

STATE OF MICHIGAN
COURT OF APPEALS

TIMOTHY HORNE and STEPHANIE HORNE,

Plaintiffs-Appellants,

UNPUBLISHED
June 21, 2011

V

IRA B. SAPERSTEIN,

Defendant-Appellee.

No. 297368
Oakland Circuit Court
LC No. 2008-093342-NM

Before: FORT HOOD, P.J., and DONOFRIO and RONAYNE KRAUSE, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's order granting summary disposition in favor of defendant in this legal malpractice suit. At issue is whether the six-month discovery rule of MCL 600.5838(2) saves plaintiffs' suit when otherwise the period of limitations expired. Because plaintiffs have not created a justiciable question of fact regarding when they discovered or should have discovered their claim against defendant, we affirm.

Plaintiffs retained defendant on a contingent basis on October 10, 2002, to pursue a medical malpractice suit for an act that occurred on January 24, 2002. On January 16, 2004, defendant served the medical malpractice defendant with the notice of intent to sue, tolling the period of limitations in that suit only eight days before it expired. On May 4, 2004, defendant sent plaintiffs a letter saying he had been unsuccessful in attempting to obtain a favorable opinion from a qualified expert. Defendant had consulted with a physician, but not one who was qualified as an expert witness in the case because he was not board certified in the same specialty as the medical malpractice defendant. The letter stated that defendant had contacted a New York expert who would review the file but who required his fee up front. By telephone, plaintiffs advised defendant that they no longer wished to pursue the case. Defendant sent a follow-up letter on June 9, 2004, memorializing that call and advising plaintiff that the period of limitations would soon expire and that a suit would have to be filed by June 25, 2004. In fact, the period of limitations expired on July 24, 2004.

Plaintiffs continued to pursue the claim and in November 2007 asked defendant for their file. In February 2008, plaintiffs met with attorney Tedd E. Bean, who told them that defendant had incorrectly calculated the period of limitations expiration date and that he concluded that defendant might have committed malpractice in handling plaintiffs' case. Bean opined that "it was not legally appropriate for [defendant] to have sought out the opinion of a physician who

would not qualify under Michigan law to render such an opinion” about a neurosurgeon’s treatment of Timothy Horne. Until then, Timothy Horne had not said anything to his wife about a suit against defendant.

Plaintiffs filed a legal malpractice suit against defendant on July 28, 2008. After discovery, defendant moved for summary disposition, arguing that the suit was barred by the statute of limitations, which would have expired on June 9, 2006, at the latest. The trial court heard arguments and issued a written opinion agreeing with defendant stating “[t]hat even taking all of the facts in the case in the light most favorable to Plaintiffs’ [sic] action is time barred since they knew of a potential malpractice claim against Defendant as early as June 9, 2004 and they did not file this action until July 29, 2008.”

We review the trial court’s decision on a motion for summary disposition de novo. *Spiek v Dep’t of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998).

On appeal, plaintiffs argue that the affidavits they attached were sufficient to create at least a question of fact that they did not know about their potential claim until they had spoken with attorney Bean. However, under MCL 600.5838(2), the question is not whether plaintiffs actually knew about their claim sooner, but whether they *should have known* about it more than six months before they filed their suit. MCL 600.5838(2) reads in its entirety:

Except as otherwise provided in section 5838a [not applicable here], an action involving a claim based on malpractice may be commenced at any time within the applicable period prescribed in sections 5805 or 5851 to 5856, *or within 6 months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later.* 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 shall be on the plaintiff. A malpractice action which is not commenced within the time prescribed by this subsection is barred. [Emphasis added.]

MCL 600.5805(5) and 600.5838(1) provide that suits for legal malpractice must be brought within two years after the attorney stopped serving the client unless an exception applies. The only exception plaintiffs argue applies here is the “discovery” rule set out in MCL 600.5838(2) that allows suits for malpractice to be brought “within 6 months after the plaintiff discovers or should have discovered the existence of the claim,” even if the statutory limitation period has expired. The statute also provides that the burden is on the plaintiff to prove that he or she neither discovered nor should have discovered the existence of the claim any earlier.

“[T]he standard under the discovery rule is not that the plaintiff knows of a ‘likely’ cause of action. Instead, a plaintiff need only discover that he has a ‘possible’ cause of action.” *Gebhardt v O’Rourke*, 444 Mich 535, 544; 510 NW2d 900 (1994). A possible cause of action exists when a plaintiff can allege: “(1) the existence of an attorney-client relationship, (2) the acts constituting the negligence, (3) that the negligence was the proximate cause of the injury, and (4) the fact and extent of the injury alleged.” *Id.* “Once a plaintiff is aware of an injury and its possible cause, the plaintiff is equipped with the necessary knowledge to preserve and diligently pursue his claim.” *Solowy v Oakwood Hosp Corp*, 454 Mich 214, 223; 561 NW2d 843

(1997). An objective standard applies in determining when a plaintiff should have discovered a claim. *Id.* at 223.

In the present case, although plaintiffs argue strenuously that they did not discover their claim earlier, they have never provided evidence or even argument that it is unreasonable to state that they “should have” discovered their claim earlier. Defendant did not conceal from plaintiffs the shortness of time. Defendant did not pretend to pursue their claim. He told them in no uncertain terms that he was closing their case. Plaintiffs talked to dozens of lawyers about their case. Timothy Horne stated that several attorneys told plaintiffs that defendant should have told them he was giving up on their case at least six months before the period of limitations expired. Nothing prevented plaintiffs from talking about the case with other attorneys during the two-year period that followed defendant’s last day of service. They knew defendant had stopped pursuing their case with little time left to file, and because they felt that was not the right outcome they continued searching for a lawyer to handle the litigation. This establishes that they were aware of their injury and its possible cause. Thus, plaintiffs have failed to carry their burden of showing they should not have discovered their claim earlier.

Affirmed. Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Karen M. Fort Hood
/s/ Pat M. Donofrio
/s/ Amy Ronayne Krause