THE FLORIDA SUPREME COURT

CALVIN WILEY,

Petitioner, Case No.: 82,412

CARRIE LINN YOUNG ROOF,

Respondent,
_____/

RESPONDENT'S AMENDED ANSWER BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

This appeal arises from the opinion of the Second District Court of Appeal in Roof v. Wiley, 622 So.2d 1018 (Fla. 2d DCA 1993) (A-1), reversing the dismissal of the Respondent's claim for sexual abuse against her grandfather, the Petitioner. In this brief, the Respondent, CARRIE LINN YOUNG ROOF, Plaintiff in the trial court and Appellant in the district court, will be referred to as the "PLAINTIFF", "ROOF", or as the "RESPONDENT". The Petitioner, Defendant in the trial court and Appellee in the district court, will be referred to as the "DEFENDANT", the "GRANDFATHER", or as the "PETITIONER". References to the appendix will utilize the symbol "A". References to the Petitioner's Brief on the Merits will utilize the symbol "B".

The non-argumentative portions of the Petitioner's Statement of the Case and Facts are factually accurate with respect to the procedural history of this case. The Respondent disagrees, however, with the Petitioner's characterization of the 1992 legislative amendments to Section 95.11, Fla. Stat. The 1992 amendment to Section 95.11, Fla.Stat., did not create a "new limitation period for causes of action for intentional torts based on abuse, pursuant to Florida Statute Section 39.01, 415.102, or 826.04..." as asserted by the Petitioner. (B-2). Chapter 92-102, Laws of Florida (1992) (A-2), merely amended the existing statute

of limitation for intentional torts based on abuse as defined in Section 39.01, Section 415.102, or Section 826.04, Fla. Stat. The amendment to the pre-existing statute of limitation did not create any new causes of action under Section 39.01, Section 415.102, or Section 826.04, Fla. Stat.

The Respondent's First Amended and Supplemental Complaint alleged a common law action for assault and battery against the Petitioner. (A-3). Because the Respondent was 15 at the time of the alleged assault, and because the Respondent is the Petitioner's granddaughter, the intentional tort constitutes both child abuse as defined in Section 39.01, Fla.Stat., and incest as defined in Section 826.04, Fla.Stat., bringing this case within the ambit of the legislative amendment.

SUMMARY OF THE ARGUMENT

The expiration of the statute of limitation applicable to a common-law action for intentional sexual abuse of minor does not create a vested constitutional right in the Petitioner. A limitation period does not create a cause of action, it merely cuts off the remedy of a party who has slept on its rights. Hoagland v. Railway Express Agency, 75 So.2d 822, 827 (Fla. 1954). The statute of limitation is a rule of procedure, Strauss v. Sillin, 393 So.2d 1205, 1206 (Fla. 2d DCA 1981), and its expiration does not affect the underlying substantive rights of the parties involved. Henry v. Halifax Hospital District, 368 So.2d 432, 433 (Fla. 1st DCA 1979).

The revival of a previously time-barred common-law cause of action does not violate the Petitioner's constitutional rights. Campbell v. Holt, 115 U.S. 620 (1885); Chase Securities Corporation v. Donaldson, 325 U.S. 304 (1945); Racich v. The Celotex Corporation, 887 F.2d 393 (2d. Cir. 1989); Osmundsen v. Todd Pacific Shipyard, 755 F.2d 730 (9th Cir. 1985); Davis v. Valley Distributing Company, 522 F.2d 82 (9th Cir. 1975); U.S. v. Hunter, 700 F. Supp. 26 (M.D. Fla. 1988); Clark v. Abbott Laboratories, 553 N.Y. Supp. 2d 929 (N.Y. App. Div. 1990); City of Boston v. Keane Corporation, 547 N.E. 2d 328 (Mass. 1989); Heck v. McConnell, 418 N.W. 2d 678 (Mich. Ct. App. 1987); Dandeneau v. Board of Governors for Higher Education, 491 At. 2d 1011 (R.I. 1985).

The statute under constitutional attack in this case is similar to statutes amending limitation periods for common-law

actions for sexual abuse in Minnesota and California. In K.E. v. Hoffman, 452 N.W. 2d 509 (Minn. Ct. App. 1990), and in Liebig v. Liebig, 209 Cal. App. 3d 754, 257 Cal. Rptr. 574 (1989), the Minnesota and California appellate courts addressed and upheld the constitutionality of similar statutes.

