IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC09-490
THIRD DCA CASE NO.: 3D08-676

ROMAN RAMIREZ,

Petitioner,

vs.

CHARLES HEARON McCRAVY,

Respondent.
_____/

PETITIONER'S INITIAL BRIEF
On Discretionary Review from the Third District Court of Appeal

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INTRODUCTION

The Petitioner, ROMAN RAMIREZ, seeks review of the Third District Court of Appeal's decision in *Ramirez v. McCravy*, 4 So.3d 692, 2009 (Fla. 3d DCA, February 18, 2009), *review granted*, 2009 WL 2972472 (Fla. 2009), which holds that this Court's administrative tolling orders, issued after successive weather emergencies between 2004 and 2006, did not apply to toll the time for filing a personal injury action.

The Petitioner submits that the Third District's Opinion conflicts with this Court's decision in *Hankey v. Yarian*, 755 So.2d 93 (Fla. 2000), which determined that the word "toll" means "suspend" when used in the statutory limitations context. The Opinion also directly conflicts with the Fifth District Court of Appeal's decision in *Sullivan v. State*, 913 So.2d 762 (Fla. 5th DCA 2005), which held that this Court's administrative tolling orders operated to "toll" the running of the speedy trial period, and the Third District's own decision in *State v. Hernandez*, 617 So.2d 1103 (Fla. 3d DCA 1993), which similarly applied this Court's tolling orders to "toll" the running of the speedy trial period.

Petitioner Roman Ramirez was the plaintiff in the trial court, the appellant in the Third District Court of Appeal, and is referred to herein by name.

Respondent Charles McCravy was the defendant in the trial court, the

appellee in the Third District Court of Appeal, and is referred to herein by name.

Citations to the record on appeal appear herein as (R -), and refer to the original index issued by the Third District Court of Appeal. The transcript of the trial court's February 6, 2008, hearing on Mr. McCravy's Motion for Summary Judgment supplemented the original record on appeal. References to the transcript appear herein as (T -).

STATEMENT OF THE CASE AND FACTS

Roman Ramirez and Charles McCravy were involved in a car crash on March 3, 2003. Mr. Ramirez sued Mr. McCravy on March 7, 2007, for injuries that he sustained in the accident. (R 5-6). There is no dispute that Mr. Ramirez's cause of action accrued on March 3, 2003, the date of the accident.

McCravy moved to dismiss Ramirez's Complaint on the basis that the statute of limitations had expired on March 3, 2007, barring Ramirez's lawsuit. (R 13-25). The trial court denied the motion without prejudice, allowing McCravy to raise the statute of limitations as an affirmative defense. (R 26, 27-29 at ¶12).

McCravy moved for summary judgment on his subsequent limitations defense, disputing the earlier argument that Florida Supreme Court administrative tolling orders, issued *during* the running of the limitations period, tolled the limitations period on his claim. (R 31-76).

Responding in opposition to McCravy's Motion for Summary Judgment,

Ramirez relied upon six (6) of this Court's administrative tolling orders, which were issued between the time that Ramirez's cause of action accrued (March 3, 2003) and the point at which the limitations period on his action ordinarily would have expired (March 3, 2007)[1], to argue to that the limitations period did not expire until April 3, 2007.[2] Each of the relevant Tolling Orders states that *"all time limits authorized by rule and statute applicable to civil* (inclusive of circuit and county), family, domestic violence, probate, traffic, and small claims proceedings are tolled from ... ." *Ramirez, supra* at 693 (emphasis added). (R 87- 104). Ramirez argued that the intervening Tolling Orders, in the aggregate, by their very language operated to suspend the statute of limitations, giving him an additional 31 days to file his Complaint, until April 3, 2007. (R 77-104).

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[1] There is no dispute that the limitations period applicable to Mr. Ramirez's personal injury action if four years. *See* Fla.Stats. §95.11(3).

[2] The applicable Tolling Orders were issued after Hurricanes Frances, Jeanne, Katrina, Wilma and Rita, and Tropical Storm Ernesto, encompassing the following time periods:

(1) AOSC04-95 September 1- 7, 2004 (Hurricane Frances);
(2) AOSC04-163 September 23 - 27, 2004 Hurricane Jeanne);
(3) AOSC05-41 August 24 - 29, 2005 (Hurricane Katrina);
(4) AOSC05-56 September 16-21, 2005 (Hurricane Rita);
(5) AOSC05-74 October 21 - 31, 2005 (Hurricane Wilma) ; and,
(6) AOSC06-36 August 25 - 31, 2006 (Tropical Storm Ernesto).

(R 87 - 104).

McCravy replied by arguing that Ramirez did not show that any of the storm emergencies foreclosed him from filing his Complaint by March 3, 2007. (R 105-108).

The trial court heard argument on February 6, 2008, and granted summary judgment in favor of McCravy, which Ramirez timely appealed. (T 1-13, 141-142).

On appeal, Ramirez argued that this Court's administrative tolling orders operated to "toll," suspend or stop the clock on the statute of limitations, relying on: (1) the language of the Court's tolling orders; (2) this Court's decision in *Hankey v. Yarian*, 755 So.2d 93 (Fla. 2000); (3) the Fifth District Court of Appeal's decision in *Sullivan v. State*, 913 So.2d 762 (Fla. 5th DCA 2005); and, (4) the Third District's own decision in *State v. Hernandez*, 617 So.2d 1103 (Fla. 3d DCA 1993).

The Third District affirmed the summary judgment in favor of McCravy, holding that article V, section 2, of the Florida Constitution does not vest this Court with the authority to issue tolling orders that operate to modify statutes. *Ramirez, supra* at 694. The Third District further distinguished *Sullivan*, *supra*, and *Hernandez, supra*, on the basis that both cases dealt with the speedy trial *rule* as opposed to the limitations *statute*, i.e., Fla.Stats. §95.11. With no apparent basis to do so, the

Third District imposed different standards of construction to determine the applicability of this Court's administrative orders, i.e., a strict construction as the tolling orders applied to toll statutes and a liberal construction applied as the tolling orders apply to rules.

