SUPREME COURT
STATE OF FLORIDA

Supreme Court Case No.: SC12-1474
DCA Case: 1D11-2700
Lower Tribunal Case No.: 06-CA-1855

CADUCEUS PROPERTIES, LLC, a Florida limited liability company; and, TALLAHASSEE NEUROLOGICAL CLINIC , P.A., a Florida professional association,

Petitioners

v.

WILLIAM E GRANEY, P.E., individually, and KTD CONSULTING ENGINEERS, INC., a Florida corporation,

Respondents

RESPONDENTS' ANSWER BRIEF

On Review of a Certified Conflict Decision of the First District Court of Appeal

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STATEMENT OF THE CASE AND OF THE FACTS

The respondents are the prevailing party in an appeal of a final judgment rendered against them following a non-jury trial in Leon County. In reversing the trial court, the First District held that the claims of the petitioners/plaintiffs were barred by the applicable four year statute of limitations. The First District concluded that the petitioners' action did not relate back to the original complaint based on a timely filing of a third party complaint against the respondent/defendants by another party. The First District certified a conflict with the Fifth District decision in Gatins v. Sebastian Inlet Tax Dist., 453 So.2d 871 (Fla. 5th DCA 1985).

The case involves the design and construction of a tenant interior build out of an existing shell building into an ambulatory surgical center and pain clinic ("Project"). The building is owned by Caduceus Properties, LLC ("Caduceus") with Tallahassee Neurological Clinic ("TNC") as its primary tenant (both are referred herein as "Petitioners"). Gordon & Associates, Architects ("Gordon") was the Project architect pursuant to an agreement with TNC. KTD Consulting Engineers, Inc. ("KTD") was the engineering design consultant to Gordon for the Project's HVAC system with William Graney, P.E. ("Graney") serving as the principal HVAC designer. The Project was completed in August 2005 and experienced HVAC issues as early as September 2005. An action was filed by

Caduceus only against Gordon in July 2006 for HVAC system defects. In March 2007, Gordon filed a third party complaint against KTD and Graney alleging a general inchoate claim for common law indemnity. In June 2010, Caduceus and, for the first time, TNC filed a direct action complaint against KTD and Graney. This complaint was twice amended and ultimately alleged eight counts and included a punitive damages claim. Gordon's third party complaint against KTD and Graney was dismissed on February 25, 2011, before the trial commenced (R. 1043). The trial court found in favor of both Caduceus and TNC leading to the appeal by KTD and Graney. The First District ruled that the direct action complaint filed by Caduceus and TNC against KTD and Graney was barred by the applicable statute of limitations.

Summary of Issue

The issue before this court is whether the statute of limitations operates as a bar to the direct claims brought by Caduceus and TNC against KTD and Graney after the limitations period had expired, although KTD and Graney were impleaded as third party defendants by the architect Gordon within the limitations period.

The First District ruled that the direct action was barred by §95.11(3)(c), Fla.Stat., which provides a four year period for claims "founded on the design, planning or construction of an improvement to real property". The First District determined that the claims did not "relate back" to the filing date of the third party

complaint to permit the addition of a new party plaintiff, TNC, as well as new first party defendants and revive claims that would otherwise be time barred . See Fla. R. Civ. P. 1.190(c).

Factual Background

In 2003, TNC (building tenant) and Gordon entered into a direct contract for design of improvements to a shell building to be used as a pain clinic and surgery center. (Tr. Ex. 1). Gordon and KTD entered into a design consultant agreement for engineering systems including the HVAC system design for the "Tallahassee Neurological Clinic". (Tr. Ex. 2). The Gordon/KTD Agreement provided for two KTD Project site visits during construction, in addition to the engineering design services, but no pre-design meetings with the building owner (Caduceus) or the tenant (TNC). (Tr. Ex. 2). The Gordon/KTD Agreement also provided a professional liability limitation in favor of KTD and its officers, directors, and partners in the amount of $50,000. Graney was the HVAC principal design engineer. Caduceus (building owner) served as its own general contractor and entered into direct agreements with multiple prime contractors, including Kelly Brothers Sheet Metal to perform the installation of the HVAC system. (Tr. Ex.5). The Gordon/KTD Agreement does not reference or integrate either the TNC/Gordon design agreement or the Caduceus/Kelly Brothers agreement. (Tr. Ex. 2).

