that, had it not been for defendant's malpractice, plaintiff would have received permanent maintenance at a proper level and proper child support.

¶ 9 Defendant answered the first amended complaint and then moved for summary judgment. She contended that as matters of law (1) the action was time-barred and (2) plaintiff could not establish proximate cause. The motion attached a copy of plaintiff's discovery deposition, taken April 6, 2018.

¶ 10 The motion contained a statement of "Undisputed Facts," based primarily on the deposition. They included the following. In November 2010, plaintiff sent defendant an e-mail stating that she did not know why they had to go to trial; that time need not be wasted on a trial; and that she did not want to go to trial. Before the parties settled, plaintiff read over several drafts of the agreement, proposed revisions that defendant forwarded to Hewson's attorney, and consulted with an accountant whose comments were forwarded to defendant. At the prove-up on November 30, 2010, plaintiff testified truthfully that she understood all of the terms of the settlement. On that same date, and throughout December 2010, plaintiff sent e-mails to defendant expressing her discontent with what she had received from the settlement.

¶ 11 The fact statement continued in pertinent part as follows. In her deposition, plaintiff testified that Hewson would not have accepted anything different from what was in the settlement; in particular, he would not have agreed to more or longer maintenance or more child support. After the trial court entered the dissolution judgment, plaintiff became frustrated that it

did not address her wants and concerns. On March 11, 2011, she e-mailed defendant, stating in part, " 'We were supposed to take him to the cleaners, not the opposite.' " In her deposition, she admitted that when she sent the e-mail she felt that she had not gotten what she thought she deserved from the settlement.

¶ 12 The statement of facts continued as follows. After July 25, 2011, plaintiff had no more communication with defendant and considered the attorney-client relationship to have ended in summer 2011. In October 2011, she contacted attorney Michael Poper, because she " 'knew [the settlement] was not right.' " At their first meeting, they discussed filing an action to get longer maintenance and her possible damages for legal malpractice. At some point before May 24, 2012, she retained Poper to represent her in postdissolution proceedings. In July 2017, she ratified an order that continued the agreement subject only to the modification that Hewson would have to give her a copy of his latest pay stub on June 30 and December 31 each year and copies of his W-2 forms and tax returns within seven days of receiving them.

¶ 13 The statement of facts continued that on June 4, 2013, plaintiff wrote Poper to express her dissatisfaction with the maintenance award and his representation. Poper ceased representing her. In 2015, he referred her to her current malpractice attorney. On December 21, 2016, she filed this action.

¶ 14 Defendant's motion argued first that the action was time-barred because it was filed more than two years after plaintiff knew or reasonably should have known of the injury for which she was seeking damages (see *id.*). Defendant cited the principle that the period starts to run when a prospective plaintiff knows enough to believe reasonably that an injury was wrongfully caused, thus creating an obligation to inquire further to determine whether an actionable wrong was committed. *Carlson v. Fish*, 2015 IL App (1st) 140526, ¶ 23.

¶ 15 Defendant noted that, based on plaintiff's own deposition testimony, her duty to inquire further was triggered long before December 21, 2014. She had reviewed proposed settlements and understood all the terms when she agreed to the settlement on November 30, 2010. But on that very date, she was already expressing dissatisfaction with the result of defendant's efforts. Her expressions of discontent continued through March 2011, when she complained to defendant that she had let Hewson take them " 'to the cleaners.' " Further, in October 2011, plaintiff met with another attorney in order to consider seeking to modify the dissolution settlement. Defendant argued that under *Barratt v. Goldberg*, 296 Ill. App. 3d 252, 256 (1998), as a matter of law plaintiff's duty to inquire was triggered no later than October 2011.

