IN THE SUPREME COURT OF FLORIDA

CASE NO. 94,544

MINNESOTA MINING & MANUFACTURING COMPANY, et al.,

Petitioners,

v.

EARL RAY BARNES and LYDIA BARNES,

Respondents.
_____ /

REPLY BRIEF OF PETITIONER
MINNESOTA MINING & MANUFACTURING CO.

On Certified Question from the
First District Court of Appeal

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ARGUMENT

I. PLAINTIFF'S CLAIM IS BARRED BY THE PRODUCTS LIABILITY STATUTE OF REPOSE, AND THE SO-CALLED "DIAMOND EXCEPTION" IS NOT VIABLE UNDER EXISTING LAW.

Florida's product liability statute of repose, section 95.031(2), Florida Statutes (1975), is constitutional, as there was an overwhelming public necessity for enacting it. Pullum v. Cincinnati, Inc., 476 So. 2d 657, 659 (Fla. 1985), appeal dismissed, 475 U.S. 1114 (1986). The statute permissibly operated to bar, and/or prevent, the accrual of causes of action brought more than twelve years after the date of delivery of the completed product to the original purchaser, regardless of when the purported defect in the product was or should have been discovered. Id. Plaintiffs filed suit more than twelve years after Earl Barnes' last exposure to Defendants' products. Accordingly, Plaintiffs' claims were barred.

Plaintiffs offer several arguments to avoid application of the statute. First, they claim Pullum, 476 So. 2d at 459, n*, recognized an exception to the statute which remains viable.[1] Plaintiffs fail to recognize, however, that the footnote dicta was never viable at the outset. Pullum **held** that the statute was constitutional despite the fact that it barred claims even if they

[1] In support of this position, Plaintiffs extensively rely on the Third District's decision in Owens-Corning Fiberglass Corp. v. Corcoran, 679 So. 2d 291 (Fla. 3d DCA 1996), rev, denied, 690 So. 2d 1300 (Fla. 1997). Because the Third District in Corcoron also recognized a Diamond exception, as discussed below, that case, like the First District's here, was wrongfully decided.

had yet to be discovered. That is precisely the facts presented by Diamond v. E.R. Squibb & Sons, Inc., 397 So. 2d 671 (Fla. 1981), and by this case. Accordingly, because the footnote dicta is inconsistent with the holding of Pullum, the Diamond exception was not viable from the start.

Plaintiffs next rely upon the fact that the Diamond exception has been cited in several decisions by this Court and others. What is more notable, however, is Plaintiffs' failure to cite any case in which this Court relied on the Diamond exception to hold that a statute of repose unconstitutionally barred a claim. Accordingly, this Court's mention of the Diamond exception in circumstances where the Court was not called on to determine its applicability proves nothing about the Diamond exception's continued viability.

Plaintiffs also contend that the cases interpreting Florida's medical malpractice statute of repose, section 95.11(4)(b), Florida Statutes, are inapplicable because the two statutes are different. While 3M recognizes that the statutes are not identical, and that cases interpreting the medical malpractice statute have noted distinctions, in fact, the statutes have precisely the same effect. Both constitutionally bar causes of action after a fixed date irrespective of whether the cause of action has accrued. Pullum; Kush v. Lloyd, 616 So. 2d 415, 420-21 (Fla. 1992); University of Miami v. Bogorff, 583 So. 2d 1000, 1004 (Fla. 1991). This Court has found no constitutional impediment to the medical malpractice statute barring claims that could not have been discovered during the repose period. Kush; Bogorff; Damiano v. McDaniel, 689 So. 2d

1059 (Fla. 1997). There is no reason for a contrary result under the products liability statute in this case.

Plaintiffs point to the fact that there was an announced legislative intent with respect to the medical malpractice statute, but the Court was required to infer one for the products liability statute of repose.[2] Accordingly, consistent with the footnote in Pullum, they argue that the legislature failed to announce an overpowering necessity to bar latent claims under the products liability statute. This analysis ignores that the legislature said **nothing** about latent injury claims in its preamble concerning the medical malpractice statute. See Carr, 541 So. 2d at 94. Yet, this Court has repeatedly and consistently held that the medical malpractice statute bars such claims. Accordingly, since the absence of a reference to the "latent injury situation" in the medical malpractice statute's legislative history does not render the statute unconstitutional as applied to those claims, there is no reason for a different rule with respect to the products liability statute.