The Third District held that "[t]o toll means to suspend or interrupt. There is nothing intrinsic in the language that requires tacking extra days at the end of a four year period." *Ramirez, supra* at 694.

Ramirez invoked this Court's discretionary jurisdiction, alleging a conflict between the Third District's decision in this case and this Court's decision in *Hankey v. Yarian*, 755 So.2d 93 (Fla. 2000), and the Fifth District's decision in *Sullivan v. State*, 913 So.2d 762 (Fla. 5th DCA 2005).

On September 9, 2009, this Court issued its Order accepting jurisdiction.

ISSUES ON APPEAL

I. WHETHER THE THIRD DISTRICT'S DECISION CONFLICTS WITH THIS COURT'S DECISION IN *HANKEY V. YARIAN*, 755 So.2d 93 (FLA. 2000) AND THE FIFTH DISTRICT'S DECISION IN *SULLIVAN V. STATE*, 913 So.2d 762 (FLA. 5TH DCA 2005).

II. WHETHER THIS COURT'S ADMINISTRATIVE TOLLING ORDERS OPERATE TO STOP THE CLOCK ON THE RUNNING OF THE STATUTE OF LIMITATIONS IN A PERSONAL INJURY ACTION, WHICH THEN RESUMES RUNNING AT THE EXPIRATION OF THE TOLLING PERIOD, PURSUANT TO *HANKEY V. YARIAN*, 755 So.2d 93 (FLA. 2000) .

SUMMARY OF THE ARGUMENT

This case involves the application of the Court's administrative tolling orders to a litigant's personal injury action.

The Court has jurisdiction, because the Third District Court of Appeal's decision conflicts with this Court's decision in *Hankey v. Yarian*, 755 So.2d 93 (Fla. 2000), and the Fifth District's decision in *Sullivan v. State*, 913 So.2d 762 (Fla. 5th DCA 2005).

In *Hankey, supra*, the Court held that the medical malpractice statute's tolling provision effectively stops the clock on a plaintiff's claim, which resumes running at the expiration of the tolling period. The Third District has held that this Court's tolling orders to not stop the clock on the running of the limitations period.

The Third District's decision is contrary to the language of the Court's tolling orders, which state that "***all time limits authorized by rule and statute*** applicable to civil proceedings ... ." (R 87-104 at ¶2). A "strict" construction of the tolling orders can lead to the only reasonable result, i.e., the tolling orders apply to toll applicable running statutes of limitations.

There is no support for the Third District's conclusion that the tolling orders should be construed strictly when applied to statutes and liberally when applied to rules. The Third District's distinction is one without a difference.

The Third District's determination that Fla.Stats. §59.051 prohibits this Court from issuing tolling orders that operate to extend limitations periods ignores the fact that §95.051 speaks to the suspension of the *commencement* of limitations periods and ignores this Court's analysis in *Hearndon v. Graham*, 767 So.2d 1179 (Fla. 2000), as well as the myriad statutes that contain tolling provisions which operate to toll limitations periods. The Third District misapplied *Hearndon, supra,* in this case and ignored *Hankey, supra,* which is directly on point.

Finally, a consistent across-the-board application of the tolling orders to suspend limitations periods on claims of *all* litigants is the only fair and neutral manner in which to apply the tolling orders, and avoid the proverbial "slippery slope" to determine when a limitations period was "tolled" by any given administrative order. A case-by-case analysis is neither practical nor supported by the tolling orders themselves.

ARGUMENT

I. THE COURT HAS JURISDICTION TO RESOLVE THE CONFLICT BETWEEN THE THIRD DISTRICT'S DECISION AND THIS COURT'S DECISION IN *HANKEY V. YARIAN*, 755 Sd.2d 93 (FLA. 2000) AND THE FIFTH DISTRICT'S DECISION IN *SULLIVAN V. STATE*, 913 So.2d 762 (FLA. 5TH DCA 2005).

On September 9, 2009, this Court issued its order accepting jurisdiction to review the Third District's decision. The Court has jurisdiction, because the Opinion conflicts with this Court's decision in *Hankey v. Yarian*, 755 So.2d 93 (Fla. 2000), and the Fifth District's decision in *Sullivan v. State*, 913 So.2d 762 (Fla. 5th DCA 2005).[3]

a. The Opinion Conflicts With This Court's Decision in *Hankey v. Yarian*, 755 So.2d 93 (Fla. 2000)

The Third District's Opinion conflicts with this Court's decision in *Hankey v. Yarian*, 755 So.2d 93 (Fla. 2000), in which this Court dealt with the presuit tolling provisions of the Medical Malpractice Act, Fla.Stats. §766.106(4). The issue in *Hankey*, *supra*, was whether the 90-day investigative presuit tolling period in Florida's Medical Malpractice Statute suspends the running of the two-year

[3] The Petitioner also argued that the Third District's decision conflicts with its own prior decision in *State v. Hernandez*, 617 So.2d 1103 (Fla. 3d DCA 1993), which itself would not confer conflict jurisdiction on this Court, since the conflict must be between district courts and cannot be intra-district.

limitations period for filing medical malpractice claims.

In *Hankey, supra*, this Court resolved a conflict between the Fifth and Fourth District Courts of Appeal as it related to the statutory tolling period in the medical malpractice statute. The Fifth District held that Fla.Stats. §766.104(4)'s tolling provision did not suspend the limitations period for filing suit. *See Hankey v. Yarian*, 719 So.2d 987 (Fla. 5th DCA 1998), while the Fourth District held that the running of the limitations period was suspended. *See Rothschild v. NME Hospitals, Inc.*, 707 So.2d 952 (Fla. 4th DCA 1998). This Court resolved the conflict by concluding "that the tolling period provided by section 766.106(4) does interrupt and suspend the running of the limitations period." *Hankey v. Yarian,* 755 So.2d 93, 94 (Fla. 2000).

