IN THE SUPREME COURT OF FLORIDA

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

Petitioners,

-vs-

Sup. Ct. Case No.: SC08-428
DCA Case No.: 2D07-1872

TSE INDUSTRIES, INC.,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM THE
SECOND DISTRICT COURT OF APPEAL

PETITIONERS' AMENDED INITIAL BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

For purposes of the "Petitioners' Initial Brief on the Merits," the following symbols will be utilized: "A" shall refer to the Appendix accompanying the Petitioners' Initial Brief on the Merits. "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 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) In so doing, the Larson Defendants urge the Second District has created disarray in the State regarding the statute of limitations in legal malpractice cases.

TSE sued its former counsel, the Larson Defendants, for legal malpractice associated with an unsuccessful, federal, patent infringement claim that TSE brought against one of its competitors. (R. Vol. 1, P. 1-43) The Larson Defendants answered the malpractice complaint and raised the statute of limitations as a defense (R. Vol. 1, P. 73-80, 81-85) Thereafter, the Larsons successfully moved for summary judgment because the statute of limitations barred the claim against them. (R. Vol. 5, P. 713-716) TSE appealed. (R. Vol. 5, P. 717-722)

The Second District Court of Appeal, however, reversed the summary judgment,[1] which is the decision before this Court on discretionary review. (A. 1-12)

Hence, this review concerns the proper application of the statute of limitations to legal malpractice claims -- a pure question of law based on the following undisputed timeline of events:

- In 1998, the Larson Defendants, as counsel for TSE, filed a federal patent infringement suit against Franklynn Industries, Inc. ("Franklynn") in the United States District Court for the Middle District of Florida (the "Patent Infringement Action"). The suit sought to enforce TSE's U.S. Patent Number

[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).

5,219,925 (the "TSE Patent") against one or more of Franklynn's products. (A. 3) (R. Vol. 1, P.5)

- On October 1, 2001, the Patent Infringement Action proceeded to a jury trial. (R. Vol. 4, P.645)
- On October 10, 2001, the jury returned a verdict in favor of Franklynn determining that the TSE Patent was invalid. (R. Vol. 4, P. 646)
- On October 24, 2001, the clerk entered the final judgment in the Patent Infringement Action and awarded costs to Franklynn. (A. 3) (R. Vol. 5, P. 651)
- Thereafter, TSE filed timely post-judgment motions for judgment as a matter of law and for new trial. (A. 4)
- Franklynn, in turn, filed a post-judgment motion for 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)

- Also on August 16, 2002, the federal court granted Franklynn's motion for declaration of an exceptional case and for the recovery of attorneys' fees. (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)
- Later, TSE and Franklynn resolved the collateral attorney's fees issue and settled on an amount that TSE would pay Franklynn.
- On **October 10, 2002**, TSE and Franklynn filed a joint stipulation dismissing all claims in the Patent Infringement Action. (A. 4) (R. Vol. 5, P. 672) H. William Larson signed the stipulation on behalf of TSE. (R. Vol. 5, P. 672)
- On **October 5, 2004**, *more than two years after the underlying final judgment became final*, but less than two years after the Larsons filed the stipulation to dismiss the patent infringement action, TSE filed its legal malpractice suit against the Larson Defendants in the Sixth Judicial Circuit Court in and for Pinellas County, Florida. (A. 5) (R. Vol. 1, P. 1-43)

END OF TIMELINE

TSE's malpractice complaint sought two categories of damages: (1) the attorney's fees it paid the Larson Defendants to prosecute the unsuccessful Patent Infringement Action; and (2) the attorney's fees it was subsequently required to pay

the opposing party, Franklynn, because the Patent Infringement Action was declared an "exceptional case" under 35 U.S.C. §285. (R. Vol. 1, P. 9 at ¶ 32).

The Larson Defendants moved for summary judgment based on the applicable statute of limitations for professional malpractice, section 95.11(4)(a), Florida Statutes. (R. Vol. 1, P. 73-80, 81-85) The trial court, relying on *Silvestrone v. Edell*, 721 So. 2d 1173 (Fla. 1998), granted the motion because TSE's claim 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 the *post-judgment* motion for attorney's fees was settled 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 indisputably on notice of the alleged malpractice, fully aware of a portion of its damages (i.e. the money it paid to the Larson Defendants) at the time the final judgment in the main case became final (A. 5) and well aware that additional damages were forthcoming.

