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IN THE SUPREME COURT OF FLORIDA

CASE NO. 69, 917

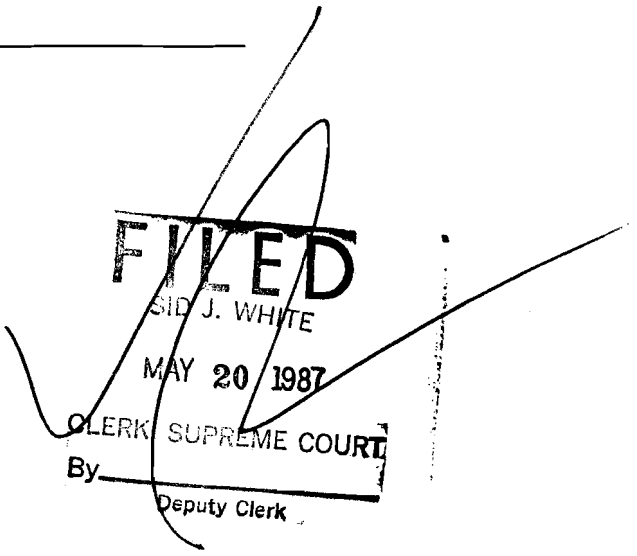
SHARON PAIT,

Petitioner,

v.

FORD MOTOR COMPANY,

Respondent.



REPLY BRIEF OF AMICUS CURIAE THE ACADEMY OF FLORIDA TRIAL LAWYERS SUPPORTING THE POSITION OF PETITIONER

THE ACADEMY OF FLORIDA TRIAL LAWYERS
AMICUS CURIAE

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TABLE OF CONTENTS

TABLE OF CITATIONS

Other Citations:

INTRODUCTION: MRS. PAIT'S CLEAR AND PERSUADING ANALYSIS

Counsel for Mrs. Pait has continued to hit the nail on the head: Ch. 86-272 plainly repealed the defective product statute of repose and wiped away the affirmative defense created by the newly revived statute. Sharon Pait's cause of action continues.

While Ford Motor Co. (Ford) and the Florida Defense Lawyers' Association (FDLA) and the Academy dispute over who can find the most apropos quote from Lewis Carroll and tangle the web even more, Mrs. Pait has provided a clear and persuading analysis that requires an affirmative answer to the first certified question - The Pullum Repealer is retroactive. This answer resolves this case and the many other cases on certification, and moots the question of the retroactivity of Pullum v. Cincinnati, Inc., 476 So.2d 657 (Fla. 1st DCA 1985).

THE LEGISLATIVE HISTORY (The Rest Of The Story)

We read with astonishment Ford's assertion that "the transcript of the House debates (Appendices "B" and "C") does not show any legislator criticizing" Pullum (Ford Br. 17). Ford does acknowledge the full House Judiciary Committee's awareness that this Court had upheld the 12-year bar (Appendix B-4-7). This Court may judicially notice that the 12-year absolute bar was upheld in only one case, Pullum, ten years after enactment. One

may also presume that Rep. Hamilton Upchurch, House Judiciary Committee Chairman and sponsor of the bill, knew why this bill had become needed. However, presumption becomes unnecessary when the floor debates (Appendix C) are reviewed (something Ford declines to do).

At page C-20, Judiciary Chairman Upchurch gave the specific example of a then existing case for a burn victim injured in a Ford that was more than 12 years old and said: "So, if the statute stays as it is in Florida -- that girl is out, she can't recover...."

And at page C-35, Judiciary Chairman Upchurch explained the purpose of the bill succinctly: "Giving them access to courts is all I'm doing." The only thing preventing access to courts was the Pullum decision receding from Battilla v. Allis-Chalmers Mfg. Co., 392 So.2d 874 (Fla. 1980), and holding that the statute of respose, although barring access to the courts, did not violate the constitutional guarantee.

The debate continued and the Judiciary Chairman continued to explain his goal of restoring access to the courts (Appendix C-39-40):

> All this bill does is establish a procedure where people that have been wronged by negligently designed pieces of equipment and machinery, where they can come into court, it gives people access to courts within four years of when the defect was discovered, and all of this emotion, all of this rhetoric, all of this demogogery [about insurance rates] does not apply.

