11-9

IN THE SUPREME COURT OF FLORIDA

CASE NO. 71,158

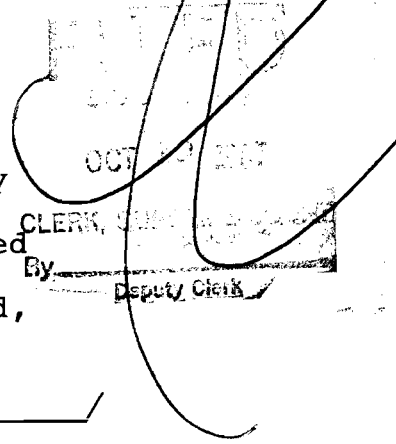
NAVISTAR INTERNATIONAL COMPANY
formerly INTERNATIONAL HARVESTER
COMPANY, a foreign corporation,

Petitioner,

vs.

WILLIAM F. SULLIVAN, IV., Attorney
in fact for the survivors of
MELITON MENDEZ, and to be appointed
personal representative of the
estate of MELITON MENDEZ, deceased,

Respondent.



BRIEF OF RESPONDENT ON THE MERITS

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TOPICAL INDEX

LIST OF CITATIONS AND AUTHORITIES

I.

INTRODUCTION

Respondent ("SULLIVAN" hereafter) was farm tractor accident, product liability, wrongful death plaintiff in the trial court and appellant in the Third District Court of Appeal. Petitioner ("NAVISTAR" hereafter), manufacturer of the tractor, was defendant and appellee. Respondent's decedent will be referred to herein as "MENDEZ." The symbol "R" shall stand for the record on appeal.

In the District Court of Appeal SULLIVAN sought review of an adverse final order (R. 16) dismissing his complaint with prejudice on time bar grounds only.

All emphasis appearing in this brief is supplied by counsel unless otherwise noted.

II.

STATEMENT OF CASE AND FACTS

A.

PREFACE

SULLIVAN was in the District Court and is herein entitled to have the record viewed in the light most favorable to him with all reasonable inferences of fact, intendments of testimony and credibility questions being drawn and resolved in his favor.*

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* See cases cited in the argument section of this brief, infra.

B.

THE PERTINENT FACTS

The subject accident occurred on October 31, 1983.

SULLIVAN'S complaint was filed on October 29, 1985. (R. 1-11)

The complaint contained the following pertinent allegations:

* * *

"[General allegations.]

"3. That at all times material hereto, Defendant INTERNATIONAL HARVESTER COMPANY, was engaged in the business of designing, manufacturing, distributing and selling farm tractors in various parts of the world, including the State of Florida and Dade County.

"4. That at all times material hereto, Defendant INTERNATIONAL HARVESTER COMPANY, held itself out to the general public and this Plaintiff, in particular, as a well qualified designer and manufacturer of farm tractor machines, possessing skill and knowledge in the design and manufacture of such a product.

"5. That on or about October 31, 1983, the decedent MELITON MENDEZ was killed when the 1969 International Harvester tractor he was operating overturned and landed upside down on top of him.

* * *

"COUNT I
NEGLIGENCE

"The Plaintiff readopts and realleges allegations 1 through 8 and further alleges:

"9. That the Defendant owed the Plaintiff the duty to exercise reasonable care in the design, manufacture and distribution of said farm tractor and Defendant knew or should have known of the rollover tendencies of tractors prior to the manufacturer of said product.

"10. That the Defendant breached said duty to the Plaintiff by negligently failing to design and/or warn, construct and/or manufacture a farm tractor with a safety device to prevent injuries such as the type suffered by decedent and/or negligent in failing to construct and/or design said tractor with less rollover tendencies.

"11. That the Defendant breached said duty to the Plaintiff by failing to warn users of the farm tractor

of its dangerous propensities.

* * *

COUNT II
STRICT LIABILITY

* * *

"17. At all times material hereto, the Defendant knew that said product was in a defective or dangerous condition and likely to cause personal injury, but proceeded to sell or distribute said product, and this amounted to willful, wanton, malicious, wreckless, oppressive and outrageous conduct on the part of the Defendant.

