

Does Counsel's Assurance Toll the Statute of Limitations?

Under Pennsylvania case law the statute of limitations "clock" generally begins "ticking" when the breach of duty occurs — known as the "occurrence" rule — not when the client has incurred damages. This concept is tempered by several exceptions. For example, the clock does not begin ticking for a minor until he or she turns 18 and, by application of the fraudulent concealment rule, where the lawyer has fraudulently concealed his or her malpractice from the client.

The discovery rule presents another such exception. This so-called rule is not actually a rule but an equitable tolling doctrine. It applies where, "despite the exercise of due diligence, the injured party is unable to know of the injury or its cause." *Fine v. Checcio*, 870 A.2d 850, 858-859 (Pa. 2005). Under ordinary circumstances, whether the rule applies presents a question of fact for the jury to determine "whether the plaintiff acted with reasonable diligence, unless the facts are so clear that reasonable minds cannot disagree on the issue." If reasonable minds cannot disagree, then it presents an issue for the court to decide. Although it is an objective test, "[i]t is sufficiently flexible ... to take into account the difference[s] between persons and their capacity to meet certain situations and the circumstances confronting them at the time in question." *Id.* "Reasonable diligence" is not an absolute standard. After all, "[t]here are [very] few facts which diligence cannot discover, but there must be some reason to awaken inquiry and direct diligence in the channel in which it would be successful. This is what is meant by reasonable diligence." *Id.*

As a recent decision illustrates, even where there is no dispute as to the facts, judges can differ in their views with respect to when the client has sufficient knowledge to trigger inquiry. *O'Kelly v. Dawson*, ___ A.3d ___, 2013 WL 600209 (Pa.Super.), presents a legal malpractice claim by husband against counsel who had represented him in his divorce. Husband's counsel had negotiated a tentative settlement agreement in which husband agreed to pay monthly alimony for three years. When wife's counsel wrote a letter to confirm the settlement, however, wife's counsel also proposed that "[t]his alimony shall be non-modifiable and shall not be affected by remarriage, co-habitation or the like." Husband's counsel advised husband that he should

not agree to this new term because it was contrary to law. Discussions continued with respect to the issue of alimony, but the parties "never signed a finalized alimony agreement."

As a result, the parties submitted their alimony dispute to a divorce master whose role is to make recommendations to a judge via a report, to which the parties can file exceptions, which the court within its discretion can then accept or reject in whole or in part. The master recommended monthly alimony for a lesser amount than had been previously negotiated by the parties, but he also recommended that husband should pay it for 10 years instead of three. Husband's counsel timely filed exceptions to the master's report, assuring husband that there was an agreement on alimony and "that the master's recommendation was 'all wrong, totally wrong, ... totally incorrect.'"

Approximately nine months after the master issued the report, the court dismissed husband's exceptions and adopted the master's recommendation. Husband did not appeal. That nine-month period is critical in the statute-of-limitations analysis because husband did not commence suit against his counsel until more than two years after the master issued the report but less than two years after the court's ruling. Accordingly, this presents the question of whether under the discovery rule the statute began to run when the master issued the report or later, when the court issued its ruling? Stated differently, did counsel's assurance that the court would reject the master's alimony recommendation toll the statute?

At trial of the malpractice action husband's counsel in the underlying action testified: "I did not in this case think we had any chance of not winning that issue. We had already agreed to alimony. There was no question. I figured the master either forgot or whatever. ..." Husband contended that he had relied upon his former counsel's legal advice and that counsel, now the defendant lawyer, had negligently failed to "effectuate the tentative alimony agreement set forth in the ... correspondence" from wife's counsel. Defendant lawyer contended that as a matter of law the statute began to run when the master issued his report, which argument was rejected by the court in response to her summary judgment motion. In that ruling the court recognized the possibility "that the equitable tolling and fraudulent concealment doctrines might be available in the case as defenses to the statute of limitations. ..." It found, however, that whether either of these doctrines applies presents an issue of fact for the jury "as to when [husband] was able, in the exercise of reasonable diligence, to know of the injury and its cause."

Notwithstanding the court's stated reason for denying the summary judgment motion, defendant lawyer asked the court again at trial to decide as a matter of law, instead of giving the issue to the jury. In that request defendant lawyer again argued that the statute of limitations time-

Avoiding Liability



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barred the malpractice claim because the statute began to run when the master issued the report and not later. Unfortunately for defendant lawyer the court granted that request but then ruled that the claim was not time-barred. The court made that ruling without indicating whether it did so as a matter of law or whether it had instead "made a factual finding regarding Husband's exercise of reasonable diligence in arriving at this conclusion." This decision allowed the jury to consider the malpractice claim on its merits, whereupon it found in favor of husband and against his former counsel and awarded damages.

In post-trial motions defendant lawyer again argued "no two reasonable minds could disagree that the statute of limitations barred [h]usband's claim" and, as a consequence, she was entitled to judgment NOV. But the trial court rejected this argument and held that the statute was not tolled until the date of the court order ruling on husband's exceptions to adopting the master's recommendation.

Defendant lawyer raised this issue, along with another issue, on appeal. A three-judge panel of the Superior Court affirmed, but by a split vote. The majority, in an opinion authored by Judge David N. Wecht and joined by Judge John L. Musmanno, found that defendant lawyer had waived the statute of limitations issue by asking the court to make the determination instead of the jury. It premised that finding upon the proposition that "two reasonable minds could disagree as to the discovery date" and therefore the trial court necessarily made a factual finding in rejecting the statute of limitations argument.

In his dissent Judge Robert E. Colville found as a matter of law that husband had sufficient facts "to awaken inquiry

continued on Page 9

Avoiding Liability *Continued from Page 4*

in a reasonable person” when he “had a report authored by a neutral master ... [and t]herein, the terms of the alleged alimony agreement were absent.” Judge Colville was not persuaded by the argument that the jury should have been given the opportunity to decide whether the statute was tolled by the undisputed fact that defendant lawyer had “assured [husband]

that ... there was an agreement and that he would ultimately prevail.”

As this case illustrates, counseling the client that the problem is fixable may or may not toll the statute, depending on the judge’s point of view. But this begs the more basic premise, which is that counsel can never guarantee that a problem is fix-

able and should make it clear that he or she can make no such guaranty. Making that point in this case would have greatly increased the likelihood that the earlier date would have been recognized as the beginning point of the running of the statute of limitations.