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NOT DESIGNATED FOR PUBLICATION

No. 96,271

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

RONALD RUSSELL WALTRIP,
Appellant,

v.

ROBERT WALTRIP,
Appellee.

MEMORANDUM OPINION

Appeal from Miami District Court; RICHARD M. SMITH, judge. Opinion filed April 20, 2007. Affirmed.

Rebecca Brock, of Olathe, for appellant.

Stephen G. Dickerson, of The Dickerson Law Group, of Olathe, for appellee.

Before GREENE, P.J., CAPLINGER, J., and BRAZIL, S.J.

Per Curiam: Ronald Russell Waltrip sued his father for childhood sexual abuse that allegedly occurred over 20 years ago. He challenges the district court's dismissal of

his complaint based on the statute of repose. Based on the trial court's well-reasoned opinion recognizing controlling Kansas case law and for the reasons stated in this opinion, we affirm.

On September 17, 2004, Ronald Waltrip filed a complaint against his father, Robert Waltrip. Ronald, who was born on January 1, 1964, alleged that Robert abused him physically and sexually throughout his childhood. He also claimed that he became aware of the abuse in 2002 when a traumatic event triggered a repressed memory of the abuse.

Robert filed a motion to dismiss, arguing the 8-year statute of repose barred Ronald's claim. He argued that assuming that Ronald turned 40 years old on the day he filed the complaint, the last possible date of childhood and abuse must have been September 16, 1982. In its decision on the motion to dismiss, the district court adopted this reasoning. The district court granted the motion to dismiss, concluding that the 8-year statute of repose barred Ronald's claim on September 16, 1990. Ronald appeals.

Dismissal of the complaint

An appellate court reviews the district court's decision on a motion to dismiss

using a de novo standard of review. *Wachter Management Co. v. Dexter & Chaney, Inc.*, 282 Kan. 365, 368, 144 P.3d 747 (2006). The district court concluded that Ronald's claim was barred by K.S.A. 60-515(a). It states:

> "Except as provided in K.S.A. 60-523, if any person entitled to bring an action, other than for the recovery of real property or a penalty or a forfeiture, at the time the cause of action accrued or at any time during the period the statute of limitations is running, is less than 18 years of age, an incapacitated person or imprisoned for a term less than such person's natural life, such person shall be entitled to bring such action within one year after the person's disability is removed, except that no such action shall be commenced by or on behalf of any person under the disability more than eight years after the time of the act giving rise to the cause of action."

In *Harding v. K.C. Wall Products, Inc.*, 250 Kan. 655, 668, 831 P.2d 958 (1992), the court recognized that statutes of limitation are distinct from statutes of repose in Kansas. Whereas a statute of limitation extinguishes a right to prosecute an accrued cause of action after a period of time, a statute of repose abolishes a cause of action after a period of time regardless of whether the cause of action has accrued. 250 Kan. at 668. Statutes of repose provide substantive rights that are subject to constitutional protection under the Kansas Constitution Bill of Rights, § 18, which states: "All persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law." 250

Kan. at 667-68.

The district court also relied on *Swartz v. Swartz*, 20 Kan. App. 2d 704, 894 P.2d 209 (1995). There, the plaintiff's suit against her mother and adoptive father for childhood sexual abuse was dismissed based on the statute of repose in K.S.A. 60-515(a). Relying on *Harding*, the Court of Appeals concluded that the prohibition in K.S.A. 60-515(a) on commencing a claim after 8 years was a statute of repose. 20 Kan. App. 2d at 706-09. The plaintiff argued that the newly enacted K.S.A. 60-523 had extended the period of time to file suit. The court rejected this argument concluding that the new statute could not revive a cause of action barred by the statute of repose. 20 Kan. App. 2d at 708.

Did the legislature revive childhood sexual abuse claims in K.S.A. 60-523?

Ronald raises several challenges to the district court's ruling, the primary challenge being the same argument that was rejected in *Swartz*. He argues that recent cases negate the principle of property rights vested through the statute of repose; therefore, K.S.A. 60-523 revived his cause of action. According to *Harding*, the legislature has the power to revive actions barred by a statute of limitations but not those barred by the statute of repose, as that would constitute a taking of property without due process of law. 250 Kan. at 669. Ronald points to two Kansas Supreme Court cases as contrary authority.

In the first case, *Shirley v. Reif*, 260 Kan. 514, 920 P.2d 405 (1996), he argues that the court reached a result that was inconsistent with the property rights approach to the statute of repose.

Ronald incorrectly presumes that the court sought to abandon the property right theory of the statute of repose. *Shirley* indicates that once the right to repose vests, it cannot be divested by a revival statute; however, during the pendency of the statute of repose, the legislature may revive a cause of action that has been barred by the statute of limitations. This holding does not provide Ronald with any relief because, unlike *Shirley*, Robert's right to repose vested before the legislature enacted K.S.A. 60-523. The statute of repose runs from the time of the act giving rise to the cause of action regardless of when the cause of action accrues. *Bonin v. Vannaman*, 261 Kan. 199, 212, 929 P.2d 754 (1996). The district court concluded that the statute of repose expired by September 16, 1990. As the last day of Ronald's childhood was December 31, 1981, the statute of repose actually expired on December 31, 1989. Regardless, once Robert's right to repose vested, it could not be divested by the later enactment of K.S.A. 60-523.

