STATE OF MICHIGAN

COURT OF APPEALS

CEDAR SPRINGS TRACTOR & EQUIPMENT, INC., a Michigan corporation, and PETER YFF and PATRICIA YFF,

Plaintiffs-Appellants,

v

MARK KEHOE and MIKA, MEYERS, BECKETT & JONES,

Defendants-Appellees,

and

JOHN ANDING and DREW, COOPER & ANDING,

Defendants.

UNPUBLISHED
December 18, 2001

No. 226701
Kent Circuit Court
LC No. 97-002585-NM

Before: Wilder, P.J., and Griffin and Smolenski, JJ.

PER CURIAM.

In this action alleging legal malpractice, plaintiffs appeal as of right the circuit court's orders granting summary disposition pursuant to MCR 2.116(C)(7), on statute of limitations grounds. We affirm.

I

The present appeal stems from a claim of legal malpractice asserted by plaintiffs against two attorneys and their law firms. The trial court granted summary disposition based on the statute of limitations to one of the attorneys and his firm, defendants Mark Kehoe and Mika Meyers, Beckett & Jones (Mika Meyers), and plaintiffs subsequently settled their claims against the other attorney, John Anding, and his firm, Drew, Cooper & Anding, prior to trial. Plaintiffs now appeal the dismissal of defendants Kehoe and Mika Meyers.

Defendant Kehoe was first retained by plaintiffs in November 1991 to render advice concerning the status of a promissory note given by Cedar Springs Tractor & Equipment, Inc., (CSTE)[1] to the National Bank of Detroit (NBD). In particular, plaintiffs sought advice regarding a "threat" made by NBD to liquidate the collateral subject to the promissory note because CSTE had fallen behind on the payments. NBD indicated to plaintiffs that the note would not be extended beyond December 31, 1991. In November and December 1991, several meetings involving Kehoe and the principals of CSTE were held. At those meetings, various options were discussed, including bankruptcy. Plaintiff Peter Yff and a potential investor met with an officer of NBD in an attempt to work out an alternative to bankruptcy and, at the conclusion of the meeting, both Yff and the investor were convinced that the loan officer had orally agreed to a six-month extension of the credit. Plaintiffs informed defendant Kehoe of the alleged agreement and, in early January 1992, plaintiffs deposited a large sum of money into the CSTE account at NBD. On January 6, 1992, NBD "swept" $356,388.58 from the account and applied it against the outstanding promissory note. NBD then initiated an action for claim and delivery and for money damages against CSTE and the individual plaintiffs herein as guarantors of the corporation's remaining debts.

Plaintiffs were referred by Kehoe to attorney Anding in March 1992 for representation in the suit brought by NBD. Anding, a specialist in lender liability law, was a former partner of Kehoe. On March 26, 1992, Anding substituted for Kehoe as counsel for plaintiffs. Anding thereafter represented plaintiffs in the NBD action and filed a counterclaim against NBD. Following a trial in 1994, NBD prevailed in both the principal action and plaintiffs' counterclaim. As a consequence of that trial, a deficiency judgment was entered against plaintiffs. A subsequent appeal to this Court by plaintiffs herein was unsuccessful. See *NBD Bank, NA v Cedar Springs Tractor & Equipment, Inc, et al*, unpublished opinion per curiam of the Court of Appeals, issued June 18, 1996 (Docket No. 181945).

On March 11, 1997, approximately five years after Kehoe last represented plaintiffs, they commenced the present action alleging, in pertinent part, legal malpractice. The gist of the malpractice claims against Kehoe and Mika Meyers consisted of allegations that Kehoe should have advised plaintiffs that the assumed agreement with NBD for an extension of the loan was not binding unless it was in writing, and that Kehoe should have advised CSTE and its principals that Chapter 11 bankruptcy proceedings were still a viable protective option even after the accounts had been swept by NBD in early January 1992. Plaintiffs also alleged that Kehoe conspired with subsequent counsel, Anding, to conceal Kehoe's malpractice and to commit a fraud on the plaintiffs.

Defendants Kehoe and Mika Meyers moved for summary disposition, alleging in relevant part pursuant to MCR 2.116(C)(7) that the statute of limitations barred plaintiffs' malpractice claims. On August 13, 1997, the trial court granted the motion insofar as it pertained to plaintiffs' claim that Kehoe should have advised them to reduce the agreement with NBD for a deadline extension to writing. However, the trial court denied the motion as it related to plaintiffs' claim that Kehoe failed to give proper advice about the option of bankruptcy.

