SUPREME COURT
STATE OF FLORIDA

Supreme Court Case No.: SC12-1474
DCA Case No.: 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 G. GRANEY, P.E., individually; and KTD CONSULTING ENGINEERS, INC., a Florida corporation,

Respondents.

PETITIONERS' INITIAL BRIEF ON THE MERITS

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

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Major B. Harding
Fla. Bar No. 0033657
Robert N. Clarke, Jr.
Fla. Bar No. 0592900
Martin B. Sipple
Fla. Bar No. 0135399
AUSLEY & McMULLEN, P.A.
123 South Calhoun Street
P.O. Box 391 (zip 32302)
Tallahassee, Florida 32301
(850) 224-9115 - telephone
(850) 222-7560 - facsimile

Counsel for Petitioners

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STATEMENT OF THE CASE AND FACTS

The co-petitioners were the prevailing plaintiffs in a non-jury trial in Leon County. The First District reversed, concluding that the plaintiffs' claims were barred by the statute of limitations. The First District held that case law that was binding on and applied by the trial court on the statute of limitations issue was wrong and would not be followed in the First District. See Gatins v. Sebastian Inlet Tax District, 453 So. 2d 871 (Fla. 5th DCA 1984). The Gatins decision relied upon by the trial court was decided more than twenty-five years ago and has been followed by two other district courts of appeal. See BMAB East Tower, Inc. v. Testwell Craig Laboratories & Consultants, Inc., 835 So. 2d 1211 (Fla. 3d DCA 2003); McKee v. Fort Lauderdale Produce Co., 503 So. 2d 412 (Fla. 4th DCA 1987). The case is now before this Court on a certified conflict with the Gatins decision.

The underlying case involves a defective heating, ventilation and air conditioning ("HVAC") system designed for a new ambulatory surgical center. The owner of the building is petitioner/plaintiff Caduceus Properties, LLC ("Caduceus"). Caduceus leases a portion of the building to co-petitioner Tallahassee Neurological Clinic, P.A. ("TNC"). The building architect was Michael Lee Gordon, who subcontracted the design

of the HVAC system to respondents KTD Consulting Engineers, Inc. ("KTD") and its principal, William G. Graney. The HVAC problems manifested themselves in late 2005. Caduceus initiated the litigation in July 2006 by suing architect Gordon, with whom it was in privity. In March 2007, architect Gordon initiated a third party action against engineers KTD and Mr. Graney. Pursuant to Fla. R. Civ. P. 1.180 (third party practice), Mr. Gordon alleged that KTD and Mr. Graney were liable for all or part of the plaintiff's claims. Mr. Gordon ultimately abandoned the litigation and declared bankruptcy during trial. Plaintiffs (Caduceus and TNC) filed a direct action within the same suit against KTD and Mr. Graney for the same damages. Pursuant to Rule 1.180, the direct action asserted claims against KTD and Mr. Graney arising from the same transaction or occurrence that was the subject matter of the plaintiff's claims against Mr. Gordon. The trial court ruled for the plaintiffs on all the claims. KTD and Graney appealed raising eight different issues.

Summary of Issue

The issue now before this Court involves the statute of limitations defense as it relates to the claims asserted by Caduceus and TNC against KTD and Mr. Graney. The HVAC problems began in approximately September 2005. The applicable statute of limitations under section 95.11(3)(c), Florida Statutes, is four years. The civil procedure rules permit a plaintiff to assert claims directly against a third party defendant brought

into the litigation by a defendant. Fla. R. Civ. P. 1.180(a). Caduceus and TNC availed themselves of this procedure and filed claims directly against KTD and Mr. Graney in June 2010. The issue is whether these claims, which were filed more than four years after the problems arose, "relate back" to the filing of the third party complaint in March 2007. See Fla. R. Civ. P. 1.190(c).

The trial court held that the direct claims were timely because they related back to the filing of Mr. Gordon's third party action in March 2007. The circuit court based its ruling on the only case that had addressed the issue at the time -- Gatins v. Sebastian Inlet Tax District, 453 So. 2d 871 (Fla. 5th DCA 1984). In Gatins, the Fifth District held that a direct action under Rule 1.180(a) relates back to the timely filing of a third party complaint against that defendant. Id. at 875. The First District rejected Gatins, reversed the circuit court's decision and certified conflict with Gatins. The First District's opinion does not address this Court's directly applicable case law holding that circuit courts are required to follow district court decisions such as Gatins "in the absence of interdistrict conflict," and "that district court decisions bind all Florida trial courts." Pardo v. State, 596 So. 2d 665, 666 (Fla. 1992). In other words, the First District applied retroactively its new procedural construction of Rules 1.180 and

1.190, notwithstanding that the trial court did not commit error in following Gatins.

Factual Background

The plaintiffs contracted with Mr. Gordon for architectural services in connection with the build-out of the new facility. (Tr. Ex. 1). Mr. Gordon, in turn, retained KTD to design the HVAC system. (Tr. Ex. 2). KTD designed a "direct expansion" or "DX" air conditioning system, without a preconditioner, for the facility. (T. 678). Mr. Graney signed and sealed the design plans in November 2004. (Tr. Ex. 221). Substantial completion of the facility occurred in July 2005. (T. 700). However, the operating room suite was not fully completed until October 2005. (T. 183). The physicians at TNC began seeing patients at the facility on a regular basis in January 2006. (T. 197).

Mr. Graney himself admitted at trial that the system he designed did not function properly. (T. 719). The problems included elevated humidity and temperature as well as condensation of water and strange smells. (T. 189, 199-200, 212-13; Tr. Ex. 83). This is critical because outpatient surgery centers are regulated by the state and required to maintain certain temperature and humidity levels to prevent bacteria growth. (T. 747; A. 14). Daily humidity logs showed the excessive humidity levels. (Tr. Ex. 84). Caduceus and TNC also introduced nurse logs, alarm logs and patient survey results documenting the persistent and significant problems.

