IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-657
Lower Tribunal No. 3D99-681

GILBRIDE, HELLER & BROWN, P.A.,
LAWRENCE HELLER and TIMOTHY HENKEL,

Petitioners,

v.

FLOYD WATKINS,

Respondent.

ANSWER BRIEF OF RESPONDENT FLOYD WATKINS

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CERTIFICATE OF FONT SIZE

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II. PREFACE

The parties will be referred to by their proper names, as Petitioners or Respondent, or as they appear below.

Floyd Watkins will be referred to as "Watkins."

Gilbride, Heller & Brown, P.A. will be referred to as "GHB."[1]

Timothy Henkel will be referred to as "Henkel."

Lawrence Heller will be referred to as "Heller."

The Record on Appeal will be referred to as "R.__."

All emphasis in this Brief is added.

[1]Unless the context indicates otherwise, "GHB" includes the Petitioners Heller and Henkel.

III. ISSUE PRESENTED FOR REVIEW

The Question certified by the Third District Court of Appeal is as follows:

> Where review of a district court decision in an action underlying a legal malpractice claim is sought in the Florida Supreme Court, does the two-year statute of limitations period of section 95.11(4)(a), Florida Statutes, begin to run from the date the decision becomes final by the supreme court's resolution of that review, or does the period run from the date of the district court's mandate?

To the extent that GHB has requested the above Question to be restated, Watkins likewise requests that the Question be re-stated, as follows:

> For purposes of determining when the two year Statute of Limitations commences to run for a litigational malpractice claim, is a district court decision deemed to be “final” and “concluded” for the purpose of establishing redressable harm notwithstanding the filing of a timely and authorized Petition for Review before the Florida Supreme Court?

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V. STATEMENT OF FACTS AND PROCEDURE BELOW

This professional malpractice claim arises out of the underlying litigation styled as *Watkins v. NCNB Nat'l Bank, N.A.*, 622 So. 2d 1063 (Fla. 3d DCA 1993).

Following the issuance of *Watkins v. NCNB,* Watkins timely filed an authorized Petition for Certiorari Review which was denied by the Florida Supreme Court on January 14, 1994. *See Watkins v. NCNB Nat'l Bank, N.A.*, 634 So. 2d 629 (Fla. 1994).

This professional malpractice action was filed on January 12, 1996, less than two years from the date of the completion of all appellate remedies, including the denial of certiorari review.

The undersigned was substituted as Watkins' counsel in 1998, after which the Petitioners' depositions were taken, and thereupon a Second Amended Complaint was filed on August 26, 1998. In response to the Second Amended Complaint, the Petitioners raised approximately thirty-five (35) affirmative defenses, chief of which, and relevant to this appeal, is the defense of statute of limitations. All parties filed motions and cross-motions directed to the statute of limitations defense.

The trial court granted the Petitioners' Motion for Summary Judgment on the sole and specific finding that Watkins' professional malpractice claim was not timely filed and therefore was time-barred. The trial court held that the two-year statute of limitations begins to run from the date of the District Court of Appeal opinion

irrespective of the filing of a timely and authorized Petition for Certiorari Review and, apparently, irrespective of the result.

A Motion for Clarification/Re-hearing was timely served. The trial court granted the motion to the extent that the Final Judgment was clarified as being "final" only as to Heller and Henkel because one Count against GHB remained intact relating to release of monies held in escrow when Watkins "bonded" off a purported retaining lien. GHB has since voluntarily dismissed any purported claim for unpaid attorneys fees. R. 2449.

An appeal was taken by Watkins which was granted by the Third District Court of Appeal on March 8, 2000 in *Watkins v. Gilbride, Heller & Brown, P.A., Lawrence Heller and Timothy Henkel,* 25 Fla. L. Weekly D560 (Fla. 3d DCA Mar. 8, 2000), in which the Third District Court of Appeal *reversed* the trial court and remanded for further proceedings.

This appeal was thereafter sought by GHB pursuant to its Notice to Invoke Discretionary Jurisdiction dated March 16, 2000.

<u>Brief Summary of Underlying Professional Malpractice Claim</u>

Watkins insists that his former counsel, GHB, induced him to proceed with what they called a "slam dunk" lawsuit against NCNB National Bank at a cost of

approximately $140,000 in fees, for a case which was ***fatally*** flawed from the beginning, both on the facts and as a matter of law. GHB has since conceded that there was no "controlling" case law which supported Watkins' claims and further, that based on the facts of the case, Watkins had no chance of success. R. 1399, at p. 166. Indeed, Henkel testified that GHB's advice to proceed with Watkins' claims would have "totally changed" had it known that Watkins had purchased "insider units" rather than "second phase units," as more particularly described below and in *Watkins v. NCNB*. R. 1570, at p. 335.[2]

