

IN THE SUPREME COURT OF FLORIDA

S.C. Case No. SC14-1238

KUBICKI DRAPER, LLP.

Petitioner,

v.

ARCH SPECIALTY INSURANCE
COMPANY,

Respondent.

BRIEF OF PETITIONER ON JURISDICTION

Christopher J. Lynch, Esq.
HUNTER, WILLIAMS & LYNCH, P.A.
The Monarch Grove Building
2977 McFarlane Road, Suite 301
Miami, Florida 33133
Attorney for Petitioner

TABLE OF CONTENTS

	PAGE
INTRODUCTION	1
STATEMENT OF THE CASE AND FACTS	1
JURISDICTIONAL STATEMENT	4
SUMMARY OF THE ARGUMENT	4
ARGUMENT	
<u>THE DECISION OF THE DISTRICT COURT IN THIS CASE EXPRESSLY AND DIRECTLY</u> <u>CONFLICTS WITH THE DECISION OF THIS COURT IN <i>CABOT V. CLEARWATER CONST.</i></u> <u><i>CO.</i>, THE SECOND DISTRICT IN <i>GRAY V. EXECUTIVE DRYWALL</i> AND THE FIFTH DISTRICT</u> <u>IN <i>RAYNER V. AIRCRAFT SPRUCE - ADVANTAGE, INC.</i></u>	5
CONCLUSION	10
CERTIFICATE OF SERVICE	11
CERTIFICATE OF COMPLIANCE	11

TABLE OF AUTHORITIES

CASES	PAGE
<i>Cabot v. Clearwater Constr. Co.</i> , 89 So.2d 622 (Fla. 1956)	<i>passim</i>
<i>Gray v. Executive Drywall, Inc.</i> , 520 So.2d 619 (Fla. 2 nd DCA 1988)	<i>passim</i>
<i>Rayner v. Aircraft Spruce - Advantage, Inc.</i> , 38 So.3d 817 (Fla. 5 th DCA 2010)	<i>passim</i>

INTRODUCTION

This is Petitioner KUBICKI DRAPER, LLP's request for discretionary review of the decision of the Fourth District Court of Appeal, dated March 26, 2014, reversing a final summary judgment entered in favor of Petitioner. Petitioner will be referred to as KUBICK DRAPER or Petitioner. The Respondent will be referred to as ARCH SPECIALTY or Respondent. The Fourth District's Opinion, which is included as an Appendix to this jurisdictional brief, will be referred to as "Op."

STATEMENT OF THE CASE AND FACTS

ARCH SPECIALTY brought suit against KUBICKI DRAPER for legal malpractice alleging that it hired KUBICKI DRAPER to defend its insured, an accounting firm, in a civil action for accounting malpractice. In 2007, after KUBICKI DRAPER withdrew from representing the accounting firm, the accounting firm settled the lawsuit. ARCH SPECIALTY alleged that it suffered damages by having to fund the accounting firm's settlement in an amount which ARCH SPECIALTY claims was negligently inflated due to KUBICKI DRAPER's alleged legal malpractice. (Op. pgs. 1-2).

In 2012, five years after the settlement agreement was reached, KUBICKI DRAPER moved for summary judgment in the present legal malpractice claim, arguing that ARCH SPECIALTY was not the appropriate plaintiff. According to the

motion for summary judgment, Arch Insurance Company ("Arch Insurance") and not ARCH SPECIALTY, should have been named as plaintiff because the exhibits to the motion for summary judgment demonstrated that Arch Insurance paid the settlement. (Op. pg. 2).

ARCH SPECIALTY then requested leave to amend to reflect the correct name for the plaintiff. The trial court effectively denied the motion when it granted summary judgment for KUBICKI DRAPER indicating that "[t]here was no issue of fact that the Plaintiff, Arch Specialty Insurance Company, is the incorrect party to these proceedings and did not suffer any of the losses claimed." As the basis for its ruling, the trial court concluded that "when the correct party is incorrectly named the matter may be resolved simply under the doctrine of misnomer but when the incorrect party is correctly named, the remedy is substitution of parties." (Op. pg. 3).

In its Opinion, pg. 3, the Fourth District summarized the Parties' respective positions on appeal as follows:

On appeal, Arch Specialty argues the trial court abused its discretion by denying the motion to amend where Arch Specialty merely sought to correct a misnomer, and where even a substitution of parties would be permissible since the two insurance companies have an identity of interest. Kubicki argues that Arch Specialty sought to bring an entirely new party into the litigation

after the statutory limitations period expired. Kubicki also contends that the identity of interest exception to the relation back rule does not apply where Arch Specialty was inexcusably neglectful and further where Kubicki did not lull Arch Specialty into believing it had named the correct plaintiff.

