[Cite as *Nye v. Eastman & Smith, Ltd.*, 2013-Ohio-4742.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

J. Randall Nye, Trustee, et al.	Court of Appeals No. L-13-1034
Appellants/Cross-Appellees	Trial Court No. CI0201206362
v.	
Eastman & Smith, Ltd., et al.	**DECISION AND JUDGMENT**
Appellees/Cross-Appellants	Decided: October 25, 2013

* * * * *

Joshua R. Cohen, Ellen M. Kramer and Peter D. Traska,
for appellants/cross-appellees.

Alan M. Petrov, Jamie A. Price and Henry N. Heuerman,
for appellees/cross-appellants.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal from a judgment of the Lucas County Court of Common Pleas, which granted appellees' Civ.R. 12(B)(6) motion to dismiss the underlying legal malpractice claim pertaining to a family trust. All family member beneficiaries of the trusts are deceased. Remaining funds are designated to pass to charitable organizations. Appellant is not a family member or beneficiary. Appellant, J. Randall Nye, served as counsel in 1994 who drafted the original trust agreements. Appellees were retained in 2009 by the sole surviving family member beneficiary to modify investment holdings. Appellant was designated to serve as the successor trustee following the death of the last of the three family member beneficiaries. This triggering event, through which appellant

became successor trustee of the trusts, occurred in 2011 several years after the legal representation at issue was furnished.

{¶ 2} On cross-appeal, appellees assert that the dismissal was ultimately on the merits and thus the dismissal should have been made with prejudice. For the reasons set forth below, the judgment of the trial court dismissing the case on the merits is modified to a dismissal with prejudice and affirmed.

{¶ 3} Appellants, J. Randall Nye, successor trustee of the Swaisgood family trusts, and John B. Nye Jr., set forth the following assignment of error:

> The trial court erred in dismissing the Complaint.

{¶ 4} On cross-appeal, appellees Eastman & Smith, Ltd. and Michael P. Henry set forth the following cross-assignment of error:

> The trial court erred in dismissing Mr. Nye's complaint without prejudice. As the grounds were substantive, and as there are no circumstances under which Mr. Nye can successfully refile his claims, the complaint should have been dismissed with prejudice.

{¶ 5} The following undisputed facts are relevant to this appeal. Norman and Anna Belle Swaisgood were married in 1941. One child was born of their marriage. In 1948, the couple had a daughter, Norma Jean Stark. Norma Jean had no children and was not interested in owning or operating the family farm property located near Fremont, Ohio. Given this scenario, approximately twenty years ago, her parents decided to sell the family farm and use the proceeds to establish several family trusts. On September 29,

1994, the Swaisgood family charitable trusts were created, with Norman being designated as trustee and beneficiary of the Norman O. Swaisgood trust and Anna Belle being designated as trustee and beneficiary of the Anna Belle Swaisgood trust.

{¶ 6} Each of the Swaisgood family trusts provided that either surviving spouse would succeed the deceased spouse as trustee. In addition, the trusts provided that Norma Jean would be designated as both successor trustee and sole beneficiary of both trusts upon the death of both of her parents. Lastly, appellant J. Randall Nye, the local attorney who prepared the trusts for Norma Jean's parents in 1994, was designated as successor trustee of the trusts upon the death of Norma Jean. Various charitable organizations were designated as the sole residual beneficiaries upon the death of Norma Jean.

{¶ 7} In addition to the farm property sale proceeds funding the trusts, insurance assets were also purchased on behalf of the trusts. On June 17, 1995, each of the respective trusts purchased a fixed accumulation life insurance policy on the life of the trustee. Each of the policies had an enumerated death benefit of $753,000. Notably, appellant's father was the insurance agent for these original 1995 insurance policy purchases for the trusts.

{¶ 8} Ten years later, in October of 2005, Norman passed away. Accordingly, Anna Belle became the successor trustee and beneficiary to Norman's trust upon his death. Less than one year after her husband passed away, in April of 2006, Anna Belle passed away. At this juncture, their only child, Norma Jean, became the sole trustee and

sole beneficiary of both family trusts. The express purpose of the trusts was to provide income for the family member beneficiaries during their lifetimes. Upon the passing of all three family members, any remaining funds were designated to pass to various charitable organizations.

