

SUPREME COURT OF FLORIDA

David R. May, as Administrator Ad Litem  
of the Estate of Oscar T. Bradley, deceased,

Appellant/Plaintiff,

v.

CASE No.: 96,652

Illinois National Insurance Company,

Appellee/Defendant,

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ON CERTIFIED QUESTION FROM THE UNITED STATES COURT OF  
APPEALS FOR THE ELEVENTH CIRCUIT  
APPEAL NO.: 98-2580

DISTRICT COURT DOCKET NO. 3:97cv110/RV

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**SUPPLEMENT TO ANSWER BRIEF OF APPELLEE**

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## **PREFACE**

Within this brief, Appellant shall be referred to as “May”, Appellee shall be referred to as “INIC” and Atlanta Casualty Company shall be referred to as “ACC”.

**CERTIFICATE OF TYPE SIZE AND STYLE**

I HEREBY CERTIFY THAT INIC's Supplement to its Answer Brief was prepared using proportionally spaced Times New Roman 14 point type in accordance with this Court's administrative order dated July 13, 1998.

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**TABLE OF CONTENTS**

PREFACE ..... i

CERTIFICATE OF TYPE SIZE AND STYLE ..... ii

TABLE OF CONTENTS ..... iii

TABLE OF CITATIONS ..... iv

SUMMARY OF ARGUMENT ..... 1

APPELLANT’S ISSUE II

IF SECTION 733.702 AND 733.710 ARE CONSIDERED  
STATUTES OF NONCLAIM, WHETHER ILLINOIS  
NATIONAL IS PRECLUDED NONETHELESS FROM  
RAISING THE NONCLAIM STATUTES IN THE BAD  
FAITH-EXCESS JUDGMENT ACTION WHEN THE  
INSURED ESTATE FAILED TO PLEAD OR  
OTHERWISE RAISE THOSE STATUTES AS A  
DEFENSE TO THE UNDERLYING WRONGFUL  
DEATH-PERSONAL INJURY ACTION ..... 3

ARGUMENT ..... 3

CONCLUSION ..... 14

CERTIFICATE OF SERVICE ..... 15

## TABLE OF CITATIONS

### CASES

<i>Aboandandolo v. Vonella</i> , 88 So.2d 282 (Fla. 1956) .....	6
<i>Attache Resort Motel, Ltd. v. Kaplan</i> , 498 So.2d 501, 503 (Fla. 3d DCA 1986) .....	12
<i>Baptist Hospital of Miami, Inc. v. Carter</i> , 658 So.2d 560, 563 (Fla. 3d DCA 1995) .....	7
<i>Barnett Bank of Palm Beach County v. Estate of Read</i> , 493 So.2d 447 (Fla. 1986) .....	5, 6, 7, 8, 9
<i>Bonti v. Ford Motor Co.</i> , 898 F. Supp. 391, 394 (S.D. Miss. 1995) .....	10
<i>Comerica Bank &amp; Trust, F.S.B. v. SDI Operating Partners, L.P.</i> , 673 So.2d 163, 166 (Fla. 4th DCA 1996) .....	7
<i>Grossman v. Selewacz</i> , 417 So. 2d 728 (Fla. 4th DCA 1982) .....	8, 9
<i>In re Estate of Bartkowiak</i> , 645 So. 2d 1082, 1084 (Fla. 3d DCA 1994) .....	7
<i>In re Estate of Gay</i> , 294 So. 2d 668 (Fla. 4th DCA 1974) .....	8, 9
<i>In re Estate of Parson</i> , 570 So. 2d 1125 (Fla. 1st DCA 1990) .....	6, 7, 8
<i>Miller v. Nolte</i> , 453 So.2d 397 (Fla. 1984) .....	5

<i>Loftus v. Romsa Const. Co.</i> , 913 P. 2d 856, 859 (Wyo. 1996) .....	10
<i>McMahon v. Eli Lilly and Co.</i> , 774 F. 2d 830 (7th Cir. 1985) .....	10
<i>Payne v. Stalley</i> , 672 So. 2d 822, 823 (Fla. 2d DCA 1995) .....	7
<i>Stern v. First National Bank of South Miami</i> , 275 So. 2d 58 (Fla. 2d DCA 1973) .....	8, 9
<i>Thames v. Jackson</i> , 598 So. 2d 121, 123 (Fla. 1st DCA 1992) .....	7, 8
<i>Tuggle v. Maddox</i> , 60 So.2d 158 (Fla. 1952) .....	6

