IN THE SUPREME COURT OF FLORIDA

Case No. 70-099

WILLIAM A. BRACKENRIDGE, :

Petitioner, :

vs. :

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

Respondents. :

BRIEF OF RESPONDENT
BARING INDUSTRIES, INC.

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TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

INTRODUCTION

This cause is before this court upon discretionary review pursuant to two questions certified by the District Court of appeal of Florida, Third District, to be of great public importance:

> I. Should the legislative amendment of Section 95.031(2), Florida Statutes (1983), abolishing the statute of repose in product liability actions, be construed to operate retrospectively as to a cause of action which accured before the effective date of the amendment?
>
> II. If not, should the decision of **Pullum v. Cincinnati, Inc.**, 476 So.2d 657 (Fla. 1985), **appeal dismissed**, _____ U.S. _____, 106 S.Ct. 1626, 90 L.Ed. 2d 174 (1986), which overruled **Battilla v. Allis Chalmers Mfg Co.**, 392 So.2d 874 (Fla. 1980), apply so as to bar a cause of action that accrued after the **Battilla** decision but before the **Pullum** decision?

This case involves an appeal from an order granting summary final judgment in favor of defendants below, AMETEK, INC., AMERICAN MACHINE AND METAL CO., TROY LAUNDRY CO., TROY EQUIPMENT, INC. (referred to collectively as "AMETEK") and BARING INDUSTRIES, INC. and against Plaintiff below, WILLIAM A. BRACKENRIDGE. Petitioner, WILLIAM A. BRACKENRIDGE, will be referred to as Petitioner or "BRACKENRIDGE." Respondent,

BARING INDUSTRIES, INC., will be referred to as Respondent or "BARING."

STATEMENT OF THE CASE AND FACTS

In this products liability action, BRACKENRIDGE alleged that he was seriously injured when his right arm was severed in a commercial laundry machine, the TROY MINUTEMART EXTRACTOR (hereinafter referred to as the "extractor"), manufactured by AMETEK and distributed by BARING. (R 15-19). The extractor was manufactured and delivered on or about August, 1967. (R 15-19). In December, 1982, over fifteen years after delivery of the extractor, BRACKENRIDGE suffered the alleged injury. (R 1-5). This lawsuit was commenced in December, 1984, more than seventeen years after the manufacture and delivery of the allegedly defective extractor. (R 1-5; 15-19). BARING asserted as an affirmative defense that BRACKENRIDGE'S claim is time barred by the applicable statute of limitations. (R 44, 257). That statute, Section 95.032(2), more appropriately known as the statute of repose, absolutely bars products liability actions instituted more than twelve years after delivery of the allegedly defective product.

BRACKENRIDGE moved for partial summary judgment on the issue of the statute of repose. (R 264). AMETEK and BARING opposed that motion, and the trial court entered summary final judgment in favor of AMETEK and BARING and against BRACKENRIDGE on the basis of **Pullum v. Cincinnati,**

Inc., 476 So.2d 657 (Fla. 1985). (R 468). In Pullum, this Court upheld the constitutionality of Section 95.031(2), the statute of repose barring this claim. The propriety of the summary final judgment based upon Pullum was the subject of this cause in the Third District Court of Appeal. The Third District affirmed the trial court's decision and certified the aforementioned questions to this Court. Brackenridge v. Ametek, 12 F.L.W. 479 (Fla. 3d DCA Feb. 10,1987).

SUMMARY OF ARGUMENT

Section 95.031(2), the products liability statute of repose, expressly bars claims instituted after twelve years from the date of delivery of the allegedly defective product. Petitioner's claim, accruing fifteen years and instituted seventeen years after the expiration of the absolute repose period, is constitutionally time barred by the statute of repose under the law both before and after this court definitively declared section 95.031(2) constitutional in **Pullum v. Cincinnati**, 476 So.2d 657 (Fla. 1985).

Under the cases preceding **Pullum**, Petitioner's action is barred because he failed to bring suit within the judicially established reasonable time of five months to one year. Petitioner's claim is absolutely barred pursuant to the **Pullum** court finding that the statute of repose constitutionally applies to bar actions accruing after the expiration of the twelve-year repose period.

Pullum applies retroactively to bar Petitioner's claim according to prevailing principles of Florida and federal law. Because Petitioner had no vested right in his cause of action, retroactive application of **Pullum** to bar his claim does not violate due process rights under either the Florida or the federal constitution. In addition, retroactive application of **Pullum** to this claim

comports with the general rule in Florida requiring that retrospective effect be given to overruling decisions of a court of last resort. It is furthermore appropriate to apply Pullum retroactively to this case according to the balancing test recognized under federal law.

Section 95.031(2) does not violate any rights of due process or equal protection guaranteed by the United States Constitution. Because it does not interfere with any vested or fundamental rights and because it provides a reasonable time for instituting actions based upon defects in products, the statute of repose comports with federal due process. Furthermore, based upon the fact that the classifications affected by the statute are reasonably related to its legitimate legislative purpose of preventing manufacturers from being exposed to pretrial liability, the statute of repose meets federal equal protection requirements.

Pullum firmly establishes that Section 95.031(2) comports with Florida constitutional requirements of access to courts, due process and equal protection. This Court is bound to follow that determination.

The repeal of the statute of repose does not operate to revive BRACKENRIDGE'S claim, which has already been extinguished by the statute of repose. Furthremore, once the statute of repose of has run, the defendant obtains a vested right not to be sued. Accordingly, no action can now or in

the future be brought against BARING based upon a products liability claim on this particular machine. This Court should hold that amendment or repeal of the statute of repose after the repose period has run, cannot divest a litigant of its vested right not to be subject to suit and give **Pullum** retrospective effect.

