IN THE SUPREME COURT OF FLORIDA

CASE NO. 70,225

JOSE LUIS MELENDEZ,

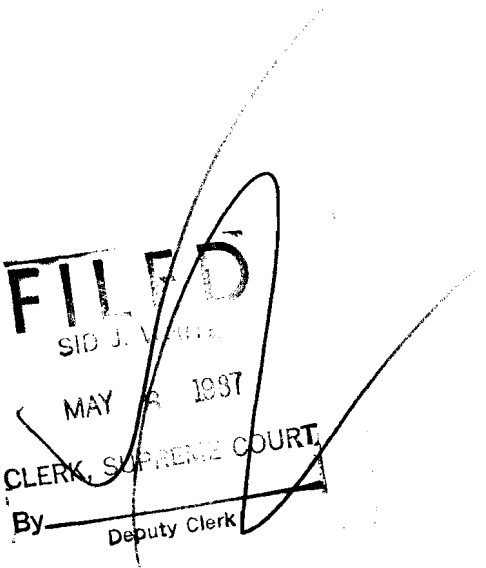
Petitioner,

-vs-

DREIS & KRUMP MANUFACTURING COMPANY,

Respondent.
_____/

BRIEF OF RESPONDENT, DREIS & KRUMP MANUFACTURING COMPANY



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STATEMENT OF CASE AND FACTS

Introduction

This action is before the court pursuant to its discretionary jurisdiction to review a decision of the District Court of Appeal, Third District, certified as passing upon questions of great public importance pursuant to Rule 9.030(a)(2)(A)(v). The trial court in this action applied the terms of Florida Statutes Section 95.031(2) as it existed at the time the cause of action arose and this litigation was filed pursuant to the determination and mandate of this court in Pullum v. Cincinnati, Inc., 476 So. 2d 657 (Fla. 1985). The Petitioner, JOSE LUIS MELENDEZ, was the plaintiff in the trial court, the appellant in the Distrct Court of Appeal, Third District, and will be referred to in this brief as "MELENDEZ". The Appellee, DREIS & KRUMP MANUFACTURING COMPANY, was the defendant in the trial court, the appellee in the lower appellate court, and will be referred to herein as "DREIS & KRUMP".

The following symbol will be used in this brief:

"R" -- Record-on-appeal

All emphasis is supplied by counsel unless otherwise indicated.

Case and Facts

MELENDEZ initiated this product liability litigation on May 17, 1983, seeking damages resulting from the use of a press brake with an incident allegedly occurring on May 10, 1982. (R. 1-10). The basis of the action was refined in an amended complaint to set forth the traditional product liability theories based upon implied warranty, negligence, and strict liability allegations. (R. 16-24). DREIS & KRUMP responded to these allegations and in an amended answer asserted that the action was time barred pursuant to Florida Statutes Section 95.031(2) which was in operative effect at that time. (R. 45-47, 51-52).

As this case developed, it was established without any contradiction whatsoever that the subject product was sold and delivered to the original purchaser on October 28, 1983, some 19 years prior to the alleged incident, and almost 20 years prior to the initiation of the present litigation. Based upon such undisputed factors, DREIS & KRUMP filed its motion for summary final judgment based upon Florida Statutes Section 95.031(2) as interpreted and applied in Pullum v. Cincinnati, Inc., supra. (R. 48-50). The trial court granted the motion for summary final judgment and a summary final judgment was entered in favor of DREIS & KRUMP and against MELENDEZ. (R. 129-130). MELENDEZ sought review in the District Court of Appeal, Third District. (R. 128).

The District Court of Appeal, Third District, affirmed the summary final judgment entered in favor of DREIS & KRUMP based upon the decision in Shaw v. General Motors Corp., 12 F.L.W. 487 (Fla. 3d DCA Feb. 10, 1987). The court proceeded to certify the following

questions to this court as being of great public importance:

I. Should the legislative amendment of Section 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 Batilla v. Allis Chalmers Mfg. Co., 392 So.2d 874 (Fla. 1980), apply so as to bar a cause of action that accrued after the Batilla decision but before the Pullum decision? (R. 161).

POINTS PRESENTED FOR REVIEW

Point I

WHETHER THE LEGISLATIVE AMENDMENT OF SECTION 95.031(2), FLORIDA STATUTES (1983) ABOLISHING THE STATUTE OF REPOSE IN PRODUCT LIABILITY ACTIONS SHOULD BE CONSTRUED TO OPERATE RETROSPECTIVELY TO A CAUSE OF ACTION WHICH ACCRUED BEFORE THE EFFECTIVE DATE OF THE AMENDMENT AND REACTIVATE AN OTHERWISE TIME BARRED ACTION?

