STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL RAY THOMAS,

Plaintiff-Appellant,

v

CHRISTOPHER D. KESSEL, DANA M. NESSEL, and NESSEL & KESSEL LAW, PLLC,

Defendants-Appellees.

UNPUBLISHED
August 13, 2020

No. 348556
Macomb Circuit Court
LC No. 2018-004065-NM

Before: FORT HOOD, P.J., and JANSEN and TUKEL, JJ.

PER CURIAM.

Plaintiff, Michael Ray Thomas, appeals as of right the trial court's order granting summary disposition to defendants Christopher D. Kessel, Dana M. Nessel, and Nessel & Kessel Law, PLLC. Plaintiff argues that the trial court erred in concluding that his legal malpractice and vicarious liability claims against defendants were barred by the statute of limitations. He additionally argues that his right to due process was violated by an ex parte hearing regarding defendants' motion for summary disposition in which he was not given an opportunity to participate. Defendants disagree and argue that even if the statute of limitations does not bar plaintiff's legal malpractice claim, his suit nevertheless fails on the basis of the collateral estoppel doctrine. This appeal is being decided without oral argument pursuant to MCR 7.214(E)(1). We agree with defendants and affirm.

I. UNDERLYING FACTS

This case arises out of plaintiff's convictions of possession of child sexually abusive material, MCL 750.145c(4), using a computer to commit possession of child sexually abusive material, MCL 752.796, and unlawful use of the Internet to solicit child sexually abusive activity, MCL 750.145d. Plaintiff hired Kessel and NKL to represent him at the trial court level of his

proceedings.[1] Kessel represented defendant through trial and his sentencing in September 2015. Plaintiff retained David B. Herskovic as his appellate counsel on December 22, 2015. That same day Kessel sent a letter to plaintiff informing him that Kessel was no longer representing plaintiff and that Herskovic had Kessel's entire file and would be handling plaintiff's case from that point forward. Kessel did state, however, that he was willing to assist Herskovic in handling plaintiff's case if Herskovic had any questions for Kessel. On November 4, 2016, defendant filed a Standard 4 brief with this Court in his criminal appeal, arguing in relevant part that Kessel had been ineffective as his trial counsel.

On May 11, 2017, this Court affirmed plaintiff's convictions and sentences. *People v Thomas*, unpublished per curiam opinion of the Court of Appeals, issued May 11, 2017 (Docket No. 329750), p 1. Relevant to this appeal, plaintiff argued in his Standard 4 brief that Kessel was ineffective as his trial counsel. *Id*. at 9-12. This Court disagreed, holding that Kessel was effective as plaintiff's trial counsel. *Id*. at 10-12. Plaintiff then appealed to our Supreme Court, but his application for leave to appeal was denied on March 5, 2018. *People v Thomas*, 501 Mich 981; 907 NW2d 565 (2018).

Plaintiff requested and received the files from his criminal case from Kessel and Herskovic shortly after our Supreme Court denied his application for leave to appeal. According to plaintiff, the files he received from Herskovic contained evidence that had not been presented to any court during the pendency of his criminal case. Consequently, in April 2018, plaintiff filed a petition for a writ of habeas corpus in federal court based on this purportedly newly discovered evidence.[2]

Plaintiff then filed a complaint on October 17, 2018, alleging that Kessel committed legal malpractice when representing plaintiff in his criminal trial, and seeking money damages. Plaintiff additionally alleged that Nessel and NKL were vicariously liable for Kessel's legal malpractice. In lieu of an answer, defendants filed a motion for summary disposition in which they argued that summary disposition was appropriate because plaintiff's claim was barred by the statute of limitations and the collateral estoppel doctrine. Plaintiff responded and disagreed, arguing that his complaint was timely and that collateral estoppel did not bar his legal malpractice claim. Defendants replied and again argued that plaintiff's claim was barred by the statute of limitations and collateral estoppel.

On February 4, 2019, the trial court held a proceeding. Plaintiff was not present at the proceeding. The proceeding lasted approximately one minute and defendants did not offer any argument at the proceeding. Instead, they proffered a document, but it was not admitted into evidence. Furthermore, the trial judge informed defendants' attorney at the proceeding that she

[1] For ease of reference, we refer to the attorney-client relationship Kessel and NKL entered into with plaintiff as Kessel's attorney-client relationship with plaintiff, because based on the record before this Court, it appears that Kessel was the only attorney from NKL who worked on plaintiff's criminal case.

