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## STATEMENT OF CASE AND FACTS

The United States Court of Appeals, Eleventh Circuit certified the following question to this Court pursuant to article V, section 3(b)(6), Florida Constitution, section 25.031, Florida Statutes, and Rule 9.150, Florida Rules of Appellate Procedure, as involving an unsettled question of Florida law and as being determinative of the federal appellate proceeding:

WHETHER SECTION 733.702 AND SECTION 733.710 OF THE FLORIDA STATUTES CONSIDERED SEPARATELY AND/OR TOGETHER OPERATE AS STATUTES OF NONCLAIM SO THAT IF NO STATUTORY EXCEPTION EXISTS, CLAIMS NOT FORMALLY PRESENTED WITHIN THE DESIGNATED TIME PERIOD ARE NOT BINDING ON THE ESTATE, OR DO THEY ACT AS STATUTES OF LIMITATIONS WHICH MUST BE PLEADED AND PROVED AS AFFIRMATIVE DEFENSES IN ORDER TO AVOID WAIVER.

*May v. Illinois Insurance Company*, 190 F.3d 1200, 1208 (11<sup>th</sup> Cir. 1999)

This suit arises from an automobile accident involving Oscar T. Bradley, and Inez and Donald Prockup on or about September 21, 1991. Bradley and Inez Prockup were killed. Donald Prockup brought a personal injury/wrongful death action in Florida circuit court against Bradley's estate and the estate of Velma Murphy, the owner of the car driven by Bradley, but failed to file a timely claim in Bradley's estate. David R. May was appointed administrator ad litem of the Bradley estate to defend that suit. Murphy had a \$10,000/\$20,000 liability policy

with Atlanta Insurance Company, which defended the action on behalf of both Murphy and Bradley. Bradley had a \$10,000/\$20,000 liability policy with Illinois National Insurance Company, the defendant in this case. Prockup received a \$1.1 million judgment against the Bradley estate and Murphy. Subsequent to the entry of the final judgment, Prockup executed a release as to Murphy and her insurer, in exchange for payment of her \$20,000 policy limit. 109 F. 3d at 1203.

May, as administrator ad litem of the Bradley estate, then instituted this action in state court against Illinois National, for bad faith refusal to settle, complaining "the estate of Oscar T. Bradley is now obligated to pay the full amount of said judgment, with interest."<sup>1</sup> Illinois National removed the action to the United States District court, Northern District of Florida, where the court granted summary judgment on the ground that the estate was not liable for the amount of the judgment in excess of the insurance coverage, because Prockup failed to preserve the claim by filing a legally sufficient statement of claim against the Bradley estate. *Id.* The affirmance of the federal trial court's ruling turns on whether the requirement of filing a legally sufficient claim in accordance with The Florida Probate Code is waived if not pled as an affirmative defense and proved. 109 F. 3d at 1206. For the following reasons, the time bars for submitting claims in sections 733.702 and 733.710, Florida Statutes (1991), are not

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<sup>1</sup> The recovery of damages by an estate based on bad faith by an insurance company is barred unless the estate itself is liable in the probate proceeding to the third-party claimant for damages in excess of the policy limits. *See Boston Colony Insurance v. Gutierrez*, 386 So. 2d 783 (Fla. 1980). This case does not involve the policy limits insurance coverage provided by Atlanta Insurance Company, only a claim in excess of that coverage.

waived by the failure to plead them as affirmative defenses and prove them.

### SUMMARY OF ARGUMENT

The time bars for submitting claims in sections 733.702 and 733.710, Florida Statutes (1991), are not waived by the failure to plead them as affirmative defenses and prove those defenses.

There are no conflicting decisions regarding this waiver issue as it relates to section 733.702. Both that statute and its implementing statute, section 733.705, expressly state that no action by an interested person or court action is needed to bar a claim that is untimely.

Section 733.710 was drafted for the sole purpose of making it self-executing, thereby eliminating the state action that caused the then similar Oklahoma claim statutes to be scrutinized and struck down as violative of the federal constitution.

Section 733.710, unlike 733.702, has no provision for extending the time bar based on fraud or estoppel. Further, section 733.702(5) expressly provides that the extensions of time allowed under section 733.702 do not apply to section 733.710.

## ARGUMENT

### **INTRODUCTION**

As lawyers and jurists, we feast on words. We employ them to communicate with fierce precision the position of a client or the workings of a law. When we use a term of our art, we recognize that certain premises flow logically from it.

