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.

JURISDICTION BRIEF OF RESPONDENTS

DARRYL M. BLOODWORTH
Florida Bar Number: 141258
NICHOLE M. MOONEY
Florida Bar Number: 057908
DEAN, MEAD, EGERTON, BLOODWORTH,
CAPOUANO & BOZARTH, P.A.
P.O. Box 2346
Orlando, Florida 32802-2346
Phone: 407/841-1200

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I. STATEMENT OF THE CASE AND FACTS.

Respondents agree with and adopt Petitioner's Statement of the Case and Facts except as follows. Although Petitioner was victorious at trial and was awarded treble damages as well as attorneys' fees, he was unhappy with the result of the trial. Petitioner believed that Respondents committed malpractice during the course of the trial, regarding the issue of damages.[1] Petitioner knew of the alleged malpractice and believed he had been damaged when the jury returned its verdict. (A, 2).[2] During and immediately after trial, Petitioner consulted with a lawyer about bringing a malpractice action against Respondents. (A, 2). Furthermore, after the trial, Petitioner instructed Respondents not to move for additur or new trial, and not to appeal. (A,2). These were the only actions which might have corrected the alleged negligence and thereby delayed the statute of limitations. (A, 2). Petitioner's only post trial motions related to recovery of attorneys' fees.[3] The motions for attorneys' fees and the post trial motions of the other plaintiff, Glenn Teal, delayed the entry of the final judgment for approximately two years after the jury's verdict. (A, 2).

The Fifth District held that in this case the statute of limitations began to run on Petitioner's malpractice claim when he knew of his alleged injury and instructed Respondents not to pursue any actions which might remedy that injury. (A, 3). Petitioner admitted he was aware of the facts giving rise to his claim for legal malpractice at the conclusion of the underlying

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[1]Specifically, Petitioner believed Respondents should have requested more damages at trial and hired an economist as an expert, even though he acknowledged that no economist could predict his damages.

[2]Respondents will refer to citations in Petitioner's Appendix attached to Petitioner's Brief on Jurisdiction. Such citations will be designated as "(A, p. #)."

[3]The issue of attorneys' fees was not part of Petitioner's claim for malpractice.

federal court trial. (A, 2-3). Indeed, he sought legal advice about his claim. Nevertheless, Petitioner did not bring his legal malpractice claim for over three years after he discovered it.

The trial court granted summary judgment because the statute of limitations had run before Petitioner filed his malpractice complaint. The Fifth District affirmed, finding that Petitioner sued upon specific acts of alleged malpractice which occurred before and during trial, and of which Petitioner had full knowledge. (A, 2). Judge Sharp dissented, and concluded 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).

II. SUMMARY OF THE ARGUMENT.

There is no conflict between the Fifth District's opinion in this case and decisions of this Court or other district courts. The Fifth District's opinion was based upon the specific facts in this case. It ruled that the statute of limitations on Petitioner's legal malpractice claim started to run upon entry of the jury's verdict because Petitioner then knew or should have known of his cause of action, and redressable harm existed.

The Fifth District properly interpreted and applied this Court's decisions to the facts at hand. Following opinions of this Court, the Fifth District refused to impose a bright line rule which would always require entry of final judgment or decision on appeal before the statute of limitations for legal malpractice actions begins to run. Further, the Fifth District recognized that under the peculiar facts presented, redressable harm was established at the time of the jury's verdict. Petitioner precluded any act which might cure the damage which allegedly resulted from Respondents' alleged malpractice before and during trial. The Fifth District recognized that Petitioner, by his own acts, thereby precluded any action which might delay the establishment

of redressable harm and, thus, the running of the statute of limitations. Finally, although Petitioner argues that the statute of limitations period expired before the appeal period expired under the Fifth District's opinion, the fact is that no appeal could have been taken based on Petitioner's own actions. Reviewing these facts, the Fifth District determined that Petitioner's cause of action accrued on the date of the jury's verdict, when he had knowledge of his alleged injury. Under the language of the statute, the limitations period began to run at that time.

Based upon the facts of this case there is no direct or express conflict with either this Court's decisions or the decisions of other Florida District Courts of Appeal. Therefore, this Court does not have jurisdiction.

III. LEGAL ARGUMENT.

A. There is no conflict between the Fifth District's opinion and this Court's opinion in Employers' Fire.

Petitioner first argues that the Fifth District misconstrued and misapplied this Court's opinion in Employers' Fire Ins. Co. v. Continental Ins. Co., 326 So. 2d 177 (Fla. 1976). However, it is Petitioner who ascribes an incorrect interpretation of the Employers' Fire case to the Fifth District's opinion.

The Florida Legislature 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, Petitioner knew of the alleged acts of malpractice and his alleged damages. He consulted an attorney regarding a malpractice claim both during and immediately after the trial. Petitioner also instructed Respondents not to take any action, including an appeal, which might cure or

mitigate the consequences of the alleged malpractice. Petitioner thereby precluded the only acts which could have delayed the commencement of the statute of limitations.

