

IN THE SUPREME COURT OF OHIO

11-1138

CLIFFORD L. BOGGS,

Appellant,

vs.

JAMES L. BAUM, et al,

Appellees.

On Appeal from the Franklin
County Court of Appeals,
Tenth Appellate District.

Court of Appeals Case No.
10AP-864.

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT, CLIFFORD L. BOGGS

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II. EXPLANATION OF WHY THIS CASE IS ONE OF A CLAIMED RIGHT OF APPEAL THAT INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION AND WHY IT IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST

This case presents a claimed right of appeal involving a substantial constitutional question involving the unconstitutional application of the savings statute (ORC § 2305.19) as held in a Decision and Judgment Entry of the Tenth District Court of Appeals, Franklin County, because it places that statute in direct conflict with Ohio Civil Rule 41 and so violates the Ohio Constitution-Article IV, Section 5(B). Specifically, because that Court of Appeals had initially and incorrectly held that the statute of limitations against Appellees had begun to run on a date before the date otherwise required by law, Appellant was forced to rely upon two dismissals, instead of one, to save his case. In this case, the first dismissal was made pursuant to a stipulation of dismissal under Ohio Civ. R. 41(a)(1)(b) and then the second one was made pursuant to an unilateral notice of dismissal under Ohio Civ. R. 41(a)(1)(a); but the Court of Appeals found the two dismissals impermissible for being in violation of the judicially created one dismissal rule under the savings statute by extending that rule to the fact pattern here.

The one dismissal rule under the savings statute has been judicially created because, on its face, the language of the savings statute contains no such limitation. This language is necessarily absent from the statute because it could not constitutionally contain such a limitation. The Court of Appeal's extension of the one dismissal rule of law to the situation where one dismissal is made by a stipulation of the parties under Rule 41(A)(1)(b) and another dismissal is made by a notice of dismissal under Rule 41(A)(1)(a) puts the savings statute (ORC § 2305.19) in direct conflict with Rule 41, and so results in an unconstitutional application of that statute in violation of the Ohio Constitution-Article IV, Section 5(B), since Rule 41 contains no such one dismissal limitation in that fact pattern.

At the time Appellant dismissed his action for the second time pursuant to Ohio Civ. R. 41(a)(1)(a), this Court had never squarely addressed the issue on point and no lower court had ever applied the one dismissal rule to the fact pattern here. To the contrary in *Thomas v. Freeman* (1997), 79 Ohio St. 3d 221, 227, 680 N.E. 2d 997, this Court discussed, as dicta, this issue by suggesting that a plaintiff may use the savings statute only once to re-file a case. But then in *Frysinger v. Leech* (1987), 32 Ohio St. 3d 38, 512 N.E. 2d 337, this Court suggested that the one dismissal rule should not even apply when one of the dismissals is by stipulation of the parties because “[t]he adverse parties can prevent repeated dismissals and re-filings under [Rule 41], by simply declining to stipulate.” *Id.*, 42-43. Appellant respectfully submits that if this Court were to accept the Court of Appeals ruling by declining jurisdiction in this matter then it will have tacitly upheld that Court’s ruling and thereby allow this unconstitutional application to spread throughout Ohio courts. As such, it is imperative that Ohio litigants obtain from this Court a bright line ruling that squarely addresses this issue on point.

Moreover, this case is one of public or great general interest to all persons in the State of Ohio because in spite of this Court’s long standing position that the attorney-client relationship is a fiduciary one, the Tenth District Court of Appeals, Franklin County, below, has now limited the attorney-client relationship to its representation component. This appears to be the first Ohio court to have done so. In this case, as Appellant’s, Clifford L. Boggs attorneys, Appellees held a large sum of money in their trust account that Boggs had given to them as an advancement for expenses in an underlying personal injury undertaking against a person by the name of Dickens. Dickens is not a party to this action. Then Appellees failed to account for and return this sum of money to Boggs until March 25, 2004, yet the Court of Appeals, below, held that the statute of limitation for the malpractice action against Appellees for their handling of the

underlying personal injury undertaking against Dickens began to run on January 20, 2000. As a result of this ruling, Ohio litigants who now attempt to avail themselves of their constitutional right to access the courts, will find that this right can be denied to them because the relationship with their attorney for a particular undertaking has terminated, and the statute of limitations has begun to run on a date before the date otherwise required by law. This is so since the relationship has terminated because the representation component of it has ended even though the attorney continues its fiduciary obligation to the client until it accounts for, and returns, any unused monies of the client which has been held in trust for that particular undertaking.

This ruling has now created an incongruous attorney-client relationship that has two endings: one harmful ending for clients because the commencement of the statute of limitations against their attorneys has prematurely began and yet a beneficial ending for their attorneys that protects them from malpractice actions which otherwise could have been brought against them by their clients while they continue to do harm to their clients by failing, or refusing, to account for, and return, monies held by them in trust for their clients in the underlying undertaking. *For example, in some situations attorneys may now be in the position to demand payment of fees for an undertaking and attempt to assert a setoff from client's funds held in trust for that undertaking to pay those fees while, at the same time, they are protected from a malpractice action for that undertaking because the client is precluded from bringing that action since the statute of limitations has prematurely began to run and then expire.* Unless, this Court immediately accepts jurisdiction over this intolerable situation and corrects the ruling of the Court of Appeals then litigants in this state who have a claim against their attorney will be irreparably harmed.

III. STATEMENT OF THE CASE AND FACTS

(A) THE CASE: This is an action against Appellees for legal malpractice. It was originally filed in the Court of Common Pleas for Franklin County on January 19, 2000, as Case No. 00CVA01-491. On December 10, 2002 that action was dismissed otherwise than upon the merits and without prejudice as to any further action by stipulation of the parties pursuant to Ohio Civ. R. 41(A)(1)(b). Pursuant to this stipulation, that action was then re-filed in the trial Court on December 5, 2003, as Case No. 03CVA12-13367. On July 10, 2006 that action was dismissed otherwise than upon the merits and without prejudice as to any further action by a notice of voluntary dismissal pursuant to Ohio Civ. R. 41(A)(1)(a). The action was then re-filed as the present action on June 13, 2007, under case number 07 CVA 06 7848. *Court of Appeals Decision, Appendix 2, [¶¶ 3 & 4.] [Hereinafter App. 2, [¶__]]*

Then in this present action, Appellees first filed a Motion to Dismiss on July 27, 2007 that contested the June 13, 2007 re-filing. On August 27, 2007, Plaintiff [Appellant] filed an Amended Complaint and a memorandum contra to Defendants' [Appellees] Motion to Dismiss. On September 5, 2007, Appellees then filed a Combined Motion to Dismiss Plaintiff's Amended Complaint and Reply Memorandum in Support of Motion to Dismiss Plaintiff's Complaint. *App. 2, [¶¶ 4 & 5.]* On the 5th day of June, 2009, the original trial judge [Judge Horton] in the present action entered a Decision and Entry that denied Defendants' [Appellees] Motion to Dismiss filed on July 27, 2007; denied Defendants' Combined Motion To Dismiss Plaintiff's Amended Complaint filed September 5, 2007, and; granted Plaintiff's Motion To Strike filed on September 24, 2007. *App. Exh. 2, [¶ 6]; Trial Court Decision and Entry, App. Exh. 3.*

Then on October 23, 2009, this action was re-assigned to another trial judge [Cocroft, Judge] and Appellees then filed a Motion for Summary Judgment on April 30, 2010. Appellant,

Boggs, then filed a Memorandum Contra to that Motion and Appellees filed a Reply thereto. On August 17, 2010, the Court, under the new Judge, granted Appellees' Motion for Summary Judgment. *App. Exh. 2, [¶¶ 8-12]; Decision and Entry, App. Exh. 4.* On September 10, 2010, Appellant timely filed an appeal with the Franklin County Court of Appeals, Tenth Appellate District, appealing the trial Court's granting of summary judgment. *App. Exh. 2, [¶1].*

Then in a Decision dated May 24, 2011 and a Judgment Entry dated May 25, 2011, that Court of Appeals upheld the trial court's granting summary judgment to Appellees; and it is from that Judgment Entry dated May 25, 2011 that Appellant now petitions this Court to accept jurisdiction. *App. Exh. 1 & 2.*

(B) THE FACTS: In this action for legal malpractice involving an underlying personal injury undertaking, during the entire attorney-client relationship between the parties, Appellees held the sum of \$3,000.00 of Appellant's, Boggs, money in trust for him to cover expenses in the underlying action but then failed to account for and return that sum to him until sometime around on or about March 25, 2004. In this malpractice action, Appellant retained the services of Attorney Edward W. Erfurt III to analyze Appellees conduct in not returning this trust money until March 25, 2004; and to further analyze the opinions and conclusions of Attorneys Keith Karr and James Baum, the latter being one of the Defendants-Appellees herein, as to the consequences of their conduct. Attorney Erfurt took exception with Appellees' position as to when the attorney-client relationship ended as opined by Karr and Baum in their respective affidavits. Erfurt opined that the attorney-client relationship for the underlying personal injury undertaking did not terminate until March 25, 2004 when Appellees finally returned the money which they held in trust for Appellant, Boggs, in that undertaking. Thus, according to the opinion of Attorney Erfurt the original statute of limitations against Appellees did not expire

until March 25, 2005 since the attorney-client relationship with Appellant did not terminate until March 25, 2004 when Appellees finally returned Boggs's trust money to him. *App. Exh. 2, [¶¶ 2, 7 & 21]*

IV. ARGUMENT IN SUPPORT OF THE PROPOSITIONS OF LAW

PROPOSITION OF LAW NO. I

LIMITING THE OHIO SAVINGS STATUTE (ORC §2305.19) TO ONE DISMISSAL WHEN THE FIRST DISMISSAL HAS BEEN MADE PURSUANT TO A STIPULATION OF THE PARTIES UNDER OHIO CIVIL RULE 41(A)(1)(b) AND THEN THE SECOND DISMISSAL HAS BEEN MADE PURSUANT TO A UNILATERAL NOTICE OF DISMISSAL UNDER OHIO CIVIL RULE 41(A)(1)(a) RESULTS IN AN UNCONSTITUTIONAL APPLICATION OF ORC §2305.19 UNDER ARTICLE IV, SECTION 5(B) OF THE OHIO CONSTITUTION SINCE SUCH AN APPLICATION PUTS THE STATUTE IN DIRECT CONFLICT WITH THE CIVIL RULE.

