IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. 71,158
DCA CASE NO. 86-1001

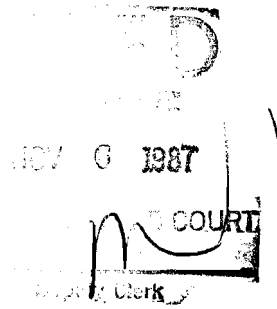
NAVISTAR INTERNATIONAL COMPANY, formerly INTERNATIONAL HARVESTER COMPANY, a foreign corporation,

Petitioner,

vs.

WILLIAM F. SULLIVAN, IV., etc.,

Respondent.
_____/



REPLY BRIEF OF PETITIONER ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS (Continued)

ARGUMENT

Since the filing of the main brief of the parties, this court has issued its decision in the case of Melendez v. Dreis & Krump Manufacturing Co., _____ So. 2d _____, 12 F.L.W. 517, (Fla. 10/15/87 Case No. 70225). The Melendez case is factually identical to the instant action and considered the same issues of law now before this court.

Just as in the pending case, the plaintiff's decedent in Melendez was injured more than twelve years after the manufacture and sale of the allegedly defective product. All arguments advanced by Sullivan concerning the effect or application of Pullum and the post-Pullum legislative changes to F.S. §95.031(2) have now been considered by this court and decided unfavorably to Sullivan.

In the Melendez decision, this court considered the post-Pullum repeal of the repose provisions of F.S.§95.031(2) and said this legislative change could not save the plaintiff's suit. The decision goes on to explain that the 1986 amendment to this statute provided only for its prospective application after July 1, 1986. The absence of a clear manifestation of intent for a retroactive application of this legislation prevents its application to a case such as the one at bar. The case of Lowry v. Parole & Probation Commission, 473 So. 2d 1248 (Fla. 1985), which is cited by Sullivan, is readily distinguishable because it

involved not only a different statute but also involved a rewording of a statute for clarity rather than a material change or repeal of the statute as occurred in the instant case.

In the Melendez decision, the court reiterated the general rule of law that "a decision of a court of last resort which overrules a prior decision [i.e. Pullum] is retrospective as well as prospective in its application unless declared by the opinion to have prospective effect only." This court has agreed that Pullum is to have retrospective application. Pullum necessarily applies to bar the instant lawsuit.

Finally, the Melendez case acknowledges the inapplicability of the case of Nissan Motor Co. v. Phlieger, 508 So.2d 713 (Fla. 1987) to the instant factual scenario where the decedent's injury occurs more than twelve years after the manufacture and sale of the product. Phlieger, which is a cornerstone of Sullivan's position, does not control this case. The Melendez decision removes any doubt that a survivor's right of action depends upon the existence of a viable claim in favor of the decedent. See also: Duval v. Hunt, 15 So. 876 (Fla. 1894); Carter v. J. Ray Arnold Lumber Co., 91 So. 893 (Fla. 1922); Epps v. Railway Express Agency, 40 So.2d 131 (Fla. 1949); Collins v. Hall, 157 So. 646 (Fla. 1934); Variety Children's Hospital v. Perkins, 445 So.2d 1010 (Fla. 1983); Ash v. Stella, 457 So. 2d 1377 (Fla. 1984); Metropolitan Life Ins. Co. v. McCarson, 467 So.2d 277 (Fla. 1985); Pait v. Ford Motor Co., 500 So.2d 743 (Fla. 5th DCA 1987); Kirchner v. Aviall, Inc., ___ So.2d ____ (Fla. 1st DCA 1987) (Case

No. BN-219, opinion filed 8/26/87); Hudson v. Keene Corp., 445 So.2d 1151 (Fla. 1st DCA 1984). Only where the decedent has a viable claim (because his injury occurs within twelve years of the manufacturing of the product) will the two year wrongful death statute preserve the claim beyond the twelve year statute of repose.

