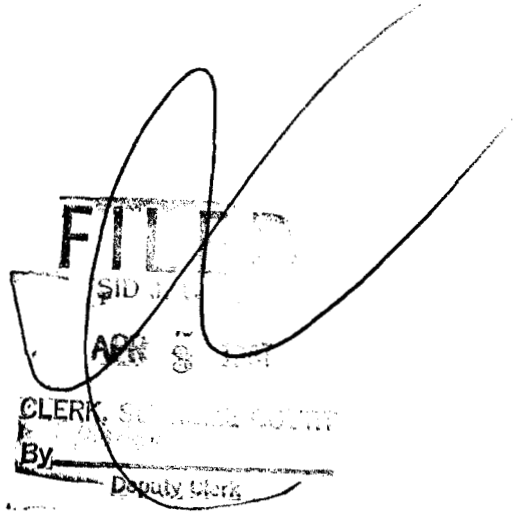
IN THE SUPREME COURT
STATE OF FLORIDA
TALLAHASSEE, FLORIDA



CHARLES DAVID HARRISON and
VICKY EULEEN HARRISON, his
wife,

Appellants/Petitioners,

vs.

CASE NO.: 70,214

HYSTER COMPANY, a Nevada
corporation,

Appellee/Respondent.

JURISDICTIONAL BRIEF OF RESPONDENTS

GEORGE A. VAKA, ESQUIRE
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TABLE CITATIONS

STATEMENT OF THE CASE AND FACTS

Respondent, Hyster Company, [1] adopts by reference the decision of the Second District Court of Appeal in this case as its statement of the case and facts. (A. 1-2)[2]

JURISDICTIONAL ISSUES

I.

WHETHER THE DECISION OF THE DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH ANOTHER APPELLATE DECISION.

II.

WHETHER THE SECOND DISTRICT'S INTERPRETATION OF FLORIDA STATUTE SECTION 95.031(2)(1986) THAT THE LEGISLATIVE REPEAL OF THE TWELVE YEAR STATUTE OF REPOSE FOR PRODUCTS LIABILITY SHOULD NOT BE RETROACTIVELY APPLIED DENIES THE HARRISONS' ACCESS TO THE COURTS PURSUANT TO ARTICLE I §21 OF THE FLORIDA CONSTITUTION

III.

WHETHER A DECISION OF A DIFFERENT DISTRICT COURT OF APPEAL WHEREIN A QUESTION IS CERTIFIED AS A QUESTION OF GREAT PUBLIC IMPORTANCE CONFERS JURISDICTION TO REVIEW THE PRESENT

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[1] For ease of reference herein, the Respondent, Hyster Company will be referred to by name. The Petitioners, Charles David Harrison and Vicky Euleen Harrison will be referred to by name or collectively as Petitioners.

[2] All references to the Appendix attached hereto will be referred to as (A.) followed by the appropriate page number of the Appendix.

DECISION WHERE THE SECOND DISTRICT COURT OF APPEAL DID NOT CERTIFY THE PRESENT DECISION AS PASSING UPON A QUESTION OF GREAT PUBLIC IMPORTANCE

SUMMARY OF THE ARGUMENT

The Petitioners have failed to demonstrate that this Court may exercise its discretionary jurisdiction to review the decision of the Second District Court of Appeal in the present decision. The Petitioners contend that this Court may exercise its discretionary jurisdiction in three manners. First, Petitoners contend that the decision of the Second District Court of Appeal expressly and directly conflicts with another appellate decision. In order for the Petitioners to demonstrate that conflict, they must satisfy the criteria as established in Nielsen v. City of Sarasota, 117 So.2d 731 (Fla. 1960), that is, that there is either rule or fact conflict present in the decision of the Second District. The cases cited by the Petitioners in support of their argument do not conflict with the present decision nor with the cases cited the Second District, Small v. Niagara Machine & Tool Works, ___So.2d___, 12 FLW 366, No. 86-1161 (Fla. 2d DCA 1/20/87), or this Court's decision in Foley v. Morris, 339 So.2d 215 (Fla. 1976), which formed the foundation for the Second District's decision in Small.

