Supreme Court of Florida

CASE NO: SC15-740
On Certified Question From
The United States Court of Appeals for the Eleventh Circuit
(Case No. 14-11959)
(District Court Case No. 13-CV-23998-CMA)

BARRY MUKAMAL, AS CHAPTER 7 TRUSTEE OF THE BANKRUPTCY ESTATE OF DONALD KIPNIS, and KENNETH A. WELT, AS CHAPTER 7 TRUSTEE OF THE BANKRUPTCY ESTATE OF LAWRENCE KIBLER,

Petitioners,

v.

BAYERISCHE HYPO-UND VEREINSBANK, AG, a corporation, now known as UNICREDIT BANK AG; HVB U.S. FINANCE, INC., now known as UNICREDIT U.S. FINANCE, INC.,

Respondents.

PETITIONERS' REPLY BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

Twenty-five years ago, in *Peat, Marwick v. Lane*, 565 So. 2d 1323, 1327 (Fla. 1990), this Court established that if the existence of injury depends on related litigation, a claim accrues only when final judgment is entered in that related case. The accrual question certified by the Eleventh Circuit asks this Court to choose between the date when: (i) Plaintiffs received the IRS's proposed adjustments in the notice of deficiency, or (ii) Plaintiffs' tax court case was finally resolved. Consistent with *Peat, Marwick*, this Court should select the latter date, because that is when Plaintiffs were first injured. Had the tax court ruled in Plaintiffs' favor, they would have had no injury and, therefore, no claim against Defendants.

Having no good argument that the earlier date would be appropriate, Defendants instead ask this Court to rewrite the certified question to address a different issue: the "first injury" rule. But reframing the certified question does not help Defendants because the Eleventh Circuit was correct in rejecting these same arguments in formulating the certified question. Plaintiffs' "first injury" was not until the invalidation of their tax treatment.

Defendants argue that Plaintiffs were first injured upon Defendants' "early" termination of the CARDS related loan in 2001. But Plaintiffs have neither suffered, nor pleaded injury resulting from that termination. Further, because Defendants had the contractual right to cancel the loan, even today

(after the tax court ruling), Plaintiffs have no claim against Defendants for exercising that right.

Defendants do not offer any rationale why the rule in *Peat, Marwick* should be limited to malpractice cases, when this Court has never made any such distinction. They cannot avoid the ripeness arguments on which their accomplices (KPMG and Sidley) prevailed. And they identify no public policy considerations supporting the rejection of the clear, bright-line finality accrual rule in *Peat, Marwick* to instead replace it with a new accrual rule that would prevent victims from suing admitted fraudfeasors and force victims to sue conspiring defendants in separate suits at different times.

Defendants' brief is also striking for its strident tone and insinuation that Plaintiffs were somehow the wrongdoers here. Unlike Defendants, Plaintiffs committed no fraud; they were not even assessed penalties by the IRS because they disclosed the CARDS transaction they believed to be legitimate on their tax returns. *Kipnis v. Commissioner or Internal Revenue*, 2012 WL 5371787, at *7 (U.S. Tax Court Nov. 1, 2002). Plaintiffs defended the transaction in good faith, defeated summary judgment, and presented the still-supportive testimony of their accountant at trial.

In sum, this Court should answer the Eleventh Circuit's certified question by confirming that Plaintiffs' claims accrued only when the tax

court judgment against them became final. Because Plaintiffs filed their claims one year after that final judgment, their claims are timely.

I. Plaintiffs Were Not Injured Under Governing Florida Law Until the Final Conclusion of The Tax Court Case.

Settled Florida law holds Plaintiffs had no ripe claim against any defendant until they suffered actual (not merely potential) injury. In *Peat, Marwick*, this Court rejected defendants' contentions that an IRS notice of deficiency or the expenditure of fees to fight the IRS's proposed adjustments triggered accrual under Florida's statute of limitations. 565 So. 2d at 1326. Rather, the Court properly found that the limitations period "commenced when the United States Tax Court entered its judgment." *Id*. at 1327.

Defendants argue that *Peat, Marwick* only applies in accounting or legal malpractice cases. But Defendants are wrong. In *Blumberg v. USAA Casualty Insurance Co.*, 790 So. 2d 1061, 1065 (Fla. 2001), this Court held that a claim involving neither lawyers nor accountants accrues "at the conclusion of the related or underlying judicial proceeding."

