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SUPREME COURT OF FLORIDA

CASE NO. SC99-86

On Certification from the United States Court of Appeals
for the Eleventh Circuit

Lower Tribunal No. 98-5447

FREMONT INDEMNITY COMPANY,

Plaintiff/Appellant,

v.

**CAREY, DWYER, ECKHART, MASON
& SPRING, P.A., etc., et al.,**

Defendants/Appellees.

APPELLANT'S BRIEF ON THE MERITS

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1.

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ABBREVIATIONS

In this Brief, the Parties are referred to as “Appellant” or “Fremont” and “Appellee” or “Carey, Dwyer”. References to the Record on Appeal are to “R” and the volume and page number. References to the Record Excerpts are to the Tab number.

STATEMENT OF THE CASE AND OF THE FACTS

The United States Court of Appeals for the Eleventh Circuit has ably stated most of the relevant facts for this Court, and we adopt the same as our own. If this Court determines that it needs further detail for its decision, it may be found in the following statement, which replicates the statement in Fremont's Initial Brief to the Eleventh Circuit, which in turn largely replicates the Magistrate Judge's Findings of Fact in the U.S. District Court. This statement, from the asteriks immediately below, to the asteriks on page 13, was accepted as accurate before the Eleventh Circuit by Carey, Dwyer, with the exception of Fremont's reservation at footnote 1. Carey, Dwyer contends, to the contrary of Fremont's assertion in that footnote, that all the Magistrate Judge's Findings were correct.

a. Course of Proceedings and Disposition Below

On February 14, 1997, Fremont, a liability insurer, filed a complaint against the Carey, Dwyer law firm and an individual Carey, Dwyer attorney. Counts I-III were for legal malpractice in the handling of the defense of a piece of litigation against Fremont's insured, phrased as breach of contract, professional negligence and breach of fiduciary duty. Count IV was for

indemnity. The basis of jurisdiction was diversity of citizenship and Florida law applied. (RI -1-24).

The indemnity claim was eventually dismissed. Fremont's notice of appeal covered that ruling as an additional ground of appeal. Fremont does not, however, proceed further as to the propriety of the ruling on Count IV, and the history of the proceedings as to the indemnity claim is therefore omitted.

Carey, Dwyer answered Counts I-III of the complaint on April 8, 1997 (RI-8) and on September 12, 1997 moved for final summary judgment on those three counts, claiming that Florida's two-year statute of limitations on the malpractice claims had elapsed long prior to the institution of this action. (RI -39). In support of their motion, Carey, Dwyer submitted the deposition of Alan Faigin, Esq., ("Mr. Faigin"), Secretary and General Counsel to Fremont's parent company, Fremont General Corporation. (RI -41).

On November 3, 1997, Fremont filed its objections to the "undisputed facts" as stated by the Appellee attorneys in support of their summary judgment motion. (R2-59). That same day Fremont filed its memorandum in response to the motion for summary judgment, attaching as evidence in

support of its position, answers to interrogatories that it had given in the action and an affidavit of Mr. Faigin. (R2-60).

On November 4, 1997, the District Court referred the summary judgment motion to the Magistrate Judge for his Report and Recommendation (R2-52) and on November 7, 1997, Carey, Dwyer requested oral argument on the motion. (R2-54).

On November 10, 1997, Carey, Dwyer filed its reply on the motion for summary judgment (R2-57), replied to Fremont's objections to its statement of undisputed facts (R2-57), and moved to strike the affidavit of Alan Faigin. (R2-56).

On November 14, 1997, the Magistrate Judge granted oral argument on the summary judgment motion and scheduled it to be heard on December 9, 1997. (R2-63).

On November 18, 1997, the District Court referred the motion to strike the affidavit of Alan Faigin to the Magistrate Judge for his report and recommendation. (R2-65).

On December 3, 1997, Fremont filed its opposition to Carey, Dwyer's motion to strike Mr. Faigin's affidavit and its own cross-motion to exclude inadmissible conjecture contained in the deposition of Alan Faigin. (R2-70).

Oral argument on the motion for summary judgment was heard on December 9, 1997. (R2-74).

On July 14, 1998, the Magistrate Judge rendered his report and recommendation to the District Court that Carey, Dwyer's motion to strike Mr. Faigin's affidavit be denied, that Fremont's motion to strike inadmissible conjecture be, likewise, denied, and that the motion for summary judgment be granted on the ground that the statute of limitations had run on the causes of action asserted. (R2-84).

Fremont timely objected to the report and recommendation on July 24, 1997. (R2-85). Carey, Dwyer responded on August 5, 1998. (R2-86). The District Court adopted the Magistrate Judge's decision in all particulars on August 24, 1998, (R2-87), and entered final summary judgment that same day. (R2-88).

This appeal ensued, being timely filed on September 17, 1998. (R2-89).

b. Statement of the Facts'

The claims arise out of conduct by Defendant Michael Spring, while acting as an attorney in the Defendant law firm. The Defendants contracted with the Plaintiff in February, 1985 to act as counsel on behalf of itself and a firm of architects to whom the Plaintiff had issued a professional liability insurance policy with a \$2 million limit. The architects had given a notice of claim by a developer, Interdevco, which arose out of the structural failure of a building under construction.

