[Cite as *Smith v. Barclay*, 2012-Ohio-5086.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Glenn A. Smith,	:	
Plaintiff-Appellant,	:	
		No. 11AP-798
v.	:	(C.P.C. No. 09CV-15396)
Craig Barclay et al.,	:	(ACCELERATED CALENDAR)
Defendants-Appellees.	:	

N U N C P R O T U N C
D E C I S I O N[1]

Rendered on November 20, 2012

Amer Cunningham Co., L.P.A., Jack Morrison, Jr., Thomas R. Houlihan, and *Vicki L. DeSantis*, for appellant.

Reese, Pyle, Drake & Meyer, P.L.L., and *Christopher R. Meyer*, for appellees Craig D. Barclay and Craig D. Barclay L.L.C. and Craig D. Barclay d.b.a. Alton & Barclay, L.P.A.

John C. Nemeth & Associates, David A. Herd and *John C. Nemeth*, for appellees David Shroyer and Colley, Shroyer & Abraham Co., L.P.A.

APPEAL from the Franklin County Court of Common Pleas

KLINE, J.

{¶1} Glenn A. Smith (hereinafter "Smith") appeals the judgment of the Franklin County Court of Common Pleas. The trial court found that Smith filed his legal-malpractice claim after the statute of limitations had expired. As a result, the trial court granted summary judgment in favor of the Appellees.

[1] This decision replaces, nunc pro tunc, the original decision released on November 1, 2012, and is effective as of that date. This decision deletes several editorial changes not approved by the authoring judge.

{¶2} On appeal, Smith contends that the trial court erred in choosing September 10, 2008, as the accrual date for his legal-malpractice claim. We disagree. After conducting a de novo review, we also choose September 10, 2008, as the accrual date. And because Smith filed his legal-malpractice claim on October 14, 2009 -- i.e., more than one year after the accrual date -- the Appellees are entitled to summary judgment. Accordingly, we affirm the judgment of the trial court.

I.

{¶3} Smith believes that he suffered medical malpractice at the hands of Dr. Darrell Gill (hereinafter "Dr. Gill"). *See Smith v. Gill*, 8th Dist. No. 93985, 2010-Ohio-4012. As a result, Smith met with attorney David Shroyer (hereinafter "Shroyer") about pursuing a medical-malpractice claim. Shroyer then referred Smith to attorney Craig Barclay (hereinafter "Barclay").

{¶4} Smith and Barclay entered into a contingent fee agreement. The agreement states the following: "CLIENT has requested CRAIG D. BARCLAY to investigate whether or not there is reasonable cause to believe that the CLIENT has a meritorious medical malpractice/wrongful death claim." Under the agreement, Shroyer was to serve as "co-counsel" and share in the potential legal fees.

{¶5} In *Smith v. Gill*, the Eighth Appellate District discussed the facts of Smith's medical-malpractice case.

> On July 17, 2006, [Smith] was transported to Doctors Hospital of Nelsonville ("Doctors") complaining of chest pains he believed to be a heart attack. He requested and was eventually transferred to Riverside Methodist Hospital ("Riverside") in Columbus, Ohio, on July 18, 2006.
>
> On July 6, 2007, [Smith] sent letters to Dr. Gill, Doctors, and National Emergency Services ("NES") via certified mail notifying them that he intended to pursue a medical malpractice claim as a result of the treatment he received at Doctors. These letters, sent pursuant to R.C. 2305.113, were intended to extend the statute of limitations for filing his claim by 180 days ("180-day letter"). The letter sent to Doctors specifically named Dr. Gill and was signed for by J. Blair on July 9, 2007. The letter sent to NES, which is a medical staffing company with which Dr. Gill is an independent contractor, was signed for by M.A. Mitchell on July 9, 2007, but did not name Dr. Gill in any manner. The

> letter sent to Dr. Gill's personal address was not signed for until July 21, 2007. *Smith v. Gill*, 2010-Ohio-4012, at ¶ 2-3.

