

O/A 4-1-88

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CLERK SUPREME COURT
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IN THE SUPREME COURT OF FLORIDA

GLENN KAISNER and
BARBARA KAISNER,
his wife,

Petitioners,

vs.

CASE NO. 71,121

GARY JOSEPH KOLB;
DALE ROBERT JONES;
PINELLAS COUNTY
SHERIFF'S DEPARTMENT; and
AMERICAN DRUGGIST
INSURANCE COMPANY,

Respondents.

REVIEW OF THE SECOND DISTRICT COURT OF APPEAL OF FLORIDA

**REPLY BRIEF OF AMICUS CURIAE
ACADEMY OF FLORIDA TRIAL LAWYERS**

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ARGUMENT

On June 29, 1979, Glenn Kaisner was injured as the result of certain negligent acts of Deputies Kolb and Jones, in the scope of their employment by the Pinellas County Sheriff's Department. On that date, Florida statutory law provided that governmental employees could be sued personally for negligently inflicted injuries, such as those suffered by Kaisner. See District School Board of Lake County v. Talmadge, 381 So. 2d 698, 703 (Fla. 1980); Fla. Stat. § 768.28(9) (1977). Also on that date, Florida statutory law provided that, as consideration for the insurance premium, governmental immunity could not be imposed as a defense to preclude recovery from governmental liability insurers for negligently inflicted injuries, such as those suffered by Kaisner. See Fla. Stat. §§ 30.55, 455.06 (1977).

In 1980, the Florida Legislature enacted legislation which provided that, in any action pending on or after June 30, 1980, governmental employees could not be sued personally for negligently inflicted injuries, such as those suffered by Kaisner. See Act of June 30, 1980, ch. 80-271, §§ 1, 4, 1980 Fla. Laws 1113, 1113-14, 1115 (current version at Fla. Stat. § 768.28(9) (1987)). In 1987, the Florida Legislature enacted legislation which provided that, in any action pending on or after June 30, 1987, governmental immunity could be imposed as a defense to preclude recovery from governmental liability insurers for negligently inflicted injuries, such as those suffered by Kaisner. Act of June 30,

1987, ch. 87-134, §§ 3-5, 1987 Fla. Laws 1059, 1061-62 (current version at Fla. Stat. § 768.28(5) (1987)).

At the time of his injury in 1979, in addition to any other rights of recovery Kaisner may have acquired, Kaisner acquired the right to seek redress from (1) Deputies Kolb and Jones, and (2), in effect, the Pinellas County Sheriff's Department's governmental liability insurer, which could not assert the insured's governmental immunity as a defense. The subsequent enactments of the Florida Legislature, if applied to bar (1) Kaisner's previously accrued cause of action against Deputies Kolb and Jones and (2) Kaisner's previously accrued cause of action against the Pinellas County Sheriff's Department's liability insurer, would violate Kaisner's constitutional right to due process of law.

As explained by this court in McCord v. Smith, 43 So. 2d 704 (Fla. 1949), retroactive application of a legislative act is invalid where vested rights are adversely affected or destroyed, id. at 708-09. This court has already addressed the retroactive application of the 1980 legislation in Rupp v. Bryant, 417 So. 2d 658 (1982). In Rupp, the injury to Bryant occurred, as here, prior to the effective date of chapter 80-271. Rupp, 417 So. 2d at 660. In holding that the subsequent change in the law could not be applied retroactively to bar Bryant's accrued causes of action against certain governmental employees, this court explained,

The Bryants prior to the 1980 amendments thus had the right to seek recovery from both Rupp and

Stasco since neither defendant could assert immunity. The amendments plainly abolished this right retroactively. Based on due process considerations expressed in Village of El Portal v. City of Miami Shores, 362 So. 2d 275 (Fla. 1978), and McCord v. Smith, 43 So. 2d 704 (Fla. 1949), which prohibit retroactive abolition of vested rights, we agree with the district court that section 768.28(9), Florida Statutes (Supp. 1980), is unconstitutional insofar as it abolishes the Bryants' right to recover from Rupp and Stasco.

Rupp, 417 So. 2d at 665-66. The legislature's attempt, by way of chapter 87-134, to retroactively abolish Kaisner's right of recovery from the Pinellas County Sheriff's Department's governmental liability insurer is indistinguishable, and is equally unconstitutional.

