

No. 1-12-2440

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

**IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT**

DR. FRED GEISLER,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County
)	
v.)	No. 2012 P 6374
)	
HINSHAW & CULBERTSON LLP,)	Honorable
)	Deborah Mary Dooling,
Defendant-Appellee.)	Irwin J. Solganick,
)	Judges Presiding.

PRESIDING JUSTICE HARRIS delivered the judgment of the court
Justices Simon and Pierce concurred in the judgment.

ORDER

¶ 1 *Held:* Dr. Geisler's legal malpractice complaint is barred by the two-year statute of limitations where he knew or should have known that he suffered actual injuries attributable to the alleged malpractice when the arbitrator issued his December 31, 2005, order finding him liable for tail insurance coverage, but he filed his complaint almost three years later.

¶ 2 Plaintiff, Dr. Fred Geisler, appeals the circuit court's judgment after a bench trial dismissing his claim against defendant, Hinshaw & Culbertson LLP (Hinshaw) for failure to prove the elements of a breach of fiduciary duty. The court also found that Dr. Geisler's claim is time-barred under the statute of limitations. On appeal, Dr. Geisler contends the trial court erred in its findings that he did not establish a *prima facie* case and that his claim is time-barred. Dr. Geisler also contends that the trial court erred in awarding Illinois Supreme Court Rule 137 (Ill. S. Ct. R. 137 (eff. July 1, 2013)) sanctions in favor of Hinshaw. For the following reasons, we affirm.

¶ 3 JURISDICTION

¶ 4 Judgment on the Rule 137 motion for sanctions was entered on February 29, 2012. The trial court entered its final judgment on the case on July 17, 2012. Respondent filed a notice of appeal on August 14, 2012. Accordingly, this court has jurisdiction pursuant to Illinois Supreme Court Rules 301 and 303 governing appeals from final judgments entered below. Ill. S. Ct. R. 301 (eff. Feb. 1, 1994); R. 303 (eff. May 30, 2008).

¶ 5 BACKGROUND

¶ 6 Dr. Geisler is a neurosurgeon who has researched spinal hardware used to treat spinal injuries, and has developed new hardware and new operative techniques utilizing the specialized hardware. In 1992, Dr. Geisler became associated with the Chicago Institute of Neurosurgery and Neuroresearch (CINN). CINN is a neurosurgical practice in which its shareholders are neurosurgeons. CINN hired Neurosource, Inc. (Neurosource) to help in managing CINN, and one of Neurosource's duties is to facilitate the procurement of professional liability insurance coverage for the neurosurgeons in the practice.

¶ 7 CINN and its neurosurgeons signed an agreement which governed the employment relationship. According to the contract, CINN agreed to maintain professional liability insurance for the neurosurgeons and if it cannot reasonably obtain such insurance, CINN has the right to terminate the relationship for "practice cause." A physician can also terminate the relationship for "physician cause" if CINN breaches a material obligation under the contract. The agreement contains an arbitration clause in the event the parties cannot resolve disputes arising from the employment contract.

¶ 8 CINN hired Hinshaw to represent it in medical malpractice matters as well as in commercial matters. Partner Michael Kelly represented physicians and the practice in medical malpractice matters, and partner Daniel Ryan represented them in other types of cases, including corporate matters. These partners maintained completely separate practices. David Sheffert, general counsel to CINN, was primarily responsible for securing malpractice coverage for the physicians.

¶ 9 On March 12, 2002, Dr. Geisler was scheduled to perform a procedure on his patient, Katerina Lalicata. Before the procedure, Dr. Connelly, a cardiovascular surgeon who was not a member of CINN, began surgery on Lalicata to create a path to her spine so that Dr. Geisler could perform his procedure. While Dr. Connelly was working on Lalicata, her aorta ruptured. Dr. Geisler was called into the operating room to assist Dr. Connelly in repairing the rupture, but Lalicata subsequently died. Lalicata's estate filed a wrongful death medical malpractice suit in which Dr. Geisler and CINN were named as defendants. Hinshaw partner Kelly represented the parties in the malpractice suit.