{¶6} Barclay was responsible for the 180-day letters to Dr. Gill, Doctors Hospital of Nelsonville, and National Emergency Services.

{¶7} In a letter dated November 7, 2007, Barclay ended his representation of Smith. Barclay wrote the following:

> I cannot recommend the filing of a lawsuit, nor can I represent you should you decide to do so. Therefore, Dave Shroyer and I will not be taking any more active role in your potential case.
>
> * * *
>
> As you know, we took steps to extend the statute of limitations by sending out statutorily provided letters of notice to the potentially negligent providers, thereby extending your statute of limitations by 180 days. That **statute of limitations will now expire if a lawsuit is not filed on or before January 5, 2008 or your rights will be forever barred**. Please keep this deadline utmost in mind as you promptly determine whether or not to seek further opinions. (Emphasis sic.)

{¶8} In December 2007, Smith hired Amer Cunningham Co., L.P.A., to pursue the medical-malpractice claim against Dr. Gill. Then,

> [o]n January 4, 2008, [Smith] filed a complaint in the common pleas court for medical malpractice and named as defendants Dr. Gill, Doctors, and Riverside. Dr. Gill filed his answer on March 10, 2008[,] asserting as a defense that appellant failed to file his claim within the one-year statute of limitations for medical malpractice claims. * * *
>
> On September 10, 2008, Dr. Gill filed a motion for summary judgment claiming that he never received the 180-day letter that was sent to his home, and therefore the statute of limitations was not extended. Dr. Gill relied on this to argue that [Smith] failed to file his complaint within the one-year statute of limitations, and thus the suit should be dismissed as it pertained to Dr. Gill. This motion was accompanied by Dr. Gill's affidavit, which merely reiterated that he never received a 180-day letter at his home and that the only 180-day letter he saw was the one sent to NES that was shown to him by his attorney.

> [Smith] filed a brief in opposition to Dr. Gill's motion for summary judgment, wherein he provided proof that Dr. Gill had signed for the 180-day letter on July 21, 2007. [Smith] relied on this evidence, the 180-day letters sent to NES and Doctors, and a letter from the vice president of Western Litigation, Inc.[,] to argue that Dr. Gill had notice of the lawsuit and that the statute of limitations had been extended. The letter from Western Litigation was dated July 17, 2007[,] and informed [Smith's] counsel that NES had received the 180-day letter addressed to it and that Western Litigation had "been retained to investigate [Smith's] claim by the professional liability insurer for Darrell Gill, D.O."
>
> Dr. Gill responded to [Smith's] brief in opposition by redacting the two paragraphs in his affidavit that indicated that he never received a 180-day letter. Dr. Gill's reply brief then argued that the fact that he signed for a 180-day letter on July 21, 2007 is irrelevant because the statute of limitations had already expired. The trial court denied Dr. Gill's motion for summary judgment stating that it had no evidence of when the statute of limitations began to run on [Smith's] claim and thus the cause of action could not be disposed of by a summary judgment motion.
>
> [Smith] was deposed on March 25, 2009. During his deposition, [Smith] admitted that he threatened to sue Dr. Gill before being transferred to Riverside. [Smith] specifically stated, "when I left I told Dr. Gill that I was going to pursue a claim of medical negligence against him, yes." Based on this testimony, Dr. Gill filed a motion for reconsideration of the trial court's ruling on his previous summary judgment motion. In his motion, Dr. Gill argued that because of [Smith's] admission, the statute of limitations began to run on July 18, 2006, and thus the statute of limitations had already expired when Dr. Gill received the 180-day letter on July 21, 2007.
>
> The trial court entered summary judgment in Dr. Gill's favor, finding: 1) the statute of limitations began to run on July 17, 2006; 2) Dr. Gill did not receive the 180-day letter until July 21, 2007; and 3) the 180-day letters received by Doctors and NES were insufficient to impart notice upon Dr. Gill, and thus the statute of limitations had not been extended. *Smith v. Gill*, 2010-Ohio-4012, at ¶ 4-9.

