IN THE SUPREME COURT OF FLORIDA

CASE NO. 69, 917

SHARON PAIT,

Petitioner,

v.

FORD MOTOR COMPANY,

Respondent.

BRIEF OF AMICUS CURIAE THE ACADEMY OF FLORIDA TRIAL LAWYERS SUPPORTING THE POSITION OF PETITIONER

THE ACADEMY OF FLORIDA TRIAL LAWYERS
AMICUS CURIAE

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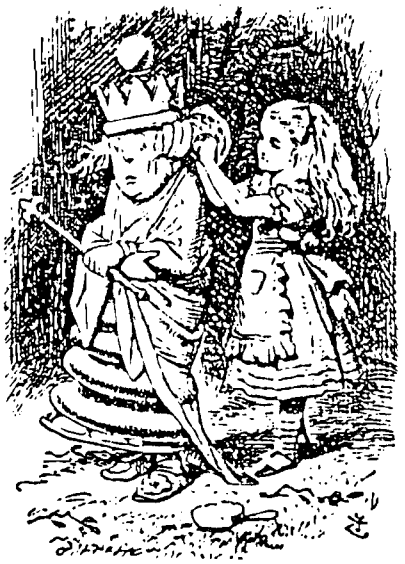
PREFACE

The legal labyrinth created by the recent, short-lived, reactivation of the defective product statute of respose, and by the absence of a Florida Supreme Court ruling on whether the reactivation was retroactive, has befuddled lawyers and judges from Atlanta to Miami and is reminiscent of the world Alice found Through The Looking Glass. For example, when the White Queen offered Alice "two pence a week, and jam every other day" to be her maid, Alice found that

THROUGH THE LOOKING-GLASS



'You couldn't have it if you *did* want it,' the Queen said. 'The rule is, jam to-morrow and jam yesterday—but never jam *to-day*.'

'It *must* come sometimes to "jam to-day,"' Alice objected.

'No, it ca'n't,' said the Queen. 'It's jam every *other* day: to-day isn't any *other* day, you know.'

'I don't understand you,' said Alice. 'It's dreadfully confusing!'

Defective product victims sidetracked in the courts below by the statute of repose have been like the forlorn tourist who asked the mountaineer for directions back to the City: "I'm sorry, Mister, but you can't get there from here." Now they seek this Court's steady, fair direction.

This Court's declaration that Pullum v. Cincinatti, Inc., 476 So.2d 657 (Fla. 1985), is not retroactive or that the Legislature's recent remedial reaction, **"The Pullum Repealer"**, is retroactive would solve the puzzle finally and equitably.

STATEMENT OF THE CASE

Pait: A Prototypical Pullum/Repose Problem

Sharon Pait's statute of repose situation is quite typical of that now plaguing defective product victims:

-- Before July 22, 1972: The defective tractor which eventually killed Grady Pait was manufactured and delivered.

-- 1975: The statute of repose (enacted in 1974) became law. Section 95.031(2), Fla. Stat. provided (emphasis ours):

> (2) Actions for products liability 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.

-- December 11, 1980: The Florida Supreme Court decided Battilla v. Allis Chalmers Mfg. Co., 392 So. 2d 874 (Fla.

1980), holding that, as applied to a defective product action, "section 95.031 denies access to courts under article I, section 21, Florida Constitution," because it eliminated all right of access to courts for those hurt by defective products more than 12 years old.

-- July 22, 1984: Grady Pait was injured and killed while using the defective tractor.

-- July 22, 1985: Sharon Pait timely filed this action against defendant manufacturer.

-- 1980-85: The Legislature made no attempt to change the statute to avoid the impact of Battilla.

-- August 29, 1985: The Florida Supreme Court decided Pullum v. Cincinnati, Inc., 476 So.2d 657, 659 (Fla. 1985), receding from the Battilla decision in order to eliminate "the premise of Pullum's equal protection argument", and holding that "section 95.031(2) is not unconstitutionally violative of article I, section 21 of the Florida Constitution."

-- December 19, 1985: The defendant manufacturer was granted leave to and filed an amended motion to dismiss asserting for the first time the statute of repose based upon Pullum.

-- January 28, 1986: Applying Pullum retroactively, the trial court dismissed Sharon Pait's action.

-- February 10, 1986: Sharon Pait filed her notice of appeal from the Pullum-based dismissal.

-- June 7, 1986, and July 9, 1986, respectively, the Florida Legislature, reacting to Pullum and at its first opportunity, passed and the Governor signed **The Pullum Repealer** which

amended §95.031(2), to provide as follows:

CHAPTER 86-272

Committee Substitute for House Bill No. 832

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.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Paragraph (o) of subsection (3) of section 95.11, Florida Statutes, is amended, and paragraph (g) is added to subsection (4) of said section, to read:

95.11 Limitations other than for the recovery of real property.--Actions other than for recovery of real property shall be commenced as follows:

(3) WITHIN FOUR YEARS.--

(o) An action for ~~libel, slander,~~ assault, battery, false arrest, malicious prosecution, malicious interference, false imprisonment, or any other intentional tort, except as provided in subsection (5).

(4) WITHIN TWO YEARS.--

(g) An action for libel or slander.

