IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

CASE NO: 91,953
L.T. CASE NO: 96-2236

ART SILVESTRONE,

Petitioner,

vs.

MARC Z. EDELL, BUDD, LARNER,
et al.,

Respondents.
_____/

RESPONDENTS' AMENDED BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondents in this action are Marc Z. Edell and Budd, Larner, et al. The Petitioner in the action is Art Silvestrone. Respondents will be referred to herein as “Edell” and “Budd, Larner”, or collectively as “Respondents.” Petitioner shall be referred to as “Silvestrone” or “Petitioner.”

For the Court&s convenience, Respondents will adopt the symbols and citations to the record on appeal utilized by Petitioner and set forth in the preface page of Petitioner&s Initial Brief on the Merits. In addition, references to Respondents& appendix filed herewith shall be “(RA Tab #, p. #)”. For the Court&s convenience, excerpts of the Deposition of Art Silvestrone and the Deposition of Stephen Milbrath referred to herein are included in the Respondents& Appendix as Tabs 1 and 2 respectively.

I. STATEMENT OF THE CASE AND FACTS

For the convenience of the Court, Respondents adopt the statement of the case and the statement of the facts set forth in Petitioner&s Brief on the Merits except with respect to the following.

Silvestrone sued the PGA Tour, Inc., in the United States District Court for the Middle District of Florida, Orlando Division, (the "federal court trial"), claiming that the PGA Tour violated federal antitrust laws by its rules regarding who could compete in senior tour golf tournaments and by wrongfully excluding him from competing in three golf tournaments.[1] Although Silvestrone expected a larger verdict, he was victorious at trial and was awarded damages in the amount of $3,770, which was trebled. This result is not atypical of antitrust cases against sports associations,[2] yet Silvestrone was unhappy with the verdict and the results of the trial. According to his deposition, Silvestrone felt that Edell should have asked for damages during final argument,[3] and should have retained an economist to testify as to

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[1]Silvestrone participated in 115-120 golf tournaments while playing on the senior tour. (RA 1, Depo. of Silvestrone, pp. 92-93).

[2]See, e.g., United States Football League v. Nat&l Football League, 842 F. 2d 1335 (2d Cir. 1988) (affirming jury award of damages in the amount of $1, trebled to $3.)

[3]Silvestrone believed Edell should have asked for $2 million during closing arguments. (RA 1, Depo. of Silvestrone, pp. 116-19). Prior to trial Silvestrone turned down settlement offers as high as $175,000 because he wanted $2 million. (RA

his damages,[4] even though he admitted that no economist could predict how much money he would have earned had the rules been different or had he not been excluded from the three tournaments. (RA 1, Depo. of Silvestrone, p. 84). Silvestrone also contended that Edell originally told him that settlement proceeds would be tax free but later told him (well before trial) that any settlement proceeds would be taxable. (RA 1, Depo. of Silvestrone, pp. 51-52).

As Petitioner points out, Silvestrone approached Stephen Milbrath ("Milbrath"), an Orlando attorney, about taking over the case and bringing it to trial. (RA 2, Depo. of Milbrath, pp. 16, 28, 35). Although Milbrath declined to represent Silvestrone at trial, he did advise Silvestrone throughout the trial.

1, Depo. of Silvestrone, p. 41). When asked the reason for wanting $2 million, Silvestrone responded he could have asked for $10 million, "It&s a good number" and he thought he could get $2 million because people in law suits get $2 million. Silvestrone stated he believed that the jury could give him any number they wanted to. (RA 1, Depo. of Silvestrone, pp. 41, 83).

[4](RA 1, Depo. of Silvestrone, p. 83). However, in a letter to Edell dated December 26, 1989, Silvestrone stated "...I will insist upon hiring the experts myself so that I can control the costs." (RA 3). Further, Silvestrone suggested several economists who had been suggested to him by Steven Milbrath. These suggestions included Professor Charles Goetz of the University of Virginia Law School. Results of discussions with Professor Goetz were summarized in a letter to Professor Goetz from Harriet D. Milks of Edell&s office (RA 4). As that letter clearly shows, Professor Goetz did not believe he could be of any assistance of Silvestrone.

The jury returned its verdict awarding Silvestrone damages on February 27, 1990. However, final judgment was not entered until February 4, 1992. The delay in the entry of the final judgment was due almost entirely to post-trial motions for attorneys& fees filed by Respondents. However, neither the motions for attorneys& fees nor the amount of attorneys& fees charged were alleged as a basis of Silvestrone&s legal malpractice claim.

Further, entry of final judgment was not delayed by the calculation of treble damages. According to the applicable statute, as discussed below, once the jury verdict is rendered in an antitrust case, damages are automatically trebled under the statute. Thus, the act of trebling the damages award was simply a ministerial act. See 15 U.S.C. § 15(a); Fla. Stat. 542.22(1). After approximately April, 1990 (when the Court denied Silvestrone&s motion for injunction), the only remaining issues to be resolved by the court were disputes with regard to the amount of the attorneys& fees.[5]

Almost immediately after the conclusion of the federal court trial, in early March, 1990, Silvestrone consulted with Milbrath about the possibility of bringing a malpractice suit against Respondents. (RA 1, Depo. of Silvestrone, pp. 103-05; RA

[5]In addition, as Petitioner acknowledged, Glenn Teal filed a motion for new trial or additur in his case, which was a separate case that was tried with Silvestrone&s case. Teal&s motion did not affect Silvestrone&s rights or when his cause of action accrued. However, Teal&s motion, and its disposition, delayed the entry of final judgment in Silvestrone&s case.

2 Depo. of Milbrath, pp. 45-46). Milbrath advised Silvestrone against appeal. (RA 2, Depo. of Milbrath, p. 114). Thereafter, Silvestrone specifically instructed Edell not to pursue post-trial motions for additur, new trial or an appeal. (RA 5; RA 6; RA 1, Depo. of Silvestrone, pp. 128-30; RA 2, Depo. of Milbrath, p. 113).

Silvestrone waited approximately three years (until March 19, 1993) before he filed a complaint alleging malpractice against Respondents based upon the alleged negligence before and during the federal court trial. The trial court in the malpractice action entered summary judgment, finding that the statute of limitations barred Silvestrone&s claim. On appeal, the Fifth District affirmed and held that the statute of limitations began to run when the jury&s verdict was entered because Silvestrone had all the information necessary at that time to establish his cause of action. (A 3).

