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FILED
SID J. WHITE
AUG 14 1991
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

CASE NO. : 78,255

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

Petitioners/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

BRIEF OF PETITIONER KELSEY-HAYES ON THE MERITS

Clifford B. Selwood, Jr.
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Nancy Little Hoffmann
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TABLE OF CITATIONS

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TABLE OF CITATIONS (Continued)

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QUESTIONS PRESENTED

POINT I

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

POINT II

WHETHER WHERE A PRODUCT MANUFACTURER'S POTENTIAL LIABILITY FOR A DEFECTIVE PRODUCT WAS EXTINGUISHED BY THE PASSAGE OF TWELVE YEARS AFTER SALE OF THE PRODUCT, PURSUANT TO THE STATUTE OF REPOSE THEN IN EFFECT, LIABILITY CANNOT CONSTITUTIONALLY BE REVIVED BY REPEAL OF THAT STATUTE EVEN AS TO INCIDENTS OCCURRING AFTER SUCH REPEAL.

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PREFACE

This brief is submitted on behalf of Petitioner KELSEY-HAYES COMPANY, in support of its petition to review the June 11, 1991 decision of the District Court of Appeal, Third District. The District Court's opinion reversed summary judgments which had been entered in favor of this Petitioner and its co-Petitioner, FIRESTONE TIRE & RUBBER COMPANY, who were the Defendants below in a wrongful death action filed by Respondent, MARIA ACOSTA, as Personal Representative of the Estate of LUIS ACOSTA, SR., deceased.

In this brief, the Respondent/Plaintiff Maria Acosta will be referred to as the Plaintiff. The Petitioners will be referred to either as the Defendants or as "Firestone" and "Kelsey-Hayes." Reference to the Record on Appeal will be by R.1-396. Any emphasis in quoted material is that of the writer unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The history of the case and the material facts were succinctly set forth by the District Court of Appeal in its opinion, as follows:

> In August, 1987, Luis Acosta was killed when a multipiece rim and wheel assembly exploded, causing part of the assembly to separate and strike him. In December, 1987, Maria Acosta, as personal representative of her husband's estate, filed a wrongful death action against Firestone and Kelsey Hayes, the manufacturers of the component parts of the rim assembly.
>
> Firestone and Kelsey Hayes moved for summary judgment alleging that Acosta's claim was time-barred under the 1975 Statute of Repose, section 95.031(2), Florida Statutes. In response, Acosta alleged that her cause

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of action was viable under the current version of section 95.031(2), Florida Statutes, which repealed the twelve-year statute of repose in products liability actions.

Following a stipulation between the parties, the trial court made the following findings: (1) that the latest date of delivery to the initial purchaser was December 31, 1966; (2) that the effective date of Florida's product liability twelve-year statute of repose was January 1, 1975; (3) that the twelve-year statute of repose elapsed on December 31, 1978; (4) that the statute of repose was repealed by the Florida legislature on July 1, 1986; and (5) that the incident which gave rise to this litigation did not occur until August 18, 1987, twenty-one years after the product was delivered to the initial purchaser and seven and one-half years after the twelve-year repose period had expired.

Following a hearing, the trial court granted the defendants' motions for summary judgment finding that the twelve-year repose period had expired while section 95.031(2), Florida Statutes (1975), was still in force and effect and constitutional and that, therefore, the plaintiff's cause of action was extinguished before it ever accrued. The trial court also held that in 1978, when the twelve-year repose period expired, immunity from suit became a vested right which could not constitutionally be affected by the subsequent repeal of the statute of repose.

(R.391-2; A.2-3) [footnotes omitted].

In its eight-page memorandum opinion and order (R.381-388, A.8-15), the trial court explained that the statute of repose terminated the right to bring an action after the twelve-year period, and that the right to bring such an action is foreclosed when the event giving rise to the cause of action does not occur within that period (R.383, A.10). The court reasoned that since the Plaintiff would have had no cause of action had the incident occurred between December 3, 1978 (when the twelve-year period expired) and July 1, 1986 (the date when

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the statute of repose was repealed), the critical inquiry must be the effect, if any, the 1986 repeal had with respect to the plaintiff's ability to thereafter bring suit and the Defendants' previously granted statutory right not to be sued after expiration of the twelve-year repose period on December 3, 1978 (R.385, A.12).

