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' REPLY BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

For purposes of the "Petitioners' Reply 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).

"Int. Br." shall refer to the Petitioners' Amended Initial Brief on the Merits. "Ans. Br." shall refer to the Respondent's Answer Brief on the Merits.

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."

REPLY 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.

The Respondent, like the district court below, misconstrues this Court's opinion in *Silvestrone v. Edell*, 721 So. 2d 1173 (Fla. 1998). Contrary to Respondent's assertion, this Court never said that the cause of action for litigation related legal malpractice does not commence to "run until the underlying matter is *fully concluded*." (Ans. Br. 7)(emphasis supplied).

What this Court actually wrote was: "[T]he statute of limitation does not commence to run until the litigation is concluded by final judgment. To be specific, we hold that the statute of limitations does not commence to run until the final judgment becomes final." *Silvestrone*, 721 So. 2d at 1175.

The *Silvestrone* opinion must be harmonized with this Court's earlier opinion in *City of Miami v. Brooks*, 70 So. 2d 306 (Fla. 1954). When read together, it is apparent that *Silvestrone* was not creating an exception to toll the statute of limitations for litigation related professional malpractice. It was merely recognizing that for litigation related legal malpractice, the cause of action does not *accrue* until the

damages become certain. In other words, *redressable harm* is not established until the final judgment becomes final after all appellate rights are exhausted, because until that time the damages are merely speculative.

Whereas post-judgment motions and appellate actions in the underlying case can delay the finality of the judgment and possibly change the outcome, ancillary or collateral matters do not.

TSE knew without a doubt that it had redressable harm when the final judgment became final on September 16, 2002, and nothing that happened after that in Franklynn's ancillary, "exceptional case/attorney's fees" proceeding was going to change that. TSE's claim for malpractice against the Larson Defendants seeking damages for paying their fees and costs in pursuing the case against Franklynn was ripe *and the harm was redressable* when the final judgment became final.

Respondent next argues that there are benefits to tolling the statute of limitations until all litigation is "fully concluded," such as avoiding conflicts of interest, and avoiding having to sue one's own attorney. However, the argument is weak at best, because it fails to recognize that the aggrieved party is <u>not</u> required to sue their attorney ***immediately***, there is a statute of limitations period (two years) before the claim has to be filed. That period gives the party a chance to wrap up any ancillary or collateral matter in the underlying proceeding while continuing to work

with his or her attorney. It is unlikely that the aggrieved party will ever be put in conflict with his or her attorney given the limitations period. In this particular case, Franklynn's attorney's fees claim was resolved and the dismissal was entered on October 10, 2002, less than two months after the final judgment became final on September 16, 2002. Conflict was not the problem. It was the fact that TSE waited a *full two years* before bringing the claim that was the problem.

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 Respondent argues that the instant decision does not conflict with *Integrated Broadcast Services, Inc. v. Mitchel*, 931 So. 2d 1073 (Fla. 4th DCA 2006), because "the facts underlying the two cases appear to be distinct," and therefore, there is "no intra-district [sic] conflict to support jurisdiction." (Ans. Br. pp. 5, n. 1; 8) Respondent then supports its argument by citing *Tetzlaff* [1] for the proposition that there is "no express and direct conflict where cases are factually distinct." (Ans. Br. Pp. 9-10) Respectfully, the Respondent is applying the wrong standard.

[1] *Tetzlaff v. Florida Unemployment Appeals Com'n*, 926 So. 2d 1267 (Fla. 2006).

The Second District's decision below was **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). When a district court certifies conflict, the parties need not show that the conflict is expressed in the opinion. Article V, section 3(b)(4) of the Florida Constitution provides this Court with "jurisdiction per se" over district court opinions that are certified to be in conflict with another district court's opinion. *See State v. Vickery*, 961 So. 2d 309, 312 (Fla. 2007)("[C]ertification of conflict provides us with jurisdiction per se.") "Even a summary type decision made on the basis of a single citation, in the absence of any stated legal reasoning, will qualify for review if it is certified to be in conflict." Phillip J. Padavano, *Florida Appellate Practice*, § 3.11 at 75 (2007-08 ed.).

