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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' REPLY BRIEF

On Discretionary Review from a Decision of the First District Court of Appeal

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

Petitioners, Caduceus Properties, LLC ("Caduceus") and Tallahassee Neurological Clinic, P.A. ("TNC"), pursuant to Fla. R. Civ. P. 9.210(d), submit their reply to the answer brief of respondents, KTD Consulting Engineers, Inc. ("KTD") and William E. Graney, P.E.

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

Caduceus initiated this litigation by suing defendant Michael Lee Gordon in July 2006. Mr. Gordon filed a third-party complaint against KTD and Mr. Graney in March 2007. In June 2010, Caduceus and TNC filed a direct action against KTD and Mr. Graney pursuant to Fla. R. Civ. P. 1.180(a). At that point, the circuit court continued the trial in order to prevent any prejudice. The matter proceeded to trial on the merits in March 2011 and the circuit court entered a judgment in favor of petitioners against respondents.

This Court accepted jurisdiction on the basis of certified conflict. The decision under review is Graney v. Caduceus Properties, LLC, 91 So. 3d 220 (Fla. 1st DCA 2012), which expressly and directly conflicts with Gatins v. Sebastian Inlet Tax District, 453 So. 2d 871 (Fla. 5th DCA 1984). The issue is whether, for statute of limitations purposes, a direct action by a plaintiff against a third-party defendant "relates back" to the timely filing of the third-party complaint. The Gatins

court held that relation back applies under these circumstances based upon the principle, articulated by this Court in I. Epstein & Bro. v. First National Bank of Tampa, 110 So. 354 (Fla. 1926), that merely adjusting the status of an existing party does not constitute a new cause of action. The Graney court, over a dissent by Judge Van Nortwick, rejected Gatins and reversed the trial court's judgment in favor of petitioners.

In this Court, KTD and Mr. Graney argue that relation back under Fla. R. Civ. P. 1.190(c) "should only be permitted where there is a mistake or misnomer in identifying a party defendant." (Ans. Brf., p. 8). This is also what the First District held. Graney, 91 So. 3d at 228. The problem with this argument is that this is not what the rule of civil procedure says. Florida's relation back rule is simple and broad 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.

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

The words "mistake" or "misnomer" do not appear in Rule 1.190(c). Rather, Florida's relation back rule applies whenever the new claim arises from the same "conduct, transaction, or occurrence" as the claim set forth in the original pleading. There is no dispute in this case that petitioners' direct claims

against KTD and Mr. Graney arose from the same conduct, transaction or occurrence as the third-party claim. Graney, 91 So. 3d at 224. The restrictive interpretation espoused by respondents and the First District is contrary to the plain language of the rule and the principle that relation back should be applied liberally so that cases are resolved on the merits.

As discussed in petitioners' initial brief, some states do limit relation back to situations involving "mistake" or "misnomer." See, e.g. State ex rel. Hilker v. Sweeney, 877 S.W.2d 624 (Mo. 1994); Laliberte v. Providence Redevelopment Agency, 288 A.2d 502 (R.I. 1972). However, the relation back rules in those states are different and narrower than Florida's rule, and specifically refer to the "mistake" or "misnomer" scenario. This Court should not judicially amend the relation back rule to impose restrictions that do not appear in the text.

KTD and Mr. Graney seek to avoid the First District's reliance on inapplicable cases by focusing on the decision in Higginbotham v. Fearer Leasing, Inc., 189 N.W.2d 125 (Mich. App. 1971), which involves a relation back rule similar to Florida's. (Ans. Brf., pp. 15-16). This 42-year-old decision is distinguishable. There, the plaintiff sought to amend to add direct claims against the third party defendant ***at the pretrial hearing***. Id. at 126. In reversing the trial court's decision

allowing the amendment, the court specifically noted that, in applying the relation back rule:

> [t]he stage at which leave to amend is requested, according to the circumstances of each case, is nevertheless a pertinent factor affecting the court's discretion. It will obviously become increasingly difficult to justify leave to amend at each later stage of a proceeding, especially if the circumstances indicate that the same action could have been taken any earlier stage.

Id. at 127, quoting 1 Honigman & Hawkins, Michigan Court Rules Annotated (2d ed.), pp. 409, 414, 415.

Here, KTD and Mr. Graney do not argue that the circuit court abused its discretion in permitting the direct action claims. The Higginbotham court specifically noted that the timing of the proposed amendment is a factor affecting a trial court's discretion to permit an amendment. There is no contention in this case that KTD and Mr. Graney were unfairly prejudiced by the assertion of the direct action claims on the eve of trial.

