IN THE SUPREME COURT OF FLORIDA

WILLIAM SHAW,
individually; and
as guardian and next friend of
GREGORY SHAW and
SCOTT SHAW; and
CHRISTAL SHAW,
his wife,

Petitioners,

vs.

CASE NO. 70,344

GENERAL MOTORS CORPORATION; and
FEDERATED DEPARTMENT STORES, INC.,

Respondents.
_____/

REVIEW OF THE THIRD DISTRICT COURT OF APPEAL OF FLORIDA

BRIEF OF PATRICIA ANN GRIFFIN AND LARRY D. GRIFFIN

AMICI CURIAE

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STATEMENT OF THE CASE AND OF THE FACTS

Patricia Ann Griffin, by and through her next friend and natural father, Larry D. Griffin, and Larry D. Griffin, individually [hereinafter referred to collectively as "Griffin"], like the petitioners in this review proceeding, are plaintiffs whose products liability causes of action accrued in excess of twelve years after delivery of the injurious product to its original purchaser, but prior to this court's decision in Pullum.[1]

Following this court's decision in Pullum, the United States District Court for the Northern District of Florida summarily applied Florida's products liability statute of repose[2] to retroactively abolish Griffin's accrued cause of action. Griffin appealed to the United States Court of Appeals for the Eleventh Circuit, arguing primarily that the retroactive abolishment of Griffin's accrued cause of action violated Griffin's right to procedural due process, both under the United States Constitution

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[1] Pullum v. Cincinnati, Inc., 476 So. 2d 657 (Fla.), reh'g denied mem., 482 So. 2d 1352 (Fla. 1985), appeal dismissed mem., 106 S. Ct. 1626 (1986).

[2]

> Actions for products liability . . . under s. 95.11(3) must be begun within the period prescribed in this chapter [four years], with the period running from the time the facts giving rise to the cause of action were discovered or should have been discovered with the exercise of due diligence . . . but in any event within 12 years after the date of delivery of the completed product to its original purchaser . . . regardless of the date the defect in the product . . . was or should have been discovered.

§ 95.031(2), Fla. Stat. (1985)(emphasis added), repealed in part, Ch. 86-272, § 2, Laws of Fla.

and the Florida Constitution. The United States Court of Appeals for the Eleventh Circuit has entered an order advising Griffin and several other similarly situated plaintiffs that the Eleventh Circuit's opinion is being withheld pending a decision by this court in Pait v. Ford Motor Co.[3] and the present case.[4]

A. The Products Liability Statute of Repose: First Breath

In 1973, in Kluger v. White,[5] this court held, pursuant to the open courts provision of the Florida Constitution,[6] that where a right of access to the courts for redress for a particular injury has been provided by statutory law predating the adoption of the Declaration of Rights of the Florida Constitution, or where such a right has become a part of the common law, the legislature is without power to abolish the right, absent overwhelming public necessity and the unavailability of any alternative, without providing a reasonable alternative to protect the rights of the people of Florida to redress for injuries.[7]

In 1974, the products liability statute of repose[8] was enacted by the Florida Legislature to take effect on January 1,

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[3]No. 69,917 (Fla. pending).

[4]The order of the United States Court of Appeals for the Eleventh Circuit is reproduced as Appendix A to this brief.

[5]281 So. 2d 1 (Fla. 1973).

[6]"**Access to Courts.**--The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." Art. I, § 21, Fla. Const.

[7]Kluger, 281 So. 2d at 4.

[8]Supra note 2.

1975.[9] The enacting legislation, however, by providing that anyone with an accrued cause of action would, upon the effective date of the products liability statute of repose, have a one-year grace period within which to sue, ensured that no accrued cause of action would be retroactively abolished.[10]

In 1979, in Overland Construction Co. v. Sirmons,[11] this court applied the principles enunciated in Kluger to a statute of repose similar to the products liability statute of repose and concluded that where an injury occurred after the running of the statute of repose, and the statute of repose, therefore, operated to bar the cause of action before the cause of action accrued, the statute of repose impermissibly benefited "one class of defendants, at the expense of an injured party's right to sue, and in violation of our constitutional guarantee of access to courts."[12] In 1980, in Battilla v. Allis Chalmers Manufacturing Co.,[13] this court found the products liability statute of repose indistinguishably unconstitutional.[14]

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[9]Ch. 74-382, § 36, Laws of Fla.

