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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC2013-992

LEON KOPEL,

Petitioner,

vs.

BERNARDO KOPEL and
ENRIQUE KOPEL,

Respondents.
_____/

L.T. Case No.: 3D11-536

On Discretionary Review Of A Decision Of The
District Court of Appeal, Third District

RESPONDENT'S ANSWER BRIEF

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INTRODUCTION AND JURISDICTIONAL STATEMENT

This Court accepted jurisdiction to review the decision below, *Kopel v. Kopel,* 117 So. 3d 1147 (Fla. 3rd DCA 2013) based on an alleged conflict. As previously pointed out in Respondent's brief on jurisdiction, Petitioner's claim that the Third District Court of Appeal erroneously applied an incorrect rule of law is wrong. As evidenced by the totality of the district court's opinion, the correct rule of law was followed. Fourteen years after the original complaint, the amended pleading added a legal claim never previously advanced which was based on new, different and distinct facts. Pursuant to the applicable rule of law, this amended claim does not "relate back" to avoid the statute of limitations. There is no conflict; this Court should decline to take this case based on a lack of jurisdiction.

In their plenary brief, in addition to arguing this alleged conflict issue, Petitioner further argues that the Third District's holding that no evidence existed below to support any of Petitioner's claims, new or old, is erroneous. In an effort to avoid the district court's findings, Petitioner presents only the facts of the case generally, wholly ignoring the details of the case. The specific facts in detail prove that no evidence supported Petitioner's pleadings and claims. The district court was correct. Thus any alleged conflict error herein is harmless.

Finally, Petitioner does not address the two other issues raised below but found moot by the district court as a result of its reversal on the above grounds. In

the event this Court were to disagree with both of the above holdings below, since the Petitioner wants a plenary review of the trial, these additional issues should be considered. Both issues were preserved for appeal.

Final judgment was based on a verdict which is inconsistent as a matter of law; the Petitioner improperly injected the wealth of the Respondent into the trial below, in violation of the trial court's order in limine. Respondent was thus deprived of a fair and impartial trial. If this Court were to overturn the district court's opinion, due process requires that the Respondent receive a new trial at a minimum, devoid of improper prejudicial information and based on verdicts that are consistent.

STATEMENT OF THE CASE AND FACTS

Petitioner's version of the facts of the case is inaccurate in many material respects, at times not supported by the record, and critical details are omitted. Respondent therefore provides the following statement of the case and facts so this Court may have a full understanding of the trial below.

This case is about a family that did business together for decades. The story begins in the late 1980's. The following is a list of the key players and companies involved to assist in understanding the events:

a. **Sharja Kopel** – The patriarch of the family in control of all decision making. The father of Respondent Enrique Kopel and Petitioner Leon Kopel; grandfather of Bernardo Kopel;

b. **Enrique Kopel** – Respondent. Older brother to Leon Kopel; father of Bernardo Kopel;

c. **Leon Kopel** - Petitioner. Younger brother to Enrique Kopel; uncle to Bernardo Kopel.

d. **Bernardo Kopel** – son of Enrique Kopel; nephew of Leon Kopel;

e. **KOP-I** – a Florida corporation, owning a 50% interest in real property in Miami, Florida (the warehouse property);

f. **KOP-II** – a Florida corporation, owning a shopping center in Miami, Florida;

g. **Eminence Corporation, N.V.** – A Netherlands Antilles corporation, formed and owned by Leon Kopel (1/3) and Enrique Kopel (2/3). Purchased the note and the mortgage on the warehouse property from the bank;

h. **Nautilus Holding Ltd., BVI.** – A British Virgin Islands corporation, formed and owned by Leon Kopel (1/3) and Enrique Kopel (2/3). Purchased the other 50% of the warehouse property.

The relevant history begins in the mid 1980's. Leon and Enrique Kopel, brother, worked with their father, Scharja Kopel, in the family business empire in

the Dominican Republic where they all lived. Scharja, the patriarch of the family, controlled everything with the proverbial velvet glove. He made all ultimate decisions on family investments. (A–5, p. 32-33)

In 1987, Scharja's oldest grandson, (Enrique Kopel's son) Bernardo, was graduating from the University of Miami. (A–5, p. 36) Scharja wanted to assist him and at the same time thought investing in Florida real estate would be a good idea for the family. (A–5, p. 36) He directed that family money be sent to Florida and that Leon, Enrique, and Bernardo, would each own one-third of the investments. (A–5, p. 36)

In 1988 and 1989, the family invested approximately $6.6 million to buy two properties, half of the ownership of a piece of land in Miami,[1] to be developed as a warehouse, and all of a Miami shopping center. (A–1) Accordingly, each of the three had approximately $2.2 million in the deal from the family coffers. (A–1)

Due to U.S. laws regarding foreign ownership and various tax issues, the lawyers who set up the two entities to own these two investments as S-corporations with Bernardo Kopel, being the only U.S. citizen, as the sole owner of the entities, Kop-I and Kop II. (A–5, p. 9, T.Vol.3, p.22) Within the family, however, there was never any question but that each owned one-third of these companies; it was

[1] The other half of the warehouse property was owned by third party outside investors. In 1991 this half was then bought by Nautilus Holding, BVI, a new company Leon Kopel and Enrique Kopel formed for this purpose and owned one-third and two thirds respectively.

understood that Bernardo was simply "fronting" the ownership. (A–5, p. 5, 34, T.Vol.3, p.22)

In 1991, several things changed within the family. Scharja had become elderly and ill. He decided to retire from all of the family businesses. He advised his sons Leon and Enrique that they were to pay him $8.84 million.

