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SUPREME COURT OF ALABAMA

OCTOBER TERM, 2011-2012

1091533

Charles E. Jerkins

v.

Lincoln Electric Company et al.

Certified Question from the United States District Court for the Northern District of Ohio, Eastern Division (1:04-CV-18810)

On Application for Rehearing

STUART, Justice.

APPLICATION OVERRULED. NO OPINION.

Malone, C.J., and Woodall, Bolin, Parker, Main, and Wise, JJ., concur.

Murdock and Shaw, JJ., concur specially.

MURDOCK, Justice (concurring specially).

I concur to overrule the application for rehearing. I write separately for two reasons: (1) to offer additional comments regarding this Court's response to the first certified question in this case on original submission and, (2) with respect to our answer to the second certified question, to address certain concerns expressed by the applicants for rehearing that are also addressed by Justice Shaw in his special writing on application for rehearing.

1. The First Certified Question

The following statement appears in American Law Reports:

> "Since in a case of exposure to disease through the negligence of another, no one can know whether disease will result, and, if the exposure is to an occupational disease, the disease may develop only after months and years of repeated exposure, and even long after exposure has ceased, and, if it does develop, no one will be able to say at precisely what time it first existed nor exactly what exposure produced it, many cases, manifestly to escape the rigor and supposed general soundness of the idea that an action for negligence accrues at the time of the negligence ..., have evolved a theory whereby the continuing negligence is regarded as a single wrong against which the limitation period commences to run only from the time of cessation of the wrong, or cessation of the inhalation of the dust, gas, or fumes, or exposure to deleterious substance ...."

Annot., When Limitation Period Begins to Run Against Cause of Action or Claim for Contracting Disease, 11 A.L.R.2d 277, 289 (1950). This passage speaks of a "single wrong," as well as a single limitation period -- "the limitation period" -- that commences to run only at the single point in time when that wrong ceases. Consistent with this passage, I had until this case been under the impression that Alabama's "continuing tort" theory of recovery for long-term exposure to toxic substances, when applied in tandem with the last-exposure rule recognized in Garrett v. Raytheon Co., 368 So. 2d 516 (Ala. 1979), meant that, so long as a claim was filed within the period of limitations following the plaintiff's last exposure to the hazardous substance, the plaintiff could recover all damages referable to the malady resulting from the exposure to the hazardous substance at any time during the plaintiff's term of employment.

On original submission in this case, however, the Court stated that "[a] plaintiff injured by long-term continuous exposure to a toxic substance is limited to recovering damages attributable to injuries occurring within the period of limitations." ___ So. 3d at ___. A more careful review of

the quoted passage from American Law Reports yields a possible explanation for the discord between it and our statement on original submission limiting the damages that can be recovered in a case governed by Garrett. The passage quoted from American Law Reports embraces a "single wrong" theory, and it does so based on the predicate that the plaintiff's injury may "develop" after exposure at some unknown and unknowable time. The analysis employed in Garrett, on the other hand, contemplates that the plaintiff actually suffers a physical injury when he or she suffers an exposure, even if that injury has yet to "develop" into something that is observable by the injured party.[1]

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[1]The decision in Garrett was based on the notion that "damage must have occurred at the time of exposure else defendant would not be liable." Garrett, 368 So. 2d at 520 (some emphasis added). Accordingly, the Court reasoned, the statute of limitations for injury suffered as a result of radiation exposure "begins to run when the plaintiff is exposed to radiation and an injury occurs." 368 So. 2d at 518 (emphasis added). See also William J. Bowers, Jr., Limitation of Actions -- Industrial Diseases -- Ignorance of a Cause of Action Will Not Toll Statute, 34 Tex. L. Rev. 480, 481 (1956):

> "[I]t has been held that, even though the action was brought within the statutory period after the last exposure, the statute of limitation bars recovery except for aggravation of the condition within the statutory period. Pieczonka v. Pullman Co., 89 F.2d 353 (2d Cir. 1937); Minyard v. Woodward Iron Co., 81