When *Hankey, supra*, was decided, the applicable version of the Medical Malpractice Statute stated, in pertinent part:

> (4) The notice of intent to initiate litigation shall be served within the time limits set forth in s. 95.11. *However, during the 90-day period, the statute of limitations is tolled as to all potential defendants. Upon stipulation by the parties, the 90-day period may be extended and the statute of limitations is tolled during any such extension.* Upon receiving notice of termination of negotiations in an extended period, the claimant shall have 60 days or the remainder of the period of the statute of limitations, whichever is greater, within which to file suit.

Section 766.106(4), Fla.Stats., (1999)(emphasis added).

Examining the language of §766.106(4), this Court ultimately concluded:

> Because the word "toll" has been consistently used by the Legislature and interpreted by the courts to mean "suspend" when used in a statutory limitations context, we conclude that it was intended to have the same meaning in section 766.106(4). ... . We agree with the Fourth District's concise explanation in *Rothschild* that: "Since a tolling provision interrupts the running of the statutory limitations period, the statutory time is not counted against the claimant during that ninety-day period. In essence, the clock stops until the tolling period expires and then begins to run again."

Hankey, supra at 97, quoting *Rothschild v. NME Hospitals, Inc.*, 707 So.2d 954 (Fla. 4th DCA 1998).

This Court also recognized that the "tolling" language in Fla.Stats. §90.051 has been "routinely and consistently interpreted as suspending the running of the statute of limitations time clock until the identified condition is settled." *Hankey, supra* at 96, *citing Abbott v. Kiser*, 654 So.2d 640 (Fla. 4th DCA 1995).

The administrative tolling orders at issue in this case state that *"all time limits authorized by rule and statute* applicable to civil (inclusive of circuit and county), family, domestic violence, probate, traffic, and small claims proceedings are *tolled* from ... ." (R 87-104 at ¶2)(emphasis added). Nothing in the tolling orders excludes their application to Fla.Stats. §95.11. Unless this Court meant to define

the word "toll" differently than the manner in which it interpreted the word in *Hankey, supra* - - and the tolling orders do not indicate any different intent - - the Third District's decision directly conflicts with *Hankey, supra*.

On the one hand, consistent with the Court's interpretation of the word "toll," the Third District recognized that to "toll" means to suspend or interrupt. Yet, on the other hand, the Third District concluded that there "is nothing intrinsic" about this Court's use of the word "toll" in the tolling orders "that requires tacking extra days at the end of a four year period." The Third District's conclusion contradicts the acknowledged meaning of the word "toll." If the clock stops ticking on a limitations period, and resumes when the tolling period expires, the limitations period must necessary run beyond the original expiration date.

Although the Third District characterized the result as "extra days" being "tacked onto" the four-year limitations period[4], the fact is that the limitations period contained the same 1,460 days (four years) allowed by Fla.Stats. §95.11(3). It just expired on a later date - - because the tolling period stops the clock on the running of the limitations period, which resumes running at the expiration of the tolling period. Contrary to the Third District's characterization that the plaintiff gains "extra days," the number of days in the limitations period remains the same - - they

[4] *Ramirez, supra* at 694.

simply expire later, in exactly the same manner that the limitations period expired later in the *Hankey* malpractice case.

Nothing in *Hankey, supra*, indicates that the Court limited its holding to medical malpractice cases or that other litigants should be treated any differently than Ms. Hankey when a limitations period is tolled.

Although Mr. Ramirez argued at every step in these proceedings that *Hankey, supra*, was applicable in this case, the Third District appears to have ignored that decision in its entirety (the opinion does not even mention *Hankey, supra*.)

Instead, the Third District focused on this Court's decision in *Hearndon v. Graham*, 767 So.2d 1179 (Fla. 2000), which dealt with the application of the delayed discovery doctrine and is distinguishable on that basis, as we explain in great detail below. The Third District also focused on *Sullivan v. State*, 913 So.2d 762 (Fla. 5th DCA 2005) and *State v. Hernandez*, 617 So.2d 1103 (Fla. 3d DCA 1993), attempting to distinguish both on the basis that they dealt with the speedy trial rule rather than a statute of limitations. However, nothing in this Court's tolling orders suggests that such a distinction exists or that different standards of construction of the Court's tolling orders should be applied in different instances.

b. The Opinion Conflicts With the Fifth District's Decision in *Sullivan v. State*, 913 So.2d 762 (Fla. 5th DCA 2005)

Applying this Court's administrative tolling orders in *Sullivan v. State,* 913 So.2d 762 (Fla. 5th DCA 2005), the Fifth District determined that the speedy trial period was tolled during the period covered by three of the Court's administrative tolling orders, also issued after successive hurricanes in 2005.

> During the time between Appellant's arrest and the expiration of the speedy trial period, three administrative orders of the Supreme Court of Florida were entered wherein "all time limits authorized by rule and statute affecting the speedy trial procedure" were "tolled" in Seminole County due to hurricanes Charley, Frances and Jeanne for a cumulative tolling period of 15 days. Although the lower court and counsel for the parties had considered the effect of the tolling orders for Charley and Jeanne, they had overlooked the order for hurricane Frances, of which we take judicial notice. Fla. Admin. Order No. AOSC04-88 (Sept. 15, 2004). When all three tolling orders are considered, the Notice of Expiration of Speedy Trial was premature and subject to a motion to strike.

Sullivan, supra at 763.

