IN THE SUPREME COURT OF FLORIDA

KELLY DEAN PERMENTER,

Petitioner,

vs.

GEICO GENERAL INSURANCE COMPANY,

Respondent.
_____/

Case No. 93,471

Second District Court of Appeal No.: 97-03201

ANSWER BRIEF OF RESPONDENT, GEICO GENERAL INSURANCE COMPANY

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Appeal from the Second District Court of Appeal
of the State of Florida

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STATEMENT OF THE CASE AND FACTS

The Respondent seeks affirmation of the Second District Court of Appeal's ruling of summary judgment in its favor. The Petitioner, KELLY JEAN PERMENTER (hereinafter PERMENTER), was involved in an auto accident on April 12, 1991 with the Defendant, TIMOTHY J. FISCHER (hereinafter FISCHER). (R. at 1). At the time of the accident, PERMENTER was insured through GEICO GENERAL INSURANCE COMPANY (hereinafter GEICO). The contract of insurance provided, in part, for uninsured/underinsured motorist coverage. (R. at 5-8). On April 7, 1995, PERMENTER filed a complaint naming only FISCHER as Defendant. (R. at 1).

PERMENTER subsequently filed a Motion to Amend to Add Third Party Defendant on March 25, 1996, which sought to add GEICO as a defendant. (R. at 2-3). A proposed amended complaint was not attached to the motion. (R. at 2-3). The motion was not noticed for hearing and the record reflects no attempt was made by the plaintiff to set it for hearing. The trial court heard and granted the motion on July 31, 1996, at a Case Management Conference. (R. at 4). The Order Permitting Amendment allowed PERMENTER to file an amended complaint five days from the date of the order. (R. at 4). The Plaintiff's First Amended Complaint naming GEICO as a defendant was filed on July 31, 1996 (R. at 5-8). In response to the Plaintiff's First Amended Complaint, an Answer and Affirmative Defenses including the statute of limitations defense, was filed by GEICO on February 27, 1997 (R. at 18-20).

GEICO filed a Motion for Summary Judgment on March 26, 1997, which alleged that PERMENTER's claim against GEICO was barred by the five year statute of limitations on causes of action arising from contracts. (R. at 22-23). PERMENTER did not file his complaint against GEICO until three and a half months after the statute of limitations had expired. (R. at 22-23). The Motion for Summary Judgment was heard on May 28, 1997 and counsel for the parties presented their respective arguments at the hearing. (R. at T. 1-15). An Order Granting Defendant's Motion For Summary Judgment was entered on June 30, 1997 by the Honorable Gasper Ficarrotta of the Circuit Court of the Thirteenth Judicial Circuit. (R. at 29-31).

The trial court's order was appealed to the Second District Court of Appeals. The court affirmed the final summary judgment holding that PERMENTER's claim against GEICO was barred by the statute of limitations. Further, the court certified conflict with decisions issued by the Third and Fourth Districts.

SUMMARY OF ARGUMENT

The Florida Statutes set forth a five year statute of limitations for bringing an uninsured/underinsured motorist benefits claim. PERMENTER filed his motion to amend to add a defendant within the statute of limitations period. After filing the motion to amend, PERMENTER made no attempt to set it for hearing and instead waited four months until a Case Management Conference was set by the court. He filed the amended complaint at the Case Management Conference, but by that time the statute of limitations had already expired.

The Florida Rules of Civil Procedure and Florida courts have consistently held that a civil action is commenced against a party when a complaint is filed. Additionally, Florida courts have required that in order to toll the statute of limitations, the proposed amended complaint must be attached to a motion to amend to add a party.

PERMENTER asserts that the statute of limitations was tolled by the filing of his motion to amend to add a new party or alternatively, that the applicable statute is unconstitutional. The Florida Statutes set forth limited events which toll the running of the statute of limitations and filing a motion to amend is not one of those circumstances. The legislative intent of the statute is apparent on its face, in that it forbids any other reason not specifically listed in the statute from tolling the limitation period. Further, the applicable statute is constitutional because it regulates a substantive right and thus,

does not infringe on the rule making authority of the court. Therefore, this court should uphold the Second District Court of Appeals affirmation of final summary judgment for GEICO.

