IN THE SUPREME COURT OF FLORIDA

CASE NO. 70,179

JUAN DOMINGUEZ and GRACIELA DOMINGUEZ,

Petitioners,

v.

BUCYRUS-ERIE COMPANY,

Respondent.
_____/

RESPONDENT'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other Authorities

INTRODUCTION

Plaintiffs/Petitioners JUAN DOMINGUEZ and GRACE DOMINGUEZ will be referred to as they stand before this Court, as they stood before the trial court and as DOMINGUEZ. Defendant/Respondent BUCYRUS-ERIE COMPANY will be referred to as it stands before this Court, as it stood before the trial court and as BUCYRUS-ERIE.

"R" refers to the record on appeal. Emphasis is supplied by counsel unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioners' statement of the facts. The relevant facts are undisputed. The allegedly defective product was manufactured in 1959. (R. 134). DOMINGUEZ was injured on May 2, 1979. (R. 1-5). Suit was filed on October 13, 1981. (R. 1-5). BUCYRUS-ERIE's motion for summary judgment was granted on the ground that the suit was barred by the statute of repose, Fla.Stat. § 95.031(2) (1979), which precludes a products liability claim filed more than 12 years from the date of manufacture.[1/] (R. 151).

1/ DOMINGUEZ refers to Fla.Stat. § 95.031 (1975) while BUCYRUS-ERIE refers to the 1979 version of the statute. The cause of action arose in 1979 when the accident occurred. Thus, the 1979 statute governs this case. However, since the 1975 and 1979 statutes are identical, the difference has no practical effect on the arguments and issues presented.

SUMMARY OF ARGUMENT

The 1986 amendment to § 95.031(2), which eliminated the 12 year bar to products liability actions, does not apply retroactively to this action which arose in 1979. The rule in Florida is that an amendment to a statute of limitation applies prospectively unless there is express, clear, and manifest legislative intent to the contrary. There is no evidence of legislative intent to apply the 1986 amendment retroactively. Thus, this action is governed by § 95.031(2) (1979) which bars products liability actions brought more than 12 years after the product was sold.

Pullum v. Cincinnati, 476 So.2d 657 (Fla. 1985), receded from Battilla v. Allis Chalmers Mfg. Co., 392 So.2d 874 (Fla. 1980), and held that Fla.Stat. § 95.031(2) could constitutionally be applied to bar a cause of action before it arose. A decision which overrules a prior decision applies retroactively unless it specifically provides to the contrary. There is a limited exception for vested property or contract rights acquired in reliance on the prior decision. Since Pullum does not announce a prospective only application, it must be applied retrospectively unless the exception applies. However, DOMINGUEZ did not acquire a vested property right in reliance on Battilla. He may have had an expectation interest but that does not qualify as a vested property right. Moreover, DOMINGUEZ neither acquired the right to sue nor refrained from exercising that right in reliance on Battilla. He acquired the right to sue because of an accident and did not bring the suit within 12 years of the product's sale because the accident did not occur un-

til after the 12 years passed. Thus, Pullum applies retroactively and bars this suit.

ARGUMENT

I. THE AMENDMENT TO FLA.STAT. § 95.031(2) DOES NOT APPLY TO THIS CASE BECAUSE DOMINGUEZ' CAUSE OF ACTION AROSE BEFORE THE AMENDMENT'S EFFECTIVE DATE.

DOMINGUEZ' cause of action arose in 1979. Fla.Stat. § 95.031(2) (1979) barred products liability actions brought more than 12 years after the product was sold. Since the allegedly defective product in this case was sold in 1959, 20 years before the cause of action arose and more than 20 years before suit was brought, DOMINGUEZ' claim was clearly barred under that statute. The first certified question should be answered in the negative.[2/]

The legislature amended Fla.Stat. § 95.031(2) in 1986 as follows, with the underlined language added and the stricken language deleted:

> Actions for products liability and fraud under s. 95.11(3) must be begun within the period prescribed in this chapter . . . but in any event an action for 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 or~~ within 12 years after the date of the commission of the alleged fraud, regardless of the date ~~the defect in~~

2/ As DOMINGUEZ notes in his brief at 5, this issue has been decided adversely to DOMINGUEZ in each of the district courts of appeal to consider the issue. Lazo v. Baring Indus., Inc., 12 F.L.W. 1021 (Fla. 3d DCA Apr. 14, 1987); Wallis v. Grumman Corp., 12 F.L.W. 613 (Fla. 3d DCA Mar. 6, 1987); Melendez v. Dreis & Krump Mfg. Co., 12 F.L.W. 554 (Fla. 3d DCA Feb. 27, 1987); Shaw v. Gen. Motors Corp., 12 F.L.W. 487 (Fla. 3d DCA Feb. 20, 1987); Small v. Niagara Mach. & Tool Works, Inc., 502 So.2d 943 (Fla. 2d DCA 1987); Pait v. Ford Motor Co., 500 So.2d 743 (Fla. 5th DCA 1987)(all certifying question to this Court).

