[Cite as *Cotterman v. Arnebeck*, 2012-Ohio-4302.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Rebecca Cotterman,	:	
Plaintiff-Appellant,	:	No. 11AP-687 (C.P.C. No. 10CV05-8148)
v.	:	(REGULAR CALENDAR)
Clifford Arnebeck et al.,	:	
Defendants-Appellees.	:	

D E C I S I O N

Rendered on September 20, 2012

Watson Law Group, LLP, *David C. Watson*, and *Titus G. Donnell*, for appellant.

Reminger Co., L.P.A., and *Matthew L. Schrader*, for appellee Clifford Arnebeck.

Mazanec, Raskin, & Ryder Co., L.P.A., and *Amy S. Thomas*, for appellee David Bressman.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, P.J.

{¶ 1} This is an appeal by plaintiff-appellant, Rebecca Cotterman, from a decision and entry of the Franklin County Court of Common Pleas, granting summary judgment in favor of defendants-appellees, Clifford Arnebeck, and David Bressman (collectively "appellees"), on appellant's legal malpractice action.

{¶ 2} In 1979, appellant began working for the Franklin County Board of Mental Retardation and Developmental Disabilities ("FCBDD"). As part of her duties, appellant

worked at a sheltered workshop known as ARC Industries South ("ARC"). FCBDD partnered with ARC, a non-profit corporation providing vocational training. The workshop included an area where picnic tables and benches were built.

{¶ 3} On September 7, 2004, appellee Bressman (individually "Bressman"), an attorney, filed a complaint on behalf of appellant in the Franklin County Court of Common Pleas, naming as defendants Quality Wood Treating Co. ("Quality Wood"), National Industrial Lumber Co. ("National Lumber"), and "Franklin County Board of Mental Retardation and Developmental Disabilities/Arc Industries South." (Complaint at ¶ 3.) The complaint alleged that the defendants had negligently exposed appellant to toxic chemicals in the treated lumber, causing her long-lasting side effects. On March 1, 2006, FCBDD filed a motion to dismiss the complaint. On May 16, 2006, Bressman filed a motion to withdraw as counsel for appellant, which the trial court subsequently granted. Appellant retained new counsel (Laren Knoll) to represent her in the pending 2004 lawsuit but appellant voluntarily dismissed the action, without prejudice, on June 26, 2006.

{¶ 4} Approximately one year later, appellant hired appellee Arnebeck (individually "Arnebeck"), an attorney, to refile the lawsuit. On June 25, 2007, appellant filed a complaint naming as defendants Quality Wood, National Lumber, and "Franklin County Board of Mental Retardation and Developmental Disabilities/Arc Industries South." (Complaint at ¶ 4.) In May of 2008, Bressman agreed to represent appellant on a limited basis in the 2007 refiled lawsuit. Appellant settled with Quality Wood and National Lumber but on May 16, 2008, the trial court filed an entry granting Bressman's motion to withdraw as counsel for appellant after an attempted settlement with FCBDD came to an impasse.

{¶ 5} On October 1, 2008, FCBDD filed a motion for judgment on the pleadings, alleging that appellant's sole remedy against FCBDD was under the Ohio Workers' Compensation Act. On November 26, 2008, Arnebeck, acting on behalf of appellant, filed a motion for leave to amend the complaint and substitute ARC for FCBDD. In the motion, appellant argued that paragraph three of the original complaint incorrectly described appellant as employed by Franklin County Board of Mental Retardation and Developmental Disabilities/Arc Industries South, and that ARC was a separately

incorporated not-for-profit Ohio corporation that partners with FCBDD. The motion further asserted that ARC had been incorrectly denominated as FCBDD in subsequent pleadings in the matter.

{¶ 6} On March 15, 2009, appellant personally sent an e-mail to FCBDD's counsel, with a discovery request directed to ARC. On April 13, 2009, Arnebeck filed a motion to withdraw as counsel for appellant, citing the fact that appellant had served discovery requests upon FCBDD and ARC without counsel's knowledge. On May 1, 2009, appellant filed a pro se response in support of her counsel's motion to withdraw. Appellant proceeded pro se with the 2007 refiled lawsuit, including filing (on April 14, 2009) a pro se motion "For Non-Party ARC Industries, Inc." to respond to discovery requests, and filing (on May 6, 2009) a motion in opposition to FCBDD's motion to stay discovery.