{¶9} Eventually, the Eighth Appellate District affirmed the trial court's decision in favor of Dr. Gill. As the court found,

> The material facts show that Dr. Gill did not receive the 180-day letter sent to his personal address until after the statute of limitations had already expired. The letter sent to Doctors was insufficient to extend the statute of limitations because the letter was signed for by a third party and there is no evidence that Dr. Gill actually received it. The letter sent to NES was insufficient to extend the statute of limitations because it did not name Dr. Gill as a potential defendant, and thus it did not comply with R.C. 2305.113(B)(1). As such, no genuine issue of material fact existed, appellant did not file his medical malpractice action within the statute of limitations, and the trial court properly granted summary judgment in favor of Dr. Gill. *Id*. at ¶ 20.

{¶10} On October 14, 2009, Smith filed the present case against Barclay, Shroyer, and various other defendants. Smith alleged that the "Defendants failed to properly extend the statute of limitations in this matter for the underlying medical malpractice case." Complaint at ¶ 13.

{¶11} On June 22, 2011, Barclay filed a motion for summary judgment. Barclay argued that Smith filed his legal-malpractice claim after the statute of limitations had expired. According to Barclay, Dr. Gill's September 10, 2008 motion for summary judgment triggered the statute of limitations for Smith's legal-malpractice claim.

{¶12} Shroyer also filed for summary judgment on June 22, 2011. Essentially, Shroyer claimed that he did not have an attorney-client relationship with Smith. In the alternative, Shroyer argued that Smith's legal-malpractice claim was barred by the statute of limitations.

{¶13} In opposing summary judgment, Smith argued that "the accrual date for the statute of limitations should be August 21, 2009, the date of the trial court decision" in the medical-malpractice case. Brief in Opposition to Summary Judgment at 8. As to Shroyer, Smith claimed that he "served discovery in paper and electronic form, including Requests for Admission, upon David Shroyer and Colley Shroyer & Abraham Co., LPA on April 15, 2011, and filed a Notice of Service of these items on April 22, 2011." *Id*. at 13. Because Shroyer did not respond to the requests for admission, Smith argued that the requests were deemed admitted under Civ.R. 36(A).

{¶14} Claiming that he never received Smith's requests for admission, Shroyer filed a Motion for Leave and Extension to Respond to Plaintiff's Discovery.

{¶15} On August 18, 2011, the trial court granted summary judgment in favor of the defendants. The trial court found the following:

> [T]he statute of limitations began to run [on September 10, 2008, when Dr. Gill filed his] motion for summary judgment. Neither the procedural maneuvering that followed, nor the Court's decision on that motion, erases or overrides the information conveyed therein. As of that time, a reasonable person would have had reason to know that a questionable legal practice may have occurred. In fact, the motion accomplished just that. Upon receipt of the motion, Plaintiff's counsel, Amer Cunningham, began looking into when prior counsel, now the current defendants, sent out the 180 day letters. The motion was the cognizable event that came after the attorney-client relationship ended. * * * The Court need not address whether there was an attorney-client relationship with Defendant Shroyer because if there was, the statute has passed for bringing suit against him.

The trial court also granted Shroyer's Motion for Leave and Extension to Respond to Plaintiff's Discovery. However, because the trial court granted summary judgment in favor of the defendants, actually responding to the requests for admission became a moot issue.

{¶16} Smith appeals and asserts the following assignments of error: I. "The Common Pleas Court erred in granting summary judgment to the Appellees." And II. "The Common Pleas Court erred in relieving David Shroyer and Colley Shroyer & Abraham Co., LPA of their admissions."

II.

{¶17} In his first assignment of error, Smith contends that the trial court erred in granting summary judgment in favor of the Appellees.

