IN THE SUPREME COURT OF FLORIDA

Case No. 69,917

SHARON PAIT,

Petitioner,

vs.

FORD MOTOR COMPANY,

Respondent.

ON REVIEW OF A DECISION OF THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT

ANSWER BRIEF OF RESPONDENT, FORD MOTOR COMPANY

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SUPPLEMENT TO STATEMENT OF THE CASE AND FACTS

Pursuant to Fla. R. App. P. 9.210(c) defendant-appellee, Ford Motor Company ("Ford") submits this account of aspects of the case which are not discussed in the Plaintiff's statement of facts and procedural history.[1/]

A few months after this action was filed, the Florida Supreme Court decided Pullum v. Cincinnati, Inc., 476 So.2d 657 (Fla. 1985). The subject was the constitutionality of the application of the portion of the statute of repose which required that a personal injury claim concerning a mass-produced product be brought within twelve years of the delivery of the article to the original purchaser. Ruling that Section 95.031(2), Fla. Stat. (1985), is constitutional, the Supreme Court receded from its earlier decision in Battilla v. Allis Chalmers Mfg. Co., 392 So.2d 874 (Fla. 1980).

The Pullums filed a petition for rehearing. Amicus, the Florida Academy of Trial Lawyers, (henceforth "Plaintiffs' Bar") filed a brief in support of the petition. This argued that the ruling should be prospective only. The Court denied the petition without comment. Pullum v. Cincinnati, Inc., 482 So.2d 1352 (Fla. 1985). The Plaintiff then sought review before the United

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1/ The Plaintiff's brief will be cited as (Pb.___). The brief submitted by the organized Plaintiff's Bar as amicus will be cited as (Ab.___).

States Supreme Court. That appeal was dismissed for want of a substantial federal question, 106 S.Ct. 1626, 90 L.Ed.2d 174 (1986).

After the Court issued its decision in Pullum, Ford filed an amended motion to dismiss on the basis of Section 95.031(2) (R. 9). The Plaintiff made only one argument in response to that contention. This was an assertion that Section 95.031(2) did not apply to a wrongful death action (R. 27-33). She has abandoned that issue on appeal.

On January 28, 1986, Circuit Judge C. Welborn Daniel granted Ford's motion. His reasoning began with the proposition that a right of action could exist under the Wrongful Death Act only if the person injured would have been entitled to maintain an action if he had not died in the accident. Grady Pait would have been barred from bringing such an action. The twelve year period specified in the statute of repose had expired a year before his death. Therefore the Judge dismissed the complaint (R. 35-36).

The Plaintiff appealed that ruling. Before the District Court of Appeal she argued - for the first time - that the Supreme Court's decision in Pullum should be given only prospective affect.

In the interim the Legislature had amended the Statute of Repose, by enacting Ch. 272, §2, Laws of Fla. This deleted the words which referred to product liability cases. (Henceforth, for clarity this brief will refer to that amendment as Chapter 272 and to the statute of repose as §95.031(2).

In an opinion by Judge Orfinger, the Fifth District Court of Appeal ruled that there was no reason to suppose Pullum was to have only prospective effect or, on the other hand, that the amendment of §95.031(2) should operate retroactively. Pait v. Ford Motor Company, 500 So.2d 743 (Fla. 5th DCA 1987). (App. "A").

COUNTER-STATEMENT OF THE ISSUES

1. Did the legislature intend that the amendment of the statute of repose should be retroactive?

2. Does dicta that a "repeal" generally operates retroactively apply to Ch. 272, a statute which does not use "repeal" terminology and which only deletes some parts of the prior statute, leaving others in place?

3. If arquendo Chapter 272 operates retroactively, would that mean it could destroy the vested right of the manufacturer to freedom from suit on a product against which the statute of repose had run?

4. Did the plaintiff challenge the retrospective effect of Pullum before the trial court?

5. If she did preserve that issue for appeal, should the Court depart from the rule that judicial decisions on a constitutional issue operate retrospectively, as well as prospectively?

SUMMARY OF ARGUMENT

Under Florida law, a statute only has prospective effect unless the legislature gives "clear and manifest" evidence of an intention that it be retroactive. There is no such evidence in this case.

The plaintiff, however, seeks to avoid that settled doctrine by focusing narrowly on dicta in secondary authorities that a "repeal" generally operates retroactively. She tries to inflate that rule of thumb into an iron-clad requirement and, then, to bootstrap to the conclusion that Chapter 272, in fact, was intended to be a "repeal" so that it must be retroactive.

A case of this importance to the public, however, should not be decided on the superficial basis of semantics or the manipulation of conclusory labels.

The Court will find that the Plaintiff's evades two vital threshold questions.

First <u>is</u> §95.031(2) a "Repealer" at all or, instead, something closer to an amendment which, like most other statutes, would have only prospective effect?

Second, if not all repeal statues apply retroactively, how can the Court decide whether Chapter 272 is one of those which do or one of the exceptions?

Ford will answer each question but, at the outset, we call attention to points which already are clear:

A. Florida precedent and the Plaintiff's own authorities show that even a retroactive change in the statute cannot destroy a vested right.

B. The twelve year period had expired a year before Mr. Pait's accident.

C. The Florida legislature gave no indication of any intention that §95.031(2) should be retroactive, or that it should be interpreted as a full scale "Repealer"; much less that it be applied retroactively in such a drastic way as to destroy vested rights.

We suggest that these well defined matters show that the answer to the certified question must be "no". In Parts 1 and 2 of this Argument, we will provide authorities which justify that conclusion and alternative lines of analysis. The first focuses primarily on the vested rights of the Defendant. The other deals with the statute itself, its phrasing and background; and, most important, the legislative history.

In Part 3, we will show that the Plaintiff failed to raise the Pullum issue before the trial court. As to the merits, the norm is that a judicial decision overruling prior precedent operates retrospectively as well as prospectively; and that an overruled decision confers no vested rights.

Indeed, the logic of Pullum itself would be undermined by the Plaintiff's approach. The Court could not have eliminated those differences in treatment which were the basis of the

constitutional attack on the statute if it had given the decision only prospective application. Further the belated limitation of the effect of Pullum would increase the confusion in many other cases.

PART 1

I.

CHAPTER 272 COULD NOT APPLY RETROSPECTIVELY IN THIS CASE BECAUSE THAT WOULD VIOLATE VESTED RIGHTS OF THE DEFENDANT, ARISING FROM THE EXPIRATION OF THE TWELVE YEAR PERIOD BEFORE THE AMENDMENT OF THE STATUTE OF REPOSE

The most direct and traditional answer to the plaintiff's claims is that the defendant had a vested right to freedom from this suit because the statute of repose had run a year before Mr. Pait's tractor was involved in the accident.

The later abolition of the statute could not destroy that right.

Therefore, while it may be that the Court could find, in another case, that the statute could be applied retroactively in some sense, that possibility is not even relevant to this appeal.

A. A repeal does not overcome or destroy vested rights.

The vested rights doctrine has constitutional roots, Trustees of Tufts College v. Triple R. Ranch, Inc., 275 So.2d 251 (Fla. 1973); but it also is a settled principle of statutory interpretation. This is how the Court made the point in a recent case:

> In Florida, it is clear that in the absence of an explicit legislative expression to the contrary, a substantive law is to be construed as having prospective effect only ....This rule mandates the statutes that interfere with vested rights will not be given retroactive effect.
>
> Young v. Altenhaus, 472 So.2d 1152 (Fla. 1985) (Emphasis supplied).