Point II

WHETHER THE DECISION OF PULLUM V. CINCINNATI, INC. APPLIES RETROACTIVELY?

SUMMARY OF ARGUMENT

The courts of this state have consistently held that where there is no clear legislative intent to make a statutory amendment retroactive, the new legislation applies prospectively only. Additionally, even if this were not the case, an amendment to a statute cannot breathe life into a cause of action which has been previously extinguished. In this case DREIS & KRUMP acquired a vested right to the defense presented in Florida Statutes Section 95.031(2) which was enacted in 1975, and an amendment to such statute in 1986 simply cannot be applied retroactively in violation of the decisions of this court. The amendment simply did not revive

a non-existent cause of action or a cause of action which had been extinguished.

There is a distinction between rights acquired under a statutory provision and the expectations of individuals with regard to decsions rendered by the courts of this state. The decision of this court in Pullum v. Cincinnati, Inc., 476 So. 2d 657 (Fla. 1985), which overruled earlier precedent is generally applied retroactively because the judicial construction of the statute is deemed to relate back to the enactment of the statute. The statute was merely inoperative until the Pullum decision. Florida Statutes Section 95.031(2) was merely dormant and inopertive until the decision of this court in Pullum and at such time it became operative to apply retroactively.

The law of this state very simply dictates that decisions from its highest court apply retroactively unless otherwise stated, and a contrary rule applies to statutory amendments which dictate that they apply only prospectively unless there is a clear legislative intent to apply retroactively. If a statute is to apply retroactively, it may not destroy rights vested under the statutory provision.

ARGUMENT

Point I

THE LEGISLATIVE AMENDMENT OF SECTION 95.031(2), FLORIDA STATUTES (1983) ABOLISHING THE STATUTE OF REPOSE IN PRODUCT LIABILITY ACTIONS SHOULD NOT BE CONSTRUED TO OPERATE RETROSPECTIVELY TO A CAUSE OF ACTION WHICH ACCRUED BEFORE THE EFFECTIVE DATE OF THE AMENDMENT AND REACTIVATE AN OTHERWISE TIME BARRED ACTION.

The Florida Legislature simply could not breathe new life into the non-existent action of MELENDEZ through statutory manipulation. Most assuredly, the rights of DREIS & KRUMP under the existing statutory repose as it existed in its pre-amendment statuts have been elevated to the position that they could not be destroyed. It is abundantly clear that once the limitation period has expired and a cause of action cannot be maintained the legislature simply cannot, through statutory provisions, resurrect the extinguished action. As noted by this court in Walter Denson & Son v. Nelson, 88 So. 2d 120 (Fla. 1956):

> Ordinarily statutes of limitation are construed as being applicable only to the remedy and not to the substantive right. Parties to a contract, in the absence of a specific provision in the contract, have no vested interest in particular limitation laws until the period prescribed by the statute of limitations has run. The Legislature has the power to increase a prescribed period of limitation and to make it applicable to existing causes of action provided the change in the law is effective before the cause of action is extinguished by the force of a pre-existing statute. id. at 122.

In the most general sense, statutes of repose and statutes of time limitation are similar because they set forth an established time period within which actions must be commenced. It is submitted that statutes of repose are substantive because under a statute of repose there simply is no right to bring an action after the expiration of a certain period of time. On the other hand, a statute

of limitation delineates and sets forth the time available to a party to commence or initiate a legal action once the injury has occurred and it does not begin to run until the wrong has been or should have been discovered. It is important to note, however, that even if the present legislation were interpreted based upon cases involving merely limitation of action statutes the amendment in the present case is not retroactive.

This court very clearly rejected retroactive operation in the limitation context in Foley v Morris, 339 So. 2d 215 (Fla. 1976). In a similar manner, and more closely on point with regard to a procedural limitation, this court addressed a lengthened limitation period by amendment in Homemakers, Inc. v. Gonzales, 400 So. 2d 965 (Fla. 1981).

In Homemakers this court reviewed and considered whether an amendment to a limitation provision which lengthened a limitation period could be retroactively applied to rejuvenate an action which had been already barred by the terms of a prior limitation statute. This court clearly held that a modification to the limitation provision which lengthened or extended the limitation period could not operate retroactively to breathe life into an action which was time barred prior to subsequent legislative action which amended and lengthened the limitation period. It is submitted that the legislative amendment and modification which occurred with regard to the statute of repose in 1986 simply cannot and does not operate retroactively to breathe life into an action filed by MELENDEZ which was time barred.

