SUPREME COURT OF FLORIDA

KELLY DEAN PERMENTER,

Petitioner,

vs.

GEICO GENERAL INSURANCE COMPANY,

Respondent.
_____/

CASE NO. 93,471

District Court of Appeal
2nd District - No. 97-03201

PETITIONER'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE

Petitioner, KELLY DEAN PERMENTER (hereinafter PERMENTER), Plaintiff below, was injured in an automobile accident on April 12, 1991 when his vehicle collided with that of Defendant/tortfeasor, TIMOTHY J. FISCHER (hereinafter FISCHER). At the time of the collision Defendant, FISCHER was uninsured. Petitioner, on the other hand, did carry insurance through the Respondent/Defendant, GEICO GENERAL INSURANCE COMPANY (hereinafter GEICO), including uninsured/underinsured motorist coverage.

In 1995 PERMENTER filed his original Complaint (Rec. P. 1) against Defendant, FISCHER, in the Circuit Court of the Thirteenth Judicial Circuit in and for Hillsborough County, Florida, to which FISCHER filed an answer.

Because of FISCHER'S lack of insurance, on March 25, 1996 PERMENTER filed a Motion for Leave to Amend the Complaint to add GEICO, PERMENTER'S uninsured motorist carrier, as an additional Defendant to the action (Rec. P. 2). The motion was erroneously titled a "Motion to Amend to Add Third Party Defendant" but was treated by the trial court as a Motion to Amend to add a defendant. On July 31, 1996, at a Case Management Conference, the trial court entered an Order permitting Plaintiff to file the Amended Complaint, "... within five (5) days from the date of entry of this Order." (Rec. P. 4).

PERMENTER filed his first Amended Complaint immediately after

the hearing on July 31, 1996 (Rec. P. 5-8), adding GEICO as a named defendant in the uninsured motorist action. The Amended Complaint was subsequently served on GEICO on September 27, 1996.

On February 27, 1997 GEICO filed its Answer And Affirmative Defenses, alleging in its Second Affirmative Defense that the cause of action against GEICO was barred by the statute of limitations (Rec. P. 18-20). On March 21, 1997 GEICO filed a Motion For Summary Judgment on the issue of the statute of limitations (Rec. P. 22-23), which was heard by the trial court on May 28, 1997.

On June 30, 1997 the trial court entered an Order granting Defendant's Motion For Summary Judgment, and granting Final Summary Judgment in favor of GEICO (Rec. P. 29-31).

The matter was timely appealed to the Second District Court of Appeals, and on June 17, 1998 the court issued its opinion, affirming the summary judgment, but certifying conflict with decisions issued by the Third and Fourth Districts. Petitioner now seeks to have this conflict resolved, and for this court to quash the opinion of the Second District.

STATEMENT OF THE FACTS

On April 12, 1991 PERMENTER was injured as a result of the negligent operation of a motor vehicle by Defendant, FISCHER, an uninsured motorist. Defendant/Respondent, GEICO, provided uninsured motorist coverage for Plaintiff's benefit pursuant to a policy issued to PERMENTER by GEICO. PERMENTER made claim for payment under the uninsured motorist coverage.

PERMENTER filed suit against Defendant, FISCHER, within Florida's four year statute of limitations. Because FISCHER failed to carry liability insurance, on March 25, 1996, prior to the expiration of the five year statute of limitations relating to contract actions such as uninsured motorist policies, PERMENTER filed a Motion for Leave to Amend his complaint in order to add GEICO as an additional Defendant. PERMENTER's motion was specific in that it identified GEICO as the party to be added, as well as the legal and factual basis for the addition. (Rec. P2-3) Although PERMENTER did not attach a copy of the proposed Amended Complaint to the motion, the motion clearly identified the cause of action as an uninsured motorist claim against GEICO.

The motion was not heard by the trial court until July 31, 1996, more than five years after the date of the accident. The trial court, however, entered an Order on July 31, 1996 granting the motion and directing PERMENTER to file an amended complaint within five (5) days of the Order. PERMENTER filed his amended complaint immediately following the hearing, and the amended

complaint was subsequently served in a timely fashion on GEICO.

GEICO's subsequent Motion For Summary Judgment alleged that PERMENTER's failure to file the amended complaint within five years of the accident created a time bar to the action, notwithstanding the fact that the motion to amend had been filed prior to the expiration of the limitations period.

Petitioner contends that a specific motion for leave to amend the complaint to add a new party, and which clearly identifies the new party to be added and the nature of the cause of action, constitutes the "commencement" of the action against the new party. A subsequently court-authorized amended complaint therefore relates back to the date the motion was filed.

There is no question but that PERMENTER filed his motion within the statutory period. The trial court, however, entered Final Summary Judgment in favor of Defendant, GEICO, solely because PERMENTER had failed to attach a copy of the proposed amended complaint to his motion to amend. The trial court's ruling hinged on whether it was necessary to attach a copy of the proposed amendment to a timely filed Motion to Amend in order for the amended complaint to relate back to the date the motion was filed.

