IN THE
SUPREME COURT OF FLORIDA

CASE NO. 70,475

AQUILINA LAZO,

Petitioner,

v.

BARING INDUSTRIES, INC., and
CHICAGO DRYER COMPANY LAUNDRY MACHINES,

Respondents.

On Appeal from the Third District Court of Appeal
and the Questions Certified as being of Great
Public Importance

INITIAL BRIEF OF RESPONDENT, CHICAGO DRYER COMPANY LAUNDRY MACHINES

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(CERTIFIED QUESTIONS)

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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?

INTRODUCTION

Pursuant to this Court's briefing schedule dated May 5, 1987, Respondent, CHICAGO DRYER COMPANY LAUNDRY MACHINES, hereby files its Initial Brief on the Merits.

Respondent was a co-defendant in the trial court. Respondent, CHICAGO DRYER COMPANY LAUNDRY MACHINES was the manufacturer of a gas heated flatwork ironer.

Petitioner was the Plaintiff in the trial court and sought damages against the Respondent under a theory of products liability.

The co-defendant in the trial court, BARING INDUSTRIES, INC., was the distributor of the gas heated flatwork ironer.

The Record-on-Appeal will be referred to as "R- " followed by the appropriate page number.

Reference to Petitioner's Brief will be referred to as "PB- " followed by the appropriate page number.

Petitioner will be referred to as "Petitioner" or by her proper name.

Respondent will be referred to as "Respondent", CHICAGO DRYER and/or MANUFACTURER.

Co-defendant (Appellee/Respondent) will be referred to as BARING INDUSTRIES or DISTRIBUTOR.

All emphasis in the Initial Brief of Respondent is supplied by counsel unless otherwise noted.

STATEMENT OF THE CASE/FACTS

The Respondent, CHICAGO DRYER COMPANY LAUNDRY MACHINES, accepts the Petitioner's Statement of the Case and Facts with the following exceptions:

1. Subsequent to Respondent's filing an Amended Motion to Dismiss based on the Statute of Limitations (R. 17-18), the Respondent, on December 18, 1984, filed a Motion to Amend its Affirmative Defenses (R-20) which was granted on December 20, 1985 (R-31).

2. Respondent's Motion for Summary Judgment was filed on May 19, 1986 (R-76-78). From May 19, 1986 when Respondent filed its Motion for Summary Judgment based upon the decision of Pullum v. Cincinnati, Inc., 476 So.2d 657 (Fla. 1985) and the July 14, 1986 hearing on the Motion for Summary Judgment, Chapter 86-272, Laws of Florida (1986) became effective.

3. Petitioner's Statement of the Facts relative to the injury suffered by Petitioner and the cause of that injury, are based on the allegations made in her Complaint (R-1-6). This matter is before the Court on two certified questions from the Third District Court of Appeal which affirmed Final Summary Judgments entered in favor of the Respondent. By not contesting the factual statements made by the Petitioner, Respondent is not conceding that Petitioner's allegations are true.

SUMMARY OF THE ARGUMENT

Petitioner's cause of action is based upon an injury she received from an allegedly defective product manufactured and distributed by Respondent and Baring Industries, respectively. The accident ocurred on December 17, 1982, which was approximately 15 years after the product was delivered to the original purchaser.

As of September, 1979, Florida Statute § 95.031(2), effectively barred any products liability suit against Respondent as the manufacturer of this gas heated ironing machine.

Petitioner's Complaint for damages against Respondent was filed on September 30, 1983, relying upon the Supreme Court's decision in Battilla v. Allis Chalmers Manufacturing Company,392 So.2d 874 (Fla. 1980) which held § 95.031(2) unconstitutional. On August 29, 1985, in Pullum v. Cincinnati, Inc., 476 So.2d 657 (Fla. 1985), the Supreme Court receded from the Battilla decision and held the Statute of Repose to be constitutional. On July 1, 1986, the legislature amended Florida Statute § 95.031(2) thereby repealing the 12 year Statute of Limitation for bringing suits against a manufacturer for products liability. The trial court entered a Summary Judgment in favor of Respondent on the basis that her Complaint, which was filed September 30, 1983, was barred by the then existing Statute of Repose.

Petitioner seeks to have the benefit of Chapter 86-272, Laws of Florida, applied to her "cause of action".

The Florida Legislature clearly indicated no manifestation of intent that the law be given retroactive effect. Homemakers, Inc. v. Gonzalez, 400 So.2d 965 (Fla. 1981); Foley v. Morris, 339 So.2d 215 (Fla. 1976).

