STATE OF MICHIGAN

COURT OF APPEALS

DENNIS TUBBERGEN,

Plaintiff-Appellant,

v

DYKEMA GOSSETT, PLLC, JAMES BRADY, and MARK MAGYAR,

Defendants-Appellees.

UNPUBLISHED
December 16, 2021

No. 355795
Kent Circuit Court
LC No. 20-005897-NM

Before: GADOLA, P.J., and SWARTZLE and CAMERON, JJ.

PER CURIAM.

In this legal malpractice action, plaintiff Dennis Tubbergen appeals the trial court's order granting summary disposition in favor of defendants Dykema Gossett, PLLC, James Brady, and Mark Magyar under MCR 2.116(C)(7) (claim barred by statute of limitations). We reverse and remand for further proceedings consistent with this opinion.

I. BACKGROUND

Plaintiff was involved with a company that provided marketing and consulting services. After plaintiff learned that he was being investigated in relation to a "nationwide investment fraud scheme," he sought legal counsel from defendants. In April 2013, defendants sent plaintiff an engagement letter, which outlined the terms of the retainer agreement. Plaintiff and Brady signed the letter, and defendants began reviewing certain materials and providing information to the government in response to a subpoena that the government had issued.

Although defendants believed that the production process was complete by early August 2013, the United States Attorney's Office informed defendants that it had not received a full and complete response to its original subpoena. A new subpoena was issued, and defendants prepared responses. In August 2016, the United States Attorney's Office indicted plaintiff for multiple counts of wire fraud. Plaintiff paid defendants additional money, and defendants began performing work on plaintiff's case. In November 2016, plaintiff informed Brady that he no longer wanted defendants to represent him.

In October 2018, plaintiff filed suit against defendants, alleging legal malpractice in relation to defendant's pre-indictment representation. Specifically, plaintiff alleged that he would not have been indicted but for Brady and Magyar's malpractice and that Dykema was vicariously liable for their malpractice. In November 2019, the parties stipulated to dismissing the action without prejudice and to tolling the statute of limitations.

After plaintiff's criminal charges were dismissed, he again filed suit against defendants in August 2020. In lieu of filing an answer to the complaint, defendants moved for summary disposition under MCR 2.116(C)(7). Defendants argued that plaintiff's claims were time-barred because the April 2013 engagement letter limited defendants' initial representation of plaintiff to the government's "[i]nvestigation," i.e., the pre-indictment proceedings. Plaintiff opposed the motion, arguing that defendants agreed to represent him throughout the entirety of the criminal proceedings, that the government's investigation did not end solely because he was indicted, and that defendants' representation did not end until plaintiff terminated the relationship in November 2016. In the alternative, plaintiff argued that questions of fact existed because the parties' agreement was ambiguous.

After holding oral argument, the trial court concluded that the plain language of the April 2013 retention letter established that the parties agreed that defendants' representation would end when the investigation ended, which was when the Federal Bureau of Investigation brought the matter to the prosecutor. The trial court concluded that the agreement was unambiguous and granted summary disposition in favor of defendants. This appeal followed.

II. STANDARDS OF REVIEW

Summary disposition under MCR 2.116(C)(7) may be granted if "dismissal of the action . . . is appropriate because of statute of limitations[.]" "This Court reviews de novo a circuit court's decision on a motion for summary disposition brought under MCR 2.116(C)(7)." *Altobelli v Hartmann*, 499 Mich 284, 294-295; 884 NW2d 537 (2016).

> When reviewing a motion under MCR 2.116(C)(7), this Court must accept all well-pleaded factual allegations as true and construe them in favor of the plaintiff, unless other evidence contradicts them. If any affidavits, depositions, admissions, or other documentary evidence are submitted, the court must consider them to determine whether there is a genuine issue of material fact. If no facts are in dispute, and if reasonable minds could not differ regarding the legal effect of those facts, the question whether the claim is barred is an issue of law for the court. However, if a question of fact exists to the extent that factual development could provide a basis for recovery, dismissal is inappropriate. [*Dextrom v Wexford Co*, 287 Mich App 406, 428-429; 789 NW2d 211 (2010) (citations omitted).]

The interpretation of contractual language is reviewed de novo. *VHS Huron Valley Sinai Hosp, Inc v Sentinel Ins Co (On Remand)*, 322 Mich App 707, 715; 916 NW2d 218 (2018).