Pursuant to its agreement with Gordon, KTD designed a direct expansion (DX) HVAC system. The HVAC system served, in part, operating rooms and a recovery room which were subject to regulations adopted by the Florida Agency for Healthcare Administration (AHCA). (T. 342). AHCA reviewed and approved the design drawings for spaces subject to its review, including the HVAC designs. (T. 342, 349). The City of Tallahassee also reviewed and approved the design drawings for the Project, including those for the entire HVAC system. (T. 349). The certificate of occupancy for the building was issued in August 2005, and immediately thereafter complaints concerning the HVAC system were raised. (T.184). In September 2005, KTD and Graney received written notice from Caduceus and TNC's counsel of the issues and KTD's potential liability. (Tr. Ex. 58). While the HVAC system did not function as designed, the facility experienced no disruption of operations. TNC did not shut down due to HVAC issues, no procedures were cancelled, no reporting of issues was made to AHCA and no damages were claimed for lost profits due to operation disruptions. (T. 157-58, 6-25 and 1-25). Ultimately, the building owner, Caduceus, decided to replace the direct expansion (DX) HVAC system with a chilled water HVAC system, a much more expensive system.

Procedural History

On July 24, 2006, Caduceus filed suit against the architect Gordon, seeking damages related to the malfunctioning HVAC system. (R. 37). TNC was not a named plaintiff in this initial complaint. (R. 37). On March 7, 2007, Gordon and Associates filed a third-party complaint against its consulting engineer KTD and Graney. (R. 162). Having denied liability to the Caduceus complaint, Gordon asserted a single count against KTD and Graney for an inchoate claim of common law indemnity, alleging "to the extent that Gordon is liable to Plaintiff for damages as alleged in Exhibit "B" [Caduceus complaint against Gordon], KTD or Graney or both are liable to Gordon for such damages." (R. 162). Gordon did not allege breach of contract, professional negligence, §553.84, Fla.Stat., the statutory action for a violation of the Florida Building Code, or breach of implied covenant of good faith and fair dealing. (R. 162). Ultimately, Gordon's third party complaint against KTD and Graney was dismissed by the trial court on February 25, 2011 (R. 1043).

On June 3, 2010, Caduceus and, for the first time, TNC sought leave to file a direct action against third-party defendants KTD and Graney. (R. 264). On June 4, 2010, Caduceus moved to add TNC as a party plaintiff. (R. 298). Prior to this pleading, TNC was not a party in the litigation. On July 13, 2013, the court granted Caduceus' two motions. (R. 355). The trial court permitted Caduceus and TNC to amend the direct action complaint twice with the Second Amended Direct

Action Complaint filed on March 11, 2011, 10 days before trial. (R. 1530). In response, KTD and Graney raised the statute of limitations as an affirmative defense. (R. 1830), in addition to doing so on December 9, 2010 to the Amended Direct Action Complaint. (R. 541). The Second Amended Direct Action Complaint is the final operative complaint against KTD and Graney and included a claim for punitive damages. (R. 1530).

Caduceus and TNC asserted claims plead in the alternative, as well as being plaintiffs in the alternative to each other. (R. 1531, ¶9). The building owner Caduceus asserted claims against KTD and Graney for professional negligence (Count I), Violation of Florida Statute 553.84 (Count III), breach of third party beneficiary contract (Count V), and breach of implied covenant of good faith and fair dealing (Count VII). The building tenant, TNC, as an alternative plaintiff, asserted claims in the alternative against KTD and Graney for professional negligence (Count II), Violation of Florida Statute 553.84 (Count IV), breach of third party beneficiary contract (Count VI), and breach of implied covenant of good faith and fair dealing (Count VIII). (R. 1530).

