

IN THE SUPREME COURT OF OHIO

CASE NO. 2011 - 1013

11-1913

On Appeal from the Eighth Appellate District
Cuyahoga County, Ohio
Court of Appeals Case No. CA 11 096302

KELLY VOCAIRE

Plaintiff-Appellant,

v.

STAFFORD & STAFFORD CO. LPA., et al.,

Defendants-Appellees

DEFENDANTS-APPELLEES' STAFFORD & STAFFORD CO. LPA, VINCENT A. STAFFORD, ESQ. AND KENNETH J. LEWIS' MEMORANDUM OPPOSING JURISDICTION

Kelly M. Vocaire (Pro Se)
206 Fairmount Drive
Hermitage, PA 16148

Plaintiff-Appellant, *Pro Se*

Deborah L. Smith
GUARNIERI & SECREST, PLL
151 East Market Street
P.O. Box 4270
Warren, Ohio 44482
(330) 393-1584
Email – ganslaw@netdotcom.com

Counsel for Non-Party Movant, Tamera Ochs-Rothschild, Trustee

John P. O'Neil (0067893)
Gregory G. Guice (0076524)
REMINGER CO., L.P.A.
1400 Midland Building
101 Prospect Avenue West
Cleveland, Ohio 44115-1093
Tel. (216) 687-1311
Fax (216) 687-1841
Email: joneil@reminger.com
gguice@reminger.com

*Counsel for Defendants-Appellees
Stafford & Stafford Co. LPA, Vincent
A. Stafford, Esq. and Kenneth J. Lewis,
Esq.*

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INTRODUCTION

Plaintiff-Appellant Kelly Vocaire (“Vocaire”) filed a complaint against the Stafford Defendants in the Cuyahoga County Court of Common Pleas alleging legal malpractice in the handling of a domestic relations action. The trial court resolved the matter on a Motion to Dismiss, finding that Vocaire’s claim was untimely pursuant to the application of Ohio’s one-year statute of limitations. Prior to the trial court’s dismissal of Vocaire’s Complaint, the Trustee of Vocaire’s bankruptcy proceedings attempted to enter the case as a party in interest pursuant to Civ. R. 17. The trial court’s rulings were affirmed on appeal.

The Trustee has filed a Memorandum in Support of Jurisdiction which does not challenge either the trial court or the appellate court’s denial of her request to become a party to this dispute. Instead, the Trustee has filed a nearly identical copy of the Memorandum in Support of Jurisdiction filed by *pro se* appellant Vocaire. As such, the Trustee has abandoned any claim related to the lower courts’ rejection of her attempt to become a party to this action. Because the Trustee is not a proper party to this action, she has no standing to petition this Court on behalf of Vocaire and her Memorandum in Support of Jurisdiction should be either struck from the record or denied. Due to Vocaire’s filing of bankruptcy and failure to timely include the Trustee in the proceedings, she too has no standing to further pursue this matter. Moreover, regardless of the identity of the party pursuing this matter, the claim is barred by the statute of limitations.

STATEMENT OF GREAT GENERAL OR PUBLIC INTEREST

This is not a case of public or great general interest. Rather, the fact-specific holding of the Eighth Appellate District in the within matter, which is in conformity with the well-established case law in Ohio, will have little, if any, significant impact beyond the parties to this dispute.

In an effort to manufacture an issue which captures this Court's attention, Appellant¹ has presented an explanation as to why this case is a case of public or great general interest which dismisses the evidentiary findings in the record and obscures the breadth of case law from both this Court and Ohio's appellate courts which provides clear guidance to litigants, practitioners, and the lower courts as to the application of Ohio's one-year statute of limitation for attorney malpractice and the proper identification of those facts which constitute a "cognizable event" for purposes of initiating the running of the statute of limitations. The gravamen of Appellant's argument is that both the Eighth District Court of Appeals and the trial court ignored claims of fraud and misrepresentation in finding the Appellant's claims time-barred as a matter of law. As such, the within appeal, by its own terms, concerns the facts and procedural history of this case and, thus, does not affect other pending cases, nor would it affect future cases litigated in this State.

