IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC08-2059
DCA Case No. 2D06-3851

RICHARD HANCHETT and TRENAM, KEMKER, SCHARF, BARKIN, FRYE, O'NEILL & MULLIS, P.A.,

Petitioners,

vs.

TECHNICAL PACKAGING, INC.,

Respondent.

ON DISCRETIONARY REVIEW FROM THE SECOND DISTRICT COURT OF APPEAL

RESPONDENT'S BRIEF ON JURISDICTION

WARREN R. TRAZENFELD, P.A.
Bayview Executive Plaza
3225 Aviation Avenue, Suite 600
Miami, Florida 33133-4741
-and-
HERSCH & TALISMAN, P.A.
2937 SW 27th Avenue
Suite 206
Coconut Grove, Florida 33133
Tel.: (305) 358-0570
Fax: (305) 358-1916

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STATEMENT OF THE CASE AND FACTS

Petitioners, Richard Hanchett and Trenam, Kemker, Scharff, Barkin, Frye, O'Neill & Mullis, P.A., have sought review of the Second District's decision in the case *sub judice* on the ground of express and direct conflict. For the purpose of determining whether such a conflict exists, this Court is limited to the facts which appear on the face of the Second District's opinion. *Hardee v. State*, 534 So. 2d 706, 708 n. (Fla. 1988).[1] Those facts are as follows:

A. The underlying litigation and malpractice.

Respondent, Technical Packaging, sold cellophane cigar tubes. (R.A. 2). UCB Films, Inc. delivered cellophane to Technical in thirty-five separate orders between December 1996 and May 1998, with each order reflected in its own set of documents. *Id.* When Technical used this cellophane, its customers complained about defects that had not existed when Technical was using cellophane from its previous supplier. *Id.* Technical believed that the complaints were caused by UCB's defective cellophane. *Id.* It lost a significant amount of money due to these complaints. *Id.*

Petitioner Hanchett, an attorney with the Trenam Kemker firm, was

[1]Petitioners' Statement of the Case and Facts and Appendix violate this rule and should, accordingly, be disregarded. Respondent attaches as an appendix hereto solely the corrected opinion of the Second District in this case. R.A. refers to this Appendix.

assigned to represent Technical in defending against its customers' claims. (R.A. 2). In March 2000, Technical consulted with Trenam about suing UCB on a contingency-fee basis. *Id*. The firm declined to undertake this representation in the summer of 2001. *Id.*

Thereafter, Technical hired another law firm and, on March 3, 2003, filed suit against UCB. (R.A. 2). Technical's complaint recited eight causes of action, including breach of contract. *Id.* The court entered final summary judgment in favor of UCB ruling that a four-year statute of limitations applied to all of Technical's claims, making the lawsuit untimely. *Id.* The court held that the four-year period applied to the breach-of-contract claim, as well as the other claims, because the Technical-UCB sales agreements were oral contracts. *Id.* Technical did not appeal that judgment. (R.A. 3).

B. This suit.

Thereafter, Technical sued Hanchett and Trenam for malpractice asserting that during the consultations that led to the firm declining to represent it in the suit against UCB, Hanchett gave Technical incorrect dates for the termination of limitations periods; and, as a result, Technical's suit against UCB was untimely filed. (R.A. 1, 3).

Hanchett/Trenam raised several defenses, including abandonment – that is, that Technical had waived any malpractice claims by not appealing the adverse judgment

in the underlying lawsuit. (R.A. 3). Specifically, Hanchett/Trenam argued that the court erred in ruling that the UCB -Technical agreements were oral contracts, with four-year limitations periods. *Id.* Hanchett/Trenam contended that the agreements were instead written contracts entailing five-year limitations periods, and that Technical should have prosecuted an appeal based on that legal theory. *Id.* Hanchett/Trenam moved for and was granted summary judgment based on this defense. *Id.*

C. The Second District's holding.

On appeal, the Second District reversed. First, it explained the concept of abandonment, quoting at length from prior decisions which had addressed this issue:

> Where a party's loss results from judicial error occasioned by the attorney's curable, nonprejudicial mistake in the conduct of the litigation, and the error would *most likely* have been corrected on appeal, the cause of action for legal malpractice is abandoned if a final appellate decision is not obtained. *Pennsylvania Ins. Guar. Ass'n v. Sikes,* 590 So.2d 1051 (Fla. 3d DCA 1991). . . .
>
> Our cases should not be read to require every party who suffers a loss and attributes that loss to legal malpractice to obtain a final appellate determination of the underlying case before asserting a claim for legal malpractice. The test for determining when a cause of action for attorney malpractice arises remains when the existence of redressable harm has been established. In some cases, redressable harm caused by errors in the course of litigation can only be determined upon completion of the appellate process. In other cases, the failure to obtain appellate review should not bar an action for malpractice. We are unable to establish a bright-line rule that complete appellate review of the underlying litigation is a condition precedent to every legal malpractice action. To

> do so would, in many cases, violate the tenet that the law will not require the performance of useless acts.
>
> *Segall v. Segall*, 632 So. 2d 76, 78 (Fla. 3d DCA 1993) (quotation marks and most citations omitted; emphasis added); *see also Hunzinger Constr. Corp. v. Quarles & Brady Gen. P'ship*, 735 So. 2d 589, 595 (Fla. 4th DCA 1999) ("The circumstances in which a client's subsequent actions constitute an abandonment of a legal malpractice claim, as a matter of law, are very narrow. . . . In the instant case, we cannot say, as the court could in *[Pennsylvania Ins. Guar. Ass'n v.] Sikes*, [590 So. 2d 1051 (Fla. 3d DCA 1991),] that the mistake in the original proceedings would in all likelihood have been corrected on appeal." (internal quotation marks omitted; citations omitted)); *Eastman v. Flor-Ohio, Ltd.*, 744 So. 2d 499, 504 (Fla. 5th DCA 1999) ("Accordingly, the trial court in this case properly concluded that the park owner did not abandon its right to pursue a claim of legal malpractice against the law firm by voluntarily dismissing its appeal from the adverse judgment in the class action suit because that judgment was not likely to be reversed due to a finding of judicial error relating to the alleged claim of legal malpractice.").

(R.A. 5-6). Based on these prior decisions, the Court held that the issue in this case was "whether Hanchett/Trenam could demonstrate under the summary judgment standard that an appeal by Technical of the federal district court's adverse judgment would in all likelihood have resulted in a reversal . . ." (R.A. 6).

The Court then held that Hanchett/Trenam had not established abandonment as a matter of law because Technical's UCB lawsuit would have been too late even under the five-year statute of limitations since that limitations period would have begun to run when the contract was breached – i.e., when the defective goods were delivered:

> Florida case law consistently holds that a cause of action for breach of contract accrues and the limitations period commences at the time of the

> breach. *See, e.g., Holiday Furniture Factory Outlet Corp. v. State, Dep't of Corr.,* 852 So. 2d 926, 928 (Fla. 1st DCA 2003) (citing *State Farm Mut. Auto. Ins. Co. v. Lee,* 678 So. 2d 818 (Fla.1996)). The parties do not dispute that, in the underlying action, the respective breaches occurred when the defective product was delivered from UCB to Technical. . . .
>
> . . . Given that causes of action for breach accrued during the December 1996-May 1998 period, when the defective cellophane was delivered, the limitations period corresponding to the respective deliveries expired between December 2001 and May 2003. Because thirty-two of the thirty-five orders at issue were delivered before March 1998, a lawsuit filed in March 2003 with respect to these deliveries was time-barred even under a five-year statute. In short, even if the federal appeals court had reversed with a ruling that the statute of limitations was five years, Technical was still too late in filing its original lawsuit as to the majority of its claims. As a result, Hanchett/Trenam failed to demonstrate abandonment with respect to these claims, and we must reverse the summary judgment at least in part.

(R.A. 7-8). The Court specifically rejected the Hanchett/Trenam claim that Florida case law held that the limitations period for breach of contract started running at some time other than when the breach occurred:

> Hanchett/Trenam argue that some of the cases really mean that a cause of action accrues when financial damages occur. However, they cite no cases in which damages became apparent after the breach and the court held that the cause of action accrued and the limitations period commenced when the damages occurred. On the contrary, some cases conclude that as of the breach at least nominal damages occur, such that the cause of action for breach of contract accrues then, even though actual damages occur later. *See, e.g., Abbott Labs., Inc. v. Gen. Elec. Capital,* 765 So. 2d 737, 740 (Fla. 5th DCA 200 0). . . . [A]t present the rule in Florida is that a cause of action accrues on a breach-of-contract action when the breach occurs.

