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.

REPLY BRIEF OF PETITIONERS

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CERTIFICATE OF FONT SIZE

This brief has been prepared using a 14-point proportionally spaced Times New Roman font.

TABLE OF CONTENTS

Page

I. TABLE OF CITATIONS

Page

Cases

Statute and Rules

II. CORRECTIONS TO RESPONDENT'S STATEMENT OF FACTS AND PROCEDURE BELOW

The petitioners respond briefly to Watkins' factual statement in order to correct certain misstatements contained in Watkins' statement of facts. Contrary to Watkins' statements in his answer brief, the petitioners have never "conceded" that they committed malpractice. Rather, GHB has at all times denied negligence. [R. vol. I, p. 210-23]. Solely for purposes of petitioners' motion for summary judgment on statute of limitations grounds, GHB argues that *even if* Watkins' allegations of negligence were true, his malpractice claim is nonetheless barred. That does not constitute a substantive admission of negligence or of the truth of Watkins' allegations in this case.

Watkins has made a number of statements in his brief concerning whether he purchased "insider units" or "second phase units" in the Silver Pines venture that was the subject of the Watkins v. NCNB counterclaim. While none of these "facts" has any bearing on the statute of limitations issue, it must be noted that Watkins' assertion that GHB knowingly misstated any fact in its pleadings in Watkins v. NCNB case is wholly unsupported by the record in this case. GHB will not repeat a lengthy factual discussion that is beyond the scope of this proceeding, but would simply refer to the discussion of the record contained in its brief before the district court. [GHB's Answer Brief, pp. 1-22, filed as an Appendix hereto].

The logical inconsistency of Watkins' positions in this case should be emphasized. On one hand, the entire basis for his negligence claim against GHB is his allegation that the counterclaim crafted by GHB was "fatally flawed from the beginning, both on the facts and as a matter of law," and caused him to waste time and money from the very outset. [Answer Brief, p. 3; R. vol. XX, pp. 4373-79]. On the other hand, when faced with GHB's statute of limitations defense, Watkins argues that he sustained no redressable harm until he exhausted all possible avenues of review in an effort to save the purportedly "fatally flawed" counterclaim. [R. vol. XX, pp. 4380-4411].

GHB has argued that the counterclaim it drafted was supported by a fairly debatable interpretation of lender-liability law. See Crosby v. Jones, 705 So.2d 1356 (Fla. 1998); [R. II, pp. 230-33; vol. XIII, pp. 2299-2306]. After Watkins fired GHB, and hired new counsel, Thomas E. Scott,[1] Scott continued to twice argue the same positions in both his motion for rehearing in the Third District and in his jurisdictional brief before this Court. [R. vol. XIII, pp. 2397-2400, 2431-32]. Watkins position in this case is thus that the identical lender-liability argument that constituted negligence

[1] Thomas E. Scott previously served as a trial judge in both the state and federal courts and as the U.S. Attorney for the Southern District of Florida. Watkins has never suggested that Scott's actions in the Watkins v. NCNB litigation were anything less than competent.

when taken by GHB was a legitimate argument when adopted by Scott.

The illogic and inconsistencies of Watkins' arguments and positions will not, GHB hopes, obscure the essentially simple facts governing the statute of limitations issue in this case.

III. ARGUMENT

A. Under the *Silvestrone* Bright-Line Rule, Watkins Sustained Redressable Harm as a Matter of Law When the Judgment in *Watkins v. NCNB* Became Final

Watkins argues that a litigant suffers no redressable harm from an adverse judgment of a district court of appeal so long as a petition for discretionary review[2] is pending. Watkins' position runs afoul of Silvestrone.

