IN THE SUPREME COURT OF FLORIDA

CASE NO.: 66,198

RICHARD A. PULLUM,

Petitioner,

vs.

CINCINNATI, INC., etc., et al.,

Respondents,

RESPONDENT'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

The Petitioner is Richard Pullum, Plaintiff below and will be referred to herein as "Petitioner".

The Respondents, Cinncinnati, Incorporated, is the manufacturer of the product in question and Sti-Gro First Corporation, formerly known as Harry P. Leu Machinery Corporation, is the dealer of the manufacturer, and together they were the Defendants below, and will be referred to herein as "Respondents". The Record on Appeal will be referred to as "R". The Petitioner filed his action against the Respondents, on November 25, 1980. The original action included only Harry P. Leu, Inc., as Defendant. Thereafter, a Second Amended Complaint was filed to include Cincinnati, Incorporated as a Defendant and to name Sti-Gro First Corporation as a Defendant. The Second Amended Complaint was filed pursuant to an Order which granted leave to file an Amended Complaint and change the name of the dealer to include the Trustees of Sti-Gro First Corporation as a dissolved corporation. (R1-7)

The Petitioner, Plaintiff below, in his Second Amended Complaint, sought to recover damages based on the theories of product liability, negligence, breach of implied warranty, and strict liability in tort. All counts were based on an alleged manufacturing defect of a press brake owned and operated by the employer of the Petitioner, who was injured when he placed his hand between the ram and bed of the press brake and unintentionally stepped on the foot pedal, causing the machine to operate and crush his hand. (R31)

The Respondent, Cincinnati, Incorporated, answered the Second Amended Complaint setting forth a general denial and affirmative defenses, and alleging in particular that Florida Statute 95.031(2) had run and barred Petitioner's cause of action. (R26) The Respondent Sti-Gro also answered the Second Amended Complaint

by alleging that Florida Statute 95.031(2) had run and therefore barred the Petitioner's cause of action. (R58, 68)

Thereafter, the parties entered into a pre-trial compliance and stipulation (R73) which was set forth in the Order of the Court dated June 27, 1983, and styled "Order Re: Statute of Limitations". (R92) The Court entered its Order on June 27, 1983, finding that the applicable Statute of Limitations, Florida Statute 95.031(2) had run and therefore barred the Petitioner's claim. Thereafter, the Court entered Summary Final Judgment in favor of the Respondents on June 29, 1983. (R95(

The Petitioner, Appellant below, timely filed his Notice of Appeal on July 13, 1983. The First District Court of Appeal heard oral argument on April 25, 1984, and rendered its opinion on September 26, 1984. Richard Pullum v. Cincinnati, Incorporated, et al, ____ So.2d _____, 9 FLW 2057 (Fla. 1st DCA Sept 26, 1984). Petitioner's Motion for Rehearing was denied, but the First District Court of Appeal certified the question under consideration by this Court as a question of great public importance.

STATEMENT OF FACTS

The parties in the lower court stipulated as to certain facts that were undisputed which were essentially as follows: (1) the action was filed by the Petitioner on November 25, 1980; (2) the machine in question, a press brake, was delivered to the original purchaser on November 11, 1966; (3) the Petitioner was injured while operating the machine on April 29, 1977, (R92)

The Petitioner was injured on April 29, 1977 while operating a Cincinnati press brake series 9 x 10, serial number 35110 while he was working at the course of his employment for Florida Metal Products, Inc. located in Jacksonville, Duval County, Florida (R Dep., Pullum, p. 28, 29). The accident in question happened on the Friday following the Monday that the Petitioner started to work at Florida Metal (R Dep., Pullum, p. 22). The Petitioner had no experience working with press brakes or fabricating equipment prior to this employment and no training other than in the 8th grade when he made an ashtray from a piece of metal with a hammer. (R Dep., Pullum, p. 24) The Petitioner had made no study or put in any apprenticeship, but knew the general workings of a press brake, that it was a machine that bends metal. (R Dep., Pullum, p.24-27)

The Petitioner recalled a warning sign on the machine stating "Danger, cut the machine off before putting hand under die". (R Dep., Pullum, P. 47-48)

On the day of the accident, the Petitioner was bending four-inch galvanized sheet metal which was eight or ten feet long, putting three and a half inches into the back of the machine and bending the last half inch of it at a 90-degree angle upward. (R Dep., Pullum, p. 49-50) He was operating the machine with a helper, using their hands to place the three and a half inches to the bacak of the machine, holding the metal with their fingers, one-half inch away from the ram and bed as the ram struck the metal. (R Dep., Pullum, p. 49-50) The press brake was a mechanical press brake,

he was right-handed and was using his left foot to work the foot pedal. (R Dep., Pullum, p. 53-56) The Petitioner was injured while bending a piece of metal with the larger end to the back and the metal fell to the back of the machine, since it was not propped, and to get the metal from the back side of the machine, the Petitioner stuck his hands into the point of operation and at that time unintentionally he stepped on the pedal, causing the ram to crush his hands. (R Dep., Pullum, p 57-59) Neither the Petitioner nor his helper were using tools to hold the metal in place, but were only using their hands.

No barrier guard was being utilized by the employer in the setup, although approximately three years prior to the date of the injury, the Respondent/manufacturer had offered the employer, Florida Metals, a "Waveguard" device that would have attached to the machine, setting up an electrical light beam, the length of the point of operation that would have stopped the ram in place whenever a workman broke the light beam or placed any part of their body in the area of the point of operation. (R Dep., Wellington, p. 45-57) The employer chose not to purchase the Waveguard device offered by the Respondent/manufacturer.

