STATE OF MICHIGAN

COURT OF APPEALS

GREGORY J. REED,

Plaintiff-Appellant,

v

KENNETH M. DAVIES, KENNETH M. DAVIES, P.C., GARY A. BENJAMIN, and LAW OFFICES OF GARY A. BENJAMIN, P.C.,

Defendants-Appellees.

UNPUBLISHED
March 11, 2004

No. 242709
Wayne Circuit Court
LC No. 02-208797-NM

Before: Hoekstra, P.J., and Sawyer and Gage, JJ.

PER CURIAM.

Plaintiff appeals as of right an order of the trial court granting defendants' motion for summary disposition, dismissing his claim for legal malpractice, and granting sanctions in favor of defendants. We affirm.

The instant case arises out of plaintiff's May 1992 retention of defendant Davies to represent him in a condemnation action. When Davies took an extended vacation from fall 1993 to January 1994, he enlisted defendant Benjamin to represent plaintiff in his stead. In December 1993, the trial court entered default against plaintiff because of his repeated failure to attend scheduled depositions; as a result, the trial court decided the remaining issues in a nonjury hearing. Benjamin stopped representing plaintiff as of January 1994, and Davies stopped representing defendant as of August 1995.

In December 1997, Davies sued plaintiff to recover payment for legal services rendered in the condemnation action. In February 1998, plaintiff counter-claimed against Davies for professional negligence based on Davies' alleged failure to perform legal services provided under the terms of their May 1992 contract. Benjamin was not a party to the underlying claim or the counter-claim. In May 1998, plaintiff and Davies signed a settlement agreement which acknowledged the existence of an attorney lien for any fees on the proceeds received by plaintiff from the condemnation action. Additionally, the parties agreed that upon resolution of the condemnation claim, they were to decide by mutual agreement the amount of Davies' total attorney fees, and that any unresolved dispute between claimed attorney fees in the matter was to be ultimately decided by the trial court. In June 1998, plaintiff and Davies stipulated to dismiss "without prejudice and without costs, all of the claims, counter-claims, and third-party claims of the parties, reserving to each their respective rights and defenses available to the parties on all of

the claims, counter-claims, and third-party claims as of December 30, 1997, the date of filing of the original Complaint in this matter."

The condemnation case was eventually resolved by consent judgment in March 2001. Because the parties could not agree on the amount of attorney fees due Davis, an evidentiary hearing was held in November 2001 pursuant to the settlement agreement. Davies testified that a $600,000 settlement offer was made to resolve plaintiff's claims in the condemnation action. Plaintiff now claims that Davies never communicated such an offer, and that the first time he learned of such an offer was at the November 2001 evidentiary hearing. Plaintiff also now claims that Davies presented him with a "fraudulent" billing statement at the hearing.

In March 2002, plaintiff filed the instant legal malpractice claim against defendants Davies and Benjamin. The trial court granted defendants' motion for summary disposition pursuant to MCR 2.116(C)(7) and dismissed plaintiff's claim on the basis that the statute of limitations had expired. The trial court also imposed sanctions against plaintiff pursuant to MCR 2.114(E), on the basis that plaintiff did not conduct a reasonable inquiry into the validity of his claims. The trial court stated:

> I'm going to grant dismissal in this case . . . This matter incredibly began on April 29th, 1991, no doubt a date Avery Williams would like to have avoided, when the City of Detroit filed an action against [plaintiff] and others to condemn property . . . and the matter indeed was not resolved under January 2001 when this matter was settled.
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> In 1997 [defendant Benjamin] filed a suit to recover his – for fees expanded – to recover fees for time expended in this – in the '91 case in a case styled [defendant] Davies against [plaintiff] Reed . . .
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> That case produced a counterclaim filed by counsel for [plaintiff] against [defendant] Davies asserting malpractice in the 1991 case. It was asserted as a defense and asserted as a counter complaint seeking money damages for the failure to represent [plaintiff] appropriately. And as counsel has pointed out the case was resolved by a stipulation which resulted in an order of dismissal. The matter was dismissed without prejudice and pursuant to the stipulation of the parties. And the stipulation claim incorporated both the claim and the counterclaim and it read in full . . . now come the parties through their respective counsel and do hereby stipulate and agree to dismiss without prejudice and without cost all of the claims, counterclaims and third party claims of the parties, reserving to each their respective rights and defenses available to the parties on all of the claims, counterclaims and third party claims as of December 30, 1997, the date of filing of the original complaint in this matter. There is no waiver of defenses. And all if says is that if the suit is brought again nothing – the suit counts for nothing. But it's certainly not this Court's ruling that this adjudication should take place as of December 30, 1997. We still adjudicate this case as of 2002 and hear any defenses available to the parties.

