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IN THE SUPREME COURT OF FLORIDA

CASE NO. 70,225

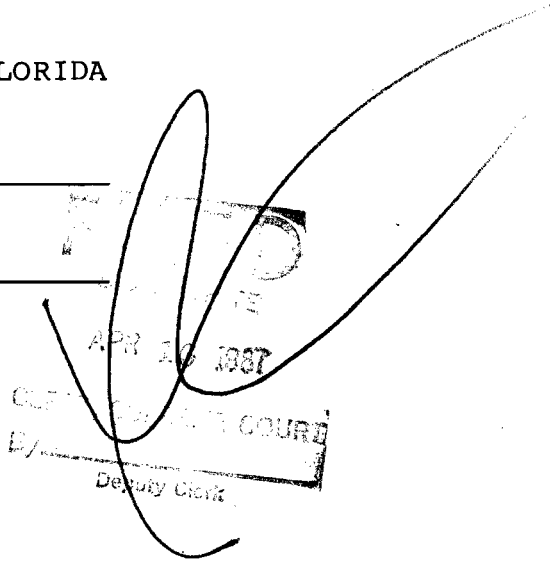
JOSE LUIS MELENDEZ,

Petitioner,

vs.

DREIS & KRUMP MANUFACTURING COMPANY,

Respondent.



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

MAIN BRIEF OF PETITIONER, JOSE LUIS MELENDEZ

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INTRODUCTION

This is a petition for review brought on behalf of JOSE LUIS MELENDEZ for this Court's determination of two questions certified by the District Court of Appeal, Third District, to be of great public importance. The Defendant below referred to as the Respondent herein is DREIS & KRUMP MANUFACTURING COMPANY.

STATEMENT OF THE CASE AND FACTS

The chronology of events leading to this Petition for Review is as follows:

-October 28, 1963: The Respondent, DREIS & KRUMP MANUFACTURING COMPANY sold and delivered a defective press-brake machine to the original purchaser.

-1975: The statute of repose, Section 95.031(2) Fla. Stat. (1975) became the law in Florida.

-December 11, 1980: The Florida Supreme Court held in Battilla v. Allis Chalmers Manufacturing Company, 392 So.2d 874 (Fla. 1980) the statute of repose, Section 95.031(2), Fla. Stat. (1975) unconstitutional as violative of the Florida access to court guarantee found in Art. I, Sec. I of the Florida Constitution.

-May 10, 1982: The Petitioner was injured while operating the defective press-brake machine manufactured by the Respondent, DREIS & KRUMP MANUFACTURING COMPANY.

-May 17, 1983: The Petitioner, JOSE LUIS MELENDEZ, filed suit against the Respondent/Manufacturer, DREIS & KRUMP MANUFACTURING COMPANY, relying upon the existing law in the State of Florida.

-1980-1985: The Florida Legislature met in the spring of 1980, 1981, 1982, 1983, 1984 and 1985 and made no attempt to alter the statute of repose as amended by the Battilla decision.

-August 29, 1985: The Florida Supreme Court in Pullum v. Cincinnati, Inc., 476 So.2d 657 (Fla. 1985) receded from its prior decision in Battilla and held the statute of repose, Section 95.031(2) Fla. Stat. (1975) constitutional.

-November 4, 1985: The Respondent/Manufacturer was granted leave to amend their Answer to raise the statute of repose as an affirmative defense based upon the recent Pullum decision.

-December 31, 1985: The Trial Court entered Final Summary Judgment against the Petitioner based upon the retroactive application of the Pullum decision.

-January 21, 1985: The Petitioner, JOSE LUIS MELENDEZ, filed his Notice of Appeal.

-April 21, 1986: The United States Supreme Court denied review of the Pullum decision.

-July, 1986: The Florida Legislature repealed the Statute of Repose, Section 95.031(2), Fla. Stat. (1975) with regard to product liability actions.

