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SUPREME COURT OF FLORIDA

ALVA ALLEN INDUSTRIES, INC.,

Petitioner,

vs.

MIGUEL TORRES,

Respondent.

CASE NO. 78,435

FIRESTONE TIRE & RUBBER COMPANY and KELSEY HAYES COMPANY,

petitioners,

vs.

MARIA ACOSTA, as Personal Representative of the Estate of Luis ACOSTA, Deceased,

Respondent.

Case No. 78,255

PETITIONER FIRESTONE'S BRIEF ON THE MERITS

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INTRODUCTION

By its notice to invoke this Court's discretionary jurisdiction, Petitioner, FIRESTONE TIRE & RUBBER COMPANY ("Firestone"), seeks review of the decision of the District Court of Appeal, Third District, in ACOSTA v. FIRESTONE TIRE & RUBBER CO., 16 FLW D1546 (Fla. 3d DCA 1991).[1] In the decision brought up for review, the Third District reversed two summary final judgments entered by the trial court in favor of Firestone and Petitioner, KELSEY-HAYES COMPANY ("Kelsey-Hayes"), and against Respondent, MARIA ACOSTA, as Personal Representative of the Estate of Luis Acosta, Deceased ("Acosta"),on the basis of an application of the twelve-year products liability statute of repose. The Third District noted that its decision directly and expressly conflicted with the decision of the Fourth District in WALKER v. MILLER MFG. CO., 16 FLW D1386, on motion for rehearing and certification, 16 FLW D2148 (Fla. 4th DCA 1991), on the same point of law, and because the Third District felt that the case presented "a question of great public importance," it certified the *matter to* this Court for further consideration.[2] The point of law presented is straight-forward: When the period of time specified in a statute of ultimate repose on products liability

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[1]This Court's jurisdiction is predicated upon Article V, Section 3(b)(3), Florida Constitution (1980).

[2]The Third District's decision in TORRES v. ALVA ALLEN INDUSTRIES, INC., S. Ct., Case No. 78,435 was recently consolidated with the instant case. Review of the Fourth District's decision in WALKER has also been sought here. WALKER v. MILLER ELECTRIC MFG. CO., S.Ct., Case No. 78,506.

claims expires while that statute is still in force and effect and constitutional without the occurrence of any product-related incident which could potentially give rise to a claim for damages against the product manufacturer, distributor or retailer, should (or can) that manufacturer, distributor or retailer nevertheless be subjected to tort liability for a product-related injury which subsequently occurs at a point in time after a repeal of that statute of repose?

STATEHENT OF THE CASE

This products liability action was instituted in early December, 1987 with Acosta's filing of a complaint against Firestone seeking recovery of damages under Florida's Wrongful Death Statute.[3] The litigation arose out of the separation of a twenty-one year old multi-piece truck tire rim[4] (R. 1-11). After subsequent procedural skirmishes, including Acosta's amendment of her complaint (R. 46-53), Firestone filed its answer, which generally denied the material allegations of the complaint and included numerous affirmative defenses including, inter alia, the

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[3]The following abbreviation will be utilized during the course of this brief:

R. _ Record on appeal.

All emphasis has been added by counsel unless indicated otherwise,

[4]The truck tire rim is composed of two parts: the "rim base", which was manufactured by Kelsey-Hayes and the "side ring", which was manufactured by Firestone. In this case, the separation of the two parts was alleged to have occurred after the decedent had changed a tire on the rim and was in the process of inflating the newly-mounted tire.

affirmative defense that Acosta's claim was barred by virtue of the expiration in 1978 of Florida's twelve-year products liability statute of repose, Section 95.031(2), Florida Statutes (hereinafter "Statute of Repose") (R. 79-84).

Less than two years later in August of 1989, Acosta filed a separate products liability action against Kelsey-Hayes arising out of the same incident involved in the pending suit against Firestone (R. 109-15). An agreed order was entered in early January, 1990 consolidating the two actions (R. 140-41).

Several months later, Firestone filed a motion for summary final judgment, along with a supporting affidavit, predicated upon its affirmative defense based upon the absolute bar of the Statute of Repose (R. 182-92). Kelsey-Hayes subsequently filed a similar motion seeking entry of a summary final judgment in its favor (R. 303-16).

Firestone and Kelsey-Hayes' motions for summary final judgment ultimately came up before the trial court for hearing on July 24, 1990 (A. 10-45). The trial judge below reviewed the motions filed by Firestone and Kelsey-Hayes, as well as the supporting affidavits filed by those parties, and, after hearing argument of all counsel, concluded that the motions for summary final judgment were well taken and should be granted (R. 381-89; A. 1-9). The trial Court's findings and conclusions were recited in an eight-page memorandum opinion and order granting the motions for summary final judgment of Firestone and Kelsey-Hayes (Id.). Summary final judgment was thereafter entered in favor of Firestone and Kelsey-Hayes, precipitating an appeal by Acosta

to the Third District (R. 375, 378-80). Ten months later, the Third District reversed and remanded for further proceedings (R. 390-96).

