IN THE SUPREME COURT OF FLORIDA

CASE NO.: 70,157

DCA-3 NO.: 86-282

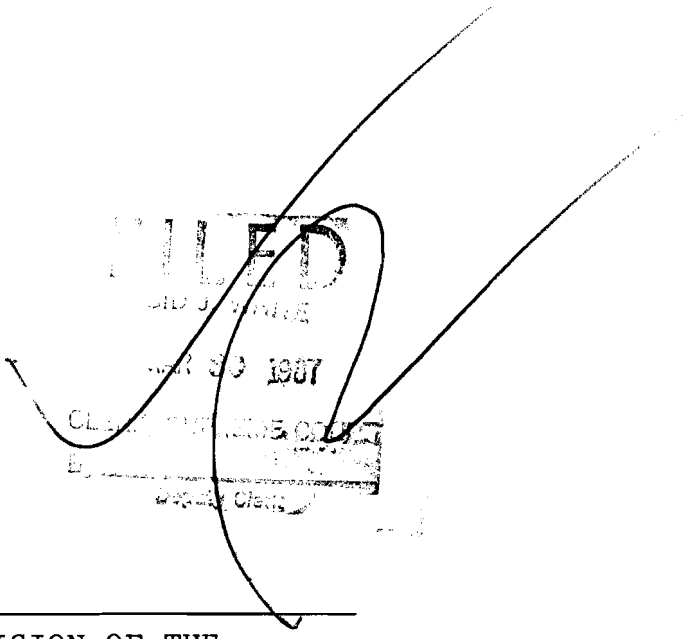
HARRY LANE and ROSA LANE, his wife,

Petitioners,

vs

KOEHRING COMPANY,

Respondent.



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

PETITIONER'S BRIEF

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REQUEST FOR ORAL ARGUMENT

APPELLANTS, HARRY LANE and ROSA LANE, by their undersigned counsel, hereby request oral argument.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was mailed this 27th day of March, 1987, to Leanne J. Frank, Esq., CORLETT, KILLIAN, HARDEMAN, McINTOSH & LEVI, P.A., 116 West Flagler Street, Miami, Florida, 33130; and to DAVID L. RICH, ESQ., 1620 West Oakland Park Boulevard, Fort Lauderdale, Florida, 33311.

By: _____
GARY K. SILBER
Florida Bar No. 373699

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	i
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE AND FACTS	2
QUESTIONS PRESENTED	3
SUMMARY OF ARGUMENT	4
ARGUMENT	
POINT I THE LEGISLATURE'S REPEAL OF THE TWELVE YEAR PRODUCTS LIABILITY STATUTE OF REPOSE MUST BE RETROACTIVELY APPLIED.	5
POINT II IF THE REPEAL OF THE STATUTE OF REPOSE DOES NOT OPERATE RETROSPECTIVELY, NEITHER SHOULD THE PULLUM DECISION OPERATE TO BAR A CAUSE OF ACTION THAT WAS VIABLE WHEN IT ACCRUED.	9
CONCLUSION	12
CERTIFICATE OF SERVICE	13

PRELIMINARY STATEMENT

This is a petition for review of a decision of the Third District Court of Appeal brought by HARRY and ROSA LANE. That Court certified two questions to be of great public importance. The Respondent is KOEHRING COMPANY.

STATEMENT OF THE CASE AND FACTS

Harry Lane was injured on July 21, 1981, by a crane manufactured by Koehring Company. As a result, Mr. Lane is now a paraplegic, confined to a wheelchair. (R. 133-134). The crane which injured Mr. Lane was manufactured and sold to the original purchaser on February 17, 1966. (R. 471-472). Mr. Lane brought his lawsuit against Koehring Company on September 30, 1983, two years after the accident and over fifteen years after the crane entered the stream of commerce.

In December, 1985, Koehring Company moved for summary judgment on the ground that the Lanes' action was barred by former Florida Statute §95.031(2)(1979), the products liability statute of repose. That motion was granted. After the motion was granted, the legislature amended §95.031 to repeal the products liability statute of repose. On appeal, the Third District Court of Appeal affirmed the trial court's decision and certified two questions to this Court for its determination. Those questions follow.

QUESTIONS PRESENTED

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 accrued 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 Batilla v. Allis Chalmers Mfg. Co., 392 So.2d 874 (Fla. 1980), apply so as to bar a cause of action that accrued after the Batilla decision but before the Pullum decision?

