

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

DANIEL B. JONES	:	APPEAL NO. C-060803
		TRIAL NO. A-0601668
and	:	
LESLIE E. JONES,	:	<i>JUDGMENT ENTRY.</i>
Plaintiffs-Appellants,	:	
vs.	:	
SEBALY, SHILLITO & DYER, L.P.A.,	:	
and	:	
KEVIN BOWMAN,	:	
Defendants-Appellants.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

Plaintiffs-appellants Daniel and Leslie Jones appeal the trial court’s judgment dismissing their case against defendants-appellees Sebaly, Shillito & Dyer, L.P.A., (“SS&D”), a law firm, and Kevin Bowman, formerly an attorney with SS&D.

The Joneses alleged that in mid-2003 they retained Bowman and SS&D to represent them in a civil lawsuit filed in the Butler County Court of Common Pleas against the People’s Community Bank and others. In late 2003 or early 2004, Bowman entered into settlement discussions with the bank’s lawyers without the

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

Joneses' knowledge. In mid-February, Bowman presented the Joneses with the proposed settlement documents. The Joneses did not agree to the settlement. Subsequently, Bowman signed the Joneses' names and the name of their business attorney, Timothy R. Evans, on the settlement documents. Further, Bowman dismissed the Joneses' lawsuit against the bank with prejudice. On February 20, 2004, the Joneses received a package containing the forged settlement documents and the entry of dismissal.

The Joneses later retained attorney Kyle B. McKenzie, who assisted them in receiving a refund of their retainer fee from SS&D in October 2004. In November 2004, McKenzie moved to set aside the judgment of dismissal entered in the Joneses' lawsuit against the bank. The Butler County judge presiding over the action initially granted the Civ.R. 60(B) motion on February 15, 2005. But nine days later the judge vacated that order and reinstated the dismissal.

The Joneses instituted this action against Bowman and SS&D on February 21, 2006—over two years after they had received the forged documents and the entry of dismissal. In their complaint, the Joneses alleged that Bowman and SS&D had committed negligence and “fraud.”

The trial court held that the complaint alleged a cause of action for legal malpractice, not fraud, and that it was filed more than one year after the statute of limitations for legal malpractice claims had expired. Thus, the trial court dismissed the complaint as untimely filed.

In their sole assignment of error, the Joneses now argue that the trial court erred in dismissing their complaint. We disagree.

We review a dismissal of a complaint under Civ.R. 12(B)(6) de novo.² To dismiss a complaint under Civ.R. 12(B)(6) for failure to state a claim upon which relief can be granted, it must appear beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle the plaintiff to relief.³ A motion to dismiss based upon a statute of limitations may be granted when the complaint shows indisputably on its face that the action is time-barred.⁴

The Joneses argue that they pleaded a proper fraud claim. “Fraud may be broadly defined as the concealment or misrepresentation of a fact or a set of facts material to the transaction between the parties, the falsity of which is known to the defendant (or if not actually known, should have been known), by which falsity the defendant intends to mislead the plaintiff and in reliance on which the plaintiff acts to his detriment.”⁵ In their complaint, the Joneses alleged that Bowman and his law firm had made false and deceptive statements of fact when they forged their signatures and settled and dismissed the lawsuit without authorization. But the Joneses failed to plead all the elements of a fraud claim: they did not allege that (1) Bowman or SS&D had made any misrepresentation to them; (2) that Bowman or SS&D had intended to induce their reliance on a misrepresentation; or (3) that they had relied on any such misrepresentation.

Additionally, the allegations in the Joneses’ complaint arose out of the alleged professional misconduct of Bowman and SS&D during their representation of the

² See *Battersby v. Avatar, Inc.*, 157 Ohio App.3d 648, 2004-Ohio-3324, 813 N.E.2d 46, at ¶5.

³ *O'Brien v. Univ. Community Tenants Union, Inc.* (1975), 42 Ohio St.2d 242, 245, 327 N.E.2d 753.

⁴ *Velotta v. Leo Petronzio Landscaping, Inc.* (1982), 69 Ohio St.2d 376, 433 N.E.2d 147, paragraph three of the syllabus.

⁵ *Hibbett v. Cincinnati* (1982), 4 Ohio App.3d 128, 131, 446 N.E.2d 832.

Joneses. Generally, if a client sues his former lawyer for damages arising out of the lawyer's representation, the action is one for malpractice, not fraud.⁶

The Joneses argue also that the trial court imposed an unconstitutional pleading requirement for fraud claims against a lawyer. The trial court required an allegation that the lawyer had committed the fraud for his own gain. We decline to address this argument because we have already held that the Joneses failed to allege a fraud claim without regard to the additional pleading requirement imposed by the trial court.

In sum, the Joneses did not allege sufficient facts to state a claim for fraud against Bowman and SS&D. But the Joneses did allege sufficient facts to state a legal malpractice claim against Bowman and SS&D. We now review whether the trial court erroneously concluded that this claim was time-barred.

A legal malpractice cause of action is governed by a one-year statute of limitations.⁷ The cause of action accrues and the statute of limitations begins to run (1) when there is a cognizable event where the client discovers or should discover that his injury is related to his attorney's action or inaction, and the client is put on notice to pursue his possible remedies against the attorney, or (2) when the attorney-client relationship for a particular transaction or undertaking terminates, whichever occurs later.⁸

The Joneses argue that a cognizable event did not take place until February 24, 2005, when the Butler County judge vacated his order of February 15, 2005, and reinstated the judgment dismissing the Joneses' lawsuit against the bank with

⁶ Id.; see, also, *Leski v. Ricotta*, 8th Dist. No. 83600, 2004-Ohio-2860.

⁷ See R.C. 2305.11(A).

⁸ *Zimmie v. Calfee, Halter & Griswold* (1989), 43 Ohio St.3d 54, 538 N.E.2d 398, syllabus.

prejudice. They claim that they could not have become aware of any injury until this time, because during the period between the two conflicting orders they had no injury due to the reinstatement of their lawsuit.

The Ohio Supreme Court, in *Zimmie v. Calfee, Halter & Griswold*, rejected a similar argument.⁹ The focus of a court in applying the discovery rule is not whether an injury disappears and reappears, but rather whether a cognizable event has occurred that would have alerted a reasonable person that “a questionable legal practice may have occurred” such that he may need to pursue remedies.¹⁰ In this case, that event occurred when the Joneses received the allegedly forged documents and the entry of dismissal on February 20, 2004. At that point, they were aware of the effect of Bowman’s and SS&D’s actions: the unsatisfactory settlement and the premature termination of their lawsuit against the bank.

Thus, where the cognizable event occurred in February 2004, and the attorney-client relationship ended at the very latest by October 2004, the Joneses’ legal malpractice claim was not timely filed in February 2006. We overrule the assignment of error and affirm the trial court’s judgment.

Further, a certified copy of this Judgment Entry shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R.24.

HILDEBRANDT, P.J., CUNNINGHAM and DINKLACKER, JJ.

To the Clerk:

Enter upon the Journal of the Court on August15, 2007

per order of the Court _____.
Acting Presiding Judge

⁹ Id. at 58-59.

¹⁰ Id. at 58.