The statute of repose cases relied upon by the Petitioner and the cases involving statutory causes of action are inapplicable in this case. Once the statutory time period for bringing a statutory action expires, the cause of action ceases to exist. Similarly, when the statute of repose expires, the cause of action no longer exists for all intents and purposes. To the contrary, in a common-law cause of action, the statute of limitation merely limits the available remedy of the plaintiff.

The dismissal of the Respondent's cause of action was under appeal at the time of the legislative amendment. The Respondent's timely appeal of the lower court's judgment keeps her action alive until there is a final determination on appeal. Florida Patient's Compensation Fund v. Von Statina, 474 So.2d 783, 787 (Fla. 1985). As a result, this appeal must be determined in accordance with the law in effect at the time of the appellate court's decision rather than the law in effect at the time the judgment appealed was rendered. Cantor v. Davis, 489 So.2d 18 (Fla. 1986).

ARGUMENT

I. THE EXPIRATION OF A STATUTE OF LIMITATION APPLICABLE TO A COMMON-LAW ACTION FOR INTENTIONAL SEXUAL ABUSE OF A MINOR DOES NOT CREATE A VESTED CONSTITUTIONAL RIGHT.

The Petitioner alleges that he possesses a vested constitutional right not to be sued in a common-law action for sexual abuse because of the expiration of the previously existing statute of limitation. According to the Petitioner, an incestuous child abuser has a "vested" property right in the expiration of the statute of limitation. While there are circumstances where vested rights can be created by the expiration of a limitations period, sexual abuse is not a constitutionally protected right and the Petitioner has no right not to be sued for sexual abuse.

The ability of a person to sue another at common law for intentional assault and battery exists independent of any legislative or statutory enactment. Under common law, the right to bring an action exists indefinitely unless the cause of action is barred by the equitable doctrine of laches or unless the cause of action is barred by a statutory limitations period. The statutory limitations period does not create a cause of action, it merely cuts off the remedy of the party who has slept on his rights. Hoagland v. Railway Express Agency, 75 So.2d 822, 827 (Fla. 1954). Statutes of limitation are rules of procedure, Strauss v. Sillin, 393 So.2d 1205, 1206 (Fla. 2d DCA 1981), and their expiration does not affect the underlying substantive rights of the parties involved. Henry v. Halifax Hospital District, 368 So.2d 432, 433 (Fla. 1st DCA 1979).

The United States Supreme Court in Campbell v. Holt, 115 U.S. 620, 626 (1885), espoused the rule of law that still applies today, "The rule in the courts of the United States, in respect to pleas of the statute of limitations, has always been that they strictly affect the remedy, and not the merits." In Campbell, the United States Supreme Court upheld the revival of a cause of action for breach of contract previously barred by a pre-existing statute of limitation. The defendant alleged that the limitation defense, being complete and perfect, could not be taken away and that to do so would violate the Fourteenth Amendment to the United States Constitution which declares that no state shall, "[D]eprive any person of life, liberty, or property without due process of law." The Court upheld the retroactive revival of a previously time-barred cause of action and expressly held that a defendant, in an action not involving title to real or personal property, did not obtain a vested property right upon the expiration of the statute of limitations.

The dissenting justices in Campbell v. Holt unsuccessfully asserted the position adopted by the Petitioner in this case; that the expiration of the statute of limitation creates a right which is protected by the Fourteenth Amendment of the Constitution. This argument was rejected by the majority who correctly held that only the remedy and not the substantive rights of the parties were affected.

The Supreme Court reaffirmed this position in Chase Securities Corporation v. Donaldson, 325 U.S. 304 (1945). In Chase, the U.S.

Supreme Court directly addressed the question presented in this appeal and held:

> The substantial federal questions which survive the state court decision are whether this case is governed by Campbell v. Holt and if so, whether that case should be reconsidered and overruled.
>
> In Campbell v. Holt, supra, this Court held that where lapse of time has not invested a party with title to real or personal property, a state legislature, consistently with the Fourteenth Amendment, may repeal or extend a statute of limitations, even after right of action is barred thereby, restore to the plaintiff his remedy, and divest the defendant of the statutory bar. This has long stood as a statement of the law of the Fourteenth Amendment, and we agree with the court below that its holding is applicable here and fatal to the contentions of appellant.

Chase Securities Corporation v. Donaldson, 325 U.S. at 311-312.

