STATE OF MICHIGAN

COURT OF APPEALS

EDWARD P. MANTURUK and TECHNICAL COLD EXTRUSIONS, INC.,

Plaintiffs-Appellants,

v

JAMES E. BERGESEN, BERGESEN & DECKER, and ROCKWOOD W. BULLARD III,

Defendants-Appellees,

and

ZEFF & ZEFF, P.C., and A. ROBERT ZEFF,

Defendants.

UNPUBLISHED
February 17, 2005

No. 245641
Wayne Circuit Court
LC No. 01-133536-CK

Before: Cavanagh, P.J., and Fitzgerald and Meter, JJ.

PER CURIAM.

In this legal malpractice action, plaintiffs appeal as of right from the trial court's order granting defendants summary disposition under MCR 2.116(C)(7), based on the statute of limitations. We affirm.

Plaintiffs retained defendants James Bergesen and Rockwood Bullard III and their law firm, Bergesen & Decker,[1] to represent them in a lawsuit against General Motors Corporation (GM), Aida Engineering, Inc., and Aida Engineering, Ltd.[2] The lawsuit was filed in 1994, but it was dismissed on February 10, 1998, for being untimely under the applicable statute of limitations. Plaintiffs then commenced this action against defendants[3] on August 7, 1998,

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[1] Bergesen, Bullard III, and their firm will be referred to as "defendants" in this opinion.

[2] The two Aida companies will be collectively referred to as "Aida" in this opinion.

[3] Plaintiffs also named as defendants A. Robert Zeff and Zeff & Zeff, P.C., but they were dismissed by stipulation.

alleging legal malpractice for failing to file the underlying action in a timely manner. The parties subsequently entered into a tolling agreement whereby they agreed (1) to dismiss the malpractice action while the underlying case was pending on appeal, and (2) that the original filing date of August 7, 1998, would govern any statute of limitations question in the legal malpractice case in the event it was refiled. In July 2000, this Court affirmed the dismissal of the underlying lawsuit based on the statute of limitations. *Manturuk v General Motors Corp,* unpublished opinion per curiam of the Court of Appeals, issued July 14, 2000 (Docket No. 211722). Plaintiffs refiled this legal malpractice action in 2001. Defendants subsequently moved for summary disposition on the ground that the legal malpractice action was not timely filed under the statute of limitations. The trial court granted defendants' motion and denied plaintiffs' motion for reconsideration. This appeal followed.[4]

Plaintiffs challenge the trial court's determination that their legal malpractice action was barred by the statute of limitations.

This Court reviews de novo a trial court's decision with regard to a motion for summary disposition. *Spiek v Dep't of Transportation,* 456 Mich 331, 337; 572 NW2d 201 (1998). Here, the trial court granted summary disposition under MCR 2.116(C)(7). Summary disposition is appropriate under this subrule if a claim is barred by the applicable statute of limitations. A motion under MCR 2.216(C)(7) is governed by the following standards:

> A defendant who files a motion for summary disposition under MCR 2.116(C)(7) may (but is not required to) file supportive material such as affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(3); *Patterson v Kleiman,* 447 Mich 429, 432; 526 NW2d 879 (1994). If such documentation is submitted, the court must consider it. MCR 2.116(G)(5). If no such documentation is submitted, the court must review the plaintiff's complaint, accepting its well-pleaded allegations as true and construing them in a light most favorable to the plaintiff. [*Turner v Mercy Hospitals & Health Services of Detroit,* 210 Mich App 345, 348; 533 NW2d 365 (1995).]

