SUPREME COURT OF FLORIDA

MINNESOTA MINING & MANUFACTURING CO., and
PULMOSAN SAFETY EQUIPMENT CORPORATION,
Appellants,

v. CASE NO. 94,544

EARL BARNES and LYDIA BARNES,
Appellees.

ON APPEAL FROM THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, CASE NO. 97-03331

LOWER TRIBUNAL : CASE NO. 95-848-CA-01
CIRCUIT COURT OF ESCAMBIA COUNTY, FLORIDA

BRIEF OF
PULMOSAN SAFETY EQUIPMENT CORPORATION

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STATEMENT OF THE CASE AND FACTS

This is an appeal by Pulmosan Safety Equipment Corporation, Appellant here and defendant below, upon a certified question by the First District Court of Appeals which reversed a final summary judgment in favor of Pulmosan Safety Equipment Corporation and against Earl Barnes and Lydia Barnes, his wife, Appellees here and plaintiffs below. Two other defendants remain appellants here. The final summary judgment rendered in favor of Appellant was based upon the now repealed product liability statute of repose, Florida Statute § 95.031(2).

References in this brief to the Record on Appeal will be made by designation of "R" followed by the volume number and page number assigned by the clerk of the lower tribunal.

On June 12, 1995, Earl Barnes, joined by his wife Lydia, filed a negligence and strict product liability action against various sellers, suppliers and distributors of sand and certain equipment used in sandblasting operations, including safety masks and hoods, respirators and sand blast pots (R-I 1-25; R-IV 559-622). The complaint, as subsequently amended, alleged that Barnes, a sandblaster by trade, contracted a progressive occupational disease known as silicosis caused by exposure to respirable free silica found in the sand used by sandblasters during sandblasting operations (R-IV 562). Barnes alleged further that defendants sold, manufactured, marketed or distributed products which caused or contributed to his occupational disease (R-IV 562). Concerning discovery of his disease, Barnes alleged: "On June 1, 1995, the plaintiff, Earl Barnes, learned that he had contracted silicosis. At no time prior to June 1, 1995, did the plaintiff know, nor should he have known the nature of his injury and the cause of his injury. Therefore, the plaintiff brings this suit within the four year statute of limitations." (R-I 5-6, ¶ 19; R-IV 563 ¶ 17).

Defendants denied the material allegations of the amended complaint and, as pertinent to this appeal, alleged as an affirmative defense that plaintiffs' action was barred by the twelve-year product liability statute of repose, section 95.031(2), Florida Statutes (1975). Defendant Standard Sand and Silica Company alleged specifically: "That the plaintiffs' claims are barred by the Statute of Repose formerly contained in [F]lorida Statute 95.031(2) (1975) because more than twelve years elapsed between the delivery to the original purchaser of any product sold by the defendant relevant to this action and the date this action was filed." (R-IV 633). The other defendants filed identical or substantially similar affirmative defenses based on the product liability statute of repose (R-IV 643 [Empire], 648 [Pulmosan], 702 [Schmidt], 718 [Flexo], 727 [Clark Sand and Clark Sales], R-V 763 [Key Houston], 771 [Minnesota]). Defendants also alleged that plaintiffs' action was barred by the applicable statute of limitations (R-IV 632, 643, 648, 697, 714, 727; R-V 762, 771).

Through requests for admission, answers to interrogatories and the discovery deposition of Earl Barnes, it was established that Barnes was first exposed to silica dust and sandblasting equipment when he went to work as a sandblaster for Odom Tank Company in 1972. His duties comprised sandblasting objects such as water tanks, ground storage tanks, ships and bridges (R-III 332, 336-37; R-V 781, 807, 935; [deposition of Barnes at 14, 18-19]). The last possible date of Barnes' exposure to silica dust and the last possible date he could have used abrasive sand and related products distributed by defendants was June, 1974, when he last worked for Odom Tank-Company (R-V 781, 807, 935). Barnes' employment with Odom Tank Company from 1972 to June, 1974 was his only known exposure to silica dust and sandblasting equipment (R-III 335-36; [deposition of Barnes at 17 18]).