(R.A. 7-8, n. 3).

SUMMARY OF ARGUMENT

The decision *sub judice* does not expressly and directly conflict with any decision of another court. As the Second District held, Florida case law is clear that a cause of action for breach of contract accrues when the contract is breached and that a plaintiff is held to have abandoned a legal malpractice action by not appealing only if it can be found that the error would *most likely* have been corrected on appeal. The cases petitioners cite simply do not hold to the contrary. Accordingly, the Second District's opinion is in accord with Florida decisional law. Therefore, there is no reason for this Court to review this action.

ARGUMENT

A. The Second District's decision is in accord with Florida law which holds that a breach of contract claim accrues at the time of breach.

Hanchett/Trenam contend that the Second District's decision expressly and directly conflicts with the decision of the First District in *Holiday Furniture Factory Outlet Corp. v. State, Dep't of Corr.*, 852 So. 2d 926 (Fla. 1st DCA 2003), and the decisions of the Fourth District in *J.J. Gumberg Co. v. Janis Services, Inc.*, 847 So. 2d

1048 (Fla. 4th DCA 2003), and *Barbara G. Banks, P.A. v. Thomas D. Lardin, P.A.*, 938 So. 2d 571, 574 (Fla. 4th DCA 2006).[2] In fact, there is no conflict – the cases petitioners cite rely on the very principle of law that the Second District relied on.

For example, the First District expressly held in *Holiday Furniture Factory Outlet* that: "A cause of action on a contract accrues and the limitations period commences at the time of the breach." 852 So. 2d at 928. It then held that "each failure to pay an installment [of rent] constitutes an individual breach" – not an individual element of damages, as petitioners assert – and that was why the statute of limitations barred recovery of only those installments that were due more than five years before plaintiff filed suit. *Id.*

Similarly, in *Barbara G. Banks, P.A. v. Thomas D. Lardin, P.A.*, 938 So. 2d 571, 574 (Fla. 4th DCA 2006), the Court recognized that "[a] cause of action on a contract accrues upon breach of the contract." It then held that the contract in the case

[2]Petitioners also contend that there is conflict with the decision in *In re Estate of Tensfeldt*, 839 So. 2d 720 (Fla. 2d DCA 2003). However, even assuming that such conflict existed – which it does not since the Court in *Tensfeldt* looked to the date of breach to determine when the statute of limitations began running – intra-district conflict is not a basis for this Court's jurisdiction. *See* Fla. R. App. P. 9.030(2)(A)(iv) (stating that "[t]he discretionary jurisdiction of the supreme court may be sought to review (A) decisions of district courts of appeal that . . . (iv) expressly and directly conflict with a decision of *another* district court of appeal or of the supreme court on the same question of law").

before it was not breached until the defendant obtained the attorney's fees and refused to share them and, thus, that was when the cause of action accrued.

Finally, in *J.J. Gumberg Co., supra*,, the Court merely held that the action was time-barred even if the date of injury was used – there was no discussion whether that was also the date of the breach of contract or whether one date should be used over the other. Accordingly, this case does not state any principle of law – much less one that expressly and directly conflicts with the Second District's decision.[3]

B. The Second District's decision is in accord with Florida law on abandonment.

As their second point, petitioners contend that the opinion *sub judice* expressly and directly conflicts with decisions of the Third, Fourth, and Fifth Districts by holding that the standard to apply in evaluating an abandonment defense is whether the appeal "would in all likelihood have resulted in a reversal." Again, there is no conflict. All of the Districts apply the very same standard.