Defendant Spring knew by late February 1985 that the developer's losses were in excess of the \$2 million policy and that therefore, separate counsel should have been appointed to represent the insured and Fremont; that urgent efforts should have been made to settle the claim, and that an immediate tender of the policy and demand on the engineers (with whom the architects had subcontracted) and their insurer for indemnity might be warranted. (¶¶ 17, 18).²

However, the Plaintiff alleges that Spring negligently analyzed the claim and advised Fremont and the insured in late February 1985 that the engineers were primarily liable and that

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The facts and issues as stated by the Magistrate Judge and thereafter adopted by the District Court are generally correct and are therefore recited as the Statement of the Facts as a single, lengthy quotation. We have italicized the passages that we contend are inadmissible conjecture and should not have been considered on summary judgment although, as is explained below, recent Florida Supreme Court authority makes the issue academic. The whole of the "Statement of Facts" is therefore to be found at R2-84 and at Tab 84 of the Record Excerpts.

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Our Footnote: the Court's references to the Complaint are to RI-I. It is contained at Tab 1 of the Record Excerpts.

the damages seemed unlikely to exceed the engineer's \$5 million policy. (¶ 19). This led to Spring taking virtually no action for 2 years to evaluate and settle the claim, during which time the damages to the developer increased. (¶ 21).

By November, 1985, Spring knew that the damages claimed by the developer exceeded \$9 million, which was in excess of both the engineer's and the architect's policies: however no action was taken. (¶ ¶ 24, 25). On April 22, 1986, the developer sent a letter to Spring, claiming damages in excess of \$10 million and demanding policy limits. This letter was not relayed to Fremont or its insured and Spring, without authorization, rejected the demand. (¶ ¶ 26, 27). The developer, Interdevco, filed suit in state court in May, 1986 against the architect and the engineers.

Spring received additional letters from the developer's attorney on October 14, 1986 and October 27, 1986, advising of escalating damages, complaining of bad faith by Fremont and demanding the policy limits. These demand, (sic), were not relayed to Fremont or the insured and were rejected by Spring, without authority or sufficient information (¶ ¶ 30-33).

By late 1985, Spring knew that the developer faced potential foreclosure on the project and that the engineer's insurer had paid out a substantial portion of its policy limits. However, he continued to recommend that Fremont do nothing. (¶ ¶ 35, 36). Spring knew by late 1986 that the engineer's policy was in effect exhausted as a result of a confidential settlement. (¶ 37). By January, 1987, Spring knew that the foreclosure action threatened by the construction lenders had been filed. (¶ 38). On April 23, 1987, Spring wrote to Fremont, enclosing the October 14 and October 27 letters as well as a new letter of April 16, 1987, all from the developer's attorney and all demanding policy limits. Spring's letter advised Fremont that the engineer's policy was paid out and requested authority to offer Fremont's policy limits. (¶ ¶ 34-39).

According to the Complaint, "Upon receiving this letter, Fremont appointed separate counsel for itself and its insured and put the case under immediate review and, as soon as the transition had been made, terminated Spring's representation." (§ 40). The new counsel for Fremont began taking the discovery and retaining experts that Spring had failed to do previously. This led to the determination that the possible remaining damages were great and that the developer believed that Fremont would be liable for the whole amount in a bad faith action. Fremont attempted to settle with the developer, making "successively higher settlement offers" until the policy limits were offered in 1989. These offers were rejected by the developer. (§§ 42-46).

A further wrinkle in the saga occurred in connection with the state court foreclosure action filed against the developer. The construction lenders failed and were taken over by the Resolution Trust Corporation. The RTC then removed the foreclosure action to federal court along with the consolidated underlying litigation between the developer and the architect. The developer and the RTC entered into a contract of settlement in June, 1991, which resulted in a stipulated deficiency judgment of \$8,936,911, along with an assignment to the RTC of the developers' causes of action against the architects and any rights to a future bad faith action against Fremont. (§§ 47-49). After this settlement, the cause was remanded to state court. (§ 51).

In late 1993, Fremont began to negotiate with (sic), RTC to end the underlying litigation. (§ 52). On February 21, 1995, "following two years of negotiation," Fremont and the RTC entered into a "Contract of Assignment and Settlement," pursuant to which Fremont paid the RTC \$4.5 million on February 28, 1995, with Fremont receiving numerous of the rights held by RTC, including the underlying judgment and the RTC's rights in the underlying litigation. (§§ 52-54). In March, 1995, Fremont settled all outstanding claims with its insured by agreeing to pay any judgment in the underlying litigation. (§ 55).