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[1] CSTE, which supplied machinery to the lumber industry, was owned by plaintiffs Peter and Patricia Yff.

Defendants subsequently took the deposition of plaintiff Patricia Yff. At her deposition, Mrs. Yff acknowledged that on June 21, 1995, her husband sent a letter to Kehoe requesting a copy of his file, and that she and her husband were concerned about Kehoe's representation on the date the letter was sent. On the basis of this deposition testimony, defendants renewed their motion for summary disposition based once again on expiration of the requisite limitations period. On December 30, 1998, the trial court issued its opinion and order granting defendants' renewed motion, reasoning that by June 1995 plaintiffs had reasonable suspicion of Kehoe's alleged malpractice and that this suspicion commenced the running of the appropriate statute of limitations. The trial court concluded that plaintiffs' remaining malpractice claims against defendants were time barred under the six-month discovery rule set forth in MCL 600.5838(2). Plaintiffs now appeal.

II

We review de novo the trial court's ruling on a motion for summary disposition. *Ins Comm'r v Aageson Thibo Agency*, 226 Mich App 336, 340; 573 NW2d 637 (1997). Furthermore, whether the period of limitations bars a cause of action represents a legal question that we also review de novo. *Id*. at 340-341.

In reviewing a (C)(7) motion,[2] this Court must accept the contents of the complaint as true unless contradicted by documentation submitted by the movant. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). This Court also must consider and construe in the plaintiff's favor any affidavits, admissions, or other documentary evidence submitted by the parties. If the facts are not in dispute and reasonable minds could not differ regarding the legal effect of those facts, the trial court should determine as a matter of law whether the statute of limitations bars a cause of action. *Jackson Co Hog Producers v Consumers Power Co*, 234 Mich App 72, 77; 592 NW2d 112 (1999). However, if a material factual dispute exists in such a manner that factual development could provide a basis for recovery, summary disposition is inappropriate. *Id*.

Generally, a legal malpractice action must be brought within two years of the date the attorney discontinues serving the client or within six months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later. MCL 600. 5805(5); MCL 600.5838; *Gebhardt v O'Rourke*, 444 Mich 535, 541; 510 NW2d 900 (1994). A lawyer 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 lawyer was retained to perform. *Maddox v Burlingame*, 205 Mich App 446, 450; 517 NW2d 816 (1994). Retention of an alternative attorney effectively terminates the attorney-client relationship between the defendant and the client. *Id.*

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[2] Although defendants' renewed motion was also brought pursuant to MCR 2.116(C)(10), and the trial court did not specify the subsection underlying its ruling, a grant of summary disposition pursuant to MCR 2.116(C)(7) is proper where a claim is barred by the applicable statute of limitations. *Travelers Ins Co v Guardian Alarm Co of Michigan*, 231 Mich App 473, 477; 586 NW2d 760 (1998).

Plaintiffs concede that defendant Kehoe ceased acting as their attorney on March 26, 1992. Plaintiffs did not file their complaint until March 11, 1997; thus, it is undisputed that plaintiffs did not file their complaint within two years after the accrual of their claim as required by MCL 600.5805(5). *Stroud v Ward*, 169 Mich App 1, 6; 425 NW2d 490 (1988); *Chapman v Sullivan*, 161 Mich App 558, 561-562; 411 NW2d 754 (1987). Consequently, this case was timely filed only if plaintiffs filed their complaint within the six-month discovery period allowed by MCL 600.5838(2), or if, as plaintiffs now allege, the statute of limitations has been tolled pursuant to MCL 600.5855 because the malpractice cause of action was fraudulently concealed by defendant Kehoe.

In its first opinion and order granting defendants' motion for summary disposition with respect to plaintiffs' allegation that Kehoe failed to advise them regarding the need for a written agreement with the creditor, the trial court acted on the basis of the six-month discovery period set forth in MCL 600.5838(2), holding in pertinent part that

> Plaintiffs' complaint was filed on March 7, 1997. In a written opinion attached to plaintiffs' complaint and dated May 19, 1994, Circuit Judge Robert Benson dismissed plaintiffs' creditor liability action against the bank. Specifically, he determined that the burden of proving the existence of the alleged agreement by the creditor to give an extension of time was on the plaintiffs, and that the burden had not been sustained. Specific reference was made to the lack of a written agreement. As of March 7, 1997, therefore, if not well before, plaintiffs should have discovered the importance of reducing their so-called agreement to writing. To the extent failure to so advise by Mr. Kehoe is alleged to be malpractice, such a claim clearly is barred by the statute of limitations. With respect to such claims, therefore, the Motion for Summary Disposition should be and the same hereby is GRANTED.

