

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHELLE STALK AND URBAN  
CONSTRUCTION COMPANY, LLC, A  
NEVADA LIMITED LIABILITY  
COMPANY,  
Appellants,

vs.

MICHAEL MUSHKIN,  
Respondent.

No. 56406

MICHELLE STALK; AND URBAN  
CONSTRUCTION COMPANY, LLC, A  
NEVADA LIMITED LIABILITY  
COMPANY,  
Appellants,

vs.

MICHAEL MUSHKIN,  
Respondent.

No. 56865

FILED

DEC 27 2011

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY *Angela*  
DEPUTY CLERK

ORDER OF AFFIRMANCE

These are consolidated appeals from a district court summary judgment in a legal malpractice action and a post-judgment order awarding costs. Eighth Judicial District Court, Clark County; Timothy C. Williams, Judge.

The issues herein arise out of an attorney/client relationship between appellants Michelle Stalk and Urban Construction Company, LLC (Urban) (which is wholly owned by Stalk) and respondent Michael Mushkin, Esq., and relate to a business relationship between Stalk and Allan Bird, owner of Real Property Services Corporation (RPSC). Mushkin represented Stalk and Urban in three mechanics lien cases beginning in 2001. Mushkin also had a business relationship and an attorney/client relationship with Bird and his assorted business entities. Bird owned various companies that built and rehabilitated apartment

complexes. Stalk and Bird had on-going construction contracts concerning the apartment complexes. After Bird fired Stalk, Stalk and Urban sued Mushkin for interference with their business relationship with RPSC. Stalk and Urban alleged that Mushkin induced Bird to cancel contracts with Urban and to cease doing business with Urban. In addition, Stalk and Urban alleged that Mushkin breached the fiduciary duties that he owed them as their attorney by filing a motion in an unrelated case seeking dismissal of his client, RPSC, and naming Stalk and Urban as indispensable parties. The district court granted summary judgment against Stalk and Urban, finding that they failed to file this action within the two-year statute of limitations.<sup>1</sup>

On appeal, Stalk and Urban argue that factual issues exist that preclude summary judgment as to when Stalk discovered or should have discovered material facts constituting the basis of their legal malpractice claims for the purpose of calculating the statute of limitations.<sup>2</sup> We disagree and conclude that the district court properly

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<sup>1</sup>The parties are familiar with the facts, and we do not recount them further except as necessary to our disposition.

<sup>2</sup>Concerning Stalk and Urban's arguments regarding costs, we conclude that the district court did not abuse its discretion in awarding \$5,743.57 in costs from the requested \$10,096.32. Pursuant to NRS 18.005(17), it was permissible for the district court to award costs for any reasonable and necessary expenses, which in this case included those costs incurred for an expert who wrote a report but was not required to testify. We further conclude that the amount of the judgment was supported by the record. We also decline to find an error in the award for \$19 for the recordation and certification of the judgment as Stalk and Urban failed to provide any authority or persuasive argument as to why this de minimis award was improper. See Smith v. Timm, 96 Nev. 197, 201, 606 P.2d 530, *continued on next page . . .*

granted summary judgment as no issues of material fact existed concerning the beginning of the tolling of the statute of limitations.

Issues of material fact

Stalk and Urban argue that they had no knowledge of any material facts constituting their first legal malpractice claim before May 2003 when Stalk learned that Mushkin filed a motion naming Stalk and Urban as indispensable parties in a wrongful termination action filed against RPSC. Stalk and Urban also contend that they had no knowledge of any material facts constituting their second legal malpractice claim for Mushkin's interference with the contracts between Stalk and Bird until the deposition of the contractor who took over the contracts with RPSC in September 2002. Stalk and Urban argue that any earlier events did not trigger the statute of limitations because they did not inform Stalk of the material facts that constitute the cause of action for legal malpractice—they did not put Stalk on notice that Mushkin was working behind the scenes to cause Bird to terminate his contracts and business relationship with Stalk or that Mushkin was working to cause Urban harm.

Pursuant to NRS 11.207(1), Stalk and Urban had two years after they “discover[ed] or through the use of reasonable diligence should have discovered the material facts which constitute the cause of action” to file their attorney malpractice claim. We conclude that the statute of limitations bar Stalk and Urban's claims as the uncontroverted evidence supported that Stalk and Urban knew of the causes of action more than

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*... continued*

532 (1980) (stating that the court was unable to find error because the appellant had failed to provide adequate legal authority).

two years before filing suit. While this question as to when Stalk and Urban discovered the claims would normally be a question of fact for the jury, we have held that “[d]ismissal on statute of limitations grounds is [ ] appropriate when uncontroverted evidence irrefutably demonstrates plaintiff discovered or should have discovered the facts giving rise to the cause of action.” Bemis v. Estate of Bemis, 114 Nev. 1021, 1025, 967 P.2d 437, 440 (1998) (internal quotations and quotation marks omitted). We agree with the district court that it is uncontroverted that the two-year timeframe expired before Stalk and Urban acted on their claims.

