ORIGINAL

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

REPLY BRIEF OF PETITIONER, KELLY DEAN PERMENTER

CRAIG A. LAPORTE, ESQUIRE
PROLY & LAPORTE, P.A.
Oak Trail Professional Center
11914 Oak Trail Way
Port Richey, Florida 34668
(727) 863-1553
Facsimile (813) 862-8386
Florida Bar No. 372511
Attorney for Petitioner

INDEX

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (Cont'd)

SUMMARY OF ARGUMENT

A nearly-identical issue has now been addressed by the Third District in a case decided within the past two weeks, and with a non-final opinion which supports Petitioner's position. Respondent, throughout its Answer Brief has miscategorized the issue as one of "tolling" the applicable statute of limitations. The true issue, however, is whether an amended complaint, once court authorized, relates back in time to the date of a motion to amend. This is therefore a procedural issue for proper determination by this court without reference to §95.051 Fla.Stat.(1985).

The logical conclusion, while honoring the fundamental concept of the rules of civil procedure, is to allow the amended complaint to relate back to the motion to amend. This preserves the fairness required of the rules without adversely impacting any substantial rights.

This court should quash the opinion of the Second District and replace it with an opinion that a timely filed motion to amend, which adequately identifies the parties to be added and the cause of action to be pled, commences a cause of action for statutes of limitation purposes.

ARGUMENT #1

PETITIONER'S AMENDED COMPLAINT RELATES BACK IN TIME TO THE DATE THE MOTION FOR LEAVE TO AMEND WAS FILED, NOT TO THE DATE OF THE ORIGINAL COMPLAINT. §95.051(2) FLA. STAT. IS THEREFORE INAPPLICABLE TO THIS ACTION.

Since Petitioner's Initial Brief was filed, the Third District Court of Appeal has not only revisited this issue, but has issued its non-final opinion on a nearly identical case to that presented herein. Williams v. Totura & Company, Inc., 98-1470 (Fla. 3dDCA October 7, 1998). The reasoning employed by Williams is compelling. Relying on Smith v. Metropolitan Dade County, 338 So.2d 878, 879 (Fla. 3dDCA 1976), the Williams court held that "[a]n amended complaint relates back to the date a motion to amend is filed; the timely filing of such motion defeats a statute of limitations defense." Williams, Supra.

Contrary to the Respondent's assertions, Petitioner is not suggesting that this court "carve out a judicial exception to the Statute of Limitations". Admittedly, Florida's courts have been reluctant to do that. Carey v. Beyer, 75 So.2d 217 (Fla. 1954); Swartzman v. Harlan, 535 So.2d 605, 607 (Fla. 2dDCA 1988); Fulton County Adm'r v. Sullivan, 1197 WL 589312, 22 Fla. L. Weekly S578, 579 (Fla. 1997). However, the Permenter case does not require this court to adopt a "tolling" rationale in order to arrive at a just decision. The issue presented by this case is purely procedural; whether an amended complaint relates back in time to the date a motion to amend is filed.

Respondent and the Second District Court focused on the applicability of Florida Statute §95.051(2) (1985). See Respondent's Answer Brief at Page 6, 15-18: Permenter v. GEICO, 712 So.2d 1178 (Fla. 2dDCA 1998). The Second District mistakenly applied Fla.Stat. §95.051(2) to the facts of this case, and apparently would have reached the same result if presented with the facts of Frew v. Poole and Kent Co., 654 So.2d 272 (Fla. 4th DCA 1995) and Smith v. Metropolitan Dade County, 338 So.2d 878 (Fla. 3dDCA 1976). Interestingly, Respondent does not ask this court to overrule either of those cases, but wishes this court to restrict its decision to the Permenter facts. Respondent's Answer Brief at Page 10. Unfortunately, the Second District did not restrict its decision to the underlying facts, but found that its decision was in full conflict with those of the Third and Fourth Districts. Permenter at 1179.

Williams and its progeny do not rely on §95.051, Fla.Stat., whatsoever. Williams, Supra; Frew, Supra; Smith, Supra; R.A. Jones & Sons, Inc. v. Holman, 470 So.2d 60, 66 (Fla. 3dDCA 1985). Those decisions rely instead on the procedural determination that an amended complaint relates back in time to the date a party moves for authority to file the amendment. In this fashion the Third and Fourth Districts avoid any constitutionality issues pertaining to Fla.Stat. §95.051(2), and do justice to the parties by allowing substance to rule over form.

Furthermore, legislative enactments may not infringe upon the

Supreme Court's rule-making authority. Haven Federal Savings & Loan, Ass'n v. Kirian, 579 So.2d 730 (Fla. 1991); Ong v. Mike Guido Properties, 668 So.2d 708 (Fla. 5th DCA 1996). To the extent that Fla.Stat. §95.051(2) interferes with this court's rule-making authority it is unenforceable. Id. Again, however, this court need not reach this issue by simply determining that §95.051, Fla. Stat. has no application to these facts.

