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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

HADLEY HOWE, Plaintiff and Appellant, v. FRED G. GLANTZ, Defendant and Respondent.	B239364 (Los Angeles County Super. Ct. No. BC430567)

APPEAL from a judgment of the Superior Court of Los Angeles County, Rex Heeseman, Judge. Affirmed.

Hadley Howe, in propria persona, for Plaintiff and Appellant.

Gaglione, Dolan & Kaplan and Jack M. LaPedis for Defendant and Respondent.

INTRODUCTION

In this action for legal malpractice, plaintiff Hadley Howe alleged that defendant Attorney Fred G. Glantz failed to initiate civil litigation on Howe's behalf arising out of personal injuries he suffered in two separate incidents while riding a public bus in Santa Barbara. Glantz moved for summary judgment on the basis that Howe never retained Glantz to represent him as to either incident, and in fact Howe did not even speak to Glantz until long after the claims filing deadline had passed as to both incidents. Glantz contends that the undisputed facts establish that Glantz's authorized representatives did not offer Glantz's services as an attorney or lead Howe to reasonably believe he had retained Glantz. Howe argues on appeal that triable issues of fact exist as to Glantz's liability for the acts of his agents and that an attorney-client relationship was indeed established. Because we find no triable issues of fact that would support the existence of any duty on Glantz's part, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

I. The Motion for Summary Judgment

In support of his motion for summary judgment, Glantz asserted the following as undisputed material facts. Prior to 2007, Glantz had represented Howe in various legal matters but their attorney-client relationship had terminated upon the completion of the last matter in 1997. On April 19, 2007, Howe was involved in an accident while riding a Santa Barbara Metropolitan Transit District (MTD) bus. Within 30 days of the April 2007 accident, Howe went to the MTD office and received a claim form and correspondence from MTD. Howe did not complete the claim form and instead put it away in a cupboard in his home.

Howe first spoke with someone at Glantz's office shortly after September 17, 2007, and told her he had been in an accident and that he needed to speak with Glantz. He was told to call back later because Glantz was busy. Howe first discussed the actual

facts of his April 2007 accident with Glantz or his representative more than six months after that accident.

Howe was involved in a second accident on an MTD bus on February 23, 2008. He went to the MTD office within 30 days of that accident but did not receive a claim form. Howe spoke with "Patty" at Glantz's office in March 2008. He knew she was not a lawyer. He did not know if she was authorized by Glantz to give legal advice. He believed he told Patty he was in an accident with the MTD. Patty told him he had two years from the date of the accident to file a lawsuit.

Howe first spoke to Glantz on January 26, 2009, more than 10 months after the second accident. Pursuant to Glantz's instructions, Howe went to the MTD office on February 19, 2009, and was given another copy of the April 24, 2007 correspondence from the MTD, including another claim form, regarding the April 2007 accident. He also received an MTD claim form regarding the February 23, 2008 accident. In April 2009, Howe completed and submitted to MTD the claim form regarding the April 2007 accident as well as a claim form regarding the February 2008 accident. Both claims were rejected because they were not submitted within six months after the respective accident.

Glantz and Howe did not enter into a written retainer agreement with respect to either bus accident. Between April 2007 and January 26, 2009, Howe did not disclose confidential information regarding either bus accident to Glantz or his authorized representative. Until January 26, 2009, neither Glantz nor his authorized representative offered Glantz's services as an attorney to Howe. Between April 2007 and January 26, 2009, neither Glantz nor his authorized representative acted as if or indicated by statements that Glantz was representing Howe regarding either bus accident. Between those dates, Glantz and his authorized representatives did not provide Howe with any legal advice.

II. Opposition to the Motion for Summary Judgment

In opposition to the motion for summary judgment, Howe asserted that the motion was premature because discovery had not been completed. In addition, Glantz had

addressed only those causes of action dependent upon the existence of an attorney-client relationship, ignoring those involving Glantz's employees for which Glantz could be held vicariously liable regardless of the existence of an attorney-client relationship and also failing to address potential liability based on negligent supervision. Howe also argued that Glantz's agents told him to keep calling back and to wait until he had received medical treatment and then call back, thus conducting themselves in a manner that caused Howe to reasonably believe he had acquired representation. Howe asked Glantz's agent how long he had to file his lawsuit and she mistakenly told him two years.