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) This Petition ensued.

SUMMARY OF THE ARGUMENT

The Second District's decision runs afoul of a well established rule 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." *City of Miami v. Brooks*, 70 So. 2d 306, 308 (Fla. 1954).

This longstanding rule was applied by this Court in its opinion in *Silvestrone v. Edell*, 721 So. 2d 1173 (Fla. 1998), where the Court 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. The Court determined that until the final judgment becomes final, the plaintiff's damages are merely speculative. *See id.*

Applying *Silvestrone* verbatim to the facts of the instant case would have resulted in an affirmance below, because the judgment in the underlying patent infringement case became final, and damages were clearly incurred, more than two years before the legal malpractice claim was filed by TSE. TSE sought as damages all of the attorney's fees it paid the Larson Defendants to prosecute the failed patent infringement action. (R. Vol. 1, P. 9 at ¶ 32). Those damages were certain when the final judgment became final on September 16, 2002, after TSE's appellate rights expired. Moreover, TSE was on notice of those damages when the final judgment was entered. That TSE continued to negotiate the amount and payment of Franklynn's attorney's fees and costs did not change the finality of the final judgment. The Second District, however, set the start date of the statute of limitations as the date Franklynn's attorney's fees were resolved by settlement. Thus, the decision below expressly and directly conflicts with *Silvestrone* and *Brooks* and must be quashed.

The Second District below also *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 judgments became final, but less than two years after the subsequent

awards of sanctions against the plaintiffs 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 even though the sanctions resulted from the malpractice in the underlying case. 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. (A. 11)

The Second District disagreed with this approach and determined that there can be only one statute of limitations period, but that it should 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 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)

While *Mitchel* conflicts with the Second District's decision below, it too is flawed because it fails to recognize the general principle that the statute of limitations attaches when the cause of action accrues. As in the instant case, the plaintiff in *Mitchel* could have sued its former counsel at the conclusion of the underlying case,

when the final judgment became final, because it knew or should have known at that time that it was damaged by its counsel's malpractice. The *Mitchel* court's solution -- to recognize multiple statute of limitation periods for the same professional malpractice -- may be innovative, but it plainly contradicts fifty-plus years of Florida jurisprudence. Accordingly, this Court should disapprove of the Fourth District's decision in *Mitchel*.

Finally, TSE's sole argument below in its appeal to the Second District was that the trial court erred in failing to recognize the "continuing representation doctrine" as a toll to the statute of limitations on the litigation-related legal malpractice. However, this Court long ago rejected that doctrine under a different name -- the "continuous treatment doctrine." *See Kelley v. School Board of Seminole County*, 435 So. 2d 804 (Fla. 1983). And there is no other support or justification for the application of the doctrine in Florida law. Accordingly, it cannot serve as a basis for approving the Second District's decision below.

STANDARD OF REVIEW

"Summary judgment is proper if there is no genuine issue of material fact and if the moving party is entitled to a judgment as a matter of law." *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000). Where the

question is solely a legal one, the standard of review of an order granting summary judgment is ***de novo***. *See id.*

ARGUMENT

ISSUE I: THE SECOND DISTRICT COURT OF APPEAL HAS MISCONSTRUED THIS COURT'S OPINION IN *SILVESTRONE v. EDELL*, 721 So. 2d 1173 (Fla. 1998), AND ERRONEOUSLY HELD THAT THE STATUTE OF LIMITATIONS FOR LEGAL MALPRACTICE DOES NOT BEGIN TO RUN UNTIL THE RESOLUTION OF POST-JUDGMENT COLLATERAL MATTERS.

This case turns on a relatively simple question, but one having far reaching implications: *Does the statute of limitation for litigation-related legal malpractice begin to run when the final judgment becomes final?* This Court has already answered that question affirmatively, but the decision from the Second District below puts the question squarely back before this Court. The Second District's decision below held that professional malpractice is a "continuing tort" and the two-year statute of limitation does not begin to run until every action is completed by the attorney involved, including post-judgment, collateral matters.

