9-19

IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

CHARLES DAVID HARRISON,
and VICKY EULEEN HARRISON,
his wife,

Petitioners,

vs.

CASE NO. 70,214

HYSTER COMPANY, a Nevada
corporation,

Respondent.

BRIEF OF RESPONDENT, HYSTER COMPANY

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HYSTER COMPANY

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STATEMENT OF THE CASE AND FACTS

The Respondent, Hyster Company, is in basic agreement with the statement of the case and facts provided by the Petitioners. Hyster Company would respectfully restate the statement of the case and facts to include the following:

The Plaintiffs/Petitioners, Charles David Harrison and Vicky Euleen Harrison, filed a products liability action against the Defendant/Respondent, Hyster Company on December 3, 1985.[1] (R. 1-4)[2] The Complaint alleged that Charles Harrison was injured on December 27, 1982 while using a forklift truck manufactured by Hyster. (R. 1-2) The Plaintiffs sought to impose damages upon Hyster and alleged theories of recovery premised upon negligent design of the forklift truck, strict liability in tort, breach of warranty of fitness for the intended use of the truck and negligent failure to warn the Plaintiff of the defects in the forklift truck. Additionally, Mrs. Harrison sought recovery for her loss of consortium as a result of her husband's injuries. (R. 1-4)

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1 The Plaintiffs/Petitioners, Charles David Harrison and Vicky Euleen Harrison will be referred to as the "Plaintiffs" or by name. The Defendant/Respondent, Hyster Company will be referred to as "Hyster" or the "Defendant".

2 All references to the record on appeal will be referred to as "R." followed by the appropriate page number of the record on appeal.

On January 6, 1986 Hyster answered the Complaint and raised as its first defense the statute of repose contained in Section 95.031(2), Florida Statutes. (R. 5-7) On January 27, 1986 Hyster served its motion for summary judgment along with the supporting affidavit of B. I. Bould, the Vice President, legal officer and secretary of Hyster Company. (R. 8-10) The affidavit stated that the Hyster Model 870C Industrial Truck which bore serial number CFD-2165-F and which was identified in the Plaintiffs' Complaint as being the truck in question, was manufactured by Hyster in Danville, Illinois in 1962. That same product was delivered to the original purchaser, Home Builder Supply located in Cocoa, Florida on April 17, 1962. (R. 10) The Defendant's motion recited the facts as stated in the affidavit, cited Section 95.031(2), Florida Statutes and relied upon this Court's decision in Pullum v. Cincinnatti, Inc., 476 So.2d 657 (Fla. 1985) as the legal basis for its entitlement to an order granting summary judgment.

On January 30, 1986 the Plaintiffs responded to the affirmative defenses of Hyster and stated that Section 95.031(2), Florida Statutes was unconstitutional under Article I, §21 of the Florida Constitution. Additionally, the Plaintiffs stated that to apply Section 95.031(2), Florida Statutes retroactively to their case would entirely abolish the cause of action and therefore bar excess to the courts. (R. 11-12) Following a hearing and the submission of memoranda of law regarding the parties' respective legal positions, the trial court entered an

order granting Hyster's motion for summary judgment and also a final judgment based upon the order on June 9, 1986. The court's ruling was based its order on this Court's decision in Pullum v. Cincinnatti, Inc., 476 So.2d 657 (Fla. 1985) and the Second District's decision in American Liberty Insurance Company v. West and Conyers, 491 So.2d 573 (Fla. 2d DCA 1986). The Plaintiff filed a timely notice of appeal on June 30, 1986 to the Second District Court of Appeal. On February 13, 1987 the Second District affirmed the summary judgment entered by the trial court in favor of Hyster Company based upon its opinion in Small v. Niagra Machine and Tool Works, 502 So.2d 943 (Fla. 2d DCA 1987). The Plaintiff filed a timely notice of intent to invoke this Court's discretionary jurisdiction and this appeal followed.

POINTS ON APPEAL

The Respondent would respectfully restate the points on appeal as follows:

I.

WHETHER THE SECOND DISTRICT COURT OF APPEAL CORRECTLY DECIDED THAT THE LEGISLATURE'S REPEAL OF SECTION 95.031(2), FLORIDA STATUTES, THE TWELVE-YEAR STATUTE OF REPOSE FOR PRODUCTS LIABILITY CLAIMS, CAN NOT RETROACTIVELY REVIVE A CLAIM WHICH BECAME TIME BARRED PRIOR TO THE EFFECTIVE DATE OF THE REPEAL.

