IN THE SUPREME COURT OF FLORIDA

CASE NO. 70,818

ORLANDO DIAZ,

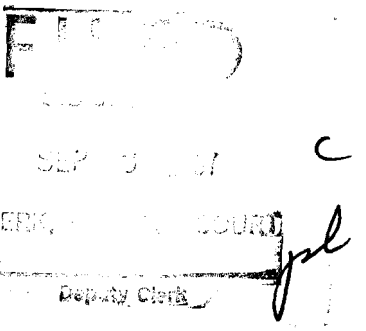
Petitioner,

-vs-

CURTISS-WRIGHT CORP.,

Respondent.

_____/



BRIEF OF PETITIONER, ORLANDO DIAZ

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STATEMENT OF CASE AND FACTS

Introduction

This case is before the Court under a petition for review filed on behalf of ORLANDO DIAZ seeking a determination of three questions certified by the District Court of Appeal, Third District, to be of great public importance. The present case presents a somewhat exceptional and extraordinary situation created and presented by the product liability Statute of Repose, its lengthy invalidity under Battilla v. Allis Chalmers Manufacturing Co., 392 So.2d 874 (Fla. 1981), a reversal of decisions in Pullum v. Cincinnati, Inc., 476 So.2d 657 (Fla. 1985), and its subsequent repeal at the first meeting of the Florida Legislature as set forth in Chapter 86-272, Laws of Florida. Superimposed upon this scenario is the application of Rule 1.540 to provide relief to render justice and avoid an illogical result contrary to all sense of fairness.

The Petitioner, ORLANDO DIAZ, was the plaintiff in the trial court, the appellee in the district court of appeal, and will be referred to herein as "DIAZ". The Respondent, CURTISS-WIRGHT

CORP., was the defendant in the trial court, the appellant in the district court of appeal, and will be referred to in this brief as "CURTISS-WRIGHT".

The following symbols will be used in this brief:

"R" -- Record-on-Appeal

"A" -- Appendix filed simultaneously herewith

All emphasis is supplied by counsel unless otherwise indicated.

Case and Facts

DIAZ initiated this litigation against CURTISS-WRIGHT in June, 1984, seeking the recovery of personal injury damages resulting from a fall which occurred on September 3, 1982, from a defective aircraft ladder manufactured and sold by CURTISS-WRIGHT. (A. 1-2). After minor amendments to the complaint (A. 3-4), the action was scheduled for trial for a period commencing in December, 1985. (A. 5).

At the time of the injury and the initiation of the underlying litigation the 12 year repose provision of Florida Statutes Section 95.031(2) had been determined to be unconstitutional under the circumstances in this case in the decision of Battilla v. Allis Chalmers Manufacturing Co., 392 So.2d 874 (Fla. 1981). Notwithstanding such original opinion, in late August, 1985, the original opinion in Pullum v. Cincinnati, Inc., 476 So.2d 657 (Fla. 1985) was rendered by this Court, which reconsidered and receded from the Battilla determination. In late September, 1985, CURTISS-WRIGHT filed a motion for summary final judgment asserting the 12 year repose provision of Florida Statutes Section 95.031(2) as requiring the entry of a judgment in favor of CURTISS-WRIGHT. (A. 6-10).

CURTISS-WRIGHT demonstrated in the trial court that the product in question had in fact been manufactured more than 12 years before both the injury to DIAZ and the filing of the litigation.

The case proceeded to a hearing upon the motion for summary judgment filed by CURTISS-WRIGHT and after this Court denied rehearing in Pullum the trial judge proceeded to enter a summary final judgment in favor of CURTISS-WRIGHT and against DIAZ on the basis of the 12 year Statute of Repose as contained in Florida Statutes Section 95.031(2), and as determined to be valid and operative in Pullum. (A. 11).