**STATUTES**

Section 733.702 .....	<i>passim</i>
Section 733.702 (1) .....	11
Section 733.702 (3) .....	11
Section 733.710 .....	<i>passim</i>
Section 733.16 .....	8

**OTHER AUTHORITIES**

Ch. 88-340, § 6, Laws of Florida .....	5
Fla. R. Civ. P. 1.110 (d) .....	6

## **SUMMARY OF ARGUMENT**

May's contention that his failure to raise §§ 733.702 and 733.710 in the underlying action constitutes a waiver, even if this Court determines that these statutory provisions are jurisdictional statutes of nonclaim, has no basis in law or fact. The Eleventh Circuit has resolved May's "Issue II" adversely to May's position and, therefore, May's invitation to this Court to consider his "Issue II" should be rejected. Even if this Court accepts May's invitation, his position should still be rejected because the decisions of every court in Florida to consider May's "Issue II", including a decision of this Court, have reached a conclusion adverse to May's position. Due to the aforementioned decisions, May's initial brief cites cases from other jurisdictions and cases which are factually distinguishable from the instant case in hopes of bolstering his argument. However, not one of the cases cited by May in connection with "Issue II" stands for the proposition that a party can waive a jurisdictional statute of nonclaim by failing to raise it as an affirmative defense. May's contention that his stipulation to liability in the underlying case resulted in a waiver of §§ 733.702 and 733.710 is also without merit as the statutory provisions at issue specifically provide that actions of the personal representative do not result in a waiver of the time requirements of the statutes. Similarly, May's position that the lower court in the underlying case had subject matter jurisdiction to enter a judgment against the estate

fails to recognize that no such jurisdiction exists for untimely claims in excess of limits of insurance. Additionally, parties cannot create subject matter jurisdiction by agreement and the lack of subject matter jurisdiction involved in the instant case cannot be waived. May's final argument in support of his position on "Issue II" is the most puzzling of all. Despite the fact that there has been no finding of "bad faith" against INIC, May asks this Court to determine that Prockup's judgment, which is in excess of one million dollars, is an obligation of the estate he purportedly represents in order to prevent INIC from escaping the consequences of its alleged "bad faith". It would seem that a bigger concern for May to consider is the consequences to the estate and its beneficiaries if this Court were to accept his argument here and INIC is subsequently determined not to have acted in "bad faith".

## ARGUMENT

IF SECTION 733.702 AND 733.710 ARE CONSIDERED STATUTES OF NONCLAIM, WHETHER ILLINOIS NATIONAL IS PRECLUDED NONETHELESS FROM RAISING THE NONCLAIM STATUTES IN THE BAD FAITH-EXCESS JUDGMENT ACTION WHEN THE INSURED ESTATE FAILED TO PLEAD OR OTHERWISE RAISE THOSE STATUTES AS A DEFENSE TO THE UNDERLYING WRONGFUL DEATH-PERSONAL INJURY ACTION

May's contention that this Court should determine that failure to raise §§ 733.702 and 733.710 as affirmative defenses in the underlying wrongful death/personal injury action prevents INIC from raising the statutes as a defense to the bad faith action, even if the Court finds that these statutes are jurisdictional statutes of nonclaim, is wholly without merit and contrary to the law of this state. In presenting the instant case to this Court for resolution of its certified question, the United States Court of Appeals for the Eleventh Circuit specifically acknowledged that May's "Issue II" has already been resolved adversely to May's position when it stated:

... we must determine whether the statutes [§§ 733.702 and 733.710] operate as statutes of limitations or statutes of repose or nonclaim. The distinction is significant. If they [the statutes] act as jurisdictional statutes of nonclaim or statutes of repose, untimely claims are automatically barred. Prockup would then have had no claim against the estate, and May would have no basis for its bad faith failure to settle suit. If, as May contends, they [the statutes] operate as statutes of limitations, they must be pleaded and proved

by the estate as an affirmative defense or on a motion to dismiss. Under this characterization, May would be correct in his assertion that the estate's failure to raise the untimeliness issue constitutes a waiver.

(Slip Op. at 13) (emphasis added). Should this court adopt May's position on "Issue II", the "significant distinction" between jurisdictional statutes of nonclaim and statutes of limitation discussed by the Eleventh Circuit would become utterly insignificant. In fact, if this Court were to adopt May's position on "Issue II", the question actually certified by the Eleventh Circuit would be moot because §§ 733.702 and 733.710 would be waived regardless of whether they are considered statutes of limitation or jurisdictional statutes of nonclaim. Based on the foregoing, INIC respectfully requests that this Court deny May's invitation to look beyond the question actually certified by the Eleventh Circuit to reach May's "Issue II".

