SUPREME COURT OF FLORIDA

EDWARD PURTY,

Petitioner,

vs.

McDONNELL DOUGLAS CORPORATION,

Respondent.
_____/

CASE NO. 70,152
THIRD DISTRICT COURT
No. 86-1041

ON APPEAL FROM THE FLORIDA DISTRICT COURT OF APPEAL
THIRD DISTRICT

INITIAL BRIEF OF PETITIONER

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BY: _____
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REQUEST FOR ORAL ARGUMENT

Petitioner, MR. EDWARD PURTY, pursuant to Rule 9.320, Fla.R.App.P. hereby requests the opportunity to orally present its argument before the Court. Petitioner is of the belief that the oral argument will be beneficial to this Court in resolving the issues of great public importance presented in this case.

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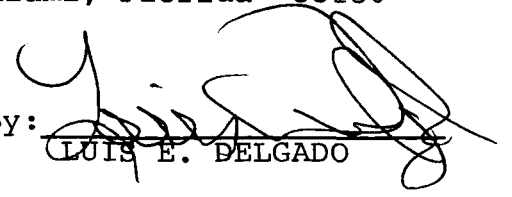
By: 
LUIS E. DELGADO

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STATEMENT OF THE ISSUES

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. Cincinnatti, Inc., 476 So.2d 657 (Fla. 1985), appealed dismissed, ____US____ 106 S. CT. 1626, 90 L.ED.2d 174 (1986), which overruled Batilla v. Allis Chalmers Mfg. Co., 392 So.2d 874 (Fla. 1980), applies so as to bar a cause of action that accrued after the Batilla decision but before the Pullum decision.

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STATEMENT OF THE CASE

This is a timely appeal of an affirmance by the Third District Court of Appeal which certified the legal questions presented as being of great public importance.[1] This case was begun on December 14, 1984 with the filing of a second Amended Complaint. (R. 1-13) On February 7, 1985 McDONNELL DOUGLAS filed its answer to Second Amended Complaint (R. 14-18) to which MR. PURTY filed his Reply and Avoidance on February 11, 1985. (R. 19-21)

On February 15, 1985, McDONNELL DOUGLAS filed its Motion for Summary Judgment. (R. 35-37)

On January 3, 1986, the lower tribunal entered its Order on McDONNELL DOUGLAS' Motion for Summary Judgment (R. 636-637) granting the motion as it pertains to Counts Six (6) and Seven (7) sounding in strict liability and warranty respectively. (R. 22-36) Ruling on Count Six (6) alleging negligence was reserved. Thereafter, in the wake of Pullum v. Cincinnati, Inc., 476 So.2d 657 (Fla. 1985), the lower

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1. Throughout this Initial Brief and, unless otherwise indicated, citation to the record-on-appeal is designated (R.). The Appellant, EDWARD PURTY, is Plaintiff in the lower tribunal and is designated throughout this Initial Brief as MR. PURTY. The Appellee, McDONNELL DOUGLAS CORPORATION, was one of the Defendants in a multi-defendant action in the lower tribunal and is designated throughout this Initial Brief as McDONNELL DOUGLAS. At this time, the action in the lower tribunal remains pending against the remaining Defendants, TPI International Airways, Inc. and Kidde, Inc.

tribunal granted McDONNELL DOUGLAS' Motion for Summary Judgment as to the remaining negligence count and Summary Final Judgment was entered on March 28, 1986. (R. 734)

A timely appeal was taken, pursuant to Fla.R.App.P. 9.100, from the Summary Final Judgment entered March 28, 1986, Summary Final Judgment entered April 2, 1986, and an Amended Summary Final Judgment entered April 24, 1986.[2]

On June 9, 1987 the Third District Court of Appeal, without reaching Petitioner's various assignments of error, affirmed the lower tribunal on authority of Shaw v. General Motors Corporation, 503 So.2d 362, 12 F.L.W. 613 (Fla. 3rd DCA March 6, 1987). The Third District Court of Appeal certified the issues raised in this appeal as requiring immediate resolution by this Court because the issue concerned questions of great public importance.

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2. The distinction between these three Judgments pertains only to a reservation of jurisdiction to tax costs and fees, a distinction without significance to this appeal.

