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SID J. WHITE
OCT 4 1991
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

SUPREME COURT OF THE STATE OF FLORIDA

ALVA ALLEN INDUSTRIES, INC.,

Petitioner,

vs. Case No. **78,435**

MIGUEL TORRES,

Respondent.
_____/

FIRESTONE TIRE & RUBBER COMPANY, et al.,

Petitioner,

vs. Case No. 78,255

MARIA ACOSTA as Personal Representative of the Estate of LUIS **ACOSTA,** SR., deceased,

Respondent.
_____/

On discretionary review from the District Court of Appeal of Florida for the Third District

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ACADEMY OF FLORIDA **TRIAL LAWYERS' AMICUS CURIAE** BRIEF

LUFFO
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ACOSTA

DOES THE NOW REPEALED STATUTE OF REPOSE, SECTION 95.031(2), FLORIDA STATUTES (1975), BAR A PLAINTIFF'S CAUSE OF ACTION WHERE THE LAW IN EFFECT AT THE TIME THE DECEDENT'S CAUSE OF ACTION ACCRUED WOULD HAVE PERMITTED HIM TO MAINTAIN A PRODUCTS LIABILITY ACTION IF HE WERE ALIVE?

11. SUMMARY OF ARGUMENT:

The statute of repose defines a cause of action. It is the time of the accrual of a cause of action which determines which statute of repose applies. Therefore, all causes of action which accrue after the repeal of the statute of repose cannot be affected by the repealed statute.

The manufacturers and sellers of dangerously defective products had no constitutionally protected vested substantive right which would have prevented the repeal of the statute of repose from being effective.

111. ARGUMENT:

THE **NOW** REPEALED STATUTE OF REPOSE, SECTION 95.031(2) FLORIDA STATUTES (1975), **DOES** NOT BAR **ANY** CAUSE OF ACTION ACCRUING AFTER REPEAL SINCE THE STATUTE OF REPOSE **HAS** BEEN REPEALED.

The petitioners and amicus curiae Florida Defense Lawyer's Association attempt to make the issue before this honorable court complicated when it really is quite simple. After this honorable court reversed *Battilla v. Allis Chalmers Manufacturing Company*, 392 So.2d 874 (Fla. 1980), in *Pullum v. Cincinnati, Inc.*, **476** So.2d 657 (Fla. 1985) holding that the statute of repose was constitutional, the Florida legislature repealed the statute. The question therefore before this court is whether or not this repeal was effective as to products that were twelve years old on the date of repeal?

In *Melendez v. Dreis and* ***Krump*** *Manufacturing Company*, 515 So.2d 735 (Fla. **1987)** this honorable court was required to decide if the legislature intended the repeal of the statute of repose to apply to causes **of** action that accrued while the statute of repose was in effect and after the twelve year period of repose had expired. The holding in *Melendez* was that the legislature did not give any clear manifestation of its intent to give the statute retroactive effect, so no retroactive effect was warranted. *Id.* at 736. This holding implies that had the legislature so intended, its repeal of the statute of repose could have been retroactive, i.e., the legislature, **if** it so intended, could have entirely erased this honorable court's decision in *Pullum.* This further implies that any expectations from the sellers or manufacturers of these

defective products do not rise to a level entitling them to constitutional protection. If the legislature could have repealed the statute of repose retroactively then it certainly had the power to repeal it prospectively, which, by the language of repeal, it did.

The citations by opposing counsel to F.S. 611.2425 regarding the repeal of any statute not affecting any right accruing before that repeal, miss the issue. The issue is whether or not the manufacturers and sellers of these defective products had any right to which section 11.2425 would apply, not whether section 11.2425 applies.

Petitioners and amicus curiae FDLA write about the legislature's inability to impair substantive rights and their reliance upon those rights. Apparently, there is nothing in the record which shows any reliance by any of these defendants on any such rights. In fact, reliance would be quite unlikely unless each of these defendants limited its sales to the state of Florida or other states that had similar statutes of repose. How could any of these defendants know where any of these products would be sold? The products were initially shipped before the statute of repose was passed, how could there be any reliance? If the product was initially manufactured in another state, or initially entered the stream of commerce in another state, then should not the other state's statute of repose or lack of statute of repose govern?