Even if this Court decides to accept May's invitation to look beyond the question certified by the Eleventh Circuit, May's position on "Issue II" has absolutely no basis in law or fact. In his initial brief, May fails to cite a single case specifically supporting his proposition that failure to raise a jurisdictional statute of nonclaim as an affirmative defense constitutes a waiver. Perhaps the aforementioned lack of legal authority is a result of the fact that every case in the State of Florida which has addressed May's "Issue II" in the context of § 733.702 or § 733.710 reached a conclusion which is

contrary to May's position. The foregoing would certainly explain why the Eleventh Circuit also determined that May's position on "Issue II" in the instant case was without merit.

Although May relies heavily on this Court's decision in *Barnett Bank of Palm Beach County v. Estate of Read*, 493 So.2d 447 (Fla. 1986) to attempt to support his position on the question actually certified to this Court by the Eleventh Circuit, it is interesting to note that May fails to make a single reference to *Barnett Bank* in his discussion of "Issue II". In *Barnett Bank*, this Court held that a prior version of §733.702 was a statute of limitations rather than a jurisdictional statute of nonclaim because no exceptions for fraud or estoppel were contained in the version of §733.702 being considered.<sup>1</sup> *Barnett Bank* at 448-49. In discussing the reason why the foregoing determination was necessary to a resolution of the case, the *Barnett Bank* court stated:

[W]e must decide whether the three-month limitation period in section 733.702 is a jurisdictional statute of nonclaim or a statute of limitations. An untimely claim filed pursuant to a jurisdictional statute of nonclaim is automatically barred. *Miller v. Nolte*, 453 So. 2d 397 (Fla. 1984). However, a claim filed beyond the time set forth in a statute of

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1 In 1988, the Florida Legislature added statutory exceptions to the jurisdictional bar of § 733.702 for fraud and estoppel in response to this Court's concerns in *Barnett Bank*. See Ch. 88-340, § 6, Laws of Fla.

limitations is only barred if the statute of limitations is raised as an affirmative defense or, if the defense appears on the face of the prior pleading, by way of motion to dismiss. Fla. R. Civ. P. 1.110 (d). Failure to plead that the statute of limitations has expired constitutes waiver. *Aboandandolo v. Vonella*, 88 So. 2d 282 (Fla. 1956); *Tuggle v. Maddox*, 60 So. 2d 158 (Fla. 1952). Thus, the estate contends that section 733.702 is a statute of nonclaim which automatically bars Barnett Bank’s claim, while Barnett Bank asserts that section 733.702 is a statute of limitations which the estate waived by its failure to object.

*Barnett Bank* at 448. (emphasis added). A comparison of the foregoing language from this Court with the analysis of the distinction between jurisdictional statutes of nonclaim and statutes of limitation in the Eleventh Circuit’s opinion in the instant case reveals almost identical reasoning. Therefore, it appears that May not only “respectfully disagrees” with the Eleventh Circuit on “Issue II” but also disagrees with the pronouncements of this Court, as well.

Every opinion of the District Courts of Appeal to be faced with May’s “Issue II” after this Court’s decision in *Barnett Bank* also reflects a conclusion contrary to May’s position. In *In re Estate of Parson*, 570 So.2d 1125 (Fla. 1st DCA 1990), the First District Court of Appeal held that amendments to the Florida Probate Code by the Florida Legislature after this Court’s holding in *Barnett Bank supra* evidenced the legislature’s intent that § 733.702 be construed as a jurisdictional statute of nonclaim rather than a statute of limitations. *Parson* at 1126. In reaching the foregoing

