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IN THE SUPREME COURT OF FLORIDA

CASE NO.: 78,255

FIRESTONE TIRE & RUBBER CO., and KELSEY-HAYES *COMPANY,*

Petitioner/Defendants,

v.

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

Respondent/Plaintiff.
_____/

DISCRETIONARY PROCEEDINGS TO REVIEW A DECISION OF THE DISTRICT COURT OF APPEAL, THIRD DISTRICT OF FLORIDA

ANSWER BRIEF OF MARIA ACOSTA ON THE MERITS

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OTHER AUTHORITIES

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STATEMENT OF THE CASE AND THE FACTS

In August of 1987 Luis Acosta Sr. was changing the tire on a school bus which unexpectedly and violently "exploded", causing the "side ring" to separate from the assembly with violent force, thereby striking Mr. Acosta. Mr. Acosta subsequently died from his injuries. In December of 1987, the Personal Representative of Mr. Acosta's estate, Maria Acosta, filed suit against Firestone and Kelsey-Hayes, the manufacturers of the component parts, under the applicable statute of limitations in existence at that time for product liability causes of action, *95.031(2), Florida* Statutes, *1975*, which had a four year limitations period. Mr. Acosta's accident occurred in August 1987, his lawsuit was filed in December 1987, well within the applicable statute of limitations in existence at the time his cause of action accrued.

The defendants, Firestone and Kelsey-Hayes, moved for summary judgment on the grounds that they had a "vested right" not to be sued because of the repose provision which had been contained in *95.031(2), Florida* Statutes, *1975.* The repose provision had been repealed effective July 1986. The now repealed provision which Firestone and Kelsey-Hayes relied upon limited a manufacturer's liability to 12 years after the date of delivery of the completed product to its original purchaser, "regardless of the date of the defect in the product", 95.031*(2), Florida* Statutes, *1975.* The multi-piece tire rim assembly was manufactured and delivered to the first purchaser sometime in 1966.

The trial court granted Firestone and Kelsey-Hayes' summary judgment holding that when the twelve year repose period expired in 1978, immunity from suit became a "vested right" which could not be affected by the subsequent repeal of the repose provision.

On appeal, the Third District reversed the trial court's summary judgment, grounding its decision in the plain meaning of the amendment and the prior reasoning of this Court construing the same provision:

> Based upon the plain language of the 1986 amendment and case law interpreting the repealed and current versions of section 95.031(2), we conclude that the repealed statute of repose is inapplicable here and that a products liability action may be maintained under sections 95.031(2) and 95.11, Florida Statutes (1987)[1] We agree with Judge Ryskamp's interpretation in *Daniell* that the Florida Supreme Court in *Melendez*, by holding that the repeal of section 95.031(2) does not operate retroactively, "merely provided a definite date, the effective date of the amendment, to break cleanly with past policy regarding repose in products liability actions. Only this reading gives effect to the plain meaning of the amendment...."

Acosta v. Firestone Rubber & Tire Co. and Kelsey-Hayes *Co.*, 16 FLW D1546 (Fla. 3d DCA June 11, 1991) [Appendix, pages 1-21

Acknowledging that this was a case of first impression in Florida, the Third District certified to this Court the following question as an issue of great public importance:

> 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.

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[1] [Footnote by the Court "This action was filed four months after Mr. Acosta was killed."]

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This Court deferred on the question of jurisdiction and consolidated *Acosta* with *Walker v. Miller Mfg. Co.,* 16 FLW D1386, (Fla. 4th DCA May 22, 1991), superseded by 16 FLW 2148, August 14, 1991, from the Fourth District and *Torres v. Alva Allen,* 16 FLW D1554 (Fla. 3d DCA June 11, 1991) from the Third District for briefing on the merits.

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SUMMARY OF THE ARGUMENT

This Court is called upon to draw a bright line separating actions which accrued prior to the repeal of the statute of repose and therefore subject to its provisions, and those actions which accrued after the repeal of the statute of repose. This Court has already held, albeit implicitly, that actions which accrue after repeal are viable. However, none of this Court's previous decisions deal with the precise point raised in Acosta, i.e. the viability of a cause of action which accrues after repeal of the repose provision.