{¶ 7} By judgment entry filed June 2, 2009, the trial court denied appellant's motion for leave to amend the complaint and to substitute ARC as a defendant. The court noted that, while FCBDD was denominated as "Franklin County Board of Mental Retardation and Developmental Disabilities/Arc Industries South" in the complaints in both the original and current action, the record was devoid of any evidence suggesting that ARC had notice of either action until appellant began requesting discovery from it in April of 2009. The court determined that appellant, at the very least, knew of her injuries when the complaint was first filed in the previous action in September 2004. Accordingly, the court concluded, under the tw0-year statute of limitations governing actions for bodily injuries, appellant was obligated to bring her suit against ARC by September 2006, which she failed to do. The court granted FCBDD's motion for judgment on the pleadings, and dismissed the complaint.

{¶ 8} On May 28, 2010, appellant initiated the instant action by filing a complaint against appellees, alleging causes of action for negligence and legal malpractice. Appellant alleged that the 2004 complaint omitted ARC as a defendant because Bressman incorrectly identified FCBDD and ARC as a single entity. The complaint further alleged that, after hiring Arnebeck to refile the case in 2007, Arnebeck also failed to name ARC as a defendant. According to the allegations of the complaint, appellant "became aware of Mr. Bressman's and Mr. Arnebeck's legal malpractice when, due to Mr. Bressman's and

Mr. Arnebeck's breach of duty in acting as Ms. Cotterman's attorneys, Ms. Cotterman's case was dismissed." (Complaint at ¶ 26.)

{¶ 9} On May 10, 2011, Arnebeck filed a motion for summary judgment. On May 13, 2011, Bressman filed a motion for summary judgment. Appellant filed responses in opposition to both motions for summary judgment. On July 19, 2011, the trial court filed a decision and entry granting summary judgment in favor of appellees, finding that appellant's legal malpractice claims were barred by the applicable statute of limitations.

{¶ 10} On appeal, appellant sets forth the following assignment of error for this court's review:

> THE TRIAL COURT [COMMITTED] ERROR AS A MATTER OF LAW BY HOLDING PLAINTIFF/APPELLANT'S LEGAL MALPRACTICE CLAIM WAS TIME BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS.

{¶ 11} In his brief in response to appellant's assignment of error, Bressman raises the following three conditional cross-assignments of error:

> I. PLAINTIFF COTTERMAN'S FAILURE TO ESTABLISH HER UNDERLYING CLAIM AGAINST ARC INDUSTRIES, INC., AS REQUIRED BY *ENVIRONMENTAL NETWORK CORP. v. GOODMAN WEISS MILLER, L.L.P.*, 119 OHIO ST.3D 209, 2008-OHIO-3833, BARS HER CLAIM AGAINST ATTORNEY BRESSMAN AS A MATTER OF LAW.
>
> II. PLAINTIFF'S FAILURE TO PRESENT EXPERT TESTIMONY TO ESTABLISH THE ELEMENTS REQUIRED IN A LEGAL MALPRACTICE CASE BARS HER CLAIM AGAINST ATTORNEY BRESSMAN AS A MATTER OF LAW.
>
> III. PLAINTIFF'S VOLUNTARY DISMISSAL OF THE 2004 LAWSUIT BROKE THE CHAIN OF CAUSATION AND BARS HER CLAIM AGAINST ATTORNEY BRESSMAN AS A MATTER OF LAW.

{¶ 12} Under her single assignment of error, appellant asserts the trial court erred in holding that her legal malpractice action against appellees was barred under the applicable statute of limitations. While appellant contends that objectionable conduct occurred during the pendency of the lawsuit, she argues that a cognizable event did not occur until June 2, 2009, when the trial court denied her motion to add ARC as a party and the case was dismissed with prejudice.

