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 REPLY BRIEF

Hendrik G. Milne, Esquire
Florida Bar No. 335886
Craig P. Kalil, Esquire
Florida Bar No. 607282
Silvia M. Garrigó, Esquire
Florida Bar No. 725625

Aballí, Milne, Kalil & Garrigó, P.A.
Attorneys for Appellant
1980 SunTrust International Center
One Southeast Third Avenue
Miami, Florida 33131
Ph: (305) 373-6600

Fax: (305) 373-7929

TABLE OF CONTENTS

TABLE OF CITATIONS

Statutes

ARGUMENT

1.
Introduction

The parties agree, for the sake of these proceedings, that Carey, Dwyer was hired to defend Fremont in the underlying litigation; that Carey, Dwyer negligently failed to analyze Fremont's exposure to loss and negligently failed to relay offers of settlement within its $2 million policy limits, thus exposing Fremont to potential "bad faith" liability for an excess verdict; and that Fremont realized these facts at the time of, or shortly after, firing Carey, Dwyer in August 1987. The parties also agree that, in the absence of such malpractice, Fremont would probably have had to pay $2 million in settlement sometime in late 1986 or early 1987.

It is also accepted that, after Carey, Dwyer was fired in August 1987, Fremont's new lawyers did the analysis and other work that Carey, Dwyer should have done, charged the fees appropriate to that work and, in 1989, tendered $2 million in attempted settlement of the case, which was refused.

As of some date in 1989, therefore, it is fair to say that Fremont knew that its old lawyers had been negligent, that it *may* well have lost the opportunity to settle the case within policy limits, that it *might* become liable to pay the whole amount of an eventual

verdict, regardless of amount, and that there would be continuing legal expense. However, Fremont had still not had to pay the $2 million - or any sum - in settlement and a zero verdict remained a possibility - as indeed it did until the case was finally concluded by settlement for $2 million in 1999. The defense fees had not, by 1989, approached anywhere close to $2 million. Indeed, the Eleventh Circuit has concluded from the admissible evidence of record in this case that such point had not arrived at the date that the underlying action was filed.[1] We assume that such factual finding must be accepted by this Court in reaching its conclusion.

Carey, Dwyer argues, nevertheless, that under the rationale of *Breakers of Ft. Lauderdale v. Cassel,* 528 So. 2d 985 (Fla. 3d DCA 1988), Fremont had suffered "irreversible damage" through mounting defense costs by some date in 1989 and that Fremont's right to sue expired two years later. Even if this Court were to conclude, contrary to our submission, that *Breakers* survives *Silvestrone v. Edell*, 721 So.2d 1173 (Fla. 1998), there are a number of problems with this assertion.

---

1 "Fremont's total additional costs of defense had not reached its policy limits, for which the case could arguably have been settled, at the time this action was filed." *Fremont Indemnity Co. v. Carey Dwyer Eckhart Mason & Spring, P.A.*, 197 F.3d 1053 (11th Cir. 1999).

(a) Carey, Dwyer's argument is based on inadmissible guesswork, not evidence.

Carey, Dwyer's argument is predicated in large part on deposition answers - given over timely objection and a promptly filed motion to strike - by Mr. Alan Faigin, Secretary and General Counsel of Fremont's parent corporation, as to his beliefs as to what would have happened in the absence of malpractice.

As we pointed out in the U.S. District Court, Mr. Faigin's testimony was inadmissible. First, Mr. Faigin did not assume responsibility for monitoring the underlying litigation until 1991 or 1992, (some four or five years after Carey, Dwyer had been fired) and had no personal knowledge of any of the relevant events at the time in question.[2] Second, Mr. Faigin's statements on fees were predicated on a privileged settlement document prepared by others: he made it clear that he professed no knowledge or expertise in that regard.[3] Third, Mr. Faigin could not say whether or not the case would have necessarily settled at the time the policy demands were made.[4]

---

2 Rl-41-4, 6, 7; R2-70-5.

3 R2-59-1 through 3. We disagree with Carey, Dwyer's assertion, unsupported by any case-law, that this settlement letter, generated in this action, can have possibly lost its privileged nature, when the action is still continuing.

4 R2-59-3; R2-60-13; R2-85-8, 9.

Therefore, Mr. Faigin's observations regarding what he thought were the consequences of Carey, Dwyer's malpractice constituted mere inadmissible lay conjecture as to the ultimate issues in a case that yet remained to be tried[5] - which merely begs the question here.