Discovery also established that Barnes' left lung was removed on July 16, 1984 (R-V

782, 807). Barnes testified that he was advised initially by his physicians that his lung had been removed because of cancer, but was told by his physicians several weeks after the surgery that the lung actually was removed because of a fungal infection identified as actinomycosis (R-III 360-61, 410; R-V 782, 807-08; [deposition of Barnes at 42-43, 92]). Barnes testified on deposition that he did not learn that the removal of his lung and the pulmonary problems he had been experiencing were possibly related to exposure to silica dust until 1992 (R-III 357-58; [deposition of Barnes at 39-40]). A diagnosis of silicosis was provided to plaintiffs in 1995 when tissue analysis was completed (R-III 358; [deposition of Barnes at 40]).

Following discovery, defendants moved for summary judgment on several grounds, including the product liability statute of repose (R-V 811, 815, 826, 834, 936; R-VI 949; R-VIII 1337, R-X 1618). Pertinent to this appeal, defendants contended that plaintiffs' action was barred by section 95.031(2), Florida Statutes, which required plaintiff to bring his action within twelve years from the date of delivery of the product to its original purchaser, regardless of the date plaintiff discovered or should have discovered his cause of action (R-IX 1360-82). Since Earl Barnes was last employed in sandblasting on June 30, 1974, defendants contended that plaintiffs' action should have been brought no later than June 30, 1986 (R-V 936-38; R-IX 1360-81).

Citing Diamond v. E.R. Squibb and Sons, Inc., 397 So. 2d 671 (Fla. 1981), plaintiffs countered by arguing that the product liability statute of repose cannot constitutionally bar a "latent" injury case where, as here, the effects of product exposure are not recognizable until after the statute of repose has expired (R-VI 1067-73). Plaintiffs also argued that defendants' motions for summary judgment should be denied based on the "reliance"

exceptions to the statute of repose, citing Mosher v. Speedstar Div. of ACMA, 675 So. 2d 918 (Fla. 1996)(R-VI 1073-74).

By letter ruling dated July 11, 1997, the trial court determined that the twelve-year product liability statute of repose applied and barred plaintiffs' from filing any asserted silicosis claim after June 30, 1986, i.e, twelve years after Barnes terminated his employment with Odom Tank Company (R-X 1615-16). The trial court also determined that the reliance exception to the statute of repose did not apply to this case (R-X 1616). Accordingly, final summary judgment was entered in favor of defendants Minnesota Mining and Manufacturing Company, Pulmosan Safety Equipment Corporation and Key Houston and other defendants no longer parties to this cause. (R-X 1654). Based on the disposition of the case, the remaining grounds for summary judgment advanced by defendants were deemed moot and the trial court made no rulings thereon (R-X 1654).

Prior to plaintiffs filing their notice of appeal, defendants Clemco Corporation, Empire Abrasive Equipment Corporation, West Florida Equipment Company, Mine Safety Appliances Company and E.D. Bullard Company were dropped or dismissed from the action (R-II 287, 307; R-V 833; R-X 1652, 1659). Since the trial court's entry of final summary judgment, all defendants have been dismissed or settled with plaintiffs except for Minnesota Mining & Manufacturing Co., Pulmosan Safety Equipment Corp., and Key Houston.

On October 5, 1998, the First District Court of Appeal reversed the trial court final summary judgment and remanded the cause for further proceedings consistent with the opinion. Additionally, the appellate court certified the question for review here as one of great public importance. On December 9, 1998, the appellate court issued its mandate. On December 23, 1998, the appellate court denied Pulmosan's motions for rehearing, rehearing

en banc and request for additional certification. On December 16, 1998, Minnesota Mining & Manufacturing, Inc., filed its notice to invoke the discretionary jurisdiction of this Court. On December 28, 1998, Pulmosan filed its notice of joinder to invoke the discretionary jurisdiction of this Court. On December 29, 1998, the Court ordered postponement on the issue of jurisdiction and set forth a briefing schedule for the parties. On January 7, 1999, the Court extended the time for Pulmosan to file its brief until February 24, 1999.