At about the same time, Leon decided he wanted his one-third ownership in the U.S. investments to be reflected somehow so he sought out a Florida transactional attorney, Michael Rosenberg, who began working to accomplish this. (A-5, p. 33) While he advised Leon he could take title, he pointed out that as a non-US citizen, Leon would have to withhold significant amounts of any distributions for US taxes. Leon did not want to do this. Thus to avoid US tax withholding, Leon and the others agreed to the Florida attorney's suggestion that they create fake promissory notes from Bernardo to Leon for $845,000 and for $1,450,000 even though the transactions were investments, not loans. (A-5, T. Vol 3, pp.28)

In August of 1991, two promissory notes from Bernardo to Leon were created, back dated with "effective dates" to January 4, 1989 and January 3, 1989, for $1.4 million and $845,000 respectively. (T.Vol 3, 29, 35). Since this was to represent Leon's investment in the Florida deals (his approximately $2.2 million), the original notes were photocopied, never delivered and then destroyed. This was

all done by this Florida attorney because these documents were never intended to be "real" loans.

At the same time, to receive his "buyout", Scharja directed Leon and Enrique to borrow money from the Royal Bank of Canada through their corporations. (A-5, p.10) Wishing to make other investments besides just paying their father, Leon and Enrique sought and obtained a $15 million loan in October of 1991, from the Royal Bank of Canada. They used a series of transactions, using their respective personal corporations. Leon's solely owned corporation, Lerif Corporation, borrowed $5,000,000; Enrique's solely owned corporation, Beko Corporation, borrowed $10,000,000. (A-5, p.47) Using this greater sum they invested more money in Miami real estate and made other investments including buying the note and mortgage from the lender on one of the Miami properties as an investment. (A-5, 53, 56) These two corporations, Lerif and Beko, specifically used the proceeds as follows:

1) Scharja's corporation, Blackberry, was paid $8,884,000. (A-1)

2) Leon and Enrique formed a new company, Nautilus Holdings, Ltd., a British Virgin Islands corporation, with Leon owning 1/3rd and Enrique owning 2/3rds to purchase the other half of the Florida warehouse property from the outside investors for $535,000. (A-1)

3) Leon and Enrique formed another new company, Eminence Corporation, NV, a Netherlands Antilles corporation, with Leon owning 1/3rd and Enrique owning 2/3rds which then purchased from Southeast Bank, N.A. the $5,150,000 note secured by mortgage on one of the Miami properties from Southeast Bank, N.A. for the discounted sum of $4,851,119. (A-1)

4) The remaining approximately $730,000 was used for expenses and an interest reserve. (A-1)

With Scharja no longer in control, and after these transactions were all completed in the fall of 1991, Leon and Enrique began experiencing serious difficulties with each other in the operation of the family's main business, a textile factory in the Dominican Republic. In 1992, the situation deteriorated totally. In the middle of the night, literally, Leon wrongfully ousted Enrique's belongings from Enrique's office at the family factory and business in the Dominican Republic, despite Enrique's ownership interest. Thereafter Enrique no longer received his share of any profits in that business. (T.Vol.3, p.72)

Then, not long after that, still in 1992, Leon demanded payment on the two fake promissory demand notes for $845,000 and $1,450,000 that had been created pursuant to attorney Rosenberg's plan. (T.Vol.3, p. 74-75)

When he was not paid on those fake notes, in November of 1994, Leon filed suit. In his original complaint, Leon pled that the two U.S. corporations, KOP I

(the warehouse property) and KOP II (the shopping center property) were created and "funded" in December 1988 and January 1989 by Leon and Enrique with $6.6 million with Leon responsible for 1/3rd of this sum. (A-1) He then pled that in October of 1991, when the $15 million was borrowed from the Royal Bank of Canada, he and Enrique paid "Kopel family members and/or their wholly owned corporation(s)" $8.884 million, used corporations to buy the other half of the warehouse property for $535,000, and "supplied funds to Eminence Corporation for acquisition of the mortgage" for $4,851,119, with the balance being for "fees and expenses". (A-1)

On these allegations, Leon sued in three counts:

(1) Count I was a claim that Bernardo owed him $1.4 million on the January 4, 1989 demand promissory note (A-1);

(2) Count II was a claim that Bernardo owed him $845,000 on the January 3, 1989 promissory note. (A-1): and,

(3) Count III was his claim that he had lent $5,000,000 to Bernardo and Respondent Enrique when Leon's corporation Lerif borrowed that sum from the Royal Bank of Canada which money was used as follows: (A-1)

a. $178,333 as one-third of the $535,000 that was funded via Nautilus Holdings Limited so that its subsidiary, P.Z. Distribution could purchase a 50% interest in Tradezone Expo Associates;

b. $1,616,666 as one-third of the approximate $4,850,000 which was funded through Eminence Corporation to acquire from Southeast Bank/First Union its $5,150,000 Note payable to Southeast Bank;

c. $383,333 as one-third of the $1,150,000 originally invested in KOP-I for reinvestment in Tradezone;

d. $351,000 as one-third of the approximate $1,053,000 which was required to carry ongoing interest charges in connection with the Southeast mortgage loan on the Tradezone property for the period subsequent to the threatened foreclosure;

e. $845,000 that was lent pursuant to the promissory note dated January 3, 1989;

f. $1,400,000 that was lent pursuant to the promissory note dated January 4, 1989;

g. Additional monies which were believed to have been used for interest and fees, and other unknown purposes.

Over the next few years, the litigation progressed with changes occurring in the pleadings due to the obvious inconsistencies in Leon's claims. Pleading alternatively that the same funds identified above were loans or were investments, all Leon cared about was getting his money returned regardless of the true facts.