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STATEMENT OF THE FACTS

This products liability action arises out of an incident which occurred on January 9, 1984 at Miami International Airport. (R. 23) On that day MR. PURTY was injured seriously when struck in the head by a fire extinguisher container known colloquially as a fire bottle, manufactured by Kidde, Inc. Prior to the injury, the bottle was one in a system of four located in the wings of a DC-8-51 airplane registration number N8009U sold by United Airlines, Inc. to TPI International Airways, Inc. (R. 48-70)

Immediately prior to MR. PURTY's injury the four fire bottles were removed, for resale and future use, from the aircraft by one of MR. PURTY's crew members. (R. 66-68) Shortly after removal, one of the bottles discharged striking MR. PURTY in the head causing him serious injury. (R. 66, 217, 354)

McDONNELL DOUGLAS involvement was the design, manufacture and placement, in the stream of commerce, of the completed product, DC-8-51 aircraft registration number N8009U, including its component parts. Those portions of the Complaint pertaining to McDONNELL DOUGLAS are contained in Counts five (5), Six (6) and Seven (7). (R. 28-30) The Affidavit of Earl J. Crawley (R. 46-65) submitted by McDONNELL DOUGLAS reflects that the aircraft was delivered initially to the purchaser, United Airlines, Inc. on September 14, 1959. The fire bottles involved in this

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incident were not contained in the DC-8-51 aircraft at the time of the initial delivery inasmuch as they were manufactured in July, 1962. However, McDONNELL DOUGLAS authorized the subject type bottles as approved replacement parts for the bottles contained in the aircraft at the time of the initial delivery in 1959. (R. 428)

In May, 1973, subsequent to the manufacture of the extinguisher in issue, the extinguisher manufacture, Kidde, Inc. determined that a caution label should be attached to the extinguishers such as the one which injured MR. PURTY. Kidde advised McDONNELL DOUGLAS of its decision to attach caution labels to the extinguishers. McDONNELL DOUGLAS did not, however, advise aircraft purchasers or other federal agencies who may have been able to locate and advise owners of aircrafts of the dangerous extinguishers and of Kidde's determination that caution labels were necessary. No caution label was attached to the extinguisher involved which injured MR. PURTY. There were no instructions or notices in the immediate area detailing procedure for removing the extinguishers from the aircraft. (R. 267) MR. PURTY contends that the absence of this caution containing instructions for removal and the foreseeable result of physical injury if proper care was not exercised, proximately caused his injuries. MR. PURTY contends further that McDONNELL DOUGLAS and Kidde were responsible for communicating this caution to actual or potential owners and users.

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SUMMARY OF ARGUMENT

I. WHETHER THE LEGISLATIVE AMENDMENT OF SECTION §9.0312, FLA. STAT. 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 AFFECTIVE DATE OF THE AMENDMENT

The District Court of Appeal erred in failing to apply retrospectively the legislative amendment of Section of Fla. Stat. §95.031 (2). The intent of the legislature was that the statute apply retroactively so as to achieve its remedial purpose. Statutes which are remedial in nature are applicable to pending cases. The legislature's remedial purpose in amending the statute can be achieved only by retroactive application of the statute.

II. WHETHER PULLUM v. CINCINATTI, INC., 476 So. 2d 657 (Fla. 1985) IN ITS APPLICATION OF THE STATUTE OF REPOSE, SECTION §95.0312 FLA. STAT. 1979 SHOULD BE APPLIED PRESPECTIVELY TO THOSE CAUSES OF ACTION ACCURING A REASONABLE PERIOD OF TIME SUBSEQUENT TO AUGUST 29, 1985.

Retrospective application of Pullum v. Cincinnatti, Inc., 467 So.2d 657 (Fla. 1985) violates the potential property that MR. PURTY had by virtue of his cause of action which occurred prior to Pullum. Extinguishment of this potential right violates the Florida constitutional guarantee of access to the courts for redress of any injury.

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ARGUMENT

WHETHER THE DISTRICT COURT OF APPEAL ERRED IN FAILING TO RETROSPECTIVELY APPLY THE LEGISLATIVE AMENDMENT OF SECTION 95.0312, FLA. STAT. 1983, ABOLISHING THE STATUTE OF REPOSE IN PRODUCT LIABILITY ACTIONS.