Section 2. Subsection (2) of section 95.031, Florida Statutes, is amended to read:

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 an action for fraud under s. 95.11(3) must be begun ~~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.

Section 3. Section 1 of this act shall take effect October 1, 1986, and shall apply to causes of action accruing after that date, and Section 2 of this act shall take effect July 1, 1986.

Approved by the Governor July 9, 1986.

Filed in Office Secretary of State July 9, 1986.

-- January 15, 1987: The Fifth District applied Pullum, but not **The Pullum Repealer**, retroactively; affirmed the dismissal of Sharon Pait's otherwise timely action; and certified the following questions of great public importance.

ISSUES (THE CERTIFIED QUESTIONS)

Because the Fifth District's opinion is short and contains the certified questions, we set it out in full.

ORFINGER, J.

The plaintiff appeals from a final judgment dismissing this wrongful death action on the basis of section 95.031(2), Florida Statutes (1985), the statute of repose, which provides that product liability actions must be commenced within 12 years after the date of delivery of the completed product to its original purchaser. Plaintiff's decedent was killed on July 22, 1984 while operating a tractor manufactured and delivered more than 12 years earlier by defendant Ford Motor Company.

We affirm on the authority of Pullam [sic] v. Cincinnati, Inc., 476 So.2d 657 (Fla. 1985) which held the statute in question to be constitutional, and not a denial of equal

protection or of access to courts.[1] Pullam [sic] expressly receded from Battilla v. Allis Chalmers Manufacturing Company, 392 So.2d 874 (Fla. 1980) which had earlier held the statute in question to be an unconstitutional deprivation of plaintiff's access to courts. If a decision holding a statute to be unconstitutional is subsequently overruled, the statute will be valid from the date it became effective. Christopher v. Mungen, 61 Fla. 513, 534, 55 So. 273, 280 (1911); State ex rel. Gillespie . Bay County, 112 Fla. 687, 151 So. 10 (1933). It does not appear that any property or contract rights were acquired by the plaintiff here such as would make an exception to this rule applicable. Cf. Florida Forest and Park Service v. Strickland, 18 So.2d 251 (Fla. 1944).

Neither do we perceive a legislative intent that the 1986 amendment to section 95.031(2), abolishing the 12 year statute of repose in products liability cases, operate retroactively. However, because the questions involved here are recurring and appear to be of great public importance, we certify the following to the Supreme Court of Florida.

I

WHETHER THE LEGISLATIVE AMENDMENT OF SECTION 95.031(2), FLORIDA STATUTES (1985), ABOLISHING THE STATUTE OF REPOSE IN PRODUCT LIABILITY ACTIONS, SHOULD BE CONSTRUED TO OPERATE RETROSPECTIVELY TO A CAUSE OF ACTION WHICH ACCRUED BEFORE THE EFFECTIVE DATE OF THE AMENDMENT?

II

IF NOT, WHETHER THE DECISION OF PULLAM [sic] V. CINCINNATI, INC., 476 So.2d 657 (FLA. 1985) WHICH OVERRULED BATTILLA V. ALLIS CHALMERS MANUFACTURING COMPANY, 392 So.2d 874 (FLA. 1980) APPLIES SO AS TO BAR A CAUSE OF ACTION FOR WRONGFUL DEATH THAT ACCRUED AFTER THE BATTILLA DECISION BUT BEFORE THE PULLAM [sic] DECISION?

[1]See also Cassidy v. Firestone Tire & Rubber Company, 495 So.2d 801, (Fla. 1st DCA 1986); American Liberty Insurance Company v. West and Conyers, Architects and Engineers, 491 So.2d 573 (Fla. 2d DCA 1986).

SUMMARY OF ARGUMENT

As it did in City of Orlando v. Desjardins, 469 So.2d 831 (Fla. 5th DCA 1985) (opinion by Orfinger, J.), the Fifth District has overlooked that:

> If a statute is found to be remedial in nature, it can and should be retroactively applied in order to serve its intended purposes. Village of El Portal v. City of Miami Shores, 362 So.2d 275 (Fla. 1978); Grammer v. Roman, 174 So.2d 443 (Fla. 2d DCA 1965).

City of Orlando v. Desjardins, 493 So.2d 1027, 1028 (Fla. 1986). There can simply be no debate that the Legislature's repeal of the statute of repose was remedial. Indeed, the very nature of a repeal is to remedy some existing problem with the prior state of law. In this case, that "problem" was that the Legislature, which for five years had accepted Battilla's "amendment" of the statute of repose, learned that the Supreme Court had unexpectedly receded from Battilla. The Legislature moved at its first opportunity to remedy the situation by restoring Battilla's abolition of the statute of repose thereby seeking to restore to defective product victims their remedies against the manufacturers. The Legislature both abolished statute's role as an absolute bar and eliminated the denial of equal protection suffered by those such as the petitioner in Pullum itself. The obvious remedial purpose of this enactment requires the retroactive application of **The Pullum Repealer.**

One way or the other, the defective product victims must be saved from the quicksand. Fair is fair: either they are entitled to the benefit of all changes in the law during the life

of their case, just like the defendants, or neither party is entitled. Or the Pullum decision should not be applied during the pendency of existing cases because the rule requiring application of the law in existence during the life of a case will not be allowed to disturb vested rights, and at the time of Pullum the plaintiffs had vested rights in their causes of action. Sunspan Engineering & Construction Co. v. Spring-Lock Scaffolding Co., 310 So.2d 4,8 (Fla. 1975) ("a vested cause of action, or 'chose in action' is personal property"). Pullum could not disturb those vested rights, and thus could not create any vested right of defendants to a windfall defense (Battilla was so well accepted as the law of Florida that the defendants in the many cases now on appeal had not pled the statute of repose and, as in Sharon Pait's case, had to move to amend to assert the long-dead statute of repose).