CERTIFIED QUESTION PRESENTED FOR REVIEW

IS THE EXCEPTION ESTABLISHED IN DIAMOND V. E.R. SQUIBB & SONS, INC., 397 So.2d 671 (Fla. 1981), STILL VIABLE IN VIEW OF THE COURT'S RECENT DECISIONS HOLDING THE MEDICAL MALPRACTICE STATUTE OF REPOSE CONSTITUTIONAL?

SUMMARY OF ARGUMENT

THE EXCEPTION ESTABLISHED IN DIAMOND V. E.R. SQUIBB & SONS, INC., 397 So.2d 671 (Fla.1981), IS NO LONGER VIABLE IN VIEW OF THE COURT'S RECENT DECISIONS HOLDING THE MEDICAL MALPRACTICE STATUTE OF REPOSE CONSTITUTIONAL?

In their initial complaint and subsequently filed amended complaint, Appellees alleged that Earl Barnes was employed as a sandblaster from early 1972 through June, 1974, when he terminated his employment with Odom Tank Company. During that approximate 28 month period, Earl Barnes testified that he regularly utilized various equipment manufactured and sold by Appellants and supplied to him by his employer to sandblast various surfaces and that during the course of that work activity, he was exposed to silica and, consequently, developed a progressive lung disease.

Appellees asserted below that, since Earl Barnes' lung disease did not manifest until more than 12 years after 1974, his cause of action did not accrue until more than 12 years after defendants last delivered products to his employer and his cause of action did not accrue until more than 12 years after his last exposure to silica. Accordingly, the final summary judgment against Appellees unconstitutionally denied them access to the courts. Appellees entire reliance on an unconstitutional denial of excess to the courts is based upon Diamond vs. E. R. Squibb and Sons, Inc., *infra*, and several asbestos exposure claims cases arising only out of the Third District Court Of Appeals.

However, Diamond has been impliedly receded from by all of the subsequent Florida Supreme Court cases since Pullum, *infra*. Only the Third District Court Of Appeals has followed Diamond and only consistently in asbestos related claims. Since Diamond, this

Court has not been squarely faced with a products liability latent injury claim where an issue of the applicability of the statute of repose has been found to bar the claimant's action. Since Pullum, *infra*, this Court has not followed Diamond in any case where the cause of action accrued after the pertinent statute of repose had run.

Based upon its holding in Overland Construction Co. vs. Sirmons, *infra*, this Court reversed the Third District Court Of Appeal's Diamond opinion. The Sirmons case involved the application of a statute of repose substantively identical to the repose statute at issue here. Several years later, this Court was presented with the constitutionality of the repose statute at issue here. In Battilla vs. Allis Chalmers Manufacturing Co., *infra*, this Court held that Fla. Stat. §95.031(2) was unconstitutional as applied. Battilla relied upon the holding in Sirmons.

Then in Pullum vs. Cincinnati, Inc., *infra*, this Court reversed its holding in Battilla. Since Battilla was based upon the holding in Sirmons, Sirmons was likewise receded from by this Court. Since Sirmons was the legal basis for the holding in Diamond, Diamond's legal foundation crumbled.

Since Pullum, this Court has not addressed the constitutionality of Fla. Stat. §95.031(2) as it applies to actions in a Diamond context. However, it has addressed the applicability and constitutionality of statutes of repose for medical malpractice and claims against architects and engineers. In each instance, it has found the statute of repose constitutional even though claimant's cause of action accrued after the statute of repose had run. That is, it has found that four years is four years (Fla. Stat. §95.11(4)(b)) and that twelve years is twelve years (Fla. Stat. §95.11(3)(c)).

Judge Gilliam set forth her rulings regarding the various motions for summary

judgment in a letter to all counsel of record. Judge Gilliam stated, "Since Pullum, though, the supreme court and the First District Court Of Appeal have held that statutes of repose may operate to foreclose a cause of action before it accrues." Doe vs. Shands Teaching Hospital And Clinics, Inc., 614 So.2d 1170 (Fla.1st DCA 1993). The Doe court noted that this Court in Pullum, *infra*, "...of necessity, found that the statute of repose denies neither equal protection nor access to courts."

Under the facts of this case and pursuant to Fla. Stat. §95.031(2), the trial court was correct in determining that the statute of repose had lapsed and that Appellees' actions were barred after June 30, 1986. It is irrelevant when Earl Barnes discovered the cause of his lung disease; since he brought this action after June 30, 1986, Appellees claims are barred.

