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, LARDNER, et al.,

Respondents.
_______________________________/

PETITIONER'S INITIAL BRIEF ON THE MERITS

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PREFACE

This is a Petition for this Court to review on the merits a decision of the Fifth District Court of Appeal which directly and expressly conflicts with other Florida appellate decisions. Petitioner was the Plaintiff in the court below and Respondents were the Defendants. Herein the parties will be referred to as they stood in the lower court or by proper name. The following symbols will be used:

(R)	-	Record-on-Appeal
(T)	-	Transcript of Summary Judgment
(D)	-	The depositions of Silvestrone and Milbrath are in the record but they are not assigned record page numbers
(A)	-	Petitioner's Appendix

STATEMENT OF THE CASE

Art Silvestrone and Glenn Teal, golf professionals, sued the Senior PGA Tour, its commissioners, governing board and several named individual defendants in the Federal District Court in Florida, alleging violation of the Sherman and Clayton Antitrust Acts (Silvestrone depo, Ex#50). Silvestrone alleged that the Defendants had promulgated eligibility requirements regarding who could compete in the PGA's Senior Tour which not only violated federal antitrust laws, but which also wrongfully excluded him from competing in golf tournaments (Silvestrone's depo, Ex#41). Silvestrone and Teal were both represented by the same attorney and their lawsuits were consolidated for trial.

After a two week trial, Plaintiffs prevailed. The jury returned a verdict on February 27, 1990 against the Defendants on liability, finding that they had conspired to violate the antitrust laws (Silvestrone depo, Exs#42,57). However, the jury only awarded Silvestrone $3,777.50 in damages and awarded Teal no damages (Silvestrone depo, Ex#57). On the day the verdict was entered, the District Court ruled that entry of judgment would be deferred until post-trial issues of treble damages and pre-judgment interest were resolved (R60, docket entry #175).

As a result of the jury's verdict, Plaintiffs filed an Application for Injunctive Relief to prevent the PGA Tour from violating the antitrust laws in the future (Silvestrone depo, Ex#42). On April 14, 1990, the District Court denied Silvestrone and Teal's request since the PGA Tour had changed its eligibility rules as a result of Silvestrone and Teal's lawsuits

(Milbrath depo, p.90, Silvestrone depo, Ex#51), and the court found no evidence that a violation was likely to continue or recur (Silvestrone depo, Ex#51).

On May 31, 1990, the attorney for Silvestrone and Teal filed applications for attorney's fees (R62, docket entries #200, 202), and that matter was referred to a U.S. Magistrate by the District Court Judge (R62,docket entry #221). Because of the outstanding issues of treble damages, pre-judgment interest and attorney's fees, a Final Judgment was not entered in favor of Silvestrone and Teal by the District Court until February 4, 1992, almost two years after the verdict (R64, docket entry #232). In that Final Judgment, the District Court trebled the jury's award to Silvestrone[1] and awarded him $11,332.50 in damages,[2] plus $228,973.11 in attorney's fees and costs, and also awarded Teal $29,328.64 in attorney's fees and costs (R64, docket entry #232). Although Teal filed a Motion for New Trial and Additur (R64, docket entry #239) Silvestrone did not, and on April 27, 1992, the court denied Teal's motion (R65, docket entry #247).

Silvestrone and Teal did not appeal the Final Judgment entered in the antitrust lawsuit. However, on January 19, 1993, within two years of entry of that judgment, Silvestrone and Teal filed a legal malpractice action in the Florida state courts against the New Jersey

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[1]/On page one of the majority opinion the Court states that the "subsequently entered Final Judgment...does not and...cannot change the result of the jury verdict". In fact, the Final Judgment did change the result of the jury's verdict because in the Final Judgment the Court trebled Silvestrone's damages, and also awarded him attorney's fees and costs.

[2]/Page one of the dissent states that the jury verdict was $11,310, but that is incorrect (A5).

attorney who had been their lead counsel in the antitrust lawsuit, and his law firm (collectively referred to as "the trial attorney"), and also sued the Florida law firm that had been associated as "local counsel" (R8-11). Silvestrone and Teal alleged that Defendants' negligence in representing them in the antitrust lawsuit had resulted in their recovering less than the full measure of their damages (R7).

Defendants filed an Answer which raised the two-year statute of limitations for legal malpractice as an affirmative defense (R10). Defendants subsequently filed a Motion for Summary Judgment on that defense, which the trial court granted. The court found that the statute of limitations had run from the entry of the verdict, rather than from entry of the Final Judgment, in the antitrust lawsuit (R67-68).

Silvestrone appealed the Summary Judgment to the Fifth District, which affirmed, finding that Silvestrone knew about the alleged malpractice when the jury returned its verdict in the antitrust lawsuit (A2). Therefore, the Court concluded, the two year statute of limitations for legal malpractice began running at the time the jury returned its verdict since Silvestrone did not subsequently appeal the Final Judgment entered in the case (A3). The Court acknowledged that the filing of an appeal within 30 days of entry of the Final Judgment would have tolled the running of the statute of limitations for legal malpractice under established case law. Yet, it overlooked the fact that by ruling that the statute of limitations began to run from entry of the verdict, rather than the Final Judgment, the statute of limitations expired seven days <u>before</u> expiration of the 30 day period within which to appeal the Final Judgment.