¶ 16 Defendant's motion argued second that, as a matter of law, plaintiff could not establish that any injury was proximately caused by defendant's allegedly deficient performance. Defendant reasoned that there was no factual basis to find that, but for defendant's allegedly substandard representation, a more favorable result would have been reached. In her deposition, plaintiff had testified that Hewson would not have accepted any settlement terms that were more generous to her than the eventual agreement. Asked whether he would have agreed to more or longer-lasting maintenance or higher child support, she testified, " 'Absolutely not. It's his way or the highway.' " Further, she had also testified that she did not want to go to trial: she was influenced by her Catholic faith, she did not want her children to know that their parents were going to trial, and she did not want to have to testify in court or be cross-examined. Also, she acknowledged having been unwilling to spend the time or money that a trial would have required. Finally, she admitted that on July 20, 2012, after consulting successor counsel, she ratified the essential terms of the agreement.

¶ 17 Plaintiff filed a response to the summary judgment motion, attaching affidavits from herself and Poper. In contending that the action was not time-barred, she argued as follows. Only in November or December 2015 did she know, or should she reasonably have known, that she had been injured and that her injury had been wrongfully caused. Plaintiff's assent to the settlement had been induced by defendant's "fraudulent concealment of her actions by assuring [plaintiff] that the settlement was the best she would receive." In her deposition, plaintiff testified that, whenever she raised concerns to defendant, defendant reassured her that she was getting the best result that she could. Plaintiff testified that she "had nowhere else to go" and had already spent thousands of dollars by then, so she trusted defendant.

¶ 18 Plaintiff argued that, under the fraudulent concealment statute, she had had five years after she discovered her cause of action in which to file her complaint. See 735 ILCS 5/13-215 (West 2018). Defendant had violated her fiduciary duty to disclose to plaintiff that she should have received more maintenance and child support, given the length of the marriage and the parties' respective assets. This concealment distinguished the case from *Barratt*.

¶ 19 Plaintiff argued next that she had raised a factual issue on proximate cause. She contended first that whether or not Hewson would have accepted a different settlement was not important, "because even if there was no agreement by [Hewson], [defendant] should have taken the matter to trial and the Judge could have made the ultimate decision." Further, plaintiff's aversion to a trial did not negate proximate cause, as "[defendant] should have still negotiated a better settlement, or explained to [plaintiff] what her maintenance amount should be *** and allowed [plaintiff] to make the decision to settle for a lesser amount with all of the information."

¶ 20 In her affidavit, plaintiff stated that, before she signed the settlement agreement, defendant told her that it was the best she would get and that she could end up worse off after a

trial. After the settlement was entered, defendant continued to reassure plaintiff that it was the best available. Poper never advised plaintiff about a malpractice claim. She did not become aware that she had a claim until November or December 2015, when her current counsel told her so.

¶ 21 In his affidavit, Poper stated that plaintiff retained him in mid-October 2011. They never discussed any damages as a result of legal malpractice or any causes of action for malpractice that plaintiff might have. In 2015, he referred plaintiff to her current malpractice attorney.

¶ 22 In replying to plaintiff's response, defendant reiterated that as a matter of law the limitations period started no later than when plaintiff hired a second attorney to investigate. Defendant noted plaintiff's testimony that she hired Poper in October 2011 because she was " 'concerned that things were not right,' " in view of Hewson's lavish lifestyle and her feeling that the settlement had been unjust. Defendant also contended that the evidence raised no genuine issue of fraudulent concealment; no authority supported the theory that defendant's reassuring statements were affirmative acts that kept plaintiff from discovering her cause of action. According to defendant, *Carlson* and *Barratt* had rejected similar arguments. Moreover, that plaintiff ended defendant's representation of her and sought out Poper's advice showed that any fraudulent concealment had not lasted past October 2011.

¶ 23 Finally, defendant reiterated that plaintiff could not prove proximate cause, because her own testimony established that Hewson would never have accepted a less one-sided settlement and that she would not have gone to trial. Further, plaintiff had ratified the agreement in 2012 rather than having Poper seek to modify its maintenance or child-support provisions.

¶ 24 The trial court granted defendant summary judgment. The court relied on the statute of limitations and did not discuss proximate cause. Plaintiff timely appealed.