The better rule is that the timely filing of a motion to amend, which adequately identifies the party to be added, as well as the factual basis of the new cause of action, "commences" the cause of action for statute of limitation purposes.

The Second District, contrary to the law enunciated by the

Third and Fourth Districts, opined that under no circumstances does a timely filed motion to amend toll the statute of limitations. The Second DCA held that the attachment of a proposed amended complaint is irrelevant to a determination of the issue simply because the legislature has not statutorily authorized such a tolling. In addition, the appellate court ruled that the court approved amended complaint does not relate back to the date the motion to amend was filed. This decision is in direct conflict with the prior decisions of the two other districts.

POINTS ON APPEAL

POINT 1

A MOTION TO AMEND FILED PRIOR TO THE EXPIRATION OF THE STATUTE OF LIMITATIONS, AND WHICH ADEQUATELY IDENTIFIES THE PARTY TO BE ADDED AND THE BASIS OF THE CAUSE OF ACTION TO BE PLED TOLLS THE LIMITATIONS PERIOD LONG ENOUGH FOR THE COURT TO RULE UPON THE MOTION.

POINT 2

DETERMINATION OF WHETHER AN AMENDED COMPLAINT, FILED PURSUANT TO COURT AUTHORIZATION, RELATES BACK TO THE FILING DATE OF A MOTION TO AMEND IS PROCEDURAL IN NATURE. TO THE EXTENT THAT §95.051, FLA. STAT. (1971) CONFLICTS WITH THE COURT'S INHERENT RULE-MAKING AUTHORITY, THE STATUTE UNCONSTITUTIONALLY INVADES THE POWERS OF THE JUDICIARY

SUMMARY OF ARGUMENT

The timely filing of a motion for leave to amend to add an additional party, and which sets forth with specificity the identity of the party to be added, as well as the basis of the cause of action, constitutes the "commencement" of the amended action for statute of limitation purposes. Although this has the effect of tolling the statute of limitations until such time as the trial court has an opportunity to hear and rule on the motion, it is more properly a procedural consideration. The court approved amended complaint, upon filing, then relates back to the date the motion to amend was filed.

Since this is a procedural matter interpreting the Florida's Rules of Civil Procedure, §95.051, Fla.Stat.(1991) is inapplicable to a determination of this issue. To the extent that §95.051(2), Fla.Stat. (1991) dictates how this court should apply its rules of procedure, the statute is unconstitutional.

Rule 1.050, Fla.R.Civ.P. provides that an action is deemed commenced upon the filing of a Complaint. However, Rule 1.190(a), Fla.R.Civ.P. does not authorize, nor will the courts recognize an amended complaint filed in violation of that rule. Furthermore, Rule 1.190, Fla.R.Civ.P., does not require that a copy of the proposed amendment be attached to the motion, and an amended complaint filed without leave of court under these circumstances is a nullity. Therefore, it is unjust to time-bar a party who timely seeks court authorization to amend a pleading simply because a copy

of the "proposed" amended pleading was not attached to the motion. To so rule deprives the courts and the parties, because of a mere technicality, of an opportunity to decide legitimate disputes on the merits. Florida's courts have long strived to avoid this very result.

The rationale employed by the Third and Fourth Districts is far more consistent with the ideals previously expressed by this Court; to have cases decided on the merits where possible. Petitioner's argument that attaching a copy of the proposed amendment to a fully descriptive motion is unnecessary is a logical extension of those appellate decisions. The Second District's opinion, on the other hand, employs a strict statutory construction in reaching its result, and fails to recognize that this matter is procedural in nature and therefore not subject to legislative edict or control.

ARGUMENT
POINT 1

A MOTION TO AMEND FILED PRIOR TO THE EXPIRATION OF THE STATUTE OF LIMITATIONS, AND WHICH ADEQUATELY IDENTIFIES THE PARTY TO BE ADDED AND THE BASIS OF THE CAUSE OF ACTION TO BE PLED " COMMENCES" THE ACTION AGAINST THE NEW PARTY FOR STATUTE OF LIMITATION PURPOSES.

The Second District erred in affirming the trial court's Final Summary Judgment in GEICO'S behalf, and Petitioner, PERMENTER, requests this court quash its opinion. Petitioner, PERMENTER, filed his motion for leave to amend within the applicable limitations period. §95.11(2)(b), Fla.Stat. (1991). (Rec. P. 2). It is undisputed that the trial court did not hear the motion until shortly after the five year statute of limitations had expired. The amended complaint naming GEICO was filed on the same day that the court granted PERMENTER's motion. It was then timely served on the Defendant/Respondent.

The Second District, affirming the final summary judgment for GEICO, adopted a two prong approach to its holding. First, it applied a strict statutory construction of §95.051(2), Fla.Stat. (1991) Permenter v. GEICO General Ins. Co., 712 So.2d 1178 (Fla. 2dDCA 1998). Second, it held that PERMENTER's amended complaint, filed after court authorization, did not relate back to the filing of the original complaint.

