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' REPLY BRIEF

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STATEMENT OF FACTS

After termination of the attorney-client contract and relationship, Petitioners asked Respondents to move the Court to set aside the dismissal with prejudice and fix their mistake. Respondents refused. On April 20th, 1995, Judge Sholts denied Petitioners' pro se motion to set aside the dismissal. Petitioners filed this lawsuit within four years thereafter.

ARGUMENT

Point I: Respondents had a duty to preserve Petitioners' cause of action.

By undertaking to dismiss Petitioners' lawsuit, Respondents assumed a duty to preserve the cause of action. Respondents intended to benefit Petitioners or affect their rights\1 Respondents failed to warn Petitioners against signing the notice of voluntary dismissal with prejudice. After negligently preparing and filing the notice, Respondents had a duty to fix their mistake and protect Petitioners from loss. As for this point, Petitioners rely upon the argument set forth in their initial brief at pages 18 through 25. Respondents do not deny that they had a duty to preserve Petitioners' cause of action.

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1. This fact distinguishes Angel, Cohen and Rogovin v. Oberon Investment, N.V., 512 So.2d 192 (Fla. 1987) and the other cases cited in Respondent's brief on the merits at page 14.

However, Respondents state that:

> "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 to or ability to bring a legal malpractice claim." [Respondent's brief on the merits, page 14]

Usually, attorneys do not owe duties to persons not in privity. However, in this case, Respondents had a duty to Petitioners. None of the cases cited by Respondents involve negligent acts or omissions done after termination of an attorney-client relationship. Moreover, all of those cases recognize an exception to the privity requirement for persons who are intended to benefit from rendition of legal services. Pate v. Threlkel, 661 So.2d 278 (Fla. 1995). This Court should not rebuild the citadel of privity to exonerate Respondents.

Point II: The four-year statute applies to Count II.

Florida Statutes s. 95.11(3) (1995) which provides a four-year limitations period applies to Count II because it states a cause of action for negligence after termination of the attorney-client relationship.

However, Respondents contend that **the two-year statute of limitations applies to a discharged attorney**. They argue that since Mr. Montgomery acted in his capacity as an attorney at the time he prepared the notice of voluntary dismissal with prejudice, "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." (Respondents say nothing about their subsequent negligent failure and refusal to fix their mistake). Respondents cited Dadic and Chipman. As will be seen, neither case cited by Respondents indicates that the two-year statute of limitations applies to a case where an attorney commits a negligent act or omission after termination of the attorney-client relationship. Respondents urge this Honorable Court to apply the statute of limitations contrary to its express language.

Obviously, the two-year statute of limitations does not apply to such a case because it states: "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.

> "We reverse the order appealed and remand this legal malpractice action to the trial court to permit the appellant and to amend his complaint to allege that, as a member of the prepaid legal services plan, he had not been in direct privity

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2. Count II states a cause of action for negligence. It does not state a cause of action for legal malpractice because there was no privity of contract between Petitioners and Respondents at the time of the negligent acts and omissions. Dadic v. Schneider, 722 So.2d 921 (Fla. 4th DCA 1998). However, even if Count II stated a cause of action for legal malpractice, section 95.11(4)(a) would not apply to any negligent acts or omissions which happened after termination of the contractual attorney-client relationship for lack of privity of contract.

> with the attorneys alleged to have committed the alleged malpractice. It appears that the trial court declined to permit the amendment, having concluded that the two-year professional malpractice limitations period of section 95.11(4)(a), Florida Statutes (1991) had passed, thus plaintiff's proposed amendment would be futile. However, section 95.11(4)(a) excludes from the two-year period those actions where persons are not in direct privity with the professional, thus the limitations period for such exclusions is four years....Reversed and remanded with instructions to permit the amendment." Hickey v. Dunn & Corey, 761 So.2d 1245 (Fla. 3d DCA 2000).

See also Baskerville-Donovan Engineers, Inc. v. Pensacola Executive House Condominium Association, Inc., 581 So.2d 1301 (Fla. 1991) and Pate v. Threlkel, supra.

In Gonzalez v. Jacksonville General Hospital, 365 So.2d 800 (Fla. 1st DCA 1978) the appellate Court rejected the argument that rendition of professional service alone makes the two-year statute of limitations applicable.