Counsel writes about the legislature's intent in its original enactment of the statute of repose. Again, this misses the point. This statute has been repealed. If no substantive right for which constitutional protection was created, the legislature's original intent in creating the period of repose is simply irrelevant. The statute was

repealed, and the legislature intended to repeal it.

As Judge Ryskarnp wrote in ***Daniel1 v. Baker-Roos, Inc.***, 5 FLW (Fed) 268 (So. Dist. of Fla. July 13, 1990)

> The circumstances of this case when viewed in light of the statute's history render defendants' claim meritless. Significantly, the statute of repose did not exist when the allegedly defective scaffolding was delivered; it was not enacted until 1974. Even after the statute was enacted, its history was volatile and scarcely could have created an expectation that it would continue to protect defendants. The Florida Supreme Court first declared that the statute denied access to the courts in violation of the Florida constitution by terminating a cause of action before it arose. ***Battilla v. Allis Chalmers Mfg. Co.***, 392 So.2d 874 (Fla. 1980). Six years later, the court reversed itself and ruled that the statute of repose did not violate the Florida constitution. *Pullum v. Cincinnati, Inc.*, 476 So.2d 657 (Fla. 1985). The following year, the Florida legislature amended the statute to repeal the portion applicable to products liability actions. Considering the history of the statute and the facts of this case, defendants lacked even a reasonable expectation that the statute would apply to plaintiffs' claim, much less a vested interest in the statutes' protection.

Id. at 268-69.

If the defendants had considered Florida law on the question of repose before being sued, they could have had no more than "a mere expectation based on the anticipation of the continuance of an existing law." ***Ramos v. Carnahan***, 16 FLW C76 (Fla. 10th Cir. April 1, 1991) quoting ***Lamb v. Volkswugenwerk Aktiengesellschuft***, 631 F.Supp 1144 (SD Fla. 1976).

Wesley Theological Seminary of the United Methodist Church v. United States Gypsum Company, 876 F.2d 119 (D.C Cir. 1989) dealt with an amended District of

Columbia statute of repose. In that case a similar argument was made as defendants are making in the case at bar. Although recognizing the distinction between statutes of limitation and repose, the court held that the distinction was metaphysical and added nothing to the analysis of whether or not the repeal of the statute could be given retroactive effect as the legislature intended. The court noted that many legislative acts affect substantive rights and are valid. The court found the requisite rational basis in the retroactive repeal of the statute of repose, i.e., the repeal was effective retroactively. Since there is no constitutional prohibition against retroactive repeal of a statute of repose, *Id.*, there is no constitutional prohibition against the Florida legislature's prospective repeal of the statute of repose.

Counsel for Alva Allen Industries, Inc. relies upon North Carolina case law (*Boudreau v. Baughman*, 322 N.C. 331, 368 S.E.2d 849 (1988)) stating that the statute of repose creates a substantive right. Counsel neglects to mention that in North Carolina, where the statute of repose was materially altered, the courts have ruled that the statute of repose in effect when the cause of action arises is the statute of repose which governs; i.e., the legislature did have the power to change whatever rights defendants might have had in that statute of repose. *New Bern Associates v. Celotex Corporation*, 87 N.C.App. 65, 359 S.E.2d 481 (1987); *Olympic Products Company v. Roof Systems, Inc.*, 79 N.C.App. 65, 339 S.E.2d 432 (1986).

> A statute of repose does not bar a claim but defines it. If an action is not brought on an existing claim within the time prescribed by a statute of limitations the claim is barred and the defendant has a vested right not to be sued which the legislature may not take from him. In the case of a statute of repose which defines a claim the legislature

> can create claims based on matters that occur in the future. In this case the General Assembly in 1981 defined claims for injuries which occurred after that date. The plaintiff's claim arose after the adoption of this statute and it is not barred by the applicable statute of limitations. It is not a claim which has been barred by a statute of limitation which the legislature has attempted to revive. If the injury had occurred before the 1981 amendment to the statute and more than six years after the completion of the construction there would have been no claim and the amendment to G.S. 1-50(5) would not have affected it.

