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 REPLY BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Defendants have stated the facts in a light most favorable to them, which only emphasizes that there are conflicts in the evidence which a jury should be allowed to resolve on the malpractice issue.

Defendants state in footnote 4 that Silvestrone wrote a December 26, 1989 letter to his trial attorney stating that he insisted upon hiring the experts himself so he could control the costs. Defendants also state that Silvestrone suggested they hire Dr. Goetz, among others, but Dr. Goetz could not be of assistance to Silvestrone. These statements must be put in context. Silvestrone's trial attorney wrote him a December 20, 1989 letter stating that the judge had denied his Motion to Withdraw and that "I am most disturbed by the fact that I have to continue to represent you" (Milbrath depo, Defs Ex#8). In a December 22, 1989 letter he refused to schedule any experts unless Silvestrone contacted him "immediately with regard to the billing arrangements" (Milbrath depo, Defs Ex#9). It was only after Silvestrone received that letter that he wrote the December 26, 1989 letter stating that if expert witnesses were needed, he wanted to hire them himself so that he can control the costs. He suggested two potential expert economists, Jim Lichtblat of Princeton University and Charles Goetz, a professor at the University of Virginia Law School (Milbrath depo, Defs Ex#11). His letter stated: "I would

appreciate your considering these two individuals and letting me know as well which experts you wish to use...” (Milbrath depo, Defs Ex#11).

On February 8, 1990, Silvestrone once again wrote his trial attorney and stated that some time ago he had suggested that they hire Dr. Goetz “or some other market structure economist” but he (the trial attorney) had failed to hire an economist. Silvestrone was very concerned because PGA had listed an economist as an expert witness for the trial (Milbrath depo, Defs Ex#20). In response to that letter, his trial attorney wrote back that “it is impossible to represent a client who lies to you” (Milbrath depo, Defs Ex#25). Even though Silvestrone’s prior letter had requested him to hire an economist, his attorney’s response was that if Silvestrone would recommend one “I would be happy to speak with him” (Milbrath depo, Defs Ex#25). These documents indicate that whether or not Professor Goetz thought he could be of any assistance to Silvestrone is irrelevant. Goetz was not the only economist around. Silvestrone was asking his trial attorney to hire some economist, but he never did.

In footnote 6, Defendants state that Judge Sharp incorrectly concluded that the federal judge could have granted a new trial to Silvestrone in the anti-trust case up until the Final Judgment was entered. Defendants cite a United States Supreme Court case dealing with orders granting judgments not withholding the verdict,

not new trials. Defendants have apparently overlooked Rule 59(d) of the Federal Rules of Civil Procedure which provides that not later than 10 days after entry of a judgment the court "of its own initiative" may order a new trial for any reason it might have granted a new trial if such motion had been filed by a party. Clearly, that rule gave the federal judge the right to grant a new trial, even though Silvestrone did not file a motion for new trial. In fact, in HABER v. NASSAU COUNTY, 557 F.2d 322 (C.A. NY 1977), the court held that a district judge has a broad discretion in ordering a new trial, as distinguished from his power to enter judgment notwithstanding the verdict. It is clear that a new trial can be granted on the court's own initiative without a motion being filed. PRUITT v. HARDWARE DEALERS MUTUAL FIRE INS. CO., 112 F.2d 140 (C.C.A. Ga. 1940).

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

Defendants argue that EMPLOYERS FIRE INS. CO. v. CONTINENTAL INS. CO., 326 So.2d 177 (Fla. 1976) recognized that entry of a Final Judgment was not necessary to begin the running of the statute of limitations. However, that was solely because in that

case a minute book entry by the court incorporated all of the information that was contained in the subsequently entered final judgment. That fact is lacking in this case. EMPLOYERS FIRE did not hold, nor has any other case in Florida ever held, that the statute of limitations runs from entry of a verdict.

