[Cite as *Wilkerson v. O'Shea*, 2009-Ohio-6550.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

CHUN CHA WILKERSON,	:	
Plaintiff-Appellant,	:	CASE NO. CA2009-03-068
	:	O P I N I O N
- vs -		12/14/2009
	:	
JOHN L. O'SHEA, et al.,	:	
Defendants-Appellees.	:	

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CV2008-09-4048

Thomas G. Eagle, 3386 N. State Route 123, Lebanon, Ohio 45036, for plaintiff-appellant

White, Getgey & Meyer Co., L.P.A., Carl J. Stich, Jr., 1700 Fourth & Vine Tower, One West Fourth Street, Cincinnati, Ohio 45202-3621, for defendants-appellees, John L. O'Shea, Angela M. Hughes, and Cohen, Todd, Kite & Stanford, LLC

RINGLAND, J.

{¶1} Plaintiff-appellant, Chun Cha Wilkerson, appeals a decision dismissing her breach of contract and unjust enrichment claims against defendants-appellees, attorneys John L. O'Shea and Angela M. Hughes, and their law firm, Cohen, Todd, Kite & Stanford, LLC.[1]

{¶2} In 2005, Wilkerson hired O'Shea and Hughes to represent her in two

1. Pursuant to Loc.R. 6(A), we sua sponte remove this case from the accelerated calendar and place it on

cases in Butler County and another case in Hamilton County. Wilkerson paid attorney fees to O'Shea and Hughes from February to October of 2005. In November 2005, Wilkerson discharged O'Shea and Hughes, and hired new counsel.

{¶3} In 2008, Wilkerson filed a complaint against O'Shea, Hughes, and Cohen, Todd, Kite & Stanford (hereinafter "appellees") alleging that appellees had breached their contract with her and had been unjustly enriched by overcharging her for legal services. Appellees moved for summary judgment on the ground that Wilkerson's claims sounded in legal malpractice, and since she failed to file a malpractice claim within the one-year statute of limitations for filing such claims in R.C. 2305.11(A), she was barred from doing so. The trial court agreed and dismissed Wilkerson's complaint.

{¶4} Wilkerson now appeals, assigning the following as error:

{¶5} Assignment of Error No. 1:

{¶6} "THE COURT ERRED IN APPLYING THE 1 YEAR STATUTE OF LIMITATIONS FOR MALPRACTICE RATHER THAN THE 6 YEAR STATUTE OF LIMITATIONS FOR ORAL CONTRACT AND/OR THE 6 YEAR STATUTE OF LIMITATIONS FOR UNJUST ENRICHMENT OR 4 YEAR STATUTE OF LIMITATIONS FOR BREACH OF FIDUCIARY DUTY."

{¶7} Assignment of Error No. 2:

{¶8} "THE TRIAL COURT ERRED IN NOT ALLOWING THE REMEDY OF UNJUST ENRICHMENT TO APPLY TO A LAWYER'S RETENTION OF A UNUSED RETAINER OF $7500 AND $25,851.62 OF MONIES PAID TO PLAINTIFF/APPELLANT BY ANOTHER PARTY."

{¶9} Wilkerson's first and second assignments of error raise similar issues, and therefore we will address them together.

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the regular calendar for purposes of issuing this opinion.

{¶10} Wilkerson argues the trial court erred by applying the one-year statute of limitations for malpractice claims to this case rather than the six-year statute of limitations for oral contracts and unjust enrichment or the four-year statute of limitations for breach of fiduciary duty. We disagree.

{¶11} An appellate court reviews a trial court's decision to grant summary judgment on a de novo basis, *Grafton v. Ohio Edison Co.,* 77 Ohio St.3d 102, 105, 1996-Ohio-336, meaning the appellate court uses the same standard the trial court should have used in ruling on the summary judgment motion. *Reese v. Barbiere,* Clermont App. No. CA2002-09-079, 2003-Ohio-5110, ¶8. A trial court may award summary judgment only when (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, which must be viewed in a light most favorable to the nonmoving party, that reasonable minds can come to but one conclusion, and that conclusion is adverse to the nonmoving party. *Welco Industries, Inc. v. Applied Cos.*, 67 Ohio St.3d 344, 346, 1993-Ohio-191.

