STATE OF MICHIGAN

COURT OF APPEALS

HVW DISTRIBUTION, LLC, ALBERT SIMON, DON VIDOSH, JOSEPH WILSON, DANIEL FENWICK, CHARLES HELSEL and DENNISE VIDOSH, Plaintiffs-Appellants,	UNPUBLISHED November 10, 2009
v	No. 284261 Oakland Circuit Court
JOHN E. NEMAZI and BROOKS KUSHMAN, PC, Defendants-Appellees.	LC No. 2007-086734-NM

Before: Stephens, P.J., and Jansen and Wilder, JJ.

PER CURIAM.

Plaintiffs appeal as of right the circuit court's order granting summary disposition to defendants. We affirm.

I

The individual plaintiffs designed a particular type of Christmas tree stand that they wished to patent, produce and sell. A company in Germany, Krinner, holds several patents for a similar product. Plaintiffs formed a limited liability corporation, HVW, in order to explore opportunities to sell their stand, and retained defendants in January 2003 to assess the patentability of their design. Defendants allegedly informed plaintiffs that their tree stand did not infringe on any Krinner patent, that the HVW stand was patentable, and that plaintiffs could manufacture their product without fear of infringement. Plaintiffs, through defendants, filed a patent application on July 11, 2003 and began production. Plaintiffs hired a sales force, negotiated to partner with another company, entered into a licensing agreement for sales, and began selling the product.

Krinner then contacted plaintiffs, alleging a claim of infringement on Krinner patents, and plaintiffs thereafter halted advertising and sales. Defendant Nemazi was notified of Krinner's position, and wrote a letter to plaintiffs on November 7, 2003 stating that, in his opinion, the Krinner claim was invalid and plaintiffs had valid defenses against it. Nemazi recommended, however, that plaintiffs try to reach a settlement with Krinner rather than engage in costly litigation.

On January 28, 2004, Nemazi faxed a letter to plaintiff Simon as a follow-up to a recent prior conversation. In the letter, Nemazi noted his disappointment that in that conversation, a telephone conference concerning plaintiffs' outstanding bill, Simon had stated his dissatisfaction "with the legal services our firm *has provided*" concerning the Christmas tree stand and a search regarding a driveway hockey backstop. (Emphasis added). Nemazi indicated that his review of the files showed that all of the work done was consistent with the legal services requested by plaintiffs. Nemazi also stated that "[s]ince you are no longer making payments on your outstanding bill *and have retained new counsel*," it was better for all concerned that defendants terminate representing plaintiffs at that time. (Emphasis added).

Plaintiffs filed a complaint in the Oakland Circuit Court on October 28, 2005, alleging professional negligence against defendants. In order to facilitate the conduction of informal discovery and an attempt to resolve the dispute, the parties entered into a written tolling agreement on May 29, 2007, which states in relevant part:

> WHEREAS, the statute of limitations defense predicated on the dismissal of Plaintiff's Complaint should be tolled with respect to Plaintiffs' beginning on the Effective Date [May 29, 2007] and continuing until the termination of this Agreement under its terms;
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> * * *
>
> 1. Plaintiffs and Defendants, by their counsel, stipulate to the dismissal of Plaintiffs' Complaint without prejudice against its refilling.
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> 2. The Parties agree that if Plaintiffs re-file their Complaint, Defendants will not raise the statute of limitations defense available to them as a result of the dismissal without prejudice of Plaintiffs' Complaint, with the exception that Defendant and any privy, successor or assign, preserves all defenses, including but not limited to the defense of statute of limitations which are asserted or which could have been asserted on the original filing date of Plaintiffs' Compliant in Case No. 05–070173 NM, upon Plaintiffs' refiling thereof.
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> 3. If Plaintiffs refile their Complaint, they must do so no later than August 31, 2007 and must refile in the Oakland County Circuit Court. . . .
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> * * *
>
> 5. Defendants agree that the time period between the Effective Date of this Agreement and the date Plaintiffs' Complaint is refiled, shall not be included in the calculation of time for purposes of any Statute of Limitations defense which might be otherwise applicable to Plaintiffs' claims. It is expressly the intention of the Parties, however to preserve all of their claims and defenses at the time of the original filing of Plaintiffs' Complaint, including and Statute of Limitations defense.