[2] That case is still pending. *Michael Ray Thomas v Thomas Winn*, U.S. District Court, Eastern District of Michigan, number 2:18-cv-13829.

intended to base her decision on the briefs alone. In March 2019, the trial court granted summary disposition to defendants in a written order. The trial court concluded that plaintiff's legal malpractice claim was barred by the statute of limitations because his attorney-client relationship with Kessel ended at sentencing on September 29, 2015. Consequently, plaintiff's complaint was untimely because it was filed in October 2018 more than two years after September 29, 2015. The trial court did not address the six-month discovery rule that can in some instances extend the statute of limitations, or defendants' collateral estoppel argument. This appeal followed.

II. STATUTE OF LIMITATIONS

Plaintiff argues that the trial court erred in finding that his legal malpractice claim was not timely and thus barred by the statute of limitations. We disagree.

A. PRESERVATION AND STANDARD OF REVIEW

An issue raised in the trial court and pursued on appeal is preserved even if the trial court failed to address or decide the issue. *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994). The issue of whether the statute of limitations barred plaintiff's legal malpractice claim was raised by defendants in their motion for summary disposition. Additionally, the trial court addressed and decided the issue when it granted summary disposition to defendants. Thus, the issue is preserved.

A trial court's summary disposition ruling is reviewed de novo. *Walters v Nadell*, 481 Mich 377, 381; 751 NW2d 431 (2008).

> A party may support a motion under MCR 2.116(C)(7) by affidavits, depositions, admissions, or other documentary evidence. If such material is submitted, it must be considered. MCR 2.116(G)(5). Moreover, the substance or content of the supporting proofs must be admissible in evidence . . . . Unlike a motion under subsection (C)(10), a movant under MCR 2.116(C)(7) is not required to file supportive material, and the opposing party need not reply with supportive material. The contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant. [*Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999) (quotation marks and citations omitted).]

Furthermore,

> [w]e must consider the documentary evidence in a light most favorable to the nonmoving party for purposes of MCR 2.116(C)(7). If there is no factual dispute, whether a plaintiff's claim is barred under a principle set forth in MCR 2.116(C)(7) is a question of law for the court to decide. But when a relevant factual dispute does exist, summary disposition is not appropriate. [*Moraccini v City of Sterling Hts*, 296 Mich App 387, 391; 822 NW2d 799 (2012) (citations and quotation marks omitted).]

Finally, "[t]here is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

B. ANALYSIS

A legal malpractice claim has four elements: "(1) the existence of an attorney-client relationship (the duty); (2) negligence in the legal representation of the plaintiff (the breach); (3) that the negligence was a proximate cause of an injury (causation); and (4) the fact and extent of the injury alleged (damage)." *Barrow v Pritchard*, 235 Mich App 478, 483-484; 597 NW2d 853 (1999).

"A legal malpractice claim must be brought within two years of the date the attorney discontinues serving the client or within six months after the client discovers or should have discovered the claim, whichever is later." *Hooper v Lewis*, 191 Mich App 312, 314; 477 NW2d 114 (1991); MCL 600.5805(8); MCL 600.5838(2).[3] "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. Retention of an alternative attorney effectively terminates the attorney-client relationship between the defendant and the client." *Maddox v Burlingame*, 205 Mich App 446, 450; 517 NW2d 816 (1994) (citations omitted). Finally, "the standard under the discovery rule is not that the plaintiff knows of a 'likely' cause of action. Instead, a plaintiff need only discover that he has a 'possible' cause of action." *Gebhardt v O'Rourke*, 444 Mich 535, 544; 510 NW2d 900 (1994). "Once an injury and its possible cause is known, the plaintiff is aware of a possible cause of action." *Id*. at 545.

Kessel's retainer agreement with plaintiff stated that Kessel would represent plaintiff up to and including a potential criminal trial. The retainer agreement did not, however, specify when Kessel's representation of plaintiff would end. Nevertheless, Kessel's attorney-client relationship with plaintiff was terminated at the latest on December 22, 2015, when plaintiff hired Herskovic as his appellate counsel and Kessel sent a letter to plaintiff explaining that their attorney-client

[3] MCL 600.5805(8), which establishes the normal two-year statute of limitations for malpractice actions provides: "Except as otherwise provided in this chapter, the period of limitations is 2 years for an action charging malpractice." Additionally, MCL 600.5838(2), which establishes the six-month discovery provision, provides:

> Except as otherwise provided in section 5838a or 5838b, an action involving a claim based on malpractice may be commenced at any time within the applicable period prescribed in sections 5805 or 5851 to 5856, or within 6 months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later. The plaintiff has the burden of proving that the plaintiff neither discovered nor should have discovered the existence of the claim at least 6 months before the expiration of the period otherwise applicable to the claim. A malpractice action that is not commenced within the time prescribed by this subsection is barred.

relationship had ended.[4] Thus, to comply with the two-year statute of limitations plaintiff needed to file his legal malpractice claim no later than December 23, 2017. See MCR 1.108(1) ("The day of the act, event, or default after which the designated period of time begins to run is not included," and that rule regarding computation of time also applies to statutes as well as the court rules and court orders. MCR 1.108). Yet plaintiff failed to file within the two-year period.

Plaintiff argues that the two-year statute of limitations should be extended because of a purported agency relationship between Kessel and Herskovic. According to plaintiff, if an agency relationship existed between Kessel and Herskovic, the two-year statute of limitations would not have run until two years after Herskovic's representation of the Plaintiff-Appellant had ended. We need not decide whether plaintiff's legal argument regarding agency and the continuation of a lawyer-client relationship has merit, because the trial court in any event properly granted summary disposition to defendant.

"[F]undamental to the existence of an agency relationship is the right to control the conduct of the agent with respect to the matters entrusted to him." *St Clair Intermediate Sch Dist v Intermediate Ed Assn/Mich Ed Ass'n*, 458 Mich 540, 558; 581 NW2d 707 (1998) (citations omitted). There is no evidence of an agency relationship between Kessel and Herskovic in the record, and plaintiff failed to allege facts sufficient to establish one. In his complaint, plaintiff alleged that he retained Herskovic as his appellate counsel due to Kessel's recommendation that he do so. Plaintiff additionally alleged that Kessel agreed to assist Herskovic with plaintiff's appeal "if Plaintiff so chose to retain him." But plaintiff failed to allege or to provide any document establishing that he "so chose" to retain Kessel or that Kessel had any part in his appeal. Similarly, plaintiff further failed to allege or provide any documentation establishing that Kessel had any control over how Herskovic handled plaintiff's appeal. Consequently, no facts or allegations support the existence of an agency relationship between Kessel and Herskovic. Thus, while plaintiff is correct that whether an agency relationship exists is a question of fact for the jury, *Vargo v Sauer*, 457 Mich 49, 71; 576 NW2d 656 (1998), as with any other argument in opposition to a motion for summary disposition, a plaintiff must at least allege facts or present supporting evidence which, viewed in the light most favorable to the plaintiff, would establish a material factual question; here, that question would be whether there was any evidence to support a claimed or potential agency relationship. See *Maiden*, 461 Mich at 119. While we assume without deciding that plaintiff submitted sufficient evidence in that regard, he was still required to comply with the statute of limitations. Reasonable minds cannot dispute that Kessel terminated his attorney-client relationship with plaintiff at the latest on December 22, 2015, which mandated that he file his claim no later than December 23, 2017. There is thus no dispute of material fact on the issue of when Kessel's representation of plaintiff ended. Yet plaintiff failed to timely file suit.

Nevertheless, plaintiff's legal malpractice claim might still be timely if he filed his claim within six months of discovering his potential legal malpractice claim. *Hooper*, 191 Mich App at

[4] Because plaintiff filed his complaint on October 17, 2018, more than two years after December 22, 2015, this Court need not consider if plaintiff's attorney-client relationship with plaintiff was terminated at some earlier time, such as the date of plaintiff's sentencing, because it could have no effect on the outcome of this issue.

314. Earlier, on November 4, 2016, plaintiff had filed a Standard 4 brief in his underlying criminal case arguing that Kessel was ineffective as his trial counsel. Consequently, as of November 4, 2016, the six-month discovery provision began to run because plaintiff knew at that time that he might have been prejudiced by Kessel's performance as his trial counsel. By bringing a claim of ineffective assistance of counsel, plaintiff demonstrated that he knew he had a "possible" cause of action against Kessel regarding inadequate representation, which is all that is necessary to make the discovery prong of the statute of limitations inapplicable. See *Gebhardt*, 444 Mich at 544. Thus, plaintiff discovered that he had a possible cause of action against Kessel no later than November 4, 2016. The six-month discovery rule gave plaintiff until May 5, 2017, to file his legal malpractice claim. Because that date is earlier than the normal two-year statute of limitations, plaintiff only had until December 23, 2017, the normal two years, to file his legal malpractice claim. See MCL 600.5838(2) (providing that a plaintiff has until the later of two years, or six months after discovery of claim, in which to file suit); *Hooper*, 191 Mich App at 314 (same). Thus, plaintiff's legal malpractice claim was untimely. Because reasonable minds cannot dispute that plaintiff knew or should have known that he had a possible legal malpractice claim by the date that he submitted his Standard 4 brief, there can be no dispute of material fact on the issue and thus no factual matters in this case required or permitted a jury to consider the claim.