Judge Sharp filed a lengthy dissenting opinion which concluded that the statute of limitations ran from entry of the Final Judgment, not the verdict, under the facts of this case and under Florida case law. She also based her conclusion on public policy reasons because the majority's conclusion constituted a virtual trap for a client in attempting to determine when his cause of action for legal malpractice accrued (A5-10). Judge Sharp pointed out that the majority opinion resulted in Silvestrone having only 13 (actually 23) days after entry of the Final Judgment in the antitrust lawsuit to sue his attorneys for legal malpractice (A9).

STATEMENT OF THE FACTS

Since this case involves an appeal of a Summary Judgment entered against Silvestrone, the facts must be viewed in a light most favorable to him. DILALLO v. RIDING SAFELY, 687 So.2d 353, 354 (Fla. 4th DCA 1997); MOORE v. MORRIS, 475 So.2d 666 (Fla. 1985). The following facts are so stated.

Silvestrone had trouble with his trial attorney in the antitrust case long before trial. This resulted in his consulting with another attorney, Steven Milbrath, who also handled antitrust cases, to see if he would take over his case. Milbrath told Silvestrone it was too near trial, and would be too expensive, to change attorneys (Milbrath depo, p.32-33). However, he took Silvestrone under his wing, so to speak, in order to assist him in communicating with his trial attorney, with whom Silvestrone had a very strained relationship at that point (Milbrath depo, p.65). In Milbrath's opinion, Silvestrone was trying to work with his trial attorney, who was being intractable and unreasonable (Milbrath depo,

p.77-78). According to Milbrath, Silvestrone was very intimidated by his trial attorney, who was articulate and skilled, whereas Silvestrone was not particularly literate although he was "pretty intelligent" (Milbrath depo, p.65).

Silvestrone's trial attorney ultimately filed a Motion to Withdraw before trial, which was denied. Milbrath testified that his impression was that the trial attorney thought the motion would be granted, and so there was a "large gap" when very little work was done on Silvestrone's case by his trial attorney (Milbrath depo, p.77-80). Milbrath felt that Silvestrone was "left hanging" and that nothing was being done to protect his interests (Milbrath depo, p.79). Silvestrone's attorney had even told Milbrath that he was so angry with Silvestrone, and that there was such a level of distrust between them, that he was "begrudgingly" working on the file (Milbrath depo, p.112). It did not appear to Milbrath that Silvestrone's attorney was putting aside his personal animosity in trying to do the best for his client (Milbrath depo, p.112).

Silvestrone was in a state of shock over the jury's award of damages (Silvestrone depo, p.104-05). He was very unhappy with his trial attorney because of the way he tried the damages portion of his case, among other things (Milbrath depo, p.46). His attorney had put on inadequate evidence of, and failed to ask the jury to award, any amount of damages (Silvestrone depo, p.97, 102, 116, 165; Milbrath depo, p.50). He also informed the jury that this lawsuit was not about damages, but that Silvestrone was bringing the lawsuit "for the principle of the thing" (Silvestrone depo. p 116). Silvestrone discussed filing a motion for new trial on damages or a motion for an additur with his trial attorney (Silvestrone depo,

Ex#41). His trial attorney advised him that there was little hope the District Court Judge would grant either motion (Silvestrone depo, Ex#41). Milbrath also advised Silvestrone that it would be foolish to spend money to appeal the amount of the jury's verdict, if that was the only ground for appeal (Milbrath depo p.114).

After the trial, Silvestrone talked to Milbrath in March, 1990 about filing a malpractice suit against his trial attorney (Silvestrone depo, p.97,165, Milbrath depo, p.108). Milbrath felt the whole matter had been handled very poorly by Silvestrone's trial attorney (Milbrath, depo, p.59). While he told Silvestrone that he did not know enough about the case to have a well-formed opinion as to whether his trial attorney had committed malpractice, his "off-the-cuff" opinion was that he had committed malpractice in a variety of ways (Milbrath depo, p.53,59). For example, he felt it was gross negligence to try Silvestrone's antitrust case without an economist to testify to business damages (Milbrath depo, p.46,97). However, since Milbrath felt he might end up being a fact witness in any malpractice case, he advised Silvestrone to obtain an opinion from another attorney as to whether his trial attorney had committed malpractice (Milbrath depo, p.59).[3] Silvestrone and Teal subsequently met with another attorney to obtain that advice (Milbrath depo, p.54).

