SUPREME COURT OF FLORIDA

CHARLES DAVID HARRISON and VICKY EULEEN HARRISON, his wife,

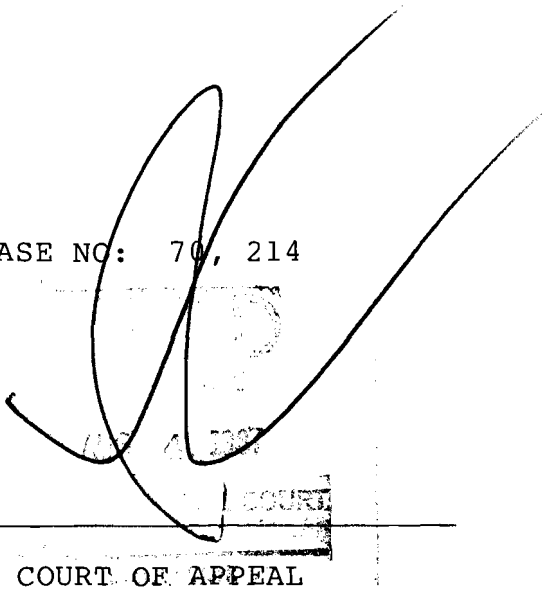
Appellants,

vs.

HYSTER COMPANY, a Nevada corporation,

Appellee.

CASE NO: 70, 214



ON APPEAL FROM THE SECOND DISTRICT COURT OF APPEAL
THE STATE OF FLORIDA

INITIAL BRIEF ON THE MERITS OF APPELLANTS, CHARLES DAVID HARRISON and VICKY EULEEN HARRISON, his wife

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STATEMENT OF CASE

References to portions of the Record on Appeal will be identified by an "R" followed by the page number(s) in the Record.

References to the Appendix of this Brief will be identified by an "A" followed by the page number(s) in the Appendix.

The parties referred to in this Brief will be noted as the HARRISONS for the Petitioners, and HYSTER, for the Respondent, unless otherwise specified.

This is an action by the HARRISONS against HYSTER, for the breach of warranty, strict liability, and negligence (R-1-4).

On January 27, 1986, HYSTER filed a Motion for Summary Judgment (R-8-10).

On June 10, 1986, the Court signed an Order granting HYSTER'S Motion for Summary Judgment (R-62), and entered a Final Judgment in favor of HYSTER (R-63).

Thereafter, an Appeal was timely filed, with the Second District Court of Appeals.

On February 13, 1987 the Second District Court of Appeals affirmed the Lower Court Ruling (A-1-2), and Notice to Invoke Jurisdiction was timely filed.

On July 6, 1987 the Supreme Court of Florida issued an Order accepting Jurisdiction on this matter and the initial brief on the merits was timely filed.

STATEMENT OF FACTS

On December 27, 1982, near Bartow, Polk County, Florida, while CHARLES DAVID HARRISON was using a HYSTER COMPANY lift-truck, the forks on the HYSTER COMPANY lift-truck fell on top of CHARLES DAVID HARRISON, severely injuring his leg, elbow and arm.

The lift-truck was manufactured on or about April 17, 1962 (see Affidavit attached to HYSTER'S Motion for Summary Judgment (R-8-10), but the cause of action did not accrue until December 27, 1982, when CHARLES DAVID HARRISON was injured by the lift-truck in question.

Subsequently, on December 3, 1985, the HARRISONS filed their lawsuit against HYSTER COMPANY for negligence, breach of warranty, and strict liability.

SUMMATION OF ARGUMENT

The following is a summation of the arguments herein stating that the Supreme Court should reverse the lower courts rulings granting and upholding a final summary judgment.

1. A first key element in applying Florida Statute 95.031 retrospectively rather than prospectively is the general principle "expressio unius est exclusio alterius", which means the mentioning of one thing implies the exclusion of another. Several cases are cited infra, in support of this argument, and its application in applying Florida Statute 95.031 in a retrospective manner, based upon the language in Florida Statute 95.031 (3) stating an applicable date of October 1, 1986 for this act to effect with regard to libel and slander, but, does not state any (emphasis added) date for products liability and fraud.

