IN THE SUPREME COURT OF FLORIDA.

CASE NO. 63,704

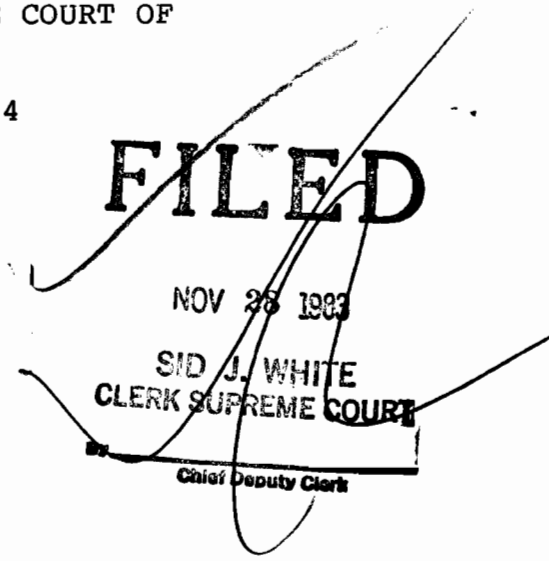
JOHN W. KEMP,

Petitioner,

vs.

MURPHY MANUFACTURING COMPANY,

Respondent.



BRIEF OF PETITIONER ON THE MERITS

HORTON, PERSE & GINSBERG
and
TEW, SPITTLER, BERGER & BLUESTEIN
410 Concord Building
Miami, Florida 33130
Attorneys for Petitioner

TOPICAL INDEX

LIST OF CITATIONS AND AUTHORITIES

I.

INTRODUCTION

Petitioner--truckdriver injured when the rear door of a truck unexpectedly slammed shut--was negligence, product liability personal injury plaintiff in the trial court. In the District Court of Appeal, he sought review of an adverse summary final judgment rendered in favor of defendant/respondent, manufacturer and/or assembler of the truck body* on time bar grounds only. The District Court affirmed.

The parties will alternately be referred to herein as they stand on appeal and as follows: petitioner as "KEMP;" and respondent as "MURPHY." The symbol "R" shall stand for the record on appeal.

All emphasis appearing in this brief is supplied by counsel unless otherwise noted.

II.

STATEMENT OF CASE AND FACTS

A.

PREFACE

This case is in all pertinent particulars identical to CATES v. GRAHAM, 427 So. 2d 290 (Fla. 3 DCA 1983), which presently pends before this Court on the merits, Supreme Court Case No. 63,449.

The facts of this case are basically undisputed. Therefore, KEMP will refer to the record here only where

* There were two other defendants below. Both have been let go. They are not involved here.

essential or where there might be some dispute.

Under this heading, KEMP--to facilitate an understanding of the whole picture--will chronologically correlate the facts of this case with an outline of recent developments in Florida time bar law.

B.

THE FACTS AND RECENT DEVELOPMENT OF TIME BAR LAW.

1. In 1968--the subject truck body was manufactured and/or assembled by MURPHY.

2. On April 15, 1968--MURPHY sold/delivered the truck body to a Florida purchaser.

3. Prior to 1974--the time bar statute applicable to cases such as the case at Bar provided for a four-year limitation period. See § 94.11(4), 1971 Fla. Stat.

4. On January 1, 1975--wholesale revised time bar Chapter 95, Florida Statutes, went into effect. See Laws of Florida, Chapter 74-382. The sections of the revised chapter pertinent here are the following:

a. New § 95.11(3) provides:

* * *

"95.11 Limitations other than for the recovery of real property

"Actions other than for recovery of real property shall be commenced as follows:

* * *

"(3) Within four years.--

"(a) An action founded on negligence;

"(b) Any action not specifically provided for in these statutes;

* * *

"(d) An action founded on design, planning or construction of an improvement to real pro-

perty, with the time running from the date of actual possession by the owner or the date of abandonment of construction if not completed, or upon completion or termination of the contrct between the professional engineer, registered architect or licensed contractor and his employer; provided that when the action involves a latent defect, the time runs from the time the defect is discovered or should have been discovered with the exercise of due diligence, but in any event within twelve (12) years after the date of actual possession by the owner or the date of abandonment of construction if not completed, or upon completion or termination of the contract between the professional engineer, registered architect or licensed contractor and his employer.

"(e) An action for injury to a person founded on the design, manufacture, distribution, or sale of personal property that is not permanently incorporated in an improvement to real property, including fixtures."

