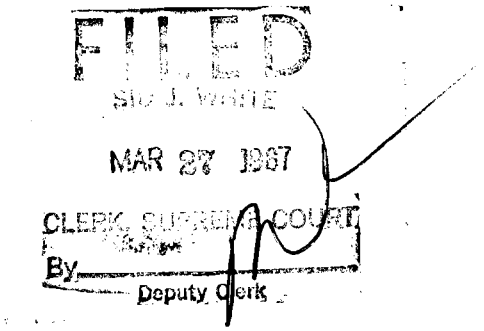
IN THE SUPREME COURT OF FLORIDA

CASE NO. 70,158

THIRD DISTRICT CASE NO. 86-238



ROBERT P. WALLIS, *

Petitioner, *

v. *

THE GRUMMAN CORPORATION, *

Respondent. *

ON REVIEW OF A DECISION OF
THE DISTRICT COURT OF APPEAL
THIRD DISTRICT

BRIEF OF THE PETITIONER, ROBERT P. WALLIS

Melvin A. Rubin
2627 Biscayne Blvd.
Miami, FL 33137
[305] 576-8610

Jerry B. Schreiber
Suite 207
Biscayne Bldg.
19 W. Flagler St.
Miami, FL 33130
[305] 371-4444

Joseph C. Segor
12815 S.W. 112 Ct.
Miami, FL 33176
[305] 233-1380

TABLE OF CONTENTS

TABLE OF CONTENTS (CONT.)

TABLE OF AUTHORITIES

PAGE

CASES:

TABLE OF AUTHORITIES (CONT.)

PAGE

TABLE OF AUTHORITIES (CONT.)

STATUTES:

TABLE OF AUTHORITIES (CONT.)

OTHER AUTHORITIES:

STATEMENT OF THE FACTS

The Plaintiff/Petitioner, Robert P. Wallis, was injured in the crash of a Grumman Model G-21 A (Goose) aircraft (R.312-313). It is agreed that the plane was delivered to its original purchaser by the Defendant/Respondent, The Grumman Corp., more than twelve years prior to the date on which suit was filed.

The case had been in litigation many years when, on October 9, 1985 Grumman filed a motion for Summary Judgment on the ground that suit was barred by the Statute of Repose contained in §95.031(2) Florida Statutes (1975).[1] Grumman supported its motion by citing this court's decision in Pullum v. Cincinnati, Inc., 476 So.2d 657 (Fla.1985) upholding the validity of the statute.

Summary Judgment was granted (R.327) and the Plaintiff appealed to the Third DCA (R.324). While the appeal was pending, the legislature repealed the Statute of Repose, Ch.86-272, §2, Laws of Fla.(A1-1).

---

[1]Section 95.031 Computation of Time. - Except as provided in subsection 95.051(2) and elsewhere in these statutes, the time within which an action shall be begun under any statute of limitations runs from the time that the cause of action accrues.

(2) Actions for products liability and fraud under subsection 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 subsection 95.11(3), but in any event within twelve years after the date of delivery of the completed product to its original purchaser or within twelve years after the date of the commission of the alleged fraud, regardless of the date the defect in the product or the fraud was or should have been discovered.

The Plaintiff argued four contentions to the Third DCA:

1. The statutory repeal should be given retrospective effect.

2. Pullum should not be given retrospective effect.

3. The decision in Pullum should not be applied to cases founded on injuries caused by products that have useful lives that are longer than twelve years.

4. The Statute of Repose should not be applied to Count III of the complaint which alleges a cause of action for a breach of the duty to warm and not a cause of action founded on the design, manufacture, distribution or sale of personal property.

