STATE OF MICHIGAN

COURT OF APPEALS

TRUCKNTOW.COM,

Plaintiff-Appellant,

v

UHY ADVISORS MI, INC., and UHY, LLP,

Defendants-Appellees.

UNPUBLISHED
August 26, 2021

No. 354999
Oakland Circuit Court
LC No. 2020-181583-CB

Before: RIORDAN, P.J., and MARKEY and SWARTZLE, JJ.

RIORDAN, P.J. (*dissenting*).

I respectfully dissent.

MCL 600.5805(8) provides that the "the period of limitations is 2 years for an action charging malpractice." MCL 600.5838(1), which deals with malpractice claims, provides as follows:

> [A] claim based on the malpractice of a person who is, or holds himself or herself out to be, a member of a state licensed profession 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, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim.

Simply put, malpractice claims have a two-year statute of limitations and accrue at the time the professional "discontinues serving the plaintiff" on the matter that led to the malpractice claim, regardless of when the plaintiff discovers the claim. See *Ohio Farmers Ins Co v Shamie*, 243 Mich App 232, 240; 622 NW2d 85 (2000). "The Legislature intended that the last day of service be the sole basis for determination of accrual. Lack of ripeness, i.e., that not all the elements of the tort have been discovered, is irrelevant to the two-year limitation period." *Gebhardt v O'Rourke*, 444 Mich 535, 543-544; 510 NW2d 900 (1994).

The question here is whether plaintiff's claim is barred by the statute of limitations. The answer depends on when defendants "discontinued serving" plaintiff.[1] Because the trial court did not err in determining that defendants discontinued serving plaintiff on November 27, 2017, and plaintiff's complaint was filed more than two years after that date, I would affirm the trial court and hold that plaintiff's claim is barred by the statute of limitations.

The matter out of which the malpractice claim arose, as framed by the parties, was defendants' work assisting plaintiff in responding to the Department of Treasury's audit. Defendants discontinued assisting plaintiff on this matter on November 27, 2017, as evidenced by the lack of any other professional services rendered after that date. The interactions between the parties after November 27, 2017, were not professional services provided by defendants to plaintiff for purposes of assisting plaintiff with the audit. As the billing invoices show, no services were provided after that date. Had defendants performed additional professional services for plaintiff on this matter, they presumably would have charged a fee for doing so, and that fee would have been reflected in a billing invoice.

This Court has explained that a lack of additional billing is relevant to the determination of when a professional firm discontinues serving a plaintiff. For instance, in *Bauer v Ferriby & Houston, PC*, 235 Mich App 536; 599 NW2d 493 (1999), we reasoned that because the defendant firm had not billed the plaintiff client for any of its follow-up activities that occurred after the professional relationship was formally terminated, those activities were "not . . . legal service[s] in furtherance of a continuing or renewed attorney-client relationship." *Id*. at 540. Likewise, in the matter before us, the lack of billing for professional services after November 27, 2017, indicates that the June 2018 communications in this case were not further services. In fact, the activities at issue in *Bauer*, which involved multiple communications and legal research, were more extensive than the few e-mail communications in this case. See *id*. at 537. In contrast, in *Maddox v Burlingame*, 205 Mich App 446, 450-451; 517 NW2d 816 (1994), this Court reasoned that the defendant attorney's submission of a billing invoice to the plaintiff clients showed that the attorney had not yet discontinued serving the plaintiffs. This is starkly different than the matter before us now, in which defendants billed plaintiff for no services after November 27, 2017. Thus, both *Bauer* and *Maddox* are instructive. Defendants were no longer providing professional services for plaintiff after that date.

As the trial court recognized, the May 30, 2018 letter by Scott Silberman of plaintiff's firm implicitly admitted that defendants discontinued their provision of professional services. In that communication, Silberman stated that defendants had failed to "follow up on the 2nd OIC [Offer in Compromise] over the last 7 months." This was an implicit acknowledgment that there had

[1] I question whether the majority correctly assumes that defendants continued "serving plaintiff in a professional capacity *with respect to matters giving rise to the malpractice claims*." [Emphasis added.] The particular malpractice claim here concerns the alleged failure to timely file a tax appeal in 2016. The professional relationship thereafter concerned an Offer in Compromise (OIC), which is distinct from a tax appeal. However, because defendants' brief on appeal seemingly concedes the issue concerning the 2016 tax appeal, therefore I will not discuss it further.

been no provision of professional services by defendants—indeed, no contact between the parties—since the filing of the OIC, and after November 27, 2017.

Plaintiff argues—and the majority agrees—that the e-mail communications between June 14, 2018 and June 18, 2018, prove that defendants had not discontinued services. However, I find the following response from Silberman illuminating: "[We are] going to call the auditor, play dumb, and try and see if this is what they will accept . . . . If we need any more assistance we will ask for it. Please put everything on your side on hold for the time being." Silberman later wrote, "I ask that you let [another professional] move into the driver's seat. We need to let someone else try and resolve this once and for all." These messages clearly show that Silberman had devised his own strategy independent of defendants and was not expecting defendants to provide any further professional services to plaintiff.

Finally, plaintiff suggests that the June 2018 e-mail communications extended the statute of limitations under the "last treatment rule." This argument misses the mark because the "last treatment rule" is merely a common-law rule that was "codified and expanded by MCL 600.5838(1)." *Levy v Martin*, 463 Mich 478, 487; 620 NW2d 292 (2001). Moreover, as noted previously, *Bauer* specifically addressed the issue of whether follow-up communications or activities, occurring after the completion of professional services, extend the statute of limitations. The follow-up activities in that case included multiple communications with the plaintiff and legal research to assist the plaintiff's efforts. *Id*. at 537-538. This Court concluded that those follow-up activities did not extend the statute of limitations. *Id*. at 539. "To hold that such follow-up activities attendant to otherwise completed matters of representation necessarily extends the period of service to the client would give providers of legal services a powerful disincentive to cooperate with a former client who needs such attention." *Id*. The same is true in this case. The June 2018 e-mail communications, which are far less involved than the legal research that was performed in *Bauer*, did not extend the statute of limitations.

For these reasons, I would affirm the trial court's grant of summary disposition in favor of defendants.[2]

/s/ Michael J. Riordan

[2] I also agree with the trial court that sanctions against plaintiff were not warranted under MCL 600.2591 or MCR 1.109(E)(6).