April 1, 2004

Via Facsimile (732-981-2491)
Honorable Diane X. Pincus, JSC
Middlesex County Court House
1 JFK Square
New Brunswick, New Jersey 08903

RE: MISIEWICZ V. SUNCOR ASSOCIATES, ET AL.- 2674-01
Our File No.: 61A-2432

Defendant Purvis' 2nd Motion for Reconsideration

Dear Judge Pincus:

Rather than waste space, we will simply use the following format to launch our responding personal attacks at defense counsel: In the reply brief defense counsel has [insert personal attack here], he has also [insert personal attack here] Furthermore defense counsel is [insert personal attack here]. As to his statement in footnote 1 that implies they were not provided the appendix until yesterday, we phoned Lawyer's Service and confirmed it was in fact delivered on Monday the 29th. [insert personal attack here]

Additionally, defense counsel has known for a year the three basis upon which we would oppose this motion (none of which of course were decided in *Greczyn*). Nevertheless, he has waited until a reply brief to address them. This is improper. *A.D. v. Morris County Bd. of Social Services*, 353 N.J.Super. 26, 30 (App. Div. 2002) ("It is improper to raise an argument for the first time in a reply brief. Typically, such an argument will not be recognized.") (citations omitted); *Pressler, Current N.J. Court Rules*, comment on *R.* 2:6-5 (2002). [insert personal attack here] At the very least, we should be permitted to address these new arguments by way of this supplemental opposition.

Now to the important part.

I. "the more specific identification of the fictitiously-designated defendant [does] not introduce a new party or a new cause of action"

Rule 4:49-2 clearly states a motion for reconsideration has to be made within 20 days. Plaintiffs do dispute defendant's argument that Rule is somehow inapplicable under these circumstances. Furthermore, defendant asserts this motion is warranted under the "new controlling authority" circumstances. However, as we made clear, the *Greczyn* opinion did not

address nor decide the particular legal issues presented to this Court in this case. Thus, while *Greczyn* may be new authority, it is not controlling nor precedential authority.

Defendant does not and can not dispute that current, controlling Supreme Court law is clear that under the fictitious party rule "the more specific identification of the fictitiously-designated defendant [does] not introduce a new party or a new cause of action". *Viviano,* 101 N.J. at 548; *Farrell,* 62 N.J. at 120-23. Defendant also does not and can not dispute that the *Greczyn* language that- "a defendant who is named beyond the ten-year period [is not] subject to suit under the principles of fictitious party practice..." *Greczyn,* 2004 WL at 1- is inconsistent with this clear Supreme Court law. Indeed, since the Supreme Court clearly says a new party is not named, how can it be that the party is deemed to fall outside the 10 years? In fact, not only does defendant not dispute this fact, he does not even address it, hoping this inescapable reality will somehow be lost in his mis-mash of baseless personal attacks.

While it is true the Supreme Court decisions of *Viviano,* 101 N.J. at 548 and *Farrell,* 62 N.J. at 120-23 came out before *Greczyn*, the mere passage of time from an earlier Supreme Court decision, without the undermining of the rationale of that decision by either the New Jersey or United States Supreme Court, is not a basis for determining that the earlier decision is no longer controlling authority. *Haber v. Haber*, 253 N.J.Super. 413, 417 (App.Div. 1992). In other words, subsequent decisions by interim appellate courts cannot by "mere force of chronological circumstances" overrule an earlier rule of law set down in a Supreme Court decision. *State v. Turetsky,* 78 N.J.Super. 203, 214 (App.Div. 1963). Defendants' position amounts to the argument that this Court has to now ignore the earlier Supreme Court law that clearly says the amendment does not add a new party because of the more recent decision in *Greczyn*. Given the undisputable reality that the Supreme Court is the highest court in the state, this position is clearly incorrect. Thus reconsideration is not in order because given this clear Supreme Court law, there is no new "controlling" authority because the Supreme Court trumps the interim appellate court, even where the Supreme Court decisions pre-date the relied upon appellate decision. *Id.*