Pursuant to this agreement, plaintiff's complaint was dismissed on June 7, 2007.

The parties were unable to resolve the dispute, and on October 22, 2007, plaintiffs refiled their complaint. Defendants moved for summary disposition under MCR 2.116(C)(7), arguing that the complaint was time barred. The trial court granted the motion, and this appeal followed.

II

We review a decision on a motion for summary disposition, as well as questions of contract construction, de novo. See *Manuel v Gill*, 481 Mich 637, 643; 753 NW2d 48 (2008). Similarly, the determination whether contractual language is ambiguous is a question of law reviewed de novo. *St Clair Med, PC v Borgiel*, 270 Mich App 260, 264; 715 NW2d 914 (2006). If a word or phrase is unambiguous such that no reasonable person could differ concerning the application of the term or phrase to undisputed material facts, summary disposition is appropriate. However, if reasonable minds could disagree, a question of fact exists for the factfinder, and summary disposition is inappropriate. *Id.*

Motions for summary disposition on the basis that the statute of limitations had run are considered under MCR 2.116(C)(7). In reviewing a decision under that rule, we consider all documentary evidence submitted by the parties, and accept all well-pleaded allegations as true, construing them in favor of the nonmoving party. *Smith v Kowalski*, 223 Mich App 610, 616; 567 NW2d 463 (1997).

III

Plaintiffs' complaint was untimely because their malpractice claim accrued on November 7, 2003 rather than January 28, 2004.

The attorney-client relationship, and thus determination of when the representation ended for purposes of applying the pertinent statute of limitations in litigation arising from the relationship, is governed by the explicit terms of the contract between them. See *Seyburn, Kahn, Ginn, Bess, Deitch, & Serlin, PC v Bakshi*, 483 Mich 345, 348, 358; 771 NW2d 411 (2009). Such follow-up ministerial acts as reviewing, copying, or returning a former client's file do not extend the accrual date beyond when the attorney-client relationship was terminated. *Id.*, at 348.

> Under Michigan's statutory law, a client's claim against his or her attorney for professional malpractice accrues on the date that his attorney "discontinues serving the plaintiff in a professional . . . capacity as to the matters out of which the claim for malpractice arose . . . ." MCL 600.5838(1). The client's action for malpractice is time-barred unless it is brought within two years from the date the claim accrued or arose (i.e., the date that services were discontinued), or within six months of the date that "the plaintiff discovers or should have discovered the existence of the claim," whichever date occurs later. MCL 600.5805(6); MCL 600.5838(2); *Kloian v Schwartz*, 272 Mich App 232, 237; 725 NW2d 671 (2006). [*Wright v Rinaldo*, 279 Mich App 526, 528-529; 761 NW2d 114 (2008).]

In this case, the statutory limitations period for the legal malpractice claim is two years from the conclusion of the attorney-client relationship because plaintiffs knew of the alleged malpractice during the attorney-client relationship. MCL 600.5805(6).

Plaintiffs claim that the attorney-client relationship was severed by the fax sent by Nemazi on January 29, 2004 and dated January 28, 2004. We disagree.

Nemazi's November 7, 2003 letter provided plaintiffs with a legal analysis of the validity of plaintiffs proposed response to Krinner's allegation of infringement. Nemazi also recommended that plaintiffs seek to settle with Krinner. After this letter, defendant's did no additional legal work on that specific issue, i.e., the patentability of the Christmas tree stand, which is the subject of the malpractice claim. Moreover, Nemazi's January 28, 2004 letter referred to this prior legal work in the past, rather than present, tense. In this regard, *Bauer v Ferriby & Houston, PC*, 235 Mich App 536, 538; 599 NW2d 493 (1999), supports defendants' contention that their duty to plaintiffs was to provide a specific legal service, and that the last date on which they provided the specific legal service at issue in this action, advice on the patentability of plaintiffs' product, was November 7, 2003. Defendants engagement letter, which contains an "as requested" provision indicating that they were not representing plaintiffs in an ongoing matter, but would work on specific legal issues as requested, lends further support to defendants' argument.

