

ORIGINAL

IN THE SUPREME COURT OF OHIO

**FLAGSTAR BANK, FSB,**

Plaintiff-Appellant,

vs.

**AIRLINE UNION'S MORTGAGE  
COMPANY, et al.,**

Defendants-Appellees.

10-0508

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On Appeal from the Hamilton County  
Court of Appeals, First Appellate District  
  
Court of Appeals  
Case No. C 0900166

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**NOTICE OF CERTIFIED CONFLICT OF  
APPELLANT FLAGSTAR BANK, FSB**

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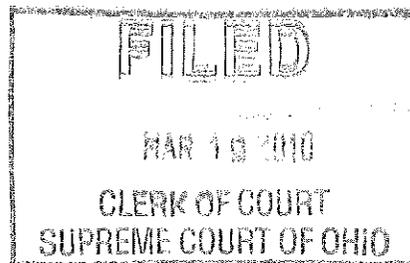
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Counsel for Plaintiff-Appellant,  
Flagstar Bank, FSB



Notice of Certified Conflict of Appellant Flagstar Bank, FSB

Appellant Flagstar Bank, FSB gives notice that on March 3, 2010, the Hamilton County Court of Appeals, First Appellate District, entered in Case No. C 0900166 an Entry Granting Motion to Certify Conflict (attached as "Exhibit A"). The First District Court of Appeals certified the following question:

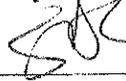
Under R.C. 2305.09(D), does a cause of action for professional negligence accrue on the date that the negligent act is committed, or on the date that the negligent act causes actual damages?

The First District certified the conflict based on its decision in *Flagstar Bank, FSB v. John L. Reinhold, et al.*, First Appellate District Case No. C-090166, Judgment Entry filed February 10, 2010 ("Exhibit B"). The conflict cases are:

1. *JP Morgan Chase Bank v. Lanning*, Fifth District Case No. 2007CA223, 2008-Ohio-893 ("Exhibit C");
2. *Fritz v. Brunner Cox, L.L.P.* (2001), 142 Ohio App. 3d 664, 756 N.E.2d 740 ("Exhibit D"); and
3. *Gray v. Estate of Barry* (1995), 101 Ohio App.3d 764, 656 N.E.2d 729 ("Exhibit E").

Pursuant to S. Ct. Prac. R. 4.1, a copy of the Entry certifying the conflict, the underlying decision, and the conflict cases are all attached as the respectively designated exhibits.

Respectfully submitted,



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Counsel for Plaintiff-Appellant,  
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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing has been served upon the following via regular, U.S. Mail, on this 19th day of March, 2010.

Robert J. Gehring  
Brian E. Hurley  
**CRABBE, BROWN & JAMES LLP**  
30 Garfield Place  
Suite 740  
Cincinnati, Ohio 45202

A handwritten signature in black ink, appearing to read 'SD', followed by a long horizontal line extending to the right.

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Samir Dahman

IN THE COURT OF APPEALS  
FIRST APPELLATE DISTRICT OF OHIO  
HAMILTON COUNTY, OHIO

FLAGSTAR BANK, FSB,

APPEAL NO. C-090166

Appellant,

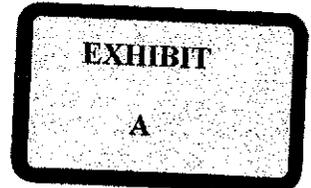
vs.



ENTRY GRANTING MOTION  
TO CERTIFY CONFLICT

AIRLINE UNION'S MORTGAGE  
COMPANY, et al.,

Appellees.



This cause came on to be considered upon the motion of the appellant to certify this appeal to the Ohio Supreme Court as being in conflict with *JP Morgan Chase Bank v. Lanning*,<sup>1</sup> *Fritz v. Brunner Cox, L.L.P.*,<sup>2</sup> and *Gray v. Estate of Barry*.<sup>3</sup>

The Court finds that the motion to certify is well taken and is granted.

This appeal is certified to the Ohio Supreme Court as being in conflict with the above cases. The certified issue is as follows:

"Under R.C. 2305.09(D), does a cause of action for professional negligence accrue on the date that the negligent act is committed, or on the date that the negligent act causes actual damages?"

To The Clerk:

Enter upon the Journal of the Court on MAR - 3 2010 per order of the Court.

By   
Presiding Judge

(Copies sent to all counsel)

<sup>1</sup> 5<sup>th</sup> Dist. No. 2007CA223, 2008-Ohio-893.

<sup>2</sup> (2001), 142 Ohio App.3d 664, 756 N.E.2d 740

<sup>3</sup> (1995), 101 Ohio App.3d 764, 768-769, 656 N.E.2d 729.



D87278555

**IN THE COURT OF APPEALS  
FIRST APPELLATE DISTRICT OF OHIO  
HAMILTON COUNTY, OHIO**

FLAGSTAR BANK, FSB,

Plaintiff-Appellant,

vs.

JOHN L. REINHOLD,

Defendant-Appellee,

and

JAMES WHITED, ET AL.

Defendants.

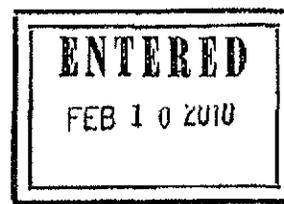
APPEAL NO. C-090166

TRIAL NO. A-0804164

*JUDGMENT ENTRY.*



D86974863



We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.<sup>1</sup>

Plaintiff-appellant Flagstar Bank, FSB, appeals from the trial court's entry granting summary judgment to defendant-appellee John L. Reinhold on its claims for negligent misrepresentation and professional negligence.

In April 2001, Flagstar purchased several residential mortgage loans from defendant Airline Union's Mortgage Company ("AUM"). The borrowers on these loans defaulted, leaving insufficient collateral to satisfy the loans. In April 2008,

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<sup>1</sup> See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

**EXHIBIT**

**B**

**OHIO FIRST DISTRICT COURT OF APPEALS**

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Flagstar filed suit against AUM, the loan officers involved, and a group of residential property appraisers, including Reinhold, to recover damages. In its complaint, Flagstar alleged that Reinhold had negligently performed real estate appraisals on December 19, 2001, June 12, 2002, and March 10, 2001.

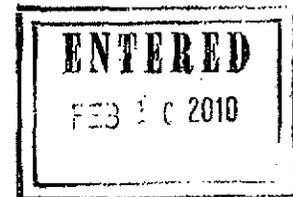
Reinhold subsequently moved for summary judgment, asserting that Flagstar's claims against him for negligent misrepresentation and professional negligence were barred by the four-year statute of limitations found in R.C. 2305.09(D). The trial court, relying upon the Ohio Supreme Court's decision in *Investors REIT One v. Jacobs*<sup>2</sup> and this court's subsequent decision in *Hater v. Gradison, Division of McDonald & Company Securities, Inc.*,<sup>3</sup> granted Reinhold's motion. Flagstar subsequently dismissed without prejudice its claims against the other defendants and filed a timely appeal from the trial court's judgment.

On appeal, Flagstar has raised a single assignment of error, in which it argues that the trial court erred by entering summary judgment for Reinhold on its claims of negligent misrepresentation and professional negligence. Flagstar argues that the trial court erred in holding that its negligence claims against Reinhold accrued for statute-of-limitations purposes on the date his appraisals had been completed, instead of on the date that it had suffered actual damages. We disagree.

