IN THE SUPREME COURT OF FLORIDA

CASE NO. 70,158
THIRD DISTRICT CASE NO. 86-238

ROBERT P. WALLIS,

Petitioner,

v.

GRUMMAN CORPORATION,

Respondent.

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

BRIEF OF RESPONDENT, GRUMMAN CORPORATION

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INTRODUCTION

This brief is filed on behalf of the Respondent, Grumman Corporation ("Grumman"), in support of a Final Summary Judgment entered by the trial court and affirmed by the Third District Court of Appeal. Grumman was a defendant below and Petitioner Robert P. Wallis ("Wallis") was the plaintiff. References to Wallis' brief will be indicated as (WB ___), and references to the record will be (R. ___).

STATEMENT OF THE CASE AND FACTS

Grumman accepts the Statement of the Case and Facts of Petitioner, Wallis, as being substantially accurate subject to the following corrections and additions:

1. All six counts, including Count III, of Wallis' Fifth Amended Complaint are causes of action for products liability. (R. 312-319). In Count III, Wallis alleges that Grumman, as manufacturer of the subject aircraft, negligently failed to warn the aircraft's users that the aircraft was defective in design and that "either a new design or safety devices should be used" on its fuel system. (R. 316). Count III does not allege that Grumman breached an asserted duty to remedy the purported defect. (R. 316-317).

2. Section 95.031(2), Florida Statutes (the Statute of Repose) was in full force and effect when Wallis was injured and commenced this action.

3. The Florida Supreme Court rendered its decision in Batilla v. Allis Chalmers Manufacturing Company, 392 So.2d 874 (Fla. 1981), after Wallis instituted this suit.

4. The subject aircraft was delivered to its original purchaser on March 9, 1942 (R. 26), which was more than twelve years prior to April 20, 1978, the date that the suit was commenced. (WB 1).

SUMMARY OF THE ARGUMENT

The amendment eliminating the twelve year statute of repose in products cases cannot be applied retroactively because it has the effect of enlarging the statute of limitations, and the legislature has failed to expressly provide for retroactive application in clear and explicit language. Homemakers v. Gonzalez, 400 So.2d 965 (Fla. 1981). On the contrary, the effective date provision, the only indicium of legislative intent, shows that there was no intent to apply the amendment retroactively.

The amendment to the statute of repose cannot be retroactively applied as a remedial statute because retroactive application would impair Grumman's vested rights acquired when the action became barred by the statute of repose. Even if the amendment could be characterized as remedial, it should not apply retroactively because Gonzalez requires an express showing of a legislative intent to apply an act of this nature retroactively.

The amendment should not be applied retroactively under the "retroactive repealer rule" because the effective date clause indicates that this was not the legislative intent, and because retroactive application here would unfairly impair Grumman's vested rights.

Abolishing a statute of repose is indistinguishable from enlarging a statute of limitations, which was at issue in Gonzalez. Therefore, this Court, like all of the District Courts of Appeal that have addressed the issue, should conclude that the broad holding of Gonzalez controls here and that the amendment applies prospectively only.

This Court's decision in Pullum v. Cincinnati, 476 So.2d 657 (Fla.), rehearing denied, 482 So.2d 1352 (Fla. 1985), appeal dismissed, ___ U.S. ___, 106 S.Ct. 1626, 90 L.Ed.2d 174, 54 U.S.L.W. 3996 (1986), was properly given retroactive effect because it fell under the general rule that a decision of a court of last resort is given prospective as well as retroactive effect. All of the District Courts of Appeal that have confronted this issue have given Pullum retroactive effect.

Count III of Wallis' Fifth Amended Complaint was properly found barred by the statute of repose because the statute barred all actions for products liability, and this bar encompassed an allegation of a failure of a continuing duty to warn. Eddings; infra; Dague, infra.

ARGUMENT

I.

CHAPTER 86-272, SECTION 2, LAWS OF FLORIDA IS INAPPLICABLE TO WALLIS' CLAIM AND HAS NO EFFECT ON THE SUMMARY FINAL JUDGMENT ENTERED IN FAVOR OF GRUMMAN.

Chapter 86-272, Section 2, Laws of Florida, which repealed the statute of repose effective July 1, 1986, should not be applied retroactively to this case. It is well established that "the presumption is against retroactive application of a statute where the Legislature has not expressly in clear and explicit language expressed an intention that the statute be so applied". Foley v. Morris, 339 So.2d 215, 216 (Fla. 1976).

In Foley, this Court concluded that an amendment to Section 95.11(6), Florida Statutes, providing for a two-year statute of limitations in medical malpractice claims, could not be retroactively applied. This Court reviewed Chapter 71-254, Laws of Florida, which amended Section 95.11(6), and concluded that "[n]othing in the language of the act manifests an intention by the Legislature to do otherwise than to prospectively apply the new two-year statute of limitations." Id. at 217.[1/] Accordingly, this Court held:

1/ Like Chapter 86-272, the act involved in Foley, Chapter 71-254, provided an explicit effective date. Section 2 of Chapter 71-254 stated: "This act shall take effect on July 1, 1972".