Regardless, it is Respondent's position that a Statute of Repose is distinguishable from a Statute of Limitations Universal Engineering Corp. v. Perez, 451 So.2d 463 (Fla. 1984).

If this court determines that Chapter 86-272 operates prospectively only, Petitioner asserts she is then entitled to have the Pullum decision applied prospectively only and thus not bar her claim.

A decision of a court of last resort which overrules a prior decision is retrospective as well as prospective in its operation unless declared by the opinion to have prospective effect only. Black v. Nesmith, 475 So.2d 963 (Fla. 1st DCA 1985); Cassidy v. Firestone Tire Rubber Company, 495 So.2d 801 (Fla. 1st DCA 1986). The Pullum decision was silent on this matter.

Petitioner relies upon Florida Forest and Park Service v. Strickland, 154 Fla. 472, 18 So.2d 251 (1944) to indicate that she has a property right which is destroyed by the retroactive application of Pullum. Since Petitioner acquired

her right only as a result of an accident over which she had no control, and which occurred 12 years after the delivery of the product she claims to be defective, she could not have relied upon the existence or non-existence of the Statute of Repose as to the accrual of her cause of action. See: Specially Concurring Opinion of Justice Grimes in Nissan Motor Company, Ltd. v. Lynn Phlieger, 12 FLW 256 (May 28, 1987, Supreme Court, Case No. 68-823).

ARGUMENT

ISSUE I

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

In considering this question, the Petitioner is asking this Court to construe the legislative intent in a manner which would make Chapter 86-272, Laws of Florida, retroactively apply to a cause of action that was previously barred merely because the cause was still within the judicial system when the new law became effective.

If the Statute of Repose and the Repeal of the Statute of Repose are considered analogus to the Statute of Limitations, the reasoning of this Court in Foley v. Morris, 339 So.2d 215 (Fla. 1976) is applicable. In Foley, the Court held that:

> Since the presumption is against retroactive application of a Statute where the legislature has not expressly in clear and explicit language expressed an intention that the statute be so applied and recognizing the authority of the legislature to adopt the Statute of Limitations which retroactively shortens the period of limitations, providing a reasonable time as allowed by the statute within which to file suit, where there is manifest legislative intent to retroactively shorten the period, we must look to the language...

Clearly, in the absence of a clear manifestation of legislative intent to the contrary, the Statute of Limitations is construed as prospective only and not

retrospective in their operation. See also Homemakers, Inc. v. Gonzalez, 400 So.2d 965 (Fla. 1981).

Further, the Courts cannot and should not undertake to supply words purposely omitted from a statute. On the other hand, extreme caution should be used in adding words to a statute unless it is obvious that the legislative intent could only be effectuated by adding such words. Armstrong v. City of Edgewater, 157 So.2d 422 (Fla. 1963).

In order for Chapter 86-272 to be retroactively applied, as argued by Petitioner, this Court would have to provide for a "saving clause" and/or add additional language.

Chapter 86-272, Laws of Florida, merely indicates that the change in F.S. § 95.031(2) (exclusion of products liability cases) becomes effective July 1, 1986. There is nothing else in the language of that law that manifests an intention by the legislature to do otherwise than prospectively repeal the Statute of Repose. [1]/

There is a distinction, however, between a Statute of Limitations and a Statute of Repose. As set forth in Universal Engineering Corp. v. Perez, 451 So.2d 463 (Fla. 1984), citing Bauld v. J.A. Jones Construction, Company, 357 So.2d 401, 402 (Fla. 1978), the court said:

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[1]/ The very purpose of enacting a saving clause is to manifest an intention by the legislature to apply the law retroactively. See Nash v. Asher, 342 So.2d 1038 (Fla. 4th DCA 1977); Universal Engineering Corp. v. Perez, 451 So.2d 463 (Fla. 1984); Carpenter v. Florida Central Credit Union, 369 So.2d 935 (Fla. 1979).

> Rather than establishing a time limit within which [an] action must be brought, measured from the time of accrual of the cause of action, these [Statute of Repose] provisions cut off the right of action after a specified time measured from the delivery of a product or the completion of work. They do so regardless of the time of the accrual of the cause of action or of notice of the invasion of the legal right.