On April 19, 1995, Fremont notified the developer's counsel that it was the owner of the causes of action being prosecuted on its behalf in the state court, and instructed them to dismiss the case as against the architects, with the developer being discharged of further liability on the judgment debt. (¶ 57). However, the developer refused, which resulted in a later federal action (*Fremont v. Interdevco*, 95-815-Civ-Graham) in which both parties sued for declaratory judgment as to the meaning of the RTC settlement/assignment. (¶ 58).

The District Court entered orders in this later action in July, 1996, holding that Fremont validly acquired the RTC deficiency judgment, but it did not have the right to settle the underlying litigation. Both sides appealed to the Eleventh Circuit, where the cause is still pending. (¶ ¶ 59-60).³ The underlying litigation between the developer and the architects is also pending in state court. (¶ 61).⁴

According to the Complaint, the actions by the Defendants exposed Fremont to "an unreasonable risk of a future bad faith action by its insured" and Fremont did not have to await the underlying litigation's outcome to bring the present suit if "it could achieve a reasonable settlement." (¶ ¶ 62, 63). Additionally, the Complaint asserts:

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Our Footnote: while the summary judgment motion was under review, the Eleventh Circuit affirmed Judge Graham in an unpublished opinion, *Fremont Indemnify Co., v. I.G.S.Q., Inc.*, 136 F. 3d 1330 (11th Cir. 1998). We advised the Court of that fact on July 24, 1998. (R2-85-3).

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Our Footnote: as the Eleventh Circuit notes, the underlying action has now been settled. This was almost immediately before oral argument in September, 1999.

Regardless of the eventual result on the federal appeal or the underlying State Court action, FREMONT'S payment to the RTC of \$2.5 million in excess of its policy limits on February 28, 1995 was a reasonable attempt to settle the underlying litigation and/or secure a set off against a potential excess verdict, and constituted the first redressable injury proximately caused by the actions of SPRING and Carey Dwyer. This action has been commenced within two years of such payment. (¶ 64).

In each of the counts for malpractice, the Plaintiff sets out the specific acts, and states that as a result of the breaches, Fremont was damaged in an amount which includes the \$2 million of the policy limits paid to the RTC, the next \$2.5 million in excess of the policy limits and "all litigation and other expenses. determined to have been occasioned by the continuing underlying and collateral actions alleged above." (¶ ¶ 68, 71, 74).

During the deposition of Alan Faigin, Secretary and General Counsel of Fremont General Corporation, taken on August 26, 1997, counsel stipulated that Fremont was aware of the alleged malpractice committed by the Defendants at the very least by August 12, 1987, which was the date Spring was terminated. (T.8).⁵ *Faigin stated, as set forth in the Complaint, that but for Spring's negligence, Fremont has been damaged by ongoing defense costs and fees which would not have been incurred. (T. 20).*

Faigin testified that Fremont was not aware of the fact that offers to settle for policy limits were made until the April 23, 1987 letter from Spring. (T. 27). According to Faigin, when the letter was received, Fremont retained separate counsel for itself

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Court's Footnote 1: "'T' refers to the transcript of the deposition of Alan Faigin, which has been filed with the Court. (D.E.#41)." [Our Footnote: the Court's references to Mr. Faigin's deposition are to RI-41 .]

immediately. After the file was reviewed, and another law firm chosen' separate counsel was appointed for the insureds. (T. 28-29).

Faigin stated that it was "generally right" that if Spring had done the things which he is alleged not to have done in the case that Fremont would have been in a position to respond to the settlement demands, pay its \$2 million limit and be done with the case. (T. 35-36). *He added that some of the expenses incurred after Spring was terminated would have been incurred in any event, but that some would not have been.* (T. 38). *Faigin could not be precise as to the amount of damages sought for fees incurred by Fremont for other counsel due to Spring's improper handling of the case, but estimated it in the hundreds of thousands of dollars.* (T. 41). *This amount represented the sum over and above what would have been the amount charged to Fremont by Spring had he performed properly.* (T. 42).

Faigin estimated that a large part of the expert fees and more than half of the attorney fees incurred have been subsequent to Spring's termination. (T. 48). He added that at the time Spring was terminated, Fremont knew of the acts of negligence, but did not know whether or not the acts would result in damage to Fremont. (T. 54). According to the deponent, there was "high probability" that there would be damage, but that there was also the possibility that the case could have been settled within the policy limits. (T. 55).⁶ Faigin acknowledged that the policy limits were tendered and rejected in 1989, as set forth in the Complaint. (T. 56). Attempts were also made to settle the case for over the policy limits, with the last offer made in the early 1990's for \$3.5 million. (T. 57-58). He added that Fremont knew

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Our Footnote: the Court omitted that Fremont's experts estimated that little, if anything, was actually due, and that a zero verdict was also a possibility. (R2-60-37).

in the early 1990's that the developer would not accept a settlement within the policy limits at that time. (T. 58). Faigin added that Spring "was responsible for us losing the opportunity to settle with (sic), our policy limits." (T. 60). Fremont *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.* (T. 60).

