STATE OF MICHIGAN

COURT OF APPEALS

JAMES EASTON, Plaintiff-Appellant,	UNPUBLISHED August 2, 2011
v	No. 298875 Wayne Circuit Court
NEIL A. MILLER and NEIL A. MILLER, P.C., Defendants-Appellees.	LC No. 09-031180-NM

Before: TALBOT, P.J., and HOEKSTRA and GLEICHER, JJ.

PER CURIAM.

Attorney Neil Miller represented James Easton in a first-party no-fault benefits action. In 2006, Easton settled part of his no-fault claim while preserving his eligibility to recover additional work loss benefits. On December 17, 2007, attorney Tracy Thomas sent Miller a letter stating that Thomas had "been retained by [plaintiff] to represent him" in the no-fault action. Despite the letter, on January 3, 2008, Miller filed a new complaint on Easton's behalf seeking additional no-fault benefits. On December 21, 2009, Easton sued Miller for legal malpractice. The parties dispute whether Easton's suit was timely. We hold that Miller continued to represent Easton when Miller filed the second no-fault action. We therefore reverse the circuit court's order finding otherwise, and remand for further proceedings.

I. FACTUAL BACKGROUND

Plaintiff James Easton was in a motorcycle accident in 2004. He retained defendants Neil A. Miller and Neil A. Miller, P.C. to represent him in an action to recover first-party no-fault benefits from his insurance carrier. In February 2006, Miller negotiated a settlement agreement with the insurance company whereby the insurer paid Easton $22,500 in exchange for Easton's release of his right to work loss benefits from September 20, 2004 through March 1, 2006. The settlement specifically preserved Easton's right to seek work loss benefits for the period of March 1, 2006 through September 20, 2007.

According to the record, Miller took no action to secure Easton's work loss benefits for the March 1, 2006 through September 20, 2007 period. On December 17, 2007, Thomas sent Miller a letter referencing the no-fault action that stated in its entirety:

> Please be advised that I have been retained by Mr. James Easton to represent him in connection with the above-referenced matter. I will be in touch soon to discuss this matter's status and securing Mr. Easton's file.

Thomas sent a follow-up letter on December 24, 2007:

> Please permit this letter to serve as a follow-up to my letter of December 17, 2007, and the two phone calls that I have placed to your office that have gone unreturned. It is critical that I touch base with you to discuss this matter's status and to secure Mr. Easton's file. Please contact me as soon as possible.

Miller did not respond to Thomas's communications. Instead, on January 3, 2008, Miller filed on Easton's behalf a new complaint for first-party no-fault benefits. Miller signed the complaint, representing that he served as Easton's counsel. The defendant insurance carrier served Miller with its answer and a request that Easton submit to an independent medical examination. One month later, Miller forwarded to Thomas the no-fault complaint and a "substitution of counsel" form, advising: "My file is quite voluminous, and too large to mail. You may want to send someone over to pick it up." Two weeks later, Miller informed Thomas by letter:

> My file is ready and sitting at our front desk for your office to pick up.
>
> My only outstanding cost is the $150.00 filing fee.
>
> Please advise if you are going to substitute in as Mr. Easton's attorney in the current case, as discovery, IME and deposition responses need to be filed and I need to know how we are going to proceed.

Thomas filed the substitution of counsel with the court on February 27, 2008. Thereafter, Thomas negotiated a $10,335 settlement with Easton's insurance carrier, on which Miller asserted a $164.68 lien for his costs. To reinforce his lien claim, Miller sent the following letter to the attorney representing the defendant no-fault carrier:

> It was a pleasure talking to you on the telephone. I waive any lien in the above matter that I may have for attorney fees, but insist on enforcing my attorneys lien for costs of $164.68, which I expect to be reimbursed directly to [sic] from any settlement, and not to the plaintiff or current plaintiff's counsel. My name does not have to appear on Plaintiff's settlement draft as long as ACIA/AAA reimburse me directly.
>
> The lien consists of a $150.00 Wayne County Circuit Court filing fee, and $14.68 for copies and postage.

As a function of the no-fault "one year back" rule, MCL 500.3145(1),[1] and Miller's delayed filing of Easton's claim for additional no-fault benefits, Easton lost his claim to benefits accruing between March 1, 2006 and January 3, 2007. On December 21, 2009, Easton filed the instant legal malpractice action arguing that Miller's inaction after negotiating the original settlement agreement cost Easton nine months' worth of benefits.