If, on the other hand, the defective product victims were somehow subject to the change in the law accomplished by Pullum's resurrection of the statute of repose--and thus to the divestment of their hitherto vested right--then the "vested" right provided by windfall to the defendants in Pullum was likewise divested by the Legislature's remedial passage of the **The Pullum Repealer.**

In short, if a vested right cannot be divested by any subsequent event under any principle of law--like the rule requiring application of the law in existence at the time of decision--then the defective product victims prevail, because their vested rights were first in time. On the other hand, if the plaintiffs' vested rights must give way to changes in the law

during the life of a case, and thus were divested by Pullum, then the defendants should be subject to the same standard, and their Pullum-created rights were likewise divested by the Legislature's remedial repealing action. One way or the other, the defective products victims' rights to pursue their actions are preserved.

ARGUMENT

Both issues, retroactivity of **The Pullum Repealer** and retroactivity of Pullum itself, are so completely intertwined that in this brief we discuss them together and in the overall context of the history of the statute of repose's elimination of suits (hereinafter, SORES). For orientation, a more comprehensive history of the origins of, protections against, recurrence of, and, now final eradication of SORES is set out below.

1975: THE 1974 LEGISLATURE CREATED SORES, BUT REALIZING THEIR SEVERE IMPACT, ENACTED A SAVINGS CLAUSE TO PROTECT EXISTING CAUSES OF ACTION FROM SORES. When the Legislature enacted the defective product statute of repose, it understood the drastic effect and the need to provide some means of protecting defective product victims with existing causes of action. The means adopted was a one year savings clause. §95.022, Fla. Stat. (1975).

1980: THE ACCESS TO COURTS GUARANTEE VACCINATED MOST DEFECTIVE PRODUCT VICTIMS AGAINST SORES. On its first opportunity to test the validity of the statute of repose as an absolute bar, as opposed to its role as a statute of limitations

shortener (as in Pullum), this Court held that the statute unconstitutionally "denies access to courts under article I, section 21, Florida Constitution." Battilla. And until Pullum, that remained the law.

1980-85: THE LEGISLATURE ACCEPTED THE CONSTITUTIONAL MEDICINE AGAINST SORES. The Florida Legislature met in the Springs of 1980, 1981, 1982, 1983, 1984 and 1985 and never did it make any attempt to restore the defective products statute of repose. The Legislature accepted this Court's holding that our organic law forbade the absolute barring of a cause of action before it accrued. Battilla. Three times (1981, 1983 and 1985) the Legislature reenacted the general statutes. This had the effect of making Battilla's holding a part of the statute itself. In Delaney v. State, 190 So.2d 578, 581-82 (Fla. 1966) this Court declared:

> In this state, as in most others, the rule prevails that in reenacting a statute the legislature is presumed to be aware of constructions placed upon it by the highest court of the state, and, in the absence of clear expressions to the contrary, is presumed to have adopted these constructions. Rabinowitz v. Keefer et al., 1931, 100 Fla. 1723, 132 So. 297; Depfer v. Waler, 1936, 125 Fla. 189, 169 So. 660. Indeed, there is substantial authority for the proposition that such reenactment of the statute bars the court from subsequently changing its earlier construction. Rabinowitz v. Keefer, supra; 8 Fla.Jur., Courts, Sec. 152 (1956); 82 C.J.S. Statutes, §370 (1953). In Johnson v. State, Fla. 1956, 91 So.2d 185, we applied this rule to a criminal statute, expressly overruling a contrary construction by dictum in Grimes v. State, Fla. 1953, 64 So.2d 920.

In the Johnson case cited above, the Court had enforced this principle because to do otherwise would be to engage in "judicial

legislation." 91 So.2d at 187. Accord, Walsingham v. State, 250 So.2d 857, 859 (Fla. 1971); State v. Barquet, 262 So.2d 431, 438 (Fla. 1972).

Underscoring the Legislature's acceptance of Battilla, was its refusal to accept the identical result for a different statute of repose in Overland Construction Co. v. Sirmons, 369 So.2d 572 (Fla. 1979). In Overland this Court

> "held that, insofar as section 95.11(3)(c) operates as an absolute bar to actions commenced more than twelve years after events connected with the construction of improvements to real property, it violates article I, section 21 of the Florida Constitution."[4]

Universal Engineering Corp. v. Perez, 451 So.2d 463, 466 (Fla. 1984). In footnote 4 to Perez, this Court noted "that the Legislature in response to Overland" adopted a preamble to address the constitutional defects identified in Overland. 451 So.2d at 466, citing Ch. 80-322, Laws of Florida. Moreover, the Court noted, in footnote 3 of Perez, that the Legislature had also amended section 95.11(3) to increase that particular statute of repose from 12 to 15 years.

