

IN THE SUPREME COURT OF FLORIDA

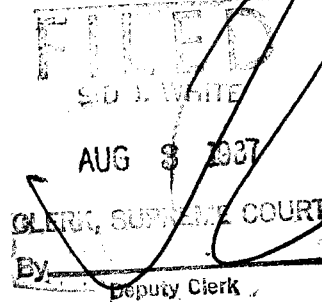
CASE NO. 70,475

AQUILINA LAZO,
Petitioner,

vs.

BARING INDUSTRIES, INC.
and CHICAGO DRYER COMPANY
LAUNDRY MACHINES,

Respondents.



PETITIONER'S CONSOLIDATED REPLY BRIEF

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INTRODUCTION

This Reply Brief is being filed on behalf of the Petitioner, AQUILINA LAZO, in response to the Answer Brief of Respondents, BARING INDUSTRIES, INC. and CHICAGO DRYER COMPANY LAUNDRY MACHINES.

The Petitioner will be referred to in this Brief as "Petitioner" or "Mrs. Lazo." Respondent CHICAGO DRYER COMPANY LAUNDRY MACHINES will be referred to in this Brief as "Respondent" or "Chicago Dryer." Respondent BARING INDUSTRIES, INC. will be referred to as "Respondent" or "Baring." All emphasis has been supplied unless otherwise indicated.

The Petitioner will rely upon the Statement of the Case and Facts set out in her Initial Brief.

POINTS ON APPEAL

I.

WHETHER THE DECISION OF PULLUM V. CINCINNATI, 476 SO.2D 657 (FLA. 1985), SHOULD NOT BE APPLIED SO AS TO BAR PETITIONER'S CAUSE OF ACTION WHICH ACCRUED PRIOR TO THE PULLUM DECISION

II.

WHETHER APPLICATION OF THE STATUTE OF REPOSE TO EXTINGUISH PETITIONER'S ACCRUED CAUSE OF ACTION DOES NOT COMPORT WITH THE DUE PROCESS AND EQUAL PROTECTION GUARANTEES UNDER THE UNITED STATES AND FLORIDA CONSTITUTIONS

III.

WHETHER THE REPEAL OF THE STATUTE OF REPOSE OPERATES RETROSPECTIVELY AS TO PETITIONER'S CAUSE OF ACTION

SUMMARY OF ARGUMENT

On December 17, 1982, MRS. LAZO sustained severe and permanent injuries to her arm and hand as the result of a defective Flatwork Ironer manufactured by CHICAGO DRYER and distributed by BARING. At that time she acquired an accrued cause of action which is recognized as a vested property right protected under the due process clause of the 14th Amendment to the U.S. Constitution and Article I, Section 9 of the Florida Constitution. She timely filed a complaint on September 30, 1983. While her lawsuit was pending, the Florida Supreme Court rendered its decision in Pullum v. Cincinnati, Inc., 476 So.2d 657 (Fla. 1985), reversing its prior construction of Section 95.031(2), Florida Statutes, and upholding the validity of the twelve year period of repose in product liability actions. Subsequently, the legislature, effective July 1, 1986, repealed the statute of repose for product liability actions. Chapter 86-272, §§2 and 3, Laws of Florida. In spite of the repeal, the trial court, based upon the Pullum decision, granted the Respondents' motions for summary judgment.

In support of the argument that retroactive application of the Pullum decision to bar Petitioner's accrued cause of action comports with the equal protection and due process clauses of the federal and state constitutions, Respondent Baring contends that the decision of Battilla v. Allis Chalmers Mfg. Co., 392 So.2d 874 (Fla. 1980), merely created some uncertainty as to the constitution-

tionality of Section 95.031(2), Florida Statutes (1975) as applied to actions accruing after the expiration of the twelve year period of repose. This contention is baseless as Battilla and the case authorities cited therein clearly established that Section 95.031, Florida Statutes, could not be applied so as to bar a cause of action which accrued after the expiration of the twelve (12) year repose period. The Pullum decision itself also recognized this well-settled ruling and then receded from it. When Mrs. Lazo sustained her injuries on December 17, 1982, she acquired an accrued cause of action against Baring and had a vested right to seek recovery from Baring. See Rupp v. Bryant, 417 So.2d 658 (Fla. 1982). Retroactive application of the Pullum decision would therefore result in a denial of due process.