III. ANALYSIS

Plaintiff argues that the trial court erred by granting summary disposition in favor of defendants. We agree.

A plaintiff must bring a legal malpractice claim within two years of when the malpractice claim first "accrued or arose (i.e., the date that services were discontinued), or within six months of the date that the plaintiff discovers or should have discovered the existence of the claim, whichever date occurs later." *Wright v Rinaldo*, 279 Mich App 526, 529; 761 NW2d 114 (2008) (quotation marks and citations omitted). MCL 600.5838(1) provides:

> Except as otherwise provided in [MCL 600.5838a or MCL 600.5838b], 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.

"Special rules have been developed in an effort to determine exactly when an attorney 'discontinues serving the plaintiff in a professional . . . capacity' for purposes of the accrual statute." *Kloian v Schwartz*, 272 Mich App 232, 237; 725 NW2d 671 (2006). For example, representation ends when the client or the court relieves the attorney of the obligation to serve the client. *Id*. A legal malpractice claim also accrues when the "attorney sends notice of withdrawal as his or her final act of professional service[.]" *Id*. at 238. However, it is not necessary that an attorney receive or send a formal notice terminating the professional relationship. See *id*. Instead, accrual occurs on the last day that the attorney renders professional services to the client. *Gebhardt v O'Rourke*, 444 Mich 535, 543; 510 NW2d 900 (1994). In other words, " '[a] lawyer discontinues serving a client . . . upon completion of a specific legal service that the lawyer was retained to perform.' " *Bauer v Ferriby & Houston, PC*, 235 Mich App 536, 538; 599 NW2d 493 (1999) (citation omitted).

Plaintiff argues that the "last treatment rule" outlined in *Levy v Martin*, 463 Mich 478; 620 NW2d 292 (2001), controls in this case. In *Levy*, our Supreme Court addressed the application of the last treatment rule to accounting malpractice claims. The defendants in *Levy* prepared annual tax returns for the plaintiffs from 1974 to 1996. *Id*. at 480-481. In August 1997, the plaintiffs sued the defendants for the negligent preparation of the 1991 and 1992 tax returns. *Id*. at 481. The Supreme Court concluded that the plaintiffs' claims were not time-barred. *Id*. at 480. It reasoned that the continued and yearly preparation of tax returns constituted the matters out of which the claim for malpractice arose and stated that "it is clear here that [the] plaintiffs, rather than receiving professional advice for a specific problem, were receiving generalized tax preparation services from [the] defendants." *Id*. at 489. The Court noted, however, that the result may have been different if the defendants had presented evidence that the annual tax preparations constituted "discrete transactions":

> We note that the result may have been different if defendants had come forward with documentary evidence that each annual income tax preparation was a discrete transaction that was in no way interrelated with other transactions. Accordingly, this opinion does not mean, for example, that if an accountant prepared income tax returns for a party annually over a period of decades, the statute of limitations for alleged negligence in preparing the first of these tax returns would not run until the overall professional relationship ended. [*Id*. at 489 n 19.]

We conclude that whether the last treatment rule dictates the outcome in this case depends on interpretation of the April 2013 engagement letter. "A fee or retainer agreement is a contract and is subject to the law of contracts." *Estate of Kalisek by Kalisek v Durfee*, 322 Mich App 142, 149; 910 NW2d 717 (2017).

> A court's primary obligation when interpreting a contract is to determine the intent of the parties. The parties' intent is discerned from the contractual language as a whole according to its plain and ordinary meaning. When a contract is clear and unambiguous, the provisions reflect the parties' intent as a matter of law and courts are to construe and enforce the language as written. A contract is not open to judicial construction unless an ambiguity exists. A contract is ambiguous only when two provisions irreconcilably conflict with each other or when a term is equally susceptible to more than a single meaning. Whether a contract is ambiguous is a question of law, while determining the meaning of ambiguous contract language becomes a question of fact. [*Bodnar v St John Providence, Inc*, 327 Mich App 203, 220; 933 NW2d 363 (2019) (quotation marks, citations, and alteration omitted).]

