IN THE SUPREME COURT OF OHIO

JULIUS J. SZABO

Plaintiff/Appellant

v.

ALEXANDER GOETSCH, et al.

Defendants/Appellees

DISCRETONARY APPEAL FROM THE CUYAHOGA COUNTY COURT OF APPEALS, EIGHT APPELLATE DISTRICT

07-0868

COURT OF APPEALS CASE NO. CA-06-088125

MEMORANDUM IN SUPPORT OF JURISDICTION

COUNSEL FOR APPELLEES

GEORGE S. COAKLEY (0020419)
Reminger & Reminger Co., L.P.A.
1400 Midland Building
Cleveland, Ohio 44115
(216) 687-1311
(216) 687-1841 Facsimile
gcoakley@reminger.com

BRUCE R. FREEDMAN (0023864)
Law Office of Bruce R. Freedman
3250 W. Market Street, Suite 203
Akron, Ohio 44333
330-867-9242

WILLIAM LOVE (0000141)
739 W. Rextur Drive
Akron, Ohio 44319
(330) 644-2489

COUNSEL FOR APPELLANT

JOSEPH G. STAFFORD (0023863)
GREGORY J. MOORE (0076156)
The Stafford Building
2105 Ontario Street
Cleveland, Ohio 44115
(216) 241-1074
(216) 241-4572 (facsimile)
jgs@stafford-stafford.com
gjm@stafford-stafford.com

FILED

MAY 10 2007

MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

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I. EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST

This case presents an opportunity for this Court to review a brand new standard created by the Eighth District Court of Appeals in regard to the commencement of the statute of limitations in a legal malpractice action. The standard created by the Eighth District Court of Appeals in *Julius J. Szabo v. Alexander E. Goetsch, et al.*, Eighth District Court of Appeals Case No. CA-06-088125, requires litigants everywhere to have the knowledge, skill and training possessed by an attorney in reference to discovering when legal malpractice has occurred; and requires a litigant to file a cause of action before they discover such a cause of action has occurred. The new standard also permits the trial court to determine genuine issues of fact relating to when a cognizable event occurs in reference to the statute of limitations on a legal malpractice claim – when under Ohio law, fact finding is clearly the province of the jury.

The following example explains the standard created by the Eighth District Court of Appeals:

A litigant against whom summary judgment has been granted files an appeal of the judgment granting summary judgment through his appellate counsel. The matter comes on for oral hearing on July 21, 2004, at which time appellee's counsel argues, *inter alia*, that appellant's trial counsel filed a response to the motion for summary judgment in the trial court, which failed to contain a certificate of service as required by Civil Rule 5. The trial court's underlying entry granting summary judgment does not mention any issue of service relating to Civil Rule 5 or failure to comply with Civil Rule 5, in reference to the response brief. The court of appeals, without addressing the merits of the underlying litigation or appeal, issued a decision on August 5, 2004, affirming the trial court's decision granting summary judgment solely on the basis of the failure of appellant's trial counsel to comply with Civil Rule 5. The appellant's arguments

concerning the underlying litigation or the trial court's reasoning for granting summary judgment were not addressed by the appellate court.

The litigant thereafter files a legal malpractice action on August 3, 2005 against his trial counsel. The litigant's trial counsel files a motion for summary judgment arguing that the filing was outside of the statute of limitations provided in R.C. 2305.11(A), and further alleging, *inter alia*, that the litigant was present for the oral argument before the court of appeals on July 21, 2004. The litigant's trial counsel argues that the litigant was thereby placed on notice of his trial counsel's legal malpractice during the oral argument before the court of appeals on July 21, 2004, solely because appellee's counsel argued to the court of appeals that appellant's trial counsel failed to comply with Civil Rule 5.

The argument advanced by the litigant's trial counsel in his motion for summary judgment is solely that since the issue of his failure to comply with Civil Rule 5 was discussed during the oral argument between appellate counsel and the court of appeals panel on July 21, 2004, that constituted a "cognizable event" sufficient to place the litigant on notice of his trial counsel's legal malpractice; and as such his filing of a legal malpractice action on August 3, 2005, exceeded the one year statute of limitations period.

The litigant argued in his response to the motion for summary judgment that he discovered his trial counsel's malpractice when the court of appeals issued its decision on August 5, 2004, affirming the earlier summary judgment solely on the basis of his trial counsel's failure to comply with Civil Rule 5. Therefore, the commencement of the legal malpractice action on August 3, 2005, was within the one-year statute of limitations period. Additionally, as genuine issues of material fact existed regarding when the cognizable event occurred (i.e. July 21, 2004 vs. August 5, 2004) summary judgment was not proper.

The trial court in the legal malpractice case granted summary judgment for the litigant's trial counsel. The litigant appealed the trial court's decision granting summary judgment, and argued to the court of appeals that it is the date upon which the court of appeals issued its decision on August 5, 2004, when the litigant first discovered his trial counsel's legal malpractice and the date upon which the "cognizable event" occurred, beginning the statute of limitations.

