IN THE SUPREME COURT OF FLORIDA

Case No. 82,412

District Court of Appealof Florida,
Second District, Case No. 91-04243

CALVIN WILEY,

Petitioner,

vs.

CARRIE LYNN YOUNG ROOF,

Respondent.

_____/

On Discretionary Review Of A
Decision of The District Court
Of Appeal Of Florida, Second District

BRIEF AND APPENDIX OF AMICUS CURIAE BLACKWELL & WALKER, P.A.

(A M E N D E D)

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STATEMENT OF THE CASE AND FACTS

Blackwell & Walker, P.A., Amicus Curiae, files this brief in support of the position advocated by Petitioner, Calvin Wiley, and will adopt the Statement of the Case and Facts of Petitioner's Brief on the Merits. The interest of the Amicus Curiae is described in its Motion for Leave to File Amicus Curiae Brief served February 14, 1994.

SUMMARY OF ARGUMENT

The district court's decision is erroneous and in direct conflict with decisions of this Court holding that the legislature lacks the power to revive a cause of action which has already been extinguished by the running of a pre-existing statute of limitations. Chapter 92-102, as construed by the district court, improperly deprived petitioner of his vested right not to be sued on a time-barred claim, in violation of his due process rights under the Florida Constitution. There are no considerations of public policy which can validate this violation of petitioner's right to due process, because perceptions of public policy by the courts or the legislature do not take precedence over constitutional rights.

The district court also erred in failing to construe Chapter 92-102 in a manner that would avoid any violation of the due process prohibition against reviving time-barred claims. Nothing in the act itself nor its legislative history supports the district

court's interpretation that the legislature intended to revive claims already extinguished by statutes of limitations pre-dating the 1992 act. On the contrary, the statutory language and the legislative Staff Analysis indicate only an intent to allow a plaintiff four years to file an action for abuse, if that plaintiff's claim would be barred under the newly enacted limitations imposed by Chapter 92-102. The district court's finding that the 1992 act had revived claims time-barred by pre-existing statutes of limitations gave the act an unintended retroactive effect which would violate due process and the settled Florida policy against revival of time-barred claims. Accordingly, the district court's decision is erroneous and should be reversed.

ARGUMENT

POINT I

THE DISTRICT COURT ERRED IN DECIDING THAT §2, CHAPTER 92-102, LAWS OF FLORIDA, WAS CONSTITUTIONALLY EFFECTIVE TO REVIVE AN ALLEGED CAUSE OF ACTION FOR CHILD ABUSE ALREADY BARRED BY A PRE-EXISTING STATUTE OF LIMITATIONS.

The holding and rationale of the opinion below directly contravenes the well-settled rule in Florida that the legislature may not, consistent with the Constitution of Florida, revive a cause of action which has become barred under a prior statute of limitations. A central error which permeates the entire opinion is the district court's apparent holding that a person has no "constitutional right not to be sued once the limitations period has run for intentionally abusing a minor." Roof v. Wiley, 622 So.

2d 1018, 1022 (Fla. 2d DCA 1993). The district court's affirmation that no constitutional prohibition exists resulted from a material misinterpretation and misapplication of this Court's decisions holding that the legislature may not revive a time-barred cause of action. The district court discussed, but misconstrued, several such cases in its opinion.

The first such case the district court misinterpreted is this Court's decision in Walter Denson & Son v. Nelson, 88 So. 2d 120, 121 (Fla. 1956), cited in support of the district court's view "that the Legislature does have the power to revive a claim previously barred by a statute of limitations . . .." Roof, 622 So. 2d at 1021. In its analysis of Denson, the district court paid no heed to that part of this Court's holding which directly addressed the issue at hand:

> 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.

Denson at 122 (emphasis added).

The decision below also misapplied and failed to heed the teaching of Firestone Tire & Rubber Co. v. Acosta, 612 So. 2d 1361 (Fla. 1992), also discussed at page 1021 of Roof. In Firestone, this Court reaffirmed its holding in Denson and emphasized that the legislature lacks "the power to increase a prescribed period of limitation" as to causes of action "extinguished by the force of a pre-existing statute." Firestone, at 1364. (Emphasis that of this

Court). The Firestone decision went on to explain that this reasoning was based on "a party's right to have the statute of limitations period become vested once it has 'completely run and barred [the] action.'" Id, citing Mazda Motors of America, Inc. v. S.C. Henderson & Sons, Inc., 364 So. 2d 107, 108 (Fla. 1st DCA 1978), cert. denied, 378 So. 2d 348 (Fla. 1979). Although the opinion below discussed and quoted from Firestone, it ignored its holding that the legislature has no power to deprive persons of their vested right to a limitations bar after a pre-existing statute has run.