II.

WHETHER THE SECOND DISTRICT COURT OF APPEAL CORRECTLY DECIDED THAT AN APPLICATION OF THIS COURT'S DECISION IN PULLUM V. CINCINNATTI, INC., 476 So.2d 657 (Fla. 1985) DOES NOT DENY PETITIONERS' RIGHT TO ACCESS TO COURTS AS PROVIDED IN ARTICLE I, §21 OF THE FLORIDA CONSTITUTION.

SUMMARY OF THE ARGUMENT

The 1986 Florida Legislature enacted Chapter 86-272, Laws of Florida, which in part repealed Florida's twelve-year statute of repose for actions based on products liability theory. Section 3 of the act stated that the repeal "shall take effect on July 1, 1986." The Plaintiffs maintain that this repeal acts to revive a claim which was previously time barred under the old statute. Plaintiffs' argument is incorrect, however, because it ignores the proper rule of statutory construction to be applied to this statute and decisions from this Court which construe virtually identical language in similar statutes which have concluded that the repeal is to be prospective only.

This Court need not look further than its decision in Foley v. Morris, 339 So.2d 215 (Fla. 1976) to decide the present case. In Foley, this Court reversed a decision of the Second District Court of Appeal which retroactively applied a new statute of limitation in a medical malpractice action. This Court unanimously held that there was a presumption against retroactive application of a statute where the Legislature had not expressed in clear and explicit language that the statute was to be retroactively applied. Reviewing Chapter 71-274, §95.11(6), section 2 of which provided: "this act shall take effect on July 1, 1972," this Court held that there was nothing in the language of the act which manifested an intent by the Legislature to have the new statute of limitations retroactively

applied. This Court should rely upon its decision in Foley v. Morris to affirm the decision of the Second District Court of Appeal in favor of the Respondent in this case.

The Plaintiffs have also argued that to apply this Court's decision in Pullum v. Cincinnati, Inc., 476 So.2d 657 (Fla. 1985) in their case denies their right to access of courts as provided in Article I, §21 of the Florida Constitution. What the Plaintiffs are really requesting this Court to do is to again revisit the access to court argument that this Court heard, analyzed and rejected in Pullum. There simply is no need to revisit that issue in this case.

Finally, the Plaintiffs suggest that the Pullum decision should not be "retroactively" applied to their case. Once again, the Plaintiffs argument is flawed because decisions which overrule earlier precedent are generally given retroactive effect unless specifically declared by the decision to have a prospective effect only. See, Florida Forest and Park Service v. Strickland, 154 Fla. 472, 18 So.2d 251 (Fla. 1944); Florida East Coast Railway Company v. Rouse, 194 So.2d 260 (Fla. 1967); Parkway General Hospital, Inc. v. Stern, 400 So.2d 166 (Fla. 1981). The Plaintiffs in this case cannot demonstrate that any exception to the above-stated rule applies to them. This Court should affirm the decision of the Second District Court of Appeal.

ARGUMENT

I.

THE SECOND DISTRICT COURT OF APPEAL CORRECTLY DECIDED THAT THE LEGISLATURE'S REPEAL OF SECTION 95.031(2), FLORIDA STATUTES, THE TWELVE-YEAR STATUTE OF REPOSE FOR PRODUCTS LIABILITY CLAIMS, CAN NOT RETROACTIVELY REVIVE A CLAIM WHICH BECAME TIME BARRED PRIOR TO THE EFFECTIVE DATE OF THE REPEAL.

Reduced to its basic components, the Plaintiffs' argument is really quite simple. The Harrisons maintained that the Legislature's repeal of the twelve-year statute of repose for products liability claims revives their products liability claim even though the injury occurred more than twenty years after delivery of the product to the initial purchaser. Moreover, they contend that their claim is revived even though the statute became effective subsequent to the trial court's entry of the summary judgment in favor of Hyster. While the 1986 Florida Legislature could have included a provision in the act to revive time-barred claims, none was included in that piece of legislation. Where the Legislature has not manifested a specific intent to revive time-barred claims, and to have the repeal of Section 95.031(2), Florida Statutes to be retroactively applied to those claims, the statute should be applied prospectively only.

