IN THE SUPREME COURT OF FLORIDA

CASE NO. SC 00-2487
L.T. 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 a general
partner of MONTGOMERY &
LARMOYEAUX, a Florida general
partnership, MONTGOMERY
LARMOYEAUX, P.A.,

Respondents.
_____/

PETITIONERS' INITIAL BRIEF ON THE MERITS

Paul Richard Bloomquist, Esq.
Florida Bar Number 283371
3175 South Congress Avenue
Suite 301
Palm Springs, Florida 33460
Mailing Address:
P. O. Box 15363

West Palm Beach, FL 33416
(561) 439-2999

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STATEMENT OF THE CASE AND OF THE FACTS

This is a petition for discretionary review of an order affirming an order granting Respondent's motion to dismiss Petitioner's case for expiration of the statute of limitations.

Petitioners retained the respondent attorneys to prosecute a products liability action against a drug manufacturer for the wrongful death of their child. [R27, 34-41, 70] Two days later, Respondents filed suit on Petitioners' behalf against Copley Pharmaceuticals, Walgreens, and pharmacist Gary Suresch. [R27, 9-19]

That complaint alleged that Petitioners' 26-month-old son, Rodney Stebbins, Jr., died after inhaling Albuterol sulfate 0.5 percent solution which was manufactured and distributed by the defendants. The medicine was supposed to help Rodney breathe. However, it was contaminated and recalled by the Food and Drug Administration. Allegedly, the contaminated medicine caused Rodney's death. [R9-19]

One month after filing suit, Respondents filed a motion to withdraw which was granted. [R27]

Respondents advised Petitioners to dismiss the case to avoid exposure to liability for the defendants' costs and attorney's fees. [R27, 25] Respondents told Petitioners they could file suit again. [R27-28, 50]

After Respondents withdrew, they gratuitously undertook to dismiss the case. [R29, 23, 24] They prepared a notice of voluntary dismissal with prejudice for Petitioners' signatures. [R23] The words "with prejudice" were inserted in the notice because of a substantive clerical error or mistake as to which Florida Rule of Civil Procedure 1.540 would provide relief. [R101, 21, 22] Respondents did not tell Petitioners the difference between a notice of voluntary dismissal with prejudice and a notice of voluntary dismissal without prejudice. [R28] Given Respondents' advice, thinking they could file suit again, Petitioners signed the notice and returned it to Respondents [R27-28, 48-50, 23] who filed it with the Court. [R30, 23, 24]

Subsequently, Petitioners retained other attorneys who, being unaware of the notice of voluntary dismissal with prejudice, filed another products liability suit against Copley Pharmaceuticals in Massachusetts. [R28]

Thereafter, Petitioners discovered the meaning of the phrase "with prejudice" and the effect of the notice of voluntary dismissal. Petitioners' new attorney sought Florida counsel to file a motion to set aside the dismissal. Unfortunately, they did not find a Florida lawyer who would help. [R48] Accordingly, Petitioners' new counsel asked Respondents to move the Court to set aside the dismissal. Respondents refused. [R30, 102-103] Mr. Montgomery wrote:

> "Whoever told you that she could not prevail in vacating the voluntary dismissal with prejudice is wrong. If, in fact, the facts you have told me are correct, the court would vacate that order without question....I do not care for your last paragraph. It is you who have taken the responsibility to represent Mr. and Mrs. Stebbins. It is you who has the responsibility to obtain counsel in Florida, if you truly believe in the Stebbins' case, to vacate this order under F.R.Civ.P. 1.540(b). Please do not write me anymore." [R25, 106] [Appendix 2]

Accordingly, without the assistance of counsel,

Petitioners prepared and filed a motion to set aside the dismissal which stated:

> "I am asking for the courts to please set aside this dismissal with prejudice. Mr. Bob Montgomery file this motion or April 18, 1994. It was not made understood to me until February 2, 1995 what dismiss with prejudice meant. I understood I could pick up the lawsuite again. On February 2, 1995 I learned I only had until April 18, 1995. Because my attorneys are in New York they are not Florida attorneys I needed to find a local attorney. I was unsuccessful as I tried 10 different attorneys and no one would accept the assiment. The reason Mr. Bob Montgomery gave me for droping the case was becuase the strain that killed my son didn't match. We have since found out that differtly. Please it was unfair for me that this case was withdrawn without me fully understanding that I could not pick it up at a latter day. I feel it should not have been done like this being I did not have the knowledge of what dismiss with prejudice was. I am going forward representing myself. Please I am asking the courts set this aside." [Signed] Rodney Stebbins and Patricia Stebbins. [R28, 48-49] [Appendix 3]

There was attached to the motion a notarized letter signed by Rodney Stebbins which stated:

> Dear Your Honor 4-13-95
> "At this time my wife and I are separated. So I wasn't present at the time she wrote the letter to you concerning our case against Copley. I would just like to add that Mr. Montgomery in fact told me that there would be no problem in refiling our case up to two years from our son's death. Thank you. [Signed] Rodney Stebbins. [R50]

Petitioners attended a motion hearing pro se, tried to argue against the attorney for Copley Pharmaceuticals, and lost. \1 The Honorable Judge Thomas Sholts denied the motion on **April 20, 1995.** [R52, 55, 28] The time to appeal that order expired on **May 20, 1995.**

Subsequently, Copley Pharmaceuticals made a small settlement offer which Petitioners did not accept. [R29] Thereafter, the lawsuit the petitioners' new attorneys filed in Massachusetts was dismissed. [R29]

On **April 19, 1999** Petitioners sued Respondents for negligence.\2 [R1] Petitioners filed suit within four

_____

1. Obviously, Petitioners did not know what to tell the Court. In the motion to set aside voluntary dismissal with prejudice, Petitioners did not allege that there was a substantive clerical error or mistake. They only alleged that they misunderstood the legal effect of the paper they signed. Probably, they did not know about Ms. Larson's handwritten note which stated: "Do motion to dismiss without prejudice", or understand the significance thereof. [Appendix 1] No wonder they could not find a Florida lawyer who was willing to move the Court to set aside the dismissal

