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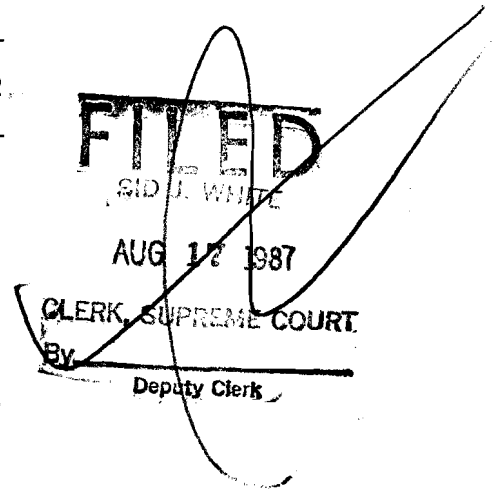
IN THE SUPREME COURT OF FLORIDA

CASE NO. 70,752



EDWARD PURTY,

Petitioner,

-vs-

McDONNELL DOUGLAS CORPORATION,

Respondent.

ON APPEAL FROM THE FLORIDA DISTRICT COURT OF APPEAL, THIRD DISTRICT

ANSWER BRIEF OF RESPONDENT

KIMBRELL & HAMANN, P.A.
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STATEMENT OF THE CASE

McDONNELL DOUGLAS CORPORATION (hereinafter "MDC") does not disagree with any significant aspects of the Statement of the Case of EDWARD PURTY (Hereinafter "MR. PURTY"). MDC would correct a date which was inadvertently misstated by MR. PURTY. The Motion for Summary Judgment was filed by MDC on October 15, 1985 and not February 15, 1985 as indicated by MR. PURTY. (R.37-45).[1/]

1/ In its Answer Brief, the Respondent will refer to the Record on Appeal as (R.____).

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STATEMENT OF FACTS

MDC again does not substantially disagree with MR. PURTY's Statement of the Facts. MDC does feel, however, that one point needs to be clarified.

In his Statement of the Facts, MR. PURTY states that the fire bottles were not contained in the DC-8 aircraft when it was initially delivered to the original purchaser, United Airlines. *See* Petitioner's Initial Brief at pp.10-11. MR. PURTY further states that the fire bottles on the aircraft at the time of the accident were not manufactured until July, 1962. *Id.* While MDC does not dispute that the fire bottle which allegedly injured MR. PURTY was not manufactured until July, 1962 and thus was not included on the aircraft when originally delivered to United Airlines, the record is silent as to when the remaining three fire bottles were manufactured by Kidde, Inc. Thus, it is unknown as to whether these fire bottles were on the aircraft at the time of delivery.

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SUMMARY OF ARGUMENT

The Third District Court of Appeal has certified two questions to this Court as being of great public importance. McDONNELL DOUGLAS CORPORATION (hereinafter "MDC") respectfully submits that the question of whether the legislative amendment to Section 95.031(2), Florida Statutes, abolishing the statute of repose should apply retroactively should be answered in the negative. MDC also submits that the question concerning whether ***Pullum v. Cincinnati, Inc.***, 476 So.2d 657 (Fla. 1985), ***appeal dismissed***, ___ U.S. ___, 106 S.Ct. 1626, 90 L.Ed.2d 174 (1986), applies to a cause of action which accrued after ***Battilla v. Allis Chalmers Mfg. Co.***, 392 So.2d 874 (Fla. 1980), but before ***Pullum*** should be answered in the affirmative.

The legislative amendment to Section 95.031(2), Florida Statutes, should not be applied retroactively in that the language of the amendment itself and the legislative history of amendment clearly indicate that the Florida Legislature intended the amendment to have only prospective application. As such, there is no reason to depart from the long-standing rule in Florida that a law is presumed to apply prospectively absent a clear, express or manifest legislative expression to the contrary. ***Young v. Altenhaus,*** 472 So.2d 1152 (Fla. 1985); ***State v. Lavazzoli,*** 434 So.2d 321 (Fla. 1983); ***Homemakers, Inc. v. Gonzalez,*** 400 So.2d 965 (Fla. 1981); ***Foley v. Morris,*** 339 So.2d 215 (Fla. 1976).

