

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

THE ESTATE OF RYAN ZWINGLER, MICHELE ZWINGLER,
INDIVIDUALLY AND AS THE ADMINSTRATOR FOR THE ESTATE OF
RYAN ZWINGLER, ET AL.,

Plaintiffs-Appellants,

v.

ESTATE OF WILLIAM JOSEPH KISSINGER, JR.,

Defendant-Appellee.

OPINION AND JUDGMENT ENTRY
Case No. 26 MA 0017

Civil Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 2024 CV 00571

BEFORE:

Cheryl L. Waite, Carol Ann Robb, Mark A. Hanni, Judges.

JUDGMENT:

Affirmed in part. Reversed in part and Remanded.

Atty. Michael J. O'Shea, for Plaintiffs-Appellants

Atty. Robert S. Yallech, and *Atty. Brian D. Sullivan*, Reminger Co., L.P.A., for Defendant-Appellee

Dated: October 16, 2026

WAITE, P.J.

{¶1} Appellants Estate of Ryan Zwingler and Michele Zwingler, individually and as administrator of the Estate of Ryan Zwingler, appeal a February 10, 2026 judgment entry of the Mahoning County Court of Common Pleas granting a partial motion for judgment on the pleadings and a partial grant of summary judgment in favor of Appellee Estate of William Joseph Kissinger. In this complex attorney malpractice action involving two other lawsuits, Appellants essentially argue that the trial court erroneously found that malpractice against Appellee could not succeed as to one lawsuit because the opposing party in that action, the Ohio Department of Transportation (“ODOT”), was protected by sovereign immunity and because the complaint was not timely filed. As to a second lawsuit, Appellants argue that the trial court improperly determined the paving company, Central Allied Enterprise, Inc., (“CAE”) did not negligently complete a state road paving job because the work was accepted by ODOT. For the reasons that follow, Appellants’ argument as to the ODOT lawsuit is without merit and the judgment of the trial court is affirmed as to that case. However, the argument in regards to CAE’s lawsuit has merit, and the judgment is reversed and remanded as to that case.

Factual and Procedural History

{¶2} This matter has a somewhat complicated factual and procedural history due to the involvement of multiple case numbers having different parties. The outcome of these cases led to the present malpractice action against Appellee, but because it was based on allegations arising from the other two lawsuits, this matter involves what can best be described as a case within a case. The issue on appeal involves a legal malpractice action arising from these suits, which had two trial

court case numbers and involved different parties but arose from the same factual occurrence, the death of Ryan Zwingler. Pursuant to the case-within-a-case doctrine, in order to successfully assert a legal malpractice action, here, a plaintiff must establish grounds for the underlying case or cases which resulted in the malpractice. Thus, the merits of the underlying actions are critical. For ease of understanding, the general facts will be discussed first, and the two different underlying trial court cases will be addressed separately.

General Facts

{¶3} While this appeal concerns legal malpractice, the underlying event which gave rise to this claim involved a fatal motor vehicle accident. On May 27, 2013, two men, Ryan Zwingler and Jarod Cameron, were working for Bell Plants, Inc. While in the scope of their employment duties, they operated a 2008 Freightliner Conventional 6x2 truck-trailer on state route 534 (“SR 534”). On the day in question, Cameron was driving with Zwingler as the passenger. Evidence shows that at the time of the incident, Cameron was operating the vehicle at a speed of around fifty miles per hour in a fifty-five miles per hour zone. John T. Massalsky, Jr., who was driving a vehicle following this truck, told investigators that Cameron drove in what he described as “normal operation.”

{¶4} According to investigations which took place after the fact, the lane of travel and the shoulder area of SR 534 are extremely narrow. The lane of travel was measured at 9.29’ wide. In comparison, the truck driven by Cameron was 8’6” wide, leaving him just over six inches on both sides of the truck to stay within the lane. In other words, the truck essentially filled up the entire width of the driving lane, leaving little room for the vehicles in the oncoming traffic lane. The shoulder area of the roadway on which Cameron was

traveling measured 18” wide. The tires on the truck measured 11.6”. There was a 6” drop in the berm to the shoulder area, which had a downslope.

{¶5} At some point on the night at issue, in the opposing traffic lane a large truck approached the vehicle operated by Cameron. Just before the vehicles were to pass one another, the truck operated by Cameron suddenly shifted to the right, within the shoulder area, before overcorrecting to the left and colliding into the incoming truck, causing a large fire. An investigation after the fact showed that Cameron feared the vehicles would not both fit in their narrow lanes without hitting one another and attempted to operate the truck he was driving on the shoulder. However, due to the drop off and the narrow shoulder area, apparently Cameron attempted to re-enter the lane of traffic when he realized the shoulder was too narrow for his tire.

