IN THE SUPREME COURT OF FLORIDA

CASE NO. _____

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

vs.

TECHNICAL PACKAGING, INC.

Respondent

On Appeal from the Second District Court of Appeal
State of Florida

PETITIONERS' BRIEF ON JURISDICTION

F. WALLACE POPE, JR.
FBN : #124449
JOHNSON, POPE, BOKOR,
RUPPEL & BURNS, LLP
P.O. BOX 1368
Clearwater, FL 33757
(727) 461-1818
(727) 441-8617
Attorneys for Petitioners

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases:

Statutes:

STATEMENT OF THE CASE AND FACTS

We will refer to the petitioners as "Trenam." References are to the tab numbers of the appendix to this brief.

Trenam quotes these facts from the Second District's opinion:

> Technical Packaging sold cellophane cigar tubes. In the late 1990s its cellophane supplier was UCB Films, Inc. ("UCB"). Technical ordered cellophane from UCB on approximately thirty-five occasions during this period, with each order reflected in its own set of documents. At some point Technical's customers began complaining about defects in cigar tubes that had not existed when Technical was purchasing cellophane from its previous supplier. Technical claimed that UCB's allegedly defective cellophane was delivered between December 1996 and May 1998. Technical lost a significant amount of money. Trenam, which had had a long-term attorney-client relationship with Technical, assisted Technical in defending claims made by its customers; Hanchett was assigned to represent Technical. In March 2000, Technical consulted with Trenam about the possibility of suing UCB on a contingency-fee basis. After Trenam declined to undertake this representation in the summer of 2001, Technical hired another law firm and filed a complaint against UCB on March 3, 2003. UCB removed the suit to the federal Middle District of Florida. Technical's complaint recited eight causes of action, only one of which-breach of contract-forms the basis of the issue in the instant appeal. UCB pleaded statute of limitations as a defense and prevailed on its motion for summary judgment, with the court ruling that a four-year statute applied to all of Technical's claims, making the lawsuit untimely. The four-year period applied to the breach-of-contract claim because, the court ruled, the Technical-UCB sales agreements were oral contracts. See § 95.11(3)(k), Fla. Stat. (2002) (providing that "[a] legal or equitable action on a contract. . . not founded on a written instrument, including an action for the sale and delivery of goods" entails a four-year limitations period). Technical did not appeal the judgment.
>
> The gist of the present malpractice action is that during the consultations leading to Trenam's declining to represent Technical

> Packaging in a lawsuit against UCB, Hanchett allegedly gave Technical incorrect dates for the termination of limitations periods; as a result, Technical's March 2003 suit against UCB was untimely filed. For its part, Hanchett/Trenam raised several defenses, including abandonment-that is, that Technical, by not appealing the adverse judgment in the underlying lawsuit and winning a reversal, waived any malpractice claims against Hanchett/Trenam. Specifically, Hanchett/Trenam argued below and argue here that the federal district court erred in ruling that the agreements for the sale of cellophane from UCB to Technical were oral contracts, thus entailing four-year limitations periods. Hanchett/Trenam contend (as Technical did in the underlying lawsuit) that the sales agreements were written contracts entailing five-year limitations periods, see § 95.11(2)(b), and that Technical should have prosecuted an appeal based on that legal theory. Relying on the defense of abandonment, Hanchett/Trenam moved for summary judgment and prevailed on that ground. Technical appeals. (Panel Opinion, pp. 2-3, fn. omitted, A-1)

Trenam's abandonment argument was not limited to whether the transactions between Technical and UCB were oral or written contracts. Trenam also argued that the federal court's order could be reversed on a variety of grounds, including accrual and the determination that there was no genuine issue of material fact as to both the date Technical's tort claims accrued and tolling.

Technical was not the end user of the cellophane. It utilized the cellophane in its manufacture of cigar tubes that it sold to its customers, who used the tubes to package their cigars for sale. Technical claimed that its business was damaged after its customers experienced problems with the finished tubes and attributed them to Technical. All damages that Technical

claimed in its underlying complaint against UCB were based on the problems that Technical's customers encountered.