The statute of repose under consideration in this case may be similar to a statute of limitation, but there is a very definite

distinction involved. The statute of repose which was applied in this case was triggered based upon the time the product was sold and delivered to the original purchaser. When the incident or injury arose from the product after the authorized established period had elapsed, there simply was no liability or responsibility on the part of DREIS & KRUMP in this case. This situation demonstrates that a statute of repose does not simply bar or preclude a remedy as a procedural mechanism but the operative effect is that absolutely no cause of action ever arose or existed. See, e.g., Rosenberg v. Town of North Bergen, 293 A.2d 662 (N.J. 1972). This concept is very similar to the immunity which was addressed by this court in Walker & Laberge, Inc. v. Halligan, 344 So. 2d 239 (Fla. 1977).

The workers' compensation exclusive remedy doctrine or immunity from liability concepts are well known and have been applied for many years under Florida law. The Florida Legislature has amended the immunity concept as to the persons entitled to the benefit of the immunity and one such amendment was addressed by this court in its Walker & Laberge decision. A workman was injured in October of 1972 and initiated an action to recover damages from a subcontractor on the construction project. The subcontractor, Walker & Laberge, asserted immunity from liability under the workers' compensation statutes which were in effect on the date of the accident. In 1974, prior to the filing of the action, the Florida Legislature amended the workers' compensation immunity doctrine by eliminating certain persons from its benefit. Walker & Laberge, the subcontractor, asserted that it was entitled to the immunity which existed at the time the cause of action accrued. The trial court determined otherwise and applied the amendment retro-

activity to defeat the immunity.

This court in Walker & Laberge, Inc. v. Halligan, supra, applied the stated "well-established" rule that in the absence of clear legislative expression to the contrary a law is presumed to operate prospectively. Further, this court applied the seminal limitation of action cases which dictate prospective application of legislation. This court specifically rejected application of the decisions MELENDEZ has presented as a basis for retroactive application. This court clearly analyzed that both Summerlin v. Tramill, 290 So. 2d 53 (Fla. 1973), and Tel Service Co. v. General Capital Corp., 227 So. 2d 667 (Fla. 1969), involved statutes which were inherently procedural or affected only the measure of damages for vindication of a substantive right. This court analyzed that the "guest statute" modification addressed a burden of proof requirement but did not address a substantive statutory right. In a similar manner, the Tel Service Co. decision addressed an amendment concerning a measure of damages and did not work any modification of a substantive right.

This court in Walker & Laberge clearly determined that the immunity from suit concept was a substantive statutory right which could not be retroactively withdrawn. Since such right had vested before the amendment the substantive legislative action could not destroy the right.

It is submitted that the present case involves a substantive "immunity type" provision as opposed to a procedural mechanism such as a limitation of action. However, even if the present statute of repose were applied as a "limitation of action" provision the 1986 amendment could not retroactively apply to breathe life into a cause

of action which never existed or was extinguished by the statute of repose.

Other states have prohibited the adoption of legislation which would revive a cause of action which has been previously extinguished. This has been considered in the context of a repose concept. See, e.g., Ford Motor Co. v. Moulton, 511 S.W.2d 690 (Tenn. 1974), cert. denied, 419 U.S. 870, 95 S.Ct. 129 (1975); Trustees of Rowan Technical College v. J. Hyatt Hammond Associates, Inc., 328 S.E.2d 274 (N.C. 1985); Colony Hill Condominium I Association v. Colony Co., 320 S.E.2d 273 (N.C. App. 1984), review denied, 375 S.E.2d 485 (N.C. 1985). It is submitted that the legal discussions are largely theoretical because there simply has been no clear legislative intent to apply the statutory amendment in a retroactive manner. Additionally, fundamental legal concepts dictate that the amendment to the Florida statute of repose in 1986 cannot be applied retroactively.

The decisions upon which MELENDEZ attempts to rely relate primarily to the field of usury and the application of statutes permitting the exercise of a privilege to assert certain provisions. The usury cases were specifically rejected by this court in Walker & Laberge, Inc. v. Halligan, supra, as being applicable for retroactive application of a statute to prohibit an otherwise statutory defense. In a similar manner, decisions dealing with the jurisdiction of a particular forum to determine a controversy does not involve the same concepts because no one obtains vested rights to any particular forum for the adjudication of rights. Additionally, the very essence of a jurisdictional statute would require retroactive operation because when the very purpose of the legisla-

tion was to remove jurisdiction, jurisdiction should not survive even with pending matters.

