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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

KEN SHIFREN, Plaintiff and Appellant, v. RANDY M. SPIRO et al., Defendants and Respondents.	B230631 (Los Angeles County Super. Ct. No. BC427789)

APPEAL from a judgment of the Superior Court of Los Angeles County, John Kronstadt, Judge. Reversed.

Law Offices of Warren Nemiroff and Warren Nemiroff for Plaintiff and Appellant.

Reback, McAndrews, Kjar, Warford & Stockalper, Cindy A. Shapiro, James J. Kjar and Evan N. Okamura for Defendants and Respondents.

Ken Shifren filed a legal malpractice action in 2009 against defendants Randy M. Spiro and the firm Altshuler & Spiro (Attorneys) after a court determined in Shifren's marriage dissolution action that the trust documents Attorneys prepared failed to ensure that Shifren's mother's gift of real property would be characterized as his separate property. In the marriage dissolution action, the court concluded the trust documents did not terminate and revoke an agreement between Shifren and his wife stating that all property acquired during the marriage would be characterized as community property (transmutation agreement).

Attorneys obtained summary judgment on Shifren's legal malpractice action, contending the complaint was time barred by the applicable statute of limitations. (Code Civ. Proc., § 340.6, subd. (a).)[1] Attorneys argued Shifren suffered actual injury for purposes of the accrual of the statute of limitations as early as 2001 when the trust documents were prepared, but at the latest in 2007 when Shifren incurred attorney fees in the marriage dissolution action to resolve the dispute over the validity of the trust documents.

In this case, we conclude the allegations of attorney error arising from the preparation of the trust documents required a resolution of the marriage dissolution action to establish that Attorneys breached a duty of care owed to Shifren and to establish the consequences of Attorneys' error. Thus, the facts do not indisputably show that Shifren's cause of action accrued, and the statute began to run on his claim, before a judicial

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[1] Code of Civil Procedure section 340.6 states in pertinent part: "(a) An action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first. . . . [I]n no event shall the time for commencement of legal action exceed four years except that the period shall be tolled during the time that any of the following exist: [¶] (1) The plaintiff has not sustained actual injury."

Unless otherwise stated, all further statutory references are to the Code of Civil Procedure.

determination in the marriage dissolution action. Accordingly, we reverse and remand for further proceedings.

UNDISPUTED MATERIAL FACTS

1. *Shifren Family Trust Documents*

a. *Transmutation Agreement*

In 1988, Shifren and his wife established the Shifren Family Trust (1988 trust) and executed the transmutation agreement. The transmutation agreement stated: "We, KENNETH SHIFREN and BARBARA K. SHIFREN, husband and wife, of Los Angeles County, California, hereby confirm our intention that each and all items of property, or interests therein, of whatever kind or character, whether now owned or later acquired, and however title thereto may be held by either of us, either on the date hereof or at any time in the future, including any property which either of us may in the future acquire by inheritance or gift, is and constitutes community property held as such by both of us . . . ."

b. *2001 Amendment and Restatement of the Shifren Family Trust*

In 2001, Shifren and his wife hired Attorneys to make further amendments to their family trust before Shifren's mother transferred property to him. Shifren's mother held a 60 percent interest in commercial property located at 2940 E. Olympic Boulevard (Olympic property), and Shifren and his wife held the remaining interest. Shifren and his wife wanted to ensure that the amended estate plan included a provision that Shifren's mother's gift of her interest in the Olympic property would remain his separate property.

Attorneys prepared the "Amendment to and Restatement of the Shifren Family Trust, Under Trust Agreement dated November 7, 1988" (2001 trust). The 2001 trust stated the 1988 trust, and subsequent amendments, were amended by deleting "all provisions thereof and by restating said Trust as follows." The fifth provision of the 2001 trust was titled "Retention of Character of Property," and stated: "All property now or hereafter conveyed or transferred to the Trustee to be held by the Trustee pursuant to this Trust Agreement which was at the date of such conveyance or transfer community property or quasi-community property of the Trustors, or the separate property of either

Trustor shall remain the community property or quasi-community property of the Trustors, or the separate property of either Trustor as it was before such conveyance or transfer. Notwithstanding the foregoing, any property held by the Trustors as joint tenants which is conveyed to the Trustee shall be deemed to be the community property of the Trustors."

In 2002, Shifren's mother transferred her interest in the Olympic property to Shifren "a married man as his sole and separate property."

2. *2006 Marital Dissolution Action*

In 2006, Shifren and his wife separated, and his wife filed for dissolution of their marriage. In the marital dissolution action, Shifren's wife took the position that the 2001 trust did not alter the transmutation agreement and thus Shifren's gift of his mother's interest in the Olympic property was community property, not his separate property.

