

STATE OF MICHIGAN
COURT OF APPEALS

MICHAEL WHITE and the DAVID WHITE TRUST,

UNPUBLISHED
August 22, 2006

Plaintiffs-Appellants,

v

ROBERT A. HAHN, JACK WEINSTEIN and LAWRENCE HURLBURT,

No. 256178
Saginaw Circuit Court
LC No. 03-049462-NM

Defendants-Appellees.

MICHAEL WHITE and BUS A. WHITE,
Successor of the DAVID A. WHITE TRUST,

Plaintiffs-Appellants,

v

ROBERT A. HAHN,

No. 265087
Saginaw Circuit Court
LC No. 05-056677-NM

Defendant-Appellee.

Before: Zahra, P.J., and Neff and Owens, JJ.

PER CURIAM.

Docket No. 256178

Plaintiffs appeal as of right from the trial court's orders granting summary disposition to defendants, holding that plaintiffs' claims for professional malpractice were barred by the statute of limitations. We affirm.

Plaintiffs filed suit against defendants, alleging that they provided incorrect advice about the applicable statute of limitations and failed to preserve plaintiffs' interests in an underlying case concerning a breach of contract by purchasers of real estate and business interests. In the underlying case between plaintiffs and the purchasers, the trial court found that some of plaintiffs' claims were barred by the statute of limitations. The trial court granted a directed

verdict in favor of the purchasers after the jury's award in favor of plaintiffs for approximately three million dollars.

At the time of the directed verdict, plaintiffs' counsel told plaintiffs that everything would get straightened out on a motion for reconsideration. The trial court denied plaintiffs' motion for reconsideration on February 28, 2003, and plaintiffs filed the instant malpractice case against defendants on August 22, 2003.

Defendants in this case did not represent plaintiffs in the underlying case. Rather, defendants had represented or met with plaintiffs prior to the underlying lawsuit and provided advice concerning or looked into plaintiffs' cause of action against the purchasers. Plaintiffs filed the instant lawsuit based on defendants' advice and their actions, or lack of action as alleged by plaintiffs.

The trial court granted summary disposition to all defendants on the ground that plaintiffs' claims were barred by the statute of limitations. The court found that plaintiffs were aware of a possible cause of action against defendants on August 29, 2002, when the trial court in the underlying case granted a directed verdict in favor of the purchasers. Based on that date of discovery, plaintiffs' filing of this case almost a year later was barred by the six-month statute of limitations.

A trial court's decision to grant summary disposition based on a statute of limitations is reviewed de novo. *Mayberry v General Orthopedics, PC*, 474 Mich 1, 5; 704 NW2d 69 (2005).

The statute of limitation for legal malpractice claims is either two years from the last day of an attorney's service to the client or six months from the date of discovery of the claim. MCL 600.5805(6), 600.5838(1), 600.5838(2). Plaintiffs do not argue that their claim was filed within the two-year statute of limitations as it relates to any of the three defendants. Rather, the only issue argued by plaintiffs is that their claim was filed within six months of their discovery of the claim.

The discovery-rule statute states that "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." MCL 600.5838(2).

A cause of action accrues under the discovery rule when the plaintiffs know or should have known of the injury. *Moll v Abbott Laboratories*, 444 Mich 1, 17; 506 NW2d 816 (1993). "[T]he phrase 'should have known' is an objective standard based on an examination of the surrounding circumstances." *Id.* at 18. When looking at those circumstances, the question is when should plaintiffs have discovered a *possible* cause of action. *Id.* at 20, 22. The *Moll* Court referred to Black's Law Dictionary to define "possible" as "[c]apable of existing, happening, being, becoming or coming to pass; feasible, not contrary to nature of things; neither necessitated nor precluded; free to happen or not; contrasted with impossible." *Id.* at 22 quoting Black's Law Dictionary (6th ed.).

