IN THE SUPREME COURT OF FLORIDA

CASE NO. 70, 818

FILED
SID J. WHITE
SEP 28 1987
CLERK, SUPREME COURT
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ORLANDO DIAZ,

Petitioner,

-vs-

CURTISS-WRIGHT CORPORATION,

Respondent.

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

BRIEF OF RESPONDENT

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

The Respondent disagrees with Petitioner's Statement of the Case and Facts to the extent such Statement contains argument rather than a concise, impartial rendering of the history and facts of this case.

For the Court's convenience, 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 Petitioner. The Respondent, CURTISS-WRIGHT 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 Respondent.

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.

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SUMMARY OF THE ARGUMENT

The decision of the Third District Court of Appeal was correct in every respect and should be affirmed by this Court. The legislative amendment of the statute of repose cannot and should not be applied retroactively to deprive Respondent of its vested statutory repose defense. There was no legislative intent to apply the amendment retroactively and, under Florida law, the Legislature cannot constitutionally enact a statute which would retroactively deprive a party of a vested right.

Moreover, the court's finding that ***Pullum*** is to be applied retroactively is in keeping with well-established principles of Florida law. Also, this finding is in accord with every other appellate court in this state.

Furthermore, a close reading of the history and language of Florida Rule of Civil Procedure 1.540(b), in conjunction with its federal counterpart, reveals that it does not provide relief to the Petitioner in this action. As held by the appellate court, the summary judgment against the Petitioner is without prospective application and, thus, it is not the type of judgment from which relief may be granted pursuant to Rule 1.540(b).

Finally, as found by the appellate court, Petitioner's cause of action was barred by the four-year statute of

limitations.

Based on the foregoing argument and authority, the decision of the Third District Court of Appeal should be affirmed.

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ARGUMENT

I.

THE THIRD DISTRICT COURT OF APPEAL CORRECTLY HELD THAT THE LEGISLATIVE AMENDMENT OF SECTION 95.031(2), FLORIDA STATUTES (1983), ABOLISHING THE STATUTE OF REPOSE IN PRODUCT LIABILITY ACTIONS, SHOULD NOT BE APPLIED RETROSPECTIVELY SO AS TO REVIVE A CAUSE OF ACTION BARRED PRIOR TO THE EFFECTIVE DATE OF THE AMENDMENT.

Chapter 86-272, Laws of Florida, abolished the statute of repose in product liability actions. Section 3 of Chapter 86-272, providing an effective date, unequivocally states that Section 2 of the Act shall take effect July 1, 1986. The inclusion in a statute by the legislature of an effective date has been held to effectively rebut any argument that retroactive application of the law was intended. *See e.g., State of Florida, Department of Revenue v. Zuckerman-Vernon Corp.,* 354 So.2d 353, 358 (Fla. 1977).

An additional reason for a prospective application is the fact that the title of Ch. 86-272 is devoid of any reference that the statute should be given retrospective application. Where it is intended that a statute should have retrospective operation, the title must convey appropriate notice of this aspect. *Chiapetta v. Jordan,* 153 Fla. 788, 16 So.2d 641, 645-46 (1943). Because the language of the statute providing an effective date is explicit and the law is clear that it should be applied prospectively, it

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is accordingly unnecessary to resort to rules of construction. ***See McCarthy v. Havis,*** 23 Fla. 508, 2 So. 819 (1887).

Nevertheless, in an abundance of caution, the well established rule of statutory construction is that in the absence of a ***clear*** legislative intent to provide retrospective effect, a statute operates only prospectively. ***State v. Lavazzoli,*** 434 So.2d 321 (Fla. 1983); ***Walker & LaBerge, Inc. v. Halligan,*** 344 So.2d 239 (Fla. 1977); ***Sammis v. Bennett,*** 32 Fla. 458, 14 So. 90 (1893).