The defense asserted is in this current case which was filed March 14, 2002, that the Statute of Limitations has run in the case because of the age of the lapse of representation . . . by [defendant] Davies of [plaintiff], and the Court fully agrees.

First of all, while the case is dismissed, I'm going to take . . . Plaintiff's . . . representation made in the . . . 1997 case as binding. He says, and I may grant him a few days leeway, that . . . the Defendant Davies represented Plaintiff Reed until August 2nd, 1995. I think there was an omitted digit and it was probably August 24th. But – or August 25, excuse me, 1995 . But whichever date it is, the two-year Statute of Limitations would have run by August 25, 1997. And in that respect the Defendant Davies cannot be sued because the claim is time barred.

There are two arguments with respect to Davies that counsel has asserted here. [Plaintiff's counsel] has argued that because [defendant] Davies has billed [plaintiff] Reed for time spent in collecting his bill and pursuing his – the collection issue that is now before the Court, that somehow it renews the representation. Nothing could be further from the truth. If anything, the fact that the fee dispute is now hotly ongoing, means that the parties are more adverse than they've ever been. And I don't think [plaintiff] could believe in any flight of fancy that [defendant] Davies by pressing a claim for fees against him is acting as [plaintiff's] lawyer in that respect, and that claim is rejected out of hand.

Secondly, as we've discussed substantially on this record, the other claim against [defendant] Davies – the claim that the Statute of Limitations does not bar [plaintiff's] claim is based on the idea of newly discovered evidence.

And [defendant] Davies' surprise as expressed in the transcript . . . that that testimony of recent discovery of [defendant] Benjamin's role in the case provides a basis both to proceed against [defendant] Davies and to proceed against [defendant] Benjamin.

As the Court has pointed out when a lawyer makes a claim for legal malpractice against another lawyer for conduct arising out of the case, this Court finds as a matter of law that there's a duty to examine the case file. And that Rule 2.114 of the Michigan Court Rules is not satisfied unless that is done.

Since the statute 600.5838(2) requires that a Plaintiff in these circumstances bears the burden of showing that he either discovered or should have discovered the existence of the claim, this Court finds that [plaintiff] through counsel should have done so when – in preparation for the assertion of malpractice in the 1997 case. The failure to do that is fatal to the cause of action here.

The Plaintiff by merely examining the files that were available to anybody in this case would have discovered . . . [defendant] Benjamin's role which completely exonerates him and in this Court's view also would put him on reasonable inquiry notice about why [defendant] Benjamin was representing [plaintiff] suddenly and without arguably notice to [plaintiff], and he would have been able to make

> inquiry to make that determination at the point at which he filed the 1998 counter complaint.
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> The Court is also very troubled by the timing of this claim, I need to state I think there may be a reason, [plaintiff's counsel], why you have been brought in as a newcomer to this case when Mr. Shakoor represents [plaintiff] in the fee dispute and represented [plaintiff] during the 1997 case. You're brought in as the innocent. When Mr. Shakoor might have been more reluctant to raise this in light of his recollection of what happened in the prior suit, and I'm troubled by that.
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> I am troubled by the timing of this separate lawsuit filed independently, sent to another court by the failure to follow the certification rule, rather than having this matter brought here. And I truly wonder whether this was to follow 2.114(D)(3), interposed for an improper purpose such as to harass or cause unnecessary delay or endless increase in the cost of litigation.
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> The proliferation of separate charges, separate Defendants in the acquisition case, fractionation of claims has caused nothing but confusion for a decade. And I sense that that pattern occurs here in the filing of this belated malpractice case, not only against [defendant] Davies but against [defendant] Davies' lawyer in the collection issue when we needed to get to a result in the fee issue.
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> This appeal ensued.

On appeal, plaintiff challenges the trial court's granting of defendants' motion for summary disposition under MCR 2.116(C)(7). This Court reviews a trial court's decision on a motion for summary disposition pursuant to MCR 2.116(C)(7) de novo. *DiPonio Construction Co, Inc v Rosati Masonry Co, Inc*, 246 Mich App 43, 46-47; 631 NW2d 59 (2001). Additionally, whether plaintiff's claim is statutorily time-barred is a question of law for this Court to decide de novo. *Id*. at 47. When reviewing a trial court's decision granting a motion for summary disposition under MCR 2.116(C)(7), this Court must consider all documentary evidence submitted by the parties and accept the nonmoving party's well-pleaded allegations, except those contradicted by documentary evidence, as true, and construe those allegations in favor of the nonmoving party. *Id.* at 46, n 2.

