

989 F.Supp. 1359
(Cite as: 989 F.Supp. 1359)

H

United States District Court,
D. Kansas.

TURNER AND BOISSEAU, CHARTERED,
Plaintiff,

v.

**NATIONWIDE MUTUAL INSURANCE COM-
PANY,** Defendant.

Civil Action No. 95-1258-DES.

Dec. 1, 1997.

Law firm brought suit against client to recover attorney fees, expert fees, and costs incurred in defending lawsuit. Client removed action to federal court and filed counterclaim to recover fees and costs paid to law firm. Law firm moved to dismiss counterclaim, and motion was denied. Client filed amended counterclaim. Law firm moved for partial summary judgment as to single count of amended counterclaim. The District Court, [Saffels](#), Senior District Judge, held that: (1) counterclaim was subject to three-year statute of limitations for oral and implied contracts; (2) cause of action accrued when attorney-client relationship terminated; (3) fact question as to whether accord and satisfaction had occurred with respect to law firm's first invoice precluded summary judgment; and (4) fact question as to whether client intended to waive its claims regarding subsequent invoices precluded summary judgment.

Motion denied.

West Headnotes

[1] Attorney and Client 45 105.5

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k105.5 k. Elements of Malpractice or Negligence Action in General. [Most Cited Cases](#)
(Formerly 45k105)

Under Kansas law, legal malpractice generally constitutes both a tort and a breach of contract.

[2] Attorney and Client 45 129(1)

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client


45k129 Actions for Negligence or Wrongful

Acts

45k129(1) k. In General; Limitations. [Most](#)

[Cited Cases](#)

Under Kansas law, where legal malpractice involves failure to perform contractual obligation, whether express or implied, cause of action is in contract.

[3] Attorney and Client 45 162

45 Attorney and Client

45IV Compensation

45k157 Actions for Compensation

45k162 k. Time to Sue, and Limitations.

[Most Cited Cases](#)

Client's amended counterclaim to recover fees paid to law firm, which alleged that law firm had billed client for fees and expenses that were substantially greater than necessary, had provided inexperienced counsel at trial, and had failed to provide appropriate legal advice, stated claim for breach of contract, and, therefore, was subject to Kansas' three-year statute of limitations on contracts rather than two-year statute of limitations on tort actions. [K.S.A. 60-512](#).

[4] Limitation of Actions 241 55(3)

241 Limitation of Actions

241II Computation of Period of Limitation

241II(A) Accrual of Right of Action or De-

fense

241k55 Torts

241k55(3) k. Negligence in Perform-

ance of Professional Services. [Most Cited Cases](#)

Under Kansas law, client's breach of contract claims against law firm accrued when attorney-client relationship was terminated, not when client's claims attorney informed law firm that client would not pay any more of their invoices and that client wanted arbitration of all of the bills from the beginning of the representation. [K.S.A. 60-512](#).

989 F.Supp. 1359
(Cite as: 989 F.Supp. 1359)

[5] Limitation of Actions 241  **55(3)**

241 Limitation of Actions


241II Computation of Period of Limitation

241III(A) Accrual of Right of Action or Defense

241k55 Torts

241k55(3) k. Negligence in Performance of Professional Services. [Most Cited Cases](#)

Under continuous representation rule, as set forth in Kansas law, client's cause of action does not accrue until attorney-client relationship is terminated; thus, statute of limitations is tolled during period attorney continues to represent client on same matter out of which alleged malpractice arose.

[6] Judgment 228  **181(6)**

228 Judgment

228V On Motion or Summary Proceeding

228k181 Grounds for Summary Judgment

228k181(5) Matters Affecting Right to Judgment

228k181(6) k. Existence of Defense.

[Most Cited Cases](#)

Fact question as to whether law firm and client had agreed upon amount by which first invoice for law firm's services would be reduced, so as to constitute accord and satisfaction, precluded summary judgment for law firm on client's counterclaim to recover fees paid to law firm.

