IN THE SUPREME COURT OF FLORIDA

CASE NO. 63,704

JOHN W. KEMP,

Petitioner,

vs.

MURPHY MANUFACTURING COMPANY,

Respondent.

ANSWER BRIEF OF RESPONDENT ON THE MERITS

GERALD E. ROSSER, ESQUIRE
Attorney for Respondent
Suite 412, Biscayne Building
19 West Flagler Street
Miami, Florida 33130
Telephone: (305) 371-7220

IN THE SUPREME COURT OF FLORIDA

CASE NO. 63,704

JOHN W. KEMP,

Petitioner,

vs.

MURPHY MANUFACTURING COMPANY,

Respondent.

ANSWER BRIEF OF RESPONDENT ON THE MERITS

GERALD E. ROSSER, ESQUIRE
Attorney for Respondent
Suite 412, Biscayne Building
19 West Flagler Street
Miami, Florida 33130
Telephone: (305) 371-7220

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER AUTHORITIES

FLORIDA STATUTES

INTRODUCTION

In this brief the parties will be referred to by name or as they stood at trial: KEMP - Plaintiff; MURPHY MANUFACTURING - Defendant.

STATEMENT OF THE CASE AND FACTS

MURPHY MANUFACTURING cannot accept KEMP's statement of the case and facts, largely because it is mostly law and mostly irrelevant. Neither can MURPHY MANUFACTURING accept the statement that the instant case is in "all pertinent particulars" identical to Cates v. Graham, 427 So.2d 290 (Fla. 3d DCA 1983).

KEMP was aware of the alleged defect in the truck door prior to his accident. He attempted to avoid the danger by opening the door as wide as possible whenever he used it. He reported the condition to his supervisor. (See the interrogatories and answers attached as an appendix).

On August 14, 1979, the incident occurred in which KEMP was injured. The injury allegedly arose from the very condition of which KEMP was already cognizant. On April 15, 1980, twelve years expired from the date of delivery of the product by MURPHY MANUFACTURING. On October 28, 1980, KEMP filed the instant suit. Summary final judgment was entered on March 9, 1982; it was affirmed on May 3, 1983, by the District Court of Appeal, Third District.

ISSUE ON APPEAL

WHETHER FLORIDA STATUTES §95.031(3) MAY CONSTITUTIONALLY BE APPLIED TO SHORTEN THE TIME WITHIN WHICH SUIT MIGHT OTHERWISE BE MAINTAINED AND, IF SO, TO WHAT EXTENT.

ARGUMENT

Plaintiff argues at length about the law relating to summary judgments. Defendant has no quarrel with any of the assertions made, the law in this area being well established. There are no disputed issues of material fact to forestall affirmance of the summary judgment already affirmed by the lower tribunal.

Plaintiff's total argument with regard to disputed issues of fact is on pages 15 and 16 of his brief. He argues that the record does not conclusively establish that he discovered or should have discovered the defect "on the precise day that the incident itself occurred." Plaintiff's own interrogatory answers (in the Appendix to this brief) belie that assertion. He admits knowing of the defect, attempting to avoid it, and speaking to his supervisor about it, all prior to the accident. The Facts of Perez v. Universal Engineering Corp., 413 So.2d 75 (Fla. 3d DCA 1982)(currently pending review in this Court, Case No. 62,157) are not the same as those in the case at bar.

The only real issue in the instant case is whether the statute of repose, §95.031(3), Fla.Stat., may be applied to bar Plaintiff's action under the circumstances here.

Plaintiff's cause of action accrued on the day of the accident, August 14, 1979. The twelve year statute of repose, on its face, barred Plaintiff's suit as of April 15, 1980, eight months after his accident. Thus, Plaintiff, who could otherwise have sued up until August 14, 1983, (four years), did not have his access to the courts abolished, but only had his time within which to sue shortened to eight months.

This Court has, of course, considered this statute, and other statutes of repose, in the past. The only constitutional infirmity previously found in such statutes is that in certain cases they may abolish a cause of action before it arises, thus completely denying access to the courts. In such cases the statutes are unconstitutional as applied. Diamond v. E. R. Squibb and Sons, Inc., 397 So.2d 671 (Fla. 1981); Overland Construction Co. v. Sirmons, 369 So.2d 572 (Fla. 1979)

In other decisions this Court has upheld the constitutionality of statutes of repose where they foreshortened but did not eliminate Plaintiff's time within which to sue. Bauld v. J. A. Jones Constr. Co., 357 So.2d 401 (Fla. 1978); Purk v. Federal Express Co., 387 So.2d 354 (Fla. 1980).

Although KEMP alludes often to the "savings" clause of §95.022 Fla.Stat. (which provides one year within which to sue in cases where the enactment of the statute would have barred an existing cause of action on its effective date of January 1, 1975), that clause has no bearing on this case.

The only constitutional issue is whether the time within which to sue was "ample and reasonable". Overland v. Sirmons, supra, at 575.

Plaintiff argues that the absolute minimum of time within which to sue which is constitutionally ample and reasonable is one year. It is unclear what comfort Plaintiff gets from that argument--he did not sue within one year. He sued on October 28, 1980, more than fourteen months after his cause of action accrued. By his own reasoning Plaintiff's Petition must be denied.

Plaintiff ignores numerous authorities which hold that a period of less than one year within which to file suit is not, ipso facto, unreasonable and unconstitutionally. Initially, this Court has recognized the power of the legislation to enact statutes of repose. Bauld, supra, at 357 So.2d 402. This Court also had no difficulty with situations in which a statute of repose does not abolish but merely abbreviates the period of time during which suit could be commenced. Overland, supra, at 369 So.2d 574-575.

