IN THE SUPREME COURT OF FLORIDA

CASE NO. 70,686

MARY ALLEN,

Petitioner,

vs.

A.M.F. INC. d/b/a
UNION MACHINERY DIVISION,

Respondent.
_____ /

ANSWER BRIEF OF RESPONDENT, A.M.F., INC.

ON REVIEW OF A DECISION AND CERTIFIED QUESTION FROM THE DISTRICT COURT OF APPEAL, THIRD DISTRICT

DAVID J. HORR, ESQ.
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STATEMENT OF THE CASES AND FACTS

This case is before the court on a petition for review brought by Mary Allen, Petitioner, for resolution of two questions certified by the Third District Court of Appeal to be of great public importance. This brief is filed on behalf of Respondent, A.M.F., Inc. d/b/a Union Machinery Division.

The Respondent accepts the Statement of the Case and of the Facts contained in the initial brief.

The following symbol is adopted for use in this Answer Brief: "PB" for Petitioner's Brief.

ISSUES PRESENTED

The Petitioner has stated the questions presented for decision as follows:

A.

WHETHER THE DECISION RENDERED BY THIS COURT IN PULLUM V. CINCINNATI, INC. HAS BEEN INVALIDATED BY A SUBSEQUENT CLARIFICATION OF LEGISLATIVE INTENT.

B.

WHETHER THE DECISION RENDERED BY THIS COURT IN PULLUM V. CINCINNATI CAN BE CONSTITUTIONALLY APPLIED TO THE FACTS OF THIS CASE SO AS TO EXTINGUISH PLAINTIFF'S ACCRUED CAUSE OF ACTION.

C.

ASSUMING ARGUENDO THAT PULLUM V. CINCINNATI, INC. COULD BE CONSTITUTIONALLY APPLIED TO A CASE SUCH AS THIS--WHETHER ON THIS RECORD, PROPERLY VIEWED, THE TRIAL COURT ERRED IN RENDERING, ON REPOSE GROUNDS, THE SUMMARY FINAL JUDGMENT APPEALED.

Because this case, like several others, was affirmed on the authority of Shaw v. General Motors Corp., 503 So.2d 362 (Fla. 3d DCA 1987), Respondent adopts as the issues herein the following questions as they have been certified to this Court. To the extent that Petitioner has attempted to interject an additional question of law in her third issue, Respondent has offered argument to rebut same.

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.

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 (1976) 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.

III.

WHETHER THE TRIAL COURT ERRED IN RENDERING SUMMARY FINAL JUDGMENT.

SUMMARY OF THE ARGUMENT

The legislative amendment to the statute of repose is of prospective application only. The language of the amendment, Chapter 86-272, Sec. 2, Laws of Florida, clearly expresses a prospective effective date by use of the following language: "shall take effect July 1, 1986." This fact alone forbids giving the amendment to the statute a retroactive application.

Where a decision overrules a prior decision of unconstitutionality, the statute originally declared unconstitutional is valid from the date of the enactment of the statute. While there are limited instances where a decision has been made "prospective only" in its application, this case does not fall within the exception class.

There is a fundamental distinction between an expectation interest and a vested property right in an accrued cause of action. Appellants cause of action became legally cognizable because of the decision in Battilla v. Allis Chalmer Mfg. Co., supra, not as a result of a legislative act. There was always the possibility this Court could reverse itself. Petitioner's interest in this cause of action is properly characterized as an expectation interests not a vested property right. Liability for the product in this case had been reposed for three years beyond the statutory twelve year repose period. Petitioner

had no valid cause of action at the time of her injury. Repeal of twelve year repose period cannot resurrect the claim, and there was no duty to warn of any potential defect.

The trial court found that the statute of repose bars Petitioner's claim. The Third District Court correctly affirmed the entry of a summary final judgment.

ARGUMENT

I.

THE LEGISLATIVE AMENDMENT OF THE STATUTE OF REPOSE SHOULD NOT BE APPLIED TO CAUSES OF ACTION WHICH ACCRUED PRIOR TO THE AMENDMENT

A. It is generally understood that statutes will be prospective only in their application.

The statute of repose, Section 95.031(2), Florida Statutes (1986 Supp.) falls within the general rule that statutes shall operate prospectively. In construing the statute of limitations in a medical malpractice case, this Court held that "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 . . ." Foley v. Morris, 339 So. 2d 215, 217 (Fla. 1976). Absent such an expression, prospective application is the norm.