[7] Contracts 95  **227**


95 Contracts

95II Construction and Operation

95II(E) Conditions

95k227 k. Waiver. [Most Cited Cases](#)

Under Kansas law, waiver in contract law implies that party has voluntarily and intentionally renounced or given up a known right, or has caused or done some positive act or positive inaction which is inconsistent with contractual right.

[8] Judgment 228  **181(5.1)**

228 Judgment

228V On Motion or Summary Proceeding

228k181 Grounds for Summary Judgment

228k181(5) Matters Affecting Right to Judgment

228k181(5.1) k. In General. [Most Cited](#)

[Cases](#)

Court should be cautious in granting motion for summary judgment, under Kansas law, when resolution of dispositive issue necessitates determination of state of mind of one or both parties.

[9] Federal Civil Procedure 170A  **2515**

170A Federal Civil Procedure

170AXVII Judgment

170AXVII(C) Summary Judgment

170AXVII(C)2 Particular Cases

170Ak2515 k. Tort Cases in General.

[Most Cited Cases](#)

(Formerly 228k181(16))

Fact question as to whether client intended to waive its claims against law firm by paying law firm's invoices precluded summary judgment for law firm on client's counterclaim to recover fees paid to law firm.

***1360** [Daniel G. Menzie, Turner & Boisseau, Chartered, Peter G. Collins](#), Wallace, Saunders, Austin, Brown & Enochs, **Chartered**, Wichita, KS, [Hal D. Meltzer, Turner & Boisseau, Chartered](#), Overland Park, KS, for **Turner and Boisseau, Inc.**, Plaintiffs.

[Lee M. Smithyman](#), David J. Roberts, Smithyman & Zakoura, Chtd., Overland Park, KS, for **Nationwide Mutual Insurance Company**, Defendants.

MEMORANDUM AND ORDER

[SAFFELS](#), Senior District Judge.

This matter is before the court on plaintiff's Motion for Partial Summary Judgment (Doc. 135) on the defendant's Amended Counterclaim (Doc. 116).

I. BACKGROUND

In December 1988, the defendant, **Nationwide Mutual Insurance Company** (“**Nationwide**”), employed the plaintiff, **Turner & Boisseau, Chartered** (“**Turner & Boisseau**”), to represent the defendant's insured in *Murphy v. Smock*, a case filed in the Dis-

989 F.Supp. 1359

(Cite as: 989 F.Supp. 1359)

trict Court of Finney County, Kansas. The case was tried to a jury on July 17, 1992, but was settled prior to the conclusion of trial.

Turner & Boisseau filed suit in Barton County District Court on May 2, 1995, alleging that **Nationwide** owed the plaintiff \$54,280.19 for attorney's fees, expert's fees, and other costs incurred in defending *Murphy v. Smock* between March 17, 1992, and December 8, 1992. The defendant removed the action to federal court on May 23, 1995. On October 12, 1995, the defendant filed a counterclaim against the plaintiff, seeking in excess of \$72,446.27 for fees and costs paid to the plaintiff prior to March 17, 1992. Nationwide claims that Turner & Boisseau breached its contract to provide the defendant with proper legal services and representation. The defendant alleges that the plaintiff, among other things, billed the defendant for fees and expenses that were substantially greater than necessary, provided inexperienced counsel at trial, and failed to provide appropriate legal advice.

On November 7, 1995, the plaintiff filed a motion to dismiss the defendant's counterclaim for failure to state a claim upon which relief can be granted pursuant to [Federal Rule of Civil Procedure 12\(b\)\(6\)](#). The plaintiff's motion to dismiss the defendant's counterclaim was denied by this court on February*1361 12, 1996. The defendant then filed an amended counterclaim in this matter on September 3, 1996. Plaintiff filed the present motion for partial summary judgment as to Count I of the amended counterclaim on March 19, 1997.