The court of appeals issued a decision on March 26, 2007 affirming the trial court's decision granting summary judgment creating a new standard for litigants everywhere, providing:

> ***"Although we affirm the grant of summary judgment, we note the harsh result of this decision. This case stands for the unfortunate proposition that a litigant must identify the cognizable event and act on it, all before the litigant's case is resolve. Requiring a litigant to recognize and appreciate a legal concept he is not trained in and then requiring the litigant to file suit, all before his case is resolved places a heavy burden upon litigants."***

The above cited reference is the new standard established by the Eighth District Court of Appeals in *Julius J. Szabo v. Alexander E. Goetsch, et al.*, Case No. CA-06-088125, which provides the following:

- The standard requires a litigant who sits through an oral argument, where legal issues are argued between counsel and the court of appeals, to comprehend and analyze the legal issues raised, and predict the outcome of a court of appeals decision – despite black letter Ohio law that a court speaks only through its journal;
- The standard requires a litigant to essentially file suit for legal malpractice before the litigant has a cause of action for legal malpractice (i.e. requiring a litigant to file suit before a court of appeals decision is issued which establishes a claim for legal malpractice); and
- The standard also permits the trial court to decide genuine issues of material fact existing in the record, which establish factual disputes as to when a "cognizable event" occurred

(i.e. trial court determining issue as to whether cognizable event occurred on July 21, 2004 or August 5, 2004).

As admitted by the Eighth District Court of Appeals, the decision reached in this matter creates a "heavy burden" and a "harsh result". The Appellant, Julius J. Szabo, sets forth that the decision reached by the Court of Appeals creates bad precedent; an impossible burden for litigants; and a completely unjust result for litigants who have valid legal malpractice claims against attorneys who have fallen below the standard of care and injured their client(s).

The first proposition of law addresses the impossible standard established by the Eighth District Court of Appeals. The application of such a standard would literally preclude valid legal malpractice actions from being filed by clients who have been injured by their counsel's malpractice. Such an impossible standard which produces unquestionably unjust results must be prevented by this Court; as such protection was not contemplated nor intended in the legislature's enactment of Ohio Revised Code Section 2305.11(A).

The second proposition of law deals with the fact that the Court of Appeals' decision permits the trial court to decide genuine issues of material fact. Clearly such a result prevents the jury from determining factual disputes existing between the parties. In this matter there remained genuine issues of material fact as to when the cognizable event occurred – July 21, 2004 or August 5, 2004 – and these issues are to be decided by the jury, rendering summary judgment improper.

Each of the propositions of law and the issues raised in this appeal are of public or great general interest especially for those litigants who are seeking an appeal, those lawyers who will be arguing the appeal, and those litigants who may be listening to an oral argument between counsel and a court – without any formal legal training or knowledge. The practical effect of the Eighth District's decision in Szabo, is that a litigant must assume that if a judge in the trial court or a panel

member of the court of appeals raises an issue or questions are raised in reference to an issue, the litigant is on notice of potential malpractice, even though a court speaks only through its journal and the litigant, much like his counsel, cannot predict or know what a court or a court of appeals may decide – or what its basis for a decision may be. This Court must accept jurisdiction as a matter of public or great general interest in order to prevent the application of the Szabo decision and the unjust results it will produce.

II. STATEMENT OF THE CASE AND FACTS

Julius J. Szabo ("Szabo") is the litigant referred to in the above example; as a result of the malpractice of Attorneys Alexander Goetsch, William Love, and Bruce Freedman ("Appellees") discovered by Szabo after the Eighth District Court of Appeals issued its decision on August 5, 2004, in Appellate Case Nos. 83974 & 83975, he filed a legal malpractice action against the Appellees on August 3, 2005 in Cuyahoga County Case No. CV-05-569120. The claims for legal malpractice arise from the legal representation of Szabo by the Appellees in the underlying cases of *Robert Nosal, et al. v. Julius Szabo*, (Case No. CV-494416, Cuyahoga County Court of Common Pleas); and *Julius J. Szabo v. Alec Pacella*, (Case No. CV-505451, Cuyahoga County Court of Common Pleas). These two cases involved allegations of breach of contract involving six (6) different mobile homes. Szabo's claims in **both** cases were lost to the Trial Court's granting of summary judgment on November 28, 2003.

Appellees represented Szabo, at varying times during the course of this underlying litigation. Attorney Goetsch entered an appearance on behalf of Szabo and commenced his attorney-client relationship with Szabo on or about September 26, 2003. On November 20, 2003, in Attorneys Goetsch and Freedman prepared and filed a Brief in Opposition to the Plaintiff's Motion for Summary Judgment and Brief in Opposition to the Plaintiff's Motion for Sanctions/Motion to

Enforce Court Order on behalf of Julius J. Szabo in the underlying actions. **Neither of the responsive briefs contained a certificate of service indicating that service upon the Plaintiffs or their attorneys had been completed.** It is undisputed that this error was committed by Appellees, who represented Szabo, during this time period. See, Appellee's Motion for Summary Judgment in Case No. CV-05-569120, p. 4-5. The Trial Court's Judgment Entry granting summary judgment in favor of the Plaintiffs in Case Nos. CV-494416 and CV-505451, does **not** indicate that the service error was a consideration in the decision of the Trial Court to grant summary judgment. Further, on December 4, 2003, counsel for the Plaintiffs in Case Nos. CV-494416 and CV-505451 filed a Motion to Strike from the record, Szabo's responsive briefs, because both were filed without a certificate of service.

The Motion to Strike was **denied** by the Trial Court on December 10, 2003. **At this time, it was NOT clear nor could it have been clear to Szabo or any litigant, that this fatal procedural error, committed by the Appellees, would injure and/or damage the claims of Szabo.** See, Affidavit of Julius J. Szabo, attached to Brief in Opposition to Summary Judgment in Case No. CV-05-569120.

