IN THE SUPREME COURT OF FLORIDA

CASE NO. 70,179

JUAN DOMINGUEZ and GRACIELA DOMINGUEZ,
Petitioners,

vs.

BUCYRUS-ERIE COMPANY,
Respondent.

PETITIONERS' BRIEF ON THE MERITS

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I. INTRODUCTION

This Court has jurisdiction pursuant to Rule 9.030 (a)(2)(A)(v) Florida Rules of Appellate Procedure. The District Court of Appeal of Florida, Third District, certified the following questions to be of great public importance:

> "(1) Whether the legislative amendment of section 95.031(2), Florida Statutes (1983), abolishing the statute of repose in product liability actions, should be construed to operate retrospectively as to a cause of action which accrued before the effective date of the amendment.
>
> (2) If not, whether the decision of **Pullum v. Cincinnati, Inc.**, 476 So.2d 657 (Fla. 1985), **appeal dismissed,** ___ U.S.___, 106 S.Ct. 1626, 90 L.Ed. 2d 174 (1986), which overruled **Battilla v. Allis Chalmers Mfg. Co.**, 392 So.2d 874 (Fla. 1980), applies so as to bar a cause of action that accrued after the **Battilla** decision but before the **Pullum** decision." **Dominguez v. Bucyrus-Erie Company**, 11 FLW 546 (Fla. 3rd DCA, Feb.11, 1987).

II. STATEMENT OF THE CASE AND FACTS

This is a product liability action brought by the petitioners Juan and Graciela Dominguez against the respondent Bucyrus-Erie Company a manufacturer of industrial dredging equipment. The petitioner Juan Dominguez was injured on May 2, 1979, while working on a dragline manufactured by the respondent. The product was manufactured and shipped to the original purchaser in 1959. The complaint was filed October 13, 1981. (R-1-5,134).

The respondent moved for summary judgment solely on the ground that Section 95.031(2) Florida Statutes (1975)

and this Court's decision in **Pullum v. Cincinnati, Inc.**, 476 So.2d 657 (Fla. 1985) barred the action which was brought more than twelve years after the equipment was delivered to the original purchaser.

Summary judgment was entered for the respondent manufacturer and this appeal followed. (R-151). Subsequent to filing the appeal to the District Court, the legislature amended Section 95.031(2) Florida Statutes. The amendment, effective July 1, 1986, abolished the statute of repose in product liablility actions. Chapter 86-272 Sections (2) & (3) Laws of Florida 1986.

The District Court affirmed on authority of **Shaw v. General Motors Corp.**, 11 FLW 847 (Fla. 3rd DCA, March 24, 1987) and certified the two questions set forth above.

III. SUMMARY OF ARGUMENT

The first certified question should be answered in the affirmative. The rule which requires appellate courts to apply the law as it exists at the time of the disposition of the appeal prevents the statute of repose from operating to bar a cause of action still pending at the time the statute was abolished. The application of this rule will not result in retroactive application of the repealing amendment. Rather, it will result in the prospective application of a new statute to cases pending after the effective date of that statute.

If this Court concludes that reversal of the District Court's opinion requires retroactive application of the repealing statute, relief should still be granted for the petitioners. The repealing statute can and should be applied retroactively because it is remedial in nature.

Finally, if the first certified question is not answered in the affirmative the petitioners' constitutional rights to due process and access to the courts for redress of injuries will be abrogated.

The second certified question should be answered in the negative. Application of **Pullum, supra,** to the this cause will result in an unconstitutional deprivation of the petitioners' vested property rights in their cause of action.

If the Court decides that **Pullum, supra,** does have retrospective application, it should not be applied to this cause. The legislature's distinction between defective products which cause injury before twelve years from their

manufacture and those which do not cause injury until after expiration of twelve years is unreasonable and unconstitutional as applied to this case where the product has a much greater useful life than twelve years.

Finally, this Court should recede from its decision in **Pullum, supra**, in so far as it holds that persons injured after expiration of the statute of repose may not seek redress in the courts. Such a holding violates Article 1, Section 21 of the Florida Constitution.

IV. ARGUMENT

A. THE LEGISLATIVE AMENDMENT OF SECTION 95.031(2), FLORIDA STATUTES,(1983), ABOLISHING THE STATUTE OF REPOSE IN PRODUCT LIABILITY ACTIONS, SHOULD BE CONSTRUED TO OPERATE RETROSPECTIVELY AS TO A CAUSE OF ACTION WHICH ACCRUED BEFORE THE EFFECTIVE DATE OF THE AMENDMENT.