The issue purportedly raised by Appellant in her sole Proposition of Law, what constitutes a cognizable event for purposes of triggering R.C. 2305.11(A), has been applied consistently since this Court's decision in *Flowers v. Walker* (1992), 63 Ohio St.3d 546, 549 ("constructive

1. Because both Vocaire and the Trustee filed virtually identical Memorandum in Support of Jurisdiction, "Appellant" refers to both Plaintiff-Appellant Vocaire, as well as the Trustee, despite the fact that the Trustee is an improper party to this appeal.

knowledge of facts, rather than actual knowledge of their legal significance, is enough to start the statute of limitations running...”). As such, this case does not provide any basis upon which the Court is compelled to revisit existing Ohio law and no meaningful demonstration has been made by Appellant that a conflict now exists among the appellate districts concerning the application of the foregoing authority.

The Eighth District Court of Appeals issued a well-reasoned, unanimous decision which succinctly detailed the facts and the procedural history of this matter and concretely establishes that this Court should decline jurisdiction relative to the captioned matter. In the decision of the Eighth District, which serves as the basis for Appellant’s appeal, the court determined that the trial court correctly granted summary judgment in favor of Appellees where the undisputed record evidence demonstrated: (1) Appellant was on notice of a cognizable event no later than September 2004; and, (2) the attorney-client relationship was terminated on September 15, 2004. *Vocaire v. Stafford & Stafford Co., LPA*, 8th Dist. No. 96302, 2011-Ohio-4957.

Based upon these findings, the appellate court determined in a thoughtful, reasoned manner that the trial court correctly granted judgment in favor of the Appellees. In reaching this conclusion, the Eighth Appellate District applied the guiding principles of this Court as set forth in *Zimmie v. Calfee, Halter & Griswold* (1989), 43 Ohio St.3d 54; and *Flowers v. Walker*, supra.

In truth, this case involves the well-established proposition that an action for legal malpractice accrues and the statute of limitations begins to run when there is a cognizable event whereby the client discovers or should have discovered that her injury was related to her attorney’s act or non-act. There is no new or otherwise novel legal interpretation of these

established legal principles implicated by this appeal.

This Court's jurisdiction is reserved for a narrow class of cases which present significant, novel propositions of law. Appellant's admittedly fact-driven inquiry is inherently limited to her individual lawsuit and does not rise to the level of public or great general interest. No demonstration has been made by Appellant that some conflict or confusion exists concerning how the appellate districts are applying R.C. 2305.11(A), even in claims where the plaintiff alleges she was misled by the actions of her former counsel. Instead, Appellant asks this Court to further review the decisions of the trial court and Eighth District Court of Appeals as she believes the lower courts failed to consider factual evidence supportive of her position.

In light of the foregoing, Appellees respectfully submit that the captioned matter fails to present any issue of public or great general interest and, as such, rests beyond the purview of this Court's discretionary jurisdiction.

COUNTER-STATEMENT OF THE CASE AND FACTS

The trial court adjudicated this matter pursuant to a motion to dismiss filed by Defendants-Appellees Stafford & Stafford Co. LPA, Vincent A. Stafford, Esq. and Kenneth J. Lewis, Esq.'s ("the Stafford Defendants") in accordance with Civ. R. 12(B)(6). As such, the record evidence in this dispute is limited to the allegations contained within Plaintiff-Appellant Kelly Vocaire's ("Vocaire") Complaint. That pleading alleges that the Stafford Defendants began representing Vocaire with respect to a domestic relations matter in December 1997. (Compl, ¶ 6.) Thereafter, the Stafford Defendants filed a motion to withdraw from the representation on November 17, 1998, but allegedly did not inform Vocaire of their intent to withdraw. (Id., ¶ 11.)

After filing their motion to withdraw, the Stafford Defendants allegedly also failed to notify Vocaire of an upcoming January 10, 2001, hearing. (Id., ¶¶ 14-15.) As a result, Vocaire did not attend the hearing and her child support obligation was increased from \$384.00 per month to \$598.00 per month. (Id., ¶¶ 21-22.)