> "Appellant first contends that since she has couched her second amended complaint in terms of carelessness and negligence and that since Appellees did not themselves provide medical or other treatment then section 95.11 (6) is not applicable and that therefore the four year

> statute of limitations is applicable. We reject that contention on that premise. Clearly, unless the nurse furnished by appellees (or one of them) was careless or negligent and thereby caused injury to appellant then no liability can be visited upon appellees. The act of administering the shot by the nurse, we hold, was a medical act.
>
> Accordingly, F.S. 95.11(6), Florida Statutes 1993, was applicable to appellees as well as the hospital. That statute would have, unless rendered ineffective by a subsequent amendment, barred the action which was commenced by the plaintiff more than two years after her alleged injury.
>
> "However, F.S. 95.11(6), as it existed on April 2, 1973, the date of the alleged negligent act, ceased to exist on January 1, 1975, the effective date of Chapter 74-382. Section (4)(a) of that act provided for a two-year period of limitations applicable to actions for professional malpractice, whether founded on contract or tort, with the proviso 'that the limitation of actions herein for professional malpractice shall be limited to persons in privity with the professional." Clearly there was no privity between appellant and appellees, nor between appellant and the nurse who administered the shot complained of. The privity was between appellant and the hospital, which is not a party to this appeal. Since the two-year statute of limitations provided by Chapter 74-382 was limited to persons in privity with the professional it necessarily follows that the limitation was and is inapplicable. Having determined that statute to be inapplicable the only remaining statute of limitations which could have been applied is section (3)(a) of s. 95.11 'an action founded on negligence' or section (3)(b) 'any action not specifically provided for in these statutes.' The period provided for in those sections was four years." Id. at 803

Thus, contrary to Respondents' argument, before Section 95.11(4)(a) can apply, something more than rendition of professional services or "Montgomery acting in his capacity as an attorney" is required, i.e., the existence of privity

of contract between the parties. Therefore, section 95.11(4)(a) does not apply to Count II, because there was no privity of contract between Petitioners and Respondents at the time of the acts and omissions described in Count II.

Nevertheless, Respondents argue:

> "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." [Respondents' brief on the merits, p. 14]

That statement makes no sense in light of Baskerville-Donovan where this Honorable Court stated:

> "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" Baskerville Donovan Engineers, Inc. v. Pensacola Executive Condominium Association, Inc., 581 So.2d at 1303.
>
> "As the first of District noted below: Section 95.11(4)(a) is specifically limited in application to 'persons in privity with a professional.' The decision by the Supreme Court and...and its more recent decision in...do not expand that limitation." Pate v. Threlkel, 661 So.2d at 281 (Fla. 1995).

Respondents cannot avoid the fact that after they withdrew as counsel and mailed Petitioners a disengagement letter terminating the attorney-client contractual relationship (and after Petitioners retained substitute counsel) Respondents were no longer in privity of contract with Petitioners.\3 It follows that the two-year statute of limitations did not applied to any subsequent-to-withdrawal

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3. See exhibits in Respondents' appendix including 15, Montgomery letter dated April 13, 1994: "Since I am no longer attorney of record in your case..." See also 17, Montgomery letter dated April 13, 1995: "I did not represent the Stebbins when they made the decision to

dismiss the matter with prejudice." A rose by any other name may smell as sweet, but a terminated contractual relationship is not "privity" for purposes of section 95.11(4)(a), Fla. Stat.

negligent acts and/or omissions on the part of Respondents (e.g. negligently refusing to move the court to set aside the dismissal with prejudice and fix the attorney's mistake in drafting the notice of dismissal with prejudice).

Dadic v. Schneider, 722 So.2d 921 (Fla. 4th DCA 1998) does not support Respondents' argument at all. The sued their former attorney and made several claims. The legal malpractice they alleged as follows:

> "They claimed he did not add parties, did not sue for certain claims, did not present the facts at a hearing in the manner that they wished, did not conduct depositions in the manner they wanted, refused to make certain motions, and refused to accuse one of the opposing parties of perjury. They also made a claim for malpractice based upon Schneider's failure to follow up in discovery and to properly prepare for trial ... " Id. at 922.

Obviously, the allegedly negligent acts and omissions which the Dadics claimed constituted malpractice happened during the term of the attorney-client relationship. Obviously, Dadic does not hold that a negligent act or omission done after the attorney withdraws can serve as the predicate for a legal malpractice case.

Moreover, Dadic certainly does not indicate that Florida Statutes s. 95.11(4)(a) applies to our case. The statute of limitations was not at issue in Dadic.