(Tr. Exs. 29, 82, 85). After an extensive and lengthy effort to correct the defective "DX" system, Caduceus ultimately decided to remove the system and replace it with a more expensive "chilled water" system which has worked effectively. Damages sought by Caduceus included removing the DX system and replacing it with the chilled water system.

Caduceus and TNC presented expert testimony regarding the design flaws that caused the problems. (T. 279). The expert identified four specific design flaws: (1) failure to include a preconditioner; (2) oversizing of the compressors; (3) approval of the wrong type of cooling coils; and (4) an insufficient control sequence. (T. 299). Most of the testimony and evidence at trial centered around these complex and technical issues. The trial court concluded that these design flaws independently and collectively caused the HVAC problems at the facility. KTD and Mr. Graney did not challenge these core findings on appeal.

Procedural History

As previously noted, Caduceus filed suit against architect Gordon in July 2006. (R. 37). In the complaint, Caduceus specifically alleged that the HVAC system did not function properly and that the facility was experiencing elevated humidity and temperature, excessive moisture in the walls, water dripping from light fixtures, pungent odors, mold and extreme fluctuations in temperature. (R. 39). These were issues identified in the litigation from the outset.

Architect Gordon filed his third party complaint against engineers KTD and Mr. Graney in March 2007. (R. 162). As required by the civil procedure rules, the prior complaint by Caduceus containing the allegations noted above was attached to the Gordon third party complaint. See Fla. R. Civ. P. Form 1.948 (noting that "[a] copy of the complaint from which the third-party complaint derived must be attached."). Mr. Gordon specifically alleged that "[t]o the extent that Gordon is liable for to [sic] Plaintiff for damages as is alleged in [the amended complaint], KTD or Graney or both are liable to Gordon for such damages." (R. 164). Thus, the issues raised by the Gordon third party complaint were those asserted in the underlying pleadings, and KTD and Mr. Graney were on notice in March 2007 that the case involved alleged defects in their design of the HVAC system.

The case was stayed for thirteen months while the parties attempted to correct the problems. (R. 205, 214). Unsuccessful mediation occurred in May 2010. Shortly thereafter, in June 2010, Caduceus and TNC filed a direct action complaint against KTD and Mr. Graney pursuant to Rule 1.180(a). (R. 264). The direct action was filed after it became apparent that Mr. Gordon might declare bankruptcy. In fact, Mr. Gordon stopped actively defending the litigation and his counsel withdrew. Mr. Gordon ultimately declared bankruptcy during the trial.

The operative pleading became the plaintiffs' Second Amended Direct Action Complaint. (R. 1530). This pleading asserts claims against KTD and Mr. Graney for professional negligence (Counts I-II), violation of the building code pursuant to section 553.84, Florida Statutes (Counts III-IV), breach of third party beneficiary contract (Counts V-VI), and breach of the implied covenant of good faith and fair dealing (Counts VII-VIII). The claims asserted all relate to the design of the HVAC system and arise out of the same conduct, transaction, or occurrence as the claims set forth against KTD and Mr. Graney in March 2007.

The circuit court conducted a multi-day non-jury trial in March 2011. Eighteen witnesses testified, including experts on both sides. The trial court found in favor of Caduceus and TNC with respect to all of their claims against KTD and Mr. Graney and awarded a total of $489,134.52 in damages. (R. 1850). The trial court awarded TNC $35,341.11 and awarded Caduceus $453,793.41. (R. 1850). The amount awarded is significantly less than the total cost of designing and installing the replacement chilled water system. (T. 223-37). The parties hotly contested the nature and causes of the problems and the trial involved complex issues of HVAC engineering and design. The circuit court found that KTD and Graney negligently designed

the system, causing the damages. (R. 1850). The trial court entered a final judgment on May 3, 2011. (R. 2074).

Respondents KTD and Mr. Graney appealed and raised eight issues. Respondents did not argue in their brief that Gatins was wrongly decided. Rather, KTD and Mr. Graney attempted to distinguish Gatins on the facts. The First District raised the issue of whether Gatins should be followed for the first time at oral argument. The First District denied petitioners' post-oral argument request to fully brief this Gatins issue. (See Order of February 9, 2012). In a 2-1 decision with Judge Van Nortwick dissenting, the First District rendered an opinion disagreeing with Gatins and reversing the circuit court's judgment applying the case. See Graney v. Caduceus Properties, LLC, 91 So. 3d 220 (Fla. 1st DCA 2012). The First District certified direct conflict with Gatins and this Court accepted jurisdiction to resolve the conflict.

It is respectfully submitted that the circuit court did not err in holding that petitioners timely filed the direct action claims. Under Gatins, petitioners' direct action claims related back to the filing of the Gordon third party complaint, and were thus timely. Because the First District had not previously ruled on this issue, the trial court was bound by Gatins and properly followed it. See Pardo v. State, 596 So. 2d 665 (Fla. 1992) (in the absence of interdistrict conflict, district court

decisions bind all Florida trial courts). Thus, this case presents the odd situation in which a district court has reversed a trial court's judgment even though the trial court manifestly did not commit error.[1] The trial court was required to follow Gatins and it would have been error not to do so.

SUMMARY OF ARGUMENT

This Court should adopt the decision in Gatins. Specifically, the Court should hold that, for statute of limitations purposes, a plaintiff's direct claims against a third party defendant relate back to the filing of the third party complaint against that defendant, so long as the direct action claims arise from the conduct, transaction or occurrence that is the subject matter of the third party complaint. The Fifth District decided Gatins more than twenty-five years ago and it has been followed by two other district courts of appeal.[2] The two-judge panel of the First District in the decision below

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[1] As discussed below, even if this Court holds that the First District's opinion was correct, such a ruling should apply only prospectively. The trial court was bound by Gatins and did not commit error based upon the state of the law that existed when its ruling was made. The trial court's judgment should therefore be reinstated.

