[Cite as *Schneidmiller v. Rapp*, 2015-Ohio-2334.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

GARY D. SCHNEIDMILLER, ET AL.,	)	
	)	
PLAINTIFFS-APPELLANTS,	)	
	)	CASE NO. 14 MA 23
V.	)	
	)	OPINION
ROBERT N. RAPP, ET AL.,	)	
	)	
DEFENDANTS-APPELLEES.	)	

CHARACTER OF PROCEEDINGS:	Civil Appeal from Court of Common Pleas of Mahoning County, Ohio Case No. 12CV3878
JUDGMENT:	Reversed and Remanded
APPEARANCES: For Plaintiffs-Appellants	Attorney Richard L. Allen, Jr. 225 East Robinson Street, Suite 600 P.O. Box 2854 Orlando, FL 32802-2854
For Defendants-Appellees	Attorney Robert S. Yallech 11 Federal Plaza Central, Suite 1200 Youngstown, Ohio 44503

JUDGES:

Hon. Gene Donofrio
Hon. Cheryl L. Waite
Hon. Mary DeGenaro

Dated: June 9, 2015

[Cite as *Schneidmiller v. Rapp*, 2015-Ohio-2334.]
DONOFRIO, P.J.

{¶1} Plaintiffs-appellants, Gary Schneidmiller, Eric Schneidmiller, Praesidium Alliance Group, LLC, and Praesidium Medical Professional Liability Insurance Company, appeal from a Mahoning County Common Pleas Court judgment granting summary judgment in favor of defendants-appellees, Peter Comodeca, Robert Rapp, Kevin Shannon, John McGuire, Matthew Kucharson, Eric Zell, and Calfee, Halter & Griswald, LLP, on appellants' legal malpractice claim.

{¶2} Appellee Calfee, Halter & Griswold, LLP (Calfee) provided legal services to appellants Gary Schneidmiller (Gary), Eric Schneidmiller (Eric), Praesidium Alliance Group, LLC (PAG), and Praesidium Medical Professional Liability Insurance Company (PMPLIC). Gary is the chief executive officer of PAG and also the president of PMPLIC. Eric is the chief operating officer of PAG and the vice president of PMPLIC. Appellees Comodeca, Rapp, Shannon, McGuire, Kucharson, and Zell are attorneys who work for Calfee.

{¶3} Calfee provided legal services to appellants in two matters. The first matter involved a dispute regarding shares of APMD Holdings, Inc. stock and the right to convert APMD preferred stock. PMPLIC holds 10 million shares of $5 par value stock in APMD. Calfee filed a complaint with the Texas State Securities Board on appellants' behalf in that matter. The second matter was a federal lawsuit and arbitration. A lawsuit was filed against Gary, Eric, and PAG in federal court alleging material misrepresentations in a transaction. The lawsuit was eventually dismissed and ordered to arbitration. On January 9, 2012, the chairman of the arbitration panel indicated that had Rapp put forth a Private Securities Litigation Reform Act (PSLRA) defense, the panel would have set its schedule accordingly and taken the PSLRA defense into consideration.

{¶4} On August 26, 2011, appellants sent an eight-page, single-spaced letter to Calfee expressing their dissatisfaction with Calfee's representation. Appellants alleged that Calfee did not adequately follow their instructions, failed to raise various defenses, failed to provide informed consent, and improperly billed them.

{¶5} In a September 14, 2011 letter, Comodeca, on behalf of Calfee,

informed appellants that Calfee's representation was terminated, effective immediately.

