IN THE SUPREME COURT OF FLORIDA

CASE NO.: 99-86

Eleventh Circuit Case No.: 98-5447

FREMONT INDEMNITY COMPANY,

Plaintiff/Appellant,

vs.

CAREY DWYER ECKHART MASON & SPRING, P.A. (f/k/a CAREY, DWYER, COLE, ECKHART, MASON & SPRING, P.A.) and MICHAEL C. SPRING,

Defendants/Appellees.

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# APPELLEES' ANSWER BRIEF

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## TABLE OF CONTENTS

**Page**

## TABLE OF CITATIONS

## STATEMENT OF COMPLIANCE

Counsel for the Appellees certifies that this brief was typed in 14 point arial and complies with the Administrative Order of this Court dated July 13, 1998.

## INTRODUCTION

The Appellant, Fremont Indemnity Company, will be referred to throughout this brief as "Appellant" or "Fremont".

The Appellees, Carey Dwyer Eckhart Mason & Spring, P.A. (f/k/a Carey, Dwyer, Cole, Eckhart, Mason & Spring, P.A.) and Michael C. Spring will be referred to collectively as "Appellees" or "Carey Dwyer" or individually as "Spring".

References to the Record on Appeal will be designated by the letter "R". For the sake of continuity, Carey Dwyer will utilize the same Record designations it used in its brief to the United States Court of Appeals for the Eleventh Circuit. The Eleventh Circuit requires Record references to cite to the volume number of the Record, the document number and the page number within the document. Thus, for example, a Record cite of (R1-41-8) refers to volume 1 of the Record, document 41 and page number 8 of document 41. There are two volumes in this Record. Documents 1-51 are contained in volume 1 and documents 52-90 are contained in volume 2.

## STATEMENT OF THE CASE AND FACTS

### i. The Nature of the Case

This case arises out of a claim for legal malpractice brought by Fremont against Carey Dwyer and Spring. Fremont has alleged that because Spring failed to properly defend its insured when he represented the insured from 1985 to 1987, Fremont lost the opportunity to settle the claim against its insured within the insured's policy limits. As a result, Fremont began sustaining damages no later than 1989 in the form of additional attorney's fees and costs it had to pay to other attorneys and experts to defend a case it otherwise could have settled, but for Spring's negligence.

### ii. The Issue

Whether the United States District Court correctly granted Carey Dwyer's Motion for Final Summary Judgment finding that Fremont's 1997 Complaint was untimely pursuant to the applicable two-year statute of limitations, when 1) Fremont had notice of the malpractice[1] in 1987; 2) Fremont began suffering irreversible

[1] For the purposes of this appeal, Carey Dwyer does not contest the allegations that Spring committed malpractice or Fremont was damaged. Carey Dwyer reserves any and all grounds for denial, demurrer and objections to those allegations in subsequent proceedings, if necessary.

redressable harm as a result of the malpractice in 1989 (in the form of additional costs and attorney's fees); and 3) the outcome of the litigation in which the claimed malpractice occurred had absolutely no bearing on whether malpractice was committed or at least some redressable harm was sustained by Fremont.

### iii. Course of Proceedings and Disposition Below

Carey Dwyer hereby adopts the Course of Proceedings and Disposition Below contained in Fremont's Initial Brief, pp. 1-4.

Carey Dwyer also agrees with Fremont's statement that The United States Court of Appeals for the Eleventh Circuit has ably stated most of the relevant facts for this Court. (Fremont's Initial Brief, p. 1). However, the Eleventh Circuit stated, in its Statement of the Issue, that "Fremont's total additional costs of defense had not reached its policy limits, for which the case could have arguably been settled, at the time this action was filed." This is not entirely correct.

Fremont paid law firms and experts it had to hire after it fired Spring over $4,000,000 as of August 25, 1997. (R1-41-18-25).[2] Carey Dwyer strongly believes

[2] The information detailing the costs and attorney's fees incurred by Fremont as a result of Spring's negligence comes from a confidential settlement letter produced by Fremont at the deposition of Alan W. Faigin. Early in the case, the parties agreed to keep certain facts confidential so they could not be used against Fremont in the lawsuit between Fremont and

that the total amount of attorney's fees and costs paid to attorneys and experts surely exceeded the $2,000,000 policy limits of Fremont's insured on or before February 14, 1997, the date Fremont filed its Complaint. However, there is no direct proof of this in the Record. Thus, Carey Dwyer would concede that the Eleventh Circuit's later assertion that "while the district court found that Fremont had incurred some 'damage from the malpractice well before 2 years prior to the filing of the complaint' in this action, it did not find that said damage equaled or exceeded Fremont's policy limits" is correct.

