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2-22-64

IN THE SUPREME COURT OF FLORIDA

CASE NO. 69,917

SHARON PAIT, :
 :
 Petitioner, :
 :
 vs. :
 :
 FORD MOTOR COMPANY, :
 :
 Respondent. :

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

MAIN BRIEF OF PETITIONER, SHARON PAIT

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INTRODUCTION

This is a petition for review brought by Sharon Pait, for determination of two questions certified to be of great public importance. The respondent is Ford Motor Company.

STATEMENT OF THE CASE AND FACTS

Sharon Pait appealed from a final judgment dismissing this wrongful death action on the basis of Section 95.031(2), Florida Statutes (1985), the statute of repose in product liability actions. Sharon Pait's husband was killed on July 22, 1984 while operating a tractor manufactured and delivered more than twelve years earlier by Ford Motor Company.

The district court of appeal affirmed on the authority of Pullum v. Cincinnati, Inc., 476 So.2d 657 (Fla. 1985) which held the statute constitutional. The district court determined that Pullum's revalidation of the previously held unconstitutional statute rendered the statute valid from the date it became effective.

The district court also held, "Neither do we perceive a legislative intent that the 1986 amendment to section 95.031(2), abolishing the 12 year statute of repose in products liability cases, operate retroactively." Recognizing the questions to be of great public importance, they were certified to this court as appropriate for review. The certified questions are set forth verbatim as the Issues on Review.

ISSUES ON REVIEW

I.

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?

II.

IF NOT, WHETHER THE DECISION OF PULLUM V. CINCINNATI, INC., 476 So.2d 657 (FLA. 1985) WHICH OVERRULED BATTILLA V. ALLIS CHALMERS MANUFACTURING COMPANY, 392 So.2d 874 (FLA. 1980) APPLIES SO AS TO BAR A CAUSE OF ACTION FOR WRONGFUL DEATH THAT ACCRUED AFTER THE BATTILLA DECISION BUT BEFORE THE PULLUM DECISION?

SUMMARY OF ARGUMENT

Florida is a common law jurisdiction. Under the common law rules of statutory construction, the repeal of a statute operates retrospectively. Absent a saving clause or a statute of general application, the common law rule applies.

Chapter 86-272 does not contain a saving clause to preserve to Ford its statutory defense. There is no general statutory or constitutional prohibition against retrospective repeal. Pensacola & A.R. Co. v. State, 45 Fla. 86, 33 So. 985, 986 (1903) (the constitutional provision regarding repeal of criminal statutes has no application to civil legislation).

Cases on appeal are to be decided upon the laws as they exist at the time of rendition of the appellate decision. The repeal of the statute of repose dictates that the case be decided as if the statute never came into existence. The statute was in derogation of the common law and, absent the statute, Ford is fully accountable for the death and resulting damage inflicted by its defective product.

ARGUMENT

I.

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.

Under the common law rules of statutory construction, the repeal of a statute operates retrospectively. The first certified question should be answered in the affirmative.

The general rule against the retrospective construction of statutes does not apply to repealing acts, which, in the absence of a saving clause or other clear expression of intention, are generally to be construed retrospectively.

82 C.J.S., Statutes, §434. Where a right given by a statute is not by nature a vested right, it will fall with the statute unless expressly excepted. 82 C.J.S., Statutes, §436. As a general rule, the repeal of a statute without any reservation takes away all remedies given by the repealed statute and defeats all actions and proceedings pending under it at the time of its repeal. This rule is especially applicable to the repeal of statutes creating a cause of action or providing a remedy not known to the common law. 82 C.J.S., Statutes, §439(a).

The repeal of a statute authorizing a particular defense operates to deprive defendant in a pending suit of such defense, even though it has already been pleaded. [§439(a)].

Corpus Juris Secundum is one source of the general rules of statutory construction. Sutherland Statutory Construction (4th Edition) is another valuable reference in determining the certified question. Sutherland provides:

The effect of the repeal of a statute having neither a saving clause nor a general saving statute to prescribe the governing rule for the effect of the repeal, is to destroy the effectiveness of the repealed act in futuro and to divest the right to proceed under the statute. Except as to proceedings past and closed, the statute is considered as if it never had existed. [§23.33].

Sutherland explains that, under common law principles of statutory construction and interpretation, all rights, liabilities, penalties, and forfeitures which are of purely statutory derivation and unknown to the common law are eliminated with the

repeal of the statute, "irrespective of the time of their accrual." §23.33.

To avoid the common law rule of retrospective application of the repeal of the statute of repose, Ford Motor Company must show that it has a vested right to its defense. Sutherland provides, "In order to become vested, the right must be a contract right, a property right, or a right arising from a transaction in the nature of a contract which has become perfected to the degree that it is not dependent on the continued existence of the statute." §23.34. Ford's defense, predicated entirely upon the statute, does not meet this criteria. Ford's statutory defense, now repealed, is what Sutherland describes as an inchoate right.