* * *

b. New § 95.031, Florida Statutes, provides:

* * *

"95.031 Computation of time

"(1) Except as provided in subsection (3) and in 95.051 the time within which an action shall be begun under any statute of limitations runs from the time the cause of action accrues, except as otherwise specifically provided in these statutes.

"(2) A cause of action accrues when the last element constituting the cause of action occurs.

"(3) Actions for products liability and fraud under section 95.11(3) must be begun within the period running from the time the facts giving rise to the cause of action were discovered or should have been discovered with the exercise of due diligence instead of running from any date prescribed elsewhere in § 95.11(3), <u>but in any event within twelve (12) years after the date of delivery of the completed product to its original purchaser</u> or the date of the commission of the alleged fraud regardless of the date the defect in the product or the fraud was or should have been discovered."

* * *

c. New § 95.022 entitled "Effective Date; saving clause" provides:

* * *

> "This act shall become effective on January 1, 1975, but any action that will be barred when this act becomes effective and that would not have been barred under prior law may be commenced before January 1, 1976, and if it is not commenced by that date, the action shall be barred."

* * *

5. On January 1, 1976--the one-year § 95.022, supra, "saving clause" period expired.

6. On August 14, 1979--the subject accident occurred.

7. On April 15, 1980--just eight months after occurrence of the subject incident--the twelfth year after delivery by MURPHY of the truck body ended.

8. On October 28, 1980--KEMP commenced this action against MURPHY and other defendants. (R. 1-5)* During the course of proceedings, KEMP filed an amended complaint. In due course, MURPHY filed an answer raising a time bar affirmative defense. (R. 201-203)

9. On June 26, 1981, MURPHY filed a motion for summary judgment (R. 207-208) on only the following time bar grounds:

---

*On the basis of information available at the time, the original complaint was filed, KEMP named "Rokar, Inc. d/b/a Murphy Body Distributors," as a defendant. This was a misnomer. Murphy Body Distributors was a predecessor of the present appellee, Murphy Manufacturing Company. The misnomer was corrected when KEMP filed his amended complaint (R. 171-186). As pointed out, supra, Murphy is the only defendant left in this litigation.

* * *

"1. The truck body that is the subject matter of the plaintiff's complaint was delivered to its original purchaser on April 15, 1968. See attached affidavit of Jerry Lanier.

"2. That Florida Statutes 95.031(2) requires that the plaintiff's action must be begun within twelve (12) years after the date of delivery of the completed product to its original purchaser. The prescribed twelve (12) year period ran on April 15, 1980, and the plaintiff's complaint was not filed until March 27, 1981.

"3. That there is no genuine issue as to any material fact, and the defendant, MURPHY MANUFACTURING COMPANY, is entitled to a judgment as a matter of law as it appears from the pleadings and affidavit filed in this cause."

* * *

The affidavit of Lanier (R. 210-211) confirmed the assertions made in the motion regarding delivery to original purchaser.

10. On March 9, 1982--the trial court entered the summary final judgment appealed.

III.

POINT INVOLVED ON THE MERITS

WHETHER ON THIS RECORD--PROPERLY VIEWED--THE TRIAL COURT ERRED IN RENDERING THE SUMMARY FINAL JUDGMENTS APPEALED ON TIME BAR GROUNDS.

IV.

ARGUMENT

ON THIS RECORD--PROPERLY VIEWED--THE TRIAL COURT ERRED IN RENDERING TIME BAR SUMMARY JUDGMENT AGAINST APPELLANT.

A.

APPLICABLE LAW

1. Re: Summary Judgment--it is well settled that on

appeal from a summary final judgment, the appellant is entitled to have the record viewed in the light most favorable to him with every inference of fact and intendment of testimony being indulged in his favor and against the movant for summary judgment. The movant for summary judgment has the burden of showing conclusively the non-existence of genuine issues of material fact. If the existence of such issues, or the possibility of their existence, is reflected by the record, or the record even raises the slightest doubt in this regard, a summary final judgment may not be granted. E.g., WILLS v. SEARS, ROEBUCK & COMPANY, 351 So. 2d 29 (Fla. 1977); WILLIAMS v. FLORIDA REALTY AND MANAGEMENT COMPANY, 272 So. 2d 176 (Fla. 3 DCA 1973); LAMPMAN v. CITY OF NORTH MIAMI, 209 So. 2d 273 (Fla. 3 DCA 1968); VISINGARDI v. TIRONE, 193 So. 2d 601 (Fla. 1967); and HOLL v. TALCOTT, 191 So. 2d 40 (Fla. 1966).