Vocaire admittedly became aware of the increased child support obligation in October, 2001 and brought the matter to the attention of the Stafford Defendants and, while they allegedly stated they would “take care of it,” this never happened. (Id., ¶¶ 29-30.) According to the Complaint, the attorney-client relationship with the Stafford Defendants finally terminated on September 14, 2004. (Id., ¶¶ 28 & 30.) Despite these facts, Vocaire did not file her complaint for legal malpractice until January 30, 2006, claiming that she did not have proof that the Stafford Defendants failed to “take care” of the child support obligation until some time in 2005. (Id., ¶¶ 35-36.)

Based upon these facts, the Stafford Defendants filed a Motion to Dismiss based on: 1) the fact that Vocaire declared bankruptcy in 2004, making the claim a part of the bankruptcy estate and the Trustee was not joined as a party to the action; and 2) the fact that Vocaire’s claims were time barred.²

The trial court stayed the matter pending a resolution of Vocaire’s bankruptcy petition. Then, on November 13, 2009, Vocaire filed several motions seeking to reactivate the case including a Motion to Release Stay/Motion to Schedule Case Management Conference and a Motion to Join Bankruptcy Trustee Pursuant to Civ. R. 17(A). Ultimately, the trial court denied

² As Vocaire’s Memorandum in Support of Jurisdiction is silent as to the trial court’s finding that she is not the real party in interest for purposes of pursuing this action, this claim has been abandoned and Vocaire’s Memorandum in Support of Jurisdiction should be struck as she does

Vocaire's Motion to Join Bankruptcy Trustee and granted the Stafford Defendants' Motion to Dismiss. Vocaire appealed the trial court's dismissal to the Eighth District Court of Appeals.

In affirming the trial court's dismissal based upon the one-year statute of limitations, the appellate court found that the undisputed facts in the record clearly demonstrated that Vocaire was on notice of a cognizable event as early as October 2001 when she learned of the increase in her child support. By the time the attorney-client relationship terminated on September 15, 2004, "Vocaire should have known the increased child support obligations was related to her attorney's act or non-act, especially since they failed to 'take care' of it as promised. Thus, the statute of limitations started running on September 15, 2004, at the very latest. Yet Vocaire did not file the complaint until January 27, 2006, well over one year later." See, *Vocaire v. Stafford*, supra, ¶ 16.

ARGUMENT AGAINST APPELLANT'S PROPOSITION OF LAW

A. The Statute Of Limitations On A Legal Malpractice Claim Begins To Run When The Client Discovers Or Should Have Discovered Facts And Circumstances Which Lead, Or Should Lead, The Client To Believe That A Questionable Legal Practice May Have Occurred

It is axiomatic that "[u]nder R.C. 2305.11(A), an action for legal malpractice accrues and the statute of limitations begins to run when there is a cognizable event whereby the client discovers or should have discovered 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, citing *Omni-Food & Fashion, Inc. v. Smith* (1988), 38 Ohio St. 3d 385. *Zimmie* and *Omni-Food* require two factual determinations: (1) When should the client have known that he or

not have standing to bring this appeal.

she may have an injury caused by his or her attorney? and, (2) When did the attorney-client relationship terminate? The later of these two dates is the date that starts the running of the statute of limitations. *Zimmie*, syllabus; *Omni-Food*, paragraph one of the syllabus.

As explained by this Court in *Zimmie*, a “cognizable event” is something that should alert a reasonable person that a questionable legal practice may have occurred. (*Id.* at 57-58.) Notably, the event (or series of events) is treated in terms of notice or awareness, and can be actual or constructive. *Flowers v. Walker* (1992), 63 Ohio St.3d 546, 549; *Spencer v. McGill* (1993), 87 Ohio App.3d 267, 278. Here, Vocaire asks this Court to abrogate this existing law by creating a new standard for legal malpractice which requires the client to “become fully aware” of alleged mistakes in lawyering before the statute of limitations begins to run. This Proposition of Law seeks to reverse the holding in *Flowers v. Walker* (1992), 63 Ohio St.3d 546 and must be denied.

1. The trial court and appellate court properly applied this Court’s holdings in *Zimmie* and *Flowers* to deny Vocaire’s claims as a matter of law

The gravamen of Vocaire’s argument is that the statute of limitations should not begin to run until the she had actual knowledge that the Stafford Defendants did not truthfully communicate the status her child support obligation or their alleged failure to correct it. There is no merit to this argument as it presupposes Vocaire needed actual knowledge of the alleged misrepresentation to start the statute of limitations clock. This theory is contrary to Ohio law. See, *Flowers v. Walker*, 63 Ohio St.3d at 549 (“constructive knowledge of facts, rather than actual knowledge of their legal significance, is enough to start the statute of limitations running under the discovery rule.”)

