[Cite as *Thut v. Canala*, 2005-Ohio-4335.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

GARY M. THUT,	:	**O P I N I O N**
Plaintiff-Appellant,	:	**CASE NO. 2004-L-063**
- vs -	:	
JOHN CANALA,	:	
Defendant-Appellee.	:	

Civil Appeal from the Court of Common Pleas, Case No. 03 CV 000133.

Judgment: Affirmed.

David N. Patterson, 33579 Euclid Avenue, Willoughby, OH 44094 (For Plaintiff-Appellant).

Edward L. Joseph, 2403 St. Clair Avenue, Cleveland, OH 44114 (For Defendant-Appellee).

WILLIAM M. O'NEILL, J.

{¶1} This is a legal malpractice action. Appellant, Gary M. Thut, appeals from the judgment entering summary judgment in favor of his former attorney, appellee, John Canala.

{¶2} Canala, an attorney in Mentor, Ohio, represented Thut in 1994 in a Lake County Juvenile Court proceeding, wherein Thut sought to modify his child support order and reduce an arrearage in child support asserted against him by the Lake County Child Support Enforcement Division. The matter proceeded to judgment in 1997, and, then, Canala's representation of Thut ceased until the year 2000. In January, 2000, Thut asked Canala to appear with him at an administrative hearing regarding the child support arrearage, because the agency continued to assert a larger arrearage against him than was contained in the 1997 juvenile court order.

{¶3} Two other legal matters were at issue between the parties. The first involved Michael Poplestein, against whom Thut had obtained a default judgment in Willoughby Municipal Court in 1992. The second involved a claim against Accurate Excavating for damage caused to Thut's driveway. Thut alleged in his complaint that, due to neglect by Canala, Thut missed an opportunity to collect on his judgment prior to Poplestein's filing bankruptcy and Canala neglected to file suit against Accurate Excavating for damage caused to his driveway.

{¶4} In his amended complaint, Thut alleged three separate causes of action against Canala, sounding in negligence, breach of contract, and breach of fiduciary duty. Thut's original complaint was filed on January 21, 2003, and in both his original complaint and his amended complaint, he made the following allegation:

{¶5} "[Thut] became aware of [Canala's] failure to institute the action [against Poplestein] when he contacted [Canala] upon the death of his mother in April 2002."

{¶6} Canala's answer denies all the substantive allegations of the amended complaint and sets forth as one of its affirmative defenses, "[Thut's] cause of action is barred by the Statute of Limitations."

{¶7} The attorney-client relationship between Thut and Canala commenced in 1994, when Canala represented Thut in cases pending in the Lake County Juvenile Court. As the result of Canala's representation, Thut secured a judgment on June 27, 1997, which, among other things, reduced Thut's child support arrearage to $5,194.51. However, in the ensuing years, Thut continued to have problems with both the Lake County, Ohio and the Westmoreland County, Pennsylvania (where the mother of the children was living) child support enforcement agencies, who insisted that his child support arrearage was far in excess of $5,194.51. Because of his continuing problems, in January 2000, Thut asked Canala to accompany him to an administrative hearing respecting the child support arrearage, to which Canala assented. Canala did not appear for Thut in any judicial or administrative hearing after January 2000.

{¶8} Following the child support arrearage hearing, Thut sent an email to Canala, which arrived August 7, 2000, and asked for a meeting "to get some of my legal problems taken care of."

{¶9} Following the above hearing and the foregoing communication, Canala sent a letter to Thut asking him to stop requesting Canala to assist him with his legal problems and advising him that if he should ever have a legitimate legal problem, "there are other people practicing law in this county [to assist you]." This letter was dated July 26, 2001.

{¶10} Subsequent to Canala's letter of July 26, 2001, Thut sent a letter to Canala on March 8, 2002, advising Canala that he was about to lodge a grievance with the Lake County Bar Association or the Ohio Disciplinary Counsel unless Canala made an accounting for actions taken in his behalf and a "roadmap" for their resolution. Canala did not respond to this letter.

{¶11} The last communication between the parties occurred in April, 2002, when, by Thut's account, he asked Canala to handle the administration of his late mother's estate and, by Canala's account, Thut asked him to be a pallbearer at his mother's funeral. In any case, Canala did not act as a pallbearer, nor did he handle the estate administration.