II. PLAINTIFF'S LEGAL MALPRACTICE CLAIM IS NOT TIME-BARRED

Miller filed a motion for summary disposition only two months into the legal malpractice action, asserting that his attorney-client relationship with Easton terminated on December 17, 2007, when Easton retained Thomas. On that date, Miller insists, Easton's legal malpractice claim accrued, rendering the December 21, 2009 complaint untimely by four days. Miller readily acknowledges that his January 3, 2008 decision to file a complaint on Easton's behalf seems to contradict that his attorney-client relationship with Easton ended with Thomas's December 17, 2007 letter. According to Miller, the complaint did not resuscitate the attorney-client relationship because he filed it without Easton's knowledge or consent. Easton, on the other hand, contends that *both* Thomas and Miller served as his counsel following the December 17, 2007 letter, and that Miller continued to represent him until the circuit court entered the official substitution of counsel. Easton maintains that Miller admitted to the continued attorney-client relationship by filing the January 3, 2008 complaint on his behalf and by filing a lien for his costs.

"The question whether a cause of action is barred by the applicable statute of limitations is one of law, which this Court reviews de novo." *Seyburn, Kahn, Ginn, Bess, Deitch and Serlin, PC v Bakshi*, 483 Mich 345, 354; 771 NW2d 411 (2009). We also review de novo a trial court's ruling on a motion for summary disposition under MCR 2.116(C)(7). *Kuznar v Raksha Corp*, 481 Mich 169, 175; 750 NW2d 121 (2008). In reviewing the motion, "we consider all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict it." *Bryant v Oakpointe Villa Nursing Ctr, Inc*, 471 Mich 411, 419; 684 NW2d 864 (2004).

A plaintiff must bring a legal malpractice action within two years after the claim first accrues. MCL 600.5805(1) and (6). Relevant to the current case, a malpractice claim against a state-licensed professional attorney "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." MCL 600.5838(1) (emphasis added); see also MCL 600.5827.

The first step in establishing a legal malpractice claim is to prove the existence of an attorney-client relationship. *Mitchell v Dougherty*, 249 Mich App 668, 676; 644 NW2d 391 (2002). "Generally, when an attorney is retained to represent a client, that representation

[1] The statutory "one year back" rule provides, "[T]he claimant may not recover benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced."

continues until the attorney is relieved of the obligation by the client or the court," *id.* at 683, or until the attorney "completes the specific legal service he was retained to perform." *Nugent v Weed*, 183 Mich App 791, 796; 455 NW2d 409 (1990). "[N]o formal discharge by the client is required, and the termination of an attorney-client relationship can be implied by the actions or inactions of the client." *Mitchell*, 249 Mich App at 684. It is well established that "[r]etention of an alternate attorney effectively terminates the attorney-client relationship." *Wright v Rinaldo*, 279 Mich App 526, 534-535; 761 NW2d 114 (2008); *Maddox v Burlingame*, 205 Mich App 446, 450; 517 NW2d 816 (1994). However, the attorney-client relationship is not severed when a client hires additional, rather than substitute, counsel. *Maddox*, 205 Mich App at 451. An attorney may, in certain circumstances, continue to act after the subject of the representation has ended. When a client accuses an attorney of legal malpractice and asserts that the attorney's "additional" services extended the period of representation, the court must determine whether the attorney was acting in "an ongoing attorney-client relationship" or was merely making "a remedial effort concerning past representation." *Bauer v Ferriby & Houston, PC*, 235 Mich App 536, 538; 599 NW2d 493 (1999).

The facts of the current case resemble those presented in *Maddox v Burlingame*, 205 Mich App 446; 517 NW2d 816 (1994). The *Maddox* plaintiff hired the defendant attorney to handle the sale and financing of its franchised business to Florida residents. The sale closed and security instruments were filed in 1986. When the purchasers filed for bankruptcy and defaulted on the financing agreement in 1988, the plaintiff advised the defendant attorney to consult with Florida counsel regarding any available state law remedies. The Florida counsel later informed the plaintiff that there was "a problem" with the security instrument prepared and filed by the defendant attorney. On August 15, 1988, the plaintiff telephoned the defendant and accused him of malpractice. This prompted the defendant to contact the Florida counsel and to conduct legal research regarding the Florida Uniform Commercial Code filing requirements. The defendant attorney billed the plaintiff for those services. *Id.* at 447-449.

