Comment

Shideler v. Dwyer: The Beginning of Protective Legal Malpractice Actions

ROBERT D. MACGILL*

I. INTRODUCTION

On March 3, 1981, the Indiana Supreme Court handed down its decision in *Shideler v. Dwyer*.[1] *Shideler* presented two issues to the court. First, the court decided which statute of limitations is applicable to legal malpractice actions.[2] Second, it determined when a cause of action accrues for legal malpractice.[3] The court's decision on both of these issues will have far-reaching effects, not only upon practicing attorneys, but also upon those persons injured by legal malpractice.

One result of the court's decision is that legal malpractice actions will be governed by the relatively short two year statute of limitations provided by the first clause of Indiana Code section 34-1-2-2. The most striking result of the court's opinion in *Shideler*, however, is that a cause of action for legal malpractice accrues, and the statute of limitations begins to run, before a determination is made that the attorney's services failed to have their intended effect. This early accrual forces the attorney representing the party potentially aggrieved to toll the statute of limitations on the legal malpractice claim by filing a protective action for legal malpractice before other pending litigation determines whether an attorney's services had their intended effect.

These protective actions mandated by the *Shideler* decision will have two particularly bothersome effects. If a protective action is filed while the attorney's work is being reviewed in other litigation to determine if it had its intended effect, the party aggrieved by the alleged act of legal malpractice will be required to simultaneously *defend* the validity of the attorney's work in one action and to *attack* it in a separate malpractice action. Another unfortunate conseuqence is that such a protective action may needlessly diminish an attorney's professional reputation. This particular harm becomes especially apparent if one evisions a situation in which a significant

---

*Mr. MacGill is an Associate with the Indianapolis law firm of Bingham, Summers, Welsh and Spilman.

[1]417 N.E.2d 281 (Ind. 1981), *vacating and remanding*, 386 N.E.2d 1211 (Ind. Ct. App. 1979).

[2]*See* text accompanying notes 12-52 *infra*.

[3]*See* text accompanying notes 53-113 *infra*.

amount of publicity accompanies the protective legal malpractice action, and the attorney's work is eventually judged to have had its intended effect.

Perhaps the Indiana Supreme Court in deciding *Shideler* did not foresee the potential for this sequence of events. However, the decision will drastically affect any lawyer advising a client on how to proceed when he *might* have been harmed by the legal services rendered by another attorney, as well as any lawyer against whom a cause of action for legal malpractice is filed.

II. Factual Circumstances of *Shideler*

Shideler v. Dwyer[4] involved an interlocutory appeal by Shirley A. Shideler and Barnes, Hickam, Pantzer & Boyd [Barnes, Hickam] of an order entered by the trial court which denied their motion for summary judgment in a legal malpractice action brought by Mary Catherine Dwyer. The grounds for the defendants' motion were that Dwyer's action for legal malpractice was barred by the application of the statute of limitations periods set forth in Indiana Code section 34-4-19-1 and the first clause of section 34-1-2-2. Dwyer's cause of action sought damages from the defendants for legal malpractice based on professional services which were rendered or should have been rendered in 1973 pursuant to the preparation of the will of Robert P. Moore. Moore's will was executed on October 8, 1973 and was admitted to probate on December 21, 1973, one week after he died. The controversy in *Shideler* stemmed from the following provision of the will:

> "Clause 7.1(c); *Provision for Mary Catherine Dwyer.* I specifically direct Dominie L. Angelicchio to use his best efforts as long as he owns any shares of stock of Moorfeed Corporation, to cause the Corporation to continue the employment of Mary Catherine Dwyer until her retirement or her other service termination date, then from and after such date and until her death, or the death of Dominie L. Angelicchio prior thereto, Dominie L. Angelicchio shall cause the Corporation to pay Mary Catherine Dwyer as a retirement benefit the sum of $500 per month."[5]

The events that followed the testator's death were succinctly summarized by the Indiana Court of Appeals:

> "Dwyer decided to terminate her employment in the fall of 1974. Her attorney discussed Clause 7.1(c) in Moore's Will with Shideler, who was then serving as attorney for Moore's

---

[4]417 N.E.2d 281 (Ind. 1981).

[5]*Id.* at 284 (quoting 386 N.E.2d at 1212-13 (emphasis in original)).

estate. The estate and Angelicchio took the position that Dwyer would have to meet the qualifications set forth in the profit-sharing plan of Moorfeed Corporation before she would be eligible for any benefits provided by Clause 7.1(c) of Moore's Will. Nevertheless, Dwyer submitted her resignation effective October 31, 1974.

When Dwyer did not receive a payment for November 1974, she filed her petition on November 13, 1974, asking the Marion County Probate Court to construe the Will of Robert P. Moore. The Probate Court entered its decree on June 30, 1975, and held that Clause 7.1(c) of Moore's Will was

> '. . . null and void and of no effect because of its impossibility of performance. The language of said Clause 7.1(c) is merely precatory language. Such Clause 7.1(c) is directed to a corporation and a stockholder of such corporation cannot cause the corporation to perform the acts set out in said clause.'

Dwyer filed her action against Shideler and Barnes, Hickam on June 29, 1977. She alleged, *inter alia*, that Robert P. Moore had intended for Dwyer to receive $500 per month in addition to other retirement benefits, and that Shideler and Barnes, Hickam, who prepared the Will for Moore, knew or should have known that Clause 7.1(c) would be held void.

Shideler and Barnes, Hickam ultimately filed their motion for summary judgment, which the trial court denied."[6]

The defendants' interlocutory appeal of the denial of their motion for summary judgment presented two issues to the Indiana Court of Appeals and to the Indiana Supreme Court. First, which statute of limitations will apply to actions for legal malpractice? Second, when does an action for legal malpractice accrue, causing the statute of limitations to begin running?

The Indiana Court of Appeals affirmed the trial court's denial of Shideler's motion for summary judgment.[7] The court noted that the date upon which a cause of action accrues "is generally a question of fact for the jury."[8] Additionally, the court concluded that a factual issue existed as to the proximate cause of the harm allegedly suffered by Dwyer.[9] Consequently, the Indiana Court of Appeals

---

[6]417 N.E.2d at 284 (quoting 386 N.E.2d at 1213).

[7]386 N.E.2d at 1217.

[8]*Id.* (citing Montgomery v. Crum, 199 Ind. 660, 161 N.E. 251 (1928); Winston v. Kirkpatrick, 110 Ind. App. 183, 37 N.E.2d 18 (1941)).