{¶6} Appellants filed a legal malpractice complaint against appellees on December 31, 2012. The complaint alleged that appellees reviewed APMD's by-laws but failed to advise appellants that the by-laws contained a "dissent's rights" clause that, if utilized, would have required APMD to redeem PMPLIC's ten million shares at $5 per share for a total of $50 million or stopped a reverse merger by APMD. The complaint further alleged that appellants discovered the existence of the dissenter's rights clause on April 3, 2012, when new counsel requested information from APMD's by-laws. Additionally, the complaint asserted that appellees failed to raise the PSLRA as a defense in the federal case and arbitration, which subjected appellants to increased attorney fees and loss of income to Gary and Eric. Appellants asserted they learned that the failure to raise the PSLRA prejudiced their case when the chairman of the arbitration panel expressed his surprise that Rapp did not raise it in the initial defense. Appellants stated that this happened on January 9, 2012.

{¶7} Calfee filed a counterclaim asserting appellants failed to pay over $80,000 in legal expenses.

{¶8} Appellees filed a motion for summary judgment on appellants' complaint. They asserted that appellants' complaint was barred by the one-year statute of limitations for legal malpractice claims. They asserted appellants' cause of action accrued no later than September 14, 2011, when Calfee sent appellants a letter terminating representation. They further asserted that a "cognizable event" occurred on August 26, 2011, when appellants sent Calfee the letter expressing their dissatisfaction with Calfee's legal representation.

{¶9} Appellants filed a memorandum in opposition to summary judgment. They asserted that a cognizable event, starting the running of the statute of limitations, did not occur until January 9, 2012, when the arbitration panel indicated to them that Rapp had failed to timely raise the PSLRA defense, which they assert was evidence of Rapp's negligence. And they asserted they did not learn until April 3,

2012, that appellees failed to advise them of the existence of their dissenter's rights. In the alternative, appellants requested that the trial court continue the matter pursuant to Civ.R. 56(F), to allow time for discovery before ruling on appellees' motion.

{¶10} The trial court granted appellees' summary judgment motion. It found the attorney-client relationship ended on September 16, 2011. It also found the cognizable event that put appellants on notice of a potential legal malpractice claim occurred, at the latest, on August 26, 2011. The court pointed out that appellants' August 26 letter demonstrated appellants were alerted to allegedly questionable legal practices including "carelessly ignoring" appellants' objectives, giving up the PSLRA defense by proceeding to arbitration, and failing to follow appellants' instructions. Yet in spite of these facts, appellants did not file their complaint until December 31, 2012, beyond the one-year statute of limitations.

{¶11} After the court granted summary judgment in appellees' favor on appellants' complaint, appellees voluntarily dismissed their counterclaim against appellants.

{¶12} Appellants filed a timely notice of appeal on February 26, 2014.

{¶13} Appellants raise three assignments of error. Their first two assignments of error assert that summary judgment in appellees' favor was not proper. Therefore, the first two assignments of error share the same standard of review.

{¶14} In reviewing a trial court's decision on a summary judgment motion, appellate courts apply a de novo standard of review. *Cole v. Am. Industries & Resources Corp.*, 128 Ohio App.3d 546, 552, 715 N.E.2d 1179 (7th Dist.1998). Thus, we shall apply the same test as the trial court in determining whether summary judgment was proper. Civ.R. 56(C) provides that the trial court shall render summary judgment if no genuine issue of material fact exists and when construing the evidence most strongly in favor of the nonmoving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. *State ex rel. Parsons v. Flemming*, 68 Ohio St.3d 509, 511, 628 N.E.2d 1377 (1994). A

"material fact" depends on the substantive law of the claim being litigated. *Hoyt, Inc. v. Gordon & Assoc., Inc*., 104 Ohio App.3d 598, 603, 662 N.E.2d 1088 (8th Dist.1995), citing *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 247-248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

{¶15} With this standard of review in mind, we turn to appellants' first assignment of error, which states:

> THE TRIAL COURT ERRED WHEN IT GRANTED SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS AND FOUND THAT A COGNIZABLE EVENT OCCURRED, AT THE LATEST ON AUGUST 26, 2011 FOR ALL APPELLANTS.

