SUPREME COURT OF FLORIDA

DAVID R. MAY, as Administrator Ad Litem of the Estate of Oscar T. Bradley, deceased,

Appellant,

v. CASE NO. 96,652

ILLINOIS NATIONAL INSURANCE COMPANY,

Appellee.

ON CERTIFIED QUESTION FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT
CASE NO. 98-2580

INITIAL BRIEF OF APPELLANT

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The undersigned attorney hereby certifies that this brief was prepared using a 14-point Times New Roman proportionally spaced font in accordance with this court's administrative order dated July 13, 1998.

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STATEMENT OF THE CASE AND FACTS

This case is before the court on certified question from the United States Court of Appeals for the Eleventh Circuit to address an issue of Florida probate law which affects the outcome of an insurance bad faith-excess judgment action brought by petitioner David R. May, as administrator ad litem of the estate of Oscar T. Bradley, against Bradley's insurer, respondent Illinois National Insurance Company. The record on appeal transmitted to this court by the Eleventh Circuit will be cited in this brief by volume number, followed by the docket number assigned by the district court and the appropriate page number. The Eleventh Circuit's slip opinion appended to this brief under Tab 1 will be cited as "Slip op."

The relevant facts indicate that Illinois National issued a standard automobile liability insurance policy to Oscar T. Bradley with limits of $10,000 per person and $20,000 per accident. Slip op. at 5; R1-1 (Complaint ¶ 4 and Exhibit B). On September 21, 1991, while the policy was in full force and effect, Bradley negligently operated a motor vehicle owned by his niece, Velma Murphy, that collided with a vehicle driven by Donald Prockup in which his wife, Inez Prockup, was riding as a passenger. As a result of the accident, Bradley and Inez Prockup were killed and Donald Prockup sustained bodily injuries. Slip op. at 4; R1-1 (Complaint ¶ 5).

A. Probate Proceedings

On May 20, 1992, no estate proceedings having been commenced on behalf of Oscar T. Bradley, Prockup filed a petition in the Circuit Court in and for Escambia County, Florida, Probate Division (hereafter "probate court"), for appointment of David R. May as administrator ad litem of the Bradley Estate. R2-85 (Exhibit C). In his petition, Prockup alleged that he held a cause of action against the Bradley Estate as a result of the accident of September 21, 1991. R2-85 (Exhibit C). On May 26, 1992, the probate court entered an order appointing May as administrator ad litem of the Bradley Estate "to represent the estate in the action against the estate which arose out of an accident on September 21, 1991, in which Inez Prockup sustained fatal injuries." R2-85 (Exhibit D).

On February 4, 1993, Emmer Bell Johnson, one of Oscar Bradley's nieces, filed a petition for administration in the same probate proceedings commenced by Prockup, requesting appointment as personal representative of her uncle's estate. R2-85 (Exhibit E). In response to Johnson's petition, Prockup filed an answer, affirmative defenses and counter-petition for administration in which he sought appointment of May as personal representative. R2-85 (Exhibit G). In his counter-petition, Prockup provided the following information about his pending claim against the Bradley Estate:

> 1. Respondent [Prockup] is a creditor of the Estate of OSCAR THOMAS BRADLEY, by virtue of a wrongful

> death claim against the estate of OSCAR THOMAS BRADLEY which arose out of an automobile accident in Holmes County, Florida, on September 21, 1991, in which INEZ PROCKUP sustained fatal injuries.

Slip op. at 11; R2-85 (Exhibit G, page 2). After another relative, Fred Bradley, petitioned for appointment, the probate court appointed Johnson and Bradley as co-personal representatives of the estate by order dated July 23, 1993. R2-85 (Exhibits H and J). After their appointment, the co-personal representatives never sought May's removal as administrator ad litem and no order was ever entered by the probate court to that effect.

On September 2, 1993, and September 9, 1993, the co-personal representatives published notice of administration in a local newspaper, notifying creditors that they had three months to file claims against the estate. R2-85 (Exhibit N). As will be discussed in detail in the argument section of this brief, section 733.702, Florida Statutes, provides that no claim is binding upon an estate unless filed within the later of three months after first publication of notice of administration or, in the case of a creditor served with a copy of the notice of administration, thirty days after such service. Section 733.710, Florida Statutes, provides that the estate shall not be liable for any claims or causes of action unless a claim is filed pursuant to section 733.702 within two years after the decedent's death. On December 27, 1993, more than three months after first publication of notice of administration, and more than two years after Bradley's death, Prockup

filed an unliquidated "Statement of Claim" against the Bradley Estate "for damages which arose out of an accident in Holmes County, Florida, on September 21, 1991, in which Inez Prockup sustained fatal injuries." Slip op. at 6; R2-85 (Exhibit O). Prockup did not file a statement of claim for his own bodily injuries arising out of the same accident. Although Prockup's claim was filed beyond the three-month deadline, the co-personal representatives filed a "proof of claim" on February 22, 1994, stating their intention to honor Prockup's claims for both bodily injury and wrongful death in an "undetermined" amount. R2-85 (Exhibit P).