The textbook on which the plaintiff tries to base her "repeal" argument says much the same thing and even applies that reasoning to the specific situation before the Court:

> "A right which has become vested is not dependent upon the common law or the statute under which it was acquired for its assertion. It has an independent existence. Consequently, the repeal of the statute or the abrogation of the common law from which it originated does not erase a vested right but it remains enforceable without regard to the repeal."
>
> Sutherland Statutory Construction §23.34 (4th Ed.) (Emphasis supplied).

In short, the Plaintiff's own authorities point out the glaring weakness in her position.

She has sought to evade this problem by relying (Pb. 5) upon additional dicta in Sutherland that there can be no vested right unless something akin to a property or contract right is involved. It is not clear just what limitations the author meant to describe by that general language.

More important, it is clear that the right to freedom from a lawsuit after the statute of limitations or repose has run is protected and, thus, "property" for this purpose at least. See, for example La Floridienne v. Seaboard Airline Railway, 59 Fla.

196, 52 So. 298 (Fla. 1910) (Passage of period set in statute of repose covering railroad rate charges created vested right in the defendant which barred claims even though later legislation purported to authorize suits for forfeitures based on transactions during the period.); Bahl v. Fernandina Contractors, Inc., 423 So.2d 964 (Fla. 1st DCA 1982) (Passage of three-year winding-up period for dissolved corporations barred plaintiff's personal injury action against the dissolved corporation.) See also, CBS, Inc. v. Garrod, 622 F.Supp. 532 (M.D. Fla. 1985) (Repeal of a statute does not deprive one of a right or defense which arose under it).

Other state courts have come to the same conclusion. See Colony Hill Condo Rm. #1 Ass'n v. Colony Co., 320 S.E.2d 273 (N.C. App. 1984) and Rosenberg v. Town of North Bergen, 61 NJ 190, 293 A.2d 662 (1972).

B. Chapter 272 is not a mere "remedial" or "curative statute".

The Plaintiffs' Bar tries a different argument, (Ab. 7) one which contradicts the Plaintiff's basic view of the case, as well as its own.

In spite of all the talk elsewhere in its brief about "The Pullum Repealer" (sic), Amicus now would have the Court believe that Chapter 272 is, after all, only a minor curative or remedial matter so that it can apply retroactively.

They do not provide any precedent that a "curative" or "remedial" statute could override a vested right. Therefore the argument gets them nowhere.

Further, an amicus cannot assert a position which is not taken by one of the parties to the litigation. Acton v. Ft. Lauderdale Hospital, 418 So.2d 1099 (Fla. 1st DCA 1982), aff'd 440 So.2d 1282 (Fla. 1983).

As to the merits, the Plaintiff's Bar does not give the Court any guidance as to the meaning of this conclusory label. Instead it merely asserts (Ab. 7) that Chapter 272 "remedies" a wrong and so must be retroactive.

Counsel's subjective views as to what is "just" or "wrong" are not a sufficient intellectual foundation for such a grave decision. Any change has to be "remedial", in a vague sense, if one simply assumes that the old law was "bad". But that would mean virtually every statute would have retroactive effect -- contrary to long-standing precedent. It is not suprising that the only case amicus cites in this part of its brief, City of Orlando v. DeJardins, 493 So.2d 1027 (Fla. 1986), does not support that proposition.

On the contrary, DeJardins highlights the limited nature of the exception.

The case arose because the legislature, having enacted the Sunshine Law, discovered that one effect was to require the disclosure of of the litigation files of attorneys who represent

public agencies. A statute was soon passed creating an exception. The Court held that this applied retroactively. Justice Adkins, however, emphasized that the later act did not go to the substance of any cause of action. It was, instead, only a limited and technical regulation of the procedural framework for litigation in general.

That reasoning distinguishes this case.

Chapter 272 is hardly the technical correction characteristic of a "curative" statute. The amendment put an end to the statute of repose as far as future product cases are concerned. Beyond that, the Plaintiff's argument ignores both precedent and important considerations of policy.

C. The statutes before the Court are classically substantive.

A statute of repose is not a matter of remedy but, instead, one of substance. It does not codify any of the ways in which a right might be enforced or even close off one such path. Instead it defines an important dimension of the cause of action itself.

The New Jersey Supreme Court explained the significance of those facts in Rosenberg v. Town of North Bergen, supra:

> [T]he statute . . . does not bar a cause of action; its effect, rather, is to prevent what might otherwise be a cause of action, from ever arising. [Once the period runs] the injured party literally has no cause of action. The harm that has been done is damnum absque injuria -- a wrong for which law affords no redress. The function of the statute is thus rather to define substantive rights than to alter or modify a remedy.
> 61 N.J. 190, 293 A.2d 662 at 667.

Accord Cheswold Volunteer Fire Co. v. Lambertson Construction Co., 489 A.2d 413 (Del. 1984); Colton v. Dewey, 212 Neb. 126, 321 N.W.2d 913 (1982).

In the context of product liability, the effect of §95.031(2) is that if the article did no harm during the twelve year period, it is "reasonably safe" or "not defective" as a matter of law even if an accident later does occur. Necessarily, then, the statute helps to define the wrong and to establish one of the fundamental limitations on the scope of the manufacturer's duty. In short it is substantive and not merely remedial.

It follows that such a statute could not be enforced retroactively in the absence of "clear and manifest" intention to that effect by the legislature; Seddon v. Harpster, 403 So.2d 409 (Fla. 1981), Young v. Atenhaus, 472 So.2d 1152 (Fla. 1985) and certainly not in a manner which would destroy vested rights.

It also follows that Chapter 272, having abolished such a critical substantive measure, cannot itself be dismissed as a mere "technical correction". The effect is too profound and too closely linked to the definition of the product liability cause of action.

D. A reversal would have effects far beyond this case.

The Plaintiff asserts (Pb. 10) that Ford did not "rely" on the statute to set its prices. That is pure speculation. Nevertheless, in speaking of the economic impact of the legislation she calls attention to an additional, critical weakness in amicus' argument and, in fact, in her own position.

The absence of an express statement of retroactivity is no mere oversight, to be "cured" or "remedied" by a court's creative reading, as amicus would have it. That would be impermissible judicial legislation, on its face.

This is all the more true in view of the fact that the Chapter 272 was adopted during a perceived insurance and torts "crisis" and against the backdrop of other massive tort litigation reforms, most of which even became effective on July 1, 1986, the same day as did the pertinent portion of the statute.

The point is intensely practical.

If both the Tort Reform and Insurance Act and Chapter 272 are deemed to operate prospectively, the legislature would have made adjustments to the position of each side as to future cases. On the other hand, it would not have changed the position of either side as far as the older cases were concerned.

If, however, Chapter 272 were to be retroactive, that consistency would be destroyed. The legislature would have removed existing protection for older products but -- on the same day -- it would have given more protection to new products.

It would not have made sense for the legislators to move in opposing directions on the same problem on the same day.

Even more important, the Court could not now intervene by concluding that Chapter 272 should be retroactive unless it were willing to overrule basic precedent. That, in turn, would raise

questions as to the effect on other closed cases and controversies. The resulting uncertainty and confusion would increase premiums and the prices of manufactured articles, as potentional defendants sought to protect themselves against the unexpectedly revived risks.

