STATE OF MICHIGAN

COURT OF APPEALS

STEVEN DALE MAURO, Plaintiff-Appellant,	UNPUBLISHED May 15, 2008
v	No. 277277 Cass Circuit Court
GARY R. HOSBEIN, Defendant-Appellee.	LC No. 07-000034-NM

Before: Jansen, P.J., and Zahra and Gleicher, JJ.

PER CURIAM.

In this legal malpractice case, plaintiff appeals as of right a circuit court order granting defendant summary disposition pursuant to MCR 2.116(C)(7) (expiration of the statute of limitations). Plaintiff also challenges a judgment awarding defendant costs and attorney fees as a sanction for plaintiff's selection of an improper venue. We affirm in part and reverse in part.

I. Facts and Proceedings

In July 1994, the Cass County prosecuting attorney filed a fourth-degree criminal sexual conduct charge against plaintiff, who then worked for Berrien County as a court psychologist. Because the complainant was also a Berrien County court employee, the Berrien County prosecutor's office disqualified itself from pursuing the charge. The Cass County prosecutor's office assumed the responsibility of prosecuting plaintiff. In October or November 1994, the Cass County prosecutor filed additional charges against plaintiff alleging two counts of misdemeanor assault and battery involving other complainants.

Plaintiff retained defendant, a Berrien County attorney, to defend the criminal charges. On September 15, 1994, the Berrien Circuit Court judge assigned to defendant's case filed a notice of disqualification, and the case was reassigned to the Kalamazoo Circuit Court in October 1994. In January 1995, however, a Kalamazoo Circuit Court judge transferred the case back to the Berrien District Court, where plaintiff pleaded nolo contendere to a misdemeanor charge. The prosecution subsequently dismissed the remaining charges pursuant to a plea agreement. In the interim, plaintiff filed for divorce in Tuscola County, and one of the alleged victims sued plaintiff and several Berrien Circuit Court employees in Berrien County.

Defendant represented plaintiff in the criminal matters until October 1995. In 1997, defendant briefly represented plaintiff in the divorce action, which had been transferred to Berrien County. The parties agree that defendant has not provided plaintiff with any legal services for approximately 11 years, since 1997.

On January 23, 2007, plaintiff filed a "verified complaint" against defendant in the Cass Circuit Court. The complaint alleged that defendant "pressured" plaintiff into ultimately entering the nolo contendere plea agreement by advising him that he "would not get a fair trial in Berrien County because the judges were extremely angry with Plaintiff, as well as with Defendant for representing Plaintiff." Plaintiff further alleged that defendant inaccurately counseled that the plea agreement would not endanger his psychology and teaching licenses, and that plaintiff's name would not have to appear on the Michigan Sex Offender Registry.[1] In addition to these factual allegations, plaintiff's verified complaint set forth the following three alleged breaches of defendant's duty of care, together with a single paragraph addressing causation:

> 2. Defendant breached his duty to Plaintiff by not conducting a reasonable factual investigation of the charges against Plaintiff.
>
> 3. Defendant breached his duty to Plaintiff by failing to conduct a reasonable legal investigation of the legal issues surrounding the charges against Plaintiff.
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> 4. Defendant was negligent in failing to adequately advise Plaintiff of the legal ramifications of pleading nolo contendere to the charges.
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> 5. Defendant's deficient performance at the time of the plea agreement prejudiced Plaintiff's case resulting in an involuntary plea agreement.

The "relief" sought included a "[j]udgment against Defendant for all fees paid to Defendant," for "all moneys paid by Plaintiff to defend his psychology license and teaching certificate," and for plaintiff's loss of income since July 1994.

In February 2007, defendant filed a motion for summary disposition in lieu of an answer, pursuant to MCR 2.116(C)(7) and MCR 2.111(F)(2)(a). Alternatively, defendant sought a change of venue, proposing in his supporting brief that "should the Court not dismiss the complaint with prejudice, Plaintiff [sic] requests change of improper venue pursuant to MCR 2.223 and MCL[] 600.1653 to Berrien County, Michigan, with imposition of appropriate costs, attorney fees and sanctions."

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[1] In September 1996, the Michigan Board of Psychology suspended plaintiff's psychologist license for six months. The Michigan Department of Education suspended plaintiff's teaching certificate in March 1996, and revoked it in January 2001.

In response to defendant's motions, plaintiff asserted that "[u]p until August 4, 2006, Dr. Mauro believed Mr. Hosbein was a very good attorney, and it was the prosecution and court personnel who were the cause of his injury." According to a January 2007 affidavit of plaintiff, he discovered defendant's malpractice on August 4, 2006, when "I requested my present attorney … to review my files and advise me regarding a reversal of my plea agreement." Plaintiff's response also contained his February 2007 affidavit insisting that he did not know that his felony prosecution had been transferred from Berrien to Kalamazoo County until he read it in defendant's summary disposition pleadings.

