For Whom the Statute Tolls:

An Analytical Look at the Tolling Provision in Florida's Product Liability Statute of Repose

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A considerable amount of commentator and jurisprudential ink has been spilled on Florida's product liability statute of repose through the years. The statute was first enacted in 1974, held unconstitutional by the Florida Supreme Court in 1980, declared constitutional again in 1985, repealed by the legislature in 1986, and later re-enacted in 1999.[1] This "on again, off again" history made it incredibly difficult for attorneys litigating product liability claims to know with any degree of certainty whether their actions were barred by the statute of repose and, as a result, a considerable amount of litigation arose out of this confusion. However, surprisingly little attention has been paid to the multifaceted and often complex issues that arise in interpreting and applying the statute's tolling provision.

F.S. §95.031(2)(d) reads:

> The repose period prescribed within paragraph (b) is tolled for any period during which the manufacturer through its officers, directors, partners, or managing agents had actual knowledge that the product was defective in the manner alleged by the claimant and took affirmative steps to conceal the defect. Any claim of concealment under this section shall be made with specificity and must be based upon substantial factual and legal support.

The issues that have been litigated include 1) what qualifies as actual knowledge that a product is defective; 2) who falls within the ambit of a manufacturer's "officers, directors, partners, or managing agents"; 3) what constitutes affirmative steps to conceal; 4) what degree of specificity and substantial factual and legal support are required to trigger the tolling provision; 5) who bears the burden of proving the requisite elements; and 6) whether the applicability of the tolling provision is an issue of fact to be decided by a jury or a question of law that the court should decide before trial.

Perhaps unsurprisingly, the answers to most of these questions are considerably less clear than litigants might prefer. Nonetheless, the authors hope that a review of the provision's plain language and the state and federal decisions that have interpreted and applied it, will make the statute more manageable for the Florida product liability practitioner.[2]

The 1999 Amendment to §95.031

In 1999, the Florida Legislature resuscitated the state's statute of repose, which it had repealed in 1985.[3] As amended, F.S. §95.031(2)(b) provides as follows:

> Under no circumstances may a claimant commence an action for products liability, including a wrongful death action or any other claim arising from personal injury or property damage caused by a product, to recover for harm allegedly caused by a product with an expected useful life of 10 years or less, if the harm was caused by exposure to or use of the product *more than 12 years after delivery of the product to its first purchaser or lessee who was not engaged in the business of selling or leasing the product or of using the product as a component in the manufacture of another product.* All products, except those included within subparagraph 1. or subparagraph 2., are conclusively presumed to have an expected useful life of 10 years or less.[4]

There are only two exceptions to the rule. The first is when a claimant is exposed to or uses the product within the repose period, but an injury caused by that exposure or use does not manifest itself until after expiration of the repose period.[5] The second is where a manufacturer specifically warrants, through express representation or labeling, that its product has an expected useful life exceeding 10 years.[6] Thus, absent application of the tolling provision, §95.031(2)(b) operates as a time bar to virtually all product liability claims where the harm occurs more than 12 years from the date of its delivery to the first retail purchaser or lessee.

A Primer on Florida Courts' Application of the Statute

Historically, when the tolling provision is not implicated, Florida state and federal courts have not hesitated to apply the statute of repose to summarily dispose of claims where a manufacturer proffers undisputed record evidence affirmatively and conclusively demonstrating that the product at issue was manufactured and delivered to an initial purchaser or lessee more than 12 years prior to the date on which the product allegedly caused injury to the plaintiff. *Lamb By and Through Donaldson v. Volkswagenwerk Aktiengesellshaft*, 631 F. Supp. 1144 (S.D. Fla. 1986), *aff'd sub. nom. Eddings on Behalf of Eddings v. Volkswagenwerk, A.G.,* 835 F. 2d 1369 (11th Cir. 1988), *cert. den.*, 488 U.S. 822 (1988), for instance, involved a summary judgment entered in favor of the defendant car manufacturer and against a plaintiff who was rendered a quadriplegic 12 years and eight days after the vehicle in which he was a passenger was delivered to its first customer. Similarly, *Lebowitz v. Toyota Motor Sales, U.S.A., Inc.*, No. 11-21798-CIV, 2011 WL 13223745 (S.D. Fla. Sept. 7, 2011),[7] involved a summary final judgment entered against the owner of a vehicle who allegedly was injured due to the failure of the vehicle's air bag to deploy 12 years and 11 months after it was leased to its first customer.[8]