{¶6} Massalsky, following behind Cameron’s vehicle, observed the accident, pulled off the road and apparently approached the two truckers. He saw that Cameron and Zwingler were trapped inside their burning vehicle and called 911. Neither Cameron nor Zwingler survived the accident. The driver of the other truck was able to escape and survived. The instant action does not directly involve Cameron’s estate, the driver of the other truck, or Massalsky.

{¶7} The road had been paved by Central Allied Enterprises, Inc. (“CAE”) approximately nine years before the incident. A contract between CAE and Ohio Department of Transportation (“ODOT”) specified the shoulder drop off could not be more than one inch. Testimony from CAE employees stated that at the time of completion, there was no drop off. ODOT accepted the project as compliant with the terms of the contract. However, it is clear from two reports, one completed by Trooper Jester of the

Ohio State Patrol and one completed by Patrick Altvater, an expert witness, that the shoulder had a drop off of 6” from the roadway at the time of the accident.

Attorney William Kissinger

{¶8} Shortly after the accident, Zwingler’s parents retained Attorney William Kissinger to open a probate case and potentially seek redress by means of litigation for wrongful death and survivorship claims. Attorney Kissinger opened a probate case and intended to address those matters. He hired Attorney Scott Melton to pursue wrongful death and survivorship claims. Attorney Melton is licensed to practice law in Pennsylvania but is not licensed in Ohio, hence he needed to obtain *pro hac vice* admission. The Mahoning County Court of Common Pleas, Probate Division, approved the retainer agreement between the Zwingler Estate and Attorney Melton on October 16, 2014.

{¶9} On May 27, 2015, Attorney Kissinger and Attorney Melton filed two lawsuits: Estate of Ryan Zwingler v. Central-Allied Enterprises, Inc., case number 2015-cv-1410, and Estate of Ryan Zwingler v. Ohio Department of Transportation, case number 2015-00525JD.

{¶10} In essence, the action against CAE pertained to their workmanship in paving SR 534. It was alleged that the lanes and shoulder were too narrow and that the berm and shoulder had a significant drop off creating a dangerous situation. The action against the ODOT involved claims related to its alleged failure to inspect and identify these issues and the failure to warn motorists of the roadway’s defects.

Attorney Scott Melton

{¶11} In October of 2017, Attorney Melton discovered that he had failed to take a necessary step in the *pro hac vice* admission process. The step involved his failure to file the trial court's judgment entry granting him permission to proceed *pro hac vice*. He communicated this fact to the Ohio Supreme Court, Attorney Kissinger, and the Zwingler family. Attorney Melton told Attorney Kissinger that he did not believe that the issue would have a significant impact, but if it did, he had two million dollars in liability insurance coverage. Sometime around this discovery, Attorney Melton and Attorney Kissinger voluntarily dismissed both cases based on their need for additional time to prepare the cases.

{¶12} Despite Attorney Melton's proper communication and handling of his mistake, Attorney Kissinger moved to terminate the contract between Attorney Melton and the Zwingler family. Attorney Kissinger also met with the Zwingler family and convinced them to proceed solely through his representation of both the probate matters and wrongful death claims despite his lack of experience handling wrongful death cases.

{¶13} Attorney Kissinger never attempted to obtain the case file from Attorney Melton, and instead demanded that Attorney Melton turn the claim over to his insurance carrier.

Legal Proceedings

{¶14} On October 9, 2018, Attorney Kissinger refiled the wrongful death action against CAE, but did not timely refile the action against ODOT. Although the full picture is less than clear, as not all case files connected with this matter are within the record, it appears that Attorney Kissinger was the sole lawyer in these matters.

{¶15} On January 11, 2019, Attorney Kissinger filed a complaint on behalf of the Zwingler family against Attorney Melton and his malpractice carrier. The action was originally filed in the probate court but was removed to federal court before Attorney Kissinger voluntarily dismissed the case.

{¶16} On August 12, 2019, the Mahoning County Bar Association grievance committee notified the Zwingler family that Attorney Melton had not violated the Ohio Code of Professional Conduct. Similarly, the Ohio Disciplinary Council also found no grievable offense.

{¶17} On September 18, 2019, in the other case, CAE filed a motion for summary judgment arguing that the lawsuit against it was untimely filed, alleging the first lawsuit was void ab initio due to Attorney Melton’s failure to complete the *pro hac vice* process. The court denied the motion, finding that the complaint was not void.

{¶18} Attorney Melton agreed to pay up to \$30,000 through his malpractice carrier for independent counsel to represent the Zwinglers. On October 23, 2020, a trial court found that Attorney Melton’s minor mistake in his *pro hac vice* admission did not render the complaint he filed on behalf of Appellant Estate void. The court noted that the Ohio Office of Disciplinary Counsel deemed the mistake with the *pro hac vice* admission process to be “inadvertent” and not grounds for discipline.