[9]386 N.E.2d at 1217. The court noted at footnote 4:

Each of the [defendants'] arguments . . . assumes that the denial of payments in 1974 was proximately caused by the overt act of drafting a Will with a

remanded the interlocutory appeal of Shideler and Barnes, Hickam to the trial court for further proceedings.[10] Shideler and Barnes, Hickam petitioned the Indiana Supreme Court to transfer their cause from the First District of the Indiana Court of Appeals. Their petition for transfer, presenting the same two issues—which statute of limitations applies and when does it begin running—was granted.[11]

III. The Statute of Limitations for Legal Malpractice Actions

Prior to *Shideler*, it was unclear which Indiana statute of limitations applied to legal malpractice actions.[12] The supreme court removed this uncertainty by first holding that Indiana Code section 34-4-19-1,[13] which provides that medical malpractice actions must be brought within two years of the negligent act or omission, does not apply to legal malpractice actions.[14] The court then decided, when presented with a five-count complaint alleging, *inter alia*, breach of contract, fraud, and negligence, that the nature or substance of the complaint sounded in tort.[15] Therefore, Indiana Code section 34-1-2-2,[16] which provides that an action for injury to personal property is timely if brought within two years of the accrual of action,

---

void provision. The record does not support this basic premise; at best, a genuine issue of material fact exists and makes summary judgment improper. Because we do not accept this basic premise, we deem it unnecessary to respond to each of the arguments presented.

Id. n.4.

[10]*Id.* at 1217.

[11]417 N.E.2d at 283.

[12]*See* Jackson, *Professional Responsibility and Liability, 1980 Survey of Recent Developments in Indiana Law*, 14 Ind. L. Rev. 433, 455-57 (1981). *See also* Annot., 2 A.L.R.4th 284 (1980) for a reprise of state and federal cases discussing what statutes of limitation govern actions against an attorney for malpractice. *See generally* R. Mallen & V. Levit, Legal Malpractice §§ 191-98 (1977 & Supp. 1979).

[13]Ind. Code § 34-4-19-1 (1976) provides in part:

No action of any kind for damages, whether brought in contract or tort, based upon professional services rendered or which should have been rendered, shall be brought, commenced or maintained, in any of the courts of this state against physicians, dentists, surgeons, hospitals, sanitariums, or others, unless said action is filed within two (2) years from the date of the act, omission or neglect complained of.

[14]417 N.E.2d at 283.

[15]*Id.* at 288-89.

[16]Ind. Code § 34-1-2-2 (1976) provides in pertinent part:

The following actions shall be commenced within the periods herein prescribed after the cause of action has accrued, and not afterwards.

First. For injuries to person or character, for injuries to personal property, and for a forfeiture of penalty given by statute, within two (2) years. . . .

was the applicable statute of limitations, and not section 34-1-2-1,[17] which bars an action for breach of contract if not filed within six years after accrual. The decision of these issues resolved a split which had developed between districts of the Indiana Court of Appeals.

A. *Section 34-4-19-1 Limited to Medical Malpractice Actions*

The *Shideler* court was faced with a split among districts of the Indiana Court of Appeals regarding the application to legal malpractice actions of the malpractice statute of limitations found in Indiana Code section 34-4-19-1. The third district of the Indiana Court of Appeals initially held in *Cordial v. Grimm*[18] that section 34-4-19-1 had been intended by the legislature to apply to legal as well as medical malpractice actions.[19] However, the first district later held in *Shideler v. Dwyer*[20] that the legislature never intended such an application, a holding which was implicitly accepted by the second district in *Anderson v. Anderson*.[21]

At the outset of its opinion, the supreme court summarily rejected Shideler's argument that the statute of limitations governing actions for medical malpractice applies to legal malpractice actions:

> We are in accord with the Court of Appeals, First District, upon this issue and its holding that the doctrine of ejusdem generis limits the application to the term "or others," as used in said statute, to others of the medical care community. Accordingly, *Cordial v. Grimm* . . . is expressly overruled.[22]

In *Cordial*, a client brought a legal malpractice action for damages allegedly resulting from his attorney's actions or inactions

---

[17]IND. CODE § 34-1-2-1 (1976) provides in pertinent part:

The following actions shall be commenced within six (6) years after the cause of action has accrued, and not afterwards.

First. On accounts and contracts not in writing.

. . . .

Third. For injuries to property other than personal property, damages for any detention thereof, and for recovering possession of personal property.

[18]169 Ind. App. 58, 346 N.E.2d 266 (1976), *noted in* 13 VAL. U.L. REV. 383 (1979).

[19]169 Ind. App. at 67-68, 346 N.E.2d at 272.

[20]386 N.E.2d 1211, 1215 (Ind. Ct. App. 1979), *vacated and remanded*, 417 N.E.2d 281 (Ind. 1981).

[21]399 N.E.2d 391 (Ind. Ct. App. 1979). The second district stated: "A cause of action for legal malpractice, however, does not accrue until the aggrieved party has suffered both an injury to his property and damages." *Id.* at 401 (citing Shideler v. Dwyer, 386 N.E.2d at 1215).

[22]417 N.E.2d at 283.

rendering Cordial's valid workmen's compensation claim worthless.[23] The client appealed an order granting summary judgment which the trial court based upon the grounds that the statute of limitations had expired. However, the trial court failed to specify the statute of limitations upon which it based its decision.[24] The Third District Court of Appeals affirmed the order, holding that the trial court could have found that the action was barred under either the first clause of section 34-1-2-2 or section 34-4-19-1.[25]

Judge Hoffman, writing for a split panel,[26] first noted that "statutes of limitation are statutes of repose which are founded upon considerations of justice and sound public policy, and are, therefore, favored by the courts."[27] He further acknowledged the warning in *Kidwell v. State*,[28] that the interpretative doctrine of ejusdem generis " 'should not become a device for unduly narrowing the scope and operation of statutes.' "[29] Based upon these two premises, Hoffman reviewed the overall text and history of section 34-4-19-1 to determine if the general wording of the statute prevented it from applying to malpractice actions against attorneys.

The court held that the title[30] of the Act and the text itself disclosed "no legislative intent that this statute be applied only in medical malpractice cases."[31] Hoffman further pointed out that at the time the law was passed, legislators were aware of malpractice actions against attorneys[32] and that the common law definition of malpractice was limited to wrongdoing by members of the two traditional professional groups, doctors and lawyers.[33] Therefore if the General Assembly had "wished to enact a statute applicable only to medical malpractice actions, it would have so indicated in its terms or text through the use of terms applicable to such actions."[34]

---

[23]169 Ind. App. at 59-60, 346 N.E.2d at 268 (1976).

[24]*Id.* at 61, 346 N.E.2d at 268.

[25]*Id.* at 64-68, 346 N.E.2d at 270-72.