Faigin also testified that the payment to the RTC was the result of discussions and negotiations that began prior to 1995, and that Fremont first retained the lawyers who provided the services in the negotiations in 1994. (T. 61, 62). According to Faigin, if Spring had handled the case properly, Fremont never would have been required to make any payment to RTC and that the need for the payment was caused by Spring's actions or inactions prior to his termination. (T. 63).

Faigin could not ascertain when the fees spent began to exceed the amounts which should have been reasonably spent by Spring, *but acknowledged that they were incurred at some point in time.* (T. 65). Faigin added that it "is probably correct" that when the policy limits offer was made in 1989, Fremont had done whatever it thought was necessary to evaluate the claim as it contended Spring should have done. (T. 65). *He a/so stated that it "is probably correct" that if it had not been for Spring's negligence, Fremont would have been able to settle the case at least by 1989 and not incurred the defense expenses for the subsequent years.* (T. 66).

The Answers to Interrogatories, which were signed by Mr. Faigin, state that Spring was terminated on August 12, 1987.⁷ This termination was a result of by, (sic), the letter from Spring

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Our Footnote: the Court's references to the interrogatory answers are to R2-60-46 through 71.

dated April 23, 1987. Upon receipt of this letter, Fremont retained separate counsel and reviewed Spring's conduct of the case. The representation of the insured was transferred from Spring to Stansell and Rice on August 12, 1987. However, the case was subsequently transferred to the Kenny Nachwalter firm in mid-1993.

An affidavit by Alan Faigin, dated October 31, 1997, has also been filed by the Plaintiffs.⁸ In the affidavit, which was filed after the present motion for Summary Judgment, Faigin states that counsel's questions during the deposition concerning fees that would have been incurred were too narrow, since it is possible that a tender of the policy limits would have been rejected even in the absence of malpractice. In such an event, there would be no bad faith exposure but a continuing obligation to fund the defense would be present and possibly still continuing.

According to Faigin, under the terms of the policy, a tender of full limits, unless accepted as a full settlement, would have no effect on Fremont's continuing responsibility to fund the defense. The affidavit also states that there is no record basis for the assumption that an opportunity to settle for policy limits was present in April, 1987. Faigin also points to the letters of April 16 and April 23, 1987 as an implicit demand for policy limits, but not an offer to accept the tender in settlement of all claims against Fremont's insured.

The issue before this Court on the Motion for Final Summary Judgment is whether the Plaintiffs cause of action for legal malpractice is barred by the limitation imposed by Florida Statute Section 95.11(4)(a). The parties do not dispute for the purposes of this motion that there has been malpractice; that

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Our Footnote: the Court's references to the affidavit are to R2-60-30 through 45.

Florida law applies; that the applicable statute of limitations is 2 years and that the Complaint was filed on February 14, 1997.

The focus of the disagreement is on when the 2 years began to run. According to the Defendant, it started in 1987 when Spring was terminated as Counsel, or at the latest, in 1989 when Fremont knew that damages had been sustained. The Plaintiff contends that the statute started to run at the earliest in late February 1995, when payment was made to the RTC. The Plaintiff also argues that the statute may not even have started running due to other pending litigation.⁹

The Court concluded that:

The present case falls within the category of cases . . . where damages, although speculative as to final amount, are actually sustained. The facts before this Court show that the Plaintiff had knowledge of the negligence as early as 1987, and that some damages related to the malpractice, which are sought as recoverable, were incurred at least by 1989. The Plaintiffs reliance on the payment to the RTC or the possible outcome of other actions is misplaced where there is no dispute that the failure by counsel (the malpractice) clearly resulted in some damage to the Plaintiff prior to February, 1995. . . .

This Court finds that the evidence presented shows that the Plaintiff first incurred damage from the malpractice well before 2 years prior to the filing of the Complaint. Since the applicable 2 year limitations period was not met, the relief sought in the complaint should be barred.

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Our Footnote: i.e. the action in which the malpractice occurred.

The underlying litigation which the Appellees, Mr. Spring and Carey, Dwyer, were retained to defend (I.G.S.Q, Inc. f/k/a Interdevco Grove Square, Inc., v. Hernandez, et al., Case No. 86-20513 CA 20), was then still pending in the Miami-Dade County Circuit Court with no trial date set. (Undisputed). The case was finally settled in September 1999. (Undisputed). This action is now before this Court upon the following question certified by the U.S. Eleventh Circuit Court of Appeals: "WHEN DID THE STATUTE OF LIMITATIONS BEGIN TO RUN IN THIS CASE?"

STATEMENT OF THE ISSUE

Whether Fremont's action for legal malpractice against Carey, Dwyer, Eckhart, Mason & Spring, P.A. and Michael C. Spring, Esq. is barred by the two-year limitation imposed by § 95.11(4)(a) Fla. Stat. (1997) where: (1) the malpractice complained of consists of errors and omissions in the handling of the defense of litigation and (2) the litigation in which the claimed malpractice occurred was pending when the malpractice action was commenced.