Firestone and Kelsey-Hayes assert that they have a vested right never to be sued on products which entered the stream of commerce before June 30, 1974. They also contend that the repeal of the repose provision has no effect on these "vested" rights. This argument is in conflict with the leading cases in the country which have construed the effect of a repealed repose provision on causes of actions which accrue after the effective date of the repeal; the precise issue raised in Acosta and certified by the Third District. The Firestone and Kelsey-Hayes position is also in conflict with past cases of this Court which discuss the repose provision. The leading cases all hold that causes of action which accrue after the repeal of repose provisions are viable causes of action. This court should affirm the Third District's opinion and bring Florida in line with the best reasoned decisions in the country on this issue.

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ARGUMENT ONE

THIS COURT SHOULD EXERCISE ITS DISCRETIONARY JURISDICTION TO REVIEW THE PRESENT DECISION BECAUSE OF THE CLEAR CONFLICT BETWEEN THE THIRD AND FOURTH DISTRICT COURTS OF APPEAL AND BECAUSE THE CASE INVOLVES AN ISSUE OF GREAT PUBLIC IMPORTANCE

As the Third District recognized in its opinion in *Acosta*, the conflict between its decision and *Walker* "could not be more direct (R.395,). This is so because the Fourth District in *Walker* relied primarily on the reasoning of the circuit court in *Acosta*, which it found to be factually indistinguishable. Thus, the present situation provides an unusually clear and direct example of the need for exercise of this Court's discretionary review power under *Article V, Sections 3(b)(3) and (4), of the Florida Constitution.* Indeed, this case typifies the "real and embarrassing conflict of opinion and authority" which requires resolution by this Court. *Ansin v. Thurston*, 101 So.2d 808, 811 (Fla. 1958). Stated differently, the decisions are so directly in conflict that if they had been rendered by the same court, one decision would overrule the other. Id. at 811.

Absent this Court's resolution of this obvious conflict, the question of whether a person injured after July 1, 1986 by a product originally sold before June 30, 1974 could bring a cause of action against the manufacturer will depend entirely upon the geographic location of the trial forum. Under the present state of the law, a plaintiff living on 215th Street in Dade County could pursue an action whereas a plaintiff living across the street in

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Broward could not. This is going to be an ongoing problem for an indefinite period of time for products manufactured before June 30, **1974** have varying useful lives. It is not only conceivable but foreseeable that this problem will reappear well into the twenty first century, as litigants are told that their actions are barred by a law which was repealed in **1986.**

Consider the following scenario if this Court affirms the Fourth DCA's opinion in ***Walker.*** A product such as a tire rim which was delivered on June 30, **1974** could not **form** the basis for a cause of action when it exploded in 1987, but a tire rim which was delivered on July 1, **1974** and exploded on the same day in 1987 would be a viable cause of action. Taking it a bit further, suppose for arguments sake that the tire rims were manufactured on the same day at the same plant. One was delivered to the original purchaser, a tire garage, on June 30, 1974 while the other was delivered to the same garage on July 1, **1974.** Both tire rims are installed the next month on a Dade County School Bus, In **1987** the school bus has two flat tires. Two men are sent out to fix the flats and both tire rims explode, killing the two repairmen. The personal representative of the man killed by the rim delivered an June 30 is barred from bringing a wrongful death action based on the underlying products liability claim, while the personal representative of the other man who was killed by the rim manufactured the same day and installed the same day but delivered a day later would have a viable cause of action. This is fundamentally unfair, but is what will occur if this Court adopts

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the Fourth District's opinion and rejects the Third District's reasoning.

Acoatatherefore asks this Court to exercise its discretionary power to review and affirm the decision of the Third District Court of Appeal in *Acosta.*

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ARGUMENT TWO

THE ARGUMENTS COLLECTIVELY MADE BY DEFENDANTS CONCERNING THE *MELENDEZ* DECISION ARE TAKEN OUT OF CONTEXT. THE CASE MUST BE CONSTRUED WITHIN THE CONTEXT AND TOTALITY OF THE CIRCUMSTANCES WHICH GAVE RISE TO THIS COURTS DECISION IN *MELENDEZ* AND THE OTHER "WINDOW" CASES