ARGUMENT

THE TRIAL COURT PROPERLY ENTERED SUMMARY FINAL JUDGMENT AGAINST BRACKENRIDGE ON THE GROUND THAT HIS CLAIM IS BARRED BY THE STATUTE OF REPOSE.

I.

THE STATUTE OF REPOSE CONSTITUTIONALLY APPLIES TO BAR PETITIONER'S CLAIM UNDER FLORIDA LAW BOTH BEFORE AND AFTER **PULLUM.**

A.

BECAUSE BRACKENRIDGE FAILED TO FILE SUIT WITHIN A REASONABLE TIME AFTER HIS INJURY HIS CAUSE OF ACTION IS BARRED BY THE STATUTE OF REPOSE AS CONSTRUED PRIOR TO **PULLUM**.

Section 95.031(2), **Fla.Stat.** (1981) provides:

> Actions for products liability and fraud under s. 95.11(3) must be begun within the period prescribed in this chapter, with the period running from the time the facts giving rise to the cause of action were discovered or should have been discovered with the exercise of due diligence. . . . **but in any event within 12 years after the date of delivery of the completed product to its original purchaser** or within 12 years after the date of the commission of the alleged fraud, regardless of the date the defect in the product or the fraud was or should have been discovered.

This products liability statute of repose, by its express terms, cuts off a right of action instituted after twelve years from delivery of the allegedly defective pro-

duct "regardless of the time of the accrual of the cause of action or of notice of the invasion of a legal right." Universal Engineering Corp. v. Perez, 451 So.2d 463, 465 (Fla. 1984).

Petitioner's claim was filed over seventeen years after delivery of the extractor, the allegedly defective product. The statute of repose, on its face, thus bars BRACKENRIDGE'S claim, commenced over five years after the expiration of the absolute twelve-year repose period. Petitioner, however, questions the constitutional propriety of applying the absolute twelve-year bar of the statute of repose to his claim. Petitioner asserts that although the statute of repose was declared constitutional in Pullum v. Cincinnati, Inc., 476 So.2d 657 (Fla. 1985), that decision does not apply to this case. Based upon Florida law prior to Pullum, Petitioner argues, the statute of repose is unconstitutional as applied to his claim because it operates to abolish his cause of action before it ever accured in violation of the Florida Constitution's guaranty of access to courts.

Pursuant to pre-Pullum standards, however, Appellant's claim is constitutionally time-barred based upon the fact that it was not commenced within a reasonable time after the injury suffered. In the cases preceding Pullum, the Florida Supreme Court held that a statute of repose will not operate to unconstitutionally deprive a liti-

gant of access to courts where it merely shortens the time for filing a claim, rather than completely abolishing the cause of action, provided a reasonable time is permitted for bringing suit. Purk v. Federal Press Company, 387 So.2d 354 (Fla. 1980); Overland Construction Co. v. Sirmons, 369 So.2d 572 (Fla. 1979); Bauld v. J.A. Jones Construction Co., 357 So.2d 401 (Fla. 1978). In both Overland and Bauld, the Supreme Court indicated that a one-year period constituted a reasonable time. Furthermore, in Cates v. Graham, 451 So.2d 475 (Fla. 1984), the court found that a five-six month limitation on bringing an action, the time left in that case for commencing suit under the applicable statute of repose, though short, was nonetheless a reasonable time; imposing this time constraint on Cates' right to bring his action did not result in an unconstitutional denial of access to courts. See also, Feil v. Challenge-Cook Brothers, Inc., 473 So.2d 1338 (Fla. 4th DCA 1985)(four months for bringing suit under statute of repose sufficient time to furnish claimants access to courts).

In this case, BRACKENRIDGE'S injury was inflicted in December, 1982. This lawsuit was not filed until December, 1984, two years after the injury. According to pre-Pullum standards, BRACKENRIDGE was entitled to, at most, one year, Bauld and, arguably as little as five to six

months, Cates, in which to institute suit after accrual of his claim. Thus, because this claim was filed two years after the injury arguably more than a year and one-half after the expiration of the judicially declared "reasonable time," Cates, the present action is barred pursuant to pre-Pullum case law.

Petitioner argues that Section 95.031(2) was amended by Battilla v. Allis Chalmers Manufacturing Co., 392 So.2d 874 (Fla. 1980), to allow four years to file an action which accrues subsequent to the expiration of the twelve-year repose period. This contention is devoid of merit. Battilla is a perfunctory **per curiam** opinion which simply found that as applied to that set of unstated facts, Section 95.031(2) operated as a denial of access to courts. Nothing in that decision indicates that the Supreme Court added any judicial gloss to Section 95.031(2) that in any way resembles the "amendment" suggested by Petitioner. If any judicial "amendment" could be engrafted onto the statute of repose under Battilla and the other pre-Pullum cases interpreting the statute, such a provision would permit a litigant no more than the court-established "reasonable time" for instituting an action accruing after the expiration of the absolute twelve-year repose period. As previously noted, these pre-Pullum decisions firmly determine that a period of five or six months to one year

constitutes a reasonable time for bringing suit. **See, Cates**; **Bauld**. Thus, BRACKENRIDGE did not have four years to bring his action according to pre-**Pullum** law, but merely the five or six to twelve month "reasonable time" allowed by **Cates** and **Bauld**. BRACKENRIDGE'S claim is, therefore, time barred pursuant to the judicial "amendment" to the statute of respose in effect prior to **Pullum**.

B.