> Since the legislative intent to provide retroactive effect to Section 95.11(6), Florida Statutes, is not express, clear, or manifest, we conclude that it does not apply to causes of action occurring prior to its effective date. Id.

Florida appellate courts have uniformly adhered to the principles set forth in Foley.[2/]

The presumption against retroactive application applies where amendments, like the amendment to Section 95.031(2), enlarge statutes of limitations. In Homemakers, Inc. v. Gonzales, supra, 400 So.2d 965, this Court expressly reaffirmed the principle that "a statute of limitations will be prospectively applied unless the legislative intent to provide retroactive effect is express, clear and manifest", and applied it to an amendment which lengthened, in some instances, the existing limitation period. Id. at 967. This Court held that since Chapter 95, Florida Statutes, did not evince any express, clear or manifest intent that Section 95.11(4), Florida Statutes should apply retroactively, that section did not govern plaintiff's claim which accrued prior to the statute's effective date. Id.

In Point I(B) (WB 12-16), Wallis makes a vain attempt to distinguish Gonzalez. Wallis argues that in Gonzalez it was

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2/ See, e.g., Dade County v. Ferro, 384 So.2d 1283 (Fla. 1980); Nelson v. Winter Park Memorial Hospital Association, Inc., 350 So.2d 91 (Fla. 4th DCA 1977); McGlynn v. Rosen, 387 So.2d 448, 469 (Fla. 3d DCA 1980), review denied, 392 So.2d 1376 (Fla. 1981); Imperial Point Colonnades Condominium, Inc. v. Freedom Properties International, Inc., 349 So.2d 1194, 1195 (Fla. 4th DCA 1977).

unclear whether the legislature intended the enlarged statute of limitation to apply to the plaintiff (WB 14). In Gonzalez, the period of limitations applicable to the plaintiff's claim was enlarged when the legislature reclassified the claim from medical malpractice to general negligence. Contrary to Wallis' arguments, this Court's opinion in Gonzalez applies generally to all enlarged limitation periods, whether created by a change in classification or by a legislative enlargement of the applicable period. This is the only possible interpretation of this Court's holding that "the failure of the court below to follow the reasoning of Brooks[3/] with regard to retroactivity leads to an erroneous result in the instant case." Gonzalez, at 967. Brooks was expressly approved by this Court in Gonzalez, and held generally that statutes of limitations are not to be given retroactive effect absent a clear manifestation of legislative intent. Significantly, none of the District Courts of Appeal which have construed Gonzalez have limited its holding as Wallis urges this Court to do.[4/]

Wallis also argues that if Gonzalez is controlling on the issue of retroactive application of the amendment, then this Court should recede from it. (WB 16). Wallis relies on Judge

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3/ Brooks v. Cerrato, 355 So.2d 119 (Fla. 4th DCA), cert. denied, 361 So.2d 831 (Fla. 1978).

4/ See, e.g., Durring v. Reynolds, Smith & Hills, 471 So.2d 603, 607 n.6 (Fla. 1st DCA 1985) (citing Gonzalez, the court concludes that a statute enlarging the limitations period should not apply retroactively unless the legislature expressly evinces such an intent).

Ferguson's dissent in Dominguez v. Bucyrus-Erie Company, 503 So.2d 364 (Fla. 3d DCA 1987), where it was urged that the "corrective" legislation should be applied to a case sandwiched between Battilla and Pullum. This reasoning is inapplicable here because Wallis filed his action prior to this Court's decision in Batilla.

If this Court should recede from Gonzalez and applies the amendment retroactively, it would unfairly deprive Grumman and other defendants similarly situated of vested rights acquired when the statute of repose was in full force and effect. Grumman and other defendants would be fully justified in relying on the statute of repose, confident that there is no legal way in which their liability might be revived, once extinguished by the running of the statute. By contrast, it would not be unfair to apply the amendment prospectively to Wallis because his claim was already barred when he filed his complaint, at which time the statute had neither been repealed nor declared unconstitutional.

It is reasonable to presume that the legislature was aware that Gonzalez required it to expressly indicate an intent to apply a law retroactively. Cf. Collins Inv. Co. v. Metropolitan Dade County, 164 So.2d 806 (Fla. 1964) (the legislature is presumed to know existing law when a statute is enacted). There is no unfairness in not applying the amendment retroactively where the legislature failed to express an intent to apply it retroactively, and where the action was already

barred before the statute was amended or declared unconstitutional.[5/]

Wallis concedes (WB 6) that the District Courts of Appeal which have been confronted with the issue here have unanimously concluded that the statutory amendment which abrogated the product liability statute of repose cannot be given retroactive effect.[6/] Federal Courts applying Florida law have also uniformly held that the repeal of the statute of repose in

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5/ Wallis contends (WB 15) that "without a broad interpretation of Gonzalez, Florida precedent would place this state in the camp of the majority which holds that an amendment that lengthens a limitations statute is presumed to apply retroactively" and that "[t]he majority rule is especially applicable to present case". This contention is incorrect because the "majority rule" referred to in Justice England's dissent in Gonzalez, affords only "non-barred litigants the benefit of extended statutes of limitations...." 400 So.2d at 968 (emphasis added). See also Mazda Motors, supra, 364 So.2d at 108 (The legislature may amend the statute enlarging the time within which an action may be brought before the action is barred by the statute of limitations). It is clear that the present action would be barred even under the "majority rule" urged by Justice England, because the statute of repose had already run on Wallis' claim prior to the adoption of the amendment.

