

Civil Practice and Procedure

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More Good News for Accountants

Accountants often perform work that strays well beyond traditional accounting tasks such as tax preparation and audits and includes assisting with estate planning and business consulting. Over the last several years, the consequences of whether the legal protections available to accountants in Illinois apply when they undertake such activities has been the subject of several important cases. Most recently, in *Mitchell v. Stonecasters, LLC*, 2018 IL App (2d) 180127, the Illinois Appellate Court, Second District, held that the statute of limitations for accountants applies when an accountant provides business valuation services. The *Mitchell* court also held that the plaintiff was on inquiry notice sufficient to trigger the statute of limitations and to investigate further whether a cause of action existed against the accountant when he suspected that the valuation report prepared by the accountant was inaccurate.

Background Facts

In August 2013, Mitchell executed an employment agreement with Stonecasters and its president, Frank Honold, that gave Mitchell an 11.5% interest in the company and required that Mitchell's interest be repurchased at "fair market value" should he be terminated. *Mitchell*, 2018 IL App (2d) 180127, ¶¶ 3-4. Mitchell paid \$149,500 for his interest in the company. *Id.* ¶ 3. In the event of termination, the value of Mitchell's interest in Stonecasters was to be determined by a panel of three valuation experts, one chosen by each side and a third valuation expert acceptable to both parties. *Id.* ¶ 4. Following the purchase, Stonecasters' business improved. *Id.* ¶ 5.

Stonecasters terminated Mitchell without cause on October 24, 2014. *Id.* ¶ 6. Each side chose a valuation expert, and the parties selected Joseph Modica, a CPA and certified valuation analyst, as the independent expert. *Id.* On January 9, 2015, Modica issued a report stating that the fair market value of Mitchell's interest was \$13,000. *Id.* ¶ 7. Mitchell believed that this valuation was much too low and filed an action against Stonecasters on June 26, 2015. *Id.* ¶¶ 8-9. Mitchell alleged that certain information was withheld from Modica and sought to recover the true value of his interest. *Id.* ¶ 9.

During the course of discovery, on July 21, 2017, a December 30, 2014 email was produced that allegedly showed that Honold and Modica had colluded to manipulate Modica's valuation. *Id.* ¶¶ 11-12. Prior to receiving the email, Mitchell believed that the claimed error in Modica's report was solely that information was withheld. *Id.* ¶ 11. After receipt of the December 2014 email exchange, Mitchell filed an amended complaint alleging professional negligence against Modica. *Id.* ¶¶ 13-14.

Modica moved to dismiss Mitchell's complaint pursuant to 735 ILCS 5/2-619(a)(5), arguing that the two-year statute of limitations in 735 ILCS 5/13-214.2(a) applied. *Id.* ¶ 15. Modica argued that Mitchell was aware of any alleged injury on January 9, 2015 when Modica transmitted his report or certainly by the filing of the complaint against Stonecasters on June 26, 2015. *Id.* In response, Mitchell argued that Modica was acting in an appraisal, not an accounting capacity,

and that the catchall five-year statute of limitations in 735 ILCS 5/13-205 applied. *Id.* ¶ 16. In any event, Mitchell argued that he did not discover Modica’s wrongdoing until July 21, 2017 when he received a copy of the December 2014 email exchange between Honold and Modica. *Id.* The trial court dismissed Mitchell’s claim against Modica as untimely and Mitchell appealed. *Id.* ¶ 17.

The Accountant Statute of Limitations Applies

The central issue as to which statute of limitations applies is whether Modica was providing “professional services” as the Illinois Public Accounting Act defines that term. *Id.* ¶¶ 23-24. The statute provides that:

Actions based upon tort, contract or otherwise against any person, partnership or corporation registered pursuant to the Illinois Public Accounting Act, as amended, or any of its employees, partners, members, officers or shareholders, for an act or omission in the performance of professional services shall be commenced within 2 years from the time the person bringing an action knew or should reasonably have known of such act or omission.

