11-16

SUPREME COURT OF FLORIDA

CASE NO. 71,106

OCT

J. I. CASE COMPANY, a foreign corporation,

Defendant/Petitioner,

vs.

SHEILA HENLEY, as Personal Representative of the Estate of Nathaniel Henley, Sr., Deceased,

Plaintiff, Respondent.

ON REVIEW OF A DECISION OF THE DISTRICT COURT OF APPEAL, THIRD DISTRICT

ANSWER BRIEF OF RESPONDENT

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INTRODUCTION

Sheila Henley, Respondent (hereinafter referred to as "Henley"), seeks affirmation of the decision of the Third District Court of Appeals on rehearing in Henley v. J.I. Case Co., 510 So.2d 342 (Fla. 3 DCA 1987) in which the following question was certified as being of great public importance:

> DOES THE STATUTE OF REPOSE BAR A WRONGFUL DEATH ACTION WHERE THE DEATH OCCURRED MORE THAN TWELVE YEARS AFTER THE ORIGINAL PURCHASE OF THE PRODUCT WHICH ALLEGEDLY CAUSED THE DEATH?

Henley contends that the certified question should be answered in the negative and that the decision of the Third District Court of Appeals on rehearing should be affirmed.[1]

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[1] References to the record on appeal will be by the symbol ("R") while references to the appendix will be by the symbol ("App").

STATEMENT OF THE CASE AND FACTS

This case arises from an accident that occurred on March 7, 1985 (R.1). At the time of the accident Nathaniel Henley, Sr. was working for Florida Mining and Materials Corp. d/b/a South Florida Prestressed, a company that manufactures concrete forms (R.1). On the date of the accident Mr. Henley was struck by a Travelift, a large crane-like machine used to transport heavy concrete forms from one location to another. The Travelift involved in this case was manufactured and delivered to its original purchaser in 1971 (R.16). Surviving Mr. Henley are his wife, his two year old son and his parents.

On June 12, 1985 the Plaintiff filed suit against the J. I. Case Company, (hereinafter referred to as "Case") as the manufacturer of the Travelift that struck and killed Mr. Henley (R.1-7). The Plaintiff alleged, among other things, that the Travelift lacked adequate safety devices including wheel guards and a warning system. Discovery commenced shortly after the filing of the Complaint, interrogatories were propounded and depositions were taken. On December 6, 1985 the Defendant filed a Motion for Entry of Final Judgment on the grounds that the Supreme Court's decision in Pullum v. Cincinnati, 476 So.2d 657 (Fla. 1985), barred the Plaintiff's action (R.19-20). The Defendant contended that since the Travelift was more than twelve years old at the time of the accident, the Plaintiff was precluded from going forward with a wrongful death action. On April 23, 1986 the Court entered an order denying the Defendant's Motion for Summary Judgment (R.42-43). The case was then set for trial (R.44-45). On October 3, 1986 the Defendant filed a renewed Motion for Summary

Judgment based on the same grounds originally asserted in its first Motion (R.55-56). The Defendant's renewed Motion for Summary Judgment was granted by the Court on November 19, 1986 (R.58).

The Third District Court of Appeals affirmed the summary judgment on May 26, 1987. Two days later, on May 28, 1987, this court issued its opinion in Nissan Motor Company Limited v. Phlieger, 508 So.2d 713 (Fla. 1987) (hereinafter "Nissan"). Based on that authority, Henley moved for rehearing, contending that Nissan made it clear that the statute of repose had no application to wrongful death actions timely filed within the applicable two year statute of limitations. On July 14, 1987 the Third District reversed the summary judgment entered on behalf of Case and certified the previously set forth question to this court.

Case has petitioned this court seeking an affirmative answer to the certified question.

SUMMARY OF THE ARGUMENT

The certified question should be answered in the negative and the decision of the Third District Court of Appeal, on rehearing, should be affirmed.

This court in Nissan Motor Co., Ltd. v. Phlieger, 508 So.2d 713 (Fla. 1987) made it clear that Section 95.031(2) Florida Statutes does not bar wrongful death actions brought more than 12 years after the original purchase of the product. Case's interpretation of Nissan, that it is limited to only those cases where the death occurred before the expiration of the 12 year period, is too restrictive and inconsistent with the language in the opinion. The legal question presented here is not materially different than the question presented in Nissan. Does Section 95.031(2), Florida Statutes bar a wrongful death action brought pursuant to Section 95.11, Florida Statutes? It either does or it does not and this Court's decision in Nissan was clear and unequivocal - it does not.