Appellant, Clifford L. Boggs, first timely raised this constitutional argument in both courts, below. *App. 2, [¶ 48]*. Yet both of those courts refused to address the issue and with the Court of Appeals holding that: “[t]he trial court’s oversight does not affect the disposition of this case, as the trial court did not ‘apply’ R.C. 2305.19 as a rationale for granting summary judgment. Rather, the trial court determined that R.C. 2305.19 did not apply, rendering appellant’s third complaint untimely. Accordingly, appellant incorrectly avers that the trial court’s application of R.C. 2305.19 conflicts with Civ. R. 41(A), as the trial court did not apply the statute with which Civ. R. 41(A) purportedly conflicts.” *Id.* To the contrary, and with due respect to both courts, below, ORC § 2305.19 does apply to this case because Appellant could have relied only upon the original statute of limitation when first filing this action and then the savings statute when re-filing it. They are the only two filing statutes that apply to this case, and the timeliness of commencing the original action under ORC § 2305.11(A) is not in dispute. What is now in dispute, because as is shown in subsequent sections of this document the Court of

Appeals prematurely commenced the original statute of limitations, is whether Appellant complied with the savings statute when he dismissed this action for the second time and then re-filed it.

It appears as though no Ohio court has ever specifically addressed the issue as to whether ORC § 2305.19 is procedural in nature, but this Court has stated that it is not a statute of limitation nor does it toll the statute of limitations. *See Reese v. Ohio State University* (1983), 6 Ohio St. 3d 162, 163, 451 N.E.2d 1196, 1198. Nevertheless, in accordance with the above authority, it is obvious that ORC § 2305.19 serves as a supplement to the statute of limitations in certain situations such as the one here and so it must be procedural in nature. Moreover, ORC § 2305.19 does apply in this case because it is that statute which is now in dispute and, in turn, it is necessary that this statute, as applied, be in compliance with Article IV, Section 5(B) of the Ohio Constitution when read in conjunction with Rule 41 (A).

As shown above, this action was twice dismissed, once pursuant to a stipulation of dismissal pursuant to Ohio Civil Rule 41 (A)(1)(b) and then a notice of dismissal pursuant to Ohio Civil Rule 41 (A)(1)(a). So if this Court were to assume that the statute of limitations had begin to run on January 20, 2000, as argued by Appellees and accepted by the Court of Appeals, (*App. I, [¶¶ 8, 26]*), and then let stand the Court of Appeals ruling that the savings statute can only be used once under this fact pattern, then it would do so without ever having squarely decided this issue on point. This is so because in *Thomas v. Freeman* (1997), 79 Ohio St. 3d 221, 227, 680 N.E. 2d 997 this Court once discussed, but only as dicta, this issue because that case did not involve the one dismissal rule. *See Mihalcin v. Hocking College* (4th Dist. 2000, No. 99 CA 32), 2000 Ohio App. LEXIS 1188, at *12-13). But then in yet another case where this Court again had before it an issue other than the one presented here it employed instructive

language indicating that the one dismissal rule may not apply when one dismissal is by stipulation of the adverse parties. See *Frysiner v. Leech* (1987), 32 Ohio St. 3d 38, 512 N.E. 2d 337. “[An] adverse parties can prevent repeated dismissals and re-filings under this rule, by simply declining to stipulate.” Along those lines, in at least two other cases, courts have held that the one dismissal rule may not apply when the second dismissal had been made pursuant to a stipulation of the parties. See *Hutchinson v. Wenske* (2nd Dist. 1999), 2000-Ohio-267, 131 Ohio App. 39 613, 723 N.E. 2d 176; *Turner v. C.&F. Products Co. Inc.* (10th Dist. 1995, No. 95APE02-175), 1995 Ohio App. Lexis 4404.

As such, if this Court should let stand the Court of Appeals decision that extends the one dismissal rule to the fact pattern presented in this action then this Court’s will allow to continue, without ever having squarely addressed this issue on the merits, the unconstitutional application of ORC § 2305.19 under Article IV, Section 5(B) of the Ohio Constitution by putting that statute in direct conflict with Civil Rule 41 since it will limit a Plaintiff to one dismissal when Rule 41 contains no such limitation when one of the dismissals is by stipulation under Rule 41(A)(1)(b). Ohio litigants are too often presented with this fact pattern and yet without a bright line ruling from this court that is squarely on point.

The saving statute (ORC § 2305.19) provides, in pertinent part, that:

- (A) In any action that is commenced or attempted to be commenced, if in due time ... the plaintiff fails otherwise than upon the merits, the plaintiff... may commence a new action within one year after the date of...the plaintiff’s failure otherwise than upon the merits or within the period of the original applicable statute of limitations, whichever occurs later... .

The Ohio General Assembly repealed a number of statutes shortly after the Ohio Civil Rules took effect in 1970 but ORC § 2305.19 was not one of them. Nevertheless, this Court has found from the legislative history of the Amended House Bill repealing those statutes that the

failure to repeal or amend any other section of the Ohio Revised Code does not establish any evidence concerning its conflict with a procedural rule. *See Brockman v. Northern trading Co.* (10th Dist. 1972), 33 Ohio App.2d 250, 255, 62 Ohio Op.2d 358, 294 N.E.2d 912, 915. This ruling is significant here because Appellant does not ask this Court to find ORC § 2305.19 in conflict with Rule 41 on its face but rather he argues that the lower Court's ruling has put it in conflict with the Rule as applied. So that the fact the Ohio General Assembly has failed to repeal or amend ORC § 2305.19 does not establish any evidence concerning its conflict with such rule as applied.

Article IV, Section 5(B), in pertinent part, provides:

Article IV. Judicial

§ 5. Other powers of the Supreme Court

(A) ...

(B) The Supreme court shall prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right. [A]ll laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. [*Emphasis added*]

No authority need be cited to support the statement that Ohio Civil Rule 41 is such a rule of practice and procedure contemplated by the above provision of the Ohio Constitution.

It first took effect in July of 1970 and, in pertinent part, it provides:

Rule 41. Dismissal of Actions

(A) Voluntary dismissal: effect thereof.

(1) By plaintiff; by stipulation. Subject to..., a plaintiff, without order of the court, may dismiss all claims asserted by that plaintiff against a defendant by doing either of the following:

(a) filing a notice of dismissal at any time before the commencement of trial... .

(b) filing a stipulation of dismissal signed by all the parties who have appeared in the action.

Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as adjudication upon the merits of any claim that the plaintiff has once dismissed in any court. [*Emphasis added*].

Ohio Civ. R. 41(A)(1)(b) provides only that: "... a notice of dismissal operates as adjudication upon the merits of any claim that the plaintiff has once dismissed in any court.", not a combination of a stipulation and a notice. [*Emphasis added*]. *Again see Frysinger, supra*, 32 Ohio St. 3d 38, 42-43. So for the "two dismissal rule" to apply, both dismissals must have been made pursuant to Ohio Civ. R. 41 (A)(1)(a), i.e. "dismissals by notice". *Also see Riley v. Med. College of Ohio Hosp. (1992)*, 83 Ohio App. 3d 139, 141, 614 N.E.2d 788 (holding the one dismissal rule inapplicable when first dismissal was by court order pursuant to stipulation); *Hershiser v. BOS Corp. (1990)*, 69 Ohio App.3d 186, 189, 590 N.E.2d 323 (holding one dismissal rule inapplicable when first dismissal was by stipulation); *Graham v. Pavarini (1983)* 9 Ohio App. 3d 89, 93-94, 458 N.E.2d 421 (holding one dismissal rule inapplicable when two prior dismissals were by court order or stipulation); *Randustrial Benefit Plan v. Rollins Burdick Hunter Agency of Ohio, Inc. (1984)*, 16 Ohio App. 3d 144, 474 N.E.2d 1226 (holding one dismissal rule inapplicable when second dismissal was by court order pursuant to Fed.R.Civ.P. 41[a][2]). Though none of these cases involved the savings statute since, in all of them, both dismissals occurred before the original statute of limitations had expired, they, nevertheless, clearly show that in a fact pattern where the savings statute is not involved it is well settled that the one dismissal rule only applies to prevent two dismissals that are both made pursuant to Rule 41(A)(1)(a). The involvement of the savings statute here should not make the outcome any different because of the constitutional issue presented and since the "[t]he adverse parties can

prevent repeated dismissals and re-filings under this rule, by simply declining to stipulate".
Fryinger, supra, 32 Ohio St. 3d 38, 42-43.

In the fact pattern present in this action where the savings statute is involved, if the lower Court had been presented with a Rule 41(A)(1)(a) two dismissal situation, then any holding by the lower Court which would have limited Appellant to one dismissal under ORC § 2305.19 would not have placed that statute in direct conflict with Rule 41 because under that fact pattern any one dismissal interpretation of the savings statute would have put it in compliance with Rule 41. So no unconstitutional application of the statute would be present there. But the lower Court's extension of that rule of law to the situation where one dismissal is by stipulation of the parties under Rule 41(A)(1)(b) puts ORC § 2305.19 in direct conflict with Rule 41 since the Rule contains no such one dismissal limitation in that fact pattern.

On its face, the language of the savings statute contains no one dismissal rule. This language is necessarily absent from the statute because it could not constitutionally contain such language. Appellant respectfully submits that if this Court were to uphold the lower Court's ruling by extending the one dismissal rule to the fact pattern here then this Court will have affirmed the lower Court's creation of an unconstitutional application of ORC § 2305.19 under Article IV, Section 5(B) of the Ohio Constitution. This Court should accept jurisdiction of this case to correct this unconstitutional application.

PROPOSITION OF LAW NO. II

THE ATTORNEY-CLIENT RELATIONSHIP FOR A PARTICULAR TRANSACTION OR UNDERTAKING CONSISTS OF BOTH REPRESENTATION AND FIDUCIARY COMPONENTS AND THAT RELATIONSHIP DOES NOT TERMINATE UNTIL BOTH THE REPRESENTATION COMPONENT ENDS AND THE FIDUCIARY COMPONENT HAS BEEN SATISFIED; THUS SIGNALLING, FOR STATUTE OF LIMITATION PURPOSES, THE END OF THAT RELATIONSHIP ONLY UPON THE CONCLUSION OF BOTH.