The present case involves the retroactive application of the amendment and abolishment of the Florida Statute of Repose in product liability actions. Application of the Florida Statute of Repose to the present action would bar Petitioner and the many other persons injured during the statute's short revival period from pursuing their claims. The statute provides in impertinent part;

> (2) actions for products liability and fraud under Section 95.11 (3) must began within the period prescribed in this chapter with the period running from the time the facts giving rise to the cause of action where discovered or should have been discovered with the exercise of do deligence, instead of running from the date prescribed elsewhere in Section 95.11 (3), but in any event within 12 years after the date of delivery of the completed product which the original purchaser, or within 12 years after the date of the commission of the allege fraud, regardless of the date the defect in the product or the fraud was or should have been discovered. Fla. Stat. Section 95.031 (2) (1982).

In 1980, this Court in Batilla v. Allis Chalmers Manufacturing Company, 392 So.2d 874 (Fla. 1980), held that the Statute of Repose, as applied to products which were already 12 years old at the time that the cause of action accrued, was unconstitutional. On December 14, 1984, when MR. PURTY filed his lawsuit, Fla. Stat. §95.031(2) had been

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declared unconstitutional as a deprivation of access to the Courts, Batilla at 875.

The aircraft manufactured by McDONNELL DOUGLAS in this case was delivered to the initial purchaser, United Airlines, Inc. on September 14, 1959. The Statute of Repose would have expired, had the statute been effective, on September 14, 1971. Thus, MR. PURTY's claim would have been barred by the Statute of Repose before the injury even occurred.

The injury which prompted this action occurred on January 9, 1984, the date the cause of action accrued. MR. PURTY began his lawsuit on December 14, 1984 when he filed suit. In reliance on Batilla, and its progeny, MR. PURTY undertook substantial and extremely costly discovery and actively prosecuted his case. Midway through his lawsuit, after having expended substantial time and monies, MR. PURTY's lawsuit as to McDONNELL DOUGLAS, was taken away from him by the reversal of Batilla and the affirmation of the constitutionality of Section 95.031 (2) Fla. Stat. Pullum v. Cincinnati, Inc., 476 So.2d 657 (Fla. 1985).

After Final Summary Judgment was entered against MR. PURTY, the legislature amended Section §95.031 (2) Fla. Stat. and abrogated the Statute of Repose in product liability actions. MR. PURTY submits that the lower court should be directed to apply the prevailing law, apply the statute retroactively and find that MR. PURTY's action was timely brought.

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APPLICATION OF SECTION 95.0312 FLORIDA STATUTE AS AMENDED TO CASES OF ACTION ACCRUING PRIOR TO ITS EFFECTIVE DATE

Generally, disposition of an appeal should be consistent with the law in effect when the appellate decision is rendered and not the law in effect at the time the judgment is rendered. State v. Lavazzoli, 434 So.2d 321 (Fla. 1983). In the absence of a legislative expression to the contrary, a substantive law is to be construed as having prospective effect only. Lavazzoli Notwithstanding, statutes which relate only to procedure or remedies are generally held applicable to all pending cases. McCord v. Smith, 43 So.2d 704 (Fla. 1949).

In determining whether Section 95.031 (2) Fla. Stat should be retroactively applied one must first consider the intent of the legislature. Retroactive application of a legislative act is not invalid where retroactive intent is indicated in the statute, the provision does not violate the Constitution and does not result in manifest injustice. Seaboard Systems Railroad, Inc. v. Clemente, 467 So.2d 348 (Fla. 3 DCA, 1985). The legislature's repeal of the Statute of Repose reflects its recognition of the hardships and unfairness which the statute caused. Though not explicitly providing for retroactive application it can reasonably be said that the legislature intended that the statute apply retroactively. Section (3) of Fla. Stat. 95.031 provides

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that Section (1) of the act shall apply to causes of action accruing after October 1, 1986. Section (3) does not, however, require or mention that the section dealing with the Statute of Repose, Section (2), apply prospectively. Insofar as the legislature explicitly provided that Section (1) was to be prospectively applied, but did not so provide for Section (2), reasonable statutory construction indicates that the legislature did not intend prospective but retrospective application. Thus, considering the remedial measure and purpose for which the statute was amended, it can reasonably be argued that retroactive application was contemplated by the legislature.

