# STATE OF MICHIGAN

# COURT OF APPEALS

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WILLIAM L. COMER FAMILY EQUITY PURE TRUST, AMERICAN WAY TRUST, FINANCIAL FREEDOM CONSULTANTS, OSA DEVELOPMENT COMPANY, OSA EXPLORATIONS, BURICA DEVELOPMENT COMPANY, BURICA EXPLORATION, WILLIAM R. COMER, SCOTT C. COMER, LEE ANNE COMER, MARLAINA L. COMER, MYRA L. COMER and MT. ZION CONSTITUTIONAL FUND,

Plaintiffs-Appellants,

v

THOMAS & JENSEN, P.C., JENSEN, SMITH & CLARK, P.C. and PETER C. JENSEN,

Defendants-Appellees.

UNPUBLISHED
April 25, 1997

No. 186676
Clare Circuit Court
LC No. 93 900177 NZ

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Before: Corrigan, P.J., and Sullivan* and T.G. Hicks,** JJ.

PER CURIAM.

In this legal malpractice action, plaintiffs appeal by right the orders granting defendants' motions for summary disposition under MCR 2.116(C)(7) (statute of limitations) and (C)(8) (failure to state a claim). We affirm.

Defendant Peter Jensen, a lawyer, represented plaintiffs, a collective of family members, trusts and partnerships, in a federal court action in 1987. In that case, plaintiffs sought to recover assets seized by the Internal Revenue Service (IRS) to satisfy a tax deficiency. The federal court entered judgment for the IRS. Plaintiffs thereafter retained different counsel and in March 1991 moved to modify the tax case trial record with additional evidence. The federal district court denied the motion in

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.
** Circuit judge, sitting on the Court of Appeals by assignment.

December 1991. In January 1992, plaintiffs appealed to the Sixth Circuit Court of Appeals, which affirmed the judgment for the IRS in June 1992. The United States Supreme Court denied certiorari in December 1992.

Plaintiffs brought the instant action in June 1993, alleging breach of contract and legal malpractice against defendant Jensen in the underlying tax case. Plaintiffs claimed that Jensen had not kept them apprised of adverse IRS filings, had made unauthorized filings himself, and had failed to use all information that plaintiffs had provided to him.

Defendants moved for summary disposition under MCR 2.116(C)(7), contending that the two-year statute of limitations for legal malpractice claims barred plaintiff's suit. MCL 600.5805(4); MSA 27A.5805(4). Plaintiffs admitted that they filed their action more than two years after Jensen ceased representing them, but averred that they had discovered their cause of action only upon the United States Supreme Court's denial of their petition for certiorari. They argued that their claim thus was timely under the six-month discovery rule. MCL 600.5838(2); MSA 27A.5838(2).[1] Plaintiffs asserted that even if the discovery rule did not apply, their suit was timely under the statute of limitations for fraud. MCL 600.5855; MSA 27A.5855. Plaintiffs then sought to amend their complaint to add allegations of fraud and a violation of the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq.*; MSA 19.418(1) *et seq.*

The circuit court granted defendants' motion for summary disposition under MCR 2.116(C)(7), ruling that plaintiffs had not filed their action within six months of their discovery of the alleged malpractice. The court, however, granted plaintiffs' request to amend their complaint regarding the MCPA and fraud. After plaintiffs filed a second amended complaint alleging a violation of the MCPA but not fraud, defendants moved for summary disposition under MCR 2.116(C)(8). The court granted defendants' motion, stating:

> The acts complained of by the plaintiff[s], the representation of a defendant in a lawsuit, are . . . acts that a licensed attorney is specifically authorized to perform. In fact, only a licensed attorney may perform this service in our state. These acts of representation are subject to extensive regulatory and disciplinary measures. Thus, this matter is controlled by *Kekel* [*v Allstate Ins Co*, 144 Mich App 379; 375 NW2d 455 (1985)] and . . . defendants are exempted from the MCPA.