In Employers' Fire, the Supreme Court specifically addressed the question of when the statute of limitations begins to run where there is no appeal.

> ...[W]e 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.

Employers' Fire, 326 So. 2d at 181 (emphasis added). The Court also said, as noted in the Fifth District's opinion:

> 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.

Id. By this language, this Court specifically recognized that the entry of a final judgment is not necessary to begin the running of the statute of limitations.

Petitioner requests that this Court establish a bright line, wooden rule that no claim for legal malpractice may accrue before the entry of the final judgment. Petitioner argues that this must be the rule even where there has been an adjudication of liability but entry of final judgment is delayed. However, such a rule is contrary to the statute itself 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 begins to run.

As the Fifth District noted, once the jury returned its verdict and Petitioner directed Respondents not to seek additur, move for a new trial, or file an appeal, Petitioner had all the information necessary to sue Respondents. The statute of limitations began to run at that time. (A, 3).[4] To delay the commencement of the statute of limitations under the facts of this case until entry of final judgment would be to directly contravene this Court's rejection of the bright line rule. The Fifth District did not misapply or misinterpret Employers' Fire.

Petitioner also relies on McGurn v. Scott, 596 So. 2d 1042, 1043 (Fla. 1992) for the proposition that only a final judgment or final order determines the rights and liabilities of a party. McGurn does not even address the statute of limitations issue. Further, McGurn found that the issue of costs and attorneys' fees may be adjudicated after final judgment and that the reservation of jurisdiction to award costs or attorneys' fees does not affect the finality of an underlying judgment. Id. at 1044. Thus, McGurn does not support Petitioner's theory.[5]

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[4]In fact, if Petitioner had brought this malpractice claim in 1990 or 1991, Respondents could not have claimed that the suit was premature. 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).

[5] Petitioner also cites Grissom v. Commercial Union Ins. Co., 610 So. 2d 1299 (Fla. 1st DCA 1992) for the proposition that a final judgment is necessary in order for a case to be "finally and fully adjudicated." This case does not address legal malpractice. However, as Petitioner notes, the court stated, "Ordinarily, the statutory time commences on the date when judgment was entered and the litigation has come to an end." Id. at 1309. According to the facts on the record, this is not the ordinary case.

Likewise, the cases which Petitioner cites for the proposition that the statute of limitations for legal malpractice begins to run only when the litigation is concluded by final judgment are inapplicable. For example, in Zakak v. Broida & Napier, P.A., 545 So. 2d 380 (Fla. 2d DCA 1989), there was no jury verdict awarding damages; rather, there was a dispute over the attorney's authority to settle the case. In the present case, Petitioner's alleged damages resulted from the entry of the jury's verdict, yet Petitioner precluded any actions which might cure the alleged damage. In addition, even the Zakak court acknowledged that the limitations period in a legal malpractice action begins to run upon entry of final judgment or an appellate decision, "Unless the facts of the case clearly show that the legal malpractice was or should have been discovered at an earlier date..." Zakak, 545 So. 2d at 381 (citing Sawyer v. Earle, 541 So. 2d 1232 (Fla. 2nd DCA 1989)) (emphasis added).[6]

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 address situations similar to the instant action. As noted by the Fifth District, Petitioner was not suing on the final judgment, but on "specific acts of alleged malpractice, which to his knowledge, occurred long before the entry of the final judgment." (A, 2) (emphasis added). By his own admission, Petitioner knew of the alleged malpractice during and immediately after the trial and consulted a lawyer regarding a malpractice claim. Clearly, Petitioner could have filed his malpractice action shortly after the jury's verdict because the verdict resulted in his alleged damages and concluded all judicial labor

[6] Sawyer v. Earle was disapproved by Peat, Marwick, Mitchell & Co. v. Lane, 565 So. 2d 1323 (Fla. 1990) to the extent Sawyer conflicted with that decision. However, the Peat, Marwick Court distinguished Sawyer, noting that in that 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 and proceeded upon that advice. Id. at 1327.

to be done with respect to his alleged damages.[7] Based on these undisputed facts, this case does not conflict with other district court opinions. The Fifth District properly determined, in accord with Employers' Fire, that the statute of limitations began to run from the time the jury verdict allegedly creating Petitioner's damages was rendered. Because no conflict exists, this Court does not have jurisdiction over this issue.

B. The Fifth District's opinion does not conflict with cases holding there is no legal malpractice action until redressable harm is established.

Petitioner also relies on Peat, Marwick, which held that a cause of action for malpractice does not accrue until the existence of redressable harm or injury has been established and the injured party knows or should know of the injury or negligent act. No conflict between this opinion and Peat, Marwick exists.