The Third DCA affirmed per curiam the decision of the Circuit Court (A1-2) on the authority of its decision in Shaw v. General Motors Corp., ___ So.2d ___(Fla.3rd DCA 1987)(Case No.86-379, Opinion filed Feb.10, 1987).(A3-4). The Opinion did not mention the Plaintiff's third and fourth contentions, supra and those were not dealt with in Shaw. As it had done in Shaw, the DCA certified the following questions to this court as being of great public importance:

> "I. Should the legislative amendment of §95.031(2), Florida Statutes (1983), abolishing the Statute of Repose in product liability actions, be construed to operate retrospectively as to a cause of action which accrued before the effective date of the amendment?

> II. If not, should the decision of Pullum v. Cincinnati, Inc., 476 So.2d 657 (Fla.1985), appeal dismissed, ___ U.S. ___, 106 S.Ct.1626, 90 L.Ed.2d 174 (1986), which overruled Battilla v. Allis Chalmers Mfg. Co., 392 So.2d 874 (Fla.1980), apply so as to bar a cause of action that accrued after the Battilla decision, but before the Pullum decision?"

The Plaintiff filed timely notice of appeal pursuant to the certification.

SUMMARY OF THE ARGUMENT

The repeal of the statute of repose should be given retrospective effect. Repealing statutes are generally given retrospective effect in the absence of a savings clause or other clear expression of legislative intent. This rule applies with the special force to statutes that involve a remedy rather than substantive rights. This is because statutes involving remedies are generally applied retroactively themselves whether they are repealing statutes or statutes otherwise amending or changing remedies.

When the legislature repealed the statute of repose for product liability causes of action it clearly signaled a total change of thinking regarding the usefulness of the repose concept in the field of product liability. In doing so it removed the previously existing bar to product liability suits where the product was delivered to the first purchaser more than twelve years prior to suit. The general rules of retroactivity pertaining to repeal statutes and remedial statutes should have been applied here.

This court's decisions in Foley v. Morris, 339 So.2d 215 (Fla.1976) and Homemakers, Inc. v. Gonzalez, 400 So.2d 965 (Fla.1981) should be limited to their facts. If that is done they are not precedent for barring the retroactive application of the repealing act. If they are construed to prevent such an application this court should recede from them.

If the court does not declare that the repeal of the statute of repose should be retroactively applied it should rule in light of that repeal that its decision in Pullum v. Cincinnati, Inc., should be given prospective application only. This would lessen the injustices caused to those whose cause of action accrued prior to the repeal, but who could not complete their suits prior to Pullum.

If the court either declares the repealing statute retroactive or limits Pullum to prospective effect only, it should vacate the decision of the Third DCA and remand for further proceedings.

If the court does neither of these, it should rule that Count III of the complaint herein, dealing with breach of the duty to warn, is not a product liability cause of action. Consequently, Pullum does not apply to that count and the Third DCA erred in affirming the trial court's summary judgment as to Count III. The court should vacate the Third DCA's judgment to the extent that it applies to Count III and remand for further proceedings.

I

THE LEGISLATIVE AMENDMENT OF §95.031(2), FLORIDA STATUTES (1985), ABOLISHING THE STATUTE OF REPOSE IN PRODUCT LIABILITY ACTIONS SHOULD BE CONSTRUED TO OPERATE RETROSPECTIVELY AS TO A CAUSE OF ACTION WHICH ACCRUED BEFORE THE EFFECTIVE DATE OF THE AMENDMENT.

The Third DCA held in Shaw v. General Motors Corporation, ___ So.2d ___3rd DCA 1987)(Case No.86-379, Opinion filed Feb.10,1087) that the statutory amendment which abrogated the Statute of Repose in product liability cases could not be given retrospective effect because "(w)ithout an express intent to provide retroactive effect, a law operates prospectively." Other DCA's have come to the same conclusion, Pait v. Ford Motor Co., 12 FLW 277 (Fla.5th DCA 1/15/87); Small v. Niagara Machine & Toolworks, 12 FLW 366 (Fla.2d DCA, 1/20/87).

In this brief, the Petitioner will demonstrate that the DCA's have misapplied the rule pertaining to the retrospective operation of statutes and that the two cases upon which they have relied to support the overly broad rule stated above, have also been misapplied. See Foley v. Morris, 339 So.2d 215 (Fla.1976) and Homemakers v. Gonzalez, 400 So.2d 965 (Fla.1981).

