STATE OF MICHIGAN

COURT OF APPEALS

JAMES R. ROTH CHARITABLE REMAINDER UNITRUST, JONATAHAN ROTH CHARITABLE REMAINDER UNITRUST, JONATHAN R. ROTH and JAMES R. ROTH,

Plaintiffs-Appellants,

v

DAVID LIEBERMAN, SEYBURN KAHN GINN BESS & SERLIN, P.C., STEVEN B. HAFFNER and STEVEN B. HAFFNER & ASSOCIATES, P.C.,

Defendants-Appellees.

UNPUBLISHED
January 19, 2010

Nos. 286867; 288374
Oakland Probate Court
LC No. 2007-313515-CZ

Before: Wilder, P.J., and O'Connell and Talbot, JJ.

PER CURIAM.

In Docket No. 286867, plaintiffs appeal as of right from the probate court's order granting summary disposition in favor of defendants. Plaintiffs argue that the probate court erred when it concluded that plaintiffs' claims were barred by the applicable statutes of limitations. In Docket No. 288374, plaintiffs appeal from the probate court's order granting the Haffner defendants' motion for sanctions and attorney fees. In this appeal, plaintiffs argue that the trial court erred in concluding that plaintiffs should have known that their claims were time-barred before filing their complaint. We affirm in both cases.[1]

The background of this case involves a complicated intra-family dispute, resulting in litigation in probate court, which was completed in November, 2007, by consent judgment. Plaintiffs allege defendants committed attorney malpractice and fraud, and breached fiduciary duties to plaintiffs by maintaining representation of plaintiff trusts, of which plaintiffs are

[1] This Court consolidated plaintiffs' appeals on November 3, 2008. *Roth v Lieberman*, unpublished order of the Court of Appeals, entered November 3, 2008 (Docket Nos. 286867 and 288374).

beneficiaries, while aiding and abetting plaintiffs' brother and cousin in an alleged self-dealing property sale transaction, binding plaintiff trusts.

In Docket No. 286867, plaintiffs first argue that the probate court erred when it concluded that plaintiffs' claims were barred by the statute of limitations. On appeal, a trial court's decision to grant or deny summary disposition is reviewed de novo. *Kuznar v Raksha Corp*, 481 Mich 169, 175; 750 NW2d 121 (2008). In reviewing a motion for summary disposition under MCR 2.116(C)(7), this Court also accepts the plaintiff's well-pleaded allegations as true and construes them in the plaintiff's favor. *Id*. at 175. Further, this Court reviews all evidence presented to the trial court and if the evidence demonstrates that one party is entitled to judgment as a matter of law, or that there is no genuine issue of material fact regarding the running of the period of limitations, summary disposition is appropriate. *Id*. Additionally, questions of law, including statutory interpretation, are reviewed de novo. *Id*. at 176.

The statute of limitations period for a malpractice claim is two years from the time claim accrues or "within 6 months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later." MCL 600.5805(6); MCL 600.5838(2). Further, MCL 600.5835(1) specifies that a malpractice claim accrues "at the time that person discontinues serving the plaintiff in a professional or pseudoprofessional capacity as to the matters out of which the claim for malpractice arose." Plaintiffs' complaint was filed June 14, 2007.

Plaintiffs presented evidence that defendants, David Lieberman and Steven B. Haffner, billed plaintiff trusts through 2007, and argued that this evidence established that Leiberman and Haffner maintained a professional legal relationship with plaintiffs less than two years before plaintiffs filed their complaint. Defendants argued that the invoices were for indemnification payments arising out of an indemnification provision of the trust instruments requiring the trusts to indemnify any trustee for costs and fees associated with any cause of action. The trial court rejected plaintiff's contention, and we agree. We will consider the sets of invoices in turn.

One set of invoices are addressed from Lieberman to "Jeffrey Roth, Trustee, James R. Roth CRUT & Jonathan Roth CRUT." They are accompanied by a cover letter from Safford & Baker to Jaffe, Raitt, Heuer & Weiss ("Jaffe Raitt"), stating, "David Lieberman asked me to forward these invoices to your payment by the Trusts." Lieberman argued, and the trial court concluded, that these invoices were sent from Jeffrey's personal attorneys (Safford & Baker) to James's attorney (Jaffe Raitt) for indemnification from the trusts for Jeffrey's personal legal expenses incurred during the litigation instigated by plaintiffs. Lieberman also argued that he represented interests adverse to plaintiffs during the intra-family litigation and, therefore, it is only logical that invoices to plaintiff trusts for work during that time were for indemnification rather than for services rendered to plaintiffs. The trial court agreed with this argument as well. On appeal, plaintiffs' argue that it is not possible to conclusively determine whether the invoices are for work done for Jeffrey, personally, or for the trusts, leaving a genuine issue of material fact regarding Lieberman's last date of service *for the* trusts.