Most notably, in *Sullivan, supra*, the Fifth District aggregated all of the applicable tolling orders that were issued within the speedy trial period - - even one on which the defendant did not rely - - for purposes of extending the defendant's six-month speedy trial period for an additional 15 days. The court applied *all* (3) of the tolling

orders that fell within the six-month period, correctly determining that each tolling order suspended the running of the time period, and added a cumulative tolling period of 15 days *at the end* of what would have been the six-month period. Thus, the State had an additional 15 days to try Sullivan, even though the case could have been tried at any point during the six-month period.

McCravy's argument below - - that the tolling orders only apply to deadlines at or about the time of the court closures - - does not square with *Sullivan*. Applying Mr. McCravy's analysis, the defendant in *Sullivan* should have been tried at any point during the six-month period during which there was no storm emergency, unless there had been a single tolling order issued at the very end of the time period, which would have precluded a trial. Notwithstanding the Third District's attempt to distinguish between rules and statutes - - and applying different standards of construction of the tolling orders to each, i.e., liberal and strict, respectively - - there is no substantive difference between the speedy trial period and a statute

of limitations period for purposes of determining a tolling period. There is certainly nothing in the language of any of the tolling orders to suggest that such a distinction must be - - or even may be - - made.

The Third District distinguishes the application of the Court's tolling orders to *rules*, such as the speedy trial rule, from the orders' application to *statutes*, such as Fla.Stats. §95.11. The Court's tolling orders make no such distinction.[5] The tolling orders toll "all time limits authorized by ***rule and statute*** applicable to civil (inclusive of circuit and county), family, domestic violence, probate, traffic, and small claims proceedings ... ." (R 87-104 at ¶2). Nothing in the tolling orders supports varying standards of construction.

The Opinion conflicts with the Fifth District's decision in *Sullivan, supra,* because nothing in the tolling orders supports the Third District's interpretation. The language of the tolling orders is clear - - the clock effectively stops ticking on "***all time limits authorized by rule and statute*** applicable to civil proceedings ... ,"

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[5] Specifically, the Third District states: "[W]e conclude that the orders should be strictly construed in the context of statutes, as opposed to rules," implying that the orders should be liberally applied in the context of rules and strictly applied in the context of statutes. *Ramirez, supra* at 694. Again, however, there is nothing in the tolling orders to suggest that this Court intended for the orders to have anything other than a single effect, i.e. to "toll" time limits authorized by rule and statute.

necessarily including Fla.Stats. §95.11, regardless of whether the limitations period ends at or around the weather emergency. (R 87-104)(emphasis added).

If anything, a "strict construction" of the tolling orders would require just that - - their application to "***all*** time limits authorized by rule and statute applicable to civil proceedings ... ." (R 87-104 at ¶2). Reading anything else into the tolling orders is anything but a "strict" construction.

Under similar circumstances in *State v. Hernandez*, 617 So.2d 1103 (Fla. 3d DCA 1993), the Third District itself applied the Hurricane Andrew tolling order to *all* time limits for two weeks, beginning on August 24, 1992. The defendant filed a demand for speedy trial on June 29, 1992. The State inadvertently allowed the defendant's 50-day period speedy trial period to elapse. On August 18, 1992, the defendant filed a Motion to Discharge. The trial court ordered that the defendant be forever discharged, if he was not brought to trial within 10 days. *See Hernandez*, 617 So.2d at 1103. During this ten-day period, Hurricane Andrew struck and this Court issued its administrative tolling order, tolling "all time limits authorized by rule and statute" for two weeks, beginning on August 24, 1992.

Notwithstanding the tolling order, the trial court discharged the defendant on September 9, 1992. *Id.* On appeal, the Third District determined that the defendant's discharge was premature and reversed the trial court, explaining that

this Court's administrative order:

> ...[S]erved to toll the running of the speedy trial window period in this case. Consequently, five days of the 10-day window had elapsed prior to August 24th, and the window *was tolled* from August 24th through September 6th. Thereafter, the window *resumed running* on September 7th. Clearly, only eight days of the window period had elapsed when the defendant was discharged on September 9th. His discharge was, therefore, premature and is reversed.

See Id.

By holding that this Court's administrative tolling orders do not apply in this case, the Third District's decision conflicts with this Court's decision in *Hankey, supra*, and the Fifth District's decision in *Sullivan, supra.*, as well as the Third District's own prior decision in *Hernandez, supra*.

II. THIS COURT'S ADMINISTRATIVE TOLLING ORDERS OPERATE TO STOP THE CLOCK ON THE RUNNING OF LIMITATIONS PERIODS, WHICH THEN RESUMES UPON THE EXPIRATION OF THE TOLLING PERIODS.

In arguing that Mr. Ramirez's tort claim was timely filed, we looked first to the language of this Court's administrative tolling orders. The administrative orders state, in pertinent part, "that *all* time limits authorized by rule and statute applicable to civil ... proceedings are *tolled.*" Facially, the tolling orders seem pretty

clear. We believe that if this Court did not intend for its tolling orders to stop or suspend the running of limitations periods, it would not have employed the broad "tolling" language, nor would the Court have said that the orders toll "all time limits authorized by rule and statute... ." (R 97-104). If this Court meant to exclude statutes of limitations, we believe that the Court would have said so.

Nonetheless, the Third District held that this Court's tolling orders "have no application to this case," affirming the trial court's entry of summary judgment in favor of McCravy on several bases, some of which were raised by McCravy but most of which were not. *Ramirez, supra* at 694. None of the Third District's reasons for affirming the summary judgment in favor of Mr. McCravy consider the actual language of the Court's tolling orders. Nor, as we mentioned earlier, does the Third District consider - - or even mention - - this Court's analysis of how limitations periods are "tolled" in *Hankey v. Yarian, supra.*

First, the Third District found that article V, section 2, of the Florida Constitution does not vest this Court with the authority to toll statutory limitations periods. *See Ramirez, supra* at 693-94. The Constitution vests this Court with authority to enact rules of judicial administration, which this Court did. The

Constitution does not limit the authority of this Court to adopt rules of administration that impact statutory limitations periods.