A. THE REPEAL OF THE STATUTE OF REPOSE WAS A REMEDIAL ACT WHICH SHOULD BE APPLIED TO CASES PENDING ON THE EFFECTIVE DATE OF THE STATUTE.

It has never been the rule that acts which repeal statutes can only be given retroactive effect where the

legislature expressly provided for such a result. Just the opposite is true. Repealing acts are construed retroactively in the absence of a savings clause or other clear expression of legislative intent, 82 C.J.S., Statutes, §434; Sutherland Statutory Construction (4th Edition), §23.33.

The Rule of Retroactivity applies to the repeal of statutes that create a remedy. When a statute authorizing a particular defense is repealed the repeal operates to deprive the Defendant in a pending suit of the defense, even though it has already been pleaded, 82 C.J.S., Statutes, §439(a).

The Statute of Repose that is at issue in this case did not do away with product liability causes of action where the product was first sold more than twelve years prior to the date the cause of action accrued. It merely provided a defense that barred the remedy. The repeal did away with the bar and restored the remedy.

The DCA's that have refused to give the repealing act retroactive effect have relied on cases that have involved changes in the length of statutes of limitation. In so doing, they have erred.

Chapter 86-272, §2 Laws of Fla. did not simply change the length of the product liability repose time period. Instead, it abolished the repose concept altogether. The distinction between an amendment slightly lengthening the repose time period and the repeal of the repose statute is not trivial. One is a

technical adjustment, the other is an abandonment of the repose idea.

The purpose of a Statute of Repose is to place some finite limitation on the length of time a manufacturer shall remain at risk after placing his product in the stream of commerce. The fairness and usefulness of applying repose provisions to product liability cases has been strongly criticized, McGovern, The Variety, Policy and Constitutionality of Product Liability Statutes of Repose, 30 Am.U.L.Rev. 579, 594 (1981).

When the legislature repealed the Statute of Repose for product liability actions it went from the camp of the supporters of repose statutes to the camp of their critics. The question raised by this case and the many other similarly situated cases is what kind of respect should the courts accord this change in Florida's position. Should Plaintiffs, whose cases were in the courts when the enactment went into effect, be denied their day in court by a statute that is now dead, or should they be granted the opportunity to obtain redress without regard to when the product that injured them was first placed in the stream of commerce?

The answer to that question is inherent in the nature of the enactment. The legislature has now said that the age of the product causing injury is no longer a relevant concern. That being the case, there is no reason why causes of action accruing

before the effective date of the repeal and that were still in the courts on that date, should not be given the benefit of the legislature's change of mind, see Reiter v. American Laundry Machinery, Inc., No.86-1160-Civ.-T-15(B)(M.D. Fla.1986).

This court has held that statutes that operate in furtherance of the remedy or in confirmation of already existing rights are not retrospective laws and do not come within the general rule against retrospective laws. Consequently, where, as here, the legislature has repealed a defense and restored a barred remedy the doctrine that appellate courts should apply the law in effect at the time of their decisions should be applied. Florida Patient's Compensation Fund v. Von Stetina, 474 So.2d 783, 787-788 (Fla.1985); City of Orlando v. Desjardins, 493 So.2d 1027 (Fla.1986).

In Desjardins, this court said that if a statute is found to be remedial "...it can and should be retroactively applied in order to serve its intended purpose." The issue in Desjardins was whether an amendment providing an exemption to the Public Record Act for agency litigation files during the course of litigation should be applied retroactively.

This court observed that a contextual examination of the exemption leaves little doubt:

> "...as to its salutary and protective purpose of mitigating the harsh provision of the Florida Public Record Act as applied to public entities' litigation files in ongoing litigation."

