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IN THE SUPREME COURT OF FLORIDA

CASE NO. 66,198

RICHARD PULLUM,

Petitioner,

vs.

CINCINNATI, INCORPORATED, etc., et al.,

Respondents.

PETITIONER'S BRIEF ON THE MERITS

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PREFACE AND SUMMARY OF ARGUMENT

Richard Pullum, Petitioner seeks reversal of a summary judgment against him on statute of repose grounds. The issue is whether the application of Section 95.031(2) to Mr. Pullum and those similarly situated violates the equal protection clauses of the Florida and United States Constitutions. The First District Court of Appeal has certified that the question is of great public importance.

In this brief, Pullum traces the history of the products liability statute of repose and shows it to have been effectively amended by the application of the special Florida constitutional guarantee of access to courts. The result is that the statute as it stands today no longer accomplishes its legislatively intended purpose of presenting perpetual products liability and, yet, has a limited continuing application against a small arbitrarily, indeed preventing accidentally, chosen class of defective product victims, including Richard Pullum. Those victims are deprived of the ordinary limitations period for filing suit. Moreover, the statute arbitrarily discriminates among those victims, with some having almost 4 years to file their actions, while others may have 3 years or 2 years or 2 months or 2 days.

We examine the equal protection decisions of this Court and the United States Supreme Court and show that they compel a ruling that today's Section 95.031(2) violates the equal protection guarantees.

Pullum further shows that the statute is incapable of being interpreted to broaden the class to whom it applies in order to avoid the equal protection violation. For to do so, would run afoul

of the access to courts guarantee of our Constitution.

Finally, the brief demonstrates conclusively that the single previous decision by this Court dealing with an equal protection challenge to Section 95.031(2) dealt with an entirely different argument, one addressing the statute in its inception and not as it operates today after our access to courts guarantee has altered it. Moreover, it is shown that the appellant in the earlier case challenged the Legislature's judgment in choosing a particular means to accomplish the goal of preventing perpetual products liability, whereas Richard Pullum challenges the statute now that the statute can no longer achieve the legislative goal and operates merely to discriminate against an accidental, arbitrary class of defective product victims who are indistinguishable from all other victims of defective products.

The brief concludes by asking that the Court answer the certified question affirmatively and order that the summary judgment be reversed.

STATEMENT OF THE CASE AND FACTS

The Certified Question

The District Court of Appeals, First District, certifies the great public importance of this question:

> Does Section 95.031(2), Florida Statutes, deny equal protection of the laws to persons such as appellant who are injured by products delivered to the original purchaser between eight and twelve years prior to the injury?

Pullum v. Cincinnati, Incorporated, _____ So.2d _____, 9 FLW 2405 (Fla. 1st DCA Nov. 16, 1984)(Appendix A). We contend this question addressing Florida and federal constitutional guarantees of equal protection should be answered affirmatively.

The Statute

When enacted by the Legislature, Section 95.031(2) read:

> Actions for products liability... under s.95.11(3) must be begun within the period prescribed in this chapter [four years], 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 s.95.11(3), but in any event within 12 years after the date of delivery of the completed product to its original purchaser... regardless of the date the defect in the product ... was or should have ben discovered.

The Statute As Amended By Our Access To Courts Guarantee

This Court, applying our access to courts guarantee has amended Section 95.031(2) by effectively adding the following

clause after the final word "discovered":

> , except that anyone injured more than 12 years after the date of delivery of the completed product to its original purchaser shall have four years to being an action.

Battilla v. Allis Chalmers Mfg. Co., 392 So.2d 874 (Fla. 1981); Diamond v. E. R. Squibb and Sons, 397 So.2d 671 (Fla. 1981), Art. 1, Sec. 21, Fla. Const. (1968).

The Result Of The Amendment By Our Access To Courts Guarantee

Today all victims of defective products have four years from injury to bring their actions - all, that is, except those injured between 8 and 12 years after delivery of the defective product. As the certifying court explains:

> [T]hose persons injured during the time frame of eight to twelve years after delivery date will be governed by a limitations period of something less than four years, such period depending upon the point, during that time frame, when the injury occurs (i.e., if the injury occurs nine years after delivery, the party would have three years to sue; if the date of injury was 10 years after delivery, suit would have to be brought within two years; etc.).

Pullum v. Cincinnati, Incorporated, _____ So.2d _____, 9 FLW 2057 (Fla. 1st DCA Sept. 26, 1984) (Appendix B.)

