STATE OF MICHIGAN

COURT OF APPEALS

KILE D. WARD,

Plaintiff-Appellant,

v

MALCOLM A. HARRIS and KOHL, HARRIS & PETERS, P.C.,

Defendants-Appellees.

UNPUBLISHED
May 3, 2002

No. 228160
Oakland Circuit Court
LC No. 98-007378-NM

Before: Holbrook, Jr., and Jansen and Wilder, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting summary disposition in favor of defendants in this legal malpractice action. We affirm.

From April 14, 1994, until December 18, 1995, plaintiff was treated by a doctor for eyelid lesions, without success. In February 1996, plaintiff retained defendant Malcom A. Harris for the purpose of bringing a medical malpractice action against the doctor. Defendant Harris is employed by the defendant law firm, Kohl, Harris & Peters, P.C. On February 6, 1996, plaintiff signed a retainer agreement. At that time, defendant Harris informed plaintiff that a review of the medical records would have to be undertaken before deciding whether to pursue a case on plaintiff's behalf. On May 26, 1996, defendant Harris sent plaintiff a letter indicating that he would not pursue a medical malpractice claim because an ophthalmologist had provided an unfavorable review of plaintiff's medical records. Thereafter, plaintiff located a doctor, who subsequently wrote a letter indicating that the standard of care was breached and that there was a delay in plaintiff's diagnosis and treatment. Based on that correspondence, on December 1, 1997, defendants served a notice of intent to file a claim. According to correspondence from defendants to plaintiff, they advised plaintiff during a meeting that if, upon receipt of the notice, the physician declined to resolve the matter without suit, they would not prosecute the matter any further based on their evaluation of the medical records.

On December 15, 1997, the doctor's insurance carrier acknowledged receipt of the notice of intent in a letter to defendant Harris. On May 14, 1998, the insurance carrier indicated that it did not intend to settle the claims asserted against the doctor. On May 29, 1998, defendant Harris wrote to plaintiff notifying him that the insurance carrier had refused to settle the case and that he intended to close the file. In the letter, defendant Harris also noted that the statute of limitations would be expiring within the next several weeks and that plaintiff would need to

commence litigation promptly, if he chose to do so. On June 2, 1998, plaintiff retrieved the file from defendants. Plaintiff testified that he contacted his new attorney sometime between June 2, 1998 and June 4, 1998. On July 7, 1998, plaintiff's new attorney filed a two-count complaint against defendants, alleging legal malpractice and breach of contract. Ultimately, defendants were granted summary disposition, and plaintiff now appeals.

I

We review de novo a trial court's decision on a motion for summary disposition. *Hawkins v Mercy Health Services, Inc*, 230 Mich App 315, 324; 583 NW2d 725 (1998). A motion for summary disposition under MCR 2.116(C)(10) tests the factual basis of a claim.[1] *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993). We consider the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted in a light most favorable to the nonmoving party. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999). The motion is properly granted if no genuine issue of material fact exists, thereby entitling the moving party to judgment as a matter of law. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

A. The Statute of Limitations

Before addressing whether plaintiff can establish the elements of legal malpractice, we must first address the "applicable notice period" and the expiration of the statute of limitations on plaintiff's underlying medical malpractice claim.

The limitations period for a malpractice claim is two years from the time the claim accrues. MCL 600.5805(1) and (5). A medical malpractice claim accrues at the time of the act or omission that gave rise to the claim "regardless of the time the plaintiff discovers or otherwise has legal knowledge of the claim." MCL 600.5838a(1). A medical malpractice claim may be filed within the two-year period or within six months after the plaintiff discovers or should have discovered the claim, whichever is later. MCL 600.5838a(2). According to the complaint, defendants' answers to interrogatories, and plaintiff's statements throughout the lower court proceedings, plaintiff was treated from April 14, 1994 until December 18, 1995, and plaintiff discovered the alleged malpractice from the doctor's *continual* treatment in January 1996. Plaintiff offers no specific date on which the doctor's breach occurred. Rather, he complains of ongoing deficiencies in care and treatment that continued until December 18, 1995, when plaintiff last treated with his doctor. Therefore, plaintiff had two years from the time of the last treatment date, which was December 18, 1995, in which to file this action.

Unlike other claims, a medical malpractice complaint cannot be filed at any time during the limitations period. Pursuant to statute, the plaintiff "shall not" file a medical malpractice

[1] The trial court did not indicate what subsection of MCR 2.116 it relied upon in granting summary disposition. Defendants moved for summary disposition under MCR 2.116(C)(8) and (10). Both plaintiff and defendants attached documentary evidence and affidavits to their motion and response. Because the trial court considered material beyond the pleadings in evaluating the motions, we review its decision under MCR 2.116(C)(10). *DeHart v Joe Lunghamer Chevrolet, Inc*, 239 Mich App 181, 184; 607 NW2d 417 (1999).