A subjective standard is not to be used to determine whether a plaintiff should have known of an injury because that would encourage plaintiffs to sleep on an objectively known cause of action. *Moll, supra* at 16-17. Using such an approach would defeat the Legislature's purpose in enacting a statute of limitations. *Id.*

The trial court in the underlying case granted a directed verdict to the purchasers in August 2002, holding that the statute of limitations barred plaintiffs' claims. At that time, an injury to plaintiffs was plainly feasible and capable of existing because the trial judge's ruling in favor of the purchasers identified a possible three million dollar injury to plaintiffs. While plaintiffs may have subjectively believed that nothing was wrong due to their reliance on their attorney who stated it would all get straightened out in a motion for reconsideration, under the objective reasonable person standard, plaintiffs should have discovered a possible cause of action when the trial court in the underlying case ruled against them by entering a directed verdict for the purchasers.

Docket No. 265087

Plaintiffs filed a separate action against Hahn in June 2005, alleging that he negligently drafted the contract at issue in the underlying case between plaintiffs and the purchasers. The trial court granted summary disposition in favor of Hahn pursuant to MCR 2.116(C)(10) on the basis that plaintiffs failed to establish the existence of a genuine issue of material fact, where they offered no evidence of Hahn's negligence other than an unfavorable opinion issued by this Court, which in dicta indicated that a provision of the contract could not be interpreted as plaintiffs desired. *White v Republic Services, Inc. [Republic II]*, unpublished opinion per curiam of the Court of Appeals, (Docket No. 247928, issued December 2, 2004), slip op, p 3. Plaintiffs appeal this grant of summary disposition as of right. We affirm.

A

First, plaintiffs argue that the trial court erred by not granting their alternative motions for change of venue or judicial disqualification¹. This Court reviews "a trial court's decision concerning a motion for a change of venue to determine whether it was clearly erroneous." *Bass v Combs*, 238 Mich App 16, 19; 604 NW2d 727 (1999).

Pursuant to MCR 2.222(A), a party may request a change of venue for reasons of convenience or concerns regarding impartiality. Here, plaintiffs alleged that they could not receive an impartial trial in the Saginaw Circuit Court because of "Defendant Attorney's intimate knowledge of the officials of the Saginaw County Circuit Court System." However, plaintiffs have failed to cite any authority suggesting that because an attorney has practiced for many years in a particular court system that it should be presumed that an impartial trial concerning that attorney cannot be held in that location. The appellant may not merely announce his position

¹ The issue of judicial disqualification is unpreserved and we decline review of it because plaintiffs failed to request that the trial court refer the question of disqualification to the chief judge of the circuit court for reconsideration of the issue in accord with MCR 2.003(C)(3)(a). *Welch v District Court*, 215 Mich App 253, 258; 545 NW2d 15 (1996).

and leave it to this Court to discover and rationalize the basis for his claims. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998). The trial court did not clearly err in denying the motion to change venue.

B

Next, plaintiffs assert that the trial court erred by granting summary disposition in favor of Hahn. A trial court's ruling on a motion for summary disposition is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). In *Simko v Blake*, 448 Mich 648, 655; 532 NW2d 842 (1995), our Supreme Court set forth the following elements as those a plaintiff must adequately allege to state an action for legal malpractice:

- (1) the existence of an attorney-client relationship;
- (2) negligence in the legal representation of the plaintiff;
- (3) that the negligence was a proximate cause of an injury; and
- (4) the fact and extent of the injury alleged. [*Simko, supra* at 655, quoting *Coleman v Gurwin*, 443 Mich 59, 63, 503 NW2d 435 (1993).]

Hahn moved for summary disposition pursuant to MCR 2.116(C)(10), and submitted an affidavit stating that he had previously represented the Whites, and, accordingly, was knowledgeable about the facts and circumstances at issue. In the affidavit, Hahn further asserts as follows:

That based upon the foregoing and my knowledge of the facts and circumstances of that representation, it is my professional opinion that I in turn met the standard of practice of a lawyer in the community of Saginaw during the course of that representation and that there was no action during that representation on behalf of Michael White and David White which was a violation of the standard of practice which was a proximate cause of any damages to Michael White and David White.