It would be difficult to find a more innocent and compelling claimant than Diamond. However, Diamond is a prime example of hard cases making bad law. This Court needs to finally put to rest Diamond, just as it did Batilla, and affirm the lower court's Order of Final Summary Judgment against Appellees and in favor of Appellants including Pulmosan Safety Equipment Corporation.

ARGUMENT

Appellant respectfully asserts that Justice Holmes' admonition is apropos to Diamond, *infra*, and its progeny:

> "Great cases, like hard cases, make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend." Northern Sec. Co. v. United States, 193 U.S. 197, 400-401, 24 S.Ct. 436, 468, 48 L.Ed. 679 (1904) (Holmes, J., dissenting).

In his pleadings and in his responses to discovery, Earl Barnes asserted and presented evidence that he had been employed as a sandblaster with Odom Tank Company from early 1972 through June 30, 1974. He further alleged that as a result of use of products, i.e., sand, blasting pots, paper masks, hoods, etc., manufactured and distributed by the various defendants below, he was exposed to silica dust and contracted a pulmonary disease caused by inhaling the silica dust. (R-I 1; R-IV 559). Appellees assert that exposure to silica dust results in the development of silicosis, a pulmonary disease. (R-IV 562, 569). Appellees further assert that silicosis is a disease characterized by a period of "latency" between exposure to the silica dust and manifestation of silicosis. Appellees have to date failed to cite to any record evidence to support this contention but rely solely only upon dicta in cases cited below.

After significant discovery and the taking of Earl Barnes' deposition, Appellees filed

their first Amended Complaint. (R-IV 559). In response to motions for summary judgment, Appellees filed the deposition of Earl Ray Barnes. (R-II 316). Between June 2, 1997 and June 9, 1997, Minnesota Mining Manufacturing Co., Clark Sand Company, Clark Sales and Rental, Inc., and Pulmosan Safety Equipment Corporation filed their respective motions for summary judgment based upon Florida's statute of repose, inter alia. (R-V 811, R-V 936, R-VI 949).

Appellants argued that Florida's product liability statute of repose, Fla. Stat. §95.031(2), barred Appellees' action as of June 30, 1986. Since Appellees' complaint was not filed and served until 1995, Appellees' complaint was time barred. The trial court agreed with Appellants and issued her letter ruling, dated July 11, 1997, granting Appellants's motions for summary judgment. (R-IX 1461). On August 1, 1997, an Order of Final Summary Judgment was entered. (R-X 1654). On August 15, 1997, Appellees timely filed their Notice of Appeal. (R-X 1667).

Perceiving the need to restrict the perpetual liability of defendants to products liability actions, the Florida legislature enacted section 95.031 which became effective on January 1, 1975. Ch. 74-382, § 3, 1208, Laws of Fla. Fla. Stat. §95.031 provided:

> 95.031 Computation of time. Except as provided in subsection 95.051(2) 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.
>
> (1) A cause of action accrues when the last element constituting the cause of action occurs. For the purposes of this chapter, the last element constituting a cause of action on an obligation or liability founded on a (written instrument) payable on demand or after date with no specific maturity date specified in the (instrument), and the last element constituting a cause of action against any endorser, guarantor, or other person secondarily liable on any such obligation or liability founded on (a written instrument payable on demand or after date), is the first written demand for payment, notwithstanding that the endorser, guarantor, or other person secondarily liable has executed a separate writing evidencing such liability.

> (2) Actions for products liability and fraud under subsection 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 subsection 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. (emphasis added).

As it applied to products liability actions, this statute was declared unconstitutional as applied by this Court in Battilla vs. Allis Chalmers Mfg. Co., 392 So.2d 874 (Fla. 1980). This Court found this statutory subsection violated Florida's guarantee of access to courts as provided by Article 1, section 21, of the Florida Constitution. As *stare decisis*, this Court relied upon its prior decision in Overland Construction Co., vs. Sirmons, 369 So.2d 572 (Fla. 1979), which invalidated Fla. Stat. §95.11(3)(c), which provided a similar twelve-year statute of repose for actions based upon the negligent design, planning or construction of improvements to real property. The Sirmons court held that this statutory subsection violated Florida's constitutional guarantee of access to courts.

