SUPREME COURT
STATE OF FLORIDA

DAVID BLIZZARD, ETC., ET AL.

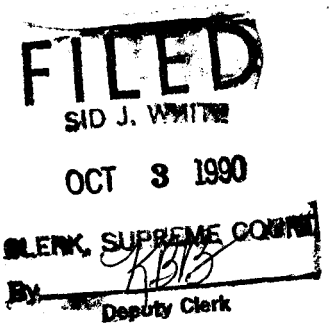
Petitioners/Appellant(s)

vs.

W. H. ROOF CO., ETC.

Respondents/Appellee(s)

CASE NO: 75,772
5DCA CASE NO: 89-00573



DISCRETIONARY REVIEW FROM THE
FIFTH DISTRICT COURT OF APPEAL

PETITIONERS MAIN BRIEF

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CITATION OF AUTHORITIES

ISSUE

THAT FLORIDA STATUTES SECTION 96.11(5)(d) AND SECTION 631.68 ARE UNCONSTITUTIONAL AND THE GRANTING OF THE SUMMARY JUDGMENT IN THIS CASE WAS IMPROPER BY THE TRIAL COURT.

STATEMENT OF THE CASE AND FACTS

Petitioners submit the following as their statement of the case and facts in this Appeal.

This case was begun by the filing of a Complaint on March 11, 1988. (R1 through R3). The Complaint alleged negligence on the part of the named Respondent for an incident that occurred on October 24, 1984, at approximately 7:00 p.m., and involved an excavation by the Respondent which was unmarked and in which the Appellant, DAVID BLIZZARD, a minor child, was injured. Further, the Complaint alleged that he had received severe personal injuries as a result of the accident. (R1 through R3).

The Respondent was served with the Complaint and on April 7, 1988, filed its Answer. (R6 through R8).

On September 23, 1988, Respondent filed a Motion for Summary Judgment with attachments, (R14 through R112), stating that it was entitled to Summary Judgment based upon a Statute of Limitations argument.

On February 21, 1989, the deposition was taken of Cy Davis, an employee of Florida Insurance Guaranty Association (R159) and was filed with the Court on March 2, 1989 (R162). Also on March 2, 1989, an Affidavit by Petitioners' counsel was filed (R163).

On March 3, 1989, an Order and Summary Final Judgment was entered by the trial court (R181 . The Notice of Appeal was

filed on March 17, 1989 (R182), and Directions to the Clerk was filed on March 17, 1989 (R183).

As shown in the attachments to the Motion for Summary Judgment, the Respondent was insured by Iowa National Mutual Insurance Company, which had gone into receivership on October 11, 1985 (R14) and that Florida Insurance Guaranty Association was appo nted Receiver (R15).

It was the position of the Respondent/Defendant that under Florida Statutes Section 95.11(5)(d) and Florida Statutes 631.68, that the Statute of Limitations had run against both the insured Respondent and Florida Insurance Guaranty Association as of October 10, 1987, and the filing of the Complaint on March 11, 1988, was, therefore, untimely. (R15) This was the basis for the granting of the Summary Judgment.

That Notice of Appeal was filed to the Fifth District Court of Appeal on March 21, 1989, oral argument was held on January 30, 1990, and the Opinion of the Fifth District Court of Appeals was issued on February 22, 1990 (A1 - A4). The Petition for Discretionary Review was filed on April 4, 1990.

SUMMARY ARGUMENT

ISSUE

WHETHER THE COURT ERRED IN GRANTING A SUMMARY JUDGMENT FOR DEFENDANT BASED ON FLORIDA STATUTES OF LIMITATIONS SECTION 95.11(5)(d) AND SECTION 631.68

Petitioners submit that the lower court erred in applying Florida Statutes Section 95.11(5)(d) and Section 631.68 and granting Summary Judgment based upon those statutes of limitations, as the statutes are unconstitutional and violate equal protection, equal access to the courts, and improper delegation of authority by the Legislature to the Executive Branch.

The Statute of Limitations for a tort action against an individual in this State for acts of negligence is governed by Florida Statutes 95.11(3)(a) and is of four (4) years duration from when the cause of action accrues. The application of this Statute of Limitations to the present case would show that this Complaint was timely filed against the Respondent.

