A-43271-7

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-2487
L.T. CASE NO. 4D99-4228

PATRICIA J. NALE, f/k/a
PATRICIA STEBBINS, and
RODNEY STEBBINS, individually
and as Personal Representatives of
the Estate of Rodney Stebbins, Jr.,

Petitioners,

vs.

ROBERT M. MONTGOMERY, JR.,
individually and as general partner of
MONTGOMERY &
LARMOYEAUX, a Florida General
Partnership, MONTGOMERY &
LARMOYEAUX, a Florida General
Partnership, and MONTGOMERY &
LARMOYEAUX, P.A.,

Respondents.
________________________________/

RESPONDENTS' BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS[1]

Nale[2] appeals from an order of dismissal with prejudice that was affirmed by the Fourth District Court of Appeal. (R.96-97) The pleadings and record affirmatively establish that Nale's 1999 legal malpractice claim was filed beyond the statute of limitations – no matter what date is used as a "trigger" – and was therefor time barred.[3]

Nale's complaint alleges that she retained Montgomery & Larmoyeaux ("Montgomery") in 1994 to investigate and pursue a claim against Copley Pharmaceuticals, Inc. (R.1-5) Exhibits to the complaint suggest that the Nales believed their son died because of an alleged defect in medication. (A.1-16) Montgomery filed suit in a timely fashion in the same year. Within a short time thereafter, investigation established that there was no relationship between the medication and the child's death. (A.12) Nale was promptly advised, in writing, of the lack of evidence to support the complaint and that Montgomery had filed a motion to withdraw as counsel. (A.12) This same letter advised that Montgomery would *not* file a notice of voluntary dismissal so as to give Nale the option of trying to retain other counsel to pursue the lawsuit. (A.12) Montgomery's motion to withdraw was granted by the trial court. (R. 1-5; A.

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[1] **The symbol "R" refers to the Index to the Record on Appeal. The symbol "A" refers to the Respondent's Appendix.**

[2] Patricia Nale and her former spouse, Stebbins, are referenced collectively as "Nale."

[3] A summary of the chronology of events is located at the end of the Statement of Case and Facts.

15)

On April 13, 1994, approximately one month after Montgomery withdrew as counsel, Montgomery mailed Nale a notice of voluntary dismissal, along with a return envelope. (A.15) Both Nale and her spouse signed the voluntary dismissal with prejudice and it was filed with the court on April 19, 1994. (R. 1-5) Montgomery had advised Nale that they could be liable for costs and, in the event of an offer of judgment, for attorneys fees. (A.12)

By February 2, 1995, less than one year later, Nale was aware that the voluntary dismissal with prejudice had the effect of fully concluding her case. (A. 23-24) Nale contacted ten attorneys in an attempt to find someone to represent her interests before retaining counsel in New York. (R. 1-5, 17, 23-24, 26-31) Some time prior to April 13, 1995, Nale's new counsel learned of the dismissal with prejudice that had been filed in Florida. (A. 17)

On April 13, 1995, Nale field a pro-se motion to set aside the voluntary dismissal with prejudice. (R. 26-31, 58-66, A.23-24) Nale's motion to vacate clearly established that she was fully aware if the significance and effect of the earlier dismissal of the action in Florida – the motion specifically states that "it was not made understood to me until February 2, 1995, what dismiss with prejudice meant. I understood I could pickup the lawsuit again. On February 2, 1995, I learned I only had until April 18, 1995. …" (R. 58-66; A.23-24) Her motion also noted that ten attorneys had refused to represent her. (R. 58-66; A.23-24) Nale simultaneously served a notice of hearing on this motion.