~~the product or~~ the fraud was or should have been discovered.

Fla.Laws ch. 86-272 (eff. July 1, 1986). The amendment eliminates the 12 year bar in products liability actions and limits it to fraud actions.

DOMINGUEZ argues that this amendment should be applied retroactively to his cause of action which arose almost seven years before the amendment's effective date. To support his position, DOMINGUEZ claims that ch. 86-272 § 3 repealed, rather than amended, the statute of repose. This argument should be rejected. This was an amendment, not a repeal. And the legislature showed no intent that this amendment apply retroactively.

a. Ch. 86-272 was an amendment, not a repeal.

Although he premises his entire argument on this assumption, DOMINGUEZ offers no support for his assertion that ch. 86-272 effectuated a repeal, rather than an amendment. Ch. 86-272 by its very terms makes the amendatory nature of the Act clear. The title to Ch. 86-272 states that it is an Act "amending s. 96.031, F.S.; deleting a limitation upon the initiation of actions for products liability." The body of the Act states that "subsection (2) of section 95.031, Florida Statutes, is amended to read". Then it states the amendments.

Further the very nature of the limited action taken by the legislature shows an amendment, not a repeal. The provision at issue merely deleted a portion the statute of repose. It did not repeal the entire statute. The fact that there were changes to a

prior statute naturally means it was amended. Thus, § 95.031(2) was amended and not repealed.[3/]

b. The amendment does not apply retroactively because there is no legislative intent to do so.

The amendment does not apply retroactively because there is no evidence of legislative intent that it do so. The amendment merely states that it "shall take effect July 1, 1986". Fla. Laws Ch. 86-272, § 3. This statement is insufficient to show that the legislature intended retroactive application.[4/]

The issue is governed by this Court's decision in Homemakers, Inc. v. Gonzalez, 400 So.2d 965 (Fla. 1981). In Homemakers, plaintiff's claim for medical malpractice accrued in 1973. The statute of limitation in effect in 1973 provided that any such action had to be brought within two years. The statute was amended effective January 1, 1975 to provide that the two year limi-

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[3/] However, even if ch. 86-272 § 3 can be construed as a repeal, it also substantially re-enacted § 95.031(2) (1983). Therefore the 1986 changes are still treated as amendments.

> [W]here a statute has been repealed and substantially re-enacted by a statute which contains additions to or changes in the original statute, the re-enacted provisions are deemed to have been in operation continuously from the original enactment whereas the additions or changes are treated as amendments effective from the time the new statute goes into effect.

McKibben v. Mallory, 293 So.2d 48, 53 (Fla. 1974).

[4/] None of the cases on which DOMINGUEZ relies involve interpretation of an amendment to a statute of limitation. DOMINGUEZ ignores that body of law and only discusses repeals.

tation only applied to persons in privity with the physician. The district court recognized that the plaintiff's cause of action would have been barred by the statute of limitation in effect when that cause of action arose:

> That statute would have, unless rendered ineffective by subsequent amendment, barred the action which was commenced by the plaintiff more than two years after her alleged injury.

Gonzalez v. Jacksonville Gen. Hosp., Inc., 365 So.2d 800, 803 (Fla. 1st DCA 1978). However it held that the subsequent amendment applied retroactively to plaintiff's cause of action. The subsequent amendment limited the two year limitation statute only to those in privity with the physician. Since the plaintiff was not in privity, her claim was governed by the general four year statute of limitation rather than the amended two year statute. 365 So.2d at 803-04.

This Court expressly rejected this analysis and reversed. It held that

> a statute of limitation will be prospectively applied unless the legislative intent to provide retroactive effect is express, clear and manifest.

Homemakers, Inc. v. Gonzalez, 400 So.2d 965, 967 (Fla. 1981).

