[Cite as *Duvall v. Manning*, 2011-Ohio-2587.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

MICHAEL ALAN DUVALL, et al.,	:	**O P I N I O N**
Plaintiffs-Appellants,	:	**CASE NO. 2010-L-069**
- vs -	:	
FRANCIS MANNING, et al.,	:	5/27/11
Defendants-Appellees.	:	

Civil Appeal from the Court of Common Pleas, Case No. 09 CV 003451.

Judgment: Affirmed.

F. Harrison Green, F. Harrison Green Co., L.P.A., 230 Executive Park, 4015 Executive Park Drive, Cincinnati, OH 45241 (For Plaintiffs-Appellants).

Theresa A. Richthammer and *Jeffrey D. Stupp*, Gallagher, Sharp, Fulton & Norman, Sixth Floor, Bulkley Building, 1501 Euclid Avenue, Cleveland, OH 44115-2108 (For Defendants-Appellees).

TIMOTHY P. CANNON, P.J.

{¶1} Appellants, Michael Alan DuVall and Jerry J. Devis, appeal the summary judgment of the Lake County Court of Common Pleas in favor of appellees, Francis Manning and Manning & Manning Co., L.P.A., on appellants' claim for legal malpractice against appellees. At issue is whether appellants' malpractice claim was time-barred. For the reasons that follow, we affirm.

{¶2} The statement of facts that follows is based on the parties' affidavits and evidentiary materials, no depositions having been submitted on summary judgment. In his affidavit, Manning stated that on May 9, 2005, DuVall retained him as successor counsel to represent DuVall and Devis in a civil action pending in the Cuyahoga County Court of Common Pleas. That action had been filed on appellants' behalf by their previous counsel. The action involved a claim by appellants against their condominium association and certain individuals alleging they were liable for damage sustained by appellants' respective units.

{¶3} Manning stated that during his representation of appellants, DuVall made all client decisions on behalf of DuVall and Devis. Manning sent all invoices only to DuVall, and he alone paid for all Manning's legal services. In fact, Manning never met Devis. Based on the foregoing, Manning stated in his affidavit that for purposes of the Cuyahoga County litigation, DuVall was Devis' agent.

{¶4} Manning stated that DuVall is a retired attorney; was actively involved in the Cuyahoga County litigation; and essentially acted as co-counsel with Manning. DuVall insisted on having sole authority over retaining and working with experts. He hired several experts on his own to testify in the case. DuVall also exercised sole authority over all discovery proceedings.

{¶5} According to Manning's affidavit, during Manning's representation of appellants, DuVall spent almost every day working on the case. In the initial stages of Manning's representation, DuVall worked on the case for several months at appellees' offices. Later, DuVall rented his own office space near appellees' offices where he worked on the case and where his voluminous case files were stored.

{¶6} Manning stated that on January 5, 2007, he filed a Civ.R. 41(A) voluntary dismissal of the Cuyahoga County action at DuVall's direction because he believed the experts were not adequately prepared for trial. In contrast, in his affidavit, DuVall suggested the action was voluntarily dismissed due to his health issues. In any event, it is undisputed that one year later, on January 4, 2008, Manning timely refiled the action in Cuyahoga County.

{¶7} Meanwhile, appellants retained another firm, Matre, Matre & Beyke Co., L.P.A., to represent them in the Cuyahoga County action. That firm filed a notice of appearance in the Cuyahoga County Court of Common Pleas on September 29, 2008. On October 2, 2008, Manning attended a pretrial in that action with counsel from the Matre firm.

{¶8} Then, on October 4, 2008, DuVall sent a letter to Manning in which he stated:

{¶9} "Since January, [2008,] I have brought to your attention errors, omissions, and a failure to deliver legal services that I have paid for and requested that you credit my account for the same. For nine months you have ignored my requests. I again request you to review your legal service record and credit my account for the errors, omissions, and a failure to deliver legal services for which you have already been paid."

{¶10} In response, on October 10, 2008, Manning sent a letter to DuVall in which he stated:

{¶11} "Your claim of errors, omissions and failures of legal services not only catches me by surprise but leads me to the conclusion our relationship must end. I am at a loss to what errors, omissions and failures you are referring to as no such short

comings [sic] have been raised by you in any of our recent lengthy meetings. As an attorney, I only have my reputation to offer and use to earn the trust of my clients. Experience has taught me that letters such as yours are the clearest evidence that I have lost your trust. As such I am terminating this relationship effective immediately."