{¶19} In a July 16, 2021 judgment entry in the CAE case, the court found that “the failure by the Estate’s then only counsel of record Attorney Kissinger to timely refile the complaint against ODOT in the Ohio Court of Claims is a major legal and procedural impediment for the Estate in the pending civil action. Accordingly, Attorney Kissinger is faced with at least the possibility of the Estate having a viable legal professional

malpractice claim against him.” The court deemed that potential claim gave rise to a conflict of interest, and removed him from the case. According to the Appellant Estate, despite being dismissed from the case by the court, Attorney Kissinger continued his representation of the Appellant Estate for some time.

Proceedings Against Attorney Kissinger (Instant Issue)

{¶20} On July 7, 2022, Appellants filed a complaint against Attorney Kissinger, asserting claims of legal malpractice and breach of fiduciary duty. On March 6, 2024, Appellants voluntarily dismissed the complaint. Shortly thereafter, it appears that Attorney Kissinger died.

{¶21} On March 21, 2024, the complaint was refiled against Appellee. It contained the same claims as the earlier complaint. On April 29, 2025, Appellee filed a motion for summary judgment. While the motion will be addressed more thoroughly within the arguments, it sought summary judgment on the basis of the case-within-a-case doctrine. The doctrine applies to some legal malpractice claims where the merits of the underlying litigation are directly at issue in determining the malpractice action. In essence, the doctrine provides that the plaintiff may only succeed in a legal malpractice action where the merits of the underlying case can be demonstrated.

{¶22} Appellee filed a motion for partial judgment on the pleadings based on its contention that the legal malpractice claim, as it pertains to the ODOT case, was barred by the statute of repose. In the alternative, Appellee argued that Appellants could never succeed in the case against ODOT, as ODOT is protected from suit by sovereign immunity.

{¶23} On August 15, 2025, the trial court filed two judgment entries. The first addressed the action against ODOT and granted Appellee’s motion for judgment on the pleadings. The court determined that Appellants failed to bring the action against ODOT within four years and violated the statute of repose. Even if the complaint had been timely filed, the court determined that ODOT enjoyed sovereign immunity which would prevent Appellants from recovery. The court’s second entry addressed the complaint against CAE and granted summary judgment in favor of Appellee. The court relied on the testimony from two CAE employees that the berm was flush with the pavement in accordance with the contractual requirements on the date that the project was completed. The court explained that construction was completed on August 2, 2004, nine years before the accident, and ODOT’s approval of the work occurred on August 17, 2004. The court observed that the only evidence of faulty work arises from two expert reports completed nine and thirteen years after the work had been completed. The court determined that the testimony of the workers essentially outweighed the reports. This appeal challenges both judgment entries.

{¶24} After the filing of the notice of appeal in this matter, some procedural issues arose. The parties in this matter sought and received extensions of time in which to file their respective briefs, and Appellants slightly exceeded even the time as extended. As a result, this case has been pending for a somewhat longer time than usual.

{¶25} In addition, on July 29, 2026, counsel for Appellee filed a “Notice of Substitution of Counsel.” The motion was not properly signed, however, and it was later learned that counsel intended to completely withdraw from the case and entirely new

counsel was to represent. We requested that an amended notice be filed with the appropriate signature, which was received on August 7, 2026.

Judgment on the Pleadings

{¶26} Appellants' first and second assignments of error involve judgment on the pleadings, which is governed by Civ.R. 12. An appellate court reviews a trial court's ruling on a Civ.R. 12(C) motion *de novo*. *Pelletier v. Mercy Health Youngstown, L.L.C.*, 2024-Ohio-2131, ¶ 10 (7th Dist.), citing *Ahmed v. Sargus*, 2005-Ohio-2382, ¶ 7 (7th Dist.). On review, the Court must construe all material allegations of the complaint as true and make all reasonable inferences in favor of the nonmoving party. Where a motion pursuant to Civ.R. 12(C) is filed, dismissal is appropriate only where "it appears beyond doubt that the plaintiff can prove no set of facts entitling him or her to relief." *Maternal Grandmother v. Hamilton Cty. Dept. of Job and Family Servs.*, 2021-Ohio-4096, ¶ 13, quoting *Reister v. Gardner*, 2020-Ohio-5484, ¶ 17.

ASSIGNMENT OF ERROR NO. 1

THE TRIAL COURT ERRED WHEN IT GRANTED DEFENDANT-APPELLEE ESTATE OF KISSINGER'S MOTION FOR JUDGMENT ON THE PLEADINGS BASED ON R.C. 2305.117(B)'S FOUR YEAR REPOSE PERIOD BECAUSE THAT STATUTE HAD NOT BEEN ENACTED WHEN KISSINGER'S LEGAL MALPRACTICE OCCURRED AND BECAUSE IT APPLIES PROSPECTIVELY, IT DOES NOT APPLY TO THE ZWINGLERS' LEGAL MALPRACTICE CLAIMS IN THIS CASE. [ERROR AT DOCKET NO. 64 (08/15/2025 JUDGMENT ENTRY)].

