SUPREME COURT OF FLORIDA

KELLY DEAN PERMENTER,

Petitioner,

vs.

GEICO GENERAL INSURANCE COMPANY,

Respondent.
_____/

CASE NO. 93,471

District Court of Appeal
Second District - No. 97-03201

BRIEF OF AMICUS CURIAE ACADEMY OF FLORIDA TRIAL LAWYERS

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10

INDEX

TABLE OF AUTHORITIES

I. INTRODUCTION

Amicus Curiae Academy of Florida Trial Lawyers submits this brief in order to assist the Court to decide this appeal so as to promote stability and certainty in the civil trial practice, and to avoid unnecessary confusion relating to procedures for plaintiff's counsel to add a new party defendant to an existing lawsuit.

II. ARGUMENT

Contrary to the Second District Court of Appeal's focus on whether a motion to amend to add a party "tolls" applicable statutes of limitations, we believe that the simple issue presented by this appeal is whether a timely motion to amend to add a defendant to an existing lawsuit is sufficient to commence an action against the new defendant even if the motion is heard after the running of the statute of limitations.

We also believe that procedures to commence lawsuits, to file amended pleadings, and to relate those amended pleadings back to an original pleading, are strictly within the rule-making power of the courts, making irrelevant whether a motion to amend "tolls" a statute of limitations enacted by the legislature. See, e.g., RCP 1.110(b)(claims for relief); RCP 1.190(c)(relation back of amendment).

The issue presented by this appeal clearly has been treated as a judicial, procedural issue in the past. For example, in Smith v. Metropolitan Dade County, 338 So.2d 878 (Fla. 3 DCA 1976), a case procedurally similar to the present case, the Third District stated:

> [A] motion for leave to amend with the amended complaint attached joining additional defendants filed within the statutory period stands in the place of the actual amendment which is filed with leave of court subsequent to the running of the statute of limitations. [citation omitted]. Plaintiff having filed her motion for leave to join additional parties before the running of the statute of limitations, it follows that the amended complaint related back to the filing of her motion to amend so as to defeat a defense based on the statute of limitations relating to the time in which an action must be filed. (our emphasis)

338 So. 2d at 879. This discussion by the Third District is purely procedural. Therefore it is absolutely unnecessary to query, as the Second District did in the present case, whether a motion to amend somehow substantively "tolls" a statute of limitations.

The Second District Court of Appeal has, in effect, promulgated a new procedural rule and applied it retroactively to the present case. This unfairly penalized plaintiff's trial counsel, who had every right to rely on the then-existing law, that granting a timely filed a motion to amend after the statute runs, relates back to the time the motion was filed. See, Smith, supra; and Frew v. Poole and Kent Co., 654 So.2d 272 (Fla. 4 DCA 1995).

This court has held, more than once, that rules of procedure should be prospective only, unless specifically provided otherwise. Cerniglia v. Cerniglia, 679 So.2d 1160, 1164 (Fla. 1996); Mendez-Perez v. Perez-Perez, 656 So.2d 458, 460 (Fla. 1995); Pearlstein v. King, etc., 610 So.2d 445, 446 (Fla. 1992). In so holding, this court has clearly recognized the fundamental unfairness of retroactively applying a new rule of procedure so as to penalize

trial counsel who justifiably relied, and acted upon, a previous rule. Cf., Dosdourian v. Carsten, 624 So.2d 241, 246 (Fla. 1993)(outlawing Mary Carter agreements but recognizing that "until this opinion Mary Carter agreements were legal in Florida, and we are loathe to penalize those who have entered into such agreements."); and Frazier v. Baker Material, etc., 559 So.2d 1091 (Fla. 1990)(refusing to penalize plaintiff with loss of claim when he was acting in accordance with then-prevailing judicial interpretation of the controlling statute.)

