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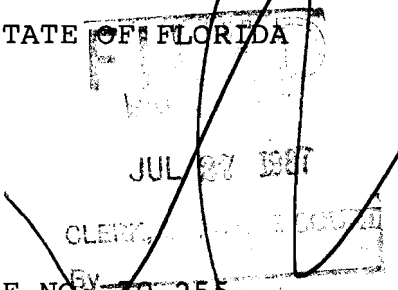
IN THE SUPREME COURT OF THE STATE OF FLORIDA



JAMES A. MATHIS, ET UX.,

Petitioners,

v.

FOOTE STEEL CORPORATION, ET AL.,

Respondents.

_____/

CASE NO. 70,255

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

INITIAL BRIEF OF PETITIONERS

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TABLE OF CITATIONS AND AUTHORITIES

PRELIMINARY STATEMENT

The Parties herein shall be referred as they appeared before the Circuit Court Judge. The Petitioners/Appellants/Plaintiffs, JAMES A. MATHIS and CATHY MATHIS, will be referred to as "Plaintiffs." The Respondents/Appellees/Defendants will be referred to as "Defendants."

Witnesses shall be referred to by surname and/or by title.

References to the Record below shall be made by: (R--).

STATEMENT OF THE CASE AND FACTS

As there have been multiple defendants involved in this case, only the facts which pertain to the Defendants Harnischfeger Corp. and Harnischfeger & Pauling Corp. will be related.

On August 17, 1977, the Plaintiff, JAMES A. MATHIS, was seriously injured and rendered a paraplegic when the boom of a crane designed and manufactured by the Defendants collapsed and fell on him. On August 13, 1981, the Plaintiffs brought suit against these Defendants and others under several theories of liability. Notice for trial was filed by the Plaintiffs on January 11, 1985.

On three separate occasions, the cause was set for trial and was continued on motion by one of the Defendants, over the objections of the Plaintiffs. On July 26, 1985, one of the Defendants, GEORGE FOOTE, moved for continuance of the trial set for August 12, 1985. The continuance was granted because Mr. Foote was set to go to the Soviet Union on vacation and a cancellation would have meant a forfeiture of the $10,000.00 price of the trip. Had this (third) continuance not been granted, trial would have taken place in the two-week period beginning August 12, 1985, before the Pullum case was handed down.

In early 1986, these Defendants moved for summary judgment on the basis that the Plaintiffs' suit was barred by Section 95.031(2) Florida Statutes, as construed by the case of Pullum v. Cincinnati, 476 So.2d 657 (Fla. 1985).

Summary judgment in favor of the Defendants was granted on March 13, 1986, and Plaintiffs timely appealed.

The Fifth District Court of Appeal, on February 18, 1987, affirmed the summary judgment on the basis of the Pullum case and other cases construing the statute in question. (Appendix page 1).

Plaintiffs timely petitioned The Supreme Court of the State of Florida to invoke its discretionary jurisdiction, which petition was granted June 8, 1987.

POINTS ON APPEAL

Point I

Whether the application of Section 95.031(2) Florida Statutes (pursuant to the Pullum decision) to bar the Plaintiffs' suit was error.

Point II

Whether a rational and legitimate basis exists for applying an arbitrary limitation period of twelve years to actions involving all products, irrespective of the normal useful life of said products.

SUMMARY OF ARGUMENT

The 12 year statute of repose, as it was applied through the Pullum case to bar the Plaintiffs' suit, was an unconstitutional denial of the Plaintiffs' right of access to courts. The corrective legislation passed in 1986 should be given retrospective effect so as to guard the Plaintiffs' constitutional rights. The Plaintiffs' had the right to rely on the Battilla decision and should not be precluded from completing their case which was initiated after Battilla but before Pullum.

There is no rational and legitimate basis for applying an arbitrary 12 year limit to actions involving products, irrespective of the normal useful life of the said products. There are practical ways for manufacturers to manage their exposure to liability that would not involve cutting off a plaintiff's right to sue for injuries even before the right had accrued. The application of the 12 year statute of repose in this case was incorrect and denied the Plaintiffs their constitutional rights.

ARGUMENT ON POINT I

Whether the application of Section 95.031(2) Florida Statutes(pursuant to the Pullum decision) to bar the Plaintiff's suit was error.

The application of the statute of repose, pursuant to this Court's decision in Pullum v. Cincinnati, 476 So.2d 657 (Fla 1985), to bar the Plaintiffs' suit was error.

This Court is not unaware of the many cases on appeal which concern this same issue. An examination of the decisions which have been handed down since the Pullum decision shows that 30 cases have been reported in Florida Law Weekly. Of the 30, 26 have certified to this Court questions of great public importance. All concern plaintiffs, like the Plaintiff here, whose injuries occured more than 12 years after the product was delivered to the original purchaser. These cases have been barred because, although they had been filed on the basis of this Court's decision in Battila v. Allis Chalmers Manufacturing Co., 392 So.2d 874 (Fla 1980), (which held the statute of repose unconstitutional as applied to a person who was injured and whose cause of action against a manufacturer accrued more than 12 years after delivery) the effect of Pullum is that the twelve year statute of repose is considered to have been valid all along. (Appendix, pages 2 and 3)

Although the legislature promptly amended the statute to delete the 12 year limit, Florida courts have not given the amendment retroactive effect. Ch. 86-272 Laws of Florida. In Cassidy v. Firestone Tire & Rubber, 495 So.2d 801 (Fla 1st DCA 1986), one of the 30 cases mentioned above, the court stated that

that no substantial inequity or unfairness had been shown which would result from an application of the Pullum decision.

