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SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
OCT 29 1991
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

FIRESTONE TIRE & RUBBER COMPANY and KELSEY HAYES COMPANY,

Petitioners,

vs.

Case No. 78,255

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

Respondent.
_____/

PETITIONER FIRESTONE'S REPLY BRIEF

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INTRODUCTION

During the course of its reply brief, Petitioner, FIRESTONE TIRE & RUBBER CO. ("Firestone"), will utilize the following abbreviations:

"Kelsey-Hayes"	=	Petitioner, Kelsey-Hayes Company
"Acosta"	=	Respondent, MARIA ACOSTA, as Personal Representative of the Estate of Luis Acosta, Deceased
"ACOSTA"	=	Decision of the Third District in ACOSTA v. FIRESTONE TIRE & RUBBER CO., 16 FLW D1546 (Fla. 3d DCA 1991)
"WALKER"	=	Conflicting 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).

All emphasis has been added by counsel unless indicated otherwise.

REPLY ARGUMENT

THIS COURT SHOULD QUASH THE DECISION OF THE THIRD DISTRICT WHICH IMPROPERLY REVERSED ENTRY OF SUMMARY FINAL JUDGMENT IN FAVOR OF FIRESTONE: (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 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DID NOT INTEND TO DEPRIVE FIRESTONE OF THAT RIGHT OF REPOSE, NOR COULD IT CONSTITUTIONALLY DO SO, WHEN IT SUBSEQUENTLY REPEALED THE STATUTE OF REPOSE IN 1986.

It is clear that a statute of repose, such as the twelve-year products liability statute of repose which is at the center of

the instant controversy, terminates the right to bring an action (or, stated otherwise, prevents the accrual of any cause of action) after the lapse of a specified period of time after a "triggering event." An injured party's generally recognized right to bring an action is foreclosed when the event which would ordinarily give rise to a cause of action does not transpire within that time interval. See, MELENDEZ v. DREIS & KRUMP MFG. 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); LAMB v. VOLKSWAGENWERK AKTIENGESELLSCHAFT, 631 F.Supp. 1144 (S.D. Fla. 1986). Cf., UNIVERSITY OF MIAMI v. BOGORFF, 583 So.2d 1000, 1003 (Fla. 1991) (where, in discussing Florida's seven-year statute of ultimate repose applicable to actions founded upon medical negligence, this Court stated that "a statute of repose 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.");

In the instant case, the parties stipulated below that the twelve-year maximum period of a manufacturer's exposure to liability provided for in the statute of repose at issue elapsed with respect to the Firestone product on December 31, 1978 -- a point

in time when the statute of repose was still in force and effect and valid. Indeed, at the time the period of repose expired as to Firestone's product, the decision in **BATTILLA** v. ALLIS **CHALMERS** MFG. CO., 392 So.2d 874 (Fla. 1980) had not even been handed down, and therefore, it cannot be said that the initial purchaser of Firestone's product, much less Acosta's decedent, had any valid expectation that Firestone could be held liable for any damages as a result of a product-related injury occurring after December 31, 1978.

Acosta argues in her answer brief that "[t]he common ground between the (cases presently before this Court] and those where this Court held that the cause of action was viable [i.e. - the "window cases"[1]] is reliance upon the existing law at the time of filing suit," (Acosta's Answer Brief ["AB"] at 11). Quoting from this Court's opinion in **FRAZIER**, Acosta states that a "claimant with a viable cause of action is entitled to rely on the existing law which **provides** that claimant access to the court," and therefore "[t]he key to Acosta's cause of action then becomes the terminology 'viable cause of action'." (AB at 11).

Accepting this as being the "**key**" to determination of the issue raised in the instant case, application of well-established principles of law on this point makes it clear that Acosta had no "viable cause of action" at the time the accident giving **rise** to the instant litigation occurred, since:

> **Simply** stated, a statute of repose is triaaered once the product is delivered to its first purchaser. If an injury results from the product after the authorized period has

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[1]In her answer brief, Acosta argues that "[t]o adopt the defense's argument that the date of delivery is dispositive on the question of whether a cause of action is viable [in this case]

> elapsed, the victim is without recourse to the manufacturer of the product. A statute of repose" ... does not a 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.

LAMB, 631 F.Supp. at 1147 (citations omitted). Accord BRACKENRIDGE, 517 So.2d at 669; MELENDEZ, 515 So.2d at 736; HAMPTON, 511 So.2d at 1106 n.2 (Fla. 5th DCA 1987).

In her brief, Acosta reaches the incorrect legal conclusion by employing a line of reasoning which both begins and ends with the same erroneous assumption, i.e. that a "viable cause of action" accrued in Acosta's favor on the date of Luis Acosta's accident. As the above-noted case law makes clear, an injury caused by a product which has reached its original purchaser more than twelve years prior, such as here, "forms no basis for recovery because the statute prevents the accrual of a right of action."

