STATE OF MICHIGAN

COURT OF APPEALS

TRUCKNTOW.COM,

Plaintiff-Appellant,

v

UHY ADVISORS MI, INC., and UHY, LLP,

Defendants-Appellees.

UNPUBLISHED
August 26, 2021

No. 354999
Oakland Circuit Court
LC No. 2020-181583-CB

Before: RIORDAN, P.J., and MARKEY and SWARTZLE, JJ.

PER CURIAM.

Plaintiff TrucknTow.com appeals by right the trial court's opinion and order granting summary disposition in favor of defendants UHY Advisors MI, Inc., and UHY, LLP (collectively UHY). Plaintiff sued UHY for accounting malpractice, and the trial court agreed with UHY's argument that the action was time-barred. The issue posed in this case concerns identifying the date that the claim for accounting malpractice accrued. We reverse and remand for further proceedings.

I. FACTUAL BACKGROUND

In 2014, the Michigan Department of Treasury (the Department) initiated an audit with respect to plaintiff's payment of taxes. Plaintiff retained UHY on January 15, 2015, to respond to the audit. On November 19, 2015, the Department sent plaintiff a notice of preliminary audit, indicating that plaintiff owed $452,150 in unpaid sales taxes. UHY worked on the issue of plaintiff's sales tax liability, eventually obtaining a reduction in the sales tax balance to $273,537. The Department's final determination, issued on June 6, 2016, stated that plaintiff's total tax liability was $273,537. On October 30, 2017, UHY filed an Offer in Compromise (OIC) with the Department, seeking further reduction in the sales tax debt. In the cover letter to the Department, on UHY letterhead, Susan Wagner of UHY stated:

> *On behalf of our client*, Truck N Tow.Com, enclosed you will find our request for an [OIC] . . . . This offer is a result of a sales tax audit, [with] which we disagree on the final assessment amount. The discrepancy is further explained within this document.

> You will also find enclosed the payment in full for the amount we believe is correct. We understand that interest is still owed on this amount and that the amount may be adjusted, *based on further conversations as we resolve this issue.* We are sure you will have questions and the need for additional documentation *so please do not hesitate to contact me*. I can be reached at . . . .
>
> We appreciate your assistance with this matter and *look forward to working with you on reaching a final resolution.* [Emphasis added.]

According to an invoice from UHY to plaintiff dated June 12, 2020, covering professional services rendered during a period ending on November 30, 2017, billable services were last rendered on November 27, 2017. In a letter from plaintiff's CEO Scott Silberman to UHY dated May 30, 2018, Silberman blasted UHY, expressing extreme displeasure with UHY's services and listing numerous alleged shortcomings. The letter noted that plaintiff had contacted Wagner on May 21, 2018, to discuss plaintiff's complaints. Silberman demanded a written response by UHY to plaintiff's grievances by no later than June 8, 2018. Silberman indicated that "[f]ailure to timely provide a viable plan . . . will leave us no alternative but to engage another firm to resolve this matter for us."

By letter dated June 8, 2018, the Department rejected the OIC because there was "[i]nsufficient evidence . . . to support the offer" and because there was no supporting documentation regarding out-of-state sales claims. The letter was addressed to plaintiff and copied to UHY. Plaintiff received notice of the Department's rejection of the OIC on Thursday, June 14, 2018. With respect to the rejection notice, Christine Pollitt, plaintiff's controller, wrote to UHY's Wagner and others by e-mail on June 14, 2018, stating, "Please review and advise on next steps." That same day Wagner responded to Pollitt by e-mail, indicating that she would "work on a response and will probably need . . . help with documenting the out of state sales." Wagner also asked Pollitt if she would be available for a call the following Tuesday. Jerry Grady, another UHY employee, sent an e-mail to Wagner on June 14, 2018, which was copied to CEO Silberman, as were all the e-mails that we are examining, and Grady's e-mail provided:

> I have a thought as I have been working with a data professional that potentially could pull data from their system and we work backwards and prepare a report of revenue per customer and tie it to the business name and address. I believe this is what was provided to the state but let me know.

Silberman, still on June 14, 2018, responded by e-mail to Grady:

> Susan [Wagner] should have known [the Department] would want evidence to support the out of state sales. I think it would be reasonable to provide these reports (if I can get them) . . . . Your involvement has not proven useful. Chris [Pollitt] is going to call the auditor, play dumb, and try and see if this is what they will accept . . . . If we need any more assistance we will ask for it. Please put everything on your side on hold for the time being.

