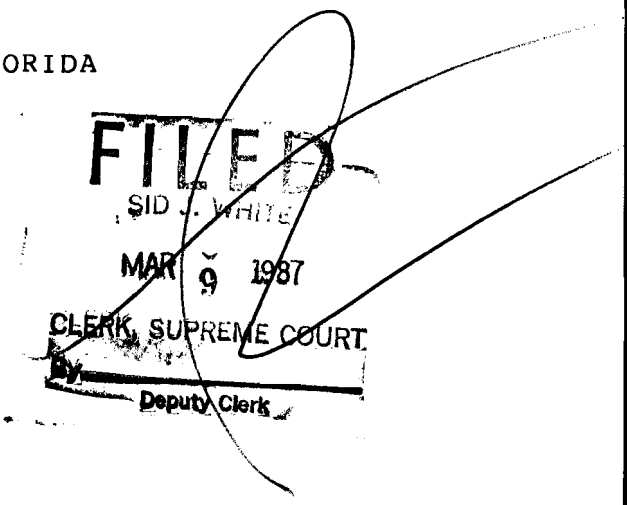
IN THE SUPREME COURT OF FLORIDA

CASE NO. 69,917



SHARON PAIT, *

Petitioner, *

v. *

FORD MOTOR COMPANY, *

Respondent. *

ON REVIEW OF A DECISION OF
THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT

BRIEF OF AMICUS CURIAE, ROBERT P. WALLIS ON BEHALF OF THE PETITIONER

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PRELIMINARY NOTE

The Fifth DCA has certified two questions to this court. This brief will address only the first question dealing with the retroactive operation of the amendment to Section 95.031 (2) Florida Statutes (1985) abolishing the Statute of Repose in product liability cases.

SUMMARY OF THE ARGUMENT

The legislature adopted an entirely new policy regarding product liability cases when it repealed the Statute of Repose. The repeal expressed the legislatures intent to permit product liability cases to be decided on their merits without regard to artificial barriers in the form of time limits.

This legislative intent to remove a procedural defense to the Plaintiff's remedy should be retroactively applied in order to serve its intended purpose. The denial of retroactive effect by the Fifth DCA in this case and by the 2nd and 3rd DCA's in other cases is based on a misreading of this court's opinions in Statute of Limitation cases.

Those cases do not require the prospective application of the repealing amendment. However, if they should be construed to have that effect, this court should recede from them, at least to the extent that they apply to an amendment that entirely repeals a Statute of Repose.

> WHETHER THE LEGISLATIVE AMENDMENT OF SECTION 95.031 (2), FLORIDA STATUTES (1985), ABOLISHING THE STATUTE OF REPOSE IN PRODUCT LIABILITY ACTIONS, SHOULD BE CONSTRUED TO OPERATE RETROSPECTIVELY TO A CAUSE OF ACTION WHICH ACCRUED BEFORE THE EFFECTIVE DATE OF THE AMENDMENT.

The Fifth DCA ruled that the repeal of Section 95.031 (2) Florida Statutes (1985) did not preserve the Plaintiff's cause of action because it did not:

> "...perceive a legislative intent that the 1986 amendment to Section 95.03 (2), abolishing the 12 year Statute of Repose in products liability cases, operate retroactively." 12 FLW 277.

The court did not further elaborate on its reason for coming to that conclusion. Other DCA's have relied on the proposition supposedly set out in Foley v. Morris, 339 So.2d 215 (Fla.1976) and Homemakers, Inc. v. Gonzalez, 400 So.2d 965 (Fla.1981) that amendments lengthening a statute of limitation should not be applied retroactively in the absence of a clear legislative intent to accomplish that result, Small v. Niagara Machine & Tool Works, 2d DCA Case No.86-1161 (1/20/87), 12 FLW 366 (1/30/97); Shaw v. General Motors Corporation, 3rd DCA Case No.86-379 (2/10/87); Wallis v. The Grumman Corporation, 3rd DCA Case No. 86-238 (2/24/87) citing Shaw, supra.

In this brief, your amicus will demonstrate that the repeal of the Statute of Repose was more than a mere technical amendment changing the length of a Statute of Limitation. Instead, it was a major change in legislative policy toward

product liability cases which should be given a broad reading in order to effectuate its remedial purpose.

The amicus will also contend that the cases relied upon to deny the repeal retroactive effect have been construed too broadly and are not authority for the results reached in the repose cases.