The Third District Court of Appeals, when asked to consider the issues in this case in light of this Court's decision in Nissan, correctly held that 95.031(2) does not bar a wrongful death action timely filed under 95.11.

Apart from the clear meaning of Nissan there are important constitutional principles that militate against answering the certified question in the affirmative. When Henley filed her suit, the controlling law was that she had two years from the date of her husband's death in which to file the wrongful death action. At that time the 12 year product liability statute of repose had previously been held unconstitutional by

this Court. Therefore, on the day that Mr. Henley was killed, there was no legal impediment whatsoever to the filing of the action against Case. When Henley filed her lawsuit in reliance upon the law in effect at that time, she acquired a property interest and a vested right to pursue her claim. It would be a denial of due process to retroactively destroy such a property right or to otherwise take it away.

The Florida Legislature's recent amendment to Fla. Stat. 95.031(2) is yet further reason why the certified question should be answered in the negative. The amendment, which is remedial in nature, should be given retroactive effect and would therefore be dispositive in answering the pending certified question.

ARGUMENT

I
WRONGFUL DEATH ACTIONS TIMELY FILED WITHIN THE TWO YEAR STATUTE OF LIMITATIONS ARE NOT BARRED BY THE 12 YEAR STATUTE OF REPOSE

This Court, in Nissan Motor Co., Ltd. v. Nissan, 508 So.2d 713 (Fla. 1987), was presented with the question of whether Florida's Wrongful Death Act simply gave the decedent's designated beneficiaries a right of action based upon the decedent's underlying products liability cause of action that the decedent would have had had he lived or, alternatively, whether the Act created a new and independent cause of action in the statutorily designated beneficiaries. The answer to the question obviously being important in answering the question of whether the statute of repose would bar a wrongful death action where the death occurred more than twelve years after the original purchase of the product.

In considering the question, this Court specifically rejected the argument that Case makes here that the right to recover for wrongful death is strictly limited to the rights the injured person would have had if it was not a wrongful death case.

> [Nissan] contends that Florida's Wrongful Death Act simply gives the designated beneficiaries a right of action based on the decedent's underlying products liability cause of action. Thus, according to Nissan, because the underlying products liability action is barred by Section 95.031(2), Mrs. Phlieger has a right of action but has no viable cause of action. Nissan relies heavily on this Court's decisions in Variety Children's Hospital v. Perkins, 445 So.2d 1010 (Fla. 1983), and Ash v. Stella, 457 So.2d 1377 (Fla. 1984), for the position that Florida's Wrongful Death Act does not create a cause of action separate and distinct from that which the decedent could have maintained had he

> lived. We reject this narrow interpretation of Florida's Wrongful Death Act . . .
>
> Nissan at 714.

This court went on to hold that the Act "creates a new and independent cause of action in the statutorily designated beneficiaries." Id. at 714. And, after careful analysis, concluded:

> that the legislature did not intend that section 95.031(2) operate as a bar to wrongful death actions brought more than twelve years after the original purchase of the product allegedly causing death.
>
> Nissan at 715.

Nissan should be dispositive on the certified question presented here.

Case's argument that the holding in Nissan is limited to those instances where the death occurred before the running of the 12 year statute of repose, was specifically rejected by the Third District Court of Appeals on rehearing in this case. After considering the argument the Court noted that:

> What was done in Nissan was to permit the personal representative to bring suit after the expiration of the statute of repose. This, to us, is the strongest indication that the products liability statue of repose which requires that the action be begun within the 12 year period is simply inapplicable to wrongful death actions.
>
> Henley v. J.I. Case Co., 510 So.2d 342 (Fla. 3rd DCA 1987)

The Third District's opinion, although not controlling here, is significant for the simple reason that it zeroed in on the obvious - the statute of repose barred all actions after the expiration of 12 years and this Court's decision in Nissan allowed the Plaintiff to proceed with her suit filed outside the 12 year period.

The question of whether a wrongful death case arising out of a product defect was controlled, for limitations purposes, by the product liability statute of limitations (Fla. Stats. 95.031(2), 95.11(3)(e)) or by the wrongful death statute of limitations (Fla. Stat. 95.11(4)(d)) is not new. The same dilemma arose from the conflict between the medical malpractice statute of limitations and the wrongful death statute of limitations. Which controlled in a death case based upon medical malpractice? Before the medical malpractice statute of limitations was amended to specifically say it applied to death cases arising from medical malpractice, the decision was the same as the one made in Nissan - the wrongful death period of limitations controlled, and the deceased's estate could bring a death action even if the period of limitations for injuries from medical malpractice had expired. See Bruce v. Byer, 423 So.2d 413 (Fla. 5th DCA 1982); Estate of James v. Martin Memorial Hospital, 422 So.2d 1043 (Fla. 4th DCA 1982); Worrell v. John F. Kennedy Memorial Hospital, Inc., 384 So.2d 897 (Fla. 4th DCA 1980), rev'd other grounds, Dober v. Worrell, 401 So.2d 1322 (Fla. 1981). Unlike the medical malpractice statute of limitations, however, the products liability statute of limitations, with the accompanying statute of repose, has never been amended to specify any application to death cases.