{¶27} Appellants assert that the occurrence which gave rise to the malpractice claim happened on October 16, 2018, when any claims against ODOT were essentially lost due to Attorney Kissinger’s failure to file the lawsuit against ODOT within the proper time. Appellants state that the legislature did not enact the statute of repose until June 21, 2021, the effective date of the statute. Because the statute of repose is not to be applied retroactively, Appellants contend that the statute did not apply in 2018 when the malpractice claim arose, and cannot be used to bar its otherwise valid claims against ODOT.

{¶28} The decision of the trial court was essentially two-pronged: the ODOT complaint was barred by the statute of repose and, in the alternative, ODOT enjoyed sovereign immunity. Either way, if the trial court is correct, Appellants cannot rely on their assertion that they had a valid suit against ODOT but for the malpractice of Attorney Kissinger. To overcome this hurdle, Appellants begin by arguing that the statute of repose was not effective until June 16, 2021 and does not apply retroactively. Appellants’ claim against ODOT which gave rise to the malpractice occurred on October 16, 2018 (the date the alleged malpractice occurred), hence the statute of repose was not yet in effect.

{¶29} Even so, Appellants argue that the statute of repose is inapplicable for a second reason. Appellants explain that Attorney Kissinger’s negligence had not resulted in actual damage until April 28, 2022, which is the date that Attorney Kissinger was responsible for losing the CAE case through his malpractice. Appellants reason that where a recovery against the state is involved (as in the case against ODOT), any recovery is reduced by any collateral recovery (which should have been gained from the CAE lawsuit). In other words, if Appellants were successful in both its lawsuits against

ODOT and CAE, recovery against ODOT would be reduced by any amount they recovered from CAE.

{¶30} Appellee responds that the legal malpractice statute is analogous to the medical malpractice statute. The latter bars both accrued and non-vested malpractice claims that have not been timely filed. Appellee contends that it is thus possible for a claim of negligence to expire before the negligence claim is even discovered. Appellee also argues that R.C. 2305.19, the savings statute, does not apply to the statute of repose. Hence, the fact that the action was timely filed in 2022 and refiled in 2024 is inconsequential.

{¶31} The statute of limitations for an action based on legal malpractice is found within R.C. 2305.117, which provides in relevant part:

(A) Except as otherwise provided in this section, an action upon a legal malpractice claim against an attorney or a law firm or legal professional association shall be commenced within one year after the cause of action accrued.

(B) Except as to persons within the age of minority or of unsound mind as provided by section 2305.16 of the Revised Code, and except as provided in divisions (C) and (D) of this section, both of the following apply:

(1) No action upon a legal malpractice claim against an attorney or a law firm or legal professional association shall be commenced more than four years after the occurrence of the act or omission constituting the alleged basis of the legal malpractice claim.

(2) If an action upon a legal malpractice claim against an attorney or a law firm or legal professional association is not commenced within four years after the occurrence of the act or omission constituting the alleged basis of the claim, then, any action upon that claim is barred.

(C)(1) If a person making a legal malpractice claim against an attorney or a law firm or legal professional association, in the exercise of reasonable care and diligence, could not have discovered the injury resulting from the act or omission constituting the alleged basis of the claim within three years after the occurrence of the act or omission, but, in the exercise of reasonable care and diligence, discovers the injury resulting from that act or omission before the expiration of the four-year period specified in division (B)(1) of this section, the person may commence an action upon the claim not later than one year after the person discovers the injury resulting from that act or omission.

{¶32} The Ohio State Supreme Court explained the difference between the statute of limitations and the statute of repose in *Wilson v. Durrani*, 2020-Ohio-6827. Essentially, both the statute of limitations and the statute of repose accomplish the same goal: to limit the time in which to bring a legal claim. However, these statutes operate differently and each targets a different actor.

{¶33} As to the statute of limitations, it “establishes ‘a time limit for suing in a civil case, based on the date when the claim accrued (as when the injury occurred or was discovered).’ ” *Id.* at ¶ 9, quoting *Black’s Law Dictionary* 1707 (11th Ed.2019). The statute

of limitations “operates on the remedy, not on the existence of the cause of action itself.” *Id.*, citing *Mominee v. Scherbarth*, 28 Ohio St.3d 270, 290 (1986), fn. 17 (Douglas, J., concurring). “Statutes of limitations emphasize plaintiffs’ duty to diligently prosecute known claims.” *Id.* at ¶ 10.

