W00A 047

IN THE SUPREME COURT OF FLORIDA

DAVID MASON,

Petitioner,

vs.

ARTURO SALINAS, JR.

Respondent

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Case No.: 82,968

PETITIONER'S REPLY BRIEF ON THE MERITS

On Review from the District Court of Appeal
Second District, State of Florida
In Case No. 92-04118

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ARGUMENT

I. FLORIDA LAW PROHIBITS REVIVAL OF CLAIMS PREVIOUSLY BARRED BY A STATUTE OF LIMITATIONS

In Salinas' answer brief it appears that he concedes that in light of this court's decision in *Wiley v. Roof*, 19 Fla. L. Weekly S334 (Fla. June 24, 1994), his claim is barred by the statute of limitations. It is also his position that such a decision results in a perversion of the legal system. What Salinas attempts to do is arouse an emotional reaction in the courts decision making process. This court has however already dealt with and recognized in *Wiley v. Roof*, that cases involving allegations of sexual assault inevitably bring with it emotional and psychological factors which make barring of such a claim, assuming that it is true, seem perverse. It is clear however that the *Wiley* decision was made in accordance with the law and that decision in and of itself prevents the perversion of the legal system.

> As pointed out by the amici curiae briefs submitted in this case, the torts of incest and abuse involve a myriad of social, psychological and legal variables that often prevent a person, particularly a minor, from immediately reporting these types of offenses. The legislature may appropriately determine and modify the period of time for filing actions in abuse and incest cases. This does not mean however that it may revive a cause of action that has already been barred by the expiration of the pre-existing statute of limitations.

The *Wiley* decision is not an aberration as is implied in Salinas' brief. Although it is true that the legislature has the power to increase a prescribed period of limitation, it may do so only if the "change in the law is effective **before** the cause of action is extinguished by the force of a pre-existing statute." *Walter Denson & Son v. Nelson,* 88 So.2d 120, 121 (Fla 1956)(emphasis added). A party has the "'right to have the statute of

limitations period become vested once it has completely run and barred [an] action.'" *Firestone Tire & Rubber Co.,* 612 So.2d 1361, 1364 (Fla. 1992), (quoting *Mazda Motors of America, Inc. v. S.C. Henderson & Sons, Inc.,* 364 So.2d 107, 108 (Fla 1 DCA 1978), *cert. denied*, 378 So.2d 348 (Fla. 1979). See also *Corbett v. General Engineering & Machinery Co.,* 37 So.2d 161 (Fla 1948); and *Patterson v. Sodders,* 167 So.2d 789 (Fla 2nd DCA 1964). In the present case Salinas' claim was barred some 12 years prior to the change in the limitations period.

Finally, Salinas seems to imply in his brief that Mason's reliance on the statute of limitations is a factor in determining whether that right has become a protected property interest. The operation of a statute of limitation is however entirely unaffected by a defendant's reliance.

> 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. (citations omitted). They are by definition arbitrary and their operation does not discriminate between the just and the unjust claim, or the voidable and unavoidable delay. *Wiley.*

If the decision of the appellate court is left standing, the potential for an inordinate number of claims which were previously extinguished by the existing statute of limitations will now be revived. In each of those cases, the passage of time, stale evidence, and unavailable witnesses will work to deprive Mason of an opportunity to fairly present a defense and will be contrary to the law as outlined by this court previously in *Wiley v. Roof.* The Second District's decision in the present case should therefore be overturned.

II. RESPONDENT'S FAILURE TO SEEK LEAVE TO AMEND PRIOR TO A DISMISSAL WITH PREJUDICE PRECLUDES CONSIDERATION OF THAT ISSUE FOR THE FIRST TIME ON APPEAL

Salinas argues in his answer brief that based upon Florida's discovery rule, he should be able to amend his complaint so as to include allegations concerning the time that he first became aware of his cause of action. The record however fails to disclose that he ever sought leave to amend his complaint in the lower court. Because Salinas raised this issue for the first time in the Second District Court of Appeal, that court could not, and in fact did not, address that issue in its decision. Courts have routinely held that an:

> ...appellant's failure to seek leave to amend prior to the dismissal with prejudice or to move for rehearing requesting leave to amend, precludes consideration of the issue for the first time on appeal. *Chase Securities Corporation v. Donaldson et al.*, 325 U.S. 304, 65 S.Ct. 1137 (1945), rehearing den. 325 U.S. 896, 65 S.Ct. 1561 (1945); citing *Century 21 Admiral's Port, Inc. v. Walker,* 471 So.2d 544 (Fla 3rd DCA 1985);. *Johnson v. RCA Corp.*, 395 So.2d 1262 (Fla 3rd DCA 1981); *Hohenberg v. Kirstein,* 349 So.2d 765 (Fla 3rd DCA 1977).

This court has no power to review the applicability of the discovery rule as there is no judicial act by a lower court which this court can review. Respondent is therefore foreclosed from raising the issue on appeal and this argument should be disregarded.

CONCLUSION

Based upon the foregoing, it is clear that the Second District Court of Appeal erred in overturning the trial court's dismissal of the present case. That decision should therefore now be overturned in accordance with this Court's decision in *Wiley v. Roof.*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by regular United States Mail this 29th day of August, 1994, to Attorney for Respondent, **J. ARBY VAN SLYKE, ESQ.**, 216 E. Government Street, P.O. Box 13244, Pensacola, Florida 32591.

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