{¶12} Shortly after the litigation against him was commenced on January 21, 2003, Canala filed a motion for summary judgment, arguing that Thut's claims were time-barred by the applicable statute of limitations. In response, Thut referred to his letter to Canala dated March 8, 2002, and asserted that "an attorney-client relationship existed between [Thut] and [Canala] until April, 2002."

{¶13} Thut has styled his assignments of error as "propositions of law"; however, we shall review them as if they are assignments of error.

{¶14} Thut's first assignment of error reads as follows:

{¶15} "The trial court erred in granting summary judgment for Appellee where uncontroverted evidence showed that the attorney-client relationship still existed, and the Trial Court found that there was no genuine issue of material fact."

{¶16} Pursuant to Civ.R. 56, summary judgment is proper where: (1) no genuine issue of material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds 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 that party. Further, a party seeking summary judgment must point specifically to some evidence that affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims.[1] In response, the nonmoving party must set forth specific facts that demonstrate that there is a genuine factual issue to be tried. He may not rest on conclusory statements or the bare allegations of his complaint.[2]

{¶17} We note further that although Thut's claims sound in negligence, breach of contract, and breach of a fiduciary duty, it is well settled that an action by a client against his attorney for damages resulting from the manner in which the attorney represented, or failed to represent, the client, constitutes an action for malpractice within the meaning of R.C. 2305.11, irrespective of whether the action is predicated upon tort or contract.[3] In accordance with that statute, a claim for legal malpractice must be commenced within one year from the date the cause of action accrued.

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1. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292.
2. *Smith v. L.J. Lewis Ent., Inc., d.b.a. Action Emergency Ambulance* (Sept. 28, 2001), 11th Dist. No. 2000-T-0052, 2001 Ohio App. LEXIS 4413, at *12-14.
3. *Muir v. Hadler Real Estate Mgmt. Co*. (1982), 4 Ohio App.3d 89, 90.

{¶18} An attorney-client relationship existed between Thut and Canala, lasting seven years, between 1994 and 2001. However, there is no evidence in the record to support the proposition that such a relationship existed after July 26, 2001. In his letter on that date, Canala told Thut in unequivocal terms that he no longer wished to assist Thut in his legal affairs; that he wished Thut to stop asking for his assistance; and that he should seek the assistance of other lawyers in Lake County should he have future legal problems. The fact that Thut sent another communication to Canala on March 8, 2002 is of no consequence, because he could not then resurrect what had already been put asunder. Likewise, the oral communication between the parties in April, 2002, cannot be used by Thut to overcome the fact that Thut was time-barred from suing Canala. Even if we were to assume that Thut contacted Canala in April, 2002, for the purpose of engaging him to assist in the administration of his deceased mother's estate, the fact that Canala did not undertake that engagement and did not reply to Thut only serves to corroborate that the attorney-client relationship was terminated with Canala's letter of July 26, 2001.

{¶19} In Canala's reply to plaintiff's brief in opposition, Canala's affidavit in support of his reply states that he wrote to Thut on July 26, 2001, and a copy of his letter is attached. Canala told Thut in the letter to stop contacting him for legal assistance, that he will no longer provide any assistance to him, and to go elsewhere for his future legal problems. Nowhere in the record is there anything to contradict that Canala terminated the relationship by his letter of July 26, 2001. In fact, in Thut's letter dated March 8, 2002, he admits that the last contact he had with Canala was in July 2001.

{¶20} Even apart from Canala's letter terminating the attorney-client relationship, Thut has adduced no other specific facts to contradict the conclusion that all three of his causes of action are time-barred. With respect to his claim that Canala failed to file suit for damage to his driveway, his email transmission dated August 7, 2000 acknowledges that Thut knew at that time that no suit had been filed, which would bar him from filing suit after August 7, 2001. With respect to his claim that Canala mishandled the matter involving his child support arrearage, the last effort by Canala in this regard occurred in January 2000, so any claim for malpractice would have had to be filed by January 2001. Finally, with respect to Thut's allegation that Canala mishandled an opportunity to collect on his 1992 judgment against Michael Poplestein, Thut acknowledges in a fax transmission of July 20, 1999, that he was aware of Poplestein's bankruptcy filing at that time. Thut is relegated to the bare allegation of his complaint and amended complaint that, by virtue of some contact with Canala in April 2002, the substance of which is unknown, an attorney-client relationship still existed. Yet, no other specific facts are adduced to support this bare allegation, and for that reason Thut's claims are time-barred.

