ORIGINAL

IN THE SUPREME COURT OF OHIO

13-0378

Terri L. Ruf,	)	
	)	
Appellant,	)	**On Appeal from the Summit County Court of Appeals, Ninth Appellate District**
	)	
v.	)	
	)	
	)	**Court of Appeals Case No. CA 26297**
Kathryn A. Belfance, et al.,	)	
	)	
Appellees.	)	

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT TERRI L. RUF

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FILED
MAR 08 2013
CLERK OF COURT
SUPREME COURT OF OHIO

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

This case raises a critical issue for clients, attorneys, and courts in Ohio involved in legal malpractice cases; with regard to the statute of limitations, does the hiring of other counsel, unbeknownst to initial counsel, *necessarily terminate* the attorney-client relationship with initial counsel regardless of subsequent conduct of either party. Ohio courts that have been confronted with this situation find that it does not. However, the Ninth District Court of Appeal's announcement in the instant matter places Ohio's appellate courts in conflict relative to this issue and the public requires the guidance of the Supreme Court of Ohio.

The Ninth District's decision in this case now creates a new, absolute, hard-and-fast rule, stating that an attorney-client relationship automatically ends, thereby triggering the statute of limitations for a legal malpractice action, upon a client's retention of other counsel. In fact, the dissenting opinion agrees and acknowledges that the Ninth District should not create a "hard and fast rule that retention of new counsel terminates an attorney-client relationship." (Dissent Op. at ¶24).

In determining when an attorney-client relationship ends for purposes of statute of limitations, Ohio courts consider *every* act and *all* of the conduct of the parties to the relationship that is found to be either inconsistent or consistent with a continued attorney-client relationship – rather than considering *only* the hiring of additional counsel. In doing so, courts conclude that the hiring of other counsel *may* be sufficient to mark the end of the original attorney-client relationship, *but not* when such act is followed by conduct of initial counsel and the client that signals the relationship is still on-going or that it clearly terminates at a later date.

An attorney acting in a manner that is consistent with an on-going attorney-client relationship (i.e., continuing to work on a client's matter at the direction and desire of the client)

and the existence of multiple acts by the parties which all *may* be construed as sufficient to mark the end of the attorney-client relationship, creates ambiguity as to when the relationship terminated. Thus, the Ninth District's newly created rule circumvents the well-established law in Ohio that the termination of an attorney-client relationship for purposes of a statute of limitations analysis must be marked by a clear and unambiguous act. *Mobberly v. Hendricks*, 9th Dist. 98 Ohio App.3d 839, 843, 649 N.E.2d 1247 (Nov. 30 1994) citing *Mastran v. Marks*, 9th Dist. No. 14270, 1990 Ohio App. LEXIS 1219. At the very least, acts that signal a continued attorney-client relationship and acts that portray the relationship has ceased creates, as Ohio courts hold, a question of fact as to the accrual date of the statute of limitations which should remain for the trier-of-fact and not be dismissed through summary judgment. *Burdge Law Office Co., L.P.A. v. Wilson*, 2d Dist. No.2002-CV-4936, 2005-Ohio-3746; *Burzynski v. Bradley & Farris Co., L.P.A.*, 10th Dist. No.01AP-782, 2001-Ohio-8846; *Monastra v. D'amore*, 8th Dist. 111 Ohio App.3d 296, 676 N.E.2d 132, (April 1, 1996). The Ninth District's new rule, however, mandates as a question of law that the hiring of other counsel automatically terminates the attorney-client relationship regardless of conduct by the parties that signals both a continued relationship and a terminated relationship.

Moreover, the Ninth District's new rule of law is opposite existing law that in Ohio, a client and an attorney may continue a relationship affording the attorney an opportunity to correct or mitigate any perceived negligence and thereby potentially avoiding the filing of a subsequent legal malpractice action. *Omni-Food & Fashion, Inc. v. Smith*, 38 Ohio St.3d 385, 387 528 N.E.2d 941.

Not only does the Ninth District's decision stand in stark contrast to every Ohio decision dealing with the present issue, it also creates a requirement that threatens to wreak havoc on

clients' freedom and ability to choose counsel and obtain the advice of an additional attorney without terminating the relationship with original counsel as a matter of law. This new rule of law created by the Ninth District forces a client to disclose its new attorney-client relationship with other counsel to its original counsel or otherwise, unknowingly jeopardize the attorney-client relationship with the original counsel for the purposes of the statute of limitations to bring a legal malpractice claim. The Ninth District's law wrongfully presumes that clients will understand and have the ability to recognize when this professional relationship forms or terminates. Further, the law disregards the reality that attorneys often require some type of formal agreement prior to even reviewing a client's matter – especially one as complex and voluminous as Ms. Ruf's matter. Simply, this new bright-line rule, denies a client an opportunity to receive the legal advice of a second attorney relative to the client's legal matter without, according to the Ninth District, terminating the attorney-client relationship with client's first attorney.

The Ninth District justifies its decision by speculating that Ms. Ruf's failure to disclose her dealings with the new attorney was done for the purpose of "deceiving" her original counsel and "tricking" it into rendering legal services.[1] The Ninth District reasoned that it must refrain from rewarding clients for such conduct. The effect of the Ninth District's law, however, will result in the discouragement and dissuasion of clients to seek out and obtain a second opinion to ensure that the client's interests are not being represented negligently by current counsel.