In November of 1997, Leon filed his Second Amended Complaint, (A-2) adding many corporations to the lawsuit including the foreign entities, Eminence Corporation NV and Nautilus Holdings Ltd., a BVI company. Leon now changed the lawsuit to claim that he had invested the $5 million in these companies and the

two U.S. companies, KOP I and KOP II, while at the exact same time this money was a loan by him to Bernardo. He continued to sue on the two promissory notes totaling $2.25 million from Bernardo, sought the $5,000,000 back as an alleged loan to both Bernardo and Enrique, and alternatively claimed that he never loaned any money, but rather invested all of this $5,000,000 in the entities and was entitled to unspecified damages for fraud, shareholder's derivative action, RICO and a host of other claims. (A-2)

Over the next decade, the Second Amended Complaint was narrowed by motions which dismissed a number of the claims. Ultimately, Leon's attempt to sue the foreign corporations, Eminence and Nautilus, in the U.S. was denied for lack of jurisdiction over these foreign corporations. (R. 576-577)

In 2008, the case was tried before a jury based on the remaining pleadings in the Second Amended Complaint. Leon chose at that time to sue on the two promissory note counts for $2.25 million, the loan for $5 million and unjust enrichment for the same $5 million. At trial, however, Leon now injected, over objection, his claim for the first time ever, that various settlement conversations between he and Enrique in 1992 were not actually settlement discussions, but rather independent oral agreements whereby Enrique was to pay $5 million to Leon in exchange for Leon's transferring his interests in all the entities to Enrique. Leon testified that these discussions were between Enrique and Leon only.

Respondent objected on the basis of surprise to these new claims and oral evidence, fourteen years after the case began, but the objections were overruled. However, this trial ended in a hung jury and subsequent mistrial. The trial court then ordered the parties to amend the pleadings again to clarify the claims. Respondent's objections to this ruling were denied.

In September of 2008, fourteen years after the original complaint, Leon Kopel filed his Third Amended Complaint (which was dismissed), his Fourth Amended Complaint which was dismissed, and then in 2009, a Fifth Amended Complaint (which the court permitted to proceed). (A-7; R. 9967-9970)

Changing his claims each time, in the Fifth Amended Complaint, Leon alleged that from 1987 to 1991, money was provided by the family to Bernardo with the understanding that he, Leon and Enrique would "each be entitled to a one/third interest in any profits from the ventures operated by" Bernardo (A-7; R. 9967-9970). Leon then alleged that in 1991, when he and Enrique borrowed the $15 million, those funds were used to repay their father and in "furtherance of their business interests in Miami." (A-7; R.9967-9970)

On these two new factual claims, Leon now abandoned the claims he had been asserting for the past 15 years on the two fake promissory notes for $1.4 million and $845,000. Instead, he now alleged that when the funds from the $15

million Royal Bank of Canada loan were used to repay his father and to make new additional investments, at the exact same time in 1991:

a) This money was a loan by Leon to Bernardo of $5,000,000 (Count I – Money lent to Bernardo);

b) That during the funding of this $5,000,000 to Bernardo, that Enrique and Bernardo orally promised that they would pay him this same $5,000,000 in exchange for Leon's ownership interests in the companies (Count II – Breach of Oral Agreement by Enrique and Bernardo); and,

c) he alleged that by providing this same $5,000,000 to both Enrique and Bernardo, they were unjustly enriched if allowed to keep the benefit of this money (Count III – Unjust Enrichment Against Enrique and Bernardo). (A-7; R.9967-9970)

Defendants challenged this pleading due to its inherent inconsistencies and due to the new claims being time barred by the applicable statute of limitations based on the four corners of the pleading (four years on an oral agreement). (R.9971-9975) The motion was denied; the case proceeded to trial on this pleading.

Prior to trial, Defendants moved for summary judgment. (R.10170-10179) The essence of the motion was the complete lack of evidence: of any money ever being loaned to Bernardo; that Bernardo participated in any agreement to repay Leon in exchange for Leon's interests in various companies; and as to Enrique,

since the claim of an oral agreement was pled for the first time in 2008, some fourteen (14) years after the lawsuit commenced, it was time barred by the applicable four (4) year statute of limitations on oral agreements. As to unjust enrichment, because no direct benefit was ever made to Enrique or Bernardo, this claim failed as a matter of law. (R.10170-10179)

In response, Leon claimed that his oral testimony that the money he invested in various entities was a loan to Bernardo precluded summary judgment on the loan count, that the doctrine of relation back precluded summary judgment on the oral agreement count, and that unjust enrichment applied even if the benefit was indirect. The trial judge denied all motions for summary judgment.

Respondent moved in limine prior to trial, (R. 10877-10886) obtaining an order in limine that there should be no introduction into this trial of any facts concerning the Respondent's alleged wealth including any receipt of monies by the corporations from sales of assets nor should the corporate fiction be ignored. Respondent argued that there were no pleadings upon which such evidence would be relevant and the overly prejudicial nature of this evidence precluded its admission. The trial court agreed, ruling:

> We're certainly not going to be retrying those issues. I can tell you right now, I plan to hold everyone to, you know, what's in this last Complaint; and that is the three counts: money lent, you have the breach of the agreement and then you have unjust enrichment. **I really do not expect or want to hear anything about what was earned or loaned or paid out to these other corporations.**

> So I'm going to grant your Motion in part. In part. In that you can describe the relationships between the parties as it relates to what they may have owned together, **but** I don't want anything about any prior lawsuits or claims or receipts of monies unrelated to the underlying facts of this case. (emphasis added)

From opening statement to closing, Leon repeatedly violated this order in limine. In his opening he stated that Respondent and Bernardo received $19 million when the companies sold certain assets, (A-3) Respondent's timely objection was overruled; the subsequent timely motion for mistrial was denied. (A-3) Thereafter, Leon used this prejudicial and improper evidence to imply that Respondent was a multimillionare despite no proof of this existing. This became a focal point of the entire trial. Leon brought his point home in his closing argument, arguing that Respondent received these monies but gave nothing to Leon despite the undeniable fact that Respondent never received any of these funds. The companies had invested the proceeds in new investments which were ultimately lost in the recession.