The bright-line rule announced in Silvestrone does *not* state that redressable harm cannot exist until all conceivable avenues of review of an adverse final judgment have been exhausted. Rather, that rule is expressly and simply that: "[I]n those cases that proceed to final judgment, the two-year statute of limitations for litigation-related

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[2] In his answer brief Watkins refers to a "petition for certiorari" filed in the Watkins v. NCNB case. [Answer Brief pp. 1, 2, 10, 22]. The document filed by attorney Scott in the Watkins v. NCNB case was, correctly, entitled a notice to invoke discretionary jurisdiction. See Fla. R. App. P. 9.120, 9.900. Watkins also incorrectly refers to the proceedings in this Court in the Watkins v. NCNB case as an "appeal." [Answer Brief pp. 2, 15, 16]. Clearly, no "appeal" to this Court was or could have been taken in that case.

malpractice under section 95.11(4)(a), Florida Statutes (1997), begins to run *when the final judgment becomes final*." Silvestrone v. Edell, 721 So.2d 1173, 1175-76 (Fla. 1998) (emphasis added).

Watkins has ignored the fact that a petition to invoke the discretionary jurisdiction of this Court neither affects nor undermines the finality of a district court's judgment. Accordingly, the pendency of a petition for discretionary review cannot--and should not--prevent the statute of limitations from running.

Watkins' attempt to divorce the concepts of finality and redressable harm conflicts with this Court's ruling in Silvestrone. Watkins argues that even where finality (in the form of a final judgment of a district court) exists, redressable harm does not exist so long as discretionary review is being sought in this Court. In fact Silvestrone holds that redressable harm occurs as a matter of law when the final judgment becomes final.[3] The judgment became final in Watkins v. NCNB when the Third District denied rehearing. 622 So.2d 1063 (Fla. 3d DCA 1993), review denied, 634 So.2d 629 (Fla. 1994). Neither the judgment nor the redressable harm was undone or avoided by Watkins' filing of a petition for discretionary review.[4]

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[3] As discussed below at sections III.A.1 and III.A.2 of this brief, the Silvestsrone bright-line rule addresses both the injury and notice aspects of redressable harm.

[4] See note 7 below.

Watkins' argument also ignores the case law that prompted this Court to draw the bright line at final judgment. As Silvestrone explained, prior to that decision the district courts differed as to when redressable harm occurred in the litigational malpractice context. For example, the Fifth District had held that redressable harm could occur even *before* any final judgment was entered, while the Second District had held that redressable harm occurred only when final judgment was entered in the underlying case. See Silvestrone v. Edell, 701 So.2d 90, 91-92 (Fla. 5th DCA 1997), quashed, 721 So.2d 1173 (Fla. 1998); Zakak v. Broida and Napier, P.A., 545 So.2d 380, 381 (Fla. 2d DCA 1989).

This Court, in order "to provide certainty and reduce litigation over when the statute starts to run," resolved that conflict by holding that courts need not engage in a factual inquiry as to whether redressable harm existed prior to final judgment because redressable harm is deemed to exist as a matter of law when the "final judgment became final." Silvestrone, 721 So.2d at 1176.

In effect, Silvestrone moved the point at which redressable harm is deemed to have occurred from some indeterminate point during the course of the litigation to the clear and definite moment when "the final judgment became final." Contrary to Watkins' argument, Silvestrone's bright-line rule did not move the point of accrual *beyond* or *after* the point of finality. Neither *Silvestrone* nor any of the other cases

cited by Watkins actually held that redressable harm occurred *at any point later than* the point at which a final judgment became final on appeal.[5]

In accordance with Silvestrone's bright-line rule, Watkins suffered redressable harm as a matter of law when the Third District rendered its judgment in Watkins v. NCNB. Therefore, Watkins' cause of action for legal malpractice accrued and the statute of limitations began to run on that date.