It was recognized in WILLIAMS, supra, at page 177:

* * *

> "When a defendant moves for summary judgment, the trial court does not determine whether the plaintiff can prove (his) case but only whether the pleadings, depositions and affidavits conclusively show that (he) cannot prove (his) case."

* * *

In CONNELL v. SLEDGE, 306 So. 2d 194 (Fla. 1 DCA 1975), the First District Court of Appeal summarized the rules regarding summary judgments and made the following observations:

a. A summary judgment proceeding is not a trial by

affidavit or deposition.

b. A summary judgment may be granted only in cases where there is no genuine issue of material fact.

c. The allegations of the complaint (when the defendant moves for summary judgment) must be accepted, for the purposes of the motion, as true.

d. If the pleadings, depositions, answers to interrogatories, admissions, affidavits and other evidence in the file raises the slightest doubt upon any issue of material fact, then a summary judgment may not be entered.

In FONTAINEBLEAU HOTEL CORPORATION v. SOUTHERN FLORIDA HOTEL AND MOTEL ASSOCIATION, 294 So. 2d 390 (Fla. 3 DCA 1974), this Court had occasion to state:

* * *

> "It is axiomatic that summary judgments should be granted with great caution and where there exist issues which are in conflict as reflected by the pleadings, and the record before the trial court supports the conflict in factual matters, a summary judgment should not be granted." 294 So. 2d at page 390.

* * *

More recently, it was recognized in DAWSON v. SCHEBEN, 351 So. 2d 367 (Fla. 4 DCA 1977) that even if some facts are not in dispute where different inferences might be drawn from some of the undisputed facts summary judgment is improper.

2. Re: Limitations of Actions--as pointed out, supra, the revised Florida time bar statutes went into effect on January 1, 1975. Basically they provide that in product

cases: suit must be filed within four years, § 95.11(3)(e), supra; the time to commence running from "the time the facts" are discovered or should have been discovered "with the exercise of due diligence; but in any event within" twelve years "after the date" the "completed product" was delivered "to its original purchasers." § 95.031(3), supra. The one year saving clause expired on January 1, 1976.

MURPHY has indulged in a misconception throughout. It treats both the four-year proviso contained in the subject statute as a "statute of limitations." The four-year "must sue" proviso is a statute of limitation. The twelve-year proviso is what is often termed a "statute of repose." Such statutes purport to extinguish potential causes of action after the expiration of a lengthy period of time, in this case, twelve years, even if the cause of action did not accrue until post passage of the twelve-year period.

BAULD v. J. A. JONES CONSTRUCTION CO., 357 So. 2d 401 (Fla. 1978), a construction project case, involved the following facts:

1. The last work done on the construction project by the defendant general contractor was completed on August 16, 1961. Twelve years from that date expired on August 16, 1973.

2. On July 8, 1972, within twelve years of completion of the last work by the defendant, the claimant suffered injury. At the time of the incident, the four-year statute of limitations was in effect and the claimant had until July 8, 1976, in which to commence action.

3. In 1974, Chapter 95, Florida Statutes, was amended in the manner described above with an effective date of January 1, 1975. Section 95.022, supra, allowed claimants effected by the new Act until January 1, 1976, in which to commence action.

4. On July 7, 1976--within four years of the date of the incident sued upon, but more than twelve yers after the last work done by the defendant, BAULD commenced her action against the contractor.

5. In BAULD this Court held that the new statute of limitations could constitutionally be applied to time bar the BAULD action. It must be remembered that the cause of action in BAULD accrued prior to the passage of a twelve-year period. In BAULD this Court held that the absolute twelve-year prohibitory provision did not operate to abolish BAULD'S cause of action, but merely abbreviated the period within which suit could be commenced from four to three and one-half years. BAULD sued without the abbreviated period.

6. In BAULD this Court emphasized the fact that the shortened time period--shortened to 3 1/2 years--<u>was ample and reasonable.</u>

OVERLAND CONSTRUCTION CO. v. SIRMONS, 369 So. 2d 572 (Fla. 1979) was decided post BAULD. The following occurred in the OVERLAND CONSTRUCTION case:

1. Work was completed by the defendant contractor in 1961. A twelve-year period thereafter expired in 1973.

2. In 1975, more than twelve years after completion of

construction, the claimant was injured.