[10]"[A]ny action that will be barred when 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." Ch. 74-382, § 36, Laws of Fla.

[11]369 So. 2d 572 (Fla. 1979).

[12]Id. at 574.

[13]392 So. 2d 874 (Fla. 1980).

[14]Id.

B. The Accrual of Griffin's Cause of Action

As alleged in Griffin's complaint,[15] on or about January 23, 1985, at about 6:30 in the evening, seventeen-year-old Patricia Ann Griffin [hereinafter referred to individually as "Patricia Ann"] was in the process of loading paper into a tractor trailer from an automobile designed and manufactured by Ford Motor Co. [hereinafter referred to as "Ford"]. Upon completing her task, Patricia Ann drove the Ford automobile to a position in front of the tractor trailer, so that she could pick up some paper that had fallen to the ground during the loading process. Patricia Ann placed the Ford automobile in what appeared to her to be the "park" position, left the engine running and got out of the Ford automobile.

Patricia Ann began picking up the paper on the ground and, at least one minute after getting out of the Ford automobile, noticed a box beneath the tractor trailer. Patricia Ann reached down to retrieve the box and, as she did so, perceived a bright light which she later learned to be the Ford automobile's back-up lights. The Ford automobile, without any warning, had suddenly engaged powered reverse. The Ford automobile moved abruptly backward in powered reverse and struck Patricia Ann, pinning her head between the rear of the Ford automobile and the tractor trailer. As a result, Patricia Ann received severe, crushing and permanent injuries to her head, face and eyes.

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[15]Griffin's complaint is reproduced as Appendix B to this brief.

Griffin alleged in the complaint that Patricia Ann was injured as a result of defects in the design and manufacture of the Ford automobile, defects which existed at the time the automobile left Ford's possession. Griffin further alleged that although Ford had actual notice, years prior to Patricia Ann's injury, that Ford automatic transmission systems were defectively designed and had caused hundreds of serious injuries and numerous deaths, Ford had willfully, wantonly and recklessly disregarded Griffin and other consumers' rights and safety, by failing to warn of the defect or recall the Ford automobiles.

C. The Products Liability Statute of Repose: Last Gasp

On August 29, 1985, this court issued its opinion in Pullum, in which this court sua sponte receded from Battilla and held that application of the products liability statute of repose to bar a cause of action before the cause of action accrued, was not an unconstitutional denial of access to courts.[16] Motions for rehearing in Pullum were denied without opinion on November 4, 1985,[17] and the decision became final on November 19, 1985.[18] This court did not address whether Pullum could be applied retroactively to abolish an accrued cause of action.

Griffin's complaint against Ford was filed in the United States District Court for the Northern District of Florida on

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[16]Pullum, 476 So. 2d at 659-60.

[17]Supra note 1.

[18]Fla. R. App. P. 9.340.

September 9, 1985. Encouraged by Pullum, Ford moved for summary judgment on December 10, 1985. Attached to Ford's motion was an affidavit which revealed that the automobile which injured Patricia Ann was a 1971 Ford, which was delivered to its original purchaser on or before October 27, 1971. Ford's motion for summary judgment was granted.

At its first opportunity following this court's decision in Pullum, the Florida Legislature repealed the products liability statute of repose.[19]

This court has now been asked to decide the fate of those plaintiffs, like the petitioners and Griffin, whose causes of action, although they accrued before this court's decision in Pullum, were retroactively abolished by various trial courts following Pullum.

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[19]Ch. 86-272, § 2, Laws of Fla.

SUMMARY OF ARGUMENT

An accrued cause of action is a species of property, protected by both the federal and Florida due process clauses. It is vested property, which guarantees the owner, at minimum, a substantial right to redress through some effective procedure, a meaningful opportunity to be heard. Retroactive application of a legislative act is invalid under both federal and Florida procedural due process principles where, as a result, vested rights are adversely affected or destroyed. The violation of those rights is no less clear when that result is accomplished by the state judiciary in the course of construing an otherwise valid state statute. Under both federal and Florida procedural due process principles, therefore, this court's decision in Pullum may not be applied retroactively to abolish a plaintiff's accrued cause of action.