-February 17, 1987: The District Court of Appeal, Third District, applied Pullum retroactively affirming the Trial Court's decision, however, in doing so, certified to the Supreme Court of Florida the following questions as being of great public importance. The certified questions are set forth as the issues on review.

ISSUES ON REVIEW

I.

SHOULD THE LEGISLATIVE AMENDMENT OF SECTION 95.031(2), FLORIDA STATUTES (1983) ABOLISHING THE STATUTE OF REPOSE IN PRODUCT LIABILITY ACTIONS, BE CONSTRUED TO OPERATE RETROSPECTIVELY AS TO A CAUSE OF ACTION WHICH ACCRUED BEFORE THE EFFECTIVE DATE OF THE AMENDMENT?

II.

IF NOT, SHOULD THE DECISION OF PULLUM v. CINCINNATI, INC., 476 So.2d 657 (Fla. 1985), APPEAL DISMISSED, ___ U.S. ___, 106 S.Ct. 1626, 90 L.Ed.2d. 174 (1986) WHICH OVERRULED BATTILLA v. ALLIS CHALMERS MFG. CO., 392 So.2d 874 (Fla. 1980), APPLY SO AS TO BAR A CAUSE OF ACTION THAT ACCRUED AFTER THE BATTILLA DECISION BUT BEFORE THE PULLUM DECISION?

SUMMARY OF ARGUMENT

Under the general rules of statutory construction, repealing legislation is to be given retroactive operation. The Respondent's right to the statute of repose defense, by nature not a vested right, falls with the recent repeal of said Statute. The Florida Legislature specifically intended that its repeal of the statute of repose apply not only to pending actions, but also retrospectively.

In addition, an appellate court in reviewing a judgment on direct appeal, must dispose of the case according to the law prevailing at the time of the appellate disposition. The instant action was pending on appeal at the time the statutory defense was repealed and as such the first certified question should be answered in the affirmative.

If the recent repeal of the statute of repose is held not to operate retrospectively, then the Pullum decision should not act as a bar to Petitioner's cause of action. This cause of action having accrued at the moment the Petitioner was injured became a vested property right that should not be retroactively abolished.

ARGUMENT

I.

THE LEGISLATIVE AMENDMENT OF SECTION 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.

The Legislative amendment of Section 95.031(2), Fla. Stat. (1985) abolishing the statute of repose in product liability actions should be construed to operate retrospectively and as such, the first certified question must be answered in the affirmative.

The repeal of a statute is generally given retroactive application if the right or remedy has been created by the statute itself. At the time the statute is repealed, that right or remedy if not a vested right or expressly excepted, will fall with the statute. 49 Fla. Jur. 2d, Stat., §210. This Court in Yaffee v. International Company, Inc., 80 So.2d 910 (Fla. 1955) stated:

> [T]he general rule, to the effect that repealing statute should be given a retrospective operation, is based upon, and confined to, the situation where a right or remedy has been created fully by statute; it being held, in such event, that when the statute is repealed, the right or remedy created by the statute falls with it.

80 So.2d at 911-912.

Accord, Bureau of Crimes Compensation, Department of Labor and Employment Security v. Williams, 405 So.2d 747 (Fla. 2nd DCA 1981).

At common law, there was no twelve-year cap on product liability actions. The Respondent's "right" to the statute of repose defense, having been created wholly by statute, falls with the recent repeal of that statute. The Respondent possesses no vested right to this defense as it is directly dependent upon the continued existence of said statute. Under the general rules of statutory construction, the repeal of a statute authorizing a particular defense operates to deprive a defendant in a pending action of such defense. 82 C.J.S., Statutes, Sec. 439 (a). Once Section 95.031(2), Fla. Stat. (1975) was repealed by the Florida Legislature, the Respondent was deprived all statutory defenses incident thereto. In Tel Service Company, Inc. v. General Capital Corporation, 227 So.2d 667 (Fla. 1969) the Florida Supreme Court held:

> An action predicated on remedies provided by the usery statutes creates no vested substantive right, but only an enforceable penalty. Accordingly, such penalty or forfeiture possesses no immunity against statutory repeal or modification and the enactment of legislation to this effect abates such penalty or forfeiture pro tanto even during the pendency of an appeal from a final judgment predicated on such statutory penalties or forfeiture.