2. Additionally, the decision of the second district court of appeal does not allow the HARRISONS access to the courts pursuant to article I section 21 of the Florida Constitution, and any application of this statutory revision of 95.031 would be circumventing the will of the legislature.

ARGUMENT

POINT I.

THE DECISION OF THE DISTRICT COURT OF APPEAL, SECOND DISTRICT OF FLORIDA, IN AFFIRMING THE TRIAL COURT'S SUMMARY FINAL JUDGMENT FOR HYSTER IS IN ERROR IN THAT FLORIDA STATUTE 95.031 (3) SHOULD BE APPLIED RESTROSPECTIVELY, TO ALLOW THE HARRISONS CLAIM, RATHER THAN THE PROSPECTIVE APPLICATION USED BY THE DISTRICT COURT OF APPEAL, SECOND DISTRICT OF FLORIDA.

In the spring of 1986, the Florida Legislature revised Florida Statute 95.031 (2) to eliminate the so called twelve-year Statute of Repose for products liability. In addition, the Florida Legislature, within the same revised Statute, altered the limitation period for libel and slander, Florida Statute 95.031 (1), and in Florida Statute 95.031 (3), stated that sections 1 and 2 would apply as follows:

> "Section 1 of this Act shall take effect October 1, 1986, and shall apply to causes of action occurring after the date, and Section (2) of this Act shall take effect on July 1, 1986."

A key question in this matter is whether the revised edition of Florida Statute 95.031 (2) is applicable for causes of action occurring prior to July 1, 1986. As was previously stated in this brief, the HARRISONS' cause of action arose on December 27, 1982, and under the judicial interpretation of Florida Statute 95.031 (2), in the case of Battilla v. Allis Chalmers Manufacturing Company, 392 So. 2d 874 (Fla. 1980), when the HARRISONS filed suit in December of 1985, the HARRISONS would not have been subjected to a Statute of Limitations defense, had this case been applicable. However in the interim period the case of Pullum v. Cincinnati, Inc., 476 So. 2d 657 (Fla. 1985), had become the applicable law. In Pullum id. the Court stated as

follows:

> "We recede from this decision (Battilla v. Allis Chalmers Manufacturing Company, 392 So. 2d 874 (Fla. 1980), and hold that Section 95.031 (2) is not unconstitutionally violative of Article I of Section 21 of the Florida Constitution. The Legislature, in enacting this Statute of Repose, reasonably decided that perpetual liability places an undue burden on manufacturers, and it decided that twelve (12) years from the date of sale is reasonable time for exposure to liability for manufacturers of a product."

The above, decided in August 1985, in effect, reversed the Battilla, supra, decision, and left the HARRISONS without any access to the Courts for their grievances.

It is readily admitted that in most instances a Statute of Limitation is to be prospectively applied, if the Statute is enlarged, Martz v. Rishaman, 144 So. 2d 83 (Fla. 1st DCA 1962). However, there are several exceptions to the normal prospective application of the Statutes, and several of these exceptions are applicable in the case at bar.

A key exception, which applies to the present case, and is a basis for the Court to reverse the lower court ruling, involves the general principal of "expressio unius est exclusio alterius", which simply means the mentioning of one thing implies the exclusion of another. (Fla. Jur. II, Vol 35; Statutes, Section 126). Therefore, where a Statute allows or forbids certain things, it is ordinarily construed to be excluding from its operation all those not expressly mentioned. Thayer v. State of Florida, 335 So. 2d 815 (Fla. 1976); State ex rel. Shevin v. Indico Corporation, 319 So. 2d 173 (Fla. 1st DCA 1975); Dobbs v. Sea Isle Hotel, 56 So. 2d 341 (Fla. 1952); and Devin v.

City of Hollywood, 351 So. 2d 1022 (Fla. 4th DCA 11976).

In Thayer, supra, the court stated

> "where a Statute enumerates the things on which it to operate or forbid certain things it is ordinarily to be construed as excluding from its operation all those things not expressly mentioned."

