

FOURTH DIVISION
September 4, 2014

1-13-1825

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

<i>In re</i> MARRIAGE OF:)	Appeal from the
)	Circuit Court of
ELIZABETH W. NESBITT n/k/a ELIZABETH)	Cook County.
MONTSERAT,)	
)	
Petitioner-Appellant,)	
)	
and)	No. 01 D 04596
)	
BRUCE M. NESBITT,)	Honorable
)	Leida J. Santiago,
Respondent-Appellee.)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Lavin concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court of Cook County's order granting respondent's motion to dismiss the amended petition for rule to show cause is affirmed. Petitioner has no claim to a portion of respondent's settlement of his complaint for legal malpractice against attorneys representing him during the dissolution proceedings because the cause of action for legal malpractice in the dissolution

proceedings did not accrue during the parties' marriage and therefore the resulting settlement is not a marital asset.

¶ 2 Petitioner, Elizabeth W. Montserat, f/k/a Elizabeth W. Nesbitt, filed an amended petition for a rule to show cause why respondent, Bruce M. Nesbitt, should not be held in indirect civil contempt for violating the final judgment in this dissolution proceeding for failing to distribute to Elizabeth her marital share of a settlement Bruce received in a lawsuit for legal malpractice against his former dissolution attorneys. Bruce moved to dismiss the petition for rule pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2012)). The circuit court of Cook County granted the motion and dismissed Elizabeth's amended petition for rule to show cause and for other relief. The trial court later denied Elizabeth's motion to reconsider the order granting Bruce's motion to dismiss. For the reasons that follow, we affirm.

¶ 3 BACKGROUND

¶ 4 Elizabeth filed a petition for dissolution of marriage in March 2001. In January 2004 the parties entered an agreed order regarding the distribution of the bulk of the marital estate. The agreed order listed the items then remaining for adjudication. The items remaining for adjudication after the parties entered the January 2004 agreed order included, among others, items of remaining marital property to be disclosed by each party and the issue of contribution toward attorney fees. The January 2004 agreed order allocated property 62½% in favor of Bruce and 37½% in favor of Elizabeth. The January 2004 agreed order contains a clause titled "Subsequent Adjustment(s) to Property Division" which reads as follows:

“In the event that it is ever determined that a material undisclosed marital asset was in existence on the date of the entry of final Judgment--irrespective of whether the omission was intentional, inadvertent, or due to lack of knowledge on the part of either party or both parties--then an appropriate adjustment shall be effectuated. More specifically, if [Bruce] is the party who failed to disclose the item, he shall pay to [Elizabeth] an amount equal to *** (37.5 %) of the item’s value ***.”

¶ 5 On September 2, 2005, the trial court entered a memorandum opinion and order and a judgment for dissolution of marriage. The memorandum opinion and order (hereinafter September 2005 order) references the January 2004 agreed order and states the remaining marital property is to be divided equally. The September 2005 order also orders Bruce to pay \$700,000 in contribution toward Elizabeth’s attorney fees. The judgment for dissolution of marriage (hereinafter September 2005 judgment or dissolution judgment) incorporates the January 2004 agreed order and order for contribution (among other instruments incorporated into the dissolution judgment), distributes the previously unallocated marital property, and orders reviewable maintenance in favor of Elizabeth. On December 12, 2005, the trial court entered a supplemental judgment for dissolution of marriage. On January 27, 2006, the trial court entered an amended supplemental judgment for dissolution of marriage.

¶ 6 In September 2011 Elizabeth filed a petition for a rule to show cause and for other relief, related to a settlement Bruce received in a lawsuit against his former attorneys who had represented him during the dissolution proceedings, seeking a percentage of the settlement.

The petition generally asserted that under the January 2004 agreed order Elizabeth was entitled to an adjustment to the property division because Bruce's malpractice claim was an asset in existence when the court entered final judgment. Bruce filed a motion to dismiss the petition pursuant to section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2010)). In February 2012, the trial court granted Bruce's motion to dismiss without prejudice.

¶ 7 In April 2012 Elizabeth filed the amended petition for rule to show cause and for other relief that is the subject of this appeal. The amended petition asserted that sometime after entry of final judgment in the dissolution proceedings Bruce's former attorneys filed a lawsuit against him to collect unpaid legal fees. On May 18, 2007, Bruce filed a counterclaim against his former attorneys for malpractice. On January 28, 2011, Bruce's malpractice action against his former attorneys was dismissed pursuant to an agreed order of dismissal. The order makes specific reference to a settlement and execution of documents relating to that settlement.

¶ 8 Elizabeth's petition alleges that "such cause of action had accrued by the date of entry of the parties' Final Judgment (*i.e.*, January 27, 2006, which was the ultimate deadline for timely disclosure by Bruce), because prior to such date Bruce '*** knew or reasonably should have known of the injury for which damages [were] sought ***.' [Citation.]" The amended petition alternatively alleges that "such cause of action had accrued by such date because (i) any lack of awareness on Bruce's part by such date as to his claim *** was, and is, irrelevant (due to the stipulation provision from the parties' original Judgment ***.)" Elizabeth alleged that Bruce had failed to comply with the applicable provision of the "Final Judgment" by not making payment to her based on the malpractice award.