The case was tried without a jury on March 21 through 24, 2011 before the Honorable Jackie Fulford. On April 20, 2011, despite Caduceus' and TNC's claims being alternative claims, the trial court issued its Order on Trial ruling that (i) both Caduceus and TNC prevailed on their professional negligence actions

against KTD and Graney, jointly and severally; (ii) both Caduceus and TNC prevailed on their §553.84 violation of building code actions against KTD and Graney, jointly and severally; (iii) both Caduceus and TNC prevailed on their breach of third-party beneficiary contract actions against KTD; and (iv) both Caduceus and TNC prevailed on their breach of implied covenant of good faith and fair dealing actions against KTD. (R. 1850). The order provided no findings of fact or legal conclusions. (R. 1850). The trial court awarded Caduceus damages in the total amount of $453,793.41. TNC was awarded $35,341.15. (R. 1850).

During the trial, Graney and KTD moved for involuntary dismissal based upon the statute of limitations defense at the close of Plaintiffs' case. The trial court denied the motion relying on the Fifth Districts' decision in Gatins v. Sebastian Inlet Tax Dist., 453 So.2d 871 (Fla. 5th DCA 1985). KTD and Graney appealed the trial court's decision on several grounds, including its denial of the motion for involuntary dismissal on the statute of limitations defense to the direct action complaint of Caduceus and TNC.

The First District reversed the judgment of the trial court concluding that the direct action filed by Caduceus and TNC against Graney and KTD did not relate back to the timely filed third party complaint by Gordon and therefore the direct action was barred by the statute of limitations. Graney v. Caduceus Properties, LLC, 91 So. 3d 220, 228 (Fla. 1st DCA 2012). The First District certified a direct

conflict with the Fifth District in Gatins v. Sebastian Inlet Tax Dist., 453 So.2d 871 (Fla. 5th DCA 1984).

SUMMARY OF ARGUMENT

This Court should affirm and adopt the decision of the First District rendered below. For statute of limitations purposes, the relation back rule, Fla. R. Civ. P. 1.190(c), should only be permitted where there is a mistake or misnomer in identifying a party defendant, not for willfully failing to timely add a known party defendant. The plaintiff should not be relieved of the burden of demonstrating mistake or misnomer simply because the party to be added as a direct defendant is in the litigation as a third-party defendant. As stated by the First District, "to hold otherwise would amount to interpreting rule 1.190(c) to mean that the filing of a third-party complaint tolls the running of the statute of limitations on a cause of action between the plaintiff and a third-party defendant. Nothing in the text of the rule compels such an expansive interpretation." Graney v. Caduceus Properties, LLC, at 228.

ARGUMENT

I. THE UNTIMELY DIRECT ACTION COMPLAINT DOES NOT RELATE BACK TO THE FILING DATE OF THE THIRD PARTY COMPLAINT

The applicable statute of limitations for this matter was provided in §95.11(3)(c), Fla.Stat., and required that an action founded on the design, planning,

or construction of an improvement to real property, must be brought within four (4) years from time of actual possession by the owner, the date of the issuance of a certificate of occupancy, the date of abandonment of construction if not completed, or the date of completion or termination of the contract between the professional engineer, registered architect, or licensed contractor and his or her employer, whichever date is latest.

The latest date in this case has been determined to be September 2005. The First District found that "Caduceus and TNC were well aware of the identities of Graney and KTD and their roles in the design and approval of the HVAC system from the time the system began to fail in August or September 2005. Further, it is undisputed that Caduceus and TNC were aware of the potential liability of KTD and Graney when Gordon filed the third-party complaint, just over eight months after the original lawsuit [Caduceus only] was filed and at least two years before the statute of limitations ran. Graney, at 225-26. Nonetheless, Caduceus did not seek to add KTD and Graney as direct defendants until June 2010, and TNC did not become a party to the action until June 2010.