The statute of repose was amended by the Florida Legislature pursuant to Chapter 86-272, Sec. 2, Laws of Fla., to delete the previously existing twelve (12) year repose period. Section 3 of the same chapter provided that the deletion of the repose period "of this act shall take

effect July 1, 1986." (emphasis added). The intent of the Legislature is clearly expressed by its choice of language of command. Thus, the amendment should only have prospective application. In Foley v. Morris, supra, a determination of Legislative intent was predicated on the bald language used by the Legislature in establishing the effective date. If the Legislature had intended retroactive application of Chapter 86-272, Sec. 2, Laws of Fla., it would have said so.

Petitioner argues (PB. 8) the Legislative amendment is a message to this Court that it misinterpreted the legislature's intent in Pullum v. Cincinnati, Inc., 476 So. 2d 657, reh'g denied, 482 So. 2d 1352 (Fla. 1985), appeal dismissed _____U.S._____, 106 S. Ct. 1626, 90 L. Ed. 2d 174 (1986). This argument and interpretation of Legislative intent is misplaced. The clear legislative intent is the unambiguous prospective July 1, 1986 effective date for this legislative amendment. Chapter 86-272, Sec. 3, Laws of Fla. Had the legislature intended what Petitioner contends it would have deleted the statute of repose retrospectively to February 12, 1981 (the date on which the rehearing was denied in Battilla v. Allis Chalmers, 392 So.2d 874 (Fla. 1980) or sought to nullify Pullum retrospectively through some other express language. The legislature did not do so.

B. Precedent decided in analogous contexts demonstrates that statutes of repose and limitation should be prospectively applied.

In Homemakers, Inc. v. Gonzales, 400 So.2d 965 (Fla. 1981), the Court construed the statute of limitation which was changed between the time the cause of action accrued and the action was instituted. The Court held that the "savings clause" of the subject malpractice statute allowing a one year grace period before causes of action were prematurely barred by the amended statute limitation period did not evince a legislative intent that the amendment was to have retroactive effect.

Interpreting the statute of repose as applied to causes of action relating to improvements upon real property, the Third District Court of Appeal held that the statute of limitations which revised the time period from twelve to two years, would not be applied retroactively. Stuyvesant Ins. Co. v. Square D. Co., 399 So. 2d 1102 (Fla. 3d DCA) (reh'g denied 1981) (cases collected at 1104).

Construing the application of an amended statute of limitation this Court has held that when a cause of action arises from an occurrence which predates the effective date of an amendment to a statute of limitations, that amendment does not apply. Dade County v. Ferro, 384 So. 2d 1283 (Fla. 1980). In Ferro, the Court applied the principal enunciated in Foley v. Morris, supra, to the

amendment of Sec. 95.11(4)(b) (Fla. Stat. 1975). The Court indicated there was no intent expressed that the amendment to the statute should be retroactively applied and refused to do so.

In this instance, the legislative amendment to the Statute of Repose reflects no language expressing an intent for retrospective application. Thus, the amendment is properly construed to have only prospective application.

II.

THE PULLUM DECISION OPERATES TO BAR CAUSES OF ACTION WHICH ACCRUED AFTER THE BATTILLA DECISION BUT BEFORE THE PULLUM DECISION

A. Where a judicial decision overrules a prior decision of unconstitutionality, the statute is valid from the date of its enactment.

The seminal case of Christopher v. Mungen, 61 Fla. 513, 55 So. 273 (1911), dealt with the effect of a judicial decision which overrules a prior case finding a statute unconstitutional. The Supreme Court of Florida held:

> Where a statute is judicially adjudged to be unconstitutional, it will remain inoperative while the decision is maintained; but if the decision is subsequently reversed, the statute will be held to be valid from the date it first became effective, 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 unconstitutional.

55 So. 2d at 280. The ratio decedendi of Christopher is that courts have no power to repeal or abolish statutes, they decide only their Constitutionality.

The rule of Christopher v. Mungen controls this case. Limited exceptions to the rule, may exist. However, none of the exceptions apply to the facts of this case.