2. April 18, 1999 was a Sunday. If Petitioners' action accrued when the time expired to move to set aside the dismissal (April 18, 1995) Petitioners filed suit within the time permitted, on Monday, April 19, 1999. Thorney v. Clough, 438 So.2d 985 (Fla. 3d DCA 1983), Moorey v. Eytchison & Hoppes, Inc., 338 So.2d 558 (Fla. 2d DCA 1976), Herrero v. Black and Decker Manufacturing Company, 275 So.2d 54 (Fla. 3d DCA 1973). The Court may take judicial notice of the calendar. s. 90.202 (12), Fla. Stat. (2001).

years after the time expired to appeal the order denying Petitioners' motion to set aside the dismissal but more than four years after Respondents filed the notice of voluntary dismissal with prejudice. On September 4, 1999 Petitioners filed an amended complaint which the trial court eventually dismissed. [R26]

Count I of the amended complaint pled an action for attorney malpractice. [R27]

Count II stated an action for negligence after termination of the attorney-client relationship as distinct from attorney malpractice, because it was after Respondents withdrew that they prepared and filed the notice of voluntary dismissal with prejudice and refused to fix their mistake. [R29]

Specifically, Petitioners alleged that, after Respondents withdrew as counsel for Petitioners, Respondents gratuitously undertook to dismiss the case (and so assumed a duty to dismiss it in a non-negligent manner such that Petitioners could file suit again); Respondents negligently prepared and filed a notice of voluntary dismissal with prejudice; and subsequently Respondents negligently refused to move the Court to set aside the dismissal. [R29-30]

On September 15, 1999 Respondents filed a motion to dismiss the amended complaint. In their motion Respondents argued that Petitioner's action was time barred by the applicable statute of limitations. Respondents argued that Florida Statutes s. 95.11(4)(a), which provided a two-year limitations period, applies to this case, and that the petitioners' action accrued in February, 1995 when Petitioners admittedly knew that the attorneys' error might preclude them from suing the drug manufacturer. Respondents attached a copy of Petitioners' motion to set aside voluntary dismissal with prejudice which is quoted above. [R42-57]

Respondents also alleged that: "The amended complaint fails to set forth sufficient allegations of duty..." [R45]

On November 17, 1999, The Honorable James Carlisle heard argument on Respondents' motion. [R72] As for the statute of limitations, Petitioners argued that Florida Statutes s. 95.11(4)(a) did not apply to Count II, because there was no privity of contract between Petitioners and Respondents at the time of the alleged negligence and Count II does not state a cause of action for attorney malpractice. On the contrary, the statute of limitations applicable to count II is 95.11(3) (1995), which provides a four-year limitations period. Also, Petitioners argued that their action accrued on May 20, 1995, when the time expired for them to appeal Judge Sholts's order dated April 20, 1995 denying their motion to set aside the dismissal, because it was then that the petitioners suffered redressable harm. Petitioners relied on Silvestrone v. Edell, 721 So.2d 1173 (Fla. 1998). [R74-82]

As for duty, Petitioners argued that Respondents gratuitously undertook to dismiss the lawsuit and so assumed a duty to dismiss it in a non negligent manner, such that Petitioners could file suit again. Petitioner relied on Union Park Memorial Chapel v. Hutt, 670 So.2d 64 (Fla.

1996), Parker v. Gordon, 442 So.2d 273 (Fla. 4th DCA 1983), and Jones v. Runft, Leroy, Coffin and Matthews, 873 P.2d 861 (Idaho, 1994) and copies of those cases were provided to the Court. [R83-95]

On November 18, 1999 Judge Carlisle granted Respondents' motion and dismissed the complaint with prejudice. [R96]

During the hearing, it sounded to the undersigned attorney like Judge Carlisle accepted Respondents' argument that Count II accrued when Petitioners learned the meaning of the phrase "dismissed with prejudice" and they knew that the attorney's error might preclude them from prosecuting their claims against the drug manufacturer. [R107]

Accordingly, Petitioners filed an amended motion for rehearing dated November 19, 1999 which argued that Petitioners' knowledge that it was possible that they might suffer loss was immaterial to the date when their cause of action accrued. Petitioners relied on Silvestrone where this Honorable Court rejected the argument that the plaintiffs' cause of action accrued "...when the jury returned its verdict because it was at that point that Silvestrone knew about the allegedly insufficient damages award and any malpractice which may have caused it." 721 So.2d at 1174 (Fla. 1988). Petitioners argued that their negligence action accrued when they suffered damage or redressable harm; that is when Judge Sholts denied their motion to set aside the notice of voluntary dismissal with prejudice and the time for appeal of that order expired. [R107-111]

On November 19, 1999 Petitioners also filed an amended motion to amend and a proposed second amended complaint [Appendix 6] which alleged:

> "8. Defendants knew that Plaintiffs intended to continue to prosecute their claims against Copley."
>
> "10. Inclusion of the words "with prejudice" in said notice of voluntary dismissal was a substantive clerical error or mistake subject to correction pursuant to Florida Rule of Civil Procedure 1.540 and Miller v Fortune Insurance Co...."

> "15. Thereafter, Plaintiffs' new counsel asked Defendants to help Plaintiffs move the court to set aside the notice of dismissal with prejudice, but Defendants refused...." [R100-105]

On November 19, 1999 the Judge Carlisle denied Petitioners' motions for rehearing and to amend. [R112]

On December 13, 1999 Petitioners filed a notice of appeal. [R113-114]

In their initial brief, Petitioners argued that the trial court erroneously granted Respondents' motion to dismiss the amended complaint because Count II was not barred by the applicable statute of limitations. Petitioners argued that Florida Statutes s. 95.11(3) (1995), the four-year statute, applied to this case.