In Chase, the plaintiff brought a securities case in 1937 over 8 years after the purchase of securities in 1929. At the time of the suit, a six year statute of limitation applied to the action. During the pendency of the case, the state legislature amended the statute of limitation to expressly authorize any purchaser of a security to bring an action within one year of the effective date of the new act. The window period revived the plaintiff's previously barred cause of action.

The trial court held that the window period operated to extend the statute of limitation and allowed plaintiff's claim despite the expiration of the previously existing statute of limitation. The state supreme court affirmed the lower court and held that the window period reviving the plaintiff's cause of action was not violative of the due process provision of the Fourteenth Amendment of the United States Constitution. The United States Supreme Court

affirmed the state supreme court and expressly upheld the constitutionality of a window period very similar to the window period in this case. In its opinion, the United States Supreme Court discussed the history and purpose of statutes of limitation:

> Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost. Order of Railroad Telegraphers v. Railway Express Agency, 321 U.S. 342, 349 (1944). They are by definition arbitrary, and their operation does not discriminate between the just and unjust claim, or the avoidable and unavoidable delay. They have come into the law not through the judicial process but through legislation. They represent a public policy about the privilege to litigate. Their shelter has never been regarded as what now is called a "fundamental" right or what used to be called a "natural" right of the individual. He may, of course, have the protection of the policy while it exists, but the history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control.

Chase Securities Corporation v. Donaldson, 325 U.S. at 314.

The Supreme Court's analysis in Chase distinguished between common-law and statutory causes of action. The Court held that retroactive legislation reviving a previously time-barred common-law action merely reinstated a lapsed remedy and did not create a new right or subjective potential defendant to a new liability. Chase Securities Corporation v. Donaldson, 325 U.S. at 312, fn.8.

Statutorily created causes of action are not comparable to common-law actions for purposes of analysis of the statute of limitations. Once the limitation period expires on a statutorily

created cause of action, the cause of action itself ceases to exist. To the contrary, when the statute of limitation expires on a common-law right of action, the cause of action still exists, only the limitation period bars pursuit of the claim.

In Racich v. The Celotex Corporation, 887 F.2d 393,396 (2d Cir. 1989), the United States Court of Appeals upheld the constitutionality of a window period authorizing pursuit of a previously barred common-law action for personal injury due to asbestosis and stated:

> ...[U]nlike the statutorily-created causes of action cited by appellant, the statute at issue here revived, rather than created, certain categories of common-law tort actions, and thus merely eliminated a statute of limitations defense....The expiration of the statute of limitations prior to the enactment of the revival statute did not eliminate plaintiff's cause of action, but merely suspended the court's ability to grant any remedy.

The federal courts have uniformly recognized the state legislatures' ability to revive previously barred common-law causes of action. Osmundsen v. Todd Pacific Shipyard, 755 F.2d 730, 733 (9th Cir. 1985); Davis v. Valley Distributing Company, 522 F.2d 82, 83 (9th Cir. 1975); United States v. Hunter, 700 F. Supp. 26, 27 (M.D. Fla. 1988); Cf., Sarfati v. Wood Holly Associates, 874 F.2d 1523, 1525 (11th Cir. 1989) ("a statute of limitations that restricts a right created by statute rather than a right at common law generally is deemed to be a substantive limit on the right as opposed to a mere procedural limit on the remedy.")

Other state courts follow the federal rule that common-law actions can be revived by retroactive modification of the statute of limitations. For example, in New York the legislature enacted

a toxic tort revival statute similar to the sexual abuse revival statute which is the subject of this appeal. In upholding the constitutionality of the revival statute, the appellate court in Clark v. Abbott Laboratories, 553 N.Y.S.2d 929, 933 (N.Y. App. Div. 1990) held:

> The toxic tort revival statute did not create a new cause of action. As its popular name suggests, the statute revived actions that had been dismissed as time-barred as well as personal injury causes of action that were time-barred because the injury had not been diagnosed within the statutory period. (Citations omitted). A statute of limitations, when imposed as a time-bar, does not eliminate the substantive right, it merely suspends the remedy. (Citations omitted). The legislature could, at any time, repeal the statute of limitations, and the substantive right could be enforced by an action. (Citations omitted). Moreover, a cause of action may be enforced despite the time-bar where a defendant waives the statute of limitations by failing to bring a pre-answer motion for dismissal or by failing to plead the defense in his answer. (Citations omitted).