Additionally, the Respondent/manufacturer, after the date of the delivery of the machine, continually provided safety information and warning stickers to the employer by gratuitously mailing such information to the said purchaser of the machine, Florida Metal. The Respondent/manufacturer, on 7/71, mailed a mechanical safety manual to all known users, including Florida Metal, on 10/71 mailed a Waveguard flyer introducing the Waveguard safety device to all known users, including Florida Metals, on 2/73 mailed an "Updated Bulletin Vol. No. 1" advising all owners and users of the ANSI Standards and offered Cincinnati's help in making sure that their customers' machines complied with ANSI standards, on 6/74 mailed "Update Bulletin Vol. No. II, No. 3" advising the users of the user's responsibilty to guard point of operations of the press brakes, on 6/24/74, mailed Cincinnati's proposal No. 74-695 proposing to

provide Waveguard device for the subject machine to Florida Metals, and on 6/75 mailed Update Bulletin Vol. No. III, No. 3 offering to lend an ANSI B11 film dealing with cutting, bending and teamwork as it relates to metal forming. On 1/19/76, Cincinnati mailed press brake safety material, including a complimentary copy of the ANSI B11..3 standards safety manual, set of warning tags, operator safety guidelines, operator safety check, Waveguard Bulletin, Guidelines for Installing a Sensing Device, a letter on a one-piece brake band and a letter offering Cincinnati's assistance to update all of their users' equipment. On 3/76, Respondent mailed Update Vol. No. IV, No. 1 to all known users following up on the January safety mailing and on 7/76 mailed Update Vol. IV, No. 3 to all users discussing OSHA safeguarding requirements and offered Cincinnati's help. (R Dep., Wellington, p. 45-61)

Thereafter, on 4/29/77, the Petitioner was injured at Florida Metals on the Cincinnati machine.

The Petitioner, Mr. Pullum, was operating the machine at the time of his injury without a foot guard over the foot pedal.

The machine, as sold and delivered by Cincinnati, met the applicable ANSI standards by providing a foot locking device to lock the pedal in place. (R Dep., Wellington, p. 61)

The Florida Worker's Compensation safety rules and provisions, Section 440.56, et seq. and 8 AS-11MPOO-1960, et seq. provide that the employer has the duty of providing point of operation guarding as well as providing substantial covers over foot pedals in regard to press brakes. Additionally, the OSHA standards place the burden upon the employer to provide adequate guarding for machinery and the ANSI standards make it the burden of the employer or user to provide point of operation guarding. The ANSI standards do not require a foot pedal cover. The OSHA and ANSI standards were effective after the sale and delivery of the press brake but prior to the date of the accident and place the burden on the employer rather than the manufacturer. The

Florida Worker's Compensation safety rules were adopted in 1960 prior to the sale and delivery of the said machine and were in effect at the date of the accident.

The applicable Florida Statute of Limitations, Florida Statute 95.031(2) was effective on January 1, 1975, and provides in pertinent part as follows:

> Section 3. Section 95.031, Florida Statute is created to read:
>
> (3) Actions for products liability and fraud under Section 95.11(3) must be begun within the period prescribed in this chapter with the 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 Section 95.11(3), but in any event within twelve years after the date of delivery of the completed product to its original purchaser or 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.
>
> Section 35. If any part or parts of this act are adjudged invalid, the remaining part shall not be affected thereby.
>
> Section 36. This act shall become effective on January 1, 1975, but any action that will be barred when this act becomes effective and that would not have been barred under prior law may be commenced before January 1, 1976, and if it is not commenced by that date, the action shall be barred.
>
> Approved by the Governor July, 3, 1974.
>
> Chapter 74-382 is shown in its entirety in the Appendix.

The machine having been delivered on November 11, 1966, the 12-year cutoff from the date of delivery would happen on November 11, 1976, when the applicable statute of limitations would run. The date of the enactment of the statute being January 1, 1975, the injury occurred after the enactment. The Petitioner/Plaintiff had from April 29, 1977, (date of injury) until November 11, 1978, within which to bring his action within the applicable statute of limitations; otherwise, his action would have been barred on November 11, 1978 (12 years from date of delivery). The Petitioner/Plaintiff did not bring his action until November 25, 1980, and thus the lower court held that the action was time barred by the Statute of Limitations, Florida Statute 95.031(2).

The lower court held that the Petitioner had one year, six months and twelve days to file his action before the statute ran, but he did not do so.

The Circuit Court, Judge John M. McNatt on June 27, 1983 in its "Order Re: Statute of Limitations," noted

> "The cited statute requires that such an action be filed 'within 12 years after the date of delivery', whereas this action was filed fourteen years and fourteen days after the date of delivery and three years, six months and twelve days after the injury.
>
> "The Plaintiff had one year, six months and twelve days to file his action before the statute ran, but did not do so."
>
> "Plaintiff asserts taht the statute is unconstitutional because it denies Plaintiff equal protection of the laws under the Constitution of the United States and of the State of Florida. However, the Supreme Court of Florida has held the statute to be Constitutional. Purk v. Federal Press Co., (Fla.) 387 So(2d) 354.
>
> "This action falls squarely within the Purk decision and the Court is compelled to rule that the action is barred by said statute of limitations."

(Appendix 1)

The Petitioner's only issue is whether the statute violates the equal protection clause of the United States and Florida Constitutions. U.S. Constitution, Amendment XIV, Section 1, and Fla. Constitution Basic Rights, Article I, Section 2. (Appendix 4-5)

The Respondents agree that this is the only issue presented.

ISSUE PRESENTED

I.

Whether Florida Statute, Section 95.031(2) (1975), Amended 1977 Voilates the Equal Protection Clauses of the United States Constitution, Amendment XIV, Section 1 and Florida Constitution, Article I, Section 2.

ARGUMENT

I.

The Purk Decision is Controlling.

The Florida Supreme Court, Purk v. Federal Press Co., 387 So.2d 354 (Fla. 1980) has held that the statute of limitations, Florida Statute 95.031(2) does not violate the equal protection clauses when the time for bringing the action is only shortened.

