IN THE SUPREME COURT OF FLORIDA

CASE NO. 70-099

WILLIAM A. BRACKENRIDGE,

Petitioner,

vs.

AMETEK, INC., and BARING INDUSTRIES, INC.,

Respondents.

On Appeal From The District Court
Of Appeal, Third District

ANSWER BRIEF OF AMETEK, INC.

STROOCK & STROOCK & LAVAN
Attorneys for Respondent,
AMETEK, INC.
3300 Southeast Financial Center
200 South Biscayne Boulevard
Miami, Florida 33131-2385
Telephone: (305) 358-9900

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SUMMARY OF ARGUMENT

In 1975, the Florida legislature enacted Fla. Stat. § 95.031(2), the statute of repose, which provided that products liability suits had to be commenced within twelve years after delivery of the product to its original purchaser.

Respondent, Ametek, Inc., delivered a Troy Minuteman extractor to its original purchaser in or about September, 1967. In December 1982, petitioner allegedly placed his arm in the extractor while it was in operation, resulting in an amputation. In December 1984, petitioner filed a products liability lawsuit against Ametek. Ametek asserted, among other affirmative defenses, that petitioner's claim was time barred by the statute of repose.

While petitioner's suit against Ametek was pending, this Court, in Pullum v. Cincinnati, Inc., 476 So.2d 657 (Fla. 1985), confirmed that the statute of repose was constitutional. Relying on Pullum, the trial court entered summary judgment for Ametek, and the Third District Court of Appeal affirmed.

Petitioner argues that if Pullum is applied retroactively to his pending case, he will be deprived of a property right without due process. But a litigant does not have an absolute "vested" or "property" right in the law, and he is subject to changes in the law while his case is pending. Even if petitioner had a cause of action against Ametek by virtue of pre-Pullum case law, which is questionable, applying Pullum to

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petitioner's pending cause of action is not constitutionally impermissible. Supreme Court decisions generally will be applied retrospectively.

Petitioner also argues that the legislative repeal of the statute of repose should be applied retroactively. This argument should also be rejected by this Court. Session Law 86-272 repealed the statute of repose as of July 1, 1986. The legislature did not make such a repeal retroactive to pending cases. Thus, this Court should apply the general rule that a new statute operates prospectively unless expressly made retroactive by the legislature. Additionally, petitioner's cause of action had expired under the statute of repose prior to the enactment of Session Law 86-272 and the legislature cannot impose a new obligation or duty on Ametek by retroactively reviving Petitioner's claim.

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ARGUMENT

I. UNDER PULLUM PETITIONER'S CLAIM IS BARRED BY THE STATUTE OF REPOSE.

A. Pullum Confirmed That The Statute Of Repose Barred Products Liability Claims Brought Later Than Twelve Years After The Original Delivery Of The Product.

Florida Statutes Section 95.031(2), the "statute of repose," provided:

> Actions for products liability . . . must be begun within the period prescribed in this chapter . . . but in any event within 12 years after the date of delivery of the completed product to its original purchaser . . . regardless of the date the defect in the product . . . was or should have been discovered.

The statute of repose reflected a judgment by the legislature that a manufacturer should not be exposed to liability indefinitely.

Ametek manufactured, and in or about September 1967 delivered to its original purchaser, a commercial laundry machine known as an extractor.[1] Petitioner alleges that he was injured while operating the extractor in December 1982, more than 15 years after the extractor's delivery.[2] Petitioner's suit was

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1 An extractor spins wet clothes to remove excess water prior to their being placed in a dryer.

2 Ametek has pled that the extractor at issue contained state-of-the-art safety devices which would have made petitioner's injury impossible had such devices not been intentionally circumvented. (R. 44-47, 256-257A).

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filed in December 1984, more than 17 years after the extractor's delivery and well beyond the statute of repose twelve year period. Ametek pled the statute of repose as an affirmative defense. (R. 44, 257).

On August 28, 1985, the Supreme Court of Florida held that the statute of repose did not violate the access to courts provision of the Florida Constitution. Pullum, supra.[3] In so holding, Pullum recognized and deferred to the legislature's finding that compelling policy considerations dictated placing a reasonable time limit on a manufacturer's exposure to liability.

