IN THE SUPREME COURT OF FLORIDA

CASE NO. 74,031

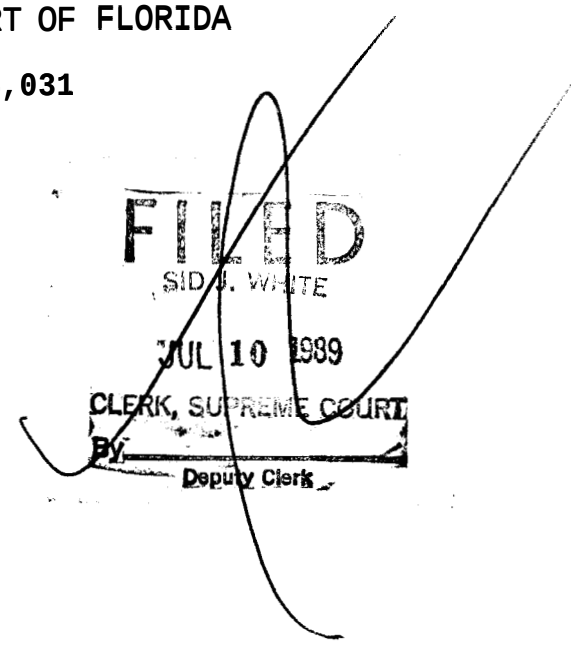
PEAT, MARWICK, MITCHELL & CO.,

Petitioner,

vs.

FRANK A. LANE and CAROL P. LANE,

Respondents.
_____/



ON DISCRETIONARY REVIEW OF A DECISION OF THE THIRD DISTRICT COURT OF APPEAL CERTIFIED TO BE IN DIRECT CONFLICT WITH A DECISION OF ANOTHER DISTRICT COURT OF APPEAL

ANSWER BRIEF OF RESPONDENTS FRANK A. LANE and CAROL P. LANE

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STATEMENT OF THE CASE AND FACTS

This case concerns the application of the professional malpractice statute of limitations in a claim against an accountant.

The Lanes retained Peat, Marwick, Mitchell & Co. (now known as Peat, Marwick, Main & Co.) to serve as their tax advisors and to prepare appropriate and necessary tax documents, including personal income tax returns. On December 30, 1976, Peat Marwick, as part of its tax advice, recommended that the Lanes invest in a limited partnership known as Northern Voices, Ltd. Based upon this recommendation, the Lanes invested a total of $13,612.33 in 1976 and 1977. Thereafter, Peat Marwick utilized various deductions based upon the losses of the Northern Voices partnership in preparing the Lanes tax returns for the years 1976 through 1979.

On March 17, 1981 the Lanes received a deficiency letter from the Internal Revenue Service challenging the deductions Peat Marwick had taken on behalf of the Lanes. The IRS took the position that the Lanes, as limited partners, were not entitled to deduct partnership losses of Northern Voices. The asserted deficiency relating to this investment in 1976 and 1977 totalled over $50,000.00 in increased taxes and interest.

The symbol "A." refers to Petitioners' Appendix.

An IRS deficiency letter is not a final determination of an individual's tax obligation. The IRS regulations themselves acknowledge that the ninety day letter is preliminary in nature. The secretary may on its own rescind the notice of deficiency. I.R.C. §6212(d). Further, no assessment of a deficiency nor any levy or proceeding for collection may commence if the taxpayer has filed a petition in the tax court. I.R.C. §6213(a) The deficiency letter itself acknowledges its lack of finality because it contains explicit instructions on how to contest the IRS's determination:

> If you want to contest this deficiency in court before making any payment, you have 90 days from the above mailing date of this letter (150 days if addressed to you outside of the United States) to file a petition with the United States Tax Court for a redetermination of the deficiency. The petition should be filed with the United States Tax Court, 400 Second Street NW., Washington, D.C. 20217, and the copy of this letter should be attached to the petition. The time in which you must file a petition with the Court (90 or 150 days as the case may be) is fixed by law and the Court cannot consider your case if your petition is filed late. If this letter is addressed to both a husband and wife, and both want to petition the Tax Court, both must sign the petition or each must file a separate, signed petition. You can get a copy of the rules for filing a petition by writing to the Clerk of the Tax Court at the Court's Washington, D.C. address shown above. **(A.** 6)