A. The Standard for Summary Judgment

{¶18} "Because this case was decided upon summary judgment, we review this matter de novo, governed by the standard set forth in Civ.R. 56." *Comer v. Risko*, 106 Ohio St.3d 185, 2005-Ohio-4559, 833 N.E.2d 712, ¶ 8. Summary judgment is appropriate only when the following have been established: (1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to only one conclusion, and that conclusion is adverse to the nonmoving party. Civ.R. 56(C). *Accord Bostic v. Connor*, 37 Ohio St.3d 144, 146, 524

N.E.2d 881 (1988); *Capella III, L.L.C. v. Wilcox*, 190 Ohio App.3d 133, 2010-Ohio-4746, 940 N.E.2d 1026, ¶ 16 (10th Dist.). In ruling on a motion for summary judgment, the court must construe the record and all inferences therefrom in the opposing party's favor. *Doe v. First United Methodist Church*, 68 Ohio St.3d 531, 535, 629 N.E.2d 402 (1994).

{¶19} The burden of showing that no genuine issue of material fact exists falls upon the party who moves for summary judgment. *Dresher v. Burt*, 75 Ohio St.3d 280, 294, 662 N.E.2d 264 (1996). However, once the movant supports his or her motion with appropriate evidentiary materials, the nonmoving party "may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in [Civ.R. 56], must set forth specific facts showing that there is a genuine issue for trial." Civ.R. 56(E). *Accord Reywal Co. Ltd. Partnership v. Dublin*, 188 Ohio App.3d 1, 2010-Ohio-3013, 933 N.E.2d 1164, ¶ 9 (10th Dist.).

{¶20} "In reviewing whether an entry of summary judgment is appropriate, an appellate court must independently review the record and the inferences that can be drawn from it to determine whether the opposing party can possibly prevail." *American Mut. Share Ins. Corp. v. CUMIS Ins. Soc., Inc.*, 10th Dist. No. 08AP-576, 2009-Ohio-364, ¶ 14. "Accordingly, we afford no deference to the trial court's decision in answering that legal question." *Morehead v. Conley*, 75 Ohio App.3d 409, 412, 599 N.E.2d 786 (4th Dist.1991). *Accord American Mut. Share Ins. Corp.* at ¶ 14.

B. The Accrual Date for Smith's Legal-Malpractice Claim:

Dr. Gill's September 10, 2008 Motion for Summary Judgment

{¶21} On appeal, Smith argues that the trial court erred in choosing September 10, 2008, as the accrual date for Smith's legal-malpractice claim.

{¶22} "Section 2305.11(A) of the Ohio Revised Code provides that a legal malpractice claim must be commenced within one year following the date upon which the cause of action accrued." *Bowman v. Tyack*, 10th Dist. No. 08AP-815, 2009-Ohio-1331, ¶ 9. "The determination of when a cause of action of malpractice accrues is a question of law to be reviewed *de novo* by this court." *DiSabato v. Thomas M. Tyack & Assoc. Co., L.P.A.*, 10th Dist. No. 98AP-1282, 1999 WL 715901, *2 (Sept. 14, 1999); *accord Bowman* at ¶ 10.

> Under 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. *Zimmie v. Calfee, Halter & Griswold*, 43 Ohio St.3d 54, 538 N.E.2d 398 (1989), syllabus.

Accordingly, a court must make "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, 846 N.E.2d 509, ¶ 4.

{¶23} Here, the parties agree that the attorney-client relationship between Smith and Barclay ended in November 2007. Therefore, because the attorney-client relationship ended more than one year before Smith filed his legal-malpractice claim, we must focus on the cognizable-event prong of the *Zimmie* test. In other words, we must answer the following question: When should Smith have known that he may have had an injury caused by his attorney? We believe the answer to that question is September 10, 2008, the date on which Dr. Gill filed his initial motion for summary judgment.

{¶24} According to Smith, "the accrual date for the statute of limitations should be August 21, 2009, the date of the trial court decision, because that was the first date that Smith knew of the need to pursue remedies against Appellees." Appellant's Brief at 6. Essentially, Smith argues that the cognizable event occurred when the trial court granted summary judgment in favor of Dr. Gill.