Thereafter, Silvestrone and Teal's lawsuit remained pending for an extended period of time while prejudgment interest, treble damages and attorney's fees were being

[3]/At the time of his deposition, Milbrath had not formed any opinions as to what Silvestrone's trial attorney should or should not have done (Milbrath depo, p.121), other than the "off-the-cuff" opinion he had given Silvestrone (Milbrath depo, p.59).

determined. Finally, on January 20, 1992, Silvestrone wrote his trial attorney and instructed him to "immediately secure the entry of a final judgment in this case, so that the matter can come to a conclusion" (Silvestrone depo, Ex#43). The Final Judgment in the antitrust case was subsequently entered by the District Court on February 4, 1992. Silvestrone and Teal's legal malpractice lawsuit was filed against their trial attorney on January 19, 1993, less than a year later.

SUMMARY OF ARGUMENT

The Fifth District incorrectly decided that the two year statute of limitations for legal malpractice committed in the antitrust litigation ran from entry of the verdict, since no appeal was subsequently filed by Silvestrone from the Final Judgment entered in that litigation. The Fifth District misinterpreted this Court's prior opinion in EMPLOYERS FIRE INS. CO. v. CONTINENTAL INS. CO., 326 So.2d 177 (Fla. 1976). If the guidelines of that case are applied here, the statute of limitations could only run from the Final Judgment entered in the antitrust lawsuit because that was the only document that finally and fully determined the rights and liabilities of the parties.

Other cases indicate that the statute of limitations begins to run in a litigational malpractice action when "redressable harm" has been established, and that occurs when the underlying action is "finalized", "entirely resolved", "concluded", or is no longer pending.

Because the Fifth District used the verdict, rather than the Final Judgment, as the starting point for the running of the statute of limitations, the statute expired 23 days after the Final Judgment was entered, and seven days before Silvestrone's 30 day time period to appeal the Final Judgment had run. It is undisputed that the filing of an appeal within 30 days tolls the running of the statute of limitations until the appeal is concluded. However, under the Fifth District's ruling, an appeal would necessarily have to revive an already expired statute of limitations. This is impossible under IN RE ESTATE OF SMITH, 685 So.2d 1206 (Fla. 1996) where this Court held that once a claim has been extinguished by the statute of limitations, it cannot later be revived.

Even assuming the statute of limitations began to run from the verdict, the fact that Silvestrone's attorney continued to represent him in the antitrust lawsuit until well after the Final Judgment was entered two years later, tolled the running of the statute of limitations until that representation ceased, pursuant to the continuous representation doctrine.

ARGUMENT

I THE TWO YEAR STATUTE OF LIMITATIONS FOR LEGAL MALPRACTICE COMMITTED IN THE ANTITRUST LITIGATION DID NOT BEGIN TO RUN UNTIL THAT LITIGATION WAS CONCLUDED BY FINAL JUDGMENT WHICH WAS ALSO WHEN REDRESSABLE HARM WAS ESTABLISHED

A) Under EMPLOYERS FIRE INS. CO. v. CONTINENTAL INS. CO., 326 So.2d 177 (Fla. 1976), the Statute of Limitations Ran From Entry of the Final Judgment, Not Entry of the Verdict

In EMPLOYERS FIRE, supra, the trial court announced its ruling at the conclusion of a non-jury trial. A minute book entry incorporated the court's ruling which awarded damages to the plaintiff and against the defendant in the amount of $575,000. Both the clerk and the judge signed the minute book entry, and it was assigned a book and page number. Eleven months later a formal judgment document captioned "Final Judgment" was signed and recorded by the trial judge. It quoted in full the minute book entry and then entered judgment for the plaintiff, and added the phrase "for which let execution issue". The trial court subsequently entered summary judgment for the defendant in a bad faith lawsuit arising out of the $575,000 award. The court found that the statute of limitations had expired since it ran from the signed minute book entry in the underlying lawsuit, rather than from the final judgment entered eleven months later. The Second District reversed, holding that the statute began to run from the final judgment. This Court reversed and in doing so it provided guidelines for determining when a statute of limitations begins to run generally, and more specifically as to whether it runs from a minute book entry or a much later entered final judgment.

The Court held that a statute of limitations commences at the time a litigant's liability or rights are "finally and fully adjudicated". The Court stated that this generally meant, "when the presiding judge or clerk **records judgment** for one party against the other in a specified amount after with a jury or non-jury trial." Id. at 181. This, the court held, could be accomplished when the final judgment was recorded in the official record book or when the minute book entry was made at the conclusion of the trial depending upon its content.

In order for the minute book entry to be sufficient to constitute a recorded judgment, the Court stated that it must constitute a final adjudication of liability containing all the information necessary to establish the enforceable right. Id. at 181. In footnote 13, the Court held that the "verdict and judgment portions of the minute book may be viewed together" to make that determination. If a minute book is sufficient under these guidelines, the Court held, there was no reason to delay the running of the statute of limitations until the final judgment was entered. The court concluded that in that case the minute book entry and the final judgment essentially "contain the identical information." Id. at 179, and reversed for further proceedings consistent with the Court's opinion.