If the plain language of Nissan means what it says then all death cases, regardless of whether they accrued before or after the running of the twelve year statute of repose, are governed by the two year limitations period of Fla. Stat. 95.11(4)(d). And so they should be.

Case, however, in reliance upon such cases as Variety Children's Hospital v. Perkins, 445 So.2d 1010 (Fla. 1983), Hudson v. Keene Corporation, 445 So.2d 1151 (Fla. 1st DCA 1984), aff'd 472 So.2d 1142 (1985) and others, contend that wrongful death actions cannot proceed where the decedent would not have been permitted to proceed had he lived. But, Variety Children's Hospital was considered by this Court in Nissan and found not to be controlling. It was the rationale of that case, rejected in Nissan, which the First District relied upon in deciding Hudson and which this Court relied upon in deciding Nance v. Johns-Manville Sales Corp., 466 So.2d 1113 (Fla. 3d DCA 1985). Neither Hudson nor Nance control the issue at hand any more than Variety Children's Hospital did.

Nissan should not be so narrowly construed such that it only applies to deaths which occur prior to the running of the twelve year statute of repose. A wrongful death action is a new and independent cause of action, with its own statute of limitations, which the legislature never intended to bar by operation of the statute of repose. For these reasons alone, the certified questions should be answered in the negative.

II.
THE TRIAL COURT ERRED IN RETROACTIVELY APPLYING PULLUM TO HENLEY'S CASE

A. History

In 1975, the Florida legislature enacted Florida Statute Section 95.031(2), the product liability statute of repose. The statute provided that an action for product liability must be commenced no later than twelve years after the date of delivery of the completed product to the original purchaser. In addition to the statute of repose, the relevant statute of limitations, Florida Statute Section 95.11(3)(e), provided that an action for product liability must be commenced within four years from the time the facts giving rise to the cause of action were discovered or should have been discovered with due diligence.

These two statutes were intended to operate complementary, with an action to be brought in any event within twelve years from the date of delivery of the completed product to its original purchaser, regardless of the date the defect in the product was or should have been discovered. This gave individuals who were injured by products within eight years after the delivery date four years within which to bring their lawsuit, individuals who were injured between eight and twelve years after the delivery date up to four years in which to bring suit, depending when in that time period they were injured, and lastly, barring those individuals who were injured twelve or more years after product delivery from filing suit.

This Court has distinguished statutes of limitation from statutes of repose:

> Rather than establishing a time limit within which [an] action must be brought, measured from the time of accrual of the cause of action, these [statutes of repose] provisions cut off the right of action after a specified time measured from the delivery of a product or the completion of work. They do so regardless of the accrual of the cause of action or of notice of the invasion of a legal right.

Universal Engineering Corp. v. Perez, 451 So.2d 463 (Fla. 1984). Both statutes limit the time period within which a plaintiff may bring suit, but there are important differences between the two statutes. The statute of limitations limits the time within which a plaintiff may bring suit after the cause of action accrues, whereas the statute of repose potentially bars the plaintiff's suit before the cause of action arises.

On December 11, 1980, this Court held the statute of repose unconstitutionally barred access to courts to litigants injured by products more than twelve years after the delivery date, in violation of Article I, Section 21, of the Florida Constitution. Battilla v. Alice Chalmers Manufacturing Co., 392 So.2d 874 (Fla. 1980). Battilla involved a plaintiff who was injured more than twelve years after the delivery date of the defective product. The Court held the statute unconstitutional as applied to this plaintiff, as it completely barred the plaintiff's cause of action before it accrued. Battilla amended the statute of repose to provide that plaintiffs who were injured by defective products less than eight years after the delivery date had four years to file suit, plaintiffs who were injured twelve or more years after the product delivery date had four years in which to file their suit, and plaintiffs who were injured by

defective products somewhere in the eight to twelve year period after product delivery had less than four years in which to file suit, depending when in that time frame they were injured. The reason for this result was that plaintiffs injured between eight and twelve years after product delivery were not completely barred from bringing their cause of action they merely had less time to file, and the statute of repose was not unconstitutional as applied to these plaintiffs.

