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2012 IL App (3d) 100634-U

Order filed March 2, 2012

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2012

ROBERT HARRIS,	) Appeal from the Circuit Court
	) of the 13th Judicial Circuit,
Plaintiff-Appellant,	) La Salle County, Illinois,
	)
v.	) Appeal No. 3-10-0634
	) Circuit No. 09-L-97
	)
JOSEPH NAVARRO,	) Honorable
	) Robert C. Marsaglia,
Defendant-Appellee.	) Judge, Presiding.

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JUSTICE HOLDRIDGE delivered the judgment of the court.  
Justices McDade and Wright concurred in the judgment.

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**ORDER**

¶ 1 *Held:* The trial court did not err when it dismissed the plaintiff's legal malpractice action as time barred by the statute of repose.

¶ 2 Robert Harris brought an action for legal malpractice against his criminal defense attorney, Joseph Navarro. The trial court granted Navarro's motion to dismiss Harris's complaint as untimely under section 13-214.3 of the Illinois Code of Civil Procedure (the Code). 735 ILCS 5/13-214.3(c) (West 2008). Known as the statute of repose, subsection (c) of the Code provides

that an action for damages against an attorney arising out of an act or omission in the performance of professional services may not be commenced more than six years after date on which the act or omission occurred. 735 ILCS 5/13-214.3(c) (West 2008).

¶ 3

### FACTS

¶ 4 The facts are not in dispute. Harris retained Navarro to provide legal representation in a state criminal matter in La Salle County in July 1998. On August 13, 1998, Harris posted a \$50,000 bond and was released from custody in connection with that charge. On April 16, 1999, Harris was arrested on an unrelated federal tax matter and held in federal custody without bail. Shortly after being arrested on the federal matter, Harris instructed Navarro to withdraw his bond in the state matter. Harris wished to use the returned bond money for personal and legal expenses in the federal matter. Harris told Navarro that he saw no reason to "tie up" his money in the state matter while he was being held on the federal charge. Navarro advised against withdrawing the state court bond, indicating that Harris would receive credit against any sentence in the state matter for time spent in federal custody, as long as the bond remained posted in the state matter. On Navarro's advise, Harris did not seek the return of his bond.

¶ 5 In March 2000, Harris entered a negotiated plea of guilty in the state matter and was sentenced to an 18-year term of imprisonment. At the time sentence was imposed, Harris was informed that he would not receive credit for the time spent in federal custody, contrary to Navarro's previous advice. In January 2005, Harris filed a motion seeking *nunc pro tunc* credit for his period of federal incarceration. The motion was denied.

¶ 6 In March 2006, Harris filed a petition for postconviction relief, alleging that Navarro had given ineffective assistance of counsel in failing to properly advise him regarding presentence

credit. In October 2006, an evidentiary hearing on Harris's motion was held at which Navarro testified and denied rendering ineffective assistance to Harris. Navarro maintained that his actions and advice regarding Harris's bond were consistent with a trial strategy of attempting to use the bond money in order to negotiate a lower sentence in the state matter. On August 22, 2008, this court rejected Navarro's claim that his actions constituted trial strategy and held that Harris had incorrectly served 328 days in custody due to Navarro's incompetent legal advice.

¶ 7 On January 30, 2009, Harris filed a complaint for legal malpractice against Navarro. Navarro filed a motion to dismiss the complaint, claiming that Harris had failed to raise his claim of legal malpractice within six years of the date on which the alleged act of malpractice occurred. The trial court granted Navarro's motion to dismiss. Harris then appealed the dismissal of his complaint.

¶ 8 ANALYSIS

¶ 9 We review a trial court's ruling on a motion to dismiss *de novo*. *Neppl v. Murphy*, 316 Ill. App. 3d 581 (2000). At issue in this case is the statute of repose for legal malpractice, which provides that an action for legal malpractice may not be commenced "in any event more than 6 years after the date on which the act or omission occurred." 735 ILCS 5/13-214.3(b), (c) (West 2008). The statute of repose is designed to place an outer limit on the time commencing an action and operates to curtail the "long tail" of liability that results from the discovery rule. *Hester v. Diaz*, 346 Ill. App. 3d 550, 553 (2004). The time for filing an action for legal malpractice begins at the time that the attorney performs the last act for the client. *Hester*, 346 Ill. App. 3d at 554.

¶ 10 Here, Navarro maintains that the last act he performed for Harris was in March 2000, when he represented Harris at the entry of his negotiated guilty plea. Thus, Navarro maintains, the statute of repose would bar any action for malpractice filed by Harris after March 2006, since Harris did not file his action against Navarro until January 2009, well beyond the limitation imposed by the statute of repose.

