SUPREME COURT OF FLORIDA

CASE NO. 66,198

FIRST DISTRICT CASE NO. AU-62

RICHARD PULLUM,

Plaintiff/Petitioner,

v.

CINCINNATI, INC.; THE CINCINNATI SHAPER COMPANY; STI-GRO FIRST CORP., formerly known as Harry P. Leu Machinery Corp., dissolved Florida corporation; ROBERT H. STINE, EUGENE E. STINE and ROBERT E. GROTH, as directors and/or trustees of Sti-Gro First Corp.,

Defendants/Respondents.

BRIEF OF AMICUS CURIAE ACADEMY OF FLORIDA TRIAL LAWYERS SUPPORTING POSITION OF PETITIONER

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ACADEMY OF FLORIDA TRIAL LAWYERS

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QUESTIONS PRESENTED

POINT I

WHETHER FLORIDA STATUTE SECTION 95.031(2) DENIES EQUAL PROTECTION OF THE LAWS TO FLORIDA CITIZENS WHO ARE INJURED BY PRODUCTS DELIVERED TO THE ORIGINAL PURCHASER BETWEEN EIGHT AND TWELVE YEARS PRIOR TO THE INJURY.

POINT II

WHETHER THE FIRST DISTRICT COURT OF APPEAL ERRED IN RELYING ON PURK v. FEDERAL PRESS COMPANY, 387 So.2d 354 (Fla. 1980) TO DISPOSE OF PETITIONER'S EQUAL PROTECTION ATTACK ON FLORIDA STATUTE 95.031(2).

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STATEMENT OF THE CASE AND FACTS

This brief is submitted on behalf of the ACADEMY OF FLORIDA TRIAL LAWYERS, a large statewide association of trial lawyers specializing in litigation in all areas of the law, in support of the position of the Plaintiff/Petitioner in this case.

Since the ACADEMY does not have a complete copy of the Record on Appeal, we will assume the accuracy of the Statement of the Case and Facts as set forth by the Plaintiff/Petitioner, RICHARD PULLUM, in his initial brief on the merits.

In this brief, reference to the Defendants/Respondents, CINCINNATI, INC., THE CINCINNATI SHAPER COMPANY, STI-GRO FIRST CORP., formerly known as Harry P. Leu Machinery Corp., ROBERT H. STINE, EUGENE E. STINE and ROBERT E. GROTH, as directors and/or trustees of Sti-Gro First Corp., will be by name or as the Defendants/Respondents; reference to RICHARD PULLUM, will be by name or as the Plaintiff/Petitioner. Any emphasis appearing in this brief is that of the writer unless otherwise indicated.

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ARGUMENT

POINT I

FLORIDA STATUTE SECTION 95.031(2) DENIES EQUAL PROTECTION OF THE LAWS TO FLORIDA CITIZENS WHO ARE INJURED BY PRODUCTS DELIVERED TO THE ORIGINAL PURCHASER BETWEEN EIGHT AND TWELVE YEARS PRIOR TO THE INJURY.

It is the ACADEMY's position that the First District Court of Appeal erred in upholding the constitutionality of Section 95.031(2) when faced with the constitutional attack presented by Plaintiff/Petitioner RICHARD PULLUM establishing that this statute operates to deny equal protection of the laws to those persons injured by a product which is between eight and twelve years old. As explained below, those persons falling within this classification have varying amounts of time, but all less than four years, in which to file suit if injured by a defective product. However, those persons injured by a product which is less than eight or more than twelve years old, always have four full years in which to file suit.

The ACADEMY submits that the operation of this statute and its effect on the Plaintiff/Petitioner in this case, as well as other citizens of this State who are or may be similarly situated, works an unavoidable injustice which can only be remedied by declaring this statute unconstitutional based on the equal protection guarantees of the Florida and United States Constitutions.

The statute in question, section 95.031(2), provides that:

> (2) Actions for products liability and fraud under s. 95.11(3) must be begun within the period prescribed in this chapter, with the

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> 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 s. 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.

However, this statute was effectively "amended" by this Court's decisions in Battilla v. Allis Chalmers Manufacturing Company, 392 So.2d 874 (Fla. 1980) and Diamond v. E. R. Squibb & Sons, Inc., 392 So.2d 671 (Fla. 1981).