The 1986 Florida Legislature enacted Chapter 86-272, Laws of Florida. (A true, accurate and verbatim copy of Chapter 86-272, Laws of Florida is attached hereto as Appendix "A") The preamble to Chapter 86-272 states that it is:

> "An act relating to limitations of actions; amending s. 95.11, F.S.; reducing the time within which actions for libel and slander must be commenced; amending s. 95.031, F.S.; deleting a limitation upon the initiation of actions for products liability; providing an effective date."

Section 1 of the act amended Section 95.11, Florida Statutes and reduced the statute of limitations for actions for libel and slander from four to two years. Section 2 of the act amended Section 95.031, Florida Statutes. Section 2 repealed the twelve-year statute of repose for actions based on products liability and instead maintained the twelve-year statute for purposes of fraud.

Section 3 of the act provides:

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

Initially it should be noted that while statutes of repose and statutes of limitation are similar in most instances, there are slight analytical distinctions between the two. A statute of repose such as the former Section 95.031(2), Florida Statutes terminates the right to bring an action after the lapse of a specified period of time. A statute of repose forecloses

the right to bring an action when the event giving rise to the cause of action does not transpire within the prescribed time interval. A statute of limitations on the other hand, prescribes the time a party has to initiate an action once the injury has occurred. The statute of limitations does not begin to run until the wrong has actually been discovered or should have been discovered. As noted by the United States District Court in Lamb v. Volkswagen Werk Aktiengesellschaft, 631 F.Supp. 1144, 1147 (S.D. Fla. 1986), "a statute of repose . . . does not bar a cause of action; its effect, rather is to prevent what might otherwise be a cause of action, from ever arising." Citing, Rosenberg v. Tower of North Bergen, 61 N.J. 190, 293 A.2d 662, 667 (1972).

While there are slight analytical differences between a statute of repose and a statute of limitation, a review of the cases which address statutory changes to periods of limitation are helpful to the analysis of the present issue. See, Nissan Motor Company, Ltd. v. Phlieger, ___ So.2d ___ (Fla. 1987) [12 FLW 256, 258, 5/28/87] (J. Grimes concurring). One need not look further than several opinions of this Court to resolve the issue presented in this case. It is well established that in the absence of a clear legislative expression to the contrary, a statute is presumed to operate prospectively only. See, Young v. Altenhaus, 472 So.2d 1152, 1154 (Fla. 1985); State v. Lavazolli, 434 So.2d 321, 323 (Fla. 1983). See also, Shaw v. General Motors Corporation, 503 So.2d 362, 363 (Fla. 3d DCA 1987); Small v. Niagra Machine and Tool Works, 502 So.2d 943 (Fla. 2d DCA 1987).

Most helpful, however, to resolving the present case are two decisions by this Court. In Foley v. Morris, 339 So.2d 215 (Fla. 1976) one of the questions before the Court was whether the plaintiff's cause of action was governed by the previously existing four-year statute of limitation or by a newer two-year statute of limitations which specifically addressed medical malpractice actions. The plaintiff's cause of action accrued on September 11, 1971 and the Second District applied the new shorter period of limitation which became effective on July 1, 1972 to affirm a dismissal of a complaint which had been filed in September of 1974. Reversing the Second District this Court noted that the District Court's decision in fact retrospectively applied the new statute of limitations contrary to the intent of the Legislature. Writing for a unanimous court Justice Drew explained that there was a presumption against retroactive application of a statute where the Legislature had not expressed in clear and explicit language that the statute was to be retroactively applied. Reviewing Chapter 71-274, §95.11(6), the Court examined section 2 of the act. It provided:

> "Section 2. This act shall take effect on July 1, 1972."

This Court stated that there was nothing in the language of the act which manifested an intention by the Legislature to do anything other than prospectively apply the new statute of limitations.

Explaining the Court's conclusion Justice Drew adopted the following language from American Jurisprudence:

> "Where the Legislature has not sufficiently manifested its intent whether a statute of limitations should apply retrospectively or should apply prospectively only, the question is passed on to the Courts to determined, as a matter of construction, in which of these ways the statute should apply. In most jurisdictions, in the absence of a clear manifestation of legislative intent to the contrary, statutes of limitation are construed as prospective and not retrospective in their operation, and the presumption is against any intent on the part of the Legislature to make such a statute retroactive. Thus, rights accrued, claims arising, proceedings instituted, orders made under the former law, or judgments rendered before the passage of an amended statute of limitations will not be affected by it, but will be governed by the original statute unless a contrary intention is expressed by the Legislature in the new law." 51 Am.Jur.2d, §57, Limitations of Actions.