**iv. Statement of the Facts**

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the developer. An agreed upon Order of Confidentiality was later signed by the District Court. (R1-38). Throughout this case, undersigned counsel was very careful to avoid referring to any aspect of the Record which addressed the confidential settlement letter, even when he was asked about figures contained in the letter at oral argument before the Eleventh Circuit (undersigned advised the Eleventh Circuit he did not feel he could respond because of the confidential nature of the letter even though he was allowed to under the terms of the Order). Nevertheless, the confidential settlement letter is attached to the deposition of Alan W. Faigin as Exhibit 2, and it is part of the Record. Undersigned believes it is not improper to refer to the letter at this time because the underlying case has settled. Therefore, the confidentiality agreement between counsel has no further purpose. Moreover, it has always been undersigned's belief that Fremont waived the confidentiality of the letter when it cited to the exact figures contained in the letter in its Memorandum in Response to Defendant's Motion for Summary Judgment. (R2-60-26).

Carey Dwyer hereby adopts the Statement of the Facts as set forth by Magistrate Judge Robert L. Dube in his Report and Recommendation (R2-84). This Statement of the Facts was adopted by Fremont in its entirety and can be found in Fremont's Initial Brief, pp. 5-13.

Carey Dwyer continues to assert, as Fremont points out, that there was no inadmissible conjecture contained in the Magistrate Judge's Statement of the Facts, and that all of the Magistrate Judge's findings were correct.

## SUMMARY OF THE ARGUMENT

The Order of the District Court granting Carey Dwyer's Motion for Final Summary Judgment should be affirmed since Fremont's Complaint is time barred by Florida's two-year statute of limitations governing legal malpractice actions. Fremont's legal malpractice claim is time barred because 1) Fremont had notice of the malpractice in 1987; 2) Fremont began sustaining irreversible damages because of the malpractice in 1989 (in the form of attorney's fees and costs it was forced to pay because it lost the opportunity to settle the underlying case[3] within policy limits); and 3) no matter what occurred in the underlying case, the redressable harm

[3] Any reference to the "underlying case" refers to the case between Fremont and the developers.

sustained by Fremont was irreversible. The statute of limitations began running in this case in 1989, when Fremont knew about the malpractice and began sustaining irreversible redressable harm in the form of attorney's fees and costs it had to pay lawyers and experts because it lost the opportunity to settle the underlying case. The Silvestrone bright line rule does not apply here because there is nothing any party or court could have done that would have cured the malpractice or redressable harm sustained by Fremont beginning in 1989, and occurring every year thereafter.

## ARGUMENT

### THE DISTRICT CORRECTLY RULED THAT FREMONT'S CLAIM IS UNTIMELY BECAUSE FREMONT HAD NOTICE OF THE MALPRACTICE AND RESULTING IRREVERSIBLE DAMAGES BY 1989

The District Court correctly ruled that Fremont's Complaint is time barred by Florida's two-year statute of limitations governing legal malpractice actions.[4] In Florida, it is well established that a cause of action for legal malpractice accrues when a party sustains redressable harm and the party knew or should have known of either the injury or the negligent act. Peat, Marwick, Mitchell & Co. v. Lane, 565 So.2d 1323, 1325 (Fla. 1990). In this case, Fremont has stipulated that it knew Spring committed legal malpractice on August 12, 1987, the day it terminated him as counsel for the architects. (R1-41-8, 9). Fremont has also claimed that Spring's negligence, which was committed from 1985 to 1987, cost Fremont the opportunity to settle the underlying claim within its insured's policy limits. (R1-41-60). As a result, Fremont sustained irreversible damage. This damage includes additional attorney's fees and costs Fremont had to expend, because the malpractice cost them the opportunity to settle the claim within policy limits. Fremont sought these

[4] Florida Statute § 95.11(4)(a).

damages in its Complaint. (R1-1-18, 20, 23).[5] Fremont's corporate representative testified at deposition that these damages accrued in 1989 (R1-41-65, 66). Thus, Fremont knew Mr. Spring committed malpractice in 1987, and knew the malpractice caused irreversible damage in 1989. These facts make Fremont's Complaint untimely as a matter of law.

**1. Breakers of Ft. Lauderdale, Ltd. v. Cassel**

**A. Fremont's cause of action for legal malpractice accrued in 1989, the moment it sustained irreversible damages in the form of additional attorney's fees and costs because Spring cost Fremont the opportunity to settle the underlying case within policy limits**

The District Court correctly found that Fremont's cause of action was untimely, since it had notice of the malpractice in 1987 and had sustained damages, which were sought as recoverable in the Complaint, in 1989. (R2-84-12, 13).

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[5] Fremont cannot claim that the statute of limitations is tolled because it cannot determine the precise amount of damages it sustained from the malpractice. The only pertinent issue is when Fremont began sustaining some damage. Kellermeyer v. Miller, 427 So.2d 343, 346 (Fla. 1st DCA 1983) quoting City of Miami v. Brooks, 70 So.2d 306 (Fla. 1954) ("The general rule, of course, is that where an injury, although slight, is sustained in consequence of the wrongful act of another, and the law affords a remedy therefor, the statute of limitations attaches at once. It is not material that all the damages resulting from the act shall have been sustained at that time and the running of the statute is not postponed by the fact that the actual or substantial damages do not occur until a later date").