The "express and direct conflict" requirement comes into play when the district court does not certify the conflict. *See* art. V, § 3(b)(3), Fla. Const. (granting the Florida Supreme Court jurisdiction to review district court opinions that "expressly and directly" conflict with the decision of another district court of appeal or with one of its own decisions). This was not the case here.

Moreover, any factual differences between the instant case and *Mitchel* are inconsequential. Respondent has pointed out that the attorney in *Mitchel* withdrew from representing the aggrieved party during the pendency of the appeal in the

underlying case and before to the entry of the sanction judgment, whereas the Petitioners in the instant case continued to represent TSE through the resolution of the ancillary attorney's fees (i.e. sanctions) proceeding. However, the Respondent has grossly misstated the importance of those factual distinctions. They certainly were not "controlling factual elements" that would preclude a finding of conflict. *See Kyle v. Kyle*, 139 So. 2d 885 (Fla. 1962).

Judge Stringer's majority opinion below held that the start date of the statute of limitations was delayed until all litigation was "concluded," including the post-judgment, ancillary attorney's fees matter. Judge Stringer opined that until that point, damages were merely speculative. Accordingly, Judge Stringer's opinion was not contingent upon the fact that the Larsons continued to represent TSE through the conclusion of the ancillary attorney's fees matter.

Likewise, in *Integrated Broadcast Services, Inc. v. Mitchel,* the attorney's early withdrawal from the original litigation had no impact on the Fourth District's opinion. 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 fact that the

attorney withdrew before either judgment was entered did not play a role in the court's analysis.

Thus, there is no question that this Court has the discretion to exercise jurisdiction over the instant case. The only question is whether it should. Respectfully, the Petitioners believe it is absolutely critical that this Court exercise its discretionary jurisdiction in this case. This case will have far-reaching consequences beyond litigation related legal malpractice cases.

If the decision is left to stand, it will call into question the appropriate commencement date for all statutes of limitation on professional malpractice claims. For example, under Judge Stringer's analysis, does a cause of action for medical malpractice accrue, and the statute of limitations commence, before all treatment is completed?

Simply put, Judge Stringer's opinion upsets the proverbial apple cart. This Court should use this case as an opportunity to reaffirm the long established law in Florida that the statute of limitations, on any claim, begins to run when redressable harm has been established and is known. "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) (emphasis supplied).

<u>ISSUE III</u>: 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*.

Respondent's assertion that the continuing representation doctrine has long been recognized by Florida courts is simply wrong. As clearly delineated in the Petitioner's Initial Brief, no Florida court has ever applied the doctrine to toll the statute of limitations for professional malpractice. (Int. Br. at pp. 19-26) Respondent cites two Florida cases that mention the doctrine in *dicta* (Ans. Br. at pp. 10-11), but they emanate from a single, misguided, federal district court judgment that simply misconstrued Florida law. *See Wilder v. Meyer*, 799 F. Supp. 164 (S.D. Fla. 1991). **Again, no Florida court has ever adopted the continuous representation doctrine or the continuous treatment doctrine.**

To the contrary, this Court has specifically rejected the continuous treatment doctrine in *Kelley v. School Board of Seminole County*, 435 So. 2d 804 (Fla. 1983). This Court has since reaffirmed its rejection of the doctrine under similar circumstances. *See Almand Constr. Co., Inc. v. Evans*, 547 So. 2d 626, 628 (Fla.

1989). And a number of District Courts have noted the Florida Supreme Court's rejection of the continuous treatment doctrine. *See, e.g., Gomez v. Flynn, M.D.,* 518 So. 2d 366, 367 (Fla. 1st DCA 1987); *Bd. of Trustees of Santa Fe Community College v. Caudill Rowlett Scott, Inc.*, 461 So. 2d 239, 244 (Fla. 1st DCA 1984); *Mercedes Benz of North America v. King,* 549 So. 2d 795 (Fla. 5th DCA 1989).