{¶16} Appellants argue a genuine issue of material fact exists as to whether a cognizable event occurred more than a year prior to their filing of the lawsuit. They assert that their August 26, 2011 letter merely pointed out "a variety of managerial issues" and the main issue was fees. They argue that dissatisfaction with an attorney, without more, is not a cognizable event that commences the running of the statute of limitations. Appellants argue the evidence demonstrated that at the time of the August 26 letter, they had not discovered that appellees' actions caused them to lose the arbitration hearing or that appellees failed to advise them of the dissenter's rights.

{¶17} Appellants further assert that although they discussed the PSRLA in the August 26 letter, at that time they were under the impression that Rapp raised it at their urging and that the arbitration panel was considering it. Appellants assert it was not until they were informed on January 9, 2012, by the arbitration chairman that Rapp had not scheduled a time with the arbitration panel to apply the PSRLA. They urge that until the arbitration chairman explained that the PSRLA had not been set for hearing, no cognizable event occurred.

{¶18} Pursuant to R.C. 2305.11(A), a claim for legal malpractice shall be commenced within one year after the cause of action accrued. A legal malpractice

accrues, starting the running of the statute of limitations,

> when there is a cognizable event whereby the client discovers or should have discovered that his injury was related to his attorney's act or non-act and the client is put on notice of a need to pursue his possible remedies against the attorney or when the attorney-client relationship for that particular transaction or undertaking terminates, whichever occurs later.

Zimmie v. Calfee, Halter & Griswold, 43 Ohio St.3d 54, 538 N.E.2d 398, syllabus (1989). A "cognizable event" is an event sufficient to alert a reasonable person that his attorney has committed a "questionable legal practice." *Id*. at 58.

{¶19} In order to determine when a legal malpractice cause of action accrues, the court should determine (1) "when the injured party became aware, or should have become aware, of the extent and seriousness of his or her alleged legal problem," (2) "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 (3) "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 injury." *Omni-Food & Fashion, Inc. v. Smith*, 38 Ohio St.3d 385, 388, 528 N.E.2d 941 (1988).

{¶20} The parties do not dispute the following facts.

{¶21} On August 26, 2011, Gary and Eric sent a letter to Calfee, which raised numerous allegations, including:

(1) Against the advice of local Virginia counsel, retained by Calfee, and appellants' concurrence, Calfee pushed to dismiss the federal suit in favor of arbitration;

(2) Only at appellants' suggestion did Calfee petition the arbitration panel for relief under the PSLRA;

(3) "Having paid for an excellent education on the PSLRA by an unquestionable expert – it is only after we enter Arbitration that we are advised that by changing forums we may well have voluntarily given-up the strong defenses and powerful deterrents of the PSLRA to Claimants[;]"

(4) Appellants pushed for the PSLRA to be pursued;

(5) The arbitration panel applied the standards of the PSLRA;

(6) The panel's agreement to apply the PSLRA was a "key victory[;]"

(7) Calfee failed to keep them informed;

(8) Calfee failed to act as directed by appellants; and

(9) Calfee improperly billed appellants.

(Def. Motion for Summary Judgment, Comodeca Aff. Ex. A). The trial court found that this letter asserted "allegations of the precise misconduct" appellants raised in their complaint. Specifically, the court points to mention of the PSLRA.

{¶22} But the trial court took appellants' statements regarding the PSLRA defense out of context. Appellants did state they were advised they may have given up PSLRA defenses and they pushed Rapp to raise the PSLRA. However, later in the letter, appellants wrote, "The Counsel [appellees] won – albeit pushed by us – a huge victory over Claimants in January 2011 when the Panel itself took up the suggestion and applied the stringent standards of the PSLRA!" (Def. Motion for Summary Judgment, Comodeca Aff. Ex. A, p.5). And then they wrote that Calfee, "just achieved the key victory of having the Panel apply the PSLRA." (Def. Motion for Summary Judgment, Comodeca Aff. Ex. A, p.6). They also referenced "the big victory of the Panel's taking the PSLRA avenue of its own volition." (Def. Motion for Summary Judgment, Comodeca Aff. Ex. A, p.3).

