STATE OF MICHIGAN

COURT OF APPEALS

DINO RIGONI, RIGONI INVESTMENTS, LLC, and RIGONI ASSET MANAGEMENT, LLC,

Plaintiff-Appellants,

v

JOAN WESTRATE, Personal Representative of the Estate of MARK A. WESTRATE, and WESTRATE & THOMAS,

Defendants,

and

RANDY KOLAR and RHOADES MCKEE, PC,

Defendants-Appellees.

UNPUBLISHED
October 19, 2017

No. 334179
Cass Circuit Court
LC No. 15-000752-NM

Before: MURRAY, P.J., and SAWYER and MARKEY, JJ.

PER CURIAM.

Plaintiff[1] appeals as of right the trial court's order granting defendants'[2] motion for summary disposition in this legal malpractice action. For the reasons stated herein, we affirm.

I. FACTS AND PROCEDURAL HISTORY

In 1999, plaintiff's long-time attorney Mark Westrate referred him to defendants Randy Kolar and Rhoades McKee, PC for estate planning services. After several meetings, Kolar drafted an estate plan designed to transfer ownership of plaintiff's farm to his daughter and son-

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[1] Rigoni Investments, LLC and Rigoni Asset Management, LLC are not parties to this appeal. Counsel conceded dismissal of their claims below.

[2] Defendants Joan Westrate and Westrate & Thomas are not parties to this appeal, and do not appear to have participated in the proceedings below. Thus, we use the term defendants to refer only to Randy Kolar and Rhoades McKee, PC collectively.

in-law, Dina and Chris Razjer. Plaintiff testified at his deposition that although he attended all of the meetings, he did not understand the estate plan, and Kolar never provided a proper explanation. Nevertheless, he signed the estate planning documents on March 9, 2001.

In November 2010, a dispute arose between Chris and plaintiff. As a result, plaintiff met with Westrate to discuss his options for changing the estate plan. Lacking a full understanding of the documents himself, Westrate wrote to Kolar on January 12, 2011, stating, "I would . . . much appreciate your revisiting these documents and providing us your sage advice concerning what his options are." In his February 3, 2011 response to Westrate's inquiry, Kolar summarized the estate plan created in 2001, explained why it might be difficult to alter the plan, and made suggestions for how plaintiff might do so.

Ultimately unhappy with the legal services provided, plaintiff initially filed a malpractice action against defendants in January 2013, which was dismissed by stipulated order on January 2, 2015.[3] Then, on December 30, 2015, plaintiff filed the present legal malpractice suit against defendants, asserting that he suffered mental anguish, emotional distress, and financial loss as a result of their failure to adequately explain the estate plan. Specifically, plaintiff claimed that defendants (1) failed to explain that under the estate plan, the Razjers, rather than plaintiff, would be responsible for the farm's property taxes, (2) failed to explain the potential effects of treating rent payments and timber income from the farm as his own, and (3) committed other improper acts or omissions.

In response, defendants filed a motion for summary disposition pursuant to MCR 2.116(C)(7), (8), and (10), arguing that plaintiff's claim was time-barred under MCL 600.5838(1), because he failed to file the complaint within two years after they discontinued service in the matter out of which the claim arose. According to defendants, plaintiff's legal malpractice claim accrued when the estate planning documents were executed in 2001, and Kolar's February 2011 response to Westrate's inquiry did not revive the action.

In his answer in partial opposition to defendants' motion, plaintiff argued that he timely filed suit with his original complaint on January 13, 2013, because defendants' service did not end upon completion of the estate planning documents in 2001. Instead, plaintiff asserted, defendants' representation with regard to estate matters continued through Kolar's 2011 response to Westrate, and his resignation as trustee remover of plaintiff's estate in a letter dated May 26, 2011.

Ultimately, the trial court granted defendants' motion for summary disposition pursuant to MCR 2.116(C)(7), (8), and (10), ruling that plaintiff's claim was time-barred. Citing *Bauer v Ferriby & Houston, PC*, 235 Mich App 536; 599 NW2d 493 (1999), the court found that

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[3] Plaintiff and defendants entered into a tolling agreement in January 2015, which stated, "The period between the Effective Date and the Termination Date of this Agreement shall not be included in determining the applicability of any statute of limitations, laches or any other defense based upon the lapse of time in any action or proceeding hereafter brought by the Rigoni Parties against the Westrate Parties, Kolar or RM."

defendants completed estate planning services for plaintiff in 2001, and Kolar's February 2011 letter did not resurrect the attorney-client relationship.

II. ANALYSIS

Plaintiff argues that the trial court erred when it granted defendants' motion for summary disposition because when he initially filed the legal malpractice action on January 13, 2013, he did so within two years of the date on which defendants discontinued serving him as to matters out of which the malpractice claim arose. Thus, he asserts, the claim is not time-barred.

We review a trial court's decision on a motion for summary disposition de novo. *Kloian v Schwartz*, 272 Mich App 232, 235; 725 NW2d 671 (2006). MCR 2.116(C)(7) "permits summary disposition where the claim is barred by an applicable statute of limitations," *Nuculovic v Hill*, 287 Mich App 58, 61; 783 NW2d 124 (2010), and "[i]n the absence of a disputed fact, whether a cause of action is barred by the statute of limitations is a question of law subject to review de novo," *Kloian*, 272 Mich App at 235. To review a motion under MCR 2.116(C)(7), this Court must "consider affidavits, depositions, admissions, and other documentary evidence if the supporting materials are admissible." *Id*. at 235.[4]

A legal malpractice action must be filed within two years of the date the claim accrues, or within six months of when the plaintiff discovers the claim's existence, whichever is later. MCL 600.5805(6); MCL 600.5838(2); MCL 600.5838b(1); *Gebhardt v O'Rourke*, 444 Mich 535, 541; 510 NW2d 900 (1994). The six-month discovery rule is not at issue. A legal malpractice claim accrues at the time counsel "discontinues serving the plaintiff in a professional or pseudoprofessional capacity as to the matters out of which the claim for malpractice arose[.]" MCL 600.5838(1); *Kloian*, 272 Mich App at 237. "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) (citation omitted); *Bauer*, 235 Mich App at 538.

