[Cite as *John Oleyar HR-10 Profit Sharing Plan & Trust v. Martin, Pergram &* *Browning Co., L.P.A*, 2001-Ohio-4046.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

John Oleyar HR-10 Profit Sharing Plan and Trust et al.,	:	
	:	
Plaintiffs-Appellants,		
	:	No. 01AP-182
v.		
	:	(ACCELERATED CALENDAR)
Martin, Pergram & Browning Co., L.P.A. et al.,		
	:	
Defendants-Appellees.		
	:	

O P I N I O N

Rendered on November 27, 2001

Wolman, Genshaft & Gellman, Nelson E. Genshaft, Susan B. Gellman and *Benson A. Wolman*, for appellants.

John C. Nemeth & Associates, and *David A. Herd*, for appellees.

APPEAL from the Franklin County Court of Common Pleas.

KENNEDY, J.

Plaintiffs-appellants, John Oleyar HR-10 Profit Sharing Plan and Trust and John Oleyar, appeal from a judgment of the Franklin County Court of Common Pleas

granting the motion for summary judgment of defendants-appellees, Martin, Pergram & Browning Co., L.P.A., and Dennis L. Pergram.

Appellants filed a verified complaint on January 22, 1999, asserting causes of action for legal malpractice. Appellees moved for summary judgment on September 29, 2000, asserting that appellants' claims were barred by the statute of limitations, by a release of claims, by an improper assignment of interests, and by the doctrines of waiver and estoppel. The parties filed competing memoranda in support of and in opposition to the motion for summary judgment. On January 10, 2001, the trial court filed a decision and entry granting the motion for summary judgment, concluding that the action was barred by the statute of limitations. Appellants filed a timely notice of appeal.

On appeal, appellants assert one assignment of error:

> The Court of Common Pleas erred in granting the defendants' motion for summary judgment on statute of limitations grounds because there are genuine issues of material fact regarding the accrual of the action that were improperly resolved in favor of the appellee.

Additionally, appellees assert three cross-assignments of error:

> **First Cross-Assignment of Error**
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> The trial court, in the alternative, should also have granted summary judgment to Appellees as against Appellant John Oleyar based upon a release of claims.
>
> **Second Cross-Assignment of Error**
>
> The trial court, in the alternative, should also have granted summary judgment to Appellees as to all claims except the 4.68% investment interest of the John Oleyar HR-10 Profit Sharing Plan because Appellants did not properly possess the claims of the other limited partners as malpractice claims cannot be assigned.

Third Cross-Assignment of Error

> The trial court, in the alternative, should also have granted summary judgment to Appellees based upon the doctrines of waiver and estoppel.

Appellants brought this action on behalf of a group of investors in the limited partnership of Flickers Bethel Centre, Ltd, which operated a cinema pub on Bethel Road in Columbus, Ohio. The other limited partners assigned their claims against appellees to appellants. The limited partners retained appellees, in 1992, to represent them in three pending lawsuits against the Ackerman family and their business entities, who were responsible for the day-to-day operations of Flickers, alleging mismanagement. Appellees filed one additional lawsuit against the Ackermans. The limited partners and the Ackermans reached a settlement resolving all four pending cases. A judgment entry was filed on September 29, 1993, adopting the settlement agreement. Under the terms of the settlement agreement, one of the Ackerman entities issued a promissory note for $160,000, payable in monthly installments to the limited partners through a designated representative. Pergram was designated as the representative to receive payments from the Ackermans. Additionally, the limited partners were granted a security interest in the property and equipment at the cinema and in the liquor license. Appellees prepared UCC-1 forms to record the security interests, but the forms were not filed until December 29, 1993.

On December 26, 1993, three days prior to the filing of the UCC-1 forms, a fire destroyed part of the cinema and the collateral that was subject to the limited partners' security interest. Despite the fire, the Ackermans continued to make payments under the settlement agreement and promissory note until early 1996. At some point in late 1993, or early in 1994, appellees contacted Oleyar to pick up his files from appellees' office or

they would be destroyed. According to Pergram, the firm gave Oleyar everything, "lock, stock and barrel." Although Oleyar was never told that appellees were keeping any files from the Flickers matter, Oleyar assumed they were keeping a basic file given that they had discussed the likelihood of default by the Ackermans. In a letter written by Oleyar dated January 22, 1994, Oleyar made reference to a "final bill" from appellees for the legal services related to the Flickers litigation. Oleyar was not aware of any other legal services billed after that time.