Second, the Third District found that Ramirez could not rely on any equitable tolling doctrines, because Ramirez did not allege "that he was induced to forebear from filing suit," an argument that Ramirez never even advanced below. *Ramirez, supra* at 694.

Next, the Third District found that statutes of limitations may only be tolled by the reasons enumerated in Fla.Stats. §95.051, none of which are applicable in this case. *See Ramirez, supra* at 693-94. Section 95.051 enumerates instances in which the *commencement* of limitations periods may be tolled, as this Court analyzed in *Hearndon v. Graham*, 767 So.2d 1179 (Fla. 2000), and does not apply once a limitations period has begun to run.

The Third District found that this Court's tolling orders "should be strictly construed in the context of statutes, as opposed to rules," and thus have no application to this case, since the weather emergencies did not in any way delay Ramirez from timely filing his suit. *See Ramirez, supra* at 694. Nothing in the tolling orders suggests differing standards of construction or any analysis on a case-by-case basis.

In sum, Third District conclusion is not supported by either the language of

this Court's administrative tolling orders, case law applying this Court's tolling orders, or any case law interpreting *other* tolling provisions.

I. This Court Has Authority to Issue Administrative Orders That Toll Applicable Statutes of Limitations

As a basis for barring the Plaintiff's claims in this case, the Third District stated that this Court's administrative orders "should be strictly construed in the context of statutes, as opposed to rules," citing *Sullivan v. State*, 913 So.2d 762 (Fla. 5th DCA 2005) and *State v. Hernandez*, 617 So.2d 1103 (Fla. 3d DCA 1993), both of which held that this Court's administrative tolling orders operated to toll speedy trial periods.[6] *Ramirez, supra* at 694. The Third District found that article V, section 2, of the Florida Constitution "grants the Florida Supreme Court the power to 'adopt rules for the practice and procedure in all courts' not to modify statutes." *Id.*, quoting Fla.Const. art. V, §2.[7] The Third District concluded:

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[6] Florida Rule of Criminal Procedure 3.191 provides certain time limits within which every person charged with a crime shall be tried. The Rule provides for speedy trial "without demand," requiring that the defendant be tried within 90 days or 175 days for misdemeanors or felonies, respectively. *See* Fla.R.Crim.P. 3.191(a). A defendant is entitled to speedy trial "upon demand" within 60 days.. *See* Fla.R.Crim.P. 3.191(b). It bears noting that the speedy trial rule began as a statute - - Fla.Stats. §915.01, which was repealed in 1971.

[7] Article V, section 2 of the Florida Constitution provides, in pertinent part:

> (a) The supreme court shall adopt rules for the practice and procedure in all courts including the time for seeking appellate review, the

> administrative supervision of all courts, the transfer to the court having jurisdiction of any proceeding when the jurisdiction of another court has been improvidently invoked, and a requirement that no cause shall be dismissed because an improper remedy has been sought. ... .

Fla.Const. Art. V, §2.

> Therefore, by strictly construing the administrative orders, we find that they have no application to this case, as the weather emergencies did not in any way delay Ramirez from promptly filing his suit.

Ramirez, supra at 694.

The Third District's conclusion is problematic for a number of reasons.

First, nothing in the language of the administrative orders themselves suggests that this Court intended that the orders be construed under varying standards, i.e., strictly as they apply to statutes and liberally as they apply to rules. Each administrative order states that "***all time limits authorized by rule and statute*** applicable to civil (inclusive of circuit and county), family domestic violence, probate, traffic, and small claims proceedings ***are tolled*** from ... ." (R 87-104 at ¶2)(emphasis added). Therefore, the orders either "toll" time limits authorized by "rule and statute" or they do not.

Public policy requires consistent application of this court's administrative orders, not an ad hoc case-by-case basis. Moreover, nothing in the orders suggests that their application should be determined on a case-by-case basis. Indeed, the administrative orders on their fact provide only limited instances in which certain claims may be considered on a case-by-case basis - - none of which exist in this case.

> 4. This Court recognizes that there may be instances where, because of this Hurricane, these and other time limits in the Eleventh Judicial Circuit could not be met *even after taking into consideration the tolling periods stated above*. If such a claim is made, it shall be resolved by the court wherein jurisdiction lies on a case-by-case basis where a party demonstrates that the lack of compliance with requisite time periods was directly attributable to this emergency situations.

(R 87-104 at ¶4)(emphasis added).

> 5. The Court likewise recognizes that cases outside Miami-Dade County may also be affected by this emergency situation. Consequently, the tolling of time periods in cases outside of Miami-Dade County shall be permitted only where a party demonstrates that the lack of compliance with requisite time periods was directly attributable to this emergency situations.

(R 87-104 at ¶5).

Those instances do not apply in this case. The tolling orders require a party to demonstrate that a lack of compliance with time periods was attributable to the emergency situation only where time periods "could not have been met even after taking into consideration the tolling periods" provided in the order. *Id*. If a party meets a time limit that is contemplated by the tolling period, i.e., a tolled statute of limitations, there is no requirement - - or authority for that matter - - to apply a case-by-case analysis. In other words, the language of the tolling orders demonstrates a clear intent by this Court to apply the tolling orders across the board

to all litigants, *unless* a party could not meet a time limit "even after taking into consideration the tolling periods." *Id.* Mr. Ramirez's situation was not one in which the trial court had to make a determination on a case-by-case basis, because Mr. Ramirez filed his lawsuit long before April 7, 2003, (the expiration of the statute of limitations on his tort claim, taking into the account the time periods during which the statute was suspended.)

Therefore, the Third District's imposition of varying standards of construction has no support.