In apparent recognition of this effect of the statute of repose, the Legislature passed Section 11.2425, Florida Statutes

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disregards this Court's reasoning in BATTILLA ..., PULLUM v. CINCINNATI, INC., 476 So.2d 657 (Fla. 1985) ..., MELENDEZ ..., BRACKENRIDGE v. AMETEK, INC., 517 So.2d 667 (Fla. 1987), NATIONAL INS. UNDERWRITERS v. CESSNA AIRCRAFT CORP., 522 So.2d 53 (Fla. 5th DCA 1988), rev. den, 531 So.2d 1352 (Fla. 1988), LOWELL v. SINGER CO., 528 So.2d 60 (Fla. 1st DCA 1988), rev, den. 539 So.2d 476 (Fla. 1989), and FRAZIER v. BAKER MATERIAL HANDLING CORP., 559 So.2d 1091 (Fla. 1990)." (AB at 8-9). The "window cases", however, only recognized a very narrow exception to application of the statute of repose, an exception which clearly is not implicated under the facts of the ACOSTA case. See, e.g., BRACKENRIDGE (absent detrimental reliance on BATTILLA, statute of repose must be applied to bar claim).

(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 ...." As the Fourth District properly observed in WALKER, Section 11,2425 constitutes the clearest expression of legislative intent as to whether the 1986 amendment of the products liability statute of repose was intended to eliminate the operative effect of that statute as to those situations where the controlling events had already occurred prior to the amendment, i.e. - the statute's cutting off of any potential right of action after a specified time measured from delivery of a product. Cf. WALTER DENSON & SON v. NELSON, 88 So.2d 120, 122 (Fla. 1956) (although dealing with a statute of limitations, the rule was recognized that the legislature has the power to increase *a* prescribed limitations period provided that the change in the law is effected before the cause of action has already been extinguished by the force of a pre-existing statute).[2] Since the operative effect of the statute of repose occurs at a point in time measured from the "triggering event" of product delivery, it is simply of no legal consequence that an injury occurs after expiration of the repose period. This obviously explains the failure of Acosta to cite any statute of repose cases supporting her proposition that "the accrual of a cause of

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[2]Both the trial court in ACOSTA and the Fourth District in WALKER cited to this Court's prior decision in WALTER DENSON & SON by way of analogy. Interestingly, ACOSTA does not even cite to that decision, much less attempt to distinguish it, in her answer brief.

action is the element that triggered the repose provision." (AB at 16).

To summarize, we begin with the proposition that the statute of repose at issue was enacted in 1975. The amendment at issue took effect as of July 1, 1986, and removed products liability cases from the scope of the statute, Therefore, the prior statute of repose would govern those operative events which had already occurred prior to the date of repeal. Those events were: (1) the sale of a product; and (2) the expiration of a twelve-year period from the date of the initial sale without an event causing injuries having occurred or a lawsuit having been filed. Both of these necessary events coalesced in the ACOSTA case before July 1, 1986, the date of the amendment.

It is true that a different event (indeed, the sole event upon which ACOSTA relies here) -- the accident -- did not occur within that time interval. However, the statute of repose at issue clearly provided -- just as unmistakenly -- that unless an injury occurred or a lawsuit were filed, any possible liability on the part of the manufacturer would end twelve years after the date of the delivery of the product to the initial purchaser, no matter what else might happen thereafter, The statute of repose at issue unequivocally provided that the accident date did not control its application. Indeed, the accident date could not be treated as controlling (as ACOSTA suggests) without transforming the repose provision into something significantly different -- a statute of limitations.

Thus, the trial judge did not apply the statute of repose "after it had been repealed", as the Third District erroneously

found. Instead, the trial judge recognized, and properly so, that the statute of repose governed those events which were within its scope and which had already occurred while the statute was in effect. Conversely, the trial judge refused to give retrospective effect to the amendment, thereby obeying this Court's own authoritative statement in **MELENDEZ.** The trial judge in **ACOSTA** did nothing more and nothing less than to give effect to the statute of repose insofar as that statute established the legal consequences of past controlling events.

This Court should reject outright Acosta's further argument that "[t]he only reliance in this case was Mr. Acosta's reliance upon the law in existence when his cause of action accrued." First, as we have already noted, no cause of action could accrue to Mr. Acosta (or his survivors) as to injuries sustained during use of the Firestone product after December 31, 1978, when the twelve-year repose period expired. Secondly, the only arguable reliance in this case would be that of Acosta's counsel, in mistakenly believing that he could pursue the claim simply because Luis Acosta's accident occurred after the amendment of the statute of repose, without any consideration being given to the fact that the twelve-year repose period had already expired some seven and one-half years earlier as to the Firestone product. The case law in this state makes it clear that this type of alleged reliance is legally irrelevant to the question posed. See, e.g., BRACKENRIDGE v. **AMETEK,** INC., 517 So.2d at 669 (where an accident is purely fortuitous and any detriment suffered is not shown to have been **prompted** by reliance arising from

existing statute or case law, there is no "detrimental reliance"; mere expenditure of funds and prosecution of lawsuit does not constitute the type of detrimental reliance that can give rise to the acquisition of property or contract rights); CASSIDY v. FIRESTONE TIRE & RUBBER CO., 495 So.2d 801, 802 n.2 (Fla. 1st DCA 1986) (same),

