

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE**

MICHIKO TRACY MUKASA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 02-218 GMS
	)	
BALICK & BALICK, ATTORNEYS AT LAW,	)	
SIDNEY BALICK, JOHN DOE AND	)	
JOHN DOE, ESQUIRE,	)	
	)	
Defendants.	)	

**MEMORANDUM AND ORDER**

**I. INTRODUCTION**

Michiko Tracy Mukasa (“Mukasa”), the plaintiff in this diversity action, initiated this legal malpractice claim against the Balick & Balick law firm, attorney Sidney Balick, and two John Doe attorneys (collectively “Balick”)<sup>1</sup>. The legal malpractice claim arises out of an underlying personal injury and products liability action related to an automobile accident in which Mukasa was seriously injured. Mukasa alleges that Balick negligently handled her lawsuit by failing to preserve the wreckage of the automobile she was driving at the time of the accident so that it could be examined by experts. Mukasa believes that Balick’s failure to preserve the vehicle may prove fatal to her case against the manufacturers of the car and tires. As a result, Mukasa filed a complaint against Balick on March 22, 2002, alleging legal malpractice and claiming damages in excess of \$75,000.

Presently before the court is Balick’s motion to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). In support of the motion, Balick asserts that Mukasa’s claim is barred by the applicable three-year statute of limitations. *See* 10 DEL. CODE ANN. § 8106 (1999).

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<sup>1</sup> John Doe and/or John Doe, Esquire are attorneys whose names are unknown to the plaintiff and who participated in the Balick firm’s legal representation of Mukasa.

Contrary to Balick's contentions, the court finds that Mukasa's complaint for legal malpractice was timely filed. However, compliance with the statute of limitations necessitated Mukasa's filing of a claim which is not yet ripe for disposition. Because dismissal for lack of justiciability would be inequitable, the court will stay this action until the case becomes ripe.

## **II. FACTS**

On December 14, 1998, Tracy Mukasa was in an automobile accident which took place on Route 295 in the state of New Jersey. The accident occurred when a tractor-trailer allegedly sideswiped Mukasa's Honda CR-V, causing the vehicle to skid out of control and roll over several times. Mukasa was partially paralyzed as a result of the accident. The Honda CR-V she was operating was manufactured by American Honda Motor Co. ("Honda") and was equipped with tires manufactured by Michelin North America ("Michelin"). Shortly after the accident, Mukasa's father, to whom the vehicle was registered, signed the title to the totaled vehicle over to the State Farm Insurance Company ("State Farm").

On February 24, 1999, Mukasa retained Balick to represent her for claims arising out of the automobile accident. One month later, on March 24, 1999, State Farm placed the vehicle up for auction. The buyer, All In One Auto Parts, finalized their purchase on March 25, 1999. It remains undisputed that Balick made no attempt to prevent the sale or to arrange for inspection of the vehicle by experts prior to the sale.

On May 17, 1999, Mukasa terminated Balick's representation and retained new counsel. Mukasa has since commenced a suit in the Superior Court of New Jersey, Mercer County (Docket No. L-3656-00) ("the underlying action") which names Honda and Michelin, among others, as

defendants. Mukasa has asserted products liability claims against both Honda and Michelin. That action is presently pending and discovery is still being conducted. Counsel has estimated that the action will most likely remain pending for at least a year.

Although the vehicle has not been preserved, Mukasa has located an expert who was employed by attorneys for Canal Insurance Company to examine the totaled Honda CR-V. This expert conducted an examination and took pictures of the vehicle before it was auctioned and sold. Mukasa's deposition of this expert is scheduled but has not yet taken place. In the meantime, Honda has furnished Mukasa with crash test reports and design drawings of the vehicle. Furthermore, Mukasa has deposed Linda Stuckey, an eyewitness to the accident who told the police officer that she saw a tire on Mukasa's vehicle blow out after it left the road. Post-accident photographs of the vehicle and its tires are also available to Mukasa. As a result of this alternative evidence, Mukasa's actions against Honda and Michelin have not been abandoned and remain viable to date.

