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 REPLY BRIEF
On Discretionary Review from the Third District Court of Appeal

MARLENE S. REISS, ESQ.
Fla. Bar No. 864048
Counsel for Petitioner Roman Ramirez
Two Datran Center, Suite 1612
9130 South Dadeland Boulevard
Miami, Florida 33156
Telephone: (305) 670-8010
Facsimile: (305) 670-2305

TABLE OF CONTENTS

Table of Authorities

REPLY

LAW OFFICES OF MARLENE S. REISS, ESQ., P.A.
9130 SOUTH DADELAND BOULEVARD ♦DATRAN II - SUITE 1612 ♦MIAMI, FLORIDA 33156
PHONE: 305-670-8010 ♦FAX: 305-670-2305 ♦EMAIL: REISSAPPLAW@BELLSOUTH.NET

The Issue Decided by the Third District Was Not "Novel"
and Does Not Deprive This Court of Conflict Jurisdiction on That Basis

As a basis for arguing that this Court does not have conflict jurisdiction to review the Third District's decision, the Respondent argues a district court decision based on a so-called "novel argument"cannot form the basis of this Court's provide conflict jurisdiction.

While it is true that the Third District characterized the Petitioner's argument as "novel," we submit that it was not. Rather, the Petitioner's argument was based on an order that "tolls" "all time limits authorized by rule and statute," and thus, the Petitioner simply relied on the law that deals with the tolling of time periods. (R 87-104). To that end, the Third District's decision conflicts with this Court's and the Fifth District's decisions *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 fact, to the extent that *Sullivan, supra,* actually dealt with this Court's tolling orders identical to those at issue in this case, the Petitioner's argument was not "novel" at all. (Answer Brief at 7). The argument was addressed squarely in *Sullivan, supra*, and by the Third District itself in *State v. Hernandez,* 617 So.2d 1103 (Fla. 3d DCA 1993).

Moreover, to the extent that the Respondent argues that the Third District's false distinction between statutes and rules, i.e., statutes of limitations vs. procedural

rules (the speedy trial rule,) renders the ruling "novel," we submit that a rationale that is unsupported by any authority does not render the ruling "novel," it merely renders it in conflict with earlier decisions that ruled on identical administrative orders. (Answer Brief at 7-8). There is no language in either *Sullivan* (or *Hernandez* for that matter) that distinguishes those cases from this case. Neither the Fifth District in *Sullivan*, nor the Third District in *Hernandez* appears to have based those decisions on the fact that the speedy trial rule was at issue rather than a statute of limitations.

The Respondent has attempted to expand on the Third District's rationale - - even though the Respondent never raised the issue below - - by arguing the same false distinction that the Third District has created. (Answer Brief at 8-11). Like the Third District's decision, the Respondent's argument is devoid of any substantive reason to create the distinction between procedural rules and statutes that would render this Court's administrative tolling orders applicable to one and not the other.

Although the Third District decided to "give greater scrutiny" to an administrative order that implicates a statute of limitations as opposed to a rule of procedure, this Court's administrative tolling orders do not support a different standard of application, and the Third District's decision to create different standards of application does not divest this Court of conflict jurisdiction, where an opinion of

this Court clearly and unequivocally explains the concept of tolling that the Third District does not even mention in its decision. *See Hankey v. Yarian*, 755 So.2d 93 (Fla. 2000).

The Respondent has now framed "the legal question" below - - for the very first time - - as whether this Court has authority to issue administrative orders that operate to extend statutes of limitations, as opposed to procedural rules. That was not the issue below. (Answer Brief at 9). Rather, the issue below was whether the Court's administrative orders operate to do exactly what they state - - toll "***all time limits authorized by rule and statute*** applicable to civil proceedings ... ." (R 87-104 at ¶2). Re-characterizing the proceedings below as something other than what they were will not divest this Court of conflict jurisdiction.

The Respondent further argues that, because *Hankey v. Yarian*, 755 So.2d 93 (Fla. 2000), dealt with the tolling of the statute of limitations in medical malpractice actions by statute, rather than rule, there is no conflict between that decision and the Third District's decision.

Again, the distinction argued by the Respondent is one without a difference. The importance of *Hankey, supra,* and the express and direct conflict between that case and the Third District's opinion is that, in *Hankey,* this Court explained what the word "toll" means:

> 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).

The Third District, however, reached a completely contrary conclusion, by determining 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." (Opinion at 5). The Third District's decision cannot be reconciled with this Court's decision in *Hankey*.

Regardless of whether *Hankey* involved a statute or a rule, the Third District's decision directly conflicts with this Court's determination of the operative effect of a tolling rule, provision, order or statute. Tolling periods either "suspend" the running of a time period or they do not - - this Court has said unequivocally that they do.

Again, by stating that this Court "never dealt with the same question of law" in *Hankey* as the Third District did in this case, the Respondent has reframed the

issue in this case - - which is and always has been whether "toll" means to suspend the running of a time period. (Answer Brief at 12).

The Court has jurisdiction to review the Third District's decision

The Merits

On the merits, the Respondent states that this Court's administrative order "do not apply to extend the limitations period" in this case. (Answer Brief at 14). The administrative orders say otherwise.

While the Respondent focuses on the "substantial property interests of a defendant regarding his limitations defenses," which "a plaintiff cannot lightly ignore," (Answer Brief at 14), a defendant's right to assert a limitations defense cannot trump the plaintiff's equal - - if not more important - - protected property right of access to the courts. *See Candansk, LLC v. Estate of Hicks*, ___So.3d ___ (Fla. 2d DCA, November 13, 2009), citing *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982).