* * *

COUNT III
BREACH OF IMPLIED WARRANTY
OF MERCHANTABILITY

* * *

COUNT IV
BREACH OF IMPLIED WARRANTY OF FITNESS
FOR PARTICULAR PURPOSE

* * *

[Counts III and IV simply realleged factual allegations previously alleged.]

* * *

On December 4, 1985, NAVISTAR filed a motion to dismiss SULLIVAN'S complaint on time bar grounds only. (R. 12-13)

On March 21, 1986, the trial court entered the order appealed dismissing SULLIVAN'S complaint with prejudice on time bar grounds only on authority of PULLUM v. CINCINNATI, INC., 476 So. 2d 657 (Fla. 1985).

III.

POINTS INVOLVED

POINT I

SULLIVAN was appellant in the District Court. This Court has taken jurisdiction of the merits of the controversy between the parties. The Court must consider all of the points raised by SULLIVAN below. NAVISTAR cannot be allowed to pick and choose only the merits points it wants to argue.

In the District Court SULLIVAN raised the following

points on appeal each of which must now be considered by this Court on its merits:*

POINT I

WHETHER THE DECISION RENDERED BY THIS COURT IN PULLUM v. CINCINNATI, INC., 476 So. 2d 657 (Fla. 1985) HAS BEEN INVALIDATED BY A SUBSEQUENT CLARIFICATION OF LEGISLATIVE INTENT.

POINT II

WHETHER THE DECISION RENDERED BY THIS COURT IN PULLUM v. CINCINNATI, INC., SUPRA, A PERSONAL INJURY CASE CONTROLS THE DISPOSITION OF THE SUBJECT WRONGFUL DEATH CASE.

POINT III

WHETHER THE DECISION RENDERED BY THIS COURT IN PULLUM v. CINCINNATI, INC., SUPRA, CAN BE CONSTITUTIONALLY APPLIED TO THE FACTS OF THIS CASE SO AS TO EXTINGUISH SULLIVAN'S ACCRUED CAUSE OF ACTION FOR WRONGFUL DEATH.

POINT IV

ASSUMING ARGUENDO THAT PULLUM v. CINCINNATI, INC., SUPRA, COULD BE CONSTITUTIONALLY APPLIED TO A CASE SUCH AS THIS--WHETHER ON THIS RECORD, PROPERLY VIEWED, THE TRIAL COURT ERRED IN ENTERING THE ORDER APPEALED ON REPOSE GROUNDS IN ANY EVENT.

IV.

SUMMARY OF ARGUMENT

SULLIVAN contends that the order appealed must be reversed because:

1. The Florida Legislature immediately post-PULLUM amended the time bar statute construed in PULLUM to clarify its intent thereby rendering PULLUM invalid (Point I).

2. For the reasons explained by the District Court of

* Merits consideration of each of these points currently pends in this Court for decision in a multiplicity of cases.

Appeal, Fifth District, in PHLIEGER v. NISSAN MOTOR CO., LTD., 487 So. 2d 1096 (Fla. 5 DCA 1986), and approved by this Court in NISSAN MOTOR CO., LTD. v. PHLIEGER, 508 So. 2d 713 (Fla. 1987), personal injury PULLUM is inapplicable to Florida wrongful death cases (Point II).

3. PULLUM cannot be Florida or federal constitutionally applied to the case at Bar so as to extinguish SULLIVAN'S cause of action for wrongful death which accrued and vested post-BATILLA and pre-PULLUM (Point III).

4. In any event PULLUM is inapposite here because SULLIVAN'S complaint charges NAVISTAR with continuing negligence in the nature of a failure to warn (Point IV).

V.

ARGUMENT

A.