¶ 9 Elizabeth's petition alleges that Bruce's fees to this law firm increased \$555,000 after the close of proofs in the dissolution proceedings. Bruce's countercomplaint for malpractice alleged, in part, that following the entry of the January 2004 agreed order, he "could have concluded his participation in the *** proceedings in a reasonable manner" but his attorneys "chose to pursue further litigation in the matter against [Bruce's] interests." Bruce's malpractice complaint also alleges his attorneys failed to seek an offset in the distribution of marital assets for sums he paid from his nonmarital assets for Elizabeth's support during the proceedings resulting in their loss. He also alleges the attorneys failed to obtain a stipulation of the remaining marital assets to be divided after the January 2004 agreed order resulting in further losses and unnecessary litigation. Elizabeth's petition alleges that a settlement the trial court recommended and that included a \$100,000 contribution toward her attorney fees through July 31, 2003 was available to Bruce.

¶ 10 The amended petition alleges that after the circuit court dismissed Bruce's malpractice case Elizabeth's attorney wrote to Bruce and Bruce's attorney regarding the settlement seeking payment of 37½% of the settlement amount. They had been unable to determine the settlement amount due to a lack of a response to their inquiries. Elizabeth's amended petition seeks relief based on the definition of marital property in the Illinois Marriage and Dissolution of Marriage Act (Dissolution Act) and based on the parties' alleged stipulated definition of property in the January 2004 agreed order. First, the amended petition argues that "all requirements under the [Dissolution Act] for accrual of Bruce's malpractice claim *** had been met prior to January 27, 2006." In pertinent part, the amended petition alleges that Bruce suffered damages in the form of, at minimum, "the bulk of his court-ordered

contribution to [Elizabeth's] litigation costs (\$700,000) and the bulk of his own subsequently generated litigation costs (\$555,000)" as a result of his attorneys' failure to accept the settlement offer. The amended petition argues in part that the malpractice claim had accrued before January 27, 2006 because Bruce knew the terms of the proposed settlement and his own litigation costs. Alternatively, the amended petition argues that because the January 2004 agreed order states that a nondisclosure of a material asset could occur even if the nondisclosing party did not have knowledge of the asset at the time of the final judgment, then "the usual requirement for accrual of a legal malpractice cause of action" that a party have knowledge as to the injury for which damages are sought is eliminated.

¶ 11 Bruce filed a motion to dismiss the amended petition pursuant to section 2-615 of the Code (735 ILCS 5/2-615 (West 2012)). On December 5, 2012, the trial court granted Bruce's motion to strike and dismiss the amended petition for rule to show cause and for other relief with prejudice. The court's written judgment notes that on January 27, 2006, the court entered an Amended Supplemental Judgment for Dissolution of Marriage "which incorporated all the previous judgments and stipulations, culminating into the parties' 'Final Judgment.'" The court determined that it first had to find when Bruce's cause of action arose. Then, if the cause of action arose during the dissolution proceedings, the court would go on to address whether the subsequent settlement of that cause of action was an asset within the meaning of the parties' January 2004 agreed order.

¶ 12 The trial court found that assuming *arguendo* that Bruce realized at some point during the dissolution proceedings that his attorneys were mishandling the case, he would still only be able to speculate at that point as to the possible damages, "especially where their case was

not fully resolved until the entry of their final judgment on January 27, 2006.” The court found that Bruce would not have been able to prove actual damages before entry of the parties’ final judgment, at which time “the parties’ entire estate would have been divided.” Therefore, the court found, Bruce’s malpractice claim did not accrue until after the entry of the parties’ final judgment on January 27, 2006. The court held that, based on its holding that Bruce’s cause of action arose after entry of the parties’ final judgment the issue of whether a cause of action for malpractice that arises prior to the entry of a final judgment of dissolution is marital property was irrelevant. The court also found that based on its holding any settlement was nonmarital property--the cause of action having accrued after entry of the judgment--the portion of the parties’ agreement stating that knowledge of the undisclosed asset is irrelevant to the right to adjustment provides no relief for Elizabeth on this issue.

¶ 13 In January 2013 Elizabeth filed a motion to reconsider the trial court’s December 5, 2012 order. Following briefing and argument by the parties, the court denied Elizabeth’s motion to reconsider. The court noted Elizabeth’s argument in her motion to reconsider that Bruce’s cause of action began to accrue on September 2, 2005, when the court entered the memorandum order, and her argument that precedent permitted finding that a cause of action for malpractice can accrue prior to the entry of an adverse judgment. The trial court found that the stated exception to the general rule that a cause of action for malpractice does not accrue prior to the entry of an adverse judgment which the parties cited required that “ ‘a clear finding of attorney neglect had already been made in [the] case.’ ” The trial court in this case found that “there was no finding by the Court of any attorney neglect and therefore, the

Court asserts as it did before that [Bruce's] malpractice claim could not have accrued until the entry of an adverse judgment.”

¶ 14 The trial court rejected Elizabeth's argument that whether the supplemental or amended supplemental judgments were the result of posttrial motions should affect its judgment (because the accrual date could not be tolled pending posttrial motions) even if discovery proved that Bruce became aware of a cause of action at the time the court entered the September 2005 judgment. The court held that whether the “malpractice claim began to accrue at the time the parties' Original Judgment was entered on September 2, 2005 or when the Amended Supplemental Judgment for Dissolution was *** entered on January 27, 2006, the Court finds the results in this case would not be affected” because the parties' marriage was dissolved at the time the court entered the September 2005 judgment, therefore any settlement from that malpractice claim would be Bruce's nonmarital property.

¶ 15 The trial court also rejected Elizabeth's argument that because the court entered the memorandum order first the parties were still married when the malpractice claim began to accrue. The court found that argument “meritless since both the Memorandum Opinion and Order and the parties' Judgment were filed the same day. Furthermore, [Elizabeth] does not provide any rule of law or case that requires the Court to make determinations based on the order in which documents are entered with the court.” The court further held that the “malpractice action did not accrue any earlier than the entry of the parties' Original Judgment on September 2, 2005.”