Szabo filed an appeal of the Trial Court's decision granting summary judgment in CV-494416 and CV-505451 on December 22, 2003, instituting Eighth District Appeal Nos. 83974 and 83975. Szabo asserted numerous arguments in favor of his position, seeking to reverse the decision of the Trial Court. The Court of Appeals decision in Case Nos. 83974 and 83975 was released on August 5, 2004, affirming the decision of the Trial Court granting summary judgment against Szabo. See, *Nosal v. Szabo* (August 5, 2004), Cuyahoga App. Nos. 83974 and 83975, 2004-Ohio-4076. For the first time, the appellate court addressed the fatal procedural errors committed by Appellees. The decision sets forth as follows:

> "Sometime after the Trial Court granted summary judgment, Appellees learned that Szabo had filed a response to their motion for summary judgment. Upon discovering that they had never received service of Szabo's response, counsel for Appellees obtained a time-stamped copy of Szabo's response to their motion for summary judgment by facsimile. Szabo's response brief did not contain a certificate of service, nor did Szabo subsequently file a proof of service with the clerk of courts, certifying that the response brief had been served to appellees..."

See, *Nosal v. Szabo*, *supra*.

> **Ordinarily, where the Appellee does not file a notice of cross-appeal, this court would pass upon the review of any of Appellee's assignments of error ... HOWEVER, under the peculiar procedural circumstances that occurred in the trial court below, the consideration of appellee's first cross-assignments of error is VIRTUALLY DISPOSITIVE of this appeal; and will be addressed first...**

Id. (Emphasis added)

The remainder of the appellate decision addresses the failure of Szabo's attorneys to serve copies of their responsive briefs upon counsel for the Appellees. **The merits of Szabo's assignments of error are NEVER ADDRESSED by the appellate court.** Id. The Eighth District Court of Appeals affirmed the decision of the Trial Court on the sole basis of the failure to serve the responsive briefs and/or attach a certificate of service page to the responsive briefs

> "...Here, Szabo failed to include a certificate or proof of service with the Trial Court. According to the strict mandates of Civ. R. 5(D), the Trial Court should not have considered Szabo's response to appellee's motion for summary judgment and such response should have been stricken from the record... Because the Trial Court should not have considered or entertained Szabo's response...Szabo's response should have been stricken from the record. Thus, Appellee's cross-assignment of error is well taken."

Id.

Szabo's arguments concerning the underlying litigation were **not** addressed by the appellate court. The court of appeals issued its decision primarily on the issue of the fatal procedural error caused by the Appellees. Id. **Although argued at the Court of Appeals, Szabo, did not discover, nor could he or any litigant have predicted, that the failure to serve and/or failure to attach a certificate of service to the responsive pleadings filed by his attorneys**

would result in the barring of his claims in the underlying cases CV-494416 and CV-505451 until after the appellate decision was released ON AUGUST 5, 2004.

It is undisputed that Szabo was damaged by the Appellees' negligent representation. The only question before the Trial Court in Case No. CV-05-569120 was 'when' this fact was discovered by Szabo. The negligent acts of the Appellees were first discovered by Szabo on or about August 5, 2004, the date that the appellate decision in Nosal v. Szabo was released. The Appellees filed a motion for summary judgment in Trial Court Case No. CV-05-569120, arguing that Szabo became aware of the Appellees' malpractice during the oral argument before the Court of Appeals in Nosal v. Szabo on July 21, 2004. The facts in the record and the parties' respective positions briefed before the Trial Court established the fact that a genuine issue of material fact existed as to when the cognizable event occurred in reference to the Appellees' malpractice. The Trial Court, without the benefit of an evidentiary hearing, granted the Appellees' motion for summary judgment and summarily dismissed the case on April 4, 2006. See, Vol. 3524, Pg. 0113.

Szabo filed a notice of appeal of the Trial Court's April 4, 2006 decision to the Eighth District Court of Appeals in Case No. CA-06-088125. The Court of Appeals rendered its decision on March 26, 2007, affirming the Trial Court's decision, and providing the following:

> ***"The facts enunciated above reveal that, at the latest, Szabo became aware that improper legal work had occurred as of July 21, 2004, and that notice was given on this date of the need to investigate and pursue possible legal malpractice remedies . . . Consequently, Szabo had until July 21, 2005, to file a claim for legal malpractice. Szabo did not file his claim until August 3, 2005. Therefore, we find the one-year statute of limitations barred Szabo's August 3, 2005 complaint for legal malpractice. Although we affirm the grant of summary judgment, we note the harsh result of this decision. This case stands for the unfortunate proposition that a litigant must identify the cognizable event and act on it, all before the litigant's case is resolve. Requiring a litigant to recognize and appreciate a legal concept he is not trained in and then requiring the litigant to file suit, all before his case is resolved places a heavy burden upon litigants."***

See, Appendix Exhibit "1".

The Court of Appeals essentially determined that "notice" was given to Szabo solely because it was alleged that he was in the courtroom during an oral argument of the issues on appeal. Assuming that the Court of Appeals discussed an issue relating to the failure of Szabo's trial counsel (Appellees herein) to comply with Civil Rule 5, and that one of the panel judges mentioned this issue during the oral argument, clearly neither Szabo nor any litigant (or attorney for that matter) can predict what the entire panel who heard that oral argument would decide. There was no way possible for Szabo to predict that the Court of Appeals would not even reach the merits of the underlying litigation or the merits of Szabo's assignments of error, and merely hang its decision on the fact that his trial counsel (Appellees herein) failed to comply with Civil Rule 5.