A third key case misapplied by the opinion below was Celotex Corp. v. Meehan, 523 So. 2d 141 (Fla. 1988). Although the Roof opinion discussed Meehan at length, 622 So. 2d at 1022, it completely ignored the important footnote in Meehan noting "that the law of Florida would only allow an expansion of the statute of limitations period when the change is made before the cause of action is barred by the prior statutory limitation period." Meehan, 523 So. 2d at 146-47, citing Corbett v. General Engineering & Machinery Co., 160 Fla. 879, 37 So. 2d 161 (1948).

Although this Court's decisions in Denson, Firestone, and Meehan do not expressly cite a specific constitutional prohibition against legislative revival of time-barred causes of action, the constitutional basis for those holdings is inherent and implicit. The holdings are based on a restraint on legislative power, a restraint which could not exist apart from a violation of "some express or implied inhibition of the Constitution." Holly v.

Adams, 238 So. 2d 401, 404 (Fla. 1970).

Petitioner Wiley has correctly identified due process as the source of the constitutional restraint. In addition to the authorities discussed on pages 15-17 of his brief, the case of Delk v. Department of Professional Regulation, 595 So. 2d 966 (Fla. 1st DCA 1992) is pertinent, because it defines due process as embracing a civil counterpart to the criminal rule prohibiting ex post facto laws:

> Due process includes a prohibition against ex post facto laws which deprive a citizen of life, liberty or property based on conduct occurring before the effective date of the prohibition.

Id. at 967. (Emphasis added).

The Delk case held that professional practices used in 1984-85 by a licensed dentist could not be judged by the standards of a statute enacted in 1986, and that the dentist's right "to practice his profession [was] protected by the due process clauses of the state and federal constitutions which provide that no person shall be deprived of life, liberty or property without due process of law." Id.

The vested right of a potential defendant not to be sued on a time-barred cause of action is no less a property right and is also protected by due process. See Starnes v. Cayouette, 418 S.E. 2d 669 (Va. 1992), holding that a Virginia statute allowing an extended period to file previously time-barred actions for child abuse violated due process guarantees under the state constitution. Even if Chapter 92-102 does not violate the U.S. Constitution,

which is not conceded, it does not follow that the act complies with the more rigorous due process requirements of the Florida Constitution, as construed by this Court. See Traylor v. State, 596 So. 2d 957, 961 (Fla. 1992).

The opinion below appears to acknowledge the possibility that a vested right might exist in a limitations bar to an action for products liability, but observes that "the same argument cannot apply to the facts and public policy issues in the instant case," because "the Florida legislature has unmistakenly and clearly expressed its intent to revive a cause of action for intentional abuse." Roof, 622 So. 2d at 1022. The district court did not cite, and could not cite, any authority for its apparent belief that considerations of public policy can empower the legislature to deprive citizens of vested property rights which are protected by the due process clause of the Florida Constitution.

The legislature made no pronouncement of public policy in its enactment of Chapter 92-102; the policy considerations were inferred by the district court. Undoubtedly, the court had in mind the profoundly harmful effects of child abuse, particularly that involving sexual misconduct. However, the court gave no rationale by which the revival of long-barred claims for money damages, not even limited to claims of sexual abuse, could serve to "deter" acts which occurred decades before the statute was passed. Anyway, considerations of public policy cannot validate a statute which deprives citizens of their constitutional rights.

POINT II.

THE DISTRICT COURT ERRED IN FAILING TO CONSTRUE CHAPTER 92-102 IN A MANNER THAT WOULD AVOID THE CONSTITUTIONAL PROHIBITION AGAINST REVIVING A CAUSE OF ACTION EXTINGUISHED BY A PRE-EXISTING STATUTE OF LIMITATIONS.

The opinion below also violates the rule that, "[w]henever possible a statute should be construed so as not to conflict with the Constitution." Florida v. Staler, 19 Fla. L. Weekly, S56 (Fla. Jan. 27, 1994); Firestone v. News-Press Publ. Co., 538 So. 2d 457, 459-60 (Fla. 1989). The court below should have applied this principle, because Chapter 92-102 can be interpreted in a way that would avoid violating the due process prohibition against reviving time-barred causes of action.

