STATE OF MICHIGAN

COURT OF APPEALS

KIRIT BAKSHI, PRATIMA BAKSHI, ADVANCE TECHNOLOGIES LIMITED PARTNERSHIP, INTERFACE ELECTRONICS, INC., and DATA AUTOMATION CORPORATION,

Plaintiffs-Appellants/Cross-Appellees,

v

GORDON GOLD, FRANKLYN M. KRIEGER, and SEYBURN, KAHN, GINN, BESS, HOWARD, DEITCH and SERLIN, P.C.,

Defendants-Appellees/Cross-Appellants.

UNPUBLISHED
August 10, 2001

No. 220867
Oakland Circuit Court
LC No. 95-499835-NM

Before: White, P.J., and Cavanagh and Talbot, JJ.

PER CURIAM.

Plaintiffs appeal as of right, challenging several orders dismissing their various claims on summary disposition in this legal malpractice action. Defendants have filed a cross appeal. We affirm.

This Court reviews a decision on a motion for summary disposition de novo to determine whether the moving party was entitled to judgment as a matter of law. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). In reviewing a motion brought pursuant to MCR 2.116(C)(10), the court must consider the affidavits, pleadings, admissions, and documentary evidence filed in the action or submitted by the parties in the light most favorable to the party opposing the motion. *Id*. Summary disposition is appropriate if the affidavits and other documentary evidence show that there is no genuine issue with respect to any material fact and the moving party is entitled to judgment as a matter of law. *Id*.

Plaintiffs first argue that the trial court erred in dismissing count II of their malpractice complaint, relating to defendants' alleged failure to properly establish personal jurisdiction over several defendants in an underlying lawsuit. In order to prevail on a legal malpractice claim, a

plaintiff has the burden of showing that the defendant was negligent in its legal representation of the plaintiff, and that the negligence was a proximate cause of an injury. *Simko v Blake*, 448 Mich 648, 655; 532 NW2d 842 (1995). On cross-appeal, defendants argue that they were entitled to summary disposition based on the attorney judgment rule of *Simko, supra*.

The underlying action was dismissed in October 1991, based on a determination that the court lacked jurisdiction over the defendants, who were located in India.[1] Plaintiffs argue that had defendants presented all of the evidence available to them, the underlying action would not have been dismissed for lack of personal jurisdiction. We disagree. A review of the record reveals that in opposing summary disposition in the underlying suit, defendants did raise and present most of the facts that plaintiffs now argue should have been presented. Defendants were only required to act as an attorney of ordinary learning, judgment, or skill would act under the same or similar circumstances. *Simko, supra* at 650. The evidence fails to establish a genuine issue of material fact with regard to whether defendants failed to adequately oppose the motion for summary disposition on jurisdictional grounds.

We reject plaintiffs' contention that the law of the case doctrine applies to this issue. Under the law of the case doctrine, "if an appellate court has passed on a legal question and remanded the case for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain materially the same." *Grievance Administrator v Lopatin*, 462 Mich 235, 259; 612 NW2d 120 (2000). The appellate court's decision likewise binds lower tribunals because the tribunal may not take action on remand that is inconsistent with the judgment of the appellate court. *Id*. at 260. Here, however, the instant legal malpractice action involves an entirely separate legal proceeding from the underlying action that was dismissed. Accordingly, the law of the case doctrine does not apply.

Plaintiffs also argue that the trial court's decision dismissing the malpractice claim involving Minicomp Private Limited is inconsistent with its observation that "if such evidence existed and was available to defendants at the time, then defendants' failure to utilize such evidence in opposition to the motion for summary disposition could constitute a gross error in judgment for which defendants would be liable." We disagree. When read in context, it is apparent that the trial court was merely identifying circumstances which would support a malpractice action. This conditional statement was not intended as a declaration that such circumstances were shown to exist in this case. Accordingly, plaintiffs' argument is without merit. In sum, we conclude that plaintiffs have failed to establish a valid basis for disturbing the trial court's dismissal of count II of their amended complaint.

Next, plaintiffs argue that the trial court erred in ruling that the Bakshis had no standing to bring a malpractice action on behalf of their dissolved corporations. We disagree. Legal actions must be prosecuted in the name of the real party in interest. MCL 600.2041; MCR

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[1] That decision was affirmed by this Court in *Interface Electronics v Minicomp Private Limited*, unpublished opinion per curiam of the Court of Appeals, issued October 10, 1994 (Docket No. 146262).