Florida Forest & Park Service v. Strickland, 18 So. 2d 253 (Fla. 1944), upon which Petitioner Allen relies, does not apply. Petitioner's truncated quotation from this case [PB 9] is somewhat misleading. Petitioner omits the initial language of the passage from which the cited quotation is abstracted. Reading this quote in its entire original context the Court recognized "relation back" of judicial decisions is the norm and "prospective only" application the exception. Thus, the exception is triggered when the decision expresses that it is to have "prospective only" application. Therefore, the Christopher v. Mungen rule must apply. Pullum did not contain language explicitly providing for "prospective only" application.

The absence of "prospective only" language in Pullum is not the only factor which distinguishes Florida Forest from this case. Florida Forest is a case which affected contract rights arising from a contract of employment. Specifically, the Court made changes in the appeal proceedings from an administrative board deciding

workmen's compensation cases to the circuit courts. The Court had decided a case delineating the appeal process three months earlier in Tigertail Quarries v. Ward, 16 So. 2d 812 (Fla. 1944) but because of delays in publishing the advance sheets of that opinion, and the fact that the parties in Florida Forest & Park had exhausted administrative compliance, the opinion was made prospective only. Thus, the Court stated:

> A right to compensation having accrued, at least potentially, by the happening of the injury, and the compensation claimant having proceeded by a judicially approved statutory course of procedure to enforce the claim; such valuable potential property or contract right to compensation should not be cut off by subsequent overruling court decision given a retrospective operation.

Florida Forest & Park at 254.

The decision in Florida Forest & Park is not surprising then in its zeal to protect a choate contract right arising from the employment relationship. In contrast, the right affected in this case is fundamentally different. Petitioner fails to state what vested "right" she enjoyed and how it was protected. [PB 9] Respondent respectfully urges Petitioner enjoyed no vested "right". The product in the instant case was distributed into commerce in 1965. By operation of the statute of repose any claim in conjunction with the product was extinguished in 1977. Petitioner's injury occurred May 17, 1980.

Batilla was not decided until after all these events transpired.

The additional cases Petitioner relies upon, as being "in accord" with Florida Forest & Park are procedurally and factually distinguishable and, as "relation back" exception cases do not warrant application to the facts of this case.

Department of Revenue v. Anderson, 389 So.2d 1034 (Fla. 4th DCA), reh'g denied (1980), is inapposite for several reasons. First, the questions certified in this case by the Third District Court of Appeal have Constitutional underpinnings. There is no similar issue of great import in Department of Revenue, supra.

Second, Judge Ervin was quick to point out in his dissent the dubious doctrinal underpinnings of the majority opinion in Department of Revenue, supra.[1] Thus, the opinion was an affirmance of the trial court's ruling which was decided on equitable and estoppel grounds. Department of Revenue cannot control this case. Furthermore, an essential element of Florida Forest & Park is absent in

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[1]The majority opinion in Dept. of Revenue v. Anderson, supra, cites to two cases. One case, City of Naple v. Conboy, 182 So.2d 413 (Fla. 1965) was decided on estoppel grounds. The other, Interlachen Lake Estates v. Snyder, 304 So.2d 433 (Fla. 1974), was decided by this Court after ad valorem and assessment issues had been certified to it by the Circuit Court. The Supreme Court specifically noted prospective operation of the opinion because persons who had relied on the statute did so assuming it to be valid despite a new provision to the 1968 State Constitution.

Department of Revenue. The Florida Forest & Park exception only applies where "a statute has received a given construction by a court of supreme jurisdiction." Id. at 253 (emphasis supplied). The supreme jurisdiction requirement forecloses the possibility that the lower courts would be fashioning non-uniform law, and thus pre-empting the higher judicial tribunal.

Petitioner Allen further urges this Court to afford Pullum, supra, prospective application on the authority of International Studio Apartment Ass'n v. Lockwood, 421 So. 2d 1119 (Fla. 4th DCA), cert. denied, 430 So. 2d 451 (Fla. 1983), cert. den., 464 U.S. 893 (1983). Analysis of that case shows that it is wholly inapposite to the facts of this case.