Moreover, retroactive application of the Pullum decision only serves to exacerbate the equal protection violation in light of the repeal of the statute of repose effective July 1, 1986. A plaintiff who is injured by a defective product can file suit regardless of the date of delivery to the initial purchaser. In addition, such action would violate the established case law that rights acquired under a former construction of a statute by the Supreme Court should not be destroyed by giving a retrospective operation to a subsequent overruling decision. Florida Forest and Park Service v. Strickland, 154 Fla. 472, 18 So.2d 251 (1944); Christopher v. Mungen, 61 Fla. 513, 55 So. 274 (1911).

Finally, in view of the lack of legislative response to the

Battilla decision and repeal of the statute of repose in reaction to the Pullum decision, there is no longer any validity to the argument that there is a compelling public necessity and/or legitimate legislative goal in protecting manufacturers from the threat of perpetual liability.

The cases of Black v. Nesmith, 475 So.2d 963 (Fla. 1st DCA 1985) and Nissan Motor Co., Ltd. v. Phlieger, ___ So.2d ___, 12 FLW 256 (Fla. S.Ct. Case No. 68,823; opinion filed May 28, 1987) cited by Respondent Chicago Dryer are factually and/or legally distinguishable and do not support Respondent's position that the Pullum decision can be applied so as to bar a cause of action that accrued previously thereto.

Contrary to the position of Respondents, the issue for determination is the retrospective operation of a total repeal of a statute (of repose) rather than the retrospective operation of a statute which lengthens a limitations period. The general rule is that repealing statutes be given retrospective operation. Therefore, the repeal of 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 repeal.

The statute of repose being remedial in nature, Baring's additional argument about an alleged vested right not to be sued lacks merit in light of the above-enumerated principle of law. Furthermore, at the time of the manufacture and sale of the machine in

question, there was no statute of repose in effect and, therefore, Respondent cannot claim any vested right not to be sued with respect to the machine. See Hellinger v. Fike, 503 So.2d 905 (Fla. 5th DCA 1986).

Thus, the repeal of the statute of repose in product liability actions should be construed to operate retrospectively (i.e., that the statute never existed) as to Petitioner's cause of action, which accrued prior to July 1, 1986, the effective date of the repeal.

ARGUMENT

I.

THE DECISION OF PULLUM V. CINCINNATI,
476 SO.2D 657 (FLA. 1985), SHOULD NOT
BE APPLIED SO AS TO BAR PETITIONER'S
CAUSE OF ACTION WHICH ACCRUED PRIOR
TO THE PULLUM DECISION

A.

In support of the argument that retroactive application of the Pullum decision to bar Petitioner's claim comports with Florida case and constitutional law, Respondent Baring contends that the decision of Battilla v. Allis Chalmers Mfg. Co., 392 So.2d 874 (Fla. 1980), only created some uncertainty as to the constitutionality of Section 95.031(2), Florida Statutes (1975) as applied to actions accruing after the expiration of the twelve-year statute of repose. Contrary to this contention, the Battilla decision (and the authorities cited therein) clearly established that Section 95.031, Florida Statutes (1975) could not be applied so as to bar a cause of action which accrued after the expiration of the twelve (12) year period of repose inasmuch as such application would result in a violation of the access to the courts guarantee under Article I, Section 21, of the Florida Constitution. See Overland Construction Co. v. Sirmons, 369 So.2d 572, 574-5 (Fla. 1979); Purk v. Federal Express Co., 387 So.2d 354, 357 (Fla. 1980). The Pullum decision itself also recognized this well-settled ruling in

Battilla but then receded from it.

Mrs. Lazo was injured in December, 1982, and under this Court's interpretation of Section 95.031(2), Florida Statutes, said statute could not be applied to bar her cause of action. When she sustained her injuries on December 17, 1982, Mrs. Lazo acquired an accrued cause of action against Baring. Luckie v. McCall Mfg. Co., 153 So.2d 31 (Fla. 1st DCA 1963). Thus, Petitioner at that time had a vested right to seek recovery against the Respondent and, therefore, had more than just a "mere expectation" as alleged by Baring. See Rupp v. Bryant, 417 So.2d 658 (Fla. 1982). An accrued cause of action is a species of property right protected by the due process clauses of the United States and Florida Constitutions. Retroactive application of the Pullum decision would violate Petitioner's due process rights. Logan v. Zimmerman Brush Co., 455 U.S. 422, 428, 102 S.Ct. 1148, 1154-55, 71 L.Ed.2d 265, 273 (1982); Rupp, supra.

