

STATE OF MICHIGAN
COURT OF APPEALS

JAMES AZZAR,

Plaintiff-Appellant,

v

PETER R. TOLLEY and TOLLEY
VANDENBOSCH KOROLEWICZ & BRENGLE,
P.C.,

Defendants-Appellees.

UNPUBLISHED
November 2, 2004

No. 249879
Kent Circuit Court
LC No. 01-008069-CH

Before: Sawyer, P.J., and Smolenski and Schuette, JJ.

PER CURIAM.

Plaintiff appeals as of right from a circuit court order granting a motion for summary disposition in favor of defendants. We reverse and remand for further proceedings before the trial court.

The basic issue in this appeal is whether the statute of limitations had run on plaintiff's legal malpractice claim against defendants, when plaintiff filed his complaint on May 12, 2001. More specifically, the issue is whether the statute of limitations was tolled when plaintiff's loan transaction with defendant Peter Tolley ended on January 29, 1997, or when plaintiff terminated his attorney-client relationship with Tolley on July 20, 1999.

According to plaintiff's complaint, from June 1993 through July 1999, plaintiff employed defendant Peter Tolley, a licensed attorney and shareholder of defendant law firm, and defendant law firm, as general legal counsel for plaintiff's companies. Additionally, in his deposition, defendant Tolley acknowledged that he first began performing legal services for plaintiff around 1975. Tolley further testified that prior to becoming plaintiff's attorney, plaintiff and Tolley had been personal friends. Commencing in June 1993 and ending in June 1999, Tolley served as general counsel for plaintiff's various companies. Tolley explained that while he was retained as general counsel for plaintiff's entities, plaintiff continued to employ defendant law firm for work that Tolley was unable to do. Tolley testified that in addition to performing legal services for plaintiff's companies, he performed many non-legal tasks for plaintiff, such as providing employment and human-resource advice.

In July 1994, Tolley expressed to plaintiff his interest in purchasing a parcel of land for development purposes. Following discussion between plaintiff and Tolley, plaintiff allegedly

agreed to loan Tolley \$98,000 for the land acquisition in return for Tolley's agreement to develop 145 acres of the land for profit. After developing the property and earning a profit, defendant Tolley allegedly agreed to repay plaintiff in full and split any remaining profits. Plaintiff also alleges that he agreed to advance the funds to Tolley "based entirely upon Plaintiff's absolute faith in Tolley [as his lawyer and legal advisor] and Plaintiff's complete reliance upon Tolley's representation that the Real Estate would be collateral for the repayment of the Advanced Funds."

Beginning July 6, 1994 and ending March 28, 1995, plaintiff made three cash advancements to Tolley totaling \$98,000. On July 22, 1994, defendant and defendant's wife, Cheryl Tolley, entered into a land contract with CBF Investment Company. On July 24, 1996, using money advanced by plaintiff along with a commercial loan obtained from a local bank, defendant and Cheryl Tolley purchased the property from CBF for \$312,500, as tenants by the entirety.

On October 2, 1996 defendant Tolley paid plaintiff \$10,622.91 and on January 27, 1997, Tolley paid plaintiff \$1,000 on the cash advance. However, on January 29, 1997, pursuant to a divorce decree between Tolley and his wife, defendant Tolley conveyed all of his interest in the land to Cheryl Tolley by quitclaim deed. Following the conveyance of the real estate from defendant to Cheryl Tolley, plaintiff learned that "the Real Estate is not collateral for the repayment of the Advanced Funds." Furthermore, plaintiff asserts "Tolley has refused to repay Plaintiff the balance of the Advanced Funds [\$86,377.09], and has stated that he is unable and/or unwilling to make further payments to Plaintiff."

The complaint alleged claims against defendant Tolley for breach of contract, promissory estoppel, and unjust enrichment. Plaintiff's complaint alleged Tolley and defendant law firm committed legal malpractice by failing to secure the repayment of plaintiff's loan. In support of his malpractice claim, plaintiff argued that because defendants never limited the scope of their legal representation, defendants owed several legal duties to plaintiff regarding plaintiff's cash advance for the real estate transaction.