B. Prockup's Suit Against the Bradley Estate

On May 15, 1992, Prockup filed suit in state court for the wrongful death of his wife and for his own bodily injuries against Velma Murphy, the owner of the vehicle driven by Oscar Bradley, and David R. May, "as personal representative of the Estate of Oscar T. Bradley, deceased." Slip op. at 4; R2-85 (Exhibit K). On June 11, 1992, an answer was filed jointly on behalf of Murphy and May by attorney Linda Wade who had been retained by Atlanta Casualty Company, Murphy's insurer. R2-95 (Exhibit A). In addition to general denials of negligence, the answer filed by Murphy and May raised the affirmative defenses of comparative fault, fault of third-parties, failure to use seat belts and setoff for collateral sources. R2-95 (Exhibit A). Pursuant to the subsequent stipulation of

the parties to that action, Murphy and May admitted liability and the cause was submitted to a special master for determination of Prockup's damages. R2-95 (Exhibit B). The special master awarded Prockup $175,000 for his bodily injuries and $931,522.73 for the wrongful death of his wife. Slip op. at 5; R2-95 (Exhibit B). Based on the special master's findings, a final judgment was entered against Murphy and May, in his representative capacity, for $1,106,522.73. R2-85 (Exhibit Q). At no time during the Prockup wrongful death-personal injury action did the Bradley Estate, either by answer, affirmative defense or otherwise, raise any defenses or objections related to Prockup's failure to comply with the claims filing requirements established by the Florida Probate Code, nor did the estate assert a defense based on section 733.702(4)(b), Florida Statutes, which limits recovery against the estate to the limits of liability insurance in the absence of a timely statement of claim.

C. The Bad Faith-Excess Judgment Action

May, as administrator ad litem of the Bradley Estate, subsequently instituted the current action against Illinois National in the Circuit Court in and for Escambia County, Florida, to recover damages based on Illinois National's alleged "bad faith" failure to settle the Prockup claims against the Bradley Estate within policy limits, resulting in an excess judgment against the estate for over $1 million. Slip

op. at 5; R1-1. The cause was removed by Illinois National to the United States District Court for the Northern District of Florida. Slip op. at 5; R1-1.

As pertinent to the certified question, Illinois National alleged in its answer that May's bad faith action against the insurer was barred under Florida law because the Bradley Estate had "no personal exposure or liability to Donald Prockup, individually, or as Personal Representative of the Estate of Inez Prockup, for any sums in excess of the policy limits afforded by Illinois National." R2-79, ¶ 25. In this respect, Illinois National moved for summary judgment on the ground that the estate was not liable for the excess judgment because Prockup's claims, individually, and in his representative capacity, were barred by operation of the Florida Probate Code, arguing specifically that Prockup failed to file a statement of claim against the Bradley Estate within three months of the first publication of the notice of administration as required by section 733.702, Florida Statutes, or within two years after Bradley's death as required by Section 733.710, Florida Statutes. R2-85.[1]

In response to Illinois National's motion for summary judgment, May argued that (1) Prockup's petition for appointment of May as guardian ad litem and his counter-petition for administration filed in the Bradley Estate proceedings satisfied the filing requirements and provided sufficient notice pursuant to sections

[1] Copies of sections 733.701-733.710, Florida Statutes (1991), are appended to this brief under Tab 3.

733.702 and 733.710, Florida Statutes; (2) the co-personal representatives of the Bradley Estate waived the filing requirements established by sections 733.702 and 733.710 by failing to raise Prockup's noncompliance with those statutes as an affirmative defense to the Prockup wrongful death-personal injury action filed against the Bradley Estate, by filing a "proof of claim" in the probate court and by making partial payment of the claim; and (3) even if the Bradley Estate was not personally liable for the excess judgment, the administrator ad litem nonetheless could maintain a bad faith suit and recover the excess judgment from Illinois National because the potential bad faith claim was an asset of the estate which the estate's representatives were obligated to collect on behalf of the creditors. May's third argument was based on *Camp v. St. Paul Fire & Marine Ins. Co.*, 616 So. 2d 12 (Fla. 1993), and *Venn v. St. Paul Fire & Marine Ins. Co.*, 99 F.3d 1058 (11th Cir. 1996). R2-95.[2]

The district court granted Illinois National's motion for summary judgment and entered final judgment in its favor accordingly. R3-153, 154; Tab 2. The district court determined that (1) Prockup failed to file a sufficient statement of claim against the Bradley Estate within three months after first publication of the notice of administration or two years after Bradley's death as required by sections

[2] *Camp* and *Venn* held that the trustee of an insured's bankruptcy estate could maintain an action for bad faith against the bankrupt's liability insurer even though the excess judgment entered against the insured had been discharged in bankruptcy and cancelled of record.

733.702 and 733.710, Florida Statutes, respectively (R3-153-5-9); (2) because section 733.710, Florida Statutes, operates as a statute of repose, rather than a statute of limitations, the co-personal representatives of the Bradley Estate could not waive Prockup's noncompliance (R3-153-9-12); and (3) because the Bradley Estate was not liable for Prockup's claims not perfected under the Florida Probate Code, no cause of action for bad faith to recover the excess judgment exists under Florida law. R3-153-12-14.

The United States Court of Appeals for the Eleventh Circuit affirmed the summary judgment, in part, and certified a determinative question of Florida law to this court. In framing the issues, the court of appeals first noted that "Florida law recognizes a cause of action by an insured against his liability insurer based on the insurer's bad faith failure to settle a claim resulting in an excess judgment against the insured that exceeds policy limits." Slip op. at 2, citing *Boston Old Colony Ins. Co. v. Gutierrez*, 386 So. 2d 783 (Fla. 1980), *cert. denied*, 450 U.S. 922 (1981). The court further noted, however, that "[i]f a deceased insured's estate is not obligated to pay the excess judgment, then no cause of action for bad faith exists." Slip op. at 2, citing *Fidelity & Cas. Co. v. Cope*, 462 So. 2d 459, 461 (Fla. 1985).

