IN THE SUPREME COURT OF FLORIDA

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

Defendants/Petitioners,

Sup. Ct. Case No. SC08-428

-vs-

TSE INDUSTRIES, INC.,

Respondent.
_____/

ON PETITION FOR REVIEW FROM A DECISION OF THE
SECOND DISTRICT COURT OF APPEAL, STATE OF FLORIDA
CASE NO. 2D07-1872

PETITIONERS' BRIEF ON JURISDICTION

BRANDON S. VESELY, ESQ.
Fla. Bar No. 022070
MICHAEL J. KEANE, ESQ.
Fla. Bar No. 257516
Keane, Reese, Vesely & Gerdes, P.A.
770 Second Avenue South
St. Petersburg, FL 33701
Tel: (727) 823-5000
Fax: (727) 894-1023
Attorneys for Petitioners

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PRELIMINARY STATEMENT

For purposes of the "Petitioners' Brief on Jurisdiction," the following symbols will be utilized: "A" shall refer to the Appendix accompanying the "Petitioners' Brief on Jurisdiction." "R" shall refer to the Record on Appeal. Reference shall be made to the record volume and appropriate page number, for example: (R. Vol. 1, P. 51-56).

The Petitioners, LARSON & LARSON, P.A., HERBERT W. LARSON, and H. WILLIAM LARSON, JR., will be referred to collectively as "the Larson Defendants" or as "Petitioners." The Respondent, TSE INDUSTRIES, INC., will be referred to as "TSE," or as "Respondent."

STATEMENT OF THE CASE AND JURISDICTIONAL FACTS

This Petition seeks review of the Second District Court of Appeal's decision reversing a Final Summary Judgment entered in favor of the Larson Defendants in a legal malpractice action brought by the Respondent, TSE. (A. 1-12)

The trial court, relying on *Silvestrone v. Edell*, 721 So. 2d 1173 (Fla. 1998), determined that TSE's claim for *litigation-related legal malpractice* against the Larson Defendants, which stemmed from an unsuccessful, federal, patent infringement action, was time barred under the statute of limitations because it was not filed within two years of the date upon which the judgment in the patent infringement action became **final**. (A. 2)(R. Vol. 5, P. 713-716) The Second District disagreed and reversed, holding that the statute of limitations for the litigation related legal malpractice did not begin to run until a post-judgment motion for attorneys fees was ruled upon and the litigation was "fully resolved." (A. 10-11) The Second District made this ruling despite acknowledging that: (1) the alleged malpractice occurred, if at all, during the main case (A. 5); (2) the main case went to final judgment and the appeals period expired more than two years prior to the malpractice suit being filed (A. 4); and (3) TSE was undisputably on notice of the alleged malpractice and at least a portion of its damages at the time the final judgment in the main case became final. (A. 5)

The relevant facts for this Court's jurisdictional analysis are contained in the time line below:

- In **1998**, the Larson Defendants, as counsel for TSE, filed a complaint for patent infringement against Franklynn Industries, Inc. ("Franklynn") in the United States District Court for the Middle District of Florida. The suit sought to enforce a TSE patent (the "TSE Patent") against one or more of Franklynn's products. (A. 3) (R. Vol. 1, P.5)
- Pursuant to a jury verdict, the federal court entered an order declaring the TSE Patent invalid. On **October 24, 2001**, the clerk entered a judgment in the patent infringement action. (A. 3) (R. Vol. 5, P. 651)
- Thereafter, TSE filed a post-judgment motion for judgment as a matter of law and for new trial. (A. 4)
- Franklynn, in turn, filed a motion for the declaration of an exceptional case and for the recovery of attorneys' fees incurred in the Patent Infringement Action pursuant to 35 U.S.C. §285. (A. 3-4)
- On **August 16, 2002**, the federal court entered an Order disposing of TSE's post-judgment motions. (A. 4) (R. Vol. 5, P. 654-661) This Order rendered the final judgment ripe for appeal, but TSE did not seek appellate review of the final judgment. (A. 4)

- In a separate Order, also dated **August 16, 2002**, the federal court granted Franklynn's motion for the declaration of an exceptional case and for the recovery of attorneys' fees. (A. 4) The court gave Franklynn additional time to submit evidence regarding the amount of its fees and costs. (A. 4) (R. Vol. 5, P. 663-670)
- On **September 16, 2002**, the final judgment in the patent infringement action became **final** because the time period for appeal expired. (A. 4)
- On **October 10, 2002**, TSE and Franklynn resolved the attorney's fees issue and filed a joint stipulation dismissing all claims in the Patent Infringement Action. (A. 4) (R. Vol. 5, P. 672)
- On **October 5, 2004**, less than two years after the Larson Defendants filed the stipulation to dismiss the patent infringement action, but more than two years after the underlying judgment became final, TSE filed suit against the Larson Defendants for legal malpractice. (A. 5) (R. Vol. 1, P. 1-43) TSE's complaint alleged that it "was required to not only pay significant attorneys' fees and expenses to initiate and prosecute its unsuccessful Patent Infringement Action against Franklynn, but TSE was also required to pay significant attorney's fees and expenses to Franklynn." (A. 5)