There is some evidence on the record that Jaffe Raitt represented plaintiffs during the probate litigation. There is no documentary evidence on the record of Safford & Baker's representation of Jeffrey, this point is not disputed by plaintiffs. The invoices are from a period of time entirely within the period of litigation. There is no indication on the invoices of work

done specifically for the trusts and, more importantly, plaintiffs do not specifically claim that the invoices show work done for the trusts. Further, the invoices *were* sent from Safford & Baker to Jaffe Raitt and they reveal more than a dozen conferences between Lieberman and Safford & Baker. Finally, an independent trustee's report from the original probate litigation concluded that the trusts were paying Lieberman during the litigation pursuant to the indemnification provisions of the trusts.

While plaintiffs claim there is a genuine issue of material fact simply because there is no explicit statement on the invoices that the payments made were pursuant to indemnification, the circumstantial evidence strongly supports Lieberman's and Jeffrey's assertion that Lieberman represented interests adverse to plaintiffs and that the trusts were liable to indemnify Jeffrey for attorney fees. Indeed, plaintiffs have not presented any evidence that counters these suggestions *or* that actually suggests Lieberman did work for the trusts during this time period. Plaintiffs' only evidence is these invoices, which is easily rebutted by logical inferences arising out the facts and circumstances of the case which plaintiffs are not able to rebut. See *Bergen v Baker*, 264 Mich App 376, 387; 691 NW2d 770 (2004) ("Circumstantial evidence can be evaluated and utilized in regard to determining whether a genuine issue of material fact exists for purposes of summary disposition."). We conclude, therefore, that the probate court did not err in this respect.

The second set of invoices are addressed directly to the trusts. Each invoice contains a line item for each year from 1997 to 2007. Through 2005, each charge is for preparation of tax returns.[2] For 2006, the charge is for "Discussions with Special Trustee and meetings with Plante and Moran." For 2007, the charge is for, "Court appearances and preparation." The arguments with respect to these invoices is nearly identical to the first invoices. Plaintiffs merely claim that the invoices are not conclusive. Lieberman argues the circumstances make plain that the work done after the probate litigation began was not for plaintiff trusts, their adversaries in the litigation. Lieberman also avers that the work in 2006 and 2007 was a result of a court mandate in the probate litigation to explain his accounting techniques, though there is no proof of this. As above, we conclude that plaintiffs have not presented any actual evidence that Lieberman was working for the trusts during this time period, and that the circumstantial evidence drawn from the mere ambiguity of the invoices is insufficient to create a genuine issue of material fact on this issue.

There are also bank statements and canceled checks evidencing payments from the trusts to Haffner from September 1, 2005, to October 5, 2006. Haffner argues that the payments were for indemnification for services provided for Jeffrey. Similarly, Haffner represented interests adverse to plaintiffs during the litigation, including deposing plaintiffs during that litigation. The independent trustee's report also indicates that the trusts were making indemnification payments to Haffner during the probate litigation. Plaintiffs have not offered any evidence to rebut the conclusive inferences drawn from these circumstances, other than the ambiguity of the invoices, which we conclude insufficient to create a genuine issue of material fact.

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[2] Lieberman is also a certified public accountant.

Plaintiffs next argue that the proper limitations period for their claim against Lieberman is the six-month discovery period prescribed by MCL 600.5838(2): "within 6 months after the plaintiff discovers or should have discovered the existence of the claim." Plaintiffs concede that this limitations period is not applicable for Haffner. Plaintiffs argue that Lieberman acted "as though he were a neutral party" during the probate litigation, preventing plaintiffs from discovering his role in Jeffrey's self-dealing.

MCL 600.5838(2) provides both an objective and subjective test regarding a plaintiff's knowledge of a cause of action. *Levinson v Trotsky*, 199 Mich App 110, 112-113; 500 NW2d 762 (1993). That is, the six-month discovery period can be triggered by a plaintiff's actual knowledge *or* if plaintiff "had reason to know" of the existence of a claim. *Id*. Further, a plaintiff need only be aware of a "possible cause of action" to begin the six-month period. *Gebhardt v O'Rourke*, 444 Mich 535, 544; 510 NW2d 900 (1994).