The Purpose Of The Statute As Enacted

Dissenting in Battilla, Justices McDonald, Overton and Alderman explained the purpose of Section 95.031(2) as enacted:

> The legislature, in enacting section 95.031(2), has determined that perpetual liability places an undue burden on manufacturers. It has determined that twelve years from the date of sale is a reasonable time for exposure to liability for manufacturers of products.

392 So.d at 875. However, the Court held that the method adopted by the Legislature for avoiding perpetual liability violated the access to courts guarantee. Battilla; Diamond. The result: plaintiffs injured after year twelve of a product's existence can bring suit. This is directly contrary to the Legislature's intended purpose of eliminating such perpetual liability.

The Purpose Of The Statute Now That It Has Been Amended By Our Access To Courts Guarantee

The purpose served by the statute now that it has been amended by our access to courts guarantee is....

The above space is purposely blank. No one, neither the defendants (by brief or in oral argument before the First District), nor the certifying court itself, no one has identified a purpose to be served by Section 95.031(2) now that it no longer prevents perpetual liability.

Richard Pullum And The Pressbrake

On April 29, 1977, the ram of an unguarded Cincinnati pressbrake machine crushed Richard Pullum's hands (Pullum Deposition). On November 25, 1980, he filed suit alleging

negligence and strict liability (R. 17).[1] More than six months remained on the four-year tort statute of limitations. Section 94.11(3)(a)(e), Fla. Stat. Nevertheless, on the day before trial the trial court ruled that the action was barred by Section 95.031(2) and granted the defendants summary judgment (R. 92-93; R. 94). About a month before trial, the manufacturer had provided sworn answers to interrogatories and testimony establishing that the pressbrake was first shipped to Mr. Pullum's employer on November 11, 1966. (R. 86-91; Ralph W. Wellington Deposition.) Thus, November 11, 1978, was the twelfth anniversary of the delivery. Based on this revelation, the trial court ruled the action barred by Section 95.031(2).

In sum, Richard Pullum was injured by the unguarded pressbrake and diligently filed suit less than four years later but has been barred from having his case heard on its merits. He has been barred because, unknown to him, the machine was first delivered 10 1/2 years before the accident and, unknown to him, the twelfth anniversary of the delivery passed on November 11, 1978, when 2 1/2 years remained on the ordinary statute of limitations.

The Issue Is Not Access To Courts

Aware of this Court's view that a statute of repose does not bar access to the courts when it only shortens the time within

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[1] There were subsequent amended complaints and answers (R. 14; R. 26; R. 31; R. 58; R. 68).

which suit must be filed, Bauld v. J. A. Jones Construction Co., 357 So.2d 401 (Fla. 1978), we have never contended that Section 95.031(2) denied Richard Pullum access to the courts, even though he had only a year and a half instead of the usual four years to file suit. Our interpretation of this Court's view was recently verified when the Court held that even five to six months is not so short as to deny access to the courts. Cates v. Graham, 451 So.2d 475, 477 (Fla. 1984).

The Issue Is Not Denial Of Equal Protection By The Statute As Enacted

As enacted by the Legislature, Section 95.031(2) was quite capable of withstanding equal protection analysis as distinguished from access to courts. Indeed, speaking of the similar architectural statute of repose, in Overland this Court declared:

> [T]he unique restriction imposed by our constitutional guarantee of a right of access to courts makes it irrelevant that this "statute of repose" may be valid under state or federal due process or equal protection clauses.

369 So.2d at 575. There is a key difference between the analysis used in deciding access to courts questions as opposed to equal protection. In the access to courts analysis, assuming no reasonable alternative has been provided in place of the abolished right of action, one searches for "an overpowering public necessity and an absence of any less onerous alternative means of meeting that need." Id. at 573. However, in the equal protection analysis the court determines whether the classifications are reasonable and bear some rational relationship to a legitimate state objective.

Ostendorf v. Turner, 426 So.2d 539, 544 (Fla. 1982); State v. Lee, 356 So.2d 276, 279 (Fla. 1978). The dissenting Justices in Battilla, 392 So.2d at 875, stated they perceived "a rational and legitimate basis" for what they saw as a reasonable classification of tort victims into those injured by older products and those injured by newer products with 12 years being the cut-off point. And the Battilla majority did not voice disagreement. However, the majority applied the stricter access to courts test (overpowering public necessity and less onerous alternatives), effectively amended Section 95.031(2) and thereby disrupted the classification scheme originally enacted by the Legislature. Now, instead of affecting all victims of defective products delivered more than eight years before injury, the statute affects only those injured between the eighth and twelfth year after delivery.