The Court of Appeals correctly cited *Zimmie v. Calfee, Halter & Griswold* (1989), 43 Ohio St. 3d 54, 538 N.E. 2d 398 and *Omni-Food & Fashion, Inc. v. Smith* (1988), 38 Ohio St. 3d 385, 388, 527 N.E. 2d 385, 528 N. E. 2d 941 for the proposition that a claim for legal malpractice accrues and the statute of limitations begins to run for a particular transaction or undertaking when there is a cognizable event or when the attorney-client relationship for that particular transaction or undertaking terminates, whichever occurs later. *Appendix Exh. 2, [¶17]*. Thus, the termination of the attorney-client relationship serves as one of the triggering events that commence the running of that statute of limitations in a legal malpractice action. The other is a cognizable event which is not at issue here. *See Zimmie, supra*, at syllabus. The relevant original statute of limitations applicable to this case is one year from the triggering event pursuant to ORC § 2305.11(A). The lower court incorrectly applied *Omni-Food's* "particular undertakings or transactions" rationale when it held that: "[h]ere appellant's malpractice claim is completely unrelated to the delay in returning the expense retainer. Appellant's complaint alleges only that appellees were negligent in the management of the personal injury lawsuit. Appellant did not allege that appellees committed malpractice by failing to return the expense retainer until March 25, 2004." *App. 2, [¶ 22]*. Then Court of Appeals incorrectly held that: "[A] client's relationship with his or her former counsel has terminated and their mutual confidence has dissolved at the time the client files a malpractice action against the attorney. Appellant's conduct in filing the malpractice action was sufficient to signal the termination of the attorney-client relationship for statute of limitations purpose." *App. 2, [¶ 26]*.

Both of these rulings are incorrect because the later necessarily limits the attorney-client relationship to strictly the representation component and the former unduly parcels each component of a particular matter so as to treat each transaction in that matter as a separate

undertaking for statute of limitation purposes. This is tantamount to holding that every pleading filed in this action has constituted a separate “particular undertaking or transaction” a separate attorney-client relationship, and separate statute of limitations. The *Omni-Foods* rationale does not support this parceled view of the attorney-client relationship.

But more important for the proceedings before this Court, the representation component of the attorney-client relationship makes up only a part of that relationship for this Court has been careful to distinguish between “relationship” and “representation” and so has consistently held that the key word in the attorney-client relationship is “relationship” and not “representation”. See *Zimmie and Omni-Foods, supra; Frysinger, supra*, 32 Ohio St. 3d 38. This is necessarily so in that an attorney-client relationship is a fiduciary one as well. “The attorney stands in a fiduciary relationship with the client and should exercise professional judgment solely for the benefit of the client and free of compromising influences and loyalties”. *Disciplinary Counsel v. Moore* (2004), 2004-Ohio-734, ¶15, 101 Ohio St. 3d 261, 264, 804 N.E.2d 423. Thus the attorney-client relationship between Appellant and Appellees in the underlying personal injury undertaking did not terminate until the conclusion of the both the representation and fiduciary components of the underlying action. This court should accept jurisdiction of this case to correct the ruling of the Court of Appeals which held otherwise.

PROPOSITION OF LAW NO. III

WHEN, IN AN ATTORNEY-CLIENT RELATIONSHIP FOR A PARTICULAR TRANSACTION OR UNDERTAKING, THE ATTORNEY RECIEVES FROM THE CLIENT A SUM OF MONEY RELATED TO THAT UNDERTAKING AND HOLDS THAT MONEY IN ITS CLIENTS' FUND ACCOUNT, THE RELATIONSHIP DOES NOT TERMINATE UNTIL THE ATTORNEY SATISFIES ITS FICUCIARY OBLIGATION TO THE CLIENT BY ACCOUNTING FOR, AND RETURNING, ANY UNUSED MONIES; THUS CREATING A QUESTION OF FACT AS TO THE END OF THAT RELATIONSHIP FOR PURPOSES OF SIGNALLING WHEN THE STATUTE OF LIMITATIONS BEGINS TO RUN AND FURTHER MAKING THE ACTION

NOT PROPER FOR RESOLUTION BY SUMMARY JUDGMENT AS TO THAT ISSUE.

Ohio courts, following the lead by this Court, have consistently held that the question of when an attorney-client relationship for a particular undertaking or transaction has terminated is necessarily one of fact which is decided on a case-by-case basis and so is not a proper issue to be resolved by summary judgment as is the case here. *See Omni-Food & Fashion, Inc., supra*, 38 Ohio St. 3d 385, 388. The Court of Appeals limited this rationale by focusing in on only one aspect of the attorney-client relationship, that of representation, and chose to ignore the other aspect of that relationship: namely, the fiduciary obligation to return client's money held in trust, which is the overarching issue here. *App. 2, [¶ 18]*. By employing the lower Court's analysis, the original statute of limitations for legal malpractice against Appellees would have expired on January 19, 2001, since it accepted Appellee's position that the attorney-client relationship ended on January 19, 2000. *App. 2, [¶¶ 8, 26]*.

However, the fiduciary component of the attorney-client relationship contains essential "mutual confidences" as well such as in the case here the proper spending of, accounting for, and the return of the \$3,000.00 that Appellees held in trust for Appellant in the underlying personal injury undertaking since in this fiduciary component the attorney must exercise professional judgment "solely for the benefit of the client and free of compromising influences and loyalties". *Again see Disciplinary Counsel, supra*, (2004), 2004-Ohio-734, ¶15. It necessarily follows that the attorney-client relationship continued as long as Appellees became obligated to return the check that it held in trust for Appellant but failed to do so until March 25, 2004. To hold otherwise would allow the attorney to act other than "solely for the benefit of the client and free of compromising influences and loyalties". *See Montali v. Day*, (8th Dist., No. 80327), 2002-Ohio-2715, Ohio App. LEXIS 2812, [*P40]. (holding that a genuine issue of material fact exists

under *Omni-Food* as to whether the attorney-client relationship continues when the attorney becomes obligated to deliver a check to the client but fails to do so. Citing *Omni-Food & Fashion, Inc. v. Smith* (1988), 33 Ohio St. 3d 385, 388, 527 N.E. 2d 385, 528 N. E. 2d 941).

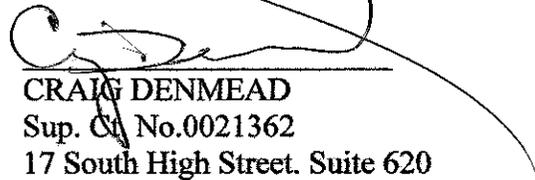
Thus there remained a question of fact as to the end of the attorney-client relationship for purposes of signaling when the statute of limitations began to run in this action and further making this action not proper for resolution by summary judgment as to that issue. This Court should accept jurisdiction of this action to correct the Court of Appeals ruling that held otherwise.

V. CONCLUSION

Therefore, Appellant respectfully request that this Court accept jurisdiction in this case so that these important issues can be presented and reviewed on their merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

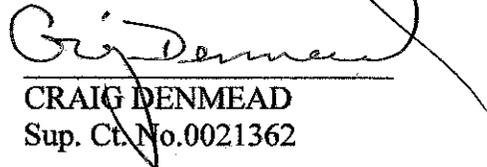
The undersigned hereby certifies that a true and accurate copy of the foregoing document was forwarded via United States mail, first class postage fully prepaid, on this 5th day of July 2011, to the following:

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Respectfully submitted,

DENMEAD LAW OFFICE



CRAIG DENMEAD
Sup. Ct. No. 0021362

COUNSEL FOR APPELLANT,
CLIFFORD L. BOGGS.

APPENDIX

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Exhibit 4-Decision and Entry of the Common Pleas Court of Franklin County [Cocroft, Judge] dated August 17, 2010.

Exhibit 1

Judgment Entry of the Court of Appeals, Tenth Appellate
District, Franklin County dated May 25, 2011.

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

FILED
COURT OF APPEALS
10:00 AM
MAY 25 2011
CLERK OF COURTS

Clifford L. Boggs,

Plaintiff-Appellant,

v.

James L. Baum et al.,

Defendants-Appellees.

No. 10AP-864
(C P C No 07CVA-06-7848)
(REGULAR CALENDAR)

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on May 24, 2011, appellant's four assignments of error are overruled, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed. Costs are assessed against appellant.

BROWN, FRENCH, & KLATT, JJ.



Judge Susan Brown

EXHIBIT

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Exhibit 2

Decision of the Court of Appeals, Tenth Appellate District,
Franklin County dated May 24, 2011.

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IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

FILED
COURT OF APPEALS
FRANKLIN CO. OHIO

2011 MAY 24 PM 1:04

CLERK OF COURTS

Clifford L. Boggs, :
 :
Plaintiff-Appellant, :
 :
v. :
 :
James L. Baum et al., :
 :
Defendants-Appellees. :

No. 10AP-864
(C.P.C. No. 07CVA-06-7848)
(REGULAR CALENDAR)

D E C I S I O N

Rendered on May 24, 2011

Denmead Law Office, and Craig Denmead, for appellant.

James E. Arnold & Associates, LPA, and W. Evan Price, II, for appellees.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} Plaintiff-appellant, Clifford L. Boggs, appeals from a judgment of the Franklin County Court of Common Pleas granting summary judgment to defendants-appellees, James L. Baum and Karr & Sherman Co., L.P.A., on the grounds that appellant did not commence his legal malpractice action within the one-year limitations period set forth in R.C. 2305.11. For the reasons that follow, we affirm.

{¶2} The facts giving rise to this appeal are as follows. On September 6, 1996, appellant retained appellees and attorney Keith Karr to represent him in a civil action to

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recover damages for bodily injuries he allegedly sustained in an automobile accident on September 12, 1994. In conjunction with the representation, appellant deposited \$3,000 with appellees to cover litigation expenses. Appellant filed a complaint against the alleged tortfeasor on September 9, 1996. On July 17, 1997, appellant voluntarily dismissed the complaint pursuant to Civ.R. 41(A)(1)(a). Appellant refiled the action on July 22, 1998. On January 6, 1999, the trial court dismissed the refiled complaint, with prejudice, because it was filed more than one year from the July 17, 1997 notice of dismissal. In mid-January 1999, appellees notified appellant by letter that he had a potential malpractice action against them.

{¶3} On January 19, 2000, appellant filed a complaint against appellees and Karr for legal malpractice. On December 10, 2002, the parties stipulated to the dismissal of the complaint pursuant to Civ.R. 41(A)(1)(b). Appellant refiled the complaint on December 5, 2003. On July 10, 2006, appellant voluntarily dismissed the refiled complaint pursuant to Civ.R. 41(A)(1)(a).

{¶4} On June 13, 2007, appellant refiled the complaint against appellees.¹ Thereafter, on July 27, 2007, appellees filed a Civ.R. 12(B)(6) motion to dismiss, arguing that appellant's refiled complaint was time-barred by the one-year statute of limitations applicable to legal malpractice actions because appellant had already availed himself of the one-time use of R.C. 2305.19, Ohio's "savings statute," when he refiled the complaint on December 5, 2003 following the stipulated dismissal on December 10, 2002.