PREFACE RE: SUFFICIENCY OF COMPLAINTS

To state a cause of action, Rule 1.110, F.R.C.P., requires that the complaint contain:

* * *

> "(1) A short plain statement of the grounds upon which the court's jurisdiction depends unless the court already has jurisdiction and the claim needs new grounds of jurisdiction to support it, (2) a short and plain statement of the ultimate facts showing that the pleader is entitled to relief and (3) a demand for judgment for the relief for which he deems himself entitled. Relief in the alternative or of several different types may be demanded. Every complaint shall be considered to pray for general relief."

* * *

To comport with the requirements of the above quoted rule, a

complaint need only state facts sufficient to indicate that a cause of action exists and need not anticipate affirmative defenses. E.g., BAXTER v. ROYAL INDEMNITY CO., 285 So. 2d 652 (Fla. 1 DCA 1973); HAMMONDS v. BUCKEYE CELLULOSE CORP., 285 So. 2d 7 (Fla. 1973); PIZZI v. CENTRAL BANK & TRUST CO., 250 So. 2d 895 (Fla. 1971); and TRIPLETT v. BREVARD PROPERTIES, INC., 1927, 94 Fla. 869, 115 So. 534.

The purpose of a motion to dismiss is to determine whether the plaintiff has alleged a good cause of action, and for purposes of passing on such a motion, the court must assume that all facts alleged in the complaint are true, this while construing allegations contained therein in the light most favorable to the plaintiff. HAMMONDS v. BUCKEYE CELLULOSE CORP., supra; ODHAM v. FOREMOST DAIRIES, 128 So. 2d 586 (Fla. 1961); and SIMON v. TAMPA ELECTRIC CO., 202 So. 2d 209 (Fla. 2 DCA 1967).

On appeal from an order dismissing a complaint for failure to state a cause of action or to allege facts entitling the plaintiff to relief, the duty of the appellate court is to determine whether the complaint alleges sufficient ultimate facts which under any theory of law would entitle the plaintiff to the relief requested. See cases cited, supra.

B.

POINT I

THE DECISION RENDERED BY THIS COURT IN PULLUM v. CINCINNATI, INC., SUPRA, HAS BEEN INVALIDATED BY A SUBSEQUENT CLARIFICATION OF LEGISLATIVE INTENT.*

The following principles of law regarding statutory construction are well established in Florida:

1. Where reasonable differences arise as to the meaning or application of a statute, legislative intent is "the polestar of judicial construction." LOWRY v. PAROLE AND PROBATION COM'N, 473 So. 2d 1248 (Fla. 1985); TAMPA-HILLSBOROUGH COUNTY EXPRESSWAY AUTHORITY v. K. E. MORRIS ALIGNMENT SERVICES, INC., 444 So. 2d 926 (Fla. 1983); TYSON v. LANIER, 156 So. 2d 833 (Fla. 1963).

2. When an amendment to a statute is enacted within a relatively short time after controversies have arisen as to the interpretation of the original act, a court may consider that amendment as a legislative interpretation of the original law and not as a substantive change thereof. LOWRY v. PAROLE AND PROBATION COM'N, supra, and cases cited therein.

3. The courts will avoid an interpretation or construction of a statute which will produce an unreasonable result or render its operation unjust or unfair. See 49 Fla. Jur. 2d, Statutes, §§ 183 and 184.

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* The question of whether the subject amendment applies to causes of action accruing pre-passage of the amendment was recently certified to this Court in WILLIAMS v. AMERICAN LAUNDRY MACHINERY INDUSTRIES, Fla. 2 DCA Case No. 86-2043, opinion filed October 2, 1987, 12 FLW 2357. On information and belief the question already pends in this Court in any event.

4. The Florida statute of limitations for product liability cases is Section 95.11(3)(e). It contains no repose provision. The product statute of repose is Section 95.031, Florida Statutes. That statute contains the following pertinent provisions:

* * *

"95.031 Computation of time

"Except as provided in subsection (2) and in s. 95.051 and elsewhere in these statutes, the time within which an action shall be begun under any statute of limitations runs from the time the cause of action accrues.

