[Cite as *Grenoble v. Rion, Rion, Rion, L.P.A., Inc.*, 2015-Ohio-971.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

PREBLE COUNTY

DEAN O. GRENOBLE,	:	
		CASE NO. CA2014-07-006
Appellant,	:	
		O P I N I O N
	:	3/16/2015
- vs -		
	:	
RION, RION, RION, L.P.A., INC., et al.,	:	
Appellees.	:	

CIVIL APPEAL FROM PREBLE COUNTY COURT OF COMMON PLEAS
Case No. 14-CV-030155

Dean O. Grenoble, #A613947, Hocking Correctional Facility, 16759 Snake Hollow Road, P.O. Box 59, Nelsonville, Ohio 45764, appellant, pro se

Rion, Rion, Rion, L.P.A., Inc., Jon Paul Rion and Nicole Rutter-Hirth, 130 West Second Street, Suite 2150, P.O. Box 10126, Dayton, Ohio 45402, for appellees

M. POWELL, J.

{¶ 1} Plaintiff-appellant, Dean O. Grenoble, appeals pro se a decision of the Preble County Court of Common Pleas granting summary judgment in a legal malpractice action to defendants-appellees, the law firm of Rion, Rion, Rion, L.P.A., Inc., and two of its attorneys, John H. Rion and Jon Paul Rion. For the reasons discussed below, we affirm the decision of the trial court.

{¶ 2} In August 2009, appellant was arrested in Preble County, Ohio. Shortly thereafter, he retained appellees to conduct his defense. Following a bench trial, appellant was found guilty of one count of possession of marijuana, and one count of possession of criminal tools. In August 2010, appellant was sentenced to a mandatory prison term of eight years on the possession of marijuana charge, and a concurrent 12-month term for the possession of criminal tools charge. With the assistance of appellees, appellant obtained a stay of his sentence pending appeal, and remained free on bond to return to his home near Tuscon, Arizona.

{¶ 3} This court subsequently affirmed appellant's conviction and sentence. *State v. Grenoble*, 12th Dist. Preble No. CA2010-09-011, 2011-Ohio-2343. As a result, appellant's bond was "cancelled" and he was ordered to appear to begin serving his sentence. Appellant did not voluntarily appear, and he was returned to Ohio only after significant extradition efforts by the state. Appellant alleges that his failure to appear was due to the advice of appellees to challenge extradition from Arizona, and that this advice led to the forfeiture of a bond he had posted.[1] Regardless, appellant began serving his eight-year prison term in October 2011.

{¶ 4} In December 2011, appellees, on behalf of appellant, moved the trial court for a modification of appellant's sentence. On December 22, 2011, the trial court filed an entry denying the motion.

{¶ 5} On January 23, 2012, appellant, acting through new counsel, appealed the denial of his motion to modify sentence. In his brief, filed on April 19, 2012, appellant argued he received ineffective assistance of counsel during appellees' representation. This court affirmed the trial court's refusal to modify appellant's sentence. *State v. Grenoble*, 12th Dist.

1. It is not clear from the record what the trial court meant when it referred to appellant's bond as "cancelled," or whether the bond appellant allegedly forfeited was the same bond referenced by the trial court.

Preble No. CA2012-01-001, 2012-Ohio-5961.

{¶ 6} On January 16, 2014, the clerk of the trial court received a document from appellant that was captioned "Motion to Proceed *In Forma Pauperis*." (Emphasis sic.) The motion indicated that "[appellant's] Affidavit of Indigency and the statement of the institution cashier is attached hereto and made a part hereof[,]" but these documents are not in the record. On January 30, 2014, the trial court granted appellant's motion and allowed him to file a complaint without the normal deposit of court costs. On that same day, appellant's complaint, captioned "Complaint in Legal Malpractice," was filed with the trial court.

{¶ 7} Appellees moved to dismiss appellant's complaint on the ground that the statute of limitations had expired on his legal malpractice claim. The trial court converted appellees' motion into a motion for summary judgment, and appellees subsequently filed a memorandum in support of summary judgment accompanied by supporting affidavits and other exhibits. Appellant filed pro se a memorandum in opposition that was not accompanied by any supporting affidavits or exhibits.

{¶ 8} On June 26, 2014, the trial court found that appellant's claim was barred by the statute of limitations, and therefore granted summary judgment in favor of appellees.

{¶ 9} Appellant now appeals, raising three assignments of error.