However, as shown from GHB's pleadings which GHB drafted and filed on Watkins' behalf, GHB ***always knew*** that Watkins purchased the three "insider units" and NOT the"second phase units." R. 251, 278, at 291; 308, at 323. Alarmingly, GHB admits that it had premised Watkins' entire case on the theory that Watkins was sold "second phase units," when it knew to the contrary! R. 1433-34, at pp. 200-01. Henkel testified that:

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[2] "Insider units" refers to the sale of units in the partnership which were RE-SALES of previously "sold" units to the General Partners of the partnership (for which the insider never had paid for in the first place, in order to unlawfully create the false appearance of a successful securities closing, *i.e.* that the purported minimum number of units required to break escrow had been sold). "Second phase" units means previously UNSOLD units which could only have been sold had the escrow been handled according to the escrow agreement and S.E.C. Rule 10(b)-9.

. . . .   we were premising our
23 legal opinion on those previously unsubscribed
24 units, that that brought him within the second
25 phase of offering and that's what made him a
1 foreseeable and intended beneficiary based on the
2 legal authority.
3   And the position that we could argue
4 would make him the recipient of a duty by the
5 bank.
6   ***Now, if he wasn't, if he was simply a***
7 secondary purchaser, aftermarket purchaser in a
8 securities field, evolved from an existing
9 investor, that would have changed my legal advice
10 because the bank would have not known. They would
11 have known that the units would have been sold to
12 other people, or could have been, even though
13 there were restrictions on transfer, ***but the fact***
14 that he was in that initial second phase was a key
15 to our advice. It was very important, he was in
16 that second phase.

Key to this issue is that GHB knew that Watkins was not in that "second phase," as demonstrated by simply reviewing the pleadings which GHB filed on behalf of Watkins, as well other documents which GHB admits it filed. Specifically, in his "White Book"[3] which GHB admits that it had prior to undertaking his representation, Watkins stated:

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[3] The "White Book," as it later came to be known, was a compilation of documents, excerpted transcriptions of discussions with witnesses and many other documents prepared by Watkins which became the road map for unraveling the huge securities fraud of which Watkins was just one of many victims.

> When Mr. Watkins signed the note with NCNB Bank (exhibit H) <u>*Mr. Watkins believed* </u>he was buying one unit valued at $100,000.00 from Ron's father, Raymond Molina. Later he discovered that Mr. Raymond Molina never owned one unit. His maximum participation in the partnership at any given time totaled one half of a unit, or $50,000.00 (exhibit I & __). <u>*Mr. Watkins further believed*</u>, that he was buying the last two remaining units from the partnership making a total of 21.5 units sold. . . . .
>
> Mr. Ron Molina said that he had taken Mr. Watkins's $300,000.00 and used it to pay off the Molina family's Limited Partner Notes. Mr. Ron Molina said he decided to sell Mr. Watkins one half of a unit ($50,000.00) which he owned, one unit (i.e. $100,000.000) which his company Financial Capital of America owned one unit (i.e. $100,000.000) which his brother, Gerald Molina, owned, and one half of a unit which his father, Raymond Molina, owned. <u>*This was done without Mr. Watkins's knowledge*</u>.

R. Vol. XI, pp. 1927-28. In addition, both Henkel and Heller testified that they reviewed the White Book prior to asserting any claims on Watkins' behalf. R. Vol. VIII, pp. 1234-1557, deposition pp. 155-62; R. Vol. IX, pp. 1626-1708, deposition pp. 42-43, 48-49.

Even GHB's pleadings which GHB drafted and filed on Watkins' behalf, alleged that Watkins was sold the "insider units" and was not in the "second phase." R. 251, 278, 291, 308, 323.

Historical Background

The salient facts relative to the narrow issue on this appeal are brief and relatively undisputed. The historic background of the underlying litigation which appears below is quoted substantially from the Third District Court of Appeal's Opinion in *Watkins v. NCNB*, 622 So. 2d 1063 (Fla. 3d DCA 1993).

Watkins appealed from a final judgment striking his affirmative defenses and dismissing his counterclaims in an action by NCNB National Bank of Florida, N.A. ("NCNB") on a promissory note for a loan used by Watkins to purchase units in a limited partnership, known as Silver Pines, Ltd.

In December 1987, the general partners of Silver Pines contacted Watkins regarding the sale of partnership units in a limited partnership formed to purchase, manage, and resell a shopping center. After inspecting the shopping center and a placement memorandum which was used to market the sale of the units, Watkins

decided to purchase three units in the partnership.[4] NCNB loaned Watkins $276,000 secured by a promissory note in connection with the purchase of the partnership units.