Statutes of limitation are not simply technicalities; they are fundamental to a well ordered judicial system. *See Board of Regents of University of State of N.Y. v. Tomanio*, 446 U.S. 478, 487, 100 S.Ct. 1790, 1796 (1980). In Florida, once an action becomes time barred by the applicable statute of limitations, "the defendant possesses

a constitutionally protected property interest to be free from that claim." *Wood v. Eli Lilly & Co.*, 701 So.2d 344, 346 (Fla. 1997).

The law of Florida has been settled for many decades -- the statute of limitations on any claim begins to run when the cause of action accrues. In *City of Miami v. Brooks*, 70 So. 2d 306 (Fla. 1954), this Court defined the rule to mean that the statute of limitations begins to run when the last element necessary for the cause of action occurs. The *Brooks* Court wrote:

> 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). Counsel for TSE acknowledged this authority before the trial court and stipulated to its viability. During arguments at the summary judgment hearing, the following colloquy took place:

> MR. KEANE [Counsel for the Larson Defendants]:
> . . .
> Because the court decided to make it a bright line, the bright line that is drawn is: When is the judgment rendered.
> Now, counsel will undoubtedly argue that, "Well, we didn't know the full extent of our damages because the attorney's fees were not fixed." But that is of no moment

> in the statute of limitations law, and that has been true forever.
>
> I have the case of City of Miami [v. Brooks] – and there are lots of cases to that effect.
>
> MR. ELEFF [Counsel for TSE]: Mr. Keane, I can help you on that part of your argument. I am not going to contend to the contrary.
>
> MR. KEANE: Pardon me? Which part?
>
> MR. ELEFF: I'm not going to contend that the statute didn't run until we knew all the damages.
>
> MR. KEANE: Okay. Good.

(R. Vol. 4, P. 681-682)

The rule of accrual, as set forth in *Brooks,* was subsequently codified in section 95.031, Florida Statutes, which reads, in relevant part:

> [T]he time within which an action shall be begun under any statute of limitations runs from the time the cause of action accrues.
>
> (1) A cause of action accrues when the last element constituting the cause of action occurs . . .

The rule of accrual was later echoed in this Court's opinion in *Silvestrone v. Edell*, 721 So. 2d 1173 (Fla. 1998), which dealt with litigation-related legal malpractice. The *Silvestrone* Court adopted a "bright-line" rule that a litigation-related malpractice claim accrues for statute of limitations purposes "when the final judgment becomes final." *Silvestrone*, 721 So. 2d at 1175-76. A "final judgment becomes final" when all matters affecting rendition and all appeals are over and there is nothing the parties can do to change the outcome of the underlying matter. *See id*.

The Court reasoned that until that point in time the damages are merely speculative. *See id.*

The United States Supreme Court has spoken on the subject. In the recent opinion of *Wallace v. Kato*, 127 S.Ct. 1091 (2007), the Court wrote:

> "Under the traditional rule of accrual . . . the tort cause of action accrues, and the statute of limitations commences to run, when the wrongful act or omission results in damages. The cause of action accrues even though the full extent of the injury is not then known or predictable." 1 C. Corman, Limitation of Actions § 7.4.1, pp. 526-527 (1991) (footnotes omitted); see also 54 C.J.S., Limitations of Actions § 112, p. 150 (2005). Were it otherwise, the statute would begin to run only after a plaintiff became satisfied that he had been harmed enough, placing the supposed statute of repose in the sole hands of the party seeking relief.

Wallace, 127 S.Ct. at 1097 (emphasis supplied).

In contrast to *Brooks*, *Wallace*, and most importantly *Silvestrone* because it addresses litigation-related legal malpractice, the Second District below determined that the statute of limitations on TSE's claim for litigation-related legal malpractice did not begin to run when the final judgment in the patent infringement case became final on September 16, 2002. (A. 4) This the Court decided even though no further judicial review of the conduct that constituted the claimed malpractice was availing, and though the Larsons' fees component of damages was certain and no longer reviewable.