The Florida Legislature could not constitutionally give life to Petitioner's claim because Respondent's right to repose under the pre-amendment statute already had vested. ***See, Corbett v. General Engineering & Machinery Co.,*** 160 Fla. 879, 37 So.2d 161, 162 (1948) (a person has no vested right in the running of a statute of limitations unless it has completely run and barred the action). As the Florida Supreme Court has explained:

> 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.***

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Walter Denson & Son v. Nelson, 88 So.2d 120, 122 (Fla. 1956) (emphasis added).

An analogous situation was presented in ***Martz v. Riskamm,*** 144 So.2d 83 (Fla. 1st DCA 1962) which involved the time limitations regarding a claim of dower. At the date of the decedent's death, the relevant statute provided that any dower interest would be barred unless the widow's claim was filed within nine months after the first publication of notice to creditors, or three years after the death of her husband, whichever occurred first. The nine month period closely paralleled a statute of limitations, the cause of action "accruing" upon publication of notice; the 3-year period was essentially a statute of repose. Before the expiration of the three year period, the statute was amended and the three year repose period was repealed.

The ***Martz*** court found that since the repose period had not yet barred the action at the time of its repeal, and no publication notice was ever filed, the widow's claim for dower was not barred. The court found that the rule adopted in ***Corbett*** was applicable and held that the repeal of the former act removed the bar contained therein for any claim in existence at that time, i.e., that was not already barred by the three year repose period. The court rejected the argument that the ***Corbett*** rule was not applicable because

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the repose provision was not a "statute of limitation" stating:

> [T]he ***Corbett*** rule was followed in ***Walter Denson & Son v. Nelson,*** which involved the statutory period for applying for modification of a workmen's compensation award. There it was held that although the statute was not strictly a statute of limitation, it was in the nature of statutes of limitation and sufficiently analogous that the ***Corbett*** rule may be appropriately applied.

Martz, 144 So.2d at 88. The ***Martz*** court likewise found the repose-type statute which was before it sufficiently analogous to a statute of limitations for application of the ***Corbett*** rule.

Applying the above principles to the issue at hand, it is clear that a repeal of the statute of repose in products cases will not revive actions already barred by the repealed statute, i.e., barred prior to July 1, 1986, the effective date of the repeal. This conclusion holds true regardless of whether or not the legislature intended the repeal to be "retroactive." Once an action has been barred by the previous statute, a potential defendant has a vested right in that complete defense which cannot be abrogated by subsequent legislation. ***See generally, Walker & LaBerge, Inc. v. Halligan,*** 344 So.2d 239, 243 (Fla. 1977) (a vested substantive statutory right such as immunity from suit cannot be retroactively withdrawn).

It is unconstitutional to enact a statute which revives a cause of action already barred. ***Ford Motor Co. v. Moulton,*** 511 S.W.2d 690 (Tenn. 1974), ***cert. denied,*** 419 U.S. 870 (1975). Accordingly, any product liability action barred by the twelve year repose provision of §95.031, Fla. Stat., prior to July 1, 1986, remains barred. ***See, Trustees of Rowan Technical College v. J. Hyatt Hammond Associates, Inc.,*** 328 S.E.2d 274 (N.C. 1985) (amendment to statute of repose cannot constitutionally revive an action already barred).

Recognizing that the law of this state dictates that the repeal of the statue of repose should not be applied retrospectively, Petitioner employs unsupported rules of statutory construction and ultimately, resorts to a ***post hoc ergo propter hoc*** argument in support of his position that the repeal should be retrospectively applied. (***See*** Petitioner's Brief at p.13). However, the law is clear and the vote is in: the 1986 amendment of § 95.031(2) is prospective in application. Such has been the unanimous decision of every district court of appeal in this state that has addressed the issue.[1/]

7/ ***See, e.g., Pait v. Ford Motor Company,*** 500 So.2d 743 (Fla. 5th DCA 1987); ***Willer v. Pierce,*** 505 So.2d 441 (Fla. 4th DCA 1987); ***Shaw v. General Motors Corp.,*** 503 So.2d 362 (Fla. 3d DCA 1987); ***Small v. Niagara Machine &***
(Footnote continues)

It is urged, therefore, that this Court recognize the well-established law of the state and take notice of the fact that all appellate courts which have addressed the issue are in accord, and affirm the decision of the Third District Court of Appeal in this case.

