

& Ovington (collectively, Greger). Jackson contends that the trial court erred in holding that her claims are barred by the one-year statute of limitations for legal malpractice actions contained in R.C. 2305.11(A). Jackson also contends that the trial court erred in denying her motion for summary judgment against Greger.

{¶ 2} We conclude that the trial court did not err in applying the statute of limitations to bar Jackson's claims. Based on her attorney's advice, Jackson pled guilty in state court to charges of resisting arrest. The City of Kettering, Ohio, and its police officers then asserted a collateral estoppel defense to Jackson's civil complaint against them in federal court based upon her allegation that excessive force was used against her. The assertion of this defense was based on Jackson's prior guilty plea in state court, and should have alerted a reasonable person of the need to investigate remedies against the attorney who had represented Jackson in the state court criminal action. Accordingly, the trial court did not err in dismissing Jackson's legal malpractice claim for failure to comply with the one-year statute of limitations in R.C. 2305.11(A). Because the resolution of this issue requires dismissal of Jackson's action, the issue of whether genuine issues of material fact exist is moot. The judgment of the trial court is therefore Affirmed.

I

{¶ 3} Jackson's malpractice claims relate to a criminal complaint filed against her in June 1999, charging her with disorderly conduct, assault on a police officer, and resisting arrest. These charges arose from an incident that occurred when Kettering, Ohio, police officers Scott Drerup and Jerome Csizma came to Jackson's

home to investigate a 911 hang-up call. When the officers arrived, Drerup saw a broken picture frame and a white towel containing what appeared to be blood stains.

After speaking briefly with Jackson, Drerup went upstairs to investigate, and spoke with a gentleman named Jeffery Kinder, who said he and Jackson had been arguing.

In the meantime, Csizma spoke with Jackson downstairs. Jackson appeared very intoxicated and was having difficulty walking in a straight line. Upon learning that Drerup had gone upstairs, Jackson started up the stair-steps. Csizma asked Jackson to stay downstairs, but she refused. When Jackson got to the top of the stairs, she told Drerup that he would have to leave if he did not have a warrant. Jackson became enraged during this discussion and threw her cordless phone on the floor. After the phone bounced up, almost hitting Drerup, he told Jackson that she was under arrest for disorderly conduct. Jackson began retreating down the stairs, and Drerup grabbed Jackson's arm to try to handcuff her. Jackson then began struggling and kicking her legs toward Drerup. Drerup managed to work Jackson down the stairs, and when the officers finally got Jackson to the bottom step, they did a "take-down." Jackson was then taken to the police station. Jackson was hospitalized for three or four days after her arrest, and had surgery on her neck for injuries she allegedly sustained in the incident.

{¶ 4} Jackson retained Lawrence Greger to represent her in the criminal action filed against her in Kettering Municipal Court. Based on information provided by Jackson, and discovery provided by the prosecutor, Greger determined that Jackson would likely be convicted of all three charges if the case proceeded to trial. Greger also concluded, based on discussions with the trial judge, that Jackson would

receive a significant jail sentence if she went to trial and were found guilty. However, she would not go to jail if she entered a plea.

{¶ 5} Greger was aware of Jackson's desire to pursue a civil rights claim against the police officers under Section 1983, Title 42, U.S.Code. Greger and Jackson discussed the fact that a guilty plea to a charge of resisting arrest would make the claim more difficult to pursue, but would not foreclose it. Greger testified that Jackson was fully informed about the consequences, but decided to plead guilty to the charge of resisting arrest so that she could avoid jail time. Jackson's mother also wanted her to enter a guilty plea, so that Jackson would not go to jail.

{¶ 6} Jackson acknowledges that she pled guilty because she did not want to go to jail. She testified, however, that Greger had said that pleading guilty to resisting arrest "wouldn't hold" against her suit with the police officers. Presumably, this means that Greger said a guilty plea would not affect a subsequent civil action.

{¶ 7} Greger's representation of Jackson ended on November 3, 1999, with the plea to the charge of resisting arrest. Jackson then obtained other counsel, and filed suit in June 2001, against Officer Drerup, Officer Csizma, and the City of Kettering, Ohio, in the United States District Court for the Southern District of Ohio. The complaint was brought pursuant to Section 1983, Title 42, U.S.Code, and alleged that the officers had used unnecessary and excessive force in the arrest. Jackson alleged that the officers' excessive force had caused her to sustain serious and permanent injuries, including a C3 fracture with C2-3 and C3-4 subluxations that required surgery. Jackson also raised claims under the Americans with Disabilities Act, Section 12101, Title 42, U.S.Code et. seq., and the Rehabilitation Act., Section

12134, Title 42 U.S.Code, because the officers allegedly released her on her own recognizance so that the City could escape liability for her medical expenses.

