

**HARRY A. WITT**  
**VERSUS**  
**GASPER J. SCHIRO**

\* **NO. 2007-CA-0299**  
\* **COURT OF APPEAL**  
\* **FOURTH CIRCUIT**  
\* **STATE OF LOUISIANA**

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**CANNIZZARO, J., DISSENTS AND ASSIGNS REASONS**

I respectfully dissent from the majority. The majority would vacate the trial court judgment and remand the matter for an evidentiary hearing on the issue of fraud. I would affirm the trial court judgment for the reasons set forth below.

La. R.S. 9:5605(A) provides that actions for legal malpractice shall be brought within one year “from the date of the alleged act, omission, or neglect, or within one year from the date that the alleged act, omission, or neglect is discovered or should have been discovered.” La. R.S. 9:5605(A) also provides an outside time limit for bringing a malpractice action of three years from the date of the alleged malpractice. La. R.S. 9:5605(E), however, states that the time periods established in La. R.S. 9:5605(A) “shall not apply in cases of fraud.” Thus, the only time that a legal malpractice action can be brought outside of the three year time limit is where fraud is involved, in which case there is a one year period from the date of discovery of the fraud during which suit can be brought. A fraud action is subject to a one year prescriptive period under La. C.C. art. 3492.

Mr. Witt filed a complaint with the Office of Disciplinary Counsel on January 31, 2002, alleging that Mr. Schiro failed to pursue Mr. Witt’s case “with diligence and failed to communicate with Mr. Witt in regard to the status of the case.” In re Schiro, 04-1647, p.2 (La. 11/15/04), 886 So.2d 1117, 1118.

Therefore, as of January 31, 2002, it is clear that Mr. Witt was on notice that Mr. Schiro may have committed legal malpractice, fraudulently or otherwise.

Under the provisions of La. R.S. 9:5605(A), Mr. Witt had one year from the date he discovered or should have discovered the alleged acts, omissions, or neglect of Mr. Schiro to file suit. There is no allegation that after the complaint was filed with the Office of Disciplinary Counsel, Mr. Schiro committed fraud. Further, the allegations in Mr. Witt's petition in the instant case do not contain allegations of any acts or omissions that were not included in the complaint. Thus, at the latest Mr. Witt should have brought suit on or before January 31, 2003. Suit was not brought until October 31, 2003, which was well outside the one year period for filing the malpractice suit.

Mr. Witt's reliance on La. R.S. 9:5605(E) is of no help to him. Based on the record before us, any fraud that might have occurred would have happened prior to the filing of the complaint on January 31, 2002. The one year prescriptive period for fraud under La. C.C. art. 3492 had already run when suit was filed in the instant case. Thus, Mr. Witt's reliance on the provisions of La. R.S. 9:5605(E) is misplaced, because he should have filed suit no later than January 31, 2003, and he did not. Under both La. R.S. 9:5605 and under La. C.C. art. 3492, his fraud claim had already prescribed when he filed the instant suit.

On the face of the record, Mr. Witt's fraud claim has prescribed. Therefore, I see no need for a remand to determine whether or not fraud occurred. A finding that fraud did occur would not change the result in the instant case, because any fraud claim that could have been brought has prescribed.