The Petitioner in this case had one year, six months and twelve days to file his action. The period was shortened by the application of Florida Statute 95.031(2). The injury occurred after the date of the enactment of the statute, and the Petitioner made his own decision to wait three years, six months and twelve days after the date of the injury to bring his action. The Petitioner cannot now complain, having had an adequate time to bring his action and himself being the sole cause of the bar to his action.

The Supreme Court of Florida has decided squarely the arguments and issues presented by the Petitioner in the case of Purk V. Federal Press Co., supra.

In the Purk case, the Plaintiff in a product liability action appealed from a summary judgment entered in favor of the Defendants on the grounds that the same Statute of Limitations, Florida Statute 95.031(2), barred the action. The Supreme Court of Florida, in an opinion written by The Honorable Justice J. Boyd, held that the Statute of Limitations, providing that an action for products liability must be begun within 12 years after the date of the delivery of the completed product to its original purchaser regardless of the date the defect in the product was or should have been discovered, did not unconstitutionally deny access to the courts, since the time for bringing the suit was shortened and the cause of action was not abolished, and further

held that the statute did not deny equal protection. In Purk, the Defendant, Federal Press, manufactured and the Defendant, Florida Machinery Corporation, sold and delivered a punch press to the Plaintiff's employer with delivery occurring no later than June 2, 1961. Purk was injured using the machine on April 24, 1973. Florida Statute 95.031(2) was effective on January 1, 1975. Purk was injured on April 24, 1973, and Purk filed her products liability action on April 13, 1976.

Section 36 of the statute contains a savings clause by virtue of which an action that would have been barred by the new statute and that would not have been barred under the prior law was allowed a savings period allowing the case to be commenced before January 1, 1976, or be barred.

Under the four year statute, Florida Statute 95.11(3)(a)(e) Purk would have been allowed to file her action until April 24, 1977. Purk's action then fell under the provisions of the savings clause, Section 36 of the new statute, in that the action "would not have been barred under prior law" since the injury occurred on April 24, 1973. Purk thus had from April 24, 1973 until January 1, 1976 to bring the action and the new statute shortened the four year statute by one year, four months and six days.

The Supreme Court in Purk discussed two previous cases dealing with the constitutionality of the new statute, Bauld v. J. A. Jones Construction Co., 357 So. 2d 401 (Fla. 1978) and Overland Construction Co. v. Sirmons, 369 So.2d 572 (Fla. 1979). The Purk Supreme Court had previously struck down Florida Statute 95.11(3)(c) in application in Overland insofar as it provided an absolute bar to lawsuits brought more than 12 years after events connected with the construction of improvements to real property.

We can present the issues no better than the Florida Supreme Court in Purk v. Federal Press Co., beginning at page 357 as follows:

"In Bauld v. J. A. Jones Construction Co., 357 So.2d 401 (Fla. 1978), we were faced with the question of the validity of section 95.11(3)(c), Florida Statutes (1975). We held that the 12 year limitation of actions founded on the design, planning, or construction of an improvement to real property, as applied in that case, did not deny access to courts by abolishing a cause of action in violation of Article I, Section 21, Florida Constitution. In the subsequent case of Overland Construction Co. v. Sirmons, 369 So.2d 572 (Fla. 1979), we held that Section 95.11(3)(c), insofar as it provided an absolute bar to lawsuits brought more than 12 years after events connected with the construction of improvements to real property, did violate Article I, Section 21.

The majority opinion in Overland explained why the two cases were treated differently.

In Bauld, unlike the present case, the injury occurred prior to the enactment of Section 95.11(3)(c), at a time when the applicable statute of limitations provided only that suit must be commenced within 4 years. When Section 95.11(3)(c) took effect in 1975, 2-1/2 years of that period had elapsed, during which time an action could have been filed. Moreover, the savings clause of Section 95.022 extended the deadline for instituting existing causes of action which would otherewise have been terminated by the new 12 year limitation for an additional year. Consequently, the absolute 12 year prohibitory provision did not operate to abolish Pearl Bauld's cause of action, but merely abbreviated the period within which suit could be commenced from 4 to 3-1/2 years. Although shortened, the time for bringing suit was found to be ample and reasonable; it was not forestalled altogether.

By contrast, Sirmons' cause of action was already barred by the 12 year limitation when it first accrued - that is, when his injuries occurred. No judicial forum would ever have been available to Sirmons if the 12 year prohibitory portion of the statute were given effect. Obviously, our decision as to the validity of the statute vis-a-vis Pearl Bauld would not operate to bar our declaring the same statute invalid vis-a-vis Jerry sirmons. 369 So.2d at 574-75 (footnotes omitted).

The present case is like Bauld in that the injury occurred prior to the enactment of Section 95.11(3)(c). The time for bringing suit was shortened, but the cause of action was not abolished. We hold that as applied here, Section 95.11(3)(c) does not deny the right of access to courts.

(2) The Petitioner 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 v. Federal Press Co., 387 So.2d at p. 357-358.

The Florida Supreme Court in Purk made note that the Purk case is like the Bauld case in that the injury occurred prior to the enactment of Section 95.11(3)(c)

and the time for bringing the suit was shortened, but the cause of action was not abolished - holding that in that set of facts equal protection is not denied.

The Respondents would show unto the court that in this case the Petitioner is in essentially the same type of situation as in Bauld and Purk, in that although the injury occurred after the enactment of the statute, the time for bringing the suit was merely shortened, but the cause of action was not abolished. The Petitioner was given an adequate time to file his lawsuit one year, six months and twelve days after the date of injury.

