STATE OF MICHIGAN

COURT OF APPEALS

DALLIAS E. WILCOXON,

Plaintiff-Appellant,

v

MARK L. TEICHER,

Defendant-Appellee.

UNPUBLISHED
October 23, 2008

No. 279160
Wayne Circuit Court
LC No. 06-632350-NM

Before: Meter, P.J., and Talbot and Murray, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendant's motion for summary disposition in this legal malpractice action. We affirm.

In June 1994, plaintiff sued her former employer, Minnesota Mining & Manufacturing Company (3M), for employment discrimination. The trial court dismissed the lawsuit, and this Court affirmed that dismissal. *Wilcoxon v Minnesota Mining & Mfg Co (Wilcoxon I)*, 235 Mich App 347, 371; 597 NW2d 250 (1999). In July 2001, plaintiff, acting in propria persona, sued the three attorneys – Michael Conway, Brenda Braceful, and Horace Cotton – who had, at various times, represented her in the 3M lawsuit. Conway moved for summary disposition on statute of limitations grounds in 2002 and was successful. In March 2003, plaintiff, again acting in propria persona, then filed another complaint, apparently because she was unable, earlier, to successfully serve Cotton, and the two cases were consolidated and essentially treated as one, with Conway treated as having been dismissed from the case. In August 2003, plaintiff retained defendant to represent her and paid him $10,000 as a retainer. He sent a letter to plaintiff stating, in part:

> This fax is to confirm that I received your $10,000 retainer check and your social security number. With these, I have gone across the street to my regular bank, Bank One, and opened a separate Client Trust Account for these funds. I opened it under your social security number, because it is my policy that such funds are appropriately placed in a savings account, which this is, and that any interest would be yours. Even though savings account interest is presently at a low rate, interest is better than no interest and it's your interest.

In another letter, he stated, "I will agree to take on your case on the following basis: I receive a $10,000 retainer. This retainer will be for attorney fees, on an hourly basis up to $10,000. If the

hours do not reach that amount, then the balance will be returned." Plaintiff indicated that she agreed with those terms. On December 11, 2003, defendant filed an appearance in the case.

Cotton successfully moved for summary disposition on statute of limitations grounds on June 4, 2004. Defendant moved to withdraw as plaintiff's attorney on October 12, 2004, and the trial court granted this motion on November 19, 2004. The suit against Braceful was dismissed when plaintiff failed to appear for trial on February 8, 2005.

Again acting in propria persona, plaintiff appealed to the Court of Appeals from the dismissal of her lawsuit. This Court issued a decision on September 19, 2006. The panel concluded that plaintiff's malpractice claims were barred by the statute of limitations:

> There is no dispute that Conway ceased providing legal services to plaintiff upon the entry of an order effectuating his withdrawal as her counsel on June 9, 1995. Clearly, cessation of legal services by Conway in 1995 exceeds the two-year statute of limitations for legal malpractice, given plaintiff's filing of her complaint in July of 2001. Similarly, Braceful was permitted to withdraw as plaintiff's counsel on September 20, 1996. The termination of legal representation by Braceful on plaintiff's behalf occurred almost five years before plaintiff initiated the legal malpractice lawsuit. Cotton's representation of plaintiff terminated with the conclusion of the employment discrimination case and entry of summary disposition in favor of 3M on June 13, 1997. Cotton's representation of plaintiff concluded fully four years before plaintiff's legal malpractice action was initiated. It cannot be disputed that plaintiff, with respect to all defendants, failed to file her complaint within the two-year period after the accrual of her claim as required by MCL 600.5805(6). [*Wilcoxon v Conway (Wilcoxon II)*, unpublished opinion per curiam of the Court of Appeals, issued September 19, 2006 (Docket No. 261135), slip op, p 2.]

The Court also concluded that the six-month discovery period set forth in MCL 600.5838(2) did not serve to save plaintiff's claims. *Wilcoxon II*, *supra* at 2-3. It stated that plaintiff failed to "demonstrate that she neither discovered nor should have discovered the claim more than six months before commencing the lawsuit for legal malpractice." *Id*. at 3.