This Court's decision in Homemakers, Inc. v. Gonzalez, 400 So.2d 965 (Fla. 1981) is also instructive on the issue raised in the present case. Unlike Foley where the statute of limitations was shortened, Gonzalez involved the issue of whether a statute which extended the period of limitations could be retroactively applied to breathe new life into a cause of action which had been untimely filed under the old statute. In that case, Linda Gonzalez was given an injection by a nurse at Jacksonville General Hospital on the evening of April 2, 1973. Mrs. Gonzalez immediately experienced pain and reported the incident to a supervisor. Some two and a half years later, on

November 12, 1975, Mrs. Gonzalez filed a mediation claim against Jacksonville General Hospital and alleged that she was permanently disfigured as a result of the careless and negligent administration of the injection by the nurse the hospital. Jacksonville General filed a third-party complaint against Homemakers, Inc. and Medical Personnel Pool in the mediation proceeding and claimed that one of the two services had provided the nurse who gave Mrs. Gonzalez the injection. That action was ultimately dismissed by agreement of the parties but on July 9, 1976 Mrs. Gonzalez filed a medical malpractice action in the circuit court. Jacksonville General was again the only named defendant. As it had done in the mediation proceeding Jacksonville General again brought a third-party claim against Homemakers and Medical Personnel Pool. In a second amended complaint, Mrs. Gonzalez also added those parties as defendants. Summary judgment was entered for all defendants based on the statute of limitations defense. Mrs. Gonzalez appealed the summary judgment to the First District Court of Appeal which reversed the judgments entered by the trial court and held that Mrs. Gonzalez' action was not time barred because of the statute of limitations. Jacksonville General, Homemakers and Medical Personnel Pool then appealed to this Court.

The issue raised before this Court was whether the statute of limitations existing on April 2, 1973, that is, Section 95.11(6), Florida Statutes (1973) applied to Mrs. Gonzalez' action or whether its amended version as expressed

through Section 95.11(4)(a), Florida Statutes (Supp. 1974) and effective January 1, 1975 applied. The amended statute included a savings clause with respect to the effective date which stated as follows:

> "Effective date; savings clause. - This act shall become effective on January 1, 1975, but any action that will be barred whenever this act becomes effective and that would not have been barred under prior law may be commenced before January 1, 1976, and if it is not commenced by that date, the action shall be barred."

The statute was amended a second time in early-1975 which expanded the period of time in which the action could be brought from a strict two years to not later than four years from the date of the incident or occurrence out of which the cause of action accrued.

Reversing the First District's decision which stated that the amended statute of limitation could be retroactively applied to Mrs. Gonzalez' action, this Court relied upon the Fourth District's decision in Brooks v. Cerrato, 355 So.2d 119 (Fla. 4th DCA 1978), cert. den., 361 So.2d 831 (Fla. 1978). Writing for the majority, Justice Adkins explained that the correct rule of statutory interpretation was stated in Brooks and that a statute of limitations would be prospectively applied unless the legislative intent to provide retroactive application was express, clear and manifest. Concluding that the act had no

express, clear or manifest intent demonstrated within it, this Court reversed the First District's decision and found that Mrs. Gonzalez' claim was time barred.

The 1986 Legislation which addresses Section 95.031(2), Florida Statutes which is the subject of the present appeal is virtually identical to that language which was construed in Foley v. Morris, 339 So.2d 215 (Fla. 1976). Indeed, the only real difference between the two is the fact that the act in Foley was to take effect on July 1, 1972 whereas the present act was to take effect on July 1, 1986. Since this Court has held that the language in Foley clearly did not demonstrate an unequivocal manifestation of retroactive effect, retroactive application of the present act must be precluded by virtue of the same conclusion.

The Petitioner has placed a great deal of emphasis upon the fact that Section 3 of the 1986 act differentiates between actions based upon libel or slander and those actions which are premised upon a products liability theory. While the Petitioners have correctly noted their observation, they have completely misapprehended the importance of the distinction. The Plaintiffs rely upon a general rule of statutory construction known as "expressio unius est exclusio alterius", which means the mentioning of one thing implies the exclusion of another. 35 Fla.Jur.2d, "Statutes," §126. The thrust of the Plaintiffs' argument is that the fact that Section 3 states that with respect to slander and libel the at shall take effect as of October 1,

1986 and shall apply to all causes of action occurring after that date yet only states that subsection 2 of the act takes effect July 1, 1986 that the Legislature intended for the repeal of the statute of repose to be retroactively applied to all causes of action which accrued prior to July 1, 1986. (See Petitioners' Brief, p. 4) The argument ignores the most obvious reason for the distinction between the two sections of Chapter 86-272. Section 1 of the act shortens the statute of limitation for libel and slander whereas Section 2 deletes and therefore lengthens the statute regarding products liability claims.