As the Fifth District properly recognized, Silvestrone was well aware of the facts giving rise to his claim for malpractice against Respondents at the conclusion of the federal court trial. In fact, he sought legal advice concerning such a claim in 1990. Yet, Silvestrone did not file a claim for malpractice for over three years, delaying the filing of that claim with full knowledge of the facts upon which his action was based. The Fifth District properly noted that Silvestrone admitted he was aware of the facts giving rise to his claim for legal malpractice at the conclusion of the underlying federal court trial and instructed his

attorney not to pursue any actions which might remedy his alleged injury. (A 2-3). Thus, the Fifth District affirmed the trial court's grant of summary judgment. Judge Sharp's dissent does not take issue with the foregoing facts but concludes that there should be a bright line rule that the statute of limitations does not start to run until the entry of final judgment. (A 9).[6]

II. SUMMARY OF THE ARGUMENT

Petitioner asks this Court to ignore the facts of this case, and the application of the law to those facts, and instead to institute a bright line rule which would require that a final judgment or decision on appeal be entered before any action for litigational malpractice could accrue and the statute of limitations could begin to run. This is simply not appropriate as it asks this Court to speculate on what might be appropriate under

[6]In her opinion, Judge Sharp stated that between the jury's verdict and the entry of the final judgment various motions were filed, and at least a portion of these motions could have affected the outcome. She then offers the examples that the judge could have granted a new trial or even reversed the jury verdict and could have revisited the cause at any time and changed the result up until the time the final judgment was entered. (A 9-10). This statement is incorrect. Under the Federal Rules of Civil Procedure a motion by the parties would be required in order to vacate or modify the verdict. See, e.g., Johnson v. New York, N.H. & H.R. Co., 344 U.S. 48, 73 S. Ct. 125 (1952) (stating that a trial court cannot enter a judgment notwithstanding the verdict in the absence of a motion for such a judgment made within ten days after the reception of the verdict.) See also Ruth v. Sorensen, 104 So. 2d 10 (Fla. 1958) (stating that Fed. R. Civ. P. 59 preserves the right of the litigant to move for a new trial). Because Silvestrone precluded all such motions those rules provide him no relief and did not confer any authority on the trial court which could have affected the outcome of the case after the jury's verdict.

different circumstances rather than apply the law to the facts of this case. The Fifth District Court of Appeal properly applied the law to the undisputed facts, and concluded that the limitations period began to run upon the entry of the jury&s verdict in the federal court trial, affirming the summary judgment entered below.

Florida Statutes § 95.11(4) (1997) provides that the statute of limitations for a legal malpractice action is two years and "the period of limitations shall run from the time the cause of action is discovered or should have been discovered with the exercise of due diligence." Further, the Fifth District properly interpreted this Court&s ruling in Employers& Fire Insurance Co. v. Continental Insurance Co., which ruled that the judicial event which causes a statute of limitations to begin to run is not the same as the judicial event which commences the time to file an appeal. Employers& Fire supports the Fifth District&s ruling that Silvestrone&s rights were finally and fully adjudicated as of the date of the jury&s verdict because the verdict established the basis of the liability Silvestrone now claims. The cases relied on by Petitioner do not support his position that a final judgment must be entered before full and final adjudication on the merits can occur based on the facts of this case. Neither the trebling of damages nor the award of attorneys& fees and costs contained in the final judgment changed the full and final determination of Silvestrone&s rights decided by the jury. The trebling of damages is a ministerial act; the award of attorneys& fees is ancillary to any

issue of damages. Thus, they do not affect the claims upon which Silvestrone brought suit.

The Fifth District&s opinion properly determined that redressable harm and knowledge of the injury was established as of the date of the jury&s verdict in accordance with Peat, Marwick, Mitchell & Co. v. Lane. The Peat, Marwick court held that a cause of action for malpractice does not accrue until the existence of redressable harm or injury is established and the injured party knows or should know of the injury or negligent act. Neither Peat, Marwick nor the other cases relied on by Petitioner holds that redressable harm occurs only upon the entry of a final judgment. The fact that Silvestrone precluded all actions which might cure his alleged harm establishes that Silvestrone&s redressable harm occurred as of the date of the jury&s verdict, and by his own admission he knew of the alleged malpractice as of that date. Therefore, the Fifth District Court of Appeal properly found, under the Peat, Marwick standards, that Silvestrone&s cause of action, and therefore the statute of limitations, began to run as of the date of the jury&s verdict.

Moreover, the ruling by the Fifth District does not require a revival of an expired statute of limitations, and does not conflict with In re Estate of Smith as suggested by the Petitioner. Petitioner again asks this Court to speculate as to what might have happened had Silvestrone changed his mind and appealed. However, as noted by the Fifth District Court of Appeal,

Silvestrone did not change his mind. He specifically prohibited any motion for new trial or additur, and prohibited an appeal. Thus, by Silvestrone&s own instructions, there was no appeal which could possibly revive an expired action barred by a statute of limitations. This Court must review the facts at hand. The Fifth District properly did so, and determined that because of Silvestrone&s actions, the statute of limitations began to run as of the date of the jury&s verdict.

Finally, Silvestrone argues that if the statute of limitations began to run as of the date of the jury&s verdict, then the doctrine of continuous representation tolls the statute of limitations. However, as the Fifth District properly noted, this argument may not now be addressed as it was never raised in the trial court. Such a tolling argument would be in the nature of an avoidance of the affirmative defense filed by Respondents, and therefore Silvestrone would be required to file a reply to the affirmative defense, which he did not do. Additionally, even if applied, the continuous representation doctrine does not toll the statute of limitations because Silvestrone had knowledge of the alleged malpractice both before and during the federal court trial. He cannot sit back and wait for Respondents& representation to end to file a malpractice claim under Florida law. Further, the doctrine of continuous representation is most often asserted where the professional continually assures his client that the problem will be fixed and thereby causes the client to do nothing.

Clearly, that did not occur. Respondents never assured Silvestrone that they would correct the problems of which he now complains. For these reasons, the continuing representation doctrine does not toll the statute of limitations.