Second, the Constitutional provision that authorizes this Court to enact and issue its administrative orders gives this Court full authority to issue tolling orders that operate to "toll" statute of limitations. Article V, section 2, of the Florida Constitution grants the Florida Supreme Court the power to "adopt rules for the practice and procedure in all courts" - - which this Court accomplished by enacting Judicial Administration Rule 2.205, which gives the Court:

> (iv) ... the power, upon request of the chief judge of any circuit or district, or sua sponte, in the event of natural disaster, civil disobedience, or other emergency situation requiring the closure of courts or other circumstances inhibiting the ability of litigants to comply with deadlines imposed by rules of procedure applicable in the courts of this state, to enter such order or orders as may be appropriate to *suspend, toll, or otherwise grant relief from deadlines imposed by otherwise applicable statutes* and

> rules of procedure for such period as may be appropriate, including, *without limitation*, those affecting speedy trial procedures in criminal and juvenile proceedings, *all civil process and proceedings*, and all appellate time limitations; and ... .

Fla.R.Jud.Admin. 2.205(a)(2)(B)(iv).[8]

Therefore, the Third District's conclusion that this Court does not have authority to issue tolling orders that "modify statutes" is not supported by the language of the tolling orders, the Florida Constitution or the Florida Rules of Judicial Administration.[9] *Ramirez, supra* at 694.

ii. The Third District's Discussion of Equitable Estoppel is Not Applicable

The Third District apparently felt compelled to discuss the doctrine of equitable tolling, which neither party raised below. The only arguments advanced by Mr. Ramirez in both courts below were: (1) that this Court's tolling orders operated by their very language to suspend the running of the limitations period on his cause of action; (2) case law interpreting the Court's tolling orders applied to

[8] Formerly numbered Fla.R.Jud.Admin. 2.030(a)(2)(B)(iv).

[9] The Petitioner submits that this Court's administrative tolling orders do not "modify statutes" as the Third District suggests. *Ramirez, supra* at 694. Rather, the administrative tolling orders suspend the running of applicable limitation periods for brief periods of time. The four-year statute of limitations on Mr. Ramirez's tort claim remains intact, but for brief periods during which the clock stopped running on the limitations period.

stop the clock on speedy trial periods; and, (3) that this Court had analyzed the effect of "tolling" periods in *Hankey v. Yarian, supra*, concluding that a tolling period stops the clock on limitations periods, such that they resume again upon the expiration of the tolling period. Mr. Ramirez never argued that he was "induced . . . into forebearing [sic] from filing his suit in a timely fashion." *Ramirez, supra* at 694.

The Court's administrative tolling orders do not require any allegation from a litigant that he or she relied on the tolling orders in any manner. Rather, the tolling orders say what they say, i.e., that *"all time limits authorized by rule and statute* applicable to civil (inclusive of circuit and county), family domestic violence, probate, traffic, and small claims proceedings *are tolled* from ... ." (R 87-104 at ¶2)(emphasis added). The tolling orders require a party to demonstrate that a lack of compliance with time periods was attributable to the emergency situation only where time periods "could not have been met *even after taking into consideration the tolling periods*" provided in the order. (R 87-104 at ¶4)(emphasis added). If a party meets a time limit that is contemplated by the tolling period, i.e., a tolled statute of limitations, there is no requirement - - or authority for that matter - - to apply a case-by-case analysis. Again, the orders either "toll" time limits authorized by statute and rule or they do not. Any discussion about whether Mr. Ramirez

relied on the tolling orders in waiting until March 7, 2007 to file his suit is simply not relevant. The issue is whether the effect of the Court's tolling orders is what the orders say the effect is - - to "toll" "all time limits authorized by rule and statute applicable to civil . . . proceedings... ." (R 87-104).

The Third District's decision imposes a requirement that the tolling orders do not contain - - that a litigant demonstrate that the weather emergencies, which are the basis of the tolling orders, in some way delayed the litigant "from promptly filing his suit." *Ramirez, supra* at 694. As the Petitioner demonstrated earlier, as long as a litigant timely complies with statutory deadlines, taking into consideration the application of the intervening tolling orders, the application of the tolling orders should not be considered on a case-by-case basis. Rather, the tolling orders must be applied consistently and equally to all litigants. Only when a litigant has not met a deadline *beyond* the applicable tolling periods is there any requirement that he or she demonstrate that any lack of compliance was directly attributable to an emergency situation.

iii. Section 95.051 Enumerates Grounds for Tolling the Date on Which Applicable Limitations Periods Commence, Not Grounds Under Which Limitations Periods May be Tolled Once they Have Begun to Run

The Third District relied on Fla.Stats. §95.051 and this Court's decision in *Hearndon v. Graham*, 767 So.2d 1179 (Fla. 2000), to conclude that only those

tolling grounds enumerated in §95.051 may operate to suspend the running of a limitations period.[10] *Ramirez, supra* at 693-94.

The Third District's reliance on §95.051 is misplaced because it ignores this Court's analysis in *Hearndon, supra*, in which the Court distinguished between the accrual of a cause of action and the tolling of a limitations period that has already begun to run.

In *Hearndon, supra*, the issue was whether the "delayed discovery doctrine" applied to the *accrual* of the plaintiff's cause of action for childhood sexual abuse, such that the statute of limitations was triggered. The delayed discovery doctrine delays the accrual of a cause of action until the plaintiff reasonably discovers the right of action. *Hearndon, supra* at 1184. The Court recognized that the determination of whether a cause of action is time-barred involves separate and distinct issues of: (1) when the action accrued; and, (2) whether the limitations period was tolled. *Hearndon, supra* at 1184.

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[10] The Defendant/Respondent did not argue in either the trial court or on appeal that Fla.Stats. §95.051 applied to prohibit this Court from issuing its administrative tolling orders, the effect of which is to toll "***all time limits authorized by rule and statute*** applicable to civil proceedings ... ," necessarily including Fla.Stats. §95.11. Therefore, the briefs do not contain any argument relating to the applicability of §95.051. Nonetheless, the Third District found that this Court cannot issue orders that toll statutes of limitations on the basis that §95.051 provides an exhaustive list of circumstances under which limitations periods may be tolled.