¶ 16 This appeal followed.

¶ 17

ANALYSIS

¶ 18 On appeal Elizabeth argues that the trial court's December 5, 2012 and May 6, 2013, orders should be reversed because the trial court erroneously held the malpractice claim did not accrue either (1) before the court entered the September 2005 judgment, or (2) when the trial court entered the September 2005 order but before the court entered the September 2005 judgment. Elizabeth also argues that the court erred in holding that a malpractice claim that accrues before entry of a dissolution judgment should not be considered a marital asset and that the trial court erroneously held that the claim accrued when the court entered the January 27, 2006 amended supplemental judgment.

¶ 19 "Proof of willful disobedience of a court order is essential to any finding of indirect civil contempt." *In re Marriage of McCormick*, 2013 IL App (2d) 120100, ¶17. "A petition for a rule to show cause initiates the contempt proceedings [citation], and the notice must adequately describe the facts on which the contempt charge is based [citation]." (Internal quotation marks and citations omitted.) *City of Quincy v. Weinberg*, 363 Ill. App. 3d 654, 665 (2006). "A motion to dismiss brought under section 2-615 of the Code attacks the sufficiency of the complaint, on the basis that, even assuming the allegations of the complaint to be true, the complaint does not state a cause of action that would entitle the plaintiff to relief." *Miller v. Harris*, 2013 IL App (2d) 120512, ¶16. "[I]n reviewing the sufficiency of a complaint, we must accept as true all well-pleaded facts and any reasonable inferences that can be drawn from those facts, and we must view the allegations of the complaint in the light most favorable to the plaintiff. [Citation.] A cause of action should not be dismissed unless it is clearly apparent that no set of facts can be proved consistent with the allegations that would

entitle the plaintiff to recover. [Citation.]” (Internal quotation marks and citations omitted.) *Miller*, 2013 IL App (2d) 120512, ¶16. The same standards apply to a decision to dismiss a petition for a rule to show cause. *Smith v. Intergovernmental Solid Waste Disposal Ass'n*, 239 Ill. App. 3d 123, 146 (1992) (“Since the trial court *** granted the motion to strike the petition for rule to show cause, the standard of review is the same as for rulings on motions to strike or dismiss a complaint in a civil action”). Thus, the petition should be dismissed if no set of facts can be proved consistent with the allegations that would show willful disobedience of a court order. “This is an issue of law which this court may consider independent of any ruling by the trial court.” *Id.*

¶ 20 The right to a cause of action is a property interest. *Link by Link v. Venture Stores, Inc.*, 286 Ill. App. 3d 977, 979-80 (1997) (“This cause of action was a vested property interest. As a vested right, the cause of action could not be abrogated by subsequent legislative action without offending plaintiff’s due process rights.”). A cause of action which accrues during a marriage, and which was not acquired by a method listed in section 503(a) of the Dissolution Act (750 ILCS 5/503(a) (West 2012)), is marital property. *In re Marriage of DeRossett*, 173 Ill. 2d 416, 420 (1996) (“Section 503(a) contains an ‘exclusive’ and ‘specific’ list of nonmarital property”). Because Bruce did not acquire his malpractice cause of action by one of the methods listed in section 503(a), the cause of action is marital property if he acquired it during the marriage. *In re Marriage of Samardzija*, 365 Ill. App. 3d 702, 705-06 (2006) (“all property

acquired by either spouse during marriage is marital property”).¹ Therefore, our determination of when the cause of action accrued and when the marriage ended will be dispositive.

¶ 21 1. Dissolution of the Marriage

¶ 22 On September 2, 2005, the trial court entered a judgment for dissolution. We hold that for purposes of determining the parties’ respective property rights the marriage ended on September 2, 2005, when the court entered the judgment for dissolution of marriage and not before. *In re Marriage of Awan*, 388 Ill. App. 3d 204, 209 (2009) (holding value of marital property should be determined as of the date the court dissolved the parties’ marriage and not date of order resolving property issues entered almost 18 months later). The decision in *In re Marriage of Leopando*, 96 Ill. 2d 114, 119 (1983) is instructive. There, our supreme court held as follows:

“A petition for dissolution advances a single claim; that is, a request for an order dissolving the parties’ marriage. The

¹ Elizabeth asks this court to reverse the trial court insofar as it held that a legal malpractice claim is not marital property even if that claim accrues during the marriage. We decline. In the May 6, 2013 order denying the motion to reconsider, the trial court stated that it refused to expand current case law holding workers’ compensation and pension awards and causes of action for personal injury to be marital property to include causes of action for legal malpractice stemming from dissolution proceedings. Whether that was in fact the basis of the trial court’s ruling is uncertain because the court also found that Bruce’s malpractice cause of action did not accrue any earlier than the September 2, 2005 dissolution judgment, at which point any potential award would be his nonmarital property. Regardless, “[w]e need not analyze the trial court’s reasoning, as our review is *de novo*. Furthermore, we may affirm on any basis appearing in the record, whether or not the trial court relied on that basis, and even if the trial court’s reasoning was incorrect.” *Bank of New York v. Langman*, 2013 IL App (2d) 120609, ¶ 31. We will not reverse the trial court on the basis of mere surplusage in its order.

numerous other issues involved, such as custody, property disposition, and support are merely questions which are ancillary to the cause of action. [Citation.] They do not represent separate, unrelated claims; rather, they are separate issues relating to the same claim. In fact, it is difficult to conceive of a situation in which the issues are more interrelated than those involved in a dissolution proceeding. Should the trial court decline to grant the petition for dissolution, no final relief may be obtained relevant to the other issues involved.” *In re Marriage of Leopando*, 96 Ill. 2d at 119.