Finally, Plaintiffs point out that in this case, Earl Barnes was exposed to a "new" product but did not purportedly learn of his injury until after the statute expired, as contrasted to a case

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[2] The announced public necessity with respect to the medical malpractice statute, limiting perpetual liability in light of the undue burden on doctors, see Carr v. Broward County, 541 So. 2d 92, 94 (Fla. 1989) is virtually identical to the implied public necessity, recognized in Pullum, of limiting manufacturers' liability in light of case law expanding such liability. Pullum, 476 So. 2d at 659-60.

where the plaintiff is exposed to a twenty-one year old product. They claim, without valid explanation, that the statute operates differently in those situations. This contention cannot be sustained.

Clearly the statute operates differently as to different persons. For example, someone who brings a claim based on an alleged defect in a two-year old product would not be barred; a person injured by an eleven-year old product may be barred; and a person injured by a product delivered to its initial purchaser more than twelve years before suit will be barred. This does not render it unconstitutional. See Pullum, 476 So. 2d at 460. The legislature made a choice, as is its constitutional prerogative in light of overwhelming public necessity, about which category of claims would be permitted, and which would not. Although Plaintiffs quarrel with that choice, as their claim falls in the latter group, respectfully, it is not for this Court to second-guess the legislature's decision. Kush, 616 So. 2d at 422. Accordingly, this Court should order the trial court's final judgment reinstated.

II. EVEN IF DIAMOND IS VIABLE, IT DOES NOT APPLY HERE BECAUSE BARNES' INJURY MANIFESTED ITSELF BEFORE THE REPOSE PERIOD EXPIRED.

The First District concluded that an injured plaintiff must not only manifest symptoms within the repose period but also have notice of a causal connection between the allegedly defective product and the symptoms. The basis for this decision, as Plaintiffs' brief demonstrates, are a series of statute of

limitations cases. However, decisions by this Court, acknowledge (albeit in dicta), that the existence of a "Diamond exception" for latent injuries **under the statute of repose** would impose only a manifestation of injury requirement, not a manifestation plus notice requirement. See Pullum, 476 So. 2d at 659, n* ("The **injury** caused by the product did not become **evident** until over twelve years after the product has been ingested.") (emphasis added); Conley v. Boyle Drug Co., 570 So. 2d 275, 283 (Fla. 1990) ("delay between the mother's ingestion of the drug and the manifestation of **the injury** to the plaintiff"); Wood v. Eli Lilly & Co., 701 So. 2d 344, 346 (Fla. 1997) (Diamond provides that statute of repose did not bar cause of action "before there was an manifestation **of injury**").

Here, Earl Barnes' lung was removed in 1984 (R.V. 782, 807). Assuming Diamond applies, for purposes of this case, Barnes' injury manifested itself at that time -- prior to the expiration of the statute of repose -- notwithstanding that he allegedly did not have knowledge of a causal connection until 1992. Accordingly, even if the Diamond exception were viable, these Plaintiffs' claims are barred.

Moreover, imposing a knowledge/accrual requirement on the statute of repose is inconsistent with the theory behind such a statute and wrongfully blurs the distinction between a statute of repose and a statute of limitation. Whereas a statute of limitation bars enforcement of an accrued cause of action, Carr v. Broward County, 505 So. 2d 568, 570 (Fla. 4th DCA 1987), aff'd, 541

So. 2d 92 (Fla. 1989), a statute of repose not only bars an accrued cause of action, but will also cut off a right of action within a specified time after the delivery of a product, **regardless of when the cause of action accrued**. Melendez v. Dreis & Krump Mfg. Co., 515 So. 2d 735, 736 (Fla. 1987). Accord Kush v. Lloyd, 616 So. 2d 415, 421-22 (Fla. 1992). In other words, a statute of repose, by definition, will "prevent the accrual of a cause of action where the final element necessary for its creation occurs beyond the time period established by the statute." Carr, 505 So. 2d at 570.

Accordingly, imposing an accrual requirement on a statute of repose is a conceptual impossibility. The ordinary operation of a statute of repose would bar these Plaintiffs' claims notwithstanding that the final element necessary for its accrual -- knowledge -- occurred outside the statutory period. Imposing an accrual requirement, therefore, has the effect of converting the statute of repose into a different animal altogether -- a statute of limitations without a discovery clause. Kush, 616 So. 2d at 421. This Court must reject this fundamentally improper suggestion. Accordingly, this Court should reverse the decision of the First District and order the trial court's well reasoned final judgment be reinstated.

CONCLUSION

Based on the foregoing discussion and authorities, 3M asks this Court to reverse with directions to enter judgment for 3M.

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WE HEREBY CERTIFY that a true and correct copy of the foregoing was sent via U.S. Mail this _____ day of May, 1999 to all counsel on attached service list.

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