

STATE OF MICHIGAN  
COURT OF APPEALS

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MARIZA LAFFIN,

Plaintiff-Appellant,

V

DAVID M CAPLAN and CAPLAN &  
ASSOCIATES, PC, a/k/a DAVID M CAPLAN,  
PC,

Defendants-Appellees.

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UNPUBLISHED

April 27, 2006

No. 265125

Oakland Circuit Court

LC No. 04-061790-NM

Before: Markey, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

Plaintiff appeals by right an order granting summary disposition to defendants because plaintiff filed her suit after the statute of limitations had passed and failed to establish that defendants' alleged legal malpractice was the proximate cause of her injury. We affirm.

Plaintiff challenges the trial court's application of the statute of limitations to bar her claim. This Court reviews de novo a trial court's determination regarding a motion for summary disposition. *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001). A motion for summary disposition under MCR 2.116(C)(7) does not test the merits of a claim, but rather, certain defenses that may make a trial on the merits unnecessary. *DMI Design & Mfg, Inc v ADAC Plastics, Inc*, 165 Mich App 205, 208; 418 NW2d 386 (1987). When reviewing a motion for summary disposition granted pursuant to MCR 2.116(C)(7), this Court must accept as true the plaintiff's well-pleaded allegations, and construe them in a light most favorable to the plaintiff. *Id.*; *Gortney v Norfolk & Western RR Co*, 216 Mich App 535, 538-539; 549 NW2d 612 (1996). If the pleadings show that a party is entitled to judgment as a matter of law, or if the affidavits or other proofs show that there is no genuine issue of material fact, the trial court must enter judgment without delay. MCR 2.116(I)(1); *Gortney, supra* at 539.

The relevant statutes of limitations contain the following language:

A person shall not bring or maintain an action to recover damages for injuries to persons or property unless, after the claim first accrued to the plaintiff or to someone through whom the plaintiff claims, the action is commenced within the periods of time prescribed by this section. [MCL 600.5805(1).]

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Except as otherwise provided in this chapter, the period of limitations is 2 years for an action charging malpractice. [MCL 600.5805(6).]

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(1) Except as otherwise provided in section 5838a,<sup>[1]</sup> 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) Except as otherwise provided in section 5838a, 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. [MCL 600.5838.]

Here, the parties agree that plaintiff filed her claim more than two years after defendants rendered their last professional service for plaintiff as her attorneys in a divorce action. The dispute centers on the six-month discovery rule and when plaintiff should have discovered her claim against defendants.

Our Supreme Court interpreted the above statutes in the context of an attorney malpractice claim in *Gebhart v O'Rourke*, 444 Mich 535; 510 NW2d 900 (1994).<sup>2</sup> The Court held that the plaintiff first knew of her claim of legal malpractice when she moved for a new trial, not at the later date when she obtained a final judgment of acquittal. *Id.* at 544-545. The Court observed that § 5838 provides “that accrual occurs without regard to whether the client’s malpractice claim is ripe.” *Id.* at 542. The standard under the discovery rule of § 5838 is not that a plaintiff discovers a likely cause of action; rather, “a plaintiff need only discover that he has a ‘possible’ cause of action.” *Id.* at 544, citing *Moll v Abbott Laboratories*, 444 Mich 1; 490 NW2d 305 (1993).

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<sup>1</sup> Section 5838a deals with medical malpractice.

<sup>2</sup> Though *Gebhart* involved representation in a criminal matter, the fact that the present case arises from a civil proceeding does not render *Gebhart* inapplicable. *Gebhart* was decided in general terms applying statutory language and principles that govern this case.

The Court stated the four elements of a legal malpractice claim are: “(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.” *Gebhart, supra* at 544 (citations omitted). Regarding the fourth element, the Court opined:

[H]arm is established not by the finality of the damages, but by the occurrence of identifiable and appreciable loss. Once an injury and its possible cause is [sic] known, the plaintiff is aware of a possible cause of action. [*Id.* at 545 (citations omitted).]

In this case, plaintiff is mistaken when she argues that she did not know of her loss until after the April 28, 2004 hearing where the court enforced the language of the consent judgment. She should have known earlier of a possible claim against defendants. The fact that her former husband made no child support payments in October 2003 after his credit from the property settlement expired should have alerted plaintiff to a possible problem. Despite assurances from the friend of the court and the fact that it seized her former husband’s tax refund proceeds, plaintiff must have realized there was a serious problem with the consent judgment as early as March 26, 2004. On that date her former husband filed a motion to strike the wage withholding order. In that motion, he specifically cited the provision in the judgment that plaintiff disputes as inconsistent with the original settlement she agreed to and which she never would have signed absent defendants’ alleged negligence. Plaintiff filed an *in propria persona* answer to that motion on April 5, 2004. At this point, she should have reviewed the plain language of the settlement agreement and consent judgment, noticed the discrepancy, and realized that defendant may have committed malpractice that was jeopardizing her entitlement to child support. Because she filed her complaint against defendant on October 19, 2004, over six months after she should have known of her potential cause of action, MCL 600.5838 bars her claim.

Given our resolution of plaintiff’s first issue, we need not address the question of whether plaintiff presented sufficient evidence that defendants’ alleged malpractice was the proximate cause of her loss.

We affirm.

/s/ Jane E. Markey

/s/ Bill Schuette

/s/ Stephen L. Borrello