conclusion, the *Parson* court cited *Barnett Bank* with approval for the proposition that jurisdictional statutes of nonclaim automatically bar untimely claims regardless of whether they are raised as affirmative defenses. *Id.* See also *Comerica Bank & Trust, F.S.B. v. SDI Operating Partners, L.P.*, 673 So.2d 163, 166 (Fla. 4th DCA 1996) (citing *Barnett Bank* court's distinction between jurisdictional statutes of nonclaim and statutes of limitation with approval); *Baptist Hospital of Miami, Inc. v. Carter*, 658 So.2d 560, 563 (Fla. 3d DCA 1995) (acknowledging that a statute of repose constitutes an absolute bar to a claim or cause of action after a particular period regardless of the underlying circumstances); *Payne v. Stalley*, 672 So.2d 822, 823 (Fla. 2d DCA 1995) (holding claim time barred under §§ 733.702 and 733.710 despite specific finding that no affirmative defense related to §§ 733.702 or 733.710 raised by the estate in underlying Federal litigation); *In re Estate of Bartkowiak*, 645 So.2d 1082, 1084 (Fla. 3d DCA 1994) (holding that § 733.710 automatically extinguished judgment creditor's untimely claim regardless of whether creditor knew or should have known of its right to file a claim and regardless of whether personal representative had obligation to notify judgment creditor of record); *Thames v. Jackson*, 598 So.2d 121, 123 (Fla. 1st DCA 1992) (citing *Barnett Bank* court's distinction between jurisdictional statutes of nonclaim and statutes of repose with approval). Based on the foregoing, May's contention that §§ 733.702 and 733.710 can be waived if not raised as affirmative

defenses is directly contrary to long-standing Florida law. This Court should reject May's position on "Issue II" in accordance with the dictates of *stare decisis* and nothing referred to by May in his initial brief supports a contrary result.

May's initial brief fails to provide any basis in law or fact for his position that failure to raise a jurisdictional statute of nonclaim as an affirmative defense constitutes a waiver. May's reliance on *Grossman v. Selewacz*, 417 So.2d 728 (Fla. 4th DCA 1982); *In re Estate of Gay*, 294 So.2d 668 (Fla. 4th DCA 1974); and *Stern v. First National Bank of South Miami*, 275 So.2d 58 (Fla. 3d DCA 1973) for the proposition that applicable statutes of nonclaim must be pled as affirmative defenses is misplaced for several reasons. All of the foregoing cases involved the issue of whether and under what circumstances § 733.702 or its predecessor, § 733.16, could be raised in a motion to dismiss, not whether failure to raise the statute as an affirmative defense constitutes waiver. *Grossman* at 730; *Gay* at 669; *Stern* at 60. Additionally, none of the aforementioned cases involved or discussed § 733.710. Also, all of the foregoing cases were decided prior to the amendments to the Florida Probate Code referenced in *Parson supra* and *Thames supra* which reflected the legislature's intent that § 733.702 be construed as a jurisdictional statute of nonclaim. Most telling of all is this Court's discussion of Plaintiff's position in its opinion in *Barnett Bank supra*. In *Barnett Bank*, this Court held a prior version of § 733.702 was a statute of limitations rather than a

jurisdictional statute of nonclaim. *Barnett Bank* at 448. In doing so, this Court, citing *Grossman, Gay, and Stern*, stated:

[s]imilarly, other cases have used the nonclaim terminology when referring to section 733.702 and its predecessors, but have treated the statute as a statute of limitations by either requiring the estate to affirmatively plead the statute of limitations or...

*Barnett Bank* at 448. By clear implication, if the prior version of § 733.702 at issue in *Barnett Bank* had been a jurisdictional statute of nonclaim, there would have been no requirement that the estate affirmatively plead such a statute. Thus, if this Court answers the Eleventh Circuit’s certified question in the instant case in accordance with INIC’s position, then May’s failure to raise §§ 733.702 and 733.710 as affirmative defenses in the underlying wrongful death/personal injury action would not constitute a waiver.

May’s reliance on decisions from other jurisdictions and on certain cases involving the Florida product liability statute of repose is similarly misplaced. As previously indicated in this supplement, both this Court and the District Courts of Appeal in Florida who have directly addressed May’s “Issue II” have consistently ruled adversely to May’s position. Thus, the authorities cited by May from other jurisdictions to attempt to support his position have little, if any, relevance to the resolution of May’s “Issue II” in the instant case. Additionally, none of the cases from

foreign jurisdictions cited by May involve jurisdictional statutes of nonclaim in the probate context. Also, none of the cases from foreign jurisdictions cited by May resulted in a determination that the defendant waived the statute of repose by failing to raise it as an affirmative defense. *See McMahon v. Eli Lilly and Co.*, 774 F. 2d 830 (7th Cir. 1985) (holding that defendant waived statute of repose defense, even though raised as an affirmative defense, due to improper conduct of defendant's counsel); *Bonti v. Ford Motor Co.*, 898 F. Supp. 391, 394 (S.D. Miss. 1995) (holding that statute of repose pled by defendant and specifically stating that waiver issue not reached by Court); *Loftus v. Romsa Const. Co.*, 913 P.2d 856, 859 (Wyo. 1996) (holding Wyoming construction statute of repose sufficiently pled by defendant). Similarly, as acknowledged briefly by May in his initial brief, not a single one of the Florida cases cited by May involved a determination that the defendant had waived the Florida products liability statute of repose by not raising said statute as an affirmative defense. In each of the cases cited on page twenty-nine of May's initial brief, the courts simply state that the Defendant raised the statute of repose as an affirmative defense during the statement of the factual history of the case. Certainly, such passing references do not come close to supporting May's waiver position, especially in light of the multitude of prior Florida cases which are adverse to May's position.