Even if this Court were to ignore the law with which the Ninth District's decision conflicts and the public policy it places in jeopardy, the facts of this case create extreme

[1] No evidence in the record exists to support such speculation as to Ms. Ruf's mindset during the transition from current counsel to the succeeding counsel, but rather is only the creative argument of Appellees which the Ninth District adopted.

uncertainty as to whether Ms. Ruf's action was actually time-barred. When faced with such uncertainty, Ohio courts are guided by the principle that because statutes of limitations limit "the rights of the citizens of Ohio for redress, cases in which the application of a statute of limitations is *doubtful* should be resolved in favor of permitting the case to be decided upon its merits." *Daniel v. McKinney*, 181 Ohio App.3d 1, 2009-Ohio-690, 907 N.E.2d 787, ¶56 (2d Dist.) (Emphasis added).

STATEMENT OF THE CASE AND FACTS

This case arises from a divorce in which Appellees Kathryn Belfance, Lisa Carey Dean, Kathryn A. Belfance & Associates, LLC, and Roderick Linton Belfance, LLP (collectively referred hereinafter as "Belfance") represented Appellant, Terri Ruf, in a divorce against her husband, Dr. Walter Ruf. During the preparation and proceedings of trial and post-trial, there were numerous instances of negligence on the part of Appellees which resulted in Ms. Ruf filing the instant legal malpractice action. Because those events are not currently pertinent to the present statute of limitations issue, the specific facts surrounding Belfance's negligence during the Ruf v. Ruf matter will not be discussed.

The Summit County Court of Common Pleas, Domestic Relations Division issued its Final Entry of Decree of Divorce in Ruf v. Ruf on June 28, 2007. Belfance filed a Notice to Appeal on July 18, 2007 with the Ninth District Court of Common Pleas, Summit County. Due to Belfance's failure to oversee the timely transmittal of the record, the court of appeals declined to address the merits of Ms. Ruf's appeal. Belfance subsequently filed a Notice of Appeal with this Court, but jurisdiction was declined and the appeal was dismissed on July 9, 2008.

Frustrated with the result of the divorce trial and appeal, as well as the uncertainty as to the scope of the remaining issues and the direction of the remaining post-decree divorce matters,[2] Ms. Ruf contacted domestic relations attorney Richard A. Rabb on August 12, 2008 to obtain a second opinion regarding the case upon the referral of undersigned counsel Richard S. Koblentz. Some general facts were discussed and, eventually, the two planned to meet and further discuss Ms. Ruf's divorce on that next Monday, August 18, 2008.

On August 18, 2008, Ms. Ruf and Mr. Rabb met in person and discussed, among other matters, the various pending, post-decree matters outlined above. As Mr. Rabb does with all of his prospective clients, he drafted a fee agreement on August 19, 2008 and sent a signed copy to Ms. Ruf shortly thereafter. The date on which Ms. Ruf signed the fee agreement is unknown and the present record only possesses a copy with Mr. Rabb's signature. The fee agreement contained a general description of the services he would provide to Ms. Ruf and acknowledged that Ms. Ruf agreed to pay Mr. Rabb a retainer in the amount of $8,000.00. Ms. Ruf eventually paid Mr. Rabb the retainer amount, but the date of this payment is also unknown as it is not in the current record. Ms. Ruf did not alert Belfance that she had concerns regarding Belfance's handling of her divorce case or her communications with Mr. Rabb as she desired Belfance continue her representation in post-decree matters, which would have, in Ms. Ruf's view, mitigated or extinguished her damages.

On August 25, 2008, after Ms. Ruf consulted with Mr. Rabb, Belfance filed a Motion to Release Bond and a Motion to Recuse the domestic relations judge on Ms. Ruf's behalf. Ms.

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[2] Pending matters (some of which remain to this day) included: quit-claim deed for the marital residence, division of a Charles Schwab account, lottery of wine collection, Ms. Ruf's access to and the sale of a vacation property in Montana, division of Dr. Ruf's medical practice's accounts receivable, division of certain stocks, relinquishment of certain monies in escrow, transfer of certain firearms between parties, sale of valuable paintings, Dr. Ruf's maintenance of life and health insurance, daughter's tuition, division of marital jewelry.

Belfance faxed copies of opposing counsel's Response in Opposition to Release of Supercedeas Bond and a draft Reply to opposing counsel's response to Ms. Ruf in early September 2008. Later, Ms. Belfance, Ms. Dean and Ms. Ruf met on September 11, 2008 to discuss, review and potentially sign an affidavit for disqualification prepared by Belfance. During the meeting, Ms. Ruf requested changes to the affidavit, but Ms. Belfance disagreed with the proposed changes. Eventually, this disagreement, coupled with Ms. Belfance's belief that Ms. Ruf's confidence in her as her attorneys was deteriorating, led to Ms. Belfance's proposal that the parties terminate their attorney-client relationship.

The next day, September 12, 2008, Ms. Belfance filed a Reply to Defendant's Response in Opposition to Release of Supercedeas Bond on behalf of Ms. Ruf. On that same day, Ms. Belfance drafted and subsequently sent a letter to Ms. Ruf which memorialized the discussion had during the meeting the day before and enclosed a Notice of Withdrawal of Counsel for Ms. Ruf's Signature. This letter stated in pertinent part:

> Trust and confidence are fundamental to an attorney-client relationship. Given your expressed lack of trust and confidence, it is appropriate for you to obtain new counsel. As we discussed, I will assist in the transition to your new counsel and provide your counsel with any information that will aid in finalizing your matter.

