STATE OF MICHIGAN

IN THE SUPREME COURT

PAULETTE STENZEL,

Plaintiff-Appellee,

v.

BEST BUY CO., INC.,

Defendant

and

SAMSUNG ELECTRONICS AMERICA, INC.

Defendant-Appellant.

Supreme Court No. 156262

Court of Appeals Docket No. 322018

Ingham Co. Cir. Ct.
Case No. 14-000427-NO

Lawrence P. Nolan (P25908)
Gary G Villas (P43399)
Nolan, Thomsen &Villas, P.C.
Attorneys for Plaintiff-Appellee
239 S. Main St.
Eaton Rapids, MI 48227
(517) 663-3306
Boardmem15@aol.com

Paul E. Tower (P49151)
Caryn A. Ford (P69590)
Garan Lucow Miller P.C.
Attorneys for Defendant Best Buy Co., Inc.
1155 Brewery Park Blvd., Ste. 200
Detroit, MI 48207
(313) 446-5552
cford@garanlucow.com
ptower@garanlucow.com

Paul L. Nystrom (P57067)
Jill M. Wheaton (P49921)
Dykema Gossett PLLC
Attorneys for Defendant-Appellant Samsung Electronics America, Inc.
39577 Woodward Ave., Ste. 300
Bloomfield Hills, MI 48304
(248) 203-0700
pnystrom@dykema.com
jwheaton@dykema.com

DEFENDANT-APPELLANT SAMSUNG ELECTRONICS AMERICA, INC.'S REPLY BRIEF

ORAL ARGUMENT REQUESTED

THIS APPEAL INVOLVES A RULING THAT PORTIONS OF A STATUTE ARE INVALID

DYKEMA GOSSETT•A PROFESSIONAL LIMITED LIABILITY COMPANY•39577 WOODWARD AVENUE, SUITE 300•BLOOMFIELD HILLS, MICHIGAN 48304

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Court Rules

Samsung Electronics America, Inc. ("SEA") submits this Reply to Plaintiff-Appellee's Response to SEA's Brief on Appeal ("Pl's Br."). Plaintiff's Brief consists of little more than the parroting of two things – the Court of Appeals Special Panel's findings, followed by the conclusory statement that each finding was correct, without any analysis or showing as to why that is purportedly the case; and repetition of the statement "statutes of limitations are procedural in nature", as if this were a mantra which alone requires affirmance. But when the issues are actually analyzed; the case law is reviewed and applied; and the statute and court rule are enforced as written; it is clear that the Special Panel erred and this Court should reverse.

I. THE SPECIAL PANEL ERRED IN FINDING AN IRRECONCILABLE CONFLICT BETWEEN THE COURT RULE AND THE STATUTE.

The statute and court rule can be read in harmony, and therefore there is no irreconcilable conflict between the two. The statute requires a plaintiff to file a motion for leave to amend a complaint to add an entity identified by a notice of non-party fault, and the court rule says nothing on the subject of a motion. The court rule does not state that a motion is *not* required, or that the court rule was abrogating the statutory motion requirement. One can read them together to conclude that a motion, filed within 91 days of the notice, is required before a complaint can be so amended; that leave to amend will be granted if the motion is timely filed; that the amended complaint will relate back to the date of the filing of the original complaint; and that this type of amendment is not done through the other court rule that governs amendment of pleadings (under which relation back would not apply). Such an interpretation is consistent with the plain language of both the statute and the court rule.

In response, Plaintiff simply argues that there is a conflict because "the court rule does not require a Motion prior to the filing of an Amended Complaint and the court rule [sic,

presumably Plaintiff means "statute"] does." (Pl's Br., p. 7.) Plaintiff is wrong. Just because a motion is not mentioned in the court rule, when it is required by the statute, does not mean that a motion is no longer required. Repudiation of a statutory requirement is not done by silence. To the contrary, by referring back to the statute, the court rule is implementing, and not replacing and repealing, the statute, including its requirement of a motion.

SEA cited the legal maxim that clear and unambiguous language in court rules and statutes are to be given their plain meaning and enforced as written. (SEA's Br., p. 12.) Plaintiff agrees and pays lip service to this maxim. (Pl's Br., p. 6.) But she then argues precisely the opposite, advocating affirmance of the Special Panel's decision, which reads the motion requirement *out of* the statute, and reads a waiver of the motion requirement *into* the court rule.

SEA also noted that the holding that the statutory motion requirement is invalid because it conflicts with a court rule operates as a finding that the statute is unconstitutional, which is the kind of finding that should never be made lightly. And SEA noted that any doubts must always be weighed in favor of the validity of a statutory requirement. (SEA's Br., p. 13, 14.) Plaintiff did not respond to either argument.