May also contends that INIC is prevented from relying on §§ 733.702 and 733.710 in the “bad faith” action because May admitted liability in the underlying case. Again, May’s argument misses the point. Section 733.702 (1) specifically provides that the statutory time bar for filing claims applies regardless of whether the personal representative has recognized the claim by “paying part of it or interest on it or otherwise.” Section 733.702 (3) provides that untimely claims are barred even though no objection is made on the grounds of timeliness or otherwise unless an extension has been granted based upon one of the statutory exceptions. Section 733.702 (3) goes on to state that no independent action can be brought on an untimely claim unless an extension has been granted. Section 733.702 clearly supports the conclusion that no action by the personal representative, or the administrator ad litem in the instant case, can revive an untimely claim. Surely, if the statute provides that an independent action cannot even be filed on an untimely claim, then stipulation to liability by the administrator ad litem in such an improper action should have no effect on the viability of the statute. It is even clearer that actions by a personal representative or an administrator ad litem do not effect the application of § 733.710 because the statute specifically provides that it applies “[n]otwithstanding any other provision of the code,” which would included any provisions dealing with objections to claims or with the pursuit of independent actions against the estate. Were §§ 733.702 and 733.710

ordinary statutes of limitation which act as mere waivable procedural bars to prosecution of an action, May's argument might well have merit. *See Attache Resort Motel, Ltd. v. Kaplan*, 498 So.2d 501, 503 (Fla. 3d DCA 1986). However, if this Court adopts INIC's position on the question certified by the Eleventh Circuit, then §§ 733.702 and/or 733.710 act as automatic bars to untimely claims which cannot be waived by stipulating to liability or otherwise as lack of subject matter jurisdiction cannot be waived. *Id.*

In his initial brief, May urges this Court to accept his position on "Issue II" to "prevent Illinois National from escaping the consequences of its alleged bad faith failure to settle the claims filed against the estate." (May's Initial Brief at P. 32). The foregoing argument simply showcases the extent to which May has apparently forgotten his position in this case. If INIC prevails in this appeal, the Estate of Oscar Bradley and its beneficiaries, to whom May supposedly owes a fiduciary duty as administrator ad litem, would be completely insulated from any liability for the excess judgment at issue in this case. Despite the fact that the foregoing would certainly appear to constitute a favorable result for the estate and its beneficiaries, May is not supporting INIC's position. In fact, May has opposed INIC's position on this issue through summary judgment, appeal to the Eleventh Circuit and in the current proceedings before this Court. May asks this Court to rule that the judgment of over one million

dollars obtained by Prockup is valid and is an obligation of the estate he purportedly represents. All of this to “prevent Illinois National from escaping the consequences of its alleged bad faith.” However, there has been no determination that INIC acted in “bad faith” in handling the Prockup claim. If this Court accepts May’s position in this case and INIC is ultimately determined to have not acted in “bad faith”, it is difficult to see how the Estate of Oscar Bradley and its beneficiaries will “escape the consequences” of May’s actions as administrator ad litem.

## **CONCLUSION**

If this Court determines that §§ 733.702 and/or 733.710 are jurisdictional statutes of nonclaim or statutes of repose, INIC respectfully requests that this Court reject May's contention that failure to raise these statutes as affirmative defenses still results in a waiver.

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered to **Lefferts L. Mabie, III, Esquire**, Lefferts L. Mabie, P.A., 777 S. Harbour Island Boulevard, One Harbour Place, Suite 860, Tampa, Florida 33602; **Louis K. Rosenbloum, Esq.**, One Pensacola Plaza, Suite 212, 125 West Romana Street, Pensacola, Florida 32501, **Robert J. Mayes, Esquire**, 517 Deer Point Drive, Gulf Breeze, Florida 32561, and to **David McGee, Esquire**, Beggs & Lane, Blount Building, Suite 700, Pensacola, Florida 32501, by U.S. mail this \_\_\_\_\_ day of December, 1999.

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