SUMMARY OF THE ARGUMENT

This Petition seeks review of a decision from the Second District Court of Appeal reversing a final summary judgment in favor of the Larson Defendants on a litigation related legal malpractice claim filed by the plaintiff, TSE. (A. 1-14)[1]

In the decision, the Second District **certified** conflict with the Fourth District's decision in *Integrated Broadcast Services, Inc. v. Mitchel*, 931 So. 2d 1073 (Fla. 4th DCA 2006). (A. 12) In both the instant case and *Mitchel*, the plaintiffs filed litigation related legal malpractice actions against the defendants more than two years after the underlying judgment became final, but less than two years after the subsequent award of sanctions against the plaintiff for litigation related misconduct. *See* § 95.11(4)(a), Fla. Stat. (2000).

The Fourth District in *Mitchel* determined that the subsequent sanctions award should be treated like a separate judgment subject to its own statute of limitations period. The Second District, reviewing *Mitchel*, dubbed this the "bifurcated statute of limitations" approach and recognized that the *Mitchel* court was essentially creating two separate limitations periods for the same alleged misconduct, simply because there were two distinct judgments for damages. (A. 11)

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[1] The decision is currently reported as *TSE Industries, Inc. v. Larson & Larson, P.A.*, 33 Fla. L. Weekly D404 (Fla. 2d DCA Feb. 1, 2008).

The Second District disagreed with this approach and determined that there can be only one statute of limitations period, but that it would begin to run when the underlying litigation is fully resolved, which includes the disposal of all post-judgment motions for attorney's fees. (A. 10-12) In stark contrast to *Mitchel*, the Second District's approach does not focus on when the damages are incurred, only when the case is concluded. (A. 10)

The Second District's decision also expressly and directly conflicts with this Court's opinion in *Silvestrone v. Edell*, 721 So. 2d 1173 (Fla. 1998). *Silvestrone* announced a "bright line rule" that "in those cases that proceed to final judgment, the two-year statute of limitations for litigation-related malpractice under section 95.11(4)(a), Florida Statutes (1997), begins to run when final judgment becomes final." *Silvestrone*, 721 So. 2d at 1175-76. Applying *Silvestrone* verbatim to the instant case would have resulted in an affirmance because the judgment in the underlying patent infringement case became final, and damages were incurred, more than two years before the legal malpractice claim was filed by TSE. Therefore, the Second District attempted to distinguish it. (A. 8) However, the two decisions cannot be reconciled if indeed this Court's opinion in *Silvestrone* is a "bright line rule." Decisional conflict may be created by the misapplication of a specific holding

previously announced by this Court. *See Arab Termite & Pest Control of Florida, Inc. v. Jenkins*, 409 So. 2d 1039, 1041 (Fla. 1982).

Finally, the Second District's decision expressly and directly conflicts with this Court's opinion in *City of Miami v. Brooks*, 70 So. 2d 306 (Fla. 1954), and the cases that follow it, on the well established principle of law that a cause of action accrues, and the statute of limitations begins to run, when all of the elements of the cause of action have occurred and "it is not material that all the damages resulting from the act shall have been sustained at that time and the running of the statute is not postponed by the fact that the actual or substantial damages do not occur until a later date." 70 So. 2d at 308.

Here there is no dispute that at least a portion of TSE's alleged damages were incurred when the final judgment in the underlying patent infringement action became final. Nor is there any dispute that TSE was on notice of those damages when the final judgment was entered. However, the Second District clearly looked past those damages[2] and opted to move the start date for the statute of limitations to when the

[2] At one point in its opinion, the Second District acknowledges that TSE was claiming damages for having to pay attorney's fees and costs to the Larson Defendants to initiate and prosecute its unsuccessful Patent Infringement Action (A. 5), which damages necessarily accrued when the underlying final judgment became final; and at another juncture the Court writes: "in such actions, the client does not incur damages until the conclusion of the related judicial proceedings when the amount of attorneys' fees has been finally established." (A. 10)

post-judgment motion for attorney's fees was resolved. Thus, the decision expressly and directly conflicts with *Brooks*.

ARGUMENT

ISSUE I: THE SECOND DISTRICT'S DECISION *CERTIFIES CONFLICT* WITH THE FOURTH DISTRICT COURT OF APPEAL'S DECISION IN *INTEGRATED BROADCAST SERVICES, INC. v. MITCHEL,* 931 So. 2d 1073 (Fla. 4TH DCA 2006).

The appellate decision below is **certified** to be in direct conflict with the Fourth District's decision in *Integrated Broadcast Services, Inc. v. Mitchel,* 931 So. 2d 1073 (Fla. 4th DCA 2006). In both *Mitchel* and the instant case, the plaintiffs filed litigation related legal malpractice actions against the defendants more than two years after the underlying judgment became final, but less than two years after the subsequent award of sanctions against the plaintiff for litigation related misconduct.