227 So.2d at 271

Even in situations where the Court's jurisdiction depends upon a statute which is repealed or otherwise nullified, the jurisdiction falls over the pending cases unless the repealing statute contains a savings clause. State ex rel Arnold v. Revels, 109 So.2d 1 (Fla. 1959). The repeal

of the statute of repose (Chapter 86-272, Laws of Florida, [1986]) contains no such savings clause. Section 1 of said Chapter provides for the amendment of the Statute of Limitations in libel and slander actions. Section 2 includes the repeal of the statute of repose. Section 3 of the statute provides that:

> Section 1 of this Act shall take effect October 1, 1986 and shall apply to causes of action accruing after that date and Section 2 of this Act shall take effect July 1, 1986.

The specific language of the statute expressly provides that Section 1 shall be given prospective application. However, Section 2 "shall take effect July 1, 1986." This effective date provision neither dictates prospective application of the repeal nor does it act as a savings clause preserving Respondent's statutory defense. This Court has retroactively applied the repeal of other statutes which contain an analogous effective date provision. In Tel Service, Inc. v. General Capital Corp., supra., this Court held the repeal of Section 687.07 by Chapters 69-135 Laws of Florida (1969) to have retrospective application. The effective date provision within Section 3 of said statute provided "this act shall take effect October 1, 1969." Additionally, in Summerlin v. Tramill, 290 So.2d 53 (Fla. 1974), this Court retroactively applied Chapter 72-1 Laws of Florida (1972) which chapter specifically repealed the guest statute. Section 2 of said statute provided that "this act shall take effect upon becoming law." It is evident that these provis-

ions contained within repealing legislation do not indicate the legislative intention of prospective application. To the contrary, the Florida Legislature has consciously treated the amendment to the libel and slander Statute of Limitations (Sec. 1) differently than the repeal of the statute of repose (Sec. 2). This indicates that the Florida Legislature intended its repeal of the statute of repose to apply not only to pending litigation, but also retrospectively. Additional intent to apply the repeal retrospectively is evinced by the Legislature's repeal of statute immediately after the Pullum decision had just revived it. The Florida Legislature met during five legislative sessions from 1980 through 1985 and made no attempt to modify the statute of repose as amended by Battilla. In fact, the Florida Legislature re-enacted the general statutes in 1981, 1983, 1985 and as such, adopted the construction of Section 95.031(2) as amended by Battilla. This Court in Delaney v. State, 190 So.2d 578 (Fla. 1966) stated:

> In this State, as in most others, the rule prevails that in re-enacting a statute the Legislature is presumed to be aware of constructions placed upon it by the highest Court of the State, and, in the absence of clear expressions to the contrary, it is presumed to have adopted these constructions.

190 So.2d at 581.

The Florida Legislature in the first legislative session following the Pullum decision expressly repealed the statute of repose. This repeal was remedial in nature to restore and preserve the right of litigants to access to the

Florida Courts. As this Court stated in City of Orlando v. Desjardins, 493 So.2d 1027 (Fla. 1986): "If a statute is found to be remedial in nature, it can and should be retroactively applied in order to preserve its intended purposes." It is evident that the Florida Legislature's response to the Pullum decision would require retroactive application of the recent repeal.

Independent of the issue of retroactive application, an appellate court in reviewing a judgment on direct appeal must dispose of the case according to the law prevailing at the time of the appellate disposition, irrespective of the law prevailing at the time of rendition of the judgment appealed. Florida East Coast Railway Company v. Rouse, 194 So.2d 260 (Fla. 1966); Summerlin v. Tramill, 290 So.2d 53 (Fla. 1973); Goodfriend v. Druck, 289 So.2d 710 (Fla. 1974). The Florida Supreme Court in Pensacola and A. R. Co. v. State, 45 Fla. 86, 33 So. 985, (Fla. 1903) stated:

> [T]he effect of a repealing statute is to obliterate the statute repealed as completely as if it had never been enacted, except for the purpose of those actions or suits which were commenced, prosecuted and concluded whilst it was an existing law, and that an action cannot be considered as concluded while an appeal therein is pending before an appellate court having jurisdiction to review it.

