5-11

IN THE SUPREME COURT OF FLORIDA

CASE NO: 70,157

HARRY LANE and ROSA LANE, his wife,

Petitioners,

vs.

KOEHRING COMPANY

Respondent.

ON REVIEW OF A QUESTION CERTIFIED
TO BE OF GREAT PUBLIC IMPORTANCE
BY THE THIRD DISTRICT COURT OF APPEAL

RESPONDENT'S BRIEF

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CITATIONS

RESPONDENT'S BRIEF

INTRODUCTION

This petition seeks review of a decision of the Third District Court of Appeal which certified two questions to this Court as being of great public importance.

Petitioners Harry and Rosa Lane, plaintiffs in the trial court, appellants in the Third District, will be referred to collectively as "PETITIONERS" or "LANE". Respondent Koehring Company will be referred to by name or as "RESPONDENT". The symbol "R" refers to the record on appeal.

STATEMENT OF THE CASE AND FACTS

Respondent adopts the statement of the case and facts set forth in Petitioners' initial brief with the following changes and additions. In this products liability action, LANE alleges that he was seriously injured when the boom of a crane manufactured by KOEHRING fell on him. (R. 133-134). Mr. LANE receives workmens compensation benefits for his injury. (R. 9). The crane was manufactured and delivered to the original purchaser on February 17, 1966. (R. 471- 472). On July 21, 1981, over fifteen years after delivery of the crane, LANE suffered the alleged injury. (R. 133- 144). This lawsuit was commenced September 30, 1983, more than seventeen years after the manufacture and delivery of the allegedly defective crane to the original purchaser. (R. 133-144).

KOEHRING moved for summary judgment on the ground that LANE's action was time barred by Section 95.031(2), Florida Statutes (1981), more appropriately known as the statute of repose, which absolutely bars products liability actions instituted more than twelve years after delivery of the defective product to the original purchaser. (R. 466-470). The trial court granted KOEHRING's motion for summary judgment. (R. 480). While this case was on appeal at the Third District, the legislature amended Section 95.031 to repeal the products liability statute of repose. The Third District affirmed the final summary judgment in KOEHRING's favor, finding that LANE's action was time barred, and certified two questions to this Court as being of great public importance.

QUESTIONS CERTIFIED

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 Battilla v. Allis Chalmers Manufacturing 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?

SUMMARY OF ARGUMENT

I

Where the legislature does not clearly express an intention that a statute be retroactively applied to a cause of action arising out of events occurring prior to the statute's effective date, the statute should be applied prospectively only. This rule of statutory construction thus requires that the legislative intent to provide retroactive effect be express, clear and manifest. Homemakers, Inc. v. Gonzales, 400 So.2d 965 (Fla. 1981); Foley v. Morris, 339 So.2d 215 (Fla. 1976).

As the legislature did not clearly express an intention that Section 95.031(2) be retroactively applied to a cause of action arising out of events occurring prior to the statute's effective date (see attached Florida Session Laws, Chapter 86-272, HB No. 832, amending Florida Statute Section 95.031) and in fact, specifically provided that the act would take effect prospectively on July 1, 1986, there was no express, clear and manifest legislative intent to provide retroactive effect of the amendment.

Furthermore, this statute was amended at the same time as an over all tort reform act was being initiated, and this Court must, therefore, look at these acts in conjunction rather than as isolated occurrences.

II

Both the trial court and the Third District

properly applied Pullum to bar Petitioners' cause of action that accrued after the Battilla decision but before the Pullum decision.

It is well settled that if a decision holding a statute unconstitutional (Battilla), is subsequently overruled (Pullum), the statute will be held valid from the date it became effective. This Court as well as the district courts have recently applied this basic principal in determining that Pullum applies retrospectively to bar causes of action, such as the one alleged here, which spring from injuries occurring subsequent to Battilla but before Pullum. Indeed, this Court applied its holding in Pullum retrospectively to Pullum himself. Retrospective application of Pullum comports with well settled principals of law and with Florida and Federal Constitutional guarantees. Retrospective application of Pullum to this case is dictated by the general rule that an overruling decision of a court of last resort applies both prospectively and retrospectively, unless the opinion expressly declares it to have prospective effect only. Pullum is not only devoid of any such declaration, but, is an opinion which actually applies its holding retrospectively to the litigant himself, thus manifesting clear intent to require retrospective application to pending cases.