Even when the tolling provision is raised, some Florida courts have granted manufacturers summary relief where the plaintiff fails to show that the statute's tolling provision should apply — usually because it was not established that the defendant had actual knowledge of a particular defect. *Theobald v. Piper Aircraft, Inc.*, 309 F. Supp. 3d 1253 (S.D. Fla. 2018), *appeal dismissed*, 18-11839-D, 2018 WL 5734220 (11th Cir. Aug. 9, 2018), and *appeal dismissed,* 18-14764-DD, 2019 WL 948799 (11th Cir. Jan. 10, 2019), for example, arose out of a May 24, 2013, crash of a 1978 aircraft resulting in the deaths of plaintiffs' decedents. They, in turn, sued Piper, who responded with a motion for summary judgment based on Florida's statute of repose.[9] Plaintiffs opposed the motion based on evidence (*i.e.*, affidavits from their own experts), which they claimed established that the defendant "should have known" that its stabilator-equipped aircraft were susceptible to in-flight breakups.[10] The district court granted the motion. In doing so, it emphasized that "evidence of what [defendant] should have known or what [defendant] could have concluded based on testing," does not amount to evidence that Piper had "actual knowledge of any defect with its aircrafts."[11] The court went on to hold that, in addition to the lack of evidence of actual knowledge, plaintiff also presented no evidence of affirmative steps taken by Piper to conceal the alleged defect, and no evidence that any of its officers, directors, partners, or managing agents had actual knowledge that the product was defective and took affirmative steps to conceal it, as required for the statute of repose to be tolled.[12]

The court in *Competitor Liaison Bureau, Inc. v. Cessna Aircraft Co.*, No. 6:08-cv-2165, 2011 WL 1344455 (M.D. Fla. Apr. 8, 2011) *aff'd*, 454 Fed. App'x 792 (11th Cir. 2011), reached a similar result. That was a subrogation case arising out of a July 10, 2007, in-flight electrical fire that caused a 1978 aircraft to crash into a neighborhood resulting in the deaths of all onboard, as well as personal injury and property damage on the ground.[13] The gravamen of the plaintiff insurer's claim was that the aircraft was defective, unreasonably dangerous by virtue of Cessna's use of PVC-insulated wire in the cockpit, when it knew or should have known that the wire was not flame resistant and would create dangerous quantities of toxic fumes and smoke when ignited.[14] Cessna moved for summary judgment based, in part, on Florida's statute of repose, and the district court granted the motion.[15] In reaching its decision, the court noted that plaintiffs' proffer of evidence, to wit: an excerpt from the deposition of a Cessna engineer referencing studies from the carpet industry in the mid-1980s, which ostensibly led to general knowledge that PVC could off-gas chlorine when ignited, was insufficient to establish that Cessna knew that wires insulated by PVC and installed in its planes would pose the same risk.[16] The court further concluded that there was no evidence that Cessna received any reports or complaints related to the toxicity of burning PVC-insulated wiring prior to the lawsuit.[17]

Other courts, however, have been considerably less inclined to apply the statute and/or have insisted that the jury decide issues relating to its applicability, where, in the courts' minds, a plaintiff has either triggered or managed to create an issue of fact regarding the applicability of §95.031(2)(d). *Avila v. Isuzu Motors America, LLC*, No. 08-23544-CIV, 2009 WL 9124376, at *1 (S.D. Fla. Sept. 1, 2009), for example, arose out of a June 1, 2008, accident involving a 1995 automobile that was sold to its first retail purchaser on December 31, 1995. The accident left the right front passenger paralyzed from the chest down.[18] Plaintiff filed suit on December 3, 2008, and defendant responded with a motion for summary judgment based on §95.031(2)(b).[19] Plaintiff opposed the motion claiming that issues of fact existed as to whether the passenger seat was defective and, if so, whether Isuzu had actual knowledge of the defect and took affirmative steps to conceal it, based on publicly available crash test reports, photographs, and videos, and an internal memorandum authored by legal counsel for General Motors, an Isuzu competitor.[20] The district court agreed with the plaintiff and denied the motion.[21] It then ordered the parties to proceed to trial solely on the issues of 1) whether the passenger seat installed in the

vehicle was defective; 2) whether the defendant had actual knowledge of the defect; and 3) whether the defendants took affirmative steps to conceal the defect.[22] In doing so, however, the court did not discuss how the proffered evidence amounted to knowledge, much less "actual knowledge" on the part of an Isuzu officer, director, partner, or managing agent, that the product was defective in the manner alleged by the plaintiff (*i.e.*, that the vehicle's seats had a propensity to collapse during collisions).[23]