The trial court concluded that since it was undisputed that the twelve-year period expired while the statute of repose was still in force and constitutional, it necessarily followed that Plaintiff's cause of action was extinguished before it arose or accrued. Moreover, the repealing of the statute could not constitutionally operate to "revive" a manufacturer's potential liability, where the twelve-year statutory period had expired prior to repeal of the statute of repose (R.387-388, A.14-15).

On appeal by the Plaintiff, the Third District Court of Appeal reversed, noting that the case appeared to be one of first impression in the Florida courts. Placing great emphasis on a recent federal district court decision, the Third District found that the statute of repose did not create a vested right to be free from liability (R.393, 394; A.4-5). The Third District concluded that the repealed statute of repose was inapplicable, and that Plaintiff should be permitted to pursue her wrongful death action since her decedent would have been permitted to maintain a products liability were he alive (R.395; A.6).

Shortly before the Third District issued the opinion under review, the Fourth District Court of Appeal affirmed the dismissal of a products liability/wrongful death action on

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virtually identical facts in Walker v. Miller Electric Manufacturing Company, 16 FLW D1386 (Fla. 4th DCA, opinion filed May 22, 1991), rehearing pending. The Walker court relied heavily upon what it termed "a persuasive circuit court opinion which is factually indistinguishable," namely the trial court's opinion in the present case. 16 FLW D1386-7. Accordingly, recognizing the obvious conflict between the two decisions, the Third District certified its decision to be in direct conflict with Walker.

The Third District further found that the case presented a question of great public importance, and accordingly certified the following question to this Court:

> 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.

(R.396; A.7).

This Court's review jurisdiction was timely invoked. On July 18, 1991, this Court issued an order reflecting that it has postponed its decision on jurisdiction, and ordered that the case be briefed on the merits.

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SUMMARY OF ARGUMENT

The obvious conflict between the decisions of the Third District in the present case and the Fourth District in Walker v. Miller Electric should be reviewed by this Court in the exercise of its discretionary jurisdiction, and should be resolved in favor of the rule announced in Walker, The Third District's opinion fails to recognize the concept both impliedly and expressly stated by this Court that the legislature cannot deprive a defendant of its statutorily granted and vested immunity from suit by a subsequent enactment.

When twelve years passed after the delivery of the product in question here, at a time when the statute of repose was in effect, no cause of action could thereafter arise with respect to that product. The subsequent amendment of Sec. 95.031(2), Fla.Stats. eliminated the repose provision, but only as to those causes of action which thereafter accrued and were not already barred. accordingly, the trial court correctly granted summary judgment in favor of the manufacturers, and the Third District's opinion reversing that judgment should be quashed.

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POINT I

THIS COURT SHOULD EXERCISE ITS DISCRETIONARY JURISDICTION TO REVIEW THE PRESENT DECISION BECAUSE OF THE CLEAR CONFLICT BETWEEN THE DECISIONS OF 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 the present decision, the conflict between its decision and Walker "could not be more direct (R.395, A.6)." This is so because the Fourth District in Walker relied primarily on the reasoning of the circuit court's opinion 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 1986 by a product originally sold before 1974[1/] can sue its manufacturer will depend entirely upon the geographic location of the trial forum. Under the present state of the law, a plaintiff in the

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1/ i.e., twelve years before repeal of the statute of repose.

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Third District could pursue such an action, whereas a plaintiff in the Fourth District could not.

Although this is an issue which will eventually resolve itself by the passage of time, since products sold before 1974 will ultimately fall out of use, in the meantime it poses a serious problem for those litigants who will be treated unequally (and, by definition, thus unfairly) by the courts unless and until this Court establishes a uniform rule of law to be applied throughout the courts of this state.

Defendant Kelsey-Hayes therefore urges this Court to exercise its discretionary power to review the decision of the Third District Court of Appeal presented here.

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POINT 11

WHERE A PRODUCT MANUFACTURER'S POTENTIAL LIABILITY FOR A DEFECTIVE PRODUCT WAS EXTINGUISHED BY THE PASSAGE OF TWELVE YEARS AFTER SALE OF THE PRODUCT, PURSUANT TO THE STATUTE OF REPOSE THEN IN EFFECT, LIABILITY CANNOT CONSTITUTIONALLY BE REVIVED BY REPEAL OF THAT STATUTE EVEN AS TO INCIDENTS OCCURRING AFTER SUCH REPEAL.