Although not cited in the Petitioners' brief one need only look to Homemakers, Inc. v. Gonzalez, 400 So.2d 965 (Fla. 1981), again, to understand the distinction. The Court noted in Gonzalez:

> "The 'savings clause' of Section 95.022, though considered, offers no evidence of such intent [of retroactivity]. 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 limitations. We determined, as did the Fourth District in Brooks v. Cerrato, 355 So.2d 119 (Fla. 4th DCA 1978), 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 the time periods remain the same or when lengthened. In fact, the obvious purpose of enacting a savings clause is to satisfy the constitutional mandate that to shorten a period of limitation, the Legislature must by statute allow reasonable time to

> file actions already accrued . . . ." 400 So.2d at 967. (emphasis in original)

In the present case, the Florida Legislature did not include a savings clause in Chapter 86-272 when it shortened the period of limitations for libel and slander. Instead, the Legislature addressed the issue of the act's application to causes of action already accrued by providing that the shortened statute of limitations would only apply to causes of action that accrued after October 1, 1986. Thus, under the statute, there would be no class of persons with accrued, but not yet barred, causes of action under the pre-existing four-year statute of limitations.

Florida courts have long recognized the power of the Legislature to increase the period of time which constitutes the period of limitation and to also make it applicable to an existing cause of action, provided that the change is made before the cause of action is precluded under the pre-existing statute of limitations and provided further that no agreement of the parties is violated. See, Corbett v. General Engineering & Machinery Company, 37 So.2d 161 (Fla. 1948). In accordance with the recognition of the Legislature's power to do so, Florida courts have held that if an amending statute lengthens the period for filing a claim allowed by an existing statute, prior to the expiration of the period allowed by the existing statute, then the amending statute will be applicable to the pending claim. See, Garris v. Weller Construction Company, 132 So.2d 553 (Fla.

1960); Walter Denson & Son v. Nelson, 88 So.2d 120 (Fla. 1956); Corbett v. General Engineering & Machinery Company, 37 So.2d 161 (Fla. 1948). In this case, the Plaintiffs' cause of action was precluded under the pre-existing statute of repose prior to the effective date of the statute. See, Pullum v. Cincinnatti, Inc., 476 So.2d 657 (Fla. 1985).

If it had been the intention of the Florida Legislature that the repeal of the statute of repose contained in Chapter 86-272 was to be applied retroactively so as to revive claims which had previously been time barred, it can certainly be presumed that the Legislature would have specifically stated that intent. As noted at page 4 in Petitioners' Brief, the Legislature is presumed to know the existing law when it enacts a statute and it is also presumed that the Legislature is acquainted with the judicial construction of the former laws on the subjects concerning which some statute is enacted. See, Bermudas v. Florida Power & Light Company, 433 So.2d 565, 567 (Fla. 3d DCA 1983). In this case, it can certainly be presumed that the Florida Legislature knew when it enacted Chapter 86-272, that acts which shorten or lengthen statutes of limitation are presumed to be prospective only. See, Homemakers, Inc. v. Gonzalez, 400 So.2d 965 (Fla. 1981); Foley v. Morris, 339 So.2d 215 (Fla. 1976); Brooks v. Cerrato, 355 So.2d 119 (Fla. 4th DCA 1978), cert. den., 361 So.2d 831 (Fla. 1978). The Legislature can also be presumed to have known that the statutes of limitations in effect at the time the action was brought would be

the one that would be applied to the action. See, e.g., Wimpey v. Sanchez, 386 So.2d 1241 (Fla. 3d DCA 1980). Presumably, the Legislature also knew it had the power to create a revival statute if it in fact had so intended.[3] The plain and simple fact of the matter is that Section 3 of Chapter 86-272 does not contain a clear and express manifestation of the Florida