In *Investors REIT One*, the Ohio Supreme Court rejected a discovery rule for claims of accountant negligence in the context of R.C. 2305.09(D) and held that the four-year statute of limitations governing those claims commenced to run "when the

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<sup>2</sup> (1989), 46 Ohio St.3d 176, 546 N.E.2d 206.  
<sup>3</sup> (1995), 101 Ohio App.3d 99, 655 N.E.2d 189.



OHIO FIRST DISTRICT COURT OF APPEALS

allegedly negligent act was committed.”<sup>4</sup> The Ohio Supreme Court affirmed its holding in *Investors REIT One in Grant Thornton v. Windsor Homes, Inc.*<sup>5</sup>

In *Hater v. Gradison, Division of McDonald & Company Securities, Inc.*, this court extended the reasoning of *Investors REIT One* to claims of professional negligence by brokers, dealers, and appraisers.<sup>6</sup> In so doing, we expressly rejected the argument that Flagstar makes in this appeal: that no actionable injury can be held to have occurred so as to set in motion the running of the statute of limitations until damage has resulted from that negligent act.<sup>7</sup> In *Hater*, we held that this argument was nothing more than an attempt to circumvent the unavailability of the discovery rule for these types of claims.<sup>8</sup>

While Flagstar has cited a number of cases, mainly from the Fifth and Sixth Appellate Districts, that arguably conflict with our analysis in *Hater*,<sup>9</sup> we believe that our reasoning in *Hater* is sound.<sup>10</sup> It is consistent not only with the majority of Ohio appellate districts, but also with the broad and explicit language of the Ohio Supreme Court in *Investors REIT One* and *Grant Thornton*.<sup>11</sup>

Because the record reveals that Reinhold had performed each of the real estate appraisals in 2001 or 2002, which was more than four years before Flagstar filed its claims for professional negligence and negligent misrepresentation against

<sup>4</sup> *Investors REIT One*, supra, at 182.

<sup>5</sup> (1991), 57 Ohio St.3d 158, 160, 566 N.E.2d 1220.

<sup>6</sup> *Hater*, supra, at 109-111.

<sup>7</sup> *Id.* at 110.

<sup>8</sup> *Id.*

<sup>9</sup> See, e.g., *JP Morgan Chase Bank v. Lanning*, 5th Dist. No. 2007CA00223, 2008-Ohio-893; *Fritz v. Brunner Cox, L.L.P.* (2001), 142 Ohio App.3d 664, 756 N.E.2d 740; *Gray v. Estate of Barry* (1995), 101 Ohio App.3d 764, 768-69, 656 N.E.2d 729.

<sup>10</sup> See *Dancar Properties, Ltd. v. O’Leary-Kientz*, 1st Dist. No. C-030936, 2004-Ohio-6998, at ¶14 (following *Hater* and rejecting the discovery rule for negligent-misrepresentation claims).

<sup>11</sup> See *Schnippel Construction Inc. v. Jim Proffit*, 3rd Dist. No. 17-09-12, 2009-Ohio-5905 (summarizing the extensive Ohio appellate case law rejecting the “delayed damages,” “actual injury,” or “actual damage” argument).



**OHIO FIRST DISTRICT COURT OF APPEALS**

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him, the trial court properly entered summary judgment in his favor. As a result, we overrule Flagstar's sole assignment of error and affirm the judgment of the trial court.

A certified copy of this judgment entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

**SUNDERMANN, P.J., CUNNINGHAM and DINKELACKER, JJ.**

*To the Clerk:*

Enter upon the Journal of the Court on February 10, 2010  
per order of the Court \_\_\_\_\_  
Presiding Judge



LEXSEE



Caution

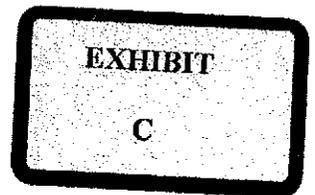
As of: Mar 19, 2010

**JP MORGAN CHASE BANK NA, Plaintiff-Appellee -vs- RODGER B. LANNING  
II, ET AL., Defendants-Third Party Plaintiffs-Appellants -vs- CMEA TITLE  
AGENCY, INC., ET AL., Third-Party Defendants-Appellees**

Case No. 2007CA00223

**COURT OF APPEALS OF OHIO, FIFTH APPELLATE DISTRICT, STARK  
COUNTY**

2008 Ohio 893; 2008 Ohio App. LEXIS 755



**March 3, 2008, Date of Judgment Entry**

**PRIOR HISTORY:** [\*\*1]

**CHARACTER OF PROCEEDING:** Appeal from the Stark County Court of Common Pleas, Civil Case No. 2006CV00625.

**DISPOSITION:** Reversed and Remanded.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Appellant mortgagors sought review of a judgment from the Stark County Court of Common Pleas (Ohio), which granted a motion by appellees, a mortgagee, a title company, and others, to dismiss the mortgagors' claims of negligence and willful and wanton misconduct due to the vacatur of tenants from property that was not foreclosed. The dismissal was based on the limitations bar under R.C. 2305.09(D).

**OVERVIEW:** The mortgagors executed a note and mortgage on their property. The title company recorded an altered mortgage document. The mortgagee commenced the foreclosure action against the mortgagors, and attempts at negotiation of a forbearance failed. Accordingly, the mortgagee obtained a foreclosure judgment and the property was sold at a sheriff's sale. That sale was subsequently vacated. In the interim, the mortgagee's loan servicer had informed tenants of another property owned by the mortgagors to vacate due to the foreclosure, which was error. Thereafter, the mortgagors filed a third-party action against the mortgagee, the servicer, and others, which was dismissed by the trial court

upon a determination that the claims were barred by the limitations period under R.C. 2305.09(D). On appeal, the court held that the trial court erred in determining that the claim accrued when an altered mortgage was recorded. Rather, the delayed damages theory and the discovery rule were applicable to the circumstances. Accordingly, the action did not accrue until the date when the foreclosure action was filed, as the mortgagors did not suffer an actual injury until that time.

**OUTCOME:** The court reversed the judgment of the trial court and remanded the matter for further proceedings.

**CORE TERMS:** statute of limitations, accountant, accrue, cause of action, mortgage, sheriff's sale, negligence claims, tax return, foreclosure, assignment of error, de novo, suffered damages, actual injury, protected interest, delayed-damages, negligently, preparation, discovery, recorded, altered, accrued, property located, wanton misconduct, time-barred, recording, willful

**LexisNexis(R) Headnotes**

*Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Failures to State Claims  
Civil Procedure > Appeals > Standards of Review > De Novo Review*

[HN1]An appellate court's standard of review on a Civ. R. 12(B)(6) motion to dismiss is de novo. A motion to

dismiss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of a complaint. Under a de novo analysis, the appellate court must accept all factual allegations of the complaint as true and all reasonable inferences must be drawn in favor of the nonmoving party.

**Governments > Legislation > Statutes of Limitations > Time Limitations**

[HN2]See R.C. 2305.09(D).

**Governments > Legislation > Statutes of Limitations > Time Limitations**

**Torts > Procedure > Statutes of Limitations > Accrual of Actions > Discovery Rule**

[HN3]Pursuant to the discovery rule, a cause of action accrues, for statute of limitations purposes, at the time a plaintiff discovers, or, in the exercise of reasonable care, should have discovered, the injury.

**Torts > Negligence > Proof > Burdens of Proof**

**Torts > Negligence > Proof > Elements**

[HN4]To establish actionable negligence, one must show in addition to the existence of a duty, a breach of that duty and injury resulting proximately therefrom.

