**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**
**IN AND FOR NEW CASTLE COUNTY**

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| GEORGE E. WILHELM and PAMELA A. WILHELM, | ) | |
| Plaintiffs, | ) | |
| v. | ) | C.A. No. 12C-06-015 DCS |
| DONALD E. MARSTON, ESQUIRE and DOROSHOW PASQUALE KRAWITZ & BHAYA | ) | |
| Defendants. | ) | |

Submitted: November 15, 2013
Decided: November 20, 2013

*Upon Consideration of Defendants' Motion for Summary Judgment Based on Statute of Limitations – Motion* **GRANTED**

# OPINION

Kevin William Gibson, Esquire, Gibson & Perkins PC, Media, Pennsylvania, Attorney for Plaintiff

Paul M. Lukoff, Esquire and Douglass Cummings, Esquire, Wilks, Lukoff & Bracegirdle, LLC, Wilmington, Delaware, Attorneys for Defendants

**STREETT, J.**

## Introduction

Defendants Donald E. Marston, Esquire ("Mr. Marston") and the law firm of Doroshow Pasquale Krawitz & Bhaya (the "law firm") have moved for summary judgment pursuant to Superior Court Civil Rule 56(c). Defendants contend that the legal malpractice claim, asserted by the Plaintiffs George E. Wilhelm ("Mr. Wilhelm") and his wife, Pamela E. Wilhelm, is barred by the statute of limitations.

Having considered the motion, the response, and oral argument, Defendants' motion for summary judgment is granted.

## Factual and Procedural Background

On July 16, 1998, Mr. Wilhelm, an employee of Delmarva Power & Light Company ("D P & L"), was injured while repairing a downed light pole. A vehicle driven by an unidentified tortfeasor struck the pole which caused the pole to strike and injure Mr. Wilhelm.[1]

At the time of the accident, Plaintiffs had an automobile insurance policy with Nationwide Insurance ("Nationwide") which provided uninsured/underinsured motorist coverage.[2]

Mr. Wilhelm met with Mr. Marston of Doroshow Pasquale Krawitz & Bhaya for the first time on September 20, 2000.[3] The fee agreement that Mr.

[1] Amended Compl., ¶ 5-6 (Aug. 15, 2012).

[2] *Id.* at ¶ 11.

[3] Defs.' Mot., Ex. A, Item C (Oct. 8, 2013).

Wilhelm signed that day indicates that he retained the law firm "to represent [him] in the following matter: a work accident which occurred on or about June or July of 1998."[4]

On November 8, 2000, Mr. Marston sent Mr. Wilhelm an engagement letter.[5] The letter confirmed that Mr. Wilhelm retained the law firm to represent him in a claim for workers' compensation benefits against Conectiv (successor to D P & L) in connection with the 1998 work accident. The letter included Mr. Marston's understanding of the facts based on their September 20, 2000 meeting, an outline of the workers' compensation benefits that Mr. Wilhelm might have been entitled to receive, and their respective roles and responsibilities. Mr. Marston stated that he would "continue to investigate [Mr. Wilhelm's] claim, obtain pertinent medical and factual information and communicate with the worker's [*sic*] compensation carrier for [Mr. Wilhelm's] employer . . . [and would] also handle any litigation before the Industrial Accident Board, should that become necessary."[6]

By June 2004, Mr. Marston had successfully obtained a workers' compensation award on Mr. Wilhelm's behalf.[7] On June 11, 2004, Mr. Marston

[4] *Id.*

[5] *Id.* at Ex. A, Item D.

[6] *Id.*

[7] Amended Compl. at ¶ 10.

sent Mr. Wilhelm a letter confirming that the Defendants' representation of Mr. Wilhelm in the workers' compensation claim against Conectiv had ended.[8]

On November 25, 2008 (more than four years after Mr. Marston's representation had ended), Mr. Wilhelm met with Gary Nitsche, Esquire ("Mr. Nitsche") about a motor vehicle accident that occurred in August 2008.[9] During that meeting, Mr. Nitsche asked Mr. Wilhelm about prior injuries and Mr. Wilhelm provided details about the 1998 accident and indicated that the workers' compensation claim had been resolved. Mr. Nitsche also asked Mr. Wilhelm whether he suffered a permanent injury and Mr. Wilhelm responded that he thought that he did. Mr. Nitsche then informed Mr. Wilhelm that he had an uninsured motorist claim stemming from the 1998 accident.