In partially affirming the summary judgment, the court of appeals specifically held that (1) May's argument that an excess judgment action could be maintained under *Camp* and *Venn* without Prockup having perfected a claim under

the Probate Code lacked merit (slip op. at 6-8); (2) the petition for appointment as administrator ad litem and the answer and counter-petition for appointment as personal representative, both filed by Prockup in the Bradley Estate proceedings, were insufficient to satisfy the claims filing requirements established by the Florida Probate Code (slip op. at 8-11); and (3) neither the estate's failure to file an objection to Prockup's claim nor its partial payment of Prockup's claim constituted a waiver. Slip op. at 12-13. The court's rulings left unresolved the question whether the Bradley Estate had waived Prockup's failure to timely file a claim against the estate by neglecting to raise that point as an affirmative defense to Prockup's wrongful death-personal injury action. Slip op. 13. The court of appeals noted that to answer that question it must determine whether sections 733.702 and 733.710, Florida Statutes, operate as statutes of limitations, which must be pled and proved by the estate, or whether they operate as statutes of repose or nonclaim that automatically bar an action against the estate. Slip op. at 13. In this respect, the court acknowledged a divergence of opinion between Florida's third and fourth district courts of appeal on this point of law and, accordingly, certified the following question to this court:

> WHETHER SECTION 733.702 AND SECTION 733.710 OF THE FLORIDA STATUTES CONSIDERED SEPARATELY AND/OR TOGETHER OPERATE AS STATUTES OF NONCLAIM SO THAT IF NO STATUTORY EXCEPTION EXISTS, CLAIMS NOT FORMALLY PRESENTED WITHIN THE DESIGNATED TIME PERIOD ARE NOT BINDING ON THE ESTATE, OR DO THEY

ACT AS STATUTES OF LIMITATIONS WHICH MUST BE PLEADED AND PROVED AS AFFIRMATIVE DEFENSES IN ORDER TO AVOID WAIVER

Slip op. at 18.

ISSUES PRESENTED FOR REVIEW

I.

(as framed by the certified question)

WHETHER SECTION 733.702 AND SECTION 733.710 OF THE FLORIDA STATUTES CONSIDERED SEPARATELY AND/OR TOGETHER OPERATE AS STATUTES OF NONCLAIM SO THAT IF NO STATUTORY EXCEPTION EXISTS, CLAIMS NOT FORMALLY PRESENTED WITHIN THE DESIGNATED TIME PERIOD ARE NOT BINDING ON THE ESTATE, OR DO THEY ACT AS STATUTES OF LIMITATIONS WHICH MUST BE PLEADED AND PROVED AS AFFIRMATIVE DEFENSES IN ORDER TO AVOID WAIVER

II.

IF SECTIONS 733.702 AND 733.710 ARE CONSIDERED STATUTES OF NONCLAIM, WHETHER ILLINOIS NATIONAL IS PRECLUDED NONETHELESS FROM RAISING THE NONCLAIM STATUTES IN THE BAD FAITH-EXCESS JUDGMENT ACTION WHEN THE INSURED ESTATE FAILED TO PLEAD OR OTHERWISE RAISE THOSE STATUTES AS A DEFENSE TO THE UNDERLYING WRONGFUL DEATH-PERSONAL INJURY ACTION

SUMMARY OF ARGUMENT

Adhering to this court's decision in *Barnett Bank of Palm Beach County v. Estate of Read*, 493 So. 2d 447 (Fla. 1986), section 733.702, Florida Statutes (1991), which establishes the procedural framework and time limits for filing claims against estates, should be construed as a statute of limitations subject to waiver rather than a statute of repose or "jurisdictional" statute of nonclaim. Although the Florida Probate Code has been amended in several respects since *Barnett Bank* was decided, the decision has never been overruled and the foundation for its holding remains intact. Similarly, this court should resolve the direct conflict between the third and fourth districts by holding that section 733.710, Florida Statutes (1991), operates as a statute of limitations. This result is supported by legislative history and recognizes that section 733.710, although purporting to bar all claims unless filed within two years after the decedent's death, does not contain the absolute words of finality typical of true statutes of repose. Further, if section 733.710 is construed as a statute of repose, the probate court would lose authority two years after the decedent's death to grant relief to worthy creditors fraudulently induced by unscrupulous personal representatives into forgoing the filing of valid claims.

Alternatively, even if sections 733.702 and/or 733.710 are construed as statutes of repose, the Bradley Estate nonetheless was required to plead those

statutes as affirmative defenses to the independent action for wrongful death and personal injury filed by Prockup. Because the Bradley Estate failed to plead or otherwise raise either section 733.702 or section 733.710 in Prockup's wrongful death-personal injury action, the estate waived its defenses based on those statutes and the excess judgment remains a valid obligation of the estate which can support a bad faith action.

ARGUMENT

I. Sections 733.702 and 733.710 should be construed as statutes of limitations.

Before addressing the certified question, three essential terms should be defined and distinguished: "statute of limitations," "statute of repose" and "statute of nonclaim." "A statute of limitation begins to run upon the accrual of a cause of action except where there are provisions which defer the running of the statute in cases of fraud or where the cause of action cannot be reasonably discovered." *Kush v. Lloyd*, 616 So. 2d 415, 418 (Fla. 1992). "In contrast to a statute of limitation, a statute of repose precludes a right of action after a specified time which is measured from the incident of malpractice, sale of a product, or completion of improvements, rather than establishing a time period within which the action must be brought measured from the point in time when the cause of action accrued." *University of Miami v. Bogorff*, 583 So. 2d 1000, 1003 (Fla. 1991). A statute of nonclaim, sometimes referred to as a "jurisdictional" statute of nonclaim, is more "akin to a statute of repose," *Comerica Bank & Trust, F.S.B. v. SDI Operating Partners, L.P.*, 673 So. 2d 163, 164 (Fla. 4th DCA 1996), and "operates as an automatic bar to untimely claims." *Thames v. Jackson*, 598 So. 2d 121, 123 (Fla. 1st DCA 1992). Adding to the confusion regarding the appropriate terminology, Florida courts frequently use the term "nonclaim" in its broadest

sense to encompass both statutes of limitations and statutes of repose. *See Barnett Bank of Palm Beach County v. Estate of Read*, 493 So. 2d 447, 448 (Fla. 1986); David T. Smith, *Nonclaim Procedure Under the Florida Probate Code: Exceptions to an Apparent Statutory Bar*, 40 U. Fla. L. Rev. 335, 336 n.4 (1988).