A. THE REPEAL OF THE STATUTE OF REPOSE WAS A REMEDIAL ACT WHICH SHOULD BE APPLIED TO CASES PENDING ON THE EFFECTIVE DATE OF THE STATUTE.

Chapter 86-272, Section 2 (1986) did not simply change the length of the products liability repose period. Instead, it abolished the repose concept altogether. The distinction between an amendment slightly lengthening the repose time period and the repeal of the repose statute is not trivial. One is a technical adjustment, the other is an abandonment of the repose idea. The consequences that stem from the distinction become very important if it is assumed that Florida has accepted the doctrine that enactments that lengthen limitations periods should not be give retroactive effect, absent clear legislative intent.

The purpose of a Statute of Repose is to place some finite limitation on the length of time a manufacturer shall remain at risk after placing his product in the stream of commerce. The fairness and usefulness of applying repose provisions to product liability cases has been strongly criticized, McGovern, The Variety, Policy and Constitutionality of Product Liability Statutes of Repose, 30 Am.U.L.Rev. 579, 594 (1981).

When the legislature repealed the Statute of Repose for product liability actions it went from the camp of the supporters of repose statutes to the camp of their critics. The question raised by this case and the many other similarly situated cases is what kind of respect should the court's accord this change in Florida's position. Should Plaintiffs, whose cases were in the courts when the enactment went into effect, be denied their day in court by a statute that is now dead, or should they be granted the opportunity to obtain redress without regard to when the product that injured them was first placed in the stream of commerce?

The answer to that question is inherent in the nature of the enactment. The legislature has now said that the age of the product causing injury is no longer a relevant concern. That being the case, there is no reason why causes of action accruing before the effective date of the repeal and that were still in the courts on that date, should not be given the benefit of the legislature's change of mind, see Reiter v. American Laundry Machinery, Inc., No.86-1160-Civ.-T-15 (B) (M.D. Fla.1986).

The Statute of Repose did not do away with product liability causes of action where the product was first sold more than twelve years prior to the date the cause of action accrued. It merely provided a defense that barred the remedy. The repeal did away with the bar and restored the remedy.

This court has held that statutes that operate in furtherance of the remedy or in conformation of already existing

rights are not retrospective laws and do not come within the general rule against retrospective laws. Consequently, where, as here, the legislature has restored a barred remedy the doctrine that appellate courts should apply the law in effect at the time of their decisions should be applied. Florida Patient's Compensation Fund v. Von Stetina, 474 So.2d 783, 787-788 (Fla.1985); City of Orlando v. Desjardins, 493 So.2d 1027 (Fla.1986).

In Desjardins, this court said that if a statute is found to be remedial "...it can and should be retroactively applied in order to serve its intended purposes." The issue in Desjardins was whether an amendment providing an exemption to the Public Records Act for agency litigation files during the course of litigation should be applied retroactively.

This court observed that a contextual examination of the exemption leaves little doubt:

> "... as to its salutary and protective purpose of mitigating the harsh provision of the Florida Public Records Act as applied to Public entities' litigation files in ongoing litigation."

There is little doubt about the purpose of the repeal of the product liability statue of repose. It was a legislative recognition that the repose idea had failed in the product

liability field.[1] The inconsistent treatment accorded to various repose statutes by this court no doubt affected the legislatures decision, see Bauld v. J.A. Jones Construction Co., 357 So.2d 401 (Fla.1978); Overland Construction Company, Inc. v. Sirmons, 369 So.2d 572 (Fla.1979); Purk v. Federal Press, Co., 387 So.2d 354 (Fla.1980); Battilla v. Allis Chalmers Manufacturing Company, 392 So.2d 874 (Fla.1981); Diamond v. E.R. Squib & Sons, Inc., 397 So.2d 671 (Fla.1981); Pullum v. Cincinnati, Inc., 476 So.2d 657 (Fla.1985).

The decisions immediately prior to Pullum had so eviscerated the repose defense that only the legal rights of Plaintiffs injured by defective products between eight and twelve years old were affected by the statute. By that time the repose provision was similar to the Cheshire Cat's grin, "... which remained sometime after the rest of it had gone." Alice's Adventures in Wonderland, Ch.VI, Pig and Pepper.