Moreover, my consideration of the present case has brought to my attention Alabama cases governed by the last-exposure rule of Garrett, which as noted by the main opinion on original submission, presaged our answer to the certified question before us, i.e., that damages are limited to those resulting from injuries occurring within the limitations period. Thus, in the case of Minyard v. Woodward Iron Co., 81 F. Supp. 414, 417-18 (N.D. Ala. 1948), the federal district court was able to state:

> "Under pertinent decisions of the Alabama courts, a recovery may be had for injury resulting from a continuous tort subject to the limitation that only damages which occurred within the period of limitations may be recovered, provided that the damages sustained within the statutory period are separable from those that are barred under the

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> F. Supp. 414 (N.D. Ala. 1948). These decisions in effect treat each exposure as an independent cause of action."

(Emphasis added.) As the Garrett Court stated, "injury ... occurred on the date or dates of exposure." 348 So. 2d at 520 (emphasis added). It was on this basis that the Garrett Court, as discussed in the text that follows this footnote, could reason its way to a holding that, in effect, said no cause of action could be brought for any injuries if not brought within the limitations period following the last exposure, while at the same time maintaining the position that, even if a claim is timely filed under this rule, recovery may be had only for injuries experienced by the plaintiff within the limitations period.

> statute by the lapse of time. American Mutual Liability Ins. Co. v. Agricola Furnace Co., 236 Ala. 535, 183 So. 677 [(1938)]; Howell v. City of Dothan, 234 Ala. [158], 174 So. 624 [(1937)]; Lehigh Portland Cement Co. v. Donaldson, 231 Ala. 242, 164 So. 97 [(1935)]. Cf. Michalek v. United States Gypsum Co., 2 Cir., 76 F.2d 115 [(1935)]; Stornelli v. United States Gypsum Co., 2 Cir., 134 F.2d 461 [(1943)]."

(Emphasis added.)

In accord with this statement from Minyard is the following statement by this Court in Garrett, itself:

> "Among our cases, continuous tort cases are significant in the limitation of actions context. It was thus that in American Mutual Liability Insurance Co. v. Agricola Furnace Co., 236 Ala. 535, 183 So. 677 (1938), this Court held that recovery for a continuous tort could be had only for those damages which occurred within the period of limitations. See also Howell v. City of Dothan, 234 Ala. 158, 174 So. 624 (1937). The cause of action was, therefore, not barred by the statute of limitations until one year after the last day on which the plaintiff was exposed to the dangerous conditions which caused the injury. Minyard v. Woodward Iron Co., 81 F. Supp. 414 (N.D. Ala.), aff'd, 170 F.2d 508 (5th Cir. 1948). This was, and is, the rule in all cases concerning continuous torts in Alabama."

368 So. 2d at 521 (emphasis added).

It is as a consequence of such authority that I concurred in the main opinion's response to the first certified question on original submission.[2]

2. The Second Certified Question

I first note that I agree with Justice Shaw that the decision in Cazalas v. Johns-Manville Sales Corp., 435 So. 2d 55, 57 (Ala. 1983), indicates a distinction for purposes of § 95, Ala. Const. 1901, between the ability of the legislature, by lengthening a statute of limitations, to revive a cause of action previously barred by lapse of time, and the ability of the legislature to legislate an expansion of the period as to which damages can be claimed in an action

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[2]The main opinion on original submission stated:

> "[U]nder the continuous-exposure rule of Garrett, the statutory period of limitations for a continuous tort begins to run from the 'date of injury,' 368 So. 2d at 520, which is 'the last day on which plaintiff was exposed to the danger.' Garren v. Commercial Union Ins. Co., 340 So. 2d 764, 766 (Ala. 1976)."