A. Section 733.702

Section 733.702, Florida Statutes (1991) provides:

> **733.702 Limitations on presentation of claims**
>
> (1) *If not barred by s. 733.710, no claim or demand against the decedent's estate that arose before the death of the decedent*, including claims of the state and any of its subdivisions, whether due or not, direct or contingent, or liquidated or unliquidated; no claim for funeral or burial expenses; no claim for personal property in the possession of the personal representative; and no claim for damages, including, but not limited to, an action founded on fraud or another wrongful act or omission of the decedent, is binding on the estate, on the personal representative, or on any beneficiary *unless filed within the later of 3 months after the time of the first publication of the notice of administration or, as to any creditor required to be served with a copy of the notice of administration, 30 days after the date of service of such copy of the notice on the creditor, even though the personal representative has recognized the claim or demand by paying a part of it or interest on it or otherwise*. The personal representative may settle in full any claim without the necessity of the claim being filed when the settlement has been approved by the beneficiaries adversely affected according to the priorities provided in this code and when the settlement is made within the statutory time for filing claims; or, within 3 months after the first publication of the notice of

administration, he or she may file a proof of claim of all claims he or she has paid or intends to pay.

(2) No cause of action heretofore or hereafter accruing, including, but not limited to, an action founded upon fraud or other wrongful act or omission, shall survive the death of the person against whom the claim may be made, whether an action is pending at the death of the person or not, unless the claim is filed within the time periods set forth in this part.

(3) Any claim not timely filed as provided in this section is barred even though no objection to the claim is filed on the grounds of timeliness or otherwise unless the court extends the time in which the claim may be filed. Such an extension may be granted only upon grounds of fraud, estoppel, or insufficient notice of the claims period. No independent action or declaratory action may be brought upon a claim which was not timely filed unless such an extension has been granted. If the personal representative or any other interested person serves on the creditor a notice to file a petition for an extension or be forever barred, the creditor shall be limited to a period of 30 days from the date of service of the notice in which to file a petition for extension.

(4) Nothing in this section affects or prevents:

(a) A proceeding to enforce any mortgage, security interest, or other lien on property of the decedent.

(b) To the limits of casualty insurance protection only, any proceeding to establish liability of the decedent or the personal representative for which he or she is protected by the casualty insurance.

(c) The filing of a claim by the Department of Revenue subsequent to the expiration of the time for filing claims provided in subsection (1), provided it does so file within 30 days after the service of the inventory by the personal representative on the department or, in the event an amended or supplementary inventory has been prepared, within 30 days after the service of the amended or supplementary inventory by the personal representative on the department.

> (d) The filing of a cross-claim or counterclaim against the estate in an action instituted by the estate; however, no recovery on such a cross-claim or counterclaim shall exceed the estate's recovery in such an action.
>
> (5) Nothing in this section shall extend the limitations period set forth in s. 733.710.

(emphasis supplied).

As the Eleventh Circuit opinion suggests, several Florida cases decided in recent years have addressed the question whether section 733.702 operates as a statute of limitations or a jurisdictional statute of nonclaim. In *Barnett Bank of Palm Beach County v. Estate of Read*, 493 So. 2d 447, 448 (Fla. 1986), this court squarely held that section 733.702, Florida Statutes (1983), operates as a statute of limitations rather than a jurisdictional statute of nonclaim and, therefore, was subject to equitable excuses for failing to timely file claims, such as fraud or estoppel.[3] The court explained:

> We must decide whether the three-month limitation period in section 733.702 is a jurisdictional statute of nonclaim or a statute of limitations. An untimely claim filed pursuant to a jurisdictional statute of nonclaim is automatically barred. *Miller v. Nolte*, 453 So. 2d 397 (Fla. 1984). However, a claim filed beyond the time set forth in a statute of limitations is only barred if the statute of limitations is raised as an affirmative defense or, if the defense appears on the face of the prior pleading, by way of motion to dismiss. Fla.R.Civ.P. 1.110(d). Failure to plead that the statute of limitations has expired constitutes

[3] Section 733.702 was amended in 1988 to permit the court to grant extensions for filing claims on grounds of fraud and estoppel. *See* Ch. 88-340, § 6, Laws of Fla.; *In re Estate of Parson*, 570 So. 2d 1125, 1125 n.1 (Fla. 1st DCA 1990).

> waiver. *Aboandandolo v. Vonella*, 88 So. 2d 282 (Fla. 1956); *Tuggle v. Maddox*, 60 So. 2d 158 (Fla. 1952). Thus, the estate contends that section 733.702 is a statute of nonclaim which automatically bars Barnett Bank's claim, while Barnett Bank asserts that section 733.702 is a statute of limitations which the estate waived by its failure to object.
>
> We hold that section 733.702 is a statute of limitations.

Barnett Bank, 493 So. 2d at 448.

Next, in *In re Estate of Parson*, 570 So. 2d 1125, 1126 (Fla. 1st DCA 1990), the first district considered amendments to the Probate Code enacted after 1983, the version of the Probate Code construed by *Barnett Bank*. Although *Barnett Bank* had not been overruled by this court, the first district classified section 733.702, Florida Statutes (Supp. 1988), as a jurisdictional statute of nonclaim because, the court reasoned, the 1984 and 1986 amendments to section 733.705, Florida Statutes, which governs payment of and objections to claims, "indicate the legislature's intent to create a jurisdictional statute of nonclaim which, under the circumstances specified in the statutes, automatically bars untimely claims." *Parson*, 570 So. 2d at 1126. In this respect, the 1984 amendment added the following language to section 733.705(3) (subsequently renumbered as section 733.705(4)):

> No action or proceeding on the claim shall be brought against the personal representative after the time limited

above, and any such claim is thereafter forever barred without any court order.