Petitioners argued that Section 95.11(4)(a) does not apply because there was no privity of contract between Petitioners and Respondents at the time of the alleged negligence as required by the statute. Baskerville-Donovan Engineers, Inc. v. Pensacola Executive House Condominium Association, Inc., 581 So.2d 1301 (Fla. 1991) and Pate v. Threlkel, 661 So.2d 278 (Fla. 1995). Additionally, Petitioners argued that section 95.11(4)(a) only applies to professional malpractice actions and that Count II did not state a cause of action for attorney malpractice because an attorney-client relationship is an essential element of such an action and, again, there was no such relationship between Petitioners and Respondents at the time of the alleged negligence. Petitioners argued that if there is a reasonable doubt as to which statute of limitations applies, the Court should apply the longer limitations period. Silva v. Southwest Florida Blood Bank, Inc., 601 So.2d 1184 (Fla. 1992).

Further, Petitioners argued that the action pled in Count II accrued on May 20, 1995 (when the time expired to appeal the order denying the motion to set aside notice of voluntary dismissal), less than four years before suit was filed. Again, Petitioners argued that they did not sustain any redressable harm until Judge Sholtz denied their motion to set aside the notice of voluntary dismissal:

> "Appellees' negligent refusal to move the Court to set aside the dismissal could not harm Appellants

> before Judge Sholts denied that motion. Judge Sholts could have granted the motion to set aside the notice of voluntary dismissal with prejudice, or reversed his own ruling. Appellants could have taken an appeal. If Judge Sholts had changed his decision or this Honorable Court had reversed it, Appellants would not have sustained any damage at all. Appellants' cause of action for negligence on the part of Appellees never would have accrued."
>
> "Appellants' prior knowledge of the possibility that they might suffer loss if Judge Sholts denied their motion to set aside the notice of voluntary dismissal with prejudice is immaterial to when their cause of action accrued." [Appellants' initial brief, pps. 17-18, Appendix 7]

Petitioners' relied on Silvestrone and Peat, Marwick, Mitchell and Co. v. Lane, 565 So.2d 1323 (Fla. 1990).

Accordingly, Petitioners argued that they filed suit within the time permitted on **April 19, 1995**, less than four years after **May 20, 1995**. Therefore, Count II was not time barred.

Additionally, Petitioners contended that the trial Court abused its discretion by denying their amended motion to amend and file the proposed second amended complaint mentioned above.

In their answer brief, Respondents argued that the two year statute of limitations applied because Mr. Montgomery acted as an attorney when he prepared and filed the notice of voluntary dismissal with prejudice. Respondents also relied on Silvestrone and argued:

> "In the instant case, the "bright line" for a legal malpractice action was drawn at the latest, on **April 20, 1995**, when the trial court denied Nale's motion to vacate the voluntary dismissal with prejudice and established that Nale's underlying claim was forever barred." [Answer brief, p. 8]

However, Respondents argued that if the four-year

statute of limitations applied, Petitioners' action was still time barred because it accrued on **April 18, 1994** when Respondents filed the notice of voluntary dismissal and Petitioners lost their right to litigate.

In the reply brief, Petitioners argued that the Court should not apply Florida Statute s. 95.11(4)(a) contrary to its terms because there was no privity of contract between Petitioners and Respondents at the time of the alleged negligence as Respondents had withdrawn and mailed a disengagement letter to Plaintiffs and Plaintiffs had retained new counsel which Respondents refused to assist.

Again, Petitioners argued that the action stated in Count II accrued on May 20, 1995, when the time expired to appeal Judge Sholts's order denying their motion to set aside the dismissal, the judgment became final, and the litigation was concluded, because they did not really sustain any damage or redressable harm before that date.

> "In the amended complaint Appellants alleged that Appellees negligently failed to assist their unsuccessful attempt to set aside the notice of voluntary dismissal with prejudice. Appellants could not possibly have suffered any damage as a result of that negligent omission until Judge Sholts denied their motion. And they had thirty days within which to appeal that ruling. If Judge Sholts had reversed his ruling or Appellants had taken an appeal and this Honorable court had reversed, Appellants would not have sustained any damage. Appellants' cause of action for negligence on the part of Appellees never would have accrued." [Reply brief of Appellants, pps. 11-12, Appendix 8]

Again, Petitioners replied that their knowledge of the "possibility that they might suffer loss if Judge Sholts denied their motion to set aside the notice of voluntary dismissal with prejudice is immaterial as to when their negligence action accrued."

On September 13, 2000 the Fourth District Court of appeal affirmed. The Court held that the statute of limitations began to run on **April 18, 1994** when Appellees filed the notice of voluntary dismissal with prejudice "because appellants' cause of action was lost by the

dismissal with prejudice." Nale v. Montgomery, 768 So.2d 1166, (Fla. 4th DCA 2000). The Court stated:

> "Because 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 a year later**, as somehow extending the period of limitations for the act of negligence which caused the damage to appellants."
>
> Id. at 2194. [Appendix 9].

The Court tried to distinguish Silvestrone as follows:

> "Appellant's reliance on *Silvestrone v. Edell*, 721 So.2d 1173 (Fla. 1998), on the issue of the accrual of their cause of action is misplaced....They cannot rely on malpractice cases to establish accrual of a cause of action and then apply it to a common law negligence action." Id. at 2194. [Appendix 9]

On September 25, 2000 Appellants filed a motion for rehearing and clarification. [Appendix 10] Again, Petitioners contended that they did not sustain any redressable harm because of Respondents' failure to help them move the Court to vacate the dismissal until the time expired to appeal Judge Sholts's order denying their motion. The appellate Court denied Petitioners' motion for rehearing on October 20, 2000. [Appendix 11]

November 19, 2000 was a Sunday. On Monday, **November 20, 2000** Appellants timely filed a notice of appeal which the Court treated as a notice to invoke discretionary jurisdiction.

On October 16, 2001, this Honorable Court accepted jurisdiction over this proceeding.

SUMMARY OF ARGUMENT

The trial Court erroneously granted Respondents' motion to dismiss Petitioners' amended complaint with prejudice and the appellate Court erroneously affirmed that decision. Count II states a cause of action for negligence after termination of the attorney-client relationship.