In stating the issue on this point of appeal, Kelsey-Hayes has departed from the language used by the Third District in its certified question, since the question as phrased[2/] is at the same time too narrow and too broad. It is too narrow because it purports to limit the question to only those product-related injuries which result in death, whereas it should be made clear that this Court's resolution of this issue will govern all product liability cases, not just those resulting in a death. This is so because this Court has already clearly established in Pait v. Ford Motor Company, 515 So.2d 1278 (Fla. 1987) that the question of whether a wrongful death action may be brought depends entirely upon whether the decedent had a viable products liability action at the time of his death.

The certified question is, at the same time, too broadly stated because it fails to encompass the necessary facts present here (and in Walker) that the twelve-year repose period after the product's sale had expired, and that on that date the statute of repose was in effect and constitutional. As the question was posed by the Third District, excluding that

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2/ The certified question is quoted at page four, supra.

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crucial fact, it could be answered only in the negative./

In 1975, the Florida Legislature enacted Section 95.031(2),[4] Florida Statutes, which provides that:

> actions for products liability ... must be begun within the period prescribed in this chapter, with 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, ... but in any event within 12 years after the date of delivery of the completed product to its original purchaser ... regardless of the date the defect in the product ... was or should have been discovered. (Emphasis added)

In 1986, the legislature amended that statute so as to eliminate the twelve-year repose period for products liability actions. Ch. 86-272, §2, Laws of Fla.

In 1980 this Court held the statute unconstitutional as applied to a plaintiff whose injury occurred more than twelve years after the delivery of the product to its first purchaser, Battilla v. Allis Chalmers Manufacturing Company, 392 So.2d 874 (Fla. 1980). This court receded from that opinion in Pullum v. Cincinnati, Inc., 476 So.2d 657 (Fla. 1985), appeal dismissed, 475 U.S. 1114, 106 S.Ct. 1626, 90 L.Ed.2d 174 (1986). Thereafter, this Court held in Melendez v. Dreis and Krump Manufacturing Company, 515 So.2d 735 (Fla. 1987), that Pullum operated retroactively so as to bar causes of action which accrued in the interval between the Battilla and Pullum decisions. The Melendez court also held that the 1986

3/ In other words, the Third District asks whether a repealed statute could bar a plaintiff's cause of action where the law in effect at the time it accrued would have permitted that action.

4/ Referred to hereafter as the "statute of repose."

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legislative repeal of the statute of repose did not operate retrospectively. Accordingly, an action which had accrued prior to the legislative repeal, but more than twelve years after original delivery of the product, could not be saved by the statutory repeal even though the case was still in the appellate process at the time the statute was amended. Id. at 736.

The present state of the law is thus clear as to causes of action which accrued prior to the 1986 legislative amendment, but more than twelve years after delivery of the product -- they are barred. Melendez, supra. The law is also clear as to causes of action accruing after July 1, 1986 and less than twelve years after delivery of the product -- they need only be filed within four years of discovery of the facts giving rise to the cause of action. Sec. 95.031(2), Fla.Stats. (1987). Left unresolved as yet by this Court, and resolved in two opposite directions by the Third and Fourth District Courts of Appeal, is the question presented in this case: Where more

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repose was in effect, a plaintiff's cause of action was barred even though a new statute of limitation existed when the action accrued. Defendant Kelsey-Hayes urges this Court to adopt that view for the reasons which follow.

This Court has made it clear that a statute of repose operates to cut off a right of action after a specified time measured from the delivery of a product, regardless of the time of the accrual of the cause of action or of notice of the invasion of a legal right. Melendez v. Dreis and Krump Manufacturing Company, 515 So.2d 735 (Fla. 1987); Universal Engineering Corporation v. Perez, 451 So.2d 463 (Fla. 1984); Bauld v. J. A. Jones Construction Company, 357 So.2d 401, 402 (Fla. 1978).

This Court has also clearly settled the issue of whether a cause of action may constitutionally be barred before it accrues, Pullum, supra. When a statute of repose is in effect, as it was here when the twelve-year period elapsed, it prevents what might otherwise be a cause of action from ever arising. Any injury caused by a product that had been delivered to its original purchaser more than twelve years prior to the filing of a plaintiff's lawsuit would thus give rise to no cause of action against the manufacturer or designer. Eddings v. Volkswagenwerk, A.G., 835 F.2d 1369 (11th Cir. 1988), cert. denied 488 U.S. 822 (1988).