Plaintiffs first argue that the circuit court inappropriately applied the statute of limitations for legal malpractice to their breach of contract claim. We disagree. Defendants moved for summary disposition under MCR 2.116(C)(7); such a motion asserts that the cause of action is statutorily barred. *Witherspoon v Guilford*, 203 Mich App 240, 243; 511 NW2d 720 (1994). When reviewing a motion under MCR 2.117(C)(7), this Court must accept the plaintiff's well-pleaded allegations as true and construe them in the plaintiff's favor. If the facts are not in dispute, whether the statute bars the claim is a question of law for the court. *Id.* We review questions of law under the de novo standard. *Rapistan Corp v Michaels*, 203 Mich App 301, 306; 511 NW2d 918 (1994).

The circuit court correctly relied on *Brownell v Garber*, 199 Mich App 519, 524-526; 503 NW2d 81 (1993). In his action against his attorney, the plaintiff in *Brownell* alleged legal malpractice, breach of contract and fraud. The trial court granted the defendant's motion for summary disposition under MCR 2.116(C)(7) because the statutory period for filing a legal malpractice action had expired. *Id*. at 522-523. The plaintiff appealed, arguing that he had a "special contract" with the defendant and thus his suit sounded in contract, not malpractice. This Court decided that the plaintiff and the defendant did not have a special agreement. Rather, the parties had contracted for legal services wherein the defendant would "exercise appropriate legal skill in providing representation." *Id*. at 526 (citations omitted). Thus, this Court decided that the trial court did not err in ruling that the plaintiff's breach of contract claim was duplicative of his malpractice claim. *Id*.

Like the plaintiff in *Brownell*, plaintiffs here have failed to provide facts showing that the contracted-for legal services arose from a "special agreement." Plaintiffs attempted to distinguish *Brownell* merely by stating in their brief that "[t]he typical attorney-client relationship referred to in *Brownell*, however, is far removed from the facts . . . in the instant action." That statement is insufficient to remove this case from the clear holding of *Brownell*. Plaintiffs' breach of contract claim is duplicative of their legal malpractice claim and thus the statute of limitations for malpractice bars it; the circuit court correctly granted summary disposition to defendants under MCR 2.116(C)(7).

Additionally, plaintiffs argue that the circuit court erred in finding that they had discovered the alleged malpractice in 1990. We cannot agree. In an April 1990 letter, plaintiff William Comer stated that Jensen had failed to provide documents and had failed to notify plaintiffs of IRS filings. Therefore, plaintiffs were aware of Jensen's actions in 1990. Moreover, plaintiffs filed their appeal in the Sixth Circuit more than one year before bringing the instant malpractice suit. Even if they did not know of the malpractice in 1990, they certainly knew when they appealed in January 1992. See *Hayden v Green*, 166 Mich App 352, 363; 420 NW2d 201 (1988) (Hood, J., dissenting), which was adopted by our Supreme Court in 431 Mich 878; 429 NW2d 604 (1988). We decline plaintiffs' invitation to rule that they did not discover their claim until the United States Supreme Court denied their petition for certiorari. *Id*.

Plaintiffs next assert that the services of lawyers fall within the MCPA and that the circuit court erred in granting defendants' motion for summary disposition under MCR 2.116(C)(8). We disagree. A summary disposition motion under MCR 2.116(C)(8) tests a complaint's legal sufficiency on the pleadings alone. *Simko v Blake*, 448 Mich 648, 654; 532 NW2d 842 (1995).

The MCPA prohibits unfair acts in the "conduct of trade or commerce." MCL 445.903(1); MSA 19.419(3)(1). The MCPA defines "trade or commerce" as:

> [T]the conduct of a business providing goods, property, or service primarily for personal, family, or household purposes and includes the advertising, solicitation, offering for sale or rent, sale, lease, or distribution of a service or property, tangible or intangible, real, personal, or mixed, or any other article, or a business opportunity. [MCL 445.902(d); MSA 19.418(2)(d).]

The MCPA neither includes nor precludes legal services within its scope. The MCPA, however, exempts "[a] transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States." MCL 445.904(1)(a); MSA 19.418(4)(1)(a).

