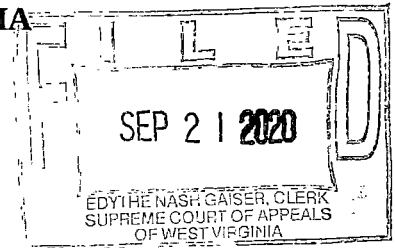


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SUPREME COURT OF APPEALS OF WEST VIRGINIA

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**CLAY R. HUPP,
Plaintiff Below, Appellant**

vs.

No. 20-0532

**RICHARD A. MONAHAN and
THE MASTERS LAW FIRM, LC,
Defendants Below, Appellees**

BRIEF

Appellant, Clay R. Hupp

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TABLE OF CONTENTS

<u>Section</u>	<u>Page(s)</u>
Assignments of Error	1
Statement of the Case	1-3
Summary of Argument	3-4
Statement Regarding Oral Argument and Decision	4-5
Argument	5-9
Conclusion	9
Certificate of Service	10

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TABLE OF AUTHORITIES

Authority

Page(s)

Case Law

Smith v. Stacy, 482 S.E.2d 115, 198 W. Va. 498 (1996)

1, 2, 4, 6, 7 and 8

Vansickle v. Kohout, 599 S.E.2d 856, 215 W. Va. 433 (2004)

1 and 8

Treatise

Legal Malpractice, Ronald E. Mallen and Jeffrey M. Smith (4th ed. 1996)

7

ASSIGNMENTS OF ERROR

1) The lower court erred in finding Richard A. Monahan's and The Masters Law Firm's (appellees/defendants) representation of appellant/plaintiff Clay Hupp ended when this Court upheld a circuit court decision September 3, 2014 in an underlying action affirming insufficient evidence had been submitted in an appeal of the termination of disability benefits for Mr. Hupp's hearing loss. This error resulted in the lower court dismissing Hupp's legal malpractice action against the appellees filed October 4, 2018 as barred by the applicable two-year statute of limitations for negligence although appellees had represented Hupp regarding this termination of disability benefits as of January 2018, within ten (10) months of his filing this lawsuit against them for legal malpractice.

2) The lower court erred in finding the representation by Mr. Monahan and The Masters Law Firm of appellant Hupp had not continued until January 2018, otherwise the filing of this action October 4, 2018 against Monahan and the law firm for negligence would have been found to occur within the applicable two-year period and not been dismissed.

STATEMENT OF THE CASE

This constitutes a legal malpractice action the lower court dismissed as being untimely filed outside the applicable statute of limitations. The lower court found the appellee lawyers' representation had not continued until the later date when the filing of this action would have been timely. The doctrine of continuous representation governs this appeal, and there appear to be only two (2) prior holdings by this Court that address this matter: Smith v. Stacy, 198 W. Va. 498, 482 S.E.2d 115 (1996), which established the doctrine, and Vansickle v. Kohout, 215 W. Va. 433, 599 S.E.2d 856 (2004) some eight (8) years later narrowing the doctrine's application.

In 1999 West Virginia Consolidated Public Retirement Board ("WVCPRB" or "Board") awarded

Mr. Hupp a permanent partial-disability retirement on grounds he could no longer perform the duties of a state trooper due to his hearing loss. Eleven (11) years later in July 2010 the Board sent him a notice for a recertification exam by a physician of its choice to determine whether he was still disabled. August 2010 Dr. Marsha Bailey, a physician selected by the Board, found Mr. Hupp was no longer disabled, and WVCPRB terminated his disability benefits effective December 1, 2010. Because he had accumulated enough years service and due to his age, Hupp elected to retire rather than return to active duty. However, he appealed this termination because disability benefits are significantly better than those of straight retirement.