Chapter 86-272 Section (2) Laws of Florida (1986) abolished the twelve year statute of repose for product liability actions. **1/** The Chapter also includes a change in the statute of limitations for libel and slander actions. Section (3) states that the libel and slander provisions apply to causes of action accruing after October 1, 1986. With regard to the repeal of the 12 year statute of repose for product liability actions, Section (3) states only that the section takes effect July 1, 1986.

1/ In addition to the District Court's opinion in the instant case, the following cases, all decided after the legislature's abolition of the statute of repose, have held contrary to the appellant's position herein: **Cassidy v. Firestone Tire & Rubber Co.**, 495 So.2d 801 (Fla.1st DCA 1986)(repeal of statute not discussed but cited); **Harrison v. Hyster Co.**, 12 FLW 540 (Fla. 2d DCA Feb. 13, 1987) (only repeal of statute discussed); **Small v. Niagra Machine & Tool Works**, 12 FLW 366 (Fla. 2nd DCA Jan. 20, 1987)(both retroactivity of **Pullum** and repeal of statute discussed). The following cases have also held contrary to appellant's position herein and have certified substantially indentical questions to this Court: **Melendez v. Dreis & Krump Mfg. Co.**, 12 FLW 554 (Fla. 3rd DCA Feb 17, 1987); **Brackenridge v. Ametek, Inc.**, 12 FLW 479 (Fla. 3rd DCA Feb. 10, 1987); **Lane v. Koehring Co.**, 12 FLW 478 (Fla. 3rd DCA Feb. 10, 1987); **Shaw v. General Motors Corp.**, 12 FLW 847 (Fla. 3rd DCA March 24, 1987); **Pait v. Ford Motor Corp.**, 12 FLW 277 (Fla. 5th DCA Jan. 23, 1987); **Wallis v. Grumman Corp.**, 12 FLW 613 (Fla. 3rd DCA Feb. 24, 1987). See also; **Lamb v. Volkswagenwerk Aktiengesellschaft**, 631 F.Supp. 1144 (S.D.Fla. 1986) and **Eddings v. Volswagenwerk, A.G.**, 635 F.Supp. 45 (N.D. Fla. 1986) which have also applied **Pullum** retroactively,

First, it is the petitioners' position that the rule of law requiring appellate courts to dispose of cases according to the law as it exists at the time of the appeal governs here and not the line of cases which hold that statutes of limitation should not be applied retroactively Consequently, the statute of repose which has been abolished should not operate to bar the present suit.

It is both the general and the Florida rule that appellate courts must apply the law as it exists at the time of appellate disposition rather than at the time of the rendition of the judgment appealed. **Florida East Coast Railway Company v. Rouse,** 194 So. 2d 260 (Fla. 1967). This rule has been applied to statutory law as well as judicial decisions. See for example: **Florida Patient's Compensation Fund v. Von Stetina,** 474 So. 2d 783 (Fla. 1985); **Goodfriend v. Druck,** 289 So.2d 710 (Fla. 1974); **Board of Public Instruction v. Budget Commission,** 167 So. 2d 305 (Fla. 1964) and **General Capital Corporation v. Tel Service Co.,** 183 So.2d 1 (Fla. 2nd DCA 1966).

Where a court order or judgment is based upon a statute which is subsequently repealed it has been held that reversal is required. In **Royal Atlantic Ass'n v. Royal Condominium Man., Inc.,** 258 So.2d 39 (Fla. 3rd DCA 1972), the trial court granted partial summary judgment upholding the validity of a condominium management contract based on a statute which declared all such contracts to be valid. The Third District reversed because of the subsequent repeal of the statute.

In **Carr v. Crosby Builders Supply Company, Inc.,** 283 So.2d 60 (Fla. 4th DCA 1973), the trial court correctly applied the automobile "guest statute" which required gross negligence before an injured passenger could recover from the owner or driver of the vehicle. Subsequent to entry of the final judgment the "guest statute" was repealed. The final judgment was, accordingly, reversed. See also **Ingerson v. State Farm Mutual Automobile Insurance Company,** 272 So.2d 862 (Fla. 3rd DCA 1972), and **Arick v. McTague,** 292 So.2d 31 (Fla. 1st 1973). In **Richey v. Town of Indian River Shores,** 337 So.2d 410 (Fla. 4th DCA 1976), affirmed, **Town of Indian River Shores v. Richey,** 348 So.2d 1 (Fla. 1977), the District Court stated that a statute dealing with voter registration requirements which was expressly repealed during the pendency of the appeal could not control the case. See **Richey, supra,** at 414.