{¶34} In comparison, the statute of repose “bars ‘any suit that is brought after a specified time since the defendant acted . . . even if this period ends before the plaintiff has suffered a resulting injury.’ ” *Id.* at ¶ 9, quoting *Black’s* at 1707. The statute of repose “bars the claim-the right of action-itself.” *Id.*, citing *Treese v. Delaware*, 95 Ohio App.3d 536, 545 (10th Dist. 1994). In contrast to the statute of limitations, the statute of repose “emphasize[s] defendants’ entitlement to be free from liability after a legislatively determined time.” *Id.* at ¶ 10.

{¶35} “ ‘When the discovery rule’ - like the one the Ohio Supreme Court has applied to legal malpractice claims - ‘governs the running of a statute of limitations, the ‘discovery rule gives leeway to a plaintiff who has not yet learned of a violation, while the rule of repose protects the defendant from an interminable threat of liability.’ ” *Owens v. Purcel*, 2024-Ohio-1514, ¶ 14 (6th Dist.), citing *Wilson* at ¶ 10; *California Pub. Employees’ Retirement Sys. v. ANZ Securities, Inc.*, 582 U.S. 497, 506 (2017). “So, while the discovery rule may delay the accrual of a claim for purposes of the statute of limitations, the statute of repose operates to mitigate the effects of the discovery rule by preventing indefinite potential liability.” *Id.*

{¶36} The first step in our analysis is to determine the date of the event that gave rise to the malpractice claim. Contrary to Appellants’ claims, the date the malpractice arose is unquestionably the date that Attorney Kissinger failed to timely file a negligence

action against ODOT. While Appellants raise the effect of losing the CAE case on the ODOT case, the actual negligence relevant to the ODOT case is the failure to timely file the lawsuit. That inaction had no real effect on the CAE case. Any allegations of malpractice in the loss of recovery against CAE are limited to the facts and law in that case and are far removed from any relevance in the case against ODOT.

{¶37} Appellants filed a notice of supplemental authority prior to oral argument, *Gottschalk v. Kelley*, 2026-Ohio-3159, ¶ 20 (3d Dist.). *Gottschalk* answers the question whether retroactive application of the statute of repose is constitutional. However, Appellants misapply the case. Appellants are correct in that the Third District found the statute of repose was enacted in 2021 and application of that statute to earlier events could result in unconstitutionally retroactive application. However, understanding the facts of *Gottschalk* is critical to its application. In January of 2018, the Appellant's attorney shared confidential information with another party during a contentious child custody action. *Id.* at ¶ 2. The Appellant's fiancé at that time worked at the same law firm as her attorney. In 2021, the Appellant and her fiancé had already married and he left the law firm. In so doing, he took her physical case file with him. The Appellant did not review the case file until 2024. At that time, she learned that her attorney had shared sensitive private information about her with her (now) husband's ex-wife. In 2025, she filed a legal malpractice lawsuit against the attorney. The trial court found that the statute of repose, enacted in 2021, barred her lawsuit.

{¶38} The Third District explained that under Ohio law, a malpractice action generally accrues when the wrongful act occurs. *Id.* at ¶ 17. However, the Court noted

an exception where the malpractice is not apparent at the time it occurs. In that instance, the discovery rule applies. The Court stated:

As noted previously, the Supreme Court of Ohio held that the application of a statute of repose is not unconstitutionally retroactive if the claimant had a reasonable time in which to file his or her claim. *See Adams*, 4 Ohio St.3d at 40; *Oaktree*, 2014-Ohio-1937, at ¶ 1, 12. In turn, the Supreme Court of Ohio relied upon the discovery rule to provide the reference point for determining whether a claim was filed within a reasonable time. *Adams* at 40.

Gottschalk at ¶ 22 (3d Dist.). The *Adams* Court, cited within *Gottschalk*, declared a “reasonable time” is one year. *Id.* at 40. In other words, the discovery rule provides an injured party a reasonable time, one year after learning of the wrongful act, to file a malpractice claim regardless of whether the applicable statute of limitations had run.

{¶39} The *Gottschalk* Court ultimately found that at the time the court barred the action, further discovery was necessary to determine whether the Appellant learned of the malpractice act when her file was taken in 2021, when a second proceeding related to that information occurred in 2022, or when she reviewed the file in 2024. *Id.* at ¶ 20. Hence, the case had been prematurely dismissed.

{¶40} In applying *Gottschalk*, it is clear that Appellants in this matter learned of the malpractice, at the latest, by July 16, 2021. On that date, the trial court filed a judgment entry in the CAE case stating that:

[T]he failure by the Estate's then only counsel of record Attorney Kissinger to timely refile the complaint against ODOT in the Ohio Court of Claims is a major legal and procedural impediment for the Estate in the pending civil action. Accordingly, Attorney Kissinger is faced with at least the possibility of the Estate having a viable legal professional malpractice claim against him.