¶ 11 Harris maintains, however, that the time limit imposed by the statute of repose was tolled by Navarro's fraudulent concealment of the cause of action from him. Harris points to section 13-215 of the Code which provides:

"Fraudulent Concealment. If a person liable to an action fraudulently conceals such action from the knowledge of the person entitled thereto, the action may be commenced at any time within 5 years after the person entitled to bring the same discovers that he or she has such a cause of action, and not afterwards. " 735 ILCS 5/13-215 (West 2008).

¶ 12 Harris maintains that Navarro's testimony at the October 2006 hearing on the postconviction petition, wherein Navarro maintained that his actions in representing Harris constituted trial strategy and not ineffective assistance of counsel, established that Navarro was fraudulently concealing legal malpractice. Harris further maintains that it was only when this court rejected Navarro's trial strategy explanation in August 2008 that he finally discovered that Navarro's actions constituted legal malpractice.

¶ 13 Harris's characterization of Navarro's actions as fraudulent concealment is not supported by our *de novo* review of the record. While Navarro's actions in handling Harris's case may have

constituted legal malpractice, Navarro made no attempt to conceal his actions from Harris so as to conceal a possible legal malpractice action. There is no evidence that Navarro made any attempts to prevent Harris from discovering that he had a potential claim for legal malpractice. In fact, the record established that Harris was aware of his potential claim against Navarro as early as March 2000, when his sentence was not reduced for time served in federal custody as Navarro had advised that it would be. Surely, when Harris was informed that he would not receive credit for time served, as Navarro had advised, he would have considered the possibility that Navarro had acted incompetently. In any event, Harris was clearly aware of his potential claim of legal malpractice at the time he filed his petition for postconviction alleging ineffective assistance of counsel in March 2006. The date he filed his postconviction petition was within the six-year statute of repose. In other words, if Harris had filed his legal malpractice claim at the same time he filed his postconviction petition, the legal malpractice claim would have been within the time limit imposed by the statute of repose.

¶ 14 Additionally, Harris's claim that he could not discover that he had a potential legal malpractice claim until this court ruled in August 2008 that Navarro rendered ineffective assistance is unconvincing. Harris raised a claim of ineffective assistance in his postconviction petition filed in March 2006. Logically, he was aware in March 2006 that he had a claim for legal malpractice since his postconviction petition contained all the allegations sufficient to raise a legal malpractice claim. This court's subsequent confirmation that he had, indeed, been given deficient representation by Navarro can in no way be said to be the date on which he "discovered" his potential cause of action against Navarro.

¶ 15 Equally unpersuasive is Harris's argument that Navarro's testimony at the postconviction hearing was the "last act of representation" which began the six-year period imposed by the statute of repose. *Hester*, 346 Ill. App. 3d at 554. We cannot agree. Navarro's appearance as a witness at the postconviction hearing was not as an advocate on Harris's behalf, but as a witness. Moreover, since Navarro testified that his actions did not constitute ineffective assistance of counsel, we can easily assume that he testified as a witness against Harris's petition for postconviction relief. We find, therefore, that Navarro's testimony at the postconviction hearing could not have been an act of representation on Harris's behalf.

¶ 16 Considering the record as a whole, we find that Harris's cause of action against Navarro arose in March 2000, and Navarro did nothing to conceal the allegedly deficient representation. Harris had, therefore, until March 2006 to file his complaint for legal malpractice. The trial court did not err in dismissing as untimely Harris's complaint for legal malpractice which was not filed until January 2009, well beyond the six-year time limit imposed by the statute of repose.

¶ 17 Harris next maintains that the statute of repose unconstitutionally deprives him of due process. Harris has failed to properly preserve his constitutional claim by failing to comply with Supreme Court Rule 19, which requires prior notification to the Attorney General of any claims of unconstitutionality of a statute (Ill. S. Ct. R. 19 (eff. Sept. 1, 2006)). We note, however, that the statute of repose has past constitutional muster under both equal protection and due process grounds. *Griffin v. Goldenhersh*, 323 Ill. App. 3d 398, 411 (2001); *Meyers v. Underwood*, 316 Ill. App. 3d 970, 986 (2000).

¶ 18 Harris lastly maintains that Navarro was equitably estopped from raising the statute of repose as a defense to his legal malpractice claim. The doctrine of equitable estoppel provides

that a party may not raise timeliness objections to a claim where that party induced another party to forgo the filing of a claim by misrepresentation or concealment of material facts. *DuLuna v. Burciaga*, 223 Ill. 2d 49, 82-83 (2006). As we have already determined that Navarro did not misrepresent or conceal anything from Harris, the doctrine of equitable estoppel will not toll the time allowed by the statute of repose for filing a legal malpractice claim.

¶ 19

#### CONCLUSION

¶ 20 For the foregoing reasons, the judgment of the circuit court of La Salle County dismissing the plaintiff's complaint for legal malpractice is affirmed.

¶ 21 Affirmed.