Further, as a statute of repose or the abolition of a statute of repose is substantive in nature, the amendment to Section 95.031(2) does not fall under the exception that remedial statutes may be applied retroactively in certain circumstances. ***See Lamb v. Volkswagenwerk Atkiengesellschaft,*** 631 F. Supp. 1144 (S.D. Fla. 1986); ***Rosenberg v. Town of North Bergen,*** 283 A.2d 662 (1972). Finally, as MDC had acquired vested, substantive rights under the statute of repose, it would be unconstitutional to apply the amendment to Section 95.031(2) retroactively in this case. ***L. Ross, Inc. v. R.W. Roberts Construction Co., Inc.,*** 466 So.2d 1096 (Fla. 5th DCA 1985), ***approved,*** 481 So.2d 484 (Fla. 1986).

This Court's decision in ***Pullum v. Cincinnati, Inc.,*** 476 So.2d 657 (Fla. 1985), ***appeal dismissed,*** ___ U.S. ___, 106 S.Ct. 1626, 90 L.Ed.2d 174 (1986), should be applied retrospectively to causes of action which accrued after ***Battilla v. Allis Chalmers Mfg. Co.,*** 392 So.2d 874 (Fla. 1980), but before ***Pullum.*** The holding of ***Pullum*** itself evidences this Court's intent that ***Pullum*** apply to cases pending at the time of the decision. In addition, as MR. PURTY acquired no vested property or contract rights as a result of the decision in ***Battilla*** or the statute of repose, it is not unconstitutional to apply ***Pullum*** to his case. ***See, e.g., Lamb v. Volkswagenwerk Atkiengesellschaft,*** 631 F. Supp. 1144 (S.D. Fla. 1986).

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ARGUMENT

I.

THE LEGISLATIVE AMENDMENT OF SECTION 95.031(2), FLORIDA STATUTES (1983), ABOLISHING THE STATUTE OF REPOSE IN PRODUCT LIABILITY ACTIONS SHOULD NOT BE APPLIED RETROACTIVELY TO A CAUSE OF ACTION WHICH ACCRUED BEFORE THE EFFECTIVE DATE OF THE AMENDMENT.

The Third District Court of Appeal was correct in adhering to its earlier decision in ***Shaw v. General Motors Corp.***, 503 So.2d 362 (Fla. 3d DCA 1987), in which the court held that the legislative amendment to Section 95.031(2) should not be applied retroactively. MDC respectfully submits that this Court should answer the first question certified by the Third District Court of Appeal in the instant case in the negative.

A.

THE LANGUAGE OF THE AMENDMENT ITSELF EVIDENCES A LEGISLATIVE INTENT THAT THE AMENDMENT APPLY PROSPECTIVELY ONLY.

It is a long-standing rule of statutory construction that in the absence of a clear, legislative expression to the contrary, a law is presumed to operate prospectively. *See Young v. Altenhaus*, 472 So.2d 1152 (Fla. 1985); *State v. Lavazzoli*, 434 So.2d 321 (Fla. 1983); *Homemakers, Inc. v. Gonzales*, 400 So.2d 965 (Fla. 1981); *Seddon v. Harpster*, 403 So.2d 409 (Fla. 1981); *Foley v. Morris*, 339 So.2d 215 (Fla. 1976). In addition, where the language of the statute in question clearly conveys the legislative intent that the

statute apply prospectively only, then it is unnecessary to engage in statutory construction to determine legislative intent. ***Citizens of State v. Public Service Commission***, 425 So.2d 534 (Fla. 1982); ***Seaboard System Railroad, Inc. v. Clemente***, 467 So.2d 348 (Fla. 3d DCA 1985).

MR. PURTY points to the language of the amendment to Florida Statutes § 95.031(2) as evidence that the Florida Legislature "intended the statute to apply retroactively." Initial Brief at p.14. As support, MR. PURTY points to Section (3) of the amendment and argues that the section was silent on the issue of the prospective effect of Section (2) of the amendment which dealt with the statute of repose. According to MR. PURTY, this silence coupled with the language of Section (3) which notes that Section (1) concerning the statute of limitations on libel and slander claims was to apply only to causes of action accruing after October 1, 1986 indicates a legislative intent that Section (2) was to apply retroactively. MDC respectfully submits that MR. PURTY's argument is flawed, and the language of the amendment reflects, if anything, the intent of the legislature that the statute apply prospectively.[2/]

2/ It should be noted for clarity that Sections (1) and (2) were amended by way of two separate and distinct bills. House Bill 832 concerning libel and slander was the basis of the amendment contained in Section (1) while House Bill 944 formed the basis for the abolition of the statute of repose in Section (2). MDC questions
(Footnote continues)