Two days later on September 14, 2008, Ms. Ruf requested Belfance to duplicate her file, which then obviously had to be provided to Mr. Rabb. Shortly thereafter, Ms. Ruf signed a Notice of Withdrawal of Counsel which was prepared and signed by Ms. Belfance. On September 19, 2008, the Notice of Withdrawal was filed with the Summit County Court of Common Pleas and served upon opposing counsel. The court granted Belfance's motion to withdraw as Ms. Ruf's counsel on September 22, 2008. Though Mr. Rabb was initially engaged to review the status and remaining issues of Ms. Ruf's divorce matter, he subsequently became

Ms. Ruf's successor counsel of record in the post decree proceedings following Belfance's withdrawal.

On September 2, 2009, within one year of their meeting on September 11, 2008, at which Belfance expressed her intent to terminate the attorney-client relationship, as well as the termination letter dated September 12, 2008, Ms. Ruf filed the present action against Belfance. Belfance denied liability and filed a counterclaim for outstanding attorney's fees. Discovery ensued and the parties retained their respective experts. At the close of discovery, and pursuant to Civ. R. 56(C), Belfance filed a Motion for Summary Judgment which Ms. Ruf opposed. By a judgment entry journalized on January 18, 2012, the trial court granted Belfance's Motion for Summary Judgment on the basis that Ms. Ruf's legal malpractice action was time-barred under the applicable one-year statute of limitations pursuant to R.C. 2305.11(A). Ignoring the parties' meeting on September 11, 2008, Belfance's termination letter on September 12, 2008, and the legal services that Belfance rendered throughout the first half of September 2008, the trial court arbitrarily designated August 18, 2008 to be the day on which the parties' attorney-client relationship terminated. Consequently, the trial court concluded that Ms. Ruf's claim was time-barred as of August 18, 2009. Ms. Ruf filed a Notice of Appeal with the Ninth District Court of Appeals relative to the issue of termination of the attorney-client relationship. The issue as to occurrence of the cognizable event was not in dispute.

Ms. Ruf moved to recuse Ninth District Judge Eve Belfance on the basis that she was Appellee Kathryn Belfance's daughter and also requested the voluntary recusal of the entire Ninth District panel of judges. The motion was granted and the Ohio Supreme Court assigned three appellate judges from the Eighth District Court of Appeals to preside over Ms. Ruf's appeal acting as the Ninth District. After oral argument, the court rendered its opinion wherein the

majority affirmed the trial court's decision, but the dissenting opinion concluded that trial court had erred in granting summary judgment as "reasonable minds could disagree as to which event terminated the attorney-client relationship" while further recognizing that the majority opinion creates a new hard and fast rule of law. (Op. Dissent, at ¶¶ 24, 26).

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law 1: After a "cognizable event" has occurred, the statue of limitations period for legal malpractice actions does not automatically accrue once the client hires other counsel.

According to this Court, the statute of limitations for a legal malpractice action under R.C. 2305.11(A) begins to run when there is either (1) a "cognizable event" or (2) a termination of the attorney-client relationship, whichever occurs later. *Zimmie v. Calfee, Halter & Griswold*, 43 Ohio St.3d 54, 538 N.E.2d 398 (1989), at syllabus. With regard to the "termination prong", Ohio courts do not utilize an absolute, hard-and-fast rule stating that this prong is satisfied, thereby triggering the statute of limitations, if the client hires other counsel. To adopt a rule-of-law as the Ninth District did directly contradicts the case law developed within Ohio's courts since this Honorable Court's announcement in *Zimmie*.

For example, in *Asente v. Gargano,* the clients, dissatisfied with their attorney, hired another attorney on April 8, 1998 to represent them in the same matter for which the original attorney was hired. 10th Dist. Nos. 04AP278, 04-LW-4240, 2004-Ohio-5069, ¶13. On June 5, 1998 the new attorney filed an action with the court on behalf of the clients. *Id.* The *Tenth District Court of Appeals* held that the attorney-client relationship between the clients and the original attorney terminated on the latter of the two dates when the "newly-retained counsel filed an action in Ohio concerning the same matter for which [the clients] had hired [their original attorney]". *Id.*

In *Chambers v. Melling, Harding, Schuman and Montello*, the client became greatly dissatisfied with the outcome of his case and, in the last week of May 2002, hired a new attorney to replace his current attorney (the replacement attorney eventually became the client's legal malpractice counsel). 8th Dist. No. 85045, 2005-Ohio-2456, ¶17. On June 2, 2002, the client drafted a letter,[3] terminating his and the original attorney's relationship. *Id.* at ¶19. Relative to the statute of limitations, the *Eighth District Court of Appeals* concluded that the attorney-client relationship ended on the date of the letter, June 2, 2002. *Id.*

Ohio courts also conclude that retention of other counsel may be sufficient to mark the end of the original attorney-client relationship, but does not *necessarily* do so when such act is *followed* by conduct that signals the relationship is still on-going or that it terminates at a later date. At the very least, the existence of multiple acts that are sufficient to terminate an attorney-client relationship creates a question of fact as to the accrual date of the statute of limitations for a legal malpractice action.