> The legislature, in enacting this statute of repose, reasonably decided that perpetual liability places an undue burden on manufacturers, and it decided that twelve years from the date of sale is a reasonable time for exposure to liability for manufacturing of a product. Justice McDonald, in maintaining the constitutional validity of section 95.031(2) in his dissenting opinion in Battilla, correctly reasoned as follows:
>
> . . . .
>
> > I perceive a rational and legitimate basis for the legislature to take this action, particularly in view of the relatively recent developments in expanding the liability of manufacturers.

476 So.2d at 659-60.

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3 Article 1, Section 21, Florida Constitution, the access to courts provision, provides:

> The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.

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Relying on Pullum, the trial court entered summary judgment for Ametek on December 5, 1985 (R. 468). On February 10, 1987, the Third District Court of Appeal affirmed the trial court's summary judgment. (R. 469-70)

Since Pullum, four District Courts of Appeal have considered whether it can be applied retroactively and all answered affirmatively. See Cassidy v. Firestone Tire & Rubber Co., 495 So.2d 801 (Fla. 1st DCA 1986); Shaw v. General Motors Corp., 12 F.L.W. 487 (Fla. 3d DCA Feb. 10, 1987); Small v. Nicaraqua Machine & Tool Works, 12 F.L.W. 366 (Fla. 2d DCA Jan. 20, 1987); Pait v. Ford Motor Corp., 500 So.2d 743 (Fla. 5th DCA 1987). As shown below, these decisions represent the correct legal conclusion under Florida law.

B. Pullum Should Be Applied To Petitioner.

1. This Court Did Not Limit Its Holding In Pullum To Prospective Application Only.

Florida has long adhered to the principle that the overruling of a decision holding a statute unconstitutional validates the statute as of its effective date. Christopher v. Munqen, 55 So. 273, 280 (Fla. 1911). Two of the four District Courts of Appeal which have held that Pullum is retroactive did so on the authority of Christopher v. Munqen. See also, Shaw v. General Motors Corp., 12 F.L.W. at 487; Pait v. Ford Motor Co., 500 So.2d at 744. Thus, Pullum validated the statute of repose

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as of its 1975 effective date and made it applicable to petitioner.

This Court did not hold that Pullum would apply prospectively only. Petitioner attempts to circumvent this fact by arguing that his cause of action against Ametek constitutes a property right which cannot be taken away from him without due process under the Florida Constitution.[4] This argument should be rejected for two reasons. First, it is unclear that petitioner had a cause of action against Ametek prior to Pullum. Second, even if he did, Pullum can be retroactively applied without infringing petitioner's due process rights under the Florida or United States Constitutions.

2. It Is Unclear That Petitioner Had A Cause of Action Against Ametek Prior To Pullum.

Petitioner's property right argument assumes that he had a cause of action against Ametek prior to Pullum. However, when petitioner was injured in 1982, he was confronted with a statute of repose which expressly barred his claim against Ametek because more than twelve years had elapsed since Ametek delivered the product. Petitioner was also confronted with three Supreme Court of Florida decisions interpreting the statute of repose in

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4 Article I, Section 9 of the Florida Constitution provides, in relevant part, that "[n]o person shall be deprived of . . . property without due process of law . . . ."

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certain circumstances. None of those cases declared the statue of respose per se unconstitutional.

In Purk v. Federal Press Co., 387 So.2d 354 (Fla. 1980), plaintiff's injury occurred less than twelve years after the machine at issue had been delivered, but suit was not filed until after twelve years had elapsed. Purk held that the shortening of the time within which to bring a products liability suit "as applied . . . does not deny the right of access to courts." Id. at 387 (emphasis added). Here, of course, petitioner was injured after the expiration of the twelve year period.