Olympic** Products **Company at **434.**

From ***Pullum*** and ***Melendez*** we know that the statute of repose was constitutional and in effect until the legislature repealed it, Therefore, if before repeal the manufacturer and seller of the dangerously defective product had a substantive right protected by the constitution not to be sued, then no victim of that product **in any case** could maintain a suit against the manufacturer or seller. However, this court held in ***Fruzier v. Baker Material Handling Corporation,*** 559 So.2d 1091 (Fla. 1990) that if the victim had relied upon ***Battilla*** in delaying the bringing of the law suit then the victim could maintain the cause of action. The decision in ***Frazier*** is certainly equitable and logical. From this decision it is obvious that whatever rights the manufacturer and seller of the dangerously defective product might have had, those rights do not enjoy constitutional protection, since, if they did, the plaintiff in ***Frazier*** would have been out **of** court regardless of the harshness of the result. ***Frazier*** therefore implies that any rights that the defendants might have had not to be sued are not constitutionally protected.

Therefore, when the legislature repealed the statute of repose, it had the power

to repeal it retrospectively (which it did not do according to ***Melendez)*** or prospectively which from its very language it did do. Since the constitution did not prohibit the Florida Supreme Court from allowing the plaintiff in ***Frazier*** to pursue his reposed claim, the constitution does not prohibit the legislature from allowing every other victim of these dangerously defective products from pursuing that victim's claim since the claim arises after the repeal of the statute of repose.

Throughout their briefs, counsel **for** the petitioners and amicus, **FDLA,** write about the effect the repeal had on their "vested, substantive rights." It is upon this premise that their argument is based. However, they provide little authority[1] for their conclusion that the statute actually created a "vested, substantive right." In fact ***Frazier*** and ***Melendez*** imply that it did not create any such right.

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[1] ***Sedar v. Knowlton Construction Company,*** **49** Ohio St. 3d 193, 551 N.E.2d **938** (1990); ***Cheswold Volunteer Fire Company v. Lambertson Construction Company,*** 489 A.2d 413 (Del. 1984) and ***Hawkins v.*** D & ***J Press Company, Inc.,*** 527 F.Supp. 386 (E.D.Tenn. 1981) simply held the statutes of repose in their respective states were constitutional, none of these cases dealt with the issue at bar. ***University of Miami v. Bogorff,*** ____ So.2d ____, 16 FLW S149, (Fla. 1991); ***Carr v. Broward County,*** 541 So.2d 92 (Fla. 1989); ***Commonwealth v. Owens-Corning Fiberglas Corporation, 238*** **Va** 595, 385 S.E.2d **865** (1989) and ***Rittenhouse v. Taber Grain Company,*** **203** Ill.App. **3d** 639, 561 N.E.2d **264** (1990) are all cited for their ***dicta*** since, in these cases, the repose period had expired before the bringing of the claim. ***Reynolds v. Porter, 760*** P.2d 816 (Okla. 1988) and ***Highland v. Bracken,*** 202 Ill.App. 3d 65, 560 N.E.2d **406** (1990) are cited solely for their definitional distinctions between statutes of repose and limitations; neither case dealt with the issue at bar. ***Hall v. Luby Corporation, 232*** N.J.Super. 337, **556** A.2d **1317** (1989) addressed the issue of whether or not an elevator is an improvement to real estate and thus subject to the state's statute of repose; it also did not address, in any way, the issues at bar. ***Harris v. Clinton Corn Processing,*** **360** N.W.2d **812** (Iowa 1985) and ***Thornton v. Cessna Aircraft Company,*** 886 F.2d ***85*** (4th Cir. 1989) dealt with whether the statute of repose was substantive in a choice of laws context only. ***Hupman v. Cook,*** **640** F.2d 497 (4th Cir. **1980)** addresses the issue, but only in ***dicta.***

The statute of repose simply defines the cause of action. ***Daniell.*** When the **cause of** action accrues, the seller's and the manufacturer's right not to be sued either vests or does not vest depending upon whether the period of repose has expired. Before the accrual of the cause **of** action, the seller and manufacturer only have an expectation that they will not be sued for damages caused by their old, dangerously defective products.