The parties agree that "MCL 600.5805 and MCL 600.5838 require 'a plaintiff in a legal malpractice action to file suit within two years of the attorney's last day of service, or within six months of when the plaintiff discovered, or should have discovered the claim.'" *Terrace Land Development Corp v Seeligson & Jordan,* 250 Mich App 452, 455; 647 NW2d 524 (2002),

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[4] In their appellate brief, defendants request that this Court strike the briefs filed by plaintiffs Edward Manturuk and Technical Cold Extrusions, Inc. (TCE). After defendants filed their brief, however, this Court denied defendants' motion to strike TCE's brief but granted defendant's motion to strike Manturuk's brief. Manturuk later filed a second brief, in which he adopted TCE's arguments and issues. Manturuk's second brief has not been stricken and was not the subject of defendants' earlier motion to strike. Because this Court has already considered and addressed defendants' request to strike TCE's and Manturuk's original briefs, we decline to further revisit this issue. See *People v Hayden,* 132 Mich App 273, 297; 348 NW2d 672 (1984); *People v Douglas,* 122 Mich App 526, 530; 332 NW2d 521 (1983).

quoting *Gebhardt v O'Rourke,* 444 Mich 535, 539; 510 NW2d 900 (1994). Plaintiffs concede that they did not file their claim within two years of defendants' last day of service. Therefore, they rely on the six-month discovery exception.

Our Supreme Court's decision in *Gebhardt* provides persuasive authority for the resolution of the instant case. In *Gebhardt*, the plaintiff was criminally charged and represented at trial by the defendant. *Gebhardt*, *supra* at 537. The plaintiff was convicted and dismissed the defendant as her attorney in favor of a new attorney. *Id*. at 537-538. Her new attorney moved for a new trial, citing defense counsel's failures at trial. *Id*. at 538. The trial court set aside the jury's conviction due to insufficient evidence. *Id*. The prosecution filed a complaint for superintending control in this Court, which was denied. *Id.* After the Supreme Court denied leave to appeal on April 19, 1989, the plaintiff filed a legal malpractice action against her original attorney on November 3, 1989. *Id*.

The Court analyzed the plaintiff's malpractice claim under the discovery rule and held that she was aware of her possible claim when her new attorney moved for a new trial.

> The plaintiff's action is also barred under the six-month discovery rule. Recently, in *Moll v Abbott Laboratories*, 444 Mich 1; [506 NW2d 816] (1993), we stated that the 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.
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> Ms. Gebhardt knew that she had a possible claim against Mr. O'Rourke when she moved for a new trial. At this time, she was able to allege the elements of a malpractice claim. These elements 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. *Basic Food Industries, Inc v Grant*, 107 Mich App 685, 690; 310 NW2d 26 (1981); *Coleman v Gurwin*, 443 Mich 59, 63; 503 NW2d 435 (1993).
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> Plaintiff was clearly able to allege the first two elements at the time of her motion for new trial. There is no doubt that an attorney-client relationship existed because Mr. O'Rourke was the attorney of record at Ms. Gebhardt's trial. Concerning the second element, acts constituting negligence were alleged in Ms. Gebhardt's motion for new trial. Specifically, plaintiff alleged that she was denied effective assistance of counsel by Mr. O'Rourke's failure to move for an independent psychiatric examination of the complainant or to present expert testimony regarding the children's false accusations of sexual abuse. These acts allegedly deprived Ms. Gebhardt of a substantial defense at trial.
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> The last two elements are generally more problematic to analyze under the discovery rule. One could argue that damages and causation were uncertain until the plaintiff obtained a final judgment of acquittal. However, harm is established not by the finality of the damages, but by the occurrence of identifiable and appreciable loss. *Luick v Rademacher*, 129 Mich App 803; 342 NW2d 617 (1983); *Hayden v Green*, 431 Mich 878; 429 NW2d 604 (1988). Once an injury

and its possible cause is known, the plaintiff is aware of a possible cause of action. *Moll, supra* at 24.

> In plaintiff's motion for new trial, she complained of Mr. O'Rourke's failure to provide a substantial defense. While Judge Elliott did not rule on ineffective assistance of counsel, it is clear by plaintiff's allegations in her motion for new trial, that she knew that Mr. O'Rourke's failure to provide a substantial defense was the possible cause of her harm. Therefore, discovery of plaintiff's cause of action occurred no later than March 27, 1987, some thirty-two months before she filed her malpractice claim. Thus, her suit is barred by the six-month discovery provision. [*Gebhardt, supra* at 544-546 (footnote omitted).]