Fremont's contention that this suit is timely because it was filed within two years of the payment to the RTC or is premature because the underlying litigation was ongoing when the Complaint was filed[6] is incorrect. (R2-60-2). Fremont has overlooked its own assertion that because Spring's negligence cost it the opportunity to settle the underlying claim by 1989, and it had to pay additional attorney's fees and costs as a result, its irreversible damages actually began no later than 1989.

In a very similar case, Florida's Third District Court of Appeal held that a client sustained redressable harm when it was forced to pay additional attorney's fees after its attorney failed to consummate a settlement. In Breakers of Ft. Lauderdale, Ltd. v. Cassel, 528 So.2d 985 (Fla. 3d DCA 1988), the plaintiff and defendant entered into a settlement agreement. However, because of the defendant's attorney's negligence, the settlement was never consummated. Subsequently, the settlement fell apart and the case was reactivated. When the lawsuit was concluded, the defendant had to pay more money than it would have paid had its attorney consummated the settlement. The defendant in the underlying

[6] The underlying case was settled for $6,500,000. Fremont paid the RTC $4,500,000 in February, 1995 and paid the developer $2,000,000 in September, 1999.

suit then commenced an action for legal malpractice against its attorney. The trial court dismissed the defendant/former client's amended complaint, with prejudice, on statute of limitations grounds. On appeal, Florida's Third District reversed, holding that the amended complaint should have been dismissed, without prejudice. Id. at 986.

Although the Third District allowed the former client to amend its complaint so it could attempt to state a cause of action, the court held that the action as pled was untimely on statute of limitations grounds. In its ruling, the Third District stated as follows:

> We note, however, that the trial court was correct in rejecting the alternative argument of [the former client] that the statute of limitations did not begin to run until May 23, 1986, when the lawsuit which [the former attorney] allegedly improperly failed to settle was concluded with [the former client] having to pay a substantially greater amount than the amount contained in the earlier agreed upon, but unconsummated, settlement. **Damage to [the former client] occurred the moment it was called upon to incur the expense of having to continue to defend against a lawsuit that should have been settled but for its attorney's alleged malpractice.** That moment - and the accrual of the cause of action for legal malpractice - occurred when [the former client] learned that the lawsuit against it had been revived, not, as [the former client] urges, when it paid damages to the claimant. The court's opinion in Diaz v. Piquette, 496 So.2d 239 (Fla. 3d DCA 1986), rev.den., 506 So.2d 1042 (Fla. 1987), upon which [the former client] relies, addresses the question of when a cause of action for legal malpractice accrues against an attorney who has lost a

> case at trial, not the question of when a cause of action for legal malpractice accrues against an attorney who has allegedly improperly failed to consummate the settlement of a case. In the former situation, as Diaz correctly holds, there can be no claim of malpractice until the loss determined at trial is made final on appeal; **in the latter and present situation, one need not await the eventual result of the lawsuit that should have been settled to determine that the failure to complete the settlement is malpractice and that damage from that failure, although not then completely ascertainable, is immediate.** See City of Miami v. Brooks, 70 So.2d 306 (Fla. 1954).

Id. at 986 (emphasis added).[7]

Similarly, in this case, Fremont's cause of action accrued the moment it was called upon to incur the expense of having to continue to defend against a lawsuit that should have been settled but for its attorney's malpractice (1989) and its attorney committed malpractice which caused those damages (1987). The District Court correctly concluded that Carey Dwyer properly relied upon Breakers below. (R2-84-13). For these reasons, Carey Dwyer respectfully submits that the District Court's ruling should be affirmed and the Eleventh Circuit should be told that the statute of limitations started running in this case in 1989.

**B. Breakers is still a viable case at this time**

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[7] See also Pioneer National Title Ins. Co. v. Andrews, 652 F.2d 439, 441(5th Cir. 1981) (plaintiff suffered legally cognizable damages when it incurred the expense of defending itself in underlying lawsuit).

Fremont has claimed Breakers should not be considered by this Court because it is no longer good law after Silvestrone, or it is distinguishable from this case. (Fremont's Initial Brief, pp. 22-25). For the following reasons, Carey Dwyer would assert that Fremont's analysis is incorrect.

First, Fremont claims that because the Breakers court started the statute of limitations clock while the litigation was pending, it is "inconsistent with Silvestrone and no longer good law." Obviously, Carey Dwyer is arguing that this case and Breakers either fall outside of or are exceptions to the bright line laid down by this Court in Silvestrone. Carey Dwyer believes the holding in Breakers is not foreclosed by Silvestrone because in Breakers, like here, the client knew the attorney committed malpractice and sustained irreversible damage before the underlying suit was concluded. In Silvestrone, the plaintiff did not sustain any damage until the litigation was concluded in a manner he found unfavorable. Obviously, if this Court feels that Breakers was overruled by Silvestrone, Carey Dwyer will lose this appeal.

Second, Fremont asserts that the ruling in Breakers is inapplicable because Breakers is an unconsummated settlement case while this case concerns unconveyed settlement offers. Fremont is splitting hairs with this distinction. The facts of

Breakers and this case are remarkably similar: in each case an attorney was allegedly negligent because a settlement did not occur and in each case the client sustained irreversible redressable harm in the form of increased attorney's fees and costs as a result of the alleged negligence. These factors do not distinguish Breakers from this case, they distinguish Breakers and this case from Silvestrone.