PART 2

Introduction:

Our alternative analysis leads to the same result as does Part 1, but it does so through an examination of the statutory text, the legislative history and the background of Chapter 272 in terms of other legislation and considerations of policy. The Plaintiff, in contrast, largely ignores these matters although they are critical to the decision of a question of such public importance.

Her strategy, instead, is to beg the question as to whether Chapter 272 is a "repeal" for the technical purpose of retroactivity analysis. She merely picks the label she desires without giving the Court any reason to choose that designation rather than another. It may be shrewd advocacy to take that oversimplified approach but it is no help in making a reasoned decision.

The Court cannot decide whether the rule to which the Plaintiff refers was meant to apply to this situation, or whether it would achieve a result consistent with the legislative intent,

unless it carefully examines every aspect of the matter. Deciding whether this is a "repeal" for purposes of retroactivity is the last step in that process, not the first.[2/]

II.

THE PLAINTIFF'S TALK ABOUT A "REPEAL RULE" EVADES THE FUNDAMENTAL QUESTION OF WHETHER THAT DICTA WAS INTENDED TO APPLY TO A STATUTE LIKE CHAPTER 272

A. The Plaintiff's brief does not offer the Court any guidance as to the nature of a "repeal" even though that term is the basis of her position.

The unstated -- and unexamined -- premise of the Plaintiff's argument is that a "repeal" can be recognized without question and then dealt with by mechanical rules.

That is not the law. Indeed, even the apparent simplicity of the Plaintiff's approach is a mirage. She and her amicus never say why one statute is a "repeal" while another is not. They merely use the word as a rhetorical device, a different way to express the result they want -- that Chapter 272 be enforced retroactively regardless of the consequences beyond this lawsuit and the others in which the Plaintiff's Bar is immediately interested.

2/ The lower courts already have recognized that the label should not control the outcome. In this case, Judge Orffinger called Chapter 272 an "amendment". In other cases, judges have refered to it as a "repeal". But no judge has decided that the statute is retroactive.

The Court, however, cannot avoid the question.

B. Even the authorities the Plaintiff cites do not claim that "repeal" is a self-defining concept.

The authorities the Plaintiff herself emphasizes recognize that the presumption that a "repeal" is retroactive is not a rule but a generality, subject to many exceptions.

The Sutherland text, in particular, destroys the Plaintiff's basic premise by recognizing that "repeal" is not a single, unmistakable phenomenon but a general concept which blends imperceptibly into that of "amendment." As the author puts it:

> "Repeal and amendment are not mutually exclusive terms ...they both are frequently applied to the same act."
>
> Sutherland, Stat. Const. §23.02 (4th ed.)

Later he elaborates on the same point:

> "Where the repealing effect of a statute is doubtful, the statute is strictly construed to effectuate its consistent operation with previous legislation. A court may examine legislative history to find whether repeal was intended."
>
> Sutherland, Stat. Const. §23.10 (4th ed.)

The logical import is that unless the case clearly falls within the bounds of the "repeal" principle, it is subject to the general rules of interpretation including the strong presumption in Florida against retroactivity.

Indeed, when Sutherland deals with the question of how a court is to decide whether a statute is a "repeal" he suggests exactly the analysis we would urge:

> In determining whether a repeal has been effectuated, the environment, association and character of the statute in its field of operation, the history of previous legislation, the legislative history of the act, and the nature of the defect sought to be remedied by its enactment are all important factors to be considered by the courts. Likewise, the rules pertaining to mandatory and permissive verbs, and the time of taking effect may be of conclusive significance.
>
> Sutherland, Stat. Const. 23.06 (4th ed.)

Plaintiff has not given the Court the benefit of that analysis. Her failure unfairly saddles the Defendant with the necessity of "proving a negative" i.e. that Chapter 272 is not a "repealer".

Nevertheless, that is what we will do.

C. Common sense and accepted terminology show that Chapter 272 was not a repeal in the technical sense the Plaintiff uses that word.

We would not deny that Chapter 272 changed the prior law. But it is equally obvious that there must be more than a change if a bill is to be governed by the special rules pertinent to a "repealer". If that were not so, every new statute could be said to "repeal" the previously existing law so that the norm would be for statutes to have retroactive effect. The law, of course, is exactly the opposite. Young v. Attenhaus and Seddon v. Harpster.

Further, if that were not already the rule, the courts would have to develop the same analysis. Consider a simple example. If the legislature were to delete the words from the traffic code which require motorists to stop at a red light, the change might

be said to be a "repeal" in ordinary speech. That would not mean, however, that the change necessarily operates retroactively. A Judge would be irresponsible if he did not require strong evidence of such an unusual intention.

Similarly, it is true that "repeal" suggests abolition in ordinary speech. But ordinary speech does not trigger the technical rules of retroactivity. Furthermore Chapter 272 did not abolish the statute of repose. It remains in effect to this day. The change, instead, was only to delete the sections of the statute which apply to prior liability cases.

This, in turn, means that the work done on the statute fits the basic definition of an amendment -- a change which removes a portion of a document while leaving the rest in effect. Sutherland, Statutory Construction §23.02.

These principles of interpretation, like every other, are subject to the overriding consideration of the legislative intent.

III.

THERE IS NO SIGN IN THE LEGISLATIVE HISTORY OF AN INTENTION THAT THE CHANGE IN THE STATUTE OF REPOSE SHOULD BE RETROACTIVE

The Plaintiff's Bar would have the Court believe the legislature passed something called "The Pullum Repealer" in a storm of indignation. In reality, the transcript of the House debates (Appendices "B" and "C") does not show any legislator criticizing that case.[3/]

3/ Only one speaker, Mr. Hickson even referred to the case and then not by name. (See Appendix "B"). The statute, in fact,

Footnote Continued

Further, no speaker said that the proposed change in the statute would have any retroactive effect. Still less did anyone suggest the legislature should foment a constitutional battle by purporting to override judicial precedent which protects vested rights in such a situation.

Similarly the staff analyses prepared for the House of Representatives (Appendices "D" and "E") do not use the word "repeal" or discuss the possibility of retroactive effect. Note in particular, the sections on "economic impact". The authors spoke of the likelihood that the legislation would result in a greater number of judgments and "an increase in the number of cases which would be filed and which may proceed to trial". But there is not a single reference to the possibility that closed cases might be revived or appellate decisions overruled; or old cases revived so that plaintiffs could sue on products even where the twelve year period had expired. Yet those would be the consequences of a "repeal" under the plaintiff's view.

Footnote Continued from Previous Page

does not even track the subject matter of Pullum. Pullum held that the legislature could enact a statute of repose under which a cause of action could be barred before it accrued i.e. if the accident did not happen until the article was more than twelve years old. The statute now at issue does not address that question but, instead, removes product liability from the scope of the statute of repose altogether.

A. The Plaintiff's amicus did not warn the legislators of the supposed retroactive effect of the bill during the judiciary committee debate.

Other than the staff, the only witness before the Judiciary Committee was attorney W. C. Gentry, representing the Plaintiffs' Bar. (See Appendix "B"). Mr. Gentry did not once use the words "repeal" or "retroactivity". Nor did he mention the rule of thumb that a "repealer" generally operates retroactively, much less say anything about reopening cases where the period already had expired.

