SUPREME COURT OF FLORIDA

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

v. CASE NO. 94,544

EARL BARNES and LYDIA BARNES,
Respondents.

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

REPLY BRIEF OF
PULMOSAN SAFETY EQUIPMENT CORPORATION

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PULMOSAN'S CERTIFICATE OF FONT SIZE COMPLIANCE

COMES NOW PULMOSAN SAFETY EQUIPMENT CORPORATION, pursuant to this Court's administrative order, and certifies that the Reply Brief of this Petitioner was filed utilizing "Courier New 12 point" as provided by Microsoft Windows 98 operating system.

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?

REPLY ARGUMENT

THE HOLDING 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?

Perceiving the need to restrict the perpetual liability of defendants to products liability actions, the Florida legislature enacted § 95.031 which became effective on January 1, 1975. Ch. 74-382, § 3, 1208, Laws of Fla. Fla. Stat. §95.031(2) 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.
>
> (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).

Amicus for Respondents concedes that "[t]his Court in Pullum held that the legislature's rationale constituted [an overriding public] necessity." Amicus Brief at page 6, footnote 5.

Respondents' and Amicus' answer briefs are each fatally flawed in their legal analysis of the constitutionality of Florida's products liability statute of repose which this Court found passed

constitutional muster in Pullum as required by Kluger. Their respective analyses are each founded upon the asserted relevance of "accrual of a cause of action" which is further clouded with the overlay of "manifestation" as to when a claimant, Respondents here, becomes aware that he/she has suffered an injury and that such injury was caused by a particular product or products. They are further attempting to cloud the issue by asserting that different types of products require different forms of legal treatment under the statute at issue. When the Pullum court held that §95.031(2) satisfied the constitutional requirements of Kluger, *infra*, then "accrual of a cause of action" and "manifestation" became irrelevant *instanter*.

In Battilla vs. Allis Chalmers Mfg. Co., 392 So.2d 874 (Fla. 1980), this Court found §95.031(2) violated Florida's guarantee of access to courts as protected by Article 1, section 21, of the Florida Constitution, in violation of this Court's prior holdings in Kluger vs. White, 281 So.2d 1 (Fla. 1973) and Overland Construction Co., vs. Sirmons, 369 So.2d 572 (Fla. 1979). Sirmons held that Fla. Stat. §95.11(3)(c), providing a similar twelve-year statute of repose for actions based upon the negligent design, planning or construction of improvements to real property, violated Florida's constitutional guarantee of access to courts.

Diamond v. E.R. Squibb & Sons, Inc., 397 So. 2d 671 (Fla. 1981), held that §95.031(2) was unconstitutional as applied because

it barred the injured party's cause of action before it ever accrued. This case was brought on behalf of a plaintiff whose *in utero* injury did not manifest itself until more than twelve (12) years after she was first exposed to diethylstilbestrol (DES). This Court opined that the Legislature could not have meant the statute of repose to apply to a cause of action that did not accrue within the repose period because the injurious effects did not manifest until after the repose period had expired. Diamond was decided on the basis of Battilla.

Several years later in Pullum, *infra*, this Court was again presented with the constitutionality of the repose statute as applied. This Court now found that §95.031(2) did not violate Florida's Constitution, that it did not violate the constitutional principles set forth in Kluger and that the legislature reasonably concluded that public policy required that an outer time limit be set for a manufacturer's liability after which a claim of injury caused by a product is forever barred regardless of when the cause of action accrued or the injury became manifest.

In Pullum vs. Cincinnati, Inc., 476 So.2d 657 (Fla. 1985), this Court, in receding from its decision in Battilla, 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).

Since Pullum, this Court has not addressed the constitutionality of §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)).

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. Carr unequivocally states that a statute of repose precludes a right of action after a specified period of time which is measured from the date of sale of a product to the original end user rather than establishing a time period within which the action must be brought measured from the date when the cause of action accrued. Carr reinforces the argument that the statute at issue here meets the constitutional test first enunciated in Kluger.

> "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." (Emphasis added).

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

University of Miami vs. Bogorff, 583 So.2d 1000 (Fla. 1991), reiterated 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.

> "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." (Emphasis added).
> Id. 583 So.2d at 1003.

Bogorff was decided **10** years after Diamond.