Battilla v. Allis Chalmers Manufacturing Co., 392 So.2d 874 (Fla. 1980), from which three Justices dissented, is a two paragraph per curiam opinion concluding that "as applied to this case, section 95.031 denies access to courts under Article I, Section 21, Florida Constitution." Id. at 874 (emphasis added). Battilla does not discuss the facts before the Court or explain its reasoning. Furthermore, the Battilla majority relied on Overland Construction Co. v. Sirmons, 369 So.2d 572 (Fla. 1979) as authority for its holding. Id. at 874. Overland held that Fla. Stat. §95.11(3)c), the statute of repose for construction defects, was unconstitutional as to plaintiffs injured after the twelve year period expired. However, as pointed out by Justice McDonald in his Battilla dissent, buildings have a longer useful life than manufactured products, and there is a rational basis for treating the two differently when determining the length of

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exposure to liability. Id. at 875. Battilla thus did not definitively hold that the products liability statute of repose was per se unconstitutional as to parties injured more than 12 years after delivery of a product, and petitioner could not have reasonably relied on it to conclude that he had a cause of action against Ametek.

Finally, in Diamond v. E. R. Squibb and Sons, Inc., 397 So.2d 671 (Fla. 1981), plaintiff had been exposed to a drug while a fetus but did not manifest symptoms until approximately twenty years after birth. Faced with these facts, the Court held that as applied to the case before it, Fla. Stat. §95.031(2) was unconstitutional because it would have served to bar the claim of a plaintiff whose damage was inflicted before twelve years had elapsed although not discovered until after those twelve years had elapsed.

Justice McDonald's concurring opinion in Diamond recognized the distinction between the peculiar facts present there and the typical statute of repose facts, such as those here, in which the injury does not occur until after the twelve year period has expired:

> In this plaintiff's case the claim would have been barred, even though the wrongful act had taken place, before the injury became evident. She had an accrued cause of action but it was not recognizable, through no fault of hers, because the injury had not manifested itself. This is different from a situation where the injury is not inflicted for more than twelve years from the sale of the product.

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397 So.2d at 672 (emphasis added).

At least one other court has found that, prior to Pullum, the validity of the statute of repose as to a party injured after the twelve-year period expired was ambiguous. In Lamb v. Volkswagenwerk, A.G., 635 F.Supp. 45 (S.D. Fla. 1986), the court noted that pre-Pullum case law on the statute of repose "cannot be considered altogether definitive" and that "[t]his lack of judicial consensus at least arguably suggested that the statute . . . had not been terminally quashed. [T]he statute was not repealed . . . subsequent to Battilla. . . ." 635 F.Supp. at 1150.

Petitioner's brief repeatedly stresses his reliance on Battilla. But petitioner must also be held to have been aware of the Christopher v. Munqen, which put petitioner on notice that if this Court ever overruled Battilla, the statute of repose would be validated retroactively to its effective date:

> The import of this rule [Christopher v. Munqen] is that a law duly enacted by the legislature and later declared unconstitutional will remain dormant and inoperative but not dead. . . . If the law is resurrected by a later decision the law will be considered valid from its inception. . . . Applying this standard, too, it is apparent that Pullum, supra, simply restored the right of the instant Defendants to be excused from liability for their products after the passage of twelve years. Despite, Plaintiff's good faith reliance upon Battilla, supra, and Plainitiff's diligence in proceeding with this action, Plaintiff did not receive by virtue of Battilla, an absolute assurance that the statute of repose would remain forever abrogated.

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Lamb v. Volkswagenwerk, 631 F.Supp. at 1148-49.

Thus, when petitioner filed his suit, it was unclear whether his claim was barred by the statute of repose. The statute had never been declared per se unconstitutional and the cases construing it, at best, raised an issue as to whether petitioner could pursue a claim against Ametek.

3. Even If Petitioner Had A Cause of Action Against Ametek Prior to Pullum, That Decision May Constitutionally Be Applied Retroactively.

a. Retroactive Application Of Pullum Does Not Offend The Florida Constitution.

(i) Petitioner's Cause of Action Against Ametek Is Not An Absolute Property Right Under Florida Law.

The basic theme echoing through petitioner's brief is that he has a property right in his suit and that he cannot be deprived of that right without due process. This is not the law.