In the second case, *See v. Hartley*, 257 Kan. 813, 896 P.2d 1049 (1995), he argues the court found that conflicting statutes of limitations and repose must be resolved to effectuate the intent of the legislature. Presumably, he claims that K.S.A. 60-523 should

be interpreted to revive his cause of action because the legislature intended to prolong the period of time for plaintiffs to file claims of childhood sexual abuse. The problem with this argument is that it misapplies *See* and it ignores the holdings in *Harding* and *Shirley*.

See did not affect *Harding's* holding that the statute of repose creates a right of property that the legislature may not suspend. As in *Shirley*, the issue in *See* was precisely when the right to repose vested. *See* is consistent with *Harding* because it indicates that in light of the savings clause of K.S.A. 60-518, an action filed before the statute of repose expires is not barred even if refiled 6 months later. As Ronald's claim does not involve application of a savings clause, *See* is inapplicable.

Ronald finally argues that the Kansas Constitution Bill of Rights, § 2 empowers the legislature with the authority to repeal immunity previously granted; therefore, the legislature has repealed the statute of repose through enactment of K.S.A. 60-523. Section 2 of the Kansas Constitution Bill of Rights states:

> "All political power is inherent in the people, and all free governments are founded on their authority, and are instituted for their equal protection and benefit. No special privileges or immunities shall ever be granted by the legislature, which may not be altered, revoked or repealed by the same body; and this power shall be exercised by no other tribunal or

agency."

Section 2 applies to political, not property rights; therefore, Ronald's reliance on it is inapplicable. See *Stephens v. Snyder Clinic Ass'n*, 230 Kan. 115, 127-28, 631 P.2d 222 (1981).

Ronald raises arguments in his brief alleging violation of his constitutional rights and other arguments challenging *Harding*. However, Ronald's attorney conceded at oral argument that *Harding*, *Swartz*, and *Shirley* are controlling. Therefore, we will not address those arguments.

Finally, Ronald argues that the rationale behind a statute of repose does not apply to allowing a child abuser "to be free of worry of a possible lawsuit when his intentional actions have caused the victim a lifetime of repercussions and pain." Although this argument is no doubt sincere, this court is bound to follow the law. Ronald's argument is best made in the proper forum for amending the state constitution.

The doctrine of estoppel

Ronald argues that Robert should have been prohibited from asserting the statute of repose defense due to equitable estoppel. The kind of conduct necessary to give rise to estoppel is a question of fact. *Coffey v. Stephens*, 3 Kan. App. 2d 596, 597, 599 P.2d 310 (1979). Whether the doctrine of equitable estoppel applies is a question of law when the facts are uncontroverted. *Petty v. City of El Dorado*, 270 Kan. 847, 849-50, 19 P.3d 167 (2001).

In *Rockers v. Kansas Turnpike Authority*, 268 Kan. 110, 116, 991 P.2d 889 (1999), the court stated:

> "'A party asserting equitable estoppel must show that another party, by its acts, representations, admissions, or silence when it had a duty to speak, induced it to believe certain facts existed. It must also show it rightfully relied and acted upon such belief and would now be prejudiced if the other party were permitted to deny the existence of such facts.' [Citation omitted.]"

Estoppel will not be held to exist where facts are ambiguous or subject to more than one construction. *Ram Co. v. Estate of Kobbeman*, 236 Kan. 751, Syl. ¶ 5, 696 P.2d 936 (1985). In order to establish estoppel, the plaintiff must prove "some representation

or course of conduct which amounts to affirmative inducement sufficient to cause plaintiff to delay bringing the action." *Coffey*, 3 Kan. App. 2d at 599. The inducement must have been relied upon in good faith by the plaintiff. 3 Kan. App. 2d at 597.

The district court did not make factual findings regarding the estoppel claim. Ronald relies upon an article to argue that victims of childhood sexual abuse are often unable to blame their abuser and they therefore delay taking legal action. See Hood, Note, *The Statute of Limitations Barrier in Civil Suits Brought by Adult Survivors of Child Sexual Abuse: A Simple Solution*, 1994 U. Ill. L. Rev. 417 (1994). His argument is a generalization and it certainly does not prove that he was prevented from bringing his claim by his father's abuse.

Even if the facts were proven as Ronald asserts them, he has not made a proper case for equitable estoppel. In order to establish estoppel, Ronald must prove that he rightfully relied on Robert's acts or omissions and they caused him to wait until the statute of repose expired. Despite the fact that Robert's alleged abuse may have been traumatic, it cannot be reasonably construed to be an inducement to Ronald to delay filing his suit after 1989. Likewise, it is difficult to understand how Ronald could have innocently relied on Robert's alleged behavior since he claims to have repressed his memory of it until 2002. Furthermore, if this court were to sustain Ronald's argument, it would essentially destroy

the statute of repose and the statute of limitations as all such plaintiffs could claim that their claims were filed late because of such alleged abuse.

Affirmed.