Ch. 84-25, § 1, Laws of Fla. Notably, the *Parson* court's conclusion that section 733.702 had evolved into a statute of nonclaim was based exclusively on amendments to section 733.705, not any amendments to section 733.702.[4]

In *Spohr v. Berryman*, 589 So. 2d 225 (Fla. 1991), this court construed the 1985 version of section 733.702, Florida Statutes, and held that a creditor's filing of a lawsuit within the nonclaim period does not comply with the claim filing requirements established by section 733.702. Although the case was not cited, the court apparently disagreed with *Parson* and reaffirmed its holding in *Barnett Bank* that although section 733.702 is "known as a statute of nonclaim, it is nevertheless a statute of limitations." *Spohr*, 589 So. 2d at 227.

More recently, the court in *Pezzi v. Brown*, 697 So. 2d 883, 884 (Fla. 4th DCA), *rev. denied*, 705 So. 2d 7 (1997), citing *Spohr*, confirmed that "Section 733.702 operates as a statute of limitations for claims made against an estate." In that case, the court held that a creditor's failure to timely file a claim against the estate within the time limits prescribed by section 733.702 and section 733.710 did not bar the claimant's cause of action for damages to the extent of the decedent's

[4] The *Parson* court further buttressed its ruling by noting that the United States Supreme Court in *Tulsa Professional Collection Servs., Inc. v. Pope*, 485 U.S. 478, 108 S. Ct. 1340, 99 L. Ed. 2d 565 (1988), had held "that an Oklahoma statute similar to Florida's 1987 statute was a jurisdictional statute of nonclaim, not a statute of limitations." *Parson*, 570 So. 2d at 1126, n.2.

liability insurance coverage. The court noted that, pursuant to section 733.702(4)(b), the failure to timely file a claim against the estate does not prevent "[t]o the limits of casualty insurance protection only, any proceeding to establish liability of the decedent or the personal representative for which he or she is protected by the casualty insurance." *See Pezzi*, 697 So. 2d at 885.[5]

The foregoing summary of cases indicates that this court's holding in *Barnett Bank* remains extant authority for the proposition that section 733.702 is a statute of limitations which must be raised by appropriate pleadings. *Barnett Bank* and the cases cited therein recognize that section 733.702 is intended to provide a procedural framework for filing claims and does not contain absolute words of finality typical of statutes of repose. *See, e.g., Harbour House Properties v. Estate of Stone*, 443 So. 2d 136, 137 (Fla. 3d DCA 1983) ("Section 733.702, Florida Statutes (1981) and its predecessors are not nonclaim statutes but guidelines for judicial procedure which may be relaxed in the sound discretion of the probate court for good cause shown."). In fact, in its current form, section 733.702 authorizes the probate court to extend the time for filing claims on grounds of fraud, estoppel and insufficient notice. *See* § 733.702(3), Fla. Stat. (1991). If section 733.702 was a true statute of repose, no extensions would be allowed.

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[5] Most recently, the court in *Agency for Health Care Admin. v. Estate of Johnson*, 24 Fla. Law Weekly D2061 (Fla. 3d DCA September 8, 1999), declined to address the issue whether section 733.702 is a statute of limitations or a jurisdictional statute of nonclaim, resolving the case on other grounds.

The first district's decision in *Parson* does not dictate a contrary result. Although the court in that case determined that certain post-1983 amendments to section 733.705 expressed the legislature's intent for section 733.702 to operate as a statute of nonclaim, the reasoning of the *Parson* court apparently was not accepted by this court in *Spohr* or by the fourth district in *Pezzi*. Further diluting *Parson's* holding, the court in that case, as noted previously, based its reasoning on an amendment to section 733.705, not amendments to section 733.702. In this respect, section 733.705, like section 733.702, is a statute of limitations which encompasses "rules of judicial procedure," as distinguished from a jurisdictional statute of nonclaim. *See In re Estate of Hammer*, 511 So. 2d 708, 711 (Fla. 4th DCA 1987), *appeal dismissed*, 529 So. 2d 693, 694 (Fla. 1988); David T. Smith, *Nonclaim Procedure Under the Florida Probate Code: Exceptions to an Apparent Statutory Bar*, 40 U. Fla. L. Rev. 335, 337 (1988), citing *inter alia*, *In re Estate of Sale*, 227 So. 2d 199, 201 (Fla. 1969).

Further distinguishing *Parson*, May respectfully submits that the first district in that case construed the amendment to section 733.705 in the incorrect context. The legislature added the following language to section 733.705(3) in 1984: "No action or proceeding on the claim shall be brought against the personal representative after the *time limited above*, and any such claim is thereafter forever barred without any court order." Ch. 84-25, § 1, Laws of Fla. (emphasis

supplied). In reaching the conclusion that this amendment expressed the legislature's intent that section 733.702 operate as a jurisdictional statute of nonclaim, the *Parson* court apparently overlooked the fact that the "time limit above" refers to the thirty-day period after the personal representative files an objection to a filed claim, not to the time limit for filing claims established by section 733.702.

As this court noted in *Barnett Bank*, in the normal administration of estates, valid reasons frequently arise for excusing untimely claims. *See Barnett Bank*, 493 So. 2d at 449. To construe section 733.702 as a jurisdictional statute of nonclaim could cause worthy creditors with valid excuses for untimely filing to lose their rights to assert valid claims. *Id.* Accordingly, this court should reaffirm *Barnett Bank* and hold that section 733.702 operates as a statute of limitations which the estate can waive if not pled appropriately.