Respondent's argument that prospective application of the Pullum decision would totally erode the rationale underlying the opinion is frivolous. Whether or not the opinion is applied prospectively or retroactively, those plaintiffs injured more than eight (8) years but less than twelve (12) years after the date of delivery to the initial purchaser will still have less than four (4) years to file suit in contrast to those plaintiffs injured less than eight (8) years after the date of initial delivery. Moreover, inasmuch as the statute of repose has been repealed effective July 1, 1986, retroactive application of the Pullum decision to bar

Petitioner's cause of action would result in a denial of equal protection of law since any plaintiff who is now injured by a defective product can file suit regardless of the date of delivery to the initial purchaser. Thus, retroactive application of the Pullum decision only serves to further exacerbate the equal protection violation.

Having a vested right to seek recovery for her injuries against the Respondent,¹ retroactive application of the Pullum decision violates the well-established principle of law that where a statute has received a given construction by a court of supreme jurisdiction and rights have been acquired by parties under such construction, such rights should not be destroyed by giving a retrospective operation to a subsequent overruling decision. Florida Forest and Park Service v. Strickland, 154 Fla. 472, 18 So.2d 251 (1944).

Baring argues to the contrary and cites as authority in support of this position Florida East Coast Ry. v. Rouse, 194 So.2d 260 (Fla. 1967) That case is easily distinguishable in that the plaintiff was not barred from seeking recovery from the defendant railroad as a result of the railroad comparative negligence statute being declared unconstitutional. A new trial was required. Retroactive application of the Pullum decision will result in the loss of Petitioner's vested right to seek redress of her injuries and,

1 Rupp v. Bryant, 417 So.2d 658, 665-66 (Fla. 1982); State Department of Transportation v. Knowles, 402 So.2d 1155 (Fla. 1981)

therefore, Respondent's reliance upon Florida East Coast Ry. v. Rouse, 194 So.2d 260 (Fla. 1967) is misplaced and clearly is not dispositive of this issue. Christopher v. Mungen, 61 Fla. 513, 55 So. 274 (1911), also relied upon by Respondent, fails to lend any support to Respondent's position. Mungen not only holds that where a decision which adjudges a statute unconstitutional is subsequently reversed, the statute will be held to be valid from the date it first became effective, but also holds that rights acquired under that decision which first declared the statute to be invalid will not be affected by the subsequent decision that the statute is constitutional.

B.

In suggesting that the Pullum decision confirms the constitutionality of applying the statute of repose to bar products liability claims accruing after the expiration of the twelve-year repose period, Respondent relies solely upon the alleged legitimate legislative goal and compelling public necessity of protecting manufacturers from the threat of perpetual liability which is the underlying premise of the Pullum decision. Nevertheless, as pointed out in Petitioner's Initial Brief, in light of the total lack of legislative response to the Battilla decision, the existence of any legislative objective or compelling necessity to eliminate perpetual liability for manufacturers was at best questionable at the time this Court rendered its decision in Pullum. Furthermore, since the legislature has repealed the

applicable statute of repose in direct response to the Pullum decision, it is clear that the rationale underlying the Pullum decision no longer exists. Therefore, Petitioner most respectfully requests that this Court recede from the Pullum decision.

C.

Respondent's contention that retroactive application of the Pullum decision to bar Petitioner's claim comports with the United States constitutional and federal case law is entirely based upon the notion that law in this area was unsettled. Petitioner has already demonstrated under subsection A of this Brief that prior to the Pullum decision the law was settled that Section 95.031(2), Florida Statutes, could not be applied to bar a cause of action where claimant was injured more than twelve (12) years after the date of delivery of the defective product to the initial purchaser. If, in fact, this principle of law was not well settled by the Battilla decision, then it only would have been necessary for this Court in Pullum to make a clarification or render a further explanation rather than to expressly recede from its holding in the Battilla case. Thus, the Pullum decision itself refutes Respondent's unfounded notion that the law was unsettled with respect to Petitioner's accrued cause of action and vested right to seek relief against Respondent.

D.

Chicago Dryer, in support of the argument that Pullum should be applied retroactively, relies heavily upon Black v. Nesmith, 475

So.2d 963 (Fla. 1st DCA 1985) and Nissan Motor Company, Ltd. v. Phlieger, __So.2d__, 12 FLW 256 (Fla. S.Ct. Case No. 68,823; opinion filed May 28, 1987). Both cases are readily distinguishable. In Black v. Nesmith, supra, the District Court held that Section 742.011, Florida Statutes (1969) simply did not create a right in defendants to avoid their obligations by fathering illegitimate children of married women. Thus, defendant Nesmith had acquired no property or contract right by judicial construction of a statute.