The respondent argued in the lower court that a statute of limitations applies prospectively unless there is clear and express legislative intent to the contrary. The respondent argued that this Court's opinion in **Homemakers Inc. v. Gonzales,** 400 So.2d 965 (Fla. 1981), rather than the cases cited above, should control the application of the repealing statute.

It is submitted that this Court's opinion in **Homemakers, supra,** should not control the instant case for several reasons. First, the application of existing law to a pending case is not, in the technical sense, a retroactive application of law. It is, rather, the

prospective application of a new law to cases pending after the effective date of the new law.

At the time the suit was filed in **Homemakers, supra,** the two year statute in effect at the time of injury had expired. The suit was therefore barred at the time it was filed unless the new statute of limitations could be interpreted to operate retroactively. As a statute of limitations begins to run from the date of injury or knowledge thereof, in order for the new statute to apply it would have to be construed to relate back to the date of the plaintiff's injury. This is a retroactive application in the true sense. 2/ This Court held that it did not

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2/ As noted by Justice England's dissent in **Homemakers,** prior to **Brooks v. Cerrato,** 355 So.2d 119 (Fla. 4th DCA 1978) and the adoption of its reasoning in **Homemakers,** Florida law gave the plaintiff the benefit of an extended statute of limitations provided that it went into effect before the pre-existing statute had run on the plaintiff's action. Those cases holding that a statute of limitations could not be applied retroactively dealt with new statutes which shortened the time rather than extended it or dealt with situations where the prexisting statute had run prior to the enactment of the new extended statute. As stated by Justice England, **Brooks, supra,** was the first Florida case to apply the retroactivity concerns of shortened statute cases to an extended statute case. **Homemakers** changed the law in that it held that the plaintiff would not be given the benefit of an expanded statute of limitations even where the new statute was passed prior to expiration of the prexisting statute unless the legislature's intent to apply the statute retroactively was clear and express.

Homemakers holds that application of an extended statute of limitations which was passed prior to expiration of the pre-existing statute in a particular case is a **retroactive** application of law. This is a complete reversal of this Court's prior position that such an application was not retroactive legislation and does not impair any vested right. See **Corbett v. General Engineering & Machinery Co.,** 37 So.2d 161 (Fla. 1948). For the reasons discussed herein, it does not follow, however, that the holding in **Homemakers** means that the application to a properly pending case of an act repealing a statute of repose is a retroactive application of law.

operate retroactively. Consequently, at the time the suit was filed it was already barred and was not properly "pending",as is the instant case, at the time of the appeal.

In the instant case, there was no bar to the suit at the time it was filed. In **Batilla, supra,** the statute of repose had been declared unconstitutional as applied where it denied access to the courts to persons who had not been injured until after expiration of the twelve year period. At the time this suit was filed **Batilla** was in effect and the statute was a nullity. See **State ex re. Nuveen v. Greer**, 88 Fla. 249, 102 So.739 (1924). Even if **Pullum, supra,** could be said to have, temporarily, barred the action, the revival of the action by repeal of the statute of repose while the case was still pending is not retroactive application of the repealing act. It is, rather, the prospective application of the law in effect at the time of the appeal of a pending case. This is distinguishable from the facts of **Homemakers, supra,** where the suit was barred before it was filed and was, consequently, never pending.

The significance of the date of injury vis-a-vis a statute of limitations does not relate to a statute of repose. There is no need to find that the repeal of the statute of repose must relate back to some earlier point in time in order for it to be applied in this case. Those cases, cited above, which stand for the proposition that a case should be disposed of according to the law at the time

of the appeal should govern here and not **Homemakers, supra,**.