Bogorff continued with an 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. (Emphasis added).
>
> ....
>
> "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." Id at 420 (Emphasis added).
>
> ....

> "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." Id. at 421

Kush was decided **11** years after Diamond.

Petitioner rejects Respondents' argument that the cases upholding Florida's medical malpractice statute of repose are neither dispositive nor persuasive regarding the constitutionality of Fla. Stat. §95.031(2). Respondents' argument is curious at best. Starting with Carr, this Court has cited 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. Since Pullum, this Court has not cited Diamond as *stare decisis* for any case before the Court. When presented with the opportunity, this Court declined.

Phelan vs. Hanft, 471 So.2d 648 (Fla. 3rd DCA 1985), held that the medical malpractice statute of repose was unconstitutional and cited in support the Diamond case. 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). The Third District Court of Appeals reliance upon Diamond was disapproved. Thus, when given the opportunity to reaffirm/approve the Diamond rationale, this Court declined. This is the clearest expression in support of Petitioner's argument that Diamond is no longer legal precedent in this State.

Both below and here before this Court, Respondents and Amicus

AFTL have totally ignored the Phelan case. This case was cited by both Petitioners below and again in their initial briefs to this Court. Respondents' ostrich-like response will not cause Phelan to disappear from sight. Petitioner respectfully suggests that Respondents cannot assert a cogent argument to refute that the overruling of Phelan sounded the death knell of Diamond.

Phelan is important for several reasons:(1) the Phelan court was reversed in its reliance upon Diamond, a products liability case, for holding a medical malpractice statute of repose unconstitutional as applied; (2) it was the opposite result from Carr vs. Broward County, 505 So.2d 568 (Fla. 4th DCA 1987), which rejected the Diamond analysis of denial of access to court; (3) this Court affirmed the Fourth District Court of Appeals holding in Carr and rejected the Third District Court of Appeals holding in Phelan; (4) this Court based its rationale for rejecting the holding in Phelan upon its prior holdings in Pullum - a products case, which receded from Battilla - a products case, to reach its holding in Carr - a medical malpractice case; (5) the Diamond holding was no longer legal precedent as it was grounded upon Battilla which was receded from by Pullum.

Petitioner further asserts that Respondents' argument that Petitioner's product is inherently dangerous from its very first use is specious and factually unfounded. Respondents argue that Petitioner manufactured a product that was inherently dangerous

from its very first use, i.e., like DES, and that, like DES, Petitioner's product should not receive the protection of the statute of repose in the same fashion that Diamond held DES was not entitled to receive. However, no court has ever held that asbestos, DES, silica or any other naturally occurring mineral or manufactured chemical or pharmaceutical is inherently "dangerous at the time of its creation and ingestion." Respondents' Brief at page 14. Nor do Respondents cite to this Court a case so holding.

Furthermore, Petitioner's product didn't cause the Respondents' claimed disease of silicosis. Petitioner made a "desert hood", which was never represented to be used for respiratory protection but only for "ricochet" protection. The allegations regarding Petitioner's product are that it failed to provide respiratory protection to the Respondent and that Petitioner failed to warn the Respondent that its desert hood did not provide protection to the wearer from respirable silica.

Fla. Stat. § 95.031(2) makes no distinction nor limitation as to what kinds or types of products are covered or not covered. The legislature intended that all "products" be covered and relied on its ordinary definition for application by the courts of this state. Furthermore, Diamond was not decided on the basis that DES was inherently dangerous or that it was in a particular class of products which the statute was never designed to protect. Diamond was decided solely on the basis that a claimant was being denied

access to the court before the cause of action had ever accrued.

When this Court found the statute of repose constitutional in Pullum, the underlying precedent for the holding in Diamond evaporated and so did the viability of Diamond.

CONCLUSION

Under the facts of this case and pursuant to Fla. Stat. §95.031(2), the trial court was eminently correct in determining that the statute of repose had lapsed and that Respondents' claims were barred after June 30, 1986. It is irrelevant when Earl Barnes discovered the new cause of his lung disease; since he brought this action after June 30, 1986, Respondents' claims are barred. Accordingly, the order of final summary judgment entered in Petitioner's favor based upon the twelve-year product liability statute of repose should be affirmed.

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 certified question should be answered in the negative and the Diamond case finally and unequivocally put to rest.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 12th day of April, 1999, to:

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