{¶ 10} Assignment of error No. 1:

{¶ 11} THE TRIAL COURT JUDGE VIOLATED CIV.R. 5(E) FILING REQUIREMENTS BY FILING THE COMPLAINT FOURTEEN DAYS AFTER BEING RECEIVED WITH THE IN FORMA PAUPERIS REQUEST. [SIC]

{¶ 12} Appellant observes that the timestamp on his "Motion to Proceed *In Forma Pauperis*" indicates the motion was received by the clerk of the trial court on January 16, 2014. Yet, appellant notes that the trial court did not grant his motion or approve the filing of his complaint until January 30, 2014. Appellant asserts the trial court violated Civ.R. 5(E)

when it failed to file his complaint on the day that his materials were received by the clerk, i.e., January 16, 2014.

{¶ 13} Appellant's reliance on Civ.R. 5(E) is misplaced. Pursuant to Civ.R. 3(A), the proper method of commencing a civil action is by filing a complaint with the trial court, and obtaining service within one year of such filing. *Seger v. For Women, Inc.*, 110 Ohio St.3d 451, 2006-Ohio-4855, ¶ 7. The methods of filing and service prescribed by Civ.R. 5 may be used only after the action is properly commenced pursuant to Civ.R. 3, and only with respect to "Pleadings and Other Papers Subsequent to the Original Complaint." Civ.R. 5(E). *See also In re Holtel*, 4th Dist. Athens No. 1267, 1987 WL 15481, *3 (Aug. 11, 1987). Thus, Civ.R. 5(E) was not relevant to appellant's attempt to file his complaint in January 2014.

{¶ 14} In addition, appellant failed to comply with the statutory process for obtaining a waiver of deposit. R.C. 2323.31 allows courts of common pleas to require an advance deposit for the filing of any civil action. *Guisinger v. Spier*, 166 Ohio App.3d 728, 2006-Ohio-1810, ¶ 4 (2d Dist.). Accordingly, the Preble County Local Rules and the Preble County Schedule of Deposits for Costs require the clerk to collect a deposit for court costs from plaintiffs in a civil action at the time the complaint is filed. For those who cannot afford the required payment, R.C. 2323.31 provides that

> [I]f a plaintiff makes an affidavit of inability either to prepay or give security for costs, the clerk of the court shall receive and file the petition. Such affidavit shall be filed with the petition, and treated as are similar papers in such cases.

{¶ 15} Thus, if the clerk is presented with any paper that is properly prepared and accompanied by an affidavit of indigency, it is the clerk's duty under R.C. 2323.31 to file the paper without charge. However, it is axiomatic that "[t]he power to make any decision as to the propriety of any paper submitted or as to the right of a person to file such paper is vested in the court, not the clerk." *State ex rel. Wanamaker v. Miller*, 164 Ohio St. 176, 177 (1955);

Rhoades v. Harris, 135 Ohio App.3d 555, 558 (1st Dist.1999). Therefore, where the clerk is presented with a paper that is not accompanied by either the requisite filing fee or an affidavit of indigency, the clerk must defer to the court's judgment as to the propriety of that paper and the right of a person to file it.

{¶ 16} In the present case, appellant's complaint was not accompanied by either the requisite filing fee or an affidavit of indigency. Instead, appellant presented the clerk with a "Motion to Proceed *In Forma Pauperis*." Although the clerk's timestamp indicates this motion was received on January 16, 2014, the clerk did not have the authority to grant the motion and file appellant's complaint at that time. Therefore, the clerk rightly submitted the motion to the trial court for a determination as to appellant's right to file his complaint. The record indicates the court considered appellant's motion within a reasonable time, and the clerk duly filed the complaint after the motion was granted on January 30, 2014.

{¶ 17} Consequently, appellant's first assignment of error is overruled.

{¶ 18} Assignment of error No. 2:

{¶ 19} DEFENDANT'S WERE DIRECTLY RESPONSIBLE, AS DETERMINED FROM THEIR CONTRACTUAL REQUIREMENTS, FOR PLAINTIFF'S SIGNIFICANT LOSS OF PROPERTY, CAUSING THE SUIT TO FALL UNDER THE TWO YEAR STATUTE OF LIMITATIONS OF R.C.2305.10. [SIC]

{¶ 20} Appellant argues the trial court erred by applying the one-year statute of limitations for malpractice claims to his case. Appellant contends the trial court should have instead applied the two-year statute of limitations for a product liability action pursuant to R.C. 2305.10. Elsewhere in his brief, appellant also contends that the four-year statute of limitations under R.C. 2305.09 for the tortious taking of personal property applies, and that "it is conceivable" that the eight-year statute of limitations under R.C. 2305.06 for actions on a written contract may also apply. Thus, appellant argues the trial court's award of summary

judgment to appellees should be reversed.

