

STATE OF MICHIGAN  
COURT OF APPEALS

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MAKEYA MILLER,

Plaintiff-Appellant/Cross Appellee,

v

WEISBERG & WALKON, P.C., and CLIFFORD  
B. WALKON,

Defendants-Appellees/Cross  
Appellants.

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UNPUBLISHED

June 27, 2006

No. 258952

Wayne Circuit Court

LC No. 04-405756-NM

Before: Cavanagh, P.J., and Fort Hood and Servitto, JJ.

PER CURIAM.

Plaintiff appeals as of right the summary dismissal of her legal malpractice case on the ground that it was barred by the statute of limitations. See MCR 2.116(C)(7). Defendants cross appeal the trial court's denial of their request for sanctions. We affirm.

Plaintiff was injured as a child and was represented by defendants in a lawsuit filed on her behalf. The underlying lawsuit was resolved in 1988, when the parties agreed to accept the mediation evaluation. The proceeds of the settlement were paid to plaintiff's guardian, but her guardian was never appointed to act as plaintiff's conservator and, consequently, the money was never properly accounted for under the probate court's supervision. Shortly after plaintiff turned 18 years old on November 2, 2000, she learned that the settlement proceeds no longer existed.

Plaintiff then obtained an order vacating the satisfaction of judgment in the underlying lawsuit and requiring the defendants in the underlying lawsuit to repay the amount of the settlement because they had paid the proceeds to the wrong party. The underlying defendants appealed that order. While the appeal in the underlying matter was pending, plaintiff and the current defendants, her former attorneys, entered into a "tolling agreement" whereby plaintiff agreed to forego pursuing a legal malpractice action against defendants between October 24, 2001, and 60 days after a "final disposition" in plaintiff's appeal, and defendants agreed to waive any statute of limitations defense based on the passage of time during that period. The agreement defined the date of "final disposition" as the date this Court decided the appeal, unaffected by any motion for rehearing or application for leave to appeal to our Supreme Court.

On May 20, 2003, this Court reversed the underlying order vacating the satisfaction of judgment, holding that plaintiff did not timely file her motion for postjudgment relief. *Miller v*

*Molette*, unpublished opinion per curiam of the Court of Appeals, issued May 20, 2003 (Docket No. 235575). Plaintiff's motion for rehearing was denied by this Court on July 2, 2003, and her application for leave to appeal was denied by our Supreme Court on December 30, 2003. See 469 Mich 986 (2003). On February 26, 2004, plaintiff brought this legal malpractice action against defendants. Defendants moved for summary disposition, arguing that plaintiff's action was barred by the statute of limitations and by collateral estoppel, MCR 2.116(C)(7). The trial court granted defendants' motion, agreeing that plaintiff's action was untimely under the statute of limitations, but denied defendants' request for sanctions.

Plaintiff first argues that the trial court erred in dismissing her action, pursuant to MCR 2.116(C)(7), on the ground that it was barred by the statute of limitations. After review de novo, we disagree. See *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

An action for legal malpractice must generally be brought within two years from the time the defendant discontinues serving the plaintiff in a professional or pseudoprofessional capacity as to the matter out of which the claim for malpractice arose, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim,<sup>1</sup> or within 6 months after the plaintiff discovers or should have discovered the existence of the claim,<sup>2</sup> whichever is later. If a claim accrues before the affected party reaches the age of 18 years, that individual has one year after reaching the age of majority in which to file the action, even though the period of limitations may have run.<sup>3</sup>

Plaintiff first argues that the two-year limitations period did not begin to run until after she turned 18 years old on November 2, 2000, because defendants were obligated to continue to represent her estate until she turned 18 and retained new counsel.

In *Maddox v Burlingame*, 205 Mich App 446, 450; 517 NW2d 816 (1994), this Court explained:

A lawyer discontinues serving a client when relieved of the obligation by the client or the court, *Stroud v Ward*, 169 Mich App 1, 6; 425 NW2d 490 (1988), or upon completion of a specific legal service that the lawyer was retained to perform. *Chapman v Sullivan*, 161 Mich App 558, 561-562; 411 NW2d 754 (1987). Retention of an alternative attorney effectively terminates the attorney-client relationship between the defendant and the client. *Stroud, supra* at 4. [Emphasis added.]

Here, defendants were retained to represent plaintiff in the underlying lawsuit, which was closed in 1988. The only evidence of defendants' appearance in the probate court on plaintiff's behalf was defendants' appearance in November 1988, when the probate court approved the guardian's request to spend some of the settlement proceeds for plaintiff's living expenses. There is no evidence that defendants did anything more to represent plaintiff in the probate court. Because

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<sup>1</sup> See MCL 600.5805(6); MCL 600.5838(1).

<sup>2</sup> See MCL 600.5838(2).

<sup>3</sup> See MCL 600.5851(1).

the evidence showed that defendants were retained solely for the purpose of representing plaintiff in the underlying lawsuit, which concluded in 1988, the two-year limitations period ended in 1990. There is no basis for concluding that the two-year period did not begin to run until November 2000, when plaintiff turned 18 years old.