The Issue Is Denial Of Equal Protection By The Statute Now That It Has Been Amended By The Access To Courts Guarantee

We contended at each level below that Section 95.031(2), as amended by this Court's application of the access to courts guarantee, denies Richard Pullum (and others injured by 8 to 12 year-old defective products) protection of the law equal to the full four-year protection of the right to sue enjoyed by those injured by 8 to 12 year-old defective products. As the certifying court acknowledged:

> Pullum complains that he is denied equal protection because he had only one and a half years from his injury within which to file suit whereas a person injured by the same machine approximately two and one half years later (at least 12 years after delivery) would have, by virtue of the holding in Overland, four years within which to file.

9 FLW at 2057.

We presented to the First District an array of decision by this Court which support the conclusion that Section 95.031(2), as amended by the application of the access to courts guarantee, denies equal protection to Richard Pullum and all others in the accidental class made up only of those injured by 8 to 12 year-old defective products. Given that the certifying court did not identify a reasonable basis for such a classification or find that such a classification bears a rational relationship to a legitimate state objective, it appears the decision was the product of two decisions by this Court, Hoffman v. Jones, 280 So.2d 431 (Fla. 1973) and Purk v. Federal Press Co., 387 So.2d 354 (Fla. 1980). In Hoffman this Court made it clear to the district courts that when this Court has spoken on a point of law the district courts are not at liberty to rule otherwise, even if they also certify the question for review. And in Purk, in which Mrs. Purk and all in her circumstances were given an equal one year to file suit under the savings clause, the Court had, indeed, spoken briefly on the question of Section 95.031(2) and equal protection. There the Court said:

> The appellants 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.

387 So.2d 357-58.

The question naturally arises whether this Court was declaring Section 95.031(2) impervious to any equal protection attack (the defendants' view), or whether the Court's declaration was limited to the particular fact pattern and circumstances present and at issue in Purk (our view). In the argument which follows, we present reason upon reason why Purk does not control this case and why the Court should, in line with many previous equal protection decisions, declare that Section 95.031(2), as now amended by the access to courts guarantee, denies equal protection to Richard Pullum and other victims of 8 to 12 year-old products.

Indeed, if Purk already provides the answer, why would the Judges Mills, Smith and Nimmons have certified the following as a question of great public importance?

THE CERTIFIED QUESTION

DOES SECTION 95.031(2), FLORIDA STATUTES, DENY EQUAL PROTECTION OF THE LAWS TO PERSONS SUCH AS APPELLANT WHO ARE INJURED BY PRODUCTS DELIVERED TO THE ORIGINAL PURCHASER BETWEEN EIGHT AND TWELVE YEARS PRIOR TO THE INJURY?

ARGUMENT

THE ACCESS TO COURTS GUARANTEE OF THE FLORIDA CONSTITUTION HAS SO ALTERED SECTION 95.031(2) THAT ITS ONLY REMAINING MEANS OF APPLICATION VIOLATES THE EQUAL PROTECTION CLAUSES OF THE UNITED STATES AND FLORIDA CONSTITUTIONS.

I

INTRODUCTION

If the machine that crushed Richard Pullum's hands had been 8 years old or less, he would have had four full years to file suit.

If it had been 12 years old or older, he would have had four full years to file suit. His mistake, which has cost him a hearing on the merits, was getting hurt when the machine was between 8 and 12 years old. Because of this, and this only, he was inequitably allowed not four, but one and a half years to file suit.

II

TODAY'S SECTION 95.031(2): A MUTATION BY CONSTITUTIONAL MISHAP

A. The Purpose Of The Statute And Why It Was Unattainable.

Section 95.031(2) and its statutory sister, Section 95.11(3)(c), were enacted to accomplish a specific purpose.

> Section 95.11(3)(c)...creates absolute immunity from suit for certain professionals and contractors connected with the construction of improvements to real property after the expiration of twelve years from the completion of the building

Overland Construction Co. v. Sirmons, 369 So.2d 572, 574 (Fla. 1979). This Court discussed policy reasons behind the enactment of such statutes, noting

> that several other states have adopted analogous limitations, principally to counter a trend in the decisional law toward expanded liability for professionals engineers, architects and contractors, and that the need for this type of statute is predicated on the difficulty of proof which naturally accompanies the passage of time.

Id. These policy reasons were not sufficient to save the statute from the operation of Florida's constitutional guarantee of access to courts. Art I, Section 21, Fla. Const.