Plaintiff first argues that his legal malpractice claim was filed within the two year statute of limitations as required by MCL 600.5805(5). We disagree. Generally, "a legal malpractice claim must be brought within two years of the date the attorney discontinues serving the client, or within six months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later." MCL 600.5805(5); MCL 600.5838; *Maddox v Burlingame*, 205 Mich App 446, 450; 517 NW2d 816 (1994). "A lawyer discontinues serving a client when relieved of the obligation by the client or the court, or upon completion of a specific legal service that the lawyer was retained to perform." *Id*.

Plaintiff maintains that his claim did not accrue against Benjamin until October or November 2001, when Benjamin allegedly breached his duty to plaintiff by representing Davies at the evidentiary hearing on attorney fees, thereby creating a conflict of interest. Plaintiff's claim is wholly without merit, because the record reveals that Benjamin discontinued

representing plaintiff in January 1994. Any claim of legal malpractice against Benjamin expired in January 1996, and the instant claim was not filed until March 2002.

Plaintiff next argues that his claim did not accrue against Davies until November 2001, when Davies submitted a billing statement reflecting fees incurred for "representing" him in October and November 2001. Again, plaintiff's claim is wholly without merit. The record reveals that such fees were related to Davies' collection efforts on the underlying condemnation action, and can in no way be construed as fees for representing plaintiff. Davies discontinued representing plaintiff in August 1995. Any claim of legal malpractice against Davies expired in August 1997, and the instant claim was not filed until March 2002. Accordingly, plaintiff's claim was timely filed only if he filed his complaint within the six-month discovery period allowed by MCL 600.5838(2).

Next, plaintiff asserts that his discovery of Davies' failure to inform him of a $600,000 settlement offer constituted newly discovered evidence, and therefore his claim for legal malpractice was not barred by the statute of limitations. We disagree. The discovery rule set out in MCL 600.5853(2) allows commencement of an action within six months after a plaintiff discovers or should have discovered the existence of a claim. But in *Moll v Abbott Laboratories*, 444 Mich 1, 23-24; 506 NW2d 816 (1993), our Supreme Court held that "the standard under the discovery rule is not that the plaintiff knows of a 'likely' cause of action. Instead, a plaintiff need only discover that he has a 'possible' cause of action." *Gebhardt v O'Rourke*, 444 Mich 535, 544; 510 NW2d 900 (1994). In the instant case, plaintiff argues that he was not aware of his possible cause of action in legal malpractice against Davies until the evidentiary hearing in November 2001, where Davies testified that he received a $600,000 settlement offer in the condemnation action. However, it is evident that plaintiff was aware that he had a possible cause of action against Davies in February 1998, when he filed the counter-complaint alleging the elements of a legal malpractice claim. Discovery of plaintiff's cause of action occurred no later than February 1998, some four years before he filed the instant claim. Therefore, his claim is barred by the six-month discovery provision.

This Court has held that "the discovery rule does not act to hold a matter in abeyance indefinitely while a plaintiff seeks professional assistance to determine the existence of a claim." *Turner v Mercy Hospitals & Health Services of Detroit*, 210 Mich App 345, 353; 533 NW2d 365 (1995). "A plaintiff must act diligently to discover a possible cause of action and 'cannot simply sit back and wait for others' to inform [him] of its existence." *Id*., quoting *Grimm v Ford Motor Co*, 157 Mich App 633, 639; 403 NW2d 482 (1986). Further, MCL 600.5838(2) places the burden of proof on plaintiff to show that he neither discovered nor should have discovered the claim more than six months before he filed suit. Plaintiff has failed to meet that burden. Davies testified that he informed plaintiff of the offer, plaintiff contends that he did not. Plaintiff, however, has failed to provide the appropriate argument to support his claim that he was unaware of the settlement offer and he has failed to support his argument with evidence beyond the assertion made in his affidavit. Moreover, plaintiff has failed to establish that he could not have discovered this particular allegation earlier in this string of litigation. We cannot and will not search for argumentative support for a party's claim, especially when the burden of proof is on that party. We are not persuaded by plaintiff's argument that he was not aware of the $600,000 settlement offer until November 2001. Because we do not believe that any factual development as to the existence of plaintiff's knowledge of the settlement offer could provide a basis for

recovery, we believe the trial court properly granted summary disposition in favor of defendant, on the basis that plaintiff's malpractice action was barred by the six-month discovery provision of MCL 600.5838(2). *Jackson Co Hog Producers v Consumers Power Co*, 234 Mich App 72, 77; 592 NW2d 112 (1999).

