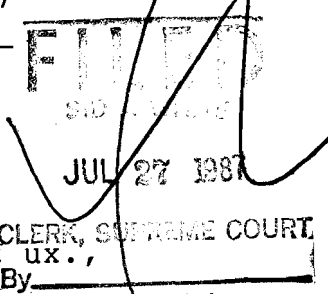
IN THE SUPREME COURT OF FLORIDA

CASE NO. 70, 687



FRANCIS H. KEYES, et ux.,

Petitioners,

-vs-

FULTON MANUFACTURING CORP., etc.,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW
FROM THIRD DISTRICT COURT OF APPEAL
CASE NO. 86-538

BRIEF OF RESPONDENT ON MERITS

KIMBRELL & HAMANN, P.A.
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Of counsel

TABLE OF CONTENTS

KIMBRELL & HAMANN, P.A.
SUITE 900 BRICKELL CENTRE, 799 BRICKELL PLAZA, MIAMI, FLORIDA 33131-2805 • TELEPHONE (305) 358-8181

TABLE OF AUTHORITIES

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OTHER AUTHORITIES

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SUMMARY OF THE ARGUMENT

There was no "clarification" of legislative intent in the amendment of the statute of repose to remove products liability cases from its ambit. Both the original statute of repose and the Act amending it reflect that the Legislature originally had intended to place an outermost limit on the time to sue product manufacturers. The Legislature just changed the law, ***after*** the judgment in question. A new intent is not a "clarification" of an initial intent. FULTON notes that Petitioners make no argument that they were benefitted by a retroactive application of the substituted policy pronouncement of the Legislature.

All of Florida's District Courts of Appeal and several federal courts have rejected unconstitutionality arguments such as made by Petitioners herein. There was no property right vested by the erroneous holding in ***Battilla***, and, thus, no constitutionally-protected interest was violated by applying the valid statute of repose.

A claim against a manufacturer for negligent failure to warn of a product's propensities is a "products liability" action. The manufacturer's duty is founded on its distribution or sale of the product and, hence, squarely within the statue of repose. Common sense dictates that the

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Legislature intended to bar all claims against a manufacturer arising from such a sale, whether based on allegations of defect in design or manufacture, or on alleged failure to warn incident thereto.

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ARGUMENT

I.

THE ENACTMENT OF CHAPTER 86-272, LAWS OF FLORIDA, WAS NOT A CLARIFICATION OF PRIOR LEGISLATIVE INTENT.

There is no merit in Petitioners' argument that -- by enacting Ch. 86.272, Laws of Florida -- the Legislature clarified its original intent with regard to the statute of repose, § 95.031(2), Fla. Stat. (1979). The intent of the Legislature was correctly stated by this Court as follows:

> The [L]egislature, in enacting this statute of repose, reasonably decided that perpetual liability places an undue burden on manufacturers, and it decided that twelve years from the date of sale is a reasonable time for exposure to liability for manufacturing of a product.

Pullum v. Cincinnati, Inc., 476 So.2d 657, 659 (Fla. 1985).

That the original intent of the Legislature was to place an absolute time bar on products liability actions is evident from the unambiguous language of the statute itself:

> 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***

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> ***product to its original purchaser*** or within 12 years after the date of commission of the alleged fraud, ***regardless of the date of the defect in the product*** or the fraud ***was or should have been discovered.***

Section 95.031(2), Fla. Stat. (1979) (emphasis added).

Further evidence of the original intent of the Legislature is found in the language of the Act amending the statute of repose which states: "A bill to be entitled[:] An [A]ct relating to limitations of actions; . . . ***deleting a limitation upon the initiation of actions for products liability***. . . ." Ch. 86-272, Laws of Florida (1986) (emphasis added). Had the Legislature intended the original statute of repose not to impose such a time limitation, there would have been no need for a legislative ***deletion*** of the limitation.

Petitioners do not undertake to explain what they contend the Legislature originally intended. Implicit in their argument is the assumption that the Legislature intended to permit actions sounding in products liability to be brought more than twelve years after a sale. There is neither authority nor reasoning for such a position. Therefore, Petitioners' first argument should be rejected.

Petitioners do not contend that they should be granted relief by a retroactive application of the Legislature's ***new***

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policy pronouncement. Therefore, that question is not before this Court and FULTON makes no argument thereon.

II.