See, also, McGowan v. New York Telephone Company, 544 N.Y.S.2d 423 (N.Y. Sup. Ct. 1989) (toxic tort revival statute); City of Boston v. Keane Corporation, 547 N.E.2d 328 (Mass. 1989) (revival period for otherwise barred actions in asbestosis related corrective actions); Heck v. McConnell, 418 N.W.2d 678 (Mich. Ct. App. 1987) (Retroactive amendment to paternity statute); Dandeneau v. Board of Governors for Higher Education, 491 A.2d 1011 (R.I. 1985) (Retroactive application of the statute of limitations for claims against the state).

Several states have enacted statutes similar to Section 95.11(7), Fla.Stat. (1992), which include a revival period for previously time-barred causes of action for sexual abuse. In K.E. v. Hoffman, 452 N.W.2d 509 (Minn. Ct. App. 1990) (A-4), a

plaintiff's action for sexual abuse was dismissed on summary judgment under a general statute of limitation applicable to abuse cases. During the pendency of the appeal, the Minnesota legislature enacted an enlarged statute of limitation that applied retroactively to revive the plaintiff's action. The Minnesota Court of Appeals sustained the constitutionality of the retroactive modification to the statute of limitations and held that a prospective defendant in a sexual abuse case did not have a constitutionally protected vested right not to be sued.

In upholding the constitutionality of the retroactive application of the amended statute of limitation to revive a previously barred common-law cause of action, the Court held:

> We acknowledge that the question whether this statute accords respondents a constitutionally protected right hinges on which of three types of statutes of limitation was involved. See, Donaldson v. Chase Securities Corp., 216 Minn. 269, 274-77, 13 N.W.2d 1, 4-5 (1943), aff'd, 325 U.S. 304 (1945). Plainly, the limitations statute in the present case is not analogous to one involving adverse possession where the passage of time extinguishes the Plaintiff's right and remedy, and gives the defendant a vested property right. Moreover, Section 541.07(1) is distinguishable from a second class of statutes which creates both a cause of action and a limitation period within which the action must be brought. Instead, in this case, only the appellant's remedy against respondents and not the parties' respective rights, was effected when the limitations period expired. A limitations statute which applies merely to a parties' remedy does not create a vested right in respondents. See Donaldson, 216 Minn. at 376, 13 N.W.2d at 5. Accordingly, we hold the legislature did not impair respondents' due process rights by enacting Section 541.073 which lifted the limitations bar and revived appellant's claim against them.

K.E. v. Hoffman, 452 N.W.2d at 513.

After ruling that revival of an extinguished common law cause of action did not impair any vested rights of the defendant, the Minnesota Court recognized the legislative authority to address the problem of sexual abuse:

> ...[T]he statute plainly reflects awareness of the difficulty sexual abuse victims have in identifying and recognizing their injuries immediately. Research shows victims of sexual abuse may repress the memory of such incidents, and not discover the actual source of their problem for many years. In acknowledging this problem, the legislature, by enacting Section 541.073, limits the possibility of the general statute of limitation barring a claim for sexual abuse, and holds the sexual abuser liable for his offenses. Because we are not in the position to judge the wisdom of the legislation, where, as here, the statute has a reasonable relation to the State's legitimate purpose of affording sexual abuse victims a remedy, we reject respondent's due process claims.

K.E. v. Hoffman, 452 N.W.2d at 513-514.

In Liebig v. Liebig, 209 Cal. App. 3d 754, 257 Cal. Rptr. 574 (1989) (A-5), the California court addressed the constitutionality of a window period allowing victims of sexual abuse to bring a previously time-barred action. In Liebig, as in the case sub judice, a granddaughter filed suit against her grandfather alleging sexual molestation after the original limitations period expired. The legislature then enacted an amended statute of limitation for any lawsuit based on sexual molestation that included a provision applying the new statute to, "any action which would be barred by application of the period of limitation applicable prior to [the enactment of the statute]." Liebig, 209 Cal.App.3d at 831, 257 Cal.Rptr. at 575.