III. LEGAL ARGUMENT

A. THE FIFTH DISTRICT PROPERLY APPLIED THE STATUTE OF LIMITATIONS FOR LEGAL MALPRACTICE TO THE INSTANT FACTS AND AFFIRMED THE TRIAL COURT'S ENTRY OF SUMMARY JUDGMENT

The trial court and the Fifth District correctly determined that Silvestrone did not bring his action for legal malpractice against Respondents within the two year limitations period set forth in Florida Statutes § 95.11. The Florida Legislature has determined that the statute of limitations for a legal malpractice action is two years and "the period of limitations shall run from the time the cause of action is discovered or should have been discovered with the exercise of due diligence." Fla. Stat. § 95.11(4) (1997) (emphasis added). As of the date of the jury's verdict in the federal court trial, Silvestrone knew of the alleged acts of malpractice and believed he had been damaged. He consulted with an attorney regarding the malpractice claim immediately after trial. Thereafter, he instructed Edell not to appeal and not to file motions for additur or new trial. Silvestrone thereby precluded any action which might have cured or mitigated the consequences of the malpractice he alleges, and the

only actions which could have delayed the commencement of the statute of limitations.

1. The Fifth District properly interpreted Florida law and determined that the statute of limitations began to run upon the jury's verdict.

a. The Fifth District properly interpreted Employers' Fire.

As noted above, the statute of limitations for legal malpractice begins to run when a plaintiff knows or should know of the alleged malpractice. See Fla. Stat. § 95.11(4). This Court has established that the judicial event which causes a statute of limitations to begin to run is not necessarily the same as the judicial event which commences the time to file an appeal. In Employers' Fire Ins. Co. v. Continental Ins. Co., 326 So. 2d 177, 181 (Fla. 1976), this Court stated:

> Statutes of Limitations are enacted to bar claims which have been dormant for a number of years and which have not been enforced by persons entitled to enforcement. To allow that time period to be expanded by the interval between a final adjudication of liability containing all the information necessary to establish the enforceable right, and the court's execution of a formal piece of paper called final judgment, would be to extend the statutes unnecessarily by nonuniform lengths of time. For these reasons, we hold that the time period for measuring a statute of limitations commences at the time a litigant's liabilities or rights have been finally and fully adjudicated. In general this will mean when the presiding judge or clerk records judgment for one party against the other in a specified amount after either a jury or non-jury trial. In these cases neither the signing of a minute

> book nor the signing of a document of final judgment are relevant to the liability of one party to the other for a specified amount. The fact of liability can be established for purposes of a limitations defense irrespective of the date on which the minute book entry or the judgment document is signed.

Id. (emphasis added) (footnotes omitted).

In the above-cited language, this Court specifically addressed the question of when the statute of limitations begins to run where there is no appeal, as is the case here. By its language, the Court specifically recognized that the entry of a final judgment is not necessary to begin the running of the statute of limitations. Indeed, the court stated that the fact of liability can be established for purposes of the statute of limitations irrespective of the date of the final judgment or even the minute book entry. What is necessary to commence the statute of limitations is the full and final adjudication of the litigant&s rights.[7]

[7]"Adjudicate" means "To determine finally." Black&s Law Dictionary 42 (6th Ed. 1990). "Adjudication" is defined as "The legal process of resolving a dispute. The formal giving or pronouncing a judgment or decree in a court proceeding... it implies a hearing by a court, after notice, of legal evidence on the factual issue(s) involved. The equivalent of a #determination&. It contemplates that the claims of all the parties thereto have been considered and set at rest." Id. (citations omitted); see also Miller v. Scobie, 152 Fla. 328, 11 So. 2d 892, 894 (Fla. 1943). Thus, the term "adjudicate" or "adjudication" does not require the entry of a final judgment.

In Employers& Fire, the plaintiff&s rights were finally and fully adjudicated by a judge&s signed minute book entry which set forth the court&s ruling after a non-jury trial. Eleven months after the minute book entry, a formal final judgment which incorporated the minute book entry was signed and recorded by the trial judge. This Court found that the minute book entry was sufficient to establish the fact of liability, and thus there was no reason to delay the commencement of the statute of limitations until the final judgment document was entered. Id.

Likewise, in this case, the jury&s verdict determined the liability of the parties. Approximately two years after the jury&s verdict, a formal document entitled final judgment was signed and recorded by the trial judge incorporating the jury&s verdict, awarding attorney&s fees, and entering judgment for petitioner. Like the minute book entry in Employers& Fire, the jury verdict constituted a full and final adjudication of liability and contained all information necessary to establish Silvestrone&s enforceable right. See id. Thus, there was no reason to delay the statute of limitations until final judgment according to this Court&s ruling in Employers& Fire.

Silvestrone attempts to distinguish a jury verdict from a minute book entry. However, the minute book entry was simply a record of the court&s determination after a non-jury trial, much as the jury&s verdict is a record of the jury&s determination after the

conclusion of the evidence. The fact that there is no actual "minute book entry" is not dispositive. The jury&s verdict, establishing Silvestrone&s damages, determined Silvestrone&s rights and liabilities.

Silvestrone also argues that unlike Employers& Fire, all judicial labor in determining liability and damages was not complete when the jury&s verdict was rendered in the federal court trial. Silvestrone argues that this is obvious because the District Court trebled his damages and awarded attorneys& fees and costs after the verdict, and therefore the verdict did not finally and fully adjudicate his rights and liabilities.

With regard to the issue of the treble damages, however, they were set upon the award of the jury&s verdict under the statute. The statute provides, "[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States... and shall recover threefold the damages by him sustained...." 15 U.S.C. § 15(a) (emphasis added); see also Fla. Stat. § 542.22(1). The federal court did not have discretion not to treble the damages; thus, once the jury&s verdict was rendered, the damages were automatically trebled under the statute, and no judicial labor remained.

Further, an award of attorneys& fees and costs is not an element of damages, and is not one of Silvestrone&s bases for

bringing the malpractice action.[8] See McGurn v. Scott, 596 So. 2d 1042 (Fla. 1992). The determination of attorneys& fees is a matter ancillary to a damages award, and does not affect the finality of an underlying judgment. Id. Thus, although the formal final judgment was entered later, and the attorneys& fees and costs included therein, it was the jury&s verdict which established Silvestrone&s damages upon which he now appeals.