On June 16, 2009, Mr. Nitsche filed an uninsured motorist claim against Nationwide on behalf of Plaintiffs.[10] The complaint alleged that Mr. Wilhelm suffered "potentially permanent personal injuries, pain and suffering, uncovered present and future medical expenses, and mental and emotional anguish as a result of the 1998 accident."[11] Plaintiffs further alleged that Nationwide was

[8] *Id.* at Ex. A, Item E.

[9] Defs.' Mot., Ex. B.

[10] *See Wilhelm v. Nationwide General Ins. Co.*, 2011 WL 4448061 (Del. Super. May 11, 2011).

The opinion in *Wilhelm v. Nationwide General Ins. Co.* was attached as an exhibit to the complaint in the instant case.

[11] *Id.* at *1.

"contractually and statutorily liable . . . for injuries and damages under the uninsured/underinsured motorist coverage in [their] insurance policy with [Nationwide]."[12]

On May 11, 2011, the Court granted Defendant Nationwide's motion for summary judgment and held that the "lawsuit, filed eleven years after the accident, [was] not in compliance with 18 *Del. C.* § 3902(a)(3)(c), or the policy language [requiring the insured to notify the insurer of a claim "as soon as practicable"] . . ."[13] The Court noted that "[f]ollowing the [1998] incident, Mr. Wilhelm retained the services of an attorney from Doroshow, Pasquale regarding a potential workers' compensation claim. Mr. Wilhelm claim[ed] that, at that time, he was not advised about any potential [uninsured motorist] claim he may have had under his insurance policy with [Nationwide]."[14]

The Court rejected the Plaintiffs' contention that the delay of over eleven years "should be excused because their original counsel [Mr. Marston] failed to advise them of their potential entitlement to [uninsured motorist] benefits."[15] The Court cited *State Farm Mutual Automobile Ins. Co. v. Johnson*[16], which held that a thirty-four week delay in notifying the insurer of a claim was not excused on the

[12] *Id.*

[13] *Id.* at *6.

[14] *Id.* at *1.

[15] *Id.* at *5.

[16] 320 A.2d 345, 346 (Del. 1974).

basis that the plaintiff relied on the advice of her attorney not to report her accident. The Court also found that "Plaintiffs' position [was] even weaker because there is no allegation that anyone, including prior counsel, instructed them not to file a . . . claim. Here, they simply did not exercise any potential rights under their policy for more than a decade."[17]

The Court's opinion, granting summary judgment in favor of Nationwide, was affirmed by the Delaware Supreme Court on September 28, 2011.[18]

On June 1, 2012, eight months after the Delaware Supreme Court affirmed the Superior Court's decision, the Plaintiffs initiated a legal malpractice action against Mr. Marston and his law firm. They alleged that Mr. Marston was negligent for "failing to promptly investigate the identity of all parties that had legal liability to compensate Plaintiffs for their injuries" resulting from the unidentified tortfeasor's negligence, "failing to give Nationwide notice of Plaintiffs' uninsured motorist claim for uninsured motorist coverage 'as soon as practical,'" and "failing to file suit against Nationwide so as to protect the Plaintiffs' claim for uninsured motorist coverage 'as soon as practical.'"[19] Plaintiffs further alleged that Mr. Marston's law firm was liable for his purported negligence under the doctrine of respondeat superior. The Plaintiffs sought to

[17] *Wilhelm v. Nationwide General Ins. Co.*, 2011 WL 4448061 at *5.

[18] Amended Compl. at ¶ 24. *See also Wilhelm v. Nationwide General Ins. Co.*, 2011 WL 4529376 (Del. Sept. 28, 2011) (affirming the Superior Court's decision granting summary judgment).

[19] Compl., ¶ 28 (June 1, 2012).

recover the damages that they would have recovered if they were successful in a claim against Nationwide, plus interest and costs (including attorney's fees).