Caduceus and TNC opted not to file a direct complaint against KTD and Graney before the statute of limitations ran in September 2009 although it knew that the brief third party complaint filed by Gordon against KTD and Graney was purportedly for common law indemnity and incorporated by reference the original

complaint filed solely by Caduceus. (R. 162). The architect/owner design contract referenced in the third party complaint was entered into by Gordon and the separate tenant entity, TNC. Despite the absence of TNC as a party to either the Caduceus original complaint or by incorporation in the third party complaint, Caduceus and TNC argue that they were not precluded from filing their plaintiffs in the alternative multiple count direct action complaint against KTD and Graney nine months after the expiration of the statute of limitations. This filing was nearly five years after the HVAC problems were known and more than three years after the filing of the Gordon third party complaint in response to the Caduceus original action.

The Caduceus and TNC direct action complaint added new parties in the form of TNC (named plaintiff) and KTD and Graney (as first party defendants). The direct action complaint, as amended, also added significant additional claims against KTD and Graney which were unquestionably time barred. As noted above, these claims included professional negligence, §553.84, Fla. Stat., a statutory action for a violation of the Florida Building Code, breach of contract and breach of implied covenant of good faith and fair dealing. (R. 1530). Defending against these claims is a different animal than the common law indemnity claim asserted by Gordon. Additionally, Caduceus and TNC convinced the trial court to permit a

claim for recovery of punitive damages based on KTD and Graney's actions beginning in July 2005.

It would appear evident that Caduceus and TNC's true target in the litigation was KTD and Graney, yet neither Caduceus nor TNC took the steps to timely sue the engineering firm or its principal, William Graney. Caduceus and TNC explain the shift in focus in the litigation by their admission that they became concerned with the financial stability of the architect Gordon in or around May 2010. (Petitioner's Brief 6). This confirms what the First District ultimately held, that "Caduceus and TNC made an intentional or tactical decision not to timely bring claims against parties they knew to be potentially liable. Caduceus and TNC were aware of the identities of KTD and Graney since the time that the HVAC system first began to fail in August 2005. TNC and Caduceus deliberately chose to sue another defendant with full knowledge of the existence and identity of other potential defendants." Graney v. Caduceus Properties, LLC, 91 So. 3d 220, 228 (Fla. 1st DCA 2012).

Caduceus and TNC argue that since KTD and Graney were parties to "the litigation", the claims against them are of no import as long as the third party complaint was filed within four years and the amendment arising out of the same transaction or occurrence. While the amendments relate in general to the underlying Project, the claims and parties are manifestly different. Prior to the

direct action complaint, KTD and Graney were defending a pass-through claim for common law indemnity by Gordon based on its consultant agreement. In defending this claim, KTD and Graney needed only to prove that Gordon was himself negligent, which would have served as a complete defense to the third-party complaint. This would not prove difficult to do given that Caduceus and TNC argued that Gordon abandoned the project when he was arrested for solicitation and his sole remaining employee in contact with TNC quit before completion. (R. 1580). Further, the agreement between Gordon and KTD contained a limitation of liability provision which may have limited KTD and Graney's exposure to damages as no tort based claims were alleged by Gordon. The difference in defending the inchoate claim asserted by Gordon and defending the tort, contract, statutory, and punitive damages claims made by Caduceus and TNC is significant.

Caduceus and TNC argue that their own knowledge of KTD and Graney and their potential liability has no bearing on actions taken by Caduceus and TNC, or the timeliness of those actions, to assert a direct action complaint with significant additional claims. The position advocated by Caduceus and TNC puts no constraints or requirements on a party amending a pleading to add new claims against new direct defendants as long as there is a timely filed third party complaint against that party. The amending plaintiffs are not required to move diligently upon learning the identity of a potentially liable party. Indeed, the

plaintiff may forego amending or, if it so chooses, amend and take the litigation in a different direction after years of litigation and mediation efforts. This is precisely what occurred in this case. Under these circumstances, Caduceus and TNC should not be rewarded for their tactical dilatoriness.