* * *

"(2) Actions for products liability and fraud under s. 95.11(3) must be begun within the period prescribed in this chapter, with the period running from the time the facts giving rise to the cause of action were discovered or should have been discovered with the exercise of due diligence, instead of running from any date prescribed elsewhere in s. 95.11(3), but in any event within 12 years after the date of delivery of the completed product to its original purchaser or within 12 years after the date of the commission of the alleged fraud, regardless of the date the defect in the product or the fraud was or should have been discovered."

* * *

5. PULLUM v. CINCINNATI, INC., supra, was decided on August 29, 1985. The decision did not become final until November 4, 1985, when rehearing was denied. Immediately upon becoming aware that this Court had misconstrued its intent, the Florida legislature amended § 95.031, supra, deleting the repose provisions therefrom.

The legislature has told this Court that it misinterpreted its legislative intent in PULLUM. PULLUM was an aberration. It is now a nullity.

NAVISTAR makes no mention of this merits point in its brief.

C.

POINT II

THE DECISION RENDERED BY THIS COURT IN PULLUM v. CINCINNATI, INC., SUPRA, A PERSONAL INJURY CASE, DOES NOT CONTROL THE DISPOSITION OF THE SUBJECT WRONGFUL DEATH CASE.

PULLUM was a personal injury case. PHLIEGER was a wrongful death case. PHLIEGER involved the following chronology of events:

1. February 13, 1970--truck originally sold to NISSAN;

2. August 1981--within twelve years of sale of truck PHLIEGER'S decedent killed as a result of an allegedly defective roof design;

3. June 1983--without twelve years from date of sale but within two years of date of death PHLIEGER'S widow filed a wrongful death action.

In PHLIEGER the District Court of Appeal reversed a time bar summary judgment rendered in favor of NISSAN. The Court, inter alia, stated and held:

* * *

"There was some confusion in this case regarding which statute of limitations to apply and the applicability of the statute of repose. Had Mrs. Phlieger brought a products liability action against Nissan for her own injuries from the defective truck, then her cause of action would have been a products liability action governed by the four year statute of limitations under section 95.11(3). In that case, the provisions of section 95.031(2) would also apply to bar a suit twelve years after the date of delivery of the completed product to its original purchaser regardless of the date the defect was discovered. Here, however, the action, although admittedly based on negligence, strict liability, and breach of warranty, was a wrongful death action pursuant to section 768.19. Thus by its very language, section 95.031(2) does not apply and, rather, the two year statute of limitations for wrongful death actions found in section 95.11(4)(d) applies.

"This conclusion is supported by Parker v. City of Jacksonville, 82 So. 2d 131 (Fla. 1955). In that case, the Florida supreme court held that a wrongful death action based on the alleged negligence of the City of Jacksonville was governed by the two year statute of limitations for wrongful death actions and not by te one year statute of limitations pertaining to actions against municipalities for 'any negligence or wrongful injury or damage to person or property.' The court held that the one year limitation did not apply to all actions, but only applied to negligent or wrongful, that is, 'tortious' conduct. The court pointed out that Mrs. Parker's suit was not for the injuries sustained by her late husband, but was for the death resulting from that injury, which was an independent and distinct grievance created by statute. The court also noted that repeals by implication are not favored and concluded that the legislature had not intended to repeal the two year wrongful death statute of limitations by enacting the one year statute of limitations for actions against municipalities.

"In the present case, Mrs. Phlieger likewise is not suing for the injuries sustained by her husband but is seeking damages for the death resulting from that injury. There is no express language in sections 95.031(2) and 95.11(3) which would include a wrongful death action based on products liability claims. And, as was noted in Parker, repeal by implication is not favored. Since products liability claims and wrongful death actions are separate and distinct causes of action, the wrongful death statute of limitations should have been applied for.

