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 BRIEF ON JURISDICTION

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PREFACE

This is a Petition to Invoke the Court's discretionary jurisdiction to review an opinion of the Fifth District Court of Appeal which directly and expressly conflicts with opinions of this Court and of other Florida intermediate appellate courts. The parties will be referred to as they stood in the lower court or by proper name. The following symbol will be used:

(A) - Petitioner's Appendix

STATEMENT OF THE CASE AND FACTS

Art Silvestrone filed a federal antitrust lawsuit. The jury returned a verdict finding in his favor on February 27, 1990, but awarding him a minimal amount of damages (A1-2). The other plaintiff in the case filed post-trial motions, but Silvestrone did not, although his attorney's Motion for Attorney's Fees was pending post-trial (A2). Because of these motions, a Final Judgment on the jury verdict and for attorney's fees was not entered for Silvestrone until February 4, 1992, almost two years after the verdict (A2).

Silvestrone did not appeal the Final Judgment entered in the antitrust lawsuit. However, within two years of entry of that judgment, Silvestrone filed a legal malpractice action against the attorney who had represented him in that lawsuit (A1-2). The trial court granted Summary Judgment to the defendant-attorney in the legal malpractice action, finding that the two year statute of limitations ran from the entry of the verdict, rather than the Final Judgment, in the antitrust lawsuit (A2). That meant Silvestrone had only 23 days after entry of that judgment to sue his attorney. It also meant that the statute of limitations expired 7 days before expiration of the 30-day period to appeal the Final Judgment.

The Fifth District affirmed concluding that since Silvestrone had not appealed the Final Judgment in the antitrust lawsuit, "when the jury returned its verdict the statute of limitations started running at that time" (A3). The Court's dissenting opinion concluded that the statute of limitations ran from entry of the Final Judgment under the facts of the

case and Florida case law, and also for public policy reasons because a conclusion otherwise constituted a virtual trap for the litigant (A5-10).

SUMMARY OF ARGUMENT

The Fifth District's opinion creates an express and direct conflict with the decisions of this Court and with other District Courts which hold that the statute of limitations for legal malpractice predicated on errors or omissions committed in the course of litigation does not begin to run until that litigation is concluded by Final Judgment, or an appeal if necessary. Under the Fifth District's ruling, entry of a verdict starts the statute of limitations running where no appeal is filed in the underlying litigation. That ruling resulted in the type anomaly that occurred here. With the verdict as the guidepost, the statute of limitations expired 23 days after the Final Judgment was entered, and 7 days before Silvestrone's time to appeal the Final Judgment had run. The Fifth District admitted that under established case law if an appeal is filed from the Final Judgment, the statute of limitations does not begin to run until the appeal process is concluded. However, 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 on February 27, 1992. If an appeal had been filed thereafter up until the thirtieth day of the appeal period, or March 3, 1992, it would necessarily have to revive the already expired statute of limitations, which is impossible. This anomaly was occasioned by the Fifth District's use of entry of the verdict, rather than the Final Judgment, to begin the running

of the statute of limitations. The Fifth District's ruling directly and expressly conflicts with the other Florida appellate decisions cited herein, and this Court should exercise its jurisdiction to resolve that conflict.

QUESTION PRESENTED

THE FIFTH DISTRICT'S DECISION THAT THE STATUTE OF LIMITATIONS IN A LEGAL MALPRACTICE CASE BEGINS TO RUN FROM ENTRY OF VERDICT IN THE LITIGATION GIVING RISE TO THE LEGAL MALPRACTICE, WHERE NO APPEAL IS FILED IN THAT LITIGATION, DIRECTLY AND EXPRESSLY CONFLICTS WITH CASE LAW WHICH HOLDS THAT THE STATUTE BEGINS TO RUN FROM ENTRY OF FINAL JUDGMENT IN THE UNDERLYING LITIGATION

ARGUMENT

A) The Fifth District Misconstrued and Misapplied this Court's Opinion in EMPLOYERS' FIRE INS. CO. v. CONTINENTAL INSURANCE CO., 326 So.2d 177 (Fla. 1976)

The Fifth District has announced "that when the jury returned its verdict, he [Silvestrone] had all the information necessary to establish his cause of action,...and the statute of limitations started running at that time" (A3). The court incorrectly came to the conclusion that that was what this Court held in EMPLOYERS' FIRE INS. CO. v. CONTINENTAL INS. CO., 326 So.2d 177 (Fla. 1976). The Fifth District's opinion presents an express and direct conflict with EMPLOYERS' FIRE because it accepts that

case as controlling precedent, but then attributes to it a patently erroneous and unfounded principle of law, PINKERTON-HAYS LUMBER CO. v. POPE, 127 So.2d 441 (Fla. 1961), and/or misapplied the law established by EMPLOYERS' FIRE, which likewise presents a direct and express conflict. WALE v. BARNES, 278 So.2d 601 (Fla. 1973).