Because Hahn submitted documentary evidence in support of the motion, plaintiffs were required to come forward with evidence indicating that Hahn had breached the applicable standard of practice, thereby establishing the existence of a genuine issue of material fact for trial. MCR 2.116(G)(4). In this regard, plaintiffs cited to Hahn's testimony in the underlying case, concerning his belief as to what the contract required of the purchasers as evidence that he breached the standard of practice when contrasted with this Court's opinion in *Republic II*. However, an adverse ruling is generally insufficient to establish liability. *Simko, supra* at 656-658. Rather, an attorney's duty is "to act as would an attorney of ordinary learning, judgment, or skill under the same or similar circumstances." *Id.* at 658. Here, plaintiff presented no evidence that Hahn failed to meet that standard.

Plaintiffs assert in the alternative that they had a special contract with Hahn to accomplish the result they desired, which he breached because the result he guaranteed did not come to fruition. In *Babbit v Bumpus*, 73 Mich 331, 337-338; 41 NW 417 (1889), our Supreme Court stated as follows:

A lawyer is not an insurer of the result in a case in which he is employed, unless he makes a special contract to that effect, and for that purpose. Neither is there any implied contract, when he is employed in a case, or any matter of legal business, that he will bring to bear learning, skill, or ability beyond that of the average of his profession. Nor can more than ordinary care and diligence be required of him, without a special contract is made requiring it.

Under *Babbit*, a court may not imply the existence of a contract guaranteeing a certain legal result. In this instance, the most plaintiffs allege is that Hahn assured them of his belief that the language in the settlement agreement protected their interests. They have not alleged that they openly agreed on any contractual terms or even that Hahn might have understood his assurances as a promise of something more than ordinary care and diligence. *Nicholson v Han*, 12 Mich App 35, 42; 162 NW2d 313 (1968). The trial court properly granted summary disposition in favor of Hahn.

C

Plaintiffs next assert that the trial court erred by not allowing them to amend their complaint. A trial court's decision on a motion to amend a complaint is reviewed for an abuse of discretion. *Dorman v Clinton Twp*, 269 Mich App 638, 654; 714 NW2d 350 (2006). A motion to amend ordinarily should be granted unless there are particularized reasons, including futility, for denying it. *Sands Appliance Services, Inc v Wilson*, 463 Mich 231, 239-240; 615 NW2d 241 (2000); see also MCR 2.118(A)(2). "An amendment is futile where the paragraphs or counts the plaintiff seeks to add merely restate, or slightly elaborate on, allegations already pleaded." *Dowerk v Oxford Charter Twp*, 233 Mich App 62, 76; 592 NW2d 724 (1998).

Here, plaintiffs sought to amend the sections of their complaint related to damages. The trial court denied the motion, concluding that allowing plaintiffs to amend their complaint would be a futile act because Hahn was entitled to summary disposition on plaintiffs' underlying claim. The trial court did not abuse its discretion in concluding that amendment would be futile in this instance because the proposed amendment only elaborated on allegations already pleaded, on which the trial court correctly granted summary disposition in favor of Hahn and the amendment would have been futile.

D

Plaintiffs next argue that the trial court erred by sanctioning them for filing a frivolous suit. A trial court's finding "that an action is frivolous is reviewed for clear error." *Kitchen v Kitchen*, 465 Mich 654, 661; 641 NW2d 245 (2002). The amount of sanctions imposed is reviewed for an abuse of discretion. *In re Costs & Attorney Fees*, 250 Mich App 89, 104; 645 NW2d 697 (2002). MCR 2.625(A)(2) provides in relevant part that "if the court finds on motion

of a party that an action or defense was frivolous, costs shall be awarded as provided by MCL 600.2591.” MCL 600.2591 states as follows:

(1) Upon motion of any party, if a court finds that a civil action or defense to a civil action was frivolous, the court that conducts the civil action shall award to the prevailing party the costs and fees incurred by that party in connection with the civil action by assessing the costs and fees against the nonprevailing party and their attorney.

(2) The amount of costs and fees awarded under this section shall include all reasonable costs actually incurred by the prevailing party and any costs allowed by law or by court rule, including court costs and reasonable attorney fees.

(3) As used in this section:

(a) “Frivolous” means that at least 1 of the following conditions is met:

(i) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.²

(ii) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.