___ So. 3d at ___. Consistent with the foregoing discussion, I believe this characterization of the holding in Garrett would be more accurately phrased if it stated that, "[u]nder the continuous-exposure rule of Garrett, the [last] period of limitations [within which any claim can be brought for any injuries suffered as a result of an exposure logically begins to run on] 'the last day on which plaintiff was exposed to the danger.'"

that is otherwise filed within a valid statutory limitations period. To the extent that Justice Shaw's writing also hints at some concern about this disparate treatment, I would agree with that as well. Such disparate treatment appears to be in conflict with the principles discussed in Part 1 above. In particular, as the main opinion on original submission observed, ___ So. 3d at ___ (quoting Cazales, 435 So. 2d at 57), the rule governing the period within which injuries must have occurred to be recoverable "'does not ... operate independently of the statute of limitations,'" but, "'[t]o the contrary, it is a function the statute of limitations.'"

That said, I am reluctant to suggest merit in the defendants' argument that the prohibition in § 95, Ala. Const. 1901, against "reviving" an "otherwise time-barred claim" placed some limit on the Court's holding in McKenzie v. Killian, 887 So. 2d 861 (Ala. 2004), that a six-year limitations period was applicable to wantonness claims. Section 95 states that "the legislature shall have no power to revive any right or remedy which may have become barred by lapse of time, or by any statute of this state." (Emphasis added.) I see nothing in this language that requires us to

apply § 95 to judicial decisions. To the contrary, doing so would be at odds with the strong bias in favor of retroactive application of judicial decisions, a bias that is a function of the so-called "declaratory theory" of appellate review.[3]

It is correct, as the welding-rod manufacturers argue on rehearing, that McKenzie was "wrongly decided." Nonetheless, it was decided. It thereby became the "law of the land." And it remained so until it was overruled in Ex parte Capstone

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[3]Aside from the defendants' reliance on § 95, Justice Shaw notes their reliance on caselaw:

> "The welding-rod manufacturers and amici curiae cite ... various cases in support of their position that a change in a statute of limitations, either directly by the legislature or indirectly by this Court, cannot operate to revive a cause of action already subject to the bar of a previous limitations period. See, e.g., Johnson v. Garlock, Inc., 682 So. 2d 25, 27-28 (Ala. 1996); Ex parte State Dep't of Revenue, 667 So. 2d 1372, 1374 (Ala. 1995); Crawford v Springle, 631 So. 2d 880, 881 (Ala. 1993); and Lader v. Lowder Realty Better Homes & Gardens, 512 So. 2d 1331, 1333 (Ala. 1987)."

___ So. 3d at ___ (emphasis added). In point of fact, I can find no cases that support the emphasized portions of this position. Consistent with the wording of § 95, the four above-cited cases address only actual changes in statutes adopted by the legislature. None of these cases addresses or places any limitation on the ability of a court, under the declaratory theory discussed below, to declare the meaning of an already existing statute.

Building Corp., [Ms. 1090966, June 3, 2011] ___ So. 3d ___ (Ala. 2011).

This Court's bias in favor of retroactive application of judicial decisions is based on the declaratory theory of appellate review:

> "'Since the Constitution does not change from year to year; since it does not conform to our decisions, but our decisions are supposed to conform to it; the notion that our interpretation of the Constitution in a particular decision could take prospective form does not make sense.' American Trucking Ass'ns, Inc. v. Smith, 496 U.S. 167, 201, 110 S.Ct. 2323, 110 L.Ed.2d 148 (1990) (Scalia, J., concurring).
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> "Even when this Court is not applying a rule of constitutional or statutory law, but is only addressing the effects of decisional law, our strong inclination is to avoid establishing rules that are to be applied prospectively only:
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> > "'Although circumstances occasionally dictate that judicial decisions be applied prospectively only, retroactive application of judgments is overwhelmingly the normal practice. McCullar v. Universal Underwriters Life Ins. Co., 687 So. 2d 156 (Ala. 1996) (plurality opinion). "Retroactivity 'is in keeping with the traditional function of the courts to decide cases before them based upon their best current understanding of the law.... It also reflects the declaratory theory of law, ... according to which the courts are understood only to find the law, not to make it.'" 687 So. 2d 156, quoting James B. Beam Distilling Co. v. Georgia, 501 U.S.