On August 31, 2009, upon entering judgment of dissolution, the court determined the 2001 trust did not terminate the transmutation agreement. Thus, Shifren's mother's gift of her interest in the Olympic property was characterized as a community asset.

3. *2009 Malpractice Action*

On December 10, 2009, Shifren filed a complaint against Attorneys. The operative complaint alleges Shifren and his wife hired Attorneys to perform legal services, which included "reviewing and updating existing family estate planning documents and the termination or revocation of an existing Transmutation Agreement[.]" Attorneys allegedly failed to "adequately and properly terminate and revoke the Transmutation Agreement[.]"

Attorneys brought a motion for summary judgment, contending the applicable statute of limitations barred the action. Attorneys claimed Shifren's malpractice action was barred because the wrongful act occurred when Shifren and his wife executed the 2001 trust. Alternatively, Attorneys asserted that even if the statute of limitations were tolled, Shifren suffered actual injury in 2002 when the interest in the Olympic property was transferred to him, or by 2007 when Shifren incurred attorney fees in the marital dissolution action to litigate whether the 2001 trust revoked and terminated the

transmutation agreement. The trial court concluded the action was time barred and granted summary judgment. This timely appeal followed.

DISCUSSION

We independently review the trial court's order granting summary judgment and determine if the undisputed facts establish that Attorneys are entitled to judgment as a matter of law on their statute of limitations defense. (§ 437c, subd. (c); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849, 860.) Our resolution of this issue depends upon whether Shifren suffered actual injury one year before he filed his legal malpractice action. (§ 340.6, subd. (a)(1).) The parties present several possible dates when Shifren suffered actual injury for purposes of the accrual of the statute of limitations. We focus on Attorneys' contention that Shifren suffered actual injury in 2007 when he incurred attorney fees in the marriage dissolution action to litigate the validity of the 2001 trust.[2] Applying the actual injury analysis reiterated by our Supreme Court in *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739 (*Jordache*), we conclude that Shifren did not suffer actual injury in 2007. Rather, Shifren suffered actual injury in 2009 upon the judicial determination in the marital dissolution action that the 2001 trust did not revoke and terminate the transmutation agreement.

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[2] We have considered and rejected Attorneys' alternative argument that Shifren suffered actual injury in 2002 when his mother transferred her interest in the Olympic property to him. Attorneys argue that upon transfer, the Olympic property was transmuted to community property, and Shifren lost the right he had retained Attorneys to secure by drafting the 2001 trust. The 2001 trust that Attorneys prepared purportedly amended the 1988 trust, revoked the transmutation agreement, and contained a provision addressing the characterization of Shifren's mother's gift as his separate property. In 2002, Attorneys' negligence in drafting the 2001 trust created only the potential for future harm.

1. *Jordache and the Actual Injury Requirement*

A cause of action against an attorney for a wrongful act or omission arising from the performance of professional services must "be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission whichever occurs first." (§ 340.6, subd. (a).) Section 340.6, subdivision (a) contains a tolling provision, stating: "in no event shall the time for commencement of legal action exceed four years except that the period shall be tolled during the time that any of the following exist: [¶] (1) The plaintiff has not sustained actual injury. . . ." Thus, a cause of action for legal malpractice accrues when the client sustains actual injury and discovers, or reasonably should have discovered, his or her cause of action. (*Jordache, supra,* 18 Cal.4th at pp. 743, 748-752.)

Based upon the extensive discussion of the actual injury provision of section 340.6, subdivision (a)(1) in *Jordache, supra,* 18 Cal.4th 739, Attorneys contend that incurring attorney fees constitutes actual injury for purposes of the accrual of a legal malpractice action. Attorneys misread *Jordache*; the court explicitly rejected a bright line rule.

Jordache, supra, 18 Cal.4th 739, held that a client sustains actual injury when the client suffers legally cognizable damages compensable in a legal malpractice action. (*Id*. at p. 743.) In *Jordache*, the law firm contended that the client sustained actual injury when it incurred defense costs arising from the law firm's omission in failing to tender the defense of the underlying action to its insurer. (*Id*. at p. 746.) The client contended it suffered actual injury when it settled the insurance coverage action for less than the full amount of the claim. (*Ibid.*) The narrow issue in *Jordache* was whether actual injury, necessary to commence an action arising from the law firm's failure to tender the defense, occurred upon settlement of the subsequent coverage action. (*Id*. at p. 747.)

