IN THE SUPREME COURT OF FLORIDA

CASE NO. 70,686

THIRD DISTRICT COURT
OF APPEAL NO. 86-934

MARY ALLEN,

Petitioner,

vs.

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

Respondent.
_____/

BRIEF OF PETITIONER ON THE MERITS

(CERTIFIED QUESTIONS)

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I.
INTRODUCTION

The petitioner, MARY ALLEN, was the appellant in the Third District Court of Appeal and was the plaintiff in the trial court. The respondent, A.M.F. INC., d/b/a UNION MACHINERY DIVISION, was the appellee/defendant. In this certified question merits brief of petitioner the parties will be referred to as the plaintiff and the defendant and, alternatively, by name. The symbols "R" and "A" will refer to the record on appeal and the rule-required appendix which accompanies this brief, respectively. All emphasis has been supplied by counsel unless indicated to the contrary.

II.
STATEMENT OF THE CASE AND FACTS

The subject matter of this proceeding is the Florida Statute of Repose. The District Court of Appeal, Third District, has certified to this Court that the instant cause presents questions of great public importance and has made such certification after affirming the summary final judgment appealed (R. 704, 707):

* * *

> "THIS CAUSE came on to be heard upon Defendant, A.M.F., INC.'s Motion for Summary Judgment and upon argument of counsel and the Court being otherwise advised in the premises, it is hereby
>
> ORDERED AND ADJUDGED:
>
> That Summary Judgment is granted hereby in favor of Defendant, A.M.F., INC. The Court determines that there is no genuine issue as to any material fact,

that the subject product was delivered to the first purchaser on or about June, 1965 and that the accident which is the subject of this lawsuit occurred on or about May 17, 1980, more than fourteen years after the date of delivery of the product to its original purchaser. § 95.031(2), Florida Statutes, as recently interpreted by the Florida Supreme Court in Pullum v. Cincinnati, Inc., 476 So. 2d 6578 (Fla. 1985) is applicable to bar the present cause of action. The Complaint is dismissed hereby, and Plaintiff, MARY ALLEN, shall take nothing against A.M.F., INC and Plaintiff shall go hence without day. Costs shall be hereinafter taxed according to law."

* * *

The sequence of events pertinent to this Court's review may be stated as follows:

A. The product was purchased/assembled/distributed no later than June of 1965 (R. 688, paragraph 1);

B. The plaintiff was allegedly injured--as a result of the failure of the product--on May 17, 1980 (R. 688, paragraph 2);

C. The plaintiff--through complaint and various amendments thereto--sued the defendant alleging numerous theories of recovery including a theory of negligent failure to warn (R. 1-3, 8, 152-158);

D. After this Court rendered its opinion in PULLUM v. CINCINNATI, INC., 476 So. 2d 657 (Fla. 1985) [wherein this Court receded from its prior opinion in BATILLA v. ALLIS CHALMERS MFG. CO., 392 So. 2d 874 (Fla. 1980)]--PULLUM decided August 29, 1985, rehearing denied November 4, 1985--this defendant sought (from the trial court) and received (an order granting) leave to amend its answer to include an affirmative defense of "statute of repose" (R. 678-680, 703);

E. The defendant filed motion for summary judgment on the sole ground that § 95.031(2), Florida Statutes, barred the cause of action (R. 688-690). It is undisputed that the plaintiff sustained physical injury outside of twelve years from the date of purchase. The trial court granted the defendant's motion and entered the order set out in full, supra.

F. The plaintiff appealed to the Third District Court of Appeal, which court affirmed the summary final judgment and certified this case to this Court (A. 14).

The plaintiff reserves the right to argue the significance of the above facts and other relevant record facts in the argument portion of this brief.

III.

QUESTIONS CERTIFIED

A.

WHETHER THE LEGISLATIVE AMENDMENT OF § 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.

B.

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 BATTILA V. ALLIS CHALMERS MFG. CO., 392 SO. 2D 874 (FLA. 1980), APPLIES SO AS TO BAR A CAUSE OF ACTION THAT ACCRUED BEFORE THE PULLUM DECISION.

IV.

ISSUES PRESENTED FOR REVIEW

The plaintiff suggests to this Court the questions certified require consideration and resolution of the following issues:

A.

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

B.

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

C.

ASSUMING ARGUENDO THAT PULLUM V. CINCINNATI, INC., SUPRA, 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.

V.