{¶ 9} In 2009, Norma Jean, as sole trustee and sole surviving beneficiary, became concerned with the amount of income and distributions to her from the family trusts. In order to learn what options were available to her for purposes of generating greater income and distributions from the trusts for her use, Norma Jean secured legal representation from Eastman & Smith, Ltd. and Eastman attorney Michael Henry.

{¶ 10} Norma Jean was advised that if she elected to surrender the two insurance policies owned by the trusts that had been purchased in 1995 from appellant's father, she could attain her goal of securing significant cash distributions and also purchase new investments for the trusts. Upon indirectly learning of Norma Jean's intent regarding modifying her trust investments, appellant, the attorney who was counsel to Norma Jean's parents when the trusts were established 15 years earlier, unilaterally sent correspondence in 2009 to appellees, Norma Jean's legal counsel in the matter. Appellant aggressively set forth his unsolicited opinion in opposition to Norma Jean's investment modification plans.

{¶ 11} Notably, appellant conceded that, "Norma Jean is an adult and obviously can make her own decisions." Appellant nevertheless attempted to characterize the purpose of income to Norma Jean from the family trusts as solely for "emergency"

situations even though the underlying trust documents do not contain the word "emergency" or other language that could reasonably be construed consistent with appellant's representation. Since appellant did not represent Norma Jean in 2009 or at any other time, appellant had learned of Norma Jean's 2009 plans to modify her trust investments through a phone call placed by appellees to appellant's father due to his involvement in the 1995 insurance policy purchases for the trusts.

{¶ 12} Appellant's father was the agent in the original life insurance policies to the trusts in 1995, subsequent to his son having served as the attorney who set up the trusts on behalf of Norma Jean's parents. As appellees concede, "John B. Nye Jr. was the agent listed on the 1995 life insurance policies." Thus, in 2009, appellees contacted appellant's father to seek his professional courtesy in exploring the possible waiver of any surrender charges by the insurance carrier that may be associated with the policies sold to the trusts by appellant's father being surrendered.

{¶ 13} Rather than addressing the requested assistance in waiving life insurance policy surrender fees, appellant's father informed appellant of Norma Jean's plans to modify the trust investments. Significantly, appellant was not and had never been Norma Jean's counsel.

{¶ 14} Appellees, Norma Jean's counsel, subsequently received unsolicited correspondence in 2009 from appellant aggressively questioning her investment modification intentions and suggesting that there were, "better ways for Norma Jean to reach her goals without incurring the high cost of surrendering the life insurance

policies." Since appellant was not her legal counsel and appellant's father was not her investment representative, the correspondence from appellant attempting to intercede in several capacities was troubling.

{¶ 15} Ultimately, appellant and his father did not undertake any formal or legal attempts to block the surrender of the 1995 policies in order to generate income for Norma Jean. On the contrary, this was a legitimate course of action by Norma Jean, consistent with her abilities pursuant to the trust provisions, and conducted by and through the advice of counsel.

{¶ 16} Following the 2009 surrender of the 1995 life insurance policies, Norma Jean purchased new life insurance policies for the trusts, in her capacity as sole trustee and sole beneficiary of each of the trusts. Appellant had no official or legal role in any of the 2009 transactions. The legal work underlying this matter performed by appellees for Norma Jean in 2009 was completed on or before October 15, 2009.

{¶ 17} Each of the policies surrendered in 2009 possessed a cash distribution value of $256,091.46 and each of the newly purchased policies possessed a death benefit value of $150,000 and interest payments to Norma Jean of $1,365.23. None of the disputed 2009 trust transactions were legally challenged by appellant, a licensed attorney in the state of Ohio, despite his awareness and opposition in writing to appellees.