Although Pergram was designated as the representative for payments under the promissory note, as early as 1993, he attempted to have Oleyar take over receiving the payments. However, the Ackermans would not agree to having Oleyar receive payments unless the other limited partners agreed to it. Eventually, the parties agreed to allow Dave Siegesmund to accept payments under the promissory note. In a letter from Pergram to the limited partners dated November 14, 1995, he indicated that he wanted to be taken out of the loop. Oleyar indicated that Pergram was performing no legal services at the time and was merely acting as a conduit for payments and that Pergram had never billed them for receiving or processing the payments. Pergram received no more payments after November 1995.

The Ackermans continued making payments through Siegesmund until the end of 1995, or early 1996. However, Oleyar took no action against the Ackermans when the payments ceased. According to Oleyar, he had been advised by Pergram to wait until they accumulated a substantial dollar amount in default before taking any legal action. Pergram indicated that he was "out of the loop" at the time of default and that he was un-

aware when the payments stopped, because Siegesmund was then receiving the payments.

Early in January 1998, Oleyar learned, through the newspaper or through Gerard Pizzuti (another limited partner), that Call Insurance obtained a court order to have the sheriff padlock Flickers. Oleyar indicated that the padlocking "did make him sit up and take notice" and that it caused him concern. However, Oleyar chose to call Dave Lackey, the attorney involved in the Call Insurance litigation, himself. Lackey informed Oleyar that he was unaware that the limited partners' lien existed and that he was surprised by Oleyar's call. Oleyar told Lackey that he would be hearing from an attorney, but Oleyar did not specify who that attorney would be.

Subsequently, Pergram left a message on Oleyar's answering machine or voice mail indicating that he had some information on the Flickers situation that he wanted to discuss with Oleyar. Pergram indicated that he called Oleyar after Steve Martin, another attorney in the firm, had received a courtesy call from an attorney involved in the Call Insurance matter. Martin suggested that Pergram contact Oleyar to inform him that something was happening with Flickers. On January 22, 1998, Oleyar sent a fax to Pergram apologizing for not returning Pergram's call and indicating how Pergram could contact him. However, neither Pergram nor anyone from his firm ever contacted Oleyar. According to Oleyar's deposition, he was aware of the Call Insurance litigation a couple of weeks before sending the fax to Pergram on January 22, 1998. Oleyar indicated that Pergram had performed no legal services for him between November 1995, when Pergram ceased processing payments, and January 22, 1998.

Oleyar engaged the law firm of Brooks and Wilburn in January or February 1998, to handle the Call Insurance matter. In March 1998, they intervened in the Call Insurance litigation and reached a settlement in April 1998, whereby Oleyar and the other limited partners terminated their security interest in the collateral at Flickers. On January 22, 1999, appellants filed the malpractice action against appellees.

In appellants' single assignment of error, they argue that the trial court erred by granting appellees' motion for summary judgment on statute of limitations grounds because genuine issues of material fact remain that precludes summary judgment. We disagree.

An appellate court reviews a trial court's grant of summary judgment independently and without deference to the trial court's determination. *Sadinsky v. EBCO Mfg. Co.* (1999), 134 Ohio App.3d 54, 58. An appellate court applies the same standard as the trial court in reviewing a trial court's disposition of a summary judgment motion. *Maust v. Bank One Columbus, N.A.* (1992), 83 Ohio App.3d 103, 107. Before summary judgment can be granted under Civ.R. 56(C), the trial court must determine that:

> *** (1) [N]o genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made. *** [*State ex rel. Parsons v. Fleming* (1994), 68 Ohio St.3d 509, 511 (citing *Temple v. Wean United, Inc.* [1977], 50 Ohio St.2d 317, 327)].

Summary judgment is a procedural device to terminate litigation, so it must be awarded cautiously with any doubts resolved in favor of the non-moving party. *Murphy v. Reynoldsburg* (1992), 65 Ohio St.3d 356, 358-359.

The trial court concluded that appellants' malpractice action, filed January 22, 1999, was barred by the one-year statute of limitations. Finding no genuine issues of material fact that would preclude summary judgment, the trial court found that the attorney-client relationship terminated no later than November 1995. Additionally, the trial court concluded that the cognizable event that should have led to appellants discovering the alleged malpractice by appellees occurred in early 1994. Thus, appellants' cause of action accrued no later than November 1995, according to the trial court. Appellants assert that their cause of action did not accrue until April 30, 1998, when Oleyar learned the exact details of the Ackermans' actions and of Pergram's alleged failure to comply with Ohio liquor law through the Call Insurance litigation. Moreover, they argue that the attorney-client relationship did not terminate until some time after January 22, 1998, when Oleyar sent the fax to Pergram in response to Pergram's message. However, appellees counter that the cognizable event occurred and the attorney-client relationship terminated prior to January 22, 1998.