In his dissenting opinion in Battilla, Justice McDonald reasoned in support of the constitutional validity of Fla. Stat. §95.031(2) as follows:

> "Until the decision of Matthews v. Lawnlite Co., 88 So.2d 299 (Fla.1956), Florida recognized the early common law rule which inhibited recovery where there was no privity of contract. Since then the law of products liability has evolved to the point that we now recognize liability of a manufacturer which sells a product in a defective condition unreasonably dangerous to the user or consumer.
>
> This developing liability of a manufacturer creates a policy dispute. It could be logically argued that once a product is manufactured and sold a manufacturer should be subject to liability for an injury whenever caused by that product. It could also be argued that such liability would place an onerous burden on industry and that, therefore, liability should be restricted to a time commensurate with the normal useful life of manufacturer products.
>
> ... I perceive a rational and legitimate basis for the legislature to take this action, particularly in view of the relatively recent developments in expanding the liability of manufacturers. Because the normal useful life of buildings is

> obviously greater than most manufactured products there is a distinction in the categories of liability exposure between those sought to be limited by section 95.11(3)(c), struck down in Overland, and those listed in section 95.031(2).

Id. 392 So.2d at 874-75.

In Pullum vs. Cincinnati, Inc., 476 So.2d 657 (Fla. 1985), this Court again was presented with the constitutionality of Fla. Stat. §95.031(2). Pullum argued that Battilla violated his right to equal protection of the laws where the time for bringing suit occurred between the eight and twelfth year after a product was first delivered to the initial purchaser. This Court in reviewing its decision in Battilla receded from that opinion. It stated:

"We recede from this decision and hold that section 95.031(2) is not unconstitutionally violative of Article I, section 21 of the Florida Constitution. The legislature, 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." Id. at 476 So.2d 659. (Emphasis added).

In a footnote to Pullum, this Court acknowledged the existence of Diamond vs. E. R. Squibb and Sons, Inc., 397 So.2d 671 (Fla. 1981). The Pullum court opined that Diamond presented an entirely different factual context because the injury caused by the DES did not manifest until many years later and not until after the statute of repose had run. Thus, the Diamond plaintiff was barred from access to courts before her cause of action ever accrued.

Not long after Pullum was decided, the Florida legislature repealed the twelve-year statute of repose as applied to product liability actions by amending Fla. Stat. §95.031(2), with an effective date of July 1, 1986. Chap.86-272, §2, at 2020, Laws of Fla. Upon its repeal, issues arose concerning the retroactive effect of the repeal on a cause of action that

accrued before the date of repeal and whether a defendant had a vested right where more than twelve years had elapsed from the date of sale of the product and the twelve year period had elapsed prior to the repeal of this statutory subsection.

Repeal of Fla. Stat. §95.031(2) did not retroactively strip Pulmosan of its then vested right. Conversely, the Pullum decision did retrospectively change the law in construing the application of the Statute of Repose. Florida law is well settled that for a statute of limitations to be applied retrospectively, there must be a clear statement of legislative intent that the statute be given retrospective effect. Homemakers, Inc., v. Gonzales, 400 So.2d 965 (Fla. 1981); Foley v. Morris, 339 So.2d 215 (Fla. 1976). Likewise, any amendment to or negation of a statute only applies prospectively. Melendez v. Dreis & Krump Manufacturing Co., 515 So.2d 735 (Fla. 1987); Walker & LaBerge, Inc. v. Halligan, 344 So.2d 239 (Fla.1977) (immunity from suit not retroactively withdrawn by subsequent legislation).

A manufacturer whose product had been delivered to its original purchaser more than twelve years prior to the repeal has a vested right in not being sued for any injuries or damages resulting from its product which occur after the twelve years had expired. Firestone v. Acosta & Walker v. Miller Electric, 612 So. 2d 1361 (Fla. 1992) (citing Mazda Motors of America, Inc. v. S.C. Henderson & Sons, Inc., 364 So. 2d 107 (Fla. 1st DCA 1978), cert. den., 378 So. 2d 348 (Fla. 1979) which held that a party had a vested right in a statute of limitations once the specified time had run completely barring the action).