[2] See BMAB East Tower, Inc. v. Testwell Craig Laboratories & Consultants, Inc., 835 So. 2d 1211 (Fla. 3d DCA 2003); McKee v. Fort Lauderdale Produce Co., 503 So. 2d 412 (Fla. 4th DCA 1987).

became the first Florida court to depart from the Fifth District's decision in Gatins and its progeny.[3]

The rule applied in Gatins reflects the application of fundamental principles of Florida law. One such principle is that the purpose of statutes of limitation is to prevent stale claims. That purpose is not applicable when a third party defendant is timely brought into a case and the direct claims arise from the same transaction or occurrence as the third party claims. Under these circumstances, the third party defendant is already actively defending within the limitations period and is not prejudiced by the assertion of a direct claim involving the same issues.

Another fundamental principle reflected in Gatins is that statute of limitations defenses are disfavored and the public policy of this state is to decide cases on the merits. Consistent with this principle, this Court has held that the relation back rule (Fla. R. Civ. P. 1.190(c)) is to be liberally construed. To that end, this Court has held that statutes of limitation are not implicated where, as in this case, a pleading merely adjusts the status of an existing defendant, as opposed

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[3] It is worth noting that the First District incorrectly framed the issue as whether the direct action complaint relates back to the filing of the original complaint, as opposed to the Gordon third party complaint. The error is not insignificant and, as further discussed below, is emblematic of the flaws permeating the First District's decision.

to introducing a new defendant. Here, or course, the direct action complaint did not introduce any new defendants, but merely adjusted the status of existing third party defendants KTD and Mr. Graney. These two defendants were well aware of, and actively defending, the issues in the case.

The First District's decision, in contrast to Gatins, reflects a cramped and narrow interpretation of the relation back rule. The First District held that relation back "should only be permitted where there is a mistake or misnomer in identifying a party defendant...." Graney, 91 So. 3d at 228. This is not what the rule says. The First District relies on a series of decisions from other jurisdictions that address versions of the relation back rule that are different and narrower than Florida's rule. Florida's relation back rule requires only that the new claim arise from the same "conduct, transaction, or occurrence" set forth in the original pleading. Fla. R. Civ. P. 1.190(c). There is no dispute in this case that the direct action by Caduceus and TNC arose from the same transaction or occurrence as the third party complaint against KTD and Mr. Graney. Graney, 91 So.3d at 224. The First District's post-trial interpretation of the relation back rule retroactively changes the law applicable at the trial court level and overturns a judgment based on the merits of the case. Since the original adoption of the relation back rule in 1967,

Committee Notes and case law establish that the rule should be broadly construed to overcome a statute of limitations defense where the purposes served by the statute are not implicated.

Finally, to the extent the Court is inclined to adopt the rule announced by the First District, it should do so only prospectively. As previously noted, the trial court did not err in following Gatins. It was required to do so because Gatins (and the two appellate decisions following it) represented the only decisions addressing the issue at the time. This Court is authorized to hold that its procedural decisions apply only prospectively and has done so under similar circumstances in the past. It would be fundamentally unfair to reverse the circuit court's judgment when it correctly applied the law in existence at the time.

ARGUMENT

I. THE TRIAL COURT CORRECTLY HELD THAT THE DIRECT ACTION COMPLAINT RELATES BACK TO THE TIMELY FILING OF THE THIRD PARTY COMPLAINT.

The purpose of statutes of limitation is to keep stale litigation out of the courts. That purpose has no application in this case. The HVAC problems at the facility began manifesting themselves in approximately September 2005. Caduceus initiated the litigation less than a year later, in July 2006, by filing suit against Mr. Gordon. (R. 37). Mr. Gordon initiated a third party action against KTD and Mr. Graney

in March 2007. (R. 162). KTD and Mr. Graney were thus parties to the litigation within two years of the problems manifesting themselves, and well within the four-year statute of limitations. The only thing that changed in June 2010 was the ***status*** of KTD and Mr. Graney -- from solely third-party defendants to, in addition, direct defendants. Under these circumstances, the policies underlying the statute of limitations are not applicable.

The Gatins Decision

The trial court relied on Gatins in holding that petitioners timely filed the direct action complaint. Gatins involved a wrongful death action by the father of Mary Ellen Gatins, who died when she fell through an opening in a guardrail at a state park. Gatins, 453 So. 2d at 872. The father sued the Sebastian Inlet Tax District, which owned, maintained and controlled the pier. Id. The District timely initiated a third party action against the engineering and construction firm that had built the pier. Id. Thereafter, after expiration of the statute of limitations applicable to wrongful death actions, the father filed an amended complaint asserting a direct action against the engineering firm. Id. The engineering firm moved for summary judgment based upon the statute of limitations and the trial court granted the motion. The father appealed.

The Fifth District reversed. In doing so, the court recognized a split of authority among other jurisdictions

addressing the issue. Id. at 873-75. The court identified several older, out-of-state cases holding that, under these facts, the direct action claim is time barred even if the party against whom the direct claims are asserted was impleaded as a third party defendant within the limitations period. Id. at 873. However, the court also identified a line of New Jersey cases standing for the contrary proposition. Id. at 873-75. The Gatins court discusses the rationale of these New Jersey cases at length and its discussion is worth reviewing.

One principle underlying the New Jersey decisions rests upon the nature of a "cause of action." Specifically, the principle is that the assertion of a direct action based upon the same transaction or occurrence as an existing third party action does not constitute a new "cause of action." Gatins, 453 So. 2d at 873-84, citing DeSisto v. City of Linden, 193 A.2d 870 (N.J. App. 1963) ("Plaintiff is not seeking to add a new cause of action, for the essential ground or object of the action and the wrong alleged are the same."). The DeSisto court explained that:

> A new party may not be added after the statute has run. A new claim different in character arising out of other circumstances than those set forth in the original pleading may not be added. However, a new claim based on the occurrences and the same wrong against an existing party may be asserted when that party has become a party and has been alerted to the claim before the running of the statute.

Gatins, 453 So. 2d at 874, quoting DeSisto, 193 A.2d at 874-75.

The second principle articulated in the New Jersey cases is that allowing the assertion of a direct action against a third party timely brought into the suit is consistent with the objective of statutes of limitation, which is to bar stale claims. Gatins, 453 So. 2d at 874, citing Greco v. Valley Fair Enterprises, 253 A.2d 814 (N.J. App. 1969) ("As is readily apparent, when defendant has had timely notice that the plaintiff sets up and is seeking to enforce a claim against him because of specified conduct in which he has participated, the reason for the statutory limitation no longer exists.").