THE STATUTE OF REPOSE CONSTITUTIONALLY APPLIES TO BAR PETITIONER'S CLAIM PURSUANT TO THE HOLDING IN **PULLUM**.

1.

PULLUM CONFIRMS THE CONSTITUTIONALITY OF APPLYING THE STATUTE OF RESPOSE TO BAR PRODUCTS LIABILITY CLAIMS ACCRUING AFTER THE EXPIRATION OF THE TWELVE-YEAR REPOSE PERIOD.

Pullum, decided during the pendency of this cause, emerges out of a string of cases which, though failing to carve out any **per se** determination regarding the constitutionality of the statute of repose, cast doubt upon the constitutionality of applying Section 95.031(2) to bar actions arising after the expiration of the twelve-year repose period. In **Pullum**, this court unequivocally declared section 95.031(2) constitutional as applied to actions instituted after the expiration of the absolute twelve-year repose period, regardless of whether they accrued before or after this twelve-year period has elapsed. Specifically, this court, in **Pullum**, held that the absolute twelve-year time bar contained in Section 95.031(2) violates neither the access to courts provision of the Florida Constitution nor the constitutional guarantee of equal protection of the laws. The **Pullum** decision's determination that the statute of repose constitutionally bars claims accruing

after the expiration of the twelve-year repose period is based upon the legitimate legislative goal and compelling public necessity of protecting manufacturers from the threat of perpetual liability.

2.

RETROSPECTIVE APPLICATION OF PULLUM TO PETITIONER'S CLAIM COMPORTS WITH FLORIDA CASE LAW AND THE FLORIDA CONSTITUTION.

As a general rule, disposition of a case on appeal should be consistent with the law in effect at the time of the appellate court's decision. State v. Lavazzoli, 434 So.2d 321 (Fla. 1983); Hendeles v. Sanford Auto Auction, Inc., 364 So.2d 467 (Fla. 1978); Cantor v. Davis, 11 F.L.W. 249 (Fla., June 5, 1986); Seaboard System Railroad, Inc. v. Clemente, 467 So.2d 348 (Fla. 3d DCA 1985)[hereinafter referred to as Seaboard]. This "time of decision" rule does not apply, however, when a new rule alters a substantive right. Lavazzoli; Seaboard. Moreover, it is axiomatic that retroactive application of a new law is not unconstitutional unless it operates to create new or to take away vested rights. City of Lakeland v. Cabinella, 129 So.2d 133 (Fla. 1961); Seaboard; City of North Bay Village v. City of Miami Beach, 365 So.2d 389 (Fla. 3d DCA 1978). A corollary to this proposition is the principle that retroactive application of a remedial measure affecting only the remedy available in a cause of action which already exists or confirming existing rights does not violate due process. City of North Bay Village; Village of El Portal v.

City of Miami Shores, 362 So.2d 275 (Fla. 1978); Seaboard.

According to these basic principles, retroactive application of Pullum to BRACKENRIDGE'S claim comports with the requirements of the Florida Constitution. The Pullum court's determination that the statute of repose is constitutional as applied to claims arising from injuries occurring after the expiration of the twelve-year repose period does not operate to create new or to destroy any vested, substantive rights. Retroactive application of Pullum does not operate to deprive Petitioner of a vested, property right in his cause of action because BRACKENRIDGE had no vested right in his claim prior to Pullum. In order for a right to be considered vested, it must be

> more than a mere expectation based on 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.

In Re Will of Martell, 457 So.2d 1064, 1067 (Fla. 2nd DCA 1984).

When BRACKENRIDGE suffered the alleged injury in December, 1982, his cause of action was subject to the limitation contained in the statute of repose. According to the express language of these provisions, BRACKENRIDGE'S claim was

barred when at the time of the injury which occurred over twelve years after delivery of the allegedly defective product. It is true that at the time BRACKENRIDGE incurred his injury, the case law interpreting the statute of repose created uncertainty about the constitutionality of Section 95.031(2) as applied to actions accruing after the expiration of the twelve-year repose period. Based upon the uncertainty of the law preceding Pullum, Petitioner possessed at most, a mere expectation that this state of the law would continue to exist.

As noted earlier, none of the cases prior to Pullum delineated a **per se** rule regarding the constitutionality of the statute of repose. Each of these cases is distinguishable in some fashion from the present set of circumstances.

In Battilla v. Allis Chalmers Manufacturing Co., 392 So.2d 874 (Fla. 1980), the Supreme Court declared in a perfunctory **per curiam** opinion that as applied to that case, the statute of repose denied access to courts under the Florida Constitution. Because Battilla fails to delineate the facts upon which the decision is based, or to offer any reasoning for its conclusion, it has limited precedential value.

In Diamond v. E.R. Squibb and Son, Inc., 397 So.2d 671 (Fla. 1981), plaintiff had been exposed to a drug while

a fetus, and although her injury was incurred long before the effective date of the statute of repose, she did not manifest symptoms of this injury until she was almost 20 years old, long after the twelve-year repose period had elapsed. Based upon these facts, the court found that the statute of repose operated unconstitutionally to bar the claim of a litigant who was injured before the expiration of twelve-year repose period, which in that case operated to bar an "**accrued** cause of action . . . not recognizable, through no fault of [plaintiffs], because the injury had not manifested itself." Diamond at 397. In this case, unlike the situation in Diamond, the injury did not occur until well after the expiration of the twelve-year repose period. Thus, the constitutional issue facing the court in Diamond does not exist in this case where BRACKENRIDGE did not suffer any latent injury many years before the twelve-year repose period had expired. See, Pullum, note at 659; Diamond, McDonald specially concurring, at 672. See, Carr v. Broward County, Nos. 85-2690, 85-2820, 4-86-0209 (Fla. 4th DCA April 8, 1987).