The Fifth District correctly reviewed these facts and stated that Silvestrone was not suing on the final judgment but was suing on "specific acts of alleged malpractice, which to his knowledge, occurred long before the entry of the final judgment." (A 2) (emphasis added). Applying the facts of this case to the law established in Employers& Fire and Florida Statutes § 95.11(4), it is clear that the statute of limitations began to run when Silvestrone knew of the alleged harm, which occurred upon the rendition and entry of the jury verdict, not upon the entry of the final judgment.

Instead of considering these facts, Petitioner urges this Court to establish a bright line, wooden rule that no claim for legal malpractice may ever accrue before the entry of final judgment. Petitioner argues that this must be the rule even where there has been an adjudication of liability if the entry of the

[8]Silvestrone did not raise the issue of attorneys& fees as a basis for his claim in the Circuit Court or District Court of Appeal.

final judgment is delayed. Such a rule would be contrary to the express and unambiguous language of Florida Statutes § 95.11 which provides that the limitations period begins to run when the plaintiff knew or should have known of the cause of action. Fla. Stat. § 95.11(4). Indeed, this Court specifically rejected such a bright line rule in Employers& Fire, refusing to require that a final judgment be entered before the limitations period may begin to run. This Court recognized that the limitations period begins to run when the plaintiff&s rights are finally and fully adjudicated which may be established irrespective of the date of final judgment. Id. at 181. As the Fifth District noted, once the jury returned its verdict and Petitioner directed Respondents not to seek additur, move for new trial, or file an appeal, Petitioner had all the information necessary to bring a legal malpractice claim against Respondents and could have filed this action then. The statute of limitations necessarily began to run at that time. (A 3).[9] To delay the commencement of the statute of limitations under the facts of this case until the entry of final judgment would directly contravene this Court&s prior rejection of such a

[9]In fact, had Petitioner brought this malpractice claim in 1990 or 1991, Respondents could not have claimed that the suit was premature because the cause of action accrued when the jury&s verdict was rendered and Petitioner knew of the alleged malpractice. See Edwards v. Ford, 279 So. 2d 851 (Fla. 1973) (notice or knowledge by a client that a cause of action has accrued triggers the statute of limitations for legal malpractice).

bright line rule. Therefore, the Fifth District&s opinion should be affirmed.

b. The cases following Employers& Fire do not require entry of final judgment to commence the statute of limitations.

Petitioner cites a number of other cases for the proposition that the statute of limitations could not run until final judgment was entered. For example, Petitioner relies on McGurn v. Scott for the proposition that only the final judgment or final order determines the rights and liabilities of the parties. However, McGurn does not address the statute of limitations. Instead, McGurn dealt with the time for commencing an appeal. As noted above, this Court has drawn a clear distinction between the time for commencing an appeal and the time for commencing the limitations period. See Employers& Fire, 326 So. 2d at 181. McGurn found that a judgment attains the degree of finality necessary for an appeal when it disposes of the action between the parties and leaves no judicial labor to be done except the execution of the judgment. McGurn, 596 So. 2d at 1043. No appeal was or could be taken here. For purposes of the statute of limitations, Silvestrone&s claim matured once the jury returned its verdict and he was aware of his claim.

Petitioner also raises a new issue by likening the trebling of damages to the determination of prejudgment interest, discussed in McGurn. However, trebling the damages is unlike

prejudgment interest. Prejudgment interest is available in some cases, but not in others; thus, a court must determine whether prejudgment interest is appropriate in each case. However, the antitrust statute does not grant the court discretion to decide whether to treble damages. Instead, it provides that the plaintiff "shall" recover treble damages. 15 U.S.C. § 15(a). While it is true that treble damages are an element of damages, and not ancillary to the action like attorneys& fees, it is not true that the trebling of damages requires judicial labor as is made clear by the statute.[10] Thus, McGurn cannot support Petitioner&s theory that there was no final determination of the rights and liabilities of Silvestrone until the attorneys& fees were included in the final judgment.

Petitioner also relies on Grissom v. Commercial Union Insurance Co., 610 So. 2d 1299 (Fla. 1st DCA 1992). It, too, is not dispositive. There the court stated, "Ordinarily, the statutory time commences on the date when judgment was entered and litigation has come to an end." Id. At 1309. Petitioner requests this Court to ignore the facts of this case and find that this is the ordinary situation. However, because Silvestrone was aware of his damages well before the entry of the final judgment, and even

[10]Further, as previously noted, McGurn specifically found that the issues of costs and attorneys& fees may be adjudicated after final judgment, and the reservation of jurisdiction to award these types of fees does not affect the finality of the underlying judgment. Id. at 1044.

consulted an attorney about legal malpractice prior to that time, this is certainly not the ordinary case; the ordinary rule cannot simply be blindly applied.

Petitioner further relies on Zakak v. Broida and Napier, P.A., 545 So. 2d 380 (Fla. 2d DCA 1989) for the general rule that if a cause of action for legal malpractice is predicated on errors or omissions committed in the course of litigation, the statute of limitations does not begin to run until the litigation is concluded by final judgment, or decision on appeal. Id. at 381. However, the facts of Zakak are materially different from those herein presented.

In Zakak the appellants retained the appellees to defend them in a personal injury action. During the course of the litigation, one of the attorneys represented that he had the authority to settle the case and the appellants would contribute $15,000 toward to the overall settlement. The plaintiff accepted the offer, but appellants refused to contribute $15,000, contending that their attorney did not have authority to settle. Id. The trial court granted the plaintiff&s motion to enforce the settlement agreement, and ordered appellants to pay. After they refused, the trial court entered a final judgment for damages. Id.

Appellants later sued appellees for legal malpractice and the trial court dismissed the action finding that the statute of limitations began to run when the trial court entered the order requiring the appellants to pay. Id. However, the Second District

stated that the order did not become final at that time because the trial court had the authority to reconsider and modify or vacate the order until entry of final judgment.