The facts of this case are important, as the Eighth Appellate District's holding is very much limited to these specific circumstances. In this regard, the facts in evidence relied upon by the courts below to conclude that a cognizable event occurred no later than 2004 are as follows:

1. Vocaire was aware of an increase in her child support obligation in October, 2001;
2. Vocaire was aware of the Stafford Defendants' alleged failure to notify her of the January 10, 2001, hearing "sometime after October, 2004;
3. Vocaire suspected there was a problem with the representation because she admittedly complained about the increase in her child support obligation to the Stafford Defendants "repeatedly from August, 2002 through September 14, 2004," but nothing happened; and,
4. The attorney-client relationship terminated on September 15, 2004.

Despite these overwhelming facts demonstrating that Vocaire was on notice of and perceived mistakes in lawyering by the Stafford Defendants, she argued to the trial court, the appellate court, and now to this Court, that these facts do not evince a cognizable event. Rather, Vocaire argues that the cognizable event could not have occurred until she had concrete proof that the Stafford Defendants did not seek to amend her child support obligation as they allegedly told her they would do. This contention is contrary to Ohio law and was flatly rejected by the appellate court.

As succinctly summarized by the Eighth District below:

The test for identifying a cognizable event is an objective one. *Woodrow v. Heintschel*, Lucas App. No. L-10-1206, 2011-Ohio-1840, ¶ 40. How would a reasonable person, dissatisfied with Stafford's efforts to correct this problem, have reacted? "The test necessarily takes into account all the relevant facts and circumstances." *Id.* A reasonable person would not have waited almost three years to investigate why her child support payments increased by over \$200 per month especially since the increased

monthly obligation applied retroactively for a total “in excess of \$45,000.”

Vocaire obviously suspected there was a problem because she admits she repeatedly asked her attorneys to correct it. By the time the attorney-client relationship terminated on September 15, 2004, Vocaire should have known the increased child support obligation was related to her attorney’s act or non-act, especially since they failed to “take care” of it as promised.

Vocaire v. Stafford & Stafford, supra, at ¶ 15.

These undisputed facts viewed through the filter of this Court’s prior precedent in *Zimmie* and *Flowers*, lead to the inescapable conclusion that a cognizable event occurred no later than 2004 and started the statute of limitations running. Even assuming the Stafford Defendants “mislead” Vocaire about trying to correct the child support award and that they failed to notify her of the January, 2001, hearing, which they did not, a reasonable person would still have been on notice that something was amiss and some minimal inquiry was warranted to clarify the admitted dissatisfaction regarding the child support award. As she cannot escape this fact, Vocaire now appeals to this Court to change the standard so as to allow her claim against the Stafford Defendants to survive. This is not an appropriate rationale to invoke this Court’s discretionary jurisdiction and the within appeal should be dismissed.

B. The Trustee Has No Standing To Pursue This Appeal.

In addition to the fact that any claims against Appellees are time barred, the Trustee was never joined as a party in this matter and does not seek this Court’s discretionary review of the lower courts’ denial of her motion to join the underlying litigation as a real party in interest. As such, the Trustee has no standing to seek an appeal of the substantive issues in the case.

Ohio law is clear; a party has no right of direct appeal from an adjudication unless they were a party to the underlying action. See, *In re Adoption of T.B.S.*, 4th Dist. No. 07CA3139, 2007-Ohio-3559. Being allowed to appear in an action and to submit a brief in the trial court likewise does not give a person a right to appeal. *Cincinnati v. Kellogg* (1950), 153 Ohio St. 291; *In re McAuley* (1979), 63 Ohio App.2d 5.