The grandfather in Liebig alleged that the legislative power to extend a civil limitations period may be exercised only prior to the period's expiration and alleged that the retroactive window period deprived him of his "vested right" not to be sued. This same argument is made by the Petitioner in this case. In rejecting this argument, the California appellate court held that the retroactive window period allowing the revival of a previously time-barred sexual abuse claim was constitutional based on the important public policy served by the statute:

> Even if we were to assume arguendo that a vested right exists in repose of a cause of action, the law is clear that vested rights are not immune from retroactive laws when an important state interest is at stake....In this case the important state interest espoused by Section 340.1 is the increased availability of tort relief to Plaintiff's who had been the victims of sexual abuse while a minor. [The Defendant] complains that the trial court had no "evidence" of public policy before it, the identification of public policy can be as much an interpretive as an evidentiary exercise. The language of the retroactivity provision of Section 340.1 indicates a clear legislative intent to maximize claims of sexual-abuse minor Plaintiff's for as expansive a period of time as possible. The public policy is manifest from the text of the law.

Liebig v. Liebig, 209 Cal.App.3d at 834, 257 Cal.Rptr., at 577-578.

The Virginia case cited by the Petitioner is inapposite. In Virginia, the state legislature in 1887 enacted a statute creating a substantive right to rely on the expiration of a limitations period. Virginia Code Section 8.01-234, originally enacted as Virginia Code Section 2926 of the Code of 1887, expressly states:

> If, after a right of action or remedy is barred by a statute of limitation, the statutes be repealed, the bar of the statute as to such right or remedy shall not be deemed to be removed by such repeal.

The existence of this statute created the substantive vested right discussed in Starnes v. Cayouette, 419 S.E.2d 669 (Va. 1992). Florida has no similar statute creating a substantive right in the expiration of the limitations period.

In Celotex Corporation v. Meehan, 523 So.2d 141 (Fla. 1988), this Court applied the New York toxic tort revival statute which was the subject of the court's opinion in Clark v. Abbott Laboratories, supra. In dicta in a footnote, this Court stated:

> We note that the law of Florida would only allow an expansion of a statute of limitations period when the change is made before the cause of action is barred by the prior statutory limitation period. Corbett v. General Engineering & Machinery Company, 160 Fla. 879, 37 So.2d 151 (1948).

Celotex Corporation v. Meehan, 523 So.2d at 146-147.

Although the footnote is gratuitous and not essential to the Court's decision, the Petitioner asserts that this caveat was neglected by the Second District below. (B-10-11). Contrary to the argument of the Petitioner, both Celotex Corp. v. Meehan, supra, and Corbett v. General Engineering and Machinery Co., supra, are distinguishable from the case sub judice based on the nature of the underlying cause of action: both cases involved statutorily created causes of action and their accompanying statutes of limitation.

In Celotex Corp. v. Meehan, supra, this Court addressed the constitutionality of a newly enacted limitation statute in the

context of a statutory wrongful death action. As a result, the statutory right to bring the action was dependent on the non-expiration of the statutory limitations period. Corbett v. General Engineering & Machinery Co., supra, addressed the retroactive amendment of a statute of limitations applicable in a statutory workers compensation action. Absent the statutorily created workers compensation statute, the cause of action did not exist.

The same is true for the other cases relied upon by the Petitioner that involve statutorily-created rights and their accompanying limitation of remedy provisions. E.g., Walter Denson & Son v. Nelson, 88 So.2d 120 (Fla. 1956) (workers compensation case); Martz v. Riskamm, 144 So.2d 83 (Fla. 1st DCA 1962) (statutory dower interest); Davis & McMillan v. Industrial Accident Commission, 246 P. 1046 (Ca. 1926) (workers compensation action).

The distinction between statutory causes of action and common law causes of action also distinguishes the statute of repose cases relied upon by the Petitioner. The statute of repose creates an affirmative statutory right to be free from suit after a specified period of time. The statute creates a right rather than a limit on a remedy. Upon expiration of the statute of repose, the statutory right accrues.

In Firestone Tire & Rubber Company v. Acosta, 612 So.2d 1361 (Fla. 1992), this Court held that the repeal of a statute of repose did not revive causes of action extinguished by operation of the statute. The decision in Acosta, as recognized by the Second District below, noted that the act repealing the statute of repose

did not indicate any legislative intent to apply the statute retroactively. Whereas the Florida legislature, "Unmistakably and clearly expressed its intent to revive a cause of action for intentional abuse," in Chapter 92-102, Laws of Florida. Roof v. Wiley, 622 So.2d at 1022.

