IN THE SUPREME COURT OF FLORIDA

CASE NO. 70,158

THIRD DISTRICT CASE NO. 86-238

ROBERT P. WALLIS, *

Petitioner, *

v. *

THE GRUMMAN CORPORATION, *

Respondent. *

ON REVIEW OF A DECISION OF
THE DISTRICT COURT OF APPEAL
THIRD DISTRICT

PETITIONER'S REPLY BRIEF

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I

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

Grumman confuses two distinct issues:

1. Whether the repeal of the statute of repose operates retroactively.

2. If so, whether Grumman's rights vested prior to the repeal so as to insulate Grumman from the retroactive application of the repeal.

A. THE REPEAL OPERATES RETROACTIVELY WITH REGARD TO CASES THAT WERE IN LITIGATION AT THE TIME OF ITS ENACTMENT.

The law is very clear, the effect of an act repealing a remedial statute is to obliterate the repealed statute as if it had never been enacted, except as to suits that were commenced, prosecuted and concluded while it was an existing law. An action is not considered concluded while an appeal is pending before an appellate court having jurisdiction to review it, State v. Revels, 109 So.2d 1 (Fla.1959); Tel Service, Inc. v. General Capital Corporation, 227 So.2d 667 (Fla.1969); Rothermel v. Florida Parole and Probation Commission, 441 So.2d 663 (Fla.1st DCA 1983); Gewant v. Florida Real Estate Commission, 166 So.2d 230 (Fla.3rd DCA 1964).

Foley v. Morris, 339 So.2d 215 (Fla.1976) and Homemakers, Inc. v. Gonzalez, 400 So.2d 965 (Fla.1981) did not involve repeal statutes; they dealt with amendments that changed the length of statutes of limitation, but did not repeal those statutes. The courts that have relied on those cases as authority for limiting the retroactive application of the statute abolishing the products liability statute of repose have erred because they have failed to distinguish between the two categories of legislative enactments.

The Petitioner must confess that in his initial brief he may have dwelt too much on the analogy between the repeal of the statute of repose and amendments lengthening statutes of limitation when distinguishing Foley and Gonzalez. Here, he wishes to make clear that the law governing this case is the law dealing with repeal statutes.

Under that body of law there is no need for the legislature to have expressed an intent that the repeal be applied retroactively in order for the repeal to be treated in that manner. The reason for this is that repealing statutes are generally considered retroactive where there is no savings clause or general statute limiting the effect of the repeal, 49 Fla. Jur.2d Statutes §209.

Grumman's argument that the inclusion of an effective date for the operation of a statute rebuts the contention that a retrospective application of the law was intended is wrong. All legislative enactments have an effective date. That date can be

set by the legislature or, if no date is set, it is the date the act becomes law.

The comment in State Department of Revenue v. Zuckerman-Vernon Corporation, 354 So.2d 353, 358 (Fla.1977) referred to in Grumman's Brief (pp.9-10), stating in effect that the statute being construed should not be given retrospective application because it contained an effective date of July 1, 1977 is not applicable to this cause for two reasons:

1. The statute is Zuckerman-Vernon was a substantive act, regarding which the presumption was against retroactivity; whereas the statute in this case in a repealing act which carries a presumption of retroactivity.

2. The establishment of a July 1st effective date should, in nearly all instances, be given very little weight because that is the traditional date given to statutes that are to go into effect immediately after the adjournment of the legislature.

Examination of the repealing statute in this case, Ch.86-272 §2, Laws of Florida (1986) reveals that despite being giving a July 1, effective date, the law was not approved by the Governor and filed in the office of the secretary of state until July 9, 1986 (A.1-2). In essence, the July 1st date was merely an indication by the legislature that the law was to go into effect as soon as possible.

If the effective date had been postponed for a significant amount of time, Grumman might be able to take comfort from that fact, but the July 1st date assigned to the repealing act is not an indication of legislative intent to reverse the usual presumption of retroactivity accorded to repealing statutes.

B. GRUMMAN DOES NOT HAVE A VESTED RIGHT IN THE STATUTE OF REPOSE.

Grumman's contention that it has a vested right in its repose defense has appeal only if the history of the case, the history of the repose statute in this court and the nature of the statute are ignored.

The statute of repose does not provide immunity from suit. It, like statutes of limitation with which it is intimately linked, provide defendants a defense in bar which they can either invoke or waive. A suit filed after the expiration of a statute of limitation or repose is not void on its face, rather it is subject to the defense being raised either in the answer or by appropriate motion. If the defense is not raised, even though available, the suit can proceed to a conclusion on the merits.

In this case, Grumman raised the repose defense in August 1978 by way of a motion for summary judgment (R.25). The trial court granted the motion (R.41), but vacated its order prior to entry of a final judgment (R.60) upon the authority of this court's decision in Overland Construction Co. v. Sirmons, 369 So.2d 572 (Fla.1979), construing a similar repose provision contained in §95.11 (3)(c) Florida Statutes (1975).