Kelsey-Hayes and Firestone both frame their arguments to this Court differently from the certified question from the Third DCA. In doing so they ask the court to focus only upon the date of delivery of the product and hold irrelevant all other elements of Acosta's cause of action. This argument is in conflict with the Court's past reasaning, i.e. this Court has never focused solely upon the date the product was delivered to the first purchaser, but rather upon three distinct elements, that is, on the nexus between the date of delivery, the date the cause of action accrued and the viability of the repose provision. In each case considered by this Court, the key determinant as to whether a cause of action was viable rested finally upon whether the plaintiff had relied upon the law in existence at the time the cause of action accrued, not the date of delivery as Firestone and Kelsey-Hayes contend. To adopt the defense's argument that the date of delivery is dispositive on the question of whether a cause of action is viable disregards this Court's reasoning in *Battilla* v. *Allis Chalmers* Mfg. *Co.*, 392 So.2d 874 (Fla. 1980), *Pullum v. Cincinnati, Inc.*, 476 So.2d 657 (Fla. 1985), *Melendez* v. *Dreis* & *Krump* Mfg. Co., 515 So.2d 735 (Fla 1987), *Brackenridge v. Ametek, Inc.*, 517 So.2d 667 (Fla. 1987), *National Insurance Underwriters v. Cessna Aircraft*

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Corporation, 522 So.2d 53 (Fla. 5th DCA 1988) [review denied, 531 So.2d 1352 (Fla. 1988)], *Lowell v. Singer company, 528* So.2d 60 (Fla. 1st DCA 1988) [review denied, 539 So.2d 476 (Fla. 1989)], and *Frazier v. Baker Material Handling Corporation, 559* So.2d 1091 (Fla. 1990).

This Court's line of cases construing causes of actions which accrued during the interval between *Battilla* (which questioned the constitutionality of the repose provision) and *Pullum* (which held the statute constitutional) demonstrate that the focus has never been limited solely to delivery dates, rather this court has considered the following as the significant elements; a) the date the cause of action accrued; b) the date of delivery of the product and c) whether the plaintiff had relied upon the law in existence on the day the cause of action accrued.

The date of delivery has been held to be dispositive only while the repose provision was in effect. The date of delivery ceases to be dispositive once the repose provision is repealed, whether by judicial construction or legislative amendment. Viewed collectively these cases have the following nexus:

1. In cases where the twin elements of injury (cause of action accrued) and delivery (running of the repose provision during the interval) occurred during the window or interval between *Battilla* and *Pullum* (1981 to November 1985, when the repose provision was judicially repealed) and where the third element was also present, i.e. plaintiffs relied upon the law in existence when their cause of action accrued, the causes of actions were not

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barred. See *National Underwriters, Lowell, Frazier.* In *National Underwriters,* the injury occurred in 1983 and the repose provision ran in 1984. In *Lowell,* the injury occurred in 1982 and the repose provision ran in 1983. In *Frazier,* the injury to Frazier occurred in 1982, the injury to Hearn occurred in 1983 and the repose provision ran in 1984. Thus in the cases where this Court determined that the causes of actions were viable, both delivery and accrual of the cause of action were significant but the fact that the plaintiffs had relied upon the law in existence when their cause of action accrued was held to be dispositive.

2. Where the delivery element, i.e. the repose provision ran before the *Battilla-Pullum* window this Court decided there the third dispositive element of reliance was missing and the causes of action were barred. However, even when a cause of action was barred, this Court considered all three elements, never did it focus solely upon the date of delivery as dispositive. See *Melendez* and *Brackenridge.* In Melendez this Court stressed both the date that the cause of action accrued as well as the date of delivery, but since there was no reliance, the crucial third element was missing and his cause of action was barred. Melendez *at* 736.

3. None of the cases construed by this Court as yet have dealt with the circumstance where the cause of action accrued after the legislative repeal of the repose provision. To reiterate, all the injuries in *Battilla, Pullum, Melendez, Brackenridge, National Underwriters, Lowell* and *Frazier* occurred prior to the repeal of

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the repose provision; *Pullum* in 1977, *Melendez* in 1982, *National Underwriters* in 1983, *Lowell* in 1982 and *Frazier* in 1982 and 1983. It is only in the consolidated cases presently before this Court that all injuries occurred after the repeal of the repose provision; *Acosta* in 1987, *Walker* in 1988 and *Torres* in 1988.

The factual differences between the consolidated cases and the window cases cannot be overemphasized, for the consolidated cases present a factual pattern which has not been considered by this Court previously, i.e. injury after statutory repeal. The common ground between the consolidated cases and those where this Court held that the cause of action was viable *(National* Underwriters, *Lowell* and *Frazier)* is reliance upon the existing law at the time of filing suit. As this Court emphasized in *Frazier,* "[a] claimant with a viable cause of action is entitled to rely on the existing law which provides that claimant access to the court." *Frazier at* 1093.