The placement memorandum specified that if fourteen (14) units were not sold by July 1, 1986, the monies would be refunded to the initial investors unless the deadline was extended by the general partners to on or before September 30, 1986. If the fourteen (14) units were sold before the closing date, *(i.e. the "first phase")* the offering would continue until twenty-one and one-half (21.5) units were sold *(i.e. the "second phase")*. Thus, the partnership units would be offered during two phases. NCNB as an escrow agent agreed to hold in escrow the subscription proceeds and the promissory notes from first phase investors and refund the monies to the first phase investors if fourteen partnership units were not sold before the closing date. NCNB allegedly wrongfully terminated the escrow and disbursed the subscription money and

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4 Although not relevant to the court's opinion at the time that it was written, and as noted above, Watkins thought that he was buying one "insider" unit and the "last two" remaining units of the offering, but that he was sold three "insider units." R. 251, 278, at 291; R, 251; 308, at 323. This was a significant issue for Watkins for two main reasons. One, Watkins had been advised (and which presumably was independently verified by his broker), that all but the last two units had been sold in the original offering. This would have meant that there should have been $1.9mm in Partnership Capital (i.e. 19 units x $100,000 ea.). In reality, there had only been 8 ½ units actually sold for approximately $850,000 in Partnership Capital, less Partnership fees and other expenses which reduced the Partnership Capital to the fatally anemic amount of less than $600,000. Two, Watkins would not have invested in Silver Pines had he known that the "insiders" were abandoning the investment.

promissory notes to Silver Pines on or about October 1986 notwithstanding the fact that the minimum number of units had not been sold.

NCNB sued Watkins on the promissory note. Watkins counterclaimed and asserted several affirmative defenses. The counterclaims and affirmative defenses alleged fraudulent inducement, negligent misrepresentation, breach of fiduciary duty, estoppel, unclean hands, and cancellation of the promissory note. The trial court granted NCNB's motion to dismiss the counterclaims and strike the affirmative defenses.

The Third District Court of Appeal further held that the "trial court properly dismissed the counterclaims and affirmative defenses as NCNB owed no fiduciary or common law duty to disclose to Watkins that the Silver Pines offering closed on October 1986 without the minimum number of units having been sold." *Watkins,* 622 So. 2d at 1064.

" . . . THE REST OF THE STORY"

As alluded to above, the matter in dispute in this litigation is the story behind the *Watkins v. NCNB* debacle.

In May 1990, Watkins was referred to GHB by his friend, Tom Tew, relative to the dispute with NCNB National Bank of Florida. R. 424-25, at pp. 60-61.

GHB agreed to represent Watkins in the NCNB dispute, as well as a number of other matters all arising out of the same securities fraud. Watkins claims that GHB repeatedly advised him that he had a "slam dunk" lawsuit against NCNB, and that based upon such repeated assertions, Watkins was induced to pay GHB in excess of $140,000 to pursue the matter with NCNB. R. 420, at p. 56. Not surprisingly, GHB denies ever rendering such advice to Watkins. GHB, however, admits that "throughout" the litigation, Watkins repeatedly inquired about his "percentages." Henkel maintains that when asked by Watkins about his "percentages," the Firm would only advise him generally that litigation is "inherently risky," but that his case had "merit" and was "worthy of presentation."[5] Nevertheless, the result was the same - NCNB's Motion to Dismiss was granted and all of Watkins' claims were thereby dismissed, with prejudice and adverse summary judgment was entered against Watkins

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[5] GHB (through the testimony of Henkel,) testified that "merit" means "worthy of presentation." When asked what "worthy of presentation" meant, Henkel testified that it means that the case had "merit." R. 1496-98, at pp. 263-65. One is left with a sense of frustration as to exactly what GHB's advice was and whether they satisfied their duty to render a candid opinion relative to the merits of the claim and its probable outcome. *See McNealy v. State*, 183 So. 2d 738 (Fla. 1st DCA 1966) (holding that an attorney is obligated to render to his client a candid opinion of the merits and probable results of pending or contemplated litigation).

for the unpaid balance of the Promissory Note, plus default rate interest and NCNB's legal fees and costs.

An appeal to the Third District Court of Appeal of the dismissal was thereafter filed by GHB. On August 3, 1993 (Rehearing Denied on September 21, 1993), this Court rendered its Opinion affirming the dismissal in *Watkins v. NCNB*. A timely and authorized Petition for Certiorari was thereafter filed in this Court by Watkins' new counsel, Tom Scott, which was denied on January 14, 1994. *See Watkins v. NCNB Nat'l Bank, N.A.*, 634 So. 2d 629 (Fla. 1994). Less than two years later, on January 12, 1996, Watkins initiated the underlying litigation.