[26]Justice Staton concurred in the result. Justice Garrard concurred in a written opinion which agreed that section 34-1-2-2 controlled and did not reach the question of whether section 34-4-19-1 applied to legal malpractice actions. *Id.* at 70, 346 N.E.2d at 273-74.

[27]*Id.* at 65, 346 N.E.2d at 270 (citations omitted).

[28]249 Ind. 430, 230 N.E.2d 590 (1967), *cert. denied*, 392 U.S. 943 (1968).

[29]169 Ind. App. at 66, 346 N.E.2d at 271 (quoting Kidwell v. State, 249 Ind. 430, 432, 230 N.E.2d 590, 591-92 (1967), *cert. denied*, 392 U.S. 943 (1968)).

[30]The law was entitled "An Act Concerning Proceedings in Civil Malpractice Cases." Act of March 6, 1941, ch. 116, § 1, 1941 IND. ACTS 328 (codified at IND. CODE § 34-4-19-1 (1976)). The statute was given the heading "Actions—Malpractice—Limitation of Actions." 1941 IND. ACTS 328.

[31]169 Ind. App. at 67, 346 N.E.2d at 271.

[32]*Id.* at 67, 346 N.E.2d at 272.

[33]*Id.* at 67-68, 346 N.E.2d at 272.

[34]*Id.* at 67, 346 N.E.2d at 271-72.

In *Shideler*, the First District of the Indiana Court of Appeals initially distinguished *Kidwell's* caution against mechanically using ejusdem generis, upon the grounds that *Kidwell*, and an earlier case, *Woods v. State*,[35] referred to reliance "upon the doctrine in an effort to limit the proscriptions of a criminal statute."[36] The court concluded that if: "the legislature had intended the statute to apply to malpractice cases brought against attorneys, we are confident that either it would have omitted its listing [of medical specialists] altogether or it would have included attorneys in its listing."[37] The court also rejected the suggestions made in *Cordial* that the listing of particular medical specialists in section 34-4-19-1 was an attempt to broaden the statute's application beyond the traditional limitation of malpractice to include professional wrongdoings by lawyers and doctors,[38] stating that "physicians and surgeons would be recognized as members of the medical profession and would not belong in any listing of 'exceptions.' "[39]

The supreme court summarily accepted the conclusions of the court of appeals.[40] The rejection of section 34-4-19-1 as the applicable statute of limitations is important because it would have barred any legal malpractice action not filed within two years of the *occurrence* of the negligent act or omission.[41]

B. The Choice Between Sections 34-1-2-1 and 34-1-2-2

The next step in the court's analysis was to determine whether Indiana Code section 34-1-2-1 or section 34-1-2-2 was the applicable statute of limitations. Section 34-1-2-1 could be deemed applicable to legal malpractice actions by virtue of either its first or third clause.[42] The court first addressed the plaintiff's assertion that her suit sounded in contract rather than in tort, which would have rendered the first clause of section 34-1-2-1 the applicable statute of limitations. The court rejected this argument. The court held that " *'it is the nature or substance of the cause of action rather than the form of the action, which determines the applicability of the statute*

---

[35]236 Ind. 423, 140 N.E.2d 752 (1957).

[36]386 N.E.2d at 1214.

[37]*Id.*

[38]169 Ind. App. at 67-68, 346 N.E.2d at 272.

[39]386 N.E.2d at 1214 n.3.

[40]417 N.E.2d at 283.

[41]The test incorporated into section 34-4-19-1 for determining when a cause of action accrues reflects the traditional rule applicable to legal malpractice actions. *See* notes 53-54 *infra* and accompanying text.

[42]*See* note 17 *supra*.

of limitations.' "[43] Applying this test to the manner in which the plaintiff pleaded her case, the court clearly identified the nature of Dwyer's cause of action: "the number and variety of Plaintiff's technical pleading labels and theories of recovery cannot disguise the obvious fact—apparent even to a layman—that this is a malpractice case, and hence is governed by the statute of limitations applicable to such actions."[44]

The court proceeded to determine whether the third clause of section 34-1-2-1 or the first clause of section 34-1-2-2 should be applied as the appropriate statute of limitations. Indiana Code section 34-1-2-1 is a six year statute of limitations which applies to "injuries to property other than personal property,"[45] whereas section 34-1-2-2 applies to "injuries to person or character, for injuries to personal property. . . ."[46] A comparison of these two statutes reveals that the issue of which is the appropriate statute of limitations would be determined by the court's decision on whether or not a cause of action for legal malpractice is one for injury to personal property.

In deciding whether a claim for legal malpractice is a claim for injury to personal property, the court noted that Indiana courts have "consistently viewed 'personal property' in its broad and natural sense, and have rebuffed arguments for a narrow and technical interpretation of the term."[47] The court further explained that under Indiana's broad definition of personal property it is clear that "the first clause of § 34-1-2-2 '* * * is not to be limited only to direct injuries to chattels, *but also incorporates violations to a person's rights and interests in or to such property*.' "[48] Consequently, the court held that the plaintiff's action for legal malpractice was "one for injuries to personal property within the meaning of Ind. Code § 34-1-2-2."[49]

The court's holding that a cause of action for legal malpractice is a claim for an injury to personal property was also influenced by the following declaration of policy made by the court at the outset of its opinion:

> Formerly statutes of limitations were looked upon with disfavor in that they are invariably in derogation of the com-

---

[43]417 N.E.2d at 285 (emphasis in original) (quoting Koehring Co. v. National Automatic Tool Co., 257 F. Supp. 282, 292 (S.D. Ind. 1966), *aff'd per curiam*, 385 F.2d 414 (7th Cir. 1967)).

[44]417 N.E.2d at 286.

[45]IND. CODE § 34-1-2-1 (1976).

[46]*Id.* § 34-1-2-2 (1976).

[47]417 N.E.2d at 287.

[48]*Id.* (emphasis in original) (quoting Rush v. Leiter, 149 Ind. App. 274, 279, 271 N.E.2d 505, 508 (1971) (action for conversion of personal property consisting of farm produce and livestock)).

[49]417 N.E.2d at 288.

> mon law. "Now, however, the judicial attitude is in favor of statutes of limitations, rather than otherwise, since they are considered as statutes of repose and as affording security against stale claims. Consequently . . . the courts are inclined to construe limitation laws liberally, so as to effect the intention of the legislature. . . ." Such statutes rest upon sound public policy and tend to the peace and welfare of society and are deemed wholesome. They are enacted upon the presumption that one having a well-founded claim will not delay enforcing it.[50]

This declaration of policy is consistent with the court's eventual finding that the six year statute of limitations provided by the third clause of Indiana Code section 34-1-2-1 was not applicable to legal malpractice actions.

