IN THE SUPREME COURT OF FLORIDA

PAULA JEAN HEARNDON,

Appellant,

vs.

KENNETH L. GRAHAM,

Appellee.

Case No.: 92, 665

First District Court of Appeal
Case No.: 92-3842

APPELLEE'S ANSWER BRIEF

MICHAEL W. JONES, P.A.

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PREFACE

The Appellee, **KENNETH L. GRAHAM,** shall be referred to as, Appellee, Respondent and/or Defendant. The Appellant, **PAULA JEAN HEARNDON,** shall be referred to as Appellant, Petitioner and/or Plaintiff.

STATEMENT OF THE CASE AND FACTS

In February 1991 the petition filed a multi-count complaint against the respondent, in the circuit court in and for Alachua County, Florida. Among other things, the complaint alleged that the defendant murdered the plaintiff's mother in 1975; that he tortured and sexually violated the plaintiff from 1968 through 1975; that the plaintiff's memory of these events was blocked by "traumatic amnesia"; that the defendant's bad acts caused the impairment of the plaintiff's memory; and that her recall did not return until January 18, 1988.

The defendant moved to dismiss the complaint on multiple grounds, and that motion was granted with leave to amend several of the counts, and without leave to amend several others. The complaint was amended and was thereafter met with another motion to dismiss. On October 5, 1992, the circuit judge entered a final judgment dismissing the first amended complaint with prejudice. The dismissal was predicated on the expiration of all applicable statutes of limitation prior to the complaint being filed. From this final judgment the plaintiff timely appealed to the First District Court of Appeal.

On February 26, 1998 the First District issued an opinion, which was withdrawn and substituted with a revised opinion on April 14, 1998. The opinion affirmed the trial court's judgment dismissing with prejudice the amended complaint,

and certified the following question as one of great public importance:

WHERE A PLAINTIFF IN A TORT ACTION BASED UPON CHILD ABUSE ALLEGES THAT SHE SUFFERED FROM TRAUMATIC AMNESIA CAUSED BY THE ABUSE, DOES FULTON COUNTY ADMIN. V. SULLIVAN, 22 FLA. L. WEEKLY S578 (FLA. 1997), PRECLUDE JUDICIAL RECOGNITION OF AN EXCEPTION TO OR A TOLLING OF THE STATUTE OF LIMITATIONS BASED UPON THE DOCTRINE OF DELAYED DISCOVERY RECOGNIZED IN CHAPTER 92-102, LAWS OF FLORIDA?

SUMMARY OF ARGUMENT

Florida law does not permit courts to create exceptions to, or tolling periods for, statutes of limitation. Since 1974, this has been solely the prerogative of the Legislature. The delayed discovery exception to the statute of limitations, created to benefit victims of sexual abuse and codified in *Florida Statute Section 95.11(7)*, cannot be retroactively applied. Therefore, this court must answer affirmatively the question certified to it by the First District Court of Appeal.

POINT ON APPEAL

THE DOCTRINE OF "DELAYED DISCOVERY", CODIFIED IN *FLORIDA STATUTE SECTION 95.11(7),* AS A TOLLING EXCEPTION TO THE STATUTE OF LIMITATIONS FOR VICTIMS OF SEXUAL ABUSE, CANNOT BE RETROACTIVELY APPLIED NOR JUDICIALLY IMPOSED IN THE INSTANT CASE.

Statutes of limitation are properly named because they are creatures of legislative origin. *Chapter 95, Florida Statutes* enumerates the times within which causes of action are either prosecuted or extinguished. The limitations clock begins ticking when the last element of the cause of action occurs. *Section 95.031(1), Florida Statutes (1991).* In cases of alleged sexual abuse and battery occurring before 1992, "The last contemporaneous injury is itself sufficient to complete the cause of action and commence the limitations period." *Lindabury v. Lindabury, 552 So.2d 1117 (Fla. 3rd DCA 1987).* Thus, by any calculation the time frames alleged in the amended complaint prove that the plaintiff's claim is time barred.