Section 2 of Chapter 92-102, as quoted in the decision below, provides:

> Notwithstanding any other provision of law, a plaintiff whose abuse or incest claim is barred under Section 1 of this act has 4 years from the effective date of this act [April 8, 1992] to commence an action for damages.

Id, 622 So. 2d at 1020. (Emphasis added). Significantly, § 2 of Chapter 92-102 does not purport to revive any cause of action of a plaintiff whose abuse or incest claim is already barred and thus extinguished by the running of a pre-existing statute of limitations. Rather, § 2 operates only to give any "plaintiff whose abuse or incest claim is barred under §1 of this act" four years from the effective date of the act to bring an action. The phrase "this

act" obviously refers only to Chapter 92-102, not to any prior statute.

Section 1 of Chapter 92-102 amended § 95.011(3)(o) by adding a new exception to the pre-existing 4-year limitation period applicable to any "action for assault, battery, ... or any other intentional tort ...." Sub-section (7) creates a new cause of action for "abuse" (as that term is defined in other statutes) and also prescribes new periods of limitation for the new tort: 7 years after plaintiff attains majority, 4 years after he or she ceases to be a dependent of the abuser, or 4 years after discovering the injury and its causal relationship with the abuse, whichever occurs later. Chapter 92-102, § 1.;§ 95.11(3)(o) and (7), Fla. Stat. (Supp. 1992).

In holding that Section 2 of Chapter 92-102 "clearly expresses an intent to revive for a four year period previously time-barred causes of action based on intentional abuse or incest," the district court relied both on the language of the act itself and some legislative history. In a footnote, the court referred to "the committee discussion on Senate Bill No. 1018 which reflects the intent to reinstate a cause of action for sexual abuse to allow those who would otherwise be time-barred to go back and maintain the action." Roof, 622 So. 2d at 1021. Another part of the legislative history, more reliable and more pertinent than the unspecified excerpt from committee discussion cited in Roof, is the formal Senate Staff Analysis and Economic Impact Statement to the Committee Substitute for Senate Bill 1018 (Mar. 4, 1992) ("Staff

Analysis"), a copy of which comprises the Appendix ("A ") to this brief. The Staff Analysis "SUMMARY", under the subheading "Effect of Proposed Changes", states:

> The bill would permit a plaintiff whose claim would be barred under the new limitations period to bring an action within 4 years after the effective date of the act.

[A 1; emphasis added].

The "COMMENTS" section of the Staff Analysis, under the subheading "Revival of Barred Claims," states:

> Section 2 of the bill provides that any claim barred by the newly created statute of limitations could be brought within 4 years after the effective date of the act. Section 2 may be subject to challenge. Such a case would be one of first impression in Florida.

[A 2; emphasis added].

These quoted excerpts confirm, contrary to the finding of the district court, that the legislature did not intend, by the enactment of Chapter 92-102, to revive abuse claims already barred by pre-existing statutes of limitations. Rather, the legislative intent was to extend for 4 years the time for bringing claims which "would be...barred by the newly created statute of limitations...." [A 1-2; emphasis added]. The quoted language refutes the district court's conclusion that the legislature intended to give the bill the retroactive effect of reviving claims already extinguished by the running of statues of limitations which pre-dated the 1992 act.

The district court cited and purported to follow Homemakers, Inc. v. Gonzales, 400 So. 2d 965 (Fla. 1981) and other cases

holding that a legislative intent to give retroactive effect to a statute of limitations must be "express, clear and manifest." Roof, 622 So. 2d at 1020. However, the district court's conclusion on retroactivity actually conflicts with Homemakers and similar settled authorities. Neither the act itself nor the Staff Analysis discloses any intent to revive claims already barred under pre-existing statutes of limitations.

Respondent Roof alleges she was assaulted on or about March 15, 1973. Her cause of action thus became barred and extinguished on March 16, 1977, by the running of the 4-year statute applicable to intentional torts. § 95.11(3)(o), Fla. Stat. (1977). This claim of Respondent Roof does not fall within the savings provision of the 1992 act, because her cause of action was not "barred under Section 1" of Chapter 92-102, but was barred by the statute of limitations in effect in 1977.[1] The 1992 act does not purport to extend the period of limitations for claims already barred by the running of prior statutes. The district court erred in holding otherwise.