In *North Shore Auto Sales v. Weston, Hurd, Fallon, Paisley & Howley*, the client had a disagreement with his attorney and hired another attorney to review the case and replace the original attorney as counsel (the replacement attorney eventually became the client's legal malpractice counsel). 8th Dist. No. 86332, 2006-Ohio-456, ¶4. The new attorney subsequently filed two different motions on behalf of the client on September 17, 2003. *Id.* After discovering that the client hired new counsel, original counsel sent the client a letter on October 1, 2003, stating that the filings made by new counsel "severed the bonds of mutual trust and confidence

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[3] *See also* the *Seventh District Court of Appeals'* decision in *McOwen v. Zena,* 7th Dist. No. 11MA58, 2012-Ohio-4568 where the court determined that a letter from a client to her attorney informing the attorney that she intended to terminate the relationship did not terminate the relationship, but rather a subsequent letter from the client unambiguously informing the attorney of her decision to terminate him marked the end of the relationship.

essential to the relationship of attorney and client" and that it will withdraw from representation. *Id.* at ¶5-6. The *Eighth District Court of Appeals* held that the attorney-client relationship ended on November 10, 2003 – the day the new attorney filed a notice of appearance with this Court. *Id.* at ¶17-18.

The *Second District Court of Appeals* held similarly in its decision in *Burdge Law Office Co., L.P.A. v. Wilson*, No.2002-CV-4936, 2005-Ohio-3746. There, original counsel's last contact with its client was on June 12, 2001. *Id.* at ¶12. The client hired new counsel to represent him in the same matter; an act that original counsel did not discover until July 5, 2001 when it received a copy of a Notice of Appeal filed by new counsel. *Id.* On that same day, original counsel sent a letter, notifying the client that their attorney-client relationship was terminated. *Id.* at ¶13. The Second District Court concluded that "reasonable minds could only conclude that the attorney-client relationship terminated no later than July 5, 2001" – the date on which original counsel first learned of the client's hiring of replacement counsel.[4] *Id.* at ¶14.

In *Monastra v. D'Amore*, an upset client hired other counsel as a result of her original counsel's failure to communicate and make progress in her divorce case. 111 Ohio App.3d 296, 298, 676 N.E.2d 132. On March 22, 1993 the client sent a letter to her original counsel informing him that he was terminated as her attorney and instructed him to send her file to her replacement counsel. *Id.* The Eighth District concluded that, when weighing the evidence most strongly in favor of the non-movant, the attorney-client relationship could have ended on the date of the termination letter (March 22), the date original counsel's motion to withdraw was granted by the court (May 7), or on the last day original counsel rendered services to the client (June 15).

[4] Disregarding the client's failure to disclose his retention of other counsel, the *Second District* concluded that the attorney-client relationship terminated on the date the attorney became aware of being replaced rather than the date the client actually hired replacement counsel.

Id. at 304. The court did not include, however, the date of the client's retention of other counsel as a possible termination date which occurred prior to all of the other possible termination dates described by the court.

The *Monastra* court also found that the statute of limitations tolled while the original attorney continued to work on the client's matter after being advised that he was fired. *Id.* at 303-304. Under Ohio law, the statute of limitations tolls while the terminated attorney continues to work on the client's matter and Ohio courts have yet to require a client to disclose hiring of a second attorney to original counsel. *Okocha v. Fehrenbacher*, 101 Ohio App.3d 309, 319-320, 655 N.E.2d 744 (8th Dist. 1995); *see Flynt v. Brownfield, Bowen & Bally*, 882 F.2d 1048, 1052 (6th Cir. 1989); *see also*, *Omni-Food & Fashion, Inc.*, 38 Ohio St.3d 385, 387 528 N.E.2d 941. Therefore, the Ninth District's new rule also conflicts with another established principle of law as Belfance also continued to work on the matter after Ms. Ruf consulted a second attorney.

In another conflicting case, *Cotterman v. Arnebeck*, the client, dissatisfied with his attorney's handling of his case, took his legal representation into his own hands and served discovery requests, pro se, upon opposing counsel on March 15, 2009, unbeknownst to his attorney. 10th Dist. No. 11AP-687, 2012-Ohio-4302, ¶6. The attorney discovered the client's conduct and on April 13, 2009, the attorney filed a motion to withdraw as counsel. *Id.* at ¶18. The client filed a response in support of the attorney's motion to withdraw on May 1, 2009, describing her desire that the attorney no longer represent her interests. *Id.* On May 12, 2009, the client sent e-mail correspondence to the attorney stating that the attorney's services were no longer needed in her case and that he was terminated as her counsel. *Id.* The *Tenth District Court of Appeals*, considering all of these acts by the parties, held that the attorney-client relationship terminated, at the latest, May 12, 2009. *Id.*

In *Burzynski*, counsel wrote the client a letter on December 15, 1997, informing the client that it would no longer represent him. No.01AP-782, 2001-Ohio-8846. In February 1998, the client retained new counsel for the same matter. *Id.* The Tenth District Court of Appeals held that "When viewed in a light most favorable to plaintiff, the facts reflect the attorney-client relationship arguably ended in December 1997, when defendants notified plaintiff they would no longer represent him * * * [or] at least by February 1998, when plaintiff retained new counsel." *Id.*

The foregoing cases illustrate that hiring of other counsel does not, under existing Ohio law, automatically end an attorney-client relationship, which is especially true when such act is surrounded by conduct of current counsel that signals the relationship is still on-going or that it terminates at a later date. Moreover, as seen by the authority above, whether the client hires other counsel to replace the original counsel or whether the client chooses not to disclose its retention of new counsel to original counsel is immaterial. At the very least, Ohio courts conclude that retention of new counsel is *one* date on which the attorney-client relationship *could* have ended thereby creating a question of material fact as to when the statute-of-limitations accrued.