Thus, although the Legislature had not accepted Overland, it had accepted Battilla; although it had not accepted the unconstitutionality of the construction project statute, it had accepted the unconstitutionality of the defective product statute.

1980-85: THE BENCH AND BAR OF FLORIDA HANDLED DEFECTIVE PRODUCT CASES WITHOUT SORES. Not only the Legislature, but also the judiciary and tort lawyers, both plaintiff and defense, knew,

understood and accepted that the absolute bar of the defective product statute of repose was no more. In the half-decade between Battilla and Pullum there were no decisions at all concerning the defunct 12 year absolute bar. Only the limited continuing aspect of the statute which shortened the statute of limitations for defective product victims hurt between 8 and 12 years after delivery was being litigated. Pullum v. Cincinatti, Inc., 458 So.2d 1136 (Fla. 1st DCA 1984); McRae v. Cessna Aircraft Co., 457 So.2d 1093 (Fla. 1st DCA 1984); Feil v. Challenge-Cook Bros., Inc., 473 So.2d 1338 (Fla. 4th DCA 1985); Hamilton v. Piper Aircraft Corp., 473 So.2d 301 (Fla. 4th DCA 1985).

And, in the cases where the Pullum-revived absolute bar is presently at issue, it all began when the members of the defense bar diligently leafed through their Florida Law Weekly of August 30, 1985 - the one carrying Pullum. Unsurprisingly, a flurry of motions to amend whirled out of word-processors from Pensacola to Key West in order to raise the windfall defense.

1986: THE LEGISLATURE REACTED PROMPTLY TO REMEDY THE FRESH OUTBREAK OF SORES AND IMMUNIZED DEFECTIVE PRODUCT VICTIMS AGAINST THEM. The United States Supreme Court denied review in Pullum on April 21, 1986. In less than 60 days the statute of repose, which Pullum had just revived, had been wiped off the books by the Florida Legislature. As surely as day follows night, the Legislature followed Pullum with **The Pullum Repealer** to return the law to its state under Battilla. Ch. 86-272, Laws of Florida (1986). Additionally, **The Pullum Repealer**, by eliminating the

statute of repose altogether, cured the equal protection violation the petitioner in Pullum had sought to redress.

1986-87: THE BENCH AND BAR SEEK THE ANSWER - ARE ANY DEFECTIVE PRODUCT VICTIMS STILL SUSCEPTIBLE TO SORES? History reflects that this Court issued a phenomenal 64 opinions in two days, August 29 and 30, 1985. 10 Florida Law Weekly 422-492, 495-504. This volume of cases may explain how in Pullum the Court omitted addressing the retroactivity question. Adding to the uncertainty was the fact that, when the district court in Cassidy v. The Firestone Tire and Rubber Company, Case No. BK-198 (Fla. 1st DCA Jan. 13, 1986), certified

> ...the following question as one requiring immediate resolution by the Supreme Court because it ...will have a great effect on the proper administration of justice throughout the state:
>
> Whether The Rule Announced in Pullum v. Cincinnati, Inc., 476 So.2d 657 (Fla. 1985) Is Applicable To Cases Filed Prior To Publication Of That Opinion.,

the Court declined to answer the question. Cassidy v. The Firestone Tire and Rubber Company, Case No. 68,160 (Fla. Jan. 21, 1986). The uncertainty about the retroactivity question has led to a hodge-podge of retroactivity decisions.

In the following representative cases, Pullum has been held not retroactive: George v. Firestone, Case No. GCA 85-0117-MMP (N.D. Fla. July 9 and July 31, 1986) (to retroactively apply Pullum would violate due process by depriving the plaintiff of a vested right); accord, Cox v. Farrel-Birmingham, Co., Case No. PCA 86-4064-WEA (N.D. Fla. Sept. 17, 1986), overruling Eddings v. Volkswagenwork, A.G., Case No. PCA 84-4476-WEA (N.D. Fla, Jan. 9,

1986); Dease v. Jeep Corporation, Case No. CI 85-460 CIV-ORL (M.D. Fla. 1986); Felder v. Heim Corporation, Case No. 85-5487-CO (Broward Co., Judge Price, Dec. 23, 1985); Owens v. Firestone, Case No. 84-350-CIV-T-10 (M.D. Fla. Jan. 28, 1986); Harp v. Safe-Lad, Case No. 83-10545-CA (Duval Co., Judge Soud, March 10, 1986).