Thereafter, at the first meeting of the Florida Legislature, and after the time for filing an appeal had expired, the Florida Legislature immediately repealed the repose section which had been applied and construed in Pullum and totally eliminated the 12 year repose provision as it applied to products in Chapter 86-272, Laws of Florida. (A. 12-13). The Legislature specifically directed in Section 3 of Chapter 86-272, Laws of Florida, that an unrelated limitation provision become effective October 1, 1986, and apply to actions accruing after such date. However, the Legislature very specifically stated that with regard to the section which eliminated the 12 year repose provision as to product liability litigation, such would take effect July 1, 1986.

At the time the summary final judgment was entered in favor of CURTISS-WRIGHT it was totally unknown and could not have been known that the Florida Legislature would repeal the 12 year repose provision at the earliest possible date and at its first meeting after the statute had been interpreted to bar actions even before

the accident had occurred. By the time the statute had been thus repealed in Chapter 86-272, Laws of Florida, DIAZ had no alternative but to file and seek relief from the prior summary final judgment which had been entered in the trial court pursuant to Rule 1.540(b). (A. 14-15). DIAZ petitioned the trial court to provide relief because a grievous wrong had occurred, new and unforeseen conditions had arisen, exceptional circumstances existed, the basis upon which the prior judgment was entered had been totally eliminated and repealed, the effect of the Pullum decision was totally reversed and vacated by Legislative action, and it was totally inequitable and unconscionable that the rights of an individual be precluded and destroyed under such circumstances.

The trial court recognized and acknowledged that it was faced with exceptional, extraordinary circumstances which required relief for justice. The trial court recognized the sanctity of final judgments but concluded:

> Courts are - or should be - in the business for the major (if not sole) purpose of providing a vehicle for resolution of its citizens' disputes. Trial Courts are constantly reminded by appellate decisions to decide issues on the merits and not on technical niceties; though on occasion, one person's "technicality" is another's "constitutionally guaranteed right".
>
> If the Plaintiff has a legitimate cause of action, (i.e., his injuries were the result of the Defendant's negligent design, manufacture and sale of the product in question), to bar the courthouse door becaue the happenstance that suit was filed June of 1984 and not July of 1986 seems not only fortuitious, but tragically unfair. Rights of Litigants, Plaintiff or Defendant, should not rest on such an insubstantial foundation. Law, without Logic or Compassion, is neither Justice, nor worthy of human commendation.
>
> One of the purposes for which this Court exists is to use equitable principles to avoid the harshness of

slavish and blind obedience to immutable rules of Law. (A. 17-18).

The trial court proceeded to grant DIAZ relief from the prior summary final judgment and vacated such judgment by its order dated December 19, 1986. (A. 16-18).

CURTISS-WRIGHT filed its appeal seeking review of the non-final order entered pursuant to Rule 1.540, Florida Rules of Civil Procedure. CURTISS-WRIGHT asserted that the trial court had erred in providing relief based upon application of the Pullum decision and the impact of the repeal of the Statute of Repose. Further, CRUTISS-WRIGHT asserted that the procedures available under Rule 1.540 were not available to provide relief because DIAZ had not previously sought appellate review of the final judgment entered in favor of CURTISS-WRIGHT.

The District Court of Appeal, Third District, reversed the order for two separate reasons. First, the District Court of Appeal, Third District, held that the Pullum decision operated retroactively and validated the Statute of Repose as of its effective date, and that the 1968 modification of the Statute of Repose did not operate retroactively to revive a cause of action. Secondly, the District Court of Appeal, Third District, held that one seeking relief from judgment must show that the judgment has prospective application and that it would no longer be equitable for the judgment to remain operative. The appellate Court held that the first element had not been satisfied because the judgment entered against DIAZ in this litigation was not one of prospective application. (A. 19-21).

Notwithstanding its determination, the District Court of

Appeal, Third District, certified the following questions to this Court:

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 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?

III. In the event that the court construes the legislative amendment abolishing the statute of repose in product liability cases to operate retrospectively as to a cause of action which accrued before the effective date of the amendment, or in the event that the court decides that Pullum does not bar a cause of action, as here, that accrued after the Battilla decision, does Florida Rule of Civil Procedure 1.540(b) permit a court to relieve a party from a final judgment grounded on Pullum?