In this case, the record does not reflect that an entry was made in the District Court's minute book when the jury returned its verdict in the antitrust lawsuit, and if one was made, its content. Rather, the record only contains docket sheets for the antitrust lawsuit from the clerk's docket book, which reflects the return of the verdict in that case (R60), and the verdict form (Silvestrone's depo, Ex#57). The clerk's docket book is something entirely different from the clerk's minute book, which is what was involved in EMPLOYERS FIRE. Here, there is no minute book entry that is essentially identical to the Final Judgment. There is no minute book entry containing all the information necessary to constitute a final and full adjudication of the parties' rights and liabilities. There is no minute book entry at all, or at least no record of one in this case. Accordingly, the only document before the Court that could possibly have determined the "rights and liabilities" of the parties in the antitrust lawsuit was the Final Judgment. EMPLOYERS FIRE clearly does not hold

that the entry of a verdict starts the statute of limitations running, as the Fifth District held. Unlike the minute book entry in EMPLOYERS FIRE, all judicial labor in determining liability and damages was not complete when the verdict was returned by the jury in the antitrust lawsuit. This is obvious since the District Court subsequently trebled Silvestrone's damages and awarded him attorney's fees and costs (but no prejudgment interest) when it entered the Final Judgment in his favor almost two years after the verdict. Therefore, the verdict did not finally and fully adjudicate the parties' rights and liabilities. That was done solely by the subsequently entered Final Judgment, and therefore under EMPLOYERS FIRE the statute of limitations did not commence to run until that time.

In deciding that the verdict started the statute of limitations to run, the Fifth District incorrectly relied upon language in this Court's opinion in EMPLOYERS FIRE to the effect that so long as the minute book entry is "complete", delaying the running of the statute of limitations until a formal judgment is entered unnecessarily extends the limitations period. But again, this Court's language had reference to a minute book entry which contained identical information to that contained in the subsequently entered final judgment. Here, the verdict did not contain the identical information contained in the Final Judgment entered two years later. It did not contain the treble damages award, or the attorney's fees and costs award. The verdict returned by the jury in this case cannot be equated with the minute book entry in EMPLOYERS FIRE, which reflected a final and full adjudication of the parties' rights and liabilities. Only the Final Judgment in this case accomplished that feat.

Accordingly, that is when the statute of limitations began to run in this case under the EMPLOYERS FIRE guidelines.

B) Cases Decided Since EMPLOYERS FIRE Indicate that the Statute of Limitations in this Case Ran From Entry of the Final Judgment in the Antitrust Lawsuit

Cases decided since EMPLOYERS FIRE indicate that entry of the Final Judgment, rather than the verdict, was the controlling factor here. In McGURN v. SCOTT, 596 So.2d 1042, 1043 (Fla. 1992), this Court reiterated that it is the entry of a final judgment or final order that determines the "rights and liabilities" of parties with reference to the matters in controversy and leaves nothing of judicial character to be done. The Court determined that that could not occur where all the elements of damages had not yet been decided, stating:

> An element of damages is not ancillary to the subject matter of the cause regardless of how straight-forward and ministerial the calculation of those damages may be.

In the court below, the trial attorney argued that even though treble damages were not awarded by the District Court until the Final Judgment was entered two years after the jury verdict, that award was nothing more than a ministerial act. He argued that if a plaintiff prevails under the antitrust statute, the court must automatically treble the damages awarded and has no discretion not to do so. That fact is irrelevant. This Court rejected the same argument regarding an award of prejudgment interest in McGURN v. SCOTT, supra at 1044. The Court held that a reservation of jurisdiction to award prejudgment interest results in a so-called "final judgment" being less than a full and final adjudication of the parties' rights and liabilities, even if calculation of prejudgment interest is "generally straight forward and

ministerial". Id. at 1044. This is because, the Court held, prejudgment interest is an element of damages which is part and parcel of the "main adjudication". Id. at 1044. Likewise, in this case treble damages were an element of Silvestrone's damages, and until they were awarded, the rights and liabilities of the parties were not finally decided for statute of limitations purposes.

The District Courts have also ruled that the "finally and fully adjudicated" requirement of EMPLOYERS FIRE occurs when judgment is entered and the litigation ends. In GRISSON v. COMMERCIAL UNION INS. CO., 610 So.2d 1299, 1309 (Fla. 1st DCA 1992), the First District interpreted "finally and fully adjudicated" as follows:

> Ordinarily, the statutory time commences on the date when judgment was entered and the litigation has come to an end.

Likewise, cases specifically dealing with legal malpractice have held that the statute of limitations begins to run when the litigation giving rise to that cause of action is finally concluded by judgment. In ZAKAK v. NAPIER, 545 So.2d 380, 381 (Fla. 2d DCA 1989), the Zakaks hired a lawyer to defend them in a personal injury action. The lawyer agreed to settle the case, with the Zakaks paying $15,000. The plaintiff accepted the offer but the Zakaks claimed their attorney did not have authority to settle the case. The trial court entered a February 12, 1985 order enforcing the settlement, and when the Zakaks refused to pay, the court entered an October 29, 1989 final judgment against them. The Zakaks did not appeal the final judgment, but they sued their attorney for malpractice on February 16, 1987. The trial court dismissed their lawsuit finding that the two year statute of limitations had run.