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[5] See Peat, Marwick, Mitchell & Co. v. Lane, 565 So.2d 1323, 1326 (Fla. 1990) (non-litigational malpractice claim accrued upon completion of *appeal* of IRS decision); Abbott v. Friedsam, 682 So.2d 597, 599 n.1 (Fla. 2d DCA 1996) (noting in dicta that malpractice limitation period begins to run when underlying litigation finalized "by appeal"); Zakak, 545 So.2d at 381 (statute of limitations began to run upon final judgment in trial court); Diaz v. Piquette, 496 So.2d 239, 240 (Fla. 3d DCA 1986), review denied, 506 So.2d 1042 (Fla. 1987) (limitation period began running when "the adverse judgment was affirmed on *appeal"*, emphasis added); Birnholz v. Blake, 399 So.2d 375, 377-78 (Fla. 3d DCA 1981) (malpractice action premature where underlying action still pending in trial court); cf. Chapman v. Garcia, 463 So.2d 528, 529 (Fla. 3d DCA 1985) (attorney malpractice claim premature where underlying action on *appeal* to district court, reference to further review by Florida Supreme Court clearly dicta); Wilson v. Clark, 414 So.2d 526, 530 (Fla. 1st DCA 1982) (not a malpractice or limitations case, language concerning review in supreme court is dicta).

1. *Silvestrone* Did Not Alter the Definition of Redressable Harm, Which Requires That Even Minimal Damages Will Trigger the Accrual of a Malpractice Claim

While Silvestrone clarified *when* redressable harm would be deemed to have occurred in a litigational malpractice case, the Court did not change the definition of redressable harm itself or increase the quantum of damage that must be sustained in order to support a cause of action.

"Redressable harm" is simply damage for which "redress" may be sought through a lawsuit, i.e, a matured or accrued cause of action for malpractice or any other type of negligence. See Hold v. Manzini, 736 So.2d 138, 142 (Fla. 3d DCA 1999). A plaintiff need not have suffered *all* of his damages for the cause of action to accrue. Even "minimal" damage suffices to sustain a cause of action for legal malpractice. Edwards v. Ford, 279 So.2d 851, 853 (Fla. 1973). The Silvestrone rule recognizes that even where the amount of damages has not been determined, when the "final judgment becomes final," the losing party has suffered *some* redressable harm.[6]

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[6] Watkins makes the absurd argument that GHB's action in seeking a stay of the district court's mandate in this case constitutes an admission of Watkins' position that redressable harm does not occur until discretionary review is concluded. Watkins disregards the significance of such a motion--that without a stay the trial court must proceed in accordance with the district court's judgment. The necessity of seeking a stay of mandate underscores the fact that redressable harm flows from such a final judgment, regardless of the pendency of discretionary review proceedings in this Court.

In this case, Watkins would have sustained any alleged harm at the time the Third District rendered its judgment in Watkins v. NCNB. Those alleged damages consisted of the fees paid to GHB for pursuing this allegedly meritless claim and the interest he incurred on the NCNB note.[7]

Watkins urges that so long as a petition for discretionary review is pending, a losing litigant has not suffered an "adverse outcome." This argument disregards the authority of the court of appeal and the effect of its judgment. A final judgment of a district court is clearly an "adverse outcome" on the merits of the appeal, which as a matter of law and of practical reality causes harm to the losing litigant.

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[7] Even had this Court accepted jurisdiction and quashed the decision of the Third District in Watkins v. NCNB, this would not have undone or cured any of his alleged damages. According to Watkins, "based on the facts of the case, Watkins had no chance of success." [Answer Brief, p. 3]. Thus it is Watkins' position that even if this Court had quashed the Third District decision in this case and ruled that his counterclaim did state a cause of action, he nonetheless would have ultimately lost against NCNB, because the facts of his Silver Pines investment did not entitle him to relief under any legal theory.

2. The *Silvestrone* Bright-Line Rule Holds that, As a Matter of Law, a Litigant is on Notice of Any Claim for Malpractice at the Point at Which the Final Judgment in the Underlying Litigation Becomes Final

In addition to suffering at least minimal damage a plaintiff must be on actual or constructive notice of his lawyer's alleged negligence for a cause of action to accrue. Silvestrone resolves both the harm and notice issues by placing the time of accrual at the point of finality. In so doing the Court ruled as a matter of law that the time of final judgment is the point "when all the information necessary to establish the enforceable right was discovered or should have been discovered." Silvestrone, 721 So.2d at 1176.