The reason for steering away from such a detrimental rule-of-law, aside from the ambiguity that would result if it were utilized in these types of cases, is that it violates Ohio public policy because its practical effect stifles the client's ability to obtain counsel of their choice. *See Kala v. Aluminum Smelting & Refining Co., Inc.*, 81 Ohio St.3d 1, 5, 1998-Ohio-439, 688 N.E.2d 258. A client's decision to partake in a minimal period of non-disclosure as she attempts to obtain a second opinion of the status of her case, regardless of whether it involves hiring another attorney, is a natural occurrence and is essential for the protection of a client's

freedom of choice of counsel. Rather than being dissuaded from obtaining a new perspective on their case, as the Ninth District's ruling does, a client should be freely encouraged to acquire information from another attorney in order to allow that client to either confirm or disregard certain doubts that they may have relative to the representation they received from original counsel. The Ninth District's new hard-and-fast rule of law forces clients to immediately notify original counsel of their dealings with another attorney, but Ohio courts that have been confronted with this scenario have yet to saddle clients with this requirement or place any significance whatsoever on a client's failure to do so. *See Burdge Law Office Co.*, No.2002-CV-4936, 2005-Ohio-3746; *North Shore Auto Sales*, No. 86332, 2006-Ohio-456.

The Ninth District's new rule of law also works contrary to the established policy that a client and attorney may continue their relationship to afford an attorney the opportunity to correct or mitigate any negligence so as to potentially avoid any future legal malpractice claims. *Omni-Food & Fashion, Inc.*, 38 Ohio St.3d 385, 387 528 N.E.2d 941. If clients are deemed to have automatically and immediately terminated the attorney-client relationship with original counsel upon hiring of other counsel, as the Ninth District mandates, the opportunity for original counsel to correct its negligence is eliminated. This will undoubtedly lead to an unnecessary increase in legal malpractice causes of actions within Ohio courts – a goal contemplated by this Court when ruling that the statute of limitations period should be tolled in some cases. *Id.*

Moreover, some attorneys require clients to enter into formal agreements before they will even agree to discuss a matter with that particular client. Depending on the volume of information of the case – here, the information compiled in the underlying matter was voluminous to say the least – a client should be permitted to hire other counsel to review such material without being forced into a position to lose her current counsel. In a case as elaborate

and complex as the underlying divorce in the case at bar, considerable time and effort was necessary on the part of the new attorney just to get caught up to speed on all the issues present. Here, Ms. Ruf's file maintained by Belfance was not duplicated until mid-September 2008 and Mr. Rabb clearly could not have reviewed her file and fully advised Ms. Ruf prior to receiving it. A client, such as Ms. Ruf, should not be punished or denied the opportunity to speak to other counsel because the complexity of her case is such that other competent counsel was not willing to look at her case without a formal agreement.

Further, the Ninth District's rule appears to ignore the reality that the formation and termination of an attorney-client relationship, as evinced here, is a complex and arbitrary concept especially to non-lawyer clients. For instance, not all attorney-client relationships have retention letters signed by both the attorney and client (the retention letter here was not signed by Ms. Ruf), which eliminates a clear-cut method of determining the formation date. In other situations, a client may have multiple attorneys for different issues within the same matter who are retained at different times throughout a case (e.g., personal counsel, corporate counsel, insurance counsel). *See North Shore Auto Sales*, No.2002-CV-4936, 2005-Ohio-3746, ¶4 (after disagreement with corporate counsel, client hired personal counsel to replace corporate counsel and eventually filed legal malpractice claim against corporate counsel). Lawyers themselves have experienced much difficulty recognizing the formation of relationships with their clients which has led to much litigation over the years.

The Ninth District now expects untrained lay persons who are at an obvious disadvantage in terms of communication skills and knowledge of both substantive and procedural law, to recognize the formation and termination of an attorney-client relationship, and then, in the event that they believe a relationship has formed, alert original counsel that they are in contact with

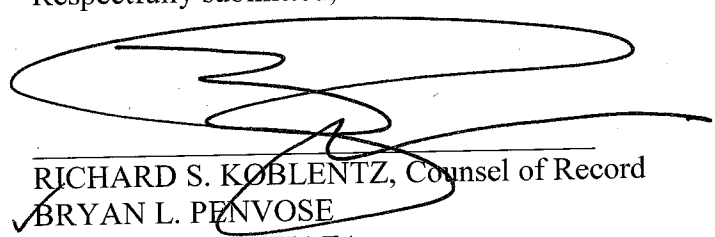
another attorney who may replace them as counsel at the risk of losing both current counsel (which is a near certainty) as well as new counsel (in the event new counsel, after reviewing the facts and proceedings of the matter, chooses not to represent the client). Such a rule will surely prove to be disastrous to the existing body of law on this issue.

Basic logic and reason tells us that such a rule, which conditions one attorney-client relationship's termination on another attorney-client relationship's formation, is untenable and inappropriate to utilize in the realm of legal malpractice actions where the court must look to an unambiguous act to mark the beginning of the statute of limitations period. *See Mobberly*, 98 Ohio App.3d 839, 843, 649 N.E.2d 1247 citing *Mastran*, No. 14270, 1990 Ohio App. LEXIS 1219.

CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest. Appellant, Terri Ruf, respectfully requests that this Honorable Court accept jurisdiction in this case so that the important issues presented will be reviewed on the merits.

Respectfully submitted,



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TERRI L. RUF

CERTIFICATE OF SERVICE

I certify that a copy of this Memorandum in Support of Jurisdiction was sent by ordinary U.S. mail to counsel for Appellees, Kathryn Belfance, Lisa Carey Dean, Kathryn A. Belfance & Associates, LLC, and Roderick Linton Belfance, LLP, 1501 Euclid Avenue, Sixth Floor, Cleveland, Ohio, 44115 on March 7th, 2013.