Furthermore, retrospective application does not violate constitutional guarantees of due process, access to

courts, or equal protection. First, because the statute of repose operated to cut off LANE's cause of action before it ever accrued, he had no vested right in any claim arising from the allegedly defective product. Moreover, LANE did not obtain any vested right in his cause of action in reliance upon the pre-Pullum construction of the statute of repose. The mere expectation that he might have been able to pursue a common law tort theory based upon the continued application of the perfunctory finding in Battilla is clearly not tantamount to a vested right. It is futhermore axiomatic that no person has a vested right in any rule of common law entitling them to have such a rule of law remain unchanged for their benefit. Thus, because LANE had no vested right in his cause of action, retrospective application of Pullum cannot conveivably operate to violate his due process rights. A statute of limitation is remedial rather than substantive in nature, and a litigant has no vested right in the benefit of a particular limitation law in effect when his cause of action accrues.

This court in Pullum unequivocably determined that the legislature had a rational and legitimate purpose in limiting the liability of manufacturers to twelve years. Accordingly, the abridgment of any common law action LANE may have pursued here comports with Florida's Constitutional guarantee of access to courts.

Finally, because no arbitrary classifications are

established as a result of the repeal of the statute of repose, retrospective application of Pullum raises no equal protection problems.

JURISDICTION

As this Court has requested briefs on the merits from the parties, without yet determining whether to accept jurisdiction, Respondent takes this opportunity to briefly address the jurisdictional aspects of this case.

As a preliminary matter, Respondent suggests that neither of the two questions certified by the Third District are questions of great public importance, in that both have been adequately addressed by the courts of this state.

First, the law is clear that statutes (or amendments to statutes) do not apply retrospectively in the absence of an express, clear or manifest intent that they do so. The presumption is against retroactive application of a statute where the legislature has not expressed, in clear and explicit language, an intention that a statute be so applied.

Applying this rule of construction to the amendment of Section 95.031(2), it can readily be seen that by stating that the amendment "shall take effect July 1, 1986", without expressing a clear intent that the amendment have retrospective effect, the presumption against retroactive application applies.

Next, the second question so certified, whether the decision of Pullum which overruled Battilla should apply so as to bar a cause of action that occurred after the Battilla decision but before the Pullum decision, was addressed and decided by this Court itself in the Pullum case. As this Court's holding in Pullum applied to Pullum himself, whose cause of action accrued after Battilla but obviously before Pullum, this Court must have intended the decision to apply to other litigants whose cause of action accrued after Battilla. The question has, therefore, already been answered by this Court. Additionally, each district court in Florida which has considered and addressed the second certified question has interpreted Pullum so as to apply to bar causes of action accruing after Battilla but before the Pullum case. See Cassidy v. Firestone Tire & Rubber Company, 495 So.2d 801 (Fla. 1st DCA 1986); Pait v. Ford Motor Co., 500 So.2d 743 (Fla. 5th DCA 1987); Small v. Niagara Machine & Tool Works, 502 So.2d 943 (Fla. 2d DCA 1987); and of course, the decision in the instant case which was affirmed on the authority of Shaw v. General Motors Corp., 12 F.L.W. 487 (Fla. 3d DCA, February 10, 1987).

ARGUMENT

I

THE LEGISLATURE'S AMENDMENT OF THE TWELVE-YEAR PRODUCTS LIABILITY STATUTE OF REPOSE MUST BE PROSPECTIVELY APPLIED IN THE ABSENCE OF AN EXPRESS, CLEAR OR MANIFEST INTENT THAT SAID AMENDMENT IS TO APPLY RETROSPECTIVELY.

The law is well-settled that where the legislature does not clearly express an intention that a statute (or an amendment to a statute) be retrospectively applied to a cause of action arising out of events occurring prior to the statute's effective date, the statute should be prospectively applied only. Homemakers, Inc. v. Gonzales, 400 So.2d 965 (Fla. 1981); Foley v. Morris, 339 So.2d 215 (Fla. 1976). See also Durring v. Reynolds, Smith & Hills, 471 So.2d 603 (Fla. 1st DCA 1985); Alford v. Summerlin, 423 So.2d 482 (Fla. 1st DCA 1982); Regency Wood Condominium v. Bessent, Hammack and Ruckman, 405 So.2d 440 (Fla. 1st DCA 1981).