Plaintiffs amended their complaint on August 15, 2012, adding that Mr. Marston was also negligent for his failure "to give notice to Plaintiffs that they might have the right to assert an under/uninsured motorist claim against Nationwide" and "that they might want to consult with other counsel to assert [such claim]."[20]

Mr. Nitsche prepared an expert disclosure report pursuant to Superior Court Civil Rule 26(b)(4) on July 23, 2013. Plaintiffs reported that their expert, Mr. Nitsche, would testify, *inter alia*, that "had Nationwide been alerted to the fact of the uninsured benefit claim at or about the time Mr. Marston was retained by Mr. Wilhelm that claim would have been timely made under the contractual language of the insurance policy . . ." and Plaintiffs would have prevailed on their pain and suffering and loss of consortium claims.[21]

Mr. Nitsche was deposed on August 29, 2013. Mr. Nitsche testified that he initially met with Mr. Wilhelm on November 25, 2008.[22] He further testified that during the initial meeting, he (Mr. Nitsche) informed Mr. Wilhelm of an uninsured

[20] Amended Compl. at ¶ 30.

[21] Pls.' R. 26(b)(4) Resp., ¶ 7-8 (July 23, 2013).

[22] Although Mr. Nitsche testified that November 25, 2008 is an approximate date, that it is possible that he met with Mr. Wilhelm one week earlier, and that there was a lag in sending out the initial intake letter dated November 25, 2008, Plaintiffs do not dispute November 25, 2008 as the date that Mr. Wilhelm met with Mr. Nitsche.

motorist claim arising from Mr. Wilhelm's 1998 accident and that Mr. Wilhelm indicated that he had been unaware that he could assert such claim.

On October 8, 2013, Defendants filed a motion for summary judgment alleging that Plaintiffs' legal malpractice claim was barred by the statute of limitations. Plaintiffs submitted a response on November 4, 2013. A hearing was held on November 15, 2013.

**Parties' Contentions**

Defendants contend that Plaintiffs' complaint is untimely because it was not filed within the three-year statute of limitations for legal malpractice claims. Defendants assert that "[u]nder any set of facts, [Mr. Wilhelm] failed to file his malpractice lawsuit on a timely basis"[23] within the required three-year statute of limitations.

Defendants maintain that Mr. Marston's representation of Plaintiff ended in June 2004 and, thus, Mr. Wilhelm had until June 2007 to timely file any complaint against the Defendants. Defendants calculate that the operative date for Mr. Wilhelm's legal malpractice claim is June 11, 2004. This is based on Defendants' representation upon Mr. Wilhelm signing the fee agreement (September 20, 2000) until the workers' compensation claim ended (June 11, 2004) and that no further acts or omissions attributable to Mr. Marston occurred after the workers'

[23] Defs.' Mot. at ¶ 10.

compensation case was closed because Mr. Marston and the law firm no longer represented him.

Defendants also assert that the "time of discovery" exception, which would toll the statute of limitations until Plaintiffs discovered Mr. Marston's alleged negligence, is inapplicable because a provision in Mr. Wilhelm's insurance policy required that he "submit written proof of the [uninsured motorist] claim to [Nationwide] as soon as practicable."[24]

Defendants further maintain that, even if the "time of discovery" exception applies in this case, Plaintiffs' case was not filed within the appropriate time limitation. Here, Plaintiffs' expert informed Plaintiff on November 25, 2008 of the possibility of an uninsured motorist claim. Plaintiffs' expert (Mr. Nitsche) had advised Mr. Wilhelm that he had a possible uninsured motorist claim related to the 1998 accident.[25] Hence, Defendants contend, Plaintiffs were aware on November 25, 2008 of the possibility of an uninsured motorist claim that Mr. Marston did not pursue. Defendants argue that under the "time of discovery" exception, Plaintiffs would have had three years from the date of that discovery to timely file their complaint (November 25, 2011).

[24] Defs.' Mot. at Ex. C.

[25] Plaintiffs provided no explanation for Mr. Nitsche's seven month delay in pursuing the uninsured motorist claim that was ultimately unsuccessful.

Plaintiffs' response broadly denies Defendants' claims and does not offer an operative date for the statute of limitations. Instead, Plaintiffs posit that Mr. Wilhelm's initial consultation with Mr. Nitsche on November 25, 2008 did not raise a "red flag" that clearly and unmistakably would have led a prudent person to be concerned that Mr. Marston had failed to advise them about asserting an uninsured motorist claim against Nationwide.