Finally, the suggestion by MELENDEZ that this case must be determined in accordance with the law prevailing at the time of appellate disposition without regard to the "retroactive application" issue is simply without merit. It is recognized that a case should be determined in accordance with the law in existence at the time of the appellate disposition but this does not make each and every statute retroactive if a statute just happens to be effective at the time of an appellate decision. MELENDEZ simply misconstrues and does not understand application of the doctrine. Each and every decision set forth has been determined to be of a procedural nature and to be "retroactive" in application and, therefore, applicable to the pending case. This proposition of law does not in any way modify or alter the doctrine that the statute in this case cannot be retroactively applied.

Point II

THE DECISION OF PULLUM V. CINCINNATI, INC. APPLIES RETROACTIVELY.

It is clear that each and every district court of appeal in this state which has considered the application of the Pullum decision has clearly held that the decision should be applied retroactively in accordance with existing Florida law. The argument and position of MELENDEZ to the contrary simply has no support in Florida law. The Pullum decision has been retroactively applied in accordance with Florida law by each and every district court of appeal to which the issue has been presented. See, e.g., Cassidy v. Firestone Tire & Rubber Co., 495 So. 2d 801 (Fla. 1st DCA 1986); American Liberty Insurance Co. v. West & Conyers, 491 So. 2d 573 (Fla. 2d DCA 1986); Small v. Niagara Machine & Tool Works, 12 F.L.W. 366 (Fla. 2d DCA Jan. 20, 1987); Shaw v. General Motors Corp., 12 F.L.W. 487 (Fla. 3d DCA Feb. 10, 1987); Pait v. Ford Motor Co., 12 F.L.W. 277 (Fla. 5th DCA Jan. 15, 1987). It is submitted that MELENDEZ merely makes statements that he had attained some type of vested interest in an existing decision which is not supported under Florida law.

It simply cannot be disputed that the general rule in this state is that a decision of this court which overrules a former decision is retrospective as well as prospective in its operation unless this court specifically declares that the decision shall have prospective effect only. See generally, Florida Forest & Park Service v. Strickland, 18 So. 2d 25 (Fla. 1944); Florida East Coast Railway Co. v. Rouse, 194 So. 2d 260 (Fla. 1967); Parkway General Hospital, Inc. v. Stern, 400 So. 2d 166 (Fla. 3d DCA 1981).

The exception to the rule simply does not apply in this case and MELENDEZ attempts to rely upon cases in which a party proceeded with procedural steps to perfect an appeal based upon existing law and the court simply would not permit subsequent decisions from reaching back to destroy the appeal which had been otherwise properly perfected. The present case presents a far different situation in that it is clear that MELENDEZ had absolutely no vested right in the concept that the decisional law of this state would remain in any particular condition forever. In this case DREIS & KRUMP did not have a vested right in the doctrine of contributory negligence which existed when it produced its goods after the judicial adoption of a concept of comparative negligence. The same theories could be applied to privity concepts, strict liability concepts, and other judicially created expansions in the law of product liability which did not exist at the time DREIS & KRUMP manufactured its product.

The application of Pullum did not improperly destroy, nor did MELENDEZ hold any type of vested right under a particular decision in this state. A substantive vested right required more than a mere expectation that the decisional law would remain in any particular status. MELENDEZ was simply pursuing a theory to recover damages. The statute of repose had been enacted long before the incident involved in this litigation and long before this action was filed. It had merely been placed in an inoperative status while the decisions which precluded its operation remained in full force and effect. When the decision was reversed, the statute was determined to be valid from the date it first became effective. The statute in this case merely remained dormant and inoperative but was not

deceased or removed from the "statutory" law. See, e.g., Christopher v. Mungen, 55 So. 273 (Fla. 1911); State v. Lee, 22 So. 2d 804 (Fla. 1945); and State v. White, 194 So. 2d 601 (Fla. 1967).

It must also be noted that even if MELENDEZ had acquired some type of common-law action, which he did not in any way, the action itself can be abolished by the legislature based upon public necessity in the absence of less onerous alternative means as set forth in the "access to courts" decisions. This court in Pullum has determined, by reversing Battilla that it was abundantly proper to place a limitation upon perpetual liability and the limitation does not in any way violate the "access to courts" concepts and is not unconstitutional. It is submitted that the Pullum decision in and of itself destroys the position asserted by MELENDEZ in this case. The mere prospect that one may recover damages from someone else based upon some particular theory is not tantamount to a vested right. At the time the statute of repose was enacted in 1975, MELENDEZ had no cause of action and an unaccrued cause of action is not a property right at all.

CONCLUSION

Based upon the arguments, authorities, and reasoning set forth herein, this court should determine that the statutory amendment cannot be retroactively applied and the decision of this court in Pullum is properly applied in this litigation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was mailed this 4th day of May, 1987, to Keith A. Truppman, Esq., Attorney for MELENDEZ, 1700 Sans Souci Boulevard, North Miami, FL 33181.

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