A. First District: Graney Decision

The First District held that the direct action complaint filed by Caduceus and TNC in June 2010 against Graney and KTD did not relate back to the original complaint based on a timely filed third party complaint by the architect Gordon. Accordingly, the direct action was barred by the statute of limitations. Graney v. Caduceus Properties, LLC, 91 So. 3d 220, 228 (Fla. 1st DCA 2012). In reaching this conclusion, the First District ruled that relation back "should only be permitted where there is a mistake or misnomer in identifying a party defendant, not a mistake in failing to add a party defendant. The fact that a defendant who is proposed to be added has participated in the lawsuit as a third-party defendant does not relieve the plaintiff of the burden of demonstrating mistake or misnomer. To hold otherwise would amount to interpreting rule 1.190(c) to mean that the filing of a third-party complaint tolls the running of the statute of limitations on a cause of action between the plaintiff and a third-party defendant. Nothing in the text of the rule compels such an expansive interpretation". Id.

In this case the First District found the opposite of mistake or misnomer, noting that "Caduceus and TNC made an intentional or tactical decision not to timely bring claims against parties they knew to be potentially liable. Caduceus and TNC were aware of the identities of KTD and Graney since...August 2005... and...deliberately chose to sue another defendant with full knowledge of the existence and identity of other potential defendants." Id. Ultimately, the First District ruled that since there was no mistake or misnomer Caduceus and TNC should not be given a second opportunity to add new claims against KTD and Graney as newly added first party defendants after the four year limitations period expired. Id.

The First District reviewed the Fifth District's holding in Gatins and the decisions of other courts which favor the interpretation of the relation-back doctrine in the third party practice context as an adjustment of the status of existing parties. Id at 227. The Court considered the logic and facts underlying Gatins and similar cases, but determined that the contrary "line of authority represented a more reasonable interpretation of the relation-back doctrine" which is "consistent with the underlying purpose of the statute of limitations." Id. See State ex rel. Hilker v. Sweeney, 877 S.W.2d 624, 628 (Mo. 1994) (relation back is triggered only by a mistake in identifying a party defendant and not by a mistake in failing to add a party defendant); Laliberte v. Providence Redev. Agency, 109 R.I. 565, 288

A.2d 502 (1972) (holding that plaintiffs could not assert direct action against third-party defendants after the statute of limitations had run); J.G. Boyd's Good Housekeeping Shops, Inc. v. Gen. Sec. Serv., Inc., 483 S.W.2d 826 (Tex.Civ.App.1972) (holding that plaintiff's claim against third-party defendant was barred by the statute of limitations); Mathai v. Catholic Health Initiatives, Inc., No. Civ.A. 00–656, 2000 WL 1716747, at *3 (E.D.Pa. Nov.16, 2000) (unpublished decision) (holding that federal rule allowing relation back "was not intended to assist a plaintiff who ignores or fails to respond in a reasonable fashion to notice of a potential party"); Higginbotham v. Fearer Leasing, Inc., 32 Mich.App. 664, 189 N.W.2d 125 (1971).

Respondents' argument that the cases favorably cited by the First District involve significantly more stringent relation-back rules is inaccurate. The Court in Higginbotham v. Fearer Leasing, Inc. ruled that the statute of limitations was not tolled as to the principal plaintiffs by reason of the defendants' motion to make the third-party defendant a party to the action for the purpose of contribution. N.W.2d at 131. Michigan's relation back rule is nearly identical to Fla. R. Civ. P. 1.190(c), providing:

> ... the amendment relates back to the date of the original pleading whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading. GCR 1963, 118.4

The Higginbotham Court ruled "with the majority of Federal authority that plaintiffs cannot amend the pleadings after the running of the statute of limitations to make a third-party defendant a principal defendant." 32 Mich. App. 664, 676-77, 189 N.W.2d 125, 131 (Mich. Ct. App. 1971). Additionally, the case of Duffy v. Horton Mem'l Hosp., 66 N.Y.2d 473, 488 N.E.2d 820 (1985), upon which Caduceus and TNC rely, dismisses the importance of the text of the relation back rule: "the language of the governing statute, ... is not particularly helpful, since it does not state whether or not it is applicable to an amended complaint served upon someone not named in the original complaint. Analysis should, therefore, turn on the policy considerations underlying Statutes of Limitations". 66 N.Y.2d 473, 476, 488 N.E.2d 820, 823 (1985).

