IN THE SUPREME COURT OF OHIO

TONY PEH,	:	Case No. 2021-0197
	:	
Plaintiff-Appellant,	:	On Appeal from the Greene County Court
v.	:	of Appeals, Second Appellate District
	:	
THOMAS KOLLIN, *et al*.,	:	Court of Appeals Case
	:	No. 2019 CA 0071
Defendants-Appellees.	:	

MEMORANDUM IN OPPOSITION TO JURISDICTION OF APPELLEES FROST BROWN TODD LLC AND BENJAMIN HELWIG

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I. THIS CASE PRESENTS NO ISSUE WORTHY OF THIS COURT'S DISCRETIONARY JURISDICTION

Appellant, Tony Peh ("Peh") seeks this court's discretionary review of a Second District Court of Appeals decision finding Peh's attorney malpractice claims to be time barred by the statute of limitations. R.C. 2305.11(A). Knowing the invocation of this court's discretionary jurisdiction requires the issues to be argued respond to a "public or great general interest," Appellant bases his jurisdictional hopes on a misstatement of the Appellate Court's holding. Contrary to Appellant's characterization, the Court of Appeals did not abandon precedent by legislating new law. The Court of Appeals imagined no automatic scienter upon receiving an adverse ruling; it presumed no lawyer-like knowledge of the law on the part of the client; and nowhere in the Court's opinion is there a suggestion that the Court of Appeals departed from stare decisis. In unanimously affirming summary judgment for the appellees, the Court of Appeals relied exclusively on well-established case law applying the statute of limitations trigger of "cognizable event" to fact-specific cases including:

- *Zimmie v. Calfee, Halter and Griswold*, 43 Ohio St.3d 54, 538 N.E.2d 398 (1989) ("an action for legal malpractice accrues and the statute begins to run when there is a cognizable event");

- *Omni-Food & Fashion, Inc. v. Smith*, 38 Ohio St.3d 385, 528 N.E.2d 941 (1988) (to determine the accrual date a court should consider "when the injured party became aware, or should have become aware, of the extent and seriousness of his or her alleged legal problem; whether the injured party was aware, or should have been aware, that the damage or injury alleged was related to a specific legal transaction or undertaking previously rendered him or her; and whether such damage or injury would put a reasonable person on notice of the need for further inquiry as to the cause of such damage or inquiry");

- *Smith v. Conley*, 109 Ohio St.3d 141, 2006-Ohio-2035, 846 N.E.2d 509, ¶ 4 (two factual determinations are required: "(1) When should the client have known that he or she may have an injury caused by his or her attorney? and (2) When did the attorney client relationship terminate? The later of these two dates is the date that starts the running of

the statute of limitations); *Id.* at ¶ 5 (adverse judgments have been recognized as cognizable events);

- *Flowers v. Walker*, 63 Ohio St.3d 546, 549, 589 N.E.2d 1284 (1992) ("A plaintiff need not have discovered all the relevant facts necessary to file a claim in order to trigger the statute of limitations"); *Id*. ("constructive knowledge of the facts, rather than actual knowledge of their legal significance is enough to start the statute of limitations running under the discovery rule");

- *Griggs v. Bookwalter*, 2d Dist. Montgomery No. 24985, 2006-Ohio-5392, ¶ 20, quoting *Deutsch v. Keating, Muething & Klekamp*, 2d Dist. Montgomery No. 20121, 2005-Ohio-206, ¶ 16 (plaintiff need not "'be aware or suffer the full extent of his injury before there is a cognizable event'");

- *Al-Mosawi v. Plummer*, 2d Dist. Montgomery No. 24985, 2012-Ohio-6934, ¶ 23, citing *Lynch v. Dial Fn. Co. of Ohio No. 1, Inc.*, 101 Ohio App.3d 742, 748, 656 N.E.2d 714 (8th Dist. 1995) ("it is knowledge of the facts not legal theories, which starts the running of the statute of limitations");

- *Burdge Law Office Co., LPA v. Wilson*, 2d Dist. Montgomery No. 20687, 2005-Ohio-3746, ¶ 18 (the earliest cognizable event was the date counsel notified the client of the trial court's ruling).