On April 20, 1995, the trial court entered an order denying Nale's motion to set aside the voluntary dismissal with prejudice. (R. 26-31; A. 29-30) A copy of this order was served on Nale. (A.29-30) Nale did not pursue an appeal. Nale's own pleadings acknowledge that as of April 20, 1995, both Nale and her New York counsel were therefor fully aware of the fact that her right to pursue any product liability action had forever ended. (R. 26-31)

On April 19, 1999, far more than two years after these events, Nale filed a legal malpractice action against Montgomery. (R. 1-5) A motion to dismiss was filed which alleged, *inter alia,* that it affirmatively appeared from the face of the complaint that Nale's action was barred by the applicable statute of limitations. (A.18-30) Apparently without seeking leave of court, Nale filed an amended complaint, with no substantive differences in the allegations. (R. 26-31) Montgomery again filed a motion to dismiss raising the statute of limitations. (R. 42-57) Montgomery also filed certified copies of Nale's 1995 motion to vacate, the notice of hearing, and the April 20, 1995, order. (R. 58-66, A.31-46)

Following the hearing on Montgomery's motion to dismiss, the trial court entered an order dismissing the instant action with prejudice. (R. 96-97) Nale sought leave of court to file a second amended complaint which, again, raised no substantively different matters, and also sought a rehearing of the dismissal order. (R. 98-99, 100-106, 107-111) Upon consideration, the trial court denied these motions. (R. 112, 113-117) Nale appealed to the Fourth

District Court of Appeal and lost again.

For the convenience of the Court, the relevant events occurred in the following chronology:

2-11-94	Montgomery files complaint on behalf of Nale (R. 1-5)
3-11-94	Montgomery's motion to withdraw (R. 1-5)
3-18-94	Montgomery writes Nale to advise that investigation is complete and shows no liability by defendants, advises Nale of statute of limitations, and returns the file (A. 12)
3-24-94	Order granting Montgomery's motion to withdraw (R. 1-5)
4-13-94	Notice of Voluntary Dismissal With Prejudice of Nale's case is sent to Nale to sign and file (A.15)
4-18-94	*Voluntary Dismissal With Prejudice is signed by Nale and filed* (R.1-5)
2-2-95	*Nale learns of the 4-18-95 deadline for a Rule 1.540(b) motion for relief from dismissal order based on excusable neglect and "what dismissal with prejudice meant"* (A. 23-24)
2-2-95 to 4-13-95	Nale unsuccessfully asks ten lawyers to take her case (A. 23)
?	Nale retains New York attorney who learns of voluntary dismissal. (A. 17)
4-13-95	Montgomery writes to respond to New York counsel's inquiry regarding the voluntary dismissal with prejudice (A.17)
4-13-95	Nale files *pro se* motion to vacate voluntary dismissal with prejudice (R. 26-31; A. 23-24)
4-20-95	*Trial court denies motion to vacate voluntary dismissal with prejudice* (R. 26-31; A. 29-30)
4-17-96	*Last day of two-year statute of limitations for legal malpractice claim* (if two-years is calculated from the 4-18-94 filing of the notice of voluntary dismissal with prejudice (R. 1-5))

4-19-97 *Last day of two-year statute of limitations for legal malpractice claim* (if two years is calculated from the trial court's 4-20-95 order (A. 29-30) denying the motion to set aside the voluntary dismissal pursuant to Rule 1.540(b)) (assuming, *arguendo*, that the one-year period for filing a Rule 1.540(b) motion can extend the "end of litigation" rule announced in *Silvestrone v. Edell, infra.)*

4-17-98 *Last day of four-year general negligence statute of limitations* (if four years is calculated from the alleged wrongful act of preparation/filing of the 4-18-94 notice of voluntary dismissal with prejudice (R. 1-5) in the underlying action) (assuming, *arguendo,* that a general negligence claim could be pursued)

2-1-99 *Last day of four-year general negligence statute of limitations* (if four years is calculated from Nale's 2-2-95 notice of the possible invasion of her rights as set forth in her 4-13-95 motion to vacate) (assuming, *arguendo,* that a general negligence claim could be pursued)

4-19-99Nale files legal malpractice action against Montgomery (R. 1-5)

ISSUES ON APPEAL

I

WHETHER THE APPELLATE COURT PROPERLY AFFIRMED THE DISMISSAL OF THIS CASE WITH PREJUDICE WHERE IT AFFIRMATIVELY APPEARED FROM THE FACE OF THE COMPLAINT THAT THE ACTION WAS TIME BARRED AND THE COMPLAINT COULD NOT BE AMENDED TO STATE A CAUSE OF ACTION