ARGUMENT

I. THE SECOND DISTRICT COURT OF APPEALS CORRECTLY DETERMINED THAT THE PETITIONER'S CLAIM AGAINST GEICO WAS TIME BARRED WHEN HE FAILED TO FILE HIS AMENDED COMPLAINT ADDING A DEFENDANT WITHIN THE FIVE YEAR STATUTE OF LIMITATIONS.

A. FLORIDA RULES OF CIVIL PROCEDURE AND FLORIDA STATUTES CLEARLY PROHIBIT PETITIONER'S MOTION FOR LEAVE TO AMEND FROM TOLLING THE STATUTE OF LIMITATIONS.

The Respondent, GEICO, seeks approval of the Second District Court of Appeal's decision affirming summary judgment for GEICO. When an order granting summary judgment is appealed and it has been proven that no genuine issue as to any material fact exists, the only remaining question for the appeals court is whether summary judgment was properly granted or denied under the law. Wesley Constr. Co. v. Lane, 323 So. 2d 649, 650 (Fla. 3rd DCA 1975), cert. denied, 336 So. 2d 1185 (Fla. 1976). The standard of appellate review for a ruling of summary judgment is abuse of discretion. Ocean Villa Apartments v. City of Fort Lauderdale, 70 So. 2d 901, 902 (Fla. 1954); Standard Commodities Corp. v. N.D.E., Inc., 168 So. 2d 571 (Fla. 3rd DCA 1964) (per curiam).

Under Florida law there is a five year statute of limitations for an action on a contract. Fla. Stat. §95.11(2)(b) (1995 & Supp. 1996). Claims brought for uninsured/underinsured motorist coverage fall under this provision and are thus barred if not brought in five years from the date of the accident. State Farm Mut. Auto. Ins. Co. v. Kilbreath, 419 So. 2d 632, 633 (Fla. 1982). The Florida Statutes specifically set forth the limited circumstances which toll the statute of limitations. Fla. Stat.

§95.051 (1985). Such circumstances include concealment of the person to be sued, use of a false name to avoid service of process, the incapacity of a person entitled to sue, and the payment of any part of the principal or interest on a written instrument. Fla. Stat. §95.051(1)(a-h) (1985). The statute's final provision explicitly forbids any other event or situation other than those listed in the statute from tolling the statute of limitations. Fla. Stat. §95.051(2) (1985).

The Petitioner would have this court carve out a judicial exception to the statute of limitations. Based upon the facts of the case at bar, the exception advocated by the Petitioner would toll the running of the statute if a motion to amend to add an additional defendant was filed. It would then be unnecessary to file a complaint naming the new defendant until sometime after the statute of limitations had ran, as was the case below. (R. at 5-8).

The Petitioner's attempt to create an exception where one does not already exist fails for three reasons. The first reason is that the plain language of Florida Statute §95.051(2) (1985), expressly prohibits any other circumstance not listed in the statute from tolling the limitations period. The limited tolling provisions of the statute and its mandate that no "other reasons" be advanced to toll the statute were the primary reasons for the Second District's decision to uphold the summary judgment ruling in favor of GEICO. Permenter v. GEICO, 712 So. 2d 1178 (Fla. 2d DCA 1998). The legislative intent behind the statute's enactment

can be determined by reading the plain language of the statute. See Aetna Cas. & Sur. Co. v. Huntington Nat'l Bank, 609 So. 2d 1315 (Fla. 1992). Thus, in this case the rule proposed by the Petitioner, that a motion to amend would toll the statute of limitations, is not consistent with the announced legislative policy.

Further, Florida courts have consistently been reluctant to construct exceptions to the statute of limitations when the legislature has chosen not to do so. Carey v. Beyer, 75 So. 2d 217 (Fla. 1954); Swartzman v. Harlan, 535 So. 2d 605, 607 (Fla. 2d DCA 1988) (per curiam) ("because the legislature has expressly provided for instances which toll the running of the statute of limitations and has excluded any other reason, we are not free to create an exception to that determination"); Grantham v. Blount, Inc., 683 So. 2d 538, 542 (Fla. 2d DCA 1996), (The court declined to create a judicial exception to the all inclusive tolling provisions of § 95.051). Therefore, no matter how compelling the circumstances, this court has steadfastly maintained the integrity of the Florida Statute of Limitations and its tolling provisions. See Fulton County Adm'r v. Sullivan, 22 Fla. L. Weekly S578, 579 (Fla. 1997) (the court declined to expand the statutory exceptions to the statute of limitations in a wrongful death case where the defendant had fraudulently concealed his identity).