Relying on two prior opinions, the court held that there is no statutory basis for a motion to amend to toll the statute of limitations. Id. at 1179; citing, Swartzman v. Harlan, 535 So.2d

605, 606 (Fla. 2dDCA 1988), and Grantham v. Blount, Inc., 683 So.2d 538 (Fla. 2dDCA 1996). See also, §95.051 Fla.Stat. (1991).

Swartzman is easily distinguishable from this matter. In Swartzman, the plaintiff filed a lawsuit on a promissory note some 6½ years after the default on the note. The plaintiff attempted to avoid the five year statute of limitations based on defendant's filing and subsequent dismissal of a bankruptcy petition. The district court ruled that the bankruptcy action was not specifically recognized or provided for as a tolling factor in Florida Statute 95.051, and the bankruptcy petition therefore had no effect on when the limitations period expired. 535 So.2d at 607.

Grantham likewise is dissimilar to the case at bar. In that case, a Plaintiff filed a Complaint just prior to the statute of limitations expiring, and named a "John Doe" as a party-defendant. After the statute had expired, Plaintiff attempted to amend the complaint to name the true party-defendants in place and stead of John Doe. Relying upon §95.051, Fla.Stat. (1993), the court held that the "John Doe" complaint did not toll the limitations period. Grantham, 683 So.2d at 541. Additionally, because the original complaint failed in any manner to identify the "John Doe" defendant, the court reasoned that the amended complaint containing a true identity did not relate back to the original complaint. Id.

> [Florida] courts liberally permit an amended pleading, correcting the error in the defendant's proper legal name, to relate back to the original filing date. Cabot v. Clearwater Constr. Co., 89 So.2d 662 (Fla. 1956); Palm Beach County v. Savage Constr. Corp. 627 So.2d 1332 (Fla. 4thDCA 1993). Nevertheless, some mistakes in the identification of a

> defendant in the initial complaint are so substantial that an amendment in the description of the defendant results in an entire change in the parties.

Id.

In Permenter, the trial court was not faced with these dilemmas. The Plaintiff timely filed a motion to amend to add GEICO as a defendant, and specifically identified GEICO as the intended party-defendant. He also clearly established the legal basis of the claim. Yet, the district court opined that those actions simply were insufficient because §95.051 Fla.Stat. (1991) controlled and did not expressly provide for tolling under these circumstances. Permenter, 712 So.2d 1179. Furthermore, the Second District noted that §95.051(2) Fla.Stat. (1991) prohibits any action, not enumerated therein, from tolling the statutes of limitation. Id. This is the same rationale employed in Swartzman and Grantham. The Permenter court, however, made no distinction between the substantive law and the court's inherent and constitutional power to regulate procedural matters.

The better rule of law is that espoused by the Third and Fourth Districts, which recognizes that a motion to amend tolls the statute of limitations until the trial court has an opportunity to hear and rule on the motion.[1]

The Third District first addressed this issue in Smith v.

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[1] Although the opinions of these courts refer to a "tolling" of the statute of limitations, a close examination reveals that the courts determined that the motion to amend commenced the action, and the subsequently court-authorized amended complaint related back in time to the motion.

Metropolitan Dade County, 338 So.2d 878 (Fla. 3rd DCA 1976), a medical malpractice action. In that case the Plaintiff had filed a malpractice Complaint against a physician. Shortly before the applicable statute of limitations expired, Plaintiff filed a Motion to Amend to add new parties. The trial court heard the matter after the limitations period expired, and granted the motion. The Amended Complaint was subsequently served on the new Defendant, who moved to dismiss it based on expiration of the statute of limitations. The lower court agreed and dismissed the new actions.

In reversing, the Third District noted:

> [t]he better rule is that 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. See, Rademaker v. E.D. Flynn Export Co.,17 F.2d 15 (5th Circuit 1927). 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 time of 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.

Id. at 879 (*citing*, Cf. Galuppi v. Viele, 232 So.2d 408 (Fla. 4th DCA 1970).

In R.A. Jones & Sons, Inc. v. Holman, 470 So.2d 60 (Fla. 3rd DCA 1985), the Third District reiterated this holding. Relying on Smith, the District Court again noted that the date a motion to amend is filed is the key date in determining whether the statute of limitations is tolled. Id. at 66.

The Plaintiff in Jones filed his original complaint within the applicable limitations period. Shortly before its expiration, the Plaintiff filed a motion for leave to amend to include previously unknown damages. The trial court was unable to consider the motion until after the statute of limitations had expired, and then entered an Order authorizing Plaintiff to file the Amended Complaint, effective on the date of the Order. Id. at 63. Defendants moved to dismiss the Amended Complaint alleging that the new complaint was filed after the statute of limitations expired. Id. The trial court initially denied Defendant's motion, but later granted a directed verdict in Defendant's favor on this issue. Id.