Respondents withdrew and ended their contractual relationship with Petitioners. At that point Respondents did not owe any contractual duty to Petitioners.

However, thereafter Respondents gratuitously undertook to dismiss the case against the drug manufacturer and assumed a duty to dismiss it in a non-negligent manner. Respondents could have dismissed the case without prejudice and preserved Petitioners' cause of action. Unfortunately, Respondents negligently prepared a notice of voluntary dismissal with prejudice for Petitioners' signatures. Respondents made a substantive clerical error or mistake which was subject to correction pursuant to Florida Rule of Civil Procedure 1.540 when they prepared the notice of dismissal with prejudice. Respondents failed to warn Petitioners that if they signed the notice, their case would be lost. Respondents then filed the notice of dismissal with prejudice with the Court.

Subsequently, when Petitioners' new attorneys, who are not admitted to practice law in Florida, asked Respondents to help Petitioners move the Court to set aside the dismissal, Respondents refused to fix their mistake.

Count II was not barred by the applicable statute of limitations. Florida Statutes section 95.11(3) (1995) applies to this negligence action and allows Petitioners four years to sue Respondents.

Before the trial court, Respondents relied on Florida Statutes section 95.11(4)(a). That section does not apply to this case because there was no privity of contract between Petitioners and Appellees at the time of the alleged negligence. Also, this is not a legal malpractice case as distinct from a case of negligence after termination of the attorney-client relationship.

Petitioners' negligence action accrued when Respondents

sustained damage or redressable harm. Petitioners fault Respondents for failing to move the Court to set aside the dismissal. If the Court would have vacated the dismissal, Petitioners would not have sustained any damage and their negligence action would not have accrued. Petitioners sustained redressable harm at the conclusion of the litigation, when the time expired to appeal the order denying Petitioners' motion to set aside the notice of voluntary dismissal with prejudice.

Petitioners filed suit against Respondents on **April 19, 1999**, within four years after **May 20, 1995**, the date on which the Court rendered the order denying Petitioners' motion to set aside the dismissal.

The trial Court erred by denying Petitioners' Amended motion to amend their amended complaint and the appellate Court erroneously affirmed. The standard of review for motions to amend is abuse of discretion. Public policy favors liberal amendment of pleadings to enable trials on the merits in the interests of justice. Permission to amend should not be denied unless the amendment privilege has been abused, there would be unfair prejudice to the opposing party, or amendment would be futile. Petitioners had not abused the amendment privilege. Indeed, they had not previously moved the court to amend their complaint. Also, the Court did not find and the record did not show that Respondents would suffer any unfair prejudice if the motion was granted. Finally, it was not conclusively shown that Petitioners could not state a cause of action. The Court should have let Petitioners amend their complaint to clarify allegations relating to duty, negligence, and the statute of limitations.

The judgment should be reversed and the cause remanded for trial on the merits.

ARGUMENT

POINT I--THE FOURTH DISTRICT COURT OF APPEAL ERRONEOUSLY AFFIRMED THE TRIAL COURT'S ORDER GRANTING RESPONDENTS' MOTION TO DISMISS PETITIONERS' AMENDED COMPLAINT

A. Standard of Review--De Novo Review

This is a petition for discretionary review of an order affirming an order granting a motion to dismiss Petitioners' amended complaint. On a motion to dismiss, the Court must assume that all allegations set forth in the complaint are true and draw all reasonable inferences in the plaintiffs' favor. Accordingly, an issue regarding the sufficiency of a complaint is an issue of law. Vienneau v. Metropolitan Life Insurance Co., 548 So.2d 856 (Fla. 4th DCA 1989). Petitioners contend that the lower Court incorrectly decided an issue of law as to when their cause of action accrued which resulted in erroneous application of the statute of limitations. This Honorable Court may decide all issues of law without deference to any lower Court. Coleman v. Florida Insurance Guaranty Association, Inc., 517 So.2d 686 (Fla. 1988), Florida Power Corp. v. Lynn, 594 So.2d 789, 791 (Fla. 2d DCA), rev. den. 602 So.2d 942 (Fla. 1992).

B. According to the Petitioners' complaint, Respondents had a duty to preserve Petitioners' right of action.

In the amended complaint, Petitioners alleged the following facts. Petitioners retained Respondents. Respondents filed a lawsuit on Petitioners' behalf. Respondents advised Petitioners to dismiss the suit and told Petitioners they could file suit again later.

Respondents withdrew. After termination of the attorney-client relationship Respondents undertook to dismiss the lawsuit. Respondents negligently prepared a notice of voluntary dismissal with prejudice. Respondents negligently expressly or impliedly misrepresented to Petitioners that they could safely execute said notice

without losing or severely compromising any rights of action they had. Respondents negligently filed said notice of voluntary dismissal with prejudice with the court.

Respondents negligently failed to assist Petitioners with their unsuccessful attempt to set aside the notice of voluntary dismissal with prejudice. As a result Petitioners' rights of action were lost or severely compromised. [R26-31]

In the proposed second amended complaint Petitioners also alleged that Respondents knew that Petitioners intended to continue to prosecute their claims against Copley Pharmaceuticals; that inclusion of the words "with prejudice" in the notice of voluntary dismissal was a substantive clerical error or mistake subject to correction pursuant to Florida Rule of Civil Procedure 1.540; and Petitioners' new counsel asked Respondents to help Plaintiffs move the Court to set aside the dismissal, but Respondents refused.

Respondents withdrew with the Court's permission, mailed Petitioners a disengagement letter, and so terminated their attorney-client relationship with Petitioners. At that point, they did not have any contractual duty to Petitioners. However, it was still possible for Respondents to have a duty to Petitioners.

> "Although privity of contract may create the duty of care providing the basis for recovery in negligence, lack of privity does not necessarily foreclose liability if a duty of care is otherwise established.' Baskerville-Donovan Engineers, Inc. v. Pensacola Executive House Condominium Ass'n, Inc., 581 So.2d 1301, 1303 (Fla. 1991)," Rushing v. Bosse, 652 So.2d 869 (Fla. 4th DCA 1995).