There is, therefore, no neccessity for this Court to look for a clear and express manifestation of the legislature's intent to make the repealing act retroactive before it may be applied to this case. 3/

In addition, **Homemakers, supra**, should not control the instant case because statutes of repose and statutes of limitations are significantly different. As stated by the this Court in **Bauld v. J. A. Jones Const. Co.**, 357 So.2d 401 (Fla.1978):

3/ Assuming arguendo, this Court were to conclude that a finding of clear and express legislative intent to apply the repealing act retroactively were necessary before it could be applied here, it is submitted, as an alternative argument, that such intent is apparent. Chapter 86-272 Section (2) Laws of Florida 1986 repealed the statute of repose for product liability actions. The Chapter also includes a change in the statute of limitations for libel and slander actions. Section (3) states that the libel and slander provisions apply to causes of action accruing after October 1, 1986. With regard to the repeal of the 12 year statute of repose, Section (3) states only that the section takes effect July 1, 1986. It is apparent, therefore, that the legislature intended the libel and slander provision to apply prospectively only and the product liability section to apply retrospectively. Such a construction is in accord with the rule that where particular language is included in one section of a statute but omitted in another section of the same act it is presumed that the legislature acted intentionally in the disparate language and the statute should be construed as excluding that which is not specifically mentioned, i.e. prospective only application of the repeal of the statute of repose. See **Russello v. U.S.**, 104 S.Ct. 296, (1983); **Winter v. Hollingsworth Properties, Inc.**, 587 F.Supp. 1289 (D.C. Fla. 1984); **Dobbs v. Sea Isle Hotel**, 56 So.2d 341 (Fla. 1952).

Additionally, the use of different language in different portions of the same statute is strong evidence that different meanings were intended. **Dept. of Prof. Reg., Bd. of Medical v. Durrani**, 455 So.2d 515 (Fla. 1st DCA 1984); **Ocasio v. Bureau of Crimes, Etc.**, 408 So.2d 751 (Fla. 3rd DCA 1982).

> "We recognize the fundamental difference in character of these provisions from the traditional concept of a statute of limitations. Rather than establishing a time limit within which action must be brought, measured from the time of accrual of the cause of action, these provisions cut off the right of action after a specified time measured from the delivery of a product or the completion of work. They do so regardless of the time of the accrual of the cause of action or of notice of the invasion of a legal right." **Bauld, supra**, at 402.

The date of injury does not have the significance to a statute of repose it has to a statute of limitations. A statute of limitations usually runs from the date of injury or discovery thereof. The statute of repose in question runs from the date of delivery of the product. In **Dade County v. Ferro**, 384 So.2d 1283 (Fla. 1980), this Court,in dealing with the issue of the attachment date of a final repose provision of a medical malpractice statute of limitations, found that the date a statute attaches is determined by the language of the statute itself:

> "While the date of discovery is entirely relevant in ascertaining the attachment of a statute of limitations which measures from that date, it is equally irrelevant in ascertaining the attachment date of a statute of limitations which measures by its terms from the date of the incident giving rise to the injury." **Ferro, supra,** at 1286.

The difference is significant here because the date of the accrual of the cause of action, or the date of the injury, or date of notice of the injury, is of no import. The time is measured only from the date of delivery of the

product. In order to measure whether or not the time has run on a statute of limitations the statute in effect at the time of accrual of the action must be looked to. For a new statute to apply it must have been in effect at the time of accrual of the cause of action, i.e. it must be applied retroactivly. There is nothing significant about the date the cause of action accrued in the context of a statute of repose which dates from delivery of the product.

The repeal of the statute of repose need not be interpreted to have been in effect at the time the cause of action accrued in order to benefit the plaintiff. For this reason the application of the repealng act does not require any retroactive application of law. The absence of retroactive application of an extended statute of limitations in **Homemaker's** resulted in the case being barred before it was ever filed and consequently it was not "pending", as was the instant case, at the time of enactment of the new statute. The statute of repose need not be applied retroactively to the date of injury in order to apply here. Retroactive application of an extended statute of limitations, this Court's concern in **Homemaker's supra,** is not, analagous to the repeal of a statute of repose.

Even if this Court were to conclude that the repeal of the statute of repose must be applied retroactively in order to benefit the plaintiffs, there is an additional reason why the rule against retroactive application cited

in **Homemakers, supra,** should not control. The repeal of the statute of repose was a remedial act by the legislature. A remedial statute is one designed to correct existing law or one designed to afford a remedy where there was none. **Adams v. Wright,** 403 So.2d 391 (Fla. 1981). As to those persons injured by products delivered more than twelve years before the injury, the statute of repose eleminated any redress for those injuries. While the Florida Supreme Court's opinion in **Battilla, supra** was in effect, the statute was a nullity and a remedy existed for that class of persons. **Pullum, supra,** reactivated the statute and those persons were again without a remedy. In the next legislative session after **Pullum** the legislature acted by repealing the statute. It is submitted that there is no other reasonable characterizaion of the legislature's action but that it acted to correct the problem in the law created by **Pullum** and to afford those persons in the plaintiffs' position a remedy where they had none.