By use of the special one (1) year Statute of Limitations contained in Florida Statutes 95.11(5)(d) and Florida Statutes 631.68, the court found that the Complaint was untimely.

It is the position of the Petitioners that these statutes first deny equal protection to persons injured in similar causes of action and has created a special class of tort feasor that is both unreasonable and arbitrary.

Secondly, the statutes have denied equal access to the courts to Plaintiffs injured in the same causes of actions based upon the status of the tort feasor, not by identity of the tort feasor or identity of the cause of action, but rather by whether or not he has insurance coverage through a guaranty association created by the State.

Lastly, the Legislature has unlawfully and improperly delegated to members of the Executive Branch or a State funded corporation, a legislative power and conferred to these entities the authority or discretion as to its execution, interpretation, and effective dates.

Petitioners submit that the statutes which are presently in question cannot withstand judicial scrutiny as to the constitutionality of the statutes.

MAIN ARGUMENT

ISSUE

WHETHER THE COURT ERRED IN GRANTING A SUMMARY JUDGMENT FOR DEFENDANT BASED ON FLORIDA STATUTES OF LIMITATIONS SECTION 95.11(5)(d) AND SECTION 631.68

Petitioners submit the following as their argument on the issue of constitutionality of Florida Statutes Section 95.11(5)(D) and Section 631.68 and the effect of that constitutionality question on the entry of the Summary Judgment by the trial court in this case.

Petitioners respectfully submit that the aforementioned statutes are unconstitutional on at least one out of three separate grounds and will divide the following arguments between these three contentions.

I. IMPROPER DELEGATION OF AUTHORITY. It has long been a matter of settled Florida Law that the Legislature cannot grant to agencies, individuals, or the Executive Branch unrestricted discretion in applying a law or improperly delegate legislative power to the Executive Branch, see 10 Fla.Jur.2d, Constitutional Law Section 174.

In the case presently before the court, Florida Statutes Sections 95.11(5))(d) and 631.68 clearly grant authority to the Executive Branch to create law, to wit: a statute of limitations. Florida Statutes Section 95.11(5)(d) provides that an action against a guaranty association is barred after one year

from the date of filing claim. It has no guidelines or restrictions upon when the deadline for filing claims occurs. Obviously, this is totally within the discretion of the Receiver or governing body of the Liquidation. Florida Statutes Section 631.68 also contains the same l-year limitation from the date of filing claim. However, the Respondent in this matter and the Fifth District Court of Appeal in its opinion, found that this delegation of authority did have minimal restrictions on it because of Florida Statutes 631.18(1) which states that the time for filing of claims must be of at least 6 months length from the date of the Liquidation Order.

Petitioners respectfully submit that the 6-month rule set forth in Florida Statutes Section 631.18(1) is not sufficient to save the other statutory sections from constitutional scrutiny.

This court, in the case of Highridge Management Corporation vs. State, 354 So.2d 377 (Fla. 1978) in discussing the issue of improper delegation of authority, referred to its previous case of Dickerson vs. State, 227 So.2d 36 (Fla. 1969) and stated:

> "...that the exercise of the police power by the Legislature must be clearly defined and limited in scope *so* that nothing is left to unbridled discretion or whim of the administrative agency responsible for enforcement of the act."

In the case of D'Alemberte vs. Anderson, 349 So.2d 164 (Fla. 1977), this court examined Florida Statutes Section 112.313(1) and one of the arguments in that case was that there was an improper delegation of authority to the Ethics Commission to determine what is prohibitive conduct by an individual. The

court in that case stated:

> "In essence, the determination of what is lawful or prohibited conduct is delegated to the Ethics Commission. It is not proscribed by the Legislature nor is it delegated to the Ethics Commission accompanied by meaningful standards and guidelines for the Commission to follow."

Petitioners submits that in the present case, this is exactly what has occurred. The Legislature, which normally would enact the Statute of Limitations in Florida, has created a 1-year statute of limitations to follow a "claim filing deadline", and the only restriction that has been placed on that is that the claim filing deadline must be at least 6 months in duration. This could create a statute of limitations of as little as 18 months, or as long as infinity, based upon the discretion of the Receiver and the Court. It is obvious that the determination of what the Statute of Limitations period will be is going to be determined by the Executive Branch, Department of Insurance through its Receivers, the Circuit Court in Leon County, Florida. There is some indication in the Fifth District Court of Appeal Opinion and in the brief filed by the Respondent that in some way, since the court is involved in the setting of the time in filing claims, that this saves this statute under the improper delegation argument. If the Legislature cannot delegate legislative powers to the Executive Branch, it surely cannot save that improper delegation by involving the court, and asking that a circuit court set the statute of limitations.