In Foley, this Court refused to retroactively apply an amendment to a statute of limitations which had the effect of shortening the statute. In the following manner this Court noted that in the absence of a clear manifestation of legislative intent to the contrary, statutes of limitation are construed as prospective and not retrospective in their operation, and the presumption is against any intent on the part of the legislature to make such a statute retroactive:

> "In most jurisdictions, in the absence of a clear manifestation of legislative intent to the contrary, statutes of limitation are construed as prospective and not retrospective in their operation, and the presumption is against any intent on the part of the legislature to make such a statute retroactive. Thus, rights accrued, claims arising, proceedings instituted, orders made under the former law, or judgments rendered before the passage of an amended statute of limitations will not be affected by it, but will be governed by the original statute unless a contrary intention is expressed by the legislature in the new law."

339 So.2d at 217.

The statute construed in Homemakers, Inc. had been subjected to several amendments over a two-year period with the effect that some causes of action under the original provision were shortened while others were lengthened. Along with one of these amendments, the legislature enacted a "savings clause," which provided a one-year grace period for the filing of causes of action that would be prematurely barred by the new statute of limitations. The plaintiff in Homemakers, Inc. argued that the "savings clause" should be applied to lengthen her pre-existing cause of action. Finding no indication of any legislative intent that the provision be used to lengthen a cause of action, this Court noted that "the obvious purpose of enacting a savings clause is to satisfy the constitutional mandate that to shorten a period of limitation, the legislature must by statute allow a reasonable time to file actions already accrued." 400 So.2d at 967 (emphasis in

original). It is well established that a new statute of limitations which short- ens the period for filing a cause of action is presumed not to apply retroactively to causes of action which have already accrued unless there is a clear expression of legislative intent to give the new statute retroactive effect. E.g., Carpenter v. Florida Central Credit Union, 369 So.2d 935 (Fla. 1979); Foley v. Morris, supra. Similarly, where, as here, a new statute or amendment enlarges the limitations for a cause of action, it is still presumed not to apply retroactively to an action already accrued unless the legislature has clearly evinced such an intent. Homemakers, Inc. v. Gonzales, supra.

Applying these principals to the instant case, it must be presumed that when the legislature passed Chapter 86-272 (attached) it was aware of the longstanding rule that statutes are presumed to be prospective only in the absence of an express intent to the contrary. There is nothing in the preamble to Chapter 86-272 or the statutory language which amounts to an express, clear or manifest intent to make the new statute retroactive to causes of action in existence on the effective date of the statute. To the contrary, the legislature clearly expressed an intent that the amendment apply prospectively only ("this act shall take effect July 1, 1986.") It is not for this Court to question the wisdom of the legislature, or go beyond the legislative mandate that the amendment apply

prospectively only. Even aside from this clear intent, the presumption in Florida is that amendments to statutes will be applied prospectively only unless the intent to provide retroactive effect is express, clear and manifest. The Petitioner has pointed to nothing in either the statute itself, the preamble, or the legislative history to indicate an intent to provide retroactive effect of the amendment. Further, the statute was not amended in a vacuum, but rather was amended at the same time as an overall tort reform act was being initiated in Florida, and these acts must therefore be looked at in conjunction rather than as isolated occurrences. Although the legislature repealed the twelve-year statute of repose which provided protection for manufacturers from being exposed to perpetual liability long after their product has completed its useful life and possibly been subjected to abuse and misuse, other protections have now been provided to such manufacturers under the tort reform act.

As a final note, Respondent would point out that Petitioners would surely not contend that the amendment should apply to their cause of action had it shortened the statute of limitations, and therefore, as a just rule of law, such amendments should likewise not apply to existing causes of action when their effect is to lengthen a statute of limitations.

II

PULLUM V. CINCINNATI, SUPRA, APPLIES TO THE INSTANT CASE SO AS TO BAR LANE'S CAUSE OF ACTION WHICH ACCRUED AFTER THE BATTILLA DECISION BUT PRIOR TO PULLUM.

Petitioner argues that if this Court holds that the repeal of the statute of repose does not retrospectively apply to his cause of action, but that the Pullum decision does retrospectively apply, that he will be denied the equal protection of the law. In so arguing, Petitioner overlooks the fact that he will be treated equally with all plaintiffs who were injured and whose cases were pending after Battilla and before Pullum and the repeal of Section 95.031(2).