The Court also addressed plaintiff's argument that the limitations period should have been tolled because of fraudulent concealment on the part of Conway, Cotton, and Braceful. See MCL 600.5855. The Court stated:

> We cannot accept plaintiff's contention that Conway fraudulently concealed his failure to file a worker's compensation claim. Conway's representation of plaintiff terminated in 1995. Subsequently, plaintiff retained the services of three other attorneys. Plaintiff admits having access to her entire legal file as early as 1997, following dismissal of the employment discrimination case. Yet, plaintiff alleges that she did not discover the absence of a worker's compensation filing until 2001, after the conclusion of her attempt to appeal the action to the Michigan Supreme Court. Significantly, plaintiff fails to state with any particularity the acts engaged in by Conway to conceal this omission. Rather,

> plaintiff merely indicates that Conway asserted he would file a worker's compensation claim but failed to do so. Reversal is unwarranted.
>
> Next, plaintiff alleges that Cotton fraudulently concealed his failure to file responsive pleadings. Based on Conway's termination of an attorney-client relationship with plaintiff following dismissal of the employment discrimination claim in 1997, there is no basis to support plaintiff's assertion she was unable to discover the alleged fraud until 2001, given her access to the entire legal file for the four-year interim period.
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> Plaintiff contends that Braceful concealed a possible settlement offer of $60,000 from her employer, which was purportedly not disclosed until a November 1, 2002, hearing. Despite providing a purported quotation of a verbal exchange with Braceful that appears to be solely based on plaintiff's alleged recollection, plaintiff provides no verification of either the exchange or the existence of an offer. Although plaintiff relies upon her own affidavit on appeal to substantiate this alleged verbal exchange, the affidavit put forth by plaintiff fails to even reference Braceful or her representation of plaintiff, and we deem it insufficient. Again, reversal is unwarranted.
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> Under the circumstances presented, MCL 600.5855 simply does not form a basis to avoid the statute of limitations. In sum, the statute of limitations bars plaintiff's action with respect to all defendants. [*Wilcoxon II*, *supra* at 3-4.]

On November 16, 2006, plaintiff sued defendant. In the complaint, plaintiff provided a long list of defendant's allegedly negligent acts: failing to conduct any discovery, failing to make a timely appearance on plaintiff's behalf, failing to prepare to handle the case, failing to notify plaintiff that he was withdrawing from the case, withdrawing from the case for no good cause, failing to provide an accounting concerning the retainer, failing to return plaintiff's complete file, failing to withdraw from the case in a timely fashion when his physical condition was an issue, and failing to be truthful regarding whether he notified plaintiff of his motion to withdraw.

Plaintiff alleged that defendant's withdrawal from the case with no notice to her and without good cause led to the dismissal of her malpractice action because she failed to appear for a trial about which she had no notice and for which she had no representation. She alleged that defendant's negligent preparation and failure to conduct discovery also harmed her.

Plaintiff set forth three counts in the complaint: legal malpractice, breach of contract, and conversion (relating to the retainer).

On November 15, 2006, plaintiff filed an affidavit in which she stated that defendant had assured her that her case was strong but that he did not make an appearance in the case for four months after she paid the retainer. Plaintiff also stated that defendant allowed discovery to close without having conducted any discovery. She further alleged:

> 11. That Mr. Teicher did advise me that he suffered two (2) cardiac arrest episodes which prevented him from conducting discovery on my behalf but that

> the Judge was wrong in not allowing an extension of time for discovery because his illness was a legitimate reason to stop the running of the discovery cut off [sic] date.
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> 12. That Mr. Teicher assured me that I should not concern myself with the trial court's refusal to extend discovery as he was appealing her decision to the Michigan Court of Appeals and that they would not rule against him.
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> 13. That Mr. Teicher advised me that the Court of Appeals had ruled against him but that he would still prevail for me.
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> 14. That less than one (1) year after I retained Mr. Teicher, he withdrew from my case *without any notice* and without even an explanation as to the [sic] why.
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> 15. That I discovered that [sic] fact that Defendant Teicher had withdrawn from my case from then defendant Brenda E. Braceful as she served a copy of the judge's order granting her dismissal form [sic] my case, approximately three (3) months after Mr. Teicher's withdrawal.
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> 16. That the copy of the order of dismissal that Ms. Braceful sent[] stated that Ms. Braceful's motion was being granted because, in pertinent part: [plaintiff did not appear]. [Emphasis in the affidavit.]

