STATE OF MICHIGAN

COURT OF APPEALS

J. EDWARD KLOIAN,

Plaintiff-Appellant,

v

MICHAEL ALAN SCHWARTZ and SCHWARTZ, KELLY & OLTARZ-SCHWARTZ, P.C.,

Defendants-Appellees.

FOR PUBLICATION
September 12, 2006
9:00 a.m.

No. 267033
Wayne Circuit Court
LC No. 05-514737-NM

Official Reported Version

Before: Saad, P.J., and Jansen and White, JJ.

WHITE, J. (*concurring in part and dissenting in part*).

I respectfully dissent from the majority's affirmance of the circuit court's grant of summary disposition of the legal malpractice claim regarding the Wayne County case. In all other respects, I concur.

The period of limitations governing a legal malpractice action is two years. MCL 600.5805(6). A legal malpractice claim accrues at the time that an attorney discontinues serving a client with respect to matters out of which the claim for malpractice arose:

> [A] claim based on the malpractice of a person who is, or holds himself or herself out to be, a member of a state licensed profession 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, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim. [MCL 600.5838(1).]

MCR 2.117(C) provides:

> (1) Unless otherwise stated or ordered by the court, an attorney's appearance applies only in the court in which it is made, or to which the action is transferred, until a final judgment is entered disposing of all claims by or against the party whom the attorney represents *and the time for appeal of right has passed. . . .*

(2) An attorney who has entered an appearance may withdraw from the action or be substituted for *only on order of the court*. [Emphasis added.]

As the majority notes, defendants submitted a letter from defendant Schwartz to plaintiff dated May 13, 2003 in support of their motion for summary disposition, which stated:

> Dear Mr. Kloian:
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> Enclosed please find orders from the Wayne County Circuit Court dismissing your malpractice cases against Fried, Gold, Findling and their law firms. In dismissing these cases, Judge Gillis remarked that you have a history of suing lawyers. He found that your claims were barred by the doctrine of *res judicata.* He also made reference to his decision dismissing your malpractice case against Howard Lederman. He incorporated the reasoning in his written opinion in that case, which he issued in that case on October 21, 2002, into these cases.
>
> You have twenty-one (21) days from today within which to file a claim of appeal. That gives you until June 3, 2003. If you do not file a claim of appeal by that time, you lose your right of appeal. After that, you could file an application for leave to appeal, which is discretionary with the court. Accordingly, if you intend to file an appeal of these orders of dismissal, you should do so no later than June 3, 2003.
>
> If you want to file an appeal, you should obtain another lawyer to do so, as I shall not be representing you on any appeal of these dismissals. As I indicated to you previously, I have concluded that you had virtually no chance of success in these matters, given the orders and opinions of Judge Shapero in the United States Bankruptcy Court. It is my belief that any appeal of these dismissals would be a waste of time, money and effort. I do not foresee any basis upon which an appellate court would reverse the dismissals. The principal [sic] of *res judicata* which Judge Gillis used in dismissing your malpractice case against Lederman was used by him in dismissing these cases. It is unlikely in the extreme that any appellate court would overturn such a ruling.
>
> Very truly yours,
>
> Michael Alan Schwartz

"'A lawyer discontinues serving a client when relieved of the obligation by the client or the court,[1] or upon completion of a specific legal service that the lawyer was retained to

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[1] See also *Hooper v Hill Lewis*, 191 Mich App 312, 315; 477 NW2d 114 (1991) (holding that the plaintiff's letter to the defendant attorneys stating that they had no authority to act on his behalf "relieved defendants of their obligation to represent him" and noting that "[a]n attorney discontinues serving a client, for purposes of the statute of limitations, when the attorney is (continued…)

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), which in turn cited *Stroud v Ward*, 169 Mich App 1, 6; 425 NW2d 490 (1988), and *Chapman v Sullivan*, 161 Mich App 558, 561; 411 NW2d 754 (1987). In *Chapman, supra* at 561, the Court noted that the defendant attorney had been retained to perform a "specific legal service, i.e., to advise and represent [the plaintiff] in the sale of her business and draft certain documents in connection with the sale," versus having been retained "to represent [the] plaintiff in any pending or proposed litigation." *Chapman*, which defendants cite on appeal, thus sheds light on the meaning of the phrase "specific legal service." In the instant case, plaintiff retained defendants to represent him in the consolidated Wayne County cases, i.e., pending litigation, as opposed to retaining defendants for a specific legal service, such as the sale of a business.

