

IN THE SUPREME COURT OF FLORIDA

CASE NO. 70,179

JUAN DOMINGUEZ and GRACIELA DOMINGUEZ,
Petitioners,

vs.

BUCYRUS-ERIE COMPANY,
Respondent.

PETITIONERS' REPLY BRIEF ON THE MERITS

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I. ARGUMENT

A. THE LEGISLATIVE AMENDMENT OF SECTION 95.031(2), FLORIDA STATUTES, (1983), ABOLISHING THE STATUTE OF REPOSE IN PRODUCT LIABILITY ACTIONS, SHOULD BE CONSTRUED TO OPERATE RETROSPECTIVELY AS TO A CAUSE OF ACTION WHICH ACCRUED BEFORE THE EFFECTIVE DATE OF THE AMENDMENT.

In their initial brief, petitioners cite certain cases which hold that a court order or judgment must be reversed where it is based upon a statute which is subsequently repealed while the action is pending. (initial brief pp.6-7). In its answer brief, respondent first argues that these cases are not controlling because Chapter 86-272 Section(2) Laws of Florida (1986) was not a repeal but an amendment to Section 95.031(2) Florida Statutes.

Respondent is technically correct in that Chapter 86-272(2) did amend Section 95.031(2) which deals with matters other than the statute of repose in product liability actions. Portions of Section 95.031(2) were left intact. The statute of repose for product liability actions, however, was completely abrogated and abolished. The amendment had the same effect as a repeal as far as the statute of repose in product liability actions is concerned. The fact that the statute dealt with matters other than the product liability statute of repose so that abrogation of that part alone was necessarily effectuated by amendment rather than repeal is a distinction without

a difference. The point of the cases cited by petitioners is that, barring the impairment of existing rights, appellate courts must apply the law as it exists at the time of the appeal. The principle of those cases is applicable here notwithstanding that the abolition of the product liability statute of repose was entitled an amendment rather than a repeal.

Respondent also argues that the lack of a savings clause in Chapter 86-272(2) Laws of Florida is further evidence that the legislature did not intend its retroactive application. The purpose of a savings clause is to allow a reasonable time to file actions already accrued when the new statute **shortens** a period of limitations. **Homemakers, Inc. v. Gonzales**, 400 So.2d 965 (Fla. 1981). A savings clause has no possible application to a statute which enlarges a period of limitations or, as in this case, a law which abolishes a statute of repose.

In response to petitioners' arguments distinguishing a statute of repose from a statute of limitations, respondent states that the analysis for retroactivity purposes is the same and that the pertinent date is the date the cause of action accrued, citing this Court's opinion in **Dade County v. Ferro**, 384 So.2d 1283 (Fla. 1980). While that case did deal with a final repose provision of a medical malpractice statute of limitations, that provision measured from the date of the incident giving rise to the cause of action. This Court stated

at p.1286:

"While the date of discovery is entirely relevant in ascertaining the attachment date of a statute of limitations which measures from the that date, it is equally irrelevant in ascertaining the attachment date of a statute of limitations which measures **by its terms** from the date of the incident giving rise to the injury. The only relevant date in the case of the latter type statute of limitations is the date of occurrence or incident. (emphasis supplied).

The product liability statute of repose, **by its terms** measures from the date the product was delivered. Using the rationale of **Ferro**, the only relevant date is the date the product was delivered not the date the cause of action accrued and the distinction set forth in petitioners initial brief is sound.

Respondent also argues that the principle which favors retroactive application of remedial statutes should not apply to Chapter 86-272(2) Laws of Florida (1986) because all statutes of limitations are remedial statutes yet they are not applied retroactively without clear and express legislative intent. While all statutes of limitations may be "remedial" in the most general sense of the word in that they relate to procedure and remedies, all statutes of limitations are not remedial in the particular sense of a law designed to correct existing law or to afford a remedy where there was none so as to allow retroactive application. **Adams v. Wright**, 403 So.2d 391 (Fla. 1981).

Such remedial rights arising for the purpose of

protecting substantive rights must be retroactively applied. **City of Orlando v. Desjardins**, 493 So.2d 1027 (Fla. 1986). The very nature of a repeal is to remedy some existing problem in the law which is what the legislature did in this instance. By abolishing the statute of repose, those persons injured after expiration of the twelve year period were given a remedy for the purpose of protecting their substantive right to seek redress of injury where they had no such right because of the statute of repose and decision in **Pullum**. This is a classic example of a law of a remedial nature which can and should be retroactively applied in order to serve its intended purposes. **City of Orlando, supra**. Such statutes should be applied retroactively whether or not they contain express language to that effect. (See cases cited pp.13-14 initial brief).

