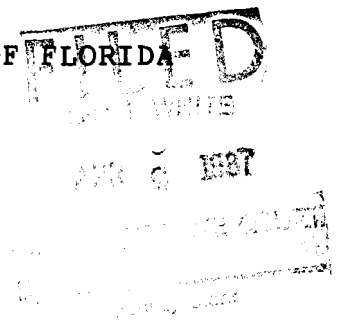
IN THE SUPREME COURT OF FLORIDA



SHARON PAIT, as Personal Representative of the Estate of GRADY PAIT, deceased,

Petitioner,

vs. Case No. 69,917

FORD MOTOR COMPANY,

Respondent.

_____/

BRIEF OF AMICUS CURIAE
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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE AND FACTS 1

SUMMARY OF ARGUMENT 3

ARGUMENT

I. THE LEGISLATIVE AMENDMENT OF SECTION 95.031(2), FLORIDA STATUTES, ABOLISHING THE STATUTE OF REPOSE IN PRODUCT LIABILITY ACTIONS, SHOULD NOT BE CONSTRUED TO APPLY RETROSPECTIVELY TO A CAUSE OF ACTION WHICH ACCRUED BEFORE THE EFFECTIVE DATE OF THE AMENDMENT 4

II. THE DECISION IN PULLUM V. CINCINNATI, INC., 476 So.2d 657 (FLA. 1985), WHICH OVERRULES BATTILLA V. ALLIS CHALMERS MFG. CO., 392 So.2d 874 (FLA. 1980), APPLIES SO AS TO BAR A CAUSE OF ACTION FOR WRONGFUL DEATH THAT AROSED AFTER THE BATTILLA DECISION BUT BEFORE THE PULLUM DECISION 17

CONCLUSION 28

CERTIFICATE OF SERVICE 28

TABLE OF AUTHORITIES

CASES	PAGE
Aronson v. Congregation Temple De Hirsch, 123 So.2d 408 (Fla. 3d DCA 1960)	24
Barnett Bank of Palm Beach County v. Estate of Read, 493 So.2d 447 (Fla. 1986)	14
Battilla v. Allis Chalmers Mfg. Co., 392 So.2d 874 (Fla. 1980)	1, 9, 10, 17, 18, 19, 24, 26, 27
Bolick v. American Barmag Corp., 293 S.E.2d 415 (N.C. 1982)	15, 16
Brackenridge v. Ametek, Inc., 12 F.L.W. 479 (Fla. 3d DCA 1987)	2
Brooks v. Cerrato, 355 So.2d 119 (Fla. 4th DCA 1978), cert.den., 361 So.2d 119 (Fla. 1978)	11
Burmaster v. Gravity Drainage Dist. No. 2, 366 So.2d 1381 (La. 1978)	15
CBS, Inc. v. Garrod, 622 F.Supp. 532 (M.D. Fla. 1985)	16
Carpenter v. Florida Central Credit Union, 369 So.2d 935 (Fla. 1979)	10
Cassidy v. Firestone Tire & Rubber Co., 495 So.2d 801 (Fla. 1st DCA 1986) rev. den., ____ So.2d ____ (Fla., Case No. 69,668, opinion filed March 27, 1987)	20
Cassidy v. Firestone Tire and Rubber Co, ____ So.2d ____ (Fla. Case No. 69,668 opinion filed March 27, 1987)	2
Cheswold Volunteer Fire Co. v. Lambertson Construction Co., 489 A.2d 413 (Dela. 1984)	14, 26
Chevron Oil Co. v. Huson, 404 U.S. 97 (1971)	20
Christopher v. Mungen, 61 Fla. 513, 55 So. 273 (1911)	21, 22, 24, 25

Coggins v. Clark Equipment Co.,
12 F.L.W. 750 (Fla. 5th DCA 1987) 2

Colony Hill Condominium I Ass'n. v.
Colony Co., 320 S.E.2d 273 (N.C.App. 1984) 14

Colton v. Dewey, 212 Neb. 126,
321 N.W.2d 913 (1982) 15

Culpepper v. Culpepper,
147 Fla. 632, 3 So.2d 330 (1941) 24

Department of Revenue v. Anderson,
389 So.2d 1034 (Fla. 1st DCA 1980),
rev. denied, 399 So.2d 1141 (Fla. 1981) 23, 24

Durring v. Reynolds, Smith and Hills,
471 So.2d 603 (Fla. 1st DCA 1985) 11

Eddings v. Volkswagenwerk, A.G.,
635 F.Supp. 45 (N.D. Fla. 1986) 2, 20

First Savings & Loan Ass'n. v.
First Federal Savings & Loan Ass'n of
Hawaii, 547 F.Supp. 988 (D. Haw. 1982) 15

Florida Forest & Park Service v. Strickland,
154 Fla. 472, 18 So.2d 251 (1944) 22, 23, 27

Fogg v. Southeast Bank, N.A.,
473 So.2d 1352 (Fla. 4th DCA 1985) 4, 5

Foley v. Morris, 339 So.2d 215 (Fla. 1976) 4, 7, 11

Garofalo v. Community Hosp. of S. Broward,
382 So.2d 722 (Fla. 4th DCA 1980) 11

Harrison v. Hyster Co., 12 F.L.W. 540
(Fla. 2d DCA 1987) 2

Homemakers, Inc. v. Gonzales,
400 So.2d 965 (Fla. 1981) 10, 11, 12

Hudson v. Keene Corp.,
445 So.2d 1151 (Fla. 1st DCA 1984),
approved, 472 So.2d 1142 (Fla. 1985) 18

International Studio Apartment Ass'n. v.
Lockwood, 421 So.2d 1119 (Fla. 4th DCA 1982),
cert. den., 464 U.S. 895 (1983) 24, 26

Kahn v. Trans World Airlines, Inc.,
82 A.D.2d 696, 443 N.Y.S.2d 79 (1981) 14

Klein v. Catalano, 386 Mass. 701,
437 N.E.2d 514 (1982) 26

L. Ross, Inc. v. R. W. Roberts Construction
Co., Inc. 466 So.2d 1096 (Fla. 5th DCA 1985),
approved, 481 So.2d 484 (Fla. 1986) 15

Lamb v. Volkswagenwerk Aktiengesellschaft,
631 F.Supp. 1144 (S.D. Fla. 1986) 2, 15, 20, 24, 26