The amendment involved in Homemakers contained a specific savings clause, Fla.Stat. § 95.022 (Supp. 1974), which provided that any action barred by the amendment could be filed within one year of the amendment's effective date. This Court found no evidence that this savings clause evinced a legislative intent to apply the amendment retroactively.

> The "savings clause" of section 95.022, though considered, offers no evidence of such intent. This clause provides a grace period of one year for causes of action which would be prematurely barred by retroactive application of the new statute of limitation. We determine, as did the Fourth District in Brooks, that section 95.022 was specifically directed only to those sections of chapter 95 whose time periods were shortened by the amended statute, and has no application where time periods remained the same or were lengthened.

400 So.2d at 967 (emphasis by court).

This Court concluded that the controlling statute of limitation was that in effect when the plaintiff's cause of action arose. The subsequent amendment did not apply:

> The impact of our holding in the instant case is that the statute of limitation applicable to Mrs. Gonzales' claim for all purposes is section 95.11(6), Florida Statutes (1973), which provides a two-year period of limitation. Neither of the subsequent amendments to chapter 95 disrupted the application of section 95.11(6) since there is no evidence of legislative intent of retroactivity.

400 So.2d at 967.

The Homemakers court cited with approval the holding in Brooks v. Cerrato, 355 So.2d 119, 120 (Fla. 4th DCA 1978) that:

> [b]efore a statute of limitation can be applied retroactively there must be a clear manifestation of legislative intent that it be given retroactive effect.

It found no such evidence with respect to the amendment before it even though that amendment included a savings clause. See also Dade County v. Ferro, 384 So.2d 1283, 1287 (Fla. 1980)(amendment to statute of limitation not retroactive without "express, clear or manifest intent that it be applied retroactively"); Garofalo

v. Community Hosp., 382 So.2d 722 (Fla. 1980); Stuyvesant Ins. Co. v. Square D. Co., 399 So.2d 1102, 1104 (Fla. 3d DCA 1981) ("when a cause of action arises from an occurrence which predates the effective date of a statute of limitations, that statute does not apply"); Dep't of Transp. v. Soldovere, 452 So.2d 11, 13 (Fla. 1st DCA 1984)("In the absence of manifest legislative intent to make changes in period of limitation retroactive, the change is presumed prospective only").[5/]

5/ DOMINGUEZ claims at 10, n.3 that there is sufficient evidence of legislative intent to apply the amendment retroactively. He points out that section 1 of Ch. 86-272 applies to causes of action accruing after October 1, 1986 while section 2 merely states that it shall "take effect July 1, 1986". He then argues that the legislature's failure to state in explicit terms that section 2 is prospective only, as it did for section 1, establishes legislative intent to apply section 2 retroactively. But all the cases cited above hold that silence by the legislature is not evidence of "manifest legislative intent" to apply a statute retroactively. Silence is all that exists here. In any event, the difference between the legislative language is fully accounted for by the difference between the effective dates of the two sections, July 1 and October 1.

DOMINGUEZ' argument in this regard attempts to utilize various rules of statutory construction. However, "such rules are useful only in cases of doubt and should never be used to create doubt, only to remove it." State v. Egan, 287 So.2d 1, 4 (Fla. 1973).

> If the language of the statute is clear and unequivocal, then the legislative intent must be derived from the words used without involving incidental rules of construction or engaging in speculation as to what the judges might think that the legislators intended or should have intended.

Tropical Coach Line, Inc. v. Carter, 121 So.2d 779, 782 (Fla. 1960). Further, if the requisite uncertainty exists to allow resort to these rules of construction, then the legislative intent to apply the statute retroactively cannot be "express, clear and manifest" as required for the retroactive application (footnote continued)

Here, the 1986 amendment to Fla.Stat. § 95.031(2) does not even contain a savings clause. It simply states that the amendment "shall take effect July 1, 1986". Since there is absolutely no evidence of any legislative intent to apply the amendment retroactively, Homemakers applies to this statute of repose and compels the conclusion that it does not apply retroactively to causes of action which arose before its effective date. See Durring v. Reynolds, Smith & Hills, 471 So.2d 603, 607-08 & n.6 (Fla. 1st DCA 1985)(finding § 95.11(3)(c), statute of repose for actions against architects and engineers, not retroactive; rule applies regardless of whether the new statute of limitation shortens or enlarges the existing statute).