POINTS INVOLVED ON APPEAL

Point I

WHETHER THE LEGISLATIVE AMENDMENT OF SECTION 95.031 (2), FLORIDA STATUTES (1983), ABOLISHING THE STATUTE OF REPOSE IN PRODUCT LIABILITY ACTIONS, OPERATES RETROSPECTIVELY AS TO A CAUSE OF ACTION WHICH ACCRUED BEFORE THE EFFECTIVE DATE OF THE AMENDMENT?

Point II

WHETHER THE DECISION OF PULLUM v. CINCINNATI, INC., 476 So. 2d 657 (Fla. 1985), SHOULD BE RETROACTIVELY APPLIED TO BAR A CAUSE OF ACTION WHICH ACCRUED PRIOR TO THE RENDITION OF SUCH DECISION?

Point III

WHETHER FLORIDA RULE OF CIVIL PROCEDURE 1.540(b) IS AVAILABLE TO PROVIDE RELIEF FROM A JUDGMENT WHICH SHOULD NO LONGER CONSTITUTE A BAR TO A CAUSE OF ACTION.

SUMMARY OF ARGUMENT

The present case is one of many presenting certified questions concerning the operative effect of the Statute of Repose in product liability actions as interpreted by this Court in Pullum v. Cincinnati, Inc., 476 So.2d 657 (Fla. 1985), and its subsequent repeal by the Florida Legislature. Numerous individuals, such as DIAZ, were caught in the vicious web spun under the circumstances. The legislative repeal of the repose provision must be applied retroactively because the repose itself was one of statutory origin. The defense was a direct statutory matter and there was no vested right under the statute. When the statute was repealed the defense fell as nonexistent and is applied in a retrospective manner.

Secondly, the totality of the circumstances would indicate that the Florida Legislature intended the repeal of the Statute of Repose provision to be retroactive. The Legislature clearly provided for an effective date, but did not limit the effective date to matters arising thereafter.

If the repeal of the 12 year Statute of Repose is not to be applied retroactively, the decision of this Court in Pullum should be applied prospectively only. Although there is a general rule with regard to the retroactive application of judicial decisions, this case falls into the exception. All public policy reasons also dictate that the decision should be applied prospectively only. The factors outlined for consideration of retroactive application have been substantially impacted by the decision of the Florida Legislature to repeal the

repose provision. The Florida Legislature continued with the repose provision as previously interpreted by this Court and in the very first session following the Pullum decision the statute was repealed as it was interpreted by this Court. Such repeal should impact this Court's decision with regard to applying Pullum only in a prospective manner.

Finally, the injured party in this case had suffered an adverse summary final judgment and it was unknown and could not have been known that thereafter the Florida Legislature would totally reverse the statutory repose provision. The injured party could not simply file another case because the doctrine of res judicata would bar an attempt to relitigate a cause of action previously subject to a summary final judgment. Rule 1.540 was intended to be an incorporation of the old common-law writs and equitable remedies which would permit parties to challenge existing judgments when no other mechanism for relief was available. The procedure rule concerning post-judgment challenges was designed and intended to afford relief under circumstances such as those presented in this case. The summry final judgment which had been entered against the injured party in this case was prospective in application and would continue to bar the claim unless otherwise modified or vacated. Rule 1.540(b) is intended as a procedural mechanism to afford justice due to changed circumstances and the equities of the case. In this case DIAZ has found himself in a legal morass not of his own making which cries out for relief if the judicial system affords the capacity to deal with such human needs.

ARGUMENT

Point I

THE LEGISLATIVE AMENDMENT OF SECTION 95.031(2), FLORIDA STATUTES (1983) ABOLISHING THE STATUTE OF REPOSE IN PRODUCT LIABILITY ACTIONS OPERATES RETROSPECTIVELY AS TO A CAUSE OF ACTION WHICH ACCRUED BEFORE THE EFFECTIVE DATE OF THE AMENDMENT.