Lane v. Koehring Co., 12 F.L.W. 478
(Fla. 3d DCA 1987) 2

Levy v. Levy, 483 So.2d 455
(Fla. 3d DCA 1986) 24

Lincoln First Bank of Rochester v. Rupert,
60 A.D.2d 193, 400 N.Y.S.2d 618 (1977) 14

Martz v. Riskamm, 144 So.2d 83
(Fla. 1st DCA 1962) 12

Mazda Motors of America, Inc. v.
S.C. Henderson & Sons, Inc.,
364 So.2d 107 (Fla. 1st DCA 1978),
cert. den., 378 So.2d 348 (Fla. 1979) 12, 13

Neff v. General Development Corp.,
354 So.2d 1275 (Fla. 2d DCA 1978) 12

Overland Construction Co. v. Sirmons,
369 So.2d 572 (Fla. 1979) 9, 10

Parkway General Hosp., Inc. v. Stein,
400 So.2d 166 (Fla. 3d DCA 1981) 23

Pullum v. Cincinnati, Inc., 476 So.2d 657
(Fla. 1985), appeal dismissed for want of
substantial federal question, _____ U.S.
_____, 106 S.Ct. 1626, 90 L.Ed.2d 174 (1986) ... 1, 2, 3, 5, 9, 10, 17, 18, 19, 20, 23, 24, 27, 28

Purk v. Federal Press Co.,
387 So.2d 354 (Fla. 1980) 18, 19

Rosenberg v. Town of North Bergen,
61 N.J. 190, 293 A.2d 662 (1972) 14

Rothermel v. Florida Parole and Probation
Commission, 441 So.2d 663 (Fla. 1st DCA 1983) .. 4, 5

Rupp v. Bryant, 417 So.2d 658 (Fla. 1982) 16, 24

Ryter v. Brennan, 291 So.2d 55
(Fla. 1st DCA 1974) 23

Seaboard System R.R., Inc. v. Clemente,
467 So.2d 348 (Fla. 3d DCA 1985) 4, 6

Seddon v. Harpster, 403 So.2d 409 (Fla. 1981) .. 4

Shaw v. General Motors Corp.,
12 F.L.W. 487 (Fla. 3d DCA 1987) 2, 4

Small v. Niagara Machine & Tool Works,
12 F.L.W. 366 (Fla. 2d DCA 1977) 2, 11

State, Department of Transportation v. Knowles,
402 So.2d 1155 (Fla. 1981) 16

State ex rel Badgett v. Lee, 156 Fla. 291,
22 So.2d 804 (1945) 21

State ex rel. Gillespie v. County of Bay,
112 Fla. 687, 151 So. 10 (1933) 21

State ex rel. Nuveen v. Greer, 88 Fla. 249,
102 So. 739 (1924) 21

State v. Lavazzoli, 434 So.2d 321 (Fla. 1983) .. 4

Stuyvesant Ins. Co. v. Square D. Co.,
399 So.2d 1102 (Fla. 3d DCA 1981) 11

Thorton v. Mono Manufacturing Co,
99 Ill.App.3d 722, 425 N.E.2d 522 (1981) 14, 24, 26

Trustees of Tufts College v.
Triple R. Ranch, Inc., 275 So.2d 521
(Fla. 1973) 4

Variety Children's Hosp. v. Perkins,
445 So.2d 1010 (Fla. 1983) 18

Walker & La Berge, Inc. v. Halligan,
344 So.2d 239 (Fla. 1977) 4, 16

Wallis v. Grumman Corp.,
12 F.L.W. 613 (Fla. 3d DCA 1987) 2

Walter Denson & Son v. Nelson,
88 So.2d 120 (Fla. 1956) 12

Young v. Altenhaus,
472 So.2d 1152 (Fla. 1985) 4, 5

STATUTES:

Section 95.031(2), Florida Statutes 1, 2, 3, 4, 5, 9, 17

Section 95.031(2), Florida Statutes (1975) 12, 24, 27

Section 768.19, Florida Statutes 18

Chapter 86-272, Laws of Florida 3, 5, 6, 7, 8, 10, 12, 16, 17, 24

Chapter 86-272, Section 1, Laws of Florida 8

Chapter 86-272, Section 2, Laws of Florida 7, 8

Chapter 86-272, Section 3, Laws of Florida 7

STATEMENT OF THE CASE AND FACTS

This product liability action arises out of an accident that occurred on July 22, 1984, while petitioner's decedent, Grady Pait, was operating a Ford tractor (R: 1). The tractor allegedly rolled over, and Mr. Pait sustained fatal injuries (R: 1). The tractor was more than twelve years old at the time of the accident (R: 27, 35).

Petitioner filed this action against Ford in June, 1985, alleging various defects in the tractor. Ford moved to dismiss on grounds not presently material. Shortly thereafter, this Court decided Pullum v. Cincinnati, Inc., 476 So.2d 657 (Fla. 1985), appeal dismissed for want of substantial federal question, _____ U.S. _____, 106 S.Ct. 1626, 90 L.Ed.2d 174 (1986). In Pullum, this Court overruled its earlier decision in Battilla v. Allis Chalmers Mfg. Co., 392 So.2d 874 (Fla. 1980), and held that Section 95.031(2), Florida Statutes, a statute of repose which, inter alia, requires product liability actions to be brought within twelve years of the product's delivery to the original purchaser, does not violate the Florida Constitution.

Ford then filed an amended motion to dismiss on the basis of Section 95.031(2), Florida Statutes. (R: 9). The trial court held that under the wrongful death act a right of action exists only if the person injured would have been entitled to maintain an action had death not ensued, and that Grady Pait would not have been able to maintain such an action By virtue of Section 95.031(2). (R: 35). The trial court

therefore granted Ford's amended motion and dismissed the complaint. (R: 35-36).

On appeal, the Fifth District Court of Appeal affirmed, holding that the effect of Pullum was to "reinstate" the statute of repose as of its original effective date. The Fifth District also declined to give retrospective operation to a 1986 statute abolishing the statute of repose in product liability cases. Finally, the District Court certified to this Court its decision on these two points as being of great public importance.[1]

This Court's jurisdiction was then invoked by filing of an appropriate notice.