> 529, 535-36, 111 S.Ct. 2439, 2443-44, 115 L.Ed.2d 481 (1991).'
>
> "Professional Ins. Corp. v. Sutherland, 700 So. 2d 347, 352 (Ala. 1997)."

Alabama State Docks Terminal Ry. v. Lyles, 797 So. 2d 432 (Ala. 2001).

Consistent with this declaratory theory, the Court in McKenzie made a declaration as to the meaning of an existing statute. It was not acting as a legislature.

> "'A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power.'"

New Orleans Pub. Serv., Inc. v. Council of City of New Orleans, 491 U.S. 350, 370-71 (1989) (quoting Prentis v. Atlantic Coast Line Co., 211 U.S. 210, 226 (1908)). This difference is the reason for § 95.

SHAW, Justice (concurring specially).

I concur to overrule the application for rehearing. However, I write specially to acknowledge the concerns expressed on rehearing by the defendant welding-rod manufacturers and amici curiae Business Council of Alabama and Alabama Defense Lawyers Association that application of the six-year limitations period set out in McKenzie v. Killian, 887 So. 2d 861 (Ala. 2004), to Charles E. Jerkins's wantonness claim will have the unintended effect of reviving wantonness claims that would otherwise be subject to the two-year limitations bar that predated McKenzie. Specifically, the welding-rod manufacturers argue:

> "In answering the second certified question, this Court acknowledged that McKenzie was wrongly decided, as it recently held in Ex parte Capstone Building Corp., [[Ms. 1090966, June 3, 2011] ___ So. 3d ___ (Ala. 2011)] (overruling McKenzie). But it nonetheless applied McKenzie's erroneous six-year rule to plaintiff's wantonness claim -- allowing him to sue for any injury he could link to an exposure that occurred in the six years prior to his commencement of suit -- because he 'filed ... before McKenzie was overruled.' (___ So. 3d at ___, Jerkins v. Lincoln Elec. Co., No. 1091533 (Ala. June 30, 2011).) In so ruling, the Court looked only to the question of how Capstone should be applied to a case filed before it was decided, not to the question posed by the federal court as to how McKenzie should be applied to claims that arose before it was decided.

> "The Court thought it was necessary to apply McKenzie's rule because of a concern that applying a two-year limitations rule would deprive plaintiff of a 'vested right' in a claim that would have been timely under McKenzie. But the Court apparently overlooked the fact that many of plaintiff's alleged exposures occurred more than two years before the decision in McKenzie and were thus already stale under the limitations period that was applicable before McKenzie was decided. It thus did not address whether McKenzie resurrected claims based on those older exposures, notwithstanding defendants' own vested rights in the repose afforded to them under the previously applicable two-year limitations period.
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> "Defendants seek rehearing solely as to this narrow issue, and ask the Court to conclude that McKenzie's rule should only apply as to claims that were not already stale under the previously applicable two-year limitations period on the date McKenzie was decided. Because the Jerkins decision did not specifically address this issue, defendants respectfully submit that the Court overlooked or misapprehended significant points of law and fact, warranting rehearing of that issue. See Ala. R. App. P. 40(b)."

(Footnote omitted.)

As I understand the welding-rod manufacturers' argument, they do not challenge this Court's answer to the first certified question, which was summarized in the instant opinion on original submission as follows: "A plaintiff injured by long-term continuous exposure to a toxic substance is limited to recovering damages attributable to injuries

occurring within the period of limitations." ___ So. 3d at ____. They object, instead, to this Court's answer to the second certified question, which authorizes the application of the six-year limitations period and, by extension, a six-year period of recovery for damages to Jerkins's wantonness claim. In other words, the specific concern of the welding-rod manufacturers seems to be their perception that there is a constitutional impediment to allowing Jerkins to recover damages attributable to injuries occurring during the six-year period preceding the filing of his action.

