IN THE SUPREME COURT OF FLORIDA

Case No. SC08-428

LARSON & LARSON, P.A., HERBERT W. LARSON,
and H. WILLIAM LARSON, JR.,
Petitioners,

vs.

TSE INDUSTRIES, INC.,
Respondent.

On Petition For Review from the District Court of Appeal,
Second District, State of Florida

RESPONDENT'S JURISDICTIONAL BRIEF

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SUMMARY OF THE ARGUMENT

This Court lacks jurisdiction because the Second District Court of Appeal's opinion in this case can be reconciled with the Fourth District Court of Appeal's decision in Integrated Broadcast Services, Inc. v. Mitchel, 931 So. 2d 1073 (Fla. 4th DCA 2006), despite the Second District's certification of conflict with that decision. The instant case appears factually distinct from Integrated Broadcast Services, permitting the two opinions to be harmonized to avoid conflict. The remaining cases on which petitioners rely do not conflict with the instant case and in fact are addressed in the Second District opinion at issue. Thus, the petition for review should be denied because this Court has no basis for conflict jurisdiction and review simply is not warranted.

ARGUMENT

The jurisdiction of this Court extends only to the narrow class of cases enumerated in Article V, Section 3(b) of the Florida Constitution. Gandy v. State, 846 So. 2d 1141, 1143 (Fla. 2003). See also Mystan Marine, Inc. v. Harrington, 339 So. 2d 200, 201 (Fla. 1976) ("Time and again we have noted the limitations on our review and we have refused to become a court of select errors.").

Conflict jurisdiction is limited to decisions "that expressly and directly conflict with a decision of another district court of appeal or of the Supreme Court on the same question of law." See Art. V, Sec. 3(b)(3), Fla. Const. Conflict exists

only if the same issue of law is decided and the cases are not factually distinguishable. See Kyle v. Kyle, 139 So. 2d 885, 887 (Fla. 1962). Absent a conflict, this Court lacks jurisdiction to review the district court's decision. See The Florida Star v. B.J.F., 530 So. 2d 286, 288-89 (Fla. 1988).

I. The Second District's Opinion Below Does Not Conflict With Integrated Broadcast Services, Inc. v. Mitchell, 931 So. 2d 1073 (Fla. 4th DCA 2006) For Purposes of Review by this Court Because the Cases Appear to be Factually Distinct.

Petitioners rely on the Second District's certification of conflict with Integrated Broadcast Services to support their jurisdictional argument herein. Although the Second District certified conflict "to the extent that it [Integrated Broadcast Services] holds that the statute of limitations on the underlying judgment runs when the underlying judgment becomes final even when a motion for attorneys' fees or sanctions remains pending" (Second District Opinion at p. 12), the two cases are distinguishable on controlling facts.

In Integrated Broadcast Services, the Fourth District held that there was a bifurcated statute of limitations for the judgment arising from the underlying litigation and the subsequent judgment awarding monetary sanctions against the plaintiff. Although the opinion in Integrated Broadcast Services includes only limited facts and not many dates, it is apparent that the allegedly errant counsel in that case withdrew from representing the client some time after entry of the final judgment on the merits and prior to entry of the trial court's order awarding

sanctions. From the limited history of the underlying litigation that is provided in the opinion, it seems likely that this suit for legal malpractice was filed more than two years after counsel's withdrawal. In contrast, in the instant case, the petitioners did not withdraw from representing TSE after the adverse final judgment or before the order determining that TSE would be liable to the defendant in the underlying litigation for fees. In fact, petitioners did not withdraw at any time up through the settlement of the fee claim and the filing of the dismissal with prejudice that they signed on behalf of TSE within two years prior to the filing of the state court malpractice action. Thus, the instant case and Integrated Broadcast Services are factually distinct, permitting their differing outcomes to be harmonized.

Indeed, in his concurring opinion, Judge Altenbernd recognizes that the subject opinion "probably is a modified version of the continuing representation doctrine" (Opinion, p. 13), a doctrine apparently not raised or considered at all in Integrated Broadcast Services because it was not factually supportable. Moreover, as Judge Altenbernd's concurring opinion further notes, the Second District opinion at issue basically holds that "a claim of litigation-based malpractice is a continuing tort that ceases, and thereby accrues, with the final stipulation of dismissal in the lawsuit in which the malpractice occurs" and that "it is not unreasonable to hold that accrual of the action occurs on a continuing basis that

ends either when the lawyer is fired or the lawsuit reaches the point of final dismissal." (Opinion, p. 14).

In the instant case, petitioners were not fired and did not withdraw prior to the lawsuit reaching the point of final dismissal and that point of final dismissal occurred within two years of the filing of the malpractice claim. In contrast, in Integrated Broadcast Services, the allegedly malpracticing counsel withdrew from representation in what only can be interpreted from that opinion as a point in time more than two years from the filing of the malpractice cause of action. Thus, given the disparity in critical facts, the two opinions likely are not in conflict and do not support jurisdiction. See Kyle, 139 So. 2d at 887 ("If the two cases are distinguishable in controlling factual elements . . . , then no conflict can arise."); see also Ortiz v. State, 963 So. 2d 226 (Fla. 2007) (discharging jurisdiction where opinions alleged to be in conflict factually distinguishable); Gillis v. State, 959 So. 2d 194 (Fla. 2007) (jurisdiction improvidently granted and therefore discharged where cases factually distinguishable).