Once an injury has occurred and a cause of action has, therefore, accrued, the cause of action has, in essence, an existence of its own, independent of the underlying law which made possible its birth: the accrued cause of action is property, which may not be destroyed by the retroactive application of a subsequent change in the law. Any attempt by the state to remove an accrued cause of action from its owner, by denying a hearing on the merits of the cause of action, is a deprivation of a vested property interest and, thus, a deprivation of the owner's fundamental right to procedural due process. See Coombs v. Getz, 285 U.S. 434, 448 (1932) (the right to enforce a contractual obligation, having become vested, was within the protection of the due process clause); Angle v. Chicago, St. Paul, Minneapolis & Omaha Railway, 151 U.S. 1, 19 (1893) ("A right of action to recover damages for an injury is property, and has a legislature

the power to destroy such property? An executive may pardon and thus relieve a wrongdoer from the punishment the public exacts for the wrong, but neither executive nor legislature can pardon a private wrong or relieve the wrongdoer from civil liability to the individual he has wronged."); Pritchard v. Norton, 106 U.S. 124, 132 (1882) ("[A] vested right of action is property in the same sense in which tangible things are property Whether it springs from contract or from the principles of the common law, it is not competent for the Legislature to take it away."); Pitts v. Unarco Industries, 712 F.2d 276, 279 (7th Cir.) ("An accrued cause of action [in tort] is a right of property protected by the Fourteenth Amendment"), cert. denied mem., 464 U.S. 1003 (1983); Greyhound Food Management, Inc. v. City of Dayton, 653 F. Supp. 1207, 1216 (S.D. Ohio 1986) ("Upon the occurrence of an injury, a person acquires a vested right (i.e., a property right protected by the due process clause of the fourteenth amendment) in those causes of action arising out of the injury under the state law applicable at the time.")¹

¹Several state courts have also reached the conclusion that an accrued cause of action is vested property which may not be divested by application of a subsequent change in the law without violating the plaintiff's right to procedural due process. See Cheswold Volunteer Fire Co. v. Lambetson Construction Co., 489 A.2d 413, 418 (Del. 1985) ("[D]ue process preserves a right of action [in tort] which has accrued or vested before the effective date of the statute."); Marcel v. Louisiana State Department of Public Health (Department of Health & Human Resources), 492 So. 2d 103, 109-10 (La. Ct. App.) ("Where an injury has occurred for which the injured party has a cause of action, such cause of action is a vested property right."), cert. denied mem.,

At the time Kaisner was injured, his causes of action accrued under the law as it then existed. Kaisner's accrued causes of action are property, which may not be destroyed by the retroactive application of a subsequent change in the law. Any attempt by the state to do so, by denying Kaisner a hearing on the merits of his causes of action, would be a deprivation of vested property interests and, thus, a deprivation of Kaisner's fundamental right to procedural due process.

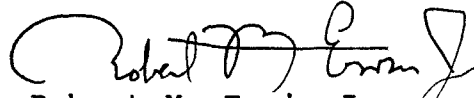
494 So. 2d 334 (La. 1986); Reeves v. Ille Electric Co., 170 Mont. 104, 110, 551 P.2d 647, 650 (1976) ("Where an injury has already occurred for which the injured person has a right of action, the Legislature cannot deny him a remedy."); Rosenberg v. Town of North Bergen, 61 N.J. 190, 199-200, 293 A.2d 662, 667 (1972) ("The legislature is entirely at liberty to create new rights or abolish old ones as long as no vested right is disturbed."); Berry v. Beech Aircraft Corp., 717 P.2d 670, 676 (Utah 1985) ("[O]nce a cause of action under a particular rule of law accrues to a person by virtue of an injury to his rights, that person's interest in the cause of action and the law which is the basis for a legal action becomes vested, and a legislative repeal of the law cannot constitutionally divest the injured person of the right to litigate the cause of action to a judgment.").

CONCLUSION

For the foregoing reasons, as well as for the reasons expressed in the Academy's initial brief, the decision of the court of appeal should be quashed and the judgment under review reversed and remanded for further proceedings consistent with the views expressed and the authorities cited in the Academy's initial brief and herein.

Respectfully submitted,

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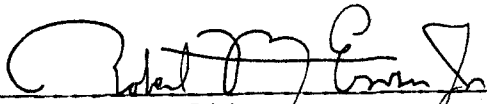
Certificate of Service

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