B. THE DECISION OF **PULLUM V. CINCINNATI, INC.**, 476 SO.2D 657 (FLA. 1985), **APPEAL DISMISSED**, ____ U.S. ____, 106 S.CT. 1626, 90 L.ED 2D 174 (1986), WHICH OVERRULED **BATTILLA V. ALLIS CHALMERS MFG. CO.**, 392 SO.2D 874 (FLA. 1980); DOES NOT APPLY SO AS TO BAR A CAUSE OF ACTION THAT ACCRUED AFTER THE **BATTILLA** DECISION BUT BEFORE THE **PULLUM** DECISION.

Respondent argues that the above question need not be addressed in this case because it accrued when the petitioner was injured in 1979, which was prior to this Court's decision in **Battilla, supra**.

It is submitted that the petitioners' cause of action nevertheless had fully accrued at the time the suit was filed (which was after **Battilla**) and at the time **Pullum, supra**, was decided. Were it not for the fact that **Pullum** "reconstitutionalized" the statute of repose there would have been no basis for summary judgment. Clearly, the respondent would not have been entitled to summary judgment on the grounds that an unconstitutional statute barred the action. Absent **Pullum**, the petitioners would have had the right to prosecute their case to judgment, so it necessarily had accrued when the bar of the statute of repose was removed by **Battilla**.

As discussed under issue A above, the date of injury does not have the significance to a statute of repose, which by its terms runs from the date the product was delivered, as it has to a statute of limitations which runs from the date of injury. See **Dade County v. Ferro, supra**, and **Bauld**

v. J. A. Jones Const. Co., 357 So.2d 401 (Fla. 1978). In such a case the only relevant question should be whether the petitioners had a cause of action when the suit was filed.

In the instant case, the statute of repose, which measures from the date of delivery, was not in effect when the product was delivered. It was not, pursuant to **Battilla**, in effect when the case was filed and it is not, pursuant to Chapter 86-272(2) Laws of Florida (1986), in effect at the time of the appeal. At the time this suit was filed, petitioners had a valid cause of action and they incurred the expense of litigating it for four years in reliance on this Court's opinion in **Battilla**. To retroactively apply **Pullum** to a cause of action which petitioners clearly had the right to pursue at the time it was filed is nothing other than the destruction of a cause of action in violation of petitioners rights to due process and equal protection. (See cases cited at pp.17-20 of initial brief).

It is the petitioners' position that **Pullum** should not be applied here because the cause of action necessarily accrued before **Pullum** was in effect and to divest the plaintiffs' of their cause of action deprives them of a vested property right. If the change in the law represented by **Pullum** can be applied to the instant case, then, as discussed above, the change in the law represented by the repeal of the statute of repose should also be

applied, or this Court should recede from **Pullum**. Any other result will not serve the ends of right or justice. As recently stated by Judge Ferguson in **Clausell v. Hobart Corporation**, 12 FLW 1224,1225 (Fla. 3rd DCA May 12, 1987):

" Affirmance is required by **Shaw**; however, in my view, as was stated in a concurring opinion in **Dominguez v. Bucyus-Erie Co**, 503 So.2d 364 (Fla. 3rd DCA 1987) our first duty in construing a statute is to reconcile it with constitutional mandates. See **Biggs v. Smith**, 134 Fla. 569, 184 So.106 (1938). That duty requires us to give the statute retroactive application so as to open the court for redress in accordance with article I, section 21, of the Florida Constitution. The purpose of the constitutional provision is to give vitality to the maxim that for every wrong there is a remedy. **Holland ex rel. Williams v. Mayes**, 155 Fla. 129, 19 So. 2d 709 (1944). Any claim of the parties to 'vested rights' in pre-statute law is subordinate."

See also this Court's recent opinion in **Smith v. Department of Insurance**, 12 FLW 189,191-192 (Fla. April 23, 1987) and cases cited therein. Prior to the enactment of the statute of repose and prior to the enactment of Florida's present constitution, persons such as the petitioners had a right to seek redress for injuries resulting from defective products. **Matthews v. Lawnlite Co.**, 88 So.2d 299 (Fla. 1956). The elimination of that right by the statute of repose and this Court's decision in **Pullum** with no alternative remedy or overpowering public necessity with no alternative method of meeting such necessity, violates petitioners right to access to the courts pursuant to article I, section 21 of the Florida Constitution.

II. CONCLUSION

Based upon the authorities cited and the reasons discussed above, the decision of the District Court of Appeal, Third District in favor of the respondent should be reversed and the case remanded for a jury trial on the merits.

Respectfully submitted,

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III. CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Petitioners' Reply Brief On The Merits was served by mail on Cooper, Wolfe & Bolotin, P.A., Suite 700, Courthouse Tower, 44 West Flagler Street Miami, FL 33130 and Phillip Blackmon, Esquire, 2665 S. Bayshore Drive, Fifth Floor, Miami, FL 33133, this 1st day of June, 1987.

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