¶ 10 In early December of 2003, CINN, pursuant to its obligation under the employment agreement, found it was unable to provide Dr. Geisler and two other physicians with professional

liability insurance coverage for 2004. General counsel Sheffert retained Hinshaw partner Ryan to assist CINN in determining the physicians' employment situations in the event CINN cannot obtain insurance coverage as required under the employment agreement. When Dr. Geisler discovered that Ryan was working with CINN in his employment contract matter, he sent a letter to Kelly dated December 20, 2003, asking him to withdraw as Dr. Geisler's counsel in all medical malpractice cases. Ryan stated that he learned Dr. Geisler was a Hinshaw client in a malpractice case only after he spoke to Kelly about Dr. Geisler's letter.

¶ 11 According to Sheffert, CINN and its insurance brokers worked in December 2003 to find options for the affected physicians, including Dr. Geisler. In e-mail correspondence contained in the record, some options the parties considered included Dr. Geisler working out of Rush North Shore Medical Center or relocating to Indiana where CINN maintained practice sites. Both options would provide malpractice insurance for Dr. Geisler. However, the correspondence made clear that if he relocated Dr. Geisler bore responsibility under the employment agreement for obtaining tail coverage for all medical services rendered prior to December 31, 2003.

¶ 12 CINN eventually determined that despite its best efforts it could not obtain the required insurance for Dr. Geisler, and terminated his employment for practice cause effective January 4, 2004. Dr. Geisler also wrote a letter terminating the employment agreement based on physician cause for CINN's failure to provide the required insurance and lack of good faith in obtaining the insurance. A few weeks after ending his employment with CINN, Dr. Geisler joined a practice at Rush-Copley Medical Center in Aurora.

¶ 13 The parties attempted to resolve their dispute over whether Dr. Geisler's termination was for practice cause or for physician cause. Under the contract, if CINN properly terminated his

employment for practice cause, Dr. Geisler must obtain and pay for tail insurance coverage for claims arising after his termination based on events that occurred while he was employed by CINN. If Dr. Geisler properly terminated the agreement for physician cause, CINN would have the obligation to obtain and pay for such tail insurance coverage. On April 6, 2004, CINN filed an arbitration demand pursuant to the contract because the parties could not resolve their dispute. In its arbitration complaint, CINN sought a determination that Dr. Geisler must obtain tail insurance in the amount of \$2 million or fund an escrow in that amount for any eligible claims.

¶ 14 Dr. Geisler hired attorneys Patrick McGuire and Jerome Weiner to represent him in the arbitration proceeding. The attorneys acknowledged that Hinshaw's alleged conflict of interest was an issue from the start of their representation of Dr. Geisler. However, they did not request that Hinshaw withdraw from representing CINN in the proceeding and never made such a request during the six-plus years the arbitration took place.

¶ 15 On December 31, 2005, the arbitrator released his ruling of an interim award in favor of CINN. In the ruling, the arbitrator stated that the parties agreed to bifurcate the hearing to determine liability first, and to determine damages or any order to perform in a second hearing. After the liability hearing, the arbitrator found that CINN properly terminated Dr. Geisler's employment for practice cause under the contract. The arbitrator rejected Dr. Geisler's contention that CINN did not act in good faith to obtain professional liability insurance for him. He further ruled that under the contract, Dr. Geisler was required to obtain tail insurance to cover claims made after his termination and to name CINN as an additional insured. The arbitrator also found that Dr. Geisler "is not entitled to reimbursement for the expenses that he incurred in addition to the \$10,000 in expenses that he incurred in 2003."

¶ 16 On October 15, 2008, Dr. Geisler filed this cause of action for breach of fiduciary duty against Hinshaw. Neurosource was also named as a party in the suit. In the amended complaint, Dr. Geisler alleged that Hinshaw breached its fiduciary duty to him by simultaneously representing him in the medical malpractice litigation and advising CINN regarding Dr. Geisler's termination due to an inability to obtain professional liability insurance for him. He also alleged that a conflict of interest existed in Hinshaw's representation of CINN during the arbitration proceedings.

¶ 17 The case proceeded to jury trial in January 2012. At the close of Dr. Geisler's case, Neurosource moved for a directed verdict, and after being granted a weekend to review the motion, Dr. Geisler voluntarily dismissed Neurosource from the case and the trial proceeded against Hinshaw only. The jury could not reach a unanimous verdict and the trial court declared a mistrial. Neurosource subsequently filed a motion for Rule 137 sanctions which the trial court granted.

