IN THE SUPREME COURT OF FLORIDA

CASE NO. 66,198

RICHARD PULLUM,

Petitioner,

vs.

CINCINNATI, INCORPORATED, etc., et al.,

Respondents.

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PETITIONER'S REPLY BRIEF

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## INTRODUCTION: FIVE WAYS TO AVOID THE ISSUE

The First District has stated the issue clearly:

> 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?

Tellingly, we today reply to a brief which avoids the issue.

### (1) When The Law Is Against You...

Unable to distinguish both Supreme Courts' equal protection decisions and unable to identify any legitimate purpose now served by the amended statute, defendants have adopted the old adage, "When the law is against you, argue the facts."

Although defendants finally say they agree that violation of the equal protection clauses is "the only issue presented" (Resp. Br., p.7), one must trudge through an unnecessary, lengthy and argumentative statement of the "facts" to find that acknowledgment. This is but a transparent effort to whisper to the court, "Even though the amended statute is arbitrary, serves no purpose and obviously denies equal protection, you should affirm the summary judgment because we think we would win at trial anyway."

If the facts were so strongly in defendants' favor, one would expect them to have moved for summary judgment on that basis. But, defendants' motion was based solely on s. 95.031(2). At oral argument the certifying court promptly informed defendants' counsel that such a recital is irrelevant to the equal protection question, which defendants grudgingly admit is "the only issue presented."

Undaunted by the First District's rebuff, defendants have once again stated their version of the liability facts to best benefit themselves. And, in so doing, they have ignored their responsibility for the completely unguarded foot pedal which was essential to the happening of the accident. Defendant deposed Richard Pullum's expert witnesses, Dr. George N. Sandor of the University of Florida and S. Melville McCarthy of Tallahassee, who found the pressbrake defective. We are quite sure the court will disregard the invitation to speculate as to how a jury might decide the case. Nevertheless, the record does contain the depositions should the Court wish to satisfy itself that genuine issues of material fact abound.

(2) <u>If You Don't Like The Answer...</u>

In our initial brief we were careful, perhaps repetitively so, to make it clear that the ISSUE on this appeal is NOT ACCESS TO COURTS, BUT EQUAL PROTECTION. Yet, time after time after irrelevant time defendants make statements calculated to show that Richard Pullum's access to courts was not totally denied and, thus, that the access to courts guarantee was not violated. This constant repetition of an irrelevant point is a silent confession that defendants have no point to make on the equal protection issue.

In sum, defendants have applied another old adage: "If you don't like the answer [the statute denies equal protection], change the question [does the statute deny access to the courts?]." The unrebutted fact remains that the statute of repose, as amended by the access to courts guarantee, no longer

serves any purpose and arbitrarily discriminates against people hurt by defective 8 to 12 years old products.

(3) If Platitudes Were Arguments...

Another way to avoid debate on a losing issue is to state and restate points about which there is no debate. Therefore, defendants spend many a line repeating what we made clear on pages 6 and 7 of our initial brief, the issue is not access to courts. So, the many places where defendants make the point that Pullum's cause of action was not abolished (e.g., Resp. Br., pp.11, 13, 16, 17, 18-19, 22, 24-25) are useless.

The same must be said for defendants' platitudes about principles of law; e.g., defendants' pages unnecessarily distinguishing among the strict scrutiny, substantial relationship and rational basis tests for equal protection violations. We made it plain that "rational basis" is the test here. There is no dispute about that. The challenge we put to defendants - and the challenge they fail to meet - is to demonstrate a rational basis for discriminating only against victims of 8 to 12 year-old defective products.

Another point is defendants' utterance of the severability principle that, if part of a statute is unconstitutional, the court should enforce the remainder. This hornbook recitation loses all force, however, when defendants admit (p.15) that the court is so obligated only when the remainder of the statute "is valid and constitutional." We have shown that the remainder of amended s. 95.031(2) denies equal protection.