STATEMENT OF THE FACTS

The only "material" facts which are relevant to the disposition of the point of law presented are specifically set forth in the memorandum opinion and order entered by the trial judge. Those facts are as follows:

> During the course of the July 24th hearing, the parties stipulated and agreed that the following operative dates are the only ones material to disposition of the Defendants' Motions: (1) that the latest date of delivery to the initial purchaser of the products which are the subject matter of the instant Litigation was December 31, 1966; (2) that the effective date of Florida's products liability Statute of Repose, Sec. 95.031(2), was January 1, 1975 [See, Laws of Florida, Ch. 74-382, §§3 and 36]; (3) that the twelve-year maximum period of exposure to liability provided for in said Statute of Repose elapsed with respect to the subject products on December 31, 1978; (4) that said Statute of Repose was subsequently repealed by the Florida Legislature, effective July 1, 1986 [See, Laws of Florida, Ch. 86-272, §§2 and 3]; (5) that the incident which gave rise to the subject litigation did not occur until August 18, 1987, some twenty-one years after the subject products were delivered to the initial purchaser and some seven and one-half years after the twelve-year statutory repose period had expired. (R. 382-83; A.2-3).

On the basis of these limited "material" facts, the trial court concluded that Firestone's and Kelsey-Hayes' motions for summary final judgment should be granted: "(a) since the twelve-year period for filing suit with respect to the products in question had expired at a point in time when the statute of

repose was in force and effect and constitutional; (b) since on that date immunity from suit became a vested right of the Defendants, and; (c) since such right could not constitutionally be affected or changed by the subsequent appeal of the statute of repose on July 1, 1986." (R. 388).

During the pendency of this case in the Third District, a "factually indistinguishable case" was decided by the Fourth District Court of Appeals -- WALKER v. MILLER MFG. CO., 16 FLW D1386 (Fla. 4th DCA 1991). The Fourth District in WALKER agreed with the conclusion reached by the trial judge in the instant case, observing that the reasoning expressed in her memorandum opinion was "thorough and persuasive." [16 FLW at D1387]. Some three weeks after the Fourth District's decision in WALKER, the Third District issued its decision and opinion in the instant case, The Third District expressed its feeling that the "result" reached by the trial court in the instant case and by the Fourth District in WALKER was "absurd" [16 FLW at D1546], choosing instead to rely upon the contrary reasoning expressed in the decision and opinion handed down by U. S. District Judge Ryskamp in DANIELL v. BAKER-ROOS, INC., NO. 89 Civ. 14100 (S.D. Fla. July 1990):[5]

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[5]It is interesting to note that the Third District stated at one point in its June 11th opinion that "[t]his case appears to be one of first impression in the Florida appellate court system" and therefore turned to Judge Ryskamp's decision in DANIELL for guidance, yet later in its opinion the Third District "recognized that our decision today is in direct conflict with" the Fourth District's decision in WALKER, which had been rendered some twenty days earlier.

> 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 and products liability actions. Only this reading gives effect to the plain meaning of the amendment ...."
>
> To deprive the Appellant of her cause of action in this case would, in effect, apply a repealed statute prospectively, nullifying the 1986 amendment abrogating the statute of repose in products liability cases, and wreak havoc on ordinary rules of statutory interpretation. Such a result would be absurd. [16 FLW at D1547].

Firestone and Kelsey-Hayes have now come *to* this Court requesting that it exercise its discretionary jurisdiction so as to resolve the undeniable express and direct conflict reached by the Third District in Acosta and by the Fourth District in WALKER on the same point of law, a point of law that raises a question which both of those courts have now certified "to be of great public importance."[6] ACOSTA, 16 FLW at D1547; WALKER, 16 FLW at D2150.

SUMMARY OF ARGUMENT

Over the last several decades, the tort liability of product manufacturers and of professionals has increased dramatically. This expanded tort liability had a direct economic impact upon those classes of tort defendants, which impact was undeniably

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[6] As Kelscy-Hayes aptly observes in its initial brief on the merits, the Third District has incorrectly framed the certified question in such a manner as to allow for only one answer, an answer which validates its conclusion and decision in the instant case.

reflected in their insurance rates, the increased cost of which was ultimately passed on to the consumer in the price of the goods and the services provided. Due to this substantial economic impact and the inadequate predictability of the length of exposure to claims, manufacturers and other professionals began to seek relief in the state legislatures across this country, arguing that they needed protection to alleviate the insurance problem and to stabilize the costs of goods and services. To stem the tide of increased tort exposure over longer periods of time, manufacturers and other professionals began lobbying their state legislatures requesting that they supplement the standard statutes of limitations with statutes of ultimate repose, In Florida, the results of those efforts were substantial revisions in the statutes of limitations pertaining to actions based upon medical malpractice, to actions against engineers and architects and to actions based upon products liability theories.

