[Cite as *Boggs v. Baum*, 2011-Ohio-2489.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Clifford L. Boggs,	:	
Plaintiff-Appellant,	:	
		No. 10AP-864
v.	:	(C.P.C. No. 07CVA-06-7848)
James L. Baum et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on May 24, 2011

Denmead Law Office, and *Craig Denmead*, for appellant.

James E. Arnold & Associates, LPA, and *W. Evan Price, II*, for appellees.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} Plaintiff-appellant, Clifford L. Boggs, appeals from a judgment of the Franklin County Court of Common Pleas granting summary judgment to defendants-appellees, James L. Baum and Karr & Sherman Co., L.P.A., on the grounds that appellant did not commence his legal malpractice action within the one-year limitations period set forth in R.C. 2305.11. For the reasons that follow, we affirm.

{¶2} The facts giving rise to this appeal are as follows. On September 6, 1996, appellant retained appellees and attorney Keith Karr to represent him in a civil action to

recover damages for bodily injuries he allegedly sustained in an automobile accident on September 12, 1994. In conjunction with the representation, appellant deposited $3,000 with appellees to cover litigation expenses. Appellant filed a complaint against the alleged tortfeasor on September 9, 1996. On July 17, 1997, appellant voluntarily dismissed the complaint pursuant to Civ.R. 41(A)(1)(a). Appellant refiled the action on July 22, 1998. On January 6, 1999, the trial court dismissed the refiled complaint, with prejudice, because it was filed more than one year from the July 17, 1997 notice of dismissal. In mid-January 1999, appellees notified appellant by letter that he had a potential malpractice action against them.

{¶3} On January 19, 2000, appellant filed a complaint against appellees and Karr for legal malpractice. On December 10, 2002, the parties stipulated to the dismissal of the complaint pursuant to Civ.R. 41(A)(1)(b). Appellant refiled the complaint on December 5, 2003. On July 10, 2006, appellant voluntarily dismissed the refiled complaint pursuant to Civ.R. 41(A)(1)(a).

{¶4} On June 13, 2007, appellant refiled the complaint against appellees.[1] Thereafter, on July 27, 2007, appellees filed a Civ.R. 12(B)(6) motion to dismiss, arguing that appellant's refiled complaint was time-barred by the one-year statute of limitations applicable to legal malpractice actions because appellant had already availed himself of the one-time use of R.C. 2305.19, Ohio's "savings statute," when he refiled the complaint on December 5, 2003 following the stipulated dismissal on December 10, 2002.

{¶5} On August 27, 2007, appellant filed a response to the motion to dismiss, along with an amended complaint. In the amended complaint, appellant asserted that the

[1] Karr is not named as a defendant in the June 13, 2007 refiled complaint.

parties' December 10, 2002 Civ.R. 41(A)(1)(b) stipulation of dismissal "contained an agreement between the parties that the action could be refiled." Amended Complaint, ¶2. Appellant further asserted that "[d]uring the entire attorney-client relationship between the parties, [appellees] held a sum of [appellant's] money in trust for him in the underlying personal injury action [and] appellees failed to return that sum until sometime around * * * March 29, 2004." Amended Complaint, ¶6. Under his single count for legal malpractice, appellant asserted that "[f]rom prior to September 6, 1996 and until after January 20, 1999, Defendants * * * were retained by, and did agree to provide legal representation to" appellant regarding his personal injury claim. Amended Complaint, ¶16. Appellant alleged that appellees breached their duty of care in failing to timely refile the personal injury action.

{¶6} On September 5, 2007, appellees filed a Civ.R. 12(B)(6) motion to dismiss appellant's amended complaint on grounds identical to those asserted in its previous motion to dismiss. In support of its motion, appellees attached as exhibits photocopies of the parties' December 10, 2002 Civ.R. 41(A)(1)(b) stipulation of dismissal and appellant's July 10, 2006 Civ.R. 41(A)(1)(a) notice of dismissal. On September 24, 2007, appellant filed a response to the motion to dismiss, along with a motion to strike the exhibits. By decision and entry filed June 5, 2009, the trial court denied appellees' motions to dismiss and granted appellant's motion to strike.