The First District found that while KTD and Graney "were on notice of the complaint against Gordon brought by Caduceus and TNC, and were aware of the need to prepare a defense in the third-party action brought by Gordon, they lacked notice that the plaintiffs intended to file a direct action against them, an action which included different claims, requiring different elements of proof. This is precisely the type of harm that statutes of limitation are designed to prevent." Graney at 228. The First District's well reasoned analysis lead to the proper conclusion that the otherwise time barred claims asserted by Caduceus and TNC against KTD and Graney would not be deemed timely due to the filing of a third

party complaint for common law indemnity and therefore would not relate back to the original complaint. Id.

B. Fifth District: Gatins Decision

In Gatins v. Sebastian Inlet Tax Dist., 453 So.2d 871 (Fla. 5th DCA 1985), a father timely brought a wrongful death action against Sebastian Inlet Tax District individually and on behalf of his daughter, who was killed when she fell through an opening in the guardrail on a pier owned and operated by the Tax District. On the day before the statute of limitations ran on the wrongful death claim, the Tax District filed a third-party complaint against the engineering and construction company (Beindorf) that constructed the pier. Following the expiration of the statute of limitations, the plaintiff, with leave of court, filed a third amended complaint adding Beindorf as a party defendant. Id at 872. The third amended complaint was filed within three months of learning the identity and potential liability of Beindorf. Id.

In considering whether plaintiff's amended pleading adding the third-party defendant as a direct defendant related back to the filing of the third party complaint, the Fifth District acknowledged that the majority of courts in other jurisdictions had determined that such amendments did not relate back. Id. at 873. The Fifth District noted that "of the jurisdictions that have considered the issue, most have held that such claim is barred despite the fact that the party sought to be

added was impleaded as a third party defendant within the limitation period. See Laliberte v. Providence Redevelopment Agency, 109 R.I. 565, 288 A.2d 502 (1972); J.G. Boyd's Good Housekeeping Shops, Inc. v. General Sec. Serv., 483 S.W.2d 826 (Tex.Civ.App.1972); Higginbotham v. Fearer Leasing, Inc., 32 Mich.App. 664, 189 N.W.2d 125 (1971); Trybus v. Nipark Realty Corp., 26 App.Div.2d 563, 271 N.Y.S.2d 5 (1966); Abate v. Barkers of Wallingford, Inc., 27 Conn.Supp. 46, 229 A.2d 366 (1967); Holmes v. Capital Transit Co., 148 A.2d 788 (D.C.1959); Hankinson v. Pennsylvania Railroad Co., 160 F.Supp. 709 (E.D.Pa.1958). Gatins, at 873.

The Gatins court concluded that permitting the amendment was not inconsistent with the purposes underlying the statute of limitations, and simply adjusted the status of an existing party in the litigation. Id. "If a third party complaint is filed within the applicable limitation period and the third party defendant is made aware that it may be held liable for the plaintiff's damages, these purposes are satisfied and the fact that the plaintiff is permitted to amend outside the limitation period to formally make the third party defendant a party defendant is not inconsistent with these purposes, at least where, as here, the plaintiff's claim concerns the same issues as are raised in the third party complaint." Id. at 875.

Gatins v. Sebastian Inlet Tax Dist. is a standalone case which has not been expressly adopted by other Florida courts. The First District observed that

"although cited by two of the other Districts, no Florida court has expressly adopted the reasoning in Gatins or applied the court's holding to similar facts. Kaye v. Steiner, 460 So.2d 568, 568 (Fla. 3d DCA 1984) (Pearson, J. concurring) ("The introductory signal to the cases cited in this per curiam affirmance should not be construed as our approval of Gatins ...."); BMAB E. Tower, Inc. v. Testwell Craig Lab. & Consultants, Inc., 835 So.2d 1211 (Fla. 3d DCA 2003) (no discussion of facts); McKee v. Fort Lauderdale Produce Co., Inc., 503 So.2d 412 (Fla. 4th DCA 1987) (Stone, J. dissenting) ("Although I concur in the result reached in Gatins, in my view it is not applicable here."). Graney, at 226.