complaint unless he has first given the defendant "written notice . . . not less than 182 days before the action is commenced." MCL 600.2912b(1). Plaintiff served the doctor with the requisite notice of intent on December 1, 1997. Because the limitations period would have expired during the time plaintiff was precluded from filing suit, the limitations period was tolled. MCL 600.5856(d); *Omelenchuk v City of Warren*, 461 Mich 567, 574; 609 NW2d 177 (2000). In *Omelenchuk*, our Supreme Court held that if a potential plaintiff gives the required 182-day notice during a period in which the limitations period would expire, the limitations period is tolled for 182 days after the notice of intent is given, regardless of whether or how the potential defendant responds to the notice of intent. *Id*. at 573-577. Here, the two-year limitations period was set to expire on December 18, 1997. On December 1, 1997 (approximately seventeen days before the expiration of the limitations period) plaintiff provided the required notice to the doctor. As a result of the notice, the limitation period was tolled 182 days. Rather than expiring on December 18, 1997, the limitations period was thus tolled from December 1, 1997, until June 1, 1998; it then resumed for another seventeen days until it expired on June 18, 1998.

B. Legal Malpractice

A claim of legal malpractice is grounded in professional negligence. In order to establish a cause of action for legal malpractice, the plaintiff has the burden of establishing the following elements: (1) the existence of an attorney-client relationship; (2) negligence in the legal representation of the plaintiff; (3) that the negligence was a proximate cause of an injury; and, (4) the fact and extent of the injury alleged. *Simko v Blake*, 448 Mich 648, 655; 532 NW2d 842 (1995). Factual causation is established by showing that, but for the attorney's negligence, the client would have prevailed in the underlying suit. *Charles Reinhart Co v Winiemko*, 444 Mich 579, 586; 513 NW2d 773 (1994).

Here, we find that plaintiff cannot establish that, but for defendants' alleged negligence, his medical malpractice claim would have been timely filed. As indicated above, on June 2, 1998, the attorney-client relationship between defendants and plaintiff ended. Plaintiff retrieved his files from defendants' office on that date. Plaintiff testified that, between June 2, 1998 and June 4, 1998, he retained his current counsel. Viewed in a light most favorable to plaintiff, the evidence shows that, at the time the attorney-client relationship between plaintiff and defendants ceased, plaintiff had more than two weeks to file his medical malpractice suit. See *Boyle v Odette*, 168 Mich App 737, 425 NW2d 472 (1988).[2] Accordingly, we hold that the trial court did not err in summarily dismissing plaintiff's legal malpractice claim against defendants.

C. Equitable Estoppel

We reject plaintiff's arguments that defendants are estopped from claiming that the doctor did not breach the standard of care because of their contrary statement in the notice of intent to file a claim, and from relying on the last date of treatment as the accrual date because of

[2] We note that this is not a situation where defendants attempted to cut off their liability for negligent acts by ending the attorney-client relationship, or where the ultimate loss of the claim was merely a manifestation of the injury caused by defendants' negligence. Cf. *Teodorescu v Bushnell, Gage, Reizen & Byington (On Remand)*, 201 Mich App 260; 506 NW2d 275 (1993).

their statement that the doctor continuously breached the standard of care, which, plaintiff alleges, supports a finding that the accrual date could have occurred earlier.

Equitable estoppel rests in broad principles of justice. *Mertz v Mertz*, 311 Mich 46, 55; 18 NW2d 271 (1945). In *Soltis v First of America Bank-Muskegon*, 203 Mich App 435, 444; 513 NW2d 148 (1994), this Court set forth the elements of equitable estoppel:

> Equitable estoppel arises where a party, by representations, admissions, or silence intentionally or negligently induces another party to believe facts, the other party justifiably relies and acts on that belief, and the other party will be prejudiced if the first party is allowed to deny the existence of those facts.

We find that plaintiff's reliance on the equitable estoppel doctrine does not provide a basis for reversal for several reasons. At the outset, we note that plaintiff has not provided any authority for his suggestion that an attorney's mere filing of a notice of intent to file a claim on behalf of a client invokes the equitable estoppel doctrine under similar circumstances, or that defendants are estopped from relying on the last date of treatment as the accrual date when the alleged deficiencies have been continual. Plaintiff's reliance on *Bessman v Weiss*, 11 Mich App 528, 531; 161 NW2d 599 (1968), is misplaced because the facts of this case are clearly distinguishable. A party may not merely announce a position and then leave it to this Court to discover and rationalize the basis for the claim. *Mudge v Macomb Co*, 458 Mich 87, 104-105; 580 NW2d 845 (1998), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). Moreover, to find that equitable estoppel applies to the facts of this legal malpractice case would be unreasonable, and would stretch the equitable estoppel doctrine as it relates to legal malpractice to questionable limits.[3] Accordingly, the trial court did not err in summarily dismissing plaintiff's legal malpractice claim against defendants.

II

Plaintiff also argues that a genuine issue of material fact exists regarding whether defendants are liable for misrepresentation. Because plaintiff did not raise this issue below, indeed did not even allege a claim for misrepresentation in his complaint, it is not preserved for appellate review. *Booth Newspapers, Inc v Univ of Michigan Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993).

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Kathleen Jansen
/s/ Kurtis T. Wilder

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[3] See 2 R Mallen & J Smith, Legal Malpractice, § 20.14, at 717-718 (4th ed).