Third, Fremont claims that Breakers is distinguishable because the attorney's fees and costs generated by the failure to consummate the settlement immediately exceeded the settlement amount. Therefore, "[p]erhaps on those facts it was fair to conclude that the statute [of limitations] should be deemed to start running immediately." Fremont further asserts that because it may have taken the case to trial and obtained a defense verdict or settled the case for an amount under policy limits, it may have come out ahead because it lost the opportunity to pay the developers $2,000,000 back in 1987.[8]

This assertion is completely illogical. In this case, Fremont knew malpractice was committed in 1987. Fremont also knew that because of the malpractice, it was

[8] Fremont's claim that it could have settled the case for under the $2,000,000 policy limits is contrary to the Record evidence. Fremont's representative testified he knew in the early 1990's that "it would have to pay more than 2 million to settle the case, but did not know exactly how much it would have to pay." (R2-84-7 citing deposition of Faigin, R1-41-60).

not in a position to determine whether policy limits should be paid. It therefore hired other attorneys and experts to evaluate the case. By 1989, because these attorneys and experts did the work Spring should have done, Fremont was in a position to evaluate the case. After completing its evaluation, Fremont decided to tender its insured's $2,000,000 policy limits to the developer. Unfortunately, its offer to settle was too late and the developer rejected the offer. At this point, Fremont had to start funding a defense it otherwise would not have had to fund but for Spring's negligence. This is an element of damage that accrued the moment Fremont began funding the defense. Fremont had to pay these expenses regardless of what occurred thereafter in the underlying case. These damages are irreversible.

Fremont is claiming in this case that it would be better to await the outcome of the underlying case to see if, despite Spring's negligence, it may have ended up with what it deemed a more favorable result. Fremont is apparently implying that if it would have obtained a defense verdict, for example, at trial, it would not have sued Carey Dwyer and Spring for malpractice.

Yet, the issue is not whether Fremont would have sued. The issue is whether they could have sued. The answer to that crucial question is yes, for even if they

obtained a defense verdict at a later date, Fremont had a viable cause of action for legal malpractice against Carey Dwyer in 1989 because Spring's negligence forced Fremont to fund a defense it otherwise would not have had to fund.[9] This is damage, and this damage is irreversible.

Moreover, it is well settled in Florida law that a victim of a legal wrong, in this case Fremont, has a duty to mitigate its damages. Faragher v. Boca Raton, 524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998). Fremont could not have recovered any item of damages it could have avoided. State ex rel. Dresskell v. Miami, 13 So.2d 707, 709 (Fla. 1943). Thus, Fremont had to retain other attorneys and experts and attempt to settle the case in order to mitigate any damages it may have incurred as a result of Spring's negligence. Otherwise, Fremont's failure to mitigate would have been raised as an affirmative defense by Carey Dwyer, and Carey Dwyer could have avoided liability on those grounds.

When a victim undertakes to mitigate damages, the victim cannot be punished. In other words, the victim cannot be worse off for having mitigated. Ricketts v. Adamson, 483 U.S. 1, 22, 107 S.Ct. 2680, 97 L.Ed.2d 1 (1987). The costs of mitigating damages in legal malpractice actions can be increased attorney's

[9] Edwards v. Ford, 279 So.2d 851, 853 (Fla. 1973).

fees and costs incurred to cure a prior attorney's negligence. These damages were sought by Fremont in the Complaint, and are recoverable in Florida. See Coble v. Aronson, 647 So.2d 968 (Fla. 4th DCA 1994) rev. den. 659 So.2d 1086 (Fla. 1995); Saenz v. Rigau and Rigau, 549 So.2d 682 (Fla. 2d DCA 1989) rev. den. 560 So.2d 234 (Fla. 1990); Canadian Universal Ins. Co. v. Employers Surplus Lines Ins. Co., 325 So.2d 29 (Fla. 3d DCA) cert. den. 336 So.2d 1180 (Fla. 1976); and Mallen & Smith, Legal Malpractice, Section 19.6 (4th ed. 1996) ("The clients injury may be the expense of retaining another attorney. Such damages can result from an attempt to avoid or minimize the consequences of the former attorney's negligence.") (footnote omitted). If Fremont would have obtained a defense verdict in this case, and then sued Carey Dwyer for malpractice, it would be illogical for Carey Dwyer to respond to Fremont by stating 1) yes, we committed malpractice; and 2) yes, that malpractice caused you to fund a defense you otherwise would not have had to fund (costing you at least hundreds of thousands of dollars); and 3) yes, those are damages recoverable in Florida. But, you cannot sue us because our negligence allowed you to save the $2,000,000 you otherwise would have paid since you won the case at trial. Under Fremont's scenario, this would be an airtight defense for Carey Dwyer and Fremont could never sue Carey Dwyer as a result.