Counsel also argue that a repeal of a statute in Florida cannot divest the holder of a vested substantive right. This again misses the issue as none of the cases cited establish that the type of right the defendants claim in this case is the type **of** right which is subject to constitutional protection. In ***Walker*** *v. LaBerge, Inc.*, **344** So.2d 239 (Fla. 1977), this court held that the immunity granted by the legislature pursuant to the workers' compensation statute was substantive and that immunity could not be affected by statutory amendment. In that case, the legislature had specifically designated a statutory immunity. In the case at bar it did not do so.

Counsel for **FDLA** refers to the "immunity" created by the legislature. However, no legislative history is presented to show the legislature intended to create immunity and not merely to define the scope **of** a particular cause of action. Therefore, analogizing the issue before this court to opinions that interpret statutes that explicitly create immunity creates an argument based on a faulty premise and the argument therefore must fail. The implication of *Frazier* and *Melendez* is that whatever rights the manufacturers and sellers of these dangerously defective products had, these rights did not include a grant of immunity.

Division of Workers' Compensation v. Brevda, 420 So.2d 887 (Fla. 1st DCA 1982) a case also cited by counsel for Alva Allen Industries, Inc. is cited for its ***dicta.*** That case held that the statute allowing attorney's fees in a certain type of action did not create the type of substantive vested right which enjoyed constitutional protection; therefore, when the legislature repealed that statute, the right to the attorney's fees, which would have otherwise been **due,** vanished.

Counsel **for** Alva Allen Industries, Inc. criticizes Judge Ryskamp's decision in ***Daniell*** on several grounds, none of which are persuasive:

A. Counsel does not attempt to distinguish ***Wesley Theological Seminary,*** relied upon **by** Judge Ryskamp but simply says that ***Wesley Theological Seminary*** is an anomaly. In fact, ***Wesley Theological Seminary*** is neither an anomaly nor incorrect. ***Olympic Products Company*** and ***New Bern Associates*** agree with the holding in ***Wesley Theological Seminary,*** i.e., that the statute of repose in effect when the cause of action arises is the statute of repose that governs. Based upon the implications from the decisions from the Florida Supreme Court in *Melendez* and ***Frazier*** the decisions in ***Wesley Theological Seminary*** and in ***Daniell*** **were** correct.

B. ***Boudreau*** specifically reserves ruling on the effect **of** the repeal of the statute of repose, since the plaintiff brought the law suit within the twelve year period. ***Id.*** at 853, f.n.1. ***Boudreau*** is simply another case that defines the distinction between statutes of limitation and of repose. Although, for choice **of** law purposes, ***Boudreau*** states that the statute of repose is substantive, it fails to consider whether the statute creates the type of vested substantive rights which ***are*** due

constitutional protection. In North Carolina, therefore, although for choice of law purposes a statute of repose is substantive, ***Boudreau,*** for constitutional purposes the statute of repose creates no vested rights until the cause of action accrues; the statute in effect at the time of accrual governs. ***Olympic Products Company.***

C. ***Goad v. Celotex Corp.***, 831 F.2d 508 (4th Cir. 1987), is another case recognizing the distinction between statutes of **repose** and limitations in **a** choice **of** law context. ***Goad*** held that the statute **of *Limitations*** of the forum state, being procedural, controlled. *Goad* did not deal with the question of the effect of characterizing a statute of repose as substantive for choice of law analysis and the legislature's power to repeal it. In North Carolina, where the courts have ruled on both issues (whether the statute of repose is substantive for choice **of** law analysis: yes; whether it creates vested substantive rights, entitled to constitutional protection: no), there is a fundamental difference in result: ***Boudreau, Olympic Products Company***. There is no reason to assume the Fourth Circuit would rule any differently from the North Carolina courts if the issue of the defendant's so called "vested rights" versus the legislative power to repeal a statute of repose were before it. *Id*.

D. ***Weeks v. Rernington Arms Company, Inc., 733*** F.2d **1485** (11th Cir. 1984) does not deal with a repealed statute of repose. In ***Weeks*** the period of repose had expired (the statute had not been repealed) when the victim of the defectively designed product was injured. ***Weeks*** adds nothing to the analysis of the case at bar. Distinguishing between a statute of repose and a statute of limitation is simply a

matter of definition. The real question is whether or not any rights created by **a** statute of repose are the type **of** rights which the constitution protects. ***Weeks*** does not deal with this question.