In Pullum v. Cincinnati, Inc., 476 So.2d 657 (Fla. 1985), the Plaintiff fell into the eight to twelve year class. Pullum's hands were crushed in a pressbrake machine on April 29, 1977. The pressbrake was shipped to the original purchaser on November 11, 1966. Thus, the injury took place less than eleven years after the original delivery. Plaintiff filed suit on November 25, 1980, less than four years after his injury, but more than twelve years after delivery of the pressbrake to the original purchaser. Thus, while Pullum's injury occurred before the twelve-year statute of repose, he did not file suit until after the twelve year period. The trial court granted summary judgment in favor of the defendant based on the statute of repose, Florida Statute Section 95.031(2).

Pullum appealed to the Fourth District Court of Appeal and argued that the statute of repose, as amended by Battilla, violated his constitutional right to equal protection by arbitrarily providing him and similar plaintiffs less than four years in which to file suit because they fell in the eight to twelve year period. Pullum did not argue that he was denied access to courts, as prior Supreme Court decisions held that a mere shortening of time to file suit is not a denial of access to courts.

Universal Engineering Corp. v. Perez, 451 So.2d 463 (Fla. 1984); Purk v. Federal Press Co., 387 So.2d 354 (Fla. 1980). The District Court affirmed, holding that the statute of repose did not deny Pullum equal protection. The District Court certified the question to this Court as being of great public importance.

In his brief to the Supreme Court Pullum argued that the unequal treatment between people injured in the first eight years or after year twelve on the one hand, and people injured from years eight to twelve on the other hand, is purely arbitrary, and the Supreme Court should declare the accidental classifications under the mutant section 95.031(2), irrational, arbitrary, purposeless and unconstitutionally violative of the equal protection guarantees. The only question before this Court was whether the "amended" statute of repose violated Pullum's equal protection rights by giving him less than four years in which to file suit.

This Court did not address the issue but instead reversed its earlier decision in Battilla and declared that the statute of repose was indeed constitutional, even as to injuries occurring more than twelve years after product delivery. If Pullum is given a retroactive application, any pending lawsuit brought more than twelve years after delivery of a product, including Henley's, will be thrown out of court and injured plaintiffs will have their rights to seek redress of their injuries thrown out as well.

B. Florida Law Prohibits Retroactive Application

In the present case, the trial court erroneously applied the Pullum decision retroactively by entering summary judgment against Henley.

Florida case law and the Florida and United States Constitutions expressly prohibit the retroactive application of Pullum.

The Florida Supreme Court clearly set forth the standard for determining the retroactive application of judicial interpretations of statutes in Florida Forest and Park Service v. Strickland, 18 So.2d 251 (1944). Strickland involved a situation similar to Pullum, wherein the Supreme Court initially gave one construction to a statute and subsequently reversed itself. The Supreme Court held that while ordinarily a decision of a court of last resort overruling a former decision is retrospective, there is a "common sense exception to the rule":

> The rights, positions and courses of action of parties who have acted in conformity with, and in reliance upon, the construction given by a court of final decision to a statute should not be impaired or abridged by reason of a change in judicial construction of the same statute made by a subsequent decision of the same court in overruling its former decision. (Emphasis supplied). Id. at 253.

In Henley, Pullum should be given prospective application only, as in Strickland.

The key to the "prospective only" application in Strickland was that property rights had been acquired by the workmen's compensation claimant under the prior judicial construction of the statute. At the time Strickland filed his workmen's compensation claim he relied on the then controlling case of Johnson v. Midland Constructors, Inc., 150 Fla. 353, 7 So.2d 449 (Fla. 1942), which construed the workmen's compensation statute to provide for direct appeal of a deputy commissioner's ruling to the Circuit Court. Strickland, in reliance on Johnson, successfully appealed

an adverse commissioner's ruling to the Circuit Court. Strickland's employer then appealed the Circuit Court's judgment to the District Court of Appeal. While the appeal was pending, the Florida Supreme Court re-examined the statutory law pertaining to the procedure providing for review of workmen's compensation orders and held in Tigertail Quarries, Inc. v. Ward, 16 So.2d 812 (Fla. 1944) that there was no right of direct appeal to the Circuit Court from a deputy commissioner's ruling.