Moreover, Ohio law clearly provides that "[i]t is well established that a court speaks only through its journal entry. See, *Schenley v. Kauth* (1953), 160 Ohio St. 109; *Glick v. Glick* (Cuyahoga 1999), 133 Ohio App.3d 821, citing, inter alia, *Schenley*, *supra*. Therefore, despite what may have been mentioned by the Court of Appeals during the oral argument – a litigant cannot be expected to file a preemptive lawsuit, just in case the Court of Appeals issues a decision consistent with the remarks by one of the panel members. The first time that Szabo discovered his trial counsel's malpractice is on August 5, 2004, the date the Court of Appeals issued its journal entry. See, *Schenley*, *supra*.

III. ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

The Appellant, Julius J. Szabo, restates herein the above Explanation of Why This Case Is of Public Or Great General Interest and the Statement of the Case and Facts, as if fully rewritten.

PROPOSITION OF LAW NO. I: Arguments Set Forth During An Oral Argument Made Before A Court Of Appeals Panel Do Not Constitute A Cognizable Event Or Notice Necessary To Investigate And Pursue Legal Malpractice Claims Against A Litigant's Trial Counsel; Litigants Should Not Be Held To The Same Standard As Attorneys In Reference To Recognizing And Appreciating Legal Concepts Relating To Potential Legal Malpractice

Claims; Litigants Should Not Be Required To File Suit (For Legal Malpractice) Prior To The Resolution Of A Matter, Especially Where The Result Cannot Be Predicted Or Guaranteed.

PROPOSITION OF LAW NO. II: Disputed Issues of Material Fact Relating To When A Cognizable Event Occurred In Reference To A Legal Malpractice Claim Are To Be Decided By The Trier Of Fact; And It Is Not Proper For A Trial Court To Determine Such Issues.

The Appellant states that a court speaks only through its journal. Schenley v. Kauth (1953), 160 Ohio St. 109; Glick v. Glick (Cuyahoga 1999), 133 Ohio App.3d 821, citing, inter alia, Schenley, *supra*. Arguments made by counsel during a court of appeals oral argument, or issues raised by appellate counsel or any of the panel judges during such an oral argument are not sufficient to place a party on notice of a potential claim for legal malpractice – i.e. just because appellate counsel or a judge mentions an issue during oral argument does not make it so. If such a standard would be allowed to stand, litigants everywhere must be on notice that any passing comment or argument by an opposing counsel or a judge during a hearing places a litigant on notice of malpractice.

In this matter there remained genuine issues of material fact as to when the cognizable event occurred – July 21, 2004 or August 5, 2004 – and these issues are to be decided by the jury, rendering summary judgment improper. The Trial Court's Judgment Entry of April 4, 2006 in Case No. CV-05-569120, was completely contradictory to Ohio law, as genuine issues of material fact existed which preclude summary judgment. It is clear from the record that genuine issues of material fact exist as to when Szabo discovered the acts of negligence committed by the Appellees in their legal representation of Szabo.

The Ohio Supreme Court has held that, prior to a Trial Court granting summary judgment, the Court must first determine that:

> "(1) no genuine issues of material fact remain to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor

of the non-moving party, that conclusion is adverse to the party against whom the motion for summary judgment is made." Davis v. Loopco Industries (1993), 66 Ohio St.3d 64 (as summary judgment is a procedural device employed to terminate litigation, it must be awarded with caution. **All doubts must be rendered in favor of the non-moving party.)**"

In the within matter, the only evidence that the Trial Court could consider, when ruling upon the appellee's Motion for summary Judgment, were the pleadings of the parties and discovery responses as no other evidence had been set forth in the case up until the granting of summary judgment. The matter was dismissed without an evidentiary hearing on the Appellee's motion.

Summary Judgment in this matter was improperly granted because the facts are clearly subject to reasonable dispute. The improper granting of summary judgment precludes the jury's consideration of a case and should, therefore, be used sparingly, only when reasonable minds can come to but one conclusion. *Shaw v. Central Oil Asphalt Corporation* (1981), 5 Ohio App.3d 42, 44. Szabo's Complaint, filed on August 3, 2005, alleges that the Appellees collectively and individually breached the standard of care, normally exercised by attorneys in the state of Ohio, during their representation of Szabo; and said malpractice directly and proximately caused damages suffered by Szabo.[1]

The elements for a claim for legal malpractice based on negligent representation of an attorney are set forth in the Supreme Court of Ohio case, *Vahila v. Hall* (1997), 77 Ohio St.3d 421, as follows: (1) the attorney owes a duty or obligation to the Plaintiff; (2) that there was a breach of that duty and departure from the standard of care; and (3) there is a causal connection between the breach of duty and damages. The question for review by the Court of Appeals is on what date Szabo realized and/or discovered that Appellees' acts of legal malpractice. **The one-year statute**

1 Szabo additionally set forth claims of intentional and negligent infliction of emotional distress.

of limitations commences to run, either when (a) the client discovers the malpractice; or (b) in the exercise of reasonable diligence, the client should have discovered the resulting damage or injury. *Zimmie v. Calfee, Halter & Griswold* (1989), 43 Ohio St.3d 54; *Omni-Ford & Fashion, Inc. v. Smith* (1988), 38 Ohio St.3d 385.

