# STATE OF MICHIGAN

# COURT OF APPEALS

RICHARD R. ROBERTS and STACY D. ROBERTS,

Plaintiffs-Appellants,

v

LAWRENCE R. LASUSA, LASUSA LAW OFFICES, PLC, and CALCUTT ROGERS & BOYNTON, PLLC,

Defendants-Appellees,

and

JOSHUA M. REYNOLDS,

Defendant.

UNPUBLISHED
April 24, 2012

No. 300547
Leelanau Circuit Court
LC No. 10-008259-NM

Before: SAWYER, P.J., and WHITBECK and M. J. KELLY, JJ.

PER CURIAM.

In this suit for legal malpractice, plaintiffs Richard and Stacy Roberts appeal by right the trial court's orders granting summary disposition in favor of defendants Lawrence LaSusa, LaSusa Law Offices, PLC, and Calcutt Rogers & Boynton, PLLC.[1] Because we conclude that the trial court properly granted summary disposition in favor of defendants, we affirm.

Robert and Joanne Saffell sold a termite-infested home to plaintiffs without noting that there had been a previous problem with bugs in the Seller's Disclosure Statement. Plaintiffs retained Calcutt Rogers & Boynton, PLLC (the Calcutt Firm) to represent them and sued the Saffells. LaSusa initially handled their case and, on his advice, they dropped their fraud, silent fraud, and contract claims. They proceeded to trial against the Saffells with a single claim, innocent misrepresentation, which was premised on the failure to disclose the bug infestation on the seller's disclosure. Although they prevailed at trial, this Court reversed the jury's verdict in

[1] Plaintiffs did not challenge the trial court's decision to grant summary disposition in favor of defendant Joshua Reynolds.

favor of plaintiffs on the innocent misrepresentation theory. See *Roberts v Saffell*, 280 Mich App 397; 760 NW2d 715 (2008). This Court determined that the Seller's Disclosure Act precluded a claim of innocent misrepresentation based on factual inaccuracies or omissions contained in a Seller's Disclosure Statement. *Id.* at 413-414, citing in relevant part MCL 565.955(1). By the time of this Court's decision in *Roberts v Saffell*, LaSusa had left the Calcutt Firm. After the appeal, another lawyer with the Calcutt Firm, Joshua Reynolds, represented plaintiffs in opposing a motion for entry of judgment including attorney fees and costs and in a motion to set aside dismissal or amend pleadings.

Plaintiffs then sued the various defendants for legal malpractice. Specifically, plaintiffs pleaded that defendants negligently encouraged them to drop their breach of contract and fraud claims when they should have known that a claim of innocent misrepresentation was not actionable under the Seller's Disclosure Act. The trial court granted summary disposition to all defendants. It dismissed the claims against Reynolds because there was no evidence that he was involved in the case during the period of the alleged malpractice. Next, it determined that plaintiffs' claims against LaSusa and his new firm were barred under the two-year period of limitations applicable to malpractice claims. The trial court explained that LaSusa's representation ended after plaintiffs hired their appellate lawyer, which was more than two years before plaintiffs sued LaSusa for malpractice. Finally, the trial court also determined that the Calcutt Firm could not be held directly or indirectly liable for the alleged malpractice and, accordingly, granted summary disposition in its favor as well.

On appeal, plaintiffs argue that the trial court erred when it determined that the statute of limitations barred their malpractice claim. When considering a motion under MCR 2.116(C)(10), the trial court must determine whether there is a genuine issue of material fact in dispute between the parties. *Coblentz v Novi*, 475 Mich 558, 569; 719 NW2d 73 (2006). A genuine issue of material fact exists if the record, taken in the light most favorable to the nonmoving party, establishes an issue on which reasonable minds could differ. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008). When deciding a motion for summary disposition, the court may not make findings of fact or credibility determinations. *Amerisure Ins Co v Plumb*, 282 Mich App 417, 431; 766 NW2d 878 (2009). This Court reviews de novo a trial court's grant of summary disposition. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). This Court must review the record in the same manner as the trial court, giving no deference to the trial court's decision, and determine whether the movant was entitled to judgment as a matter of law. *Scalise v Boy Scouts of America*, 265 Mich App 1, 10; 692 NW2d 858 (2006).

To establish a prima facie case of legal malpractice, plaintiffs must prove: (1) the existence of an attorney-client relationship; (2) negligent actions by the attorney; (3) proximate cause; and (4) damages. *Gebhardt v O'Rourke*, 444 Mich 535, 544; 510 NW2d 900 (1994). However, a plaintiff must bring his or her malpractice claim within two years from the claim's accrual. MCL 600.5805(1), (6). A claim of legal malpractice "accrues at the time [the attorney] discontinues serving the plaintiff in a professional or pseudoprofessional capacity as to the matters out of which the claim for malpractice arose . . . ." MCL 600.5838(1). A plaintiff is also permitted to file a malpractice claim within six months of the time when they actually discover or should discover the existence of their claim. MCL 600.5838(2). For the purposes of an accrual date, it is well established that a plaintiff's retention of a different lawyer in the matter

effectively terminates the lawyer-client relationship and starts the clock on the limitations period. *Estate of Mitchell v Dougherty*, 249 Mich App 668, 683; 644 NW2d 391 (2002); *Maddox v Burlingame*, 205 Mich App 446, 450; 517 NW2d 816 (1994). "Ministerial" acts performed in furtherance of ethical obligations to former clients cannot be used to revive or maintain the lawyer-client relationship. *Wright v Rinaldo*, 279 Mich App 526, 537-538; 761 NW2d 114 (2008). The key difference between ministerial and substantive legal services is "whether the new activity occurs pursuant to a current, as opposed to a former, attorney-client relationship." *Bauer v Ferriby & Houston, PC*, 235 Mich App 536, 539; 599 NW2d 493 (1999). To be ministerial acts, any contacts with the client should be brief and must not be billed. *Maddox*, 205 Mich App at 451 (stating that billing for new services constitutes an acknowledgement of continued representation in a matter).