Not only is *Greczyn* not controlling authority given the Supreme Court decisions of *Viviano,* 101 N.J. at 548 and *Farrell,* 62 N.J. at 120-23, but it is also not instructive here because it neither addressed nor decided the *legal* issues squarely presented here. In trying to distract the Court here from the reality that the legal issues now presented in this case were neither presented nor decided by neither the Law Division nor the appellate court in *Greczyn*, defendant makes much to do about opinions held and statements made before the *Greczyn* decision even came out. However, *inter alia*, since such statements were made before the *Greczyn* decision was issued, they are simply of no moment because there is no way to tell what legal issues the court squarely intended to and did decide months before the opinion is even issued. *see, e.g., Feldman*, 125 N.J. 117 at 132 ("the precedential effect of an opinion depends on the court's intention to resolve an issue squarely presented.").

Defendant argues the factual issues in *Misiewicz* and *Greczyn* are identical. This is incorrect because in *Greczyn*, unlike here, there was no dispute as to the date the CO was released. Even were the facts otherwise identical, such simply does not equate to an identity of legal issues.

This factual vs. legal issue distinction is critical because were facts the only component of the *stare decisis* analysis, irrespective of varying legal issues presented, argued and decided, the law would become hopelessly contorted. ***Consider the following simple auto hypothetical***: Suppose a plaintiff driver was injured in an auto accident by a defendant who ran a red light. At the time of the accident the plaintiff was uninsured and intoxicated. The issue presented on appeal, "one of first impression," is whether this uninsured plaintiff was barred from suing because he was intoxicated at the time of the accident. The appeals court rules in a reported decision (A v. B) that this uninsured driver is not barred from bringing a claim, even though he was intoxicated at the time. The parties do not raise and the issue was never decided, whether the plaintiff should be barred from suing because he is uninsured.

Later in another case, C v. D, with different parties and a different defense attorney, but the exact same facts- an uninsured, intoxicated driver is injured by a driver who runs a red light- the defense attorney decides to move for summary judgment arguing that since the plaintiff was uninsured at the time of the accident, he should be barred from suing. The plaintiff attorney then relies on the reported decision in A v. B where the uninsured, intoxicated driver was not barred from suing. The plaintiff attorney argues that since A v. B was a case of "first impression" with identical facts, that A v. B controls C v. D. Defense counsel argues A v. B does not control C v. D because although the facts are the same, the legal issues presented in C v. D are different than those presented and squarely decided in A v. B. That is, although both cases involved intoxicated, uninsured drivers, the only issue raised, addressed and decided in A v. B was whether intoxication was a bar to suit.

This hypothetical shows that were *stare decisis* to mean, as defendant argues, that courts must mechanistically arrive at the same result in cases with similar facts, regardless of the legal issues presented and argued, the law would become hopelessly convoluted as it would mean, under this hypothetical, uninsured drivers would be free to sue. While the bar against uninsured drives is of course statutory in New Jersey, the point is that the danger of convoluted law from this erroneous concept of *stare decisis* is readily apparent. *Feldman*, 125 N.J. 117 at 132 ("the precedential effect of an opinion depends on the court's intention to resolve an issue squarely presented.").

In the instant case, the arguments advanced by counsel for Purvis are analogous to the arguments advanced by the plaintiff attorney in C v. D. He argues that the *Greczyn* opinion controls the question of how the clear Supreme Court law that "the more specific identification of the fictitiously-designated defendant [does] not introduce a new party or a new cause of action" *Viviano,* 101 N.J. at 548; *Farrell,* 62 N.J. at 120-23- impacts the question presented here and not decided in *Greczyn*: whether or not Purvis was named in the original complaint. He takes the same position on the constitutional issue. Putting aside the fact that the Supreme Court has already answered this question in the affirmative, *Id.*, as the *Greczyn* court clearly did not address that issue vis a vis the clear pronouncements in *Viviano* and *Farrell*, this Court is free to decide that issue anew. Furthermore, even if *Greczyn* did decide the question in the negative, this Court is bound to follow the Supreme Court which had earlier answered it in the affirmative. *Turetsky,* 78 N.J.Super. at 214 (subsequent decisions by lower courts cannot by "mere force of chronological circumstances" overrule earlier decisions of higher courts).

