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 Discretionary Review From the Second District Court of Appeal

---

RESPONDENT'S ANSWER BRIEF ON THE MERITS

Marie Tomassi, Esq.
Florida Bar No. 772062
Stanley H. Eleff, Esq.
Florida Bar No. 269018
Edward B. Carlstedt, Esq.
Florida Bar No. 0136972
TRENAM, KEMKER, SCHARF, BARKIN,
FRYE, O'NEILL & MULLIS, P.A.
200 Central Avenue, Suite 1600
St. Petersburg, FL 33701
Telephone (727) 820-3952
Facsimile (727) 820-0835
mtomassi@trenam.com
Attorneys for Respondent
TSE Industries, Inc.

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE

Cases

Other Authorities

PRELIMINARY STATEMENT

This case reviews a decision of the Second District Court of Appeal determining when the statute of limitations began to run for a legal malpractice claim where the allegedly errant attorneys continued to represent the client beyond entry of the final judgment through to the resolution of a pending attorneys' fee claim. Petitioners are referred to herein as "Larson & Larson." Respondent, TSE, Industries, Inc., is referred to herein as "TSE." Record references are by volume and page number or by descriptive term as appropriate.

STATEMENT OF THE CASE AND FACTS

The undisputed facts relevant to the statute of limitations issue presented herein are limited and simple. Larson & Larson represented TSE as plaintiff in a federal court patent infringement action that resulted not only in an adverse jury verdict but also post-verdict proceedings to allow the defendant to recover attorneys' fees from TSE. TSE Industries, Inc. v. Larson & Larson, P.A., 33 Fla. L. Weekly D404 (Fla. 2d DCA Feb 1, 2008) ("Panel Opinion" hereinafter, references to copy provided by Larson & Larson in its Appendix). Final judgment on the jury verdict was entered on August 16, 2002. (Panel Opinion, p. 4). TSE did not appeal this judgment. (Id.) Also on August 16, 2002, the district court entered its order granting the defendant's fee motion, leaving the amount for later determination. (Id.) The parties to the patent suit then settled the fee amount and

on October 10, 2002, filed a stipulation for dismissal signed by Larson & Larson on TSE's behalf. (Id.)

On October 5, 2004, TSE sued Larson & Larson for legal malpractice. (Id. at pp. 4-5). Eventually the trial court granted Larson & Larson's motion for summary judgment, finding that the statute of limitations ran no later than two years from when the final judgment on the jury verdict became final, rejecting TSE's assertion of the continuing representation doctrine. (Id. at p. 5). The Second District Court of Appeal disagreed, reversing the summary judgment. (Id. generally).

The Second District expressly recognized that "this case is controlled by Silvestrone because it involves malpractice that arises out of the handling of litigation." (Id. at p. 7); See Silvestrone v. Edell, 721 So. 2d 1173 (Fla. 1998). Noting that Silvestrone's "bright-line rule" provides for the start of the statute when the underlying litigation is concluded by final judgment and rejecting the narrow reading urged by Larson & Larson, the Court concluded that here, "the litigation was not concluded until the parties filed the stipulation to dismiss the underlying action with prejudice." (Id. at p. 8). The Second District expressly applied Silvestrone to these facts, noting that "this case presents a factual scenario not contemplated in Silvestrone" in which the issue had been whether to start the statute when the jury reached its verdict or when the court entered judgment. (Id.).

The Court found that its "conclusion that the trial court's interpretation of Silvestrone was flawed" rendered moot TSE's argument regarding the continuing representation doctrine (id. at p. 11), although the panel opinion turned on many policy concerns also advanced and protected by that doctrine. (See, e.g., Panel Opinion at p. 10).

The Second District certified conflict with Integrated Broadcast Services, Inc. v. Mitchel, 931 So. 2d 1073 (Fla. 4th DCA 2006) "to the extent that it 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." (Id. at p. 12). In a concurring opinion, Judge Altenbernd refers to the panel holding as "probably …a modified version of the continuing representation doctrine." (Id. at p. 13).

STANDARD OF REVIEW

TSE agrees that this Court has *de novo* review of the issues presented herein.

SUMMARY OF THE ARGUMENT

The Second District correctly determined that the statute of limitations for TSE's litigation-based malpractice claim against Larson & Larson did not begin to run until the filing of the stipulation for dismissal, which was the end of the underlying litigation. This decision is consistent with, and honors the principals of, existing Florida law, including this Court's decision in Silvestrone. As the Second

District noted, the Silvestrone search for finality need not be so limited as to end with entry of a final judgment. Instead, under facts such as those above, the Court looks for the end of the underlying litigation to start the limitations period.