The Second District reversed, holding that when 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 that litigation is concluded by final judgment, or if appealed, until a final appellate decision is rendered.[4]

In SPIVEY v. TRADER, 620 So.2d 212 (Fla. 4th DCA 1993), a client retained an attorney for advice regarding the incorporation of a construction business. He informed the attorney of an accident involving a truck owned by his company. The attorney advised the client that three parcels of real estate, owned by him and his wife, could be transferred safely into the new corporation in which he and his wife each owned 40% of the stock, without jeopardy of being affected by the personal injury action. Subsequently, a large personal injury verdict was rendered against the client. At that point, the client hired another attorney to dissolve the corporation in January, 1984. Nonetheless, the court in the personal injury action entered a final judgment in a supplementary proceeding, declaring the client's interest in the three parcels of property, as a 40% owner of property in the corporation, subject to execution. The client initially appealed but later dismissed the appeal, and one year later he sued his attorney for malpractice. The attorney argued that the client realized he gave him bad advice when he dissolved the corporation in January, 1984. The client admitted he

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[4]/The Second District prefaced its holding with "unless the facts of the case clearly show that the legal malpractice was or should have been discovered at an earlier date", citing to SAWYER v. EARLE, 541 So.2d 1232 (Fla. 2d DCA 1989). This Court overruled SAWYER v. EARLE in PEAT, MARWICK, MITCHELL & CO. v. LANE, 565 So.2d 1323 (Fla. 1990).

became concerned at that time that the three parcels of property may be subject to the personal injury judgment. The court granted a summary judgment for the attorney based on the statute of limitations. The Fourth District reversed, holding that the cause of action for legal malpractice accrued, and the two-year legal malpractice statute of limitations began to run, when judgment was entered against the client in supplementary proceedings, and not before.

In WILKERSON v. STERNSTEIN, 558 So.2d 516 (Fla. 1st DCA 1990), a client sued his attorney for malpractice alleging he had suffered damages as a result of negligent tax advice rendered in 1982. The attorney raised the statute of limitations as a defense. The First District agreed that the statute of limitations did not begin to run until judgment was entered against the client in the tax court.

Finally, in ELDRED v. REBER, 639 So.2d 1086 (Fla. 5th DCA 1994), the issue before the Fifth District was when the statute of limitations began to run in a litigational malpractice action where the underlying action had been appealed. The Court concluded that the limitations period began to run when the appellate decision was "rendered" as defined in Fla.R.App.P. 9.020(g), not when its mandate issued. More importantly, however, for purposes of this case, the Court also discussed the inception date of the statute of limitations where a case is not appealed, as here. The Court stated that the Florida Supreme Court had set forth guidelines for determining that issue in EMPLOYERS FIRE INS. CO. v. CONTINENTAL INS. CO., 326 So.2d 177 (Fla. 1976), and quoted the following language from the Supreme Court's opinion:

> ...we hold that the time period for measuring a statute of limitations commences at the time a litigant's liability 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. (emphasis added)

639 So.2d at 1087.

The Fifth District concluded that the above explanation in EMPLOYERS FIRE coincided with the definition of the term "rendition" contained in Rule 9.020(g), Florida Rules of Appellate Procedure.[5] The Court clearly equated the commencement of the running on the statute of limitations with rendition of a final judgment. The Fifth District's opinion in this case, is contrary to, and ignores its prior opinion in ELDRED.

The above cases indicate that entry of the Final Judgment in the antitrust lawsuit started the statute of limitations running for Silvestrone's legal malpractice claim. Without question, Silvestrone filed his malpractice lawsuit less than one year after entry of that judgment. His lawsuit was well within the applicable two year statute of limitations, and therefore the trial court and the Fifth District erred in holding that Silvestrone's lawsuit was time barred.

C PEAT, MARWICK, MITCHELL & CO. v. LANE, 565 So.2d 1323 (Fla. 1990) and Its Progeny Likewise Hold That a Cause of Action for Legal Malpractice Does Not Occur Until the Existence of "Redressable Harm" Has Been Established, Which is When the Underlying Action is Concluded By Judgment

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[5]/The Court quoted 9.020(g) which provides that a final order is "rendered" when a signed, written order is filed with the clerk, unless timely and authorized post-trial motions are filed, which extends the order's "rendition" until all post-trial motions are relied upon.

In PEAT, MARWICK, supra, this Court addressed the issue of when a client's cause of action for malpractice accrued against an accounting firm. In December, 1976, the accountants in that case had recommended the clients invest in a limited partnership, and their 1976 and 1977 tax returns claimed deductions based on losses in the partnership. On March 17, 1981, the IRS notified the clients that there were tax deficiencies, and the amounts owed, in their 1976 and 1977 tax returns because of the claimed deductions regarding the limited partnership. The clients challenged the IRS determination, but later agreed to an order dated May 9, 1983 requiring them to pay a tax deficiency. On February 22, 1985, the clients sued their accountants for malpractice. The trial court granted summary judgment to the accounting firm based upon the statute of limitations. The Third District reversed finding that the statute of limitations for malpractice did not run until redressable harm occurred, and that was when judgment was entered by the tax court against the clients. This Court agreed stating that two factors must be present:

> Generally, a cause of action for negligence does not accrue until the existence of a redressable harm or injury has been established **and** the injured party knows or should know of either the injury or the negligent act. *See Barron v. Shapiro*, 565 So.2d 851 (Fla. 1990); *Edwards v. Ford*, 279 So.2d 851 (Fla. 1973); *Birnholz v. Blake*, 399 So.2d 375 (Fla. 3d DCA 1981). In this instance, we must decide when the redressable harm or injury occurred. Was it when the Lanes received the ninety-day letter or when the tax court judgment was entered?
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> * * *
>
> We find, consistent with the holdings of numerous attorney malpractice cases, that until their tax court action was final, the Lanes did not have an action for malpractice....
>
> * * *

> We hold that, under the circumstances of this case, where the accountant did not acknowledge error, the limitations period for accounting malpractice commenced when the United States Tax Court entered its judgment. This holding is consistent with the case law established for legal malpractice, and we find no justification for treating accountants differently. (emphasis added)

In ZITRIN v. GLASER, 621 So.2d 748, 750 (Fla. 4th DCA 1993), the Fourth District held that both factors referred to by this Court in PEAT, MARWICK are required in order for the limitations period to begin running. Mere knowledge of the injury or negligence, without the establishment of the existence of a redressable harm, will not start the limitations period running. ZUCKERMAN v. RUDEN, BARNETT, McCLOSKEY, 670 So.2d 1050, 1051 (Fla. 3d DCA 1996). In this case, the trial court and the Fifth District focused solely on whether Silvestrone had knowledge of the negligence. As indicated in the above cased, that fact alone does not start the statute of limitations for malpractice running. There must also be redressable harm, which was not established here until the Final Judgment was entered in the antitrust case.

In ZUCKERMAN, the client retained a law firm to represent him in a loan transaction in exchange for a promissory note and real estate mortgage. When the mortgagor defaulted, the client learned the mortgagor's wife did not sign the mortgage which was on homestead property. When the client attempted to foreclose on the mortgage, the mortgagor claimed the mortgage was invalid. The client sued his attorney while the foreclosure action was pending. The trial court granted summary judgment to the attorney, ruling that the client's

cause of action accrued over two years earlier when he learned of the defect in the mortgage. The Third District discussed the requirement of redressable harm and reversed stating:

> ...Only when the foreclosure action has been entirely resolved will the statute of limitations on the malpractice action begin to run.

670 So.2d at 1051.

The Third District likewise held in BIERMAN v. MILLER, 639 So.2d 627, 628 (Fla. 3d DCA 1994), that so long as the underlying action giving rise to the legal malpractice has not been concluded, the legal malpractice action is premature because there is no redressable harm. And, in CHAPMAN v. GARCIA, 463 So.2d 528 (Fla. 3d DCA 1985), a minor child, through her parents, sued her attorneys for legal malpractice when they allegedly permitted the statute of limitations to expire against medical malpractice defendants. The Third District held that the plaintiffs had no cause of action for legal malpractice so long as the underlying medical malpractice action, out of which the legal malpractice claim arose, was still pending either in the trial court or on appeal.

Finally, in ABBOTT v. FRIEDSAN, 682 So.2d 597, 599 (Fla. 2d DCA 1996) fn.1, the Second District stated "...in Florida the statute of limitations for legal malpractice generally does not begin to run...until the legal proceeding which underlies the malpractice claims has been "finalized", by appeal if necessary". Obviously, if an appeal is not necessary, the statute begins to run when the underlying trial court litigation is finalized. That is when redressable harm occurs.

Under the above cases, "redressable harm" giving rise to a cause of action for legal malpractice is established when the underlying litigation in which the attorney's errors or omissions were committed occurred, is "entirely resolved", "concluded", "finalized", or is no longer "pending", and that does not occur until final judgment is entered. In this case, Silvestrone's antitrust lawsuit was not entirely resolved or finalized until the Final Judgment was entered, and that is when his redressable harm occurred. His lawsuit for malpractice was filed within one year thereafter, well within the two year statute of limitations, and therefore it was timely.

D **The Fifth District's Decision that the Statute of Limitations for Legal Malpractice Predicated on Litigational Errors Begins to Run From the Verdict Rather Than the Final Judgment, Where no Appeal has been filed from that Judgment, Deprives Litigants of Well-Established Rights**

First, as Judge Sharp pointed out in her dissent, Silvestrone only had 13 [actually 23] days after entry of the Final Judgment in the antitrust lawsuit to sue his trial attorney for legal malpractice (A9). Section 95.11(4) Fla. Stat. gives Silvestrone two years to file that lawsuit, not 23 days. Accordingly, the Fifth District's decision that the statute of limitations runs from the verdict deprives litigants of the statutory right provided them by §95.11(4) Fla. Stat.