The Plaintiff in Pullum tried to make the grin disappear as well, by arguing that the statute denied equal protection of the laws to persons who are injured by products delivered to the original purchaser between eight and twelve years prior to injury. When this court pulled the plug on its

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[1] The legislature did not abandon the concept with regard to other causes of action. The same bill that repealed the product liability repose provision retained and adjusted the repose provision pertaining to fraud, Ch.86-272 Section 2, Laws of Florida (1986). The repose statute applying to improvements to real property was left untouched, Section 95.11 (3)(c) Florida Statutes (1981).

prior interpretation of the statute in Pullum, the legislature pulled the plug on the statute.

The legislature's recognition that after years of judicial tinkering, the repose concept could not be equitably applied should be given the widest effect possible. This court should rule that the repeal applies to all cases where the cause of action occurred prior to the repeal and which were still in the courts on the effective date of the repeal.

B. FOLEY V. MORRIS, 339 SO.2D 215 (FLA.1976) AND HOMEMAKERS, INC. V. GONZALEZ, 400 SO.2D 965 (FLA.1981) DO NOT PROHIBIT THE REPEAL OF THE PRODUCT LIABILITY REPOSE STATUTE FROM BEING RETROACTIVELY APPLIED. IF THEY DO HAVE THAT EFFECT, THIS COURT SHOULD RECEDE FROM THEM.

Neither Foley v. Morris, 339 So.2d 215 (Fla.1976) nor Homemakers, Inc. v. Gonzalez, 400 So.2d 965 (Fla.1981) prohibit the retroactive application of the amendment repealing the product liability Statute of Repose.

Foley involved an amendment that shortened a Statute of limitation. Citing 51 Am.Jur.2d, Limitation of Action, Section 57 (1970) this court held that unless a contrary legislative intention is expressed in the new law, the change in the Statute of Limitation would be considered prospective. Based on the facts in Foley, the court's ruling is not exceptional because most court's have held that shortened Statutes of Limitation should not be given retrospective effect, see Annot., 79 ALR 2d 1080 (1961). Whether the rule should be applied to statutes that increase the limitation period is another question.

Several District Court's of Appeal have interpreted Homemakers, Inc. v. Gonzales, supra as extending it to such statutes, Regency Wood Condominium, Inc. v. Bessent, Hammack and Ruckman, Inc., 405 So.2d 440, 443 (Fla.1st DCA 1981); Orpheus Investments, S.A. v. Ryegon Investments, Inc., 447 So.2d 257, 259, n.1 (Fla.3rd DCA 1983). The Second District has directly

extended the Foley rule to the present situation, Small v. Niagara Machine & Tool Works, 2d DCA Case No.86-1161 (1/20/87), 12 FLW 366 (1/30/87).

Neither Foley nor Gonzalez should be extended beyond the specific facts that gave rise to them. Foley is strictly a shortened Statute of Limitation case. Gonzalez is more complicated.

The Plaintiff in Gonzalez was injured on April 2, 1973 by an injection given to her by a hospital nurse. The Defendants were two nursing service organizations, one of which had provided the nurse to the hospital. The Statute of Limitation in effect on the day of the accident was the two year medical malpractice statute, Section 95.11 (6) Florida Statutes (1973). The problem in Gonzalez was that the claim would be barred if that provision applied because suit was not filed until July 9, 1976.

On January 1, 1975, the legislature amended the medical malpractice Statute of Limitation so as to require privity between injured Plaintiffs and Defendant medical professionals, Section 95.11 (4)(a) Florida Statutes (Supp.1974). Gonzalez argued that she was no longer covered by the Medical Malpractice Statute of Limitation because she lacked the required privity. Instead, she contended that her cause of action should be construed as one founded on negligence or as a cause of action not specifically provided for in the statute. Both of those

provided four year limitation periods, Sections 95.11 (3)(a), (p), Florida Statutes (Supp.1974). If they applied, then Gonzalez' cause of action was timely filed.

This court ruled that the 1975 amendment should not be applied retroactively to Gonzalez and therefore her action was barred by the 1973 Malpractice Statute. The court cited Foley in support of its ruling and a Fourth DCA case, Brooks v. Cerrato, 355 So.2d 119 (Fla.4th DCA 1978) that had relied on Foley. The specific rational of the cases that the court cited was the proposition that amendments to Statutes of Limitation should not be retroactively applied absent an "... expressed, clear or manifest legislative intent ..., Brooks, 355 So.2d at 120.