¶ 18 At the retrial, which was a bench trial, Dr. Geisler presented an expert witness, Mary Robinson, who opined that Hinshaw violated its fiduciary duty to him. She concluded that Hinshaw's representation of Dr. Geisler in medical malpractice cases and its representation of CINN during the employment dispute were directly adverse and violated Illinois Rule of Professional Conduct 1.7. She also concluded that Hinshaw maintained a duty of loyalty to Dr. Geisler even after his termination, and its representation of CINN in the arbitration proceeding violated Rule 1.9. On cross-examination, however, Robinson acknowledged that she did not review deposition transcripts or Hinshaw's file. She also did not read the arbitration transcripts or the depositions taken during arbitration, nor did she read the employment agreement in full.

¶ 19 Hinshaw moved for judgment at the close of Dr. Geisler's case. The trial court found that Robinson's opinion lacked a basis in the record since she failed to review all of the relevant materials. It also noted that the issue may have been waived due to Dr. Geisler's failure to raise it in the arbitration proceeding. The trial court further found that Dr. Geisler's claim was time-barred by the two-year statute of limitations. It reasoned that the arbitrator's interim award of December 31, 2005, in which he determined that Dr. Geisler was not entitled to reimbursement for expenses that he incurred in addition to the \$10,000 he incurred in 2003, was a pecuniary loss that "set the statute of limitations running at that particular time." Dr. Geisler filed this suit on October 15, 2008, almost three years later. The trial court granted CINN's motion and Dr. Geisler filed this timely appeal.

¶ 20

ANALYSIS

¶ 21 Dr. Geisler filed this cause of action for breach of fiduciary duty against Hinshaw on October 15, 2008. Hinshaw argues that the arbitrator's interim award of December 31, 2005, in which he determined that Dr. Geisler was not entitled to reimbursement for fees and expenses he incurred, but was responsible for obtaining tail insurance coverage, represented a pecuniary loss that set the two-year statute of limitations running. Since Dr. Geisler filed his suit on October 15, 2008, almost three years later, Hinshaw contends that the suit is time-barred. Dr. Geisler, however, argues that his legal malpractice cause of action did not accrue until he became liable for specific monetary damages. He contends that this situation first occurred on January 11, 2008, after Hinshaw settled the Lalicata case and requested that he pay CINN \$50,000 plus fees

for the settlement, and since he filed his cause of action less than 10 months later his suit is not time-barred.¹

¶ 22 Section 13-214.3(a) of the Illinois Code of Civil Procedure (735 ILCS 5/13-214.3(a) (West 2008)) states that an action for legal malpractice must commence within two years "from the time the person bringing the action knew or reasonably should have known of the injury for which damages are sought." However, the injury in a legal malpractice action is not a personal injury or the attorney's negligent act itself, but instead is "a pecuniary injury to an intangible property interest caused by the lawyer's negligent act or omission." *Warnock v. Karm Winnad & Patterson*, 376 Ill. App. 3d 364, 368 (2007). Therefore, the existence of actual damages is essential to a viable cause of action for legal malpractice. *Northern Illinois Emergency Physicians v. Landau, Omahana & Kopka, Ltd.*, 216 Ill. 2d 294, 306 (2005). Regarding the statute of limitations, "a cause of action for legal malpractice will rarely accrue prior to the entry of an adverse judgment, settlement, or dismissal of the underlying action in which plaintiff has become entangled due to the purportedly negligent" actions of his attorney. *Lucey v. Law Offices of Pretzel & Stouffer, Chartered*, 301 Ill. App. 3d 349, 356 (1998).

¶ 23 We agree with Hinshaw and the trial court that Dr. Geisler knew or reasonably should have known of his injury when the arbitrator entered his decision on December 31, 2005. When the parties could not agree on the terms of Dr. Geisler's termination, the dispute proceeded to arbitration where the arbitrator found that CINN properly terminated Dr. Geisler's employment for practice cause under the contract. The arbitrator rejected Dr. Geisler's

¹ Dr. Geisler also finds significant the fact that Hinshaw had raised the statute of limitations issue previously in a motion to dismiss and a motion for summary judgment, but the trial court denied both motions. However, in denying the motions the trial court did not rule on the merits of the issue, finding only that the allegations raise issues of fact as to when the claim was discovered "so as to have been filed within the applicable two-year limitations period."

contention that CINN did not act in good faith to obtain professional liability insurance for him and ruled that under the contract, Dr. Geisler was required to obtain tail insurance to cover claims made after his termination and to name CINN as an additional insured. The arbitrator also found that Dr. Geisler "is not entitled to reimbursement for the expenses that he incurred in addition to the \$10,000 in expenses that he incurred in 2003."