Last, in Overland Construction Co., Inc. v. Simmons, 364 So.2d 572 (Fla. 1979), the court found Section 95.11(3)(c), the "construction defect" statute of repose, to be unconstitutional as applied to that case because it operated to abolish plaintiff's action when it accrued. Over-

land is distinguishable from the present case because Overland involved Section 95.11(3)(c), the construction defect statute of repose, whereas Section 95.031(2), the products liability statute of repose is at issue here. This fact is significant because of the policy rationale underlying the finding in Pullum that the products liability statute of repose is, indeed, constitutional as applied to bar actions accruing after the expiration of the twelve-year repose period. The Pullum court concluded that the legislative designation of twelve years is a reasonable period of time for exposure to liability for manufacturing a product. On the other hand, because the normal useful life of buildings is greater than the useful life of most manufactured products, the time of liability exposure contained in Section 95.11(3)(c) struck down in Overland was unduly restrictive. See, Battilla, Justice McDonald dissenting. Thus, unlike the twelve-year prohibitory provision in Section 95.034(2), the twelve-year repose provisions applicable to construction defect cases did not reflect an appropriate legislative determination of the time in which architects, contractors and the like should be exposed to liability.

In this case, Petitioner's claim was not a pre-existing right which vested prior to the effective date of the statute of repose. See Bauld, Purk. Furthermore, based

upon the state of the law relating to the products liability statute prior to Pullum, BRACKENRIDGE was arguably devoid of any right of action at all through application of the express twelve-year bar of the statute of repose. At most, BRACKENRIDGE possessed a mere expectation grounded on the anticipation of the continuance of what he apparently believed was existing law -- that the statute of repose would not apply to him. Such a tenuous reliance interest certainly does not rise to the level of a vested right. In re Will of Martell. Retroactive application of Pullum to bar Petitioner's claim would, therefore, not have the effect of violating BRACKENRIDGE'S due process rights by destroying or in any way interfering with his vested right in a cause of action. Cf. Young v. Altenhouse, 472 So.2d 1152 (Fla. 1985)(statute authorizing award of attorney's fees to prevailing party cannot constitutionally be applied retrospectively to causes of action that accrued prior to effective date of statute because statute creates new obligation or duty); Rupp v. Bryant, 417 So.2d 658 (Fla. 1982)(retroactive application of amendment to sovereign immunity statute violates due process where it abolishes plaintiff's pre-existing, vested right to recover from school authorities); Foley v. Morris, 339 So.2d 215 (Fla. 1976)(new medical malpractice statute of limita-

tions does not apply retroactively to an action that accrued prior to effective date of statute).

Retrospective application of **Pullum** to the case at bench comports not only with Florida constitutional imperatives but with Florida's general rule of civil law 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 and Park Service v. Strickland**, 18 So.2d 251, 153 (Fla. 1944); **See, International Studio Apartment Assoc., Inc. v. Lockwood**, 421 So.2d 1119 (Fla. 4th DCA 1982), **review denied**, 430 So.2d 451 (Fla. 1983); **cert. denied**, 104 S.Ct. 244 (1983). **Pullum** is bereft of any declaration, either express or implicit, that it should apply prospectively only. In fact, by applying its holding **retrospectively** the Florida Supreme Court, by implication, manifested the intent to require retrospective application of its decision to pending cases. Furthermore, the rationale underlying the **Pullum** holding would be totally eroded if the opinion itself were to be applied prospectively only. In maintaining the constitutionality of section 95.032(2), this court rejected **Pullum's** equal protection challenge. **Pullum** argued that after **Battilla,** the statute of repose denied equal protection because it con-

tinued to apply arbitrarily to only that class of defective products plaintiffs whose injuries occurred between the eighth and twelfth years, thus treating more favorably those individuals injured after the expiration of the twelve-year repose period. The Pullum court definitively disposed of this constitutional challenge by ruling that all plaintiffs would be subjected equally to the absolute 12-year bar imposed by section 95.031(2), including those individuals, like Petitioner here, who were injured over 12 years after delivery of the allegedly defective product.

If Pullum applied prospectively only, plaintiffs such as Petitioner here, who were injured after expiration of the twelve-year repose period and who had cases pending at the time Pullum was decided, would still be treated more favorably than Pullum and persons in his position (whose injuries occurred between the eighth and twelfth year of the repose period). Accordingly, if Pullum were to be given prospective effect only, it would not operate to eliminate the equal protection question which it expressly resolved. Ultimately, the United States Supreme Court, when faced with this issue by way of appeal, dismissed for want of a substantial federal question. This ruling constitutes an adjudication on the merits. Hicks v. Miranda, 95 S.Ct. 2281 (1975).

Pursuant to the overwhelming weight of governing authority and to the **Pullum** decision itself, the statute of repose as construed in **Pullum** applies restrospectively to bar the present action.

Contrary to Petitioner's assertion, BRACKENRIDGE'S claim cannot be exempted from the rule requiring retrospective application of overruling decisions pursuant to the "common sense" exception:

> that the rights, positions and causes of action of parties who have acted in conformity with, and in reliance upon, the construction given by a court of final decision to a statute should not be impaired or abridged by reason of a change in judicial construction of the same statute made by a subsequent decision of the same court overruling its former decision.

Strickland at 253.