Plaintiffs add that the statute of limitations would have started to run on November 25, 2008 only if Mr. Nitsche had told Plaintiff "that he had a time barred [uninsured motorist] action due to [Mr. Marston's] failure to assert and/or alert [Mr. Wilhelm] that he had a valid [uninsured motorist] claim."[26] Plaintiffs further argue that Mr. Nitsche did not convey "to Mr. Wilhelm that [Mr. Marston] made an uncorrectable mistake by failing to pursue an [uninsured motorist] action"[27] because Mr. Nitsche intended to pursue the uninsured motorist claim and that "a contingent fee workers [*sic*] compensation attorney would not pursue a case to the [Delaware] Supreme Court unless said attorney believed he had a valid cause of action."[28]

[26] Pls.' Resp., 2 (Nov. 4, 2013).

[27] *Id.*

[28] *Id.*

## Standard of Review

Summary judgment is granted only when there are no genuine issues of material fact after there has been adequate time for discovery and the moving party is entitled to summary judgment as a matter of law.[29] Evidence is viewed in the light most favorable to the non-moving party.[30] The Court will not grant summary judgment "if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of the law to the circumstances."[31]

Once the moving party has demonstrated "through affidavits or other admissible evidence that there is no genuine issue as to any material fact, the burden shifts to the non-moving party to demonstrate that there are material issues of fact."[32] If the non-moving party is unable to demonstrate that an issue of material fact is in dispute, the Court may grant summary judgment.[33]

## Discussion

Upon consideration of the parties' submissions and arguments, the Court finds that Plaintiffs failed to timely file their complaint and, consequently, their

[29] Super. Ct. Civ. R. 56(c); *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991).

[30] *Coleman v. Pricewaterhousecoopers, LLC*, 854 A.2d 838, 842 (Del. 2004).

[31] *Machulski v. Boudart*, 2007 WL 315357, *1 (Del. Super. Jan. 31, 2007) (denying summary judgment on the basis that a factual dispute precluded a conclusion that the attorney's alleged malpractice was inherently unknowable until a later time) (citing *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962)).

[32] *Id.* (citing *Moore v. Sizemore*, 405 A.2d 679 (Del. 1979)).

[33] *Conaway v. Griffin*, 2009 WL 562617, *2 (Del. Mar. 5, 2009) (affirming the Superior Court's decision granting summary judgment to defendants-attorneys because there were no issues of material fact in dispute).

legal malpractice claim is barred by the statute of limitations. Accordingly, Defendants are entitled to judgment in their favor.

In Delaware, legal malpractice actions are subject to a three-year statute of limitations.[34] The three-year period begins to run at the time of the alleged malpractice.[35]

Moreover, although "[i]gnorance of the facts does not act as an obstacle to the operation of the statute under Delaware law[,]"[36] there is a limited exception to the statute of limitations in legal malpractice cases.[37] The "time of discovery" exception "tolls the three-year period in cases where the negligence was inherently unknowable by a blamelessly ignorant plaintiff."[38] If the exception applies, then the statute does not begin to run until the plaintiff has discovered facts "constituting the basis of the cause of action *or* the existence of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery of such facts."[39]

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[34] 10 *Del. C.* § 8106; *Sammons v. Andersen*, 2009 WL 590381, *3 (Del. Mar. 9, 2009).

[35] *Coleman v. Pricewaterhousecoopers, LLC*, 854 A.2d at 842. *See also HealthTrio, Inc. v. Margules*, 2007 WL 544156, *7 (Del. Super. Jan. 16, 2007).

[36] *Sammons v. Andersen*, 2009 WL 590381 at *3.

[37] *Shea v. Delcollo & Werb, P.A.*, 2009 WL 2476603, *2 (Del. Aug. 13, 2009).

[38] *Coleman v. Pricewaterhousecoopers, LLC*, 854 A.2d at 842.

[39] *Boerger v. Heiman*, 965 A.2d 671, 674 (Del. 2009) (quoting *Coleman v. Pricewaterhousecoopers, LLC*, 854 A.2d at 842 (emphasis in original)).

In the instant case, Plaintiffs assert that Mr. Marston was negligent for failing to identify all possible parties who were liable to Plaintiffs as a result of the 1998 accident, including Nationwide. Specifically, Plaintiffs argue that if Mr. Marston notified them at or near the time that Mr. Wilhelm retained Defendants, the Plaintiffs would have asserted a timely uninsured motorist claim against Nationwide.