Subsequently, when Respondents gratuitously agreed to dismiss the case, they assumed a duty to dismiss it in a non-negligent manner and preserve Petitioners' right of action. Respondents had advised Petitioners that they could file suit again. Respondents should have prepared a notice of voluntary dismissal without prejudice. At least they should have warned Petitioners that if they signed the notice of voluntary dismissal with prejudice their rights would be lost.

In Union Park Memorial Chapel v. Hutt, 670 So.2d 64 (Fla. 1996), this Honorable Court stated:

> "It is clearly established that one who undertakes to act, even when under no obligation to do so, thereby becomes obligated to act with reasonable care....As this court recognized over 60 years ago in Banfield v. Addington, in every situation where a man undertakes to act, ...he is under an implied legal obligation or duty to act with reasonable care, to the end that the person or property of others may not be injured.' 104 Fla. at 667, 140 So. 896. The Restatement (Second) of Torts explains this well accepted rule of law as follows:
>
> > One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the third person or his things, is subject to a liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if (a) his failure to exercise reasonable care increases the risk of such harm, or...(c) the harm is suffered because of reliance of the other or the third person upon the undertaking.' Restatement (Second) of Torts, Section 324A (1965)." Union Park Memorial Chapel v. Hutt, 670 So.2d at 66-67.

In Jones v. Runft, Leroy, Coffin & Matthews, Chartered, 125 Idaho 607, 873 P.2d 861 (1994) the Idaho Supreme Court recognized this common law doctrine and applied it to a law firm, saying:

> "A claim for breach of an assumed duty is a negligence action where the duty of care results from a voluntary undertaking...A voluntary duty is distinct from any other duty the party may have as a result of another undertaking or relationship." Jones v. Runft, Leroy, Coffin & Matthews, Chartered, 873 P.2d at 865-866.

Based upon the evidence before it, the Court held there was a genuine issue of material fact as to whether the law firm voluntarily assumed a duty on behalf of a non-client, Jones.

It is obvious from the opinion that the Court did not consider Jones to be an attorney malpractice case, for it stated:

> "As we have discussed above, a breach of an assumed duty claim is a negligence action. Because there is no statute of limitations specifically governing negligence actions that do not involve personal injury or malpractice, we apply the four-year statute of limitations found in I.C. s. 5-224." Id. at 867.

Thus, according to the complaint, Respondents assumed a duty to Petitioners.

Even if Respondents had not assumed a duty, Florida law would have imposed one. Obviously, when Respondents prepared and filed the notice of voluntary dismissal with prejudice they intended to benefit or affect Petitioners. Unfortunately, they negligently failed to warn Petitioners that if they signed the notice they would lose their right of action.

In Pate v. Threlkel, 661 So.2d 278 (Fla. 1995), this Honorable Court held that, if under the prevailing standard of care a physician had a duty to warn his patient of the genetically transferable nature of his condition and of the importance of testing his children for the condition, that duty would also run to the children, despite lack of privity of contract. The Court recognized:

> "In other professional relationships...we have recognized the rights of identified third-party beneficiaries to recover from a professional because that party was the intended beneficiary of the prevailing standard of care. In such cases we have determined that an absence of privity does not necessarily foreclose liability. Baskerville-Donovan Engineers, Inc. v. Pensacola Executive House Condominium Ass'n, 581 So.2d 1301 (Fla. 1991); First Florida Bank, N.A. v. Max Mitchell & Co., 559 So.2d 9 (Fla. 1990); First American Title Ins. Co. v. First Title Service Co., 457 So.2d 467 (Fla. 1984); see also McAbee v. Edwards, 340 So.2d 1167 (Fla. 4th DCA 1976).

> ...those decisions relax the privity limitation on liability by expanding the class of persons who could bring a cause of action against a professional beyond those in strict contractual privity with the professional....by way of these opinions the Court has simply identified parties not in direct contractual privity, or even in "near privity," who may sue the professional." Pate v. Threlkel, 661 So.2d 278 (Fla. 1995).

Moreover, after filing the notice of voluntary dismissal with prejudice, discovering their error, and learning that Petitioners needed help or their rights would be lost, Respondents had a duty to move the Court to set aside the dismissal. Who else could have known and shown the Court that inclusion of the words "with prejudice" was a substantive clerical error or mistake which could be corrected by application of Florida Rule of Civil Procedure 1.540 and Miller v. Fortune Insurance Co., 484 So.2d 1221 (Fla. 1986)? (See Rebecca Larson's handwritten memorandum which stated: "Do motion to dismiss without prejudice. Thanks" which was attached to the original complaint as Exhibit C) [Appendix 1].\3

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3. In their motion to set aside notice of voluntary dismissal with prejudice [Appendix 3] Petitioners only alleged that they misunderstood the legal effect of the paper they signed. They did not allege a substantive clerical error or mistake which would justify relief under Florida Rule of Civil Procedure 1.540 (1995).

> "It is also recognized that if the defendant's own negligence has been responsible for the Plaintiff's situation, a relation has arisen which imposes a duty to make a reasonable effort to give assistance, and avoid any further harm. Where the original danger is created by innocent conduct involving no fault on the part of the defendant, it was formerly the rule that no such duty arose; but this appears to have given way to a recognition of a duty to take action, both where the prior innocent conduct has created an unreasonable risk of harm to the plaintiff, and where it has already injured him." Prosser and Keeton on the Law of Torts, s. 56, pps. 376-377 (West Publishing Co., 5th ed. 1984).

As authority for that statement, Prosser and Keeton cite the Restatement of Torts, Second, s. 321(1) (1965) which states: "If the actor does an act, and subsequently realizes or should realize that it has created an unreasonable risk of causing physical harm to another, he is under a duty to exercise reasonable care to prevent the risk from taking effect."