In Firestone, *supra*, this Court upheld application of the statute of repose on the ground that, at the moment the twelve-year repose period expired, the manufacturer had a vested right in not being sued. The Court stated that the purpose of a statute of repose is to cut off a right of action after a specified time as measured from the date of delivery of a

product regardless of the date the cause of action might thereafter accrue. Under Fla. Stat. § 11.2425 (1987), "The repeal of any statute by the adoption and enactment of Florida Statutes 1987 ... shall not affect any right accrued before repeal." Since the manufacturer's right in not being sued more than twelve (12) years after delivery of the finished product to the original purchaser had already vested, it can not later be taken away. The Court further held that the repeal of the statute of repose did not have the effect of reestablishing a cause of action which had previously been extinguished by operation of law. Any amendment to or negation of the statute would only apply prospectively and only in those matters where the repose period had not yet expired.

In Diamond v. E.R. Squibb & Sons, Inc., 397 So. 2d 671 (Fla. 1981), this Court held Fla. Stat. §95.031(2) to be an unconstitutional bar of access to the courts because it barred the injured party's cause of action before it ever accrued. This case was brought on behalf of a plaintiff who was injured as a result of her mother's ingestion of DES while pregnant with the plaintiff. However, the *in utero* injury did not manifest itself until the plaintiff was a teenager and more than twelve (12) years after she was first exposed to the DES. This Court opined that the Legislature could not have meant the statute of repose to apply to this type of case where the exposure, i.e., injury, to the product occurs within the repose period but the injurious effects (i.e., latent disease) allegedly caused by that exposure are not manifested until after the repose period had expired. But Diamond predates Pullum.

In Carr v. Broward County, 541 So.2d 92 (Fla.1989), this Court signaled the demise of Diamond as standing for the legal maxim that a statute of repose which bars a cause of action before it ever accrues is violative of Florida's constitutional guarantee of access to courts. The Carr court unequivocally states that a statute of repose precludes a right of action

after a specified time which is measured from the sale of a product rather than establishing a time period within which the action must be brought measured from the point in time when the cause of action accrued. The following language from Carr highlights this Court's position that the statute at issue here meets the constitutional test first enunciated in Kluger vs. White, 281 So.2d 1 (Fla. 1973).

> "In a series of subsequent cases, we considered the legislative authority to restrict or limit actions by statutes of repose. Cf. Melendez v. Dreis and Krump Mfg. Co., 515 So.2d 735 (Fla.1987); Pullum v. Cincinnati, Inc., 476 So.2d 657 (Fla.1985), appeal dismissed, 475 U.S. 1114, 106 S.Ct. 1626, 90 L.Ed.2d 174 (1986); Battilla v. Allis Chalmers Mfg. Co., 392 So.2d 874 (Fla.1980); Overland Constr. Co., Inc. v. Sirmons, 369 So.2d 572 (Fla.1979). In Pullum, we recognized that statutes of repose are a valid legislative means to restrict or limit causes of action in order to achieve certain public interests. Pullum concerned the statute of repose for actions for products liability and fraud as set forth in section 95.031(2), Florida Statutes (1979). We held that statute did not unconstitutionally violate the access-to-courts provision of article I, section 21, of the Florida Constitution, or the principles enunciated in Kluger, noting:
>
> > The legislature, 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. 476 So.2d at 659.
>
> In Pullum, we receded from Battilla v. Allis Chalmers Manufacturing Co., 392 So.2d 874 (Fla.1980), which had held that section 95.031, as applied in a products liability action, unconstitutionally denied access to courts. We concluded that section 95.031 was constitutional even as applied to causes of action which had not accrued until after the twelve-year statute of repose had expired. We recently held that Pullum applied retrospectively to bar causes of action which accrued after Battilla but before Pullum. See Melendez v. Dreis and Krump Mfg. Co., 515 So.2d 735 (Fla.1987)." (Emphasis added).

Id. 541 So.2d at 95. Pullum was decided 4 years after Diamond.

