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

Deputy Clerk

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

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

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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.

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.

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, answer brief on the merits, and reply brief were timely filed.

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.

TABLE OF CITATIONS

BATTILLA v. ALLIS CHALMERS MANUFACTURING COMPANY, 392 So.2d 874 (Fla. 1980) — page 3,4,7

BERMUDEZ v. FLORIDA POWER and LIGHT COMPANY, 433 So.2d 565 (Fla. 3d DCA 1983) — page 3

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DEVIN v. CITY OF HOLLYWOOD, 351 So.2d 1022 (Fla. 4th DCA 1976) — page 2,4

DOBBS v. SEA ISLE HOTEL, 56 So. 2d 341 (Fla. 1952) — page 2

DOMINGUEZ v. BUCYRUS-ERIE COMPANY, 503 So. 2d 364 (Fla. 3d DCA 1987) — page 6,7

HOLLAN EX REL. WILLIAMS v. MAYES, 155 Fla. 129, 19 So. 2d 709 (1944) — page 7

HOMEMAKERS, INC. v. GONZALEZ, 400 So. 2d 965 (Fla. 1981) — page 1

PULLUM v. CINCINNATI, INC., 476 So.2d 657 (Fla. 1985) — page 4,5,6 7,8

SHAW v. GENERAL MOTORS CORP., 503 So. 2d 362 (Fla. 3d DCA 1987) — page 6

SMITH v. STURM, RUGER ,SMITH & COMPANY,INC., 12 FLW 1746 (Fla. 2d DCA 1987) — page 7,8

STATE v. WEBB, 398 So. 2d 820 (Fla. 1981) — page 4

STATE EX REL. SHEVIN v. INDICO CORPORATION, 319 So. 2d 173 (Fla. 1st DCA 1975) — page 2

THAYER v. STATE of FLORIDA, 335 So.2d 815 (Fla. 1976) — page 2

FLORIDA JURISPRUDENCE SECOND

FLA. JUR. II, VOL. 35; STATUTES, SECTION 1261.

STATUTES

FLORIDA STATUTE 95.031

CONSTITUTIONAL AMENDMENTS

ARTICLE I, SECTION 21 OF THE FLORIDA CONSTITUTION

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 RETROSPECTIVELY, TO ALLOW THE HARRISONS CLAIM, RATHER THAN THE PROSPECTIVE APPLICATION USED BY THE DISTRICT COURT OF APPEAL, SECOND DISTRICT OF FLORIDA.

In response to the Hyster's contention, in its answer brief on the merits, stating that Florida Statute 95.031 (3) cannot be applied retroactively, Harrisons would disagree on several grounds.

Hyster cites FOLEY v. MORRIS, 339 So. 2d 215 (Fla. 1977), as being virtually identical to the present situation. FOLEY, id., does stand for the general presumption against retroactive application of a statute where the legislature has not expressed in clear and explicit language an intention that the statute be applied retroactively. However, Hyster has failed to take into account several crucial points made by the appellants.

Hyster, in the case of FOLEY, id., and HOMEMAKERS INC., v. GONZALEZ, 400 So. 2d 965 (Fla. 1981), has gone to great lengths to reiterate the general principal cited above in FOLEY, supra. Additionally, Hyster has gone to great lengths to educate the court on the differences between a statute of repose and statute of limitations. Hyster states that there is in fact only a slight analytical distinction between the two (page 8 of Hyster's answer brief on merits). However, there is certainly more than just an analytical distinction between the two, and it is fair to point out that both the FOLEY, supra and HOMEMAKER, supra, cases are

cases are based upon an alteration concerning a statute of limitation. One should note that a statute of limitations is far different than a statute of repose, which is repealed in this particular matter, since it is obvious that the statute of repose can preclude a cause of action before (emphasis added) it arises. One would certainly believe this is more than a slight analytical difference as claimed by Hyster.

Once again, as it has been mentioned previously, there are several key elements that distinguish this particular case from those cited by the appellees.

The first key point revolves around 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 items 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 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 above general maximum 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 liable shall take effect on 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. Subsection (3) only states that the act will take effect as of July 1, 1986 and is silent as to any cause of action which accrues prior to July 1, 1986.

In conjunction with the above cited maximum of law there are several other general principals, which are helpful in construing this particular statute.