{¶12} "The crucial consideration in determining the applicable statute of limitations in a given action is the actual nature or subject matter of the cause, rather than the form in which the complaint is styled or pleaded. *Hunter* [*v. Shenango Furnace Co.* (1988)], 38 Ohio St.3d [235] at 237 ***. A party cannot transform one cause of action into another through clever pleading or an alternate theory of law in order to avail itself of a more satisfactory statute of limitations. *Love v. Port Clinton* (1988), 37 Ohio St.3d 98, 100 ***." *Callaway v. Nu-Cor Automotive Corp.*, 166 Ohio App.3d 56, 2006-Ohio-1343, ¶14. See, also, *Radio Parts Co. v. Invacare Corp.*, 178 Ohio App.3d 198, 2008-Ohio-4777, ¶17.

{¶13} "[M]alpractice consists of 'the professional misconduct of members of the

medical profession and attorneys.' Such professional misconduct may consist either of negligence or of breach of the contract of employment[.]" *Muir v. Hadler Real Estate Mgmt. Co.* (1982), 4 Ohio App.3d 89, 90, quoting *Richardson v. Doe* (1964), 176 Ohio St. 370, 372. Legal malpractice includes such things as billing errors, *Byrd v. Peden* (Sept. 28, 1999), Franklin No. 99AP-111, p. 2, or overcharging a client for legal services. *Rosenberg v. Atkins* (Oct. 5, 1994), Hamilton App. No. C-930259, p. 2.

{¶14} "[A]n action for malpractice must be commenced within one year after the cause of action accrued[.]" R.C. 2305.11(A). *Rosenberg*. If it is not, and if the defendant in the action timely raises this defense "by proper plea," the "lapse of time shall be a bar to the action." R.C. 2305.03(A).

{¶15} "[A]n 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 nonact 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.

{¶16} In *Rosenberg*, Hamilton App. No. C-930259 at 2, the appellant brought a complaint alleging that her attorneys had overcharged her for litigation expenses not attributable to her claims and failed to provide her with a satisfactory accounting of all litigation expenses, court costs and settlement proceeds. The trial court granted summary judgment against appellant after finding that her claims sounded in legal malpractice and were therefore barred by the one-year statute of limitations in R.C. 2305.11(A). The court of appeals upheld the trial court's decision, stating:

{¶17} "Each of appellant's claims arose out of the manner in which appellant was

represented within the attorney-client relationship. Clearly, appellant's claims sound in legal malpractice in spite of appellant's attempts to label them otherwise. Appellant sought recovery for damages allegedly caused by legal malpractice. Therefore, appellant's claims are subject to the one-year statute of limitations set forth in R.C. 2305.11(A)." *Rosenberg*, Hamilton App. No. C-930259 at 2.

{¶18} In this case, Wilkerson alleged in her complaint that appellees overcharged her for their legal services and failed to provide an adequate accounting of the fees they charged. Wilkerson's claims sound in legal malpractice in spite of her attempt to label them otherwise, and therefore her claims are subject to the one-year statute of limitations in R.C. 2305.11(A). Id. Because Wilkerson did not bring her malpractice claim within one year of the termination of the parties' attorney-client relationship, and because Wilkerson has never alleged she was not aware by the termination date that her alleged injury was related to appellees' conduct in representing her, the trial court properly found Wilkerson's claims to be barred by the one-year statute of limitations for legal malpractice claims set forth in R.C. 2305.11(A).

{¶19} Wilkerson argues her complaint "sounds in contract," and therefore the trial court should have applied the six-year statute of limitations for oral contract in R.C. 2305.07, rather than the one-year statute of limitations for malpractice claims in R.C. 2305.11(A). In support, she cites *Douglas v. Corry* (1889), 46 Ohio St. 349, paragraphs one, two and three of the syllabus, wherein the court found a six-year statute of limitations period applicable to an action in which a client sued his attorney for money collected and not paid over to a client.

{¶20} However, Wilkerson's reliance on *Douglas* is misplaced, as the predecessor statute to R.C. 2305.11(A), i.e., Section 4983 of the Revised Statutes, was not enacted until 1894, which was five years *after Douglas* was decided. See

Richardson v. Doe (1964), 176 Ohio St. 370, 372. Consequently, the *Douglas* court did not have an opportunity to address the issue before us in this case, namely, the appropriateness of applying the one-year statute of limitations now contained in R.C. 2305.11(A).

{¶21} Wilkerson next argues her complaint "sounded *** in unjust enrichment[,]" and therefore a six-year statute of limitations period should have been applied, as found in cases like *Drozeck v. Lawyers Title Ins. Corp.* (2000), 140 Ohio App.3d 816, 823. She further argues the statute of limitations for malpractice "is a limit on a legal action," while her claim for unjust enrichment is an "equitable action" that "is independent of legal actions."