The Purk decision was made after the court had reached its decision in Overland when the court, in regard to the 12 year bar after events connected with the construction of improvements to real property, had held that the application did violate Article I, Section 21, of the Florida Constitution and thus denied access to the courts. The Purk Court then must have known in ruling on the product liability section of the statute that in regard to the application of the statute insofar as the 12 years provided an absolute bar to lawsuits that in application the product liabilitys section of the statute would also be unconstitutional in application. That decision was reached in Batilla v. Allis-Chalmers Mfg. Co., 392 So.2d 874 (Fla. 1981) where the Supreme Court of Florida specifically held that the Statute of Limitations 95.031(2) in a product liability action where the 12 year delivery date would bar access to the courts violated Article I, Section 21 and was unconstitutional as applied to that type of action citing Overland Constructionv. Sirmons.

The court went on later in Diamond v. E. R. Squibb & Sons, Inc., 397 So.2d 671 (Fla. 1981) to hold that where the 12 year statute of limitations in a suit against a manufacturer for product liability was barred before it ever existed in that tit was not discovered until 20 years after the drug was administered, then the operations of Section 95.031(2) in that case ws essentially the same as in Overland Construction Co. v. Sirmons. The statute of limitations operated in both cases to bar the cause of

action before it ever accrued, so that no judicial forum was available to the Plaintiff, and thus was unconstitutional as applied. It is important to note that Supreme Court Justice Boyd wrote the decision in Diamond as well as writing the decision in Purk.

Perhaps putting these important cases in chronological sequence would be helpful, and they are as follows:

Bauld v. J. A. Construction Co., 357 So.2d 401 (Fla. March 1976), rehearing denied May 5, 1978. Justice Boyd wrote the opinion for the Court. The issue was whether the 12 year statute barred the Plaintiff's rights under Florida Statute 95.11(3)(c) providing for a 4 year limitation of action against a contractor, when in any event the action must be begun within 12 years from the date of possession by the owner or termination or completion of the contract. The Court noted that Florida Statute 95.11(3)(c) was similar to 95.031(2) dealing with product liability and went on to hold that the constitutional challenges to the statute were unfounded because the time for bringing the cause of action was shortened, but that the 1 year savings clause provided in the statute a reasonable time to bring the action and thus although the time was shortened, the statute as applied in that case did not deny access to the courts by abolishing a cause of action, but merely shortened the time period. The Florida Supreme Court stated:

> There is no vested right in a litigant to the benefit of the statute of limitations in effect when his cause of action accrues." 357 So.2d at p. 403

The next case was Overland Construction Co., v. Sirmons, 369 So.2d 572 (March 1979), rehearing denied May 1979, wherein Chief Justice England, in writing for the Court held that the same statute in Bauld, Florida Statute 95.11(3)(c), was unconstitutional in applicaiton because the 12 year period denied access to the courts.

Thereafter came **Purk v. Federal Press Co.,** 387 So.2d 354 (Fla. July 1980) in which Justice Boyd for the Supreme Court of Florida upheld the product liability statute 95.031(2), since it only shortened the period of time.

Following that, **Batilla v. Allis-Chalmers Mfg. Co.,** 392 So.2d 874 (Fla. December 1980), rehearing denied February 1981, followed by **Diamond v. E.R. Squibb & Sons, Inc.,** 397 So.2d 671 (Fla. April 1981), both **Batilla** and **Diamond** holding the 12-year product liability statute unconstitutional in application, since it denied access to the courts.

The Plaintiff/Petitioner has adequate time to bring his action, as ruled by the lower court. He had one year, six months and twelve days to file his action before Fla.Stat. 95.031(2) ran, but he chose not to do so.

The Respondents would then respond to the Petitioner's question, "But what about Mrs. Purk?" by answering the Plaintiff/Petitioner's action falls squarely within Mrs. Purk's decision. The Plaintiff/Petitioner's action is barred as found by the lower court. (A 1)

In the case of **Regents of Univ. of Cal. v. Hartford Acc. & Indemnity Co.,** 59 Cal.App.3d 844 (Cal. 1st C.A. 1976), reversed on other grounds 147 Cal.Rptr. 486, 581 P.2d 197 (Cal. 1978), addressed essentially the same questions in the Court of Appeals as presented in **Bauld.** There, the California statute of limitations provided ten years after completion of work as a complete bar against contractors. the Plaintiff was asserting that the statute in application denied the Plaintiff equal protection under both the U.S. Constitution, Fourteenth Amendment and the California Constitution. The statute in application provided for a nine month period to bring the action shortening a three-year statute, but in application did not bar the cause of action or abolish it. The California appellate court in holding the nine month period constitutionally adequate, the California Court of Appeals noted:

"Whether there was a reasonable time in these cases is not a matter committed to the discretion of the trial court. The question is one of the constitutionality of the statute, which in turn applies to the pending case: and if it appears that there was a reasonable time for exercise of the remedy before the statutory bar became fixed, the lower court cannot consider individual hardships or other circumstances but must give effect to the express provisions of the law...

We have no hesitancy in holding that the nine month period in which the owner could have filed an action against the contractor and its surety was a matter of law a reasonable period."

(citing in part **Terry v. Anderson,** 95 U.S. 628, 24 L.Ed. 365 (1878) (nine months and seventeen days)..**Mercury Herald Co., v. Moore,** 22 Cal.2d 269, 138 P.2d 673 (Cal. 1943) (one year) **Murphy v. Murphy,** 5 Cal.2d 640, 55 P.2d 1169 (Cal. 1936) (71 days) **Kerckoff v. Cuzner Mill & Lumber Co. v. Olmstead,** 85 Cal. 80, 24 P. 648 (Cal. 1890) (30 days)

131 Cal.Rptr. at p.129-130

II.

A Statute May Be Unconstitutional and Void as to Its Application to a Part of Its Subject Matter and Valid and Constitutional as to Other Parts of Its Subject Matter.