The taxpayer who believes the IRS findings are in error can challenge the deficiency ruling, much like one would challenge an unfavorable jury verdict. I.R.C. §6213, 6215. The taxpayer's burden is comparable to an appellant's in a civil case: both the jury verdict and IRS ruling are presumed correct.

Upon receipt of the deficiency letter, the Lanes contacted Peat Marwick and were advised that there was a sound basis for the Northern Voices deduction and for challenging the deficiency notice. Based upon Peat Marwick's advice and recommendation, the Lanes applied for a redetermination of the deficiency on June 8, 1981. The proceeded to challenge/litigate the issue in the tax court.

On May 9, 1983 the United States Tax Court rendered its decision against the Lanes and instructed them to pay the deficiency. The Lanes then filed their complaint against Peat Marwick on February 22, 1985, well within two years of the tax court's determination of an improper deduction.

Peat Marwick moved for summary judgment in the trial court on the grounds the suit against it was not filed within two years of the Lanes' receipt of the deficiency letter. The trial court granted summary judgment. The Third District Court of Appeal reversed and remanded. Lane v. Peat, Marwick, Mitchell & Co., 540 So.2d 922 (Fla. 3rd DCA 1989) The Third District ruled that the statute of limitations period did not commence until the United States Tax Court proceeding which affirmed the deficiency was concluded on May 9, 1983. In analogizing to the legal malpractice cases, the Third District reasoned that

> A cause of action for negligence does not accrue until the client knows or should know a cause of action exists. A cause of action for professional malpractice does not arise until "the existence of redressable harm has been established." [citations omitted]
>
> The Lanes did not suffer redressable harm until the tax court entered judgment against them. Until that time, the Lanes knew only that Peat Marwick might have been

> negligent; however, if the tax court did not uphold the deficiency, the Lanes would not have a cause of action against Peat Marwick for accounting malpractice. [citations omitted] Thus, the filing of a lawsuit against Peat Marwick within two years of the entry of the adverse tax court ruling was timely.

The Third District certified that its decision conflicted with the case of Sawyer v. Earle, 541 So.2d 1232 (Fla. 2nd DCA 1989) where the Second DCA had departed from precedent and decided that a cause of action for professional malpractice stemming from litigation representation arose before an adverse appellate ruling.

This court accepted jurisdiction.

ISSUES ON APPEAL

I. WHETHER THE THIRD DISTRICT PROPERLY CONSIDERED THE LEGISLATIVE PURPOSE FOR A STATUTE OF LIMITATIONS WHEN IT REACHED ITS DECISION.

II. WHETHER THE RULE APPLIED BY THE THIRD DISTRICT COURT OF APPEAL IS APPLICABLE TO CLAIMS FOR ACCOUNTING MALPRACTICE IN FEDERAL INCOME TAX MATTERS.

111. WHETHER THE COMMENCEMENT OF THE LIMITATIONS PERIOD BEGINS WITH THE CONCLUSION OF THE TAX COURT APPEALS AND NOT ON THE ISSUANCE OF THE NINETY DAY LETTER.

SUMMARY OF ARGUMENT

prosecution suits against the taxpayers who pursue such unwarranted litigation.