{¶7} Thereafter, appellees filed an answer to appellant's amended complaint. Appellees denied appellant's assertion that the parties' December 10, 2002 Civ.R. 41(A)(1)(b) stipulation of dismissal included an agreement allowing appellant to refile the action. Appellees admitted that it did not return appellant's $3,000 expense retainer until

late March 2004, but denied that an attorney-client relationship continued beyond January 20, 1999. In addition, appellees asserted the affirmative defense that appellant's claim was barred by the one-year statute of limitations applicable to a legal malpractice claim.

{¶8} On April 30, 2010, appellees filed a motion for summary judgment. Appellees argued that appellant's cause of action for legal malpractice accrued, at the very latest, on January 19, 2000, when appellant terminated the attorney-client relationship regarding the personal injury matter by filing the malpractice action against appellees. Appellees contended that, in refiling his complaint on December 5, 2003 following the December 10, 2002 dismissal by stipulation, appellant necessarily invoked the protection of the savings statute because the one-year statute of limitations on the legal malpractice claim had expired on January 19, 2001. Appellees argued that appellant could not again utilize the savings statute to refile his complaint following his July 6, 2010 voluntary dismissal. Accordingly, appellees maintained that appellant's refiled action was time-barred by the one-year statute of limitations.

{¶9} In response, appellant argued that a genuine issue of material fact exists as to when the statute of limitations began to run on his legal malpractice claim. Appellant maintained that the attorney-client relationship did not terminate, and thus the statute of limitations did not begin to run, until March 25, 2004, when appellees returned his $3,000 expense retainer. Accordingly, argued appellant, he did not invoke the savings statute when he refiled the complaint on December 5, 2003 following the December 10, 2002 dismissal, because the original statute of limitations did not expire until March 25, 2005.

Appellant claimed that he used the savings statute only once when he voluntarily dismissed the complaint on July 10, 2006 and then refiled it on June 13, 2007.

{¶10} Appellant further argued that, even if the attorney-client relationship terminated on January 19, 2000 and the statute of limitations expired on January 19, 2001, appellees were still not entitled to judgment as a matter of law because no Ohio court has held that the one refiling rule of R.C. 2305.19(A) applies when the action is first dismissed by stipulation of the parties pursuant to Civ.R. 41(A)(1)(b). Appellant further argued that the stipulation in the December 10, 2002 dismissal included an agreement permitting refiling, thereby tolling the statute of limitations. Appellant argued that, under either scenario, he did not utilize the savings statute to refile the action on December 5, 2003. According to appellant, he used the savings statute only once when he voluntarily dismissed the complaint on July 10, 2006 and refiled it on June 13, 2007.

{¶11} Finally, appellant argued that application of the one refiling rule in R.C. 2305.19 to circumstances where one of the dismissals is by stipulation conflicts with Civ.R. 41 and, as such, violates Section 5(B), Article IV, of the Ohio Constitution.

{¶12} On August 17, 2010, the trial court filed a decision and entry granting appellees' motion for summary judgment. The court implicitly rejected appellant's contention that the attorney-client relationship continued until appellees returned appellant's $3,000 expense retainer on March 25, 2004, concluding, instead, that appellant's filing of the malpractice action on January 19, 2000 terminated the attorney-client relationship between the parties. The trial court also concluded, relying on the Fifth District Court of Appeals' decision in *Frazier v. Fairfield Med. Ctr.*, 5th Dist. No. 08CA90, 2009-Ohio-4869, that the one refiling rule applicable to R.C. 2305.19 applies even when

an action is first dismissed by stipulation of the parties pursuant to Civ.R. 41(A)(1)(b). Accordingly, the trial court held that appellant's second attempted refiling of the complaint on June 13, 2007 was outside the time permitted by R.C. 2305.19, which was one year from the December 10, 2002 dismissal by stipulation; thus, appellant's malpractice action was barred by the statute of limitations.