B. Section 733.710

Section 733.710, Florida Statutes (1991) provides:

> **733.710 Limitations on claims against estates**
>
> (1) Notwithstanding any other provision of the code, 2 years after the death of a person, neither the decedent's estate, the personal representative (if any), nor the beneficiaries shall be liable for any claim or cause of action against the decedent, whether or not letters of administration have been issued, except as provided in this section.

> (2) This section shall not apply to a creditor who has filed a claim pursuant to s. 733.702 within 2 years after the person's death, and whose claim has not been paid or otherwise disposed of pursuant to s. 733.705.
>
> (3) This section shall not affect the lien of any duly recorded mortgage or security interest or the lien of any person in possession of personal property or the right to foreclose and enforce the mortgage or lien.

As noted by the Eleventh Circuit, the third and fourth districts have reached different conclusions concerning whether section 733.710 is a statute of limitations or a jurisdictional statute of nonclaim (statute of repose). The third district in *Baptist Hosp. of Miami, Inc. v. Carter*, 658 So. 2d 560 (Fla. 3d DCA 1995) (Tab 4), concluded that section 733.710, Florida Statutes (1989), was a statute of limitations, rather than a statute of repose or nonclaim, and, therefore, held that an estate could be estopped on grounds of fraud or misrepresentation to deny a claim filed outside the two-year deadline established by section 733.710.

Among several reasons supporting its conclusion, the court first noted that section 733.710's title ("*Limitations* on claims against estates") indicated that it was intended to operate as a statute of limitations. *See Baptist Hospital*, 658 So. 2d at 563 (emphasis supplied).[6] Next, the court quoted legislative history which specifically identified section 733.710 as a "statute of limitations":

> "Second, the free standing statute of limitations barring claims after the expiration of three years of a decedent's

[6] The same argument would apply to section 733.702, entitled "*Limitations* on presentation of claims." (emphasis supplied).

> death, would be reduced to two years whether or not a petition for administration has been filed.
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> * * * * * *
>
> Section 9 amends section 733.710, F.S., relating to limitations on claims against unadministered estates. The bill reduces the so called "free standing" *statute of limitations* provision from 3 to 2 years and provides that the limitation would apply whether or not letters of administration had been issued. The current three-year *statute of limitations* applies only if no letters of administration have been issued."

Baptist Hospital, 658 So. 2d at 563, (emphasis supplied), quoting H.R. Comm. On Judiciary Final Staff Analysis & Economic Impact Statement (June 15, 1989).

The *Baptist Hospital* court next found that section 733.710 did not contain "the magic words of finality which show the legislature's intention to foreclose the equitable claims which are precluded by a true statute of repose." *Baptist Hospital*, 658 So. 2d at 563. In this respect, the court by analogy cited *Barnett Bank's* construction of section 733.702 as a statute of limitations. *Id.*[7]

Finally, the *Baptist Hospital* court acknowledged the *Parson* court's conclusion that the 1984 amendment to section 733.705(3) indicated the legislature's intent to create a jurisdictional statute of nonclaim that would

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[7] As an example of a statute of repose with "magic words of finality," the court cited section 95.11(4)(b), Florida Statutes (1993): "[H]owever, in no event shall the action be commenced later than 4 years from the date of incident or occurrence out of which the cause of action accrued." *Baptist Hospital*, 658 So. 2d at 564.

automatically bar untimely claims. The court concluded, however, "that the language of 733.710 invokes *Barnett* rather than *Parson*. There is no language indicating the existence of an absolute cut off, and thus of a statute of repose." *Baptist Hospital*, 658 So. 2d at 563-64.

The waters were muddied considerably by *Comerica Bank & Trust, F.S.B. v. SDI Operating Partners, L.P.*, 673 So. 2d 163, 164 (Fla. 4th DCA 1996) (Tab 5), in which the fourth district disagreed with *Baptist Hospital* and concluded that section 733.710, Florida Statutes (1991), "states an absolute bar—akin to a statute of repose—that the court lacks the power to avoid."[8] In reaching this conclusion, the *Comerica* court relied extensively on its analysis of the *Pope* decision in which the United States Supreme Court invalidated several statutes of limitations dealing with filing claims against estates. According to *Pope*, "self-executing" statutes of repose that automatically bar claims without significant state participation generally are valid for due process purposes. *See Comerica*, 673 So. 2d at 164-65. The court then concluded: "Knowing the effect of the *Pope* decision, it seems inescapable that the legislative intent for section 733.710 was to create a self-executing period of repose—without significant action by the state itself, it must be

[8] Although the *Comerica* court certified direct conflict with *Baptist Hospital*, this court's jurisdiction apparently was never invoked and the conflict remains unresolved.

noted—for all claims after the lapse of the 2-year period." *Comerica*, 673 So. 2d at 165.

The *Comerica* court also found that the language from sections 733.702 and 733.710 supported its conclusion:

> The introductory adverbial phrase in section 733.702(1), "[i]f not barred by s. 733.710," means that the 2-year period of section 733.710 is paramount over the limitations period in section 733.702(1). Reading the two sections together, it appears that section 733.702 fixes the basic time frame for filing of claims in decedent's estates being probated in Florida, but section 733.710 sets an absolute deadline beyond which no claim may be entertained.

Comerica, 673 So. 2d at 165. Additionally, the court found that section 733.702(3) "contains express language barring untimely claims without any necessity for the PR to object to the tardiness in filing;" that section 733.702(5), which allows the probate court to extend the time to file claims on the grounds of fraud, estoppel or insufficient notice, prevents the court from extending the time to file claims beyond the time limit set by section 733.710; and that to construe section 733.710 as a statute of limitations would make it indistinguishable from section 733.702. *Comerica*, 673 So. 2d at 166.