Thus, whether or not the issue in *Greczyn* was one of "first impression" is immaterial to whether: a) the precise issues raised here were squarely decided there (and they were not) and; b) whether this court is bound to follow the Supreme Court decisions which clearly decide the issue raised here in the affirmative. Additionally, whether or not plaintiffs counsel argued in a Certification in support of a motion to intervene filed some ten months before the *Greczyn* decision is simply immaterial to whether the *Greczyn* court squarely addressed the legal issues now presented to this court.[1]

Indeed, defendant argues that when the facts presented in a case are the same, that the court much mechanistically reach the same result regardless of the legal issues presented in the subsequent case. This is clearly not the law. *Feldman*, 125 N.J. 117 at 132 ("the precedential effect of an opinion depends on the court's intention to resolve an issue squarely presented."); *Pelow*, 300 N.J.Super. at 636-37; *Graf*, 208 N.J.Super. at 244; (trial court is bound to follow ruling of appellate court only when "*same issues are present*")

II. Defendant's Arguments are Constitutionally Invalid

In its reply, defendant misinterprets not only the case law cited by plaintiff but also over simplifies the issue whether defendant's proposed application of the statute of repose invades the exclusive rule-making authority of the New Jersey Supreme Court. As explained in plaintiff's original submission, rules promulgated by the Supreme Court are presumed to be constitutional and it is the defendant's burden to establish that the application of the fictitious party rule in *R.* 4:26-4 invades the functions and power of the Legislature. *Suchit v. Baxt*, 176 *N.J. Super.* 407, 424-425 (Law Div. 1980). Here, it is undisputed that a motion to amend a complaint to further identify a previously sued party is a matter of practice and procedure, not of substantive law. As such, the statute of repose may not override *R.* 4:26-4 and plaintiff properly invoked the rule in more specifically identifying Jack A. Purvis as a defendant.

In *Winberry v. Salisbury*, 5 *N.J.* 240 (1950), the New Jersey Supreme Court recognized that substantive law defines the rights and duties of the parties. *Id.* at 247-48. Contrarily, procedural law

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[1]Furthermore, as stated previously, the motion to intervene in *Greczyn* was made because we knew that defense counsel would, as he is doing here, try to use it as precedential. While defense counsel quotes incomplete snippets to try to personally attack plaintiffs counsel and distract this Court from the real issues, a reading of the arguments in that Certification together with the procedural posture of that case vis a vis the motion for reconsideration and motion to intervene show there is no inconsistency in the arguments. Judge Ciccone denied the motion thus mooting out those new arguments and thus otherwise disagreeing with the argument that the issues are in fact sufficiently similar. Furthermore, the argument that the issues were similar vis a vis the motion for reconsideration was clearly tied to the claims and defenses and the fact that defense counsel would try to use it as precedential. These arguments as to similarity of factual issues, which were rejected by Judge Ciccone anyway, simply have no impact on what *legal* issues were ultimately raised and decided in the *Greczyn* appeal nearly a year later.

controls the means by which the parties may exercise those rights and duties. *Id.* Explained another way, if the matter "is but one step in the ladder to final determination and can effectively aid a court function, it is procedural in nature and within the Supreme Court's power of rule promulgation." *Suchit v. Baxt*, 176 *N.J. Super.* 407, 427 (Law Div. 1980).

In its brief, the defendant broadly contends that the whole of the statute of repose is substantive in nature and prevails over *R.* 4:26-4. The New Jersey Supreme Court, however, has indicated that a law or rule may defy precise categorization because statutes and rules have both procedural and substantive implications. *Knight v. City of Margate*, 86 *N.J.* 374, 388-89 (1981). Moreover, it has commented that "'[t]he line between 'substance' and 'procedure' shifts as the legal context changes. Each implies different variables depending upon the particular problem for which it is used.'" *State v. Leonardis*, 73 *N.J.* 360, 373 (1977).