While it is true that the Trustee did attempt to join the action filed by Vocaire pursuant to Civ.R. 17, and that this request was denied by both the trial and appellate court, the Trustee is not appealing these decisions to this Court. Instead, the sole basis of the Trustee's Memorandum in Support of Jurisdiction is confined to arguments in favor of Vocaire's disagreement with the lower court's application of Ohio's one-year statute of limitations to Vocaire's complaint against the Stafford Defendants. The Trustee, a nonparty to this action, lacks standing to challenge the lower courts' determination on the merits and her attempt to join the Memorandum in Support of Jurisdiction filed by Vocaire is improper.

It is a well settled principle that an appeal from the denial of a motion to participate in an action is limited solely to the issue of whether the asserted right to participate exists. See, *State ex rel. Montgomery v. Columbus*, 10th Dist. No. 02AP-963, 2003-Ohio-2658, ¶ 33 (holding that appellants had no standing to appeal the trial court's judgment because they were not parties to the litigation); *Southside Community Dev. Corp. v. Levin*, 116 Ohio St.3d 1209, 1211, 2007-Ohio-6665 ("We hold that a person's assertion that it has a legal right to be a party to the BTA [Board of Tax Appeals] appeal makes it a 'party' * * * for one limited purpose: to seek the court's determination of whether the asserted right exists"); *Tomrob, Inc. v. Cuyahoga Metro*

Hous. Auth. (Sept. 11, 1997), 8th Dist. Nos. 71593 and 71688, 1997 Ohio App. LEXIS 4316 (holding that the appeal of a motion to intervene is limited solely to the issue of intervention, not the merits of the underlying appeal).

The Trustee is not attempting to appeal the trial court's refusal to allow her to join Vocaire's action against the Stafford Defendants. As a result, this claim has been abandoned and the Trustee is not a proper party to this appeal such that she should be permitted to argue the merits of Vocaire's appeal.

C. Vocaire Has No Standing To Pursue This Appeal.

In addition to being barred by the statute of limitations, Vocaire also lacks standing to prosecute this appeal. "[S]tanding prevents a person from bringing a case to protect the rights of a third party. *Mulqueeny v. Mentor Chiropractic Ctr., Inc.*, 11th Dist. Mo. 2001-L-034, 2002-Ohio-1687 citing *State ex rel. Rien Constr. Co. v. Rice* (May 7, 1999), 11th Dist. No. 99-T-0025, 1999 Ohio App. LEXIS 2101, ("Before an individual can have standing to assert a claim, he must be the "real party in interest" to the action. In defining the foregoing term, the Supreme Court of Ohio has indicated that it is not sufficient for the individual to have a general interest in the subject matter of the action; instead, the individual must be the party who will directly be helped or harmed by the outcome of the action. *Shealy v. Campbell* (1985), 20 Ohio St. 3d 23, 24."). "Similarly, a party generally may not prosecute an appeal to protect the rights of a third party." *Id.* An appeal is permitted only to correct errors injuriously affecting an appellant. *Mulqueeny* at *4, citing *Ohio Contract Carriers Assn., Inc. v. Pub. Util. Comm.* (1942), 140 Ohio St. 160, syllabus. An appellant usually does not have standing to argue issues affecting another person.

Id., citing *In re Leo D.*, 6th Dist. No. L-01-1452, 2002-Ohio-1174.

Vocaire's current appeal is solely for the benefit of the bankruptcy estate and trustee. Upon the filing of her bankruptcy petition, any and all claims possessed by Vocaire against Stafford became property of the bankruptcy estate. See *Powers v. Dankof*, 2nd Dist. No. CA 24505, 2011-Ohio-6180 (summary judgment affirmed when plaintiff-appellant was not the proper party in interest due to filing of bankruptcy and failure to join bankruptcy trustee as a party; Further, motion under Civ. R. 17(A) to incorporate trustee properly denied as untimely (i.e. 5 months after defense of lack of real party in interest raised)); See also, *Kovacs v. Thomson, Hewitt & O'Brien* (1997), 117 Ohio App.3d 465-468. (Court of appeals affirmed dismissal of claim holding that 1) plaintiffs "lack standing to bring the malpractice claim, as it was the property of the bankruptcy estate; and 2) the trustee was deprived of capacity to bring the claim derivatively because he filed his complaint after the statutory limitation period had run."). The *Kovacs* and *Powers* courts found that any malpractice claim possesses by the plaintiffs, against the defendants, was a legal interest of which the plaintiffs became divested when the claim became an asset of the bankruptcy estate. *Id.* The *Kovacs* court stated the existence of plaintiffs' cause of action for the purposes of becoming an asset of the bankruptcy estate "dates from the point at which all elements of the malpractice claim became present, regardless of whether the malpractice claim had yet accrued for purposes of establishing the limitations for bringing the claim." *Kovacs* at 469 (emphasis added).