Under the rationale of *Gebhardt*, plaintiffs here were aware of their possible cause of action for legal malpractice in 1997, when GM and Aida definitively raised the statute of limitations as a defense in the underlying case. Indeed, GM and Aida raised the issue in their affirmative defenses filed in 1994 and again raised the issue in 1997 by way of motions for summary disposition. At that point, plaintiffs were on notice of a possible cause of action and the identifiable and appreciable loss caused by the possible malpractice.

Our Supreme Court's decision in *Solowy v Oakwood Hosp Corp,* 454 Mich 214; 561 NW2d 843 (1997), further supports the conclusion that plaintiff's legal malpractice action was properly dismissed. In *Solowy*, the Court held that the plaintiff was aware of a possible cause of action for medical malpractice related to prior treatment for cancer once another doctor advised her that a suspicious growth was possibly either the return of the earlier cancer or a noncancerous growth. *Id.* at 217, 224. The Court rejected the plaintiff's argument that she did not discover a possible cause of action until the doctor later confirmed that the growth was indeed cancer after testing a tissue sample. *Id*. at 224-226. *Solowy* provides support by analogy for the trial court's decision in the instant case.

Plaintiffs appear to argue that summary disposition was inappropriate because the submitted evidence did not show when they actually knew that they had a possible cause of action against defendants. Plaintiffs contend that they could not have had "actual" notice until the court in the underlying case issued its decision dismissing the case. However, the discovery rule involves an objective standard. "[T]he discovery rule period begins to run when, on the basis of objective facts, the plaintiff should have known of a possible cause of action." *Solowy, supra* at 222; see also *Moll*, *supra* at 17-18. Therefore, plaintiffs cannot avoid the bar of the discovery rule when, on the basis of objective facts, they should have been aware of their possible claim. Thus, the trial court did not err by failing to determine whether plaintiffs had actual knowledge of their claim.

The objective facts demonstrated that plaintiffs were on notice in 1997, at the latest, that the underlying action might be dismissed because it was not timely filed under the statute of limitations. Under our Supreme Court's decisions in *Gebhardt, Moll,* and *Solowy,* plaintiffs' awareness of a possible cause of action for legal malpractice did not depend on the judge's dismissal of the underlying case, which thereby confirmed that the underlying action was untimely. Because the material facts were not in dispute, the trial court properly held as a matter of law that plaintiffs' legal malpractice action was barred by the statute of limitations. *Solowy, supra* at 230.

Plaintiffs alternatively argue that it was not reasonable to require them to file an action for legal malpractice before their underlying lawsuit was dismissed and that they acted diligently in filing this action. Because plaintiffs failed to raise this "reasonableness" argument in the trial court, appellate relief is not warranted absent a showing of plain error affecting their substantial rights. MRE 103(d); *Kern v Blethen-Coluni,* 240 Mich App 333, 336; 612 NW2d 838 (2000).

Plaintiffs' argument is premised on language in our Supreme Court's decision in *Solowy, supra* at 225-227, in which the Court recognized that the six-month discovery rule should be applied with reason and flexibity. Plaintiffs appear to argue that they acted diligently because they contacted another attorney after the underlying action was filed and the second attorney advised them that their original attorney had not committed malpractice. Plaintiffs contend that it was not unreasonable for them to fail to pursue a claim for malpractice before the judge dismissed the underlying action.

However, because plaintiffs did not raise this theory below, it was never developed or addressed. Consequently, the record simply does not support plaintiffs' arguments that they acted diligently and reasonably under the circumstances, and plaintiffs have failed to establish plain error. As noted above, plaintiffs cannot avoid the bar of the discovery rule when, on the basis of objective facts, they should have been aware of their possible claim.