In the following cases, Pullum has been held retroactive: Pait, the decision under review which certified the pending questions; Lamb v. Volkswagenwerk Aktiengesellschaft, 631 F. Supp. 1144 (S.D. Fla. 1986); Thorsby v. Williams-White, Case No. TCA 84-7230-WS (N.D. Fla. Jan. 30, 1986); Eddings v. Volkswagenwerk, A.G. Case No. PCA 84-4476-WEA (N.D. Fla. Jan. 9, 1986), overruled, Cox v. Farrel-Birmingham Co., Case No. PCA 86-4064-WEA (N.D. Fla. Sept. 17, 1986); American Liberty Insurance Co. v. West and Conyers, 491 So.2d 573 (Fla. 2d DCA 1986) (Pullum applied, but retroactivity question not discussed); Cassidy v. The Firestone Tire and Rubber Company, 495 So.2d 801 (Fla. 1st DCA 1986) (pends before this Court on application for review on conflict grounds); Small v. Niagara Machine & Tool Works, So.2d , 12 F.L.W. 366 (Fla. 2d DCA January 20, 1987); Shaw v. General Motors Corp., So.2d , 12 F.L.W. 487 (Fla. 3d DCA February 10, 1987); Lane v. Koehring Co., So.2d , 12 F.L.W. 478 (Fla. 3d DCA February 10, 1987) and Brackenridge v. Ametek, Inc., So.2d , 12 F.L.W. 479 (Fla. 3d DCA February 10, 1987). The last three decisions, the most recent, each certify the same "questions of great public importance" certified by the Court in Pait.

The Battilla decision, which was in force when many causes of action had already accrued, had rendered the statute "inoperative ab initio ..." State ex rel. Nuveen v. Greer, 88 So.2d 249, 102 So. 739, 743 (1924). Thus, the statute of repose was a virtual nullity--and, therefore, the Plaintiffs had a vested property right in their causes of action.

The rule requiring application of a new law or decision to a pending case will give way to equitable considerations--that is, to vested rights. Thus, Pullum's potential impact on vested property rights counsels a prospective-only construction, as this Court indicated in Florida Forest and Park Service v. Strickland, 18 So.2d 251, 253 (Fla. 1944), where the Court recognized "a certain well recognized exception" (to the general rule that overruling decisions are retrospective):

> [W]here 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 retrospective operation.

Thus, this Court could not have intended to impair such vested rights by its decision in Pullum. Instead, the Court merely intended to cure the equal protection problem created inadvertently by Battilla. To do so the Court reconsidered Battilla and revitalized the long dead statute. But there is no reason to suppose a retroactive intent.

The confusion in the lower courts on the retroactivity question is well illustrated by the Cassidy and Pait opinions. Cassidy simply quotes the general rule of Florida Forest & Park

Service v. Strickland, 18 So.2d 251 (Fla. 1944)--that "decisions overruling earlier precedent are generally given retroactive effect...." Cassidy, 495 So2d at 802. But Cassidy fails even to acknowledge the well-recognized vested rights exception stated in Florida Forest. On the other hand, Pait, the decision under review, specifically errs in another direction by saying (emphasis ours):

> It does not appear that any property or contract rights were acquired by the plaintiff here such as would make an exception to this rule applicable. Cf. Florida Forest and Park Service v. Strickland, 18 So.2d 251 (Fla. 1944).

Thus, the Pait court did recognize the Florida Forest exception which Cassidy had overlooked, but itself overlooked the fact that "a vested cause of action or 'chose in action' is personal property." Sunspan Engineering & Construction Co. v. Spring-Lock Scaffolding Co., 310 So.2d 4, 8 (Fla. 1975) (emphasis supplied).

Moreover, the lower courts have generally overlooked that a retroactive application of Pullum would raise new constitutional problems. This Court acknowledged in Davis v. Artley Construction Co., 18 So.2d 255 (1944), citing Florida Forest, that if the retroactive application of its decision would deny the plaintiff a pre-existing right to pursue his claim, such a decision would impermissibly deny the plaintiff access to the courts under the Florida Constitution. Such an outcome would also violate federal due-process rights. In Chevron Oil Co. v. Huson, 404 U.S. 97, 107-08, 92 S. Ct. 349, 30 L. Ed.2d 296 (1971), the United States Supreme Court declared in language highly pertinent to the present controversy:

> When the respondent was injured, for the next two years until he instituted his lawsuit, and for the ensuing year of pretrial proceedings, these Court of Appeals decisions represented the law governing his case. It cannot be assumed that he did or could foresee that this consistent interpretation of the Lands Act would be overturned. The most he could do was rely on the law as it then was.
>
> To hold that the respondent's lawsuit is retroactively time barred would be anamolous indeed . . . Retroactive application of the Louisiana Statute of Limitations to this case would deprive the respondent of any remedy whatsoever on the basis of superseding legal doctrine that was quite unforeseeable. To abruptly terminate this lawsuit that has proceeded through lengthy and, no doubt, costly discovery states for a year would surely be inimical to the beneficent purposes of the Congress.
>
> In Cipriano v. City of Houma, 395 U.S. 701, 89 S. Ct. 1897, 23 L. Ed.2d 647 (1969), we invoked the doctrine of nonretroactive application to protect property interests . . . and in Allen v. State Board of Elections, 393 U.S. 544, 89 S. Ct. 817, 22 L. Ed.2d 1 (1969), we invoked the doctrine to protect elections held under possibly discriminatory voting laws. Certainly the respondent's potential redress for his allegedly serious injury--an injury that may significantly undercut his future earning power--is entitled to similar protection. Non-retroactive application here simply preserves his right to a day in court.

Since the statute of repose was a nullity when the injury occurred in this case, and when many actions were filed, the defective product victims each had a vested right in that cause of action, and the retroactive denial of that right would be a violation not only of the established rules for applying overruling decisions, but also of the Florida and federal constitutional provisions on which those rules are based.