SEA argued that the Special Panel improperly invalidated the statutory motion requirement based on its own value judgments and belief that the requirement was a waste of time. And SEA pointed out the benefits behind the motion requirement. Yet Plaintiff did not respond to these points either.

The answer to the first question posed by this Court – is there a conflict between the statute and the court rule – is no.

II. THE SPECIAL PANEL ERRED IN HOLDING THAT A PARTY MAY AMEND A COMPLAINT UPON NOTICE OF NONPARTY FAULT WITHOUT FIRST FILING A MOTION.

The Special Panel erred in not enforcing the statute as written but rather, in finding a conflict and then holding that the court rule overrides the statute. There is no conflict, and both, including the statutory motion requirement, can and should be applied and enforced. To not require the filing of a motion is to not enforce the statute, and to find that an express statutory requirement is trumped by a silent court rule is error.

SEA then argued that even if there was a conflict, the statute, not the court rule, would govern in this case. As set forth in SEA's brief (pp. 19-20), in *McDougall v Schanz*, 461 Mich 15, 30; 597 NW2d 148 (1999) this Court discarded what it viewed as an excessively mechanical approach to analyzing the boundaries between judicial and legislative rulemaking authority. In essence, the Court found that some of its previous decisions had relied too heavily on superficial "procedural" and "substantive" labels when considering whether rules fell within the purview of judicial or legislative rulemaking authority. Instead, this Court set forth a more functional approach, recognizing that rules with procedural elements may nevertheless be within the legislative prerogative when they are connected to substantive rights. 461 Mich at 30. This shift was solidified four years later in *Gladych v New Family Homes, Inc*, 468 Mich 594, 600-01; 664 NW2d 705 (2003) which concluded that the limitation periods provided by a statute served substantive goals, and therefore the statutory requirements regarding the tolling of the statute of limitations superseded a conflicting court rule.

The Special Panel ignored the central premise of *McDougall* and *Gladych* by concluding that it was "beyond rational argument" that the question of whether a pleading can be amended is a matter of practice and procedure which "does not concern" substantive law. Thus, per the Special Panel, any court rule in conflict —here, MCR 2.112(K)(4) — must supersede. (Special

Panel Opinion, p. 8, JA 235a.) The Special Panel ignored the fact that the amendment often involves, as here, the potential tolling of a statute of limitations, which is a substantive issue.

Similarly, Plaintiff acts as if the shift in *McDougall* and *Gladych* never happened. At least she acknowledges that statutes of limitations are involved, but then says over and over that "Michigan courts…have held that that statutes of limitations are procedural in nature", as if that ends the inquiry. (Pl's Br., pp. 8, 9, 12, 13.) It does not, and the cases cited by Plaintiff are inapposite.

First, Plaintiff relies on pre-*McDougall/Gladych* cases, including *Buscaino v Rhodes*, 385 Mich 474; 189 NW2d 202 (1971) (Pl's Br., pp. 9, 13), which this Court expressly *overruled* in *Gladych*. *Busciano* simply cannot support a finding that, as Plaintiff claims, simply because statutes of limitations are "procedural", this automatically means that any statute regarding or involving same falls to a contrary court rule; indeed, it was overruled for taking exactly such an absolutist approach. *Gladych* held that in the event of a conflict, if the statute concerns a matter that is "*purely* procedural and pertains *only* to the administration of the courts", 468 Mich at 600 (emphasis added), the contrary court rule will control, but if the statute concerns "a principle of public policy, having as its basis something other than court administration…the [court] rule shall yield." *Id.* The Court then found that statutes of limitations are not "purely" procedural, noting all of the public policy reasons behind them, and held, "statutes regarding periods of limitations are substantive in nature." *Id.* And the Court expressly noted that *Busciano* was "operating under the erroneous belief that statutes of limitations were merely procedural in nature", and overruled it. (Indeed, this makes sense. Statutes of limitations are a subject of legislation and public policy concerns, hence their name, "statutes" of limitations, not "court rules" of limitations).

Plaintiff also cites the older case of *Forest v Parmalee Mills*, 402 Mich 348; 262 NW2d 653 (1978) (Pl's Br, pp. 9, 13.) There, the Court rejected the plaintiff's argument that a two year statute of limitations applicable to tort cases brought against governmental entities for highway related injuries (as opposed to the general three year tort limitations period) was unconstitutional. The case had nothing to do with a conflict between a court rule and a statute, and actually supports SEA. In upholding the validity of the statute, the Court held, "as procedural requirements these statutes of limitations are to be upheld by courts unless it can be demonstrated that they are so harsh and unreasonable in their consequences that they effectively divest plaintiffs of the access to the courts intended by the grant of the substantive right." 402 Mich at 360. The Court found there was a rational basis for the shorter time limit for claims against the government, and concluded, "the law has long held that, in creating a right, the Legislature may place reasonable restrictions on the exercise of that right." *Id.* at 362. In our case the statute created a right — to amend a complaint and have that amended complaint relate back to the date of original filing; and placed reasonable restrictions on the exercise of that right — the filing of a motion to amend, made within a certain time period.