In a more recent case, Florida Teaching Profession vs. Turlington, 490 So.2d 142 (1st D.C.A. Fla. 1986), the court in quoting from a previous opinion stated:

> "The constitutional prohibition against the unlawful delegation of legislative authority is designed to prevent the exercise by any one but the legislature of the sovereign power to enact laws. It is also designed to safeguard against the exercise of unrestricted discretion in the application of the law by an administrative agency charged with this enforcement."

While the Legislature obviously had a purpose in the creation of the Florida Insurance Guaranty Association and its powers under Chapter 631 of the Florida Statutes, and it may in fact be proper to give claims against F.I.G.A. a 1-year statute of limitations. It cannot be proper to give those statute of limitations to the individual insureds.

In the present case, the only restriction on the Executive Branch is the 6-month rule. There is an arbitrary decision by the Executive Branch made with a court as to what is in the best interest of F.I.G.A. and/or the Executive Branch as to the time deadline for filing claims. In fact, to further compound the problem, the Legislature even gave to the Receiver the additional power to allow the filing of late claims, which it must be assumed would then roll over the statute of limitations under Florida Statute 631.18(1)(3)(c).

In the present case, an Affidavit was filed that shows that F.I.G.A. has, in fact, extended claim periods, has in fact allowed the filing of late claims which again creates a situation

in which no one can be really sure when the statute of limitations run, but again, is faced with the discretionary acts of the Executive Branch for this determination.

That under the statutes in question there is no limitation on the discretion of the Executive Branch to set the time period for filing claims and creating a statute of limitations that does not run from when the cause of action accrues, is not based upon the tort, but more than likely, based purely upon the workload of the Receiver and the Florida Insurance Guaranty Association. In the case of League of Mercy Associates vs. Walt, 376 So.2d 893 (1st D.C.A. Fla. 1979) examination was made of the statute to determine whether it was an improper delegation of authority based upon inadequate guidelines being given to the Consumer Affairs officer to determine what organizations should receive permits as charities. The court went into a great deal of explanation of all the guidelines given to the Consumer Affairs Office in making this determination. In the present case, there is one limitation and it cannot meet the definition of being even "minimal".

11. DENIAL OF EQUAL ACCESS TO THE COURTS. Article I, Section 21 of the Constitution of the State of Florida states that the Court shall be open to every person for redress of any injury and justice shall be administered without fail, denial or delay. The courts in Florida on many occasions have interpreted this provision as it deals with constitutionality of statutes and denial of access to the courts.

The leading Florida cases on questions of denial of excess to court in tort situations are Chapman vs. Dillon, 415 So.2d 12 (Fla. 1982) and Lasky vs. State Farm Insurance Company, 296 So.2d 9 (Fla. 1974). Both of these cases dealt with the amendments made to Chapter 627 of the Florida Statutes which created the No-Fault law and Personal Injury Protection benefits, also in that same line of cases, is the case of Kruger vs. White, 281 So.2d 1 (Fla. 1973). The question of denial of right of access as stated in Kruger vs. White, is based on the following rule:

> "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 injury unless the Legislature can show an overpowering public necessity for the abolishment of such right..."

In the case before the Court in the statutes in question, the Legislature has not provided a reasonable alternative to protect the rights of people of the State to redress for injury. What the Legislature has done in the present case is close the courts to a certain class of injured persons based not on the cause of action or the identity of the defendant, but rather on the insolvency of a third party, that being the defendant's insurance carrier. It is interesting to note that presently under Florida Law, the insurance carrier is not even a party in interest due to the nonjoinder statute that the Legislature has passed. While the Legislature, the Executive Branch and the Judiciary all have an interest in insurance companies who are insolvent in the State of Florida, there is absolutely no overpowering public necessity for the abolishment of the rights

of the individual to seek redress in our courts for injuries done to them.