THE IMPACT OF **THE PULLUM REPEALER**

The general rule is that repealing statutes should be given retroactive operation if the right or remedy has been created by statute. When a statute is repealed, the right or remedy created by statute falls with it. Yaffee v. International Company, 80 So.2d 910 (Fla. 1955), Bureau of Crimes Compensation, Department of Labor and Employment Security v. Williams, 405 So.2d 747 (Fla. 2nd DCA 1981); see 49 Fla. Jur. 2d, Statutes §210.

The statute of repose is not a bar to pending actions; the statute has been repealed. The general rule in Florida is that "an appellate court, in reviewing a judgment on direct appeal, will dispose of the case according to the law prevailing at the time of the appellate disposition." Goodfriend v. Druck, 289 So.2d 710, 711 (Fla. 1974). This rule typically applies to intervening judicial decisions, but it equally applies to intervening legislative acts. Thus, in Florida Patient's Compensation Fund v. Von Stetina, 474 So.2d 783, 787 (Fla. 1985), the Supreme Court held enforceable an intervening legislative cap on yearly payments by the Florida Patient's Compensation Fund, because "the judgment awarded in favor of Von Stetina is not final until the case has been disposed of on appeal. An appellate court is generally required to apply the law in effect at the time of its decision." And, directly on point is Royal Atlantic Association v. Royal Condominium Managers, Inc., 258 So2d 39, 40 (Fla. 3rd DCA 1972), in which the trial court had declared a condominium management contract invalid under then-existing law. The court reversed the judgment in light of the

subsequent legislative repeal of the statute while the case was on appeal.

In sum, the rule requiring application of the law in existence at the time of the appeal operates of its own force, independent of any retroactive legislative intention. Thus, "we must reject the contention that a change in the law is to be given effect in a pending case only where that is the clear and stated intention of the legislature." Bradley v. School Board, 416 U.S. 696, 715, 94 S. Ct. 2006, 40 L. Ed.2d 476. To the contrary, unless the application of a statute to pending cases would produce a manifest injustice--see discussion below--the rule requiring such application will be suspended only if the Legislature has explicitly declared that the statute will be prospective only, in which case the "courts generally give it that effect...". Seaboard System R., Inc. v. Clements, 467 So.2d 348, 357 (Fla. 3rd DCA 1985).

In the instance of **The Pullum Repealer**, Ch. 86-272, there is no such explicit legislative requirement of prospective-only impact. To the contrary, section 3 of the new statute provides that "Section 1 of this act [creating a new statute of limitations for certain actions not relevant here] shall take effect October 1, 1986, and shall apply to causes of action accruing after that date," but that "Section 2 of this act [repealing the statute of repose in defective product cases] shall take effect July 1, 1986." Thus, while the Legislature was consciously aware of its power to apply the new statute only to causes of action accruing after its effective date, because it

did precisely that with respect to another provision of the same act, it did not so provide relative to its repeal of the statute of repose. Under ordinary principles of statutory construction, that provides a powerful argument that the Legislature in fact intended that its repeal of the statute of repose would apply not only to pending actions, but also would apply retroactively in the classic sense.

Additional evidence of the Legislature's intent is that it acted so quickly to abolish the statute of repose immediately after the Pullum decision had revived it. It is clear that the Legislature did not explicitly require a prospective only application of the new statute, and that observation precludes any contention that the Legislature itself intended to circumvent the general rule requiring application of the law in effect at the time of decision.

ENFORCEMENT OF THE GENERAL RULE TO APPLY **THE PULLUM REPEALER** TO ALL ACTIONS WILL NOT UNDERMINE VESTED RIGHTS.

Another exception to the general rule is that a new law will apply only prospectively if its application to pending actions would create a "manifest injustice." In determining whether such an application would be unjust, the closest analogy is to those cases discussing the question of whether a new statute of limitations should be retroactively or prospectively applied. As a general proposition, there is no inequity--and certainly no federal constitutional barrier--to even the retroactive revival of a cause of action which has actually expired under the old statute of limitations. Campbell v. Holt, 115 U.S. 483 486-87 115

S. Ct. 620, 627-28 (1885); Chase Securities Corp. v. Donaldson, 325 U.S. 304, 311-16, 65 S. Ct. 1137, 89 L. Ed. 1628, 1634-36 (1945); International Union of Electrical Workers v. Robbins & Myers, Inc., 429 U.S. 229, 243-44, 97 S. Ct. 441, 50 L. Ed.2d 427, 439 (1976) (Congress was not "without constitutional power to revive, by enactment, an action which, when filed, is already barred by the running of a limitations period." citing Chase Securities Corp. v. Donaldson, 325 U.S. 315-16.

There are circumstances under Florida Law, however, in which the pre-existing statute of limitations will be held to have conferred a vested right in one party or the other, which right cannot be disturbed even by explicit legislative action. From the plaintiff's perpective, the rule is that "to shorten a period of limitation, the legislature must by statute allow a reasonable time to file actions already accrued" and this rule reflects a "constitutional mandate..." Homemakers Inc. v. Gonzales, 400 So.2d 965, 967 (Fla. 1981). And from the defendant's perspective, 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. Mazda Motors of America, Inc. v. S.C. Henderson & Sons, Inc. 364 So.2d 107, 108 (Fla. 1st DCA 1978), cert. denied, 378 So.2d 348 (Fla. 1979).