Indeed, Mr. Gentry gave this assurance to the committee:

> "The purpose of this is to at least allow a person who has been injured to bring a claim when they discover their injury and not to arbitrarily cut it off at twelve years, and we think it certainly is an amendment and its an amendment in the public interest, and that's the purpose of it." Appendix "B", p.3. (Emphasis supplied)

That testimony cannot be reconciled with the position the Academy now takes before the Supreme Court i.e. that the bill was a repeal and not an amendment.

On the contrary, everything in Mr. Gentry's presentation was consistent with the idea that this bill -- like the great majority of others -- would modify existing law rather than eliminate it; and that it only would have prospective effect.

IV.
THE TEXT OF THE STATUTE AND AN ANALYSIS OF THE BASIC NATURE OF CHAPTER 272 CONFIRM THAT THERE IS NO BASIS FOR THE PLAINTIFF'S DEMAND THAT THE COURT MAKE THE STATUTE RETROACTIVE

A. It is established law that a statute has only prospective effect unless the legislature shows a clear intention that it should operate retrospectively.

When the Court considers factors beyond the legislative history, one logical starting point would be the basic precedent which legislature assumed to be familiar with and to have taken into account. Bridges v. Williamson, 449 So.2d 400 (Fla. 2d DCA 1984) and Seddon v. Harpster, 403 So.2d 409 (Fla. 1981).

Retroactive legislation presents difficult questions of constitutional law and basic fairness. Hochman, The Supreme Court and the Constitutionality of Retroactive Legislation, 73 Harv. L.Rev. 692 (1960). Therefore, the presumption is that a bill is to operate only prospectively. This is true in Florida Young v. Altenhaus, 472 So.2d 1152 (Fla. 1985); Seddon v. Harpster, 403 So.2d 409 (Fla. 1981); and in other American jurisdictions as well. DeMars, Retrospectivity and Retroactivity of Civil Legislation Reconsidered, 10 Ohio Northern L.Rev. 253 (1983) at 258-259.

It follows that if a legislator intended that a proposed statute be the exception which operates retroactively, he or she would say so. No one did that during the hearings preceding its passage. Further this was no oversight.

B. The text of the statute does say that it is a "repeal".

The Plaintiff and her amicus talk about "repeal" and "The Pullum Repealer"[4/] but they do not point to that term anywhere in the statute.[5/]

The inconvenient fact is that the legislature just did not say Chapter 272 was a "repealer".

The statute does not bear that title.

Furthermore the word "repeal" never appears in the text. Instead Chapter 272 speaks twice of "amendment".

C. The statute does not use the phrasing or format of a typical Florida "repealer".

The few cases the plaintiff cites (Pb. 9) for retroactivity consistently discuss statutes which use direct and unequivocal language of "repeal".

Consider, for instance, the repeal of the Guest Statute, the subject of several of the cases the Plaintiff cites. Chapter 72-1, Laws of Florida says "Section 320.59, Chapter 320, Florida Statutes is repealed". If the 1985 session had used that straight-forward formula, it might be plausible -- although still

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4/ Amicus, in particular, carries the technique of propaganda to an absurdity. Changes in typeface suggest that the Plaintiff's Bar simply set its automatic typewriter to insert the phrase "The Pullum Repealer" at every possible point, complete with Victorian initial capitals. The insistent repetition might suggest to the unwary that the statute bore that title. The Court will see that the statute (Appendix "F") simply did not use such language.

5/ The reality is the statute does not address the question dealt with by Pullum and it does not "repeal" that case. Indeed, how could the legislature properly "repeal" a ruling by the Supreme Court on a matter of constitutional law?

far from compelling -- to suppose that the legislators meant to invoke the rule of thumb on which the plaintiff bases her case. In fact, however, the legislators did not use that language or anything like it. Rather, they quietly deleted those phrases which covered product liability cases.

If anything, then, the logic behind the Plaintiff's own theory suggests the draftsmen wished to avoid the presumption which would have been triggered if they had used the accepted formula -- that is if the statute book said "Section 95.031(2) is hereby repealed".

D. The dicta the Plaintiff relies upon does not take into account the complexities of a partial "repeal" or "amendment".

One of the Plaintiffs' secondary authorities, Corpus Juris Secundum, seems to speak only of the relatively simple situation in which an entire statute is "repealed". That is far different from the situation now before the Court, in which some of the statutory wording is deleted but other sections remain in place. In that context, a legal fiction that the amended provision "never existed" -- even though other parts of the same statute remain in full effect -- could distort the rights and duties of the persons subject to the statute.[6/]

6/ Changes in the tax code, for example, could be distorted.

That CJS did not address these complexities suggests the anonymous authors did not presume to set forth a general rule which would bind appellate courts in that difficult area.

The Plaintiff's major authority, the Sutherland text, does recognize the more complex possibility of a partial repeal. The author, however, does not say what effect that has on the presumption that the ordinary "repeal" statute is to have retroactive effect. Moreover, as we have seen, Sutherland does recognize that questions of this nature make it difficult, if not impossible, to say whether a particular statute would be more fairly characterized as a "repeal" statute or as an "amendment". Thus he, too, does not purport to set forth the rigid rule the Plaintiff advocates.

E. The Plaintiff also misinterprets other aspects of the statute and the inferences as to intent which they suggest.

The Plaintiff emphasizes (Pb. 3,8) that the statute does not have a "saving clause". But that actually undermines her claim that Chapter 272 was a retroactive "repeal". If the legislators had intended the statute to have retroactive effect, they would have wished to avoid a conflict with the settled doctrine that vested rights may not be destroyed.[7/] Therefore the draftsmen would have included a saving clause of some type, perhaps one defining those rights and differentiating them from the claims and defenses which were to be destroyed.

7/ The authority for that rule of law is discussed at p. 20 infra.

They did not take that precaution. The logical explanation is that there was no need for a saving clause because the bill, like the vast majority of others, was intended to have only prospective effect.

Similarly, Section Three of Ch. 272 -- that which deleted product liability cases from the statute of repose -- recited that it was to take effect on July 1, 1986. Yet if the legislators had intended that the change should operate retroactively, there would have been no reason for the draftsman not to have allowed the bill to become law sixty days after the end of the session of the legislature, as it would under Art. III, §9, Fla. Const. Once the statute did take effect, everything that had happened in the past would be governed. It would not matter whether the date chosen was July 1st or December 30th. Thus specifying the date would have been a vain act under the Plaintiff's theory.

F. Section Three, at most, might create an ambiguity concerning the question of retroactivity.

The legislators put two different dates of effectiveness together in Section Three. The first clause recites that it will apply to causes of action which accrue after a certain date. The other clause is silent on that point. The Plaintiff tries to squeeze the necessary "strong evidence" of legislative intent for retroactivity from those meager facts.

That effort is doomed. An ambiguity might be construed against the draftsman if this were a contract case. But the Court is dealing with interpretation of a statute, a matter in which important public interests are at stake. Therefore the presumptions are strongly against the Plaintiff's position.

More particularly, the fact the two sections are somewhat different proves little or nothing.

The difference might be a mere oversight by the staff draftsmen. It is only in the light of hindsight, after all, that the supposed need for coordination between the two parts becomes significant. Section One deals with libel and slander whereas Section Two deals with the radically different subject matter of fraud and product liability. The considerations which bear upon one are not the same as those which bear upon the other; and the two sections were not required to operate together as a unit.

Indeed, the Plaintiff may well place the emphasis on the wrong section. The decision to take special care to make it explicit that the change in the period for libel and slander applied to causes accruing as of a certain date may have nothing at all to do with Section Two or product liability. It is more probable, in fact, that it reflects some aspect of libel and slander law, or even a political reason -- such as the effect of that date on a claim against a powerful newspaper.