Florida law is clear that where a statute is found to be remedial it can and should be retroactively applied in order to serve its intended purpose. **City of Orlando v. Desjardins,** 493 So.2d 1027 (Fla. 1986); **Village of El Portal v. City of Miami Shores,** 362 So.2d 275 (Fla. 1978). This is true whether the statute is procedural or substantive in nature. **City of Orlando, supra.** This rule has been applied to statutes which do not contain any

express language of retroactive intent. **City of Orlando, supra; Florida Patient's Comp., Fund, supra; City of Lakeland v. Catinella,** 129 So.2d 133 (Fla. 1961).

Remedial statutes are also subject to the requirement that they always be construed so as to afford relief rather than to deny it. **Neville v. Leamington Hotel Corp.,** 47 So.2d 8 (Fla. 1950). The rules with regard to remedial statutes weigh heavily in favor of a holding by this Court that the repeal of the statute of repose should be applied to the instant case under either the theory of nonretroactive application of existing law to pending cases or the retroactive application of a remedial act, or the construction of the act as one which the legislature intended to apply retroactively. **4/**

4/ The plaintiffs would submit an additional argument in favor of not applying the reasoning of **Homemakers** to this case. As the new statute was a repealing act, the rule holding that repealing statutes be given retrospective application should apply. The rule is that where a remedy or right is created wholly by statute, when the statute is repealed the right or remedy falls with it. **Yafee v. International Co.,** 80 So.2d 910 (Fla. 1955). Prior to enactment of the statute of repose, the defendant had no right to be free from accountability for its twelve year old defective products. Now that the statute no longer exists there is no basis for the defendant's exemption from suit to continue. Weighing against this argument is **CBS, Inc. v. Garrod,** 622 F.Supp. 532 (M.D. Fla. 1985) which held that the repeal of a statute may not divest one of a defense which arose under the former statute. The reasoning on which the holding is based is that substantive type, complete defenses may not be abrogated after they accrue in the same sense that a cause of action may not be abrogated after accrual because it is a vested right. The defendants have no vested right in the statute of repose. **Walter Denson & Son v. Nelson,** 88 So.2d 120 (Fla. 1956). It is the rule stated in **Yafee, supra,** and not the exception stated in **CBS, supra** which is relevant here.

Finally, as stated by Judge Ferguson in his specially concurring opion below:

> "Affirmance is required by **Shaw**; otherwise I would dissent. **The reason for giving the revised section 95.031(2),** Florida Statutes (Supp. 1986), **retrospec-application is most compelling.**
>
> The Florida Constitution, article I, section 21, provides that '(t)he courts shall be open to every person for redress of any injury.' This provision was adopted to give consititutional vitality to the maxim that for every wrong there is a remedy. **Holland ex rel. Williams v. Mayes,** 155 Fla. 129, 19 So.2d 709 (1944).
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> **Pullum v. Cincinnati, Inc.,** 476 So.2d 657 (Fla. 1985), effectively shut the courthouse door on a cause of action in certain product liability cases even before the cause of action accrued, leaving a person injured by another private person without a remedy. The 1986 revision to section 95.031(2) was a prompt legislative overruling of **Pullum.**
>
> **We are not paralyzed, by policy or precedent, from giving the corrective legislation retrospective application** to a case which was sandwiched between **Battilla** and **Pullum,** so that substantial justice and right shall prevail as contemplated by the constitution. Our duty as an appellate court in construing a statute is first to reconcile it with constitutional mandates. See **Biggs v. Smith,** 134 Fla. 569, 184 So. 106 (1938) ('The duty is on this Court to see that substantial justice and right shall prevail.'). **Dominguez v. Bucyrus-Eire Co.,** 12 FLW 546 (Fla. 3rd DCA, Feb. 11, 1987).

There is no logic or public purpose to be served by denying the plaintiffs the right to pursue their claim which has been pending for over five years because of a statute essentially in effect during that time for only the ten months between **Pullum** and the repealing act.