Justice England's dissent interpreted Gonzalez to mean that Florida had joined the minority of states that apply the rule of non-retroactivity to amendments that lengthen statutes of limitation as well as to those that shorten them, 400 So.2d at 968.

On its facts, Gonzalez does not require so broad an interpretation. The real question in Gonzalez was whether the reclassification from medical malpractice to another cause of action should be retroactively applied to the Plaintiff. If it was, she would be the beneficiary of a result that very possibly was never contemplated by the legislature - an increase in the limitation period applicable to her. Quite correctly, the court ruled that such a result required a clear manifestation of

legislative intent. A manifestation that was absent under the facts of Gonzalez.

Viewed in this light, Gonzalez need not and should not be viewed as overturning past Florida precedent supporting the retroactive application of repealing statutes, Yaffee v. International Company, Inc., 80 So.2d 910 (Fla.1955); Tel Service Co, Inc. v. General Capital Corporation, 227 So.2d 667 (Fla.1969); State ex rel Arnold v. Revels, 109 So.2d 1 (Fla.1959); Carr v. Crosby Builders Supply Company, Inc., 283 So.2d 60 (Fla.4th DCA 1973). This interpretation of Gonzalez is supported by the fact that the majority in Gonzalez never acknowledged that they were overruling past precedent.

Without a broad interpretation of Gonzalez, Florida precedent would place this state in the camp of the majority which holds that an amendment that lengthens a limitation statute is presumed to apply retroactively, Orpheus Investments, supra, 447 So.2d at 260. This follows from the general proposition that appellate courts must apply the law as it exists at the time of their decision, Carr v. Crosby Builders Supply Company, 283 So.2d 60 (Fla.4th DCA 1973); Seaboard System Railroad, Inc. v. Clemente, 467 So.2d 348 (Fla.3rd DCA 1985); Slaughter v. Marees, 319 So.2d 580 (Fla.1st DCA 1975); Royal Atlantic Association v. Royal Condominium Managers, Inc., 258 So.2d 39 (Fla.3rd DCA 1972).

The Majority rule is especially applicable to the present case where we are dealing with the repeal of a statute of repose, not the lengthening of a limitation statute. There are no valid reasons why the benefit of the legislatures intent to abandon the repose concept in product liability actions should be withheld from Plaintiffs whose actions were in court when the new policy went into effect.

Neither Foley nor Gonzalez compel such a result. If they do compel it, the product of their compulsion is an injustice which this court should correct.

If the decision below is allowed to stand, the scale of justice will be unbalanced in favor of the Defendant. It is unjust that the Plaintiff should be denied the opportunity to present her case merely because she was unlucky enough to be caught between this court's change of mind in Pullum and the legislature's change of mind about the statue of repose.

If, however, the decision below is reversed, the Defendant will still be able to interpose all of the substantive defenses that may be available to it and the case can be decided on its merits.

The law should decide controversies on their merits, not on the basis of procedural anomalies. This court should rule that the Repeal of the Repose Statute should apply to causes of action that accrued prior to the effective date of the repealing amendment.

Respectfully submitted,

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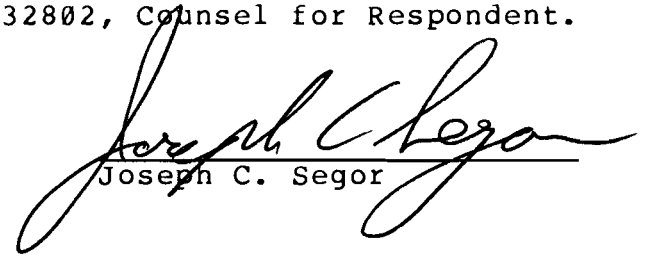
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF AMICUS CURIAE, ROBERT P. WALLIS ON BEHALF OF PETITIONER was mailed this March 4, 1987 to: David W. Bianchi, Esq., Stewart, Tilghman Fox & Bianchi, 1900 Courthouse Tower, 44 West Flagler Street, Miami, Florida 33130 and James C. Blecke, Esq., Suite 705 Biscayne Building, 19 West Flagler Street, Miami, Florida 33130, Counsel for Sharon Pait and Sharon Lee Stedman, Esq., Rumberger, Kirk, Caldwell, Cabaniss & Burke, 11 East Pine Street, Orlando, Florida 32802, Counsel for Respondent.



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