Judge Stringer instead chose October 10, 2002, as the start date for the statute of limitations because, in his words: "[T]he client does not incur damages until the conclusion of the related judicial proceedings when the amount of attorneys' fees has been finally established. Until the case is fully resolved, there is a chance that the appeals process could result in a reversal of the original decision that established an injury." (A. 10) Judge Stringer's understanding of the timeline and the record is simply wrong.

TSE knew on September 16, 2002, that its case against Franklynn was completely over and that it had lost; there were no further appellate rights. TSE also knew on September 16, 2002, that it had paid the Larson Defendants for their alleged malpractice in pursuing the claim against Franklynn. TSE knew that nothing transpiring after September 16, 2002, would change that portion of its damages -- i.e. the amount of money it had paid the Larson Defendants. The only matter left open for consideration at that point in time was Franklynn's claim for attorney's fees, which was a separate component of TSE's overall damages and was a collateral matter to the main case.[2]

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2 It is well settled that attorney's fees are a collateral matter over which a court retains jurisdiction even after being divested of jurisdiction on the merits of the underlying case. An outstanding fee issue does not bar recognition of a merits judgment as final and appealable. *See Budinich v. Becton Dickinson & Company*, 486 U.S. 196, 199-200, 108 S.Ct. 1717 (1988); *McGurn v. Scott*, 596 So. 2d 1042, 1044 (Fla.

Thus, on September 16, 2002, TSE's cause of action for litigation-related legal malpractice against the Larson Defendants accrued. The fact that Franklynn's claim for its attorney's fees against TSE was not resolved at that time did not toll the running of the statute of limitations. The cause of action accrued even though the full extent of the damages was not then known or predictable. *See Wallace*, 127 S.Ct. at 1097; *Brooks*, 70 So. 2d at 308

Judge Altenbernd's concurring opinion confirms that the Court was well aware that TSE's cause of action for malpractice accrued prior to October 2002. He writes:

> In this case, assuming there was an act of malpractice, it would seem that a claim of professional malpractice accrued prior to October 2002 because a final judgment that was subject to execution against the client existed prior to that time. It would appear that the plaintiff in this case had discovered the act of alleged malpractice more than two years prior to the filing of this lawsuit.
>
> . . .
>
> **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. 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. 13-14)(citations omitted; emphasis supplied).

1989)("[A]n award of attorneys' fees or costs is ancillary to, and does not interfere with, the subject matter of the appeal and, thus, is incidental to the main adjudication.")

Judge Altenbernd applies a "continuing tort" theory to justify looking past the original accrual date and to conclude that the statute of limitations did not begin to run until all the damages were determined and the litigation was fully resolved. However, litigation-related legal malpractice is not a "continuing tort" that would extend beyond the final judgment. The Second District recently defined what a continuing tort is, and by their own definition the facts below do not qualify:

> A continuing tort is established by continual tortious acts, not by continual harmful effects from an original, completed act. When a defendant's damage-causing act is completed, the existence of continuing damages to a plaintiff, even progressively worsening damages, does not present successive causes of action accruing because of a continuing tort.

Suarez v. City of Tampa, 33 Fla. L. Weekly D. 408, 2008 WL 268910, *4 (Fla. 2d DCA Feb. 1, 2008) (quotations and citations omitted). Here, the alleged damage-causing act was the Larson Defendants failure to advise TSE to settle or drop the patent infringement suit. That act was completed when the final judgment in the patent infringement action became final on September 16, 2002, if not sooner. The subsequent harmful effect of being required to pay Franklynn's attorney's fees and costs does not convert the legal malpractice claim against the Larson Defendants into a continuing tort. *See id.* There are no allegations of misconduct or malpractice after September 16, 2002.

In summary, the Second District's decision below is erroneous. The court misconstrued this Court's opinion in *Silvestrone* and erred by straying away from the traditional rule of accrual for statutes of limitation in Florida. The trial court was correct in granting summary judgment to the Larson Defendants and they are entitled to their constitutionally protected property interest to be free from the malpractice claim. Accordingly, the Petitioners respectfully request this Court quash the appellate court's decision and reinstate the trial court's judgment.