Sometimes, however, the people, through their legislature, create a law that defies our existing language or uses one of our terms of art with the intent that it carry its generic meaning. Our first reaction quite naturally is to make the law fit within our existing comprehension. We push the “square peg” into the “round hole” and over-cerebrate to the point where our logical syllogisms leading us from valid premises to sound conclusions become a morass of inconsistency. Notwithstanding our being pure with good intention, our wrestling to fit a law within our traditional labels can blind us to the very heart of what the people’s representatives’ intended.

We think this mischief was afoot in *Baptist Hospital of Miami v. Carter*, 658 So. 2d 560 (Fla. 3d DCA 1995) (see, for example, page 563) and other cases addressing sections 733.702 and 733.710, Florida Statutes. This may very well explain why at least part of the question facing the United States Court of Appeals was heretofore unsettled. The question of waiver posed by the court can and should be answered precisely, but perhaps without the labels of “statute of limitation”, “repose” and “nonclaim,” which have been somewhat misused, overused, and emasculated in our jurisprudence.

***I. THE TIME BAR IN SECTION 733.702, FLORIDA STATUTES, IS NOT WAIVED BY THE FAILURE TO PLEAD IT AS AN AFFIRMATIVE DEFENSE AND PROVE IT TO A COURT***

Section 733.702(3), states in pertinent part that:

*Any claim not timely filed as provided in this section is barred even though no objection to the claim is filed on the grounds of timeliness or otherwise unless the court extends the time in which the claim may be filed."*

(Emphasis added)

Section 733.705, Florida Statutes, addresses the process by which claims can be paid or objections to claims can be made and the process for suing on a claim to which an objection has been filed. In pertinent part, the law states:

*No action or proceeding on the claim shall be brought against the personal representative after the time limited above, and any such claim is thereafter forever barred without any court order.*

(Emphasis added)

The courts in both *Baptist Hospital* and *Comerica Bank & Trust Company v. SDI Operating Partners*, 673 So. 2d 163 (Fla. 4<sup>th</sup> DCA 1996) concur that the time bar in section 733.702, Florida Statutes, is not waived by the failure to plead it as an affirmative defense and prove it to a court. 658 So. 2d at 563, *quoting from, Estate of Parson*, 570 So. 2d 1125, 1126 (Fla. 1<sup>st</sup> DCA 1990); 673 So. 2d at 165-66.

The legislature's express decision to not require further pleading, proof, and

court action on barred claims is consistent with the overall policy behind probate legislation: to provide for the “speedy settlement of estates” in order that “the payment of claims and the distribution to the beneficiaries [not] be substantially delayed or disrupted.” *Spohr v. Berryman*, 589 So. 2d 225, 228 (Fla. 1991)

For these reasons, the failure to plead and prove the time bar as a defense does not waive the time bar. Further, in light of the unanimity of the appellate courts on this issue, we do not perceive this issue, as it relates to 733.702, as unsettled. *See Johns v. Wainwright*, 253 So. 2d 873, 874 (Fla. 1971) (“The District Courts of Appeal were never intended to be intermediate courts.” In most cases, the decisions of those courts are “final and absolute.”)

## **II. THE TIME BAR IN SECTION 733.710, FLORIDA STATUTES, IS NOT WAIVED BY THE FAILURE TO PLEAD IT AS AN AFFIRMATIVE DEFENSE AND PROVE IT TO A COURT**

In *Tulsa Professional Collection Services Inc. v. Pope*, 485 U.S. 478, 108 S.Ct. 1340, 99 L.Ed.2d 565 (1988), a statutory time bar for probate claims was invalidated on federal due process grounds. The Court in *Pope* drew a distinction for due process purposes between time bars that are effective by their very terms and time bars where "private parties make use of state procedures with the overt, significant assistance of state officials." 485 U.S. at 486, 108 S.Ct. at 1345. The

self-executing statutes do not create a due process problem, because there is insufficient state action to trigger constitutional protections of the individual. *See* 485 U.S. at 486-87, 108 S.Ct. at 1345-46.