¶ 23 Based on the foregoing authorities we hold that the malpractice claim is marital property if it accrued prior to the trial court’s entering the September 2005 judgment.

¶ 24 2. Accrual of the Claim

¶ 25 We next will next determine the date the malpractice cause of action accrued. If the claim accrued prior to the September 2, 2005 judgment, it would be considered marital property. If the cause of action accrued after the judgment of dissolution was entered on September 2, 2005, it would be considered nonmarital property. “In order to sustain an action of legal malpractice, a plaintiff must establish facts supporting three elements: (1) the attorney owed the plaintiff a duty arising from the attorney client relationship; (2) the attorney breached that duty; and (3) the attorney’s breach proximately caused the plaintiff to sustain actual damages.” *Brannen v. Seifert*, 2013 IL App (1st) 122067, ¶61. “[A] cause of action for legal malpractice does not accrue until a plaintiff discovers, or within a reasonable

time should discover, his injury and incurs damages directly attributable to counsel's neglect.

[Citation.]” (Internal quotation marks and citations omitted.) *Blue Water Partners, Inc. v.*

Edwin D. Mason, Foley and Lardner, 2012 IL App (1st) 102165, ¶48 (citing *Lucey v. Law Offices*

of Pretzel & Stouffer, Chartered, 301 Ill. App. 3d 349, 353 (1998)). In this case the judgment of

dissolution of marriage entered on September 2, 2005 constituted an adverse judgment, which

ordinarily is the standard by which we judge the date of accrual of a legal malpractice case.

“This court has noted that there may be rare cases in which it is painfully obvious, prior to

any adverse ruling against the plaintiff client, that he *has been* injured as a result of professional

negligence.” (Emphasis added and internal quotation marks and citations omitted.)

Kheirkhavash v. Baniassadi, 407 Ill. App. 3d 171, 177 (2011). However, we do not find this is

one of those rare cases where the client was actually injured prior to the adverse ruling.

¶ 26 a. Agreed Order

¶ 27 As a preliminary matter we must address the effect, in any, of the parties' agreed order

on accrual of Bruce's claim. Elizabeth states that she agrees that the agreed order did not

eliminate the requirement of knowledge for accrual purposes. Nonetheless we reject any

implicit argument that the parties' January 2004 agreed order eliminated the need for Bruce's

malpractice cause of action to have “accrued” because the parties agreed that “knowledge” of

an undisclosed marital asset at the time of the dissolution was not required to trigger the

adjustment provided for in the agreed order for undisclosed marital assets. “The primary

objective in construing a contract is to give effect to the intent of the parties. [Citations.] A

court must initially look to the language of a contract alone, as the language, given its plain

and ordinary meaning, is the best indication of the parties' intent. [Citations.] Moreover,

because words derive their meaning from the context in which they are used, a contract must be construed as a whole, viewing each part in light of the others.” *Gallagher v. Lenart*, 226 Ill. 2d 208, 232-33 (2007).

¶ 28 The meaning of the pertinent language in the agreed order, taken in context, is that lack of knowledge is not an excuse for nondisclosure. Regardless, the plain language of the agreed order states that the undisclosed marital asset had to be in existence at the time of the dissolution to trigger the adjustment provision. The accrual of a cause of action determines when the cause of action--and hence the potential marital asset--comes into existence. *Puritan Finance Corp. v. Bechstein Construction Corp.*, 2012 IL App (1st) 112261, ¶11 (“ ‘Accrue,’ *** is used in the law to describe when a cause of action comes into being.”). A cause of action for legal malpractice does not accrue unless and until the malpractice plaintiff “discovers, or within a reasonable time should discover, his injury and incurs damages directly attributable to counsel’s neglect.” *Blue Water Partners, Inc.*, 2012 IL App (1st) 102165, ¶48. Bruce’s knowledge of certain information is only relevant to determine when his cause of action accrues (and thus exists). The fact the parties stipulated that neither had to possess knowledge of an existing marital asset to trigger the adjustment provision is irrelevant to the accrual inquiry. Until the cause of action accrues, it does not exist. If the cause of action had not accrued at the time of the dissolution, even if the fact of nonaccrual was due to a lack of knowledge by Bruce, the language in the agreed order would not apply.

¶ 29 b. Accrual

¶ 30 Elizabeth argues that prior to September 2, 2005, Bruce knew, or should be deemed to have known, that he had suffered attorney neglect that led to damages. Appellant further

argues that prior to such date, Bruce knew, or is deemed to have known, that he had, for certain, sustained damages due to such neglect, regardless whether the total amount of the damages remained to be determined. We have no need to address Elizabeth's arguments regarding Bruce's knowledge of the alleged neglect as bearing on when his cause of action accrued. The dispositive issue in this case is when Bruce suffered actual damages from his former attorneys' conduct.

¶ 31 Actual damages are an essential element of legal malpractice and where "the mere possibility of harm exists or damages are otherwise speculative, actual damages are absent and no cause of action for malpractice yet exists." *Blue Water Partners, Inc.*, 2012 IL App (1st) 102165, ¶56. "[A] cause of action for legal malpractice does not accrue until a plaintiff *** incurs damages directly attributable to counsel's neglect." *Lucey*, 301 Ill. App. 3d at 353. The circumstances of the particular case determine when the negative consequences of the alleged malpractice become "painfully obvious" such that the cause of action accrues. *Blue Water Partners, Inc.*, 2012 IL App (1st) 102165, ¶¶60, 63.