ISSUE II: THE CASE OF *INTEGRATED BROADCAST SERVICES, INC. v. MITCHEL*, 931 So. 2d 1073 (Fla. 4th DCA 2006) CONFLICTS WITH THE SECOND DISTRICT'S DECISION BELOW, BUT IT TOO FAILS TO APPLY THE TRADITIONAL RULE OF ACCRUAL FOR STATUTE OF LIMITATIONS ON PROFESSIONAL MALPRACTICE CLAIMS AND THEREFORE SHOULD BE DISAPPROVED.

The Second District's 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 essentially held that there were two statute of limitations periods stemming from the same 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 id* at 1074. 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 the damages have been determined and the case is "fully resolved." (A. 8, 10, 11-12)

While *Mitchel* conflicts with the Second District's decision below, it too is flawed because it fails to recognize and apply the "traditional rule of accrual," which states that the statute of limitations attaches when the cause of action accrues. *See Wallace v. Kato*, 127 S.Ct. 1091, 1097 (2007); *City of Miami v. Brooks*, 70 So. 2d 306, 308 (Fla. 1954). As in the instant case, the plaintiff in *Mitchel* could have sued its former counsel at the conclusion of the underlying case, when the final judgment became final, because it knew or should have known at that time that it was damaged by the sum it paid its counsel. The *Mitchel* court's solution -- to recognize multiple statute of limitations periods for the same professional malpractice -- contradicts the

longstanding law of Florida. Following *Silvestrone*, the two year statute of limitations for litigation-related legal malpractice should attach when the final judgment becomes final. Accordingly, this Court should disapprove of the Fourth District's decision in *Mitchel*.

ISSUE III: THE CONTINUING REPRESENTATION DOCTRINE WAS REJECTED BY THIS COURT IN *KELLEY v. SCHOOL BOARD OF SEMINOLE COUNTY*, 435 So. 2d 804 (Fla. 1983) AND NO CHANGE IN THE LAW IS WARRANTED WHERE THE *EXHAUSTION OF APPEALS RULE* HAS BEEN FULLY EMBRACED BY THIS COURT SINCE *SILVESTRONE*.

The Respondent, TSE's, **sole** argument on appeal to the Second District was "the trial court erred by failing to apply the continuing representation doctrine to toll the statute of limitations." (R. Vol. 6, Tab I, P. 14-21) The Second District's subsequent opinion reversing the summary judgment is confusing concerning the continuing representation doctrine. On the one hand, the majority opinion, written by Judge Stringer, appears to side-step the continuing representation doctrine, by suggesting that a proper reading of *Silvestrone* moots the issue. (A. 11) On the other hand, Judge Altenbernd's concurring opinion states: "Our holding today probably is a modified version of the continuing representation doctrine." (A. 13)

If Judge Altenbernd was correct that Judge Stringer's majority opinion was indeed adopting a modified version of the continuing representation doctrine, then the Second District erred because there is no Florida authority to support the ruling.

The Parties' appellate briefs below analyzed the applicability of the continuing representation doctrine in Florida. The Larson Defendants, as Appellees, demonstrated that the continuing representation doctrine has never been adopted in Florida by identifying and analyzing every case in Florida (both state and federal) that had ever mentioned the term "continuing representation doctrine."[3] (R. Vol. 6, Tab II, P. 25-34) Since then, the Larson Defendants discovered that this Court has specifically rejected the same doctrine under a different name, the "continuous treatment doctrine."[4] *See Kelley v. School Board of Seminole County*, 435 So. 2d 804 (Fla. 1983).

[3] The term *"continuing representation doctrine"* is used interchangeably with *"continuous representation doctrine," "continuing representation rule,"* and *"continuous representation rule*.

[4] In jurisdictions where it is recognized, the "continuing representation doctrine" is to legal malpractice what the "continuous treatment doctrine" is to medical malpractice. *See* S*humsky v. Eisenstein*, 96 N.Y.2d 164, 167, 726 N.Y.S.2d 365, 368, 750 N.E.2d 67, 70 (2001). They both work the same way; they both toll the running of the statute of limitations on malpractice claims while the professional continues to represent or treat the plaintiff. *See id.*

In *School Board of Seminole County v. G.A.F. Corp.*, 413 So. 2d 1208 (Fla. 5th DCA 1982) the Fifth District reversed a summary judgment entered against a plaintiff suing to recover for alleged improper design or supervision of construction of roofs for three schools. The trial court had granted the defendant's motion for summary judgment on the basis of the running of the applicable statute of limitations for professionals. The Fifth District disagreed. The district court found that Florida's statute of limitations embodied the "continuous treatment doctrine" when a client-professional relationship is involved.

