IN THE SUPREME COURT OF THE STATE OF FLORIDA

JAMES A. MATHIS, ET UX.,

Petitioners,

vs.

FOOTE STEEL CORPORATION, ET AL.,

Respondents.

_____/

CASE NO.: 70,255

DISTRICT COURT OF APPEAL,
5TH DISTRICT NO. 86-513

APPELLEE'S ANSWER BRIEF

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PRELIMINARY STATEMENT

In this Brief, Appellants/Plaintiffs, James A. Mathis and Kathy Mathis shall be referred to as "plaintiffs". Appellees/Defendants, Harnischfeger Corporation and Pauling and Harnishfeger Corporation, shall be referred to as "defendants".

Citations to the record on appeal will be designated by (R-).

STATEMENT OF THE CASE AND FACTS

Only the facts relevant to this appeal concerning Defendants Harnischfeger Corporation and Pauling and Harnischfeger Corporation are stated below.

On August 17, 1977, the plaintiff, James A. Mathis, was injured when the boom of a crane manufactured in part by these defendants collapsed and fell on him. On August 13, 1981 the plaintiff brought suit against, among others, the defendants Harnischfeger and Pauling and Harnischfeger Corporation under several theories of liability.

Plaintiff's statement of the case and facts contends that this cause was set for trial on three separate occasions but was continued each time. They further contend that as a result, trial was not had prior to this Court's decision in Pullum v. Cincinnati, 476 So.2d 657. (Fla. 1985). Plaintiff attempts to mislead this Court that Harischfeger Corporation and Pauling and Harnischfeger Corporation were responsible for the continuances when in fact none of them were prompted by these defendants. The only objection to a trial date by these defendants concerned a conflict with schedules in September and October of 1985. Plaintiffs requested a date certain in December of 1985. Any of those trial periods would have been subsequent to the Pullum decision.

Defendants, Harnischfeger Corporation and Pauling and Harnischfeger Corporation move for Summary Judgment based upon the fact that such an action was barred by Florida Statute §95.031(2) as construed by the Pullum decision. An Order was entered granting Summary Judgment for these defendants on March 13, 1986.

Plaintiffs filed an appeal with the Fifth District Court of Appeal on February 18, 1987. The Fifth District Court of Appeal affirmed the Summary Judgment on the basis of Pullum and Pate v. Ford Motor Company, 12 FLW 277 (Fla. 5th DCA Jan. 15, 1987). The Court also cited the decision of Small v. Niagara Machine and Tool Works, 12 FLW 366 (Fla. 2d DCA Jan. 20, 1987) as support. Plaintiffs have appealed to this Court from the decision of the Fifth District Court of Appeal.

ISSUES PRESENTED

ARGUMENT ON ISSUE NUMBER I

THE DISTRICT COURT WAS CORRECT IN ITS APPLICATION OF FLORIDA STATUTES §95.031(2) BARRING THE PLAINTIFF'S CAUSE FOR ACTION

AGRUMENT ON ISSUE NUMBER II

A RATIONAL LEGITIMATE BASIS EXISTS FOR APPLYING THE TWELVE (12) YEAR LIMITATION TO CASES BASED ON PRODUCTS LIABILITY

ARGUMENT ON ISSUE NUMBER III

THE 1986 LEGISLATION AMENDING FLORIDA STATUTE §95.031(2) SHOULD NOT BE GIVEN RETROSPECTIVE EFFECT

SUMMARY OF ARGUMENT

Purusant to Florida Statute §95.031(2), plaintiff's injury could not form any basis of a legal cause of action in the courts of the State of Florida; therefore, plaintiff's never had a cause of action against defendants. Insofar as no cause of action ever existed, plaintiff's right of access to the courts under Florida's constitution could not have been denied.

No clear precident existed for the circumstances of the instant case; therefore, plaintiff's could not have detrimentally relied upon existing law, and any such reliance is not a proper basis for limiting the application of existing case law and to perspective only operation. In addition, plaintiffs have not been deprived of a property or contract right; therefore there is no such basis for limiting the application of existing law to perspective only operation. Further, even if the applicable statute was once adjudged unconstitutional, it has now been adjudged constitutional and should be treated as if valid from the date of its enactment. This court has held that a rational and legitimate basis exists for applying the limitations period of twelve (12) years to cases based on products liability and that twelve (12) years was a reasonable limitation period to be applied.