* * *

"In Variety Children's Hospital v. Perkins, the Florida supreme court held that a wrongful death action was barred where the decedent, during his lifetime, had filed a personal injury action against the tortfeasor and had fully recovered. In so holding, the court explained as follows:

> "'At the moment of his death the injured minor Anthony Perkins had no right of action against the tortfeasor because his cause of action had already been litigated, proved and satisfied. The recovery awarded by the judgment in the previous personal injury action included damages arising from future expenses. Since there was no right of action existing at the time of death, under the statute no wrongful death cause of action survived the decedent.'

445 So. 2d at 1012.

"Here Mrs. Phlieger points out that at the moment of her husband's death, the twelve years had not yet run and he did have a cause of action against Nissan. In Love v. Hannah, 72 So. 2d 39 (Fla. 1954), the Florida supreme court held that the plaintiff's right of action under the wrongful death statute must be determined by the facts existing at the time of the death of decedent. At the time of his death, the decedent had the right to bring an action against Nissan and thus the subsequent wrongful death action was not barred.

"Nissan's argument that Mrs. Phlieger's action was barred would have merit only if her husband had been killed more than twelve years after the delivery of the truck and he himself was barred from filing suit. See Variety Children's Hospital v. Perkins (where decedent had no cause of action against tortfeasor because his personal injury action had already been litigated, proved and satisfied during his lifetime, subsequent wrongful death action based on the same tortious conduct was barred); Hudson v. Keen Corporation, 445 So. 2d 1151 (Fla. 1st DCA 1984) (where four year statute of limitations for personal injury actions had expired during a decedent's lifetime and decedent would have been barred from filing suit himself, subsequent wrongful death action b ased on the same tortious conduct was likewise barred). Here, as was noted above, the twelve year statute of repose had not expired when the cause of action, for wrongful death, accrued."

* * *

In PHLIEGER, NISSAN proceeded to this Court. In NISSAN MOTOR CO., LTD. v. PHLIEGER, 508 So. 2d 713 (Fla. 1987), this Court approved the District Court decision in toto. This Court held:

* * *

"We agree with the district court that 'by its very language section 95.031(2) does not apply [to wrongful death actions].' 487 So. 2d at 1097. Section 95.031-(2) specifically refers to 'the actions for products liability . . . under s. 95.11(3).' Section 965.031(2) makes no reference to wrongful death actions under section 95.11(4)(d); nor does either section 95.11(3) or section 95.031(2) refer to actions for damages because of death. Compare Ash (wrongful death action based on medical malpractice barred where medical malpractice statute of limitations specifically defined an action for medical malpractice as including a claim for damages because of death) with Parker v.

City of Jacksonville, 82 So. 2d 131 (Fla. 1955) (wrongful death action was not barred by statute of limitations pertaining to actions against city for any negligence or wrongful injury or damage to person or property where statute did not expressly refer to death actions.). Therefore, we conclude that the legislature did not intend that section 95.031(2) operate as a bar to wrongful death actions brought more than twelve years after the original purchase of the product allegedly causing death."

* * *

It is submitted that the telling "cause of action for death cannot accrue or vest prior to death" argument made by the District Court and approved by this Court in PHLIEGER applies equally as well to deaths occurring post-passage of the twelve-year repose period. Indeed, this Court specifically so held in PHLIEGER.

NAVISTAR has a lot to say about this merits point in its brief. However, everything of substance that it says was rejected by this Court in PHLIEGER.

D.

THE DECISION RENDERED BY THIS COURT IN PULLUM v. CINCINNATI, INC., SUPRA, CANNOT BE CONSTITUTIONALLY APPLIED TO THE FACTS OF THIS CASE SO AS TO EXTINGUISH SULLIVAN'S ACCRUED CAUSE OF ACTION FOR WRONGFUL DEATH.