Section 95.031(2), Florida Statutes (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, instead of running from any date prescribed elsewhere in s. 95.11(3), but in any event within 12 years after the date of delivery of the completed product to its original purchaser or within 12 years after the date of the commission of the alleged fraud, regardless of the date the defect in the product or the fraud was or should have been discovered.

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 product "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).

The injury of which Petitioner complains did not even arise until over fifteen years after delivery of the allegedly defective product to the original purchaser. Under the express language of the statute of repose, Petitioner's right of action never "accrued" but was cut off before the alleged injuries, which occurred over three years after the expiration of the absolute twelve-year repose period. The statute of repose on its face, therefore, bars Petitioner's claim, commenced more than seventeen years after delivery of the crane and over five years after the expiration of the twelve-year repose period.

Petitioner contends, however, that his vested rights bar the retrospective application of the Pullum decision to his cause of action. Thus, Petitioner argues that Pullum, which expressly receeded from Battilla and definitively declared the statute of repose constitutional as written, cannot be applied retrospectively to bar his claim.

Respondent submits that under governing principles of law, Pullum is binding on the present case as

authority that the statute of repose validly bars this action. It is well-settled law that if a decision holding a statute unconstitutional is subsequently overruled, the statute will be held valid from the date it became effective:

> Ordinarily, 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 . . . . Generally speaking, therefore, a judicial construction of a statute will ordinarily be deemed to relate back to the enactment of the statute, much as though the overruling decision had been originally embodied therein.

Florida Forest and Park Service v. Strickland, 18 So.2d 251, 253 (Fla. 1944) (emphasis supplied). Thus, the fact that the statute was deemed unconstitutional in Battilla does not affect its validity now that the statute has been held valid in Pullum:

> Where a statute is judicially adjudged to be unconstitutional, it will remain inoperative while the decision is maintained; but if the decision is subsequently reversed, the statute will be held to be valid from the date it first became effective, even though rights acquired under particular adjudications where the statute was held to be invalid will not be affected by the subsequent decision that the statute is constitutional.

Christopher v. Mungen, 61 Fla. 513, 55 So. 273, 280 (1911) (emphasis supplied). On rehearing, the court in Christopher further clarified its position to reflect that the statute would be applied to everyone except the parties

to the decision holding the statute constitutional. Accordingly, retrospective application of Pullum's holding does not divest Petitioner of any substantive right to any limitation law arguably in existence before Pullum.

Thus, the fact that the statute of repose was declared unconstitutional as applied in Battilla has no effect on the validity of its application to Petitioner's claim after this Court specifically held the statute constitutional in Pullum. Christopher v. Mungen, supra.

Applying the basic rule of law delineated in Mungen, a number of district courts in Florida have recently held that Pullum applies retrospectively to bar causes of action, such as the one alleged here, which spring from injuries occurring after Battilla but before Pullum. Shaw v. General Motors Corp., 12 F.L.W. 487 (Fla. 3d DCA, February 10, 1987); Brackenridge v. Ametek, Inc., 12 F.L.W. 479 (Fla. 3d DCA, February 10, 1987); Pait v. Ford Motor Co., 500 So.2d 743 (Fla. 5th DCA 1987); Small v. Niagara Machine & Tool Works, 502 So.2d 943 (Fla. 2d DCA, 1987); Cassidy v. Firestone Tire & Rubber Co., 495 So.2d 801 (Fla. 1st DCA 1986); American Liberty Insurance Co. v. West and Conyers, 491 So.2d 573 (Fla. 2d DCA 1986).

It is axiomatic under both Federal and Florida law that the determination of legal questions must be consistent with the law in effect at the time the question is actually decided. See, e.g., Edwards v. Sea-Land

Service, Inc., 720 F.2d 857 (5th Cir. 1983); Cantor v. Davis, 489 So.2d 18 (Fla. 1986); Hendeles v. Sanford Auto Auction, Inc., 364 So.2d 467 (Fla. 1978). As a corollary to this proposition, the general rule applicable in Florida and delineated by this Court in Florida Forest and Park Service v. Strickland, 18 So.2d 251, 253 (Fla. 1944) is that "a decision of a court of last resort overruling a former decision is retrospective as well as prospective in operation, unless specifically declared by the opinion to have prospective effect only." See also Florida East Coast Railway Co. v. Rouse, 194 So.2d 260 (Fla. 1967); International Studio Apartment Ass'n. v. Lockwood, 421 So.2d 1119 (Fla. 4th DCA 1982), rev. denied, 430 So.2d 451 (Fla. 1983), cert. denied, 104 S.Ct. 244 (1983), Parkway General Hospital v. Stern, 400 So.2d 166 (Fla. 3d DCA 1981).