{¶12} DuVall did not respond to Manning's letter. Subsequently, on October 15, 2008, Manning filed a motion to withdraw as counsel for DuVall and Devis in the Cuyahoga County court with respect to the action pending there. In his motion, Manning cited as grounds "the fact Counsel and Plaintiffs have reached an impasse on how to proceed with [the Cuyahoga County] action ***." Manning stated in his affidavit that on October 15, 2008, he served DuVall and Devis and their new counsel with copies of that motion. The Cuyahoga County Court of Common Pleas granted Manning's motion to withdraw on October 28, 2008.

{¶13} In his affidavit filed in opposition to summary judgment, DuVall denied being Devis' agent, but he did not dispute any of the factual allegations in Manning's affidavit from which Manning concluded that DuVall was Devis' agent. It is therefore undisputed that DuVall made decisions on behalf of both himself and Devis and that DuVall alone paid all invoices Manning submitted. Further, DuVall did not dispute that he played an active role in the underlying litigation and that he essentially acted as co-counsel with Manning. Moreover, DuVall admitted that during Manning's representation of appellants, he, DuVall, "worked closely with Manning in gathering the facts and coordinating with the experts."

{¶14} DuVall admitted that he retained the Matre firm and that on October 2, 2008, that firm entered an appearance on appellants' behalf in the Cuyahoga County litigation.

{¶15} DuVall admitted that he received Manning's October 10, 2008 termination letter, but said it "shocked" him because he never lost trust in Manning. DuVall stated that he hired additional counsel merely to "assist" Manning and that his October 4, 2008 letter was only meant to obtain "a corrected invoice." DuVall also admitted having received a copy of Manning's October 15, 2008 motion to withdraw.

{¶16} Devis did not file an affidavit below in support of appellants' opposition to summary judgment. He therefore did not dispute that Manning served him with appellees' motion to withdraw on October 15, 2008. It is therefore undisputed that Devis was served with Manning's motion to withdraw on October 15, 2008.

{¶17} Then, more than one year later, on October 21, 2009, appellants filed a complaint against appellees claiming legal malpractice. Appellants alleged appellees were negligent in that, before filing the notice of dismissal of the Cuyahoga County action in January 2007, they failed to amend the complaint, as appellants had requested, to assert additional claims and name additional defendants. They alleged these claims were therefore not preserved under the savings statute. They further alleged that when appellees refiled the action on January 4, 2008, they failed to assert the additional claims and to sue the additional parties as appellants had requested.

{¶18} In due course, appellees filed an answer to appellants' malpractice complaint. They also filed a motion for summary judgment, arguing that appellants' claim was barred by the one year statute of limitations provided for at R.C. 2305.11(A).

In opposition, appellants argued the date on which the attorney-client relationship ended was a question of fact for the jury to determine. The trial court found that the attorney-client relationship between appellees and DuVall was terminated on October 10, 2008, the date of Manning's letter to him, and that the attorney-client relationship between appellees and Devis was terminated on October 15, 2008, the date Manning filed his motion to withdraw. The trial court found that since appellants filed their legal malpractice claim on October 21, 2009, more than one year after the attorney-client relationship between the parties ended, appellants' claim was time-barred.

{¶19} Appellants appeal the trial court's summary judgment, asserting the following for their sole assignment of error:

{¶20} "The trial court erred when it granted summary judgment since DuVall and Devis's [sic] complaint for legal malpractice was filed within the applicable statute of limitations."

{¶21} Appellate courts review a trial court's grant of summary judgment de novo. *Alden v. Kovar*, 11th Dist. Nos. 2007-T-0114 and 2007-T-0115, 2008-Ohio-4302, at ¶34; *Brown v. Scioto Cty. Commrs.* (1993), 87 Ohio App.3d 704, 711. "'[W]e review the judgment independently and without deference to the trial court's determination.'" Id., citing *Brown*. An appellate court must evaluate the record "in a light most favorable to the nonmoving party." *Link v. Leadworks Corp*. (1992), 79 Ohio App.3d 735, 741. Furthermore, a motion for summary judgment must be overruled if reasonable minds could find for the party opposing the motion. Id.

{¶22} In order for summary judgment to be granted, the moving party must prove that "(1) no genuine issue as to any material fact remains to be litigated, (2) the

moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made." *Mootispaw v. Eckstein* (1996), 76 Ohio St.3d 383, 385.

{¶23} "*** [T]he moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim. The 'portions of the record' to which we refer are those evidentiary materials listed in Civ.R. 56(C), such as the pleadings, depositions, answers to interrogatories, etc., that have been filed in the case. ***" (Emphasis omitted.) *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 296.

