

STATEMENT OF THE CASE AND FACTS
IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC00-1263
Lower Tribunal Case No.: 4D99-1067

ROBERT T. MOSHER,

Petitioner,

v.

STEPHEN J. ANDERSON,

Respondent.

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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CERTIFICATE OF TYPE SIZE AND STYLE

The type style utilized for this Answer Brief is 14 point proportionately space

Times New Roman.

PREFACE

This cause is within the discretionary jurisdiction of the Florida Supreme Court to review a decision of the Fourth District Court of Appeal rendered on May 3, 2000, which certified a conflict with a decision of another district court of appeal. Fla. R. App. P. 9.030 (a) (2) (A) (vi). The Petitioner, Robert T. Mosher, is the Appellee in the lower tribunal and shall be referred to as “Mosher” or “creditor.” The Respondent, Stephen J. Anderson, is the Appellant in the lower tribunal and shall be referred to as “Anderson” or “debtor.”

The lower tribunal shall be referred to as the “district court below.” The citations to the Record below shall be denoted as (R. _____).

Anderson adopts the Statement Of The Case And Facts submitted in the Petitioner’s Initial Brief On The Merits.

SUMMARY OF ARGUMENT

Since the loan to Anderson was not in writing, the four year statute of limitations governs the transaction, and an action to enforce the loan was required to be commenced within that time or the enforcement was barred. The only other statutory provision governing the issue is the provision that the period runs from the time the cause of action accrues, and the cause of action accrues when the last element of the cause of action occurs.

Since there were no repayment terms agreed upon with respect to the oral loan to Anderson, the district court below correctly held, consistent with its own precedent and the majority of jurisdictions deciding the issue, that the period begins to run at the time the loan is made, and not when demand for payment is made. This interpretation is required by the general principal expressed by the courts in this state that the purpose of a statute of limitations is to encourage the prompt resolution of claims, and to prevent parties from unreasonably delaying the enforcement of legal rights.

On the other hand, the contrary holding in Mason v. Yarmus, 483 So.2d 832 (Fla. 2d DCA 1986), that the cause of action on an oral debt accrues and the statute of limitation begins to run when there has been a demand for payment and a failure by the debtor to pay, creates uncertainty and could have the effect of delaying the running of the statute of limitations indefinitely. Furthermore, the Mason ruling is

based on law which is applicable only to a written “note.” Since the legislature enacted statutory provisions stating that a cause of action accrues on a written “note” upon the first written demand for payment, but the Legislature failed to include an oral loan within these provisions, it must be assumed that the Legislature did not intend for a cause of action to accrue on an oral loan on the first written demand for payment. Accordingly, it is apparent that the Mason decision is not based on sound reasoning and, furthermore, the decision is an improper attempt to extend the application of statutory provisions beyond what was intended by the Legislature.

Therefore, the incorrect decision in Mason should not be followed, and this court should affirm the holding of the district court below.

ARGUMENT

I. A CAUSE OF ACTION ON AN ORAL LOAN WITHOUT REPAYMENT TERMS ACCRUES ON THE DATE THE LOAN IS MADE AND THE STATUTE OF LIMITATIONS COMMENCES TO RUN ON THAT DATE.

The district court below stated that “the issue in this case is whether the statute of limitations begins to run on an oral loan, payable on demand, when the loan is made, or when demand for payment is made.” Anderson v. Mosher, 758 So.2d 1177, 1177 (Fla. 4th DCA 2000). The court correctly resolved that issue by stating that “we hold, consistent with precedent of this court and the majority of jurisdictions deciding the issue, that the period of limitations begins to run at the time the loan is made, not when demand for payment is made” Id. at 1178. On the other hand, the Second District Court of Appeal in Mason v. Yarmus, 483 So.2d 832, 833 (Fla. 2d DCA 1986), stated that “[w]e agree with the trial court that the cause of action in this case did not accrue, and the statute of limitations on the obligation did not begin, until there had been a demand for payment and a failure by the debtor to pay.”

The Anderson decision is the position adopted by the majority of jurisdictions

and is consistent with the applicable Florida Statutes, whereas the Mason decision is based on statutory provisions which are completely inapplicable to an oral loan.

A. A Cause of Action Accrues Upon the Occurrence of the Last Element of the Cause of Action.

Since the loan obligation in this case was not founded on a written instrument, the applicable statute of limitations was the four year period provided in § 95.11(3)(k), Fla. Stat. (1991) which was in effect at the time enforcement became barred on October 19, 1992. The beginning of the four year period was controlled by § 95.031 Fla. Stat. (1991) which provided that “the time within which an action shall be begun under any statute of limitations runs from the time the cause of action accrues,” and by the first sentence of § 95.031(1) Fla. Stat. (1991) which provided that “[a] cause of action accrues when the last element constituting the cause of action occurs.”