Both the trial court in the present case and the Fourth District in Walker analogized to Florida decisions regarding the effect of amendments to statutes of limitation. This Court

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held in Corbett v. General Engineering & Machinery Company, 160 Fla. 879, 37 So.2d 161 (1948) and, later, in Walter Dsnson & Son v. Nelson, 88 So.2d 120 (Fla. 1956) that the legislature has the power to increase the period of time within which to bring suit, and to make it applicable to existing causes of action "...provided such change is made before the cause of action is extinguished under the pre-existing statute of limitations." Under such circumstances, i.e., where the action has not already been barred by the earlier statute, such an amendment will not be considered to impair a vested right. Corbett, supra at 162; Nelson, supra at 122. See also Mazda Motors of America, Inc. v. S. C. Henderson & Sons, Inc., 364 So.2d 107 (Fla. 1st DCA 1978) [a person has no vested right in the running of the statute of limitations unless it has completely run and barred his action.]

It is clear from the above cases that the right not to be sued was considered not to be vested only in cases where, at the time of the amendment, the plaintiff still had the right to bring suit. Were those decisions concerned with cases such as the present one, where the statutory period had already run, the courts would have been compelled to reach the opposite conclusion -- i.e., that the defendants' right not to be sued had become vested and could not be eliminated by subsequent legislation.

As this Court more recently observed in Clausell v. Hobart Corporation, 515 So.2d 1275 (Fla. 1987), in discussing the concept of vested rights, a plaintiff does not have a vested

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right in his cause of action because it is at most a mere expectation. This Court went on to state, drawing upon various federal decisions and quoting from In Re Will of Martell, 457 So.2d 1064, 1067 (Fla. 2d DCA 1984), that a right cannot be considered a substantive vested right unless it is an immediate right of present enjoyment, or a present fixed right of future enjoyment. The immunity from suit created by Section 95.031(2) on January 1, 1975 became vested in this Defendant three years later when the twelve-year repose period expired as to the product involved in this litigation. That right not to be sued must be considered a substantive, vested right in that on that date it became a present fixed right of future enjoyment -- a right not to be sued at any time in the future should the product in question cause injury.

In rejecting this analysis, the Third District in the present case stressed the fundamental difference between a statute of repose and a statute of limitation (R.394-5, A.5-6). The distinction is a real one and should not be overlooked. However, this Court in Melendez, supra, specifically found that cases involving changes to statutes of limitation provide some insight on the question of how statutes of repose should be applied. Id. at 736. Indeed, in Melendez this Court cited its earlier decision in Homemakers, Inc. v. Gonzales, 400 So.2 965 (Fla. 1981) in which it refused to apply a statute lengthening the statute of limitations to a cause of action occurring prior to the effective date of the amendment.

The Third District also held that a statute of repose does

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not create a vested interest. However, the Florida and Federal cases cited in support of that holding dealt not with the issue of whether a defendant had a vested right not to be sued, but rather whether the plaintiff's cause of action was a vested property right. Eddings, supra at 1374; Brackenridge v. Ametek, Inc., 517 So.2d 667, 669 (Fla. 1987). Those decisions do not address the question of whether a defendant's right not to be sued, acquired as the result of the expiration of a statutory repose period, is a vested right, which cannot constitutionally be impaired.

Not mentioned in the Third District's opinion, although cited in the trial court's opinion (and in Melendez, supra at 736), is the case of Walker & LaBerge, Inc. v. Halligan, 344 So.2d 239 (Fla. 1977). In that case, this Court held that while parties do not have a vested sight in any given mode of procedure, a defendant's statutorily created immunity from suit is a substantive right which cannot be withdrawn by subsequent legislation. Id. at 243. Halligan involved worker's compensation immunity rather than immunity created by a statute of repose; however, both situations nonetheless involve the legislature's impairment of a substantive immunity which had already vested. Although in Halligan the right in question was a subcontractor's immunity from suit, which had vested because of the employee's injury, a manufacturer's immunity from suit is no less vested and protected from subsequent impairment when the twelve-year statutory repose period expires.

