IN THE SUPREME COURT OF FLORIDA

CASE NO. 70-099

WILLIAM A. BRACKENRIDGE,

Petitioner,

vs.

AMETEK, INC. and BARING INDUSTRIES, INC.,

Respondents.

REPLY BRIEF TO ANSWER BRIEFS OF AMETEK, INC. AND BARING INDUSTRIES, INC.

BETH TYLER VOGELSANG, ESQUIRE
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A. Brackenridge had a cause of action prior to the Florida Supreme Court's ruling in Pullum

The Respondent/Baring Industries, Inc. first argues that it is doubtful that Brackenridge had a cause of action prior to Pullum. This argument is meritless. The Florida Supreme Court ruled in Battilla v. Allis Chalmers Manufacturing Co., 392 So. 2d 874 (Fla. 1980), that the twelve-year product statute of repose was unconstitutional as applied to plaintiffs who suffered injuries twelve or more years after the product delivery date. This is precisely the factual situation in Brackenridge. In Battilla v. Allis Chalmers Manufacturing Co., 392 So. 2d 874 (Fla. 1980), Overland Construction Co. v. Sirmons, 369 So. 2d 572 (Fla. 1979) and Diamond v. E.R. Squibb & Sons, Inc., 397 So. 2d 671 (Fla. 1981), the supreme court expressly held that statutes which abolish a right of action before it accrues so that no judicial forum is available to an aggrieved plaintiff are unconstitutional. There is no question but that the state of law after Battilla and at the time Brackenridge filed his lawsuit was that the product liability statute of repose was unconstitutional as applied to plaintiffs who were injured by products more than twelve years after the product was delivered.

B. Pullum cannot constitutionally be applied retroactively to Brackenridge's case

Respondents argued that even if Brackenridge had a cause of action prior to Pullum, it is not unconstitutional to retroactively time bar his lawsuit. Baring Industries concedes in its brief that "an accrued cause of action is arguably a species of property protected by the due process clause of the Fourteenth Amendment." (Baring's brief at 27). Yet, Baring maintains that Brackenridge's cause of action had not accrued at the time of his injuries since the statute of repose "was in effect long before Petitioner's cause of action accrued, and the cases preceding Pullum did not definitively settle the question of the constitutionality of applying the express twelve year bar of the statute of repose to claims, such as Petitioner's, occurring after expiration of the statute of repose." This argument relies upon the same faulty premise discussed in Section A, supra, namely that Brackenridge did not have a cause of action prior to Pullum. Battilla was the controlling law at the time of Mr. Brackenridge's injury and the filing of his law suit. Pursuant to Battilla he had a viable cause of action which accrued at the time of injury.

The crux of the Respondents' arguments is that the state has the freedom to create new rights and to abolish common law rights at its will and that plaintiffs do not have vested rights in tort claims for damages under state law. The fallacy of this argument again turns on the distinction between expectations and accrued causes of actions.

Division of Worker's Compensation v. Brevda, 420 So.2d 887 (Fla. 1st DCA 1982) cited by the Respondents in support of their argument that vested rights can be retroactively abrogated without depriving one of due process rights is inapposite. The retroactivity issue in Brevda did not concern the retroactive extinguishment of one's right to sue for an injury in tort. The issue was whether Brevda could pursue attorney's fees as an element of his damages. The court noted that attorney's fees (unlike a cause of action in product liability) depend upon a statute or contract for their allowance. Id. at 890. The court held that there was no vested cause of action for recovery of fees since the right or remedy created by the statute dissolved upon repeal of the statute. There the statute had been repealed before the plaintiff had entered into a contract with his attorney.

Justice Grimes followed the "vested rights" theory in his specially concurring opinion in Nissan Motor Co., Ltd. v. Lyn Phlieger, 12 FLW 256, May 29, 1987:

> As a general rule, a decision of a court of last resort which overrules a prior decision is retrospective as well as prospective in its operation unless declared by the opinion to have prospective effect only. Black v Nesmith, 475 So.2d 963 (Fla. 1st DCA 1985). The Pullum decision was silent on the question of retroactivity. However, there is an exception to the foregoing rule which provides that where property or contract rights have been acquired under and in accordance with a previous statutory construction of the supreme court, such rights should not be destroyed by giving a restrospective operation to a subsequent overruling decision. Department of Revenue v. Anderson, 389 So.2d 1034 (Fla. 1st DCA 1980), review denied, 399 So.2d 1141 (Fla. 1981). In Florida Forest & Park Service v.