Nor could there be. Caduceus and TNC asserted their direct claims in June 2010. (R. 264). At that point trial was scheduled for August 2, 2010. (R. 248). KTD and Mr. Graney filed a motion to dismiss the direct action complaint based upon petitioners' failure to obtain leave, or, in the alternative, for a continuance. (R. 349). They did not move to dismiss the direct action complaint based on any statute of limitations

argument. Thereafter, all of the parties, including KTD and Mr. Graney, filed a joint stipulation ***agreeing*** to the filing of the direct action complaint (while reserving all defenses) so long as the trial was continued. (R. 352). The trial court approved the joint stipulation and entered an order continuing the trial. (R. 355). The trial court subsequently rescheduled the trial for March 2011, nine months after the filing of the direct action complaint. (R. 416).

This procedural history refutes the argument of KTD and Mr. Graney that "[t]he position advocated by Caduceus and TNC puts no constraints or requirements on a party amending a pleading to add new claims against direct defendants as long as there is a timely filed third party complaint against that party." (Ans. Brf., p. 12). To the contrary, significant "constraints" exist. First, the proposed amendment must arise from the same "conduct, transaction, or occurrence" as the original pleading. Fla. R. Civ. P. 1.190(c). This substantive limitation insures that the purpose of the statute of limitations is satisfied, i.e., if the defendant has been impleaded within the limitations period, there should be no risk of lost records or faded memories. See Gatins, 453 So. 2d at 875 (permitting the plaintiff to amend outside the limitations period to formally make the third party defendant a party defendant is not inconsistent with the statute of limitations "at least where, as here, the plaintiff's claim

concerns the same issues as are raised in the third party complaint").

Second, the trial court always retains discretion to deny the amendment if, as the Higginbotham court noted, it is asserted so late in the proceedings that the opposing party would be unfairly prejudiced. Here, no such prejudice occurred. The trial court (at the request of KTD and Mr. Graney) continued the trial date for seven months to prevent any such prejudice. Indeed, respondents did not even argue the statute of limitations defense until the trial via a motion for involuntary dismissal at the close of petitioners' case in chief.

As an apparent "fall back" argument, KTD and Mr. Graney suggest that that they were prejudiced due to the nature of the third-party complaint. In particular, they refer several times to the "inchoate" nature of Mr. Gordon's third-party claim against them. (Ans. Brf., pp. 2, 5, 12). It is unclear what this means. "Inchoate" has been defined as "[i]mperfect; partial; unfinished; begun, but not completed." See Black's Law Dictionary, p. 686 (5th ed. 1979). Mr. Gordon's March 2007 third-party complaint does not fit this definition.

Rather, the procedural framework applicable here is well established in the rules of civil procedure. Caduceus initially sued defendant Gordon. Pursuant to Rule 1.180(a), defendant Gordon sued third party defendants KTD and Graney. Importantly,

the amended complaint filed by Caduceus against Mr. Gordon is attached to the third party complaint filed by Mr. Gordon against KTD and Mr. Graney. In the amended complaint, Caduceus specifically alleged that the HVAC system did not function properly and that the facility was experiencing significant problems. (R. 39). In the third-party complaint, as required by Rule 1.180(a), 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 framed by the third party complaint in fact and by rule directly overlapped with those asserted in the underlying complaint. Indeed, pursuant to Rule 1.180(a), KTD and Mr. Graney were required to defend against both Mr. Gordon's claim and petitioners' claim. KTD and Mr. Graney were on notice in March 2007 that the case involved alleged defects with the HVAC system and were already defending that claim.

KTD and Mr. Graney cannot plausibly contend that Mr. Gordon's third-party complaint did not put them on notice of the nature of the claims ultimately tried. Again, the rules of civil procedure are applicable. A direct action by a plaintiff against a third party defendant ***must*** "arise out of the same transaction or occurrence that is the subject matter of the plaintiff's claim." Fla. R. Civ. P. 1.180(a). When the direct

action was filed, KTD and Mr. Graney had thus already been litigating the "subject matter of plaintiff's claim" since March 2007. Further, respondents' argument conflicts with the settled principle that the test for relation back is whether "the original pleading gives fair notice of the *general fact situation* out of which the claim or defense arises." See Flores v. Riscomp Indus., Inc., 35 So. 3d 146, 148 (Fla. 3d DCA 2010) (emphasis in original). Respondents' argument that defending against the claims in the second amended direct action complaint is a "different animal" than "the common law indemnity claim asserted by Gordon" is a sound bite, is not accurate, and is not a legal basis for overturning the trial court's judgment. The trial court prevented any prejudice by continuing the trial for seven months.