{¶ 8} The defendants filed an answer in the federal court action on November 2, 2001, and raised twelve affirmative defenses, including the statute of limitations, res judicata, and collateral estoppel. In January 2003, the defendants filed a motion for summary judgment in the federal action, and the district court rendered summary judgment in favor of defendants on April 22, 2003. The district court concluded that the Section 1983 unlawful entry, unlawful arrest, and excessive force claims were barred by collateral estoppel. This decision was based on authority from the Sixth Circuit Court of Appeals, which had held that in Ohio, an arrest cannot be lawful if an officer uses excessive force. The district court concluded therefore that Jackson's guilty plea to resisting a legal arrest and conviction necessarily included a finding that the officers did not use excessive force.

The court also concluded that the conviction precluded a finding that the officers' entry was unlawful. Accordingly, the district court held that Jackson would not be able to prevail on her claims of excessive force, unlawful entry, and unlawful arrest. See *Jackson v. Csizma* (Apr. 22, 2003), N.D. Ohio No. C-3-01-261, slip. op., pp. 5-8.

{¶ 9} Jackson appealed the decision to the United States Court of Appeals for the Sixth Circuit, but reached a settlement agreement with the City of Kettering before the appellate case was briefed. The Sixth Circuit subsequently dismissed the appeal for lack of prosecution in August 2003, based on Jackson's failure to file either a stipulation to dismiss or a brief, as directed. See *Jackson v. City of Kettering* (Aug. 14, 2003), C.A. 6 No. 03-3638.

{¶ 10} Jackson filed a legal malpractice action against Greger in the Montgomery County Common Pleas Court, in July 2003, while the federal appeal was still pending. An interlocutory appeal was taken in the common pleas court case, on the issue of whether Greger could discover privileged communications between Jackson and the attorney who had represented her during the federal court action. We decided that issue against Greger, and the Ohio Supreme Court affirmed. See *Jackson v. Greger*, 160 Ohio App.3d 258, 2005-Ohio-1588, affirmed, 110 Ohio St.3d 488, 2006-Ohio-4968.

{¶ 11} Before taking the interlocutory appeal, Greger had filed a motion for summary judgment. Greger contended in the summary judgment motion that Jackson's claims were barred by the one-year statute of limitations in R.C. 2305.11(A). Following the decision on the interlocutory appeal, Jackson filed a motion for summary judgment on the merits of her legal malpractice claim. The trial court granted Greger's motion, concluding that November 2, 2001, is the date of the "cognizable event" that would have placed a reasonable person on notice that his or her attorney may have committed a questionable legal practice. This is the date the City of Kettering answered the Section 1983 complaint and asserted the affirmative defense of collateral estoppel. Since Jackson did not file a legal malpractice action until July 2003, the court held that the claim against Greger was barred. The trial court also denied Jackson's motion for summary judgment, concluding that genuine issues of material fact exist on the issue of Greger's alleged malpractice.

{¶ 12} Jackson appeals from the decision rendering summary judgment in favor of Greger and overruling Jackson's motion for summary judgment.

II

{¶ 13} Jackson's First Assignment of Error is as follows:

{¶ 14} "THE TRIAL COURT ERRED WHEN IT HELD THAT PLAINTIFF'S CLAIMS ARE TIME-BARRED BY THE ONE YEAR STATUTE OF LIMITATIONS GOVERNING LEGAL MALPRACTICE, UNDER O.R.C. § 2305.11(A)."

{¶ 15} Under this assignment of error, Jackson contends that the trial court erred in concluding that her claims are time-barred. Jackson contends that her cause of action for legal malpractice did not accrue until April 22, 2003, when the United States District Court rendered summary judgment on the Section 1983 claims. Jackson argues that damage is a necessary element of a cause of action for negligence, and that she did not sustain damage as a result of Greger's alleged actions until the federal district court dismissed her action.

{¶ 16} In assessing summary judgment motions, the trial court applies the following standard:

{¶ 17} "A trial court may grant a moving party summary judgment pursuant to Civ. R. 56 if there are no genuine issues of material fact remaining to be litigated, the moving party is entitled to judgment as a matter of law, and reasonable minds can come to only one conclusion, and that conclusion is adverse to the nonmoving party, who is entitled to have the evidence construed most strongly in his favor." *Smith v. Five Rivers MetroParks* (1999), 134 Ohio App.3d 754, 760.

{¶ 18} Appellate courts "review summary judgment decisions *de novo*, which means that we apply the same standards as the trial court." *GNFH, Inc. v. W. Am.*

Ins. Co., 172 Ohio App.3d 127, 133, 2007-Ohio-2722, at ¶ 16.

{¶ 19} The statute governing time limits for legal malpractice actions requires that they be commenced within one year after the cause of action accrues. R.C. 2305.11(A). The Ohio Supreme Court has held that under R.C. 2305.11(A):

{¶ 20} “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 and Griswold* (1989), 43 Ohio St.3d 54, syllabus.