As noted earlier, because the state of the law prior to **Pullum** concerning the applicability of the statute of repose to claims such as Petitioner's was, at best, uncertain, retrospective application of **Pullum** to this action does not operate to abridge rights obtained in reliance on settled law. This case is, therefore, unlike those situations in which the court applied the "prospective only" exception, **e.g.,** **Strickland**(decision overruling previously well-settled and accepted procedure for review of compensation orders not retrospectively applicable to work-

men's compensation claimant seeking review of vested right of action in strict accordance with then prevailing judicial interpretation of statutes in force); International Studio Apartment Assoc., Inc. (where unconstitutionality of statute authorizing clerk of court to invest funds deposited into registry was issue of first impression whose resolution was not clearly foreshadowed, and where clerk acted in reliance upon validity of statute, holding that statute was unconstitutionally applied prospectively only).

Even if BRACKENRIDGE possessed a potential right of action in reliance upon pre-Pullum law, to preclude Petitioner's action is nonetheless perfectly permissible pursuant to the principle that

> . . . **where mere inchoate rights are concerned, depending for their existence on the law itself, they are subject to be abridged or modified by law, and** . . . statutes of this character apply to such rights existing at the time of their passage, provided a reasonable time is given **after the passage of the act, and before it would operate as a bar, for the party to exercise the right.**

Bauld at 3, quoting Hart v. Bastwick, 14 Fla. 162, 181 (1872). The language in Strickland that Petitioner relies upon states:

> The rights, positions and courses of action of parties who have acted in conformity with and in reliance upon, the construction given by a court of final decision to a statute should

> not be impaired or abridged by reason of a change in judicial construction of the same statute[.]

18 So.2d at 251.

Petitioner has failed both at the trial and appellate level to demonstrate that WILLIAM BRACKENRIDGE took **any course of action** or in any way acted in conformity with and reliance upon **Battilla**. It cannot be seriously argued that BRACKENRIDGE'S injury occurred as a result of any course of action or in reliance upon **Battilla**. Thus, Petitioner's argument based upon **Strickland** must fail.

An examination of **Florida East Coast Ry. v. Rouse**, 194 So.2d 260 (Fla. 1967) reveals the error is Petitioner's argument. In **Rouse**, the plaintiff was injured by a train while walking on the defendant's railroad tracks. At trial both sides requested instruction under the railroad comparative negligence statute. Final judgment was entered for the plaintiff in the amount of $16,333.00. This court then rendered its decision in **Georgia Southern & Florida Ry. Co. v. Seven-Up Bottling Co.**, 175 So.2d 39 (Fla. 1965) finding the statute unconstitutional. Even though both sides had requested the instruction and judgment for the plaintiff had been entered this court, upon certiorari review, held that a new trial was required because the appellate court was required to apply the law as it existed at

the time of appeal. It is obvious that in **Rouse** the plaintiff acquired no property right in the judicial construction given the statute **even though a final judgment had been entered.** Here, BRACKENRIDGE acquired no property right in the judicial construction given the statute of repose before **Pullum.** The District Court of Appeal of Florida, Third District, correctly applied the law of **Pullum** to this case.

Further, Respondent submits that under governing principles of law applied in the recent Florida cases following **Pullum, Pullum** is binding on the present case as authority that the statute of repose validly bars this action. It is a well-settled tenet of Florida law that if a decision holding a statute unconstitutional is subsequently overruled, **the statute will be held valid from the date it became effective.** Thus, the fact that the statute of repose was declared unconstitutional **as applied** in **Battilla** has no affect on the validity of its application to BRACKENRIDGE'S claim after the Supreme Court specifically held the statute constitutional in **Pullum. Christopher v. Mungen**, 61 Fla. 513, 55 So. 274 (1911).

RETROACTIVE APPLICATION OF PULLUM TO PETITIONER'S CLAIM COMPORTS WITH THE UNITED STATES CONSTITUTIONAL AND FEDERAL CASE LAW.

A. RETROACTIVE APPLICATION OF **PULLUM** DOES NOT VIOLATE DUE FEDERAL PROCESS.

Just as in Florida, governing principles of federal law require that an appellate court apply the law in effect at the time it renders its decision. **Edwards v. Sea-Land Service, Inc.**, 720 F.2d 857 (5th Cir. 1983), citing **Gulf Offshore Co. v. Mobil Oil Corp.**, 453 U.S. 473, 486 n. 16, 101 S.Ct. 2870, 2879 n. 16, 69 L.Ed.2d 784 (1981); **United States v. Schooner Peggy**, 5 U.S (1 C) 103, 110, 1 L.Ed. 49 (1801).

Petitioner contends, however, that retropsective application of **Pullum** to preclude his claim unconstitutionally divests him of a protected property right in violation of the due process clause of the United States Constitution.

Under federal law, an accrued cause of action is arguably a species of property protected by the due process clause of the Fourteenth Amendment. **Logan v. Zimmerman Brush Co.**, 455 U.S. 422, 102 U.S. 1148, 71 L.Ed. 265 (1982); **Pitts v. Unarco Industries, Inc.**, 712 F.2d 276 (7th Cir.). **cert.denied**, 464 U.S. 1003, 104 S.Ct. 509, 78 L.Ed. 2d 698 (1983). An unaccrued cause of action, on

the other hand, is not constitutionally protected. Pitts; Ducharme v. Merrill-National Laboratories, 574 F.2d 1307 (5th Cir.); cert. denied, 439 U.S. 1002, 99 S.Ct. 612, 58 L.Ed. 2d 677 (1978). Section 95.031(2) was in effect long before Petitioner's cause of action accrued, and the cases preceding Pullum did not definitively settle the question of the constitutionality of applying the express twelve-year bar of the statute of repose to claims, such as Petitioner's, occurring after expiration of the repose period. Based upon this set of circumstances, BRACKENRIDGE possessed no vested, constitutionally protected property interest in his cause of action prior to the Supreme Court's decision in Pullum. See, Pitts; Ducharme. Retroactive application of Pullum to this claim, therefore, could not operate to deprive Petitioner of a property right he did not acquire. See, Weeks v. Remington Arms Co., 733 F.2d 1485 (11th Cir. 1984).