"If the contract, although inartfully worded or clumsily arranged, fairly admits of but one interpretation, it is not ambiguous." *Holmes v Holmes*, 281 Mich App 575, 594; 760 NW2d 300 (2008) (quotation marks and citation omitted).

The April 2013 signed engagement letter reflects that the parties agreed that defendants would represent plaintiff concerning the "above matter." The letter then continues that the "representation is to be only with respect to the matter described above." Although the term "matter" is not defined or described anywhere in the body of the letter, Brady appears to be referencing the "[i]nvestigation," which is only referenced in the letter's subject line. The letter also refers to potential "continuing representation" upon "indictment." Neither "[i]nvestigation" nor "indictment" are defined in the letter.

"[T]he failure to define a contractual term does not render a contract ambiguous." *Wells Fargo Bank, NA v Cherryland Mall Ltd Partnership*, 295 Mich App 99, 115; 812 NW2d 799 (2011). "To determine the ordinary meaning of a term, [this Court] may refer to a dictionary." *Cole v Auto-Owners Ins Co*, 272 Mich App 50, 53; 723 NW2d 922 (2006). "Terms in a particular trade are given their natural and ordinary meaning in that trade." *Wells Fargo Bank, NA*, 295 Mich App at 115 (quotation marks and citation omitted). Additionally,

> [p]arol evidence is always receivable to define and explain the meaning of words or phrases in a written instrument which are technical and not commonly known, or which have two meanings—the one common and universal and the other technical. Similarly, where a new and unusual word or phrase is used in a written instrument, or where a word or phrase is used in a peculiar sense as applicable to a particular trade, business, or calling or to any particular class of people, it is proper to receive extrinsic evidence to explain or illustrate the meaning of that word or phrase. Such evidence neither varies nor adds to the written memorandum, but merely translates it from the language of trade into the ordinary language of the

people generally. [*Id*. (quotation marks and citation omitted; alteration in original).]

Given the facts at issue in this case, we conclude that "[i]nvestigation" and "indictment" are technical terms. Accordingly, we will consider dictionary definitions and extrinsic evidence when defining those terms. "Investigation" is defined as "[t]he activity of trying to find out the truth about something, such as a crime[.]" *Black's Law Dictionary* (11th ed). "Indictment" is defined as "[t]he formal written accusation of a crime, made by a grand jury and presented to a court for prosecution against the accused person." *Black's Law Dictionary* (11th ed).

Although the terms are different, they are not fundamentally inconsistent. As noted by plaintiff, "the word 'investigation' in the context of a government criminal matter is not limited, in either a technical or ordinary sense, to only the period before charges are brought." Indeed, investigations do not necessarily end once a defendant is criminally charged. This is because the parties sometimes continue to collect evidence in an effort to "find out the truth about" a defendant's criminal involvement. By way of example, the charges in this case were dismissed post-indictment after the government engaged in further investigation. Further support for plaintiff's argument was provided by plaintiff's proposed legal expert David Kramer, who averred:

> The phrase "investigation" as used in the engagement letter does not in any way suggest that a representation on a criminal matter terminates on indictment. An indictment does not terminate a criminal investigation and government investigations do not end when a client is charged or indicted.

On the other hand, as noted by the trial court, use of the word "[i]nvestigation" could also support defendant's reading of the contract that plaintiff retained defendants for pre-indictment proceedings only. As noted above, although the letter references "indictment," it appears that defendants were referencing the term "[i]nvestigation" when attempting to define the scope of "the matter." The use of the two terms could demonstrate a distinction between the pre- and post-indictment proceedings. It is also noteworthy that the subject of the letter is "[i]nvestigation," as opposed to a general term such as "criminal matter." Thus, the term "[i]nvestigation" is subject to more than one interpretation, thereby rendering the contract ambiguous. See *Bodnar, Inc*, 327 Mich App at 220. Because the parties' intent is not clear from the plain language of the April 2013 agreement, there are questions of fact for the trier of fact. See *Farmer's Ins Exch v Kurzmann*, 257 Mich App 412, 418; 668 NW2d 199 (2003) ("Ambiguities in a contract generally raise questions of fact for the jury[.]"). Consequently, questions of fact also exist as to when the claims accrued, and the trial court erred by granting summary disposition in favor of defendants.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael F. Gadola
/s/ Brock A. Swartzle
/s/ Thomas C. Cameron