IN THE SUPREME COURT OF FLORIDA

CASE NO. 70,818

ORLANDO DIAZ,

Petitioner,

-vs-

CURTISS-WRIGHT CORP.,

Respondent.

_____/

REPLY BRIEF OF PETITIONER, ORLANDO DIAZ

MAGILL & LEWIS, P.A.
Attorneys for Petitioner
Suite 200
7211 S.W. 62 Avenue
Miami, FL 33143
Telephone: (305) 662-9999

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STATEMENT OF CASE AND FACTS

Introduction

The Petitioner, ORLANDO DIAZ, was the plaintiff at the trial level, the appellee in the district court of appeal, and will continue to be referred to in this brief as "DIAZ". The Respondent, CURTISS-WRIGHT CORP., was a defendant at the trial level, the appellant in the district court of appeal, and will be referred to herein as "CURTISS-WRIGHT".

DIAZ will continue to use the symbols in this brief as utilized in his original brief as follow:

"R" -- Record-on-Appeal

"A" -- Appendix filed with the initial brief

All emphasis is supplied by counsel unless otherwise indicated.

Case and Facts

DIAZ adopts and incorporates by reference the Statement of Case and Facts previously presented to the Court. DIAZ responds herein only as necessary for clarification, correction, and response to legal theories.

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.

The entire "retroactive" position asserted by CURTISS-WRIGHT fails to address in any way the decisions which DIAZ has presented discussing and applying a total repeal of a statutory provision and the rights existing thereunder. The State of Florida, Department of Revenue v. Zuckerman-Vernon Corp., 354 So.2d 353 (Fla. 1977), decision considered only a partial statutory amendment as to the amount of a statutory penalty tax. This Court simply refused to modify a penalty tax which had been previously assessed under a specific statute when a partial amendment of the statute was adopted while the case was pending on appeal. This decision does not in any way address repealing legislation and its operative effect upon rights which were created exclusively by the repealed statute.

The second position set forth by CURTISS-WRIGHT concerning the sufficiency of the title of Chapter 86-272 which repealed the Statute of Repose in product liability matters must be rejected for two reasons. First, the challenge was never mentioned in any way at either the trial level or in the district court of appeal. CURTISS-WRIGHT simply seeks to thrust a challenge to the repealing statute for the first time in this Court, contrary to the parameters of proper review and the preservation of positions in litigation.

Secondly, the subject of the repeal is very definitely set

forth in the title of the repealing legislation. The title is not defective and provides very clear and definite notice that limitations upon the initiation of actions for product liability is deleted and no longer exists. The bill provided in pertinent part:

> A bill to be entitled
> An act relating to limitations of actions; amending s. 95.11, F.S.; reducing the time within which actions for libel and slander must be commenced; amending s. 95.031, F.S.; deleting a limitation upon the initiation of actions for products liability; providing an effective date. (A. 12). Laws of Florida, Chapter 86-272 (1986).

It is submitted that the result and interpretation requested by CURTISS-WRIGHT must be rejected. If CURTISS-WRIGHT'S position is adopted an individual injured by a defective product on June 30, 1986, would have no access to the courts of this state for redress of the wrong because the repeal of the repose position would have not become applicable until the following day. The repose provision would, in effect, be extended to apply to actions filed after the legislation has been totally repealed.

The present case is not at all similar to Corbett v. General Engineering & Machinery Co., 37 So.2d 161 (1984), in which there was a discussion of a statute of limitation in the worker's compensation context. In the present case there is no issue as to one sitting on his rights and permitting a limitation period to expire. On the contrary, the present factual scenario presents a situation in which an individual has attempted to timely protect his rights but has apparently fallen into the eight month legal limbo created by the Statute of Repose manip-

ulations by both the court system and the Legislature.

The decision in Martz v. Riskamm, 144 So.2d 83 (Fla. 1st DCA 1962), specifically recognized that there is a difference between statutes of limitation and those in the nature of a "non-claim" statute. The Court in Martz found that the provision was more similar to a statute of limitation than a Statute of Repose or non-claim and, therefore, the decisions pertaining to statutes of limitation would be applied. In the present case it is very clearly a Statute of Repose or non-claim provision under which a statutory defense existed that no cause of action could arise even before an injury occurred. It is respectfully submitted that the Martz and Corbett concepts should not be applied under the circumstances of this case and the decisions which address the repeal of statutes under which rights exist should be controlling.