Rights which are wholly derived from a statute are lost by the repeal of the statute from which they stem. Inchoate rights are but an incident to the statute and fall with its repeal. Inchoate rights are by definition not vested rights such as escape the common law rule. §23.35.

These common law rules of statutory construction and interpretation of repealing legislation have been consistently applied by the courts of Florida. In Yaffee v. International Company, Inc., 80 So.2d 910 (Fla. 1955), this court recognized:

[T]he general rule, to the effect that repealing statutes should be given a retrospective operation, is based upon, and confined to, the situation where a right or remedy has been created wholly by statute; it being held, in such event, that when the statute is repealed, the

right or remedy created by the statute falls with it. [80 So.2d at 911-912].

Although this court was dealing with the converse proposition, it gave as an example the repeal of a statute creating defenses of usury. The repeal renders valid a contract that was subject to the defenses of the statute when made. 80 So.2d at 912. Usury statutes in Florida do not have the effect of invalidating contracts for interest at a rate higher than the statutory maximum, but only accord to the obligor the personal privilege of setting up or waiving affirmative defenses of usury in respect to such contracts. 80 So.2d at 912.

Here by analogy, Section 95.031(2) does not destroy or obliterate an action for personal injury or wrongful death based upon product liability. It only accords to the manufacturer the privilege of setting up or waiving the affirmative defense of the statute in respect to any action brought outside the statute.

In Tel Service Co., Inc. v. General Capital Corporation, 227 So.2d 667 (Fla. 1969), this court held the usury statutes create no vested substantive right, but only an enforceable penalty. 227 So.2d at 671.

Accordingly, such penalty or forfeiture possesses no immunity against statutory repeal or modification and the enactment of legislation to this effect abates such penalty or forfeiture pro tanto even during the pendency of an appeal from a final judgment predicated on such statutory penalties or forfeiture. [227 So.2d at 671; emphasis added].

In State ex rel. Arnold v. Revels, 109 So.2d 1 (Fla. 1959), this court determined when the jurisdiction of a court depends upon a statute which is repealed or otherwise nullified, the jurisdiction falls even over pending cases "unless the repealing statute contains a saving clause." 109 So.2d at 3. Quoting with approval from Pensacola & A.R. Co. v. State, 45 Fla. 86, 33 So. 985, 986 (1903), this court said:

[T]he effect of a repealing statute is to obliterate the statute repealed as completely as if it had never been enacted, except for the purpose of those actions or suits which were commenced, prosecuted, and concluded whilst it was an existing law, and that an action cannot be considered as concluded while an appeal therein is pending before an appellate court having jurisdiction to review it. [109 So.2d at 3].

Here, this case was pending on appeal when the statutory defense was repealed.

In Carr v. Crosby Builders Supply Company, Inc., 283 So.2d 60 (Fla. 4th DCA 1973), trial was held and judgment was entered for the defendant upon the application of the guest statute. The guest statute was repealed subsequent to the final judgment. The Fourth District reversed because, "We must, in reviewing a judgment on direct appeal, dispose of the case according to the law prevailing at the time of the appellate disposition, irrespective of the law prevailing at the time of rendition of the judgment appealed." 283 So.2d at 62. Implicit in the court's decision is the recognition that the repealing

legislation has retrospective application. See also, Summerlin v. Tramill, 290 So.2d 53 (Fla. 1974).

At common law, there was no restriction upon an automobile passenger's right of recovery from a negligent driver. Florida enacted its guest statute to protect the driver by limiting his liability to gross negligence. With the repeal of the guest statute, negligent drivers lost this statutory protection and were once again liable for damages caused by their simple negligence.

The same is true here. At common law there was no restriction on a claim for products liability. Judgment was entered on a statute now repealed. The case on appeal should be decided upon the laws that presently exist. Under the common law rules of statutory construction, the repeal of the statute of repose entitles Sharon Pait to proceed as if the statute never existed at all.

The repeal of the statute of repose has no saving clause. Chapter 86-272 contains three sections. Section 1 is the amendment of the libel and slander statute of limitation. Section 2 includes the repeal of the statute of repose. Section 3 provides: "Section 1 of this act shall take effect October 1, 1986, and shall apply to causes of action accruing after that date, and Section 2 of this act shall take effect July 1, 1986." Thus section 1 is expressly given prospective application. Section 2 is not. There is no saving clause to preserve to Ford its statutory defense now repealed.

"This act shall take effect July 1, 1986" is not language which limits the repeal to prospective application. In Tel Service Co., Inc. v. General Capital Corporation, this court held the repeal of Section 687.07 to be retrospective. Chapter 69-135, Laws of Florida amended Chapter 687. Sections 2 and 3 provided:

Section 2. Section 687.07, Florida Statutes, is hereby repealed.

Section 3. This act shall take effect October 1, 1969.