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COURT OF APPEALS
DANIEL M. HORWITZ
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SUMMIT COUNTY
CLERK OF COURTS

STATE OF OHIO)
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

TERRI L. RUF

Appellant

v.

KATHRYN A. BELFANCE, et al.

Appellees

C.A. No. 26297

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. 2009 09 6525

DECISION AND JOURNAL ENTRY

Dated: January 23, 2013

KEOUGH, Judge.

{¶1} Plaintiff-appellant, Terri L. Ruf, appeals the summary judgment of the Summit County Court of Common Pleas in favor of defendants-appellees Katherine A. Belfance, Melissa Carey Dean, Katherine A. Belfance & Associates, L.L.C., and Roderick Linton & Belfance, L.L.P. (collectively "Belfance"), on Ruf's legal malpractice claim against appellees. At issue is whether Ruf's malpractice claim was time-barred. For the reasons that follow, we affirm.

I. Facts and Procedural Background

{¶2} On April 21, 2005, Ruf retained Belfance to represent her in divorce proceedings. The divorce decree was announced and journalized on June 28, 2007. Belfance subsequently filed an appeal on Ruf's behalf, but the appellate court declined to address the merits of the appeal in large part because exhibits from the divorce trial had not been timely filed with the court of appeals. Ruf pursued a discretionary appeal to the Supreme Court of Ohio, which declined jurisdiction on July 9, 2008.

{¶3} On August 12, 2008, unbeknownst to Belfance, Ruf consulted by phone with Richard A. Rabb, a domestic relations attorney. Ruf conceded at her deposition that she had lost confidence in Belfance and called Rabb with the intent to have him take her place. On August 18, 2008, Ruf met with Rabb and discussed her dissatisfactions with Belfance and the divorce case, and requested that Rabb represent her in the divorce case. That same day, Rabb spoke with attorney Richard Koblentz about Ruf's divorce case. Ruf had already engaged Koblentz to pursue a legal malpractice claim against Belfance, and he had referred her to Rabb.

{¶4} Rabb agreed to become Ruf's counsel and on August 19, 2008, sent her a confirming retention letter, which Ruf signed and returned. Although the record does not reflect the date of payment, pursuant to the retention letter, Ruf paid Rabb a retainer of $8,000. Two days later, on August 21, 2008, Ruf conferred again with Rabb regarding both the divorce case and a potential malpractice case against Belfance.

{¶5} Ruf did not notify Belfance that she had retained new counsel nor did Rabb give notice that he was Ruf's new counsel. On September 11, 2008, Ruf and Carl Patrick, her boyfriend and an attorney licensed in Florida, met with Belfance to discuss filing an affidavit of prejudice against the domestic relations judge with the Chief Justice of the Supreme Court of Ohio. Ruf did not inform Belfance at the meeting that she had retained new counsel and, to the contrary, affirmatively misrepresented to Belfance that she had *not* retained other counsel. When Belfance advised Ruf during the meeting that she would not sign an affidavit of prejudice, Ruf became unhappy and questioned Belfance's motives. Ruf's attitude caused Belfance to conclude that Ruf should obtain new counsel and she so advised Ruf in a letter dated September 12, 2008. The trial court approved Belfance's withdrawal on September 22, 2008.

{¶6} On September 2, 2009, Ruf filed her complaint for legal malpractice against Belfance. The parties engaged in discovery and retained experts regarding the standard of care. On November 18, 2011, Belfance filed a motion for summary judgment in which she argued that no genuine issue of material fact existed with respect to the merits of Ruf's malpractice claims and that Ruf had failed to file her complaint within the one-year limitations period set forth in R.C. 2305.11(A).

{¶7} The trial court subsequently granted Belfance's motion for summary judgment on statute of limitations grounds alone. The court held that a cognizable event sufficient to put Ruf on notice of a questionable legal practice had occurred on or before August 18, 2008, and, further, that Ruf had effectively terminated the attorney-client relationship on or before August 18, 2008. Accordingly, the court held that Ruf's legal malpractice action was time-barred because the applicable one-year statute of limitations expired on August 18, 2009, and Ruf did not file her action until September 2, 2009.

II. Analysis

{¶8} Civ.R. 56(C) provides that summary judgment is appropriate when (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) after construing the evidence most favorably for the party against whom the motion is made, reasonable minds can only reach a conclusion that is adverse to the nonmoving party. *Zivich v. Mentor Soccer Club, Inc.*, 82 Ohio St.3d 367, 369-370, 1998-Ohio-389, 696 N.E.2d 201 (1998); *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (1977). We review the trial court's judgment de novo, using the same standard that the trial court applies under Civ.R. 56(C). *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 1996-Ohio-336, 671

N.E.2d 241 (1996). Accordingly, we stand in the shoes of the trial court and conduct an independent review of the record.

{¶9} In her single assignment of error, Ruf contends that the trial court erred in granting summary judgment to Belfance.

{¶10} Under R.C. 2305.11(A), an action for legal malpractice must be filed within one year of the time the cause of action accrues.

> [A]n 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, 43 Ohio St.3d 54, 538 N.E.2d 398 (1989), syllabus, citing *Omni-Food & Fashion, Inc. v. Smith*, 38 Ohio St.3d 385, 528 N.E.2d 941 (1988). "*Zimmie* and *Omni-Food* require two factual determinations: (1) When should the client have known that he or she may have an injury caused by his or her attorney? and (2) When did the attorney-client relationship terminate? The latter of these two dates is the date that starts the running of the statute of limitations." *Smith v. Conley*, 109 Ohio St.3d 141, 2006-Ohio-2035, 846 N.E.2d 509, ¶ 4.