Thus, the 12 year limitation provision of § 95.031(2) (1979) still applies to any claim that a defect in the 20 year old product caused DOMINGUEZ' injury. The 1986 amendment to that statute does not apply to DOMINGUEZ' cause of action, which arose almost seven years before the amendment's effective date.

DOMINGUEZ argues that the Homemakers analysis is inapposite. He claims Homemakers is inapplicable for several reasons. First, he claims at 9 that application of the 1986 amendment would not be improper retroactive application because the Homemakers plaintiff's suit was barred when it was filed while his suit here was viable under Battilla and this case was still "pending" when the amendment took effect. This analysis is incorrect. The deter-

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of a statute of limitation. DOMINGUEZ' alternative argument falls of its own weight.

minative date for retroactivity purposes is the date the cause of action arose. See Homemakers, Inc. v. Gonzalez, supra, 400 So.2d at 967 (in absence of legislative intent to apply statute retroactively, it does not apply to causes of action occurring prior to its effective date).

DOMINGUEZ also claims that the 1986 amendment "revived" his cause of action. However, under Pullum his right to bring any products liability suit based on this machine ended in 1971, 12 years after the machine was originally sold. The 1986 amendment to § 95.031(2) could not revive a right which no longer existed. Although a new statute of limitation may be applied retroactively to existing causes of action if the requisite legislative intent is present, the amendment may not be applied to a cause of action already extinguished under the pre-existing statute of limitation. As stated by this Court:

> [I]t is well settled by the authorities that the legislature has the power to increase the period of time necessary to constitute limitation, and to make it applicable to existing causes of action, provided such change is made before the cause of action is extinguished under the pre-existing statute of limitations.

Walter Denson & Son v. Nelson, 88 So.2d 120, 121 (Fla. 1956). See also Corbett v. Gen. Eng'g & Mach. Co., 160 Fla. 879, 37 So.2d 161 (1948)(also reciting rule that legislature has power to enlarge a statute of limitation and apply it to existing causes of action provided change is made before cause of action is extinguished under prior statute); Orozco v. Children's Hosp. of Philadelphia, 638 F.Supp. 280 (E.D.Pa. 1986); Buckner v. GAF

Corp., 495 F.Supp. 351 (E.D.Tenn. 1980); Penry v. Wm. Barr, Inc., 415 F.Supp. 126 (E.D.Tex. 1976); Bajalia v. Jim Magill Chevrolet, Inc., 497 So.2d 489 (Ala. 1986); Jefferson County Dep't of Soc. Serv. v. D.A.G., 607 P.2d 1004 (Colo. 1980)(en banc); Conner v. Copley Press, Inc., 459 N.E.2d 955 (Ill. 1984); Green v. Karol, 344 N.E.2d 106 (Ind.App. 1976); Babco Indus., Inc. v. New England Merchants Nat'l Bank, 380 N.E.2d 1327 (Mass.App. 1978); Colony Hill Condo. I Assoc. v. Colony Co., 320 S.E.2d 273 (N.C.Ct.App. 1984); Clark v. Jeter, 518 A.2d 276 (Pa.Super.Ct. 1986); Anderson v. Sneed, 615 S.W.2d 898 (Tex.Civ.Ct.App. 1981)(all holding new statute of limitation does not apply retroactively to "revive" cause of action barred by old statute before new one became effective). See also Morton v. Tullgren, 563 S.W.2d 422 (Ark. 1978)(stated rule); State ex rel. Research Med. Center v. Peters, 631 S.W.2d 938 (Mo.Ct.App. 1982)(rule stated; cause of action not expired under prior statute of limitation when new one became effective); Denver Wood Prod. Co. v. Frye, 275 N.W.2d 67 (Neb. 1979)(same).

When this Court receded from Battilla, it validated the statute from its original date. Christopher v. Mungen, 61 Fla. 513, 55 So. 273, 280 (1911). Thus, when DOMINGUEZ was injured in 1979, the statute of repose was valid. It precluded any products liability suit against BUCYRUS-ERIE based on this machine after 1971. It certainly barred this 1981 action based on a 1979 injury. The 1986 amendment simply could not revive the cause of action already extinguished under the prior statute.