Plaintiff argues that defendants did not discontinue service when he signed the estate planning documents on March 9, 2001. He asserts, instead, that Kolar's February 2011 response to Westrate's inquiry regarding his options for changing the estate plan, and May 2011 resignation as trustee remover, demonstrate the existence of an ongoing attorney-client relationship with regard to estate planning, the matter out of which his claim for legal malpractice arose.[5]

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[4] Despite listing MCR 2.116(C)(8) as a basis for its decision, the trial court looked beyond the pleadings to grant defendants' motion for summary disposition. Additionally, because MCR 2.116(C)(7) governs the statute of limitation's argument, that is the rule properly relied upon for the motion. Thus, we will review the case only under MCR 2.116(C)(7). See *Collins v Detroit Free Press, Inc*, 245 Mich App 27, 31; 627 NW2d 5 (2001).

[5] We note that in support of their motion for summary disposition, defendants attached a March 4, 2002 letter from plaintiff to Rhoades McKee, requesting that his account with the firm be

It is true that, under MCL 600.5838(1), if a plaintiff is injured as a result of professional services, but continues to receive related services, those continuing services "constitute 'the matters out of which the claim for malpractice arose.' " *Levy v Martin*, 463 Mich 478, 488-489; 620 NW2d 292 (2001). However, in *Bauer*, this Court acknowledged that a distinction must be made between actions taken by counsel as part of an ongoing attorney-client relationship, and "remedial effort[s] concerning past representation." *Bauer*, 235 Mich App at 538. To determine if an attorney's actions extend representation for statute of limitation purposes, "the proper inquiry is whether the new activity occurs pursuant to a current, as opposed to a former, attorney-client relationship." *Id*. at 539. The *Bauer* Court held that an attorney's efforts to remedy an error from an earlier representation did not extend the accrual date for the plaintiff's legal malpractice claim, reasoning that the efforts amounted to "follow-up activities attendant to otherwise completed matters of representation[.]" *Id*. at 537, 539-540.

Similarly, "ministerial" tasks undertaken by an attorney following otherwise-completed representation do not extend the accrual date for legal malpractice claims. In *Wright v Rinaldo*, 279 Mich App 526, 537-538; 761 NW2d 114 (2008), for example, this Court, citing *Bauer*, held that an attorney's ministerial task of advising a former client to file a maintenance fee for his patent did not extend the accrual date for the client's legal malpractice claim.

Despite plaintiff's argument to the contrary, it is clear that Kolar's February 2011 response to Westrate's inquiry and May 2011 resignation as trustee remover were simply follow-up actions regarding an otherwise-completed legal service, and did not demonstrate an ongoing attorney-client relationship between plaintiff and defendants. The communications occurred 10 years after the estate plan was executed, and Kolar did not add to, or change, the plan. He simply provided a summary of the already-existing documents, and suggestions for how they could be altered. Further, as plaintiff admitted several times throughout his deposition, he hired defendants for the sole purpose of preparing an estate plan, not to provide legal advice regarding operation of the farm, rent payments, or timber income. Thus, defendants discontinued serving plaintiff upon completion of the estate plan in 2001, the service plaintiff retained defendants to perform.

Plaintiff attempts to distinguish *Bauer*, arguing that Westrate's 2011 letter to Kolar was an "inquiry in the very same matter [out of which his claim arose], i.e. estate planning." But by this logic, any action taken by an attorney that relates to a matter resolved through earlier representation would either resurrect the past attorney-client relationship, or establish the existence of an ongoing relationship, and the aforementioned caselaw precludes such a result. Moreover, plaintiff's legal malpractice claim arose out of defendants' conduct during the drafting of the estate plan, and not Kolar's 2011 response to Westrate, or his letter resigning as trustee remover of plaintiff's estate. Plaintiff's counsel clarified, at the motion for summary disposition hearing, that defendants' inadequate explanation of the estate plan constituted

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closed. The letter appears to have been signed by plaintiff. Yet when confronted with the letter during his deposition, plaintiff denied ever signing or sending the letter. Nonetheless, plaintiff's challenge to the trial court's decision fails.

plaintiff's sole allegation of malpractice, stating that defendants had a duty which "arose at the time Mr. Kolar wrote and offered up for execution this complicated estate plan, and it is the duty to simply explain it and be sure that [plaintiff] understands it, and to be sure that [plaintiff] at least knows how to conduct his affairs in a way which is respectful and mindful of it." Therefore, plaintiff's legal malpractice claim accrued at the time he signed the estate plan in 2001 – when defendants completed service on the matter out of which his claim arose – and both his original complaint and the complaint he filed in 2015 are barred by the statute of limitations.

Affirmed. Having prevailed in full, defendants may tax costs pursuant to MCR 7.219(A).

/s/ Christopher M. Murray
/s/ David H. Sawyer
/s/ Jane E. Markey