Still other courts have initially decided that the evidence proffered in support of tolling was enough to overcome summary judgment in favor of the defendant manufacturer and allowed the case (and the statute of repose issues) to proceed to trial only to later determine — post-verdict — that the evidence was indeed insufficient. That's precisely what occurred in *Romero v. Toyota Motor Corp.*, 916 F. Supp. 2d 1301 (S.D. Fla. 2013). Although the defendants first raised the statute of repose in a motion for summary judgment, the district court concluded there was "marginally sufficient" evidence to allow the issue to proceed to trial on whether the action was subject to the statute's tolling exception.[24] After the trial, however, the court agreed with defendants that the evidence was indeed insufficient to charge Toyota with actual knowledge of a defect.[25] Specifically, the *Romero* court found, among other things, that the plaintiff's trial evidence, which included vehicle rollover tests purporting to show that Toyota knew the vehicle had a propensity to roll over, did not demonstrate that Toyota had actual knowledge of a defect, as required to trigger the tolling provision of the statute of repose.[26] Upon concluding that the plaintiff's evidence was insufficient to satisfy each element of §95.031(2)(d), the *Romero* court set aside the jury's verdict in favor of the plaintiff and entered judgment as a matter of law in favor of the defendants.[27]

It is difficult to discern whether the disparate results reached by the courts in *Theobald*, *Competitor Liaison*, *Avila*, and *Romero*, and, as importantly, the divergent paths that led to those results, have their roots in 1) the factual nuances of each of the cases; 2) the lack of guidance found in the language of the statute itself; 3) the paucity of Florida appellate authority on the dispositive issues involved; 4) the inherent judicial preference that disputes be decided on their merits; or 5) some combination of the above. What is abundantly clear, however, is that, when it comes to Florida's statute of repose, the path chosen and the outcome reached can have profound implications — particularly on the expenditure of considerable litigant and judicial resources spent prosecuting and defending a complex product liability case only to later find out that it is time barred. Thus, it behooves Florida practitioners and courts to understand the intended parameters and essential elements of the statute as thoroughly as the caselaw will permit, so that when confronted with it, they can maximize its intended effect.

Burdens

Sections 95.031(2)(b) and (d) are silent with respect to who bears the burden of their applicability. However, there is no principled basis for treating these provisions any differently than other directly analogous statutes. Specifically, because the underlying limitations period is deemed to be an affirmative defense, the defendant is deemed to bear the initial burden of establishing that the statute applies (*i.e.*, the date that the limitations period began to run and the date it ended). The burden then shifts to the plaintiff seeking to avail itself of a tolling provision or other exception to defeat that defense.[28] Thus, in the case of §§95.031(2)(b) and (d), the burden is on the defendant manufacturer to first establish 1) the date of injury or death and 2) the date that the product was delivered to the first purchaser or lessee who was not engaged in the business of selling or leasing the product or of using the product as a component in the manufacture of another product. The burden then shifts to the plaintiff to establish each of the elements necessary to trigger the tolling provision found in §95.031(2)(d). Because a plaintiff seeking a ruling that the statute is tolled is required to prove, among other things, active concealment on the part of the defendant, the burden is one that must be met by a showing of clear and convincing evidence.[29]

The "Actual Knowledge of Defect" Requirement

The first and, arguably, most complex hurdle that a party seeking to avail itself of the tolling protection afforded by §95.031(2)(d) is likely to encounter is what constitutes actual knowledge that the product is defective. The statute provides little guidance on this key point. However, the cases construing it do offer some insight. Specifically, drawing on precedent involving analogous tolling provisions in other statutes, including §95.11(4)(b), Florida state and federal courts have defined "actual knowledge" in several material ways. In *Romero*, for example, the court held that a finding of actual knowledge requires more than a showing of mere negligence (*i.e.,* that a defendant *should have known* of, or could have discovered through testing, the existence of a defect).[30] While such a showing may be relevant to the plaintiff's claim of negligence, it was wholly irrelevant to the issue of actual knowledge in the context of Florida's product liability statute of repose.[31]