These changes began to occur in 1975 with a substantial revision of Chapter 95, Florida Statutes, by the Florida Legislature. Included within that substantial revision was the twelve-year products liability statute of repose, which provided in pertinent part that: "actions for products liability ... must be begun ... in any event within twelve 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." Ch. 74-382, §3, Laws of Florida [codified at §95.031(2), Fla. Stat. (1975)]. In contrast to a statute of limitations, a statute of repose precludes a right of action

after a specified time; in this case, within a specified time after the delivery of the product to its initial purchaser.

The products liability statute of repose is "triggered" once the product is delivered to its first purchaser, and, if an injury results from the product after the authorized period (twelve years) has lapsed, the victim is without recourse to the manufacturer of the product. Thus, the effect of the Statute of Repose may be to bar the cause of action before it has even accrued. This result was declared to be permissible in 1985 when the Florida Supreme Court upheld over constitutional attack Florida's twelve-year products liability statute of ultimate repose in PULLUM v. CINCINNATI, INC., 476 So.2d 657 (Fla. 1985). In upholding the statute, the Supreme Court in PULLUM declared that the Legislature had reasonably determined that "perpetual liability places an undue burden on manufacturers" and that "twelve years from the date of sale is a reasonable time for exposure to liability for manufacturing of a product." [476 So.2d at 6591.

It is thus clear that a statute of repose terminates the right to bring an action after the lapse of a specified period of time after the "triggering event" and that the right to bring any action is foreclosed when the event giving rise to the cause of action does not transpire within that time interval. In the instant case, the parties stipulated below that the twelve-year maximum period of exposure to liability provided for in the Statute of Repose elapsed with respect to the subject products at a point in time when the Statute of Repose was still in force and

effect and constitutional and that the incident which gave rise to the subject litigation did not occur until August 18, 1987, some twenty-one years after the subject products were delivered to the initial purchaser, and some seven and one-half years after the twelve-year statutory repose period had expired.

The unique circumstance presented by the instant appeal, however, relates to the fact that the accident which gave rise to Acosta's products liability suit against Firestone occurred just over a year after the Florida Legislature repealed the Statute of Repose. The presence of this unique circumstance focuses the inquiry in this case to the resolution of two questions: (1) whether the Florida Legislature's repealing of the products liability statute of repose in 1986 was intended by that body to retroactively deprive a manufacturer such as Firestone of its previously fixed right not to be sued for injuries alleged to have been caused by a product as to which the twelve-year ultimate repose period had already expired at a point in time prior to the effective date of the repeal; and (2) if so, whether such intention is constitutionally permissible. The answers to both of these questions are in the negative, as both the trial judge here and the Fourth District found in WALKER.

First, in repealing the Statute of Repose in 1986 the Florida Legislature did not intend to retroactively deprive manufacturers of their right not to be sued for injuries alleged to have been caused by products as to which the twelve-year ultimate repose period had already expired prior to the effective date of such repeal. *See*, WALKER, 16 FLW at D2149; S11.2425, Fla. Stat.

(1987). Cf., MELENDEZ v. DREIS & KRUMP MFG. CO., 515 So.2d 735, 736 (Fla. 1987) (finding that the Legislature did not manifest any intention that the repeal of the Statute of Repose was to be applied retroactively so as to allow resurrection of causes of action previously barred under the statute). Secondly, even if the Florida Legislature intended to "revive" a manufacturer's potential liability notwithstanding the expiration of the twelve-year ultimate repose period prior to the repeal of the statute, then such an intent would run afoul of constitutional constraints. WALKER, 16 FLW at D2149. Cf., WALTER DENSON & SON v. NELSON, 88 So.2d 120, 122 (Fla. 1956) (stating the rule to be that the Legislature has the power to increase a prescribed period of limitation "provided the change in the law is effected before the cause of action is extinguished by the force of a pre-existing statute.").

Thus, based upon the undisputed fact that the twelve-year period expired in the instant case at a point in time when the Statute of Repose was still in force and effect and constitutional, it necessarily follows that Acosta's cause of action was extinguished before it ever even arose or accrued by virtue of the force of that previously existing Statute of Repose. Applying the rule of the NELSON case, the subsequent repeal of the pre-existing Statute of Repose could not change or "breath life into" Plaintiff's extinguished ability to sue Firestone. WALKER. Cf., WALKER & LABERGE, INC. v. HALLIGAN, 344 So.2d 239 (Fla. 1977) (immunity from suit not retroactively withdrawn by subsequent legislation); CBS, INC. v. GARROD, 622 F.Supp 532

(M.D. Fla. 1985) aff'd, 803 F.2d 1183 (11th Cir. 1986) (repeal of a statute does not divest one of the defense which arose under the former statute). The Fourth District in WALKER correctly resolved the legal issues raised. The Third District did not, and accordingly, its decision should be quashed,

ARGUMENT

I.