The statute in question is constitutional as applied to the Plaintiff/Petitioner's situation and facts and constitutional in operation to those facts and should be upheld. The author of 16 Am.Jur.2d **Constitutional Law** Section 273 at page 757 states the general principle of law as follows,

"Statutes may be unconstitutional and void as to their application to a part of their subject matter and valid as to other parts or to state the problem more concretely, they may be constitutional in operation in respect to some persons state of facts and unconstitutional as to others. It has been said that if a statute is reasonably appropriate in its overall approach it should be upheld, notwithstanding it may be unconstitutional in special circumstances, especially when it is apparent that the legislature would want the act to prevail where constitutionally it may. And even though provision is a single idea, a statute partially void because of inapplicablity to a portion of the subject matter covered will be treated as operative and enforceable as to the

> one portion and inoperative as to the other if the subject matter is of such a nature that it may be divided."

The author of Fla.Jur.2d **Constitutional Law,** Section 74 at page 293 states the Florida rule similar as follows:

> "Constitutionally valid legislation may be unconstitutionally exercised. There can be a unconstitutional application of valid legislation. A statute or ordinance may be valid as applied to one state of facts, although under another state of facts an application of the statute may violate rights secured by the organic law. In such cases, the statute is not destroyed, but the duty is imposed upon the Courts to enforce the regulation in those cases where it may legally be applied."
> Citing cases 10 Fla.Jur.2d at page 294.

The Supreme Court of Florida in the case of **In Re Seven Barrels of Wine,** 83 So. 627 (Fla. 1920) adopted essentially the same rule in holding that a statute would not be retrospectively applied since to do so would make it unconstitutional in application. The court there noted that the legislative intent must not be thwarted since it must be assumed that the Legislature contemplated the enactment of a law that would conform to the constitution and that it would be applied to classes of cases in which it may be validly enforced. 83 So. 632, see also **Ex Parte Wise,** 192 So. 872 (Fla. 1940).

Statutes are presumptively valid and constitutional and are prima facia valid and constitutional. See **Winter Haven v. A.M. Klemm & Son,** 181 So. 153 (Fla. 1938), reh. denied 182 So.2d 841 (Fla. 1938). The Courts are bound to give full effect to a legislative intent expressing a savings clause or a separability clause if it is possible to do so without offending some recognized canon of statutory interpretation. **State Ex Rel Lane Drugstores v. Simpson,** 166 So. 227 (1935), cert. denied 299 U.S. 543, 81 L.Ed. 399 (1936); **Watson v. Buck,** 313 U.S. 387, 85 L.Ed. 1416 (1941).

The particular statute in question (A 6-22) contains a savings clause and a severability clause; thus, this Court is bound to follow the legislative intent to uphold the constitutionality of the statute in application where it is valid and constitutional.

The Plaintiff/Petitioner had one year, six months and twelve days to bring his action and the statute is constitutional in application to his case and bars the same.

The Plaintiff/Petitioner presents the case of **Aldana v. Holub,** 381 So.2d 231 (Fla. 1980) where there the medical mediation arbitration provisions were struck down as being violate of due process. There the court reached the conclusion that the procedure offends due process providing a valuable legal right and in application denied access to the courts. Here, there is no claim of denial of access to the courts or violation of due process, but only that the statute violates the equal protection provisions. The case of **Aldana** is then readily distinguishable.

III.

The Classification System Under the Statute Does Not Violate the Equal Protection Clause and the Plaintiff Has No Standing to Complain About the Statute.

The principle of law is that even though a statute may be void as to application to a part of its subject matter, it still may be constitutional as applied to other parts. Additionally, Plaintiff/Petitioner has no standing to complain.

Reasonable classifications are permitted under the equal protection clause. **Greater Miami Financial Corporation v. Dickinson,** 214 So.2d 874 (Fla. 1968). Under the rational basis or minimum scrutiny test employed in equal protection analysis, a statutory classification will be held unconstitutional only if it results in treatments so markedly different as to be wholly arbitrary; a classification will not be struck down if it results incidentally in some inequality or is not drawn with mathematical precision. **Re: Estate of Greenberg,** 390 So.2d 40 (Fla. 1980), appeal dismissed 101 S.Ct. 1475 (1980).

Petitioner asserts that the treatment he received was markedly different from that received by others similarly injured. As evidence of the disparity, he makes two arguments. First, Petitioner cites the treatment given to the Plaintiffs in **Batilla, Overland,** and **Diamond.** However, as previously discussed, those Plaintiffs received different treatment because their causes of action were abolished before they arose,

but Petitioners cause of action was not barred and, in fact, could have been commenced for over 18 months.

Secondly, Petitioner asserts his similarity to a hypothetical Plaintiff injured on day 364 of year 11 after delivery of the product to its original user, and notes the disparity in treatment received by Petitioner and likely to be received by the hypothetical Plaintiff under Fla.Stat. 95.031(2).

Respondent asserts that the Petitioner lacks the requisite standing to challenge the constitutionality of Fla.Stat. 95.031(2) as applied to a hypothetical Plaintiff injured closer to the end of the 12 year period than was the Petitioner. One who is not himself denied some constitutional right or privilege may not be heard to raise constitutional questions on behalf of some other person who may at some future time be effected. **Steele v. Freel,** 157 Fla. 223, 25 So.2d 501 (Fla. 1946). Petitioner has standing to challenge Fla.Stat. 95.031(2) only insofar as it applies to persons: (1) injured by a product between 8 and 12 years after it was delivered to the original user, (2) with time to exercise due diligence to discover the facts leading to the injuries, and (3) with adequate time to commence action.