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[3] It is interesting that the New York Legislature addressed a very similar problem during 1986. It amended New York's statute of limitations concerning various toxic torts by amending C.P.L.R. 214-B in Chapter 682 of its Regular Session Laws. The commentary to the statute indicates that it is in response to some of the problems addressed to toxic tort litigation. Of significance to this Court is Section 4 of the new act. Section 4 which is known as the revivor statute states in pertinent part:

> "Notwithstanding any other provisions of law, . . . , or charter requiring as a condition precedent to commencement of an action or special proceeding that a notice of claim be filed or presented, every action for personal injury, injury to property or death caused by the latent effects of exposure to diethylstilbestrol, tungsten-carbide, asbestos, chlordane or polyvinylcholoride upon or within the body or upon or within property which is barred as of the effective date of this act or which was dismissed prior to the effective date of this act solely because the applicable period of limitations has or had expired is hereby revived and an action thereon may be commenced provided such action is commenced within one year from the effective date of this act. . . ." (A true, accurate and verbatim copy of Chapter 682 of the 1986 Regular Session Laws of New York are attached hereto as Appendix "B")

Legislature's intent that the deletion of the twelve-year statute of repose for products liability claims should be retroactively applied. Thus, that statute must be applied prospectively only.

Petitioners assert that the line of cases upon which they rely provides "an exception" to the appropriate rule of construction to be applied to this case. Interestingly, not one of those cases recognizes that it is providing an exception to the present rule. Those cases merely state a different rule of statutory construction which simply does not apply to this case. To even apply the rule of statutory construction expressed in Thayer v. State of Florida, 335 So.2d 815 (Fla. 1976); Dobbs v. Sea Isle Hotel, 56 So.2d 341 (Fla. 1952); Devin v. City of Hollywood, 351 So.2d 1022 (Fla. 4th DCA 1976); State ex rel. Shevin v. Indico Corporation, 319 So.2d 173 (Fla. 1st DCA 1975), one must admit the basic premise upon which those cases are founded. That is, that there is no express statement by the Legislature to retroactively apply the new statute of limitations. However, once that admission is made, the flaw in the Petitioners' argument becomes apparent because it admits that the statue in question does not satisfy the requirements stated in Foley v. Morris, 339 So.2d 215 (Fla. 1976).

In the present case, the Petitioners have not demonstrated that the repeal of the twelve-year statute of repose in products liability cases should be retroactively applied. Indeed, the best argument that the Petitioners can make to this Court admits that the Legislature made no clear manifestation of

intent to retroactively apply the statute. The mere repeal of a statute does not divest a defendant of a defense which arose under the previous statute. See, CBS, Inc. v. Garrod, 622 F.Supp. 532, 534 (M.D. Fla. 1985), aff'd., 803 F.2d 1183 (11th Cir. 1986). In the absence of a clear manifestation of intent by the Legislature to retroactively apply the repeal this Court should affirm the judgment in favor of Hyster based upon the application of the previous twelve-year statute of repose to the Plaintiffs' claim.

II.

THE SECOND DISTRICT COURT OF APPEAL CORRECTLY DECIDED THAT AN APPLICATION OF THIS COURT'S DECISION IN PULLUM V. CINCINNATTI, INC., 476 So.2d 657 (Fla. 1985) DOES NOT DENY PETITIONERS' RIGHT TO ACCESS TO COURTS AS PROVIDED IN ARTICLE I, §21 OF THE FLORIDA CONSTITUTION.

Petitioners have stated that the failure of the Second District Court of Appeal to retroactively apply the repeal of the twelve-year statute of repose to their case denies them access to court as guaranteed by Article I, §21 of the Florida Constitution. In reality, petitioners are arguing that to apply the pre-existing twelve-year statute of repose and its constitutional interpretation provided by this Court in Pullum v. Cincinnatti, Inc., 476 So.2d 657 (Fla. 1985) denies them their constitutional right of access to court. Indeed, Petitioners argue the same argument that this Court heard, analyzed and rejected in Pullum. It is somewhat curious that to support their argument Petitioners rely upon decisions of various district courts of appeal which have refused to retroactively apply the repeal of the statute of repose and have affirmed the decisions based upon Pullum v. Cincinnati, Inc., 476 So.2d 657 (Fla. 1985). A closer analysis of the situation demonstrates that an application of the Pullum interpretation of Section 95.031(2), Florida Statutes does not deny the Harrisons' access to courts and is proper in this case.