But what about exceptions to this mechanistic rule? Are there occasions when the clock will be tolled or abated? The answer, historically and presently, is in the affirmative, but no exception applies to the instant case, mandating an affirmative answer to the certified question and an affirmance of the decisions below. Historically

these exceptions were largely judicial in origin, no doubt created by courts' desires to avoid unfair and harsh results. The district court's opinion in this case contains an excellent discussion of the evolution of judicially created tolling exceptions which will not be repeated here.

The Legislature's primacy in matters of limitations periods was made clear in 1974 by the enactment of *Section 95.051(2), Florida Statutes (1975),* which states:

> (2) No disability or other reason shall toll the running of any statute of limitations except those specified in this section, *s. 95.091, the Florida Probate Code,* or the *Florida Guardianship Law.*

This court in *The Fulton County Administrator v. Sullivan, 22 FLW S578 (Fla. Sup. Ct., September 25, 1997),* expressly ruled that it was a legislative -- not judicial -- function to establish the circumstances under which the limitations periods could be tolled. Judicial expansion of the tolling events enumerated in *Section 95.951,* however fair or sympathetic, is unauthorized and invalid.

Indeed, the Legislature codified the "delayed discovery" exception advocated by the petitioner, in its enactment of *Section 95.11(7), Florida Statutes (1993),* which tolls the statute of limitations for abuse victims for seven years after they reach majority; for four years after leaving the control of the abuser; or for four years from the date the victim discovered an injury caused by the abuser, whichever is longer. This statute provides no relief, however, for the instant petitioner, because no statutory tolling period existed at relevant times in her case. Her claims were time-

barred four years after the last alleged injury, or by 1979 according to the amended complaint. See *Lindabury, supra.*

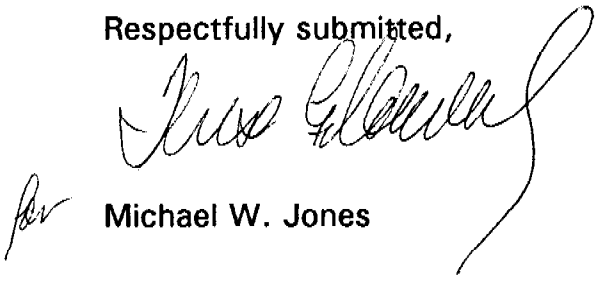
The benefit of *Section 95.11(7)* is prospective only and cannot be claimed by those whose causes of action were extinguished prior to enactment of this statutory exception. *Wiley v. Roof, 641 So.2d 66 (Fla. 1994).* That is because, as this court has explained, the respondent has a property right to be free from the prosecution of stale claims, and this right accrued four years from the date of the last alleged injury to the petitioner. His right cannot be yanked from him by judicial creation of a then-nonexistent tolling circumstance, or by the retroactive application of a current legislatively created one.

CONCLUSION

The proper result here is neither difficult or unfair. The Legislature made clear in 1974, by passage of *Section 95.051(2),* that it had the sole authority to designate tolling exceptions to the statutes of limitation. At the time of the events alleged in the amended complaint, there was no tolling exception for alleged victims of sexual abuse, who were governed by the rule expressed in *Lindabury:* suit must be commenced within four years of the last injurious contact. Application of this rule bars the instant petitioner's action. Subsequent creation by the Legislature of the "delayed discovery" exception, codified in *Section 95.11(7),* cannot by retroactive application resurrect the extinguished claim, for to do so would violate the respondent's vested property right to be free from this suit, a right specifically acknowledged by this court in *Wiley v. Roof, supra.*

The question certified by the First District should be answered in the affirmative, and the final judgment of dismissal affirmed.

Respectfully submitted,



Michael W. Jones

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been furnished this 4 day of **February, 1999** to **NORM LACOE, ESQUIRE,** 4232-B Northwest 6th Avenue, Gainesville, Florida 32609 and **HORACE N. MOORE, SR., ESQUIRE, Post Office Box 2146, Gainesville, Florida 32602-2146** by U.S. Mail.

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