

IN THE SUPREME COURT OF FLORIDA

Case No. 69,917

SHARON PAIT,	:
Petitioner,	:
vs.	:
FORD MOTOR COMPANY,	:
Respondent.	:

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

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REPLY BRIEF OF PETITIONER, SHARON PAIT

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REPLY TO FORD'S STATEMENT OF THE CASE

Moving to dismiss Mrs. Pait's complaint, Ford had the burden of persuading the trial court to retrospectively apply Pullum v. Cincinnati, Inc., 476 So.2d 657 (Fla. 1985). Ford filed a memorandum in support of its amended motion to dismiss, arguing that the trial court should give Pullum retrospective effect (R. 19-21). Ford has consistently relied upon the same case law in the trial court, the district court of appeal, and this court. The trial court applied Pullum by ruling that the statute of repose barred Mrs. Pait's cause of action. The retrospectivity issue was before the trial court and he ruled upon it. The issue was properly before the district court of appeal and the district court ruled upon it as well, certifying the question to this court as one of great public importance. The district court ignored Ford's preservation argument and this court should do the same.

Ford has turned the two certified questions into eight major issues with twenty-two subheadings in its fifty page answer brief. This reply brief will return to the certified questions as the Issues on Review.

#### ISSUES ON REVIEW

##### I.

WHETHER THE LEGISLATIVE AMENDMENT OF SECTION 95.031(2), FLORIDA STATUTES (1985), 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.

##### II.

IF NOT, WHETHER THE DECISION OF PULLUM v. CINCINNATI, INC., 476 So.2d 657 (Fla. 1985), WHICH OVERRULED BATTILLA V. ALLIS CHALMERS MANUFACTURING COMPANY, 392 So.2d 874 (Fla. 1980) APPLIES SO AS TO BAR A CAUSE OF ACTION FOR WRONGFUL DEATH THAT ACCRUED AFTER THE BATTILLA DECISION BUT BEFORE THE PULLUM DECISION.

#### REPLY ARGUMENT

Ford's primary argument is its claim to a vested right in its statutory defense, although it never identifies when in time this vesting occurred. Ford argues equally hard that neither Grady Pait nor his survivors have any vested rights of equal dignity. According to Ford, Sharon Pait's right to bring suit for the wrongful death of her husband may come and go with judicial and legislative change, yet Ford's defense is inviolate. It is Sharon Pait however, not Ford, with the vested right of action for the wrongful death of her husband.

Ford presumes that the statute created some new and essential element to a product liability action unattainable by Mrs. Pait. The statute did not, however, change the nature of the claim. Mrs. Pait must allege and prove Ford's defective product caused the death of her husband. The now repealed statute of repose merely gave to Ford the privilege of setting up or waiving the affirmative defense of the statute. Like any other affirmative defense, it is a confession and avoidance. It admits that the product caused injury or death, but allows the manufacturer to avoid liability if the action is brought outside the statute.

When section 95.031(2) was amended, the statutory limitation on product liability actions was repealed. Under the common law rules of statutory construction, the repeal of a statute operates retrospectively. Upon repeal, the statute is considered as if it never had existed. Ford argues that the statute was not repealed, but was simply amended. This argument confuses the effect on the statute itself and the effect on the statutory defense which has been eliminated.

In her main brief, Mrs. Pait relied heavily upon Sutherland Statutory Construction and does so again in this reply brief. Section 23.33 provides:

Under the common law rules of construction and interpretation, when the effect of a repeal is ascribed to be the 'destruction,' 'obliteration,' 'abrogation,' 'cancellation,' 'abolishment,' or 'rescission' of the repealed statute, it is the effect of the repeal on rights, offenses, liabilities, penalties, and forfeitures acquired, and

suits and prosecutions pending under the repealed statute which is contemplated by the description, rather than an explanation of what has happened to the statute itself by the repeal. [e.s.].

As reflected in Chapter 86-272, Section 95.031, Florida Statutes was amended, "deleting a limitation upon the initiation of actions for products liability." (e.s.). The statute itself was amended, but the limitation upon products liability actions was "deleted." Regardless of whether Ford's statutory defense is considered deleted, destroyed, obliterated, abrogated, cancelled, abolished, or rescinded, Chapter 86-272 effected a repeal of the so called statute of repose in products liability actions.

Under the common law rules of statutory construction, amendments are considered prospective, repeals retrospective. Predictably, Ford relies entirely upon case law giving prospective application to legislative amendments. Ford degrades to inapposite dicta the Florida precedent on retrospective application of repealing legislation.

The statute of repose was not amended. It was not increased from twelve to fourteen years, or decreased to ten years. It was repealed. There is no longer a statutory limitation upon the bringing of a products liability action. Absent a saving clause or a general saving statute, the statute is considered as if it had never existed. Sutherland Stat. Const. § 23.33 (4th Ed). See also, Tel Service Co., Inc. v. General Capital Corporation, 227 So.2d 667, 671 (Fla. 1969); State ex rel. Arnold v. Revels, 109 So.2d 1, 3 (Fla. 1959).

[T]he effect of a repealing statute is to obliterate the statute repealed as completely as if it had never been enacted, except for the purpose of those actions or suits which were commenced, prosecuted, and concluded whilst it was an existing law, and that an action cannot be considered as concluded while an appeal therein is pending before an appellate court having jurisdiction to review it.

Pensacola & A. R. Co. v. State, 45 Fla. 86, 33 So.985, 986 (1903). Dictum perhaps, but worthy of quotation in State ex rel. Arnold v. Revels, 109 So.2d at 3. Ford cannot seriously dispute Florida's recognition of the general rule that repealing legislation is given retrospective application. See, Yaffee v. International Company, Inc., 80 So.2d 910, 911-12 (Fla. 1955).


Ford has supplemented the record in this case with a transcript of the legislative proceedings on the repeal of the statute of repose. Ford argues the transcript is silent on retrospective application, but it is equally devoid of any indication that the repeal was intended to be prospective only. Under the common law rules of statutory construction, the repeal of a statute operates retrospectively absent a saving clause. Absent affirmative legislative expression to the contrary, it must be assumed that the legislature intended the common law rules to apply. There is nothing in the legislative history to suggest otherwise.

CONCLUSION

The first certified question should be answered in the affirmative. If the first certified question is answered in the negative, then the second certified question must be answered in the negative as well.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Petitioner, Sharon Pait, was mailed to: DAVID W. BIANCHI, ESQUIRE, Stewart, Tilghman, Fox & Bianchi, 1900 Courthouse Tower, 44 West Flagler Street, Miami, Florida 33130; SHARON LEE STEDMAN, ESQUIRE, Rumberger, Kirk, Caldwell, Cabaniss & Burke, 11 East Pine Street, Orlando, Florida 32802; EDWARD T. O'DONNELL, ESQUIRE, Mershon, Sawyer, Johnston, Dunwody & Cole, 200 South Biscayne Boulevard, Miami, Florida 33131; WAYNE HOGAN, ESQUIRE, Brown, Terrell, Hogan & Ellis, P.A., 804 Blackstone Building, Jacksonville, Florida 32202; MELVIN A. RUBIN, ESQUIRE, 2627 Biscayne Boulevard, Miami, Florida 33137; JERRY B. SCHREIBER, ESQUIRE, Suite 207, Biscayne Building, 19 West Flagler

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