These decisions followed this Court's opinion in Overland Construction Company v. Sirmons, 369 So.2d 572 (Fla. 1979) which found that Section 95.11(3)(c), providing a twelve year statute of repose for actions arising out of improvements to realty, was unconstitutional because it denied claimants the right to access of the courts. The Court will note that no claim has been made by the Plaintiff/Petitioner that he was denied access to courts by the operation of this statute.

Prior to Battilla and Diamond, Section 95.031(2) barred a plaintiff's right of action before it arose for those persons injured by a product more than twelve years old. Nevertheless, these decisions gave a plaintiff, injured by a product more than twelve years old, four years from the date of discovery of their cause of action in which to bring suit. Therefore, if a plaintiff was "fortunate" enough to have been injured by a product which was more than twelve years old, he would have had four full years in which to bring an action.

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Those claimants, including RICHARD PULLUM, who are injured by a product which is more than eight but less than twelve years old, suffer the arbitrary and capricious operation of this statute, since they alone are afforded less than four years within which to seek recovery for their injuries under the existing state of law with respect to access to courts. See Bauld v. J. A. Jones Construction Company, 357 So.2d 401 (Fla. 1978) and Purk v. Federal Press Company, 387 So.2d 354 (Fla. 1980). Persons falling within this category could have anywhere from one day to four years within which to file suit, depending on mere happenstance. The constitutional infringement on this class of claimants, including Plaintiff/Petitioner, is apparent.

In analyzing whether a statute violates equal protection guarantees, one must determine whether there is any reasonable or rational basis for the classification, the classification must treat all class members alike, and the division in the two classes must bear some rational relationship to a legitimate state objective. Sasso v. Ram Property Management, 431 So.2d 204 (Fla. 1st DCA 1983); Lasky v. State Farm Mutual Automobile Insurance Company, 296 So.2d 9 (Fla. 1974). In this case, application of the twelve year statute of repose clearly does not meet this test. The class of persons injured by manufactured products is not being treated equally, since those who were injured after twelve years may bring suit at any time within the four years after the discovery of the facts giving rise to their cause of action, as may those injured before a product reaches its eighth year. It is only those in the middle category who, because of purely accidental factors, do not have an equal time within which to bring suit.

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This Court has previously, without hesitancy, struck down statutes which violate equal protection guarantees. In Osterdorf v. Turner, 426 So.2d 539 (Fla. 1982) a five year residency requirement for entitlement to a homestead exemption of $25,000.00 was held to violate the equal protection clause, where this Court found no rational basis for distinguishing between bona fide residents of more than five consecutive years and bona fide residents of less than five consecutive years, in the payment of taxes on their homes.

Similarly, in Mikell v. Henderson, 63 So.2d 508 (Fla. 1953) this Court struck down a statute which prohibited the raising, training and fighting of gamecocks except when conducted on steamboats. Again this Court found no rational basis for the classification of cockfighting on land or on a steamboat and held the statute unconstitutional on equal protection grounds. Also see, Moore v. Thompson, 126 So.2d 543 (Fla. 1960) [Sunday closing law applicable to used car dealers only violative of equal protection]; Rollins v. State, 354 So.2d 61 (Fla. 1978) [holding that statute prohibiting persons under the age of 21 from playing billiards in a billiard parlor was arbitrary and unconstitutional where there was no rational distinction between playing billiards in a billiard parlor or playing pool in a bowling alley].

Although this Court has held that the statute in question did not violate equal protection guarantees when passed, Purk, supra, that decision did not discuss what equal protection argument may have been made and based its ruling on the fact that the statute did not deny the plaintiffs access to the courts. At the time of that ruling, however, the present situation had

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not arisen because the Supreme Court had not yet ruled, as it later did in Battilla and Diamond, that Section 95.031(2) would have no applicability to causes of action discovered after twelve years. The inapplicability of Purk will be discussed further, infra.

This Court in Battilla and Diamond effectively amended this statute to provide that it would not apply to persons discovering their cause of action after twelve years. It was this "amendment" which now renders this statute vulnerable to an equal protection attack.

In Caldwell v. Mann, 157 Fla. 633, 26 So.2d 788 (1946), the statute in question controlled the possession and sale of mullet and originally applied to the entire State of Florida when it was passed. Subsequently the Legislature eliminated sixteen counties from the operation of this statute. Upon review of an equal protection challenge, this Court held that an act which is valid at the time of its enactment may become invalid by a change in conditions occurring after its passage. Id. at 790.

