[Cite as *Quillin v. Woodward*, 2009-Ohio-2409.]

COURT OF APPEALS
TUSCARAWAS COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
ESTATE OF ARLENE QUILLIN	:	Hon. Sheila G. Farmer, P.J.
	:	Hon. W. Scott Gwin, J.
Plaintiff-Appellant	:	Hon. William B. Hoffman, J.
	:	
-vs-	:	
	:	Case No. 2008 AP 080050
ESTATE OF JOHN WOODWARD	:	
	:	
Defendant-Appellee	:	O P I N I O N

CHARACTER OF PROCEEDING:	Civil appeal from the Tuscarawas County Court of Common Pleas, Case No.2007CV020149
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	May 20, 2009
APPEARANCES:	
For Plaintiff-Appellant	For Defendant-Appellee
ELIZABETH BURICK 1428 Market Avenue Canton, OH 44714	ROBERT B. DAANE 200 Market Avenue North Millennium Centre-Suite 300 Canton, OH 44702

Gwin, J.

{¶1} Plaintiff-appellant the Estate of Arlene Quillin by and through co-executors Joyce McMorrow and Wesley Quillin, appeal a summary judgment of the Court of Common Pleas of Tuscarawas County, Ohio, which held appellant's claim against defendant-appellee the Estate of John Woodard by and through co-executors, John L. Woodard, II and Marsha Daniels, was barred for failure to file the claim within the two-month time period allotted by R.C. 2117.12. Appellant assigns four errors to the trial court:

{¶2} "I. THE TRIAL COURT ERRED AS A MATTER OF LAW IN FINDING THAT THE CLAIM OF THE APPELLANT FILED IN THE ESTATE OF JOHN WOODARD WAS BARRED BY THE TWO-MONTH FILING LIMITATION STATED IN R.C. 2117.12.

{¶3} "II. THE TRIAL COURT ERRED IN FINDING THAT THE CLAIM OF THE APPELLANT FILED IN THE ESTATE OF JOHN WOODARD AND BASED ON A LEGAL MALPRACTICE CLAIM WAS NOT A CONTINGENT CLAIM UNDER R.C. 2117.37 AND THEREFORE WAS BARRED BY THE TWO-MONTH FILING LIMITATION STATED IN R.C. 2117.12.

{¶4} "III. THE TRIAL COURT ERRED AS A MATTER OF LAW IN FINDING THAT THE APPELLANT WAS NOT ENTITLED TO THE APPLICATION OF THE SAVINGS CLAUSE FOR PERSONS UNDER LEGAL DISABILITY FOUND IN R.C. 2305.16, THEREBY TOLLING THE TIME PERIOD TO FILE THE COMPLAINT UNTIL THE DISABILITY WAS REMOVED OR UNTIL APPELLANT PASSED AWAY AND A REPRESENTATIVE APPOINTED.

{¶5} "IV. THE TRIAL COURT ERRED AS A MATTER OF LAW IN FINDING THAT THERE WERE NO DISPUTED ISSUES OF FACT AS TO THE LEGAL DISABILITY OF ARLINE QUILLIN DURING THE TWO-MONTH TIME PERIOD PURSUANT TO R.C. 2117.12 IN WHICH SHE WAS REQUIRED TO FILE A COMPLAINT FOR LEGAL MALPRACTICE IN THE COURT OF COMMON PLEAS BASED ON THE CLAIM FILED IN THE ESTATE OF JOHN WOODARD FOR THE DECEDENT COMMITTING LEGAL MALPRACTICE."

{¶6} The record indicates Arlene Quillin hired attorney John Woodard to prepare a trust agreement to protect her property in the event she needed health care or nursing home care at some point in the future. At the time these events took place, the State Medicaid Program regulations contained a "look back period". If the property was put into an irrevocable trust, then, after the look back period had expired, the property would not be considered an available resource affecting Quillin's eligibility for Medicaid.

{¶7} In March 2001, John Woodard prepared a trust agreement and Arlene Quillin transferred her property into the trust. In 2002 or 2003, Quillin began living in a nursing home, and in 2005, she applied for Medicaid to assist in paying for her care. In December 2005, the Tuscarawas County Job and Family Services denied Quillin's application, finding the trust funds were available to her for her care. Appellant alleges Woodard had not drafted the trust document properly. Woodard prepared an amendment to the trust in February 2006, while Quillin appealed the determination she was ineligible for Medicaid benefits. In April 2006, Woodard died. Shortly thereafter, the Department of Job and Family Services Bureau of State Hearings overruled the appeal.