Florida Courts recognized and applied this principal in the following cases: White v. City of Waldo, 659 So.2d 707 (Fla. 1st DCA 1986), appeal dismissed, 666 So.2d 901, rehearing denied, 667 So.2d 774, (which quoted the Restatement section as above); Tucker v Gadsden County, 670 So.2d 1053 (Fla. 1st DCA 1996), ("When a governmental entity created a known dangerous condition, which is not readily apparent to persons who could be injured by the condition, a duty at the operational level arises to...protect the public from, the known danger.") Id. at 1054; Jespers v. Taylor, 105 So.2d 569, 571 (Fla. 1958) (followed by Zylka v. Leikvoll, 144 N.W.2d 358 (Minn. 1966) (which indicates that golfers must yell "Fore!" after teeing off and endangering others), and Rivera v Randall Eastern Ambulance Service, Inc., 393 So.2d 605, 606 (Fla. 3rd DCA 1981) (indicating that drivers must render assistance to accident victims).

Thus, accepting the allegations of the amended complaint as true, Respondents owed a duty to Petitioners.

Respondents should be held liable for Petitioners' damages. Respondents are expert trial lawyers. Any reasonably competent trial lawyer could have easily avoided harm to Petitioners through the exercise of reasonable care. Respondents were at fault. Negligence should be discouraged. Petitioners should be compensated. And Respondents are better able to distribute the loss than Petitioners. This Court should not rebuild the citadel of privity to exonerate Respondents.

C. Count II is not barred by the statute of limitations.

1. Florida Statutes s. 95.11(3) applies to Count II.

Count II states an action for negligence after termination of the attorney-client relationship. Florida Statutes s. 95.11(3) (1995) applies to Count II. It states: "Actions other than for the recovery of real property shall be commenced as follows: (3) **Within four years**.--(a) An action founded on negligence."

2. Florida Statutes s. 95.11(4)(a) does not apply.

Respondents' motion to dismiss the amended complaint alleged that Florida Statutes s. 95.11(4)(a) barred Petitioners' claims. However, section 95.11(4)(a) is not applicable to Count II for two reasons.

First, there was no privity of contract between Petitioners and Respondents at the time of the alleged negligence. Accordingly, the plain language of the statute specifically excepts Petitioners from its application.\4 "However, the limitation of actions herein for professional

malpractice shall be limited to persons in privity with the professional." s. 95.11(4)(a), Fla. Stat. (1997).

In Baskerville-Donovan Engineers, Inc. v. Pensacola Executive House Condominium Association, Inc., 581 So.2d 1301 (Fla. 1991) this Honorable Court held:

> "The issue is whether the two-year statute of limitations set forth in Section 95.11(4)(a), Florida Statutes (1983), applies only to malpractice actions where direct privity of contract exists between the plaintiff and a professional. We hold that it does and that the trial court erred in dismissing the plaintiff's suit....The term 'privity' as used in Section 95.11(4)(b) means direct contractual privity. The term 'privity' is a word of art that derives from the common law of contracts. It is commonly used to describe the relationship between persons who are parties to a contract." Id. at 1301-1303.

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4. "Our initial responsibility when construing a statute is to give the words their plain and ordinary meaning." Silva v. Southwest Florida Blood Bank, Inc., 601 So.2d 1184, 1186 (Fla. 1992).

See also Pate v. Threlkel, 661 So.2d 278, 281 (Fla. 1995) and Archey v. Government Healthcare Services, 718 So.2d 249 (Fla. 1st DCA 1998).

Second, obviously section 95.11(4)(a) applies to professional malpractice actions only. Count II does not state a cause of action for attorney malpractice, again because there was no attorney-client relationship between Appellees and Appellants at the time of the alleged negligence. An attorney-client relationship is an essential element of a legal malpractice case. Dadic v. Schneider, 722 So.2d 921 (Fla. 4th DCA 1998).

3. If in doubt, the longer limitations period applies.

The statute of limitations is not a favored defense because it may bar an otherwise valid claim. Accordingly, statutes of limitations are strictly construed. Ambiguities in a statute of limitations should be construed in favor of the plaintiff. If there is reasonable doubt as to which

statute of limitations applies, courts apply the longer limitations period.

> "... we must also keep in mind the pertinent rules of construction applicable to statutes of limitations. This Court has previously stated that '[w]here a statute of limitations shortens the existing period of time the statute is generally construed strictly, and where there is reasonable doubt as to legislative intent, the preference is to allow the longer period of time.'... 'It is well established that a limitations defense is not favored, and that therefore, any substantial doubt on the question should be resolved by choosing the longer rather than the shorter possible statutory period.' Thus, ambiguity, if there is any, should be construed in favor of the plaintiffs." Silva v. Southwest Florida Blood Bank, Inc., 601 So.2d 1184 (Fla. 1992).

See also Archey v. Government Healthcare Services, 718 So.2d 249 (Fla. 1st DCA 1998).

4. Count II accrued on May 20, 1995, less than four years before commencement of this action.

A negligence action accrues when the plaintiff sustains damage. "A cause of action accrues when the last element constituting the cause of action occurs." s. 95.031, Fla. Stat.

> "Generally, a cause of action for negligence does not accrue until the existence of a redressable harm or injury has been established and the injured party knows or should know of either the injury or the negligent act." Peat, Marwick, 565 So.2d 1323 at 1325.

Obviously, a plaintiff "...would not be on notice of any

right of action until he has been injured." Smith v. Continental Insurance Company, 326 So.2d 189 (Fla. 2nd DCA 1976).

A litigant cannot sustain damage consisting of loss of his case because of negligence on the part of his trial attorney until the litigation is concluded by final judgment because the trial Court can retract any interlocutory ruling at any time before entry of judgment.

Silvestrone v. Edell, 721 So.2d 1173 (Fla. 1998) was an attorney malpractice action which arose from alleged errors committed by an attorney in the course of litigation. Attorney Marc Edell represented the plaintiff, Art Silvestrone, on an antitrust case. On February 27, 1990 the jury returned a verdict for Silvestrone. During the next two years, the Court considered post trial motions including Co-plaintiff Teal's motion for a new trial. On February 4, 1982, the Court entered a final judgment. That judgment was not appealed.