Relying on Smith, the Third District reversed and remanded for further proceedings. Jones, 470 So.2d at 72. The court noted that "[J]ones' amended complaint would be deemed filed on December 31, 1979, the date upon which Jones filed its motion for leave to amend..., notwithstanding the recitation in the trial court's order that the amendment was to be considered filed as of the date of the order, February 15, 1980." Id. at 66 (emphasis added). The key date considered by the Third was the date the Motion to Amend was filed, not the date that the trial court addressed the motion.

It is significant to note that neither Smith nor Jones turns on whether the proposed amended complaint is attached to the motion for leave to amend. Although dicta in Smith suggests that a copy of the proposed amended complaint was attached, the decision does not appear to turn on that fact. The Jones court, citing Smith,

stated that "[t]o determine whether the statute of limitations has run, the amended complaint shall be considered filed at the time of filing the motion for leave to amend". Jones, 470 So.2d at 65 (*citing*, Smith, 338 So.2d at 878).

The Jones court clearly was concerned with the idea that a congested trial court calendar could prevent litigants from having their cases determined on the merits. Referring to a Michigan case interpreting a similar rule, the Third District noted that the filing of a motion for leave to amend the complaint should toll the statute of limitations until such time as the trial court has an opportunity to rule upon the motion. "This removes the problem of a trial court's delay affecting the outcome of the case". Jones, 470 So.2d at 65, f.n. 9 (*citing*, Charpentier v. Young, 403 Mich. 851, 291 N.W. 2d 926 (1978); Fazzalare v. Desa Industries, Inc., 135 Mich. App. 1, 351 N.W. 2d 886 (1984)).

In a similar case, the Fourth District followed the Third DCA's lead when it held that a motion for leave to amend filed within the statutory period stands in the place of the actual amendment until such time as the court has an opportunity to rule. Frew v. Poole and Kent Co., 654 So.2d 272 (Fla. 4th DCA 1995). Admittedly, the Frew court relied on the fact that the Plaintiff had attached a proposed amended complaint to his motion for leave to amend. Frew holds that the proposed amended complaint relates back to the date the motion for leave to amend was filed. Id. at

274. The decision is silent on whether a motion to amend, standing alone, which substantially identifies the parties and issues to be pled in the amended complaint, would be the key date for a subsequently approved and filed amended complaint.

The Frew court was also called upon to decide whether the Plaintiff had an obligation to serve the amended complaint and summons prior to the expiration of the statute of limitations. The court found that to be a needless effort, and adopted the rationale that a Plaintiff who files the motion for leave to amend, and who must await a ruling should not be penalized if the trial court fails to act before the expiration of the statute of limitations. Id. at 275.

Fla.R.Civ.P. 1.190 gives little guidance on the technical requirements necessary under these circumstances. Rule 1.190(a) simply provides that:

> [A] Party may amend his pleading only by leave of court....Leave of court shall be given freely when justice so requires.

Rule 1.190(c) states:

> When 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 shall relate back to the date of the original pleading.

Rule 1.190(e) states:

> At any time in furtherance of justice, upon such terms as may be just, the court may permit any...pleading...to be amended....At every stage of the action the court must disregard any error or defect in the proceedings which does not effect the substantial rights of the parties.

Id. (emphasis added).

Reviewing the authors' comments provides little guidance.

> The rule does not spell out the mechanics of accomplishing an amendment. It can be done by a pleading which merely shows the amendment, addition or change, by interlineation on the original pleading or by a new amended pleading which replaces the original.

Fla.R.Civ.P. 1.190 (Authors Comments 1967) (emphasis added).

The authors' comments provide for three means by which an amendment may be accomplished. First, "by a pleading which merely shows the amendment, addition or change....". Id. In this case Plaintiff's motion to amend clearly set forth the amendment, addition or change, by identifying the party to be added and the cause of action against the new party. Although Plaintiff did not attach a copy of the proposed amended complaint, the authors' comments do not suggest that such a technicality is required.

The second suggested means of accomplishing an amendment is by interlineation on the original pleading. However, the comments suggest that this is not a favored procedure. Id.

Finally, the authors suggest that an amended pleading may be filed, replacing the original. Id.

Plaintiff, PERMENTER'S, Motion to Amend in this matter provided, in pertinent part;

> [2.] Plaintiff subsequently filed suit against Defendant FISCHER, but has learned that Defendant FISCHER was uninsured/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 insurer under the uninsured motorist provision of its insurance policy.

(Rec. P. 2).

This clearly falls within the authors' first suggested method for amending a pleading.

As earlier noted, attaching a copy of the proposed amended complaint is a mere technicality not required by the Rules of Civil Procedure and should not control the determination of whether a motion to amend "commences" an action for statute of limitation purposes.