Decisions by Courts in other states supports Respondent's view that Petitioner lacks the standing to challenge Fla.Stat. 95.031(2) on the basis of injury to such a hypothetical Plaintiff. In **Hatheway v. Secretary of the Army,** 641 Fed.2d 1376 (C.A., Colorado 1981), cert. denied 102 S. Ct. 324 (1981), the Court said that a person to whom a statute may be constitutionally applied will not be heard to challenge that statute on the grounds it may conceivably be applied unconstitutionally to others. Similarly, one to whom application of the statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or situations in which its application might be unconstitutional. **Myron v. Martin,** 670 Fed.2d 49 (C.A. 5, 1982). As a general rule, a party lacks standing to assert the constitutional rights of another. **Clements v. Fashing,** 102 S. Ct. 2836 (1982);

Goldcross Ambulance v. City of Kansas City, 538 F.S. 956 (D.C. Mo. 1982); **In re: Flanagan,** 533 F.Supp. 957 (D.C. New York, 1982).

There is only one recognized situation in which a party may assert the constitutional rights of another. The Rule of Standing, as expressed in the preceeding paragraph, does not apply where a statute may be interpreted as reaching constitutionally protected speech. **United States v. Damond,** 676 Fed.2d 1060 (C.A. Texas 1982). In other words, a litigant can assert the standing of one against whom an overbroad statute would operate to "chill" constitutionally protected speech.

Petitioner's challenge is not based on the first amendment right of freedom of speech. Therefore, the Rule of Standing would apply in Petitioner's situation.

Petitioner also argues that **Batilla, Overland,** and **Diamond** operate on Fla.Stat. 95.031(2) so as to create irrational and arbitrary classes in violation of the equal protection clauses.

The test for whether a classification system denies equal protection depends on the nature of the right allegedly denied. Where the right is fundamental (eg., speech or worship) or suspect (e.g., race or religion), the U.S. Supreme Court has used a strict scrutiny test. Where the classification systems involves quasi/suspect classes, the U.S. Supreme Court has used a substantial relationship test. In all other cases, the Court has used a minimum scrutiny test.

The Federal Courts recognized that although there is no right of access to the Courts specifically mentioned in the United States Constitution, such a right exists, based on the Due Process Clause, the Privileges and Immunities Clause and the First Amendment Right to Petition. **Ryland v. Shapiro,** 708 Fed.2d 967 (C.A. 5, 1983). Courts have required that such access be meaningful, adequate and effective. **Id.**

By these standards, Appellant was not denied the right of access to the Courts. Eighteen months after discovery of the injuries was more than adequate time in which

to commence action. The access available to the Appellant would have been meaningful and effective had Appellant taken advantage of it.

The Federal Courts have not declared that among fundamental rights is the right to a forum in civil action. Therefore, a minimum scrutiny test would be employed to determine whether the classification system created under F.S. 95.031(2) denied equal protection to the Appellant.

Unlike the United States Constitution, the Florida Constitution counts among the fundamental rights that of access to the Courts. The Florida Constitution, Article 1, Section 21. Despite the fact that a fundamental right is involved, the Florida Courts have used a minimum scrutiny test to determine whether a statute of limitations creates a classification system which denies equal protection. Under such a test, a statutory classification will be held unconstitutional only if it results in treatment so disparate as to be wholly arbitrary, and a classification will not be struck down because it results incidentally in some inequality or is not drawn with mathematical precision. **Re: Estate of Greenberg, supra.** The Minimum Scrutiny test was also used in **Purk, supra,** to determine whether F.S. 95.031(2) denied equal protection.

Minimum Scrutiny uses the "Rational Basis Test", by which a Court should inquire only whether it is conceivable that a classification bears some rational relationship to a legitimate state objective. **Florida High School Activities Association v. Thomas by and through Thomas,** 434 So.2d 306 (Fla. 1983). The "Rational Basis Test" has also been called the "Some Reasonable Basis Test", which the First D.C.A. recently reaffirmed was the proper test for purposes of minimum scrutiny under the Equal Protection Clases of the Federal and State Constitutions. **Sasso v. Ram Property Management,** 431 So.2d 204 (Fla. 1st D.C.D 1983). Thus, the test for the classification system set up under F.S. 95.031(2) is whether it bears some reasonable relationship to a legitimate state objective.

The legitimate objective the state sought to accomplish was described by Justice McDonald dissent in **Batilla, supra.** Justice McDonald noted that the legislature determined that perpetual liability placed an undue burden on manufacturers, and that 12 years from the date of delivery to the original user was a reasonable time for exposure to liability for manufacturers. Justice McDonald also noted that F.S. 95.031(2) is different from Fla.Stat. ?95.11(3)(c), struck down in **Overland,** because improvements to real property have longer useful lives than most manufactured products, calling for a distinction in the categories of liability exposure.

With regard to equal protection claims, the function of the courts is not to substitute their evaluation of legislative facts for that of the Legislature. **Minnesota v. Cloverleaf Creamery Co.,** 449 U.S. 456, 66 L.Ed.2d 659 (1981), rehearing denied 68 L.Ed.2d 222 (1981).

The reasonable basis (test) is the standard to be met as to whether the statute offends the equal protection clauses. **McGowan v. Maryland,** 366 U.S. 420, 6 L.Ed.2d 393 (1961). This constitutional standard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the state's objectives. A statutory discrimination and a classification will not be set aside if any state of facts reasonably may be conceived to justify it and the classification is not unconstitutional because in practice it results in some inequality. See **McGowan, supra** and **Lindsley v. Natural Carbonick Gas Co.,** 220 U.S. 61, 55 L.Ed. 369 (1911). The Court should be aware of the many states that have adopted statutes of limitations based on the date of delivery of the product or completion of the project whichi have been held to not violate equal protection clause. See **Carter v. Hartenstein,** 248 Ark 1172, 455 S.W.2d 918 (Ark. 1970), appeal dismissed, 401 U.S. 901, 91 S.Ct. 868, 27 L.Ed.2d 800 (1971); **Regents of the University of California v. Hartford Accident and Indemnity Company,** 59 Cal.App.3rd 675, 131 Cal.Rptr. 112 (Cal.App. 1976); **Reeves v. Ille Electric Company,** 551 P.2d 647 (Montana 1976); **Nevada Lake Shore Company v. Diamond Electric, Inc.,,** 89 Nev. 293,