In rejecting KUBICKI DRAPER's arguments and reversing the summary judgment, the Fourth District held that:

We find that the trial court erred in denying the motion to amend for two reasons. First, the mistake in the naming of the plaintiff was a misnomer and the Parties were all aware of the true identity of the party bringing suit. Second, Kubicki Draper's summary judgment submission show identities of interest between the incorrectly named plaintiff and the plaintiff that should have been named.

(Op., pg. 1).

The court further rejected KUBICKI DRAPER's additional contention that an amendment cannot relate back based on an identity of interest if the failure to name the correct party is due to inexcusable neglect. In so ruling the court specifically noted that the Fifth District decision in *Rayner Aircraft Spruce - Advantage, Inc.*, 38 So.3d 817 (Fla. 5th DCA 2010) rev. den. 64 So.3d 679 (Fla. 2011), was distinguishable. (Op. pg. 5, n.3).

KUBICKI DRAPER now seeks review respectfully submitting that the Fourth District's decision conflicts with this Court's decision in *Cabot v. Clearwater Constr. Co.*, 89 So.2d 622 (Fla. 1956), the Second District's decision in *Gray v. Executive Drywall, Inc.*, 520 So.2d 619 (Fla. 2nd DCA 1988) rev. den. 529 So.2d 694 (Fla. 1988), and the Fifth District's decision in *Rayner*.

JURISDICTIONAL STATEMENT

This Court has discretionary jurisdiction to review a decision of a district court of appeal that expressly and directly conflicts with a decision of the Supreme Court or another district court of appeal on the same point of law. *Art V., §3(b)(3) Fla. Const. (1980); Fla. R. App. P. 9.030(a)(2)(A)(iv).*

SUMMARY OF THE ARGUMENT

The decision of the Fourth District Court of Appeal below expressly and directly conflicts with the decision of this Court in *Cabot v. Clearwater Constr. Co.*, the Second District's decision in *Gray v. Executive Drywall Inc.* and the Fifth District's decision in *Rayner v. Aircraft Spruce - Advantage Inc.*, all of which recognize that while the filing of an amended complaint to correct a misnomer relates back to the filing of the original complaint, the rule does not apply where a new party is added. The Fourth District's characterization of the defect in this case as a misnomer while at the same time recognizing that the two corporations involved were

separate legal entities expressly and directly conflicts with the holding of the Second District in *Gray* wherein the Second District concluded, on almost identical facts, that the naming of the improper party did not involve a misnomer and that the amendment would not be permitted even though the newly added defendant knew it could have been named originally as a defendant and therefore suffered no prejudice by it being added after the running of the statute of limitations.

Second, the Fourth District also incorrectly applied the "identity of interest" exception, in direct conflict with *Rayner*, where such a new party is added, since the failure to initially name the proper party, Arch Insurance Company, was due to the inexcusable neglect of the originally named Plaintiff, ARCH SPECIALTY. For these reasons, Petitioner respectfully requests that the Court grant this Petition and exercise its discretionary jurisdiction.

ARGUMENT

THE DECISION OF THE DISTRICT COURT IN THIS CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THIS COURT IN *CABOT V. CLEARWATER CONST. CO.*, THE SECOND DISTRICT IN *GRAY V. EXECUTIVE DRYWALL* AND THE FIFTH DISTRICT IN *RAYNER V. AIRCRAFT SPRUCE - ADVANTAGE, INC.*

Petitioner respectfully contends that the district court's decision below is in direct conflict with this Court's decision in *Cabot*, the Second District's decision in *Gray* and the Fifth District's decision in *Rayner*. In *Cabot*, this Court explained the

relation back doctrine, set forth in *Florida Rule of Civil Procedure* 1.190(c),¹ as follows:

The general rule appears to be that whether an amendment of process or pleading changing the description of a party from a corporation to an individual or vice versa after the statute of limitations has run introduces a new party or new cause of action depends upon whether the mis-description is interpreted merely as a misnomer or defect in the characterization of the party or whether it is deemed an entire change of parties. If the former, the amendment relates back to the commencement of the action. If the latter, the amendment amounts to the institution of an entirely new action.

At 633-64, cites omitted (emphasis supplied).

Clearly, in the instant case the Respondent sought to do more than merely "correct a misnomer," as concluded by the Fourth District. Rather, as the Fourth District opinion itself demonstrates, the corporations are separate legal entities incorporated in different states. (Op. pg. 2). Hence, the Respondent sought to bring in an entirely new party years after the statute of limitations expired.

¹Rule 1.190(c) provides that an amendment relates back to the date of the original filing, "When the claim or defense asserted in the amended pleading arose out of the conduct, transaction or a occurrence set forth or attempted to be set forth in the original pleading."

The decision below is also in conflict with the district courts' decisions in *Gray* and *Rayner* both of which also emphasized that the relation doctrine does not apply when a new party is added. In *Gray* the plaintiff attempted to add a new party defendant. Like ARCH SPECIALTY and Arch Insurance, the defendants in *Gray* were related corporations.