II

WHETHER THE APPELLATE COURT PROPERLY AFFIRMED THE DENIAL OF NALE'S MOTION TO AMEND THE COMPLAINT WHERE IT WAS SHOWN THAT THE COMPLAINT NEVER COULD BE AMENDED TO STATE A VIABLE CAUSE OF ACTION

ARGUMENT SUMMARY

Settled law allows a trial court to dismiss a complaint where it is clear that the action is untimely. The instant claim against Montgomery is governed by the two-year statute of limitations for acts of alleged professional negligence whether or not Montgomery was acting pursuant to a contract when he undertook any action on behalf of Nale. The face of Nale's pleading shows that the instant action was filed more than four years after she had specific knowledge that her efforts to vacate the dismissal of the underlying action were unsuccessful and that the underlying action was time barred.

Even if one assumes, *arguendo,* that a four-year, general negligence statute of limitations could apply, it is clear from the pleadings that Nale's suit is still untimely.

Nale's motion to amend the complaint was properly denied because the proposed amendment set forth no new allegations of fact, and it was established that Nale could not submit any amendment to the complaint that would state a cause of action under any theory of law.

STANDARD OF REVIEW

When reviewing an order dismissing a complaint, all well pleaded allegations of the non-moving party are taken as true. *McAbee v. Edwards,* 340 So.2d 1167 (Fla. 4th DCA 1976). "Mere statements of opinion or unsupported conclusions [that are] unsupported by specific facts will not suffice." *Other Place of Miami, Inc. v. City of Hialeah Gardens,* 353 So.2d 861, 862 (Fla. 3rd DCA 1978). The court is "not bound by bare allegations which are unsupported or unsupportable." *Id.* at 862.

A trial court has discretion to deny a motion to amend the pleadings, and such order will be affirmed on appeal unless an abuse of discretion is shown. *Life General Security Ins. Co. v. Horal,* 667 So.2d 967 (Fla. 4th DCA 1996).

ARGUMENT

I

THE APPELLATE COURT PROPERLY AFFIRMED THE DISMISSAL OF THIS CASE WITH PREJUDICE WHERE IT AFFIRMATIVELY APPEARED FROM THE FACE OF THE COMPLAINT THAT THE ACTION WAS TIME BARRED AND THE COMPLAINT COULD NOT BE AMENDED TO STATE A CAUSE OF ACTION

An action may be properly dismissed on a motion to dismiss if it appears from the face of the complaint and the attached documents that the statute of limitations has run. *Toledo Park Homes v. Grant,* 447 So.2d 343 (Fla. 4th DCA 1984) ("the defense of statute of limitations may be raised by motion to dismiss only where its violation appears on the face of the complaint or its exhibits"); *see also: Kulpinski v. City of Tarpon Springs,* 473 So.2d 813 (Fla. 2d DCA 1985); *Adams v. Knabb Turpentine Co., Inc.,*435 So.2d 944 (Fla. 1st DCA 1983); *Margerum v. Ross Builders, Inc.,* 427 So.2d 261 (Fla. 5th DCA 1983).

Exhibits are "considered a part [of the complaint] for all purposes." Fla. R. Civ. Pro. 1.130(b). If the contents of the exhibits conflict with and negate the allegations of the complaint, then these exhibits will control and may be the basis of a motion to dismiss. *Health Application Systems, Inc. v. Hartford Life and Cas. Ins. Co.,* 381 So.2d 294 (Fla. 1st DCA 1980). *See also: Harry Pepper & Assoc. Inc. v. Lasseter,* 247 So.2d 736 (Fla. 3d DCA 1971), *cert. denied* 252 So.2d 797 (Fla. 1971); *Warren v. Dairyland Ins. Co.,*

662 So.2d 1387 (Fla. 4th DCA 1995); *American Seafood, Inc. v. Clawson,* 598 So.2d 273 (Fla. 3d DCA 1992), *review dismissed,* 606 So.2d 1164; *Ginsberg. v. Lennar Florida Holdings, Inc.,* 645 So.2d 490, *rehearing denied,* 659 So.2d 272; *Opti, Inc. v. Sales Engineering Concepts, Inc.,* 701 So.2d 1234 (Fla. 4th DCA 1997).