{¶ 13} Pursuant to Civ.R. 56(C), summary judgment shall be rendered "if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Further, summary judgment shall not be rendered unless it appears from the evidence "that reasonable minds can 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 or stipulation construed most strongly in the party's favor." This court's review of a trial court's decision granting summary judgment is de novo. *Comer v. Risko*, 106 Ohio St.3d 185, 2005-Ohio-4559, ¶ 8. Similarly, "[t]he determination of the date a cause of action for legal malpractice accrues is a question of law reviewed de novo by an appellate court." *Cicchini v. Streza*, 160 Ohio App.3d 189, 2005-Ohio-1492, ¶ 17 (5th Dist), citing *Whitaker v. Kear*, 123 Ohio App.3d 413, 420 (4th Dist.1997).

{¶ 14} Under Ohio law, the statute of limitations for a legal malpractice action is one year. R.C. 2305.11(A). In *Zimmie v. Calfee, Halter & Griswold*, 43 Ohio St.3d 54, 58 (1989), the Supreme Court of Ohio held:

> [U]nder R.C. 2305.11(A), an action 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.

{¶ 15} Thus, the holding in *Zimmie* requires "two factual determinations: (1) When should the client have known that he or she may have an injury caused by his or her attorney? and (2) When did the attorney-client relationship terminate? The latter of these two dates is the date that starts the running of the statute of limitations." *Smith v. Conley*, 109 Ohio St.3d 141, 2006-Ohio-2035, ¶ 4.

{¶ 16} We first consider whether the trial court erred in determining that the attorney-client relationships at issue terminated more than one year before appellant commenced her legal malpractice action. With respect to the termination rule, "the

attorney-client relationship is consensual in nature and the actions of either party can affect its continuance." *Brown v. Johnstone*, 5 Ohio App.3d 165, 167 (9th Dist.1982). It has been held that "conduct which dissolves the essential mutual confidence between attorney and client signals the termination of the professional relationship." *Id.* at 166. Under Ohio law, "courts look for a discrete act (or acts) by either party that signals the severing of their relationship." *Woodrow v. Heintschel*, 194 Ohio App.3d 391, 2011-Ohio-1840, ¶ 43 (6th Dist.).

{¶ 17} Here, the record indicates that Bressman's involvement in the 2007 refiled action ended on May 16, 2008, when the trial court granted his motion to withdraw. Thus, the attorney-client relationship terminated over one year before appellant filed her legal malpractice claim on May 28, 2010.

{¶ 18} With respect to Arnebeck, the court found that the attorney-client relationship terminated when appellant "disallowed him from further court appearances." The record indicates that Arnebeck filed a motion to withdraw as counsel for appellant on April 13, 2009, citing the fact that appellant had served discovery requests upon FCBDD and ARC without counsel's knowledge. In her pro se "response in opposition to plaintiff's counsel's motion for a status conference and in support of plaintiff's counsel's motion to withdraw," filed on May 1, 2009, appellant represented she "does not wish Mr. Arnebeck to represent her in any manner whatsoever in this case," and that "Mr. Arnebeck has no authority from her to attend a status conference on her behalf, nor is he authorized to enter into a binding status conference order and/or begin negotiation toward settlement of the case." In that filing, appellant also requested that the court grant Arnebeck's motion to withdraw. On May 12, 2009, appellant sent an e-mail to Arnebeck in which she informed Arnebeck: "Your services are no longer needed in my case. You are hereby terminated as my legal counsel in the matter." The record therefore reflects that the attorney-client relationship between appellant and Arnebeck terminated, at the latest, by May 12, 2009, more than one year prior to the date appellant commenced her action (May 28, 2010).

{¶ 19} The dispositive issue on appeal, therefore, involves whether there is a later "cognizable event" whereby appellant discovered, or should have discovered, that her injury was related to appellees' alleged malpractice such that her legal malpractice action

against appellees is not time-barred. *Burzynski ex rel. Estate of Halevan v. Bradley & Ferris Co., L.P.A.*, 10th Dist. No. 01AP-782 (Dec. 31, 2001). A cognizable event is one "sufficient to alert a reasonable person that a questionable legal practice may have occurred." *Id*. Thus, "[t]he 'cognizable event' puts the plaintiff on notice to investigate the facts and circumstances relevant to his or her claim in order to pursue remedies." *Id*. For purposes of accrual of the statute of limitations, a "plaintiff's 'injury' is defined in terms of notice, * * * and the analysis is a factual one," with the focus on "what the plaintiff knew or should have known." *Id*.