B. THE DECISION OF **PULLUM V. CINCINNATI, INC.**, 476 SO.2D 657 (FLA. 1985), **APPEAL DISMISSED,** ___ U.S.___, 106 S.CT. 1626, 90 L.ED 2D 174 (1986), WHICH OVERRULED **BATTILLA V. ALLIS CHALMERS MFG. CO.**, 392 SO.2D 874 (FLA. 1980), DOES NOT APPLY SO AS TO BAR A CAUSE OF ACTION THAT ACCRUED AFTER THE **BATTILLA** DECISION BUT BEFORE THE **PULLUM** DECISION.

The plaintiff was injured May 2, 1979 and this suit filed in October, 1981, within the four year statute of limitations provided in Section 95.11(3) Florida Statutes, but beyond the 12 years from date of delivery required by Section 95.031(2) Florida Statutes (1975). Prior to the instant suit being filed, this Court entered its decision in **Battilla v. Allis Chalmers Mfg. Co.**, 392 So.2d 874 (Fla. 1980).

Batilla, supra, held that the statute of repose was unconstitutionally applied in that it denied access to the courts as guaranteed by Article I, Section 21, Florida Constitution. In reliance on this Court's pronouncements on the statute, the plainitffs filed suit and litigated for approximately four years. The case had not yet been tried when, in August, 1985, this Court entered its opinion in **Pullum, supra.**

In **Pullum, supra,** this Court quoted with approval Justice McDonald's dissent in **Battilla,** and held the statute of repose of twelve years to be a reasonable act of the legislature and not violative of the constitution. Summary judgment was entered in the instant case on authority of the **Pullum** case. (R-134).

It is submitted that **Pullum,** should not be given retrospective effect so as to bar the instant suit. It is the general rule that a decision of a court of last resort overruling a former decision is retrospective as well as prospective unless specifically declared to be be prospective only. There is, however, "a well recognized exception" to the rule. Where a statute receives "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 retrospective application of a subsequent overruling decision. **Florida Forest and Park Service v. Strickland,** 154 Fla. 472, 18 So.2d 251, 253 (Fla. 1944).

In **Florida Forest, supra,** the "property or contract' right which could not be destroyed by the subsequent overruling decision was a workmen's compensation claim. **Florida Forest, supra,** and **Davis v. Artley Const. Co.,** 154 Fla 481, 18 So.2d 255 (1944) delcined to give retroactive aplication to a decision changing the procedure for perfecting appeals in workmen's compensation cases. **Florida Forest, supra,** has been cited as authority for denying retroactive application of judicial decisions where such application would destroy various interests.

In **Aronson v. Congregation Temple De Hirsch,** 123 So.2d 408 (Fla. 3rd DCA 1960) and **Fuller v. Riley,** 124 So 2d 409

Fla. 3rd DCA 1960), the Third District, relying on **Florida Forest**, declined to retroactively apply an overruling decision which changed the time for filing a notice of appeal. Retroactive application of the decision would have resulted in the dismissal of the appeals, which were both civil cases.

In **Culpepper v. Culpepper**, 147 Fla. 632, 3 So.2d 330 (1941), which was decided before **Florida Forest, supra,** this Court held that it would not retroactively apply a decision altering the rules of pleading. This Court stated as its reason the fact that the parties had the right to rely on the prior decision. This Court also considered reliance in **Interlachen Lakes Estates, Inc. v. Snyder**, 304 So.2d 433 (Fla. 1973). Therein this Court stated that its decision declaring a property tax assessment statute to be unconstitutional would operate prospectively only because persons had relied on the statute. See also **Department of Revenue v. Anderson,** 389 So 2d 1034 (Fla. 1st DCA 1980).

This Court held in **Rupp v. Bryant,** 417 So.2d 658 (Fla. 1982) that a statute could not be applied retroactively so as to abolish vested rights. The vested rights were pending causes of action against certain public employees. The statute sought to relieve public employees from personal liability for their negligent acts. This Court declared that due process considerations would prevent the statute's retroactive application to pending

causes of action. See also **State Dept. of Transportation v. Knowles,** 402 So.2d 1155 (Fla. 1981).

The retroactive application of **Pullum** to the instant case would destroy the plaintiffs' accrued, vested and pending right to recover for injuries in violation of the plaintiffs' rights to due process. Further, the plaintiffs litigated their case for approximately four years in reliance on this Court's prior decisions declaring the statute of repose unconstitutional as applied to the facts of their claim. This should also weigh against retroactive application of the **Pullum** case.