Chipman v. Chonin, 597 So.2d 363 (Fla. 3d DCA 1992) also does not support Respondents' position.

> "Chipman alleged in his complaint that the defendant's withdrawal as counsel caused him to lose monetary damages in an age discrimination case. However, the record is devoid of any evidence which would support this claim. Any loss of these damages must be attributable to Chipman himself, since he chose to voluntarily accept his former employer's settlement offer." Id. at 363.

Chipman did not involve negligent acts or omissions

done by an attorney after termination of the attorney-client relationship. And Chipman says nothing about the applicable statute of limitations.

Clearly, Florida Statutes s. 95.11(4)(a) does not apply to our case, because there was no privity of contract between the parties at the time of Respondents' negligence.

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 period of limitations. Silva v. Southwest Florida Blood Bank, Inc., 601 So.2d 1184 (Fla. 1992).

The four-year limitations period for negligence cases applies to Count II.

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

In the initial brief Petitioners argued that Count II accrued when they sustained damage. s. 95.031, Fla. Stat. As this Court stated in Peat, Marwick: "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 at 1325. Obviously, a plaintiff "...would not be on notice any right

of action until he has been injured." Smith v. Continental Insurance Company, 326 So.2d 189 (Fla. 2d DCA 1976). Respondents do not disagree with that.

Petitioners demand damages for the loss of their cause of action against Copley Pharmaceuticals, Walgreens and Suresch. Accordingly, Petitioners contend that they did not sustain redressable harm, i.e. loss of their cause of action against the drug manufacturer, and this action did not accrue until May 20, 1995 when the time expired to appeal Judge Sholts's order denying their motion to set aside dismissal with prejudice, because that is when the underlying lawsuit was finally concluded by final judgment.

Before Judge Sholts executed that order, he could have reversed the ruling he announced at the motion hearing and granted the motion to set aside dismissal with prejudice. Before May 20, 1995, Petitioners could have appealed Judge Sholts's order denying their motion. If Judge Sholts had rendered a different decision or the appellate court had reversed, Petitioners would not have sustained any damage at all. Petitioners' cause of action for negligence on the part of Respondents never would have accrued.

Apparently, Respondents would have almost agreed if this were an attorney malpractice case, for they argue:

> "In the instant case, the "bright line" for a legal malpractice action was drawn on **April 20th, 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." [Respondents' brief on the merits, p. 13].

Inconsistently, Respondents contend that Petitioners' negligence action for the same damages accrued on **April 19, 1994**, when they filed the notice of voluntary dismissal with prejudice. Quoting the Fourth District Court, they argue that "the damage of the loss of the cause of action was complete when the notice of voluntary dismissal was filed." [Respondents brief on the merits, p. 17]

Respondents overlook and desperately want this Honorable Court to ignore Petitioners' main argument: that **after** terminating the attorney-client relationship and **filing the notice of dismissal with prejudice, Respondents also negligently refused to fix their mistake and move the Court to set aside the dismissal with prejudice**.\4

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4. The continuing torts doctrine applies to our case. "The continuing torts doctrine is recognized under our state law...The question of whether Mackal's actions constituted continuing torts precludes the granting of summary judgment as to Counts I and II...We also note that the granting of summary judgment as to Counts I and II in their entirety was

Obviously, Respondents' negligent refusal to fix their mistake could not possibly have caused redressable harm to Petitioners before Judge Sholts denied Petitioners' motion to set aside the dismissal with prejudice. Again, if Judge Sholts had rendered a different decision or the appellate

court had reversed, Petitioners would not have sustained any damage at all, and Petitioners' cause of action for negligence on the part of Respondents never would have accrued. Therefore, Petitioners' action against Respondents accrued when the time expired to appeal Judge Sholts's order denying the motion to set aside the dismissal with prejudice. Respondents failed to answer that argument.

Indeed, Respondents want to avoid the language of Silvestrone. This court recognized that post-judgment motions can delay the conclusion of litigation, the time when a litigant suffers redressable harm, and the time when a cause of action for litigation-related negligence accrues.

> "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 denial of the motions for rehearing." Silvestrone at 1175.