{¶ 18} Not long after the trust transactions at issue, Norma Jean became seriously ill. On June 9, 2011, Norma Jean passed away. At that juncture, appellant became successor trustee of the trusts. Various charitable organizations became the successor

beneficiaries. Each of the 2009 life insurance policies purchased by Norma Jean in the course of the now disputed investment transactions yielded $151,365.40 for the benefit of the successor beneficiary charities.

{¶ 19} On June 12, 2012, three years after the underlying 2009 legal counsel and corresponding investment changes, appellant filed suit against appellees alleging legal malpractice and wholly related breach of contract claims. In essence, appellant alleged that some sort of malfeasance occurred in connection to the 2009 transactions given that they ultimately diminished the residual value of the trusts for the successor charitable organization beneficiaries.

{¶ 20} Interestingly, it is not contended and has never been contended that any provision of the trust agreements prohibited the 2009 transactions. Rather, it is suggested without relevant legal support that Norma Jean and her legal counsel somehow could have and should have accomplished Norma Jean's 2009 trust objectives with investment options that would not cause a potential diminished trust value at the then indeterminate future date when the remaining residual value of the trusts would pass on to the successor beneficiaries upon Norma Jean's eventual death. The trial court was not persuaded.

{¶ 21} On February 27, 2013, the trial court granted appellees' Civ.R. 12(B)(6) motion to dismiss. The trial court determined in relevant part that appellant lacked standing to pursue the malpractice claims as he was neither a trustee nor a beneficiary at the time of the disputed transactions. As such, he lacked any possible basis to assert proper standing. In conjunction with this, the trial court held that even assuming

arguendo that appellant somehow possessed the requisite standing, the matter was filed long after the applicable R.C. 2305.11(A) one-year statute of limitations for claims of legal malpractice claims had expired. The record reflects that appellant felt so strongly upon learning of the matter that he wrote an unsolicited letter in opposition to the investment plans in 2009, yet he failed to file legal action against appellees until 2012, the year after Norma Jean passed away and several years after the expiration of the statute of limitations. This appeal ensued.

{¶ 22} In the sole assignment of error, appellants contend that the trial court erred in granting the dismissal of the complaint pursuant to Civ.R. 12(B)(6). It is well-established that appellate review of a disputed Civ.R. 12(B)(6) dismissal is conducted on a de novo basis, utilizing the same standard as that employed by the trial court. A complaint must be dismissed for failure to state a claim upon which relief can be granted when plaintiff can prove no set of facts in support of the claim that would entitle him to relief. *Perrysburg Township v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, 814 N.E.2d 44, ¶ 5.

{¶ 23} In conjunction with the above, the Ohio Supreme Court has consistently reinforced the legal principle that only the client of an attorney or one in strict privity with the client of an attorney may properly assert a legal malpractice claim. *Shoemaker v. Grindlesberger*, 118 Ohio St.3d 226, 2008-Ohio-2012, 887 N.E.2d 1167, ¶ 9. In *Shoemaker*, the named beneficiaries of decedent's estate filed a legal malpractice action against legal counsel for the decedent alleging certain actions had negligently diluted the

value of the estate. The Supreme Court of Ohio determined that although the plaintiffs were lawful beneficiaries of the estate, they nevertheless lacked the requisite privity and standing to pursue malpractice claims against decedent's attorney. The privity between counsel and counsel's client did not extend to that client's estate beneficiaries. *Id.* at ¶ 10.

{¶ 24} This strict privity rule is statutorily reinforced by the express language set forth in R.C. 5815.16 which states, "absent an express agreement to the contrary, an attorney performs legal services for a fiduciary * * * has no duty or obligation in contract, tort, or otherwise to any third party." As applied to the instant case, the record clearly reflects that appellees performed legal services in 2009 for Norma Jean in her capacity as trustee and beneficiary of both trusts. Appellant, as a third-party successor trustee only, was owed no duty or obligation by appellees. Under *Shoemaker*, even assuming arguendo that appellant was a named beneficiary at the time of the disputed decisions, no duty or obligation was owed. The legal representation occurred between appellees and Norma Jean. The privity extended no further. In addition, the record reflects that Norma Jean never expressed concerns regarding the 2009 legal counsel she received from appellees and never expressed regret in her corresponding 2009 investment decisions.