The second reason why the Petitioner's attempt to create a judicial exception to the statute of limitations is unsuccessful

can be found in Florida Rule of Civil Procedure 1.050. It provides that a civil action is commenced by the filing of a complaint. Since 1955, Florida law has provided that a civil action against a party is initiated when a complaint is filed naming that party. Friday v. Newman, 183 So. 2d 25, 26 (Fla. 2d DCA 1966). In the case at hand, although the motion to amend to add a defendant was filed before the five year statute of limitations (R. at 2-3), the amended complaint itself was filed three and a half months after the statute ran. (R. at 5-8). Following the provisions set forth in Rule 1.050, the action against the Respondent, GEICO, was commenced when the amended complaint was actually filed.

The Petitioner does not dispute that the amended complaint naming GEICO was filed after the statute expired. However, he states in his brief that attaching a copy of the proposed amended complaint to the motion to amend is a technicality not required by Fla. R. Civ. Pro. 1.190 governing amendments to pleadings. While it is true that Rule 1.190 does not require that the proposed amended complaint be attached to the motion, it also does not address whether a motion to amend to add a new party tolls the statute of limitations. Thus, Rule 1.190 is not dispositive of the issue before this court. However, Rule 1.050 is clear on its face and requires that a complaint must be filed to initiate an action against a party. Rule 1.050 cannot be ignored, nor dismissed as a "mere technicality". Instead, its clear requirements should be adopted by this court.

The third reason Petitioner's attempt to create a judicial exception to the statute of limitations fails can be found in Fla. R. of Civ. P. 1.070(j). The rule requires that an initial pleading be dismissed if it is not served upon a Defendant within 120 days of filing. In proposing the creation of a legal fiction, that the amended complaint adding a new party was filed as of the date of filing the motion to amend, the Petitioner creates another procedural problem. In order to comply with Rule 1.070(j), the Petitioner would not only have to obtain court approval to file the amended complaint, he would also need to have the added defendant served within 120 days of filing his motion to amend. If the Petitioner failed to meet the rule's specifications, his amended complaint would be subject to dismissal. The Petitioner's only other alternative would be to ask the court to ignore the legal fiction and count the 120 days from the date of the actual filing of the amended complaint. See Eldridge v. Multi-Resources, Inc., 695 So. 2d 1320 (Fla. 4th DCA 1997). Therein lies the rub: one legal fiction begets another until the Florida Statutes and Rules of Civil Procedure have no real effect on parties' actions and no real meaning.

Florida courts have addressed the issue of whether a motion to amend to add a new party with the amended complaint attached tolls the statute of limitations. In Frew v. Poole and Kent Co., 654 So. 2d 272, 273 (Fla. 4th DCA 1995), the plaintiff filed a motion for leave to amend to add a new party with the amended complaint attached four days before the statute of limitations

expired. Six months later, the plaintiff obtained permission from the court permitting the amended complaint. Id. The court reasoned that the plaintiff had no control over when the court might hear her motion, but by filing the motion to amend and the amended complaint within the statute of limitations, she had done everything within her power to toll the statute. Id. at 275. It held that the motion filed with the amended complaint tolled the statute, however the amended complaint was dismissed on other grounds. Id. at 275.

In contrast, in the case at bar PERMENTER did not file his amended complaint with his motion to amend to add a new party. (R. at 2-3). The Petitioner waited to file the amended complaint until the court heard his motion at a case management conference set by the court four months after the motion was filed. (R. 5-8). Thus, the Petitioner in this case did not do everything within his power to toll the statute and therefore according to Frew, his case should be dismissed.