Technical alleged that its customers' claims did not arise until 1998 (A-2, p.5, .¶ 19). In its summary judgment ,the Federal District Court found that the statute of limitations began to run on Technical's claims against UCB in June, 1998. (A-3, pp. 8-9).[1]

THE OPINION OF THE SECOND DISTRICT COURT OF APPEAL

A. The "Accrual" Holding.

Florida Statutes, Section 95.031(1), provides that a cause of action accrues when the "last element" constituting the action occurs. The Second District, citing *Rollins, Inc. v. Butland*, 951 So. 2d 860, 876 (Fla. 2d DCA 2006), recognized that a cause of action for breach of contract has three elements: (1) a contract; (2) a breach; and (3) damages. On page 7 of its opinion, the Second District held:

> Notwithstanding the statutory 'last-element' principle of section 95.031(1), however, 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. [citing *Holiday Furniture Factory Outlet Corp. v. State, Dep't of Corr.*, 852 So. 2d 926, 928 (Fla. 1st DCA 2003) and *State Farm Mut. Auto. Ins. Co. v. Lee*, 678 So. 2d 818 (Fla. 1996)]

---

[1] The record shows that Technical's insurance carrier wrote its counsel on January 14, 2000, and stated that Technical's customers had not asserted any formal claims against Technical. (Panel Opinion, p. 6, A-1)

Ignoring the question of when Technical sustained damages – the last of the elements necessary to "accrue" the cause of action – the Second District held that the "breaches occurred" when UCB delivered the defective product to Technical.[2] Therefore, according to the Second District, even if the five year statute of limitations applied, the causes of action accrued during the December, 1996 – May, 1998, period and the limitations periods expired between December, 2001 and May, 2003. Accordingly thirty-two of the thirty-five orders were delivered before March, 1998, so the lawsuit filed in March, 2003, was time barred even under a five year statute. Thus, according to the Second District, the statute began running before Technical sustained any damages at all.

B. The "Abandonment Defense" Holding.

"Abandonment" is available as a defense where an appeal could have cured the claimed malpractice. *Coble v. Aaronson*, 647 So. 2d 968, 970 (Fla. 4th DCA 1994).

On page 6 of its opinion, the Second District holds that the standard for assessing whether "abandonment" is a defense to a legal malpractice action requires the law firm to show that an appeal of the underlying order

---

[2] Under this reasoning, if Technical received the bulk defective cellophane, stored it for five years and then used it, Technical would simply be out of luck. Its cause of action would have expired before it sustained any damage.

"would in all likelihood have resulted in a reversal." Citing *Segall v. Segall*, 632 So. 2d 76, 78 (Fla. 3d DCA 1993) and *Pennsylvania Ins. Guar. Ass'n* v. *Sikes*, 590 So. 2d 1051 (Fla. 3d DCA 1991).

Trenam timely moved for rehearing, etc., but the Second District denied the motion after making a small change in a single sentence of its initial opinion. (A-4). Trenam timely filed a notice seeking to invoke the discretionary jurisdiction of this Court.

ARGUMENT

I. Conflict Regarding the Accrual Holding

In the opinion below, the Second District recognizes the statutory mandate of Florida Statutes, Section 95.031(1), that a cause of action accrues "when the last element constituting the action occurs." The Second District also recognizes that there are three elements to a breach of contract claim: (1) a valid contract; (2) a material breach; and (3) damages. These are *separate* elements. Notwithstanding this acknowledgement, the Second District clearly held that the cause of action accrues when the *second element*, the "breach," occurs, and not when the third element, "damages," occurs. A number of opinions recognize that "damages" may occur after the breach. There is no point in having a separate damages element if it is always the same as the breach element.

The Second District's opinion is in direct conflict with *Holiday Furniture Factory Outlet Corp. v. State, Dep't of Corr.*, 852 So. 2d 926 (Fla. 1st DCA 2003).[3] Holiday Furniture leased property to the State for a five year term beginning February 1, 1995. The State totally breached the lease on March 1, 1995, and did not take possession of the property. Holiday Furniture sued on December 28, 2001, almost seven years after the March 1, 1995, breach date. The First District held that each individual failure to pay constituted an *individual item of damage to the lessor*. Holiday Furniture was entitled to sue the State "for all of the unpaid installments, and the statute of limitations bars recovery only of those installments due over five years before Holiday Furniture sued on December 28, 2001." *Id.* at 928. Holiday Furniture's cause of action did not accrue until it suffered actual damage each month that it failed to receive the monthly rent. The First District applied no fictional "nominal damage" as of the date of breach, March 1, 1995.

The Second District's opinion directly conflicts with its own opinion in *Estate of Tensfeld v. Tensfeld*, 839 So. 2d 720 (Fla. 2d DCA 2003). There, the Court held that a cause of action for breach of contract to make a will devising certain amounts to specific persons did not accrue in 1992,

[3] Ironically, the Second District cites *Holiday Furniture* in support of its accrual holding (Panel Opinion, p. 7, A-1).

when the testator made a will that breached his contract, but accrued when the testator died in 2000, and the devisees sustained damage.

The opinion below conflicts with *J.J. Gumberg Co. v. Janis Services, Inc.*, 847 So. 2d 1048 (Fla. 4th DCA 2003), where a general contractor contracted with the property owner to procure liability insurance. The Fourth District held that the cause of action accrued when an employee was injured, (i.e. damage occurred) and not earlier when the contractor breached by failing to procure liability insurance.