On June 15, 2018, Grady responded to Silberman by e-mail, observing that the Department is "looking for much more than just a spreadsheet" and is "not agreeing with data prepared reports

as we have provided everything to them based on what was able to be pulled and gathered." Grady also discussed a 30-day window within which to appeal the rejected OIC. Silberman replied to Grady by e-mail on June 18, 2018, stating, "You guys might want to check your facts. We were told there is NO APPEAL process for rejected OICs." After further back and forth regarding the possibility of an appeal, Silberman e-mailed Grady on June 18, 2018, indicating, "I ask that you let [another professional] move into the driver's seat. We need to let someone else try and resolve this once and for all." Plaintiff viewed June 18, 2018, as the date that it discharged UHY.

Plaintiff filed the instant civil action against UHY on June 5, 2020, alleging that UHY had committed "professional malpractice." Plaintiff alleged that its malpractice claim accrued no earlier than June 8, 2018, and that June 18, 2018—the date on which it allegedly discharged UHY—is when UHY "discontinued serving [plaintiff] in a professional capacity as to the matters out of which the claim for malpractice arises." UHY moved for summary disposition under MCR 2.116(C)(7), arguing that plaintiff's complaint was barred by the two-year statute of limitations that applies to malpractice actions under MCL 600.5805(8). UHY contended that it discontinued serving plaintiff in a professional capacity on November 27, 2017, which was the last date on which billed services were provided to plaintiff by UHY. The trial court granted UHY's motion for summary disposition and denied its motion for sanctions in an opinion and order entered on September 30, 2020. This appeal ensued.

II. STANDARD OF REVIEW AND SUMMARY DISPOSITION UNDER MCR 2.116(C)(7)

MCR 2.116(C)(7) provides for summary disposition of a claim when it is barred by the "statute of limitations." This Court reviews de novo a trial court's decision on a motion for summary disposition, a determination that an action is time-barred, and questions of statutory construction. *Caron v Cranbrook Ed Commnity*, 298 Mich App 629, 635; 828 NW2d 99 (2012).

In *RDM Holdings, Ltd v Continental Plastics Co*, 281 Mich App 678, 687; 762 NW2d 529 (2008), this Court recited the principles pertaining to a motion for summary disposition brought pursuant to MCR 2.116(C)(7):

> Under MCR 2.116(C)(7) . . ., this Court must consider not only the pleadings, but also any affidavits, depositions, admissions, or other documentary evidence filed or submitted by the parties. The contents of the complaint must be accepted as true unless contradicted by the documentary evidence. This Court must consider the documentary evidence in a light most favorable to the nonmoving party. If there is no factual dispute, whether a plaintiff's claim is barred under a principle set forth in MCR 2.116(C)(7) is a question of law for the court to decide. If a factual dispute exists, however, summary disposition is not appropriate. [Citations omitted.]

III. LAW AND ANALYSIS

Plaintiff argues that the trial court erred by determining that plaintiff's complaint was barred by the statute of limitations. We conclude that the documentary evidence created a factual dispute regarding the date that UHY discontinued serving plaintiff.

MCL 600.5805(8) provides that the "the period of limitations is 2 years for an action charging malpractice." MCL 600.5838, which addresses malpractice claims, states, in pertinent part, as follows:

> (1) Except as otherwise provided in section 5838a or 5838b, 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*.

MCL 600.5838 governs the issue of accrual in cases alleging accounting malpractice. *Ohio Farmers Ins Co v Shamie (On Remand)*, 243 Mich App 232, 238; 622 NW2d 85 (2000). A claim accrues when a defendant discontinues professional accounting services with respect to matters out of which the claim for malpractice arises. *Id.* at 240. "[T]he date when plaintiff suffered damages is irrelevant to the accrual of the claim." *Id.* In *Gebhardt v O'Rourke*, 444 Mich 535, 543-544; 510 NW2d 900 (1994), our Supreme Court construed MCL 600.5838 in the context of an attorney malpractice action, stating:

> The Legislature intended that the last day of service be the sole basis for determination of accrual. Lack of ripeness, i.e., that not all the elements of the tort have been discovered, is irrelevant to the two-year limitation period. We will follow the statutory scheme as clearly written and intended by the Legislature. A client has up to two years from the time his attorney stops representing him regarding the matter in question to bring a malpractice suit.

In this case, UHY submitted an invoice dated June 12, 2020, which was five days after the lawsuit was filed, showing professional services rendered to plaintiff through November 30, 2017. The final entries were for various services performed on November 27, 2017. On the basis of the invoice, UHY asserts that on November 27, 2017, it discontinued serving plaintiff in a professional capacity with respect to matters giving rise to the malpractice claims.