{¶23} The above statements from the letter demonstrate that at the time they wrote the letter, appellants were completely unware of the fact that Rapp had failed to properly raise the PSLRA as a defense in the federal case and arbitration. Moreover, Gary and Eric both submitted affidavits stating that they were unaware until January

9, 2012, that appellants had been injured by Rapp's failure to schedule a hearing to argue the PSLRA defense. (Opp. To Summary Judgment, Gary Aff. ¶9, Eric Aff. ¶9). A cause of action for legal malpractice accrues when the client discovers, or should have discovered in the exercise of reasonable care, the resulting injury. *Zimmie*, 43 Ohio St.3d at ¶57. In other words, the action accrues when the injury is discovered or should have been discovered, not when the negligent act occurs. Thus, construing the evidence in favor of appellants, as we are required to do, there is a genuine issue of material fact as to when appellants learned of a cognizable event regarding Rapp raising or not raising the PSLRA defense in arbitration.

{¶24} In finding that the cognizable event occurred at the latest on August 26, 2011, the trial court also relied on *Lincoln General Ins. Co. v. Pipino*, 7th Dist. No. 06 MA 125, 2007-Ohio-5046. In that case, Lincoln General retained the Wiles Firm to represent it in a probate case. The matter settled. Several years later, Lincoln General retained another law firm regarding the settlement. The new firm requested a copy of the file from the Wiles Firm in March 2003. The new firm also sent the Wiles Firm a letter on March 20, 2003, stating that Lincoln General was recently put on notice of a claim under the theory that its failure to secure a settlement of the wrongful death claim and/or to have it approved by the probate court was violative of the wrongful death statute and the settlement was null and void. On November 6, 2003, the new firm sent the Wiles Firm a letter stating it should put its malpractice carrier on notice concerning the problems with the settlement. On December 15, 2003, the probate court issued a judgment stating that the settlement was "of no consequence" and the matter would proceed. In January 2004, at the latest, Lincoln General was made aware of the probate court's ruling. *Id*. at ¶24.

{¶25} Lincoln General filed its legal malpractice claim against the Wiles Firm in September 2005.

{¶26} On summary judgment, the trial court found that the complaint was filed beyond the one-year statute of limitations. *Id*. at ¶14. Lincoln General appealed. On appeal, this court found:

> [W]hen we determine when there is a cognizable event, we look to an event that puts a reasonable person on notice that "a questionable legal practice may have occurred." * * * Here, there is a probate court ruling in the Withers estate that Lincoln General knew of, although not binding on them, that clearly indicated that the Withers settlement was not valid because there was no prior probate court approval as is required by R.C. 2125.02(C). Furthermore, even prior to that probate court's decision, there are letters from Lincoln General's current attorney, Pion, to its former attorney, Pipino, indicating that Lincoln General has been put on notice that the Withers settlement might be null and void for failing to get prior probate court approval. In fact, one of the letters informs Pipino to put his malpractice carrier on notice of a possible claim. When the letters are taken in combination with the probate court's ruling, we find that a reasonable person at that point would be on notice that a questionable legal practice may have occurred.

(Internal citations omitted); *Id*. at ¶30. Thus, we concluded that at the latest, the cognizable event occurred in January 2004. *Id*. at ¶24.

{¶27} In *Lincoln*, although we found that the letters from the client to the law firm indicated a possible malpractice claim, our holding was that the letters *in addition to an adverse ruling by the probate court* would put a reasonable person on notice of a questionable legal practice. We did not find, as the trial court here suggests, that the letters standing alone created the cognizable event.

{¶28} A legal malpractice accrues, starting the running of the state of limitations, when a cognizable event occurs or when the attorney-client relationship terminates, whichever occurs later. R.C. 2305.11(A). The parties agree here that the attorney-client relationship terminated with the September 2011 letter from Calfee to appellants. But a genuine issue of material fact exists as to when the cognizable event occurred.