Contrary to Peat Marwick's assertion, the IRS's determination of a tax deficiency is not the "last word" on the

Until there is a final adverse appellate ruling, a professional malpractice claim is not ripe or justiciable because the plaintiff has not yet suffered damages. As the cases have repeatedly held, at all times prior to such a final adjudication, the plaintiff is merely on notice of a potential or possible action for negligence against the professional. This is because while a professional might have breached a duty to the plaintiff, no action for negligence exists until such time as this breach is the proximate cause of an injury sustained by the plaintiff. In the instant case, if the Lanes had successfully challenged the IRS ruling, the potential claim against Peat Marwick for malpractice would have disappeared because 1) Peat Marwick's advice would have been proven sound and 2) the Lanes would not have sustained any recoverable damages. Peat Marwick cannot seriously contend that the Lanes should have sued Peat Marwick anyway to collect the attorney's fees which were expended in proving that Peat Marwick had given correct and sound advice in taking the Northern Voices deduction.

Peat Marwick's suggestion that the Lanes should have sued immediately then asked to abate the litigation pending the outcome of the appeal of the IRS ruling is an acknowledgment that any earlier suit by the Lanes would have been premature. If a suit is premature and no claim exists, then it logically follows that the statute of limitations has not yet commenced.

Further, a filed and abated suit does not avoid any of the delays, disappearances, or fading memories which form the fundamental concerns behind a statute of limitations.

Peat Marwick's reliance upon the case of ~~Edwards v. Ford~~, 279 So.2d **851** (Fla. 1973) is misplaced because of factual dissimilarities. In that legal malpractice claim, the clients were told that their attorneys had prepared usurious contracts and the attorneys then "agreed to take whatever steps might be necessary to correct the injurious effect of the documents, free of charge.'' Id. at **851**. Such an acknowledgment of wrongdoing by the attorneys is readily distinguishable from the instant case where Peat Marwick never suggested that it erred in its actions.

To reverse the Third District's ruling would require a taxpayer to sue his accountant at a time when he is only on notice of a possible invasion of his rights and has not suffered any damages. At such a time there is no claim which is ripe or justiciable because of the nonexistence of all essential elements to the establishment of a claim.

ARGUMENT

I. THE THIRD DISTRICT PROPERLY CONSIDERED THE LEGISLATIVE PURPOSE FOR A STATUTE OF LIMITATIONS WHEN IT REACHED ITS DECISION.

In its ruling, the Third District Court of Appeal clearly followed the legislative intent behind the statute of limitations for professional malpractice claims. The statute of limitations for such actions is not triggered until such time as an action accrues.[1]

There was no accrual of a claim by the mere receipt of the IRS ninety day deficiency letter. Peat Marwick continuously and erroneously refers to this ninety day letter as a "conclusive determination" that taxes were underpaid despite the plain provisions to the contrary of both the ninety day letter itself and the Internal Revenue Code. "Conclusive" is defined by the American Heritage Dictionary of the English Language as "serving to put an end to doubt or question; decisive; final". Clearly, the ninety day letter is not conclusive.

The Lanes did not discover, by receipt of that letter, that their accountants had malpracticed. Rather, it served only to notify the Lanes that the IRS and Peat Marwick disagreed about

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[1]The applicable statute of limitations, §95.11(4)(a) provides for suits within two years in: "An action for professional malpractice, other than medical malpractice, whether founded on contract or tort; provided that the period of limitations shall run from the time the cause of action is discovered or should have been discovered with the exercise of due diligence. However, the limitation of actions herein for professional malpractice shall be limited to persons in privity with the professional."

the efficacy of a particular deduction. Peat Marwick's position that taxpayers such as the Lanes should sue their accountant for malpractice at the same time they mount a challenge to the IRS's ninety day letter puts the taxpayer in a wholly untenable position. On one hand, the Lanes would have to sue Peat Marwick for malpractice in taking a bad deduction. That stance is wholly antagonistic and inconsistent with the position the Lanes would simultaneously be asserting in the tax court where they would be claiming the deduction was proper and the error was by the IRS. Neither the Lanes nor their attorneys could in good faith take these mutually exclusive positions. Cannons of Ethics 4-3.1. Nor can one ignore the problems that would arise from use of deposition testimony in one case as an admission against interest in the other action, or the possible imposition of sanctions under F.S. 557.105.