{¶25} Smith's argument, however, ignores clear Tenth District precedent. As this court has held, "The focus of the inquiry should be on the point of discovery, that is, awareness, that the client discovered or should have discovered that he has been injured by the attorney's act or omission. *The focus should be on what the client was aware of and not an extrinsic judicial determination*." (Emphasis sic.) *DiSabato*, 1999 WL 715901, at *6, quoting *McDade v. Spencer*, 75 Ohio App.3d 639, 642-643, 600 N.E.2d 371 (10th Dist.1991). *See also Burzynski ex rel. Estate of Halevan v. Bradley & Farris Co., L.P.A.*, 10th Dist. No. 01AP-782, 2001 WL 1662042, *4-6 (Dec. 31, 2001). Therefore, Smith's "cause of action accrue[d] not when actual damages occur[ed] as a result of some

judicial determination, but when he knew or should have known of his counsel's alleged failure." *DiSabato* at *6.

{¶26} Here, Smith should have been aware of his counsel's alleged failure when Dr. Gill filed the September 10, 2008 motion for summary judgment. *See DiSabato* at *4; *McDade* at 642-643. This motion describes the exact nature of Barclay's questionable legal practice. Indeed, the conduct described in Dr. Gill's September 10, 2008 summary-judgment motion is the basis for Smith's complaint in the present case. Accordingly, this motion should have made Smith aware that a "'questionable legal practice may have occurred' and [that Smith] might need to pursue remedies against his attorney." *Werts v. Penn*, 164 Ohio App.3d 505, 2005-Ohio-6532, 842 N.E.2d 1102, ¶ 11 (2d Dist.), quoting *Deutsch v. Keating, Muething & Klekamp, L.L.P.*, 2d Dist. No. 20121, 2005-Ohio-206, ¶ 17. Moreover, an "injured party need not be aware of the full extent of his or her injuries before the 'cognizable event' triggers the statute of limitations." *Fisk v. Rauser & Assoc. Legal Clinic Co., L.L.C.*, 10th Dist. No. 10AP-427, 2011-Ohio-5465, ¶ 23, citing *Zimmie*, 43 Ohio St.3d at 58, 538 N.E.2d 398. *See also Griggs v. Bookwalter*, 2d Dist. No. 21220, 2006-Ohio-5392, ¶ 20. On the contrary, "'[k]nowledge of a *potential* problem starts the statute to run, even when one does not know all the details.'" (Emphasis added.) *Id.*, quoting *Halliwell v. Bruner*, 8th Dist. No. 76933, 2000 WL 1867398, *6 (Dec. 14, 2000). Therefore, it was not necessary for Smith to know, with certainty, that Barclay had committed a questionable legal practice. Rather, Smith's knowledge of *potential* legal malpractice was enough to trigger the statute of limitations. And here, Dr. Gill's September 10, 2008 motion for summary judgment provided Smith with the knowledge of potential malpractice -- regardless of whether a questionable legal practice had been definitively established.

C. Smith's Arguments

{¶27} Initially, we find no merit in Smith's argument that a cognizable event must be a judicial determination. The Tenth Appellate District has consistently rejected this argument. *See, e.g., DiSabato* at *6. Furthermore, Smith appealed the trial court's decision in his medical-malpractice case. *See Smith v. Gill*, 2010-Ohio-4012. Therefore, under Smith's argument, which judicial determination would constitute the cognizable event? Would it be the trial court's August 21, 2009 judgment or the appellate court's August 26, 2010 judgment? The Second Appellate District addressed this issue in

Jackson v. Greger, 2d Dist. No. 23571, 2010-Ohio-3242. As that court noted, "Another problem with requiring judicial decisions to be the 'cognizable event' is that the statute of limitations could be almost indefinitely extended, since parties could claim lack of injury until after they had exhausted the last possible resort for appeal. The Supreme Court of Ohio rejected this idea in *Zimmie*[.]" *Id*. at ¶ 25. We agree with the *Jackson* court's reasoning, and we reject the notion that a cognizable event must be either (1) a judicial determination or (2) a showing of actual injury.