Leon never put any documents into evidence. None. The sole evidence at trial was oral testimony concerning the monies allegedly loaned and the alleged promises which, contrary to even the untimely amended pleading, was now testified to as having occurred in 1992, long after the alleged loan in 1991. On this oral testimony, Leon obtained a jury verdict finding for him on all counts. The jury found that Bernardo borrowed $5,000,000 (Count I) and at the same exact moment

of this loan, in exchange for Leon's interests in the companies, Bernardo orally agreed to re-pay Leon $2,000,000 (Count II) and Enrique orally agreed to pay Leon $3,000,000 (Count II). The jury also found Leon had advanced this same $5,000,000 to both Bernardo and Enrique, and that they were unjustly enriched in the sum of $10,000,000 (Count III). (R. 10887-10889)

Before the jury was released, Respondent pointed out the many fundamental inconsistencies in the verdicts and requested that the jury be so instructed and sent back to deliberate again. (T. Vol.4, p. 95-99) Leon opposed this request and the trial court agreed with Leon and refused to send the jury back to deliberate and correct the verdicts. (T. Vol.4, p.98)

Respondent timely filed a motion for new trial or judgment notwithstanding the verdict. (R.10913-10917) These motions were denied.

Petitioner Leon filed his motion for Prejudgment Interest and Entry of Final Judgment. (R.10909-10912) In his motion, despite apparently recognizing the problems and inconsistencies with the verdicts, Leon sought a final judgment on all the verdicts, seeking $20 million plus interest. At the hearing on these motions, without any pending motion to correct the verdict or for remittitur, the trial court *sua sponte* ruled that final judgment would be entered on the verdict on Count III (unjust enrichment) only, against both defendants jointly and severally, and that the court was reducing the verdict on its own to $5,000,000. The trial court also

granted pre-judgment interest on this sum using the arbitrarily selected date of funding, all over Respondent's objections. Respondent also treated the court's ruling as a remittitur, rejected same but the court still refused to give Respondent a new trial on damages only.

Final Judgment was entered on February 1, 2011 against both Defendants jointly and severally for $5,000,000 plus prejudgment interest of $9,063,164.50 for a total judgment of $14,063,164.50. (R.10922)

After full briefing and oral argument, the Third District Court found that on the facts in the record, no evidence existed to support any of Leon's claims and reversed the case as a matter of law. (A-8) The district court additionally held that for an amended pleading to relate back to the original pleading to avoid the statute of limitations, "the pleading must not state a new cause of action. See Daniels v. Weiss, 385 So. 2d 661, 663 (Fla. 3d DCA 1980). '[W]hen a cause of action set forth in an amended pleading in a pending litigation is new, different, and distinct from that originally set up, there is no relation back.' Trumball Ins. Co. v. Wolentarski, 2 So. 3d 1050, 1055 (Fla. 3d DCA 2009(quoting Livingston v. Malever, 137 So. 113, 118 (1931). (A-8)

Specifically, on the evidence in the record, the district court held that "the claim for unjust enrichment warrants reversal because Leon's $5 million investment in a jointly-held corporation only indirectly benefited one of the

appellants." That the statute of limitations barred the claim on the oral promises (Count II) because the amended claims alleged "that at the same time Bernardo borrowed money from him, Enrique orally promised Leon $5 million in exchange for Leon's release of all of his interests in these companies. This new claim of an oral promise to pay him $5 million for his interests in the companies was asserted for the first time in 2008, fourteen years after the alleged agreement was made." Since the alleged oral promise by Enrique to repay Leon his $5 million was **new, different, and distinct** from that which was originally pled"... it did not relate back. (A-8)

Petitioner filed his claim of conflict jurisdiction with this Court arguing that the Third District court did not use the proper test for relation back and the decision was in express and direct conflict with the other district courts because the proper test was not enunciated by the court.

SUMMARY OF ARGUMENT

The district court held that there was no evidence to support any of Petitioner's claims. The court further held that the claims alleged in 2008, based on facts pled some fourteen years after the original complaint had been filed, were "new, different and distinct" from the original claims. The court used the appropriate test for whether new claims relate back. There is no express or direct conflict jurisdiction in this case. Contrary to Petitioner's assertions, no Florida

court holds that the test is merely whether the general facts originally pled permits entirely new legal claims based on entirely different detailed facts to relate back. Petitioner's attempt to use broad general words of the rule to avoid the holdings of all Florida's courts should be denied. Every court interprets the rule as requiring that the facts pled originally must apprise a litigant sufficiently of the factual claims to permit amendment years later whereby new claims are being brought to relate back to the original filing.

Examining the differences between the facts alleged originally in the case at bar with those alleged fourteen years later, reveals two wholly different factual scenarios, so different and distinct, as to preclude relation back.

As to the Respondent, Petitioner originally alleged he loaned him and his son $5,000,000 in 1991 when Petitioner borrowed money to pay his one third share of money due to their parents and invested the rest in corporations that owned or bought land and a shopping center in Miami, a note owed by the corporation, and the like. Fourteen years later, Petitioner pled that he loaned $5,000,000 to Respondent's son only, and at the same identical time, Respondent (and his son) made some separate oral agreement to pay Petitioner $5,000,000 in exchange for Petitioner's interests in all the investments. His testimony even contradicted this untimely pleading, wherein he admitted the alleged deal was in the year after the alleged loan.

Even a cursory comparison of the two claims reveals such a total difference in both the facts alleged and the legal theories advanced, that as the district court held, no reasonable person could conclude that these claims were based on the same "conduct, transaction or occurrence". Petitioner's broad reading of this test would almost make a nullity of the concept that litigants are to be timely presented with the facts and claims being brought against them to prevent surprise.

The district court was also correct in determining that the claims were not supported by the evidence. Despite Petitioner's oral testimony that he "lent" $5,000,000 to Bernardo Kopel, the pleadings themselves proved otherwise as did Petitioner's own testimony. Petitioner himself admitted that in 1991, after Petitioner's corporation, Lerif Corp., borrowed $5,000,000 from the Royal Bank of Canada, over $2.8 million was paid to Petitioner's parents. Bernardo received nothing from this money. No evidence existed that these funds were a loan to anyone. With the remaining funds, Petitioner admitted he invested $1.6 million in a newly formed corporation of which he owned one-third, and invested another portion in a different newly formed corporation of which he also owned a third.