In *K73 Corp v Stancati*, 174 Mich App 225; 435 NW2d 433 (1988), also cited by defendants on appeal, the president of K73 Corporation filed suit against the defendant attorney he had hired to represent him in the sale of his business. The circuit court dismissed the plaintiff's legal malpractice case on statute of limitations grounds. This Court affirmed. After citing MCL 600.5805 and quoting 600.5838(1) and (2), this Court noted:

> Reading the two sections in conjunction reveals that under § 5805 the period of limitation is two years from the time the claim accrues at the time the last service is rendered. Finally, § 5838 provides that the running of the statute is tolled for six months after the plaintiff discovers or should have discovered the existence of the claims. Thus, a legal malpractice action must be brought within two years of the date the attorney discontinues serving the plaintiff or within six months after the plaintiff discovers or should have discovered the existence of the claim. The plaintiff may take advantage of whichever provision provides the longer period within which to file. *Chapman v Sullivan*, 161 Mich App 558, 563; 411 NW2d 754 (1987).
>
> Plaintiff first contends that defendant did not "discontinue treating or otherwise serving" plaintiff as to the matters out of which the claim for malpractice arose until within two years of the date the complaint was filed. Plaintiff theorizes that defendant's retention of the corporate books and records and preparation of the corporation's 1983 minutes constituted an ongoing service and representation within two years of filing suit.
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> Defendant counters that these services did not specifically pertain to matters out of which the claim for malpractice arose, i.e., the sale of the business

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(…continued)

relieved of the obligation to serve by either the client or a court"), *Maddox, supra* at 450 (noting that "[r]etention of an alternative attorney effectively terminates the attorney-client relationship between the defendant and the client"), *Bolster v Monroe Co Bd of Rd Comm'rs*, 192 Mich App 394, 398-399; 482 NW2d 184 (1991) (holding that when attorney made no attempt to withdraw as counsel for the plaintiffs, and pursued their interests, the trial court did not err in finding that he continued to represent the plaintiffs and quoting MCR 2.117[C][2]).

and the alleged failure of defendant to seek and obtain security for plaintiff's interest.

> This Court has held that an attorney does not "discontinue treating or otherwise servicing his client" for purposes of the malpractice statute of limitations until his client or the court relieves him of the obligation. *Chapman, supra*, p 561. In the present case, the record indicates that defendant discontinued serving plaintiff regarding the sale of the business on February 4, 1982, the date of the final billing submitted by defendant. After this date, defendant was not involved in any matters associated with the sale of the business as plaintiff had retained another attorney, Milton Marovich. Although defendant admitted that after plaintiff was represented by Marovich he was approached by Drennan's attorney and plaintiff in the courthouse hallway because he had knowledge of the sale of the business, defendant did not believe that he gave plaintiff any advice, opinions or comments on the sale of the business after February 4, 1982. Defendant did not represent plaintiff in any pending or proposed litigation after this date. Moreover, when deposed, plaintiff admitted that in April, 1982, Marovich represented him in connection with the sale of the business and, thereafter, he did not seek legal services from defendant regarding this matter. Thus, we conclude that plaintiff relieved defendant of his obligation in April, 1982, which was well over two years before plaintiff filed this action [on September 21, 1984].
>
> Plaintiff must therefore show that he did not or could not have discovered the existence of his claim until after March 21, 1984. [*K73, supra* at 228-229 (citations omitted).]

Anno: *Attorney malpractice—Tolling or other exceptions to running of statute of limitations*, 87 ALR5th 473, 496, discusses *K73 Corp* as follows:

> It should be noted that most courts, when dealing with a former client's argument that an attorney's "continuous representation" of the client serves to toll the statute of limitations on the client's legal malpractice action, or serves to trigger a later commencement date for the action, will look to the date on which the subject attorney submitted a final bill for services to the client or the date on which a formal termination of services occurred.