Chairman Upchurch concluded his House floor presentation of the bill, saying (Appendix C-40):

> I would urge a favorable vote for this bill for the people of Florida to give them access to the courts when they are injured.

Is it truly a mystery to Ford and the FDLA as to what prompted the Judiciary Chairman's bill? If so, only to them. It was explained in the House Judiciary Committee that this Court had upheld the constitutionality of the absolute bar (only one case did that - Pullum); Chairman Upchurch used the specific example of an actual Ford gas-tank explosion victim who was already subject to preclusion from access to court by the statute of repose. How? Only by way of the Pullum decision.

And, the repeated reference to access to courts by the Judiciary Chairman was and is significant. What was the then most recent Florida Supreme Court case to discuss the access to courts guarantee in the products liability context? Pullum. And what had Pullum done? It had allowed the statue of repose to deny access to the courts, but had held that the particular denial did not violate the constitution.

Ford feigns ignorance as to why the Legislature repealed the statute of repose. However, realizing they cannot change the circumstances surrounding the passage of Ch. 86-272, Ford and FDLA simply ask this Court to ignore those circumstances. But, this Court does not ignore the legislative and judicial facts surrounding a repeal, or even an amendment. In Brown v. Griffin,

229 So.2d 225, 227-28 (Fla. 1969), the Court undertook to devine legislative intent, and said (emphasis supplied):

> A statue should be construed in the light of the evil to be remedied and the remedy conceived by the legislature to cure that evil. Spencer v. McBride, 14 Fla. 403.
>
> In arriving at the legislative intent in amending the statute under consideration it is appropriate to consider the prior judicial construction of the statute which was amended as well as the practical operation of that statute before and after the amendment.

The prompt repeal of the long dormant defective product statute of repose after its revivification in Pullum creates a short, clearly marked trail leading to an inescapable conclusion.

Another formulation for discerning legislative intent was stated by this Court in State v. Webb, 398 So.2d 820, 824 (Fla. 1981):

> It is a fundamental rule of statutory construction that legislative intent is the polestar by which the court must be guided, and this intent must be given effect even though it may contradict the strict letter of the statute. Furthermore, construction of a statute which would lead to an absurd or unreasonable result or would render a statute purposeless should be avoided. To determine legislative intent, we must consider the act as a whole - "the evil to be corrected, the language of the act, including its title, the history of its enactment, and the state of the law already in existence bearing on the subject."

(Original emphasis and citation omitted, emphasis supplied).

Absurd and unreasonable would be the only way to describe a turn of events by which (1) a person has a valid cause of action, (2) an unexpected decision holds constitutional a statute of

repose, the unconstitutionality of which the Legislature had long accepted, (3) a windfall affirmative defense drops into the lap of the defendant, (4) the Legislature acts immediately to remedy the situation by repealing the formerly dormant statute and (5) the revival, but not the repeal, is held to be retroactive, so that the once valid cause of action is destroyed.

If the Legislature's purpose is a mystery, to the appellees, it is no more a mystery than that presented in Hans Christian Anderson's tale, "The Emperor's New Clothes." Pait's analysis is clear-eyed; it sees through the talk; and it is consistent with the rules relating to statutory repeal and consistent with the rules stated in Brown v. Griffin and State v. Webb, supra.

THE EMPEROR'S NEW CLOTHES
(The Crowd Murmurs, And One Speaks Out)

Various panels of the district courts of appeals have now sent more than 15 Pullum Retroactivity/Pullum Repealer Retroactivity cases to this Court on certification. As discussed in our initial brief, the early decisions varied as to rationale. But, the fact of repeated certification shows an uneasiness about the arguments advanced by the defense bar and manufacturers - the feeling that an "absurd and unreasonable" result is being reached. State v. Webb. In short, the appellate judiciary is murmuring that something is amiss.