VI. SUMMARY OF THE ARGUMENT

In *Silvestrone v. Edell*, 721 So. 2d 1173 (Fla. 1998), this Court stated that a "malpractice claim is hypothetical and damages are speculative until the underlying action is concluded with an adverse outcome to the client." *Silvestrone* at 1173. Further, this Court stated that:

> [S]ince redressable harm is not established until final judgment is rendered, see *Chapman v. Garcia*, 463 So. 2d 528, 529 (Fla. 3d DCA 1985)(holding that plaintiffs could not sue attorneys for legal malpractice so long as underlying medical malpractice action, out of which legal malpractice claim arose, was still pending in trial court or on appeal); *Abbott v. Friedsam*, 682 So. 2d 597, 600 n. 1 (Fla. 2d DCA 1996)(stating in dicta that statute of limitations for legal

> malpractice generally does not begin to run until legal proceedings underlying malpractice claim have been finalized, by appeal if necessary), a malpractice claim is hypothetical and damages are speculative until the underlying action is concluded with an adverse outcome to the client.

Id.

The holding of *Silvestrone* altered the analysis of when the statute of limitations in a litigational context begins to run from the "knew or should have known" standard, to the "redressable harm" standard. This Court's analysis recognized that so long as the matter is not final and not concluded, a malpractice claim is merely hypothetical and damages are speculative.

In *Silvestrone*, this Court quashed the Fifth District Court of Appeal's Opinion in *Silvestrone v. Edell*, 701 So. 2d 90 (Fla. 5th DCA 1997) and instead approved the Second District Court of Appeal's Opinion in *Zakak v. Broida & Napier, P.A.*, 545 So. 2d 380 (Fla. 2d DCA 1989). *Silvestrone* at 1176. In *Zakak*, the Second District Court of Appeal held that when a cause of action is based upon litigational errors, the statute of limitations for a legal malpractice action does not begin to run until that litigation is concluded by final judgment, or if appealed, ***until a final appellate decision is rendered***. *Zakak* at 381; *see also Haghayegh v. Clark*, 520 So. 2d 58 (Fla. 3d DCA 1988)(holding that the statute of limitations does not commence to run until the amount

of damages, if any, are ascertained and until there was a final determination by the appellate court that the appellant's option had expired, the statute had not commenced to run, citing *Airport Sign Corp. v. Dade County*, 400 So. 2d 828 (Fla. 3d DCA 1981); *Birnholz v. Blake,* 399 So. 2d 375 (Fla. 3d DCA 1981); *Diaz v. Piquette*, 496 So. 2d 239 (Fla. 3d DCA 1986); and *Chapman v. Garcia*, 463 So.2d 528 (Fla. 3d DCA 1985)).

It is difficult to accept GHB's position that the point in time at which a "final appellate decision has been rendered" should ignore the fact that an authorized and timely appellate review is still underway which could reverse what may be the *temporary* effects of an attorney's malpractice.

In order to defeat Watkins' right to a trial on the merits of his malpractice claim, GHB has sought to twist the words "final" and "concluded" to such an extent as to create a netherworld premised upon illogical and conceptually counter-intuitive principles which require the pretense that this Court made certain holdings not contained within its Opinion, while simultaneously disregarding what this Court specifically held - all at their election and all when it favors GHB to do so. Words such as "final" and "concluded" would no longer be defined according to ordinary use and common sense. GHB has gone so far as to argue that when this Court adds, in a

footnote, "For instance . . . . ." that this Court really means "This is the exclusive list of possibilities." In fact, the entire premise of GHB's argument rests on convincing this Court that the following excerpt from *Silvestrone* was intended to alter the law of "when a final judgment becomes final:"

> To be specific, we hold that the statute of limitations does not commence to run until the final judgment becomes final. [FN2]
>
> FN2. ***For instance***, a judgment becomes final either upon the expiration of the time for filing an appeal or postjudgment 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 a denial of the motions for rehearing.

GHB's contorted logic further suggests that while this Court specifically cites to well-established legal precedent for the principle of "when a final judgment becomes final," that this Court didn't really mean that either. *See Watkins v. Gilbride, Heller & Brown, P.A.*, *Lawrence Heller and Timothy Henkel*, 25 Fla. L. Weekly D560 (Fla. 3d DCA Mar. 8, 2000), fn. 4.

Finally, GHB's position collapses under the weight of its own Motion to Stay Mandate filed in the Third District Court of Appeal.[6] If GHB could have demonstrated any shred of credibility to its position, it failed when GHB recognized in its Motion to

[6] The Clerk of the Third District Court of Appeal has advised that this motion will be included in the Record on Appeal transmitted to this Court.

Stay Mandate, that so long as the possibility of review by this Court existed, and so long as there was a chance for reversal, the matter was NOT final, merely because the Third District Court of Appeal issued its opinion.

The Third District Court of Appeal was correct in reversing the Trial Court and remanding for further proceedings so that Watkins can proceed to trial.