SUMMARY OF THE ARGUMENT

In order to provide certainty and to reduce litigation over when the two-year statute of limitations provided for in § 95.11(4)(a) Fla. Stat. (1997) starts to run in “litigational malpractice” cases, this Court announced a “bright-line rule” that “the statute of limitations does not commence to run until the litigation is concluded by final judgment.” *Silvestrone v. Edell*, 721 So.2d 1173, 1175 (Fla. 1998).

This litigational malpractice action was filed before the underlying action had proceeded to judgment. The U.S. District Court nevertheless deemed it time-barred. Under *Silvestrone*, however, the malpractice action was, actually, premature. The underlying action was then settled late in 1999, while the U.S. District Court’s decision was on appeal to the United States Court of Appeals for the Eleventh Circuit. It follows that the settlement started the statute running and that this malpractice action is now mature and timely.

The pivotal reason for the Eleventh Circuit’s certification to this Court is *Breakers of Ft. Lauderdale v. Cassel*, 528 So. 2d 985 (Fla. 3d DCA 1988), which Carey, Dwyer argues affords an exception to the rule in *Silvestrone*. In *Breakers*, the Third District Court of Appeal concluded that a lawyer’s failure to reduce a settlement to writing was immediately actionable since the

resumption of litigation caused immediate legal expense and therefore immediate damage.

First, *Breakers* is inconsistent with, and must be deemed overruled by, *Silvestrone*.

Second, *Breakers* is, anyway, distinguishable as an “unconsummated settlement” case. Its rationale does not apply to “failure to convey settlement offer” cases like this one - and, indeed, *Silvestrone*, itself.

Third, *Breakers*, dealt with a minimal settlement of under \$1,500, where the cost of resuming litigation would have immediately exceeded the settlement amount. In the present case, however, settlement would have cost \$2 million and it cannot be determined from the record when Fremont’s litigation costs exceeded that amount.

Fourth, had the settlement offers been conveyed, it is possible that Fremont’s tender of policy limits would have been refused in full settlement of the case. In such an event, Fremont would have avoided any “bad faith” exposure but would have been under a continuing policy obligation to fund the defense. If such had been the case – and a jury would be free to so decide – Fremont’s recoverable damages would not include attorneys’ fees. It

follows that the Breakers rationale, which depends on legal expenses being legally recoverable damages, does not apply.

Fifth, the Third District Court of Appeal's decision in Breakers is logically inconsistent with its own later decision in *Bierman v. Miller*, 639 So. 2d 627 (Fla. 3d DCA 1994), where it held that a lawsuit is premature while all that has been suffered is continuing litigation expense and exposure to a judgment.

In sum, we submit that this Court should answer the question certified by the U.S. Eleventh Circuit Court of Appeals as follows: "The statute of limitation began to run when the case in which the claimed malpractice occurred was brought to a final conclusion by settlement."

ARGUMENT

1.

In *Silvestrone v. Edell*, this Court stated a "bright-line rule" for the commencement of the statute of limitations in litigational malpractice cases in order to promote certainty in the law and to minimize unnecessary litigation. Under this rule, Fremont's malpractice action is timely.

In *Silvestrone v. Edell*, 721 So.2d 1173 (Fla. 1998), this Court stated that the law was "not clear as to when the limitations period for legal malpractice in a litigation-related context begins to run." In order to "provide certainty and reduce litigation over when the statute starts to run," it therefore stated a "bright-line rule," as follows:

when a malpractice action is predicated on errors or omissions committed in the course of litigation, and that litigation proceeds to judgment, the statute of limitations does not commence to run until the litigation is concluded by final judgment."

"Bright-line rules" are drawn in the law for exactly the purposes stated in *Silvestrone*: to provide certainty for the guidance of litigants and to reduce

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Silvestrone, at 1173.

labor for the courts.” In order for it to be a “bright-line rule,” it can admit of no exception. *Silvestrone*, therefore, overrules all prior authority, whether explicitly listed or not, which would indicate any earlier date for the triggering of the statute of limitations than the date of final judgment.

The Carey, Dwyer lawyers were hired to defend a piece of litigation. Fremont alleges that they did so negligently: in the words of *Silvestrone*, Fremont contends that there were “errors or omissions committed in the course of litigation.” *Silvestrone*, at 1173. This case is, thus, a “litigation-related malpractice case.” The action in which the alleged malpractice occurred had not yet gone to final judgment when the malpractice action was filed and no recoverable loss had yet been suffered since: “a malpractice

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“A statute of limitations which is triggered by an externally verifiable date is a classic example of an objective, bright-line rule which fosters predictable outcomes in otherwise unpredictable situations.” *DeBusk v. Johns Hopkins Hospital*, 342 Md. 432, 439, 677 A.2d 73, 76 (Md. 1996); “It provides a bright-line rule which benefits all by providing greater certainty. At the same time, the burden on the judicial system is minimized.” *Dawson v. Scoff*, 50 F.3d 884,895 (11th Cir. 1995); “[T]his Circuit’s bright-line rule fosters predictability.” *State Treasurer of the State of Michigan v. Barry*, 1999 U.S. App. LEXIS 2595 (11th Cir. Feb. 19, 1999); “This clear, bright-line rule, which the Court applied until recently’ ensures that judges and litigants will not waste their resources ...” *Jerome B. Grubart, Inc. v. Greaf Lakes Dredge & Dock Co.*, 513 U.S. 527, 549 (1995) (concurring opinion).

claim is hypothetical and damages are speculative until the underlying action is concluded with an adverse outcome to the client.” *Silvestrone*, at p. 1175. Applying the “bright-line rule” in *Silvestrone*, the action was premature when filed and became mature upon the later disposition of the underlying case by settlement. The analysis should be that simple. This simplicity of application was why the rule in *Silvestrone* was adopted.

