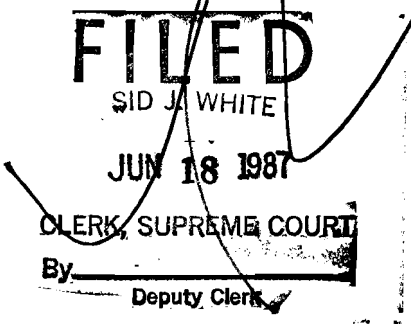
IN THE SUPREME COURT OF FLORIDA

CASE NO. 70,581



KATHY MANUEL,

Petitioner,

vs.

EIG CUTLERY, INC., et al.,

Respondents.

PETITIONER'S BRIEF ON THE MERITS

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INTRODUCTION

This brief is filed on behalf of Kathy Manuel, plaintiff in a products liability action. The defendants, appellees, are the distributors and sellers and successor in interest to the distributors and sellers of a .38 caliber Derringer. This Court has jurisdiction pursuant to Article V, §3(b)(4), Florida Constitution. The District Court of Appeal, Third District certified the following questions as questions of great public importance:

> I. WHETHER THE LEGISLATIVE AMENDMENT OF SECTION 95.031(2), FLORIDA STATUTES (1983), ABOLISHING THE STATUTE OF REPOSE IN PRODUCT LIABILITY ACTIONS, SHOULD BE CONSTRUED TO OPERATE RETROSPECTIVELY AS TO A CAUSE OF ACTION WHICH ACCRUED BEFORE THE EFFECTIVE DATE OF THE AMENDMENT.
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> II. IF NOT, WHETHER 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), APPLIES SO AS TO BAR A CAUSE OF ACTION THAT ACCRUED AFTER THE BATTILLA DECISION BUT BEFORE THE PULLUM DECISION.

STATEMENT OF THE CASE AND FACTS

Kathy Manuel was injured on December 3, 1981, when a .38 caliber Derringer accidently discharged and a bullet struck her causing a spinal cord injury. (R.1-2)[1] One

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[1] In addition to the distributor and seller, Eig Cutlery, Inc. and Eig Corporation and the successor corporation, Hill Brothers, Inc., suit was brought against an entity known as Tanfoglio, the manufacturer. No pleading has ever been

count of the complaint alleges negligence in causing a weapon to be sold that was inherently defective because of the absence of a safety mechanism to prevent an accidental discharge. Another count is for strict liability for placing an unreasonably dangerous firearm in the stream of commerce. (R.4-6)

In their answer, the defendants asserted as an affirmative defense that the action was barred by Section 95.031(2) of the Florida Statutes for failure to commence the suit within twelve years after delivery of the completed product to the original purchaser. (R.19-20)

The defendants filed a motion for summary judgment asserting that even though suit was filed within the 4-year limitations period provided in Section 95.11(3), it was not filed within twelve years from the delivery of the completed product to its original purchaser so that Section 95.031(2) precluded the plaintiff from bringing suit. In support of their motion for summary judgment, defendants submitted two affidavits establishing that the date of delivery of the firearm in question to its original purchaser was May 4, 1964. (R.23)

Plaintiff filed the affidavit of an engineer who examined the subject firearm. He stated that firearms have a useful life well in excess of twelve years and that the

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[1] (continued) filed in this action by this defendant. The summary final judgment is on behalf Eig Corporation, Eig Cutlery, Inc. and Hill Brothers, Inc.

subject firearm could accidentally discharge if it were dropped. It was, however, possible to design a firearm so that it would not accidentally discharge. (R.39-42) The trial judge entered final summary judgment for defendants. An appeal was taken to the District Court of Appeal which affirmed on the authority of Shaw v. General Motors Corp., 503 So.2d 362 (Fla. 3d DCA 1987), certifying the two questions forth above.

SUMMARY OF ARGUMENT

The legislative amendment of Section 95.031(2), Florida Statutes (1983) abolishing the statute of repose in product liability actions needs not be construed retrospectively to apply to an action pending on the date of repeal. This Court should apply the statutory law at the time of final appellate disposition rather than the statutory law existing when the trial court renders judgment. Alternatively, in order to construe the repeal of the statute of repose to reconcile it with the constitutional mandate of access to the courts, it must be given retroactive application under the facts here presented.