It must be initially noted that the modification to Section 95.031(2) was not a mere amendment but was a direct repeal of the repose provision as it would apply in product liability litigation. There is a distinction between a mere amendment and a total repeal. A repeal of a legislative provision is generally afforded retroactive application if the matter affected has its origin in the statute itself. If a right, remedy, or other obligation is a direct statutory matter, the repeal is applied retroactively. If there is no vested right under the statute, when the statute is repealed the matter addressed by the statute falls with the statute itself.

For example, this Court discussed retrospective operation of repealing statutes in Yaffee v. International Co., Inc., 80 So.2d 910 (Fla. 1955), in the lender/borrower context. The direct issue involved the question of usury and this Court discussed the general principles applicable to repealing statutes. This Court cited decisions from foreign jurisdictions which would approve repealing statutes being provided retrospective operation in those situations where a right or remedy was created wholly by statute. This Court seemed to acknowledge that under such circumstances when a statute was repealed the right or remedy based upon such statute would also fall.

A direct application of such concept can be found in Bureau of Crime Compensation, Department of Labor & Employment Security v. Williams, 405 So.2d 747 (Fla. 2d DCA 1981), in which a claimant sustained injuries in March, 1980, a claim for benefits under legislation was filed in April, 1980, the benefits were denied in July, 1980, and a notice of appeal was filed in August, 1980. Initially, the statute which created the right included a provision for an award of attorney's fees, but effective July 1, 1980, the attorney's fee provision was repealed. In holding that the repeal was to be applied retroactively to a claim which arose prior to its repeal the Court stated:

> Repealing statutes apply retrospectively in all situations where a right or remedy has been created wholly by statute. Thus, when the legislature repeals a statute, the right or remedy created by the statute falls with it. (citation omitted). Since all rights under the Crimes Compensation Act are statutory, Mr. Williams had no vested cause of action against the State for any recovery other than that which the act would allow. Id. at 748.

It is abundantly clear that the recovery of damages caused by the fault of another has never been limited by common law to a repose provision of 12 years or any other number of years as a substantive right. The defense asserted by CURTISS-WRIGHT in this litigation was purely a creature of statute. This must also be viewed in terms of the Legislature being fully aware of what had occurred in the judicial system with causes of action being precluded before the injury ever arose. CURTISS-WRIGHT simply had no vested right in the defense of repose and its validity depended exclusively upon the continued existence of the statutory provision. When the Statute of Repose was repealed, there

was no statutory defense available and there was no vested right in such statutory defense.

One also finds that retroactive application of statutory matters was approved by this Court in Tel Service Co. v. General Capital Corp., 227 So.2d 667 (Fla. 1969), in which usury provisions were again addressed. This Court stated:

> As noted by the District Court, authority is legion to the effect that an action predicated on remedies provided by the usury statutes creates no vested substantive right but only an enforceable penalty. Accordingly, such penalty or forfeiture possesses no immunity against statutory repeal or modification and the enactment of legislation to this effect abates such penalty or forfeiture pro tanto even during the pendency of an appeal from a final judgment predicated on such statutory penalties or forfeiture. Id. at 671.

It must be noted that the repealing legislation contains absolutely no savings provisions. To the contrary, it can be asserted that Chapter 86-272, Laws of Florida (1986), contemplates retroactive application of the repeal of the Statute of Repose. The first section of the legislation addresses liable and slander actions with the repeal involved in this case addressed in Section 2. The effective date provision provided that Section 1 would be effective October 1, 1986, and applied to causes of action accruing after that date. On the contrary, the provisions pertaining to the repeal of the Statute of Repose were to become effective July 1, 1986, without reference to prospective application.

It is interesting to note that this Court addressed retroactive application of a legislative repeal in Summerlin v. Tramill, 290 So.2d 53 (Fla. 1974), in connection with the old Florida "guest statute". In Summerlin a plaintiff merely

alleged "gross negligence" without setting forth the operative or ultimate facts upon which such conclusion was based. Thereafter, the guest statute was repealed. This Court approved retroactive application of the repeal of the guest statute in holding that the claimant was required to prove only simple negligence due to the repeal of the guest statute, and, therefore, any deficiency in the allegations of gross negligence were totally irrelevant.