Petitioners also contend that the present decision violates their rights under Article I Section 21 of the Florida Constitution. Their contention in in error, however, as this Court ruled in Pullum v. Cincinnati,Inc. 476 So.2d 657 (Fla.

1985), that the statute of repose does not deny access to courts. Likewise, a retroactive application of the Pullum decision does not deny access to courts. See, American Liberty Insurance Company v. West And Conyers, Architects And Engineers, 491 So.2d 573 (Fla. 2d DCA 1986).

Finally, Petitioners assert that this Court can invoke its jurisdiction pursuant to Article V Section 3(b)(4) of the Florida Constitution. That argument is flawed, however, because the Second District did not certify this decision as passsing upon a question of great public importance. The mere fact that another district court of appeal has done so does not provide a spring board upon which the present Petitioners can invoke discretionary review in this case. See, Hillsborough Association For Retarded Citizens, Inc. v. City of Temple Terrace, 332 So.2d 610 (Fla. 1976); Bullard v. Wainwright, 313 So.2d 653 (Fla. 1975).

ARGUMENT

I.

THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH ANOTHER APPELLATE DECISION

Under Article V Section 3(b)(3), Florida Constitution (1980) this Court may only exercise its discretionary jurisdiction where the decision appealed from expressly and directly conflicts with the decision from another Florida court.

The 1980 amendment to the Florida Constitution dictates that the conflict must be "express" and contained within the written rule announced by the Court. Jenkins v. State, 385 So.2d 1356 (Fla. 1980); Dodi Publising Company v. Editorial America, S.A., 385 So.2d 1369 (Fla. 1980). Cf. School Board of Pinellas County v. District Court of Appeal, Second, 467 So.2d 985 (Fla. 1985). Mere conflicts of opinions or reasons alone are insufficient to create conflict jurisdiction. The conflict must exist between the actual decisions. Gibson v. Maloney, 231 So.2d 823 (Fla. 1970).

Typically, there are two situations which authorize the invocation of this Court's conflict jurisdiction: (1) when the decision applies a rule of law to produce a different result in a case involving substantially the same material facts as those in a prior case decided by another appellate court; or (2) where the decision announces a rule of law that conflicts with one previously announced by another appellate court. Nielsen v. City of Sarasota, 117 So.2d 731 (Fla. 1960). "Rule" conflict may be demonstrated where there is a misapplication of a rule of law in a case which contains different facts from the earlier precedent. Lubell v. Roman Spa, Inc., 362 So.2d 922 (Fla. 1978). "Conflict" must appear between the decisions and be present within the four corners of the majority decision which has been appealed. Reaves v. State, 485 So.2d 829 (Fla. 1986).

The Second District's decision simply does not contain a sufficient statement of facts to determine that there is "fact" conflict present. Even if one was to look at the facts presented in the case cited by the Second District for its decision, Small v. Niagara Machine & Tool Works, ___So.2d____, 12 FLW 366, No. 86-1161 (Fla. 2d DCA 1/20/87), none of the cases cited by the Petitioners remotely resemble the facts in Small or the present situation. Indeed, none of the cases cited by the Plaintiff address the repeal of a statute of repose or limitations. Thus, Petitioner has failed to demonstrate conflict by one acceptable means, that is by "fact" conflict.

With respect to "rule" conflict, the Second District did not announce a rule of law which conflicts with any other previously announced decision by another Court. The correct rule of law to be applied to determine whether a statute of limitations should be applied retroactively or prospectively was stated by this Court in Foley v. Morris, 339 So.2d 215 (Fla. 1976). In Foley, a medical malpractice statute of limitations was reduced by the legislature from four years to two years. The statute itself stated: "This act shall take effect on July 1, 1972." This court noted that there was nothing in the language of the act which manifested an intent by the legislature to apply the statute other than prospectively. Stating the rule of law to be applied, this Court held:

> "In most jurisdictions, in the absence of a clear manifestation of legislative intent to the contrary, statutes of limitation are construed

> as prospective and not retrospective in their operation, and the presumption is against any intent on the part of the legislature to make such a statute retroactive. Thus, rights accrued, claims arising, proceedings instituted, orders made under the former law, or judgments rendered before the passage of an amended statute of limitations will not be affected by it, but will be governed by the original statute unless a contrary intention is expressed by the legislature in the new law."