¶ 24 In his amended complaint Dr. Geisler alleged that Hinshaw breached its fiduciary duty to him and created a conflict of interest when it "counseled CINN on matters related to Geisler's termination and provided CINN with legal advice that was adverse to Geisler's interests" while he was still Hinshaw's client. Dr. Geisler also alleged that CINN wished to terminate him based on practice cause so that he would be responsible for obtaining a policy for "tail" insurance that would cover both him and CINN. It is clear from his amended complaint that one of the injuries Dr. Geisler believed was attributable to Hinshaw's breach was his termination from CINN for practice cause and his subsequent responsibility for obtaining tail insurance. The arbitrator's December 31, 2005, ruling found that Dr. Geisler was terminated for practice cause and ordered that he obtain tail insurance coverage for himself and for CINN. Therefore, the December 31, 2005, order is an adverse judgment with actual damages from which a legal malpractice action can accrue.

¶ 25 Dr. Geisler disagrees, arguing that in order for an adverse judgment to signal the accrual of a legal malpractice action, it must award specific money damages against him. He contends, however, that the arbitrator's ruling denying his request for attorney fees and expenses incurred subsequent to his termination, did not represent actual damages that triggered the statute of limitations. Although the mere fact that a party has incurred additional attorney fees due to the alleged malpractice is insufficient to show actual damages, "the incurring of additional attorney

fees may trigger the running of the statute of limitations for legal malpractice purposes, but only where it is clear, at the time the additional fees are incurred, that the fees are directly attributable to former counsel's neglect." *Lucey*, 301 Ill. App. 3d at 355.

¶ 26 However, we need not address whether the attorney fees and expenses Dr. Geisler incurred were directly attributable to Hinshaw's alleged neglect because he also suffered damages when the arbitrator found him liable for tail insurance coverage pursuant to the employment agreement. Dr. Geisler counters that although the arbitrator found him liable for such coverage in the December 31, 2005, order, he left the issues of specific monetary damages and performance for a second hearing. Therefore, since the order did not specify the amount of damages, the damages he suffered due to the arbitrator's ruling were speculative and insufficient to trigger the statute of limitations in his legal malpractice claim.

¶ 27 We disagree with Dr. Geisler's contention that the damages stemming from the arbitrator's ruling were speculative or uncertain. Damages in a legal malpractice claim are speculative "only if their existence itself is uncertain, not if the amount is uncertain or yet to be fully determined." *Northern Illinois Emergency Physicians*, 216 Ill. 2d at 307. Here, the parties agreed to bifurcate the hearing to determine liability first. After the liability hearing, the arbitrator found that CINN properly terminated Dr. Geisler for practice cause and therefore Dr. Geisler was responsible, pursuant to the employment agreement, for obtaining tail insurance coverage for himself and for CINN. These damages were not speculative because the arbitrator ruled that Dr. Geisler must pay for tail insurance coverage; only the amount remained for determination in a second hearing. Dr. Geisler suffered actual damages when the arbitrator issued his December 31, 2005, award, and therefore the order triggered the running of the two-year statute of limitations. Since Dr. Geisler filed his complaint on October 15, 2008,

almost three years later, his suit is time-barred. Due to our disposition of this issue, we need not consider Dr. Geisler's claim that the trial court erred in finding that he did not establish a *prima facie* case for legal malpractice.

¶ 28 This court is also precluded from reviewing Dr. Geisler's claim on appeal that the trial court improperly ordered Rule 137 sanctions against him after the mistrial. A motion for Rule 137 sanctions "is considered a claim in the cause of action with which it is connected *** [and] is the equivalent of adding an additional count to a complaint." *John G. Phillips & Associates v. Brown*, 197 Ill. 2d 337, 339-40 (2001). The trial court below awarded Rule 137 sanctions against Dr. Geisler after the mistrial. Although an order declaring a mistrial is not a final order, it may be reviewed on an appeal from a final judgment in the proceeding where the entire record is open for review. *Conover v. Smith*, 20 Ill. App. 3d 258, 260 (1974). However, we have determined that Dr. Geisler's complaint is barred by the applicable two-year statute of limitations. Therefore, the issue of sanctions is likewise time-barred as it is considered a claim in Dr. Geisler's complaint.

¶ 29 For the foregoing reasons, the judgment of the circuit court is affirmed.

¶ 30 Affirmed.