STATE OF MICHIGAN

COURT OF APPEALS

MELODY FARMS, INC., a Michigan corporation, a/k/a STERLING CAPITAL SERVICES, MELODY FARMS, MELODY FARMS DAIRY, MELODY DISTRIBUTING and MELODY FOODS, GEORGE & GEORGE and SHARKEY T. GEORGE, LAKESIDE FORD PRODUCTS, INC., a Michigan corporation, IRA WILSON AND SONS DAIRY COMPANY, a Michigan corporation, and SWELDON, LTD., a Michigan corporation, a/k/a AMERICO ENTERPRISES, AMERICA GROUP, AMERICAN COMMERCIAL ENTERPRISES, and AMERICAN COMMERCIAL GROUP, jointly and severally,

Plaintiffs-Appellants,

v

CARSON FISCHER, PLC, a Michigan professional legal corporation, ROBERT CARSON, and WILLIAM C. EDMUNDS, jointly and severally,

Defendants-Appellees.

UNPUBLISHED
February 16, 2001

No. 215883
Wayne Circuit Court
LC No. 98-810806NM

Before: Zahra, P.J., and Hood and McDonald, JJ.

PER CURIAM.

Plaintiffs appeal as of right in this legal malpractice action from an order granting summary disposition to defendants because of expiration of the statute of limitations and failure to state a claim. We affirm.

Plaintiffs alleged that defendants committed malpractice in the defense and drafting of the arbitration agreement settling a 1985 case involving the withdrawal liability claims brought by Central States Southeast and Southwest Areas Pension Funds (Central States). The arbitration

proceeded before the American Arbitration Association in 1988 and the claim was dismissed in 1990 (first representation).

In 1994, Central States sued plaintiffs in federal court, alleging violations of the arbitration agreement. The primary issue was whether the release clause in the arbitration agreement was a "general release," or a release of specific defendants only. The agreement included a six-year period of limitations reserving Central States' right to bring a claim if it found the opposing parties had violated the agreement's provisions. It is the drafting of the agreement and defendants' alleged indiscretions in representing plaintiffs that gave rise to the claim of malpractice arising out of the first representation. Defendants at first represented plaintiffs in this matter, but then withdrew from representation in July 1996 (second representation). November 1, 1996, was the closing date for discovery. In July 1997 the federal judge found for Central States in part and dismissed in part, holding that the release clause in the agreement was ambiguous. In the present malpractice suit, brought in April 1998, plaintiffs included claims of constructive fraud and breaches of contract, trust, and fiduciary duty arising from the second representation.

First, we examine plaintiffs' argument that defendants continually represented them from before the agreement was drafted until 1996, when plaintiffs formally released defendants upon defendants request to withdraw. The trial court determined that the statute of limitations had expired on claims arising from the first representation, and granted partial summary disposition under MCR 2.116(C)(7). We review a trial court's ruling on a motion for summary disposition de novo. *Rheaume v Vandenberg*, 232 Mich App 417, 420; 591 NW2d 331 (1998). When a defendant's motion for summary disposition is premised on MCR 2.116(C)(7), the plaintiff's well-pleaded allegations must be accepted as true and construed in the plaintiff's favor; the motion should not be granted unless no factual development could provide a basis for recovery. *Stabley v Huron-Clinton Metropolitan Park Authority*, 228 Mich App 363, 365; 579 NW2d 374 (1998). The court must consider not only the pleadings, but also any affidavits, depositions, admissions, or documentary evidence that have been filed or submitted by the parties. MCR 2.116(G)(5).