On this undisputed and admitted evidence, the district court correctly held that no evidence existed whatsoever to support the claim that Petitioner loaned any funds to Bernardo Kopel. As to the new claim that there was some sort of oral settlement agreement reached by the parties, Petitioner admitted that he never

signed the written agreement and never provided the ownerships he had promised to Respondent in exchange for payment. Finally, as to the unjust enrichment claim, no facts supported the claim, plus the evidence above revealed that Respondent never received any direct benefit thus barring the claim as a matter of law. The district court's holdings being eminently correct, the opinion of the court should be upheld.

Finally, should this Court overturn the district court, Petitioner violated the Order in Limine and Florida law in injecting improper information falsely implying that Respondent had received millions of dollars all designed to prejudice the jury. This focal point of the trial deprived Respondent of a fair and impartial trial. The end result was an inconsistent verdict which Respondent timely pointed out to the trial court but which was not sent back to the jury for correction. The trial court's attempt to correct the errors did not afford Respondent the due process all litigants are entitled to receive. These errors, properly preserved and fundamental to due process, should result at a minimum in a new trial if the district court is reversed.

ARGUMENT

Jurisdiction was improvidently granted in this case because there is no conflict, express, direct or otherwise, between the decision below and the applicable rule of law as followed below and by all other Florida courts. No facts

exist in the record supporting Petitioner's claims. Finally, Petitioner injected improperly prejudicial matters into trial and the verdict was inherently inconsistent.

I THE THIRD DISTRICT FOLLOWED THE PROPER RULE OF LAW; THIS COURT LACKS JURISDICTION AS NO CONFLICT EXISTS - THE NEW PLEADING STATED TOTALLY NEW, DISTINCT AND DIFFERENT FACTS AND CLAIMS, THUS NO RELATION BACK AND THE STATUTE OF LIMITATIONS RAN

Petitioner admits that Count II of the Fifth Amended Complaint, filed in 2008, was a new claim. Since the statute of limitations had run more than a decade before this claim was first made, it is barred unless the doctrine of "relation back" applied.

Statutes of limitations exist to protect litigants from being sued on stale claims because evidence and testimony is unavailable and witness' memories fade. *Caduceus Properties LLC v. Graney*, 137 So. 3d 987, 992 (Fla. 2014). Before a litigant can amend pending litigation to add an otherwise time barred claim, the applicable rule requires that the new matter must arise out of the "same conduct, transaction, or occurrence". The purpose of this rule is to balance the policy of liberal amendment to pleadings to permit trial on the merits of a cause against the policy of due process in giving litigants timely notice of the claims being brought to afford an opportunity to develop the evidence in response. *Totura & Company vs. Williams*, 754 So. 2d 671, 681 (Fla. 2000) (explaining that the purpose of

statutes of limitations 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" (quoting *Order of R.R. Tels. v. Ry. Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944)).

This Court long ago stated this core concept of our justice system, that "gotcha" tactics and surprise violate our beliefs in fair play. Specifically, regarding the pleadings, this Court stated, "[C]auses of action should be decided on their merits, and not as the result of "surprise, trickery, bluff, and legal gymnastics." *Surf Drugs v. Vermette,* 236 So.2d 1111 (1970).

The modern rule governing amendment of pleadings is in accord with this concept. Based on the rule enacted in 1937 and the Federal Rule, the modern rule states "[w]hen 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, Florida Rules of Civil Procedure (1967). In Florida, pleading practice requires that the pleader provide sufficient information to apprise the litigant of the facts being relied on and the claims being brought. The concept of due process in this regard means that a litigant can thereupon develop the facts and evidence in response to the pleader's assertions.

Florida courts have consistently and repeatedly applied this rule as precluding amendment whenever and wherever a "new, different and distinct" cause of action has been brought. As the Third District recently stated, quoting the Second District:

> [T]he proper test of relation back of amendments is not whether the cause of action stated in the amended pleading is identical to that stated in the original (for in the strict sense almost any amendment may be said to be a change of the original cause of action), but whether the pleading as amended is based upon the same specific conduct, transaction, or occurrence between the parties upon which the plaintiff tried to enforce his original claim. * * *
>
> *Keel v. Brown*, 162 So. 2d 321, 323 (Fla. 2d DCA 1964); *see also Armiger v. Associated Outdoor Clubs, Inc.*, 48 So. 3d 864, 870 (Fla. 2d DCA 2010). In *Flores v. Riscomp Indus., Inc.*, 35 So. 3d 146, 148 (Fla. 3d DCA 2010), this Court explained, "We have articulated the test to be whether 'the original pleading gives fair notice of the general fact situation out of which the claim or defense arises,'" and that "[t]he [relation back] doctrine is to be applied liberally to achieve its salutary ends." *See also Caduceus Props., LLC v. Graney*, 137 So. 3d 987 (Fla. 2014) (same), and cases cited therein.

Mender v. Kauderer, , (Fla. 3rd DCA July 2014)(not final).

In *Caduceus,* cited by the Third district above, this Court recently stated:

> [P]ermitting relation back in this context is also consistent with Florida case law holding that rule 1.190(c) is to be liberally construed and applied. See, e.g., *Fabbiano v. Demings*, 91 So. 3d 893, 894-95 (Fla. 5th DCA 2012) (explaining that the relation-back rule is to be liberally interpreted and acknowledging that the underlying "rationale for this rule is grounded in the notion of fair notice"); *Flores v. Riscomp Indus., Inc.*, 35 So. 3d 146, 148 (Fla. 3d DCA 2010) (explaining that the relation-back doctrine is to be liberally applied and articulating "the test to be whether 'the original pleading gives fair notice of the general fact situation out of which the claim or

defense arises' " (quoting *Kiehl v. Brown*, 546 So. 2d 18, 19 (Fla. 3d DCA 1989).
Id.