Then, as in the fable, one spoke out. In essense, he said, "These arguments in which the manufacturers have dressed their claim - that Plaintiff's rights, though first, were not vested,

but Defendant's rights, which came later, were vested - these arguments are transparent." In actuality, he said this:

> FERGUSON, Judge, specially concurring.
>
> Affirmance is required by *Shaw*; otherwise I would dissent. The reason for giving the revised section 95.031(2), Florida Statutes (Supp.1986), retrospective application is most compelling.
>
> The Florida Constitution, article I, section 21, provides that "[t]he courts shall be open to every person for redress of any injury." This provision was adopted to give constitutional vitality to the maxim that for every wrong there is a remedy. *Holland ex rel. Williams v. Mayes*, 155 Fla. 129, 19 So.2d 709 (1944).
>
> *Pullum v. Cincinnati, Inc.*, 476 So.2d 657 (Fla.1985), effectively shut the courthouse door on a cause of action in certain product liability cases even before the cause of action accrued, leaving a person injured by another private person without a remedy. The 1986 revision to section 95.031(2) was a prompt legislative overruling of *Pullum*.
>
> We are not paralyzed, by policy or precedent, from giving the corrective legislation retrospective application to a case which was sandwiched between *Battilla* and *Pullman*, so that substantial justice and right shall prevail as contemplated by the constitution. Our duty as an appellate court in construing a statute is first to reconcile it with constitutional mandates. *See Biggs v. Smith*, 134 Fla. 569, 184 So. 106 (1938).

Dominguez v. Bucyrus-Erie Co., 503 So.2d 364, 365 (Fla. 3d DCA 1987). This fundamental fairness approach has the decided advantage of avoiding getting caught up in unproductive word games.

SUBSTANCE OVER FORM

The answer briefs show an attempt to overcomplicate the case by making it a word game of oneupmanship played with rules and exceptions: We say it's a repeal; they say it's an amendment. We say it's remedial; they say it's not. We say Pait's claim was vested; they say it wasn't. We say their affirmative defense wasn't vested; they say it was. We say green; they say red. Et cetera.*

If the Court were not to decide this case on the straightforward basis posited by counsel for Pait, then given the web of rules and counter-rules, definitions and counter-definitions, words and counterwords, the Court can reach the same

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*By "quips and sentences and paper bullets" our opponents have sought to make the repeal seem an amendment, to trivialize Mrs. Pait's cause of action, to make the vesting of rights a one way street, and to suggest the Legislature was unaware that it was reacting to Pullum. This is serious business which Ford belittles with talk of aristocracy and mockery. Our reference to Alice and the White Queen was to capsulize the fact that when constitutional law and rules of statutory construction seem to apply unevenly - and in one direction - as they have thus far in the district courts of appeal - it is time for the Court to step in and guide with a firm, fair hand. We quote Carroll for substance; they quote him for word play.

right result and correspondingly enhance confidence in the civil justice system.*

Putting things in perspective, the Pullum court's revivification of the statute of repose was itself quite short-lived. The Legislature promptly "deleted" the statute. Ch. 86-272 (title). We are back to pre-Pullum law. But, although gone, the statute is not forgotten. Its ghost still haunts the claims of certain plaintiffs. Florida jurisprudence would not be well served by a legacy of epitaph's in Southern Second reading, in essence:

Pait v. Ford Motor Co.
Cause of action retroactively destroyed.
Legislature's rescue attempt thwarted.

A SOLUTION

A recent Florida decision points to a solution this Court can use; a method which will enhance confidence in the civil justice system by avoiding the destruction of otherwise valid causes of action, especially since the reason behind Pullum, the statute of repose itself, has now been eliminated by the Legislature. In International Studio Apt. Ass'n. v. Lockwood,

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*The Defense Association (FDLA Br. 5, n 4) stopped short in quoting the colloguy between Alice and Humpty Dumpty about words: "The question is," said Humpty Dumpty, "which is to be master - that's all." This Court is master of both the words and the principles of fairness which will govern the resolution of this matter.

421 So.2d 1119 (4th DCA 1982), rev. denied, 430 So.2d 451 (Fla. 1983), cert. denied, 464 U.S. 895 (1983), a copy of which is appended for convenient reference, a United States Supreme Court decision had "overruled" a decision of this Court, but did not say whether that overruling decision, holding a statute unconstitutional, would be retrospective or prospective. The Fourth District, to whom the retrospective/prospective question was put, relied upon Florida Forest and Park Service v. Strickland, 154 Fla. 472, 18 So.2d 251 (1944), and held the overruling decision prospective only. It did so on an analysis that prompted the court to conclude that good faith reliance on the previous "overruled" decision results in prospective only application. By engaging counsel, going through the disruption of litigation and incurring the costs of prosecuting the action, Mrs. Pait is properly seen as having specifically relied on Battilla and the unconstitutionality of the statute of repose. Moreover, she had acquired a property right - her cause of action. See Sunspan Engineering & Construction Co. v. Spring-Lock Scaffolding Co., 310 So.2d 4, 8 (Fla. 1975) ("a vested cause

of action or "chose in action" is personal property"), a decision tellingly left undiscussed by Ford and FDLA.*