Obviously, the issue of the admissibility of Mr. Faigin's testimony is a matter of federal law for resolution by the Eleventh Circuit, and is not within the scope of the question certified to this Court.[6] We note, however, that the fact that the 11th Circuit makes no mention of any such "evidence" indicates that it accepts Fremont's position. Accordingly, Mr. Faigin's conjecture should play no part in the determination of these proceedings.

(b) Carey, Dwyer ignores the fact that Fremont's defense costs do not *necessarily* constitute recoverable damages.

Carey, Dwyer's analysis assumes that Fremont's continuing defense costs *necessarily* constitute "damages," and that these trigger the statute of limitations. However, as we stated in our initial brief to this Court:

---

5 R2-59-4, 5; R2-70-3 through 16; R2-85-7,8.

6 We venture to suggest that if the issue of admissibility were governed by Florida law, such testimony from a witness with no personal knowledge of the events at issue and no expertise for the basis of an opinion, would be excluded.

> the District Court accepted Fremont's affidavit evidence[7] 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 be present and possibly continuing."[8] 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.

Initial Brief, p. 24-25.

In other words, the jury would be free to conclude that what probably would have happened in the absence of malpractice would have been that Fremont would have tendered the $2 million - thus avoiding any "bad faith" exposure for any excess result - but would have had to continue to pay for its insured's continuing defense under the defense clause of the insurance policy. Under this scenario, Fremont's only recoverable damages would be the amount of a verdict or settlement in excess of $2 million: none of Fremont's lawyers' fees would constitute "damages." Carey, Dwyer misses this point entirely.

---

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

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

(c) In arguing that defense costs constituted "irreversible damage" by 1989, Carey Dwyer ignores the fact that, in the absence of malpractice, Fremont would have had to pay the much greater sum of $2 million by early 1987.

Carey, Dwyer's cites *Breakers* as the justification for its position, although it is not, in fact, the analysis expressed in *Breakers.* Under *Breakers*, the limitations clock would start ticking in 1987, when Fremont got the first fee bill from its new lawyers, after firing Carey, Dwyer. At that time, Fremont was clearly better off by $2 million in "saved" settlement dollars plus the amount of fees that it would have otherwise had to pay for competent representation. Carey, Dwyer recognizes that some credit needs to be given for the "savings" in fees, since it does not argue that the clock started running in 1987, but two years later, in 1989. However, if credit is due for dollars "saved" - i.e. dollars that would have had to have been spent in the absence of malpractice - then what is the rationale for giving credit for the relatively minor amount of saved fees, but not the $2 million in saved settlement costs. Defense of the case had

certainly not cost anything like $2 million by anytime in 1989.[9] If such credit is given, there was, clearly, no "irreversible damage" by 1989.

(d) Carey Dwyer, moreover, ignores the impact of interest in the damage computation.

A further problem with Carey, Dwyer's approach is that if the commencement of the statute of limitations is to be determined by a process of offsetting financial debits and credits, then it must be a true financial analysis, as it would be at the trial of the case, and interest must be factored in. It would obviously be unfair, in assessing damages against Carey, Dwyer at trial, not to recognize the fact that, in the absence of malpractice, Fremont would have had to pay $2 million to settle the case in 1987, and that Fremont had the time-value of that "saved" $2 million for every year thereafter. The prejudgment interest rate[10] was 12% through 1994, 8% in 1995 and 10% thereafter. If we apply that rate to the "saved" settlement figure of $2 million, it generates a figure of $220,000 per year through 1994, $160,000 in 1995 and $200,000

9

Or indeed at any time prior to this action being filed. "Fremont's total additional costs of defense had not reached its policy limits, for which the case could arguably have been settled, at the time this action was filed."
Fremont, 197 F.3d at 1054.

10

Fla. Stat. § 55.03.

per year thereafter. When interest is factored in, it may be seen even more clearly how far from having suffered "irreversible damage" Fremont was in 1989. Moreover, the total credit, principal and interest, as of the date of suit in 1997, calculated on the "saved" settlement funds alone,[11] was therefore somewhere over $4.3 million - which is in excess of Carey, Dwyer's highest suggested figure for the defense costs by that time.[12]

(e) The rule Carey, Dwyer proposes would create confusion for litigants and increase labor for the Courts.