It is abundantly clear that the Florida Legislature was satisfied with the operative judicial interpretation and application of the Statute of Repose following the Battilla decision and made no efforts to modify or change the statutory provision. It is important to note that in the very first legislative session following the reversal of judicial position set forth in Pullum, the Florida Legislature took immediate action and repealed the repose provision. It is submitted that such act was remedial in nature to restore and preserve the rights of the citizens of this state to be compensated for injuries sustained through the wrongful acts of others.

By the time this Court addresses this case it will have considered probably 20 to 30 other cases involving the same question. The uncertainty and confusion created by the scenario of judicial decision followed by immediate repeal has created enormous practical problems. As noted by the trial court in this case, if a citizen of this state had a legitimate cause of action based upon the conduct of a defendant, to bar the courthouse door because of a happenstance as to when a legal action was filed is

tragically unfair. The present scenario in which Florida jurisprudence finds itself may call for the application of unique and extraordinary judicial wisdom to find the ultimate fairness within the depths of legal confusion and multiple arguments.

Point II

THE DECISION OF PULLUM v. CINCINNATI, INC., 476 So.2d 657 (Fla. 1985), SHOULD NOT BE RETROACTIVELY APPLIED TO BAR A CAUSE OF ACTION WHICH ACCRUED PRIOR TO THE RENDITION OF SUCH DECISION.

DIAZ recognizes the existence of the general rule in this state which applies decisions of this Court retrospectively as well as prospectively unless there is a specific declaration that the decision shall have prospective effect only. This has been addressed by multiple courts in Florida Forest & Park Service v. Strickland, 18 So.2d 25 (Fla. 1944); Davis v. Artley Construction Co., 18 So.2d 255 (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).

There are exceptions to the general rule which involve non-retroactive application where vested rights in the nature of contractual or property rights have accrued based upon prior decisions. Additionally, one finds that the District Court of Appeal, Fourth District, mandated prospective application of a decision in International Studio Apartment Association, Inc. v. Lockwood, 421 So.2d 1119 (Fla. 4th DCA 1982). In such decision the Court permitted the clerk of the circuit court to retain certain income earned on deposited funds and applied the de-

cision prospectively only.

It is submitted that the repeal of the Statute of Repose in product liability litigation should be considered in analyzing whether the prior decision should be applied retrospectively or prospectively. One finds the prospective/retrospective analysis in Chevron Oil Co. v. Huson, 404 U.S. 97, 92 S.Ct. 349 (1971). The United States Supreme Court set forth three factors to be considered in determining whether a decision should be applied prospectively only. These factors were substantially impacted by the repeal of the Statute of Repose. If the Legislature had not repealed the statute the Pullum decision would have had retrospective application. The first factor related to whether a new principle of law was being established. For a decision to be applied prospectively only, the decision must establish a new principle of law by either overruling clear past precedent on which the litigants may have relied, or deciding an issue of first impression. The second factor directed courts to weigh the merits of each case and decide whether retroactive operation would further or retard the operation of the rule in question by looking at prior history. The final element required courts to balance the equities which might be imposed by retroactive application.

It is respectfully submitted that the subsequent repeal of the 12 year Statute of Repose will create a very small window through which numerous citizens of this state will fall if the Pullum decision is applied retroactively. The determinations prior to the rendition of the Pullum decision will be the same

as those reached after July 1, 1986. Thus, retroactive application of Pullum creates approximately a six month window through which many persons will have lost their rights. If the Legislature had not repealed the statutory repose a valid argument could be presented that retroactive operation was required to further the principle of law involved. The equities would have also been weighted more favorably toward application of the statutory repose as interpreted by this Court if the repeal had not occurred. However, when all factors are place in proper perspective it would be fundamentally unfair to penalize those persons whose case happened to be before the courts of this state during the six month interim period.