Judge Cowart dissented and wrote:

> [T]he majority cites no authority for the statement that such "continuous treatment" doctrine has already been adopted as a part of Florida law relating to the accrual of a cause of action and the resultant commencement of the running of the statute of limitations against a "professional." Existing law does not require a client to sue his professional "immediately" after discovering negligently caused injury or damage. Applicable statutes of limitation give either two or, as here, four years within which time the client should either give up on his amiable but bungling professional, get competent help and sue, or be forever barred from asserting his stale claim.

Id. at 1213.

In *Kelley v. School Board of Seminole County*, 435 So. 2d 804 (Fla. 1983) this Court held that Judge Cowart had "reached the proper conclusion" about the doctrine and *quashed* the majority opinion. 435 So. 2d at 805.

The *Kelley* court, citing *City of Miami v. Brooks*, 70 So. 2d 306 (Fla. 1954), reiterated the general rule that a statute of limitations begins to run when a person has been put on notice of his or her legal right to a cause of action. *See id*. at 806. The Supreme Court then held: "[R]egardless of [the architect's] attempts to repair the roofs and regardless of the school board's lack of knowledge of a specific defect, the school board knew more than four years prior to August 1977 that something was wrong with the roofs of these three schools. This knowledge meets the discovery aspect of subsection 95.11(3)(c)." *Id.* at 807.

The *Kelley* case **predates** the six cases identified and analyzed by the Larson Defendants in their Answer Brief below to reach the conclusion that the "continuing representation doctrine" has never been adopted in Florida. Ironically, none of the six cases that mention the "continuing representation doctrine" ever recognize the "continuous treatment doctrine" or this Court's opinion in *Kelley*. In light of *Kelley*, there should be no question that the "continuing representation doctrine" has no place in Florida jurisprudence.

Nevertheless, in the face of TSE's assertion that the continuing representation doctrine is deeply rooted in Florida law, the Petitioners offer the following summary of the *only* six cases that address the "continuing representation doctrine." This summary of cases, coupled with the *Kelley* opinion, reveals that the trial court did not err in granting summary judgment because the continuing representation doctrine has no place in Florida jurisprudence:

(1) Wilder v. Meyer, 779 F. Supp. 164 (S.D. Fla. 1991). This federal court case was decided eight years after *Kelley*, and was the first case from a Florida court (state or federal) to write the words "continuing representation doctrine." It is also the only case, past or present, to apply the continuing representation doctrine to toll the statute of limitations until the Second District's decision below. *Wilder* cites to *Birnholz v. Blake*, 399 So. 2d 375 (Fla. 3d DCA 1981), for support in its application of the doctrine, but the *Birnholz* case never addressed the continuing representation doctrine. Instead, *Birnholz* recites the legal principle that a cause of action for legal malpractice does not *accrue* until the legal proceedings underlying the malpractice claim have been finalized.[5] Thus, the *Wilder* court was wrongheaded in its

[5] This is basically the same rule that was approved by the Florida Supreme Court in *Silvestrone v. Edell*, 721 So. 2d 1173 (Fla. 1998) as the "bright line" test.

application of the continuing representation doctrine, especially in light of the *Kelley* decision.

Federal courts are charged with ruling upon the law of a state as it exists, and should neither expand that law nor create new law. *See St. Paul Fire & Marine Ins. Co. v. Jacobson*, 48 F.3d 778, 783 (4th Cir. 1995).

(2) *Hampton v. Payne*, 600 So. 2d 1144 (Fla. 3d DCA 1992). In *Hampton*, the Third District recognized the doctrine, but found it inapplicable to the facts of that case. The *Hampton* court cited Nebraska law for its authority in considering the doctrine. 600 So. 2d at 1145.