Plaintiff additionally alleged in the affidavit that defendant had not provided her an accounting of the retainer and had not paid her back any of the money or paid her any interest from it.

On February 16, 2007, defendant moved for summary disposition under MCR 2.116(C)(8) and (C)(10), arguing that (1) the Court of Appeals determined that plaintiff's claims against Conway, Cotton, and Braceful were time-barred, and plaintiff was collaterally estopped from relitigating that issue; (2) plaintiff could not establish causation in her lawsuit against defendant because the limitations periods for her underlying malpractice claims expired before she retained defendant; (3) plaintiff's contract claim against defendant was nothing more than a reiteration of her malpractice claim against him; and (4) there was no conversion because defendant spent 101.2 hours on the case, at $240 an hour, and thus he was not obligated to return any of the retainer.

In plaintiff's response brief, she argued that (1) collateral estoppel did not apply because the issue of defendant's malpractice in pursuing the underlying malpractice case was never litigated; (2) if the underlying malpractice claims were truly time-barred at the time defendant entered the case, then defendant acted unethically in accepting the $10,000 retainer, and it should be returned to plaintiff; and (3) she raised a valid breach-of-contract claim in addition to a legal malpractice claim against defendant.

In May 2007, the trial court granted defendant's motion for summary disposition, stating that the Court of Appeals had found that plaintiff's claims against Conway, Cotton, and Braceful were time-barred and that it could not revisit that ruling. The court stated, in part:

> What I'm saying is regardless of what the attorneys allegedly failed to do or actually failed to do, the Court of Appeals has ruled against you and said that the claims against those three lawyers were filed too late by you and that, therefore, [defendant's] actions when he came into the case could not have caused you any injury.

Plaintiff argued that the Court of Appeals ruling should not be dispositive because, essentially, the Court of Appeals was bound by the trial court record, and defendant did not act diligently in, for example, trying to establish in the trial court that the statute of limitations should have been tolled because of fraudulent concealment. The trial court stated:

> [T]he Court of Appeals decided the fraudulent concealment issue against you. They decided that the statute of limitations expired, the period in which you had to file the action expired, and I am bound by the Court of Appeals. I am bound by their ruling, whatever I might think.
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> Whether I thought they had sufficient evidence based on the record below to decide differently is totally immaterial. They made their decision – or it, the Court of Appeals, made its decision, and they found against you. Now, you may have some other avenue of redress with respect to – I guess he was your fourth lawyer, [defendant], but it's not here.

Plaintiff argues on appeal that the trial court erred in concluding that collateral estoppel barred her malpractice claim against defendant. She claims that the issue of defendant's negligent pursuit of the underlying claim was never adjudicated.

We review de novo a trial court's grant of summary disposition. *Aichele v Hodge*, 259 Mich App 146, 152; 673 NW2d 452 (2003). Summary disposition under MCR 2.116(C)(10) is appropriate if "there is no genuine issue as to any material fact, and the moving party is entitled to judgment . . . as a matter of law." In reviewing a motion brought under MCR 2.116(C)(10), we "consider the pleadings, affidavits, depositions, admissions, and any other evidence . . . ." *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993). We view the pleadings and evidence "in favor of the party opposing the motion, and grant the benefit of any reasonable doubt to the opposing party." *Id*. A motion for summary disposition under MCR 2.116(C)(8) "tests the legal sufficiency of the pleadings." *Radtke*, *supra* at 374.