Florida law recognizes that reliance on existing law is not a vested property right. In Division of Workers' Compensation, Bureau of Crimes Compensation v. Brevda, 420 So.2d 887 (Fla. 1st DCA 1982), a victim of a crime was awarded certain benefits, including attorney's fees, by the Bureau of Crimes Compensation. The statutory provision for the award of attorneys' fees was on the books when the victim suffered his injuries, but had been repealed by the time the victim retained his attorney. The victim argued that his "rights to such fees had vested and could not be retroactively abrogated." 420 So.2d at 890.

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Brevda vacated the attorneys' fee award, noting that "[t]o be vested, a right must be more than a mere expectation based on an anticipation of the continuance of an existing law . . . ." 420 So.2d at 891. The court then rejected the victim's argument, finding that he held "nothing more than expectable interest -- not a vested right." Id. See also, In re Will of Martell, 457 So.2d 1064 (Fla. 2d DCA 1984).

As in Brevda, petitioner here held an expectation regarding the continuation of what he assumed was favorable case law on the statute of repose. Although petitioner relied on that expectation in filing his suit, that reliance is not entitled to absolute constitutional protection.

Two federal courts have expressly recognized that reliance on pre-Pullum case law is not constitutionally protected. In Eddings v. Volkswagenwerk, 635 F. Supp. 45 (N.D. Fla. 1986) the court, echoing the language from Brevda that a vested property right must be more than an expectation that existing law will continue unchanged, noted:

> Pullum, receding from Battilla, held the statute was not unconstitutional. No cause of action was created by the statute and Battilla vested in plaintiffs no cause of action. It removed the bar of the statute to plaintiffs' assertion of a cause of action. But plaintiffs had, at most, a mere expectation that they had a cause of action they could pursue, and a subsequent decision, holding the statute to be constitutional, could not and does not deprive them of any vested rights.

635 F. Supp. at 47.[5]

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5 Eddings also noted that a plaintiff's expenditure of fees and costs in reliance of pre-Pullum case law does not raise

Additionally, in Lamb v. Volkswagenwerk, 631 F.Supp. 1144 (S.D. Fla. 1986), the court stated:

> "To be vested a right must be more than a mere expectation based on an anticipation of the continuance of an existing law; it must have become a title, legal or equitable, to the present or future enforcement of a demand." [citation omitted.] The Plaintiff in the instant case had no vested contract or property right prior to the Pullum decision; instead Plaintiff was merely pursuing a common law tort theory to recover damages. Indeed the statute of repose and the lapse of the twelve year statutory period obviated the very possibility of Plaintiff sustaining any legal injury from the Volkswagenwerk vehicle. . . . A Plaintiff has no vested right in a tort claim. The mere prospect that Plaintiff might recover damages from a defendant on a tort theory is clearly not tantamount to a vested right. Retroactive application of the statute of repose cannot deprive Plaintiff of a vested right because Plaintiff's claim never became vested.

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constitutional implications.

> Plaintiff brought a law suit. As with any law suit, he might or might not prevail. Absent the Pullum decision, there would have been no property right created in him to money spent in litigation he may have lost. The Pullum decision could not and does not alter that fact.
>
> Obviously, plaintiff has spent money in work up and preparation of the case. But that does not give plaintiff a property right any more than defendants' expenditure of monies in defense have given them a property right. Plaintiff has not received money or property, or goods or services, or any other thing of value, in reliance on the Battilla decision.

635 F. Supp. at 47.

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631 F.Supp. at 1149.

The argument that Pullum cannot be applied retroactively without infringing on a property right was also rejected by the Fifth District Court of Appeal:

> If a decision holding a statute to be unconstitutional is subsequently overruled, the statute will be valid from the date it became effective . . . . 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.

Pait v. Ford, 500 So.2d at 744.

Petitioner's position that his cause of action is a property right which cannot be retroactively abolished by a change in the law ignores the rule that ordinarily, a Supreme Court decision overruling a former decision is applied retroactively. Christopher v. Mungen, supra, 55 So.2d at 280. If petitioner is correct that a cause of action is an absolute property right entitled to constitutional protection, then a change in the law by Supreme Court opinion could never constitutionally be applied retroactively. Accordingly, petitioner's argument would cause the exception of prospective application to swallow the rule of retrospective application.

(ii) Under Applicable Florida Authorities, Pullum Should Be Given Retrospective Effect To Bar Petitioner's Suit.

