[Cite as *Visual Edge Technology, Inc. v. Brunner-Cox L.L.P.*, 2010-Ohio-5337.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

VISUAL EDGE TECHNOLOGY, INC.,

Plaintiff-Appellant

-vs-

BRUNER-COX LLP

Defendant-Appellee

JUDGES:
Hon. William B. Hoffman, P.J.
Hon. Sheila G. Farmer, J.
Hon. Patricia A. Delaney, J.

Case No. 2010CA00041

O P I N I O N

CHARACTER OF PROCEEDING: Appeal from the Court of Common Pleas, Case No. 2009CV01490

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: November 1, 2010

APPEARANCES:

For Plaintiff-Appellant

THOMAS W. HARDIN
134 Second Street, NW
New Philadelphia, OH 44663

For Defendant-Appellee

CRAIG G. PELINI
RAYMOND C. MUELLER
8040 Cleveland Avenue, NW
Suite 400
North Canton, OH 44720

Farmer, J.

{¶1} Appellant, Visual Edge Technology, Inc., hired appellee, Bruner Cox LLP, to conduct audits for fiscal years 2004 and 2005. In March of 2007, appellant was contemplating an initial public offering of its stock so it employed McGladrey & Pullen to audit fiscal year 2006. The audit, which occurred in 2007, discovered discrepancies with respect to prior years. A re-audit of years 2004 and 2005 was necessary. The re-audit was concluded in the last half of 2008 wherein restatements of income established previously unknown substantial losses.

{¶2} On April 15, 2009, appellant filed a complaint for professional negligence against appellee. Appellee filed a motion for summary judgment on December 21, 2009. By judgment entry filed January 28, 2010, the trial court granted summary judgment to appellee.

{¶3} Appellant filed an appeal and this matter is now before this court for consideration. Assignment of error is as follows:

I

{¶4} "THE TRIAL COURT ERRED BY GRANTING DEFENDANT/APPELLEE'S MOTION FOR SUMMARY JUDGMENT."

I

{¶5} Appellant claims the trial court erred in granting summary judgment to appellee. Specifically, appellant claims the trial court failed to apply the "delayed damages theory" as espoused by this court in *Fitz v. Brunner Cox, L.L.P.* (2001), 142 Ohio App.3d 664. We disagree that *Fitz* is applicable sub judice.

{¶6} Summary Judgment motions are to be resolved in light of the dictates of Civ.R. 56. Said rule was reaffirmed by the Supreme Court of Ohio in *State ex rel. Zimmerman v. Tompkins,* 75 Ohio St.3d 447, 448, 1996-Ohio-211:

{¶7} "Civ.R. 56(C) provides that before summary judgment may be granted, it must be determined 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. *State ex. rel. Parsons v. Fleming* (1994), 68 Ohio St.3d 509, 511, 628 N.E.2d 1377, 1379, citing *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 4 O.O3d 466, 472, 364 N.E.2d 267, 274."

{¶8} As an appellate court reviewing summary judgment motions, we must stand in the shoes of the trial court and review summary judgments on the same standard and evidence as the trial court. *Smiddy v. The Wedding Party, Inc*. (1987), 30 Ohio St.3d 35.

{¶9} Basically the facts are undisputed. Appellee is a certified public accounting firm. Appellee and appellant entered into three separate agreements to provide auditing services (December 13, 2004, February 1, 2005, and November 18, 2005). All three agreements where for auditing services, not tax preparation. Each of the agreements contained the following clause: "no claim arising out of services rendered pursuant to the agreement by or on behalf of Visual Edge Technology, Inc.

and subsidiaries shall be asserted more than two years after the date of the last audit report issued by Brunner-Cox LLP."

{¶10} The last audit report was issued on April 10, 2007. Appellant initiated its claim for professional negligence against appellee on April 15, 2009, outside the contractual statute of limitations of two years which expired in March of 2008.[1]

{¶11} It is appellant's position, as stated in the affidavit of Yvonne Brown, appellant's Chief Accounting Officer, at ¶5, that no damages were known until completion of a re-audit for years 2004 and 2005 which was concluded in the last half of 2008:

{¶12} "Visual Edge Technology, Inc. is claiming several items of damage as a result of Bruner's errors: opportunity cost due to its inability to proceed with the initial public offering; the amounts paid to McGladrey for repeating the 2005 and 2004 audit, and the loss of several million dollars of net worth as a result of the restatements. None of these amounts were known, or reasonably could have been known, in March 2008, when the contractual limitation period expired. Indeed, the re-audit which is the keystone to Visual Edge Technology, Inc.'s damages was not completed until nearly nine months after the contracture limitation expired."