511 P.2d 113 (Nevada 1973); **Rosenburg v. Town of North Bergen**, 61 N.J. 190, 293A.2d 662 (1972); **Howell v. Burk**, 90 N.M. 688, 568 P.2d 214 (App., 1977); **Joseph v. Burns**, 260 Or. 493, 491 P.2d 203 (1971); **Freezer Storage, Inc. v. Armstrong Pork Company**, 234 Pa.Super. 441, 341 A.2d 184 (1975), affirmed 476 Pa. 270, 382 A.2d 715 (Pa. 1978(; **Watts v. Putnam County**, 529 S.W.2d 488 (Tennessee, 1975); **Hill v. Forrest and Cotton, Inc.**, 559 S.W.2d 145 (Tex. Vic. App. 1977); **Good v. Christenson**, 527 P.2d 223 (Utah, 1974); **Yakima Fruit and Cold Storage Company v. Central Heating and Plumbing Company**, 81 Wash.2d 528, 503 P.2d 108 (1972).

The Appellant relies on **Zobel v. Williams**, 457 U.S. 55, 65, 72 l.ed.2d 672, 681, 102 S.Ct. 2309 (1983), **Mikell v. Henderson**, 63 So.2d 508 (Fla. 1953), **Moore v. Thompson**, 126 So.2d 543 (Fla. 1960), and **Rollins v. State**, 354 So.2d 61 (Fla. 1978). These cases deal with a classification system unlike the one presented in this appeal and thus are readily distinguishable.

Appellee's Answer to Appellant's Tweedledum, Tweedledee Argument.

The Supreme Court in 1945 in the case of **Chase Securities Corp. v. Donaldson,** 325 U.S. 304, 89 L.Ed. 1628 (1945) dismissed the Appellant's "logical arguments" as follows when the United State Supreme Court explained:

> "Statutes of limitation find their justification in necessity and convenience rather than in logic. The represent expedience rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizens from being put to his defense after memories have faded, witnesses have died or disappeared and the evidence has been lost . . . They are by definition arbitrary, and their operation does not discriminate between the just and unjust claim, or the avoidable and unavoidable delay. . . . The history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relative large degree of legislative control." (emphasis added)
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> 325 U.S. at page 314.

IV.

Issue - Whether Petitioner and Others Similarly Situated Were Denied Equal Protection of the Laws By the Operation of Florida Statute 95.031(2)

The question certified by the Florida First District Court of Appeal to the Florida Supreme Court concerns whether Florida Statute 95.031(2) denies equal protection of the laws to persons such as the Petitioner, Richard Pullum, and those similarly situated.

Given the facts of this case, the certified question must be elaborated upon. The Petitioner was injured by a press brake in April 1977, or approximately 10-1/2 years after the press brake was delivered to its original user, and approximately 1-1/2 years before the end of the 12 year period in which the Petitioner could commence action under Flordia Statute 95.031(2). In its decision rendered on September 26, 1984, the Florida District Court of Appeal found that the Petitioner had sufficient time to commence his action, and that he was not denied his right of access to the Courts, guaranteed by Article I, Section 21, of the Florida Constitution. The time remaining

for Petitioner to commence his action was sufficient and did not constitute a denial of justice.

The Petitioner's situation is readily distinguishable from others in the class of persons who were or may be injured by some product somewhere between 8 and 12 years after the product was delivered to its original user. The Petitioner had sufficient time after discovering his injuries to commence action to protect his rights. Someone injured much closer to the end of the 12 year limit stated in Florida Statute 95.031(2) would not have sufficient time and would undoubtly be denied the equal protection of laws granting access to the Courts for redress of injuries, a right guaranteed by the Florida Constitution and a right vested to all citizens of Florida. Thus, the certified question should be read in the context of whether Florida Statute 95.031.(2) denied equal protection to the Petitioner and those similarly situated - that is, those persons who were injured somewhere between 8 and 12 years after a products delivery to its original user and who had sufficient time in which to commence an action based on such injuries. That class, and only that class, is the subject of the certified question.

Equal protection of the laws means that each person is entitled to stand before the law on equal terms with, and to enjoy the same rights and bear the same burdens, as are imposed on others in a similar situation. Caldwell v. Fann, 157 Fla. 633, 26 So.2d 788 (Fla. 1946). Equal protection of the laws demands only reasonable conformity in dealing with parties similarly situated. Hunter v. Flowers, 43 So.2d 435 (Fla. 1949). Equal protection declares its sufficient if a statute applies to all persons similarly situated. Battaglia v. Adams, 164 So.2d 195 (Fla. 1964).

Therefore, equal protection of the laws requires that some law or statute be applied with reasonable conformity to persons similarly situated. In the case at bar, that statute is Florida Statute 95.031(2), and the guarantees of equal protection of the laws would require that that statute be so applied to the Petitioner and others who are injured 8 to 12 years after delivery of the product to its original users and who

have sufficient time remaining to commence action. A denial of equal protection must be determined from the consideration of the peculiar facts of the case at hand. See Liberty Warehouse Company v. Burley Tobacco Growers Cooperative Marketing Association, 276 U.S. 71, 72 L. Ed. 473, 48 S. Ct. 491.

The Petitioner has asserted that Florida Statute 95.031(2) has operated to deprive him, and others situated similarly to him, of the ordinary limitations period for filing suit based on personal injuries derived from the manufacturing defect of a product. (Petitioners Brief, p.1), or, in other words, the right to have a certain time in which to commence his suit.