Because plaintiff's legal malpractice claim was untimely, the issue of whether it was also barred by collateral estoppel is moot. See *Ardt v Titan Ins Co*, 233 Mich App 685, 693; 593 NW2d 215 (1999) ("This Court need not address issues that have become moot."). As such, we will not address that issue.

III. DUE PROCESS

Plaintiff argues that his right to due process was violated by the February 4, 2019 proceeding because it was conducted without his presence. We disagree.

A. PRESERVATION AND STANDARD OF REVIEW

A due process issue must be raised at the trial court level to be preserved. *Bay Co Prosecutor v Nugent*, 276 Mich App 183, 192-193; 740 NW2d 678 (2007) ("Plaintiff did not assert a due process claim below; therefore, this issue is unpreserved."). Defendant failed to raise his due process claim at the trial court, raising it for the first time on appeal. Thus, the issue is unpreserved. This Court, however, "may overlook preservation requirements if the failure to consider the issue would result in manifest injustice, if consideration is necessary for a proper determination of the case, or if the issue involves a question of law and the facts necessary for its resolution have been presented." *Smith v Foerster-Bolser Const, Inc*, 269 Mich App 424, 427; 711 NW2d 421 (2006). Plaintiff's due process argument on appeal involves a question of law and we have all the facts necessary for its resolution. Thus, we choose to "overlook the lack of preservation and consider the issue." *Id*. When this Court overlooks the lack of preservation in a case it applies the standard of review for a preserved issue rather than the plain error standard of review used for an unpreserved issue. See *id*. (deciding to overlook the lack of preservation and using the normal de novo standard of review for a directed verdict).

"Issues of constitutional law are reviewed de novo." *In re Carey*, 241 Mich App 222, 226; 615 NW2d 742 (2000). A trial court's decision to limit or dispense with oral arguments on motions

is reviewed for an abuse of discretion. *Bancorp Group, Inc v Michigan Conference of Teamsters Welfare Fund*, 231 Mich App 163, 169; 585 NW2d 777 (1998). "An abuse of discretion occurs when the decision resulted in an outcome falling outside the range of principled outcomes." *Hayford v Hayford*, 279 Mich App 324, 325; 760 NW2d 503 (2008). "An error of law necessarily constitutes an abuse of discretion." *Denton v Dep't of Treasury*, 317 Mich App 303, 314; 894 NW2d 694 (2016).

B. ANALYSIS

Defendants argue that plaintiff waived his due process argument because he did not object to the February 4, 2019 proceeding taking place without his presence. "Generally, a party may not remain silent in the trial court, only to prevail on an issue that was not called to the trial court's attention." *Walters*, 481 Mich at 388. The February 4, 2019 proceeding was the final proceeding to take place in this case before the trial court issued its written order granting summary disposition to defendants. Plaintiff did not file anything with the trial court between the time of the proceeding and the trial court's summary disposition order. However, the record fails to establish when plaintiff even learned of the proceeding because it was conducted outside of his presence, and thus the record also fails to establish whether he had the opportunity to object to a proceeding which he might not have known even was taking place. Thus, because the record is unclear as to whether plaintiff contributed to the decision to hold the proceeding without him, and the record fails to establish if he even had an opportunity to object to the proceeding, the issue is not waived. See *Walters*, 481 Mich at 388; *Bloemsma v Auto Club Ins Ass'n (After Remand)*, 190 Mich App 686, 691; 476 NW2d 487 (1991) ("Error requiring reversal must be that of the trial court, and not error to which the appellant contributed by plan or negligence.").