Realistically the Court will never have a definitive answer to these uncertainties. But that lack of information about one section is hardly a "clear and manifest" basis for an inference that the legislature desired to take the unusual and drastic step of making the other section retroactive.

A moment's thought shows that this would be a round-about and undependable way to achieve the result the Plaintiff attributes to the legislators. Indeed it seems inconceivable that the draftsmen would not have made their intention far more explicit if they wanted Section 1 to be a mere amendment, without retroactivity, while Section 2 was to be a full repealer with total retroactivity.

In any event, the legislative history offers an explanation which is simple and far more convincing than lawyer's speculation.

The statute was a combination of two bills, one (HB 832, Appendix "F") dealing with libel and slander and the other (HB 944, Appendix "F") with product liability. The final version incorporated that language from each bill which set its date of effectiveness. The difference shows only that the person who combined the bills saw each provision as adequate for its purpose.

All else is guesswork.

V.

THE CHANGES, OVER TIME, IN THE EFFECT AND SCOPE OF THE STATUTE OF REPOSE ARE NOT "UNFAIR" BUT AN UNAVOIDABLE COST OF A DEMOCRATIC SYSTEM, TEMPERED BY AN INDEPENDENT JUDICIARY

With an aristocratic contempt for precedent, Amicus asserts (Ab. 25, 29) that the amending statute also must operate retrospectively because Pullum, a judicial opinion, has that effect. The argument may have the appeal of superficial symmetry, but it cannot withstand analysis.

The suggestion ignores the abundant holdings to the contrary and the underlying differences between courts and legislatures.

Still the Court may be troubled by the possibility of "unfairness" arising from the complicated relationship between the amendments and the changes of judicial doctrine.

The plaintiff's complaint (Pb. 13) that the manner in which the statute and Pullum interact does not bear a "reasonable relationship to any legitimate purpose"[8/] seems designed to

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8/ Although this part of the Plaintiff's brief uses the language of equal protection doctrine, she does not advance any constitutional argument. Certainly she could not succeed in such a contention. The reason for the confusion is that the situation involves two statutes and two different judicial opinions on the same constitutional issue. No one suggested that the relationship among the statute and the judicial opinions as to constitutionality served any purpose in and of itself. In any event, a "reasonable relationship" between a statute and an opinion is inherent in judicial review. That is the purpose of the long settled body of precedent concerning the differences between a statute and an opinion in terms of retroactivity. Realistically, the Plaintiff's argument is merely another belated attack on the result of Pullum. As to amicus, if

Footnote Continued

appeal to that concern.

Similarly she demands that the Court discuss various questions which were not certified;[9/] and then says the answers would support her suggestion that there would be a "crazy quilt of artificial time limits."

She does not explain, of course, why those time limits are any more "artificial" than any other time limits set forth in a statute.

A more general answer is that if, arquendo, there is "unfairness" in the situation, it falls impartially on individual defendants and plaintiffs alike. Each has been required to participate in complicated litigation because of the changes.

We suggest, moreover, that Plaintiff overlooks the implications of our constitutional system when she complains of unfairness. For the same reason, the mockery implicit in amicus' cartoon and her talk of "Alice In Wonderland" is ill placed.[10/]

Footnote Continued from Previous Page

the Plaintiff's Bar truly were distressed by changes in the law over time, it would not have campaigned to change the statute of repose. Obviously its true concern is only over who wins this lawsuit. and others like it.

9/ We suggest that the Court, in fact, cannot answer those questions because the Plaintiff has not specified whether the State of Repose had run in each instance and, more important, no litigant has the power to compel the Court to issue an advisory opinion on a hypothetical matter. If the Court chooses to answer, we suggest that it should assume that the Statute of Repose had run before repeal in each instance and that each question, accordingly, should be answered "Yes".

10/ To respond in amicus' own terms, if the public is puzzled by the changes in doctrine over the past years, it hardly would

Footnote Continued

The courts cannot be expected to hold that it is "unfair" to one plaintiff that he is barred by the statute of repose while another is not, depending on the age of the product. Nor could one defendant complain that another escaped liability for the same reason. The legislature decided that difference in result was necessary, given the different circumstances of the claimants and the importance in product liability law of a fundamental matter as the passage of time.[11/] The principle of separation of powers requires that the decision of the other branch be respected.

Similarly litigants -- and the courts -- must respect the power of a later session of the legislature to adopt a different rule -- albeit that power is subject to constitutional limitations such as respect for vested rights.

Footnote Continued from Previous Page

be reassured by a revolutionary judicial opinion abolishing fundamental precedent as to the difference between a statute and a judicial ruling. Particularly when that opinion would be a holding that there never was a statute of repose after all because the legislature somehow and at some time passed something called "The Pullum Repealer" even though Chapter 272 does not bear that title or even deal with the same subject matter as did the Pullum opinion. The Red Queen would be proud of such an effort.

11/ See Henderson, Product Liability and the Passage of Time: The Imprisonment of Corporate Rationality, 58 NYU L.Rev. 165 (1983).

We would be the last to deny that these changes cause disruption. But, regrettable as it is, the confusion is an unavoidable consequence of the legislature's power to change the law from time to time.

The Court also has changed its view as to an important constitutional issue -- the breadth of the powers of the legislature. The institution is flexible and realistic enough to correct what it sees as a mistake. That is one of the strengths of our system. The complexities and changes in the result of lawsuits such as this are an inescapable side effect, but worth the price.

VI.

THE PLAINTIFF'S MISCELLANY OF OTHER ARGUMENTS HAVE NO SUBSTANCE

A. That the appellate court must apply the law "as it is at the time of the appeal" adds nothing to their position.

The Court, of course, may consider the existence of Chapter 272 at this stage but it still must interpret that statute in the light of precedent and logic. It would make no sense to say that if a statute is passed during the course of an appeal it must be retroactive. Yet that is what the Plaintiff (Pb. 7) and her amicus (Ab. 18-19) seem to suggest.

We think it clear from the authorities already discussed in this brief that the decision on retroactivity should depend upon the legislative intent and logical analysis, not a fluke of timing. Consider, after all, the implication of amicus' argument.

A statute passed after the cause of action had accrued, but during the trial, would not govern if it was not intended to be retroactive; but the same statute would be retroactive -- no matter what the legislature intended -- if it were not passed until later when the appeal had begun.

None of the cases the Plaintiff cites suggests that such an absurdly rigid result is necessary or even appropriate. [12/]

B. That the law was changed is a neutral fact insofar as the different question of the retroactive effect of that change is concerned.

The defendant concedes that the legislators changed the statute of repose so that it no longer limits product liability actions. That, however, is separate and distinct from the question before the Court -- whether the legislators intended the change to be retroactive.

12/ Bradley v. School Board of City of Richmond, 416 U.S. 696, 94 S.Ct. 2006, 40 L.Ed. 2d 476 (1974) the decision which the Plaintiffs' Bar relies on for that strange proposition actually has no bearing on this case. To begin, the Court was discussing a federal statute. The principles of interpretation in that situation do not apply when a state supreme court deals with a state statute. Furthermore, Bradley involved a class action based on a civil rights statute and the Supreme Court said that extraordinary subject was different from "a mere dispute between private persons". Even more important, Bradley itself rejects the plaintiff's suggestion. The paragraph she cites is followed immediately (Id., 40 L.Ed 2d at 490-491) by a statement that such a statute would not control if there were indications in the legislative history that it should not govern the particular case -- the situation in this instance.