Finally, a third principle articulated in the New Jersey cases is that, under these circumstances, the third party defendant is not prejudiced by the assertion of direct claims. Gatins, 453 So. 2d at 874, citing Lawlor v. Cloverleaf Mem. Park, 266 A.2d 569 (N.J. 1970). In Lawlor, the New Jersey Supreme Court, in adopting the holdings of DeSisto and Greco, noted that "the court rules and DeSisto were in the books and later amendment of the complaint with relation back should readily have been anticipated," and thus "plaintiff's delay in amending the complaint did not in anywise prejudice the third-party defendants."

The Gatins court concluded that "the New Jersey view is consistent with the principles governing limitations of actions

in our state and with the philosophy behind our rules of civil procedure." Gatins, 453 So. 2d at 875. The court held that, as in New Jersey, the purpose of statutes of limitation in Florida is to protect a party from unexpected enforcement of stale claims. Id. at 875, citing Nardone v. Reynolds, 333 So. 2d 25 (Fla. 1976). The court reasoned that this purpose is not implicated where the third party is timely brought into the action:

> [i]f 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.

Gatins, 453 So. 2d at 875.

Importantly, the Gatins court also emphasized that "the amended pleading here did not actually introduce a new defendant but rather adjusted the status of an existing party." Id. at 875, citing I. Epstein & Bro. v. First Nat. Bank of Tampa, 110 So. 354 (Fla. 1926).

This Court should adopt Gatins and reinstate the trial court's judgment in this case. As the Gatins court recognized, the purpose of statutes of limitation is "to promote justice by preventing surprises through the revival of claims that have

been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." Totura & Co. v. Williams, 754 So. 2d 671, 681 (Fla. 2000). Limitation provisions protect a party from being "left to shield himself from liability with nothing more than tattered or faded memories, misplaced or discarded records, and missing or deceased witnesses." Major League Baseball v. Morsani, 790 So. 2d 1071, 1075 (Fla. 2001), quoting Nardone v. Reynolds, 333 So. 2d 25, 36 (Fla. 1976).

In this case, as in Gatins, KTD and Mr. Graney were not left to defend themselves with "nothing more than tattered or faded memories, misplaced or discarded records, and missing or deceased witnesses." Morsani, supra. KTD and Mr. Graney were brought into the lawsuit by Mr. Gordon in March 2007, well within the statute of limitations. (R. 162). Those pleadings directly raised the defects within the HVAC system. (R. 39; 162). Among other things, the pleadings allege that "the heating, ventilation and air-conditioning ('HVAC') system that was designed by Defendants does not function properly." (R. 169). KTD and Mr. Graney were thus not disadvantaged or prejudiced in any way by the filing of the direct action suit in 2010. (R. 264). They were well aware from March 2007 that they were being sued for defects in the design of the HVAC system and were actively defending those claims. Indeed, Rule 1.180(a)

specifically authorizes a third party defendant to "assert against the plaintiff any defenses that the defendant has to the plaintiff's claim." Fla. R. Civ. P. 1.180(a). This means that, once they were brought into the case in March 2007, KTD and Mr. Graney were fully able to assert ***against Caduceus*** any defenses that might exist to its claims. In other words, under the rule, KTD and Mr. Graney were litigating these issues directly against Caduceus as of March 2007.

Nor were respondents otherwise prejudiced by petitioners' assertion of the direct claims. Gatins was decided more than twenty-five years ago and was "on the books" when Mr. Gordon filed the third party complaint. As the New Jersey Supreme Court recognized in Lawlor, respondents could have and should have anticipated that petitioners would file a direct action. Indeed, the existence of the decision in Gatins is likely the reason that KTD and Mr. Graney neither moved to dismiss the direct action complaint, nor moved for summary judgment on statute of limitations grounds prior to trial. Respondents sought a ruling on the statute of limitations issue for the first time at trial via a motion for involuntary dismissal at the close of petitioners' case in chief. (T. 614-25).

As previously noted, two other district courts of appeal have expressly adopted Gatins. BMAB East Tower, Inc. v. Testwell Craig Laboratories & Consultants, Inc., 835 So. 2d 1211

(Fla. 3d DCA 2003); McKee v. Fort Lauderdale Produce Co., 503 So. 2d 412 (Fla. 4th DCA 1987). No Florida court (until now) has declined to follow Gatins. Gatins itself was decided more than twenty-five years ago and the principle of law established in that case has never been altered by the Legislature or this Court pursuant to its rulemaking authority. Indeed, it is fair to characterize the holding in Gatins as "hornbook law."[4]

Fundamental Principles Support Gatins

The Fifth District did not decide Gatins in a vacuum. The court surveyed the manner in which courts in other jurisdictions had addressed the issue. In adopting the New Jersey view that a direct action complaint relates back to the timely filing of the third party complaint, the Gatins court concluded that this view "is consistent with the principles governing limitations of actions in our state and with the philosophy behind our rules of civil procedure." The Fifth District's conclusion is correct. The line of cases adopted by the Fifth District in Gatins reflects the application of several underlying principles that are bedrocks of Florida law.

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[4] E.g., The Florida Bar, Florida Civil Practice Before Trial, § 10.55 (2011) citing I. Epstein and Gatins; Norm LaCoe, LaCoe's Pleadings Under the Florida Rules of Civil Procedure, § 1.190(77) (2011) (citing Gatins and authorities therein); 35 Fla. Jur. 2d Limitations and Laches § 111 (2011); 8 A.L.R.2d 6 Change in Party After Statute of Limitations Has Run § 69 (2011) (cumulative supplement).

One such principle, noted above, is that merely adjusting the status of an existing defendant does not constitute a new cause of action. See Gatins, 453 So. 2d at 875, citing I. Epstein & Bro. v. First Nat. Bank of Tampa, 110 So. 354 (Fla. 1926). In other words, KTD and Mr. Graney were already in the case and actively defending when petitioners' filed their direct action. The only thing that changed at that point was their status, which shifted from being solely third-party defendants to also being direct defendants. The direct action claims did not constitute a new cause of action for statute of limitation purposes.