(7/16/21 J.E.) Hence, Appellants were placed on notice of the malpractice by at least July 16, 2021, if not before. The discovery rule would operate to give Appellants a reasonable time, one year, in which to file their action after receiving notice of malpractice. The following appears to reflect the relevant timeline:

May 27, 2013:	Accident occurred.
May 2015:	Two lawsuits filed, one against ODOT and one against CAE.
October 16, 2017:	Lawsuits voluntarily dismissed without prejudice.
October 9, 2018:	Action refiled against CAE.
October 16, 2018:	Deadline to refile against ODOT (failure to file triggers apparent malpractice).
July 16, 2021:	Appellants learned of the malpractice.
July 7, 2022:	Malpractice lawsuit filed.
October 16, 2022:	Deadline pursuant to the statute of repose.
March 6, 2024:	Lawsuit dismissed.
March 21, 2024:	Second malpractice lawsuit filed.

{¶41} Because Appellants had more than one year after discovery to file their action regardless of the statute of repose, based on *Gottschalk*, the statute of repose is

not unconstitutionally retroactive, here. In fact, the statute of repose provided Appellants with an additional year after the typical discovery rule deadline.

{¶42} Although not mentioned in either party's brief, a case arising out of the Sixth District is very similar. *Owens, supra*. In *Owens*, the appellant was struck by a vehicle on December 20, 2014. *Id.* at 2. Due to her status as a minor, she had until March 17, 2018 to file a lawsuit against the driver. On March 4, 2019, counsel for the appellant filed a lawsuit against the driver, who had died several years prior. However, the court dismissed the case on October 8, 2019 for failure to perfect service of process. The appellant sued her attorney on August 21, 2020. She dismissed the case on December 28, 2021 and refiled on December 21, 2022 relying on the savings statute. The court dismissed the action after granting a motion for judgment on the pleadings. The court determined that the incident giving rise to the malpractice was the failure to file the timely complaint on March 17, 2018, which gave her until March 17, 2022 to file a complaint. As in the instant case, the Appellants filed the complaint, voluntarily dismissed the complaint, and then attempted to refile it in reliance on the savings statute. The refiled complaint was filed nine months after the statute of repose ended. *Id.*

{¶43} The *Owens* Court held that the refiled lawsuit was not filed within the statute of repose period. The Court began with the act or omission giving rise to the lawsuit, which was failure to file a complaint within the statute of limitations. This occurred on March 17, 2018. Counsel refiled the complaint on December 21, 2022, more than four years after the malpractice event. The *Owens* Court explained that even if it were to accept the date the appellant learned of the malpractice event, the discovery rule would

only have given the appellant one year from its discovery to file the complaint. However, the complaint was filed in excess of that one-year discovery period. *Id.* at ¶ 27.

{¶44} As addressed by the *Owens* Court, Appellants had, at most, four years to file a malpractice lawsuit against Appellee, which would have ended on October 16, 2022. Appellants filed a timely lawsuit on July 7, 2022. Had Appellants not dismissed that complaint on March 6, 2024, after expiration of the statute of repose, the lawsuit could have proceeded to its natural resolution. However, Appellants dismissed the matter after the expiration of the statute. The attempt to later refile was futile. Additionally, Appellants filed their lawsuit years after expiration of the discovery period, as in *Owens*. Hence, Appellants cannot proceed with a lawsuit against Appellee in relation to their claims against ODOT. Since their claims against ODOT failed, in accordance with the case-within-a-case doctrine, Appellants' first assignment of error is without merit and is overruled.

ASSIGNMENT OF ERROR NO. 2

THE TRIAL COURT ERRED BY GRANTING DEFENDANT-APPELLEE ESTATE OF KISSINGER'S MOTION FOR JUDGMENT ON THE PLEADINGS BECAUSE THE FACE OF THE PLEADINGS DO NOT DEMONSTRATE THAT ODOT HAD SOVEREIGN IMMUNITY IN THE UNDERLYING CASE, AND MOREOVER, SOVEREIGN IMMUNITY DID NOT APPLY IN THE UNDERLYING CASE AGAINST THE OHIO DEPARTMENT OF TRANSPORTATION. [ERROR AT DOCKET NO. 64 (08/15/2025 JUDGMENT ENTRY)].

{¶45} Appellants challenge the court’s finding of sovereign immunity on the part of ODOT. Again, this pertains only to the suit against ODOT. Appellants urge that the court could only consider the complaint and the answer, as the motion involved judgment on the pleadings. Despite this, Appellants argue it is clear the court considered extraneous information not contained within those two pleadings. As to the merits of that decision, Appellants correctly point out that ODOT itself is not a political subdivision, but is a state agency. Appellants also correctly point out that the state has waived its immunity and has consented to lawsuits brought against ODOT in the court of claims.

{¶46} In response, Appellee appears to concede that ODOT is not a political subdivision and the state does consent to some lawsuits. However, Appellee contends the waiver is limited and does not pertain to cases that do not involve public roads. Appellee contends that statutorily, a public road does not include the berm. Hence, the waiver of immunity does not apply.