The Plaintiff also makes little sense when she suggests (Pb. 11) that a statute's retroactive or prospective effect can depend on the number of months which elapse between its passage and a prior judicial opinion dealing with the question of constitutionality in application. There is no such principle of law.[13/] Further the two questions are "apples and oranges".

Similarly, the Plaintiff's brief claims (Pb. 11) that the fact three sessions passed the statute of repose without change means that the legislature necessarily approved Battilla. That reading may be permissible speculation but it is anything but compelling. It certainly does not lead to the far different conclusion that a later session of the legislature intended that the courts should go back over old cases and that they should be decided on the basis that there never was a statute of repose at all yet that is what retroactivity would mean.

C. The usury cases emphasized in the Plaintiff's brief have little relevance.

The Plaintiff dwells on the complexities of usury cases and says that "by analogy" §95.031(2) does not "destroy or

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13/ The Court has rejected similar suggestions in the past. See, for example, Seddon v. Harpster, 403 So.2d 409 (Fla. 1981) where the Second District certified a question concerning a statute of limitations, in part at least, because of a belief that the fact the legislature changed the Statute during the session immediately following a Supreme Court ruling interpreting it shed light on the intention of the original version of the statute. The Supreme Court, however, affirmed without even discussing the possibility that the timing of the amendment somehow might reveal intention.

obliterate" a cause of action but only gives the manufacturer a privilege to set up an affirmative defense. She does not cite any authority for the proposition. Further she studiously ignores the differences between the two concepts.

No one ever said §95.03(2) "destroyed" a cause of action. But, as we suggested earlier, the statute of repose -- unlike the usury statute -- does define important boundaries of a substantive cause of action. Therefore it can prevent one from coming into existence.

Thus the statute of repose is not a mere personal defense; and the two concepts are not "analogous".

The other arguments she draws from usury cases also do not support her position.

For example, she quotes Sutherland and Yaffee v. International Company, 80 So.2d 910 (Fla. 1955) (Pb. 5) as authority that the dicta about a repealing statute usually having retrospective operation "is based upon, and confined to, the situation where a right or remedy has been created wholly by a statute." Presumably that is true but it casts still more doubt on the relevance of her rule of thumb to this case.

Usury forfeitures are unique. The statute of repose is a far different matter. Under the common law there can be no liability for an accident which occurs after the useful life of the product has expired, See Barich v. Ottenstror, 550 P.2d 395 (Mont. 1976) and Jakubowski v. Minnesota Mining & Manufacturing,

42 NJ 177, 199 A.2d 826 (1964) or when it has worn out. The Plaintiff herself recognizes this. (Pb. 10) Thus the statute is, at least in part, the codification of a common law right and not one which is "created wholly" by statute.

In any event, this abstruse point cannot control the outcome of the case.

We call attention, once more, to the fundamental point. Whether or not the Plaintiff is correct as to what would happen if the statute were a strict "repealer", Yaffe has nothing to do with the threshold question of whether Chapter 272 is a "repealer" or instead, an amendment or perhaps a limited "repeal" without retroactive effect.[14/]

Equally important, precedent that a usury forfeiture can be abolished retroactively and that it creates no vested rights proves nothing pertinent to this appeal. The statute of repose -- unlike a mere forfeiture -- does create vested rights.

D. The Plaintiff avoids any mention of a far more direct analogy - the statute of limitation cases.

Florida consistently has refused to apply a change in the statute of limitations retroactively, absent an indisputable statement of legislative intent.

14/ That would be one way to describe the situation in which Chapter 272 had some retroactive effect in the sense that a defendant can be deprived of the benefit of the statute of repose if the twelve year period had not yet run before the enactment of Chapter 272. That, of course, has nothing to do with this case.

That is so where an amendment would operate to shorten the time for suit.[15/] Foley v. Morris, 339 So.2d 215 (Fla. 1979) (new statute of limitation which shortened time to sue from four years to two years could not be applied retroactively).[16/]

Even more significant, the Court has held that a plaintiff is not entitled to the benefit of an amendment which lengthened the statute of limitations. In Homemakers, Inc. v. Gonzales, 400 So.2d 965 (Fla. 1981) the ruling was that the amendment applied prospectively only. See also Walter Denson & Son v. Nelson, 88 So.2d 120 (Fla. 1956).

In principle, the decision to delete product liability cases from the statute of repeal was similar to these changes in the statute of limitations. It would be strange, then, to come to a conclusion directly opposite to that which the courts have reached so consistently when they address the comparable issues.

That departure from precedent would be an absurdity if it had no basis other than the fact that Plaintiff's counsel diligently labels the changes a "repeal" rather than an amendment.

15/ See also, Stuyvesant Insurance 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 plaintiffs' time to sue)

16/ See also, Garafalo v. Community Hospital of South Broward, 382 So.2d 722 (Fla. 4th DCA 1980) (two year statute of limitations as to suits for negligence against hospitals in their capacity as health care provider was not to be applied retroactively).

PART 3:

THE PLAINTIFF DID NOT ADVANCE HER ARGUMENTS CONCERNING THE EFFECT OF PULLUM WHILE THE CASE WAS BEFORE THE TRIAL COURT

The Plaintiff has abandoned the issue on which she relied before the trial court.[17/] On appeal she urges -- for the first time -- the significantly different contention that the rule of Pullum v. Cincinnati, Inc., 476 So.2d 657 (Fla. 1985) should not be applied retroactively.

When she failed to raise this issue below, the Plaintiff waived any right to use it on appeal. See, e.g., Dober v. Worrell, 401 So.2d 1322 (Fla. 1981); Lipe v. City of Miami, 141 So.2d 738 (Fla. 1962); Abrams v. Paul, 453 So.2d 826, 827 (Fla. 1st DCA 1984) ("... the function of the appellate court [is] to review errors allegedly committed by trial courts, not to entertain for the first time on appeal issues which the complaining party could have, and should have, but did not, present to the trial court.").

17/ Before the trial Judge, her only contention was that the statute of repose did not apply to a wrongful death action. The plaintiff has admitted that the twelve year repose period established by Section 95.031(2) expired before the accident that injured Grady Pait. Further, on appeal she has not denied that the trial court was correct in ruling that the product liability statute of repose precludes a wrongful death action in a case where a claim by the decedent would have been time-barred if he had survived. See Phlieger v. Nissan, 487 So.2d 1096 (Fla. 5th DCA 1986). Thus, the plaintiff effectively has conceded that the trial court was correct when it ruled against the only argument she made below.

VII.

A RULING THAT PULLUM WAS ONLY PROSPECTIVE WOULD BE INCONSISTENT WITH PULLUM ITSELF AND ESTABLISHED FLORIDA LAW

A. Pullum itself is dispositive of the retroactivity issue.

The Florida Supreme Court has held that the courts of appeal are "required to apply the law as it existed at the time of appeal." Florida East Coast Railway Co. v. Rouse, 194 So.2d 260, 262 (Fla. 1967). This is so even though the law at the time of trial may have been different. Also see, Eastern Air lines, Inc. v. Gellert, 438 So.2d 923, 929 (Fla. 3d DCA 1983). It follows as the Supreme Court has said, that "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." Florida Forest & Park Service, v. Strickland, 154 Fla. 472, 18 So.2d 251, 253 (1944).