And, importantly, the Fourth District also considered and applied the retroactivity analysis stated by the United States Supreme Court in Chevron Oil Co. v. Huson, 404 U.S. 97, 92 S. Ct. 349, 30 L.Ed. 2d 296 (1971) (copy attached). The Fourth District characterized the Florida Forest rule as analogous to the more specific rule of Chevron Oil. International Studio, 421 So.2d at 1123. The Fourth District went through the Chevron Oil analysis and found reliance on the overruled decision (also present here),

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*Also, the prevailing reasoning in the United States District Court, Northern District of Florida, the Court in George v. Firestone Tire & Rubber Co., Case No. GCA 85-0117-MMP (N.D. Fla. July 9, 1986) (copy attached), the Court conducted extensive analysis and declared:

> Based on all the foregoing, this Court concludes that plaintiff's cause of action validly accrued and became vested when plaintiff was injured. That accrued cause of action is a property right. The law of Florida, as expressed in Strickland, is that it is not proper to apply a judicial decision retroactively if doing so would deprive plaintiff of a property right. Furthermore, retroactive application of Pullum to bar plaintiff's previously accrued cause of action would plainly violate plaintiff's federal due process rights. Thus, under both Florida and Federal law, this Court cannot, should not and will not apply Pullum retroactively to extinguish plaintiff's accrued cause of action.

Slip. op. at 10. This ruling was specifically followed in Cox v. Farrel-Birmingham Co., Inc., PCA 86-4064 WEA (N.D. Fla. Sept. 17, 1986) (copy attached), in which the author of Eddings v. Volkswagenwerk, A.G., 635 F.Supp. 45 (N.D. Fla. 1986), on which Ford and FDLA rely, rejected the reasoning he had applied in Eddings.

found that retroactive operation would neither further nor retard the rule in question particularly with "the statute having been effectively eliminated," id. at 1122, (also true, but more so here), and found finally that retroactive operation would "preclude [sic: produce?] injustice and hardship," id. at 1123 (dramatically true in Mrs. Pait's case).

The Florida Forest/Chevron Oil/International Studio approach has the decided advantage of resolving the case fairly and consistently with this precedent. Indeed, the Court should consider the specific adoption of the Chevron Oil retroactivity three phase test in this case which is so like Chevron Oil, e.g.:

> To hold that the respondent's lawsuit is retroactively time barred would be anamolous indeed ... Retroactive application of the Louisiana Statute of Limitations to this case would deprive the respondent of any remedy whatsoever on the basis of superseding legal doctrine that was quite unforeseeable.

92 S.Ct. at 356. And also right on point:

> [W]e invoked the doctrine of nonretroactive application to protect property interests ... and we invoked the doctrine to protect elections held under possibly discriminatory voting laws. Certainly the respondent's potential redress for his allegedly serious injury -- an injury that may significantly undercut his future earning power -- is entitled to similar protection.

92 S.Ct. at 356 (citations omitted). And finally:

> "Non-retroactive application here simply preserves his right to a day in court."

92 S.Ct. at 356.

CONCLUSION

The first certified question should be answered in the affirmative. If the first certified question is answered in the negative, then the second certified question must be answered in the negative as well.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Edward T. O'Donnell, Esquire, 4500 Southeast Financial Center, 200 South Biscayne Boulevard, Miami, FL, 33131; James C.Blecke, Esquire, Biscayne Building, Suite 705, 19 West Flagler Street, Miami, FL, 33130; Sharon Lee Stedman, Esquire Post Office Box 1873, Orlando, FL, 32802; John M. Thomas, Esquire, Office of the General Counsel, Ford Motor Company, 330 Parklane Towers West, Dearborn, MI, 48126; Jack W. Shaw, Jr., Esquire, 1500 American Heritage Life Building, Jacksonville, FL, 32202; and to David W. Bianchi, Esquire, 1900 Courthouse Tower, 44 West Flagler Street, Miami, FL, 33130; by U. S. Mail, this 19th day of May, 1987.

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