Petitioners assert that the line of cases which they have cited to the Court provide an "exception" to the applicable rule. A review of those cases demonstrates that no exception is recognized, merely a different rule stated. More importantly, the rule of statutory interpretation relied upon by the Petitioners is the improper rule to apply when the issue is the retroactive application of a statue of limitation. To even apply the rule of statutory construction as expressed in Thayer v. State of Florida, 335 So.2d 815 (Fla. 1976); Dobbs v. Sea Isle Hotel, 56 So.2d 341 (Fla. 1952); Devin v. City of Hollywood, 351 So.2d 1022 (Fla. 4th DCA 1976); State ex rel. Shevin v. Indico Corporation, 319 So.2d 173 (Fla. 1st DCA 1975), one must admit, that there is no express statement by the legislature to retroactively apply the new statute of limitations. This admission, however, is the flaw in the petitioners' analysis because once it is made, the rule expressed by this Court in Foley v. Morris, 339 So.2d 215 (Fla. 1976) is invoked.

Since the Petitioners have not demonstrated that the decision of the Second District Court of Appeal in the present case directly and expressly conflicts with any other decision by a Florida court this court should deny their request for review.

ARGUMENT

II.

THE SECOND DISTRICT'S INTERPRETATION OF SECTION 95.031(2)(1986), FLORIDA STATUTES THAT THE LEGISLATIVE REPEAL OF THE TWELVE YEAR STATUTE OF REPOSE FOR PRODUCTS LIABILITY SHOULD NOT BE RETROACTIVELY APPLIED DOES NOT DENY THE HARRISON'S ACCESS TO THE COURT PURSUANT TO ARTICLE I, SECTION 21 OF THE FLORIDA CONSTITUTION.

The Petitioners' appear to assert in Point II of their argument that if Section 95.031(2), Florida Statutes is not applied retroactively, the Harrisons would be denied the access to Courts guaranteed them under Article I Section 21 of the Florida Constitution. While it is curious that the Petitioners have not cited any legal authority for that position, it is not surprising. In Pullum v. Cincinnati, Inc., 476 So.2d 657 (Fla. 1985), this court receded from its previous decision in Battilla v. Allis Chalmers Manufacturing Company, 392 So.2d 874 (Fla. 1980) which held that Section 95.031(2) violated Article I, Section 21 of the Florida Constitution. In receding from Battilla, this Court recognized in Pullum, that the legislature reasonably decided that perpetual liability placed an undue

burden on manufacturers and that the twelve year period from the date of sale was a reasonable time for exposure to liability for the manufacturer of a product. Id. at 659.

In reality, the Petitioners' argument is that an application of the Pullum decision to their case results in a denial of access to Court. This argument is without merit, however, because Pullum merely recognized the validity of a statute which previous interpretations did not. There is no language in Pullum to suggest that it should be limited to prospective application only and it should be applied to this case. See also, American Liberty Insurance Company v. West And Conyers, Architects And Engineers, 491 So.2d 573 (Fla. 2d DCA 1986).

ARGUMENT

III.

A DECISION OF A DIFFERENT DISTRICT COURT OF APPEAL WHEREIN A QUESTION IS CERTIFIED AS A QUESTION OF GREAT PUBLIC IMPORTANCE DOES NOT CONFER JURISDICTION TO REVIEW THE PRESENT DECISION WHERE THE SECOND DISTRICT COURT OF APPEAL WHERE THE SECOND DISTRICT DID NOT CERTIFY THE PRESENT DECISION AS PASSING UPON A QUESTION OF GREAT PUBLIC IMPORTANCE.

The Petitioners assert that this Court can exercise its jurisdiction because the Fifth District in Pait v. Ford Motor Company, 500 So.2d 743 (Fla. 5th DCA 1987), certified the question regarding retroactivity of Section 95.031(2), Florida Statutes to this Court as question of great public importance.

