# STATE OF MICHIGAN

# COURT OF APPEALS

ROGER T. SCHLEHUBER,

Plaintiff-Appellant,

v

RONALD J. VARGA and LAW OFFICE OF RONALD J. VARGA,

Defendants-Appellees.

UNPUBLISHED
December 22, 2005

No. 264193
Mackinac Circuit Court
LC No. 04-005902-NM

Before: Owens, P.J., and Saad and Fort Hood, JJ.

PER CURIAM.

In this legal malpractice case, plaintiff appeals as of right from the trial court's order granting summary disposition to defendants. We affirm.

Defendant[1] represented plaintiff in divorce proceedings from 1998 through 2000. Among the assets to be divided was plaintiff's pension earned from the federal government. The consent judgment resolving that case included a federal employee's retirement order (FERO), which was entered on February 4, 2004. Among its provisions is that if plaintiff predeceases his former wife, she "is awarded the maximum possible former spouse survivor annuity under the Federal Employees Retirement System." Plaintiff and his former wife litigated certain issues, other than the survivorship provision, stemming from the FERO, but ultimately agreed to have it entered as part of a consent judgment.

According to plaintiff, he understood that his former wife would receive a percentage of pension benefits earned up to the time of the divorce, but contended that defendant never explained the full significance of the survivor benefit. Plaintiff protests that had defendant better advised him, he would not have agreed to the FERO, or to the overall property division.

[1] Because the defendants in this case consist of an attorney and the business entity under which he practices, the singular term "defendant" in this opinion will refer to the two collectively.

Plaintiff states that he first became aware of his former wife's survivorship rights from employment-related correspondence that he received in May 2004, which led him to seek to have the FERO rescinded. The trial court declined to disturb the FERO because it was but one part of a complex, negotiated settlement. The trial court further stated that the survivorship provision "certainly should have been discovered and if there was an error it was an error upon [plaintiff] or his attorney in not bringing it to the court's or someone else's attention."

Plaintiff filed the instant suit on November 4, 2004. Defendant sought summary disposition on the grounds of collateral estoppel, the statute of limitations, and plaintiff's assent to entry of the divorce judgment. The trial court rejected the collateral estoppel argument, but stated that plaintiff "either knew or should have known that this [survivorship] value was overlooked" at the time the FERO was signed in 2000. The trial court held that the two-year limitations period applicable to legal malpractice actions had run, and that plaintiff, in light of what he knew or should have known all along, could not take advantage of the six-month tolling provision.

MCL 600.5838(1) establishes that a malpractice claim against a lawyer "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." See *Gebhardt v O'Rourke*, 444 Mich 535, 543; 510 NW2d 900 (1994). Defendant reports that the attorney-client relationship ended in March 2000, and plaintiff nowhere suggests that the representation extended beyond that date, or that he can otherwise maintain his cause of action if the two-year period of limitations applies. However, MCL 600.5838(2) provides that a malpractice claim "may be commenced . . . within 6 months after the plaintiff discovers or should have discovered the existence of the claim . . . ."

Plaintiff's sole issue on appeal is whether the trial court erred in holding that he was not entitled to proceed as one who brought suit within six months of having discovered his claim. We review a trial court's decision on a motion for summary disposition de novo as a question of law. *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999).

The trial court recognized that a jury question existed concerning whether defendant had sufficiently advised plaintiff with regard to the survivorship provision of the FERO, but concluded that plaintiff himself "either knew or should have known that this value was overlooked" at the time the FERO was signed in 2000.

Plaintiff insists that he never received from defendant an official copy of the signed FERO, while defendant maintains that he repeatedly provided plaintiff with the necessary documentation. This factual dispute cannot be resolved on summary disposition. See *Manning v Hazel Park*, 202 Mich App 685, 689; 509 NW2d 874 (1993) (in deciding motions for summary disposition, "[t]he court may not make factual findings or weigh credibility").

However, plaintiff admits to participating in negotiations over the FERO. Although he complains that he neither saw, nor was asked to review, the FERO before it was signed, he nowhere suggests that he did not know of its existence, that he could not readily have obtained a copy, or that any of its contents were misrepresented to him.

Plaintiff argues that, because he is not a lawyer, even if he had read the FERO he might not have understood the full significance of the survivorship provision. However, we conclude that it requires no specialized expertise to understand that the provision in question grants the former wife survivorship rights, and that an interested person agreeing to such a provision should inquire as necessary to understand it fully.

For purposes of periods of limitation, "'should have known' is an objective standard based on an examination of the surrounding circumstances." *Moll v Abbott Laboratories*, 444 Mich 1, 18; 506 NW2d 816 (1993) (products liability). "The discovery rule applies to the discovery of an injury, not to the discovery of a later realized consequence of the injury." *Id.* See also *Gebhardt, supra* at 544 (applying principles from *Moll, supra*, in the context of legal malpractice).

In this case, the existence of the FERO was known to plaintiff upon its creation and entry as part of his divorce judgment. Its was always a matter of record, and thus plaintiff could have explored, or asked about, its provisions with no unusual exertion. The trial court correctly held that plaintiff could not use the discovery rule to revive his time-barred legal malpractice claim.

Affirmed.

/s/ Donald S. Owens
/s/ Henry William Saad
/s/ Karen M. Fort Hood