(iii) The party's legal position was devoid of arguable legal merit.

(b) “Prevailing party” means a party who wins on the entire record.

A determination of frivolousness must be assessed based on the circumstances at the time the claim was made. *Jerico Constr, Inc v Quadrants, Inc*, 257 Mich App 22, 36; 666 NW2d 310 (2003).

We consider the main issue here to be whether at the time plaintiffs filed this suit it was devoid of any arguable legal merit. The trial court granted summary disposition in favor of Hahn because it found that plaintiffs failed to support their assertion that Hahn was negligent. At the time plaintiffs filed this action, this Court had stated in dicta in *Republic II* that the purchasers of

² Although plaintiffs deny that they filed this action in order to harass or injure Hahn, the fact that this was the third lawsuit plaintiffs filed against him or his law firm in which summary disposition was granted in the defendants’ favor suggests that plaintiffs harbor a certain level of animosity toward Hahn that may be motivating their actions as distinguished from the merits of their claims.

plaintiffs' businesses were correct that the language in the settlement agreement that Hahn apparently assured plaintiffs protected their interests, did not protect their interests in the manner he suggested. Accordingly, plaintiffs had some reason to believe that Hahn had erred in drafting the settlement agreement.

However, this Court's opinion in *Republic II*, also indicated that the referenced portion of its analysis was dicta because the applicable statute of limitations had barred plaintiffs' claims related to the primary provision of the contract at issue. Thus, when this suit was commenced, plaintiffs should have known that they could not prevail on the proximate cause element of their claim as it relates to that provision. Further, there is no indication in the record that plaintiffs sought advice from an attorney concerning whether Hahn had in any manner breached the applicable standard of care in drafting the settlement agreement which would have been a logical and reasonable inquiry to make before filing a malpractice action. *Attorney General v Harkins*, 257 Mich App 564, 576; 669 NW2d 296 (2003) ("The frivolous claims provisions impose an affirmative duty on each attorney to conduct a reasonable inquiry into the factual and legal viability of a pleading before it is signed").

Additionally, we conclude that this claim was barred by the applicable statute of limitations at the time it was filed. As set forth above, the statute of limitations for legal malpractice claims is either two years from the last day of an attorney's service to the client, MCL 600.5805(6) and MCL 600.5838(1), or six months from the date the claim was or should have been discovered, MCL 600.5838(2).

Plaintiffs do not argue that their claim was filed within the two-year statute of limitations. Rather, plaintiffs assert that they filed their claim within six months of discovering it. The injuries about which plaintiffs complain in this case are the purchasers' failure to transfer certain stock shares to them, the purchasers' failure to provide them a share of the revenue they received from the sale of a piece of real property, and the purchasers' failure to provide them with a share of the revenues they earned from the Whitefeather landfill. The statute of limitations began to run when plaintiffs were aware of these injuries and that they might be linked to Hahn's drafting of the contract. *Gebhardt v O'Rourke*, 444 Mich 535, 545; 510 NW2d 900 (1994).

Regarding the injuries related to the purchasers' failure to transfer the stock shares to plaintiffs and the purchasers' failure to provide plaintiffs a share of the revenue they received from the sale of the property, plaintiffs should have been aware of these injuries when the purchasers allegedly breached the contract by selling the property without transferring the stock or a share of the proceeds to plaintiffs. As for plaintiffs' claim for royalties related to the operation of Whitefeather, this asserted injury occurred when the purchasers bought Whitefeather in 1999 because, according to plaintiffs, if the agreement had been properly drafted they would have been entitled to a share of the Whitefeather revenues when the purchasers began operating Whitefeather.

As for when plaintiffs should have been aware that these injuries were possibly connected to Hahn's drafting of the agreement, they should have been aware of this possible connection more than six months before they filed this action. The primary issues in the trial court in *Republic II* were what the settlement agreement meant and whether it protected plaintiffs' interests with regard to the transfer of stock, whether it entitled plaintiffs to a portion of the proceeds from the sale of the property, and whether plaintiffs were entitled to royalties

from the purchasers' operation of Whitefeather. Accordingly, plaintiffs minimally should have been aware of these injuries and their possible connection to Hahn's drafting of the agreement by the end of the trial in *Republic II*, because at that time they were "equipped with the necessary knowledge to preserve and diligently pursue" their claim. *Solowy v Oakwood Hosp Corp*, 454 Mich 214, 223; 561 NW2d 843 (1997).