The simple fact that allegedly malpracticing counsel in Integrated Broadcast Services had withdrawn from the representation eliminates many of the policy concerns articulated by this Court and expressly recognized by the Second District in reaching its conclusion in the instant case, including protecting parties from having to argue inconsistent positions if they are required to file a malpractice

action before resolution of the attorneys' fee issue in the underlying action and avoiding the creation of a conflict of interest that would place the parties in an untenable situation. These considerations simply would not have existed in Integrated Broadcast Services, but were of paramount importance in the instant case and in other cases that have been before this Court in which limitations issues were considered. Thus, respondent respectfully submits that although there appears to be a conflict in a limited portion of the legal holding of the instant opinion as compared to the opinion in Integrated Broadcast Services, in fact, the cases are factually distinguishable and can be harmonized so that this Court does not have conflict jurisdiction and need not dedicate its time and resources to this matter.

II. The Second District's Decision in the Instant Case Does Not Conflict with this Court's Opinions in Silvestrone v. Edell, 721 So. 2d 1173 (Fla. 1998) or City of Miami v. Brooks, 70 So. 2d 306 (Fla. 1954).

Petitioner asserts that the instant opinion expressly and directly conflicts with this Court's opinion in Silvestrone v. Edell, 721 So. 2d 1173 (Fla. 1998). The Second District, however, expressly applied Silvestrone to the facts of this case, rejecting the narrow interpretation of that decision advanced by petitioner below. As the Second District recognized, "this case presents a factual scenario not contemplated in Silvestrone." (Opinion, p. 8). To effectuate the policy concerns addressed by this Court in Silvestrone, however, as well as in other "Supreme

Court jurisprudence discussing professional malpractice," the Second District applied Silvestrone to conclude that the statute of limitations did not begin to run until the date on which the parties filed the stipulation to dismiss the underlying action with prejudice. Thus, the instant decision does not conflict with Silvestrone. In truth, petitioner quarrels not with a purported conflict, but rather with the Second District's interpretation and application of Silvestrone and other cases from this Court.

To accept petitioner's assertion that the Second District not only misapplied Silvestrone, but did so in a way that conflicts with its holding, would require this Court to reject its own long-stated policy concerns. This Court's existing law expresses concern about and addresses matters such as the need to allow for the full resolution below prior to requiring the statute of limitations to begin running to protect plaintiffs from having to take contrary positions in the underlying action and in the subsequent malpractice case and to avoid prematurely disrupting existing relationships. See, e.g., Blumberg v. USAA Casualty Insurance Co., 790 So. 2d 1061 (Fla. 2001); Peat, Marwick, Mitchell & Co. v. Lane, 565 So. 2d 1323 (Fla. 1990), both of which are expressly addressed in the instant opinion below.

Equally unavailing is petitioner's argument that the instant opinion expressly and directly conflicts with City of Miami v. Brooks, 70 So. 2d 306 (Fla. 1954). To support conflict jurisdiction, the purported conflict must "appear within the four

corners" of the decision brought up for review. See Hill v. Hill, 778 So. 2d 976 (Fla. 2001). The instant opinion does not address Brooks, nor does it expressly conflict with Brooks' holding that the statute of limitations begins to run when an injury is sustained even if more damages occur later. The instant opinion no more conflicts with Brooks than does Silvestrone or any of the other jurisprudence from this Court regarding the statute of limitations in professional negligence cases that delay the beginning of the running of the period until the termination of the underlying matter or representation. Petitioners simply have failed to demonstrate any express and direct conflict between the Second District opinion in any decision of this Court or of any District Court of Appeal.

CONCLUSION

Petitioners have failed to demonstrate express and direct conflict between the Second District opinion below and any existing District Court of Appeal or Florida Supreme Court case. Instead, the instant opinion is factually distinct from the Fourth District Court of Appeal opinion in Integrated Broadcast Services, allowing these two opinions to be reconciled. The Second District expressly recognized and correctly applied this Court's decision in Silvestrone, protecting the same policy considerations addressed in that case and in other cases from this Court. In the absence of an express and direct conflict, this Court is without jurisdiction and petitioners' petition for review should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Jurisdictional Brief has been furnished to Brandon S. Vesely, Esquire and Michael J. Keane, Esquire, Keane, Reese, Vesely & Gerdes, P.A., P.O. Box 57, St. Petersburg, Florida 33731-0057, by United States Mail on this 31st day of March, 2008.

_____

Marie Tomassi, Esq.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Respondent's Jurisdictional Brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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Marie Tomassi, Esq.