International Studio, supra, involved a statute which authorized the clerk of a circuit court to collect interest on funds which had been escrowed in court-pending litigation. The United States Supreme Court declared the Florida statute unconstitutional in Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 101 S. Ct. 446, 66 L. Ed 2d 358 (1980). On remand, this Court declared unconstitutional the portion of the statute authorizing the clerk to invest deposited funds. Webb's Fabulous Pharmacies, Inc. v. Beckwith, 394 So. 2d 1009 (Fla. 1981). The decision in International Studio, supra, was given "prospective only" effect to protect individuals who had

relied on trial court rulings (which were later invalidated by Beckwith) and deposited funds in the court with the expectation of recouping accrued interest if they prevailed in the litigation. Petitioner fails to articulate why International Studio, supra, should apply in this case, Respondent submits that International falls within the exception class recognized by Florida Forest & Park Services v. Strickland, supra, because the Florida statute therein had been declared unconstitutional by the United States Supreme Court. Thus, International Studio, supra, cannot control in this case.

It is noteworthy that the decision in Pullum applied retroactively. This Court did not manifest any intent in the opinion that the rule of law enunciated would only be prospectively applied. Further, if Pullum, supra, is now restricted to prospective application it will erode the doctrine of retroactive constitutionality contemplated by Christopher v. Mungen, supra, by broadening the Florida Forest & Park Service, supra, exception. Such a result would impermissibly broaden the Florida Forest exception by allowing decisions (such as Pullum) to be subsequently limited to prospective application when the decision which established the rule did not manifest such an intent. This construction will disserve stare decisis and lead to confusion and conflicting decisions among lower courts as to whether an exception to the generally understood rule of

Christopher v. Mungen may have been imputed or imperfectly expressed in the higher court's opinion. The exception would in effect swallow the rule, and create a new rule of unsettling proportion.

Consequently, retrospective application of Pullum to appellant's claim comports with Florida case law, and Petitioner's action is time barred under the law.

B. An accrued cause of action is not a constitutionally protected property right.

There is a fundamental distinction between a right conferred by statute to institute a claim and a cause of action which arises because a judicial decision renders an integral element of a claim legally cognizable. In this case Petitioner Allen has an expectation interest in an accrued cause of action. This does not rise to the level of a constitutionally protected property right.

Petitioner's injury occurred in May 1980, which preceded the decision in Battilla. At the time of the injury the product had been in commerce for fifteen (15) years. It is axiomatic that a cause of action does not accrue until someone has been damaged by the acts complained of. Penthouse North Ass'n., Inc. v. Lombardi, 461 So. 2d 1350 (Fla. 1984). A cause of action does not "accrue" within a statute of limitations until an action can be instituted thereon, provided however, there must be

some person capable of being sued. Berger v. Jackson, 156 Fla. 251, 23 So. 2d 265, (1945) (construing Sec. 95.11(5)(e) Fla. Stat. (1945)). Petitioner's cause of action did not accrue until after Battilla, because it was not until after Battilla that the last element of her cause of action--a legally cognizable injury--existed. Slatcoff v. Dezen, 76 So.2d 792 (Fla. 1955).

Petitioner argues that "Pullum cannot be Florida constitutionally applied to the instant case." [PB 8]. However, the doctrinal ground on which Petitioner would have this Court refuse to apply Pullum is not clear. However, that retrospective operation of the Court's decision in Pullum does not violate any constitutional rights of Petitioner.

Petitioner does not have a constitutionally protected property right in an accrued cause of action where the cause of action accrued merely by judicial construction, passing on the constitutionality of a statute, as distinguished from retrospective divestment by legislation. Had the Petitioner a right conferred by statute this court could properly protect that right from legislative divestment, whether that divestiture was by repealing statute or amending legislation, if the legislative act did not comport with procedural due process. As early as 1872, this Court held that:

> [t]he authorities seem fully to establish the rule that where mere

> inchoate rights are concerned, depending for their original existence on the law itself, they are subject to be abridged or modified by law, and that statutes of this character apply to such rights existing at the time of their passage, provided that a reasonable time is given after the passage of the act, and before it would operate as a bar, for the part to exercise the right.

Bostwick v. Bostwick, 14 Fla. 162, 180-1 (1872). The court there was construing a statute vesting title by adverse possession as modified by a statute of limitations. The Bostwick decision prohibits retroactive legislative displacement of rights without affording a reasonable time after the passage of the act for the parties to assert their right.

