

STATE OF MICHIGAN
COURT OF APPEALS

MARCIA DOWNS, f/k/a MARCIA DOUGLAS,
Personal Representative of the Estate of
NATASHA DOUGLAS,

Plaintiff-Appellant,

v

ALBERT J. DIB and DIB & FAGAN, PC,

Defendants-Appellees.

UNPUBLISHED
March 17, 2015

No. 319372
Oakland Circuit Court
LC No. 2013-135407-NM

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

PER CURIAM.

In this action for legal malpractice, plaintiff Marcia Downs, acting as personal representative of the estate of Natasha Douglas, appeals as of right the trial court's order granting summary disposition in favor of defendants pursuant to MCR 2.116(C)(7) on statute of limitations grounds. For the reasons set forth in this opinion, we reverse and remand for further proceedings consistent with this opinion.

I. BACKGROUND.

This legal malpractice claim arises from the alleged negligent handling of a medical malpractice lawsuit commenced by plaintiff in 2002. In 2000, plaintiff reported to Northern Michigan Hospital (NMH) for the birth of her baby, Natasha. After an emergency cesarean section, plaintiff's daughter was pronounced dead. Plaintiff alleged that the doctors and nurses that treated her were negligent and hired defendant Albert J. Dib to represent her pursuant to a contingency fee agreement. After nearly a decade of legal proceedings and out-of-court settlements, only a vicarious liability claim against NMH remained. Plaintiff alleged that NMH was vicariously liable for the actions of its employee, a labor and delivery nurse. Defendant Dib retained two experts for the medical malpractice case, both of whom were midwives and not labor and delivery nurses. NMH moved the trial court to strike the testimony of the expert witnesses on the basis that the experts were not labor and delivery nurses. At an April 28, 2010 hearing attended by both Dib and plaintiff, the trial court granted NMH's motion to strike the experts' testimony. During the hearing, NMH moved orally for dismissal, arguing that plaintiff would be unable to provide a prima facie case of medical malpractice without expert testimony. The trial court agreed on the record and entered an order memorializing that decision on May 11,

2010. The case then moved through the appellate courts, with this Court affirming the trial court's decision, and our Supreme Court denying leave to appeal on January 25, 2013.

On August 1, 2013, plaintiff filed the present suit against Dib and his firm for legal malpractice. In lieu of filing an answer, defendants moved the trial court for summary disposition. They argued that the suit was filed outside the applicable statute of limitations, which is two years from the accrual date or six months from discovery of the malpractice. Defendants argued that the claim accrued when the professional relationship ended. Further, defendants insisted that the relationship ended when the trial court dismissed the medical malpractice claims on May 11, 2010, because the contract only applied through the trial portion of the case and another attorney outside of defendant's law firm managed the appeal. Defendants also argued that plaintiff should have been aware of the legal malpractice claim when the trial court struck the expert witnesses' testimony and dismissed the action while plaintiff was present on April 28, 2010.

Plaintiff asserted that the attorney-client relationship lasted throughout the appeals. Plaintiff contends that she did not discover her potential legal malpractice claim until she contacted this Court on February 1, 2013 and was told that her cases had all been dismissed. Then, on March 12, 2013, plaintiff received a letter from defendant. The letter, in its entirety, read:

We lost in the trial court and appealed to the court of appeals. We lost in the Court of Appeals (see attached) and appealed to the Supreme Court. We lost in the Supreme Court (see attached). Regrettably, there is nothing more that can be done. As such, we are closing out our file and cannot take any further action in the matter.

Thank you for allowing us to represent you. I wish we could have had a better outcome, but despite our best efforts and multiple appeals, we could not prevail.

Should you wish to discuss this further, feel free to contact me.

It is uncontested that the letter was signed by Dib. Plaintiff contends in her complaint that the above letter was the first notice she had from any attorney that her case had been dismissed. Thus, she argued, the attorney-client relationship did not end until receipt of the letter. However, the trial court agreed with defendants and granted their motion for summary disposition pursuant to MCR 2.116(C)(7). This appeal then ensued.