SUMMARY OF ARGUMENT

Principles of statutory construction compel that a repealing statute be given retrospective operation. Since the procedural statute which gave rise to the affirmative defense of the products liability statute of repose was repealed, that repeal has the effect of eliminating the statute as if it never was. Therefore, since Appellants had a viable cause of action against Appellee when that cause of action accrued, and since no affirmative defense of the statute of repose can now be raised to bar the action, Appellants must be given the opportunity to seek redress of their injuries.

ARGUMENT

POINT I

THE LEGISLATURE'S REPEAL OF THE TWELVE YEAR PRODUCTS LIABILITY STATUTE OF REPOSE MUST BE RETROACTIVELY APPLIED.

In 1981, when the defective crane caused Appellant, Harry Lane's accident making him a paraplegic, Appellant had a valid cause of action against Defendant Koehring Company, the manufacturers of the crane. Appellant's cause of action was not subject to the defensive bar of Fla. Stat. §95.031(2), even though the crane was delivered to the original purchaser more than twelve years earlier, because Batilla v. Allis Chalmers Mfg. Co., 392 So.2d 874 (Fla. 1980), had previously held that statute to unconstitutionally deprive persons situated like Appellant of their guaranteed right of access to the courts under Article I, Section 21 of the Florida Constitution.

Similarly, when Appellant filed his lawsuit in this case in 1983, he had a valid cause of action, not subject to the defensive bar of §95.031(2). Not until 1985, when this Court decided Pullum v. Cincinnati, Inc., 476 So.2d 657 (Fla. 1985), appeal dismissed, __U.S.__, 106 S.Ct. 1626, 90 L.Ed. 2d 174 (1986), was Defendant, Koehring Company, arguably entitled to raise the defense of the statute of repose.

However, after this Court's decision in Pullum, the Florida Legislature acted, at its very next session, to overrule Pullum by repealing the twelve year products liability statute of repose. Ch. 86-272, §2, Laws of Fla.

It is the law of Florida that where a statute is repealed with no saving clause or general statute limiting the effect of the repeal, the repealed statute is considered as if it had never existed. The courts have no power to perpetuate a law which the legislature has repealed. 49 Fla. Jur. 2d Statutes §209. This is particularly so where, as here, the statute gives a party only the right to raise an affirmative defense which modifies the common law. Then, when the statute is repealed, the right it created falls with it and the common law is reinstated. Id.; Yaffee v. International Co., 80 So.2d 910 (Fla. 1955).

Since the twelve year statute of repose in products liability actions has been repealed, it must be viewed as if it never existed and cannot be the basis for defendant, Koehring Company's defense in this case. This result is mandated by the Legislature's action. The Legislature's conduct in repealing this statute evinces a clear and unambiguous intent that the twelve year statute of repose not be applied to bar any plaintiff's right of access to the courts. When this Court decided Batilla in 1980, the Legislature was free to act if it intended for the statute of repose to bar a plaintiff's cause of action before it ever accrued. By failing to act in five years, the Legislature clearly evinced its

agreement with Batilla that §95.031(2) was unconstitutional when it completely barred a plaintiff's action before it accrued.

And, if the Legislature's inaction wasn't enough to illustrate its thinking, certainly its recent affirmative action is. As soon as this Court receded from Batilla, the Legislature acted to restore the rule of Batilla. Even the language used by the legislature makes it clear that they intended to make a full repeal and create a situation where it would be as if the statute never existed. Ch.86-272 treated limitations on actions for libel and slander in Section 1, as well as repealing the limitation on products liability actions in Section 2. Then, in Section 3, the Legislature wrote:

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

Certainly, if the Legislature intended this repeal of the products liability statute of repose to be treated differently than all other repeals of statutes; i.e., that only this repealed statute should not be applied retroactively, then the Legislature would have said so. The Legislature could have said that Section 2 of the act would apply to causes of action accruing after its effective date, just like it did as to Section 1. The fact that the Legislature treated the sections differently, compels the conclusion that the Legislature intended the clear difference. That clear intent should be given effect.