The two-year legal malpractice statute of limitations applies

The pleadings and exhibits clearly establish that Nale had specific, actual knowledge on February 2, 1995, of the purpose and effect of a dismissal with prejudice. The pleadings also show that on April 20, 1995, Nale knew that the trial court in the underlying action would not set aside the dismissal of the underlying lawsuit. Nale chose not to appeal this order. The trial court in the instant action was entitled to take judicial notice of the pleadings and orders attached as exhibits to the motion to dismiss. Fla. Stat. § 90.202. The governing two-year statute of limitations therefore barred any action that was not filed by 1997. Nale did not file her lawsuit until April 19, 1999.

Florida Statute section 95.11 provides, in pertinent part, that a plaintiff must file:

> (4) Within two years. –
>
> (a) An action for professional malpractice, other than medical malpractice, whether founded on contract or tort; provided that the period of limitations shall run from the time the cause of action is discovered or should have been discovered with the exercise of due diligence. However, the limitation of actions herein for professional malpractice shall be limited to persons in privity with the professional.

The case of *Silvestrone v. Edell,* 721 So.2d 1173 (Fla. 1998), mandated the dismissal of the instant action on the grounds it was time barred. The *Silvestrone* case reiterates the longstanding law of Florida that the statute of limitations for a legal malpractice action expires two years after the attorney's negligence becomes known to the client and damages have accrued. *See, e.g. Peat, Marwick, Mitchell & Co. v. Lane*, 565 So.2d 1323 (Fla. 1990); *Sawyer v. Earle,* 541 So.2d 1232 (Fla. 2d DCA), *cause dismissed,* 545 So.2d 1368 (Fla. 1989); *Edwards v. Ford,* 279 So.2d 851 (Fla. 1973); *Coble v. Aronson,* 647 So.2d 968 (Fla. 4th DCA 1994), *rev. denied,* 560 So.2d 234 (Fla. 1990) The Florida Supreme Court specifically stated that, in claims alleging litigational malpractice, the two year time period is so clear that it is a "bright line." *Silvestrone,* at 1176. In the instant case, the "bright line" for a legal malpractice action was drawn on April 20, 1995, when the trial court denied Nale's motion to vacate the voluntary dismissal with prejudice, established that Nale's underlying claim was forever barred, and Nale chose not to appeal. Under the Florida Supreme Court's clear holding in *Silvestrone,* Nale had two years from the date of this ruling to initiate any action against Montgomery. Because Nale missed this deadline (by several years), the instant action was properly dismissed with prejudice.

The two-year statute of limitations applies to a discharged attorney

Nale attempts to argue that somehow the two-year statute of limitations should not apply because Montgomery was no longer counsel of record at the

time the dismissal with prejudice was prepared. Nale first tries to argue that she is entitled to proceed under a four-year statute of limitations because there was no signed contract in effect with Montgomery at this point in time. The plain wording of the statute clearly defeats this proposition. Section 95.11(4)(a) specifically states that the two-year period applies to an action for professional malpractice "*whether founded on contract or tort.*" (emphasis added) Montgomery was acting in his capacity as an attorney at the time of preparing the voluntary dismissal with prejudice, therefore the absence of any written contract is irrelevant and does not affect the application of the two-year statute of limitations to bar the instant action. *See: Dadic v. Schneider,* 722 So.2d 921 (Fla. 4th DCA 1998); *Chipman v. Chonin,* 597 So.2d 363 (Fla. 3rd DCA 1992).

Nale next tries to claim a lack of privity in a final attempt to avoid the two-year statute of limitations. This effort is equally unsuccessful. Unless an individual is in privity with the attorney, or is an intended third party beneficiary of the attorney's work (generally, a beneficiary of a will drafted by an attorney), there is no right or ability to bring a legal malpractice claim. *See, e.g. Angel, Cohen & Rogovin Oberon Inves. N.V. v. Oberon Inves. N.V.,* 512 So.2d 192 (Fla. 1987); *Lorraine v. Grover, Ciment, Weinstein & Stauber,* 467 So.2d 315 (Fla. 3d DCA 1985); *Hewko v. Genovese,* 739 So.2d 1189 (Fla. 4th DCA 1999); *National Union Fire Ins. Co. v. Salter,* 717 So.2d 141 (Fla. 5th DCA 1998), *rev. denied* 727 So.2d 908 (Fla. 1999); *Kinney v. Shinholser,* 663

