IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES WRAY,
Appellant,
vs.
CHARLES JOHNSON, INDIVIDUALLY; AND CHARLES JOHNSON AND/OR DAVID JOHNSON, TRUSTEE OF THE HOYT SIBLEY AND MARY SIBLEY 1973 TRUST,
Respondents.

DAVID WRAY,
Appellant,
vs.
CHARLES JOHNSON, INDIVIDUALLY; AND CHARLES JOHNSON AND/OR DAVID JOHNSON, TRUSTEE OF THE HOYT SIBLEY AND MARY SIBLEY 1973 TRUST,
Respondents.

No. 34914

FILED

DEC 17 2002

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY J. Richards
CHIEF DEPUTY CLERK

No. 35027

ORDER OF AFFIRMANCE

On July 26, 2002, this court granted appellants' petition for en banc reconsideration. This decision is issued in lieu of our order of affirmance issued by the Southern Panel on December 12, 2001.

In these consolidated appeals, appellants, James Wray and David Wray, appeal from a grant of summary judgment in favor of respondents, Charles Johnson and David Johnson. The district court's order dismissed the Wrays' legal malpractice and fraud claims against the Johnsons on statute of limitations grounds.

02-21579

In 1973, Hoyt and Mary Sibley created a joint marital trust, drafted by respondent, Charles Johnson. Charles Johnson drafted several trust amendments for the Sibleys, most recently in 1991. The final amended trust granted the surviving spouse a special power of appointment over the decedent spouse's contributions to the trust. The survivor could exercise this special power of appointment inter vivos or through a testamentary document. The trust instrument contained no restrictions on the designation of beneficiaries pursuant to any exercise of the powers of appointment, except that the survivor could not appoint to himself. Mary then executed a will, also drafted by Charles Johnson, leaving all of her property to the trust.

On July 28, 1991, Mary died. Hoyt promptly began using the power of appointment to make gifts of Mary's property to several people, including the Wrays, who were Mary's children from a prior marriage. Hoyt died in 1997, using the testamentary power of appointment to dispose of the remainder of Mary's property. Hoyt did not appoint any of this property to the Wrays.

In 1998, David and James Wray filed suit against respondents, Charles Johnson and the current trustee, David Johnson, alleging legal malpractice in drafting Mary's estate plan. The Wrays asserted that Mary intended them to be beneficiaries under the trust, and that Charles Johnson committed malpractice in drafting the powers of appointment without providing for them. The Wrays later amended their complaint to include a fraud claim against Charles Johnson based on his pretrial deposition testimony.

In granting summary judgment, the district court ruled that NRS 11.207(1), the statute of limitation governing such matters, barred the Wrays' suit. The district court also found that the Wrays failed to allege or present evidence of fraud. James and David Wray timely filed separate appeals contesting this order, which have been consolidated.

We review de novo a district court's grant of summary judgment.[1] We view all evidence in the light most favorable to the party opposing summary judgment.[2] The party opposing summary judgment must present evidence creating a genuine issue of material fact, and may not rely on "'gossamer threads of whimsy, speculation, and conjecture.'"[3]

Statute of limitations for legal malpractice

The district court concluded that NRS 11.207(1), the legal malpractice statute of limitations, bars any such claim here. NRS 11.207(1) provides that a claim for legal malpractice must be brought within two years from the date the plaintiff discovered or should have discovered the injury, or four years from the date of injury, whichever occurs first.[4] A legal

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[1]Coury v. Robison, 115 Nev. 84, 88, 976 P.2d 518, 520 (1999) (citing Bulbman, Inc. v. Nevada Bell, 108 Nev. 105, 110, 825 P.2d 588, 591 (1992)).

[2]Mark Properties v. National Title Co., 117 Nev. ___, ___, 34 P.3d 587, 590 (2001).

[3]Kopicko v. Young, 114 Nev. 1333, 1336, 971 P.2d 789, 790-91 (1998) (quoting Posadas v. City of Reno, 109 Nev. 448, 452, 851 P.2d 438, 441-42 (1993)).

[4]The Legislature amended NRS 11.207(1) in 1997. At the time of Mary's death in 1991, NRS 11.207(1) provided a four-year statutory period from the time when the plaintiff suffers injury and discovers the material facts giving rise to the cause of action. As our result is the same under either version of the statute, we need not address which version applies.

malpractice action does not accrue until the attorney's negligence has caused damages.[5]

Hoyt received the power of appointment in 1991 and promptly began exercising it. The Wrays suffered injury, at the latest, when Hoyt began to appoint Mary's property. The evidence also shows that the Wrays received a copy of Mary's estate planning documents, along with a diagram explaining Hoyt's power to make gifts of Mary's property, shortly after her death. Thus, the Wrays were aware of all the relevant facts in 1991. The statute of limitations had, therefore, run prior to the Wrays' 1998 complaint.

Fraud

A plaintiff in a civil fraud action must prove, among other things, justifiable reliance upon the defendant's misrepresentation.[6] The Wrays allege that Charles Johnson committed fraud by lying in a pretrial deposition. The Wrays presented no evidence that they relied upon the alleged misrepresentation. Accordingly, the district court correctly granted summary judgment to the Johnsons on this claim.

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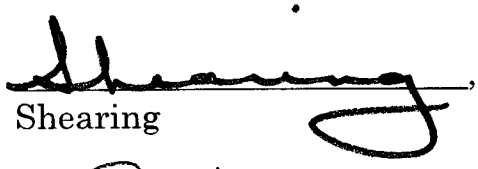
[5]See Kopicko, 114 Nev. at 1337, 971 P.2d at 791.

[6]See Wohlers v. Bartgis, 114 Nev. 1249, 1260-61, 969 P.2d 949, 957-58 (1998).

As these issues dispose of this case, it is unnecessary to reach the parties, remaining arguments. Therefore, we

ORDER the judgment of the district court AFFIRMED.[7]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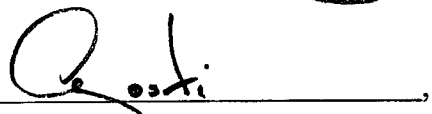
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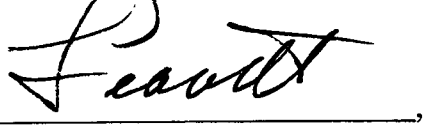
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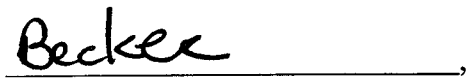
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cc: Hon. Allan R. Earl, District Judge
James H. Wray III
David Wray
Edwards, Hale, Sturman, Atkin & Cushing, Ltd.
Lionel Sawyer & Collins/Las Vegas
Clark County Clerk

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[7]The Honorable Cliff Young, Chief Justice, voluntarily recused himself from participation in the decision of this matter.

MAUPIN, J., with whom ROSE, J. agrees, concurring in part and dissenting in part:

It is evident that the Wrays were aware of facts that placed them upon notice that the final estate plan drawn by Charles and David Johnson might result in their not receiving the bulk of the assets that comprised their mother's estate. However, the limitation period governing legal malpractice did not start to run until the Wrays sustained legal damages.[1] That did not occur until the exercise of Hoyt Sibley's power of appointment became legally effective in 1997.

I agree that the fraud claim was properly dismissed as stated by the majority.

_____, J.
Maupin

I concur:

_____, J.
Rose

[1]See Kopicko v. Young, 114 Nev. 1333, 1336, 971 P.2d 789, 791 (1998).