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

JURISDICTIONAL BRIEF OF APPELLANTS, CHARLES DAVID HARRISON and VICKY EULEEN HARRISON, his wife

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SUMMATION OF ARGUMENT

The following is a summation of the arguments herein stating that the Supreme Court should take jurisdiction of this matter:

1. There are several District Court of Appeal cases and Supreme Court cases, which conflict with the case at Bar, as decided by the Second District Court of Appeal, State of Florida, with regard to retrospective vs. prospective application of Florida Statute 95.031. A key area involves the general principle "expressio unius est exclusio" which means the mentioning of one thing implies the exclusion of another. In the case at Bar, Florida Statute 95.031 (3) as amended by the Florida Legislature in the Spring of 1986, clearly states an applicable date of October 1, 1986 for this act to take effect with regard to slander & libel, but does not state any date for liability and fraud. As a result the above expressed principle of Law comes into play, along with various cases, in this area.

2. The District Court of Appeal, Second District of Florida's decision in the case at bar holding that Florida Statute 95.031 is to be applied in a prospective manner effectively denies the petitioner access to the courts as is guaranteed by Article I section 21 of the Florida Constitution.

3. Finally, the case of Pait v. Ford Motor Company, 500 So.2d 743 (Fla. 5th DCA 1987), raised the same questions involved in the case at Bar, and these questions where certified to Supreme Court by the Fifth District Court of Appeals to be of great public importance in the Pait I.d., case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded to FOWLER, WHITE, BOGGS, VILLAREAL, AND BANKER, P.A.; GEORGE A. VAKA, ESQUIRE Post Office Box 1438 Tampa, Florida 33601; on this 27 day of March, 1987.

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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.

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.

ARGUMENT

POINT I

THE DECISION OF THE DISTRICT COURT OF APPEAL, SECOND DISTRICT OF FLORIDA, IN THE CARE AT BAR DOES NOT ALLOW FLORIDA STATUTE 95.031 (3) TO BE APPLIED RESTROSEPECTIVELY, AND IS THEREFORE IN CONFLICT WITH DECISIONS OF THE FLORIDA SUPREME COURT AND OTHER DISTRICT COURTS OF APPEAL.

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), state 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 that 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, 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, under the case of Pullum v. Cincinati, Inc., 476 So.2d 657 (Fla. 1985), which was applicable at that time 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 a reasonable time for exposure to liability for manufacturers of a product."

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

In most instances, a Statute of Limitation is to be propspectively 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 to the present situation.

The key exception, which applies to the present case, and is a basis for this Court to take Jurisdiction 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 1976).

In Thayer, supra, the general statement

> "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 state 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 allowed.

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 that accrue after July 1, 1986.

In summing up the above arguments, the cases of Thayer, supra, State, ex rel. Shevin supra, Dobbs supra, and Devin, supra, are in conflict with this case, which applies Florida Statute 95.031 in a retrospective manner.

ARGUMENT

POINT II

THE DECISION OF THE DISTRICT COURT OF APPEAL, SECOND DISTRICT OF FLORIDA IN THE CASE AT BAR, IN CONTINUING FLORIDA STATUTE 95.031 (3) TO HAVE PROSPECTIVE EFFECT, INDICATES THAT ARTICLE I OF SECTION 21 OF THE FLORIDA CONSTITUTION WAS NOT VIOLATED.

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. The Court has failed to realize that by holding Floria Statute 95.031 (3) applies propectively, the HARRISONS are denied access to the Courts under Article I section 21 of the Florida Constitution.

ARGUMENT

POINT III

THE DECISION OF THE COURT OF APPEALS, SECOND DISTRICT OF FLORIDA, IN THIS MATTER IS OR POINT WITH A RECENT DECISION OUT OF THE FIFTH DISTRICT COURT OF APPEALS, WHICH THE FIFTH DISTRICT CERTIFIED AS A QUESTION OF GREAT PUBLIC IMPORTANCE.

In the case of Pait v. Ford Motor Company, 500 So.2d 743 (Fla. 5th DCA 1987), the question of retroactive effect of Florida Statute 95.031 was raised by the appellant.

The Court, similiar to the present case, held that the Statute did not apply in a retroactive fashion. However, the court cited the following question to the Florida Supreme Court, which is identical to the case at Bar.

> "are recurring and appear to be of great public importance, we certify the following to the Supreme Court
>
> I
>
> "as is stated in the above case, the question of retroactivity of Florida Statute 95.031 is of great public importance and the court should not act accordingly with regard to Jurisdiction in this matter."

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BY: _____
JAMES A. YANCEY

CONCLUSION

Petitioners request the Florida Supreme Court to take jurisdiction of this case under the provisions of rule 9.030 (2) of the Florida Appellate procedure Rules, on the following basis:

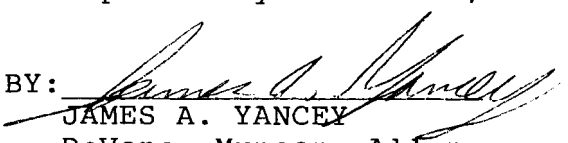
1) That the decision of the Second District Court of Appeal, in the case at bar is in direct conflict with decisions of other District Courts of Appeal and with decisions of the Florida Supreme Court on the same points of Law.

2) The decision of the Second District Court in the case at bar construes Article I section 21 of the Constitution of the State of Florida.

3) The key questions addressed in the case at bar has been certified, in the fifth District Court of Appeal in the Pait v. Ford Motor Company, case, to be of great public importance.

Based on the above the Supreme Court should take Jurisdiction of this matter.

Respectfully submitted,

BY: 

JAMES A. YANCEY
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& Langston

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