Nowhere in the Court of Appeals decision does the word "automatically" appear. This case, like the cases cited in the Appellate Court's decision, supports only the proposition that, based on the facts in this case, Peh should have investigated a legal malpractice claim once he knew that the Court of Appeals, in its March 2012 opinion, rejected his lawyers' arguments regarding delay in bringing the claim, dismissed the "clean hands" defense because it wasn't properly presented and reinstated plaintiff's breach of contract claim despite 10 years of delay costing Peh hundreds of thousands of dollars. As of March 2012, Peh knew all the facts that he now claims evidence "glaring failures" by the defendant-lawyers in defending him. The Court of Appeals appropriately determined March 2012 was the date of Peh's "cognizable event."

The opinion, however extrapolated, in no way supports Appellant's two propositions of law. Contrary to Proposition of Law No. 1, Peh's cognizable event was not automatically triggered by the March 2012 opinion; it was triggered by everything Peh knew and should have

questioned. As to Appellant's Proposition of Law No. 2, the March 2012 Court of Appeals decision debunked the advice that the lawyers had given him thus creating a cognizable event. The statute of limitations for lawyer malpractice would have no trigger if clients with full knowledge of the underlying facts and with appreciation of their injury could avoid untimeliness of their claim by contending, "I relied on my lawyer." There is no public or great general interest presented by the facts or the application of established law in this case.

Without a novel question of law, the only issue presented by this appeal is whether the Court of Appeals' decision incorrectly applied the law to the facts of this case. Right or wrong, a Court of Appeals decision predicated upon distinct facts and well-settled law is not reviewable by this Court absent a "public or great general interest." A dispute between two business partners (Peh and Reid) over a decade old equipment lease or the subsequent dispute between Peh and his lawyers, which was dismissed on summary judgment and unanimously ratified by the Court of Appeals, effects only the interest of the litigants, not the citizens of Ohio.

Ironically, even if the Court would be inclined to grant discretionary jurisdiction to the appellant, and the Court reversed the Court of Appeals' finding that March 2012 was Peh's cognizable event, the case would be remanded so that the trial court could consider other cognizable events fatal to appellant's claim and other outcome-determinative defenses including the contractual waiver in paragraph 3.05 of the equipment lease, common law waiver of a statute of limitations argument in the appellate court for not having preserved it in the trial court and the enforceability of R.C. 1310.52 as the governing statute of limitations, all of which belie a case of public or great general interest. Appellant's Motion in Support of Jurisdiction should be denied.

II. STATEMENT OF THE CASE AND FACTS

Appellee is satisfied with Appellant's statement of the procedural posture of this case, but contests the factual description.

In September 2011, Benjamin Helwig ("Helwig") received a client referral from Tom Kollin ("Kollin"). Kollin had recently obtained a favorable verdict for Peh following a bench trial in Greene County Court of Common Pleas by arguing the equitable theories of laches, estoppel, unclean hands, and accord and satisfaction ("Underlying Litigation"). The plaintiff in the Underlying Litigation, Marilyn Reid ("Reid"), appealed that verdict and Kollin referred the matter to Helwig to handle the appeal. Helwig agreed to represent Peh, the appellee.

The Underlying Litigation stemmed from an alleged breach of an equipment lease (the "Lease") between Wallaby's (Peh's restaurant) and Reid. Peh negotiated the Lease on behalf of Wallaby's and as surety for the lessee's obligations. The term of the Lease, which began in 1996, included two significant provisions pertinent to the Underlying Litigation and the malpractice suit at issue:

> 3.05 – The lessee hereby waives, and agrees not to assert, any and all existing and future claims, defenses and offsets against any rent or other payment due hereunder. The lessee agrees to pay the rent and other amounts hereunder regardless of any claim, defense or offset which may be asserted by the lessee or on its behalf.
> * * *
> 15.03 – No covenant or condition of this Lease may be waived except by written consent of the Lessor. Forbearance or indulgence by the lessor in any regard whatsoever shall not constitute a waiver of the covenant or condition to be performed by the Lessee to which the same may apply, and, until complete performance by the Lessee of any covenant or condition, the Lessor shall be entitled to invoke any remedy available to the Lessor under the lease or by law or in equity despite said forbearance or indulgence.