{¶5} On August 27, 2007, appellant filed a response to the motion to dismiss, along with an amended complaint. In the amended complaint, appellant asserted that the

¹ Karr is not named as a defendant in the June 13, 2007 refiled complaint.

parties' December 10, 2002 Civ.R. 41(A)(1)(b) stipulation of dismissal "contained an agreement between the parties that the action could be refiled." Amended Complaint, ¶2. Appellant further asserted that "[d]uring the entire attorney-client relationship between the parties, [appellees] held a sum of [appellant's] money in trust for him in the underlying personal injury action [and] appellees failed to return that sum until sometime around * * * March 29, 2004." Amended Complaint, ¶6. Under his single count for legal malpractice, appellant asserted that "[f]rom prior to September 6, 1996 and until after January 20, 1999, Defendants * * * were retained by, and did agree to provide legal representation to" appellant regarding his personal injury claim. Amended Complaint, ¶16. Appellant alleged that appellees breached their duty of care in failing to timely refile the personal injury action.

{¶6} On September 5, 2007, appellees filed a Civ.R. 12(B)(6) motion to dismiss appellant's amended complaint on grounds identical to those asserted in its previous motion to dismiss. In support of its motion, appellees attached as exhibits photocopies of the parties' December 10, 2002 Civ.R. 41(A)(1)(b) stipulation of dismissal and appellant's July 10, 2006 Civ.R. 41(A)(1)(a) notice of dismissal. On September 24, 2007, appellant filed a response to the motion to dismiss, along with a motion to strike the exhibits. By decision and entry filed June 5, 2009, the trial court denied appellees' motions to dismiss and granted appellant's motion to strike.

{¶7} Thereafter, appellees filed an answer to appellant's amended complaint. Appellees denied appellant's assertion that the parties' December 10, 2002 Civ.R. 41(A)(1)(b) stipulation of dismissal included an agreement allowing appellant to refile the action. Appellees admitted that it did not return appellant's \$3,000 expense retainer until

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late March 2004, but denied that an attorney-client relationship continued beyond January 20, 1999. In addition, appellees asserted the affirmative defense that appellant's claim was barred by the one-year statute of limitations applicable to a legal malpractice claim.

{18} On April 30, 2010, appellees filed a motion for summary judgment. Appellees argued that appellant's cause of action for legal malpractice accrued, at the very latest, on January 19, 2000, when appellant terminated the attorney-client relationship regarding the personal injury matter by filing the malpractice action against appellees. Appellees contended that, in refileing his complaint on December 5, 2003 following the December 10, 2002 dismissal by stipulation, appellant necessarily invoked the protection of the savings statute because the one-year statute of limitations on the legal malpractice claim had expired on January 19, 2001. Appellees argued that appellant could not again utilize the savings statute to refile his complaint following his July 6, 2010 voluntary dismissal. Accordingly, appellees maintained that appellant's refiled action was time-barred by the one-year statute of limitations.

{19} In response, appellant argued that a genuine issue of material fact exists as to when the statute of limitations began to run on his legal malpractice claim. Appellant maintained that the attorney-client relationship did not terminate, and thus the statute of limitations did not begin to run, until March 25, 2004, when appellees returned his \$3,000 expense retainer. Accordingly, argued appellant, he did not invoke the savings statute when he refiled the complaint on December 5, 2003 following the December 10, 2002 dismissal, because the original statute of limitations did not expire until March 25, 2005.

Appellant claimed that he used the savings statute only once when he voluntarily dismissed the complaint on July 10, 2006 and then refiled it on June 13, 2007.

{¶10} Appellant further argued that, even if the attorney-client relationship terminated on January 19, 2000 and the statute of limitations expired on January 19, 2001, appellees were still not entitled to judgment as a matter of law because no Ohio court has held that the one refiling rule of R.C. 2305.19(A) applies when the action is first dismissed by stipulation of the parties pursuant to Civ.R. 41(A)(1)(b). Appellant further argued that the stipulation in the December 10, 2002 dismissal included an agreement permitting refiling, thereby tolling the statute of limitations. Appellant argued that, under either scenario, he did not utilize the savings statute to refile the action on December 5, 2003. According to appellant, he used the savings statute only once when he voluntarily dismissed the complaint on July 10, 2006 and refiled it on June 13, 2007.

{¶11} Finally, appellant argued that application of the one refiling rule in R.C. 2305.19 to circumstances where one of the dismissals is by stipulation conflicts with Civ.R. 41 and, as such, violates Section 5(B), Article IV, of the Ohio Constitution.

{¶12} On August 17, 2010, the trial court filed a decision and entry granting appellees' motion for summary judgment. The court implicitly rejected appellant's contention that the attorney-client relationship continued until appellees returned appellant's \$3,000 expense retainer on March 25, 2004, concluding, instead, that appellant's filing of the malpractice action on January 19, 2000 terminated the attorney-client relationship between the parties. The trial court also concluded, relying on the Fifth District Court of Appeals' decision in *Frazier v. Fairfield Med. Ctr.*, 5th Dist. No. 08CA90, 2009-Ohio-4869, that the one refiling rule applicable to R.C. 2305.19 applies even when

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an action is first dismissed by stipulation of the parties pursuant to Civ.R. 41(A)(1)(b). Accordingly, the trial court held that appellant's second attempted refile of the complaint on June 13, 2007 was outside the time permitted by R.C. 2305.19, which was one year from the December 10, 2002 dismissal by stipulation; thus, appellant's malpractice action was barred by the statute of limitations.

{¶13} Appellant assigns four errors on appeal:

[I.] THE TRIAL COURT COMMITTED PREJUDICIAL AND REVERSIBLE ERROR AS A MATTER OF LAW BY GRANTING SUMMARY JUDGMENT TO DEFENDANTS-APPELLEES WHEN IT HELD THAT THE ATTORNEY-CLIENT RELATIONSHIP NECESSARILY ENDS WHEN A CLIENT FILES A MALPRACTICE CLAIM AGAINST AN ATTORNEY INSTEAD OF HOLDING THAT THE RELATIONSHIP CAN CONTINUE UNDER THE FIDUCIARY ASPECT OF THAT RELATIONSHIP SO LONG AS THE ATTORNEY HOLDS A CLIENT'S MONEY IN TRUST WHICH IT HAS A FIDUCIARY OBLIGATION TO RETURN AND DOES NOT END UNTIL THAT OBLIGATION IS FULLFILLED [SIC].

[II.] THE TRIAL COURT COMMITTED PREJUDICIAL AND REVERSIBLE ERROR AS A MATTER OF LAW BY GRANTING SUMMARY JUDGMENT TO DEFENDANTS-APPELLEES WHEN IT HELD THAT THERE DID NOT REMAIN A QUESTION OF FACT AS TO WHETHER THE ATTORNEY-CLIENT RELATIONSHIP WAS STILL IN EXISTENCE AT THE TIME OF THE FIRST RE-FILING OF THE ACTION BECAUSE DEFENDANTS-APPELLEES STILL HELD PLAINTIFF-APPELLANT'S MONEY IN TRUST, THUS REQUIRING THE INVOKING OF THE SAVINGS STATUTE (ORC § 2305.19) ONLY ONCE AND THAT WAS AT THE TIME OF THE SECOND RE-FILING BECAUSE THE ORIGINAL STATUTE OF LIMITATIONS WAS STILL IN EFFECT, AND INVOKED, AT THE TIME OF THE FIRST RE-FILING.

[III.] THE TRIAL COURT COMMITTED PREJUDICIAL AND REVERSIBLE ERROR AS A MATTER OF LAW BY GRANTING SUMMARY JUDGMENT TO DEFENDANTS-APPELLEES WHEN IT HELD THAT THE ONE RE-FILING

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RULE UNDER THE OHIO SAVINGS STATUTE APPLIED WHEN AN ACTION WAS FIRST DISMISSED BY STIPULATION OF THE PARTIES UNDER OHIO CIVIL RULE 41(A)(1)(B) AND THEN DISMISSED A SECOND TIME BY A UNILATERAL NOTICE OF DISMISSAL UNDER OHIO CIVIL RULE 41(A)(1)(A) SINCE, AT NO TIMES RELEVANT TO THIS ACTION, WERE DEFENDANTS-APPELLANTS ENTITLED JUDGMENT AS A MATTER OF LAW UNDER CIVIL RULE 56.

[IV.] THE TRIAL COURT COMMITTED PREJUDICIAL AND REVERSIBLE ERROR AS A MATTER OF LAW BY GRANTING SUMMARY JUDGMENT TO DEFENDANTS-APPELLEES WHEN IT FAILED TO ADDRESS AND THEN HOLD THAT LIMITING THE OHIO SAVINGS STATUTE TO ONE DISMISSAL WHEN THE FIRST DISMISSAL WAS PURSUANT TO A STIPULATION OF THE PARTIES UNDER OHIO CIVIL RULE 41(A)(1)(B) AND THEN THE SECOND DISMISSAL WAS MADE PURSUANT TO A UNILATERAL NOTICE OF DISMISSAL UNDER OHIO CIVIL RULE 41(A)(1)(A) WOULD BE AN UNCONSTITUTIONAL APPLICATION OF ORC §2305.19 UNDER ARTICLE IV, SECTION 5(B) OF THE OHIO CONSTITUTION AS BEING IN CONFLICT WITH OHIO CIVIL RULE 41.

{¶14} As appellant's four assignments of error challenge the trial court's decision granting summary judgment to appellees, we first set forth the familiar standard governing summary judgment.

{¶15} An appellate court reviews summary judgment under a de novo standard. *Coventry Twp. v. Ecker* (1995), 101 Ohio App.3d 38, 41; *Koos v. Cent. Ohio Cellular, Inc.* (1994), 94 Ohio App.3d 579, 588. Summary judgment is appropriate only when the moving party demonstrates: (1) no genuine issue of material fact exists, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds could come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence most

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strongly construed in its favor. Civ.R. 56(C); *State ex rel. Grady v. State Emp. Relations Bd.*, 78 Ohio St.3d 181, 183, 1997-Ohio-221.

{¶16} Appellant's first and second assignments of error will be addressed together, as they present the same general argument. Appellant contends in these assignments of error that the trial court erred in concluding that the parties' attorney-client relationship terminated, and thus appellant's cause of action accrued, when appellant filed his legal malpractice action on January 19, 2000.

{¶17} An action for legal malpractice must be commenced within one year of the time the cause of action accrues. R.C. 2305.11(A). A claim 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 that his injury was related to his attorney's act or non-act and the client is put on notice of a need to pursue his possible remedies against the attorney or when the attorney-client relationship for that particular transaction or undertaking terminates, whichever occurs later." *Zimmie v. Calfee, Halter & Griswold* (1989), 43 Ohio St.3d 54, syllabus, applying *Omni-Food & Fashion, Inc. v. Smith* (1988), 38 Ohio St.3d 385.