The limitations statute is otherwise silent as to when a cause of action accrues on an oral loan without repayment terms. Except for the discussion in Anderson and Mason, it does not appear that there are any Florida cases that have directly expressed an opinion on when a cause of action accrues on an unwritten loan without repayment terms. However, at least two other Florida cases have ruled on when the statute of limitations has run on an oral loan, without expressly dealing with the issue of when the cause of action accrues. In an action “for money lent,” this court ruled that, since

the transaction was determined to be an oral contract, “the action for recovery thereon must be held to be barred by the statute of limitations unless shown to have been brought within three years.” Johnson v. Harrison Hardware Furniture Co., 160 So. 878, 879 (Fla. 1935). The three year statute of limitation applied in Johnson has been extended to four years under § 95.11(3)(k), Fla. Stat. (1991). Also, the district court below held in an earlier case that loans were barred by § 95.11(3)(k), Fla. Stat. (1995) where no demand for payment was made within four years. See DeSouza v. DeSouza, 708 S.2d 993, 994 (Fla. 4th DCA 1998). Since the Johnson and DeSouza cases concluded that the enforcement of the loans was barred after the number of years of the applicable statute of limitations had run from the making of the loans, it necessarily follows that the cause of action had to have accrued at the making of the loans.

Courts from other states that have dealt specifically with the accrual of a cause of action on an oral loan have determined that the cause of action accrues at the time the loan is made. See Matter of Estate of Musgrove, 696 P.2d 720 (Ariz. Ct. App. 1985); In Re Kharisma Jewelry, Inc., 165 B.R. 371 (Bkrcty. E.D.N.Y. 1994).

The Petitioner’s Initial Brief suggests that language used by this court in State Farm Mutual Automobile Insurance Company v. Lee, 678 So.2d 818 (Fla. 1996), has some bearing on this issue. In that case, this court stated that it is generally

recognized that a cause of action on a contract accrues, and the statute of limitations commences to run, upon the occurrence of a breach of the contract. Id. at 821. However, that case dealt with a written insurance contract where the insurance company would only have an obligation to pay if a certain event occurred. In the case of an oral loan with no repayment terms, the debtor is obligated to repay from the time of the making of the loan. Therefore, the rule cited in Lee should have no application to an oral loan without repayment terms. If we are to look to other contract law for guidance, it would be preferable to look to situations similar to a loan transaction where one party has completely performed and the other party then becomes obligated to pay. An example is the decision in Birnholz v. Steisel, 394 So.2d 523, 524 (Fla. 3rd DCA 1981), in which the court stated that: “As in the case of the general Florida rule concerning quantum meruit claims for services rendered . . . the universally accepted doctrine as to attorneys fees is that the statute of limitations accrues when the particular services are completed.” In Birnholz, the appellant argued, as does the creditor in the instant case, that the statute of limitations should not commence running until a written demand for payment is made. Id. The court responded that the argument “would permit an attorney, at his option, to delay the running of the statute ad infinitum merely by neglecting to bill his client. It is thus unsatisfactorily contrary to the very purpose of the statute of limitations itself.” Id. The same reasoning

should be applied to the oral loan to the debtor in the instant case.

B. The Last Element of a Cause of Action on an Oral Loan Without Repayment Terms Occurs, and the Statute Of Limitations Begins to Run, When the Loan Is Made.

In Anderson, the district court below held that “the period of limitations begins to run at the time the loan is made, not when demand for payment is made.” Anderson, 758 So.2d at 1177. As pointed out above, this ruling is entirely consistent with § 95.11(3)(k), Fla. Stat. (1991) and § 95.031, Fla. Stat. (1991), which were the Florida statutes governing this issue at the time the enforcement of the debtor’s loan became barred on October 19, 1992.

This issue was dealt with extensively in an *American Law Reports* Annotation. See Annotation, Jay M. Zitter, J.D., *When Statute Of Limitations Begins To Run Against Action Based On Unwritten Promise To Pay Money Where There Is No Condition Or Definite Time For Repayment*, 14 A.L.R. 4th 1385 (1981). The Annotation indicates that its purpose was “to collect and discuss the state and federal cases in which the courts have considered when the statute of limitation period begins to run on a claim based on an oral agreement to pay money, whether as part of a loan or otherwise, when the agreement contains no specific time for the payment of the money.” Id. at 1386. Almost every case cited in the Annotation concludes that the statute of limitations began to run when the loan was made and an action was barred

at the expiration of the number of years of the applicable statute of limitations. Id. at 1387–1390.

In its decision in Hawkins v. Barnes, the Fifth District Court of Appeals stated that:

Statutes of limitation are designed to prevent unreasonable delay in the enforcement of legal rights. The purpose of setting a fixed time limit on the right to assert a civil claim is to encourage prompt resolution of controversies and to protect against the risk of injustice. The result may seem harsh when the statute of limitations operates to extinguish a valid claim. Nevertheless, the policy of the statute is to bring an end to potential liability by imposing a fixed time limit on the right to assert a claim. As to each civil action, the applicable statute of limitations serves notice of a potential bar and provides a reasonable time within which the plaintiff can initiate a claim.

661 So.2d 1271 (5th DCA 1995) (citing Baskerville-Donovan Engineers, Inc. v. Pensacola Executive House Condo. Ass’n, Inc., 581 So.2d 1301 (Fla. 1991)).