Because the line between substance and procedure is not concrete, the Court has expressed the notion that constitutional powers may blend. *See id.* at 370-71. Specifically, it has explained:

> It is well settled that while the doctrine of separation of powers is designed to prevent a single branch from claiming or receiving inordinate power, there is no bar to cooperative action among the branches of government. On the contrary, the doctrine necessarily assumes the branches will coordinate to the end that government will fulfill its mission.

[*Id.* at 371 (quoting *Brown v. Heymann*, 62 *N.J.* 1, 11 (1972)).] Based upon above, in *Leonardis*, *supra*, the Court held that aspects of pretrial intervention ("PTI") that were procedural in nature were within its rule-making power. *Id.* at 374. Conversely, it held that the Legislature was within its constitutionally-delegated authority to enact measures "affecting the substantive aspects of PTI." *Id.* This sharing of responsibility for PTI preserved the "concomitant responsibility which have been given to the Court by the Constitution." *Id.* To hold otherwise "would render the Court's constitutional power over practice and procedure ephemeral at best, would severely distort the separation of powers concept, and would put at risk the very independence of the judicial branch of government." *New Jersey District Court Assoc. v. New Jersey Supreme Court*, 205 *N.J. Super.* 582, 588 (Law Div. 1985).

Here, contrary to the suggestion of the defendant, plaintiff does not contend that the ten-year limitations period in the statute of repose is unconstitutional in its entirety. Instead, plaintiff challenges defendant's argument that the Legislature may constitutionally limit the application of *R.* 4:26-4 and the Supreme Court's decisions that have delineated when an action has been brought pursuant to the fictitious party rule. In relevant part, the statute of repose provides that "[n]o action . . .shall be brought . . . more than 10 years after the performance or furnishing of such services and construction." *N.J.S.A.* 2A:14-1.1. The statute, however, does not define the meaning of the term "brought." *See id.* Moreover, it is silent as to the application of *R.* 4:26-4. As such, the statute of repose and the fictitious party rule do not expressly conflict and it may not be said that the Legislature considers the issue of when an action has been brought, or deemed to have been brought, to be one of substance.

Instead, based upon Supreme Court precedent, it has been held that the fictitious party rule, and its effect on when an action is brought against a defendant, involves a matter of practice and procedure. In *Farrell v. Votator*, 62 N.J. 111 (1973), the Supreme Court clearly explained that "[t]he plaintiffs' cause of action was not changed, nor was a new party added by the amendment identifying Votator as the true party referred to under the fictitious name John Doe in the original complaint." *Id.* at 120. Similarly, in *Viviano v. CBS,* 101 N.J. 538 (1986), it reiterated that "the more specific identification of the fictitiously-designated defendant did not introduce a new party or a new cause of action." *Id.* at 548. Consequently, the Supreme Court has recognized that R. 4:26-4 is procedural in nature. *See Farrell*, *supra*, 62 *N.J.* at 120 (describing fictitious party rule as "procedural").

The defendant's interpretation of the statute of repose does not merely implicate procedural issues. Contrarily, the defendant's reading is incompatible with the Court's promulgation of *R.* 4:26-4 and its decisions and directly interferes with the judiciary's role in providing the mechanisms for resolving disputes. *See Alan J. Cornblatt, P.A. v. Barow*, 153 *N.J.* 218, 248 (1998) (noting affidavit of merit statute is not "incompatible" with court rules and will not "interfere" with judiciary role). Because *R.* 4:26-4 is but one step in the ladder to final determination, it is procedural in nature and within the Supreme Court's constitutional rule-making authority. Moreover, the fact that the statute of repose may have substantive aspects does not preclude the Supreme Court from promulgating rules of practice and procedure. Like in *Leonardis*, *supra*, the Court was entitled to enact *R.* 4:26-4 and the fictitious party practice. Thus, the constitutional delegation of authority to the Supreme Court commands that the procedural mechanisms in *R.* 4:26-4 be applied in this matter, and plaintiff respectfully requests that the Court deny defendant's motion for reconsideration.