> We extrapolate, therefore, that while accrual pertains to the existence of a cause of action which then triggers the running of a statute of limitations, tolling focuses directly on limitation periods and interrupting the running thereof.
>
> That both accrual and tolling may be employed to postpone the running of a statute of limitation s so that an action would not become time-barred should not cause confusion between these distinct concepts. Thus, a determination of whether a cause of action is time-barred pursuant to the expiration of a statute of limitations may require two different analyses: First, whether the cause of action accrued and, if so, when; and, second, whether s statutory tolling provision applies.

Hearndon, supra at 1185.

The Court stated that "[A] statute of limitations 'runs from the time the cause of action accrues' which, in turn, is generally determined by the date 'when the last element constituting the cause of occurs'." *Hearndon, supra* at 1184-85, quoting *State Farm Mut. Auto, Ins. Co. v. Lee*, 678 So.2d 818, 821 (Fla. 1996). "The 'tolling' of a limitation period would interrupt the running thereof subsequent to accrual." *Hearndon, supra* at 1185, quoting Fla.Stats. §95.051.

The issue in *Hearndon, supra*, was when the plaintiff's cause of action for childhood sexual abuse accrued, not whether the running of the statute of limitations had been suspended once the action accrued and the limitations period had begun to fun. Although the Court stated that §95.051(2) "specifically precludes application of any *tolling* provision not specifically provided therein," we

respectfully submit that the statement refers to the first part of the Court's stated two-pronged analysis, i.e., whether and when the cause of action accrued, in order to determine when the statute of limitations is triggered.

Section 95.051 cannot be read to provide an exhaustive list of grounds for tolling the *running* of limitations periods once a cause of action has accrued, because it fails to allow for statutory tolling provisions that actually deal with the suspension of limitations periods once a litigant's cause of action has accrued and the limitations period has begun to run. Indeed, the majority - - if not all - - of the enumerated grounds for "tolling" in §95.051 are actually events that appear to delay the accrual of a plaintiff's cause of action or the time period at which the limitations period *begins* to run, i.e., the absence from the state of the person to be sued; intentional evasion of service of process by use of a false name; intentional evasion of service of process by concealment of the person to be sued, adjudicated incapacity of the person entitled to sue; pending arbitral proceedings pertaining to a dispute that is the subject of an action; minority of the person entitled to sue. *See* Fla.Stats. §95.051(1).

Section 95.051(2) also suggests that the section is intended to delay the time period at which the limitations period commences. "No disability or other reason shall toll the running of any statute of limitations except those specified in this

section, s. 95.091, the Florida Probate Code, or the Florida Guardianship Law." Fla.Stats. 95.051(2).

In this case, there was no dispute that Mr. Ramirez's cause of action accrued on the date of the car accident, i.e., March 3, 2003. The statute of limitations began to run on March 3, 2003. Therefore, the Third District's application of §95.051 was misplaced. Although the Third District relied on this Court's brief discussion of §95.051 in *Hearndon v. Graham*, 767 So.2d 1179 (Fla. 2000), this Court's analysis of §95.051 in *Hearndon* was misapplied, because the Third District's decisions fails to recognize the two-pronged analysis set forth in *Hearndon* on which this Court focused in distinguishing between the distinct concepts of accrual of a cause of action the tolling of a limitations period; "First, whether the cause of action accrued and, if so, when; and second, whether a statutory tolling provision applies." *Hearndon, supra* at 1185.[11] The Third District

[11] The entirety of the Third District's analysis of §95.051 appears in four sentences:

> Section 95.051, Florida Statutes (2006), enumerated eight different, specific grounds for tolling limitation periods. None of those are applicable here. In *Hearndon v. Graham*, 767 So.2d 1179, 1185 (Fla. 2000), the Florida Supreme Court held that delayed discovery due to lack of memory could not toll the statute of limitations as it was

did not take into account the fact that *Hearndon, supra,* dealt with the point at which the limitations period is triggered and not the suspension of a limitations period that had begun to run.

Interpreting §95.051 as providing an exhaustive list of grounds for the tolling of a limitations period that has already begun to run *after* the cause of action has accrued - - as the Third District has done - - ignores other statutory tolling provisions.

For example, Fla.Stats. §766.106 tolls the statute of limitations for the pre-suit screening period in medical malpractice cases. Section 766.106(4) provides, in pertinent part:

> (4) Service of presuit notice and tolling.--The notice of intent to initiate litigation shall be served within the time

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> not one of the eight enumerated grounds. It added that "the tolling statute specifically precludes application of any tolling provision not specifically provided therein." *Id*.

Ramirez, supra at 693.

> Furthermore, we have the Florida Supreme Court itself in *Hearndon* specifically declaring that by enumerating eight grounds in section 95.051, the legislature has basically precluded application of any other tolling provisions that imaginative litigants may come up with.

Ramirez, supra at 694.

> limits set forth in s. 95.11. *However, during the 90-day period, the statute of limitations is tolled as to all potential defendants. Upon stipulation by the parties, the 90-day period may be extended and the statute of limitations is tolled during any such extension.* Upon receiving notice of termination of negotiations in an extended period, the claimant shall have 60 days or the remainder of the period of the statute of limitations, whichever is greater, within which to file suit.

