IN THE SUPREME COURT OF FLORIDA

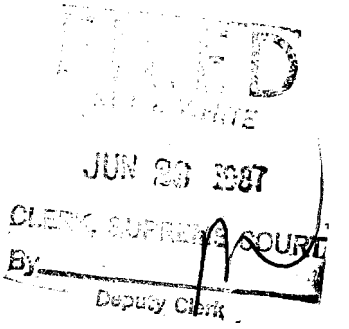
WILLIAM SHAW,
individually; and
as guardian and next friend of
GREGORY SHAW and
SCOTT SHAW; and
CHRISTEL SHAW,
his wife,

Petitioners,

vs.

GENERAL MOTORS CORPORATION; and
FEDERATED DEPARTMENT STORES, INC.,

Respondents.
_____/



CASE NO. 70,344

REVIEW OF THE THIRD DISTRICT COURT OF APPEAL OF FLORIDA

REPLY BRIEF OF PATRICIA ANN GRIFFIN AND LARRY D. GRIFFIN

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Robert King High Jr.
and
Robert M. Ervin Jr.
of the law firm of
Ervin, Varn, Jacobs,
Odom & Kitchen
Post Office Drawer 1170
Tallahassee, Florida 32302
(904) 224-9135

Attorneys for Griffin

TABLE OF CONTENTS

TABLE OF CITATIONS

ARGUMENT

Griffin will reply to those few portions of the respondents' brief which purport to address the procedural due process issue argued in Griffin's initial brief.

The respondents state that if Pullum v. Cincinnati, Inc., 476 So. 2d 657 (Fla.), reh'g denied mem., 482 So. 2d 1352 (Fla. 1985), appeal dismissed mem., 106 S. Ct. 1626 (1986), were not applied retroactively, plaintiffs who were injured after the running of the statute of repose, but before this court's decision in Pullum, "would still be treated more favorably than [the plaintiff in] Pullum and persons in his position. Thus," the respondents argue, "the Pullum decision, if prospective only, would not have eliminated that plaintiff's equal protection argument." [Brief of Respondents at 20]

In making this argument, the respondents overlook three things: First, in Pullum, this court never acknowledged the existence of an equal protection violation. This court merely "eliminated the premise of Pullum's equal protection argument," Pullum, 476 So. 2d at 660 (emphasis added). Indeed, the First District Court of Appeal, the decision of which was under review in Pullum, found there to be no such violation. See Pullum, 476 So. 2d at 658. Second, if there were an equal protection violation, the avoidance of an equal protection violation is not justification for the violation of a plaintiff's right to procedural due process. Third, as noted by this court in Nissan Motor Co. v. Phlieger, 12 F.L.W. 256, 257 n.2 (Fla. May 28, 1987), the products liability statute of repose has been effectively repealed.

If the respondents' argument is valid, the repeal of the statute of repose, if not applied retroactively, would also result in more favorable treatment for others than for the plaintiff in Pullum and persons in his position.

The respondents also argue that the United States Supreme Court's summary dismissal of Pullum was a disposition on the merits of Griffin's procedural due process argument. [Brief of Respondents at 4, 20] To the contrary, if the memorandum dismissal of Pullum was a disposition on the merits of anything, it was a disposition on the merits of the equal protection argument. The respondents have apparently overlooked the fact that the plaintiff in Pullum had no standing to raise the present procedural due process issue, either in this court or in the Supreme Court. The plaintiff in Pullum, who was injured by a product ten and one-half years after the date of delivery of the injurious product to its original purchaser, had one and one-half years within which to sue, and was out of court simply because he failed to do so within that time. He was totally unaffected by retroactive application of Pullum, which only affects persons, such as the petitioners and Griffin, who were injured before the Pullum decision and in excess of twelve years after delivery of the injurious product to its original purchaser.