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[1]See also, Coggins v. Clark Equipment Co., 12 F.L.W. 750 (Fla. 5th DCA 1987). The Third District Court of Appeal has followed the same cause, and reached the same holdings, in Shaw v. General Motors Corp., 12 F.L.W. 487 (Fla. 3d DCA 1987), Brackenridge v. Ametek, Inc., 12 F.L.W. 479 (Fla. 3d DCA 1987), Lane v. Koehring Co., 12 F.L.W. 478 (Fla. 3d DCA 1987), and Wallis v. Grumman Corp., 12 F.L.W. 613 (Fla. 3d DCA 1987). The First District Court of Appeal has held that Pullum applies retrospectively, but did not certify the issue or address the effect of the 1986 amendment to the statute of repose. Cassidy v. Firestone Tire & Rubber Co., 495 So.2d 801 (Fla. 1st DCA 1986), rev. den., ____ So.2d ____ (Fla., Case No. 69,668, opinion filed March 27, 1987). The Second District Court of Appeal has held that Pullum applies retrospectively and that the amendment to Section 95.031(2), Florida Statutes, is prospective only. Small v. Niagara Machine & Tool Works, 12 F.L.W. 366 (Fla. 2d DCA 1987); Harrison v. Hyster Co., 12 F.L.W. 540 (Fla. 2d DCA 1987). The federal district courts have also held that Pullum is to be applied retrospectively. Eddings v. Volkswagenwerk, A.G., 635 F.Supp. 45 (N.D. Fla. 1986); Lamb v. Volkswagenwerk Aktiengesellschaft, 631 F.Supp. 1144 (S.D.Fla. 1986). This remarkable degree of unanimity itself tends to demonstrate the correctness of the Fifth District's decision.

SUMMARY OF ARGUMENT

The language of Chapter 86-272, Laws of Florida, itself demonstrates that the legislature intended the amendment to Section 95.031(2), Florida Statutes, to be prospective only. Retrospective operation would be wholly inconsistent with the legislature's specification of an effective date. Like a change in a statute of limitations, a change in a statute of repose should be held to be prospective in nature absent a clear showing of contrary legislative intent. Moreover, retrospective application of the amendatory act in the circumstances of the instant case would run afoul of constitutional proscriptions against depriving a party of his vested rights -- here, a right to a defense which had become an absolute bar prior to enactment of the 1986 statute. The District Court's first question should be answered "No."

Where a statute is adjudged unconstitutional, it remains inoperative so long as that decision stands; but if the decision is subsequently reversed or overruled, the statute will be held to be valid from the first date it became effective. That principle is firmly grounded in the constitutional separation of powers. Even apart from constitutional ramifications, overruling appellate decisions are generally held retroactive unless the decision itself specifies otherwise. Pullum not only did not specify that it was applicable only prospectively, but a careful analysis reveals that Pullum's holding necessarily requires retroactive effect.

The only pertinent exception to the "relation-back" rule is that it should not operate to overturn vested rights previously acquired in justified reliance on the overruled decision. Petitioner here did not acquire any such vested right, since there was no reliance involved. At most, petitioner had the mere hope that the prior decision might continue in effect. The District Court's second question should be answered "Yes."

ARGUMENT

I. THE LEGISLATIVE AMENDMENT OF SECTION 95.031(2), FLORIDA STATUTES, ABOLISHING THE STATUTE OF REPOSE IN PRODUCT LIABILITY ACTIONS, SHOULD NOT BE CONSTRUED TO APPLY RETROSPECTIVELY TO A CAUSE OF ACTION WHICH ACCRUED BEFORE THE EFFECTIVE DATE OF THE AMENDMENT.

The fact that the statute of repose was amended in 1986 is irrelevant to the instant case. A statute is generally presumed not to be retrospective "where the Legislature has not expressly in clear and explicit language expressed an intention that the statute be so applied." Foley v. Morris, 339 So.2d 215, 216 (Fla. 1976).[2]

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[2]See also, to like effect, Young v. Altenhaus, 472 So.2d 1152 (Fla. 1985); State v. Lavazzoli, 434 So.2d 321 (Fla. 1983); Seddon v. Harpster, 403 So.2d 409 (Fla. 1981); Walker & LaBerge, Inc. v. Halligan, 344 So.2d 239 (Fla. 1977); Trustees of Tufts College v. Triple R. Ranch, Inc., 275 So.2d 521 (Fla. 1973); Shaw v. General Motors Corp., 12 F.L.W. 487 (Fla. 3d DCA 1987); Fogg v. Southeast Bank, N.A., 473 So.2d 1352 (Fla. 4th DCA 1985); Seaboard System R.R., Inc. v. Clemente, 467 So.2d 348 (Fla. 3d DCA 1985); Rothermel v. Florida Parole and Probation Commission, 441 So.2d 663 (Fla. 1st DCA 1983).

An exception to the general rule exists where a statute is remedial in nature.[3] Both petitioner and the Academy of Florida Trial Lawyers (hereafter "the Academy") rely on that exception. Indeed, the Academy observes (Brief at 7) that the "very nature of a repeal is to remedy some existing problem with the law."[4] The Academy proves too much in attempting to claim remedial status for Chapter 86-272, Laws of Florida. Not only does the Academy claim that all repealing[5] acts are, by nature, retrospective in operation (a position shared by petitioner), but the Academy goes much further. If, as the Academy asserts, the nature of a remedial statute is to "remedy some exiting problem" in the law, every amendment to an existing statute and every enactment of a new statute is remedial. If the repeal of an existing statute is "remedial" simply because it "remedies some existing problem with the law," any amendatory statute and every new statutory enactment

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[3]Young v. Altenhaus, supra; Fogg v. Southeast Bank, N.A., supra; Rothermel v. Florida Parole and Probation Commission, supra.

[4]The Academy's claims that Chapter 86-272, Laws of Florida, is a "Pullum Repealer" which is, of necessity, "remedial" brings to mind another quotation from Lewis Carroll, of whom the Academy seems so fond: "'When I use a word,' Humpty Dumpty said, in rather a scornful tone, 'it means just what I choose it to mean - neither more nor less.' 'The question is, 'said Alice, 'whether you can make words mean so many different things,'" Lewis Carroll, Through the Looking Glass, Chapter 6.

[5]As an examination of Chapter 86-272 reveals, it is not, in the normal sense of the word, a "repeal" since the session law merely deletes a portion of the statute, leaving the balance of Section 95.031(2), Florida Statutes, intact as a statute of repose applicable to other types of actions. Chapter 86-272, we submit, is an amendatory act, not a repeal.

is likewise remedial. The law of Florida, however, is not that every statute is retrospective in nature, as the Academy's suggested rationale would require. Rather, the courts will look to the legislature's choice of an effective date, and to the substantive or procedural nature of the statute, among other matters, in determining whether retrospective operation is required.