EMPLOYERS' FIRE involved a bad faith lawsuit against an insurer for failure to defend its insured which resulted in a verdict and judgment against the insured. The issue was whether the statute of limitations on the bad faith lawsuit ran from the moment the judge signed the minute book entry of the verdict or whether it ran from the later entry of the final judgment against the insured. This court held that:

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

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 which determines the "rights and liabilities" of parties with reference to the matters in controversy and leaves nothing of judicial character to be done.

A number of District Courts have ruled that the "finally and fully adjudicated" requirement of EMPLOYER'S FIRE INS. occurs when judgment is entered and the

litigation ends.[1] 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 dealing specifically 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 Second District held 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.[2] In SPIVEY v. TRADER, 620 So.2d 212 (Fla. 4th DCA 1993), the Fourth District also held that a legal malpractice

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[1]/Interestingly enough, in ELDRED v. REBER, 639 So.2d 1086 (Fla. 5th DCA 1994), the Fifth District discussed the inception date of the statute of limitations in a litigational malpractice action where the underlying action had or had not been appealed. In the latter situation, the Fifth District in ELDRED interpreted the "finally and fully adjudicated" language in EMPLOYERS' FIRE INS. to "coincide with the definition of the term 'rendition'" in Florida Rule of Appellate Procedure 9.020(g) which requires a final order. Obviously, the Fifth District's decision in ELDRED v. REBER conflicts with its decision in this case.

[2]/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).

action accrued, and the two-year legal malpractice statute of limitations began to run, when judgment was entered against the client in supplementary proceedings. Likewise, in WILKERSON v. STERNSTEIN, 558 So.2d 516 (Fla. 1st DCA 1990), the First District held that the statute of limitations in a malpractice action did not begin to run until judgment was entered against the client. These cases conflict with the Fifth District's opinion in this case that entry of the verdict in the underlying litigation, rather than entry of the final judgment, began the running of the statute of limitations for legal malpractice.

B) The Fifth District's Opinion Likewise Directly and Expressly Conflicts with Cases Holding that a Cause of Action for Legal Malpractice Does Not Accrue Until the Existence of Redressable Harm Has Been Established

In PEAT, MARWICK, MITCHELL & CO., v. LANE, 565 So.2d 1323, 1325 (Fla. 1990), this Court held that a cause of action for legal malpractice does not accrue until: (1) the existence of a redressable harm or injury has been established, and; (2) the injured party knows or should know of either the injury or the negligent act. Both factors are required in order for the limitations period to begin running. ZITRIN v. GLASER, 621 So.2d 748, 750 (Fla. 4th DCA 1993). In BIERMAN v. MILLER, 639 So.2d 627, 628 (Fla. 3d DCA 1994), the Third District held 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. Likewise, in ZUCKERMAN v.

RUDEN, BARNETT, McCLOSKEY, 670 So.2d 1050, 1051 (Fla. 3d DCA 1996), the Third District acknowledged that the test for determining when a legal malpractice cause of action has occurred is based on the establishment of redressable harm, and then concluded that only when the underlying litigation giving rise to the malpractice action "has been entirely resolved will the statute of limitations on the malpractice action begin to run". And 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".

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" or "finalized", and that does not occur until final judgment is entered. The Fifth District's ruling that the statute of limitations runs from entry of the jury's verdict is directly and expressly contrary to these cases.

C) The Fifth District's Opinion is Contrary to This Court's Ruling that Once a Claim Has Been Extinguished By the Statute of Limitations, the Claim Cannot Be Revived

The Fifth District acknowledges that, if an appeal is filed, the statute of limitations for legal malpractice does not begin to run until the underlying lawsuit in which the claimed malpractice took place has been finally decided on appeal. 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 to 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 needs to be resolved

CONCLUSION

The conflict of decisions presents an important opportunity for the Court to clear up the existing conflict regarding when the statute of limitations runs in a legal malpractice case, where no appeal is filed in the underlying litigation giving rise to the legal malpractice cause of action. The Fifth District held that the statute of limitations runs from the entry of the verdict, whereas this Court and other Florida intermediate appellate courts have held that the statute runs from entry of the final judgment in the underlying litigation. The Court should resolve this conflict to add certainty and uniformity in the law for the benefit of both litigants and attorneys.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true copy of the foregoing was furnished by mail this 12th day of JANUARY, 1998 to: DARRYL M. BLOODWORTH, ESQ., P. O. Box 2346, Orlando, FL 32802.

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