Florida law, as it stands today, requires the affirmance of the circuit court's order. This would be true even if there were nothing in Pullum to suggest that the Supreme Court considered the retroactivity issue. But, in reality, an examination of the case makes it clear that the Court did have to deal with that concept in order to reach the conclusion it did.

To begin, the Court confronted an anomaly that had been created by its prior decisions.

Battilla had held that the statute of the twelve year repose period had expired. Thus persons injured after the twelve year repose period had the full four year period of §95.11(3)(1) in which to institute their action. However, Purk had held that the statute of repose could be applied, constitutionally, when it merely shortened the time within which suit could be brought. Thus persons injured more than eight but less than twelve years after the product's first sale were given less than four years to institute their action.

Mr. Pullum was injured ten and one-half years after the product's first sale. At the time of his injury, he had one and one-half years in which to file his action before the repose period would expire. He did not do so, but he did sue within four years of his injury. The trial court granted summary judgment to the defendant. The district court affirmed, on the authority of Purk.

Before the Supreme Court, Pullum argued that there was no rational basis on which to treat persons injured eight to twelve years after sale differently than those injured more than twelve years after sale and, accordingly, that section 95.031(2), as applied after Purk and Battilla, violated equal protection.

The Supreme Court did not rule on the merits of Pullum's argument. Rather, it expressly receded from Batilla and held that this eliminated the disparate treatment upon which Pullum's equal protection argument was based. This led to the conclusion

that the statute of repose was not unconstitutional as applied to persons injured after the repose period had expired. On that basis, the Court affirmed the summary judgment entered against Pullum.

Yet, if Pullum were only prospective, the unequal and allegedly irrational treatment about which the plaintiff had complained would remain. Persons (like Grady Pait) injured prior to Pullum, but more than twelve years after the product's sale, would have a full four years to begin their action. But persons (like Pullum himself) injured prior to Pullum but between eight and twelve years after the product's sale would have less than four years. Therefore if the Pullum decision were only prospective in effect, it could not have eliminated the premise of Pullum's equal protection argument, and the Supreme Court could not have affirmed the summary judgment without addressing the merits of that argument.

The Court, however, deemed it unnecessary to address that question. Therefore it necessarily is implicit in the Court's holding -- that the premise of Pullum's equal protection argument had been eliminated and that summary judgment against Pullum was proper -- that the decision was to operate retrospectively as well as prospectively.[18/]

18/ The point that a prospective application of the Pullum decision would not resolve Pullum's equal protection argument was squarely presented to the Court by Pullum's Motion for Rehearing. Thus the Plaintiff's apparent suggestion that the Supreme Court did not understand the significance of its holding it is unwarranted.

B. Established principles of Florida law dictate that Pullum be given retrospective as well as prospective effect.

If the Court were to choose to reexamine the issue of Pullum's retrospective effect at this late date, the result would be the same.

The controlling principles are clear. Indeed they were set forth as early as 1911 under circumstances similar to those of this case:

> Where a statute is judically 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 be invalid will not be affected by the subsequent decision that the statute is unconstitutional.
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> Christopher v. Mungen, 61 Fla. 513, 55 So. 273, 280 (1911) (emphasis added).

The Plaintiff virtually ignores this general rule. Thus she argues that when Grady Pait was killed, Battilla "was the law in Florida". She then leaps to the conclusion that she somehow acquired a vested right to sue, protected against the retrospective application of Pullum or any other Supreme Court decision.

The Plaintiff's Bar elaborates on that theme by their lengthy argument that the tort claimant must have a vested right if the manufacturer acquired a vested right when the statute of repose ran.

Each argument is flawed. The two situations are not comparable. The statute is valid; the Plaintiff has not challenged either §95.031(2) or Chapter 272 on their merits.[19/] In contrast, Batilla, the original judicial opinion, was not valid.

Further, when the Florida Supreme Court declared that Batilla was incorrectly decided, its decision meant that Batilla was not and never been the law of Florida[20/] and that the Plaintiff could acquire no rights by virtue of that decision.

This is demonstrated by the facts and holding of Christopher Mungen, 61 Fla. 513, 55 So. 273 (1911) a case the Plaintiffs' Bar attempts to rely upon. Christopher was a title dispute. Jane Mungen claimed to have inherited a one-half interest in real property from her father. The successors in interest of Jane Mungen's half sister, Eliza Lewis, however claimed to own the entire parcel.

Jane Mungen's mother had been a slave who died prior to emancipation. An earlier decision of the Supreme Court made Eliza Lewis (whose mother had beem emancipated) the heir of her father

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19/ Indeed she attempts to rely upon Chapter 272. Presumably a court would not have any patience with a demand that it reconsider the merits of Pullum and return, yet again, to the constitutionality of §95.031(2) even if that issue had been raised and preserved.

20/ This is traditional or "Blackstone" doctrine. The Court undoubtedly is aware of more sophisticated jurisprudential analyses but they are not pertinent to this question.

to the exclusion of Jane Mungen. Thus, under that decision, the successors in interest of Eliza Lewis were entitled to sole title to the land. In Christopher, however, the Court overruled the earlier case and held that Jane Mungen "has a legal title by inheritance . . . to an undivided half of the land." This change in the law meant the successors in interest lost their claim to that undivided half. Moreover, the Court expressly stated that "[t]he decision overruled did not vest rights in those not party to the suit." 55 So. at 281.

The Court applied the same principle more recently in Rupp v. Bryant, 417 So.2d 658 (Fla. 1982), another case upon which amicus tries to rely. The plaintiff in Rupp was injured by the negligence of a public employee. Subsequently, the legislature passed a bill making public employees immune from liability for negligent acts. By its own terms, this statute was to operate retroactively. The Supreme Court held that the statute could not be applied retroactively to destroy a cause of action that had vested under the law as it stood prior to the statute's effective date. To apply this holding, the Court then was required to determine what the law had been prior to the enactment of the statute.

Earlier the Court's view had been that victims of governmental negligence had always been able to sue the employee individually. District School Board v. Talmadge, 417 So.2d 698 (Fla. 1982); Rupp, supra. Under that doctrine, the Rupps had an

unqualified right to sue the public employee defendant. In Rupp, however, the Supreme Court determined that Talmadge was wrong.

Under the Court's new view, public employees were immune from suit unless they owed a special duty to the tort victim and the injury occured in the course of ministerial duties. The Court expressly applied this stricter standard to the Rupp plaintiffs, even though that effectively deprived them of the unqualifed right they had enjoyed under Talmadge.

Yet another example is Eastern Air Lines, Inc. v. Gellert, 438 So.2d 923, 929 (Fla. 3d DCA 1983). At the time of trial in that case, the law in the Third District was that a corporation was liable for punitive damages if its employee, acting in the scope of his employment, was guilty of willful and wanton misconduct. Mercury Motors Express, Inc. v. Smith, 372 So.2d 116 (Fla. 3d DCA 1979). The jury in Eastern was so instructed, and it assessed punitive damges against the employer. A judgment was entered and the employer appealed. While the case was on appeal, the Supreme Court reversed the Court of Appeal and held that punitive damages could not be assessed against the employer unless the employer was at fault. Mercury Motors Express, Inc. v. Smith, 393 So.2d 545 (Fla. 1981). The Court of Appeal held, in Eastern, that it was bound to apply the law as it stood at the time of appeal. It reversed the punitive damage award against the employer, thus denying the plaintiffs the benefits of the incorrect district court opinion in Mercury Motors. For similar

analysis, see Lamb v. Volkswagenwerk, 631 F.Supp. 1144 (S.D. Fla. 1986).