Tool Works, 502 So.2d 943 (Fla. 2d DCA 1987).

II.

THE THIRD DISTRICT COURT OF APPEAL CORRECTLY DECIDED THAT *PULLUM V. CINCINNATI*, 476 SO.2D 657 (FLA. 1985), SHOULD BE APPLIED RETROACTIVELY TO BAR CAUSES OF ACTION WHICH ACCRUED PRIOR TO THE RENDITION OF SUCH DECISION.

As candidly conceded by Petitioner (*see* Petitioner's Brief at p.14), and as so held by the lower court in the instant action, the general and well-settled rule in Florida is that decisions which overrule prior decisions which had declared a statute unconstitutional are given retroactive effect whereby judicial construction of the statute is deemed to relate back to the enactment of the statute. ***Florida Forest & Parks Service v. Strickland***, 18 So.2d 251 (Fla. 1944); ***Cassidy v. Firestone Tire and Rubber Co.***, 495 So.2d 801 (Fla. 1st DCA 1986).

Petitioner relies upon ***Chevron Oil Co. v. Hudson***, 404 U.S. 97, 92 S.Ct. 343, 30 L.Ed.2d 296 (1971), for the proposition that ***Pullum*** should not be applied retroactively. In ***Chevron Oil***, the United States Supreme Court was presented with the issue of whether the Louisiana one-year statute of limitations on personal injury actions should be applied retroactively to an action pending prior to the Supreme Court's decision in ***Rodrigue v. Aetna Casualty***, 395 U.S. 352 (1969). Retroactive application of ***Rodrigue***, which held that state law was applicable to

accidents occurring on the Outer Continental Shelf, would have barred the ***Chevron Oil*** plaintiff's claim.

In reaching its decision, the Court listed three factors to be weighed in making a determination regarding whether a decision should be applied retroactively: (1) whether the decision established a new principle of law; (2) whether retroactive application would further or retard the operation of the new law; and (3)whether retroactive application would produce substantial inequitable results. ***Chevron Oil Co.***, 404 U.S. at 107.

A thorough analysis of the present issue, to wit, whether ***Pullum*** should be applied retroactively, was conducted by the Honorable Judge Stanley Marcus of the United States District Court for the Southern District of Florida in ***Blanco v. Wasco Products***, No. 85-964, slip op. (D. Fla March 18, 1986).[2/] In ***Blanco***, plaintiff had fallen through a skylight in 1981. The skylight had been manufactured around 1968 or 1969. Plaintiff filed a products liability action in 1984.

Based on the Florida statute of repose and on ***Pullum***, defendant moved for summary judgment asserting that

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2/ This is an unpublished order. For the Court's convenience, it is reproduced and included in the Respondent's Appendix at 1.

plaintiff's action was effectively time barred in 1981, twelve years after the skylight was manufactured. Plaintiff countered that ***Pullum*** should not be applied retroactively, citing in support of its argument the decision of ***Chevron Oil, supra***.

Noting that "product liability statutes of repose are designed and intended to encourage deligence [***sic***] in the prosecution of claims...", ***Blanco***, slip op. at 5, Judge Marcus granted defendant's motion for summary judgment. In so doing, the court had occasion to employ the ***Chevron Oil*** non-retroactivity analysis. First, the court ***in dictum***, noted that it did not feel the ***Chevron Oil*** test "obtained in the instant case." ***Blanco***, slip op. at 11. Second, the court decided that the first prong of the ***Chevron Oil*** test was met, namely, that a new principle of law was being established. ***Id***.