1. Standard of Review

{¶ 21} Appellate review of a trial court's decision to grant summary judgment is de novo. *Ward v. Graue*, 12th Dist. Clermont No. CA2012-06-046, 2013-Ohio-1107, ¶ 10. Thus, the appellate court uses the same standard the trial court should have used, and examines the evidence to determine whether as a matter of law no genuine issues exist for trial. *Id.* Pursuant to Civ.R. 56(C), summary judgment is appropriate when (1) there are no genuine issues of material fact to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) when all evidence is construed most strongly in favor of the nonmoving party, reasonable minds can come to only one conclusion, and that conclusion is adverse to the nonmoving party. *Zivich v. Mentor Soccer Club, Inc.*, 82 Ohio St.3d 367, 369-370 (1998).

2. The Statute of Limitations

{¶ 22} To determine which statute of limitations governs a given claim, "courts must look to the actual nature or subject matter of the case, rather than to the form in which the action is pleaded. The grounds for bringing the action are the determinative factors, the form is immaterial." *Hambleton v. R.G. Barry Corp.*, 12 Ohio St.3d 179, 183 (1984); *DLK Co. of Ohio v. Meece*, 12th Dist. Warren No. CA2012-07-060, 2013-Ohio-860, ¶ 18.

{¶ 23} It is well-settled that a client's action against his attorney for damages resulting from the manner in which the attorney represented the client constitutes an action for malpractice within the meaning of R.C. 2305.11(A). *Muir v. Hadler Real Estate Mgt. Co.*, 4 Ohio App.3d 89, 90 (10th Dist.1982). "The term 'malpractice' refers to professional misconduct, i.e., the failure of one rendering services in the practice of a profession to exercise that degree of skill and learning normally applied by members of that profession in similar circumstances." (Emphasis omitted.) *Strock v. Pressnell*, 38 Ohio St.3d 207, 211

(1988). Malpractice may consist of either negligence or breach of contract. *Wilkerson v. O'Shea*, 12th Dist. Butler No. CA2009-03-068, 2009-Ohio-6550, ¶ 13.

{¶ 24} Upon review, we find that the statute of limitations for malpractice under R.C. 2305.11(A) – and not the respective statutes of limitations for product liability actions, the tortious taking of personal property, or written contracts – applies to appellant's claims. Appellant claims appellees breached their contract with appellant by "[falling] short in their quality of legal care and responsibility," and that this breach entitled appellant both to a product liability action, and to recover his property which was taken from him due to appellees' "false representation." These claims sound in legal malpractice.

{¶ 25} First, we note that the services of an attorney do not constitute a "product" as contemplated by product liability claims pursuant to R.C. 2307.71 through 2307.80. According to R.C. 2307.71(A)(12)(a), a "product" for the purposes of a product liability claim involves "any object, substance, mixture, or raw material that constitutes tangible personal property * * *." Because the services of an attorney do not meet the definition of a "product" under R.C. 2307.71(A)(12)(a), the statute of limitations for product liability under R.C. 2305.10 does not apply here.

{¶ 26} Moreover, all of appellant's claims arose out of the manner in which appellant was represented within the attorney-client relationship. Appellant's argument for the application of the statute of limitations for the tortious taking of personal property, R.C. 2305.09, is based upon appellees' alleged advice to appellant to post bond in Arizona, and appellant's subsequent forfeiture of that bond.[2] Appellant's argument for application of the statute of limitations for actions on a written contract, R.C. 2305.06, is based upon "the

2. In this respect, appellant asserts that his case is similar in nature to *Bittner v. Wilkinson*, 6th Cir. No. 00-3848, 19 F. Appx. 310 (Sep. 14, 2001). After reviewing *Bittner*, we are unable to discern how that case is relevant to the present appeal, or how it supports appellant's argument. *Bittner* involves an inmate's federal and state law claims against several officials of an Ohio prison for failure to protect, retaliation, cruel and unusual punishment, and assault. *Id.* at 312.

contractual nature of [appellant's] association with [appellees] * * *."

{¶ 27} Clearly, appellant's claims sound in legal malpractice, notwithstanding appellant's attempts to label them otherwise. *Wilkerson*, 2009-Ohio-6550 at ¶ 30, citing *Callaway v. Nu-Cor Auto*. *Corp.*, 166 Ohio App.3d 56, 2006-Ohio-1343, ¶ 14 (10th Dist.). Complaints sounding in malpractice subsume other, duplicative claims. *Illinois Natl. Ins. Co. v. Wiles, Boyle, Burkholder & Bringardner Co., L.P.A.*, 10th Dist. Franklin No. 10AP-290, 2010-Ohio-5872, ¶ 15. Therefore, appellant's claims are subject to the one-year statute of limitations set forth in R.C. 2305.11(A).