Finally, absent specific legislative intent, the 1986 amendment to Florida Statute §95.031(2) should not be retrospectively applied to the case at bar. Plaintiff's injury occurred over ten years ago and said amendment is totally void of any expression of intent by the legislature that it be applied retrospectively.

ARGUMENT ON ISSUE I

THE DISTRICT COURT WAS CORRECT IN ITS APPLICATION OF FLORIDA STATUTES §95.031(2) BARRING THE PLAINTIFF'S CAUSE FOR ACTION.

The applicable Statute of Repose found in 7 Fla. Stat. Ann. §95.031(2) provides in pertinent part as follows:

> Actions for products liability and fraud under §95.11(3), must begin within the period running from the time the facts giving rise to the cause of action were discovered or should have been discovered with the exercise of due diligence, instead of running from any date prescribed elsewhere in §95.11(3) but in any event, within twelve (12) years after the date of delivery of the completed product to its original purchaser . . .

The above Statute of Repose unambiguously provides a time limit of twelve (12) years within which a product liability action on a particular manufactured product must be brought. A statute of repose should be distinguished from a statute of limitations. A statute of limitations does not begin to run until the cause of action accrues, while a statute of repose terminates the right to bring an action after a certain period of time expires. Colony Hill Condominium I Association v. Colony Co., 320 S.E.2d 273, 276 (N. C. App. 1984). The period of time bears no relationship to when the particular wrong occurred. Klein v. Catalano, 437 N.E.2d 514, 516 (Mass. App. 1982). A statute of repose defines the scope of a right to bring a cause of action. It effectively clears a potential defendant of any wrong doing or obligation once the time limit expires. Colony Hill, supra at 326. A statute of repose, in other words, does not bar a cause of action; its effect is to prevent what might otherwise be a cause of action from ever arising. Rosenberg v. Town of North Bergen, 293 A. 662, 667(N. J. 1972).

The potential plaintiff has no cause of action. It is within the power of the legislature to create new rights or abolish old ones as long as no vested right is disturbed. Id. A plaintiff has no vested right in a tort claim. Durcharme v. Merill National Laboratories, 574 F.2d 1307 (5th Cir. 1978), cert. denied, at 439 U.S. 1002 (1978).

The application of each of the above principles have been applied specifically to Florida Statute §95.031(2) in the recent case of Lamb v. Volkswagenwerk Aktiengesellschaft, 631 F. Supp. 1144 (S.D. Fla. 1986). The court in Lamb unequivocally stated its understanding of Erie Railroad Co. v. Thompkins, 304 U.S. 64 (1938) and Bailey v. Southern Pacific Transport Co., 613 F.2d 1385, 1388 (5th Cir.), cert. denied, 449 U.S. 836 (1980) mandating that it follow the most recent announcements of the Florida Supreme Court regarding its analysis and determination of the apposite statute of repose to the case then at bar. Lamb at 1147. That case is identical to the circumstances of the instant case in that the injury occurred after the expiration of the limitation period and its reasoning should be applied herein. It is uncontroverted that the crane and its boom were manufactured by defendants in 1959. Plaintiff in the instant action was injured on August 17, 1977 and filed his complaint on August 13, 1981.

Applying the principles in Lamb to the case sub judice, it is clear that plaintiff's right of access to the court would not have been unconstitutionally denied. By definition, plaintiffs had no cause of action to pursue. The Florida Legislature abolished the cause of action and rightfully so, since plaintiffs could have no vested right in a tort claim. Durcharme.