Unlike Zakak, the present case is premised on Petitioner&s alleged damages which accrued when the jury returned its verdict. Thereafter, Petitioner precluded any actions which might have cured the alleged damages. No judicial labor remained which could affect Silvestrone&s rights and liabilities. Moreover, even the Zakak court acknowledged that a limitations period in a legal malpractice action begins to run upon entry of final judgment or appellate decision, "unless the facts of the case clearly show that the legal malpractice was or should have been discovered at an earlier date..." Id. at 381 (citing Sawyer v. Earle, 541 So. 2d 1232 (Fla. 2d DCA 1989) (emphasis added).[11]

Similarly, Spivey v. Trader, 620 So. 2d 212 (Fla. 4th DCA 1993) and Wilkerson v. Sternstein, 558 So. 2d 516 (Fla. 1st DCA 1990) do not support Petitioner&s argument that a final judgment is necessary for the statute of limitations to run. The factual

[11]As Petitioner has noted, Sawyer v. Earle was disapproved by Peat, Marwick, Mitchell & Co. v. Lane, 565 So. 2d 1323 (Fla. 1990). However, it was disapproved only to the extent that Sawyer conflicted with that decision. It was not overruled. The Peat, Marwick Court distinguished Sawyer, noting that in the Sawyer case the client understood and believed that his representation was not proper at an earlier stage when he dismissed his lawyer, whereas in Peat, Marwick, the Lanes believed that their accountant&s advice was correct (until the tax court&s decision) and proceeded upon that advice. Id. at 1327. Thus, the disapproval of Sawyer does not affect the statement cited in the Zakak case.

situations in those cases are dissimilar to the present case. In both cases no harm or damage had occurred to the plaintiffs until the entry of the final judgment. However, in this case, as noted by the Fifth District, Silvestrone was suing not on the final judgment but on specific acts of alleged malpractice which he knew had occurred long before the entry of final judgment. (A 2). By his own admission, he knew that the alleged malpractice occurred during trial and he consulted a lawyer regarding this claim. Thus, he could have filed his malpractice action shortly after the jury&s verdict because it was the verdict, not the entry of the final judgment, which resulted in the adjudication of his rights, and thereby resulted in his alleged damages.

Wilkerson and Spivey do not address situations in which the harm clearly occurred prior to the entry of the final judgment as there was no adjudication establishing harm until the final judgment. By relying on these cases, Petitioner is again asking this Court to ignore the facts of this case, and simply hold that the statute of limitations never begins to run in litigational malpractice cases until the final judgment is entered.

Finally, Petitioner relies on Eldred v. Reber, 639 So. 2d 1086 (Fla. 5th DCA 1994). In Eldred, the appellant lost the underlying case, allegedly due to his attorney&s malpractice, and appealed. Had he won the appeal, it would have obviated the attorney&s negligence. However, the appellant lost the appeal and then sued his attorney. The attorney defended on the ground that

the statute of limitations began to run when the appellate court rendered its decision. The appellant argued that the limitations period began to run when the appellate court issued its mandate, not upon rendition of the decision. The Fifth District held that the limitations period began to run when the decision was rendered. Id. at 1087.

Petitioner argues that the full and final adjudication which is required for the statute of limitations to begin to run where there is no appeal coincides with the term "rendition." Petitioner argues that the Eldred court thereby equated the commencement of the running of the statute of limitations with the rendition of a final judgment. However, Eldred simply dealt with whether the date of rendition or date of mandate by an appellate court was the applicable date, not whether entry of a final judgment is required to commence the statute of limitations. Eldred required only that the rights be finally and fully adjudicated, which, in that case, occurred upon the rendition of the order; the mandate was a mere technicality.

As addressed above, full and final adjudication of Silvestrone&s rights occurred as of the date of the jury verdict. Thereafter, Silvestrone precluded any action which might reverse or lessen the result. Therefore, there was a full and final determination of his rights in 1990. These facts must be considered when reviewing the Fifth District&s opinion; the Fifth District properly

determined that the statute of limitations period began to run from the date of the jury verdict.

2. The Fifth District properly determined that redressable harm was established as of the date of the jury's verdict.

Petitioner also relies on Peat, Marwick, Mitchell & Co. v. Lane, 565 So. 2d 1323 (Fla. 1990), and other cases, to argue that a cause of action for malpractice does not accrue until redressable harm is established, which, Petitioner argues, is when the underlying action is concluded by final judgment or appeal. However, these cases do not equate redressable harm with the entry of final judgment. Instead, these cases support Respondents' position.

In Peat, Marwick this Court held that a cause of action for malpractice accrues when the existence of redressable harm or injury is established and the injured party knows or should have known of the injury or negligent act. Id. at 1325. There, the issue was whether the injury occurred when the Internal Revenue Service challenged the Lanes' tax returns or when the tax court ruled on the appeal. This Court recognized that if the negligent conduct could be overturned and thereby remedied on appeal, no redressable harm existed until the appeal was decided. Id. Thus, the court found that no redressable harm occurred until judgment was entered by the tax court against the clients.

In Peat, Marwick, the clients believed their accountant&s advice was correct and appealed. They simply had no knowledge of the actual harm prior to the tax court&s opinions. Silvestrone, however, had such knowledge. Unlike the litigational malpractice cases addressed in Peat, Marwick, Silvestrone knew of the alleged malpractice at the time of the jury&s verdict.[12] Appellate review could not remedy the allegedly negligent conduct and thereby remove redressable harm established by the jury&s verdict because, as the Fifth District specifically noted, Silvestrone prohibited any such appeal or other action. (A 1, 3) Peat, Marwick does not deal with facts similar to the instant case, and it clearly does not establish a bright line rule that redressable harm occurs only upon entry of final judgment.

The other cases upon which Petitioner relies are also inapposite. For example, in Zuckerman v. Ruden, Barnett, McCloskey, Smith, Schuster & Russell, P.A., 670 So. 2d 1050 (Fla. 3d DCA 1996), the Court agreed that redressable harm as well as knowledge of the injury or negligence must be established before the statute of limitations will begin to run. Id. at 1051. However, in that case Zuckerman sued the Ruden, Barnett firm based

[12]Florida law is clear that a plaintiff must only know of the facts giving rise to a cause of action or legal malpractice and have some damages in order to trigger the statute of limitations. It is not necessary for the plaintiff to know the full extent of his damages. See Edwards v. Ford, 279 So. 2d 851 (Fla. 1973); Throneburg v. Boose, Casey, Ciklin, Lubitz, Martens, McBane & O&Connell, P.A., 659 So. 2d 1134, 1136 (Fla. 4th DCA 1995); case dismissed, 664 So. 2d 248 (1995).

on a possible malpractice stemming from a problematic foreclosure action. Zuckerman attempted to sue his attorney during the litigation of a foreclosure action and brought the malpractice suit before the issues on the merits in the foreclosure action were decided. The Court found that Zuckerman could not establish redressable harm until the merits were resolved, and therefore, the statute of limitations did not bar his claim.