Regardless of whether claims of professional misconduct by an attorney are framed in terms of negligence or breach of contract, all such claims state a cause of action for legal malpractice. *Rumley v. Buckingham, Doolittle & Burroughs* (1998), 129 Ohio App.3d 638, 641-642. Under R.C. 2305.11(A), an action for legal malpractice must be commenced within one year after the cause of action accrued. In *Zimmie v. Calfee, Halter & Griswold* (1989), 43 Ohio St.3d 54, syllabus, the Supreme Court of Ohio delineated the test for determining when the cause of action accrues in a legal malpractice action:

> Under 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. ***

The determination of the date of accrual of a cause of action for legal malpractice is a question of law that is reviewed *de novo* on appeal. *Whitaker v. Kear* (1997), 123 Ohio App.3d 413, 420. The determination of when the attorney-client relationship for a particular transaction terminates is a question of fact. *Omni-Food & Fashion, Inc. v. Smith* (1988), 38 Ohio St.3d 385, 388.

Upon a review of the record viewed most favorably for appellants, we agree with the trial court that there are no genuine issues of material fact; instead, the parties merely dispute the legal significance of the undisputed facts in the record. With regard to the termination of the attorney-client relationship, we agree with the trial court that it occurred no later than November 1995. By that point, Pergram had ceased serving in the capacity of an attorney and had concluded his duties processing payments. In 1994, Oleyar had received what he called a "final bill" for appellees' legal services related to the transaction and had been instructed by Pergram to pick up the files related to the matter or they would be destroyed. There was no contact between Pergram and Oleyar for over two years. While any of these events in isolation may be ambiguous, when taken as a whole it is clear and unambiguous that the attorney-client relationship had ceased. Moreover, the fact that Pergram attempted to contact Oleyar prior to January 22, 1998, to pass on some information about Flickers, did not resuscitate the attorney-client relationship. The parties never actually spoke, and Oleyar subsequently retained other counsel. Thus,

the trial court did not err in granting summary judgment on this issue. See *Mobberly v. Hendricks* (1994), 98 Ohio App.3d 839, 843.

With regard to the cognizable event that should have alerted appellants to the alleged malpractice by appellees, we disagree with the trial court's conclusion that this event occurred late in December 1993, or early in 1994, when Oleyar learned that a fire had destroyed some of the collateral covered by the security agreement and Pergram allegedly advised him that nothing could be done about it. According to Oleyar's deposition testimony, he was unconcerned after the fire because Pergram advised him that there would be no problems as long as the Ackermans continued making payments. Thus, because the payments continued after the fire without any problems, Oleyar had no reason to question the legal representation by appellees at this point.

However, we conclude that the cognizable events that should have put appellants on notice that they were injured by appellees' representation occurred early in January 1998, when Flickers was padlocked under court order and when Lackey informed Oleyar that he was unaware of the limited partners' lien. Oleyar's deposition testimony indicates that the padlocking of Flickers "did make him sit up and take notice" and that it caused him concern. His response was to call Lackey, who was surprised by his call and was unaware of any other security interests. Oleyar indicated he learned of the Call Insurance litigation a couple of weeks before sending the fax to Pergram on January 22, 1998, and the first thing he did was to call Lackey. Thus, both events occurred prior to January 22, 1998. While appellants may not have been aware of the specific extent of their injury at this point, a reasonable person should have been alerted that there was a problem with appellees' representation. See *Zimmie*, at 58.

Therefore, because the attorney-client relationship terminated no later than November 1995, and the cognizable event occurred in early January 1998, appellants' cause of action accrued prior to January 22, 1998. Thus, the trial court did not err in granting summary judgment on statute of limitations grounds. Appellants' complaint, filed January 22, 1999, exceeded the one-year statute of limitations in R.C. 2305.11(A). Consequently, appellants' assignment of error is overruled.

Because we overrule appellants' assignment of error, appellees' three cross-assignments of error are rendered moot.

Based upon the foregoing reasons, appellants' single assignment of error is overruled, and appellees' three cross-assignments of error are moot. Consequently, the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

DESHLER and LAZARUS, JJ., concur.