Plaintiff relies on Battilla v. Allis Chalmers Mfg. Co., 392 So.2d 874 (Fla. 1981), in which this Court struck down §95.031(2) as a violation of plaintiff's right of access to the courts. In this per curiam opinion disapproving §95.031(2), this Court relied chiefly on Overland Construction Co. v. Sirmons, 369 So.2d 572 (Fla. 1979), where it was held that a similar twelve year statute of repose regarding architects and builders was violative of a plaintiff's constitutional right of access of the courts. However, in a well reasoned dissent, which has now become the majority opinion, Justice McDonald (joined by Justices Overton and Alderman) reasoned that, although the language in Overland was such that it could be authoritive to extend its application to Fla. Stat. §95.031(2) such should be limited to apply only to Fla. Stat. §95.11(3)(c). Battilla at 874. Justice McDonald expressed that a twelve year limitation would be reasonable for liability regarding manufactured products although not for liability regarding improvements to real property. Id. at Overland, however did not address the constitutionality of §95.031(2), but held only that problems of proof did not constitute a compelling necessity sufficient to justify the twelve year limitation bringing causes of action based on negligent design, planning or construction of an improvement to real property. Overland at 574. Obviously there is quite a difference between cases based on defects and improvements to real property and cases based on product defects.

In a more recent case this court has announced its reversal of Battilla and held that the statutue was not unconstitutional. Pullum v. Cincinnati, Inc., 476 So.2d 657 (Fla. 1985). In Pullum the plaintiff was injured in April of 1977 while operating a Cincinnati Press-Brake Machine delivered to its original purchaser

in November of 1966. The plaintiff there filed suit in 1980, more than twelve years from the delivery date. In Pullum this court had its first opportunity to revisit the product liability statute of repose found in §95.031(2). This court chose to reverse its prior ruling in Battilla and held that the statute was constitutional. In Pullum, this court affirmed granting of Summary Judgment in favor of a defendant manufacturer, when the plaintiff had instituted suit more than twelve years after the delivery of the product to its initial purchaser. This court determined that the statute does not deny equal protection, because it rationally relates to a legitimate state objective. Contrary to its previous holding in Battilla, this court also ruled that the statute did not violate Florida's access-to-courts constitutional provision. "The legislature in enacting this statute of repose, reasonably decided that perpetual liability places an undue burden on manufacturers, and it decided that twelve years from the date of sale is a reasonable time for exposure to liability for manufacturing of a product". Id. at 659. The court also observed, as Justice McDonald had in his dissent in Battilla, that because the normal useful life of a building is obviously greater than most manufactured products, distinction should be made between limiting liability exposure for buildings and for products.

This analysis is correct. The unique provisions of Florida's constitution, which declares that "[t]he courts shall be open to every person for redress of any injury" is a mandate to the judiciary, not the legislature. It ensures that the courts will be open to

those who suffer an invasion of a legal right as established by a constitutional, statutory, or common law. It does not curtail the ability of the legislature to define and limit legal rights and injuries. The legislature can classify damage as outside the realm of legal injury, and such pronouncements must be upheld so long as no other constitutional provision is violated. In upholding the constitutionality of §95.031(2), the Pullum court recognized that it was not denying the plaintiff of redress to which he was entitled, but, rather, the plaintiff had no cause of action to be pursued.

The plaintiff in the case at bar argues that Pullum should not be given retroactive application so as to eviscerate his reliance on Battilla and effectively bar his cause of action in this case. The general rule under Florida law is that a decision of a court of last resort which overrules a former decision or establishes previously unrecognized claims for relief is retrospective as well as prospective in its operation unless specifically declared by the decision to have only a prospective effect. Florida Forest and Park Service v. Strickland, 18 So.2d 251 (Fla. 1944); Parkway General Hosp., Inc. v. Stern, 400 So.2d 166 (Fla. 3d DCA 1981). The exception to this general rule applies to cases where property or contract rights have been acquired in accordance with such construction. Those rights should not then be destroyed by giving a subsequent overruling decision retrospective operation. Florida Forest at 253. In the instant case the plaintiff has neither alleged nor are there in fact any such rights that would preclude the general rules application. Furthermore, a statute is not unconstitutionally retrospective in its operation unless it impairs a substantive, vested right. A substantive vested right is an immediate right of present enjoyment, or a present fixed right of future enjoyment.