Beginning with Rademaker v. E.D. Flynn Export Co., 17 F. 2d 15 (5th Cir. 1927), the federal courts have held that if a plaintiff files a motion to amended the complaint along with the proposed amended complaint and serves both upon the defendant before the statute of limitations expires, the statute is tolled until the court rules on the motion. Rademaker v. E.D. Flynn Export Co., 17 F. 2d 15 (5th Cir. 1927), cited in, Frew v. Poole and Kent Co., 654 So. 2d 272, 275 (Fla. 4th DCA 1995); Pearson v. Niagara Mach. & Tool Works, 701 F. Supp. 195 (N.D. Okl. 1988),

(citing Fed. R. Civ. P. 15(a), the court held the proposed amended complaint accompanied by the motion for leave to amend filed within the statute of limitations tolled the statute); Eaton Corp. v. Appliance Values Co., 634 F. Supp. 974 (N.D. Ind. 1984), affirmed 790 F. 2d 874 (Fed. Cir. 1986); Moore v. Grossman, 824 P. 2d 7 (Colo. Ct. App. 1991), (in order for the statute to be tolled, the Plaintiff had to file her motion for leave to amend and the proposed amended complaint and serve the Defendant with the above within the statute of limitations).

In Frew, the court cited Rademaker with approval, but declined to hold that it was necessary to obtain service on the defendant to toll the statute. Id. at 275. Instead, the court chose to follow the rule enunciated in Smith v. Metro. Dade County, 338 So. 2d 878 (Fla. 3rd DCA 1976).

In Smith, the plaintiff filed a motion to amend to add new defendants and attached the amended complaint. Id. at 879. The statute of limitations terminated before the court ruled on the motion. Id. The court held that the statute of limitations was tolled by the plaintiff's filing of her motion and amended complaint. Id. In contrast to Smith and Frew, PERMENTER did not file his amended complaint with his motion to amend to add a new party. (R. at 2-3). The filing of the amended complaint would have formally initiated the action against GEICO. PERMENTER's failure to file his amended complaint before the statute of limitations' expiration bars his claim under the rule set forth in Smith and Frew.

B. PETITIONER'S AMENDED COMPLAINT DOES NOT RELATE BACK TO THE DATE THE ORIGINAL COMPLAINT WAS FILED.

Florida Rule of Civil Procedure 1.190(c) provides that under certain situations an amendment to a pleading should relate back to the prior filing of that pleading. In Cabot v. Clearwater Constr. Co., 89 So. 2d 662 (Fla. 1956), the Defendant was correctly named but incorrectly listed as being incorporated. The Plaintiff sought to amend the complaint after the statute of limitations had ran. Id. at 663. This court ruled that where an amendment to a complaint does not change the cause of action and merely corrects a misnomer or description of a party defendant it is not considered a new cause of action for limitation purposes.

However, when there is the attempted addition of an entirely new party the amendment amounts to the institution of an new action. Thus, it does not relate back to the filing of the original complaint and the statute of limitations, if it had ran, would bar the action. Id. at 664. See Galuppi v. Viele, 232 So. 2d 408 (Fla. 4th DCA 1970); Kozich v. Shahady, 702 So. 2d 1289 (Fla. 4th DCA 1997); Troso v. Florida Ins. Guar. Ass'n Inc., 538 So. 2d 103 (Fla. 4th DCA 1989) (in determining if the statute of limitations ran, an amendment which added a new party did not relate back to the original complaint); R.A. Jones and Sons, Inc. v. Holman, 470 So. 2d 60 (Fla. 3rd DCA 1985) (amended complaint related back to the time when the motion to amend was filed because the original parties and the substituted parties had sufficient identity of interest so as not to prejudice the added

defendants).

As indicated by the Second District, the case at hand is distinguishable from relation back cases. Permenter v. GEICO, 712 So. 2d 1178 (Fla. 2d DCA 1998). PERMENTER named only the Defendant, FISCHER, in the original complaint (R. at 1) and subsequently added GEICO in his amended complaint (R. at 5-8). GEICO was the Plaintiff's automobile insurer and is an entirely new party which does not share any identity of interest with FISCHER. (R. at 5-8). Any attempt to argue that the amended complaint should relate back to the date when the original complaint was filed necessarily fails because this case does not fall within the confines of the relation back doctrine enunciated in Cabot.