So.2d 643 (Fla. 5th DCA 1995), *review denied sub nom Moncrief v. Kinney,* 671 So.2d 788 (Fla. 1996); *Espinosa v. Sparber, Shevin, Shapiro, Rosen & Heilbronner,* 586 So.2d 1221 (Fla. 3d DCA 1991); *Winston v. Brogan,* 844 F.Supp. 753 (S.D. Fla. 1994). In the instant case, Nale had a direct relationship with Montgomery, whether or not there was a written contract in effect, and therefore she has direct privity with Montgomery rather than a third party beneficiary status. *Dadic, supra.* Accordingly, the two-year statute of limitations is applicable.

Nale misplaces her reliance on the *Dadic, supra,* case. The *Dadic* case plainly states the elements for a legal malpractice action: "(1) the attorney must be employed by or in privity of contract with the plaintiff; (2) the attorney must have neglected a reasonable duty; and (3) the negligence must have resulted in and was the proximate cause of loss to the plaintiff." *Dadic, supra,* at 923. *Dadic* further states that the "attorney need not be in privity with the client throughout the entire course of the underlying action" before a legal malpractice claim can exist. Rather, when counsel has been discharged prior to the conclusion of the transaction for which he was hired, the court must determine whether the attorney's actions are a proximate cause of the client's claim of loss. *See also: Chipman v. Chonin, supra.* The plaintiff's claim does *not* lose its character as a legal malpractice action. Additionally, the *Dadic* case does not consider any statute of limitations issue. The same rationale applies to distinguish the various cases Nale cites regarding the duty of care by a

volunteer. Any duty that Montgomery is alleged to have voluntarily undertaken was necessarily for *legal representation,* and is therefore still subject to the two-year legal malpractice statute of limitations.

Nale also misplaces her reliance on the cases of *Baskerville-Donovan Engineers, Inc. v. Pensacola Exec. House,* 581 So.2d 1301 (Fla. 1991), *Archey v. Government Healthcare Services,* 718 So.2d 249 (Fla. 1st DCA 1998) and *Pate v. Threlkel,* 661 So.2d 278 (Fla. 1995). The *Pate* decision is inapplicable because it only discusses the scope of a physician's duty to warn, and does not discuss statute of limitations issues. The other two cases are distinguishable because they permit a four-year statute of limitations in that narrow class of cases where the plaintiff is a known or anticipated third party beneficiary who is pursuing the professional malpractice claim – Nale does not hold such status. Rather, Nale dealt directly with Montgomery and is not a third party beneficiary.

This Court could also consider the fact because Montgomery was discharged as counsel, the applicable two-year statute of limitations cannot be extended for any reason. *See, for example, Perez-Abreu, Zamora & DeLaFe, P.A. v. Taracido,* 790 So.2d. 1051 (Fla. 2001), *Alagia, Day, Trautwein & Smith v. Broadbent,* 882 S.W.2d 121, 122-126 (Ky. 1994) ("continuous representation" rule may delay statute of limitations in legal malpractice action).

The instant claim is time-barred even if a four-year, general negligence

statute of limitations is applied

Nale alternatively argues that Count II is merely a "negligence" claim not related to Montgomery's representation and therefor should fall within the four-year statute of limitation. Nale cannot avoid the fact that this count of the complaint still arises out of the alleged malpractice claim and is necessarily governed by the two-year provision – a "rose by any other name" is still a rose. If, however, one assumes, *arguendo,* that Nale could allege a claim of general negligence, the instant case remains time barred.

As the Fourth District explained in its opinion

> A cause of action for general negligence must be commenced within four years. *See* §95.11(3)(a), Fla. Stat. (1999). Pursuant to section 95.031(1), "[a] cause of action accrues when the last element constituting the cause of action occurs." In the instant case, the elements of the cause of action were the existence of a duty, breach of that duty, causation, and damage to the appellants. *See Miller v. Foster,* 686 So.2d 783, 783 (Fla. 4th DCA 1997). Assuming that appellees had a duty, it was breached when they filed the notice of voluntary dismissal with prejudice on April 18, 1994, and the damages, if any, accrued on that date, because appellants' cause of action was lost by the dismissal with prejudice. This suit was not filed until April 19, 1999, five years after the cause of action accrued and after the statute of limitations had expired."