The cases of State, ex rel. Shevin, supra, and Devin, supra, also stand for the same general principal. In the case of State, ex rel. Shevin, supra, the question revolved around Florida Statute 60.05, which dealt with the law of nuisance. The facts in this case were that the State sued the Appellees to prevent the building of a condominium complex on the basis of a permanent nuisance. Eventually, the State lost the case, and the Trial Court awarded the Appellee, as the prevailing party, costs of the action. On appeal, the Court stated that Florida Statute 60.05 expressly states in Subsections (1), (3), and (4), when costs may be taxed to the losing party. Nowhere in any of those Subsections does it state that the loser in this case, the State, was among those cited by the Statute, to pay costs. Therefore, the Court reversed the Trial Court's action awarding the costs to the prevailing party, citing the maxim of law stated above.

In Dobbs, supra, the applicable Statute was Florida Statute 440.02 (18) and 440.19 (1) which allowed for a two-year statutory period from the time of injury for an individual to file under the Florida Worker's Compensation Act, with one listed exception concerning payment of compensation made without an award on account of such injury or death. The exception in this case was that a claim could be filed within two (2) years after the date of the last payment. The Court, in rendering its opinion, stated

that the Legislature clearly enunciated the only exception to the two-year time limitation, and all other speculative variances from the Statute would not be allow.

The above general maxim of law cited in the various cases is applicable to revised Florida Statute 95.031 (2) due to the wording of Subsection (3) of Florida Statute 95.031, which, clearly states that the Act for slander and libel shall take effect as of October 1, 1986, and it shall apply to all causes accruing after that date (emphasis added). Subsection (3), however, does not make that same statement for products liability and fraud. It only states that the Act takes effect July 1, 1986, and is silent as to any cause of action which accrues prior to July 1, 1986.

As stated, a key to this Statute is the lack of any statement concerning an effective date when the cause of action accrues. However, there are several other general principals of law that are most helpful in construing the Statute.

First of all, in the case of Bermudez v. Florida Power and Light Company, 433 So. 2d 565 at page 567 (Fla. 3rd DCA 1983), the court stated that:

> "The Legislature is presumed to know the existing law when it enacts a Statute, and it is presumed that the Legislature was acquainted with the judicial construction of the former laws on the subjects concerning which some Statute is enacted." (emphasis added)

In the present situation, as was previously stated, Florida Statute 95.031 (2) had been judicially interpreted for some five (5) years, from 1980 up through August, 1985, as a result of the case of Battilla, supra, as not being an absolute twelve-year bar for

any cause of action in products liability, and in the case of HARRISONS, under Battilla's, supra, reasoning, the HARRISONS would have had no difficulty bringing an action.

As it has already been stated the Pullum, supra, decision rendered by the court in August 1985 had the chilling effect of cutting off the HARRISONS cause of action. In an immediate (emphasis added) response, the Legislature in the 1986 session, completely eliminated the twelve-year Statute of Repose under Florida Statute 95.031 (2). The obvious (emphasis added) intent of the Florida Legislature was to eliminate the Pullum, supra, decision. The language that the Court uses in Pullum stating that:

> "The Legislature enacting the Statute of Repose, reasonably decided that perpetual liability places an undue burden on manufacturers, and decided twelve-years from the date of sale is a reasonable time for exposure to liability from the manufacturers product."

was in error, and there can be no stronger indictment of such error than the Legislature's immediate response to the holding in the Pullum, supra, case.

Further, in the case of State v. Webb, 398 So. 2d 820, (Fla. 1981), at page 824, the Court stated:

> "In looking at the Legislative intent, we must consider Act as a whole, the evil (emphasis added) to be corrected, the language of the Act, including its title, the history (emphasis added) of its inactment, and the state of law already in existance bearing on the subject."

Additionally, in the case of Devin, supra, the Court stated that the primary guide to statutory interpretation is to determine the purpose of the Legislature; any uncertain issue should be resolved by an interpretation toward (emphasis added)

the public benefit (emphasis added); it is not the function of the judicial branch to supply admissions to the Legislature.

Based on the above it becomes obvious that a decision not to apply the revised Florida Statute 95.031 retroactively will circumvent the obvious intent of the Legislature in repealing the Statute of Repose.