The decision of this Court in Walker & La Berge, Inc. v. Halligan, 244 So.2d 239 (Fla. 1977), addresses the legal theories which are before the Court in the present dispute. In the Walker decision this Court found distinctions with regard to the worker's compensation provisions and the decisions upon which DIAZ has relied in this litigation. It is submitted that this Court recognizes the validity of the Summerlin v. Tramill, 290 So.2d 53 (Fla. 1974), principles and must determine whether such principles apply in the present case. It is respectfully submitted that the decisions DIAZ has presented to the Court should be adopted in this product liability/Statute of Repose controversy.

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.

It is respectfully submitted that CURTISS-WRIGHT'S reliance upon a decision from the United States District Court, Southern District of Florida, is totally misplaced. First, CURTISS-WRIGHT fails to recognize that such decision was rendered prior to the repeal of the Statute of Repose. Thus, the impact of such repeal could not have been considered in such decision. Additionally, everyone is now aware that there are various federal district court opinions around the State of Florida which vary with regard to the application of the Pullum decision.

Additionally, one of the criteria addressed by the federal district Judge related to whether the retroactive application of the Pullum decision would impede the function of the statute addressed in the decision. It is clear that this critical element was totally eliminated when the Statute of Repose was repealed. There was no reason to retroactively apply the Pullum decision to protect the legislation when the Legislature had in fact repealed the provision.

The third element in the analysis of retroactive application of a legal decision addressed the "equities". When the federal district Judge rendered his decision the equities were probably more evenly balanced because the Statute of Repose had not been totally repealed at that time. It is respectfully submitted that the equities shifted dramatically when the Leg-

islature repealed the Statute of Repose at its very first opportunity after seeing the interpretation of the statute changed by the judicial system.

Finally, CURTISS-WRIGHT does not respond to the equities that if CURTISS-WRIGHT maintains some type of vested interest in a statutory repose defense which could not be retroactively modified, it is submitted that DIAZ had some type of vested property right in his cause of action that should not have been retroactively destroyed. It is submitted that the exception to the prospective application of decisions should be applied in this case. Further, DIAZ recognizes that the existing district court of appeal level decisions all have applied Pullum retroactively, however, all of the district courts of appeal have certified the question to this Court due to the totality of the circumstances involved.

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.

CURTISS-WRIGHT'S position with regard to the availability of post-judgment Rule 1.540 relief is basically separated into two distinct arguments. The first with regard to whether the original summary final judgment in the action seeking damages was technically one of "prospective application" within the post-judgment relief context may be somewhat arguable even though CURTISS-WRIGHT fails to even discuss or address the multiple decisions cited by DIAZ in which such relief was afforded. However, the second argument presented by CURTISS-WRIGHT that the original summary final judgment entered against

DIAZ had no res judicata effect is not only without any merit whatsoever, it was CURTISS-WRIGHT'S position in the trial court, as reflected in the transcript of proceedings, that relief was not available because the summary final judgment was totally final and barred any further action. Not only did CURTISS-WRIGHT fail to even assert such position, CURTISS-WRIGHT argued a totally contrary position in the trial court.

When DIAZ initiated his action against CURTISS-WRIGHT he sought recovery based upon common-law theories of liability to recover damages from CURTISS-WRIGHT. The common-law action was not in any way dependent upon or predicated upon any type of statutory right which would afford a cause of action for the recovery. It was nothing more than a legal action to recover damages due to tortious conduct of CURTISS-WRIGHT.

In defending the action CURTISS-WRIGHT set forth certain defenses and a summary final judgment was entered against DIAZ based upon the defenses asserted. The summary final judgment was not predicated upon any type of statutory cause of action, but was simply a judgment holding that DIAZ was not entitled to the relief sought.

As analyzed in Kirksey v. City of Jackson, 714 F.2d 42 (5th Cir. 1983), a judgment or decision is considered to have "prospective application" if the judgment precludes a party from proceeding further. If such definition is to be applied then the summary final judgment in this case was most certainly of "prospective application" for which Rule 1.540 relief was available.