In this matter, all of Vocaire's allegations stem from a hearing that took place in 2001, well prior to the filing of the bankruptcy, which did not occur until 2004. The date of accrual for

claims relative to the statute of limitations is different from the date of accrual relative to inclusion in a bankruptcy estate. *Kovacs* at 469. Thus, at the time when Vocaire filed the Complaint in this case, in 2006, her claims were already property of the bankruptcy estate regardless of her failure to schedule the claims properly during the bankruptcy. As a result, these claims could have only been prosecuted by the bankruptcy trustee. Vocaire had no standing to prosecute these claims and has no standing to pursue this appeal. Vocaire is not the proper party in interest and Ohio law does not allow a party with no interest in the case to prosecute claims on behalf of another party. See *Daryl E. Murphy, et al. v. Albert Jones, Jr., et al.* (May 28, 1999) 6th Dist. No. E-98-084, 1999 Ohio App. LEXIS 2379 (“Accordingly, because Auto Owners was not a party to the proceedings below and did not seek to intervene in that action, it had no right to appeal the trial court's order awarding appellees prejudgment interest and this appeal must be dismissed.”); See also *Troy J. Doucet, v. Telhio Credit Union, Inc.*, 10th Dist. No. 05AP-307, 2006-Ohio-4342 (appeal dismissed because ... “appellant is effectively “an interloper, trying to prosecute a claim that belongs to his estate in bankruptcy.”” *Biesek v. Soo Line Railroad Co.* (C.A.7, 2006), 440 F.3d 410, 413.”).

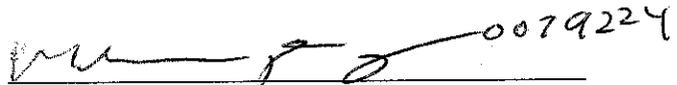
CONCLUSION

The factual and procedural history of this case does not warrant review by this Court. Appellant's dissatisfaction with the trial court's and Eighth Appellate District's disposition of her case does not rise to the level of public or great general interest required to invoke this Court's jurisdiction. The lower courts applied well-settled law to hold that, under the facts of this particular case, Vocaire's claims against the Stafford Defendants were time-barred as a matter of

law. Moreover, neither Vocaire, nor the Trustee have standing to pursue this appeal. As such, this Court's discretionary review is unnecessary.

Defendants-Appellees Stafford & Stafford Co. LPA, Vincent A. Stafford, Esq. and Kenneth J. Lewis, Esq. respectfully request that this Court deny the request for discretionary review.

Respectfully submitted,



John P. O'Neil (0067893)
Gregory G. Guice (0076524)
REMINGER CO., L.P.A.
1400 Midland Building
101 Prospect Avenue West
Cleveland, Ohio 44115-1093
Tel. (216) 687-1311
Fax (216) 687-1841
Email: gguice@reminger.com
joneil@reminger.com

*Counsel for Defendants-Appellees
Stafford & Stafford Co. LPA, Vincent A. Stafford,
Esq. and Kenneth J. Lewis, Esq.*

CERTIFICATE OF SERVICE

A copy of the foregoing *Memorandum in Opposition to Jurisdiction* was sent by regular

U.S. mail this 13 day of December, 2011 to:

Kelly M. Vocaire
206 Fairmount Drive
Hermitage, PA 16148
Appellant, *Pro Se*

Deborah L. Smith
GUARNIERI & SECREST, PLL
151 East Market Street
P.O. Box 4270
Warren, Ohio 44482
Counsel for Non-Party Movant, Tamera Ochs-Rothschild, Trustee


John P. O'Neil (0067893)
Gregory G. Guice (0076524)

*Counsel for Defendants-Appellees
Stafford & Stafford Co. LPA, Vincent A.
Stafford, Esq. and Kenneth J. Lewis, Esq.*