Strickland, 154 Fla. 472, 18 So.2d 251 (1944), this Court applied the exception to a case in which a worker's compensation claimant had appealed an adverse decision to the circuit court in accordance with existing law. After the circuit court had ruled in favor of the claimant but while the case was still on appeal, the supreme court had overruled a prior decision and held that those seeking review of decisions of deputy commissioners in worker's compensation cases must first exhaust their remedies by way of appeal to the Florida Industrial Commission. The Strickland court recognized that the claimant had relied on existing procedures when he appealed to the circuit court and refused to penalize him for failing to appeal to the Florida Industrial Commission when he had no reason to know that he should do so.

I find respondent to have been in a substantially similar position. When her husband died, she had more than six months to bring suit even under the statute of repose. However, because the statute of repose had been declared invalid in Battilla, she had no reason to believe that she did not have the full two years provided by section 95.11(4)(d). It was only after she had sued within that two-year period that this Court in Pullum reinstated the validity of the statute of repose. Like the claimaint in Strickland, respondent had relied on the existing statutory construction to her detriment, and as to her, Pullum should not be applied retroactively.

Justice Grimes distinguished the issue in this case, however, holding that:

The recent decisions in Pait and Cassidy v. Firestone Tire & Rubber Co., 495 So.2d 801 (Fla. 1st DCA 1986), in which Pullum was retrospectively applied may be distinguished because in both of those cases the accidents occurred beyond the twelve-year period of the statute of repose. There, the claimants' rights were acquired only as a result of accidents over which they had no control, and there was no reliance upon existing law pertaining to the length of time within which they could bring suit. (Emphasis supplied)

Although Justice Grimes distinguished our case from Nissan Motor, he acknowledged that Plaintiffs in Brackenridge's position acquired rights as a result of their accidents. He simply stated they did not rely on the law pertaining to the length of time within which they could bring suit. Equity and justice dictate that this court follow its rule in Florida Forest & Park Service v. Strickland, 154 Fla. 472, 18 So.2d 251 (1944).

C. The Legislative Amendment of Section 95.031(2), Florida Statute 1983, abolishing the State of Repose in product liability actions should be construed to operate retrospectively as to a cause of action which occurred before the effective date of the amendment.

The cases cited by the Respondents for the position that the repeal of the statute of repose cannot be applied retroactively, involved amendments to statutes of limitation which lengthened the time for filing a claim which had already expired under the prior statute of limitation. These cases do not provide authority on the issue of retroactivity of a repealing statute with regard to a statute of repose. The Legislature did not amend the statute of repose, it repealed the statute of repose. The repealed statute, in regard to its operative effect, is considered as if it had never existed. 49 Fla. Jur. 2d Statutes Section 209. Since the effect of the repeal of the statute of repose was to repeal it from its enactment, Brackenridge's cause of action was never extinguished as it was timely filed under the existing statute of limitations.

CONCLUSION

The Respondents understandably failed to rebut the basic fairness and equity arguments set forth in Brackenridge's initial brief. Since the decision in Pullum, a substantial number of plaintiffs' claims have been thrown out of court because these unlucky people were injured before the legislature could respond to the Pullum decision. At the time this defective laundry equipment was manufactured, at the time it amputated William Brackenridge's arm, at the time Mr. Brackenridge filed his law suit, at the time his appeal was pending before the Third District Court of Appeal and presently, there is no statute of repose to bar his claim. To retroactively apply Pullum to Brackenridge, particularly in light of the repeal of the statute of repose, is to deny Brackenridge basic due process rights by depriving him of his vested property right to pursue his cause of action. For the foregoing reasons the Petitioner, William A. Brackenridge, respectively requests that the decision of the Third District Court of Appeal be quashed, Pullum be applied prospectively only and/or the legislative repeal of the statute of repose be applied retrospectively.

Respectfully submitted,

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By: Beth Tyler Vogelsang
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was mailed this 4th day of June, 1987 to LAW OFFICES OF JAMES NELSON, Attorneys for Baring, One Biscayne Tower, Suite 2628, Two South Biscayne Boulevard, Miami, Florida; STROOCK & STROOCK & LAVAN, Attorneys for Ametek, 3300 Southeast Financial Center, Miami, Florida; and STEVEN R. BERGER, P.A., Suite B-5 8525 S. W. 92nd Street, Miami, Florida 33156.

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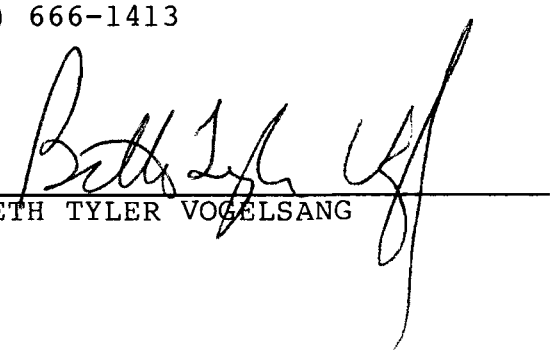
By: 
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