Viewing the provisions of Chapter 86-272, Laws of Florida, in that light, rather than in the false light of the Academy's rationale, it is apparent that the statute is a substantive one. Since a statute of repose defines substantive rights,[6] it cannot be said to be remedial in nature. Consequently, the amended statute must be applied prospectively only.

Unlike the retrospective application of a judicial decision reversing a prior holding of unconstitutionality, which has constitutional implications,[7] whether a newly-enacted statute is to be applied retrospectively is initially a question of legislative intent. Only after it has been determined that the legislature intended for a statute to be applied retroactively does the court need to address whether

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[6]The principle that an appellate court will apply the law in effect at the time of the appellate decision, discussed infra, does not apply where a new law alters an existing substantive right. Seaboard System R.R., Inc. v. Clemente, 467 So.2d 348 (Fla. 3d DCA 1985).

[7]This point is discussed in Point II, infra.

this may be done within constitutional bounds.

THE LANGUAGE OF THE STATUTE ITSELF

The language of the session law in question precludes a determination that the legislature's intent was to render the section retroactive. Section 2 of Chapter 86-272, Laws of Florida, abolished the twelve-year repose period and Section 3 of that Chapter provided that Section 2 "shall take effect July 1, 1986." Such language has previously been held to indicate prospective application only. Specifically, this Court in Foley v. Morris, supra, determined that language nearly identical to that of the instant amended statute, ("This act shall take effect on July 1, 1972,") did not manifest an intent for retrospective operation, and prospectively applied the new statute. Id. at 217. Thus, since the language used in connection with the statute of repose does not reveal a retroactive intent, the petitioner's argument must fail.

Petitioner argues that a retrospective intent should be gathered by contrasting the language used in specifying effective dates for the two portions of Chapter 86-272, Laws of Florida.[8] Petitioner points out that Section 1 of that Chapter "shall take effect October 1, 1986, and shall apply to

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[8]The propriety of drawing any inference from the difference in language as to the effective dates of the two sections is dubious, at best, in view of the legislative history, which demonstrates that Chapter 86-272 was an amalgam of two separate bills. For purposes of argument, however, we will ignore that point.

causes of action accruing after that date," while Section 2 "shall take effect July 1, 1986," and concludes that the omission of "and shall apply to causes of action accruing after that date" indicate a legislative intent that the statute operate retrospectively. Further analysis demonstrates petitioner's error.

Section 1 of Chapter 86-272, Laws of Florida, simply changes the statute of limitations on defamation actions from four years to two. Legislative intent to have the statutory change apply only prospectively is easy to express in such instances, in language such as the legislature has chosen. Section 2 of Chapter 86-272, on the other hand, deals with a statute of repose, not a statute of limitations. Statutes of repose, by their very nature, do not concern themselves with when a cause of action accrues; rather, the date on which they preclude further action is measured from a different significant date (here, delivery to the original purchaser). Thus, concepts of "accrual" are not particularly appropriate when a statute of repose is amended.

More significantly, however, petitioner's argument is fundamentally flawed in overlooking the significance of the fact that the legislature chose to specify an effective date at all, rather than making the statute effective "upon becoming a law," as is often done. If, as petitioner contends, the legislature intended for the statute of repose to be repealed even as to pending cases, why even have a specified effective date? Surely, it must have some significance. The courts have

repeatedly held that every word and phrase of a statute is to be treated as having some meaning and import. Here, the plain meaning of the statutory language was that the repeal of the statute of repose was to take effect on July 1, 1986; by the same token, that legislative intent was that the repeal should not be effective prior to July 1 -- i.e., that it was not to have retrospective effect.

Petitioner and the Academy point to the difference in legislative response to this Court's decisions in Battilla, Overland Construction[9] and Pullum as somehow indicating a legislative intent[10] to amend Section 95.031(2), Florida Statutes, retroactively. Their argument seems to be that the legislature accepted Battilla, but tried to overrule Overland Construction (by re-enacting the statute without the constitutional flaws this Court had described) and Pullum (by amending the statute). The argument overlooks the fact that the Legislature repeatedly re-enacted Section 95.031(2), Florida Statutes, in the years between Battilla and Pullum, indicating a continuing legislative desire for a product liability statute of repose during those intervening years. -- a desire frustrated by the Battilla Court's holding (now rejected) that this was constitutionally impermissible. The

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[9]Overland Construction Co. v. Sirmons, 369 So.2d 572 (Fla. 1979).

10The Academy also refers to the acquiescence of the bench and bar to this Court's decision in Battilla as if it had some significance beyond a recognition of this Court's proper role in the Constitutional framework. It has no significance beyond respect for the Court and its role.

petitioner's argument also overlooks the basis of the finding of unconstitutionality in Battilla and Overland Construction -- a deprivation of access to the courts without providing an adequate alternative and in the absence of an overwhelming public necessity. In attempting to cure the constitutional defects in the statute struck down by Overland Construction, the legislature made findings of such an overwhelming public necessity. By not doing so in response to Battilla, and by amending the statute in response to Pullum, the legislature was apparently exercising its discretion and avoiding potential constitutional challenges in an area it perceived as not involving quite the same overwhelming necessity.

The above principles of statutory construction are further buttressed by the fact that Chapter 86-272, Laws of Florida, does not contain a savings clause of any type. A savings clause, by its nature, imparts retroactivity on statutes within its ambit, and the absence of a savings clause demonstrates a legislative intent that the statute is not to be applied retrospectively. Homemakers, Inc. v. Gonzales, 400 So.2d 965 (Fla. 1981); Carpenter v. Florida Central Credit Union, 369 So.2d 935 (Fla. 1979).