The adoption of section 34-1-2-2 by the *Shideler* decision has resolved the uncertainty in Indiana regarding which statute of limitations applies to legal malpractice actions. As the *Shideler* opinion demonstrates,[51] however, the application of section 34-1-2-2 will "immerse Indiana courts into the often confusing analysis of when a cause of action accrues."[52]

IV. The Accrual of an Action for Legal Malpractice

Three different rules have developed regarding when the statute of limitations begins to run on an action against an attorney for malpractice. The traditional rule holds that an action for malpractice accrues upon the occurrence of the negligent act.[53] The statute of limitations may expire prior to any actual injury to the plaintiff, however, thereby creating injustice and hardship without indemnification.[54] For these reasons, some courts have recently abandoned this rule and have adopted the discovery rule whereby negligence actions against attorneys do not accrue until the client discovers or

---

[50]*Id.* at 283 (citations omitted).

[51]*See* notes 59-89 *infra* and accompanying text.

[52]Jackson, *supra* note 12, at 457. *See also* cases collected at note 96 *infra* for examples of the confusion and difficulty this analysis has created.

[53]*See, e.g.*, Wilcox v. Plummer, 29 U.S. (4 Pet.) 172 (1830). *See also* Annot., 18 A.L.R.3d 978 (1974); Mallen, *supra* note 12, § 200; Lathrop, *Legal Malpractice: Plaintiffs, Limiting Statutes and* Heyer v. Flaig, 37 Ins. Counsel J. 258 (1970). The rationale underlying this rule is expressed in Sullivan v. Stout, 120 N.J.L. 304, 199 A. 1 (1938). "An action by the client for the misfeasance or nonfeasance of his attorney is based on the latter's breach of duty, and not on the consequential damages subsequently resulting." *Id.* at 306, 199 A. at 3 (quoting 17 R.C.L. 977, § 132).

[54]*See* Note, *Accrual of Statutes of Limitations: California's Discovery Exceptions Swallow the Rule*, 68 Calif. L. Rev. 106 (1980); Note, *The Commencement of the Statute of Limitations in Legal Malpractice Actions—The Need for Re-Evaluation:* Eckert v. Schoal, 15 U.C.L.A. L. Rev. 230 (1967).

should have discovered facts which establish a cause of action.[55] The third rule holds that an action against an attorney for malpractice accrues when a person sustains injury and damage, regardless of that person's state of knowledge.[56]

The Indiana Supreme Court in *Shideler v. Dwyer*,[57] based its decision upon this latter rule in holding that Dwyer's cause of action was barred by the statute of limitations set out in Indiana Code section 34-1-2-2.[58] The court ruled that damage occurred and the cause of action accrued upon the death of the testator Moore, and not when the will was drafted or at some time after Moore's death when the will provision was adjudged to be invalid. This Comment suggests that the manner in which this form of the "damage" rule was applied in *Shideler* will result in unnecessary protective or provisional legal malpractice actions. This Comment further suggests that a different application of the "damage" rule would have avoided the problems posed by protective legal malpractice actions.

A. The Moment of Accrual

Under Indiana law, legal injury and damage are the elements necessary for a cause of action to accrue.[59] The statute of limitations

---

[55]*See, e.g.*, Neel v. Magana, 6 Cal. 3d 176, 491 P.2d 421, 98 Cal. Rptr. 837 (1971); Green v. Adams, 343 So.2d 636 (Fla. Dist. Ct. App. 1977); Kohler v. Woollen, 15 Ill. App. 3d 455, 304 N.E.2d 677 (1973); Cameron v. Montgomery, 225 N.W.2d 154 (Iowa 1975). *See also* MALLEN, *supra*, note 12, § 204; *but see* Note, *Legal Malpractice—Is the Discovery Rule the Final Solution?*, 24 HASTINGS L.J. 795 (1973).

[56]*See, e.g.*, Ft. Meyers Seafood Packers, Inc. v. Steptoe & Johnson, 381 F.2d 261 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 946 (1968); Price v. Holmes, 198 Kan. 100, 422 P.2d 976 (1967); Marchand v. Miazza, 151 So.2d 372 (La. App. 1963). *See also* MALLEN, *supra* note 12, § 201.

[57]417 N.E.2d 281 (Ind. 1981).

[58]*See* notes 12-50 *supra* and accompanying text.

[59]Montgomery v. Crum, 199 Ind. 660, 678, 161 N.E. 251, 258-59 (1928); Board of Comm'rs v. Pearson, 120 Ind. 426, 428, 22 N.E. 134, 135 (1889).

The court of appeals in *Shideler* defined "injury" and "damages" by quoting from an early Indiana Supreme Court decision which stated in part:

> There is a material distinction between damages and injury. Injury is the wrongful act or tort which causes loss or harm to another. Damages are allowed as an indemnity to the person who suffers loss or harm from the injury.
>
> . . . The one is the legal wrong which is to be redressed, the other the scale or measure of the recovery.

City of North Vernon v. Voegler, 103 Ind. 314, 318-19, 2 N.E. 821, 824 (1885) (citations omitted), *quoted in* 386 N.E.2d at 1215. The Indiana Supreme Court rejected this definition of "damages," however, noting that the lower court "confused *damage*, as a requisite element of any tort with *damages* as a measure of compensation. For a wrongful act to give rise to a cause of action . . . , it is not necessary that the extent of the damage be known or ascertainable but only that damage has occurred." 417 N.E.2d at 289 (emphasis in original).

does not begin to run until these two elements coalesce resulting in the accrual of a cause of action.[60] The imposition of these requirements is logical because the law generally does not render one liable to an action until he has inflicted a legally-cognizable injury and damage.[61] The apparent simplicity and logic of these requirements, however, do not result in easy application. Great difficulty lies in determining the point at which a cause of action accrues.

The supreme court focused upon the damage element of this two-pronged test because there was no issue with respect to legal injury in *Shideler*. The majority ultimately held that Dwyer suffered loss or harm (damage) on the date Robert Moore died because his will then had a "dispositive effect."[62] The effect of this holding was to regard Dwyer's cause of action for legal malpractice as having accrued more than two years before it was brought. Consequently, Dwyer's action for legal malpractice was barred.