## (4) The Standing Issue: A Red Herring

Because he was injured by a 10-1/2 year old machine, Richard Pullum had but 1-1/2 years to file suit. If on that same day similar defective machines, one 7 and one 13 years-old, had injured other plaintiffs, those victims each would have had four full years to sue. Not only is that discrimination, it is discrimination by a mutant statute with no remaining purpose.

If Richard Pullum were not irrationally discriminated against by the amended statute, then he would have no standing to challenge it. But, as a victim, he is fully entitled to point out how the statute victimizes others. Steele v. Freel, 25 So.2d 501 (Fla. 1946); State v. Hill, 372 So.2d 84, 85 (Fla. 1979).

Defendants drag the red herring of "standing" across the record only because it stings when we discuss the most pitiful victims of todays s. 95.031(2), e.g., those with one day or one week or one month to file suit. Recognizing that such victims are also effectively denied access to the courts, defendants launch into their standing argument. They make this argument apparently out of an unfounded fear that the Court, while ruling that the amended statute denies equal protection, might also rule that Richard Pullum has been denied access to courts. However, the Court very well knows that we have limited our constitutional attack to equal protection grounds. It just happens that those who have just one day, or one week, or one month to sue are denied not only equal protection (as is Richard Pullum), but also access to the courts (something we have not claimed for Pullum.)

Indeed, to the extent that the access to courts guarantee may yet rescue other injured people from s. 95.031(2) (thereby further shrinking the class to when the statute applies) the blatancy of the equal protection violation suffered by Pullum's class becomes even more apparent. (See discussion, infra at 9,10.)

Richard Pullum, denied equal protection by the mutant statute, plainly has standing to point out how it also denies equal protection to the remainder of his class.

### (5) How Not to Succeed At Distinguishing Cases Without Really Trying

On page 21 defendants say that key - absolutely key - decisions by this Court and the United States Supreme Court are "readily distinguishable". Yet, they omit any explanation, thereby leaving to the reader's imagination. They did exactly the same in the district court. This time when we cited the Zobel, Mikell, Moore and Rollins cases, we were sure defendants would still be unable to distinguish them, but we thought they might try. We are reassured to learn they are still stumped. And they should be. The unconstitutional discriminations in Zobel v. Williams, 457 U.S. 55, 65, 72 L.Ed.2d 672, 102 S.Ct. 2309 (1982)(the date a person moved to Alaska), Mikell v. Henderson, 63 So.2d 508 (Fla. 1953)(roosters fighting on land instead of steamboats), Moore v. Thompson, 126 So.2d 543 (Fla. 1960)(selling used cars on Sunday) and Rollins v. State, 354 So.2d 61 (Fla. 1978) (shooting pool in a pool hall instead of a bowling alley) -- these discriminations are so like the

irrational one victimizing Richard Pullum (hands crushed by a 10-1/2 year-old machine instead of a 7 or 13 year-old machine) there is simply no distinguishing them.

And by their silence defendants concede that the other equal protection decisions do deal with arbitrary, purposeless classifications similar to that of the amended s. 95.031(2): the five-year homestead exemption residency requirement, Ostendorf v. Turner, 426 So.2d 539, 544-45 (Fla. 1982); the statute discriminating against itinerant, but licensed, Florida dentists, Florida State Board of Dentistry v. Mick, 361 So.2d 414 (Fla. 1978); the statute that discriminated against "bad" drivers without promoting safe driving, State v. Lee, 356 So.2d 276 (Fla. 1978); the roadside advertising statute that discriminated only against gas station operators, State v. Blackburn, 104 So.2d 19 (Fla. 1958); the statute treating railroads differently from other modern common carriers, Georgia Southern and Florida Ry. Co. v. Seven-Up Bottling Co., 175 So.2d 39 (Fla. 1965); and the once constitutional statute which was amended to make possession of mullet unconstitutionally unlawful in Hardee County but lawful in Marion County, Caldwell v. Mann, 26 So.2d 788 (Fla. 1946).