Howe filed a response to Glantz's separate statement of facts. He indicated he had been unable to complete the claim form he was given by MTD because of his dyslexia. He placed the form in a cupboard until January 2009 when Glantz asked him to look for it. Howe pointed to his deposition testimony in which he said that the woman he spoke to in September 2007 was Glantz's agent, and that he told her he was injured in an MTD accident. The only thing Howe knew about Patty was that she was employed by Glantz and that her job duties were to do "[e]verything [Glantz] asked her to do." Having been represented by Glantz in three prior personal injury matters, he was familiar with Patty and had dealt with her "in a legal pattern, attorney situation with [Glantz]." Howe said initially he telephoned Glantz's office about "once a week for a few months attempting to get ahold of [Glantz]." Whenever he called, he spoke with Patty or Robin. Even after giving Patty the details of why he needed legal help—because he was injured in an MTD accident—Patty continued to speak with him rather than transfer the call to Glantz. When Howe said he was worried there might be some time limitations involved regarding both accidents, Patty told him that he had two years to file, that Howe should get the surgery and physical therapy out of the way, and then call Glantz before the two years were up. Accordingly, Howe believed Patty was authorized to speak for Glantz.

Howe visited the MTD office after he spoke to Glantz in January 2009; Glantz told him if he could get a copy of the February 23, 2008 accident form, they might have something to go on. Glantz had called someone else into his office while on the phone

with Howe and discussed the case with that person. Howe had no idea that Glantz would deny representation until he again spoke with Glantz in March 2009.

III. The Reply to the Opposition

Glantz filed a reply to the opposition, pointing out that Howe's complaint contained only a single cause of action for professional negligence and therefore Glantz's motion for summary judgment need only address that cause of action. Glantz asserted that absent some objective evidence of an agreement to represent a plaintiff, it is not sufficient that a plaintiff "thought" the defendant was his attorney. Glantz also objected to Howe's using his own deposition transcript to oppose the motion for summary judgment rather than relying on a declaration.

IV. The Hearing and the Ruling

The hearing on the motion for summary judgment was held on October 28, 2011. The trial court had issued a tentative decision, which after a brief discussion became the order of the court. At the hearing, counsel for Howe asserted that Howe's complaint contained causes of action in addition to that for professional negligence which depended upon the negligent acts of Glantz's office staff. The court responded that even if it did, alleging failures by an attorney's staff was "part and parcel" of alleging legal malpractice.

The trial court stated in its order granting summary judgment that the primary issue was whether an attorney-client relationship existed between Howe and Glantz. In examining the factors relevant to determining the existence of an attorney-client relationship, the trial court made the following findings: (1) it was undisputed that Glantz did not volunteer his legal services to Howe; (2) Howe did not provide Glantz or any of his employees details of the accidents until January 2009; (3) there was no evidence Howe reasonably believed he was consulting Glantz in his professional capacity, as Howe knew Patty was not an attorney and did not know if she was authorized to give legal advice on Glantz's behalf; (4) Howe could point to nothing that objectively indicated that Glantz was representing him. The conversation between Howe

and Patty indicated she told Howe to get his medical treatment out of the way and then retain Glantz; (5) there was no contact between Howe and Glantz during the limitations period and a few phone calls with his office staff did not constitute sufficient contact to create an attorney-client relationship; (6) the only legal advice given to Howe was the statute of limitations for a personal injury claim. Howe did not tell Patty the accidents occurred on a public bus; (7) although Glantz had previously represented Howe, that relationship terminated in 1997; (8) Howe paid no legal fees; and (9) Howe did not consult Glantz or his staff in confidence. Therefore, Howe could not reasonably believe that an attorney-client relationship existed, and accordingly, Glantz owed no legal duty to Howe.

V. The Motion to Set Aside the Judgment and for a New Trial

Howe moved for a new trial on the grounds that he had newly discovered evidence to present and that the evidence was insufficient to support the grant of summary judgment. Glantz filed opposition, pointing out that Howe had failed to present any new evidence.

The trial court denied the motion to set aside the judgment and order a new trial. The court noted that Howe failed to cite to any new evidence, but apparently sought to reopen the proceedings so he could depose Patty and Glantz. However, the court concluded Howe had failed to exercise diligence in deposing Patty and Glantz (or even noticing their depositions) before the motion for summary judgment was heard—almost two years after the action had been filed.

This timely appeal followed.