The key to Acosta's cause of action then becomes the terminology "viable cause of action". Firestone and Kelsey-Hayes argue that in Acosta there is no viable cause of action because the manufacturers had a right not to be sued which vested before the repeal of the statute and the legislature intended that this right be "vested" and thus could not be disturbed by a repeal of the repose provision. This is the primary argument made by all defendants in the consolidated cases. To answer the question of whether Acosta has a viable cause of action, we must first examine the legislative intent and the nature of a vested right.

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ARGUMENT THREE

THE LEGISLATIVE INTENT IN REPEALING THE REPOSE PROVISION

In statutory construction the primary purpose is to ascertain legislative intent. Absent a specific savings clause the existing law is abrogated as if it had never existed. See generally *Crawford, CONSTRUCTION OF STATUTES, CHAPTER XXVIII Construction of* Repealing Acts. Further, if a right is dependent upon a statute, that right cannot survive the repeal of the statute which gave the right, again absent a specific savings clause. In other words rights dependent upon a statute and still inchoate, that is, not perfected by a final judgment are lost by a repeal of the statute. See *Bejger* v. *Zawadzki*, 232 N.W. 746 (Mich. 1930).

The deliberations in the Senate and House of Representatives regarding repeal of the repose provision of the statute of limitations, centered on removing the then operative twelve year statute of limitations in product liability actions. These was no discussion or even contemplation that any vestige would remain of the repealed repose provision. The introduction to the amendment in the Senate Committee specifically indicates that the bill's purpose was to reinstate the four year statute of limitations:

> [The] Supreme Court of Florida upheld the constitutionality of this provision which provides in the current law that any action for products liability, even if it was not diacovered or could not have been discovered, must necessarily be brought within 12 years from the date of original purchase.. . ..." and what this bill does is provide that in those cases *you* would not have the 12 year absolute ban on products liability actions. [emphasis supplied]

(page 4-5, Transcript of Senate Court Systems and Judiciary Committee Deliberations) [Appendix pages 11-12]

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The deliberations in the House of Representatives also establish that the intent of repeal was to remove the bar to maintaining an action after 12 years and reinstate the four year statute of limitations:

> "All we're doing is removing the cap. We then have a four year statute of limitations that comes from the time that the defect was found out or should have been found out. It is not a major deviation of the law. It's something that is very fair...
>
> Representative Upchurch's amendment is an excellent one because otherwise those people will be barred before they even know they have a cause of action under the 12-year statute...
>
> It is a reasonable limitation that you be able to sue from the time you discover, not from the time of manufacture because otherwise you could be out of Caurt without even knowing there was a manufacturer's defect..." [emphasis supplied]

(page 15-16, House of Representatives Deliberations Transcript) [Appendix pages 30-31]

After much debate (which centered upon the cost of insurance and not on divesture of rights enjoyed by the manufacturers during the time span that the repose provision was law) the bill was passed into law. All of the deliberations concerned reimposing a limitations period of 4 years. There was absolutely no discussion of vested rights. Pure and simple, the legislature intended to make the limitations period run from the date of discovery or when the cause of action accrued. There was not a single comment made during deliberations in the House of Representatives or the Senate that anything other than a four year statute of limitations would be applicable after the effective date of the repeal. There was

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certainly no discussion about the repealed statute reaching past its death to bar causes which accrued after repeal.

The "vested rights" argument of the manufacturers was not foreseen by the legislature and that is the reason that it was not addressed. However, it is evident that the legislature clearly did not intend that the repose provision would outlive its repeal because the legislature did not include any form of a savings clause in the repeal amendment itself. The legislature thought that by repeal it accomplished what it intended, the reinstatement of a four year statute of limitations.

Firestone and Kelsey-Hayes argue that the legislative intent which governs this case is found not in the statute of limitations itself but rather in *11.2425, Florida Statutes, (1987)* which states "the repeal of any statute by the adoption and enactment of Fla. Stats 1987...shall not affect any right accrued before such repeal." This argument is wrong for two reasons. First, when construing the application of any statute, the general cannot be construed to abrogate that which is more specific, i.e. in repealing the repose provision the legislature specifically reinstituted the four year statute of limitations. There is no language in the amendment which can be construed as vesting any rights in the defendants, nor can the defendants point to any such language. Secondly, the application of *11.2425, Florida Statutes, 1987,* relies upon the premise that a right had accrued, i.e. the vested right not to be sued. Thus before this statute is triggered, a right must have become vested, and whether such a

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"vested right" had accrued before repeal, or in fact whether such a right could have accrued absent a cause of action is at the heart of the question presented to this Court in the consolidated cases.