SUMMARY OF ARGUMENT

The opinion of the District Court of Appeal, Third District, must be quashed because:

A. The Florida Legislature, immediately post-PULLUM, amended the time bar statute construed in PULLUM to clarify its intent, thereby rendering PULLUM invalid;

B. PULLUM cannot be (Florida or Federal) constitutionally applied to the case at bar so as to extinguish plaintiff's cause of action which accrued and vested pre-PULLUM; and

C. In any event PULLUM is factually inapplicable here because plaintiffs' complaint charged the defendant with continuing negligence in the nature of a failure to warn.

VI.

ARGUMENT

A.

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

The following principles of law regarding statutory construction are well established in Florida:

1. Where reasonable differences arise as to the meaning or application of a statute, legislative intent is "the polestar of judicial construction." LOWRY v. PAROLE AND PROBATION COM'N, 473 So. 2d 1248 (Fla. 1985); TAMPA-HILLSBOROUGH COUNTY EXPRESSWAY AUTHORITY v. K.E. MORRIS ALIGNMENT SERVICES, INC., 444 So. 2d 926 (Fla. 1983); TYSON v. LANIER, 156 So. 2d 833 (Fla. 1963).

2. When an amendment to a statute is enacted within a relatively short time after controversies have arisen as to the interpretation of the original act, a court may consider that amendment as a legislative interpretation of the original law and not as a substantive change thereof. LOWRY v. PAROLE AND PROBATION COM'N, supra, and cases cited therein.

3. The courts will avoid an interpretation or construction of a statute which will produce an unreasonable result or

render its operation unjust or unfair. See 49 Fla. Jur. 2d, Statutes, §§ 183 and 184.

4. The Florida statute of limitations for product liability cases is Section 95.11(3)(e). It contains no repose provision. The product statute of repose is Section 95.031, Florida Statutes. That statute contains the following pertinent provisions:

* * *

"95.031 Computation of time.

"Except as provided in subsection (2) and in s. 95.051 and elsewhere in these statutes, the time within which an action shall be begun under any statute of limitations runs from the time the cause of action accrues.

* * *

"(2) Actions for products liability and fraud under s. 95.11(3) must be begun within the period prescribed in this chapter, with the period running from the time the facts giving rise to the cause of action were discovered or should have been discovered with the exercise of due diligence, instead of running from any date prescribed elsewhere in s. 95.11(3), but in any event within 12 years after the date of delivery of the completed product to its original purchaser or within 12 years after the date of the commission of the alleged fraud, regardless of the date the defect in the product or the fraud was or should have been discovered."

* * *

5. PULLUM v. CINCINNATI, INC. was decided on August 29, 1985. The decision did not become final until November 4, 1985 when rehearing was denied. Immediately upon becoming aware that this Court had misconstrued its intent, the Florida Legislature amended § 95.031, supra, deleting the repose pro-

visions therefrom. See Chapter 86-272, Laws of Florida, House Bill No. 832. A copy of the bill is reproduced hereat.

CHAPTER

86-272

CS/HB832, First Engrossed

Committee Substitute for House Bill No. 832

A bill to be entitled

An act relating to limitations of actions; amending s. 95.11, F.S.; reducing the time within which actions for libel and slander must be commenced; amending s. 95.031, F.S.; deleting a limitation upon the initiation of actions for products liability; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Paragraph (c) of subsection (3) of section 95.11, Florida Statutes, is amended, and paragraph (g) is added to subsection (4) of said section, to read:

95.11 Limitations other than for the recovery of real property.--Actions other than for recovery of real property shall be commenced as follows:

(3) WITHIN FOUR YEARS.--

(c) An action for libel, slander, assault, battery, false arrest, malicious prosecution, malicious interference, false imprisonment, or any other intentional tort, except as provided in subsection (5).

(4) WITHIN TWO YEARS.--

(g) An action for libel or slander.

Section 2. Subsection (3) of section 95.031, Florida Statutes, is amended to read:

95.031 Computation of time.--Except as provided in subsection (2) and in s. 95.051 and elsewhere in these statutes, the time within which an action shall be begun under any statute of limitations runs from the time the cause of action accrues.

CS/HB832, First Engrossed

(2) Actions for products liability and fraud under s. 95.11(3) must be begun within the period prescribed in this chapter, with the period running from the time the facts giving rise to the cause of action were discovered or should have been discovered with the exercise of due diligence, instead of running from any date prescribed elsewhere in s. 95.11(3), but in any event an action for fraud under s. 95.11(3) must be begun within 12 years after the date of delivery of the completed product to the original purchaser or within 12 years after the date of the commission of the alleged fraud, regardless of the date the defect in the product or the fraud was or should have been discovered.