On or about September, 1979, Florida's Statute of Repose effectively barred any cause of action against Respondent for any liability arising from the product (gas heated flatwork ironer) manufactured by Respondent on or about September, 1967. At that time (September, 1979), Petitioner had no cause of action against Respondent. On December 17, 1982, when Petitioner's injury occurred, her "right" to bring a cause of action against Respondent was based on case law determining that F.S. § 95.031(20 was unconstitutional. Battilla v. Allis Chalmers, Mfg., Co., 392 So.2d 874 (Fla. 1980)

Petitioner had no vested right that was taken away from her by legislative enactment. When Chapter 86-272, Laws of Florida, became effective on July 1, 1986, Petitioner had no rights denied to her since, under the existing Statute of Repose in effect on the date that her cause of action accrued, she was barred from filing suit against Respondent. The Battilla case cannot be considered as an "amendment" to the Statute of Repose for the purposes of creating and/or

giving to the Petitioner a cause of action against Respondent. Pullum v. Cincinnati, Inc., 476 So.2d 657 (Fla. 1985).

Thus, the certified question must be answered in the **negative**

ISSUE 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?

A decision of a court of last resort which overrules a prior decision is retrospective as well as prospective in its operation unless declared by the opinion to have prospective effect only. Black v. Nesmith, 475 So.2d 963 (Fla. 1st DCA 1985). The Pullum decision is silent on the question of retroactivity. The only exception, and the one upon which Petitioner relies, is where property or contract rights have been acquired under and in accordance with a previous statutory construction of the Supreme Court. Department of Revenue v. Anderson, 389 So.2d 1034 (Fla. 1st DCA 1980), review denied, 399 So.2d 1141 (Fla. 1981); Florida Forest and Park Service v. Strickland, 154 Fla. 472, 18 So.2d 251 (1944).

The decision of Battilla v. Allis Chalmers Mfg. Co., 392 So.2d 874 (Fla. 1980) in no way created a property interest and/or contract right in the Petitioner. Petitioner's cause of action accrued after Battilla by way of an accident on December 17, 1982 and over which she had no control. As set forth in the concurring opinion of Justice Grimes in Nissan Motor Company, Ltd. v. Phlieger, 12 FLW 256 (May 28, 1987, Supreme Court, Case No. 68-823) at page 258:

> In Florida Forest and Park Service v. Strickland, 154 Fla. 472, 18 So.2d 251 (1944), this Court applied the exception to a case in which a worker's compensation claimant had appealed an adverse decision to the Circuit Court in accordance with the existing law. After the Circuit Court had ruled in favor of the claimant while the case was still on appeal, the Supreme Court had overruled the prior decision and held that those seeking review of decisions of deputy commissioners in worker's compensation cases, must first exhaust their remedies by way of appeal to the Florida Industrial Commission. The Strickland Court recognized that the claimant had relied on existing procedures when he appealed to the Circuit Court and refused to penalize him for failing to appeal to the Florida Industrial Commission when he had no reason to know that he should do so....
>
> The recent decisions in Pait [Pait v. Ford Motor Company, 500 So.2d 743 (Fla. 5th DCA 1987)] and Cassidy v. Firestone Tire & Rubber Company, 495 So.2d 801 (Fla. 1s DCA 1986), in which Pullum was retrospectively applied may be distinguished because in both of those cases the accidents occurred beyond the 12 year period of the Statute of Repose. There, the claimants rights were acquired only as a result of accidents over which they had no control, and there was no reliance upon existing law pertaining to the length of time within which they could bring suit.

Clearly, Petitioner cannot show any reason to depart from the general rule in Florida that Pullum is to be retroactively applied.

As set out in Black v. Nesmith, something more is needed than just the "financial cost of initiating litigation" to be sufficient for this court to give any equitable consideration to Petitioner. Cassidy v. Firestone Tire & Rubber Company, 495 So.2d 801, 802, n.2.

WHEREFORE, the second certified question must be answered in the **affirmative**.

CONCLUSION

The Respondent, CHICAGO DRYER COMPANY LAUNDRY MACHINES, respectfully requests that this Honorable Court construe Chapter 86-272, Laws of Florida, as having prospective application only and hold that the Pullum decision bars Petitioner's cause of action.

DATED: June 17, 1987

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief of Respondent has been mailed to Steven Berger, Attorney for Baring Industries, Suite B-5, 8525 S.W. 92nd Street, Miami, Floria 33156 and Alan T. Lipson, Attorney for Petitioner, STANLEY M. ROSENBLATT, P.A., Concord Building, 66 West Flagler Street, Miami, Florida 33130 this 17 day of June, 1987.

RHEA P. GROSSMAN