Plaintiff further argues that defendants fraudulently concealed their negligence from him by Davies concealing that he "abandoned" plaintiff's case for three and a half months while he took an extended vacation; Davies and Benjamin concealing that Davies enlisted Benjamin to represent plaintiff while he was away, where Benjamin did not have adequate knowledge or experience to represent plaintiff in the condemnation action; Davies breaching his duty to disclose a $600,000 settlement offer made to plaintiff in the condemnation action; and Davies submitting a "fraudulent" billing statement in November 2001. We disagree.

MCL 600.5855 provides that the statute of limitations is tolled when a party conceals the fact that the plaintiff has a cause of action. *Phinney v Perlmutter*, 222 Mich App 513, 562-563; 564 NW2d 532 (1997); *Sills v Oakland General Hospital*, 220 Mich App 303, 310; 559 NW2d 348 (1996). "The plaintiff must plead in the complaint the acts or misrepresentations that comprised the fraudulent concealment." *Id*. "The fraud must be manifested by an affirmative act or misrepresentation," unless the defendant owed an affirmative duty to disclose information because of a fiduciary relationship with the plaintiff. *Brownell v Garber*, 199 Mich App 519, 524; 503 NW2d 81 (1993). Further, plaintiff has the burden of establishing defendant's fraud. *Id*. at 531.

Plaintiff fails to support his allegations of fraudulent concealment with any authority. It is well settled that "a party may not leave it to this Court to search for authority to sustain or reject its position." *In re Keifer*, 159 Mich App 288, 294; 406 NW2d 217 (1987). Moreover, "a bald assertion without supporting authority precludes appellate examination of the issue." *Impullitti v Impullitti*, 163 Mich App 507, 512; 415 NW2d 261 (1987). We believe that plaintiff failed to plead his claim of fraudulent concealment with sufficient specificity, and his allegations are wholly unsubstantiated. Although plaintiff alleges that Davies and Benjamin concealed the fact that Benjamin acted as counsel for plaintiff in Davies' stead, we agree with the trial court's reasoning that such information was readily available to plaintiff. Concerning Davies' alleged failure to convey a $600,000 settlement offer in the condemnation claim, we reiterate that plaintiff has set forth no evidence in support of such claim. Finally, plaintiff has not demonstrated that any new evidence was discovered when Davies provided him with the supplement billing statement. Plaintiff's argument that the statute of limitations should be tolled pursuant to MCL 600.5855 is without merit, and the trial court properly granted defendants' motion for summary disposition pursuant to MCR 2.116(C)(7) on this basis.

Plaintiff next argues that the trial court erred in awarding defendant sanctions, pursuant to MCR 2.114. We review a trial court's decision regarding the imposition of sanctions under MCR 2.114(E) for clear error. *Schadewald v Brule*, 225 Mich App 26, 41; 570 NW2d 788 (1997). The trial court's decision is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made. *Id*.

MCR 2.114(E) mandates sanctions against a party or an attorney who signed a pleading knowing that it is devoid of legal merit or that it is intended for an improper purpose, such as to

harass the opposing party. MCR 2.114(D), MCR 2.114(E). In the instant case, the trial court explained that it was imposing sanctions on plaintiff because it was evident that the statute of limitations had expired, and because it appeared the claim was brought in order to harass defendants. Plaintiff argues that the trial court's decision was clearly erroneous because "there was no way [he] could have learned about the settlement offer prior to Davies' November 2001 testimony because it was not a part of the court records or files and Davies failed to communicate it to him. Nor could [he] have asserted a claim against Davies for his fraudulent bill prior to receiving it on November 6, 2001." However, plaintiff has failed to cite any authority in support of his position. A party may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998), nor may he give issues cursory treatment with little or no citation of supporting authority. *Houghton v Keller*, 256 Mich App 336, 339; 662 NW2d 854 (2003). The trial court's determination that plaintiff's claim was devoid of legal merit is not clearly erroneous, and we affirm the award of sanctions.

Affirmed.

/s/ Joel P. Hoekstra
/s/ David H. Sawyer
/s/ Hilda R. Gage