In short, as the Court expressly held in Christopher, an incorrect decision vests no rights in anyone.

This is not to say, of course, that the incorrect decision always will be treated as a nullity. As the court observed in Strickland, there are certain common sense exceptions. For example, Christopher itself suggests that a final, unreviewable judgment will not be disturbed even if based on an erroneous decision.

There is also a "common sense" exception by which a decision overruling a prior construction of a statute will not be given retrospective application if that would destroy "property or contract rights . . . acquired under and in accordance with such construction . . ." Strickland, 18 So.2d 253.

The Plaintiff has sought to expand that exception by a highly selective reading. But the issues of Strickland, in fact, are readily distinguishable from those presented by a statute of repose case -- as the District Courts of Appeal,[21/] the Federal District Court[22/] and the United States Court of Appeal for the Eleventh Circuit[23/] already have recognized.[24/]

21/ Cassidy v. Firestone Tire and Rubber Co., 495 So.2d 801 (Fla. 1st DCA 1986).

22/ Eddings v. Volkswagenwerk, 635 F.Supp. 45 (N.D. Fla. 1986); Lamb v. Volkswagenwerk Aktiengesellschaft, 631 F.Supp. 1144 (S.D. Fla. 1986)

23/ Hartman v. Westinghouse Electric Corporation, Case No. 85-3967 (11th Cir. June 20, 1986).

Footnote Continued

In Strickland, the claimant in a workmen's compensation case appealed directly to the circuit court from the unfavorable order of a commissioner. At the time, the relevant statutes had been interpreted to allow such an appeal. The circuit court ruled in claimant's favor, and the employer appealed. Subsequently, the Supreme Court ruled that an appeal to the circuit court was not proper until after review by the Florida Industrial Commission. The employer argued that this new rule should be applied to the claimant. The Supreme Court rejected that argument as unfair. The plaintiff had relied on the overruled decision in appealing to the circuit court and the time period for review in the Industrial Commission had "long since expired."

In short, in Strickland retroactive application would have deprived the claimant of both substantive rights (the compensation payment) and procedural rights (review of the commissioner's order), rights that the claimant had acquired independently of the overruled decision.

In sharp contrast, there are no factors which could justify such a departure from the general rule in this case.

The Plaintiff does not have a judgment in her favor.

24/ Indeed, every other plaintiff in this series of cases has tried to rely on Strickland; and the Plaintiff's Bar, as amicus also has emphasized that case.

She did not change her position because of the overruled decision. The courts have long recognized taking the risks involved in filing suit is not "reliance" for this purpose. See Cassidy v. Firestone Tire and Rubber Co., 495 So.2d 801 (Fla. 1st DCA 1986). A contrary rule -- "grandfathering" litigants -- would make the common law system hopelessly complex and unworkable.

Nor has the Plaintiff been denied any substantive or procedural rights that she acquired independently of the overruled decision.

At bottom, her argument is no more than an assertion that she should be allowed to maintain a cause of action because of the fortuitous circumstance that an incorrect decision in her favor had not yet been overruled at the time of the accident. Nothing in Florida law support such an argument.

C. The Plaintiff has not shown any public need for a ruling that Pullum is limited to prospective effect.

Commentators and leading jurists suggest that the courts are wise to be sparing in the use of the prospective opinion. DeMars, Retrospectivity and Retroactivity of Civil Legislation Reconsidered, 10 Ohio Northern L.Rev. 253 (1983) at 263. That technique tends to clash with the public's view of the appropriate role of the courts; and to resemble encroachment upon the traditional role of the legislature. Perrello, et al., Retroactivity of California Supreme Court Decisions: A Procedural

Step Toward Fairness, 17 Cal. Western L.Rev. 403 (1981) at 416-418.

Therefore it is not suprising that the Florida Supreme Court only rarely has made a decision prospective. Moreover, most of those instances involved questions of criminal procedure, where the Court had good reason to be concerned with the disruption that retroactivity would cause.

In contrast, there is no instance where the Court has receded from an important constitutional ruling in a civil case -- in effect, overruling itself -- and then, years later, returned to the subject to show that the second opinion, after all, should have been interpreted to be prospective only.

To speak less theoretically, there is no practical need for such a ruling. The record does not contain any statistics as to the number of cases which would be affected. Thus the Court has no way to know whether the Plaintiff's demand would reduce the practical difficulties the lower courts face.[25/]

There are reasons, in fact, to believe that it would make matters worse.

Two years, after all, have gone by since Pullum. Is the "prospectivity" to be from the date of the declaration in this case, or from Pullum itself? The latter result would require the

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25/ This is not a situation like Hoffman v. Jones, 280 So.2d 431 (Fla. 1973), where a retrospective change in fundamental doctrine obviously would have required the reversal of a large number of cases in which the trial had been completed.

reversal of decisions by two different districts of the Court of Appeal, a variety of trial courts and the Federal District Court - all of which have relied upon the settled principle that a constitutional ruling operates retrospectively.

Beyond that, the question of retroactive or prospective effect would be transformed into an important and time consuming issue in every case to come before the appellate courts; and any decision that did not deal with the question explicitly could be followed by wearisome subsidiary appeals.

We add that restraint in the resort to the "prospective" technique is particularly appropriate where the Court deals with constitutional issues.

In Pullum, the majority opinion was based on deference to the legislature's powers in matters of social welfare. That reasoning logically forecloses the Plaintiff's demand in this case that the legislature be deemed not to have had that power insofar as the period between December, 1980 and August, 1985 is concerned. Yet that would be the practical effect of a "prospective" ruling under these circumstances.

Indeed the Plaintiff's theory would seem to mean that the Court can "suspend" that constitutional power -- for a time -- by a ruling based on the judiciary's own ideas of "practicality". We find it difficult to reconcile that idea with the Court's traditional respect for the principle of separation of powers and an even more basic concept, that of the Constitution as fundamental law.

CONCLUSION

By way of summary:

(1) The Plaintiff has not presented any reasons of precedent, logic or policy why the Court should deviate from the principle that a statute operates prospectively unless the legislature gives a strong indication of intent that it should operate retroactively.

(2) Neither the legislators, nor their staff members, nor even the Plaintiff's amicus gave any indication of an intention that the changes to Section 95.031(2) should operate retroactively.

(3) Ford acquired a vested right to freedom from suit after the expiration of the twelve year period and the statute could not destroy that right even if it were applied retroactively.

(4) The Court did not say Pullum was to be prospective only. A belated ruling to that effect would undermine the constitutional analysis in that case; produce still more confusion concerning the statute of repose; and make retroactivity an issue in virtually every case where an appellate court does not specify that its decision has retrosepctive effect.

For all of these reasons, the Defendant urges that the decisions below should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of April, 1987, a true and correct copy of the foregoing was hand-delivered thereto, properly addressed to JAMES C. BLECKE, ESQUIRE, Biscayne Building, Suite 705, 19 West Flagler Street, Miami, Florida 33130; and to DAVID W. BIANCHI, ESQUIRE, 1900 Courthouse Tower, 44 West Flagler Street, Miami, Florida 33130.

Edward T. O'Donnell