2.

To recognize any exception to the “bright-line rule” in *Silvestrone*, let alone an “unconsummated settlement” exception founded on *Breakers of Ft. Lauderdale v. Cassel*, would generate fresh uncertainty about the issue of commencement of the statute of limitations and foster unnecessary litigation. No exception to the rule in *Silvestrone* should, therefore, be recognized.

The pivotal reason for the Eleventh Circuit’s certification to this Court is *Breakers of Ft. Lauderdale v. Cassel*, 528 So. 2d 985 (Fla. 3d DCA 1988), which Carey, Dwyer argues affords an exception to the rule in *Silvestrone*.

In *Breakers of Ft. Lauderdale v. Cassel*, the parties to an action agreed to a settlement. Defense counsel, however, “improperly failed to consummate the settlement.” *Breakers* at 986. The Third District Court of Appeals concluded that:

Damages to Breakers 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 Breakers learned that the lawsuit against it had been revived . . .

Breakers, at p. 986. The Court concluded that the statute commenced to run from the date of the failed settlement.

Since it is unclear from *Breakers* what was meant by the “failure to complete the settlement,” we secured, and for the Court’s convenience we attach extracts from, the briefs of the parties in the *Breakers* case.¹² From these, it appears that there had been an oral agreement for settlement at between \$1,200 and \$1,500, which had never been reduced to writing by counsel.

First of all, *Breakers* must be deemed overruled by *Silvestrone*. *Silvestrone* stated a “bright-line rule” that a litigational malpractice claim does

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The briefs in *Breakers* were no longer available from the Third District Court of Appeals. We were kindly supplied copies by counsel for appellees in that case. In order to avoid burdening the record with the entire briefs, we attach a pertinent extract, only, from *Breakers*’ Statement of Facts as Exhibit “A” and an extract from Cassel’s Statement of Facts as Exhibit “B.” We will forward the entire briefs to opposing counsel.

not accrue until the underlying litigation is at a complete and final end and all appeals have been decided. A settlement - since it ends a case prior to judgment - would obviously also start the clock running. *Breakers*, however, starts the clock while the underlying litigation is still pending. It is therefore inconsistent with *Silvestrone* and is no longer good law.

Second, if *Breakers* has any continued vitality, it must be confined to “unconsummated settlement” cases and does not apply here. In *Breakers*, the parties had reached agreement but the attorney had failed to reduce the agreement to writing. In contrast, the present case deals with offers of settlement that were never relayed to the client. Unconveyed settlement offers were also part of the claimed malpractice in *Silvestrone*. See *Silvestrone v. Edell*, 701 So.2d 90, 92 (Fla. 5th DCA 1997) (“The basis of Silvestrone’s claim, inter alia, was that ... Edell . . . failed to inform him of settlement offers.”) *Silvestrone* is, therefore, on all fours with *Carey, Dwyer*. If *Breakers* continues to be good law, it is, at a minimum, inapplicable.

Third, *Breakers* dealt with a situation where the legal fees generated by resumption of the litigation would immediately exceed the settlement amount. Perhaps on those facts it was fair to conclude that the statute should be deemed to start running immediately. But those facts are a far cry from the

facts of the present case. In this case, settlement would have cost Fremont \$2 million. While continuation of the case past the point when it should have settled cost Fremont money, there was always the possibility of a lower settlement or verdict and that Fremont might still come out ahead. We note that the Eleventh Circuit agrees 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. No such determination can be made from the record.

Fremont Indemnity Company v. Carey, Dwyer, et al., 197 F.3d 1053, 1058 (11th Cir. 1999).

Fourth, the District Court accepted Fremont’s affidavit evidence¹³ that, in the absence of malpractice, one possible outcome would have been that Fremont would have tendered its policy limits, but that the tender would have been refused as a settlement of the case. “In such an event, there would be no bad faith exposure but a continuing obligation to fund the defense would

¹³

In denying Carey, Dwyer’s Motion to Strike. R2-84-1; Tab 84, p. 1.

be present and possibly continuing."¹⁴ In such event, Fremont's damages would *not* include attorneys' fees. Breakers assumes a situation where fees would *necessarily* be recoverable as damages and therefore does not apply.