Finally, this Court's recognition that defendant's interpretation of the statute of repose impedes upon the Supreme Court's exclusive rule-making authority does not nullify the whole of the statute of repose. Instead, as reiterated by the Court in *Hamilton Amusement Center v. Verniero*, 156 *N.J.* 254 (1998), "[w]hen a statute's constitutionality is doubtful, a court has the power to engage in 'judicial surgery,' construing the statute in a constitutional way." *Id.* at 279-80. In this respect, the Court may construe the statute of repose's ten-year limitation period as a valid and constitutional exercise of the Legislature, but permit a party to utilize the fictitious party rule in *R.* 4:26-4. Therefore, based upon the above, as a matter of practice and procedure, *R.* 4:26-4 is a valid promulgation of the New Jersey Supreme Court and the plaintiff properly invoked this rule when naming Jack A . Purvis as a defendant.

III. Defendant can not make out a prima facie Statute of Repose defense and certainly not beyond any question of fact.

Defendant's inability to satisfy his burden of proving this affirmative defense is rather clear and we will only further respond to a few points.

First, the action is clearly deemed commenced when the motion to amend, with the proposed amended complaint attached, is filed, which in this case was on or about August 9th. *Northwestern Nat. Ins. Co. of Milwaukee, Wis. v. Alberts*, 769 F.Supp. 498, 510 (S.D.N.Y. 1991) ("New

Jersey law is consistent with the Second Circuit in establishing the date of the filing of the motion to amend as the date of the commencement of the Cosgrove Defendants' action against Esrine."); *citing Campbell v. Union Beach*, 153 N.J.Super. 434, 438 (App.Div.1977) ("We hold that if an original defendant moves pursuant to the requirements of R. 4:8-1(a) to join a third-party defendant before the period of limitations expires, and attaches a copy of the proposed third-party complaint to the motion in accordance with the rule, the third-party complaint is deemed filed and the third-party action commenced when the motion s filed. This result fairly complies with R. 4:2-2 which states 'A civil action is commenced by filing a complaint with the court.'); *Murray v. Barnegat Lighthouse*, 200 N.J.Super. 534, 537 (App.Div. 1985) (deeming time limitations of Title 59 Tort Claims Act satisfied when motion was brought for leave to file late notice of claim was filed); *Ioannou v. Ivy Hill Park Section Four, Inc.*, 112 N.J.Super. 28, 40 (Law Div.1970) ("they became parties as third-party defendants, so far as any statute of limitations problem is concerned, when the motion for leave to serve the third-party complaint was filed.)

Second, Mr. Mack's Certification of March 31, 2003, which does not establish for defendants the date the CO was released[2] anyway, is completely voided by his subsequent certification of April 2, 2003 where he Certified:

> I did not work in the Howell Township Construction office in 1991. I have no personal knowledge as to the date the Certificate of Occupancy for the Misiewicz office space at Candlewood Commons was issued and released to Misiewicz. I can only speculate based on documents in the Howell Township Construction Office. As has already been stated, the construction office was the subject of a state investigation that uncovered systemic record keeping deficiencies and led to the revocation of the licence of the construction official.

(*Exhibit P,* Certification of Edward Mack). Thus, as defendant can not establish a prima facie case as to when the CO was released:

> 1) defendant has no one who can testify as to the date the CO was released;
>
> 2) the purported CO is not admissible as a business record, because, given the systemic record keeping deficiencies of the Howell Construction office in 1991 which led to a state investigation and the revocation of the construction official's license, and of course as further evidenced by the wrong date listed on it, it is not trustworthy. Not only is the date incorrect, but given these serious record keeping problems, the rest of the information is clearly suspect;
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> 3) even if the CO were admissible, defendant has no one who can correct the error

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[2]New Jersey law is clear substantial completion is when the architect certifies his work is complete, the building can be safely occupied and a certificate of occupancy is released. *See, e.g., Russo Farms v. Vineland Bd. of Ed.*, 144 N.J. 84, 117 (1996)

of the wrong date listed on the document; Mr. Mack has already certified he has no personal knowledge and can only speculate based on the documents in his office, which given the systemic record keeping problems which led to a state investigation and the revocation of the construction official's license, are not reliable even if he were permitted to so speculate.

Accordingly, it is respectfully requested defendant's motion be denied.

Respectfully,

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