# STATE OF MICHIGAN

# COURT OF APPEALS

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ALEXANDER O. LEBEDOVYCH,

Plaintiff-Appellant,

v

CURTIS R. HADLEY, WILLINGHAM & COTE P.C., JULES HANSLOVSKY, and JULES HANSLOVSKY LAW FIRM,

Defendants-Appellees.

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UNPUBLISHED
November 22, 2005

No. 255797
Ingham Circuit Court
LC No. 03-001800-NM

Before: Kelly, P.J. and Meter and Davis, JJ.

PER CURIAM.

In this legal malpractice claim, plaintiff appeals as of right the trial court's orders granting defendants' motions for summary disposition. We affirm.

## I. Facts

Plaintiff retained Jules Hanslovsky in a zoning contest action against the city of Mason. Hanslovsky later informed plaintiff that Hanslovsky would be assisted by Curtis R. Hadley, an attorney at Willingham & Cote, P.C. On October 1, 1997, Hadley filed a ten-count complaint including two counts claiming due process violations. The city had the action removed to federal court and moved for summary judgment. On January 21, 1999, the federal court granted the city's motion on the two federal claims and remanded the remaining claims to state court. Hadley filed an appeal on May 17, 2001. On appeal, the United States Court of Appeals for the Sixth Circuit affirmed the decision. Hadley untimely filed a petition for writ of certiorari with the United States Supreme Court, and the petition was denied.

On October 11, 2001, plaintiff met with Hadley and discharged him. In a letter dated October 15, 2001, Hadley confirmed that (1) plaintiff had discharged Hadley at the meeting, (2) Willingham and Hadley would provide "reasonable assistance" to "facilitate the transfer of [plaintiff's] case to another attorney," and (3) Willingham's managing attorney had elected not to assign the case to another attorney. The letter further read that, on October 12, 2001, Hadley had obtained an oral extension of the scheduling order. On that date, Hadley also informed the court that the trial date had erroneously been set as a non-jury trial instead of a jury trial. Later correspondence from Hadley, dated November 6, 2001, read that a written copy of the amended

scheduling order and Hadley's motion to withdraw were enclosed. On November 21, 2001, the trial court granted Willingham's and Hadley's motion to withdraw.

Hanslovsky sent plaintiff correspondence dated November 24, 2001, indicating that he was willing to advise plaintiff's new counsel if the need arose and acknowledging that he no longer represented plaintiff. The trial court ordered Hanslovsky's withdrawal on March 19, 2002.

On October 14, 2003, plaintiff initiated this action by filing a complaint. Defendants filed motions for summary disposition. The trial court granted Willingham's and Hadley's summary disposition motion pursuant to MCR 2.116(C)(7) on the basis that plaintiff was barred by the two-year statutory period of limitations under MCL 600.5805(6) because plaintiff discharged these defendants on October 11, 2001, but did not file his complaint until October 14, 2003. Regarding Hanslovsky's motion, the trial court stated that it was unclear when Hanslovsky was discharged, but determined that plaintiff did not suffer an injury as required to state a claim for legal malpractice. The trial court granted Hanslovsky's motion for summary disposition citing MCR 2.116(C)(8).

## II. Analysis

Plaintiff contends that the trial court erred in granting defendants' motions for summary disposition. We disagree. We review de novo a trial court's decision on a motion for summary disposition. *Collins v Comerica Bank*, 468 Mich 628, 631; 664 NW2d 713 (2003).

### A. Nature of Claim

First, we address whether the trial court correctly considered plaintiff's claim to be one sounding in legal malpractice even though it was pleaded as a breach of contract claim. The essence of a claim is determined by reading the claim as a whole. *Aldred v O'Hara-Bruce*, 184 Mich App 488, 490; 458 NW2d 671 (1990). A claim against an attorney that alleges inadequate representation sounds in tort rather than breach of contract. *Id.*[1]

After reviewing plaintiff's complaint, we conclude that plaintiff's claim sounds in legal malpractice. Plaintiff alleged that defendants "[b]reached the contract by a recommendation and performance that [did] not conform to the contract to provide competent and timely service." This clearly alleges that defendants were negligent in the performance of their duties. Therefore, despite being couched in breach of contract terms, plaintiff's claim actually sounds in legal malpractice.

### B. Statute of Limitations

[1] The case plaintiff relies on, incidentally, stands for the same proposition. *Brownell v Barber*, 199 Mich App 519, 524-526; 503 NW2d 81 (1993).

Plaintiff contends that the trial court erred in granting Willingham's and Hadley's motion for summary disposition pursuant to MCR 2.116(C)(7) on the basis that plaintiff did not file his complaint within the applicable statutory period of limitations. We disagree.