This principle is a corollary of the settled principle that "limitation statutes 'are aimed at lawsuits, not at the consideration of particular issues in lawsuits." Beach v. Ocwen Federal Bank, 523 U.S. 410, 416, 118 S.Ct. 1408, 1411, 140 L.Ed.2d 566 (1998), quoting United States v. W. Pacific R. Co., 352 U.S. 59, 72, 77 S.Ct. 161, 169, 1 L.Ed.2d 126 (1956). In Western Pacific, the United States Supreme Court expressed the point as follows:

> [T]he basic policy behind statutes of limitations has no relevance to the situation here. The purpose of such statutes is to keep stale litigation out of the courts. They are aimed at lawsuits, not at the consideration of particular issues in lawsuits. Here the action was already in court and held to have been brought in time. To use the statute of limitations to cut off the consideration of a particular defense in

> the case is quite foreign to the policy of preventing the commencement of stale litigation. We think it would be incongruous to hold that once a lawsuit is properly before the court, decision must be made without consideration of all the issues in the case and without the benefit of all the applicable law. ***If this litigation is not stale, then no issue in it can be deemed stale.***

W. Pacific R. Co., 352 U.S. at 72, 77 S.Ct. at 169 (emphasis added).

Likewise, Caduceus and TNC were entitled to assert a direct action against KTD and Mr. Graney because ***the lawsuit*** was timely filed. Caduceus timely initiated a lawsuit for damages associated with the defective HVAC system in July 2006 and Mr. Gordon timely initiated a third party suit against KTD and Mr. Graney in March 2007. The direct action complaint therefore relates back to March 2007. This is the holding of Gatins. The Gatins holding is consistent with the purposes of statutes of limitation and the trial court correctly applied the decision in this case.

Another bedrock principle is that statute of limitations defenses are disfavored. Baskerville-Donovan Engineers, Inc. v. Pensacola Exec. House Condo. Ass'n, Inc., 581 So. 2d 1301, 1303 (Fla. 1991) ("where there is reasonable doubt as to legislative intent, the preference is to allow the longer period of time"). Thus, it is the public policy of this state to freely allow amendments to pleadings so that cases may be resolved upon their

merits. Bill Williams Air Conditioning & Heating, Inc. v. Haymarket Cooperative Bank, 592 So. 2d 302 (Fla. 1st DCA 1992). And, accordingly, the relation back doctrine set forth in Rule 1.190(c) is to be applied liberally. Ron's Quality Towing, Inc. v. Southeastern Bank of Florida, 765 So. 2d 134, 135 (Fla. 1st DCA 2000), quoting as follows Cabot v. Clearwater Constr. Co., 89 So. 2d 662, 664 (Fla. 1956):

> [T]he objective of all pleading is merely to provide a method for setting out the opposing contentions of the parties. No longer are we concerned with the 'tricks and technicalities of the trade'. The trial of a lawsuit should be a sincere effort to arrive at the truth. It is no longer a game of chess in which the technique of the maneuver captures the prize.

Here, after five years of litigation the circuit court held a full trial on the merits and determined that respondents negligently designed the system. The circuit court carefully weighed the competing evidence and, having determined that respondents were liable, arrived at a damages figure it deemed fair and just. The process was expensive and time consuming, but served the salutary purpose of providing a mechanism for the parties to resolve their dispute on the merits and move forward. It is the policy of this Court that cases should be resolved in this manner. It is not the policy of this Court to deprive parties of their day in court through a retroactive change in

the application of statutes of limitation the purposes of which are inapplicable to the case.

The First District's Opinion

Given the lack of benefit of any briefing on the issue and respondents' "shotgun" approach of raising eight issues on appeal, it is not surprising that critical errors of law and fact exist in the First District's opinion. The opinion not only expressly and directly conflicts with Gatins, BMAB and McKee, but also conflicts with the fundamental principles outlined above.[5]

The First District held that "[r]elation back should only be permitted where there is a mistake or misnomer in identifying

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[5] The First District inexplicably attempts to characterize Gatins as something of an "outlier." Graney, 91 So. 3d at 226. In so doing, the First District essentially ignores the unambiguous opinions in BMAB and McKee cited above, and instead relies on a special concurrence explaining a "citation PCA" that predated both of these opinions. (See Graney, 91 So. 3d at 226, citing Kaye v. Steiner, 460 So. 2d 568, 568 (Fla. 3d DCA 1984) (PCA)). The citation of Kaye ignores settled Florida law because PCAs and concurring opinions have no precedential value. Carrillo v. Case Eng'g, Inc., 53 So. 3d 1214, 1215 (Fla. 1st DCA 2011) (concurring opinion has no precedential value); State Comm'n on Ethics v. Sullivan, 430 So. 2d 928, 932 (Fla. 1st DCA 1983) (PCA has no precedential value). The fact that the concurrence in Kaye distinguished Gatins on its facts has no precedential value one way or another. It is the ***subsequent*** decision by the same district in a written opinion in BMAB (citing McKee and Gatins) that adopts Gatins in the Third District. Respectfully, the First District is simply incorrect. The First District's opinion not only expressly and directly conflicts with Gatins (5th DCA), but also with McKee (4th DCA), and BMAB (3rd DCA).

a party defendant, not a mistake in failing to add a party defendant." Graney, 91 So. 3d at 228. However, authorities cited by the court as support for its decision construe different and more narrow versions of the relation back rule adopted in other states. Florida's rule is different and broader and requires only that the new pleading arise from the same "conduct, transaction, or occurrence" as the previous pleading. Fla. R. Civ. P. 1.190(c). Thus, Gatins, BMAB and McKee were correctly decided.