An effective date provision is not a saving clause. In Carr v. Crosby Builders Supply Company, Inc., and Summerlin v. Tramill, the repeal of the guest statute was given retrospective application. The guest statute was repealed by Chapter 72-1, Laws of Florida which provided:

Section 1. Section 320.59, Chapter 320, Florida Statutes, is repealed.

Section 2. This act shall take effect upon becoming a law.

The provision for an effective date of the repealing legislation does not evince a legislative intent for prospective application only. It is not a saving clause.

Perhaps the best evidence of legislative intent is how the legislature treated the amendment to the libel and slander statute of limitation. It provided an effective date of October 1, 1986, and provided it "shall apply to causes of action accruing after that date." The repeal of the statute of repose

was not given similar prospective treatment. It is presumed where the legislature treats one subject differently than another, a different result is intended.

There was no twelve year cap on products liability claims under the common law. There was no statute of repose when Ford manufactured and delivered the vehicle which later killed Mr. Pait. Ford manufactured, priced, and sold this vehicle in contemplation of liability co-extensive with its useful life. The statute of repose has since come and gone without reliance by Ford.

Ford has no vested right to its statutory defense. Ford did not even raise the statute in its initial pleadings. It was not until rendition of the Pullum decision that Ford amended its motion to dismiss to assert the statutory defense.

Article I, Section 21 of the Florida Constitution has long guaranteed access to courts for redress of injury. In 1975, the legislature enacted the products liability statute of repose. Five years later, Battilla held the statute violated the constitutional right of access to courts to the extent it barred an action before it arose. Between its enactment in 1975 and the Battilla opinion in 1980, no reported decision applied the statute to bar actions accruing beyond the twelve year limitation. During the five years between Battilla and Pullum, the legislature made no effort to overcome the consequences of the Battilla decision.

During the five years between Battilla and Pullum the trial courts, district courts of appeal, and this court consistently applied Battilla, recognizing that the products liability statute of repose would be unconstitutional in its application to a cause of action barred before it accrued. Five legislative sessions of inaction may be taken as an indication that the legislature approved and accepted the restricted construction placed upon section 95.031(2) by Battilla. When this court receded from Battilla, the statute of repose was repealed in the next legislative session.

The substantive right of access to courts granted by the constitution and preserved in Battilla was shaken by Pullum. The legislative response was swift. Repeal was a remedial action designed to preserve and protect the right of access to courts.

If a statute is found to be remedial in nature, it can and should be retroactively applied in order to serve its intended purposes.

City of Orlando v. Desjardins, 493 So.2d 1027 (Fla. 1986). In City of Orlando as here, legislative response to case law interpretation of a statute is deserving of recognition and positive support by this court.

II.

IF THE REPEAL OF THE STATUTE OF REPOSE DOES NOT OPERATE RETROSPECTIVELY, THE DECISION OF PULLUM V. CINCINNATI, INC., WHICH OVERRULED BATTILLA V. ALLIS CHALMERS MANUFACTURING COMPANY, 392 So.2d 874 (FLA. 1980) SHOULD NOT APPLY SO AS TO BAR A CAUSE OF ACTION FOR WRONGFUL DEATH THAT ACCRUED AFTER THE BATTILLA DECISION BUT BEFORE THE PULLUM DECISION.

The common law rules of statutory construction compel an affirmative response to the first certified question. If the first certified question is answered in the negative, it must be upon a finding of vested rights in the litigants. If this court has answered the first certified question in the negative, then for all of the reasons why the repeal of the statute of repose cannot be applied retroactively, the Pullum interpretation of the statute cannot be applied retroactively.

Florida Forest and Park Service v. Strickland, 154 Fla. 472, 18 So.2d 251 (1944) is the Florida precedent on the retrospective application of an overruling decision. It treats an overruling decision like a statutory repeal. It is to be given retrospective application, unless to do so destroys vested rights acquired under the previous decision. At the moment of his death Mr. Pait, had he lived, had a valid and enforceable claim against Ford under then controlling precedent. Consequently, upon her husband's death, Mrs. Pait had a cause of action for wrongful death. This is the only discernible right which has vested in this case.

In the event this court should determine that Pullum can be applied retroactively and the repeal cannot, then this court should also answer the following uncertified questions. If a product manufactured before enactment of the statute of repose causes injury before the repeal of the statute and suit is filed after the repeal of the statute, is the statute available as a defense to the action? If a product manufactured before enactment of the statute of repose causes injury after the repeal of the statute of repose, is the statute of repose a defense to the action? If a product is manufactured after enactment of the statute of repose and causes injury after the repeal of the statute of repose, is the statute available as a defense?

The resulting crazy quilt of artificial time lines will bear no reasonable relationship to any legitimate purpose, legislative or otherwise. Retrospective application of Pullum and prospective application of the repeal is antithetical to fundamental concepts of equal justice and uniform treatment under the law. Claims for personal injury and wrongful death should not be barred before they accrue, but should be allowed to be brought within the traditional statutory time limitations triggered by the accrual of the cause of action.