Under Florida law (assuming for the moment that statutes of limitations and statutes of repose are analogous in all relevant

respects), a defendant manufacturer arguably would have had a vested right, and thus a dispositive defense, if Pullum had resurrected the statute of repose before the injury. Under such circumstances, the resurrected statute arguably would have given the defendant manufacturer a pre-existing vested right to be free of such claims, which right the Legislature could not divest by repealing the statute after the claim had been fully extinguished (and as discussed below, even this argument should fail because a statute of repose is not the same thing as a statute of limitations). However, in most cases the plaintiff's action will not have been wholly barred either at the time of the accident in question or at the time it was first filed. To the contrary, because of the Battilla decision, the statute was unenforceable--a virtual nullity--both at the time of injury, and at the time the action was filed. It should also be emphasized that in all cases of manufacture before 1975 the statute of repose was not even in existence and thus could have created no expectancy--no vested right--upon which the manufacturer relied in marketing this product. In this light, it is inconceivable that the original design of this product could have depended in any way "on a statute of limitation for shelter from liability." Chase Securities Corp. v. Donaldson, 325 U.S. 304, 316 65 S. Ct. 1137, 89 L. Ed. 1628, 1636 (1945). As this Court has stated:

> The Constitution, by its own superior force and authority, eliminates the statute or the portion thereof that conflicts with organic law, and renders it inoperative ab initio, so that the Constitution and not the statute will be applied by the court in determining the litigated rights.

State ex rel. Nuveen v. Greer, 88 Fla. 249, 102 So. 739, 743-45 (1924). See Ex Parte Messer, 87 Fla. 92, So. 330, 333 (1924) (unconstitutional statute is "void"). Thus, when the product was first manufactured, and at the time most actions were first filed, the statute of repose did not exist; it was a total nullity, void ab initio, by virtue of its unconstitutionality. And unlike the Greer case--which is much tougher because the bonds in question in Greer had not been declared invalid at the time they were issued--the statute of repose had already been declared a nullity at the time of the accident and had not even been enacted at the time of the manufacture.

Thus, the defendant manufacturer is left with the argument that it obtained a vested right only during the pendency of the litigation, when the Pullum decision resurrected the statute. At that point, the statute of repose, although void ab initio, is then considered to have been "valid from its inception." Lamb v. Volkswagenwerk Aktiengesellschaft, 631 F. Supp. 1144, 1149 (S.D. Fla. 1986) (and cases cited). Thus, the defendant manufacturer would argue that the resurrection of the statute wholly extinguished the plaintiff's claim during its pendency, creating a vested right in the defendant, and that the Legislature was then forbidden to undermine that vested right through the retroactive application of its repealing statute. By analogy, the defendant would contend, the courts cannot disturb such a vested right through enforcement of the rule requiring application of the law in existence at the time of an appeal.

There are, however, two independently-dispositive responses to any such contention. First, in a case in which the plaintiff's action was not at all time-barred at the time it initially was filed, the defendant's asserted vested right created by the subsequent Pullum decision is not the only vested right involved. To the contrary, the plaintiff also had a vested right in the cause of action. As noted, at the time of the injury, and at the time the action was filed, there was no defective product statute of repose, because the Supreme Court had declared it unconstitutional, and, thus, it was a nullity. As the Supreme Court stated in State ex rel. Nuveen v. Greer, supra 99 So. at 333, it was "inoperative ab initio..." At that time, therefore the plaintiffs had a viable cause of action, and that "chose in action" was a property right. Sunspan Engineering & Construction Co. v. Spring-Lock Scaffolding Co., 310 So.2d 4,8 (Fla. 1975). The right to assert a cause of action is at least as valuable (and entitled to protection) as the right to present a particular defense against the cause of action.

Indeed, it is precisely because of a prospective plaintiff's property interest in a viable cause of action that the Florida courts have evolved the rule that the Legislature may not, even if it says so explicitly, retroactively apply a shortened statute of limitations to fully extinguish a viable claim, but instead must allow a reasonable time for prospective plaintiffs whose actions are not time-barred under the old statute of limitations to fully extinguish a viable claim. As the Supreme Court said in Homemakers, Inc. v. Gonzales, 400 So. 2d 965, 967 (Fla. 1981),

this rule reflects a "constitutional mandate..." It is precisely because the prospective plaintiff has a property right, of constitutional dimension, in his cause of action under the pre-existing statute of limitations, that the Legislature may not entirely extinguish it. At the very least, this means that if the defendant manufacturer's Pullum-based right is vested, it is not the only vested right at issue in this kind of case, and the recognition of the defendant's right, for the purpose of defeating the rule requiring application of the law in existence at the time of an appeal, would undermine a vested right of equal status--the defective product victim's vested right in a chose in action which was perfectly valid at the time it was asserted.

And, in this context, it is no answer to argue that the victim's vested right was "extinguished" by the vested right created in the defendant by Pullum, since the obvious rejoinder is that during the course of the same litigation, the defendant's asserted vested right was then divested by the Legislature's remedial repeal of the statute of repose.