Indeed, the case on which the *Romero* court heavily relied, *Nehme v. Smithkline Beecham Clinical Laboratories, Inc.*, 863 So. 2d 201 (Fla. 2003), can fairly be construed as standing for the proposition that even a showing of gross negligence does not equate with actual knowledge for purposes of tolling a repose period. In that case, the Florida Supreme Court held that an analogous tolling provisions exception applicable in medical malpractice actions was not triggered despite a medical testing facility's "egregious" failure to properly interpret signs of cervical cancer "as big as a house" as part of its analysis of a routine pap smear, an error that resulted in the failure to diagnose a malignancy and, ultimately, the death of plaintiff's decedent.[32]

Likewise, the existence of general industry knowledge relating to a defective condition does not equate to actual knowledge on the part of a manufacturer of a particular defect for purposes of §95.031(2)(d). In *Competitor Liaison Bureau, Inc.*, for example,

the court held the fact that the general aviation industry knew that burning PVC carpet produces dangerous chlorine gas was not sufficient to vest the defendant aircraft manufacturer with actual knowledge that wires insulated by PVC and installed in its planes would pose the same risk, especially in the absence of evidence that the manufacturer received any reports or complaints related to the toxicity of burning PVC-insulated wiring prior to the lawsuit.[33] Moreover, the mere fact that a manufacturer knew of defect in a comparable, but not identical, product or product line also is not enough to satisfy the actual knowledge requirement of a statute of repose.[34]

What then constitutes sufficient "proof" that a defendant had "actual knowledge" of a defect for tolling purposes? The answer will inevitably depend on the facts specific to each case. What remains clear, however, is that guesses, suppositions, and speculations about what a manufacturer should have known given the surrounding facts and circumstances, and even gross negligence, is far from sufficient to amount to proof of "actual knowledge" that the statute stringently requires.

Who Qualifies as an Officer, Director, Partner, or Managing Agent?

It is not enough to trigger §95.031(2)(d) that just anyone employed by the manufacturer have actual knowledge of the alleged defect. Instead, the statute mandates, again without any definitional guidance, that it be someone at the highest decision-making level, the job title of which varies according to the corporate structure, *i.e.,* an officer, director, partner, or managing agent.[35] Thus, in the case of a corporation, the statute contemplates that it be an "officer or director." In the case of a general or limited partnership, §95.031(2)(d) requires proof that the requisite knowledge be possessed by a "partner." Lastly, in the case of an LLC, the decisionmaker with knowledge must be at the management level. Notably, the term "managing agent" also has meaning in the corporate context, where it has been defined as "an individual like a 'president [or] primary owner' who holds a 'position with the corporation which might result in his acts being deemed the acts of the corporation.'"[36] While there is relatively little Florida caselaw defining a "managing agent" for purposes of direct corporate liability, the cases that do address this issue suggest that "such an agent is more than just a manager or midlevel employee."[37]

> The first and, arguably, most complex hurdle that a party seeking to avail itself of the tolling protection afforded by §95.031(2)(d) is likely to encounter is what constitutes actual knowledge that the product is defective. The statute provides little guidance on this key point. However, the cases construing it do offer some insight.

Unfortunately, there is surprisingly little authority in Florida adding further clarity to the phrase "officer, director, partner or managing agent" and almost none that specifically construes it as used in §95.031(2)(d). In *Romero*, the plaintiffs summarily contended at oral argument that Toyota's key witnesses filled the statutory role.[38] The *Romero* court noted, however, that "[n]one of these witnesses…testified as to any meaningful supervisory or management responsibilities at the company-wide level and [p]laintiffs cited no facts or legal authority for their assertion that the role of these witnesses comported with the statute."[39]

In sum, the limited caselaw on this issue strongly supports the conclusion that only actual knowledge of a defect by executives at the highest level of a company (*i.e.*, those with company-wide decision-making authority) is sufficient to toll the statute of repose. Anything short of that should result in dismissal of the suit.

