

STATE OF MICHIGAN
COURT OF APPEALS

RAYMOND WICKHAM,

Plaintiff-Appellant,

v

FREDERICK J. LEPLEY,

Defendant-Appellee.

UNPUBLISHED

March 30, 2006

No. 258429

St. Clair Circuit Court

LC No. 03-002781-NM

Before: Neff, P.J., and Bandstra and Cooper, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court order granting summary disposition in favor of defendant and dismissing plaintiff's legal malpractice claim on the ground that plaintiff could not establish that defendant's alleged negligent act had proximately caused plaintiff's injury. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff's legal malpractice claim concerns defendant's failure to raise a statute of limitations defense on November 19, 2001 when he represented plaintiff in a child support enforcement proceeding before a family court.¹ Plaintiff alleges that because his youngest child born of the relevant marriage turned eighteen on May 8, 1988, the statute of limitations lapsed in 1998 under MCL 600.5809. Although neither plaintiff nor defendant raised the defense, after plaintiff was arrested for failing to comply with a payment order entered during the November 19, 2001 hearing, the family court raised the defense sua sponte and released defendant, finding that the statute of limitations had lapsed. Thus, plaintiff alleges that if defendant had raised the defense, plaintiff would not have been arrested for non-payment.

We review de novo a trial court's decision on a motion for summary disposition. *Wilcoxon v Minnesota Mining & Mfg Co*, 235 Mich App 347, 357; 597 NW2d 250 (1999). In reviewing a decision under MCR 2.116(C)(7) or (C)(10) based on the statute of limitations, we consider all documentary evidence in the light most favorable to the nonmoving party to determine whether there is any genuine issue of material fact that would entitle the non-moving party to judgment as a matter of law. *Doe v Roman Catholic Archbishop of the Archdiocese of*

¹ We use the term "family court" to distinguish the trial court in the instant case.

Detroit, 264 Mich App 632, 638; 692 NW2d 398 (2004); *Wilcoxon*, *supra* at 357-358. “Where no factual dispute exists, as in this case, whether a claim is barred by the statute of limitations is a question of law which we review de novo.” *Wayne Co Social Services Director v Yates*, 261 Mich App 152, 154; 681 NW2d 5 (2004).

The elements of legal malpractice are: (1) the existence of an attorney-client relationship; (2) negligence in the legal representation of the plaintiff; (3) that the negligence was the proximate cause of an injury; and (4) the fact and extent of the injury alleged. *Manzo v Petrella & Petrella & Assoc, PC*, 261 Mich App 705, 712; 683 NW2d 699 (2004). Because plaintiff and defendant clearly had an attorney-client relationship, the threshold question is whether defendant breached a duty owed to plaintiff. *Estate of Mitchell v Dougherty*, 249 Mich App 668, 677; 644 NW2d 391 (2002).² If the statute of limitations would have barred the proceedings, then defendant had a duty to assert the defense.

Because the “cause of action presumably arose, or arose for the last time . . . when [the youngest child] turned eighteen,” the applicable statute of limitations was the one in effect when plaintiff’s youngest child first turned eighteen. *Rzadkowolski v Pefley*, 237 Mich App 405, 411; 603 NW2d 646 (1999); *Yates*, *supra* at 154 n 2. Under the then-existing version of MCL 600.5809,³ when the youngest child turned eighteen on May 8, 1988, any “action to recover the child support payments had accrued in full, because no further payments were due according to the terms of the divorce decree.” *Ewing v Bolden*, 194 Mich App 95, 99-100; 486 NW2d 96 (1992). Because the statute of limitations for child support was ten years from the May 8, 1988 accrual date, the statute of limitations could have lapsed at the earliest on May 8, 1998 under MCL 600.5809(3) unless it was extended or waived.

Defendant argues that he had no duty to raise the statute of limitations on November 19, 2001 because it had been extended or waived by plaintiff’s partial payments deducted from July 15, 1997 to December 18, 2000.⁴ Plaintiff counters that these deductions could not have waived or extended the statute of limitations because they were deducted from his social security disability payments without his permission and constitute involuntary payments. We disagree. In *Yates*, *supra* at 157, this Court held that “*income withholding payments* [made during the limitations period] amounted to renewals of the full child support obligation and thereby served

² Even though the trial court found that there might be a question of fact concerning whether defendant owed a duty to raise the defense, “[a] decision of a court that obtained the correct result, albeit for a different reason, will be affirmed on appeal.” *Westlake Transportation, Inc v Pub Service Comm*, 255 Mich App 589, 611; 662 NW2d 784 (2003).

³ Although plaintiff quotes MCL 600.5809(4), that subsection was added in 1996 with an effective date of January 1, 1997. Thus, subsection (4) is inapplicable under *Rzadkowolski*, *supra* at 410-411.

