VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 12th day of February, 2016.

Samuel J. Dunavant, Jr., Appellant,

against Record No. 150870
Circuit Court No. CL14000672-00

George H. Bagwell, Appellee.

Upon an appeal from a judgment rendered by the Circuit Court of Halifax County.

Upon consideration of the record, briefs, and argument of counsel, the Court is of the opinion that there is no reversible error in the judgment of the circuit court.

Samuel J. Dunavant, Jr. challenges the circuit court's sustaining of a plea in bar of the statute of limitations in his action for legal malpractice against George H. Bagwell. In the underlying case, Dunavant retained Bagwell to represent him on a personal injury claim arising from Dunavant's involvement in an automobile accident. Bagwell filed an action on behalf of Dunavant against the driver of the other vehicle. The case went to trial and ended in a verdict for the defendant. In 2010, this Court refused an appeal filed by Bagwell on Dunavant's behalf challenging the final judgment in defendant's favor. There is no dispute that Bagwell's representation of Dunavant terminated at that time.

In 2014, Dunavant filed a complaint for legal malpractice against Bagwell in the Circuit Court of Halifax County. Dunavant alleged that the defense verdict in the personal injury action resulted from numerous errors committed by Bagwell during the course of the trial. Dunavant also alleged that "[t]here existed at all times relevant to [that] action an agreement between Mr. Bagwell and Mr. Dunavant that Mr. Bagwell would act as an attorney for Mr. Dunavant." The complaint, however, did not allege the existence of a written contract.

Bagwell filed a plea in bar of the statute of limitations on the ground that his fee agreement with Dunavant was an oral contract. Therefore, according to Bagwell, Dunavant's

legal malpractice action was barred by the three-year statute of limitations under Code § 8.01-246(4) for actions on unwritten contracts. Dunavant subsequently sought and obtained permission of the circuit court to depose Bagwell concerning the fee agreement.

In the deposition, Bagwell stated that he would normally have a client sign a written fee agreement but that he had "never executed one," as further evidenced by the fact the form he used "only has a blank for the client to sign." Bagwell also indicated that he did not find a written fee agreement in Dunavant's file, and that he had no recollection of his contingency fee agreement with Dunavant ("one-third plus expenses") having ever been "memorialized in writing." Dunavant further stated that he did not always use a written fee agreement with a client whom he had known for a long time, and that he had known Dunavant for over 60 years.

After deposing Bagwell, Dunavant filed both a memorandum opposing Bagwell's plea in bar and Bagwell's deposition for the circuit court's consideration in ruling on the plea. In the memorandum, Dunavant asserted that the sole issue was whether he and Bagwell had in fact entered into a written agreement subject to the five-year statute of limitations under Code § 8.01-246(2), which, if controlling, would mean this action was timely filed. Citing Gerald T. Dixon, Jr., L.L.C. v. Hassell & Folke, P.C., 283 Va. 456, 459-61, 723 S.E.2d 383, 384-85 (2012), and relying upon Bagwell's deposition testimony, Dunavant argued that "[t]here was a written agreement regardless of whether the parties actually signed a contract [because] Mr. Dunavant accepted the terms of Mr. Bagwell's standard written fee agreement, and Mr. Bagwell began and finished the performance of said agreement."

The circuit court conducted a hearing on Bagwell's plea in bar. After reviewing Bagwell's deposition and hearing argument of counsel, the court stated its finding from the bench that there was no evidence of a written agreement. In doing so, the court pointed specifically to Bagwell's unequivocal testimony that he had "'never executed'" a written fee agreement. Based on this finding, which was incorporated into the final order, the court ruled that Dunavant's malpractice action was barred by the three-year statute of limitations for an unwritten contract under Code § 8.01-246(4). Accordingly, the court sustained the plea in bar and dismissed the action.

We granted Dunavant this appeal on the following assignments of error:

1. The trial court erred when it ruled that § 8.01-246(4) applied to Mr. Dunavant's claim because "there [was] no written agreement that [it had] before [it]," as Mr. Dunavant is not required to produce the document itself.