There is little doubt about the purpose of the repeal of the product liability Statute of Repose. It was a legislative recognition that the repose idea had failed in the product liability field.[2] The inconsistent treatment accorded to various repose statutes by this court no doubt affected the legislatures decision, see Bauld v. J.A. Jones Construction Co., 357 So.2d 401 (Fla.1978); Overland Construction Company, Inc. v. Sirmons, 369 So.2d 572 (Fla.1979); Purk v. Federal Press, Co., 387 So.2d 354 (Fla.1980); Battilla v. Allis Chalmers Manufacturing Company, 392 So.2d 874 (Fla.1981); Diamond v. E.R. Squib & Sons, Inc., 397 So.2d 671 (Fla.1981); Pullum v. Cincinnati, Inc., 474 So.2d 657 (Fla.1985).

The decisions immediately prior to Pullum had so eviscerated the repose defense that only the legal rights of Plaintiffs injured by defective products between eight and twelve years old were affected by the statute. By that time the repose provision was similar to the Cheshire Cat's grin, "...which remained sometime after the rest of it had gone." Alice's Adventures in Wonderland, Ch.VI, Pig and Pepper.

The Plaintiff in Pullum tried to make the grin disappear as well, by arguing that the statute denied equal protection of the laws to persons who are injured by products

---

[2]The legislature did not abandon the concept with regard to other causes of action. The same bill that repealed the product liability repose provision retained and adjusted the repose provision pertaining to fraud, Ch.86-272 §2, Laws of Florida (1986). The Repose statute applying to improvements to real property was left untouched, §95.11(3)(c) Florida Statutes (1981).

delivered to the original purchaser between eight and twelve years prior to injury. When this court pulled the plug on its prior interpretation of the statute in Pullum, the legislature pulled the plug on the statute, thereby restoring the Plaintiff's remedy. The legislature's recognition that after years of judicial tinkering, the repose concept could not be equitably applied, should be given the widest possible effect.

In Desjardins this court applied the remedial statute doctrine to a law creating a new right. Its application is even more compelling where the remedial statute is one that repeals a failed defense. The combined force of the remedial statute doctrine and the retroactive repealer rule compel the conclusion that the Third DCA should have permitted the Plaintiff to continue with his suit. The DCA erred when it failed to retroactively apply the repealing act.

This court should hold that the repeal applies to cases pending at the time of its enactment and remand for further proceedings.

B. FOLEY V. MORRIS, 339 SO.2D 215 (FLA.1976) AND HOMEMAKERS, INC. V. GONZALEZ, 400 SO.2D 965 (FLA.1981) DO NOT PROHIBIT THE REPEAL OF THE PRODUCT LIABILITY REPOSE STATUTE FROM BEING RETROACTIVELY APPLIED. IF THEY DO HAVE THAT EFFECT, THIS COURT SHOULD RECEDE FROM THEM.

Neither Foley v. Morris, 339 So.2d 215 (Fla.1976) nor Homemakers, Inc. v. Gonzales, 400 So.2d 965 (Fla.1981) prohibit the retroactive application of the amendment repealing the product liability Statute of Repose.

Foley involved an amendment that shortened a Statute of Limitation. Citing 51 Am.Jur.2d, Limitation of Action, §57 (1970) this court held that unless a contrary legislative intention is expressed in the new law, a change in the Statute of Limitation should be considered prospective. Based on the facts in Foley, the court's ruling is not exceptional because most court's have held that shortened statutes of limitation should not be given retrospective effect, see Annot., 79 ALR 2d 1080 (1961). Whether the rule should be applied to statutes that increase the limitation period is another question.

Several District Court's have interpreted Homemakers, Inc. v. Gonzalez, supra as extending it to such statutes, Regency Wood Condominium, Inc. v. Bessent, Hammack and Ruckman, Inc., 405 So.2d 440, 443 (Fla.1st DCA 1981); Orpheus Investments, S.A. v. Ryegon Investments, Inc., 447 So.2d 257, 259, n.1 (Fla.3rd DCA 1983). The Second District has directly extended the Foley rule

to the present situation, Small v. Niagara Machine & Tool Works, 2d DCA Case No.86-1161 (1/20/87), 12 FLW 366 (1/30/87).