As evidenced by the record, Szabo clearly discovered the acts of malpractice a few days after the Court of Appeals issued its decision on August 5, 2004. Until that date, Szabo relied on the representation of his counsel (Appellees herein), concerning the status of his case, both in the trial court and the appellate level. The standard for determining when the date of accrual begins in an action for legal malpractice, is based on that of a reasonable person. **Neither Szabo nor any other litigant should be held the same standard as an attorney as established by the March 26, 2007 Court of Appeals decision**. Szabo does not need to be aware of the full extent of the injury, before there is a discovery of the issue; just that the event has occurred and that alerts a reasonable person of possible damages.

> "...For the purpose of determining the accrual date of Ohio Revised Code Section 2305.11(A) in a legal malpractice action, the trial court **must** explore the particular facts of the action and make the following determination: (1) when the injured party became 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-Ford & Fashion, Inc., supra.

In *Monastra v. D'Amore* (1996), 111 Ohio App.3d 296, the Trial Court granted summary judgment on the issue of "statute of limitations", in favor of an attorney who was being sued for legal malpractice by his former client. The Eighth District Court of Appeals **reversed** the decision of the Trial Court, stating that there were 'material issues of fact' as to **'when'** a 'cognizable event'

occurred that triggered the client's discovery of her injuries, thus precluding summary judgment on limitations grounds. "Since the question of when an attorney-client relationship ends is a question of fact, and because the evidence needs to be weighed most strongly in favor of the [non-moving party], a genuine issue of material fact remains..." Id., at p. 304.

Likewise, in *Burks v. Peck, Shaffer & Williams* (1996), 109 Ohio App.3d 1, the Eighth District Court of Appeals found that the Trial Court properly denied the law firm's motion for summary judgment on the issue of the one-year statute of limitations. The Eighth District agreed with the Trial Court in Burks, that a 'factual issue' is determined, 'when a Plaintiff knows or should know of his or her injury'. Id. at p. 9.

A **cognizable event** is an event sufficient to alert a reasonable person that in the course of legal representation, his attorney committed an improper act. *Tolliver v. McDonnell* (October 9, 2003), Cuyahoga County App. No. 82719, unreported; *Case v. Landskroner & Phillips Co., L.P.A.* (May 3, 2001), Cuyahoga App. No. 78147, unreported. **Several cases in Ohio have decided that this cognizable event can occur AFTER the termination of representation by the attorneys of law firm has occurred.** In *Vagianos v. Halpern* (December 14, 2000), Cuyahoga App. No. 76408, unreported; the Eighth District Court of Appeals reversed the decision of the Trial Court, granting summary judgment in favor of the Appellees – (attorney and law firm) on the basis that the Appellants – (Plaintiffs) did not realize the 'cognizable event' which triggered the statute of limitations to commence until a date, well after the termination of the Appellees' representation. In deciding this matter, the Court in *Vagianos* determined:

> "The burden was on the law firm to identify the date of cognizable event. In the instant case, the law firm maintains the cognizable event occurred... when [Appellees] filed its answer asserting the affirmative defense of res judicata... The mere assertion of a defense does not establish that the defenses has merit, much less that counsel's substandard representation is responsible for the availability of the defense. If the defense were ultimately rejected, there surely would be no reason to treat its mere

> assertion as a cognizable event. To rule otherwise would result in a flood of unnecessary complaints filed by clients who, in order to preserve their right to file, would feel compelled to sue their former attorney every time an affirmative defense suggested the possibility of malpractice...**Had there been an actual adverse ruling on the basis of res judicata, that adverse ruling might have constituted a cognizable event..."**

See, *Vagianos*, p. 3.

The instant action parallels the reasoning set forth in *Vagianos*. In this case, although arguments were asserted concerning the failure of the Appellees in this case, to serve a copy of the briefs and/or attach a certificate of service to the briefs involved; the Trial Court's Judgment Entry granting summary judgment in favor of the opposing litigants in the underlying action, do **not** indicate that the service error was a consideration in the decision of the Trial Court to grant summary judgment. At this time, it was **not** clear to the Appellant, Julius J. Szabo that this fatal, procedural error committed by the Appellees, would injure and/or damage the claims of the Plaintiff, Julius J. Szabo.

In affirming the Trial Court's decision by its decision in *Nosal v. Szabo* released on August 5, 2004, the Court of Appeals clearly focused on the fatal, procedural errors committed by Appellees and their failure to comply with Civil Rule 5. The Eighth District Court of Appeals affirmed the decision of the Trial Court on the sole basis of the failure to serve the responsive briefs, and/or attach a certificate of service page to the responsive briefs.

> "...Here, Szabo failed to include a certificate or proof of service with the Trial Court. According to the strict mandates of Civ. R. 5(D), the Trial Court should not have considered Szabo's response to appellee's motion for summary judgment and such response should have been stricken from the record... Because the Trial Court should not have considered or entertained Szabo's response...Szabo's response should have been stricken from the record. Thus, Appellee's cross-assignment of error is well taken."