Perhaps the most glaring flaw in respondents' analysis is their attempt to sidestep this Court's decision in I. Epstein & Bro. v. First National Bank of Tampa, 110 So. 354 (Fla. 1926). Indeed, the I. Epstein decision, which provides the jurisprudential underpinning for Gatins, is nowhere mentioned in respondents' brief. Instead, KTD and Mr. Graney generically refer to decisions of "other courts" which "favor" application of the relation back doctrine when the amended pleading merely adjusts the status of existing parties. (Ans. Brf., p. 14). Respondents' argument suggests that this Court's holding in I.

Epstein represents some sort of optional policy choice with which the First District was free to disagree. In I. Epstein, this Court did not simply "favor" an interpretation of the relation back doctrine as applicable when an existing defendant's status is merely adjusted, it so ***held***. Accordingly, the First District was not at liberty to "consider the logic" of that holding and determine that a different approach is "more reasonable." (Ans. Brf., p. 14).

In light of respondents' failure to even mention I. Epstein, it is useful to review the case. The plaintiff in that case sued two defendants, Wilfred C. Clarkson and Max Strauss, as copartners doing business as the Florida Crushed Rock Company. I. Epstein, 110 So. at 797. Clarkson appeared in the action to offer a defense, but Strauss made no appearance. Id. at 797-98. Three years later, the plaintiff dismissed the case against Strauss, with Clarkson's consent, by "striking the name of Max Strauss and the words 'copartners' wherever they appear[ed] in the declaration, so that the suit might proceed against Wilfred C. Clarkson, doing business as the Florida Crushed Rock Company." Id. at 798. Following trial, and Clarkson's death, his executor filed defensive pleas based on the statute of limitation. Id. at 798-800. The referee allowed the pleas to be filed over the plaintiff's objection and then ruled in favor of the defense. Id. at 799.

On appeal, this Court framed the issue as follows: "[d]id the striking out of the name of Max Strauss, after commencement of the suit and after the original cause of action would have been barred, if no suit had been brought, amount to the commencement of a new suit?" Id. at 800. The Court noted that if the striking of the suit against Strauss in order to continue solely against Clarkson amounted to a new lawsuit, the statute of limitation would bar the action. Id.

This Court held that Clarkson's estate could not invoke the statute of limitations as a defense, as the amendment simply changed his status from that of a "copartner" defending the suit to that of a defendant sued in his individual capacity. Id. at 805. This Court explained that:

> Defendant Clarkson having been personally served with process, having individually appeared and having individually filed pleas, and particularly averring that he alone was doing business as the Florida Crushed Rock Company, **he was therefore before the court in his individual capacity, and dismissing as to the other defendant and striking the words 'as copartners' did not work a discontinuance of the suit as to him, nor operate as the commencement of a new suit against him, he being already before the court.**

Id. at 805 (emphasis added).

I. Epstein stands for the proposition that a party defending a lawsuit in one capacity cannot raise the statute of limitations as a defense when the plaintiff amends the complaint to sue it in a different capacity for a cause of action arising from the same

act or occurrence. This is, of course, exactly what happened in this case. The holding in Gatins is based on this Court's holding in I. Epstein. See Gatins, 453 So. 2d at 875 (citing I. Epstein and stating that "[w]e emphasize that the amended pleading here did not introduce a new defendant but rather adjusted the status of an existing party"). In rejecting Gatins, the First District also rejected this Court's decision in I. Epstein, something that it is not permitted to do. Gatins is in accord with I. Epstein and should be adopted by this Court.

Finally, and perhaps most importantly, KTD and Mr. Graney concede at page 16 of their brief that analysis of this case should "turn on the policy considerations underlying Statutes of Limitations." (Ans. Brf., p. 16). This is correct. The policy of statutes of limitation is to prevent stale claims. See Estate of Eisen v. Philip Morris USA, Inc., __ So.3d __, 2013 WL 1442256, at *3 (Fla. 3d DCA April 10, 2013) (statutes of limitation are "predicated on public policy, and ... are designed to encourage plaintiffs to assert their causes of action with reasonable diligence, while the evidence is still fresh and available, to protect defendants from unfair surprise and stale claims"); accord Nardone v. Reynolds, 333 So. 2d 25, 36 (Fla. 1976).