{¶18} "The determination of the date of accrual of a cause of action for legal malpractice is a question of law that is reviewed *de novo* on appeal." *Ruckman v. Zacks Law Group, LLC*, 10th Dist. No. 07AP-723, 2008-Ohio-1108, ¶17, citing *Whitaker v. Kear* (1997), 123 Ohio App.3d 413, 420. The determination of when the attorney-client relationship for a particular transaction terminates is a question of fact. *Omni-Food & Fashion* at 388. However, "[t]he question of when the attorney-client relationship was terminated may be taken away from the trier of fact * * * if 'affirmative actions that are

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patently inconsistent with the continued attorney-client relationship' have been undertaken by either party." *Steindler v. Meyers, Lamanna & Roman*, 8th Dist. No. 86852, 2006-Ohio-4097, ¶11, citing *Downey v. Corrigan*, 9th Dist. No. 21785, 2004-Ohio-2510. See also *Trombley v. Calamunci, Joelson, Manore, Farah & Silvers, L.L.P.*, 6th Dist. No. L-04-1138, 2005-Ohio-2105, ¶43 ("Although determination of when the attorney-client relationship for a particular transaction terminates is generally a question of fact * * *, where the evidence is clear and unambiguous, so that reasonable minds can come to but one conclusion from it, the matter may be decided as a matter of law.").

{¶19} "Generally, the attorney-client relationship is consensual, subject to termination by acts of either party." *Columbus Credit Co. v. Evans* (1992), 82 Ohio App.3d 798, 804. "Conduct which dissolves the essential mutual confidence between attorney and client signals the end of the attorney-client relationship." *DiSabato v. Tyack & Assoc. Co., L.P.A.* (Sept. 14, 1999), 10th Dist. No. 98AP-1282, citing *Brown v. Johnstone* (1982), 5 Ohio App.3d 165, 166-67. "An explicit statement terminating the relationship is not necessary." *Triplett v. Benton*, 10th Dist. No. 03AP-342, 2003-Ohio-5583, ¶13, citing *Brown* at 166-67.

{¶20} Appellant contends that the parties' attorney-client relationship was comprised of two separate and distinct facets: (1) representation, which involved appellees' provision of legal advice and services, and (2) fiduciary duties, which included appellees' obligation to properly account for and return the \$3,000 expense retainer. Appellant concedes that the representation aspect of the parties' relationship ended when he filed the malpractice action on January 19, 2000. Appellant argues, however, that the fiduciary aspect of the relationship continued beyond the end of the representation.

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Specifically, appellant maintains that appellees did not fulfill the fiduciary aspect of the attorney-client relationship, and thus the attorney-client relationship was not terminated until March 25, 2004, when appellees returned the expense retainer.

{¶21} Appellant cites the affidavit testimony of his expert witness, attorney Edward W. Erfurt, III, and the affidavit testimony of appellees' witness, Keith Karr, as creating a genuine issue of material fact as to the proper termination date for the attorney-client relationship. Erfurt opined that the attorney-client relationship did not terminate until appellees fulfilled the fiduciary aspect of the relationship by returning the expense retainer on March 25, 2004. Karr averred that appellant's filing of the legal malpractice action conclusively terminated the parties' attorney-client relationship.

{¶22} We cannot find that the affidavit testimony provided by Erfurt creates a genuine issue of material fact with regard to the termination of the parties' attorney-client relationship. In *Omni-Food & Fashion*, the Supreme Court of Ohio rejected the argument that the statute of limitations should be tolled based on continued "general" representation and held that it should only be tolled with respect to acts of malpractice relating solely to particular undertakings or transactions. *Id.* at 387. Here, appellant's malpractice claim is completely unrelated to the delay in returning the expense retainer. Appellant's complaint alleges only that appellees were negligent in the management of the personal injury lawsuit. Appellant did not allege that appellees committed malpractice by failing to return the expense retainer until March 25, 2004.

{¶23} For similar reasons, appellant's reliance on *Montali v. Day*, 8th Dist. No. 80327, 2002-Ohio-2715, is misplaced. Appellant cites *Montali* for the proposition that the "attorney-client relationship continued as long as the Defendants-Appellees became

obligated to return the check that it held in trust for Boggs but failed to do so." Appellant's brief at 6. However, the basis for the malpractice claim in *Montali* was the attorney's failure to forward a check he received after the representation had terminated—not the mishandling of the representation. Here, appellant's malpractice claim is premised upon appellees' mishandling of the representation—not the failure to return the expense retainer.

{¶24} Appellant concedes that the representation in the personal injury action terminated, at the latest, when appellant filed the malpractice action on January 19, 2000. Karr averred in his affidavit and deposition testimony that appellant never sought, nor did appellees provide, any legal advice following the filing of the malpractice action.

{¶25} In *Brown*, the court held that a client's initiation of grievance proceedings before the local bar association "evidences a client's loss of confidence in his attorney such as to indicate a termination of the professional relationship." *Id.* at 167. The court noted that its conclusion was supported by the fact that the client had no further contact with the attorney after the client contacted the bar association. In *Erickson v. Misny* (May 9, 1996), 8th Dist. No. 69213, the plaintiff retained an attorney to represent him in a personal injury lawsuit. The plaintiff fired the attorney and retained new counsel. The original attorney performed no more work on plaintiff's behalf. The plaintiff later met with the original attorney in an effort to retrieve his files. The court rejected the plaintiff's contention that the attorney-client relationship continued until the attorney returned his file.

{¶26} As noted above, although the determination of when the attorney-client relationship for a particular transaction terminates is a question of fact, such question may

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be removed from jury consideration and decided as a matter of law if reasonable minds can only conclude that the evidence establishes that one of the parties engages in conduct which "dissolves the essential mutual confidence between attorney and client." *DiSabato*. Upon our de novo review of the summary judgment in this case, we agree with the trial court that the parties' attorney-client relationship terminated, and appellant's cause of action accrued, when appellant filed the malpractice action on January 19, 2000. Certainly, a client's relationship with his or her former counsel has terminated and their mutual confidence has dissolved at the time the client files a malpractice action against the attorney. Appellant's conduct in filing the malpractice action was sufficient to signal the termination of the attorney-client relationship for statute of limitations purposes.

{¶27} Appellant's first and second assignments of error are overruled.

{¶28} Appellant's third assignment of error contends that the trial court erred in holding that a plaintiff may utilize the savings clause in R.C. 2305.19(A) only once even when the action is first dismissed by stipulation of the parties pursuant to Civ.R. 41(A)(1)(b).

{¶29} Former R.C. 2305.19(A) provides, in pertinent part, that "[i]n an action commenced or attempted to be commenced, if in due time * * * the plaintiff fails otherwise than upon the merits, and the time limited for the commencement of such action at the date of * * * failure has expired, the plaintiff * * * may commence a new action within one year after such date." Civ.R. 41(A)(1)(b) provides, as relevant here, that "a plaintiff, without order of court, may dismiss all claims asserted by that plaintiff against a defendant by * * * filing a stipulation of dismissal signed by all parties who have appeared in the action."

{¶30} In *Hancock v. Kroger Co.* (1995), 103 Ohio App.3d 266, 269, this court held that "a case may only be extended by virtue of R.C. 2305.19 for one year after the initially filed action fails otherwise than upon the merits." *Id.* at 269. Thus, the savings statute may be used only once to invoke an additional one-year time period in which to refile an action. *Id.*; see also *Stover v. Wallace* (Feb. 15, 1996), 10th Dist. No. 95APE06-743, citing *Hancock*. In *Mihalcin v. Hocking College* (Mar. 20, 2000), 4th Dist. No. 99CA32, the court explained the statutory basis for the one refiling rule:

A plaintiff must satisfy at least two elements to employ the savings statute: (1) commencement of an action *before* the statute of limitations has expired, and (2) failure otherwise than upon the merits *after* the statute of limitations has expired. * * * When a plaintiff has already utilized the savings statute once, it necessarily means that he has re-filed an action *after* the statute of limitations has expired. Thus, an attempt to use the savings statute a second time (*i.e.* to file a third complaint) is an attempt to re-file an action (*i.e.* the second complaint) that was *not* commenced before the statute of limitations expired. * * * The third complaint therefore fails to qualify for re-filing under R.C. 2305.19 because it constitutes an attempt to re-file an action that was *not* commenced before expiration of the statute of limitations. * * * Were the rule otherwise, a plaintiff could utilize the savings statute to keep a cause of action alive long past the time that the statute of limitations expired. * * * This would directly contradict the Ohio Supreme Court's pronouncement that R.C. 2305.19 is neither a tolling provision nor a statute of limitations unto itself.

(Emphasis sic.)

{¶31} Appellees assert that appellant's June 13, 2007 complaint was time-barred by the one-year statute of limitations applicable to legal malpractice actions because appellant had already availed himself of the one-time use of R.C. 2305.19 when he refiled the complaint on December 5, 2003 following the stipulated dismissal on December 10, 2002.

{¶32} In response, appellant advances essentially two arguments. Appellant first contends that the one refiling rule of R.C. 2305.19(A) does not apply when the first dismissal is by stipulation of the parties pursuant to Civ.R. 41(A)(1)(b). Appellant further argues that the stipulated dismissal included an agreement permitting refiling, thereby tolling the statute of limitations. Appellant argues that, under either scenario, he did not utilize the savings statute to refile the action on December 5, 2003. According to appellant, he used the savings statute only once when he voluntarily dismissed the complaint on July 10, 2006 and refiled it on June 13, 2007.

{¶33} To support his argument, appellant relies upon *Turner v. C. & F. Prods. Co., Inc.* (Sept. 28, 1995), 10th Dist. No. 95APE02-175. In *Turner*, the plaintiff filed a complaint in federal court. After the statute of limitations had expired, the district court dismissed the complaint, without prejudice, after determining that jurisdiction did not lie in the federal court. Plaintiff refiled the complaint in the common pleas court within one year of the federal court dismissal. The parties then executed a stipulation of dismissal. The plaintiff thereafter refiled the action in the common pleas court. Upon defendant's motion to dismiss, the trial court determined that the third complaint was time barred.