> We recognize the problems which inhere in exposing builders and related professionals to potential liability for an indefinite period of time after an improvement to real property has been completed. Undoubtedly, the pas-

> sage of time does aggravate the difficulty of producing reliable evidence, and it is likely that advances in technology tend to push industry standards inexorably higher. The impact of these problems, however, is felt by all litigants. Moreover, the difficulties of proof would seem to fall at least as heavily on injured plaintiffs, who must generally carry the initial burden of establishing that the defendant was negligent. In any event these problems are not unique to the construction industry, and they are not sufficiently compelling to justify the enactment of legislation which, without providing an alternative means of redress, totally abolishes an injured person's cause of action. The legislation impermissibly benefits only one class of defendants, at the expense of an injured party's right to sue, and in violation of our constitutional guarantee of access to courts.

Id.(emphasis supplied)

When the similar product liability statute involved here came up for review, the Court also understood that

> the legislature, in enacting section 95.031(2), has determined that perpetual liability places an undue burden on manufacturers.

Battilla v. Allis Chalmers Mfg. Co., 392 so.2d 874, 875 (Fla. 1981) (dissenting opinion). Nevertheless, the Legislature's goal of avoiding perpetual liability for manufacturers was unattainable. Citing Overland, the Court held the statute violated the access to courts guarantee of our constitution. Id. (majority opinion). Accord, Diamond v. E. R. Squibb and Sons, 397 So.2d 671 (Fla. 1981). As a result and directly contrary to the intended purpose of eliminating such perpetual liability, plaintiffs injured after year twelve in a product's existence do bring suit. Now a defective product 20 years old can be the subject of a tort suit and the injured plaintiff will have four years to sue. The very machine which injured Richard Pullum is now 18 years old but, if because of a defect it today injures another worker, that plaintiff will have four full years to sue. It is the same for 25 years and

30 years and 50 years.

Only the person hurt by a product between 8 and 12 years old feels the sting of this frustrated statute. Section 95.031(2) is now a statute without a purpose; purely a trap for the unlucky.

B. Its Purpose Frustrated, The Statute Now Traps Only The Doubly Unlucky.

Richard Pullum and those similarly situated are victims of irrational, unequal treatment. Anyone injured by a product that is less than eight years old has four full years from injury or discovery to file suit. Section 95.11(3)(a), (e), Fla. Stat. Similarly, anyone injured by a product more than twelve years old also has full four years to file a suit. Overland, Battilla and Diamond. However, people injured by a product between 8 and 12 years old will have varying amounts of time less than four years to file suit. See appendix C demonstrating the disparate treatment using examples of three injured people: Plaintiff "A" injured at year 3 (4 years to sue), Richard Pullum injured 10 1/2 years after delivery (only 1 1/2 years to sue) and Plaintiff "B" injured at year 16 (4 years to sue).

This accidental intermediate group of victims also suffer irrational discrimination among themselves. For example they could have 3 months to file a suit (Plaintiff "C", if injured 11 years and 9 months after delivery) or 3 years and 9 months (Plaintiff "D", if injured 8 years and 3 months after delivery). See appendix D for comparison with Richard Pullum.

This unequal treatment between people injured in the first

eight years or after year 12, on the one hand, and people injured from years 8 to 12 is purely arbitrary. Furthermore, as argued above, this arbitrary, unequal treatment does not further the statute's purpose. The statute's objective was to prevent perpetual product liability. It no longer does. What is more, this arbitrary inequality is purely accidental. The access to courts guarantee, through Overland, Battilla and Diamond, effectively amended Section 95.031(2) to free those injured by products delivered more than 12 years before to sue manufacturers (and then have four full years to do so). As noted before, this is how the access to courts guarantee has amended the statute ("amendment" in capital letters):

> (2) Actions for products liability...under subsection 95.11(3) must be begun within the period prescribed in this chapter [four years], 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 subsection 95.11(3) but in any event within 12 years after the date of delivery of the completed product to its original purchaser..., regardless of the date the defect in the product...was or should have been discovered, EXCEPT THAT ANYONE INJURED MORE THAN 12 YEARS AFTER THE DATE OF DELIVERY OF THE COMPLETED PRODUCT TO ITS ORIGINAL PURCHASER SHALL HAVE FOUR YEARS TO BEGIN AN ACTION.

(Emphasis supplied.)

Who would suggest that the Legislature would ever knowingly pass such a discriminatory, senseless statute? Only the poor person hurt when a product is between 8 and 12 years old suffers the discrimination. And to what end?

The statute has been nearly swallowed-up by the exception. What remains is nothing more than a trap for the unwary. It is

illogical, has no remaining purpose to further, and it irrationally and arbitrarily discriminates against plaintiffs who have done nothing wrong except have the doubly bad luck to be injured - and in the wrong year. This is time-barring by lottery; justice by wheel-of-fortune.

III

THE MUTANT STATUTE DENIES EQUAL PROTECTION

A statute which has lost its purpose and irrationally discriminates randomly among selected plaintiffs denies those persons the equal protection of the laws. Section 95.031(2) is just such a statute.