Petitioner relies heavily on Florida Forest and Park Service v. Strickland, 18 So.2d 251 (Fla. 1944), to support his argument

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that Pullum should be applied prospectively only. In Strickland, petitioner's worker's compensation claim was denied by a deputy commissioner of the Florida Industrial Commission. Pursuant to then existing case law, petitioner appealed directly to the circuit court, rather than to the full Commission. The circuit court reversed the deputy commissioner's order and entered a judgment for petitioner. Defendants then appealed to this Court.

While Strickland's appeal was pending, this Court overruled prior case law and held in Tigertail Quarries, Inc. v. Ward, 16 So.2d 812 (Fla. 1944), that a deputy commissioner's order cannot be directly appealed to the circuit court, but must first be appealed to the full Florida Industrial Commission. Defendants then argued that the circuit court judgment should be reversed because, under Tigertail, that court lacked the power to render a judgment.

Strickland held that Tigertail would operate prospectively and that the circuit court judgment would not be vacated because Strickland had a contractual right to pursue his claim under the prior procedures:

> The provisions of the Workmen's Compensation Law, if accepted by employer and employee, are to be read into every contract of service between those subject to its terms. . . . [A]s applied to the facts of this case, Tigertail . . . must be given prospective application only . . . . To hold otherwise would be, in effect, to deprive the claimant of a potentially valuable claim arising by reason of his contract of employment prior to the overruling decision.

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18 So.2d at 254 (emphasis added). See also, Lamb v. Volkwagenwerk, 631 F. Supp. at 1149 ("The [Strickland] Court ruled that the revised procedures would operate prospectively only because the appeals of workmen's compensation claims were based upon the actual contract of employment").

Unlike, Strickland, petitioner's claim is not based on a contract right. Moreover, this Court implicitly limited Strickland to its facts when it considered Aronson v. Congregation Temple De Hirsch, 123 So.2d 408 (Fla. 3d DCA 1960), cert. discharged, Congregation Temple De Hirsch v. Aronson, 128 So.2d 585 (Fla. 1961).

In Aronson, an appeal from a county court probate decree was filed thirty-eight days after the date of the order from which the appeal was taken, in accordance with then-existing case law that appeals of that type needed to be filed within sixty days. While the appeal was pending, the Third District Court of Appeal decided In re Estate of Wartman, 118 So.2d 838 (Fla. 3d DCA 1960), which overruled prior authority and held that such appeals had to be filed within thirty days. The respondents then moved to dismiss the appeal as untimely. Respondent's motion was denied. Relying on Strickland, the Third District Court of Appeal held that Wartman would have prospective effect only. 123 So.2d at 410-411.

Aronson was appealed to this Court, which rejected the reasoning and holding of the Third District Court that Wartman could

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not be applied retroactively. In Congregation Temple De Hirsch v. Aronson, 128 So.2d 585 (Fla. 1961), this Court reviewed the Third District court's opinion, found that there was no basis for limiting Wartman to prospective application, and stated:

> While the district court cites and discusses many cases which it says support the conclusion reached by it, we cannot find, in the cited cases, support for the conclusion reached . . . . We, therefore, conclude that the reasons assigned by the district court for its refusal to dismiss the instant appeal are erroneous.

128 So.2d at 586.

The only reason this Court did not overrule the Third District in Aronson was because on the same day it reversed Wartman and held that the time to appeal was, in fact, sixty not thirty days. This, of course, made Aronson's appeal timely. Thus, the Third District was correct in not dismissing Aronson's appeal, but for the wrong reason.[6]

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6 Commenting on the erroneous reasoning of the district court below in not applying the change of law retroactively, the Aronson Court noted:

> Ordinarily this would require that we quash the decision under review but, inasmuch as we have this day held, in the case of In re Estate of Wartman, . . . that appeals in probate proceedings may be taken at any time within 60 days from the date of the rendition of such appealable order, and in view of the holdings of this court that the ultimate question for determination is the correctness of the conclusions reached by the lower court, and not its reasons therefor, certiorari must be and the same is hereby denied.