Here, viewing the facts in the light most favorable to the Plaintiffs, the undisputed facts are that Mr. Wilhelm was involved in a work accident on July 16, 1998 that was caused by an unidentified motorist and, at that time, Mr. Wilhelm had uninsured motorist coverage through an automobile policy with Nationwide.

It is also undisputed that Plaintiff employed Mr. Marston and the law firm, Mr. Wilhelm first met with Mr. Marston on September 20, 2000 to retain Mr. Marston's services in connection with a workers' compensation claim against Mr. Wilhelm's employer related to the 1998 accident, Mr. Marston sent Mr. Wilhelm a letter of engagement on November 8, 2000, and Mr. Marston successfully obtained workers' compensation benefits on Mr. Wilhelm's behalf. It has further been established without dispute that Mr. Marston sent a letter to Mr. Wilhelm on June 11, 2004 confirming that the Defendants' representation of Mr. Wilhelm's workers' compensation claim had ended.

It is also uncontroverted that Mr. Wilhelm met with Mr. Nitsche on November 25, 2008, on that date, Mr. Nitsche advised Mr. Wilhelm that he had an

uninsured motorist claim against Nationwide as a result of the 1998 accident, Mr. Nitsche filed an insured motorist claim against Nationwide on June 16, 2009, the Superior Court's decision granting summary judgment to Nationwide was affirmed by the Delaware Supreme Court on September 28, 2011, and Plaintiffs filed their legal malpractice claim against Defendants on June 1, 2012.

Additionally, the parties do not dispute that Mr. Marston did not advise Mr. Wilhelm of an uninsured motorist claim, did not initiate a claim against Nationwide on Mr. Wilhelm's behalf during the time that Mr. Marston represented Mr. Wilhelm, and did not advise Mr. Wilhelm to seek other counsel.

The issue, then, is whether Plaintiffs' legal malpractice claim, which was filed almost eight years after Defendants' professional relationship with Mr. Marston had ended and more than three years after Mr. Nitsche advised Mr. Marston that he had an uninsured motorist claim, was timely. Thus, the Court must determine the operative date that the statute of limitations began to run.

The law is clear that "[t]he statute of limitations begins to run upon the commission of the act or omission giving rise to the cause of action."[40] In this case, Defendants represented Mr. Wilhelm from September 20, 2000 until June 11, 2004 (the date Mr. Wilhelm's workers' compensation claim was closed).[41] The

[40] *Shea v. Delcollo & Werb, P.A.*, 2009 WL 2476603 at *2.

[41] Here, Plaintiffs' malpractice claim is premised on Mr. Marston's alleged failure to investigate all possible claims related to the 1998 accident. The alleged omission had to occur between September 20, 2000 and June 11, 2004.

alleged omission giving rise to Plaintiffs' legal malpractice claim would have had to occur at some point during that representation of Mr. Wilhelm.

Even if Plaintiffs were able to timely assert a contractual claim against Nationwide between September 2000 and June 2004[42] and Mr. Marston was therefore negligent for failing to inform Mr. Wilhelm that he could assert an uninsured motorist claim arising from the 1998 accident[43], Plaintiffs were required to file their legal malpractice claim within three years after the representation ended or three years after the "time of discovery." Defendants committed no further acts or omissions once they ceased their representation of Mr. Wilhelm's workers' compensation claim on June 11, 2004. Plaintiffs should have filed their action no later than June 11, 2007, however if the "time of discovery" exception applies whereby the statute of limitations is tolled until the alleged malpractice was discovered, Plaintiffs should have brought suit within three years after the "time of discovery" (November 25, 2011).

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Mr. Wilhelm would have been unable to assert a personal injury claim at the time he engaged Defendants' legal service because the law is well-settled that a personal injury tort claim is subject to a two-year statute of limitations. In view of the fact that Mr. Wilhelm was injured on July 16, 1998 and that he signed a fee agreement with Mr. Marston on September 20, 2000, Mr. Marston began representing Mr. Wilhelm *after* the statute of limitations for a personal injury in tort had expired. *See* 10 *Del. C.* § 8119 ("No action for the recovery of damages upon a claim for alleged personal injuries shall be brought after the expiration of 2 years from the date upon which it is claimed that such alleged injuries were sustained; subject, however, to the provisions of § 8127 of this title [alleged deficiencies in the construction of improvements to real property]").