Respondent's brief frequently relates that the amended complaint, adding GEICO, can not relate back in time to the date of the original complaint, and provides relevant citations. Respondent's Answer Brief, Pages 12-13. Petitioner readily acknowledges this statement as being both factually and legally correct. But this misses the very essence of this case. Petitioner has never suggested that the amended complaint should relate back to the original complaint. Instead, the amended complaint relates back in time to the **motion to amend**. Williams v. Totura & Company, Inc. Supra.

Respondent also suggests that Florida Rule of Civil Procedure 1.070(j) mitigates against Petitioner's position. Again, Respondent's reliance upon this rule is misplaced. Williams properly addresses this very same issue with a rule of law that is both sensible and protective of the litigant's procedural and substantive rights. Williams, Supra. The Williams trial court apparently dismissed the amended complaint, inter alia, for

failing to serve it on the opposing party within 120 days of the motion to amend. The appellate court, however, ruled that the 120 day time period began to run on the date the motion to amend was granted, not the filing date. Id. Holding otherwise "[i]s illogical because the clerk will not issue process unless the court grants the motion to amend." Id. The Williams panel declined to adopt the trial court's reasoning, stating that it was an "illogical interpretation." Id.

Adopting the Second District's reasoning herein is also illogical because it acts to unreasonably shorten the applicable statute of limitations. Further, it shortens those limitation periods for an indeterminate time frame. A litigant who seeks to add a party to an existing cause of action in Dade County, for instance, may be forced to file a motion to amend six months in advance of the statute's expiration, simply because the trial court's docket prevents a speedy hearing. On the other hand, a litigant in Charlotte County may need to file the motion only thirty days before the statute runs because the trial court can hear and rule upon the motion more expediently. This creates an undesirable result and a proverbial "minefield" for the unwary litigant.

Clearly, the better reasoning is that adopted by Williams and Ramirez v. City of Wichita, Kansas, 1993 WL 49972 (D. Kan. Nov. 18, 1993), that a timely filed motion to amend is the date to which a subsequently authorized amended complaint relates back.

This creates a bright-line rule which is simple to understand and follow, while still giving full consideration to the substantive rights of the parties.

ARGUMENT #2

A MOTION FOR LEAVE TO AMEND WHICH ADEQUATELY IDENTIFIES THE PARTIES TO BE ADDED AND THE NATURE OF THE CAUSE OF ACTION SHOULD BE CONSIDERED THE "COMMENCEMENT" DATE OF THE ACTION FOR STATUTE OF LIMITATION PURPOSES.

A motion to amend which contains sufficient information to identify the new parties and the nature of the cause of action to be added should be sufficient to commence a cause of action against those parties for statute of limitation purposes.

Respondent's Answer Brief goes into great depth explaining why Petitioner's Motion to Amend does not constitute a Complaint. Petitioner, however, has not asked this court to rename the motion or consider it anything other than what it is; a motion to amend.

Frankly, if the court were to consider the motion as a Complaint, then Petitioner should prevail in this matter since Respondent's argument seems to be that the motion fails to state a cause of action. If true the pleading would be subject, at worst, to dismissal **without prejudice**. Fla.R.Civ.P. 1.140(b); Nelson v. Ward, 190 So.2d 622 (Fla. 2dDCA 1966); Fouts v. Margules, 98 So.2d 394, 395 (Fla. 3dDCA 1957). The court should then remand with instructions to allow Petitioner an opportunity

to amend the pleading.

However, this is not the true issue before the court, nor does Petitioner ask this court to redesignate the motion as something which it is not. Petitioner simply asks this court to rule that the fundamental basis for the rules of procedure[1] dictate that for limitations purposes, a motion to amend commences an action against a new party. In that event, a subsequently court-authorized amended complaint relates back in time to the motion's filing date.

This ruling will do justice to the very purpose of the rules of procedure, while simultaneously preserving the fundamental reason for the statutes of limitation. It will also provide a final and determinative bright-line rule for all litigants and attorneys. Finally, it will be consistent with the rules and interpretations of many other federal and state jurisdictions.

CONCLUSION

For the foregoing reasons the opinion of the Second District Court of Appeal should be quashed with an opinion consistent herewith.

---

[1] 1.010 Fla.R.Civ.P. provides in pertinent part, "These rules shall be construed to secure the just, speedy and inexpensive determination of every action." Fla.R.Civ.P. 1.190(e) states in pertinent part, "At every stage of the action the court must disregard any error or defect in the proceedings which does not affect the substantial rights of the parties.

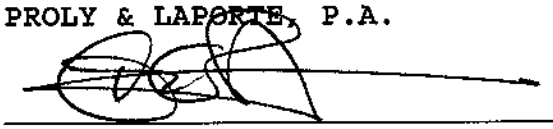
CERTIFICATE OF STYLE AND TYPE SIZE

I HEREBY CERTIFY that PETITIONER'S REPLY BRIEF 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 21st day of October, 1998.

PROLY & LAPORTE, P.A.



CRAIG A. LAPORTE, ESQUIRE
Attorney for Petitioner
Oak Trail Professional Center
11914 Oak Trail Way
Port Richey, Florida 34668
(727) 863-1553
Florida Bar No. 372511