REMEDIAL STATUTES CAN BE RETROSPECTIVELY APPLIED

If a statute is found to be remedial in nature the rules of statutory construction provide that the Statute can and should be retroactively applied in order to serve its intended purpose. Village of El Portal v. City of Miami Shores 362 So.2d 275 (Fla. 1978); Grammer v. Roman, 174 So.2d 443 (Fla. 2DCA 1965). Remedial statutes include statutes which confer a remedy, and the remedy is "the means employed in employing a right or redressing an injury", Grammer Supra at 446. Remedial statutes also include those which do not create new or take away existing vested rights, but only operate in furtherance of the remedy or confirmation of rights already existing. City of Lakeland v. Cantinela, 129 So.2d 133 (Fla. 1961). Remedial statutes

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are exceptions to the rule that statutes are addressed to the future rather then to the past. Remedial statutes do not come within the legal conception of retrospective law or the general rule against retrospective operation of statutes. Grammer v. Roman at 446. In the present action the Legislature amended Fla. Stat. 95.0312 Section (2) to remedy the inherent inequities which resulted from its application. The amended statute does not create or remove existing rights but simply permits all injured parties to bring actions on the same basis, irrespective of the date of their injury. By amending the statute the legislature was seeking to again place all injured persons in an equal position to bring their claims. It was only by amending the statute and having it apply retrospectively that the legislature could accomplish such goals.

RETROACTIVE APPLICATION OF THE SUPREME COURT DECISION IN PULLUM v. CINCINNATTI IS UNCONSTITUTIONAL

The present case involves the prospective application of the Florida Statute of Repose to a case filed during the time period when the statute had been found unconstitutional. The Florida Statute of Repose, as enacted in 1975, required that causes of action for products liability be initiated within 12 years of the date the product was delivered to its original purchaser. § 95.031(2) Fla. Stat. (1979). Recognizing that the statute would extinguish existing rights and causes of action, the Florida legislature provided a one year savings clause. The

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savings clause reflected the legislature's intent to safeguard constitutional guarantees of access to the courts and preservation of vested property or contract rights. Notwithstanding the legislature's attempt to comply with constitutional guarantees, this Court in Batilla v. Allis Chalmers Manufacturing Company, 392 So.2d 874 (Fla. 1980), clearly and unequivocaly announced that Section 95.031 worked an unconstitutional denial of access to the courts.

After Batilla, the Statute of Repose, while not legislatively repealed, had no legal effect. It was during this time that MR. PURTY was injured and filed his cause of action. In August, 1985, this Court receded from its decision in Batilla in the case of Pullum v. Cincinnatti, 476 So.2d 657 (Fla. 1985). In Pullum, this Court held that the Statute of Repose was constitutional and judicially revived the statute to its original force and effect. Unlike the Florida legislature however, this Court in Pullum did not provide a reasonable time to file suit for those causes of action that had accrued at the time the statute was revived.

In rendering the Pullum decision, this Court did not express any intention that the holding was to be apply retroactively to pending cases. Thus, since the time the Pullum opinion was issued, substantial controversy concerning its retroactive application has risen in the state and federal courts of Florida.[3] This case involves the precise issue of retroactive application of the Pullum

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decision which MR. PURTY submits violates the Florida Constitution's guarantee of access to the courts. MR. PURTY further submits that retroactive application of Pullum fails to further the legislature's avowed intent to apply a savings clause, Section, §95.022, Fla. Stat. (1974) to the Statute of Repose.

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3. This issue has been resolved favorably to MR. PURDY in Thomas L. GEORGE, et. al. v. Firestone tire and Rubber Company, Case No. GCA-85-0117-MMP (N.D. Fla. June 13, 1986). George v. Firestone Tire and Rubber Company, Case No. GCA-85-0117-MMP (N.D. Fla. June 13, 1986) and Owens v. Firestone Tire and Rubber Company, Case No. 84-350-CIV-T-10 (M.D. Fla. January 28, 1986) This issue has been resolved adversely to MR. PURTY in Eddings v. Volkswagen Werk, A.G., 635 F.Supp. 45 (N.D. Fla. 1986); Lamb v. Volkswagen Werk Aktiengesellschaft, 631 F.Supp., 1144 (S.D. Fla. 1986) and in Cassidy v. Firestone Tire and Rubber Company, 11 F.L.W. 2023 (Fla. 1st DCA September 23, 1986. Blanco v. Wasco Products,et al., Case No. 85-964-DIV-Margus (S.D. Fla. March 18, 1986); Pait v. Ford Motor Company, 12 F.L.W. 277 Fla. 50 CA January 15, 1987); Shaw v. General Motors Corp., Case No. 86-379 (Fla. 3D DCA February 10, 1987).