A litigant ought to be able to calculate the date when his claim will be forever barred with some degree of certainty. Calculating the date for commencement of the statute of limitations by determining when all credits (plus interest) exceed all debits (plus interest), is a procedure that is potentially fraught with error and subject to enormous debate. Many items of possible damage may eventually be disallowed in whole or in part.

---

11 Similar considerations, of course, apply to the unknown amount of defense costs that Fremont "saved" in 1985, 1986 and 1987. Any additional interest computation in this regard is omitted for the sake of simplicity.

12 Answer Brief, p. 3 and fn. 2.

In this case, for instance, Fremont paid $4.5 million to the RTC in 1995 and filed suit against Carey, Dwyer within two years of that payment because of the possibility that such payment might start the statute of limitations running. It suits Carey, Dwyer to accept, for present purposes, that such payment was properly made in a failed attempt to settle the case, and that such sum therefore constitutes part of Fremont's claim for damages. However, we fully anticipate that, if this case is remanded, Carey, Dwyer will argue that it is a jury issue as to whether the payment to the RTC was reasonably made in an effort to settle the case and forms part of Fremont's recoverable damages. We think that Carey, Dwyer would ultimately lose but, in truth, it may be a fairly debatable point - and nothing is certain.

Again, for statute of limitations purposes, Carey, Dwyer is willing to treat the sum total of all attorney fees and expert witness fees as having been caused by its malpractice. However, the gross amount of a fee claim cannot be taken at face value as necessarily being recoverable as damages: it is only the "reasonable" fees caused by

the malpractice that can be recovered.[13] Carey, Dwyer is certainly not proposing to waive any challenge to the reasonableness of the fees if this action is to be remanded.

In short, it may be readily seen that under the rule that Carey, Dwyer proposes, doubt on the issue of damages will prompt litigants to file early to obviate debate over the statute of limitations. Such a rule would cut against the expressed rationale of this Court in adopting the rule in *Silvestrone*, that it was to promote certainty for litigants and reduce labor for the Courts.

(f) The rule Carey, Dwyer proposes would lead to unjust results.

Under the Carey, Dwyer approach, Fremont should have sued in 1989, even though the underlying case was still pending. Had Fremont done so, there would have been a "trial-within-a-trial"[14] in which Fremont would have done its best to convince

---

13

See *Ginsberg v. Chastain ,* 501 So.2d 27 (Fla. 3d DCA 1986) (Verdict in legal malpractice case awarding attorneys fees for defense of the underlying litigation overturned, in part, for lack of evidence that such attorney's fees were reasonable and necessary).

14

The procedure of determining whether litigational malpractice caused loss has been referred to as a "trial within a trial." *Tarleton v. Arnstein & Lehr,* 719 So.2d 325, 328 (Fla. 4th DCA 1998), citing to *Silvestrone v . Edell,* 701 So.2d 90, 92 (Fla. 5th DCA 1997), and *Michael Kovach P.A. v. Pearce,* 427 So.2d 1128, 1129 (Fla. 5th DCA 1983).

a jury that the probable result in the underlying litigation would be the worst possible result for both Fremont and Carey, Dwyer: a $30 million Plaintiffs' verdict. Fremont would have, thus, been placed in the position of attempting to convince one court that the damages were minimal and another that they were catastrophic.[15] As soon as Fremont sued Carey, Dwyer, moreover, the attorney-client privilege would have disappeared and the entire strategy of counsel and client for the defense of the continuing underlying litigation would thereafter have become public by time of trial.[16] All this would have happened to the delight of the Plaintiffs in the underlying case: the testimony and exhibits in the malpractice case would have been a gold-mine of damaging admissions.

In short, a rule that forces litigation of the malpractice case before the end of the underlying case tends to prevent the effective defense of the underlying case and tends

---

15

This Court has observed that: "[t]o require a party to assert two legally inconsistent positions in order to maintain an action for professional malpractice is illogical and unjustified." Peat, Marwick, Mitchell & Co. v. Lane, 565 So.2d 1323, 1326 (Fla. 1990).