PULLUM cannot be Florida constitutionally applied to the case at Bar. Under Florida law a subsequent case constitutionally construing a statute may not be retroactively applied if such application will destroy vested rights which a party acquired under a prior court construction of the statute. In FLORIDA FOREST & PARK SERVICE v. STRICKLAND, 18 So. 2d 251 (Fla. 1944), this Court long ago held:

* * *

"Where a statute has received a given construction by a court of supreme jurisdiction and property or

> contract rights have been acquired under and in accordance with such construction, such rights should not be destroyed by giving to a subsequent overruling decision a retrospective operation. Florida Forest & Park Service v. Strickland, 18 So. 2d 251 (Fla. 1944), Department of Revenue v. Anderson, 389 So. 2d 1034 (1 DCA 1980), International Studio Apartment Association v. Lockwood, 421 So. 2d 1119 (4 DCA 1982)."
>
> * * *

Here:

1. BATILLA v. ALLIS-CHALMERS MFG. CO., 392 So. 2d 874 (Fla. 1980) was decided on December 11, 1980. In BATILLA this Court held that it worked an unconstitutional denial of access to the courts when the subject statute of repose acted as an absolute bar to a cause of action which did not accrue or vest until after expiration of the repose period.

2. SULLIVAN'S decedent was killed on October 31, 1983. SULLIVAN'S cause of action accrued and vested on that day.

3. PULLUM was not decided until August 29, 1985, after SULLIVAN'S cause of action had accrued and vested.

It is thus seen that PULLUM cannot and should not be applied here for Florida constitutional reasons alone.

PULLUM cannot be federally constitutionally applied to the case at Bar either. GEORGE v. FIRESTONE TIRE & RUBBER CO., United States District Court for the Northern District of Florida, Case No. GCA 85-0117-MMP, decided by Federal Maurice M. Paul, is directly in point and highly persuasive here. Copies of the orders entered by Judge Paul in that case are appended to this brief for the convenience of the Court. (A 1-13) SULLIVAN concedes that Judge Paul's decision is not controlling here. However, Judge Paul's decision presently

pends on the merits in the United States Court of Appeals for the 11th Circuit, Case No. 86-3629. Any decision rendered by that Court with regard to this merits point would control here. There follows a chronology of the facts involved in GEORGE v. FIRESTONE TIRE & RUBBER CO., supra, insofar as that case is pertinent here:

1. Prior to January 1, 1975, and more than twelve years prior to March 2, 1982--the product involved in GEORGE was delivered to its original purchaser.

2. Effective January 1, 1975--Chapter 95.11, Florida Statutes, was amended to create a twelve-year statute of repose in product liability cases.

3. March 1, 1979--this Court decided OVERLAND CONSTRUCTION CO. v. SIRMONS, 369 So. 2d 572 (Fla. 1979), an action based on the design, planning or construction of improvements to real property. The Court held that it worked an unconstitutional denial of access to the courts to apply the subject statute of repose as an absolute bar to a cause of action of one not injured until after expiration of the period of repose.

4. December 11, 1980--this Court decided BATILLA v. ALLIS CHALMERS MFG. CO., supra. The Court held that it worked an unconstitutional denial of access to the courts when the subject statute of repose acted as an absolute bar to a cause of action of one not injured until after expiration of the period of repose.

5. March 2, 1982--more than twelve years after the

involved product was delivered to the original purchaser, Thomas L. George was injured by the product.

6. April 10, 1985--GEORGE sued Firestone Tire & Rubber.

7. August 29, 1985--after Thomas L. George was injured and after he filed suit against Firestone Tire & Rubber Company, this Court decided PULLUM in which it suddenly receded from BATILLA and held that the statute of repose did not unconstitutionally prevent access to the courts by persons injured more than twelve years after delivery of a product.

The determinative question presented in GEORGE was whether a retroactive application of PULLUM to GEORGE would unconstitutionally extinguish GEORGE'S accrued and vested cause of action for personal injuries. In GEORGE Judge Paul held that it would. SULLIVAN implores the Court to read every word in the GEORGE decision. (A. 1-10) SULLIVAN adopts the reasoning contained therein as argument here.

Application of the GEORGE reasoning to the facts of the case at Bar mandates reversal because the chronology involved here was the following:

1. Effective January 1, 1975--Chapter 95.11, supra, was amended to create a twelve-year statute of repose in product liability cases.