Similarly, in Bierman v. Miller, 639 So. 2d 627 (Fla. 3d DCA 1994), Miller sued Bierman and his law firm for alleged negligence in drafting a severance agreement. He, too, brought the malpractice action during the pendency of litigation on the merits concerning the validity of the agreement. Thus, no redressable harm had yet been established and the Court found that the malpractice action was premature. The same is true of Chapman v. Garcia 463 So. 2d 528 (Fla. 3d DCA 1985) (finding that the plaintiffs had no cause of action for legal malpractice so long as the underlying medical malpractice action was still pending).

These cases simply do not support reversing the Fifth District in this case. Unlike the cases cited above, Silvestrone did not bring his legal malpractice action during the pendency of the underlying federal court trial. In fact, had he brought the action after the jury verdict but before entry of final judgment, it would not have been premature. The jury verdict established both redressable harm and the "alleged" injury of which he was aware. Unlike the cases discussed above, there remained nothing to

be resolved after the jury verdict which could have affected Petitioner&s legal malpractice action. The only actions which could have changed Petitioner&s alleged harm were those which he specifically prohibited.

Petitioner quotes from Abbott v. Friedsam, 682 So. 2d 597 (2d DCA 1996), in which the Second District stated in a footnote,

> ...[I]n Florida the statute of limitations for legal malpractice generally does not begin to run while the attorney continues to represent the client or until the legal proceeding which underlies the malpractice claim has been finalized, by appeal if necessary, so that the client has notice of all elements of his or her cause of action, including damages.

Id. at 599 n.1 (emphasis added). This remark notes that the statute of limitations generally does not run until the action is finalized so that the client has notice of all elements of his or her cause of action, including damages. Silvestrone, however, admits that he had notice of all elements of his cause of action immediately following the jury&s verdict. He knew that he was unhappy with Edell&s representation; knew that no economic expert had been retained or would be called at trial;[13] consulted with an attorney regarding a possible legal malpractice action; and believed he had been damaged by a jury verdict which was insufficient. He then insured that the outcome would not change by

[13]As previously noted, Silvestrone insisted upon hiring the experts himself in order to control costs.

precluding motions for new trial, additur, or appeal. It is not the "general" case.

It is inconsistent for Silvestrone to argue that redressable harm is established only when the final judgment is entered where he knew of the alleged malpractice, knew of the harm he allegedly suffered,[14] and yet he precluded any action that might have reversed either of those elements. The jury verdict, not the subsequent final judgment, established redressable harm and knowledge; at that time all elements required under the Florida Statutes, Employers& Fire and Peat, Marwick were satisfied, and the statute of limitations began to run.

B. THE FIFTH DISTRICT&S DECISION DOES NOT DEPRIVE LITIGANTS OF STATUTORY RIGHTS PROVIDED BY FLORIDA STATUTES § 95.11(4).

Finally, Petitioner argues that the statute of limitations could not have begun to run as of the date of the jury&s verdict because this deprives him of statutory rights provided by Florida Statutes § 95.11(4).[15] Petitioner argues that this decision would have given Silvestrone only 23 days to file his malpractice law suit, while the statute gives him two years to file the law

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[14]As noted above, the entire amount of the damages need not be known, only the facts giving rise to the damages and some actual damages. See footnote 12 above.

[15]This is a new argument and was not raised for consideration by the trial court or the Fifth District (until rehearing). Thus, it should not now be considered. See Sparta State Bank v. Pape, 477 So. 2d 3, 4 (Fla. 5th DCA 1985); Cartee v. Florida Dep&t. of Health and Rehabilitative Services, 354 So. 2d 81, 83 (Fla. 1st DCA 1977).

suit. Again, this argument asks the Court to ignore the facts of this case.

Silvestrone could have brought his legal malpractice action at any time within two years following the date of the jury verdict. As noted above, the fact that the attorneys& fee issue was being litigated did not preclude him from filing suit. If he preferred to wait until the attorneys& fee issue was concluded, he could easily have had the complaint prepared at an earlier date, and filed immediately after the award of attorneys& fees and entry of the final judgment. Indeed, Silvestrone contacted a malpractice attorney regarding his potential claims within days of the jury verdict. He has offered no explanation why he then waited over three years to file suit.

The Fifth District&s opinion did not change the statute of limitations for Silvestrone from two years to 23 days. It simply applied the facts of the case to the law which determines when the cause of action accrues and when the statute of limitations begins to run. Silvestrone had ample time to file suit before the limitations period expired but chose not to do so.

Petitioner also argues that the Fifth District&s opinion creates a conflict with Edwards v. Ford and In re Estate of Smith.[16] However, Petitioner&s own argument acknowledges that the delay of

[16]This too is a new argument and was not raised for consideration by the trial court or Fifth District (until rehearing). Thus, it should not now be considered. See Sparta State Bank; Cartee.

the statute of limitations by appeal applies only if an appeal is filed. See also Edwards v. Ford, 279 So. 2d 851 (Fla. 1973). The Fifth District&s ruling is not inconsistent with the case law addressed above which holds that the statute of limitations begins to run as of the date redressable harm is established and injury is known or should have been known unless the harm can be rectified on appeal. Silvestrone admittedly refused to allow any appeal, and therefore, he cannot properly ask this Court to question whether if he had appealed, the statute of limitations period would have run from a different date. Petitioner&s argument that the Fifth District&s ruling works a retroactive deprivation of rights ignores the fact that Petitioner controlled his own destiny in this respect. Silvestrone refused an appeal and though he could have changed his mind, he did not.