The *Jordache* court held there is no requirement that an adjudication or settlement must confirm a causal nexus between the attorney's error and the asserted injury, rather the determination requires an analysis of the claimed error and its consequences.

(*Jordache*, *supra*, 18 Cal.4th at p. 752.) " '[E]vents [must] have developed to a point where plaintiff is entitled to a legal remedy, not merely a symbolic judgment[.]' " (*Ibid*.) Once the plaintiff suffers actual harm, the uncertainty as to the amount of damages does not toll the limitations period.

The settlement of the coverage action in *Jordache* reflected the "client's preexisting predicament—the attorneys' alleged omissions had diminished the client's right to its liability insurance benefits." (*Jordache*, *supra*, 18 Cal.4th at pp. 744, 752-753.) Thus, the settlement confirmed, but did not establish, actual injury from the late tender to the insurer. In *Jordache*, the client suffered actual injury when it spent its own funds to pay defense costs, both in unpaid insurance benefits and in lost profits from the diversion of investment funds. (*Id.* at p. 752.) The client also suffered an additional injury in incurring litigation costs to defend the "late notice" defense in the coverage action that also decreased the settlement value. (*Id*. at pp. 752-753.)

The *Jordache* court recognized, however, that in some cases the determination of whether a client suffers actual injury arising from an attorney's advice or actions might depend upon the outcome of a claim by or against a client. (*Jordache*, *supra*, 18 Cal.4th at pp. 755, 759.) The Supreme Court cited two cases, *Sirott v. Latts* (1992) 6 Cal.App.4th 923, and *Baltins v. James* (1995) 36 Cal.App.4th 1193, in which the propriety of the attorney's advice, and the existence and effect of attorney error, depended upon a judicial resolution adverse to the client. (*Jordache*, *supra*, 18 Cal.4th at pp. 755, 758-761.) In *Sirott v. Latts*, the client received negligent advice that he did not have to pay the insurer a premium for certain medical malpractice coverage, and suffered actual injury when his attorney failed in arbitration proceedings to reinstate the coverage. (*Sirott v. Latts*, *supra*, at pp. 929-930.) In *Baltins v. James*, the attorney incorrectly predicted how a court would resolve a community property issue, and the clients suffered actual injury when they obtained an adverse judgment. (*Baltins v. James*, *supra*, at p. 1208.) As the *Jordache* court noted, these claims had to be resolved "in order for the client to know that the attorney erred." (*Jordache*, *supra*, at p. 759.)

These Court of Appeal cases highlight the difference in the claimed error and consequences of the malpractice in *Jordache*. The resolution of the insurance coverage action in *Jordache* was relevant to the attorney's alleged negligence only "insofar as it potentially affected the amount of damages [the client] might recover from [its attorney]." (*Jordache, supra,* 18 Cal.4th at p. 753.) The coverage action did not determine whether the law firm breached a duty owed to the client or the consequences of that breach of duty.

2. *Shifren Did Not Suffer Actual Injury Until the Court Determined the 2001 Trust Did Not Terminate the Transmutation Agreement*

As noted, the parties contend there are two potential dates for actual injury to Shifren arising from Attorneys' preparation of the 2001 trust. Relying on the rationale in *Jordache,* Attorneys contend the resolution of the marital dissolution action determining that the 2001 trust did not terminate the transmutation agreement only affected the amount of damages Shifren might recover, not actual injury. Shifren contends the judicial resolution determined his actual injury.[3] Thus, the issue is when was the first actualization of injury upon which Shifren suffered cognizable damages recoverable in a legal malpractice action.

As we stated in *Sindell v. Gibson, Dunn & Crutcher* (1997) 54 Cal.App.4th 1457, the analysis of actual injury differs when the underlying dispute focuses on the attorney's acts or omissions, and where the outcome of the litigation may or may not vindicate the attorney. (*Id*. at pp. 1468-1470.) Although the client incurs attorney fees, those fees are not attributable to any attorney error or omission recoverable in a legal malpractice action. The proceedings are a means to determine whether the attorney has erred. A client's victory in such litigation "is ipso facto exoneration of the lawyer." (*Id.* at p. 1469.)

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[3] Shifren necessarily concedes that he cannot recover attorney fees incurred in the marital dissolution action as tort damages in his legal malpractice action.