Finally DOMINGUEZ distinguishes Homemakers because it involved a statute of limitation and not a statute of repose. This does not change the result. The analysis for retroactivity purposes is the same. A statute of repose, like a statute of limitation, requires a clear expression of legislative intent before it will apply retrospectively. Dade County v. Ferro, 384 So.2d 1283, 1285 (Fla. 1980); Durring, supra, 471 So.2d at 607. The pertinent date for determining retroactive application of a statute of repose is the date the cause of action accrued. Thus, by definition, applying the 1986 amendments to a cause of action which accrued, unless otherwise barred, in 1979 would be a retroactive application of the amendment. Homemakers is controlling. The 1986 amendment does not apply retroactively because there is no evidence of legislative intent that it do so.

DOMINGUEZ also attempts to circumvent Homemakers by arguing that the 1986 amendment to § 95.031(2) is a remedial statute and therefore special rules apply. Dominguez' Brief at 13. DOMINGUEZ is incorrect. All statutes of limitation are remedial statutes. See Carpenter v. Florida Cent. Credit Union, 369 So.2d 935, 937 (Fla. 1979). Nonetheless, they only apply retroactively when the legislative intent to do so is express, clear and manifest. See Homemakers, supra. DOMINGUEZ' argument simply ignores the body of case law dealing with the particular type of "remedial" statute at issue here.

The Third District correctly decided this issue. The 1986 amendment to § 95.031(2) does not demonstrate an express, clear,

and manifest legislative intent that it be applied retroactively. As a result, it does not apply to causes of action which accrued before its effective date.

II. DOMINGUEZ' CLAIM IS BARRED BY FLA.STAT. § 95.031(2) (1979), AS CONSTRUED BY THIS COURT IN PULLUM V. CINCINNATI, INC., 476 So.2d 657 (FLA. 1985).

The second certified question is whether Pullum bars an action which "accrued after the Battilla decision but before the Pullum decision". There is no need to answer this question with respect to this case. DOMINGUEZ' cause of action accrued, if at all, when he was injured in 1979. Battilla was decided in 1980. The certified question is not relevant to this case and should not be answered here.

If this Court determines that it is appropriate to address this issue, it should answer the question in the negative. DOMINGUEZ claims that Pullum should not apply because its retroactive application would deprive him of a vested right, i.e. the cause of action which accrued when he was injured. DOMINGUEZ' argument is incorrect. Pullum did not deprive him of a cause of action, the statute of repose did that. Since the statute of repose was passed before DOMINGUEZ was injured, it did not deprive him of any vested right. Moreover, Pullum did not "deprive" DOMINGUEZ of a right which had vested under Battilla.

Fla.Stat. § 95.031(2) bars a products liability claim brought more than 12 years after the date of manufacture. DOMINGUEZ' claim, brought almost 20 years after the date of manufac-

ture, is barred by the clear language of the statute. In Battilla v. Allis Chalmers Mfg. Co., 392 So.2d 874 (Fla. 1980), this Court held this statute was unconstitutional to the extent that it barred a claim before it ever came into existence. This Court then receded from Battilla in Pullum v. Cincinnati, Inc., 476 So.2d 657 (Fla. 1985). It held that the statute was constitutional as applied to such a claim.[6/]

A decision which overrules a prior decision is applied retroactively absent some contrary pronouncement in the opinion.

> 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

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6/ Other jurisdictions have also held there is no constitutional impediment to a statute of repose which bars a cause of action before it accrues. See, e.g., Montagino v. Canale, 792 So.2d 554 (5th Cir. 1986)(Louisiana medical malpractice statute of repose); Hartford Fire Ins. v. Lawrence, Dykes, Goodenberger, Bower and Clancy, 740 F.2d 1362 (6th Cir. 1984)(Ohio statute of repose for designers and builders); Barwick v. Celotex Corp., 736 F.2d 946 (4th Cir. 1984)(North Carolina statute of repose for bodily injuries); Braswell v. Flintkote Mines, Ltd, 723 F.2d 527 (7th Cir. 1983) (Indiana products liability statute of repose); Van Den Hul v. Baltic Farmers Elevator Co., 716 F.2d 504 (8th Cir. 1983)(South Dakota statute of repose for builders and architects).

