STATE OF MICHIGAN

COURT OF APPEALS

ESTATE OF JON W. H. CLARK, by ANITA G. MCINTYRE, Conservator,

Plaintiff-Appellant,

v

WALTER SAKOWSKI,

Defendant-Appellee,

and

LANCE FERTIG, DAVID FROST, PAUL STEINBERG, GOLDSTEIN BERSHAD & FRIED, P.C., and JOHN DOE BONDING COMPANY,

Defendants.

UNPUBLISHED
October 13, 2000

No. 210508
Wayne Circuit Court
LC No. 96-646164 NM

Before: Bandstra, C.J., and Hood and Gage, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting summary disposition of his legal malpractice and breach of fiduciary duty claims pursuant to MCR 2.116(C)(10). We affirm in part, reverse in part, and remand for further proceedings.

Plaintiff's action sought damages arising out of the actions of defendant, an attorney, while acting as plaintiff's guardian, conservator and social security representative payee after the Wayne Probate Court declared plaintiff legally incapacitated. The trial court ruled that plaintiff's claims were time barred and that, because plaintiff invoked the doctor-patient privilege to preclude discovery concerning his mental condition, the insanity period of limitations, MCL 600.5851; MSA 27A.5851, was inapplicable.

We first consider plaintiff's contention that the trial court erred in ruling that plaintiff untimely filed the instant action. We review de novo an order granting or denying summary disposition. The

applicability of a period of limitations constitutes a question of law that we also review de novo. *Solowy v Oakwood Hosp Corp*, 454 Mich 214, 230; 561 NW2d 843 (1997). A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the available pleadings and documentary evidence, viewed in the light most favorable to the plaintiff, reveal no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455; 597 NW2d 28 (1999).

Plaintiff's first amended complaint contained two claims against defendant, (1) legal malpractice and (2) wrongful actions regarding plaintiff's social security benefits, which the parties refer to as a breach of fiduciary duty. The trial court's grant of summary disposition disposed of both counts of plaintiff's complaint.

Legal malpractice actions are governed by a two-year period of limitations. MCL 600.5805(4); MSA 27A.5805(4). Pursuant to MCL 600.5838(1); MSA 27A.5838(1), a legal malpractice claim accrues at the time the defendant "discontinues serving the plaintiff in a professional or pseudoprofessional capacity." Defendant's professional responsibilities ended on May 16, 1994, when he was removed as plaintiff's conservator.[1] *Hooper v Hill Lewis*, 191 Mich App 312, 315; 477 NW2d 114 (1991) (noting that for purposes of the period of limitations, an attorney discontinues serving the client when either the client or a court relieves the attorney of the obligation, and rejecting plaintiff's contention that discharge required a court order). Because defendant ceased to represent plaintiff after May 1994, plaintiff's cause of action for legal malpractice accrued by May 1994. Therefore, unless the period of limitations was extended or tolled, plaintiff's November 8, 1996 filing of the complaint occurred beyond the two-year period of limitations.[2]

If a party is disabled by insanity when his claim accrues, the period of limitations extends for one year "after the disability is removed . . . to make entry or bring the action although the period of limitations has run." MCL 600.5851(1); MSA 27A.5851(1). Plaintiff contends that because the probate court had declared him a legally incapacitated person when the instant claims accrued, he must be considered "insane" for the purpose of receiving the extended period of limitations.[3] A probate court's finding of legal incapacity for the purposes of appointing a guardian or conservator, however, does not dispositively qualify a person as "insane" under MCL 600.5851(2); MSA 27A.5851(2). See also *Professional Rehabilitation Associates v State Farm Mutual Auto Ins Co*, 228 Mich App 167, 176; 577 NW2d 909 (1998). Subsection 5851(2) explicitly declares that an individual's insanity "is not dependent on whether or not the person has been judicially declared to be insane," and this Court

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[1] Although defendant was not officially discharged as plaintiff's guardian until 1997, the successor conservator to defendant acknowledged her appointment in August 1994.

[2] We note that plaintiff does not argue he only discovered his cause of action within six months of the filing date. See MCL 600.5838(2); MSA 27A.5838(2).