The "Affirmative Steps to Conceal" Element

As in the case of the actual knowledge requirement, §95.031 sheds no light on what the Legislature meant by the phrase "affirmative steps to conceal" the defect. Once again, however, at least some guidance can be found in the caselaw. In *Nehme,* for example, the Florida Supreme Court looked to the dictionary to ascertain the plain and ordinary meaning of "concealment" and concluded that it means "to prevent disclosure or recognition of" and "to place out of sight," as well as "the act of refraining from disclosure; esp. an act by which one prevents or hinders the discovery of something" and "the act of removing from sight or notice; hiding."[40] Moreover, by using the term "affirmative" in §95.031(2)(d), the legislature plainly contemplated that something more than a mere negligent failure to disclose is required to trigger the statute's tolling provisions.[41]

A Few Final Thoughts

By their nature, statutes of repose are a legislative attempt to strike a difficult and delicate balance between a product liability plaintiff's right to seek redress for their injuries in the courts and the prejudice that arguably results from a manufacturer having to defend the integrity of a product more than a decade after its design and manufacture.[42] They do so by "creat[ing] a substantive right in those protected to be free from liability after a legislatively-determined period of time."[43]

Section 95.031(2)(d) plays an important role in that balancing act, by providing a vehicle for resuscitating a claim that otherwise would be barred, but only upon a showing, based on clear and convincing evidence, of corporate managerial misconduct specific to the alleged defect. As the cases outlined above illustrate, however, Florida courts continue to grapple with just how narrowly and strictly to construe and apply the legal life raft its tolling language affords and when (procedurally) to determine its applicability.

To date, most courts have chosen

to delay that determination until the summary judgment stage of the proceedings and, in some instances, have either left the issue for the jury to resolve or addressed it themselves via post-trial motions. By doing so, these courts arguably afford injured litigants every reasonable opportunity and means to discover evidence that might trigger §95.031(2)(d)'s claim-saving relief and, in the process, preserve their right to access to the courts.

An equally compelling argument can be made, however, that delaying the §95.031(2)(d) determination frustrates the principal purpose of the statute, *i.e.*, to prevent litigants (on both sides) and Florida courts from having to expend considerable resources fully prosecuting, defending, and administering cases that, on their face, are barred and where no amount of time or discovery will result in any, let alone clear and convincing evidence of the kind of misconduct required to satisfy its preconditions.

Perhaps a compromise is in order, *i.e.,* one that affords injured plaintiffs a reasonable opportunity to bring their claims within the confines of §95.031(2)(d)'s protection, while simultaneously minimizing the risk that defendants entitled to statute of repose protection will be required to litigate the case as if the statute does not exist. Indeed, a template for such a compromise already exists in the way courts address challenges to their assertion of personal jurisdiction over a nonresident defendant.

Simply stated, upon a good-faith proffer of a basis for asserting §95.031(2)(d)'s possible applicability at the outset of the litigation, courts could afford plaintiffs a reasonable amount of time to conduct limited discovery, using all means available under the Florida Rules of Civil Procedure, aimed at the elements of proof required to render its tolling provisions applicable. At the conclusion of that period, the court could conduct an evidentiary hearing and make the necessary determinations.

From the authors' perspective, the advantages of adopting that template for use in deciding §95.031(2)(d) issues are many: 1) A substantial body of caselaw already exists regarding its implementation, albeit in the personal jurisdiction arena; 2) it fairly balances the competing interests of injured plaintiffs and defendants of otherwise time-barred claims; and 3) it allows both parties and the court to promptly and efficiently resolve the tolling issue early in the litigation and, thereby, potentially save considerable litigation and judicial resources on claims for which §95.031(2)(d) offers no tolling relief.❑

[1] In *Battilla v. Allis Chalmers Manufacturing Company*, 392 So. 2d 874 (Fla. 1980), the Florida Supreme Court held the statute of repose invalid as a denial of access to the courts. Five years later, in *Pullum v. Cincinnati Inc.*, 476 So. 2d 657 (Fla. 1985), *appeal dismissed*, 475 U.S. 1114 (1986), however, the court changed its mind and held the statue valid, receding from *Battilla*. One year after *Pullum*, the legislature itself then repealed the statute. Subsequent cases were filed involving injuries occurring more than 12 years after the product had been distributed and defendants would argue that the lapse of the 12-year repose period while the statute was effective bestowed on them a vested right to immunity from liability for those claims. *See, e.g., Firestone Tire and Rubber Company v. Acosta*, 612 So. 2d 1361 (Fla. 1992) (holding that a right of immunity under the statute of repose became vested when the prescribed repose period fully lapsed before the claim accrued and that the ensuing statutory repeal could not defeat that immunity).