VII. ARGUMENT

A. "Redressable Harm" Cannot Occur While The Underlying Judgment Is Still On Appeal And Subject To Reversal.

The touchstone of the *Silvestrone* analysis begins and ends with the question of when "redressable harm" occurs. In its determination, this Court established a "bright line" between a mere hypothetical malpractice claim with speculative damages versus an actual claim with manifested and certain damages. In its efforts to define "redressable harm," this Court explained that "redressable harm" occurs when the matter in litigation is "concluded" and the final judgment from which the malpractice claim arose, has become "final."

This Court's analysis is consistent with the principle that the statute of limitations begins to run when the last element constituting the cause of action occurs, and in this instance, when the alleged damages manifest themselves from being merely contingent and hypothetical to becoming actual, certain and definite. *See* §95.031(1); *see also Peat, Marwick, Mitchell & Co. v. Lane,* 565 So. 2d 1323 (Fla. 1990) and cases cited therein.

As argued below, as well as in its Initial Brief, GHB seeks to re-order the universe in order to achieve its particular purpose. If GHB's theory is correct, then "redressable

harm" occurs at the moment that the Third District Court of Appeal renders its Opinion, *irrespective* of the filing of a timely and authorized appeal to this Court and irrespective of what would happen if this Court actually <u>reversed</u> the Third District Court of Appeal. For instance, what is the result if this Court accepts review of a particular case, but issues its Opinion more than two years after the Third District Court of Appeal Opinion? GHB suggests that the statute of limitations would have already run with the result being that a legitimately injured victim of legal malpractice would then be without a remedy. No doubt that GHB would then suggest that a legal malpractice action could be brought in the interim, and then stayed or abated, pending the results of this Court's deliberations. This position is fatally flawed because it invites premature, possibly useless litigation, which ought to be discouraged. It also invites unnecessary damage to counsel's reputations and invites implications related to the involvement of malpractice insurer's and risk underwriting requirements.

Clearly, GHB's view of "redressable harm" is unique amongst existing case law and statutes, while defying the gravity of practical reality. Watkins believes that the folly of GHB's position can best be explained by tracing the recent history of "redressable harm."

What is “Redressable Harm”?

The first reference to “redressable harm” in Florida jurisprudence is believed to appear in *Diaz v. Piquette*, 496 So. 2d 239 (Fla. 3d DCA 1986) wherein the Third District Court of Appeal held that:

> Most important, since it is plain that no claim would even have existed if the ***temporary results of the attorney's conduct had been reversed on appeal***, this decision is in accordance with the salutary concomitant principles that ***premature, possibly useless, litigation should be discouraged and that no cause of action should therefore be deemed to have accrued until the existence of redressable harm has been established***. *Birnholz v. Blake,* 399 So.2d 375*; Moore v. Morris,* 429 So. 2d 1209 (Fla. 3d DCA 1983) (Schwartz, C.J., dissenting), rev'd, 475 So.2d 666 (Fla. 1985).

The Third District Court of Appeal’s “redressable harm” analysis was followed in *Lane v. Peat, Marwick, Mitchell & Co.*, 540 So. 2d 922 (Fla. 3d DCA 1989) and thereafter approved by this Court when it stated:

> A clear majority of the district courts have expressly held that a cause of action for legal malpractice does not accrue until the underlying legal proceeding has been ***completed on appellate review*** because, until that time, one cannot determine if there was any actionable error by the attorney. *See Zakak v. Broida & Napier, P.A.*, 545 So. 2d 380 (Fla. 2d DCA 1989); *Haghayegh v. Clark*, 520 So. 2d 58 (Fla. 3d DCA 1988); *Diaz v. Piquette*, 496 So. 2d 239 (Fla. 3d DCA 1986), review denied, 506 So. 2d 1042 (Fla. 1987);

> *Richards Enterprises, Inc. v. Swofford*, 495 So. 2d 1210 (Fla. 5th DCA 1986), cause dismissed, 515 So. 2d 231 (Fla. 1987); *Adams v. Sommers*, 475 So. 2d 279 [*1326] (Fla. 5th DCA 1985); *Chapman v. Garcia*, 463 So. 2d 528 (Fla. 3d DCA 1985); *Birnholz v. Blake*, 399 So. 2d 375 (Fla. 3d DCA 1981).

Peat, Marwick at 1325.

There exists a broad and long-held line of cases which supports this ***"completed on appellate review"*** proposition too numerous to cite, however, a given sampling would include *Silvestrone, Diaz, Birnholz, Zakak, Abbott, Peat, Marwick,* and *Chapman*. The principle of "redressable harm" requiring "finality" and the conclusion of litigation is entirely consistent with the basic tenets of jurisprudence for a number of reasons.

