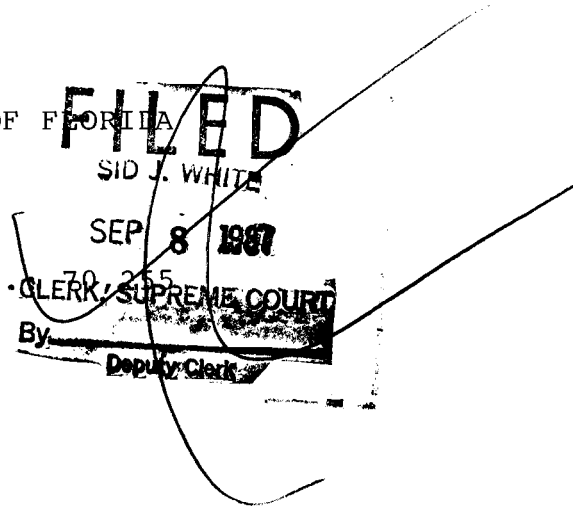
IN THE SUPREME COURT OF THE STATE OF FLORIDA



JAMES A. MATHIS, et ux,

Petitioners,

Case No. 70,255

v.

FOOTE STEEL CORPORATION, et al,

Respondents.

_____/

Appeal from the Fifth District Court of Appeal
Case No. 86-513

REPLY BRIEF OF THE PETITIONERS

HOWARD G. BUTLER, ESQUIRE
Meyers & Mooney, P.A.
17 S. Lake Ave.
Orlando, FL 32801
(305) 849-0940

CASES AND AUTHORITIES

Statement of the Case and Facts

Plaintiffs have been accused of misleading the court by saying that these Defendants were responsible for the many continuances of the trial of this cause. Plaintiffs would point out that on page 7 of their initial brief it was made very clear that the continuances were requested by other defendants and not the Defendants in this appeal.

(Because, at the time of filing of their initial brief, the index to the record on appeal was unavailable from the circuit court clerk's office due to a micro-filming error, the Plaintiffs would like to substitute an amended Statement of the Case and Facts which reflects the references to the Record. The substance has not been changed.)

Please substitute the following Statement of the Case and Facts in place of the Statement included in the Initial Brief of the Petitioners.

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 Hanischfeger & 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.

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. (R= unnumbered orders of 1/14/85, 1/17/85, 4/23/85, and 6/21/85.)

One continuance was granted because one of the defendants, Mr. Foote, (not these Defendants) 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.

After the Pullum decision, 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). (R-21-22)

Summary judgment in favor of the Defendants was granted on March 14, 1986, and Plaintiffs timely appealed. (R- 23)

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. (R-10-12)

REPLY TO ARGUMENT ON POINT I

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

It is the Defendants'/Respondents' stated position that, based on the decision in Pullum v. Cincinnati, 476 So.2d 657 (Fla 1985), the Plaintiffs'/Petitioners' cause of action never even arose because the statute of repose is deemed to have been in effect all along and, thus, there is no right of action that has been unconstitutionally denied.

Plaintiffs submit that there is authority to the contrary that shows that this court has honored a litigant's reliance on the law that was in effect at the time crucial to his case and has protected his constitutionally-protected right of access to courts.

In State v. White, 194 So.2d 601 (Fla 1967) the defendant was being criminally prosecuted for violating a law requiring a motor carrier to have a certain certificate. Defendant had previously been operating under a law which exempted his operation from having to obtain the certificate, but the law had been changed. The Supreme Court of Florida found that, while the Defendant had no vested right in continuing without having to obtain the certificate, he was justified in not getting the certi-

ficate because, prior to his being charged with the violation, the circuit judge before whom the case was presented had previously held that the law, as changed, was unconstitutional. The court cited Christopher v. Mungen, 61 Fla. 513, 55 So. 273 (Fla 1911) for the principle that a statute that has been judged unconstitutional is only dormant while the decision is maintained, but if it is reversed, the statute is held to be valid from the very first "even though rights acquired under particular adjudications where the statute was held to be invalid will not be affected by the subsequent decision that the statute is constitutional." ID at 55 So. 280.

> To hold that Appellee could be arrested and charged by information for violation of a statute previously declared unconstitutional by the very same judge before whom he was to appear and which judge had jurisdiction of the subject matter would, in our opinion, be contrary to the broad import of this principle. Accordingly, logic and justice appear to dictate that we should choose not to give our decision herein holding the statute constitutional retroactive application insofar as the charge against Appellee is concerned.

White at 604. Thus, this court honored the justified reliance on the law that was in effect, regardless of the fact that the law, as changed, was later found to be constitutional and, under the Defendants' theory, valid from its inception.