Under MCL 600.5851(1), however, plaintiff had one year after reaching age 18, or until November 1, 2001, to file a malpractice action, even though the period of limitations had otherwise run. Further, under the parties' tolling agreement, the limitations period was effectively tolled from October 24, 2001, until 60 days after this Court decided the appeal in *Miller v Molette*, i.e., until July 19, 2003, thus giving plaintiff an additional nine days beyond then, until July 28, 2003, to file an action. The action was not filed until February 26, 2004, and, therefore, was untimely.

We also reject plaintiff's reliance on the six-month discovery rule,<sup>4</sup> to argue that she did not discover her claim for legal malpractice until our Supreme Court denied her application for leave to appeal in *Miller v Molette* on December 30, 2003. Accrual of a claim under the discovery rule begins to run when the plaintiff learns that she has a possible cause of action, not a likely cause of action. *Gebhardt v O'Rourke*, 444 Mich 535, 544; 510 NW2d 900 (1994). A plaintiff is aware of a possible cause of action once an injury and its possible cause is known. *Id.* at 545. Plaintiff was aware of a possible cause of action for malpractice, at the latest, by May 20, 2003, when this Court reversed the trial court's order requiring the defendants in the underlying action to repay plaintiff. The effect of this Court's order was to leave plaintiff without a remedy against the underlying defendants. Thus, plaintiff was aware at that time of an injury and a possible cause of action against defendants for malpractice based on their failure to have a conservator properly appointed.

Further, plaintiff's application for leave to appeal in the underlying matter did not toll the six-month discovery period as a matter of law. As our Supreme Court explained in *Gebhardt*, *supra* at 546, "[t]he statute of limitations is not tolled by an appeal of the underlying matter." Moreover, the fact that the *Gebhardt* Court relied on civil cases as support for this holding demonstrates that the holding is not limited to criminal cases. To the extent that the parties' tolling agreement could be construed as affecting the six-month discovery period, plaintiff's action was still untimely because plaintiff filed this action more than six months after the expiration of the deferral period under the agreement, that being 60 days after this Court issued its decision in *Miller v Molette* on May 20, 2003.

Plaintiff alternatively argues that this Court should employ the doctrine of judicial tolling to conclude that her cause of action for legal malpractice was timely filed. However, she offers no reason why judicial tolling should apply 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 Div of Nat'l Steel Corp v City of Ecorse*, 227 Mich App 379, 424; 576 NW2d 667 (1998).

We find no merit to plaintiff's claims involving the effect and validity of the parties' tolling agreement. First, the plain language of the agreement does not support plaintiff's contention that the limitations period was tolled until 60 days after the Supreme Court denied

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<sup>4</sup> MCL 600.5838(2).

plaintiff's application for leave to appeal in *Miller v Molette*. Rather, defendants agreed to waive any statute of limitations defense based on the passage of time between October 24, 2001, and 60 days after a "final disposition" of plaintiff's appeal. Paragraph 12 of the agreement provides:

The date of the "FINAL DISPOSITION" in THE APPEAL shall be considered to be the date of the final order, opinion, or dismissal in Michigan Court of Appeals Docket No. 235575. The date of the "FINAL DISPOSITION" shall not be changed because of a Motion for Reconsideration or Rehearing filed in the Michigan Court of Appeals, or because of the filing of an application for leave to appeal to the Michigan Supreme Court by any person or entity.

Contrary to what plaintiff argues, the agreement clearly identifies the date of this Court's opinion in *Miller v Molette* as the date on which the 60-day period would begin running.

Plaintiff also asserts that the tolling agreement is against public policy to the extent that it shortens a statutory limitations period to an unreasonable period of time. But the agreement here did not shorten a limitations period; it extended it. Thus, there is no merit to this argument.

In light of the foregoing, the trial court properly determined that plaintiff's action was time-barred; therefore, the court did not err in granting defendants' motion for summary disposition on this basis. In light of our decision, it is unnecessary to consider whether defendants were also entitled to summary disposition on the basis of collateral estoppel.

In their cross appeal, defendants argue that the trial court erred in denying their request for sanctions under MCR 2.114(D) and MCL 600.2591. A trial court's decision whether a party or an attorney has violated MCR 2.114(D) is reviewed for clear error. *Contel Systems Corp v Gores*, 183 Mich App 706, 710-711; 455 NW2d 398 (1990). A trial court's decision whether to grant sanctions under MCL 600.2591 is also reviewed under the clearly erroneous standard. *In re Attorney Fees & Costs*, 233 Mich App 694, 701; 593 NW2d 589 (1999). A decision is clearly erroneous if the Court is left with a definite and firm conviction that a mistake has been made. *Id.*

Under MCR 2.114(D), an attorney is under an affirmative duty to conduct a reasonable inquiry into both the factual and legal viability of a pleading before it is signed. *LaRose Market, Inc v Sylvan Ctr, Inc*, 209 Mich App 201, 210; 530 NW2d 505 (1995). "The reasonableness of the inquiry is determined by an objective standard and depends upon the particular facts and circumstances of the case." *Id.* Sanctions are warranted under MCL 600.2591 if the claim was frivolous at the time the lawsuit was filed. *In re Attorney Fees, supra* at 702. On the existing record, we cannot say that plaintiff's action was wholly devoid of arguable legal merit; therefore, the trial court did not clearly err in denying defendants' request for sanctions.

Affirmed.

/s/ Mark J. Cavanagh  
/s/ Karen M. Fort Hood  
/s/ Deborah A. Servitto