The rule against retroactive application of decisional law or statutes where it would result in destruction of pending causes of action has also been followed by the federal courts. See for example: **Logan v. Zimmerman,** 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982); **Chevron Oil Company v. Huson,** 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971) and **Brinkerhoff-Faris Trust & Savings Co. v. Hill,** 281 U.S. 673, 50 S.Ct. 451, 74 L.Ed. 1107 (1930) which have held in accordance with federal due process considerations, accrued causes of action may not be destroyed by retroactive application of statutes or decisional law.

In **Chevron Oil, supra,** the Unitied States Supreme Court deals with the issue of retroactive application of decisional law. That case involved an overruling decision which shortened a statute of limitations. The court set

forth three factors to be considered in determining whether a decision should be appplied prospectively only. First, it must establish a new principle of law by either overruling clear past precedent upon which litigants have relied or deciding an issue of first impression. **Pullum, supra,** clearly overruled past precedent and established a new rule of law.

The second criteria of **Chevron Oil, supra,** is whether retrospective operation will further or retard operation of the rule in question. The retrospective application of **Pullum** can not now operate to further the purposes of the statute of repose because the statute has be abolished. Even if the legislature was justified in protecting manufaturers from perpetual liability for their defective products, the legislature no longer has such intent. Retrospective application of **Pullum** will only serve to prevent those relatively few plaintiffs caught in the middle between **Pullum** and the repeal of the statute of repose from seeking redress for their injuries.

The third criteria of **Chevron Oil, supra,** is whether retrospective application of the decision will produce substantially inequitable results. This factor speaks forcefully for rejecting retrospective application of **Pulllum.** To deny only those persons who fall within the ten month period between the **Pullum** decision and the repeal of the statute of repose the right to pursue their claims will result in the denial of their rights to equal protection of

the law, abrogation of both federal and state constitutional rights to due process and it will serve no purpose of right or justice.

If this Court should reject the arguments asserted herein and hold **Pullum** to have retroactive application, it is submitted that it should not bar the present suit because it is distinguishable on its facts. In **Pullum,** this Court stated that the legislature's act was reasonable and cited with approval Justice McDonald's dissent in **Battilla, supra,** which made a distinction between improvements to real property and manufactured products based on length of their useful life. The product in this case has a much greater useful life than twelve years, which is evidenced by the fact that it was in use twenty years after its manufacuture. The distinction made by the legislature and **Pullum** is not reasonable and is unconstitutional as applied to this case. 5/

This Court should reject those decisions which have held contrary to the position asserted herein (see cases cited at note 1, p. 5 above) and decline to apply **Pullum** retrospectively to this and other product liability cases

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5/ If Pullum divests the plaintiffs of their cause of action it would be a result somewhat analogous to the retroactive application of a shortened statute of limitations without a savings clause. An additional argument weighing against the application of **Pullum** here is, therefore, the Florida constitutional prohibition against the retroactive application of a shortened statute of limitations where no savings clause is provided to protect existing claims. **Homemakers, supra.**

pending before **Pullum.** In the alternative, plaintiffs would urge this Court to recede from its decision in **Pullum.** The Florida Constitution provides that the courts shall be open to every person for redress of injury. Florida Constitution, Article I, Sction 21. This Court's holdings in **Battilla, supra,** and **Overland Construction Co. v. Sirmons,** 369 So. 2d 572 (FLa. 1979) to the effect that statutes of repose which bar causes of action before they accrue violate that constitutional provision were based on sound reasoning.

V. CONCLUSION

Based upon the authorities cited and the reasons discussed above, the decision of the District Court of Appeal, Third District in favor of the respondent should be reversed and the case remanded for a jury trial on the merits.

Respectfully submitted,

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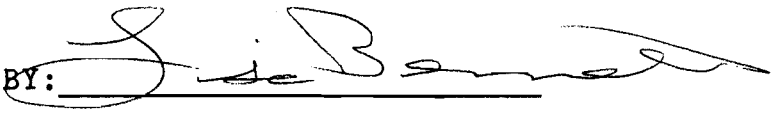
BY: 

LISA BENNETT
Counsel for Appellants

VI. CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Petitioners' Brief On The Merits was served by mail on Cooper, Wolfe & Bolotin, P.A., 44 West Flagler Street, Miami, FL 33130 and Phillip Blackmon, Esquire, 2665 S. Bayshore Drive, Fifth Floor, Miami, FL 33133, this 6th day of April, 1987.

BY: 

LISA BENNETT
Counsel for Appellants