**Torts > Procedure > Statutes of Limitations > Accrual of Actions > Discovery Rule**

[HN5]For purposes of the accrual of a claim, since there can be no negligence without injury, there can be no negligent conduct by which a cause accrues until there is an injury to a legally protected interest.

**COUNSEL:** For Third-Party Defendants-Appellees: CMEA Title Agency, Inc., et al., MARC S. BLUBAUGH, Columbus, Ohio; CAMILLE A. MILLER, Cleveland, Ohio.

For Third-Party Plaintiffs-Appellants: Rodger and Shelley Lanning, PHILLIP D. SCHANDEL, Canton, Ohio; TIMOTHY B. SAYLOR, Canton, Ohio.

**JUDGES:** Hon. William B. Hoffman, P.J., Hon. John W. Wise, J., Hon. Julie A. Edwards, J. Wise, J. and Edwards, J. concur.

**OPINION BY:** William B. Hoffman

**OPINION**

*Hoffman, P.J.*

[\*P1] Third-party plaintiffs/appellants Rodger B. Lanning, II, et al. appeal the July 17, 2007 Judgment Entry entered by the Stark County Court of Common Pleas, which granted the motion to dismiss filed by third-party defendants/appellees CMEA Title Agency, Inc.

**STATEMENT OF THE FACTS AND CASE**

[\*P2] As the trial court set forth a thorough rendition of the factual background of this matter in its July 17, 2007 Judgment Entry, we shall incorporate the majority of such herein. The Lannings own real property located at 2181 Brumbaugh Street, N.W., North Canton, Ohio ("Stark County property") and real property located at 653 East Washington Ave., Barberton, Ohio ("Summit County property"). On July 26, 2000, the Lannings executed a promissory note to JP Morgan for \$ 75,000, and secured the note with a mortgage on the Summit County property. CMEA was the title company involved in closing the loan and responsible for recording the documents.

[\*P3] In late February, 2006, JP Morgan filed a Complaint in Foreclosure against the Lannings in the Stark County Court of Common Pleas in Case No. 2006CV00625. Attached to the Complaint was a copy of the mortgage on the Summit County property with the address of the property redacted and the words "Stark County" hand written in its place. The legal description attached to the mortgage on the Summit County property referenced the Stark County property. JP Morgan and the Lannings attempted to negotiate a forbearance agreement through Ocwen, JP Morgan's loan servicer. The attempts were unsuccessful, and JP Morgan foreclosed on the Stark County property, which was subsequently sold at a sheriff's sale. The sheriff's sale of the Stark County property was eventually vacated.

[\*P4] In the meantime, Cutler and Associates, Inc., through its agent, Jonathan Caiazza, at the request of Ocwen, contacted the tenants residing in the Lannings' [\*P3] Summit County property, and instructed them to vacate the residence as it had been sold at a sheriff's sale. The Summit County property had, in reality, never been sold at a sheriff's sale, but the Stark County property had been erroneously sold.

[\*P5] On March 5, 2007, the Lannings filed a Third-Party Complaint against JP Morgan, Ocwen, CMEA, Cutler and Associates, Inc., and Jonathan Caiazza. The Lannings filed an Amended Third-Party Complaint on June 22, 2007, asserting negligence and willful and wanton misconduct claims against CMEA. JP Morgan and Ocwen filed negligence cross-claims against CMEA. CMEA filed a Motion to Dismiss the Amended Third-Party Complaint, maintaining the Lannings' claims for negligence/willful and wanton misconduct were barred by the statute of limitations.

[\*P6] Via Judgment Entry filed July 17, 2007, the trial court granted CMEA's motion to dismiss. The trial court found the four year statute of limitations for general negligence claims governed, and the Lannings, having failed to file their Complaint at the time of the injury, to wit: the date of the recording of the mortgage, were barred from recovery.

[\*P7] It is from this judgment entry the Lannings appeal, raising as [\*\*4] their sole assignment of error:

[\*P8] "I. THE TRIAL COURT ERRED IN GRANTING APPELLEE'S MOTION TO DISMISS UPON THE BASIS THAT APPELLANT'S CLAIMS WERE BARRED BY A FOUR-YEAR STATUTE OF LIMITATIONS."

I

[\*P9] In their sole assignment of error, the Lannings maintain the trial court erred in granting CMEA's motion to dismiss upon a finding their claims were barred by the four year statute of limitations for general negligence claims.

[\*P10] [HN1] Our standard of review on a Civ.R. 12(B)(6) motion to dismiss is de novo. Greely v. Miami Valley Maintenance Contrs. Inc. (1990), 49 Ohio St.3d 228, 551 N.E.2d 981. A motion to dismiss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of the complaint. State ex rel. Hanson v. Guernsey Cty. Bd. of Comms., 65 Ohio St.3d 545, 1992 Ohio 73, 605 N.E.2d 378. Under a de novo analysis, we must accept all factual allegations of the complaint as true and all reasonable inferences must be drawn in favor of the nonmoving party. Byrd v. Faber (1991), 57 Ohio St. 3d 56, 565 N.E.2d 584.

[\*P11] The issue before this Court is when the Lannings' cause of action against CMEA arose. The trial court found the date of the resulting injury was on or about August 9, 2000, when CMEA altered and recorded [\*\*5] the mortgage. The Lannings contend their cause of action did not accrue until they suffered the actual injury, the foreclosure proceedings instituted on or about February 22, 2006.

[\*P12] In support of its decision dismissing the Lannings' Third-Party Complaint, the trial court relied upon the Ohio Supreme Court's opinion in Investors REIT One v. Jacobs (1989), 46 Ohio St.3d 176, 546 N.E.2d 206. Therein, the Ohio Supreme Court held claims of accountant negligence are governed by the four-year statute of limitations for general negligence claims set forth in R.C. 2305.09(D). Id. at paragraph one of the syllabus.

[\*P13] R.C. 2305.09 provides, in pertinent part:

[\*P14] [HN2]"An action for any of the following causes shall be brought within four years after the cause thereof accrued:

[\*P15] \*\* \* \*

[\*P16] "(D) For an injury to the rights of the plaintiff not arising on contract nor enumerated in sections 2305.10 to 2305.12, 2305.14 and 1304.35 of the Revised Code." R.C. 2305.09.

[\*P17] The Investors REIT One Court also held the "discovery rule" does not apply to claims of professional negligence brought against accountants. Id. at paragraph two of the syllabus. [HN3] Pursuant to that rule, a cause of action accrues, for statute of limitations purposes, at [\*\*6] the time the plaintiff discovers, or, in the exercise of reasonable care, should have discovered, the injury. Id. at 179. The Ohio Supreme Court reaffirmed its decision in Investors REIT One in Grant Thornton v. Windsor House, Inc. (1991), 57 Ohio St.3d 158, 566 N.E.2d 1220.

[\*P18] As stated supra, the trial court in this matter found the Lannings' Complaint against CMEA for negligence was barred by the four-year statute of limitations set forth in R.C. 2305.09(D). The trial court noted, pursuant to Investors REIT One, the four-year statute of limitations period began to run when the negligent act was committed. The trial court determined, because CMEA recorded the altered mortgage on or about August 9, 2000, the Lannings' should have filed their Complaint on or before August 9, 2004. We do not agree.