Our review of the record reveals that the triggering events occurred well before Stalk and Urban filed the complaint in August 2004. In June 2001, after Bird terminated all contracts with Stalk and Urban, Mushkin sent a substitution of attorney to Stalk’s other attorney stating that there was a conflict and that he could not continue to represent Stalk without a waiver. Because Stalk failed to provide the requested waiver, Mushkin no longer appeared on Stalk or Urban’s behalf and was later substituted from the representation in January 2002. A month after sending the substitution letter, RPSC sued Urban and Stalk. A few days later, Mushkin appeared in court to support a motion by RPSC requesting the appointment of a receiver for Urban.

Then, in September 2001, Stalk sent a formal letter of complaint to the State Bar of Nevada regarding Mushkin’s representation. Stalk alleged that Mushkin had acted with malice, threatened her and her license, acted in manner that conflicted with her interests, and attempted to destroy her business, all while representing her and Urban.

In November 2001, Mushkin’s office filed a motion to dismiss a wrongful termination case against RPSC for failure to join Urban as an

indispensable party. Although the motion was denied, the complaint was amended to name Urban as a defendant in January 2002. According to Stalk, the contractor who took over RPSC's contracts after Stalk and Urban were terminated was deposed in September 2002.

However, it was not until August 2004 that Stalk and Urban filed a complaint against Mushkin. We conclude that Stalk and Urban's representations that they did not know of the claims before September 2002 and May 2003 are contradicted by Stalk's September 2001 letter to the State Bar of Nevada and the withdrawal of Mushkin in June 2001 that was formalized in January 2002. We conclude that there is no ambiguity in the letter written by Stalk—she clearly attacks Mushkin for causing the contracts between her and Bird to be cancelled and accuses Mushkin of attempting to destroy her business. Moreover, Stalk and Urban were aware as early as June 2001 that there was a conflict of interest in Mushkin's representation of them and RPSC when Mushkin sent a substitution of attorney stating that there was a conflict. While Stalk and Urban took no immediate action, Mushkin no longer appeared on Stalk or Urban's behalf and was substituted from the representation in January 2002. This substitution caused the statute of limitations to begin to run. See George L. Blum, J.D., Attorney Malpractice—Tolling or Other Exceptions to Running of Statute of Limitations, 87 A.L.R. 5th 473 (2001) (stating “that when the injury to the client may have occurred during the period the attorney was retained, the statute of limitations on a malpractice cause of action does not begin to run until the attorney's representation concerning the particular matter in issue is terminated”)

(citing R.D.H. Communications, Ltd. v. Winston, 700 A.2d 766, 87 (D.C. 1997)). Moreover, while Stalk and Urban contend that the identity of the replacement contractor was unknown until September 2002, Bird terminated Stalk and Urban's contracts in 2001, an action that should have put them on notice that they were being replaced. See Siragusa v. Brown, 114 Nev. 1384, 1393-94, 971 P.2d 801, 807 (1998) (stating that the plaintiff is required to "exercise reasonable diligence. . . . Plaintiffs may not close their eyes to means of information reasonably accessible to them and must in good faith apply their attention to those particulars within their reach.") (quoting Spitler v. Dean, 436 N.W.2d 308, 310-11 (Wis. 1989)).

While Stalk and Urban attempt to define their claim narrowly to meet the statute of limitations requirement, we conclude that it is clear that they were either on notice of the claim or should have been on notice through the use of reasonable diligence. The tolling of the statute of limitations from September 2001 or January 2002 ended well before the

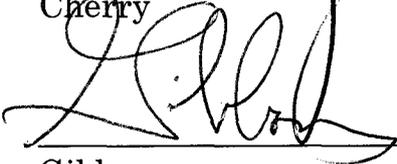
filing of Stalk and Urban's complaint in August 2004. Accordingly, as Stalk's claim is time-barred, we affirm the district court's summary judgment on this issue.<sup>3</sup>

Accordingly, we

ORDER the judgment of the district court AFFIRMED.

 \_\_\_\_\_, C. J.  
Saitta

 \_\_\_\_\_, J.  
Cherry

 \_\_\_\_\_, J.  
Gibbons

cc: Hon. Timothy C. Williams, District Judge  
Kenneth L. Hall  
Patti, Sgro & Lewis  
Michael R. Mushkin & Associates, P.C.  
Eighth District Court Clerk

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<sup>3</sup>Stalk and Urban's other arguments on appeal are rendered moot by our resolution of the statute of limitation issue in this case and, as such, will not be discussed further.