{¶8} On June 30, 2006, Quillin presented a claim against the appellee's estate, asserting Woodard's errors in establishing the trust had caused her damages in excess of $150,000. On July 6, 2006, the appellee Woodard Estate rejected Quillin's claim, and Quillin died in December, 2006. Quillin's estate filed the complaint for legal malpractice on February 21, 2007.

{¶9} Civ. R. 56 states in pertinent part:

{¶10} "Summary judgment shall be rendered forthwith 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. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, 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. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

{¶11} A trial court should not enter a summary judgment if it appears a material fact is genuinely disputed, nor if, construing the allegations most favorably towards the non-moving party, reasonable minds could draw different conclusions from the undisputed facts, *Houndshell v. American States Insurance Company* (1981), 67 Ohio St. 2d 427. The court may not resolve ambiguities in the evidence presented, *Inland*

Refuse Transfer Company v. Browning-Ferris Industries of Ohio, Inc. (1984), 15 Ohio St. 3d 321. A fact is material if it affects the outcome of the case under the applicable substantive law, *Russell v. Interim Personnel, Inc.* (1999), 135 Ohio App. 3d 301.

{¶12} When reviewing a trial court's decision to grant summary judgment, an appellate court applies the same standard used by the trial court, *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St. 3d 35. This means we review the matter de novo, *Doe v*. *Shaffer,* 90 Ohio St.3d 388, 2000-Ohio-186.

{¶13} The party moving for summary judgment bears the initial burden of informing the trial court of the basis of the motion and identifying the portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the non-moving party's claim, *Drescher v. Burt* (1996), 75 Ohio St. 3d 280. Once the moving party meets its initial burden, the burden shifts to the non-moving party to set forth specific facts demonstrating a genuine issue of material fact does exist, Id. The non-moving party may not rest upon the allegations and denials in the pleadings, but instead must submit some evidentiary material showing a genuine dispute over material facts, *Henkle v. Henkle* (1991), 75 Ohio App. 3d 732.

I & II

{¶14} In its first assignment of error, appellant argues the court erred as a matter of law in determining its claim is barred by R.C. 2117.12's two-month limitation for filing a civil suit against the appellee's estate. Its second assignment of error asserts the court was incorrect in finding the claim was not a contingent claim governed by R.C. 2117.37

{¶15} R.C. 2117.12 provides if part or all of a claim against an estate has been rejected, the claimant must commence an action on the claim within two months after

the rejection or be forever barred from maintaining an action on the claim. Appellant argues, however, her claim was contingent, and governed by R.C. 2117.37.

{¶16} R.C. 2117.37 provides if a claim is contingent at the time of a decedent's death and a cause of action subsequently accrues, the claim must be presented within one year after the decedent's death, or within two months after the cause of action accrued, whichever is later. R.C. 2117.39 provides that if at the time a cause of action accrues on a contingent claim against a decedent's estate or within two months thereafter the account of final distribution has been filed, the claim need not be presented to the estate and the claimant may proceed in a civil action against the distributees of the estate. Appellant argues the value of the claim was unknown, and therefore contingent.

{¶17} The trial court cited *Priestman v. Elder* (1994), 97 Ohio App. 3d 86, 646 N.E. 2d 234 and *Shearer v. Echelberger* (2001), 145 Ohio App. 3d 106, 761 N.E. 2d 1136, as authority for the proposition a contingent claim is one in which liability depends on some indefinite, uncertain future event which may never occur, and therefore, liability may never arise. Appellant argues the value of her malpractice claim is indefinite and uncertain because sometime in the future a jury must determine its value.

{¶18} Appellant also argues the cause of action did not accrue until after Woodard's death, when Quillin's appeal on the denial of Medicaid benefits was denied. Appellant argues, it had two years after Woodard's death to file her complaint. However, R.C. 2117. 37 and 2117.39 only apply if appellant's claim were contingent.

{¶19} As the trial court correctly stated, liability on an un-liquidated claim for damages arising out of a tort does not depend upon the occurrence of some uncertain

event in the future, because the tort which gave rise to liability has already occurred and the cause of action has accrued. *Pierce v. Johnson* (1939), 136 Ohio St. 95, 23 N.E.2d 933. The trial court found even though appellant's claim is not for a sum certain, it is not contingent. Judgment Entry of August 5, 2008, at Pg. 9, citation deleted.

{¶20} We agree with the trial court appellant's claim is not contingent and the two-month limit contained in R.C. 2117.12 applies here.

{¶21} The first and second assignments of error are overruled.

III & IV

{¶22} In its third assignment of error, appellant argues the court erred as a matter of law in not finding Quillin was under legal disability as defined in R.C. 2305.16 which would have tolled the time in which she could file her compliant for legal malpractice. The fourth assignment of error asserts there were genuine issues of material fact presented regarding whether Quillin was under legal disability.