{¶21} Thut's first assignment of error is without merit.

{¶22} Thut's second assignment of error is as follows:

{¶23} "The Trial Court weighed the evidence whereby [sic] violating Appellant's right to a trial by jury in violation of the Due Process Clause of the Fifth Amendment of the United States Constitution and Section 16, Article I of the Ohio Constitution [sic, section 5, Article 1, Ohio Constitution.]"

{¶24} Our analysis of this assignment of error starts with the long-established principle that the summary judgment process does not violate a person's right to trial by jury.[4] While the *Sartor* case was not decided under Ohio law, we believe that the rationale of that case would apply a litigant's right to a jury trial in Ohio under section 5, Article 1, Ohio Constitution, because the summary judgment process simply cuts short the litigation where there are insufficient issues for the court to permit a trial to go forward. Thut can hardly be deprived of a constitutionally guaranteed right where the United States Supreme Court has sanctioned the process.

{¶25} The other part of Thut's assignment of error asserts that the court below committed an impermissible act, namely the weighing of evidence, in granting his motion for summary judgment.

{¶26} Thut is arguing that insofar as the trial court below weighed the evidence in considering whether to grant a party's motion for summary judgment, it is prohibited from doing so. In this respect, we agree with appellant and the Fifth Appellate District, which held in *State v. 1805 Wertz Avenue, S.W. Canton, Ohio and $445.00 in U.S. Currency* that the weighing of evidence is not permissible in the consideration of whether to grant a summary judgment motion: "such weighing of evidence is inappropriate in the summary judgment arena."[5]

4. *Sartor v. Arkansas Natural Gas Corp*. (1944), 321 U.S. 620, 627.
5. *State v. 1805 Wertz Avenue, S.W. Canton, Ohio and $445.00 in U.S. Currency* (June 2, 1997), 5th Dist. No. 1996CA00288, 1997 Ohio App. LEXIS 3272, at *7.

{¶27} We do not agree, however, that the trial court weighed the evidence in this case because the Civ.R. 56 determination of whether to permit a party to proceed with his cause of action where he is barred from doing so by the applicable statute of limitations is not a matter of weighing the evidence, but a matter of law.

{¶28} Our standard of review on appeal is de novo.[6] An appellate court must conduct an "independent review" of the trial court's decision without giving any deference to it.[7] This means that we must invoke the three-part analysis of the Supreme Court of Ohio in *Dresher v. Burt,* where the court held:

{¶29} "[W]e hold that a party seeking summary judgment, on the ground that the nonmoving party cannot prove its case, bears the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on the essential element(s) of the nonmoving party's claims. *** [T]he moving party must be able to specifically point to some *evidence* of the type listed in Civ.R. 56(C) which affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims. *** [I]f the moving party has satisfied its initial burden, the nonmoving party then has a reciprocal burden outlined in Civ.R. 56(E) to set forth specific facts showing that there is a genuine issue for trial."[8]

6. *Hobart v. Newton Falls*, 11th Dist. No. 2002-T-0122, 2003-Ohio-5004, at ¶4.
7. Id. at ¶4.
8. *Dresher v. Burt*, supra, at 293.

{¶30} Applying the *Dresher v. Burt* analysis to this case, once Canala has demonstrated that he terminated the attorney-client relationship on July 26, 2001, such that a legal malpractice claim filed more than one year from that date is time-barred, Thut has the reciprocal burden to set forth specific facts to show that the attorney-client relationship was extended beyond July 26, 2001. He has only set forth his bare allegation in his amended complaint that he made contact with Canala in April 2002, but this is not the kind of specific fact that will satisfy the requirements of *Dresher v. Burt.* Moreover, the letter he wrote to Canala on March 8, 2002, threatening to file a grievance against him, and the oral communication in April 2002 do not prove that an attorney-client relationship existed at either of those times. They do no more than indicate that Thut tried to incite Canala to provide him legal assistance, but Canala's failure to respond, after unequivocally terminating the relationship on July 26, 2001, serves to reinforce our view that the attorney-client relationship ended on July 26, 2001, which means that Thut's claim is time-barred.

{¶31} Thut's second assignment of error is without merit.

{¶32} The judgment of the trial court granting Canala's motion for summary judgment is affirmed.

DIANE V. GRENDELL, J.,

COLLEEN MARY O'TOOLE, J.,

concur.