In asserting that conflict jurisdiction exists, Petitioner relied on cases that actually support Respondent's position herein. Quoting directly from *Keel v. Brown,* 162 So. 2d 321, (Fla. 2nd DCA 1964): "the proper test of relation back of amendments is not whether the cause of action stated in the amended pleading is identical to that stated in the original (for in the strict sense almost any amendment may be said to be a change of the original cause of action), but whether the pleading as amended is based upon the same **specific** conduct, transaction, or occurrence between the parties upon which the plaintiff tried to enforce his original claim." *Fabbiano v. Demings,* 91 So. 3d 893, 895 (Fla. 1st DCA 2003); *Armiger v. Associated Outdoor Club Inc.,* 48 So. 3rd 864 (Fla. 2nd DCA 2010).

Reviewing the analysis in the decision below, the Third district did not use a test different from its sister courts or this Court, but rather used the exact test called for by the rule. The fifth amended complaint alleged wholly new facts that required totally different proofs at trial than the facts alleged in the original complaint some fourteen years earlier. A claim for money lent is not the same as a claim that there was a contractual agreement whereby one party promised to pay money to another in exchange for the other's ownership in investments. These facts are "new, distinct and different" which is the proper test.

Petitioner's argument that the pleadings arise out of the "same transaction" regarding $5,000,000 begs the issue. Indeed, in case after case arising out of the same business transaction, the same automobile accident, slip and fall, or other incident, or even the identical facts and circumstances giving rise to a statutory right, amended pleadings stating new facts or causes of action based on different specific facts are disallowed as no relation back is found.

In *Trumbull v. Ins. Co. v. Wolentarski,* 2 So. 3rd 1050 (Fla. 3d DCA 2009) citing to this Court's decision in *Livingston v. Malever,* 137 So. 113 (1931), though the amended pleading to add a claim for personal injury protection benefits from the contract of insurance involved the identical parties, the same accident, and the same contract of insurance, the court held that a PIP contract action arising out of an accident was not based on the same facts as the UM contract action arising out of the same accident. The new claim involved new, different and distinct facts from the negligence claims for injuries from the accident and the contract action on the uninsured motorist contract of insurance (UM claim) originally pled. Thus, even though these claims arose from the same transaction or occurrence, the specific facts and causes of action were so different as to bar the untimely claims in the amended pleading.

Similarly, in *Dailey v. Leshin,* 792 So. 2d 527 (Fla. 4th DCA 2001), a rescission defense was raised in the initial counterclaim filed in defense to a

foreclosure action brought by the lender. Thereafter, an amended counterclaim was filed raising Truth in Lending Act (TILA) statutory violations that allegedly occurred as part of the same conduct that gave rise to the initial rescission claims in the counterclaim. The court held that the TILA violations were based on different facts than those alleged in the original counterclaim even though the same transaction was involved. Citing to *Kiehl v. Brown, supra,* the court stated that the litigant was not on "fair notice of the general factual situation." *Dailey, id.* at 532.

The First District in *Page v. MacMullan,* 849 So. 2d 15, 16, (Fla. 1st DCA 2003) similarly found that though a complaint to assert homestead exemption filed for the year 2000 included an allegation that the denial of same would result in future damages, an untimely amendment to add a claim for the year 2001 would not "relate back" because "[I]t is well-settled, however, that such amendment may not be used to avoid the statute of limitations if the amendment sets forth a new and distinct cause of action. *West Volusia Hospital Authority v. Jones,* 668 So.2d 635 (Fla. 5th DCA 1996); *School Board of Broward County v. Surette,* 394 So.2d 147 (Fla. 4th DCA 1981); *Daniels v. Weiss,* 385 So.2d 661 (Fla. 3d DCA 1980).

In a case Petitioners rely on claiming conflict, the First district again found that thought the identical causes of action were filed involving the same parties, a untimely amendment to a complaint to recover on an $11,758.48 check adding a

second check for $13,516.91 did not relate back. *Leavitt Communications, Inc. v. Quality Communications,* 939 So. 2d 257 (Fla. 1st DCA 2006).

Reviewing the other cases on which Petitioner relies reveals the error of the position.

In *Fabbiano v. Demings,* 91 So. 3d 893 (Fla. 5th DCA 2012), the plaintiff sued for negligence and later amended the claim to one for battery. After analyzing the history and purpose of the rule including the identical federal rule (Rule 15(c)(1)(b) after which Rule 1.190(c), Fla. R. Civ. P. had been copied, the court determined that different causes of action between the same parties based on the same identical operative facts permitted relation back.

Similarly, the Second district in *Armiger v. Outdoor Associated Clubs, Inc.,* 48 So. 3d 864 (Fla. 2nd DCA 2010), held that various claims of direct negligence for a slip and fall on a puddle of water against the property owner untimely amended to later claim the property owner was vicarious liable on its non-delegable duty for the actions of a maintenance company were on the identical facts and parties, and thus related back.

The dispute in *Keel v. Brown, supra.,* involved a claim asserting a partnership wherein one partner was suing originally seeking dissolution and an accounting. An amended claim was ultimately brought seeking damages. The

court held that the same parties and the same facts were involved. Simply because a new damage claim was added on the same transactions did not bar the claim.

Initially, as can be seen from all the districts, is that the analysis to be done involves the facts alleged and the causes of action brought on those facts. The Petitioner's claim that conflict jurisdiction exists because the district courts of Florida do not always enunciate clearly the buzzwords in the rule on relation back ("same conduct, transaction or occurrence") is without merit. As can be seen from all the cases wherein some courts such as in the instant case have used the language such as "new", "distinct" or "different", the substance of the analysis is the same. Thus Petitioner's claim that conflict jurisdiction exists is in error; this Court accepted jurisdiction improvidently and should now correct its decision.