In its subsequent opinion granting defendants' renewed motion for summary disposition with respect to the remaining malpractice claims, the trial court once again relied on MCL 600.5838(2). Reviewing defendants' newly proffered evidence, specifically the deposition testimony of plaintiff Patricia Yff, the court held:

> It is clear from a fair reading of the . . . testimony that plaintiffs were not satisfied with defendant Kehoe's services, and held some degree of suspicion as to the appropriateness of the same. While responsive affidavits filed by plaintiffs and their current attorney . . . raise questions of fact as to whether plaintiffs knew or should have known of possible legal negligence specific to the bankruptcy issues, there is little doubt that in a general sense there was suspicion as to Kehoe's services as early as 1995. The Court is of the opinion that such is all that is required to start the appropriate statute of limitations running.
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> . . . While plaintiffs may not have been trained in the law, and especially bankruptcy law, they nonetheless were familiar with all of the facts involved. Armed with dissatisfaction and suspicion as to whether they had been properly and competently represented, they would then have the obligation timely to investigate the matter, e.g., by presenting all of the relevant facts to attorneys or others who could then advise them as to the possible existence of liability. For

> good and solid public policy reasons, potential claimants are not permitted to sit on their hands and await the receipt of unsolicited information or opinions as to what the negligence consisted of. It is the reasonable suspicion of negligence, not the specific legal basis for same, that starts the limitation period running. All of the facts needed to secure advice as to professional negligence as it relates to bankruptcy were fully available to plaintiffs as of the time of their dissatisfaction with Mr. Kehoe as reflected in the above mentioned testimony. And it should be added that such facts were more than adequately known to plaintiffs, even in the absence of Kehoe's file.
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> For the above stated reasons, it is the considered opinion of this Court that plaintiffs should have discovered the existence of their remaining claims as to Kehoe and Mika Meyers well prior to September 11, 1996, six months before plaintiffs actually filed. In so holding, this Court recognizes the possibility that such a ruling could have been made back in August of 1997. Regardless, the additional evidence from the deposition significantly strengthens defendants' Kehoe and Mika Meyers position and, in this Court's opinion, is dispositive of the issue. The Court also recognizes the possibility that Mr. Kehoe may have been professionally negligent. While a determination on this issue would necessarily have had to await another day, the Court's holding today might well be construed as harsh. Unfortunately for plaintiffs, however, the Court believes it is mandated.

We find no error in the circuit court's grant of summary disposition based on its conclusion that plaintiffs' malpractice action is barred under the six-month discovery rule. The standard to be applied to legal as well as medical malpractice cases pursuant to MCL 600.5838(2) has been set forth by our Supreme Court in *Solowy v Oakwood Hosp Corp*, 454 Mich 214, 221-223; 561 NW2d 843 (1997):

> This Court adopted the "possible cause of action" standard for determining when the discovery rule period begins to run in *Moll* [*v Abbott Laboratories*, 444 Mich 1, 16; 506 NW2d 816 (1993)]. The majority concluded that an objective standard applied in determining when a plaintiff should have discovered a claim. Further, the plaintiff need not know for certain that he had a claim, or even know of a likely claim before the six-month period would begin. Rather, the discovery rule period begins to run when, on the basis of objective facts, the plaintiff should have known of a possible cause of action. The majority explained:
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> "We find that the best balance is struck in the use of the 'possible cause of action' standard. This standard advances the Court's concern regarding preservation of a plaintiff's claim when the plaintiff is unaware of an injury or its cause, yet the standard also promotes the Legislature's concern for finality and encouraging a plaintiff to diligently pursue a cause of action. *Once a claimant is aware of an injury and its possible cause, the plaintiff is aware of a possible cause of action.* We see no need to further protect the rights of the plaintiff to pursue a claim, because the plaintiff at this point is equipped with sufficient information to protect the claim. This puts the plaintiff, whose situation at one

time warranted the safe harbor of the discovery rule, on equal footing with other tort victims whose situation did not require the discovery rule's protection. [*Moll* at 23-24 (emphasis added).]"