On March 12, 2007, the circuit court heard defendant's motions for summary disposition and change of venue and granted both of them, ruling from the bench, in relevant part as follows:

> First of all, let's take up the venue issue, MCR 2.223(B)(1) provides for sanctions in the event you file in the wrong court, and I think this action was clearly filed in the wrong court. …
>
> So [venue in] this action was improperly laid in Cass County. According[ly], you're entitled to those expenses you have itemized for attending the wrong court under the authority of that court rule, 2.223.
>
> Now, we also have a summary disposition argued by the defendant pursuant to MCR 2.116(C)(7), and that's for failing to satisfy the Statute of Limitations. The Court finds that the Statute of Limitations has clearly run in this case. Certainly the plaintiff could have or should have known at the very latest back in about 1997 that he had a claim for alleged malpractice; that he discovered or should have discovered it back that far.

The circuit court awarded defendant costs ($52.98), and a "reasonable" attorney fee ($1,000).

II. Issues Presented and Analysis

Plaintiff challenges on appeal both the circuit court's grant of summary disposition and its award of sanctions for improper venue. We review de novo a circuit court's summary disposition ruling. *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). A motion for summary disposition brought under subrule (C)(7) does not test the merits of a claim, but rather certain defenses that may eliminate the need for a trial. *DMI Design & Mfg, Inc v ADAC Plastics, Inc*, 165 Mich App 205, 208; 418 NW2d 386 (1987). When reviewing a grant of summary disposition under subrule (C)(7), this Court accepts as true the plaintiff's well-pleaded allegations, and construes them in the light most favorable to the plaintiff. *Id*. at 208-209. We consider all materials submitted in support of and in opposition to the plaintiff's claim. *Linton v Arenac Co Rd Comm*, 273 Mich App 107, 111; 729 NW2d 883 (2006). "If the pleadings demonstrate that a party is entitled to judgment as a matter of law, or if affidavits or other documentary evidence show that there is no genuine issue of material fact, the trial court must render judgment without delay." *Harris v Allen Park*, 193 Mich App 103, 106; 483 NW2d 434 (1992).

We review for clear error a circuit court's decision to grant or deny a motion for change of venue. *Coleman v Gurwin*, 195 Mich App 8, 10; 489 NW2d 118 (1992), rev'd on other

grounds 443 Mich 59; 503 NW2d 435 (1993). We also review for clear error a circuit court's decision to impose sanctions. *Schadewald v Brulé*, 225 Mich App 26, 41; 570 NW2d 788 (1997). Clear error exists when some evidence supports the circuit court's finding, but a review of the entire record leaves this Court with the definite and firm conviction that the circuit court made a mistake. *Id*.

A. Statute of Limitations

Plaintiff first contends that the circuit court erred by granting summary disposition based on the statute of limitations, because questions of fact exist regarding when he reasonably discovered the basis for a possible legal malpractice claim against defendant. According to plaintiff, none of the attorneys he consulted during the years following his 1995 nolo contendere plea offered any criticism of defendant's conduct, and he had no reason to suspect any negligence on defendant's part until he met with his present counsel. Consequently, plaintiff asserts, either the six-month discovery rule applies and permits his claim, or a jury should decide whether he knew or should have known of a potential cause of action within six months of the filing of this lawsuit.

The general statute of limitations applicable to plaintiff's claim, MCL 600.5805(6), provides that a malpractice claim must be commenced within two years of the date it accrues, or it will be time-barred. A malpractice claim accrues on the last day of professional service, "regardless of the time a plaintiff discovers or otherwise has knowledge of the claim." MCL 600.5838(1). Pursuant to MCL 600.5838(2), however, a malpractice action "may be commenced within six months after the plaintiff discovers or should have discovered the existence of the claim if such discovery occurs after the two-year limitation period." *Fante v Stepek*, 219 Mich App 319, 322; 556 NW2d 168 (1996). If a plaintiff elects to utilize the six-month discovery provision, "[t]he 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." MCL 600.5838(2).

The elements of a legal malpractice cause of action are (1) the existence of an attorney-client relationship, (2) negligence in the legal representation of the plaintiff, (3) proximate cause, and (4) the fact and extent of the injury alleged. *Simko v Blake*, 448 Mich 648, 655; 532 NW2d 842 (1995). In *Gebhardt v O'Rourke*, 444 Mich 535, 537; 510 NW2d 900 (1994), the Michigan Supreme Court examined the statute of limitations in a legal malpractice case arising from the plaintiff's criminal prosecution for aiding and abetting the alleged rape of her then-fiance's daughter. A jury convicted the plaintiff, and her counsel last represented her at the sentencing conducted in February 1987. *Id*. at 537-538. The plaintiff sued her attorney in November 1989. *Id*. at 538.