{¶34} On appeal, the plaintiff asserted that the third complaint was timely pursuant to either Civ.R. 41(A)(1)(b) or the savings statute. This court stated that "[n]either Civ.R. 41(A)(1)(a) nor (b) creates an immunity from the application [of] R.C. 2305.19," *id.*, citing *Brookman v. Northern Trading Co.* (1972), 33 Ohio App.2d 250, and that "[n]either Civ.R. 41(A)(1)(a) nor (b) apply in the present case to bring appellant's third complaint within the statute of limitations." *Id.* We thus concluded that "[n]either R.C. 2305.19 nor Civ.R. 41(A)(1)(b) apply, and, based on those facts alone, appellant's action is time barred." *Id.*

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We further noted, however, that the stipulation stated that it was "other than on the merits and without prejudice to the refiling of the same." Based upon the language in the stipulation, we determined that a factual dispute existed as to the applicability of the principle of equitable estoppel and remanded the matter to the trial court for further proceedings.

{¶35} Appellant also relies upon *Hutchinson v. Wenzke*, 131 Ohio App.3d 613. In *Hutchinson*, the plaintiffs voluntarily dismissed their original complaint, and then refiled a second complaint within one year of the dismissal of the first complaint. The second complaint was mutually dismissed by stipulation of all parties to the action. The stipulation provided that the second dismissal was "without prejudice to refiling and otherwise than upon the merits." *Id.* Upon the plaintiffs' filing of the third complaint, the trial court granted summary judgment to the defendants, finding that the plaintiffs were prevented from utilizing the savings clause in R.C. 2305.19 for a second time pursuant to this court's holding in *Hancock*.

{¶36} The Second District Court of Appeals reversed the trial court's grant of summary judgment, finding that the defendants were equitably estopped from invoking the statute of limitations. However, the crux of the appellate court's decision in *Hutchinson* was that defendants had specifically stipulated that the complaint was dismissed without prejudice and could be refiled.

{¶37} *Turner* dispenses with appellant's first argument, i.e., that the one refiling rule of R.C. 2305.19(A) does not apply when the first dismissal is by stipulation of the parties pursuant to Civ.R. 41(A)(1)(b). Indeed, we expressly stated that Civ.R. 41(A)(1)(b) does not create any immunity from the application of R.C. 2305.19.

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{¶38} Regarding appellant's second contention—that the language of the stipulation permitting plaintiff to refile the complaint effectively tolled the statute of limitations—we note that the facts of the present case are distinguishable from those in both *Turner* and *Hutchinson*. In both cases, the second dismissal was by stipulation which expressly stated that the complaint was dismissed without prejudice and could be refiled. In the present case, the first dismissal was by stipulation, and the stipulation is not part of the record on summary judgment. Although appellant asserted in his amended complaint that the stipulation expressly stated that the complaint could be refiled, appellant neglected to attach a copy of the stipulation to his response to the motion for summary judgment. The non-moving party on summary judgment may not rest upon the mere allegations in the pleadings, but instead must point to or submit some evidentiary material that demonstrates a genuine dispute over a material fact. Civ.R. 56(E).

{¶39} Moreover, even if appellant had properly attached a copy of the stipulation to his response to appellees' motion for summary judgment, the stipulation does not act to toll the statute of limitations. To be sure, parties may, by agreement, toll the statute of limitations. However, the stipulation in the instant case does not constitute such an agreement. As noted above, appellees attached a copy of the stipulation to the motion to dismiss. The stipulation provides, in its entirety, as follows:

STIPULATION OF DISMISSAL WITHOUT PREJUDICE

Now comes Plaintiff and Defendants, James L. Baum and Karr & Sherman Co., L.P.A., by and through undersigned counsel, and hereby stipulate, pursuant to Rule 41(A)(1), Rules of Civil Procedure, to the dismissal of this action against said Defendants, without prejudice. The parties agree that this dismissal is otherwise than upon the merits; the statute of limitations on Plaintiff's claims has already expired; the anticipated re-filing of the Complaint will be timely,

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pursuant to the Ohio Savings Statute, if said re-filing is accomplished within one year of the date this Stipulation of Dismissal is filed with the Court; and, Defendants waive service of process of any re-filed complaint and agree that service of the summons and complaint may be made upon W. Evan Price, II, counsel for said Defendants, pursuant to Rule 4(D), Ohio Rules of Civil Procedure.

{¶40} The stipulation provides only that appellant could refile his complaint within one year of the date of the first dismissal pursuant to the savings statute. At the time the stipulation was filed, the statute of limitations had expired and appellant was entitled to utilize the savings statute to file a second complaint. The stipulation afforded appellant no rights beyond those available to him under the savings statute. Furthermore, the language of the stipulation does not contemplate the filing of a third complaint.

{¶41} Finally, we reject appellant's contention that the trial court erred in relying upon the *Frazier* decision. Appellant contends that *Frazier* established a "new principle of law" that should not have been applied retroactively to the facts of the present case. Appellant's brief at 10.

{¶42} In *Frazier*, the plaintiff timely filed her complaint on March 18, 2004. The statute of limitations expired on May 7, 2004 while the action was pending. On March 24, 2005, the parties filed a Civ.R. 41(A)(1)(b) stipulation of dismissal which stated it "was without prejudice to re-filing within one year of the date of this Notice." The plaintiff refiled the action within the one-year savings statute on March 17, 2006. However, the plaintiff voluntarily dismissed the second action by notice pursuant to Civ.R. 41(A)(1)(a) on September 25, 2007. The plaintiff then refiled the action on September 12, 2008. The trial court granted summary judgment to the defendant on the third complaint because the

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claim was barred by the statute of limitations and the plaintiff had already used the savings statute once.

{¶43} On appeal, the appellate court rejected the plaintiff's claim that because the first dismissal was by stipulation the savings statute could be used more than once. The court explained that any dismissal without prejudice "means the dismissal has no res judicata effect, but it does not toll the statute of limitations or otherwise extend the time for refiling [sic]." *Id.* at ¶29. Accordingly, the court affirmed summary judgment. The court essentially concluded that the fact that the first dismissal was by stipulation was a distinction without a difference since the plain language of the savings statute precluded it from applying to a third complaint. The *Frazier* decision did not announce a new principle of law. The court simply applied well-established reasoning based upon plain statutory language to a slightly different fact pattern. Accordingly, the trial court properly relied upon *Frazier*.

{¶44} *Frazier* is directly on point here. As in *Frazier*, appellant timely filed his original complaint. The statute of limitations expired while the action was pending. The parties dismissed the action by stipulation. He then refiled the action outside the statute of limitations, necessarily invoking the protection of the savings statute. He then dismissed the second action by voluntary dismissal and filed a third complaint attempting to utilize the savings statute a second time. However, appellant's second attempt to refile the action was outside the time permitted by the savings statute and the original statute of limitations had long since expired.

{¶45} We find that even construing the evidence most strongly in favor of appellant, reasonable minds could only conclude that appellant was unable to utilize the

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savings statute to refile his complaint for the third time, and, accordingly, he failed to file his complaint within the applicable statute of limitations.

{¶46} The third assignment of error is overruled.

{¶47} Appellant's fourth assignment of error asserts the trial court erred in granting summary judgment without first addressing his constitutional argument that R.C. 2305.19(A), "as applied" to his case, conflicts with Civ.R. 41(A).

{¶48} Appellant correctly states that the trial court failed to address his constitutional argument. However, the trial court's oversight does not affect the disposition of this case, as the trial court did not "apply" R.C. 2305.19 as a rationale for granting summary judgment. Rather, the trial court determined that R.C. 2305.19 did not apply, rendering appellant's third complaint untimely. Accordingly, appellant incorrectly avers that the trial court's application of R.C. 2305.19 conflicts with Civ.R. 41(A), as the trial court did not apply the statute with which Civ.R. 41(A) purportedly conflicts. See *Mihalcon*.

{¶49} The fourth assignment of error is overruled.

{¶50} Having overruled appellant's four assignments of error, we hereby affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

FRENCH and KLATT, JJ., concur.

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Exhibit 3

Decision and Entry of the Common Pleas Court of Franklin
County [Horton, Judge] dated June 5, 2009.

FILED COURT
FRANKLIN CO. OHIO
2009 JUN -5 PM 4:07
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

CLIFFORD L. BOGGS,

CASE NO. 07 CV 7848

Plaintiff,

JUDGE TIMOTHY S. HORTON

vs.

JAMES L. BAUM, et al.,

Defendants.

DECISION AND ENTRY

DENYING DEFENDANTS' MOTION TO DISMISS FILED JULY 27, 2007,
DENYING DEFENDANTS' COMBINED MOTION TO DISMISS PLAINTIFF'S
AMENDED COMPLAINT FILED SEPTEMBER 5, 2007 AND
GRANTING PLAINTIFF'S MOTION TO STRIKE FILED ON SEPTEMBER 24, 2007

Dated this 5th day of June, 2009

This matter is before the Court on Defendants' Motion to Dismiss filed on July 27, 2007. Defendants move for dismissal on two grounds: (1) Plaintiff fails to state a claim upon which relief can be granted because Plaintiff's Complaint is barred by the statute of limitations; (2) Plaintiff fails to state a claim on which relief may be granted because Plaintiff may only use Ohio's Savings Statute once. On August 27, 2007, Plaintiff filed a memorandum contra and an Amended Complaint. On September 5, 2007, Defendants filed a Combined Motion to Dismiss Plaintiff's Amended Complaint and reply in support of the original motion. On September 24, 2007, Plaintiff filed a memorandum contra to the combined motion and a Motion to Strike Certain Exhibits from Defendants' Combined Motion to Dismiss. On October 9, 2007, Defendants filed a memorandum in opposition to Plaintiff's motion. The motions are considered submitted to the Court for decision pursuant to Loc. R. 21.01.

Factual and Procedural History

On September 14, 1994, Plaintiff was involved in a car accident. Plaintiff retained attorneys James Baum and Keith Karr for representation in a personal injury action against Carrie Dickens, the driver of a car involved in an automobile accident. On September 9, 1996, Plaintiff filed suit against Ms. Dickens in the Franklin County Court of Common Pleas (Case No.

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1996 CVC 09-6798). On July 17, 1997, Plaintiff voluntarily dismissed his claims against Ms. Dickens without prejudice.

On July 22, 1998, Plaintiff re-filed his claims against Ms. Dickens in the Franklin County Court of Common Pleas (Case No. 1998 CVC 07-5636). The court dismissed the re-filed complaint with prejudice on January 6, 1999, because it had not been filed within one year from the date of the voluntary dismissal pursuant to Civ. R. 41(A).

Subsequently, on January 19, 2000, Plaintiff advanced an action against defendants James Baum, Keith Karr, and the law firm of Karr & Sherman L.P.A., for legal malpractice in the Franklin County Court of Common Pleas (Case No. 2000 CVA 01-491). In his suit against the defendants, Plaintiff alleged that the attorneys failed to timely re-file the underlying action. On December 10, 2002, that action was dismissed otherwise than upon the merits and without prejudice as to any further action by stipulation of the parties pursuant to Civ. R. 41(A)(1)(b).