Mr. Monahan and The Masters Law Firm represented Hupp in appeal of the Board's termination of his disability benefits, which throughout this action they have termed "pro bono" apparently because their representation occurred due to some sort of relationship with the state troopers association yet probably beneficial to the lawyers as well. [App. p. 12] Throughout this litigation they have also inexplicably claimed Hupp was also responsible for gathering the evidence in the appeal of his disability termination. [Id.] Appellees' representation of Hupp by not submitting sufficient evidence during the appeal of his disability termination constituted the gravamen of the malpractice claim against them. [App. pp. 1-5]

However, as in Stacy the matter at issue here is determination of the applicable statute of limitations period, not the merits or substance of Hupp's malpractice action. 198 W. Va. at 502, 482 S.E.2d at 119 The appellees' representation in appeal of the termination of Hupp's disability benefits and their failure to submit sufficient rebuttal evidence in that appeal constituted the basis for Hupp's legal malpractice action. [App. pp. 2-3, paras, 13-20; pp. 36-37, para. 7; pp. 46-47, para. 7; p. 60 and pp. 64-71] Hupp filed this legal malpractice action October 2018. [App. pp. 1-5] Whether the statute of limitations began with this Court's decision September 2014 or January 2018 when the appellees told Hupp after

some two years of communications with a hearing specialist examining him as well as with Hupp himself, there was nothing further they could do for him regarding the termination of his disability benefits is the critical issue of this appeal. [App. p. 4, para. 28] The lower court found the appellees' representation had ended September 3, 2014 and dismissed this lawsuit. It is appellant Hupp's position the appellees' representation continued until January 2018, and the lawsuit he filed against them ten (10) months later was timely.

Approximately a year after this Court had affirmed the termination of Hupp's disability benefits, the appellees continued to represent him seeking to reinstate those same benefits. This representation consisted of multiple communications with the physician, who had originally found Hupp to have a job-related hearing disability, as well with Hupp himself. These communications continued for nearly two years until January 2018 when the appellee lawyers advised Hupp there was nothing further they could do for him. Ten months later he sued them for not submitting sufficient evidence in the first place.

The essence of this appeal is whether appellees' representation of Hupp during those two years constituted continuous representation on the same or similar matter or was merely tangential as the lower court ruled in dismissing his case as not being timely filed. Appellee lawyers represented Hupp in an appeal of the termination of his disability benefits. Then they represented him in an effort to reinstate the same benefits. If this representation was not for the same matter, it was certainly for a similar matter and not tangential as the lower court held. Therefore Hupp's lawsuit for negligence filed ten (10) months after the appellees advised him they would not be able to reinstate his disability benefits was timely filed, and the circuit court erred ruling it was not.

SUMMARY OF ARGUMENT

Multiple communications from April 2016 between appellee Monahan and his law firm with Mr. Hupp's doctor seeking to reinstate his disability benefits amounted to representation certainly in a

similar matter that only ended when the lawyers informed Hupp in January 2018 there was nothing further they could do for him. Accordingly, Hupp's lawsuit against them for negligence filed ten (10) months later in October 2018 was timely and should not have been dismissed on grounds it was outside the applicable statute of limitations of two years.

**STATEMENT REGARDING
ORAL ARGUMENT AND DECISION**

This appeal merits oral argument under the Rules of Appellate Procedure for the following reasons:

Rule 19(a)(1) It involves assignments of error in the application of settled law where the appellees had represented the appellant in a similar or related matter up to a time well within the applicable two years for bringing a lawsuit against them. Smith v. Stacy, 198 W. Va. 498, 482 S.E.2d 115 (1996)

Rule 19(a)(2) The ruling of the lower court that appellees' representation ending January 2018 had only been tangential, and the filing of this lawsuit against them for negligence ten (10) months later fell outside the applicable two-year statute of limitations constituted an unsustainable exercise of discretion by the lower court where the law governing that discretion is settled under the holding of this Court governing the doctrine of continuing representation, Smith v. Stacy, 198 W. Va. 498, 482 S.E.2d 115 (1996). It is disturbing the lower court entered a Final Order of eighteen (18) pages that dismissed this action by adopting a verbatim version with only a few superficial changes to that appellees had submitted and did so within a short period of time. Appellees mailed a proposed order on Thursday, and it was entered the following Tuesday, three working days at most. [App. pp. 178-214]

Rule 19(a)(3) The holding of the lower court regarding the nature of appellees' representation leading it to find the representation was not continuous was based upon insufficient evidence. There was no analysis of the nature of the appellees' extended representation, merely a conclusion by the lower court their representation had been tangential thus the doctrine of continuous representation did not apply;

thus an erroneous finding appellant's action had not been timely filed.