It is also well settled that application of a new law to a pending action is not unconstitutional unless it operates to create new, or to take away vested rights. City of Lakeland v. Catinella, 129 So.2d 133 (Fla. 1961); Seaboard System Railroad, Inc. v. Clemente, 467 So.2d 348 (Fla. 3d DCA 1985). 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. Village of El Portal v. City of Miami Shores, 362 So.2d 275 (Fla. 1978); Seaboard System

Railroad, Inc. v. Clemente, supra.

This Court's determination in Pullum that the statute of repose is constitutional as applied to claims accruing after the expiration of the twelve-year repose period does not operate to create new or to destroy any vested, substantive right. A statute of limitation is remedial rather than substantive in nature, and a litigant has no vested right in the benefit of a particular limitation law in effect when his cause of action accrues. Bauld v. J.A. Jones Construction Co., 357 So.2d 401 (Fla. 1978); Walter Denson & Son v. Nelson, 88 So.2d 120 (Fla. 1956).

Pullum is bereft of any declaration, either express or implicit, that it should apply prospectively only. In fact, by applying its holding retrospectively to Pullum himself, this 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 were to be applied prospectively only. In maintaining the constitutionality of Section 95.031(2), this Court rejected Pullum's equal protection challenge. Pullum had argued that after Battilla, the statute of repose denied equal protection because it continued to apply arbitrarily to only that class of 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. This Court definitively disposed of this constitutional challenge by ruling that all plaintiffs would be subjected equally to the absolute twelve-year bar imposed by Section 95.031(2), including those individuals, like Petitioner here, who were injured over twelve years after delivery of the allegedly defective product.

If Pullum were to be applied prospectively only, plaintiffs such as Petitioner, 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 retrospectively to bar the present action.

Nor does application of Pullum to the instant case operate to deprive Petitioner of a vested, property right in his cause of action because he 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. 2d DCA 1984). There is no vested right in a litigant to the benefit of the statute of limitations in effect when his cause of action accrues. Durring v. Reynolds, Smith & Hills, supra.

By virtue of the Pullum decision, Section 95.031(2) is considered valid from the date of its enactment in 1975 and applies to this Petitioner. Pullum does not apply a new principal of law. While it is true that Pullum overruled Battilla, it is also true that for the five-year period prior to the Battilla decision, the statute of repose was held to be constitutional. Thus, Pullum may have changed the existing interpretation since 1980, but in so doing it reaffirmed the statute as originally enacted in 1975.

Although pursuant to the exception to the general rule requiring prospective as well as retrospective application of decisional law, retrospective application

of a new law is unconstitutional if it operates to create new or to take away vested rights, see, e.g., State v. Lavazzoli, 434 So.2d 321 (Fla. 1983); City of Lakeland v. Catinella, 129 So.2d 133 (Fla. 1961), because Petitioner acquired no vested right in this cause of action prior to Pullum, retrospective application of that opinion as a bar to the present claim does not violate due process.

Petitioner argues that retrospective application of Pullum to his cause of action destroys a right vested under Battilla, citing Florida Forest and Park Service v. Strickland, 18 So.2d 251 (Fla. 1944). In so arguing, however, Petitioner misconstrues the law announced in Strickland.

This Court in Strickland carved out the well established general axiom that retrospective as well as prospective affect must be given to an overruling decision from a court of last resort. This Court recognized, however, that this rule is inapplicable in the limited circumstances which fall under the "common sense" exception:

> that where a statute has received a given construction by a court of supreme jurisdiction and property or contract rights have been acquired under and in accordance with such construction, such rights should not be destroyed by giving to a subsequent overruling decision a retrospective operation.

18 So.2d at 253.

To argue that this proposition precludes

retrospective application of Pullum to the instant case misstates the Strickland "common sense" exception by framing it as a general rule. Moreover, this argument must be rejected in substance because Petitioner did not obtain any vested right in his cause of action in reliance upon the pre-Pullum construction of the statute of repose.