THIS COURT SHOULD EXERCISE ITS DISCRETIONARY REVIEW JURISDICTION BECAUSE OF THE EXISTENCE OF EXPRESS AND DIRECT CONFLICT BETWEEN THE DECISIONS OF THE THIRD AND FOURTH DISTRICT COURTS OF APPEAL ON THE SAME POINT OF LAW AND BECAUSE THE ISSUE INVOLVED IS CLEARLY ONE OF GREAT PUBLIC IMPORTANCE.

In order to avoid unnecessary duplication, Firestone will simply join in and adopt as its own the argument presented on this point at pages 6-7 of the initial brief filed by Petitioner Kelsey-Hayes.

II.

THIS COURT SHOULD QUASH THE DECISION OF THE THIRD DISTRICT WHICH IMPROPERLY REVERSED ENTRY OF SUMMARY FINAL JUDGMENT IN FAVOR OF FIRESTONE: (A) SINCE TEE TWELVE-YEAR PERIOD FOR FILING SUIT WITH RESPECT TO THE PRODUCTS IN QUESTION HAD EXPIRED AT A POINT IN TIME WHEN THE STATUTE OF REPOSE WAS IN FORCE AND EFFECT AND CONSTITUTIONAL; (B) SINCE ON THAT DATE THE STATUTE OF REPOSE OPERATED SO AS TO PRECLUDE ANY CAUSE OF ACTION FROM THEREAFTER ARISING AS A RESULT OF INJURIES SUSTAINED DURING USE OF THE PRODUCTS; AND (C) SINCE THE LEGISLATURE DID NOT INTEND TO DEPRIVE FIRESTONE OF THAT RIGHT OF REPOSE, NOR COULD IT CONSTITUTIONALLY DO SO, WHEN IT SUBSEQUENTLY REPEALED THE STATUTE OF REPOSE IN 1986.

Over the last several decades, the tort liability of product manufacturers and of professionals, such as architects, engi-

neers, builders, and health care providers, has increased dramatically. This increased liability has resulted from a combination of several factors, including the progressive evolution of tort theories and the concomitant erosion of numerous previously-recognized common law protections. The rapid and expansive development of negligence and strict products liability theories is one of the primary causes of the increased potential liability of manufacturers and sellers of products.

In response to this broadened *tort* liability, manufacturers, as well as medical and construction professionals, argued that there existed a significant direct impact upon them. That direct economic impact was undeniably reflected in their insurance rates, the increased cost of which was ultimately passed on to the consumer in the price of the goods and the services provided. Due to this substantial economic impact and the inadequate predictability of the length of exposure to claims, such professionals began to seek relief in the state legislatures across this country, arguing that they needed protection to alleviate the insurance problems and to stabilize the costs of goods and services. *See*, generally, Comment, "Due Process Challenges to Statutes of Repose", 40 SOUTHWESTERN L. REV. 997 (1986) (containing a discussion of the legal and economic forces leading to legislative passage of statutes of repose).

To stem the tide of increased tort exposure over longer periods of time, manufacturers and other professionals began lobbying their state legislatures requesting that they supplement the standard statutes of limitations with statutes of ultimate

repose. *See*, generally, "Status and Trends in State Product Liability Law: Statutes of Limitation and Repose", 14 JOURNAL OF LEGISLATION 233 (1987). In Florida, the results of that effort were substantial revisions in the statutes of limitations pertaining to actions based upon medical malpractice, to actions against professional engineers and architects, and to actions based upon products liability theories. See, Ch, 74-382, 57, Laws of Florida; Ch. 75-9, §7, Laws of Florida.

The Florida Legislature's response to the problems then being faced by manufacturers and by certain other professionals took two forms. With respect to the engineers and architects and the medical professionals, the Legislature supplemented the standard statutes of limitations, by including therein statutes of ultimate repose, *See*, Ch. 74-382, §7, Laws of Florida (adding a twelve-year statute of ultimate repose with respect to actions founded upon the design, planning or construction of improvements to real property [amending §95.11(3)(c)] and a seven-year statute of ultimate repose with respect to actions founded upon medical malpractice [amending §95.11(4)(b)]). Secondly, with respect to manufacturers and sellers of products, the Legislature retained the standard four-year statute of limitations, but passed a separate statute of repose, which was ultimately codified in a different section of the Florida Statutes. See, Ch. 74-382, §3, Laws of Florida (adding a twelve-year statute of ultimate repose with respect to actions founded upon products liability [codified at §95.031(2)]). For purposes of legal and constitutional analysis, however, the Florida courts have treated

these two responses in the same fashion.[7]

As noted, there was in 1975 a substantial revision of Chapter 95, Florida Statutes, by the Florida Legislature. See, Ch. 74-382, Laws of Florida. The changes became effective January 1, 1975. Ch. 74-382 §36, Laws of Florida. Included within that substantial revision was a twelve-year products liability statute of repose. In pertinent part, that products liability statute of repose provided that:

> (2) 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, instead of running from any date prescribed elsewhere in subsection 95.11(3) but in any event within twelve 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*

§95.031(2), Fla. Stat. (1975) [Ch. 74-382 §3 Laws of Florida].