6/ See Shaw v. General Motors Corporation, 12 F.L.W. 847 (Fla. 3d DCA March 24, 1987) (substituted opinion) (Relying on Gonzalez, the Court concluded that the repeal of the statute had no effect on the plaintiff's suit because a law operates prospectively unless there is an express intent to provide retroactive effect); Pait v. Ford Motor Company, 12 F.L.W. 277 (Fla. 5th DCA Jan. 15, 1987) (same conclusion). Small v. Niagara Machine & Tool Works, 12 F.L.W. 366 (Fla. 2d DCA Jan. 20, 1987) (same conclusion, relying on Foley and Gonzalez).

The Third District has followed Shaw in Brackenridge v. Ametek, 503 So.2d 363 (Fla. 3d DCA 1987); Lane v. Koehring Company, 503 So.2d 364 (Fla. 3d DCA 1987); and Melendez v. Dreis & Krump Manufacturing Company, 503 So.2d 365 (Fla. 3d DCA 1987).

The Fifth District has adhered to Pait in Harrison v. Hyster Company, 502 So.2d 100 (Fla. 5th DCA 1987); and Coggins v. Clark Equipment Company, 503 So.2d 982 (Fla. 5th DCA 1987).

products liability actions does not apply retroactively.[7/] This Court should similarly adhere to its well-reasoned and settled precedents.

Nothing in the language of Chapter 86-272, Section 2, Florida Laws, pertaining to the amendment of Section 95.031(2) manifests a clear legislative intent that the amendment be retrospectively applied. In fact, the Legislature's inclusion of an effective date of July 1, 1986, "effectively rebuts any argument that retroactive application of the law was intended." State Department of Revenue v. Zuckerman-Vernon Corporation, 354 So.2d 353, 358 (Fla. 1977).

In Zuckerman, this Court rejected the very argument being advanced by Wallis in this case. The petitioner in Zuckerman argued that Chapter 77-281, Laws of Florida, rather than Section 201.17(2), Florida Statutes (1975), governed his case because Chapter 77-281 was the prevailing law at the time of the appellate disposition. In rejecting that contention, this Court observed the "well-established rule of construction that in the absence of clear legislative intent to the contrary, a law is presumed to act prospectively" and held that:

7/ See Wilder v. The Firestone Tire & Rubber Company, Case No. 83-2205-Civ-Marcus (S.D. Fla. Oct. 29, 1986); Reiter v. American Laundry Machinery, Inc., Case No. 86-1160-Civ-T-15(B) (M.D. Fla. Dec. 15, 1986).

> The 1977 Legislature's inclusion of an effective date of July 1, 1977, in Ch. 77-281 effectively rebuts any argument that retroactive application of the law was intended. Id. at 358.

Since Section 2 of Chapter 86-272, Laws of Florida (the section that repealed the statute of repose) evinces no express, clear or manifest intent that it be applied retroactively, it similarly may not be applied to claims, such as Wallis', which accrued and were barred prior to July 1, 1986, the law's effective date.

Wallis argues that Foley and Gonzalez are not controlling because the amendment to the statute of repose is remedial and hence should apply retroactively. (WB 9-11). A remedial statute is one which confers a remedy, and a remedy is the means employed in enforcing a right or in redressing an injury. Grammer v. Roman, 174 So.2d 443 (Fla. 2d DCA 1965).

The act repealing Florida's statute of repose was not "remedial" in any sense that would permit retroactive application so as to revive actions already barred. Once the statute of repose had run[8/] and barred an action, it conferred on manufacturers a vested right, see Corbett v. General Engineering and Machinery, 160 Fla. 879, 37 So.2d 161, 162 (1948) (a person has a vested right in a statute of limitations when it has

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8/ Here, Wallis' claim was time barred because the aircraft was delivered more than twelve years prior to April 20, 1978, the date that the suit was filed. Wallis concedes this point (WB 1).

completely run);[9/] and a substantive right of protection from the protracted fear of litigation. See, eg., Pearson v. Northeast Airlines, Inc., 309 F.2d 553 (2nd Cir. 1962), cert. denied, 372 U.S. 912 (1963). Therefore, the act repealing the statute of repose cannot be treated as merely "remedial" because retroactive application of the act would impair Grumman's substantive rights which had already vested. Cf. Village of El Portal v. City of Miami Shores, 362 So.2d 275, 277 (Fla. 1978) (retroactive provisions are constitutionally defective where they adversely affect or destroy vested rights; quoting McCord v. Smith, 43 So.2d 704 (Fla. 1950)).