Fifth, the Third District Court of Appeal's decision in Breakers is logically inconsistent with the its own later decision in *Berman V. Miller*, 639 So. 2d 627 (Fla. 3d DCA 1994) where it held that neither having to pay "considerable attorneys fees" nor exposure to "multi-million dollar judgments" constituted such "redressable harm" as would justify the institution of a lawsuit, and that the malpractice action was premature until the underlying litigation was over.

In sum, however defensible the result in Breakers might have been on the law at the time and on its own particular facts, it has been overruled by *Silvestrone* or, at the very least, has no application here.

¹⁴

R2-84-8; Tab 84, p.8.

CONCLUSION

Desiring much-needed certainty in the law of the State, and seeking to lessen the burden on the Courts, this Court adopted a “bright-line rule” in *Silvestrone v. Edell* - a rule that applies in every case, bar none - that if the malpractice case is “litigation-related,” the date of the final conclusion of the underlying litigation is the earliest date that the cause of action can accrue and the statute of limitations begin to run.

The intent of this rule was to obviate the kind of uncertainty that prompted Fremont to file this malpractice case before conclusion of the underlying action in the first place, and to obviate the waste of the parties’ money and the time of the Courts in going through the kind of analysis that the Courts have had to go through in this case.

We submit that, consistent with *Silvestrone*, this Court should answer the question certified by the U.S. Eleventh Circuit Court of Appeals as follows: "The statute of limitations began to run when the case in which the claimed malpractice occurred was brought to a final conclusion by settlement."

Respectfully submitted,


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to **Lewis N. Jack, Esq.** and **Scott A. Cole, Esq.** at Josephs, Jack, & Gaebe, P.A., Grove Professional Building, 2950 S.W. 27th Avenue, Suite 100, Miami, Florida 33133-3765, on this 1st day of March, 2000.



Hendrik G. Milne

DISTRICT COURT OF APPEAL
THIRD DISTRICT OF FLORIDA

CASE NO. 87-1915

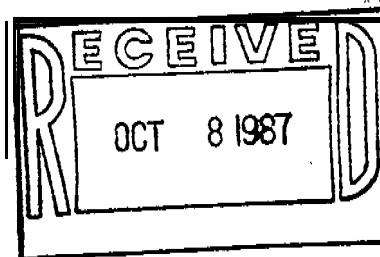
BREAKERS OF FORT LAUDERDALE, LTD.,
a Florida limited partnership

Appellant,

vs.

JAMES S. CASSEL,

Appellee.



On Appeal From The Circuit Court
of Dade County, Florida

APPELLANT'S INITIAL BRIEF

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EXHIBIT A

A handwritten signature in black ink, appearing to read "S. Alan Orth".

STATEMENT OF CASE AND FACTS

This appeal arises out of the trial court's (Honorable Jack Turner presiding) Dismissal with Prejudice of Plaintiff's Amended Complaint. (ROA: 67). The Amended Complaint, filed by BREAKERS, sought damages against CASSEL due to his neglect of a **litigation** matter in which he was retained to represent the then-Defendant BREAKERS. (ROA: 21). The underlying case was entitled Di-corn Enterprises, Inc. v. BREAKERS of Fort Lauderdale Development Corp. - and BREAKERS of Fort Lauderdale, Inc., Case No. 84-24298-CM, Broward County Circuit Court. That case **was** filed by Di-corn against Appellant in or about October 1984. (ROA: 22, ¶9). Shortly after the Di-corn suit was filed, the parties, with the assistance of counsel, reached mutually agreeable terms for the settlement and termination of that action. (ROA: 23, ¶11).

BREAKERS' complaint addressed **CASSEL's** failure to **fully** document the settlement **thereby** allowing Di-corn to bring additional claims against BREAKERS by way of an Amended Complaint. (ROA: 23, paragraphs 12 thru 15).

On January 2, 1987, BREAKERS filed this case against CASSEL alleging, inter alia:

"15. The negligent acts and omissions first came to the attention of the Plaintiff on or about December 27, 1984 when the Amended Complaint was served, making demand for damages above and beyond the **\$1,200.00** to **\$1,500.00** agreed upon." (ROA: 3, ¶15).

In response, CASSEL filed a Motion to Dismiss on the ground that the action, as **alleged by BREAKERS, was** filed beyond the applicable Statute of Limitations, arguing that the Statute of

Limitations began to run on December 27, and that the two-year statute (Fla. Stat. 95.11(4)(a)) expired on December 28, 1986, five (5) days before the BREAKERS suit was filed. (ROA: 16). After a hearing on the Motion to Dismiss, the Trial Court entered an order dismissing the Complaint with prejudice. (ROA: 36).

