

STATE OF MICHIGAN
COURT OF APPEALS

DR. FAWZI SHAYA and MARY SHAYA,

Plaintiffs-Appellants,

v

ROBERT S. HERTZBERG, MICHAEL I.
ZOUSMER, and HERTZ, SCHRAM &
SARETSKY, P.C.,

Defendants-Appellees.

UNPUBLISHED

January 20, 2005

No. 249320

Oakland Circuit Court

LC No. 2002-043221-NM

Before: Neff, P.J., and Cooper and R.S. Gribbs*, JJ.

PER CURIAM.

In this case, arising out of plaintiffs Dr. Fawzi Shaya and Mary Shaya's legal malpractice claim against defendants Robert S. Hertzberg, Michael I. Zousmer, and Hertz, Schram & Saretsky, P.C., plaintiffs appeal as of right the order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(7) and MCR 2.116(C)(10). We affirm.

I. Facts and Procedural History

Plaintiffs sold their medical laboratory business to Universal Standard Medical Laboratories (USML). In 1996, plaintiffs brought suit against USML for breach of contract, as USML failed to make a \$500,000 balloon payment as required by a promissory note. Plaintiffs prevailed and USML appealed to this Court arguing that the trial court improperly denied its motion for summary disposition where the parties had agreed to arbitrate all disputes. USML posted a bond on appeal in the amount of the judgment plus interest. Subsequently, USML filed for bankruptcy, which automatically stayed its pending appeal. Plaintiffs retained defendants to represent their interests in the bankruptcy proceedings. Defendants entered into a stipulated order on behalf of plaintiffs which lifted the stay for the limited purpose of allowing USML to proceed with its appeal.

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

USML successfully argued before this Court that the trial court improperly denied its motion for summary disposition, as plaintiffs' claim was barred by an agreement to arbitrate.¹ Plaintiffs sought leave to appeal to the Michigan Supreme Court, which was granted on reconsideration.² Following defendant's motion for reconsideration, the Supreme Court held that the stipulated order to lift the bankruptcy stay only allowed USML, not plaintiffs, to pursue a claim of appeal from the judgment entered by the trial court in plaintiffs' breach of contract case.³

While plaintiffs' motion for leave to appeal was pending, they filed a legal malpractice claim against defendants on August 21, 2002, arguing that defendants failed to seek a special provision to make the appeal bond continue to be effective even if the appellate courts remanded the underlying case for arbitration.⁴ According to plaintiffs, the bond was their only hope to collect their judgment as USML had no other assets remaining. On March 5, 2003, plaintiffs were allowed to file an amended complaint alleging that defendants were negligent in entering the stipulated order to allow USML's appeal to continue. Defendants moved for summary disposition of both complaints, arguing that the two-year statute of limitations had run, as their service to plaintiffs discontinued on February 8, 2000. Defendants argued that plaintiffs should have discovered the potential harm to their interests on August 29, 2000, when this Court reversed their award and remanded for arbitration. Therefore, plaintiffs should have filed their complaint by February of 2002. Defendants also argued that their actions were not the cause-in-fact of plaintiffs' damages. The trial court granted both motions.

After the stay was lifted by the bankruptcy court, the Supreme Court granted plaintiffs' motion to reopen their application to appeal; however, it was held in abeyance pending the outcome of *Papp v Mason*.⁵ Following the dismissal of *Papp*, plaintiffs' application for leave to appeal in the underlying action was denied.⁶

¹ *Shaya v Universal Standard Medical Laboratories*, unpublished opinion per curiam of the Court of Appeals, issued August 29, 2000 (Docket No. 209948), slip op pp 1, 6.

² *Shaya v Universal Standard Medical Laboratories (On Reconsideration)*, 466 Mich 860; 643 NW2d 579 (2002).

³ *Shaya v Universal Standard Medical Laboratories*, 467 Mich 871; 651 NW2d 921 (2002).

⁴ The bond only secured the payment of the judgment if this Court affirmed the trial court's judgment or if the appeal was dismissed or discontinued, not if the case was remanded for arbitration.

⁵ *Papp v Mason*, 468 Mich 870; 659 NW2d 231 (2003), dismissed December 8, 2003; *Shaya v Universal Medical Laboratories*, 659 NW2d 231 (2003).