RETROSPECTIVE APPLICATION OF STATUTES OF LIMITATION

This Court and the District Courts of Appeal have consistently held that an amendment to a statute of limitations or repose will not be applied retroactively. Specifically, where an amendment would operate to shorten one's time to sue, the courts have, absent a clear legislative intent to the

contrary, found the amendatory statutes to be prospective only. Stuyvesant Ins. Co. v. Square D. Co., 399 So.2d 1102 (Fla. 3d DCA 1981) (statute of repose applicable to improvements to real property could not be retroactively applied to shorten plaintiff's time to sue); Foley v. Morris, supra (new statute of limitation which shortened time to sue could not be applied retroactively); Garofalo v. Community Hosp. of S. Broward, 382 So.2d 722 (Fla. 4th DCA 1980) (two year statute of limitations as to suits for negligence against hospitals was not to be applied retroactively). See also, Durring v. Reynolds, Smith and Hills, 471 So.2d 603 (Fla. 1st DCA 1985); Brooks v. Cerrato, 355 So.2d 119 (Fla. 4th DCA 1978), cert. den., 361 So.2d 119 (Fla. 1978). In accordance with that line of authority, the repeal of the instant statute of repose was held not retroactive in Small v. Niagara Machine & Tool Works, 12 F.L.W. 366 (Fla. 2d DCA 1977), as well as in the numerous other cases cited in footnote 1, supra.

Even more significantly, this Court in Homemakers, Inc. v. Gonzales, 400 So.2d 965 (Fla. 1981), held that the plaintiff was not entitled to the benefit of an amendment lengthening the statute of limitations. In Homemakers, the medical malpractice plaintiff was injured on April 2, 1973. At that time, the applicable statute of limitations was two years (i.e., plaintiff had until April 2, 1975, to file suit). Prior to that date, on January 1, 1975, the statute was amended. Suit was instituted on July 9, 1976, more than three years after plaintiff's injury. This Court held that the amendment

applied prospectively only, and thus the plaintiff could not obtain the benefit of the lengthened statute of limitations. As the dissent pointed out, Homemakers expands prior case law which held that if the new statute was enacted before the prior statute had run, the new statute would be applicable; otherwise the new statute would be prospective only. See, Walter Denson & Son v. Nelson, 88 So.2d 120 (Fla. 1956); Mazda Motors of America, Inc. v. S.C. Henderson & Sons, Inc., 364 So.2d 107 (Fla. 1st DCA 1978), cert. den., 378 So.2d 348 (Fla. 1979); Neff v. General Development Corp., 354 So.2d 1275 (Fla. 2d DCA 1978); Martz v. Riskamm, 144 So.2d 83 (Fla. 1st DCA 1962).

Thus, the applicable statute is Section 95.031(2), Florida Statutes (1975), which provided that all products liability actions would be extinguished if not filed within twelve years from the delivery of the product to the original purchaser. The fact that the legislature subsequently amended this statute cannot alter the plaintiff's or defendant's rights acquired under the prior statutes.

CONSTITUTIONAL IMPLICATIONS OF RETROSPECTIVE APPLICATION

Even if the legislature had intended to apply Chapter 86-272, Laws of Florida, retroactively, it could not be constitutionally applied in that manner in cases, such as the instant one, where the statutory period had run prior to the effective date of the new law. Interestingly enough, the Academy seems to recognize this, observing (Brief at 21):

> . . . a pre-existing statute of limitations will confer vested rights of constitutional dimension if the

> pre-existing statute has already run at the time the Legislature expands it, in which case the Legislature may not revive a theretofore - lost cause of action, even if it attempts to do so explicitly.

Yet that is precisely the situation here -- the pre-existing statute (the 12 year statute of repose) had already run as to Grady Pait at the time the legislature amended the statute of repose. To apply that amendment retroactively, as petitioner seeks, deprives respondent of a right which had already vested.

Petitioner argues that the defense of a statute of repose or a statute of limitations is not a vested right, but an inchoate right which is lost with the repeal of the statute. Petitioner cites federal cases in support of her position, but ignores Florida law to the contrary. Thus, for instance, in Mazda Motors of America, Inc. v. S. C. Henderson & Sons, Inc., 364 So.2d 107, 108 (Fla. 1st DCA 1978), cert. den., 378 So.2d 348 (Fla. 1979), it is pointed out that: "A person has no vested right in the running of a statute of limitations unless it has completely run and barred his action. Before the action is barred by the statute of limitations, the legislature may amend the statute enlarging the period of time within which an action may be brought." (Emphasis supplied). Thus, under Florida law, there is a vested right where the statute of limitations has already run and thereby barred the action.

If anything, a statute of repose presents an even stronger case for a vested right to a defense than does an ordinary statute of limitations. A statute of repose, unlike a

statute of limitations, defines a substantive right to bring an action, and filing within that time is a condition precedent to bringing an action; a failure to file suit within that period thus gives the defendant a vested right not to be sued, which cannot be impaired by giving retroactive effect to a subsequently-enacted statute. Kahn v. Trans World Airlines, Inc., 82 A.D.2d 696, 443 N.Y.S.2d 79 (1981); Lincoln First Bank of Rochester v. Rupert, 60 A.D.2d 193, 400 N.Y.S.2d 618 (1977); Colony Hill Condominium I Ass'n. v. Colony Co., 320 S.E.2d 273 (N.C.App. 1984).

A statute of repose, unlike a statute of limitations, prevents what might otherwise constitute a cause of action from ever arising, making it damnum absque injuria. The function of a statute of repose is to define a substantive right, rather than limiting the remedy. As explained in Rosenberg v. Town of North Bergen, 61 N.J. 190, 293 A.2d 662, 667 (1972):

> It does not bar a cause of action; its effect, rather, is to prevent what might otherwise be a cause of action, from ever arising. Thus injury occurring more than ten years [the New Jersey repose period] after the negligent act allegedly responsible for the harm forms no basis for recovery. The injured party literally has no cause of action. The harm that has been done is damnum absque injuria - a wrong for which the law affords no redress. The function of the statute is thus rather to define substantive rights than to alter or modify a remedy. (Emphasis in original).

To like effect, see Cheswold Volunteer Fire Co. v. Lambertson Construction Co., 489 A.2d 413 (Dela. 1984); Thorton v. Mono Manufacturing Co, 99 Ill.App.3d 722, 425 N.E.2d 522 (1981);

Burmaster v. Gravity Drainage Dist. No. 2, 366 So.2d 1381 (La. 1978); Colton v. Dewey, 212 Neb. 126, 321 N.W.2d 913 (1982); Bolick v. American Barmag Corp., 293 S.E.2d 415 (N.C. 1982); Lamb v. Volkswagenwerk Aktiengesellschaft, 631 F.Supp. 1144 (S.D. Fla. 1986).