Certainly, if Fremont took the case to trial and won a defense verdict, Fremont would not be able to sue for the $2,000,000 because it did not pay that sum to the developer. It surely could sue, however, for the costs of funding the defense, no matter the amount of those costs or the outcome of the subsequent trial.

Fremont is asking this Court to fashion a rule of law which states that a victim does not have a cause of action against a tortfeasor, who is guilty of nonfeasance, for the costs of mitigating its damages if through its own efforts the victim is able to reduce the damages to a point below what they would have been but for the nonfeasance. This stands Florida damages law on its head.

Based upon the foregoing, it is clear that Fremont had a viable cause of action for legal malpractice in 1989. Fremont's Complaint, filed in 1997, is untimely as a result. This is the exact situation the Third District addressed in Breakers, where the court found " . . . one need not await the eventual result of the lawsuit that should have been settled to determine that the failure to complete the settlement is malpractice and that damage from that failure, although not then completely ascertainable, is immediate." This Court should therefore advise the Eleventh Circuit that the statute of limitations began to run in this case in 1989.

### C. The Third District's ruling in Bierman is not logically inconsistent

**with its ruling in Breakers**

Fremont claims that Breakers is distinguishable because it is logically inconsistent with a later decision by the Third District in Bierman v. Miller, 639 So.2d 627 (Fla. 3d DCA 1994). (Fremont's Initial Brief, p. 25). Fremont is incorrect.

In Bierman, the Third District set forth the facts as follows:

> The Bierman law firm negotiated a severance agreement between its client Robert Miller and FTM Sports [ ]. The agreement, which contained a covenant not to sue, was structured to protect Miller from civil liability for financial misdealing and to prevent the disclosure to any governmental authority, except where required. The agreement also contained a confidentiality provision. Miller in turn agreed to provide full disclosure to FTM and cooperate with their investigation of internal corporate matters. In the severance agreement, Miller represented that he had not personally benefitted from the transactions that formed the basis of the investigation, and that all the statements he made in the agreement were true.
>
> After the parties had executed the agreement and Miller had discussed matters with FTM . . . Miller was served with a summons and complaint reflecting that FTM . . . had sued him in federal district court. The complaint sought damages. . .; it also sought a declaratory judgment that the severance agreement between Miller and FTM was void because Miller had fraudulently induced FTM into that agreement []. Miller filed a counterclaim seeking to enforce the covenant not to sue and the confidentiality provision of the severance agreement.
>
> While the federal action was pending, Miller sued Bierman for legal malpractice, alleging that Bierman was negligent in drafting the severance agreement and in failing to protect Miller's interests. Miller sought damages

> for the . . . attorney's fees he was amassing . . . and for his exposure to a multi-million dollar judgment [ ].

In its ruling, the Third District held as follows:

> Miller filed suit prematurely, as he has not yet suffered redressable harm. One of the central issues in the federal suit is the viability of the severance agreement: Miller's 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 . . . there can be no determination in the malpractice action as to whether Bierman was negligent in negotiating and drafting that agreement.

The Bierman court, quite obviously, did not want Miller to have to argue in federal court that the severance agreement should be enforced and argue in another court that it was negligently drafted. Moreover, in Bierman, if the federal court upheld the severance agreement, FTM could not pursue Miller for civil liability pursuant to the covenant not to sue.

In this case, the subject matter of Spring's negligence was never at issue in the underlying case (either at trial or on appeal). Fremont was never placed in a position of arguing that Spring was not negligent in the underlying case. Therefore, there was no reason for Fremont to wait until 1997 to file its Complaint. Fremont had a viable cause of action against Spring in 1989 when it knew about the alleged malpractice and sustained damage. The damage sustained by Fremont, unlike the

damage in Bierman (failure to properly draft a severance agreement), could not have been cured in the underlying case. The holding in Bierman is consistent with the holding in Breakers.

## 2. Silvestrone v. Edell

**Silvestrone's bright line rule does not apply here or this case represents an exception to the rule because the outcome of the underlying case could never have had any bearing on the issues of whether malpractice was committed or damages were sustained by Fremont**

Fremont's claim is time barred because it does not need to await entry of a final judgment to confirm that it had notice of the malpractice and damages in 1989. Fremont has incorrectly asserted that its claim for legal malpractice against Carey Dwyer is not ripe. Fremont has cited to this Court's ruling in Silvestrone v. Edell, 721 So.2d 1173 (Fla. 1998) to support this assertion.[10] However, a careful reading of Silvestrone will show that this case is not covered by the bright line rule set forth by this Court in Silvestrone because there is nothing that could have occurred in the underlying case either at trial or on appeal that could have cured the malpractice or redressable harm sustained by Fremont which was sought in its Complaint.

In Silvestrone, the facts are as follows:

> Marc Edell represented Art Silvestrone in a federal antitrust action. Glenn Teal was a coplaintiff in this action. On February 27, 1990, the jury returned a verdict and awarded Silvestrone $3,777.50 in damages, but awarded no

[10] Eight cases have cited Silvestrone, including this one. Although there is some confusion as to when the bright line rule begins to run, Watkins v. Gilbride, Heller & Brown, P.A., 2000 WL 256327 (Fla. 3d DCA March 8, 2000), none of the cases have facts similar to this case.