Moreover, the jury verdict did not include all of the information necessary to constitute a final and full adjudication of a party's rights and liabilities, which was the standard used by this Court in EMPLOYERS FIRE. It was not a final adjudication in the sense that it did not finally adjudicate and resolve all issues between the parties. It did not resolve the attorney's fees and costs issues or the treble damages issue. Defendants argue that attorney's fees and costs are not elements of damages, and therefore there is a final adjudication even if those issues are not determined. However, Defendants admit that treble damages is an "element of damages" and that treble damages were not determined until the Final Judgment was entered. Defendants merely contend that the trebling of damages was nothing more than a ministerial act because under 15 U.S.C. §15(a), the federal court had no discretion but to treble the damages. Nonetheless, this Court held in McGURN v. SCOTT, 596 So.2d 1042, 1043 (Fla. 1992) that regardless of how ministerial the calculation of an element of damages might be, so long as that element of damages is not

decided, there is no final adjudication of the rights and liabilities of the parties.

Defendants argue that a ruling that the statute of limitations began to run in this case when the Final Judgment was entered, would be contrary to the language in §95.11(4) Fla. Stat. which provides that the limitation period begins to run when the Plaintiff knew or should have known of his cause of action. In fact, the language of the statute provides that the period of limitations runs from the time "the cause of action is discovered or should have been discovered". The key wording is "cause of action", since the statute does not provide that the statute of limitations runs from the time the professional negligence is discovered. Case law provides that a party's cause of action accrues when the plaintiff's rights are finally and fully adjudicated. While the Defendants continue to argue that in EMPLOYERS FIRE this Court held that that could occur irrespective of the entry of a Final Judgment, they ignore the fact that Silvestrone's rights were not finally and fully adjudicated in this case until the Final Judgment was entered. There is simply no escaping that fact. All issues between the parties were not "finally and fully adjudicated" until that document was entered.

Defendants argue in footnote 7 that the definition of "adjudicate" does not require entry of a final judgment. However, it does require a final resolution of all the issues between the

parties, and that did not occur here until the Final Judgment was entered.

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

Defendants attempt to distinguish the trebling of damages from a determination of prejudgment interest, discussed by this Court in McGURN v. SCOTT, supra. There is no distinction. In McGURN, this Court stated that regardless of how straightforward and ministerial the calculation of an element of damages might be, that element of damages was not ancillary to the cause of action, and therefore all the rights and liabilities of the parties were not determined until that element was determined. Defendants' argument is simply that treble damages, while an element of damages, required only ministerial judicial labor. McGURN establishes that even if nothing more than ministerial acts are required in calculating an element of damages, there has been no final adjudication of the rights and liabilities of the parties until that occurs.

Defendants attempt to distinguish the other cases cited at pages 12-17 of Silvestrone's main brief by simply arguing that the facts in those cases are dissimilar. Be that as it may, those cases hold that the statute of limitations runs from entry of a final judgment.

Defendants are simply wrong in arguing that full and final adjudication of Silvestrone's rights occurred as of the date of the

jury verdict. As previously stated, the District Court Judge could have granted a new trial, even though Silvestrone did not request one. The court did not determine attorney's fees, costs or treble damages until the Final Judgment was entered. There was clearly no full and final adjudication of Silvestrone's rights until the Final Judgment was entered. He sued his trial attorney for malpractice within one year thereafter.

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

Defendants argue that unlike PEAT, BARWICK, MITCHELL & CO. v. LANG, 656 So.2d 1323 (Fla. 1990), here Silvestrone knew of the alleged malpractice at the time of the jury's verdict. However, "redressable harm" had not been established, which occurred when the underlying action was concluded by judgment according to the cases cited at pages 17-21 of Silvestrone's main brief. Defendants attempt to distinguish those cases by simply arguing that in those cases redressable harm was not established, whereas in this case the jury verdict established redressable harm. Defendants' argument is simply contrary to the cases Silvestrone relies upon which have held that redressable harm is established when the underlying action is concluded by judgment.