The Indiana Supreme Court began its analysis of the damage element of the accrual inquiry by reviewing a factually similar case from Kansas. This case, *Price v. Holmes*,[63] involved a cause of action for legal malpractice in which an attorney negligently supervised the execution of a will. In *Price*, the Kansas Supreme Court relied upon an earlier Kansas case, *Kitchener v. Williams*,[64] where the defective installation of plumbing equipment resulted in an explosion two years later. It was held in *Kitchener* that the plaintiff's cause of action did not accrue until the explosion of the plumbing equipment had occurred, the time that the tortious act occasioned damage.[65] In the *Price* case, the Kansas Supreme Court held that the "explosion" occurred when the testator's will was declared void because it was on that date that "the ground fell from under Lillian Price; prior to that time the will had been held valid by two (2) courts, and Lillian had suffered no damage at the hands of Mr. Holmes."[66]

The Indiana Supreme Court disagreed with the opinion of the Kansas Supreme Court on the question of when damage occurred. The Indiana court explained:

> The fallacy in the Kansas opinion is the conclusion that there had been no *injury* done until the Supreme Court said

---

[60]199 Ind. at 678, 161 N.E. at 258-59.

[61]*Id.*; Merritt v. Economy Dep't Store, Inc., 125 Ind. Ct. App. 560, 564, 128 N.E.2d 279, 280-81 (1955).

[62]417 N.E.2d at 290.

[63]198 Kan. 100, 422 P.2d 976 (1967).

[64]171 Kan. 540, 236 P.2d 64 (1951).

[65]*Id.* at 551-52, 236 P.2d at 73.

[66]198 Kan. at 105, 422 P.2d at 980-81.

> so. Our Court of Appeals was led into the same trap but relegated the task of effecting the "explosion" to the Marion County Probate Court, overlooking the theoretical possibility that the *injury* might have been averted by appellate proceedings.[67]

The Indiana Supreme Court's description of the "fallacy" in the *Price* decision indicates its belief that the Kansas court should not have concluded that *injury* does not occur until the supreme court says so. This, however, is not an accurate evaluation of the Kansas Supreme Court's conclusion in *Price*. In *Price*, the Kansas court held that "Lillian [Price] had suffered no *damage*"[68] until the will had been declared void.

The Kansas Supreme Court's holding that no *damage* had resulted to Lillian Price until it declared the will void is quite defensible. No loss for which the law allows indemnity had actually resulted to Lillian Price until that date because the will had previously been held valid by two different Kansas courts.

The Indiana Supreme Court's analysis of the *Price* case was flawed in two respects. First, the Indiana Supreme Court misapprehended what the Kansas court concluded regarding when damage occurs. Second, the Indiana Supreme Court failed to take notice of the Kansas Supreme Court's analysis in *Price* of when loss or harm (damage) has actually been suffered. The analysis in *Price* of the damage issue was more accurate than that of the *Shideler* majority because the *Price* court focused upon when damage *actually* resulted to the plaintiff.

Under common law decisions,[69] the damage portion of the accrual test seeks to identify when damage is actually suffered, not when it *might* be suffered. The *Shideler* opinion focused on the point at which damage *might* have been suffered. The surprising result in *Shideler* might be explained by the Indiana Supreme Court's apparent dissatisfaction with the prospect of waiting until the appellate process is complete before a cause of action would accrue for a particular act of legal malpractice.[70] This concern is manifested by the Indiana Supreme Court's statement in *Shideler* that "[t]he fallacy in the Kansas opinion is the conclusion that there had been no injury done until the Supreme Court said so."[71]

---

[67]417 N.E.2d at 289 (emphasis added).

[68]198 Kan at 105, 422 P.2d at 980-81 (emphasis added).

[69]*See, e.g.*, Essex Wire Corp. v. M.H. Hilt Co., Inc., 263 F.2d 599 (7th Cir. 1959); Montgomery v. Crum, 199 Ind. 660, 161 N.E. 251 (1928).

[70]This is exactly what happened in Price v. Holmes, 198 Kan. 100, 422 P.2d 976 (1967).

[71]417 N.E.2d at 289.

This concern may have steered the Indiana Supreme Court away from making a practical analysis in *Shideler* regarding when damage was actually suffered.[72] In most instances, whether any loss or harm (damage) actually results from an attorney's services will depend upon a finding that the particular work did not have its intended effect. Under the facts of *Shideler*, such a finding was certainly a prerequisite to damage being incurred. As a practical matter, no compensable damage could be proven by Mary Catherine Dwyer without such a finding by a trial or appellate court. Unfortunately, the court seemed to overlook this need to assess, in a practical way, the damage prong of the accrual test.

After discussing the *Price* case, the Indiana Supreme Court continued its analysis of the damage element of the test for accrual by discussing its decision in *Board of Commissioners v. Pearson*.[73] In *Pearson*, the plaintiff brought an action in 1884 for injuries allegedly suffered due to the negligent design of a bridge constructed in 1871. The court held that the cause of action did not accrue until Pearson's injury in 1884 even though the alleged negligence of the defendant occurred thirteen years earlier.[74]

The court discussed the applicability of the *Pearson* rationale to the facts of *Shideler*:

> The drafting of Moore's Will and the resulting disappointment to Plaintiff may be likened to the construction of the bridge and its subsequent collapse in the *Pearson* case (supra). In both, the wrong preceded the damage by a considerable period of time. In neither, did the cause of action accrue until damage resulted from the wrong. In the case of the bridge, the damage occurred and the cause of action accrued when the bridge collapsed. That is when damage resulted to Pearson.
>
> When did damage to Plaintiff result from Defendant's alleged negligence? Not when the Will was drafted or executed, because it had to await the death of Moore before it would have any dispositive effect. But at his death, the instrument was operative; and, just as the negligent construction of the bridge in *Pearson* became irremediable with its collapse under Pearson's weight, the wrong, if any, set in

---

[72]Common law decisions in Indiana indicate that the test for determining whether damage has been sustained involves a determination that loss or harm has actually been suffered. *See* note 69 *supra*.

[73]120 Ind. 426, 22 N.E. 134 (1889).

[74]*Id.* at 428, 22 N.E. at 135.

> motion with the drafting of Moore's Will became *irremediable* with his death.[75]

This portion of the majority's opinion which analogizes to the *Pearson* case is fraught with analytical problems. The major problems include the erroneous parallel the majority draws from *Pearson* to *Shideler*, and the court's apparent change in its analysis of the damage element of the accrual test.

The flaws in the parallel drawn from *Pearson* to *Shideler* by the majority were aptly summarized by Chief Justice Givan in his dissent:

> The majority takes the position that in the case at bar the impingement to the plaintiff first occurred when the will was probated. Thus, likening that incident to the incident of the collapse of the bridge. If we draw a parallel between the two cases, it would seem the negligence in constructing the bridge parallels the negligence, if any, in constructing the will. The probate of the will would parallel the opening of the bridge to traffic. The collapse of the bridge parallels the decision of the Probate Court in holding that the bequest to the plaintiff was void and of no force and effect.[76]

Chief Justice Givan's analogy from *Pearson* to *Shideler* is infinitely more clear than that of the majority. The majority purported to rely on *Pearson*. Had it properly applied *Pearson*, however, it would not have held that Mary Catherine Dwyer's cause of action was barred.