The underlying dispute between Shifren and his wife in the marital dissolution action focused on whether the 2001 trust terminated the transmutation agreement. The court's resolution of that issue established: (1) Attorneys breached a duty owed to Shifren, and as a consequence, (2) Shifren lost his separate property interest in the Olympic property. Before that judicial determination, Shifren had no reason to believe that Attorneys negligently prepared the 2001 trust. Thus, the judicial resolution characterizing the Olympic property as community property was the first actualization of injury upon which Shifren suffered cognizable damages recoverable in a legal malpractice action. Unlike *Jordache*, the court's determination in the marital dissolution action did not confirm Shifren's actual injury or reflect Shifren's "pre-existing predicament." Attorneys' alleged negligence in drafting the 2001 trust had no effect until the subsequent adjudication in the marital dissolution action.

We reject Attorneys' contention that Shifren suffered actual injury when he hired counsel in the marriage dissolution action *before* the court determined that the 2001 trust did not terminate the transmutation agreement. Shifren had no cognizable damages recoverable in a legal malpractice action at that point because the parties merely disputed the terms of the 2001 trust. Shifren could have prevailed, and Attorneys would have been vindicated.

Section 340.6, subdivision (a)(1) does not require a client wishing to preserve his or her legal malpractice claims to litigate two lawsuits simultaneously, asserting in one that the attorney made no error, and asserting in the other that the attorney erred. If this were so, Shifren's wife also would have had to file a legal malpractice claim against Attorneys just in case the court determined the 2001 trust actually terminated the transmutation agreement. This leads to an absurd result that would compel both parties in a dispute over an attorney's written work to also file premature legal malpractice actions.

Attorneys contend, however, that since Shifren incurred attorney fees in the marital dissolution action, this case is similar to *Jordache, supra,* 18 Cal.4th 739, *Sindell v. Gibson, Dunn & Crutcher, supra,* 54 Cal.App.4th 1457, *Sirott v. Latts, supra,*

6 Cal.App.4th 923, and *Apple Valley Unified School Dist. v. Vavrinek, Trine, Day & Co.* (2002) 98 Cal.App.4th 934, applying *Jordache* to accounting malpractice. None of these cases holds that fees incurred to defend an attorney's written work in an adversary proceeding are cognizable damages in a legal malpractice action. In two of the cases, *Jordache* and *Sirott v. Latts*, defense costs were recoverable damages arising from attorneys' omissions in failing to tender the defense and in failing to properly advise on insurance coverage. (*Jordache, supra*, at p. 752; *Sirott v. Latts, supra*, at pp. 928-930.) In the other two cases, *Sindell v. Gibson, Dunn & Crutcher* and *Apple Valley Unified School Dist. v. Vavrinek, Trine, Day & Co.*, fees paid to defend a collateral action or to attempt to mitigate the professional's negligence were cognizable damages in a malpractice action. (*Sindell v. Gibson, Dunn & Crutcher, supra,* at pp. 1470-1471; *Apple Valley Unified School Dist. v. Vavrinek, Trine, Day & Co., supra*, at p. 949.)

Callahan v. Gibson, Dunn & Crutcher LLP (2011) 194 Cal.App.4th 557 also does not advance Attorneys' position. Callahan addressed the negligent drafting of a partnership agreement that failed to include a provision for the limited partnership's continuation in the event that the sole remaining general partner became disabled. (*Id.* at p. 564.) As is pertinent here, the court concluded the plaintiffs in the malpractice action did not suffer actual injury when the partners executed the agreement or when they incurred fees in the preparation of the partnership agreement. (*Id*. at pp. 570-574, 580-581.) Instead, like the plaintiffs in *Sindell v. Gibson, Dunn & Crutcher*, the *Callahan* plaintiffs suffered actual injury when they incurred fees to defend an action seeking to escape the consequences of the attorney's negligence. (*Id*. at pp. 575, 580-581.) *Sindell* and *Callahan* did not involve litigation in which the parties to the agreement disputed its validity, and the outcome of that litigation determined attorney error.

Based upon *Jordache*, we therefore reject Attorneys' position that actual injury occurred when Shifren incurred attorney fees in the marital dissolution action to defend the 2001 trust. Rather, Shifren suffered actual injury in 2009 when the court rendered its decision that the 2001 trust did not terminate the transmutation agreement. As a consequence of that judicial determination, Shifren lost his separate property interest in

the Olympic Property. The statute of limitations did not begin to run until 2009, and did not expire until a year later. (§ 340.6, subd. (a)(1).) The complaint for legal malpractice was filed well within that period. Thus, the trial court should have rejected the statute of limitations defense. The trial court erred in granting summary judgment.

DISPOSITION

The judgment is reversed. Shifren is entitled to costs on appeal.

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ALDRICH, J.

We concur:

KLEIN, P. J.

CROSKEY, J.