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Branch Banking & Tr. Co. v. Gerrard, Esq., 134 Nev. Adv. Op. 106 (Dec. 27, 2018)

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CIVIL APPEAL: STATUTE OF LIMITATIONS FOR LEGAL MALPRACTICE

Summary

The Court determined that the filing of a petition for writ of certiorari without first obtaining a stay of remittitur from the Court does not affect the statute of limitations for a legal malpractice claim. Moreover, the Court held that the time period for a legal malpractice claim begins accruing when the remittitur is issued.

Background

I.

Gerrard represented appellant Branch Banking & Trust in a property lawsuit. The district court ruled against Branch Banking & Trust, and the Court later affirmed. Branch Banking & Trust then filed petitions with the Court for rehearing and those petitions were denied. On March 18, 2014, the Court issued a remittitur and closed the appeal. Branch Banking & Trust then filed a writ for certiorari with the United States Supreme Court, which was denied on October 6, 2014. On October 5, 2016, Branch Banking & Trust filed a complaint of legal malpractice against Gerrard. Gerrard claimed the statute of limitations had passed. The district court ruled in favor of Gerrard and dismissed Branch Banking's complaint.

Discussion

II.

A.

According to NRS § 11.207(1) legal malpractice claims have a two-year statute of limitations from the date the client should have discovered the claim or a four-year statute of limitations from the date the client suffered damages.² Under this statute, whichever time period expires earlier applies.³

Nevada case law also imposes a "litigation malpractice tolling rule" onto NRS § 11.207(1). In *Brady, Vorwerch, Ryder & Caspino v. New Albertson's, Inc.*, the Court said that the tolling rule applied to the two-year discovery rule, which states that "the damages for a malpractice claim do not accrue until the underlying litigation is complete, thus, a malpractice claim does not accrue and its statute of limitations does not begin to run during a pending appeal of an adverse ruling from the underlying litigation."⁴ Therefore, for the statute of limitations to begin running on a legal malpractice claim, the client must discover the malpractice and suffer damages. According to *Hewitt v. Allen*, the malpractice accrual does not begin while there is a pending appeal from an adverse ruling.⁵

The issue in this case is whether the appeal in the property case was resolved when the Court issued the remittitur or whether the case was resolved when the U.S. Supreme Court denied the writ petition. Because both parties agree on the facts of the case, the Court reviewed the case

¹ By Katrina Brandhagen.

² NEV. REV. STAT. § 11.207(1) (2017).

³ *Id.*

⁴ 130 Nev. 632, 642, 638, 333 P.3d 229, 235, 232 (2014).

⁵ 118, Nev. 216, 221, 43 P.3d 345, 348 (2002).

de novo and concluded that the statute of limitations in this case began to run when the remittitur was issued.

B.

According to *Dickerson v. State*, when the Court issues the remittitur, the appeal concludes and appellate jurisdiction ends.⁶ The Nevada Rules of Appellate Procedure 41(b)(3) also states that “a party may file a motion to stay the remittitur pending application to the Supreme Court of the United States for a writ of certiorari.”⁷ This rule also provides that “stay shall not exceed 120 days, unless the period is extended” by order or “notice from the clerk of the Supreme Court of the United States [is given] that the party who has obtained the stay has filed a petition for the writ in that court.”⁸ If a party does not file a stay, then 25 days after the Court or the court of appeals enters its judgment, the remittitur is issued and jurisdiction returns to the district court.⁹

The tolling rule in Nevada originates in *Semanza v. Nevada Medical Liability Insurance Co.*¹⁰ In *Semanza*, the Court said that the malpractice suit should have been dismissed because there was an ongoing appeal from the adverse judgment.¹¹ Here, Branch Banking & Trust argues that if the U.S. Supreme Court had granted its writ, then Branch Banking’s position would have been the same as the respondents in *Semanza*. However, the Court stated that they could not rule in favor of Branch Banking & Trust because it had failed to obtain a stay of the remittitur. The Court reasoned that connecting the tolling rule with the time that the remittitur is issued gives certainty as to when the statute of limitations begins.

Conclusion

The Court held that district court correctly dismissed the complaint under NRS 11.207(1). Thus, the Court affirmed the district court’s decision.

⁶ 114, Nev. 1084, 1087, 967 P.2d 1132, 1134 (1998).

⁷ NEV. R. APP. P. 41(b)(3).

⁸ *Id.*

⁹ NEV. R. APP. P. 41(a)(1).

¹⁰ 104 Nev. 666, 765 P.2d 184 (1988).

¹¹ *Id.* at 668–69, 765 P.2d at 186.