The statute of repose established a substantive right even more clearly than the statute of limitations because it not only barred a cause of action after a certain amount of time, it extinguished all causes of action brought after twelve years, even if they had not yet arisen. See Eddings v. Volkswagenwerk, 635 F. Supp. 45, 49 (N.D. Fla. 1986). Therefore, the amendment repealing the statute of repose in products cases should not be applied retroactively.

9/ See Mazda Motors of America, Inc. v. S.C. Henderson & Sons, Inc., 364 So.2d 107, 108 (Fla. 1st DCA 1978), cert. denied, 378 So.2d 348 (Fla. 1979) (same holding). See also Young v. Alterhaus, 472 So.2d 1152 (Fla. 1985) (statutes that interfere with vested rights will not be given retroactive effect); Department of Transportation v. Cone Brothers Contracting Company, 364 So.2d 482, 486 (Fla. 2d DCA 1978 (same as Young).

Wallis relies on City of Orlando v. Desjardins, 493 So.2d 1027 (Fla. 1986), in support of his proposition that the amendment was remedial and should be applied retroactively. In Desjardins, this Court concluded that a statute recognizing an attorney-client exemption to a city's duty to produce documents under the Public Records Act should be applied to ongoing litigation. This Court reasoned that the exemption was "addressed to precisely the type of '[r]emedial rights [arising] for the purpose of protecting or enforcing substantive rights.'" Id. at 1028. The statutory exemption merely provided a limited exception to "the harsh provisions of the Florida Public Records Act". Id. at 1029. It must be distinguished from the repeal of the statute of repose, which, if given retroactive effect, would revive products liability actions already barred by the statute. Retroactive application of the amendment here, unlike in Desjardins, would impair vested substantive rights, contrary to settled law and the Constitution.

Even if the amendment here could be characterized as "remedial," Desjardins would not control because it did not involve a statute of limitations. This Court has clearly held that a statute lengthening a limitations period should not be

applied retroactively unless there is a clear legislative intent to apply it retroactively. See Gonzalez.[10/]

Desjardins does not authorize retroactive application of a statutory amendment which would affect vested substantive rights. In fact, though Desjardins discussed retroactive application, the actual holding did not retroactively affect any pre-existing vested or accrued right. Rather, the amendment was simply applied as of the time of the appellate decision to ongoing litigation which had been initiated prior to the amendment, where the plaintiff had no vested right to compel disclosure of the City's litigation files.

Wallis argues that the repeal of the statute of repose should apply to the present case under the "retroactive repealer rule". (WB 7-9, 11). This rule is inapplicable in the present case because the legislature expressly provided for an effective date of the amendment, which precludes retroactive application to impair rights which had already accrued prior to that date. Cf. Gay v. City of Coral Gables, 47 So.2d 529 (Fla. 1950) (when legislative intent is clear from the words, courts are bound thereby).[11/] Further, a repealing statute, like a remedial

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10/ Contrary to Wallis' assertions (WB 15), this view is in accord with the approach taken by the majority of states. See 51 Am.Jur.2d Limitations of Actions §357, p. 635 (1970).

11/ Wallis, relying on Sutherland, Statutory Construction Section 23.33 (4th Ed. 1985), states that: "Repealing acts are construed retroactively in the absence of a savings clause or other clear expression of legislative intent." (WB 7). That is (cont.)

statute, should not be applied retroactively where to do so would impair vested rights. See Massa v. Nastri, 125 Conn. 144, 3 A.2d 839 (1939) (if retroactive application of a repealing statute would take away a legal defense available at the time, it should be avoided); 73 Am.Jur.2d Statutes §385, at 506 (1974) (a repealing statute should not be construed to operate retroactively where it would impair vested rights). Cf. Village of El Portal, supra, at 277. Therefore, the District Court correctly refused to apply the amendment to Section 95.031 retroactively.

Wallis argues that the legislature decided to abolish the repose concept in products liability actions immediately after this Court upheld its constitutionality in Pullum, and that this legislative decision "should be given the widest possible effect" (WB 11). This argument ignores the fact that the only indication of legislative intent is the effective date, which

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not a correct paraphase of Section 23.33, which actually states that the effect of such a repeal "is to destroy the effectiveness of the repealed act in futuro and to divest the right to proceed under the statute." Id. at 417 (emphasis added). The rule of Sutherland applicable to this case appears in the next ensuing section entitled "Vested Rights". That section states that "the repeal of the statute or the other abrogation of the common law from which it originated does not erase a vested right, but it remains enforceable without regard to the repeal". Sutherland, §23.34 at 421 (emphasis added). Wallis also relies on 82 C.J.S. Statutes Section 434 (1953) for the proposition that repealing acts are construed retroactively absent a savings clause (WB 7). Wallis has ignored Section 435 of the same work, which states that the repeal of an act does not operate to impair vested rights. Id. at 1010. Sections 434 and 435 must be read in pari materia.

does not support the argument that the legislature intended that the amendment apply retroactively. The presumed legislative awareness of Pullum when the twelve year limitations in products liability actions was repealed necessarily means that the legislature was also aware of the precedents in Foley and Homemakers, which require an express indication of legislative intent before such an amendment will be applied retroactively. Since no such intention was expressed, the amendment applies prospectively only.