This Court's decision in Pullum v. Cincinnati, Inc., 476 So.2d 657 (Fla. 1985) has been discussed by numerous courts throughout the state. Suffice it to say, that in Pullum, this Court receded from its previous ruling in Batilla v. Allis-Chalmers Manufacturing Company, 392 So.2d 874 (Fla. 1981) which held Section 95.031(2), Florida Statutes to be unconstitutional on the basis that it violated Article I, §21 of the Florida Constitution. Citing Justice MacDonald's dissent in Batilla, the Pullum court recognized the rational and legitimate legislative basis for enacting the statute of repose expressed in Section 95.031(2), Florida Statutes. In so doing, this Court rejected Mr. Pullum's contention that the statute of repose violated that constitutionally protected right. See also, American Liberty Insurance Company v. West & Conyers, 491 So.2d 573 (Fla. 2d DCA 1986).

There have been numerous cases in Florida which have addressed "retroactively" applying the Pullum decision to existing cases. See, e.g., Shaw v. General Motors Corporation, 503 So.2d 362 (Fla. 3d DCA 1987); Small v. Niagra Machinery & Tool Works, 502 So.2d 943 (Fla. 2d DCA 1987); Pait v. Ford Motor Company, 500 So.2d 743 (Fla. 5th DCA 1987); Cassidy v. Firestone Tire & Rubber Company, 495 So.2d 801 (Fla. 1st DCA 1986). Those cases clearly demonstrate why an application of Pullum to the present decision is appropriate.

In Cassidy v. Firestone Tire & Rubber Company, 495 So.2d 801 (Fla. 1st DCA 1986), the plaintiffs appealed a summary judgment entered in a products liability action for a 1982 injury and argued that the Court misapplied the twelve-year statute of repose to their case. The injury occurred more than twelve years after the allegedly defective product was delivered to the original purchaser. Both the injury and the commencement of the action occurred subsequent to this Court's decision in Batilla v. Allis-Chalmers Manufacturing Company, supra, and before Pullum v. Cincinnati, Inc., supra. Affirming the summary judgment based upon the Pullum ruling, the First District correctly noted that decisions which overrule earlier precedent are generally given retroactive effect unless specifically declared by the decision to have only a prospective effect. See, Florida Forest and Park Service v. Strickland, 154 Fla. 472, 18 So.2d 251 (Fla. 1944); Florida East Coast Railway Company v. Rouse, 194 So.2d 260 (Fla. 1967); Parkway General Hospital, Inc. v. Stern, 400 So.2d 166 (Fla. 3d DCA 1981). The only recognized exception to that rule is where a statute has received a given construction by a court and property or contract rights have been acquired under and in accordance with that construction, such that those rights should not be destroyed by giving a subsequent overruling decision retroactive application.

In order for the Plaintiffs to avoid an application of Pullum to their case they would have to demonstrate a substantive vested right which they had acquired in accordance with the

previous construction of Section 95.031(2), Florida Statutes. In this case, it is impossible for the Plaintiffs to demonstrate such a right. A substantive vested right is an immediate right of present enjoyment or, a present fixed right of future enjoyment. See, In re Will of Martel, 457 So.2d 1064, 1067 (Fla. 2d DCA 1984). To be raised to the sanctity of a vested right, the right must be more than just a mere expectation which is based upon some anticipation of the continuance of an existing law. It must have become a title, legal or equitable, to the present or future enforcement of the demand. See, Division of Workers' Compensation v. Brevda, 420 So.2d 887, 891 (Fla. 1st DCA 1982). The Harrisons in this case had no vested contract or property right prior to the Pullum decision. At best, the Harrisons were trying to recover damages under a common law tort theory. Typically, one does not have a vested right in a tort claim. See, Ducharme v. Merrill-National Laboratories, 574 F.2d. 1307 (5th Cir. 1978), cert. den., 439 U.S. 1002, 99 S.Ct. 612, 58 L.Ed.2d 677 (1978). In fact, common law rights may be restricted, and even abolished, by the Legislature if premised both in an overpowering public necessity and in the absence of a less onerous alternative means. See, Overland Construction Company v. Sirmons, 369 So.2d 572 (Fla. 1979).