Pullum v. Cincinnati, Inc., 476 So.2d 657 (Fla. 1985), app. dism., ___U.S.___, 106 S.Ct. 1626, 90 L.Ed.2d 179 (1986) cannot be constitutionally applied to bar a cause of action that accrued after Battilla v. Allis Chalmers Manufacturing Company, 392 So.2d 874 (Fla. 1981) but before Pullum without violating the mandate of the Supreme Court of the United States in Chevron Oil Co. v. Huson, 404 U.S. 97,

92 S.Ct. 349, 30 L.Ed.2d 296 (1971) as well as general principles of Florida and federal constitutional law.

ARGUMENT

THE 12-YEAR STATUTE OF REPOSE FORMERLY FOUND IN SECTION 95.031(2), NOW REPEALED, DOES NOT BAR THE PLAINTIFF FROM BRINGING SUIT ON A CAUSE OF ACTION WHICH ACCRUED FIVE YEARS AFTER THE 12-YEAR PERIOD PROVIDED FOR IN THE STATUTE AND WAS FILED WHILE BATTILLA WAS THE LAW OF FLORIDA.

A. Repeal of the Statute of Repose

There is no question that this suit was timely filed under the applicable 4-year statute of limitations. Kathy Manuel was injured in December, 1981 and the complaint was filed in July, 1984. Does the 12-year statute of repose, repealed effective July 1, 1986, bar Kathy Manuel from bringing suit where her injury occurred five years after the 12-year period provided for in the statute?

Long before the existence of a statute of repose or decisions construing it, the Declaration of Rights of the Florida Constitution provided that the courts shall be open to every person for redress of injury. Article I, Section 21, Florida Constitution. In 1975, the Florida legislature enacted a statute of repose which applied to product liability litigation.

As in all statutes of repose, the purpose is to put an outer limit on the period of time within which suit may be brought, regardless of when a cause of action accrues or knowledge of a cause of action is gained. After enactment

in 1975, actions for product liability were governed by the statute of repose set forth in Section 95.031(2) which provides that such actions had to be begun within the 4-year period provided for in the limitations chapter but in any event within twelve years after the date of delivery of the completed product to the original purchaser. Section 95.031(2) was amended, effective July 1, 1986, to eliminate the 12-year limitation.

Petitioner submits that determination of "retrospective" application of the statute of repose repeal is not necessary to find the repeal applies, so that petitioner's cause of action is not barred. Florida law requires an appellate court to apply the law as it exists at the time of appellate disposition. See, Florida Patient's Compensation Fund v. Von Stetina, 474 So.2d 783 (Fla. 1985); Goodfriend v. Druck, 289 So.2d 710 (Fla. 1974); Board of Public Instruction v. Budget Commission, 167 So.2d 305 (Fla. 1964); Carr v. Crosby Builders Supply Company, Inc., 283 So.2d 60 (Fla. 4th DCA 1973); Royal Atlantic Association v. Royal Condominium Managers, Inc., 258 So.2d 39 (Fla. 3d DCA 1972).

The statute of limitations in effect at the time of appellate disposition of Kathy Manuel's case by the District Court of Appeal and this Court would permit her to bring her action since the statute of repose no longer exists. Judgment here was entered in the trial court based on a statute then in effect and now repealed. This Court should

dispose of this case in accordance with the current status of the law.

If retrospective application of the repeal of the statute of repose is necessary to permit Petitioner to have her day in court, then as Judge Ferguson stated in his special concurrence to Dominguez v. Bucyrus-Erie Company, 503 So.2d 364, 365 (Fla. 3d DCA 1987) the reason for retrospective application ". . .is most compelling":

> "The Florida Constitution, article I, section 21, provides that '[t]he courts shall be open to every person for redress of any injury.' This provision was adopted to give constitutional vitality to the maxim that for every wrong there is a remedy. Holland ex rel. Williams v. Mayes, 155 Fla. 129, 19 So.2d 709 (1944).
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> Pullum v. Cincinnati, Inc., 476 So.2d 657 (Fla.1985), 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.
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> We are not paralyzed, by policy or precedent, from giving the corrective legislation retrospective application to a case which was sandwiched between Battilla and Pullum, 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)."

Accepting as a given fact that the revision of Section 95.031(2) repealing the 12-year statute of repose ". . .was

a prompt legislative overruling of Pullum," Dominguez v. Bucyrus-Erie Company, supra at page 365, this was clearly expressed legislative intent that the repealing legislation should apply retrospectively. See, Homemakers, Inc. v. Gonzales, 400 So.2d 965 (Fla. 1981).[3] This is particulrly true where a statute is remedial and should be applied retroactively to serve its intended purpose. City of Orlando v. Desjardins, 493 So.2d 1027 (Fla. 1986).

In order that the constitutional requirement of access to the courts for redress retain any vitality, the repeal of the statute of repose must be considered retroactive to cases filed under the law of Battilla and still pending when Pullum was decided. The first certified question must be answered in the affirmative.