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[1] The claims against the clients of Amicus Curiae, Blackwell & Walker, are even more remote, the alleged abuse having ended in 1959. The plaintiff's claim in that case thus became barred in 1961, by the running of the 2-year statute of limitations for assault, battery, or false imprisonment, § 95.11(6), Fla. Stat. (1961), or at the latest in 1963, by the running of the 4-year period of limitations applicable to any action for relief not otherwise provided for in Chapter 95. Section 95.11(4), Fla. Stat. (1963). The holding of the Second District Court of Appeal in Roof, as applied to Blackwell & Walker's clients, means that this elderly couple would be forced to defend a "revived" cause of action which was extinguished some 30 years ago by the statute of limitations then in effect. Such a result is not only unconstitutional, it is utterly unconscionable.

CONCLUSION

Based on reasons and authorities set forth in this brief and in the Petitioner's brief on the merits, the decision of the district court is erroneous and should be reversed.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 10th day of March, 1994 to Martin Errol Rice, Esquire, of Martin Errol Rice, P.A., 696 First Avenue North, Suite 400, P.O. Box 205, St. Petersburg, Florida 33731, Counsel for Petitioner, and to Barry A. Cohen, Esquire and Christopher P. Jayson, Esquire of Barry A. Cohen, P.A., 100 East Twiggs Street, Suite 4000, Tampa, Florida 33602.

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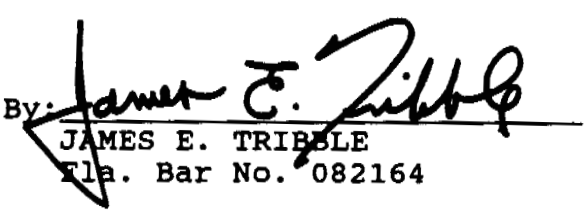
By: 
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REVISED: _____ BILL NO. CS/SB 1018

DATE: March 4, 1992 Page 1

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Lang	Lang	JU	Fav/CS
2.			AP	
3.				
4.				

SUBJECT: Civil Actions/Abuse or Incest

BILL NO. AND SPONSOR: CS/SB 1018 by Judiciary and Senator Grant

I. SUMMARY:

A. Present Situation:

The general statute of limitations for a civil action based on an intentional tort is 4 years. The statute of limitations would apply to a civil action alleging abuse or incest.

Abuse is defined in ss. 39.01 and 415.102, F.S. Section 39.01, F.S., defines child abuse as "any willful act that results in any physical, mental, or sexual injury that causes or is likely to cause the child's physical, mental, or emotional health to be significantly impaired." Section 415.102, F.S. defines abuse of the elderly or disabled as "the nonaccidental infliction of physical or psychological injury to an aged person or disabled adult by a relative, caregiver, or adult household member, or the failure of a caregiver to take reasonable measures to prevent the occurrence of physical or psychological injury to an aged person or disabled adult."

Incest is a criminal offense under s. 826.04, F.S. Under that section, it is a felony to knowingly marry or have sexual intercourse with a person to whom one is related by lineal consanguinity, or a brother, sister, uncle, aunt, nephew, or niece.

B. Effect of Proposed Changes:

The bill modifies the 4 year statute of limitations. An action could be commenced at any time within 7 years of the age of majority. An action also could be brought within 4 years after the injured person leaves the dependency of the abuser, or within 4 years after the time the injured party discovers both the injury and the causal relationship between the injury and the abuse, whichever occurs later.

The bill would permit a plaintiff whose claim would be barred under the new limitations period to bring an action within 4 years after the effective date of the act.

II. ECONOMIC IMPACT AND FISCAL NOTE:

A. Public:

Any individual harmed by abuse or incest could file a civil action at any time. Thus, more people could recover damages for abuse or incest. The number of individuals and the amount of damages are indeterminable.

B. Government:

The bill would increase court caseloads. The increase is indeterminable.

III. MUNICIPALITY/COUNTY MANDATES RESTRICTIONS:

None.

IV. COMMENTS:

A. Revival of Barred Claims

Section 2 of the bill provides that any claim barred by the newly created statute of limitations could be brought within 4 years after the effective date of the act. Section 2 may be subject to challenge. Such a case would be one of first impression in Florida.