Fla.Stats. §766.106(4)(emphasis added).[12]

Similarly, Florida's No-Fault Statute requires that a pre-suit Demand Letter be sent to personal injury protection (PIP) insurers in order to give the insurer 30 days within which it may pay a PIP claim without exposure to the statutory

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[12] The 90-day period referred to in §766.106(4) is the investigative period required by Fla.Stats. §766.203(3), which provides in pertinent part:

> (a) No suit may be filed for a period of 90 days after notice is mailed to any prospective defendant. During the 90-day period, the prospective defendant or the defendant's insurer or self-insurer shall conduct a review as provided ins. 766.203(3) *to determine the liability of the defendant. Each insurer or self-insurer shall have a procedure for the prompt investigation, review, and evaluation of claims during the 90-day period. … .*

Fla.Stats. §766.106(3)(a).

penalties for overdue medical bills. *See* Fla.Stats. 627.736(10). Section 627.736(10)(e) provides, in pertinent part:

> (e) The applicable statute of limitation for an action under this section shall be tolled for a period of 30 business days by the mailing of the notice required by this subsection.

Fla.Stats. §627.736(10)(e).

If §95.051 provides an exhaustive list of grounds for the actual tolling of statutes of limitations, it cannot be reconciled with other statutory tolling provisions, like Fla.Stats. §§766.106 and 627.736(10), which were enacted *after* §95.051.[13] Indeed, if §95.051 is interpreted as providing an exhaustive list of

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[13] The enactment of §95.051 dates back to 1974, when the legislature rewrote and renumbered the provisions formerly contained in §§95.05 and 95.07, both of which delayed the commencement of the limitations period on grounds of disability existing when the plaintiff's cause of action accrued, and the defendant's absence from the state when the plaintiff's cause of action accrued.

The medical malpractice presuit investigatory period, and applicable tolling periods relating thereto, were enacted in 1985. *See* Fla.Stats. §766.104, formerly numbered §768.495.

The No-Fault Statute's Demand Letter requirement, and applicable tolling provisions related thereto, was enacted in 2001. *See* Fla.Stats. §627.736(10), formerly numbered §627.736(11).

grounds for the actual tolling of limitations periods once they have begun to run, the legislature itself cannot enact statutory tolling provisions that such an interpretation would prohibit.[14] Since the legislature often enacts statutory provisions that toll applicable limitations periods, there is no conclusion to reach other than that §95.051 does *not* provide an exhaustive list of circumstances, to the exclusion of all others, under which limitations periods may be tolled once they have begun to run. *See Williams v. Jones*, 326 So.2d 425 (Fla. 1975)("[T]he Legislature is presumed to know the existing law when it enacts a statute and is also presumed to be acquainted with the judicial construction of former laws on the subject concerning which a later statute is enacted."); *Collins Invest. Co. v. Metro Dade County*, 164 So.2d 806 (Fla. 1964).

Moreover, under the Third District's analysis, if the statute of limitations on a plaintiff's claim expires on a day during which the courts are closed due to a weather emergency or other disaster natural or otherwise, the plaintiff is forever barred from filing suit, because this Court cannot issue an order tolling a limitations period, since neither emergencies nor disasters are enumerated within Fla.Stats.

[14] Although not an exhaustive list, a number of other statutes similarly toll applicable statutes of limitations. *See* Fla.Stats. §213.285(4)(c); §400.0233(4); §429.293(4); §558.004(10); §631.042(3); §718.1255(4)(I); §720.311(1); §766.306. The Third District's construction of §95.051 would prohibit the legislature from enacting any statute which operates to toll a statute of limitations.

§95.051.

Finally, as a matter of public policy, the Court's administrative tolling orders should be applied across the board to all litigants. McCravy argued below that the purpose of limitations periods is to protect "unwitting defendants from unexpected enforcement of stale claims brought by plaintiffs who have slept on their rights." (Answer Brief at 5, quoting *Maynard v. Household Finance Corp., III,* 861 So.2d 1204 (Fla. 2d DCA 2003)).

The Petitioner recognizes that limitations periods are in place to impose an element of finality on potential claims. However, the practical effect of this Court's administrative tolling orders, which result from weather emergencies, is to extend limitations periods by a matter of days. As the Court can see in this case, which involved unusual successive storms in a particularly active storm season, the additional time added to Mr. Ramirez's limitations period was only approximately 30 days. This is not a situation in which a plaintiff sought to bring his claims years beyond the applicable limitations period. If a collateral benefit of the Court's tolling orders is to allow a plaintiff an additional three days to file his lawsuit, McCravy cannot possibly argue any legitimate prejudice, other than the fact that he must defend a lawsuit that was filed three days after the limitations period would ordinarily have expired.

Moreover, McCravy's position unavoidably implicates the proverbial "slippery slope." How many days must a litigant have left on his or her limitations period to file suit, after the courts reopen following an administrative tolling order, before the litigant has failed to "diligently pursue" his right? (Answer Brief at 11). Unless the Court is prepared to impose an arbitrary time period, applying the Court's tolling orders to litigants across-the-board, effectively stopping the clock on running limitations periods, is the only fair and neutral means by which the orders may be applied.

CONCLUSION

The Petitioner respectfully requests that the Court disapprove the Third District's Opinion in this case and, consistent with its decision in *Hankey v. Yarian*, 755 So.2d 93 (Fla. 2000) and the Fifth District's decision in *Sullivan v. State*, 913 So.2d 762 (Fla. 5th DCA 2005), hold that an administrative order, which "tolls" all time limits authorized by rule and statute, operates to "toll" the statute of limitations on a personal injury action regardless of whether the limitations period expires on or around the time of a weather emergency.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was sent by U.S. Mail to: NEIL ROSE, ESQ., *Counsel for Defendant*, Bernstein, Chackman & Liss, 1909 Tyler Street, 7th Floor, Hollywood, Florida 33021; and BERNARD BUTTS, JR., ESQ., *Trial Counsel for Plaintiff*, 1790 West 49th Street, Suite 210, Hialeah, Florida 33012, this 5th day of October, 2009.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Initial Brief generated in Time New Roman 14-point font, in compliance with Fla.R.App.P. 9.210(a).

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