In University of Miami vs. Bogorff, 583 So.2d 1000 (Fla 1991), this Court held that a statute of repose which bars a cause of action before it ever accrues is not violative of Florida's constitutional guarantee of access to courts. It reiterated:

> "In contrast to a statute of limitation, a statute of repose precludes a right of action after a specified time which is measured from the incident of malpractice, sale of a product, or completion of improvements, rather than establishing a time period within which the action must be brought measured from the point in time when the cause of action accrued. See Melendez v. Dreis & Krump Manufacturing Co., 515 So.2d 735 (Fla.1987); Universal Engineering Corp. v. Perez, 451 So.2d 463 (Fla.1984); Bauld v. J.A. Jones Construction Co., 357 So.2d 401 (Fla.1978)." (Emphasis added).

Id. 583 So.2d at 1003. Bogorff was decided 10 years after Diamond.

The Bogorff Court continued with its analysis of the effect of a statute of repose as barring a claim before the cause of action ever accrued by reference to its prior opinion in Carr.

> "In Carr v. Broward County, 541 So.2d 92 (Fla.1989), we held that the statutory repose period for medical malpractice actions does not violate the constitutional mandate of access to courts, [FN3] even when applied to a cause of action which did not accrue until after the period had expired. See also Pullum v. Cincinnati, Inc., 476 So.2d 657 (Fla.1985) (receding from Battilla v. Allis Chalmers Manufacturing Co., 392 So.2d 874 (Fla.1980), and holding the twelve-year statute of repose in products liability actions constitutional even as applied to causes of action which did not accrue until after the period expired), appeal dismissed, 475 U.S. 1114, 106 S.Ct. 1626, 90 L.Ed.2d 174 (1986)."

Id. 583 So.2d at 1004

In Kush v. Lloyd, 616 So.2d 415 (Fla. 1992), this Court reaffirmed its position on the constitutional viability of statutes of repose:

> "There is considerable misunderstanding of the relationship between statutes of limitation and statutes of repose. A statute of limitation begins to run upon the accrual of a cause of action except where there are provisions which defer the running of the statute in cases of fraud or where the cause of action cannot be reasonably discovered. On the other hand, a statute of repose, which is usually longer in length, runs from the date of a discrete act on the part of the defendant without regard to when the cause of action accrued." Id. at 418
> ....
> "In contrast to a statute of limitation, a statute of repose precludes a right of action after a specified time which is measured from the incident of malpractice, sale of a product, or completion of improvements, rather than establishing a time period within which the action must be brought measured

> from the point in time when the cause of action accrued. *See*, Melendez v. Dreis & Krump Manufacturing Co., 515 So.2d 735 (Fla.1987); Universal Engineering Corp. v. Perez, 451 So.2d 463 (Fla.1984); Bauld v. J.A. Jones Construction Co., 357 So.2d 401 (Fla.1978)." Id at 420 (emphasis added).
> ....
> "In Carr v. Broward County, 541 So.2d 92 (Fla.1989), we held that the statutory repose period for medical malpractice actions does not violate the constitutional mandate of access to courts, even when applied to a cause of action which did not accrue until after the period had expired. See also Pullum v. Cincinnati, Inc., 476 So.2d 657 (Fla.1985) (receding from Battilla v. Allis Chalmers Manufacturing Co., 392 So.2d 874 (Fla.1980), and holding the twelve-year statute of repose in products liability actions constitutional even as applied to causes of action which did not accrue until after the period expired), appeal dismissed, 475 U.S. 1114, 106 S.Ct. 1626, 90 L.Ed.2d 174 (1986)." Id. at 421
> ....
> "In the final analysis, the dissenting opinion seems to rest upon its reluctance to eliminate a cause of action before it has accrued. Yet, this is exactly what a statute of repose does. See Melendez v. Dreis & Krump Mfg. Co., 515 So.2d 735 (Fla.1987) (holding that the former product liability statute of repose barred the suit before the cause of action accrued)." Id. at 421

Appellees argued below that the foregoing cases dealing with the medical malpractice statute of repose are not dispositive of the constitutional viability of the product liability statute of repose. In support of that position, Appellees cited Diamond, a products liability case decided years before all of the foregoing cited cases. Appellees further argued that products liability cases from the Third District Court Of Appeals conclusively show that Diamond is still good law with respect to the products liability statute of repose. Appellees further argued that Diamond, when referred to in medical malpractice cases, is still good law because this Court distinguishes Diamond as a products liability case. In support of this contention, Appellees cited Damiano vs. McDaniel, 689 So.2d 1059 (Fla. 1997). However, Damiano states emphatically that Diamond was decided years before Carr and its progeny.