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ARGUMENT FOUR

THE NATURE OF VESTED RIGHTS AND THE RELIANCE PRINCIPLE: AN EXPECTATION IS NOT A FIXED VESTED RIGHT

Firestone and Relsey-Hayes' rights under the repose provision were at most an expectation which could ripen into a fixed vested right only if an injury occurred while the repose provision was the law in Florida. This is because the rights accorded by the repose provision were contingent in nature and thus never fixed before the cause of action accrued. This contingent right to escape liability could only become vested when the cause of action (the injury) occurred during the period when the repose provision was law. Causes of action which might arise in the future were at best inchoate rights. If an injury occurred while the repose provision was the law, they became vested, but once the law was repealed, the inchoate rights were extinguished.

Firestone and Kelsey-Hayes ask this Court to overlook that the accrual of a cause of action is the element that triggered the repose provision. They also ask this Court to disregard the common nexus which occurs in those cases which hold that a party is entitled to rely upon an amended or repealed statute; the statute relied upon was in existence at the time the cause of action accrued. Thus for example in *Walker & Laberge, Inc.* v. *Halligan*, 344 So.2d 239 (Fla. 1977), a case heavily relied upon by the defendants, the injury occurred in 1972. Just before the action was filed but after the injury occurred the legislature amended the statute, *Walker & Laberge at* 240. The defendant moved for summary

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judgment, "relying on the law as it existed at the time the alleged tort was committed." *Walker & Laberge at* 240. The trial court denied the motion and applied the 1974 amendment retroactively. This Court in reversing the trial court applied the law as it existed when the cause of action, the injury, accrued.[2]

The date of an injury or accident as the dispositive element in the construction of amended or repealed statutes was the gist of the holding in the Fifth District's recent *Berwald v. General Motors Acceptance Corp., 570* So.2d 1109 (5th DCA 1990). At issue in *Berwald* was whether the August 6, 1986, amendment to *324.021(9)(b), Florida Statutes, 1986 Supp.,* which abrogated vicarious liability for the lessor of an automobile was applicable to an accident which occurred on August 8, 1986. The Fifth DCA held that "appellant's rights as a victim of personal injuries caused by a motor vehicle did not accrue until the date of the accident which was after the statute became law." *Berwald* at 570. See also *Young v. Althenus,* 472 So.2d 1152 (Fla. 1985) where this Court in construing the applicability of 768.56, *Florida Statutes, 1981,* framed the issue as "whether section 768.56 applies to causes of action which accrued prior to the statute's effective date" and held that is was "not applicable to these causes of action." *Young* at 1153.

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[2] The trial court had also held that "if the amendment was not retroactive, the statute would have been unconstitutional as it existed on the date the cause of action accrued.'' *Walker at 240* Thus *Walker* went on an interlocutory appeal to this court, bypassing the normal appellate route.

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In Homemakers, Inc. v. *Linda Gonzales,* 400 So.2d 965 (Fla. 1981), the issue was "the effect of subsequent amendments upon the application of section 95.11(6) Fla. Stats. 1973." *Gonzales at 965.* In *Gonzales,* the injury occurred on April 2, 1973. On July 9, 1976 Mrs. Gonzales filed suit. This court noted specifically that the date of her injury, April 3, 1975 would control what statute was applicable to her cause of action. The defendants argued that she was barred from maintaining her cause of action because of an amendment which was passed subsequent to her injury. This court noted that "[c]learly, had section 95.11(6) remained unamended until April 6, 1975, Mrs. Gonzales' cause of action would have been barred by the statute, since no action of any kind was begun until November 12, 1975."[3] *Gonzales at 965.* This court concluded that the date the cause of action accrued was controlling:

> "In the final analysis Mrs. Gonzales' claim accrued on April 3, 1973, but no action was taken thereon within two years, so her action is barred by section 95.11(6)."

Gonzales at 967. See also *Foley v.* Morris, 339 So. 2d 215 (Fla. 1976) (holding that four year statute in effect when cause of action accrued, would be applicable); Corbett *v.* General *Engineering & Machinery* Co., 37 So.2d 161,162 (Fla. 1948) ("Since the one year statute was repealed there was no law to bar the claim other than the newly enacted two years' law.)

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[3] This was the date that Mrs. Gonzales had initiated medical mediation.