The rights accruing upon the expiration of a statute of repose are entirely different from the operation of a statute of limitation. As a result, the cases relied upon by the Petitioner involving the retroactive application of a statute of repose, i.e., Firestone Tire & Rubber Company v. Acosta, 612 So.2d 1361 (Fla. 1992), Melendez v. Dreis & Krump Manufacturing Co., 515 So.2d 735 (Fla. 1987), and Walker v. Miller Electric Manufacturing Co., 591 So.2d 242 (Fla. 4th DCA 1991), are irrelevant to a determination of the legislature's ability to retroactively amend a statute of limitation.

The retroactive application of an amendment to the statute of limitation does not create any special hardship or oppressive result for the Petitioner. As noted in Chase Securities Corp. v. Donaldson, 325 U.S. 304, 316 (1945):

> This is not a case where appellant's conduct would have been different if the present rule had been known and the change foreseen. It does not say, and could hardly say, that it sold unregistered stock depending on a statute of limitation for shelter from liability.

Applying this analysis in the case sub judice, it is obvious that the alleged abuser cannot claim that he committed sexual abuse, "[d]epending on a statute of limitation for shelter from liability." Stated differently by the United States Supreme Court:

> No man promises to pay money with any view to being released from that obligation by lapse of time. It violates no right of his, therefore, when the legislature says, time shall be no bar, though such was the law when the contract was made.
>
> Campbell v. Holt, 115 U.S. 620, 628 (1885).

The law is clear that no vested right accrues upon expiration of the statute of limitation for a common-law cause of action. Since the statute of limitation affects only the remedy, the legislature has the authority to amend the statute of limitation without affecting any vested rights as alleged by the Petitioner.

II. THE LEGISLATURE HAS THE POWER TO RETROACTIVELY AMEND A STATUTE OF LIMITATION TO REVIVE A PREVIOUSLY-BARRED CAUSE OF ACTION EVEN IF VESTED RIGHTS ARE AFFECTED.

The Petitioner's argument is based on the premise that he acquired a vested right in the expiration of the statute of limitation, and that upon accrual of this vested right, the legislature has no authority to amend the statute. Assuming arguendo that a right accrues as a result of the expiration of limitations period, the legislature still has the authority to retroactively amend the statute of limitation.

The district court correctly noted that legislative intent is the key to determining whether an amendment to a statute of limitation will be applied retroactively. If the language of the statute clearly expresses an intent to apply an amendment retroactively, the legislature can revive a claim previously barred by a statute of limitation and give a statute of limitation

retroactive affect. Roof v. Wiley, 622 So.2d 1018, 1021 (Fla. 2d DCA 1993). This is consistent with the opinion in Homemakers, Inc. v. Gonzales, 400 So.2d 965, 967 (Fla. 1981), wherein this Court held that:

> ...[A] statute of limitations will be prospectively applied unless the legislative intent to provide retroactive effect is express, clear, and manifest. (Emphasis supplied).

See, also, Orpheus Investments v. Ryegon Investments, Inc., 447 So.2d 257, 259 (Fla. 3d DCA 1983); Alford v. Summerlin, 423 So.2d 482 (Fla. 1st DCA 1982); Regency Wood Condominium, Inc. v. Bessent, Hammock, & Ruckman, Inc., 405 So.2d 440 (Fla. 1st DCA 1981).

Where there is a clear legislative expression of intent to have the statute apply retroactively, a statute can be given retrospective operation even where existing rights are impaired or destroyed. See, e.g., State v. Lavazzoli, 434 So.2d 321, 323 (Fla. 1983); Trustees of Tufts College v. Triple R. Ranch, Inc., 275 So.2d 521 (Fla. 1973).

As recognized by the California appellate court in Liebig v. Liebig, 209 Cal.App.3d 728, 734, 257 Cal.Rptr. 574, 577 (1989) (A-5):

> Even if we were to assume arguendo that a vested right exists in repose of a cause of action, the law is clear that vested rights are not immune from retroactive laws when an important state interest is at stake.

The Florida legislature has deemed it appropriate to preserve the public's health, welfare, morals, safety, and economic

interests by allowing victims of abuse to bring an action during the window period created in Section 2 of Chapter 92-102, Laws of Florida. The legislative intent of the amendment is clear:

> Section 2. Notwithstanding any other provision of law, a Plaintiff whose abuse or incest claim is barred under Section 1 of this act has four years from the effective date of this act to commence an action for damages. (A-2)

Although the intent of the statute is apparent, the legislative history of Chapter 92-102, Laws of Florida, is further evidence of the intent of the legislature. The Senate Staff Analysis and Economic Impact Statement for the act discusses the effect of Section 2:

> 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-6)

The purpose of the window period is to grant plaintiffs penalized by the application of the old statute of limitations a prescribed period within which to pursue their claims based on abuse. The affect of the statute in this case is to abolish the Defendant's statute of limitations defense on the abuse claim and to revive Plaintiff's cause of action.