Plaintiff then re-filed that action on December 5, 2003, in the Franklin County Court of Common Pleas (Case No. 03 CVA 12-13367). On July 10, 2006, that action was dismissed otherwise than upon the merits and without prejudice as to any further action by a notice of voluntary dismissal pursuant to Civ. R. 41(A)(1)(a).

On June 13, 2007, Plaintiff filed the instant legal malpractice action against Defendants James Baum and the law firm of Karr & Sherman L.P.A. Defendants now request dismissal of the instant re-filed action.

Plaintiff's Motion to Strike

On September 5, 2007, Plaintiff filed a Motion to Strike. Plaintiff seeks to strike Exhibits B and C attached to Defendants' Combined Motion to Dismiss Plaintiff's Amended Complaint and Reply. Plaintiff argues that the exhibits should be stricken as they are matters outside of the pleadings and therefore improper under a Civ. R. 12(B)(6) motion to dismiss. Defendants respond that the exhibits are necessary for rulings on the motion but fail to cite any case law to support their contentions. Exhibit B is a copy of the Stipulation of Dismissal without Prejudice

EXHIBIT 3

filed in Case No. 2000 CVA 01-491 and Exhibit C is a copy of the Notice of Voluntary Dismissal filed in Case No. 2003 CVA 12-13367.

It is well-settled Ohio law that a court must test only the sufficiency of the complaint or the amended complaint when ruling on a Civ. R. 12(B)(6) motion. *State ex rel. Keating v. Pressman* (1974), 38 Ohio St.2d 161. After review of the record and the law, this Court finds that Exhibits B and C are matters outside of the pleadings and therefore not required to test the sufficiency of Plaintiff's Amended Complaint. Plaintiff's Motion to Strike is **GRANTED** and Exhibits B and C of Defendants' Combined Motion to Dismiss the Amended Complaint are **STRICKEN**.

Procedural Considerations

A Civ. R. 12(B)(6) motion to dismiss is a procedural motion designed to test the sufficiency of a complaint or cause of action. *Thompson v. Central Ohio Cellular, Inc.* (1994), 93 Ohio App.3d 530, 538 citing *Hanson v. Guernsey Cty. Bd. of Commrs.* (1992), 65 Ohio St.3d 545. Civ. R. 12(B) provides, in pertinent part:

Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted, . . . A motion making any of these defenses shall be made before pleading if a further pleading is permitted.

The Ohio Supreme Court explained that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *O'Brien v. University Comm. Tenants Union, Inc.* (1975), 42 Ohio St.2d 242, 245 (citation omitted). Further, "when a party files a motion to dismiss for failure to state a claim, all the factual allegations of the complaint must be taken as true and all reasonable inferences must be drawn in favor of the nonmoving party." *Byrd v. Faber* (1991), 57 Ohio St.3d 56, 60 (citations omitted). However, a party must bear in

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mind that "while the factual allegations of the complaint are taken as true, the same cannot be said about unsupported conclusions." *Thompson*; see also *State ex rel. Hickman v. Capots* (1989), 45 Ohio St.3d 324 ("Unsupported conclusions of a complaint are not considered admitted, *** and are not sufficient to withstand a motion to dismiss****") (citations omitted).

Defendants argue that Plaintiff may only use Ohio's Savings Statute, RC § 2305.19, once to invoke an additional one-year time period to re-file this action, and that Plaintiff has used the Savings Statute twice. Defendants contend that Plaintiff used the Savings Statute on December 5, 2003 and June 13, 2007. Accordingly, Defendants contend that Plaintiff was barred by the "one-use-rule" from re-filing on June 13, 2007 because Plaintiff had already used the Savings Statute on December 5, 2003 to re-file this action. However, Plaintiff responds that a question of fact exists as to whether the attorney-client relationship between Plaintiff and Defendants existed at the time of the first dismissal and the first re-filing so as to invoke the original statute of limitations. Therefore, Plaintiff contends that the Savings Statute was invoked only once, at the time of the second re-filing, and thus dismissal would be improper.

The Savings Statute provides a plaintiff with the option of commencing a new action within either (1) "one year after the date of reversal of the judgment or the plaintiff's failure otherwise than upon the merits or"; (2) "the period of the original applicable statute of limitations, whichever occurs later." Plaintiff argues that during the entire attorney-client relationship between the parties, Defendants held a sum of Plaintiff's money in trust for him in the underlying personal injury action, and that Defendants failed to return the money until on or about November 2, 2004. Under this set of facts, Plaintiff's position is that the statute of limitations did not expire until November 2, 2005. Therefore, Plaintiff contends that the attorney-client relationship was in existence at the time of the first dismissal on December 10, 2002, and that the relationship was intact at the time of the first re-filing on December 5, 2003. Further, Defendants held Plaintiff's money in trust as late as March 29, 2004, thus the statute of limitations could have conceivably ran until March 29, 2005. As such, Plaintiff argues that the

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Savings Statute was not used against Defendants for legal malpractice since that filing and re-filing was made under the original statute of limitations. Under both these circumstances, it is plausible that the Savings Statute would have been used only on June 13, 2007, when Plaintiff re-filed the action that was dismissed on July 10, 2006.

Ohio courts have consistently held that the question of when an attorney-client relationship for a particular transaction or task has terminated is one of fact which is to be decided on a case-by-case basis. Accordingly, a motion to dismiss should not be granted when a question of fact exists as to when the attorney-client relationship terminated between the parties involved. See *Omni-Food & Fashion, Inc. v. Smith* (1988), 38 Ohio St.3d 385, 388.

There are at least three dates when the original statute of limitations could have expired as to Plaintiff's claims for legal malpractice against Defendants, thereby creating a genuine dispute of fact as to when the attorney-client relationship between the parties properly ended. Thus, there is a genuine dispute of fact as to whether the Savings Statute was used for the first re-filing on December 5, 2003. Based on the factual dispute, this Court finds that dismissal is unwarranted.

Even if the Court were to agree with Defendants that there is not a question of fact as to the date when the attorney-client relationship between the parties ended, Defendants fail to properly rebut Plaintiff's argument that the Savings Statute does not apply when the action is dismissed by the stipulation of the parties. Defendants fail to support their contention that the one re-file rule applies when the action is dismissed by stipulation of the parties with appropriate case law. Instead, Defendants argue that allowing Plaintiff to use the Savings Statute a second time would frustrate the purpose of the Civil Rules. However, Defendants support this argument with case law that is factually distinguishable from the instant case. Notably, Defendants rely on cases that were dismissed because the plaintiff filed a unilateral notice of dismissal under Civ. R. 41(1)(a) more than once or once in conjunction with other dismissals and then the plaintiff re-filed the action.

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In the case sub judice, the first dismissal of the action was stipulated by both parties under Civ. R. 41(1)(b), and Plaintiff argues that there is no authority that provides that the Savings Statute has been limited in use to one-refiling when one dismissal was by stipulation of the parties with an agreement for a right to re-file. Plaintiff contends that such authority is lacking because any such holding would lead to an unconstitutional extension and application of RC § 2305.19 under Article IV, Section 5(B) of the Ohio Constitution. Plaintiff further contends that such reasoning is in direct conflict with Civ. R. 41 and limits Plaintiff to one re-filing. In addition, Plaintiff argues that such limitation serves no useful purpose when a defendant participates in one of the dismissals and re-filings through stipulation, as is the case here.

After careful consideration of the record and the law, this Court finds that Defendants' request for dismissal is not well taken as a set of facts exist consistent with the allegations within the Amended Complaint that would allow Plaintiff relief. Therefore, Defendants are not entitled to dismissal. Accordingly, it is hereby,

ORDERED that Defendants' Motion to Dismiss filed July 27, 2007 is **DENIED**;

ORDERED that Defendants' Combined Motion to Dismiss Plaintiff's Amended Complaint filed September 5, 2007 is **DENIED**; and

ORDERED that Plaintiff's Motion to Strike filed September 24, 2007 is **GRANTED**.

IT IS SO ORDERED.



TIMOTHY S. HORTON, JUDGE

COPIES TO:

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Counsel for Defendants

EXHIBIT 3

Exhibit 4

**Decision and Entry of the Common Pleas Court of Franklin
County [Cocroft, Judge] dated August 17, 2010.**

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

Clifford L. Boggs,

Plaintiff,

v.

James L. Baum, et al.,

Defendants.

Case No. 07CVA06-7848 (Cocroft, J.)

TERMINATION NO: 18
BY: AEF 8-17-10
FINAL APPEALABLE ORDER

2010 AUG 17 PM 3:49

DECISION AND ENTRY GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, FILED APRIL 30, 2010

Rendered this 17th day of August, 2010

COCROFT, J.

This matter is before the Court on the motion for summary judgment filed by the defendants, James L. Baum and Karr & Sherman Co., L.P.A., on April 30, 2010. The plaintiff, Clifford L. Boggs, filed a memorandum contra on June 28, 2010. The defendants filed a reply on July 30, 2010. This matter is now ripe for decision.

From September 6, 1996, until January 20, 1999, the defendants were retained by the plaintiff to provide legal representation regarding a personal injury claim. (Amended Complaint, ¶ 16). The plaintiff contends that the defendants breached their duty of care by negligently pursuing and dismissing a complaint they filed on the plaintiff's behalf, Case No. 96CVC09-6798. (Id, ¶ 19). The plaintiff further contends that the defendants failed to properly and timely re-file the dismissed complaint. (Id, ¶ 20).

This legal malpractice action was originally filed on January 19, 2000, as Case No. 00CVA01-491. (Id, ¶ 1). On December 10, 2002, that action was dismissed without prejudice by stipulation of the parties, pursuant to Civ. R. 41(a)(1)(b). (Id, ¶ 2). That

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EXHIBIT 4

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action was then re-filed on December 5, 2003, as Case No. 03CVA12-13367. (Id, ¶ 3). That action was subsequently dismissed without prejudice by notice of voluntary dismissal, pursuant to Civ. R. 41(a)(1)(a). (Id, ¶ 4). The current action represents the re-filing of the previous action.¹

The defendants contend that the plaintiff's claims are barred by the statute of limitations. (Defendants' motion for summary judgment, p. 5). Specifically, the defendant contends that the plaintiff can only use the Ohio Savings Statute once to invoke an additional one-year time period in which to re-file an action. (Id). The defendants further contend that, because the attorney-client relationship ended with the filing of the first malpractice action in 2000, the one-year statute of limitations has expired, pursuant to R.C. 2305.11. (Id, p. 5).