APPLICATION OF THE STATUTE OF REPOSE TO THIS LAWSUIT WAS NOT UNCONSTITUTIONAL.

Petitioners' unconstitutionality argument commences by characterizing the question as whether the ***Pullum*** decision can be applied retroactively. A more appropriate statement of the question is whether the statute of repose constitutionally can be applied to this case in light of ***Battilla v. Allis-Chalmers Mfg. Co.***, 392 So.2d 874 (Fla. 1980).

The focus should be on the constitutionality of the application of the statute because, bluntly put, ***Battilla*** was wrongly decided. The statute of repose did not "become constitutional" upon the rendition of ***Pullum***; the statute was constitutional when it was enacted. "If a decision holding a statute to be unconstitutional is subsequently overruled, the statute will be valid from the date it became effective." ***Pait v. Ford Motor Co.***, 500 So.2d 743, 744 (Fla. 5th DCA 1987), ***citing, Gillespie v. Bay County***, 151 So. 10 (Fla. 1933) and ***State ex rel. Christopher v. Mungen***, 55 So. 273, 280 (Fla. 1911). ***Accord, Shaw v. General Motors Corp.***, 503 So.2d 362 (Fla. 3d DCA 1987).

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In ***Pait***, the Fifth District rejected constitutional attacks on the application of the statute of repose to cases involving accidents which occurred after the ***Battilla*** decision, yet prior to ***Pullum***. The ***Pait*** Court found that no "property or contract rights were acquired by the plaintiff here such as would make an exception to this rule [(quoted above)] applicable." 500 So.2d at 744.

In accord with ***Pait*** and involving the same operative facts as the case at bar are the Second District's decisions in ***Smith v. Sturm, Ruger, Smith & Co.***, No. 86-2598 (Fla. 2d DCA 7/17/87) and ***Small v. Niagara Machine & Tool Works***, 502 So.2d 943 (Fla. 2d DCA 1987). Mrs. Small was injured after the ***Battilla*** decision and before ***Pullum***. Suit was filed in 1983 and, after the Supreme Court decision in ***Pullum***, the trial court granted summary judgment for the manufacturer based on the statute of repose. In rejecting the plaintiff's unconstitutionality argument, the Court held:

> But for ***Battilla***, the statute of repose was operative when Mrs. Small was injured in 1982. In light of ***Pullum***, we give proper construction to the statute and find that the Small's lawsuit is barred.

502 So.2d at 946.

Even if the question were viewed as one of the retroactively, ***vel non***, of ***Pullum***, the judgment below should

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be affirmed. Such was the approach (and result) in the First District's case, ***Cassidy v. Firestone Tire & Rubber Co.***, 495 So.2d 801 (Fla. 1st DCA 1986). The Court held:

> Petitioners' action involves an injury which occurred more than twelve years after the allegedly defective product was delivered to the original purchaser, and the action was thus not begun within the period prescribed by section 95.031(2). Both the injury and the commencement of the action occurred subsequent to the Florida Supreme Court's decision in ***Battilla v. Allis Chalmers Manufacturing Co.***, 392 So.2d 874 (Fla. 1981).
>
> * * *
>
> Petitioners contend that ***Pullum*** should not be given effect in the present case, since appellants' action was filed after the decision in ***Battilla*** but prior to the decision in ***Pullum***. However, Petitioners have shown no substantial inequity or unfairness which would result upon application of the ***Pullum*** ruling, nor does the decision in ***Pullum*** suggest that it should be limited to prospective application. As indicated in ***Florida Forest & Parks Service v. Strickland***, 18 So.2d 251 (Fla. 1944), decisions overruling earlier precedent are generally given retroactive effect whereby judicial construction of a statute is deemed to relate back to the enactment of the statute. Petitioners have shown no cause to depart from the general rule in the present case. We therefore determine that ***Pullum*** should be given effect and appellants' action is barred by section 95.031(2), Florida Statutes (1982).

495 So.2d at 802 (footnotes deleted).

Another case rejecting constitutional arguments akin to those of Petitioners herein is ***American Liberty Ins. Co. v. West & Conyers***, 491 So.2d 573 (Fla. 2d DCA 1986). No Florida District Courts of Appeal have accepted a constitutional challenge to application of the statute of repose to a case involving an accident occurring between the time of the ***Battilla*** decision and the ***Pullum*** case.