{¶13} The leading case on professional negligence is *Investors REIT One vs. Jacobs* (1989), 46 Ohio St.3d 176, 182, wherein the Supreme Court of Ohio specifically rejected the extension of the discovery rule to professional negligence claims:

{¶14} "The General Assembly has not adopted a discovery rule applicable to general negligence claims arising under R.C. 2305.09. This court will not interpret R.C.

[1]Throughout its appellate brief, appellant acknowledges the contractual statute of limitations expired in March of 2008.

2305.09 to include a discovery rule for professional negligence claims against accountants arising under R.C. 2305.09 absent legislative action on the matter."

{¶15} This holding was reaffirmed in *Grant Thornton v. Windsor House* (1991), 57 Ohio St.3d 158.

{¶16} Appellant does not challenge the legal principle that parties can agree to shorten the statute of limitations as was done in the agreements in this case. *Glove American Casualty Co. v. Goodman* (1994), 41 Ohio App.2d 231.

{¶17} Appellant's April 15, 2009 complaint set forth the following claim:

{¶18} "Plaintiff engaged Defendant as its C.P.A. to audit its books for fiscal year 2004-2005. As a result of said employment, Defendants were responsible for competently and professionally conducting said audit."

{¶19} A summary of the services to be performed is included in each of the three separate audit agreements:

{¶20} "We will perform an audit of Visual Edge Technology, Inc. and Subsidiaries' consolidated financial statements as of and for the period ending December 31, 2004. We understand that the consolidated financial statements will be prepared in accordance with accounting principles generally accepted in the United States of America. The objective of an audit of consolidated financial statements is to express an opinion on those statements."

{¶21} In support of the delayed and untimely filing of the complaint for damages, appellant argues our holding in *Fitz,* supra, permits an extension of the contractual statute of limitations. In order to address this issue, we must examine our rational in *Fitz*.

{¶22} *Fitz* involved a claim of professional negligence for the preparation of a 1994 Federal tax return by Bruner-Cox. *Fitz* was assessed interest and penalties on August 13, 1998. *Fitz* filed his complaint on March 24, 2000. The trial court granted summary judgment to Bruner-Cox, finding the four year statute of limitations under R.C. 2305.09(D) applied.

{¶23} On appeal, *Fitz* argued their cause of action for professional negligence did not accrue until August 13, 1998, the date of the initial IRS assessment, since he did not suffer an actual injury until then. Based upon the facts, this court agreed and specifically found that the cause of action in *Fitz* did not accrue until the discovery of damages.

{¶24} The characterization of *Fitz* as an adoption of the discovery rule is inaccurate. *Fitz* involved an IRS initiated audit which commenced beyond the four year statute of limitations. The independent action by a third party precipitated the claim of negligence. The case sub judice involved an audit which in and of itself was a mere opinion of appellant's financial condition.

{¶25} *Fitz* is also distinguishable for the reason that the statute of limitations was contractually shortened to two years for each audit, including the last one. Although appellant argues the damages were not discoverable until late 2008, it is clear that the actual negligence was discovered in the 2006 audit of March 2007:

{¶26} "For fiscal years 2004 and 2005, the Defendant Bruner Cox was the auditor for Visual Edge Technology, Inc. In March 2007, Visual Edge Technology, Inc. was contemplating an initial public offering of its stock, and decided to employ McGladrey & Pullen, a national accounting firm, to audit fiscal year 2006.

{¶27} "In the course of the audit of fiscal year 2006 (which actually occurred in 2007), discrepancies were discovered with respect to the prior audits." See, Brown aff. at ¶2-3.

{¶28} Even if we were to adopt *Fitz* beyond its very restrictive accrual of cause of action holding, appellant misses the two year contractual statute of limitations by one month.

