

STATE OF OHIO)
)ss:
COUNTY OF MEDINA)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

JODWAY HEATING & COOLING, LLC,
et al.

C.A. No. 08CA0089-M

Appellees

v.

ROBERT W. STEVENS, INC., et al.

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF MEDINA, OHIO
CASE No. 07CIV1897

Appellants

DECISION AND JOURNAL ENTRY

Dated: September 28, 2009

WHITMORE, Judge.

{¶1} Defendants-Appellants, Robert W. Stevens and Robert W. Stevens, Inc. (collectively “Stevens”), appeal from the judgment of the Medina County Court of Common Pleas, awarding \$14,224.50 plus interest to Plaintiffs-Appellees, Jodway Heating & Cooling, LLC, Michael A. Jodway, and Kolleen Jodway (collectively “Jodway”). This Court affirms.

I

{¶2} After Jodway began as a sole proprietorship, it hired Stevens, an accountant, to prepare its tax returns. At Stevens’ suggestion, Jodway eventually decided to change from a sole proprietorship to a limited liability corporation, which would be taxed as a Subchapter S corporation. Stevens, however, never ensured that the Internal Revenue Service (“IRS”) received the specific filings that were necessary to transition Jodway to an S corporation for tax treatment purposes. Nonetheless, Stevens prepared Jodway’s tax returns for 2002, 2003, and 2004 as if the S corporation forms had been properly filed. As a result, Jodway paid fewer taxes

to the IRS for those years than it would have if its returns had reflected its sole proprietorship status.

{¶3} In 2005, the IRS notified Jodway that its 2004 return could not be processed as submitted because Jodway did not have the necessary S corporation forms on file. Jodway hired another accountant, Carol Merinar, to aid with its accounting problems. Merinar filed Jodway's S corporation forms with the IRS in 2006. She also corrected a previous social security wage filing that Stevens had completed incorrectly for Jodway.

{¶4} On November 20, 2007, Jodway brought suit against Stevens for breach of contract and accountant negligence. The matter proceeded to a jury trial, and the jury found Stevens liable in the amount of \$14,224.50. Stevens now appeals from the foregoing judgment and raises one assignment of error for our review.

II

Assignment of Error

“THE JURY IN THE TRIAL COURT LOST ITS WAY TO THE DETRIMENT OF APPELLANTS BY AWARDED DAMAGES TO APPELLEES THAT WERE SPECULATIVE IN NATURE.”

{¶5} In his sole assignment of error, Stevens argues that the jury's damage award is speculative because Jodway has yet to incur any actual damages as a result of his negligence. Specifically, he argues that Jodway does not have a cause of action for accountant negligence until the IRS levies a penalty assessment against it. We disagree.

{¶6} Stevens does not take issue with the evidence presented at trial and does not assert any factual challenges. He challenges the jury's damage award solely on an issue of law. On the basis of the evidence presented at trial, he argues that Jodway does not yet have a claim against him for accountant negligence. “Because this assignment of error raises issues of law only, our

review is de novo.” *Warren v. Denes Concrete, Inc.*, 9th Dist. Nos. 08CA009414 & 08CA009422, 2009-Ohio-2784, at ¶32, quoting *State v. Hochstetler*, 9th Dist. No. 03CA0025, 2004-Ohio-595, at ¶10. We set forth relevant testimony from the court below solely to provide a context for analyzing the foregoing issue of law.

{¶7} Merinar testified that Jodway is currently liable to the IRS in the amount of \$12,912, plus any additional penalties and interest, as a result of Stevens filing its tax returns under an S corporation designation when, in fact, the IRS had yet to accept its S corporation election. Merinar admitted, however, that she based the foregoing figure on her own calculations because the IRS had yet to actually assess Jodway as of the time of trial. She further admitted that it was possible for Jodway to petition the IRS to waive any additional taxes, penalties, or interest due as a result of Stevens’ negligence. Michael Jodway also testified that Jodway incurred \$12,912 in tax liability as a result of Stevens’ accounting errors, but had yet to pay the IRS the additional taxes. Additionally, Michael testified that Jodway accrued \$1,312.50 in charges from Merinar as a result of the work she performed for Jodway, identifying and correcting Stevens’ accounting errors.