The respondents also argue that the non-retroactivity rule of Florida Forest & Park Service v. Strickland, 154 Fla. 472, 18 So. 2d 251 (1944), is inapplicable because there has been no "reliance." [Brief of Respondents at 21-24] Strickland's

non-retroactivity rule, which is merely due process by another name, is that where a statute has received a given construction by this court, and property rights have been acquired in accordance with the construction, the property rights may not be destroyed by giving a subsequent overruling decision retroactive operation, id. at 477, 18 So. 2d at 253. The apparent origin of the "reliance" argument is obiter dictum in Strickland that "some courts have gone so far as to adopt the view that the rights, positions, and courses of action of parties who have acted in conformity with, and in reliance upon," a given statutory construction, should be protected by the non-retroactivity rule. See id.

In making their "reliance" argument, the respondents rely on Eddings v. Volkswagenwerk, A.G., 635 F. Supp. 45 (N.D. Fla. 1986), a case which used a "reliance" analysis in rejecting an argument that Pullum could not be applied retroactively. What the respondents overlook in making their "reliance" argument, however, is the fact that the court which decided Eddings has since receded from the "reliance" analysis used in Eddings, and has expressly held that "a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause" and, accordingly, that Pullum may not be applied retroactively without violating the plaintiff's fundamental right to procedural due process. Cox v. Farrel-Birmingham Co., No. PCA 86-4064-WEA, slip op. at 2 (N.D. Fla. Sept. 16, 1986)(order denying motion for summary judgment)(emphasis added). The court observed in Cox that "[i]n several other cases, including cases by the undersigned, [this]

reasoning has not been applied." The court concluded in Cox "that [this] reasoning is correct and that this court and other courts, in not applying [this] reasoning, were in error." Cox, slip op. at 2-3. [Cox is reproduced as Appendix E to Griffin's initial brief]

"Reliance," therefore, is irrelevant to the procedural due process issue. The respondents' statement that "a vested right is more than a mere expectation based upon an anticipation of the continuance of existing law," is entirely correct. [See Brief of Respondents at 28] As explained by the numerous cases cited by Griffin at pages 15 through 17, 20 through 21 and 23 of Griffin's initial brief, unlike a mere expectation, an accrued cause of action is a vested property right, which may not be destroyed by the state without a hearing on the merits of the purported owner's claim of entitlement. How the accrued cause of action, the property, was acquired, be it by accident or otherwise, is irrelevant. It is property nonetheless and, as such, protected by the plaintiff's constitutional right to procedural due process.[1]

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[1]This "reliance" analysis has apparently spawned a misunderstanding as to the nature of the plaintiff's property interest. The respondent in Pait v. Ford Motor Co., No. 69,917 (Fla. pending), for instance, cites three cases for the proposition that an "incorrect" decision vests no property interest in anyone. Brief of Respondent at 41-44, Pait. The respondent in Pait has missed the point. The property interest involved here is not a so-called "incorrect" decision. The property interest involved here is an accrued cause of action which, once it comes into existence, lives on despite the subsequent "correction" of an "incorrect" decision which may have made the existence of the cause of action possible. The relevant moment in time,

The respondents also argue, rather amorphously, that Griffin's reliance on Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982), and Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673 (1930), is misplaced. [Brief of Respondents at 28 & n.8] In nearly the same breath that the respondents attempt to distinguish Logan and Brinkerhoff-Faris Trust & Savings Co., however, the respondents state, "Logan involved an issue of procedural due process. The holding of the Court was that where the State had recognized a right of recovery for a particular wrong, due process required that the state provide a hearing on the merits of the claim. . . . Similarly, in [Brinkerhoff-Faris Trust & Savings Co.], the court was concerned with the violation of procedural due process, not the rights of the plaintiff on the merits" (emphasis added). [Brief of Respondents at 28 & n.8]