Plaintiffs also complain that summary disposition should not have been granted before discovery was completed. Ordinarily, summary disposition is inappropriate before the completion of discovery on a disputed issue. *Kelly-Nevils v Detroit Receiving Hosp*, 207 Mich App 410, 421; 526 NW2d 15 (1994). However, summary disposition may be appropriate before the close of discovery if further discovery does not stand a fair chance of uncovering any additional factual support for the opposing party's position. *Crawford v State of Michigan,* 208 Mich App 117, 122-123; 527 NW2d 30 (1994). If a party believes that summary disposition is premature because discovery has not been completed, that party must at least assert that a dispute exists and support the allegation with "some independent evidence." *Bellows v Delaware McDonald's Corp*, 206 Mich App 555, 561; 522 NW2d 707 (1994).

Although plaintiffs contend that discovery should have been completed before the trial court made its ruling, they have not identified any relevant facts that they contend should be explored in discovery or that otherwise support their argument. Therefore, we reject this claim of error.

Plaintiffs also assert that this Court can apply "judicial tolling" to avoid the statute of limitations in this case. While plaintiffs assert that judicial tolling has been employed as a remedy in similar situations, they do not address why it is appropriate in this case. "A party may not leave it to this Court to search for a factual basis to sustain or reject its position." *Great Lakes Division of Nat'l Steel Corp v City of Ecorse,* 227 Mich App 379, 424; 576 NW2d 667 (1998).

Plaintiffs also appear to argue that this Court should apply the common-law discovery rule, rather than the discovery rule prescribed in MCL 600.5838 specifically for malpractice actions. Plaintiffs have failed to explain or support their argument with authority that would allow this Court to ignore MCL 600.5838. To the extent that plaintiffs suggest this Court should usurp the Legislature's role and engage in law-making, this Court is charged with enforcing and

applying the law, not making it. *Michigan Residential Care Ass'n v Dep't of Social Services,* 207 Mich App 373, 377; 526 NW2d 9 (1994). Thus, we are bound to apply the discovery rule as prescribed in MCL 600.5838, and we may not adopt other standards to avoid the clear application of that statute. Furthermore, as discussed above, our Supreme Court has clarified how MCL 600.5838 is to be applied, and we are bound to follow our Supreme Court's decisions. *Lopez v General Motors Corp,* 224 Mich App 618, 630; 569 NW2d 861 (1997).

We further reject plaintiffs' argument that their tolling agreement with defendants operated to extend the period of limitation, thereby rendering their malpractice action timely. The agreement only affected the period of time after the original filing date of August 7, 1998. Moreover, the agreement expressly provided that defendants were not waiving any defenses they had to the filing of the complaint on August 7, 1998, including the statute of limitations. Because the trial court properly dismissed this action for the reason that the statute of limitations had expired before August 7, 1998, the tolling agreement does not save plaintiffs' action.

Plaintiffs also argue that the statute of limitations was extended because defendants fraudulently concealed their malpractice. Because plaintiffs did not preserve this issue by raising it below, appellate relief is foreclosed absent a plain error affecting their substantial rights. *Kern, supra* at 336.

Although the statute of limitations may be extended if a person fraudulently conceals the existence of a claim, MCL 600.5855, there is no evidentiary support for plaintiffs' claim that defendants fraudulently concealed the existence of a malpractice claim. Plaintiffs have not shown a plain error warranting appellate relief.

Plaintiffs argue that they were denied their right to be heard at the hearing on defendants' motion for summary disposition because defense counsel falsely informed the court that the motion was unopposed. Plaintiffs presented this argument in their motion for reconsideration. This Court reviews for an abuse of discretion a trial court's decision with regard to a motion for reconsideration. *In re Beglinger Trust*, 221 Mich App 273, 279; 561 NW2d 130 (1997). MCR 2.119(F)(3) provides as follows:

> Generally, and without restricting the discretion of the court, a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted. The moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error.