C. PETITIONER'S MOTION FOR LEAVE TO AMEND DOES NOT MEET THE REQUIREMENTS OF FLA. R. CIV. P. 1.110(B) AND THUS, IT CAN NOT STAND ALONE AS AN AMENDED COMPLAINT.

The PETITIONER contends that if this court finds his First Amended Complaint does not relate back to the date his original complaint was filed, alternatively his Motion to Amend meets the requirements of Fla. R. Civ. P. 1.110(b) and thus can stand alone as an amended complaint. The rule provides that a valid complaint must meet three requirements:

> (1) a statement of the grounds upon which the court's jurisdiction depends, (2) a statement of the ultimate facts showing the pleader is entitled to relief, and (3) a demand for judgment... Fla. R. Civ. P. 1110(b).

The Petitioner's Motion to Amend reads as follows:

1. On or about 4/12/91 Plaintiff was injured in an automobile accident caused by the Defendant, TIMOTHY J. FISCHER.

2. Plaintiff subsequently filed suit against Defendant Fischer, but has learned that Defendant Fischer was uninsured or /underinsured at the time of the accident.

3. On 4/12/91 Plaintiff was covered under an uninsured motorist policy through GEICO Insurance Company.

4. The interests of justice demand that Plaintiff be permitted to amend its suit to join Plaintiff's insuror (sic) under the uninsured motorist provision of its insurance policy. (R. at 2-3).

The Petitioner's motion falls short of the provisions of Rule 1.110(b) in that it does meet the first requirement of a jurisdictional statement. A jurisdictional statement for circuit court typically states the action is for damages in excess of $15,000.00. See (R. at 1, paragraph 1). PERMENTER's motion noticeably lacks that requirement. (R. at 2-3).

The rule's second element, a statement of the ultimate facts, is not met by the Petitioner's motion. An action for uninsured motorist coverage is an action founded on a contract. State Farm Mut. Auto. Ins. Co. v. Kilbreath, 419 So. 2d 632, 633 (Fla. 1982). An action based on a contract should include the following items (1) formation of the contract, (2) performance by the party seeking relief on the contract, (3) breach of the contract and (4) damages. Old Republic Ins. Co. v. Van Onweller Constr. Co., 239 So. 2d 503 (Fla. 2d DCA 1970); Cerniglia v. Davison Chemical Co., 145 So. 2d 254 (Fla. 2d DCA 1962). Performance by the party seeking relief on a contract (item two

above) has been held to constitute performance of conditions precedent by that party. Old Republic, Supra, at 505. PERMENTER's Motion to Amend indicates that a contract was formed, but fails to state that he has performed all conditions precedent to the action and fails to allege that there has been a breach of the contract. (R. at 2-3).

Permenter's motion also does not fulfill the third element found in Rule 1.110(b), a demand for judgment. A demand for judgment in a circuit court action usually begins with "WHEREFORE" and goes on to demand judgment for damages in excess of $15,000.00. See (R. at 1). PERMENTER's motion clearly does not contain a demand for judgment. (R. at 2-3). Therefore, PERMENTER's Motion to Amend does not meet the requirements of Rule 1.110(b) and thus, it can not stand alone as an amended complaint.

II. FLORIDA STATUTE §95.051 DOES NOT UNCONSTITUTIONALLY INVADE THE RULE MAKING AUTHORITY OF THE JUDICIARY.

Substantive law "creates, defines and regulates rights" and the formation of such law lies within the legislature's domain. Haven Fed. Sav. & Loan v. Kirian, 579 So. 2d 730, 732 (Fla. 1991). The courts have the power to regulate practice and procedure, which includes the form, manner and method of conducting litigation. Haven Fed. Sav. & Loan v. Kirian, 579 So. 2d 730, 732 (Fla. 1991); See also Ong v. Mike Guido Properties, 668 So. 2d 708, 710 (Fla. 5th DCA 1996). The Florida Constitution

provides that the legislature shall not enact a statute which violates the Supreme Court's authority to adopt rules for practice and procedure. Fla. Const. art. II § 3; art. V § 2(a).