[42] Defendants do not concede that an uninsured motorist claim against Nationwide for the 1998 injury would have been timely in 2000 – 2004. *But see* n. 53, *supra*.

[43] Defendants do not concede that Mr. Marston, who was retained for a workers' compensation claim related to the 1998 accident, had a duty to inform Mr. Wilhelm about an uninsured motorist claim.

Any contention that Plaintiffs were blamelessly ignorant of Defendants' alleged inherently unknowable negligence is undermined by Mr. Wilhelm's objective awareness in November 2008 of an uninsured motorist claim related to the 1998 accident. The "time of discovery" exception tolls the statute of limitations only until Plaintiffs are deemed to be on inquiry notice (i.e., until such time that they discovered facts constituting the basis for the cause of action *or* they had knowledge of facts sufficient to put a prudent person of ordinary intelligence on notice to inquire whether Mr. Marston was negligent).

In Delaware, "[i]nquiry notice does not require a plaintiff to have actual knowledge of a wrong, but simply an objective awareness of the facts giving rise to the wrong."[44] As such, "a plaintiff is put on inquiry notice when he gains possession of facts sufficient to make him suspicious, or that ought to make him suspicious."[45] There must be "red flag" that "lead[s] a prudent person of ordinary intelligence to inquire whether the defendant acted negligently, so that the aggrieved party may conduct a diligent inquiry that could lead to the discovery of facts sufficient to assert a malpractice claim."[46]

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[44] *Van Lake v. Sorin CRM USA, Inc.*, 2013 WL 1087583, *7 (Del. Super. Feb. 15, 2013) (quoting *E.I. DuPont de Nemours & Co. v. Medtronic Vascular, Inc.*, 2013 WL 261415, *11 (Del. Super. Jan. 29, 2013)).

[45] *Hegedus v. Ross*, 2012 WL 2884792, *4 (D. Del. July 12, 2012) (internal quotation marks omitted) (quoting *Sunrise Ventures, LLC v. Rehoboth Canal Ventures, LLC*, 2010 WL 363845, *7 (Del. Ch. Jan. 27, 2010)).

[46] *Estate of Stiles v. Lilly*, 2011 WL 5299295, *5 (Del. Super. Oct. 27, 2011) (internal quotation marks omitted) (quoting *Coleman v. Pricewaterhousecoopers, LLC*, 854 A.2d at 843). *See also Kaiser Group Intnl., Inc.v. Squire Sanders & Dempsey, LLP*, 2010 WL 3271198, *7 (D. Del. Aug. 17, 2010) (finding time of discovery rule inapplicable where all facts were known to the plaintiffs 3 years and 5 months prior to their legal malpractice claim which "should have put them at least on inquiry notice and which, if pursued, would have led to the discovery of the

Courts have found that if the plaintiff consults with independent counsel regarding the underlying claim, then there is a presumption that "the plaintiff discovered the allegedly negligent cause of conduct."[47] In the instant case, Plaintiff acknowledges that Mr. Wilhelm met with independent counsel[48] (Mr. Nitsche) on November 28, 2008 and that during the course of their conversation, he was advised that he had an uninsured motorist claim as a result of the 1998 accident. Indeed, Mr. Nitsche was deposed and testified, in relevant part, that when he first met with Mr. Wilhelm on November 25, 2008:

> I asked him if he had prior injuries, and he said he did, and I said tell me about it. He said I got hurt on the job, and I had some permanent problems. I asked him then how the accident happened, and he described it for me.
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> * * *
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> . . . so I continued to ask him about whether or not he had a permanent injury. He said he thought he did, who the doctors were. And then I always ask him, as I always do, what's the resolution of that case. He told me he resolved the workers' comp claim part of it.
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> I said what happened to your injury claim, and he said what do you mean? I said what happened to your motor vehicle accident claim, and I explained to him that he had – did he ever identify the driver? Yes. Did you have automobile insurance at the time? Yes, I did.