[\*P19] [HN4]"To establish actionable negligence, one must show in addition to the existence of a duty, a breach of that duty and injury resulting proximately therefrom." Mussivand v. David (1989), 45 Ohio St.3d 314, 318, 544 N.E.2d 265, 270. The Lannings, citing this general proposition, argue their cause of action for negligence against CMEA did not accrue until February 22, 2006, the date on which JP [\*\*7] Morgan filed its foreclosure action, as they did not suffer an actual injury until that time. The Lannings ask this Court to follow our holding in Fritz v. Bruner Cox, L.L.P. (2001), 142 Ohio App.3d 664, 756 N.E.2d 740, and apply a "delayed damages" theory. We find, in the interest of justice, such theory should be recognized in this matter.

[\*P20] In Fritz, this Court noted:

[\*P21] "Neither the syllabus of Investors REIT One nor the syllabus of Grant Thornton specifically address the applicability of the "delayed-damages" theory advocated by appellants. However, after considering Investors REIT One, the court in Gray v. Estate of Barry (1995), 101 Ohio App.3d 764, 656 N.E.2d 729, held as follows:

[\*P22] [HN5]"Since there can be no negligence without injury, there can be no negligent conduct by which a cause accrues \* \* \* until there is an injury to a legally protected interest. \* \* \* *In the case of a negligently prepared tax return or a tax form negligently omitted from a return, there is no injury until the I.R.S. determines to levy a penalty assessment. Until that time, no claim upon which relief can be granted exists. Similarly, it is not until such a claim may be maintained that the time for any statute of limitation* [\*\*8] *begins to run.*' (Emphasis added and footnote omitted.) *Id.* at 768-769, 656 N.E.2d at 731." (Footnote omitted). *Id.* at 668.

[\*P23] This Court in *Fritz, supra*, found the court in *Gray* "applied a delayed-damages theory in holding that the four-year statute of limitations set forth in R.C. 2305.09(D) for bringing an accountant negligence action based on negligent preparation of a tax return did not begin to run until the Internal Revenue Service assessed a penalty for negligent preparation. \* \* \* it was not until then that appellants suffered an 'invasion of a legally protected interest'. See *id.* at 768, 656 N.E.2d at 731, citing *Kunz v. Buckeye Union Ins. Co.* (1982), 1 Ohio St.3d 79, 1 OBR 117, 437 N.E.2d 1194." *Id.* at 668-669 (Footnote omitted).

[\*P24] The *Fritz* Court continued:

[\*P25] "Based on the foregoing, we find that the trial court erred in holding that appellants' complaint against appellees for accountant negligence was barred by the four-year statute of limitations contained in R.C. 2305.09(D). We find that appellants' cause of action against appellees for accountant negligence did not accrue until appellants suffered actual damages. \* \* \* the date the tax deficiencies were assessed. \* \* \*

[\*P26] "We [\*\*9] are cognizant of the fact that other courts, in interpreting and applying *Investors REIT One*, would find that appellants' complaint against appellees for accountant negligence was time-barred, since it was not filed within four years after the alleged negligent act was committed, which, in this case, was the filing of appellants' 1994 federal income tax return on September 14, 1995. However, that interpretation of *Investors REIT One* would lead to an illogical and inequitable result, namely, that appellants' claims against appellees would be time-

barred *before* appellants' damages even manifested themselves. \* \* \*

[\*P27] " \* \* \* we find *Investors REIT One* distinguishable from the case *sub judice*, since the issue in this matter is when appellants' cause of action accrued, *not* the discovery of appellants' injury. In short, we find that appellants' complaint was not barred by the four-year statute of limitations set forth in R.C. 2305.09(D), since appellants' cause of action for accountant negligence did not accrue until appellants suffered damages on August 13, 1998."

[\*P28] *Id.* at 669 - 670. (Citations and footnotes omitted). Based upon our analysis and disposition in *Fritz, supra*, we find the Lannings' [\*\*10] cause of action did not accrue until they suffered damages on or about February 22, 2006. Accordingly, the Lannings' Third-Party Complaint is not barred by the four year statute of limitations for general negligence, and the trial court erred in granting CMEA's motion to dismiss.

[\*P29] The Lannings' sole assignment of error is sustained.

[\*P30] The matter is reversed and remanded to the trial court for further proceedings consistent with this opinion and the law.

By: Hoffman, P.J.

Wise, J. and

Edwards, J. concur

s/ William B. Hoffman

HON. WILLIAM B. HOFFMAN

s/ John W. Wise

HON. JOHN W. WISE

s/ Julie A. Edwards

HON. JULIE A. EDWARDS

JUDGMENT ENTRY

For the reasons stated in our accompanying Memorandum-Opinion, this matter is reversed and remanded to the trial court for further proceedings consistent with our opinion and the law. Costs assessed to appellees.

s/ William B. Hoffman

HON. WILLIAM B. HOFFMAN

s/ John W. Wise

HON. JOHN W. WISE

s/ Julie A. Edwards

HON. JULIE A. EDWARDS

LEXSEE



Caution  
As of: Mar 19, 2010

MARK C. FRITZ, et al, Plaintiff-Appellants -vs- BRUNER COX, LLP, et al, Defendant-Appellees

Case No. 2000CA00362

COURT OF APPEALS OF OHIO, FIFTH APPELLATE DISTRICT, STARK COUNTY

142 Ohio App. 3d 664; 756 N.E.2d 740; 2001 Ohio App. LEXIS 2402



May 21, 2001, Date of Judgment Entry

**PRIOR HISTORY:** [\*\*\*1] CHARACTER OF PROCEEDING: Civil Appeal from Stark County Court of Common Pleas. Case 2000CV00756.

**DISPOSITION:** Reversed and Remanded.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Appellant, business, sought review of an order granting summary judgment in favor of appellee, accountant, by the Stark County Court of Common Pleas (Ohio).

**OVERVIEW:** Accountant had prepared business's tax returns for six years. In 1998 the IRS audited business's tax returns for 1994 and assessed penalties against business in 1998. Business brought a negligence action against accountant in 2000. Accountant maintained that the action was time barred pursuant to Ohio Rev. Code Ann. § 2305.09(D), as the negligence had occurred in 1994, more than four years prior to the filing of the action. The cause of action for accountant's negligence was not barred by the four year statute of limitations, as a cause of action had not accrued until business suffered actual injury, which occurred in 1998, the date the IRS assessed a penalty against business.

**OUTCOME:** The summary judgment ordered of the trial court was reversed.

**CORE TERMS:** accountant, tax returns, statute of limitations, cause of action, summary judgment, accrue,

cause of action, accrued, assignment of error, delayed, discovery rule, statute of limitations, sub judice, actual injury, protected interest..., negligently, preparation, accounting, matter of law, general rule, negligent act, federal income, negligence claims, limitation begins to run, timely filed, begins to run, actual damages, discovery, invasion

LexisNexis(R) Headnotes

*Civil Procedure > Summary Judgment > Appellate Review > Standards of Review*

*Civil Procedure > Summary Judgment > Motions for Summary Judgment > General Overview*

*Civil Procedure > Appeals > Standards of Review > De Novo Review*

[HN1]An appellate court must conduct a de novo review of the trial court's ruling on a summary judgment motion.

*Civil Procedure > Discovery > Methods > General Overview*

*Civil Procedure > Summary Judgment > Standards > General Overview*

[HN2]See Ohio R. Civ. P. 56(C).

*Governments > Legislation > Statutes of Limitations > Time Limitations*

*Torts > Malpractice & Professional Liability > Professional Services*

***Torts > Procedure > Statutes of Limitations > General Overview***

[HN3] Claims of accountant negligence are governed by the four year statute of limitations for general negligence claims set forth in Ohio Rev. Code Ann. § 2305.09(D).