Additionally, the majority's analysis of *Pearson* seems to change the damage portion of the accrual test. The first paragraph of the majority's analysis of *Pearson*[77] discusses the facts of *Pearson* and focuses on when damage resulted to Pearson from the tort. The second paragraph of the majority's analysis determines when damage was incurred by Mary Catherine Dwyer. At this point, the majority shifts from a traditional analysis of the damage element which includes an assessment of when compensable loss or harm was actually incurred to an inquiry into when the act became *irremediable*.

This seems to change the test set out early in the *Shideler* majority opinion[78] and in numerous other decisions construing Indiana law.[79] Although it is the prerogative of the supreme court to make such a change in Indiana common law, a change from the traditional test to a focus upon when the lawyer's work became ir-

---

[75]417 N.E.2d at 290 (emphasis added).

[76]*Id.* at 295 (Givan, C.J., dissenting).

[77]*See* text accompanying note 74 *supra*.

[78]417 N.E.2d at 289.

[79]*See* note 69 *supra*, and accompanying text.

remediable yields unfortunate results. If the focus suggested by the majority opinion in *Shideler* is upon when the questionable legal work becomes *irremediable*, rather than upon when loss or harm (damage) actually occurred, the result in extreme cases is that a cause of action for legal malpractice could be barred even before the attorney's malpractice liability arises.

For example, assume that a contract for the sale of certain goods was executed more than two years ago with a disclaimer of the warranty of merchantability that *might* not have been sufficiently conspicuous to constitute a valid disclaimer despite the fact that merchant "A" who hired the attorney to draft the contract specifically requested such a disclaimer. More than two years after the execution of the contract, suit on the warranty of merchantability has been brought against merchant "A" by merchant "B". Consequently, merchant "A" wants to sue his attorney for legal malpractice. However, merchant "A" who hired the lawyer would have no cause of action against the lawyer because the staute of limitations would have run from the point at which the "effective" warranty became irremediable under the *Shideler* analysis.[80] In such a case, compensable damage in a legal malpractice action would not have been suffered by merchant "A" until merchant "B" won or at least initiated his suit for breach of the warranty of merchantability.[81] It would not be until merchant "B" collected in his cause of action that liability would arise for legal malpractice. Thus, the cause of action for legal malpractice would be barred before any liability for legal malpractice arose because no such liability can arise until it can be proven that the contract did not have its intended effect.

Other details of the majority's view of the damage element are disturbing. The court states that the declaration by the Marion County Probate Court[82] "was not the explosion of the plumbing [*Kitchener*] nor the collapse of the bridge [*Pearson*]."[83] Instead, the court held that "[t]he explosion occurred when Moore died."[84] Clearly, impact to person or property, precipitating certain losses or harms, occurred immediately after the explosion in *Kitchener* and the collapse in *Pearson*. No contingencies prevented these losses or harms (damage) from being suffered. No such impact can be shown at Moore's death under the facts of *Shideler*; nevertheless, the Indiana

---

[80]The suit would be barred under *Shideler* because the contract was executed and had a "dispositive effect" more than two years before suit was (or would have been) brought.

[81]To prevail, merchant "B" would have to prove that the disclaimer was not a valid disclaimer.

[82]*See* text accompanying note 6 *supra*.

[83]417 N.E.2d at 291.

[84]*Id.*

Supreme Court held that Dwyer suffered damage at Moore's death.[85] The court did not specify what particular loss or harm was suffered by Dwyer at that point, and the facts given by the court fail to demonstrate what damage actually resulted at Moore's death. The facts, however, do indicate that damage would be suffered *if* the testamentary provision were declared void.

The court on several occasions also emphasized that a determination of when damage is suffered should not be confused with ascertaining the *extent of damages*.[86] This is a valid admonition because the only inquiry should be whether damage has been suffered; the extent of damage is immaterial to the accrual inquiry. However, this concern should not prompt courts to find that damage has occurred before any loss or harm is actually suffered. This concern may have been an additional motivation behind the court's ultimate holding that Dwyer suffered damage when Robert Moore died.[87]

A final influence upon the court's holding was its continuing interest in advancing the general policy behind statutes of limitation. In addition to the court's general statement of this policy early in its opinion,[88] the court reiterated the policy, acknowledging, after it reached its conclusion that Dwyer's cause of action had accrued more than two years before it was brought, that an occasional injustice might result.[89]

B. Postponement of Accrual

The facts in *Shideler* did not present each possible set of circumstances which could potentially postpone the accrual of a cause of action for legal malpractice.[90] However, two important sets of circumstances which warrant discussion were mentioned in the opinion. The first set suggests postponement of accrual when the aggrieved party does not actually know or in the exercise of reasonable care would not have known that an invasion of his rights has occurred by an act of legal malpractice.[91] The other set of circumstances mentioned in *Shideler* involves the situation in which the relationship between the negligent attorney and the client continues beyond the negligent act, and the attorney fraudulently conceals the action for legal malpractice.[92] The dicta in *Shideler* regarding

[85] *Id.*

[86] *See* note 59 *supra.*

[87] 417 N.E.2d at 291.

[88] *See* text accompanying note 50 *supra.*

[89] 417 N.E.2d at 291.

[90] *See, e.g.*, Lehman v. Scott, 113 Ind. 76, 14 N.E. 914 (1888) (infancy); Grooms v. Fervida, 396 N.E.2d 405, 409-10 (Ind. Ct. App. 1979) (imprisonment in state prison). *See also* IND. CODE § 34-1-2-5 (1976) (two year tolling provision for legal disabilities).

[91] 417 N.E.2d at 291.

[92] *Id.*

both of these issues will have an important effect upon determining when a cause of action for legal malpractice may be postponed, thereby extending the statute of limitations.

1. The Discovery Rule.—In several jurisdictions, an action for professional malpractice does not accrue until the plaintiff actually knows, or in the exercise of reasonable care should have known, all facts essential to proving the elements of a case for professional malpractice.[93] This rule has generally become known as the "discovery rule."[94]

The majority opinion in *Shideler* addressed the applicability of the discovery rule in a strange manner. The court did not relate the discovery rule to Indiana's common law requirement that injury and damage must coalesce before a cause of action accrues. At this point in its opinion,[95] the majority could have clarified much of the confusion that has existed under Indiana law by addressing the discovery rule in relation to the elements of injury and damage. Many lawyers cannot determine under Indiana law if damage occurs when it is suffered, or if damage occurs when it is suffered *and* discovered. This confusion is understandable in light of several cases which have stated that a cause of action accrues upon the occurrence of injury and "damages *susceptible of ascertainment.*"[96]

The *dicta* of the *Shideler* majority opinion could have clarified this confusion by affirmatively stating that, under the accrual inquiry, damage is suffered regardless of the aggrieved party's knowledge of the damage, or alternatively, damage is suffered only if such knowledge was or could have been possessed by one exercising due diligence.

