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18 pgs

IN THE SUPREME COURT OF FLORIDA

CASE NO.: 78,255

FILED
SID J. WHITE
OCT 31 1991
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

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

# REPLY BRIEF OF PETITIONER KELSEY-HAYES

## ON THE MERITS


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TABLE OF CITATIONS





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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 response to the answer brief of Respondent, MARIA ACOSTA. In this brief, as in its initial brief on the merits, KELSEY-HAYES will refer to the parties either by name or as Plaintiff and Defendants.

## ARGUMENT

### 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.

Since Mrs. Acosta agrees with us that this is an appropriate case for this Court's review, we will not address the jurisdictional issue further in this brief.

### POINT II

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.

The Plaintiff's opening argument reveals two major flaws in her argument. First, the nation that the date of the product's delivery is not controlling (answer brief at pp. 8-9) is directly contrary to this Court's pronouncements on the subject. Second, the claim that "reliance" is the key to resolution of this case (answer brief at pp. 9, 10, 16-20) undermines, rather than supports, her argument since there can be no possible claims of reliance by the Plaintiff under these facts.



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As to the first claim, Plaintiff is simply wrong in contending that the Court should not focus on the date the product was delivered to its first purchaser. This Court made it clear in Melendez v. Dreis & Krump Manufacturing Company, 515 So.2d 735 (Fla. 1987) and in Bauld v. J.A. Jones Construction Company, 357 So.2d 401 (Fla. 1978) that statutes of repose cut off a right of action after a specified time "measured from the delivery of a product.. .." They do so "regardless of the time of the accrual of the cause of action.. .." Bauld, supra at 402. Indeed, the statute itself stated that an action must be begun within twelve years after the date of delivery "regardless of the date the defect in the product was or should have been discovered." Ch. 74-382, §3, Laws of Florida, amended §95.031(2), Fla.Stats. Melendez, supra at 736.

Indeed, it is the very fact that a statute of repose focuses upon some other date specified by the legislature (here, the date of delivery) rather than upon the date of injury or discovery of a cause of action, which distinguishes it from conventional statutes of limitation. Try as she might, the Plaintiff cannot erase the fact that this is a statute of repose, not a statute of limitation, and that the operative date is the delivery date, as set forth in the statute. It was the clear intent of the legislature that no action could be brought more than twelve years after the delivery date, regardless of when a product might cause injury.

The Plaintiff's reliance argument is similarly unfounded.



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Contrary to her claim at page 8, the key determinant in this Court's decisions was not whether the plaintiff had relied on the law in existence at the time of injury. A plaintiff's reliance was found relevant only in those very limited cases in which a plaintiff had already been injured when the case law changed, and had postponed filing suit in reliance on this Court's previous decisions. See, e.g., Frazier v. Baker Material Handling Corporation, 559 So.2d 1091 (Fla. 1990). Where, as here, the Plaintiff could not have relied upon a change in existing case law, the Frazier exception does not apply, and an action brought more than twelve years after a products delivery will be barred, Brackenridge v. Ametek, Inc., 517 So.2d 667 (Fla. 1987). Since the accident in this case was a fortuitious event, the Plaintiff's alleged "reliance" on the law as it existed on the date of the accident is clearly non-existent.

Indeed, should this Court consider the reliance element at all, that element would weigh in the Defendants' favor. This is so because, although the statute of repose was not in effect when the product was initially delivered, it was in effect when the twelve year period expired. Accordingly, Defendants would have been entirely justified in assuming from that point onward that the door was closed to any possible litigation regarding that product, and that its business decisions (retention of records, pricing, forecasting of litigation costs, etc..) could properly be made on that basis.

The Plaintiff's next argument (answer brief at p. 12) is



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also without foundation in the law. Plaintiff argues that unless there is a specific savings clause, an amended or repealed statute "is abrogated as if it had never existed." That proposition, of course, clearly flies in the face of decisions from this Court such as Melendez, supra, in which this Court held, post-repeal, that the former statute of repose would be applied to preclude an action brought more than twelve years after the product was sold. Id. at 736.

