

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 7, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 98-2315

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

DAVID K. KALAN,

PLAINTIFF-APPELLANT,

v.

BOCKHORST, EHRLICH, KAMINSKE,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Milwaukee County: VICTOR MANIAN, Judge. *Affirmed and cause remanded.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

PER CURIAM. David K. Kalan, *pro se*, appeals from a summary judgment dismissing his legal malpractice claim against the law firm of Bockhorst, Ehrlich and Kaminske (BEK). Kalan claims that the trial court erred as a matter of law in dismissing his legal malpractice claim when it determined that his claim was barred by the statute of limitations and *res judicata*. Because Kalan filed his

complaint after the statute of limitations had expired, the trial court did not err in granting summary judgment to BEK; therefore, we affirm.¹

I. BACKGROUND

In September 1990, Kalan hired BEK to appeal a City of St. Francis Municipal Court judgment requiring him to pay the City over \$37,000. The money judgment was imposed for failure to maintain certain real estate owned by Kalan and located on South Ellen Street in the City of St. Francis.

While the appeal was pending, the City of St. Francis filed another action against Kalan for code violations on another parcel of real estate located on South Nicholson Avenue. The suit also alleged that the Ellen Street property was a nuisance. On October 16, 1991, a stipulation was reached between BEK and the City of St. Francis, by its city attorney, to settle both cases. Among other provisions of the stipulation not relevant to this appeal, Kalan agreed to convey to the City of St. Francis, the Ellen Street property in exchange for other considerations. Kalan was present in court when this term was presented and consented to its execution. On October 24, 1991, Kalan, via a telephone conversation with Attorney Bockhorst, consented to the proposed order and judgment effectuating the conveyance of the Ellen Street property. On or about the same date, however, after a visit to BEK's office, Kalan fired BEK.

On June 18, 1992, BEK sued Kalan for legal fees incurred in the defense and appeal of both cases. BEK obtained a judgment against Kalan for

¹ We also note that Kalan's appellate brief-in-chief and reply brief are inadequate and extremely difficult to decipher. Although we could affirm the judgment on these grounds alone, *see In re Estate of Balkus*, 128 Wis.2d 246, 255 n.5, 381 N.W.2d 593, 598 n.5 (Ct. App. 1985), we decline to do so.

\$6,798.69, which included \$2,450 for attorney's fees because Kalan presented a frivolous defense.

On November 10, 1997, Kalan filed his legal malpractice claim against BEK. BEK answered the complaint and asserted the affirmative defense that Kalan's claim was barred by the statute of limitations and by the doctrine of *res judicata*. BEK also alleged that Kalan's claim was frivolous. Motions for summary judgment were filed by both parties. The trial court granted BEK's motion for summary judgment and concluded that Kalan's claim was frivolous. The trial court ordered Kalan to pay to BEK attorney's fees of \$3,500. Kalan now appeals and BEK counters by requesting costs for pursuing a frivolous appeal. BEK also requests restriction of Kalan's future access to the Wisconsin court system.

II. DISCUSSION

We review summary judgments *de novo*, employing the same methodology as the trial court. See *Green Spring Farms v. Kersten*, 136 Wis.2d 304, 315, 401 N.W.2d 816, 820 (1987). We shall affirm the trial court's decision granting summary judgment if the record demonstrates that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. See § 802.08(2), STATS. Because the summary judgment methodology has been stated in many cases, we eschew its reiteration here. See, e.g., *Caulfield v. Caulfield*, 183 Wis.2d 83, 91, 515 N.W.2d 278, 282 (Ct. App. 1994).

Kalan contends that the trial court's order for summary judgment is contrary to law; that is, it cannot be supported by a statute of limitations or *res judicata* defense. We disagree.

Section 893.53, STATS.,² sets forth a six-year statute of limitations provision which applies to the tort action of legal malpractice. *See Acharya v. Carroll*, 152 Wis.2d 330, 337, 448 N.W.2d 275, 279 (Ct. App. 1989). This period of limitation is qualified to allow accrual of the claim either on the date the injury was discovered or, with reasonable diligence, should have been discovered, whichever occurs first. *See Hansen v. A.H. Robins, Inc.*, 113 Wis.2d 550, 560, 335 N.W.2d 578, 583 (1983).

From our review of the record, it is uncontroverted that the earliest that Kalan could have, with diligence, discovered that he sustained injury from the transfer of the South Ellen Street property was on October 16, 1991, the date that the trial court ordered the transfer of the property pursuant to stipulation for settlement. The latest he could have, with diligence, discovered injury, as stated by the trial court, was October 25, 1991, the day he discharged BEK. Regardless of which date is used, the filing of the malpractice claim on November 10, 1997, was beyond the six-year limitation date. Thus, the claim fails and the trial court was correct as a matter of law in its order for summary judgment.

BEK has proffered a second basis to sustain the order, one that was also used by the trial court; that is, *res judicata*. Because we have concluded that there is at least one sufficient ground to support the order, we need not examine the other. *See Gross v. Hoffman*, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938).

One matter remains. BEK moves this court, pursuant to § 809.25(3), STATS., for an order awarding it costs, fees and reasonable attorney's fees because

² Section 893.53, STATS., provides: "An action to recover damages for an injury to the character or rights of another, not arising on contract, shall be commenced within 6 years after the cause of action accrues, except where a different period is expressly prescribed, or be barred."

this appeal is frivolous. BEK additionally requests from this court, pursuant to *Village of Tigerton v. Minniecheske*, 211 Wis.2d 777, 565 N.W.2d 586 (Ct. App. 1997), an order requiring Kalan to obtain approval from the trial court before filing any further legal claims relating to the Ellen Street and Nicholson Avenue properties for the purpose of preventing any further frivolous litigation.

Claims for costs of frivolous appeals are governed by § 809.25(3), STATS. We must make a determination whether an appeal is frivolous under § 809.25(3)(c). We may make this determination as a matter of law if no factual findings are required. See *Stern v. Thompson & Coates, Ltd.*, 185 Wis.2d 220, 252-53, 517 N.W.2d 658, 670 (1994). We hold that no factual findings are required to arrive at the conclusion that the six-year statute of limitations clearly applied and there is no “reasonable basis in law or equity” to conclude otherwise. See *id.* at 253, 517 N.W.2d at 670.

We, therefore, remand this case to the trial court for a determination of costs on this appeal, and for the trial court to consider the merits of an order requiring Kalan to obtain trial court approval prior to initiating any further lawsuits pertaining to the Ellen Street and Nicholson Avenue properties.

By the Court.—Judgment affirmed and cause remanded.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.