Rule 19(a)(4) The lower court's ruling the statute of limitations commenced September 2014, not January 2018, and dismissing this action filed October 2018 as outside the applicable statute of limitations involves a narrow issue of law and the application of facts to the applicable law.

ARGUMENT

Introduction

The critical issues in this appeal are intertwined as set forth in the assignments of error: when did appellees' representation of Hupp end and was that representation continuous? Dismissing this action filed October 2018 as outside the applicable two-year statute of limitations, the lower court ruled the appellees' representation had ended September 2014, and without any analysis of the nature of their representation beyond that date, merely concluded their extended representation had been tangential. Thus the lower court erroneously dismissed Hupp's lawsuit filed October 2018 as not being timely filed although their representation had been for a similar matter, reinstatement of disability benefits, until January 2018, well within the requisite two period.

Discussion

The essence of this appeal where appellant Hupp's lawsuit was dismissed by the lower court for being filed past the applicable statute of limitations began September 28, 2015 with a letter from Hupp to the appellee lawyers. [App. p. 77] In that letter he explained a year had passed since the unsuccessful appeal of the West Virginia Consolidated Public Retirement Board's termination of his disability status, and he asked them to reapply because if anything his hearing had only worsened. [Id.] This Court had entered a Mandate September 2, 2014 effectively concluding Hupp's appeal of the Board's terminating his disability benefits. [App. p. 75] Appellee lawyers had represented Hupp throughout the entirety of this appeal. [App. pp. 32-75]

A few days later the appellees responded to Hupp's letter saying he would have to apply but if denied, and the troopers association approved their firm "representing" him in an appeal; they could be of assistance. [App. p. 79] December 22, 2015 the troopers association wrote The Masters Law Firm approving them to speak with Hupp about his issue and to "proceed as you need to." [App. p. 81]

Beginning April 2016 for nearly two years appellees engaged in multiple communications with a hearing specialist, who had originally diagnosed Hupp's hearing loss years earlier, as well as with Hupp in an effort to reinstate his disability status that had been terminated by the Retirement Board while the appellee lawyers were representing him. [App. pp. 83-140, see also App. pp. 3-4, paras. 23-28] As a result of these communications with Hupp's doctor over this period the appellees apparently determined reinstatement of Hupp's disability status was not possible and in January 2018 informed him there was nothing further they could do. [App. p. 4, para. 28]

In a Final Order numbering eighteen (18) pages and entered virtually verbatim as prepared by appellees within a few days of submission it was found "(a)ny further relationship between the parties (after the nearly two years of multiple communications discussed in the preceding paragraph) was ' **only tangentially related to legal representation the [Defendants] provided in the matter in which [they were] allegedly negligent**' ' citing Syl. Pt. 7, Smith v. Stacy [App. p. 192 emphasis supplied in appellees' proposed order and unchanged by the lower court] While Syllabus Point 7 in Stacy correctly states a legal maxim, "(t)he limitations period for a legal malpractice claim is not tolled by the continuous representation rule where an attorney's subsequent role is only tangentially related to legal representation the attorney provided in the matter in which he was allegedly negligent," the critical question remains unanswered of whether the appellees' representation of Hupp for nearly two years until January 2018 was indeed "only tangentially related" to the representation where they had been allegedly negligent? The Final Order simply concluded without any actual analysis of appellees'

representation seeking to reinstate Hupp's disability benefits for nearly two years had been "only tangentially related" to when they represented him in an unsuccessful appeal of the termination of his disability benefits. [Id.] Appellees' extended or continuing representation of Hupp seeking to reinstate his disability benefits, if not for the same or identical matter, had certainly been for a similar matter and amounted to continuing representation as articulated in Stacy discussing the doctrine of continuous representation.