Second, a party has 30 days until after a final judgment is entered to decide whether to appeal that judgment. If he decides not to appeal, but instead to sue his lawyer for malpractice committed in that litigation, under the Fifth District's ruling ,his decision not to appeal dictates that the statute of limitations began to run from a retroactive date, i.e., entry of the verdict. As applied here, Silvestrone's decision in February, 1992 not to appeal the

antitrust Final Judgment meant that his statute of limitations for malpractice began to run two years earlier in February, 1990. That constitutes a retroactive deprivation of rights.

Third, because the Fifth District ruled that the statute of limitations runs from the verdict, the statute of limitations expired seven days before expiration of the 30-day period within which Silvestrone had to appeal the antitrust Final Judgment. The Fifth District acknowledged in its opinion that if an appeal is filed in the underlying lawsuit in which the claimed malpractice took place, the statute of limitations for legal malpractice does not begin to run until that appeal is decided. EDWARDS v. FORD, 279 So.2d 851 (Fla. 1973). The problem is that here, according to the Fifth District's ruling that the statute runs upon entry of the verdict, the statute expired on February 27, 1992, before the thirtieth day for filing an appeal (the last day was March 3, 1992). Therefore, under the Fifth District's ruling, an appeal would necessarily have to revive an already expired statute of limitations if EDWARDS v. FORD, supra, is to have any effect. This is impossible under IN RE ESTATE OF SMITH, 685 So.2d 1206 (Fla. 1996), where this Court has previously held that once a claim has been extinguished by the applicable statute of limitations, the claim cannot be revived because a constitutionally protected property right to be free from the claim has vested in the defendant. The effect of the Fifth District's decision creates an obvious conflict between EDWARDS v. FORD and IN RE ESTATE OF SMITH which cannot be resolved.

<u>II</u> EVEN ASSUMING THE STATUTE OF LIMITATIONS BEGAN TO RUN FROM THE VERDICT, THE STATUTE OF LIMITATIONS WAS TOLLED UNDER THE CONTINUOUS REPRESENTATION DOCTRINE WHILE THE TRIAL ATTORNEY CONTINUED TO REPRESENT SILVESTRONE IN THE ANTITRUST LAWSUIT

The Fifth District found that the continuous representation doctrine was "one with some appeal" but that it was not presented below, and therefore would not be considered (A3-4). The Court was wrong in finding that the argument was not presented below. While the words "continuous representation doctrine" were never used, the argument was made (T21). At the hearing on the Motion for Summary Judgment, Silvestrone's attorney referred to the Florida Supreme Court's opinion in PEAT, MARWICK, MITCHELL & CO. v. LANE, 565 So.2d 1323 (Fla. 1990), which had held that requiring clients to sue their attorney for malpractice while he was still representing them in tax court "would have placed them in the wholly untenable position of having to take directly contrary positions in these two actions. <u>Id</u>. at 1326. Silvestrone's attorney argued (transcript of hearing, p.21-22):

> And one of the things that concerned the Court in that case was the prospect of the client -- and in this case, Mr. Silvestrone -- would have to sue the lawyer -- sue the firm that was prosecuting his entitlement to something; and, of course, in the *Peat Marwick* case it was the entitlement to a deduction that had been disallowed by the I.R.S.
>
> In this case we provided the Court with the docket sheet because I think it's significant to show that Mr. Silvestrone was not simply sitting back waiting for the time to elapse. There was a lot of stuff going on in this case of a litigational nature, the most significant of which is the attorneys fee award.

> To put him in the position that he would have to have sued his lawyer for litigational mistakes while at the same time that same lawyer was before the Federal District Court asking to be reimbursed for his fees would put Mr. Silvestrone in exactly the same position that the Lanes had in the *Peat Marwick* case, and that would not further any, any judicial goals of economy or efficiency or anything else. We would have a very difficult situation to be in.

The above demonstrates that an argument based on the "continuous representation doctrine" was preserved below. Accordingly, even assuming Silvestrone's cause of action for malpractice accrued when the jury verdict was returned, the continuous representation doctrine tolled the running of the statute of limitations so long as Silvestrone's trial attorney was still representing him post-trial in the antitrust lawsuit. Case law throughout the country holds that the statute of limitations on an action for legal malpractice is tolled until the date the attorney ceases to represent the client on the specific matter in which the malpractice allegedly occurred, despite the client's awareness of the attorney's negligence. 7 Am.Jur2d Attorneys at Law §243.

Florida law is in accord. In SMITH v. HUSSEY, 363 So.2d 1138 (Fla. 2d DCA 1978), the trial court granted summary judgment for an attorney in a malpractice lawsuit finding that the client became aware of his attorney's alleged negligence more than two years before he sued. The Second District reversed since the attorney had continued to represent the client even after the client was aware his property rights were in jeopardy because of his attorney's alleged negligence.