If Peat Marwick had initially conceded that its advice regarding the Northern Voices deduction was wrong and the taxes identified in the IRS ninety day letter were due and owing, an entirely different case might be presented. In such a situation the Lanes would have known of Peat Marwick's wrongdoing and would have suffered damages by paying the taxes and penalties assessed. Under such a scenario, a claim against Peat Marwick would undeniably have been ripe at that time. But that is not the course that events took. Peat Marwick sputtered its innocence and reiterated the correctness of its position, which led the Lanes to challenge the IRS.

Peat Marwick then suggests that the mere fact the Lanes incurred the expense and fees associated with this challenge is sufficient to have created a cause of action and commenced the running of the statute of limitations. This totally ignores the possibility that the Lanes would win their appeal in tax court and establish the propriety of the decuction. If the Lanes had been successful in their appeal to the tax court, Peat Marwick would surely not be advocating that the Lanes should sue Peat Marwick anyway to recover the fees and costs incurred in proving that the accountant had not given negligent advice.

II. THE RULE APPLIED BY THE THIRD DISTRICT COURT OF APPEAL IS APPLICABLE TO CLAIMS FOR ACCOUNTING MALPRACTICE IN FEDERAL INCOME TAX MATTERS.

The Third District Court of Appeal is absolutely correct in analogizing an accounting malpractice claim to a legal malpractice claim because of the similarity of the profession's obligations and the specialized procedures that they handle. A layman who is sued for negligence finds himself embroiled in "a process not begun at the urging of the client or the professional [in a process with] procedures and rules uniquely its own'' (Petitioner's Brief p. 18) just like the taxpayer who is faced with an IRS deficiency letter.

While the ninety day letter is a "culmination of an extensive administrative process" (Petitioner's Brief p. 20) a verdict in a civil action is also the culmination of extensive

discovery and a trial. The tax court appeal procedures which follow receipt of a ninety day letter are directly analogous to a losing litigant's right to challenge a jury verdict. In each instance, the failure to institute a timely appeal will result in the finality of the decision, whether by the IRS or a jury. Nevertheless, appellate review can establish that either the IRS or the jury was wrong. Peat Marwick's statement that interest accrues on a tax deficiency during the tax court proceedings is no different from the accrual of interest on a judgment while an appeal progresses.

Peat Marwick again erroneously suggests that receipt of the ninety day letter is tantamount to an announcement to the taxpayer of negligence by his accountant. It also argues that such an announcement should be particularly understood by the Lanes as being an accusation of malpractice because they are attorneys. This is a fallacious argument. As a trial lawyer in Dade County, Frank Lane is particularly aware of the unbroken line of decisions from the Third District Court of Appeal which say there is no cause of action for professional malpractice until an appeal is concluded because, until that time, one cannot determine if there was any actionable error by the professional. See for example Birnholz v. Blake, 399 So.2d 375 (Fla. 3rd DCA 1981); Diaz v. Piquette, 496 So.2d 239 (Fla. 3rd DCA 1986), rev. denied 506 So.2d 1042 (Fla. 1987); Chapman v. Garcia, 463 So.2d 528 (Fla. 3rd DCA 1985); Breakers of Fort Lauderdale, Ltd. v. Cassel, 528 So.2d 985 (Fla. 3rd DCA 1988);

Haghayegh v. Clark, 520 So.2d 58 (Fla. 3rd DCA 1988) and decisions of other districts such as Richards Enterprises v. Swofford, 495 So.2d 1210 (Fla. 5th DCA 1986), cause dismissed 515 So.2d 231 (Fla. 1987); Adams v. Sommers, 475 So.2d 279 (Fla. 5th DCA 1985); Kellermeyer v. Miller, 427 So.2d 343 (Fla. 1st DCA 1983)

Peat Marwick's argument also overlooks the fact that if the IRS had improperly or mistakenly disallowed the deduction, then the accounting firm's actions were entirely proper and no malpractice claim would exist. Filing suit for malpractice in advance of such a determination would subject the taxpayer to a claim for malicious prosecution in having filed suit without probably cause.