It is respectfully submitted that DIAZ had a cause of action which was a species of a property right which was fully protected under the laws of this state. See, e.g., Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982). Additionally, if this Court determines that CURTISS-WRIGHT had some type of vested interest in a statutory repose defense which could not be retroactively repealed, it is submitted that DIAZ should also be considered as having some type of vested property right in his cause of action that should not be impacted and destroyed by the judicial decision and the exceptions as set forth in Florida Forest & Park Service v. Strickland, supra, should be applicable.

Point III

FLORIDA RULE OF CIVIL PROCEDURE 1.540(b) IS AVAILABLE TO PROVIDE RELIEF FROM A JUDGMENT WHICH SHOULD NO LONGER CONSTITUTE A BAR TO A CAUSE OF ACTION.

The circumstances resulting from the Statute of Repose are truly unique, exceptional, and inherently unfair if individuals are precluded from setting forth a cause of action for severe injuries merely because their case happens to be in the judicial system during a very limited window period consisting of approximately six or seven months. DIAZ has been caught in the vicious web created by the product liability Statute of Repose, its lengthy invalidity under certain circumstances as determined in the Battilla decision, its subsequent validity for a short period of time pursuant to the Pullum decision, and the final repeal. The present situation cried out for judicial intervention below and the only procedural mechanism to avoid the impact of a res judicata judgment is provided in Rule 1.540. The actions and opinion of the trial court clearly reflects a recognition that our judicial system as a viable social institution must respond with justice as the circumstances dictate. A system which pushes only for termination of disputes without regard for the justness of the termination is not responding as the system was designed. As recognized by the trial court, if our system loses and rejects its logic and compassion and relies totally upon legal maneuvers the system is rejecting those it has been designed to serve and the system is truly one of technicalities as opposed to justice.

In this case DIAZ suffered the consequences of a summary final judgment and was unable to know that the Florida Legislature would immediately repeal the statute which crushed his action during the next legislative session. DIAZ could not

simply file a second legal action because the doctrine of res judicata would apply to prohibit subsequent litigation based upon the identical cause of action. The summary final judgment previously adjudicated the only cause of action and such precluded the mere filing of a second case. See, e.g., Bondu v. Gurvich, 473 So.2d 1307 (Fla. 3d DCA 1984); City of Clearwater v. United States Steel Corp., 469 So.2d 915 (Fla. 2d DCA 1985); Southern Bell Telephone & Telegraph Co. v. Roper, 438 So.2d 1046 (Fla. 3d DCA 1983).

The history of Rule 1.540, Florida Rules of Civil Procedure, can be traced to ancient common-law writs and also to Rule 60(b) of the Federal Rules of Civil Procedure. See historical discussion, 7 Moore's Federal Practice, Second Edition, ¶¶ 60.09-60-17. The ancient common-law remedies which would afford equity under certain circumstances were initially preserved in addition to the procedural rule, but when the substance of the common-law extraordinary writs found their way into codification of procedural rules, access to the individual action types of relief was totally eliminated. Thus, one finds that Florida procedure is controlled to the extent that Rule 1.540 concludes by stating that the equitable writs are abolished and developing case law has further reduced independent action types of remedies. See generally 7 Moore's Federal Practice, ¶¶ 60.18-60.20. The courts of this state have very clearly recognized that the provisions of Rule 1.540(b) were specifically designed and intended to provide an orderly method for attacking final judgments even after the time for appeal has

expired. This relief was intended, designed, and should be utilized as a substitute for the common-law writs and equitable remedies which were eliminated when Rule 1.540(b) was adopted. See generally Alexander v. First National Bank of Titusville, 275 So.2d 272 (Fla. 4th DCA 1973); Odum v. Morning Star, 158 So.2d 776 (Fla. 2d DCA 1963).