Neither Foley nor Gonzalez should be extended beyond the specific facts that gave rise to them. Foley is strictly a shortened statute of limitation case. Gonzalez is more complicated.

The Plaintiff in Gonzalez was injured on April 2, 1973 by an injection given to her by a hospital nurse. The Defendants were two nursing service organizations, one of which had provided the nurse to the hospital. The statute of limitation in effect on the day of the accident was the two year medical malpractice statute, §95.11(6) Florida Statutes (1973). The problem in Gonzalez was that the claim would be barred if that provision applied because suit was not filed until July 9, 1976.

On January 1, 1975, the legislature amended the medical malpractice statute of limitation so as to require privity between injured Plaintiffs and Defendant medical professionals, §95.11(4)(a) Florida Statutes (Supp.1974). Gonzalez argued that she was no longer covered by the Medical Malpractice statute of limitation because she lacked the required privity. Instead, she contended that her cause of action should be construed as one founded on negligence or as a cause of action not specifically provided in the statute. Both of those provided four year limitation periods, §95.11(3)(a), (p), Florida Statutes (Supp.1974). If they applied, then Gonzalez' cause of action was timely filed.

This court ruled that the 1975 amendment should not be applied retroactively to Gonzalez and therefore her action was barred by the 1973 Malpractice Statute. The court cited Foley in support of its ruling and a Fourth DCA case, Brooks v. Cerrato, 355 So.2d 119 (Fla.4th DCA 1978) that had relied on Foley. The specific rationale of the cases that the court cited was the proposition that amendments to statutes of limitation should not be retroactively applied absent an "...expressed, clear or manifest legislative intent..., Brooks, 355 So.2d at 120.

Justice England's dissent interpreted Gonzalez to mean that Florida had joined the minority of states that apply the rule of non-retroactivity to amendments that lengthen statutes of limitation as well as to those that shorten them, 400 So.2d at 968.

On its facts, Gonzalez does not require so broad an interpretation. The real question in Gonzalez was whether the reclassification from medical malpractice to another cause of action should be retroactively applied to the Plaintiff. If it was, she would be the beneficiary of a result that very possibly was never contemplated by the legislature - an increase in the limitation period applicable to her. Quite correctly, the court ruled that such a result required a clear manifestation of legislative intent. A manifestation that was absent under the facts of Gonzalez.

Viewed in this light, Gonzalez need not and should not be viewed as overturning past Florida precedent supporting the

retroactive application of repealing statutes, Yaffee v. International Company, Inc., 80 So.2d 910 (Fla.1955); Tell Service Co., Inc. v. General Capital Corporation, 227 So.2d 667 (Fla.1969); State ex rel Arnold v. Revels, 109 So.2d 1 (Fla.1959); Carr v. Crosby Builders Supply Company, Inc., 283 So.2d 60 (Fla.4th DCA 1973). This interpretation of Gonzalez is supported by the fact that the majority in Gonzalez never acknowledged that they were overruling past precedent.

Without a broad interpretation of Gonzalez, Florida precedent would place this state in the camp of the majority which holds that an amendment that lengthens a limitation statute is presumed to apply retroactively, Orpheus Investments, supra, 447 So.2d at 260. This follows from the general proposition that appellate courts must apply the law as it exists at the time of their decision, Carr v. Crosby Builders Supply Company, 283 So.2d 60 (Fla.4th DCA 1973); Seaboard System Railroad, Inc. v. Clemente, 467 So.2d 348 (Fla.3rd DCA 1985); Slaughter v. Marees, 319 So.2d 580 (Fla.1st DCA 1975); Royal Atlantic Association v. Royal Condominium Managers, Inc., 258 So.2d 39 (Fla.3rd DCA 1972).