Tigertail overruled Johnson, which was the controlling law at the time Strickland filed his appeal, and Strickland's employer argued to the Supreme Court that Tigertail should retroactively apply to bar Strickland's appeal to the Circuit Court. The Supreme Court, in determining that Tigertail should have prospective application only, 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. We hold, therefore, that as applied to the facts of this case, Tigertail Quarries, Inc. v. Ward, supra, must be given a prospective operation only; the facts bringing the case within the exception to the generally prevailing rule that court decisions will be given a retrospective as well as prospective operation. To hold otherwise would be, in effect, to deprive the claimant of a potentially valuable claim accruing by reason of his contract of employment prior to the overruling decision, the right to which he has sought to have judicially established by the only court of competent jurisdiction which may try the matter as an original judicial controversy. Id. at 254 (emphasis supplied).

The rule of non-retroactivity was applied in Aronson v. Congregation Temple De Hirsch, 123 So.2d 408, 410 (Fla. 3rd DCA 1960). There, an appellant had relied on a Florida Supreme Court case construing the Florida Appellate Rules together with Florida Statutes Section 732.16 as providing for a 60-day appeal period. The appellant filed his appeal 38 days after the entry of the order appealed from. While his appeal was pending, this Court overruled its prior construction and held that there was only a 30-day appeal period for such appeals. The appellee moved to dismiss the appeal based on the new law and the Third District Court of Appeal denied the motion holding that:

> [W]e hold that our construction of the applicable rules and statute to provide for a 30-day appeal period for such appeals, as announced in the Wartman case will not operate retroactively in other cases, but shall operate prospectively from April 21, 1960, the date of the publication of the report of In re Wartman's Estate.

In Strickland, this Court held that the right of appellate review of a worker's compensation claim was a sufficient property right to invoke the nonretroactivity exception. An even greater hardship and inequity befalls Henley by retroactively applying Pullum. At least in Strickland and Aronson the plaintiffs would have had the opportunity to have their claims decided on the merits by an impartial trier of fact, even if the new law had been applied retroactively. Here, Henley's lawsuit was in litigation for over one year, substantial time and money had been invested investigating the case, taking discovery and preparing for trial. Henley's right to a jury trial, to seek compensation for the death of a husband, son and father caused by the defendant's defective machinery, especially where

the case was in litigation for over a year and was on the threshold of going to trial, is an even greater property right and interest than that of appellate review. Henley relied on the law in effect at the time suit was filed, acquired a property right when she filed this lawsuit, and will be precluded from having any review of her claim if Pullum is retroactively applied.

C. Federal Law Prohibits Retroactive Application

The U. S. Supreme Court has ruled on this issue on a statute of limitations issue, Chevron Oil Co. v. Huson, 404 U.S. 97 (1971). After a lawsuit was initiated, the Supreme Court held in Rodriguez v. Aetna Casualty & Surety Co., 395 U.S. 352 (1969), that Lousiana's one-year statute of limitation for personal injury actions, La. Civ. Code Ann. Art. 3536, rather than the admiralty doctrine of laches governed the case. The lawsuit was timely under the laches doctrine, but barred by the one-year statue of limitations.

The Supreme Court looked at three factors in applying the nonretroactivity doctrine: (1) Whether the decision overrules clear past precedent on which litigants may have relied; (2) whether the purpose and effect of the rule will be furthered or retarded by retroactive application, looking at the prior history of the rule; and (3) whether an inequity will be imposed by retroactive application of the case. The Court held that Rodriguez, the case determining that the one-year statute of limitations was applicable, should not be applied retroactively, stating:

> To abruptly terminate this lawsuit that has proceeded through lengthy, and no doubt, costly discovery stages for a year would surely be inimical to the beneficient purpose of the Congress. It would also produce the most

> 'substantial inequitable results'.... [N]onretroactive application here simply preserves his right to a day in court. Id. at 107.

A Federal District Court has examined Pullum in light of the three factors set forth in Huson, and determined that Pullum should not be applied retroactively and that the defendant must defend the suit on the merits. The Court observed that Pullum clearly satisfied the first Huson factor because it established a new principle of law, overruled clear past precedent on which litigants had relied, and there was no foreshadowing that this Court would recede from its earlier ruling in Battilla.

The second factor in Huson is also satisfied in Henley. The purpose of the statute as stated by this Court in Battilla, is to limit liability exposure for product manufacturers to a time commensurate with the normal useful life of manufactured products. The Travelift involved in this case had been in operation since 1971 which was well within the product's normal useful life. Thus, the purpose of the statute would not be hindered by applying Pullum prospectively only. This is especially true in light of the history of Battilla as there is no reported decision in which the absolute bar has been applied or upheld. That is to say, Florida has operated for a decade without the absolute bar as the law.