The position advanced by Peat Marwick flies in the face of the reasoning advanced by the courts of this state. The decisions hold that as long as the results of the professional's conduct are not final then no redressable injury has been established and all premature, possibly useless litigation should be discouraged. Diaz v. Piquette, supra.

The cases cited by Peat Marwick are readily distinguishable. In the Feldman v. Granger, 255 Md. 288, 257 A.2d 421 (1969) decision, the Maryland court was presented with a case where tax liability was incurred because an accountant missed an IRS filing deadline and a deduction was disallowed. This failure to comply with a filing deadline was a known and

readily discernible act of malpractice which Is entirely different than determining whether there was an error in judgment regarding the validity of a deduction.

In the case of Mills v. Garlow, 768 P.2d 554 (Wyo. 1989), the Wyoming court decided to commence the statute of limitations at the time of the notice of deficiency. This is not binding on the Florida courts and is a direct departure from the philosophy and public policy underlining Florida's statute of limitations for professional malpractice.

Contrary to Peat Marwick's assertion, the tax court's decision to uphold or strike an IRS deficiency is directly tied to the propriety of the accountant's actions. If the accountant's judgment concerning the validity of the deduction was correct, then the IRS erred in disallowing it. If, on the other hand, the tax court finds that the deduction was improper, then the accountant necessarily committed malpractice in his advice and use of such deduction.

Peat Marwick seems to suggest that economical administration of the judicial system and the statute of limitations are wholly unrelated. Such is not the case. The statute of limitations is designed to enhance the orderly progress of litigation by preventing strangulation of the system by stale claims. Peat Marwick's suggestion that a taxpayer should race to the courthouse to sue his accountant--and immediately abate that claim--every time a ninety day deficiency letter is written is the anthesis of an orderly judicial system.

Filing a malpractice as a "hedge" against an adverse tax court ruling, and abating the malpractice action pending the tax court's decision, fails to solve any of the staleness concerns of a statute of limitations. During abatement no discovery takes place, witnesses' memories fade, and documents disappear as the clock ticks in the same manner as if no suit was filed. Peat Marwick also fails to consider the likelihood that an abatement motion would be denied, particularly in light of the guidelines which require the conclusion of litigation within eighteen months of the time a suit is filed. F.R.J.A. 2.085(d)(1)(B) If abatement of the premature accounting malpractice claim was not permitted, one could easily foresee a case where the taxpayer successfully sues the accountant and recovers a judgment for the tax deficiency, accrued interest, and costs and fees related to the tax court appeal, and thereafter prevails in the tax court by proving the accountant properly recommended the deduction in the first instance. The reverse scenario could also occur: the taxpayer could lose the malpractice suit against the accountant by a jury verdict that the accountant acted appropriately, then later lose in the tax court with a judicial determination that the deduction was inappropriate. The only logical way to avoid these inequities is to continue to follow the case law which holds that the professional malpractice claim does not arise until the underlying litigation/appeal is concluded.

III. THE COMMENCEMENT OF THE LIMITATIONS PERIOD BEGINS WITH THE CONCLUSION OF THE TAX COURT APPEALS AND NOT ON THE ISSUANCE OF THE NINETY DAY LETTER.

The case of Edwards v. Ford, supra, does not support Peat Marwick's position because of a factual dissimilarity with the instant action. In the Edwards case, the client's were told that their attorneys had prepared usurious contracts and the attorneys "agreed to take whatever steps might be necessary to correct the injurious effects of the documents, free of charge." Id. at **851.** The fact no litigation was yet filed in that case is irrelevant because of the attorneys' acknowledgment of their mistakes. By contrast, when the Lanes were told of a possible deficiency by the IRS, Peat Marwick said the deduction was correct and the error was made by the IRS. The case of Kellermeyer v. Miller, supra, is similarly inapplicable because it involved patently obvious roof leaks and, again, the defendant acknowledged his wrongdoing by undertaking repairs. The court properly ruled that the statute of limitations was not tolled by those repairs.