This case involves neither unfair surprise nor stale claims. KTD and Mr. Graney were impleaded into the litigation in March

2007, less than two years after the problems with the HVAC system manifested themselves. The amended complaint against the original defendant, Mr. Gordon, was attached to the original third party complaint filed by Mr. Gordon against KTD and Mr. Graney. KTD and Mr. Graney knew that the litigation involved alleged defects in the HVAC system designed by Mr. Graney and were already defending that claim. The trial court protected KTD and Mr. Graney from any unfair prejudice by continuing the trial when Caduceus and TNC filed the direct action complaint. Records were exchanged, witnesses were deposed and the case was tried while the evidence was fresh and available. The trial court reached a decision on the merits after a full trial involving the testimony of 18 witnesses and introduction of 231 exhibits. The policies underlying the statute of limitations do not remotely apply in this case.

The relation back doctrine should be applied liberally to give effect to this state's policy of deciding cases on the merits. See Estate of Eisen, 2013 WL 1442256, at *3 ("It is well settled that the rule permitting amendments to pleadings, and the relation-back doctrine, are to be liberally construed and applied."); Joe-Lin, Inc. v. LRG Restaurant Group, Inc., 696 So. 2d 539, 540 (Fla. 5th DCA 1997) ("Florida courts have a strong public policy preference to decide cases on their merits). It would be an injustice to reverse the trial court's decision on

the merits in this case based on a technical statute of limitations defense. Such a result would reflect a restrictive, not a liberal, application of the relation back rule contrary to the language of the rule and this Court's precedents. The decision in Gatins is consistent with and better reflects the policies, precedents and procedural rules of 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.

Any decision by this Court to adopt the procedural rule announced in Graney should be applied only prospectively. This Court has long held that legislative changes to statutes of limitation are applied prospectively absent a clear statement of intent to the contrary. Singletary v. Van Meter, 708 So. 2d 266, 267 (Fla. 1998). The reason for this is easily understood, as retroactive application would cut potential litigants off from their remedies through no fault of their own. This principle of justice has existed in Anglo-American law since Blackstone. See Trustees of Tufts College v. Triple R. Ranch, Inc., 275 So. 2d 521, 524-525 (Fla. 1973) (discussing the deeply rooted foundation of law governing retroactive legislation).

Respondents argue that the Graney decision is not "procedural" in nature. (Ans. Brf., p. 21). This argument is puzzling. Directly at issue is the construction and application of several rules of civil procedure. Specifically, Caduceus and

TNC asserted claims directly against KTD and Mr. Graney pursuant to Rule 1.180(a). The dispositive issue is whether, pursuant to Rule 1.190(c), those claims "relate back" to the timely filing of the third party complaint for statute of limitations purposes. Both procedural rules authorize pleadings arising out of the same "transaction or occurrence." The decision turns on an interpretation of how statutes of limitations work in the context of these procedural rules. Statutes of limitation themselves are inherently procedural. Allie v. Ionata, 503 So. 2d 1237, 1240-41 (Fla. 1987); see also Walter Denson & Son v. Nelson, 88 So. 2d 120, 122 (Fla. 1956) ("Ordinarily, statutes of limitation are construed as being applicable only to the remedy and not to the substantive right."). This case is "procedural" to its core and any decision that the relation back doctrine applies only in cases of "mistake or misnomer" should be applied only prospectively.

The First District's decision in Graney, if adopted, will radically change how statutes of limitation work in third-party practice. The Court has applied its holdings prospectively in the past when interpreting procedural rules and should do the same here. See Boyett v. State, 688 So. 2d 308, 310 (Fla. 1996) (interpretation of new procedural rule should have been applied prospectively); Armstrong v. State, 642 So. 2d 730, 738 (Fla. 1994) ("We find that our decision in Spencer - being a change in

[sentencing] procedure and not a change in the law - is to be applied prospectively only.").

The trial court below properly applied Gatins and did not err in doing so. Pardo v. State, 596 So. 2d 665 (Fla. 1992). The First District's decision to reject and certify conflict with Gatins resulted in an unexpected and unwarranted change to the law that governed at trial. It is manifestly unfair to change the rules and thus the outcome after the trial when the trial court correctly applied the existing law at the time. If left in place, the opinion below will allow respondents (and potentially other third party defendants in pending cases) to escape liability based on a legal theory never before seen in Florida. That would be a textbook example of elevating technicalities above the cause of justice - a result directly contrary to how statutes of limitation are intended to work. If this Court is inclined to depart from Gatins and establish a new procedural rule in Florida, it should hold that its decision is prospective only and does not apply to the petitioners.

CERTIFICATE OF TYPE SIZE AND STYLE

This brief is typed using Courier New 12 point, a font that is not proportionately spaced.

CERTIFICATE OF COMPLIANCE

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

Respectfully submitted,

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