[2] Florida courts have long recognized that 1) "[t]he polestar of a statutory construction analysis is legislative intent" (*Borden v. East–European Ins. Co.*, 921 So. 2d 587, 595 (Fla. 2006)); and 2) the starting point for discerning legislative intent is the plain and obvious meaning of a statute's text, which a court may readily discern from a dictionary (*Rollins v. Pizzarelli*, 761 So. 2d 294, 297-98 (Fla. 2000)). *See also West Fla. Reg'l Med. Ctr., Inc.*, 79 So. 3d 1, 8-9 (Fla. 2012). Thus, where that language is clear and unambiguous and conveys a clear and definite meaning, a Florida court is to apply that unequivocal meaning and not resort to the rules of statutory interpretation and construction, including, inter alia, an examination of the statute's legislative history and the purpose of its enactment. *See, e.g., Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984); *Gulfstream Park Racing Ass'n v. Tampa Bay Downs, Inc.*, 948 So. 2d 599, 606-07 (Fla. 2006). Because there is no such ambiguity here, this article does not address what little legislative history there is with respect to Fla. Stat. §§95.031(2)(b) and 95.031(2)(d). However, interested readers can find it in pre-filed House Bill 775, beginning on Feb. 15, 1999, and in Senate Amendment 00775-0082-665143, beginning March 8, 1999.

[3] Laws 1999, c. 99-225, §11, eff. July 1, 1999.

[4] Fla. Stat. §95.031(2)(b) (emphasis added).

[5] Fla. Stat. §95.031(2)(c).

[6] Fla. Stat. §95.031(2)(b)(2).

[7] The authors' predecessor firm, Seipp, Flick & Hosley represented Isuzu in the *Avila* case and Toyota in the *Lebowitz* case, while our current firm represented Toyota in the *Romero* case. Moreover, two of our partners represented Ford in the *Stimpson* case cited herein.

[8] *See also, e.g., Eddings v. Volkswagenwerk, A.G.*, 635 F. Supp. 45 (N.D. Fla. 1986), *aff'd sub nom. Eddings on Behalf of Eddings v. Volkswagenwerk, A.G.*, 835 F.2d 1369 (11th Cir. 1988) (decided under prior version of Fla. Stat. §95.031(2), wherein the court held that an automobile manufacturer had a vested, substantive right not to be sued in a product liability action involving a motor vehicle sold more than 12 years prior to the commencement of plaintiff's action); *Prahl v. U.S. Mineral Products Co., Inc.*, 636 So. 2d 116 (Fla. 3d DCA 1994) (concluding trial court properly applied Fla. Stat. §95.031(2) (1975), in entering summary judgment in favor of manufacturer of asbestos products); *Williams v. American Laundry Machinery*, 509 So. 2d 1363 (Fla. 2d DCA 1987), *rev. den.,* 525 So. 2d 881 (Fla. 1988) (affirming a summary judgment in favor of a manufacturer of an allegedly defective laundry press). *See also Becker v. Harken*, 06-60255-CIV, 2007 WL 1412937 (S.D. Fla. May 10, 2007) (applying Florida's statute of repose to bar claim against manufacturer).

[9] *Theobald,* 309 F. Supp. 3d at 1255-57.

[10] *Id.* at 1259.

[11] *Id.* at 1260.

[12] *Id.*

[13] *Competitor Liaison Bureau,* No. 6:08-cv-2165, 2011 WL 1344455 at *1.

[14] *Id.*

[15] *Id.*

[16] *Id.* at *6-7.

[17] *Id.*

[18] *Avila*, No. 08-23544-CIV, 2009 WL 9124376 at *1 .

[19] *Id.*

[20] *Id.* at *2.

[21] *Id.* at *3.

[22] *Id.* at *1.