735 ILCS 5/13-214.2(a).

In *Polsky v. BDO Seidman*, 293 Ill. App. 3d 414, 424 (2d Dist. 1997), the court held that the language is to be read broadly. *Mitchell*, 2018 IL App (2d) 180127, ¶ 25. Contrary to that statutory interpretation principle, Mitchell argued that one need not be a CPA to perform a valuation and that “professional services” only applies to work that only accountants can perform. *Id.*

The court rejected several of Mitchell’s arguments, including that Illinois law does not require that accountants perform tax preparation services. The court also highlighted that Section 8.05 of the Illinois Public Accounting Act broadly defines “professional services” and the Illinois Supreme Court in *Brunton v. Kruger*, 2015 IL 117663, ¶ 21, held that Section 8.05 is not exhaustive of the work that can be performed by an accountant. *Mitchell*, 2018 IL App (2d) 180127, ¶ 27.

Finally, the court rejected Mitchell’s argument that an accountant who also acted as an electrician or plumber could take advantage of the two-year statute of limitations applicable to accountants stating that: “[t]he provision of services as an electrician certainly bears no resemblance to the ‘accounting activities’ listed in section 8.05 of the Illinois Public Accounting Act. We also high doubt that the AICPA has promulgated standards for accountants who moonlight as electricians.” *Id.* ¶ 29. Accordingly, the court held that the two-year statute of limitations applied to Mitchell’s claims against Modica.

When Did Plaintiff Discover His Injury?

Once the court determined the two-year time frame within which to bring the claim, it next analyzed when Mitchell discovered that he had a cause of action against Modica. As cited above, Section 214.2(a) incorporates a discovery rule. Mitchell contended that it was his discovery of the accountant’s wrongful conduct, not the wrongful conduct of Honold and Stonecasters, that determined when his cause of action accrued. *Id.* ¶ 33. In response, Modica argued that a plaintiff need not be fully aware of the extent of his injuries or even that there was an actionable wrong for the statute of limitations



to begin to run. *Id.* ¶ 34. Modica asserted that Mitchell was on inquiry notice and needed to investigate further no later than when he filed his lawsuit against Honold and Stonecasters on June 26, 2015. *Id.*

The parties agreed that Mitchell was aware of an injury in January 2015 when he received the report, but they disagree whether he knew his injury was wrongfully caused. *Id.* ¶ 36. The court found that, based upon the record, Mitchell had enough information to support a claim against Modica before filing his lawsuit against Honold and Stonecasters because in February 2015, Mitchell’s appraiser had an email correspondence exchange with Modica questioning the veracity and completeness of the report. *Id.* ¶ 37. The bases for at least some of the claims against Modica in the October 2017 filing showed certain allegations of professional negligence were apparent at the time of the filing of the complaint against Honold and Stonecasters in June 2015. *Id.* ¶¶ 39-40.

Citing *Dancor International, Ltd. v. Friedman, Goldberg & Mintz*, 288 Ill. App. 3d 666, 673 (1st Dist. 1997), the court rejected Mitchell’s argument that knowledge of Modica’s breach was necessary to trigger the statute of limitations. *Mitchell*, 2018 IL App (2d) 180127, ¶ 41. Rather, citing to *Nolan v. Johns-Manville Asbestos*, 85 Ill. 2d 161, 171 (1981), the court stated “when a party knows or reasonably should know both that an injury has occurred and that it was wrongfully caused, the statute begins to run and the party is under an obligation to inquire further to determine whether an actionable wrong has been committed.” *Mitchell*, 2018 IL App (2d) 180127, ¶ 41.

The court suggested that, in order to conduct the requisite investigation, Mitchell should have named Modica as a respondent in discovery. *Id.* ¶ 42. The court also stated that given Mitchell believed all along that Modica’s valuation was suspect, “the law required plaintiff to take reasonable measures to investigate all of his potential claims.” *Id.*

Conclusion

The protections afforded to accountants continue to grow as the definition of “professional services” is expanded to reflect the modern practice. After the *Mitchell* decision, defense counsel should expect plaintiffs to name accountants and other professionals as respondents in discovery so as not to violate the statute of limitations for professional negligence claims.

About the Author

Donald Patrick Eckler is a partner at *Pretzel & Stouffer, Chartered*, handling a wide variety of civil disputes in state and federal courts across Illinois and Indiana. His practice has evolved from primarily representing insurers in coverage disputes to managing complex litigation in which he represents a wide range of professionals, businesses and tort defendants. In addition to representing doctors and lawyers, Mr. Eckler represents architects, engineers, appraisers, accountants, mortgage brokers, insurance brokers, surveyors and many other professionals in malpractice claims.

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