The holding in Mason, that “the cause of action in this case did not accrue, and the statute of limitations on the obligation did not begin until there had been a demand for payment and a failure of the debtor to pay,” has the effect of extending the statute of limitations indefinitely, and clearly frustrates the purpose of a statute of limitations. Mason, 483 So.2d at 833. This court has indicated that statutes of limitations are enacted to bar claims which have been dormant for a number of years, and expressed disfavor with interpretations which tend to extend statutes unnecessarily by ununiform lengths of time. See Employers’ Fire Ins. Co. v. Continental Ins. Co., 326 So.2d 177,

(Fla. 1976) (holding that the purpose of statutes of limitations is to bar a claim that have been “dormant for a number of years and which have not been enforced by persons entitled to enforcement”).

Furthermore, the court in Mason found it necessary to base its decision on § 673.122, Fla. Stat. (1983), of the Uniform Commercial Code, and on the second sentence of § 95.031(1), Fla. Stat. (1983), which are both completely inapplicable to an oral loan, and relate only to a “note.” The plain and ordinary use of the word “note” requires something in writing, and the word is defined in Webster’s New American Dictionary (1995) as “a written promise to pay a debt.” In Graham v. State, 362 So.2d 924, 925 (Fla. 1978), after stating that “[g]enerally, words in a statute should be given their plain and ordinary meaning,” this court looked to Webster’s Dictionary for the definition of the word in question. See also Tatzel v. State, 356 So.2d 787, 789 (Fla. 1978) (where this court looked to both Webster’s Dictionary and Black’s Law Dictionary to supply a definition of a word of common usage.) Furthermore, the definition of “note” in the Uniform commercial Code contemplates a written instrument. § 673.104, Fla. Stat. (1983). Therefore, the oral loan was excluded from the provisions of § 673.122 and the second sentence of § 95.031(1) by the Florida Legislature, and it is improper for a court to attempt to extend those provisions to an oral loan. Under the American form of government the legislative

branch and the judicial branch each have their sphere of operation, and it is not permitted for either branch to usurp the powers of the other. See Florida Natl. Bank of Jacksonville v. Simpson, 59 So.2d 751 (Fla. 1952). Had the Florida Legislature intended for § 673.122 or the second sentence of § 95.031(1) to apply to an oral loan, it could have written the statutes in that manner. The fact that the Legislature did not include an oral loan under those provisions of the statutes creates a presumption that the Legislature did not intend that result. See Florida Indus. Comm. v. National Trucking Co., 107 So.2d 397 (Fla. 1st DCA 1958). The rule is well established that the courts do not have the power to modify the plain purpose and intent of the Legislature, as expressed in a statute, in order to bring about what may be conceived in the minds of judges to be a more practical or proper result. See Vocelle v. Knight Brothers Paper Co., 118 So.2d 664 (Fla. 1st DCA 1960). This Court should not attribute an intent to the Legislature beyond that expressed in a statute. See Bill Smith, Inc. v. Cox, 166 So.2d 497 (Fla. 2nd DCA 1964).

Furthermore, under the well-founded principles of statutory construction, “the mention of one thing implies the exclusion of another.” Thayer v. State, 335 So. 2d 815, 817 (Fla. 1976). See also Gay v. Singletary, 700 So.2d 1220, 1221 (Fla. 1997) (stating that, when the Legislature expressly describes a situation in which a particular statute will apply “an inference must be drawn that what is not included by specific

reference was intended to be omitted or excluded”). The Thayer court clearly held that “where a statute enumerates the things on which it is to operate . . . it is ordinarily to be construed as excluding from its operation all those things not expressly mentioned.” Thayer, 335 So. 2d at 817.

This Court should, once again, apply this principle of statutory construction to this issue and, in doing so, it will find that the Florida Legislature expressly excluded oral loans from the provisions of § 673.122 and the second sentence of § 95.031(1). Accordingly, an inference “must” be drawn that, by failing to expressly include oral loans in the provisions of those two statutes which indicate that the cause of action on a “note” accrues upon written demand, the Legislature did not intend that rule to apply to oral loans.

Therefore, since the decision in Mason was based entirely on statutory provisions which were intended by the Legislature to apply only to a “note” and the court’s improper extension of those statutory provisions to an oral loan, the Mason decision should not be followed.

Finally, the creditor argues that the district court below created a “time of the essence” condition to the transaction between the lender and debtor. While the creditor’s argument is misplaced with respect to the theory of law concerning “time of the essence,” it is correct that, with respect to every statute of limitations, there is

an involuntary time requirement imposed on parties. As stated by this Court, the “purpose of a limitations period ‘is to set a time limit within which a suit should be brought.’ By its very nature, a limitations period may deprive someone of rights if he or she failed to bring an action within the applicable period.” Mendez-Perez, M.D. v. Perez-Perez, M.D., 656 So.2d 548 (Fla. 1995) (citations omitted).

CONCLUSION

For the reasons set forth above, this Court should affirm the decision of the district court below, and should disapprove the conflicting decision in Mason v. Yarmus, 483 So.2d 832 (Fla. 2d DCA 1986).

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CERTIFICATE OF SERVICE

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