IN THE SUPREME COURT OF FLORIDA

CASE NO. 92,695

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

Petitioners,

vs.

3d DCA CASE NO. 97-989

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

Respondents.
_____/

PETITION FOR DISCRETIONARY REVIEW
OF A DECISION OF THE DISTRICT COURT
OF APPEAL OF FLORIDA, THIRD DISTRICT

PETITIONERS' REPLY BRIEF

DECEMBER 11, 1998

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CERTIFICATE OF FONT TYPE

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ARGUMENT

CLAIMS FOR TRANSACTIONAL LEGAL MALPRACTICE NEED NOT AWAIT THE RESOLUTION OF OTHER LITIGATION, WHICH CANNOT AFFECT THE EXISTENCE OF. OR HARM FROM, THE MALPRACTICE

The Respondent Clients concede that in 1990, their attorney in the Childers litigation told them that the stock purchase agreement the Petitioner Attorneys had drafted failed to contain a disclosure provision (br. at 5). The sole issue here, therefore, is whether the limitations period began then or later, when the Clients settled the Childers litigation.

The Clients' brief does not address this Court's decision in City *of Miami v. Brooks,* 70 So. 2d 306,308 (Fla. 1954) (the limitations period begins to run when the wrongful act causes some injury, however slight, even though substantial damages do not occur until later), or the cases following that decision discussed in Petitioners' Brief (at 8-9). See *Sawyer* v. *Earle*, 541 So. 2d 1232, 1234 (Fla. 2d DCA) (statute of limitations not tolled merely because client, although knowing of the malpractice,

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cannot determine the full extent of the damages, citing *Brooks), cause dismissed, 545* So. 2d 1368 (Fla. 1989), *disapproved on other grounds,* 565 So. 2d 1323 (Fla. 1990); *Breakers of Fort Lauderdale, Ltd.* v. *Cassel,* 528 So. 2d 985,986 (Fla. 3d DCA 1988) (cause of action accrued when defendant learned that its attorney had improperly failed to settle the lawsuit, requiring client to continue to defend it, because "damage from that failure, although not then completely ascertainable, is immediate," citing *Brooks); Kellermeyer v. Miller, 427 So.* 2d 343, 346-47 (Fla. 1st DCA 1983) (cause of action accrued when damage occurred, even though the amount remained uncertain, citing *Brooks).* Nor do the Clients address this Court's decision in *Edwards v. Ford, 279 So.* 2d 85 1, 853 (Fla. 1973) (claim accrued when clients learned contract was "probably usurious," not when subsequent litigation eventually settled), or the cases following its analysis discussed in Petitioners' Brief (1 1- 12).

As argued in the initial brief, this case is very similar to *Edwards.* As in *Edwards,* the Clients' claim against the Attorneys accrued when the Clients were advised that the agreement was negligently drafted and they began incurring damages by having to defend a subsequent suit, which they claim they never would have faced but for the alleged malpractice. This is entirely consistent with this Court's decision in *Peat, Marwick, Mitchell* & Co. v. *Lane, 565* So. 2d 1323, 1325-27 (Fla. 1990)

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(cause of action accrues upon existence of redressable harm even though exact amount of damage has not been determined).

The Clients misconstrue the nature of the Attorneys' position in arguing (br. at 8) that the "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." The advice of the Clients' subsequent attorney that the agreement was negligently drafted establishes the Clients' knowledge of the wrongdoing, and the expense they incurred in defending the resulting lawsuit constitutes the redressable harm.