In contrast to a statute of limitations, "a statute of repose [such as §95.031(2)] precludes a right of action after a specified time which is measured from the incident of malpractice, sale of a product, or completion of improvements, rather than establishing a time period within which the action must be brought measured from the point in time when the cause of action accrued." UNIVERSITY OF MIAMI v. BOGORFF, 16 FLW 5149, 150 (Fla. 1991). In reaching its decision in WALKER, the Fourth District quoted with approval from LAMB v. VOLKSWAGENWERK

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[7] See, e.g., AMERICAN LIBERTY INSURANCE CO. v. WEST AND CONYERS, 491 So.2d 573 (Fla. 2d DCA 1986) (upholding §95.11(3)(c), Fla. Stat. (1980), the twelve-year statute of ultimate repose with respect to actions founded upon the design, planning or construction of improvements to real property, over

AKTIENGESELLSCHAFT, 631 F.Supp. 1144 (S.D. Fla. 1986), wherein Federal District Court Judge Stanley Marcus correctly explained the effect of a statute of repose:

> Simply stated, a statute of repose is triggered once the product is delivered to its first purchaser. If an injury results from the product after the authorized period has elapsed, the victim is without recourse to the manufacturer of the product. A statute of repose ". . . does not bar a cause of action; its effect, rather, is to prevent what might otherwise be a cause of action, from ever arising." Thus, under the Florida statute of repose, an injury caused by a product which has reached its original purchaser more than twelve years prior forms no basis for recovery because the statute prevents the accrual of a right of action. "The injured party literally has no cause of action. The-hark that has-been done is damnum abseque injuria - a wrong for which the law affords no redress." The effect of the statute of repose may be to bar the cause of action before it has accrued.

LAMB, 631 F.Supp. at 1147 (citations omitted). Accord, MELENDEZ v. DREIS & KRUMP MFC. CO., 515 So.2d 735, 736 (Fla. 1987) ("a statute of repose cuts off a right of action within a specified time limit after the delivery of a product . . ., regardless of when the cause of action actually accrues."); HAMPTON v. A. DUDA & SONS, INC., 511 So.2d 1104, 1106 n.2 (Fla. 5th DCA 1987); (Orfinger J., specially concurring). Cf., BAULD v. J. A. JONES CONST. CO., 357 So.2d 401, 402 (Fla. 1978) (where, in discussing

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constitutional challenge); CARR v. BROWARD COUNTY, 541 So.2d 92 (Fla. 1989) (upholding §95.11(4)(b), Fla. Stat. (1975), the seven-year statute of ultimate repose with respect to actions founded upon medical malpractice, over constitutional challenge); PULLUM v. CINCINNATI, INC., 476 So.2d 657 (Fla. 1985), appeal dism., 475 U.S. 1114 (1986) (upholding §95.031(2), Fla. Stat. (1975), the twelve-year statute of ultimate repose for actions founded upon products liability, over constitutional challenge).

the twelve-year statute of repose applicable to actions founded on the design, planning, or construction of an improvement to real property, it was noted that such statutes of repose "cut off the right of action after a specified time measured from the delivery of a product or the completion of work" and that "[t]hey do so regardless of the time of the accrual of the cause of action or of notice of the invasion of a legal right.").

In 1985 the Florida Supreme Court considered the validity of the twelve-year products liability statute of ultimate repose in **PULLUM** v. **CINCINNATI,** INC., 476 So.2d 657 (Fla. 1985), appeal dism., 475 U.S. 1114, 106 S.Ct. 1626, 90 L.Ed.2d **174** (1986).[8] In PULLUM, the Supreme Court recognized that statutes of repose are a valid legislative means to restrict or limit causes of action in order to protect or further certain overriding public interests. In considering the twelve-year products liability statute of repose which was originally enacted by the Florida Legislature in 1974 **and** became effective in 1975, the PULLUM court held that such statute violated neither the access to courts provision of Article I, Section **21,** of the Florida Constitution, nor the principles enunciated in KLUGER v. **WHITE, 281** So.2d 1 (Fla. 1973), noting that:

> The Legislature, in enacting this statute of **repose,** reasonably **decided** that perpetual liability places an undue burden on manufacturers, **and** it decided that twelve **years** from

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[8] In PULLUM , the Supreme Court expressly receded from **its** prior holding in BATTILLA v. ALLIS **CHALMERS** MFG. CO., 392 So.2d 874 (Fla. 1980) , which had held that the Statute of Repose violated the access to courts provision of the Florida Constitution when applied in such a fashion **as** to bar a products liability cause of action before it had even accrued.