16

See Fla. Stat. § 90.502(4)(c): "There is no lawyer-client privilege under this section when a communication is relevant to an issue of breach of duty by the lawyer to his client or by the client to his lawyer." See, e.g. *Procacci v. Seitlin,* 497 So.2d 969, 969 (Fla. 3d DCA 1986); *Adelman v. Adelman,* 561 So.2d 671, 673(Fla. 3d DCA 1990).

to maximize damages, which is contrary to the interests of both malpractice plaintiffs and defendants and would promote unjust results.[17]

(g) The rule Carey, Dwyer proposes would lead to the filing of unnecessary cases.

The only way to avert the evils described above, of course, would be for the Court to stay the malpractice case. In practical fact, therefore, Carey, Dwyer's proposed rule of law is far from that stated in *Breakers*. It is that the malpractice plaintiff, in failed settlement cases, must sue within two years of the accrual of possible damage, regardless of whether the underlying action is over. The Court should then stay the malpractice case until the end of the underlying action, when the plaintiff can determine whether it has sustained sufficient actual loss, overall, to justify proceeding with the expense of the lawsuit, or whether it should take a voluntary dismissal.[18]

---

17 This is, moreover, without considering the injustice that would result if Fremont were to have recovered judgment for $30 million against Carey, Dwyer, and then later succeeded in winning the underlying litigation or, as in fact transpired, settling it for much less.

18 In practical fact, therefore, the malpractice case will probably not get tried until the underlying case is over under Carey, Dwyer's proposed rule, anymore than it will under *Silvestrone* - which disposes of Carey, Dwyer's objection that only Fremont's approach would lead to the "litigation of stale claims." See Answer Brief, p. 27, fn.12.

This is a proposed rule of law that will lead to the unnecessary filing of lawsuits against lawyers and is directly contrary to the underlying "wait-and-see" rationale of *Silvestrone*.

CONCLUSION

The United States Court for the Middle District of Florida recently observed, in connection with a survey of Florida law on damages that: "It is clear that 'damages' for statute of limitations purposes and 'damages' for the substantive accrual of a cause of action do not have to be the same."[19] The Court added that: "the Florida courts at times refer to and analyze the two 'types' of damages interchangeably and at other times the Florida courts take the time to analyze statute of limitations damages."[20]

We submit that in *Silvestrone v. Edell*, 721 So.2d 1173 (Fla. 1998), this Court made a clear policy decision that, whatever the position might be in regard to the occurrence of damages with respect to the accrual of litigational malpractice actions, the statute of limitations would not be deemed to start to run until the functional end of

---

19 *Commerce Bank, N.A. v. Ogden, Newell & Welch*, 81 F.Supp. 2d 1304, 1308 (M.D. Fla. 1999).

20 *Commerce Bank,* 81 F.Supp. at 1309 (M.D. Fla. 1999), comparing *Hawkins v. Barnes*, 661 So.2d 1271 (Fla. 5th DCA 1995) with *Coble v. Aronson*, 647 So.2d 968 (Fla. 4th DCA 1994).

the underlying litigation. In reaching that decision, we believe that the Court intended to dispose of all such arguments as are attempted by Carey, Dwyer, here. While some "fine-tuning" of the rule in *Silvestrone* may still be possible,[21] it has contributed much needed certainty in what was a very confused area of the law and, unless exceptions are made, future litigation as to where that "bright line" should be drawn in particular cases should be minimal.

Carey, Dwyer has, however, extended an invitation to this Court to make a major exception to that "bright line" rule and to re-enter the morass of contradictory case-law and the confusion and unnecessary litigation before *Silvestrone*. If the policy reasons expressed in *Silvestrone* still hold good, it is, very clearly, an invitation that should be declined.

Respectfully submitted,

Aballí, Milne, Kalil & Garrigó, P.A.
1980 SunTrust International Center
One Southeast Third Avenue
Miami, Florida 33131

---

21 See, e.g. *Watkins v. Gilbride, Heller & Brown*, 2000 Fla. App. LEXIS 2318 (Fla. 3rd DCA March 8, 2000)(certified question as to whether judgment is "final" when still subject to discretionary review on certiorari by Florida Supreme Court).

Telephone: (305) 373-6600
Facsimile: (305) 373-7929

Hendrik G. Milne, Esq.
Florida Bar No. 335886
Craig P. Kalil, Esq.
Florida Bar No. 607282
Silvia M. Garrigó, Esq.
Florida Bar No. 725625

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 18th day of April, 2000.

Hendrik G. Milne