Significantly, the Second District agreed with Petitioner's reasoning that failure to attach the proposed complaint to the motion is not required by the rules of procedure, and would not be determinative of the outcome of the case. **"Although we consider it to be the better practice, the rules do not appear to require the attachment of the proposed complaint to the motion to amend."** Permenter, 712 So.2d at 1178 (emphasis added).

An action is deemed commenced upon the filing of a complaint. 1.050 Fla.R.Civ.P.. However, Rule 1.190, Fla.R.Civ.P. does not authorize, now ill the courts recognize an amended complaint filed in violation of that rule. Therefore, no logical reason exists for attaching a proposed amended complaint to a motion to amend which adequately sets forth ultimate facts, because the amended complaint is a nullity, as a matter of law. Warner-Lambert Co. v.

Patrick, 428 So.2d 718 (Fla. 4th DCA 1983); Florida Power and Light Co. v. System Council U-4 of the Int'l Brotherhood of Electrical Workers, 307 So.2d 189 (Fla. 4th DCA 1975). An opposing party is not obligated to respond to an amended pleading filed in violation of the Rules of Civil Procedure, and the improperly filed pleading in and of itself does not toll the statute of limitations. Id. at 192.

In this respect the rules of procedure are quite clear. A party seeking to amend a pleading after a responsive pleading has been filed, and absent stipulation of the parties, must seek leave of court in order for the amendment to have any legal effect. Fla.R.Civ.P. 1.190; Warner-Lambert, supra. Since an improperly filed amended pleading is a nullity and of no legal consequence, it begs the question: why would attaching the amendment to a motion to amend become the determinative factor whether the action is time-barred. It is inconsistent, at best, to suggest that in one circumstance the amended pleading is a nullity, but in another it is the key to determining a matter so substantial as that before this court. The better rule is to interpret the fully descriptive motion as the commencement of the action for statute of limitation purposes.

Florida's rules of civil procedure were modeled after the federal rules, and guidance in their interpretation may be gleaned from a review of federal court decisions. 1.010 Fla.R.Civ.P. (1967)(Author's comments). The federal courts have frequently

addressed this same issue, interpreting Rule 15, Fed.R.Civ.P., upon which Rule 1.190, Fla.R.Civ.P. is modeled.

The seminal case is Rademaker v. E.D. Flynn Export Co., 17 F.2d 15 (5th Cir. 1927). The Plaintiff filed a motion to amend his complaint just before the statute of limitations expired, and the court granted the motion. The actual amended complaint was then filed, but only after the limitations period expired. The circuit court, however, held that a motion to amend that seeks to add a party, and which by itself is a complete statement of the claim to be brought, stands as the amendment, and that a later filed amended complaint relates back to the date the motion was filed. Id. at 17.

Since Rademaker, the federal courts have expanded that ruling, and have held that a motion to amend, filed before the statute of limitations expires, tolls[2] the statute until such time as the trial court can rule upon the motion. Mayes v. AT&T Information Systems, Inc., 867 F.2d 1172 (8th Cir. 1989), citing; Rademaker, supra; Longo v. Pennsylvania Elec. Co., 618 F. Supp. 87, 89 (W.D.Pa. 1985), aff'd, 856 F.2d 183 (3d Cir. 1988); Eaton Corp. v. Appliance Valves Co., 634 F.Supp. 974, 982-83 (N.D.Ind. 1984), aff'd on other grounds, 790 F.2d 874 (Fed. Cir. 1986); Gloster v. Pennsylvania R.R., 214 F.Supp. 207, 208 (W.D. Pa. 1963).

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[2] The courts frequently refer to "tolling" the statute of limitations, when the true effect of the holding is to relate the court-approved amended complaint back to the date the motion to amend was filed. Although this appears to be a distinction without a difference, the tolling of a statute of limitations is more correctly considered substantive, whereas the interpretation of the "relation back" rule is clearly procedural.

Although many of the federal decisions reflect that the Plaintiff's motion to amend was accompanied by a proposed amended complaint, Sheets v. Dziabis, 738 F.Supp. 307 (N.D. Ind. 1990); Pearson v. Niagra Machine and Tool Works, 701 F.Supp 195 (N.D. Okl. 1988), and Chaddock v. Johns-Manville Sales Corp., 577 F.Supp 937, 939 (S.D. Oh. 1984), they do not turn solely on that issue. In Ramirez v. City of Wichita, Kansas, 1993 WL 499772 (D.Kan.), the court was faced with a situation in which the Plaintiff filed a motion to amend, without a proposed amended complaint, days before action would have been time-barred. Citing Pearson v. Niagra Machine and Tool Works, supra, the court held that the motion itself tolled the statute of limitations until the court could rule on the motion and the amended complaint could be filed. Ramirez, 1993 WL 499772 at 2. The court was faced with an even bigger problem because the Kansas Rules of Civil Procedure, unlike Florida's rules, required that the amendment be attached to the motion. Id. at 3. The court held that the motion was specific in the changes to be made, and authorized Plaintiff's to file the amended complaint consistent with the motion. Id.