This Court's litany of cases post Diamond clearly and unequivocally reveals that a statute of repose does not unconstitutionally bar the bringing of any claim after a specified

period of time regardless of whether the claimant's cause of action has accrued or not. Any other conclusion would result in all of the post Diamond cases being meaningless. The fact that this Court has not been directly presented with the issue here since Diamond and, consequently, expressly receded from Diamond does not, *ipso facto*, require the conclusion that Diamond is still *stare decisis* in this case or any other products liability case concerning the constitutional force and effect of Fla. Stat. §95.031(2).

Appellees next direct this Court's attention to several cases from the Third District Court of Appeals which have held that Fla. Stat. §95.031(2) was unconstitutional as applied based upon the holding in Diamond. Appellees further assert that this Court very recently denied review in one of those cases and, therefore, *a fortiori*, Diamond is still the law in Florida, i.e., Fla. Stat. §95.031(2) is unconstitutional where a claimant's cause of action is barred before it ever accrued. Appellant respectfully suggests that the simple denial of review says nothing about the basis for denial. Further, Appellant would suggest just as boldly that, if Diamond was still good law, this Court could have *per curiam* affirmed the Third District Court of Appeals ruling.

Appellant rejects the argument that the cases upholding Florida's medical malpractice statute of repose are not dispositive nor persuasive regarding the constitutionality of Fla. Stat. §95.031(2). This argument is curious at best. Starting with Carr and virtually every medical malpractice case thereafter, this Court has referred to Pullum and its progeny for *stare decisis* support that a statute of repose can constitutionally bar a cause of action even before it has accrued. In no case since Pullum has this Court found Diamond controlling.

Last, in Phelan vs. Hanft, 471 So.2d 648 (Fla. 3rd DCA 1985), the Third District Court of Appeals held that the medical malpractice statute of repose was unconstitutional and

cited in support the Diamond case. The Phelan court found that barring plaintiff's claim before it had accrued was violative of his constitutional right to access to courts. Upon conflict certiorari, this Court approved the Fourth District Court of Appeals opinion in Carr vs. Broward County, 505 So.2d 568 (Fla.4th DCA 1987) and disapproved Phelan. The Fourth District Court of Appeals rejected the Diamond analysis and accepted the Pullum analysis and was affirmed by this Court. The Third District Court of Appeals relied on Diamond and that holding was disapproved by this Court. Thus, when given the opportunity to reaffirm/approve the Diamond rationale, this Court rejected it. Appellant asserts that this is the clearest expression in support of its argument that this Court clearly express that Diamond is no longer legal precedent in this State.

CONCLUSION

> "This is a case of exceedingly great hardship, and we have diligently, but in vain, sought for some tenable ground upon which the [appellees] could be relieved from the loss that [a reversal] of the decree appealed from will necessarily subject them to. But hard cases, it has often been said, almost always make bad law; and hence it is, in the end, far better that the established rules of law should be strictly applied, even though in particular instances serious loss may be thereby inflicted on some individuals, than that by subtle distinctions invented and resorted to solely to escape such consequences, long-settled and firmly-fixed doctrines should be shaken, questioned, confused or doubted. It is often difficult to resist the influence which a palpable hardship is calculated to exert; but a rigid adherence to fundamental principles at all times and a stern insensibility to the results which an unvarying enforcement of those principles may occasionally entail, are the surest, if not the only, means by which stability and certainty in the administration of the law may be secured." Demuth v. Old Town Bank, 85 Md. 315, 319-20, 37 A. 266, 269 (1897).

On the question presented, this Court is compelled to find that Diamond vs. E. R. Squibb and Sons, Inc., 397 So.2d 671 (Fla. 1981), is no longer good law nor binding precedent in this State. Accordingly, the order of final summary judgment entered in Appellant's favor based upon the twelve-year product liability statute of repose should be affirmed.

Respectfully submitted,

_____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 23rd day of February, 1999, to:

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