{¶13} Appellant assigns four errors on appeal:

> [I.] THE TRIAL COURT COMMITTED PREJUDICIAL AND REVERSIBLE ERROR AS A MATTER OF LAW BY GRANTING SUMMARY JUDGMENT TO DEFENDANTS-APPELLEES WHEN IT HELD THAT THE ATTORNEY-CLIENT RELATIONSHIP NECESSARILY ENDS WHEN A CLIENT FILES A MALPRACTICE CLAIM AGAINST AN ATTORNEY INSTEAD OF HOLDING THAT THE RELATIONSHIP CAN CONTINUE UNDER THE FIDUCIARY ASPECT OF THAT RELATIONSHIP SO LONG AS THE ATTORNEY HOLDS A CLIENT'S MONEY IN TRUST WHICH IT HAS A FIDUCIARY OBLIGATION TO RETURN AND DOES NOT END UNTIL THAT OBLIGATION IS FULLFILLED [SIC].
>
> [II.] THE TRIAL COURT COMMITTED PREJUDICIAL AND REVERSIBLE ERROR AS A MATTER OF LAW BY GRANTING SUMMARY JUDGMENT TO DEFENDANTS-APPELLEES WHEN IT HELD THAT THERE DID NOT REMAIN A QUESTION OF FACT AS TO WHETHER THE ATTORNEY-CLIENT RELATIONSHIP WAS STILL IN EXISTENCE AT THE TIME OF THE FIRST RE-FILING OF THE ACTION BECAUSE DEFENDANTS-APPELLEES STILL HELD PLAINTIFF-APPELLANT'S MONEY IN TRUST, THUS REQUIRING THE INVOKING OF THE SAVINGS STATUTE (ORC § 2305.19) ONLY ONCE AND THAT WAS AT THE TIME OF THE SECOND RE-FILING BECAUSE THE ORIGINAL STATUTE OF LIMITATIONS WAS STILL IN EFFECT, AND INVOKED, AT THE TIME OF THE FIRST RE-FILING.
>
> [III.] THE TRIAL COURT COMMITTED PREJUDICIAL AND REVERSIBLE ERROR AS A MATTER OF LAW BY GRANTING SUMMARY JUDGMENT TO DEFENDANTS-APPELLEES WHEN IT HELD THAT THE ONE RE-FILING

> RULE UNDER THE OHIO SAVINGS STATUTE APPLIED WHEN AN ACTION WAS FIRST DISMISSED BY STIPULATION OF THE PARTIES UNDER OHIO CIVIL RULE 41(A)(1)(B) AND THEN DISMISSED A SECOND TIME BY A UNILATERAL NOTICE OF DISMISSAL UNDER OHIO CIVIL RULE 41(A)(1)(A) SINCE, AT NO TIMES RELEVANT TO THIS ACTION, WERE DEFENDANTS-APPELLANTS ENTITLED JUDGMENT AS A MATTER OF LAW UNDER CIVIL RULE 56.
>
> [IV.] THE TRIAL COURT COMMITTED PREJUDICIAL AND REVERSIBLE ERROR AS A MATTER OF LAW BY GRANTING SUMMARY JUDGMENT TO DEFENDANTS-APPELLEES WHEN IT FAILED TO ADDRESS AND THEN HOLD THAT LIMITING THE OHIO SAVINGS STATUTE TO ONE DISMISSAL WHEN THE FIRST DISMISSAL WAS PURSUANT TO A STIPULATION OF THE PARTIES UNDER OHIO CIVIL RULE 41(A)(1)(B) AND THEN THE SECOND DISMISSAL WAS MADE PURSUANT TO A UNILATERAL NOTICE OF DISMISSAL UNDER OHIO CIVIL RULE 41(A)(1)(A) WOULD BE AN UNCONSTITUTIONAL APPLICATION OF ORC §2305.19 UNDER ARTICLE IV, SECTION 5(B) OF THE OHIO CONSTITUTION AS BEING IN CONFLICT WITH OHIO CIVIL RULE 41.