The opinion in Stacy goes well beyond the general principle set forth in Syllabus Point 7 with a subtitle for the particular subject entitled: "A. Requirement of Continuity Same or Related Service" 482 S.E.2d at 121, 198 W. Va. at 504. This portion of the opinion discusses approvingly holdings from other jurisdictions and a treatise, Legal Malpractice by Mallen and Smith, all describing the doctrine of continuous representation as that "for the same or related service." [Id.] (emphasis supplied) This jurisdiction's seminal holding for the doctrine of continuous representation states as much, "(t)he continuous representation doctrine should be applied where the attorney's involvement after the alleged malpractice is for the performance of the same or related services and is not merely continuity of a general professional relationship." Syl. Pt. 9, Smith v. Stacy, 198 W. Va. 498, 482 S.E.2d 115 (1996) (emphasis supplied)

Appellee lawyers' representation of Hupp for nearly two years after dismissal of his appeal by this Court did not constitute a general professional relationship. They were not preparing a deed, will, engaged in other litigation or a general professional relationship in behalf of Hupp. They were representing him in an effort to reinstate disability benefits, a matter certainly similar to that he had lost on appeal while the appellee lawyers were representing him.

While referenced in the Final Order a holding some eight (8) years subsequent to Stacy if anything

is supportive of appellant Hupp. Vansickle v. Kohut, 599 S.E. 856, 215 W. Va. 433 (2004) That case does not extend the doctrine of continuing representation to another lawyer attempting to mitigate an earlier adverse result. However, here the same lawyers attempting to mitigate Hupp's loss by getting his disability benefits reinstated had represented him in an earlier effort to do the same thing.

Whether the appellee lawyers were representing Mr. Hupp in the same or related matter constitutes the essence of this appeal, and surely their continuous or extended representation if not the same, reinstating disability benefits, was at the very least related. Additional issues raised here appear, well, tangential. Was Hupp knowledgeable, learned or discovered the earlier alleged negligence? While appellees appear to regard this as somehow important, Stacy and other holdings it refers to find it immaterial. 482 S.E. 2d at 122, 198 W. Va. at 505.

Also immaterial is whether appellees acted in an underhanded manner allowing the statute of limitations to expire during the course of their representation? While even the statute of limitations the appellees (and lower court) argue applies here expired while they were representing Hupp, this was not alleged, nor did it have to be. Hupp wanted his disability status reinstated, and the appellees were representing him to do so. When they failed, he sued them for negligence for not submitting sufficient evidence in the first place and he did so well within two years after they had concluded their representation. This also addresses one of the purposes of the doctrine of continuous representation of not disrupting the attorney-client relationship by allowing the allegedly errant attorney an opportunity to correct any problem(s) he may have caused. 482 S.E.2d at 122, 198 W. Va. At 505. It also solves a purpose of statutes of limitations by preventing stale claims and preserving evidence. [Id.]

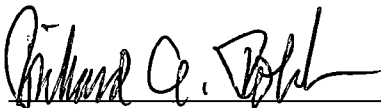
Another issue not addressed in the Final Order dismissing Hupp's lawsuit but perhaps meriting some attention would be the one year hiatus or gap between the appellees' representation in their

unsuccessful appeal of termination of disability benefits and the later efforts seeking to reinstate those benefits. Such gaps are not discussed in Stacy or the other holdings, rather a determination of whether the continuous representation is based upon the same or similar matter which occurred here. The appellees' representation was for the purpose of reinstating Hupp's disability benefits: the first time appealing the Retirement Board's termination of those benefits and the second time through a renewed effort of whether Hupp's hearing had worsened. If not the same or identical, this representation was certainly similar or related, and the doctrine of continuous representation applies tolling the applicable statute of limitations during the course of representation, and this action should not have been dismissed as filed beyond the requisite two-year period for negligence.

CONCLUSION

Appellant respectfully asks this Honorable Court reverse the lower court's dismissal of this action on grounds it was filed outside the applicable statute of limitations and remand it for further proceedings.

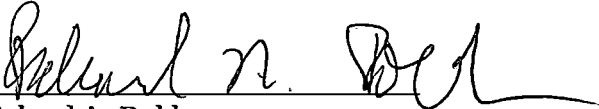
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CERTIFICATE OF SERVICE

I, Richard A. Robb, counsel for appellant, Clay R. Hupp, certify I have sent ^{hand-delivered} ~~by US Mail~~
this ^{17th} day of September, 2020 a true copy of the foregoing Brief together with a copy of the
Appendix to Richard A. Monahan, counsel for appellees, Richard A. Monahan and The Masters Law
Firm, LC, at 181 Summers Street, Charleston, WV 25301.


Richard A. Robb