First, like every other cause of action, until the cause of action accrues, there is no good faith basis to file a legal malpractice action. Naturally, *every* lawyer identified in such a premature legal malpractice action would seek a stay or abatement arguing that so long as there is any chance of a reversal by this Court, that the *temporary results of the attorney's conduct* reflected in an appealed final judgment would not be "final." GHB suggests that clients should be encouraged to initiate legal malpractice litigation even *before* the final result has been determined. Such a proposition is diametrically opposed to "the salutary concomitant principles that ***premature, possibly***

useless, litigation should be discouraged and that no cause of action should therefore be deemed to have accrued until the existence of redressable harm has been established". (citations omitted). *Diaz* at 239.

Hypocritically, GHB clearly reversed its own position when they filed their Motion to Stay Mandate in the Third District Court of Appeal. On the one hand, GHB argued before the Third District Court of Appeal and now this Court that "finality" occurs when a District Court Opinion is rendered. Simultaneously, in its Motion to Stay Mandate, GHB was compelled to recognize the folly and illogic of its position when it admitted that so long as this case was before this Court, the trial court proceedings should not be resumed pursuant to the Third District Court of Appeal's remand because of the potential of a reversal. In other words, GHB recognized that so long as a timely and authorized review before this Court is permitted, "finality" or "redressable harm" has NOT occurred.

B. <u>The Third District Court of Appeal's Opinion Below Is Consistent With Long-Standing And Well-Established Legal Precedent</u>.

In *Silvestrone*, this Court defined "redressable harm" as that point in time when the final judgment becomes "final" and the matter is "concluded." In particular, this Court held that:

> [S]ince redressable harm is not established until final judgment is rendered, *see Chapman v. Garcia*, 463 So.2d 528, 529 (Fla. 3d DCA 1985)(holding that plaintiffs could not sue attorneys for legal malpractice so long as underlying medical malpractice action, out of which legal malpractice claim arose, was still pending in trial court or on appeal); *Abbott v. Friedsam*, 682 So.2d 597, 600 n. 1 (Fla. 2d DCA 1996)(stating in dicta that statute of limitations for legal malpractice generally does not begin to run until legal proceedings underlying malpractice claim have been finalized, by appeal if necessary), a malpractice claim is hypothetical and damages are speculative until the underlying action is concluded with an adverse outcome to the client.

In *Silvestrone,* this Court cited with particularity to *Chapman* and *Abbott*. Yet, GHB argues that this Court mis-cited these two referenced cases as not standing for the propositions for which they were cited. The Third District Court of Appeal rejected this argument as "sophistry." *See Watkins v. Gilbride, Heller & Brown, P.A.*, *Lawrence Heller and Timothy Henkel*, 25 Fla. L. Weekly D560 (Fla. 3d DCA Mar. 8, 2000), fn. 4.

GHB also completely ignored *Abbott*, which although specifically cited with approval by this Court in support of its determination in *Silvestrone*, was for GHB's purposes apparently not relevant to the debate.

GHB also failed to consider the significance of this Court's quashing of the Fifth District Court of Appeal's Opinion in *Silvestrone v. Edell*, 701 So. 2d 90 (Fla. 5th

DCA 1997) and instead approving of the Second District Court of Appeal's Opinion in *Zakak*. *Silvestrone* at 1176.

The significance is not lost on Watkins, however. In *Zakak*, the Second District Court of Appeal held that when a cause of action is based upon litigational errors, the statute of limitations for a legal malpractice action does not begin to run until that litigation is concluded by final judgment, or if appealed, ***until a final appellate decision is rendered***. *Zakak* at 381.

It is difficult to accept GHB's position that the point in time at which a "final appellate decision has been rendered" should ignore the fact that an authorized and timely Appellate Review is still underway and that the alleged damages are nothing but contingent and hypothetical.

Further, GHB ignores the significance of *Wilson v. Clark,* 414 So. 2d 526 (Fla. 1st DCA 1982), which specifically reviewed the issue of when a final judgment becomes final. In *Wilson*, the First District Court of Appeal stated:

> The general rule is that an action remains pending in the trial court until after a final judgment and such time as an appeal is taken or time for an appeal expires. If an appeal is taken, the action is still pending until final disposition. *Southern Title Research Co. v. King*, 186 So. 2d 539 (Fla. 4th DCA 1966); *State ex rel. Andreu v. Canfield,* 40 Fla. 36, 23 So. 591 (1898). . . .
>
> In essence an action continues to have life until there is a

> final determination on an appeal. 1 Fla.Jur.2d, *Actions*, §§ 35 (1977); *see also Braddock v. Braddock*, 91 Nev. 735, 542 P.2d 1060, 1064 (1975); *Olson v. Hickman*, 25 Cal. App. 3d 920, 102 Cal. Rptr. 248, 249 (1972). Finality of a determination does not of course occur until time expires to file a rehearing petition and disposition thereof if filed, ***or until a timely filed petition for review in the Florida Supreme Court is acted upon.***

GHB also ignores *Birnholz*. As in *Birnholz*, this case was timely filed within two years of the denial of the Petition for Certiorari Review by the Florida Supreme Court.