In Peat, Marwick an appeal was taken. The issue in that case was whether the injury occurred when the Internal Revenue Service challenged the Lane's tax returns, or when the tax court ruled on the appeal. Unlike Peat, Marwick, Petitioner in the present case knew of the alleged injury at the time of the jury's verdict. As noted above, Peat, Marwick distinguished Sawyer v. Earle on these very grounds. Petitioner's redressable harm was established by the jury's verdict because he precluded every motion or appeal which might cure his alleged injury, and knew of his actual harm.[8] In Peat, Marwick, however, the clients thought their accountant's

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[7]Although Petitioner's damages were trebled, the judge has no discretion in trebling the jury verdict's award; once the jury verdict is rendered, the damages are automatically trebled under the applicable antitrust law. See 15 U.S.C. § 15(a); Fla. Stat. § 542.22(1). Thus, the act of trebling damages was simply a ministerial act and did not affect the finality of the judgment.

[8]Florida law is clear that a plaintiff must only know of the facts giving rise to a cause of action for 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, Marteno, McBane &

advice was correct and appealed; they had no knowledge of actual harm. Thus, Peat, Marwick does not address facts similar to this case and does not conflict with the Fifth District's ruling.

Likewise, the other cases relied upon by Petitioner are not in conflict with the instant case. For example, in Zuckerman v. Ruden, Barnett, McClosky, Smith, Schuster & Russell, P.A., 670 So. 2d 1050 (Fla. 3d DCA 1996), Zuckerman sued the Ruden, Barnett firm based on possible malpractice stemming from a problematic foreclosure action. However, Zuckerman could not establish redressable harm until the foreclosure action was resolved, and therefore his action was not barred by the statute of limitations. 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. However, the validity of the agreement was being litigated at the time the malpractice action was brought. Thus, no redressable harm had yet been established and the malpractice action was premature.

Here, however, nothing remained to be resolved after the jury's verdict. The only actions which could have changed Petitioner's alleged harm were actions which he specifically prohibited. Therefore, redressable harm was established upon entry of the jury verdict. No conflict exists.

C. The Fifth District's opinion does not conflict with cases holding that a cause of action cannot be revived by appeal.

Finally, Petitioner argues that the Fifth District's decision creates an obvious conflict with Edwards v. Ford and In re: Estate of Smith. However, Petitioner's own statement acknowledges that the delay of the statute of limitations by appeal applies only "if an appeal is filed." (Petitioner's Brief, 8); see Edwards v. Ford, 279 So. 2d 851 (Fla. 1973).

O'Connell, P.A., 659 So. 2d 1134, 1136 (Fla. 4th DCA 1995).

Petitioner argues that if the statute began to run before the final judgment was entered, then the limitations period for the legal malpractice action expired before the time for filing an appeal on the jury's verdict expired. Therefore, Petitioner argues, the Fifth District's ruling would necessarily require an appeal to revive the already expired cause of action, contravening In re: Estate of Smith, 685 So. 2d 1206 (Fla. 1996). However, the Fifth District addressed this argument.

> But [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 after 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, 2-3) (emphasis added).

The Fifth District's opinion is not in conflict with either Edwards 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. By his own actions Petitioner precluded any appeal and thereby established his redressable harm as of the date of the jury's verdict. The fact that the statute of limitations could have expired before the time for appeal expired is not relevant where the facts of this case establish that no appeal was taken or would be taken. Furthermore, in Employers' Fire this Court plainly stated that to expand the statute of limitations period by the 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 complied with this Court's ruling in Employers' Fire; it recognized that the only reason for delaying the action until final judgment or a decision on appeal is so that the offending judgment might be reversed and cure the client's alleged damages. See also Drake v. Simmons, 583 So. 2d 1074, 1075 (Fla. 5th DCA 1991). Where this is not the case, such as here, there is no reason for the delay.

CONCLUSION

Petitioner disregards the peculiar facts of this case and attempts to manufacture a conflict with Florida law in order to establish jurisdiction for this Court. Petitioner knew of his claim as of the date of the jury's verdict, consulted a malpractice attorney, but did nothing to pursue it for over three years. He instructed Respondents not to take any action which could possibly have cured the alleged malpractice. Petitioner should not now be able to expand the two year statute of limitations period established by the Florida Legislature and Florida case law. For these reasons, there is no conflict to be resolved, no break in the uniformity of the case law regarding the statute of limitations in legal malpractice actions, and this Court is without jurisdiction.

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 4th day of February, 1998.

DARRYL M. BLOODWORTH
Florida Bar No. 141258
NICHOLE M. MOONEY
Florida Bar No. 057908
Dean, Mead, Egerton, Bloodworth,
Capouano & Bozarth, P.A.
800 N. Magnolia Ave., Suite 1500
Post Office Box 2346
Orlando, Florida 32802-2346
Telephone: (407) 841-1200
Fax: (407) 423-1831

Attorneys for Respondents

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