***Governments > Legislation > Statutes of Limitations > Time Limitations***

***Torts > Procedure > Statutes of Limitations > General Overview***

[HN4] See Ohio Rev. Code Ann. § 2305.09(D).

***Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Affirmative Defenses > Tolling > Discovery Rule***

***Governments > Legislation > Statutes of Limitations > General Overview***

***Torts > Procedure > Statutes of Limitations > Accrual of Actions > Discovery Rule***

[HN5] The discovery rule is not applicable to claims of professional negligence brought against accountants. Pursuant to such rule, a cause of action accrues, for statute of limitations purposes, at the time the plaintiff discovers, or in the exercise of reasonable care, should have discovered the injury.

***Governments > Legislation > Statutes of Limitations > Time Limitations***

***Torts > Negligence > Causation > Proximate Cause > Concurrent Causation***

***Torts > Procedure > Statutes of Limitations > General Overview***

[HN6] To establish actionable negligence, one must show in addition to the existence of a duty, a breach of that duty, and injury resulting proximately therefrom.

***Real Property Law > Trusts > Real Estate Investment Trusts (REITs)***

***Tax Law > Federal Tax Administration & Procedure > Return Preparers (IRC secs. 6060, 6107, 6694-6696, 6713, 7216, 7407, 7427) > General Overview***

***Tax Law > Federal Tax Administration & Procedure > Tax Credits & Liabilities > Interest (IRC secs. 6601-6631) > General Overview***

[HN7] Since there can be no negligence without injury, there can be no negligent conduct by which a cause accrues until there is an injury to a legally protected interest. In the case of a negligently prepared tax return or a tax form negligently omitted from a return, there is no injury until the IRS determines to levy a penalty assessment. Until that time, no claim upon which relief can be

granted exists. Similarly, it is not until such a claim may be maintained that the time for any statute of limitation begins to run.

***Governments > Legislation > Statutes of Limitations > Time Limitations***

***Tax Law > Federal Tax Administration & Procedure > Tax Credits & Liabilities > Interest (IRC secs. 6601-6631) > General Overview***

***Torts > Procedure > Statutes of Limitations > General Overview***

[HN8] Some Ohio courts apply a delayed damages theory by holding that the four year statute of limitations set forth in Ohio Rev. Code Ann. § 2305.09(D) for bringing an accountant negligence action based on negligent preparation of a tax return does not begin to run until the IRS assesses a penalty for such negligent preparation. The delayed damages theory holds that it is not until such time that a party suffers an invasion of a legally protected interest.

***Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Affirmative Defenses > Statutes of Limitations > Statutory Construction***

***Torts > Damages > Compensatory Damages > General Overview***

***Torts > Procedure > Statutes of Limitations > General Overview***

[HN9] A statute of limitations is remedial in nature and is to be given a liberal construction in order to allow cases to be decided upon their merits. Every reasonable presumption will be indulged and every doubt will be resolved in favor of affording rather than denying a plaintiff his day in court. In determining when a cause of action arose, and the statute of limitations begins to run, it is a general rule that a cause of action accrues at the time the wrongful act was committed. It has been noted, however, that in some instances, application of this general rule would lead to the unconscionable result that the injured party's right to recovery can be barred by the statute of limitations before he is even aware of its existence. Therefore, in such cases, a cause of action for damages does not arise until actual injury or damage ensues. That is, the tort is not deemed complete until there has been invasion of a legally protected interest of the plaintiff.

**COUNSEL:** For Plaintiff-Appellants: JAMES M. McHUGH, Canton, OH.

For Defendant-Appellees: RICHARD G. WITKOWSKI, Cleveland, OH.

**JUDGES:** Hon. Julie Edwards, P.J., Hon. William Hoffinan, J., Hon. Sheila Farmer, J. Edwards, P.J. Hoffman, J. and Farmer, J. concurs.

**OPINION BY:** Julie Edwards

## OPINION

[\*665] [\*\*741] Edwards, J.

Plaintiffs-appellants Mark C. Fritz and MCF Machine Co., Inc. appeal from the November 22, 2000, Judgment Entry of the Stark County Court of Common Pleas.

### STATEMENT OF THE FACTS AND CASE

Appellant Mark C. Fritz is the President and owner of appellant MCF Machine Co. Inc., as well as several other business entities. Appellants retained appellee Bruner Cox, LLP, a certified public accounting firm, to provide professional accounting and tax planning services. Appellee John C. Finnucan is appellee Bruner Cox's managing partner. [\*666] As part of their professional accounting services, appellees filed appellants' 1994 federal tax returns on September 14, 1995, appellants' 1995 federal tax returns on September 6, 1996, and appellants' 1996 federal tax returns on September 15, 1997. Appellees [\*\*2] also filed appellants' federal tax returns for 1997 and 1998. Pursuant to a letter dated March 7, 1997, from the Internal Revenue Service, appellants were advised that the federal tax return for appellant MCF Machine Co., Inc. for the 1994 tax year had been assigned for examination and audit. As a result of the same, the Internal Revenue Service made an initial determination and assessment against appellants on August 13, 1998, in the amount of \$ 236,803.00 in total tax and penalties net of additional interest due on the assessed tax and penalties. After negotiations between appellants, through counsel, and the Internal Revenue Service, the amount was reduced in December of 1999 to \$ 82,098.22 including interest. Thereafter, on or about January 3, 2000, appellants terminated appellees' representation as appellants' certified public accountants. On March 24, 2000, appellants filed a complaint for negligence and breach of fiduciary duty against appellees to which appellees, with leave of court, filed an answer on May 31, 2000. Appellants, in their [\*\*742] complaint, specifically alleged, in part, that appellees had committed accountant malpractice by negligently preparing appellant MCF Machine [\*\*\*3] Co's 1994 federal income tax return. Subsequently, appellees filed a Motion for Summary Judgment on September 22, 2000, arguing that appellants' claim for accountant negligence was barred by the four year statute of limitations set forth in R.C. 2305.09(D). A brief in opposition to appellees' motion was filed by appellants on November 8, 2000. As memo-

rialized in a Judgment Entry filed on November 22, 2000, the trial court granted appellees' Motion for Summary Judgment, holding that appellants' cause of action for accountant negligence was barred by the four year statute of limitations contained in R.C. 2305.09. The trial court, in its entry, indicated that its order was a final appealable order and that there was "no just cause for delay." It is from the trial court's November 22, 2000, Judgment Entry that appellants now prosecute their appeal, raising the following assignment of error:

THE TRIAL COURT ERRED AS A MATTER OF LAW BY GRANTING THE MOTION FOR SUMMARY JUDGMENT OF THE DEFENDANTS/APPELLEES.

I

Appellants, in their sole assignment of error, argue that the trial court erred in granting the Motion for Summary Judgment filed [\*\*\*4] by appellees. Appellants [\*667] specifically contend that the trial court erred in holding that appellants' cause of action for accountant negligence was barred by the four year statute of limitations contained in R.C. 2305.09(D). [HN1]An appellate court must conduct a de novo review of the trial court's ruling on a summary judgment motion. Jones v. Shelly Co. (1995), 106 Ohio App. 3d 440, 666 N.E.2d 316. [HN2]We must refer to Civ.R. 56 which provides, in pertinent part: (C) Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary [\*\*\*5] judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor.