For several reasons, May urges this court to adopt Baptist Hospital and construe section 733.710 as a statute of limitation rather than a statute of repose. First, as the *Baptist Hospital* court indicated, the legislative history expressed by

the title of the statute and staff analysis indicates that section 733.710 was intended to operate as a statute of limitations. Second, section 733.710 does not contain absolute words of finality typical of statutes of repose. Third, from a policy standpoint, if section 733.710 is construed as a statute of repose, creditors fraudulently induced by the personal representative to forego filing claims against the estate could be left without a remedy. In this respect, section 733.702(3) authorizes the probate court to extend the time to file claims on grounds of fraud, estoppel or insufficient notice. However, if section 733.710 is considered an absolute bar, the probate court would lack authority after two years to grant an extension, even on grounds of fraud.

The facts from this court's decision in *Barnett Bank* illustrate the inequity that could follow if *Comerica* is adopted and section 733.710 is classified as a statute of repose. There, the decedent executed a promissory note for $100,000 in favor of Barnett Bank three months before his death. Shortly after he published notice of administration, the personal representative went to the bank for a meeting with its president and vice-president to discuss the status of the note. The personal representative specifically informed the bank officers that the note would be paid without the bank filing a formal claim and confirmed that advice with a letter to the vice-president. Notwithstanding the personal representative's oral and written assurances, the estate failed to pay the Barnett Bank promissory note. The bank

filed a claim against the estate but, of course, the claim was late. The trial court nonetheless found the claim due and owing and ordered the personal representative to pay it. On appeal, the fourth district reversed and held that the probate court had no authority to order payment of an untimely claim.

As mentioned previously, this court quashed the fourth district decision and held that section 733.702 was a statute of limitations subject to valid excuses for untimely filing, such as fraud and estoppel. However, had the bank in that case waited more than two years to file its statement of claim, the claim would have been barred under *Comerica's* construction of section 733.710 and the personal representative would have successfully perpetrated a fraud.

Perhaps creditors like banks, funeral directors and health care providers which frequently file estate claims will not be easily duped. Other less sophisticated creditors, however, will be easy prey for unscrupulous personal representatives. Thus, although the prompt administration of estates certainly is a laudable goal, that objective should not be pursued at the expense of innocent creditors.

II. If sections 733.702 and/or 733.710 are construed as statutes of repose, Illinois National is precluded nonetheless from raising the nonclaim statutes in the present bad faith-excess judgment action because the Bradley Estate failed to plead or otherwise raise those statutes as a defense to the underlying wrongful death-personal injury action.

The Eleventh Circuit's opinion and the wording of its certified question suggest that an estate is not required to plead a creditor's failure to comply with sections 733.702 and/or 733.710 as an affirmative defense to an independent action filed against the estate if those statutes are considered statutes of repose or "jurisdictional" statutes of nonclaim. May respectfully disagrees and further contends that the excess judgment entered in the Prockup wrongful death-personal injury case remains a valid obligation of the Bradley Estate even if sections 733.702 and/or 733.710 are considered statutes of repose.[9]

Florida courts have consistently held that a defense based on the plaintiff's failure to comply with applicable nonclaim statutes must be pled as an affirmative defense in an independent legal action filed against the estate. *See, e.g., Grossman v. Selewacz*, 417 So. 2d 728 (Fla. 4th DCA 1982); *In re Estate of Gay*, 294 So. 2d 668, 669 (Fla. 4th DCA 1974)("[T]he failure of a claimant to timely file the claim

[9] In venturing beyond the text of the certified question, May notes that the Eleventh Circuit's phrasing of the certified question was "not intended to limit the Supreme Court in considering the issue presented or the manner in which it gives its answer." Slip op. at 18.

[against the estate] as required by the statute would be an affirmative defense to any suit brought upon the claim . . . ."), *dismissed*, 310 So. 2d 734 (Fla. 1975); *Stern v. First National Bank of South Miami*, 275 So. 2d 58 (Fla. 2d DCA 1973). Although the courts in the cited cases undoubtedly used the term "nonclaim statute" in its broadest sense to include statutes of limitations, decisions from other jurisdictions outside the probate context have treated true statutes of repose as affirmative defenses for purposes of pleading and waiver. *See McMahon v. Eli Lilly and Co.*, 774 F.2d 830, 837-38 (7th Cir. 1985); *Bonti v. Ford Motor Co.*, 898 F. Supp. 391 (S.D. Miss. 1995), *aff'd*, 85 F.3d 625 (5th Cir. 1996); *Loftus v. Romsa Constr., Inc.*, 913 P.2d 856 (Wyo. 1996). Further, although waiver was not an issue, Florida courts also have recognized statutes of repose as affirmative defenses. *See Sasson v. Rockwell Mfg. Co.*, 715 So. 2d 1066, 1066 (Fla. 3d DCA 1998); *Owens-Corning Fiberglas Corp. v. Rivera*, 683 So. 2d 154, 155 (Fla. 3d DCA 1996), *rev. denied*, 691 So. 2d 1080 (Fla. 1997); *Hampton v. A. Duda & Sons, Inc.*, 511 So. 2d 1104, 1104 (Fla. 5th DCA 1987); *Small v. Niagara Mach. & Tool Works*, 502 So. 2d 943, 945 (Fla. 2d DCA 1987), *rev. denied*, 511 So. 2d 999 (Fla. 1987); *Feil v. Challenge-Cook Bros., Inc.*, 473 So. 2d 1338, 1339 (Fla. 4th DCA 1985), *rev. denied*, 486 So. 2d 596 (Fla. 1986); *McElroy v. Firestone Tire & Rubber Co.*, 894 F.2d 1505, 1507 n.4 (11th Cir. 1990).