Florida law is not fully developed with regard to the scope of Rule 1.540(b) and one finds that federal decisions are helpful in providing a proper analysis. The discussion by the Court in Kirksey v. City of Jackson, 714 F.2d 42 (5th Cir. 1983), is most helpful and enlightening concerning relief from a judgment. In Kirksey the ultimate determination was that it was unnecessary to apply post-judgment relief because the judgment challenged did not operate under the doctrine of res judicata to bar a subsequent action due to the nature of the specific claims involved which addressed constitutional issues. The federal appellate Court reasoned that the doctrine of res judicata was not applicable to litigation concerning constitutional issues because if it were, constitutional interpretations would be different throughout the country. The Court did analyze and set forth an excellent explanation that if a prior dismissal would have barred a new and independent action, relief was clearly available under the post-judgment rules such as Rule 1.540. The Kirksey Court specifically stated:

> If a dismissal would bar a new and independent action between the same parties based upon the same claims, reasserted on the basis of the alleged changes in controlling law, and thus denies the plaintiffs the right to retry their claims in light of the changes in

> the statutory and decisional law applicable to their action, then it would have "prospective application" by virtue of the continuing effect of the bar. Kirksey, supra.

It was the position of CURTISS-WRIGHT below that the summary judgment was final in nature, no appeal had been taken and that CURTISS-WRIGHT was entitled to rely upon the judgment. (Transcript of proceedings 10). The summary final judgment previously entered would bar a new and independent action, which was essentially a common-law negligence and product liability case. The summary final judgment was a bar to the rights of DIAZ as long as it remained of record and valid. The summary final judgment which DIAZ sought to have vacated falls clearly within the Kirksey discussion as an order which has prospective application by virtue of its continuing effect to bar the rights of DIAZ to a recovery.

One finds that in Equitable Life Assurance Society v. MacGill, 551 F.2d 978 (5th Cir. 1977), a Rule 60(b) attack upon a judgment was considered in connection with a judgment which had not only been entered at the district court level, but had also been approved through an appeal. The decision involved a situation in which an insurance company attempted to challenge the provisions of a final judgment after an appeal had been completed and the insurance company sought relief from the judgment which pertained to an award of attorney's fees. The appellate Court recognized that there were no cases directly on point, but that Rule 60(b) required liberal application. The appellate Court analyzed the substance of the post-judgment rule was to further justice and the courts would seek a delicate balance of adjusting concepts of finality and at the same time prevent injustice. In Equitable the Court permitted a post-

judgment proceeding to provide relief from a final judgment which, most assuredly, was not in the nature of an injunction or other declaratory judgment, but was in the nature of a final money judgment. The appellate Court clearly permitted post-judgment relief directed to such judgment.

In Block v. Thousandfriend, 170 F.2d 428 (2d Cir. 1948), the Court reviewed a situation involving an action to recover excess rents and treble damages. The Court permitted the application of Rule 60(b)(5) and (6) as a basis for rendering equity and justice as the circumstances required to vacate an otherwise final monetary judgment. The final monetary judgment was "prospective" in nature, just as the final judgment which would bar the rights of DIAZ in this case. One also finds that in Pierce Oil Corp. v. United States, 9 F.R.D. 619 (E.D. Va. 1949), the Court also utilized the provisions of Rule 60(b)(5) or (6) in providing relief with regard to judgments concerning tax refunds and monetary matters.

One of the most unique applications of post-judgment relief can be found in Pierce v. Cook & Co., 518 F.2d 720 (10th Cir. 1975), in which the appellate Court (not the trial court) utilized the provisions of the Rules of Civil Procedure to provide relief from a judgment even though the rules were designed for application at the trial court level. The Court recognized the inherent equity required to do justice as opposed to application of hollow technicalities. In Pierce a summary final judgment was entered in favor of a defendant and against the plaintiffs in the federal court, and was affirmed by an appeal. The summary final judgment was no different than the summary final judgment entered in the present