In Mahood v. Bessemer Properties, Inc., 18 So.2d 775, 780 (Fla. 1940) this Court held that a statute providing a six month period within which to sue on a contract afforded reasonable time. In In re Brown's Estate, 117 So.2d 478, 481 (Fla. 1960) the Court noted with approval that "many cases from other jurisdictions hold that a period of limitations of six months is not unreasonable."

In Carlton v. Ridings, 422 So.2d 1067 (Fla. 1st DCA 1982) the court affirmed a summary judgment based on §95.11(4)(b) Fla.Stat., the medical malpractice four-year statute of repose. There, plaintiff had a nine month period within which to sue after discovery of her cause of action.

In Nash v. Ashen, 342 So.2d 1038 (Fla. 4th DCA 1977) a summary judgment was affirmed where retroactive application of the shortened medical malpractice limitations period gave plaintiff only sixty-four days within which to sue. Although that court later decided that retroactive application was impermissible, it did not recede from its view that the plaintiff in Nash had a reasonable time to sue. Worrell v. John F. Kennedy Memorial Hospital, Inc., 384 So.2d 897 (Fla. 4th DCA 1980); Garofalo v. Community Hospital of South Broward, 382 So.2d 722 (Fla. 4th DCA 1980).

In Regents of the University of California v. Hartford Acc. & Indem. Co., 131 Cal. Rptr. 112, 129-130 (Cal. App.1976), reversed on other grounds, 147 Cal.Rptr. 486, 581 P.2d 197 (Cal. 1978) the statute of repose (a ten year version) left plaintiff nine months within which to sue. The court stated:

> We have no hesitancy in holding that the nine-month period in which the owner could have filed an action against the contractor and its surety was a matter of law a reasonable period.

It is Plaintiff's burden to demonstrate beyond a reasonable doubt that application of the statute of repose to

bar his action is unconstitutional as applied to him. A.B.A. Industries v. City of Pinellas Park, 366 So.2d 761 (Fla. 1979). Plaintiff has made no effort to point out facts which would militate for such a view. There is nothing in the record, nor, indeed does Plaintiff refer to anything, which would show that eight months was an unreasonable period of time in this case within which to file suit.

Plaintiff has couched his entire Petition here in terms of one argument: that any limitation period of less than one year is unconstitutional. As noted above, there is no authority to support that proposition, and ample authority to the contrary. Plaintiff's argument that public policy in Florida forbids limitations periods of less than one year is likewise unsupported by any authority.

Sixty day "notice-of-claim" ordinances were routinely enforced by the courts of this state prior to the enactment of §768.28 Fla.Stat. (1977). Although not statutes of limitations or repose, they did serve to cut off plaintiffs' right of access to the courts after only two months. See e.g., Butts v. County of Dade, 178 So.2d 592 (Fla. 3d DCA 1965) (finding the ordinance inapplicable to the fact, but not invalid); Nicholson v. City of St. Petersburg, 163 So.2d 775 (Fla. 2d DCA 1964).

Cates v. Graham, 427 So.2d 290 (Fla. 3d DCA 1983), currently pending review in this Court, Case Number 63,449, is the authority relied on by the lower tribunal in reaching

its decision in the instant case. That decision should be affirmed for the reasons cited in it, and in the brief of respondent on the merits in this Court, the reasoning of which is adopted, but not repeated, by Respondent in this brief.

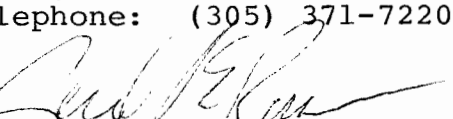
Even if this Court should reverse Cates v. Graham, reversal is not mandated in the instant case. One clean distinction is that plaintiff there had five months within which to sue, and Plaintiff here had eight months. Plaintiff there did file within twelve months of accrual of the cause of action; Plaintiff here did not. Plaintiff in Cates was a minor; Plaintiff here is an adult--who knew of the defect which caused his injury long before the injury occurred.

CONCLUSION

The order presented for review should be affirmed, regardless of this Court's decision in Cates v. Graham. The legislature did not bar Plaintiff's cause of action as soon as it arose. Plaintiff here has not, and cannot, prove beyond a reasonable doubt that the statute of repose, which allowed him eight months within which to sue, is an unconstitutional denial of access to the courts.

Respectfully submitted,

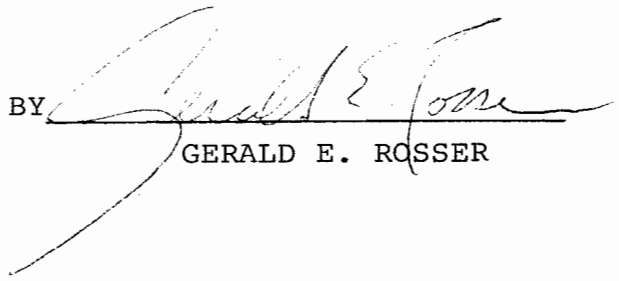
GERALD E. ROSSER, ESQUIRE
Attorney for Respondent
Suite 412, Biscayne Building
19 West Flagler Street
Miami, Florida 33130
Telephone: (305) 371-7220

BY 
GERALD E. ROSSER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this answer brief of respondent on the merits was mailed this 19th day of December, 1983, to: EDWARD A. PERSE, ESQUIRE, Horton, Perse & Ginsberg, Attorneys for Petitioner, 410 Concord Building, 66 West Flagler Street, Miami, Florida 33130; and TEW, SPITTLER, BERGER & BLUESTEIN, 304 Palermo Avenue, Coral Gables, Florida 33134.

GERALD E. ROSSER, ESQUIRE
Attorney for Respondent
Suite 412, Biscayne Building
19 West Flagler Street
Miami, Florida 33130
Telephone: (305) 371-7220

BY 
GERALD E. ROSSER