Petitioner further argues that if the statute of limitations began to run before the final judgment was entered, then the limitations period for a legal malpractice action expired before the time for filing an appeal on the jury&s verdict expired. Therefore, he argues, the Fifth District&s ruling necessarily requires that an appeal (if one had been filed) would revive the already expired cause of action in contravention of In re Estate of Smith, 685 So. 2d 1206 (Fla. 1996).

The Fifth District answered this argument in its opinion. It stated,

> [Petitioner&s] problem is that he elected not to appeal and so instructed his lawyer. Even though [Petitioner] could have changed his mind and elected to appeal up until thirty days after the final judgment was finally entered, that does not toll the running of the statute. The fact is that he did not change his mind and no appeal was ever filed. The only reason for delaying the action until the appeal is that the offending judgment might be reversed on appeal and the client would, therefore, suffer no damages. But [Petitioner] assured his continuing injury in this case by directing his attorney not to seek an additur, not to request a new trial, and not to appeal.

(A 3) (emphasis added). The Fifth District could not have addressed these facts more cogently. That court applied well settled law that the only reason to delay the running of the statute is that the redressable harm may be cured by appeal or other motions. See Peat, Marwick; Diaz v. Piquette, 496 So. 2d 239, 240 (Fla. 3d DCA 1986). Petitioner, by his own actions, made sure his redressable harm would not be cured by refusing an appeal and post-trial motions. The fact that Petitioner theoretically could have changed his mind regarding the appeal but did not do so, should not delay the statute of limitations.

There is no conflict with either Edwards v. Ford or In re Estate of Smith. This Court has specifically noted that the event which causes the statute of limitations to begin to run is not necessarily the same as the event which commences the time to file an appeal. Employers& Fire, 326 So. 2d at 181. Only Petitioner&s own actions precluded any appeal and thereby established his

redressable harm as of the date of the jury verdict; the fact that the statute of limitations could have expired before the time for appeal expired is not relevant.

Furthermore, this Court plainly stated in Employers& Fire that to expand the statute of limitations period by an interval between the final adjudication of liability and the final judgment would be to extend the statute unnecessarily by nonuniform lengths of time. Employers& Fire, 326 So. 2d at 181. The Fifth District clearly complied with this ruling by finding that where, as here, there was no appeal which might cure the alleged damages there was no reason to delay the running of the statute of limitations. There is no revival of an expired statute of limitations by an appeal. Thus, there is no conflict with In re Estate of Smith.

C. THE DOCTRINE OF CONTINUOUS REPRESENTATION WAS NOT PROPERLY RAISED, AND DOES NOT TOLL THE STATUTE OF LIMITATIONS IN THIS CASE.

1. **The doctrine of continuous representation was not properly raised below, and cannot be considered on appeal**.

As argued below, Silvestrone did not properly raise the doctrine of continuous representation as a mechanism for tolling the statute of limitations in the trial court. Instead, Silvestrone raised the argument for the first time on appeal, and thereafter addressed it in his brief on the merits filed with this Court. The Fifth District properly determined that the doctrine of

continuous representation was not presented below and could not be considered for the first time on appeal. (A 3-4).

Silvestrone argues that, contrary to Edell&s assertions, the continuous representation doctrine was sufficiently raised at the hearing on the motion for summary judgment. He cites a portion of his attorney&s argument at that hearing in an attempt to establish that the issue was raised. (Silvestrone&s Brief on the Merits, p. 23). However, reviewing that testimony in context, Silvestrone&s attorney was attempting to argue that issues of a "litigational nature" were continuing after the jury&s verdict, and therefore the statute of limitations had not run. (T 20-22). In addition, his argument at the hearing referred to this Court&s opinion in Peat, Marwick, Mitchell & Co. v. Lane, 565 So. 2d 1323 (Fla. 1990), which did not address the continuous representation doctrine.

In Peat, Marwick the Court found that no cause of action for malpractice could arise during the pendency of an appeal. Id. at 1326. In doing so, it noted that to bring a malpractice action during the pendency of a case would put a client/plaintiff in the untenable position of suing his or her accountant (lawyer) while being represented by that person. Id. It did not address this concern in reference to the tolling of the statute of limitations as Silvestrone now asserts. Further, the concern raised in Peat, Marwick of placing the client in an untenable position was not

present here. Silvestrone precluded any appeal and could have brought a malpractice claim at any time after the jury verdict.

More to the point, however, Silvestrone did not properly plead the doctrine of continuous representation as an avoidance of the statute of limitations defense. Respondents raised the statute of limitations as an affirmative defense; Silvestrone filed no reply.

Florida Rule of Civil Procedure 1.100(a) specifically notes, "If an answer or third-party answer contains an affirmative defense and the opposing party seeks to avoid it, the opposing party shall file a reply containing the avoidance." (emphasis added). The comments to the rule note that subdivision (a) was amended to make a reply mandatory where a party seeks to avoid an affirmative defense. Numerous courts, including this Court, have addressed the requirement of filing a reply to avoid an affirmative defense. For example, in Moore Meats, Inc. v. Strawn, 313 So. 2d 660 (Fla. 1975), this Court noted that under Rule 1.100(a), a plaintiff&s affirmative defense to defenses raised by a defendant must be set forth in a reply because it is an express avoidance. Id. at 661. The Court stated, "This is necessary in order to lay a predicate for such proofs so that the parties may prepare accordingly." Id.; see also American Salvage and Jobbing Co., Inc. v. Salomon, 295 So. 2d 710, 711 (Fla. 3d DCA 1974) (noting that according to the comments, the change in the rule makes a reply

mandatory when a party seeks to avoid an affirmative defense in an answer); In re Estate of Grant, 433 So. 2d 681 (Fla. 5th DCA 1983).

American Salvage and Jobbing recognized that where, as here, factual matters which raise a new point, "such as fraud, circumstances that have previously been outside of the pleadings, affirmative defenses contained within rule 1.110(d), and allied affirmative defenses such as the applicability of the statute, failure to comply with the policy provisions, election of remedies, truth, multiplicity of suits, privileges, etc.," these affirmative defenses may require avoidance. American Salvage and Jobbing, 295 So. 2d at 712. A defense that the statute of limitations is tolled by the continuous representation doctrine, raises a new issue and is in the nature of an avoidance. See Tuggle v. Maddox, 60 So. 2d 158 (Fla. 1952). Thus, it would have to be raised by reply.