To the extent a split of authority exists in other jurisdictions on this issue, the "clear trend" is toward holding that a direct action complaint relates back to the filing of a timely-filed third party complaint, so long as both arise from the same transaction or occurrence. See Rakes v. Fairmont Mobile Homes, Inc., 358 S.E.2d 236, 238 (W. Va. 1987). The reason is that the policy underlying the statute of limitations is served when the direct action defendant has been timely impleaded into the litigation: there is no risk of stale claims or lost or faded memories. When the reasons underlying application of the statute of limitations are not present, the policy of resolving cases on their merits should prevail and result in application of the relation back doctrine. See Rule 15, Fed. R. Civ. P., Advisory Cmte. Notes ("Relation back is

intimately connected with the policy of the statute of limitations.").

The cases cited by the First District as supporting its decision are in fact inapposite. The First District begins its analysis by citing a series of cases standing for the proposition that "[g]enerally, the addition of a new party will not relate back to the original complaint." Graney, 91 So. 3d at 224. Each of the cases cited is a "misnomer" case, i.e., a case in which the plaintiff sued the wrong corporate defendant and sought to amend after expiration of the statute of limitations to add the correct defendant. The cases set forth the well-established law in this state that, under these circumstances, relation back to the original complaint is permitted if there exists an "identity of interest" between the originally named defendant and the new defendant. See, e.g., Schwartz v. Wilt Chamberlain's of Boca Raton, 725 So.2d 451 (Fla. 4th DCA 1999) (plaintiff sued "Wilt Chamberlain's Restaurant, Inc.," but should have sued "Wilt's of Boca Raton, Ltd.").

Respectfully, citation to these cases is puzzling. This is not a misnomer case and petitioners were not seeking to add new defendants -- KTD and Mr. Graney were already parties (and actively defending the case) when petitioners filed their direct action. The court in Gatins recognized this, noting that "[w]e

emphasize that the amended pleading here did not actually introduce a new defendant, but rather ***adjusted the status*** of an existing party." Gatins, 453 So. 2d at 875 (emphasis added), citing I. Epstein & Bro. v. First National Bank of Tampa, 110 So. 354, 356 (Fla. 1926) ("the amendment does not bring in a new party defendant, but merely changes the capacity in which the defendant is sought to be charged").

It is perhaps this mis-reliance on the "misnomer" cases that led the majority to misstate the fundamental issue in its opinion. The majority frames the issue as whether the direct action complaint relates back to the filing of the ***original complaint***. Graney, 91 So. 3d at 224. In the misnomer cases, the issue ***is*** whether the amendment relates back to the original complaint. However, the holding of Gatins and the position taken by petitioners in this case is that the direct action complaint relates back to the filing of the ***third party complaint***. None of the parties framed the issue in the manner stated by the First District. Judge Van Nortwick correctly framed the issue in the dissent. Graney, 91 So. 3d at 229. The distinction is critically important. A holding that the direct action complaint relates back to the original complaint would be "expansive" and illogical, because the third party defendant is obviously not a party at that point and thus would not be on notice of the issues. A holding that the direct action

complaint relates back to the third party complaint, on the other hand, reflects simply the application of well-settled law in this state.

More fundamentally, the misnomer cases cited by the First District actually support petitioners' position. This is because the rationale behind the "identity of interest" cases is that, where an identity of interest exists, the "new" defendant is sufficiently on notice of the action such that the policies served by the statute of limitations are satisfied. See, e.g. Kozich v. Shahady, 702 So. 2d 1289, 1291 (Fla. 4th DCA 1997) (addition of a party relates back where the new and former parties have an identity of interest which does not prejudice the opponent). Of course, it is this exact same rationale upon which the Gatins court relied in holding that petitioners' direct action complaint related back to the third party complaint.

The First District next cites Lundy v. Adamar of New Jersey, Inc., 34 F.3d 1173 (3d Cir. 1994). Graney, 91 So. 3d at 227. However, in that case the third party defendant was ***not*** impleaded into the case within the limitations period. Lundy, 34 F.3d at 1176. Rather, the defendant filed the third party complaint more than a month ***after*** the statute of limitations expired. Id. In holding that the plaintiff could not thereafter institute a direct action against the third party

defendant, the Third Circuit relied heavily on the fact that the third party defendant "did not receive any notice of the institution of [the plaintiffs'] action within the applicable statute of limitations, which expired on August 3, 1991." Id. at 1182. Of course, in this case KTD and Mr. Graney ***did*** receive notice of the third-party claim (and thus of plaintiffs' claim as well) within the limitation period. (R. 162). Lundy does not support the First District's decision.

Similarly inapplicable are two other cases cited by the First District -- State ex rel. Hilker v. Sweeney, 877 S.W.2d 624 (Mo. 1994), and Laliberte v. Providence Redevelopment Agency, 288 A.2d 502 (R.I. 1972). Both Hilker and Laliberte construe a different, and narrower, version of their state's relation back rule than the rule in Florida. The applicable rule in Missouri at the time of the decision in Hilker provided:

> 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, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied ***and*** within the period provided by law for commencing the action against the party and serving notice of the action, the party to be brought in by amendment: (1) has received such notice of the institution of the action as will not prejudice the party in maintaining the party's defense on the merits; and (2) knew or should have known that, but for a mistake concerning the

> identity of the proper party, the action would have been brought against the party.

Hilker, 877 S.W.2d at 628, quoting Rule 55.33(c), Mo. R. Civ. P. (emphasis added). In reaching its holding, the Hilker court specifically relied upon a prior decision holding that "[F]or the Rule to apply, plaintiff must have made a mistake in selecting the proper party to sue, i.e., plaintiff must have brought an action against the wrong party." Hilker, 877 S.W.2d at 628, quoting Windscheffel v. Benoit, 646 S.W.2d 354, 357 (Mo. 1983). In other words, the Missouri relation back doctrine applies only in "misnomer" cases.

The same is true in Rhode Island. At the time of the decision in Laliberte, the Rhode Island relation back rule provided:

> 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, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment: (1), has received such notice of the institution of the action that he would not be prejudiced in maintaining his defense on the merits; and (2) knew or should have known that but for a mistake the action would have been brought against him.