II.

PULLUM v. CINCINNATI, INC., 476 So.2d 657 (Fla. 1985), MUST BE GIVEN RETROACTIVE APPLICATION.

Wallis' argument that this Court's decision in Pullum upholding the constitutionality of Section 95.031(2) and receding from Batilla v. Allis Chalmers Manufacturing Company, 392 So.2d 874 (Fla. 1981), should not be retroactively applied to this action,[12/] overlooks the fundamental principle that "[o]rdinarily 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, 154 Fla.

12/ It is noteworthy that Wallis inconsistently and without explanation seeks to have this Court's decision in Batilla retroactively applied here, but not its decision in Pullum. As demonstrated herein, Pullum must be given retroactive effect.

472, 18 So.2d 251, 253 (1944). The opinion in Pullum does not specifically state that the decision is to apply prospectively only. In fact, this Court applied the rescission of the Batilla decision retrospectively to Pullum's claim when it rejected Pullum's argument that Batilla had rendered Section 95.031(2) unconstitutional:

> The premise of Pullum's argument is that the "amendment" of the statute by Batilla has rendered it violative of his right to equal protection of the laws. He concedes that as enacted, this statute was capable of withstanding an equal protection challenge. Since we have receded from Batilla, it logically follows that section 95.031(2), does not deny equal protection. This is so because the classification originally established by the statute bears a rational relationship to a proper state objective. In receding from Batilla, we have eliminated the premise of Pullum's equal protection argument. 476 So.2d at 660 (emphasis added).13/

The question of whether Pullum should be retroactively applied to pending cases has been addressed and answered affirmatively by the First District Court of Appeal in Cassidy, supra. Like Wallis, the plaintiffs in Cassidy instituted a products liability action for an injury which occurred more than twelve years after the purportedly defective product had been delivered to the original purchaser. Unlike the present case, however,

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13/ As the First District Court of Appeal observed in Cassidy v. Firestone Tire & Rubber Company, 495 So.2d 801 (Fla. 1st DCA 1986), this Court rejected the contention that Pullum should not apply to a pending action when it denied Pullum's motion for rehearing. Id. at 2024 n. 2.

plaintiffs' injury occurred and the action was commenced in Cassidy after this Court held in Batilla that Section 95.031(2) violated Article 1, Section 21 of the Florida Constitution. While plaintiffs' action was pending, this Court rendered its decision in Pullum which receded from Batilla and upheld the constitutionality of Section 95.031(2). As a result, the trial court granted summary judgment in favor of defendants on the basis of Section 95.031(2), and plaintiffs appealed.

Plaintiffs contended on appeal that Pullum should not apply to their case because they had filed their action after Batilla but prior to Pullum. In rejecting that contention and holding that Pullum should be given retroactive effect, the First District Court of Appeal stated:

> [A]ppellants have shown no substantial inequity or unfairness which would result upon application of the Pullum ruling, nor does the decision in Pullum suggest that it should be limited to prospective application. As indicated in Florida Forest & Parks Service v. Strickland, 18 So.2d 251 (Fla. 1944), decisions overruling earlier precedent are generally given retroactive effect whereby judicial construction of a statute is deemed to relate back to the enactment of the statute. Appellants have shown no cause to depart from this general rule in the present case. We therefore determine that Pullum should be given effect and appellants' action is barred by section 95.031(2), Florida Statutes (1982). (footnote material omitted and emphasis added). 11 F.L.W. at 2024.

Subsequent District Court of Appeal decisions have uniformly applied Pullum retroactively. See Shaw, supra (3d DCA); Pait, supra (5th DCA); Small, supra (2d DCA). Federal Courts applying

Florida Law have reached the same conclusion. See, e.g., Hartman v. Westinghouse, Case No. 83-517-Civ (M.D. Fla. Dec. 10, 1985), affirmed, 794 F.2d 686 (11th Cir. 1986).

In accordance with unanimous authority, Pullum must be given retroactive effect, and the Supreme Court's construction of Section 95.031(2) must be deemed to relate back to the statute's enactment. Accordingly, Wallis' action is barred by Section 95.031(2) and the summary judgment must be affirmed.[14/]

Relying on Strickland, supra, Wallis argues that Pullum should not be applied to this action because it would unfairly cut off his right to litigate an action already commenced based

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14/ Inasmuch as both the injury and the commencement of Wallis' action occurred before this Court rendered its decision in Batilla, when Section 95.031(2) was in full force and effect, Wallis cannot claim that he relied on Batilla in instituting his action. Accordingly, the case for giving Pullum retroactive effect is even stronger in this case than it was in Cassidy. The fact that Wallis proceeded to litigate the case at considerable expense in both time and money for six years after Batilla was decided does not preclude the application of Pullum to this case. As acknowledged by the court in Cassidy, such financial expenditure "does not encompass a detrimental change in legal position, and such financial reliance does not preclude application of the Pullum decision in the present case". 11 F.L.W. at 2024 n. 1.