II. ANALYSIS.

“This Court reviews decisions on motions for summary disposition de novo to determine if the moving party was entitled to judgment as a matter of law.” *Alcona Co v Wolverine Environmental Prod, Inc*, 233 Mich App 238, 245; 590 NW2d 586 (1998). “When reviewing a motion brought under MCR 2.116(C)(7), we consider all affidavits, pleadings, and other documentary evidence filed or submitted by the parties. All well-pleaded allegations are accepted as true and are construed most favorably to the nonmoving party.” *McFadden v Imus*, 192 Mich App 629, 632; 481 NW2d 812 (1992). “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). Summary disposition pursuant to MCR 2.116(C)(7) is only proper when “the facts are not in dispute and reasonable minds could not differ concerning the legal effect of those facts.” *Poppen v Tovey*, 256 Mich App 351, 354; 664 NW2d 269 (2003). In other words, it is only “[i]n the absence of disputed facts,” that “the question whether a cause of action is barred by the statute of limitations is also a question of law.” *Boyle v General Motors Corp*, 468 Mich 226, 229-230; 661 NW2d 557 (2003).

On appeal, plaintiff argues that the trial court erred in granting summary disposition in favor of defendants for two reasons. First, plaintiff argues, the grant of summary disposition was premature because plaintiff was not permitted to engage in discovery. Plaintiff argues that had she been able to engage in discovery she could have discovered evidence that Dib’s representation continued through her appeal. We find this argument unpersuasive given the standard of review for motions pursuant to MCR 2.116(C)(7). Case law clearly states that the plaintiff’s complaint should be taken as true, unless disproven by documentary evidence provided by the defendant. *Maiden*, 461 Mich at 119. Further, MCR 2.116(D)(2) explicitly states that a motion pursuant to MCR 2.116(C)(7) may be filed before the defendant’s first responsive pleading. As such, the trial court in this case properly considered the motion under the plain language of the court rule. MCR 2.116(D)(2). Accordingly, defendants’ assertions that the trial court is permitted to grant summary disposition on a first responsive pleading, regardless of the state of discovery are correct. Plaintiff is not entitled to relief on the basis that the motion for summary disposition was premature.

Second, plaintiff argues that there was sufficient evidence provided to the trial court that Dib’s representation extended through the appellate process. Plaintiff asserts that the March 12, 2013 letter clearly states that Dib continued to represent her throughout the appellate process. Further, plaintiff argues that defendant signed the claim of appeal. Additionally, defendants names appear on the brief on appeal and defendants paid the appellate attorney out of plaintiff’s settlement. Thus, plaintiff argues, reasonable minds could differ regarding whether defendants’ representation continued through the appellate process.

Defendants assert that reasonable minds could not differ on the issue of whether their representation ended when the trial court dismissed plaintiff’s medical malpractice lawsuit. Defendants argue that the facts show that the contingent fee agreement with plaintiff stated that it only covered representation through trial and did not cover appellate fees. Additionally, defendants argue that even if defendant did continue work on the appeal that work was a separate matter and the cut-off date for purposes of the statute of limitations is when the trial court dismissed the case.

The issue left for this Court to decide is whether plaintiff’s claim is barred by the statute of limitations. MCL 600.5805(6) states that the statute of limitation for “an action charging malpractice” is two years after the claim first accrued. MCL 600.5838 defines when a professional malpractice suit accrues:

(1) . . . [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.

(2) . . . [A]n action involving a claim based on malpractice may be commenced at any time . . . 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.

“The first subsection provides that accrual occurs on the last day of professional service, regardless of when the plaintiff discovers or otherwise has knowledge of the claim.” *Gebhardt v O’Rourke*, 444 Mich 535, 541; 510 NW2d 900 (1994). Additionally, “[t]he second subsection allows additional time to file by providing that a plaintiff can file within six months of when he discovered, or should have discovered his claim.” *Id.* “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), lv den 448 Mich 867 (1995) (citations omitted).

We begin our analysis by deciding whether plaintiff’s claim falls within either of the statute of limitations cited above. We find that the six-month discovery rule, MCL 600.5838(2), bars recovery for plaintiff. The statute clearly states that the action must be commenced six months from the date the plaintiff knew or should have known about her claim. *Gebhardt*, 444 Mich at 541. Although plaintiff argues that she did not realize she might have a malpractice claim until speaking with “Joan” at the Court of Appeals on February 1, 2013, that is not the standard for this Court to apply. Rather, the record reveals that the lower court struck the testimony of the experts hired by defendant Dib on April 28, 2010, at a hearing that plaintiff attended. Further, our Supreme Court entered its order of final dismissal of plaintiff’s appeal on January 25, 2013. Therefore, at the very latest, plaintiff should have objectively known of her cause of action against defendants on January 25, 2013. The date plaintiff filed her complaint in this case, August 1, 2013, was more than six months after plaintiff should have objectively known about her cause of action. As such, plaintiff is not entitled to relief under MCL 600.5838(2). See *Gebhardt*, 444 Mich at 541.

