STATE OF MICHIGAN

COURT OF APPEALS

GARY SHUTT and MICHELLE SHUTT, Husband and Wife,

Plaintiffs-Appellants,

v

JAMES D. FLORIP and GILLARD, BAUER, MAZRUM, FLORIP & SMIGELSKI,

Defendant-Appellees.

UNPUBLISHED
September 20, 1996

No. 183830
LC No. 94-001137-NM

Before: Murphy, P.J., and O'Connell and M.J. Matuzak,* JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's order granting summary disposition pursuant to MCR 2.116(C)(7) (failure to bring an action within the applicable statute of limitations) in favor of defendants in this legal malpractice action. We affirm.

Defendants, specifically, defendant Florip, assisted plaintiffs in the purchase of a home from Stephan Marks in 1988. Prior to closing, plaintiffs had concerns about the condition of the home and whether Marks would be able to satisfy the conditions of the purchase agreement. Plaintiffs informed defendant Florip of their concerns. Defendant Florip allegedly advised plaintiffs that they had no recourse against Florip, and must close on the scheduled date. After closing, plaintiffs wanted to rescind the sale because of Marks' failure to give plaintiffs keys to the home until nearly a month after closing, and his failure to make repairs to the home. Plaintiffs again contacted defendant Florip who allegedly told them that they had no cause of action against Marks. In April and May 1993, plaintiffs discovered that defendants were shareholders of Thunder Bay Broadcasting involved in a lawsuit against Marks, chief executive officer of and shareholder in Thunder Bay Broadcasting. In December 1993, plaintiffs contacted attorney Donald Field to assist them in an unrelated matter. However, plaintiffs and Field discussed the 1988 transaction, and Field informed them that they may have had legal remedies against Marks, and that defendants may have had a conflict of interest in representing plaintiffs in a transaction with Marks.

* Circuit judge, sitting on the Court of Appeals by assignment.

In August 1994, plaintiffs filed the instant legal malpractice action. Plaintiffs asserted that defendants were negligent in failing to disclose the conflict of interest, and failing to properly advise plaintiffs of their legal remedies against Marks. Defendants moved for summary disposition, claiming that the action had not been filed within the applicable statute of limitations. The trial court agreed and dismissed the action.

I.

First, plaintiffs claim that the trial court erred in ruling that their malpractice claims were barred by the statute of limitations. We disagree.

MCL 600.5838(1); MSA 27A.5838(1) states the general rule that a malpractice action must be brought within two years of the last services rendered. However, if the claim is not readily discoverable, an exception exists which states that a claim may be commenced "at any time within 6 months after the plaintiff discovers or should have discovered the existence of the claim". MCL 600.5838(2); MSA 27A.5838(2). The plaintiff need not know of a "likely" cause of action, but 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.

This Court has held that the discovery rule does not act to hold a matter in abeyance indefinitely while a plaintiff seeks professional assistance to determine the existence of a claim. *Turner v Mercy Hospital*, 210 Mich App 345, 353; 533 NW2d 365 (1995). A plaintiff must act diligently to discover a possible cause of action and cannot simply sit back and wait for others to inform him of its existence. *Id*.

In this case, plaintiffs concede that they knew in May 1993 that defendants were financially involved with Marks, but argue that because they did not know until March 1994 that defendants were financially involved with Marks in 1988, their cause of action was not discovered until March 1994. We disagree. The information plaintiffs received in 1993 was sufficient to place them on notice of a "possible" cause of action. Even assuming that this information was not sufficient to place them on notice, it should have at least prompted plaintiffs to act diligently, which they did not, to determine if they had a "possible" cause of action. Therefore, plaintiffs conflict of interest malpractice claim was properly dismissed under MCR 2.116(C)(7).

As for plaintiffs' other malpractice claim that defendant Florip gave plaintiffs improper advice, it too was not brought within the limitations period. Plaintiffs concede that they were aware of their injury in 1988, but argue that they believed the sole cause of their injury was the seller's fraud, not defendant Florip's malpractice. However, as stated in MCL 600.5838(2); MSA 27A.5838(2), it is not plaintiffs' subjective belief that matters. The six-month tolling period begins from when plaintiffs "should have discovered the existence of the claim." Plaintiffs should have acted diligently, in October 1988, to discover their cause of action. Instead, they sat back and waited until their new attorney, originally

employed on an unrelated matter, informed them of their claims against defendant Florip. Summary disposition was proper.