The principle that "it ain't over till its over," as noted by the Majority in its Opinion below, merely echoes the common sense principle announced by many other Florida Courts. For instance, in *Adams v. Sommers* 475 So. 2d 279 (Fla. 1985) the Fifth District Court of Appeal held that:

> In addition, the question of the validity of the satisfaction of mortgage was not finally resolved until October, 1981, when this court rendered its decision ***and no further review was sought***. Had Judge Salfi's order been reversed by this court and the satisfaction of mortgage been upheld, Adams would not have had a legal malpractice action on that ground. Since the trial court's order was appealed, Adams' claim was in effect still viable and thus the statute of limitations would not have run from January 15, 1980. *See Chapman By and Through Chapman v. Garcia*, 463 So.2d 528 (Fla. 3d DCA 1985); *Birnholz*.

Adams at 281. There can be no serious debate about the reference to "no further review being sought." *Id.*

Finally, and also instructive, is *Amfac Distribution Corp. v. Miller*, 138 Ariz. 152 (Ariz. 1983) in which the Supreme Court of Arizona held that the statute of limitations related to a litigational malpractice case accrues "when the plaintiff knew or should reasonably have known of the malpractice ***and when the plaintiff's damages are certain and not contingent upon the outcome of an appeal***." *Miller* at 153. Despite its reliance on the "knew or should have known" analysis which *Silvestrone* eliminated, the Supreme Court of Arizona reached the exact result by concluding that so long as the ultimate outcome was ***contingent upon the outcome of an appeal***, the damages are not certain, and therefore, no cause of action would have accrued.

C. GHB's Interpretation Of The *Silvestrone* "Bright Line" Would Create Great Confusion And Havoc - The Opposite Purpose For Having Created The "Bright Line" In The First Place.

A simple, effective "bright line" rule would hold that the two-year statute of limitations commences to run when "redressable harm" has occurred, and that "redressable harm" occurs when appellate review has been concluded, including Supreme Court review when otherwise appropriate. Such a rule is consistent with existing case law and §95.031(1), Florida Statutes and creates no unintended consequences or confusion.

GHB, however, does not propose a “bright line” rule. Rather, GHB proposes a havoc-ridden nightmare for courts all over Florida attempting to discern when the two year statute of limitations commences to run. As stated by the Majority Opinion below:

> If we accepted GHB's contention, "finality" would occur in all cases at the district court level even though such a result flies in the face of reality. Obviously, the Florida Supreme Court on a galaxy of occasions has been - as in the Watkins v. NCNB case - the entity which had the final say and thus administered finality to the final judgment. *e.g., Henderson v. State*, 698 So. 2d 1205 (Fla. 1997).

GHB has glossed over the Third District Court of Appeal’s reasoning which specifically found that GHB’s interpretation would run *counter* to the “bright line” rule established in *Silvestrone*. In particular, the Third District Court of Appeal noted that:

> If we were to accept GHB's argument, we would face a number of questions that would be counter to the bright line intended by Silvestrone: what happens to the running of the limitations period urged by GHB if the supreme court exercises its discretionary jurisdiction? Is it automatically abated? And if the supreme court a year later decides that it had exercised its discretion improvidently and denies or dismisses the petition that had sought the discretionary review, does the period start running again from that date a year later? Or is that past year now counted as part of the limitation period?
>
> These conundrums can best be avoided by basing the result on the reality that a final judgment is not final until a timely filed appeal to, or petition for review by, the supreme court is resolved.

GHB answers these types of questions by dismissing them entirely, claiming that since such is not the specific facts of this instant case, that this Court should ignore the likely repercussions. See Initial Brief at 21. GHB further suggests that the two-year statute of limitations does not really mean two years. GHB argues that a year and eight months is as good as two years. *See* Initial Brief at Page 21, Note 7. Again, however, GHB insists on re-ordering the universe in such a way that the two year statute of limitations which commences upon the accrual of the cause of action, *i.e.* when the last element constituting the cause of action occurs, *see* §95.031(1), doesn't really mean two years, but rather means something different. GHB suggests that §95.031(1) and §95.11(4) should both be re-written to suit GHB, while depriving Watkins of his day in court. Such a suggestion should be declined.