¶ 32 For example, when the attorney's conduct is alleged to have caused the malpractice plaintiff to become entangled in litigation due to purportedly negligent advice, there have been no actual damages until the litigation is resolved adversely to the malpractice plaintiff. *Id.*, ¶¶58, 59. On the other hand, where the malpractice is alleged to have resulted in a legally insufficient appellate brief, the malpractice plaintiff suffers actual damages (in the form of attorney fees) when new counsel is ordered by the appellate court to correct the deficiencies. *Lucey*, 301 Ill. App. 3d at 354-55 (citing *Goran v. Glieverman*, 276 Ill. App. 3d 590, 595-96 (1995)). In *Goran*, when the court ordered the malpractice plaintiff's new counsel on appeal

to correct the malpractice defendant's brief, the malpractice plaintiff "incurred actionable damages," regardless of the outcome of the appeal. *Goran*, 276 Ill. App. 3d at 596 (holding replacement counsel's fees for the representation were not actionable as a result of the former attorney's neglect, but the "fees incurred to bring the defective brief into compliance were a result of neglect and were therefore actionable" when the corrected briefs were filed).

¶ 33 Given the importance of the nature of the damages alleged, we must look to Bruce's malpractice allegations to determine when he incurred damages directly attributable thereto. Bruce's counterclaim for legal malpractice alleges he hired the defendant attorneys to represent him through the property and maintenance stages of the dissolution proceedings and that Bruce paid a total of \$555,000 in legal fees. The counterclaim alleges that after the trial court entered the January 2004 agreed order, Bruce "could have concluded his participation in the Domestic Relation [*sic*] proceedings in a reasonable manner. However, [his attorneys] chose to pursue further litigation in the matter against [Bruce's] interests." Bruce also alleged that his attorneys (1) failed to seek an award or offset from the distribution of the marital estate for amounts Bruce spent from his nonmarital assets to fund and support Elizabeth; (2) failed to file an appeal bond with regard to the trial court's contribution award; and (3) failed to obtain a stipulation as to the outstanding marital assets which Bruce alleged would have "controlled further losses, including more than \$100,000 the judge later ordered [Bruce] to pay to [Elizabeth]" and escalated Bruce's legal fees.

¶ 34 After examining the allegations of damages and the precedents addressing accrual of a claim of legal malpractice, we find that no set of facts can be proved that would show Bruce

incurred damages directly attributable to attorney neglect prior to entry of the dissolution judgment.²

¶ 35 For purposes of determining whether Bruce’s cause of action accrued before the trial court entered the dissolution judgment, one item of damages alleged in the counterclaim is easily dispensed with. Bruce could not have incurred damages from his attorneys’ neglect in failing to file an appeal bond until after the court entered the September 2005 judgment. The attorneys’ negligence in failing to file the appeal bond did not occur until after the marriage was dissolved. Bruce did not incur damages attributable to that negligence until long after the court entered the judgment, when Bruce “was forced to immediately pay out more than half of the *** contribution award,” suffered damage to his credit from the execution against his assets related to the contribution award, and forfeit the appeal bond. Therefore, Bruce’s malpractice claim as to damages related to the appeal bond did not accrue until after the parties’ marriage ended. *Lucey*, 301 Ill. App. 3d at 353.

¶ 36 Bruce’s malpractice complaint alleges he suffered an “unreasonable escalation in fees” resulting from his former attorneys’ failure to obtain a stipulation as to the outstanding

² Elizabeth argues the trial court erroneously relied on the date of its decision on the final posttrial motion as the date Bruce’s cause of action accrued. Elizabeth correctly notes that the trial court retreated from the January 27, 2006 date--the date Elizabeth at least intimated to be the determinative date in her amended petition--in response to her motion to reconsider, but that nonetheless, that portion of the trial court’s December 5, 2012 order relying on the date of decision on the last posttrial motion as the date Bruce’s cause of action accrued should be reversed. We note that in attempting to refute assertions she admitted January 27, 2006 to be the determinative date, appellant admits that at oral argument her attorney asserted “the accrual date was September 2nd, 2005. That was the date Judge Figueroa entered the original final judgment.” We decline unnecessary piecemeal reversal of the trial court’s pronouncements where we are reviewing the dismissal of Elizabeth’s petition *de novo*. *Langman*, 2013 IL App (2d) 120609, ¶ 31.

marital assets following the January 2004 agreed order. Elizabeth argues that Bruce's fees "escalated" during the period between the January 2004 agreed order and the dissolution judgment--during which time Bruce's attorneys failed to settle the case and failed to establish certain assets remaining for adjudication as nonmarital--and that Bruce could have saved legal fees had his attorneys settled the proceedings.

¶ 37 "[T]he incurring of additional attorney fees may trigger the running of the statute of limitations for legal malpractice purposes, but only where it is clear, at the time the additional fees are incurred, that the fees are directly attributable to former counsel's neglect (such as through a ruling adverse to the client to that effect)." *Lucy*, 301 Ill. App. 3d at 355. See also *Sterling Radio Stations, Inc. v. Weinstine*, 328 Ill. App. 3d 58, 63 (2002) (attorney fees incurred in attempt to avoid judgment which was result of former attorney's negligence recoverable as damages). "[W]here an attorney's neglect is not a direct cause of the legal expenses incurred by the plaintiff (*i.e.*, the plaintiff prevails when sued or loses for reasons other than incorrect legal advice), the attorney fees incurred are generally not actionable." *Lucey*, 301 Ill. App. 3d at 355.