Next we turn to the language of MCL 600.5805(6). That statute provides a two-year statute of limitations from the date the claim accrues for professional malpractice cases. MCL 600.5805(6). Further, MCL 600.5838(1) states that a claim for professional malpractice accrues when the professional relationship ends. As stated by our Supreme Court: “Here, § 5805 speaks of accrual in general terms, while § 5838 defines accrual in specific terms. Therefore, following rules of construction, the specific definition of accrual as set forth in § 5838 is interpreted to be consistent with § 5805 and is controlling. Accrual of a malpractice action, for purposes of the two-year limitation period, occurs on the last day of professional service.” *Gebhardt*, 444 Mich at 543.

This Court held in *Maddox*, 205 Mich App at 450, that a lawyer's professional relationship with a client ends when asserted by the court or a client, or when the lawyer completes a specific legal service that the lawyer was contracted to perform. Additionally, this Court, citing *Stroud v Ward*, 169 Mich App 1, 6; 425 NW2d 490 (1988) stated: "Retention of an alternative attorney effectively terminates the attorney-client relationship between the defendant and the client." *Maddox*, 205 Mich App at 450. However, nothing in the record leads us to conclude that plaintiff retained the appellate attorney who averred that he alone did all of the work on the appeal. Therefore we turn to whether any of the other factors enumerated by this Court in *Maddox* were met.

It is undisputed that neither the court nor plaintiff terminated the relationship between defendants and plaintiff. Thus, we turn to whether completion of the specific legal service that defendants were retained to perform occurred prior to our Supreme Court entering its order of final dismissal of plaintiff's appeal on January 25, 2013.

Defendants assert that the relationship ended prior to entry of that order because the *trial court portion* of the medical malpractice case ended, which, defendants argue, was all that was contracted for in the contingency fee agreement. However, the contingency agreement also provided for appellate fees being billed hourly if agreed to by defendant and plaintiff. Additionally, evidence exists that indicates defendants continued their legal services during the appeal. As previously stated, defendants signed the appellate brief. Further evidence indicates that defendants paid the appellate attorney from the proceeds of the settlement. Additionally, there is the letter from defendant Dib to plaintiff dated March 12, 2013. Accordingly, it is unclear whether completion of the specific legal service that defendants were retained to perform occurred before our Supreme Court's order of final dismissal of plaintiff's appeal on January 25, 2013. If those specific legal services were not completed until the entry of our Supreme Court's order, then the August 1, 2013 date of the complaint filed in this action would be within the two-year statute of limitations. MCL 600.5805(6).

As previously stated, a motion for summary disposition pursuant to MCR 2.116(C)(7) on statute of limitations grounds is only proper when there is no material factual dispute. *Boyle*, 468 Mich at 229-230.

Viewing the totality of the record evidence submitted, we find that the trial court erred in granting summary disposition pursuant to MCR 2.116(C)(7). The trial court was presented with conflicting evidence as to whether completion of the specific legal service that defendants were retained to perform occurred prior to our Supreme Court entering its order of final dismissal of plaintiff's appeal on January 25, 2013. Defendants provided a contingency fee agreement that stated it was only applicable through the trial court phase and, they argue, did not specifically account for appellate fees. Defendants also filed an affidavit by appellate counsel which asserted defendant Dib was not involved in any manner with the appeal. Defendants brought to the attention of the trial court and this Court evidence that defendants did not directly bill plaintiff for the appeal, thereby they claim, further demonstrating the lack of an attorney-client relationship. However, this evidence conflicts with the evidence produced by plaintiff. Plaintiff provided a claim of appeal signed by Dib in his own hand, an appellate brief containing defendants' names on the cover and signature pages. Additionally, there was the March 12, 2013 letter from defendants indicating that only then had plaintiff's case file actually been closed.

Given this conflicting evidence, we find there exists a material question of fact regarding when defendants' representation of plaintiff terminated. Reasonable minds could conclude that defendants' representation continued through the appellate process and, therefore, that the present suit was filed well within the two-year statute of limitations provided by MCL 600.5805(6). As such, where a material question of fact exists, the trial court was not permitted to grant summary disposition in favor of defendants. *Boyle*, 468 Mich at 229-230.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. Plaintiff having prevailed may tax costs. MCR 7.219.

/s/ Jane E. Markey
/s/ Christopher M. Murray
/s/ Stephen L. Borrello