Even if Petitioner had a species of property right in his cause of action prior to Pullum, it is axiomatic that no person has a vested property right in any rule of common law entitling him to have such a rule of law remain unchanged for his benefit. Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, 98 S.Ct. 2620, 57 L.Ed. 2d 595 (1978); Arizona Copper Co. v. Hammer, 250

U.S. 400, 39 S.Ct. 553, 63 L.Ed. 1058 (1919); Wayne v. Tennessee Valley Authority, 730 F.2d 392 (5th Cir. 1984), cert. denied, 105 S.Ct. 908 (1985). See also, Ducharme at 1309 ("It is well-settled that a plaintiff has no vested right in any tort claim for damages under state law.")

As a corollary to this proposition, it is firmly established that "the constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object." Silver v. Silver, 280 U.S. 117, 122, 50 S.Ct. 57, 58, 74 L.Ed. 221 (1929). See also, Duke Power. In Logan, which Petitioner relies on to support his argument that his cause of action is a constitutionally protected property right, the Supreme Court reaffirmed the constitutional prerogative of the state to create new or to eliminate existing causes of action:

> 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 . . . . The Court held as much in **Martinez v. California**, 444 U.S. 277, 100 S.Ct. 553, 62 L.Ed. 2d 481 (1980), 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.

Logan, 455 U.S. at 432-33. See also, Martinez v. California, 444 U.S. 277, 100 S.Ct. 553, 62 L.Ed. 2d 481, reh'g denied, 445 U.S. 920, 100 S.Ct. 1285, 63 L.Ed. 2d 606 (1980).

Based upon the fact that pursuant to federal law, Petitioner possessed no vested right in his cause of action, retroactive application of Pullum to this claim does not violate due process. See, Blanco v. Wasco Products, No. 85-964 Civ-Marcus (S.D. Fla. March 18, 1986)(upholding retroactive application of Pullum). The bar to Petitioner's action is moreover, not rendered constitutionally infirm because it results from retroactive application of an allegedly new judicial interpretation of the statute of repose. In Cheshire Hospital v. New Hampshire-Vermont Hospitalization Service, 689 F.2d 1112 (1st Cir. 1982), relied on by Petitioner for the proposition that due process considerations apply to retroactive application of a new interpretation of a statute or regulation, the court stated that although

> laws that unsettle settled rights can be harsh. . . not every law that upsets expectations is invalid; courts have generally compared the public interest in the retroactive rule with the private interests that

> are overturned by it. [**Adams Nursing Home of Williamstown, Inc. v. Mathews**, 548 F.2d 1077, 1080 (1st Cir. 1977)] . . . . In applying this analysis, a critical consideration is the extent to which a retroactive rule or interpretation adversely affects the reasonable expectation or concerned parties.

Cheshire Hosp. at 1121.

The court in **Cheshire Hosp.** at 1121, n. 11 further noted that "'It is retroactive change of settled law, not retroactive settling of unsettled law, which may produce unjust results.'"

In this case, the state of the law prior to **Pullum** regarding the constitutionality of the statute of repose was largely unsettled. Consequently, retroactive application of holding in **Pullum** to Petitioner's claim does not violate any due process guarantee against the unsettling of settled law.

B. **PULLUM** SHOULD BE GIVEN RETROSPECTIVE EFFECT TO BAR PETITIONER'S CLAIM UNDER THE BALANCING TEST APPLIED IN FEDERAL CASES.

Because the constitutional right of due process does not extend to protect a person from a legitimate change in the law, the federal courts have applied the three-pronged balancing test delineated in Chevron Oil Co. v. Huson, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed. 2d 296 (1971), to determine whether a new civil law should be given retrospective effect:*

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied. . . . or by deciding an issue of first impression whose resolution was not

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* It should be noted that federal law does not apply to this claim which arises under Florida law. Appellee discusses federal case law regarding retroactive application of civil law in response to Petitioner's arguments on this subject.

> clearly foreshadowed. . . . Second, it has been stressed that 'we must * * * weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.'
>
> . . .
>
> Finally, we [must weigh] the inequity imposed by retroactive application[.]

Chevron, 404 U.S. at 106-107.

Under the first prong of the Chevron test, retrospective application of Pullum to this case would not be prohibited because Pullum did not establish a completely new rule of law by overruling settled precedent. Rather, Pullum affirmed the constitutionality of a statute already in existence and clarified prior law which, though failing to render a **per se** determination regarding the constitutionality of the statute of repose, cast doubt upon the validity of applying it to causes of action accruing after the expiration of the twelve-year repose period. Retroactive application of Pullum to this case would, therefore, not be precluded on the ground that it constitutes a "superseding legal doctrine that was quite unforeseeable." Chevron, at 404 U.S. 108. This case is unlike the situation in Chevron. There, retroactive application of Louisiana statute of limitation was prohibited be-

cause this new law overruled a long line of cases which had firmly established that admiralty law, including the doctrine of laches, governed plaintiff's claim.