{¶24} If the moving party satisfies its burden, then the nonmoving party has the burden to provide evidence demonstrating a genuine issue of material fact. If the nonmoving party does not satisfy this burden, then summary judgment is appropriate. Civ.R. 56(E).

{¶25} With respect to a claim for legal malpractice, "R.C. 2305.11(A) provides that a party must bring [such claim] within one year after the cause of action accrued." *Biddle v. Maguire & Schneider, LLP*, 11th Dist. No. 2003-T-0041, 2003-Ohio-7200, at ¶17. In interpreting this statute, the Supreme Court of Ohio has held:

{¶26} "'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 *** *or* when the attorney-client relationship for that particular transaction or undertaking terminates, *whichever occurs later*.' (Emphasis added.) *Zimmie v. Calfee, Halter & Griswold* (1989), 43 Ohio St.3d 54, syllabus; citing *Omni Food Fashion, Inc. v. Smith* (1988), 38 Ohio St.3d 385. *Zimmie* and *Omni-Food* require 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*. *Zimmie*, syllabus; *Omni-Food*, paragraph one of the syllabus." (Emphasis added.) *Smith v. Conley*, 109 Ohio St.3d 141, 2006-Ohio-2035, at ¶4.

{¶27} This court has held that "[a]n attorney-client relationship can terminate upon the affirmative act of either party, including a letter specifically indicating that representation has terminated." *Savage v. Kucharski*, 11th Dist. No. 2005-L-141, 2006-Ohio-5165, at ¶23; *Trickett v. Krugliak, Wilkins, Griffiths & Dougherty Co., L.P.A*., 11th Dist. No. 2000-P-0105, 2001-Ohio-3927, 2001 Ohio App. LEXIS 4806, *7. The issue of when the attorney-client relationship is terminated is a question of fact. *Trickett*, supra, citing *Omni-Food*, supra, at 388. For a trial court to grant summary judgment on the grounds that an act of either party has terminated the attorney-client relationship, the "act must be clear and unambiguous, so that reasonable minds can come to but one conclusion from it." *Mastran v. Marks* (Mar. 28, 1990), 9th Dist. No. 14270, 1990 Ohio App. LEXIS 1219, *9, jurisdictional motion overruled by the Supreme Court of Ohio at (1990), 54 Ohio St.3d 715.

{¶28} As a preliminary matter, we note that on appeal, appellants abandoned an argument they advanced in the trial court. Appellants argued below that no cognizable

event had as yet occurred because the Cuyahoga County action was still pending. As a result, they argued that their legal malpractice claim had not yet accrued and the statute of limitations had not yet started to run. However, on appeal, appellants abandon this argument, and instead simply contend that an issue of fact remains concerning when the parties' attorney-client relationship was terminated. In doing so, they concede that the cognizable event giving rise to their malpractice claim occurred prior to the termination of the parties' relationship, and that the statute of limitations began to run on the date the parties' relationship terminated. We fail to see how it could be otherwise since it would have been apparent to appellants when the complaint was refiled in the Cuyahoga County action on January 4, 2008, that it did not include the additional claims and parties appellants had allegedly asked appellees to include. Therefore, the only issue before us is whether a genuine issue of material fact exists with respect to the date on which the parties' attorney-client relationship terminated.

{¶29} Turning now to appellants' assignment of error, first, they suggest Manning's October 10, 2008 letter was ineffective to terminate the attorney-client relationship because it was based on the incorrect assumption that appellants had lost confidence in appellees. However, "the termination of the attorney-client relationship depends, not on a subjective loss of confidence on the part of the client, but on conduct, an affirmative act by either the attorney or the client that signals the end of the relationship." (Emphasis omitted.) *Mastran*, supra. Thus, whether appellants had in fact lost confidence in appellees is irrelevant. Rather, it is the affirmative act of either party that determines whether an attorney-client relationship has been terminated. Id.

In this case, Manning's October 10, 2008 letter signaled the termination of the relationship with DuVall. *Savage*, supra.

{¶30} Next, appellants argue the stated ground for appellees' October 15, 2008 motion to withdraw, i.e., that the parties had reached an impasse, is inconsistent with Manning's October 10, 2008 letter terminating the attorney-client relationship because the language in the motion suggests that Manning did not believe he had terminated the relationship. He argues this created an issue of fact concerning when the attorney-client relationship was terminated. We do not agree.