{¶ 20} Appellant argued before the trial court that the cognizable event was June 2, 2009, when the trial court in the 2007 refiled action denied appellant's motion for leave to amend the complaint and granted FCBDD's motion for judgment on the pleadings. In its decision granting summary judgment in favor of appellees, the trial court found that appellant's action for legal malpractice accrued, and the statute of limitations began to run, when appellant discovered ARC was not a party. The trial court determined that this occurred, at the latest, in March and April of 2009, when appellant, acing pro se, served a discovery request for ARC on FCBDD, and counsel for FCBDD wrote to appellant informing or reminding her that ARC was not a party. The court noted that appellant, armed with that information, inquired of Arnebeck as to whether FCBDD and ARC had been served separately; Arnebeck responded that they were treated as one. The trial court further found that appellant's understanding of the shortcomings was memorialized in her pro se brief filed on April 14, 2009, the title of which reflected her understanding that ARC was not a party. The court also cited appellant's pro se filing of May 6, 2009, as evincing not only appellant's awareness that ARC was not a party, but also "the seriousness of the problem." In that document, appellant repeated earlier arguments by Arnebeck explaining that the error in identifying the proper defendants prevented appellant from obtaining a recovery. The trial court determined that, "[i]n reading and re-typing counsel's explanation, a reasonable person would be put on notice of the problem and its significance." Thus, the trial court concluded that appellant's action for legal malpractice was time-barred. Upon review, we agree with the trial court's determination.

{¶ 21} As noted under the facts, on March 15, 2009, appellant personally sent an e-mail to FCBDD's counsel with a discovery request directed to ARC. On March 17, 2009, counsel for FCBDD responded directly to appellant, advising her "that the Court has not ruled on Plaintiff's Motion for Leave to Amend Complaint," and that "ARC Industries is not a party to this case." On April 6, 2009, appellant e-mailed Arnebeck, inquiring about ARC's status, including whether Arnebeck served each entity separately. On April 8, 2009, Arnebeck responded, advising appellant that ARC was not named in either the 2004 or 2007 lawsuits. On April 13, 2009, Arnebeck filed a motion to withdraw as appellant's counsel, and appellant proceeded to act pro se with respect to the 2007 action.

{¶ 22} As found by the trial court, appellant's knowledge is further reflected in her subsequent pro se filings with the court. Specifically, on April 14, 2009, appellant filed a pro se motion requesting "non-party, ARC Industries * * * to respond to plaintiff's first set of interrogatories, request for production of documents and requests for admissions." In that motion, appellant represented that she "did not realize that a non-party in this action should be served the First Set Of Interrogatories, Request For Production Of Documents And Requests For Admissions To Defendant by subpoena." In appellant's motion in opposition to FCBDD's motion to stay the time for discovery, filed on May 6, 2009, appellant argued that her earlier filed motion for leave to amend the complaint and substitute ARC for FCBDD was "currently pending before the Court and the parties in the case are not included or excluded to date."

{¶ 23} Appellant argues it was irrelevant whether she acquired knowledge that ARC was not a party prior to June 2, 2009 because, she maintains, the objectionable conduct had yet to cause her harm (i.e., until the court ruled on the motion and dismissed the case). Appellant's position is not supported by applicable case law.

{¶ 24} Appellant relies upon the Supreme Court of Ohio's decision in *Conley* involving a legal malpractice action arising out of an attorney's representation of a criminal defendant. In *Conley*, the court held that the client should have discovered alleged errors of trial counsel, at the latest, at the time of his conviction. We note, however, that the "sole issue" before the court in *Conley* was "whether the termination of the attorney-client relationship * * * is dependent upon the filing of a motion to withdraw pursuant to a local rule of court." *Id.* at ¶ 1. Further, we do not construe *Conley* as

holding that a cognizable event is dependent upon a judicial determination. Rather, the court in that case cited *Zimmie* for the proposition that "an action 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 his need to pursue his possible remedies." *Id.* at ¶ 4, citing *Zimmie* at syllabus.