The Third District established this standard in *Pennsylvania Ins. Guar. Ass'n v. Sikes*, 590 So. 2d 1051, 1053 (Fla. 3d DCA 1991), when it held that the plaintiff's settlement of his underlying personal injury case while the appeal of that case was

[3]The Second District's decision on this issue is also in accord with the law as stated by this Court in *State Farm Mut. Auto. Ins. Co. v. Lee*, 678 So. 2d 818, 821 (Fla. 1996), and *Mosher v. Anderson*, 817 So. 2d 812, 814 (Fla. 2002); by the Third District in *Fradley v. County of Dade*, 187 So. 2d 48 (Fla. 3d DCA 1966), and *Meyer v. Roth*, 189 So. 2d 515 (Fla. 3d DCA 1966); the Fourth District in *Medical Jet, S.A. v. Signature Flight Support-Palm Beach*, 941 So. 2d 576 (Fla. 4th DCA 2006); and, the Fifth District in *Abbott Laboratories, Inc. v. General Elec. Capital*, 765 So. 2d 737 (Fla. 5th DCA 2000).

pending constituted an abandonment of his malpractice claim because "[i]f the appeal in the personal injury had run its appellate course, in all likelihood, there would have been a reversal of the judgment."

In *Hunzinger Const. Corp. v. Quarles & Brady General Partnership*, 735 So. 2d 589, 595 (Fla. 4th DCA 1999), the Fourth District, citing *Sikes*, expressly held that because "we cannot say that the trial court's ruling *most likely* would have been reversed had the appeal gone its course . . . we hold that the legal malpractice claim was not abandoned by the termination of the appeal in the [underlying] litigation."

The Fifth District also adopted the *Sikes* approach to the abandonment defense in *Eastman v. Flor-Ohio, Ltd.*, 744 So. 2d 499, 503 (Fla. 5th DCA 1999). The Court expressly held that "the trial court in this case properly concluded that the [plaintiff] did not abandon its right to pursue a claim of legal malpractice . . . by voluntarily dismissing its appeal from the adverse judgment in the class action suit because that judgment was *not likely to be reversed* due to a finding of judicial error relating to the alleged claim of legal malpractice." 744 So. 2d at 504.

The cases now cited by defendants – *Eldred v. Reber*, 639 So. 2d 1086 (Fla. 5th DCA 2004); *Roger Zitrin, M.D., P.A. v. Glaser*, 621 So. 2d 748 (Fla. 4th DCA 1993); *Coble v. Aronson*, 647 So. 2d 968 (Fla. 4th DCA 1994); *Segall v. Segall*, 632 So. 2d 76 (Fla. 3d DCA1994); and *Lenahan v. Russell L. Forkey, P.A.*, 702 So. 2d 610, 611 (Fla.

4th DCA 1997) – are not to the contrary. In *Eldred* and *Roger Zitrin,* the question was when the malpractice cause of action had accrued for purposes of the statute of limitations; thus, they did not even address the question of the standard of proof for abandonment. The same is true of *Coble* – in that case the defense of abandonment was held to be inapplicable since litigational malpractice was not involved. In *Lenahan,* the claim of abandonment was based on dismissal of an action at the trial court level; therefore, once again the question of the requisite standard for reversal in the appellate court was not in issue. Finally, in *Segall*, the Court set forth the *Sikes* standard,632 So. 2d at 78, and applied it. Thus, there is no conflict between the districts and no basis for this Court to accept jurisdiction.

CONCLUSION

Therefore, based on the reasons and authorities set forth above, it is respectfully submitted that the Second District decision does not expressly and directly conflict with any decision of another district court and, accordingly, this Court should not accept jurisdiction over this cause.

WARREN R. TRAZENFELD, P.A.
Bayview Executive Plaza
3225 Aviation Avenue, Suite 600
Miami, Florida 33133-4741
-and-

HERSCH & TALISMAN, P.A.
2937 SW 27th Avenue
Suite 206
Coconut Grove, Florida 33133
Tel.: (305) 358-0570
Fax: (305) 358-1916

_____
PATRICE A. TALISMAN
Florida Bar No. 314511

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this ____ day of November, 2008 to: F. Wallace Pope, Jr., Esq. Johnson, Pope, Bokor, Ruppel & Burns, LLP, Post Office Box 1368, Clearwater, Florida 33757.

_____
PATRICE A. TALISMAN

CERTIFICATE OF FONT SIZE

I hereby certify that the size and style of type used in this Initial Brief is: Times New Roman Font in 14 Point Type.

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PATRICE A. TALISMAN