{¶47} Because we find that Appellants’ first assignment of error effectively ends Appellants’ ability to successfully sue ODOT, this assignment of error is moot.

Standard of Review

{¶48} Appellants’ third and fourth assignments of error involve the decision to grant summary judgment, governed by Civ.R. 56. An appellate court conducts a *de novo* review of a trial court’s decision to grant summary judgment, using the same standards as the trial court set forth in Civ.R. 56(C). *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105 (1996). Before summary judgment can be granted, the trial court must determine 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, (3) it appears from the evidence that

reasonable minds can come to but one conclusion, and viewing the evidence most favorably in favor of the party against whom the motion for summary judgment is made, the conclusion is adverse to that party. *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327 (1977). Whether a fact is “material” depends on the substantive law of the claim being litigated. *Hoyt, Inc. v. Gordon & Assoc., Inc.*, 104 Ohio App.3d 598, 603 (8th Dist. 1995).

{¶49} “[T]he moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim.” (Emphasis deleted.) *Dresher v. Burt*, 75 Ohio St.3d 280, 296 (1996). If the moving party carries its burden, the nonmoving party has a reciprocal burden of setting forth specific facts showing that there is a genuine issue for trial. *Id.* at 293. In other words, when presented with a properly supported motion for summary judgment, the nonmoving party must produce some evidence to suggest that a reasonable factfinder could rule in that party's favor. *Brewer v. Cleveland Bd. of Edn.*, 122 Ohio App.3d 378, 386 (8th Dist. 1997).

{¶50} The evidentiary materials to support a motion for summary judgment are listed in Civ.R. 56(C) and include the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact that have been filed in the case. In resolving the motion, the court views the evidence in a light most favorable to the nonmoving party. *Temple* at 327.

ASSIGNMENTS OF ERROR NOS. 3 & 4

THE TRIAL COURT ERRED IN FINDING THAT PLAINTIFFS FAILED TO DEMONSTRATE THAT THE DEFENDANT-APPELLEE IN THE UNDERLYING CASE FAILED TO CONSTRUCT STATE ROUTE 534 AS CONTRACTED AND THEREFORE PLAINTIFFS COULD NOT SUCCEED ON THEIR LEGAL MALPRACTICE CLAIM AGAINST DEFENDANT-APPELLEE FOR HIS REPRESENTATION OF PLAINTIFF-APPELLANTS CLAIMS AGAINST CENTRAL ALLIED. [ERROR AT DOCKET NO. 76 (02-10-2026 ATP. 1-2)].

THE TRIAL COURT ERRED IN CONCLUDING THAT CENTRAL ALLIED OWED NO DUTY TO THIRD PARTIES (SUCH AS RYAN ZWINGLER) IN THE UNDERLYING CASE AND THEREFORE THE PLAINTIFF-APPELLEES COULD NOT PROVE THE CASE-WITHIN-THE-CASE ON THEIR LEGAL MALPRACTICE CLAIM AGAINST DEFENDANT-APPELLEE ESTATE OF KISSINGER. [(ERROR AT 02-10-2026 AT P. 1-2)].

{¶51} Appellants argue that the trial court erred in determining they provided no evidence that the shoulder berm and drop off failed to comply with the requirements of CAE's paving contract. Appellants assert that evidence was provided by testimony from Trooper Jester and his accompanying report along with the expert witness report from Patrick Altvater. There is no question that the contract between ODOT and CAE required the berm to be almost flush with the paved roadway's surface to avoid a drop off from the

berm. The evidence from both witnesses combined to demonstrate that, despite this, a significant drop off existed at the time of the accident which contradicted the self-serving testimony of CAE employees. Explaining that it is impossible to go back in time and look at the condition of the road, berm and shoulder at the time of completion of the paving and noting that there are no photographs or other evidence showing the area at the time of completion, Appellants explain that as the reports and testimony do show there existed at the time of the accident a significant drop off, this raises at least a genuine issue of material fact on the issue. Appellants also note that based on the ODOT inspection reports a question exists as to whether the western berm (where the accident occurred) was completed. While ODOT accepted the work at the time, and Appellants acknowledge the “completed and accepted rule,” they contend an exception exists where the work product was negligently completed.

{¶52} In response, Appellee argues that two CAE employees testified that the berm and paved road were essentially flush at the time of completion of the paving work in accordance with the contract specifications. Appellee argues that the reports relied on by Appellants were created nine (Trooper Kester) and thirteen (Altwater) years after the project was completed. Appellee believes these reports are essentially immaterial, as they do not show the condition of the area at the time of paving completion. Further, Appellee argues that ODOT issued a certificate of completion certifying CAE’s work on the project substantially complied with the terms of the contract, and released funds to CAE. Because there is no evidence of negligence in the completion of the paving project, Appellee contends that no duty is owed to a third party such as Ryan Zwingler.