Reid never issued a "statement" triggering payment under the Lease and, until August 1999, never complained that Wallaby's had not paid a nickel under the Lease. Reid continued to forebear enforcement of the Lease from 1996 to 2008, other than to perfect a subordinated security interest in Wallaby's real estate that was adequate only to cover the principal due under the Lease. In 2008, the Greene County auditor filed a foreclosure proceeding against Wallaby's

and its real estate, appraising the property well below its projected fair market value. Reid would receive nothing and filed suit against Wallaby's and Peh seeking enforcement of the Lease.

Kollin answered Reid's complaint with general denials and listed 13 affirmative defenses including statute of limitations. Kollin successfully defended Peh and Wallaby's, by arguing laches, unclean hands, equitable estoppel and accord and satisfaction. The statute of limitations defense was not asserted or argued at trial or in any pre- or post-trial motion.

Helwig, now representing Peh as the Appellee and defending the trial court decision, prepared the appellee's brief and then argued before the Second District Court of Appeals ("Court of Appeals") that the equitable underpinnings of Judge Kessler's decision were supported by the evidence and should be affirmed. The Court of Appeals decision on March 30, 2012 reversed the trial court and found that the Lease was enforceable and that Peh understood its terms. The Court of Appeals referenced the forbearance provision in the Lease as support for its dismissal of the laches argument. The matter was remanded to the trial court on the issues of setoff, mitigation and recovery of interest.

On remand, in his pretrial brief, Helwig attempted to expand the issues beyond the calculation of damages—but was rejected as beyond the Court of Appeals' mandate. The trial court issued its decision and entered judgment for Reid awarding damages in the amount of $314,604.83. Reid appealed again alleging an incorrect calculation of the pre- and post-judgment interest. It was at this point that Peh decided Helwig should withdraw as his counsel. The Court of Appeals sustained Reid's assignments of error and remanded the case again for calculation of pre- and post-judgment interest consistent with its opinion. Judgment was entered against Peh and Wallaby's for $401,376.52, plus interest accruing at a rate of 15% per annum. Eventually, Peh consulted with and then retained John Paul Rieser, Dianne Marx, Stephen

Malkiewicz and the law firm of Rieser and Marx to investigate a bankruptcy option. Neither Peh nor his bankruptcy counsel initiated an investigation of lawyer malpractice despite what appellant now describes as "glaring error."

In April 2016, Reid filed a complaint for creditor's bill against Peh alleging that Peh did not have sufficient personal or real property to satisfy the entire judgment. Peh was originally represented by Rieser and Marx who did not assert the statute of limitations defense in Peh's answer to the complaint. Reid eventually amended her complaint to add Allstate Insurance Company and Tri State Development, LLC ("Tri State"), Peh's Allstate agency which he transferred to his wife, Renee McClure ("McClure"), after Reid's judgment was entered against him. McClure engaged Walter Reynolds ("Reynolds") as counsel to Tri State to defend Reid's fraudulent conveyance claim. Upon receiving the pleadings in the Underlying Litigation, Reid mentioned to McClure that he believed that the four-year statute of limitations for an equipment lease may apply to the Underlying Litigation. Peh then consulted with current counsel and filed the Complaint in this case, almost seven years after the trial court entered judgment in Peh's favor relying on equitable grounds, not the statute of limitations, and six years after the Court of Appeals reversed that ruling with no mention of a statute of limitations. As the Court of Appeals in this case summed up:

> We offer no opinion as to the merits of Peh's legal malpractice action and no opinion on whether the outcome of the contract claim might have been different if Kollin and Helwig had pursued different tactics. Our conclusion is that it is too late to find out.

III. ARGUMENT AS TO PROPOSITIONS OF LAW

A. Plaintiff's Proposition of Law No. I: "The Cognizable Event for a Legal Malpractice Cause of Action Is Not Automatically Triggered by an Adverse Ruling in the Underlying Case"