The opinion below directly conflicts with *Barbara G. Banks, P. A. v. Thomas D. Lardin, P.A.*, 938 So. 2d 571 (Fla. 4th DCA 2006), where the issue was breach of an oral contract involving a referral fee agreement between lawyers. The trial court held that the cause of action accrued when the defendant anticipatorily repudiated the contract on September 27, 1999, before any damages occurred. Reversing, the Fourth District ignored the "nominal damages" analysis of *Abbott Laboratories, Inc. v. General Electric Capital*, 765 So. 2d 737, 740 (Fla. 5th DCA 2000), and held that the cause of action accrued when damages occurred after monies were recovered and defendant refused to pay the referral fee.[4]

[4] Further evidence of the conflict and confusion in Florida law surrounding the "accrual" of a contract cause of action is found in Judge May's dissent in *Medical Jet, S.A. v. Signature Flight Support-Palm Beach*,

II. Conflict Regarding the "Abandonment" Holding.

The decision below holds that the law firm must establish that the appeal "would in all likelihood have resulted in a reversal." This holding directly conflicts with the following decisions of other district courts of appeal:

- *Eldred v. Reber*, 639 So. 2d 1086, 1087 n. 1 (Fla. 5th DCA 1994). ("'Litigational malpractice' refers to error committed in the course of litigation which ***might be changed*** on appeal." [emphasis added]).

- *Zitrin, M.D., P.A. v. Glaser*, 621 So. 2d 748, 749 (Fla. 4th DCA 1993). (In cases involving litigational malpractice – errors committed in the course of litigation – the existence of negligence is not determined until the appeal is complete.)

- *Coble v. Aaronson*, 647 So. 2d 968, 970 (Fla. 4th DCA 1994) ("In other words, if a favorable outcome on appeal ***could eliminate*** any reasonable possibility of loss because of alleged malpractice occurring during the course of litigation, redressable harm cannot be established if the case is settled and there is no appeal." [emphasis added])

- *Segall v. Segall*, 632 So. 2d 76 (Fla. 3d DCA 1994): (Court unable to establish a bright-line rule that complete appellate review of the underlying litigation is a condition precedent to every legal malpractice action. *Id*. at 78. "By engaging in conduct that led to the dismissal of their appeal, the plaintiffs foreclosed any determination that judicial error rather than attorney malpractice caused their loss in the underlying litigation, and waived their claim for malpractice." *Id*. at 78)

Inc., 941 So. 2d 576, 579 (Fla. 4th DCA 2006). Judge May points out "the elephant in the room," which is "the case law's failure to reconcile the law on the accrual of a cause of action and the statute of limitations in breach of contract actions." (*Id.* at 580).

- *Lenahan v. Russell L. Forkey, P.A.*, 702 So. 2d 610, 611 (Fla. 4th DCA 1997) ("[C]lients should not be encouraged to sue their lawyers precipitously for alleged errors, if the error ***could be*** remedied either by an appeal or the outcome of other proceedings." [emphasis added])

CONCLUSION

The decision below expressly and directly conflicts with decisions from other district courts of appeal regarding the "accrual" of a contract cause of action. The decision below also expressly and directly conflicts with decisions from other district courts of appeal regarding the standard to assess the defense of "abandonment" in a legal malpractice action.

Contract litigation is a major part of all civil litigation. The concept of the "accrual" of a contract cause of action is implicated in mortgage, insurance, lease, real estate, licenses, and all manner of other contractual disputes. When a breach occurs before any damage, an important issue arises about how that relates to the "accrual" of the cause of action. A claimant may not know that a contract has been breached until the claimant suffers some damages. It makes no sense to require a claimant to file a lawsuit before the claimant even knows that it has been harmed. Although the abandonment defense may not arise in civil litigation as often as the accrual issue, the standard for abandonment should be uniform throughout the state.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been served upon Warren R. Trazenfeld, Esq., Warren R. Trazenfeld, P.A., Bayview Executive Plaza, 3225 Aviation Avenue, Suite 600, Miami, FL 33133-4741 and Patrice A. Talisman, Esq., Hersch & Talisman, P.A., 2937 S.W. 27th Avenue, Suite 206, Coconut Grove, FL 33133 by regular U.S. mail, this ___ day of October, 2008.

JOHNSON, POPE, BOKOR,
RUPPEL & BURNS, LLP

By:_____

F. Wallace Pope, Jr.
Post Office Box 1368
Clearwater, Florida 33757
(727) 461-1818
(727) 441-8617 fax
Attorneys for Petitioners
FBN #124449

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Florida Rules of Appellate Procedure 9.100(1) and 9.210(a)(2). This brief is in 14 point, Times New Roman.

_____
F. Wallace Pope, Jr.

454437