{¶31} Based on our review of the documents, Manning's motion to withdraw and his earlier letter to DuVall are not internally inconsistent. The reason stated in the motion to withdraw was general in nature and did not disclose the communications between the parties that led to Manning's decision to terminate the parties' relationship, as fully set forth in his October 10, 2008 letter. This, however, does not imply that Manning had become equivocal about his decision to terminate the parties' relationship. It merely reflects his decision to protect the confidence of his former clients.

{¶32} Alternatively, appellants argue that the statute of limitations did not begin to run until October 28, 2008, the date on which the Cuyahoga County Court of Common Pleas granted appellees' motion to withdraw. Consequently, appellants argue the trial court erred when it found that the statute of limitations began to run on October 10, 2008, as to DuVall, and on October 15, 2008, as to Devis. Again, we do not agree. The Supreme Court of Ohio in *Conley*, supra, held:

{¶33} "The determination [of the date of termination of an attorney-client relationship] is not dependent on local rules of court. Attorneys are required to follow

local rules and must file the appropriate motion with a court to withdraw from representation, but the date of termination of the attorney-client relationship for purposes of R.C. 2305.11 is determined by the actions of the parties." Id. at ¶12.

{¶34} Here, appellants concede that appellees were required by the local rules of the Cuyahoga County Court of Common Pleas to file their motion to withdraw. Therefore, based on the foregoing authority, the date on which the attorney-client relationship terminated is determined by the conduct of the parties. As a result, the date on which appellees' motion to withdraw was filed or granted is irrelevant to the analysis.

{¶35} Appellants' reliance on *Batteiger v. Deutsch*, 2d Dist. No. 021933, 2008-Ohio-1582, for the proposition that the attorney-client relationship continues until the attorney's motion to withdraw is granted, is misplaced. In *Deutsch*, the client retained the attorney to represent him in a wrongful death action involving the death of his child. The attorney represented the client in his individual capacity and as administrator of his child's estate in probate court. The attorney subsequently filed a motion to withdraw in the common pleas court. After the court granted his motion in 2000, the attorney continued providing legal services to the client in the wrongful death action, including the filing of pleadings on the client's behalf, and also continued to represent the client in the probate proceedings. When the client filed a legal malpractice claim against the attorney in 2004, the attorney argued the attorney-client relationship ended in 1999, when he filed his motion to withdraw in the common pleas court. The Second District in *Deutsch* disagreed, holding that, based on the attorney's continued representation of the client for more than two years *after* the common pleas court granted his motion to withdraw in 2000, the attorney-client relationship continued until the attorney was

allowed to withdraw as counsel by the probate court in 2003. Id. at ¶69-70. We note that in *Deutsch*, the Second District based its holding on *Conley*, supra, in which the Supreme Court of Ohio held that the date of termination of the attorney-client relationship is determined by the actions of the parties, not local court rules regarding withdrawal of counsel. *Deutsch*, supra.

{¶36} We note that DuVall did *not* state in his affidavit that appellees provided any specific legal services for appellants after Manning's letter of October 10, 2008. In any event, the interpretation of *Deutsch* urged by appellants, i.e., that the statute of limitations begins to run only when the court grants an attorney's motion to withdraw, directly conflicts with the holding of the Supreme Court of Ohio in *Conley*, supra.

{¶37} Appellees submitted sufficient evidentiary material establishing entitlement to judgment in appellees' favor. This shifted the burden to appellants as per *Dresher*, supra, to establish a genuine issue of material fact with respect to the date the relationship terminated. Appellants did not meet this reciprocal burden. Appellants do not deny Manning's sworn statement concerning delivery of the termination documentation.

{¶38} In view of the foregoing analysis, we agree with the trial court's finding that Manning's letter and appellees' motion to withdraw were clear and unambiguous affirmative acts from which reasonable minds could come to but one conclusion, i.e., that Manning terminated the attorney-client relationship with DuVall on October 10, 2008, and with Devis on October 15, 2008. We therefore agree that there was no genuine issue of material fact regarding the date on which the relationship ended. We further agree that appellants' legal malpractice claim was filed more than one year after

the termination of the attorney-client relationship with both appellants and was, therefore, time-barred. We thus hold the trial court did not err in granting summary judgment in favor of appellees on appellants' legal malpractice claim.

{¶39} For the reasons stated in the opinion of this court, appellants' assignment of error is overruled. It is the judgment and order of this court that the judgment of the Lake County Court of Common Pleas is affirmed.

DIANE V. GRENDELL, J.,

CYNTHIA WESTCOTT RICE, J.,

concur.