The majority rule is especially applicable to the present case where we are dealing with the repeal of a statute of repose, not the lengthening of a limitation statute. There are no valid reasons why the benefit of the legislature's intent to abandon the repose concept in product liability actions should be

withheld from Plaintiffs whose actions were in court when the new policy went into effect.

Neither Foley nor Gonzalez compel such a result. If they do compel it, the product of their compulsion is an injustice which this court should correct.

If the decision below is allowed to stand, the scale of justice will be unbalanced in favor of the Defendant. It is unjust that the Plaintiff should be denied the opportunity to present his case merely because he was unlucky enough to be caught between this court's change of mind in Pullum and the legislature's change of mind about the statute of repose.

If, however, the decision below is reversed, the Defendant will still be able to interpose all of the substantive defenses that may be available to it and the case can be decided on its merits.

The law should decide controversies on their merits, not on the basis on procedural anomalies. Judge Ferguson, specially concurring in Dominguez v. Bucyrus-Erie Company, 3rd DCA Case No.86-1025 (2/11/87); 12 FLW 546, convincingly stated the case for retroactive application of the repealing statute:

> "We are not paralyzed, by policy or precedent, from giving the corrective legislation retrospective application to a case which was sandwiched between Battilla and Pullman (sic), so that substantial justice and right shall prevail as contemplated by the constitution. Our duty as an appellate court in construing a statute is first to reconcile it with constitutional mandates. See

> Biggs v. Smith, 134 Fla.569, 184 So.106 (1938)('The duty is on this court to see that substantial justice and right shall prevail.')."

This court should do justice by ruling that the repeal of the repose statute applies to causes of action that accrued prior to the effective date of the repealing statute.

II

IF THE REPEAL OF THE STATUTE OF REPOSE DOES NOT OPERATE RETROSPECTIVELY, THE DECISION IN PULLUM V. CINCINNATI, INC., WHICH OVERRULED BATTILLA V. ALLIS CHALMERS MANUFACTURING CO., 392 SO.2D 874 (FLA.1980) SHOULD NOT APPLY SO AS TO BAR A CAUSE OF ACTION FOR WRONGFUL DEATH THAT ACCRUED BEFORE THE PULLUM DECISION.

Because this court did not limit the effect of its decision in Pullum v. Cincinnati, Inc., 476 So.2d 657 (Fla.1985) to causes of action that accrued after the date of the decision, the DCA's have followed the general rule that the decisional law in effect at the time a decision on appeal is rendered governs the decision, see Pait v. Ford Motor Company, supra; Small v. Niagara Machine & Tool Works, supra; Cassidy v. Firestone Tire & Rubber, 495 So.2d 801 (Fla.1st DCA 1986).

Although the general rule applies in most instances a controlling decision can be given prospective application only where there are strong policy reasons for doing so, Bundy v. State, 471 So.2d 9 (Fla.1985); International Studio Apartment Association, Inc. v. Lockwood, 421 So.2d 1119 (Fla.4th DCA 1982). In this case there are two compelling reasons why this court should declare that Pullum should not be applied retroactively even though the court did not provide for such a limitation when it announced the opinion.

First, the decision destroys causes of action that were being litigated when the decision was unexpectedly announced.[3] Decisions that preserve a litigant's right to his day in court are far more appropriate candidates for retroactive application then decisions that forever bar a cause of action.

This court expressed in Florida Forest and Park Service v. Strickland, 154 Fla.172, 18 So.2d 251 (Fla.1944) the notion that it is unfair to cut off the right to litigate by means of a ruling in another case overruling prior procedural precedent where the litigant relied on that precedent.

The notion is strengthened by the second reason for restricting Pullum to subsequently arising cases - the swift legislative repudiation of Pullum. This court should give recognition to the fact that the repeal of the statute of repose creates the opportunity for many comparative injustices to occur. Unless Pullum is restricted so as to have the narrowest effect possible, there will be many instances such as here, where injuries caused by identical products of equal age will be compensible only because the injury arose either long enough before the announcement of Pullum for litigation to have been completed or it occurred after the repeal. Those caught in the middle will be denied a remedy merely because this court changed its mind in Pullum.