{¶ 21} The attorney-client relationship between Greger and Jackson terminated in November 1999, which was almost four years before Jackson's lawsuit was filed. The issue in the case before us, therefore, is when did a “cognizable event” occur that would have put Jackson on notice of a need to pursue possible remedies. Greger contends that the trial court was correct in concluding that the “cognizable event” occurred in November 2001, when the City of Kettering raised the defense of collateral estoppel in the federal court action. Greger contends that a reasonable person would have been put on notice to investigate, due to the City's assertion that Jackson's guilty plea barred the civil rights action.

{¶ 22} As support, Greger cites *Szabo v. Goestch*, Cuyahoga App. No. 99125, 2007-Ohio-1147. In *Szabo*, the client argued that he was not put on notice of his former attorney's possible malpractice until the Eighth District Court of Appeals

released its decision affirming a summary judgment rendered against the client. The trial court had granted summary judgment on the merits of the client's underlying action, but the Eighth District affirmed the judgment solely due to a procedural flaw – trial counsel's failure to include a certificate of service on a pleading responding to the defendant's summary judgment motion. *Id.* at ¶8-9. The Eighth District did not address the merits of the summary judgment that had been rendered. *Id.*

{¶ 23} The client subsequently filed a legal malpractice action against his attorneys, but that action was dismissed for failure to comply with the one-year legal malpractice statute of limitations. The client then appealed to the Eighth District Court of Appeals. However, the Eighth District rejected the client's argument that the "cognizable event" was its release of the decision affirming the summary judgment in the prior action. The Eighth District held that the cognizable event occurred, at the latest, during oral argument in the prior action, when the parties for each side argued regarding counsel's failure to include the certificate of service. *Id.* at ¶ 13. The Eighth District stressed that "[i]n determining the cognizable event, 'the focus should be on what the client was aware of and not an extrinsic judicial determination.'" *Id.* at ¶ 14, quoting from *Vagianos v. Halpern*, (Dec. 14, 2000), Cuyahoga App. No. 76408. Accord, *McDade v. Spencer* (1990), 75 Ohio App.3d 639, 642-43 (holding malpractice claim barred where client would have been aware of attorney's possible malpractice when a contempt motion was filed for the client's failure to comply with the terms of a separation agreement. The "cognizable event" would not have been when the trial court ruled on the contempt motion.) See also, *Griggs v. Bookwalter*, Montgomery App. No. 21220, 2006-Ohio-5392, at ¶ 20 (noting

that “ [T]he Ohio Supreme Court has never held that a party must be aware or suffer the full extent of his injury before there is a cognizable event triggering the statute of limitations in a legal malpractice action.’ ”).

{¶ 24} In *Wisecup v. Gulf Development* (1989), 56 Ohio App.3d 162, we held that even though a plaintiff knew his employer had over-reported his income to the Internal Revenue Service (“IRS”), the statute of limitations on the plaintiff’s claim against his employer did not begin to run until the IRS decided not to redetermine the income tax, because that is when the plaintiff’s cause of action accrued. *Id.* at 165, This is consistent with the result in the case before us. Jackson’s cause of action against Greger did not accrue until the City of Kettering elected to assert the collateral estoppel defense against her. The City of Kettering could have decided, for whatever reason, not to assert the collateral estoppel defense, just as the IRS could have decided to be generous and redetermine Wisecup’s tax liability. Under Jackson’s stated malpractice theory, her claim against the City of Kettering was effectively extinguished once the City of Kettering decided to assert its collateral estoppel defense, since, under her theory, the federal district court would have had no choice under the existing law, but to find for the City.¹ This is comparable to Wisecup’s possibility of obtaining favorable treatment from the IRS being extinguished once the IRS decided not to be accommodating. We also note that *Wisecup* was decided without much factual exposition, since the case was dismissed

¹We take no position whether Jackson’s excessive force claim was, in fact, barred by collateral estoppel as a result of her plea of guilty to resisting arrest – in other words, whether the federal district court was correct. Regardless, that is Jackson’s theory of legal malpractice against Greger, so she is bound to the assumption that her theory is correct.

on the pleadings. *Id.* at 163-64.