That the Legislature must have intended for the repeal of the statute of repose to apply retrospectively is established by the law of retrospective application of remedial statutes. The Legislature is, of course, presumed to know the law and it has always been the law of Florida that statutes which relate only to remedies, like §95.031(2), are to be retrospectively applied. Rothermel v. Florida Parole and Probation Commission, 441 So.2d 663 (Fla. 1st DCA 1983). In addition, it is well settled that the disposition of a case on appeal must be consistent with the law in effect at the time of the decision of the appellate court. Cantor v. Davis, 489 So.2d 18 (Fla. 1986). In this case, we are dealing with a statute that only affects remedies. Koehring Company certainly had no vested right to the affirmative defense of the statute of repose; it wasn't raised in their original pleadings or even anticipated or relied on until Pullum was decided. Since §95.031 (2) created no right vested in the defendant, its repeal cannot possibly create such a vested right to have Koehring's liability for manufacturing defective products artificially cut off. To the contrary, by refusing to apply the repealed statute of repose in this case, all that will happen is that the defendant, will properly be prevented from receiving the windfall of not having to defend a serious lawsuit.

It is, of course, the most basic policy of tort law, and of the Florida Constitution, Article I, Section 21,

that an injured plaintiff should have a forum where he can seek redress. The Legislature reaffirmed its committment to access to the courts for its citizens by repealing the limiting statute of repose. By denying Koehring Company the no-longer extant affirmative defense of the statute of repose, this Court will only be giving Plaintiff his guaranteed access to the Court to try and prove that he is now a paraplegic due to this defendant's negligence in producing this crane. All substantive defenses are still available to Koehring Company and would not be denied to Defendant.

POINT II

IF THE REPEAL OF THE STATUE OF REPOSE DOES NOT OPERATE RETROSPECTIVELY, NEITHER SHOULD THE PULLUM DECISION OPERATE TO BAR A CAUSE OF ACTION THAT WAS VIABLE WHEN IT ACCRUED.

Appellants, Harry and Rosa Lane, maintain that all the principles of statutory construction and analysis mandate that the first certified question be answered affirmatively. If this Court rules otherwise, however, then the same principles which would bar the repeal of the statute of repose from being applied retrospectively, the vested rights of the parties would similarly bar the retrospective application of the Pullum decision.

Decisions which overrule prior decisions are treated like the repeal of a statute; they are to be retrospectively applied unless to do so would destroy a right vested under

the prior decision. Florida Forest and Park Service v. Strickland, 18 So.2d 251, 253 (Fla. 1944).

In the present case, we have seen that a statute of repose, like a statute of limitation, is remedial, not substantive, and therefore, itself not a vested right. Bauld v. J.A. Jones Construction Co., 357 So.2d 401 (Fla. 1978). The only substantive rights in this case are the Florida Constitutional guarantee of access to the courts that existed as a vested right on the day the appellants' causes of action accrued in this case and the Florida and federal constitutional guarantees of equal protection under the law.

If this Court holds that the repeal of the procedural statute of repose ought not be retrospectively applied and that the Pullum decision should be retrospectively applied, then Appellants will be denied the equal protection of the law. This is so because all plaintiffs injured who sued and tried their cases or settled them before Pullum had access to the court to pursue a remedy. All plaintiffs injured who sued after the repeal date also have a remedy. Only those persons, like Plaintiffs here, who were injured and whose cases were pending after Batilla and before Pullum and the repeal of §95.031(2), have no remedy. Thus, under such a holding, these plaintiffs would be caught in a sort of time warp where because of mere happenstance they are forbidden to pursue the same remedy available to all other plaintiffs before them and after them.

That kind of result is anathema to our system of justice because it bears no rational relationship to any reasonable or legitimate purpose. As the Legislature has so clearly told us, claims for personal injury should not be barred before they can accrue. Since that was the Legislature's clear intent in repealing the statute of repose, that intent should be given its fullest effect in a uniform way to insure equal justice and opportunity.

CONCLUSION

Based on the foregoing, the first certified question should be answered, "Yes." In the event this Court answers the first certified question, "No.," then the second certified question must also be answered, "No."

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was mailed this 24th day of March, 1987, to Leanne J. Frank, Esq., CORLETT, KILLIAN, HARDEMAN, McINTOSH & LEVI, P.A., Attorneys for KOEHRING COMPANY, 116 West Flagler Street, Miami, Florida 33130, and to ~~DAVID L. RICH, ESQ., 1620 West Oakland Park Boulevard, Fort Lauderdale, Florida 33311.~~ Withdrawn

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