128 So.2d at 586.

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Had it not been for this procedural quirk, this Court, despite Strickland, would have applied Wartman retroactively to bar Aronson's pending appeal as untimely, even though it was timely at the time it was filed.

Aronson's posture is materially similar to petitioner's here. Aronson, as petitioner, relied on prior law defining a certain limitations period. When that limitations period changed, it was applicable to Aronson's pending appeal, notwithstanding Strickland. Aronson teaches that Strickland is limited to its peculiar circumstances -- Strickland's contract right -- and that in Florida, the general rule that Supreme Court decisions validating statutes will apply retroactively is alive and well.

Hoffman v. Jones, 280 So.2d 431 (Fla. 1973), provides further authority that petitioner's "property right" argument should be rejected and Pullum applied retroactively. In Hoffman, the Supreme Court of Florida abolished the contributory negligence defense and replaced it with comparative negligence. The decision was expressly made applicable "to those cases already commenced, but in which trial has not yet begun." Id. at 440. See also, Linder v. Combustion Engineering, Inc., 342 So.2d 474 (Fla. 1977)(retroactively applying new doctrine of strict liability to pending cases).

Hoffman's removal of the defense from parties to pending lawsuits is analogous to Pullum's removal of petitioner's claim

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against Ametek. Although those defendants and petitioner here may have proceeded under the assumption that they had particular defenses and claims available to them, their expectations in that regard do not rise to the level of constitutionally protected rights.

(b) Retroactive Application Of Pullum Does Not Offend The United States Constitution.

(i) Petitioner's Cause of Action Against Ametek Is Not An Absolute Property Right Under Federal Law

Petitioner also suggests that under federal law Pullum cannot be applied retroactively. However, federal law does not provide petitioner with any greater due process rights than he has under Florida law.

In Arizona Copper Co. v. Hammer, 250 U.S. 400, 420 (1919), the Supreme Court of the United States recognized that "no person has a vested right entitling him to have . . . any . . . rules of law remain unchanged for his benefit." More recently, in Duke Power Co. v. Carolina Environmental Study Group, Inc.., 438 U.S. 59, 88 n.32 (1978), the Court noted that "[o]ur cases have clearly established that '[a] person has no property, no vested interest, in any rule of the common law'." See also, Ducharme v. Merrill-National Laboratories, 574 F.2d 1307, 1309 (5th Cir.), cert. denied, 439 U.S. 1002 (1978) ("It is well settled that a plaintiff has no vested right in any tort claim for damages under state law.").

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Petitioner's reliance on Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982), in support of his position that his cause of action is an absolute property right under federal law is misplaced. Logan did, as petitioner notes, state that "a cause of action is a species of property . . . ." 455 U.S. at 428 (emphasis added). But Logan ruled that although a cause of action may be a "species" of property, it can be abolished.

> Of course, the State remains free to create substantive defenses or immunities for use in adjudication - or to eliminate its statutorily created causes of action altogether - just as it can amend or terminate its welfare or employment programs. The Court held as much in Martinez v. California . . . where it upheld a California statute granting officials immunity from certain types of state tort claims. We acknowledged that the grant of immunity arguably did deprive the plaintiffs of a protected property interest. But they were not thereby deprived of property without due process, just as a welfare recipient is not deprived of due process when the legislature adjusts benefit levels.

455 U.S. at 432 (emphasis added).

Moreover, Logan relied on Martinez v. California, 444 U.S. 277 (1980), which held that although a common law cause of action for negligence and gross negligence against certain public employees was "[a]rguably . . . a species of 'property'," the state could abolish that cause of action without violating the United States Constitution. 444 U.S. at 281-82.

(ii) There Are No Federal Constitutional Impediments To Giving Pullum Retroactive Effect To Bar Appellant's Suit.

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Federal courts have applied new statutes of limitations retroactively to dismiss pending claims. For example, In DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151 (1983), the Supreme Court overruled prior precedent and held that a six month statute of limitations governed certain action by employees under Section 301 of the Labor Management Relations Act of 1947. DelCostello was retroactively applied to bar pending claims in Rogers v. Lockheed-Georgia Co., 720 F.2d 1247 (11th Cir. 1983), reh'g denied 726 F.2d 1116 (11th Cir.), cert. denied, 469 U.S. 906 (1984), and Edwards v. Sea-Land Service, Inc., 720 F.2d 857 (5th Cir. 1983). All the legal and equitable arguments petitioner makes here were available to claimants in Rogers and Edwards; yet in both cases, the courts retroactively applied the new statute of limitations to bar suits filed in reliance on the prior limitations period.