2. The trial court erred when it ruled that §8.01-246(4) applied to Mr. Dunavant's claim because under Gerald T. Dixon, Jr. L.L.C. v. Hassell & Folkes, P.C., 283 Va. 456 (2012), any written document embodying the terms of the agreement can satisfy § 8.01-246(2)'s written contract requirement.

As to the first assignment of error, its premise is based upon a mischaracterization of the circuit court's holding. The court did not hold that Dunavant was required to "produce" anything — much less a written fee agreement — in opposing Bagwell's plea in bar of the statute of limitations. Nor did the court hold that it was shifting the burden of proof to Dunavant on this plea, see Station # 2, LLC v. Lynch, 280 Va. 166, 175, 695 S.E.2d 537, 542 (2010) ("'The moving party has the burden of proof on [a plea in bar].'" (quoting Hilton v. Martin, 275 Va. 176, 179-80, 654 S.E.2d 572, 574 (2008))), Dunavant's erroneous assertions to the contrary notwithstanding. Therefore, this assignment of error was improvidently granted and is hereby dismissed.

As to the second assignment of error, upon the facts presented, Dunavant's reliance upon Dixon and the five-year statute of limitations under Code § 8.01-246(4) is misplaced. Under the express terms of Code § 8.01-246(4), a five-year limitations period applies "[i]n actions on any contract which is not otherwise specified and which is in writing and signed by the party to be charged thereby." (Emphasis added.) Here, the circuit court's finding that Bagwell — the party being "charged" — did not execute a written fee agreement with Dunavant, as plainly supported by the evidence, negates application of the five-year limitations period in this case. See Cooper Indus., Inc. v. Melendez, 260 Va. 578, 595, 537 S.E.2d 580, 590 (2000) (trial court's findings in deciding plea in bar will not be disturbed on appeal unless "plainly wrong or without evidence to support them" (citation and internal quotation marks omitted)).

Dixon is completely consistent with this conclusion. Dunavant is indeed correct in pointing out that in Dixon, involving a dispute over the applicability of Code § 8.01-246(4), we cited with approval Simmons & Simmons Constr. Co. v. Rea, 286 S.W.2d 415 (Tex. 1995) for the following proposition: "'An unsigned agreement all the terms of which are embodied in a

writing, unconditionally assented to by both parties, is a written contract . . . unless the parties have made [their signatures] necessary at the time they express their assent.'" Dixon, 283 Va. at 460, 723 S.E.2d at 385 (quoting Simmons, 286 S.W. 2d at 418). As we proceeded to make clear in Dixon, however, recognition of an unsigned agreement as a written contract under this rationale would not bring the contract within the purview of Code § 8.01-246(4) because of the statute's requirement that the "contract be signed . . . by the party charged with breach." Id. at 460, 723 S.E.2d at 385. We reject Dunavant's argument that this statutory requirement was met by Bagwell's signature on the pleadings in the underlying case. Neither In re: Lewis, 517 B.R. 615 (E.D. Va. 2014) nor the Virginia Attorney General opinion, 2011 Op. Atty. Gen. 32, upon which Dunavant relies, supports the proposition that pleadings can form part of the terms of a written fee agreement. The five-year statute of limitations under Code § 8.01-246(4) is, therefore, inapplicable in this case in light of the trial court's finding, once again, that Bagwell did not execute a written fee agreement with Dunavant.*

For these reasons, we affirm the judgment of the Circuit Court for Halifax County. The appellant shall pay to the appellee two hundred and fifty dollars damages.

This order shall be certified to the said circuit court.

A Copy,

Teste:

Patricia L Harrington

Clerk

* We thus need not decide whether the correct statute of limitations applicable in this case is the three-year limitations period under Code § 8.01-246(4) for unwritten contracts or the two-year statute of limitations under Code §8.01-248 for miscellaneous causes of action "for which no limitation is otherwise prescribed," which might apply to an unsigned agreement found to be a written contract as addressed in Dixon. Under either a two or a three year statute of limitations, this action is time-barred.