Immediately thereafter, the Plaintiff filed a Motion for Leave to File Amended Complaint and a Motion for Rehearing. (ROA: 37, 45). On April 6, 1987, the Trial Court granted the rehearing and entered an order allowing Plaintiff fifteen (15) to file its Amended Complaint. (ROA: 54). On the same day, Plaintiff re-filed the Amended Complaint that had been attached to the Motion to Amend. (ROA: 21-35). The Amended Complaint was substantially identical to the initial Complaint except for the additions of new Paragraphs 16 and 17, which alleged:

"16. Defendant, CASSEL, in an attempt to avoid or reduce the consequences of his negligent acts and omissions, continued to defend BREAKERS until April 1, 1985 when an order was entered allowing him to withdraw due to his status as a witness for BREAKERS in defense of the claims for damages above and beyond the **\$1,500.00** limit.

17. BREAKERS incurred damages as a result of **CASSEL's** negligent acts and omissions on May 23, 1986, when **Di-com Enterprises, Inc.** and BREAKERS settled that case by the payment of **\$25,000.00** in exchange of general releases."

Thereafter, Defendant, CASSEL, filed his Motion to Dismiss the Amended Complaint which again requested dismissal with prejudice based on the argument that BREAKERS' action was barred by the Statute of Limitations. (ROA: 5 5)After a hearing on the Motion to Dismiss the Amended Complaint, the Court reserved

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IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
THIRD DISTRICT

BREAKERS OF FORT LAUDERDALE, LTD.,
a Florida limited partnership

Appellant,

CASE NO.: 87-1915

vs.

JAMES S. CASSEL

Appellee.

ANSWER BRIEF OF APPELLEE

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Attorneys for Appellee

EXHIBIT B

STATEMENT OF THE CASE

On January 2, 1987 the Plaintiff/Appellant, Breakers of Ft. Lauderdale, Ltd., filed its initial complaint against the Defendant/Appellee, James S. Cassel. (R1) The complaint alleges that Cassel was negligent in his handling of litigation for the Plaintiff (then Defendant) Breakers. (R1-15) Paragraph fifteen of the original complaint is of particular importance:

The negligence first came to the attention of the Plaintiff in this action on December 27, 1984 when an amended complaint 'was filed indicating that there were further sums due and owing which went beyond the \$1,200.00 to \$1,500.00 due for previous usage and that Di-Corn was continuing to make a claim for lost profits. (R3)

Although Breakers current attorney signed the initial complaint against Cassel on December 9th, 1986, the attorney did not officially commence the action until January 2nd, 1987 when he filed the complaint. Both the date the complaint was signed and the date the complaint was filed clearly appear on the face of the complaint. (R1-15)

Cassel moved immediately to have the complaint dismissed as timed-barred under the applicable two year statute of limitations. Florida Statute, Section 95.11(4)(a). The trial court granted that motion and dismissed the complaint with prejudice on March 3, 1987. (R36)

Thereafter the Plaintiff filed a motion for rehearing. (R45-50) In its motion for rehearing the Plaintiff **relied** heavily on BIRNHOLZ V. BLAKE, 399 So.2d 375 (Fla. 3rd DCA

1981), for the proposition that a Plaintiff/Client may not bring or maintain an action against his Defendant/Attorney while an action is pending which may avoid or reduce the consequences of the negligence of the former counsel. The Plaintiff was successful in obtaining a rehearing and an amended order allowing the Plaintiff twenty days to file an amended complaint was entered. (R54)

The amended complaint was similar to the initial complaint in most respects. The primary distinction between the first and second complaints was the addition of paragraphs sixteen and seventeen to the amended complaint and the slight modification of the language contained within paragraph fifteen of the initial complaint. For instance, Paragraph 15 of the amended complaint reads as follows:

The negligent acts and omissions first came to the attention of the Plaintiff in this action on **or** about December 27th, 1984, when the Amended Complaint was served making demand for damages in a sum above and beyond the \$1,200.00 to \$1,500.00 agreed upon.

(R23) In an apparent attempt to escape the effect of the admissions in paragraph fifteen, the Plaintiff added paragraphs sixteen and seventeen which allege:

16. Defendant CASSEL, in an attempt to avoid or reduce the consequences of his negligent acts and omissions, continued to defend BREAKERS until April 1, 1985 when an order was entered allowing him to withdraw due to his status as a witness for BREAKERS in the defense of the claims for damages above and beyond the \$1,500.00 limit,

17. BREAKERS incurred damages as a result of CASSEL'S negligent acts and omission on May 23, 1986 when DI-COM Enterprises Inc. and BREAKERS settled that case by

the payment of \$25,000,00 and exchange of general releases.

(R24) Cassel again moved to dismiss the amended complaint as time-barred, (R55-60) The trial court granted Cassel's motion to dismiss the amended complaint on July 2, 1987. (R67-69) The order granting Cassel's motion to dismiss with prejudice noted that the Plaintiff had been given the opportunity to amend its complaint to avoid the Statute of Limitations bar, but the Plaintiff had failed to remedy the defect which led to the dismissal of the original complaint. (R67) The order noted that:

g.) Although the exact amount of the Plaintiff's alleged damages may have been uncertain as of December 27, 1984, based upon all of the allegations contained within paragraphs thirteen, fourteen, and fifteen of the amended complaint, the Plaintiff had actually been damaged as of December 27, 1984.

(R68) This appeal follows.