Defendants further argue that no court has applied the *Peat, Marwick* finality accrual rule to a case such as this one. (Resp. at 27). This too is wrong. In *Loftin v. KPMG, LLP*, 2003 WL 22225621, at *7 (S.D. Fla. Sept. 10, 2003), the district court addressed claims nearly identical to those asserted here against HVB's co-conspirators, KPMG and Sidley. The court

granted defendants' motion to dismiss holding that, under Florida law, until the plaintiff and the IRS "reach a final resolution of the dispute, it is impossible to determine whether Loftin actually suffered damages." *Id.*[1]

Finally, Defendants abandon their argument (which lost in *Peat, Marwick*) that notice of deficiency triggers accrual. (Resp. at 18, fn. 11). Defendants' calculated decision to jettison one of the two certified options does not help them, because Florida law does not support an earlier accrual date. And any earlier date would require fraud victims to file lawsuits contradicting their own tax returns before the IRS even contested those

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[1] Defendants' efforts to distinguish *Loftin* fail. Defendants quote the court's conclusion that Loftin did not allege "actual injury" (Resp. at 31), but that conclusion was based on the same type of conduct alleged here and demonstrates Plaintiffs also did not suffer actual injury. *See e.g.*, Am. Compl. ¶¶ 12, 36-7 in *Loftin v. KPMG LLP, et al.*, No. 02-81166 (S.D. Fla.) ECF No. 25 (alleging fees incurred in underlying transaction).

Second, Defendants argue *Loftin* is focused on "standing" rather than on the statute of limitations. (Resp. at 33). But that is no distinction because the injury necessary to create standing is the same injury required to start the statute of limitations. *See e.g., Petra Presbyterian Church v. Vill. of Northbrook*, 489 F.3d 846, 850 (7th Cir. 2007) ("before there is an injury, there is no standing … because no damages have accrued").

Third, Defendants claim the court erred by holding that the claim accrued upon the issuance of the notice of deficiency; the argument that was rejected in *Peat, Marwick.* (Resp. at 33). But Defendants' quotation from *Loftin* merely took into account the possibility North Carolina law would govern and, under North Carolina law, a notice of deficiency commences accrual. 2003 WL 22225621, *8. Addressing Florida law, *Loftin* cited *Blumberg* and held that the claim "does not arise until final determination that taxpayers' deduction was improper." *Id.*

returns. It cannot be that, while enjoying the benefits of their bargain, Plaintiffs must sue in anticipation of the inchoate possibility that they might ultimately lose the tax benefits.

Until the federal district court decision here, Florida law was clear that claims do not accrue until the conclusion of the underlying case. While Defendants accuse Plaintiffs of seeking an "unprecedented" change, it is Defendants who seek to alter settled Florida law. (Resp. at 3).

A. Florida Regularly Applies the Finality Accrual Rule to Claims Not Involving Attorneys or Accountants.

Defendants admit that Plaintiffs' claims are timely under *Peat, Marwick*. To avoid *Peat, Marwick*, Defendants must argue that its holding is limited to claims for malpractice. But this Court has already applied *Peat, Marwick* outside the malpractice area (*Blumberg*, discussed above), which should be no surprise given this Court's holding that the "bright-line" finality accrual rule "is in line with the long-standing rule generally applicable to personal injury claims." *Larson & Larson, P.A. v. TSE Indus., Inc.*, 22 So. 3d 36, 42 (Fla. 2009); *accord Loftin*, 2003 WL 22225621, at *7 (applying the finality accrual rule to fraud and fiduciary duty claims not governed by the malpractice statute of limitations). How could it be otherwise; the ripeness of an injury does not turn on the type of defendant.

Defendants are also forced to ignore several other applications of the finality accrual to non-malpractice claims. *See, e.g.*, *Fremont Indem. Co. v. Carey, Dwyer, Eckhart, Mason & Spring, P.A.*, 796 So. 2d 504, 505 (Fla. 2001) (fiduciary duty); *Steele v. Mid-Continent Cas. Co.*, 07-60789-CIV, 2007 WL 3458543, *3 (S.D. Fla. Nov. 14, 2007) (fraud in the inducement); *Picazio v. Melvin K. Silverman & Assocs., P.C.*, 965 F. Supp. 2d 1411, 1416 (S.D. Fla. 2013) (fiduciary duty).