In reviewing de novo whether a claim is barred by the statute of limitations under MCR 2.116(C)(7), we consider all the documentary evidence submitted by the parties, and accept as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict them. *Waltz v Wyse*, 469 Mich 642, 647-648; 677 NW2d 813 (2004). If there is no genuine issue of material fact and reasonable minds could not differ on the legal effect of those facts, whether the plaintiff's claim is barred is a question of law. *Baker v DEC Int'l*, 218 Mich App 248, 253; 553 NW2d 667 (1996), modified on other grounds 458 Mich 247 (1998).

The statutory period of limitations for a legal malpractice claim is two years from the date the attorney discontinues service to the plaintiff. *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. *Mitchell v Doughterty*, 249 Mich App 668, 683; 644 NW2d 391 (2002); *Hooper v Hills Lewis*, 191 Mich App 312, 315; 477 NW2d 114 (1991). Plaintiff admits that he discharged Hadley and Willingham on October 11, 2001. Yet, on appeal, he contends that they were still required to complete certain matters after that date. According to a letter from Willingham dated October 15, 2001, plaintiff requested, at the time he discharged these defendants, that they obtain an order extending scheduling deadlines and obtain a court order reflecting their withdrawal. Plaintiff argues on appeal that because these tasks were not completed as of October 11, 2001, that date cannot be considered the date of discharge. We disagree. Plaintiff verbally discharged Willingham and Hadley, but requested that they tie up a few loose ends to preserve plaintiff's ability to continue with his claim with other representation. The fact that Willingham and Hadley agreed to perform these final tasks does not alter the date of discharge. Therefore, the trial court did not err in determining that the statute of limitations began to run when plaintiff discharged these defendants on October 11, 2001.

Two years from the date of October 11, 2001 was October 11, 2003. Plaintiff filed his complaint on October 14, 2001, three days after the statutory period of limitation had expired. Therefore, the trial court did not err in granting summary disposition in favor of Willingham and Hadley.

C. MCR 2.116(C)(10)

We next consider whether the trial court properly granted Hanslovsky's motion for summary disposition on the basis that plaintiff "failed to meet his burden of proof in establishing a prima facie case of legal malpractice" – specifically, because plaintiff failed to show that he suffered an injury. Because we conclude that plaintiff failed to establish a genuine issue of fact as to whether defendants acted negligently, we agree that summary disposition was appropriate under MCR 2.116(C)(10).

Defendants moved for summary disposition under MCR 2.116(C)(8) and (10). Because the trial court relied on materials other than the pleadings, we review the motion pursuant to MCR 2.116(C)(10). *Driver v Hanley (After Remand)*, 226 Mich App 558, 562; 575 NW2d 31 (1997). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). When

deciding such a motion, a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Id.* Consequently, summary disposition should be granted under MCR 2.116(C)(10) if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.*

A claim for legal malpractice is established by showing (1) an attorney-client relationship; (2) negligence; (3) that the negligence was a proximate cause of an injury; and (4) an injury. *Charles Reinhart Co v Winiemko*, 444 Mich 579, 585-586; 513 NW2d 773 (1994). Plaintiff alleged that defendants (1) failed to pursue viable claims in federal court; (2) failed to competently proceed in oral arguments; and (3) failed to timely appeal to the United States Supreme Court. The crux of plaintiff's complaint is that defendants committed malpractice by pursuing federal claims in federal court that had little chance of succeeding, which resulted in plaintiff paying excess attorney fees.

An attorney must exercise reasonable skill, care, discretion, and judgment while representing a client. *Simko v Blake*, 448 Mich 648, 656; 532 NW2d 842 (1995). In addition, an attorney has a duty to act as an attorney would of ordinary learning, judgment, or skill under the same or similar circumstances. *Id.* An attorney has a duty to fashion a trial strategy consistent with prevailing law, but does not have to guarantee the most favorable outcome possible. *Id.* Further, an attorney is never required to exercise extraordinary diligence or to act beyond the knowledge, skill, and ability ordinarily possessed by members of the legal profession. *Id.* If the lawyer acted in good faith and exercised reasonable care, skill, and diligence, a lawyer's mere errors in judgment are generally not grounds for a malpractice action. *Id.* at 658.

Based on the evidence presented, it is beyond dispute that defendants' pursuit of federal claims was at most an error in judgment that does not rise to the level of legal malpractice. Plaintiff claims that after being assisted by a law librarian and conducting his own research, he was able to conclude that defendants pursued federal causes of action on plaintiff's behalf that were without merit. However, an attorney is not required to predict how a court will rule or whether a court will agree with the attorney's evaluation of a situation. *Simko*, *supra* at 658. Plaintiff's bald assertion that defendants were negligent was not supported by an affidavit, deposition testimony, or any other documentary evidence. *Corley*, *supra* at 278. Accordingly, plaintiff failed to establish a genuine issue of material fact because he failed to present any evidence of defendants' alleged negligence. *Adair*, *supra* at 120. Therefore, the trial court did not err in granting summary disposition in Hanslovsky's favor under MCR 2.116(C)(10).

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Patrick M. Meter
/s/ Alton T. Davis