The third Huson factor is also met in Henley as the same inequitable results which would have occurred in Huson had the overruling decision been retroactively applied, would also result here. Henley had been in litigation for over one year prior to the summary judgment and substantial time and money had been spent in the preparation of the case prior to the summary judgment hearing. As stated by the Supreme Court "to abruptly

terminate this lawsuit that has proceeded through lengthy, and no doubt costly discovery stages for a year would surely be inimical to the beneficient purpose of the Congress, and would produce the most 'substantial inequitable results.'" Huson, 404 U.S. at 108.

D. Retroactive Application Violates Henley's Federal and State Constitutional Rights of Due Process

In Logan v. Zimmerman Brush Company, 455 U.S. 422 (1982) the United States Supreme Court held that the due process clause of the 14th Amendment to the U.S. Constitution, minimally required that "deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." It further recognized that it is well settled that a cause of action is a species of property protected by the Fourteenth Amendment's due process clause. The Court also stated that, "the hallmark of property, the Court has emphasized, is an individual entitlement grounded in state law, which cannot be removed except 'for cause'."

The state does not have the power to destroy at will such property rights, even where it is a "state-created property interest." Id. at 432. "While the legislature may elect not to confer a property right . . . it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards . . . [T]he adequacy of statutory procedures for deprivation of a statutorily created property interest must be analyzed in constitutional terms." Id. at 432.

With respect to what process is due a claimant, the Court in Logan stated that "the due process clause grants the aggrieved party the opportunity to present his case and have his merits fairly judged."

In Rupp v. Bryant, 417 So.2d 658 (Fla. 1982), this Court held that Article I, Section 9 of the Florida Constitution prohibited retroactive abolition of vested rights. The court struck as unconstitutional a statute which retroactively afforded the defense of sovereign immunity to state officials. The court held:

> Based on due process considerations expressed in Village of El Portal v. City of Miami Shores, 362 So.2d 275 (Fla. 1978), and McCord v. Smith, 43 So.2d 704 (Fla. 1949), which prohibit retroactive abolition of vested rights, we agree with the District Court that Section 768.28(9), Florida Statutes (Supp 1980), is unconstitutional insofar as it abolishes the Bryants' rights to recover from Rupp and Stasco. Id. at 466.

As recently as May 2, 1985, this Court has held that statutes that interfere with vested rights will not be given retroactive effect. Young v. Altenhaus, 472 So.2d 1152 (Fla. 1985).

This Court has recognized that the legislature has the authority to adopt the statute of limitation which retroactively shortens a period of limitation, only if it provides a reasonable time within which to file suit. Foley v. Morris, 339 So.2d 215 (Fla. 1976). When Florida Statute Section 95.031 was adopted it provided a one year grace period in order to comply with this requirement. This Court must also comply with this "grace period" requirement when it "deunconstitutionalizes" this statute, by having it take effect prospectively only or else it will violate due process.

In Cheshire Hospital v. New Hampshire-Vermont Hospitalization Service, Inc., 689 F.2d (1st Cir. 1982), the United States Court of Appeals held that due process principles apply to retroactive application of a new

interpretation of an old administrative regulation, just as well as they apply to retroactive effect of a new regulation:

> The present case, of course, is not concerned with a new regulation which is being given retroactive effect, but with the retroactive application of a new interpretation of an old regulation. We cannot dismiss the problem of retroactivity, however, merely because we are dealing with the interpretation of a regulation. Professor Davis has observed: "If interpretative rules were always merely interpretations of law that already exist, they could never be retroactive, for if they fail to reflect the true meaning of the law they interpret, they would be invalid for that reason, and if they reflect that meaning they do not make law retroactively. The obvious reality is, of course, that what is done is the name of interpretation often adds to the meaning of what is already interpreted; for instance, the Supreme Court obviously makes law when it overrules its own prior decisions interpreting due process." (Citation omitted) The considerations which affect whether a new regulation should be given retroactive effect, therefore, are also relevant to determining whether a new interpretation should be applied retroactively. (Citation ommitted)

III.

FLORIDA STATUTE §95.031(2), THE PRODUCT LIABILITY STATUTE OF REPOSE, IS UNCONSTITUTIONAL

A. Florida Statute Section 95.031(2) Violates the Florida Constitution Access to Courts Guarantee

Article I Section 21 of the Florida Constitution has a special provision which guarantees injured persons access to courts and provides: "SECTION 21. Access to Courts. -- The courts shall be opened to every person for redress of any injury, and justice shall be administered without sale, denial or delay."