Conversely, the plaintiffs contend that the stipulation in the first dismissal provided for the re-filing and, therefore, the Ohio Savings Statute did not apply to the 2003 action. (Plaintiff memorandum in opposition, p. 5). Additionally, the plaintiffs contend that there is a genuine issue of material fact as to when the attorney-client relationship ended. (Id, p. 4).

STANDARD OF REVIEW

Civ. R. 56(C) governs a motion for summary judgment. The Ohio Supreme Court has explained the Rule's requirements:

Civ. R. 56(C) provides that before summary judgment may be granted, it must be determined that (1) no genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds

¹ The plaintiff contends that the defendants held a sum of the plaintiff's money in trust for him in the underlying personal injury action. (Amended Complaint, ¶ 6). The plaintiff also contends that the defendants failed to return that sum until March 29, 2004. (Id).

can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to the party against whom the motion for summary judgment is made. *Temple v. Wear United, Inc.* (1977), 50 Ohio St. 2d 317, 327.

The party seeking summary judgment bears the burden of proof in showing that no material issues of fact remain to be litigated. *Celotex Corp. v. Catrett* (1987), 477 U.S. 317. All doubts must be resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg* (1992), 65 Ohio St. 2d 356. However, the nonmoving party is required "to produce evidence on any issue for which that party bears the burden of production at trial." *Wing v. Anchor Media* (1991), 59 Ohio St. 108, 111. Civ. R. 56(E) codifies this concept and provides in pertinent part that:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response...must set forth specific facts showing there is a genuine issue for trial.

Trial courts should award summary judgment with caution, being careful to resolve doubts and construe evidence in favor of the nonmoving party. *Bishop v. Waterbeds 'N' Stuff*, (Franklin App.) 2002-Ohio-2422 at ¶8, citing *Welco Industries, Inc. v. Applied Cos.* (1993) 67 Ohio St. 3d 344, 346.

LAW AND ARGUMENT

A. ATTORNEY-CLIENT RELATIONSHIP

A legal malpractice claim accrues when "there is a cognizable event whereby the client discovers or should have discovered that his injury was related to his attorney's act or non-act and the client is put on notice of a need to pursue his possible remedies against the attorney or when the attorney-client relationship for that particular transaction or undertaking terminates, whichever occurs later." *Zimmie v. Calfee, Halter*

& *Griswold* (1989), 43 Ohio St. 3d 54, 538 N.E.2d 398, at syllabus. (Emphasis added).

"Generally, the attorney-client relationship is consensual, subject to termination by acts of either party." *Burzynski v. Bradley & Bradley & Farris Co., L.P.A.*, 2001 Ohio 8846, ¶ 11; citing *Columbus Credit Co. v. Evans* (1992), 82 Ohio App. 3d 798, 804, 613 N.E.2d 671. Conduct which dissolves the essential mutual confidence between attorney and client signifies the end of the attorney-client relationship. *DiSabato v. Thomas M. Tyack & Assocs. Co., L.P.A.*, 1999 Ohio App. LEXIS 4212 ; citing *Brown v. Johnstone* (1982), 5 Ohio App. 3d 165, 166-167, 450 N.E.2d 693. Such conduct includes a letter notifying a client that the attorney-client relationship has been terminated, or the client retaining another attorney. *Id.*; citing *Flynt v. Brownfield, Bowen & Bally* (C.A.6, 1989), 882 F.2d 1048, and *Brown, supra.* See, also, *Wozniak v. Tonidandel* (1997), 121 Ohio App. 3d 221, 226, 699 N.E.2d 555 (a letter from an attorney to a client can terminate the attorney-client relationship). (Emphasis added).

The determination of when the attorney-client relationship for a particular transaction terminates is a question of fact. *Ruckman v. Zacks Law Group, LLC*, 2008 Ohio App. LEXIS 958, ¶ 17; citing *Omni-Food & Fashion, Inc. v. Smith* (1988), 38 Ohio St.3d 385, 388, 528 N.E.2d 941. "However, the question of when the attorney-client relationship was terminated may be taken away from the trier of fact * * * if affirmative actions that are patently inconsistent with a continued attorney-client relationship have been undertaken by either party." *Id.*; citing *Steindler v. Meyers, Lamanna & Roman*, Cuyahoga App. No. 86852, 2006 Ohio 4097, P11, citing *Downey v. Corrigan*, Summit App. No. 21785, 2004 Ohio 2510. (Emphasis added).

The defendants contend that the attorney-client relationship terminated when the

plaintiff retained attorney Steven Brown to represent him in the legal malpractice action and on January 19, 2000, filed suit against the defendants. (Defendants' motion for summary judgment, p. 3). No further legal advice was ever sought by the plaintiff or provided by the defendants. (Karr Affidavit, ¶ 8). However, the defendants were notified in January 2004 that they still had an expense retainer from the plaintiff in the defendants' trust account. (Id, ¶ 9). The defendants contend that the funds were promptly returned once the matter was brought to their attention. (Id, ¶¶ 9-10). Conversely, the plaintiff contends that the attorney-client relationship did not terminate until the \$3,000.00 held in trust to the plaintiff was returned on March 25, 2004. (Erfurt Affidavit, ¶16). Upon review, this Court finds that the conduct of filing the malpractice claim was an 'affirmative act' which dissolved the 'essential mutual confidence' between the attorney and client and, therefore, signified the end of the attorney-client relationship on January 19, 2000.

B. OHIO SAVINGS STATUTE

R.C. 2305.11(A) provides:

(A) An action for libel, slander, malicious prosecution, or false imprisonment, an action for malpractice other than an action upon a medical, dental, optometric, or chiropractic claim, or an action upon a statute for a penalty or forfeiture shall be commenced within one year after the cause of action accrued... (Emphasis added).

R.C. 2305.19(A) provides:

(A) In any action that is commenced or attempted to be commenced, if in due time a judgment for the plaintiff is reversed or if the plaintiff fails otherwise than upon the merits, the plaintiff or, if the plaintiff dies and the cause of action survives, the plaintiff's representative may commence a new action within one year after the date of the reversal of the judgment or the plaintiff's failure otherwise than upon the merits or within the period of the original applicable statute of limitations, whichever occurs later. This division applies to any claim asserted in any pleading by a defendant. (Emphasis added).

The savings statute permits a plaintiff to re-file a claim that would otherwise be time-barred within one year after the plaintiff fails otherwise than upon the merits. *Boozer v. Univ. of Cincinnati Sch. of Law*, 2006 Ohio 2610, ¶ 16. In order to invoke the protection of the savings statute after a voluntary dismissal, a party must: (1) file the original claim within the applicable statute of limitations; (2) dismiss the original claim after the expiration of the statute of limitations; and (3) re-file the claim within one year after dismissal. *Reese v. Ohio State Univ. Hosp.* (1983), 6 Ohio St.3d 162, 6 Ohio B. 221, 451 N.E.2d 1196. The saving statute can be used only once to invoke an additional one-year time period in which to re-file an action." *Hancock v. Kroger Co.* (1995), 103 Ohio App.3d 266, 269, 659 N.E.2d 336. Unilateral dismissal by notice under Civ.R. 41(A)(1)(a) is available to a plaintiff only once, and a second dismissal by notice acts as an adjudication upon the merits. *Boozer*, ¶ 17; citing *Mays v. Kroger Co.* (1998), 129 Ohio App.3d 159, 162, 717 N.E.2d 398. (Emphasis added).

In this case, the plaintiff contends that the 'one dismissal rule' does not apply because the first dismissal was by stipulation pursuant to Civ. R. 41(a)(1)(b) and, therefore, the Supreme Court's holding regarding the savings statute should be ignored. Conversely, the defendants direct this Court's attention to *Frazier v. Fairfield Medical Center*, 2009 Ohio App. LEXIS 4123 (5th Dist. 2009). In *Frazier*, the appellant filed her first complaint (*Frazier I*), later dismissing it pursuant to a Civ. R. 41 (A)(1)(b) stipulation of dismissal. The two-year statute of limitations contained in R.C. 2125.02 expired on May 7, 2004, while *Frazier I* was pending. *Id.* at ¶ 6. On March 17, 2006, the appellant re-filed her complaint (*Frazier II*), then later dismissed the case by means of a Civ. R. 41

(A)(1)(a) notice of dismissal. *Id.*, at ¶ 7. On September 12, 2008, the appellant re-filed her case (*Frazier III*). On October 7, 2008, the appellee moved for summary judgment, contending that the appellant could not use the savings statute, R.C. 2125.04, because she had used it in filing *Frazier II*. *Id.*, at ¶ 8. The trial court held *Frazier III* was barred by the statute of limitations and that the appellant had already once used the savings statute.

On appeal, the Fifth District held that the two-dismissal rule did not bar the filing of *Frazier III*. *Id.*, at ¶ 28. However, a dismissal without prejudice means the dismissal has no res judicata effect, but it does not toll the statute of limitations or otherwise extend the time for refiling. *Id.*, at ¶ 29; citing *Wolfe v. Priano*, Perry App. No. 2008-CA-8, 2009 Ohio 2208, citing *Brubaker v. Ross*, Franklin App. No. 01-AP-1431, 2002 Ohio 4396. The Fifth District further stated that in order to employ the savings statute, a plaintiff must commence an action before the statute of limitations has expired, and the first action must fail other than on the merits after the statute of limitations has expired. *Id.*, at ¶ 35. If a plaintiff has already used the savings statute once, it means she has re-filed an action after the statute of limitations ran, and accordingly, an attempt to use the savings statute a second time constitutes an attempt to re-file an action that was not commenced before the statute of limitations expired. *Id.* If courts permitted parties to use the savings statute more than once, a plaintiff could use the savings statute to keep her cause of action alive long past the time the statute of limitations had expired. *Id.* Thus, the savings statute can be used only once to re-file a case. *Id.*, at ¶ 36; citing *Thomas v. Freeman*, 79 Ohio St. 3d 221, 1997 Ohio 395, 680 N.E.2d 997. (Emphasis added).

In this case, the statute of limitations for malpractice is one year, pursuant to R.C. 2305.11(A). The stipulation by dismissal by the parties was filed on December 10, 2002. The plaintiff used the savings statute to re-file the action before December 10, 2003. The second action was dismissed by voluntary dismissal. The action was filed a third time, invoking the savings statute for the second time. However, as the defendants correctly point out, the second attempt to re-file the action is outside the time permitted by the savings statute, which is one year from December 10, 2002. As such, this Court finds that the plaintiff's current malpractice action is barred by the statute of limitations.

CONCLUSION

Accordingly, this Court finds the defendants' motion for summary judgment well-taken, and it is hereby GRANTED.

IT IS SO ORDERED.


KIMBERLY COCROFT, JUDGE

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