The *Maddox* Court determined that the plaintiff's consultation with a Florida attorney did not "necessarily terminate[] the attorney-client relationship" with the defendant. "[P]laintiff's Florida counsel was not consulted in place of, but in addition to, defendant." *Id.* at 451. A client's phone call accusing his attorney of malpractice may, in certain circumstances, serve to terminate the attorney-client relationship. In *Maddox*, however, the defendant attorney performed additional work after the client's communication and he billed the client. The *Maddox* Court concluded:

> In this factual setting, we are of the opinion that the work performed by defendant for plaintiffs, and duly billed to them, does constitute continuing representation following the 1986 sale of the business. We believe that an attorney's act of sending a bill constitutes an acknowledgment by the attorney that the attorney was performing legal services for the client. [*Id.*]

In this case, as in *Maddox*, Thomas's December 17 and December 24 letters to Miller did not communicate that Easton intended to fire Miller. In contrast with the communication in *Maddox*, Thomas's letters omitted any expression of Easton's dissatisfaction with Miller's representation. Compare *Hooper v Hill Lewis*, 191 Mich App 312, 314-315; 477 NW2d 114 (1991) (holding that the plaintiff terminated the attorney-client relationship by his letter which

stated, "Please be advised that you are not authorized to . . . act on my behalf"). Thomas's letters also failed to communicate that Easton intended to substitute Thomas as the attorney of record, or that Easton had revoked Miller's authority to act on his behalf.

In any event, Miller indisputably continued to represent plaintiff by filing a new complaint for no-fault benefits (the subject of the initial representation) less than a month after he received Thomas's initial letter. In his February letter to Thomas, Miller expressly acknowledged that he continued to represent Easton by inquiring whether Thomas intended to take over as substitute counsel. Moreover, Miller billed for the costs associated with this continued service, just as the attorney did in *Maddox*. The record evidence amply supports that Miller continued serving Easton in a professional capacity in the no-fault case until Thomas assumed formal responsibility for Easton's representation.

Miller urges that this Court's decision in *Wright v Rinaldo*, 279 Mich App 526; 761 NW2d 114 (2008), compels a different result. The underlying case in *Wright* involved a patent application prosecuted in the United States Patent and Trademark Office. *Id.* at 530. The plaintiff client became dissatisfied with his attorney, and revoked the power of attorney filed in the patent office, thereby officially relieving the defendant attorney of her professional duties. At the same time, the plaintiff executed a power of attorney in favor of new counsel. *Id.* The plaintiff purposefully concealed these actions from the defendant attorney and outwardly treated her like an integral member of his legal team, while in reality other counsel had completely taken over the defendant attorney's role. *Id.* at 530-532. Generally, the retention of additional or co-counsel would not terminate the attorney-client relationship. *Maddox*, 205 Mich App at 451. The *Wright* plaintiff, however, evinced his intent to replace counsel at the time he filed the substituted power of attorney with the Patent Office. *Wright*, 279 Mich App at 535-536. The defendant attorney in *Wright* continued in her work only because the plaintiff client secretly terminated her services. Accordingly, the *Wright* Court held that the plaintiff could not artificially extend the defendant's period of representation to take advantage of a later tolling of the statute of limitations. In contrast, Thomas's letters did not communicate that Easton intended to "relieve[] [defendant] of the obligation" to represent his client. *Mitchell*, 249 Mich App at 683. Moreover, Miller's decision to file a no-fault action on Easton's behalf and to sign the complaint as Easton's counsel evince Miller's recognition that, despite Thomas's letters, he continued to represent Easton and owed Easton the duty to preserve any remaining first-party benefits.

Accordingly, we find that Miller served Easton in a professional capacity by filing a no-fault complaint on Easton's behalf on January 3, 2008. Miller's attorney-client relationship with

Easton remained on-going at least until that date. Easton filed his malpractice claim on December 21, 2009, within the two-year statute of limitations. Therefore, the circuit court erred in dismissing Easton's malpractice claim.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Joel P. Hoekstra
/s/ Elizabeth L. Gleicher