Like a statute of non-claim, which is jurisdictional in nature (Barnett Bank of Palm Beach County v. Estate of Read, 493 So.2d 447, 448 (Fla. 1986)), failure to comply with the time period specified in a statute of repose extinguishes the right of action. First Savings & Loan Ass'n. v. First Federal Savings & Loan Ass'n of Hawaii, 547 F.Supp. 988 (D. Haw. 1982).

After substantive rights have vested, they may not be adversely affected by the enactment of subsequent legislation;[11] the legislature may not constitutionally increase an existing obligation, burden, or penalty as to a state of facts after those facts have occurred. L. Ross, Inc. v. R. W. Roberts Construction Co., Inc., 466 So.2d 1096 (Fla. 5th DCA 1985), approved, 481 So.2d 484 (Fla. 1986). The

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[11]Petitioner's suggestion that a statute of limitation or statute of repose may be retroactively repealed, revitalizing claims which had long since been barred, is not only contrary to long-standing Florida law, but also does serious violence to the purposes of statutes of limitations. How could anyone feel secure that stale claims, with their problems of missing witnesses, faded recollections, and unavailable documents, would be avoided by a limitation statute if those same stale claims could be resurrected from the dead years later by a repeal of the statute? How could any business safely dispose of outdated records and files if a lawsuit barred by limitations might later become "un-barred?" Rather than putting an end to stale litigation, statutes of limitation would simply move those claims into some new Twilight Zone from which they might some day rise, zombie-like, from the dead.

elimination of a limitation on a substantive obligation serves to increase that obligation. Id. For that reason, the repeal of a statute does not divest one of a defense which arose under the now-repealed statute. CBS, Inc. v. Garrod, 622 F.Supp. 532 (M.D. Fla. 1985).

A statutory immunity from suit is a substantive right, and one is entitled to rely on a substantive right which vested before the passage of a statute altering it. Walker & La Berge, Inc. v. Halligan, 344 So.2d 239 (Fla. 1977). When a statute would destroy a vested right if applied retrospectively, the statute must be viewed as operating prospectively only. Bolick v. American Barmag Corp., supra. Since application of Chapter 86-272, Laws of Florida, to matters occurring prior to its effective date would destroy the vested right to be immune from suit as to products which were more than twelve years old on that date, it must be applied only prospectively.

The determination of whether retroactive application of a statute affects vested rights is best determined by looking at the party's situation before the enactment and comparing it with the situation after enactment. Rupp v. Bryant, 417 So.2d 658 (Fla. 1982); State, Department of Transportation v. Knowles, 402 So.2d 1155 (Fla. 1981). Before Chapter 86-272, Laws of Florida, was enacted, Ford was immune from suit as to this particular tractor, since more than the requisite twelve years had passed. The passage of the repose

period had extinguished any right of action which might otherwise have accrued. After the statute was passed, on the other hand, Ford would not (if the new enactment applied) have been immune from suit; its vested immunity would be stripped from it by any retroactive application of Chapter 86-272, Laws of Florida.

Thus, the first question certified by the District Court must be answered in the negative. The legislature did not provide for Chapter 86-272, Laws of Florida, to operate retrospectively, and it could not be permitted constitutionally to operate retrospectively in any event.

II. THE DECISION IN PULLUM V. CINCINNATI, INC., 476 So.2d 657 (FLA. 1985), WHICH OVERRULED BATTILLA V. ALLIS CHALMERS MFG. CO., 392 So.2d 874 (FLA. 1980), APPLIES SO AS TO BAR A CAUSE OF ACTION FOR WRONGFUL DEATH THAT AROSE AFTER THE BATTILLA DECISION BUT BEFORE THE PULLUM DECISION.

Petitioner acknowledges that the 12 year repose period established by Section 95.031(2), Florida Statutes, expired before the accident that injured Grady Pait. However, petitioner argues that this Court's decision in Pullum should not be applied to cases, like this one, where the injury occurred after Battilla but before Pullum. Plaintiff's argument must be rejected on the merits since established principles of Florida law dictate that Pullum must be given full retroactive application. Thus, Grady Pait would not have been entitled to maintain an action had he survived, and a

wrongful death action is similarly barred.[12]

PULLUM ITSELF REQUIRES RETROSPECTIVE APPLICATION

There is nothing in Pullum to indicate that it is to have prospective effect only. Therefore, the decisional law in Florida as it stands today requires affirmance of the trial court's order. This would be true even if there were nothing in Pullum to suggest that the Court considered the retroactivity issue. In fact, as an examination of the issue actually decided by the Court makes clear, the holding in Pullum is necessarily a holding that the decision will operate retrospectively as well as prospectively.

Pullum presented this Court with a contention that equal protection of the laws had been denied because of the interaction of the Court's prior decisions in Battilla and in Purk v. Federal Press Co., 387 So.2d 354 (Fla. 1980). Battilla had held the statute of repose unconstitutional as to persons injured after the 12 year repose period; thus, persons in this group had a full four years from the date of injury to file suit. Purk, on the other hand, held that the statute of repose could constitutionally shorten the time within which to file suit; thus, persons in that group had less than four years to

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[12]Under Section 768.19, Florida Statutes, a wrongful death action can only be maintained if "the event would have entitled the person injured to maintain an action and recover damages if death had not ensued" and the defendant "would have been liable in damages if death had not unsued." Thus, if Grady Pait would not have been entitled to maintain an action, the wrongful death claim cannot be maintained. Variety Children's Hosp. v. Perkins, 445 So.2d 1010 (Fla. 1983); Hudson v. Keene Corp., 445 So.2d 1151 (Fla. 1st DCA 1984), approved, 472 So.2d 1142 (Fla. 1985).

file suit. Plaintiff in Pullum was injured ten and one-half years after the product's first sale, and thus, under Purk, had one and a half years to file suit.

Plaintiff in Pullum argued that this distinction had no rational basis, and thus violated the constitutional guarantee of equal protection of the laws. In response, the Court re-examined its prior decision in Battilla and expressly receded from it. The Court affirmed the summary judgment against Pullum, holding that the overruling of Battilla eliminated the basis of any argument of unequal treatment.

That holding could only have eliminated the premise of the equal protection argument if Pullum applies retrospectively. Otherwise, persons injured prior to Pullum but more than 12 years after the product's original sale (such as Grady Pait) would still have four years to file suit, while others injured prior to Pullum but less than 12 years after the product's original sale (like Richard Pullum) would have less than four years to file suit. Thus, unless the Court fully intended Pullum to be applicable retrospectively, the overruling of Battilla could not have eliminated the premise of the equal protection argument and the summary judgment could not have been affirmed without addressing that contention.