However, statutes of limitation, such as Florida Statute 95.031(2), are remedial in nature. 51 Am. Jur. 2d, Limitation of Actions, Section 28; 35 Fla. Jur. 2d, Limitations and Laches, Section 4. The statute of limitation operates to bar the remedy only; it does not extinguish the right. Christmas v. Russell, 5 Wall (U.S.) 290, 18 L. Ed. 475; Tate v. Clements, 16 Fla. 339 (Fla. 1878); Martz v. Riskamm, 144 So.2d 83 (Fla. 1st DCA 1962).

Therefore, what the Petitioner is asserting is that Florida Statute 95.031(2) operated to deprive Petitioner, and those situated similarly to him, of a right to a remedy for his alleged personal injuries, and that such deprivation is a violation of the constitutionally guaranteed equal protection of the laws.

The general rule stated by the United States Supreme Court, and cited by the Florida Supreme Court, is that a potential litigant has no vested right in any particular remedy; all that he is guaranteed by the Constitutions of the United States and Florida is the preservation of some substantial right to redress by some effective procedure. Ex-Parte Collett 337 U.S. 55, 93 L. Ed. 1207, 69 S. Ct. 944, 10 A.L.R. 2d 921; Sawyer v. State, 94 Fla. 60, 113 So. 736 (Fla. ____). The substantial right to redress available to the Petitioner, and to those situated similarly to him, were preserved by the effective

procedure of all due process rights and sufficient and reasonable time in which to avail himself of access to the Courts.

Additionally, there is no vested right in a particular period of limitation during which an action may be brought. Campbell v. Holt, 115 U.S. 620, 29 L. Ed. 483, 6 S. Ct. 209; Corbett v. General Engineering and Machinery Company, 160 Fla. 879, 37 So.2d 161 (Fla. 1948).

Petitioner has not been able to show that he, and others situated similarly to him, have been deprived of an effective procedure for protecting a substantive right or that they have been denied the equal protection of laws granting the right to pursue such a remedy. Petitioner had, as the Flordia First District Court of Appeal found, sufficient time to commence action to protect his rights of litigation. He was not deprived of any vested rights, and in fact had sufficient time to vest his rights of litigation by commencing action within 18 months from his time of injury. The same facts and conclusions also apply to others situated similarly to Petitioner. They were not deprived of any vested right under either the United States or Florida Constitution. They were not deprived of any remedy under the United States or Florida Constitution. Therefore, neither the Petitioner nor others similarly situated where denied the equal protection of the laws. Florida Statute 95.031(2) operated to allow the Petitioner, and others situated similarly to him, a reasonable and sufficient time to commence his lawsuit, and did not deny the uniform application of that statute to this class of persons.

V.

Whether the Certified Question Presents a Question Which Given the Facts and Circumstances of the Petitioner's Case, Should be Considered by the Florida Supreme Court as aQuestion of Great Public Importance

The Florida Constitution does not require that the Supreme Court decide a question certified by the District Court of Appeal to be of great public importance. State v. Cruz, 189 So.2d 882 (Fla. 1966), conformed to 191 So.2d 83. The Florida Supreme Court is not unalterably bound to decide the question, for the pivotal "may"

in the relavant constitutional provision denotes sanction or authority; it should not be construted as "shall" compling the Supreme Court to decide the merits of the question. Stein v. Darby, 134 So.2d 233 (Fla. 1961) rehearing denied.

The question certified by the Florida First District Court of Appeal is not fraught with great public importance because the case presented by Petitioner involved a determination that Florida Statute 95.031(2) was unconstitutional under the circumstances of the case. A similar question was presented to the Florida Supreme Court and the Court held that the question was not fraught with great public importance and refused to decide it. Stein v. Darby, supra.

Respondent asserts that the question certified by the Florida First District Court of Appeal is based on a case involving a mere determination of whether a statute was unconstitutally under the circumstances of the case. As Respondent has shown, the Petitioner and others situated similarly to him were not denied the equal protection of the laws, so under the circumstances of the case the statute was not unconstitutally. Therefore, given the circumstances of the case, this question is not fraught with great public importance and should not be decided by the Florida Supreme Court.

CONCLUSION

The Respondent asserts that the Petitioner and the certified question ask whether Fla.Stat. 95.031(2) denies equal protection to Richard Pullum and others situated similarly to him - in other words, the class of persons under consideration contains those persons who were injured by a product somewhere between eight to twelve years after a products delivery to its original user, and who also had reasonably sufficient time in which to commence action. For purposes of equal protection arguments, the class of persons to which Petitioner belongs is not the same as the class of persons injured eight to twelve years after delivery but without reasonably sufficient time to commence action.

Statutes of limitation, such as Fla.Stat. 95.031(2), act upon the remedy, not upon the right. The Respondent has shown that the Petitioner and those similarly situated were not denied their remedy because of any unequal application of Fla.Stat. 95.031(2). In fact, the First District Court of Appeal found that the Petitioner was afforded sufficient time to vest his right to a remedy by commencing action within the time allowed to him.

The Petitioner has not shown that anyone injured closer to the end of the twelve year period in Fla.Stat. 95.031(2) was denied equal protection of the laws. Instead, Petitioner has merely offered academic speculation concerning imaginery persons injured by products somewhere closer to the end of the twelve year period. Petitioner has simply not shown any denial of equal protection because he has failed to show that Fla.Stat. 95.031(2) was applied differently to someone else.

Respondent asserts that the certified question should either not be decided by this court or that the certified question should be answered in the negative.

Respectfully submitted this 8th day of January, 1985.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof was furnished to Wayne Hogan, Esquire, Attorney for Petitioner, and Cathy Jackson Burris, Esquire, Attorney for Amicus Curiae, by hand, this 8th day of January, 1985.

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