Every district court of appeal in this state has reached the same conclusion. Shaw v. Gen. Motors Corp., 12 F.L.W. 487 (Fla. 3d DCA Feb. 20, 1987); Small v. Niagra Mach. & Tool Works, 502 So.2d 943 (Fla. 2d DCA 1987); Pait v. Ford Motor Co., 500 So.2d 743 (Fla. 5th DCA 1987); Cassidy v. Firestone Tire & Rubber Co., 495 So.2d 801 (Fla. 1st DCA 1986). See also Coggins v. Clark Equip. Co., 12 F.L.W. 750 (Fla. 5th DCA Mar. 20, 1987); Wallis v. Grumman Corp., 12 F.L.W. 613 (Fla. 3d DCA Mar. 6, 1987); Melendez v. Dreis & Krump Mfg. Co., 12 F.L.W. 554 (Fla. 3d DCA Feb. 27, 1987); Dominguez v. Bucyrus-Erie Co., 12 F.L.W. 546 (Fla. 3d DCA Feb. 27, 1987); Am. Liberty Ins. Co. v. West & Conyers, 491 So.2d 573 (Fla. 2d DCA 1986).

> opinion to have a prospective effect only. [citations omitted]. 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 Serv. v. Strickland, 154 Fla. 472, 18 So.2d 251, 253 (1944).[7/] There is one exception to this general rule.

> [W]here 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 subsequent overruling decision a retrospective operation.

18 So.2d at 253. DOMINGUEZ relies on this exception.

Pullum did not declare that it would have only prospective

7/ An overruling decision applies retroactively because it does not make law. It only corrects an erroneous interpretation of the law.

> Had the legislature terminated the charities' immunity from tort liability, its enactment would not have had any retrospective operation . . . . But when this court pronounces the law upon a subject under scrutiny, its utterances take effect at once. The court does not make the law; it merely finds it. Therefore, when it pronounces it, it must necessarily be asumed that its pronouncement represents the law as it always was. Accordingly, when the majority this day holds that there is no immunity upon the part of charities from tort liability, its holding is retrospective as well as prospective.

Miculka v. Am. Mail Line, Ltd., 229 F.Supp. 665, 668 (D.Ore. 1964)(citing Hungerford v. Portland Sanitarium and Benevolent Ass'n, 384 P.2d 1009, 1013 (Ore. 1963)(Rossman, J., dissenting)).

application. Thus, it must be applied retroactively unless that would destroy property or contract rights which DOMINGUEZ acquired under Battilla. DOMINGUEZ does not fall within this limited exception to the general rule of retroactivity. He did not acquire a vested property interest in reliance upon Battilla.

"[D]ecisions 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." Cassidy, supra, 495 So.2d at 802. In Cassidy, the court found that this general rule should apply, not the exception concerning vested rights. The court found no "substantial inequity or unfairness" and held that Pullum barred the action. See also Small, supra, 502 So.2d at 947.

Shaw and Pait reached the same conclusion when they held the action was barred because the "overruling of a decision holding a statute unconstitutional validates the statute as of its effective date."[8/] Shaw, supra 12 F.L.W. at 487; Pait, supra. Shaw

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8/ This rule is founded on the notion that the overruled decision was always incorrect and never represented the law. See Great N. Ry. Co. v. Sunburst Oil & Refining Co., 287 U.S. 358, 365, 53 S.Ct. 145, 148-49 (1932)(court may constitutionally adhere to notion that law has a "Platonic or ideal existence before the act of declaration, in which event the discredited declaration will be viewed as if it had never been, and the reconsidered declaration as law from the beginning"). In Zweibon v. Mitchell, 606 F.2d 1172, 1175-76 (D.C.Cir. 1979), the court wrote:

> The traditional view is that decisions overruling prior holdings or announcing novel doctrine must be applied to all subsequent cases, even if the later cases involve incidents that took place before the crucial judicial ruling.

(footnote continued)

and Pait relied on Christopher v. Mungen, 61 Fla. 513, 55 So. 273, 280 (1911), which held that when a statute is declared unconstitutional it will remain inoperative while the decision is in force. However, if the decision is reversed, the statute will be considered valid from its inception although rights acquired under particular adjudications where the statute was held unconstitutional will not be affected. Id. This means that only those parties whose rights were finally adjudicated under Battilla can rely on it because only those rights are vested. Battilla conferred no vested right in DOMINGUEZ since his rights were not finally adjudicated under it.