Secondly, what is patently clear is that the lower court properly determined on the facts of this case that the amended complaint alleged facts that were not the same "conduct, transaction or occurrence" but rather were new such that different evidence was required to prove the new claim. Accordingly the lower court's decision that there was no relation back was eminently correct.

In the instant case, the original complaint pled that Leon made a $5,000,000 loan directly to the Respondent. Fourteen years later, Leon now pled that no loan was ever made to the Respondent, instead claiming that Leon's payments in 1991 to the parties' father, and his investment in various corporations invested for which

Leon admittedly received ownership, were somehow a loan to Bernardo only, but now at the same time some oral agreement was made between Leon and Enrique[2] whereby Enrique was to buy Leon's interests in the various investments Leon had made for $5,000,000. Putting aside the nonsensical nature of the claim that someone would lend $5,000,000 to one party and immediately receive a separate oral agreement from the borrower and a third party whereby the identical sum lent would be paid in exchange for the lender's interest in the entities that the $5,000,000 was being lent for, no reasonable person would compare these two factual scenarios and suggest that they were remotely stating the same facts, circumstances, conduct, transaction or occurrence. These facts and claims are totally distinct and different.

Highlighting the injustice of Petitioner Leon's position, he claimed at trial that this alleged oral agreement with Respondent occurred in front of the party's parents. Since this claim was made for the first time many years after both these witnesses had long since passed away, the prejudice to Respondent is obvious as the only witnesses to the alleged oral agreement besides the litigants were now unavailable. It is exactly for this reason that statutes of limitation exist.

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[2] Petitioner Leon also alleged that Bernardo was part of this deal meaning that at the same time he was loaning $5,000,000 to Bernardo, there was also a promise from Bernardo to repay this $5,000,000 in exchange for Leon's ownership in the investments.

...Statutes of limitations are designed to protect defendants from unusually long delays in the filing of lawsuits and to prevent prejudice to defendants from the unexpected enforcement of stale claims. See Totura & Co. v. Williams, 754 So. 2d 671, 681 (Fla. 2000)

The decision below was correct and if jurisdiction continues to be found, the decision should be affirmed on this issue as there should be no relation back.

II. THE ERROR, IF ANY, IS HARMLESS GIVEN THERE WAS NO EVIDENCE TO SUPPORT ANY OF PETITIONER'S CLAIMS

The lower court found no evidence to support any of Petitioner's claims. This holding makes this appeal an exercise in futility. Accordingly, the issue of relation back is in essence mooted by this correct finding.

Petitioner uses his bits and pieces of testimony taken out of context to attempt to argue that evidence existed in the record to support his claims, but even a cursory examination of the evidence proves that the lower court was correct that no evidence supports Petitioner's claims. Petitioner did not introduce any documents into evidence whatsoever – not a single document was introduced to support his claims of a loan of any amount to anyone, or even of this sum of money ever being provided to Bernardo. The only document related to his claim that there was some promise in 1992 to pay him back this sum in exchange for Petitioner's ownership interest in companies and investments, was a settlement agreement prepared by the Florida lawyer which Petitioner admitted he refused to sign and was never entered into.

On the claim of a loan of $5,000,000 in 1991, Petitioner admitted under oath that at all times, from the $5,000,000 he borrowed in 1991, over $2.9 million went to his (and Respondent's) father as part of deal to permit the father to retire. Thus on this fact alone, the evidence at trial proved there never was a $5,000,000 loan. Additionally, as pled and admitted by Petitioner, another almost $2 million of the balance left after payment to his father was invested in foreign companies he and Respondent created at the time for which Petitioner received an ownership interest in the companies. These companies in turn invested the monies in assets.

Petitioner cannot deny these undisputed facts in evidence. On these facts, the lower court determined that "Bernardo and Enrique are entitled to judgment as a matter of law because the evidence does not support the claims alleged in any of the three counts." The court correctly applied the law of unjust enrichment in holding that there must be a direct benefit to the recipient of the funds and payment to third parties including investments in corporations are not direct benefits. *Citing Fla. Power Corp. v. City of Winter Park,* 887 So. 2d 1237, 1241-42 n.4 (Fla. 2004); *Peoples Nat'l Bank of Commerce v. First Union Nat'l Bank of Fla. NA*, 667 So. 2d 876, 879 (Fla. 3d DCA 1996).

The lower court correctly reversed the final judgment entered based on the verdict of unjust enrichment only because no facts existed to support this claim.

III. THE FINAL JUDGMENT WAS BASED ON INCONSISTENT VERDICTS

Though the lower court failed to address the additional error in the trial below which issues were brought on the appeal, finding instead that the court's decision on the first two issues mooted the other issues, in the event this Court were to agree with Petitioner on the first two issues, justice requires that the other error, properly preserved and appealed by Respondent, be considered to afford Respondent due process. The other issues appealed were the inconsistency of the verdicts upon which the trial court tried to reconcile and the prejudicial evidence injected into the trial, over objection and in violation of the courts Order in Limine.

In the trial below, the jury entered three separate verdicts. On Count I for a loan of $5,000,000 to Bernardo, the jury found a loan and entered its verdict of $5,000,000 against Bernardo. On Count II claiming that at the same time of this loan, both Bernardo and Enrique promised to pay Petitioner this $5,000,000 back and would additionally receive Petitioner's ownership in various companies, the jury found such an agreement but entered verdict against Bernardo for $2,000,000 and against Enrique for $3,000,000 despite there being no evidence of any such division of payment. On Count III for unjust enrichment, the jury entered verdict against both Bernardo and Enrique for the sum of $10,000,000 despite there being no evidence at all supporting such a number.

Respondent recognized the inherent inconsistency in these verdicts before the jury was discharged and made the appropriate motion to send the jury back for

further deliberations. *West Boca Medical Center, Inc. vs. Marzigliano,* 965 So.2d 240, 243 (Fla. 3rd DCA 2007). Petitioner opposed the motion and the trial court agreed, declining to permit the jury to deliberate further.