Rather than respond to the Attorneys' arguments, the Clients rely (br. at 7- 10) on clearly distinguishable cases in which redressable harm would exist only after a certain outcome in unrelated litigation. See *Zuckerman v. Ruden, Burnett, McClosky, Smith, Schuster & Russell, P.A.*, 670 So. 2d 1050, 105 1 (Fla. 3d DCA) (client would suffer no damages from the attorneys' malpractice in drafting loan documents unless the client were unable to foreclose on the mortgage, which could not be determined until the foreclosure action was resolved), *review denied, 679* So. 2d 774 (Fla. 1996); *Throneburg v. Boose, Casey, Ciklin, Lubitz, Martens, McBane & O'Connell, P.A.*, 659 So. 2d 1134, 1135 (Fla. 4th DCA 1995) (malpractice in amending declaration of

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covenants on property not certain until a court ruled the amendment invalid; malpractice discovered in unrelated proceeding involving the association and another owner); *Spivey v. Trader,* 620 So. 2d 2 12, 2 13 (Fla. 4th DCA 1993) (malpractice in advice concerning transfer of properties, which resulted in execution against the properties, not certain until a judgment was rendered in proceedings supplementary to unrelated personal injury case); *Adams* v. *Sommers,* 475 So. 2d 279, 280-8 1 (Fla. 5th DCA 1985) (malpractice of estate planning attorney not certain until validity of mortgage was finally determined on appeal from unrelated divorce proceedings).

Unlike those cases, however, it is precisely because the Clients can claim damage regardless of the outcome of the Childers litigation that the Clients' settlement with Childers does not bar their malpractice claim. See *Coble v. Aronson,* 647 So. 2d 968,970 (Fla. 4th DCA 1994) (if a favorable outcome in the underlying case would eliminate the possibility of loss, redressable harm cannot be established if the case is settled; but settlement does not bar a claim where redressable harm does not depend on the outcome of the underlying litigation), *review denied sub nom., Fine, Jacobson, Schwartz, Nash, Block & England, P.A. v. Coble, 659 So.* 2d 1086 (Fla. 1995). *See also Drake* v. *Simons,* 583 So. 2d 1074, 1075 (Fla. 5th DCA), *review denied, 592* So. 2d 682 (Fla. 199 1) (if malpractice action exists regardless of outcome

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of other case, cause of action accrues when the client knew or should have known of the alleged malpractice). The Clients do not address this distinction.

Without recognizing this distinction, this Court's holding in *Peat, Marwick* cannot be properly applied. In *Peat, Marwick*, it mattered whether the tax court concluded the deduction was proper. See 565 So. 2d at 1326 ("Until the tax court determination, both the Lanes and Peat Marwick believed that the accounting advice was correct; consequently, there was no injury"). Here, the Clients can and did claim damage from the mere initiation of the resulting litigation, regardless of its outcome. How the Clients faired in litigating that case, had they done so instead of settling, would not affect the existence of this malpractice claim.

The Clients conclude that the proper rule regarding the commencement of the limitations period for transactional legal malpractice is the one suggested in Judge Sharp's dissent in *Silvestrone* v. *Edel*, 701 So. 2d 90, 94 (Fla. 5th DCA 1997) (Sharp, J., dissenting), a *litigation* malpractice case, that "the statute of limitations did not start to run (at the earliest) until entry of final judgment." The Clients speculate that "the underlying litigation could well have been resolved favorably to the [Clients] and they would then have had no claim against the [Attorneys]" (br. at 4). This case does not concern *litigational* malpractice, however, but *transactional* malpractice.

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The distinction is critical in reviewing this case. In litigational malpractice, the negligence occurs during litigation that was commenced separate and apart from the malpractice. Therefore, the attorney's fees incurred during the litigation do not result from the malpractice and cannot be claimed as damages in the malpractice action. In transactional malpractice, such as allegedly occurred in this case, however, where the subsequent litigation results from the malpractice, the attorney's fees expended can be recovered as damages. There is therefore no reason to extend the limitations period until the resolution of the suit because the malpractice already has occurred and the damages have begun to accrue.

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CONCLUSION

For the reasons stated, the district court's opinion should be quashed and the summary judgment in favor of the Petitioners should be re-instated.

Respectfully submitted,

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