Section 3. Section 1 of this act shall take effect October 1, 1986, and shall apply to causes of action accruing after that date, and Section 2 of this act shall take effect July 1, 1986.

Approved by the Governor JUL 9 1986

Filed in Office Secretary of State JUL 9 1986

The Legislature has told this Court that it misinterpreted legislative intent in deciding PULLUM. PULLUM was an aberration. As a consequence of the expression of legislative intent PULLUM should now be deemed a nullity. The opinion of the District Court of Appeal, Third District, should be quashed with directions to that court to reverse the summary final judgment appealed.

B.

THE DECISION RENDERED BY THIS COURT IN PULLUM V. CINCINNATI CANNOT BE CONSTITUTIONALLY APPLIED TO THE FACTS OF THIS CASE SO AS TO EXTINGUISH PLAINTIFF'S ACCRUED CAUSE OF ACTION.

1.

PULLUM CANNOT BE FLORIDA CONSTITUTIONALLY APPLIED TO THE INSTANT CAUSE.

Under Florida law a subsequent case constitutionally construing a statute may not be retroactively applied if such application will destroy vested rights which a party acquired under a prior court construction of the statute. In the case of FLORIDA FOREST & PARK SERVICE v. STRICKLAND, 18 So. 2d 251 (Fla. 1944), this Court long ago held:

* * *

"Where a statute has received a given construction by a court of supreme jurisdiction and property or contract rights have been acquired under and in accordance with such construction, such rights should not be destroyed by giving to a subsequent overruling decision a retrospective operation." 18 So. 2d at p. 253.

* * *

In accord: DEPARTMENT OF REVENUE v. ANDERSON, 389 So. 2d 1034 (Fla.App.1st 1980) and INTERNATIONAL STUDIO APARTMENT ASSOCIATION v. LOCKWOOD, 421 So. 2d 1119 (Fla.App.4th 1982).

The pertinent sequence of events demonstrate:

A. In BATILLA v. ALLIS-CHALMERS MFG. CO., supra, this Court held that it worked an unconstitutional denial of access to the courts when the subject statute of repose acted as an absolute bar to a cause of action which did not accrue or vest until after expiration of the repose period;

B. The injury to the subject plaintiff occurred on May 17, 1980--the date upon which plaintiff's cause of action accrued and vested;

C. PULLUM was not decided until August 29, 1985, after the plaintiff's cause of action had accrued and vested.

The District Court's opinion must be quashed.

2.

PULLUM CANNOT BE FEDERALLY CONSTITUTIONALLY APPLIED TO THE INSTANT CAUSE

GEORGE v. FIRESTONE TIRE & RUBBER CO., United States District Court for the Northern District of Florida, Case No. GCA 85-0117-MMP, decided by Federal Judge Maurice M. Paul, is directly in point and highly persuasive here. Copies of the orders entered by Judge Paul in that case are appended to this brief for the convenience of this Court (A. 1-13). The plaintiff concedes that Judge Paul's decision is not controlling here. However, Judge Paul's decision presently pends on the merits in the United States Court of Appeals for the Eleventh Circuit, Case No. 86-3629. Any decision rendered by that Court would control here. The following is a chronology of the facts involved in GEORGE v. FIRESTONE TIRE & RUBBER CO., supra, insofar as that case is pertinent here:

a. Prior to January 1, 1975, and more than twelve years prior to March 2, 1982--the product involved in GEORGE was delivered to its original purchaser;

b. Effective January 1, 1975--Chapter 95.11, Florida Statutes, was amended to create a twelve-year statute of repose in product liability cases;

c. March 1, 1979--this Court decided OVERLAND CONSTRUCTION CO. v. SIRMONS, 369 So. 2d 572 (Fla. 1979), an action based on the design, planning or construction of improvements to real property. This Court held that it worked an unconstitutional denial of access to the courts to apply the subject statute of repose as an absolute bar to a cause of action of one not injured until after expiration of the period of repose;

d. December 11, 1980--this Court decided BATILLA v. ALLIS CHALMERS MFG. CO. This Court held that it worked an unconstituional denial of access to the courts when the subject statute of repose acted as an absolute bar to a cause of action of one not injured until after expiration of the period of repose;

e. March 2, 1982--more than twelve years after the involved product was delivered to the original purchaser, Thomas L. George was injured by the product;

f. April 10, 1985--George sued Firestone Tire & Rubber;

g. August 29, 1985--after Thomas L. George was injured, and after he filed suit against Firestone Tire & Rubber Company --this Court decided PULLUM v. CINCINNATI, INC., supra, and held that the statute of repose did not unconstitutionally prevent access to the courts by persons injured more than twelve years after delivery of a product.