However, the court concluded that non-retroactive application of the statute of repose would "seriously impede the function of this statute of repose." ***Blanco***, slip op. at 13. This conclusion was reached by analyzing the very reason the statute of repose was enacted: to prevent "perpetual liability" from attaching to manufacturers.[3/]

3/ ***Blanco***, slip op. at 13 (***citing Pullum v. Cincinnati, Inc.***, 476 So.2d 657, 659 (1985)).

Consequently, the court found that ***Pullum*** did not meet the second prong of the ***Chevron Oil*** test.

Finally, the third prong of the ***Chevron Oil*** test, which involves a balancing of the equities, was analyzed. The court found that the inequitable result that the essential objective of the statute of repose - to alleviate the heavy burden of eternal liability - established equities in favor of the defendant. Based on the ***Chevron Oil*** analysis, in addition to other factors,[4/] Judge Marcus held that, under Florida law, ***Pullum*** should be applied retroactively to validate the statute of repose as of its effective date. ***Blanco***, slip op. at 14.

Based on the foregoing well-settled principles and analysis, it is urged that this Court agree with all of this

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4/ Judge Marcus concluded, at p.14, as follows:

> "More significantly, however, the Supreme Court's pronouncement in ***Chevron Oil*** would not determine the result of this lawsuit even if Plaintiff had met its three-pronged standard. Defendant has aptly reminded this court that ***Chevron Oil*** concerned the retroactive application of a federal decision involving federal law. The task of this Court in this diversity action is to reconcile this case with the current state of Florida law."

Likewise, the instant case requires an analysis of Florida law, not federal law. Therefore, like ***Blanco***, Petitioner's ***Chevron Oil*** argument and the foregoing discussion is largely a philosophical exercise in jurisprudence.

state's appellate courts[5] and conclude that ***Pullum*** should be applied retroactively. The decision of the Third District Court of Appeal accordingly should be affirmed.

5/ ***See*** footnote 1 and cases cited therein; ***see also Cassidy v. Firestone Tire & Rubber Co.***, 495 So.2d 801 (Fla. 1st DCA 1986).

<u>III</u>.

AS CORRECTLY HELD BY THE THIRD DISTRICT COURT OF APPEAL, RELIEF PURSUANT TO RULE 1.540(b) WAS NOT AVAILABLE IN THIS INSTANCE.

Simply stated, "Rule 1.540(b), Florida Rules of Civil Procedure does not generally allow parties to assert changes in the law." ***Ellis National Bank v. Davis***, 379 So.2d 1310, 1311 (Fla. 1st DCA 1980) (affirming denial of plaintiff's motion for relief from judgment based on post-judgment change in "underlying substantive law"). As recognized by the Third District Court of Appeal, a review of federal cases is useful in interpreting Rule 1.540(b) as it is essentially identical to its federal counterpart.

Except for the exclusion of subdivision (6) from the Florida rule, Rule 1.540(b) is the same as its federal counterpart, Fed.R.Civ.P. 60(b). With the goal of reaching the same result under Rule 1.540(b) as would be reached under Rule 60(b), it is the law that this Court "look to the background of the federal rule and the construction given it by federal courts as authority for the correct interpretation of the Florida rule." ***Brown v. Brown***, 432 So.2d 704, 706-07 (Fla. 3d DCA 1983), ***disapproved on other grounds***, ***DeClaire v. Yohanan***, 453 So.2d 375 (Fla. 1984).

Subdivision (b)(5) of both rules permits a court to vacate its own judgment only if two requirements are met:

> The two requirements for obtaining relief from a judgment under the section of Rule 60(b)(5) invoked by the plaintiffs are that (1) ***the judgment has prospective application*** and (2) it is no longer equitable that it should so operate. 11 C. Wright & A. Miller, ***Federal Practice and Procedure*** § 2863 (1973); 7 J. Moore & J. Lucas, ***Moore's Federal Practice*** 60.26[4] (2d ed. 1982).