{¶22} However, as stated earlier, Wilkerson "cannot transform one cause of action into another through clever pleading or an alternate theory of law in order to avail [her]self of a more satisfactory statute of limitations." *Callaway*, 2006-Ohio-1343, at ¶14, citing *Love*, 37 Ohio St.3d 98, 100. Moreover, allowing parties to avail themselves of an unjust enrichment claim where they have failed to file a timely malpractice claim would eviscerate the General Assembly's purpose in enacting R.C. 2305.11(A), which was discussed in *Richardson*, 176 Ohio St. at 372, as follows:

{¶23} "It is the misfortune of both physicians and lawyers that, in a very considerable proportion of their cases, they are unable to accomplish the purpose desired. The general public often fails to realize that circumstances over which these persons have no control may make it impossible for them to accomplish what they set out to do. ***.

{¶24} "***

{¶25} "Because of the possibility of unwarranted and fraudulent claims which would be difficult to disprove, the General Assembly in 1894 amended the one-year

statute of limitations, Section 4983, Revised Statutes (Section 2305.11, Revised Code), to include actions for malpractice."

{¶26} Wilkerson also argues the facts of this case "sufficed to show an escrow arrangement" between her and appellees, and therefore, under *Saad v. Rodriguez* (1986), 30 Ohio App.3d 156, any cause of action she had for damages proximately caused by appellees' breach of their duties as her de facto "escrow agent" should be governed by the 15-year statute of limitations period in R.C. 2305.06. However, *Saad* is readily distinguishable from this case.

{¶27} In *Saad*, the appellant hired an attorney to assist her in purchasing a parcel of real property. The attorney drafted a purchase agreement for the sale that contained a provision naming his law firm as "escrow agent" and delineating the firm's responsibilities in that capacity, which included purchasing title insurance and placing it in escrow. Id. at 157. However, the title insurance was never purchased and thus never placed in escrow, and this oversight eventually resulted in potential liability for appellant. As a result, the appellant sued her attorney and his law firm. The trial court granted summary judgment in favor of the attorney and his law firm on the ground that all work performed by them was legal work, and therefore, any misconduct would constitute legal malpractice for which the one-year statute of limitations had already expired. Id. at 158.

{¶28} The court of appeals reversed in part the trial court's decision after finding that the attorney and his law firm "occupied a dual capacity" in their relationship with the appellant since part of the work performed by them constituted "legal work" and thus was governed by the one-year statute of limitations for malpractice actions contained in R.C. 2305.11(A), but another part of their work constituted "escrow services" and thus was governed by the 15-year statute of limitations for written contracts contained in R.C. 2305.06. The court of appeals remanded the case for a determination as to whether the

alleged misconduct of the attorney and his law firm was performed in their capacity as attorneys, in which case appellant's action would be barred as untimely, or as escrow agent, in which case it would not. Id. at 159.

{¶29} In this case, Wilkerson and appellees did not have a separate escrow agreement, as did the parties in *Saad*, and appellees did not occupy a dual capacity in their relationship with Wilkerson. Cf., id. at 158. Instead, as the trial court noted, the transaction between the parties was typical of those that arise in attorney-client relationships in which litigation is involved, where the attorney receives funds to be distributed to the client. Moreover, unlike the situation in *Saad*, appellees' duties ran exclusively to Wilkerson and arose solely out of their attorney-client relationship. Cf., id. at 158-159. Thus, the trial court did not err by finding the one-year statute of limitations for malpractice claims applicable to this case.

{¶30} Finally, Wilkerson contends that her claims should have been viewed as a claim of breach of fiduciary duty, to which a four-year statute of limitations should apply. However, as with Wilkerson's unjust enrichment and breach of contract claims, Wilkerson's claims clearly sound in legal malpractice, and therefore the one-year statute of limitations applies, and Wilkerson cannot be permitted to "'transform one cause of action into another through clever pleading or an alternate theory of law in order to avail [herself] of a more satisfactory statute of limitations.'" *Callaway*, 2006-Ohio-1343 at ¶14, quoting *Love*, 37 Ohio St.3d at 100. As one court has stated:

{¶31} "Malpractice by any other name still constitutes malpractice. *** It makes no difference whether the professional misconduct is founded in tort or contract, it still constitutes malpractice." *Muir*, 4 Ohio App.3d at 90, citing *Gillett v. Tucker* (1902), 67 Ohio St. 106.

{¶32} Wilkerson's first and second assignments of error are overruled.

{¶33} Judgment affirmed.

BRESSLER, P.J., and YOUNG, J., concur