DISCUSSION

I. Standard of Review

In *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850-851, the Supreme Court described a party's burdens on summary judgment or adjudication motions as

follows: "[F]rom commencement to conclusion, the party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law. That is because of the general principle that a party who seeks a court's action in his favor bears the burden of persuasion thereon. [Citation.] There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof. . . . [¶] [T]he party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he carries his burden of production, he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact. . . . A prima facie showing is one that is sufficient to support the position of the party in question. [Citation.]" (Fns. omitted.) We review the trial court's decision to grant the summary judgment motion de novo. (*Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 65, 67-68.) The trial court's stated reasons for granting summary judgment are not binding on us because we review its ruling not its rationale. (*Szadolci v. Hollywood Park Operating Co.* (1993) 14 Cal.App.4th 16, 19; *Barnett v. Delta Lines, Inc.* (1982) 137 Cal.App.3d 674, 682.) That being said, as we explain we conclude the trial court correctly decided that summary judgment was warranted because the undisputed facts establish that there was no relationship or circumstance that gave rise to a duty on Glantz's part.

II. Howe's Reliance on His Deposition Testimony

We briefly note Glantz's argument that Howe was not permitted to rely on his own deposition testimony to oppose the motion for summary judgment and that he was required to instead use a declaration in opposition. We disagree. The statute cited by Glantz, Code of Civil Procedure section 2025.620, subdivision (b), applies by its terms to trials, not summary judgment motions. Depositions may be used in support of or in opposition to a motion for summary judgment. (Code Civ. Proc., § 437c, subd. (b);

Leasman v. Beech Aircraft Corp. (1975) 48 Cal.App.3d 376; see also Cal. Rules of Court, rule 3.1350.) Indeed, the summary judgment statute contemplates the use of deposition transcripts, subject to admissibility objections made and sustained by the trial court. (*Gatton v. A.P. Green Services, Inc.* (1998) 64 Cal.App.4th 688.)

III. There Are No Triable Issues of Material Fact

Like the trial court, we view the crux of the summary judgment motion to turn on whether triable issues of fact are present that could support the existence of an attorney-client relationship or some other basis upon which to attribute a duty to Glantz.[1] We similarly conclude that Howe has failed to establish the existence of any disputed facts that would defeat the granting of summary judgment in favor of Glantz.

One of the requisite elements of a legal malpractice claim is the existence of an attorney-client relationship with the injured party or some other imputed basis for a duty of professional care. (*Streit v. Covington & Crowe* (2000) 82 Cal.App.4th 441, 444 (*Streit*); *Nichols v. Keller* (1993) 15 Cal.App.4th 1672, 1684; *Jager v. County of Alameda* (1992) 8 Cal.App.4th 294, 297; *Fox v. Pollack* (1986) 181 Cal.App.3d 954, 959 (*Fox*).) When the evidence is undisputed, the question of whether an attorney-client relationship exists is one of law. (*Responsible Citizens v. Superior Court* (1993) 16 Cal.App.4th 1717, 1733 (*Responsible Citizens*); *Streit, supra*, 82 Cal.App.4th at p. 444.)

A formal agreement is not required; in some instances an attorney-client relationship and the attorney's resultant duties to the client can arise by inference from the conduct of the parties. (*Lister v. State Bar* (1990) 51 Cal.3d 1117, 1126; *Davis v. State Bar* (1983) 33 Cal.3d 231, 237; see *Streit, supra*, 82 Cal.App.4th at p. 444.) An

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[1] Glantz points out that Howe initially did not include the operative complaint in the record on appeal, rendering the record insufficient. Howe moved to augment the record to include numerous documents, including the face page of the complaint, which reveals the complaint was one for professional negligence. As we will discuss, we conclude that there are no disputed facts upon which a finding of duty on Glantz's part could be based, even if the complaint is viewed as additionally stating causes of action for negligent misrepresentation, negligent hiring and supervision, or some similar breach of duty.

implied-in-fact attorney-client relationship is based on the facts and circumstances of each case. (See *Miller v. Metzinger* (1979) 91 Cal.App.3d 31, 39; *Hecht v. Superior Court* (1987) 192 Cal.App.3d 560, 565-566.)

There are numerous factors relevant to assessing the parties' intent and conduct that must be considered in determining whether an attorney-client relationship has been created by implied agreement. They include: (1) whether the attorney volunteered his or her services to the prospective client; (2) whether confidential information has been disclosed by the prospective client; (3) whether the prospective client reasonably believed he or she was consulting the attorney in the attorney's professional capacity; (4) whether the attorney acted or indicated by statements that he or she was representing the prospective client; (5) the amount of contact between attorney and the prospective client; (6) whether the prospective client sought legal advice from the attorney and whether the attorney provided advice; (7) whether the attorney previously represented the prospective client, particularly where the representation occurred over a period of time or in several matters or without an express agreement; (8) whether the prospective client paid fees or other consideration in the matter in question; and (9) whether the prospective client consulted the attorney in confidence. (Vapnek et al., Cal. Practice Guide: Professional Responsibility (The Rutter Group 2012) ¶ 3:45, p. 3-19.)