{¶8} Stevens argues that a claim for accountant negligence does not accrue until an individual or entity incurs actual damages in the form of an IRS penalty assessment. Because the IRS has yet to assess Jodway and could potentially waive any existing tax liability, Stevens argues, any award of damages is speculative. Stevens primarily relies upon this Court’s decision in *Sladky v. Lomax* (1988), 43 Ohio App.3d 4, in support of his argument that Jodway’s claim has yet to accrue.

{¶9} In *Sladky*, this Court held that “actions against accountants for negligent preparation of income tax returns do not accrue until the plaintiff is notified of an IRS

assessment.” *Sladky*, 43 Ohio App.3d at 6. *Sladky* involved a claim for accountant negligence based on problematic tax returns that Sladky’s accountant submitted in 1980. The IRS audited Sladky’s returns in 1982 and finalized its decision, assessing a penalty against Sladky in 1986. This Court held that Sladky’s claim did not ripen until 1986 because a “cause of action does not accrue until there is an injury or damage and the tort is thus complete.” *Id.* at 4. Sladky’s tort for accountant negligence was not “complete” until he was formally assessed, and thus, suffered tangible damage. *Id.*

{¶10} Post-*Sladky*, the Ohio Supreme Court decided *Investors REIT One v. Jacobs* (1989), 46 Ohio St.3d 176. In *Investors*, the plaintiffs filed suit against their accountants in 1980 based on negligently audited financial statements that the accountants had prepared from 1969 to 1974. The Supreme Court determined that plaintiffs’ accountant negligence claims accrued, at the latest, when their accountants submitted their 1974 audit. *Investors*, 46 Ohio St.3d at 182. Accordingly, the causes of action arose “when the allegedly negligent act[s] w[ere] committed or, in this case, no later than 1975.” *Id.* To the extent that *Sladky* would require a party injured by accountant negligence to await tangible damage rather than be able to file suit “when the allegedly negligent act was committed,” *Sladky* no longer remains good law. *Id.* See, also, *Lord v. Ernst & Whinny* (June 3, 1992), 9th Dist. No. 15361 (questioning *Sladky*’s continued viability in light of *Investors*). Accordingly, Stevens’ reliance on *Sladky* is misplaced.

{¶11} Aggrieved parties such as Jodway may bring suit against the individual or entity whose negligence subjected them to tax liability. *Halley v. Ohio Co.* (1995), 107 Ohio App.3d 518, 525-26 (“The issue here is whether Appellee acted negligently and subjected appellants to tax liability.”). See, also, *Jim Brown Chevrolet, Inc. v. S.R. Snodgrass, A.C.* (2001), 141 Ohio App.3d 583; *Fronczak v. Arthur Andersen, L.L.P.* (1997), 124 Ohio App.3d 240; *Hater v.*

Gradison Div. of McDonald & Co. Securities, Inc. (1995), 101 Ohio App.3d 99. The fact that an aggrieved party has yet to incur *tangible* tax liability by virtue of an IRS assessment, audit or actual payment of the tax, will not bar their claim because the threat of that specific liability is sufficient to sustain a cause of action against the tortfeasor who caused the liability. *Halley*, 107 Ohio App.3d at 525-26. This holding comports with the Supreme Court's decision in *Investors* and with this Court's post-*Sladky* decisions. See *Offenbeher v. Lomax Soful & Foster, Inc.* (Sept. 25, 1996), 9th Dist. No. 17725, at *1-5 (concluding that accountant negligence claim arose when plaintiff's faulty tax returns, overpaying the IRS, were filed, not later when plaintiff was unable to recoup the overpayment); *Lord*, at *2 (concluding that accountant negligence claim arose when plaintiffs relied upon negligent tax advice, not when the IRS later audited them).

{¶12} Because Jodway was subjected to tax liability as a result of Stevens' negligence in filing Jodway's tax returns, the trial court did not err in entering judgment in favor of Jodway. Merinar calculated the amount of Jodway's tax liability and testified as to that amount. The fact that the IRS has yet to levy an assessment against Jodway is inapposite as Jodway's claim arose when Stevens negligently filed its tax returns and caused Jodway to underpay its taxes. Stevens' sole assignment of error lacks merit.

III

{¶13} Stevens' sole assignment of error is overruled. The judgment of the Medina County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Medina, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellants.

BETH WHITMORE
FOR THE COURT

MOORE, P. J.
BELFANCE, J.
CONCUR

APPEARANCES:

CONRAD G. OLSON, Attorney at Law, for Appellants.

GINO PULITO, Attorney at Law, for Appellees.