UHY's cover letter from Wagner, on behalf of plaintiff, to the Department, which accompanied the October 30, 2017 OIC, indicated or suggested that UHY would continue servicing plaintiff in a professional capacity during the period in which the Department was processing the OIC. In the letter, Wagner offered "further conversations" with the Department to "resolve" the tax issue. She also informed the Department that it should not hesitate to contact her about any questions that might arise concerning the OIC or the Department's need for any additional documentation. Wagner closed the letter by indicating that she "look[ed] forward to working with [the Department] on reaching a final resolution."

It was not until June 8, 2018, that the Department formally rejected the OIC by letter to plaintiff, with a copy going to UHY. Silberman's May 30, 2018 letter to UHY reflected that plaintiff still looked to UHY to provide guidance, explanations, and answers, and Silberman noted contacting Wagner on May 21, 2018, to discuss issues. While the letter was very critical of UHY, Silberman only threatened "to engage another firm" if a viable plan to go forward was not offered, which revealed that plaintiff still believed that UHY was continuing to provide professional

services for plaintiff. The flurry of emails from June 14th through June 18th of 2018 could reasonably be interpreted as showing that UHY was continuing to render professional services for plaintiff by offering a plan or ideas on how to keep the battle against the Department afloat. Wagner even asked Pollitt if she would be available for a phone conference on Tuesday, June 19, 2018, to discuss matters.

The act of sending a bill for services rendered by a professional constitutes an acknowledgment by the professional that he or she performed professional services for the client on the date indicated in the bill. See *Bauer v Ferriby & Houston, PC*, 235 Mich App 536, 540; 599 NW2d 493 (1999); *Maddox v Burlingame*, 205 Mich App 446, 451; 517 NW2d 816 (1994). This does not necessarily mean, however, that the failure to bill for professional services actually provided to a client establishes that those services are not to be considered for purposes of accrual under MCL 600.5838. To hold otherwise would be a patently absurd interpretation of MCL 600.5838. Although UHY did not bill plaintiff for services performed after November 27, 2017, there was evidence that could be construed as reflecting that UHY continued serving plaintiff in a professional capacity thereafter and did not discontinue rendering services until sometime after June 5, 2018.

In *Bauer*, 235 Mich App at 539, this Court observed:

> A lawyer has an ethical duty to serve the client zealously. Some of a lawyer's duties to a client survive the termination of the attorney-client relationship, most notably the general obligations to keep client confidences and to refrain from using information obtained in the course of representation against the former client's interests. Sound public policy would likewise encourage a conscientious lawyer to stand ever prepared to advise a former client of changes in the law bearing on the matter of representation, to make a former client's file available if the former client had need of it, and, indeed, to investigate and attempt to remedy any mistake in the earlier representation that came to the lawyer's attention. To hold that such 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. We conclude that the proper inquiry is whether the new activity occurs pursuant to a current, as opposed to a former, attorney-client relationship. [Citations omitted.]

Here, reasonable minds could differ regarding whether UHY's activities in June 2018 can be characterized as attending to otherwise completed matters. The trier of fact must determine whether those activities were a continuation of professional services provided to plaintiff relative to settling on a strategy in an ongoing fight with the Department over taxation issues.

We hold that a question of fact exists regarding whether the action for accounting malpractice accrued on November 27, 2017, making the complaint filed on June 5, 2020, untimely under the two-year statute of limitations, or whether it accrued after June 5, 2018, making the filing of the complaint timely.

We reverse and remand for proceedings consistent with this opinion. We do not retain jurisdiction. We decline to award taxable costs under MCR 7.219.

/s/ Jane E. Markey
/s/ Brock A. Swartzle

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RIORDAN, P.J. (*dissenting*).

I respectfully dissent.

MCL 600.5805(8) provides that the "the period of limitations is 2 years for an action charging malpractice." MCL 600.5838(1), which deals with malpractice claims, provides as follows:

> [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.

Simply put, malpractice claims have a two-year statute of limitations and accrue at the time the professional "discontinues serving the plaintiff" on the matter that led to the malpractice claim, regardless of when the plaintiff discovers the claim. See *Ohio Farmers Ins Co v Shamie*, 243 Mich App 232, 240; 622 NW2d 85 (2000). "The Legislature intended that the last day of service be the sole basis for determination of accrual. Lack of ripeness, i.e., that not all the elements of the tort have been discovered, is irrelevant to the two-year limitation period." *Gebhardt v O'Rourke*, 444 Mich 535, 543-544; 510 NW2d 900 (1994).

The question here is whether plaintiff's claim is barred by the statute of limitations. The answer depends on when defendants "discontinued serving" plaintiff.[1] Because the trial court did not err in determining that defendants discontinued serving plaintiff on November 27, 2017, and plaintiff's complaint was filed more than two years after that date, I would affirm the trial court and hold that plaintiff's claim is barred by the statute of limitations.