Pursuant to the second prong of the **Chevron** test, retrospective application of **Pullum** to bar Petitioner's claim will operate to further the "purpose and effect" of the statute of repose. The legitimate legislative goal of Section 95.031(2), recognized by the court in **Pullum**, is to protect manufacturers against the undue burden of perpetual liability. The twelve-year absolute repose period contained in Section 95.031(2) reflects the legislative determination that "twelve years from the date of sale is a reasonable time for exposure to liability for manufacturing of a product." **Pullum** at 659. It is undisputed that Petitioner's injury occurred 15 years after the expiration of the twelve-year repose period and that this case was not filed until 17 years after the twelve-year period had elapsed. Retroactive application of **Pullum** to Petitioner's claim advances the purpose of the statute of repose by preventing the manufacturer from being exposed to liability for the unreasonable period of 17 years from the date of sale of the allegedly defective product.

The last consideration under the third prong of the **Chevron** test is whether retroactive application of **Pullum** to Petitioner's claim would be inequitable. It

is true that dismissal of this action will deprive BRACKENRIDGE of a remedy. However, this fact in and of itself does not prohibit retroactive application of **Pullum** in this case. First, Petitioner has failed to demonstrate that **Pullum** overruled "clear past precedent" on which he relied. See, Edwards v. Sea-Land Service, Inc., 720 F.2d 857 (5th Cir. 1983). Rather than representing a "clear break" with past precedent, **Pullum** operates to resolve uncertainty in Florida regarding the constitutionality of applying the statute of repose to cases such as this. Second, and more significantly, in deciding whether civil rules should be given retrospective effect, federal courts, at least in the Fifth Circuit, have determined that "the purpose of the rule should be given greater weight from the extent to which the parties relied on the law that existed before that rule was announced." **Matter of S/S Helena**, 529 F.2d 744, 748 (5th Cir. 1976); **Edwards**, at 862. As pointed out earlier, the goal of the statute of repose -- to prevent a manufacturer's exposure to perpetual liability -- will clearly be promoted by applying **Pullum** to bar Petitioner's action instituted five years after the expiration of the time the Legislature deemed reasonable for allowing suits against manufacturers.

II

THE STATUTE OF REPOSE COMPORTS WITH DUE PROCESS AND EQUAL PROTECTION GUARANTEES UNDER BOTH THE UNITED STATES AND THE FLORIDA CONSTITUTIONS.

A. THE UNITED STATES CONSTITUTION.

Petitioner contends that Section 95.031(2) violates his federally protected constitutional rights to due process and equal protection of the laws. At the outset, it should be noted that statutes of repose similar to Section 95.031(2) have withstood these constitutional challenges in many federal cases, **e.g., Brubaker v. Cavanaugh**, 741 F.2d 318 (10th Cir. 1984)(Kansas statute of repose for medical malpractice actions does not violate due process or equal protection by barring claims that were not ascertained until after the expiration of four-year repose period); **Hartford Fire Insurance Co. v. Lawrence, Dykes, Goodenberger, Baxter & Clancy**, 740 F.2d 1362 (6th Cir. 1984)(Ohio's "no-action" statute did not violate due process or equal protection by barring actions for damages for defects in improvements); **Barwick v. Celotex Corp.**, 736 F.2d 946 (4th Cir. 1984)(products liability statute of respose not violative of due process or equal protection); **Braswell v. Flintkote Mines, Ltd.**, 723 F.2d 527 (7th Cir. 1983) **cert.denied**, 104 S.Ct. 2690 (1984)(Indiana's products liability statute of repose barring asbestos-related claim

accruing after expiration of ten-year repose period not violative of due process or equal protection where legislative goal is reasonably related to statutory time limit).

Federal due process considerations do not preclude legislatures from creating statutes of repose, such as Section 95.031(2), which prevent causes of action from accruing. **Hartford Fire Ins.** As previously noted, a litigant has no recognizable property interest in a cause of action until it accrues. **See, Logan; Hartford Fire Ins.; Pitts; Ducharme**. It is well-recognized that due process does not forbid a state from abolishing a cause of action or a rule of common law to obtain a permissible legislative purpose. **Hartford Fire Ins.; See also, Logan**.

Statutes of repose which curtail the time for bringing an action are the result of a legislative determination balancing the rights and duties of competing groups. In **Chase Securities Corp v. Donaldson**, 325 U.S. 304, 314, 65 S.Ct. 1137, 1142, 89 L.Ed. 1628 (1945) the court set forth the underlying philosophy of statutes of limitation:

> Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedience, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost. **Order of Railroad Telegraphers v. Railway**

> **Express Agency**, 321 U.S 342, 349 [64 S.Ct. 582, 586, 88 L.Ed.788]. They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim or the voidable and unavoidable delay. They have come into the law not through the judicial process but through legislation. They represent a public policy about the privilege to litigate. Their shelter has never been regarded as what now is called a 'fundamental' right or what used to be called a 'natural' right of the individual. He may, of course, have the protection of the policy while it exists, but the history of pleas of limitation show them to be good only by legislative grace and to be subject to a relatively large degree of legislative control.

The statute of repose in this case reflects the Legislature's legitimate goal of preventing the imposition of perpetual liability against manufacturers. Additionally, the twelve years provided by Section 95.031(2) for instituting actions based on defects in products constitutes a reasonable time for bringing suit. **Pullum**. Accordingly, Section 95.031(2) comports with the requirements of federal due process.

Section 95.031(2) does not violate equal protection rights guaranteed by the United States Constitution. The relevant inquiry here is whether there is a rational relationship between the classifications created by the statute of repose and some legitimate state objective. **See,**

Brubaker; **Barwick**; **Braswell**. Because Section 95.031(2) does not arbitrarily single out any particular class of persons but affects equally all victims of defective products delivered more than eight years before injury, its classifications bear a rational relationship to its legitimate legislative purpose of preventing perpetual liability. **See, Pullum**.