Furthermore, assuming, arguendo, that an accrued cause of action is a species of property protected by the due process clause of the fourteenth amendment, Logan v. Zimmerman Brush Co., 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982), an unaccrued cause of action is not constitutionally protected. Pitts v. Unarco Industries, Inc., 712 F.2d 276 (7th Cir.), cert. denied, 464 U.S. 1003, 104 S.Ct. 507, 78 L.Ed.2d 698 (1983); 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). In the present case, LANE's cause of action never accrued; rather, the statue of repose cut off any claims arising from the allegedly defective crane in 1978, twelve years after delivery to the original purchaser and three years before LANE even suffered the injury complained of here. The effect of the statute of repose and the lapse of the statutory period obviate the very possibility of the plaintiff sustaining any legal injury from the accident. See Tetterton v. Long Manufacturing Co., 314 N.C. 44, 332 S.E.2d 67 (N.C. 1985) (the effect of the statute of repose

is that unless the injury occurs within the prescribed time, the injured party has no cognizable claim); Rosenberg v. Town of North Bergen, 61 N.J. 190, 293 A.2d 662 (1972) (effect of statute of repose is to prevent what might otherwise be cause of action from ever arising so that injury occurring after expiration of repose period forms no basis for recovery).

Because the statute of repose barred any claims LANE may have had regarding defects in the crane before the accident ever occurred, retrospective application of Pullum cannot conceiveably operate to deprive Petitioner of a property right he never acquired. In fact, in 1978, at the time the twelve-year repose period here expired, Respondent acquired a vested right not to be sued. Colony Hill Condo I Assoc. v. Colony Co., 320 S.E.2d 273 (N.C. App. 1984).

Even if Petitioner, in filing this lawsuit, were pursuing a common law tort theory to recover damages for his injury in reliance upon Battilla, the pursuit of such a remedy in no way rises to the level of a vested right. First, any reliance LANE may have had upon the perfunctory holding in Battilla cannot be considered a vested right in a cause of action. A vested right must be "more than a mere expectation based on anticipation of the continuance of an existing law (.)" In Re Will of Martell, 457 So.2d 1064, 1067 (Fla. 2d DCA 1984). The mere prospect that LANE might have been able to recover damages from Respondent on

a tort theory is indisputably not tantamount to a vested right.

Furthermore, no person has a vested right in any rule of common law entitling them to have such a rule of law remain unchanged for their benefit. See, e.g., Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 98 S.Ct. 2620, 57 L.Ed.2d 595 (1978). In fact, common law rights may constitutionally be restricted or even abolished by the legislature to attain a permissible legislative objective. Silver v. Silver, 280 U.S. 117, 50 S.Ct. 57, 74 L.Ed. 221 (1929). See also, Duke Power Co., supra; Overland Construction Co. v. Sirmons, 369 So.2d 572 (Fla. 1979); Kluger v. White, 281 So.2d 1 (Fla. 1973). No one has a vested right in the continued existence of a body of negligence law, otherwise the law stagnates. The law must be permitted to evolve, and although certain litigants may from time to time be adversely effected by such decisions, any other conclusion precludes evolution of the law. Petitioner did not acquire his right to sue in reliance upon Battilla. The right occurred by accident, not by any conscious decision made in reliance upon judicial precedent.

Based upon the state of the law relating to the products liability statute prior to Pullum, LANE 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 LANE 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. In Re Will of Martel, supra. Such a tenuous reliance interest certainly does not rise to the level of a vested right.

Nor is Petitioner denied the constitutional guarantee of access to the courts by retrospective applicatio of Pullum. This Court in Pullum unequivocably determined that the legislature had a rational, legitimate purpose in limiting the liability of manufacturers to twelve years. The abridgment of any common law action Petitioner might have pursued here thus comports not only with state and federal due process protection, but with Florida's constitutional guarantee of access to courts under Article I, Section 21 of the Florida Constitution. Petitioner's assertion that retrospective application of Pullum to this claim violates Florida's access to courts provision has, therefore, been thoroughly addressed and definitively resolved in Pullum.

CONCLUSION

Based upon the foregoing facts, legal authorities and reasoning, KOEHRING respectfully requests this Honorable Court to answer the first certified question no, the second certified question yes, and affirm the final summary judgment in its favor.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 16th day of April, 1987, to: GARY K. SILBER, ESQ., 515 S.E. Seventh Street, Ft. Lauderdale, FL 33301 and to ~~DAVID L. RICH, ESQ., 1620 West Oakland Park Boulevard, Fort Lauderdale, Florida 33311.~~ withdrawn.

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