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MR. PURTY appears to overlook the language in Section (3) of the amendment which states that Section (2) was to be "effective July 1, 1986." Such language supports the notion that the legislature intended that the abolition of the statute of repose have prospective effect only. In fact, the effective date language contained in Section (3) is quite similar to the effective date language contained in the old amendment to the statute of limitations for medical malpractice claims which this Court discussed in ***Foley v. Morris***, 339 So.2d 215 (Fla. 1976). In ***Foley***, this Court held that the amendment shortening the statute of limitations from four years to two years for medical malpractice claims was not retroactive in effect. ***Id.*** at 217. The amendment at issue in ***Foley*** specifically stated that the act "shall take effect on July 1, 1972." ***Id.*** Interpreting the language of the statute, this Court noted that "[N]othing in the language of the act manifests an intention by the Legislature to do otherwise than prospectively apply the new two-year statute of limitations." ***Id.*** Similarly in the instant case, the language noting that the amendment "shall take effect on July 1, 1986" reflects the intention of the

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the propriety of MR. PURTY's argument that the legislature's intent in House Bill 944 can be inferred from the legislature's intent in the separate and distinct House Bill 832. In any event, such an inference certainly does not show an "express, clear, or manifest" legislative intent that the amendment is to apply retroactively. ***Foley v. Morris***, 339 So.2d 215, 217 (Fla. 1976).

Florida Legislature that the abolition of the statute or repose have prospective effect.[3/]

B.

THE LEGISLATIVE HISTORY OF THE AMENDMENT TO SECTION 95.031(2), FLORIDA STATUTES, DOES NOT REVEAL AN EXPRESS, CLEAR, OR MANIFEST LEGISLATIVE INTENT THAT THE AMENDMENT APPLY RETROACTIVELY.

Although MDC believes that the language of the amendment to Section 95.031(2) clearly demonstrates a legislative intent that the abolition of the statute of repose operate prospectively, MDC submits that the legislative history of the amendment further buttresses the notion that prospective application only was intended. Even a cursory review of the debate in the House of Representatives reveals that the question of retroactivity of the amendment was not even addressed. *See* Appendix at p. 3-44. Legislative silence on the issue of retrospective application of the amendment

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3/ It is also significant that the amendment to the statute does not contain a savings clause of any type. This Court has noted that a savings clause, when included in legislation, "imparts retroactively upon the statutes within its ambit." ***Carpenter v. Florida Central Credit Union***, 369 So.2d 935, 937 (Fla. 1979). ***See also Homemakers, Inc. v. Gonzales***, 400 So.2d 965 (Fla. 1981). ***See also, Lamb v. Volkswagenwerk Aktiengesellschaft***, 631 F. Supp. 1144, 1151 (S.D. Fla. 1986); ***McRae v. Cessna Aircraft Co.***, 457 So.2d 1093 (Fla. 1st DCA 1984), ***rev. denied***, 467 So.2d 1000 (Fla. 1985). The lack of a savings clause in the amendment to the statute is thus further evidence on the face of the amendment itself that the legislature did not intend retroactive effect.

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certainly cannot be construed as evidence of an "express, clear, or manifest" intention by the legislature and thus, provides no support for MR. PURTY's position in the instant case.

C.

THE ABOLITION OF THE STATUTE OF REPOSE IS NOT REMEDIAL IN NATURE AND IS NOT TO BE APPLIED RETROACTIVELY.

MDC does not dispute the general proposition that statutes that are remedial may be retrospectively applied in certain circumstances. ***See*** Initial Brief at pp.15-16. MDC, however, does dispute that the amendment to Section 95.031(2) is remedial in nature.

MR. PURTY seems to argue that the abolition of the statute of repose in products liability actions is remedial because the legislature desired to "remedy the inherent inequities which resulted from its application." ***See*** Initial Brief at p.16. Unfortunately, MR. PURTY's analysis is flawed as every new law, repealed law or amended law could be said to "remedy . . . inherent inequities." If this were the test for determining whether a statute is remedial, then virtually every legislative enactment could be construed as "remedial" and thus could be given retroactive application. Such is not the case. In fact, statutes concerning statutes of limitations and statutes of repose are ***substantive*** in nature and not remedial. As such,

the exception to the general rule that remedial statutes may be applied retroactively in certain circumstances is of no assistance to MR. PURTY.