{¶14} As appellant's four assignments of error challenge the trial court's decision granting summary judgment to appellees, we first set forth the familiar standard governing summary judgment.

{¶15} An appellate court reviews summary judgment under a de novo standard. *Coventry Twp. v. Ecker* (1995), 101 Ohio App.3d 38, 41; *Koos v. Cent. Ohio Cellular, Inc.* (1994), 94 Ohio App.3d 579, 588. Summary judgment is appropriate only when the moving party demonstrates: (1) no genuine issue of material fact exists, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds could come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence most

strongly construed in its favor. Civ.R. 56(C); *State ex rel. Grady v. State Emp. Relations Bd.*, 78 Ohio St.3d 181, 183, 1997-Ohio-221.

{¶16} Appellant's first and second assignments of error will be addressed together, as they present the same general argument. Appellant contends in these assignments of error that the trial court erred in concluding that the parties' attorney-client relationship terminated, and thus appellant's cause of action accrued, when appellant filed his legal malpractice action on January 19, 2000.

{¶17} An action for legal malpractice must be commenced within one year of the time the cause of action accrues. R.C. 2305.11(A). A claim for legal malpractice accrues and the statute of limitations begins to run when "there is a cognizable event whereby the client discovers or should have discovered that his injury was related to his attorney's act or non-act and the client is put on notice of a need to pursue his possible remedies against the attorney or when the attorney-client relationship for that particular transaction or undertaking terminates, whichever occurs later." *Zimmie v. Calfee, Halter & Griswold* (1989), 43 Ohio St.3d 54, syllabus, applying *Omni-Food & Fashion, Inc. v. Smith* (1988), 38 Ohio St.3d 385.

{¶18} "The determination of the date of accrual of a cause of action for legal malpractice is a question of law that is reviewed *de novo* on appeal." *Ruckman v. Zacks Law Group, LLC,* 10th Dist. No. 07AP-723, 2008-Ohio-1108, ¶17, citing *Whitaker v. Kear* (1997), 123 Ohio App.3d 413, 420. The determination of when the attorney-client relationship for a particular transaction terminates is a question of fact. *Omni-Food & Fashion* at 388. However, "[t]he question of when the attorney-client relationship was terminated may be taken away from the trier of fact * * * if 'affirmative actions that are

patently inconsistent with the continued attorney-client relationship' have been undertaken by either party." *Steindler v. Meyers, Lamanna & Roman,* 8th Dist. No. 86852, 2006-Ohio-4097, ¶11, citing *Downey v. Corrigan,* 9th Dist. No. 21785, 2004-Ohio-2510. See also *Trombley v. Calamunci, Joelson, Manore, Farah & Silvers, L.L.P.*, 6th Dist. No. L-04-1138, 2005-Ohio-2105, ¶43 ("Although determination of when the attorney-client relationship for a particular transaction terminates is generally a question of fact * * *, where the evidence is clear and unambiguous, so that reasonable minds can come to but one conclusion from it, the matter may be decided as a matter of law.").

{¶19} "Generally, the attorney-client relationship is consensual, subject to termination by acts of either party." *Columbus Credit Co. v. Evans* (1992), 82 Ohio App.3d 798, 804. "Conduct which dissolves the essential mutual confidence between attorney and client signals the end of the attorney-client relationship." *DiSabato v. Tyack & Assoc. Co., L.P.A.* (Sept. 14, 1999), 10th Dist. No. 98AP-1282, citing *Brown v. Johnstone* (1982), 5 Ohio App.3d 165, 166-67. "An explicit statement terminating the relationship is not necessary." *Triplett v. Benton,* 10th Dist. No. 03AP-342, 2003-Ohio-5583, ¶13, citing *Brown* at 166-67.

{¶20} Appellant contends that the parties' attorney-client relationship was comprised of two separate and distinct facets: (1) representation, which involved appellees' provision of legal advice and services, and (2) fiduciary duties, which included appellees' obligation to properly account for and return the $3,000 expense retainer. Appellant concedes that the representation aspect of the parties' relationship ended when he filed the malpractice action on January 19, 2000. Appellant argues, however, that the fiduciary aspect of the relationship continued beyond the end of the representation.