A state of mind is insufficient to create an attorney-client relationship unless it is reasonable under the circumstances to conclude that such a connection existed. (*Canton Poultry & Deli, Inc. v. Stockwell, Harris, Widom & Woolverton* (2003) 109 Cal.App.4th 1219, 1227; *Fox*, *supra*, 181 Cal.App.3d at p. 959.) Thus, an attorney-client relationship is not created by the unilateral declaration of one of the alleged parties that he or she believed such existed. (*Koo v. Rubio's Restaurants, Inc.* (2003) 109 Cal.App.4th 719, 729; *Fox, supra*, 181 Cal.App.3d at p. 959.) Rather, the belief must be based on the evidentiary facts from which a conclusion could reasonably be drawn that an agreement was reached between the parties either expressly or by implication to create an attorney-client relationship. (*Ibid.*; see also *Canton Poultry*, *supra*, 109 Cal.App.4th at p. 1227.) Courts must examine the expectation of the client based on how the situation would

appear to a reasonable person in the client's position. (*Responsible Citizens*, *supra*, 16 Cal.App.4th at p. 1733.)

Glantz contends that it would have been unreasonable for Howe to rely on any alleged legal advice given to him by Patty and unreasonable for him to believe that an attorney-client relationship had been formed between him and Glantz based on that conversation. We agree with both contentions.

At no time did Patty or anyone in Glantz's office volunteer Glantz's services as an attorney. Instead, Howe was repeatedly told he had to call back to speak to Glantz. Howe's conduct showed he understood that when he called repeatedly in an attempt to reach Glantz. Patty did not act or indicate by her statements that Glantz was representing Howe regarding either accident. Rather, Patty indicated that Howe should call back to retain Glantz in the future, after Howe had received treatment. Howe could not have reasonably believed that he was consulting Glantz in his professional capacity by speaking to members of his office staff, particularly when Howe knew Patty was not a lawyer and did not know whether she was authorized by Glantz to give legal advice.[2] Patty did not indicate to Howe that she had ever spoken to Glantz about Howe's case or was giving advice based on having consulted with Glantz about it. Howe could not *reasonably* rely on the statement made by Patty, a nonlawyer, about the statute of limitations, especially when he had given such scant information to Patty about his accidents. It is undisputed that Howe expressed concern about the statute of limitations and that he had in his possession a written form and correspondence from MTD that specified he had only six months to file a claim. He stated that initially he was unable to complete the form but he did not say he did not read the written information in his possession. Nonetheless, he did not share this information with Patty. He shared no

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[2] We have found no helpful authority precisely addressing the issue whether the actual or apparent agent of an attorney may bind the attorney to an attorney-client relationship. In any event, we do not find it necessary to decide that question where, as here, the acts of the attorney's employee were insufficient to create in Howe a reasonable expectation that he had entered into an implied contract with Glantz whereby Glantz was representing him in pursuing litigation with MTD.

confidential information with her. He simply continued to wait to talk to Glantz until well beyond six months after the second accident (which occurred in February 2008). When he finally spoke to Glantz in January 2009 and began receiving legal advice from him, it was not within Glantz's power to revive the case.[3]

In summary, there is no triable controversy as to whether it was reasonable for Howe to believe an attorney-client relationship existed. We conclude that under the circumstances such a belief was unreasonable.

Finally, we note that Howe filed a motion to set aside the judgment and order a new trial, seeking leave to conduct further discovery. However, he did not explain why he failed to complete the discovery or explain why he failed to ask for a continuance of the hearing on the motion for summary judgment, he did not demonstrate that he exercised reasonable diligence in attempting to complete the discovery, and he did not even suggest what further discovery might disclose that would prove helpful to him. Under these circumstances, we find no error in the trial court's denial of the motion to set aside the judgment.

DISPOSITION

The judgment in favor of Glantz is affirmed. Glantz is awarded costs on appeal.

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SUZUKAWA, J.

We concur:

EPSTEIN, P. J. WILLHITE, J.

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[3] Howe suggests that there are exceptions to the six-month claim limitations period found in Government Code sections 901 and 911.2, but he does not elaborate further.