In her brief, Acosta also challenges the "fairness" of the Fourth District's decision in WALKER and presents various hypotheticals in an attempt to prove her point. (AB at 6). To the extent that concepts of "fairness" are legally germane to a proper resolution of the conflict between the Third District's decision in ACOSTA and the Fourth District's decision in WALKER, the various considerations bearing on the issue of "fairness" and "public policy" are more objectively and exhaustively treated on pages 24-29 of the amicus brief filed by the Product Liability Advisory Council, Inc. Comparison of the hypothetical set forth in Acosta's answer brief (AB at 6-7) and the hypothetical set forth in the Product Liability Advisory Council, Inc.'s brief (PLAC brief at 26 n.16) proves the point.

In concluding, we would direct this Court's attention to the decision of the Virginia Supreme Court in SCHOOL BOARD OF THE CITY OF NORFOLK v. UNITED STATES GYPSUM CO., *360* S.E.2d 325 (Va. 1987). The operative legal facts involved in that case are indistinguishable from those presented here. In discussing the subject of the right of immunity which a manufacturer acquires upon the expiration of a period of repose, the Court there stated:

> Although "statutes of limitations" and "statutes of repose" are terms sometimes loosely employed as interchangeable, they are, in fact, different in concept, definition and function. As a general rule, the time limitation in a conventional statute of limitations begins to run when the cause of action accrues. We are of the opinion the General ASsembly intended Code §8.01-250 to be a statute of repose. The time limitation in such a statute begins to run from the occurrence of an event unrelated to the accrual of a cause of action, and the **expiration of the time extinguishes** not only the legal remedy but also **all causes of action, including those which may later accrue** as well as those already accrued. Conceptually, statutes of repose reflect legislative decisions that "as a matter of policy there should be **a** specific time beyond which a defendant should no longer be subjected to protracted liability. Thus a 'statute of repose' is intended as a substantive definition of rights as distinguished from a procedural limitation on the remedy used to enforce rights."
>
> As a statute of repose, Code §8.01-250 is a redefinition of the substantive rights and obligations of the parties to any litigation "arising out of the defective **and** unsafe condition of an improvement to real property." Specifically, we think **the lapse of the statutory period was meant to extinguish all the rights of a plaintiff, including those which might arise from an injury sustained later,** and to grant a defendant immunity from liability for all the torts specified in the statute.

360 S.E.2d at 327-28 (citations omitted). Accord, WALKER; **WALLER** v. PITTSBURGH **CORNING** CORP., **742** F.Supp. 581 (D. Kan. 1990).

The reasoning of the Virginia Supreme Court mirrors that employed by this Court in prior analogous legal settings and directly supports the Fourth District's resolution of the issue in WALKER. There is no question but that the statute at issue

was intended by Florida's Legislature to be a "statute of repose" and not a "statute of limitations." Our Legislature 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." PULLUM, 476 So.2d at 659. As a statute of repose, the statute at issue began to run from the date of initial delivery of the product (an event unrelated to the accrual of any cause of action), and therefore "the expiration of the time extinguishes not only the legal remedy but also all causes of action, including those which may later accrue as well as those already accrued." SCHOOL BOARD OF THE CITY OF NORFOLK, 360 S.E.2d at 327-28.

In Florida, a "vested right" has been defined as "an immediate, fixed right of present or future enjoyment." CITY OF SANFORD v. MCCLELLAND, 163 So. 513, 514-5 (Fla. 1935); CLAUSELL v. HOBART CORP., 515 So.2d 1275-1276 (Fla. 1987), quoting with approval from LAMB, 631 F. Supp. at 1149, In this case, such a "vested right" came into being on December 31, 1978 in favor of Firestone by virtue of the operation and effect of Florida's products liability statute of repose. The twelve-year period for filing suit with respect to the Firestone product at issue had expired at a point in time when the statute of repose was in force 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 an accident involving its product

occurring after December 31, 1978. At the point in time when the twelve-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 amending the statute of repose in 1986 did not intend to deprive Firestone of that right, nor could it permissively have done so.

CONCLUSION

Based upon the undisputed facts of record, as well as the reasoning and citations of authority set forth in those briefs filed in support of the Petitioner Firestone's position, this Court should quash the decision of the Third District in ACOSTA, which reversed the trial court's entry of summary judgment for Firestone. 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 therefore should be disapproved.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 28th day of October, 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 Blomqvist, Attorneys for Okeechobee

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