Approximately one month before the date set for the summary disposition hearing, plaintiffs' counsel was allow to withdraw, and the court ordered plaintiffs to retain new counsel by the date of the motion hearing. The record discloses that defense counsel informed the trial court at the hearing that no one would appear to represent plaintiffs; he made this statement purportedly based on telephone calls with plaintiff Manturuk and with the in-house corporation counsel for plaintiff Technical Cold Extrusions, Inc. After the court granted defendants' motion, an attorney appearing on behalf of plaintiffs arrived late. The trial court agreed to reopen the matter. The attorney who appeared on behalf of plaintiffs indicated that he was contacted by plaintiffs the day before and had not fully reviewed the matter, so the trial court gave him an

opportunity to review the file. After the attorney moved for an adjournment, which the trial court denied, the attorney declined to enter a formal appearance or argue on plaintiffs' behalf.

Even if the trial court was originally misinformed about whether an attorney would be appearing on plaintiffs' behalf, plaintiffs have failed to demonstrate that a different disposition of defendants' summary disposition motion would have resulted from a correction of this error. Indeed, plaintiffs' former counsel had already filed a written response to defendants' motion, and at the motion hearing the court agreed to reopen the matter after an attorney appearing on plaintiffs' behalf arrived late. Plaintiffs have failed to demonstrate that had an attorney fully addressed the merits of defendants' motion, a different disposition would have resulted. Accordingly, the trial court did not abuse its discretion in denying plaintiffs' motion for reconsideration.

Plaintiffs further argue that the trial court erroneously refused to adjourn the summary disposition hearing. A trial court's ruling with respect to a motion for an adjournment is reviewed for an abuse of discretion. *Soumis v Soumis,* 218 Mich App 27, 32; 553 NW2d 619 (1996). A request for an adjournment must be based on good cause. *Id.* The trial court may grant a motion to adjourn if it would promote the cause of justice. *Id*.

Plaintiffs failed to establish good cause for adjourning the hearing. Plaintiffs had already been afforded approximately three months to locate new counsel after their earlier counsel indicated that they would need to find new representation, and the court had indicated in an earlier order that plaintiffs were to have new counsel enter an appearance by the date of the hearing. Plaintiffs waited until less than twenty-four hours before the hearing to retain an attorney. If the attorney was unprepared, it was due to plaintiffs' delay in securing counsel.

Further, plaintiffs have not shown that they could have prevailed on the merits had an adjournment been granted. Therefore, they cannot show that they were prejudiced by the court's refusal to grant an adjournment. Under the circumstances, an adjournment would not have promoted the cause of justice. *Soumis, supra* at 32.

We reject plaintiffs' suggestion that this Court should construe the malpractice statute of limitations consistent with the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq*. Although plaintiffs' argument with respect to this issue is not entirely clear, they cite MCL 445.903(q) and (s) and appear to suggest that this Court should abandon the "possible cause of action" standard for determining when a plaintiff is deemed to have discovered a claim in favor of a modified standard that requires a court to consider whether it was reasonable under the MCPA for the plaintiff to know of a cause of action. As previously indicated, however, this Court is bound to apply the discovery rule as prescribed in MCL 600.5838, and we must also follow our Supreme Court's decisions delineating how the discovery rule is to be interpreted and applied. *Lopez, supra* at 630.

Manturuk's separate brief on appeal essentially presents the same arguments already addressed and rejected in this opinion. With regard to Manturuk's assertion concerning whether his attorney could have entered into a stipulation with opposing counsel to extend the period of limitations, because Manturuk has not supported this issue with any argument, proper legal authority, or reference to the record, the issue is waived. *Great Lakes Division of Nat'l Steel, supra* at 422.

Affirmed.

/s/ Mark J. Cavanagh
/s/ E. Thomas Fitzgerald
/s/ Patrick M. Meter