---

[3]The parties in Pullum had not raised nor briefed the issue of whether Battilla, supra should be overruled.

The court should limit the damage done by Pullum by restricting it to a prospective application only.

III

THE DISTRICT COURT OF APPEAL ERRED WHEN IT AFFIRMED THE SUMMARY JUDGMENT IN FAVOR OF GRUMMAN ON COUNT III OF THE COMPLAINT. THAT COUNT ALLEGES A BREACH OF THE DUTY TO WARN OF A KNOWN DEFECT. BREACH OF THE DUTY TO WARN DOES NOT GIVE RISE TO A CAUSE OF ACTION FOUNDED ON THE DESIGN, MANUFACTURE, DISTRIBUTION OR SALE OF PERSONAL PROPERTY. CONSEQUENTLY, THE CAUSE OF ACTION IN COUNT III IS NOT BARRED BY THE STATUTE OF REPOSE.

Section 95.11(3)(e) Florida Statutes (1980) defines an action for product liability as:

> "An action for injury to a person founded on the design, manufacture, distribution, or sale of personal property that is not permanently incorporated in an improvement to real property including fixtures."

The twelve year statute of repose contained in §95.031(2) commences to run "...after the date of delivery of the completed product to its original purchaser."

The issue here is whether an action for breach of the duty to warn of a known defect in a product is an action "...founded on the design, manufacture, distribution, or sale of personal property...." It clearly is not.

A duty to warn occurs whenever a reasonable person would want to be informed of the risk in order to decide whether to expose himself to it, Johns-Manville Sales Corp. v. Janssens, 463 So.2d 242 (Fla.1st DCA 1984). The duty arises when the risk is known. It is therefore knowledge of the risk, not the risk itself that creates the legal cause of action.

The failure to perform the duty to warn is not a single act or omission that is completed at the time of the first sale. It is a course of conduct that continues until the duty is performed or an injury occurs because the duty has been ignored.

The continuing nature of the duty to warn becomes obvious when the requirements of the aircraft industry are considered. In the aircraft industry defects that affect safety must be remedied by manufacturers. Federal Aviation Regulation 14 C.F.R. §21.3 requires manufacturers to notify the Federal Aviation Agency of known safety defects.

Courts have regularly held that after an aircraft or an aircraft part has been sold:

> "...and dangerous defects in design have come to the manufacturer's attention, the manufacturer has a duty, either to remedy these or if complete remedy is not feasible, at least to give users adequate warnings and instructions concerning methods for minimizing the danger." Braniff Airways v. Curtis-Wright Corporation, 411 F2d 451 (1969).

Other courts have made similar rulings, Devito v. United Airlines, Inc., 98 F.Supp. 88 (E.D.N.Y. 1951), Bell Helicopter Co. v. Bradshaw, 594 SW 2d 519 (Tex.Civ.App. 1979). The Third Circuit has gone even further, holding that a manufacturer is under a continuing duty to improve its product where human safety is involved, Noel v. United Aircraft Corp., 342 F.2d 232 (3d Cir. 1964).

In order to meet their safety obligations, manufacturers frequently issue service bulletins or service letters, long after their airplanes have been sold (see, A4-7). These are designed to notify owners of characteristics of the airplane that have become known, to instruct on how to handle problems and to warn of dangerous conditions. When the FAA is informed of a problem with an airplane, it can issue to all users of the aircraft "Air-Worthiness Directives" which order or suggest changes in the interest of safety.

The aircraft industry's duty to warn or to remedy known defects is continuous. That duty cannot be cut off. Consequently, the duty cannot be terminated by a statute of repose. A contrary ruling would defeat the Federal regulatory scheme and would be contrary to both custom in the industry and case law.