Although this Court has not had the opportunity to examine whether a plaintiff may bring an action under the MCPA against a lawyer, this Court recently addressed the MCPA in the context of medical services in *Nelson v Ho*, ___ Mich App ___; ___ NW2d ___ (Docket No. 184803, issued February 25, 1997). In *Nelson,* this Court analyzed the MCPA as it applies to services within a "learned profession." This Court first considered the trial court's ruling that a distinction exists between a "trade" and a "learned profession." After examining federal case law, this Court concluded that professionals are not exempt from federal anticompetitive and antitrust laws merely because they practice a learned profession. This Court then cited federal cases that discussed the difference between "commercial" and "noncommercial" conduct and stated that it found the distinction persuasive. It declined to issue a blanket exemption for the learned professions, noting in particular that while the practice of medicine clearly has a business aspect, the practice of medicine was not interchangeable with other commercial endeavors. *Id.*, slip op at 2-4.

We adopt this Court's holding in *Nelson* as our own, and apply it to the practice of law:

> [O]nly allegations of unfair, unconscionable or deceptive methods, acts or practices in the conduct of the entrepreneurial, commercial, or business aspect of a physician's practice may be brought under the MCPA. Allegations that concern misconduct in the actual performance of medical services or the actual practice of medicine would be improper. We do not consider the Legislature's use of 'trade or commerce' in defining the application of the act to exhibit an intent to include the actual performance of medical services or the actual practice of medicine. If we were to interpret the act as such, the legislative enactments and well-developed body of law concerning medical malpractice could become obsolete. While we are aware of the expense and difficulty in maintaining a medical malpractice action, we do not think the MCPA was meant by the Legislature to be an alternative to its specific statutory scheme addressing medical malpractice claims. Only when physicians are engaging in the entrepreneurial, commercial, or business aspect of the practice of medicine are they engaged in 'trade or commerce' within the purview of the MCPA. [*Id.*, slip op at 4.]

This Court instructed courts to examine the pertinent conduct case by case. If the conduct does not relate to the entrepreneurial, commercial, or business aspect of the practice, it is not within the MCPA's orbit. *Id.*, slip op at 5. In this case, plaintiffs essentially claimed that Jensen improperly prepared and handled the underlying suit. Plaintiffs' allegations do not invoke the entrepreneurial, commercial, or business aspect of Jensen's law practice. Plaintiffs' allegations were an attack on Jensen's performance of legal services and would be more appropriately brought as a malpractice action. *Id.*

We leave the question of lawyer advertising to another day, as defendants' advertising is not at issue in this case. We note, however, that attorney advertising may fall within the MCPA under *Baker v Arbor Drugs, Inc*, 215 Mich App 198, 206-208; 544 NW2d 727 (1996), wherein this Court held that a pharmacy's advertising was subject to the MCPA.

Additionally, plaintiffs argue that the court abused its discretion in not permitting them to amend their complaint. The record, however, shows that plaintiffs filed two amended complaints. Plaintiffs' argument on this point therefore is meritless.

Finally, plaintiffs assert that Count III of their second amended complaint stated a claim for fraud. We disagree. In Count III, plaintiffs clearly allege violations of the MCPA. We are not inclined to recast the plain language of plaintiffs' action so that it may fall within a broader statute of limitations. Additionally, plaintiffs may not now assert that they meant to allege fraud when they could have done so in their second amended complaint and simply did not avail themselves of that opportunity. Moreover, plaintiffs did not show that Jensen's legal strategy in the underlying case met the elements of fraud. See *Baker, supra*, 215 Mich App at 208-209; *Brownell, supra*, 199 Mich App at 533. Plaintiffs have not asserted sufficient support for their claim that defendant committed fraud so as to circumvent the statute of limitations.

Affirmed.

/s/ Maura D. Corrigan
/s/ Joseph B. Sullivan
/s/ Timothy G. Hicks

[1] MCL 600.5838(2); MSA 27A.5838(2) provides: "Except as otherwise provided . . . an action involving a claim based on malpractice may be commenced at any time within the applicable period prescribed . . . or within 6 months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later. The burden of proving that the plaintiff neither discovered nor should have discovered the existence of the claim at least 6 months before the expiration of the period otherwise applicable to the claim shall be on the plaintiff. A malpractice action which is not commenced within the time prescribed by this subsection is barred."