The statute of limitations period for a legal malpractice action is two years from the time it first accrues. MCL 600.5805(5); MSA 27A.5805(5);[1] *Bauer v Ferriby & Houston*, 235 Mich App 536, 538; 599 NW2d 493 (1999); *Levy v Martin*, ___ Mich ___, ___; ___ NW2d ___ (Docket No. 115603, dec'd 1/3/01) slip op, 3. 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, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim." MCL 600.5838(1); MSA 27A.5838(1). The statutes also include a "delayed discovery rule" that permits a plaintiff to bring the claim within six months after the plaintiff discovers or should have discovered the existence of the claim, even if it accrued more than two years earlier. MCL 600.5838(2); MSA 27A.5838(2);

[1] At the time of litigation, this statute was MCL 600.5805(4); MSA 27A.5805(4). It was subsequently renumbered by 2000 PA 2 and is referred to by its current number throughout this opinion.

Chapman v Sullivan, 161 Mich App 558, 562-563; 411 NW2d 574 (1987). However, plaintiffs do not assert that the complaint was timely under the delayed discovery rule and because more than six months passed from the time plaintiffs had notice that the release clause was ambiguous to the time they filed suit, the rule does not apply to their cause.

This Court has had several occasions to address the accrual language of the statutes and to interpret the basic premise that an attorney discontinues serving a client when relieved of the obligation by the client or the court or upon completion of a specific legal service that the attorney was retained to perform. *Bauer, supra* at 538. When service is provided in a series of discrete events, the proper inquiry is whether the new activity occurs pursuant to a current, as opposed to a former, attorney-client relationship. *Id* at 539. If no facts are in dispute, whether the claim is barred by the statute of limitations is a question for the court as a matter of law. *Harris v Allen Park*, 193 Mich App 103, 106; 483 NW2d 434 (1992). However, if a material factual dispute exists such that factual development could provide a basis for recovery, summary disposition is inappropriate. *Marrero v McDonnell Douglas Capital Corp*, 200 Mich App 438, 441; 505 NW2d 275 (1993).

Our Supreme Court recently concluded whether a series of discrete activities constitute continuous service depends on the existence of a continuing professional relationship between the professional and the person receiving the professional's services with regard to a particular subject matter. *Levy, supra* at 8. The Court upheld the principle outlined in *Morgan v Taylor*, 434 Mich 180; 451 NW2d 852 (1990), noting that continuous service can include discrete activities that are ongoing and regularly periodic, such as periodic eye examinations offered in fulfillment of a contractual obligation or annual tax return preparation. *Levy, supra* at 11.

The decisions of this Court are in accord with *Levy*. In *Chapman, supra*, the plaintiff raised an argument similar to one brought in this case, asserting that the defendant attorney had not discontinued service because he had not been formally discharged by the client. *Id*. at 560. This Court disagreed, noting that the client's file had been closed and the matter for which the attorney had been hired was completed; the defendant had rendered no legal services of any kind for three years before problems arose with the contract he had drafted. *Id*. at 561-562. Under these circumstances, there was no continuing professional relationship regarding the matter, and the Court found no reason why a formal discharge by a client or a court order would be practical or necessary. *Id*. at 562. This contrasts with the decision in *Nugent v Weed*, 183 Mich App 791, 796; 455 NW2d 409 (1990), where this Court held that the attorney, hired on an ongoing basis to handle the plaintiff's legal and investment affairs, had not discontinued servicing his client when he incorporated and ceased to practice as an individual.

In *Maddox v Burlingame*, 205 Mich App 446, 451; 517 NW2d 816 (1994), this Court specifically found the defendant attorney's service continued when he researched current law concerning a contract he had drafted for the sale of a business, made a memo to the file, and billed the client. This Court concluded that the trial court erred in ruling as a matter of law that the defendant was no longer representing the plaintiffs, and reversed the trial court's order of summary disposition. *Id.* at 451-452. The defendant in *Maddox* had worked on matters concerning the sale about once a year or so, and the plaintiff regularly turned to the defendant in this matter, thereby continuing their professional relationship.