As stated by the United States District Court for the Southern District of Florida in ***Lamb v. Volkswagenwerk Atkiengesellschaft***, 631 F. Supp. 1144 (S.D. Fla. 1986), a statute of repose acts to terminate "the right to bring an action after the lapse of a specified period." ***Id.*** at 1147. The ***Lamb*** court went on to adopt the language of ***Rosenberg v. Town of North Bergen***, 293 A.2d 662 (1972), where the New Jersey Supreme Court stated that a statute of repose ". . . does not bar a cause of action; its effect, rather, is to prevent what might otherwise be a cause of action, from ever arising." ***Rosenberg***, 293 A.2d at 667. ***See also Lamb, supra***, at 1147. The ***Rosenberg*** court went on to reach the inevitable conclusion that the "function of the statute is thus rather to define substantive rights than to alter or modify a remedy." ***Id.*** This conclusion is compelling because the statute of repose clearly does not act to codify any remedy or describe ways in which a substantive right may be enforced. Rather, the statute of repose acts to give substantive rights to manufacturers by placing a reasonable limitation on a manufacturer's duty. As stated by this Court in ***Pullum v. Cincinnati, Inc.***, 476 So.2d 657 (Fla. 1985), the statute of repose represented a

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reasonable legislative determination that "perpetual liability places an undue burden on manufacturers, and it decided that twelve years from the date of sale is a reasonable time for exposure to liability for manufacturing of a product." *Id.* at 659. In short, a statute of repose gives manufacturers a substantive right not to be sued concerning older products.

In summary, MR. PURTY's argument for retroactivity on the basis of the remedial nature of the amendment to Section 95.031(2) fails as it is beyond peradventure that the statute of repose and the amendment abolishing the statute of repose are purely substantive in nature. The amendment to Section 95.031(2) should not be applied retroactively.

D.

TO APPLY THE AMENDMENT TO SECTION 95.031 (2), FLORIDA STATUTES, RETROACTIVELY WOULD BE UNCONSTITUTIONAL.

In MR. PURTY'S case, the twelve year period of the statute of repose had completely run prior to July 1, 1986, the effective date of the amendment to Section 95.031(2). MDC thus acquired a vested right not to be sued regarding the DC-8 aircraft at issue in the instant case. To apply the amendment to Section 95.031(2) would thus deprive MDC of a substantive, vested right not to be sued. Florida law is clear that such a deprivation by would violate MDC's constitutional rights.

As noted above, a statute of repose acts to define

substantive rights rather then to mold or define remedies. ***Rosenberg v. Town of North Bergen,*** 293 A.2d 662 (1972); ***Lamb v. Volkswagenwerk Aktiengesellschaft,*** 631 F. Supp. 1144 (S.D. Fla. 1986). After substantive rights have vested, the legislature may not constitutionally pass legislation which enlarges an existing obligation, burden, a penalty as to a state of facts after those facts have occurred. ***L. Ross, Inc. v. R.W. Roberts Construction Co., Inc.,*** 466 So.2d 1096 (Fla. 5th DCA 1985), ***approved,*** 481 So.2d 484 (Fla. 1986).

As the passage of the twelve year period in the statute of repose created in MDC the right not to be sued concerning this DC-8 aircraft, MDC's situation is directly analogous to a situation where a defendant has a statutory immunity from suit. In such a situation this Court has held that such an immunity is a substantive right which cannot be retrospectively withdrawn. ***Wallace & LaBerge, Inc. v. Halligan,*** 344 So.2d 239, 243 (Fla. 1977).

Courts in other jurisdictions have held that it is unconstitutional to enact a statute which serves to revive a cause of action already barred. ***Ford Motor Co. v. Moulton,*** 511 S.W. 2d 690 (Tenn. 1974), ***cert. denied,*** 419 U.S. 870. In fact, the Supreme Court of North Carolina has held that amendments to a statute of repose cannot constitutionally revive an action already barred. ***Trustees of Rowan Technical College v. J. Hyatt Hammond Associates, Inc.,*** 313

N.C. 230, 328 S.E. 2d 274 (N.C. 1985). ***See also, Colony Hill Condominium I Ass'n v. Colony Co.,*** 70 N.E. App. 390, 320 S.E.2d 273 (N.C. App. 1984), ***rev. denied,*** 325 S.E.2d 485 (N.C. 1985).