{¶ 25} The record shows that appellant lacks any conceivable basis from which to attain the privity and standing required to properly file the legal malpractice claims underlying this case. We concur with the trial court that all claims set forth in this matter,

whether framed as legal malpractice or as breach of contract, arise from the exact same legal services furnished by appellees. They are properly merged in this matter.

{¶ 26} The record clearly reflects that Norma Jean, as sole trustee and sole beneficiary of the trusts, sought the advice of appellees in 2009 regarding her options to facilitate greater cash distributions and interest income from her family trusts. The record shows that this was not in breach of any provisions of the trust agreements. The record shows that appellant, in his limited capacity as future successor trustee of the trusts, which later occurred in 2011, lacked privity and lacked any possible standing from which to file the underlying legal malpractice case.

{¶ 27} Pursuant to R.C. 2305.11(A), the statute of limitations with which to file a legal malpractice claim is one year. In conjunction with this, the one-year statute of limitations begins to run upon the termination of the attorney-client relationship or upon the discovery of the alleged malpractice, whichever occurred later. *Smith v. Conley*, 109 Ohio St.3d 141, 2006-Ohio-2035, 846 N.E.2d 509, ¶ 4.

{¶ 28} In applying these legal parameters to this case, we note that the legal representation underlying this matter concluded on October 15, 2009, when the new insurance policies were purchased following the surrender of the 1995 policies. The record reflects that no further representation transpired between appellees and Norma Jean. With respect to discovery of the alleged malpractice, the record reflects that on April 9, 2009, appellant wrote correspondence to appellees clearly conveying concern and opposition to the pending trust transactions. As such, the statute of limitations in this

matter commenced on October 15, 2009, the later of those two dates. The record further reflects that at no time between October 15, 2009, and her June 2011 death, did Norma Jean ever communicate concern or dissatisfaction of any kind in connection with the 2009 legal counsel and trust transactions. The record reflects that Norma Jean, as the party in privity with appellees, never took any steps of any kind indicative of contemplating or pursuing legal malpractice claims against appellees.

{¶ 29} However, even assuming arguendo that appellant possesses privity and standing, appellant's cognizable event occurred no later than October 15, 2009, nearly three years before the legal malpractice claim was filed. Norma Jean passed away in June 2011 and appellant filed the matter on June 8, 2012. The record reflects that the statute of limitations for legal malpractice claims by appellant against appellees, separate and apart from its fatal failure on standing, expired on or before October 15, 2010, nearly one and one-half years before the matter was untimely filed.

{¶ 30} The record of evidence in this matter convincingly establishes that no conceivable set of facts exists which would entitle appellant to relief in this matter. The case was filed nearly one and one-half years after the expiration of the applicable statute of limitations. The record shows that there can be no conceivable set of facts from which appellant is entitled to relief. The trial court properly dismissed this case. Wherefore, we find appellant's assignment of error not well-taken.

{¶ 31} In conjunction with our determination that there is no conceivable set of facts from which appellant would be entitled to relief, we likewise conclude that the

disputed Civ.R. 12(B)(6) dismissal was on the merits of the case given that the complaint cannot be pled in any potentially successful way. Accordingly, we find appellees' cross-appeal, asserting that the dismissal should have been with prejudice given the inability to refile in any manner which could overcome the several fatal obstacles discussed at length above, well-taken.

{¶ 32} The judgment of the Lucas County Court of Common Pleas dismissing the underlying complaint pursuant to Civ.R. 12(B)(6) is hereby affirmed. We further modify the judgment pursuant to App.R. 12(A)(1)(a) to a dismissal WITH PREJUDICE for all of the aforementioned reasons. Appellants are hereby ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment of dismissal
affirmed and modified.

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A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Arlene Singer, P.J. _____

JUDGE

Thomas J. Osowik, J. _____

JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.

JUDGE