We respectfully assert to this court that changing the rules after the game is in progress only serves to render the trial practice unstable and uncertain, particularly when the "players" cannot conform to the new rule by operation of a statute of limitations. Therefore we respectfully urge that if this court chooses to adopt the Second District's position, it do so prospectively only; and insofar as the present case is concerned, approve the procedure followed by the plaintiff's counsel as justifiable in light of the law existing at the time Permenter's motion to amend was filed. This would be the fair approach; and would reduce concerns among trial lawyers and litigants that they could be penalized for following existing rules if those rules happen to change later.

Had a judge been available to hear Permenter's motion to amend before the statute ran, there would be no appeal here. However, by effectively requiring such a motion to be heard before the statute runs, the Second District has adopted the judicial construction in

this case most restrictive to access to courts. This violates the historical judicial approach in Florida, which is to adopt that judicial construction most favorable to court access. See, e.g., Lehman v. Cloniger, 294 So.2d 344, 347 (Fla. 1 DCA 1974)(ambiguities in rules should be construed in favor of, and not in restriction of, access to courts.); Kennedy v. Guarantee Management, etc., 667 So.2d 1013 (Fla. 3 DCA 1996)(dismissing handwritten, rather than typed, pleading deprived litigant of access to court.)

The interests of stability and certainty in trial practice also strongly recommend that this court, in deciding this appeal, adopt a "bright line" rule that does not rely upon the procedural idiosyncracies of each individual case. In other words, cases of this nature should not turn on whether the trial counsel tried hard enough to get a hearing before the statute of limitations ran, or whether a hearing, once obtained, was too far removed from the running of the statute of limitations.[1] The trial bar should simply be told that it either is, or is not, an acceptable procedure to add a party to an existing case by having a timely filed motion to amend heard after the statute of limitations runs.

Permitting the approach taken by plaintiff's counsel in the present case, and apparently endorsed by the Third and Fourth Districts in Smith, supra and Frew, supra, would be less expensive

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[1] Motions to amend to add parties are already subject to Rule 1.070(j), Florida Rule of Civil Procedure, providing a 120-day service window dating from the filing of the motion. Frew v. Poole and Kent Co., 654 So.2d 272, 275 (Fla. 4 DCA 1995).

to litigants, and involve less judicial time, than at least one of the alternatives, namely, requiring a plaintiff seeking to add a new defendant to file a separate lawsuit against that defendant and thereafter move to consolidate with the existing lawsuit. This alternative approach involves (we believe unnecessarily) an additional filing and service fee and at least one additional (also unnecessary) hearing to effect a consolidation. Simply put, the approach approved by the Third and Fourth Districts, rejected by the Second District, is cheaper and does not unnecessarily waste judicial resources.

Finally, rejecting the position of the Second District Court of Appeal, and accepting that of the Third and Fourth District Courts of Appeal, will serve the interest of harmonizing state and federal procedural rules on these issues. Generally, Florida courts have assumed that in adopting a rule identical to a federal rule, that our Supreme Court intended to achieve the same results that would inure under the federal rule. Zuberbuhler v. Division of Administration, 344 So.2d 1304, 1306 (Fla. 2 DCA 1977). The Second District Court of Appeal has stated:

> It is well known that our Rules of Civil Procedure are patterned very closely after the Federal Rules, and it has been the practice of the Florida courts closely to examine and analyze the federal decisions and commentaries under the Federal Rules in interpreting ours.

Jones v. Seaboard Coastline RR Co., 297 So.2d 861, 863 (Fla. 2 DCA 1974). As pointed out in petitioner's brief, the procedure followed in the present case by plaintiff's trial counsel would be

perfectly acceptable in federal court, under rules virtually identical to the Florida Rules of Procedure.

III. CONCLUSION

This Honorable Court should reverse the Second District Court of Appeal in the present case and should adopt the position previously taken by the Third and Fourth District Courts of Appeal, respectively, in Smith, supra, and Frew, supra.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via facsimile and U.S. First Class Mail to: Nina M. Hanson, Esquire, Law Offices of Howard W. Weber, 101 East Kennedy Boulevard, Tampa, FL 33602; and Craig A. LaPorte, Esquire, Proley & LaPorte, P.A.; 11914 Oak Trail Way, Port Richey, FL 34668.

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