Sullivan's suggestion that his complaint should have withstood a motion to dismiss is not well founded. The complaint plainly stated that Sullivan's accident occurred more than twelve years after the manufacture and sale of Navistar's tractor. It is well settled that where it affirmatively appears from the face of the complaint that the applicable statute of limitations has expired, the claim should be dismissed for failure to state a cause of action. Fla.R.C.P. 1.110; 1.140.

There is no question that the Pullum decision may be constitutionally applied in the pending case. Sullivan's argument regarding the unconstitutionality of applying F.S. §95.031(2), as construed by the Pullum decision, to the facts of this case has been specifically rejected by the courts of this state. Pait v. Ford Motor Co.; Hampton v. A. Duda & Sons, Inc., supra. The law is well settled that the Pullum decision establishes the constitutionality of the twelve year statute of repose as contained in §95.031(2) back to its original enactment, which preceded Sullivan's injury. As a result, Sullivan had no vested interest or claim at any time. As the court stated in Pait v.

Ford Motor Co., supra, "if a decision holding a statute to be unconstitutional is subsequently overruled, the statute will be valid from the date it became effective".

As to the Federal constitutionality of the Pullum decision on the facts of this case, Sullivan admits the opinion of Judge Maurice M. Paul (which is the sole authority for Sullivan's position) is not binding. [1] As Sullivan acknowledges, and Judge Paul himself admits, Judge Paul's decision is contrary to the weight of Federal decisions which have all held Pullum may constitutionally be applied on these facts. Lamb v.Volkswagenwerk Aktiengefellschaft, 631 F.Supp. 1144 (S.D.Fla. 1986); Thorsby v. Williams-White & Co., Case No. TCA 84-7230-WS (N.D.Fla. 1/30/86); Eddings v. Volkswagenwerk A.G., Case No. PCA 84-4476-WEA (N.D. Fla. 1/09/86).

Sullivan's final point should fare no better than any of his others. Sullivan suggests, with no citation to authority, that his claim for failure to warn of alleged defects should not be time barred even if Pullum is constitutionally applied to this case. This position is unfounded. The only wrong alleged in this suit against a manufacturer is an alleged product defect. The single injury Sullivan received gives rise to a single claim regardless of the number of causes of the injury. Variety Children's Hospital v. Perkins, supra. No matter how Sullivan's

[1] Sullivan erroneously asserts, however, that any subsequent United States Court of Appeals for the Eleventh Circuit ruling on this case would be binding. While decisions of Federal Courts may be persuasive, they are not binding. Brown v. City of Jacksonville, 236 So.2d 141 (Fla. 1st DCA 1970); State v. Dwyer, 332 So.2d 333 (Fla. 1976).

theory of recovery is styled, that alleged defect is the sole basis of his action. As this court has stated in Pullum, the statute of repose must be interpreted to apply to all products liability causes of action in order to be consistent. This is the only way to protect an alleged wrong doer from indefinite exposure regardless of when the plaintiff became aware of his cause of action. The allegation of a failure to warn is merely an element of the manufacturer's alleged negligence and is wholly insufficient to create an independent basis of recovery.

CONCLUSION

For the reasons set forth herein, it is respectfully suggested that the instant decision of the Third District Court of Appeal clearly conflicts with both the provisions of the wrongful death act and all other decisions of this state which discuss the viability of a survivor's claim under the act. It is further submitted that the instant decision of the Third District Court of Appeal is not legally or factually supportable. It is respectfully requested that this Honorable Court quash the decision of the District Court and reinstate the dismissal with prejudice which was entered by the trial court.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 4th day of November, 1987 to Edward A. Perse, Esquire, Horton, Perse & Ginsberg, Attorneys for Plaintiff/Appellant, 410 Concord Building, Miami, Florida 33130 and William Sullivan, Esquire, 300 Sevilla Avenue, Coral Gables, Florida 33134.

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