The date of discovery of the negligent acts creates genuine issues of material fact, which should be left to be decided by the trier of fact. *Zimmie v. Calfee, Halter & Griswold* (1989), 42

Ohio St.3d 54; *Omni-Ford & Fashion, Inc. v. Smith* (1988), 38 Ohio St.3d 385; *Crystal v. Wilsman* (January 30, 2003), Cuyahoga App. No. 81055, unreported (discovery eight years after settlement of case is cognizable event, trial court decision granting summary judgment reversed).

The Eighth District Court of Appeals has held that summary judgment is not a vehicle to resolve issue reserved for the trier of fact. *Nationwide Mutual Insurance Co. v. Turner* (1986), 20 Ohio App.3d 12, 16. **Ohio law commands that cases should be decided on their merits and that parties shall have their day in court.**[2]

The decision by the Court of Appeals creates dangerous precedent in this State, especially in Cuyahoga County, Ohio largest county. The decision carves out additional and unreasonable protection for attorneys who have committed acts of malpractice which the legislature never intended in R.C. 2305.11(A) and creates an insurmountable burden for litigants to (1) possess the same knowledge, skill and experience of an attorney; (2) be on notice of comments made or issues discussed during oral arguments before a court of appeals; and (3) to preemptively file suit prior to the time a legal malpractice action has been realized or discovered, just in case a court issues a decision

IV. CONCLUSION

For the foregoing reasons, the Appellant, Julius J. Szabo, respectfully requests this Honorable Court to accept jurisdiction over this appeal because the issues presented in this case are of public and great general interest.

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2 See, *Jones v. Hartranft* (1997), 78 Ohio St.3d 368; *Dehart v. Life Insurance Company* (1982), 69 Ohio St.3d 189, 193; *Perotti v. Ferguson* (1983), 7 Ohio St.3d 1, 3; *Hawkens v. Marion Correctional Institution* (1986), 28 Ohio St.3d 4,5; *Nationwide Mutual Insurance Company v. Papenhagen* (1987), 30 Ohio St.3d 14, 15; *Hopkins v. Quality Chevrolet* (1992), 79 Ohio App.3d 578, 583.

Respectfully submitted,

JOSEPH G. STAFFORD (0023863)
GREGORY J. MOORE (0076156)
Stafford & Stafford Co., L.P.A.
The Stafford Building
2105 Ontario Street
Cleveland, Ohio 44115
(216) 241-1074; (216) 241-4572
jgs@staffford-stafford.com
gjm@stafford-stafford.com
Attorneys for Appellant, Julius J. Szabo

CERTIFICATE OF SERVICE

A copy of the foregoing is being served upon George S. Coakley, located at 1400 Midland Building, 101 Prospect Avenue, West, Cleveland, Ohio 44115, Bruce Freedman, located at 32250 W. Market Street, Suite 203, Akron, Ohio 44333 and William Love, located at 339 W. Rextur Drive, Akron, Ohio 44339 by regular U.S. Mail, postage prepaid, on or about this 10th day of May, 2007.

JOSEPH G. STAFFORD (0023863)
GREGORY J. MOORE (0076156)
Stafford & Stafford Co., L.P.A.
Attorneys for Appellant, Julius J. Szabo

APPENDIX

MAR 2 6 2007

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 88125

JULIUS J. SZABO

PLAINTIFF-APPELLANT

vs.

ALEXANDER E. GOETSCH, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-569120

BEFORE: Kilbane, J., Gallagher, P.J., and Stewart, J.

RELEASED: March 15, 2007

JOURNALIZED: MAR 2 6 2007

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VOL 632 PG 0313

ATTORNEY FOR APPELLANT

Joseph G. Stafford
Kenneth J. Lewis
Stafford & Stafford Co., LPA
The Stafford Building
2105 Ontario Street
Cleveland, Ohio 44115

ATTORNEY FOR APPELLEES

For Alexander E. Goetsch:

George S. Coakley
Todd M. Jackett
Reminger & Reminger
1400 Midland Building
101 Prospect Avenue, West
Cleveland, Ohio 44115-1093

For Bruce R. Freedman:

Bruce R. Freedman
3250 W. Market Street - Suite 203
Akron, Ohio 44333

For William Love:

William Love II
739 West Rextur Drive
Akron, Ohio 44319

FILED AND JOURNALIZED
PER APP. R. 22(E)

MAR 26 2007

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY _____ DEP.

ANNOUNCEMENT OF DECISION
PER APP. R. 22(B), 22(D) AND 26(A)
RECEIVED

MAR 15 2007

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY _____ DEP.

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NOTICE MAILED TO COUNSEL
FOR ALL PARTIES: COSTS TAXED

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

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MARY EILEEN KILBANE, J.:

Julius J. Szabo ("Szabo") appeals from the trial court's decision to grant summary judgment in favor of Alexander E. Goetsch ("Goetsch"). Szabo argues that genuine issues of material fact remain as to when the cause of action for legal malpractice accrued. For the following reasons, we affirm the decision of the trial court.

On August 3, 2005, Szabo filed a complaint for legal malpractice, intentional infliction of emotional distress, negligent infliction of emotional distress, breach of contract, and breach of fiduciary duty against Goetsch, Bruce Freedman ("Freedman"), and William Love ("Love"). Szabo's allegations stem from Goetsch's representation of Szabo in two separate matters in the Cuyahoga County Court of Common Pleas.