In Caldwell, this Court concluded that the amendment destroyed the equal protection of the laws that existed in the Act when it was passed, since there was no valid basis for the classification which prohibited the possession of mullet in certain counties and did not as to others. Id. at 791. See also Georgia Southern and Florida Railway Company v. Seven-Up Bottling Co., 175 So.2d 39 (Fla. 1965), holding that a statute valid when passed became discriminatory because of changing conditions.

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In sum, operation of Section 95.031(2) against persons injured by products between eight and twelve years old results in disparate treatment of these potential claimants. There is no rational or reasonable basis for distinguishing these claims from claims made by persons injured by products from one to eight years old or over twelve years old. No argument has been made by the Defendants/Respondents, nor does one exist, that this arbitrary, unequal treatment furthers the legislative purpose of this statute.

This statute's objective was originally to prevent perpetual product liability by eliminating what the Legislature perceived was an undue burden on manufacturers of products utilized in this state. Battilla at 875 (dissenting opinion). However because of this Court's decisions in Battilla and Diamond, that intent has been effectively defeated.

As the Plaintiff/Petitioner has amply illustrated, RICHARD PULLUM is among that class of persons injured by manufactured products which are eight to twelve years old and which do not have four years within which to file suit for any injuries sustained by these products, unlike those claimants injured by products less than eight years old or more than twelve years old. The unequal treatment which has resulted to persons injured by an eight to twelve year old machine is purely accidental and consequently arbitrary. This result is simply the product of this Court's attempts in Battilla and Diamond to eradicate the other unconstitutional effects of this statute, which have now left RICHARD PULLUM in the unenviable position of also being a victim of its arbitrariness.

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POINT II

THE FIRST DISTRICT COURT OF APPEAL ERRED IN RELYING ON PURK v. FEDERAL PRESS COMPANY, 387 So.2d 354 (Fla. 1980) TO DISPOSE OF PETITIONER'S EQUAL PROTECTION ATTACK ON FLORIDA STATUTE SECTION 95.031(2).

The First District rejected RICHARD PULLUM's equal protection challenge by simply stating in its opinion that:

> The Supreme Court having denied in Purk the equal protection attack on the subject statute, we likewise reject such an attack in the instant case.

Pullum v. Cincinnati, Inc., et al., 9 FLW 2057 (Fla. 1st DCA Case No. AU-62 September 26, 1984). From this language it appears that the First District apparently misconceived the fact that although a statute may survive a constitutional attack on one basis it may still be held unconstitutional due to change of circumstances, including amendments, or impractical operation. Aldana v. Holub, 381 So.2d 231 (Fla. 1980); Georgia Southern and Florida Railroad Company v. Seven-Up Bottling Company, supra; Atlantic Coast Line Railroad Company v. Ivey, 148 Fla. 680, 5 So.2d 244 (1942); Caldwell, supra.

As Plaintiff/Petitioner pointed out to the First District, the decision in Purk is not controlling here due to the fact that Mrs. Purk was injured prior to the enactment of Section 95.031(2). Purk at 356. RICHARD PULLUM was injured after the enactment of this statute. Therefore the operation of this statute, as complained of here, had not yet occurred when this Court decided Purk.

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Secondly, the Purk appeal did not concern the equal protection arguments made herein but rather determined that there was no access to courts problem presented by enactment of this statute.

Thirdly, in Purk, the statute was attacked from its inception; however, MR. PULLUM is now challenging this statute in reference to its application to him after Battilla and Diamond have "amended it" by applying the access to courts guarantee. This Court's decision in Purk preceeded those cases.

Moreover, the only reference in the Purk decision to equal protection considerations stated:

> The appellates contend that the statute denies equal protection by establishing a classification which has no rational relation to a proper state objective. A statute of limitation does not deny equal protection if it is based on a rational distinction among classes of persons. See, e.g. Gammon v. Cobb, 335 So.2d 261 (Fla. 1976). The above discussion of the distinction between Bauld and Overland demonstrates that the statute treats differently persons in different circumstances. We hold that it does not deny equal protection.