⁴ Partial payments made *during the limitations period* (i.e., within ten years following the youngest child’s birthday) could *extend* the statute of limitations. *Yates*, *supra* at 154-156. In contrast, “[p]artial payment . . . made *after* the expiration of the period of limitations is an acknowledgment of the debt and a waiver of the defense.” *Id.* at 155 n 3.

to extend the period of limitations.” (Emphasis added). Because plaintiff was aware that these income withholding payments were being made and did not declare that the payments were not meant to renew the obligation, see *id.* at 156, we find no reason to distinguish this case from *Yates*.⁵

Plaintiff next argues that defendant had a duty to raise the defense because the family court found that it applied after plaintiff had been arrested, and plaintiff’s expert opined that defendant had such a duty because “there was at the very least a good faith argument that the . . . statute of limitations” barred the proceedings. In *Simko v Blake*, 201 Mich App 191, 194; 506 NW2d 258 (1993), affirmed 448 Mich 648; 532 NW2d 842 (1995), this Court considered an attorney’s ethical duty toward his client:

Factors to be considered when determining whether a duty exists include: foreseeability of the harm, degree of certainty of the injury, moral blame attached to the conduct, policy of preventing future harm, and the burdens and consequences of imposing a duty and the resulting liability for breach.

Because an attorney is not required to “anticipate every error or completely shield a client from the occasional aberrant ruling of a fallible judge,” he similarly cannot be held liable for failing to *foresee* and exploit such an error. *Id.* at 194. Because defendant had no duty to foresee and exploit such an error, the certainty of such an injury is inconsequential. Additionally, although an attorney has an ethical duty to serve the client zealously, this duty is not breached merely because another attorney is willing to characterize the defense as a good-faith defense. *Friedman v Dozorc*, 412 Mich 1, 54; 312 NW2d 585 (1981) (holding that an attorney’s duty to zealously advocate on behalf of his client did not turn on “what a hypothetical reasonable practitioner would have done in the same circumstances, but of whether the lawyer’s conduct was beyond the limits of reason or the bounds of the law”). Plaintiff has also cited no authority supporting his argument that an attorney has a duty to bring a defense, particularly a meritless one, simply because it might be characterized as a good-faith defense.

Next, defendant’s conduct does not appear to be morally blameworthy. See *Simko, supra* at 194. Even if the defense would have succeeded, it should not have succeeded. Also, by not raising the defense, defendant avoided potentially compromising the Michigan Rules of Professional Conduct. To illustrate, were we to hold that defendant had a duty to raise the defense because the family court later failed to consider the effect of *Yates*, such holding could be inconsistent with MRPC 3.3(a)(3). MRPC 3.3(a)(3) prohibits an attorney from intentionally “fail[ing] to disclose . . . controlling legal authority . . . directly adverse to the position of the client and not disclosed by opposing counsel.” The express policy of MRPC 3.3(a)(3) of

⁵ Plaintiff also argues that two separate limitations periods applied because his two children of the relevant marriage turned eighteen on different dates. However, such a distinction is not material. Even if these are treated as two separate obligations with two separate limitations periods, the 1997 partial payments waived the statute of limitations defense attributable to support for the eldest child, while extending the statute of limitations attributable to the youngest child. *Yates, supra* at 154-156.

mandating candor toward the tribunal is undoubtedly paramount to plaintiff's argument that defendant had a duty to bring the defense simply because it could have been argued in good faith and might have succeeded. To comply with plaintiff's asserted "duty" and MRPC 3.3(a)(3), defendant would have had to assert the defense, wait for the family court to erroneously agree, then point out that the family court had overlooked *Yates*. Because complying with both "duties" would be both absurd and pointless, defendant also avoided burdening the court with a meritless defense. See *Simko, supra* at 194. Moreover, were we to impose such a duty in these circumstances, attorneys throughout the state would be forced to raise meritless defenses to avoid liability while potentially sacrificing their ethical duty of candor.

Finally, even assuming that the statute of limitations would somehow have barred the proceedings, "where an attorney acts in good faith and in honest belief that his acts and omissions are well founded in law and are in the best interest of the client, the attorney is not answerable for mere errors in judgment." *Mitchell, supra* at 677, quoting *Simko, supra* at 658. Plaintiff has not argued that defendant acted in bad faith or that his belief concerning the statute of limitations was dishonest. Thus, any alleged error in judgment by defendant was not a gross error in judgment amounting to legal malpractice. *Mitchell, supra* at 679 (rejecting a claim of legal malpractice because the "[p]laintiffs presented no evidence that defendant attorneys' determination . . . was anything other than an honest belief well founded in the law and in the best interest of their clients"). Although plaintiff may argue that it would have been in plaintiff's best interest to raise the defense, this is arguably true only because the family court erred. By developing a strategy that a reasonable attorney could honestly believe was consistent with and well founded in state law, defendant acted in the best interests of his client. See our Supreme Court's opinion in *Simko, supra* at 656 ("[a]n attorney has the duty to fashion such a strategy so that it is consistent with prevailing Michigan law"). It cannot be reasonably argued that an attorney has a duty to fashion a strategy that he honestly and reasonably believes would be inconsistent with state law simply because the strategy might have benefited his client. Accordingly, the trial court did not err in dismissing plaintiff's legal malpractice claim. Because defendant did not breach a duty owed to plaintiff, we need not decide whether the alleged negligent act proximately caused plaintiff's damages.

We affirm.

/s/ Janet T. Neff
/s/ Richard A. Bandstra
/s/ Jessica R. Cooper