Grumman did not appeal the ruling and the litigation continued to be vigorously fought by both sides. In 1981, this court's decision in Battilla v. Allis Chalmers Manufacturing Company, 392 So. 2d 874 (Fla.1981) construing §95.031 (2) Florida Statutes (1975) vindicated the trial court's 1979 ruling. Thereafter, the litigation proceeded and the case was within several months of trial when this court rendered its decision in Pullum v. Cincinnati, Inc., 476 So.2d 657 (Fla.1985), overturning Battilla.

Once again, Grumman filed a motion for summary judgment and this time it was successful (R.327). The Petitioner, Wallis, appealed and during the pendency of the appeal the legislature repealed the statute.

This history reveals that Grumman never had a fully vested right in the statute of repose. If Grumman had succeeded in obtaining a summary judgment in 1978 and if Wallis had not appealed, Grumman's right to be free of litigation on the basis of the statute would have vested. That did not happen. Instead, Grumman lost its defense because the statute was declared unconstitutional.

When Pullum overruled the finding of unconstitutionality, Grumman was given a second chance to hide behind the repose defense, but that defense never became final because the summary judgment dismissing the complaint was appealed. The question of whether the repose statute precluded Wallis' action was still undecided when the statute was repealed.

Wallis must be given the benefit of that repeal because of the rule that cases pending on appeal are governed by the law existing after the enactment of a repealing statute, State v. Revels, supra. If a repeal eliminates a defense, then that defense is lost.

The notion that the running of a statute of limitation prior to the repeal of the statute, vests the defense and insulates it from the repeal does not apply to statutes of repose because of the essential difference between the two types of laws.

A statue of limitation is designed to give an injured party a fair amount of time to file suit after his cause of action has accrued. If the Plaintiff fails to do so, he has only himself to blame and it is reasonable that he not be afforded any benefit from the repeal or extension of the limitation period. [1]

On the other hand, a statute of repose bars an action before the cause of action ever accrues and the Plaintiff's diligence or lack thereof, has nothing to do with the applicability of the bar. It was this harshness that led this court to find the various repose statutes unconstitutional in Overland and Battilla.

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[1]In reality, limitation's statutes are never really totally repealed. They are lengthened or shortened, but there is always some limitation period.

Although the court receded from that constitutional interpretation and accorded greater deference to the legislature's finding of a need for the repose statutes, the change does not preclude the court from holding that statutes of repose do not finally vest for purposes of a repealing statute until either the right to the defense is finally adjudicated or the applicable statute of limitation has run without suit being filed.

Such an interpretation in this case would give effect to the legislature's determination that it is inequitable to use a statute of repose to destroy a products liability cause of action.[2] The concept of vesting is part of the law governing the finality of judicial endeavor. That law is governed by notions of fairness and equity.

The legislature has now found that the products liability statute of repose was unfair. This court should give the widest possible effect to that legislative judgment by permitting this and other similar cases to proceed to their final conclusions on their merits.[3]

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[2]Representative Upchurch, The House sponsor of the repealing amendment made it clear that the inequities caused by the statute were at the heart of the repeal, see A.3-4.

[3]The eminent American philosopher, Yogi Berra, once observed that the "...game ain't over, until its over." This court should rule that the "defense ain't vested, until the appeal is over."

II

IF THE REPEAL OF THE STATUTE OF REPOSE DOES NOT OPERATE RETROSPECTIVELY, THE DECISION IN PULLUM V. CINCINNATI, INC., WHICH OVERRULED BATTILLA V. ALLIS CHALMERS MANUFACTURING CO., 392 SO.2D 874 (FLA.1980) SHOULD NOT APPLY SO AS TO BAR A CAUSE OF ACTION THAT ACCRUED BEFORE THE PULLUM DECISION.

Grumman seems to argue that because of the weight of lower court authority this court is compelled to rule that Pullum should be construed so as to destroy causes of action that were pending when that decision was rendered. That is not so.

This court is the arbiter of its own decisions. It is within the court's power to decide that the damage caused by a decision that was swiftly repudiated by the legislature on equitable grounds, should be limited.

The preference in favor of deciding cases on their merits and the loss of the underlying rationale for Pullum through legislative repeal combine to provide a persuasive reason for restricting Pullum's reach.

The Petitioner urges the court to undertake strong damage control measures by declaring that Pullum does not apply retroactively.