[3] Plaintiff argues that because defendant did not raise plaintiff's competency as an affirmative defense, it cannot constitute the basis of summary disposition. We clarify that defendant's affirmative defenses raised the period of limitations defense to plaintiff's action, and the trial court dismissed plaintiff's claims on this basis.

has observed that "the definition of insanity in [MCL 600.5851(2); MSA 27A.5851(2)] is somewhat different from the definition of insanity which is applied under the probate code." *Geisland v Csutoras*, 78 Mich App 624, 628; 261 NW2d 537 (1977). Because the probate court's ruling was not determinative of plaintiff's alleged insanity under subsection 5851(2), to establish his insanity plaintiff to needed to produce further evidence that he could not "comprehend[] rights he . . . [wa]s otherwise bound to know." *Id*.

Plaintiff sought and received from the trial court, however, a protective order precluding any discovery concerning his mental condition. As a consequence of receiving this protection, plaintiff cannot "present or introduce any physical, documentary, or testimonial evidence relating to the party's medical history or mental or physical condition." MCR 2.314(B). Because plaintiff cannot meet his burden to establish some genuine issue of fact regarding his alleged insanity beyond the mere fact that a probate court declared him a legally incapacitated person, which in itself is insufficient to establish the insanity contemplated by subsection 5851(2), we conclude that the trial court properly granted defendant summary disposition of plaintiff's time barred legal malpractice claim pursuant to MCR 2.116(C)(10).[4] *Warren Consolidated Schools v W R Grace & Co*, 205 Mich App 580, 583; 518 NW2d 508 (1994); *Geisland, supra*.

With respect to plaintiff's claim that defendant mishandled plaintiff's social security benefit payments, Michigan treats breach of fiduciary duty as a common law tort governed by a three-year period of limitations. MCL 600.5805(8); MSA 27A.5805(8); *Miller v Magline, Inc*, 76 Mich App 284, 313; 256 NW2d 761 (1977). "[A] plaintiff's cause of action for a tortious injury accrues when all the elements of the cause of action, including the element of damage, have occurred and can be alleged in a proper complaint." *Travelers Ins Co v Guardian Alarm Co of Michigan*, 231 Mich App 473, 479; 586 NW2d 760 (1998).

As plaintiff's conservator, defendant was plaintiff's fiduciary. MCL 700.1104(e); MSA 27.11104(e). Plaintiff's breach of fiduciary count of his amended complaint alleged defendant's misuse of plaintiff's social security disability benefits.[5] Plaintiff's amended complaint and a December 1993 letter from plaintiff to defendant indicate plaintiff's awareness that from January through December 1993, defendant allegedly mismanaged plaintiff's monthly social security benefit payments by refusing plaintiff's repeated requests for funds to meet his basic needs. Plaintiff filed this action on November 8, 1996. In light of the applicable three-year period of limitations,[6] any alleged breaches by defendant that occurred before November 8, 1993 fall outside the period of limitations and therefore cannot be raised

[4] We note that the trial court erroneously opined that appointments of conservators and guardians for plaintiff after defendant's removal essentially rendered inapplicable MCL 600.5851; MSA 27A.5851. The appointment of a guardian for a legally incapacitated person does not constitute a removal of a disability that begins the running of the period of limitations. *Professional Rehabilitation, supra*.

[5] From January 1993 until May 1994, defendant acted as plaintiff's social security representative payee.

[6] Pursuant to the above analysis, MCL 600.5851(1); MSA 27A.5851(1) period of limitations for insane persons does not apply in this case.

by plaintiff.[7] We conclude, however, that to the extent the trial court's grant of summary disposition encompassed alleged breaches of fiduciary duty occurring after November 8, 1993, the trial court erred.

Plaintiff also argues that the trial court abused its discretion in denying his motion to strike defendant's answer to the amended complaint. A plaintiff may seek to strike an answer not in conformity with the court rules. MCR 2.115(B).[8] We review for an abuse of discretion a trial court's decision on a motion to strike a pleading pursuant to MCR 2.115. *Jordan v Jarvis*, 200 Mich App 445, 452; 505 NW2d 279 (1993). An abuse of discretion occurs when a result is so "palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias." *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 227; 600 NW2d 638 (1999).