"Where an attorney is hired to [litigate] an action that is lost by his or her malpractice, the damages in a malpractice action are the amount of the judgment against the defendant/malpractice plaintiff. [Citation.] The legal malpractice [client] is entitled to recover only the property interest lost as a result of the alleged malpractice, an amount necessarily limited to the net amount

[lost] *** in the underlying action. [Citation.]” *Sterling Radio Stations, Inc.*, 328 Ill. App. 3d at 64.

¶ 38 Bruce did not incur “actual damage” from his attorneys’ neglect in the form of their fees, even if the attorneys’ performance was negligent, until the trial court entered judgment. (Moreover, the money spent on additional attorney fees may be money well spent if it results in a favorable judgment for the client. That cannot be determined until after a judgment is entered.) We find that during the period between the proposed settlement and the end of the litigation, it was not clear that the attorneys’ fees were directly attributable to neglect because, for the reasons explained below, Bruce did not incur the damages from his attorneys’ alleged failures during the litigation until the court entered the dissolution judgment. *Warnock v. Karm Winand & Patterson*, 376 Ill. App. 3d 364, 368 (2007) (“The injury in a legal malpractice action is not a personal injury [citation], and it is not the attorney’s negligent act itself [citation]. Rather, it is a pecuniary injury to an intangible property interest caused by the lawyer’s negligent act or omission.”).

¶ 39 The damages resulting from the allegedly negligent failure to settle the proceedings remained speculative until the trial court entered the dissolution judgment. In *Learning Curve International, Inc. v. Seyfarth Shaw, LLP (Learning Curve)*, 392 Ill. App. 3d 1068, 1070 (2009), the plaintiff in the lawsuit underlying the malpractice claim at issue in that case had offered to settle their claim for \$350,000. The defendant/malpractice plaintiff in that case counteroffered \$225,000 and the parties ultimately failed to settle. *Id.* The jury returned a verdict in favor of the plaintiff in the underlying matter exposing the defendant to liability estimated at 6 million dollars. *Id.* The trial court entered a judgment notwithstanding the verdict in favor of the

defendant but that judgment was reversed on appeal and the jury's verdict reinstated. *Id.* at 1070-71.

¶ 40 On appeal in the malpractice case, in addressing the issue of when the malpractice cause of action accrued for purposes of the statute of limitations, the court noted that the plaintiff in the malpractice complaint had alleged that the defendants (1) failed to advise it of a significant risk of incurring a judgment that would render it liable for millions of dollars in damages and (2) stated that the attorney fees for winning at trial would cost less than payment of the proposed settlement. *Id.* at 1077-78. The *Learning Curve* court held that the "adverse verdict alerted Learning Curve that its potential liability exceeded the worst case scenario its attorneys had envisioned." *Id.* at 1078. But the court held that verdict did *not* trigger the statute of limitations because "the trial court did not enter judgment on the verdict." *Id.* At that point, the malpractice plaintiff was not liable for the amount of the verdict. The court held that "[w]e cannot say that the malpractice and its consequential damages became 'painfully obvious' prior to the *** decision reversing the trial court's judgment" and reinstating the jury's verdict. *Id.*

¶ 41 In this case, with regard to the failure to settle, Bruce merely alleges that the outcome of the proceedings was worse than the settlement would have been ("But for [the attorneys] acts and omissions *** [Bruce] would have settled the divorce [*sic*] case upon reasonable terms."). The allegations do not permit us to conclude that Bruce proceeded after the proposed settlement in the face of incorrect or insufficient advice or, more importantly, that he knew or should have known that in fact he was, or what the resulting damages would be.

The actual damage Bruce incurred from his attorneys alleged malpractice remained speculative until the trial court actually entered the dissolution judgment.

¶ 42 The other specific allegations of attorney neglect in the malpractice countercomplaint are the failure to seek reimbursement for expenditures of nonmarital assets during the proceedings and the failure to obtain a stipulation regarding outstanding property. Bruce did not specifically allege damages from the failure to attempt to classify remaining property as nonmarital, but Elizabeth's arguments that he did suffer such damages are coextensive with the allegation in the malpractice complaint that the stipulation "would have controlled further losses" and may be addressed in connection with the allegations regarding the stipulation.

¶ 43 "The legal malpractice plaintiff is entitled to recover only the property interest lost as a result of the alleged malpractice, an amount necessarily limited to the net amount paid by the plaintiff in the underlying action." *Sterling Radio Stations*, 328 Ill. App. 3d at 64. Bruce did not incur damages from his attorneys' failure to obtain an offset in the final property distribution for nonmarital assets Bruce expended for Elizabeth's support during the dissolution proceedings until the trial court entered the dissolution judgment dividing the remaining property. The same is true of the failure to obtain the proposed stipulation (or to attempt to characterize the remaining property as nonmarital). It is possible no actual damage would have resulted had the final distribution been more favorable to Bruce. See *Sterling Radio Stations*, 328 Ill. App. 3d at 64 ("The plaintiff can be in no better position by bringing suit against the attorney than if the underlying action had been successfully prosecuted or defended.").

¶ 44 Elizabeth argues that Bruce had no uncertainty prior to September 2, 2005 that he would not be able to claim certain property was nonmarital or to recoup his expenditures from nonmarital property because his attorneys had abandoned those claims in Bruce’s case-in-chief well before the trial court entered the dissolution judgment (specifically with the submission of his financial affidavit executed on June 1, 2005 denominating all of his assets and liabilities as marital). Thus, she argues, prior to the judgment Bruce knew or is deemed to have known he suffered damages. We disagree.