### **III. STANDARD OF REVIEW**

In ruling on a motion to dismiss, the factual allegations of the complaint must be accepted as true. *See Graves v. Lowery*, 117 F.3d 723, 726 (3d Cir. 1997); *Nami v. Fauver*, 82 F.3d 63, 65 (3d Cir. 1996). Moreover, a court must view all reasonable inferences that may be drawn from the complaint in the light most favorable to the non-moving party. *See Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969); *Schrob v. Catterson*, 948 F.2d 1402, 1405 (3d Cir. 1991). A court should dismiss a complaint "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *See Graves*, 117 F.3d at 726; *Nami*, 82 F.3d at 65 (both citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

## **IV. DISCUSSION**

### **A. Statute of Limitations**

Delaware law applies a three-year statute of limitations to claims of legal malpractice. *See* 10 DEL. CODE ANN. § 8106. The point in time from which the statute of limitations begins to run in a legal malpractice case has not been subject to a uniform rule as jurisdictions remain split on the issue. Some jurisdictions follow the “injury rule,” which states that the statute of limitations begins to run from the time the damage or injury occurs. *See Poole v. Lowe*, 615 A.2d 589, 592 (D.C. Cir. 1978). Delaware, however, follows the “occurrence rule,” which states that the statute of limitations begins to run at the time of the wrongful or negligent act. *See Isaacson, Stolper & Co. v. Artisan’s Savings Bank*, 330 A.2d 130, 132 (Del. 1974). Mere ignorance of a cause of action does not toll the statute. *Id.*

Delaware law has created two exceptions to the occurrence rule in legal malpractice cases. If either exception applies, the statute of limitations may be equitably tolled. First, fraud or concealment of the attorney’s wrongdoing may toll the statute. *Id.* Secondly, where the wrongdoing is “inherently unknowable” and the plaintiff is “blamelessly ignorant,” the statute is tolled until the plaintiff discovers or should have discovered the attorney’s wrongdoing.” *Layton v. Allen*, 246 A.2d 794, 798 (Del. 1968). This second exception is often known as the “discovery rule.”

Neither of the two exceptions to the occurrence rule apply to Mukasa’s legal malpractice claim. First, there is absolutely no evidence of fraud or concealment on the part of the Balick attorneys. Second, Balick’s wrongdoing was not “inherently unknowable” by Mukasa. By making a few well-placed telephone calls to State Farm and other places, Mukasa could have discovered that

Balick's failure to preserve the car resulted in its sale at auction on March 25, 1999. Since neither exception applies, the statute of limitations was not tolled under existing Delaware law.

Nevertheless, the court finds that the tolling issue is unimportant because Mukasa's claim was timely filed even without equitable tolling. In the case at hand, the alleged wrongdoing is Balick's failure to preserve the Honda CR-V for inspection by experts. Since Balick's wrongdoing was an omission and not an act, neither party has been able to specify an exact date on which they believe the statute of limitations began to run. Balick argues that the wrongdoing occurred generally within the time period in which Mukasa retained Balick as counsel (February 24, 1999 to May 17, 1999). Therefore, according to Balick, the date of the wrongdoing should be placed somewhere within the first month of Balick's representation of Mukasa. The court does not accept this view. Rather, the court finds that the wrongdoing occurred on March 25, 1999, when Balick allowed the vehicle to be sold at auction. It was on this date that the negative consequences of Balick's failure to preserve the vehicle were realized. Prior to the date of its sale, the vehicle was in the possession of State Farm and was available for inspection by experts. On March 25, 1999, the car became unavailable for inspection, thereby prejudicing Mukasa's ability to pursue her products liability claims and giving rise to a potential claim of legal malpractice. Thus, the court finds that the three year statute of limitations began to run on March 25, 1999.

Musaka's complaint was filed on March 22, 2002. Since the statute of limitations began to run on March 25, 1999, Mukasa's complaint was filed three days before the three year statute of limitations was to expire. The court therefore finds that Mukasa's claim was timely filed.

## **B. Legal Malpractice**

Under Delaware law, a plaintiff pursuing a legal malpractice claim must prove: “employment of the attorney, . . . the attorney's neglect of a reasonable duty, as well as the fact that such negligence resulted in and was the proximate cause of loss to the client.” *Pusey v. Reed*, 258 A.2d 460, 461 (Del. Super. Ct. 1969), *overruled on other grounds*, *Starun v. All American Engineering Co.*, 350 A.2d 765 (Del.Supr. Nov 24, 1975). *See also David B. Lilly Co., Inc. v. Fisher*, 18 F.3d 1112, 1120 (3d Cir. 1994) (applying Delaware law and citing *Pusey* for the three elements of a legal malpractice claim in Delaware as described above).