In Pullum, this Court recognized that a plaintiff had no right to a modern products liability claim at common law. Indeed, this Court explained that it was not until the decision of Matthews v. Lawnlite Company, 88 So.2d 299 (Fla. 1956) that

recovery in such an action was not inhibited by the common law requirement of privity of contract. As with Mr. Pullum, the current Plaintiffs have nothing more than a claim that arose outside the period of time prescribed by Section 95.031(2), Florida Statutes. Since this Court unequivocally held that there was both a rational and legitimate basis for the Legislature to create that statute and that an application of it to Mr. Pullum's case did not deny access to courts, it is difficult to understand the Plaintiffs' argument that their access to courts will be unconstitutionally denied in this case.

The United States District Court for the Southern District of Florida has also explained this situation in Lamb v. Volkswagen Werk Aktiengesellschaft, 631 F.Supp. 1144, 1149 (S.D. Fla. 1986). In granting a summary judgment to the manufacturer of a product in that case and applying Pullum retroactively, District Judge Marcus explained that where a statute was judicially determined to be unconstitutional, the statute remained inoperative while the decision was maintained. However, if the decision was subsequently reversed, the statute is held to be valid from the date it first became effective even though rights which may have been acquired under the particular adjudications where the statute was held to be invalid will not be affected by the subsequent decision that the statute was constitutional. Judge Marcus explained that the import of the rule was that a law which was duly enacted by the Legislature and later declared unconstitutional meant that the law remained

dormant but was not dead. Once the law was resurrected by a later decision, it is considered valid from its inception. Applying that standard to the case before him, Judge Marcus indicated that the Pullum decision merely restored the right of the defendant to be excused from liability for their products after the passage of twelve years. He further explained that despite the plaintiff's good faith reliance upon the Batilla interpretation and the diligence in proceeding with the action based upon Batilla, the plaintiff did not receive by virtue of that decision an absolute assurance that the statute of repose would remain forever abrogated. The Court thus entered summary judgment in favor of the manufacturer.

In Pullum, this Court receded from its previous interpretation of Section 95.031(2), Florida Statutes. By doing so, it reactivated the statute of repose from the date of its inception. The Harrison's claim arose more than twenty years after the delivery date of the product in question to its original purchaser. By virtue of the statute it was barred before any claim could be made. This Court recognized the Legislature's reasonable and legitimate concern for unlimited manufacturer liability in Pullum. That same logic and analysis applies in this case and this Court should affirm the decision of the Second District.

CONCLUSION

The 1986 repeal of Florida's twelve-year statute of repose for a products liability claim should not be retroactively applied. A statute should be retroactively applied only when the Legislature has manifested a clear and unmistakable intent to apply the statute in that way. In Foley v. Morris, 339 So.2d 215 (Fla. 1976), this Court construed language which is virtually identical to the language in the present act and concluded that it did not express the required manifestation of intent by the Legislature to retroactively apply a new statute of limitations. This Court should reach the same conclusion in the present case.

Likewise, Petitioners' suggestion that their access to courts as guaranteed by Article I, §21 of the Florida Constitution will be violated if the repealing statute is not applied retroactively to their case is completely without merit. In actuality, Petitioners are attempting to reargue the same argument that this Court addressed, analyzed and rejected in Pullum v. Cincinnati, Inc., 476 So.2d 657 (Fla. 1985). That argument should be rejected in this case once again. This Court should affirm the decision of the Second District Court of Appeal.

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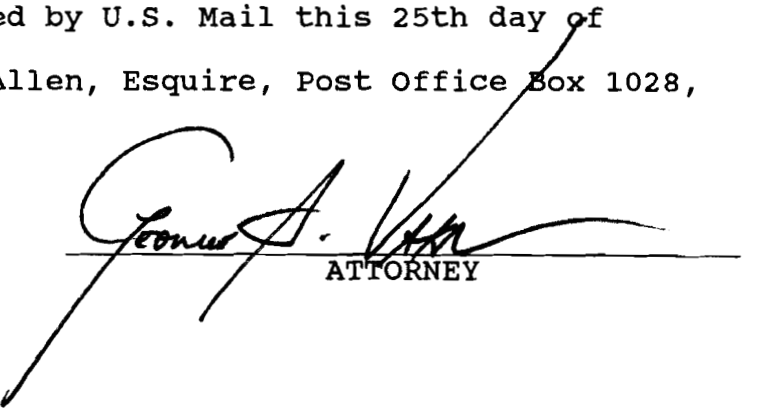
CERTIFICATE OF SERVICE

I HERBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 25th day of August, 1987 to Philip O. Allen, Esquire, Post Office Box 1028, Lakeland, Florida 33802.



ATTORNEY