The Court has consistently utilized the same analysis to assess whether a citizen's right of access to the courts have been "denied". See Overland Construction Co. v. Sirmons, 369 So. 2d 572 (Fla. 1979) and Bauld v. J.A. Jones Const. Co., 357 So. 2d 401 (Fla. 1978). The operative concern has historically been

> that where a right of access to the courts for redress for a particular injury has been provided by statutory law predating the adoption of the Declaration of Rights of the Constitution of the State of Florida, or where such right has become a part of the common law of the State pursuant to Fla Stat Sec. 2.01 F.S.A., the legislature is without power to abolish such a right 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.

Kluger v. White, 281 So. 2d 1, 4 (Fla. 1973).

The issue in this instance is whether Petitioner has such a right of access. Petitioner cites no common law authority predating the reception statutes of this state to demonstrate she has a property right in a cause of action where the claim came into existence by judicial decision as opposed to legislative process. In fact, Petitioner has no property right at all, under this set of circumstances. At best, Petitioner merely has an "expectation interest" that the holding in Battilla would be immutable for as long as it would take to prosecute her claim.

Distinguishing between a vested right and an expectation interest, the Supreme Court of the United States opined:

> A "vested right" is defined by Fearne, in his work upon Contingent Remainders, as "an immediate, fixed right of present or future enjoyment"; and by Chancellor Kent as "an immediate right of present enjoyment, or a present, fixed right of future enjoyment." 4 Kent, Comm. 202. It is said by Mr. Justice Cooley that "rights are vested, in contradistinction to being expectant or contingent. They are vested when the right to enjoyment, present or prospective, has become the property of some particular person or persons, as a present interest. They are expectant when they depend upon the continued existence of the present condition of things until the happening of some

> future event. They are contingent when they are only to come into existence on an event or condition which may not happen or be performed until some other event may prevent their vesting."

Pearsall v. Great Northern Ry Co., 161 U.S. 705, 713 (1896). The Supreme Court of Florida adopted this construction holding that a citizen has a vested property right in a lien. City of Sanford v. McClelland, 163 So. 513, 514-515 (Fla. 1935).

Petitioner's cause of action accrued as a result of this Court's holding in Battilla that the statute of repose was unconstitutional. It did not arise from a right conferred by a statute passed by the Legislature. Prior to the exercise of judicial power in Battilla, Petitioner's claim would have been clearly time-barred by the statute of repose. Petitioner's view of the doctrine of retrospectivity, that breathed life into her cause of action by virtue of Battilla, disregards the rule of Christopher v. Mungen, supra.

"A statute declared unconstitutional becomes inoperative, it is not dead, only dormant." State v. Lee, 22 So. 2d 804, 806 (Fla. 1945)(emphasis added). There was always the possibility that this Court could recede from or reverse Battilla.

To adopt Petitioner's view would limit this Court's ability to overrule itself or ever render judicial decisions of a retrospective nature when one party would be

disappointed by the abridgement of their expectation interest. A plaintiff has no vested right in a tort claim. Ducharme v. Merrill-National Laboratories, 574 F. 2d 1307 (5th Cir.) cert. denied, 439 U.S. 1002, 99 S. Ct. 612, 58 L. Ed 2d 677 (1978) (court sitting in diversity, construing Louisiana law allowing suit against manufacturer but finding no due process violation when Swine Flu Act, 42 U.S.C. Sec. 247b substituted government as defendant). Even if this Court were to find that Petitioner did have a specie of property right in her cause of action prior to Pullum, it is beyond a dispute that no person has a vested property right in any rule of common law entitling him to have such a rule of law remain unchanged for his benefit. Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, 98 S. Ct. 2620, 57 L. Ed. 2d 595 (1978).

Thus, under federal law and state law there is a fundamental distinction between a right conferred by statute to institute a cause of action and a cause of action which arises because a judicial decision allows an integral element of a claim to become legally cognizable. "Expectation interests" like Petitioner's do not enjoy the Constitutional protection Petitioner apparently urges. There is no constitutional impediment to applying Pullum and the statute or repose to render Petitioner's claim time-barred.

III.