2.201(B). A real party in interest is one who is vested with the right of action on a given claim, although the beneficial interest may be in another. *Blue Cross and Blue Shield of Michigan v Eaton Rapids Community Hospital*, 221 Mich App 301, 311; 561 NW2d 488 (1997). Because a corporation is entirely separate from its shareholders, a suit to redress injury to the corporation must be brought in the name of the corporation. *Environair, Inc v Steelcase, Inc*, 190 Mich App 289, 292; 475 NW2d 366 (1991). Moreover, it is a general rule of law that only the client of an attorney can sue for malpractice. *Atlanta Int'l Ins Co v Bell*, 438 Mich 512, 518; 475 NW2d 294 (1991). Only under limited circumstances, not applicable here, may a third party sue an attorney for malpractice. *Mieras v DeBona*, 452 Mich 278, 296; 550 NW2d 202 (1996); *Beaty v Hertzberg & Golden, PC*, 456 Mich 247, 254; 571 NW2d 716 (1997).

In this case, although the Bakshis may have had a beneficial interest in the assets of their dissolved corporations, *Environair*, *supra* at 292, to determine who the real party in interest is, this Court must determine who is vested with the right of action on a given claim. To determine who is vested with the claim, we must look to the person "who by the substantive law in question owns the claim asserted against the defendant." *Hofman v Auto Club Ins Ass'n*, 211 Mich App 55, 95; 535 NW2d 529 (1995). Here, the substantive law establishes that a suit to redress injury to the corporation must be brought in the name of the corporation, and that generally only the client of an attorney can sue for malpractice absent special circumstances not applicable here. *Michigan Nat'l Bank v Mudgett*, 178 Mich App 677, 679; 444 NW2d 534 (1989); *Adell v Sommers, Schwartz, Silver and Schwartz, PC*, 170 Mich App 196, 205; 428 NW2d 26 (1988). Moreover, by statute, corporations can still sue even though they are dissolved. MCL 450.1834(e). Accordingly, the trial court did not err in granting summary disposition based upon a lack of standing.

Next, plaintiffs contend that the trial court erred in dismissing count V of plaintiffs' complaint. We disagree. Because plaintiffs did not oppose defendants' request for summary disposition of count V, appellate relief with respect to this issue is not warranted. *Dresden v Detroit Macomb Hosp Corp*, 218 Mich App 292, 295; 553 NW2d 387 (1996).

Plaintiffs also argue that the trial court erred in dismissing the direct claims of Interface Electronics, Inc. (Interface) and Data Automation Corporation (Data) as barred by the statute of limitations. Absent any disputed issue of fact, we review de novo whether a cause of action is barred by a statute of limitations. *Colbert v Conybeare Law Office*, 239 Mich App 608, 613-614; 609 NW2d 208 (2000). See MCR 2.116(C)(7).

The statute of limitations period for a legal malpractice action is two years from the time the cause of action first accrues. MCL 600.5805(5);[2] *Gebhardt v O'Rourke*, 444 Mich 535, 541; 510 NW2d 900 (1994). A malpractice action "accrues at the time the 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). See *Bauer v Ferriby & Houston*, PC, 235

[2] At the time this action was commenced, the statute was MCL 600.5805(4). It has since been renumbered by 2000 PA 2 and is referred to by its current number in this opinion.

Mich App 536, 538; 599 NW2d 493 (1999). The statute also includes a six-month discovery rule which provides:

> Except as otherwise provided in section 5838a, an action involving a claim based on malpractice may be commenced at any time within the applicable period prescribed in sections 5805 or 5851 to 5856, or within 6 months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later. The burden of proving that the plaintiff neither discovered nor should have discovered the existence of the claim at least 6 months before the expiration of the period otherwise applicable to the claim shall be on the plaintiff. A malpractice action which is not commenced within the time prescribed by this subsection is barred. [MCL 600.5838(2).]

Pursuant to the discovery rule, a malpractice claim accrues:

> when the plaintiff discovers, or through the exercise of reasonable diligence, should have discovered, the two later occurring elements [of a malpractice action]: (1) an injury, and (2) the causal connection between plaintiff's injury and defendant's breach. [*Moll v Abbott Laboratories*, 444 Mich 1, 16; 506 NW2d 816 (1993).]

