IN THE SUPREME COURT OF FLORIDA

CASE NO. 92,695

PEREZ-ABREU, ZAMORA &
DE LA FE, P.A. and ENRIQUE ZAMORA,

Petitioners,

3d DCA CASE NO. 97-989

vs.

MANUEL E. TARACIDO, MEDICAL
CENTERS OF AMERICA, INC.,
MEDICAL CENTERS OF AMERICA AT
SOUTH FLORIDA, and MEDICAL
CENTERS OF AMERICA AT CENTRAL
FLORIDA,

Respondents.
____/

RESPONDENTS' ANSWER BRIEF ON THE MERITS

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INTRODUCTION

The Introduction and Statement of the Case and Facts furnished to the Court in the Petitioners' Initial Brief on the Merits is largely accurate and will not be reiterated herein.

The Petitioners were the Defendants in the trial court and the Appellees in the District Court of Appeal. They will be referred to herein as Petitioners/Defendants.

The Respondents were the Plaintiffs in the trial court and the Appellants in the District Court of Appeal. They will be referred to herein as Respondents/Plaintiffs.

CERTIFICATE OF FONT TYPE

The undersigned certifies that this brief was drafted using the Times New Roman 14 point font type.

STATEMENT OF THE CASE AND FACTS

As previously indicated, the Statement of the Case and Facts as rendered by the Petitioners is largely accurate and will not be reiterated herein. However, it is worth while to point out (as also mentioned in the opinion of the Third District Court of Appeal being reviewed herein) that the opinion of counsel that the Stock Purchase Agreement which formed the basis of the litigation was defective was nothing more than an opinion when rendered. The loss suffered by the Respondents which resulted in the litigation underlying this proceeding did not occur until the settlement of litigation in which these Respondents had been defendants. The attorney malpractice claim was made after the damages in the litigation had been ascertained.

SUMMARY OF ARGUMENT

The opinion of the District Court of Appeal in *Taracido v. Perez-Abreu Zamora & De La Fe, P.A.*, 705 So.2d 41 (1997) is consistent with this Court's prior decision in *Peat, Marwick, Mitchell & Company v. Lane*, 565 So.2d 1323 (Fla. 1990) and aligns itself with all of the decisions in the various state courts following the *Peat, Marwick*, supra, decision. The opinion under review here establishes consistency, both with respect to economy and efficiency in litigation as well as in defining a point at which "redressable harm" can be determined.

The lawsuit brought by the Respondents/Plaintiffs in this case against the Petitioners/Defendants, was filed within two (2) years of the Plaintiffs' being required to pay damages based on a contract improperly drawn by the Defendants. Thus, the action was brought within two (2) years of a determination that redressable harm existed, thereby following this Court's pronouncement in *Peat, Marwick*, supra, and coming squarely within the Third District opinion, in Bierman v. Miller, 639 So.2d 627 (Fla. 3d DCA 1994):

> No cause of action for legal malpractice "should be deemed to have accrued until the existence of redressable harm has been established." *Diaz v. Piquette*, 496 So.2d 239, 240 (Fla. 3d DCA 1986), *rev. denied,* 506 So.2d 1042 (Fla. 1987). *See also Peat, Marwick, Mitchell & Co. V. Lane,*

> 565 So.2d 1323, 1325 (Fla. 1990)(cause of action for legal malpractice does not accrue until actionable error by attorney determined), and *Segall v. Segall,* 632 So.2d 76 (Fla. 3d DCA 1993)(same). Miller filed suit prematurely, as he has not yet suffered redress able harm. One of the central issues in the federal suit is the viability of the severance agreement: Miller's former employer seeks to void the agreement because of Miller's alleged fraud and misrepresentation; Miller seeks to enforce the agreement. Until the validity of the agreement is decided in federal court there can be no determination in the malpractice action as to whether Bierman was negligent in negotiating and drafting that agreement.
> Id at 628.

The lower Court's opinion in this case correctly concluded that it could not be determined that the Respondents had suffered any injury arising out of the Petitioners' negligence until the resolution of the law suit among the parties; the underlying litigation could well have been resolved favorably to the Plaintiffs and they would then have had no claim against the Defendants. See, for example, Throneburg v. Boose, Casey, Ciklin, Lubitz, Martens, McBane & O'Connell, 659 So.2d 1134 (Fla. 4th DCA 1995); Spivey v. Trader, 620 So.2d 212 (Fla. 4th DCA 1993); Adams v. Sommers, 475 So.2d 279 (Fla. 5th DCA 1985).

To propel the parties into litigation without knowing that litigable damages existed would be antithetical to the concept set out in *Peat, Marwick*, supra.

