

047

IN THE FLORIDA SUPREME COURT  
Case No. 82,412

CALVIN WILEY,

Defendant/  
Petitioner,

vs.

CARRIE LINN YOUNG ROOF,

Plaintiff/  
Respondent.

**FILED**

SID J. WHITE

NOV 12 1993

CLERK, SUPREME COURT

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Chief Deputy Clerk

RESPONDENT'S ANSWER BRIEF ON JURISDICTION

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STATUTES

Section 95.11, Fla.Stat.  
Chapter 92-102, Laws of Florida

## STATEMENT OF THE CASE AND FACTS

On April 18, 1991, the Respondent filed an action for sexual abuse against her grandfather, Petitioner CALVIN WILEY. The complaint alleged that the grandfather sexually abused Respondent on or about March 15, 1973, when Respondent was 15 years old.

The trial court, by order dated November 18, 1991, granted Respondent's Motion to Dismiss with prejudice holding that the action against the grandfather was time-barred.

During the pendency of the appeal, the legislature enacted Chapter 92.102, Laws of Florida, amending Section 95.11, Fla. Stat., the statute of limitation applicable to actions founded on allegations of sexual abuse. The Second District reversed the trial court's order dismissing the first amended complaint. The District Court held that the Respondent's right to commence an action against the grandfather was revived by the enactment of Section 2 of Chapter 92-102. The case was reversed and remanded for further proceeding in the trial court.

### I. THIS CASE IS NOT RIPE FOR DISCRETIONARY REVIEW.

The Respondent's action for sexual abuse was filed in 1991 seeking recovery of damages in tort. The claim was dismissed on the pleadings without discovery and without a trial on the merits of the allegations. To date, no discovery has been undertaken and no trial has been held on the substantive issues of law and fact arising from Plaintiff's complaint.

The Petitioner requests this Court to review the constitutionality of the amended statute of limitations. The

constitutionality of the statute of limitation as applied in this case can only be determined after a trial on the merits, based on the evidence relating to the application of the statute in this case. Discretionary review should be reserved until after the case is heard at the trial level and both parties have an opportunity to conduct discovery and present evidence with respect to the merits of the case. In addition, a trial on the merits of this cause may obviate the necessity for discretionary review of this matter, conserving judicial resources.

The delay occasion by this appeal may also hinder the Respondent's ability to conduct discovery and in light of the age and health of Petitioner CALVIN WILEY may irreparably harm Plaintiff's case sub judice.

Discretionary review should be denied until a trial is held and both parties have an opportunity to present evidence on the merits of the claim and both parties have an opportunity to present evidence and testimony with respect to Petitioner's claims that the statute is unconstitutional.

## **II. THERE IS NO CONFLICT JURISDICTION.**

The cases cited by the Respondent in support of conflict jurisdiction are distinguishable from the case sub judice. Corbin vs. General Engineering and Machinery Co., 37 So.2d 161 (Fla. 1948); Wall vs. Johnson, 78 So.2d 371 (Fla. 1955), Walter Denson & Son vs. Nelson, 88 So.2d 120 (Fla. 1956), and Celotex Corp. vs. Meehan, 523 So.2d 141 (Fla. 1988), each involve statutorily created rights and the accompanying limitation of remedy provision.

Statutory causes of action are not comparable to common law tort actions for purposes of analysis of the statute of limitations because the statutory causes of actions do not exist but for the statute. Once the statutory cause of action is extinguished by the statutory limitation, the cause of action itself ceases to exist. To the contrary, when the limitations period 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 vs. Celotex Corp., 887 F.2d 393, 396, (2d. Cir. 1989), the Second Circuit Court of Appeals rejected the argument made by the Respondent and upheld the constitutionality of a window period authorizing pursuit of a previously barred common law action and held:

...Unlike 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 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 Middle District of Florida has recognized the legislature's ability to revive a previously barred common law cause of action in United States vs. Hunter, 700 F.Supp 26, 27 (M.D. Fla. 1988), wherein the Court held:

It is within the power of a legislature, however, to extend a previously applicable limitation period that had already commenced running and to enact a new limitation rule so as to revive claims already barred under a prior rule.

Since Respondent's tort claim was not statutorily created as in the cases relied upon by Petitioner for conflict jurisdiction, no conflict jurisdiction exists.

**III. CONCLUSION.**

When this Court passes upon the constitutionality of the statute in question, it should have before it sufficient evidence so that the constitutionality of the statute can be determined as applied and facially. Determination of the constitutionality of the statute at this point will deprive the Court of the context in which the statute is sought to be applied.

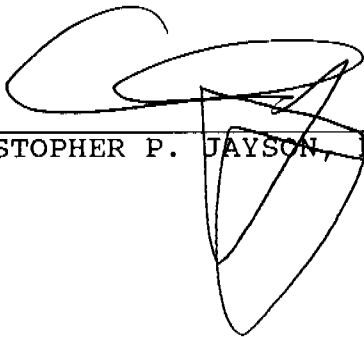
The District Court's opinion does not expressly and directly conflict with any opinion of this Court, or any opinion of other district courts of appeal in Florida. Therefore, there is no need for this Court to resolve any continuing conflict of law.

This Court should deny discretionary review at this time.

**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, ESQ., Post Office Box 41100, St. Petersburg, Florida 33743, and RICHARD DAFONTE, ESQ., 1000 Belcher Road South, Suite 2, Largo, Florida 34641, by depositing same in the U.S. Mail with proper postage affixed.

This 9th day of November, 1993.

  
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CHRISTOPHER P. JAYSON, ESQ.