To repeat, fair is fair: if the defendants successfully devalue the plaintiffs' vested right by virtue of Pullum, then by the same token the plaintiffs can devalue the defendants' asserted vested right by virtue of the Legislature's repealing action. Only by freezing the flow of ongoing litigation at a specific moment in time--an entirely unrealistic perspective by any standard of fairness--could a defendant successfully argue that it acquired a right which is so inviolable as to require

ignoring everything which happened both before and after its acquisition.

In contrast to such a strained chain of reasoning, the general rule requiring application of the law in effect at the time of an appeal should not be avoided. Both parties to a lawsuit should take the law of the case as they find it, no matter how many times it may change during the course of that lawsuit. If the action was permissible at the time it was brought, and thus was properly "pending", then despite some subsequent event which might bar the action, its revival during the pendency of the action is not retroactive legislation and does not impair any vested right.

This only makes sense. The defective product victim had a perfect right to pursue the action to successful conclusion--because there was no enforceable statute of repose at the time--and <u>if</u> they might properly be subject to an intervening change of the law which would bar the action (<u>Pullum</u>), then the defendants should likewise be subject to a subsequent intervening change during the pendency of the action (**The Pullum Repealer**), which would revive it. The law of a case might wander during its pendency, but the litigants and the courts are required to wander with it. The <u>Pullum</u> decision's resurrection of the statute of repose during the pendency of this lawsuit did not create a dispositive vested right in a defendant so long as the action remained pending, and the Legislature's repeal of the statute of repose properly changed the law, under the well-settled rule that

both parties are subject to the state of law existing during the life of a lawsuit.

A second dispositive response to the defendants' position is that even if it might be said that a defendant enjoyed a vested right in the pre-existing statute of repose, which may be said to have extinguished beyond redemption the plaintiff's vested right to bring the action, that observation would still be insufficient to forbid enforcement of the rule requiring application of the law in existence at the time of an appeal. This is because the Legislature's repeal of the statute of repose is not precisely analogous to a legislative expansion of a statute of limitations. To the contrary, whether one considers a new statute of limitations to be procedural or substantive, the fact is that the Legislature's repeal of the statute of repose was not simply substantive, but in addition was remedial, because it sought--immediately after the Pullum decision revitalized the statute--to remedy the state of law which Pullum had created. And this Court has flatly declared not only that there is no constitutional barrier to the retroactive application of remedial legislation, but that such legislation should be retroactively applied:

> If a statute is found to be remedial in nature, it can and should be retroactively applied in order to serve its intended purposes. Village of El Portal v. City of Miami Shores, 362 So. 2d 275 (Fla. 1978); Grammar v. Roman, 174 So.2d 443 (Fla. 2nd DCA 1965).

City of Orlando v. Desjardins, 11 FLW 474, 475 (Fla. September 11, 1986).

There can simply be no debate that the legislature's repeal of the statute of repose was remedial in nature. Indeed, the very nature of a repeal is to remedy some existing problem with the prior state of law. In this case, that "problem" was that the Pullum decision unexpectedly had resurrected the statute of repose and threatened to defeat the remedies of defective product victims. The Legislature moved at its first opportunity to protect these remedies from the newly stirring statute of repose. This remedial purpose is a positive argument for the retroactive application of **The Pullum Repealer.**

CONCLUSION

One way or the other, the defective product victims must be saved from the quicksand. To repeat, again, fair is fair: either defective product victims are entitled to the benefit of all changes in the law during the life of their case, just like the defendants, or neither party is entitled. Or the Pullum decision should not be applied during the pendency of existing cases because the rule requiring application of the law in existence during the life of a case will not be allowed to disturb vested rights, and at the time of Pullum the plaintiffs had vested rights in their causes of action. Pullum could not disturb those vested rights, and thus could not create any vested right in defendants to be free from suit.

If, on the other hand, the plaintiffs were subject to the change in the law accomplished by Pullum's resurrection of the statute of repose--and thus to the divestment of their own vested rights--then the vested rights provided to the defendants by

Pullum were likewise divested by the Legislature's prompt remedial repeal of the statute of repose.

In short, if a vested right cannot be divested by any subsequent event under any principle of law--like the rule requiring application of the law in existence at the time of decision--then the plaintiffs prevail because their vested rights were first in time. On the other hand, if their vested rights must give way to the rule requiring application of the law in existence during the life of a case, and thus were divested by Pullum, then the defendants should be subject to the same standard, and their Pullum-created rights were likewise divested by the Legislature's repealing action. One way or the other, the defective product victims' right to pursue their actions are preserved.

As amicus curiae, and in the interest of a stable, yet fair, state of the law in Florida, we respectfully submit that the Court should answer the first certified question affirmatively, answer the second certified question negatively, quash the decision under review and order the reversal of the judgment of dismissal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to James C. Blecke, Esquire, Stewart, Tilghman, Fox & Bianchi, Biscayne Building, Suite 705, 19 West Flagler Street, Miami, Florida 33130; David W. Bianchi, Esquire, Stewart, Tilghman, Fox & Bianchi, 1900 Courthouse Tower, 44 West Flagler Street, Miami, Florida 33130; and Sharon Lee Stedman, Esquire, Rumberger, Kirk, Caldwell, Cabaniss & Burke, 11 East Pine Street, Orlando, Florida 32802, this 23rd day of February, 1987.

Wayne Hogan