B. Application of Battilla

Five years after enactment of the 12-year statute of repose, this Court held on authority of the previous decision in Overland Construction Co. v. Sirmons, 369 So.2d 572 (Fla. 1979) that as applied to the facts of that case,

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[3] Chapter 86-272, Section 2, Laws of Florida repealed the statute of repose for product liability actions. Section 1 of this same chapter makes a change in the statute of limitations governing actions for libel or slander. Section 3 governs effective dates of sections 1 and 2, providing the change for libel or slander applies to causes of action accruing after October 1, 1986, while repeal of the product liability statute of repose shall take effect July 1, 1986. This evidences the legislature intended the libel or slander provision to apply prospectively and, because of the differently worded effective date applying to the product statute of repose, the latter provision should apply retroactively.

Section 95.031 denied access to the courts under Article I, Section 21 of the Florida Constitution. The order of the trial court holding the product liability action barred was reversed. Battilla v. Allis Chalmer Manufacturing Company, 392 So.2d 874 (Fla. 1981).

The Overland Construction Company case determined that where a plaintiff's potential cause of action arises after it would be barred by a statute of repose, application of the statute denies access to the courts as distinguished from those situations where the statute merely abbreviates the period within which suit can be commenced. While Overland involved the statute of repose for construction of improvements to real property, the reasoning applies here.

Subsequent cases involving application of the statute or repose in product liability cases indicate that the question most usually involved is shortening the period remaining for bringing an action. See McRae v. Cessna Aircraft Company, 457 So.2d 1093 (Fla. 1st DCA 1984), pet. rev. den., 467 So.2d 1000 (Fla. 1985); Feil v. Challenge-Cook Brothers, Inc., 473 So.2d 1338 (Fla. 4th DCA 1985).

The issue of shortening the period for bringing an action rather than eliminating a cause of action before it accrues was before this Court in Pullum v. Cincinnati, Inc., 476 So.2d 657 (Fla. 1985). The District Court of Appeal, First District, in Pullum v. Cincinnati, Inc., 458 So.2d 1136 (Fla. 1st DCA 1984), certified the following question as one of great public importance:

> "Does section 95.031(2) Florida Statutes, deny equal protection of the laws to persons such as appellant [petitioner] who are injured by products delivered to the original purchaser between 8 and 12 years prior to the injury?"

The District Court of Appeal had answered the question in the negative and affirmed a summary judgment against the plaintiff. The plaintiff was injured in April, 1977, while operating a piece of machinery which had been delivered to the original purchaser in November, 1966. Suit was filed against the manufacturer in November, 1980, more than twelve years after the delivery date but within the applicable 4-year statute of limitations. A critical fact is that the plaintiff was injured ten years and six months after delivery to the original purchaser which would have allowed suit to have been brought under the applicable twelve year statute of repose within the eighteen month period remaining.

On these facts, this Court approved the decision of the District Court of Appeal with the limitation that "We approve the result only of this decision." Pullum v. Cincinnati, Inc., supra at page 658.

The facts before this Court in Pullum would have permitted it to affirm the action of the trial court and approve the decision of the District Court of Appeal based upon a determination that shortening the time for bringing an action does not constitutionally deprive one of the right to access to the courts since the plaintiff in Pullum had

eighteen months from the date of injury to file this suit. Rather than accomplishing the result in this fashion, this Court chose to recede from its decision in Battilla and determine that section 95.031(2) is not unconstitutionally violative of Article I, Section 21 of the Florida Constitution because the legislature decided that perpetual liability placed an undue burden manufacturers. Twelve years from the date of original sale is a reasonable time, according to the legislature, for exposure to liability from manufacture of a product.

Notwithstanding these gratuitous pronouncements, the Pullum decision should not bar Kathy Manuel from bringing her action. On the date of her injury, the Battilla case allowed her to bring suit against the defendants. At that time, December of 1981, her right to sue arose and became vested. Kathy Manuel filed her complaint in July, 1984. On this date, the Battilla decision still validated the right to sue. The decision in Pullum which became final upon denial of rehearing in November, 1985, could not invalidate the right to maintain an action without impermissible retroactive application.

The injury to Kathy Manuel and the filing of her complaint occurred in the interim period between the decisions in Battilla and Pullum. Many years before, in the decision of Florida Forest and Park Service v. Strickland, 154 Fla. 472, 18 So.2d 251 (1944) this Court decided that a decision of a court of last resort overruling a former

decision is retrospective as well as prospective in its operation unless specifically declared by the opinion to have a prospective effect only. There is, however, a well recognized exception where rights,[4] positions, and courses of action of parties who have acted in conjunction with and in reliance upon the construction given in the former decision should not be impaired or abridged by reason of a change in judicial construction of the same statute.