case against DIAZ. The federal case was concluded and became final in January, 1971, and it was not until May of 1974 that a change occurred with regard to state law on the issue of the liability of the party. In November of 1974 the federal plaintiffs filed a motion pursuant to Rule 60(b) and slid into subsection (6) of the rule because over one year had expired since the adverse judgment had been entered. The federal appellate Court applied the terms of Rule 60(b) to provide relief from the summary final judgment upon the basis of a change in the law. It is abundantly clear that concepts of equity and justice guided the Court's hand as it relieved the unconscionable result, just as the trial court has intervened in this case to prevent injustice. The classification and discussion by the District Court of Appeal, Third District, that a summary final judgment does not have "prospective" application is simply contrary to all federal decisions which have interpreted the federal counterpart. The summary final judgment entered against DIAZ was prospective and would bar any future attempted actions by DIAZ seeking recovery based upon the same cause of action. Similar results can be found in Weilbacher v. United States, 99 F.Supp. 109 (S.D. N.Y. 1951); United States v. Edell, 15 F.R.D. 382 (S.D. N.Y. 1954); Bros, Inc. v. W.E. Grace Manufacturing Co., 320 F.2d 594 (5th Cir. 1963).

A dismissal of an action was addressed in Tsakonites v. Transpacific Carriers Corp., 322 F.Supp. 722 (S.D. N.Y. 1970). Post-judgment relief pursuant to Rule 60(b)(5) and (6) was granted and a dismissal was vacated under such post-judgment relief provisions. Many times the post-judgment provisions are applied in

connection with injunctive type actions but when the analysis of the various courts with regard to "prospective" application is reviewed the summary final judgment entered against DIAZ was certainly in such category.

Florida decisions which have addressed application of Rule 1.540(b)(5) are enlightening but do not provide direct controlling authority. For example, in Cutler Ridge Corp. v. Green Springs, Inc., 249 So.2d 91 (Fla. 3d DCA 1971), the district court of appeal did not summarily dismiss the relief requested, but provided an analysis in connection with a dismissal. In Cutler Ridge dismissals with prejudice and a summary final judgment were entered. The Court noted that the general principles related to Rule 1.540 direct that such motions are addressed to the sound discretion of the trial court. The appellate Court refused relief only because exceptional circumstances were not presented due to the fact that a certain cross-claim was insufficient as a matter of law. The Court did not reject post-judgment relief on any ground or basis that such rule could not be applied under the circumstances.

One can also find that in Hensel v. Hensel, 276 So.2d 227 (Fla. 2d DCA 1973), the appellate Court analyzed Rule 1.540(b) and specifically subparagraph (5), without suggesting in any way that the relief was limited in some fashion or could not be applied to a final judgment of dismissal or a final monetary judgment. In Hensel a final monetary judgment had been entered and the Court would not permit post-judgment relief only because certain matters had occurred before the final judgment and were not factors which occurred after the final judgment within the contemplation of post-

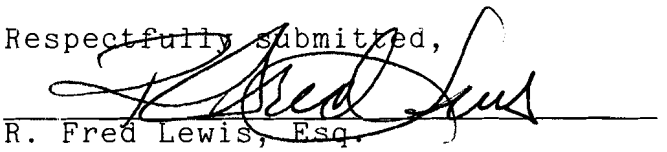
judgment relief.

It is respectfully submitted that Rule 1.540 is specifically designed to provide the equitable type of relief which is called for under the circumstances in this litigation. It was totally unknown and could not have been known that the Florida Legislature would repeal the 12 year Statute of Repose at its very first session following the Pullum decision. This case presents a classic example of an individual falling through the legal "crack" created by the inherently unfair circumstances. It is respectfully submitted that Rule 1.540 was intended to accommodate all of the ancient common-law independent remedies by which a party could challenge a final judgment and it should be applicable in this case.

CONCLUSION

Based upon the arguments, authorities and reasoning set forth herein, the repeal of the Statute of Repose should be applied retroactively and Rule 1.540 should be a mechanism and procedure available to correct injustice for those persons suffering adverse consequences during a very small window period.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was mailed this 2 day of September, 1987, to: Carol Fenello, Esq., KIMBRELL & HAMANN, P.A., 799 Brickell Plaza, Suite 900, Miami, FL 33131; and to Michael A. Genden, Esq., GENDEN & BACH, P.A., Attorneys for Plaintiff, 2150 S.W. 13th Avenue, Miami, FL 33145.

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