The matter out of which the malpractice claim arose, as framed by the parties, was defendants' work assisting plaintiff in responding to the Department of Treasury's audit. Defendants discontinued assisting plaintiff on this matter on November 27, 2017, as evidenced by the lack of any other professional services rendered after that date. The interactions between the parties after November 27, 2017, were not professional services provided by defendants to plaintiff for purposes of assisting plaintiff with the audit. As the billing invoices show, no services were provided after that date. Had defendants performed additional professional services for plaintiff on this matter, they presumably would have charged a fee for doing so, and that fee would have been reflected in a billing invoice.

This Court has explained that a lack of additional billing is relevant to the determination of when a professional firm discontinues serving a plaintiff. For instance, in *Bauer v Ferriby & Houston, PC*, 235 Mich App 536; 599 NW2d 493 (1999), we reasoned that because the defendant firm had not billed the plaintiff client for any of its follow-up activities that occurred after the professional relationship was formally terminated, those activities were "not . . . legal service[s] in furtherance of a continuing or renewed attorney-client relationship." *Id*. at 540. Likewise, in the matter before us, the lack of billing for professional services after November 27, 2017, indicates that the June 2018 communications in this case were not further services. In fact, the activities at issue in *Bauer*, which involved multiple communications and legal research, were more extensive than the few e-mail communications in this case. See *id*. at 537. In contrast, in *Maddox v Burlingame*, 205 Mich App 446, 450-451; 517 NW2d 816 (1994), this Court reasoned that the defendant attorney's submission of a billing invoice to the plaintiff clients showed that the attorney had not yet discontinued serving the plaintiffs. This is starkly different than the matter before us now, in which defendants billed plaintiff for no services after November 27, 2017. Thus, both *Bauer* and *Maddox* are instructive. Defendants were no longer providing professional services for plaintiff after that date.

As the trial court recognized, the May 30, 2018 letter by Scott Silberman of plaintiff's firm implicitly admitted that defendants discontinued their provision of professional services. In that communication, Silberman stated that defendants had failed to "follow up on the 2nd OIC [Offer in Compromise] over the last 7 months." This was an implicit acknowledgment that there had

[1] I question whether the majority correctly assumes that defendants continued "serving plaintiff in a professional capacity *with respect to matters giving rise to the malpractice claims*." [Emphasis added.] The particular malpractice claim here concerns the alleged failure to timely file a tax appeal in 2016. The professional relationship thereafter concerned an Offer in Compromise (OIC), which is distinct from a tax appeal. However, because defendants' brief on appeal seemingly concedes the issue concerning the 2016 tax appeal, therefore I will not discuss it further.

been no provision of professional services by defendants—indeed, no contact between the parties—since the filing of the OIC, and after November 27, 2017.

Plaintiff argues—and the majority agrees—that the e-mail communications between June 14, 2018 and June 18, 2018, prove that defendants had not discontinued services. However, I find the following response from Silberman illuminating: "[We are] going to call the auditor, play dumb, and try and see if this is what they will accept . . . . If we need any more assistance we will ask for it. Please put everything on your side on hold for the time being." Silberman later wrote, "I ask that you let [another professional] move into the driver's seat. We need to let someone else try and resolve this once and for all." These messages clearly show that Silberman had devised his own strategy independent of defendants and was not expecting defendants to provide any further professional services to plaintiff.

Finally, plaintiff suggests that the June 2018 e-mail communications extended the statute of limitations under the "last treatment rule." This argument misses the mark because the "last treatment rule" is merely a common-law rule that was "codified and expanded by MCL 600.5838(1)." *Levy v Martin*, 463 Mich 478, 487; 620 NW2d 292 (2001). Moreover, as noted previously, *Bauer* specifically addressed the issue of whether follow-up communications or activities, occurring after the completion of professional services, extend the statute of limitations. The follow-up activities in that case included multiple communications with the plaintiff and legal research to assist the plaintiff's efforts. *Id*. at 537-538. This Court concluded that those follow-up activities did not extend the statute of limitations. *Id*. at 539. "To hold that such 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." *Id*. The same is true in this case. The June 2018 e-mail communications, which are far less involved than the legal research that was performed in *Bauer*, did not extend the statute of limitations.

For these reasons, I would affirm the trial court's grant of summary disposition in favor of defendants.[2]

/s/ Michael J. Riordan

[2] I also agree with the trial court that sanctions against plaintiff were not warranted under MCL 600.2591 or MCR 1.109(E)(6).