3. The defendant contractor moved for a summary judgment based on the passage of the statutory twelve-year ban on lawsuits. The trial court held that the statute could not constitutionally be applied to the claimant. This Court affirmed, in pertinent part, stating and holding--with reference to the "access to the courts" provision contained in the Florida Constitution--that:

* * *

> "This constitutional mandate, which has appeared in every revision of the state constitution since 1836, has no counterpart in the federal constitution and derives its scope and meaning from Florida case law. The polestar decision for the construction of this provision is Kluger v. White, 281 So. 2d 1, 4 (Fla. 1973), in which we held:
>
> > "'Where a right of access to the courts for redress for a particular injury has been provided by statutory law predating the adoption of the Declaration of Rights of the Constitution of the State of Florida, or where such right had become a part of the common law of the State pursuant to F.S. Section 2.01, F.S.A., the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.'
>
> Based on Kluger, then we must first decide whether the legislature, without providing any reasonable alternative, has abolished a statutory or common law right of action protected by Article I, section 21, and if so, whether that

action is grounded both on an overpowering public necessity and an absence of any loss onerous alternative means of meeting that need.

"It is undisputed that a cause of action of the type asserted by Sirmons in this case--the right of an injured person to bring suit against a building contractor with whom he is not in privity for damages suffered as a result of alleged negligence in construction even after the owner has accepted the completed buiding--is one for which a right of redress is guaranteed by Article I, section 21. This common law right, though not expressly recognized by statute until 1975, was acknowledged as extant by this Court in 1959. When the 'access to courts' provision of the constitution was readopted in 1968, there existed a right of redress against contractors for the type of injury Sirmons suffered, provided, of course, that suit was commenced within four years after the cause of action accrued by the occurrence of the injury.

"Section 95.11(3)(c), insofar as is relevant to this proceeding, creates absolute immunity from suit for certain professionals and contractors connected with the construction of improvements to real property after the expiration of twelve years from the completion of the building. It unquestionably abolished Jerry Sirmons' right to sue Overland for his injuries and provided no alternative form of redress. The only remaining issue under Kluger, therefore, is whether the legislature has shown an overpowering public necessity for this prohibitory provision, and an absence of less onerous alternatives.

"The legislature itself has not expressed any perceived public necessity for abolishing a cause of action for injuries occurring more than twelve years after the completion of improvements to real property. Overland suggests that several other states have adopted analogous limitations, principally to counter a trend in the decisional law toward expanded liability for professional engineers, architects and contractors, and that the need for this type of statute is predicated on the difficulty of proof which naturally accompanies the passage of time.

"We recognize the problems which inhere in

exposing builders and related professionals to potential liability for an indefinite period of time after an improvement to real property has been completed. Undoubtedly, the passage of time does aggravate the difficulty of producing reliable evidence, and it is likely that advances in technology tend to push industry standards inexorably higher. The impact of these problems, however, is felt by all litigants. Moreover, the difficulties of proof would seem to fall at least as heavily on injured plaintiffs, who must generally carry the initial burden of establishing that the defendant was negligent. In any event, these problems are not unique to the construction industry, and they are not sufficiently compelling to justify the enactment of legislation which, without providing an alternative means of redress, totally abolishes an injured person's cause of action. The legislation impermissibly benefits only one class of defendants, at the expense of an injured party's right to sue, and in violation of our constitutional guarantee of access to courts.

"This analysis of section 95.11(3)(c) naturally calls for an explanation of our recent decision in Bauld v. J. A. Jones Construction Co, 357 So. 2d 401 (Fla. 1978), where we sustained this very provision in the face of a constitutional challenge by one whose cause of action was curtailed, rather than wholly barred, by the effect of section 95.11(3)(c), at a time when the applicable statute of limitations provided only that suit must be commenced within four years. When section 95.11(3)(c) took effect in 1975, two and one-half years of that period has elapsed, during which time an action could have been filed. Moreover, the saving clause of section 95.022 extended the deadline for instituting existing causes of action which would otherwise have been terminated by the new twelve year limitation for an additional year. Consequently, the absolute twelve year prohibitory provision did not operate to abolish Pearl Bauld's cause of action, but merely abbreviated the period within which suit could be commenced from four to three and one-half years. Although shortened, the time for bringing suit was found to be ample and reasonable; it was not forestalled altogether.