Concerning Petitioners' argument based on the United States Constitution, FULTON must point out the error in Petitioners' assertion that a decision rendered by the United States Eleventh Circuit Court of Appeals "would control here." (***See*** Petitioners' Brief at 11). It would not. This Court has held that a decision of a United States Court of Appeals holding that the application of a Florida Statute violates the Federal Constitution is "not binding on state courts." ***State v. Dwyer***, 332 So.2d 333, 335 (Fla. 1976). ***See also Ford v. Strickland***, 696 F.2d 804 (11th Cir.), ***cert. denied***, 464 U.S. 865, 78 L.Ed.2d 176, 104 S.Ct. 201 (1983).

Petitioners' reliance on the case of ***George v. Firestone Tire & Rubber Co.***, No. GCA 85-0117-MMP (N.D. Fla. 7/8/86), would appear to invoke the Due Process Clause, the only federal constitutional provision discussed in that case. That provision is not applicable for the same reason

that no violation of the Florida Constitution occurred: no property rights "vested" to Plaintiffs below by virtue of the ***Battilla*** decision. ***Pait v. Ford Motor Co.***, 500 So.2d 743 (Fla 5th DCA 1987); ***see Cassidy v. Firestone Tire & Rubber Co.***, 495 So.2d 801 (Fla. 1st DCA 1986). As held by one of the brethren of the federal trial court judge upon whose reasoning Petitioners rely:

> ***Pullum***, receding from ***Battilla***, held the statute was not unconstitutional. No cause of action was created by the statute and ***Battilla*** vested in plaintiffs no cause of action. It removed the bar of the statute to plaintiffs' assertion of a cause of action. But plaintiffs had, at most, a mere expectation that they had a cause of action they could pursue, and a subsequent decision, holding the statute to be constitutional, could not and does not deprive them of any vested rights.

Eddings v. Volkswagenwerk, A.G., 635 F. Supp. 45, 47 (N.D. Fla. 1986) (granting summary judgment for defendant manufacturer).

In another well-reasoned decision, a federal constitutional attack on the application of the statute of repose was rejected in ***Lamb v. Volkswagenwerk Aktiengesellschaft***, 631 F. Supp. 1144 (S.D. Fla. 1986). FULTON offers an excerpt which is reflective of the Court's reasoning:

> The Plaintiff in the instant case had no vested contract or property right prior to the ***Pullum*** decision; instead Plaintiff was merely pursuing a common law tort theory to recover damages. Indeed the statute of repose and the lapse of the twelve year statutory period obviated the very possibility of Plaintiff sustaining any legal injury from the Volkswagen vehicle. It is axiomatic that common law rights may be restricted, indeed even abolished by the legislature if "grounded both in an overpowering public necessity and an absence of any less onerous alternative means." ***Overland Construction Co. v. Sirmons***, 369 So.2d at 572.
>
> * * *
>
> Although Plaintiff has alleged that the Florida statute of repose violates federal due process rights, Plaintiff has failed to note that the Supreme Court has dismissed, for want of a federal question, several appeals of state court decisions upholding statutes of repose. . . . A number of state courts have construed the dismissal of statute of repose cases by the Supreme Court as an indication that the Court does not perceive any federal constitutional problems with these statutes. ***See Shibuya v. Architects Hawaii Limited***, 65 Hawaii 26, 647 P.2d 288 n.15 (1982); ***Harmon v. Angus R. Jessup Associates***, 619 S.W.2d 522, 524 (Tenn. 1981). Whatever weight other courts may attach to these summary affirmances, it seems to us that if anything, they support our conclusion that Plaintiff's federal constitutional rights are not abridged by the revitalization of the Florida statute of repose.

631 F. Supp. at 1149, 1151-52

Whether viewed as an application of a statute which was constitutional from its enactment, or as a retroactive application of ***Pullum***, the Plaintiffs below simply had no vested rights at the time of the subject accident. Therefore, the Florida Constitution and the United States Constitution were not offended by the judgment.

In closing on the constitutional question, if it is appropriate to apply equity in making such a determination, the equities are with FULTON. Which would be more inequitable: to apply a statute which had been constitutional since its enactment (if not so declared) or to apply the law of the ***Battilla*** case which we all know was wrong?

III.

AN ACTION AGAINST A MANUFACTURER FOR FAILURE TO WARN OF ITS PRODUCT'S PROPENSITIES IS A "PRODUCTS LIABILITY" ACTION SUBJECT TO THE STATUTE OF REPOSE.