(3) *Abbott v. Friedsam*, 682 So. 2d 597 (Fla. 2d DCA 1996). In *Abbott*, the Second District only mentioned the continuing representation doctrine in *dicta*, in a footnote, which reads:

> Although not necessary to our determination, we note that in Florida the statute of limitations for legal malpractice generally does not begin to run while the attorney continues to represent the client or until the legal proceeding which underlies the malpractice claims has been finalized, by appeal if necessary, so that the client has notice of all elements of his or her cause of action, including damages. *See Peat, Marwick, Mitchell & Co. v. Lane*, 565 So. 2d 1323 (Fla.1990); *Keller v. Reed*, 603 So. 2d 717 (Fla. 2d DCA 1992); *Zakak v. Broida & Napier, P.A.*, 545 So. 2d 380 (Fla. 2d DCA 1989); *Birnholz v. Blake*, 399 So. 2d 375 (Fla. 3d DCA 1981); *Wilder v. Meyer*, 779 F.Supp. 164 (S.D. Fla. 1991).

682 So. 2d at 599 n.1. Four of the five cases cited in the footnote (*i.e. Peat, Keller, Zakak*, and *Birnholz*) never addressed the continuing representation doctrine. The sole exception being *Wilder*, which as stated above was wrongheaded in its application of the doctrine. Instead, *Peat, Keller, Zakak*, and *Birnholz* recite the legal principle that a cause of action for legal malpractice does not *accrue* until the legal proceedings underlying the malpractice claim have been finalized.

(4) *Silvestrone v. Edell*, 701 So. 2d 90 (Fla. 5th DCA 1997) from the Fifth District Court of Appeal is the fourth case to mention the continuing representation doctrine. Like *Abbott*, the Fifth District's opinion in *Silvestrone* addressed the continuing representation doctrine only in *dicta*, and the court determined that the continuous representation issue was not properly preserved at trial. 701 So. 2d at 91-91.

Moreover, the Fifth District's *Silvestrone* opinion was subsequently reversed by this Court in *Silvestrone v. Edell*, 721 So. 2d 1173 (Fla. 1998), in which this Court announced the "bright line" rule for determining when the statute of limitations begins to rule in litigation-related legal malpractice actions. The "bright line" is set "when the final judgment becomes final." 721 So. 2d at 1176 ("This bright-line rule will provide certainty and reduce litigation over when the statute starts to run." *Id.*).

(5) *Perez-Abreu, Zamora & De La Fe, P.A., v. Taracido*, 790 So. 2d 1051 (Fla. 2001), from this Court was the fifth case to mention the continuing representation doctrine, but it did so only in the concurring opinion of Justice Pariente and recognized it as a foreign concept. Justice Pariente referred to the doctrine as the *Kentucky continuous representation rule* and stated it was an alternative to the rule espoused by the majority. *See id.* at 1056. Justice Pariente did not cite any Florida law to support the application of the *continuous representation rule*.

The *Perez-Abreu* majority, on the other hand, held:

> [A] negligence/malpractice cause of action accrues when the client incurs damages at the conclusion of the related or underlying judicial proceedings or, if there are no related or underlying judicial proceedings, when the client's right to sue in the related or underlying judicial proceedings has expired.

790 So. 2d at 1054.

(6) *O'Keefe v. Darnell*, 192 F.Supp.2d 1351 (M.D. Fla. 2002), is the sixth and last case to mention the continuing representation doctrine. However, *O'Keefe*, another federal case, can immediately be dismissed from the discussion because it was applying *Kansas* law when it recognized the doctrine. *See id.* at 1357.

So, that covers every published decision emanating from a Florida court (state or federal) that addresses or even mentions the "continuing representation doctrine,"

and interestingly none of these six cases mention this Court's decision in *Kelley* which rejected the continuous treatment doctrine. Had they done so, there would be no confusion. The continuing representation doctrine has not been adopted into Florida law. Justice Pariente correctly recognized it as a foreign concept in *Perez-Abreu.* The same conclusion should be reached here.

Furthermore, there is no reason to change the law in Florida to recognize the continuing representation/treatment doctrine. The bright-line rule set forth in *Silvestrone* establishes that a litigation-related malpractice claim ***accrues*** for statute of limitations purposes "when the final judgment becomes final." *Silvestrone*, 721 So. 2d at 1175-76. This rule is commonly referred to as the *exhaustion of appeals rule* and is an alternative to the continuing representation/treatment doctrine.