This Court has repeatedly invalidated statutes of limitations which operated to bar causes of action before they accrued, under the access to court guarantee. Battilla v. Allis Chalmers Manufacturing co., 392 So.2d 874 (Fla. 1980); Diamond v. E.R. Squibb & Sons, Inc., 397 So.2d 671 (Fla. 1981); Overland Construction Co. v. Sirmons, 369 So.2d 572 (Fla. 1979); Kluger v. White, 281 So.2d 1 (Fla. 1973).

This Court has disregarded the access to courts provision of the Constitution, its own prior interpretation of the provision, and has reversed itself by holding that Section 95.031(2), Florida Statutes does not violate this constitutional right. No reason or basis for its change of mind was given, nor did it even address the access to courts provision except to say that it was not violated by the statute. The court adopted Justice McDonald's dissenting opinion in Battilla, in which he stated that there was a rational and legitimate basis for the enactment of the statute. This "rational basis" test is not the proper test for reviewing statutes

under the access to courts provision. Kluger set forth the proper test for reviewing statutes under the access to courts provision, holding:

> We hold, therefore, 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 FS.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. (Citations omitted). Id. at 4.

This statute clearly fails the tests set forth in Kluger, as there has been no showing of an overwhelming public necessity for limiting the liability of the manufacturer who sells a product in a defective condition and the legislature has also failed to show that there is no alternative method of meeting such public necessity. Indeed, in Justice McDonald's dissenting opinion in Battilla, he states that it is arguable that "liability should be restricted to a time commensurate with the normal useful life of manufactured products." A much more reasonable and equitable alternative would be a statute which creates a rebuttable presumption that a product's normal useful life is twelve years. (See, e.g. Conn. Gen. Stat. Ann. Sec. 52-577(a) which provides the ten-year product statute of repose does not apply if the product's "useful safe life" is longer.)

B. Florida Statute Section 95.031(2), Violates Due Process and Equal Protection Rights Under Both the Florida and the United States Constitutions

The minimum standard for review of the statute of repose under equal protection and/or due process grounds, whether federal or state, is the "rational basis test". Under the rational basis standard, the statute would be upheld only if the statutory classification is reasonably related to a legitimate legislative objective. San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 17 (1972). The purpose of the statute is to restrict manufacturers' liability for defective products to a time commensurate with the normal useful life of manufactured products. Picking an arbitrary time limit of twelve years for all manufactured products, is an arbitrary and capricious standard and is not reasonably related to the purpose of restricting liability to the "normal useful life of manufactured products," as there is a substantial difference between the useful life span of a product such as a toaster and a jet airplane.

At least six states have held similar statutes of repose unconstitutional as violative of the equal protection clause since 1981: Kenyon v. Hammer, 142 Ariz. 69, 699 P.2d 961 (1984) (holding medical practice statute violated equal protection provisions); Austin v. Litvak, 682 P.2d 41 (1984) (holding medical practice statute violated equal protection); Shivuya v. Architects Hawaii Ltd., 65 Hawaii 76, 647 P.2d 276 (1982) (holding amended version of construction statute violates equal protection); State Fire & Casualty Co. v. All Electric, Inc., 99 Nev. 222, 660 P.2d 995 (1983) (holding construction statute violates federal and state equal protection provisions); Heath v. Sears, Roebuck, Inc., 123 N.H.

512, 464 A.2d 288, (1983) (holding products liability statute violates federal and state equal protection provisions); Terry v. New Mexico Highway Commission, 98 N.W. 119, 645 P.2d 1375 (1982) (holding construction statute does not violate federal equal protection or state's equal protection provisions but does violate due process); Schwan v. Riverside Methodist Hospital, 6 Ohio St. 3d 300, 452 N.E 2nd 1337 (1983) (holding medical malpractice statute violates state equal protection provision); Broone v. Truluck, 270 S.C. 227, 241 S.E. 2nd 739 (1978) (holding construction statute violates federal and state equal protection provisions).

Other courts have applied an intermediate standard of review to constitutional challenges to statutes of repose. In Heath v. Sears Roebuck Co., Inc., 123 N.H. 512, 464 A.2d 288 (1983) the New Hampshire Supreme Court held that the product liability statute of repose violated federal and state equal protection provisions. The court noted that one purpose of the product liability statute of repose was to ameliorate the products liability "insurance crisis". The court discussed studies that indicate that the "crisis" had abated nationwide, independent of the New Hampshire litigation. Thus, because the New Hampshire statute had little or no effect on the national insurance situation, the statute had become divorced from its purpose. The court applied a heightened level of scrutiny to the statute, because it viewed the right to recover for personal injuries, while not a fundamental right, sufficiently important to require that the restrictions imposed on it be subjected to a more rigorous judicial scrutiny than allowed under the rational basis test.