on his reliance on precedent. (WB 19).[15/] This contention has been addressed and properly rejected by the United States District Courts for the Southern and Northern Districts of Florida in Lamb v. Volkswagenwerk Aktiengesellschaft, 631 F. Supp. 1144 (S.D. Fla. 1986) and Eddings v. Volkswagenwerk, A.G., 635 F. Supp. 45 (N.D. Fla. 1986). As noted by the court in Lamb:

> A substantive vested right is an immediate right of present enjoyment, or a present fixed right of future enjoyment. In re Will of Martell, 457 So.2d 1064, 1067 (Fla. 2d DCA 1984). "To be vested a right must be more than a mere expectation based on an anticipation of the continuance of an existing law; it must have become a title, legal or equitable, to the present or future enforcement of a demand." Division of Workers' Compensation v. Brevda, 420 So.2d 887, 891 (Fla. 1st DCA 1982) (emphasis added). The Plaintiff in the instant case had no vested contract or property right prior to the Pullum decision; instead, Plaintiff was merely pursuing a common law tort theory to recover damages. Indeed, the statute of repose and the lapse of the twelve year statutory period obviated the very possibility of Plaintiff sustaining

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15/ In Strickland, the Supreme Court acknowledged a limited exception to the general rule concerning prospective operation of an overruling decision. The Supreme Court stated:

> [T]here is a certain well-recognized 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. (Emphasis added). 18 So.2d at 253.

> any legal injury from the Volkswagen vehicle.... A plaintiff has no vested right in a tort claim. 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). Moreover, under Florida law a litigant has no vested rights to the benefit of a statute of limitations in effect when this cause of action accrues. Bauld v. J. A. Jones Construction Co., 357 So.2d 401 (Fla. 1978).16/ The mere prospect that Plaintiff might recover damages from a defendant on a tort theory is clearly not tantamount to a vested right. Retroactive application of the statute of repose cannot deprive Plaintiff of a vested right because Plaintiff's claim never became vested. 631 F. Supp. at 1149. (some emphasis added).

In this case, Wallis had no vested right in his tort claim against Grumman. The possibility that he might have recovered damages was not tantamount to a vested right.

Further, Batilla did not vest Wallis with any cause of action. It is well established that a statute that is judicially determined to be unconstitutional remains inoperative only for as long as the decision holding the statute unconstitutional is valid. If the decision is subsequently reversed, the statute will be held to be valid from the date it first became effective. Christopher v. Mungen, 61 Fla. 513, 55 So. 273, 280 (1911). Accordingly, Batilla did not vest any cause of action in Wallis or imbue him with "an absolute assurance that the statute

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16/ However, a defendant does have a vested right in the running of a statute of limitations where "it has run and completely barred the action prior to the lengthening of the statute." See pp. 10-11, infra.

of repose would remain forever abrogated." Lamb, supra, 631 F. Supp. at 1150. See also, Eddings, supra, 635 F. Supp. at 47 ("Batilla vested in plaintiffs no cause of action. It removed the bar of the statute to plaintiffs' assertion of a cause of action. But plaintiffs had, at most, a mere expectation that they had a cause of action they could pursue, and a subsequent decision, holding the statute to be constitutional, could not and does not deprive them of any vested rights").

Wallis' reliance on Strickland for the proposition that Pullum may not be retrospectively applied to this case lacks merit. In Strickland, the Florida Supreme Court held that inasmuch as workers' compensation claims were based on actual employment contracts, the appellate procedure for such claims could not be revised retrospectively. As previously demonstrated, Wallis had no vested property or contract right in this case. See Lamb, supra, 631 F. Supp. at 1149; Eddings, supra, 635 F. Supp. at 47.

Wallis also contends that Pullum should not be applied retroactively because of the swift legislative repudiation of Pullum (WB 19). This contention ignores that fact that the legislature made no provision to apply the amendment retroactively. It was proper to apply Pullum retroactively to Wallis' case because his cause of action was barred by the statute of repose prior to Batilla. Contrary to his contentions (WB 19), he was not "caught in the middle" by the Pullum decision.

III.

SECTION 95.031(2), FLORIDA STATUTES, BARS COUNT III OF WALLIS' COMPLAINT BASED ON GRUMMAN'S ALLEGED BREACH OF A DUTY TO WARN USERS OF THE SUBJECT AIRCRAFT OF THE ASSERTED DEFECT IN THE AIRCRAFT.

A. The Statute Expressly Bars All "Actions" Brought After 12 Years And "Founded" On The Design And Manufacture Of An Aircraft.

Sections 95.031 and 95.11(3)(e), Florida Statutes (1985), bar Wallis' action for Grumman's alleged breach of its alleged continuing duty to warn. Section 95.031, Florida Statutes (1985), provides in part:

> Actions for products liability and fraud under s. 95.11(3) must be begun within... 12 years after the date of delivery of the completed product to its original purchaser (emphasis added).

Section 95.11(3)(e), Florida Statutes (1985), applies to, inter alia:

> (e) An action for injury to a person founded on the design, manufacture, distribution, or sale of personal property (emphasis added).

