

Reversed and Remanded and Opinion filed August 16, 2001.



In The

Fourteenth Court of Appeals

NO. 14-00-00177-CV

**HENRY P. MASSEY AND ANN A. MASSEY, INDIVIDUALLY AND AS
ADMINISTRATOR OF THE ESTATE OF COURTNEY S. MASSEY, DECEASED,
Appellants**

V.

DONALD R. ROYALL AND THE ROYALLS, A.P.C., Appellees

**On Appeal from the 55th District Court
Harris County, Texas
Trial Court Cause No. 95-48091**

OPINION

This is an appeal from a summary judgment in favor of appellee, Donald R. Royall and the Royalls, A.P.C. (“Royall”), involving legal malpractice. In three issues, appellants, Henry P. Massey and his daughter Ann Massey, individually and as Administrator of the estate of Courtney S. Massey (“Henry”), challenge the summary judgment. We reverse and remand.

F A C T U A L B A C K G R O U N D

Henry retained Royall on June 23, 1988, to represent him in his divorce, and Royall represented Henry throughout the trial. On July 26, 1989, the jury found against Henry. The final decree of divorce was entered on August 8, 1989, and on that day Royall withdrew as counsel with Henry's permission. Henry subsequently retained John Mercer to represent him, and on September 9, 1989, a motion for a new trial was timely filed.

Henry was displeased with Royall's services by August 9, 1989, and he had determined, by September 1, 1989, that Royall's malpractice had caused him damages in the range of \$20,000-\$30,000. From January 22, 1992, through March 30, 1992, Henry filed 25 grievances with the State Bar of Texas complaining of Royall's representation in his divorce case. Henry appealed the trial court's judgment, and on March 9, 1991, the court of appeals issued an opinion affirming the trial court's judgment. *See Massey v. Massey*, 807 S.W.2d 391 (Tex. App.—Houston [1st Dist.] 1991), *writ denied*, 867 S.W.2d 766 (Tex. 1993). The appeals process ended for the divorce case when the Supreme Court of Texas overruled Henry's motion for rehearing on his application for writ of error on September 29, 1993. *See Massey v. Massey*, 867 S.W.2d 766 (Tex. 1993).

On September 27, 1995, Henry filed the current suit alleging negligence and legal malpractice, breach of contract, breach of fiduciary duties, DTPA violations, and fraud. The trial court granted summary judgment in favor of Royall. Royall's motion for summary judgment presented two grounds supporting the motion: (1) Henry's suit was barred by limitations, and (2) Ann, Henry's daughter, lacks standing to sue Royall because she was not a client. Henry brings this appeal of his malpractice suit arising out of Royall's representation in the divorce proceeding.

Standard of Review

When reviewing a summary judgment, we follow these well-established rules: (1) the movant has the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law; (2) in deciding whether there is a disputed material fact issue precluding summary judgment, evidence favorable to the nonmovant

will be taken as true; and (3) every reasonable inference must be indulged in favor of the nonmovant and any doubts must be resolved in favor of the nonmovant. *Am. Tobacco Co., Inc. v. Grinnell*, 951 S.W.2d 420, 425 (Tex. 1997). Summary judgment for a defendant is proper only when the defendant negates at least one element of each of the plaintiff's theories of recovery, or pleads and conclusively establishes each element of an affirmative defense. *Science Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 911 (Tex. 1997).

Statute of Limitations

We begin with the rule that a two-year statute of limitations governs legal-malpractice claims, whether they sound in tort, contract, or other theory. *Apex Towing Co. v. Tolin*, 41 S.W.3d 118, 120 (Tex. 2001). This rule is set out in Section 16.003(a) of the Civil Practice and Remedies Code. TEX. CIV. PRAC. & REM. CODE ANN. § 16.003(a) (Vernon Supp.2001). Limitations generally begin to run when the cause of action accrues, which occurs when facts have come into existence that authorize a claimant to seek a judicial remedy. *Apex Towing*, 41 S.W.3d at 120.