The Supreme Court held that the plaintiff had not timely filed her claim because "[t]he November 3, 1989, filing of this malpractice suit occurred well beyond the two-year limitation period. Further, Ms. Gebhardt should have discovered her malpractice claim no later than March 27, 1987, when her new attorney moved for retrial." *Gebhardt*, *supra* at 541. The Supreme Court explained that the six-month discovery provision did not salvage the plaintiff's claim because "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." *Id*. at 544, citing *Moll v Abbott Laboratories*, 444 Mich 1; 506 NW2d 816 (1993). In *Moll*, the

Supreme Court observed, "The law imposes on a plaintiff, armed with knowledge of an injury and its cause, a duty to diligently pursue the resulting legal claim." *Id*. at 29. "Once an injury and its possible cause is known, the plaintiff is aware of a possible cause of action." *Gebhardt, supra* at 545.

Construing the instant complaint and record in the light most favorable to plaintiff, the essence of his claim is that defendant coerced his nolo contendere plea by failing to properly investigate the facts of the case, and by neglecting to effectively advocate on plaintiff's behalf. Plaintiff contends that as a result of this negligence, he lost his professional licenses and his source of income. Because "a plaintiff's legal malpractice claim accrues on the day that the attorney last provides professional service in the specific matter out of which the malpractice claim arose," in this case the criminal proceeding that concluded with the entry of plaintiff's plea and an October 1995 order dismissing the remaining criminal charges against him, his malpractice claim accrued in October 1995. *Kloian v Schwartz*, 272 Mich App 232, 238; 725 NW2d 671 (2006). Plaintiff thus plainly commenced this action well beyond the two-year malpractice period of limitation, which expired by October 1997.

Regarding plaintiff's attempt to invoke the discovery rule, undisputed facts of record demonstrate that all elements of plaintiff's legal malpractice claim existed within two years of the last date that defendant represented him in matters related to the criminal prosecution. In March 1996, the Michigan Department of Education suspended plaintiff's teaching certificate. Six months later, and still within two years of his plea, the Michigan Board of Psychology suspended plaintiff's psychology license. Thus, within the general two-year malpractice statute of limitations period, plaintiff knew or should have known of each element of a potential legal malpractice claim. The suspension of plaintiff's licenses put him on notice that, contrary to the advice allegedly provided by defendant, the nolo contendere plea did not shield him from negative or damaging professional ramifications of his prosecution. With the suspension of his licenses, plaintiff knew or reasonably should have known of a possible cause of action against his counsel. Because plaintiff knew or should have known that all elements of a possible malpractice claim against defendant existed by September 1996, at the latest, the six-month discovery rule in MCL 600.5838(2) does not operate to extend the general malpractice period of limitation in this case beyond October 1997, the two-year anniversary of defendant's last professional act on plaintiff's behalf regarding the criminal case.

Furthermore, we reject as completely disingenuous plaintiff's claim that he had no reason to suspect any wrongdoing on defendant's part until August 2006. The record reveals that between 1999 and 2002, plaintiff filed a plethora of grievances against the attorneys involved in his prosecution, and sought the attention of the Judicial Tenure Commission regarding the conduct of the Berrien Circuit Court. In his affidavit, plaintiff asserts that he "maintained my innocence since these charges were initially brought," and "diligently, but unsuccessfully, sought legal counsel to assist me in reversing the plea agreement." But plaintiff's early dissatisfaction with the results of his plea simply cannot be denied or overlooked. We conclude that defendant had ample incentive and opportunity during the two years after his plea to discover any missing pieces of information necessary to prepare a claim against defendant.

We also reject plaintiff's argument that "newly discovered evidence" of the transfer of his criminal case from Berrien to Kalamazoo County triggered anew the running of the discovery rule period, and thus allowed him six months from the filing of defendant's summary disposition

motion in which to assert the legal malpractice claim. Plaintiff's purported unawareness of the administrative transfer of the criminal case does not alter the facts that his cause of action accrued when defendant completed his criminal-related service to plaintiff in October 1995, or that plaintiff knew or should of known that he first sustained injury or damage as a result of his nolo contendere plea well within the applicable, general two-year malpractice statute of limitations. Objective facts existed in 1996 that should have put plaintiff on notice that he may have received improper advice from defendant. Whether plaintiff knew about the assignment of a Kalamazoo County Circuit Court judge simply bears no relevance to when his legal malpractice action accrued.