We find no error requiring reversal. Even without considering the issue of collateral estoppel, defendant was entitled to summary disposition. Defendant argued in his motion for summary disposition that plaintiff failed to establish any "cause in fact." In a legal malpractice case, the plaintiff "must establish that the defendant's action was a cause in fact of the claimed injury." *Charles Reinhart Co v Winiemko*, 444 Mich 579, 586; 513 NW2d 773 (1994). The plaintiff therefore must show that, absent the defendant's negligence, she would have been successful in the underlying lawsuit. *Id*. Moreover, when a defendant has made a properly supported motion for summary disposition under MCR 2.116(C)(10), the plaintiff, to survive the motion, must set forth specific facts showing a genuine issue for trial and may not rest upon promise or speculation. *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999).

Here, the gravamen of plaintiff's argument is that defendant inadequately pursued the fraudulent concealment issue and therefore failed to demonstrate that the underlying legal malpractice action was not time-barred. However, plaintiff utterly failed to set forth facts demonstrating any fraudulent concealment that would have enabled the underlying claim to survive. Accordingly, she failed to counter defendant's motion for summary disposition, and defendant was entitled to prevail. See *id*. Although the trial court used different reasoning to reach its conclusion concerning defendant's motion, "[w]hen this Court concludes that a trial court has reached the correct result, this Court will affirm even if it does so under alternative reasoning." *Messenger v Ingham Co Prosecutor*, 232 Mich App 633, 643; 591 NW2d 393 (1998).

Plaintiff next argues that her "conversion" claim was viable and that she is entitled to a return of her $10,000 retainer.[1] She emphasizes that if, as defendant argues, plaintiff's claims were time-barred before he even began to represent her, then it was unethical for him to accept the retainer.

"Conversion is defined as any distinct act of domain wrongfully exerted over another's personal property in denial of or inconsistent with the rights therein." *Lawsuit Financial, LLC v Curry*, 261 Mich App 579, 591; 683 NW2d 233 (2004) (internal citation and quotation marks omitted). "To support an action for conversion of money, the defendant must have obtained the money without the owner's consent to the creation of a debtor-creditor relationship and must have had an obligation to return the specific money entrusted to his care." *Id*. (internal citations and quotation marks omitted). Here, plaintiff admits that she signed a retainer agreement with defendant. Moreover, the lower court record indicates that plaintiff agreed with defendant's propositions that the retainer would be for attorney fees, on an hourly basis, up to $10,000 and that, "[i]f the hours do not reach that amount, then the balance will be returned." Defendant attached to his summary disposition motion a detailed billing statement indicating that he had spent 101.2 hours on the case, at $240 an hour, for a total exceeding $10,000. Plaintiff has failed to set forth any facts showing that this billing statement was inaccurate or fraudulent. Under these circumstances, plaintiff has failed to establish the elements of conversion. *Id*.

Plaintiff next argues that she was allowed to maintain a breach of contract action as well as a malpractice action.[2] We disagree. A court will look beyond a plaintiff's label to determine the true nature of an asserted claim. See *Aldred v O'Hara-Bruce*, 184 Mich App 488, 490-491; 458 NW2d 671 (1990). As in *Aldred*, plaintiff's claims here related to defendant's failure to represent her adequately, and therefore they sounded in legal malpractice. Plaintiff cites *Brownell v Garber*, 199 Mich App 519, 525; 503 NW2d 81 (1993), for the proposition that an action may be maintained against an attorney for breach of contract if the attorney promises to achieve a particular result that he does not ultimately achieve. Plaintiff states that she had such a

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[1] Although the trial court granted defendant's summary disposition motion in its entirety, it did not set forth specific reasoning with regard to the conversion claim.

[2] Again, although the trial court granted defendant's summary disposition motion in its entirety, it did not set forth specific reasoning with regard to the breach of contract claim.

contract with defendant because he told her that she had "one of the strongest malpractice cases that I have seen" and "I can win this case." We do not agree that this, or any other statement or document in the record, created an actionable special or implied contract.

Affirmed.

/s/ Patrick M. Meter
/s/ Michael J. Talbot
/s/ Christopher M. Murray