> the date of sale is a reasonable time for exposure to liability for manufacturing of a product.

476 So.2d at 659. *See also,* **BATTILLA v. ALLIS-CHALMERS MFG. CO.,** 392 So.2d 874, 874-75 (Fla. 1980) (McDonald, J. dissenting).

It is thus clear that a statute of repose terminates the right to bring an action after the lapse of a specified period of time from the "triggering event"; in this case, twelve years from the date of delivery of the completed products to the initial purchaser. The right to bring any action is foreclosed when the event giving rise to a possible claim for damages does not transpire within this time interval. *See,* WALKER, 16 FLW at D2149-50.

In the instant case, the parties stipulated that: (1) the latest date of delivery to the initial purchaser of the products at issue (the "triggering event") was December 31, 1966; (2) the twelve-year maximum period of exposure to liability provided for in the Statute of Repose elapsed with respect to the subject products on December 31, 1978; and (3) the incident which gave rise to the subject litigation did not occur until August 18, 1987, some twenty-one years after the subject products were delivered to the initial purchaser, and some seven and one-half years after the twelve-year statutory repose period had expired.

The trial court below properly held that on the basis of this undisputed chronology, the twelve-year period for the bringing of causes of action based on the subject products had expired at a point in time when the products liability statute of repose was

still in force and effect and constitutional. See, WALKER. Cf., PULLUM (upholding Statute of Repose over constitutional attack); SHAW v. GENERAL MOTORS CORP., 503 So.2d 362, 363 (Fla. 3d DCA 1987), appv'd 518 So.2d 900 (Fla. 1988) (holding that as a result of the PULLUM decision, the Statute of Repose was validated as of its effective date).

The complicating factor and unique circumstance presented by the instant appeal relates to the fact that the accident which gave rise to Acosta's products liability suit against Firestone and Kelsey-Hayes occurred just over a year after the Florida Legislature repealed the Statute of Repose. See, Chapter 86-272, §§2, 3, Laws of Florida. If the incident which gave rise to the subject litigation occurred between December 31, 1978 (when the twelve-year ultimate period of repose expired with respect to the subject products) and July 1, 1986 (the date when the Statute of Repose was repealed), then Acosta unquestionably would have had no cause of action because the effect of the Statute of Repose would have been *to* prevent what might otherwise be a cause of action from ever arising or accruing in the first instance. MELENDEZ v. DREIS & KRUMP MFG. CO., 515 So.2d 735, 736 (Fla. 1987); SHAW v. GENERAL MOTORS CORP., 518 So.2d 900 (Fla. 1988). Cf., UNIVERSITY OF MIAMI v. BOGORFF, 16 FLW 5149, 150-51 (Fla. 1991) (involving seven-year ultimate statute of repose governing actions for medical malpractice).

The critical inquiry here thus reduces itself to two questions: (1) whether the Florida Legislature's repealing of the products liability statute of repose in 1986 was intended by

that body to retroactively deprive manufacturers such as Fkrestone of their expectation and right not to be sued for injuries alleged to have been caused by products as to which the twelve-year ultimate repose period had already expired at a point in time prior to the effective date of the repeal; and (2) if so, whether such intention is constitutionally permissible. We respectfully submit that the answers to both of these questions are in the negative, as the Fourth District properly concluded in WALKER.

First, in repealing the Statute of Repose in 1986 the Florida Legislature did not intend to retroactively deprive manufacturers of their right not to be sued for injuries alleged to have been caused by products as to which the twelve-year ultimate repose period had already expired prior to the effective date of such repeal. The clearest expression of the Legislature's intent in this regard is found in Section 11.2425, Florida Statutes (1987), which provides in pertinent part that: "[t]he repeal of any statute by the adoption and enactment of Florida Statutes 1987 ... shall not affect any right accrued before such repeal ...."

Secondly, even if the Florida Legislature intended to "revive" a manufacturer's potential liability notwithstanding the expiration of the twelve-year ultimate repose period at a point in time prior to the repeal of the statute, then such an intent would run afoul of constitutional constraints. In this regard, several Florida decisions dealing with similar circumstances, albeit involving statutes of limitations and not statutes of

repose, are instructive. For example, in WALTER DENSON & SON v. NELSON, 88 So.2d 120 (Fla. 1956), the court was confronted with a situation where an amendment to a statute of limitations lengthened the period allowed under a prior statute for the bringing of suit. The Supreme Court stated the rule applicable in such circumstances as follows:

> Here, again, it appears to us that the better-reasoned rule is that if the period allowed by an existing statute has not run when the amending statute takes effect, then if the amending statute lengthens the period allowed, it will be applicable to a pending case.
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> * * *
>
> The Legislature has the power to increase a prescribed period of limitation and to make it applicable to existing causes of action **provided the change in the law is effective before the cause of action is extinguished by the force of a pre-existing statute.**