The Third District was correct in this case. Battilla did not give DOMINGUEZ any vested rights. DOMINGUEZ' right to sue BUCYRUS-ERIE was cut off in 1971, 12 years after BUCYRUS-ERIE originally sold the allegedly defective product. Thus, when DOMINGUEZ' injury occurred in 1979, his cause of action was already barred by the statute of repose. Battilla does not change that. See Am. Liberty Ins. Co., supra. Battilla only gave DOMINGUEZ an expectation that the statute of repose would continue to be found invalid. The mere expectation that the law will not change does not rise to the level of a vested right. "No person

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> In such cases, according to Blackstone, "judges do not pretend to make a new law, but to vindicate the old one from misrepresentation." Thus for Blackstone judicial overruling reflects not the decision that the previous approach was "bad law, but that it was not law." [footnotes omitted].

has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit." New York Cent. R.R. Co. v. White, 243 U.S. 188, 198, 37 S.Ct. 247, 250 (1917); Duke Power Co. v. Carolina Envtl. Study, 438 U.S. 59, 88, n.32, 98 S.Ct. 2620, 2638, n.32, (1978).

A vested right is more than "a mere expectation based on anticipation of the continuance of an existing law." In re Will of Martell, 457 So.2d 1064 (Fla. 2d DCA 1984). It requires an "immediate right of present enjoyment, or a present fixed right of future enjoyment." 457 So.2d at 1067. A person does not have a vested right in the decisions of a court, Benedict Oil Co. v. U.S., 582 F.2d 544 (10th Cir. 1978), in a particular tort claim, Hammond v. U.S., 768 F.2d 8 (1st Cir. 1986); Ducharme v. Merrill-Nat'l Laboratories, 574 F.2d 1307 (5th Cir. 1978), or in the statute of limitation in effect when the cause of action accrues, Bauld v. J.A. Jones Constr. Co., 357 So.2d 401 (Fla. 1978). Compare Antoine v. United States Postal Serv., 781 F.2d 433, 437, n.5 (5th Cir. 1986)(applying Supreme Court decision retroactively to bar suit which was timely under precedent existing when plaintiff filed it; court noted general rule that appellate court applies law in effect when it renders decision; no reason not to apply decision retroactively).[9/]

9/ DOMINGUEZ argues that retroactive application of Pullum is unconstitutional since "[t]o 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 (footnote continued)

The federal courts, in applying Florida law, have reached the conclusion that Pullum can constitutionally apply retroactively. In Lamb v. Volkswagenwerk Aktiengesellschaft, 631 F.Supp. 1144 (S.D.Fla. 1986), the plaintiff was injured in 1979 by an allegedly defective product more than 12 years old. She brought suit in 1982. The court rejected the plaintiff's claim that she had acquired a vested property interest under Battilla:

> 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 any legal injury from the Volkswagen vehicle. It is axiomatic that common law rights may be restricted, indeed even abolished by the legislature if "grounded both in an overpowering public necessity and an absence of any less onerous alternative means." . . . A plaintiff has no vested right in a tort claim . . . . Moreover under Florida law a litigant has no vested right to the benefit of a statute of limitation in effect when his cause of action accrues. . . . 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 de-

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the law". Dominguez' brief at 20. DOMINGUEZ comes up with this 10 month figure only by not giving Pullum retroactive effect. If Pullum applies retrospectively, it applies to all products liability actions where the cause of action accrued before the amendment to the statute of repose, and not just those accruing or pending between it and the amendment's effective date.

Moreover, the prospective application of the 1986 amendment does not give rise to an equal protection challenge by those whose actions accrued before the amendment's effective date. They have no vested right in a particular statute of limitation, especially one not in effect when their cause of action accrued. See Bauld v. J.A. Jones Constr. Co., supra, 357 So.2d at 401.

> prive Plaintiff of a vested right because Plaintiff's claim never became vested.

613 F.Supp. at 1149 (citations omitted).[10/] See also Eddings v. Volkswagenwerk, A.G., 635 F.Supp. 45, 47 (N.D.Fla. 1986)("No cause of action was created by the statute and Battilla 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").

DOMINGUEZ cannot prevail for the same reason. He had no more than an expectation. That does not rise to the level of a vested right. DOMINGUEZ was not absolutely assured that the statute of repose would lie forever dormant. Pullum merely restored to BUCYRUS-ERIE the right it was given by the 1975 statute to be free from suits after 12 years.