Plaintiff then goes on in her brief to discuss the legislative floor debate (answer brief, pp. 12-14). That discussion does not aid her cause, however, since it reveals no intent whatever to have the amendment apply retroactively. As this Court has made clear, neither a statute of limitation[1/] nor a statute of repose[2/] can be applied retroactively unless there is a "clear manifestation of retroactive effect." More specifically, this Court held that the precise amendment in question lacked any such clear manifestation of retroactive effect, and that the repeal of the statute of repose could not be applied retroactively. Melendez, supra at 736.

Quite simply, the Plaintiff has no legitimate basis for claiming (answer brief, p.14) that the legislators did or did not consider the effect of the amendment on products as to which the repose period had already expired. Absent a clear manifestation of intent in the statute itself, this Court has

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1/ Homemakers, Inc. v. Gonzales, 400 So.2d 965 (1981).

2/ Melendez, supra.



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refused to apply the amendment retroactively, and Plaintiff cannot point to any such intent in the statute.

The only expression of legislative intent on this score is that contained in §11.2425, Fla.Stats., in which the legislature manifested its intent to protect rights already accrued. Thus, the question before this Court is whether the manufacturers' right not to be sued had already accrued before the amendment was enacted. We submit that such a right clearly accrued in the present case as of December 31, 1978.

Plaintiff argues, of course, that the manufactuers' right not to be sued was merely "contingent" and had not accrued prior to repeal of the statute of repose. Plaintiff does not, however, logically support her claim, but instead continues to insist that "the accrual of a cause of action is the element that triggered the repose provision (answer brief, p. 16)." As discussed above, however, the expiration of the twelve-year period is clearly the element which activates the repose provision, as is clear from the statute itself. The manufacturers' right not to be sued accrued when the twelve year period passed without a suit having been filed.

The intent of the statute in existence at the time was to cut off all rights even though no injury had yet occurred, and the effect of the statute was to prevent a cause of action from ever accruing. Thus, on December 31, 1978, the door was permanently closed to litigation arising from this product, in accordance with the law then in effect. The legislature could not thereafter reach back in time to undo what had already



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occurred, without (as this Court held in Melendez specifically and clearly so stating.

The cases discussed by Plaintiff at page 17 of her brief are of no assistance. Berwald v. General Motors Acceptance Corporation, 570 So.2d 1109 (Fla. 5th DCA 1990) involved the question of whether an auto accident victim had a vested right in the tortfeasor's automobile lease, which was executed prior to amendment of the financial responsibility law. The Berwald court simply held that the victim's rights did not accrue until the accident occurred, when the tortfeasor's negligence and the injuries occurred. Young v. Altenhaus, 472 So.2d 1152 (Fla. 1985) held that where a plaintiff's right to enforce his cause of action vested prior to the effective date of the attorney's fee statute, the statute could not be applied to his claim.

Young supports rather than undermines our position in this case, since this Court there held that statutes which interfere with vested sights cannot be given retroactive effect. Even though the statute involved in Young contained a provision that it applied to all actions filed after its effective date, this Court held that it could not constitutionally apply to a cause of action vested before its effective date. That holding should apply equally in cases where a defense had vested prior to amendment of a statute: the amendment should not be applied retroactively so as to change the legal effect of, or impose new legal consequences upon, facts which occurred years earlier.

Plaintiff next argues that Homemakers, Inc. v. Gonzales,



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supra, somehow supports her position. The crucial distinction between Gonzales and the present case, of course, is that Gonzales involved a statute of limitations as opposed to a statute of repose. Thus, this Court in Gonzales properly focused upon the date when the plaintiff discovered or should have discovered her injury. If anything, the Gonzales case helps Defendants' position in the present case, because it held that the limitation period could not be applied retroactively without an express, clear or manifest intent that it be so applied. Id. at 967. Indeed, this Court relied upon in part Gonzales in reaching its decision not to apply the products liability repose provision retroactively. Melendez, supra at 736.