Plaintiff twice cites *Lothian v City of Detroit*, 414 Mich 160; 324 NW2d 9 (1982), again, for the over-simplified proposition that statutes of limitations are procedural and not substantive. (Pl's Br., pp. 8, 12.) In that case, which addressed the relationship between statutes of limitations and the equitable doctrine of laches, and therefore also has nothing to do with separation of powers, the Court again emphasized the "worthy policy considerations" behind statutes of limitations, 414 Mich at 166, thus supporting SEA's claim that the statute at issue is not merely procedural and should not be read out of existence.

And Plaintiff cites two post-*McDougall/Gladych* cases, *Davis v State Emples Ret Bd*, 272 Mich App 151; 725 NW2d 56 (2006) and *Hatcher v State Farm Mut Auto Ins Co*, 269 Mich App 596; 712 NW2d 744 (2005), but misunderstands their relevance. (Pl's Br., pp. 9, 13.) *Davis* addressed whether a statute of limitations could be applied retroactively, and substantive versus procedural is also relevant to a retroactivity analysis. Plaintiff cites *Davis* for its statement that "in a general sense, statutes of limitations are regarded as procedural in nature". (Pl's Br., pp. 9, 13, citing 272 Mich App at 160.) But Plaintiff fails to acknowledge that the court then went on to note that "the Supreme Court has warned against using general characterizations in analyzing the exception to the presumption of prospective application", *id.* at 160 (just as this Court has warned against using general characterizations in analyzing conflicts between court rules and statutes). And the court continued, "statutes of limitations, while generally coined as procedural, necessarily affect substantive rights…" and therefore should not fall within the "procedural" exception to the general rule that statutes only apply proactively. *Id.* at 160-61. Thus *Davis* actually undermines Plaintiff's argument that statutes of limitations should always be viewed as procedural in nature.

As for *Hatcher*, the general reference in that case to statutes of limitations being procedural was not made in the context of a separation of powers analysis involving the respective rulemaking authority of the judicial and legislative branches. Rather, *Hatcher* analyzed whether a finding that the minority tolling provision in the Revised Judicature Act does not apply to the statute of limitations in the No Fault Act violated due process. And here too, the court's finding that it did not, and the discussion in that case about the policy reasons behind statutes of limitations, actually supports SEA's position.

Plaintiff's only recognition of *Gladych* is to lift a few high-level quotes related to conflicts between statutes and court rules (Pl's Br., p. 8, 12), while ignoring the actual holding of the case—the part overruling *Buscaino* and concluding that the statutory tolling conditions, traditionally viewed as procedural, superseded a court rule to the extent there was a conflict.

The answer to the second question – whether a party may amend a complaint upon receipt of a notice of non-party fault without first filing a motion to amend — is no.

III. THE SPECIAL PANEL ERRED IN HOLDING THAT THE RELATION BACK PRIVILEGE APPLIES EVEN IF A MOTION IS NOT FILED.

As discussed in SEA's Brief (pp. 22-25), the Special Panel erred in holding that the relation-back provision in the statute still applies even if a motion is not filed, after it found the statute's motion requirement to be invalidated by the court rule. The unambiguous plain language of MCL 600.2957(2) says that relation back is only permitted if a plaintiff adds the nonparty "under this subsection," and the subsection—as the Legislature actually wrote it—expressly requires both timeliness *and* leave of court to amend a complaint. This means under Michigan's longstanding statutory interpretation principles, the substantive right of relation back is not available to a plaintiff unless the plaintiff meets both conditions required by the Legislature: timeliness and leave of court.

But apparently the Special Panel did not like this result from a policy standpoint, because it decided that what the Legislature *really* meant was that timeliness by itself is sufficient for relation back, regardless of whether the plaintiff filed a motion. In the end, the Special Panel contravened the unambiguous plain language of the statute by crafting a new rule, which consisted of the panel's favorite part of the court rule (the absence of a leave of court requirement) and its favorite part of the statute (the relation-back provision). Such an approach

openly contravenes bedrock principles of statutory interpretation. *See, e.g., Gladych*, 468 Mich at 597 (when the language of a statute is unambiguous, courts must "presume that the Legislature intended the meaning clearly expressed—no further judicial construction is required or permitted, and the statute must be enforced as written").