On these inconsistent verdicts, the Petitioner attempted to obtain a final judgment on all verdicts totaling $20 million. The trial judge rejected this and instead of granting a new trial, attempted to fashion a remedy, although no legal basis existed to do so. The trial judge *sua sponte* threw out the verdicts on Counts I and II, and entered final judgment against Bernardo and Enrique, jointly and severally, on Count III only (unjust enrichment). As to the amount of judgment, the court again on its own, *sua sponte,* reduced the verdict to $5,000,000. Over Respondent's objection, the court then awarded in excess of $9,000,000 in pre-judgment interest despite there being no date certain upon which to begin the running of interest.

The inconsistency of these verdicts is patent. Respondent did everything correct under the law to attempt to have the jury correct its own errors. The trial judge, attempted to find a reasonable method to uphold some semblance of the verdict, perhaps to try to bring closure to this then seventeen year odyssey, but no rules of procedure or common law basis existed to permit the trial court's maneuvering. Indeed, even assuming a court has the inherent power to remit a verdict *sua sponte,* pursuant to the law, the litigants thereupon have the right to

request a new trial on damages only. Respondent did so reject the remittitur but new trial was still denied to him.

Accordingly, at a minimum, a new trial should be granted.

IV. THE PETITIONER VIOLATED THE MOTION IN LIMINE AND INJECTED THE WEALTH OF THE RESPONDENT INTO TRIAL WHICH WAS HARMFUL ERROR

Leon Kopel was permitted to inject highly prejudicial evidence into the trial of this cause when he was permitted to suggest to the jury the false implication that Respondent was extremely wealthy and had committed bad acts against Leon regarding the money the companies received many years later when assets were sold. Additionally, by allowing Leon to ignore the corporate fiction, he was able to essentially sue these individual Appellants for what should have been claims against the corporate entities, claims that had been dismissed from the case long before.

The Wealth of a Litigant is Not Admissible

In Florida, the general rule is that the relative wealth or financial condition of the parties shall not be put before a jury. *Sossa By and Through Sossa v. Newman,* 647 So.2d 1018 (4th DCA 1994). Respondent raised this issue before trial by a motion in limine and obtained an order from the trial court that there would be no reference to monies earned or received.

However, from the beginning of trial through closing, Leon made the receipt of money by the corporations one of the focal themes of the trial. In opening, Leon stated, "Years later, the evidence will show that those businesses were sold for $19 million and still Leon Kopel did not get a penny back[3] (A-3)

In testimony, Leon's counsel used the following leading question to inject this information from Leon himself when he asked Leon:

Q. **Now, sir, we heard that the businesses in which you were supposed to receive a one-third interest were sold for 7.8 and 11 million dollars. How much money did Enrique or Bernardo send you from that almost 19 million dollars?**

A, Nothing. (A-5, p. 26)

This type of information was elicited again when Enrique was cross examined.

Then, in his closing argument, Leon brought home the theme again, arguing

> no one bothered to tell Leon that they were selling the shopping center for 7.8 million dollars. And certainly no one sent a cent of that back to Leon.
>
> In 2006 when they sold the warehouses for 11 million dollars and paid off a mortgage that allegedly Leon had an ownership interest in, no one even told Leon that they were selling that property. No one sent Leon any money. No one sent him a penny of the 11 million dollars and certainly no one sent

[3] Respondent's immediate objection was overruled and the motion for mistrial made after the jury had been excused was denied.

> him a penny of the 5.15 million dollar mortgage that was paid off in which they claim Leon has an ownership interest.
>
> In fact, as you heard, Benny continued to tell the federal government in his sworn tax returns filed under penalty of perjury that he was the hundred percent owner of the companies and he took all the profits and losses on his personal return consistent with his position and Enrique's position that they, and not Leon, were the owners of the properties. (T. Vol 4, page 42-43)

This theme is outrageous. First, it was factually untrue as the money was received by the companies, then reinvested into other assets and never was received by the individuals. Second, it is inappropriate to inject a party's wealth. Third, it was wrong to put before the jury the idea that Respondent had done something wrong with this money given the case plead and pursued.

Leon was able to confuse and prejudice the jury with themes not supported by the evidence, not relevant to the issues in the case, and highly prejudicial to the proper administration of a just and fair trial.

Bad Acts are Not Admissible

Underscoring the prejudice of the aforementioned theme was the implication that there was duty to share these monies received by various business entities with Leon when no such duty existed. As an owner of the entities, he was entitled to his share of any monies distributed, but no monies were ever distributed. The revenues were reinvested in other business ventures.

This theme, in violation of the order in limine, in derogation of Florida law on the legal independence of the corporate entity from its ownership, and contrary to the law prohibiting character attacks was so prejudicial as to deprive Appellants of a fair trial.

Proving that the prejudice and confusion injected into the case worked, the jury awarded $10,000,000 on the unjust enrichment count despite there being no evidence at trial of loss other than the $5,000,000 Leon claimed he had put into the companies. A new trial is warranted whenever a verdict is "so large that it indicates the jury must have been under the influence of passion, prejudice, or gross mistake." *Pierard v. Aerospatiale Helicopter Corp.,* 689 So. 2d 1099, 1101 (Fla. 3d DCA 1997), *citing Phillips v. Ostrer,* 481 So. 2d 1241, 1246 (Fla. 3d DCA 1985).

CONCLUSION

For the reasons stated above, this Court should decline to exercise its discretionary jurisdiction in this matter. Alternatively, the Court should determine that the lower court properly analyzed this issues and held that the amended claims some fourteen years later did not relate back and that there was no evidence to support Petitioner's claims. Finally, as to the other error in the trial, should the lower court's rulings be reversed by this Court, due process requires that a new trial be granted to afford Respondent a fair and impartial trial and due process.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirement of the Florida Rule of Appellate Procedure 9.210(a)(2) and is submitted in Times New Roman 14-point font.

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I certify that a copy of this motion was served by e-mail on August 21, 2014, on:

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