Appellant's hyperbole in framing Proposition of Law No. 1 excuses a cogent response. There is no argument that an adverse result in an underlying lawsuit does not in and of itself automatically trigger a "cognizable event." It can, in some instances, constitute a cognizable event if, for example, the trial court documents attorney malpractice in its opinion or it can combine with other facts to form a cognizable event. *Smith*, 109 Ohio St. 3d 141, 2006-Ohio-2030, 846 N.E.2d 509 at ¶ 5 (alleged malpractice resulted in the client's conviction which was the date on which the plaintiff should have known that he had an injury caused by the attorney); *Burdge Law Office Co., LPA*, 2d Dist. Montgomery No. 20687, 2005-Ohio-3746 at ¶¶ 15, 18 (the date the attorney informed the client of the trial court's adverse ruling was the cognizable event). In either scenario, the adjudication of a cognizable event is deliberative, not automatic. If any adverse ruling automatically triggered a client's investigation of legal malpractice, Peh's cognizable event would have occurred in 2011 when the trial court denied his motion for summary judgment, a motion based entirely on the untimeliness of Reid's complaint.

Instead, the ruling on summary judgment was a factor in the Appellate Court's decision, not a dispositive event. (Appx. 7; ¶ 16, of the Court of Appeals' September 18, 2020 Opinion). The Court of Appeals in this case appropriately analyzed all the facts that Peh knew or should have known as of March, 2012 to reach its conclusion that, by then, Peh knew enough to be suspicious of malpractice. (*Id.*at ¶ 20). As of March, 2012, Peh knew that his trial lawyer asserted the statute of limitations as an affirmative defense; he knew the statute of limitations was not argued in his motion for summary judgment; he knew he'd lost the motion for summary judgment, despite the undisputed facts of a 9-12 year delay; he sat through the trial and heard no

mention of the statute of limitations; he was aware of the verdict in his favor, a verdict based on Reid's delay in filing her lawsuit but not based on the statute of limitations; and as of March, 2012, Peh knew he had lost in the Court of Appeals and was facing bankruptcy as a consequence. He should have known that things weren't adding up. He could have asked his bankruptcy lawyers to investigate; he didn't.

Appellant's Proposition of Law No. 1 has no reality in this case. It simply doesn't apply here and cannot form the basis for discretionary jurisdiction.

B. Plaintiff's Proposition of Law No. II: "Presumption of Knowledge of the Law is Suspended in Circumstances Where a Client Is Represented by Counsel and Reasonably Relies on the Advice of Counsel to Guide is Actions or Inactions"

Appellant misconstrues the Court of Appeals decision, simply because he does not approve of its application of valid case law and sound legal principles to his specific factual scenario. Appellant does not appear to disagree that in determining the accrual date of a legal malpractice statute of limitations courts evaluate the event when a client discovered *or should have discovered* they were injured by their counsel's action or inaction. *Omni-Food & Fashion, Inc.*, 38 Ohio St.3d 385 at ¶ 2, N.E.2d 941 (1988). The Court of Appeals followed this exact prescribed analysis in determining the accrual date of appellant's legal malpractice by "exploring the particular facts" of the action. *Busacca v. Maguire & Schneider, LLP*, 162 Ohio App.3d 689, 693, 2005-Ohio-4215, 834 N.E.2d 856 (11th Dist.). *See also, Skidmore & Hall v. Rottman*, 5 Ohio St.3d 210, 450 N.E2d 684, 685 (1983).

Relying on the sufficiency of a cognizable event to put a reasonable person on notice does not conflict with laypersons trusting the advice of counsel. The critical distinction is that the cognizable event is a point in time in which a reasonable person is deemed to have been put "on notice of the need for further inquiry as to the cause of such damage or injury." *Omni-Food*

& Fashion, Inc., 38 Ohio St.3d at syllabus, 528 N.E.2d 951. The Court of Appeals did not charge Appellant with knowing what statute of limitations may have applied in the Underlying Litigation, but because Appellant was aware of all the facts necessary to inquire as to why he lost at the appellate level, the clock on a potential malpractice claim rightfully began to tick. *Flowers*, 63 Ohio St. 3d at 549. Appellant cannot have it both ways—the alleged malpractice cannot be both "a glaring error," yet not enough to put him (a reasonable person) on notice of the need for further inquiry.

IV. CONCLUSION

The trial and appellate courts correctly decided the issues before them. Those issues do not involve matters "of public or great general interest." The Court should decline the invitation to waste its time and jurisdiction over this appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Memorandum in Opposition to Jurisdiction of Appellees Frost Brown Todd LLC and Benjamin Helwig has been served via electronic mail upon the following counsel of record this 12th day of March, 2021:

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