ARGUMENT

THE THIRD DISTRICT COURT OF APPEALS APPROPRIATELY DEFINED THE POINT AT WHICH A LEGAL MALPRACTICE CLAIM RIPENS

In August of 1990 the Plaintiffs had the Defendants prepare a contract and represent them in a sale of stock. Several years later, in April of 1990, a lawsuit was filed by the stock purchaser, asserting a series of claims, all premised on the stock sale. While that lawsuit was vigorously defended, the Plaintiffs' attorney advised the Plaintiffs, sometime in 1990, that it was his opinion that the underlying contracts were defective in that they failed to fully protect the Plaintiffs from claims brought under Chapter 517, Florida Statutes. In January of 1992, the litigation with the shareholder was resolved, at a cost to the Plaintiffs of approximately $235,000.00. Within two (2) years of that resolution, this lawsuit was brought against the Defendants. On these facts, legal redressable harm did not exist until January of 1992 and this lawsuit, being brought within two (2) years of that time, is not barred by the two-year applicable Statute of Limitations.

This Court decided *Peat, Marwick, Mitchell & Co. V. Lane*, 565 So.2d 1323 (Fla. 1990) in 1990, a decision which approved the reasoning of the Third District Court of Appeals with respect to when a legal malpractice statute of limitations begins to run. Quite apart from establishing that the limitations period begins to run when redressable harm in the form of an actual damage is determined, the Court enunciates a logic particularly applicable to this case:

> If we were to accept that argument [that notice of a potential malpractice commences running of the limitations period], 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.
> Id at 1326.

This is also consistent with the Third District Court's holding that

> [T]he salutary concomitant principles that premature, possibly useless, litigation should be discouraged and that no cause of action should therefore be deemed to have accrued until the existence of redress able harm has been established.
> Diaz v. Piquette, 496 So.2d 239 (Fla. 3d DCA 1986)

From this point of departure, we become involved in the question of defining "redressable harm". On that subject, both the Third District Court of Appeal and the Fourth District Court of Appeal have tended to define that phrase as contemplating an *actual* damage, not, as the Petitioner would have this Court conclude, some marginal, fanciful, or speculative damage. The most applicable decision is short, to the point and virtually identical with the circumstances of this case. In Bierman v. Miller, 639 So.2d 627 (Fla. 3rd DCA 1994) lawyers prepared a contract which was to protect the client from certain litigation which could have been brought against him at some point in the future. The contract failed to prevent the litigation and the client began to incur substantial legal fees in defense of a lawsuit brought against him. When that client sued his former law firm, the malpractice action was abated at the request of the defendants because damages could not be determined, and since the issue was whether the contract protected the client or whether it did not protect the client. In ruling that the malpractice lawsuit should be abated, and that the malpractice lawsuit was premature, this Court reviewed the status of malpractice actions in connection with the existence of redressable harm and stated:

> No cause of action for legal malpractice "should be deemed to have accrued until the existence of redressable harm has been established." *Diaz v. Piquette*, 496 So.2d 239, 240 (Fla. 3d DCA 1986), *rev. denied,* 506 So.2d 1042 (Fla. 1987). *See also Peat, Marwick, Mitchell & Co. V.*

> *Lane,* 565 So.2d 1323, 1325 (Fla. 1990)(cause of action for legal malpractice does not accrue until actionable error by attorney determined), and *Segall v. Segall,* 632 So.2d 76 (Fla. 3d DCA 1993)(same). Miller filed suit prematurely, as he has not yet suffered redress able harm. One of the central issues in the federal suit is the viability of the severance agreement: Miller's former employer seeks to void the agreement because of Miller's alleged fraud and misrepresentation; Miller seeks to enforce the agreement. Until the validity of the agreement is decided in federal court there can be no determination in the malpractice action as to whether Bierman was negligent in negotiating and drafting that agreement.
> Id at 628.

There is no difference between the facts giving rise to the Bierman case and opinion and the facts giving rise to the Plaintiffs' action against the Defendants in this lawsuit. The underlying suit with the shareholder, while commenced and incurring attorney's fees, had not been resolved and could well have been resolved favorably to the Plaintiffs (the opinion of counsel for the Plaintiffs that the contracts were defective did not, *a fortiori,* ordain that the Plaintiffs would lose the lawsuit against the shareholder), thus incurring no cognizable loss to the Plaintiffs.

The Defendants' entire position vis-a-vis the Statute of Limitations centers on the fact that Plaintiffs' counsel advised them between April and June of 1990 that the agreements drawn by the Defendants failed to adequately protect them from claims of violating Chapter 517, Florida Statutes. That opinion of counsel to his clients has

nothing to do with establishing redressable harm; it is the ***existence*** of redressable harm which gives rise to the cause of action. In Zuckerman v. Ruden, Barnett, McCloskey, Smith, Shuster & Russell, 670 So.2d 1050 (Fla. 3d DCA 1996) the Third District Court of Appeals collected and summarized Florida law on the subject in considering whether knowledge that a law firm had failed to have the client's security interest properly perfected commenced the running of the limitations period:

> Contrary to Ruden Barnett's assertions, Zuckerman's mere knowledge of possible malpractice is not dispositive of when a malpractice action accrues. *See Adams v. Sommers*, 475 So.2d 279 (Fla. 5th DCA 1985). Rather, the test for determining when a legal malpractice cause of action has accrued is based upon the establishment of redressable harm. *Peat, Marwick, Mitchell & Co. V. Lane,* 565 So.2d 1323 (Fla. 1990); *Bierman v. Miller,* 639 So.2d 627 (Fla. 3d DCA 1994).
>
> Here, unless Zuckerman is unable to foreclose on the mortgage, he will not have suffered damages proximately caused by Ruden Barnett's alleged failure to obtain the wife's signature on the mortgage. *See Bireman*, 639 So.2d at 627; *Spivey v. Trader,* 620 So.2d 212 (Fla. 4th DCA 1993); *Haghayegh v. Clark*, 520 So.2d 58 (Fla. 3d DCA 1988). Only when the foreclosure action has been entirely resolved will the statute of limitations on the malpractice action begin to run. *Adams,* 475 So.2d at 279. Thus, Zuckerman's malpractice action is certainly not barred by the statute of limitations.
> Id. At 1051.

This holding is consistent with the Fourth District decision in Spivey v. Trader, 620

So.2d 212 (Fla. 4th DCA 1993).

> The existence of damages is an essential element to the accrual of a cause of action for legal malpractice. Here, Spivey vigorously contested the fact that the real estate, or his interest therein, was subject to attachment in the personal injury action filed against him personally. Indeed, the facts reveal the property itself was initially protected as entireties property when the personal injury action was brought, then became corporate property, and, finally, became entireties property again. The property apparently was never placed in Spivey's name alone, and it is not entirely clear just how Spivey's interest in the property was determined and made subject to attachment. Moreover, it was not until the property, or at least Spivey's interest therein, was determined to be subject to attachment, view the judgment in the supplemental proceedings, that Spivey actually suffered the injury now claimed. Had the personal injury judgment been satisfied out of other assets, (FNI) or from the co-defendant, or if the supplementary proceedings had resulted in an outcome favorable to Spivey, no cause of action would have accrued, since no damage would have occurred.
> Id at 215.

Throneburg v. Boose, Casey, Ciklin, Lubitz, Martens, McBane & O'Connell, 659 So.2d 1134 (Fla. 4th DCA 1995), most recently ties this line of cases all back to *Peat, Marwick*:

> We understand *Peat Marwick* to draw a distinction between knowledge of actual harm from legal malpractice and knowledge of potential harm. The former begins the limitations period; the latter does not. Legal services, like accounting services, are often subject to differing views among practitioners. Lawyers often disagree with one

> another on the same transaction. It seems clear to us that Peat Marwick, properly understood, means that the limitations period on claims of legal malpractice should not commerce until it is reasonably clear that the client has actually suffered some damage from legal advice or services.
> Throneberg at 1136.

The decision in Silverstrone v. Edel, 701 So.2d 90 (Fla. 5th DCA 1997) which is also under consideration by the Court is somewhat different factually and while it is readily distinguishable from this case, the discussion by the Honorable Judge Sharp in the dissent, again referring to this Court's decision in *Peat, Marwick*, supra, and the theory set out therein, states:

> I fully agree with the supreme court's statement that the basic principles for all professional malpractice actions should be the same, absent a clear legislative intent to the contrary. *Peat, Marwick* at 1325. Unfortunately, in practice it is unclear in Florida case law exactly when the statute of limitations begins to run in attorney malpractice cases. That, coupled with the uniqueness of legal malpractice actions generally, places a practitioner in the situation where he or she may have to file a legal malpractice claim before being comfortable that it is valid enough to warrant the imposition of such an expenditure on the client's part, or risk the running of the statute of limitations. This can only result in the filing of legal malpractice actions which should never be filed in the first place.
>
> . . .

> I think the better view would be that the statute of limitations did not start to run (at the earliest) until entry of the final judgment. Such a bright-line rule would give clarity and reduce litigation in the courts over *when* the statute starts to run, thereby resulting in judicial economy. Silverstrone, supra, at 93, 94.

This reasoning, together with the reasoning in the decision of the Third District Court of Appeal under review, is consistent with all significant decisions following this Court's opinion in Peat, Marwick. To the extent that the Petitioner herein seeks to revert the Court to pre-Peat, Marwick decisions, that would lead to an unraveling of a consistency among the districts which has yielded a clear standard by which the statute of limitations in legal malpractice can be measured. This Court should reject the Petitioners attempt to do so.

CONCLUSION

Based on the foregoing, the decision of the District Court of Appeal under consideration by this Court is consistent with this Court's prior decision in Peat, Marwick and fully consistent with all of the decisions following Peat, Marwick. For this reason, this Court should dismiss the instant Petition for Writ of Certiorari or, alternatively, approve the decision rendered below.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was mailed this ____ day of November, 1998, to: Raoul G. Cantero, III, Esquire, ADORNO & ZEDER, P.A., 2601 South Bayshore Drive, Suite 1600, Miami, Florida 33133.

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