While the Third District Court of Appeal certified a conflict with the Sawyer v. Earle, supra, decision, the Lanes suggest that the court's actions were perhaps unnecessary because of factual distinctions between the two cases. In the Second District case, Sawyer retained Earle to represent him in a bar grievance matter during **1980** and **1981.** Although he replaced Earle with other counsel in **1981** because he said he

lost income due to Earle's malpractice, he nevertheless waited until 1984 to sue Earle. Because Sawyer knew of the malpractice in 1981 (as evidenced by his substituting attorneys) plus the occurrence of damages, the court properly held the statute of limitations commenced at that time. That is not the same situation as in the instant case where the Lanes, in obvious ignorance of any malpractice by Peat Marwick, continued to follow the accounting firm's advice by appealing from the ninety day deficiency letter. The Lanes' actions are similar to the facts presented in the case of Adams v. Sommers, supra.

Florida cases are legion which hold that a complete cause of action must exist before a statute of limitations begins to run. Birnholz v. Blake, supra ("It is settled that the essential elements of a cause of action accrue when the last element necessary to constitute the cause of action occurs"); Airport Sign Corp. v. Dade County, 400 So.2d 828, 829 (Fla. 3rd DCA 1981) ("Until damages are actually incurred, a party cannot state a cause of action and the statute of limitations does not begin to run"); Orlando Sports Stadium, Inc. v. Sentinel Star Co., 316 So.2d 607, 610 (Fla. 4th DCA 1975) ("A cause of action must exist and be complete before an action can be commenced").

Many cases have specifically held that a potential plaintiff does not suffer any damages until such time as an adverse appellate decision is rendered and no further action is taken. Indeed, these cases explain that until such time there is no evidence of a breach of duty or negligence by the

professional but only the possibility of such malfeasance. See for example Chapman v. Garcia, Diaz v. Piauette, Richards Enterprises, Inc. v. Swofford, Adams v. Sommers, Birnholz v. Blake, Kellermeyer v. Miller, supra. As these cases have all explained, a plaintiff is only on notice of possible negligence by the professional until such time as the court's decision is rendered and appellate review ceases either by right or by choice. As the Third District has stated:

> Since it is plain that no claim would ever have existed if the temporary results of the attorney's conduct had been reversed on appeal, this decision is in accordance with the salutary concomitant principles that premature, possibly useless, litigation should be discouraged and that no cause of action should therefore be deemed to have accrued until the existence of redressable harm has been established. Diaz v. Piauette, supra, at 240.

After its decision in Sawyer v. Earle, the Second District acknowledged that "unless the facts of the case clearly show that the legal malpractice was or should have been discovered at an earlier date, when a cause of action for legal malpractice is predicated on errors or omissions committed in the course of litigation, the statute of limitations does not begin to run until that litigation is concluded by final judgment, or if appealed, until a final appellate decision is rendered". Zakak v. Broida and Napier, P.A., 14 F.L.W. 1356, 6/9/89 (Fla. 2nd DCA) With this caveat, even the Sawyer v. Earle decision falls into the line established by the other Florida cases, including both the instant Third District decision and this court's decision in the Edwards v. Ford case.

No Florida cases have specifically addressed the statute of limitations as it relates to professional malpractice by an accountant, but the Lanes submit that there is no rational basis for creating any distinction between professional malpractice by accountants and professional malpractice by physicians or attorneys. The cases relied upon by Peat Marwick supporting their position do not arise in Florida. For this reason alone, they are not binding on this court. State v. Haves, 333 So.2d 51 (Fla. 4th DCA 1976) Those cases are further distinguishable because of the failure to apply the correct date as the initiation of the statute of limitations under the discovery rule that has been adopted by this state. These cases which Feat Marwick relied upon all apply the discovery rule in such a way that the plaintiff was penalized for delaying litigation until a claim was ripe and mature. Those cases improperly, and contrary to Florida law, permitted a suit in anticipation of a wrong. The cases cited by Peat Marwick suggest that the statute of limitations should be triggered by mere notice of possibly tortious action rather than, as Florida law has routinely held, the accrual of all essential elements to pursuing a claim.