Indeed, the point that prospective application of Pullum would not resolve the equal protection argument was squarely presented to the Court on rehearing. Thus, any suggestion that the Court did not recognize that Pullum must be

applied retrospectively in unwarranted. Moreover, this Court has recently had an opportunity to address this very point yet again and correct any misunderstanding of its ruling in Pullum. In Cassidy v. Firestone Tire & Rubber Co., supra, the First District held that Pullum was to be applied retrospectively. A petition for review of that decision was filed with this Court, but the Court determined that it should decline to accept jurisdiction. Cassidy v. Firestone Tire and Rubber Co., ____ So.2d ____ (Fla., Case No. 69,668, opinion filed March 27, 1987).

CONSTITUTIONAL PRINCIPLES REQUIRE RETROSPECTIVE APPLICATION

Even if the Court were to reexamine the issue of Pullum's retrospective effect, the controlling principles of Florida law[13] are clear and well established. They were stated as early as 1911 under circumstances similar to those involved in this case:

> Where a statute is judicially adjudged to be unconstitutional, it will remain inoperative while the decision is maintained; but, if the decision is subsequently reversed, the statute will be held to be valid from the date it first became effective, even though rights acquired under particular adjudications where the statute was held to

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[13]A different test is used by the federal courts in determining whether to give retrospective effect to their own overruling decisions. Chevron Oil Co. v. Huson, 404 U.S. 97 (1971). That test is not applied, however, where the question is one of state law. Eddings v. Volkswagenwerk, A.G., 635 F.Supp. 45 (N.D. Fla. 1986); Lamb v. Volkswagenwerk Aktiengesellschaft, 631 F.Supp. 1144 (S.D. Fla. 1986). Even if it were applied, the federal test would result in a retrospective application of Pullum. Lamb v. Volkswagenwerk Aktiengesellschaft, supra.

> be invalid will not be affected by the subsequent decision that the statute is constitutional.

Christopher v. Mungen, 61 Fla. 513, 532-533, 55 So. 273, 280 (1911) (emphasis added). Other cases holding that a decision overruling a prior decision of statutory unconstitutionality must be applied retrospectively, so as to make the statute valid from its inception, include State ex rel. Badgett v. Lee, 156 Fla. 291, 22 So.2d 804 (Fla. 1945) and State ex rel. Gillespie v. County of Bay, 112 Fla. 687, 151 So. 10 (1933).

A decision upholding a statute's constitutionality and overruling a prior holding that a statute is unconstitutional renders the statute valid from its inception. That principle is fundamentally grounded in the constitutional doctrine of separation of powers. A court may not hold a statute (a creature of the legislative branch) invalid unless the statute contravenes the provisions of the Constitution itself. Where a constitutional violation exists, the Constitution prevails as the fundamental law, and the statute may not operate. State ex rel. Nuveen v. Greer, 88 Fla. 249, 102 So. 739 (1924). If, however, the court later determines that it had been in error in finding a violation of the Constitution, and that the statute passes constitutional muster after all, then the court had no constitutional power to interfere with the operation and validity of the statute in the first place, and the statute was

valid from its inception. Simply stated,[14] a statute is either constitutional or it is unconstitutional. If it is constitutional, it is valid from its inception; if it is not, it is void from its inception. If the statute does not transgress the fundamental law, the courts, under the doctrine of separation of powers, have no authority to hold it invalid at any time. It is this principle which forms the basis for the rule espoused in Christopher v. Mungen, supra, and like cases.

GENERAL PRINCIPLES OF JURISPRUDENCE REQUIRE RETROSPECTIVE APPLICATION

Even apart from the constitutional basis compelling retrospective application of a decision overruling a prior holding of unconstitutionality, the courts of Florida have repeatedly given overruling decisions retrospective effect outside the constitutional context. As observed in Florida Forest and Park Service v. Strickland, 154 Fla. 472, 18 So.2d 251, 253 (Fla. 1944):

> Ordinarily, a decision of a court of last resort overruling a former decision is retrospective as well as prospective in its operation, unless specifically declared by the opinion to have prospective effect only. (Citations omitted). Generally speaking, therefore, a judicial construction of a statute will ordinarily be deemed to relate back to the enactment of the statute, much as through the overruling decision had been originally embodied therein.

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[14]And leaving aside the wholly-different situation of unconstitutionality "as applied."

To like effect, see Parkway General Hosp., Inc. v. Stern, 400 So.2d 166, 167 (Fla. 3d DCA 1981) ("The general rule is that appellate decisions, even those which overrule earlier ones or establish theretofore unrecognized claims for relief, are to be given retrospective as well as prospective effect."); Department of Revenue v. Anderson, 389 So.2d 1034, 1037 (Fla. 1st DCA 1980), rev. den., 399 So.2d 1141 (Fla. 1981) ("Ordinarily a decision of a court of last resort overruling a former decision is retrospective as well as prospective in its operation, unless specifically declared by the opinion to have a prospective effect only."); Ryter v. Brennan, 291 So.2d 55 (Fla. 1st DCA 1974).

Pullum did not express an intent on the part of this Court that it be applied only prospectively. Indeed, as shown above, the Pullum decision itself mandates a retrospective application, and constitutional principles likewise require retrospective application of Pullum. Pursuant to general principles of jurisprudence as well, Pullum should be applied retrospectively.

THE EXCEPTION RELIED ON BY PETITIONER IS INAPPLICABLE

Petitioner ignores the general rule and relies on the exception recognized in Strickland, under which an overruling decision will not be given retrospective application if to do so will destroy "property or contract rights . . . acquired under and in accordance with such construction . . . ."

18 So.2d at 253.[15] At the time Grady Pait was killed, petitioner argues, Battilla was the law in Florida, and petitioner acquired a vested right to sue. Therefore, petitioner argues, retrospective application of Pullum would destroy a right vested by virtue of Battilla.