ARGUMENT

POINT II

THE DECISION OF THE DISTRICT COURT OF APPEAL, SECOND DISTRICT OF FLORIDA IN THE CASE AT BAR, IN UPHOLDING THE FINAL SUMMARY JUDGMENT OF THE TRIAL COURT AND FAILING TO APPLY FLORIDA STATUTE 95.031 (3) IN A RETROSPECTIVE MANNER DENIES THE APPELLANTS ACCESS TO THE COURT AS GUARANTEED BY ARTICLE I SECTION 21 OF THE FLORIDA CONSTITUTION.

Article I section 21 of the Florida Constitution states as follows:

> "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay."

The decision in this matter by the District Court of Appeals, Second District of Florida has effectively construed Article I section 21 of the Florida Constitution as not affecting the HARRISONS. However, in the case of Dominguez v. Bucyrus-Erie Company, 503 So. 2d 364 (Fla. 3d DCA 1987), the court was again faced with this question of retroactive application of Florida Statute 95.031 (2) and in fact the court upheld the prospective application of the statute. However, Judge Ferguson, in a concurring opinion, stated that

> " Affirmance is required by Shaw (Shaw v. General Motors Corp., 503 So. 2d 362 Fla. 3d DCA 1987) otherwise I would disent. For giving the revised section 95.031 (2), Florida Statute (supp. 1986) retrospective application is most compelling."
>
> The Florida Constitution, article I, section 21, provides that "(t)he court shall be opened 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 . Hollan 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 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 Pullum, 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)."

In addition, it is most interesting to note that in the case of Smith v. Sturm, Ruger, Smith & Company, Inc., 12 F.L.W., 1746 (Fla. 2d DCA 1987) that while the second district court of appeal affirmed the prospective application of the statute the court, in its opinion quoted Judge Ferguson opinion in the Dominguez, supra, case and stated that

> "for the following reasons given by Judge Ferguson in his concurring opinion in Domingues v. Bucyrus-Erie Company, 503 So. 2d 364 (Fla. 3d DCA 1987), which we believe have merit, a determination that the legislative intent behind the 1986 abolition of that statute of repose was that the abolition was to have been retroactive would not be without substantial basis."

It becomes very apparent from the above cases that at least several district court of appeals in the state of Florida believe that the retrospective application of Florida Statute 95.031 could be correct and proper, and several of the district courts have in fact certified the retrospective versus the prospective application of the Statute to the Supreme Court as a question of great importance. Shaw, supra, Smith, supra. This it becomes even more apparent, however, the only logical and proper thing to do is to allow the HARRISONS access to the courts as is mandated by article I section 21 of the Florida Constitution.

CONCLUSION

Contrary to either the appellees interpretations of the Legislature's expressed or implied intent, or the District Court of Appeals Second District of Florida, in the case at bar, Florida Statute 95.031 (3) should be retroactively applied for the following reasons:

1. The language of the Statute itself, which specifically does not allow the Statute to take affect for slander and libel for any causes of action not accruing before October 1, 1986, but made no similar statement for products liability cases.

2. The Legislative intent is not stated anywhere with specific regard to prospective verses retrospective application, but all surrounding circumstances, which is a vital consideration as cited in the Webb, supra, case, shows that the Legislature clearly disagreed with the judicial result achieved in the Pullum's, supra, case, and in response eliminated the twelve-year Statute of Repose in its entirety.

3. The above reasons give in Subsection (2) again go hand-in-hand with the Webb, supra, case stating that "the evil to be corrected is a factor to be considered." Here, the obvious evil to be corrected is the denial of access to the Courts to those such as the HARRISONS. Obviously, Pullum had the effect to deny the HARRISONS access to the Courts through no fault of their own, and clearly this evil is to be corrected. There is no doubt that the statutory revision of Florida Statute 95.031 (s) by the Florida Legislature is to be considered retrospective for all of the reasons stated above. To do anything else would circumvent the intent of the Legislature and deny access to the Courts to

the very people the Legislature intended to gain such access by the revision of the Florida Statute 95.031.

Respectfully submitted,

DeVANE, MUNSON, ALLEN
& LANGSTON

BY: Philip O. Allen
PHILIP O. ALLEN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail to FOWLER, WHITE, GILLEN, BOGGS, VILLAREAL & BANKER, George A. Vaka, Esquire, Post Office Box 1438, Tampa, Florida 33601; attorney for Appellee, on this 31st day of July, 1987.

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