{¶ 25} 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*, which involved an October 1981 interlocutory order that alerted the plaintiff to his attorney’s alleged malpractice, a December 1981 trial and judgment, a 1983 Eighth District Court of Appeals’ decision, and a 1984 decision of the Supreme Court of Ohio, which upheld the judgment of a trial court as to the invalidity of an antenuptial agreement. 43 Ohio St.3d at 58. The legal malpractice action against the client’s attorney was filed slightly less than a year after the Supreme Court of Ohio entered its final judgment in 1984. *Id.*

{¶ 26} The Supreme Court of Ohio held that the malpractice action was not timely, and should have been filed within one year of the “cognizable event,” which was the trial court’s interlocutory conclusion, in October 1981, that the antenuptial agreement was invalid. The Supreme Court of Ohio stated that this event should have made the plaintiff realize that his monetary exposure in the divorce would be greater, and would have put him on notice of the need to pursue further remedies against his attorneys. *Id.*

{¶ 27} Jackson’s position in the case before us is that the guilty plea extinguished her ability to recover for an unlawful arrest or excessive force claim under Section 1983. Under that theory, once the City of Kettering chose to assert the collateral estoppel defense, Jackson’s claim was precluded, since the facts

pertinent to that defense had already been established in the criminal case. Jackson would have been aware of this, through her attorneys in the federal court action, because an attorney's knowledge of proceedings is imputed to the client. See, e.g., *Ciganik v. Kaley*, Portage App. No. 2004-P-0001, 2004-Ohio-6029, at ¶ 25, and *Koerber v. Levey & Gruhin*, Summit App. No. 21730, 2004-Ohio-3085, at ¶ 38.

{¶ 28} Jackson argues that she had no damages attributable until the district court ruled on collateral estoppel, because her claim was still pending until that point.

But because, under her theory, the federal district court was obliged, once the City of Kettering interposed the collateral estoppel defense, to give judgment for Kettering, she lost the value of her entire claim, whatever it was worth, once the collateral defense was interposed. The injury to her was complete at that time.

{¶ 29} Furthermore, the plaintiff in *Zimmie* could have made the same argument, because his loss under the separation agreement had not yet been determined at the point labeled by the Ohio Supreme Court as the "cognizable event." The loss was also not finally determined up to the point that the last appeal was exhausted in 1984. Nonetheless, the Ohio Supreme Court rejected this theory.

The court stressed that:

{¶ 30} "Adopting a rule of law that a client is entitled to exhaust all appellate remedies before the statute of limitations commences, as appellant suggests, would be counter to our holdings in *Hershberger* and its progeny. In these cases, we found that a factual inquiry into the circumstances of a case establishes when the cause of action accrues and the period of limitations commences in a malpractice action.

{¶ 31} "* * *

{¶ 32} “In order to avoid needless litigation, if Zimmie had timely filed the malpractice action, the trial court could have been requested to stay this malpractice action until there was a final judgment from the appellate courts concerning the validity of the antenuptial agreement. The stay would eliminate any problems created by the possibility that the court of appeals or this court would reverse the trial court judgment, since such a reversal would probably result in Zimmie having no legal malpractice action against appellees.” *Id.* at 58-59.

{¶ 33} Likewise, if 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.

{¶ 34} Accordingly, the trial court did not err in holding that the City of Kettering’s assertion of collateral estoppel in its answer would have placed a reasonable person on notice of a need to pursue possible remedies against her former attorney for the alleged injury. Jackson should have filed her legal malpractice action within one year after November 2, 2001, when the City of Kettering asserted the defense of collateral estoppel in its answer. Because Jackson did not file until July 2003, her legal malpractice action is barred by the statute of limitations.

{¶ 35} Jackson’s First Assignment of Error is overruled.

III

{¶ 36} Jackson's Second Assignment of Error is as follows:

{¶ 37} "THE TRIAL COURT ERRED WHEN IT DENIED PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT FINDING THAT THERE ARE GENUINE ISSUES OF MATERIAL FACT."

{¶ 38} Under this assignment of error, Jackson contends that the trial court erred in overruling her motion for summary judgment on the issue of malpractice liability. Jackson notes that Greger admitted telling her that the guilty plea would not prevent her from filing a claim under Section 1983, Title 42, U.S.Code. Jackson further notes that under then-controlling authority of the United States Court of Appeals for the Sixth Circuit, a plaintiff who had been convicted of resisting arrest under Ohio law would be barred from asserting a Section 1983 claim for excessive force. Jackson, therefore, contends that no genuine issues of material fact exist regarding Greger's liability for malpractice. Greger argues that the district court's decision was incorrect, and that Jackson's Section 1983 claims are not barred by the entry of Jackson's guilty plea to the charge of resisting arrest.

{¶ 39} We need not address these matters. Our resolution of the First Assignment of Error disposes of the case and moots any issues concerning whether the denial of summary judgment is proper.

{¶ 40} Jackson's Second Assignment of Error is overruled.

IV

{¶ 41} All of Jackson's assignments of error having been overruled, the judgment of the trial court is Affirmed.

.....

FROELICH and WILLAMOWSKI, JJ, concur.

(Hon. John R. Willamowski, Third District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

Copies mailed to:

Kevin O'Brien
Carrie Doppes Wolfe
Joseph W. Borchelt
Carrie A. Masters
Hon. William B. McCracken (visiting judge)
Hon. Connie S. Price

\