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In Kluger v. White, 281 So.2d 1 (Fla. 1973), this Court interpreted the Florida Constitution, Article I Section 21:

> The Court shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.
>
> [W]here a right of access to the court's 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. §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... .

Kluger at 4.

In Ellison v. Northwest Engineering Co., 521 F.Supp. 199 (S.D. Fla. 1981), the District Court followed this rationale as well as that in Overland Construction Co. v. Sirmons, 369 So.2d 572 (Fla. 1979) determining that application of the twelve year statute of repose to situations such as this violated Article I, Section 21 of the Florida Constitution. Each element of a product liability action, strict liability, warranty and negligence, existed prior to the Legislature's passage of the statute of repose. Where the twelve year limitation abolished these rights, the statute of repose is unconstitutional as to that case. In this instance, the lower tribunal held that the statute of repose eliminated MR. PURTY'S strict liability, warranty and negligence actions before they ever occurred.

In Florida Forest and Park Service v. Strickland, 154

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Fla. 472, 18 So.2d 251, 254 (Fla. 1944) this Court determined the following:

> 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.

(Emphasis added)

In such an instance involving a potential property right to compensation, a change in the judicial construction of the statute must be given prospective and not retrospective application. Such a change in judicial philosophy is not a sufficient justification to strip one of a potential property right. Plaintiff relied on existing law which gave him the right and opportunity to seek redress for his injuries and resulting damages. The law in effect on the date of MR. PURTY'S injury provided him with a vested right to seek compensation. Retrospective application of Pullum would destroy MR. PURTY'S vested property right to enforce his potential claim

To give Pullum a retrospective effect commits a grave injustice. The legislature, enacting the statute of repose, determined that in order to protect the constitutional guarantee of those persons whose cases would be barred by passage of the new statute provide a period of time within which those persons could file suit. This

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statute was buried by Batilla and its progeny. Its rebirth in Pullum and retrospective application eliminates the grace period and eclipses totally potential property rights of those persons who are injured more than 12 years after the product entered the stream of commerce but prior to the decision in Pullum. Persons who, as MR. PURTY, had a viable cause of action prior to Pullum and expended substantial time and monies, have found, without notice or warnings, that they had no action. Retroactive application of PULLUM through the retroactive operation of Section 95.031 (2) would destroy MR. PURTY's right to seek redress for the injuries he has suffered without having the constitutionally mandated savings clause.

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CONCLUSION

The Summary Final Judgment in favor of McDONNELL DOUGLAS should be reversed. The legislature in amending the Statute of Repose intended that it apply retrospectively to pending claims so as to remedy the inequities caused by the statutes application. Rules of statutory construction provide that remedial statutes can and should be retroactively apply in order to serve their intended purpose. The legislatures intent in amending the Statute of Repose was to remedy and confirm an existing right. Retrospective application of the Statute of Repose was intended by the legislature and would further its remedial purpose and goal. Retrospective application of the statute is mandated by the prevailing law and would be consistent with the legislature's intent in amending the statute.

Section §95.031 (2), Fla. Stat., 1979 should not apply to those actions filed prior to Pullum nor to those filed a reasonable time beyond. This accords with the legislature's savings clause. If made prospective at all, Section §95.031 (2) would not apply to this case and the Summary Final Judgment should be reverse as to all counts.

Accordingly, MR. PURTY respectfully requests that the lower Courts be reveresed and that this action be remanded to the trial court for trial on the merits.

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WE HEREBY CERTIFY that a true and correct copy of the above and foregoing was mailed this 20th day of July, 1987 to: DOUGLAS CHUMBLEY, ESQUIRE, 900 Brickell Centre, 799 Brickell Plaza, Miami, Florida 33131.

By: _____
LUIS E. DELGADO

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