The court did neither, however, but made the following comments about the discovery rule:

> There is authority supporting the proposition that statutes of limitation attach when there has been notice of an invasion of a legal right of the plaintiff or he has been put

---

[93]*See, e.g.*, Munford v. Staton, Whaley & Price, 254 Md. 697, 255 A.2d 359 (1969); Jaramillo v. Hood, 93 N.M. 433, 601 P.2d 66 (1979); Niedermeyer v. Dusenbery, 275 Or. 83, 549 P.2d 1111 (1976). *See also* cases cited at note 55 *supra.*

[94]*See* notes 54-55 *supra* and accompanying text.

[95]417 N.E.2d at 291-92.

[96]*See, e.g.*, Essex Wire Corp. v. M.H. Hilt Co., 263 F.2d 599, 602 (7th Cir. 1959); Withers v. Sterling Drug, Inc., 319 F. Supp. 878, 880 (S.D. Ind. 1970) (quoting Gahimer v. Virginia-Carolina Chem. Corp., 241 F.2d 836, 840 (7th Cir. 1957)); Montgomery v. Crum, 199 Ind. 660, 679, 161 N.E. 251, 259 (1928); Scates v. State, 383 N.E.2d 491, 493 (Ind. Ct. App. 1978).

The *Shideler* court did say at one point that for a cause of action to accrue, "it is not necessary that the extent of the damage be known or *ascertainable* but only that damage has occurred." 417 N.E.2d at 289 (dicta) (emphasis added). It is unclear whether this was intended to overrule prior case law cited above in this footnote.

> on notice of his right to a cause of action. There may be special merit to that viewpoint where, as in *Neel v. Magna* [*sic*] . . . , the plaintiff was the client or the patient, but we do not have that problem.
>
> We also note that in many cases where the discovery rule has been applied or alluded to, the misconduct was of a continuing nature or concealed, which also was the situation in *Neel v. Magna* [*sic*]. . . .[97]

From this discussion of the discovery rule, it seems that the court does not regard the rule as a common law creation which aids in the determination of when damage is suffered thus causing action to accrue. The court is apparently suggesting that discovery of the harm has a bearing on the accrual of an action only when the attorney actually or constructively conceals from the client a cause of action for legal malpractice. This suggestion only defers the issue to an analysis of the statutory tolling provision of fraudulent concealment[98] and avoids addressing the merits of the discovery rule. Consequently, the majority opinion of *Shideler* provides little definitive guidance regarding whether the discovery rule will apply to legal malpractice actions.

The dissent's analysis of the discovery rule differed markedly from the majority's. The dissenting justices reviewed the history of California's treatment of the discovery rule.[99] This review revealed California's switch from its original position that the statute of limitations began to run from the time the act or omission constituting legal malpractice occurs to the eventual adoption of the discovery rule.[100] The discovery rule that emerged from California's process of evolution was quoted by the dissenting justices in *Shideler*: " 'in an action for professional malpractice against an attorney, the cause of action does not accrue until the plaintiff knows, or should know, all material facts essential to show the elements of that cause of action.' "[101]

---

[97]417 N.E.2d at 291 (citations omitted).

[98]IND. CODE § 34-1-2-9 (1976). *See also* notes 106-14 *infra* and accompanying text.

[99]417 N.E.2d at 295-96.

[100]*Id.* at 296.

[101]*Id.* (quoting Neel v. Magana, 6 Cal. 3d 176, 190, 491 P.2d 421, 430, 98 Cal. Rptr. 837, 846 (1971)).

The majority had cited an earlier California case, Heyer v. Flaig, 70 Cal. 2d 223, 449 P.2d 161, 74 Cal. Rptr. 225 (1969), to support its holding that Dwyer's cause of action accrued at the death of the testator. 417 N.E.2d at 283, 290. The dissent, in addition to noting that *Neel* indicates that California has changed its position, *id.* at 295-96, distinguished *Heyer* factually from the *Shideler* case. In *Heyer*, the attorney negligently left out a provision, while in *Shideler*, the provision was included, but was negligently drafted. Therefore, the dissent said, "[u]nlike the instant case, the negligence of *Flaig* was discoverable upon the death of the testatrix." *Id.* at 295.

The dissent noted that the majority of states still adhere to the rule that the statute of limitations on a claim for legal malpractice runs from the date the negligent act occurs.[102] The dissent listed cases from several other jurisdictions, however, which have adopted the discovery rule.[103] The dissenting justices did not specifically suggest that Indiana adopt the discovery rule; however, they quoted from an opinion of the Supreme Court of Appeals of West Virginia which they stated had made the "most poignant statement by a Court justifying the application of the discovery rule":[104]

> We are inclined to agree with the defendant that it is the majority view in this country that as a general proposition this statute of limitations begins to run from the date of the commission of the act of professional malpractice rather than from the date of discovery. However, we do not agree with the defendant's cavalier dismissal from consideration of the cases which subscribe to the so-called minority view. We do not equate an "overwhelming number of cases", as expressed in the defendant's brief, with justice and right.[105]

Shideler may not be properly cited for the proposition that the discovery rule has been either accepted or rejected because *Shideler* involved a plaintiff who was aware of the harm she had suffered due to the alleged acts of the legal malpractice. The dicta of the majority opinion, however, indicate that if the court was squarely presented with the issue, three of the justices would probably vote not to apply the discovery rule to postpone the accrual of a cause of action for legal malpractice.

2. Fraudulent Concealment.—In several Indiana medical malpractice cases, Indiana appellate courts have held that the statute of limitations for medical malpractice is tolled by the actual or constructive fraudulent concealment of the cause of action by the attending physician.[106] These cases have extended the doctrine of fraudulent concealment to a point where fraudulent concealment of a cause of action against the medical practitioner presumptively exists

---

[102]*Id.* at 297.

[103]*Id.*

[104]*Id.*

[105]*Id.* (quoting Family Savings & Loan, Inc. v. Ciccarello, 157 W.Va. 983, 207 S.E.2d 157 (1974)).

[106]*See, e.g.*, Carrow v. Streeter, 410 N.E.2d 1369, 1375-76 (Ind. Ct. App. 1980); Adams v. Luros, 406 N.E.2d 1199, 1202-03 (Ind. Ct. App. 1980).