While *Moll* involved pharmaceutical products liability claims, the majority's analysis is not specific to those types of claims. Quite the opposite, the analysis supports applying the standard in the context of other types of tort suits that are subject to the discovery rule.

This Court's opinion in *Gebhardt* [*v O'Rourke*, 444 Mich 535; 510 NW2d 900 (1994)] bears this out. In that case, we applied *Moll's* "possible cause of action" standard to the statutory six-month discovery rule applicable to legal malpractice claims. MCL 600.5838; MSA 27A.5838, as amended by 1986 PA 178. *The rationale of Moll applies equally to malpractice actions, whether legal or medical. Once a plaintiff is aware of an injury and its possible cause, the plaintiff is equipped with the necessary knowledge to preserve and diligently pursue his claim.* [Emphasis added.]

In the instant case, the injury about which plaintiffs complain is the loss of certain financial assets. Plaintiffs obviously became aware of this loss in January 1992 when NBD swept the CSTE account and removed over $350,000 from it, and again in the summer of 1992, when CSTE was liquidated at a loss by NBD. Given this knowledge, it must be determined whether or not plaintiffs knew or should have known that Kehoe's representation of CSTE was a possible cause of their financial losses. In this regard, the testimony of plaintiff Patricia Yff, presented by defendants in support of their motion, is significant.

In June 1995, Peter Yff wrote to defendant Kehoe and requested that he send his file to plaintiffs' current counsel, Mr. Hullman. The reasons for the request were explained by Mrs. Yff at her deposition:

Q. Now, this letter, Exhibit 9, which – from your husband's deposition, which Mr. Jack just showed you, do you recall discussing with your husband around that time that you – you needed to get Mark Kehoe's file?

A. Yes.

Q. All right. And what was the reason why you wanted to contact Mark Kehoe and get his file to give it to Mr. Hullman?

A. We just wanted to go over it ourself [sic], and also we wanted Mark [Hullman] just to look at it.

Q. Why?

A. I guess because we were dissatisfied with the way everything was handled. I . . . felt that we were grossly overcharged by Mark Kehoe.

Q. Okay.

A. And I wanted to see what his notes had said.

Q. All right. You didn't want – you didn't want him discussing the – that issue, as the letter says, with John Anding or anyone from his firm. Why not?

A. Because I don't think it was John's business that we – we wanted to check, and I guess I – I guess we didn't want John to think that we were working behind his back. I just felt that it was – just a personal thing that we wanted to get this.

* * *

Q. Just so I'm clear, Mrs. Yff, when you and your husband wrote Mark Kehoe back in June of 1995, it was because you wanted someone to look over his file?

A. Yes.

Q. Just because –

A. We were – we were concerned with the – with the billing and I – I – I just – I wanted to see it.

Q. And you were also concerned about his representation at that point?

A. Yeah, a little.

We agree with the trial court's assessment that "It is clear from a fair reading of the above testimony that plaintiffs were not satisfied with defendant Kehoe's services, and held some degree of suspicion as to the appropriateness of the same." In other words, plaintiffs discovered that they had a "possible" cause of action against defendants in June 1995. *Gebhardt, supra* at 544. Mrs. Yff's deposition testimony indicates at this time plaintiffs had engaged attorney Hullman to review defendant Kehoe's file and investigate Kehoe's representation in the NBD matter. The undisputed and determinative fact is that no later than June 1995, plaintiffs were sufficiently concerned about Kehoe's representation that they sought out another attorney to contact Kehoe and review various portions of his file. In so doing, it can reasonably be concluded that they knew or should have known about a possible claim against him, yet failed to file their complaint until March 1997. It is likewise evident that, for the reasons set forth by the trial court in its first opinion, plaintiffs should have discovered the alleged malpractice concerning Kehoe's failure to advise as to the need for a written agreement long before September 1996, six months before the complaint was actually filed.

The discovery rule does not act to hold a matter in abeyance indefinitely while a plaintiff seeks professional assistance to determine the existence of a claim; a plaintiff must act diligently to discover a possible cause of action and cannot simply sit back and wait for others to inform him of its existence. *Turner v Mercy Hosps & Health Services of Detroit*, 210 Mich App 345, 353; 533 NW2d 365 (1995). Moreover, the burden of proof is on plaintiffs to show that they neither discovered nor should have discovered the claim more than six months before they

commenced this suit. MCL 600.5838(2). Plaintiffs have not met their burden, notwithstanding their affidavits.[3] The dispositive facts are not in dispute and reasonable minds could not differ regarding the legal effect of those facts. *Jackson Co Hog Producers, supra*. We therefore conclude that the trial court properly determined as a matter of law that plaintiffs' malpractice action was barred by the six-month discovery provision of MCL 600.5838(2).