The application of *Peat, Marwick* to insurance coverage disputes demonstrates it is not limited to cases arising under Florida's malpractice statute of limitation, Section 95.11(4)(a).[2] Defendants argue that insurance coverage cases involve "malpractice/ negligence"-like claims against "advisor(s)/agent(s)," (Resp. at 31), but fail to explain why defendants' relationship to plaintiff has any bearing on when a plaintiff suffers injury. Defendants' argument was made unsuccessfully by the dissent in *Blumberg*. 790 So. 2d at 1068-9 (attempting to distinguish *Peat, Marwick* based on difference in nature of insured/agent versus attorney/client relationship, stating that attorneys have "[an] opportunity to correct their mistakes" but

[2] Defendants previously argued *Peat, Marwick* was limited to claims governed by Section 95.11(4)(a), it is not clear whether they have abandoned that argument. *See* Eleventh Circuit Resp. Br. at 26-27, 29, 30, 37.

insurance agents "neither represent[] nor advis[e] the insured regarding the insurance coverage dispute."). Just as in *Blumberg*,[3] had Plaintiffs prevailed in the underlying litigation, they would have had no claim. 790 So. 2d at 1065.

Defendants also fail to address *Medical Data Systems*, 139 So. 3d at 396-97, in which plaintiff lacked insurance coverage for the underlying suit (alleging a violation of the Fair Debt Collection Practices Act). The court applied *Blumberg* to defendant APLU, a "broker" with no direct relationship with the plaintiff. *Id*. at 395. The claim against APLU was timely because it did not accrue until the plaintiff had resolved the underlying lawsuit—only then did plaintiff have an obligation to pay, and only then was plaintiff

[3] The three cases that purportedly distinguish *Blumberg*, do not help Defendants. *Kelly v. Lodwick*, 82 So. 3d at 858-9, involved insurance agent malpractice in failing to obtain coverage. The court distinguished *Blumberg* because "there was no underlying proceeding to determine whether coverage existed because it is undisputed that coverage did not exist for the plaintiffs' underlying claim." *Id*. at 859, n. 2. In *Greenberg v. Wells Fargo Bank*, 2015 WL 1647964, at * 1, plaintiffs sued a bank for allowing plaintiffs' employee to issue checks in plaintiff's name. The employee "admitted his wrongdoing in the underlying litigation." *Id*. at *3. While the court relied on *Kelly* and cited *Blumberg*, it did not set out any basis for distinguishing *Blumberg*; and *Kelly* offers no basis to distinguish *Blumberg* here. Finally, *Tokay Auto Remarketing*, 2012 WL 1806113, at *4, does not involve accrual. There, plaintiff sued his insurer and agent over the insurer's refusal to pay. The court dismissed the claims against the agent because plaintiff alleged no theory that could sustain liability. Rather than limit *Blumberg*, *Tokay* held it was inapplicable because plaintiff had not asserted a viable claim.

injured by the lack of insurance coverage. *Id*. at 396-97. The absence of a relationship is not what mattered; what mattered is that there was no injury until the underlying case was resolved.

Defendants also fail even to address the cited authority in non-malpractice cases where a claim was held not to accrue until the resolution of an underlying proceeding or other future event. (Op. Br. at 21-22 (citing eight cases).) Defendants' "malpractice" distinction cannot be squared with such settled Florida law.

Set against this weight of authority, Defendants cite one case that purports to distinguish between accrual in a malpractice case and other claims. But that case, *Nale v. Montgomery*, 768 So. 2d 1166, 1167-68 (Fla. 4th DCA 2000), did not turn on what accrual rule was used. Rather, the negligent act, voluntarily dismissing the case, was itself the entry of final judgment. So, in *Nale*, plaintiffs' claim was not timely under any rule.

There is no special "malpractice accrual rule." Courts apply the same injury rule as in other cases: accrual occurs once plaintiffs are injured.[4]

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[4] Defendants accuse Plaintiffs of arguing for a specialized "tax shelter litigation" rule. (Resp. Br. at 3, 20, 41). Not only is this charge false, it is directly refuted in Plaintiffs' brief. (Op. Br. 21 ("Rather than a special rule for tax cases, *Peat, Marwick* and *Loftin* are simply the application of this general rule to tax shelter claims."). It is Defendants who advocate "special" accrual rules, based on the identity of the defendant and the type of claim asserted, in seeking to limit *Peat, Marwick* solely to malpractice claims.

Plaintiffs were not injured until 2012, and their claims are timely.