In HAMPTON v. PAYNE, 600 So.2d 1144 (Fla. 3d DCA 1992), an attorney represented a police officer in seeking a disability pension. The application was denied in 1977, but no appeal was taken. Later that year, the police officer was notified she was being terminated and, after an administrative hearing, she was in fact terminated, and again, no appeal was taken. The police officer sought to have the Civil Service Board reinstate her, but it determined it lacked jurisdiction because the police officer had not appealed her dismissal. Eight months later she discharged her attorney and retained a new attorney to represent her in a declaratory judgment action. She lost that lawsuit, and the appellate court affirmed in part because she had waived her right to challenge the denial of a disability pension by not appealing the adverse administrative ruling. In March, 1989, the police officer sued her former lawyer for malpractice. The trial court dismissed the action as barred by the statute of limitations. The Third District affirmed solely because it held that the continuous representation rule only tolled the two year statute of limitations up until the date the police officer discharged her lawyer. In this case, the trial attorney did not cease representing Silvestrone until after the Final Judgment in the antitrust case was entered. Accordingly, up until that point the statute of limitations for legal malpractice was tolled.

In WILDER v. MEYER, 779 F.Supp 164 (SD Fla. 1991), an investor sued his attorney for negligence and breach of fiduciary duty, among other counts, in rendering services to the investor regarding his taxes by advising him to make investments in tax shelters, which turned out to be highly speculative, unbeknownst to the investor. The court held that even though the investor had knowledge of a problem with some of the investments

by June, 1984, his lawsuit for legal malpractice against his attorney filed October 3, 1988 was timely. The court held that the two year statute of limitations was tolled by the continuing representation doctrine because the attorney continued to represent the plaintiff with regard to tax issues and communications with the IRS on the tax shelters up until he was sued for malpractice.

The District Court in WILDER relied upon BIRNHOLZ v. BLAKE, 399 So.2d 375 (Fla. 3d DCA 1981) for its ruling. In that case, the plaintiff hired an attorney to collect fees from a client for services rendered. The attorney filed suit but failed to prosecute the action for one year. A motion to dismiss was denied by the trial court, but reversed by the Third District. The attorneys continued to represent the plaintiff until March 9, 1976, when the Florida Supreme Court denied review. Plaintiff sued his attorney on March 9, 1978 for legal malpractice. The trial court granted summary judgment to the attorney, ruling that the two year statute of limitations had run. The Third District reversed finding that the attorney had continued to represent and reassure the client that the matter would be resolved in his favor.

As stated by this Court in PEAT, MARWICK, MITCHELL & CO. v. LANE, supra at 1326 (Fla. 1990):

> If we were to accept that [the defendant/accountant's] argument, the Lanes would have had to have filed their accounting malpractice action during the same time that they were challenging the IRS's deficiency notice in their tax court appeal. Such a course would have placed them in the wholly untenable position of having to take directly contrary positions in these two actions. In the tax court, the Lanes would be asserting that the deduction Peat Marwick advised them to take was proper, while they would simultaneously argue in a circuit

> court malpractice action that the deduction was unlawful and that Peat Marwick's advice was malpractice. To require a party to assert these two legally inconsistent positions in order to maintain a cause of action for professional malpractice is illogical and unjustified.

As in PEAT, MARWICK, if Silvestrone was required to sue his trial attorney while the attorney was attempting to obtain attorney's fees for him, that would send a message to the judge in the antitrust lawsuit that Silvestrone felt his attorney's services were rather worthless. It would defeat Silvestrone's contention that the court should award a fee covering all of his attorney's services, so that Silvestrone would not be responsible for any portion thereof not covered by the court-awarded fee.[6] As in PEAT, MARWICK, requiring Silvestrone to sue his trial attorney before the antitrust lawsuit was entirely concluded , or finally and fully resolved, required him to take inconsistent positions, which is illogical and unjustified.

Based upon the above cases, so long as Silvestrone was continuing to be represented by his trial attorney in the antitrust lawsuit, the statute of limitations was tolled by the continuous representation doctrine. Silvestrone's rights and liabilities in the antitrust lawsuit were not fixed or finally concluded until that litigation was concluded by entry of the Final Judgment. The post-trial matters determined by the court, after entry of the verdict, affected the amount of the judgment ultimately entered in Silvestrone's favor because it trebled the

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[6]/In fact, the trial attorney filed a charging lien against Silvestrone and Teal's compensatory damages to cover his unpaid attorney's fees (R64-65, docket entries 233-35,255). The record does not reflect how much Silvestrone and Teal owed the trial attorney over and above the amount of their jury's verdicts, which their trial attorney attached.

amount awarded by the jury and also awarded substantial attorney's fees and costs. Since Silvestrone's trial attorney continued to represent him during the two year period in between the verdict and the Final Judgment, the statute of limitations was tolled under the continuous representation doctrine, discussed supra.

CONCLUSION

Based upon the foregoing, the Fifth District's decision which affirms the Summary Judgment entered against Silvestrone based on the statute of limitations should be reversed. Silvestrone's lawsuit for legal malpractice should be allowed to proceed since under the various theories discussed, supra, it was timely filed within the two year statute of limitations.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true copy of the foregoing was furnished by mail this 23rd day of MARCH, 1998, to: DARRYL M. BLOODWORTH, ESQ., P. O. Box 2346, Orlando, FL 32802.

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