Both the United States Constitution and the Michigan Constitution "preclude the government from depriving a person of life, liberty, or property without due process of law." *Hinky Dinky Supermarket, Inc v Dep't of Community Health*, 261 Mich App. 604, 605; 683 NW2d 759 (2004), citing US Const, Am XIV; Const 1963, art 1, § 17. Due process is a flexible concept that calls for such procedural safeguards as the situation demands. *In re Brock*, 442 Mich 101, 111; 499 NW2d 752 (1993); *Mathews v Eldridge*, 424 US 319, 332, 334; 96 S Ct 893; 47 L Ed 2d 18 (1976). Due process generally requires nothing more than notice of the nature of the proceedings and an opportunity to be heard in a meaningful manner. *Cummings v Wayne Co*, 210 Mich App. 249, 253; 533 NW2d 13 (1995). In *Bonner v City of Brighton*, 495 Mich 209, 238-239; 848 NW2d 380 (2014) (quotation marks and citations omitted), our Court explained:

> The essence of due process is the requirement that "a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it." All that is necessary, then, is that the procedures at issue be tailored to "the capacities and circumstances of those who are to be heard" to ensure that they are given a meaningful opportunity to present their case, which must generally occur before they are permanently deprived of the significant interest at stake. [Citations omitted; alteration in original.]

Finally, under MCR 2.119(E)(3), "[a] court may, in its discretion, dispense with or limit oral arguments on motions, and may require the parties to file briefs in support of and in opposition to a motion."

Plaintiff argues that his right to due process was violated by the February 4, 2019 proceeding because defendants submitted evidence and offered argument. Additionally, plaintiff argues that if he had been present he would have argued that summary disposition was inappropriate in this case because he both had presented questions of fact for a jury to decide regarding the date he discovered his potential legal malpractice claim, and because of the existence of an agency relationship between Herskovic and Kessel. Essentially, plaintiff argues that he did not have a meaningful opportunity to be heard at the trial court level because he was not present at the proceeding.

The trial judge exercised her discretion under MCR 2.119(E)(3) to decide defendants' motion for summary disposition without holding a hearing and based solely on the parties' briefs, precisely because plaintiff was incarcerated and could not participate. Despite the trial court's intention, however, defendants appeared for a proceeding on February 4, 2019. Contrary to plaintiff's assertions, however, defendants did not offer any argument at the proceeding (to the surprise of the trial judge). At that time, defendants proffered a document that was not admitted into evidence, either then or at a later time. Indeed, the trial judge stated on the record on February 4, 2019, that she intended to base her decision on the briefs alone. Furthermore, after reviewing the trial judge's order granting summary disposition to defendants, it is apparent that the document proffered on that date and which purportedly established that Herskovic began representing plaintiff in his criminal appeal on October 13, 2015, had no effect on the trial court's ruling. Additionally, as explained earlier, the latest possible date for the termination of Kessel's representation of plaintiff was December 22, 2015, when Kessel informed plaintiff by letter that he no longer represented him due to plaintiff having hired new counsel. Viewing the evidence in the light most favorable to plaintiff, by taking December 22, 2015 as the termination date of Kessel's representation, plaintiff's legal malpractice claim still was untimely and thus barred by the statute of limitations. Thus, even if the trial court had relied on the document offered on February 4, 2019, which it did not, such action by the trial court could have had no effect on the ultimate disposition of this case.

Plaintiff additionally argues that, if he had been present at the proceeding, he would have argued that summary disposition was inappropriate in this case because he had presented questions of fact for a jury to decide regarding the date he discovered both his potential legal malpractice claim and the existence of an agency relationship between Herskovic and Kessel. But plaintiff already argued in his written response to defendants' motion for summary disposition that the date on which he should have discovered his legal malpractice claim was a question of fact for the jury to decide. Furthermore, as addressed earlier, both of plaintiff's arguments regarding issues of fact are meritless, because there was no dispute of *material* fact in this case. Consequently, plaintiff was not denied his right to due process when the trial court spoke with defense counsel on February 4, 2019, without providing plaintiff an opportunity to participate. The trial court had not expected to hear from counsel, and did not actually hear or receive anything material on that date; plaintiff had a full and fair opportunity to be heard through his written filings, and the trial court based its ruling on the various written filings by both parties.

IV. CONCLUSION

For the reasons stated earlier, we affirm the trial court's order granting summary disposition to defendants. Defendants, as the prevailing parties, may tax costs pursuant to MCR 7.219.

/s/ Karen M. Fort Hood
/s/ Kathleen Jansen
/s/ Jonathan Tukel