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alleged attorney malpractice) (citing *In re Tyson Foods, Inc.*, 919 A.2d 563, 585 (Del. Ch. 2007) ("No sanctuary from the statute [of limitations] will be offered to the dilatory plaintiff who was not or should not have been fooled").

[47] *Began v. Dixon*, 547 A.2d 620, 623 (Del. 1988); *HealthTrio, Inc. v. Margules*, 2007 WL 544156 at *7.

[48] *See HealthTrio, Inc. v. Margules*, 2007 WL 544156 at *8 ("Independent counsel, as used in the Began case, would include counsel separate and apart from the previously retained counsel, such that the new counsel is free from the control of the previous counsel").

> I said you had an uninsured motorist claim. What happened to it? He said what's that? So then, I said, I explained to him he would have the right to recover for his pain and suffering. That any moneys that he was paid for that, he wouldn't have to pay the comp carrier back, and he seemed somewhat agitated about that, didn't know he had that claim.[49]
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> * * *

Here, the "red flag" was clearly present. Mr. Nitsche's advice to Plaintiff in 2008 "clearly and unmistakably would have led a prudent person to inquire about whether [a previous attorney] negligently failed to [file an uninsured motorist claim against Nationwide or to advise Mr. Wilhelm to seek other counsel to file such claim]."[50] Based on Mr. Nitsche's testimony, Mr. Wilhelm was visibly "agitated" on November 25, 2008 when informed of a possible uninsured motorist lawsuit and the nature of an uninsured motorist lawsuit was explained to him. Plaintiff visibly reacted and sought clarification upon the realization that Plaintiffs might have had an uninsured motorist cause of action related to the 1998 accident that Mr. Marston had not mentioned.

Even though Mr. Wilhelm "may not have known the exact legal significance of [Mr. Marston's failure to file an uninsured motorist claim], what is clear is that [Mr. Wilhelm] was aware that there was some kind of problem [associated with not filing the uninsured motorist claim in 2000]"[51] and Plaintiff was objectively

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[49] Defs.' Mot., Ex. B.

[50] *Boerger v. Heiman*, 965 A.2d at 675 (internal quotation marks and citation omitted).

[51] *Northern Del. Aquatic Facilities, Inc. v. Cooch & Taylor*, 2007 WL 4576347, *6 (Del. Super. Dec. 10, 2007), *aff'd*, 2008 WL 2316513 (Del. June 6, 2008).

aware of an opportunity to proceed against Nationwide. Consequently, "a prudent person of ordinary intelligence would have been alerted to the possibility" that Defendants might have been negligent when they did not discuss an uninsured motorist claim.[52] Thus, in November 2008, Mr. Wilhelm had sufficient facts to inquire as to whether Mr. Marston and the law firm were negligent in failing to initiate an uninsured motorist claim during Defendants' representation of him.

So too, Plaintiffs claim that a "red flag" was not present when Mr. Wilhelm initially consulted with Mr. Nitsche because Mr. Nitsche did not characterize Defendants' representation as an "uncorrectable" mistake in failing to pursue an uninsured motorist claim must fail. Although Plaintiffs suggest that they could not have known with certainty that the eventual unidentified motorist lawsuit against Nationwide would have ended in a summary judgment in Nationwide's favor, Plaintiffs have not cited any authority that supports their theory that a "red flag" requires certainty of outcome.

Plaintiffs also argue, in the alternative, that Mr. Marston was obligated to inform Mr. Wilhelm to seek other counsel in order to pursue such claim if Mr. Marston did not wish to pursue an uninsured motorist claim on Mr. Wilhelm's behalf.[53] This theory of legal malpractice is also subject to the three-year statute of limitations.

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[52] *Boerger v. Heiman*, 965 A.2d at 676.

[53] Defendants do not concede that they had an obligation to advise Mr. Wilhelm to seek other counsel.

Plaintiffs' opinion that an uninsured motorist claim filed during Defendants' representation of Mr. Wilhelm and 33 months after the 1998 accident would have been successful is conjectural.[54] However, the Court will not reach a conclusion concerning whether the uninsured motorist claim would survive summary judgment, would succeed, or if negligence occurred.