In his answer to plaintiff's first amended complaint, defendant responded to thirty-six of the complaint's fifty numbered paragraphs with a single word, "Proofs,"[9] and answered seven of the paragraphs with the word "Deny." These answers do not meet the requirements of the court rules. See MCR 2.111(D) ("Each denial must state the substance of the matters on which the pleader will rely to support the denial."); *Dacon v Transue*, 441 Mich 315, 328; 490 NW2d 369 (1992) ("[G]eneral, conclusory allegations . . . do not provide reasonable notice."); *Stanke v State Farm Mut Automobile Ins Co*, 200 Mich App 307, 316; 503 NW2d 758 (1993) ("[T]he court rules envision more than a simple denial.").

We observe, however, that plaintiff failed to file his motion to strike until more than ten months had passed since the filing of his initial complaint.[10] The motion to strike occurred approximately eight months after defendant filed his original answer, and more than three months after defendant filed the answer to plaintiff's amended complaint. While defendant similarly submitted monosyllabic answers to plaintiff's initial complaint, plaintiff never protested the form of defendant's responses. The record contains an August 21, 1997 letter from plaintiff to defendant stating that "[y]our answer [to the amended complaint] does not conform to the Michigan Court Rules," and inquiring "if you will be filing an Amended Answer," but plaintiff did not prior to moving to strike defendant's answer move for a

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[7] Whether we consider defendant's refusals throughout 1993 to pay plaintiff any benefits as separate and distinct monthly breaches of defendant's fiduciary duty or as a continuing wrongful act, plaintiff may only timely raise any alleged breaches that occurred after November 8, 1993, within three years of plaintiff's initial complaint filing. See *Horvath v Delida*, 213 Mich App 620, 626-627; 540 NW2d 760 (1995) (While a continuing wrong, which consists of continual tortious acts, may prevent running of the period of limitations until the wrong is abated, "the damages recoverable are limited to those occurring within the applicable limitation period.").

[8] According to 1 Dean & Longhofer, Michigan Court Rules Practice, p 347, a motion to strike under MCR 2.115(B) should be allowed at any reasonable time.

[9] Prior to his repeated, simple restatements of "proofs," defendant explained in one paragraph of his answer that he left plaintiff "to their [sic] proofs on the balance of the allegations."

[10] At the time of plaintiff's motion to strike in this case, there was no scheduled trial date.

more definite statement seeking clarification of the answer. MCR 2.115(A). Moreover, plaintiff did not explain the manner in which the form of defendant's answer prejudiced him. In light of plaintiff's repeated references in his motion to strike to his inability to successfully conduct depositions of defendant and others, it appears that plaintiff filed the motion to strike defendant's answer in frustration regarding his failure to obtain requested discovery.[11] Plaintiff's motion to strike asserted prejudice in preparing for trial arising from his inability to conduct desired depositions. Given plaintiff's delay in filing the motion to strike,[12] we cannot conclude that the trial court abused its discretion in refusing to strike defendant's answer. While we recognize that defendant's vague, defective answer provides plaintiff little guidance with respect to defendant's theories and trial strategy and that the ruling regarding plaintiff's motion to strike represents a close call, we are unable to characterize the trial court's ruling as "so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias." *Alken-Ziegler*, *supra*.

We affirm the trial court's grant of summary disposition regarding plaintiff's legal malpractice claim, the trial court's grant of summary disposition regarding defendant's alleged breaches of fiduciary duty occurring before November 8, 1993, and the trial court's denial of plaintiff's motion to strike defendant's answer. We reverse the trial court's grant of summary disposition regarding plaintiff's breach of fiduciary duty claim to the extent that it encompassed defendant's alleged breaches occurring after November 8, 1993, and we remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ Harold Hood
/s/ Hilda R. Gage

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[11] When plaintiff filed his motion to strike, discovery apparently was closed but for outstanding, unsatisfied discovery requests, and the mediation date had passed. MCR 2.313(B)(2)(c) and (D)(1)(a) contemplate the striking of a pleading for a party's failure to attend a scheduled deposition. These subrules provide, however, that the party failing to appear must have disobeyed a court order demanding discovery. MCR 2.313(B)(2). No court order in this case demanded that defendant provide discovery.

[12] The trial court's questioning of the timeliness of plaintiff's motion to strike is reflected in the court's following inquiry at the motion hearing: "This case is almost a year old, and this is the first objection to the answer made on this case?"