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The foundational rationale for the cases cited is that of reliance, i.e. parties are entitled to rely upon the law in existence when the cause of action accrues. Reliance is the key. Because the repose provision was not in existence either at the time the tire rim was manufactured or at the time of Acosta's injury, this is "not a case where [the defendant's] conduct would have been different" if the defendants had known that the law would be changed. *Chase* Securities v. *Donaldson*, 325 U.S. 304, 316, 65 S. Ct. 1137 (1945). The simple fact is Firestone and Kelsey-Hayes did not rely upon the repose provision when their product entered the stream of commerce, nor could they have relied upon a law not in effect when Mr. Acosta's injury occurred. The only reliance in this case was Mr. Acosta's reliance upon the law in existence when his cause of action accrued.

This principle of reliance was the primary basis for Judge Ryskamp's opinion in *Daniell* v. *Baker-Roos, Inc.*, Case No. 89-14100-Civ-Ryskamp (S.D. Fla. July 13, 1990) [Appendix pages 3-71 when he rejected the same vested rights argument proffered to this Court:

> Cases interpreting Florida law indicate that a statute of repose does not create a vested interest. In any event, it is clear that "[t]o be vested a right must be more than a mere expectation based on an anticipation of the continuance of an existing law." Lamb *v. Volkswagenwerk Aktiengesellchaft*, 631 F. Supp. 1144, 1149 (S.D. Fla. 1986) (quoting *In* Re Will *of Martell*, 457 So.2d 1064, 1067 (Fla. 2 Dist. Ct. App. 1984), aff'd, Eddings *v. Volkswagenwerk, A.G.* , 835 F.2d 1369 (11th Cir. 1988). 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

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> 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 . . . . Six years later, the court reversed itself and ruled that the statute of repose did not violate the Florida constitution . . . . 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 statute's protection.

Judge Ryskamp's rationale is that of reliance, i.e. the viability of the cause of action in *Daniell* was controlled by the law in existence at the time the cause of action arose. Judge Ryskamp noted that in the absence of any demonstration by the defendant that the repealed provision had accorded them vested rights, the plaintiff was entitled to rely on the law in existence when their cause of action accrued. Slip, op. at p.2.

Florida is not the only state to have grappled with this issue. Other jurisdictions have dealt with the precise argument made by Firestone and Kelsey-Hayes regarding "vested rights" and have determined that these rights are not vested. In the federal system, relying upon language from the Supreme Court, these vested rights arguments have been rejected because of the dichotomy between substance and procedure, holding that any statute of limitation, including the repose provision continued within it, goes to a remedy and not to a substantive right. The Supreme Court of the United States in *Chase* Securities Corporation *v. Donaldson*,

65 S. Ct. 1137 stated that, "[t]his Court, in Campbell v. *Holt*, 115 U.S. 620, 6 S.Ct. 209, 29 L.Ed. 483 (1885), adopted as a working hypothesis, as a matter of constitutional law, the view that statutes of limitation go to matters of remedy not to destruction of fundamental rights." Chase at 1142. The language of the Supreme Court in *Chase* was relied upon by the D.C. Circuit in a case which is factually analogous to the consolidated cases presented here and which rejected the vested rights argument proffered to th s Court by Firestone and Kelsey-Hayes.

In *Wesley Theological* Seminary *v. U.S. Gypsum Co.,* 876 F.2d 119 (D.C. Cir. 1989) the D.C. Circuit Court of Appeals was called upon to answer the precise question that is posed today, whether a subsequently enacted amendment which removed previous repose protection would infringe upon the defendants "substantive right not to be sued, which vested before 1987". Wesley at 121. The argument of the defendant manufacturer U.S. Gypsum was that they had a "vested right" not to be sued because the asbestos tiles at issue at been installed in 1957 through 1960 and under the D.C. repose provision of 1981, they could not be sued "for [an] injury resulting from defective improvements to real property if the injury occurred more than ten years after the improvements completion." Wesley at *120.* Gypsum reasoned that their right not to be sued had vested in 1970, and therefore the 1987 amendment which made the statute "inapplicable to any manufacturer or supplier of any equipment or machinery or other articles installed in a structure upon real property" could not act retrospectively to

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divest them of previously vested rights to be free from liability. *Wesley* at 120. The court, in rejecting Gypsum's vested rights argument stated:

> The defendant claims to find in *Chase* and *Campbell'* a simple dichotomy between procedure and substance, under which changes in purely procedural provisions may be retroactive while changes in substantive ones may not. This constitutes the major premise of a proposed syllogism. Defendant would add a minor premise, that statutes of repose are substantive. The desired result follows automatically. We may in fact resolve this case, however, without classifying the District's statute as substantive or procedural. The cases simply do not support defendant's major premise. First the cases upholding retroactive application of amendments of statutes of limitations by no means give the procedure/substance distinction anything the place that U.S. Gypsum suggests..."