On January 19, 1993 and Silvestrone filed an attorney malpractice action against Edell. The suit was filed less than two years after the final judgment but more than two years after the verdict.

Edell defended and moved for a summary judgment based upon the statute of limitations. The trial court granted his motion. The Fifth District Court of Appeal affirmed. It held that the statute of limitations began to run when the jury returned its verdict because at that point Silvestrone knew about any alleged malpractice and the low damage award.

Silvestrone appealed to the Supreme Court. The issue was when the applicable statute of limitations began to run. This Honorable Court reversed and held the statute of limitations began to run when the judgment became final.

> "...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. To be specific, we hold that the statute of limitations does not commence to run until the final judgment becomes final.

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2. For instance, a judgment becomes final either upon the expiration of the time for filing an appeal or post judgment motions, or, if an appeal is taken, upon the appeal being affirmed and either the expiration of the time for filing motions for rehearing or of denial of the motions for rehearing." Id. at 1175.

This Court reasoned that the claim against the attorney was hypothetical and damages were speculative until the underlying action was concluded by final judgment because, before that time, the trial court had inherent authority to reconsider and retract any interlocutory rulings.

> "Since redressable harm is not established until final judgment is rendered,...a malpractice claim is hypothetical and damages are speculative until the underlying action is concluded with an adverse outcome to the client." Id. at 1175.

This Court recognized that post-judgment motions can delay the conclusion of litigation and the time when a litigant suffers redressable harm.

> In the instant case, because various post verdict motions were filed, final judgment was not entered until almost two years after the jury verdict. Since the trial court retains inherent authority to reconsider and, if deemed appropriate, alter or retract any of its nonfinal rulings prior to entry of the final judgment or order terminating an action,...the motion for a new trial filed by the coplaintiff, if granted, could have affected Silvestrone's rights and liabilities. Therefore, Silvestrone's rights or liabilities were not finally and fully adjudicated until the presiding judge resolved these matters and recorded final judgment and this final judgment became final." Id. at 1175.

This Court followed Silvestrone in Fremont Indemnity Co. v. Carey, Dwyer, Eckhart, Mason & Spring, P.A., 26 F.L.W. S546 (Fla. 2001) ("...the statute of limitations began to run at the conclusion of the underlying

litigation...redressable harm cannot be determined until the conclusion of litigation." 26 F.L.W. at S546-547) and Gilbride, Heller & Brown, P.A. v. Watkins, 783 So.2d 224 (Fla. 2001). In Gilbride it agreed that: "A final judgment is not final until a timely filed appeal to, or a petition for review by, the Supreme Court is resolved." Id. at 226. See also Perez-Abreu, Zamora & De La Fe, P.A. v. Taracido, 790 So.2d 1051 (Fla. 2001), Blumberg v. USAA Casualty Insurance Co., 790 So.2d 1061, (Fla. 2001), and Peat, Marwick, Mitchell & Co. v. Lane, 565 So.2d 1323 (Fla. 1990).

Applying the Silvestrone analysis to Count II, Petitioners' action accrued on May 20, 1995, the date when the time expired for filing a notice of appeal from Judge Sholts's order denying the motion to set aside the notice of voluntary dismissal with prejudice. Respondents' negligent refusal to move the court to set aside the dismissal could not possibly harm Petitioners before Judge Sholts denied that motion. Judge Sholts could have granted the motion to set aside the notice of voluntary dismissal with prejudice, or he could have reversed his own ruling. Petitioners could have taken an appeal. If Judge Sholts had changed his decision or this Honorable court had reversed it, Petitioners would not have sustained any damage at all. Petitioners' cause of action for negligence on the part of Respondents never would have accrued.

> "We understand Peat Marwick to draw a distinction between knowledge of actual harm from legal malpractice and knowledge of potential harm. The former begins the limitations period; the latter does not." Throneberry v. Boose, Casey, Ciklin, Lubitz, Martens, McBane & O'Connell, P.A., 659 So.2d 1134, 1136 (Fla. 4th DCA 1995).

Below, Judge Warner tried to distinguish Silvestrone by writing:

> "Appellant's reliance on Silvestrone..., on the issue of the accrual of their cause of action is misplaced. Silvestrone involved the accrual of a malpractice cause of action, which appellants adamantly disavowal that they have alleged. They cannot rely on malpractice cases to establish accrual of the cause of action and then apply it to a common law negligence action." 768 So.2d at 1167-1168.

That is not correct. Our negligence case is not distinguishable. All of the professional malpractice cases cited above involved allegations of negligence. The same principals relating to damages and the statutes of limitations apply to negligence and legal malpractice cases.

> "The Florida courts require more than mere speculation as to damages in order to either start the statute of limitations running or to state a cause of action ...
>
> The court has examined the law of Florida and has not been able to determine that Florida law defines "damages" for the purpose of professional malpractice any differently than it does for...simple negligence. " Commerce Bank, N.A. v. Ogden, Newell and Welch, 81 F.Supp.2d 1304 (M.D. Fla. 1999).

See also, Employers' Fire Insurance Company v. Continental Insurance Company, 326 So.2d 177, 181 (Fla. 1976) (where this Court stated the same rule applied to actions involving breach of contract).

However, below, Respondents argued that Petitioners' action accrued when Petitioners learned the meaning, significance and effect of the notice of voluntary dismissal with prejudice. On the contrary, Petitioners' prior knowledge of the possibility that they might suffer loss if Judge Sholts denied their motion to set aside the notice of voluntary dismissal with prejudice did not fix the time when their cause of action accrued. Remember, in Silvestrone the 5th District Court

> "...affirmed, holding that the statute of limitations began to run when the jury returned its verdict, because it was at that point that Silvestrone knew about the allegedly insufficient damages award and any malpractice which may have caused it." Silvestrone, 721 So.2d at 1174.