Accordingly, any products liability action barred by the abolished twelve year repose provision of Section 95.031(2), Florida Statutes, prior to July 1, 1986, must remain barred. MDC submits that this Court must therefore answer the first question certified by the Third District Court of Appeal in the negative.

II.

THIS COURT'S DECISION IN *PULLUM V. CINCINNATI, INC.* IS PROPERLY APPLIED TO THE INSTANT CASE

MDC respectfully submits that this Court's decision in ***Pullum v. Cincinnati, Inc.,*** 476 So.2d 657 (Fla. 1985), ***appeal dismissed,*** ____ U.S. ____, 106 S.Ct. 1626, 90 L.Ed.2d 174 (1986), may be constitutionally applied to the case at bar. MDC requests this Court to answer the second question certified by the Third District Court of appeal in the affirmative.

A.

APPLICATION OF THE *PULLUM* DECISION TO THE INSTANT CASE IS NOT UNCONSTITUTIONAL

MR. PURTY argues that application of this Court's decision in ***Pullum*** violates his right to access to the courts as guaranteed by the Florida Constitution. ***See***

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Initial Brief at pp.18-21. MR. PURTY's argument has been rejected by each and every District Court of Appeal in Florida.[4/] MR. PURTY's argument has also been rejected by several United States District Courts sitting in diversity. ***See Blanco v. Wasco Products, et al.***, Case No. 85-964-Civ-MARCUS (S.D. Fla. March 18, 1986); ***Lamb v. Volkswagenwerk Atkiengesellschaft***, 631 F. Supp. 1144 (S.D. Fla. 1986); ***Eddings v. Volkswagenwerk A.G.***, 635 F. Supp. 45 (N.D. Fla. 1986).[5/]

MR. PURTY relies upon ***Florida Forest and Park Service v. Strickland***, 154 Fla. 472, 18 So.2d 251 (1944), as support

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4/ ***See, e.g., Braziel v. Stokes Automatic Molding Equipment***, 12 F.L.W. 1841 (Fla. 4th DCA July 29, 1987); ***Williams v. American Laundry Machine Industries***, 12 F.L.W. 1808 (Fla. 2d DCA July 22, 1987); ***Willer v. Pierce***, 505 So.2d 441 (Fla. 4th DCA 1987); ***Coggins v. Clark Equipment Co.***, 503 So.2d 982 (Fla. 5th DCA 1987); ***Shaw v. General Motors Corporation***, 503 So.2d 362 (Fla. 3d DCA 1987); ***Small v. Niagara Machine & Tool Works***, 502 So.2d 943 (Fla. 2d DCA 1987); ***Pait v. Ford Motor Co.***, 500 So.2d 743 (Fla. 5th DCA 1987); and ***Cassidy v. Firestone Tire & Rubber Co.***, 495 So.2d 801 (Fla. 1st DCA 1986), ***rev. denied***, 506 So.2d 1040 (Fla. 1987).

5/ In his Initial Brief, MR. PURTY's statement that the argument that application of ***Pullum*** violates his right to access to the courts was accepted by the court in ***George v. Firestone Tire & Rubber Co.***, Case No. GCA 85-0117-MMP (M.D. Fla. 1986), and ***Owens v. Firestone Tire & Rubber Co.***, Case No. 84-350-Civ-T-10 (M.D. Fla. 1986), is not accurate. The ***George*** court relied entirely upon the Due Process Clause of the Federal Constitution in finding that the statute of repose should not be applied to a cause of action accruing after the decision of ***Battilla v. Allis Chalmers Mfg. Co.***, 392 So.2d 874 (Fla. 1980), and before ***Pullum***.

for his position that he had a vested property right in his cause of action which cannot be constitutionally cut off by the application of ***Pullum***.[6/] MR. PURTY's position is incorrect. In ***Strickland***, this Court described the general rule that a decision of a court of last resort which overrules a previous decision is retrospective and prospective in application unless property or contract rights obtained by statute have been destroyed by the new decision construing that statute. ***Strickland***, 18 So.2d at 2353. MDC contends that MR. PURTY did not acquire ***any right*** under the statute of repose or the ***Battilla*** decision much less any vested property or contract right as contemplated by ***Strickland***.

In ***Pullum***, this Court held that the decision in ***Battilla*** was incorrect and that the statute of repose was constitutional. Florida law is clear that the overruling of a decision holding a statute unconstitutional validates the statute as of its effective date. ***Lamb v. Volkswagenwerk Atkiengesellschaft***, 631 F. Supp. 1144 (S.D. Fla. 1986); ***Christopher v. Mungen***, 61 Fla. 513, 55 So. 273, 280 (1911).