Whenever a court is confronted with a classification attacked as violating equal protection, the court cannot strike down the statute unless there is a class of similarly situated people, the members of the class are receiving unequal treatment, and there is no rational relationship between the purpose of the statute and the unequal treatment being received. Department of Revenue v. Amrep Corp., 358 So.2d 1343, 1349 (Fla. 1978). The classification cannot be arbitrary, must be reasonable, must treat all class members alike, Lasky v. State Farm Ins. Co., 296 so.2d 9, 18 (Fla. 1974) and the division into classes must bear some rational relationship to a legitimate state objective. Haber v. State, 396 So.2d 707, 708 (Fla. 1981).

In Zobel v. Williams, 457 U.S. 55, 65, 72 L.Ed.2d 672, 681, 102 S.Ct. 2309 (1982), the United States Supreme Court examined a "dividend statute" for distribution to the citizenry of state mineral rights income. Each adult resident would receive one

dividend unit for each year of residency subsequent to 1959 when Alaska became a state. Id. 457 U.S. at 59. The court declared the statute unconstitutional, stating:

> in our view Alaska has shown no valid state interests which are rationally served by the distinction it makes between citizens who established residence before 1959 and those who have become residents since then.
>
> We hold that the Alaska dividend distribution plan violates the guarantees of Equal Protection Clause of the Fourteenth Amendment.

Id. 457 U.S. at 65. How much more the statute would have denied equal protection if it had discriminated only against those who had moved to Alaska between 1967 and 1971!

This court has recently cited Zobel and reached the same result in Ostendorf v. Turner, 426 So.2d 539, 544-45 (Fla. 1982). There the Court held a five-year residency requirement for entitlement to homestead exemption of $25,000 violated our equal protection clause. In language apropos here the Court minced no words in condemning the discrimination.

> We find there is 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. This disparate treatment of resident homeowners cannot be allowed if our equal protection clause is to have any real meaning.
>
> ....
>
> The reason for the equal protection clause was to assure that there would be no second class citizens. To approve the validity of the statute would in reality establish a second class of citizens in Florida.

426 So.2d at 545-46. Just so, to approve the validity of today's Section 95.031(2) would in reality establish a second class of litigants - and worse, for no purpose whatsoever.

The Florida Supreme Court is not new to the enforcement of the equal protection clause. In Mikell v. Henderson, 63 So.2d 508 (Fla. 1953), the plaintiffs were engaged in pitting gamecocks against one another. While the statute prohibited the raising, training, and fighting of gamecocks, it exempted those same activities when conducted on steamboats. The Court applied an equal protection analysis:

> There is no difference between the fighting of roosters on land, in the back yard or in the chicken runs. The fighting is the same and the cruelty is the same. Under the statute one is a violation of the law and the other is not.
>
> There is no reasonable basis for the classification of cock fighting on a steamboat, or other craft, and cock fighting on land or in the back yard. The discrimination is unreasonable and arbitrary and denies to the appellant equal protection of the law.

Id. at 509. Just so, there is no reasonable basis for allowing victims of 8 and 12 year-old products four years to sue and denying the four-year period to victims of products between 8 and 12 years old.

In Moore v. Thompson, 126 So.2d 543 (Fla. 1960), the Court examined a Sunday closing law attacked on equal protection grounds. It applied only to used car dealers. The court held that there was no valid purpose for the

> Legislature to make such a law operate only upon this certain class of business, rather than generally upon all. It is our conclusion that Chapter 59-295 laws of Florida is unconstitutional and invalid.

Id. at 551. The legislature's attempted discrimination against used car dealers was held to be "so palpably arbitrary and unreaonsable as to condemn it on its face." Id. Just so, Section 95.031(2), devoured by the exception created by the access to

courts guarantee, is so palpably arbitrary and unreasonable as to condemn it on its face.

In Florida State Board of Dentistry v. Mick, 361 So.2d 414 (Fla. 1978), the Court determined whether the statutory classification rested on "a difference which [bore] a just and reasonable relationship to a legitimate state interest." Id. at 415-16. It did not. The Court declared that the statute created

> an arbitrary and unreasonable classification between previously licensed Florida dentists who continuously reside in Florida and those who do not.

Id. at 416. Just as it is arbitrary and unreasonable to single out dentists who only live part of the year in Florida, it is arbitrary and unreasonable to discriminate only against victims of 8 to 12 year-old defective products.