The *Wesley* court then emphasized prior Supreme Court reasoning on this point:

> "our cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations. This is true even though the effect of the legislation is to impose a new duty or liability based on past acts.

[Wesley at 122 citing 428 U.S. at 15-16]

The *Wesley* court then reasoned that when Gypsum made the sales of the asbestos tiles the repose provision was not in effect' and "[t]hus defendant made the sales without reliance on the statute." *Wesley* at *122.* The *Wesley* court agreed that while there was some "real distinctions between a statute of limitation and one of

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[4] *Chase Securities Corporation v. Donaldson,* 325 U.S. 304, 316, 65 S. Ct. 1137 (1945), and *Campbell* v. *Holt*, 115 U.S. 620, 6 S.Ct. 209, 29 L.Ed. 483 (1885).

[5] When Firestone and Kelsey-Hayes delivered the component parts to the first purchaser in 1966 there was no repose provision in Florida's Statute of Limitations either.

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repose," the weight that Gypsum had placed on the distinction was unwarranted, with the correct focus being on the date of injury:

> Defendant frames the distinction around the existence of a cause of action, saying that a statute of repose prevents one from ever coming into existence whereas a statute of limitations causes the expiration of an existing cause of action. We think this line of distinction may be somewhat metaphysical. If a statute of limitation extinguishes an undiscoverable cause of action, as some do, one could easily recharacterize it as a statute of repose: so viewed it prevents the claim from ever accruing (with discovery, or the possibility of discovery being a necessary component of accrual.) Thus we rest more confidence in the distinction suggested earlier, in terms of the event that satisfies the statute (i.e., an injury for a statute of repose; filing of suit, for a statute of limitations).

Wesley at 122-123.

The Wesley court then reversed the district court's decision which had granted U.S. Gypsum's summary judgment based upon the vested rights argument. In *Independent School* District *v. W.R. Grace* & co., 752 F.Supp. 286 (D. Minn. 1990), the same vested rights argument was made to the court, and again relying upon Wesley and United States Supreme Court cases, the court held that the defendant, Grace & Co., had cited "no court which has held that a statute of repose cannot be modified", Ind. *School District* at 298 and concluded that "in the absence of such authority, the Court will follow the leading cases which have sustained retroactive modification of time limitations.. ." *Ind. School District at 298.*

One of those leading cases almost directly on point with the facts presented by the consolidated cases is the Sixth Circuits decision on "vested rights" in *Cathey* v. *Johns-Manville Sales Corp.*, 776 F.2d 1565 (1985). Tennessee had a ten year repose

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provision which was effective July 1, 1978. A year later, on July 1, 1979, the statute was amended making the ten year repose period inapplicable to asbestos related claims. The plaintiff discovered he was suffering from asbestos exposure on November 4, 1981, and filed his complaint on December 4, 1981. Johns-Manville argued that it had acquired vested rights not to be sued on the asbestos claim which could not be divested through a repeal of the repose provision. The Cathey court rejected this argument, emphasizing that the date the cause of action accrued was the correct focus in determining the applicable statute of limitations not the date of delivery:

> Due to the fact that Cavett's cause of action accrued after the effective date of the amendment, Johns-Manville, neither acquired nor developed a vested right. It is the time of the accrual of an action which determines the applicable statute of limitations".
>
> Cathey *at 1576* (collecting cases)

The Cathey court went on to explicate why the two elements of 1) when the cause of action accrued and 2) whether the repose provision was the law when the cause of action accrued were dispositive in the application of the vested rights theory:

> The present case is distinguishable from the cases cited by Johns-Manville for the proposition of vested rights. In each of these cases cited by the defendant including *Murphree v. Raybestos-Manhattan, Inc., 696* F.2d 459 (6th Cir. 1982) the injuries were discovered and therefore the causes of action accrued during a time that the statutes of repose or limitations were in effect.

The Sixth Circuit rejection of vested rights and the date of accrual as controlling is in accord with other cases from around the country where defense counsel have proffered the same argument.