This Court refined the concept of continuing service in *Bauer v Ferriby & Houston*, 235 Mich App 536, 537; 599 NW2d 493 (1999). The Court found that although an attorney remains under certain duties to the client, such as the duty to maintain confidentiality and the duty to avoid conflicts of interest, holding that such follow-up activities attendant to otherwise completed matters of representation necessarily extend the period of service to the client would give providers of legal services a powerful disincentive to cooperate with a former client who needs such attention. *Id.* at 539; MRPC 1.6; MRPC 1.9. In *Bauer*, the defendant attempted in 1996 to remedy an alleged error in a worker's compensation claim (originally settled in 1994) but did not succeed in enhancing the plaintiff's social security benefits. *Id.* at 537-538. In 1997, the plaintiff brought a malpractice action against the defendant, claiming that the defendant had erred in his assessment of the original worker's compensation claim and asserting that the defendant's follow-up activities extended the period of his service to 1996. *Id.* at 538. This Court concluded that the new activity was a response to an earlier, terminated representation, not a legal service in furtherance of a continuing or renewed attorney-client relationship and thus was insufficient to carry the limitations period forward. *Id*. at 540.

In reviewing the facts in a light most favorable to plaintiffs, we conclude that the claim for malpractice accrued in 1990 when the matter of the arbitration agreement was concluded. The trial court found that defendants were retained to perform two sets of specific legal services for plaintiffs: (1) those matters pertaining to the acquisition of Wilson, which included arbitration and settlement of Central State's claim for withdrawal liability, and (2) those matters pertaining to the Central State's litigation in federal court related to its claim for withdrawal liability. However, no legal services were rendered by defendants between 1990, when the arbitration was officially closed, and 1994 when defendants undertook to represent plaintiffs again in the litigation with Central States. The complaint and plaintiffs' affidavits merely allege that representation was continuous, but set forth no facts to support the allegation. The affidavits in support of the complaint allege no more than defendants "continued to provide advice and counsel on a variety of company and business matters, which from time to time occurred after execution of the Settlement Agreement." At the motion hearing, plaintiffs could not describe any services performed by defendants between 1990 and 1994; plaintiffs were not billed for any services by defendants during that time, and no activity relating to plaintiffs appears in defendants' records or files for that period. Further, defendants included with their motion brief a copy of the letter they sent to plaintiffs in 1990 after the arbitration had been dismissed, stating: "It now appears that this matter is concluded." This statement was not contradicted at that time. No facts were alleged to show that the parties continued a professional relationship *with regard to the matter of the agreement* after 1990, and defendants' letter concluding the matter served as an occurrence terminating their relationship on that matter. *Morgan*, *supra* at 190-191.

As in *Chapman*, we see no reason why a formal discharge or a court order would be necessary to terminate defendants' service. Defendants were not employed on a regular, periodic basis, nor on a continuing basis. They were hired for the purpose of arranging the sale and drafting the necessary documents. That matter was concluded when the arbitration was dismissed in 1990. The later litigation was a new matter; it created a new professional relationship rather than continuing the one that had ended in 1990. None of plaintiffs' broad allegations created a material factual dispute; the trial court was correct in deciding this issue as a matter of law. We hold the trial court did not err in concluding the first and second

representations were separate and discrete transactions carrying with them separate dates of accrual for the applicable limitations period.

Next, plaintiffs argue the trial court erred in granting summary disposition to defendants on the issue of proximate cause and the "error in judgment" doctrine, relating to alleged malpractice in the second representation. We disagree. The trial court concluded that the gravamen of plaintiffs' claims was that defendants failed to conduct adequate, reasonable, and necessary discovery. The court also noted that plaintiffs' asserted damages for (1) liability incurred for payment to Central States, (2) excessive attorneys fees, (3) lost management time, and (4) lost acquisition opportunities. Concerning assertion (1), plaintiffs had to establish that defendants' negligence resulted in a verdict against them that was larger than what would have been returned in the absence of the negligence. *Basic Food Industries, Inc v Grant*, 107 Mich App 685, 693; 310 NW2d 26 (1981). Concerning the remaining assertions, (2), (3) and (4), plaintiffs merely had to show that but for defendants' negligence they would not have suffered the claimed damages. *Id*.