It is Plaintiffs' position that a most unfair and inequitable result has occured by having the Pullum case applied to bar their suit. In the instant case, Plaintiff was a young construction worker who life was tragically and irreparably altered one day when a crane fell on him and crushed him. He lived, but remains a paraplegic with severe medical problems. Relying on this Court's decision in the Battilla case, he and his wife brought suit against, among others, the manufacturers of the crane who are the Defendants in this appeal. Plaintiff was prepared and anxious to go to trial on three separate occasions, only to have the case continued on motion of one of the defendants, and over his objections. It is important to note that no mention of the statute of repose was made until after the Pullum decision was handed down in 1985, seven years after the injury and four years after suit had been filed. Only after Pullum did the Defendants move for a summary judgment on the basis of the statute of repose.

The factual situation in Pullum is different than that of the instant case. In Pullum, the plaintiff was injured within the 12 year limit, but because of the operation of the statute of repose, his time for filing suit was not the 4 years allowed under the regular statute of limitations, but was shortened to a little over one year. That is a totally different situation than the instant one, where the Plaintiff's right of action did not even accrue until after the 12 year limit had expired.

It is interesting to note that, had the case gone to trial as scheduled, Plaintiff would have had his day in court and had a decision as to whether the Defendants were liable for any defect in their product. Likewise, according to this Court's recent decision in Nissan Motor Co., Ltd. v. Phlieger, 12 F.L.W. 256 (Fla May 28 1987), had the Plaintiff been killed and timely suit been brought, the cause of action against these same Defendants would not have been barred. This is not an unfair or inequitable result? While the trial was continued to allow one of the defendants (not the Defendants in the instant appeal) to vacation in the Soviet Union, the Plaintiffs had their chance for their day in court snatched away. Pullum allows their right of action to be extinguished before it ever arose. This is not a denial of the Plaintiff's constitutional right to access to the courts? Art. I, §21, Fla. Const. Apparently this substantial wrong has no remedy? As late as 1984 this Court stated that a statute which would cause a person's right of action on an injury to be extinguished before it had accrued would be unconstitutional as applied, because it would deny the person's right of access to courts. Universal Engineering Corp. v. Perez, 451 So.2d 463,468 (Fla 1984).

The legislature had a swift and unequivocal response to the Pullum decision. Within months they had amended the statute in question to elimiate the 12 year restriction. It is important to note that no such swift expression of their intent occured after the Battilla decision was handed down. It seems clear that the legislature agreed with this Court's opinion in Battilla and made no effort to reinforce or in any way reinstate the 12 year limit. Their speedy response in making the change after Pullum

is strong evidence that their intent was that there should be no limit other than the general 4 year statute of limitations.

In the face of such a clear demonstration of the intent of the legislature, it is this Court's duty to ensure that fairness and justice prevail. Consider Judge Ferguson's specially concurring opinion in Dominguez v. Bucyrus-Erie Co., 12 F.L.W. 546 (Fla 3rd DCA February 11, 1987):

> [Pullum] 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 injured by another private person without a remedy. The 1986 revision to section 95.031(2) was a 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 Pullman, (sic) 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) ("The duty is on this Court to see that substantial justice and right shall prevail.").

To rule that the corrective amendment to the statute of limitations can be applied retrospectively to those cases "sandwiched" between Battilla and Pullum would be a way to see that justice and right prevail. This court would not be opening "floodgates" that would allow thousands of plaintiffs to immediately begin filing suits. What is at stake are the few plaintiffs who were unfortunate enough to have been caught by the conflicting opinions. Plaintiffs have shown that

there are at least 30 that have gone through the appellate system, (see Appendix, pages 2,3) but there can not be many more who would fit within this narrow category.

Retrospectively applying the corrective legislation would not prejudice manufacturers in general or the defendants in these cases. For four years after the decision in Battilla and since July 1, 1986, manufacturers have operated under the knowledge that there was no statutorily prescribed limit as to how long they remained liable for products they designed and manufactured. It is very doubtful that thousands of manufacturers, upon learning of the Pullum decision in the state of Florida, promptly heaved a sigh of relief and changed their manufacturing standards to provide that products only had to last 12 years. Manufacturers know and expect that they are responsible for their products. They have several methods at their disposal to help them manage their exposure to liability for their products. If they make a product that they later discover has a defect, they can recall the product. Automobile manufacturers have done this for years. If they have reason to believe that a product is only safe or effective for a certain period of time, they can provide a statement to the purchaser which gives an indication of such. Manufacturers of foodstuffs and drugs do this all the time. A statute of repose that extinguishes a person's right of action before it accrues is unconstitutional and the legislature's intent in the instant situation is that there be no such limit. This Court is able to and should allow the corrective legislation to be applied retrospectively to those cases where, as here, injured persons

have been caught between conflicting decisions, especially since no prejudice will result to the defendants in these cases.