33 So. at 986.

The instant action was pending on appeal at the time that the statutory defense was repealed. The effect of the Florida Legislature's repeal of the statute of repose was to destroy the statute as if it had never been enacted. As

such, Petitioner JOSE LUIS MELENDEZ is entitled to access to the Florida Courts in order to seek redress for his injuries.

II.

IF THE REPEAL OF THE STATUTE OF REPOSE, SECTION 95.031(2), FLORIDA STATUTES (1985) DOES NOT OPERATE RETROSPECTIVELY, THE DECISION OF PULLUM v. CINCINNATI, WHICH OVERRULED BATTILLA v. ALLIS CHALMERS MFG. CO., SHOULD NOT APPLY SO AS TO BAR A CAUSE OF ACTION THAT ACCRUED AFTER THE BATTILLA DECISION BUT BEFORE THE PULLUM DECISION.

Should this Court answer the first certified question in the negative, it would presumably be based upon the finding of a vested right. If the Respondent/Manufacturer has a vested right in the statutory defense, so should the Petitioner have a vested property right in his cause of action. At the time that the Petitioner filed the subject action, the statute of repose had been held unconstitutional by the Florida Supreme Court in Battilla. The effect of the Battilla decision was to render the statute of repose, Section 95.031(2) Fla. Stat. (1975) "inoperative ab inito..." State ex rel Nuveen v. Greer, 88 So.2d 249 102 So.739, 743 (1924). Thus, the respondents had a viable cause of action and that "choice in action" was a personal property right. Sunspan Engineering and Construction Co. v. Spring-Lock Scaffolding Company, 310 So.2d, 4, 8 (Fla. 1975). This vested property right cannot be destroyed by giving the subsequent Pullum decision retroactive application. The Florida Supreme Court in Florida Forest and Parks Service v.

Strickland, 18 So.2d 251 (1944), held that a decision of a court of last resort which overrules a former decision cannot operate to destroy a vested property or contract right. Specifically, the Court stated:

> [W]here a statute has received a given construction by a Court of supreme jurisdiction, the property or contract rights have been acquired under and in accordance with such construction, such rights should not be destroyed by giving a subsequent overruling decision a retrospective operation.

18 So.2d at 253

In addition, the Florida Supreme Court held in Davis v. Artley Construction Company, 18 So.2d 255 (Fla. 1944), that to retroactively deprive a litigant of the benefit of a prior decision on which the litigant's rights depend is to unconstitutionally deprive him of his right of access to the courts. Petitioner JOSE LUIS MELENDEZ' cause of action accrued at the moment he was injured and became a vested right under the then controlling precedent. This personal property right having been perfected should not be retroactively abolished by a subsequent overruling court decision. Thus, the Pullum decision should not be applied retroactively to deprive the Petitioner and other litigants of their right to seek redress for their respective injuries in the Florida Courts. The second certified question must be answered in the negative.

CONCLUSION

Based upon the arguments, authorities and reasonings set forth herein, the first certified question should be answered in the affirmative. If the first certified question is answered in the negative, then the second certified question additionally must be answered in the negative.

Respectfully submitted,

RESS, GOMEZ, ROSENBERG,
HOWLAND AND MINTZ, P.A.

BY _____
KEITH A. TRUPPMAN

CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true and correct copy of the foregoing Main Brief of Petitioner, Jose Luis Melendez, has been mailed this 14th day of April, 1987 to Frederick Lewis, Esquire, Magill & Lewis, P.A., 730 Ingraham Building, 25 Southeast Second Avenue, Miami, Florida, 33131.

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