II.

Next, plaintiffs claim that the trial court erred in finding that they had failed to plead a fraudulent concealment cause of action. MCL 600.5855; MSA 27A.5855 states:

> If a person who is or may be liable for any claim fraudulently conceals the existence of the claim or the identity of any person who is liable for the claim from the knowledge of the person entitled to sue on the claim, the action may be commenced at any time within 2 years after the person who is entitled to bring the actions discovers, or should have discovered, the existence of the claim or the identity of the person who is liable for the claim, although the action would otherwise be barred by the period of limitations.

The trial court ruled that because plaintiffs had failed to allege an affirmative act, on the part of defendants, to conceal plaintiffs' claims, that plaintiffs had failed to properly assert a fraudulent concealment cause of action. This ruling was error. The general rule is indeed that fraudulent concealment must consist of an affirmative act, but an exception to this rule exists where the parties are in a fiduciary relationship. *Brownell v Garber*, 199 Mich App 519, 527; 503 NW2d 81 (1993). Because an attorney owes fiduciary duties to its client, plaintiffs did not need to assert an affirmative act. *Id* at 528. However, we find that plaintiffs have still not sufficiently asserted a fraudulent concealment cause of action.

Plaintiffs assert four grounds for its fraudulent concealment claim. First, that defendants failed to disclose a potential conflict of interest when they had a duty to do so. Second, that defendant Florip advised plaintiffs not to take legal action against Marks when defendant knew that Marks had considerable assets. Third, that defendant Florip intended to deter plaintiffs from looking into possible malpractice claims when he demanded, in a March 1994 letter, a retraction of plaintiffs' claims asserted in a February 1994 letter. Fourth, that defendants attempted to conceal the malpractice claims by denying a conflict of interest ever existed.

Plaintiffs' first two allegations are insufficient because they do not assert a claim of fraudulent concealment, but amount only to the type of conduct which plaintiffs would have been required to prove in establishing their underlying malpractice claims against defendants. *McCluskey v Womack*, 188 Mich App 465, 472; 470 NW2d 443 (1991). Plaintiffs' second two allegations are insufficient because, at the time of this alleged concealment, plaintiffs already knew or should have known of the existence of the their cause of action. Therefore, the fraudulent concealment statute, by its terms, is inapplicable. *Id*. at 473.

Because the trial court reached the correct result, albeit for the wrong reasons, we will affirm. *Glazer v Lamkin*, 201 Mich App 432, 437; 506 NW2d 570 (1993).

III.

Last, plaintiffs claim that the trial court improperly ordered them to pay costs of $700 to set aside a default entered when plaintiffs' counsel was unable, due to illness, to attend a pretrial conference.

MCR 2.401(G) states that the trial court may condition an order setting aside a default on payment, by the offending party or attorney, of reasonable expenses as provided by MCR 2.313(B)(2). Plaintiffs argue that the trial court failed to properly exercise its discretion because it was under the impression that the imposition of costs was mandatory.

Prior to October 1991, MCR 2.401 did mandate payment of costs in order to set aside a default, and it appeared at the hearing that the trial court was originally under the impression that the imposition of costs were "mandatory." However, the trial court was informed near the end of the hearing that the imposition of costs under the new rule was not mandatory, and indicated at the end of the hearing that it was going to re-read the court rule. We are confident the trial court realized its discretion prior to the entry of its order requiring the payment of costs.

Plaintiffs make other challenges to the trial court's requirement that they pay costs, but because they have failed to cite any authority for their positions, their claims are abandoned on appeal. This Court will not search for authority to support a party's position. *Roberts v Vaughn*, 214 Mich App 625, 630; 543 NW2d 79 (1995).

Affirmed.

/s/ William B. Murphy
/s/ Peter D. O'Connell
/s/ Michael J. Matuzak