In this case, the Bradley Estate not only failed to plead Prockup's failure to comply with sections 733.702 and 733.710 as an affirmative defense to Prockup's wrongful death-personal injury action, the estate also admitted liability and agreed to submit the case to a special master solely on the issue of Prockup's damages. R2-95 (Exhibit B). In this respect, a defendant's admission of liability and agreement to submit the case to the trier of fact on the limited issue of damages constitutes a waiver of all affirmative defenses. *See New York Cent. Mut. Fire Ins. Co. v. Diaks*, 69 So. 2d 786 (Fla. 1954); *Curr v. Helene Transp. Corp.*, 287 So. 2d 695 (Fla. 3d DCA 1973). Thus, by admitting liability and failing to raise Prockup's noncompliance with sections 733.702 and 733.710 as an affirmative defense to the Prockup wrongful death-personal injury action, the Bradley Estate waived its nonclaim defenses, and those defenses cannot be revived by Illinois National in the present bad faith-excess judgment action even if section 733.702 and/or section 733.710 are classified as statutes of repose.

If adopted by this court, the result reached by the *Comerica* court would not mandate a different result. Although the *Comerica* court described section 733.710 as "an absolute bar—akin to a statute of repose" and concluded that "section 733.710 creates a self-executing, absolute immunity to claims filed for the first time, as here, more than 2 years after the death of the person whose estate is undergoing probate," *Comerica*, 673 So. 2d at 167, the practical effect of that

holding must be carefully examined. In the ultimate analysis, *Comerica's* construction of section 733.710 as an "absolute, self-executing bar" means that an untimely probate claim is extinguished by operation of law without the personal representative filing an objection or taking other action in the probate proceeding. In other words, "the claimant cannot avoid it [section 733.710] by showing, as he could for the nonclaim period under section 733.702, fraud or estoppel or insufficient notice." *Comerica*, 673 So. 2d at 167. Significantly, however, the *Comerica* court never held that the personal representative was excused from asserting section 733.710, when applicable, as an affirmative defense to an independent action filed against the estate.

Further, even though *Comerica* characterized nonclaim statutes as "jurisdictional," *see Comerica*, 673 So. 2d at 167, there is nothing in *Comerica* or other authorities using that term which suggests that the circuit court lacks subject matter jurisdiction over an independent action filed against the estate when a claim has not been timely perfected in the probate court. In this respect, "subject-matter jurisdiction concerns the power of the trial court to deal with a class of cases to which a particular case belongs." *Cunningham v. Standard Guar. Ins. Co.*, 630 So. 2d 179, 181 (Fla. 1994). Further, "[t]hat an action has become time-barred does not mean that the court is automatically divested of its inherent power to deal with the general subject matter." *Attache Resort Motel, Ltd. v. Kaplan*, 498 So. 2d 501,

503 (Fla. 3d DCA 1986), *rev. denied*, 511 So. 2d 298 (Fla. 1987). Applying these principles, the circuit court in this case was vested with subject matter jurisdiction over the class of cases that included Prockup's wrongful death-personal injury action. Jurisdiction having vested, the estate was required to plead and prove its affirmative defenses, including any defenses based on Prockup's failure to comply with the applicable nonclaim statutes. Since it failed to do so, the judgment against the estate is valid. *See Curbelo v. Ullman*, 571 So. 2d 443, 445 (Fla. 1990) ("It is well settled that where a court is legally organized and has jurisdiction of the subject matter and the adverse parties are given an opportunity to be heard, then errors, irregularities, or wrongdoing in proceedings, short of illegal deprivation of opportunity to be heard, will not render the judgment void.").

The result urged by May also will prevent Illinois National from escaping the consequences of its alleged bad faith failure to settle the claims filed against the estate. In this respect, although Atlanta Casualty Company, the vehicle owner's insurer, furnished the primary defense to the Bradley Estate, a jury should be entitled to consider whether Illinois National, Bradley's insurer, failed to exercise good faith towards its insured in the defense of the Prockup claims by not ensuring that defenses based on sections 733.702 and 733.710 were asserted in the Prockup personal injury-wrongful death action. *See Aaron v. Allstate Ins. Co.*, 559 So. 2d 275 (Fla. 4th DCA) (recognizing a bad faith cause of action for an insurer's

"inadequate defense" of the insured), *rev. denied*, 569 So. 2d 1278 (Fla. 1990); *Carrousel Concessions, Inc. v. Florida Ins. Guar. Ass'n*, 483 So. 2d 513 (Fla. 3d DCA 1986) (same). *See also St. Paul Fire and Marine Ins. Co. v. Welsh*, 501 So. 2d 54, 57-58 (Fla. 4th DCA 1987) (liability insurer's claim of existence of settlement agreement was affirmative defense that should have been raised in underlying negligence action against its insureds, and failure of insurer to raise defense at that time barred it from raising issue of settlement in subsequent action by insureds for insurer's alleged bad faith in handling negligence claim and in refusing to settle for policy limits in timely manner, resulting in verdict against insureds well in excess of policy limits).[10]

[10] It should be noted that Illinois National denied coverage to the Bradley Estate and refused to participate in the defense of the Prockup action. R1-1 (Complaint at p. 3). Illinois National subsequently filed a declaratory judgment action in Escambia County Court to determine whether its policy provided coverage. R1-11 (Exhibit B). The county court determined that Illinois National's policy did in fact provide coverage for the Prockup accident and its ruling was sustained on appeal by the circuit court and district court of appeal. R1-11 (Exhibits A-D).

CONCLUSION

May respectfully urges the court to hold that sections 733.702 and 733.710, Florida Statutes, operate as statutes of limitations rather than statutes of repose. Alternatively, even if sections 733.702 and 733.710 are construed as statutes or repose, May urges the court to hold that the estate must nonetheless plead noncompliance with those statutes as an affirmative defense to an independent action against the estate, failing which, such defenses are deemed waived.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished to B. Richard Young, Esquire, 309-B South Palafox Place, Pensacola, Florida 32501 and to David L. McGee, Esquire, Blount Building, Suite 700, Pensacola, Florida 32501 by hand delivery on this 19th day of October, 1999.

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