It is based on this standard that we review appellant's sole assignment of error. As is stated above, at issue in the case sub judice is whether appellants' cause of action for accountant negligence was barred by the applicable statute of limitations. [HN3]Claims of accountant negligence are governed by the four year statute of limitations for general negligence claims set forth in R.C. 2305.09(D). Investors REIT One v. Jacobs (1989), 46 Ohio St. 3d 176, 546 N.E.2d 206, paragraph one of the syllabus. [HN4]Such section states as follows: An action for any of the following causes shall be brought within

four years after the cause thereof accrued: (D) For an injury to the rights of the plaintiff not arising on contract nor enumerated in sections 2305.10 to 2305.12, 2305.14 and 1304.35 of the Revised Code.

[HN5]Moreover, the "discovery rule" is not applicable to claims of professional [\*\*743] negligence brought against accountants. *Id.* at paragraph two of the syllabus. Pursuant to such rule, a cause of action accrues, for statute of limitations [\*\*\*6] purposes, at the time the plaintiff discovers, or in the exercise of reasonable care, should have discovered the injury. *Id.* at 179. The Ohio Supreme Court, in Grant Thornton v. Windsor House, Inc. (1991), 57 Ohio St. 3d 158, 566 N.E.2d 1220, reaffirmed its decision in Investors REIT One. [\*668] The trial court in this matter found that appellants' complaint against appellees for accountant negligence was barred by the four year statute of limitations contained in R.C. 2305.09(D). The trial court, in so holding, noted that pursuant to Investors REIT One, the four year statute of limitations period begins to run at the time the negligent act is committed. Since appellees completed work on appellants' 1994 tax return on September 14, 1995, the day the return was filed, the trial court apparently found that appellants' March 24, 2000, complaint in the case sub judice was barred by the four year statute of limitations contained in R.C. 2305.09(D). We, however, do not concur. At issue in this matter is when appellants' cause of action for accountant negligence against appellees accrued. "[HN6]To establish actionable negligence, [\*\*\*7] one must show in addition to the existence of a duty, a breach of that duty and injury resulting proximately therefrom." Mussivand v. David (1989), 45 Ohio St. 3d 314, 318, 544 N.E.2d 265. Appellants, citing the above general proposition that a cause of action does not accrue until a plaintiff suffers actual injury, argue that their cause of action for accountant negligence against appellees did not accrue until August 13, 1998, the date of the initial IRS assessment, since appellants did not suffer an actual injury until such time. Pursuant to appellants' "delayed damages" theory, appellants' March 24, 2000, complaint was timely filed within four years after their claims against appellees accrued. Neither the syllabus of Investors REIT One nor the syllabus of Grant Thornton specifically address the applicability of the "delayed damages" theory advocated by appellants. However, after considering Investors REIT One, supra., the court in Gray v. Estate of Barry (1995), 101 Ohio App. 3d 764, 656 N.E.2d 729 held as follows: [HN7]Since there can be no negligence without injury, there can be no negligent conduct by which a cause accrues... until there is an [\*\*\*8] injury to a legally protected interest... In the case of a negligently prepared tax return or a tax form negligently omitted from a return, there is no injury until the I.R.S. determines to levy a penalty assessment. Until that time, no claim upon which

relief can be granted exists. Similarly, it is not until such a claim may be maintained that the time for any statute of limitation begins to run.

Emphasis added. 101 Ohio App. 3d at 768-769. In essence, the court in Gray [HN8]applied a "delayed damages" theory in holding that the four year statute of limitations set forth in R.C. 2305.09(D) for bringing an accountant negligence action based on negligent preparation of a tax return did not begin to run until the Internal Revenue Service assessed a penalty for such [\*669] negligent preparation. The court, in Gray, found that it was not until such time that appellants suffered an "invasion of a legally protected interest". See Gray, supra. at 768, [\*\*744] citing to Kunz v. Buckeye Union Ins. Co. (1982), 1 Ohio St. 3d 79, 437 N.E.2d 1194. Based on the foregoing, we find that the trial court erred in holding that appellants' complaint against appellees for [\*\*\*9] accountant negligence was barred by the four year statute of limitations contained in R.C. 2305.09(D). We find that appellants' cause of action against appellees for accountant negligence did not accrue until appellants suffered actual damages. In the case sub judice, appellants did not suffer actual damages until August 13, 1998, the date the tax deficiencies were assessed. Since appellants' complaint was filed within four years of such date, we find that the trial court erred in holding that appellants' complaint against appellees for accountant negligence was untimely. We are cognizant of the fact that other courts, in interpreting and applying Investors REIT One, would find that appellants' complaint against appellees for accountant negligence was time barred since it was not filed within four years after the alleged negligent act was committed which, in this case, was the filing of appellants' 1994 federal income tax return on September 14, 1995. However, such an interpretation of Investors REIT One would lead to an illogical and inequitable result, namely, that appellants' claims against appellees would be time barred before appellants' damages even [\*\*\*10] manifested themselves. As Judge John F. Corrigan noted in his dissent in Philpott v. Ernst & Whinney, 1992 Ohio App. LEXIS 5930 (Nov. 25, 1992), Cuyahoga App. No. 61203, unreported: ... I find plaintiff's claims for negligent tax return preparation to be timely pursuant to R.C. 2305.09, as this tort was not complete until tax deficiencies were subsequently assessed. Accordingly, I respectfully [HN9]dissent. A statute of limitations is remedial in nature and is to be given a liberal construction in order to allow cases to be decided upon their merits. Elliott v. [\*\*670] Fosdick & Hilmer, Inc. (1983), 9 Ohio App. 3d 309, 313, 460 N.E.2d 257. "Every reasonable presumption will be indulged and every doubt will be resolved in favor of affording rather than denying a plaintiff his day in court." *Id.*, quoting Draher v. Walters (1935), 130 Ohio St. 92, 94, 196 N.E. 884; see, also, Rowe v. Bliss (1980), 68 Ohio App. 2d 247, 249, 429 N.E.2d 450. In

determining when a cause of action "arose," and the statute of limitations begins to run, it is a general rule that a cause of action accrues at the time the wrongful act was committed. See O'Stricker v. Jim Walter Corp. (1983), 4 Ohio St. 3d 84, 87, 447 N.E.2d 727; [\*\*745] [\*\*\*11] see, also Holsman Neon & Electric Sign Co. v. Kohn (1986), 34 Ohio App. 3d 53, 55, 516 N.E.2d 1284. It has been noted, however, that in some instances, application of this general rule "would lead to the unconscionable result that the injured party's right to recovery can be barred by the statute of limitations before he is even aware of its existence." O'Stricker v. Jim Walter Corp., supra. Therefore, "In such cases, a cause of action for damages does not arise until actual injury or damage ensues. See Kunz v. Buckeye Union Ins. Co. (1982), 1 Ohio St. 3d 79, 437 N.E.2d 1194 (cause of action against insurer for failure to obtain coverage accrued at date of loss); Velotta v. Leo Petronzio Landscaping, Inc. (1982), 69 Ohio St. 2d 376 [23 Ohio Op. 3d 346, 433 N.E.2d 147], paragraph two of the syllabus ('actual injury' rule applied in action for negligence brought by vendee against builder-vendor of completed residence)." Id. That is, the tort is not deemed complete until there has been invasion of a legally protected interest of the plaintiff. See Kunz v. Buckeye Union Ins. Co., supra; Sedar v.