Likewise, many states with rules of procedure similar to those of Florida have held that a timely filed motion to amend either tolls the statute of limitations or constitutes the date on which the court deems the new action to have been commenced. Moore v. Grossman, 824 P.2d 7 (Col. Ct. App. 1991), citing R.A. Jones & Sons, Inc. v. Holman, 470 So.2d 60 (Fla. App. 1985); H.L.O. ex rel.

L.E.O. v. Hossle, 381 N.W.2d 641 (Iowa 1986); Moore v. Flower, 108 Mich. App. 214, 310 N.W.2d 336, aff'd on other grounds, 121 Mich. App. 235, 329 N.W.2d 35 (1982); Allstate Insurance Co., v. Emsco Homes, Inc., 93 A.D.2d 874, 461 N.Y.S.2d 429 (1983); Mauney v. Morris, 316 N.C. 67, 340 S.E.2d 397 (1986).

> The rationale of these decisions was that, since the plaintiff took those steps within her power to toll the statute, and had to await a ruling by the trial court, the plaintiff should not be penalized if the trial court failed to act before the expiration of the statute of limitations.

Moore v. Grossman, 824 P.2d at 9, citing to Eaton Corp. v. Appliance Valves Co., supra.

The Moore v. Grossman court also rejected the argument that plaintiff could have avoided this situation by filing a separate lawsuit before the expiration of the statute of limitations and then moving to consolidate the two actions. Citing to Mauney v. Morris, supra, the Colorado court noted that the method employed by the plaintiff "promoted judicial economy by avoiding the necessity for separate trials or for plaintiff to file first a separate lawsuit and then a motion to join the two actions." Moore v. Grossman, 824 P.2d at 10.

As suggested by many of these cases, the better rule of law is that a timely-filed motion to amend, which identifies the parties and the nature of the causes of action to be added, either tolls the statute of limitations until such time as the trial court may hear and rule upon the motion, or is considered the commencement of

the action. In either case, this interpretation promotes the recognized goal of securing "the just, speedy, and inexpensive determination of every action." 1.010, Fla.R.Civ.P.

Florida courts have consistently stated that it is their objective to avoid deciding cases on technicalities.

> Now the objective of all pleading is merely to provide a method for setting out the opposing contentions of the parties. No longer are we concerned with the "tricks and technicalities of the trade". The trial of a lawsuit should be a sincere effort to arrive at the truth. It is no longer a game of chess in which the technique of he maneuver captures the prize.

Cabott v. Clearwater Const. Co., 89 So.2d 662, 664 (Fla. 1956).

The federal courts have likewise interpreted the Federal Rules of Civil procedure, upon which the Florida Rules of Civil Procedure were based, as have other state jurisdictions.

> Therefore, because the purpose of pleading is to facilitate a proper decision on the merits, the Rules of Civil Procedure should be interpreted and applied to promote these fundamental principles, and courts should reject the approach that "pleading is a game of skill in which one misstep by counsel may be decisive to the outcome." Conley v. Gibson, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)

Moore v. Grossman, 824 P.2d at 9.

Rule 1.190, Fla.R.Civ.P. is to be liberally construed. Palm Beach County v. Savage Const. Corp., 627 So.2d 1332, 1333 (Fla. 4th DCA 1993). It should therefore be construed to give effect to the recognized objective of the rules of procedure; a just, speedy and inexpensive determination of the action. 1.010 Fla.R.Civ.P.. The rule's authors stated that "if a rule needs an interpretation, the stated objective is the guide." Id.(Authors comments).

The fundamental purpose of Florida's statutes of limitations is to protect Defendants against "unusually long delays in filing of lawsuits and to prevent unexpected enforcement of stale claims". Gatins v. Sebastian Inlet Tax District, 453 So.2d 871, 875 (Fla. 5th DCA 1984), *citing*, Nardone v. Reynolds, 333 So.2d 25 (Fla. 1976); Employer's Fire Ins. Co. v. Continental Ins. Co., 326 So.2d 177 (Fla. 1976). In the present case, whether a proposed amended complaint was attached to the motion or not would have had no impact, whatsoever, on the time in which the Defendant, GEICO, would have received notice of this claim. It therefore follows that Plaintiff's failure to attach a copy of a proposed amended complaint to his motion to amend has absolutely no impact in determining whether the underlying claim is stale or there has been an unusually long delay in the filing of the lawsuit.

GEICO was not a party to the action at the time the motion to amend was filed and had no standing to intervene at the hearing on Plaintiff's motion or to object to the means employed by Plaintiff in seeking the amendment. Likewise, Plaintiff could not serve GEICO with the amended complaint until after the court's leave had been obtained; otherwise the amended complaint and its service would have been deemed a nullity and of no force or effect. Additionally, GEICO was not even entitled to notice of the hearing on Plaintiff's Motion to Amend since it was not yet a party to the action.

Therefore, failing to attach a copy of the proposed amendment to the Motion to Amend does not offend, in any fashion, the underlying theory or basis for the statute of limitations. GEICO certainly can claim no prejudice.