The supreme court has determined that where a person is prevented from exercising his legal remedy by the pendency of legal proceedings, the time during which he is thus prevented should not be counted against him in determining whether limitations have barred his right. *Hughes v. Mahaney & Higgins*, 821 S.W.2d 154, 157 (Tex. 1991); *see Cavitt v. Amsler*, 242 S.W. 246, 249 (Tex. Civ. App.—Austin 1922, writ dismissed) (limitations on suit for dividends tolled while suit to determine ownership of stock was being appealed). That rationale is also appropriate when a client's cause of action for malpractice arises during the attorney's prosecution or defense of a claim which results in litigation. *Hughes*, 821 S.W. 2d at 157. Limitations are tolled for the second cause of action because the viability of the second cause of action depends on the outcome of the first. *Id.* The foregoing tolling rule applies to suits against an attorney for malpractice. When an attorney commits malpractice in the prosecution or defense of a claim that results

in litigation, the statute of limitations against the attorney is tolled until all appeals on the underlying claim are exhausted. *Id.* In *Hughes*, the tolling period ended when the supreme court overruled the Hugheses' motion for rehearing on their application for writ of error. *Id.* at 158. That was the last action the Hugheses could and did take on the underlying case. *Id.* at n.6. The supreme court instructed courts to apply the *Hughes* tolling rule to legal-malpractice cases encompassed within its definition. *Apex Towing*, 41 S.W.3d at 122.

Is Henry's Case Barred by Limitations?

In this case, Henry alleges Royall committed legal-malpractice while representing Henry in the underlying divorce proceeding. Thus, the *Hughes* rule applies in this case. *Id.* at 123. Here, Henry's judicial remedies in the underlying divorce case were not exhausted until September 29, 1993. See *Massey v. Massey*, 867 S.W.2d 766 (Tex. 1993). Tolling of limitations ended on that date. Henry's suit against Royall was filed on September 27, 1995. Accordingly, Henry's *suit is not* barred by the two year statute of limitations applicable to legal-malpractice suits.

Was Ann One of Royall's Clients?

In a summary judgment case, the issue on appeal is whether the movant met his summary judgment burden by establishing that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c). In deciding whether there is a material fact issue precluding summary judgment, all conflicts in the evidence will be disregarded and the evidence favorable to the nonmovant will be accepted as true. *Harwell v. State Farm Mut. Auto. Ins. Co.*, 896 S.W.2d 170, 173 (Tex. 1995). Evidence that favors the movant's position will not be considered unless it is uncontroverted. *Great Am. Reserve Ins. Co. v. San Antonio Plumbing Supply Co.*, 391 S.W.2d 41, 47 (Tex. 1965).

Royall asserts, as a ground supporting his motion for summary judgment, that Ann was not his client in the divorce proceeding, and therefore she had no standing to file suit

against him. As summary judgment proof of that ground, Royall submitted the following: his affidavit stating that neither he nor anyone in his firm represented Ann Massey. He also submitted, in an attachment to his reply to Henry's response to the summary judgment, excerpts from the affidavit of Ann Massey addressing the issue of whether or not Royall represented her in the underlying divorce proceeding.

In response to the motion for summary judgment, Henry submitted his affidavit stating "Royall represented me and the interests of my children Ann Massey and Courtney Massey through the trial of the divorce case."

These competing affidavits raise a genuine issue of material fact regarding the question of whether Royall did in fact represent Ann. Royall is not entitled to summary judgment on the ground that he did not represent Ann inasmuch there is summary judgment proof in the record that an attorney-client relationship existed between Royall and Ann in the divorce proceeding. Based on Henry's controverting affidavit, Royall failed to satisfy movant's summary judgment burden of showing there is no genuine issue of material fact and that he is entitled to judgment as a matter of law. *Great Am. Reserve Ins. Co.*, 391 S.W.2d at 47 (holding burden of proof is on movant and all doubts as to existence of a genuine issue as to a material fact are resolved against him).

Accordingly, because Royall was not entitled to summary judgment on any of the grounds presented in his motion, we reverse the summary judgment in favor of Royall and remand this case to the trial court for further proceedings.

/s/ John S. Anderson
Justice

Judgment rendered and Opinion filed August 16, 2001.

Panel consists of Justices Anderson, Hudson, and Seymore.

Do Not Publish — TEX. R. APP. P. 47.3(b).