Specifically, appellant maintains that appellees did not fulfill the fiduciary aspect of the attorney-client relationship, and thus the attorney-client relationship was not terminated until March 25, 2004, when appellees returned the expense retainer.

{¶21} Appellant cites the affidavit testimony of his expert witness, attorney Edward W. Erfurt, III, and the affidavit testimony of appellees' witness, Keith Karr, as creating a genuine issue of material fact as to the proper termination date for the attorney-client relationship. Erfurt opined that the attorney-client relationship did not terminate until appellees fulfilled the fiduciary aspect of the relationship by returning the expense retainer on March 25, 2004. Karr averred that appellant's filing of the legal malpractice action conclusively terminated the parties' attorney-client relationship.

{¶22} We cannot find that the affidavit testimony provided by Erfurt creates a genuine issue of material fact with regard to the termination of the parties' attorney-client relationship. In *Omni-Food & Fashion,* the Supreme Court of Ohio rejected the argument that the statute of limitations should be tolled based on continued "general" representation and held that it should only be tolled with respect to acts of malpractice relating solely to particular undertakings or transactions. Id. at 387. Here, appellant's malpractice claim is completely unrelated to the delay in returning the expense retainer. Appellant's complaint alleges only that appellees were negligent in the management of the personal injury lawsuit. Appellant did not allege that appellees committed malpractice by failing to return the expense retainer until March 25, 2004.

{¶23} For similar reasons, appellant's reliance on *Montali v. Day,* 8th Dist. No. 80327, 2002-Ohio-2715, is misplaced. Appellant cites *Montali* for the proposition that the "attorney-client relationship continued as long as the Defendants-Appellees became

obligated to return the check that it held in trust for Boggs but failed to do so." Appellant's brief at 6. However, the basis for the malpractice claim in *Montali* was the attorney's failure to forward a check he received after the representation had terminated—not the mishandling of the representation. Here, appellant's malpractice claim is premised upon appellees' mishandling of the representation—not the failure to return the expense retainer.

{¶24} Appellant concedes that the representation in the personal injury action terminated, at the latest, when appellant filed the malpractice action on January 19, 2000. Karr averred in his affidavit and deposition testimony that appellant never sought, nor did appellees provide, any legal advice following the filing of the malpractice action.

{¶25} In *Brown*, the court held that a client's initiation of grievance proceedings before the local bar association "evidences a client's loss of confidence in his attorney such as to indicate a termination of the professional relationship." Id. at 167. The court noted that its conclusion was supported by the fact that the client had no further contact with the attorney after the client contacted the bar association. In *Erickson v. Misny* (May 9, 1996), 8th Dist. No. 69213, the plaintiff retained an attorney to represent him in a personal injury lawsuit. The plaintiff fired the attorney and retained new counsel. The original attorney performed no more work on plaintiff's behalf. The plaintiff later met with the original attorney in an effort to retrieve his files. The court rejected the plaintiff's contention that the attorney-client relationship continued until the attorney returned his file.

{¶26} As noted above, although the determination of when the attorney-client relationship for a particular transaction terminates is a question of fact, such question may

be removed from jury consideration and decided as a matter of law if reasonable minds can only conclude that the evidence establishes that one of the parties engages in conduct which "dissolves the essential mutual confidence between attorney and client." *DiSabato*. Upon our de novo review of the summary judgment in this case, we agree with the trial court that the parties' attorney-client relationship terminated, and appellant's cause of action accrued, when appellant filed the malpractice action on January 19, 2000. Certainly, a client's relationship with his or her former counsel has terminated and their mutual confidence has dissolved at the time the client files a malpractice action against the attorney. Appellant's conduct in filing the malpractice action was sufficient to signal the termination of the attorney-client relationship for statute of limitations purposes.

{¶27} Appellant's first and second assignments of error are overruled.