It should be noted that IND. CODE § 34-1-2-9 specifically discusses the effect of fraudulent concealment and states in part: "If any person liable to an action, shall conceal the fact from the knowledge of the person entitled thereto, the action may be commenced at any time within the period of limitation, after the discovery of the cause of action." *Id.*

until the doctor-patient relationship is terminated.[107] Before the Indiana Supreme Court handed down its decision in *Shideler*, doubt existed as to whether the doctrine of fraudulent concealment would be extended to apply to legal malpractice cases as well. The *Shideler* decision, however, did little to eliminate this uncertainty.

The court was not faced with the issue of fraudulent concealment within the context of legal malpractice because the plaintiff in *Shideler* was not a party to the attorney-client relationship.[108] Dicta within the majority's opinion, however, suggest that the doctrine of fraudulent concealment might apply to legal as well as medical malpractice cases. The majority opinion first noted the absence of any "unique relationship between a lawyer who drafts a will and one who is merely the object of his client's [the testator's] bounty that calls for a special rule. Without more, there is no continuing obligation to the devisee."[109] Clearly, a continuing fiduciary obligation to the client is an important rationale for tolling the statute of limitations on the basis of constructive fraudulent concealment. The majority opinion additionally pointed out that: "Although we hold that a disappointed beneficiary's action, if any, would accrue simultaneously with the death of the testator and that the statute of limitations would then begin to run, we recognize that such statutes are subject to avoidance under certain recognized circumstances."[110] Again the majority is suggesting, albeit in dicta, that fraudulent concealment may prevent the cause of action from accruing, but not under the *Shideler* facts.

Some doubt therefore remains as to whether the doctrine of fraudulent concealment will postpone the accrual of a cause of action for legal malpractice. Given the dicta of the majority opinion in *Shideler*, however, it may be reasonably concluded that an actual or constructive fraudulent concealment may postpone the accrual of a cause of action for legal malpractice. The opinions in *Carrow v. Streeter*,[111] and *Adams v. Luros*,[112] both medical practice actions, indicate that fraudulent concealment can be extremely important in determining whether the statute of limitations has run. The application of this doctrine to legal malpractice actions will make it difficult to obtain summary judgment on the basis of the statute of limita-

---

[107]*See* cases cited in note 106 *supra*.

[108]If the plaintiff had been a party to the attorney-client relationship, the issue of constructive, and possibly actual, fraudulent concealment would probably have arisen. *Id.*

[109]417 N.E.2d at 291.

[110]*Id.* at 294.

[111]410 N.E.2d 1369.

[112]406 N.E.2d 1199.

tions when the aggrieved party was also a party to the attorney-client relationship.[113]

V. CONCLUSION

The Indiana Supreme Court should have held that Mary Catherine Dwyer's cause of action for legal malpractice did not accrue until the Marion County Probate Court declared void the provision in Robert Moore's will. This would have avoided the problems posed by protective legal malpractice actions required in certain circumstances as a consequence of *Shideler*.

Exactly why the Indiana Supreme Court reached this conclusion is unclear. The court could have arrived at its ultimate holding based solely upon its analysis of the damage element of the accrual test.[114] It is also possible the court reached its decision in *Shideler* on the basis of its analysis of applicable policy considerations. It is more likely that these two possibilities are inextricably intertwined.

If the court reached its decision largely on the basis of policy considerations, it would be interesting to discover the weight attached by the majority to the policy considerations which weigh heavily against the court's decision. Perhaps the most important of these considerations is the prospect of protective or provisional legal malpractice suits being filed against attorneys. This type of suit is especially objectionable when it is not at all clear whether the attorney's services have had their intended effect.[115] The effect of such a premature suit is to needlessly diminish an attorney's professional reputation.

---

[113]This difficulty will stem from the factual issues that normally exist as to when the attorney-client relationship terminated. Given the rule under *Adams* that fraudulent concealment presumptively exists until the professional relationship is terminated, this factual dispute can alone defeat a summary judgment motion based on the statute of limitations. *Id.* at 1202-03.

[114]*See* text accompanying notes 53-59 *supra*.

[115]In order to avoid encouraging provisional lawsuits, several courts have held that a cause of action for legal malpractice does not accrue until an attorney's work has been shown to be erroneous or negligent. *See, e.g.*, Kohler v. Wollen, 15 Ill. App. 3d 455, 460, 304 N.E.2d 677, 680 (1973) (wrongful death claim); Delesdernier v. Miazza, 151 So. 2d 372, 375-76 (La. Ct. App. 1963) (breach of employment contract); United States Nat'l Bank v. Davies, 274 Or. 663, 670, 548 P.2d 966, 969-70 (1970) (sale of stock).

In Commercial Credit Corp. v. Ensley, 148 Ind. App. 151, 264 N.E.2d 80 (1970), the court held that an action for malicious prosecution was not barred by the statute of limitations because the action did not accrue until pending litigation reached a final disposition. "To hold appellee's action was barred by the statute of limitations would have the effect of forcing parties to initiate litigation with the full knowledge that it may be groundless. This we will not do." *Id.* at 160-61, 264 N.E.2d at 86. Yet the *Shideler* rule forces the plaintiff to engage in potentially "groundless" litigation.

Another policy consideration weighing against the majority's holding is the fact that one aggrieved by an act of legal malpractice may have her action barred before liability for such malpractice ever arises.[116] The final policy consideration weighing against the majority's holding is that if Dwyer had filed a protective legal malpractice suit against the drafting attorney, Dwyer might well have been placed in the untenable position of simultaneously defending the validity of the will provision in one suit and attacking its validity in another.[117]

The major policy consideration supporting the majority's decision appears to be the general policy behind statutes of limitation.[118] This policy essentially holds that statutes of limitation are statutes of repose and " 'tend to [promote] the peace and welfare of society.' "[119] Additionally, the majority's holding is supported by a concern with avoiding stale evidence and witnesses with dull memories as well as avoiding the time-consuming process of determining whether a lawyer's work will have its intended effect. Few could persuasively argue, however, that these policy considerations are more compelling than the policy considerations weighing against the majority's holding in *Shideler*.

---

[116]*See* text accompanying notes 78-81 *supra*.

[117]This problem was implicitly noted by Chief Justice Givan in his dissent. 417 N.E.2d at 296. *See also* United States Nat'l Bank v. Davies, 274 Or. at 663, 548 P.2d at 966.

[118]417 N.E.2d at 283, 291. *See also* notes 88-89 *supra* and accompanying text.

[119]417 N.E.2d at 291 (quoting Craven v. Craven, 181 Ind. 553, 559, 103 N.E. 333, 335 (1913)).