In response, defendants argued that the two-year limitations period commenced in 1994 and 1995 when the cash advancement took place. Furthermore, defendants argued that plaintiff should have discovered the malpractice claim no later than six months after June 29, 1997, when defendant Tolley conveyed his property interest to Cheryl Tolley.

At a hearing on the motions for summary disposition, the court opined:

Now we do have a situation here in which Mr. Tolley was general counsel, but this transaction is not something that he's doing in the general course of his representing Mr. Azzar and his various companies on their business. What you've got here is something unique. . . .

I think under the circumstances, that I have to conclude that more than two years had expired since anything having to do with this transaction had occurred. That when one considers that . . . the only evidence I've got in front of me is that Mr. Azzar knew . . . that the land was being conveyed, that he received the last

payment on it a couple of days earlier, that this suit wasn't filed for 52 months. . .
[T]he statute has run on this claim for malpractice. . . .

This Court reviews de novo a lower court's grant of a motion for summary disposition. *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). Furthermore, the determination of whether a cause of action is barred by the statute of limitations is a question of law and will be reviewed de novo. *Colbert v Conybeare Law Office*, 239 Mich App 608, 613-614; 609 NW2d 208 (2000).

Plaintiff argues that the circuit court erred in concluding that plaintiff's legal malpractice claim was barred by the two-year statute of limitations because it incorrectly based its decision on the assumption that plaintiff knew or should have known of the cause of action in 1997, when defendant Tolley conveyed the land to Cheryl Tolley.¹ However, plaintiff relies on MCL 600.5838(1), which provides:

A claim based on the malpractice of a person who is, or holds himself out to be, a member of a state licensed profession accrues at the time that person discontinues treating or otherwise serving the plaintiff in a professional or pseudoprofessional capacity as to the matters out of which the claim for malpractice arose.

Plaintiff also argues that pursuant to the last treatment rule, the statute of limitations for the legal malpractice claim did not accrue until July of 1999 when defendants were discharged by plaintiff. We agree.

The common law last treatment rule originated in the case of *De Haan v Winter*, 258 Mich 293, 296-297; 241 NW 923 (1932), in which the Michigan Supreme Court concluded that a medical malpractice claim does not commence until treatment for a specific injury is completed. *Levy v Martin*, 463 Mich 478, 483; 620 NW2d 292 (2001), citing *De Haan, supra*. Following the Supreme Court's decision in *De Haan*, the Legislature enacted MCL 600.5838, which expanded the common law last treatment rule to provide that a malpractice claim "accrues at the time that person discontinues serving the plaintiff in a professional . . . capacity as to the matters out of which the claim for malpractice arose, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim" *Levy, supra* at 483. This Court has further provided that legal counsel discontinues serving a plaintiff in a professional capacity when counsel is relieved of his legal obligation by either the client or the court, or upon completion of a specific legal service which counsel was retained to perform. *Balcom v Zambon*, 254 Mich App 470, 484; 658 NW2d 156 (2002), quoting *Maddox v Burlingame*, 205 Mich App 446, 450; 517 NW2d 816 (1994); MCL 600.5805(5).

The last treatment rule has been expanded to apply to routine, periodic professional services unless there is an occurrence between services that terminates the trust of the original

¹ The trial court granted summary disposition in favor of plaintiff on the breach of contract claim and in favor of defendants on the other claims. Only the ruling on the malpractice claim is at issue in this appeal.

relationship. *Levy, supra*, at 483, 485-486. In *Levy*, the plaintiff dentist and his professional corporation retained the defendant accountants to prepare plaintiff's annual tax returns from 1974 to 1996. *Id.* at 481. Due to the defendants' improper preparation of tax returns for 1991 and 1992, the plaintiff was audited by the IRS and was required to pay additional taxes and penalty charges. *Id.* The plaintiff filed a malpractice claim against the defendants in 1997, which was dismissed as untimely by the circuit court. *Id.* The Michigan Supreme Court reversed the decisions of both the circuit court and this Court, holding that under the last treatment rule, the plaintiff's claim did not accrue until at least 1996. *Id.* at 486. The Court explained "it is clear here that plaintiffs, rather than receiving professional advice for a specific problem, were receiving generalized tax preparation services from defendants." *Id.* at 489.