Kirksey v. City of Jackson, 714 F.2d 42, 43 (5th Cir. 1983) (emphasis added). In the case at bar, the trial court overlooked the requirement that the judgment from which relief is sought be one of "prospective" application.

Some types of adjudications which are prospectively applied have been described as follows:

> Injunctions, orders of disbarment, and declaratory judgments have all been held to have prospective effect. 11 C. Wright & A. Miller, ***supra***, at 205. The impact of such judgments is obviously continuing.

Kirksey v. City of Jackson, 714 F.2d 42, 42 (5th Cir. 1983). ***See also Ellis National Bank v. Davis***, 379 So.2d 1310 (Fla. 1st DCA 1980), in which the Court held that "an exception may exist [to the principle that a change in law after judgment does not provide a basis for relief under Rule 1.540(b)] when an ongoing injunction is being considered." 379 So.2d at 1310.

A judgment entered in a suit for money damages -- either in favor of or adverse to the plaintiff -- is not a judgment applied prospectively. ***See Ellis National Bank v. Davis***, 379 So.2d 1310 (Fla. 1st DCA 1980) (suit on promissory note). The Eleventh Circuit Court of Appeals has held that judgments of dismissal and judgments awarding damages are not judgments of prospective application:

> The second ground through which plaintiff seeks rule 60(b)(5) relief is that "it is no longer equitable that the judgment shall have any prospective application." This provision of rule 60(b) is equally inapposite. The judgment of dismissal in this case was not prospective within the meaning of 60(b)(5). It was final and permanent.
>
> * * *
>
> That plaintiff remains bound by the dismissal is not a "prospective effect" within the meaning of Rule 60(b)(5) any more than if plaintiff were continuing to feel the effects of a money judgment against him.

Gibbs v. Maxwell House Division, 738 F.2d 1153, 1155-56 (11th Cir. 1984) (affirming denial of Rule 60(b)(5) motion). Respondent notes that a judgment in favor of a defendant in a damages suit is less prospective than a judgment awarding damages.

Where a plaintiff prevails, the defendant remains under an ongoing obligation until the judgment is satisfied. In

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cases like this one in which the defendant prevails, the effect of the judgment is immediate and both parties can simply "walk away." There is no prospective application of a judgment where "the first case and controversy is at an end." ***Center For National Policy Review v. Richardson***, 534 F.2d 351, 353 (D.C. Cir. 1976) (affirming denial of Rule 60(b)(5) motion).

Another reason that Rule 1.540(b)(5) did not apply to vest the trial court with jurisdiction to vacate the judgment is that the judgment would have had no ***res judicata*** effect to a second lawsuit under the amended statute, assuming for the sake of argument that the amendment gave rise to a right of action by Petitioner. As explained by the Court in the ***Kirksey*** case:

> If a dismissal would bar a new and independent action between the same parties based on 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. If, however, the way to assert these claims is open, then plaintiff's motion to reopen does not fall within the scope of Rule 60(b)(5).

714 F.2d at 43-44 (affirming denial of Rule 60(b)(5) motion).[6/]

It has long been the law in Florida that an action brought under a post-judgment statutory change will not be barred by ***res judicata***. In the case of ***Wagner v. Baron***, 64 So.2d 267 (Fla. 1953), the Supreme Court held:

> The question here is whether a judgment . . . under the provisions of Chapter 742, Florida Statutes, F.S.A., prior to its amendment in 1951 of Chapter 26949, Laws of Florida, Acts of 1951, is ***res adjudicata*** of a similar proceeding brought under the Act, as amended.
>
> * * *
>
> Clearly, a judgment is not ***res judicata*** as to rights which were not in existence and which could not have been litigated at the time the prior judgment was entered.