Because the Rules of Civil Procedure are designed to provide for an orderly flow of litigation and allow civil claims to be decided on the merits, rather than on technicalities, the Second District's ruling is erroneous. Fla.R.Civ.P. 1.190, and its authors' comments provide that the rule should be liberally construed so as to allow cases to be determined on their merits. Where, as here, the rules do not provide specific procedures for litigants to employ in obtaining leave to amend their pleadings, but do provide for liberal construction, Plaintiff's motion to amend should have been deemed the "commencement" date of the action against GEICO. The trial court would then have an opportunity to hear and rule on the motion without danger of impacting the substantive rights of the parties. Once the court authorized an amendment consistent with the motion, the amended pleading would relate back in time to the date of the motion.

This court should quash the opinion of the Second District, and adopt the logic and reasoning of the Third and Fourth District's with the addition that the proposed amendment need not be attached to a properly pled motion to amend.

ARGUMENT
POINT 2

DETERMINATION OF WHETHER AN AMENDED COMPLAINT, FILED PURSUANT TO COURT AUTHORIZATION, RELATES BACK TO THE FILING DATE OF A MOTION TO AMEND IS PROCEDURAL IN NATURE. TO THE EXTENT THAT §95.051, FLA.STAT. (1971) CONFLICTS WITH THE COURT'S INHERENT RULE-MAKING AUTHORITY, THE STATUTE UNCONSTITUTIONALLY INVADES THE POWERS OF THE JUDICIARY[3]

Rule 1.190, Fla.R.Civ.P. provides the method to be employed in amending a pleading. To the extent that legislation invades the rule-making authority of the courts the legislation is unconstitutional. Art. V, §2(a), Fla. Const.; Ong v. Mike Guido Properties, 668 So.2d 708, 710 fn. 4 (Fla. 5thDCA 1996) "The Legislature has no power to prescribe rules regulating the conduct of the court's business or other matters within the inherent power of the court to regulate." Sydney v. Auburndale Constr. Corp., 96 Fla. 688, 691, 119 So. 128, 129 (1928).

Substantive laws, within the sole authority of the legislature have been defined as those which prescribe "the duties and rights under our system of government." Benyard v. Wainwright, 322 So.2d 473 (Fla. 1975). Admittedly, statutes of limitations are, in and of themselves, substantive law, subject to the creation, modification or amendment of the legislature. Generally speaking, courts will

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[3] The issue of the constitutionality of §95.051, Fla.Stat. (1971) was not addressed at the trial court or district court level; however, it was not an issue before either of the courts until the Second District issued its opinion in this case. The trial court's ruling on the summary judgment was based solely on Plaintiff/Petitioner's failure to attach a proposed amended complaint to the motion to amend.(Rec. P.30) It's ruling did not

not make exceptions to statutes of limitations when the legislature has refused to do so. Fulton County Administrator v. Sullivan, 1197 WL 589312, 22 Fla. L. Weekly S578 (Fla. Sept. 25, 1997).

However, where the legislation in question attempts to control the practices and procedures of the courts, to that extent it violates the separation of powers provisions of the constitution. Art. II, §3 Fla. Const.; Art. V, §2(a), Fla. Const.; Bernhardt v. State, 288 So.2d 490, 496-97 (Fla. 1974).

> We have said that `practice' means the method of conducting litigation involving rights and corresponding defenses, Skinner v. City of Eustis, 147 Fla. 22, 2 So.2d 116 (1941), or the manner in which the power to adjudicate or determine is exercised, Sheldon v. Powell, 99 Fla. 782, 128 So.258 (1930). It has also been said that `practice' is the method of conducting litigation. Dadswell v. State ex rel. Phillips, 186 So.2d 274 (Fla. App. 2d 1966)
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> `Practice and procedure encompass the course, form manner, means, method, mode, order, process or steps by which a party enforces substantive rights or obtains redress for their invasion. `Practice and procedure' may be described as the machinery of the judicial process as opposed to the product thereof.'

Bernhardt, supra at 497.

Unlike prior cases before this court on the issue of tolling the applicable statutes of limitation, Permenter is clearly one which involves procedural as opposed to substantive issues. The question for the court is whether §95.051 (2), Fla.Stat. (1990) may permissibly dictate this court's interpretation of its own rules of civil procedure.

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hinge on, nor mention the applicability of §95.051, Fla.Stat..

Previous cases addressed by this court have dealt with clearly substantive issues. Fulton County Administrator v. Sullivan, supra(fraudulent concealment of identity fails to toll wrongful death statute of limitations); S.R. v. State, 346 So.2d 1018 (Fla. 1977)(right to juvenile delinquency hearing within prescribed time is substantive, superceding procedural rules). These cases do not involve interpretation of procedural rules in order to reach their result. They instead focus on whether the courts have the power to carve substantive exceptions to the statutes of limitation.