Silvestrone did not file any such reply, and by failing to plead the avoidance, he waived the right to rely upon it. Fla. R. Civ. P. 1.100(a); Foliage Corp. of Florida, Inc. v. Watson, 381 So. 2d 356, 359 (Fla. 5th DCA 1980). In a similar situation, this Court reviewed an action in which a doctor raised the statute of limitations as a defense; the plaintiff in the case filed no responsive pleading. Dober v. Worrell, 401 So. 2d 1322 (Fla. 1981). This Court stated that it was inappropriate to raise the continuing representation doctrine for the first time on appeal; a party seeking to toll the statute must plead and prove circum-

stances which toll the statute. The Court noted that Florida Rules of Civil Procedure explicitly require a party opposing an affirmative defense to file a reply containing the avoidance. Therefore, this Court refused to apply the doctrine of continuing representation.

A similar ruling should be made in this case. Silvestrone was required to file a reply avoiding the statute of limitations defense but failed to do so.[17] The fact that Silvestrone&s attorney briefly mentioned a concern raised in the Peat, Marwick case is simply insufficient to lay the predicate for argument on appeal. For these reasons, the Fifth District Court of Appeal correctly refused to address the issue.

2. Even if the continuous representation doctrine may be raised, it does not toll the statute of limitations.

Even if this Court considers the continuous representation doctrine, that doctrine does not toll the statute of limitations in this case.

In Kelley v. School Board of Seminole Co., 435 So. 2d 804 (Fla. 1983), the Supreme Court of Florida specifically held that a "continuous treatment" or continuous representation doctrine would not toll the statute of limitations. There, the School Board

[17]At the least, at the time of the summary judgment hearing, or even immediately thereafter, Silvestrone should have filed a motion for leave to amend his pleadings to reply to the statute of limitations defense. That would have framed the issue in the trial court.

contracted with Kelley, an architect, to provide services for the design and construction of several elementary schools. The roofs in three of the schools began leaking shortly after construction. Extensive roof repairs were made, but the roofs eventually had to be replaced. Id. at 805. The School Board sued Kelley alleging that the leaks resulted from architectural errors.

The Court emphasized that the School Board had knowledge of the defective roofs sufficient to put it on notice that it had or might have a cause of action against the architect well prior to the filing of the suit. It was an obvious problem which existed at least four years prior to August, 1977, when the suit was filed. This Court rejected the continuous representation doctrine in Kelley and has since reaffirmed its rejection of the doctrine under similar circumstances. See Almand Constr. Co., Inc. v. Evans, 547 So. 2d 626, 628 (Fla. 1989). A number of District Courts have noted the Florida Supreme Court&s rejection of this doctrine. See, e.g., Gomez v. Flynn, M.D., 518 So. 2d 366. 367 (Fla. 1st DCA 1987); Bd. of Trustees of Santa Fe Community College v. Caudill Rowlett Scott, Inc., 461 So. 2d 239, 244 (Fla. 1st DCA 1984); Mercedes Benz of North America v. King, 549 So. 2d 795 (Fla. 5th DCA 1989).

Likewise, in this case, there were obvious "problems" which Silvestrone claims were negligence. It was obvious that Silvestrone was discontent with Edell's efforts to obtain an expert, with the amount received at trial, and with Edell's

handling of the request for damages and the testimony on damages. Silvestrone was also dissatisfied with Edell's advice regarding the taxability of settlement offers. All of these actions arose prior to or at trial and more than two years before Silvestrone filed his malpractice action. Given those facts, and Silvestrone's explicit instructions not to appeal or file post-trial motions, Silvestrone cannot now complain that the limitation period had run by the time he filed suit.

In addition, the continuous representation doctrine applies only when the professional continually assures his client that the problem will be fixed, causing the client to do nothing. See, e.g., Id.; Richards Enterprises, Inc. v. Swofford, 495 So. 2d 1210 (Fla. 5th DCA 1986) (Cowart, dissenting), cause dismissed, 515 So. 2d 231 (Fla. 1987); Smith v. Hussey, 363 So. 2d 1138 (Fla. 2d DCA 1978). For example, in Smith, Smith sued Hussey for malpractice. Hussey raised the statute of limitations as an affirmative defense. The trial court found Smith was aware of Hussey's alleged negligence and that the two-year limitations period barred his suit. The Second District reversed and found that Hussey continually assured Smith that he would take care of the matter complained of and that he would resolve the matter satisfactorily. Thus, the court found there was a factual issue as to whether Smith knew or should have known that Hussey's handling of the case constituted malpractice and therefore as to when the statute of limitations commenced to run. Id.; see also Burnside v. McCrary, 384 So. 2d

1292 (Fla. 3d DCA 1980); Wilder v. Meyer, 779 F.Supp. 164 (S.D. Fla. 1991).

In the instant case, Edell made no assurances that Silvestrone's complaints would be satisfactorily resolved. In fact, after the trial, Edell did nothing to change the verdict at Silvestrone&s instruction. Thus, there can be no factual issue on this basis as to whether Silvestrone knew or should have known that the allegedly negligent acts of Edell constituted malpractice, because Edell made no such assurances. For these reasons, the continuing representation doctrine is not applicable to toll the statute of limitations.

III. CONCLUSION

For all the foregoing reasons, the Fifth District Court of Appeal properly applied Florida law to the facts of this case, and determined that the statute of limitations ran from the date of the jury verdict in the federal court trial. Its opinion affirming the trial court&s entry of summary judgment against Silvestrone based on the statute of limitations should therefore be affirmed.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by U.S. Mail to William Summers, Esquire of SUMMERS, ANTHONY & VARGAS, 28001 Chagrin Boulevard, Suite 300, Cleveland, Ohio 44122-4425, Victor Chapman, Esquire of BARRETT, CHAPMAN & RUTA, P.A., 255 S. Orange Avenue, Suite 750, P. O. Box 533983, Orlando, Florida 32853-3983 and Edna Caruso, Esquire, of CARUSO, BURLINGTON, BOHN & COMPIANI, P.A., Suite 3-A/Barristers Building, 1615 Forum Place, West Palm Beach, Florida 33401, this _____ day of April, 1998.

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