It is recognized that most decisions which involve Rule

1.540 relief from judgment in the prospective sense relate to injunctive type judgments. If this Court determines that Rule 1.540 relief is only available under such equitable types of judgments such as injunctions, declaratory relief, and others, then such relief would not be available for the summary final judgment entered in this common law tort action. However, as demonstrated in the original brief, multiple federal decisions have afforded relief in connection with judgments entered in actions seeking monetary relief.

Reliance upon a decision such as Center for National Policy Review v. Richardson, 534 F.2d 351 (D.C. Cir. 1976), simply fails to address the issue before this Court. Such decision involved whether a determination as to access to certain records would continue in the future when subsequent legislation created a totally different set of factors. A judgment making a determination as to the availability of certain records certainly did not apply to a subsequent action seeking records under a different legislative provision. Such decision simply has nothing whatsoever to do with the binding effect of a summary final judgment entered in an action for damages.

The argument that the summary final judgment had no res judicata effect and an attempt to rely upon the Kirksey decision fall far short of proper analysis. In Kirksey the Court merely recognized that judgments concerning constitutional issues do not have res judicata operation. The present case does not involve any constitutional issues with regard to the summary final judgment. The summary final judgment did not adjudicate any constitutional issues or constitutional rights. On the

contrary, the summary final judgment simply adjudicated the rights in the tort action.

The argument presented by CURTISS-WRIGHT predicated upon Wagner v. Baron, 64 So.2d 267 (Fla. 1953), is a total red herring in this litigation. Not only is such argument totally contrary to the stated position in the trial court as recorded in the transcript of proceedings, CURTISS-WRIGHT simply fails to recognize that the cause of action asserted by DIAZ was not a statutory cause of action. The initial action filed by DIAZ was not predicated upon any statutory right and there was no change of any statute with regard to the substantive right of DIAZ to set forth an action. The Wagner decision involved a determination as to whether an action seeking relief under one statute operates as res judicata with regard to a party seeking to enforce subsequent statutory rights under a different and subsequent statutory provision. In this case DIAZ did not seek to enforce a statutory remedy and there was no change in a statutory remedy.

This case very simply involved a legislative change of a defense, not a statutory cause of action, and DIAZ was required to obtain relief from the existing summary final judgment or he would have faced a res judicata position if he had attempted to file a separate action.

CURTISS-WRIGHT continues with its red herring type argument in asserting that DIAZ did not file for relief under Rule 1.540(b) in a timely fashion but provides absolutely no authority for such argument because none exists. CURTISS-WRIGHT argues that the motion was filed almost one year after the

summary final judgment, but fails to even acknowledge that it was not until July, 1986, that the Statute of Repose provision was repealed. There was no reason for DIAZ to seek relief until the statute was repealed. At that time DIAZ acted within the time requirements of Rule 1.540(b) in seeking relief. DIAZ could not have filed a separate action without being relieved from the operative effect of the summary final judgment which had res judicata implications.

The statute of limitations argument contains no citation of authority because it is totally without support. The present action was filed by DIAZ in a timely fashion, the case was set for trial, a summary final judgment was entered against DIAZ, DIAZ sought relief in the same action pursuant to Rule 1.540, and when such relief was granted there has been no expiration of a statute of limitations. It is respectfully submitted that if Rule 1.540 relief was available as determined by the trial Court, DIAZ' action should proceed. If Rule 1.540 relief was not available, then the summary final judgment originally entered in the action precluded any further activity. This case should be decided on the appropriate legal theories and not upon positions asserted for the first time in an appeal or technical positions which have no legal supporty in previous decisions.

CONCLUSION

Based upon the arguments, authorities and reasoning set forth herein, the decision of the District Court of Appeal, Third District, should be quashed with instructions to return this action to the trial court for further proceedings to determine the rights of the parties.

Respectfully submitted,

R. Fred Lewis, Esq.
MAGILL & LEWIS, P.A.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was mailed this 15th day of October, 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.

MAGILL & LEWIS, P.A.
Attorneys for Petitioner
7211 S.W. 62 Avenue
Suite 200
Miami, FL 33143

By: R. Fred Lewis