6/ MR. PURTY variously refers to his cause of action and his right to seek compensation for his injuries as a "potential property right" and a "vested property right." Although MDC sees some inconsistency in the phrases, MDC submits the inconsistency is of no moment as MR. PURTY did not have the kind of property right which fit into the exception to the general rule of retroactivity described in ***Strickland***.

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As such, the statute of repose was valid at the time MR. PURTY was injured and thus, MR. PURTY never acquired his alleged vested property right to seek compensation for his injury. At most, MR. PURTY has only a hope and expectation that the law as announced in ***Battilla*** would continue. As noted by the court in ***Lamb***, MR. PURTY had:

> no vested contract or property right prior to the ***Pullum*** decision; instead Plaintiff was merely pursuing a common law tort theory to recover damages.

Lamb, 631 F. Supp. at 1149. As MR. PURTY had no vested rights at the time of the accident which caused his injury, neither the Florida Constitution nor the United States Constitution are offended by the application of ***Pullum*** in the instant case.

MDC respectfully submits that the second question certified by the Third District Court of Appeal should be answered in the affirmative.

B.

A FAIR READING OF *PULLUM* COMPELS THE CONCLUSION THAT THIS COURT INTENDED *PULLUM* TO HAVE RETROSPECTIVE EFFECT

The holding of this Court's decision in ***Pullum*** compels the conclusion that the decision was to have retrospective effect. In ***Pullum***, the Court was confronted with the argument that the plaintiff was denied equal protection of the laws as a result of the anomaly created by the decisions

in ***Battilla*** and in ***Purk v. Federal Press Co.***, 387 So.2d 354 (Fla. 1980). In ***Battilla***, the Court held the statute of repose unconstitutional for those people injured by products more than twelve years after delivery of the product to the original purchaser. Thus, under ***Battilla***, such a person would have the full four year statute of limitations within which to file suit. On the other hand, the Court in ***Purk*** held that the statute of repose could constitutionally shorten the time to file suit for those persons injured by a product less than twelve years after the date of delivery of the product. The plaintiff in ***Pullum*** was injured ten and one half years after delivery of the product and thus, under ***Purk***, had one and one half years to file suit.

The plaintiff in ***Pullum*** argued that there was no rational basis for making a distinction between him and a plaintiff who came under the umbrella of ***Battilla***. The plaintiff in ***Pullum*** argued that to make such a distinction violated his constitutional right to equal protection of the laws.

The ***Pullum*** Court answered this argument by disposing of the basis of Pullum's equal protection argument. The ***Pullum*** Court expressly overruled ***Battilla*** and noted that "[I]n receding from ***Battilla***, we have eliminated the premise of Pullum's equal protection argument." ***Pullum***, 476 So.2d at 660.

MDC submits that the overruling of ***Battilla*** in ***Pullum*** eliminates the equal protection claim only if ***Pullum*** was intended by this Court to have retrospective effect. Otherwise, persons injured prior to ***Pullum***, but more than twelve years after the delivery of the product (such as MR. PURTY), would still have four years to file suit under the reasoning of ***Battilla***, while those injured prior to ***Pullum***, but less than twelve years after the delivery of the product could conceivably have less than four years to file suit. Arguably, an equal protection argument could still exist. Thus, if this Court is to be believed that it intended to eliminate the basis of ***Pullum***'s equal protection argument, then the ***Pullum*** decision must be read to evidence the Court's intention that ***Pullum*** was to apply retrospectively.[7/]

7/ It should be noted that the issue of retrospective application of ***Pullum*** was presented to the Court on Pullum's Petition for Rehearing. This Court's denial of rehearing on November 5, 1985, is at least some support that the Court intended ***Pullum*** to apply retrospectively. By denying rehearing, it is evident that this Court did not feel there were any points in ***Pullum*** which merited clarification.

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CONCLUSION

For all of the reasons discussed above, MDC respectfully requests this Court to answer the first question certified by the Third District Court of Appeal in the negative and to answer the second question certified in the affirmative.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief has been furnished by United States mail this 14th day of August, 1987, to BARRANCO, KELLOUGH & KIRCHER, P.A., Attorneys for Appellant, 1040 City National Bank Building, 25 West Flagler Street, Miami, Florida 33130.

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