As the Second District wrote in Abbott v. Friedsam, once a final judgment on appeal is rendered, "the client has notice of all elements of his or her cause of action, including damages." 682 So.2d 597, 599 n.1 (Fla. 2d DCA 1996); see Eldred v. Reber, 639 So.2d 1086, 1087 (Fla. 5th DCA 1994) (statute of limitations begins running when district court decision is rendered because that is when "[a] party to an appeal first knows the outcome of that appeal."); also Silvestrone, 701 So.2d at 93 (Sharp, J., dissenting) (discussing case law on notice issue). Accordingly, Watkins was on notice of GHB's alleged negligence, as a matter of law, when the Third District judgment was rendered.

Notably, the bright-line rule mirrors the reality of this litigation. Here, shortly after the Third District issued its decision, Watkins fired GHB and retained Scott. Scott proceeded to represent Watkins by filing a motion for rehearing in the Third District and a petition for discretionary review in this Court, both of which were denied. Having retained new counsel, Watkins was indisputably on notice of his claim against GHB at the time the Third District denied his motion for rehearing and that the judgment became final pursuant to Silvestrone's bright-line rule.[8]

B. The Hypothetical Situation Described by Watkins Does Not Require Abandonment of the Bright-line Rule Set Forth in *Silvestrone*

Rather than address his own case, Watkins describes a hypothetical scenario in which this Court accepts review and issues its opinion more than two years after the final judgment of the district court. He argues that in such a situation GHB's position would leave "a legitimately injured victim of legal malpractice . . . without a remedy."

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[8] Several Florida cases have mentioned but none has expressly adopted the continuous representation rule, under which "the statute of limitations for legal malpractice generally does not begin to run while the attorney continues to represent the client." Abbott, 682 So.2d at 599 n.1; also Wilder v. Meyer, 779 F.Supp. 164, 169 (S.D. Fla. 1991); Peat, Marwick v. Lane, 565 So.2d at 1324; Silvestrone, 701 So.2d at 93 (Sharp, J., dissenting); Hampton v. Payne, 600 So.2d 1144, 1146 (Fla. 3d DCA 1992), review denied, 617 So.2d 319 (Fla. 1993); Birnholz,399 So.2d at 376. However, that rule would not effect the outcome of the present case, since GHB was replaced by other counsel prior to the conclusion of the appeal in the Third District.

[Answer Brief, p. 16]. This is not the case.

A client who has lost in the trial court and had that loss affirmed on appeal has a matured cause of action for malpractice when the adverse judgment becomes final in the district court. A petition for discretionary review in this Court is not a prerequisite for a malpractice action, and therefore a malpractice action filed while such a petition is pending would not be "premature," as a matter of law.

While there is no legal impediment to a party pursuing both a malpractice action and a petition for review simultaneously, a party may prefer for practical reasons to pursue his petition for review and malpractice claim sequentially.[9] However, that preference does not justify an extension of the statute of limitations on a malpractice claim which has already accrued and which, as Watkins' hypothetical assumes, will be unaffected by the outcome of the review proceedings in this Court.

Watkins suggests that unless the Silvestrone rule is modified to allow exhaustion of discretionary review before the statute of limitations begins running, "useless" malpractice litigation will be encouraged. Watkins is incorrect. On the contrary,

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[9] In the unlikely event that a petition for discretionary review was still pending after two years would the petitioner be required to proceed with his malpractice claim in order to avoid the limitations bar. In such a case the malpractice plaintiff could actively litigate the malpractice action while the review petition were still pending, or request that the trial court stay proceedings until this Court disposed of the discretionary review petition.

Watkins' proposed revision to the bright-line rule would encourage the filing of frivolous petitions for discretionary review, because filing the petition would give malpractice plaintiffs an automatic extension of the statute of limitations. This would be directly contrary to the letter and spirit of the limitations statutes, which exist to provide certainty to litigants and finality to litigation. Cf. Fla. R. App. P. 9.120 Committee Notes to 1977 Amendment (rule permitting automatic stay of mandate during pendency of discretionary review abolished "because it encouraged the filing of frivolous petitions and was regularly abused.").