As the court in *Comerica Bank* explained, section 733.710 “was part of a package of amendments to the Probate Code that the legislature adopted in 1989 in obvious response to the United States Supreme Court's decision in *Tulsa Professional Collection Services Inc. v. Pope*, 485 U.S. 478, 108 S.Ct. 1340, 99 L.Ed.2d 565 (1988). *See* s 9, ch. 89-340, Laws of Fla. *Pope* [threatened to invalidate] on due process grounds a host of statutes of limitations around the country dealing with the filing of claims in decedents' estates.” 673 So. 2d at 164. The obvious purpose in amending 733.710 was to create an outside limit on filing claims in an estate that was self-executing and, therefore, impervious to a *Pope*-like due process attack. *See* 673 So. 2d at 165; 658 So. 2d at 565, ft.n.2; *Estate of Parson*, 570 So. 2d at 1126.

Section 733.710 provides:

**733.710 Limitations on claims against estates.--**

(1) *Notwithstanding any other provision of the code, 2 years after the death of a person, neither the decedent's estate, the personal representative (if any), nor the beneficiaries shall be liable for any claim or cause of action against the decedent, whether or not letters of administration have been issued, except as provided in this section.*

(2) This section shall not apply to a creditor who has filed a claim pursuant to s. 733.702 within 2 years after the person's death, and whose claim has not been paid or otherwise disposed of pursuant to s. 733.705.

(3) This section shall not affect the lien of any duly recorded mortgage or security interest or the lien of any person in possession of personal property or the right to foreclose and enforce the mortgage or lien."

Consistent with the teachings of *Pope*, the legislature merely created 733.710. No other state action was involved; and no state action is required to implement the law. Indeed, an estate need not even be opened in order for this two-year time bar to apply. Further, while section 733.702 expressly contemplates some state involvement in the event of fraud or estoppel, the legislature did not include that state involvement in 733.710. We know the legislature intended this omission not by the artful application of statutory construction rules. We get it from the terms of the legislation itself, which states in section 733.702(5): “[n]othing in this section shall extend the limitations period set forth in s.733.710.” 89-340 Laws of Fla.§5. Thus, the extensions permitted for fraud and estoppel under section 733.702 cannot be used to extend the time bar under section 733.710.

Interestingly, the appellate court in *Baptist Hospital* did not address the very significant and clear statement of the legislature in 733.702(5), which may explain why *Baptist Hospital* reached a result wholly contrary to the law. The court in *Baptist Hospital* also suggested that this Court’s decision in *Barnett Bank v. Read*, 493 So. 2d 447 (Fla. 1986) all but decided that 733.710 (1991) should be labeled a waivable

“statute of limitation.” But *Read* involved pre-1984 legislation and this Court in *Read* obviously did not consider the 1989 changes to the law as *Read* was decided three years before those changes were adopted. So *Read* is hardly of any use in this case.

We should also note that the District Court of Appeal, Second District recently weighed in on whether the time bar in section 733.710 must be pled as an affirmative defense and proven. That court followed *Comerica Bank* and determined that no further pleading and proof was required in order to avoid a waiver of the time bar. See *Lutheran Brotherhood Legal Reserve Fraternal Benefit Society v. Estate of Petz*, 24 Fla. L. Weekly D2628 (Fla. 2d DCA, November 24, 1999) (certifying conflict with *Baptist Hospital*)

## CONCLUSION

Unburdened by brands of “repose” or “statute of limitation” or “nonclaim”, we need only ask: “Does the legislation contemplate further pleading of a defense, proof, and court involvement, the lack of which results in a waiver of the time bars?” The answer is not simply “no.” In fact the legislation very clearly states that the legislature in no way contemplated that result and expressly provided to the contrary.

For these reasons, the time bars in sections 733.702 and 733.710, Florida Statutes, are not waived by the failure to plead them as affirmative defenses and prove them to a court.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I CERTIFY that a true copy of this motion was served by mail on Lefferts L. Mabie, Lefferts L. Mabie, P.A. 777 S. Harbour Island Blvd., Ste. 860, Tampa, FL 33602-5746; Louis K. Rosenbloum, Louis K. Rosenbloum, P.A., P.O. Box 12443, Pensacola, FL 32582-2443; Robert J. Mayes, Robert J. Mayes, P.A., 517 Deer Point Dr., Gulf Breeze, FL 32561-4554; B. Richard Young, B. Richard Young, P.A., P.O. Box 1070, Pensacola, FL 32595-1070; David Lee McGee, Beggs & Lane, P.O. Box 12950, Pensacola, FL 32576-2950; Michael T. Bill, Young & Associates, P.O. Box 1070, Pensacola, FL 32595-1070 this \_\_\_\_\_ day of December, 1999.

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