It is likely that the underlying facts presented in Gatins swayed the court to consider an equitable result which would permit the filing of the amended direct action complaint against Beindorf, the new third party defendant discovered by the plaintiff after the statute of limitations had expired. Had the Fifth District been presented with the facts of the case at hand, it is at least arguable that it would have been less inclined to side with the minority jurisdictions on the issue. The First District, presented with plaintiffs who purposely chose to sit on their right to timely amend their complaint to add new direct defendants and claims, came to a different conclusion.

II. THE FIRST DISTRICT'S RULING WAS NOT A PROCEDURAL RULE CHANGE TO BE APPLIED PROSPECTIVELY ONLY

Caduceus and TNC argue that the First District's decision is no more than an interpretation of a procedural rule which can only be applied prospectively. The issue before the Court, however, concerns the statute of limitations defense to claims made after the limitations period expired. The labeling of the issue as a rule change made by the First District is untenable. Indeed, the case Caduceus and TNC urge this Court to adopt stated the question as one which raises "whether the statute of limitations operates as a bar to the direct claim brought by the plaintiff against a third party defendant after the limitations period had expired." Gatins, at 873. The Fifth District in Gatins did not rely on or reinterpret a procedural rule, but merely concluded its decision noting that "our 'relations back' of amendments to pleadings provision, Florida Rule of Civil Procedure 1.190(c), supports our conclusion here." at 875.

The general rule regarding retroactivity of a decision of a court of last resort is that such a decision is retrospective as well as prospective in its operation unless declared by the opinion to have a prospective effect only. See Department of Revenue v. Anderson, 389 So.2d 1034 (Fla. 1st DCA 1980); Black v. Nesmith, 475 So. 2d 963, 964 (Fla. 1st DCA 1985). International Studio Apartment Assn., Inc. v. Lockwood, 421 So.2d 1119 (Fla. 4th DCA 1982) (The general rule is that

judicial decisions in the area of civil litigation have retrospective as well as prospective application). The decision of the First District did not eliminate a property right or contract right which Caduceus and TNC possessed before the decision and purported "change in procedure".

Caduceus and TNC refer to Gatins as a procedural rule akin to the criminal procedural rule change discussed in Boyette v. State, 688 So.2d 308 (Fla. 1996). (concerning defendant's right to be physically present at site where preemptory challenges are exercised). The comparison is not apt. While Caduceus and TNC refer to Gatins as a procedural rule, the Gatins court itself did not do so. The Gatins decision and the First District decision below concern the issue of whether the statute of limitations bars the otherwise untimely direct claims brought by a plaintiff against a defendant who was impleaded as third party defendant within the limitations period. The statute of limitations period has not been reduced and applied retroactively to the direct action complaint of Caduceus and TNC. The period remains four years under §95.11(3)(c), Fla.Stat. The First District simply ruled that Caduceus and TNC failed to file within the statutory period despite knowledge of the identity and potential liability of the proposed defendants, KTD and Graney. As discussed above, the statute of limitations barred Caduceus and TNC's direct action claims. The claims were untimely when made in June 2010

and could not be rendered timely based on another party's timely filed third party complaint.

CONCLUSION

Respondents respectfully request that the Court affirm the decision of the First District Court of Appeal.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the font used in this Appellant Initial Brief is Times New Roman 14 point and in compliance with Rule 9.210, *Florida Rules of Appellate Procedure.*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was electronically mailed on the 28th day of March, 2013 to:

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RE: Supreme Court Case No.: SC12-1474
DCA Case No.: 1D11-2700
Lower Tribunal Case No.: 06-CA-1855

To Whom It May Concern:

Enclosed for filing please find the original and seven copies of Respondents' Answer Brief on The Merits in the above-referenced case.

Thank you for your kind attention to this matter.

Very truly yours,

Rouselle A. Sutton, III

RAS/lsh

Enclosure