> damages to Teal. Over the next two years, posttrial motions were filed, including Silvestrone's motion for attorney's fees and coplaintiff Teal's motion for a new trial and additur. Final judgment was rendered on February 4, 1992. The trial court trebled the jury's award to Silvestrone, awarding him $11,332.50 in damages plus $228,973.11 in attorney's fees and costs. The court awarded Teal $29,328.64 in attorney's fees and costs, but denied his motion for a new trial and additur. Neither Silvestrone nor Teal appealed the final judgment.
>
> Silvestrone subsequently filed a legal malpractice claim against Edell on January 19, 1993, because he was unhappy with Edell's performance during the course of the antitrust action. This claim was filed less than one year after final judgment was entered but more than two years after the jury verdict was rendered. The trial court granted Edell's motion for summary judgment on the basis that the two-year statute of limitations period had expired. On appeal,
> the Fifth District Court of Appeal affirmed, holding that the statute of limitations began to run when the jury returned its verdict, because it was at that point that Silvestrone knew about the allegedly insufficient damage award and any malpractice which may have caused it. See Silvestrone, 701 So.2d at 91.

This Court reversed, holding that "in those cases that proceed to final judgment, the two-year statute of limitations for litigation-related malpractice under section 95.11(4)(a), Florida Statutes (1997) begins to run when final judgment becomes final." Id. at 1176. In reaching this decision, this Court noted as follows:

> In the instant case, because various postverdict motions were filed, final judgment was not entered until almost two years after the jury verdict. Since the trial court retains inherent authority to reconsider and, if deemed appropriate, alter or retract any of its nonfinal rulings prior to entry of the final judgment or order terminating an action, [citations omitted], the motion

> for a new trial filed by the coplaintiff, if granted, could have affected Silvestrone's rights and liabilities. Therefore, Silvestrone's rights and liabilities were not finally and fully adjudicated until the presiding judge resolved these matters and recorded final judgment and this final judgment became final.

Id. at 1175.

This Court further stated that "a malpractice claim is hypothetical and damages are speculative until the underlying action is concluded with an adverse outcome to the client." Id. at 1175.

The facts of the underlying case take it outside of or constitute an exception to the bright line rule set forth in Silvestrone.[11] Fremont's malpractice claim against Carey Dwyer, unlike Silvestrone's claim, is not dependent upon what happens at trial or thereafter. Here, no matter what could have happened in the underlying

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[11] The existence of a bright line rule does not foreclose the possibility that there can be narrow exceptions to the rule. For example, in Aurbach v. Gallina, 2000 WL 124392 (Fla. February 3, 2000), this Court discussed two exceptions to the bright line rule established by the dangerous instrumentality doctrine (a narrow exception has been found for the holder of "mere naked title" of a vehicle and a statutory exception has been found for owners of motor vehicles leased for one year or longer). In Thompson v. Louisiana, 469 U.S. 17, 105 S.Ct. 409, 83 L.Ed.2d 246 (1984), the United States Supreme Court recognized that "[i]n a long line of cases, this Court has stressed that 'searches' conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment -- subject only to a few specifically and well delineated exceptions" (citations omitted).

case, Fremont still sustained redressable harm due to the alleged malpractice of Mr. Spring. This redressable harm was sustained in 1989 (according to Fremont's corporate representative), when Fremont began paying additional costs and attorney's fees made necessary because Mr. Spring cost Fremont the opportunity to settle the underlying claim within its insured's policy limits. (R1-41-60, 65, 66). This redressable harm could never have been cured by any actions taken by Fremont, its opponents, the jury or any trial or appellate court in the underlying case. Moreover, the applicable statute of limitations was triggered in 1989 because Fremont had notice of the malpractice and damages by that year.

Fremont's damages, in the form of increased attorney's fees and costs, have also been set prior to trial. In Silvestrone, the client's malpractice claim was hypothetical and damages were speculative because the trial court had the authority to rule on matters before the court which may have affected Silvestrone's rights and liabilities. The plaintiff in Silvestrone was suing for damages resulting from the unfavorable outcome of his litigation. He therefore suffered no damage until the litigation was concluded. Here, some of the damages sought by Fremont resulting from the malpractice occurred during the litigation. Fremont therefore did not have to await a trial, or final judgment, or appeal to sue for these damages. They are not

hypothetical or speculative. They began in 1989 and nothing could have erased their existence.

In this case, Fremont has sued Carey Dwyer seeking as damages the $4,500,000 it paid to the RTC, and "[a]ll litigation and other expense determined to have been occasioned by the continuing underlying and collateral actions alleged in the Complaint." (R1-1-18, 20, 23). These litigation and other expenses starting accruing in 1989. Thus, Fremont sustained irreversible damages in 1989.