{¶28} Appellant's third assignment of error contends that the trial court erred in holding that a plaintiff may utilize the savings clause in R.C. 2305.19(A) only once even when the action is first dismissed by stipulation of the parties pursuant to Civ.R. 41(A)(1)(b).

{¶29} Former R.C. 2305.19(A) provides, in pertinent part, that "[i]n an action commenced or attempted to be commenced, if in due time * * * the plaintiff fails otherwise than upon the merits, and the time limited for the commencement of such action at the date of * * * failure has expired, the plaintiff * * * may commence a new action within one year after such date." Civ.R. 41(A)(1)(b) provides, as relevant here, that "a plaintiff, without order of court, may dismiss all claims asserted by that plaintiff against a defendant by * * * filing a stipulation of dismissal signed by all parties who have appeared in the action."

{¶30} In *Hancock v. Kroger Co.* (1995), 103 Ohio App.3d 266, 269, this court held that "a case may only be extended by virtue of R.C. 2305.19 for one year after the initially filed action fails otherwise than upon the merits." Id. at 269. Thus, the savings statute may be used only once to invoke an additional one-year time period in which to refile an action. Id; see also *Stover v. Wallace* (Feb. 15, 1996), 10th Dist. No. 95APE06-743, citing *Hancock*. In *Mihalcin v. Hocking College* (Mar. 20, 2000), 4th Dist. No. 99CA32, the court explained the statutory basis for the one refiling rule:

> A plaintiff must satisfy at least two elements to employ the savings statute: (1) commencement of an action *before* the statute of limitations has expired, and (2) failure otherwise than upon the merits *after* the statute of limitations has expired. * * * When a plaintiff has already utilized the savings statute once, it necessarily means that he has re-filed an action *after* the statute of limitations has expired. Thus, an attempt to use the savings statute a second time (*i.e.* to file a third complaint) is an attempt to re-file an action (*i.e.* the second complaint) that was *not* commenced before the statute of limitations expired. * * * The third complaint therefore fails to qualify for re-filing under R.C. 2305.19 because it constitutes an attempt to re-file an action that was *not* commenced before expiration of the statute of limitations. * * * Were the rule otherwise, a plaintiff could utilize the savings statute to keep a cause of action alive long past the time that the statute of limitations expired. * * * This would directly contradict the Ohio Supreme Court's pronouncement that R.C. 2305.19 is neither a tolling provision nor a statute of limitations unto itself.

(Emphasis sic.)

{¶31} Appellees assert that appellant's June 13, 2007 complaint was time-barred by the one-year statute of limitations applicable to legal malpractice actions because appellant had already availed himself of the one-time use of R.C. 2305.19 when he refiled the complaint on December 5, 2003 following the stipulated dismissal on December 10, 2002.

{¶32} In response, appellant advances essentially two arguments. Appellant first contends that the one refiling rule of R.C. 2305.19(A) does not apply when the first dismissal is by stipulation of the parties pursuant to Civ.R. 41(A)(1)(b). Appellant further argues that the stipulated dismissal included an agreement permitting refiling, thereby tolling the statute of limitations. Appellant argues that, under either scenario, he did not utilize the savings statute to refile the action on December 5, 2003. According to appellant, he used the savings statute only once when he voluntarily dismissed the complaint on July 10, 2006 and refiled it on June 13, 2007.

{¶33} To support his argument, appellant relies upon *Turner v. C. & F. Prods. Co., Inc.* (Sept. 28, 1995), 10th Dist. No. 95APE02-175. In *Turner*, the plaintiff filed a complaint in federal court. After the statute of limitations had expired, the district court dismissed the complaint, without prejudice, after determining that jurisdiction did not lie in the federal court. Plaintiff refiled the complaint in the common pleas court within one year of the federal court dismissal. The parties then executed a stipulation of dismissal. The plaintiff thereafter refiled the action in the common pleas court. Upon defendant's motion to dismiss, the trial court determined that the third complaint was time barred.