The Second District's opinion also does not truly conflict with Integrated Broadcast Services because the cases are factually distinct. If there is a conceptual conflict, the Second District's analysis is superior because it is both consistent with Silvestrone and in concert with this Court's public policy concerns expressed in analogous contexts.

Finally, the Second District's result can be affirmed by this Court's express recognition and adoption of the continuing representation doctrine. Precluding the start of the limitations period while errant counsel continues to represent the client protects the client, permits counsel an opportunity to correct or remedy any error and avoids forcing a client to take diametrically opposed positions. Florida courts previously have recognized this doctrine and its rationale is sound.

ARGUMENT

I. THE SECOND DISTRICT COURT OF APPEAL'S DECISION IN THIS CASE DOES NOT CONFLICT WITH SILVESTRONE v. EDELL, 721 So. 2d 1173 (Fla. 1998).

The Second District Court of Appeal decision in the instant case does not conflict with Silvestrone, but instead expressly recognizes that the issue of the statute of limitations for litigation-related legal malpractice claims is controlled by Silvestrone. The Court concluded, however, that the instant case presented a factual situation not contemplated by Silvestrone and, in applying Silvestrone's analysis and holding, declined Larson & Larson's efforts to impose a strict, narrow reading of Silvestrone on these facts. The Second District decision is in harmony with both the rationale in Silvestrone and the public policy concerns expressed by this Court in other cases and, because of the factual dissimilarity between the instant case and that presented Silvestrone, is not in conflict with it.[1]

As the Second District noted below, Silvestrone focused on whether the entry of an adverse jury verdict or the entry of a final judgment triggered the statute of limitations for a litigation-based legal malpractice claim. The Court did not consider or address situations in which an attorney continues to represent a

[1] TSE respectfully submits that this Court may wish to reconsider its decision to exercise discretionary jurisdiction in this matter. As set forth above, the instant case does not conflict with existing Florida Supreme Court precedent. Moreover, as explained in Section II herein, there is no intra-district conflict to support jurisdiction.

client beyond entry of the final judgment in the underlying case. Instead, Silvestrone focused on whether the statute of limitations for malpractice could begin to run prior to a judgment becoming final. The Court logically concluded that it could not, because damages would be speculative until the underlying judgment became final. Thus, the Court focused on when the underlying litigation was concluded.

In the instant case, the underlying litigation was not concluded by the entry of the final judgment, even when it became final for purposes of appeal, but rather was concluded when the remaining question of attorneys' fees imposed as a sanction was resolved. Thus, the Second District correctly concluded that, consistent with the Silvestrone analysis, the litigation was not concluded until the stipulation for dismissal was filed.

The Second District rejected a narrow reading of Silvestrone encouraged by Larson & Larson because of policy concerns expressed by this Court in both the Peat, Marwick and the Blumberg cases. In Peat, Marwick, Mitchell & Co. v. Lane, 565 So. 2d 1323 (Fla. 1990), this Court expressed a concern about requiring a party to take conflicting positions if the statute of limitations against an accountant for malpractice began to run prior to the complete determination of a tax challenge. In Blumberg v. USAA Cas. Ins. Co., 790 So. 2d 1061 (Fla. 2001), this Court considered the potential conflicts of interest that would arise in requiring a statute

of limitations to begin running prior to the final resolution of matters that clearly would require the replacement of counsel and eliminate the chance for errant counsel to fix his or her mistake.

Larson & Larson's continued insistence that a cause of action for litigation-based legal malpractice accrues when any damage occurs ignores the fundamental difference between litigation-based legal malpractice claims and other potential causes of action. TSE does not quarrel with the general proposition that a statute of limitation begins to run when a cause of action accrues, and that all damages need not be sustained for a cause of action to accrue generally. See, e.g., City of Miami v. Brooks, 70 So. 2d 306 (Fla. 1954). As this Court held in Silvestrone, however, damages from litigation-based legal malpractice are speculative until the final judgment becomes final and the statute of limitations should not begin to run until the underlying matter is fully concluded. Applying that logic to the instant case, the underlying litigation was not fully concluded until the attorneys' fee issue was resolved by the stipulation for dismissal. That TSE may have incurred some damage prior to that time does not change the analysis in Silvestrone, a case advanced by Larson & Larson as controlling.