In Re: Will of Martell, 457 So.2d 1064, 1067 (Fla. 2nd DCA 1984). To be vested, a right must be more that a mere expectation based on an anticipation of the continuance of an existing law; it must have become a title, legal or equitable, to the present or future enforcement of a demand. Division of Workers Compensation v. Brevda 420 So.2d 887, 891 (Fla. 1st DCA 1982). As noted, the plaintiff in this case had no vested contract or property right prior to Pullum; instead plaintiff had merely been pursuing a common law tort theory to recover damages. The statute of repose in the lapse of the twelve year statutory period obviated the very possibility of plaintiff sustaining any legal injury from the boom-crane. Retroactive application of the statute of repose cannot deprive plaintiff of a vested right because plaintiff's claim never became vested.

The principle of retroactive construction is further expounded upon in Christopher v. Mungen, 55 So. 273, 280 (Fla. 1911):

> Where a statute is judiciallly adjudged to be unconstitutional, it will remain inoperative while the decision is maintained; but, if the decision is subsequently reversed, the statute will be held to be valid from the date it first became effective, even though rights acquired under particular adjudications where the statute was held to be invalid will not be affected by the subsequent decision that this statute is constitutional.

Such a law enacted by the legislature which later is declared unconstitutional will remain dormant and inoperative but not dead. Lamb supra at 1149. If the law is again given life by a later decision that law will be considered valid from its inception. State v. White, 194 So.2d 601 (Fla. 1967).

In the case sub judice, the plaintiff claims an inequity in that he reasonably relied on the ruling in Battilla in commencing his action. As long as the statute of repose existed within the

statutes, there was always the potential for the statute to be reactivated. There was no absolute assurance that the statute of repose would remain forever abrogated. In fact, the legislature took no action to abrogate the statute after Batilla. The final opinion in that case was rendered in February of 1981 just a few months prior to plaintiffs bringing this action.

The plaintiff, citing Nissan Motor Co., Ltd. v. Phlieger 12 FLW 256 (Fla. May 28, 1987), inaccurately states in his brief that had he died from his injuries the perceived cause of action would not be barred. Even a casual reading of Nissan reveals the misapplication of the rule in that case. There the plaintiff's personal representative brought a wrongful death action against the defendant, Nissan Motor Company. The trial court found the action barred by to be Fla. Stat. §95.031(2) because the plaintiff filed the action outside the twelve year statue of repose but within the statute of limitations. This Court agreed with the District Court of Appeals reversal stating first, that when the personal representative's decedent died within the twelve year period the right of action accurred and the plaintiff stepped into the decedent's place. Second, Fla. Stat. §95.031(2) was clearly inapplicable to a wrongful death action as the legislature expressed no intention to include such within the sections time limits.

The District Court correctly applied §95.031(2) in barring plaintiff's aciton in the present case. The legislature defined the time limit in which all persons could seek to pursue a products liability claim. Fla. Stat. §95.031(2). This Court, in Pullum,

ruled the §95.031(2) statute of repose constitutional. Although the plaintiff had relied on the Battilla decision in bringing his action he had acquired no vested right in so doing. Plaintiff merely had an expectation of recovery in damages on a tort claim. Thus, the general rule allowing retrospective application of a decision by a court of last resort overruling a former decision should itself be applied in the instant case. In doing so plaintiff's cause of action is clearly and correctly barred by Florida Statutes §95.031(2).

ARGUMENT OF ISSUE II

A RATIONAL LEGITIMATE BASIS EXISTS FOR APPLYING THE TWELVE (12) YEAR LIMITATION TO CASES BASED ON PRODUCTS LIABILITY.

As previously noted in Pullum this Court has held that a rational and legitimate basis exists for applying the limitations period of twelve years to causes of actions based on products liability. This Court has stated that liability should be restricted to a time commensurate with the normal useful life of manufactured products so as to relieve manufactures of the onerous burden of perpetual liability regardless of when a product was manufactured and sold.