Florida does not need the continuing representation/treatment doctrine because existing law already accomplishes the same general purpose. Florida was one of the first states to embrace the discovery rule for the statute of limitations on professional malpractice. *See Downing v. Vaine,* 228 So. 2d 622, 625 (Fla. 1st DCA 1969). Shortly thereafter, the discovery rule was legislatively adopted in section 95.11, Fla. Stat. (1975).

"The premise of the discovery rule is that the statute of limitations should not run until the client knows or should know the essential facts of the cause of action." R. Mallen & J. Smith, *Legal Malpractice* § 23.15 (2008 ed.). "The discovery rule can defer accrual beyond the time all the damages occur and does not depend on when the attorney-client relationship ends." *Id.*

While many states adopted the discovery rule, others adhered to the traditional occurrence rule. *See id.* In occurrence rule jurisdictions the statute of limitations for professional malpractice begins to run the moment the negligence occurs. Thus, the

continuing representation/treatment doctrine is important -- critical even, because otherwise the professional, by continuing to represent the client, would be able to conceal his or her negligence and allow the statute of limitations run, thus avoiding liability.

Unlike occurrence rule jurisdictions, discovery rule jurisdictions do not suffer from this problem. In a discovery rule jurisdiction the cause of action will not accrue and the statute of limitations will not begin to run until the redressable harm is discovered, or should have been discovered, by the aggrieved party. At that point, the party will have two years in most instances to bring his or her claim.

The Respondent goes to great lengths to argue that Indiana has adopted both the discovery rule and the continuous representation rule and Florida should follow suit. (Ans. Br. at pp. 12-14) However, Indiana's version of the discovery rule would require the client to sue for professional malpractice before the exhaustion of the related appeals, thus the continuing representation rule was necessary to toll the statute of limitations during the appellate process. *See Biomet, Inc. v. Barnes & Thornburg*, 791 N.E.2d 760 (Ind. Ct. App. 2003).

We do not have a similar problem here in Florida thanks to this Court's opinion in *Silvestrone*. In *Silvestrone*, this Court adopted another rule, *the exhaustion of appeals rule*, which provides that a cause of action for litigation related legal

malpractice does not accrue until the final judgment becomes final after all appeals are exhausted. This was an extension of Florida's well settled law concerning the accrual of a cause of action. It recognized that while all the elements of a cause of action for professional malpractice may be present in a litigation proceeding, until the judgment becomes final and all appeals are exhausted, there is a chance that the outcome may change. And once the final judgment becomes final after all appeals are exhausted the client will know or should know that the claim exists, thus commencing the running of the applicable statute of limitations.

Florida's present system works fine. We have the mega-exception of the discovery rule and the litigation-based exception of the exhaustion of appeals rule. These two rules combined form the *bright line* rule enunciated in *Silvestrone* and achieve the same general purpose as the continuing representation doctrine.

Adopting the continuing representation doctrine in a case like this would open the door for that rule to apply in other scenarios and would have untold consequences. It would also require this Court to recede from its opinion in *Kelley.* If there were ever a rule that could smear the bright line established in *Silvestrone* it is the continuing representation doctrine. And for what purpose? To borrow the old adage: "If it ain't broke, don't fix it."

Finally, it must be considered that judicially adopting the continuing representation doctrine would essentially alter the statute of limitations for professional malpractice. *See* §95.11(4)(a), Fla. Stat. (2007). This would seem to be a direct intrusion on the prerogatives of the legislature. Several states have declined to adopt the continuous representation doctrine for this very reason finding it more appropriate for legislative enactment. *See e.g. Harrison v. Bevilacqua,* 354 S.C. 129, 580 S.E.2d 109 (2003)("Certainly, this is an area where the legislature can create statutory law if it so chooses."); *Cunningham v. Huffman,* 154 Ill.2d 398, 609 N.E.2d 321, 324 (Ill. 1993). This Court should follow the same path and reaffirm its prior holding in *Kelley* rejecting the continuous representation/treatment doctrine.

CONCLUSION

For the foregoing reasons, and the reasons stated in the Petitioners' Amended Initial Brief on the Merits, this Court must quash the appellate court's decision and reinstate the trial court's judgment.

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 2nd day of September, 2008.

_____

BRANDON S. VESELY, ESQ.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Reply 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.