[23] *See also Stimpson v. Ford Motor Co.*, 988 So. 2d 1119 (Fla. 5th DCA 2008) (holding that whether an automotive manufacturer concealed a defect created an issue of fact which precluded summary judgment as to whether the statute of repose was tolled by such concealment, without discussing what evidence was in the record or what rendered such evidence sufficient to support a finding that the defendant knew that plaintiffs' vehicle had a defect causing the vehicle to unexpectedly accelerate and crash into a pole); *Philip Morris USA, Inc. v. Hallgren*, 124 So. 3d 350 (Fla. 2d DCA 2013) (holding that whether the statute of repose barred claims of fraudulent concealment and conspiracy to commit fraudulent concealment, as asserted against tobacco companies by the estate of the deceased smoker, was a question for the jury, given abundant evidence of not only the tobacco

companies' misleading advertising campaigns and false controversy perpetrated by tobacco industry that continued until the 1990s, but also of smoker's direct reliance on that misleading advertising).

[24] *Romero*, 916 F. Supp. 2d at 1304.

[25] *Id.*

[26] *Id.* at 1308.

[27] *Id.*

[28] *See Landers v. Milton*, 370 So. 2d 368 (Fla. 1979) ("[T]he party seeking to escape the statute of limitations must bear the burden of proving circumstances that would toll the statute."). *See also Palmer v. McKesson Corp.*, 7 So. 3d 561 (Fla. 1st DCA 2009) (holding claimant seeking to avoid, or establish exception to, statute of limitations in workers' compensation proceeding bears the burden of proving that exception); *Meneses v. City Furniture*, 34 So. 3d 71 (Fla. 1st DCA 2010) ("The party seeking to obtain the benefit of an exception to a statute bears the burden of persuasion."); *Crawford & Co. v. Connors*, 840 So. 2d 1060 (Fla. 1st DCA 2003) ("The burden of proof for demonstrating an exception is generally on the party asserting the exception."); *Richardson v. R.L. Wilson*, 490 So. 2d 1039 (Fla. 1st DCA 1986) (holding that, while the burden is on the defendant to prove that the action was not brought within the appropriate time limitation, the burden of proving the conditions that would invoke a statutory tolling provision, is on the plaintiff).

[29] *See, e.g., Zureikat v. Shaibani*, 944 So. 2d 1019, 1023 (Fla. 5th DCA 2006) (statute of limitations defense is precluded where plaintiff shows by clear and convincing evidence that defendant concealed material facts); *Castro v. East Pass Enters.,* 881 So. 2d 699, 700 (Fla. 1st DCA 2004) (noting that estoppel elements of false representation or concealment of material facts must be shown by clear and convincing evidence); *Roberson v. St. Johns County Sch. Bd.,* 973 So. 2d 598, 599 (Fla. 1st DCA 2008) (where claimant showed by clear and convincing evidence that employer misrepresented a material fact which she relied on to her detriment, employer was estopped from relying on a statute of limitations defense).

[30] *Romero*, 916 F. Supp. 2d at 1308-09.

[31] *Id. See also Theobald*, 309 F. Supp. 3d at 1261 (fact that Piper allegedly should have been on notice that its stabilator-equipped aircrafts were susceptible to in-flight breakups by virtue of its having conducted tests of the stabilator and concluded that the "flutter margins [were] questionable," is not equivalent to evidence that Piper had actual knowledge of any defect with its aircraft, so as to trigger section 95.031(2)(d)'s tolling provision).

[32] *Nehme,* 863 So. 2d at 205-07.

[33] *Competitor Liaison Bureau*, 2011 WL 1344455 at *6.

[34] *Id.* at *7-8. *See, e.g., In re Ford Motor Co. Speed Control Deactivation Switch Products Liability Litigation*, 793 F. Supp. 2d 1018, 1019-21 (E.D. Mich. 2010) (evidence that Ford knew of overheating issues in speed control deactivation switches that were not exactly the same as the one installed in plaintiffs' vehicles could not present substantial evidence to support an inference that the manufacturer knew of the particular defect alleged). *But see Baier v. Ford Motor* Co., No. C04-2039, 2005 WL 928615 (N.D. Iowa Apr. 21, 2005) (evidence, including a) an internal crash test involving a very similar vehicle showing that "upon a rear-end collision, the gas tank would rupture and allow fuel to escape into the trunk and passenger compartment of the car"; b) a report from the company's engineering staff discussing the susceptibility of the fuel tank to rupture and recommending that it be relocated; and c) board minutes discussing how the fuel system compared to one produced by a competitor; was sufficient proof that defendant knew of alleged defect in the design and manufacture of a fuel system to defeat a motion for summary judgment).

[35] Fla. Stat. §95.031(2)(d).