II. THE INSTANT OPINION DOES NOT CONFLICT WITH INTEGRATED BROADCAST SERVICES, INC. v. MITCHEL, 931 So. 2d 1073 (Fla. 4th DCA 2006).

TSE respectfully submits that, notwithstanding the Second District Court of Appeal certification of conflict, the instant decision from the Second District does not conflict with Integrated Broadcast Services, Inc. v. Mitchel, 931 So. 2d 1073 (Fla. 4th DCA 2006) because the facts underlying these two cases appear to be distinct. In the event there is a conflict, however, TSE respectfully submits that the Second District analysis is logically more sound and consistent with this Court's policy concerns expressed in other decisions and should be adopted, or that the continuing representation doctrine discussed below should be clearly and expressly recognized and applied herein.

In Integrated Broadcast Services, the Fourth District Court Of Appeal reversed summary judgment in favor of defendants based on the statute of limitations in a legal malpractice case, essentially finding that while the statute ran for any claim arising from the adverse final judgment suffered by the client in the underlying federal court litigation, it had not run for any claim arising from the sanctions subsequently imposed by a separate order that became final much later. The Court found that the client should have been permitted to pursue its claim for damages arising from the sanctions order. Id. at 1074.

The allegedly errant counsel in Integrated Broadcast Services withdrew from representing the client some time after entry of the final judgment on the merits and prior to the trial court's order awarding sanctions. Id. Although the opinion only includes limited facts and not many dates, the final judgment on the merits was appealed, and according to the opinion, counsel withdrew during the pendency of the appeal. Id. The order awarding sanctions was subsequently entered, and it too was appealed, although it later was resolved by settlement. Id. From the limited history of the underlying litigation provided, it seems likely that this suit for legal malpractice was filed more than two years after counsel's withdrawal. The Fourth District's opinion contains no reference to the continuing representation doctrine.

Integrated Broadcast Services differs from the instant case because there, the allegedly errant counsel withdrew from the representation prior to the underlying judgment becoming final and prior to the resolution of the sanctions order. These critical factual distinctions prevent the holding in Integrated Broadcast Services from being in conflict with the holding in the instant case below, where Larson & Larson continued to represent TSE through the time the underlying final judgment became final and through the resolution of the sanctions issue. Accordingly, TSE submits that there likely is no conflict among and between these district court of appeal opinions. See, e.g., Tetzlaff v. Florida Unemployment Appeals Com'n.,

926 So. 2d 1267 (Fla. 2006) (no express and direct conflict where cases are factually distinct).

To the extent the cases can be perceived as being in conflict, TSE submits that the Second District analysis is more sound because it avoids a split or bifurcated statute of limitations analysis and is more consistent with the concern expressed in Silvestrone for a bright line rule establishing the start of the statute of limitations for a litigation-based legal malpractice claim to be at the completion of the underlying proceedings. Moreover, as expressed more fully below, the continuing representation doctrine that would not have been applicable in Integrated Broadcast Services should apply here and permit a different result between the cases.[2]

III. THE CONTINUING REPRESENTATION DOCTRINE SHOULD BE APPLIED IN THE INSTANT CASE AND PERMITS THE AFFIRMANCE OF THE SECOND DISTRICT OPINION AT ISSUE ON THIS ALTERNATE BASIS.

Florida courts long have recognized the continuing representation doctrine, pursuant to which the statute of limitations for a professional negligence claim is tolled as long as the professional continues to represent the client. See, e.g., Hampton v. Payne, 600 So. 2d 1144 (Fla. 3d DCA 1992)(Plaintiff "could no longer avail herself of the continuous representation rule to toll the two year statute of

[2] Interestingly, Larson & Larson advocate for the rejection of the Integrated Broadcast Services decision, recognizing it as "flawed." (Initial Brief, p. 18).

limitations" after she replaced the allegedly errant attorney). The Second District expressly recognized this doctrine, albeit in dicta, in Abbott v. Friedsam, 682 So. 2d 597, 599 fn.1 (Fla. 2d DCA 1996), noting that "in Florida the statute of limitations for legal malpractice generally does not begin to run while the attorney continues to represent the client…".[3] Plainly if this doctrine is alive and well in Florida, it applies to the instant case and precludes the start of the statute of limitations until no earlier than the filing of the stipulation for dismissal, until which time Larson & Larson unequivocally continued to represent TSE.