The defendants in the legal malpractice action represented Szabo at varying times during the course of this underlying litigation. Goetsch entered an appearance on behalf of Szabo and thereby commenced an attorney-client relationship on October 16, 2003. Soon thereafter, the opposing parties in both cases moved for summary judgment. Goetsch, Freedman, and Love filed responsive pleadings, neither of which contained a certificate of service.

The trial court granted summary judgment in both cases. On December 4, 2003, the opposing parties moved to strike Szabo's responsive pleadings because of the failure to include certificates of service. The trial court denied the motion to strike on December 10, 2003.

Szabo retained new counsel who filed notices of appeal on December 22, 2003. The following day, Goetsch sent Szabo a letter terminating Goetsch's representation of Szabo. The two separate appeals were subsequently consolidated. The appellees in the consolidated appeal raised the following cross assignment of error:

> **"On Appellees' first Cross-Assignment of Error, the trial court should have stricken from the files and from the court's consideration, Mr. Szabo's response brief in opposition to summary judgment and the opposition affidavits submitted to the court but not served in contravention of Civ. R. 5."**

In response, Szabo's counsel argued that appellees were not prejudiced by the trial court's failure to strike because the trial court granted summary judgment in their favor, despite the consideration of the brief in opposition. On July 21, 2004, this court conducted oral arguments at which time the parties again argued the issue regarding the failure to include the certificate of service.

On August 5, 2004, this court released its decision, affirming the decision of the trial court to grant summary judgment in favor of appellees. See *Robert C. Nosal etc., et al. v. Szabo*, Cuyahoga App. Nos. 83974 and 83975, 2004-Ohio-4076. In our decision, this court addressed the failure of Goetsch, Freedman, and Love to attach a certificate of service to their responsive pleading. Specifically, we held as follows:

> **"Ordinarily, where the appellee does not file a notice of cross-appeal, this court would pass upon the review of any of appellee's assignments of error *** However, under the peculiar procedural circumstances that occurred in the trial court below, the consideration of appellee's first cross-assignment of error is virtually dispositive of this appeal and will be addressed first." Id.**

The remainder of the appellate decision addresses the failure of Szabo's attorneys to serve copies of their responsive briefs upon counsel for the appellees. Id. This court never addressed the merits of Szabo's assignments of error; we affirmed the decision of the trial court on the basis of the failure to serve the responsive briefs and to attach a certificate of service page to the responsive briefs. Id.

Szabo then filed the underlying lawsuit on August 3, 2005, almost one year from the release of Szabo. Szabo claimed that although argued at the trial court level and in this Court of Appeals, Szabo "did not discover that the failure

to serve and/or failure to attach a certificate of service to his responsive pleadings, would result in the barring of his claims in the underlying cases; until after the appellate decision was released." In response, Goetsch argued that at the latest, Szabo discovered the error when the issue was argued at oral argument on July 21, 2004. Goetsch further argued in his motion for summary judgment that because Szabo did not file the instant lawsuit within one year of July 21, 2004, his claim was barred by the one-year statute of limitation. R.C. 2305.11(A). The trial court agreed with Goetsch and granted the motion for summary judgment filed November 1, 2005.

Szabo appeals, raising a single assignment of error.

> **"The trial court erred as a matter of law in granting the appellee, Alexander Goetsch's motion for summary judgment."**[1]

We review an appeal from summary judgment under a de novo standard of review. *Baiko v. Mays* (2000), 140 Ohio App.3d 1. Accordingly, we afford no deference to the trial court's decision and independently review the record to determine whether summary judgment is appropriate. Id. See, also, *Brown v.*

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[1] Szabo fails to raise any issue regarding the trial court's decision to apply the one-year statute of limitations to all claims asserted in his complaint. Accordingly, we will not disturb the trial court's application of the one-year statute of limitations to Szabo's claims of intentional infliction of emotional distress, negligent infliction of emotional distress, breach of contract and breach of fiduciary duty.

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Scioto Bd. Of Commrs. (1993), 87 Ohio App.3d 704. Under Civ.R. 56, summary judgment is appropriate when: (1) no genuine issue as to any material fact exists, (2) the party moving for summary judgment is entitled to judgment as a matter of law, and (3) viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can reach only one conclusion, which is adverse to the nonmoving party. *Temple v. Wean United, Inc.* (1997), 50 Ohio St.2d 317.

The moving party carries the initial burden of setting forth specific facts that demonstrate his entitlement to summary judgment. *Dresher v. Burt*, 75 Ohio St.3d 280, 1996-Ohio-107. If the movant fails to meet this burden, summary judgment is not appropriate. Id. If the movant does meet this burden, summary judgment will be appropriate only if the nonmovant fails to establish the existence of a genuine issue of material fact. Id.

In the instant case, the parties do not dispute the fact that legal malpractice occurred. At issue in this appeal is when the statute of limitations began to run. R.C. 2305.11 sets forth a one-year statute of limitations for legal malpractice claims. The one-year statutory period begins to run upon the termination of the attorney-client relationship or the discovery of the alleged malpractice, whichever occurs later. *Ladanyi v. Crookes & Hanson Ltd., et al.,*

Cuyahoga App. No. 87888, 2007-Ohio-540. In *Zimmie v. Calfee, Halter & Griswold* (1989), 43 Ohio St.3d 54, the Ohio Supreme Court set forth the standard with respect to the statute of limitations for malpractice:

> **"Under R.C. 2305.11(A), an action for legal malpractice accrues and the statute of limitations begins to run when there is a cognizable event whereby the client discovers or should have discovered his injury was related to his attorney's act or non-act and the client is put on notice of a need to pursue its possible remedies against the attorney, or when the attorney-client relationship for that particular transaction or undertaking terminates, whichever occurs later."**

The *Zimmie* court defined a cognizable event as an event "which should alert a reasonable person that in the course of legal representation, his attorney committed an improper act." See, also, *Spencer v. McGill* (1993), 87 Ohio App.3d 267.