II. SUMMARY JUDGMENT STANDARD

A court shall render summary judgment upon a showing that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. [Fed.R.Civ.P. 56\(c\)](#). The rule provides that "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." [Anderson v. Liberty Lobby, Inc.](#), 477 U.S. 242, 247-48, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The substantive law identifies which facts are material. *Id.* at 248. A dispute over a material fact is genuine when the evidence is such that a reasonable jury could find for the nonmovant. *Id.* "Only disputes over facts that

might properly affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Id.*

The movant has the initial burden of showing the absence of a genuine issue of material fact. [Shapolia v. Los Alamos Nat'l Lab.](#), 992 F.2d 1033, 1036 (10th Cir.1993). The movant may discharge its burden "by 'showing'-that is, pointing out to the district court-that there is an absence of evidence to support the non-moving party's case." [Celotex Corp. v. Catrett](#), 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1985). The movant need not negate the nonmovant's claim. *Id.* at 323.

Once the movant makes a properly supported motion, the nonmovant must do more than merely show there is some metaphysical doubt as to the material facts. [Matsushita Elec. Indus. Co. v. Zenith Radio](#), 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). The nonmovant must go beyond the pleadings and, by affidavits or depositions, answers to interrogatories, and admissions on file, designate specific facts showing there is a genuine issue for trial. [Celotex](#), 477 U.S. at 324 (interpreting [Fed.R.Civ.P. 56\(e\)](#)). [Rule 56\(c\)](#) requires the court to enter summary judgment against a nonmovant who fails to make a showing sufficient to establish the existence of an essential element to that party's case, and on which that party will bear the burden of proof. *Id.* at 322. Such a complete failure of proof on an essential element of the nonmovant's case renders all other facts immaterial. *Id.* at 323.

A court must view the facts in the light most favorable to the nonmovant and allow the nonmovant the benefit of all reasonable inferences to be drawn from the evidence. *See, e.g.*, [United States v. O'Block](#), 788 F.2d 1433, 1435 (10th Cir.1986) (stating that "[t]he court must consider factual inferences tending to show triable issues in the light most favorable to the existence of those issues"). The court's function is not to weigh the evidence, but merely to determine whether there is sufficient evidence favoring the nonmovant for a finder of fact to return a verdict in that party's favor. [Anderson](#), 477 U.S. at 249. Essentially, the court performs the threshold inquiry of determining whether a trial is necessary. *Id.* at 250.

III. DISCUSSION

989 F.Supp. 1359
 (Cite as: 989 F.Supp. 1359)

A. Contract vs. Tort

Plaintiff seeks summary judgment on Count I of Nationwide's amended counterclaim. Plaintiff argues that Count I sounds in tort, rather than contract. Therefore, plaintiff argues that the two-year statute of limitations applies, rather than the three-year statute of limitations for oral and implied contracts. This argument was previously raised in plaintiff's motion to dismiss the original counterclaim, which is identical to Count I of the amended counterclaim. In ruling on the motion to dismiss, this court held that "Nationwide has sufficiently pled the existence of specific contractual duties on the part of Turner & Boisseau so as to state a claim for breach of contract." Mem. & Order dated February 12, 1996, at 7. This court further held that the three-year statute of limitations contained in [section 60-512 of the Kansas Statutes Annotated](#) would apply. *Id.* at 10.

*1362 [1][2] As this court stated in the prior Memorandum and Order, legal malpractice generally constitutes both a tort and a breach of contract. [Pizel v. Zuspann](#), 247 Kan. 54, 795 P.2d 42, 54 (1990). "Where the [legal] malpractice involves failure to perform a contractual obligation, whether **express or implied**, the cause of action is in contract." [Pittman v. McDowell, Rice & Smith, Chartered](#), 12 Kan.App.2d 603, 752 P.2d 711, 718 (1988) (quoting [Pancake House, Inc. v. Redmond](#), 239 Kan. 83, 716 P.2d 575, 578 (1986)) (emphasis added). Furthermore, the Kansas Supreme Court has stated that "where doubt exists as to whether an action is based on tort or implied contract ... words appropriate to a tort action will be disregarded and the petition interpreted as sounding in contract." [Mackey-Woodard, Inc. v. Citizens State Bank](#), 197 Kan. 536, 419 P.2d 847, 856 (1966). See Mem. & Order dated February 12, 1996, for a full analysis of the Kansas case law discussing the application of the statute of limitations for legal malpractice.