In Rollins v. State, 354 So.2d 61 (Fla. 1978), the Court examined a statute that made it illegal "to permit anyone under the age of 21 years to visit or frequent or play in any billiard parlor in this state". In striking the statute on equal protection grounds, the court stated,

> There are no practical differences between billiards played in a billiard parlor and billiards played in a bowling alley sufficient to warrant a special classification, subjecting only appellant to arrest, fine or imprisonment for allowing minors to play billiards. See Georgia Southern Florida Railway v. Seven-Up Bottling Company, 175 So.2d 39 (Fla. 1965). We note that many bona fide bowling establishments also serve alcoholic beverages. There can be no rational basis for permitting a bowling alley containing pool tables and a cocktail lounge to admit minors without complying with the restrictions imposed by Section 849.06, Florida Statutes (1975), while subjecting a neighboring billiard parlor serving no alcoholic beverages to penalty.

Id. at 63. Later the court declared:

> Just as there is no difference between the fighting of roosters on a steamboat and the fighting of roosters

> on land, there is no rational distinction between playing billiards in a billiard parlor or shooting pool in a bowling alley.

Id. at 64 (emphasis supplied). Just so, there is no difference, no rational distinction, between people hurt by 10 1/2 year-old machines (Pullum) and those hurt by 8 year-old machines or by 12 year-old machines.

In State v. Lee, 356 So.2d 276 (Fla. 1978), the Court held a statutory section establishing the "Good Drivers Incentive Fund" denied equal protection to "bad" drivers who were not permitted to share in the fund. The Court found it arbitrary to classify drivers as "bad" and deny them equal access to the fund when many of the offenses which resulted in such classification had no reasonable relation to the statute's purpose of encouraging safe driving. Id. at 281. The Court analogized, as we do, to the denial of equal protection by the billiard parlor statute in Rollins v. State, 354 So.2d 61. And, the Court recalled its ruling in State v. Blackburn, 104 So.2d 19 (Fla. 1958), that gas station operators could not be "singled out" for advertising sign regulation "while dealers in other products attractive to motorists" were not so regulated. 356 So.2d at 282. Just so, victims of products between 8 and 12 years-old cannot be singled out for short limitations periods while others similarly situated have long limitations periods.

There are many other case examples. The following cases, though, are ones in which, as here, changed circumstances resulted in a denial of equal protection by a statute which was once valid. First, in Georgia Southern and Florida Ry. Co. v. Seven-Up Bottling

Co., 175 So.2d 39 (Fla. 1965), this Court held a statute denied equal protection when it limited railroad tortfeasors to the defense of comparative negligence while all other tortfeasors could assert contributory negligence. Years earlier the Court had rejected an equal protection challenge to the same statute. Loftin v. Crowley's, Inc., 150 Fla. 836, 8 So.2d 909 (1942). The Court explained its new ruling:

> It may be that, twenty-three years ago when Loftin v. Crowley's was decided, the imposition of "comparative negligence" liability upon the railroads by the statute in question was not so unduly burdensome as to amount to a penalty; but today the situation is not the same, as the facts of the case sub judice demonstrate.
>
> For the reasons stated, we hold that Section 768.06, supra, although perhaps valid when enacted, has now become a discriminatory and burdensome exercise of the police power because of changed conditions; and that it is, therefore, invalid under the due process and equal protection clauses of the federal constitution and Section 12, Declaration of Rights, Florida Constitution, F.S.A.

175 So.2d at 42 (emphasis supplied). In another railroad case, again because of changed circumstances, a formerly valid statute was held to deny equal protection. Atlantic Coast Line RR. Co. v. Ivey, 148 Fla. 680, 5 So.2d 244, 247 (1942).

And, in a particularly relevant case, Caldwell v. Mann, 26 So.2d 788 (Fla. 1946), it was an amendment to a once valid statute which resulted in its denying equal protection. A statute controlling the possession and sale of mullet

> ...applied to the entire State of Florida when it was passed, but...since that time the legislature has by enactments...eliminated from the operation of the Act 16 counties which do not border on the salt waters of this State and has left within the purview of the Act...16 counties which do not border on the salt water of the State.

Id. at 789, 790. The Court declared:

> An Act of the legislature which is valid at the time of its enactment may become invalid by a change in conditions occurring after its passage.
>
> ....
>
> So, when the legislature eliminated many non-coastal counties from the operation of the Act it, thereby, destroyed the equal protection of the law as it existed in the Act when it was passed....

Id. at 790-91 (emphasis supplied). And the court concluded:

> There can be offered no valid basis for a classification which prohibits the possession, sale or offering for sale of mullet in Lawe, Highlands or Hardee Counties when such is not prohibited in Orange, Marion or Madison County, neither of which counties has any coastal waters which are the habitat of the fish sought to be protected.