The Petitioners understand that the statutes of limitations which generally shorten the time in which causes of action can be brought are not subject to constitutional scrutiny. However, when those statutes of limitations, which are shortened, cost individuals their rights to seek compensation for injuries and the shortening is not done across the entire group of torts and does not equally effect all persons injured under those same facts and circumstances, it must be deemed a denial and then there is no balancing by the Legislature of the concerns of the injured parties as it must do so under the cases of Chapman vs. Dillon, 415 So.2d. 12 (Fla. 1982), and Lasky vs. State Farm Insurance Company, 296 So.2d 9 (Fla. 1974).

111. DENIAL OF EQUAL PROTECTION. Petitioners, for the sake of this argument, could see that the Legislature could give to the Florida Insurance Guaranty Association a special l-year statute of limitations, as it is a statutorily created body for a particular purpose and F.I.G.A. may have a duty to defend on behalf of the insured. However, that restriction should not run to the benefit of the insured. The insured is an individual who is neither required by law nor statute under these facts and circumstances to carry insurance. Having not been required by law to carry insurance, the fact that it did purchase insurance through an insolvent company should not make it less likely or subject to some special statute of limitations.

Petitioners further submit that the statutes in question here deny equal protection to members of the same class and as such is in violation of the Florida Constitution. In the case of Lasky v. State Farm Insurance Company, 296 So.2d 9, the court held there was no violation of equal protection, but said that the equal protection classification can only be upheld if:

> "....any classification does not deny equal protection if it is reasonable and non-arbitrary, treating all persons in the same class alike and the difference between those included in the class and those excluded from it bears a substantial relationship to the legislative purpose."

The court went on to note that:

> "The classification herein treats all persons permanently injured in a vehicular accident alike, thus meeting one element of the test. It is not arbitrary to differentiate between persons permanently injured and those who will recover from their injuries, insofar as allowing only the former group to recover for pain and suffering. Rather, this is a reasonable classification."

It is obvious under the equal protection clause of the Florida Constitution that there cannot be creation of a subclass treated differently than members of the class as a whole.

Petitioners submit that the statutes in question deny equal protection to a created subclass of individuals. Those individuals are those who happen to have tort claims against individuals insured by insolvent companies which have been put into receivership under F.I.G.A.

Petitioners' basic argument is that if one sues for an action based in negligence, they have a 4-year Statute of Limitations. If they sue for an action based on Medical

Malpractice, they have a 2-year Statute of Limitations. It is immaterial whether or not the person is insured or uninsured who is the tort feasor. This argument can be made as to each and every single statute of limitations which are generally, except in this one instance, based upon the type of cause of action, not the identity of a third party, in this case F.I.G.A. Those statutes of limitations which are based upon the identity of the tort feasor are sovereign immunity and health care providers. Again, this classification of tortfeasors determines the statute of limitations, not the classification or status of a non-joined third party insurance carrier.

What this statute has created is a situation in which a person can sue a tort feasor in negligence for four (4) years, if that tort feasor is insured or uninsured, but he may not do that if that tort feasor happens to have been insured by an insolvent insurer. To put the burden of a shortened statute of limitations on the injured person because the tort feasor was unlucky enough to purchase insurance from an insolvent company, is unfair, unjust, and a denial of equal protection.

The court and the Legislature may give a special statute of limitations for a State corporation, such as F.I.G.A., and in truth if the lower court had merely ruled that there is no coverage through F.I.G.A. because of the untimely filing, that would be one thing, but to allow that special statute of limitations for a State created corporation to run to the benefit

of the tort feasor and to create a new class of tort feasor, is blatantly unfair.

If a person may be sued within a 4-year time period for negligence, whether it is insured or uninsured, but a person who purchases insurance and loses it through the insolvency of their carrier, is suddenly subject to some special privileges, then the courts have, in fact, created a class of people and an exemption from suit, based upon the financial conditions of a third party. This is a ridiculous, irrational, and totally unreasonable situation. Looking at this matter in a somewhat ridiculous extreme, it would mean that major corporations and companies and wealthy individuals, should go out and find the worst, most insolvent, close to bankruptcy insurance company that they can find, purchase insurance through it and hope that it goes insolvent, so that the statute of limitations on any claims against them is drastically shortened, statutory limitations on damages may come into effect, and injured parties and their attorneys may be caught in the quagmire of the 1-year limitation after the filing of claims, which may or may not be extended at the whim and discretion of the Executive Branch, which may or may not be properly available to the claimants, and in which they may never have any notice.