{¶29} Although appellants voiced their frustration with appellees in the August

26, 2011 letter, it is a question of fact for a jury as to whether appellants knew or should have known at that time that a questionable legal practice may have occurred. A letter to an attorney that a problem may exist, standing alone, does not necessarily put a reasonable person on notice of a questionable legal practice. See, *Lincoln General*, supra. The letter here indicates that appellants were not aware of the PSLRA problem at that time. They were under the impression that appellees had successfully pursued the PSLRA. Appellants did not become aware of the PSLRA issue until January 2012. And even though appellants expressed dissatisfaction with some of appellees' actions, they also expressed appreciation for certain results they believed appellees obtained for them. Thus, a genuine issue of material fact exists as to whether the appellants were on notice of questionable legal practices at the time of the letter or whether the cognizable event did not occur until they had notice that appellees had failed to properly pursue the PSLRA defense. Therefore, summary judgment was not proper.

{¶30} Accordingly, appellant's first assignment of error has merit.

{¶31} Appellants' second assignment of error states:

> THE TRIAL COURT ERRED WHEN IT GRANTED SUMMARY JUDGMENT IN FAVOR OF THE DEFENDANTS AND FOUND THAT THERE WAS NOT A GENUINE ISSUE OF MATERIAL FACT AS TO WHEN THE ATTORNEY-CLIENT RELATIONSHIP TERMINATED BETWEEN DEFENDANTS AND PMPLIC.

{¶32} Here appellants contend that while Calfee terminated its relationship with them regarding the arbitration, it never terminated its relationship with PMPLIC regarding the APMD stock, which was not involved in the arbitration. Appellants point to emails between Comodeca and Eric as creating a genuine issue of material fact on this point.

{¶33} Appellants further argue that while they discussed PMPLIC's representation by Calfee in the August 26, 2011 letter, the comments were positive.

They assert that there is nothing in the letter to suggest that appellants should have been on notice that Calfee had not handled the APMD matter properly. They claim the only cognizable event occurred on April 3, 2012, when PMPLIC discovered Calfee had not properly advised it of the dissent's rights clause.

{¶34} Gary is the president of PMPLIC and Eric is the vice president of PMPLIC. Appellees provided various legal services to Gary and Eric and to their businesses PAG and PMPLIC. PAG is the majority shareholder of PMPLIC. In appellants' August 26, 2011 letter, they discussed individual matters involving PAG and PMPLIC as well as numerous issues that would apply to all matters appellees were handling for appellants at the time, such as billing and communication. Thus, appellants grouped all matters concerning their businesses and appellees' legal representation of these businesses together. And when Calfee sent its September 14, 2011 letter of termination of representation, it noted that appellants had been clear in the August 26 letter that a "fundamental disagreement" existed between them. (Def. Motion for Summary Judgment, Ex. B). It also noted that Calfee would separately send final invoices. (Def. Motion for Summary Judgment, Ex. B). And just one day prior to the termination letter, Calfee sent PMPLIC c/o PAG an invoice specifically for service regarding APMD and related matters. (Counterclaim, Ex. B). Thus, the trial court did not err in finding that the attorney-client relationship terminated in September 2011.

{¶35} Accordingly, appellants' second assignment of error is without merit.

{¶36} Appellants' third assignment of error states:

> THE TRIAL COURT ERRED WHEN IT DID NOT GRANT PLAINTIFF'S RULE 56(F) MOTION.

{¶37} In their final assignment of error, appellants argue the trial court should have given them time to conduct discovery before ruling on the summary judgment motion. They note that no discovery was conducted in this case. Appellants assert they were not permitted to develop their defense to the summary judgment motion.

{¶38} Because we have already determined that summary judgment was not proper in this case, this assignment of error is moot.

{¶39} For the reasons stated above, the trial court's judgment is hereby reversed and the matter is remanded to the trial court for further proceedings pursuant to law and consistent with this opinion.

Waite, J., concurs.

DeGenaro, J., concurs.