Obviously, this Court rejected that analysis and reversed the Fifth District Court's decision.

In Silvestrone, this Honorable Court tried to establish a "bright line" rule to "provide certainty and reduce litigation over when the statute starts to run." 721 So.2d at 1176. The Court sought to obviate the need for trial

Courts to make factual determinations as to when causes of action were discovered or should have been discovered. That bright line would be blurred if the opinion rendered herein by the Fourth District Court of Appeal were to stand uncorrected.

Obviously, the Fourth District Court of Appeal held that Petitioner's action against Respondents accrued before the underlying judgment became final at the conclusion of the litigation and Petitioners sustained redressable harm. Accordingly, its decision is in express and direct conflict with Silvestrone, Fremont, Gilbride, Perez-Abreu, Blumberg, and Peat, Marwick as well as the following Florida appellate court decisions: Wilkerson v. Sternstein, 558 So.2d 516 (Fla. 1st DCA 1990), Zakak v. Broida & Napier, P.A., 545 So.2d 380 (Fla. 2d DCA 1989), Ferrari v. Vining, 744 So.2d 480 (Fla. 3d DCA 1999), Hold v. Manzini, 736 So.2d 138, 141-142 (Fla. 3d DCA 1999), Gaines v. Russo, 723 So.2d 398 (Fla. 3d DCA 1999), Chapman v. Garcia, 463 So.2d 528 (Fla. 3d DCA 1985), Birnholz v. Blake, 399 So.2d 375 (Fla. 3d DCA 1981), Eldred v. Reber, 639 So.2d 1086, 1088 (Fla. 5th DCA 1994), Richards Enterprises, Inc. v. Swofford, 495 So.2d 1210 (Fla. 5th DCA 1986), cause dismissed, 515 So.2d 231 (Fla. 1987), and Slapikas v. Apollo Systems, Inc., 766 So.2d 440 (Fla. 4th DCA 2000).

E. Petitioners filed suit within the time permitted.

Petitioners filed their original complaint against Respondents on **April 19, 1999**, less than four years after **May 20, 1995**, the date upon which Judge Sholts denied Petitioners' motion to set aside voluntary dismissal with prejudice and within the period of limitations. Accordingly, Count II is not time barred.

The trial Court erred by granting Respondents' motion to dismiss the amended complaint with prejudice and it was an error to affirm that order.

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POINT II--THE COURT ABUSED ITS DISCRETION BY DENYING PETITIONERS' AMENDED MOTION TO AMEND

A. Abuse of discretion

The standard of review of an order denying a motion to amend pleadings is abuse of discretion. Life General Security Insurance Co. v. Horal, 667 So.2d 967 (Fla. 4th DCA 1996).

B. Liberal amendments for trials on the merits

There is a policy liberally permitting parties to amend their pleadings so cases can be tried on the merits. "Leave of court shall be given freely when justice so requires." Fla.R.Civ.P. 1.190(a).

> "At any time in furtherance of justice, upon such terms as may be just, the court may permit any...pleading...to be amended....At every stage of the action the court must disregard any error or defect in the proceedings which does not affect the substantial rights of the parties." Fla.R.Civ.P. 1.190(e).

"However, leave to amend should not be denied unless the privilege has been abused, there is prejudice to the opposing party, or amendment would be futile. " Life General Security Insurance Co. v. Horal, 667 So.2d at 969.

C. No abuse of amendment privilege

Petitioners did not abuse the amendment privilege. Indeed, Petitioners had not previously moved the court to

amend their complaint. "Since Life General had not sought to amend its pleadings before the instance we now review, it cannot be said that the appellant has abused the privilege." Life General Security Insurance Co. v. Horal, 667 So.2d at 969. See also Soucy v. Casper, 658 So.2d 1017 (Fla. 4th DCA 1995).

D. No prejudice to Respondents

The trial court did not find and the record did not show that Respondents would have suffered any unfair prejudice if Petitioners' amended motion to amend their complaint had been granted. See Soucy v. Casper, 658 So.2d at 1018 and Life General Security Insurance Co. v. Horal, 667 So.2d at 969.

E. Amendment not futile

It has not been conclusively shown that Petitioners could not state a cause of action. Indeed, as shown above, the amended complaint stated a cause of action for negligence after termination of the attorney-client relationship.

Petitioners should have been permitted to clarify their allegations as to Respondents' duty, negligence, and the statute of limitations.

Notice that the trial court had discretion to grant that motion even after dismissing the amended complaint with prejudice. See Unitech Corporation v. Atlantic National Bank of Miami, 472 So.2d 817 (Fla. 3rd DCA 1985).

The trial court abused its discretion when it denied Petitioners' amended motion to amend and the order affirming the decision was in error.

CONCLUSION

The trial Court erred by granting Respondents' motion to dismiss the amended complaint with prejudice and denying Petitioners' amended motion for rehearing and Petitioners' amended motion to amend. The appellate Court erred by affirming the decision.

The judgment should be reversed and the cause remanded for additional proceedings.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was mailed to Shelley H. Leinicke, P. O. Box 14460, Fort Lauderdale, FL 33302 this ___ day of November, 2001.

_____
Paul Richard Bloomquist, Esq.
Fla. Bar No. 283371
3175 South Congress Avenue
Palm Springs, FL 33461
Mailing address:
P. O. Box 15363
West Palm Beach, FL 33416
(561) 439-2999
(561) 439-6102 (FAX)

CERTIFICATE OF PRINT FONT SIZE

I HEREBY CERTIFY that Petitioners' initial brief on the merits was printed in Courier New (Western) 12 points of no more than 10 characters per inch pursuant to Florida Rule of Appellate procedure 9.210(a)(2)(2000).

_____
Paul Richard Bloomquist, Esq.
Fla. Bar No. 283371
3175 South Congress Avenue
Palm Springs, FL 33461

Mailing address:
P. O. Box 15363
West Palm Beach, FL 33416
(561) 439-2999
(561) 439-6102 (FAX)