The law is clear that, pursuant to 18 *Del. C.* § 3902(a)(3)(c.), an "insured must notify his/her insurer within 30 days, or as soon as practicable thereafter, that the insured or his/her legal representative has a legal action arising out of the [hit-and-run] accident." Plaintiffs' policy contains similar language and unambiguously provides that "the insured must . . . submit written proof of the [uninsured motorist bodily injury] claim to [Nationwide] as soon as practicable."[55] Delays that exceed weeks, or even months, "do not constitute as soon as practicable as a matter of law."[56] Nevertheless, courts apply a reasonable person standard to the phrase ("as soon as practicable") to determine whether "the insured's conduct satisfied the notice requirement" under the circumstances.[57]

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[54] *Wilhelm v. Nationwide General Ins. Co.*, 2011 WL 4448061 at *4 (citing *State Farm Mut. Automobile Ins. Co. v. Johnson*, 315 A.2d 585, 587 (Del. 1973) (holding insured's 34-week delay was not as soon as practicable despite her contention that she relied upon her attorney's advice not to report the accident); *Bradford, Inc. v. Travelers Indem. Co.*, 301 A.2d 519, 523 (Del. Super. Nov. 17, 1972) (finding unexcused 18-month delay unreasonable as a matter of law). *But see Drainer v. AIG Annuity Ins. Co*., 2009 WL 1638641, *1 (Del. Super. May 14, 2009) (holding that whether the plaintiff's 1½ -year delay in notifying his insurance carrier of a hit-and-run accident was "as soon as practicable" was an issue of fact because he asserted that he reasonably relied on his employer's insurance to provide coverage).

[55] Defs.' Mot., Ex. C.

[56] *Wilhelm v. Nationwide General Ins. Co.*, 2011 WL 4448061 at *4.

[57] *Marckese v. Taylor*, 599 A.2d 1090, 1092 (Del. Super. 1991).

Here, even if Mr. Marston, or any other attorney, had notified Nationwide of Mr. Wilhelm's uninsured motorist claim between September 2000 and June 2004, the notification to Nationwide of an insured motorist claim related to the July 16, 1998 accident would have exceeded two years and would appear to fall beyond the recognized timeframe. Moreover, that is not the gravamen of Defendant's motion for summary judgment.

Thus, irrespective of whether Defendants were negligent or whether an uninsured motorist claim brought on an earlier date would have succeeded, Plaintiffs have failed to establish that their negligence complaint against Defendants is timely. Plaintiffs' contention that they were blamelessly ignorant is contradicted by their expert's deposition. Mr. Wilhelm was educated about the uninsured motorist claim when he met with Mr. Nitsche on November 25, 2008, thereby becoming objectively aware of facts that could give rise to a legal malpractice claim against Defendants. The operative date of the statute of limitations, in the light most favorable to the Plaintiffs, is November 25, 2008. Thus, Plaintiffs had until November 25, 2011 to timely file their legal malpractice claim against Defendants.

## Conclusion

Therefore, because the time to file a personal injury tort action had expired before Mr. Wilhelm ever met with Mr. Marston and the attorney-client relationship between the parties ended on June 11, 2004, by any theory, Plaintiffs had until

November 25, 2011 if the "time of discovery" exception applies (or until June 11, 2007 if the "time of discovery" exception did not apply), to file a legal malpractice claim against Defendants. The Court need not determine whether Plaintiffs had a viable uninsured motorist claim during Defendants' representation or whether Defendants were negligent, because Plaintiffs' complaint, which was filed on June 1, 2012, is barred as untimely and Defendants are entitled to judgment as a matter of law.

**ACCORDINGLY**, Defendants' motion for summary judgment is **GRANTED**. Defendants' additional pending motions for summary judgment[58] and the parties' pending motions *in limine*[59] are rendered moot.

**IT IS SO ORDERED.**

_____
Streett, J.

[58] The three pending motions for summary judgment are based upon collateral estoppel, duty of care, and joint and several liability. Oral argument was scheduled for November 22, 2013.

[59] There are two pending motions *in limine*.

Defendants filed a Motion *in Limine* to Exclude Any PIP-Eligible Damages on November 11, 2013. Plaintiffs have not submitted their response.

Plaintiffs filed a Motion *in Limine* to Preclude the Defense from Asserting that Plaintiffs' Expert Should have Alerted Plaintiffs that they had a Malpractice Claim on November 12, 2013. Defendants submitted a response opposing the motion.

It does not appear that a hearing on either the motion was scheduled.