Id. at 791.

Similarly, there can be offered no valid basis for a classification which denies the four-year limitations period only to people injured by defective products between 8 and 12 years-old. The classification suffering the short limitations period under Section 95.031(2), as amended, might just as well have been those born on Tuesdays, or those with red hair or those whose favorite colors are orange and blue or garnet and gold.

As explained above, there was a rational basis for the Legislature's distinguishing between victims of newer and older machines so that the statute of repose operated as follows: 1 2 3 4 5 6 7 8~~-9-10-11-12-13-14-15-16-17-18-19-20-etc.~~ However, there is no rational basis for treating victims of both older and newer products exactly alike, while discriminating only against the victims of products of intermediate age: 1 2 3 4 5 6 7 8~~-9-10-11-~~12 13 14 15 16 17 18 19 20 etc. Zobel, Ostendorf, Mikell, Moore,

Rollins, Lee, Blackburn, Georgia Southern and Caldwell found the classifications irrational, arbitrary and violative of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and Article I, Section 2 of the Florida Constitution, so too should this Court declare the accidental classifications under the mutant Section 95.031(2), irrational, arbitrary, purposeless and unconstitutionally violative of the equal protection guarantees.[2]

IV.

THE MUTANT STATUTE IS INTRACTABLY AND INCURABLY DEFECTIVE

In Carter v. Sparkman, 335 So.2d 802 (Fla. 1975), this Court upheld the medical malpractice mediation act, which fell just short of crossing "the outer limits of constitutional tolerance." Id. at 806. Nevertheless, in Aldana v. Holub, 381 So.2d 231 (Fla. 1980) the Court reviewed the actual operation of the statute. The Court found that the statute had "proven unworkable and inequitable in practical operation." Id. at 237. Finding itself unable to save the statute by interpretation without doing violence to the access to courts guarantee (id. at 237-38), the Court struck the statute, saying:

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[2]Further demonstrating the statute's irrationality (and the Legislature did create this oddity): the statute has no application to wrongful death actions whatsoever. Note that it applies only to "actions for products liability and fraud under subsection 95.11(3)". Wrongful death actions fall under subsection (4)(d) of section 95.11.

> The result we reach here is indeed ironic. The medical mediation act is unconstitutional because application of its rigid jurisdictional periods has proven arbitrary and capricious in operation, yet the act cannot be remedied by enlarging the jurisdictional period of permitting continuances or extensions of time, for to do so would constitute a denial of access to the courts. We are left, then, with a statute which is intractably, and incurably, defective.

Id. at 238 (emphasis supplied).

The same is true of the mutant Section 95.031(2). It is arbitrary and capricious. And it cannot be interpreted to accomplish its intended purpose, for that would violate the access to courts guarantee. Overland, Battilla and Diamond. The statute is, indeed, the proverbial derelict on the seas of constitutional law. It lurks, silently, with no other purpose but randomly to sink the ship carrying some hapless plaintiff's cause of action. This Court should scrap Section 95.031(2) as it did the medical mediation act in Aldana.

V.

THE PURK DECISION DEALT WITH AN ENTIRELY DIFFERENT EQUAL PROTECTION CHALLENGE AND DOES NOT CONTROL THIS CASE

As the Court has noted from Appendix B, the certifying court relied upon Purk v. Federal Press Co., 387 So.2d 354 (Fla. 1980), in ruling that Richard Pullum's claim was time-barred. However, the First District plainly had doubts about Purk's relevance. These doubts resulted in the certified question. These doubts were spawned by the existence of many distinctions - distinctions with a difference - between Mrs. Purk's circumstances and those of Richard Pullum.

First, Mrs. Purk was injured before the enactment of Section 95.031(2). Id. at 356. Richard Pullum was injured after the enactment. In its short discussion of equal protection, the Purk court did not address the situation of those, such as Richard Pullum, injured before year twelve of the product's existence and after the effective date of the statute. The Purk court relied exclusively on Bauld v. J. A. Jones Construction Co., 357 So.2d 401 (1978) in reaching its decision because "the present case is like Bauld in that injury occurred prior to the enactment of Section 95.11(3)(c)." Id. at 357 (emphasis supplied).

Second, Mrs. Purk was attacking the statute in its inception. Mr. Pullum, on the other hand, is challenging the statute now, in its application to him after Battilla, 392 So.2d 874, and Diamond, 397 So.2d 671, have amended it by applying the access to courts guarantee. Purk preceded those cases. Since Battilla and Diamond had not yet been decided and, thus, had not yet prevented the attainment of the legislative goal of avoiding perpetual products liability (see the three member dissent in Battilla arguing for a different result from Overland), the Purk court was certainly not considering whether there was any rational distinction between people injured by 8 to 12 year-old products and those hurt by products of any other age. Purk followed Bauld which decided no such question.