The determinative question presented in GEORGE was whether a retroactive application of PULLUM to GEORGE would unconstitutionally extinguish George's accrued and vested cause of action for personal injury. In GEORGE, Judge Paul held that it would. Plaintiff implores the Court to read every word in the GEORGE decision (A. 1-10). Plaintiff adopts the reasoning contained therein as argument here.

Application of the GEORGE reasoning to the facts of the instant cause mandates reversal because the chronology involved here was the following:

a. Effective January 1, 1975--Chapter 95.11, supra, was amended to create a twelve-year statute of repose in product liability cases;

b. March 1, 1979--this Court decided OVERLAND CONSTRUCTION CO. v. SERMONS, supra, and held that it worked an unconstitutional denial of access to the courts to apply the subject statute of repose as an absolute bar to a cause of action of one not injured until after expiration of the period of repose;

c. This Court next decided BATILLA v. ALLIS CHALMERS MFG. CO., supra. This Court held that it worked an unconstitutional denial of access to the courts when the subject statute of repose acted as an absolute bar to a cause of action of one not injured until after expiration of the period of repose;

d. May 17, 1980--more than twelve years after sale of the subject product, plaintiff sustains a personal injury and the cause of action for personal injury accrues and vests;

e. In June of 1981 plaintiff files suit against the subject defendant;

f. August 29, 1985--after plaintiff's cause vested, this Court decided PULLUM v. CINCINATTI, INC., in which it suddenly receded from BATILLA and held that the statute of repose did not unconstitutionally prevent access to the courts by persons injured more than twelve years after delivery of a product.

The determinative question here is basically the same as that presented in GEORGE. In his second GEORGE order, Judge Paul candidly recognized that his decision was in conflict with those rendered by two other Federal District Court judges. (A. 11-13). It is submitted that the GEORGE decision is the better reasoned decision and should be followed by this Court.

For the foregoing reasons alone the opinion of the District Court of Appeal, Third District, must be quashed with directions to that court to reverse the summary final judgment appealed and to further direct the trial court to deny to the defendant any affirmative relief predicated upon the subject statute of repose.

C.

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

Failing all else, it must be remembered that <u>one cannot repose negligence which has not occurred</u>. For the reasons

which follow, PULLUM is at least partially inapposite here in any event:

1. The applicable four-year product statute of limitations, § 95.11(3)(e), supra, applies only to:

* * *

> "(e) An action for injury to a person founded on the design, manufacture, distribution or sale of personal property that is not permanently incorporated in an improvement to real property, including fixtures."

* * *

2. What are arguably "reposed" here by former § 95.031, supra, are causes of action for strict liability, breach of implied warranty and negligence in the design or manufacture of the subject product;

3. Plaintiff's complaint has also alleged that the defendant was negligent post the design and manufacturing stage. Simply stated, the plaintiff's allegation of failure to warn, if proved, would establish that the defendant knew, from product use experience, that its product was defective and that the defendant did not warn the public of the existence of the defect.

Assuming that this Court were to answer the certified questions in such a manner as to approve the result reached by the District Court of Appeal, Third District, as pertains to the retroactivity and/or constitutionality of the subject statute of repose, it is respectfully suggested that the opinion of the District Court of Appeal, Third District, must still be

quashed and the summary final judgment appealed be reversed because one cannot repose negligence which has not occurred.

VII.

CONCLUSION

It is respectfully submitted that for the reasons stated herein the questions certified should be answered in such a manner as to allow for a reinstatement of the plaintiff's cause of action. The opinion of the District Court of Appeal, Third District, should be quashed and the summary final judgment appealed should be reversed with directions to the trial court to hold a jury trial on all issues.

VIII.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief of Petitioner on the Merits (Certified Questions) was served, by U.S. mail, this 7th day of July, 1987, on opposing counsel:

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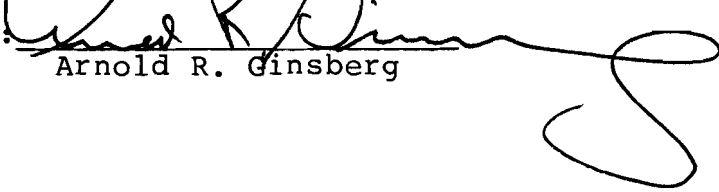
BY: 
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