Nale v. Montgomery, 768 So.2d 1166, 1166 (Fla. 4th DCA 2001). The District Court then explains in a footnote that "[b]ecause the damage of the loss of the cause of action was complete when the notice of voluntary dismissal was filed, we do not view the failure of the motion to vacate the voluntary dismissal, filed year later, as somehow extending the period of limitations for the act of

negligence which caused the damage to appellants." *Id.* at 1166.[4]

Under other cases discussing general negligence principals, the alleged tort occurred no later than February 2, 1995, based on the statements contained in Nale's *pro se* motion to vacate the dismissal with prejudice. This line of cases triggers the general negligence statute of limitations from the date the plaintiff is put on notice of the possible invasion of his rights. *See, e.g.: Doe v. Cutter Biological,* 813 F. Supp. 1547, 1555 (M.D. Fla. 1993), *affirmed,* 16 F.3rd 1231 (11th Cir. 1994) ("a general negligence action "does *not* require that Plaintiff know the full extent of his injury. Plaintiff need only have notice of the *possible* invasion of his legal rights."); Fla. Stat. §95.11(3). In contrast, the *Silvestrone* case establishes a "bright line" test that is applicable to determining the statute of limitation for a professional malpractice claim.[5] Under the *Doe* analysis, the general negligence statute of limitations would have commenced on February 2, 1995, because this is the date that Nale admits (in her April 13,

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[4] *See also: Jones v. Kootenai County Title Ins. Co.,* 873 P.2d 861 (Ida. 1994) (cited by Nale), that supports commencing the statute of limitations on April 13, 1994 when Montgomery prepared the motion to dismiss with prejudice: "a breach of an assumed duty claim is a negligence action. … To determine whether this statute of limitations bars the claim, we must determine *when the first negligent act occurred.* (cite omitted) *This analysis focuses upon the acts complained of and does not require an analysis of when the plaintiff discovered either the acts complained of or the damage resulting from those acts." Id.* at 867 (emphasis added)

[5] "Mere knowledge of possible malpractice is not dispositive of when a malpractice action accrues." *Hold v. Manzini,* 736 So.2d 138, 142 (Fla. 3rd DCA 1999). In litigational malpractice, the statute of limitations commences at the "bright line" established by the date the judgment becomes final. *Silvestrone,* 721 So.2d at 1175-6.

1995, *pro se* motion to vacate the voluntary dismissal) that she was on notice of the possible invasion of her rights. Because the lawsuit against Montgomery was filed more than four years later on April 19, 1999, the action is time-barred even if the general, four-year statute of limitations could be applicable.

Nale cannot pick and choose among portions of separate statutory provisions in an attempt to craft a statute of limitations that is to her liking. Nale cannot claim, on the one hand, that this is "litigational malpractice" so as to attempt to delay the statute of limitations trigger until the time to appeal the underlying order expired, yet simultaneously claim that this is a general negligence claim that is subject to a four year statute of limitations.[6] Because Nale's had notice of a possible invasion of her rights by February 2, 1995 at the latest, no later date can be used to "trigger" the general, four-year statute of limitations. Fla. Stat. §95.11(3)(a); *Doe, supra.* As the Fourth District correctly stated, the Nales' reliance on *Silvestrone* [cite omitted] on the issue of the accrual of their cause of action is misplaced. *Silvestrone* involves the accrual of a *malpractice* cause of action, which appellants adamantly disavow that they have alleged. They cannot rely on malpractice cases to establish accrual of a cause of action and then apply it to a common law negligence

[6] Nale relies, in part, on the case of *Commerce Bank, N.A. v. Ogden, Newell & Welch,* 81 F. Supp.2d 11304 (M.D. Fla. 1999) as support for her argument. The district court's decision in *Commerce* was reversed by the Eleventh Circuit on appeal. *Porter v. Ogden, Newell & Welch,* 241 F.3rd 1334 (11th Cir. 2001).

action." *Nale,* 768 So.2d at 1167-1186.