B. Defendants' Effort to Establish an Earlier "Injury" Sufficient to Trigger the Statute of Limitations Fails.

Defendants argue that the "first injury rule" is inconsistent with the finality accrual rule, but this Court has already held that the two rules may be consistently applied. *Larson*, 22 So. 3d at 42, 47-48. The dispute is not whether the first injury commences the statute of limitations, but when that first injury occurred. Under Florida law, just as in *Peat*, *Marwick*, *Blumberg*, *Loftin*, and others, Plaintiffs suffered no injury until the final resolution of the tax court case. Had Plaintiffs prevailed at trial, they would have enjoyed the substantial tax benefit of CARDS and suffered no injury.[5] Thus, neither the fees expended for the CARDS transaction nor the Defendants' termination of Plaintiffs' CARDS loan constituted a "first injury."

Defendants argue Plaintiffs were first injured in 2001, when HVB exercised its express contractual right to cancel the loan component of the CARDS transaction after a year; despite Plaintiffs' payment of fees in 2000.[6]

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[5] The CARDS tax benefits were worth nearly $2 million to Plaintiffs. *Kipnis*, 2012 WL 5371787, at *1, plus the time value of that amount. Plaintiffs incurred $515,000 in fees. *Id*. at *12.

[6] The payment of fees itself does not commence accrual of the statute of limitation. (Op. Br. at 15-17 (citing *Fremont*, 796 So. 2d at 506 (rejecting "claim that [plaintiff] began sustaining damages … in the form of attorney's fees and costs")).

(Resp. at 2). While it is true that the long-term loan served a business purpose at the outset (and thus supported Plaintiffs' tax court defense at summary judgment and trial), such purpose does not mean that Plaintiffs suffered cognizable injury from the loan termination. There is no allegation that Plaintiffs lost out on a single project because of the cancellation. To the contrary, the sole record evidence demonstrates Plaintiffs suffered no injury because "at no time did [they] have to forgo construction of a project because it could not get bonding." *Kipnis*, 2012 WL 5371787, at *3. Moreover, the inference that Defendants try to draw is inappropriate on a motion to dismiss. *See, e.g., Omar v. Lindsey*, 334 F.3d 1246, 1252 (11th Cir. 2003) ("inappropriate" to "constru[e] factual ambiguities in … Defendants' favor").

Further, Defendants' argument fails as a matter of law. There was (and is) no cause of action Plaintiffs could have asserted resulting from HVB's contractually-entitled loan termination. Defendants' right to terminate barred any such claim. HVB asserted and prevailed upon this very argument in *Curtis Investment Co., LLC v. Bayerische Hypo-und Vereinsbank, AG*, 341 Fed. Appx. 487, 497 (11th Cir. 2009), and may not disavow it now. Under Florida law, until "the plaintiff can file suit and

obtain relief" the limitations period "does not begin to run." *Park v. City of Melbourne*, 999 So. 2d 673, 677 (Fla. 5th DCA 2008).[7]

II. Florida's Policy Goals Are Well Served By the Finality Accrual Rule.

No public policy reason supports altering long-standing Florida accrual law here. To the extent there is a hypothetical risk of a fraud claim "growing stale," that risk is avoided by the underlying IRS investigation and tax court case (during which HVB produced documents and was deposed). Without actual risk of staleness, there is no reason to force potential plaintiffs to sue before injury is certain.

In contrast, the finality accrual rule provides real, substantial benefits to all parties and to the court because it avoids unnecessary litigation. *See* Op. Br. at 23; *see also*, *Diaz v. Piquette*, 496 So. 2d 239, 240 (Fla. 3d DCA 1986) ("premature, possibly useless, litigation should be discouraged"); *Taracido v. Perez-Abreu, Zamora & De La Fe, P.A.*, 705 So. 2d 41, 43 (Fla. 3d DCA 1997) ("A client should not be placed in the position of having to

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[7] Defendants also argue that the claims accrued earlier because Plaintiffs alleged that Defendants' admissions of fraud impaired Plaintiffs' tax court case. (Resp. at 35). However, notwithstanding such admissions, Plaintiffs defeated summary judgment, were supported by their accountant at trial and had every reason to believe that they could prevail—which is evidenced by their expenditure of defense fees. *Stokes v. Huggins Constr. Co., Inc.*, 626 So. 2d 327, 330 (Fla. 1st DCA 1993) ("knowledge of injury, not the notice of probable or possible injury … is controlling").

file a potentially baseless claim prematurely fearing that otherwise an action will be precluded by the statute of limitations.").