Laliberte, 288 A.2d at 508, quoting Rule 15(c), R.I. R. Civ. P. As in Hilker, the Laliberte court held that relation back did not apply because the plaintiff could not show that, but for a mistake, the original action would have been asserted against the third party defendant. Laliberte, 288 A.2d at 509.[6]

In contrast to the Missouri and Rhode Island relation back rules, the Florida rule is much simpler and broader, and provides:

> 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, the amendment relates back to the date of the original pleading.

Rule 1.190(c), Fla. R. Civ. P.

Notably, the modifying conditions present in the Missouri and Rhode Island rules are not present in Florida. In other words, the Florida rule is not limited only to situations in which there was a mistake by the plaintiff in selecting the proper party against whom to bring suit. The drafters of Rule

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[6] The same analysis applies to the First District's citation to the unpublished decision in Lavin v. Silver, No. Civ.A.01C06033, 2003 WL 21481006 (Del. Sup. Ct. May 12, 2003) (applying same version of relation back rule as Hilker and Laliberte). Another case cited by the First District, J.G. Boyd's Good Housekeeping v. General Securities Service, Inc., 483 S.W.2d 826 (Tex. App. 1972), does not include any discussion at all of the relation back doctrine, and it is unclear whether the doctrine existed in Texas when the case was decided in 1972. Again, the decision does not support the First District's result.

1.190(c) acknowledge that the rule is intended to have a "liberal application":

> The principle of relation back of amended pleadings existed in prior law, but it was limited to an amendment which did not state a new cause of action. The harshness of the rule was modified by a liberal construction of a "cause of action." In accord with this liberal application of the principle, the rule requires ***only*** that the amendment arise out of the "conduct, transaction, or occurrence" set forth in the original pleading.

Rule 1.190, Fla. R. Civ. P. (1967 Author's Comment) (emphasis added).

The reference to a "liberal construction" of the phrase "cause of action" refers to cases like I. Epstein. In other words, the principles underlying these decisions have been incorporated into Florida's relation back rule and find their logical application in Gatins, BMAB and McKee.

Here, there is no dispute, and the First District's opinion acknowledges, that petitioners' direct action complaint involves the same transaction and occurrence as the third party complaint. Graney, 91 So. 3d at 224. That is what is required under Florida's relation back rule. The rules of other states may well require more. To the extent they do, as is the case in Missouri and Rhode Island, decisions construing them (such as

Hilker and Laliberte) are of limited, if any, applicability to this case.[7]

After citing the decisions from other jurisdictions discussed above, the First District concludes that "[r]elation 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." Graney, 91 So. 3d at 228. Respectfully, this conclusion is flawed -- it is illogical to base the decision in this case on out-of-state cases that are in turn based upon relation back rules with restrictions that do not (and never have) existed in Florida. Indeed, the absence of any such restriction in Florida's rule supports the opposite conclusion, i.e., that this Court intended to permit relation

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[7] The First District's opinion also states that the direct action complaint included "different claims" from the original complaint by Caduceus and the Gordon third party complaint against KTD and Graney. Graney, 91 So. 3d at 228. A comparison of the third party complaint (R. 162) and the Second Amended Direct Action Complaint (R. 1530) reveals almost identical claims and, more importantly, claims arising from the same transaction or occurrence. This is the test for relation back under Rule 1.190, not identity of causes of action. See, e.g. Associated Television & Communications, Inc. v. Dutch Village Mobile Homes of Melbourne, Ltd., 347 So. 2d 746, 748 (Fla. 4th DCA 1977)("If the amendment shows the same general factual situation as that alleged in the original pleading, then the amendment relates back even though there is a change in the precise legal description of the rights sought to be enforced, or a change in the legal theory upon which the action is brought.").

back when the amended pleading involves the same "conduct, transaction or occurrence" as the original pleading.[8]

The Court of Appeals of New York construed a relation back rule similar to Florida's in Duffy v. Horton Memorial Hospital, 488 N.E.2d 820 (N.Y. 1985). As in Florida, New York's relation back rule simply provides that relation back applies if the proposed amendment arises from the same transaction or occurrence as the original pleading. Id. at 822, citing CPLR 203(e). Resolving a split among New York's intermediate appellate courts, the court in Duffy held that a direct action against a third party defendant relates back to the filing of the third party complaint. Duffy, 488 N.E.2d at 823. In doing so, the Court held that the relation back rule was ambiguous because it did not state whether or not it applies to an amended pleading served upon someone not named in the original complaint. Id. The court therefore held that its analysis should "turn on the policy considerations underlying Statutes of Limitations." Id. In terms echoing the rationale of Gatins,

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[8] The only case cited by the First District that construes a relation back rule similar to Florida's is Higginbotham v. Fearer Leasing, Inc., 189 N.W.2d 125 (Mich. App. 1971). However, in reaching its decision, the court in that case relied heavily on federal authorities. Id. at 131. The federal relation back rule is more similar to the Missouri and Rhode Island rules at issue in Hilker and Laliberte. See Fed. R. Civ. P. 15. See also Okeelanta Corp. v. Bygrave, 660 So. 2d 743, 751 (Fla. 4th DCA 1995) (noting that the federal relation back rule "is more restrictive than our Florida Rule of Civil Procedure 1.190(c)"). Thus, Higginbotham is of limited applicability.

the court held that applying the relation back doctrine in these circumstances "clearly does not conflict with these policies" because the third party defendant "is likely to have collected any preserved available evidence relating to the entire transaction or occurrence and the defendant's sense of security has already been disturbed by the pending action." Id.

The First District based its decision upon cases from other states that construe different and more narrow versions of the relation back rule than Florida's rule. Unlike those states, Florida's relation back rule is not limited to situations involving misnomer or mistake in identifying the proper party defendant. By contrast, a decision cited by the First District that construes a rule like Florida's is Duffy, which holds that relation back applies under these circumstances and under the rationale of Gatins. Gatins should be adopted by this Court.

II. IN THE ALTERNATIVE, ANY DECISION BY THIS COURT TO ADOPT THE PROCEDURAL RULE ANNOUNCED BY THE FIRST DISTRICT SHOULD BE APPLIED PROSPECTIVELY ONLY.