E. Counsel string cites several cases for their *dicta* distinguishing between the statutes of limitations and statutes of repose. Again, the difference between the statutes of limitations and the statutes of repose is one of definition. String citing to various cases which detail that distinction adds nothing to the analysis. For example: ***School Board of the City of Norfolk v. United States Gypsum Company,*** 360 S.E.2d 325 **(VA.** 1987)deals with a cause of action which accrues and is time barred by the statute of repose well before the statute of repose **is** amended. That is not the issue that is now before this honorable court.

Clausell v. ***Hobart Corporation,*** 515 So.2d 1275 (Fla. 1987)is cited by **counsel** for Firestone Tire and Rubber Company and Kelsey-Hayes Company in support of their position regarding whether or not the manufacturers and sellers **of** dangerously defective products had a vested substantive right entitled to constitutional protection in the repealed statute of repose. However, *Clausell* holds only that the plaintiff had no vested substantive right entitled to constitutional protection in the continuance of this honorable court's conclusion that the statute of repose was unconstitutional. If the victim has no such constitutional right, then why should the manufacturer or the seller of the dangerously defective product have such a right?

Although there is **a** definitional difference between a statute of **repose** and a statute of limitation that distinction does not control the outcome of this case. ***Wesley***

Theological Seminary; Daniell; ***Acosta v. Firestone Tire & Rubber Co.***, ___ So.2d ___, 16 FLW D1546, (Fla. 3d **DCA** 1991); ***Torres v. Alva Allen Industries, Inc.***, ___ So.2d ___, **16** FLW D1554 (Fla. 3d **DCA** 1991); *Ramos; **New Bern Associates;*** and ***Olympic Products Company*** have all considered the arguments made by the manufacturers and sellers of dangerously defective products and have all rejected those arguments. Apparently, **a** true anomaly is the case which has been certified in direct conflict with the cases at bar, ***Walker v. Miller Electric Manufacturing Company,*** 16 FLW 1386 (Fla. 4th DCA May **22,** 1991). ***Walker*** relied upon the trial judge's decision in ***Acosta;Acosta*** was reversed by the Third District Court of Appeal.

IV. CONCLUSION

The decision that this honorable court makes here will have a tremendous affect on many potential victims of dangerously defective products. The legislature has made its intention clear. Having lost in the legislature, the manufacturers and sellers of dangerously defective products now seek to have this court reach, what the third district in ***Acosta*** has described as an absurd result. If tort reform is truly necessary then the appropriate place to address the issue is the legislature, not the courts. There is no way to reconcile this court's decisions in *Frazier* and *Melendez* with any type **of** constitutionally protected property right belonging to the manufacturers and sellers of dangerously defective products. The certified question should be answered in the negative.

V. CERTIFICATE OF SERVICE

I HEREBY CERTIFY that **a true** and correct copy of the foregoing has been furnished by **U.S.** Mail to **RICKI TANNEN, ESQUIRE, 4000** Hollywood Boulevard, Suite 620, Hollywood, Florida **33021; BRUCE SCHWARTZ, ESQUIRE,** 2750 N.E. 187th Street, North Miami Beach, Florida **33180; STEVE BEFERA, ESQUIRE, 2900** S.W. **28th** Terrace, 5th Floor, Miami, Florida **33133; CLIFFORD B. SELWOOD, JR., ESQUIRE,** Post Office **Box 14128,** Fort Lauderdale, Florida **33302; NANCY LITTLE HOFFMAN, ESQUIRE, 4419** West Tradewinds Avenue, Suite 100, Fort Lauderdale, Florida **33308; LOVE PHIPPS, ESQUIRE,** 116West Flagler Street, Miami, Florida 33130; **EDWARD** T. **O'DONNELL, ESQUIRE, 801** Brickell Avenue, Suite **1501,** Miami, Florida 33131; **HERMAN M. KLEMICK, ESQUIRE, 1953** S.W. 27th Avenue, Miami, Florida 33145; G. **WILLIAM BISSETT, ESQUIRE,** 501 N.E. First Avenue, Miami, Florida **33132** and **DAVID W. HENRY, ESQUIRE,** Post Office Drawer **1991,** Orlando, Florida **32802;** this 2d day of October, **1991.**

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