The Fourth District correctly interpreted *Silvestrone* and properly determined the applicable statute of limitations. The District Court's ruling that the statute of limitations expired before suit was filed – no matter whether one considers this a claim of legal malpractice or a general negligence action – should be affirmed. The instant case fully harmonizes with the settled law of this state and is not in conflict with any decision.

II

THE APPELLATE COURT PROPERLY AFFIRMED THE DENIAL OF NALE'S MOTION TO AMEND THE COMPLAINT WHERE IT WAS SHOWN THAT THE COMPLAINT NEVER COULD BE AMENDED TO STATE A VIABLE CAUSE OF ACTION

A plaintiff's right to amend a complaint is not unbridled. While amendments to pleadings are liberally allowed where justice requires, this liberality decreases with the progress of litigation and the number of amendments because of the equally compelling obligation of a trial court to see that litigation finally ends. *Alvarez v. DeAguirre,* 395 So.2d 213 (Fla. 3d DCA 1981). As stated in the case of *Florida Gas v. Arkla Air Conditioning Co.,* 260 So.2d 220 (Fla. 1st DCA 1992), "three strikes are out in a baseball game; [plaintiff] has been at bat four times. Under the most liberal construction of our modern rules, we hold that ample opportunity has been proffered to appellant." The same rationale should apply here.

Where it is clear that a plaintiff is not able to state a cause of action and

cannot cure deficiencies of a pleading, it is proper for the trial court to dismiss the complaint with prejudice and to disallow further opportunity to amend. Fla. R. Civ. Pro. 1.190; *Osborn v. Delta Maintenance & Welding, Inc.,* 365 So.2d 425 (Fla. 2d DCA 1978). A mere assertion of "buzz words" will not allow a lawsuit to go forward where the requisite factual basis does not exist. *Huff v. Gold Coast Jet Ski Rentals, Inc.,* 515 So.2d 1349 (Fla. 4th DCA 1987). Allowing an amendment of Nale's pleadings would have been an abuse of the trial court's discretion and would have prejudiced Montgomery. No defendant should be required to needlessly expend time and funds to conclude a clearly futile lawsuit.

In the instant case, the record establishes that Nale's claim is time barred. Nale's proposed second amended complaint adds no new facts or theories of law that could possibly avoid the statute of limitations. Nale cannot avoid the fact that she candidly acknowledged in her own pleadings on April 13, 1995, (A. 23-24) that as of February 2, 1995, she understood "what dismissed with prejudice meant," and that she received a copy of the trial court's April 20, 1995, order enforcing the dismissal with prejudice. Nale fully understood that she had suffered some injury as a direct result of the entry of the voluntary dismissal that Montgomery prepared for her signature. At that moment in 1995, all elements of Nale's cause of action for malpractice were present, and the two-year statute of limitation was triggered. When Nale failed to file suit by 1997, her claim became time barred and no allegations in a pleading could

avoid this fact. *Huff v. Goldcoast Jet Ski Rentals, Inc., supra.* The trial court was therefor correct in dismissing Nale's complaint with prejudice. The Fourth District properly affirmed this ruling that was well within the trial court's broad discretion.

CONCLUSION

For the reasons set forth herein, it is submitted that the Fourth District properly affirmed the dismissal of Nale's complaint with prejudice and the denial of any further attempts to amend the pleadings. The appellate court's decision is in full harmony with the settled law of this state. It is respectfully requested that this Honorable Court affirm the decision and orders of the trial court.

Respectfully submitted,

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CERTIFICATE OF MAILING

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this ___ day of November, 2001, to Paul Richard Bloomquist, Esq., Counsel for Petitioners, Post Office Box 15363, West Palm Beach, FL 33416-5363.

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CERTIFICATE OF COMPLIANCE PURSUANT TO FLORIDA RULE OF APPELLATE PROCEDURE 9.210(a)(2)

Counsel for the Respondents, Robert M. Montgomery, Jr., individually and as a general partner of Montgomery & Larmoyeaux, a Florida general partnership, and Montgomery Larmoyeaux, P.A., certifies the following:

Pursuant to Fla. R. App. P. 9.210(a)(2), the attached brief for Respondents is printed using a proportionally spaced 14 point Times New Roman typeface.

Dated: November ___, 2001

____
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