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

Defendants argue that the Fifth District's decision in this case does not conflict with EDWARDS v. FORD, 279 So.2d 851 (Fla. 1973) and IN RE ESTATE OF SMITH, 685 So.2d 1206 (Fla. 1996) because, once the Final Judgment was entered Silvestrone could have elected to appeal, which would have extended the 13 days remaining for him to sue his trial attorney for legal malpractice until after

the appeal was concluded. However, what if he decided to appeal some time between February 28, 1992 (the day the statute of limitations ran) and March 3, 1992 (the last day for filing the appeal)? Under EDWARDS v. FORD, the statute of limitations would normally be tolled until the appeal was decided. However, since the statute of limitations had already expired, the subsequent filing of a timely appeal could not have tolled the statute of limitations until the appeal was concluded. In IN RE ESTATE OF SMITH, supra, this Court held that once a claim has been extinguished by the expiration of the statute of limitations, it cannot be revived. Obviously there is a conflict between the Fifth District's ruling in this case and the EDWARDS and SMITH cases.

II 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

Silvestrone stands on his contention that the continuous representation doctrine was raised at the hearing. Defendants claim that the PEAT MARWICK case, referred to by counsel for Silvestrone in his argument at the hearing, did not address the continuous representation doctrine. In fact, page 1326 of the PEAT MARWICK opinion states that if the court were to accept the argument that the cause of action for legal malpractice accrued prior to entry of the final judgment, the clients would be placed in the untenable position of having to sue their attorney for

malpractice while he was still representing them in the tax court. While PEAT MARWICK did not discuss the fact that the continuous representation of the attorney would toll the statute of limitations, it clearly recognized the fact that a client's cause of action for malpractice should not accrue while he is still being represented by his lawyer, which in effect is a reference to the continuous representation doctrine.

Additionally, Silvestrone's Memorandum in Opposition to Defendants' Motion for Summary Judgment raised the same argument he raised at the hearing. The Memorandum argued that if the limitations period ran from the verdict, he would have been required to file his malpractice claim against his trial attorneys at the same time he was relying upon them to litigate the remaining issues regarding the Final Judgment (R43).

Next, Defendants argue that Silvestrone failed to plead the doctrine of continuous representation as an avoidance of the statute of limitations defense. Defendants claim that this Court held in DOBER v. WORRELL, 401 So.2d 1322 (Fla. 1981) that "it was inappropriate to raise the continuing representation doctrine for the first time on appeal" (Respondents' brief p.39). Defendants are wrong. DOBER v. WORRELL concerned the doctrine of fraudulent concealment, not the continuing representation doctrine. The case had nothing to do with the continuing representation doctrine. Moreover, DOBER v. WORRELL merely stands for the proposition that

the failure to raise an affirmative defense in the trial court waives that defense. Here, it is Silvestrone's position that he sufficiently raised the continuous representation doctrine both at the hearing and in his Memorandum in Opposition to the Summary Judgment.

A statute of limitations defense requires no responsive pleading, and any fact which tends to defeat the affirmative defense is available to a plaintiff at trial. COURTLANDT CORP. v. WHITMER, 121 So.2d 57 (Fla. 2d DCA 1960). It has always been Silvestrone's position that the statute of limitations did not begin to run in this case until the Final Judgment was entered, which was also about the time Silvestrone's trial attorney ceased representing him. While some cases refer to the continuous representation doctrine as tolling the statute of limitations, other cases provide that the statute of limitations does not begin to run so long as the attorney is still representing the client. HAMPTON v. PAYNE, 600 So.2d 1144, 1146 (Fla. 3d DCA 1992). Accordingly, there was no reason for Silvestrone to file a reply to avoid the statute of limitations. His position was that the statute of limitations did not being to run until 1992, when the Final Judgment was entered and when his trial attorney's ceased representing him, and he filed his lawsuit for malpractice within a year thereafter, well within the statute of limitations period.

Defendants next contend that this Court rejected the continuous representation doctrine in KELLEY v. SCHOOL BOARD OF SEMINOLE COUNTY, 435 So.2d 804 (Fla. 1983) and that a number of District Courts have noted this Court's rejection of that doctrine. However, neither KELLEY nor any of the other cases cited by Defendants were cases involving legal malpractice and thus the continuous representation of a client by a fiduciary, as in this case. In contrast, the cases cited in Silvestrone's main brief all dealt with legal malpractice, and they all held that the continuous representation doctrine applies in such cases. Clearly while a fiduciary is continuing to represent his client, the continuous representation doctrine should apply.

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 11th day of MAY, 1998, to: DARRYL M. BLOODWORTH, ESQ., P. O. Box 2346, Orlando, FL 32802.

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