STATE OF MICHIGAN

COURT OF APPEALS

CONSTANCE I. BURKE,

Plaintiff-Appellant,

v

LAWRENCE A. BAUMGARTNER, P.C., and LAWRENCE A. BAUMGARTNER,

Defendants-Appellees.

UNPUBLISHED
September 4, 1998

No. 204210
Macomb Circuit Court
LC No. 97-000183 NM

Before: Holbrook, Jr., P.J., and White and J. W. Fitzgerald*, JJ.

PER CURIAM.

Plaintiff appeals as of right the circuit court's order granting defendants' summary disposition motion based on the statute of limitations, pursuant to MCR 2.116(C)(7). We affirm.

I

Defendant Baumgartner (defendant) represented plaintiff in a probate court action pertaining to the estate of her husband, Harold U. Burke (Burke), a protected person. Her husband's son, Donald Burke, had petitioned to have certain assets jointly held by plaintiff and Burke transferred back to Burke alone, to be administered by the court-appointed conservator. The probate action was settled, and a consent judgment was entered in August, 1991.

In May 1995, Donald Burke petitioned the probate court to order the court-appointed conservator of his father's estate to seek an annulment of the marriage between plaintiff and Burke. The probate court denied this petition. Subsequently, Donald Burke initiated annulment proceedings in circuit court. Plaintiff sought summary disposition dismissing the circuit court action. On July 15, 1996, the circuit court denied plaintiff's motion for summary disposition and permitted Donald Burke to proceed with the annulment action. On January 15, 1997, plaintiff commenced the instant action against defendants alleging legal malpractice.

* Former Supreme Court justice, sitting on the Court of Appeals by assignment.

In her complaint, plaintiff asserts that in the course of settlement negotiations in the probate action, defendant advised her that if she agreed to waive her right to a trial of the probate matter and to voluntarily transfer certain property held jointly with Burke to him individually, she would be entitled to a pretermitted spouse's share of his estate upon his death, should he predecease her;[1] that she relied on that advice in agreeing to the settlement; that the settlement as placed on the record did not reflect that representation; and that defendant failed to include language in the consent judgment that set forth this understanding and would prevent Donald Burke from seeking an annulment.

II

Pursuant to MCL 600.5805(4); MSA 27A.5805(4), a party has two years to bring a malpractice claim against an attorney. MCL 600.5838(1); MSA 27A.5838(1) provides that a legal malpractice claim "accrues" at the time the attorney discontinues serving the plaintiff in a professional capacity. Defendant discontinued his professional services no later than November, 1992. The statute also provides that an action is timely if filed within six months of when a plaintiff discovered or should have discovered the claim. MCL 600.5838(2); MSA 27A.5838(2). Thus, a plaintiff must bring a legal malpractice action within two years of the attorney's last day of service, or within six months of when the plaintiff discovered, or should have discovered the claim. *Gebhardt v O'Rourke*, 444 Mich 535, 539; 510 NW2d 900 (1994); *Fante v Stepek*, 219 Mich App 319, 321-322; 556 NW2d 168 (1996). At issue here is the six-month discovery provision.

A

The circuit court correctly concluded that plaintiff's action was untimely. Plaintiff had adequate knowledge of a possible cause of action more than six months before the action was filed. *Gebhardt*, *supra*. Plaintiff was aware that her deceased husband's son was seeking an annulment of the marriage from the time he filed the probate court petition asking the court to compel the conservator to file an action for annulment. The probate court denied that petition on the basis that the relief was not properly sought by the petitioner in probate court, and expressly allowed that relief might be appropriately sought in the circuit court by way of a request that petitioner be appointed next friend for purpose of pursuing an annulment action.[2] Thus, at this point plaintiff should have been aware that the settlement agreement would not necessarily be effective in precluding Donald Burke from seeking to annul the marriage, and did not guarantee her a pretermitted spouse's share of the estate upon Burke's death.

Further, plaintiff was again made aware that there was a problem with her understanding of the settlement agreement when Donald Burke commenced the circuit court annulment action in August, 1995. Thereafter a variety of motions and responses were filed by the parties to the annulment action. By April 1996, it was clear that the parties took differing positions regarding the effect of the August 1991 consent judgment, and that the consent judgment did not by its terms address the issue. Thus, plaintiff knew or should have known of the possible cause of action against defendants before July 15, 1996 (six months before the complaint was filed), because it had become clear before then that the settlement agreement and consent judgment did not directly address the issue whether Donald Burke would be able to challenge the marriage, Donald Burke did not regard the agreement as precluding him from doing so, and had, in fact, taken legal action in an effort to secure an annulment, and the consent

judgment would not necessarily be effective in securing the rights plaintiff believed she would obtain in entering into the settlement agreement.

B

Plaintiff asserts that she did not discover the negligence until the harm became real and identifiable on July 15, 1996, when the circuit court denied her motion for summary disposition. She argues that until that time, any action against defendant would have been premature; she asserts that the probate petition was dismissed as frivolous and therefore she suffered no damages and neither her marriage nor her elective share was at risk. We disagree.

First, as noted above, the prior probate petition was not dismissed on the basis that the settlement agreement barred suit, but rather on the basis that the petitioner could not proceed in probate court. The court's decision clearly left open the possibility of a circuit court action, and plaintiff suffered damage in the form of attorney's fees incurred. Additionally, the circuit court annulment action provided further notice that the settlement agreement was potentially ineffective, and plaintiff suffered additional damages in the form of additional legal expenses. Lastly, plaintiff does not explain why her damages accrued at the time summary disposition was denied by the court, and not some earlier, or later, date. The damages incurred by plaintiff after that date were no different than those incurred prior to that date; i.e., plaintiff incurred legal expenses before and after the motion was denied, and incurred no additional type of damage beginning on that date.[3]

Because plaintiff knew or should have known of her possible claim against defendants prior to July 15, 1996, her action is not rendered timely by the six-month discovery rule. The trial court properly granted summary disposition in favor of defendants.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Helene N. White
/s/ John W. Fitzgerald

[1] Burke is quite a bit older than plaintiff.

[2] We thus cannot agree with plaintiff's assertion that the probate proceeding provided no notice of malpractice because it was dismissed as frivolous through a successful summary disposition motion. The denial of the petition clearly allowed for the possibility that a circuit court action might be filed.

[3] It appears from the record of the circuit court annulment action that plaintiff requested a voluntary dismissal mid-trial, which was later determined to be with prejudice.