The parties in the instant case are not in dispute about when the attorney-client relationship terminated; however, the parties are in dispute about when the cognizable event occurred. Goetsch argues that the cognizable event occurred no later than July 21, 2004, when this court heard oral arguments concerning Szabo's underlying appeal. Goetsch argues that one of the issues raised and argued at oral argument was the failure to include the certificate of service and the ramifications of such failure. Goetsch claims that

because Szabo was present during the oral argument, he was put on notice of any malpractice on the part of Goetsch. Therefore, Szabo had only until July 21, 2005, to file a legal malpractice claim.

In response, Szabo argues that it was not until August 5, 2004, when this court released its decision, that he discovered the negligent acts of Goetsch, Freedman and Love. Szabo admits that although the issue of the certification of service was argued at the trial court level and in this Court of Appeals, he did not discover that the failure to serve and/or failure to attach a certificate of service to his responsive pleadings would result in the barring of his claims in the underlying cases. Accordingly, Szabo argues that his August 3, 2005 claim of legal malpractice was filed within the one-year statute of limitations.

Upon review, it is uncontroverted that on December 4, 2003, the opposing parties moved to strike Szabo's responsive pleadings because of the failure of defendants to include certificates of service. Additionally, on May 17, 2004, the opposing parties raised a cross-assignment of error arguing that the trial court should have stricken Szabo's response briefs for violating Civ.R. 5. Szabo's counsel responded to this cross-assignment of error, arguing that the opposing parties were not prejudiced by the trial court's failure to strike because summary judgment was granted in appellees favor despite the consideration of

the brief in opposition. Finally, on July 21, 2004, this court conducted oral arguments on the consolidated appeal; Szabo was present during the oral argument. The parties for each side argued the issue regarding the failure to include the certificate of service with the responsive pleadings.

Accordingly, viewing the facts in the light most favorable to Szabo, we conclude that no genuine issue of material fact remains to be litigated. In determining the cognizable event, "the focus should be on what the client was aware of and not an extrinsic judicial determination." *Vagianos v. Halpern*, (Dec. 14, 2000), Cuyahoga App. No. 76408. The facts enunciated above reveal that, at the latest, Szabo became aware that improper legal work had occurred as of July 21, 2004, and that notice was given on this date of the need to investigate and pursue possible legal malpractice remedies. Id.; *McDade v. Spencer* (1991), 75 Ohio App.3d 639; *Koerber v. Levey and Gruhin*, Summit App. No. 21730, 2004-Ohio-3085. Consequently, Szabo had until July 21, 2005, to file a claim for legal malpractice. Szabo did not file his claim until August 3, 2005.

Therefore, we find that the one-year statute of limitations barred Szabo's August 3, 2005 complaint for legal malpractice. Although we affirm the grant of summary judgment, we note the harsh result of this decision. This case

stands for the unfortunate position that a litigant must identify the cognizable event and act on it, all before the litigant's case is resolved. Requiring a litigant to recognize and appreciate a legal concept he is not trained in and then requiring the litigant to file suit, all before his case is resolved places a heavy burden upon litigants. Nonetheless, the law requires us to conclude that the cognizable event in the instant case took place on July 21, 2004. Therefore, Szabo's August 3, 2005 claim of legal malpractice is barred by the statute of limitations.

Szabo's sole assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Mary Eileen Kilbane

MARY EILEEN KILBANE, JUDGE

SEAN C. GALLAGHER, P.J., and
MELODY J. STEWART, J., CONCUR

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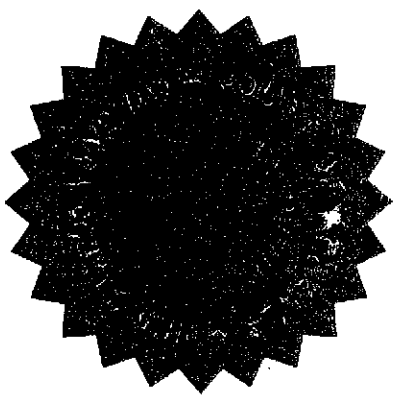
The State of Ohio, Cuyahoga County. } ss.

I, GERALD E. FUERST, Clerk of the Court of Appeals within and for said County, and in whose custody the files, Journals and records of said Court are required by the laws of the State of Ohio, to be, kept, hereby certify that the foregoing is taken and copied from the Journal Entry, Volume 632 Page 313 Dated: 3-26-07 CA 88125 of the proceedings of the Court of Appeals within and for said Cuyahoga County, and that the said foregoing copy has been compared by me with the original entry on said Journal Entry, Vol. 632 Page 313 Dated: March 26, 2007 and that the same is correct transcript thereof.



In Testimony Whereof, I do hereunto subscribe my name officially, and affix the seal of said court, at the Court House in the City of Cleveland, in said County, this 10th day of May A.D. 20 07

GERALD E. FUERST, Clerk of Courts

By C. Prusak Deputy Clerk