Purk at 357-358. It is clear from this quotation in Purk that a statute violates the equal protection laws if it treats people unequally in the same class. In Purk, however, two distinct classes were found to exist, i.e. those injured before the statute became effective and those injured afterwards. This unequal treatment between those in the first class and those in the second class did not violate equal protection because they were different classes.

Because this Court's decisions in Battilla and Diamond had not yet been decided and, thus, had not yet thwarted the legislative goal of avoiding perpetual products liability, the Purk court was not considering the issue of whether there is a rational distinction between persons injured by a product which is eight to twelve years old and those hurt by a product of any other age. This Court's decision in Purk followed Bauld which did not address this issue.

The issue raised by this appeal has not yet been addressed by this Court. MR. PULLUM is not in the class of persons who were injured by the enactment of this statute such as the plaintiffs in Purk. He is in that class of persons who were injured after the statute's enactment as in Battilla and Diamond.

The Battilla and Diamond decisions, by applying the access to courts guarantee of the Florida Constitution, unavoidably created an irrational class which is unconstitutionally denied equal protection by the operation of Section 95.031(2). This result is clearly not what the Legislature intended. Neither the Defendants/Respondents, the trial court, or the First District has suggested any practical differences which exist between those persons injured by a product which is eight to twelve years old and those persons injured by other defective products.

Certainly some evidence in the record must exist to justify this distinction and the special classification which has been created. There is absolutely no indication from the record or prior case law or the statute itself that the Legislature would have enacted Section 95.031(2) if it had known that the

access to courts guarantee would amend the statute such that it would not protect manufacturers from perpetual product liability and would serve only to discriminate against those persons injured by products which are eight to twelve years old.

The First District found that RICHARD PULLUM's equal protection argument was not materially different from that of Mrs. Purk. However, the First District did not review the Purk briefs in order to decide whether the equal protection attack there was materially different from RICHARD PULLUM's. It is clear that this Court has the authority to do so. Mitchell v. Gillespie, 161 So.2d 842 (Fla. 1st DCA 1964).

A review of the briefs in Purk clearly indicates that the equal protection attack which Mrs. Purk raised concerned only whether the twelve year statute of repose selected by the Legislature was unconstitutional based on the fact that it created a class of persons who could, if injured by a defective product of less than twelve years, pursue a cause of action against the manufacturer. However, those persons who were injured by a product more than twelve years old would not be able to pursue their claim.

The Purks argued that this twelve year cap was arbitrary and unreasonable because most manufactured products have a useful life of more than twelve years. Solely on this basis, the Purks attacked the constitutionality of this statute based on the equal protection provisions of the Florida Constitution. Certainly the issue before this Court in the present appeal is glaringly distinct.

The class of which RICHARD PULLUM is a member has been created by prior decisions of this Court, construing this statute, which were decided after Purk. Therefore this issue could not have been raised at the time this Court rendered the Purk decision. As a result, the ACADEMY submits that the First District erred in upholding the trial court's dismissal of RICHARD PULLUM's claims based on its finding that Section 95.031(2) was constitutional under this Court's decision in Purk.

This statute is incurably defective and discriminates against persons hurt by products which are eight to twelve years old, since it affects no one else. As illustrated above, the Purk decision is wholly inapplicable and cannot be the foundation for upholding the statute's constitutionality based on the record before this Court. Therefore the opinion of the First District Court of Appeal upholding the constitutionality of Section 95.031(2) must be reversed.

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CONCLUSION

For the reasons set forth above, the ACADEMY OF FLORIDA TRIAL LAWYERS respectfully urges this Court to reverse the decision of the First District Court of Appeal and hold that Section 95.031(2) denies equal protection of the laws to persons such as RICHARD PULLUM who are injured by products delivered to the original purchaser between eight and twelve years prior to the injury.

Respectfully submitted,

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On Behalf of Amicus Curiae
ACADEMY OF FLORIDA TRIAL LAWYERS

By _____
Cathy Jackson Burris

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing were served by mail this 19th day of December, 1984 upon: Wayne Hogan, Esq., 804 Blackstone Building, 233 East Bay Street, Jacksonville, Florida 32202, attorney for Plaintiff/Petitioner, and upon: Ellis E. Neder, Jr., Esq., 1001 Blackstone Building, 233 East Bay Street, Jacksonville, Florida 32202, attorney for Defendants/Respondents.

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