Furthermore, in *Nugent v Weed*, 183 Mich App 791, 793; 455 NW2d 409 (1990), the plaintiff hired the defendant as his attorney in 1971. In 1977, while representing the plaintiff, the defendant expanded his practice into a firm. *Id.* Based on the defendant's improper handling of the plaintiff's financial affairs, the plaintiff lost a substantial amount of money and subsequently fired the defendant as legal counsel in 1984. *Id.* In 1996, the plaintiff filed a legal malpractice claim against the defendant and the defendant's law firm. The trial court dismissed the plaintiff's claim as time-barred because the defendant had not represented the plaintiff individually since 1977. *Id.* at 794. This Court reversed the trial court's grant of summary disposition in favor of the defendants. The Court reasoned that the claim was not time-barred under Michigan law, because the defendant was "not retained to perform any specific legal service" and because "[t]he only changes that occurred during the entire course of [defendant's] representation was the legal form of his practice. . . ." *Id.* at 796. Therefore, the Court held that "since [defendant] never 'discontinued servicing' [plaintiff] until March of 1984, plaintiffs' March, 1986, lawsuit, which was timely against the professional corporation was timely against [defendant] individually." *Id.*

Similarly, a federal court, in applying Michigan case law, has held that "[w]here the parties have a longstanding relationship with respect to multiple interrelated matters, the statute of limitations generally has been held to run from the last date of service on all matters." *Ameriwood Industries Int'l Corp v Arthur Andersen & Co*, 961 F Supp 1078, 1093 (WD Mich, 1997).

We find that the limitations period for plaintiff's malpractice claim began in 1999, when plaintiff formally discharged defendants. As established in *Levy, supra* at 483, 485-486, the last treatment rule applies to routine, periodic professional services unless there is an occurrence between services, which terminates the trust of the original relationship. This case is factually similar to *Levy, supra*, and *Nugent, supra*, in that defendants provided services to plaintiff for a period of years, commencing in 1975. In addition to serving as general counsel for plaintiff's corporations from 1994 to 1999, defendant Tolley testified that he performed many non-legal tasks for plaintiff, such as providing employment and human-resource advice. Therefore, like the plaintiffs in *Levy* and *Nugent*, plaintiff did not receive legal advice from defendants for a specific legal problem; instead, plaintiff received generalized legal services from Tolley. Because there were no interruptions in defendants' service to plaintiff until 1999, we conclude that plaintiff's 2001 legal malpractice claim was timely filed under MCL 600.5838(1).

Last, we find unpersuasive defendants' argument that *Levy, supra*, and *Nugent, supra*, are not applicable to this case. Defendants distinguish those cases on the ground that they both

involved routine, periodic services of the same type and nature, while the transaction between defendant Tolley and plaintiff was a unique, solitary event. Specifically, defendants argue:

While Tolley did serve as general counsel for Azzar and his various business entities before and after the underlying business transaction took place, this role and the legal services he provided as general counsel were separate and completely distinct from the transaction, which was a one-time real estate investment occurring between close personal friends.

Although defendants attempt to distinguish the real estate transaction as a separate and unique occurrence between personal friends, defendants have failed to explain how the real estate transaction differs from defendant Tolley's representation of plaintiff as general counsel. MRPC 1.8(a) prohibits attorney-client business transactions unless the following requirements are met: (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner that can be reasonably understood by the client; (2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and (3) the client consents in writing. Moreover, the Michigan Supreme Court has held:

The layman does not see the attorney remove his counsellor's hat and don that of the insurance man, or the shrewd businessman, or the lender of money. The uninformed regard the attorney as just that especially when he is met in the same surroundings, regarding the same business transactions, and without any semblance of warning that he is anything but their counsellor. [*Kukla v Perry*, 361 Mich 311, 316; 105 NW2d 176 (1960).]

Therefore, because defendant Tolley never advised plaintiff that he was not serving as legal counsel for the real estate transaction, the attorney-client relationship remained in existence until July of 1999.

