

**IN THE COURT OF APPEALS 12/29/95**  
**OF THE**  
**STATE OF MISSISSIPPI**  
**NO. 95-CA-00021 COA**

**ROBERT E. JOINER**

**APPELLANT**

**v.**

**S. DENNIS JOINER, JAMES H. HERRING AND ROBERT W. LONG**

**APPELLEES**

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND  
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. JAMES E. GRAVES, JR.

COURT FROM WHICH APPEALED: HINDS COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

TIMOTHY M. FARRIS

ATTORNEYS FOR APPELLEES:

THOMAS Y. PAGE AND JOHN R. COUNTISS

NATURE OF THE CASE: CIVIL: LEGAL MALPRACTICE

TRIAL COURT DISPOSITION: SUMMARY JUDGMENT GRANTED

BEFORE FRAISER, C.J., KING, AND SOUTHWICK, JJ.

KING, J., FOR THE COURT:

The Circuit Court of Hinds County, Mississippi determined that Plaintiff's action for legal

malpractice was time barred and therefore, granted the Defendants' Motion for Summary Judgment. We find that the court was incorrect in granting the motion for summary judgment and therefore, reverse and remand.

I.

## FACTS

The defendants are partners in the law firm of Herring, Long, and Joiner. Robert Joiner retained S. Dennis Joiner to represent him in contesting penalties assessed by the Internal Revenue Service for non-payment of income taxes. Defendant Joiner advised plaintiff that the United States Tax Court or the United States District Court were appropriate forums for appealing the IRS civil penalty. Plaintiff advised Defendant Joiner that he desired to pursue the appeal in the United States Tax Court because payment of the tax, penalties, and interest would not be required until a final decision was made. Plaintiff was required to file the petition appealing the penalty assessment on or before February 9, 1991. Because Defendant Joiner erred in calculating the due date for filing the petition, the petition was not filed until February 14, 1991. On February 14, 1991, Defendant Joiner mailed correspondence to the Plaintiff advising Plaintiff that the petition was untimely filed and may be dismissed. Defendant Joiner also advised plaintiff that if the petition was dismissed by the tax court, he could still proceed in the United States District Court; however, he would be required to pay the penalty and later file a claim for refund.

On May 20, 1992, the tax court dismissed Plaintiff's petition because the petition was not filed within the time prescribed by Section 6213(a) of the Internal Revenue Code. Thereafter, on July 29, 1994, Plaintiff filed a complaint charging the defendants with legal malpractice.

II.

## WAS THE COMPLAINT BARRED BY THE STATUTE OF LIMITATIONS?

The parties are in agreement that the current action is subject to the three year period of limitation. Miss. Code Ann. § 15-1-49 (1972). However, the parties disagree as to when the statute of limitations commenced to run.

Defendants cite *Smith v. Sneed*, 638 So. 2d 1252, 1258 (Miss. 1994) and argue that the discovery rule is applicable to the current malpractice action; therefore, the period of limitations commenced to run on February 14, 1991, when Plaintiff was advised of the negligent act or omission. Defendants' application of the *Smith* court "discovery rule" in the instant case is incorrect. The discovery rule adopted by the *Smith* court states that a cause of action accrues and the limitations period commences to run when the plaintiff can reasonably be held to have knowledge of the *injury* or *disease*. See *Owens-Illinois, Inc. v. Edwards*, 573 So. 2d 704, 709 (Miss. 1990). On February 14, 1991, Defendant Joiner informed the Plaintiff that the petition was not timely filed and may be dismissed; however, dismissal of the petition did not occur until May 20, 1992. A grave disservice befalls a civil justice system, which charges a man with knowledge of an injury that he has not yet

suffered.

An individual may be aware of a wrongful act, but be unaware that he has suffered any injury therefrom. *Williams v. Kilgore*, 618 So. 2d 51, 54 (Miss. 1992). On February 14, 1991, Plaintiff became aware of the Defendants' error; however, the effect of the error did not become apparent until the petition was actually dismissed on May 20, 1992.

Where an injury is latent, a determination of when the statute of limitations begins to run focuses not on the time of the negligent act or omission, but on when the plaintiff discovers the injury. *Sweeney v. Preston*, 642 So. 2d 332, 334 (Miss. 1994). Because Plaintiff did not suffer damages until the petition was actually dismissed, we find that the cause of action accrued and the statute of limitations commenced to run on May 20, 1992. Our finding is consistent with decisions of the Mississippi Supreme Court, which state that a cause of action must be completed before an action can be commenced, and a tort is not completed until an injury occurs. *Kilgore*, 618 So. 2d at 54 (citing *Owens-Illinois*, 573 So. 2d at 706-07).

Therefore, Plaintiff's statute of limitation for commencing the malpractice action did not expire until May 20, 1995. Plaintiff's complaint for legal malpractice was filed on July 29, 1994--well within the limitations period. Therefore, the court erred in finding that the statute of limitations had expired.

Moreover, a genuine issue of material fact is presented by Plaintiff's claim that the Defendants' error caused him to suffer damages. Summary judgment should be granted only when there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. *Owen v. Pringle*, 621 So. 2d 668, 670 (Miss. 1993) (citations omitted). Summary judgment should not have been granted in the instant case because a genuine issue of material fact --whether the Plaintiff suffered damages as a result of Defendant Joiner's error remains disputed. Therefore, we reverse the circuit court's order of summary judgment.

**THE JUDGMENT OF THE CIRCUIT COURT OF HINDS COUNTY, MISSISSIPPI GRANTING APPELLEES' MOTION FOR SUMMARY JUDGMENT IS REVERSED AND THE CASE IS REMANDED FOR PROCEEDINGS CONSISTENT WITH THIS OPINION.**

**FRAISER, C.J., THOMAS, P.J., BARBER, COLEMAN, DIAZ, McMILLIN, AND SOUTHWICK, JJ., CONCUR.**

**PAYNE, J., DISSENTS WITH SEPARATE WRITTEN OPINION, JOINED BY BRIDGES, P.J.**

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PAYNE, J., DISSENTING:

I respectfully dissent. I believe that the statute of limitations began to run when the attorney told his client that the petition was untimely filed and if dismissed would necessitate proceeding in district court where he would have to prepay tax and penalty in order to apply for a refund. That was February 13, 1991. The client did not know any more about the negligence nor his recourse when the government in fact dismissed the petition on May 20, 1992. There certainly was no element of surprise that the attorney had been negligent. The lawyer was no more negligent on May 20, 1992, than he was on February 13, 1991, so the demand of diligence that the statute of limitations requires should have begun to run when the client had notice of the lawyer's failure to act promptly. All the client had left to learn was the time in which the result of that negligence would impact him. There was no doubt that the negligence was complete in February, 1991. Unlike the majority, I believe that *Smith v. Sneed*, 638 So. 2d 1252 (Miss. 1994) correctly applies to this case.

I agree with the majority that "[a]n individual may be aware of a wrongful act, but be unaware that he has suffered any injury therefrom." *Supra* at 3 (majority opinion). However, the only thing of which the client in this case was unaware was the *time* in which he would begin to feel the results of the injury -- not that he would be injured.

The client slept on his rights. The statute of limitations had run on this claim. I would affirm.

**BRIDGES, P.J., JOINS THIS SEPARATE WRITTEN OPINION.**