(footnote 4 continued):
error because several of the complained-of acts are alleged to have occurred within four years preceding the filing of the complaint." Halkey-Roberts Corporation v. Mackal, 641 So.2d 445 (Fla. 2d DCA 1994). See also Holt v. Seaboard Air Line Railroad Company, 92 So.2d 169, 170 (Fla. 1956), Rosario v. Procacci Commercial Realty, Inc., 717 So.2d 148 (Fla. 5th DCA 1998) and Pearson v. Ford Motor Company, 694 So.2d 61 (Fla. 1st DCA 1997).

The only kind of post-judgment motion that can follow a notice of voluntary dismissal with prejudice is a Rule 1.540 motion to set aside dismissal based upon substantive

clerical error or mistake. Miller v. Fortune Insurance Company, 484 So.2d 1221 (Fla. 1986). Petitioners' motion to set aside the dismissal with prejudice delayed the conclusion of litigation and the time the statute of limitations began to run.

Obviously, the lower court simply held that Petitioners' negligence action accrued before the litigation was concluded and the underlying judgment became final. Its decision is in express and direct conflict with Silvestrone, Fremont Indemnity Co. v. Carey, Dwyer, Eckhart, Mason & Spring, P.A., 26 F.L.W. S546 (Fla. 2001), Gilbride, Heller & Brown, P.A. v. Watkins, 783 So.2d 224 (Fla. 2001), Peat, Marwick, Perez-Abreu, Zamora & De La Fe, P.A. v. Taracido, 790 So.2d 1061 (Fla. 2001), Blumberg v. USAA Casualty Insurance Co., 798 So.2d 1061, (Fla. 2001) and a host of decisions of Florida's District Court of Appeals (which are listed on page 34 of Petitioners' initial brief on the merits) including Zakak v. Broida & Napier, P.A., 545 So.2d 380 (Fla. 2d DCA 1989) which served as the predicate for conflict jurisdiction in Silvestrone.

Respondents did not give a logical reason why legal malpractice cases involving negligence should not control the time when the statute of limitations commenced to run on Count II. Petitioners sustained the same kind of damage or redressable harm as Art Silvestrone and all the other

litigants who complained that their trial attorneys negligently lost their cases. As one federal judge put it:

> "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 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), reversed on other grounds, Porter v. Ogden, Newell & Welch, 241 F.3d 1334 (11th Cir. 2001).

Desperately, Respondents invoke "other cases discussing general negligence principles" including Doe v. Cutter Biological, 813 F.Supp. 1547, 1555 (M.D. Fla. 1993), affirmed, 16 F.3d 1231 (11th Cir. 1994). Respondents contrasted Doe with Silvestrone and Peat Marwick. However, based upon Doe, Respondents contend that Petitioners' negligence action accrued when "she was on notice of the possible invasion of her rights," (before Petitioners suffered redressable harm). That is exactly what the lower Courts decided in Silvestrone. The Fifth District "...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. This Honorable Court **REVERSED**. According to Respondents, Doe

conflicts with Smith v. Continental Insurance Company, 326 So.2d 189 (Fla. 2d DCA 1976) (as a plaintiff "would not be on notice any right of action until he has been injured") as well as Silvestrone, Peat, Marwick and the aforementioned cases that followed those precedents.

> "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)

Petitioners did not sustain any redressable harm as a result of Respondents' negligent failure to move the Court to vacate the dismissal with prejudice until **May 20, 1995** when the time expired to appeal Judge Sholts's order denying Petitioners' pro se motion to set aside notice of voluntary dismissal with prejudice. Count II accrued on that date and that is when the applicable four-year statute of limitations, s. 95.11(3), Fla. Stat. (1995), began running. Petitioners filed suit on **April 19, 1999**. Count II is not time barred.

The "bright line" this Honorable Court drew in Silvestrone "to provide certainty and reduce litigation over when the statute starts to run" would be blurred if the decision rendered herein by the Fourth District Court were to stand uncorrected.

Point IV: The court abused its discretion by denying Petitioners' amended motion to amend.

Petitioners' proposed second amended complaint stated a cause of action for negligence. The Court should have let Petitioners clarify allegations relating to Respondents' duty, negligence, and the statute of limitations. Hickey v. Dunn & Corey, 761 So.2d 1245 (Fla. 3d DCA 2000).

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 3rd day of December, 2001.

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CERTIFICATE OF PRINT FONT SIZE

I HEREBY CERTIFY that the reply brief of Petitioners, Patricia J. Nale and Rodney Stebbins, was printed in Courier New (Western) font 12 points of no more than 10 characters per inch pursuant to Florida Rule of Appellate Procedure 9.210(a)(2) (2000).

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