{¶ 25} This court has noted that "[t]he Ohio Supreme Court has never held that a party must be aware or suffer the full extent of his or her injury before there is a cognizable event which triggers the running of the statute of limitations in an action for legal malpractice." *Gatchell v. Lawyers Title Ins. Corp.*, 10th Dist. No. 98AP-1487 (Sept. 7, 1999). Further, the Supreme Court, in analyzing the "cognizable event" test, has rejected the notion that "legal injury" is an appropriate standard. *See Hershberger v. Akron City Hosp.*, 34 Ohio St.3d 1, 5 (1987) ("to utilize 'legal injury' might effectuate a complete undermining of the discovery rule since anyone could allege ignorance of his legal rights"). Rather, it is "the knowledge, actual or inferable, of *facts*, not legal theories, which initiates the running of the one-year statute of limitations." (Emphasis sic.) *Id.*

{¶ 26} This court, in considering the issue of when a cognizable event occurs, has held that " '[t]he focus should be on what the client was aware of and not an extrinsic judicial determination.' " *Asente v. Gargano*, 10th Dist. No. 04AP-278, 2004-Ohio-5069, ¶ 14, quoting *McDade v. Spencer*, 75 Ohio App.3d 639, 643 (10th Dist.1991). *See also Bowman v. Tyack*, 10th Dist. No. 08AP-815, 2009-Ohio-1331, ¶ 13 (rejecting appellant's argument that cognizable event was trial court's grant of motion for relief from judgment; rather, cognizable event that triggered accrual of appellant's cause of action was hearing in which appellant learned that he had a large child support arrearage that might have been caused by his counsel's failure to act in accordance with professional obligations).

{¶ 27} Other Ohio appellate courts have held similarly. *See, e.g., Barna v. Joseph*, 8th Dist. No. 56806 (June 22, 1989) (rejecting appellant's "time of actual injury" argument, in which appellant asserted that her cause of action only accrued at the time her injury was realized in a court judgment); *Sesto v. Perduk*, 9th Dist. No. 23797, 2008-Ohio-664, ¶ 14 (rejecting the Sestos' argument that their claim did not accrue until their tort suit was dismissed); *Lintner v. Nuckols*, 12th Dist. No. CA2003-10-020, 2004-Ohio-

3348, ¶ 17 (rejecting appellants' argument that statute of limitations on legal malpractice claim did not begin to run until they were "appreciably and actually damaged" when trial court determined they had no coverage under insurance policies; rather, cognizable event occurred when appellants learned that counsel failed to pursue uninsured motorist claim).

{¶ 28} In the present case, we agree with the trial court that the cognizable event triggering the accrual of appellant's cause of action for legal malpractice was the pro se discovery correspondence in which appellant was informed that ARC had not been made a party to the underlying tort action. That correspondence, in which appellant became aware that ARC should have been named to the lawsuit, as well as her subsequent pro se filings reflecting her understanding of the significance of the failure to name ARC, should have put a reasonable person on notice to investigate whether questionable legal practices may have occurred. As determined by the trial court, appellant's knowledge occurred as early as March or April of 2009, and the statute of limitations began to run, at the latest, by May 6, 2009 (at the time of appellant's pro se request for the trial court to stay discovery because of "error" in failing to properly name ARC as a party). Based upon this court's de novo review, we agree with the trial court that appellant filed her complaint more than one year after her claims against appellees for legal malpractice accrued and, therefore, the trial court did not err in granting summary judgment in favor of appellees.

{¶ 29} Accordingly, appellant's single assignment of error is without merit and is overruled. In light of our disposition of appellant's assignment of error, Bressman's conditional cross-assignments of error are rendered moot.

{¶ 30} Based upon the foregoing, appellant's single assignment of error is overruled, Bressman's three conditional cross-assignments of error are rendered moot, and the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

BRYANT and CONNOR, JJ., concur.