Amici curiae argue generally that any application of McKenzie so as to revive a wantonness claim that would otherwise be subject to the bar of the pre-McKenzie two-year limitations period would be unconstitutional. They state:

> "[F]or example, a plaintiff whose cause of action for wantonness accrued on March 4, 2002, but who had not yet filed a claim for that tort when McKenzie was decided on March 5, 2004, had already allowed his right to assert that claim [to] lapse. At that point, the defendant had a vested right in its limitations defense."

(Emphasis in original.)

The welding-rod manufacturers and amici curiae cite Ala. Const. 1901, art. IV, § 95, and various cases in support of

their position that a change in a statute of limitations, either directly by the legislature or indirectly by this Court, cannot operate to revive a cause of action already subject to the bar of a previous limitations period. See, e.g., Johnson v. Garlock, Inc., 682 So. 2d 25, 27-28 (Ala. 1996); Ex parte State Dep't of Revenue, 667 So. 2d 1372, 1374 (Ala. 1995); Crawford v. Springle, 631 So. 2d 880, 881 (Ala. 1993); and Lader v. Lowder Realty Better Homes & Gardens, 512 So. 2d 1331, 1333 (Ala. 1987).

However, I do not understand this Court's opinion on original submission as constituting authority for the general proposition that an otherwise time-barred wantonness claim may be revived by the application of the six-year limitations period set out in McKenzie. With respect to the welding-rod manufacturers' argument that the applicable period of recovery for damages could not constitutionally extend back more than two years from the date Jerkins filed his action, I note that there appears to be authority to the contrary. In Cazalas v. Johns-Manville Sales Corp., 435 So. 2d 55 (Ala. 1983), the rationale of which was not challenged on original submission and is not challenged on rehearing, this Court held that, at

least in certain instances, § 95 would not necessarily restrict the applicable period of recovery for damages concomitant with a new limitations period. This Court stated: "While § 95 would prohibit the legislature from reviving a cause of action which had become barred by lapse of time, there is no constitutional requirement that damages be apportioned to conform with the prescriptive period for filing an action." 435 So. 2d at 57. This Court did not address this issue on original submission; any reexamination of Cazalas must await a specific challenge to the logic of its holding.

With respect to the arguments of amici curiae that this Court has inadvertently held that otherwise barred claims may be revived, I note that the United States Judicial Panel on Multi-District Litigation consolidated in the United States District Court for the Northern District of Ohio, Eastern Division ("the MDL court"), in its certification, provided this Court with a limited procedural background of the multi-district litigation, as well as certain relevant, undisputed facts. The specific questions certified were framed under and based upon the facts of Jerkins's case, which I understood to

be representative of other Alabamians with wantonness claims now pending before the MDL court. Jerkins's action was filed after this Court's decision in McKenzie, and his alleged exposure to welding fumes was essentially continuous from 1979 through about 2008. Applying the limitations period set out in McKenzie, see Crawford, 631 So. 2d at 881 (noting that "generally the statute of limitations to be applied is that which is in effect when the action is filed"), and the continuing-exposure rule of Garrett v. Raytheon Co., 368 So. 2d 516 (Ala. 1979), to Jerkins's action, this Court concluded on original submission that his action was clearly not time-barred. This Court was not faced with the issue whether a claim was being revived by the application of the six-year limitations period to Jerkins, i.e., the kind of issue illustrated by the example provided by amici curiae in their rehearing application.

In sum, the concerns expressed on rehearing, although in my view worthy of serious consideration, are outside the scope of the specific questions certified to this Court and thus must await resolution another day.