{¶11} Ruf does not dispute that the cognizable event for her malpractice claim occurred more than one year before the September 2, 2009 filing of her malpractice complaint against Belfance. Rather, she contends that the attorney-client relationship ended no earlier than her September 11, 2008 meeting with Belfance and no later than Belfance's September 12, 2008

termination letter and, hence, that she brought her claim within the one-year statute-of-limitations period. At the very least, she contends there is a genuine issue of material fact as to when the attorney-client relationship terminated.

{¶12} Generally, the determination of whether an attorney-client relationship has ended is a factual question to be resolved by the trier of fact. *Omni-Food & Fashion*, 38 Ohio St.3d at 388. But one party to the relationship may take affirmative actions that are so inconsistent with a continued relationship that the question of when the attorney-client relationship ended may be decided as a matter of law. *Accelerated Sys. Integration, Inc. v. Ritzler, Coughlin & Swansinger, Ltd.*, 8th Dist. No. 97481, 2012-Ohio-3804, ¶ 43, citing *Steindler v. Meyers, Lamanna & Roman*, 8th Dist. No. 86852, 2006-Ohio-4097, ¶ 11; *Downey v. Corrigan*, 9th Dist. No. 21785, 2004-Ohio-2510, ¶ 14. Where the actions terminating the relationship are clear and unambiguous, such that reasonable minds can come to but one conclusion from the evidence, the termination may be decided as a matter of law. *Koeber v. Levy & Gruhin*, 9th Dist. No. 21730, 2004-Ohio-3085, ¶ 19; *Accelerated Sys. Integration, Inc.* at ¶ 43. Here, construing the evidence in favor of Ruf, as required by Civ.R. 56(C), we find Ruf's actions so inconsistent with a continued attorney-client relationship that the issue may be decided as a matter of law.

{¶13} "The termination of the attorney-client relationship depends, not on a subjective loss of confidence on the part of the client, but on *conduct*, an affirmative act by either the attorney or the client that signals the end of the relationship." *Mastran v. Marks*, 9th Dist. No. 14270, 1990 Ohio App. LEXIS 1219 (Mar. 28, 1990) (emphasis sic); *see also McGlothin v. Schad*, 194 Ohio App.3d 669, 2011-Ohio-3011, 957 N.E.2d 810, ¶ 14 ("The termination of the attorney-client relationship is determined by the actions of the parties."), citing *Smith v. Conley*, 109 Ohio St.3d 141, 2006-Ohio-2035, 846 N.E.2d 509, ¶ 12.

{¶14} Here, Ruf's conduct unequivocally signalled the end of the attorney-client relationship no later than August 18, 2008, when she retained new counsel for her divorce. She admitted in her deposition that she sought out Rabb because she was dissatisfied with Belfance's representation and had lost confidence in her. She consulted with Rabb on August 12, retained him on August 18, and then memorialized the new retention by signing Rabb's letter of August 19 and paying a retainer of $8,000. But perhaps most significantly, even before consulting with Rabb, she had already retained Koblentz to pursue malpractice claims against Belfance. In light of Ruf's actions, all of which were patently inconsistent with a continued attorney-client relationship, reasonable minds could only conclude that the attorney-client relationship terminated no later than August 18, 2008.

{¶15} Ruf contends, however, that her consultation with and retention of Rabb did not clearly and unambiguously terminate her attorney-client relationship with Belfance because even after August 18, Belfance filed several motions on her behalf in the domestic relations court and sent correspondence to opposing counsel. She further contends that any lack of trust and confidence sufficient to terminate the attorney-client relationship must be "experienced mutually" between the attorney and client before the relationship is terminated for purposes of a statute-of- limitations analysis. Accordingly, she contends that the attorney-client relationship did not terminate until September 12, when Belfance sent the termination letter that made both parties aware the relationship was terminated. She also argues that the limitations period should have been tolled from the date she retained Rabb until Belfance sent her termination letter. Ruf's arguments are without merit.

{¶16} First, any argument that the attorney-client relationship extended into September is based on Ruf's concealment that new counsel had been engaged (presumably so that Belfance

instead of Rabb would file the affidavit of prejudice). But Ruf's strategic concealment and misrepresentation cannot extend the attorney-client relationship for statute-of -limitations purposes where her actions to terminate that relationship were clear and unequivocal. Any finding to the contrary would reward Ruf for her deception.

{¶17} Furthermore, the case law is clear that because an attorney-client relationship is consensual in nature, the actions of *either* party to the relationship can affect its continuance. "Either party's affirmative act may terminate the relationship." *McGlothin*, 194 Ohio App.3d 669, 2011-Ohio-3011, 957 N.E.2d 810, at ¶ 14, citing *Smith*, 109 Ohio St.3d 141, 2006-Ohio-2035, 846 N.E.2d 509, at ¶ 12. *See also Mastran v. Marks*, 9th Dist. No. 14270, 1990 Ohio App. LEXIS 1219 (Mar. 28, 1990) ("[T]he termination of the relationship * * * depends * * * on * * * an affirmative act by *either* the attorney or the client that signals the end of the relationship.") (Emphasis added). Here, Ruf's actions unequivocally terminated the attorney-client relationship no later than August 18, 2008; the fact that Belfance did not know that Ruf had terminated the relationship and continued to do work for her is not dispositive.