It is unrealistic to expect the legislature of this state to provide varying limitation periods for the hundreds and thousands of products sold in this state based on their differing periods of normal useful life. The legislature, in enacting Florida Statute §95.031(2), determined that twelve years was a reasonable limitations period to apply to all manufactured products. The legislature determined that twelve years is a reasonable period of time within which a cause of action based on a defective product may be brought. Battilla at 875.

Statutes of repose are intended to shield manufacturers from the prospect of a never ending potential liability which lasts indefinately beyond the time the product is first marketed. Such statutes share a purpose of encouraging diligence and prosecution of claims, eliminating the potential for abuse from a stale claim and fostering certainty and finality in liability. Such measures are acknowledged as a legislative balancing of interest designed to insure a stable market for the manufacturer of basic products.

Statutes of repose do appear to accomodate the counterveiling interests involved. "Over ninety-seven percent of product related accidents occur within six years of the time the product was purchased . . ." Model Uniform Product Liability Act, §110, analysis, reprinted in 44 Fed. Reg. 62,714 at 62,733 (1979). The Federal Register citing an I.S.O. Closed Claim Survey. As the aforementioned reasoning Pullum delineates, clearly there is a rational and legitimate basis for Florida Statutes §95.031(2). Pullum is clearly dispositive of this appeal.

ARGUMENT OF ISSUE III

THE 1986 LEGISLATION AMENDING FLORIDA STATUTE §95.031(2) SHOULD NOT BE GIVEN RETROSPECTIVE EFFECT

A statute is not to be given retrospective effect unless its terms clearly show that such an effect was intended. Trustees of Tufts College v. Triple R Ranch, Inc., 275 So.2d 521 (Fla. 1973).

Clearly there is no legislative intent expressed to even intimate that the 1986 amendments to §95.031(2) should be effective retrospectively. See Ch. 86-272 Laws of Fla. The legislature could have easily expressed the intention to enact the 1986 amendment to apply retrospectively, however no such intention was evidenced in the amendment. Indeed, the amendment itself was almost six years in following the Battilla case.

Absent the requisite express and unequivocal legislative expression of intent that the amendments should be retrospectively applied, no such interpretation should be rendered. To so interpret an amendment such as the 1986 changes in 95.031(2) would be to go beyond proper statutory interpretation reserved for the judiciary, and cross over constitutionally prescribed boundaries separating the branches and respective powers of government.

Clearly and without any doubt, the legislature has chosen to modify the law in an expressed and quite specific manner. Equally as clear is the fact that the legislature chose not to speak of its changes applying retrospectively. Had the legislature chosen to, it had the power and ability to speak to the application of its changes. Plaintiffs wish to invite vast and sweeping retrospective application of the 1986 amendment to §95.031(2). The legislature has chosen to decline the invitation.

Clearly, it would be an abrogation of this Court's duty to ignore the absence of any legislative intent and apply the 1986 amendment to §95.031(2) retrospectively. Accordingly the 1986 amendment to §95.031(2) should not be applied retrospective back over 10 years in time to give life to the claim of the plaintiffs.

CONCLUSION

The District Court of Appeal was correct in its affirmance of the trial court's proper application of §95.031(2) in granting Summary Judgment for defendants. This court has held §95.031(2) to be constitutional. A rational and legitimate basis exists for applying the twelve (12) year limitations provided for in Florida Statutes §95.031(2) to cases based on products liability. Further, the Florida legislature's 1986 amendment of Florida Statute §95.031(2) should not be retrospectively applied absent direct expression of an intent by the legislature that it be so applied. Clearly any such intent on the part of the legislature is absent. Appellees respectively request the opinion of the Fifth District Court of Appeal in favor of the Appellees be AFFIRMED.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished, by mail this 13th day of August, 1987 to HOWARD G. BUTLER, ESQ., Meyers and Mooney, P.A., 17 South Lake Avenue, Orlando, FL 32801, Attorney for Petitioners; JOHN W. BUSSEY, ESQ., P.O. Box 6086-C, Orlando, FL 32853-6086; WILLIAM A. HARMENING, ESQ., 1727 Orlando Central, Orlando, FL 32859; and TED R. MANRY, III, ESQ., P.O. Box 1531, Tampa, FL 32601.

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