Under Florida case law, the discovery rule has routinely been used in order to mitigate the harshness which may exist if an occurrence rule is followed. The discovery rule utilizes equity and fairness by tolling a statute of limitations to prevent an injustice; the discovery rule is never used to create an injustice by prematurely initiating the statute of

limitations. "The remedy must await a wrong." Bowman v. Abramson, 545 F.Supp. 227 (Ed. Pa. 1982) Because proof of damages is an essential element to a claim for professional malpractice, earlier knowledge/discovery of alleged tortious conduct is insufficient to trigger the statute of limitations because the statute is initiated only by real injury, not a potential one.

In the case of Day v. Rosenthal, 170 Cal.Ap. 3rd 1125 217 Cal. Rptr. 89 (Ca. 2nd DCA 1985) the taxpayer sued his accountant following the tax court's affirmance of an IRS deficiency finding. The court ruled that, under the discovery rule, the statute of limitations did not commence until such time as the entry of the tax court ruling. The court stated that the statute of limitations in a claim for attorney malpractice begins when 1) the plaintiff knows or should know of the essential facts to establish the elements of his legal malpractice cause of action and 2) when the plaintiff has sustained appreciable and actual damage. Even though that plaintiff had sought an independent review from Price Waterhouse & Co. and had also received an IRS statutory deficiency notice, the court declined to commence the statute of limitations before the tax court pronouncement because the accountant had continually advised the client that the deduction was correct. The same result should occur here.

Other courts have agreed with Florida that no claim for professional malpractice occurs until all elements necessary to state a cause of action exists. The Kentucky courts have routinely held that a cause of action does not accrue until damages occur.

> If the alleged negligent conduct does not cause damage, it generates no cause of action in tort . . . . The mere breach of a professional duty, causing only nominal damages, speculative harm, or threat of future harm - not yet realized - does not suffice to create a cause of action for negligence . . . . Hence, until a client suffers appreciable harm as a consequence of his attorney's negligence, the client cannot establish a cause of action for malpractice. Prossers states the propositions distinctly, "It follows that the statute of limitations does not begin to run against a negligence action until some damage has occurred". Northwestern National Insurance Co. v. Osborne, **573** F.Supp. **1045, 1049** (Ed. Ky. **1983).** Citing Budd v. Nixen, **491** P. **2d 433, 436 (1971).**

In the case of Amfac Distribution Corp. v. Miller, **673** P. **2d 792** (Arizona **1983),** the Supreme Court of Arizona, sitting en banc, said that even though the plaintiff knew or should have known of alleged negligence by his attorneys at the time of trial or the time of judgment, no professional malpractice suit was possible and the statute of limitations did not begin to run at that time because the plaintiff had not sustained irrevocable damages. The court said that as long as the damage issue was contingent upon the outcome of an appeal, no cause of action had accrued and therefore the statute of limitations had not yet begun to run. The court explained that where a party is

"successful on appeal, his damages will be considerably lessened or possibly eliminated". Id. at 794. This is the same principle announced by this court in the Diaz v. Piquette case, supra, and the decisions cited therein.

CONCLUSION

For the reasons set forth herein, it is respectfully requested that this honorable court affirm the decision of the Third District Court of Appeal which reversed the decision of the trial court and remanded this cause to the trial court for further proceedings.

Respectfully Submitted,

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CERTIFICATE OF MAILING

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 7th day of July, 1989 to Parker D. Thomson & Karen Williams Dammer, Thomson, Muraro, Bohrer & Razook, P.A., 2200 One Biscayne Tower, 2 South Biscayne Blvd., Miami, FL 33131

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