Furthermore, during his deposition, defendant Tolley admitted that from 1975 to June of 1999, he provided legal services to plaintiff and that his duties as general counsel for plaintiff's corporations included litigation supervision; supervision of files being handled by outside counsel; review of agreements; employment of outside counsel and reviewing employee issues. He also testified that he performed many non-legal tasks for plaintiff, such as providing employment or human-resource advice. The continuing legal relationship between defendant Tolley and plaintiff lends support for our finding that even if the real estate transaction arose out of a personal relationship between defendant and plaintiff, defendant Tolley was still plaintiff's general counsel, and was still owing a duty under the attorney-client relationship.

Therefore, because this case, like *Levy* and *Nugent*, involved a continuous legal relationship between defendant and plaintiff, ending in 1999, we find that plaintiff timely filed his legal malpractice claim within the limitations period.

Because the two-year statute of limitations period for plaintiff's May 2001 legal malpractice claim did not begin running until July of 1999, plaintiff's claim is not time barred. Thus, we reverse the order of the trial court granting summary disposition in favor of defendants.

Alternatively, defendant law firm argues that even if this Court finds plaintiff's malpractice claim was filed within the two-year statutory period, the trial court's grant of summary disposition in favor of defendants should be affirmed because plaintiff's legal malpractice claim is without merit due to the lack of an attorney-client relationship. We disagree.

To establish a successful claim of legal malpractice, plaintiff must plead and prove: 1) the existence of an attorney-client relationship; 2) negligence in the legal representation of plaintiff; 3) that the negligence was a proximate cause of an injury; and 4) the fact and extent of the injury alleged. *Persinger v Holst*, 248 Mich App 499, 502; 639 NW2d 594 (2001).

We find that the real estate transaction gave rise to an attorney-client relationship between defendant law firm and plaintiff. Generally, a client's employment of one member of a law firm is deemed to be employment of the firm itself. MCR 2.117(B)(3); *Mitchell v Dougherty*, 249 Mich App 668, 681; 644 NW2d 391 (2002). Here, defendant Tolley remained employed and was a shareholder of defendant law firm during his representation of plaintiff from 1993 to 1999. Furthermore, because defendant Tolley never limited the scope of his legal representation of plaintiff, a reasonable juror could conclude that the real estate transaction gave rise to an attorney-client relationship between defendant Tolley and plaintiff. Because Tolley was still acting as plaintiff's counsel on other matters, we conclude that there is no question of material fact that the real estate transaction gave rise to an attorney-client relationship between defendants and plaintiff.

Furthermore, plaintiff supports his malpractice claim with the affidavit of attorney Jeffrey J. Seward, which provides that defendant Tolley, as a member of defendant law firm, was negligent in failing to reduce, to writing, the terms of the real estate transaction and by failing to secure an interest in the property for repayment purposes, that damages claimed by plaintiff were directly caused by defendants' conduct, and that defendant Tolley's conduct constituted a violation of MRPC 1.8.

Defendant law firm incorrectly challenges plaintiff's malpractice claim by arguing that alleged violations of Michigan Rules of Professional Conduct do not give rise to a civil cause of action and that plaintiff's alleged damages were not proximately caused by any conflicts of interest between defendant Tolley and plaintiff. Although MRPC 1.0 provides that violations of the Michigan Rules of Professional Conduct do not give rise to a cause of action, this Court has found a rebuttable presumption that violations of the Code of Professional Conduct constitute actionable malpractice. *Beattie v Firmschild*, 152 Mich App 785, 791; 394 NW2d 107 (1986).

We also find that defendant has provided no factual support to discredit Seward's conclusions. Furthermore, Tolley's testimony that he failed to reduce the terms of the loan transaction to writing and that he failed to suggest plaintiff seek independent legal counsel is evidence of defendant Tolley's negligence. Because the nonmoving party is obligated to provide specific factual support in challenging a motion for summary disposition, we conclude there are no questions of material fact that the record and the Seward affidavit give rise to a claim of legal malpractice against defendants.

Reversed and remanded. We do not retain jurisdiction.

/s/ David H. Sawyer

/s/ Michael R. Smolenski

/s/ Bill Schuette