III

THE DISTRICT COURT OF APPEAL ERRED WHEN IT AFFIRMED THE SUMMARY JUDGMENT IN FAVOR OF GRUMMAN ON COUNT III OF THE COMPLAINT. THAT COUNT ALLEGES THE BREACH OF THE DUTY TO WARN OF A KNOWN DEFECT. BREACH OF THE DUTY TO WARN DOES GIVE RISE TO A CAUSE OF ACTION FOUNDED ON THE DESIGN, MANUFACTURE, DISTRIBUTION OR SALE OF PERSONAL PROPERTY. CONSEQUENTLY, THE CAUSE OF ACTION IN COUNT III IS NOT BARRED BY THE STATUTE OF REPOSE.

The Respondent has wholly ignored the Petitioner's argument that a cause of action for failure to warn about the dangerous nature of a product is fundamentally different then actions for negligence, strict liability and warranty "founded on the design, manufacture, distribution or sale of personal property".

The action for failure to warn is "founded" on the duty to warn about the dangerous nature of a product, not on the improper design or construction of that product. Actions for negligence, etc., founded on improper design or manufacture, are for the breach of the duty to design and manufacture the product. The distinction may be subtle, but it is real and leads to the inevitable conclusion that the repealed statute of repose did not cut off a duty that persisted so long as the product was in use.

In his main brief, the Petitioner demonstrated that the manufacturers of airplanes have a continuing legal obligation to warn about defects in their products. The Respondent also did not confront the implications arising from that duty. The effect

of the lower court's ruling is to deny the Petitioner a remedy for a duty that continues beyond the twelve year limitation imposed by the statute of repose. Courts traditionally abhor a right without a remedy. This court should not deny Floridians a right to recover damages when aircraft manufacturers shirk the duty required of them by custom, law and common decency.

The cases from other jurisdictions cited by the Respondent should not be considered adverse precedent. They all construe statutes that are worded quite differently from the former Florida products liability repose statute. Britt v. Schindler Elevator Corporation, 637 F.Supp.734 (D.C.D.C.1986) involved a statute that barred any tort action resulting from unsafe improvements to real property, a far broader prohibition then the one involved here.

In Davidson v. Volkswagenwerk, A.G., 74 N.C. App.193, 336 S.E.2d 714 (1985) rev. den. 316 N.C. 375, 342 S.E.2d 892 (1986) the court upheld an attack against the North Carolina statute of repose based on the theory that an extra ordinary post-manufacture duty arises under certain circumstances and that a breach of that duty is beyond the statute. The nature of the circumstances that the Plaintiff's theory was based upon was not stated in the opinion. It is therefore impossible to know whether the case dealt with an issue similar to the one raised here.

In addition, the North Carolina statute bars "action(s)...based upon or arising out of..." product liability, again a much broader standard than the one set out in our statute.

Barwick v. The Celotex Corporation, 736 F.2d 949, 963 (4th Cir.1984) involves an asbestos exposure claim brought more than ten years after the last exposure. The statute construed, provided that suit could not be brought more than ten years from the last act of the defendant giving rise to the claim for relief. The court pointed out that the "last act" in a failure to warn situation must have been the last contact or exposure to the product and therefore the statute was violated.

The Petitioner agrees that the duty to warn in this case would cease when the last exposure to the danger caused by Grumman occurred. That would, of course, be the moment of the accident. If anything, the Barwick case supports Wallis' contention that the duty to warn survives the expiration of the repose statute.

In Dague v. Piper Aircraft Corporation, 275 Ind. 520, 418 N.E.2d 207 (1981) the statute defined a product liability action as one for injury caused by or resulting from, the manufacture, construction or design of any product. This is a much different and broader standard than the "founded on" standard in the repealed Florida statute. Dague must therefore be distinguished from the present case and is not authority for

the Respondent's position. DeHoyos v. John Mohr & Sons, 629 F.Supp.69 (D.C.N.D.Ind.1984) merely followed Dague and is not developmental.

Examination of the foreign authorities cited by the Respondent results in the conclusion that this court must construe our former statute on its face and without help from other courts.

The appropriate construction that should be given is that it does not bar suits founded on the breach of a duty to warn.

CONCLUSION

This court's ruling should preserve the present case and those similarly situated from being extinguished because of the court's construction in Pullum of the now abandoned products liability statute of repose.

Respectfully submitted,

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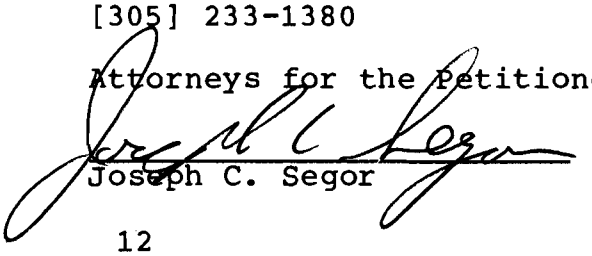

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioner's Reply Brief was mailed May ~~9~~ 11th, 1987 to: James E. Tribble, Esq., and Anthony D. Dwyer, 2400 AmeriFirst Building, One Southeast Third Avenue, Miami, Florida 33131, Attorney for Respondent.

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