Since the most relevant decision from the highest court in this state, Melendez, is adverse to Plaintiff's position, she understandably relies (as did the Third District) on federal decisions, most notably Chase Securities Corporation v. Donaldsan, 325 U.S. 304, 65 S.Ct. 1137 (1945) and various cases citing Chase. Chase held that a state legislature could extend a statute of limitations after the right of action had already been barred without contravening the 14th Amendment. Chase went on to state, however, that state courts are free to interpret their state constitutions in a more restrictive fashion. Id. at 312-313, 1141-1142. This Court has, of course, specifically refused to permit retroactive application of an extended limitation period, where the cause of action was barred. Melendez, supra; Homemaker's, supra. See also Walter



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Denson & Son v. Nelson, 88 So.2d 120 (Fla. 1956) [parties have no vested interest in particular limitation law until the period prescribed by the statute of limitation has run,]; Corbett v. General Engineering & Machinery Company, 37 So.2d 161 (Fla. 1948) [same]; Mazda Motors of America, Inc. v. S.C. Henderson & Sons, Inc., 364 So.2d 107 (Fla. 1st DCA 1978) [same].

The other federal cases which rely upon Chase cannot be considered controlling authority here since this court has chosen to follow a different approach to the problem than did the Chase court. Thus, we submit, the Third District erred in relying upon Daniell v. Baker-Roos, Inc., Case No.: 89-14100 (S.D. Fla. July 13, 1990), which in turn followed Wesley Theological Seminary v. U.S. Gypsum Company, 876 F.2d 119 (D.C. Car. 1989).

Another case relied upon heavily by the Plaintiff is Cathey v. Johns-Manville Sales Corporation, 776 F.2d 1565 (6th Cir. 1985), which involves application of Tennessee law. Tennessee's approach to the question of retroactive application of statutes, however, clearly is not in accord with that of Florida, as announced by this Court. A review of the history of Tennessee's development in this area is contained in Clay v. Johns-Manville Sales Corporation, 722 F.2d 1289 (6th Cir. 1983), relied upon in Cathey. It appears from Clay that the Tennessee Supreme Court announced that it would no longer apply the vested rights doctrine to permit a claim to be defeated before it accrued or was discovered. Id. at 1293, In Florida,



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however, this Court has specifically held that such a result is entirely consistent with the Florida constitution. See Pullum v. Cincinnati, Inc., 476 So.2d 657 (Fla. 1985).

The next case cited by Plaintiff, Roller v. Basic Construction Company, 384 S.E.2d 323 (Va. 1989) supports the Defendants' argument rather than the Plaintiff's. This is so because the court in Roller made it clear that it was basing its decision on the fact that it was a workers' compensation case, and involved different considerations than would a common law action. Indeed, it specifically distinguished its holding from its decision two years earlier in School Board of the City of Norfolk v. U.S. Gypsum Company, 360 S.E.2d 325 (Va. 1987).

The Roller court noted that in U.S. Gypsum, it had held that under a statute of repose, "a potential defendant acquires a substantive right of repose after the running of the statutory period," which right "may not constitutionally be impaired by subsequent legislation purporting to enlarge the plaintiff's time to sue." Roller at 327; U.S. Gypsum at 38-39. The court noted that in U.S. Gypsum, a cause of action arose when the allegedly wrongful or negligent acts were done, even though rights of action might not have vested in individual plaintiffs until a later time. The court went on to state:

> The statute of repose had the effect of extinguishing those causes of action five years after they arose, creating a substantive right of repose in the potential defendants which subsequent legislation could not abridge.

Roller, supra at 327.

The Plaintiff's discussion of Roller is thus totally



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misleading, since it fails to point out that Roller's holding was confined to workers' compensation cases, and that the Virginia Supreme Court's holding with respect to common law cases (such as the one here) is exactly the opposite.

The Academy's amicus brief (page 11) attempts to dispose of the U.S. Gypsum case by stating that it "deals with a cause of action which accrues and is time barred by the statute of repose well before the statute of repose is amended." That statement overlooks the distinction drawn by the Virginia Supreme Court between a cause of action and a right of action.