[3] Although many of the allegations contained in Count I of Nationwide's amended counterclaim could be interpreted as a violation of a duty imposed by law, the court finds that the nature of the allegations are such that they could also be interpreted as a breach of an express or implied agreement. Nationwide has specifically alleged and brought forth evidence of the

following agreements regarding Turner & Boisseau's legal representation: (1) an express agreement that Turner & Boisseau would provide legal representation at a lower cost than other firms through the use of computers, paralegals, and efficient internal procedures; (2) an express agreement that Lee Turner would handle and try the *Murphy v. Smock* case; (3) an express agreement that Nationwide would only pay for one trial attorney; (4) an implied agreement that Nationwide would only pay reasonable fees; and (5) an implied agreement that Turner & Boisseau would provide appropriate and reliable legal advice, guidance, and representation concerning all aspects of the *Murphy v. Smock* litigation. Therefore, the court finds that Nationwide has presented sufficient evidence to support a prima facie case for breach of contract subject to the three-year statute of limitations. See [KAN. STAT. ANN. § 60-512 \(1994\)](#).

B. Accrual

[4] Plaintiff further argues that, even if the court finds that the three-year statute of limitations for oral and implied contracts applies, Nationwide's cause of action accrued prior to October 12, 1992. Thus, plaintiff asserts that the three-year statute of limitations had expired before Nationwide filed its original counterclaim, which is identical to Count I of the amended counterclaim, on October 12, 1995. Specifically, plaintiff alleges that Nationwide's cause of action would have accrued in July of 1992, when the *Murphy v. Smock* litigation settled. Alternatively, plaintiff alleges that the latest date for accrual of this cause of action was August 20, 1992, when Nationwide's claims attorney informed Turner & Boisseau that Nationwide would not pay any more of their invoices and that Nationwide wanted arbitration of all the bills from the beginning of Turner & Boisseau's representation. However, Nationwide argues that the continuous representation rule should be applied to this case, which would make the filing of its counterclaim timely.

[5] Under the continuous representation rule, "the client's cause of action does not accrue until the attorney-client relationship is terminated." [Pancake House, Inc.](#), 239 Kan. 83, 716 P.2d 575, 579 (1986). Thus, "the statute of limitations is tolled during the period the attorney continues to represent the client on the same matter out of which the alleged malpractice

989 F.Supp. 1359
(Cite as: 989 F.Supp. 1359)

arose.” [Pittman, 752 P.2d at 715](#). In *Pittman*, the Kansas Court of Appeals stated that the rationale behind the continuous representation rule “is to avoid unnecessarily disrupting the attorney-client relationship.” *Id.* Furthermore, the *Pittman* court stated that the continuous representation rule is consistent with the underlying policy for the statute of limitations. *Id.*

In this case, **Nationwide** has submitted letters from **Turner & Boisseau**, as well as billing statements, which demonstrate that **Turner & Boisseau** did not mail Ben Murphy's release of all claims to **Nationwide** until *1363 at least October 15, 1992. However, **Turner & Boisseau** contend that the representation ended on August 20, 1992, because the relationship became adversarial and that **Turner & Boisseau** performed “mere scrivener work to complete the closing documents.” Pl.'s Reply at 16.