Some cases have gone even further and applied a "strict scrutiny analysis", which requires that the statutory classification be "necessary" to serve a "compelling state interest". In 1984, the Arizona Supreme Court applied the "strict scrutiny analysis" in Kenyon v. Hammer, 142 Ariz. 69, 688 P.2d 961 (1984), noting that "fundamental rights" are rights "exclusively or implicitly guaranteed by the Constitution", and that because the Arizona Constitution clearly guaranteed the right to bring a cause of action, the statute affected a "fundamental right" and warranted a high standard of scrutiny. Florida should apply the same strict analysis since it has a specific provision guaranteeing the right to compensation in its Constitution.

Florida's product liability statute of repose violates due process as it arbitrarily extinguishes the right to sue even before it arises. The Florida Constitution provides that the right to bring suit is fundamental, and has a specific provision guaranteeing access to its courts. The statute of repose arbitrarily distinguishes between consumers of products of long life, who are not afforded a product liability remedy, and consumers of products of short life who are able to sue for product liability.

Finally, the statute violates due process in not allowing a reasonable time to sue. While twelve years may well be a reasonable time to sue for injuries suffered because of a defective toaster, it is obviously unreasonable to apply the same standard of time to mass transit consumer products, such as cars, trains and jet aircraft. When airplanes fall from the sky, how many of its unfortunate passengers will have had the foresight

to check the aircraft manufacturer's identification plate to make sure that the aircraft was less than twelve years old?

IV.

THE LEGISLATIVE AMENDMENT OF FLORIDA STATUTE §95.031(2) ABOLISHING THE STATUTE OF REPOSE IN PRODUCT LIABILITY ACTIONS SHOULD BE CONSTRUED TO OPERATE RETROSPECTIVELY TO A CAUSE OF ACTION WHICH ACCRUED BEFORE THE EFFECTIVE DATE OF THE AMENDMENT

Florida Statute §95.031(2) (1985) was recently amended by the Florida Legislature. The amendment, which eliminates the twelve year statute of repose for products liability actions, bears an effective date of July 1, 1986.

The 1986 amendment abolishing the twelve year limitation should be applied retroactively to this case. To do otherwise will have the untenable effect of placing those persons injured after Pullum was decided (November 4, 1985) and prior to the effective date of the statutory amendment (July 1, 1986) as being the only class of persons unable to bring suit for injuries caused by products that were more than twelve years old. Others, such as Henley, who were injured prior to Pullum but whose cases were pending when Pullum was decided, would be similarly impacted. Overall, however, this relatively small group of people will be singled out - denied equal protection rights of those who are outside the class, denied access to court unlike those outside the class and left with no other remedy for alternative relief.

It is apparent from the timing of the legislative amendment - coming eight months after the Florida Supreme Court's decision in Pullum, that the amendment was intended to be remedial in nature. It is well settled that if a statute is remedial in nature, it can and should be retroactively applied in order to serve its intended purposes. City of Orlando v.

Desjardins, 493 So.2d 1027 (Fla. 1986); Village of El Portal v. City of Miami Shores, 362 So.2d 275 (Fla. 1978); Grammer v. Roman, 174 So.2d 443 (Fla. 2nd DCA 1965).

CONCLUSION

For the reasons set forth above, the certified question should be answered in the negative and the ruling of the District Court should be affirmed.

Respectfully submitted,

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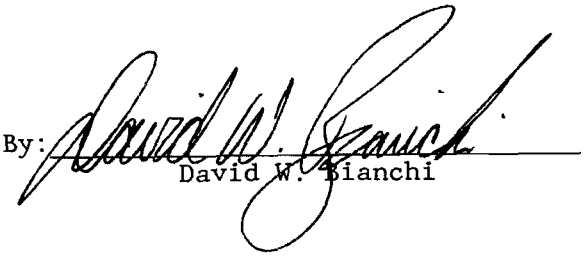
By: 
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CERTIFICATE OF MAILING

WE HEREBY CERTIFY that a true copy of the above was mailed this 22 day of October, 1987 to CHRISTOPHER LYNCH, ESQ., 66 West Flagler Street, 9th Floor, Miami, Florida 33130.

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