Had Plaintiffs prevailed in the tax court, they would have suffered no injury and would have no claim against Defendants. Neither party would have incurred litigation fees, nor would any judicial resources have been expended on these claims. Because the finality accrual rule so clearly serves this policy, Defendants' response fails even to address it. This is yet another independent reason that this Court should not alter settled Florida law.

A. The Finality Accrual Rule Avoids Forcing Plaintiffs to Simultaneously Take Contradictory Positions.

Peat, Marwick held that plaintiffs should not have to simultaneously defend their tax treatment and attack their accountants for the alleged errors. 565 So. 2d at 1326. Defendants try to distinguish *Peat, Marwick* by arguing that Plaintiffs could have prevailed in the tax court, notwithstanding HVB's admitted fraud. (Resp. at 36). While this admission undermines Defendants' entire argument (see note 5, *supra*), it does not distinguish *Peat, Marwick*. To state a claim for fraud, Plaintiffs must allege that Defendants intentionally participated in a scheme to defraud them by promoting an illegal transaction. This would directly contradict Plaintiffs' necessary allegations in their tax court case that CARDS was meritorious.

B. Defendants' Rule Structure Creates Defendant-by-Defendant Accrual and Multiplies Litigation.

Examining each defendant's relationship to a plaintiff to determine whether the finality accrual rule applies will lead to defendant-by-defendant claim splitting and multiple lawsuits concerning the same event. (Op. Br. at 24). Here, Plaintiffs' claim against Sidley indisputably accrued only at the conclusion of the tax court case, but Defendants argue that related claims against them (for fraud, conspiracy with and aiding and abetting Sidley) were time-barred before the claims were even ripe against Sidley.

Defendants argue that this situation could not arise because the finality accrual rule only applies to negligence claims. (Resp. at 40). But the finality accrual rule has been applied to intentional tort claims. *See supra* at 5-6; *Fremont*, 796 So. 2d at 505.

Limiting application of *Peat, Marwick* to attorneys and accountants would cause defendant-by-defendant claim splitting and turn Florida's statute of limitations scheme on its head by creating a much lengthier statute against professionals then against non-professionals (including those who they conspire with). Limiting *Peat, Marwick's* application to malpractice claims governed by Section 95.11(4)(a) – as Defendants sometimes argue – would be worse. Doing so would require plaintiffs to separate their tort and malpractice claims against the same professional; and file their tort claims

years before the malpractice claims are even ripe. Any manner of distinguishing *Peat, Marwick* here would inevitably result in unnecessary and duplicative litigation.

C. The Finality Accrual Rule Supplies a Clear Bright Line.

Having abandoned the notice of deficiency date, Defendants' proposed accrual rule would require a fact-intensive inquiry into both whether Plaintiffs were injured and the nature of the relationship between Plaintiffs and Defendants. This is contrary to Florida's express preference for a bright line accrual rule and avoidance of tangential litigation. *Silvestrone v. Edell*, 721 So. 2d 1173, 1176 (Fla. 1998) ("This bright-line rule will provide certainty and reduce litigation over when the statute starts to run.").

Defendants argue that this Court rejected the "bright-line 'final accrual rule'" in *Larson*. But in *Larson*, there were two accruals only because there were two separate injuries; the bright line rule was applied to each separately. 22 So. 3d at 44, 47; *id*. at 42. A rule that a claim accrues at the final conclusion of the underlying matter for all claims and defendants is clear, and it avoids uncertainty and litigation over when the claims accrue.

Defendants fail to advance any argument in favor of their reinterpretation of Florida law. This Court should not alter a rule relied upon

and applied consistently for 25 years without a strong rationale supporting the change. Nor should this Court injure Florida plaintiffs—like Petitioners here—who have relied upon the rulings of this Court to plan their litigation strategies to both defend their actions against the IRS and, should the IRS prevail, pursue their claims against fraudfeasors.

CONCLUSION

Plaintiffs respectfully request that this Court answer the Eleventh Circuit's Certified question consistently with this Court's longstanding precedent: namely, that Plaintiffs' claims accrued only when the tax court judgment became final, that Plaintiffs filed within a short period of time after that final judgment, and that Plaintiffs' claims are therefore timely.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Michael G. Dickler, certify that on September 4, 2015, I caused a true and correct copy of **Petitioners' Reply Brief on the Merits** to be served upon the following *via eFiling Portal and Email*:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that in compliance with the font requirements of Fla. R. App. P. 9.210(a)(2), the font used in Petitioners' Reply Brief On The Merits is Times New Roman 14-point.

/s/ Michael G. Dickler