FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D21-3401

PETER VON DYCK,

Appellant,

v.

RICHARD KYLE GAVIN, an individual, JOHN ALBERT CARLISLE, an individual, and LILIES, GAVIN & GEORGE, P.A., a Florida professional corporation,

Appellees.

On appeal from the Circuit Court for Duval County.
Bruce Anderson, Judge.

November 16, 2022

PER CURIAM.

Appellant, Peter Von Dyke, appeals a final order dismissing, with prejudice, his complaint for legal malpractice. The trial court dismissed the complaint, finding that the two-year statute of limitations set forth in section 95.11(4), Florida Statutes, had run. The trial court also held that, in the alternative, the complaint was due to be dismissed because the Asset Purchase Agreement (APA), upon which one of Appellant's claims was founded, provided no basis for a legal malpractice claim. Appellant challenges both of

those findings on appeal. Finding that the statute of limitations has not run, we affirm in part, and reverse in part.

Appellant argues that the trial court erred when it determined his claim was barred by the statute of limitations because this case is controlled by *Silvestrone v. Edell*, 721 So. 2d 1173 (Fla. 1998). In *Silvestrone*, the Florida Supreme Court set forth a bright-line rule to determine when the statute of limitations for legal malpractice, in a litigation context, begins to run: "[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 final judgment becomes final." *Id.* at 1175.

Contrary to Appellees' argument otherwise, the supreme court has not receded from the *Silvestrone* bright-line rule. *See Kipnis v. Bayerische Hypo-Und Vereinsbank, AG*, 202 So. 3d 859, 865 (Fla. 2016) (citing the *Silvestrone* rule with approval); *Forest v. Batts*, 228 So. 3d 156, 158 (Fla. 4th DCA 2017) ("The supreme court's consistent reliance on a bright-line rule that a cause of action for legal malpractice in litigation does not accrue until the underlying legal proceedings are complete through appellate review compels us to reverse the trial court's summary judgment."). In *Larson & Larson, P.A. v. TSE Industries, Inc.*, 22 So. 3d 36, 42 (Fla. 2009), our supreme court "reaffirmed its commitment . . . that a cause of action for legal malpractice does not accrue until the underlying legal proceeding has been completed on appellate review because, until that time, one cannot determine if there was any actionable error by the attorney." *Forest*, 228 So. 3d at 158 (citing *Peat, Marwick, Mitchell & Co. v. Lane*, 565 So. 2d 1323, 1325 (Fla. 1990)). "To require a cause of action to accrue prior to the exhaustion of appellate review could result in a situation where a malpractice claim would have to be brought while an appeal was pending, with the potential that the client may have to take two inconsistent positions in the two causes of action." *Id.* Yet in *Larson*, the supreme court held that in some circumstances a bifurcated approach is consistent with section 95.11, Florida Statues, and *Silvestrone* if the redressable harm is discrete from any damage that might be suffered by the client arising from the underlying judgment. 22 So. 3d at 47.

Here, we do not find the redressable harm to be sufficiently separate and distinct to justify bifurcation. The complaint seeks damages for attorney's fees and costs and the 9.2-million-dollar damage award. The asserted harm of incurring attorney's fees and costs is sufficiently tied to the negligence allegations and are not indisputably independent—unlike the sanctions order in *Larson*. *See* 22 So. 3d at 38 (trial court found that an employee engaged in inequitable conduct and TSE was aware of a possible problem with the patent and did not disclose it).

Thus, the trial court's finding that the statute of limitations began to run when Appellant paid attorney's fees to new counsel in the underlying litigation—because there was no basis upon which Appellant could recover those fees—does not survive the *Silvestrone* test. Although the bifurcated liability phase of the trial was complete at that time, and Appellant had paid fees that he could not recover because of Appellees' alleged legal malpractice, there was no final judgment, and without a final judgment, the statute of limitations was not triggered under the *Silvestrone* test. Accordingly, the complaint is not barred by the statute of limitation.

Finding that the statute of limitations does not bar the complaint, we now determine whether the trial court's alternative basis for dismissal was proper. In his complaint, Appellant raises, although technically within the same count, two separate bases for his legal malpractice claim. In one, Appellant argues Appellees committed legal malpractice when they failed to assert that certain clauses in the APA barred the underlying litigation. In the other, Appellant claims that Appellees failed to ensure that a Due Diligence Checklist was admitted as evidence during the liability portion of the underlying litigation.[*]

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[*]Appellant asserts Appellees received a "checklist" with handwritten notes from Hollister, a party in the underlying breach of contract litigation, during discovery which indicated the disclosure of a prior settlement agreement. Appellant claims that if the checklist were admitted as evidence in the underlying litigation he would have prevailed at trial.

The trial court only addressed the APA portion of the claim, dismissing the complaint on the alternative basis that the APA did not provide Appellant meritorious defenses. We agree that the APA does not provide a basis for a legal malpractice claim. *See Output, Inc. v. Danka Bus. Sys., Inc.*, 991 So. 2d 940, 942 (Fla. 4th DCA 2008) (holding that a contract could not provide a defense to a non-party); *see also Levitan v. Dancaescu*, 47 Fla. L. Weekly D1893 (Fla. 1st DCA Sept. 14, 2022); *Mejia v. Jurich*, 781 So. 2d 1175, 1178 (Fla. 3d DCA 2001). We also note that the trial court did not err when it considered the APA when analyzing the merits of Appellees' motion to dismiss. *See Air Quality Assessors of Fla. v. Southern-Owners Ins. Co.*, No. 1D21-1217, 2022 WL 14738493 (Fla. 1st DCA Oct. 26, 2022) ("[W]hen the terms of a legal document are impliedly incorporated by reference into the complaint, the trial court may consider the contents of the document in ruling on a motion to dismiss."). The APA was not attached to the complaint but numerous references were made to the APA in the complaint, and Appellant raised the APA as the basis for one of its arguments. Thus, we find no error in the trial court's dismissal of the APA portion of Appellant's complaint.

However, dismissal of the APA based claim does not cover the remaining allegation that Appellees failed to raise and assert the checklist arguments. Thus, Appellant may proceed on the checklist portion of the claim. *See May v. Salter*, 139 So. 3d 375 (Fla. 1st DCA 2014).

We conclude that the trial court erred in finding the statute of limitations had run and reverse this portion of the final order on appeal. But we affirm the dismissal of the APA based claim of the complaint and remand the case to proceed on the checklist portion of Appellant's legal malpractice complaint.

AFFIRMED in part, REVERSED in part, and REMANDED for further proceedings in accordance with this opinion.

BILBREY, M.K. THOMAS, and LONG, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

Peter D. Webster, Carlton Fields, Tallahassee, and Jeffrey A. Cohen, Carlton Fields, Miami, for Appellant.

Geddes Anderson and Sarah Hulsberg, Murphy & Anderson, P.A., Jacksonville; and Bryan S. Gowdy, Creed & Gowdy, P.A., Jacksonville, for Appellees.