¶ 45 “Once property is classified as marital versus nonmarital, section 503(d) of the [Dissolution] Act allows the trial court discretion to divide the marital property into just proportions, considering all relevant factors, including statutory factors.” *In re Marriage of Johns*, 311 Ill. App. 3d 699, 704 (2000). “The test of proper apportionment is whether it is equitable, and each case rests on its own facts. [Citation.] An equitable division does not necessarily mean an equal division, and a spouse may be awarded a larger share of the assets if the relevant factors warrant such a result.” *In re Marriage of Smith*, 2012 IL App (2d) 110522, ¶71.

¶ 46 The final property allocation may have favored Bruce because the trial court was not required to allocate the property equally. Thus, whether or not Bruce “waived with finality all claims *** to non-marital character with respect to remaining property items yet to be distributed by the court” is not dispositive of whether a cause of action for malpractice based on that alleged waiver accrued when such claims were “waived.” The plaintiff in a legal malpractice action is not considered to be injured unless and until she has suffered a loss for which she may seek monetary damages. *Northern Illinois Emergency Physicians v. Landau*,

Omahana & Kopka, Ltd., 216 Ill. 2d 294, 306 (2005). “The fact that the attorney may have breached his duty of care is not, in itself, sufficient to sustain the client’s cause of action. Even if negligence on the part of the attorney is established, no action will lie against the attorney unless that negligence proximately caused damage to the client.” *Id.* at 306-07.

¶ 47 Even had Bruce claimed some items were nonmarital and therefore 100% assignable to him, that claim may not have been successful as to all, or any, of the items he claimed. To establish malpractice in failing to assert any of the remaining items were nonmarital Bruce would have the burden to establish what the outcome of the proceedings would have been had his attorneys asserted certain property was nonmarital and that the distribution that actually resulted is less favorable than it would have been absent attorney neglect. *Fox v. Seiden*, 382 Ill. App. 3d 288, 298 (2008) (where the malpractice plaintiff was the plaintiff in the underlying cause of action, he “must be able to establish, in the case within a case, the damages the plaintiff would have recovered had he been successful in the underlying case.” [Citation.]”); *Northern Illinois Emergency Physicians*, 216 Ill. 2d at 307 (“where an attorney has been engaged to defend an action and the action is lost through the attorney’s negligence, the amount of the judgment suffered by the client is, generally, a proper element of recovery in a malpractice proceeding against the attorney.”). Bruce could not even begin to assert those elements of his malpractice claim until he knew what the distribution was.

¶ 48 Whatever damages Bruce may have ultimately suffered from his attorneys’ neglect with regard to the final property distribution--either with regard to stipulating what items were or were not marital or recovery for nonmarital expenditures--remained speculative until the trial court entered judgment distributing the property. Bruce had no way to know, with

sufficient certainty to assert a malpractice claim, that he would not effectively recover the distributions from his nonmarital assets through the trial court's allocation of the remaining marital property. Bruce's malpractice complaint alleges Bruce "relied upon [his attorneys'] assurances that said sums would be treated as credits for the purposes of distribution of the marital estate." Bruce could not know how the trial court would distribute the remaining property before the trial court entered the dissolution judgment. The full scope of Bruce's malpractice complaint could not be known until the outcome of the litigation over those items of property.

¶ 49 Of course, it is entirely speculative that the trial court may have awarded Bruce a greater share of the remaining property; which is precisely why Bruce's malpractice claim did not accrue until the trial court entered the dissolution judgment. *Lucey*, 301 Ill. App. 3d at 353 ("Where the mere possibility of harm exists or damages are otherwise speculative, actual damages are absent and no cause of action for malpractice yet exists."). The failure to enter the stipulation, not pursuing a claim that certain property was nonmarital, and not attempting to recoup nonmarital expenditures did not result in actual damages. Actual damages resulted from the trial court's distribution of property in the dissolution judgment. *Learning Curve*, 392 Ill. App. 3d at 1078.

¶ 50 Speculating, correctly, that we might require an order to have been entered for the cause of action to accrue, Elizabeth asks this court to find that the September 2005 order (not the dissolution judgment) was the required "adverse order" under *Lucey*. Elizabeth asserts that because the trial court entered the September 2005 order while the parties were still married, Bruce's cause of action accrued while the parties were still married, thus his settlement is

marital property. However, our decision is not based on strict application of the “adverse judgment accrual rule” in *Lucey*. See *Blue Water Partners, Inc.*, 2012 IL App (1st) 102165, ¶59 (holding “the adverse judgment accrual rule applies where the ‘plaintiff has become entangled [in litigation] due to the purportedly negligent advice of his attorney’ [citation]” and refusing to apply the rule where the court did “not address a claim of negligent advice”). As we stated at the outset, the determining factor in this case is when Bruce incurred actual damages such that the malpractice cause of action came into existence. The answer to that question will usually, as in this case, coincide with some order affixing the rights of the putative malpractice plaintiff. *Baniassadi*, 407 Ill. App. 3d at 177 (noting that cases in which an adverse ruling would not be required would be rare).

“In a legal malpractice action, actual damages are never presumed. [Citation.] Such damages must be affirmatively established by the aggrieved client. [Citation.] Unless the client can demonstrate that he has sustained a monetary loss as the result of some negligent act on the lawyer’s part, his cause of action cannot succeed. [Citation.]

Making that demonstration requires more than supposition or conjecture. Where the mere possibility of harm exists or damages are otherwise speculative, actual damages are absent and no cause of action for malpractice yet exists.”

Northern Illinois Emergency Physicians, 216 Ill. 2d at 307.