NELSON, 88 So.2d at 122. ~~See also~~, MAZDA MOTORS OF AMERICA v. S. C. HENDERSON & SONS, 364 So.2d 107, 108 (Fla. 1st DCA 1978) ("a person has no vested right in the running of a statute of limitations unless it has completely run and barred his action,"); CBS, INC. v. GARROD, 622 F.Supp. 532 (M.D. Fla. 1985), aff'd, 803 F.2d 1183 (11th Cir. 1986) (repeal of a statute does not divest one of the defense which arose under the former statute),

Based upon the undisputed fact that the twelve-year period expired in the instant case at a point in time when the Statute of Repose was still in force and effect and constitutional, it necessarily follows that Acosta's cause of action was extinguished before it ever even arose or accrued by virtue of the force of the previously-existing Statute of Repose. Applying

the rule of the **NELSON** case, the subsequent repeal of the pre-existing Statute of Repose could not change or "breathe life into" Acosta's already extinguished ability to sue Firestone and Relsey-Hayes. The Fourth District's decision in **WALKER** is correct on this point. Cf., **WALKER** & LABERGE, INC. **v.** HALLIGAN, **344** So.2d **239** (Fla. 1977) (immunity **from** suit not retroactively withdrawn by subsequent legislation).

In reaching the opposite conclusion, the Third District agreed with Judge Ryskamp's finding in the **DAPJIELL** decision **"that** the Florida Legislature could not have intended to exempt products liability actions from the 1986 amendment for an indefinite period of time **...."** **Both** Judge Ryskamp and the Third District's belief in **this** regard is unfounded, since the only products liability actions which are unaffected by the 1986 amendment are those actions arising out of products delivered to the initial purchaser prior to 1974, i.e. - **those** products **as** to which **the** 12-year period expired **prior** to repeal of the statute in 1986. Clearly, **this** does not equate to an "indefinite period of time." Secondly, the Third District pointed out that the statute of repose did not exist when the allegedly defective tire was delivered to the **original** purchaser, This circumstance would appear to be of no legal significance, since this Court has not hesi-***tated*** to apply the *statute* of repose to ***cases*** involving products which **were** delivered to their **original** purchaser prior to the 1975 effective date of the statute. See, e.g., **MELENDEZ** v. **DREIS & KRUMP** MFG. CO., 515 So.2d 735 (Fla. 1987) (press break machine sold and delivered to original purchases in 1963).

In finding that Firestone had no valid expectation in a right of repose after the twelve-year period had expired as to its product at a point in time when the statute of repose was still in force and effect, the Third District felt it significant that the history of the statute was "volatile." However, notwithstanding the statute's "volatile history", this Court nevertheless applied the statute so as to bar claims by parties injured by a product which had been delivered to its initial purchaser more than twelve years previously. See, BRACKENRIDGE v. AMETEK, INC., 517 So.2d 667 (Fla. 1988); CLAUSELL v. HOBART CORP., 515 So.2d 1275 (Fla. 1987);

Additionally, the Third District felt that its conclusion was mandated by "the plain language of the 1986 amendment." The 1986 amendment itself is, however, utterly silent on the issue posed by the various cases currently before the Court. Moreover, the Third District apparently chose to ignore the wording of Section 11.2425, Florida Statutes, enacted during the same session as the repeal of the statute of repose, which section clearly expresses the Legislature's intent that the "repeal of any statute by the adoption and enactment of Florida Statute 1987 ... shall not affect any right accrued before such appeal." In contrast, the Fourth District in WALKER felt that Section 11.2425 was an expression of intent, especially since it was consistent with this Court's declaration in NELSON that the Legislature has the power to increase a period of limitations provided the change in the law is effected before a cause of action is extinguished by the force of a pre-existing statute. [WALKER, 16 FLW at D2149].

In disagreeing with the Fourth District's decision in **WALKER**, the Third District felt that:

> To deprive the appellant of a cause of action in this case would, in effect, apply a repealed statute prospectively, nullify the 1986 amendment abrogating the statute of repose in products liability cases, and wreak havoc on ordinary **rules** of statutory interpretation. Such a result would be absurd. (16 FLW at 1547).

The Third District's reasoning in this regard is flawed. The result reached by the trial court here and by the Fourth District in **WALKER** does not apply a repealed statute prospectively. Both of those courts have simply applied a valid statute of repose to those operative events which occurred prior to the statute's repeal, The date when the twelve-year time bar "matured" under **the** statute of repose occurred *at* a point in time long before the 1986 amendment, and **it** occurred at a point in time when the statute **was** in force and effect and constitutional. The mere fact that Acosta had an accident after the 1986 amendment does not result in any prospective application. Nor does the trial court's decision here or that of the Fourth District in WALKER **"nullify"** the 1986 amendment. Both decisions have legally and properly limited the scope of the amendment to those products sold to the initial purchaser subsequent to 1974 (in which event the necessary twelve-year repose period would not have expired as to the product at the time of the repeal of the statute of repose).[9] **This** result is consistent ***with*** *the* legisla-

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[9]As to such cases, the defendant manufacturer held nothing more than "a mere expectation based on an anticipation of the continuance of an **existing** law," **which** "expectation" is not subject to constitutional deference. ***See***, **LAMB**, 631 F.Supp. at 1149 .

tive intent expressed in Sec. 11.2425 and is compelled by the principle of law adopted by this Court in the NELSON case.