In its opinion, the Third District also relied heavily upon

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a federal district court decision, Daniell v. Baker-Roos, Inc., No. 89 Civ. 14100 (S.D. Fla. July 13, 1990). In Daniell, on facts similar to those present here, the district court judge interpreted Florida's repose statute and this Court's decision in Melendez to mean that repeal of the statute of repose applied to all actions arising after the effective date of the amendment. Both Daniell and the Third District's decision in the present case, however, were based on the concept that a defendant cannot have a vested right of immunity from suit as a result of the expiration of a statutory repose period. Both opinions fail to recognize the distinction between a plaintiff's cause of action (which has repeatedly been held not to be a vested property right) and a defendant's immunity from suit which does become vested upon the happening of the statutory event (i.e., the passage of twelve years from the date of the original delivery of the product). Indeed, this Court in holding that the amendment to the statute of repose could not be retroactively applied, cited Halligan, supra, and summarized its holding as "immunity from suit not retroactively withdrawn by subsequent legislation." Melendez, supra at 736.

Although the Third District warns in its opinion that barring the claim in the present case "would, in effect, apply a repealed statute prospectively [and] nullify the 1986 amendment abrogating the statute of repose in products liability cases," this would not "wreak havoc" on rules of statutory interpretation, nor would it be "absurd." (R.394, A.5). Indeed, this Court in Homemakers "applied a repealed

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statute prospectively" when it held that a two-year statute of limitation in effect when a medical malpractice cause of action accrued would apply to bar the claim, even though a four-year statute, under which the suit would have been timely, was enacted before suit was filed. The basis for that rule was this Court's determination that the amending statute was not intended to apply retroactively; this Court reached the same conclusion as to the statute of repose in Melendez, citing Homemakers as part of the basis for its ruling. Melendez, supra at 736.

If the Defendants are correct in their assertion that they have a vested immunity from suit, then the interpretation placed by the Third District an the 1986 amendment would render it unconstitutional as applied to these Defendants, under due process considerations. Art. 1, §9, Fla.Const.; U.S. Const. Amend. V, XIV. Clearly, that is not the result envisioned by the legislature; indeed, it specifically directed in Section 11.2425, Fla.Stats., that the repeal of any statute by the adoption and enactment of the 1987 Florida Statutes "shall not affect any right accrued before such repeal,, ,,".

In summary, since twelve years had passed after the delivery of the rim and wheel assembly, the then-existing statute of repose applied to prevent any cause of action from ever arising with respect to that product. The subsequent passage of the 1986 amendatory legislation simply had no effect on the legal right enjoyed by the manufacturers to be free from suit, and no cause of action accrued in this case which is

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redressable at law. Accordingly, the decision of the trial court granting summary judgment in favor of the Defendants was correct. The Third District's opinion should therefore be quashed with directions that the trial court's judgment be reinstated.

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CONCLUSION

For the reasons set forth above, the opinion of the Third District Court of Appeal should be quashed, and the final judgment in favor of the Defendants reinstated.

Respectfully submitted,

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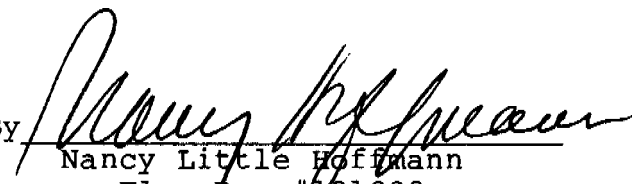
By 
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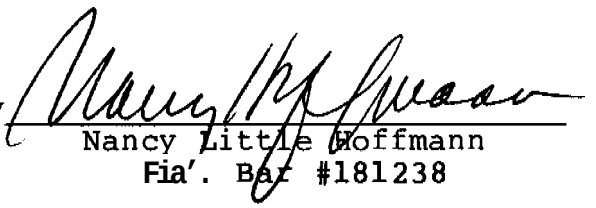
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing and attached has been served by mail this 12th day of August, 1991, to: G. William Bissett, Jr., Esquire, Preddy, Kutner, et al., 501 Northeast 1st Avenue, Miami, Florida 33132, Counsel for Appellee Firestone; Norman S. Klein, Esquire, Klein & Tannen, P.A. 633 Northeast 167th Street, Suite 1111, North Miami Beach, Florida 33162, Counsel for Appellant; Clifford B. Selwood, Jr., Esquire, Post Office Box 14128, Port Lauderdale, Florida 33302, Co-Counsel for Appellee Kelsey-Hayes; Steve Befera, Esquire, Wicker, Smith, Blomqvist, Grove Plaza Building, 5th Floor, 2900 Southwest 28th Terrace, Miami, Florida 33133; and Bruce Schwartz, Esquire, Schwastz, Weinstein & Mopsick, 2850 Northeast 187th Street, North Miami Beach, Florida 33180,

By 
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