{¶53} Appellee cites to *Beasley v. Monoko, Inc.*, 2011-Ohio-3995 (10th Dist.). Appellee uses *Beasley* to argue that a certificate of release absolves the paving company from liability. However, *Beasley* is factually distinguishable from the instant matter, as ODOT sought to recover damages in that case from the paving company due to defects discovered years after completion of a project. *Id.* at ¶ 17. In this matter Appellants, and not ODOT, seek to recover. ODOT was the actual party to the paving contract in both cases.

{¶54} Regardless, a basic review of the facts reveals that there are genuine issues of material fact yet to be addressed. To begin, there are no photographs or other evidence proving CAE's compliance with the requirement that the paved road was to be flush with the berm. While Appellants presented a certificate of completion from ODOT, two issues remain. One, the CAE employees' testimony does not negate the impact of the trooper's report or that of the expert. All of this evidence addresses the state of the road, berm and shoulder, albeit at different times. Clearly the expert report opined that for the shoulder to be in such a state of disrepair the original work must have been inadequate or defective. This raises at least a credibility issue. The trial court may not address credibility when looking at conflicting evidence, and may only grant summary judgment when the materials show that one party is unquestionably entitled to judgment. Here, the conflicting evidence appears to raise a question as to certain material facts.

{¶55} Two, as addressed by Appellants, there is an exception to the "completed and accepted rule," where the work was negligently completed. If Appellants' expert reports and testimony were accepted by a jury, it is possible to find that the work was either not completed or negligently completed. Appellee offered evidence that ODOT

approved CAE's work and deemed that it complied with the contract terms. Again, Appellants presented some evidence to rebut this: the two reports showing the berm had a very significant drop off and was far from flush at the time of the accident. Appellee claims that this long-after-the-fact evidence is irrelevant, but as framed by Appellants' expert at least, that is not true. The possibility remains that CAE negligently performed the work in a way that would not be detectable by ODOT at the time of inspection. For example, if the base of the berm was negligently constructed and caused the berm to deteriorate faster than would normally be expected, ODOT may not have been able to determine this at the time of inspection. In another example, if defective or low-quality materials were used, or the workmanship was poor, the berm could have deteriorated faster than normal, which again, may not have been detected by ODOT at the time of inspection. While Appellants have not yet proved any of these theories, such definitive proof is not required to defeat summary judgment. Appellants' evidence does serve to rebut Appellee's evidence and creates a genuine issue of material fact.

{¶56} Contradictory testimony and evidence in this matter does create a genuine issue of material fact for trial. Two CAE employees provided what is best described as self-serving testimony. They testified on behalf of the employer who pays their salaries, and without benefit of extrinsic support, that the work was completed in accordance with the contract and was not negligently performed. Appellants submitted Trooper Jester's testimony and report stating there was a significant drop off between the roadway and shoulder. Appellants' expert provided testimony and a report containing the same information. He avers the drop off could not have been caused by normal wear and tear. Appellee did not provide any rebuttal evidence to show what could have caused the sharp drop off following completion of paving, whether any cause could be

contributed to normal wear, or whether some other cause intervened to rebut the expert reports. A reasonable jury then, based on the conflicting evidence already of record, could find either that parts of the project were not completed at the time the certificate was issued or that the project was completed, but negligently. A reasonable jury could also find that the CAE employees' testimony was credible and the drop off cannot be attributed to any act or failure on CAE's part.

{¶57} This competing evidence is sufficient to create a genuine issue of material fact. It appears from the court's decision that the court improperly assumed the role of a juror and weighed the evidence in rendering its decision. This is improper in a summary judgment proceeding. Accordingly, Appellants' third and fourth assignments of error have merit and are sustained.

Conclusion

{¶58} In this case-within-a-case legal malpractice action, Appellants argue that the trial court erroneously found their malpractice action against Appellee could not succeed because in one of the underlying cases in which they alleged malpractice the opposing party in that action, ODOT, was protected by sovereign immunity and because the complaint was not timely filed. It is clear on review that the case was not timely filed, so Appellants are unable to show they had a substantial likelihood of success on the merits of the case but for Appellee's malpractice. As to a second case, Appellants argue that the trial court improperly determined the paving company, CAE, did not negligently pave a road because the work was accepted by ODOT. For the reasons provided, the matter is affirmed in part with regard to the ODOT suit, and reversed and remanded to

determine Appellants' likelihood of success on the merit of the CAE suit, but for the malpractice of Appellee.

Robb, J., concurs.

Hanni, J., concurs.

For the reasons stated in the Opinion rendered herein, Appellants' assignments of error are sustained in part and overruled in part. It is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Mahoning County, Ohio, is affirmed in part and reversed in part. This matter is remanded to the trial court for further proceedings according to law and consistent with this Court's Opinion. Costs to be divided equally between the parties.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.