The Petitioners conspicuously omit that the Second District did not certify any question in the present case to be of great public importance. In the absence of such a certification by the Second District, the Petitioners cannot invoke this Court's jurisdiction by attempting to bootstrap the discretionary jurisdiction that may be exercised in Pait v. Ford Motor Company in the present case.

Article V Section 3(b)(4), is quite specific. It provides that this Court:

> "may review any decision of a district court of appeal that passes upon a question certified by it to be of great public importance, or that is certified by it to be in direct conflict with the decision of another district court of appeal." (emphasis supplied)

The language of that section is neither ambiguous nor confusing. It allows this Court to exercise its jurisdiction to review a decision in which the district court of appeal has specifically certified a question to this Court as being of one of great public importance. In such a situation, this Court's review extends only to the "decision" of the district court of appeal and not to any other decision where the issue may have been certified to it. See, Hillsborough Association For Retarded Citizens, Inc. v. City of Temple Terrace, 332 So.2d 610 (Fla. 1976). Neither the certification of the question by the Fifth District in Pait v. Ford Motor Company, 500 So.2d 743 (Fla. 5th DCA 1987), nor the Petitioners' request in the present case, can

confer jurisdiction on this Court where it does not previously exist. See, Bullard v. Wainwright, 313 So.2d 653 (Fla. 1975). This Court should deny Petitioners request to review the present decision.

CONCLUSION

The Second District's decision in the present case does not expressly and directly conflict with any other reported Florida appellate decision. Likewise, its interpretation of Section 95.031(2), Florida Statutes does not result in a denial of access to courts in violation of Article I Section 21 of the Florida Constitution. Finally, the Petitioners cannot use the certification of a question by a different district court of appeal as bootstrap to confer jurisdiction upon the court to review the instant decision. Petitioners' request for review should be denied.

Respectfully Submitted,

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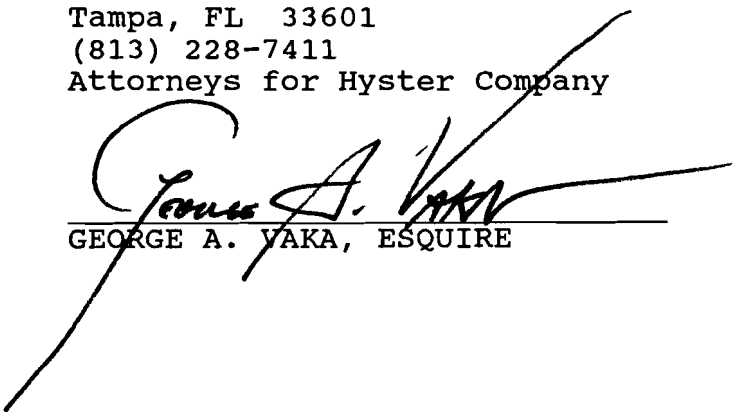
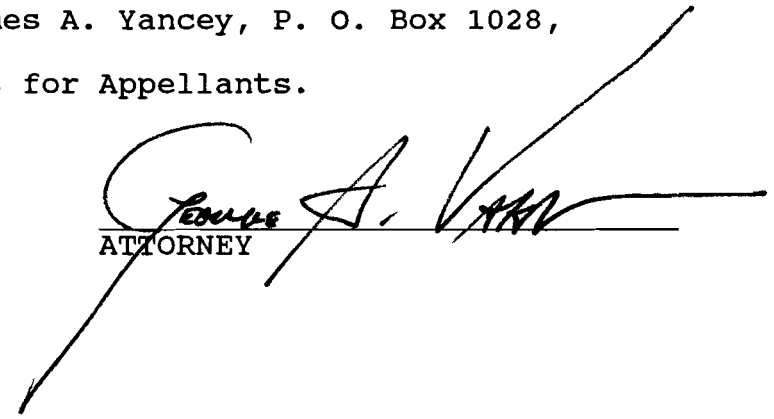


GEORGE A. VAKA, ESQUIRE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been furnished by U.S. Mail this 1st day of April, 1987: Phillip O. Allen, & James A. Yancey, P. O. Box 1028, Lakeland, FL 33802, Attorneys for Appellants.



ATTORNEY