Larson & Larson contended below and contend herein that the continuing representation doctrine never has been expressly adopted by any Florida court and therefore cannot be applied. TSE disagrees. Neither the Second nor Third District Court of Appeal opinions referenced above express any doubt as to the existence of the continuing representation doctrine in Florida. Even if that doctrine has not been expressly adopted, however, TSE respectfully submits that this Court should expressly recognize and adopt it herein because the doctrine is consistent with widely noted concerns of this Court on related issues and with the long standing Florida law discussed herein.

---

[3] TSE respectfully submits that it was entitled to rely on the continuing representation doctrine for determining the date by which it needed to file its complaint against Larson & Larson, given the Second District's clear, unequivocal statement of that doctrine as Florida law and where TSE's cause of action was within that district.

In a concurring opinion in a case regarding transaction-based legal malpractice claims, Justice Pariente addressed the advisability of the continuing representation doctrine, noting that she would not be adverse to adopting that doctrine for the resolution of transaction-based claims. Perez-Abreu, Zamora & De La Fe, P.A. v. Taracido, 790 So. 2d 1051, 1056 (Fla. 2001). Justice Pariente noted that the continuing representation doctrine as applied in Kentucky and known as the "continuous representation rule" rests on the premise that "by virtue of the attorney-client relationship, there can be no effective discovery of the negligence so long as the relationship prevails." Id., citing Alagia, Day, Trautwein & Smith v. Broadbent, 882 S.W.2d 121, 125 (Ky. 1994). Justice Pariente approved the "practical advantages" noted by Kentucky, including allowing the allegedly negligent attorney the opportunity to "correct or mitigate the harm." Id. Justice Pariente further noted that such a rule avoids requiring clients to "maintain inconsistent positions" pursuant to which a client would have to argue both that the court had erred in the first lawsuit while simultaneously arguing that the client's own attorney in that same lawsuit had erred.

Interestingly, a case out of Indiana provides one of the most comprehensive explanations of the sound policy underlying the continuing representation doctrine. In Biomet, Inc. v. Barnes & Thornburg, 791 N.E.2d 760 (Ind. Ct. App. 2003), coincidentally a case regarding a legal malpractice claim arising out of patent

litigation, the court addressed, explained and approved the continuing representation doctrine, resolving an issue of first impression in Indiana. The court determined that Indiana "should adopt the continuous representation doctrine to delay the commencement of the statute of limitations until the end of an attorney's representation of a client in the same matter in which the alleged malpractice occurred." Id. at 765. The court relied in large measure on the rationale for the rule set forth in a treatise on attorney malpractice, equally instructive here:

> The summary purpose of the continuous representation rule is to avoid disrupting the attorney-client relationship unnecessarily. Adoption of the rule was a direct reaction to the illogical requirement of the occurrence rule, which compels clients to sue their attorneys though the relationship continues, and there has not been and may never be any injury. The continuous representation rule is consistent with the purpose of the statute of limitations, which is to prevent stale claims and enable the defendant to preserve evidence. When the attorney continues to represent the client in the subject matter in which the error has occurred, all such objectives are achieved and preserved. The attorney-client relationship is maintained and speculative malpractice litigation is avoided.
>
> *****
>
> The continuous representation rule is available and appropriate in those jurisdictions adopting the damage and discovery rules. The policy reasons are as compelling for allowing an attorney to continue his efforts to remedy a bad result, even if some damages have occurred and even if the client is fully aware of the attorney's error. The doctrine is fair to all parties concerned. The attorney has the opportunity to remedy, avoid or establish that there was no error or attempt to mitigate the damages. The client is not forced to terminate this relationship, though the option exists. The

> result is consistent with all expressed policy bases for the statute of limitations.

RONALD E. MALLEN & JEFFREY M. SMITH, 3 LEGAL MALPRACTICE § 22.13, 430-31 (5th ed. 2000) (footnotes omitted). Id. at 765-66.

The Indiana court described the policies in favor of the continuing representation doctrine as "compelling." The application of the continuing representation doctrine avoids disruption of the attorney-client relationship and affords the offending attorney the opportunity to remedy his or her mistakes. It also avoids requiring a client to "constantly second-guess the attorney" and lets a client continue to "place his confidence in the attorney's ability to correct the error." Id. at 766. The court further noted that application of the doctrine does not preclude a client from deciding to immediately terminate a relationship and pursue a claim, but also, on the converse side, allows clients to avoid having to "adopt inherently different litigation postures" by having to both defend the attorney's actions in the appeal from the underlying case in which the alleged malpractice was committed while also contesting the attorney's actions in a malpractice case. Id. Perhaps most significantly, the Indiana court noted that the rule or doctrine

"further prevents an attorney from defeating a malpractice claim by continuing representation until the statute of limitations has expired."[4] Id. at 766-67.