Petitioner argues that the twelve-year time limit of Section 95.031(2) is an arbitrary standard, not reasonably related to the purpose of restricting liability to the normal useful life of the manufactured product. This argument is devoid of merit. As stated by the court in **Pullum** at 659, "twelve years from the date of sale is a reasonable time for exposure to liability for manufacturing of a product." Such a rational determination by the Legislature clearly comports with the requirements of equal protection under the United States Constitution.

Petitioner refers this Court to other state cases in which statutes of repose similar to Section 95.031(2) have been deemed unconstitutional on equal protection grounds. This reference proves unpersuasive. First, Petitioner fails to point out that although a number of states have overturned statutes of repose similar to the one at issue here, Florida is among the majority of courts which have upheld these statutes. **See, Hartford Fire Ins.**, 1365, n. 3.

Second, the statutes in the other state cases cited by Appellant are distinguishable in some fashion from Section 95.031(2), **see, e.g., Austin v. Litvak**, 682 P.2d 41 (Colo. 1984)(three-year statute of repose for medical malpractice held unconstitutional on equal protection grounds because it arbitrarily failed to exclude claims based on negligent diagnosis); **State Farm Fire and Casualty Co. v. All Electric, Inc.**, 99 Nev. 222, 660 P.2d 995 (Nev. 1983)(construction defect statute of repose violated equal protection because it arbitrarily denied immunity to owners and material suppliers); **Broome v. Truluck**, 270 S.C. 227, 241 SE 2d. 739 (1978)(construction defect statute of repose violates equal protection absent showing of rational basis for discriminating against owners and manufacturers of components).

B. **THE FLORIDA CONSTITUTION.**

Petitioner asserts that Section 95.031(2) violates the Florida constitutional guarantees of access to courts, due process and equal protection. This court has addressed and definitively rejected these constitutional challenges to the statute of repose in **Pullum**. Accordingly, Petitioner's arguments are without merit.

III

THE REPEAL OF THE STATUTE OF REPOSE HAS NO EFFECT ON THE OUTCOME OF THIS CASE.

The law of Florida is succinctly stated in **Corbett v. General Engineering and Machinery Co.**, 37 So.2d 161, 162 (Fla. 1948):

> [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 pre-existing statute of limitations[.]

In the case at bench, BRACKENRIDGE'S claim has already been extinguished by the statute of repose. The repeal of the statute cannot give new life to a previously barred cause of action. This issue was addressed by this court in **Garris v. Weller Construction Co.**, 132 So.2d 553, 555-556 (Fla. 1961) wherein the court stated:

> 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 556.

Here, BRACKENRIDGE can get the benefit of the repeal of the statute of repose **only** if his cause of action had not been barred prior to the repeal of the statute. For the reasons argued above it is submitted that BRACKENRIDGE'S claim has already been barred, and based upon the above authorities repeal of the statute cannot resurrect the previously extinguished and thus, non-existent claim. See, Bradford v. Shine, 13 Fla. 393 (1871); Annotation 133 ALR 384 (1941); Annotation 36 ALR 1316 (1925).

The Legislature could not make the repeal or amendment of the statute of repose retrospective even if it wanted to. It is well-settled that the Legislature may not, by repealing or amending a statute, deprive one of a vested right. State v. Lavazzoli, 434 So.2d 321 (Fla. 1983). Once the statute of repose has run the defendant has a vested right not to be sued. Colony Hill Condo I Association v. Colony Company, 320 SE 2d 273 (N.C. App. 1984); see, Corbett; Bradford v. Shine, 13 Fla. 393 (1871). The statute of repose is a type of statute of limitations, 53 C.J.S. **Limitation** section 1 (1948); however, it differs from a statute of limitations in that it begins to run, not from the time of an injury to a party, but at a date certain. Bauld v. J.A. Jones Construction Co., 357 So.2d 401 (Fla. 1978). Here the statute of repose began to run upon delivery of product to the purchaser. 95.031(2), **Fla.**

Stat. (1983). Any action against BARING INDUSTRIES became barred 12 years after the date of delivery notwithstanding the later amendment of the statute. **Colony Hill**. The Legislature cannot, by repealing or amending the statute of repose, revive a cause of action which has been extinguished. **See, Bradford v. Shine; Corbett**. Defendant's right not to be sued in this case vested 12 years after delivery. Accordingly, no action can now or in the future be brought against BARING based upon a products liability claim on this particular machine. Because those injured after the repeal or amendment of the statute have no cause of action against BARING based on defects in the product delivered in this case. This Court should hold that retrospective application of the repeal or amendment of the statute of repose would unconstitutionally deprive BARING of its vested right not to be sued.

CONCLUSION

The statute of repose constitutionally bars Petitioner's claim according to the law both before and after **Pullum**. Petitioner has failed to demonstrate that the statute of repose should not be applied to bar his claim. This court should hold that the statute of repose bars this claim and any other claims brought against BARING for injuries based upon a products liability theory more than twelve years after delivery of the particular machine. Thus, the repeal or amendment could not be made retroactive to deprive BARING of its vested interest not to be sued.

Further, this court should hold that **Pullum** should be given retrospective application to this case.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was mailed this 13th day of April, 1986 to **The Vogelsang Law Firm,** Suite 102A, 6701 Sunset Drive, Miami, Florida 33143 and **Stroock & Stroock & Lavan,** 3300 Southeast Financial Center, 200 South Biscayne Boulevard, Miami, Florida 33131-2385.

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