This argument is fundamentally flawed. This Court has declared that Battilla was incorrectly decided as a matter of constitutional law. Thus, as shown above, Section 95.031(2), Florida Statutes, was constitutionally valid at the time of its inception, was valid when Grady Pait was injured and died, and is valid up to the effective date of Chapter 86-272, Laws of Florida. Since Section 95.031(2), Florida Statutes, was valid at all pertinent times, petitioner acquired no rights, vested or otherwise, by virtue of the now-rejected Battilla decision.[16]

This is demonstrated by the facts and holding of Christopher v. Mungen, supra. Christopher was a title dispute between Jane Mungen, who claimed to have inherited a one-half interest in real property from her father, and the successors

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[15]See also, to like effect, Culpepper v. Culpepper, 147 Fla. 632, 3 So.2d 330 (1941); Levy v. Levy, 483 So.2d 455 (Fla. 3d DCA 1986); International Studio Apartment Ass'n., Inc. v. Lockwood, 421 So.2d 1119 (Fla. 4th DCA 1982), cert. den., 464 U.S. 895 (1983); Department of Revenue v. Anderson, 389 So.2d 1034 (Fla. 1st DCA 1980), rev. den., 399 So.2d 1141 (Fla. 1981); Aronson v. Congregation Temple De Hirsch, 123 So.2d 408 (Fla. 3d DCA 1960); Lamb v. Volkswagenwerk Aktiengesellschaft, 631 F.Supp. 1144 (S.D. Fla. 1986).

[16]The principle that an overruled decision does not vest rights in persons not parties to that decision, absent action taken in detrimental reliance on the overruled decision, remains valid. See Rupp v. Bryant, 417 So.2d 658 (Fla. 1982).

in interest of Mungen's half sister, Eliza Lewis, who claimed to own the entire parcel. Mungen's mother had been a slave who died prior to emancipation, and a prior decision of this Court had the effect of making Lewis (whose mother had been emancipated) the heir of her father to the exclusion of Mungen. In Christopher, however, the Court overruled the earlier case, and held that Mungen "has a legal title by inheritance . . . to an undivided half of the land," and thereby deprived the successors in interest of their claim to that undivided half. The Court expressly held that the overruled decision did not vest rights in those not party to the prior suit. Christopher v. Mungen, supra, 55 So.2d at 281.

In short, as the Court in Christopher expressly held, an incorrect decision vests no rights in anyone. This is not to say, of course, that the incorrect decision will always be treated as a nullity. As the Court observed in Strickland, there are certain exceptions. For example, Christopher itself suggests that a final unreviewable judgment will not be disturbed even if based on an erroneous decision.

Further, a party who has changed his position in reliance on the incorrect decision will be protected. In Strickland, for example, the workman's compensation claimant appealed directly to the circuit court, in accordance with decisional law allowing such an appeal. Subsequently, this Court ruled that an appeal to circuit court was not proper until after review by the Florida Industrial Commission. The employer in Strickland argued that this new rule should be

applied to the claimant in Strickland. This Court rejected that position, since the claimant had relied on the overruled decision in appealing to circuit court, and because the time period for review in the Industrial Commission had "long since expired." In short, retroactive application in Strickland would have denied the claimant both substantive rights (the right to compensation) and procedural rights (the right to review of the commissioner's order), rights that the claimant acquired independently of the overruled decision. See also, International Studio Apartment Ass'n. v. Lockwood, 421 So.2d 1119 (Fla. 4th DCA 1982), cert. den., 464 U.S. 895 (1983) (decision not applied retroactively where to do so would require return of money long since expended in reliance on prior law).

When a statute of repose is in effect at the time of injury, no right ever vests in the plaintiff, a vested right being something more than a mere expectation based on the anticipated continuance of an existing law. Thornton v. Mono Manufacturing Co., 99 Ill.App.3d 722, 425 N.E.2d 522 (1981); Lamb v. Volkswagenwerk Aktiengesellschaft, 631 F.Supp. 1144 (S.D. Fla. 1986). See also, Cheswold Volunteer Fire Co. v. Lambertson Construction Co., 489 A.2d 413 (Dela. 1984); Klein v. Catalano, 386 Mass. 701, 437 N.E.2d 514 (1982). Here, petitioner did not acquire a right to sue in reliance on Battilla. Petitioner did not forebear from bringing suit within twelve years of the product's date of delivery because of any reliance on Battilla's holding that the statute of

repose was unconstitutional, but rather because the accident did not occur until more than twelve years after the product was delivered.[17] Thus, the Strickland exception to the general rule of retrospective operation of judicial decisions is inapplicable here.

No factors justifying departure from the general rule are present in this case. Petitioner does not have a judgment in her favor. She did not change her position in reliance on the overruled decision. She has not been denied any substantive or procedural rights that she acquired independently of the overruled decision. Her only argument is that she should be allowed to maintain a cause of action not recognized in Florida because of the fortuitous circumstance that, at the time of the accident, an incorrect decision in her favor had not yet been overruled. Nothing in Florida law supports such an argument.

The second question posed by the District Court must be answered in the affirmative. This Court's decision in

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[17]In this case, the statutory twelve year repose period expired prior to the accident. Thus, it cannot be said that petitioner changed her position by delaying filing of the suit in reliance on Battilla's holding that the statute of repose was constitutionally unfirm. The principle espoused in Strickland would apply only in those cases where, prior to Pullum, a plaintiff had delayed in filing a suit not otherwise extinguished by the statute of repose until after that statute precluded action. In such a case, an argument could be made that plaintiff had relied, to his detriment, on the now-rejected Battilla ruling, and hence that Pullum should not be applied. This is not such a case, since plaintiff's claim was extinguished by Section 95.031(2), Florida Statutes, prior to the underlying accident.

Pullum applies to bar a cause of action which accrued prior to the date of the Pullum decision.

CONCLUSION

The decision of the District Court was correct and should be affirmed. The first question posed by the District Court should be answered in the negative, and the second question posed by the District Court should be answered in the affirmative.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail to James C. Blecke, Esquire, Biscayne Building, Suite 705, 19 West Flagler Street, Miami, Florida, 33130; Wayne Hogan, Esquire, 804 Blackstone Building, Jacksonville, Florida, 32202; Edward T. O'Donnell, Esquire, 4500 Southeast Financial Center, 200 South Biscayne Boulevard, Miami, Florida, 33131; Sharon Lee Stedman, Esquire, 11 East Pine Street, P.O. Box 1873, Orlando, Florida, 32802; John M. Thomas, Esquire, Office of the General Counsel, Ford Motor Company, 330 Parklane Towers West, Dearborn, Michigan,

48126; and to David W. Bianchi, Esquire, 1900 Courthouse Tower, 44 West Flagler Street, Miami, Florida, 33130, this 6th day of April, 1987.

Jack W. Shaw, Jr.
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