By the express terms of Sections 95.031 and 95.11(3), all products liability "actions" are barred after twelve years. Consequently, Wallis' action is barred.

Wallis' Count III, which alleges a failure of a continuing duty to warn, is also clearly founded on the design and manufacture of the aircraft under Section 95.11, and is thus barred by Section 95.031. Any duty Grumman had to warn arose solely because of Grumman's status as a manufacturer or seller of the airplane. Grumman's decision to place the aircraft into the

stream of commerce was the only basis upon which an action could have been brought against it. Therefore, Count III, based on breach of a duty to warn, was unquestionably "founded on the design, manufacture, distribution or sale" of the aircraft under Section 95.11(3)(e), and was barred by Section 95.031. See Batson v Essex Crane Rental, 1 F.L.W. Fed. D27, 28 (N.D. Fla. Jan. 20, 1987) (Section 95.11(3)(e) alone seemingly encompasses all products liability actions).

The legislature clearly intended that the twelve year statute of repose would apply to all theories of liability for product liability, including a negligent failure to warn. Eddings, supra, is the only Florida case which expressly addresses Wallis' claim that Florida's statute of repose does not apply to a claim for failure to warn. There the Court rejected a similar claim that a duty to warn cannot be cut off by the statute of repose:

> Plaintiff in Eddings contends there was a duty to warn of a defect in the automobile. Under the statute [of repose], any product liability cause of action is extinguished at the end of the twelve (12) year period. Since there is no cause of action at the end of that period, there can be no duty to warn of a defect. 635 F. Supp. at 49 (emphasis and bracketed material added).17/

17/ Predictably, Wallis has not cited any Florida cases in support of his contention that the statute of repose does not apply to a products liability claim based on an alleged failure to warn.

In Copeland v. Celotex Corporation, 447 So.2d 908 (Fla. 3d DCA 1984), quashed in part on other grounds, 471 So.2d 533 (Fla. 1985), the court stated:

> In a modern products liability suit, recovery is generally predicated upon a trireme of negligence, implied warranty and strict liability. All three of these theories center upon an alleged inferiority in the product, an inferiority referred to in the legal as in the lay vernacular as a "defect". This defect is the cause of the alleged injury and in a very general sense its existence must constitute under the respective theories of recovery a breach of duty, a breach of a warranty and, under strict liability, the presence of an "unreasonably dangerous condition" in the product. (citations omitted) (emphasis added). Id. at 911.

The ultimate source of the duty to warn alleged in Wallis' Count III is unquestionably the alleged defect in the product. Since Grumman would have no duty to warn apart from its status as the seller and manufacturer of the aircraft, the entire action, including the failure to warn count, is one for "products liability" covered by the statute of repose.

In Batson v. Essex Crane Rental, 1 F.L.W. Fed. D27 (N.D. Fla. Jan. 20, 1987), the plaintiff claimed that Florida's statute of repose applied only to strict liability claims, not to warranty and negligence claims. The Court disagreed, and stated that courts define an "action" in terms of the plaintiff's primary right or the defendant's primary wrong, not by the plaintiff's theory of recovery. Id. at 27-28. The Court concluded that an "action for products liability" under Section

95.031 included all theories of recovery. Id. at 28. The express language of Section 95.031, Eddings, Copeland and Batson all confirm that the legislature intended the statute of repose to apply to all actions for products liability, including actions for the alleged breach of continuing duty to warn of some defect in the product.

Courts in other jurisdictions have concluded that the statute of repose bars an action for failure of an alleged continuing duty to warn. In Dague v. Piper Aircraft Corporation, 275 Ind. 520, 418 N.E.2d 207 (1981), a case on all fours involving an aircraft manufacturer, the Indiana Supreme Court expressly rejected the exact contention that Wallis makes here. The Indiana Statute of repose at issue stated, in part:

> [A]ny product liability action must be commenced...not more than ten years after the initial delivery.

The statute, similar to Section 95.11(3)(e), defined products liability actions as "all actions brought for or on account of personal injury .... caused by or resulting from, the manufacture, construction or design of any product" Id. at 212.

The plaintiff contended that the statute of repose did not bar her action because the aircraft manufacturer had a continuing duty to warn of the product's dangerous nature. Id. at 211. The plaintiff, like Wallis, argued that the duty to warn is a general one and is in no way peculiar to the law of products liability. Id. at 212.

The Court stated that it is clear that the legislature intended the act to apply to all product liability actions, whether the theory of liability is negligence or strict liability in tort. Id. at 212. The Court reasoned that although the manner in which a person can be negligent concerning a duty to warn in the context of product liability is not peculiar to that field of law, an action for damages resulting from the alleged failure of the manufacturer to warn of a product's latently defective nature is certainly a product liability action based on a theory of negligence, and ultimately is one in which the claim is made that the damage was caused by or resulted from the manufacture, construction or design of the product. Id. The Court concluded that the legislature clearly intended that no cause of action would exist on any such product liability theory after ten years, id.; and it held that the statute of repose barred the plaintiff's claim based on a negligent failure to warn the user of the aircraft's alleged defect. Id. at 211.