The hypothetical scenario described by Watkins has no bearing on the facts of this particular case and surely does not justify creating an exception that would swallow the bright-line rule set forth in Silvestrone. As stated by the dissenting opinion in Watkins v. GHB below:

> In defining finality, the Court did not include discretionary petitions for certiorari. The decision to exclude discretionary petitions indicates the Supreme Court's intent to delineate the boundaries of finality, and to prevent extending the limitation period for an indefinite amount of time.

754 So.2d 759, 763-64 (Fla. 3d DCA 2000) (Gersten, J., dissenting).

C. ***Silvestrone*** **Did Not Overrule Any Previous Decision of this Court Interpreting Florida Statutes Section 95.11(4)(a), So There Is No Basis for Applying the Holding of *Silvestrone* Prospectively Only**

The doctrine of prospective application has no applicability in this case, as shown by the cases cited by Watkins. Moreover, Watkins has waived this argument by failing to raise it in the trial court. See Dober v. Worrell, 401 So.2d 1322, 1323-24 (Fla. 1981).

The doctrine of prospective application applies only when this Court overrules its own clearly established precedent. In Florida Forest and Park Service v. Strickland, this Court stated:

> Ordinarily, a decision of a court of last resort *overruling a former decision* is retrospective as well as prospective in its operation, *unless specifically declared by the opinion to has a prospective effect only*. . . . To this rule, however, there is a certain well-recognized exception that *where a statute has received a given construction by a court of supreme jurisdiction* and *property or contract rights have been acquired under and in accordance with such construction*, such rights should not be destroyed by giving to a subsequent overruling decision a retrospective operation.

18 So.2d 251, 253 (Fla. 1944) (emphasis added). In this case it is clear that the exception to the rule of retrospective application is inapplicable.

Silvestrone did not overrule any prior decision of this Court construing section

95.11(4)(a). The pre-Silvestrone case on which Watkins claims he relied was not a decision of this Court but rather certain dicta contained in the Third District's decision in Chapman. The Chapman decision did not purport to construe section 95.11(4)(a), and did not even cite or discuss that section. See Chapman v. Garcia, 463 So.2d 528, 529 (Fla. 3d DCA 1985). No court of "supreme jurisdiction" has ever construed section 95.11(4)(a) in the manner advocated for by Watkins in this case, and therefore Watkins' assertion that Silvestrone overruled any prior binding precedent on which he relied is preposterous.

Likewise Silvestrone did not state that its holding was to be applied prospectively only, and therefore must be applied retrospectively as well. See Great Northern Ry. Co. v. Sunburst Oil & Refining Co., 287 U.S. 358, 364-65 (1932); Smith v. Brantley, 400 So.2d 443, 453-54 (Fla. 1981) (England, J., dissenting); also id. at 452 (Boyd, J., concurring). Indeed, the Silvestrone rule was applied retrospectively to the Fifth District's decision then under review.

Further, Watkins did not acquire any "property or contract rights" in reliance on any pre-Silvestrone case law. He merely filed his lawsuit too late. Such an action is not the sort of reliance needed to justify an exception to the rule of retrospective application. See Melendez v. Dreis and Krump Mfg. Co., 515 So.2d 735, 737 (Fla. 1987) (decision overruling prior supreme court decision on statute of repose applied

retroactively so as to bar plaintiff's claim).

It is thus clear that the Silvestrone's interpretation of section 95.11(4)(a) must be applied retrospectively as well as prospectively.

IV. CONCLUSION

On the basis of the arguments and authorities set forth above, the petitioners request that the Court quash the decision of the Third District with directions to reinstate the summary judgment for GHB.

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing brief was served by _____ this _____ day of _____, 2000, upon Franklin L. Zemel, Esq. and Teri L. DiGiulian, Esq., Bedzow, Korn, Brown, Miller & Zemel, P.A., 20803 Biscayne Blvd., Ste. 200, Aventura FL 33180.

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