This honorable court has also been faced with congressional reliance on a supreme court decision and found that, when the court

had supplied the law upon which a person and attorneys had relied, the court would refuse to subvert the justifiable reliance and would only prospectively apply the new ruling. See Justice England's opinion concurring in part and dissenting in part in Smith v. Brantley, 400 So.2d 443, 453 (Fla. 1981). The Brantley case concerned an impeachment proceeding which was initiated after the public official had tendered his resignation. The issue was whether the resignation became effective when tendered or if it had to first be accepted by the governor to be effective. Congress had initiated impeachment proceedings after the resignation had been tendered but before it was accepted. Congress had relied on a prior decision of the Supreme Court of Florida for the principle that the resignation was not effective until accepted. The Court held that the law was that tendering the resignation is enough to make it effective, but decided to apply its ruling only prospectively. The impeachment conviction of the official was therefore upheld, apparently because of the justified reliance of the Senate on the previously-enunciated rule.

In Thompson v. Inter-County Tel. & Tel. Co., 62 So.2d 16 (Fla 1952) this court again upheld a litigant's reliance on a ruling that a particular law was unconstitutional. The court found that a later renactment of the law had rectified the problem, but the court, citing the Mungen case, held that the respondent had relied on the old law and that application of it to him would

be unsound. The court applied the new ruling prospectively.

Plaintiffs submit that they justifiably relied on a decision of the highest authority in the state. They have spent several years in litigating a case which has already gone through several appeals and has cost a great amount of money for experts. They reached the courthouse steps on several occasions, only to be turned away because a defendant had requested a continuance. To have their right of action destroyed by an application of the Pullum decision is a denial of their right of access to courts and is also manifestly unfair.

In the past, this honorable court has striven to protect a citizen's constitutional right of access to the courts for remedy for every injury done him. In Waller v. First Savings & Trust Co., 138 So. 780 (Fla 1931) this court went to great lengths to hold that a rule of English common law, which was inconsistent with our constitution, never became law in the first place. There, a man and his wife had been injured by a person who bombed their house. The tortfeasor died and the tort action was initiated against the bank as the tortfeasor's personal representative. The suit had been dismissed because the trial court held that the applicable law, which was based on the English common law adopted at the outset of Florida's statehood, provided that all actions for personal injuries died with the person. The Florida Supreme Court made an exhaustive study of the principles involved and held that the

theory of the right of action dying with the person was in direct conflict with the constitution's right of access to courts, and, therefore, the common law principle had never really become law at all in Florida since it was inconsistent with our constituion.

> To affirm such a judgment as has been rendered in this case is to ignore the plain provision of our constitutional Declaration of Rights that the courts shall always be open so that a person injured in his person or property shall have a "remedy" against his wrongdoer. Does this "remedy" not mean redress or recompense...?

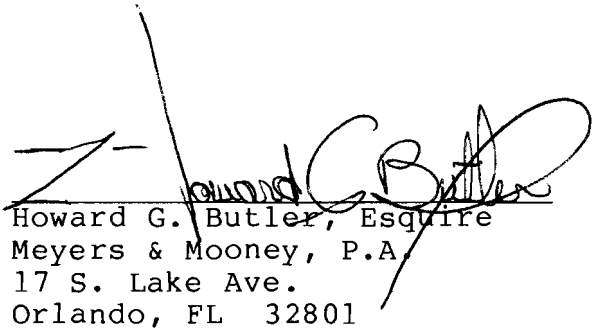
Waller at 785. Emphasis theirs. The Waller court called upon itself to be courageous in administering justice and applying the rule of reason when a law is patently opposed to our constitutional rights.

The application of the Pullum decision in a way that allows the statute of repose to have been effective all along violates the Plaintiffs' right to access to the courts. Under that statute, the Plaintiffs' cause of action was extiguished even before it arose. Plaintiffs submit that such a law violates their right of access to the courts for redress of their injuries. It is obvious that the intent of the Legislature is that there be no 12 year statute of repose. After the decision in Battila v. Allis Chalmers Manufacturing Co., 392 So.2d 874 (Fla 1980) the legislature took no steps to revise or reinstate any statute of repose. That decision stood for 5 years. When Pullum was decided,

the Legislature had a swift response and removed the 12 year limit.

Plaintiffs respectfully request that this honorable court reconsider its decision in Pullum and overrule it. At the very least, Plaintiffs request that the application of Pullum be limited to only those cases initiated after that decision was handed down, or that the corrective legislation of 1986 be given retrospective effect.

Respectfully submitted,



Howard G. Butler, Esquire
Meyers & Mooney, P.A.
17 S. Lake Ave.
Orlando, FL 32801
(305) 849-0940

Attorney for the Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Petitioners has been furnished by U.S. Mail to: John W. Bussey, Esquire, P.O. Box 6086-C, Orlando, FL 32853-6086, Wililiam A. Harmening, Esquire, 1727 Orlando Central, Orlando, FL 32859, Michael A. Miller, Esquire, One South Orange Avenue, Suite 650, Orlando, FL 32801 and Ted R. Manry, III, Esquire, P.O. Box 1531, Tampa, Florida 32601, this 4th day of September, 1987.

Howard G. Butler, Esquire
Meyers & Mooney, P.A.
17 S. Lake Ave.
Orlando, FL 32801
(305) 849-0940