Plaintiff's attempt to utilize a fraudulent concealment argument is also unavailing. The record contains no evidence that defendant concealed the transfer of the criminal case to Kalamazoo County. On the contrary, that information readily appears in the Berrien County Justice System Public Access Case Event Report of plaintiff's 1994 prosecution. Furthermore, neither the discovery rule nor the fraudulent concealment doctrine supplies an excuse for the 11-year delay present here. The determination of when the plaintiff discovers a possible cause of action focuses on resolving whether "a *reasonable person* in plaintiff's circumstances [would] have discovered the claim." *Levinson v Trotsky*, 199 Mich App 110, 112; 500 NW2d 762 (1993) (emphasis in original). "[O]nly where the victim is not aware that he has been injured because the damage is not discoverable by due diligence does the discovery rule apply." *Grimm v Ford Motor Co*, 157 Mich App 633, 638; 403 NW2d 482 (1986).

A plaintiff aggrieved by a lawyer's conduct must act with reasonable diligence to obtain legal advice and necessary supporting information, and may not simply await the fortuitous revelation of previously unknown facts before filing a claim. Because the record reveals no evidence that defendant fraudulently concealed any material information that plaintiff could not otherwise easily and quickly obtain, we conclude that the circuit court correctly determined that the statute of limitations bars plaintiff's legal malpractice claim.

B. Venue

The proper venue for a legal malpractice action is described in MCL 600.1629(1), which provides in relevant part as follows:

> Subject to subsection (2), in an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, all of the following apply.
>
> (a) The county in which the original injury occurred and in which either of the following applies is a county in which to file and try the action:
>
> (i) The defendant resides, has a place of business, or conducts business in that county.
>
> (ii) The corporate registered office of a defendant is located in that county.

In *Bass v Combs*, 238 Mich App 16, 21; 604 NW2d 727 (1999), this Court examined the application of MCL 600.1629(1) in a legal malpractice action, and held that venue must be laid in the county in which the lawyer's alleged negligence occurred. The negligence in this case thus occurred in the county or counties in which defendant provided legal services to plaintiff related to the criminal prosecutions. The Cass County prosecutor's office brought the charges in Berrien County, and no record evidence demonstrates that defendant provided legal services to plaintiff within Cass County, the forum in which plaintiff elected to file this case.

Plaintiff alleges that his "criminal matter was prosecuted in Cass County, not Berrien County," and that "[b]ecause the plea agreement was brought … in Cass County, the original injury occurred in Cass County." The record does not support this contention. The Berrien County Justice System Public Access Case Event Report instead reflects to the contrary that all proceedings in the criminal matter occurred in Berrien County, other than a single pretrial conference that took place in Kalamazoo. Plaintiff has not claimed that defendant, whose office is located in Berrien County, advised or counseled him in Cass County. Therefore, the circuit court correctly concluded that plaintiff failed to meet his burden of proving that Cass County constituted a proper venue for his claim.

The circuit court awarded defendant sanctions for plaintiff's selection of an improper venue on the basis of MCR 2.223(B)(1), which provides that if the court grants a motion to change venue based on improper venue,

> [t]he court shall order the change at the plaintiff's cost, which shall include the statutory filing fee applicable to the court to which the action is transferred, and which may include reasonable compensation for the defendant's expense, including reasonable attorney fees, in attending in the wrong court.

The circuit court ruled that plaintiff selected an improper venue, but instead of transferring the case to another county, granted defendant summary disposition pursuant to MCR 2.116(C)(7). The circuit court awarded defendant costs of $52.98, representing a $20 motion fee and a mileage expense of $32.98, and an attorney fee of $1,000. Defense counsel's affidavit explains that he calculated the attorney fee based on three hours of time spent traveling to and attending the hearing at which the circuit court granted summary disposition, plus two hours of legal research and preparation for the summary disposition hearing.

These costs and defense counsel's fee did not arise entirely, or even primarily, from defendant's motion for change of venue, or "in attending the wrong court." Defendant filed a single motion, captioned "Motion for Summary Disposition in Lieu of Answer Pursuant to MCR 2.116(C)(7) and 2.111(F)(2)(a) and Alternatively for Change of Improper Venue Pursuant to MCR 2.223," and paid one motion fee. The hearing transcript reflects that defense counsel's arguments regarding the statute of limitations consumed the vast majority of the time allotted to the hearing.

Our review of the record thus does not support the circuit court's decision to sanction plaintiff for selection of an improper venue, because the court granted summary disposition at the same hearing, and by doing so avoided any need to transfer the case.[2] Because defendant did not incur any costs specifically related to plaintiff's choice of an improper venue, we conclude that the circuit court clearly erred in finding sanctions warranted.

We affirm the circuit court's grant of summary disposition to defendant under MCR 2.116(C)(7). We vacate the circuit court's award of venue-related sanctions, and remand for entry of a judgment for defendant that eliminates these sanctions. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Brian K. Zahra
/s/ Elizabeth L. Gleicher

[2] The fact that the circuit court granted defendant's motion for change of venue before granting summary disposition does not serve as a ground to challenge the summary disposition ruling, as MCL 600.1645 provides that "[n]o order, judgment, or decree shall be void or voidable solely on the ground that there was improper venue."