Knowlton Constr. Co. (1990), 49 Ohio St. 3d 193, 198, 551 N.E.2d 938; [\*\*\*12] Elliott v. Fosdick & Hilmer, Inc., supra.

In his dissent, Judge Corrigan further noted that while, pursuant to Investors REIT One, the "discovery rule" was not applicable to accountant negligence claims, "this rule is not a 'discovery rule', as it deals with the delayed occurrence of damages, not the discovery of injury." Likewise, we find Investors REIT One distinguishable from the case sub judice since the issue in this matter is when appellants' cause of action accrued, not the discovery of appellants' injury. In short, we find that appellants' complaint was not barred by the four year statute of limitations set forth in R.C. 2305.09(D) since appellants' cause of action for accountant negligence did not accrue until appellants suffered damages on August 13, 1998. [\*671] Based on the foregoing, appellants' sole assignment of error is sustained. Accordingly, the judgment of the Stark County Court of Common Pleas is reversed.

This matter is remanded to the Stark County Court of Common Pleas for further proceedings.

By Edwards, P.J. Hoffman, J. and Farmer, J. concurs

LEXSEE



Caution  
As of: Mar 19, 2010

GRAY, Appellant, v. ESTATE OF BARRY, Appellee

No. L-94-243

Court of Appeals of Ohio, Sixth Appellate District, Lucas County  
101 Ohio App. 3d 764; 656 N.E.2d 729; 1995 Ohio App. LEXIS 1473

EXHIBIT

E

April 7, 1995, Decided

**PRIOR HISTORY:** [\*\*\*1] Trial Court No. CVE 93-10726.

**DISPOSITION:** *Judgment reversed.*

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Appellant claimant filed an accountant malpractice suit against appellee estate. The decedent was the claimant's accountant. The Toledo Municipal Court (Ohio) dismissed the action on ground that it was time-barred. The claimant appealed.

**OVERVIEW:** The claimant alleged that the estate's decedent had negligently failed to file Internal Revenue Service (IRS) form 5500R along with the claimant's income tax return. As a result of the failure, the claimant alleged that it incurred a tax penalty. The estate claimed that the action was barred because it was commenced after the expiration of the statute of limitations, Ohio Rev. Code Ann. § 2305.09(D). The claimant argued that the act of negligence was not complete until after all the elements of the tort were present. Therefore, the claimant contended that the injury was not complete until the IRS assessed a penalty for failure to timely file, and the action was commenced less than 90 days after the assessment which was well within the statute of limitations. The court reversed agreeing with the claimant's argument holding that the cause of action did not accrue until the penalty was assessed.

**OUTCOME:** The court reversed the dismissal of the claimant's action.

**CORE TERMS:** accountant, statute of limitations, malpractice, accrue, discovery rule, tax return, cause of action, preparation, assignment of error, begin to run, protected interest, negligently, discovery, audit, failure to file, tax form, penalty assessment, persuasive, responded, initiated, omission, invasion, notified, certify, levied, commencement

**LexisNexis(R) Headnotes**

*Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview*  
*Governments > Legislation > Statutes of Limitations > General Overview*

[HN1]The statute of limitation as to torts does not usually begin to run until the tort is complete. A tort is ordinarily not complete until there has been an invasion of a legally protected interest of the plaintiff.

*Torts > Negligence > General Overview*  
*Torts > Procedure > Statutes of Limitations > General Overview*

[HN2]In any negligence action, a claim for which relief may be granted cannot be maintained absent the presence of all essential elements. To establish actionable negligence, one must show the existence of a duty, a breach of that duty and injury resulting proximately therefrom. Since there can be no negligence without injury, there can be no negligent conduct by which a cause accrues until there is an injury to a legally protected interest.

**Governments > Legislation > Statutes of Limitations > General Overview**

**Tax Law > Federal Tax Administration & Procedure > Return Preparers (IRC secs. 6060, 6107, 6694-6696, 6713, 7216, 7407, 7427) > General Overview**

**Torts > Negligence > General Overview**

[HN3]In the case of a negligently prepared tax return or a tax form negligently omitted from a return, there is no injury until the Internal Revenue Service determines to levy a penalty assessment.

**COUNSEL:** Mark A. Robinson, for appellant.

Nicholas J. Milanich, for appellee.

**JUDGES:** Sherck, Judge. Melvin L. Resnick and Milligan, JJ., concur. John R. Milligan, J., retired, of the Fifth Appellate District, sitting by assignment.

**OPINION BY: SHERCK**

**OPINION**

[\*765] [\*\*729] This is an accelerated appeal from a judgment issued by the Toledo Municipal Court which dismissed an accountant malpractice suit for the reason that it was time-barred by a statute of limitations. Because we conclude the trial court erroneously applied the statute, we reverse.

[\*766] Appellee is the estate of John E. Barry. John E. Barry was a certified public accountant who, prior to his death, provided accounting and tax preparation services for appellant Joseph W. Gray III, M.D., Inc.

On July 14, 1993, appellant filed a suit, alleging that appellee's decedent had negligently failed to file, at the close of the 1987 tax year, Internal Revenue Service ("I.R.S.") form 5500R along with the remainder of appellant's 1987 return. As a result of that failure, appellant asserted, it had incurred an I.R.S. tax penalty in the amount of \$ 9,000.

Appellee [\*\*\*2] responded with a motion to dismiss appellant's complaint on the ground that the suit was commenced after the expiration of the four-year statute of limitations which governs accountant malpractice, R.C. [\*\*730] 2305.09(D). According to appellee, any wrongful act committed by John Barry occurred, at the latest, in 1988. Since there is no discovery rule for accountant malpractice, appellee argued that the suit would have had to have been initiated no later than 1992.

Appellant responded that, while it was true that it did not discover Barry's failure to file the tax return until sometime after 1988, its satisfaction of the statute of limitation is not premised on any discovery rule. Rather,

appellant maintains that there was a delayed occurrence of damages. Appellant contended that the act of negligence was not complete until all the elements of the tort were present. Therefore, according to appellant, while Barry breached his duty to file the missing tax form in 1988, that breach was not the proximate cause of any injury to appellant until the Internal Revenue Service assessed a penalty for failure to timely file. That penalty assessment did not occur until April 6, 1993: less [\*\*\*3] than ninety days prior to the commencement of this suit and well within the statute of limitations.

On August 26, 1994, the trial court, relying principally on *Philpott v. Ernst & Whinney* (Nov. 25, 1992), Cuyahoga App. No. 61203, unreported, 1992 WL 357250, granted appellee's motion to dismiss. Appellant now appeals that decision, setting forth the following single assignment of error:

"1. The trial court committed prejudicial error by dismissing Plaintiff's complaint pursuant to the Defendant's Motion to Dismiss.

"1. Appellants [*sic*] cause of action did not accrue until the assessment of damages by the IRS for the failure of appellee to file require tax returns.

"2. Appellants [*sic*] cause of action did not accrue until the discovery of Defendant's/Appellee's mal [*sic*] practice."