The Special Panel not only acted improperly, it acted inconsistently. It first found that the silence in the court rule when it comes to a motion requirement meant that it was *removing, by its silence,* the motion requirement from the statute. It then found that the silence in the court rule when it comes to relation back meant that it was *adopting, by its silence*, the relation back privilege. Such an approach is indefensible.

Perhaps that is why the only attempt Plaintiff makes to defend this portion of the Special Panel's decision is to simply repeat the Special Panel's holding, and once again repeat her argument that statutes of limitations are procedural, not substantive. (Pl's Br., pp, 13-15.) But, as discussed above, the answer is not that simple. First, if this means the court rule trumps, the court rule says nothing about relation back, so there is no relation back. Second, the relation back provision of the statute affects the substantive rights of both the plaintiff, allowing him or her to add a claim that would otherwise be time barred, and the newly added defendant, removing from it the valuable statute of limitations defense. Because substantive rights are involved, the statute cannot be ignored. And because the statute creates a very valuable, substantive right for the plaintiff, it can impose a reasonable condition on obtaining that right, namely, the filing of a timely motion. Neither the Special Panel nor the Plaintiff cite any case law that allows a court to pick and choose from a statute and court rule and create a hybrid of both, or that allows a court to retain a substantive right created by a statute while removing the procedural requirement in the statute to obtain same.

The answer to the third question — whether an amendment made without first filing a motion to amend relates back to the date the complaint was filed — is no.

IV. PLAINTIFF DID NOT SEEK LEAVE TO AMEND FROM THE TRIAL COURT

Finally, Plaintiff argues that even if this Court reverses the special panel, her claim should not be dismissed as time-barred because she did in fact seek leave of court to amend during a trial court hearing and therefore, the amended complaint related back to the date of the original filing. (Pl's Br., pp. 15-16.) In support of this claim, Plaintiff points to an exchange with the trial judge just after the judge granted Best Buy's motion to file a notice of fault of SAE, in response to which Plaintiff's counsel said, "So, Your Honor, I have 91 days from the day of the order?" The judge responded "no", and asked the parties to stipulate to extending the scheduling order. (JA 46a, April 1, 2015 Transcript, pp. 11-12.) Plaintiff first calls this an "oral request" to amend, and later calls it a "motion[] made during a hearing", which was improperly denied by the trial court. (Pl's Br., p. 16.)

Generally speaking, it would be highly imprudent to rely on such a laidback exchange as constituting a legitimate "motion." And in this particular case, the trial court—the one in in the best position to assess whether the Plaintiff orally moved for leave—did not understand the Plaintiff to have ever sought leave in any form. Indeed, the court granted summary disposition for SEA on the basis that Plaintiff did *not* comply with the statutory requirement of seeking leave to amend. (JA 214a, July 22, 2015 Transcript, pp. 13-15.) And during SEA's summary disposition hearing, Plaintiff's counsel did not even claim that it previously moved for leave to amend—it simply argued that a motion was not required. (*Id.*).

Plaintiff did not make this argument until her supplemental brief to the Special Panel. The Special Panel apparently did not consider it a viable argument because if it did, the panel

would have been required to return the issue to the original panel for "further consideration" of a "remaining, unresolved issue" outside the issue of the interaction between MCL 600.2957(2) and MCR 2.112(K)(4). (MCR 7.215(J)(5)).

A motion is required before a complaint may be amended to add a party identified by a notice of non-party fault and to have that amended complaint relate back to the original date of filing, and no such motion was made here.

CONCLUSION AND REQUEST FOR RELIEF

This Court should reverse the Court of Appeals' Special Panel Opinion and reinstate the Circuit Court opinion and order granting summary judgment to SEA.

Respectfully submitted,

DYKEMA GOSSETT PLLC

Dated: July 23, 2018

By: */s/ Jill M. Wheaton*
Paul L. Nystrom (P57067)
Jill M. Wheaton (P49921)
Attorneys for Defendant-Appellant Samsung Electronics America, Inc.
39577 Woodward Ave., Ste. 300
Bloomfield Hills, MI 48304

DYKEMA GOSSETT•A PROFESSIONAL LIMITED LIABILITY COMPANY•39577 WOODWARD AVENUE, SUITE 300•BLOOMFIELD HILLS, MICHIGAN 48304

CERTIFICATE OF SERVICE

This is to certify that on **July 23, 2018** the foregoing **Samsung Electronics America, Inc.'s Reply Brief** has been electronically filed with the Clerk of the Court through the ECF system, which will send notification to all ECF participants.

/s/ Jill M. Wheaton
Jill M. Wheaton