Permenter on the other hand deals with the interpretation to be afforded the Florida Rules of Civil Procedure, and when a action is deemed to be commenced. The Second District erroneously focused on the wrong triggering mechanism when it held that PERMENTER's amended complaint against GEICO did not relate back to the original complaint against FISCHER. Permenter, 712 So.2d at 1179, citing Johnson v. Taylor Rental Center, Inc., 458 So.2d 845, 846 (Fla. 2dDCA 1984).[4] The proper focus should be on the nature of the motion to amend, which was timely filed and which included ultimate facts which reflected a cause of action against GEICO.

Rule 1.110 (b), Fla.R.Civ.P. provides, in pertinent part, that a pleading, setting forth a claim for relief, must contain "(2) a short and plain statement of the ultimate facts showing that the

[4] Acceptance of the Second Disrict's logic, that Fla.Stat. 95.051(2) prohibits Petitioner's amended complaint to relate back to the motion to amend, will raise serious issues regarding this court's constitutional authority to regulate and interpret procedural matters.

pleader is entitled to relief." Id. PERMENTER's Motion to Amend met those requirements, even if it was not formally entitled an Amended Complaint. As previously noted, any attempts to file an amended complaint at that time, without court authorization, would have been futile and in clear violation of the rules of procedure. 1.190 (a), Fla.R.Civ.P.

Construing the rules of procedure in accordance with their stated purpose, the amended complaint, filed only after appropriate court order, should relate back in time to the motion to amend.

To do otherwise does injustice to the very purpose of the rules of civil procedure.

> This is the only just and proper result since once leave to amend has been requested and a proposed complaint is on file, the plaintiff has taken those steps within his power to toll the statute and must await the appropriate court order.
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> Thus, it is only equitable to toll the statute of limitations while the motion is pending before the court. Furthermore, this decision is consistent with the Fed.R.Civ.P. 15(a) provision that "leave [to amend] shall be freely given when justice so requires."

Ramirez v. City of Wichita, Kansas, 1993 WL 499772 at 3 (noting that motion to amend, even where no proposed amended complaint is attached, tolls statute of limitations).

To the extent that §95.051, Fla.Stat. (1991) conflicts with this interpretation, it should be deemed an unconstitutional infringement on the constitutional powers of the Supreme Court to promulgate and interpret its rules of procedure. On the other hand

this court may simply find that the statute does not encroach on the court's rule-making authority, and does not conflict with the rationale set forth herein.

This court should therefore quash the opinion of the Second District and hold that Petitioner's amended complaint against GEICO relates back in time to the date the motion to amend was filed, and is therefore not time-barred. Furthermore, to the extent the court finds that §95.051 Fla.Stat. (1991) conflicts with this court's rule-making authority, the statute is unconstitutional.

CONCLUSION

This court should quash the Second District's decision in this matter, and adopt the reasoning employed by the Third and Fourth Districts with the clarification that a proposed amended complaint need not be attached to a timely filed motion to amend in order for the amendment to relate back to the motion's filing date.

The best reasoned position is that a motion to amend which contains the identity of the party to be added in the amendment, as well as the basis for the action, constitutes the commencement of the action for purposes of the rules of procedure. This only makes sense since an amended complaint filed in derogation of the rules is a nullity. A party is compelled to obtain leave of court before amending a complaint under circumstances such as those presented in Permenter. Therefore, fundamental fairness dictates that the party be given an opportunity to seek leave of court within the limitation period, but not be punished because the court cannot hear the motion until after the statute expires.

The court should also find that §95.051 (2), Fla.Stat. (1971) has no application to this issue, or to the extent that it conflicts with this holding is an unconstitutional invasion upon the court's rule-making authority. Certainly, how this court treats a motion to amend which is filed prior to the expiration of the applicable statute of limitations is procedural in nature, and within the sole domain of this court. The opinion of the Second District should therefore be quashed.

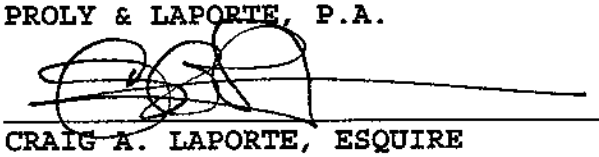
CERTIFICATE OF STYLE AND TYPE SIZE

I HEREBY CERTIFY that PETITIONER'S BRIEF ON THE MERITS employs a 12 point Courier style type.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Anthony Alfonso, Jr., Esquire, Attorney for Defendant, Fischer, 601 E. Twiggs Street, Suite 100, Tampa, Florida 33602, Howard W. Weber, Esquire, Attorney for Defendant, GEICO, 101 E. Kennedy Boulevard, Suite 1100, Tampa, Florida 33602, and Michael D. Eriksen, Esquire, Florida Academy of Trial Lawyers, Amicus Committee, 1005 Lake Avenue, Lake Worth, Florida 33460 this 11th day of September, 1998.

PROLY & LAPORTE, P.A.



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