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12-16-2010

### Summary of Moon v. McDonald, Carano & Wilson, LLP, 129 Nev. Adv. Op. 56

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*Nevada Law Journal*

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#### Recommended Citation

Rothenburg, David, "Summary of Moon v. McDonald, Carano & Wilson, LLP, 129 Nev. Adv. Op. 56" (2010).  
*Nevada Supreme Court Summaries*. 295.  
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Moon v. McDonald, Carano & Wilson LLP, 129 Nev. Adv. Op. 56 (August 1, 2013)<sup>1</sup>

## LITIGATION MALPRACTICE – REPRESENTATION IN NON-ADVERSARIAL PARTS OF PROCEEDINGS

### Summary

Appeal from a district court judgment in a legal malpractice action claiming the statute of limitations to file suit had not run and that the litigation-tolling rule should apply. The Court determined that McDonald Carano Wilson LLP did not represent appellant during litigation and litigation-tolling rule did not apply. The Court affirmed the district court's judgment.

### Disposition/Outcome

An attorney's alleged negligence in representing a creditor during the non-adversarial parts of a bankruptcy proceeding does not cause the litigation-tolling rule under *Hewitt* to apply.

### Factual and Procedural History

Appellant, Sierra International, Inc. (“Sierra”), defaulted on a promissory note and lease with Moon, the president and principal shareholder of Patterson Laboratories, Inc. (PLI). Sierra filed a Chapter 7 voluntary petition in bankruptcy court in 2001, and appellants hired respondent McDonald Carano Wilson LLP (“MCW”) in July 2002 to represent them in Sierra's bankruptcy action.

In the bankruptcy case, allegedly, pursuant to a stipulation by the attorneys and trustee, the lease of the Goodyear facility was terminated, and PLI was permitted to take possession of the collateral. MCW's representation of appellants ended in February 2003. On October 21, 2008, the bankruptcy court entered its final decree and closed Sierra's bankruptcy case.

Meanwhile, on November 3, 2006, appellants filed an action against MCW, alleging professional negligence, breach of contract, and vicarious liability arising from its representation of appellants in Sierra's bankruptcy action. In 2008, the district court dismissed the lawsuit without prejudice, appellants appealed, and this court affirmed.

On October 20, 2010, appellants filed a second action against MCW, reasserting the same claims. MCW filed a motion to dismiss the complaint pursuant to NRCP 12(b)(5), arguing that the case was time-barred under the applicable statute of limitations,<sup>2</sup> which the district court granted. The district court rejected February 17, 2009 and October 21, 2008, as the accrual dates. It held that November 3, 2006, was the appropriate accrual date because appellants knew the material facts that made up their

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<sup>1</sup> By David Rothenberg, Senior Staff Member, Nevada Law Journal.

<sup>2</sup> NEV. REV. STAT. § 11.207(1)

malpractice action as early as that date. This appeal followed.

## **Discussion**

*The district court did not err by granting MCW's motion to dismiss based upon NRS 11.207(1)*

NRS 11.207(1) allows a plaintiff to bring a claim within two years after plaintiff discovered or through the use of reasonable diligence should have discovered the material facts, which constitutes the cause of action. However, the Court held in *Hewitt v. Allen*<sup>3</sup> that a malpractice action does not accrue while an appeal from the adverse ruling is pending.

*Non-adversarial bankruptcy proceedings do not constitute litigation for purposes of the litigation malpractice tolling rule*

The Court reviewed the Arizona case *Cannon v. Hirsch*<sup>4</sup> for relevance. In *Cannon*, an attorney was retained to protect a creditor's interests in a Chapter 13 bankruptcy action. Afterwards, the creditor filed a complaint against the attorney for malpractice during the representation. On appeal, the *Cannon* court recognized that bankruptcy proceedings might contain both adversarial and non-adversarial portions and any alleged negligence during non-adversarial portions of bankruptcy proceedings does not occur in the course of 'litigation,' as that term is used for purposes of the accrual of an attorney malpractice action.<sup>5</sup> The court created a bright-line test to distinguish between the non-adversarial and adversarial portions of a bankruptcy proceeding: adversarial proceedings begin when a creditor files a complaint in a bankruptcy action.<sup>6</sup>

The Court adopted and applied the *Cannon* court's analysis and concluded that Sierra's bankruptcy action did not constitute an adversarial proceeding. MCW's rejection of the unexpired lease was resolved by stipulation of the parties and no adversarial proceeding was filed. Therefore, the proceedings were non-adversarial and constitute an uncontested matter. Furthermore, the Court determined that appellants' reliance upon *Guillot v. Smith*<sup>7</sup> was misplaced. *Guillot* was based on a presumption of the attorney's continued representation of the client.<sup>8</sup> However, MCW only represented appellants in Sierra's bankruptcy action from July 2002 to February 2003.

## **Conclusion**

The Court affirmed the district court's judgment granting MCW's motion to dismiss pursuant to NRS11.207(1).

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<sup>3</sup> 118 Nev. at 221, 43 P.3d at 348.

<sup>4</sup> 213 P.3d 320 (Ariz. Ct. App. 2009).

<sup>5</sup> *Id.* at 325, 327–28.

<sup>6</sup> *Id.* at 328 (citing Fed. R. Bankr. P. 7003 ("Commencement of Adversary Proceeding")).

<sup>7</sup> 998 S.W.2d 630 (Tex. App. 1999).

<sup>8</sup> *Id.* at 632–33.