> "By contrast, Sirmons' cause of action was already barred by the twelve year limitation when it first accrued--that is, when his injuries occurred. No judicial forum would ever have been available to Sirmons if the twelve year prohibitory portion of the statute were given effect. Obviously, our decision as to the validity of the statute vis-a-vis Pearl Bauld would not operate to bar our declaring the same statute invalid vis-a-vis Jerry Sirmons."
>
> * * *

In sum, in BAULD this court held that where an injury occurred within the twelve-year period and no suit was filed within the statutory savings period, even though the savings period shortened the applicable statute of limitations, the statute was applicble. Since BAULD still had a reasonable period of 3 1/2 years to sue. In OVERLAND the court held that the statute could not be constitutionally applied to any case where the injury occurred post passage of the twelve-year period. In accord with BAULD--PURK v. FEDERAL PRESS CO., 387 So. 2d 354 (Fla. 1980) (accident occurs April 24, 1973, period to sue shortened to two years and nine months held reasonable). In accord with SIRMONS--BATTILLA v. ALLIS-CHALMERS MFG. CO., 392 So. 2d 874 (Fla. 1980); DIAMOND v. E. R. SQUIBB & SONS, INC., 397 So. 2d 671 (Fla. 1981); and, PEREZ v. UNIVERSAL ENGINEERING CORP., 413 So. 2d 75 (Fla. 3 DCA 1982).

B.

LAW APPLIED

It is thus seen that there are three categories of cases of this description:

1. PURE BAULD CASES--in which the incident in suit

occurred at a time when there was a four-year statute of limitations which was shortened by the January 1, 1975, amendments to § 95.031, supra, last day to sue January 1, 1976. This is the BAULD and PURK category of cases. It should be noted that in such cases, the mere passage of time would not destroy the cause of action. There would still be an inquiry into the question of whether or not the time period was so drastically shortened as to deprive the claimant of his right of access to the courts. It happens that in BAULD, time shortened to three years and seven months, and PURK, time shortened to two years and nine months, this Court held that as a matter of law the shortened time period did not deprive the claimant of his right of access to the courts. It is submitted, however, that if the time had been shortened to less than one year--and this will be discussed in greater detail below--thisCourt of Florida would have held as a matter of law even in BAULD and PURK that the claimant had been deprived of his right of access to the courts.

2. PURE SIRMONS CASES--twelve-year period of repose cannot be constitutionally applied to a case where the incident sued upon occurred more than twelve years after first delivery of the product.

3. KEMP AND CATES CASES--Here, the incident sued upon occurred eleven years and four months after first delivery and long after January 1, 1976, the expiration of the one-year § 95.031(2), supra, saving period.

For the reasons which follow, the trial court erred in

holding that the subject action was time barred and the District Court of Appeal erred in affirming that holding:

1. The Court here effectually held that the period in which to sue was eight months, the time between the incident sued upon and the expiration of twelve years from the date of first delivery.

2. There is no statute of limitations under the law of the State of Florida of less than one year. It is thus clear that any shorter period of limitation is against the public policy of the State of Florida.

3. The legislature itself in passing the 95.031(2), savings clause, stated that a period of one year would be reasonable. This is a clear statement of the public policy of the State of Florida.

4. This case is much more like a SIRMONS category case than it is a BAULD category case. This is true because here the incident sued upon occurred more than three years after expiration of the § 95.031(2), supra, saving period on January 1, 1976.

5. Even if this case be considered akin to a BAULD category case--indeed, even if it were a BAULD category case--it could not be held that a period of eight months was as a matter of law a reasonable time to sue without depriving KEMP of his constitutionally guaranteed right of access to the courts.

6. There is yet another separate and distinct reason why this cause should be reversed. Assuming arguendo, but by no means conceding, that BAULD would apply here, it is not

established on this record that KEMP discovered or should have discovered the existence of a defect on the precise day that the incident itself occurred. See PEREZ v. UNIVERSAL ENGINEERING CORP., supra, 413 So. 2d 75, and cases cited therein.

V.

CONCLUSION

It is respectfuly submitted that for the reasons stated herein, the decision sought to be reviewed must be quashed and the cause remanded with eventual directions to enter an order striking MURPHY'S time bar defense, or, at the very least, and then only if BAULD is found to apply here, with directions to hold a jury trial on the "discovered or should have discovered" question.

Respectfully submitted,

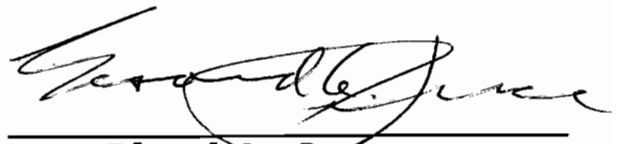
HORTON, PERSE & GINSBERG
410 Concord Building
Miami, Florida 33130
and
TEW, SPITTLER, BERGER & BLUESTEIN
304 Palermo Avenue
Coral Gables, Florida 33134
Attorneys for Appellant

By: _____
Edward A. Perse

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true copy of the foregoing Brief of Petitioner on the Merits was mailed to the following counsel of record this 22nd day of November, 1983.

GERALD ROSSER, ESQ.
412 Biscayne Building
Miami, Florida 33130



Edward A. Perse