{¶23} Appellant presented the affidavits of Quillin's two daughters who stated their mother's health had been declining both physically and mentally, to the extent that they believed she became incompetent in the months prior to her death. They assert although Quillin was able to present her malpractice claim to the appellee, her physical and mental condition thereafter prevented her from pursuing the claim within the two month-time limit. Appellant did not present any evidence from medical or psychiatric experts, or state any medical or psychiatric diagnosis. The only evidence was the daughters' statements they believed Quillen became incompetent.

{¶24} In *Fisher v. Ohio University* (1992), 63 Ohio St. #d 484, 589 N. E. 2d 13, the Ohio Supreme Court held: "The provision of former R.C. 2305.16 allowing a

limitations period to be tolled during the time a claimant was confined in an institution or hospital under a diagnosed condition or disease that rendered the claimant of unsound mind is applicable only when the claimant presents evidence substantiating he or she was of unsound mind and the disease or condition (1) was determined by a psychiatrist or licensed physician who treated the claimant during his confinement to have rendered him of unsound mind, or (2) is generally accepted by the medical community as one causing unsound mind." Syllabus by the court.

{¶25} We find as a matter of law, appellant did not present sufficient evidence Quillin's health was so poor as to rise to the level of incompetency as explained by the Supreme Court.

{¶26} The trial court found a claim of mental incompetence is not a per se reason to toll a statute of limitations. An exception in a statute of limitations in favor of persons under disability must be strictly construed, *Weaver v. Edwin Shaw Hospital,* 104 Ohio St. 3d 390, 2004-Ohio-65, 819 N.E.2d 1079. Unless there is a saving clause, a statute of limitation runs against all persons regardless of disability. Judgment Entry, p. 9-10.

{¶27} In *Vitantonio, Inc. v. Baxter*, 116 Ohio St.3d 195, 2007 -Ohio- 6052, 877 N.E.2d 663, the Ohio Supreme Court held "The saving statute R.C. 2305.19 applies to actions filed against a decedent's estate under R.C. 2117.12." Syllabus by the court. However, the original claim must be timely filed: " *** once a claim against an estate is timely filed pursuant to R.C. 2117.12, normal principles of statutory construction require that the saving statute applies." *Vitantonio* at paragraph 7, citing *Allen v. McBride,* 105 Ohio St.3d 21, 2004-Ohio-7112, 821 N.E.2d 1001 at paragraph 28. Although *Vitantonio*

did not address the issue of whether the two month time limit for presenting a claim can be tolled, nevertheless the Supreme Court indicates an action on a claim must be pursued according to statute.

{¶28} The third and fourth assignments of error are overruled.

{¶29} For the foregoing reasons, the judgment of the Court of Common Pleas of Tuscarawas County, Ohio, is affirmed.

By Gwin, J., and

Farmer, P.J., concur;

Hoffman, J., concurs

separately

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HON. W. SCOTT GWIN

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HON. SHEILA G. FARMER

_____

HON. WILLIAM B. HOFFMAN

WSG:clw 0505

Hoffman, J., concurring

{¶30} I concur in the majority's analysis and disposition of Appellant's third and fourth assignments of error.

{¶31} I further concur in the majority's disposition of Appellant's first and second assignments of error. From my reading of the majority opinion, I am uncertain as to when the majority believes Appellant's cause of action accrued. To the extent the majority opinion may be construed to conclude Appellant's malpractice claim accrued when Woodard first prepared the trust in 2001, I respectfully disagree.

{¶32} I agree the fact damages remain unliquidated does not serve to render a claim contingent. However, I find Appellant's malpractice claim was initially contingent because it depended upon an indefinite, uncertain future event which might never have occurred; namely, denial of Medicaid benefits.

{¶33} I find Appellant's cause of action for malpractice accrued in December 2005, when her Medicaid benefits application was first denied.[1] Because this was several months before Woodard's death, I concur R.C. 2117.37 does not apply.

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HON. WILLIAM B. HOFFMAN

[1] I find Appellant's argument the claim remained contingent until Appellant's appeal of the denial of Medicaid benefits following amendment of the trust was determined unpersuasive.

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IN THE COURT OF APPEALS FOR TUSCARAWAS COUNTY, OHIO

FIFTH APPELLATE DISTRICT

ESTATE OF ARLENE QUILLIN	:	
Plaintiff-Appellant	:	
-vs-	:	JUDGMENT ENTRY
ESTATE OF JOHN WOODWARD	:	
Defendant-Appellee	:	CASE NO. 2008AP080050

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Tuscarawas County, Ohio, is affirmed. Costs to appellant.

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HON. W. SCOTT GWIN

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HON. SHEILA G. FARMER

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HON. WILLIAM B. HOFFMAN