The Third District finally concluded that Firestone's contention that the 1975 statute of repose conferred a vested right not to be sued was "without merit", since a "statute of repose does not create a vested interest," citing EDDINGS v. VOLKSWAGENWERK, A.G., 835 F.2d 1369 (11th Cir.) cert. den. sub nom GRIFFIN v. FORD MOTOR CO., 488 U.S. 822, 109 S.Ct. 68, 102 L.Ed.2d 44 (1988) and BRACKENRIDGE v. AMETEK, INC., 517 So.2d 667 (Fla. 1987).[10] Neither the federal court's decision EDDINGS, nor this Court's decision BRACKENRIDGE support the Third District's conclusion. The "vested rights" discussion contained in both of those cases focused upon whether the plaintiff had acquired a vested right because of reliance upon this Court's decision in BATILLA. This Court in BRACKENRIDGE pointed out that the plaintiff's expenditure of funds in the prosecution of his suit prior to issuance of the decision in PULLUM did not constitute the acquisition of property or contract rights. Neither of those cases dealt with the right afforded to a manufacturer arising upon expiration of the statutory repose period.

In CITY OF SANFORD v. McCLELLAND, 163 So. 513 (Fla. 1935), protected rights were defined in the following fashion:

> A vested right has been defined as "an immediate, fixed right of present or future enjoyment" and also as "an immediate right of present enjoyment, or a present, fixed right of future enjoyment.

163 So. at 514-15. See also, CLAUSELL v. HOBART CORP., 515 So.2d 1275-1276 (Fla. 1987), quoting with approval from LAMB,

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[10]The Third District in footnote 4 of its opinion also stated

631 F.Supp. at 1149.

In this case, the twelve-year period for filing suit with respect to the products in question had expired at a point in time when the statute of repose was in farce and effect and constitutional. At that precise point in time, Firestone became vested with an immediate, fixed right of future enjoyment -- the right to know that it had repose from any liability arising out of any accident involving its product from that point in time forward. At the point in time when the 12-year period expired, Firestone's right to be free from future liability arising out of the use of its product was no longer a "mere expectation", but a "present, fixed right of future enjoyment." The Florida Legislature in repealing the statute of repose in 1986 did not intend to deprive Firestone of that right, nor could it permissibly have done so.

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that "Florida cases involving statutes of limitations (i.e., the NELSON case) do not mandate a different conclusion." 16 FLW at D1547. The only explanation advanced by the Third District for its belief was that "[t]here is a fundamental difference between a statute of repose ... and a statute of limitations ...." We respectfully submit that the Third District's belief in this regard overlooks the fact that in the MELENDEZ decision, this Court, in rejecting the argument that the repeal of the statute of repose should be applied retroatively, specifically stated that "the cases which involve statutory changes to periods of limitation provides some insight." (515 So.2d at 736]. Moreover, since "under the Florida statute of repose an injury caused by a product which has reached its original purchaser more than twelve years prior forms no basis for recovery because the statute prevents the accrual of a right of action [LAMB, 631 F.Supp. at 1147], the rule of law stated by this Court in NELSON should apply a fortiori.

CONCLUSION

Based upon the undisputed facts of record, as well as the reasoning and citations of authority set forth above, this Court should quash the decision of the Third District reversing the trial court's entry of summary judgment for Firestone. The trial court's entry of summary final judgment in favor of Firestone was entirely correct: (a) since the twelve-year period for filing suit with respect to the products in question had expired at a point in time when the Statute of Repose was in force and effect and constitutional; (b) since on that date (December 31, 1978) immunity from suit became a vested right of Firestone; and (c) since the Legislature did not intend to deprive Firestone of that right, nor could it constitutionally do so, when it subsequently repealed the Statute of Repose in 1986. On the precise point of law involved, the decision of the Fourth District in WALKER is entirely correct and in accordance with the law of this State, while the decision of the Third District below was not, and should be disapproved.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 11th day of September, 1991 to RIKKI TANEN, ESQ., Klein & Tannen, P.A., Attorneys for Appellant, 4000 Hollywood Boulevard, Suite 620 North, Hollywood, FL 33021, BRUCE SCHWARTZ, ESQ., Co-counsel for Appellant, Schwartz, Weinstein & Mopsick, 2750 N.E. 187th Street, North Miami Beach, FL 33180, STEVE BEFERA, ESQ., Wicker Smith Blornqvist, Attorneys for Okeechobee

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