64 So.2d at 267-68. ***Compare, e.g., Southern Bell T. & T. Co. v. Roper***, 438 So.2d 1046 (Fla 3d DCA 1983) (judgment rendered prior to change in ***decisional*** law has ***res judicata***

6/ Respondent notes that ***Kirksey*** involved a challenge to a voting system which allegedly was racially-discriminatory rather than a suit for damages. Under those facts the judgment might have been "prospective" because it affected future elections but for the lack of ***res judicata*** effect. The case at bar involves only a claim for damages; thus, there was no prospective effect for two reasons: the judgment itself was not of a continuing nature and it would not have ***res judicata*** effect.

effect).[7/]

Respondent reminds the Court that Petitioner had plenty of time to file a new suit between the stated effective date of the amended statute of repose (July 1, 1986) and the expiration of his four-year statutory limitations period in September, 1986. Therefore, if the amendment gave him a right of action (which premise has already been refuted), the first judgment had no prospective application to bar such a suit and Rule 1.540(b)(5) was inapplicable.

If there was nothing preventing Petitioner from filing a new lawsuit by September 2, 1986, there would have been nothing inequitable about leaving the judgment untouched on Petitioner's motion filed on October 29th.

Additionally, Rule 1.540(b) requires that a motion made thereunder "shall be made within a reasonable time." The motion in question was filed almost a year after the summary judgment was entered and four months after the amendment of the statute of repose. Petitioner has offered no explanation for this delay.

Consequently, as the summary judgment was not

7/ The Supreme Court has expressly recognized that a post-judgment change in statutory law can give rise to an action which is not barred by ***res judicata*** while a post-judgment change in decisional law will not. ***Plymouth Citrus Products Co-op v. Williamson***, 71 So.2d 162 (Fla. 1954).

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prospective in application and Petitioner's motion was untimely filed, it is urged that the decision of the Third District Court of Appeal be affirmed.

IV.

AS CORRECTLY HELD BY THE THIRD DISTRICT COURT OF APPEAL, PETITIONER'S CLAIM WAS ALSO BARRED BY THE FOUR-YEAR STATUTE OF LIMITATIONS.

It is uncontroverted that the instant action is one founded in product liability and, therefore, is covered by the four-year statute of limitations as set out in Section 95.11(3) of the Florida Statutes. The history of this case is also undisputed: Petitioner's cause of action accrued on September 2, 1982, the repeal of the statute of repose was effective July 1, 1986, and the four-year limitations period expired on September 2, 1986.

Therefore, as recognized by the Third District Court of Appeal, even if it were held that Petitioner's claim was not barred by the statute of repose, "the action was nevertheless barred by the statute of limitations, the operation of which cannot be avoided by a revival of an earlier action through the vehicle of a 1.540(b)(5) motion.[8/]

8/ *See* R at p.35.

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CONCLUSION

Although Petitioner cites a number of authorities and indulges in substantial argument in support of its position, Petitioner's entire argument is succinctly summarized in one word: sympathy. The legislature has left the courts and plaintiffs of this state in a quandary. While the status quo does evoke sympathy on behalf of the Petitioner, courts still recognize that, pathos notwithstanding, the law is the law. ***See, e.g., Willer v. Pierce***, 505 So.2d 441 (Fla. 4th DCA 1987) (wherein the court held that, in spite of the preclusion of plaintiff's cause of action, the legislative repeal of the statute of repose was not retroactive in application.)

Consequently, for the grounds and upon the authorities set forth herein, Respondent respectfully requests that the decision of the Third District Court of Appeal from which this appeal was taken be affirmed.

Respectfully submitted,

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By: ______________________
ROBIN THOMPSON

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF RESPONDENT has been furnished, by United States mail, this 25th day of September, 1987, to MICHAEL A. GENDEN, ESQUIRE, Attorney for Petitioner, 2150 S.W. 13th Avenue, Miami, Florida 33145, and R. FRED LEWIS, ESQUIRE, Attorney for Petitioner, Suite 200, 7211 S.W. 62nd Avenue, Miami, Florida 33143.

Respectfully submitted,

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