In addition, although plaintiffs had an outstanding balance for legal services already rendered, it is clear that no additional work was ongoing. Plaintiffs had also engaged other legal counsel before January 28, 2004. See *Bauer, supra* at 539-540. Thus, while Nemazi's January 28, 2004 letter references defendants' intent to terminate representation of plaintiffs at that time, we conclude that the letter was plainly intended to terminate the *general* relationship that was outlined in the engagement letter, meaning defendants' availability to plaintiffs on the "as requested" basis concerning all matters of patentability.

Because the accrual date of the malpractice claim, for purposes of the limitations period, was November 7, 2003, plaintiffs had until November 7, 2005 to file their claim. Plaintiffs' original complaint was filed October 28, 2005, and therefore, ten days remained before the period of limitations expired, and at that time, tolling of the period of limitations was governed by MCL 600.5856(a). By executing the tolling agreement on May 29, 2007, however, the parties agreed that regardless of the time remaining in the period of limitations under MCR 600.5856(a), thereafter, tolling and the period of limitations remaining as to plaintiff's claims were governed by the terms of the tolling agreement.

Defendants contend that the terms of the tolling agreement expressly required plaintiffs' to refile their claim by August 31, 2007 if the parties were not able to settle the dispute, and that because plaintiffs did not meet this condition, the refiled complaint was barred.

We agree. Parties may contractually shorten a statutory limitations period, regardless of the reasonableness of that agreement. *Rory v Continental Ins Co*, 473 Mich 457, 470; 703 NW2d 23 (2005). A trial court is bound to enforce an unambiguous contract as written. *Id.* at 468. "[I]n the context of a summary disposition motion, a trial court may determine the meaning of the contract only when the terms are *not* ambiguous." *D'Avanzo v Wise & Marsac, PC*, 223 Mich App 314, 319; 565 NW2d 915 (1997) (citation omitted; emphasis in original). "A contract is ambiguous if the language is susceptible to two or more reasonable interpretations. In an instance of contractual ambiguity, factual development is necessary to determine the intent of the parties and summary disposition is inappropriate." *Id*. (citations omitted).

> "[I]f two provisions of the same contract irreconcilably conflict with each other, the language of the contract is ambiguous. Further, courts cannot simply ignore portions of a contract in order to avoid a finding of ambiguity or in order to declare an ambiguity. Instead, contracts must be construed so as to give effect to every word or phrase as far as practicable." [*Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 467; 663 NW2d 447 (2003) (citation and internal quotation marks omitted).]

We conclude that the contract language stating that "[i]f Plaintiffs refile their Complaint, they must do so no later than August 31, 2007 and must refile in the Oakland County Circuit Court," is an unambiguous condition precedent to the tolling of the limitations period at the time the complaint was dismissed on June 7, 2007. The bargained-for exchange involved plaintiffs' receiving the benefit of an additional 75 days of tolling, while defendants gained the assurance that this litigation would be resolved by settlement, or refiled in the Oakland circuit court by a date certain.

Because plaintiffs were required to refile their complaint by August 31, 2007 under the tolling agreement but failed to do so, plaintiffs' complaint filed on October 22, 2007 was barred by the statute of limitations.

We reject plaintiffs' claim that the tolling agreement was modified through subsequent oral communication. The trial court correctly found that oral modification of the tolling agreement was contrary to the requirements of MCR 2.507(G), which states as follows:

> An agreement or consent between the parties or their attorneys respecting the proceedings in an action, subsequently denied by either party, is not binding unless it was made in open court, or unless evidence of the agreement is in writing, subscribed by the party against whom the agreement is offered or by that party's attorney.

Because defendants deny reaching an alleged oral modification of the tolling with the plaintiffs, and no evidence of the alleged oral modification was subsequently confirmed in writing or in open court, there can be no binding modification.

For the above stated reasons, we conclude that plaintiffs' refiling of their complaint occurred after the statute of limitations had expired, and thus that the trial court correctly determined that their claim was time barred.

Affirmed.

/s/ Cynthia Diane Stephens
/s/ Kathleen Jansen
/s/ Kurtis T. Wilder