The independent trustee's report, filed December 7, 2006, notes that the trusts had paid legal fees on behalf of Jeffrey to Lieberman. Further, the report specifically notes that Lieberman's fees from 2004, before plaintiffs' petition against Jeffrey was filed, were related to the probate litigation. This report should have put plaintiffs on notice that Lieberman may have been involved in Jeffrey's plan, giving rise to a possible cause of action against Lieberman. *Gebhardt*, 444 Mich at 544. This is particularly true because plaintiffs have already conceded that they were aware at this time of a possible cause of action against Haffner; when they advised through the independent trustee's report that Lieberman and Haffner were both being paid by the trusts for work done for Jeffrey, this constitutes discovery of facts providing reasonable notice of a possible claim against Lieberman. Because the report was filed more than six months before plaintiffs filed their complaint on June 14, 2007, plaintiffs' argument fails.

Plaintiffs next argue that their claims for fraud and breach of fiduciary duty were not subject to the two-year statute of limitations the probate court applied when it granted defendants' motions for summary disposition. Plaintiffs have waived review of this argument by utterly failing to address this argument in any way before the probate court.

> Waiver is the intentional relinquishment of a known right. The usual manner of waiving a right is by acts which indicate an intention to relinquish it, or by so neglecting and failing to act as to induce a belief that it was the intention and purpose to waive. A party who waives a right is precluded from seeking appellate review based on a denial of that right because waiver eliminates any error. [*Cadle Co v City of Kentwood*, 285 Mich App 240, 254-255; ___ NW2d ___ (2009) (quoting *Book Furniture Co v Chance*, 352 Mich 521, 526-527; 90 NW2d 651 (1958), and *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000)).]

Defendants argued the inapplicability of other statute of limitations periods, should the probate court consider alternative arguments to their primary argument regarding the two-year malpractice statute of limitations, which defendants argued subsumed all of plaintiffs' claims. Plaintiffs neither responded to these arguments in their response to defendants' motions, nor mentioned the possible application of other statues of limitations during the hearing on the motions. In fact, plaintiffs' counsel plainly laid out the framework for analysis they wished the probate court to engage in and this framework included no mention of any statute of limitations

period other than the two-year malpractice period, and the attendant six-month discovery rule period. Plaintiffs' total neglect and failure to act with respect to this argument in front of the probate court indicates a clear intention to "relinquish or abandon" their right to raise this argument. *Carter*, 462 Mich at 215; *Cadle Co*, 285 Mich App at 254-255. We need not address these arguments.

Finally, in Docket No. 288374, plaintiffs argue that the trial court erred when it awarded fees and costs, as a sanction, to the Haffner defendants. MCL 600.2591 provides that costs and fees shall be awarded if a court finds that a party's claim or defense was frivolous. Frivolous is defined as one or more of:

> (i) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.
>
> (ii) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.
>
> (iii) The party's legal position was devoid of arguable legal merit. [MCL 600.2591(3)(a).]

Likewise, MCR 2.114(E) and MCR 2.625(A)(2) mandate an award of costs and fees upon a finding of a frivolous claim. The sanctions may be levied against the attorney, the represented party, or both. MCR 2.114(E).

Plaintiffs' attempt to argue that Haffner has not been vindicated by his successful pleading of an affirmative defense (statute of limitations) and, therefore, "it would be outrageous," for Haffner to be awarded fees and costs, given the various improper conduct plaintiffs have alleged. The allegations against Haffner are irrelevant; the relevant issue with respect to sanctions is whether plaintiffs knew or should have known their claims would be time-barred when they brought their complaint. Plaintiffs argue that this was a complicated issue, citing the length of the probate court's discussion. In fact, the most complicated part of the probate court's analysis was sorting through the factual allegations. We concluded above that the probate court rightly found that plaintiffs' were not represented by defendants at any time since the probate litigation. Thus, plaintiffs must have known that their presentation of invoices and bank statements was misleading rather than meritorious. MCL 600.2591(3)(a)(ii) ("no reasonable basis to believe that the facts underlying that party's legal position were in fact true"). Plaintiffs have not addressed this inadequacy of their factual presentation in their brief on appeal. We conclude that the trial court did not clearly err when it granted sanctions in favor of the Haffner defendants.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Peter D. O'Connell
/s/ Michael J. Talbot