¶ 51 Our holding is based on an examination of the context of the alleged malpractice and the circumstances of this particular case to determine when the existence of damages directly attributable to Bruce's attorneys' negligence was no longer speculative. *Id.*, ¶¶ 56, 60. The September 2005 order did not provide the requisite certainty with regard to the damages Bruce incurred as a result of his attorneys' negligence. We find the fact that the terms of the judgment may have been spelled out in the September 2005 order does not mean that Bruce's damages were "painfully obvious" within the meaning of a claim of malpractice at that point. Bruce did not become liable on the award until the trial court incorporated the September 2005 order into the dissolution judgment. See *Currie v. Wisconsin Cent., Ltd.*, 2011 IL App (1st) 103095, ¶ 29 ("We agree with the cases that do not view a settlement agreement as a final judgment on the merits and therefore cannot find the settlement agreement *** to satisfy the first requirement for *res judicata*."); *Dotson v. Former Shareholders*, 332 Ill. App. 3d 846, 852 (2002) ("when a memorandum opinion contemplates the entry of a formal written order, it is not a final order for purposes of appeal").

¶ 52 Elizabeth's argument the order should control focuses on the order having been entered first, before the dissolution judgment, while the parties were still married. Based on the language in the parties' January 2004 agreed order that knowledge of an existing material asset is not required, Elizabeth argues Bruce did not need to have knowledge of the contents of the September 2005 order for the malpractice claim to come into existence when the trial court entered the order. Whether the court entered the order first does not answer the relevant question of whether the order is dispositive for purposes of accrual. Elizabeth does argue that "all key property allocation data and dollar amounts for the trial court's decision

are set out in the Memorandum Opinion and Order, including the court's equal allocation of the \$228,635 miscellaneous marital [citation] and the \$700,000 contribution award."

¶ 53 However, as we have discussed, Bruce did not become liable on or lose the benefits of the property allocation until the trial court entered the dissolution judgment. Under the reasoning of *Learning Curve*, the September 2005 order at best alerted Bruce to the property distribution and that the amount of the upcoming judgment in Elizabeth's favor would exceed the amount of the proffered settlement, but the cause of action did not accrue at that time. Elizabeth's own statement as to the effect of the order is that it set out items "for the trial court's decision." Bruce could not claim a loss from the entry of the order alone. *In re Marriage of Mardjetko*, 369 Ill. App. 3d 934, 936 (2007) ("Orders resolving individual issues are not appealable *** until the court resolves the entire dissolution claim."); Ill. Sup. Ct. R. 304(a) (eff. Feb. 26, 2010) ("[A]ny judgment that adjudicates fewer than all the claims *** is not enforceable or appealable and is subject to revision at any time before the entry of a judgment adjudicating all the claims, rights, and liabilities of all the parties."). Any damages from the alleged malpractice were nothing less than speculative until the court entered the dissolution judgment. *Learning Curve*, 392 Ill. App. 3d at 1078; *Northern Illinois Emergency Physicians*, 216 Ill. 2d at 306 ("For purposes of a legal malpractice action, a client is not considered to be injured unless and until he has suffered a loss for which he may seek monetary damages.").

¶ 54 Nor will we will find that Bruce's allegation in his malpractice countercomplaint is dispositive of the issue of when Bruce's cause of action accrued. Ordinarily, the issue of when a plaintiff should have discovered his injury is a question of fact, but it may be decided as a

matter of law by the court where the relevant facts are undisputed and allow for only one conclusion. *Profit Management Development, Inc. v. Jacobson, Brandvik and Anderson, Ltd.*, 309 Ill. App. 3d 289, 308 (1999). Here, the relevant facts are not in dispute. There is no dispute as to the damages Bruce alleged he suffered. The only other dispositive facts are when that damage was no longer speculative but actually incurred and directly attributable to his attorneys' alleged negligence. Elizabeth's arguments are not based on assertions of disputed facts, but on the meaning and effect of undisputed facts. Elizabeth argues that factual details demonstrate when Bruce knew of his attorneys' negligence and what damages he suffered as a result. Those facts amount to knowledge of the attorneys' conduct (including the failure to pursue certain avenues of relief for Bruce), the value of Bruce's property, and the cost of the attorneys' services. As the foregoing analyses indicate, our view of existing law in this area refutes Elizabeth's arguments that the foregoing information alone is sufficient for a cause of action for legal malpractice to accrue. We see no need to depart from established principles in this case.

¶ 55 We also reject Elizabeth's argument that the alleged simultaneity of the dissolution of the marriage and accrual of the cause of action simply means that she is not entitled to the presumption in favor of marital property in section 503(b)(1) of the Dissolution Act and that the character of the disputed property should therefore be determined based on other factors. "The settlement of property disputes is only a function of the court's broader power to terminate the legal relationship which exists between spouses and thus does not come into play unless and until a marriage has been dissolved." *In the Matter of Chandler's Estate*, 90 Ill.

App. 3d 674, 677 (1980). The dissolution judgment ended the parties' marriage and because the marriage ended the trial court could distribute their property.

¶ 56 Bruce's cause of action for legal malpractice accrued when the trial court dissolved the parties' marriage and fixed the allocation of their formerly marital property. Because the marriage no longer existed when the property allocation occurred, and the property allocation is what caused Bruce's cause of action to accrue, any settlement Bruce received from that cause of action is his nonmarital property. Accordingly, appellant can prove no set of facts that would entitle her to relief and the trial court properly dismissed the amended petition for a rule to show cause.

¶ 57

CONCLUSION

¶ 58 For the foregoing reasons, the circuit court of Cook County is affirmed.

¶ 59 Affirmed.