If this Court is inclined to adopt the interpretation of the procedural rule announced by the First District, it should do so only prospectively. The trial court manifestly did not err in applying the holding of Gatins. If applied retroactively, many existing cases not yet tried could be affected by this change in the law. Specifically, many direct actions filed in reliance on Gatins may be subject to reversal

or other procedural challenge. More fundamentally, petitioners themselves were entitled to rely on the settled law as it existed at the time and it would be fundamentally unfair to reverse the judgment in their favor based on the First District's new, post-trial interpretation of Rules 1.180 and 1.190.

This Court is authorized to determine that its interpretation of procedural rules should be applied prospectively. See Saia Motor Freight Line, Inc. v. Reid, 930 So. 2d 598, 601 (Fla. 2006) (Pariente, C.J., dissenting), citing Employers' Fire Ins. Co. v. Continental Ins. Co., 326 So. 2d 177, 181 & n. 10 (Fla. 1976), and Boyett v. State, 688 So. 2d 308, 310 (Fla. 1996).[9] Unless this Court explicitly states otherwise, a rule of law which is to be given prospective application does not apply to those cases which have been tried before the rule is announced. Boyett, 688 So. 2d at 310, citing Armstrong v. State, 642 So. 2d 730, 737-38 (Fla. 1994), cert. denied, 514 U.S. 1085, 115 S.Ct. 1799, 131 L.Ed.2d 726 (1995).

This Court's decision in Boyette is instructive. In Boyette, the Court dealt with the prospective application of a new holding relating to Fla. R. Crim. P. 3.180, which requires a

[9] Of course, it is well settled that amendments by this Court to the rules of procedure themselves are prospective unless specifically provided otherwise. See Mendez-Perez v. Perez-Perez, 656 So. 2d 458, 459-60 (Fla. 1995).

criminal defendant's presence when peremptory challenges are exercised. The Boyette Court held that the Court's decision in Coney v. State, 653 So. 2d 1009 (Fla. 1995), announcing for the first time that a defendant has the right to be present at the immediate site where challenges are exercised, should not have applied to Mr. Coney himself, because the trial court in that case properly applied the law existing at the time.

This Court resolved a conflict in a civil case and, in so doing, applied its decision only prospectively, in Picchi v. Barnett Bank of South Florida, N.A., 521 So. 2d 1090 (Fla. 1988). There, a plaintiff obtained a default judgment without a hearing notwithstanding that the defendant's counsel had filed a notice of appearance. The Fourth District reversed, based upon authority in that district to the effect that a hearing was necessary. Id. at 1090. However, the Fourth District certified conflict with a decision of the Fifth District holding that no hearing was required under these circumstances. Id. This Court resolved the conflict and adopted the decision of the Fifth District. Id. at 1090-91. However, the Court elected to apply the decision only prospectively, and left in place the decision of the Fourth District that a hearing was necessary in that case. This Court did so because it would have been unfair to the defendant to impose the new rule retroactively in light of

the fact that "the district court below has permitted the practice in the past." Id. at 1091.

The same analysis applies here. Gatins was "on the books" and settled law when this case was filed and tried. The trial court did not commit error in following Gatins and holding that the direct action complaint was timely filed. Indeed, the trial court was required to follow Gatins. See Pardo v. State, 596 So. 2d 665 (Fla. 1992) (in the absence of interdistrict conflict, district court decisions bind all Florida trial courts). If this Court elects to depart from the procedural rule of Gatins and establish a new procedural rule, it should hold that its decision is prospective only and does not apply to petitioners.

Many direct actions filed in reliance on Gatins, BMAB and McKee may now be pending across the state. If a decision by this Court reversing those cases is applied retroactively, all such pending actions are subject to involuntary dismissal notwithstanding that they were timely filed based upon the existing, binding law. Similarly, of course, petitioners in this case were entitled to rely on the existing law and it would be fundamentally unfair to retroactively impose time limits that did not exist to bar petitioners' cause of action. The unfairness if highlighted by the fact that, had Caduceus and TNC brought suit in the Fifth District (where KTD and Mr. Graney are

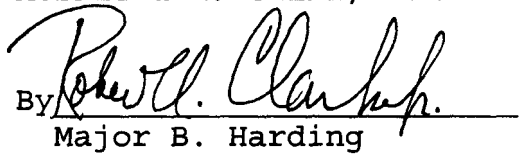
located), Gatins would almost certainly been controlling and this appeal would never have occurred. The judgment should be reinstated and, to the extent this Court adopts the First District's decision, it should do so only prospectively.

CONCLUSION

Petitioners respectfully request that the Court quash the decision of the First District Court of Appeal and remand with instructions that the First District remand to the circuit court for reinstatement of the judgment in favor of petitioners, and for any further relief the Court deems just and appropriate.

Respectfully submitted,

AUSLEY & McMULLEN, P.A.

By 

Major B. Harding
Fla. Bar No. 0033657
Robert N. Clarke, Jr.
Fla. Bar No. 0592900
Martin B. Sipple
Fla. Bar No. 0135399
123 South Calhoun Street
P.O. Box 391 (zip 32302)
Tallahassee, Florida 32301
(850) 224-9115 - telephone
(850) 222-7560 - facsimile

Attorneys for Petitioners

CERTIFICATE OF COMPLIANCE

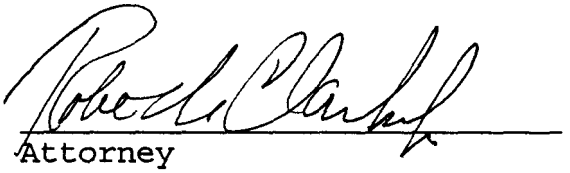
This brief is typed using Courier New 12-point font and complies with Fla. R. App. P. 9.210(a)(2).

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was mailed, first class postage prepaid, the 17th day of January 2013 to:

Patrick Delaney
Railey, Harding & Allen, P.A.
15 North Eola Drive
Orlando, Florida 32801

Michael Lee Gordon
3787 Lake Center Drive
Mount Dora, Florida 32757



Attorney