Further, defendants' statement (Resp. Br. p.16) that Aldana v. Holub, 381 So.2d 231 (Fla. 1980), is "readily distinguishable" is true; but only if one once again asks the wrong question: Does Aldana deal with equal protection? No. As we noted in our initial brief, Aldana was a denial of access to courts case and this is a denial of equal protection case. But, what of it? We cited Aldana for the specific premise, unchallenged by

defendants, that, when a statute can be saved from breaching one constitutional guarantee only by interpreting it so that it breaches another, "[w]e are left then with a statute which is intractably, and incurably, defective." Id. at 238.

Thus, the supposedly "readily distinguishable" cases go undistinguished. They are right on target and should spell the end of the mutant Section 95.031(2).

## ARGUMENT

No amount of talk about liability facts and access to courts, no amount of platitudes about standing equal protection tests and severability clauses and no amount of shifting the burden to the Court to figure out how to distinguish prior precedent - no amount of any of these things is a substitute for what defendants were required to do if the mutant s. 95.031(2) is to be allowed to continue to cut short the remedy of people in Richard Pullum's circumstances. To sustain the summary judgment defendants' duty, which they have avoided, was to show how it serves any legitimate state objective to discriminate only against victims of 8 to 12 years-old defective products.

Having separated the wheat from the chaff, we find there grains of argument to discuss, briefly. In doing so, we keep the certified question in mind:

> 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?

## I. The Amended Statute Does Not Accomplish A Legitimate State Objective

Defendants concede that the statute of repose has been amended by the access to courts guarantee and discriminates only against those injured by pre-teen defective products. The defendants' contention has to be that this discrimination somehow serves a legitimate state objective. However, at no time did they attempt to identify such an objective before the First District.

For the first time defendants have finally made an affirmative statement purporting to identify that objective. But reading defendants' statement brings a feeling of déjà vu (Resp. Br., p.20). Defendants just repeat our citation (Pet. Br., pp. 8, 12, 13, 14) of Justice McDonald's dissent in Battilla v. Allis Chalmers Mfg. Co., 392 So.2d 874, 875 (Fla. 1981), in which the dissenting justices explained the objective of the statute (preventing perpetual product liability) before the access to courts guarantee operated to amend the statute so it could not achieve that goal. Id. at 874. The key point our opponents miss, or rather ignore, is that since Battilla the statute can no longer achieve the objective described by Justice McDonald. Until some further - and constitutional - enactment by the Legislature, the producers of older defective products will not have automatic protection from potential liability, although there are other controls helping to prevent perpetual liability. Savage v. Jacobson Mgf. Co., 396 So.2d 731 (Fla.2d DCA 1981); Zyferman v. Taylor, 444 So.2d 1088 (Fla.4th DCA 1984) and Hardin

v. Montgomery Elevator Co., 435 So.2d 331 (Fla.1st DCA 1981).

Although curtailing potential perpetual product liability may have passed equal protection muster as a legitimate state objective, it failed the more stringent access to courts test. Battilla; Diamond v. E. R. Squibb and Sons, 397 So.2d 671 (Fla. 1978). The result: the only objective the defendants present as justifying the statute is no longer attainable, and has not been since Battilla in 1981. A statute which admittedly discriminates, and, yet, does not accomplish a legitimate goal, denies equal protection. Zobel; Ostendorf; Mikell; Rollins; Lee; Blackburn; Georgia Southern; Caldwell.

Defendants have not hypothesized the possible existence of even a remotely legitimate state objective to be served by s. 95.031(2) as it stands today. The certifying court could not think of one either, else it would have identified it. Indeed, if there were a legitimate purpose to be served by the statute today, the First District would not have certified 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?

## II. The Class Suffering Discrimination Is Arbitrary

Given the complete absence of a legitimate state objective for today's s. 95.031(2), perhaps we should end this brief. However, we continue in order to point out that defendants' attempt to define a class against whom discrimination would be proper (if a legitimate state objective were served) actually

bolsters our equal protection argument.