¶ 25 ANALYSIS

¶ 26 On appeal, plaintiff argues that the trial court erred both in holding that the limitations period began to run more than two years before she filed her complaint and in rejecting her argument that defendant fraudulently concealed her cause of action from her. Defendant disputes both of these contentions and argues further that the judgment can be affirmed on the ground of no proximate cause. We agree with defendant that the complaint was untimely as a matter of law. We affirm on that basis.

¶ 27 Summary judgment is proper if the pleadings, depositions, and other matters on file establish that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Id. § 2-1005(c); *Forsythe v. Clark USA, Inc*,. 224 Ill. 2d 274, 280 (2007). Our review is *de novo*. *Forsythe*, 224 Ill. 2d at 280.

¶ 28 The statute of limitations for attorney malpractice incorporates the discovery rule: an action must be filed within two years of when the plaintiff "knew or reasonably should have known of the injury for which damages are sought." 735 ILCS 5/13-214.3(b) (West 2018). Thus, the period begins when the plaintiff knows enough about her injury and its cause to put a reasonable person on inquiry to determine whether actionable conduct is involved. *Carlson*, 2015 IL App (1st) 140526, ¶ 23.

¶ 29 Plaintiff filed this action on December 21, 2016. We agree with defendant that, as a matter of law, plaintiff's duty of inquiry arose long before December 21, 2014, and that there was no genuine issue of fraudulent concealment.

¶ 30 *Carlson* and *Barratt* are not merely instructive but controlling. In *Carlson*, the plaintiff claimed that his former attorneys committed malpractice in inducing him to enter into a disadvantageous mediated settlement with his erstwhile business partners. The settlement, by

which the plaintiff's interest was bought out, was finalized in March 2008. Id. ¶ 8. In September 2008, the plaintiff sent the first of numerous e-mails to the defendants, expressing his belief that his former partners had deceived him into taking less money than he deserved. That day, the defendants e-mailed back that he had made a good deal and could easily have done much worse. *Id.* ¶¶ 9-10. In October 2008, the plaintiff e-mailed the defendants, asking whether he had " 'any legal options' " and again expressing his dissatisfaction over the buyout. The defendants responded that he could get the settlement set aside had it been procured by fraud. *Id.* ¶¶ 11-12.

¶ 31 Early in November 2008, the plaintiff told the defendants that he had consulted with three different law firms about the settlement. On November 13, 2008, the defendants advised him to work with another lawyer if he wanted, and he replied that he was dissatisfied with both the settlement and the defendants' ability to represent him. On November 19, 2008, he met with another firm (Drinker). According to him, this was when he was first made aware of a possible malpractice claim against the defendants. On November 18, 2010, he filed the malpractice action. The trial court dismissed it as time-barred. *Id.* ¶¶ 11-19.

¶ 32 The appellate court affirmed. The court first rejected the plaintiff's argument that his cause of action did not accrue until November 18, 2008, when Drinker told him that he had a possible malpractice claim. The court noted the plaintiff's judicial admissions that he knew or suspected earlier than that date that he had been defrauded. *Id.* ¶¶ 30-32. Further, the plaintiff's e-mail exchanges with the defendants beginning in September 2008 "show[ed] that [he] was not happy with his attorneys' representation in the mediation before his meeting with the Drinker lawyers." *Id.* ¶ 38. Thus, the plaintiff's duty to inquire had been triggered well before November 18, 2008, because he knew before that date that he had been injured and that his

injury had been wrongfully caused, even though he might have been unsure exactly who caused the injury. *Id.* ¶ 39.