III

Plaintiffs further argue that defendant Kehoe fraudulently concealed his negligence from plaintiffs by refusing to turn over to attorney Hullman the entire contents of the file regarding defendant's work for plaintiffs, by "selecting" Anding (his former partner and acquaintance) as his successor attorney, and by failing to advise his clients "that he had breached the standard of care while representing them."

Under MCL 600.5855, the statute of limitations is tolled when a party conceals the fact that the plaintiff has a cause of action. *Phinney v Perlmutter*, 222 Mich App 513, 562-563; 564 NW2d 532 (1997); *Sills v Oakland General Hosp*, 220 Mich App 303, 310; 559 NW2d 348 (1996); *Brownell v Garber*, 199 Mich App 519, 523-524; 503 NW2d 81 (1993). The plaintiff must plead in the complaint the acts or misrepresentations that comprised the fraudulent concealment. *Sills, supra* at 310. The fraud must have been manifested by an affirmative act or misrepresentation, unless the defendant owed an affirmative duty to disclose information because of a fiduciary relationship with the plaintiff. *Brownell, supra* at 527. The plaintiff has the burden of establishing the defendant's fraud. *Id.* at 531. Further,

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[3] Plaintiffs Peter and Patricia Yff filed affidavits in opposition to Kehoe's motion for summary disposition in which they denied knowledge that they had a cause of action against Kehoe until they were so informed by attorney Hullman in October 1996. Also, plaintiff Patricia Yff, in an affidavit filed in response to Kehoe's renewed motion for summary disposition, attempted to explain the "concern" mentioned in her deposition as a concern not with the quality of Kehoe's representation but rather a concern that Kehoe's records and testimony might not be available for introduction into evidence in the event that she and her husband were granted a new trial in the NBD action on appeal. Attorney Hullman, in an affidavit submitted in response to the renewed motion for summary disposition, stated that on August 9, 1996, he had agreed to investigate a potential malpractice claim against attorney Anding. However, the fact that an objective rather than subjective standard applies in determining whether a possible claim should have been discovered, renders plaintiffs' affidavits insufficient in creating a genuine issue of material fact necessary to avoid summary disposition. Moreover, we agree with defendants' observation that "[i]t stretches credibility too far to assume that the plaintiffs thought they had a possible claim against defendant Anding at that time and did not think they also had a possible claim against Kehoe and Mika Meyers when they had been pursuing and examining Kehoe's file materials for more than a year because of admitted concerns about the manner in which he had represented them."

> No fraudulent concealment can be said to occur where an attorney is unaware of his malpractice. It would be illogical to hold that attorneys who fail to appreciate that they have breached the standard of care have a duty to disclose such a breach notwithstanding their ignorance thereof. See Mallen & Smith, Legal Malpractice (3d ed), § 18.13, p 126. [*Id*. at 528-529.]

Here, plaintiffs have failed to plead fraudulent concealment with sufficient specificity, and their allegations in this regard are wholly unsubstantiated. Although plaintiffs allege that defendant did not promptly turn over the complete file, and attorney Hullman filed this legal malpractice case within six months after Kehoe's file was provided to him, plaintiffs cite no evidence contained in the file that establishes the concealment of a claim. The record indicates that the alleged claims of malpractice were all known to attorney Hullman prior to turning over the entire file; plaintiffs have not demonstrated that any new evidence was discovered as a result of his review of the Kehoe legal file. Moreover, plaintiffs' claim that Kehoe did not advise his clients that he had breached the requisite standard of care is meritless. Kehoe consistently denied that he breached any standard of care, and mere silence is insufficient to sustain a claim of fraudulent concealment. *Sills*, *supra* at 310. Finally, plaintiffs have presented no evidence that Kehoe's "selection" of Anding as his successor resulted in a collaboration to conceal Kehoe's malpractice. Plaintiffs' argument that the statute of limitations should be tolled by MCL 600.5855 is therefore without merit.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Richard Allen Griffin
/s/ Michael R. Smolenski