The Supreme Court in *Moll*[3] addressed accrual under the discovery rule:

> We have consistently held that under the discovery rule, a cause of action accrues when "the claimant knows or should have known of the [injury] . . . ." While the term "knows" is obviously a subjective standard, the phrase "should have known" is an objective standard based on an examination of the surrounding circumstances. Consequently, we find that a plaintiff's cause of action accrues when, on the basis of objective facts, the plaintiff should have known of an injury, even if a subjective belief regarding the injury occurs at a later date. [*Id.* at 17-18.]

Plaintiffs do not dispute that defendants discontinued serving plaintiffs in 1993. Accordingly, the direct claims of Interface and Data in the first amended complaint filed on March 20, 1996 were not timely pursuant to MCL 600.5805(5). Plaintiffs argue that the direct claims of Interface and Data were timely filed within six months of their discovery. Plaintiffs maintain that these claims were not discovered until January 31, 1996, when the trial court dismissed the legal malpractice claims filed by the Bakshis on behalf of the dissolved corporations because the Bakshis lacked standing to bring the action. The direct claims of Interface and Data seek damages on the same grounds advanced by the Bakshis on the corporations' behalf. Additionally, Interface and Data allege that defendants erroneously advised

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[3] Although *Moll* was a medical malpractice action, the Supreme Court employed the *Moll* analysis in the context of legal malpractice in *Gebhardt*. *Gebhardt*, *supra* at 544.

or failed to advise them regarding the Bakshis' standing to bring an action on behalf of the dissolved corporations.

We conclude that plaintiffs' claims are time-barred. The claims of the corporations should have been known when the Bakshis filed their initial complaint on June 30, 1995. The complaint alleged that defendants negligently handled underlying litigation in four separate matters. Even if the Bakshis first became aware of their inability to maintain a cause of action on the corporations' behalf on January 31, 1996, the discovery rule is inapplicable. Any claims based upon defendants' failure to properly advise about the dissolved corporations' standing to sue should have been known when the original complaint was filed as they concerned the underlying litigations which either had been resolved or had never been filed. The facts supporting the claims had been discovered at least at the time the original complaint was filed. Interface and Data allege substantially the same injuries as those advanced by the Bakshis on their behalf in the original complaint. Accordingly, the discovery rule does not save the direct claims of Interface and Data.

Further, although Interface and Data allege for the first time that defendants negligently advised them regarding their standing to bring a cause of action after their dissolution, they do not allege that they suffered injury as a result of the allegedly erroneous advice in the underlying litigations. Plaintiffs are required to show actual injury caused by the malpractice, not just the potential for injury. *Keliin v Petrucelli*, 198 Mich App 426, 430; 499 NW2d 360 (1993). "In a legal malpractice action, the plaintiff has the burden of showing that but for the attorney's alleged malpractice, he would have been successful in the underlying suit." *Colbert, supra at* 619-620, citing *Charles Reinhart Co v Winiemko*, 444 Mich 579, 586; 513 NW2d 773 (1994). The underlying Data litigation was tried to a jury which returned a verdict of no cause of action. With respect to the underlying claims of Interface, its action against Minicomp Private Limited was dismissed for lack of personal jurisdiction over the underlying defendants, and Interface's action against Khariwala was never filed by defendants. Accordingly, plaintiffs have alleged no newly discovered injury in these matters related to defendants' counsel about the capacity of the dissolved corporations to institute litigation.

Interface and Data also allege that defendants' erroneous advice or failure to advise regarding the proper party to bring a cause of action affected the instant legal malpractice litigation. One of the elements of a cause of action for legal malpractice is the existence of an attorney-client relationship which creates the duty on the part of the defendant. *Barrow v Pritchard*, 235 Mich App 478, 483-484; 597 NW2d 853 (1999). Because defendants ceased serving plaintiffs in 1993, defendants owed no duty to advise plaintiffs in this regard at the time they filed the instant malpractice claim in 1995. See *Bauer, supra* at 538. We agree with the trial court that defendants owed no duty to advise plaintiffs in regard to the present litigation.

Finally, plaintiffs argue that the court erred in dismissing defendant Krieger from the action based upon failure of service of process. Because it was undisputed that defendant Krieger never actually received a copy of the summons and complaint, the trial court properly granted his motion for summary disposition on this basis. *Holliday v Townley*, 189 Mich App 424, 426; 473 NW2d 733 (1991) (MCR 2.105(J)(3) forgives errors in the manner or content of service; it does not forgive a failure to serve process).

In light of our resolution of plaintiffs' issues on appeal, we need not address defendants' issues on cross appeal.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Michael J. Talbot