It is clear that the this Court did not want to require Silvestrone to sue his lawyer when the "claim is hypothetical and damages are speculative until the underlying action is concluded with an adverse outcome to the client." Id. at 1175. It would have made no sense for this Court to have required Silvestrone to sue his attorney within two years of the verdict, since his "rights or liabilities were not finally and fully adjudicated until the presiding judge resolved [pending] matters and recorded final judgment and this final judgment became final." Silvestrone, at 1175. To require Silvestrone to sue his lawyer within two years of the verdict but before entry of final judgment when various motions were pending would have 1) placed the client in the unenviable position of claiming his lawyer was not at fault in the underlying action yet negligent in the malpractice action; and 2) wasted judicial

resources by requiring the client to sue his lawyer when the malpractice claim was hypothetical and the damages were speculative.

None of the Silvestrone concerns are at issue in this case. No matter what would have occurred in the underlying case between Fremont and the developers, Fremont would never have had to take inconsistent positions regarding whether Spring was negligent. This is especially true since Fremont fired Spring on August 12, 1987. Affirming the summary judgment and recognizing that there is a very narrow exception to the bright line rule will also not open up a floodgate of litigation - it will merely reenforce the notion that a statute of limitations attaches when an injury occurs by the wrongful act of another and permanent damages are incurred as a result. See City of Miami v. Brooks, 70 So.2d 306 (Fla. 1954).[12] These facts take this case out of the bright line set forth in Silvestrone.[13]

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[12] Statutes of limitations were enacted to protect defendants against unusually long delays in filing lawsuits and to bar stale claims. State Dept. of Health v. West, 378 So.2d 1220 (Fla. 1979). If this Court fails to find that the statute of limitation began running in 1989, Carey Dwyer will be forced to defend against a claim that matured at least eight years before the Complaint was filed, and at least eleven years before this appeal is decided.

[13] This is the exact situation the Third District was faced with in Breakers of Ft. Lauderdale, Ltd. v. Cassel, 528 So.2d 985, 986 (Fla. 3d DCA 1988), where the court ruled that " . . . one need not await the eventual

Moreover, although Fremont's malpractice claims concern errors committed during litigation, this case does not appear to be a "litigation-related malpractice" case as that phrase has been defined by Florida courts. Litigational malpractice has been defined as "error committed in the course of litigation which might be changed on appeal." Eldred v. Reber, 639 So.2d 1086 n.1 (Fla. 5th DCA 1994) citing Zitrin v. Glaser, 621 So.2d 748 (Fla. 4th DCA 1992) (emphasis added). "The existence of negligence in such cases is not determined until the appeal is complete." Id. See also Coble v. Aronson, 647 So.2d 968, 970 (Fla. 4th DCA 1994). Here, as aforementioned, Spring's failure to timely relay settlement demands cannot be changed on appeal or elsewhere. Part of Fremont's damage, the increased attorney's fees and costs Fremont claimed it had to pay because of the malpractice, also cannot be changed on appeal or elsewhere. For these reasons, the bright line set forth in Silvestrone which applies to litigation-related malpractice cases should not be applied here.

In Silvestrone, this Court approved the decision of the Second District Court

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result of the lawsuit that should have been settled to determine that the failure to complete the settlement is malpractice and that damage from that failure, although not then completely ascertainable, is immediate."

of Appeal in Zakak v. Broida and Napier, P.A., 545 So.2d 380 (Fla. 2d DCA 1989).

The facts of Zakak are as follows:

> In 1984, the [Zakaks] retained the law firm of Broida and Napier, P.A. to defend them in a personal injury action brought by Marguerite Fish. During the course of that litigation, attorney Peter E. Napier represented to the other parties that he had the authority to settle the case and that the Zakaks would contribute $15,000.00 toward an overall settlement amount of $20,000.00. The plaintiff Fish accepted the offer. The Zakaks refused to contribute the $15,000.00, contending that Napier had no authority to settle on their behalf. Fish then moved for an order enforcing that settlement. The trial court heard the motion on January 15, 1985, and entered an order granting the motion on February 12, 1995.
>
> * * *
>
> The Zakaks made no payment, and on October 29, 1995, the trial court entered a final judgment for damages. No appeal was taken from that judgment.
>
> This action for legal malpractice was instituted on February 16, 1987. The defendants moved to dismiss, asserting that the face of the amended complaint established that the two year statute of limitations had run prior to suit being filed. The trial court found that the statute had begun to run with the entry of the February 12, 1985, order and dismissed the action with prejudice.

Id. at 381.

The Zakaks appealed the trial court's order. On appeal, the Second District reversed, finding as follows:

> [A]lthough the Zakaks knew that their liability was probably fixed on

> February 12, 1985, such liability did not become a confirmed fact until the entry of final judgment. A period of limitations does not begin to run until there is in existence a fully matured cause of action which may be prosecuted. Section 95.031(1), Fla.Stat. (1985). So long as the order confirming settlement remained subject to reconsideration, the Zakaks could not possess a matured cause of action which would commence the running of the statute.

Id. at 381.