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the moment of creation of the property interest, is the moment of accrual of the cause of action, not the date of the issuance of an "incorrect" decision. In each of the three cases cited by the respondent in Pait, the property interest involved vested prior to and, therefore, regardless of the "incorrect" decision. In each case, the property interest gained nothing from the subsequent "incorrect" decision. See Rupp v. Bryant, 417 So. 2d 658, 660, 661 (Fla. 1982) (the property interest, an accrued cause of action in tort, vested upon injury to the plaintiff in 1975; the "incorrect" decision, District School Board v. Talmadge, 381 So. 2d 698 (Fla. 1980), appeared thereafter, and was "corrected" in 1982); Christopher v. Mungen, 61 Fla. 513, 533, 537, 55 So. 273, 280, 281 (1911)(the property interest, an interest in real property, vested in the decedent's heirs upon the death of the decedent in 1894; the "incorrect" decision appeared in 1899, and was "corrected" in 1911); Eastern Air Lines v. Gellert, 438 So. 2d 923, 926, 928-29 (Fla. 3d DCA 1983)(the property interest, an accrued cause of action in tort, vested upon injury to the plaintiff in 1978; the "incorrect" decision, Mercury Motors Express, Inc. v. Smith, 372 So. 2d 116 (Fla. 3d DCA 1979), quashed, 393 So. 2d 545 (Fla. 1981), appeared thereafter, and was "corrected" in 1981).

That is precisely the point. The issue is not whether the plaintiff will ultimately succeed on the merits of his claim. The due process violation caused by the retroactive abolition of the plaintiff's accrued cause of action is simply the denial of the plaintiff's opportunity to be heard on the merits of his claim. George v. Firestone Tire & Rubber Co., No. GCA 85-0117-MMP, slip op. at 2 (N.D. Fla. July 31, 1986)(order denying motion for reconsideration and certifying interlocutory appeal). [George is reproduced as Appendix D to Griffin's initial brief]

CONCLUSION

The procedural due process issue which permeates the entire controversy surrounding retroactive application of Pullum has now prompted the court of appeal under review to certify the following question to this court: "Would the application of Pullum, to bar a cause of action that accrued after the Battilla decision but before the Pullum decision, deprive the plaintiff of a right of due process guaranteed by the United States Constitution?" Clausell v. Hobart Corp., 12 F.L.W. 1224 (Fla. 3d DCA May 12, 1987); accord Henley v. J. I. Case Co., 12 F.L.W. 1327 (Fla. 3d DCA May 26, 1987). For the foregoing reasons, as well as for the reasons expressed in Griffin's initial brief, the court of appeal's certified question regarding due process should be answered in the affirmative.

Robert King High Jr.
and

Robert M. Ervin Jr.
of the law firm of
Ervin, Varn, Jacobs,
Odom & Kitchen
Post Office Drawer 1170
Tallahassee, Florida 32302
(904) 224-9135

Attorneys for Griffin

Certificate of Service

I certify that a copy of this brief has been furnished to the following counsel of record by mail this 22nd day of June 1987.

Fred E. Glickman
Suite 508 Dadeland Towers
9200 South Dadeland Boulevard
Miami, Florida 33156

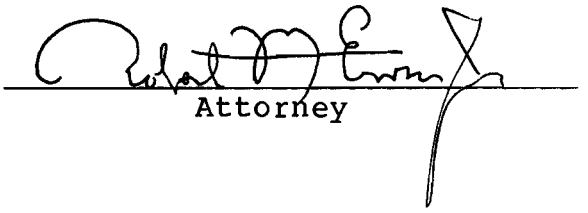
Attorneys for Petitioners

M. Steven Smith III
Wendy F. Lumish
Rumberger, Wechsler & Kirk
Suite 3410 One Biscayne Tower
2 South Biscayne Boulevard
Miami, Florida 33131

Attorneys for General Motors Corporation

David L. Sullivan
Usich & Sullivan
Suite 905 One Datran Center
9100 South Dadeland Boulevard
Miami, Florida 33156

Attorneys for Federated Department Stores, Inc.



Attorney