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For example, in Roller v. *Basic Construction Co.,* 384 S.E.2d 323 (Va. 1989), Mr. Roller's cause of action accrued on August 22, 1983. *Roller at 324.* Mrs. Roller filed a claim for workers compensation[6] benefits on August 6, 1985. In July 1983, the Virginia legislature had amended the repose provision in their statute of limitation to remove the five year limitation as it related to Mr. Roller's cause of action. The Virginia Supreme Court rejected the "vested rights" argument focusing not on when the repose provision had run but on when the injury occurred.[7] Once the court determined that the cause of action accrued on August 22, 1983, the court held that the critical event is whether the repose provision was in effect on the date the cause of action accrued:

> "If a statute of repose is in effect on that date, and if it applies under the facts of the case, it governs. But a former STATUTE OF REPOSE, REPEALED before the date of the injury by accident has no application whatsoever ... Before the occurrence of such an injury, neither party has a vested interest in the continuing existence of the statutory scheme in unaltered form. The General Assembly is free to amend the Act, including its limitations period, as circumstances may from time to time require. *An* amendment deleting a statute of repose disturbs no employer's substantive right prior to the occurrence of an injury by accident. For that reason, the 1983 amendment, as applied in this case, had no unconstitutional retrospective effect, and U.S. Gypsum is

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[6] While Roller is a worker's comp case, this Court also relied upon a worker's compensation scheme in *Florida* Forest *and Park Service v. Strickland,* 154 Fla. 472, 18 So.2d 251 (1944) in construing the repose provision in Florida's Statute of Limitations. See *Brackenridge* v. *Ametek, Inc.,* 517 So.2d at 669.

[7] In Virginia, pursuant to the workers compensation scheme, that cause of action accrued in an occupational disease when the diagnosis is first communicated to the employee. See *Roller* at 329.

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inapposite. (capital letters used by the court, other emphasis supplied]

Roller at 330.

Thus according to those courts which have construed the precise question presented in the consolidated cases, the date of injury or accident will control as to the applicability of the statute. If the repose provision is the law when the cause of action accrues, then the cause of action is barred. But if the cause of action accrues after the repeal of the repose provision, then the cause of action is viable.

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CONCLUSION

The consolidated cases all present the factual scenario of injuries and therefore causes of actions which accrued after the repeal of the repose provision. The defendants refuse to acknowledge that the repeal did affect their expectations, expectations which could only mature into vested rights while the repose provision was the law. Admittedly, while the repose provision was on the books, rights in the nature of protection from suits on products liability actions were gained by product manufacturers after twelve years had expired. Even so, these rights were not of constitutional dimension, or even "vested" until the occurrence of two events; the accrual of a cause of action and the existence of the repose provision at the time of the accrual of such cause of action. Until these contingencies were met, the rights were inchoate in nature.

The "vested rights'' which defendants assert are theoretical, abstract rights which exist apart from a cause of action or an actual case in controversy. If no citizen of Florida has a vested right in any abstract rule of law, how could a manufacturer's expectation become a vested right after repeal. No, the only logical conclusion is that the manufacturer's expectation was that their twelve year old products would be free from liability if the repose provision was law at the time the cause of action arose. Once the law was repealed the inchoate rights of manufacturers could never ripen into a vested interest and therefore were extinguished.

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Maria Acosta respectfully requests this Court to affirm the decision of the Third DCA.

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the above and foregoing Answer Brief was mailed this 1st day of October, 1991, to: NANCY LITTLE HOFFMAN, ESQUIRE, Counsel for Kelsey-Hayes, 4419 West Tradewinds Avenue, Suite 100, Fort Lauderdale, Florida, 33308; CLIFFORD B. SELWOOD, JR., ESQUIRE, Co-counsel for Kelsey-Hayes, Post Office Box 14128, Fort Lauderdale, Florida, 33302; G. WILLIAM BISSETT, JR., ESQUIRE, Preddy, Kutner, et al., Counsel for Firestone, 501 Northeast First Avenue, Miami, Florida, 33132; STEVE BEFERA, ESQUIRE, Wicker, Smith, et al., Counsel for Okeechobee Tires, Grove Plaza Building, 5th Floor, 2900 Southwest 28th Terrace, Miami, Florida, 33133; BRUCE SCHWARTZ, ESQUIRE, Schwartz, Weinstein & Mopsick, Co-counsel for Maria Acosta, 2850 Northeast 187th Street, North Miami Beach, Florida, 33180.

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