The court's finding in Zakak supports Carey Dwyer's argument that the facts of this case carry it outside the bright line of Silvestrone. In this case, unlike Zakak, Fremont had a mature cause of action in 1989, when it had notice of the malpractice and had sustained irreversible damage as a result. Part of Fremont's claim against Spring is also not contingent on, and could not have been altered by, anything done by its opponent, a jury, a trial court or an appellate court. Fremont did not have to await the entry of final judgment to determine that was damaged by Spring's negligence. In the underlying case, there is nothing the trial court could have considered that could cure Fremont's damages or redressable harm. These unique facts bring this case outside of the holdings of Silvestrone and Zakak.

The policy considerations found in Silvestrone are consistent with the those found in Peat, Marwick, Mitchell & Co. v. Lane, 565 So.2d 1323 (Fla. 1990). In Peat, Marwick, the Lanes retained Peat, Marwick to provide them with tax advice

and to assist them in preparing their personal income tax returns. On the advice of Peat, Marwick, the Lanes invested in a limited partnership. After the limited partnership lost money, Peat, Marwick advised the Lanes to deduct their losses. On March 17, 1981, the Internal Revenue Service ("IRS") sent a "Ninety-Day Letter" informing the Lanes that the IRS had determined there were deficiencies in the their tax returns because of the partnership loss deductions. The letter also informed the Lanes of the procedures available to challenge the IRS's deficiency determination. Peat, Marwick told the Lanes that the deductions were proper, and advised them to fight the IRS determination in tax court. The Lanes followed Peat, Marwick's advice and filed their challenge on June 8, 1981. Subsequently, the Lanes agreed to the entry of a stipulated order, dated May 9, 1983, which required them to pay a tax deficiency.

On February 22, 1985, less than two years after the entry of a United States Tax Court order based on the stipulation, the Lanes filed a lawsuit against Peat, Marwick for accounting malpractice.[14]

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[14] Although Peat, Marwick, concerns accounting malpractice, it also applies to legal malpractice cases. Id. at 1325. After Silvestrone, however, Peat, Marwick's holding may only be limited to transactional malpractice cases. Silvestrone, 721 So.2d at 1174n.1.

In response, Peat, Marwick claimed that the Lanes' claim was barred by the applicable two-year statute of limitations governing professional malpractice actions. Peat, Marwick claimed that the cause of action accrued when the Lanes received their Ninety-Day Letter on March 17, 1981 - therefore their malpractice claim filed on February 22, 1985 was untimely. The Lanes argued that their cause of action did not accrue until a final determination was made by the tax court, on May 9, 1983. Their argument was that if the tax court ruled in their favor, they did not have a claim for accounting malpractice since they would not have sustained redressable harm. This Court agreed with the Lanes, holding that their cause of action did not accrue until the tax court ruled against them, and the existence of a redressable harm had been established. Id. at 1325. This ruling was logical, because "if a favorable outcome . . . could eliminate any reasonable possibility of loss because of alleged malpractice occurring during the course of litigation, redressable harm cannot be established. . . " Coble v. Aronson, 647 So.2d 968, 970 (Fla. 4th DCA 1994).

The reasoning behind the ruling in Peat, Marwick is consistent with that

found in Silvestrone.[15] In both cases, this Court found that legal malpractice actions were timely because an act of a court could have eliminated the possibility of loss sustained by the client. The holdings in those cases do not apply here because there is nothing that could have cured the negligence or redressable harm resulting from the negligence (which was sought by Fremont in its Complaint (R1-1-18, 20, 23)). The District Court agreed with Carey Dwyer and ruled that this case falls within one of the specially created exceptions found in Peat, Marwick. For similar reasons, this case is also an exception to Silvestrone.

## CONCLUSION

The Order of the United States District Court granting Carey Dwyer's Motion for Final Summary Judgment should be affirmed. Fremont's claims for legal malpractice are time barred since 1) Fremont was aware of the alleged malpractice in 1987; 2) Fremont began sustaining damages because of the alleged malpractice by 1989 (in the form of attorney's fees and costs it was forced to pay because it allegedly lost the opportunity to settle the underlying claim); and 3) Fremont knew it

[15] In Silvestrone, this Court stated that Peat, Marwick is factually distinguishable because it involved transactional malpractice. Silvestrone, 721 So.2d at 1174n.1. A reading of both cases, however, will support Carey Dwyer's position that the policy behind each ruling is consistent with what Carey Dwyer is arguing here.

would have to pay more than policy limits to settle the case in the early 1990's. The bright line rule relied upon by Fremont does not apply here because there is nothing any party or court could have done that would have cured the malpractice or redressable harm sustained by Fremont in 1989. For the foregoing reasons, Carey Dwyer respectfully requests that this Court advise the Eleventh Circuit that the statute of limitations began to run in this case in 1989.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 20th day of March, 2000 to Hendrik G. Milne, Esq.; Craig P. Kalil, Esq.; and Sylvia M. Garrigó, Esq.; Aballi, Milne, Kalil & Garrigó, P.A., 1980 SunTrust International Center, One Southeast Third Avenue, Miami, Florida 33131.

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