

STATE OF MICHIGAN
COURT OF APPEALS

SIMONE T. JORDAN-EL,

Plaintiff-Appellant,

v

GAIL S. BENSON,

Defendant-Appellee.

UNPUBLISHED

July 7, 2000

No. 211875

Wayne Circuit Court

LC No. 97-723243 NM

Before: McDonald, P.J., and Gage and Talbot, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendant summary disposition of plaintiff's legal malpractice claim pursuant to MCR 2.116(C)(7) and (8). We affirm.

Plaintiff first contends that the trial court erred in granting defendant summary disposition on the basis that the applicable period of limitations had expired. We review de novo the trial court's ruling on a motion for summary disposition. *Ins Comm'r v Aageson Thibo Agency*, 226 Mich App 336, 340; 573 NW2d 637 (1997). Furthermore, whether the period of limitations bars a cause of action represents a legal question that we also review de novo. *Id.* at 340-341.

In reviewing a (C)(7) motion, this Court must accept the contents of the complaint as true unless contradicted by documentation submitted by the movant. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). This Court also must consider and construe in the plaintiff's favor any affidavits, admissions or other documentary evidence submitted by the parties. If the facts are not in dispute and reasonable minds could not differ regarding the legal effect of those facts, the trial court should determine as a matter of law whether the statute of limitations bars a cause of action. *Jackson Co Hog Producers v Consumers Power Co*, 234 Mich App 72, 77; 592 NW2d 112 (1999).

The period of limitations for a legal malpractice action is two years from "the time that [the licensed professional] 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 600.5805(4); MSA 27A.5805(4); MCL 600.5838(1); MSA 27A.5838(1). Because the record indicates that defendant last performed legal

duties requested by plaintiff sometime during May 1995, the limitations period terminated by June 1997, before plaintiff filed his initial complaint in the instant case.¹

Filing a malpractice claim beyond the general two-year limitations period is also considered timely, however, when the plaintiff files within six months of the time that he discovers or should have discovered the claim's existence. MCL 600.5838(2); MSA 27A.5838(2). In this case, plaintiff should have discovered within six months of receiving his case file from defendant in January 1996 the existence of all the claims he alleged within his complaint. Therefore, plaintiff's July 1997 filing also falls outside any applicable six-month discovery period of limitation.

Plaintiff further argues that defendant fraudulently concealed her negligence from plaintiff by refusing to send him the file regarding defendant's work for plaintiff, thereby hiding the fact that plaintiff's separate criminal file had been missing from Detroit Recorder's Court. A special limitations period exists when a defendant fraudulently conceals the existence of a malpractice claim. *Brownell v Garber*, 199 Mich App 519, 523-524; 503 NW2d 81 (1993).

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 action 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. [MCL 600.5855; MSA 27A.5855.]

The fraud must have been manifested by an affirmative act or misrepresentation, unless the defendant owed an affirmative duty to disclose information because of a fiduciary relationship with the plaintiff. *Id.* at 527. The plaintiff has the burden of establishing the defendant's fraud. *Id.* at 531.

Plaintiff contends that defendant failed to inform him that his Detroit Recorder's Court criminal file was missing, and that he had no way of knowing this because defendant refused to mail the file regarding her work on plaintiff's postappeal motions. The record evidence concerning a missing file consists of a May 26, 1995 letter from defendant's paralegal to the secretary of a Detroit Recorder's Court judge, which indicates that "[i]t is my understanding that [plaintiff's criminal] file is missing." The letter accompanied a praecipe for defendant's motion to withdraw as plaintiff's counsel. Plaintiff produced no evidence showing that defendant bore any responsibility for the missing criminal file, or that the criminal file disappeared permanently.

Plaintiff also asserts that defendant stated in a May 5, 1995 letter that she would send plaintiff her file, but that defendant then changed those terms in subsequent letters by requiring that plaintiff

¹ While plaintiff observes that an order granting defendant's motion to withdraw was entered in early August 1995, the record supports defendant's statement that the motion to withdraw was orally granted in late May 1995. Moreover, we reiterate that no indication exists that after May 1995 defendant performed on plaintiff's behalf any legal duties.

arrange for someone to pick up the file. Several letters of record address the return to plaintiff of defendant's file concerning plaintiff. A May 5, 1995 letter from defendant to plaintiff stated, "Also, unfortunately, I intend to file a motion to withdraw my Appearance in relation to your pending motion. I will also return your revised Arguments I and IV and your original file." A May 11, 1995 letter from defendant to plaintiff's mother requested, "Please make an appointment with my secretary . . . to pick up [plaintiff]'s file and a check." An August 11, 1995 letter from defendant's paralegal to plaintiff indicated that toward the end of August 1995 defendant would review plaintiff's file and make it "available for pick-up," but instructed that "[t]he file, however, will not be returned via the U.S. mail.² Some member of your family will need to contact this office to arrange to pick-up the file." A January 3, 1996 letter from defendant to plaintiff explained, "I did not release your file earlier as I requested a release from you or your family which was certainly the appropriate manner to proceed. Further, you know this was the appropriate manner to proceed as we had discussed this previously with respect to your prior counsel."

We conclude that plaintiff failed to demonstrate defendant's fraudulent conduct in failing to return the file. The letters of record reflect defendant's willingness to return her file concerning plaintiff, albeit under different conditions than plaintiff desired, and do not support plaintiff's suggestions that defendant improperly or inexplicably refused to return the file. In light of plaintiff's failure to meet his burden to establish defendant's fraud, the special statute of limitations for fraudulent concealment is not applicable in this case. MCL 600.5855; MSA 27A.5855; *Brownell, supra* at 523-524, 531.

Because the above facts were not in dispute and reasonable minds could not differ regarding the legal effect of those facts, the lower court properly determined as a matter of law that plaintiff's malpractice action was barred by the limitations period. MCR 2.116(C)(7); *Jackson Co Hog Producers, supra*. In light of our conclusion that plaintiff's claims were time barred, we need not address plaintiff's further appellate argument.³

² During the period of plaintiff's relationship with defendant, and at the time plaintiff filed this appeal, plaintiff remained imprisoned, apparently for a first-degree criminal sexual conduct conviction. MCL 750.520b; MSA 28.788(2).

³ We note briefly, however, plaintiff's next argument that the trial court erred in granting defendant summary disposition on the basis that plaintiff listed no expert witness who would testify concerning defendant's malpractice. In professional malpractice cases, expert testimony generally is required to establish the applicable standard of care and the breach of that standard. *Phillips v Mazda Motor Mfg (USA) Corp*, 204 Mich App 401, 409; 516 NW2d 502 (1994). Where the negligence alleged is so manifest, however, that it can be said as a matter of common knowledge and experience that the defendant was careless, expert testimony is not required. *Id.* at 409-410. In light of the documentary evidence explaining why defendant did not mail the file to plaintiff, we find no negligent conduct of defendant so manifest that it can be said as a matter of common knowledge and experience that defendant was careless. Because plaintiff did not offer or present any facts substantiating defendant's alleged breach of duty, we find that the trial court properly granted summary disposition on the basis that no genuine issue of material fact existed concerning plaintiff's malpractice claim. MCR

Affirmed.

/s/ Gary R. McDonald

/s/ Hilda R. Gage

/s/ Michael J. Talbot

2.116(C)(10); *Phillips, supra*. Although the trial court did not rely on MCR 2.116(C)(10), we will not reverse the trial court when it reached a correct result for the wrong reasons. *Hall v McRea Corp*, 238 Mich App 361, 369; 605 NW2d 354 (1999).