Petitioners' position that products liability actions include only claims founded on the "design or manufacture" of products (and not claims for failure to warn) is contrary to law and to logic. The best authorities on the point are the statutes of repose and limitation themselves.

By its terms, the statute of repose applies to "[a]ctions for products liability . . . under [§] 95.11

(3)." Section 95.031(2), Fla. Stat. (1979). Thus, we turn to the statute of limitations to determine what type of lawsuits are subject to the statute of repose. Section 95.11(3)(e) is not limited to strict liability and negligence claims founded on design or manufacturing defects alone. That statute applies to actions for personal injury "founded on the design, manufacture, ***distribution, or sale*** of personal property." (emphasis added).

Plainly the statutes apply to cases in which the manufacturer's liability is not based on its acts or omissions in designing or manufacturing products. What other basis could there be for such liability? FULTON submits that a failure to warn case is the classic (and nearly exclusive) example of a situation imposing liability for the "distribution or sale" of a product where nothing is actionable concerning the design and manufacturing processes. Such a case seems naturally to be included in the sphere of products liability.

The scholars of product liability law include the manufacturers' duty to warn as an "area of products liability [law]." 1A L. Frumer & M. Friedman, ***Products Liability*** § 8.01 (1986). ***See also, e.g.,*** 2 R. Hursh & H. Bailey, ***American Law of Products Liability*** § 12:4 (2d ed. 1974). That categorization includes a manufacturer's post-sale continuing duty to warn. 1A L. Frumer, ***supra,*** § 8.02.

The fact that duty-to-warn cases are products liability cases is chronicled in many common places. For example, the Bible of the researcher, the Digest, groups the cases under the Products Liability "key numbers" (Trademark registered) such as no. 14. ***E.g.,*** 27 West's Florida Digest 2d at 449 (1985).

Albeit without much ado, this Court recognized that failure to warn claims fell within the ambit of products liability in ***The Florida Bar Re: Amendment to Rules of Civil Procedure Rule 1.100(c)*** (etc.), 488 So.2d 57 (Fla. 1986), wherein the Court held that all Complaints must be filed with a Civil Cover Sheet, Form 1.997. The instructions to that form include the following:

> **II. Type of Case.** Place an "X" in the appropriate box. If the cause fits more than one type of case, select the most definitive. ***Definitions of the cases are provided below.***
>
> * * *
>
> (K) ***Products Liability*** - all matters involving injury to person property allegedly resulting from the manufacture or sale of a defective product or from a ***failure to warn.***

488 So.2d at 60 (emphasis added). FULTON reminds the Court that Petitioners cited ***no*** authority for the proposition that failure to warn claims are not products liability actions.

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Logic compels the conclusion that when the Legislature adopted the statute of repose, it did so with the intent that manufacturers could "close the book" on claims arising from their sales of products which were more than twelve years old. It would make no sense whatever that a plaintiff could be foreclosed from a claim that negligent design caused a product to blow up in his face twenty years after the sale but that the same plaintiff could bring an action based on the seller's failure to warn that the explosion could occur. Regardless of the act or omission upon which a claim against a manufacturer is based, the duty arises by virtue of the "design, manufacture, distribution, or sale" of the product. *See* § 95.11(3)(e), Fla. Stat. The duty to warn arises from the "distribution or sale" of the product; hence, the statute of repose was properly applied in this case.

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CONCLUSION

There being no misinterpretation of the Legislature's original intent, no violation of state or federal constitutional rights in the judgment below, and this case falling within those cases barred by the statute of repose, the decision below should be affirmed.

Respectfully submitted,

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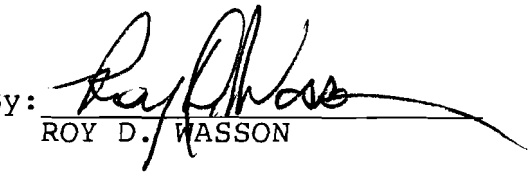
By: 
ROY D. WASSON

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Respondent FULTON MANUFACTURING CORPORATION has been furnished, by hand delivery, this 24th day of July, 1987, to ARNOLD R. GINSBERG, Horton, Perse & Ginsberg, 410 Concord Building, 66 West Flagler Street, Miami, Florida 33130.

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