In the four years since suit was filed in the instant case, Plaintiffs have employed and deposed many experts at great cost. They have been involved with several appeals. Subjecting the Plaintiffs, who for four years had relied on the authority of a decision of the Supreme Court of Florida, to the recent changes brought about by the decision in Pullum, reduces the Plaintiffs' cause of action to the same level of certainty as a throw of the dice. Such uncertainty breeds a lack of confidence in the laws of our state and undoubtedly has a chilling effect on other plaintiffs who may attempt to seek redress for injuries in costly litigation proceedings.

In Culpepper v. Culpepper, 3 So.2d 330 (Fla 1941) the defendant's attorney had filed a plea of privilege in a proceeding in reliance on a decision of the Florida Supreme Court that such a pleading was proper. While these pleadings were pending, the Florida Supreme Court decided another case in which their previous ruling was overruled. The Culpepper court held that the defendant had a right to rely on the first decision and that the order of the trial court striking the plea and effectively removing her from the case was error.

Likewise, the "sandwiched" plaintiffs in these cases had a right to rely on the Battilla decision and their acts in reliance on a decision of the court of last resort should not be tossed aside when it deprives them of their access to courts as guaranteed by the consititution.

The Plaintiffs in the instant case reached the courthouse steps on three occasions while relying on a decision of the court of the last resort. They should not be subject to the effect of the Pullum case which causes the statute of repose to have been valid all along. The corrective legislation which disposes of the 12 year limit should be retrospectively applied so as to protect the consititutional rights of the citizens of Florida who have been injured. At the very least, this Court should amend and limit its decision in Pullum to only apply prospectively and allow all of the "sandwiched" plaintiffs to complete their suits they had begun in reliance on Battilla. True justice requires no less.

ARGUMENT ON POINT II

> Whether a rational an legitimate basis exists for applying an arbitrary limitation period of twelve years to actions involving all products, irrespective of the normal useful life of such products.

Plaintiffs submit that there is no rational and legitimate basis for an arbitrary limitation period of 12 years on all products, irrespective of the normal useful life of such products.

In Florida, Kluger v. White, 281 So.2d 1 (Fla 1973) has long stood for the fundamental principle that the legislature is without the authority to abolish a right of action

> without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.

Id at 4. Section 95.031(2) Fla. Stat. (1979) abolishes a person's right of redress 12 years after the product has been delivered to the original purchaser and is, as correctly held by the court in the Battilla case, unconstitutional as applied to persons whose causes of action for product liability accrued more than 12 years after original delivery.

By their very nature, statues of limitation and repose serve to limit the period of time for which a cause of action may be brought under particular circumstances. Such statutes are generally upheld under the premise that they bear some legitimate relationship to the purpose for which they were intended to serve, i.e. to provide plaintiffs sufficient time to seek

redress while at the same time reasonably limiting defendants' exposure to liability. See Eslin v. Collins, 108 So.2d 889 (Fla 1959) There is no such legitimate relationship in this case.

As discussed in Point I, there are several practical methods for manufacturers to control their exposure to liability for their products, e.g. recalls, product expiration dates, etc. A blanket 12 year limitation on all products, regardless of the reasonable useful life of the product, is not rational. Surely a 10 ton rated crane such as in the instant case was never regarded by even the manufacturer as having a useful life of merely 12 years. Manufacturers routinely recognize differences in product life as evidenced by the different warranties they issue. In balancing the right of the manufacturer to not have the onerous burden of "insuring" every product it makes, one asks: Is it more fair to let the manufacturer "off the hook" after 12 years, regardless of any true fault on their part in making the product, than to allow a plaintiff to plead and properly prove a case, timely filed after their cause of action accrued? It is far easier, more practical, and more fair to place the burden of making safe products on the manufacturers than to cut off an injured person's right to sue even, in many cases, before that person's right to sue accrues. The Florida Constitution has long protected this right of the citizens of the state of Florida and the statute of repose, as applied to the case at issue, is unconstitutional as applied.

CONCLUSION

The application of the 12 year statute of repose, by reliance on the Pullum decision, to bar the instant case was unconstitutional. The Plaintiffs respectfully request that the corrective legislation of 1986 be given retrospective effect and that the summary judgment barring this suit on the basis of the statute of repose be overturned.

Alternatively, Plaintiffs request that the Pullum decision be amended and limited to a prospective application and that the summary judgement be likewise overturned.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Petitioners has been furnished by United States mail to John W. Bussey, Esquire, P.O. Box 6086-C, Orlando, Florida 32853-6086, William A. Harmening, Esquire, 1727 Orlando Central, Orlando, Florida 32859, Michael A. Miller, One South Orange Avenue, Suite 650, Orlando, Florida 32801 & Ted R. Manry, III, Esquire, P.O. Box 1531, Tampa, Florida 32601, this 24th day of July, 1987.

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