In their standing argument (Resp. Br., p.17, para.2) and when they attempt to reshape the certified question (Resp. Br., p.23, para.1), defendants actually reduce the size of the class discriminated against by saying (quite accurately) that defective product victims injured very close to the twelfth anniversary of the products' delivery would be denied access to the courts in the same manner as the plaintiff in Battilla. That is, at some point shorter than the five to six months held adequate in Cates v. Graham, 451 So.2d 475, 477 (Fla. 1984), a person injured near the twelfth anniversary of the delivery date would effectively be denied access to the courts so that s. 95.031(2) could not be constitutionally applied. If we assume for argument that four-months is the access to courts minimum, that reduces the class discriminated against (for equal protection purposes) from all victims of 8 to 12 year-old products to all victims of products from 8 to 11 2/3 years-old.

It is perfectly obvious that the shrinkage of the class against whom the statute discriminates means the statute has even less reason for existence. Moreover, we already know that s. 95.031(2) has no remaining reason for existence anyway. Reducing the size of the victimized class serves only to strengthen the equal protection attack.

## III. The Purk Decision Dealt With An Entirely Different Equal Protection Challenge And Does Not Control This Case

Defendants make no direct rebuttal to our demonstration that

Purk v. Federal Press Co., 387 So.2d 354 (Fla. 1980), does not control this case. Defendants now concede that a statute may survive one equal protection attack but fail another. And defendants concede that Purk was decided before Battilla amended s. 95.031(2) by applying the access to courts guarantee.

Purk, from an equal protection standpoint, was a savings clause decision, pure and simple. This Court felt that the Legislature, by affirmatively granting an extra year to file suit to people who would otherwise have been retroactively barred by the new statute of repose, had treated that group of people reasonably and had furthered the legitimate state goal of not barring their remedy with no notice. This, we suggest, was the meaning of this Court's statement in Purk that "the present case is like Bauld [v. J.A.Jones Construction Co., 357 So.2d 401 (Fla. 1978)] in that the injury occurred prior to the enactment of Section 95.11(3)(c)." Purk, 387 So.2d at 357.

Finally, defendants decline to debate our analysis of the appellant's brief in Purk. We said in our initial brief (p.25): "Mrs. Purk's argument was strictly directed to the Legislature's choice of 12 years as an ultimate cut-off point to present perpetual liabilty." And, as proof, we quoted the Purk briefs. Our opponents' silence speaks volumes.

It is undebatable: Mrs. Purk challenged the Legislature's wisdom in enacting s. 95.031(2) in its original form. As an equal protection challenge, that argument did not even merit discussion by the Court. We, however, do not challenge the Legislature's wisdom or its goal; we simply contend that

Florida's contitutional guarantee of access to the courts has so amended the statute that it can not accomplish the goal set by the Legislature. Moreover, the Legislature has accepted the Court's 1981 Battilla decision applying the access to courts guarantee. The Legislature has neither changed the statute nor made legislative findings of overpowering necessity and absence of less onerous alternatives to attempt to avoid the access to courts problem. The statute is intractably, and incurably, defective.

## CONCLUSION

Richard Pullum is part of an arbitrary, indeed accidental, class which suffers irrational discrimination while the Legislature's purpose for the statute goes unfulfilled. No reason exists for such discrimination. The certified question should be answered affirmatively and the summary judgment should be reversed.

Respectfully submitted,

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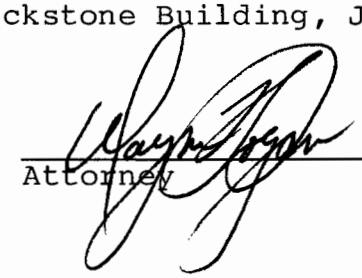
I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand this 28th day of January, 1985 to Ellis E. Neder, Jr., Esquire, 1001 Blackstone Building, Jacksonville, Florida 32202.



Attorney