The same considerations apply with equal force in Florida. First, as set forth above, Florida long has recognized the continuing representation doctrine as tolling the statute of limitations for a legal malpractice claim. Second, nothing in Silvestrone changes this analysis. Third, all of the same policy considerations that convinced Indiana to adopt this doctrine, and presumably convinced California to codify the doctrine, support the wisdom of continuing that doctrine here. Clients should not be charged with a duty to sue their counsel while that same counsel continues to represent them, particularly where the continuing representation directly involves the matter underlying the alleged malpractice. Moreover, the continuing representation doctrine addresses the concerns expressed by this Court in Peat Marwick and in Blumberg.

For the first time in the litigation between these parties, Larson & Larson argues that this Court previously has rejected the continuing representation doctrine "under a different name," relying on Kelley v. School Board of Seminole

[4] The wisdom of this doctrine has been recognized by other states. California even has codified the doctrine by providing in its Code of Civil Procedure that the statute of limitations for legal malpractice is tolled during the period that an attorney continues to represent the plaintiff and a California court has held that the statutory tolling period is "unaffected by the plaintiff's knowledge of the attorney's wrongful act or omission, as long as the representation continues." See O'Neill v. Tichy, 25 Cal. Rptr. 2d 162 (Ct. App. 1st Dist. 1994).

County, 435 So. 2d 804 (Fla. 1983). According to Larson & Larson, Kelley stands for the proposition that the "continuous treatment doctrine" has been rejected in Florida and that it is the functional equivalent of the continuing representation doctrine. Larson & Larson reads far too much into the Kelley decision that has been strictly limited in its application to roof leak cases.

In Kelley, this Court merely held that a school board knew something was wrong with the roofs of three schools, for purposes of the discovery aspect of the statute of limitations, outside the applicable time period so that the statute ran despite ongoing, continued efforts by the contractor to repair the roof. Every case that has cited Kelley has declined to extend it and has narrowly read it to apply only to leaking roof cases. See, e.g., Wishnatzki v. Coffman Construction, Inc., 884 So. 2d 282 (Fla. 2d DCA 2004) (rejecting the application of Kelley to permit dismissal of the complaint based on the statute of limitations, noting that issues of fact may exist regarding defects about which the homeowner should have had notice and noting that Kelley "stands for the rule that 'where there is an obvious manifestation of a defect, notice will be inferred at the time of manifestation regardless of whether the plaintiff has knowledge of the exact nature of the defect.'"); Snyder v. Wernecke, 813 So. 2d 213 (Fla. 4th DCA 2002) (distinguishing Kelley as a "roof leak" case only holding that "when newly finished roofs leak it is not only apparent, but obvious, that someone is at fault.");

Performing Art Center Authority v. The Clark Construction Group, Inc., 789 So. 2d 392 (Fla. 4th DCA 2001).

CONCLUSION

For the reasons set forth herein, TSE respectfully requests this Court affirm the Second District Court of Appeal decision at issue, or conclude that jurisdiction was improvidently granted and dismiss this proceeding.

Respectfully submitted,

/s/ Marie Tomassi
Marie Tomassi, Esq.
Florida Bar No. 772062
Stanley H. Eleff, Esq.
Florida Bar No. 269018
Edward B. Carlstedt, Esq.
Florida Bar No. 0136972
TRENAM, KEMKER, SCHARF, BARKIN,
FRYE, O'NEILL & MULLIS, P.A.
200 Central Avenue, Suite 1600
St. Petersburg, FL 33701
Telephone (727) 820-3952
Facsimile (727) 820-0835
mtomassi@trenam.com
Attorneys for Respondent
TSE Industries, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Answer Brief on the Merits 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 24th day of July, 2008.

/s/ Marie Tomassi
Marie Tomassi, Esq.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY the type style and size used herein is Times New Roman 14-point and that this brief complies with the requirements of Florida Rule of Appellate Procedure 9.210(a).

/s/ Marie Tomassi
Marie Tomassi, Esq.