The court is unpersuaded by **Turner & Boisseau's** argument. In **Turner & Boisseau's** letter to Gail Lewis of **Nationwide** dated September 29, 1992, David Steed of **Turner & Boisseau** stated that “plaintiff counsel has indicated he will file a Motion to Set Aside the settlement if the settlement monies are not promptly received.... As we discussed, it is my thinking that if Judge Handy were to set aside the settlement, **such would permit us to proceed to trial.**” Def.'s Mem. in Opp'n Ex. C (emphasis added). This statement does not indicate to the court that **Turner & Boisseau** had terminated their representation of **Nationwide** by the time of this letter, dated more than a month after **Turner & Boisseau** claims to have developed an adversarial relationship with **Nationwide**. Furthermore, the court notes that neither party has presented any evidence which clearly demonstrates when **Turner & Boisseau's** legal representation terminated. Therefore, the court finds that **Turner & Boisseau** continued to represent **Nationwide** on the same matter, namely the *Murphy v. Smock* litigation, at least until October 15, 1992, the date that **Turner & Boisseau** wrote the letter which was sent with the original release to **Nationwide**. Pursuant to the continuous representation rule, the court finds that **Nationwide's** counterclaim was timely filed on October 12, 1995. As a result, the court does not reach **Nationwide's** argument that the counterclaim should be deemed to have been filed, for statute of limitations purposes, on the date the motion for leave to file the counterclaim was filed.

C. Accord and Satisfaction; Waiver and Estoppel

Turner & Boisseau argue that **Nationwide** cannot include the first invoice which was reduced by John White of **Nationwide** because that claim is barred by accord and satisfaction. **Turner & Boisseau** further argue that waiver and estoppel should be applied to prevent **Nationwide** from seeking any of the money paid on the subsequent invoices because **Nationwide** knew that it could ask for a reduction and chose not to do so.

In order to show that there was an accord and satisfaction,

there must be an offer in full satisfaction of an obligation, accompanied by such acts and declarations or made under such circumstances that the party to whom the offer is made is bound to understand that if he accepts the offer, it is in full satisfaction of and discharges the original obligation. An accord and satisfaction, as an adjustment of a disagreement as to what is due from one party to another through payment of an agreed amount, must be consummated by a meeting of the minds and accompanied by sufficient consideration.

[E.F. Hutton & Co. v. Heim, 236 Kan. 603, 694 P.2d 445, 451 \(1985\)](#) (citations omitted).

[6] In this case, **Nationwide** has presented evidence which indicates that the plaintiff and **Nationwide** had not agreed upon an amount by which the invoice would be reduced. Rather, **Turner & Boisseau** offered a reduction of \$225, and **Nationwide** unilaterally reduced the bill by an additional \$360. The court is unable to find that there was a “meeting of the minds,” as is necessary to show that there was an accord and satisfaction. Therefore, the court finds that **Nationwide** has shown that there is a genuine issue of material fact on this issue.

[7][8] “Waiver in contract law implies that a party has voluntarily and intentionally renounced or given up a known right, or has caused or done some positive act or positive inaction which is inconsistent with the contractual right.” [Iola State Bank v. Biggs, 233 Kan. 450, 662 P.2d 563, 571 \(1983\)](#). “The intent to waive known rights is essential.’ ‘A court should be cautious

989 F.Supp. 1359
(Cite as: 989 F.Supp. 1359)

in granting a motion for summary judgment when resolution of the dispositive issue necessitates a determination of the state of mind of one or both of the parties.’ ” *1364 [Zenda Grain & Supply Co. v. Farm-land Industries, Inc.](#), 20 Kan.App.2d 728, 894 P.2d 881, 894 (1995). Furthermore, the Kansas Court of Appeals has stated that waiver and estoppel “conflict[] with the intent of the continuous representation rule, which encourages the client to work with the fiduciary in attempting to rectify the situation or to mitigate damages.” [Morrison v. Watkins](#), 20 Kan.App.2d 411, 889 P.2d 140, 151 (1995).

[9] In this case, Nationwide has presented evidence which indicates that it did not have the requisite intent to waive its claims against Turner & Boisseau on subsequent invoices. Furthermore, Nationwide has presented evidence that it did not terminate Turner & Boisseau's representation in order to avoid rebilling. As stated above, such action is consistent with the rationale for the continuous representation rule. Therefore, the court finds that Nationwide has demonstrated that there is a genuine issue of material fact with respect to this issue.

IT IS THEREFORE BY THE COURT ORDERED that the plaintiff's Motion for Partial Summary Judgment (Doc. 135) is denied.

D.Kan.,1997.
Turner and Boisseau v. Nationwide Mut. Ins. Co.
989 F.Supp. 1359

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