First, 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)

Hyster has stated in their answer brief that it can certainly be presumed that the Florida Legislature knew when it enacted the revised version of Florida Statute 95.031 that acts which shorten the length of the statute of limitations are presumed to be prospective only. However, in the present situation, Florida Statute 95.031 (2) had been judicially interpreted for some five (5) years, from 1980 through August 1985, as a result of the Battilla v. Allis-Chalmers Manufacturing Company, 392 So. 2d 874 (Fla. 1981) case as not being an absolute twelve (12) year bar for any cause of action of products liability, and in the case of the

Harrison under Battilla's, id., reasoning the Harrisons would have had no difficulty in bringing an action.

Of course the Pullum v. Cinncinnati, Inc., 476 So. 2d 657 (Fla. 1985), case had an immediate chilling effect of cutting off the Harrison's cause of action. In an immediate (emphasis added) response, the Legislature in the 1986 session, completely eliminated the twelve (12) 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 in 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 the 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 existence 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 omissions to the Legislature.

Obviously, the Legislature responded in an immediate fashion to the preceived ills of the Pullum decision. Hyster wishes to have those ill effects of the Pullum case applied to the Harrisons in this matter despite the obvious intent of the Legislature in repealing the Statue of Repose.

ARGUMENT II

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 Consititution as not affecting the Harrisons. In addition, Hyster has maintained in their answer brief that the Harrisons merely wish to revisit the issue that was decided in an adverse manner to the Harrisons in Pullum, supra, and therefore they should not prevail. Further, Hyster, in its answer brief, states that it is somewhat curious that the petitioners would rely upon decisions of the various District Court of Appeal which have refused to retroactively apply the repeal of Statute of Repose based upon the Pullum, supra decision.

However, once again the court's attention should be called to the concurring (emphasis added) opinion of Judge Ferguson in the case of Dominguez v. Bucyrus-Erie Company, 503 So. 2d 364 (Fla. 3d DCA 1987), which states that

> "Affirmance is required by Shaw (Shaw v. General Motors Corp., 503 So. 2d 362 (Fla. 3d DCA 1987)) otherwise I would disent. The reason 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 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, the opinion quoted Judge Ferguson's opinion in the Dominguez, supra, case and stated that

"for the following reasons given by Judge Ferguson in his concurring opinion in Dominguez 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 has become apparent that Hyster wishes to merely dismiss this matter by stating that Pullum should be upheld. However it becomes obvious from the legislative actions in the 1986 session, and more than obvious from the cases such as Dominguez, supra,

and Smith, supra, that a great many people cannot dismiss the arguments made by the Harrisons and others in a similiar position so easily. It becomes more and more apparent that the only logical and proper thing to do would be to allow the Harrisons access to the courts as mandated by Article I section 21 of the Florida Consititution, and not to trample on their right to access to the courts as Hyster would have this court do by citing the Pullum, supra, decision, which is no longer applicable.

CONCLUSION

Contrary to either Hyster's 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 effect 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, supra, case, and in response eliminated the twelve-year Statute of Repose in its entirety.

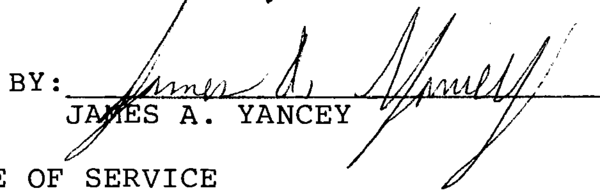
3. The above reasons give in Subsection (2) again go hand-in-hand with the Webb, supra, case stating that "the evil to be corrected is a factor to be considered." Here, the obvious evil to be corrected is the denial of access to the Courts to those such as the HARRISONS. Obviously, Pullum, supra had 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 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



BY: JAMES A. YANCEY

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 17th day of September, 1987.

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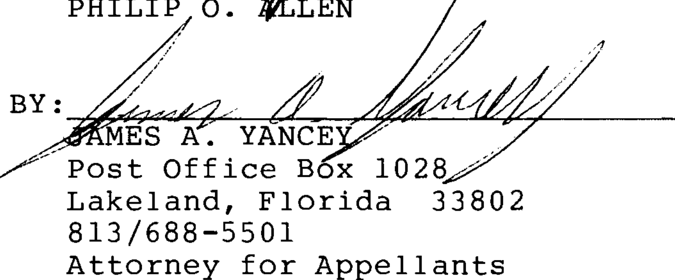
BY: PHILIP O. ALLEN



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