The issue before this court is the interpretation of Fla. Stat. §95.051 (1985). It lists exceptions to the statute of limitations and indicates that the statute will not be tolled for any other reason than those enumerated. Fla. Stat. §95.051 (2) (1985). In ruling on the case at hand, the Second District found that PERMENTER did not assert any of the tolling provisions applied to his case, and in fact none did apply. Permenter v. GEICO, 712 So. 2d 1178, 1179 (Fla. 2d DCA 1998). In his Brief on the Merits to this court, PERMENTER has once again not claimed that any of the provisions are applicable. Instead he has asserted that §95.051 is unconstitutional and that he waited until the present time to raise the issue because he was unaware that the statute applied until the Second District's ruling below. In GEICO's Answer Brief submitted to the Second District Court, it discussed §95.051 and its importance in this case. If PERMENTER was not already aware of the applicability of §95.051, GEICO's Answer Brief should have put him on notice in time for him to raise the issue in his Reply Brief to the Second District.

Nevertheless, this court should rule that §95.051 is constitutional. Delineating a statute of limitations and exceptions to it is clearly a substantive act and is within the realm of legislative authority. Williams v. Law, 368 So. 2d 1285, 1287 (Fla. 1979). Statute §95.051 does not describe the manner or

method the court must use in enforcing the statute of limitations. Thus, the court's rule making authority is not infringed on or circumvented by the statute. The court is free to create the appropriate rules of procedure to enforce the statute. However, due to the clear legislative intent of the statute, the court is not free to ignore its provisions.

In interpreting a statute, the court should consider the legislative intent and the evil to be corrected. Englewood Water Dist. v. Tate, 334 So. 2d 626, 628 (Fla. 2d DCA 1976). The legislative intent of the statute is apparent on its face in that it excludes any "other reason" from tolling the statute. Fla. Stat. §95.051 (2). Statutes of limitations are enacted to bar claims which have been dormant for a number of years. Employers' Fire Ins. Co. v. Contintental Ins. Co., 326 So. 2d 177 (Fla. 1976). The limitation periods are established by the legislature to protect defendants from having to address excessively old and/or stale claims. Nardone v. Reynolds, 333 So. 2d 25, 36 (Fla. 1976).

When the legislative intent and purpose behind the enactment of the statute are clear, the court is obligated to carry out its enforcement. Englewood Water Dist. v. Tate, 334 So. 2d 626, 628 (Fla. 2d DCA 1976). Further, it is a fundamental rule of construction that a statute must not be interpreted in a manner which renders it potentially meaningless. Ellis v. State, 622 So. 2d 991, 1001 (Fla. 1993). The statute at issue plainly identifies the allowable exceptions to the statute of

limitations. Not listed in the statute is PERMENTER's assertion that a motion to amend to add a new party should toll the statute. To give credence to PERMENTER's argument and allow such an exception would essentially render the statute meaningless. Florida courts have consistently chosen not to write exceptions into a statute when the legislature has chosen not to do so. Fulton County Adm'r v. Sullivan, 22 Fla. L. Weekly S578, 579 (Fla. 1997). Thus, the better rule is to follow the plain language of Florida Statute §95.051, which provides that there are no exceptions to the statute of limitations other than those specifically provided for in the statute.

CONCLUSION

For the foregoing reasons, the Second District Court of Appeal's order affirming summary judgment in favor of Respondent, GEICO, should be upheld.

CERTIFICATE OF SIZE, STYLE AND TYPE

I hereby certify that the Answer Brief of Respondent employs a 12 point courier style type.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail on this 2nd day of October, 1997, to: Craig A. LaPorte, Esq., Co-counsel for Plaintiff, Oak Trail Professional Center, 11914 Oak Trail Way, Port Richey, FL 34668; Anthony Alfonso, Jr., Esq., Attorney for Defendant Fischer, 601 E. Twiggs Street, Suite 100, Tampa, FL 33602; Robert E. Lecznar, Esq., Co-Counsel for Plaintiff, 5922 Main Street, New Port Richey, FL 34652; and Michael D. Eriksen, Esq., Florida Academy of Trial Lawyers, Amicus Committee, 1005 Lake Avenue, Lake Worth, Florida 33460.

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