The continuing representation/treatment doctrine is only important in jurisdictions like New York and California, where the statute of limitations for malpractice begins to run when the malpractice occurs, rather than when it is discovered. *See e.g. Greene v. Greene*, 56 N.Y.2d 86, 451 NYS.2d 46, 436 N.E.2d 496 (1982); *Huysman v. Kirsch*, 6 Cal.2d 302, 57 P.2d 908 (1936). In those jurisdictions, the continuing representation/treatment doctrine prevents the attorney from delaying the eventual outcome of the case in order to take advantage of the statute of limitations.

Florida, on the other hand, is a discovery rule jurisdiction. Section 95.11(4)(a), Florida Statutes provides, in relevant part:

> Actions other than for recovery of real property shall be commenced as follows:
> . . .
> (4) Within two years.--
>
> (a) An action for professional malpractice, other than medical malpractice, whether founded on contract or tort; **provided that the period of limitations shall run from the time the cause of action is discovered or should have been discovered with the exercise of due diligence.** However, the limitation of actions herein for professional malpractice shall be limited to persons in privity with the professional.

§ 95.11(4)(a), Fla. Stat. (2002)(emphasis supplied). Therefore, the continuing representation/treatment doctrine is unwarranted in Florida.

In *R.D.H. Communications, Ltd. v. Winston*, 700 A. 2d 766, 87 A.L.R.5th 775 (D.C. App. 1997), the District of Columbia Court of Appeals surveyed the law across the country and its treatment of this topic and recognized the *exhaustion of appeals rule* as an alternative to the continuing representation doctrine, stating:

> Other courts have adopted an *exhaustion of appeals rule* through which the cause of action accrues when the plaintiff knows or reasonably should know of the malpractice and when the damages are certain and not contingent upon the outcome of the appeal. In other words, the cause of action accrues when the case has come to the end of the appellate process. *See Amfac Distrib. Corp. v.*

> *Miller*, 138 Ariz. 155, 673 P.2d 795 (Ct. App.) (limiting the exhaustion of appeals rule to malpractice occurring during the course of litigation . . .), *approved as supplemented*, 138 Ariz. 152, 673 P.2d 792 (1983); *Semenza v. Nevada Med. Liab. Ins. Co.*, 104 Nev. 666, 765 P.2d 184 (1988) (citing *Amfac*); *Neylan v. Moser*, 400 N.W.2d 538 (Iowa 1987) (same).

R.D.H. Communications, Ltd., 700 A. 2d at 770-72.

In the instant appeal, it is unnecessary to debate the pros and cons of the two alternative rules because the Florida Supreme Court has rejected the continuous representation/treatment doctrine in the *Kelley* case, and has determined that Florida will follow the exhaustion of appeals rule as a bright-line test in *Silvestrone.*

Accordingly, the instant trial court below was correct in refusing to apply the continuing representation doctrine to toll the statute of limitations. The Second District Court of Appeal's decision reversing the trial court should and must be quashed with directions to reinstate the trial court's judgment.

CONCLUSION

The Second District Court of Appeal erred in reversing the final summary judgment below where the trial court correctly applied the bright-line rule in *Silvestrone,* that for litigation-related legal malpractice, the cause of action accrues and the statute of limitations attaches when the final judgment becomes final. The

Second District ignored the traditional rule of accrual and erroneously looked beyond September 16, 2002, to find that the cause of action did not accrue until the case was "fully resolved," including resolution of the collateral attorney's fees issue. Accordingly, the Court should quash the decision of the Second District below with directions to reinstate the trial court's judgment in favor of the Larson Defendants.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by regular U.S. Mail to MARIE TOMASSI, ESQ., Trenam, Kemker, Scharf, Barkin, Frye, O'Neill & Mullis, Post Office Box 3542, St. Petersburg, Florida, 33731-3542; and 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 20th day of June, 2008.

_____
BRANDON S. VESELY, ESQ.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Amended Initial Brief on the Merits 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.