Appellant supports its assignment of error with two arguments; we first will address appellants's second argument, which asserts that the failure to apply a discovery rule to accountant malpractice action is simply bad law. Appellant discusses at length the application of the discovery rule to virtually every other [\*767] variety of professional malpractice in Ohio and the prudence [\*\*\*4] of applying the rule to accountant malpractice cases. Appellant also directs our attention to a number of instances where the rule is applied to accountants in other jurisdictions. See, e.g., *Sato v. Van Denburgh* (1979), 123 Ariz. 225, 599 P.2d 181; *Moonie v. Lynch* (1967), 256 Cal.App.2d 361, 64 Cal.Rptr. 55; *Peat, Marwick, Mitchell & Co. v. Lane* (1990 Fla.), 565 So.2d 1323; *Marvel Engineering Co. v. Matson* (1986), 150 Ill.App.3d 787, 103 Ill.Dec. 631, 501 N.E.2d 948; *Brueck v. Krings* (1982), 230 Kan. 466, 638 P.2d 904; *Harvey v. Dixie Graphics* (1992 La.), 593 So.2d 351; *Leonhart v. Atkinson* (1972), 265 Md. 219, 289 A.2d 1; *Frank Cooke, Inc. v. Hurwitz* (1980), 10 Mass.App. 99, 406 N.E.2d 678; *Brower v. Davidson, Deckert, Schuffer & Glassman P.C.* (Mo.App.1984) 686 S.W.2d 1; *Chisolm v. Scott* (1974), 86 N.M. 707, 526 P.2d 1300; *Mills v. Garlow* (1989 Wyo.), 768 P.2d 554.

As persuasive as appellant's argument is on this issue, it is simply misdirected to this court. As an interme-

diate court, we are bound to follow the pronouncements of the Supreme Court of Ohio when that court has addressed an issue. In this instance, the Supreme Court has held [\*\*\*5] that, except for fraud or conversion, no discovery rule applies for accountant malpractice cases. Investors REIT One v. Jacobs (1989), 46 Ohio St.3d 176, 546 N.E.2d 206, paragraph two of the syllabus; Thornton v. Windsor House, Inc. (1991), 57 Ohio St.3d 158, 160, 566 N.E.2d 1220, 1222-1223. Therefore, appellant's second argument in support of its assignment of error must be rejected.

Appellant's remaining argument is more persuasive. Simply put, appellant asserts that even though Barry's failure to file occurred in 1988, there was no cause of action for which the statute of limitations could commence until the I.R.S. levied a penalty as the result of the omission. This did not occur until 1993.

Appellant directs our attention to Kunz v. Buckeye Union Ins. Co. (1982), 1 Ohio St.3d 79, 81, 1 OBR 117, 118-119, 437 N.E.2d 1194, 1196 for the proposition that [HN1]"the statute of limitation as to torts does not usually begin to run until the tort is complete. A tort is ordinarily not complete until there has been [\*\*731] an invasion of a legally protected interest of the plaintiff." *Id.* quoting Austin v. Fulton Ins. Co. (Alaska 1968), 444 P.2d 536 at 539. There was, [\*\*\*6] according to appellant, no invasion of a legally protected interest until the I.R.S. penalized appellant for Barry's omission.

Appellee responds by citing numerous cases; however, the only one directly on point is Philpott v. Ernst & Whinney, supra. In that case, a client brought suit against his accountant for, *inter alia*, improper preparation of tax returns. A later I.R.S. audit resulted in a deficiency assessment. Nevertheless, the accountant [\*768] prevailed on a motion for summary judgment, since commencement of the suit occurred outside the four-year statute of limitations.

On appeal, Philpott argued that the cause of action did not accrue until receipt of the I.R.S.'s notification of a deficiency. The court of appeals rejected that contention, citing Investors REIT One v. Jacobs, supra, for its holding that the discovery rule is unavailable in accountant malpractice actions and Holsman Neon & Elec. Sign Co. v. Kohn (1986), 34 Ohio App.3d 53, 516 N.E.2d 1284, for the proposition that an accountant's negligence accrues at the time of the negligent conduct.

The Philpott decision was not unanimous. Judge John F. Corrigan, in a dissenting opinion, wrote [\*\*\*7] that the issue was not one of discovery; rather, the issue is when a cause of action accrues. Therefore, according to Judge Corrigan, Jacobs is inapposite to the issue. As to Holsman, Judge Corrigan factually distinguished that case, as it involved a negligent audit that failed to un-

cover an employee theft. Therefore, the harm complained of in Holsman had already been completed when the accountant failed to detect the loss. In Philpott the element of injury was speculative only until the I.R.S. discovered the deficiency and levied its penalty. Judge Corrigan cited Sladky v. Lomax (1988), 43 Ohio App.3d 4, 538 N.E.2d 1089, for the proposition that an action against an accountant for negligent preparation of an income tax return does not accrue until the plaintiff is notified of an I.R.S. assessment.

We agree with the dissent in Philpott and the court of appeals opinion in Sladky. Philpott, Sladky and the present case are not discovery cases. The issue in each is the time at which the cause of action accrued. [HN2]In any negligence action, a claim for which relief may be granted cannot be maintained absent the presence of all essential elements. "To establish [\*\*\*8] actionable negligence, one must show \* \* \* the existence of a duty, a breach of that duty and injury resulting proximately therefrom." Mussivand v. David (1989), 45 Ohio St.3d 314, 318, 544 N.E.2d 265, 270. Since there can be no negligence without injury, there can be no negligent conduct by which a cause accrues, pursuant to Holsman, until there is an injury to a legally protected interest. Kunz v. Buckeye Union Ins. Co., supra. [HN3]In the case of a negligently prepared tax return or a tax form negligently omitted from a return, there is no injury until the I.R.S. determines to levy a penalty assessment. <sup>1</sup> Until that time, no claim upon which relief can be granted [\*769] exists. Similarly, it is not until such a claim may be maintained that the time for any statute of limitation begins to run.

1 There is some dispute as to whether this event is an I.R.S. preliminary audit report or the actual I.R.S. assessment of a penalty. See International Engine Parts, Inc. v. Feddersen & Co. (1995), 9 Cal.4th 606, 38 Cal.Rptr.2d 150, 888 P.2d 1279. While this may be important in a matter in which filing deadlines are narrow, the question is not applicable in this case.

[\*\*\*9] In the present matter, the time for the statute of limitations did not begin to run until 1993, when appellant was notified by the I.R.S. that a penalty had been assessed. Therefore, the trial court erred in dismissing the case as having been initiated after the statute had run. Appellant's assignment of error is found well taken.

On consideration whereof, the court finds substantial justice has not been done the party complaining, and the judgment of the Toledo Municipal Court is reversed. It is ordered that appellee pay court costs of this appeal.

This court *sua sponte* notes that our holding in this matter is in conflict with the opinion of the court of ap-

peals for Cuyahoga County as stated in *Philpott v. Ernst & [\*\*732] Whinney* (Nov. 25, 1992), Cuyahoga App. No. 61203, unreported, 1992 WL 357250. Pursuant to Section 3(B)(4), Article IV of the Ohio Constitution, whenever the judges of a court of appeals find a judgment upon which they have agreed in conflict with that of any other court of appeals, the judges shall certify the record of the case to the Supreme Court for review and final determination. See *Whitelock v. Gilbane Bldg. Co.* (1993), 66 Ohio St.3d [\*\*\*10] 594, 613 N.E.2d 1032, paragraph one of the syllabus. Having found such conflict, we do so hereby certify. <sup>2</sup>

2 Reporter's Note: No appeal has been taken from the decision of the court.

The question presented is whether, in an accountant malpractice action founded in the negligent preparation or filing of tax returns, the four-year statute of limitations for such action begins prior to the assessment of any penalty for faulty preparation or failure to file.

*Judgment reversed.*

Melvin L. Resnick and Milligan, JJ., concur.

John R. Milligan, J., retired, of the Fifth Appellate District, sitting by assignment.