This Court in Nissan Motor Co., Ltd. v. Phlieger was presented with the issue of the applicability of the product liability statute of repose in wrongful death actions. Obviously, this issue is not involved in the present action.

For further reply to both Respondents' contentions, Petitioner will rely upon the arguments and authorities stated in her Initial Brief.

II.

APPLICATION OF THE STATUTE OF REPOSE TO EXTINGUISH PETITIONER'S ACCRUED CAUSE OF ACTION DOES NOT COMPORT WITH THE DUE PROCESS AND EQUAL PROTECTION GUARANTEES UNDER THE UNITED STATES AND FLORIDA CONSTITUTIONS

With respect to Baring's argument that the statute of repose comports with the due process and equal protection guarantees of the United States and Florida Constitutions, Petitioner submits

that the constitutional validity of the statute of repose is not the issue presented. The question to be determined is whether this Court's decision reversing a previous decision of the Court holding the statute of repose invalid can be applied retroactively so as to bar an accrued cause of action. For the reasons set forth in her Initial Brief, said retroactive application clearly violates the due process and equal protection clauses of the United States and Florida Constitutions.

As to the validity of the statute of repose in product liability actions, Petitioner submits there is no legislative objective and/or compelling necessity to insulate manufacturers from perpetual liability as evidenced by the subsequent legislative repeal of the statute of repose in reaction to the Pullum decision. Thus, the statute violates not only the equal protection and due process clauses of the federal and state constitutions, but also the access to courts provision under Article I, Section 21, of the Florida Constitution.

III.

THE REPEAL OF THE STATUTE OF REPOSE OPERATES RETROSPECTIVELY AS TO PETITIONER'S CAUSE OF ACTION

In support of their argument that the repeal of the statute of repose has no effect on the Petitioner's claim, both Respondents cite as authority those cases which raise the issue of the retro-

active application of statutes which shorten or lengthen a statute of limitations period or which initially create a statute of limitations or statute of repose. In contrast, the present case raises the issue of the retroactivity of an outright repeal of a statute of repose. The general rule is that where a right or remedy has been created wholly by statute, a repeal of that statute should be given retrospective operation and the repealed statute, in regard to its operative effect, is considered as if it had never existed. Yaffee v. International Company, 80 So.2d 910 (Fla. 1955); Bureau of Crimes Compensation v. Williams, 405 So.2d 747 (Fla. 2d DCA 1981); see also C.J.S. Statutes §§421, 434 (1953).

Inasmuch as the statute of repose, like a statute of limitation, is remedial in nature and such a remedy is created wholly by statute, the operative effect of the repeal of a statute of repose is as if said statute never existed.

Thus, under the above principle of law, it is clear that the further argument of Baring about an alleged vested right not to be sued lacks merit. Moreover, at the time of the manufacture and sale of the machine in question, there was no statute of repose in effect and, therefore, Respondent cannot claim any vested right not to be sued with respect to this machine. See Hellinger v. Fike, 503 So.2d 905 (Fla. 5th DCA 1986).

Chicago Dryer also argues hereunder that this Court should not add words omitted from a statute and cites as authority in support of this position Armstrong v. City of Edgewater, 157 So.2d 422

(Fla. 1963). The Armstrong case is clearly not controlling inasmuch as the issue presented in Armstrong was whether the Court should add the word "mayor" which was inadvertently omitted from the subject statute.. In the case sub judice the issue is not simply whether the Court should or should not add or supply an omitted word but rather, as previously discussed, whether a repealing statute should be given retrospective application.

In light of the retrospective effect of the repeal of the statute of repose (i.e., that the statute of repose never existed) the legislative history² and the lack of any vested right on the part of Respondent not to be sued, the repeal of the product liability statute of repose should be construed to operate retrospectively as to a cause of action which accrued prior to July 1, 1986, the effective date of the repeal.

2 Set out in Petitioner's Initial Brief.

CONCLUSION

Based upon the foregoing reasons and citations of authority, Petitioner submits that this Court should apply the repeal of the statute of repose for product liability actions retroactively to causes of action like Petitioner's which accrued prior to the effective date of the repeal or hold that the Pullum decision should be applied only prospectively. Justice and equity as well as the guarantees under the Florida and Federal Constitutions require that Petitioner have her "day in court" to seek redress of her injuries.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Petitioner's Consolidated Reply Brief was mailed this 31st day of July, 1987, to the following counsel of record: STEVEN BERGER, ESQ., Suite B-5, 8525 S.W. 92nd Street, Miami, Florida 33156; and RHEA P. GROSSMAN, ESQ., 2710 Douglas Road, Miami, Florida 33133.

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