Notwithstanding that the party that *Gray* attempted to add as a defendant had knowledge of the litigation prior to the running of the statute and thereby suffered no prejudice by being added after the running of the statute of limitations, the court found that the relation back doctrine would not apply. Emphasizing that the principle of misnomer did not apply, the court in *Gray* stated that the defendant had no obligation to advise the plaintiff who to sue. *Id.* at 620. This holding by the Second District in *Gray* expressly and directly conflicts with the Fourth District's holding in this case permitting the amended pleading to relate back simply because KUBICKI DRAPER would not be prejudiced by the substitution of a new plaintiff.

Further, the second basis for the Fourth District's decision - that because there was an identity of interest between the two corporate entities the amendment should have been permitted, further conflicts with *Rayner* which demonstrates that if the plaintiff's failure to name the correct party is due to the plaintiff's own inexcusable neglect, the relation back doctrine would not apply.

In *Rayner* the purchaser of a parachute which was installed on an ultralight airplane filed suit when the parachute failed to open, causing a crash. Shortly before the statute of limitations was due to expire, in an attempt to determine the proper distributor and manufacturer of the parachute, the plaintiff was told by James Irvin, a principal of a company known as "Specialty," the distributor of the parachute, that the Plaintiff should sue the manufacturer Ballistic Recovery Systems.

Subsequently, and immediately before the expiration of the statute of limitations, the plaintiff sought leave to amend the complaint to add the manufacturer and the distributor. However, the amended complaint incorrectly named another distributor which was also co-owned by James Irvin. The distributor actually sued was Aircraft Spruce Advantage Inc. and not the actual distributor, Specialty. The two distributors operated separately in different cities, notwithstanding the common ownership by James Irvin.

It was only after the statute had expired, that the plaintiff sought leave to amend to add the correct distributor, Specialty, as a defendant. The trial court allowed Specialty to be added to the suit but then granted summary judgment in favor of Specialty, finding that it had not been timely sued.

The Fifth District affirmed the summary judgment stressing that the appellant sought to do more than merely correct a misnomer. *Id.* at 819. In so ruling the court

also emphasized that the appellant's failure to join the correct defendant was attributable solely to his own inexcusable neglect given the undisputed fact that the plaintiff was aware of the correct defendant. *Id.* at 820 n2.²

In the present action there can be no question that the Respondent's failure to name the correct the party until 3 years after the statute of limitations had run, was also due to inexcusable neglect. It is inconceivable that despite Arch Insurance Company's involvement in settling the underlying action, that Arch Insurance Company would not have been properly named in the initial complaint which was filed prior to the running of the statute of limitations.

For these reasons, Petitioner respectfully submits that the Fourth District's decision conflicts with *Cabot, Gray* and *Rayner*. The Fourth District has for the first time applied the misnomer standard to a case involving the addition of an entirely new party.

The Fourth District's further conclusion that simply because there may have been an identity of interest between ARCH SPECIALTY and Arch Insurance and

²*Rayner* at 820, also cites *Gray* for the holding that even knowledge of litigation against a party with some identity of interest prior to expiration of the statute of limitations should not serve as the basis for allowing addition of a new party not timely sued. This holding of *Gray* expressly and directly conflicts with the Fourth District's statement that the trial court erred because there are identity of interests, between Arch Specialty and Arch Insurance, and that all parties were aware of the true identity of the party bringing suit. (Op. pg. 1)

because KUBICKI DRAPER was not prejudiced, the amendment should have been permitted, conflicts with *Gray* and *Rayner* especially since the failure of ARCH SPECIALTY to name the correct party was due to inexcusable neglect. In so ruling, the Fourth District has essentially adopted a new standard which renders meaningless the statute of limitations which may be applicable to a given case.

CONCLUSION

For the reasons set forth above, the Petitioner requests that the Court exercise its discretionary jurisdiction and review the merits of the Fourth District's decision.

CERTIFICATE OF SERVICE

WE CERTIFY that a true and correct copy of the foregoing was sent by e-mail this 30th day of June, 2014 to: Carlos Mustelier, Winget, Spadafora & Schwartzberg, LLP, 14 NE 1st Avenue, Suite 600, Miami, FL 33132, Mustelier.c@wssllp.com and to the Clerk of the Fourth District Court of Appeals.

Respectfully submitted,

/s/Christopher J. Lynch
CHRISTOPHER J. LYNCH
FBN: 331041
HUNTER, WILLIAMS & LYNCH, P.A.
The Monarch Grove Building
2977 McFarlane Road, Suite 301
Miami, Florida 33133

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Jurisdictional Brief of Petitioner was prepared in 14- point Times New Roman font and Electronically filed with the Clerk of Court on June 30th, 2014.

/s/CHRISTOPHER J. LYNCH
FBN: 331041