The fact is the law is constantly changing and parties may find that their expectations about the law are altered. An illustration that such a change in expectations does not offend constitutional principles is Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976).

Usery involved a constitutional challenge to a new federal act aimed at compensating miners afflicted with black lung disease. As part of the compensation scheme, the statute required mine operators to pay "benefits with respect to miners who left employment in the industry before the effective date of the Act." 428 U.S. at 12.

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The mine operators in Usery argued that the act unconstitutionally imposed retroactive liability on them. The operator's argument was rejected by Usery, which found that the new law's imposition of retroactive liability was constitutionally permissible notwithstanding the law's alteration of the expectations of those affected by it:

> To be sure, insofar as the Act requires compensation for disabilities bred during employment terminated before the date of enactment, the Act has some retrospective effect . . . . And it may be that the liability imposed by the Act for disabilities suffered by former employees was not anticipated at the time of actual employment. But our cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations . . . . This is true even though the effect of the legislation is to impose a new duty or liability based on past acts.

428 U.S. at 15-16 (emphasis added).

Usery found that retroactive application of the new statute was "rational" (Id, at 18), thus ending its constitutional inquiry:

> We are unwilling to assess the wisdom of Congress' chosen scheme . . . . It is enough to say that the Act approaches the problem of cost spreading rationally; whether a broader cost-spreading scheme would have been wiser or more practical under the circumstances is not a question of constitutional dimension.

428 U.S. at 18-19.

Pullum found the legislature to have been "reasonable," "rational," and having a "legitimate basis" in passing the

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statute of repose. Thus, Pullum may alter petitioner's expectations retroactively without offending the constitution. Usery, supra.

Petitioner relies on Chevron Oil Co. v. Huson, 404 U.S. 97 (1971), which adopted a balancing test to weigh issues of retroactive application of judge-made law. Chevron, however, is inapposite.

Chevron considered retroactivity under federal law in a non-diversity case that did not deal with constitutional issues. The federal balancing test is not the law of Florida, and should not be applied to decide the issue of retroactivity under Florida law. See, Eddings v. Volkswagenwerk, A.G., supra, 635 F.Supp. at 48; Lamb v. Volkswagenwerk, A.G., supra, 631 F.Supp. at 1150. Rather, in the circumstances here present -- an opinion which recedes from an earlier decision which had held a statute unconstitutional -- the new overruling decision is applied retroactively, and the statute is deemed valid as of its original effective date. Christopher v. Mungen, supra, 55 So. at 280.[7]

The United States Constitution does not preclude application of Pullum to petitioner's case. No federal question is implicated. Lamb v. Volkswagenwerk, A.G., supra, 631 F.Supp. at 1147,

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7 Interestingly, the published federal cases which considered Pullum in the light of the Chevron balancing test have held that Pullum would be applied retroactively. See, Eddings v. Volkswagenwerk, A.G., supra, 635 F.Supp. at 48; Lamb v. Volkswagenwerk, A.G., supra, 631 F.Supp. at 1150.

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1151 ("Plaintiff's federal constitutional rights are not abridged by the revitalization of the Florida statute of repose.").[8] Under controlling Florida authority, Pullum should be retroactively applied. Accordingly, the District Court of Appeal's affirmance of the summary judgment in respondent's favor was correct.

II. SESSION LAW 86-272, REPEALING THE STATUTE OF REPOSE, DOES NOT SAVE APPELLANT'S CLAIM.

Petitioner argues that Session Law 86-272, signed into law on July 9, 1986, saves his claim because it repeals the statute of repose. This argument is erroneous. The repealing legislation provides that the repeal of the statute of repose is effective on July 1, 1986, but contains no language indicating that the legislature intended such repeal to apply retroactively to pending cases.