⁶ *Shaya v Universal Medical Laboratories*, 469 Mich 987; 674 NW2d 59 (2004).

II. Statute of Limitations

Plaintiffs contend that the trial court erroneously determined that their legal malpractice claim was time-barred. We review a trial court's determination regarding a motion for summary disposition de novo.⁷ Absent disputed issues of fact, whether a cause of action is barred by a statute of limitations pursuant to MCR 2.116(C)(7) is also reviewed de novo.⁸ In considering a motion under this subsection, the court must consider "all documentary evidence filed or submitted by the parties."⁹ A plaintiff's well-pleaded factual allegations and the admissible evidence are accepted as true and construed in the plaintiff's favor.¹⁰

Plaintiffs argue that the period of limitations on their legal malpractice claim did not begin running until the date when they incurred actual financial damages. Plaintiffs set this date at May 21, 2002, when USML moved for reconsideration of the Supreme Court's grant of leave to appeal, arguing that the bankruptcy court order lifting the stay did not provide appellate redress for plaintiffs. We disagree. Generally, an action charging legal malpractice must be commenced within two years of the accrual of the claim.¹¹ A legal malpractice claim accrues when the attorney "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 had knowledge of the claim."¹² "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."¹³ No formal discharge by a client is required, as termination of the attorney-client relationship can be implied by the conduct of the client.¹⁴ As it involves a matter of statutory construction, the determination of the last date of service is a legal question for the court.¹⁵

Although the Legislature has clearly delineated when a legal malpractice claim accrues, plaintiffs contend that the actual damage requirement, generally applicable to the accrual of tort actions, applies to legal malpractice claims. However, the Michigan Supreme Court has expressly rejected this argument.¹⁶ When plaintiff incurred damages; *i.e.*, the date on which all

⁷ *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001).

⁸ *Ashby v Byrnes*, 251 Mich App 537, 540; 651 NW2d 922 (2002).

⁹ *Maskery v Univ of Michigan Bd of Regents*, 468 Mich 609, 613; 664 NW2d 165 (2003).

¹⁰ *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999).

¹¹ MCL 600.5805(6); *Gebhardt v O'Rourke*, 444 Mich 535, 541; 510 NW2d 900 (1994).

¹² MCL 600.5838(1); *Gebhardt*, *supra* at 541.

¹³ *Balcom v Zambon*, 254 Mich App 470, 484; 658 NW2d 156 (2002), quoting *Maddox v Burlingame*, 205 Mich App 446, 450; 517 NW2d 816 (1994).

¹⁴ *Mitchell v Dougherty*, 249 Mich App 668, 684; 644 NW2d 391 (2002).

¹⁵ *Coddington v Robertson*, 160 Mich App 406, 410; 407 NW2d 666 (1987).

¹⁶ *Gebhardt*, *supra* at 542-543.

the elements of a malpractice claim were established, is irrelevant in determining the statutory last date of service.¹⁷

We find that defendants were retained by plaintiffs to perform a specific legal service that had, in fact, been completed. While the language of the retainer agreement did not specifically state what legal services defendants were to provide in connection with the bankruptcy proceedings, the retainer clearly stated that “[a]ny unearned portion of the retainer will be returned to you at the conclusion of this matter.” In February of 2000, defendants actually refunded the remainder of the retainer and plaintiffs willingly accepted the check and cashed it. As such, plaintiffs cannot now claim that defendants continued to represent them. Therefore, plaintiffs were required to file their legal malpractice claim by February of 2002, or six months before they actually filed. Accordingly, the trial court properly determined that plaintiffs’ claim was time-barred, pursuant to MCL 600.5805(6) and MCL 600.5838(1).¹⁸

However, under an exception to the general limitations period, malpractice claims may be commenced after the expiration of the two-year period if commenced “within 6 months after the plaintiff discovers or should have discovered the existence of the claim.”¹⁹ The date when a plaintiff discovered or should have discovered a claim is generally a question of fact; however, if the facts are undisputed, the court can decide the issue as a matter of law.²⁰ A plaintiff has discovered a claim if he has discovered a *possible* as opposed to a *likely* cause of action.²¹