{¶29} We find our specific ruling in *Fitz* was but a narrowing of the accrual of cause of action issue and was not an embrace of the discovery or delayed damages rule. We find our brethren from the Second District in *TCN Behavioral Health Science, Inc. v. Clark, Schaefer, Hackett & Co.,* Greene App. No. 2005-CA-18, 2005-Ohio-5918, ¶13-16, artfully defined the very limited ruling of *Fitz*:

{¶30} "There are several important practical reasons that necessitate the courts distinguishing tax preparation from tax advice in professional negligence cases. Tax preparation differs from tax advice because tax preparation requires the compiling of crucial financial information to complete and submit tax forms to the IRS. If taxes are negligently prepared, the taxpayer may not be assessed any penalty by the IRS until sometime later. As the IRS has six years to assess penalties for tax filing errors, applying the four year statute of limitations from the date negligently prepared taxes are filed would risk '**an illogical and inequitable result, namely, that appellants' claims against appellees would be time-barred *before* appellants' damages even manifested themselves**.' *Fritz v. Bruner Cox, L.L.P. (2001), 142 Ohio App.3d 664, 669, 756 N.E.2d 740* (emphasis in the original).

{¶31} "On the other hand, tax advice involves a tax professional discussing the potential benefits and drawbacks of certain types of financial activities, tax deductions, and investments with their clients based on the clients' long term goals, short term earnings, and risk tolerance. Tax advice involves the client to a greater degree, in that the client must take the advice and make a decision as to how to proceed. This is quite different from tax preparation, where a client is unlikely to reopen sealed envelopes to the IRS on April 15 to ensure that the tax preparer has enclosed all of the necessary paperwork. This quintessential difference in the client's potential level of awareness and potential ability to rectify any previous missteps has guided courts in carving out this distinction in professional negligence cases.

{¶32} "Appellant contends that the auditing services received were tax preparation rather than tax advice, and as such a delayed occurrence of damages rule should apply. However, Appellant's contention is misplaced. Appellant failed to recognize that the auditing services provided in this case do not constitute tax preparation. Appellant demonstrated in its pleadings and its appellate brief that Appellee reviewed Appellant's financial records for the fiscal year 1998. Appellee submitted a report discussing its review and its conclusions about Appellant's financial situation for that year. In *Grey, Sladky,* and *Fritz,* which Appellant cited to support its position, the professionals took physical control and primary responsibility for the satisfactory completion and collection of the tax forms and documents required by the IRS. Appellant made no mention of Appellee completing any tax forms, gathering any necessary tax documents, or in any other way generating anything for submission to federal, state, or local tax authorities. While Appellant may have referenced this audit to

assist in its tax preparation, that seems a step too removed for the audit itself to constitute tax preparation.

{¶33} "The case law indicates that the relevant time frame for the statute of limitations began to run in June 1999 with the delivery of the audit report, not when Appellant discovered the overpayment on December 21, 2001. Since the statute of limitations ran four years from the date of the alleged negligence, the time to file an action based on that alleged negligence ran out in June 2003. As the Greene County Clerk of Courts timestamp indicates that the complaint was filed September 2, 2004, the four year statute of limitations had run out over one year before Appellant filed the instant complaint. Therefore, even while Appellant may urge this Court to come to a contrary result, the trial court properly granted the 12(b)(6) dismissal because the complaint on its face demonstrates that the action was time barred."

{¶34} Upon review, we find the trial court did not err in finding *Fitz* did not apply and granting summary judgment to appellee.

{¶35} The sole assignment of error is denied.

{¶36} The judgment of the Court of Common Pleas of Stark County, Ohio is hereby affirmed.

By Farmer, J.

Hoffman, P.J. and

Delaney, J. concur.

_s/ Sheila G. Farmer_____

_s/ William B. Hoffman_____

_s/ Patricia A. Delaney_____

JUDGES

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IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

VISUAL EDGE TECHNOLOGY, INC.	:	
Plaintiff-Appellant	:	
-vs-	:	JUDGMENT ENTRY
BRUNER-COX LLP	:	
Defendant-Appellee	:	CASE NO. 2010CA00041

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

_s/ Sheila G. Farmer_____

_s/ William B. Hoffman_____

_s/ Patricia A. Delaney_____

JUDGES