No Florida court has decided the issue of whether the Legislature retroactively may apply a statute of limitations which it has extended to a claim which would be barred under the extended limitations period. However, Florida courts have held that where a statute of limitations has been extended, it is applicable retroactively to a claim which would have been barred under the old limitations period but not under the new. See Garris v. Weller Construction Co., 132 So.2d 553 (Fla. 1960); Corbett v. General Engineering & Machinery Co., 37 So.2d 161 (Fla. 1948). The Legislature must specifically provide for such retroactive application. See Homemakers, Inc. v. Gonzales, 400 So.2d 965 (Fla. 1981).

The Minnesota Court of Appeals recently upheld the retroactive proviso of a specific statute of limitations for a civil action based on sexual abuse. K.E. v. Horrman, 452 N.W.2d 509 (Minn. App. 1990). The proviso permits a plaintiff whose claim is otherwise time-barred to commence an action until a date certain set out in the proviso. Id. at 512.

The United State Supreme Court has held that a statute of limitations which provides for retroactive application to claims that would be barred does not violate due process under the 14th Amendment of the U.S. Constitution. Chase Securities Corp. v. Donaldson, 325 U.S. 304 (1945). Lower federal courts have applied this rule in subsequent cases. See, e.g., U.S. v. Hunter, 700 F. Supp. 26 (M.D. Fla. 1988); Osmundsen v. Todd Pacific Shipyard, 755 F.2d 730 (9th Cir. 1985); Davis v. Valley Distributing Co., 522 F.2d 827 (9th Cir. 1975).

B. Statutes in Other States

California and Iowa have separate statutes of limitations for civil actions arising from alleged abuse. The California statute provides that a civil action for damages resulting from childhood sexual abuse must be brought within 8 years after the date the plaintiff attains the age of majority or within 3 years of the date the plaintiff discovers, or reasonably should have discovered, that psychological injury or illness occurring after the age of majority was caused by sexual abuse, whichever occurs later. Cal. Civ. Proc. Code s. 340.1 (West 1992 Supp.)

The California statute further provides that a plaintiff 26 years of age or older at the time the action is filed must file certain "certificates of merit." The plaintiff's attorney must certify that he or she has:

1. reviewed the facts of the case;

2. consulted with a licensed mental health practitioner who the attorney believes is knowledgeable of the facts and issues in the case; and

3. concluded that based on the review and consultation that there is a reasonable and meritorious case.

Id. A licensed mental health practitioner selected by the plaintiff must certify that he or she has:

1. interviewed the plaintiff and is knowledgeable of the facts and issues in the case and

2. concluded that in his or her professional opinion there is a reasonable basis to believe the plaintiff had been subject to childhood sexual abuse.

Id.

When certificates of merit are required to be filed, the complaint may not name the defendant until the court in camera has reviewed the certificates and found, based solely on the certificates, that there is a reasonable and meritorious case. Id.

Upon the favorable conclusion of the litigation with respect to a defendant for whom a certificate of merit was filed, the court may require the plaintiff's attorney to reveal the name, address, and telephone number of the mental health practitioner consulted for purposes of filing the attorney's certificate of merit. If the court finds a failure to comply with the certificate of merit requirements, the court may order a party, or his or her attorney, or both, to pay any reasonable expenses, including attorney's fees incurred by the defendant. Id.

The Iowa statute of limitations provides that an action for damages suffered as a result of sexual abuse which occurred prior to the age of majority but not discovered until after the age of majority, must be brought within 4 years from the time of discovery of both the injury and the causal relationship. Iowa Code s. 614.8A (1991).

Other states reportedly have special statutes of limitations for civil actions based upon abuse.

V. AMENDMENTS:

None.

STATEMENT OF SUBSTANTIAL CHANGES CONTAINED IN COMMITTEE SUBSTITUTE FOR
Senate Bill 1010

The committee substitute:

1. Removes the provision eliminating the statute of limitations for abuse or incest and replaces it. Under the substituted provision, any action may be commenced within 7 years of the age of majority, or within 4 years of the injured person leaving the dependency of the abuser, or within 4 years from the time of the discovery by the injury party of both the injury and the causal relationship between the injury and the abuse, whichever occurs later.

2. Provides for retroactive application of the bill. A claim that was barred could be brought within 4 years after the effective date of the act.

Committee on Judiciary

Staff Director

(FILE TWO COPIES WITH THE SECRETARY OF THE SENATE)