Plaintiffs assert that they did not discover their claim until USML moved for reconsideration based on the limited language of the lift of stay order. Although plaintiffs failed to preserve this argument for appeal by raising it below, we may review unpreserved issues of law for which all the necessary facts were presented.²² The trial court properly ruled as a matter of law that plaintiffs knew of their possible legal malpractice claim on December 10, 2001, when their new attorney in the bankruptcy matter wrote a letter to the bankruptcy trustee noting the deficiency in the lift of stay order. The facts are undisputed that plaintiffs’ counsel referred to the automatic stay precluding plaintiffs’ further action in certain matters. The attorney also explained that his “present concern was that [plaintiffs’] prior counsel may be liable to them for legal malpractice for having stipulated that the appeal (supersedeas) bond would effectively evaporate in the event of an appellate remand or reversal” The letter clearly shows that

¹⁷ *Chapman v Sullivan*, 161 Mich App 558, 563; 411 NW2d 754 (1987).

¹⁸ The record reflects that defendants provided “wrap-up” advice until March 21, 2000. Arguably, it could be implied from the conduct of the parties that defendants continued to serve plaintiffs until that date. However, the difference of one month would not affect our ultimate determination of this issue.

¹⁹ MCL 600.5838(2); *Gebhardt*, *supra* at 541.

²⁰ *Soloway v Oakwood Hosp Corp*, 454 Mich 214, 230; 561 NW2d 843 (1997).

²¹ *Id.* at 544.

²² *Bertrand v Mackinac Island*, 256 Mich App 13, 21; 662 NW2d 77 (2003).

plaintiffs' new counsel understood that the order precluded *any* further action by plaintiffs and that plaintiffs had some possible cause of action for malpractice. As the evidence shows that plaintiffs knew of their potential legal malpractice cause of action on December 10, 2001, plaintiffs only had until June 10, 2002, to bring their claim. As plaintiffs filed their complaint two-and-a-half months later, the trial court properly determined that their claim was time-barred.²³

We also reject plaintiffs' contention that defendants did not discontinue their professional service until August 21, 2002, when this lawsuit was filed, as they never sought the permission of the bankruptcy court to withdraw as required by Local Rule 9010-1 of the United States Bankruptcy Court for the Eastern District of Michigan and Michigan Rule of Professional Conduct 1.16(c). We first note that this Court has repeatedly held, contrary to the trial court's ruling, that MRPC 1.16 applies to all counsel, not just court-appointed.²⁴ However, we find that the bankruptcy court rules have no bearing on a circuit court's determination of when a legal malpractice claim accrues or should be discovered. As noted previously, the parties ended their professional relationship in February of 2000, regardless of whether the bankruptcy court permitted this action. Although defendants should have sought the bankruptcy court's permission to withdraw as counsel, their error has no bearing on the accrual date of the legal malpractice claim.

III. Causation

The trial court also granted defendants' motion for summary disposition pursuant to MCR 2.116(C)(10). The trial court found that plaintiffs' new attorney in the bankruptcy proceedings had ample opportunity to seek an amendment to the lift of stay order to allow plaintiffs appellate redress before the limited order caused them any harm. As the new attorney took no action, plaintiffs were barred from pursuing a claim against defendants.²⁵ A motion

²³ Furthermore, we note that plaintiffs conceded in their brief on appeal that, essentially, they were aware that the lift of stay order precluded their appeal, but they remained silent hoping that USML would not notice.

²⁴ See *Keywell & Rosenfeld v Bithell*, 254 Mich App 300; 657 NW2d 759 (2002); *In re Withdrawal of Attorney*, 234 Mich App 421; 594 NW2d 514 (1999).

²⁵ Although plaintiffs challenge the trial court's order on this ground within their appellate brief, they failed to properly present this issue in their statement of questions presented. However, defendants responded to plaintiffs arguments and there is sufficient record evidence for adequate appellate review of the issue. Accordingly, we will consider plaintiffs' challenge.