Petitioner's argument for retroactive application of Session Law 86-272 is premised on the fact that the section of the law shortening the statute of limitations for libel and slander actions expressly applies only to causes of action accruing after

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8 Petitioner also relies on Cheshire Hospital v. New Hampshire-Vermont Hospitalization Service, Inc., 689 F.2d 1112 (1st Cir. 1982). However, Cheshire only recognized that "retroactive change of settled law, not retroactive settling of unsettled law . . . may produce unjust results." Id., n.11. Here, Pullum was not a retroactive change of settled law, but rather a retroactive settling of unsettled law.

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October 1, 1986, and the section repealing the statute of repose was not similarly expressly made prospective by the legislature.

Petitioner's point misses the obvious. The legislature could have expressly made the repeal of the statute of repose applicable to pending cases but did not do so. Given the legislature's silence, this Court should apply the general rule that a statute is prospective only unless expressly made retroactive by the legislature. See, e.g., Seddon v. Harpster, 403 So.2d 409, 411 (Fla.1981) ("The presumption is against retroactive application in the absence of an express manifestation of legislative intent to the contrary."); Yamaha Parts Distributors, Inc. v. Ehrman, 316 So.2d 557, 559 (Fla. 1975) ("Florida legislation is presumed to operate prospectively unless there exists a showing on the face of the law that retroactive application is intended.").

Of the four District Courts of Appeal which have held that Pullum is retroactive, three have considered Session Law 86-272 and its effect on pending cases. All three have held that the statutory repeal of the products liablility statute of repose is prospective only because it was not expressly made retroactive by the legislature. See, Shaw v. General Motors, 12 F.L.W. at 487; Small v. Niagara Machine & Tool Works, 12 F.L.W. at 366; Pait v. Ford Motor Corp., 500 So.2d at 744.

In Corbett v. General Engineering & Machinery Co., 37 So.2d 161 (Fla. 1948), the Supreme Court of Florida held that the

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legislature cannot revive a cause of action which has expired under a statute of limitations by retroactively lengthening the limitations period:

> [T]he legislature has the power to increase the period of time necessary to constitute limitation, and to make it applicable to existing causes of action, provided such change is made before the cause of action is extinguished under the preexisting statute of limitations . . . .

37 So.2d at 162.

This principle was reiterated in Garris v. Weller Construction Co., 132 So.2d 553 (Fla. 1960):

> The rule is well established that if an amending statute lengthens the period for filing a claim allowed by an existing statute, then the amending statute will be applicable to a pending claim. If a claim has not been barred when an amending statute lengthens the time within which it must be asserted, then the claimant gets the benefit of the extended period.

132 So.2d at 555.

Petitioner's claim was barred under the statute of repose prior to the enactment of Session Law 86-272. Corbett and Garris prohibit the legislature from reviving petitioner's claim by retroactively repealing the statute of repose.

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CONCLUSION

Under Pullum, Petitioner's claim against Ametek is barred by the statute of repose. The Legislature's repeal of the statute of repose came after petitioner's claim had already expired under that statute, and the Legislature cannot revive the claim. The Third District Court of Appeal's holding should be affirmed.

Dated: May 11, 1987

Respectfully submitted,

STROOCK & STROOCK & LAVAN
Attorneys for Respondent,
AMETEK, INC.
3300 Southeast Financial Center
200 South Biscayne Boulevard
Miami, Florida 33131-2385
Telephone: (305) 358-9900

By: Ricardo Torres, Jr.
David C. Pollack
Ricardo Torres, Jr.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Answer Brief of Ametek, Inc. has been mailed, this 11th day of May, 1987, to Beth Tyler Vogelsang, Esq., The Vogelsang Law Firm, attorneys for petitioner, 6701 Sunset Drive, Suite 102-A, Miami, Florida 33143; Linda Koenigsberg, Esq., Law Offices of James O. Nelson, attorneys for Baring, One Biscayne Tower, Suite 2628, Two South Biscayne Boulevard, Miami, Florida 33131; and William G. Liston, Esq., Steven R. Berger, P.A., attorneys for Baring, 8525 Southwest 92nd Street, Suite B-5, Miami, Florida 33156.

Ricardo Torres, Jr.