{¶34} On appeal, the plaintiff asserted that the third complaint was timely pursuant to either Civ.R. 41(A)(1)(b) or the savings statute. This court stated that "[n]either Civ.R. 41(A)(1)(a) nor (b) creates an immunity from the application [of] R.C. 2305.19," id., citing *Brookman v. Northern Trading Co.* (1972), 33 Ohio App.2d 250, and that "[n]either Civ.R. 41(A)(1)(a) nor (b) apply in the present case to bring appellant's third complaint within the statute of limitations." Id. We thus concluded that "[n]either R.C. 2305.19 nor Civ.R. 41(A)(1)(b) apply, and, based on those facts alone, appellant's action is time barred." Id.

We further noted, however, that the stipulation stated that it was "other than on the merits and without prejudice to the refiling of the same." Based upon the language in the stipulation, we determined that a factual dispute existed as to the applicability of the principle of equitable estoppel and remanded the matter to the trial court for further proceedings.

{¶35} Appellant also relies upon *Hutchinson v. Wenzke*, 131 Ohio App.3d 613. In *Hutchinson*, the plaintiffs voluntarily dismissed their original complaint, and then refiled a second complaint within one year of the dismissal of the first complaint. The second complaint was mutually dismissed by stipulation of all parties to the action. The stipulation provided that the second dismissal was "without prejudice to refiling and otherwise than upon the merits." Id. Upon the plaintiffs' filing of the third complaint, the trial court granted summary judgment to the defendants, finding that the plaintiffs were prevented from utilizing the savings clause in R.C. 2305.19 for a second time pursuant to this court's holding in *Hancock.*

{¶36} The Second District Court of Appeals reversed the trial court's grant of summary judgment, finding that the defendants were equitably estopped from invoking the statute of limitations. However, the crux of the appellate court's decision in *Hutchinson* was that defendants had specifically stipulated that the complaint was dismissed without prejudice and could be refiled.

{¶37} *Turner* dispenses with appellant's first argument, i.e., that the one refiling rule of R.C. 2305.19(A) does not apply when the first dismissal is by stipulation of the parties pursuant to Civ.R. 41(A)(1)(b). Indeed, we expressly stated that Civ.R. 41(A)(1)(b) does not create any immunity from the application of R.C. 2305.19.

{¶38} Regarding appellant's second contention—that the language of the stipulation permitting plaintiff to refile the complaint effectively tolled the statute of limitations—we note that the facts of the present case are distinguishable from those in both *Turner* and *Hutchinson.* In both cases, the second dismissal was by stipulation which expressly stated that the complaint was dismissed without prejudice and could be refiled. In the present case, the first dismissal was by stipulation, and the stipulation is not part of the record on summary judgment. Although appellant asserted in his amended complaint that the stipulation expressly stated that the complaint could be refiled, appellant neglected to attach a copy of the stipulation to his response to the motion for summary judgment. The non-moving party on summary judgment may not rest upon the mere allegations in the pleadings, but instead must point to or submit some evidentiary material that demonstrates a genuine dispute over a material fact. Civ.R. 56(E).

{¶39} Moreover, even if appellant had properly attached a copy of the stipulation to his response to appellees' motion for summary judgment, the stipulation does not act to toll the statute of limitations. To be sure, parties may, by agreement, toll the statute of limitations. However, the stipulation in the instant case does not constitute such an agreement. As noted above, appellees attached a copy of the stipulation to the motion to dismiss. The stipulation provides, in its entirety, as follows:

> STIPULATION OF DISMISSAL WITHOUT PREJUDICE
>
> Now comes Plaintiff and Defendants, James L. Baum and Karr & Sherman Co., L.P.A., by and through undersigned counsel, and hereby stipulate, pursuant to Rule 41(A)(1), Rules of Civil Procedure, to the dismissal of this action against said Defendants, without prejudice. The parties agree that: this dismissal is otherwise than upon the merits; the statute of limitations on Plaintiff's claims has already expired; the anticipated re-filing of the Complaint will be timely,

> pursuant to the Ohio Savings Statute, if said re-filing is accomplished within one year of the date this Stipulation of Dismissal is filed with the Court; and, Defendants waive service of process of any re-filed complaint and agree that service of the summons and complaint may be made upon W. Evan Price, II, counsel for said Defendants, pursuant to Rule 4(D), Ohio Rules of Civil Procedure.