The trial court ruled in favor of defendants under MCR 2.116(C)(8), finding that plaintiffs had failed to state a claim or present genuine issues of material fact sufficient to establish that defendants' alleged failure to conduct discovery was the proximate cause of plaintiffs' asserted damages. MCR 2.116(C)(8) tests the legal sufficiency of a complaint and allows consideration only of the pleadings. The court must accept as true all well-pleaded factual allegations, as well as any conclusions that may be reasonably drawn therefrom. *Ashley v Bronson*, 189 Mich App 498, 501; 473 NW2d 757 (1991). The motion should be granted only when on the pleadings alone, the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right to recovery. *ABB Paint Finishing, Inc v National Union Fire Ins Co*, 223 Mich App 559, 561; 567 NW2d 456 (1997).

Here, plaintiffs alleged that defendants' negligence in conducting discovery, in pretrial strategy, and in exercising judgment about the propriety of continuing to represent plaintiffs in the face of a conflict of interest caused them damages. It is clear from the pleadings, however, that defendants withdrew and were replaced by apparently competent counsel in July 1996, when discovery had four more months to run. In *Boyle v Odette*, 168 Mich App 737, 745; 425 NW2d 472 (1988), where substitute counsel was obtained four months before the statutory period ran, this Court found that the defendant attorney was not liable for alleged mistakes that could have been corrected by substitute counsel. Here, too, the trial court reasoned that because the substitution of counsel was made several months prior to the close of discovery and "at least one year prior to trial," substitute counsel had adequate time to correct any discovery deficiencies left by defendants. The trial court correctly concluded that plaintiffs' asserted failure on the part of defendants to conduct discovery could not be the proximate cause of plaintiffs' asserted damages.

Lastly, plaintiffs claim the trial court erred in granting summary disposition to defendants on their claims for constructive fraud and breach of contract, trust, and fiduciary duties. The trial court ruled that plaintiffs' claims for constructive fraud, breach of contract, and breach of fiduciary duty were merely restatements of the allegations in their malpractice claim, and that the gravamen of all claims was that defendants failed to properly discharge their professional duties

as attorneys: a claim sounding in malpractice. The court concluded that plaintiffs had failed to state a claim upon which relief could be granted under MCR 2.116(C)(8).

Claims against attorneys brought on the basis of inadequate representation sound in tort and are grounded in malpractice only. *Aldred v O'Hara-Bruce*, 184 Mich App 488, 490-491; 458 NW2d 671 (1990). The trial court was correct in ruling that plaintiffs' claims for breach of contract and breach of fiduciary duty were subsumed by the legal malpractice claim. The two breach claims merely allege negligence by defendants, stating that defendants failed to "properly and adequately" perform the duties for which they had contracted. Thus, the trial court correctly dismissed plaintiffs' claims for breach of contract and breach of fiduciary duty.

Finally, we find that plaintiffs' claim of constructive fraud is unsupported by specific facts required to survive a dismissal under MCR 2.116(C)(8). A claim for fraud is distinct from malpractice. *Brownell v Garber*, 199 Mich App 519, 533; 503 NW2d 81 (1993). The elements of a cause of action for fraud are that (1) the defendant made a material representation, (2) it was false, (3) when he made it he knew that it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion, (4) he made it with the intention that it should be acted on by the plaintiff, (5) the plaintiff acted in reliance on it, and (6) he thereby suffered injury. *Id.* at 533. The complaint broadly alleged that defendants had knowledge of the falsity of their statements or acted with reckless disregard of the truth of the statements; nothing specific is further alleged. In allegations of fraud the circumstances constituting fraud must be stated with particularity. MCR 2.112(B)(1). The trial court did not err in granting summary disposition under MCR 2.116(C)(8) for failure to state a claim concerning plaintiffs' constructive fraud claim.

Affirmed.

/s/ Brian K. Zahra
/s/ Harold Hood
/s/ Gary R. McDonald