As recognized by the United States Supreme Court, the power of the legislature to exercise its police power is:

> ...[o]ne of the most essential powers of government, -- one that is the least limitable. It may, indeed, seem harsh in its exercise, usually is on some individual, but the imperative necessity for its existence precludes any limitation upon it when not exerted arbitrarily. A vested interest cannot be asserted against it because of conditions once obtaining. Chicago & Alton R.R. v. Tranbarger, 238 U.S. 67, 78 (1915). To so hold would preclude development and fix a city forever in its

> primitive conditions. There must be progress, and if in its march private interests are in the way they must yield to the good of the community.
>
> Hadacheck v. Sabastian, 239 U.S. 394, 410 (1915).

In light of the clear legislative intent in Chapter 92-102, Laws of Florida, the window period allowing the Respondent to bring her claim for sexual abuse must be upheld. The opinion of the district court should be approved.

III. THE STATUTE OF LIMITATION IN EFFECT AT THE TIME OF THIS APPEAL GOVERNS THE DISPOSITION OF THIS CASE

The Petitioner alleges that the dismissal of the Respondent's claim in the trial court, as an adjudication on the merits, operates to create a vested right in the defense of the statute of limitation. (B-18). Had the Respondent not timely appealed the final judgment of the trial court dismissing her action, the final judgment would constitute an adjudication on the merits under Rule 1.420, Fla.R.Civ.P., and Allie v. Ionata, 503 So.2d 1237 (Fla. 1987). However, the Respondent did timely appeal the lower court's final judgment, therefore, no rights accrued and the final judgment is not res judicata.

The Respondent's timely appeal of the lower court's judgment keeps her action alive until there is a final determination on appeal. Florida Patient's Compensation Fund v. Von Stetina 474 So.2d 783, 787 (Fla. 1985); Wilson v. Clark, 414 So.2d 526 (Fla. 1st DCA 1982); McAlister v. Salas, 485 So.2d 1333 (Fla. 2d DCA 1986); Cicero v. Paradis, 184 So.2d 212 (Fla. 2d DCA 1966); Chapman v. Garcia, 463 So.2d 528 (Fla. 3d DCA 1985). As a result, the appellate courts are required to dispose of her case on appeal in

accordance with the law in effect at the time of the appellate court's decision rather than the law in effect at the time the judgment appealed was rendered. Cantor v. Davis, 489 So.2d 18 (Fla. 1986); Hendeles v. Sanford Auto Auction, Inc., 364 So.2d 467 (Fla. 1978); Florida East Coast Railway Company v. Rouse, 194 So.2d 260 (Fla. 1967).

In the words of the immortal Yogi [Lawrence Peter] Berra, "[T]he game isn't over until its over." The final judgment below was timely appealed and subject to both legislative and judicial changes during the appellate process. As a result, the final judgment created no vested rights in the Petitioner. The District Court's decision should be approved.

CONCLUSION

The decision of the District Court reviving the Respondent's claim for sexual abuse is eminently correct. The Petitioner has no vested right not to be sued in a common-law action for assault and battery based on sexual abuse. Even if such a right existed, the clear legislative intent of the legislature allows retroactive application of the statute.

The decision of the Second District Court of Appeal should be affirmed.

Respectfully submitted,

Respectfully submitted

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to MARTIN ERROL RICE, ESQ., Post Office Box 205, St. Petersburg, Florida 33731, ANTHONY S. BATTAGLIA, ESQ. and BRIAN P. BATTAGLIA, P. O. Box 41100, St. Petersburg, Florida 33743, RICHARD J. DAFONTE, ESQ., 1000 Belcher Road South, Suite 2, Largo, Florida 33641, BARBARA W. GREEN, ESQ., Grove Place, Third Floor, 2964 Aviation Avenue, Coconut Grove, Florida 33133-3862, JAMES E. TRIBBLE, ESQ., 2400 Sunbank Int'l Center, One S. E. Third Avenue, Miami, Florida 33131, and by depositing same in the U.S. Mail with proper postage affixed.

This 15th day of March, 1994.

CHRISTOPHER P. JAYSON, ESQ.