{¶40} The stipulation provides only that appellant could refile his complaint within one year of the date of the first dismissal pursuant to the savings statute. At the time the stipulation was filed, the statute of limitations had expired and appellant was entitled to utilize the savings statute to file a second complaint. The stipulation afforded appellant no rights beyond those available to him under the savings statute. Furthermore, the language of the stipulation does not contemplate the filing of a third complaint.

{¶41} Finally, we reject appellant's contention that the trial court erred in relying upon the *Frazier* decision. Appellant contends that *Frazier* established a "new principle of law" that should not have been applied retroactively to the facts of the present case. Appellant's brief at 10.

{¶42} In *Frazier,* the plaintiff timely filed her complaint on March 18, 2004. The statute of limitations expired on May 7, 2004 while the action was pending. On March 24, 2005, the parties filed a Civ.R. 41(A)(1)(b) stipulation of dismissal which stated it "was without prejudice to re-filing within one year of the date of this Notice." The plaintiff refiled the action within the one-year savings statute on March 17, 2006. However, the plaintiff voluntarily dismissed the second action by notice pursuant to Civ.R. 41(A)(1)(a) on September 25, 2007. The plaintiff then refiled the action on September 12, 2008. The trial court granted summary judgment to the defendant on the third complaint because the

claim was barred by the statute of limitations and the plaintiff had already used the savings statute once.

{¶43} On appeal, the appellate court rejected the plaintiff's claim that because the first dismissal was by stipulation the savings statute could be used more than once. The court explained that any dismissal without prejudice "means the dismissal has no res judicata effect, but it does not toll the statute of limitations or otherwise extend the time for refilling [sic]." Id. at ¶29. Accordingly, the court affirmed summary judgment. The court essentially concluded that the fact that the first dismissal was by stipulation was a distinction without a difference since the plain language of the savings statute precluded it from applying to a third complaint. The *Frazier* decision did not announce a new principle of law. The court simply applied well-established reasoning based upon plain statutory language to a slightly different fact pattern. Accordingly, the trial court properly relied upon *Frazier.*

{¶44} *Frazier* is directly on point here. As in *Frazier, a*ppellant timely filed his original complaint. The statute of limitations expired while the action was pending. The parties dismissed the action by stipulation. He then refiled the action outside the statute of limitations, necessarily invoking the protection of the savings statute. He then dismissed the second action by voluntary dismissal and filed a third complaint attempting to utilize the savings statute a second time. However, appellant's second attempt to refile the action was outside the time permitted by the savings statute and the original statute of limitations had long since expired.

{¶45} We find that even construing the evidence most strongly in favor of appellant, reasonable minds could only conclude that appellant was unable to utilize the

savings statute to refile his complaint for the third time, and, accordingly, he failed to file his complaint within the applicable statute of limitations.

{¶46} The third assignment of error is overruled.

{¶47} Appellant's fourth assignment of error asserts the trial court erred in granting summary judgment without first addressing his constitutional argument that R.C. 2305.19(A), "as applied" to his case, conflicts with Civ.R. 41(A).

{¶48} Appellant correctly states that the trial court failed to address his constitutional argument. However, the trial court's oversight does not affect the disposition of this case, as the trial court did not "apply" R.C. 2305.19 as a rationale for granting summary judgment. Rather, the trial court determined that R.C. 2305.19 did not apply, rendering appellant's third complaint untimely. Accordingly, appellant incorrectly avers that the trial court's application of R.C. 2305.19 conflicts with Civ.R. 41(A), as the trial court did not apply the statute with which Civ.R. 41(A) purportedly conflicts. See *Mihalcon*.

{¶49} The fourth assignment of error is overruled.

{¶50} Having overruled appellant's four assignments of error, we hereby affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

FRENCH and KLATT, JJ., concur.

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