[36] *Florida Power & Light Co. v. Dominguez*, 295 So. 3d 1202, 1205 (Fla. 2d DCA 2019) (quoting *Taylor v. Gunter Trucking Co., Inc.*, 520 So. 2d 624, 625 (Fla. 1st DCA 1988)). Other jurisdictions have similar definitions for managing agents. *See, e.g., Kraemer v. Croix Mgmt. Co.*, No. 02-284, 2002 WL 31718426 (D. Minn. Nov. 21, 2002) (noting that Minnesota courts have defined managing agents as persons "who have charge and control of the business activities of the corporation or of some branch or department thereof, and who, in respect to the matters entrusted to them are vested with powers requiring the exercise of an independent judgment and discretion"); *see also Lewis v. FMC Corp*., No. 11-CV-877S, 2012 WL 3655327 (W.D.N.Y. Aug. 17, 2012) (term "managing agent" connotes a "person invested by the corporation with general powers involving the exercise of judgment and discretion, as distinguished from an ordinary agent or attorney, who acts in an inferior capacity and under the direction and control of superior authority, both in regard to the extent of his duty and the manner of executing it"); *Richards v. First Union Securities, Inc.*, 714 N.W.2d 913, 922 (Wis. 2006) (a person "having a general supervision of the affairs of the corporation").

[37] *Dominguez*, 295 So. 3d at 1205 (citing *Ryder Truck Rental, Inc. v. Partington*, 710 So. 2d 575, 576 (Fla. 4th DCA 1998) ("[A] job foreman is not, as required for imposing direct liability, a managing agent of the company."); *Capital Bank v. MVB, Inc.*, 644 So. 2d 515, 521 (Fla. 3d DCA 1994) (citing *Bankers Multiple Line Ins. Co. v. Farish*, 464 So. 2d 530 (Fla. 1985)) (holding that one of several bank vice presidents, who was not on the board of directors or the loan committee, did not qualify as a managing agent); *Pier 66 Co. v. Poulos*, 542 So. 2d 377, 381 (Fla. 4th DCA 1989) (holding that a hotel manager was not a managing agent of the corporation that owned the hotel).

[38] *Romero,* 916 F. Supp. 2d at 1311.

[39] *Id.* at 1311, n. 11.

[40] *Nehme,* 863 So. 2d at 205 (quoting Merriam Webster's Collegiate Dictionary 238 (10th ed. 1994) and Black's Law Dictionary 282 (7th ed. 1999)).

[41] *See, e.g., Romero*, 916 F. Supp. 2d at 1308-09 (citing *Nehme*, 863 So. 2d at 207). In fact, in construing similar language in analogous statutes, courts in other jurisdictions have held that "a party takes 'affirmative steps to conceal' [only] when [it] actively represents a state of affairs that is not true." *See, e.g., Sysco Charlotte, LLC v. Comer*, No. 1:18CV247, 2019 WL 1359635 (M.D.N.C. Mar. 26, 2019) (citing *Ragsdale v. Kennedy*, 209 S.E.2d 494, 500-01 (N.C. 1974)). *See also Cartwright v. City of Marine City*, 336 F.3d 487, 493 (6th Cir. 2003) (where, in construing an exception pursuant to which state officials may be found to have violated the substantive due process rights of people not within their custody upon proof of "an affirmative act by the state which either created or increased the risk that the plaintiff would be exposed to an act of violence by a third party," the court held a defendant's "failure to act is not an affirmative act"); *Ahern v. Apple Inc.*, No. 18-CV-07196-LHK, 2019 WL 5102621 (N.D. Cal. Oct. 11, 2019); *Sargi v. Kent City Bd. of Educ.*, 70 F.3d 907, 912-13 (6th Cir. 1995) (failing to provide bus drivers with a plan for managing emergencies, taking seizure victim home without medical intervention, failing to maintain communication devices on a bus, and failing to tell the bus driver of the student's medical condition were not "affirmative" acts).

[42] *Nehme*, 863 So. 2d at 208-09.

[43] *Anderson v. United States*, 669 F.3d 161, 164-65 (4th Cir. 2011); *First United Methodist Church of Hyattsville v. U.S. Gypsum Co.*, 882 F.2d 862, 866 (4th Cir. 1989); *see also Global Discoveries, Ltd. v. Keller*, Case No. 2D19-3627, 2020 WL 4032225, at *2 (Fla. 2d DCA July 17, 2020).

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