Moreover, DOMINGUEZ acquired his right to sue, if any, as the result of his injury. He did not acquire the right under

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10/ Lamb, like Shaw and Pait, also held that Christopher v. Mungen, supra, barred this suit. Under Christopher, Pullum simply restored the defendants' right to be excused from liability after 12 years. Lamb noted: "Despite Plaintiff's good faith reliance upon Battilla, supra, and Plaintiff's diligence in proceeding with this action, Plaintiff did not receive by virtue of Battilla, an absolute assurance that the statute of repose would remain forever abrogated." 631 F.Supp. at 1150. The same is true here. DOMINGUEZ was not absolutely assured that the statute of repose would lie forever dormant. Pullum merely restored to BUCYRUS-ERIE the right it was given by the 1975 statute to be free from suit after 12 years.

Battilla, nor forbear excercising that right in reliance on it. Indeed DOMINGUEZ could not have relied on Battilla since that decision did not even exist when the cause of action arose. Without such reliance, DOMINGUEZ cannot claim that Pullum's retroactive application is improper.

A decision should apply retroactively where the plaintiff does not rely on the prior rule. Parkway Gen. Hosp., Inc. v. Stern, 400 So.2d 166 (Fla. 3d DCA 1981)(wife liable for her husband's medical bills just as a husband has always been liable for wife's bills), disapproved on other grounds Shands Teaching Hosp. & Clinics, Inc. v. Smith, 497 So.2d 644 (Fla. 1986). In Parkway, the court acknowledged the rule that decisions should not be applied retroactively to destroy rights previously acquired in justified reliance on the prior rule. However, it applied the decision retroactively because there was no reliance interest at stake.

> Our holding is that a wife is liable for her husband's bills simply and solely because of the marital relationship between them. Thus, the only ways in which Mrs. Stern, or any other wife, could have averted this responsibility was to have dissolved the marriage before her husband's hospitalization or somehow prevented the illness which required it. Her failure to do either was obviously not the result of any "reliance" upon the belief that, under the present law, she would not be held responsible for his subsequently-incurred bills.

400 So.2d at 167. See also Hartman v. Westinghouse Elec. Corp., No. 85-3967 (11th Cir. June 20, 1986)(plaintiffs did not acquire property rights in reliance on Battilla because reason suit not

filed within 12 years was that injury occurred after that, thus Pullum applied retroactively). And see Welch v. Henry, 305 U.S. 134, 59 S.Ct. 121 (1938)(1935 law levying special tax on 1933 corporate dividends which 1933 law had specifically exempted was constitutional since taxpayers did not rely on law in electing to receive corporate dividends); Miculka v. Am. Mail Line, Ltd., 229 F.Supp. 665 (D.Ore. 1964).

Battilla did not give DOMINGUEZ his cause of action. Nor did DOMINGUEZ delay bringing suit until more than 12 years from the date of the product's sale in reliance on Battilla's holding that § 95.031(2) was unconstitutional. The only reason he did not bring suit until the statute of repose had run was because the injury did not occur until that time. Thus, DOMINGUEZ did not acquire any property right in reliance on Battilla and the exception to the rule of retroactivity is inapplicable. The Third District correctly concluded that Pullum applies retroactively and bars this suit.

The cases cited by DOMINGUEZ do not dictate a contrary result. They acknowledge the general rule of retroactivity but find the exception applicable since under their facts property or contract rights had been acquired in reliance on the previous decision.[11/] But DOMINGUEZ did not acquire a vested property in-

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11/ DOMINGUEZ also relies on Chevron Oil Co. v. Huson, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971). Huson dealt with a federal statute and applied federal law. It is inapplicable in determining the retroactivity of Pullum. Eddings v. Volkswagenwerk, A.G., supra, 635 F.Supp. at 48; Lamb v. Volkswagenwerk Ak-
(footnote continued)

terest in reliance on Battilla. Thus the general rule, not its limited exception, applies to this case. This Court should find that Pullum applies retroactively.

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tiengesellschaft, supra, 631 F.Supp. at 1151. However, even under Huson, the result would be the same: Pullum applies retroactively. Lamb, supra, 631 F.Supp. at 1150-51.

CONCLUSION

For the reasons stated in this brief, Respondent BUCYRUS-ERIE MANUFACTURING COMPANY respectfully requests this Court to affirm the summary judgment entered in its favor.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed this 5th day of May, 1987, to: Lisa Bennett, Esq., 304 Palermo Avenue, Coral Gables, FL 33134; and Robert F. Weiner, Esq., 304 Palermo Avenue, Coral Gables, FL 33134.

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