In *Mitchel*, the Fourth District held that there were **two** statute of limitation periods stemming from the alleged legal malpractice: one running from the date the underlying judgment became final; and the other running from the date the order awarding the post-judgment sanctions became final. *See Integrated Broadcast Services, Inc. v. Mitchel,* 931 So. 2d 1073 (Fla. 4th DCA 2006). The Second District referred to this approach as a "bifurcated statute of limitations." (A. 11-12)

However, the Second District disagreed with the Fourth District's holding and determined that the correct result is that the statute of limitations on litigation related legal malpractice begins to run when all damages are determined and the case is "fully resolved." (A. 8, 10, 11-12) This is similar to the continuing representation doctrine, but the majority has not embraced that doctrine.

Judge Alternbernd's concurring opinion more clearly states the ruling: "We are essentially holding 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." (A. 13-14) Judge Altenbernd goes on to state: "Clearly both the accrual of the claim, based on the first dollar of damage, and the discovery of the claim could occur prior to that time." (A. 14)

Because the instant decision expressly and directly conflicts with *Mitchel*, as acknowledged by the Second District below, Petitioners respectfully request this Court accept jurisdiction over this Petition.

<u>ISSUE II</u>: THE SECOND DISTRICT'S DECISION ALSO EXPRESSLY AND DIRECTLY CONFLICTS WITH THIS COURT'S OPINIONS IN *SILVESTRONE v. EDELL*, 721 So. 2d 1173 (Fla. 1998), AND *CITY OF MIAMI v. BROOKS*, 70 So. 2d 306 (Fla. 1954).

The Second District's decision also expressly and directly conflicts with this Court's opinion in *Silvestrone v. Edell*, 721 So. 2d 1173 (Fla. 1998), which announced a bright line rule "that in those cases that proceed to final judgment, the two-year statute of limitations for litigation-related malpractice under section 95.11(4)(a), Florida Statutes (1997), begins to run when the final judgment becomes final." *Silvestrone*, 721 So. 2d at 1175-76. Despite the Second District's efforts to distinguish *Silvestrone*, the two decisions cannot be reconciled. The final judgment in the underlying case became "final" more than two years before TSE filed its action for legal malpractice and at that point all the elements of the cause of action were present for TSE to proceed. Therefore, if *Silvestrone's* bright line rule means what it says, the Second District decision is in direct conflict.

Finally, the instant decision also conflicts with well established Florida law recognizing that a cause of action accrues, and the statute of limitations begins to run, when all of the elements of the cause of action have occurred. In particular, the decision expressly and directly conflicts with this Court's opinion in *City of Miami v. Brooks*, 70 So. 2d 306, 308 (Fla. 1954). In *Brooks*, this Court stated:

> The general rule, of course, is that where an injury, although slight, is sustained in consequence of the wrongful act of another, and the law affords a remedy therefor, the statute of limitations attaches at once. *It is not material that all the damages resulting from the act shall have been sustained at that time and the running of the statute is not postponed by the fact that the actual or substantial damages do not occur until a later date.*

70 So. 2d at 308 (emphasis supplied).

By ruling that the statute of limitations does not begin to run until all the damages are determined and the litigation is fully resolved, including post-judgment motions for attorney's fees, the Second District has essentially turned fifty-plus years of Florida jurisprudence on its head. For these reasons, the Petitioners respectfully request this Court to accept jurisdiction over this Petition.

CONCLUSION

For all the foregoing reasons, Petitioners respectfully invoke this Court's jurisdiction under Article V, §3(b)(3) of the Florida Constitution and request the Court to: (1) accept jurisdiction; (2) establish a briefing schedule on the merits; and (3) quash the decision of the Second District Court of Appeal.

Dated: March 14, 2008 Respectfully submitted,

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BRANDON S. VESELY, ESQ.
Fla. Bar No. 0022070
MICHAEL J. KEANE, ESQ.
Fla. Bar No. 257516
Keane, Reese, Vesely & Gerdes, P.A.
770 Second Avenue South
St. Petersburg, FL 33701
(727) 823-5000
(727) 894-1023 (facsimile)
Attorneys for Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by facsimile and regular U.S. Mail to MARIE TOMASSI, ESQ., STANLEY H. ELEFF, ESQ., and EDWARD B. CARLSTEDT, ESQ., Trenam, Kemker, Scharf, Barkin, Frye, O'Neill & Mullis, P.A., 200 Central Avenue, Suite 1600, St. Petersburg, Florida 33701, on this 14th day of March, 2008.

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BRANDON S. VESELY, ESQ.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Brief on Jurisdiction uses Times New Roman 14-point font and complies with all font requirements of Fla. R. App. P. 9.210.

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Brandon S. Vesely, Esq.