2. March 1, 1979--this Court decided OVERLAND CONSTRUCTION CO. v. SIRMONS, supra. The Court held that it worked an unconstitutional denial of access to the courts to apply the subject statute of repose as an absolute

bar to a cause of action of one not injured until after expiration of the period of repose.

3. December 11, 1980--this Court decided BATILLA v. ALLIS CHALMERS MFG. CO., supra. The Court held that it worked an unconstitutional denial of access to the courts when the subject statute of repose acted as an absolute bar to a cause of action of one not injured until after expiration of the period of repose.

4. October 31, 1983--more than twelve years after NAVISTAR'S sale of the tractor, MENDEZ is killed and SULLIVAN'S cause of action for death accrues and vests.

5. August 29, 1985--after SULLIVAN'S cause vested, this Court decided PULLUM in which it suddenly receded from BATILLA and held that the statute of repose did not unconstitutionally prevent access to the courts by persons injured more than twelve years after delivery of a product.

The determinative question here is basically the same as that presented in GEORGE. In his second GEORGE order, Judge Paul candidly recognized that his decision was in conflict with those rendered by two other Federal District Court judges. (A. 11-13) It is submitted that the GEORGE decision is the better reasoned decision and should be followed by this Court as it will be by the Federal Eleventh Circuit Court of Appeals.

For the foregoing reasons alone, the subject summary final judgments must be reversed.

NAVISTAR makes no mention of this merits point in its main brief.

E.

POINT IV

ASSUMING ARGUENDO THAT PULLUM v. CINCINNATI, INC., SUPRA, COULD BE CONSTITUTIONALLY APPLIED TO A CASE SUCH AS THIS--ON THIS RECORD, PROPERLY VIEWED, THE TRIAL COURT ERRED IN RENDERING THE SUMMARY FINAL JUDGMENT APPEALED ON REPOSE GROUNDS.

Failing all else, it must be remembered that you cannot repose negligence which has not occurred. For the reasons which follow, PULLUM is at least partially inapposite here in any event:

1. The applicable four-year product statute of limitations, § 95.11(3)(e), supra, applies only to:

* * *

"(e) An action for injury to a person founded on the design, manufacture, distribution or sale of personal property that is not permanently incorporated in an improvement to real property, including fixtures."

* * *

2. This is not an "injury" case. It is a death case. See PHLIEGER v. NISSAN MOTOR CO., LTD., supra.

3. Even considered as an injury case what would be "reposed" here by former § 95.031, supra, are SULLIVAN'S causes of action for strict liability, breach of implied warranty and negligence in the design or manufacture of the involved products.

4. SULLIVAN has also asserted that NAVISTAR was negligent post the design and manufacturing stage and continued through the date of the subject accident. Simply stated, NAVISTAR, from product use experience, knew that its tractor was defective and did not warn the public of the existence of the defect.

NAVISTAR makes no mention of this merits point in its main brief.

VI.

CONCLUSION

It is respectfully submitted that for the reasons stated herein, the District Court of Appeal properly held that the summary final judgment appealed must be reversed in toto and the cause remanded for trial on all causes of action relied on by SULLIVAN. In the alternative, should this Court decide to disturb the District Court decision--at the very least, the judgments appealed must be reversed and the cause remanded for trial on SULLIVAN'S cause of action for continuing negligence and failure to warn occurring post the design and manufacturing stage.

Respectfully submitted,

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By: _____
Edward A. Perse

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true copy of the foregoing Brief of Respondent was mailed to the following counsel of record this 15 day of October, 1987.

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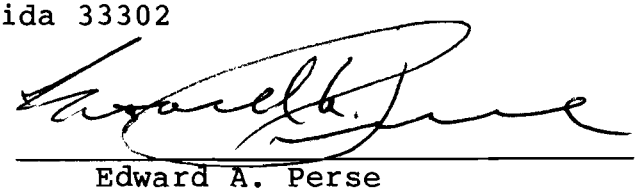

Edward A. Perse