¶ 33 The court next rejected the plaintiff's contention that the defendants had fraudulently concealed his cause of action. The plaintiff had to show affirmative acts or representations by the defendants that were calculated to lull or induce him into delaying his claim or to prevent him from discovering the claim. *Id.* ¶ 44; see *Barratt*, 296 Ill. App. 3d at 257. But the defendants' mere reassurances that the settlement was a good deal did not meet this test. First, there was no authority for the proposition that "a lawyer has an affirmative obligation to advise a client to sue the attorney for legal malpractice." *Carlson*, 2015 IL App (1st) 140526, ¶ 45. Second, well before November 18, 2008, the plaintiff had consulted three law firms and had been advised by the defendants that he should work with another lawyer if he wanted. *Id.* ¶ 46.

¶ 34 *Carlson* compels affirmance, because the undisputed facts here are no less compelling than they were there. By her own admission, plaintiff's dissatisfaction with the settlement began the very day that she signed it, and she repeatedly told defendant in the months thereafter that she felt she had been cheated by Hewson. Her extreme dissatisfaction with the settlement necessarily implied dissatisfaction with defendant's performance, a point made explicit when she e-mailed defendant that "*We* were supposed to take him to the cleaners, not the opposite." (Emphasis added.) See *id.* ¶ 39 (plaintiff's recognition that former partners had cheated him in settlement was "inseparable" from his recognition that attorneys who induced him to settle had failed to protect him).

¶ 35 *Carlson* also refutes plaintiff's contention that she raised a genuine issue of material fact on fraudulent concealment. Plaintiff relies on defendant's repeated assurances that the settlement was the best that she could get. But this is exactly the theory that the court rejected in

Carlson. As did the court there, we decline to hold that an attorney must advise a client to sue her for malpractice. Further, as in *Carlson*, the contention that defendant lulled plaintiff into complacency or ignorance is refuted by the fact that plaintiff terminated their relationship and hired a new attorney no later than October 2011, less than a year after the dissolution settlement and more than five years before she filed her complaint against defendant.

¶ 36 In *Barratt*, the plaintiff's marriage was dissolved by a December 1987 judgment that incorporated a settlement agreement negotiated by her attorney and his firm (the defendants). In spring 1991, she retained another attorney to determine whether the judgment could be vacated or modified. In March 1996, she filed a malpractice action against the defendants. In this action, she contended that the limitations period was five years and that it was only after consulting with the new lawyer in spring 1991 that she first became aware of the defendants' malpractice. The defendants moved to dismiss the complaint as untimely, contending in part that the two-year statute of limitations enacted January 1, 1991, applied. The plaintiff responded in part that the five-year statute of limitations based on fraudulent concealment applied. The trial court agreed with the defendants and dismissed the complaint. *Barratt*, 296 Ill. App. 3d at 254-55.

¶ 37 The appellate court affirmed. After holding that the suit was governed by the two-year statute of limitations, the court held that as a matter of law the plaintiff knew or should have known of her injury and that it was wrongfully caused by spring 1991, when she met with the new attorney to discuss the possibility of modifying or vacating the 1987 judgment. *Id.* at 256.

¶ 38 The court also rejected the plaintiff's allegation of fraudulent concealment. Although the court relied in part on the fact that the defendants had not continuously reassured her that the settlement was satisfactory, it also observed that the plaintiff had had no contact with the defendants after the December 1987 judgment. *Id.* at 258. More important, even had the

defendants fraudulently concealed the action for a time, the plaintiff learned of it in spring 1991, when she consulted with the second attorney. At that time, she still had the full two-year limitations period to file the complaint. *Id.*

¶ 39 As does *Carlson*, *Barratt* controls the outcome here. Plaintiff did keep in contact with defendant for approximately half a year after the dissolution judgment, but she consulted with another attorney thereafter because she had serious doubts about the judgment and wanted to consider the possibility of having it vacated or modified. Not only did this consultation start the limitations period (had it not started earlier), it ended any fraudulent concealment by defendant.

¶ 40 Plaintiff relies on several opinions that are distinguishable and do not disturb the controlling effect of *Carlson* and *Barratt*. We need not discuss them here.

¶ 41 CONCLUSION

¶ 42 For the foregoing reasons, we affirm the judgment of the circuit court of McHenry County.

¶ 43 Affirmed.