{¶28} We also reject Smith's ripeness-and-standing arguments. Despite this court's clear precedent, Smith makes the following argument on appeal: "Any rule which allows the statute to accrue prior to the trial court's decision on the merits of the defense would have compelled Smith to file suit against Barclay without knowing whether he won our lost in the trial court. But a suit against Barclay would have been barred by ripeness and standing doctrines." Appellant's Brief at 7. We disagree. The Supreme Court of Ohio has held that a plaintiff may file a legal malpractice suit even though the underlying litigation is still pending. *See Zimmie* at 58-59. This court has reached a similar conclusion. *See McDade*, 75 Ohio App.3d at 642-643, 600 N.E.2d 371; *DiSabato*, 1999 WL 715901, at *5-6; *Bowman*, 2009-Ohio-1331, at ¶¶ 5, 10-13. In following *Zimmie*, the Second Appellate District noted the following:

> [I]f Jackson had initiated a legal malpractice action against Greger within one year after the City of Kettering asserted the collateral estoppel defense, the malpractice action could have been stayed until such time as the federal courts rendered a final judgment on the matter. A judgment in Jackson's favor would have eliminated a potential legal malpractice claim against Greger, and there would have been no harm in staying the malpractice action until the federal court case was resolved. *Jackson* at ¶ 33.

We apply the reasoning of *Zimmie* and *Jackson* to the present case. Here, the ripeness-and-standing doctrines would not have prevented Smith from filing a legal-malpractice case against the Appellees. Rather, Smith could have filed his legal-malpractice case and requested a stay pending the outcome of his case against Dr. Gill.

{¶29} Finally, we reject the argument that Barclay's acts of concealment tolled the statute of limitations. Regardless of Barclay's actions, Smith became aware of the potential problem when Dr. Gill initially filed for summary judgment. Therefore, Barclay

did not prevent Smith from learning about the potential legal-malpractice claim. *See Frees v. ITT Technical School*, 2d Dist. No. 23777, 2010-Ohio-5281, ¶ 34 ("'To invoke the doctrine of fraudulent concealment as a ground for equitable tolling, an appellant must show * * * that appellant failed to discover the facts giving rise to the claim despite the exercise of due diligence.'"), quoting *Sharp v. Ohio Civil Rights Comm.*, 7th Dist. No. 04 MA 116, 2005-Ohio-1119, ¶ 10.

D. Conclusion

{¶30} For the foregoing reasons, we find that September 10, 2008, is the accrual date for Smith's legal-malpractice claim. And because Smith filed the present case more than one year after the accrual date, his legal-malpractice claim is barred by the statute of limitations. We also find the following: (1) there are no genuine issues of material fact; (2) the Appellees are entitled to judgment as a matter of law; and (3) reasonable minds can come to just one conclusion, and that conclusion is adverse to Smith. Accordingly, we overrule Smith's first assignment of error.

III.

{¶31} Because his legal-malpractice claim is barred by the statute of limitations, we find that Smith's second assignment of error is moot. Regardless of whether the trial court erred in relation to Shroyer's Motion for Leave and Extension to Respond to Plaintiff's Discovery, Smith filed his complaint more than one year after the accrual date. Therefore, Shroyer's default admissions are irrelevant, and we need not address Smith's second assignment of error. *See* App.R. 12(A)(1)(c).

{¶32} Accordingly, having overruled Smith's relevant assignment of error, we affirm the judgment of the trial court.

Judgment affirmed.

HARSHA and McFARLAND, JJ., concur.

KLINE, HARSHA, and McFARLAND, JJ., of the Fourth Appellate District, sitting by assignment in the Tenth Appellate District.