3. Application of R.C. 2305.11(A)

{¶ 28} Having determined that R.C. 2305.11(A) was the proper statute of limitations in this case, we must determine whether it was properly applied. R.C. 2305.11(A) provides that an action for malpractice must be commenced within one year after the cause of action accrued. If the action is not commenced within one year, and if the defendant in the action timely raises the expiration of the statute of limitations as a defense, the "lapse of time shall be a bar to the action." R.C. 2305.03(A).

{¶ 29} The Ohio Supreme Court has determined that an action for legal malpractice accrues and the statute of limitations begins to run when either a cognizable event occurs or the attorney-client relationship terminates, whichever comes later. *Zimmie v. Calfee, Halter and Griswold*, 43 Ohio St.3d 54 (1989), syllabus. A cognizable event occurs when the party discovers or should have discovered that he was injured by the attorney's actions or nonactions. *McGlothin v. Schad*, 194 Ohio App.3d 669, 2011-Ohio-3011, ¶ 12 (12th Dist.). The injured party does not need to be aware of the full extent of his injury for a cognizable event to occur, but the event should alert the party that there was a questionable legal practice. *Id.* For example, a cognizable event occurs when the client alleges ineffective assistance of trial counsel on appeal. *Id.* at ¶ 13.

{¶ 30} The termination of an attorney-client relationship is a fact-specific determination based upon the actions of the parties or the circumstances of the particular case. *Omni-Food & Fashion, Inc. v. Smith*, 38 Ohio St.3d 385, 388 (1988). This court has identified several ways that the attorney-client relationship can be terminated for the purposes of a legal malpractice action, such as:

> [T]he client retaining other counsel * * *. [W]hen the underlying action has concluded or when the attorney has exhausted all remedies in the case. * * * [W]hen there is a lack of subsequent legal remedies in a particular transaction and there is no communication between the parties regarding any related legal matter.

(Citations omitted.) *McGlothin* at ¶ 15.

{¶ 31} In the present case, appellant argues that the cognizable event occurred on January 28, 2013, when a former attorney and a librarian in the prison law library helped him understand he may have a claim against appellees. Yet, as noted above, appellant's complaint was not filed until January 30, 2014, one year and two days after appellant alleges the claim for malpractice accrued.

{¶ 32} "Under Civ.R. 3(A), an action is commenced if a complaint is filed and a defendant is served with the complaint within one year." *Ludwigsen v. Lakeside Plaza, LLC*, 12th Dist. Madison No. CA2014-03-008, 2014-Ohio-5493, ¶ 14. Because appellant attempted to commence his action more than one year after his claim for malpractice accrued, the trial court properly found that appellant's claim was barred by the statute of limitations under R.C. 2305.11(A).

{¶ 33} In addition, we note that even if appellant had properly filed his complaint on January 16, 2014, as he contends, appellant's malpractice claim would nonetheless be barred by the one-year statute of limitations under R.C. 2305.11(A). The record shows that appellant's attorney-client relationship with appellees was terminated no later than January

23, 2012, when appellant filed a notice of appeal through different counsel. *See McGlothin*, 2011-Ohio-3011, at ¶ 15. The record also shows that a cognizable event occurred no later than April 19, 2012, when appellant filed a brief to this court arguing the ineffective assistance of trial counsel. *See Id.* at ¶ 13. Thus, at the latest, the cause of action for malpractice accrued on April 19, 2012, approximately 21 months prior to appellant's attempt to file his complaint and commence his action.

{¶ 34} Accordingly, appellant's second assignment of error is overruled.

{¶ 35} Assignment of error No. 3:

{¶ 36} PLAINTIFF SUSTAINED INJURY DUE TO LACK OF COMMUNICATION AND FAULTY LEGAL ADVICE FROM HIS LAWYER'S WHICH CREATED A SITUATION WHERE PLAINTIFF SUSTAINED SIGNIFICANT PROPERTY LOSS. [SIC]

{¶ 37} In his third assignment of error, appellant seems to argue the trial court erred in granting summary judgment to appellees because a genuine issue of material fact still existed for trial. In view of our disposition of appellant's second assignment of error, his third assignment of error is rendered moot and we decline to address it.

{¶ 38} Judgment affirmed.

PIPER, P.J., and HENDRICKSON, J., concur.