In the instant case, defendants presented no evidence below that they submitted a final bill for services to plaintiff, or that their services were formally terminated,[2] before May 27, 2003, the date on which plaintiff's substitute counsel filed an appearance.

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[2] I do not agree with the majority and defendants that defendants' letter of May 13, 2003, quoted earlier, affirmatively stated that they were terminating their representation of plaintiff. The letter did not state that defendants were closing plaintiff's file or moving to withdraw their

(continued…)

Defendants did not move to withdraw before May 17, 2003 (two years before plaintiff filed his complaint), nor did plaintiff terminate defendants' services before May 17, 2003. This Court must accept as true the allegations in plaintiff's complaint that plaintiff received defendants' letter dated May 13, 2003, on May 17, 2003, and that substitute counsel for plaintiff filed an appearance on May 27, 2003, because no contrary evidence was submitted below. *Pusakulich v Ironwood*, 247 Mich App 80, 82; 635 NW2d 323 (2001).

I conclude that absent plaintiff's retention of substitute counsel effective May 27, 2003, under MCR 2.117(C)(1), defendants' appearance and obligation to represent plaintiff continued "until a final judgment is entered disposing of all claims by or against the party whom the attorney represents *and the time for appeal of right has passed*," i.e., until approximately June 3, 2003 (21 days after the final judgment was entered by the circuit court on May 13, 2003). Plaintiff's retention of another lawyer, who filed an appearance on May 27, 2003, relieved defendants of their obligation to represent plaintiff on that date—May 27, 2003. *Maddox, supra* at 450; *K73 Corp, supra* at 228-229. I conclude that defendants did not discontinue serving plaintiff before May 17, 2003 (two years before plaintiff filed his complaint); rather, defendants' obligation to represent plaintiff ended on May 27, 2003, when plaintiff's substitute counsel entered an appearance. Thus, I conclude that plaintiff's complaint filed on May 17, 2005 was timely filed within the two-year limitations period.[3]

(…continued)

representation of plaintiff. In the underlying legal malpractice case, had the defendants filed a motion for costs following the circuit court's dismissal of plaintiff's case, it would not be at all clear that defendants in the instant case were not still representing plaintiff in the underlying action, as defendants' letter dated May 13, 2003, states affirmatively only that defendants would not represent plaintiff *in an appeal*. I conclude that under the authorities cited, defendants' letter of May 13, 2003, did not, as a matter of law, constitute "formal termination of services" absent a court order effecting their withdrawal or a substitution of counsel, MCR 2.117(C)(2), or a termination by plaintiff of defendants' representation, such that defendants would be entitled to summary disposition under MCR 2.116(C)(7) on the basis of that letter.

[3] My conclusion is supported by the Supreme Court's decision in *Grievance Administrator v Fieger*, 476 Mich 231; 719 NW2d 123 (2006), issued during the pendency of this appeal and the subject of plaintiff's supplemental authority brief. In *Fieger*, the Court considered whether a case remains "pending" after the Court of Appeals issues a decision but before the time for filing an application for leave to appeal in the Supreme Court expires and answered that question in the affirmative:

> Because the Court of Appeals decision had not yet become effective as of the date of Mr. Fieger's comments, and because the Court of Appeals, by granting a motion for reconsideration or rehearing, could still have affected the substantial rights of his client, we conclude that the *Badalamenti* [*v William Beaumont Hosp-Troy*, 237 Mich App 278; 602 NW2d 854 (1999),] case was "begun, but not yet completed" and that Mr. Fieger's comments were made "during," "before the conclusion of," and "prior to the completion of" that case. Moreover, the case was "awaiting an occurrence or conclusion of action"—namely, the running of the aforementioned periods for filing. During this interim, then, the case was in a "period of continuance or indeterminancy." [*Id.* at 249-250.]

I would reverse the circuit court's grant of summary disposition to defendants with respect to the claim involving the Wayne County case.

/s/ Helene N. White