A *plaintiff's* protected property right of access to the courts is widely acknowledged. *See Watkins v. Gilbride, Heller & Brown, P.A.*, 754 So.2d 759 (Fla. 3d DCA 2000), Sorondo, J., concurring ("Where courts have discretion in determining the applicability of a statute of limitations, such discretion should be exercised in favor of affording the Florida Constitution's guarantee of access to

courts contained within Article I, Section 21.") *See also Pezzi v. Brown*, 697 So.2d 883, 886 (Fla. 4th DCA 1997)("statutes restricting access to the courts must be narrowly construed in a manner favoring access"); *Angrand v. Fox*, 552 So.2d 1113, 1116 (Fla. 3d DCA 1989)("it is well established that a limitations defense is not favored, ... and that therefore any substantial doubt on the question should be resolved by choosing the longer rather than the shorter possible statutory period."); *City of Miami v. Rivas*, 723 So.2d 393, 393 (Fla. 3d DCA 1999)("Florida policy dictates a strong preference that cases be decided on their merits."); *Venero v. Balbuena*, 652 So.2d 1271 (Fla. 3d DCA 1995); *Cinkat Transp., Inc. v. Maryland Cas. Co.*, 596 So.2d 746 (Fla. 3d DCA 1992).

Rather than adopting the narrow interpretation advocated by the Respondent and the Third District, as a matter of public policy, this Court should hold that its administrative tolling order should be applied consistently and broadly to allow rather than deny access to the courts.

If there is a collateral "windfall" to plaintiffs whose limitations periods are affected by the Court's administrative tolling orders, any such windfall is consistent with Florida's long-standing policy that cases be decided on their merits and that plaintiffs be granted their constitutional right of access to the courts. (Answer Brief at 22-23).

The hypotheticals advanced by the Respondent underscore the problems with a so-called "strict" application of the Court's administrative tolling orders to statutes as opposed to a liberal application to procedural rules.

The Respondent suggests that, if a defendant's 20-day time period for answering a complaint is interrupted by a weather emergency on the eighteenth day, the defendant should be able to file the answer two days after the reopening of the courts. (Answer Brief at 17-18). Alternatively, the Respondent suggests that a plaintiff who has two remaining days within a four-year limitations period to file a complaint would have the limitations period tolled, and would have two remaining days to file the complaint when the courthouse reopened. (Answer Brief at 18). While we agree, in theory, with the Respondent's analysis, it opens the proverbial can of worms which can only be slammed shut by a consistent application of the Court's tolling orders.

If a weather emergency forces the courts to close for five days on the first day of the 20-day time period within which a defendant must file his or her answer, does the defendant still have the remaining 20 days within which the answer must be filed once the courts open, even though he or she has a full 15 days beyond the court's reopening to file the answer and is not otherwise impeded from doing so?

In particular, the Respondent's hypothetical about the plaintiff whose statute

of limitations expires during the tolling period poses the thorniest question and, we believe, supports the Petitioner's position. For some reason, the Respondent agrees that a plaintiff whose limitations period expires during the tolling period still gets the remaining number of days left in his or her limitations period - - as long as the remaining period is only two days. But, what if a plaintiff's limitations period expires on the first day of a ten-day court closure? Does the plaintiff still have ten days after the courts reopen to file the complaint, or must the plaintiff be at the courthouse on the day it reopens? According to the Respondent's hypothetical analysis, that plaintiff would still seem to have ten days the complaint, even though nothing is keeping that plaintiff from filing the lawsuit on the day the courts open.

There is no practical difference between the time period in which an answer must be filed and the time period within which a lawsuit must be brought, simply because one is governed by rule and the other is governed by statute. Certainly, the Respondent makes no such distinction in its hypotheticals. If the time period within which one must be accomplished is tolled, then the time periods within which both must be accomplished must be tolled - - and the number of days remaining in either time period must be honored, whether that time period is two days, two weeks, two months or two years.

Finally, with respect to the Respondent's discussion of Fla.Stats. §59.051, the

Respondent misses the point. The Third District relied on §59.051to conclude that that statute provides an exhaustive and exclusive list of occurrences that may extend limitations periods. (Opinion at 3-4). We have pointed to a number of statutes that, in fact, toll limitations periods, notwithstanding that §59.051 does not include legislative extensions of limitations periods. Likewise, §59.051 does not include Supreme Court administrative tolling orders as a means by which limitations period may be tolled. If the Legislature may enact tolling provisions within its statutes, even though legislative enactment are not among the enumerated methods by which limitations periods may be tolled, this Court likewise has authority to toll statutory limitations periods even though its administrative orders are not among the enumerated bases set forth in §59.051.

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 of the Court, 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*, 6291 Bird Road, Miami, Florida 33155, this 19th day of November, 2009.

CERTIFICATE OF COMPLIANCE

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

MARLENE S. REISS, ESQ., P.A.
Counsel for Petitioner
Two Datran Center, Suite 1612
9130 South Dadeland Boulevard
Miami, Florida 33156
Telephone: (305) 670-8010
Facsimile: (305) 670-2305
By: _____

MARLENE S. REISS
Fla. Bar No. 864048

H:\Docs\CASES\Ramirez, R\S CT\Reply Brief.wpd