Finally, a statute may withstand one equal protection challenge and yet fail another. In Lasky v. State Farm Ins. Co., 296 So.2d 9 (Fla. 1974), certain classifications making up the tort thresholds of the no-fault automobile insurance statute withstood

equal protection attack (id. at 18-20), yet the classification requiring the fracture of a weight-bearing bone was held to deny equal protection (id. 20-21).

Here we are presenting an equal protection challenge entirely different from that argued by the appellant in Purk. We have read the Purk briefs stored in the State Archives and are providing the Court with a supplemental appendix containing certified copies of those briefs. Mrs. Purk's argument was strictly directed to the Legislature's choice of 12 years as an ultimate cut-off point to prevent perpetual liability. She contended:

> This statute arbitrarily singles out people who suffer personal injuries from a defective product more than 12 years old. It does not affect people who suffer personal injuries from defective products less than 12 years old or from other causes. It is well established in this state that unless there is some rational basis for a classification, certain groups cannot be singled out and denied their right to sue.

Appellant Purk's Main Brief, p. 10.[3] Later (at 13, 14) she said:

> If all manufactured machinery products had a useful life of 12 years or less, perhaps there could be some reasonable basis in this statute, but that is not the case.
>
> ....
>
> In the area of products liability there has been no crisis and accordingly there are no policy reasons as to why an arbitrary period of 12 years should be established to prevent an injured person from bringing suit where the injury is caused by a defective product.

[3]We note, also, that Mrs. Purk was factually in error when she said in the second sentence above that the statute "does not affect people [such as Richard Pullum] who suffer personal injuries from defective products less than 12 years old" This does cinch, though, in our view, the fact that Purk's equal protection challenge was a far cry from Richard Pullum's.

Thus, Mrs. Purk asked this Court to hold that the Legislature could not rationally select 12 years as the cut-off point for product liability. However, this Court saw that there was no reason to decide that issue in Purk. All that needed to be decided was whether Mrs. Purk was being treated the same as those similarly situated to her. She was. She and every single person whose cause of action would have been barred by Section 95.031(2) on the date of enactment were given an equal one year to file suit under the savings clause. The Legislature's choice of one-year was viewed as reasonable and its granting of this savings clause period to everyone in Mrs. Purk's class was reasonably related to the proper legislative goal of not cutting off those plaintiffs' rights of action retroactively. Purk; Bauld.

The First District was right to certify this case as one of great public importance. Seeing the arbitrary unfairness of the impact of today's Section 95.031(2) on victims of products between 8 and 12 years old, the First District accurately suspected that this Court was ruling in Purk on an equal protection argument different from Pullum's; and the Purk briefs prove it.

On the other hand, Richard Pullum's type of case has never been addressed by this Court under either the products liability or the architectural statute of repose. Mr. Pullum is not in the class of people injured before enactment, as in Bauld or Purk; he is in the class of people injured after the statute's enactment, as in Overland, Battilla and Diamond. However, unlike the plaintiffs in those cases, who were afforded a four-year statute of limitations by the application of the access to courts guarantee,

Richard Pullum falls into an unavoidably created irrational class (those hurt by 8 to 12 year-old products) which is unconstitutionally denied equal protection by being denied a four-year statute of limitations. Pullum and his class suffer this irrational discrimination while the original legislative purpose, elimination of perpetual products liability, goes unfulfilled.

In sum, we borrow and paraphrase this Court's statement in Aldana v. Holub, supra, 381 So.2d at 238:

> The result we reach here is indeed ironic. [Section 95.031(2) is unconstitutional because application of its rigid 12 year limitation bar] has proven arbitrary and capricious in operation, yet the act cannot be remedied by enlarging the [class to include those injured after the twelfth year] for to do so would constitute a denial of access to the courts. We are left, then, with a statute which is intractably, and incurably, defective.

CONCLUSION

Section 95.031(2) was enacted for a specific purpose. The access to courts guarantee thwarts that purpose. The statute now irrationally discriminates only against people hurt by 8 to 12 year-old products; it affects no one else.

The statute is intractably, and incurably, defective. The certified question should be answered affirmatively and the summary judgment should be reversed.

Respectfully submitted,

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I HEREBY CERTIFY that a copy of the foregoing has been furnished to ELLIS E. NEDER, JR., 1001 Blackstone Building, Jacksonville, Florida 32202, by hand, this 19th day of December, 1984.

WAYNE HOGAN