THE TRIAL COURT DID NOT ERR IN RENDERING A SUMMARY JUDGMENT

Finally, Petitioner argues that even if Pullum can be constitutionally applied to the facts of this case, "on this record, properly viewed, the trial court erred in rendering, on repose grounds, the summary final judgment appealed." [PB 13].

The summary final judgment in this case was not a partial summary judgment. Because this Court "revitalized" the statute of repose, in Pullum, the trial court recognized the statute as a complete defense to Petitioner's claim, even as to the "duty to warn" allegation. Petitioner seeks to frame the issue of whether it was proper for the trial court to allow the statue of repose defense as a complete bar (encompassing the duty to warn count) in the following language: "one cannot repose negligence which has not occurred." [PB 13]. Respondent respectfully argues that this phraseology is tautological, circular, and begs the question. Petitioner neither states a principle of law nor cites to any authority for the proposition. Petitioner conflates repose with a "non-occurrence". The effect of the statute of repose is that after expiration of the statutory period of 12 years, the "occurrence" is simply not negligent. In essence, Petitioner would have this Court breathe back into an extinguished claim liability for a product.

Respondent has no duty to warn of a product defect when liability for that defect was extinguished by the statute of repose. Liability and duty were extinguished by operation of the statute upon passage of the requisite twelve year period.

While not controlling, Respondent points out that Senior District Judge Arnow reached the same conclusion in Eddings v. Volkswagenwerk, A.G., 635 F. Supp. 45, 49 (N.D. Fla. 1986). Petitioner's argument ignores the fundamental distinctions between a statute of repose and a statute of limitations. In essence, Petitioner seeks to lead this court to believe that an ordinary negligence action predicated upon a duty to warn imposes a different standard than an action under the "product liability" umbrella of legal theories referred to in the language of the statute. There is no equal protection violation if two different statutes establish classifications which have a rational relation to a proper state objective. Purk v. Federal Press, 387 So. 2d 355 (Fla. 1980).

Clearly, the legislative objective of Sec. 95.031(2) Fla. Stat. in 1975 was the public policy favoring immunization of manufacturer's after the statutory period of twelve years had expired. Extinguishing liability saved manufacturers from perpetual liability. See, Lamb v. Volkswagenwerk A.G., 631 F. Supp. 1144 (S.D. Fla. 1986).

A duty to warn, in the face of legislative

action, does not exist and to premise liability for breach of a duty to warn is to create a legal fiction. A cardinal rule of statutory construction is that a statute should be construed so as to ascertain and give effect to the intention of the legislature as expressed in a statute. City of Tampa v. Thatcher Glass Corp., 445 So.2d 578 (Fla. 1974). When an interpretation of a statute would lead to an unreasonable conclusion or result which was obviously not designed by the legislature, that interpretation will not be adopted. Drury v. Harding, 461 So. 2d 104 (Fla. 1984). The legislative intent is clear and unambiguous. To read back into the statutes of repose and limitations a duty to warn is a tortured construction of both statutes. The interpretation of a statute which leads to an unreasonable or ridiculous conclusion or result obviously not designed by the legislature can not be adopted. Drury v. Harding, supra.

The summary judgment granted by the trial court and affirmed by the Third District Court of Appeal was properly granted where the facts were crystallized and all that remained was a question of law. Moore v. Morris, 475 So. 2d 666 (Fla. 1985).

This case is before the Court on a certified question. Petitioner's brief argues an issue not certified by the Third District Court of Appeal. This Court retains authority to review the entire opinion of a decision of a

district court. Zirin v. Charles Pfizer & Co., 128 So.2d 594 (Fla. 1961). Two courts have concluded that Petitioner's argument on this issue was not a separate issue. Indeed, the Third District Court of Appeal did not certify it. This exemplifies the specious nature of Petitioner's argument: there is no negligence when the duty has been reposed.

CONCLUSION

Respondent, A.M.F., Inc., urges that the decision of the Third District Court of Appeal should be affirmed. The first certified question should be answered in the negative and the second certified question should be answered affirmatively.

Respectfully submitted,

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DAVID J. HORR

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY a true and correct copy of the foregoing was mailed this 13th day of August to Arnold Ginsberg, Esq., Horton, Perse & Ginsberg, Attorneys for Petitioner, 410 Concord Building, 66 West Flagler Street, Miami, Florida, 33130.

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