When wrongs consist of a continuing course of conduct, statutes of limitation do not begin to run until the course of conduct is completed, Rogers v. White Metal Rolling & Stamping Corporation, 249 F2d 262 (2d Cir.1957); Handler v. Remington Arms Co., 144 Conn. 316, 130 A2d 793 (1957). The statute of repose can never be triggered by the breach of a duty to warn because that statute begins to run at the time of the first sale, whereas the duty to warn my arise before or after that time and continues until the time of the accident.

In the District Court of Appeal Grumman relied on the statement in Eddings v. Volkswagenwerk A.G., 635 F.Supp. 45 (N.D.Fla.1986) that "...since there is no cause of action at the end of (12 years) there can be no duty to warn of a defect." The Eddings formulation is wrong because it assumes that the duty to warn ends when the right to bring a product liability cause of action is cut off by the statute of repose. That is certainly not the case in the aircraft industry where the law requires the duty to continue throughout the life of the aircraft. The inherent nature of the duty to warn makes this true for all products, but if there was any doubt about that fact, the regulatory arrangements governing aircraft require that the doubt be put aside where those machines are concerned.

One further fact supports the argument that the duty to warn is not coupled to the existence of a cause of action for product liability. That is the fact that a duty to warn may arise from a danger that is inherent in a product, but which is not caused by a defect in the design or manufacture of that product. The duty is therefore independent of the existence of a defect and cannot be affected by a statute of repose directed solely at such defects.

The distinction between a cause of action for product liability and other causes of action related to it appears most strongly in Phlieger v. Nissan Motor Company, Ltd., 487 So.2d 1096 (Fla.5th DCA 1986) where the Fifth DCA held that a wrongful death action was not barred by the statute of repose. The death

of the deceased had been caused by an allegedly defective product and had he lived, he would have been prevented by the statute from suing. His widow, however, was permitted to bring a wrongful death action which the court recognized as being related to, but different from a product liability action.

The same is true of an action for breach of the duty to warn. In this case it arises out of a product defect, but the cause of action itself is not a product liability cause of action. The Third DCA erred when it failed to recognize the distinction and applied the statute of repose to Count III of the complaint.

CONCLUSION

This court should rule that the repeal of the statute of repose applies to causes of action that accrued prior to the effective date of the repealing act. In the alternative, it should rule that Pullum does not govern causes of action that accrued prior to the rendition of that decision.

If the court does neither of the above, it should rule that Count III of the complaint does not sound in product liability and was erroneously held to be barred by the statute of repose.

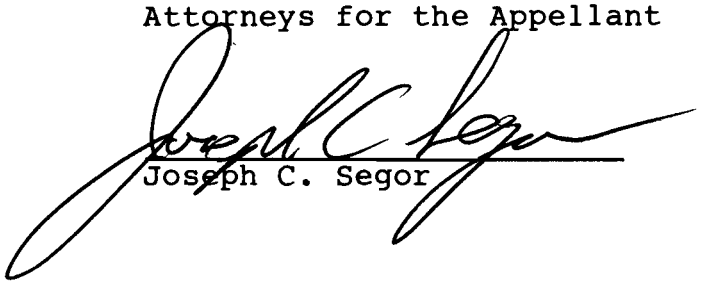
Respectfully submitted,

Melvin A. Rubin
2627 Biscayne Boulevard
Miami, Florida 33137
[305] 576-8610

Jerry B. Schreiber
Suite 207 Biscayne Building
19 West Flagler Street
Miami, Florida 33130
[305] 371-4444

Joseph C. Segor
12815 S.W. 112 Court
Miami, Florida 33176
[305] 233-1380

Attorneys for the Appellant



Joseph C. Segor

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of the Petitioner was mailed March 25, 1987 to: James E. Tribble, Esq., and Angela L. DerOvanesian, Esq., 2400 AmeriFirst Building, One Southeast Third Avenue, Miami, Florida 33131, Attorney for Appellee.

Joseph C. Segor