D. "<u>Reliance of Litigants</u>"

Finally, accepting Petitioners' argument would, in effect, substantively impact prior interpretations of §95.11, Florida Statutes, as it relates to the commencement of the limitations period. Watkins would argue that the doctrine of prospective operation may very well apply to these circumstances. Accepting Petitioners' interpretation would amount to a substantive deprivation of access to the court where Watkins reasonably relied upon existing law. Protection should be afforded to litigants who rely on well-established principles of law. Generally, as it relates to the construction of

statutory law, judicial decisions in the area of civil litigation are retrospectively applied. *See Florida Forest & Park Service v. Strickland,* 18 So. 2d 251 (Fla. 1944). Moreover, generally, a decision by a court of last resort which overrules prior decision will apply both retrospectively and prospectively, unless declared by opinion to operate prospectively only. *See Melendez v. Dreis & Krump Mfg. Co.,* 515 So. 2d 735 (Fla. 1987). However, there is a well-established common sense exception to this general rule of statutory construction such that the rights, positions, and courses of action of parties who have acted in conformity with, and in reliance upon, the construction given by a court of final decision to a statute should not be impaired or abridged by reason of a change in judicial construction of the same statute made by a subsequent decision of the same court overruling its former decision. Thus, the courts have given to such overruling decisions a prospective operation only. *Id.* at 253.

Analogously, if otherwise appropriate, the doctrine of prospective overruling should apply in this case. *See Smith v. Brantley*, 400 So. 2d 443 (Fla. 1981). In *Smith*, Justice England in his concurring opinion stated:

> We are constitutionally permitted, in the exercise of our judicial prerogative, to determine whether any newly announced rule of law should be applied retroactively, or on a prospective basis only so as not to be available to the person who has raised the issue.

Justice England then quoted from Traynor, Quo Vadis, Prospective Overruling: A Question of Judicial Responsibility, 28 Hastings L.J. 533 (1976):

> A court usually will not overrule a precedent ... when the hardship caused by the retroactive change would not be offset by the benefits. The technique of prospective overruling enables courts to solve this dilemma by changing bad law without upsetting the reasonable expectations of those who relied on it.

Smith at 453. Adoption of the doctrine of prospective overruling should finally depend upon whether or not the merits of the decision are so strong as to warrant defeating the justifiable expectations of others through retroactive application of the decision. Thus, as stated by Justice Cardozo in *Great Northern Railway Co. v. Sunhurst Oil & Refining Co.*, 287 U. S. 358 (1932), "[A]ctual reliance should be the touchstone for prospective overruling." Thus, even if in *Silvestrone*, this Court did overrule *Chapman*, which Watkins does not believe to be the case, this Court should not apply this reversal in the law retrospectively where to do so would engender gross inequity and injustice to those legitimately injured litigants who relied upon the status of the law, as established in *Chapman* in determining when to institute their legal malpractice claims when one, it is not clear that this Court intended to overrule *Chapman*, and two, if this Court did intend to overrule *Chapman*, there is no clear expression as to whether or not the change in the law is to be applied prospectively only. In short, the strength of the

decisional law, as evidenced by *Chapman* and its progeny, evidences well-justified past reliance by litigants upon the law applicable to the commencement of actions for legal malpractice. Therefore, the doctrine of prospective overruling, if applied to this case, would not defeat the justified expectations of litigants, who are entitled to be able, with confidence, to accommodate their conduct to the law, certainly in the effectuation of a legal act as important to them as knowing the time parameters for the institution of a legal malpractice action.

VIII. CONCLUSION

The purpose for creating the "bright line" rule in *Silvestrone* was to "provide certainty and reduce litigation over when the statute starts to run." By holding that "redressable harm" occurs only when appellate review has been completed, the purpose of the "bright line" rule is effected and satisfied. As a matter of practicality, GHB's suggested bright line rule would hold that a final judgment is "final," even though such final judgment is still actively being reviewed by this Court. Although such a bright line rule would favor GHB in this instant litigation, such a determination would cast a pall over jurisprudence in this State by denying practical reality; encouraging premature and unnecessary litigation; creating a host of negative consequences, many of which would be unintended, and certainly not necessarily even foreseen at this juncture; and finally, requiring the reversal of a broad, long and well-

defined line of legal principles - all of which is sure to engender significant additional litigation. The re-ordering of the universe sought by GHB which benefits GHB only - and no one else - should be rejected. GHB's appeal should be denied, and the Third District Court of Appeal should be affirmed.

Respectfully submitted,

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IX. CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed and/or faxed to ISAAC J. MITRANI, ESQUIRE, of Mitrani, Rynor & Adamsky et al., Attorneys for Petitioners, at One Southeast Third Avenue, Suite 2200, Miami, FL 33131and to MICHAEL NACHWALTER, ESQUIRE, of Kenny Nachwalter Seymour Arnold Critchlow & Spector, P.A., Attorneys for Petitioners Heller and Henkel, at 1100

Miami Center, 201 S. Biscayne Boulevard, Miami, Florida 33131 this ____ day of May, 2000.

Respectfully submitted,

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