Other courts have reached the same result. Cf. DeHoyos v. John Mohr & Sims, 629 F. Supp. 69, 79-80 (N.D. Ind. 1984) (follows Dague); Davidson v. Volkswagenwerk, 78 N.C. App. 1931, 336 S.E. 2d 716 (1985), review denied, 316 N.C. 375, 342 S.E.2d 892 (1986) (Court rejected the contention that an extraordinary post-manufacture duty brought the claim outside the purview of North Carolina's statute of repose); Britt v. Schindler Elevator Corporation, 637 F. Supp. 734, 736 (D.D.C. 1986) (District of

Columbia statute of repose applied to "any action" and encompassed plaintiff's negligence claim based on a failure to warn); Barwick v. Celotex Corporation, 736 F.2d 946, 963 (4th Cir. 1984) (Statute of repose barred claim despite plaintiff's contention that he had yet to be provided with an adequate warning). It is reasonable to conclude that the Florida legislature similarly intended that the statute of repose apply to actions based on an alleged breach of a continuing duty to warn.

It is also more consistent with the intent and purposes of the statute of repose to conclude that it applies to all theories of products liability. In Pullum, supra, this Court stated that the legislature, in enacting the Statute of Repose, reasonably decided that perpetual liability places an undue burden on manufacturers, and it decided that twelve years from the date of sale is a reasonable time for exposure to liability for the manufacture of a product. Id. at 659. It would defeat the purpose of the statute of repose to apply it only to actions for strict liability, breach of warranty and negligent design or manufacture, while permitting indefinite potential exposure for actions based on a negligent failure to warn. See, eg, Batson, supra, at D28; Davidson, supra, at 716 (to accept plaintiff's theory would defeat the purpose of the statute); Barwick, supra,

at 963 (plaintiff's theory would do away with the limitation intended by the statute of repose).[18/]

B. Wallis' Own Allegations Compel Application Of The Statute Of Repose.

Finally, Wallis' allegations in Count III of the Fifth Amended Complaint refute his contention that a duty to warn is not coupled to a cause of action for products liability. The Fifth Amended Complaint alleges that Grumman had a duty to warn users of its aircraft that the aircraft's design was defective:

> GRUMMAN, as a manufacturer of a dangerous instrumentality had a continuing duty to exercise due care to warn users of its product that the design was defective and either a new design or safety device should be used on the fuel system of the subject aircraft to insure that the aircraft maintained its airworthy characteristics.
>
> * * *
>
> GRUMMAN negligently failed to publish safety information within their knowledge so as to advise owners of existing aircraft and the FAA on how to improve the safety characteristics of the aircraft.
>
> * * *
>
> The negligence of GRUMMAN and [sic] failing to publish safety advisory bulletins recommending various safety features, including but not limited to the inclusion of

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18/ Wallis concedes that the purpose of a statute of repose is to place some finite limitation on the length of time a manufacturer shall remain at risk after placing his product in the stream of commerce (WB 8), yet he inconsistently argues that the statute should not apply to a claim for a failure to warn of an alleged defect in the product.

> direct fuel lines from each tank to the engines, the use of fuel booster pumps, and/or the use of low pressure fuel warning devices, was the sole and proximate cause and/or the concurrent cause of the injuries sustained by plaintiff. (R. 316-317; emphasis added).

In Count III, Wallis specifically alleged a negligent failure on the part of Grumman, as a manufacturer, to warn users of its aircraft that the aircraft's design was defective "and that" a new design or safety device "should be used on the aircraft." (R.316). The claim against Grumman arises out of, and is inseparable from, its duties as the manufacturer of the airplane. Therefore, Wallis' Count III is clearly a cause of action "founded on the design, manufacturer, distribution or sale of personal property" as set out in Sections 95.031(2) and 95.11(3)(e); and the trial court and the district court properly concluded that this Count was barred by Florida's statute of repose.[19/]

19/ Wallis cites Phlieger v. Nissan Motor Company, 487 So.2d 1096 (Fla. 5th DCA 1986), in support of his proposition that there is a distinction between a cause of products liability and breach of a duty to warn (WB 24-25). Phlieger held that the statute of repose was inapplicable because the action was brought under the wrongful death statute. Id. at 1097. Phlieger does not even remotely support Wallis' proposition. In fact, the opinion supports Grumman's position, by stating that Section 95.031(2) would apply if the plaintiff had brought a products liability action for her injuries. Id.

CONCLUSION

Based upon the foregoing reasons and authorities, the summary final judgment entered in favor Grumman should be affirmed.

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Respondent, The Grumman Corporation was mailed to: JOSEPH C. SEGOR, ESQ., Attorney for Appellant, 9785 S.W. 146th Street, Miami, FL 33176; MELVIN A. RUBIN, ESQ., Attorney for Appellant, 2627 Biscayne Boulevard, Miami, FL 33137; and to JERRY B. SCHREIBER, ESQ., Suite 207, Biscayne Building, 19 West Flagler Street, Miami, FL 33130, this 20th day of April, 1987.

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