

LEGAL MALPRACTICE STATUTE OF LIMITATIONS
By Ted Babbitt

The recent opinion of the Florida Supreme Court in Larson & Larson, P.A. v. TSE Industries, Inc., 34 Fla. L. Weekly S591 (Fla. Nov. 5, 2009) is interesting both for its holding and the procedure utilized for reversing the Second District in the underlying case of TSE Industries, Inc. v. Larson & Larson, P.A., 987 So. 2d 687 (Fla. 2nd DC 2008).

Larson & Larson were sued for alleged legal malpractice arising out of a patent infringement suit. The jury returned a verdict in favor of the defendants finding that the plaintiff's patent was invalid. Final judgment was entered and the case was not appealed. At the time of the entrance of the final judgment, the federal judge also found that sanctions were appropriate and retained jurisdiction for the purpose of assessing the amount of attorney's fees due under his sanctions ruling. Several months later the parties settled the sanction issue and more than two years after the judgment but five days before the date of the settlement, the lawyers were sued for legal malpractice relative to both the final judgment in the underlying case and the sanctions ruling which resulted in the settlement. The trial court entered a final summary judgment based upon the statute of limitations both with respect to the final judgment and the sanctions settlement and the Second District reversed concluding that because the sanctions claim remained outstanding, the case was not final and a legal malpractice action could be brought so long as it was brought less than two years after the date of the sanction settlement.

95.11(4)(a) Fla. Stat. (2002) states that a legal malpractice action must be brought within two years “from the time the cause of action is discovered or should have been discovered with the exercise of due diligence.”

The seminal case on when the statute of limitations runs in a legal malpractice action is the Florida Supreme Court case of Silverstrone v. Edell, 721 So. 2d 1173 (Fla. 1998). In that case at 1175, the Florida Supreme Court held:

“[W]hen a malpractice action is predicated on errors or omissions committed in the course of litigation, and that litigation proceeds to judgment, the statute of limitations does not commence to run until the litigation is concluded by final judgment. To be specific, we hold that the statute of limitations does not commence to run until the final judgment becomes final.

To be liable for malpractice arising out of litigation, the attorney must be the proximate cause of the adverse outcome of the underlying action which results in damages to the client. Since redressable harm is not established until final judgment is rendered, a malpractice claim is hypothetical and damages are speculative until the underlying action is concluded with an adverse outcome to the client.

...

We therefore hold, *in those cases that proceed to final judgment, the two-year statute of limitations for litigation-related malpractice under section 95.11(4)(a), Florida Statutes (1997), begins to run when final judgment becomes final.* This bright-line rule will provide certainty and reduce litigation over when the statute starts to run. Without such a rule, the courts would be required to make a factual determination on a case by case basis as to when all the

information necessary to establish the enforceable right was discovered or should have been discovered.”
(Emphasis by the Court.)

The case came up for review before the Florida Supreme Court as a result of a certified conflict with the Fourth District’s opinion in Integrated Broadcast Services, Inc. v. Mitchell, 931 So. 2d 1073 (Fla. 4th DCA 2006). In Mitchell the facts were nearly identical to the issues in TSE Industries, Inc., supra. A final summary judgment was rendered in favor of the defendants and was affirmed on appeal but while the case was on appeal the defendants moved for sanctions and two months after the final judgment the Court awarded sanctions which was also appealed. The legal malpractice action was brought more than two years after the final summary judgment was final on appeal but less than two years after the sanction judgment became final. The Fourth District held that the underlying legal malpractice action was barred but a legal malpractice action with reference to the sanctions was not barred.

In Larson & Larson, supra, the majority followed the lead of the Fourth District in Mitchell, supra, and concluded that there were two different accrual dates for the statute of limitations. One based upon the final judgment and the other based upon the settlement of the sanctions action. At S592 the Court concludes:

“The statute of limitations requires that a legal malpractice action on a litigation-related claim be brought within two years after the cause of action is or should have been discovered. 95.11(4)(a), Fla. Stat. (2002), and in *Silverstrone* we drew the line of accrual at the time final judgment was

final to ‘provide certainty and reduce litigation over when the statute starts to run.’ *Silverstrone*, 721 So. 2d at 1176. Until a final judgment is final, the outcome of the case and the occurrence of harm to the client remains uncertain, and it cannot be said that the cause of action was discovered or should have been discovered. *See id.* at 1175. Before that point is reached, the ‘malpractice claim is hypothetical and damages are speculative.’ *Id.* But once a judgment adverse to the client has reached the point of finality, ‘the last element constituting the [malpractice] cause of action occurs,’ 95.031(1), Fla. Stat. (2002) – that is, the element of ‘loss to the client,’ *Law Office of David J. Stern, P.A.*, 969 So. 2d at 966 – and the cause of action is or should be ‘discovered.” 95.11(4)(a), Fla. Stat. (2002).

The crux of *Silverstrone’s* reasoning is that it cannot be known with sufficient certainty that the client has suffered *any loss* caused by the lawyer’s negligence until the finality of a judgment adverse to the client. A favorable result for the client in the lawsuit – which could be the result of appellate proceedings – would, of course, mean that the client had suffered no loss. *Silverstrone’s* rule thus merely establishes a bright line for establishing when the client has suffered *some loss* as a consequence of the attorney’s negligence. It does not require that there be a determination of the *full extent* of all losses suffered by the client due to the lawyer’s negligence.” (Emphasis by the Court.)

Part of the reasoning of the Second District was that since the sanctions action was still outstanding the client still had to rely upon the lawyer’s advice and under the “continuing representation doctrine” the statute of limitations did not begin to run until the lawyer’s work was done and the client could seek other

counsel. The majority relied on Perez-Abreu Zamora & De Le Fe, P.A. v. Taracido, 790 So. 2d 1051 (Fla. 2001), which rejected the continuing representation doctrine in an architectural malpractice action and thus rejected that doctrine in legal malpractice cases as well, relying instead upon the practical meaning of when a client should reasonably be held to have discovered legal malpractice, the majority concluded that once a final judgment has been entered and the appeal period has ended or it has been affirmed on appeal, there can be no doubt in the client's mind that the client faces potential execution on the judgment and, thus, as a matter of law, will be held to have discovered the harm caused by the lawyer's negligence.

On the other hand, since this action was brought less than two years after the sanctions issue became final and since a judgment imposing sanctions would be independently appealable, the Court held along with the Fourth District that the legal malpractice action based upon the entrance of sanctions was not barred by the statute of limitations since until the settlement agreement existed, the plaintiff was unable to determine with sufficient certainty what its damages were and the limitations period, therefore, could not have commenced.

Thus where there are two severable issues, an underlying judgment in the main case and a final finding in a subsequent sanctions action, the statute of limitations begins to run independently of each other and an action must be brought within two years of each action in order to avoid being barred.

While this case ends the controversy created by the Second and Fourth District opinions discussed above, it is also interesting because it results in

reversal of the Second District even though only three Justices joined in the majority opinion. Justice Perry concurred with the majority that the underlying action was barred but would have affirmed the ruling of the trial court that the summary judgment entered barring both the underlying action and the sanctions issue was correct. Three additional Justices dissented in agreement with the Second District that neither action was barred. There was, thus, no true majority voting for reversal of the Second District's opinion or any explanation as to why such a fractured opinion should stand as an opinion of the majority and result in reversal. Chief Justice Quince was among the dissenters so it is not clear as to how the tie was broken. Nevertheless, apparently the law of Florida is now settled on this issue.

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