The United States Supreme Court deals with the issue of retroactive application of decisional law in Chevron Oil Co. v. Huson, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971). This case involved in overruling a decision which shortened a statute of limitations. The plaintiff was injured in 1965 and in 1968 he timely sued for damages under the then existing case law. Summary judgment was entered against the plaintiff based on the statute of limitations, relying on the 1969 Supreme Court decision in Rodrigue v. Aetna Casualty Surety Co., 395 U.S. 352, 89 S.Ct. 1835, 23 L.Ed.2d 360 (1969). Rodrigue applied a state statute of limitations in an action similar to the plaintiff's in the Huson case, not the laches doctrine which, under previous decisions, would have applied to permit the claim to be brought.

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[4] The right of an injured person to bring suit for damages suffered as a result of alleged negligence is one for which a right to redress is guaranteed by Article I, Section 21, who have acted in conjunction with and in reliance upon the Florida Constitution. Overland Construction Co., Inc. v. Sirmons, supra.

The Supreme Court set out three factors necessary to determine the retroactive effect of an overruling decision:

> 1. A decision to be applied non-retroactively must establish new principle of law either by overruling clear past precedent upon which litigants have relied or deciding an issue of first impression; 2. Whether retrospective operation will further or retard operation of the rule in question; 3. Whether the overruling decision produces substantially inequitable results if applied retroactively.

Utilizing these criteria, the Supreme Court declined to give retroactive effect to its own prior decision and refused to apply a state one-year statute of limitations to bar the plaintiff's suit.

Examination of the three factors utilized by the Supreme Court in the Chevron case to the action brought by Kathy Manuel requires that the statute of repose as interpreted in the Pullum case not bar her suit. Since 1838, Article I, Section 21 of the Florida Constitution has guaranteed access to courts for redress of any injury. In 1975, the Florida legislature enacted a statute of repose applicable to product liability cases. Five years later, Battilla held that the statute violated the right of access to the courts to the extent that it barred an action before it arose.

Pullum receded from Battilla. While not required by the facts of that case, Pullum seems to establish a new principle of law that the legislature can constitutionally

deny legal access to a party whose cause of action arose after expiration of the 12-year period of repose. This was, in light of Battilla a new principle which overruled past precedent upon which litigants could have relied. This meets the first criteria of non-retroactive application.

Going on to the second factor, the purpose of the statute of repose as enunciated in Pullum (quoting from the dissenting opinion in Battilla) was that liability beyond the period of repose places an onerous burden on industry. Liability should be restricted to a time commensurate with the normal useful life of the manufactured product. Accepting the statement as true, the affidavit filed on behalf of Kathy Manuel established that the normal useful life of a firearm is well in excess of twelve years depending upon the purpose for which the firearm is purchased and to be used. Retrospective application will not further operation of a 12-year statute of repose where the announced purpose of the legislation (restricting liability to the normal useful life of the manufactured product) does not apply to the product which injured Kathy Manuel.

The last factor set out by Chevron cries out most loudly for not applying Pullum retroactively to bar the suit filed by Kathy Manuel. To apply the Pullum decision retroactively to bar her action creates more than substantial inequitable results--it creates a tragic consequence which forever bars redress and the right to

prove negligence to somebody who has sustained a spinal cord injury and the catastrophic results from that injury.

Applying the three criteria of the Chevron case to the facts of the instant case constitutionally prohibits giving the Pullum decision retroactive affect to bar the suit brought by Kathy Manuel.

In summary, the retroactive application of Pullum destroys the vested right of Kathy Manuel to recover for her injuries in violation of her rights to due process and access to the courts. The product causing her injury, a hand gun, has a useful life well in excess of twelve years. Public policy is not served by limiting the right to sue based on an arbitrary cut-off date as in Pullum. This brings Kathy Manuel's injury by a hand gun with a useful life well in excess of twelve years within the orbit of Overland Construction Co. v. Sirmons, 369 So.2d 572 (Fla. 1979) which held a different statute of repose invalid as it applied to a building with a useful life greater than most manufactured goods. The second certified question should be answered in the negative.

CONCLUSION

The first certified question should be answered affirmatively. If not, second certified question should be answered negatively. The decision of the District Court of Appeal should be reversed with directions to the trial court

to reverse the summary judgment for respondents.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by mail upon Anderson, Moss, Russo, Gievers & Cohen, P.A., 2300 New World Tower, 100 North Biscayne Boulevard, Miami, Florida 33132 and Daniels & Hicks, P.A., Suite 2300, New World Tower, 100 North Biscayne Boulevard, Miami, Florida 33132, this 16th day of June, 1987.

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