The fact that the jury sided with plaintiffs regarding the meaning of the contractual language is an insufficient basis from which to conclude that plaintiffs were not aware their injuries might be linked to Hahn's drafting of the settlement agreement. A plaintiff is only required to know of a possible cause of action under the discovery rule, not a likely cause of action. *Gebhardt, supra* at 544.

The fact that this claim is barred by the applicable statute of limitations supports the trial court's finding that plaintiffs' claim in this action was devoid of arguable legal merit at the time it was filed regardless of whether Hahn was negligent. Plaintiffs argue that the fact that this claim is arguably barred by the applicable statute of limitations does not support a finding of frivolity because when they filed this claim they believed the six-month discovery rule period should be read such that the period begins to run from the later of when the plaintiffs discovered their claim or when they should have discovered their claim, MCL 600.5838(2). We find no arguable legal merit in plaintiffs' assertion. MCL 600.5838(2) states as follows:

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.

The phrase "whichever is later" as used in this section clearly applies to the "period prescribed in sections 5805 or 5851 to 5856" and the sixth-month discovery period, which begins to run when the plaintiff discovered or should have discovered a claim. MCL 600.5838(2). The courts of this state have consistently rejected plaintiffs' argument that a subjective standard should be applied. *Moll, supra* at 17-18. Considering all the foregoing, we conclude that the trial court did not clearly err when it determined plaintiffs' action was frivolous when it was filed.

Plaintiffs further assert, without citation to any authority, that the court's imposition of sanctions was error under MCL 600.2591 because Hahn's costs and fees were borne by an insurance company. However, this claim was rejected in *BJ's & Sons Constr Co, Inc v Van Sickle*, 266 Mich App 400, 409-410; 700 NW2d 432 (2005), in which this Court concluded that an insurer could recover an award of sanctions imposed for the assertion of a frivolous claim, because it incurred the expenses while acting on behalf of the insured party as a subrogee.

Plaintiffs also assert that the amount of fees awarded was unreasonable because no evidence was submitted that Hahn's attorney actually billed at the rate of \$175 an hour. We disagree.

Hahn provided the court with a list of the services rendered and the time spent on each that indicated he worked 102.2 hours on the action at a rate of \$175 an hour for a total of \$17,885 in attorney fees. Hahn's attorney submitted additional evidence indicating that his advanced costs totaled \$779.49, with the total bill for costs and fees amounting to \$18,664.49. Because Hahn's attorney submitted clear evidence of how much he billed and for what purposes, plaintiffs' contrary suggestion is without merit. The trial court determined "that a rate of \$175.00 an hour for an experienced defense counsel who has practiced in the field of professional negligence for nearly 27 years" was reasonable. We conclude that the trial court's decision in this regard was not an abuse of discretion. *John J Fannon Co v Fannon Products, LLC*, 269 Mich App 162, 172; 712 NW2d 731 (2005).

Finally, plaintiffs complain that the trial court failed to deduct from the award those fees and costs associated with frivolous defenses put forth by Hahn. Plaintiffs argue that they are entitled to a set-off for the amounts they expended in researching those asserted frivolous defenses. In support of this argument plaintiffs cite to MCR 2.625(B)(2), essentially arguing that they are entitled to costs as prevailing parties on certain issues. However, plaintiffs asserted only a single cause of action in this case, on which defendant prevailed. Accordingly, pursuant to MCR 2.625(B)(2), defendant is deemed the prevailing party. Because plaintiffs are not prevailing parties, they are not entitled to costs pursuant to MCL 600.2591 for time spent responding to any allegedly frivolous defenses asserted by Hahn.

Affirmed.

/s/ Brian K. Zahra
/s/ Janet T. Neff
/s/ Donald S. Owens