{¶18} Our conclusion is consistent with the Sixth District's reasoning in *Woodrow v. Heintschel*, 194 Ohio App.3d 391, 2011-Ohio-1840, 956 N.E.2d 855 (6th Dist.) In that case, the clients filed suit for legal malpractice, claiming that their lawyer's withdrawal without their knowledge had caused a default judgment against them and other derivative damages. The trial court ruled that the clients' action was time-barred and granted granted summary judgment to the lawyer. On appeal, the clients argued that for the attorney-client relationship to terminate, the client as well as the lawyer "must know" it has ended. *Id.* at ¶ 42. The appellate court rejected this argument, finding that the test for termination is "affirmative conduct by *either* party" and to find that one party's subjective knowledge of termination is determinative would be "unworkable

as a practical matter and contrary to *Zimmie* and the import of *Smith v. Conley, supra.*" *Id.* at ¶ 45. Thus, Ruf's argument that termination must be "experienced mutually" is without merit.

{¶19} Furthermore, in light of Ruf's actions, Belfance's letter was not necessary to terminate the attorney-client relationship. Because conduct that "dissolves the essential mutual confidence between attorney and client" signifies the termination of the attorney-client relationship, an explicit statement terminating the relationship is not necessary. *Brown v. Johnstone*, 5 Ohio App.3d 165, 166-167, 450 N.E.2d 693. Hence, as in this case, where a client, unbeknownst to her attorney, retains new counsel to represent her in the case in which current counsel is providing representation, and then purposely conceals and mispresents that retention, a termination letter or other formal communication between attorney and client is not required in order to find that the relationship has terminated.

{¶20} Last, we find without merit Ruf's argument that because Belfance continued to work on post-decree matters even after she retained Rabb, the statute of limitations should have been tolled until Belfance sent the termination letter. The statute is tolled so long as the attorney and client continue to have an attorney-client relationship. *Fisk v. Rauser & Assoc. Legal Clinic Co, LLC*, 10th Dist. No. 10AP-427, 2011-Ohio-5465, ¶ 23, citing *Vail v. Townsend*, 29 Ohio App.3d 261, 504 N.E.2d 1183 (10th Dist. 1985). Because Ruf terminated the attorney-client relationship, the statute was not tolled, even though Belfance continued to work for Ruf. Moreover, tolling in a legal malpractice context is germane where a cognizable event has occurred and the attorney-client relationship continues so that the attorney has an opportunity to correct the error and perhaps avoid a legal malpractice claim. *See Vail, supra.* Tolling is not relevant here because the attorney-client relationship unequivocally terminated no later than August 18, 2008, when Ruf retained new counsel.

{¶21} On this record, we agree with the trial court that the attorney-client relationship between Ruf and Belfance terminated as a matter of law no later than August 18, 2008, when Ruf retained Rabb to represent her in the divorce case. Because the one-year statute of limitations began to run on that date, the complaint at issue, filed on September 2, 2009, was not timely. Accordingly, Ruf's claim is barred by the statute of limitations; the trial court therefore properly granted summary judgment to Belfance.

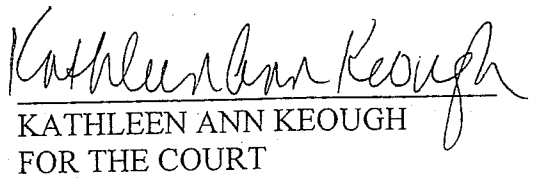
Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.



KATHLEEN ANN KEOUGH
FOR THE COURT

BLACKMON, P. J.
CONCURS.

JONES, J.
DISSENTING.

{¶22} I dissent. I would find that the trial court erred in granting summary judgment because genuine issues of material fact remain as to whether the statute of limitations had expired at the time Ruf filed her legal malpractice action.

{¶23} Ruf's decision to retain new counsel because she was dissatisfied with Belfance's representation did not unequivocally terminate the attorney-client relationship. Reasonable minds could come to more than one conclusion as to whether it was the retention of other counsel in August 2008 or the September 2008 termination letter that ended the relationship.

{¶24} In *N. Shore Auto Sales v. Weston*, 8th Dist. No. 86332, 2006-Ohio-456, this court found that a notice of substitution of counsel filed with the Ohio Supreme Court and not the earlier retention of other counsel marked the beginning of the statute of limitations period. While the facts of *N. Shore* are admittingly different, the case illustrates that there is no hard and fast rule that retention of new counsel terminates an attorney-client relationship, nor should this court create one.

{¶25} In a recent decision by the Seventh District Court of Appeals, the court found that a letter by a client to her attorney informing him that she *intended* to terminate him as her attorney did not mark the termination of the attorney-client relationship. *McOwen v. Zena*, 7th Dist. No. 11MA58, 2012-Ohio-4568. Instead, it was a subsequent letter sent from the client to the attorney in which the client unambiguously informed the attorney of her decision to terminate him that marked the end of the relationship. The court relied on the fact that the attorney performed work for the client after the client sent the first letter outlining her intent to terminate

him. Thus, the later letter marked the beginning of the statute of limitations period. *Id.* at ¶ 22. Likewise, in this case, Ruf may have intended to terminate her relationship with Belfance when she retained new counsel, but in viewing the facts in a light most favorable to Ruf, I would not find that Ruf's actions were a clear and unambiguous termination of her relationship with Belfance.

{¶26} Thus, reasonable minds could disagree as to which event terminated the attorney-client relationship. Because of this, the trial court's granting of summary judgment was in error.

(Keough, J., Blackmon, P.J., and Jones, J., Judges of the Eighth District Court of Appeals, sitting by assignment.)

APPEARANCES:

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