The Court made it clear two years later in Roller:

> Although a typical common-law plaintiff's right to sue does not accrue until he has sustained injury, and the statute of limitations only then begins to run as to him, certain rights and obligations may have become fixed at a earlier time when the wrongful act was done -- when the cause of action arose. Those rights may be vested rights, entitled to constitutional protecion.

Roller, supra at 326.

It is clear that Virginia law, rather than that of Tennessee or the federal procedural law cases, closely parallels that of Florida and is extremely persuasive.

In summary, the rights of these Defendants with respect to this product were settled as of December 31, 1978. At that time, Florida law provided that the manufacturers could no longer be sued based on that product, since it had been delivered to its original purchaser twelve years earlier. The Third District has, however, refused to apply, or to recognize the correct legal consequences of, the statute of repose which was in effect at that time. Despite the protestations in its



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opinion, a contrary interpretation would not have the effect of invalidating the legislature's right to repeal the statute; clearly, that repeal will affect all goods sold after 1974.

Similarly, an affirmance of the trial court's ruling, and approval of the Fourth District Court's opinion in Walker v. Miller Manufacturing Company, 16 FLW D2148 (Fla. 4th DCA August 14, 1991), does not constitute giving prospective application to a repealed statute. Rather, it would constitute the application of a valid statute of repose to those operative events which occurred prior to that statute's repeal.

It is clear that the legislature did not intend to retroactively deprive Defendants of their right not to be sued, since there was no clear manifestation of intent to apply the statute retroactively. Moreover, had the legislature expressed such an intent, this Court would be required to invalidate it on due process grounds. We respectfully submit that the Fourth District has reached the correct result in this case and that the Third District's decision in the present case should be quashed.



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## CONCLUSION

Far the reasons set forth above and in the initial brief, as well as the able briefs of our Co-Petitioner and the amici curiae, Defendant KELSEY-HAYES respectfully urges this Court to quash the decision of the Third District Court of Appeal and to reinstate the final summary judgment.

Respectfully submitted,

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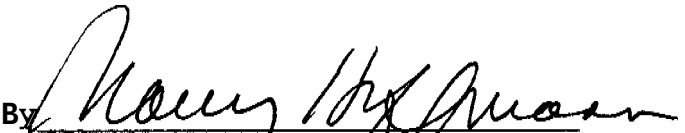
By 
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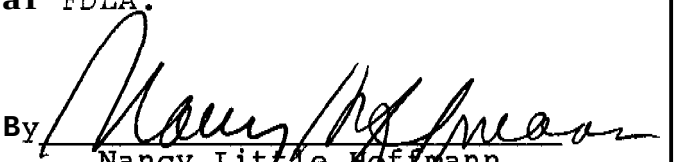
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been served by mail this 28th day of October, 1991, to: G. William Bissett, Jr., Esquire, Preddy, Kutner, et al., 501 Northeast 1st Avenue, Miami, Florida 33132, Counsel for Firestone; Ricki Lewis Tannen, Esquire, Klein & Tannen, P.A., 4000 Hollywood Boulevard, Suite 620N, Hollywood, Florida 33021, Counsel for Acosta; Clifford B. Selwood, Jr., Esquire, Post Office Box 14128, Fort Lauderdale, Florida 33302, Co-Counsel for Kelsey-Hayes; Steve Befera, Esquire, Wicker, Smith, Blomqvist, Grove Plaza Building, 5th Floor, 2900 Southwest 28th Terrace, Miami, Florida 33133, Counsel for Okeechobee Tires; Bruce Schwartz, Esquire, Schwartz, Weinstein & Mopsick, 2850 Northeast 187th Street, North Miami Beach, Florida 33180, Co-Counsel for Acosta; Clifford M. Miller, Esquire, 601 21st Street, Suite 408, Vero Beach, Florida 32960, Academy of Fla. Trial Lawyers; Edward T. O'Donnell, Esquire, Herzfeld & Rubin, 801 Brickell Avenue, Suite 1501, Miami, Florida 33131, Amicus for PLAC; and David W. Henry, Esquire, Post Office Drawer 1991, Orlando, Flroida 32802, Amicus far FDLA.

By 
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