The facts alleged in Mukasa’s complaint, taken as true, sufficiently support the first two elements of a legal malpractice claim under Delaware law. The third element, however, has not been met. Since the underlying action is still pending in New Jersey, Mukasa cannot, at this time, establish that Balick’s negligence has injured her. Despite the loss of the vehicle, there is evidence in the record concerning the condition of the vehicle and the tires. This evidence includes post-accident photographs of the vehicle, post-accident photographs of the tires, a deposition of an eyewitness to the accident, and schematics and crash test reports supplied by Honda. Furthermore, Mukasa plans to depose an expert who conducted an examination of the vehicle. Thus, it is possible that Mukasa will be able to prevail on her products liability claims against Honda and Michelin despite any alleged negligence on Balick’s part. It is also possible, however, that the available evidence will fall short, in which case Balick’s failure to preserve the vehicle could be viewed as the proximate cause of the failure of Mukasa’s case. In any event, until the underlying action is resolved, the future injury to Mukasa remains speculative.

Mukasa's situation presents an interesting dilemma for the plaintiff. As previously discussed, any complaint filed after March 25, 2002 would have been untimely. Furthermore, since Mukasa was not entitled to the benefits of equitable tolling, the statute of limitations would not have been preserved while she waited for the resolution of the underlying action. Thus, if Mukasa had waited until she had suffered an actual injury to file her complaint, her claim would be dismissed as untimely. On the other hand, by filing in compliance with the statute of limitations, Mukasa has necessarily filed her claim prior to an actual injury, and her claim is not yet ripe for decision. It could therefore be dismissed for lack of justiciability. *See Anderson v. Green*, 513 U.S. 557, 559 (1995) (dismissing case for lack of justiciability, based on the finding that since any future injury to plaintiff was merely conjectural, the case was not ripe for disposition). However, for the reasons discussed below, dismissal of Mukasa's case would be inequitable and unjust. Therefore, the court will, *sua sponte*, stay these proceedings until resolution of the underlying New Jersey action.

Although Delaware courts have not addressed this issue, authority exists in Pennsylvania to support the court's decision to stay this action. Pennsylvania, like Delaware, follows the occurrence rule and its exceptions as described above. Under Pennsylvania law,

“a client who realizes that his attorney has committed malpractice but has not yet been “injured” can still file suit against his attorney. The case would simply be stayed pending the final outcome of the underlying litigation. In this way, the aggrieved client's rights are protected while the purpose of the statute of limitations—to bar stale claims, avoid problems of proof arising from stale memories, and provide some measure of security against claims arising out of events long ago transpired—is fulfilled.” *Spillman v. Wallen*, 1996 WL 379553, \*8 (E.D. Pa. June 28, 1996).

Pennsylvania's view on the matter is consistent with Delaware law. Therefore, the court will adopt this view.

Justice requires that this case not be dismissed at this juncture. As previously noted, the statute of limitations began to run in this case on March 25, 1999 and was not subject to equitable tolling doctrines. Therefore, the statute of limitations expired on March 25, 2002. Dismissing the case at this point would require the plaintiff to refile her legal malpractice claim at the conclusion of the underlying New Jersey action. Of course, any complaint filed at that time will be well beyond the long-passed March 25, 2002 statute of limitations, and is likely to be dismissed for that reason. Thus, dismissal would effectively deprive Mukasa of access to the courts when she may in fact have a viable cause of action. Moreover, it seems unfair to needlessly punish the plaintiff for acting prudently to preserve the statute of limitations. For these reasons, the court finds that it is in the interests of justice to stay this case until the underlying action is concluded and the court can determine whether Balick's failure to preserve the vehicle was a proximate cause of an actual injury to Mukasa.

## **V. CONCLUSION**

Contrary to Balick's contentions, Mukasa's complaint for legal malpractice was timely filed. However, compliance with the statute of limitations necessitated Mukasa's filing of a claim which is not yet ripe for disposition. Since equity would look unfavorably upon dismissal, the court will stay the action pending further developments in the underlying action in New Jersey.<sup>2</sup>

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<sup>2</sup> Neither the court's ruling nor any statement made in this memorandum and order should be construed as an opinion on the merits of the underlying action or the plaintiff's legal malpractice claim.

For the foregoing reasons IT IS HEREBY ORDERED that:

1. The Defendants' Motion to Dismiss (D.I. 8) is DENIED.
2. This action is STAYED until the underlying action in the Superior Court of New Jersey, Mercer County (Docket No. L-3656-00) has concluded and the court can determine whether Balick's failure to preserve the vehicle was a proximate cause of an actual injury to Mukasa.
3. Until the conclusion of the underlying action, the parties will provide bi-annual joint status reports to the court on January 1st and June 1st of each year. The joint status reports should describe the status of the underlying action. However, the parties should immediately notify the court if and when any of the plaintiff's claims are dismissed. Additionally, the parties should immediately notify the court if the case or any portion of the case settles or otherwise concludes prior to trial.

Dated: August 27, 2002

Gregory M. Sleet  
UNITED STATES DISTRICT JUDGE