The undisputed facts show that LaSusa ceased representing plaintiffs in January 2007, which is when plaintiffs hired Mark Granzotto to be their appellate lawyer. Although LaSusa had occasional contacts with Granzotto to assist him with understanding the events of the trial as a way to reduce plaintiffs' fees to Granzotto, these contacts were brief and ministerial in nature. See *Bauer*, 235 Mich App at 539 ("To hold that . . . follow-up activities attendant to otherwise completed matters of representation necessarily extends the period of service to the client would give providers of legal services a powerful disincentive to cooperate with a former client who needs such attention."). LaSusa did not perform any substantive legal work for plaintiffs; he merely provided information to Granzotto and to plaintiffs when requested. Further, LaSusa did not bill for these services; his actions were in conformity with his ethical obligations to his former clients. Thus, given that the record evidence showed that LaSusa did not perform new substantive services for plaintiffs after they acquired alternative counsel for their appeal in January 2007, and plaintiffs sued more than six months after this Court's decision, which was the point when they knew or should have known that they had a malpractice claim, see MCL 600.5838(2), the trial court did not err when it determined that plaintiffs' March 2010 suit against LaSusa and his firm was untimely.

Regarding plaintiffs' claim against the Calcutt Firm, the evidence from its billing records shows that there was a substantial gap in time between the firm's involvement in the trial (February 2007) and its involvement in the motions following this Court's decision (October 2009). Nevertheless, we conclude that plaintiffs' claim against the Calcutt Firm was timely. Because the Calcutt Firm's representation at trial and in the later post-appeal motions both arise from plaintiffs' claims against the Saffells, the new representation revived the old representation. A firm's billed services pertaining to past representation is sufficient to constitute a continuing legal relationship between the parties. *Maddox*, 205 Mich App at 451; see also *Levy v Martin*, 463 Mich 478, 486; 620 NW2d 292 (2001) (stating that "[t]he touchstone of the analysis" is "*the continuing professional relationship* between a professional and the person receiving the professional's services with regard to a particular subject matter") (quotation marks and citation omitted). Accordingly, the Calcutt Firm's relationship with plaintiffs did not terminate until November of 2009. Plaintiff's complaint was, therefore, timely as to the Calcutt Firm.

A master may be held vicariously liable for the actions of its servant that are performed within the scope of the servant's employment. *Lee v Detroit Med Ctr*, 285 Mich App 51, 65; 775 NW2d 326 (2009).[2] However, in order to prevail against a master for malpractice, the servant must first be shown to have acted negligently towards the plaintiff. *Al-Shimmari v Detroit Med Ctr*, 477 Mich 280, 294-296; 731 NW2d 29 (2007); *Ravenis v Detroit General Hosp*, 63 Mich App 79, 83-84; 234 NW2d 411 (1975). Although a plaintiff is not required to obtain a judgment against the servant, the plaintiff must still demonstrate that the servant acted negligently; a dismissal on the merits as to the servant precludes a master from being held vicariously liable. *Al-Shimmari*, 477 Mich at 294-297. Dismissal of a claim based on expiration of the limitations period is considered an adjudication on the merits. MCR 2.504(B)(3); *Al-Shimmari*, 477 Mich at 296-297.

According to plaintiffs' allegations, the Calcutt Firm acted negligently through two agents—LaSusa and Reynolds. However, LaSusa's case was properly dismissed as barred by the statute of limitations, and the court dismissed the claim against Reynolds with prejudice. Because these dispositions operated as adjudications on the merits, plaintiffs cannot establish vicarious liability. Therefore, the trial court properly dismissed the claim against the Calcutt Firm.

As a final matter, plaintiffs make a cursory request for leave to amend their complaint under MCR 2.118 to include a claim of direct malpractice against the Calcutt Firm for negligent supervision of its employees and the release of the fraud and breach of contract claims. Plaintiffs have made no factual allegations to suggest that the Calcutt Firm negligently supervised LaSusa. Further, plaintiffs offer no legal support for such a claim. Plaintiffs may not merely announce their position and leave it to this Court to justify the basis for their claims. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998). Accordingly, we conclude that plaintiffs have abandoned this issue on appeal. *Id.*

There were no errors warranting relief.

Affirmed. As the prevailing parties, defendants may tax their costs. MCR 7.219(A).

/s/ David H. Sawyer
/s/ William C. Whitbeck
/s/ Michael J. Kelly

[2] Both sides cited MCL 450.226 for the proposition that a law firm may be "liable up to the full value of its property for any negligent or wrongful acts or misconduct committed by any of its officers, shareholders, agents or employees while they are engaged on behalf of the [firm] in the rendering of professional services." MCL 450.226. However, this statute is part of the Professional Service Corporation Act and only applies to corporations organized under that act. See MCL 450.221; MCL 450.222. Since the Calcutt Firm is a professional limited liability company, it not fall under the scope of that act. Nevertheless, common law principles of vicarious liability still apply.