The trial court also granted defendants' motion for summary disposition pursuant to MCR 2.116(C)(10) regarding plaintiffs' allegations in their original complaint that defendants were negligent in drafting the appeal bond. However, plaintiffs concede on appeal that defendants were retained nineteen months after the appeal bond was secured and, therefore, does not challenge the trial court's ruling on that ground.

under MCR 2.116(C)(10) tests the factual support of a plaintiff's claim.²⁶ "In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), we consider the affidavits, pleadings, depositions, admissions, or any other documentary evidence submitted in [the] light most favorable to the nonmoving party to decide whether a genuine issue of material fact exists."²⁷ Summary disposition is appropriate only if there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law.²⁸

As previously noted, plaintiffs were aware that the lift of stay order prevented plaintiffs from taking further action on December 10, 2001, when their new attorney sent a letter to the bankruptcy trustee referencing the limits placed upon plaintiffs by the order. The Supreme Court did not dismiss plaintiffs' application for leave to appeal based on the lift of stay order until September 18, 2002. Furthermore, we again note that plaintiffs concede that they failed to take action to remedy the situation for nine months, hoping that USML would not discover the deficiency in the order. Under these circumstances, the trial court properly found that any harm plaintiffs suffered as a result of the inadequately drafted lift of stay order could easily have been remedied before any harm befell them. As plaintiffs sat back and allowed the harm to occur, the trial court properly granted defendants' motion for summary disposition on this ground.

IV. Withdrawal of Trial Counsel

Plaintiffs also contend that the trial court erred in permitting plaintiffs' original trial counsel in the legal malpractice action (Blaske & Blaske) to withdraw based on a breakdown in the attorney-client relationship where the dispute merely concerned a disagreement regarding what parties to sue. Plaintiffs did not want to sue the attorneys who represented them in the breach of contract action (Hyman Lippitt) against USML, as Hyman Lippitt was still representing them in the appellate process. Plaintiffs contended that Blaske & Blaske filed the complaint, including a claim against Hyman Lippitt (who was later dismissed) and subsequently sought to withdraw because the omission of this party would reduce the potential award. We review a trial court's decision regarding a motion to withdraw for an abuse of discretion.²⁹

An attorney who has entered an appearance may withdraw from the action or be substituted only with the consent of the client or by leave of the court.³⁰ Plaintiffs' original counsel in this case sought and was granted permission to withdraw on the ground that there had been a breakdown in the attorney-client relationship. "[A] lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the

²⁶ *Auto-Owners Ins Co v Allied Adjusters & Appraisers, Inc*, 238 Mich App 394, 397; 605 NW2d 685 (1999).

²⁷ *Singer v American States Ins*, 245 Mich App 370, 374; 631 NW2d 34 (2001).

²⁸ *MacDonald v PKT, Inc*, 464 Mich 322, 332; 628 NW2d 33 (2001).

²⁹ *Withdrawal of Attorney*, *supra* at 431.

³⁰ MCR 2.117(C)(2); *Withdrawal of Attorney*, *supra* at 431.

interests of the client, or if: . . . other good cause for withdrawal exists.”³¹ This Court has found “good cause” to withdraw when “the client has caused a total breakdown in the attorney-client relationship.”³²

“The relations between attorney and counsel are of a delicate and confidential nature. They should have faith in each other, and their relations should be such that they can cordially co-operate. What is a sufficient cause to justify an attorney in abandoning a case in which he has been retained has not been laid down by any general rule, and in the nature of things cannot be”³³

We find that the court did not abuse its discretion in granting counsel’s motion to withdraw. Although Blaske & Blaske presented little detail in their motion to protect plaintiffs’ interests, they did properly allege a breakdown in the attorney-client relationship. Furthermore, the motion was brought very early in the proceedings—no answer had even been filed. Therefore, withdrawal could have, and was, accomplished without material adverse effect on plaintiffs’ interests. As the trial court properly granted this motion, plaintiffs’ remaining argument regarding the trial court’s decision to bar plaintiffs’ special counsel from appearing at the withdrawal hearing is moot.

Affirmed.

/s/ Janet T. Neff
/s/ Jessica R. Cooper
/s/ Roman S. Gribbs

³¹ MRPC 1.16(b)(6).

³² *Ambrose v Detroit Edison Co*, 65 Mich App 484, 488; 237 NW2d 520 (1975).

³³ *Id.* at 488-489, quoting *Genrow v Flynn*, 166 Mich 564, 567-568; 131 NW 1115 (1911).