Additionally, the Florida Legislature intended that anyone with a previously accrued cause of action would, upon the effective date of the products liability statute of repose, have a one-year grace period within which to sue. If the products liability statute of repose is to be applied, by way of Pullum, as the legislature intended, its application must include the one-year grace period. Moreover, under the open courts provision of the Florida Constitution, application of a statute of repose to a plaintiff whose cause of action accrued prior to the effective date of the statute of repose, is permissible only if the plaintiff is allowed a reasonable time after the effective date of the statute of repose within which to sue.

ARGUMENT

IN THE CASE UNDER REVIEW, AS IN THE CASES OF GRIFFIN AND NUMEROUS OTHER PLAINTIFFS IN THE STATE OF FLORIDA, THIS COURT'S DECISION IN PULLUM HAS BEEN SUMMARILY APPLIED BY A TRIAL COURT TO RETROACTIVELY ABOLISH AN ACCRUED CAUSE OF ACTION, WITHOUT A HEARING ON THE MERITS OF THE PLAINTIFF'S CLAIM. AN ACCRUED CAUSE OF ACTION IS PROPERTY. EACH CASE, THEREFORE, INVOLVES A DENIAL OF THE PLAINTIFF'S RIGHT TO PROCEDURAL DUE PROCESS, BECAUSE IN EACH CASE THE STATE HAS DESTROYED A VESTED PROPERTY INTEREST, WITHOUT FIRST GIVING THE PUTATIVE OWNER AN OPPORTUNITY TO PRESENT HIS CLAIM OF ENTITLEMENT.

No person shall be deprived of life, liberty or property without due process of law. Amend. V, U.S. Const.; Amend. XIV, § 1, U.S. Const.; Art. I, § 9, Fla. Const.

On January 23, 1985, in the State of Florida, seventeen-year-old Patricia Ann Griffin was forever deprived of the opportunity to live a normal life, a life free from excessive pain and disfigurement. She was deprived in an instant, when a Ford automobile with a defectively-designed automatic transmission system, as had hundreds of similar Ford automobiles before it, spontaneously shifted into powered reverse. She was deprived without warning, as the Ford automobile struck with such speed and such force that Patricia Ann's head was crushed and pinned between the Ford automobile and another vehicle.

No constitution could protect Patricia Ann from the pain and suffering of that instant, or from the pain and suffering which followed. But in Patricia Ann's instant of loss, Florida common law gave to her a right, an opportunity for recompense.

The facts alleged in Griffin's complaint, leading up to

and encompassing the instant of crushing, permanent injury to Patricia Ann's head, face and eyes, and the pain and suffering which ensued, bestowed upon Patricia Ann an opportunity, her sole opportunity, to regain, in the only way our society allows, that which Ford has taken from her. It is her own story that Patricia Ann has now come before this court to tell, for it is her own story that Patricia Ann is best able to tell. But it is a story similar to those of numerous other plaintiffs throughout Florida.

For in her instant of overwhelming loss, Patricia Ann was vested with a right, a property interest. It was not a right which came easily, nor was it property which one would choose to receive, given the cost of its acquisition. But it is now all that Patricia Ann has. It is a cause of action, a species of property. And under the United States and Florida constitutions, Patricia Ann may not be deprived of that cause of action without due process of law.

Numerous other plaintiffs, like Patricia Ann, have had their lives torn apart or taken from them by injurious and deadly products. And, following Pullum, numerous other plaintiffs, like Patricia Ann, have now been deprived of the only opportunity allowed to each to seek redress for what has been done to each. It is an injustice which Patricia Ann firmly believes this court does not wish to perpetuate. It is an injustice which Patricia Ann firmly believes will soon end.

A. A Cause Of Action Is Property, Which May Not Be Destroyed Without Affording The Plaintiff His Federal Procedural Due Process Right To Present His Claim Of Entitlement.

A cause of action consists of the facts which entitle one to institute and maintain a suit in court. Its elements are the invasion of a legal right of the plaintiff without justification or excuse, or the commission or threatened commission of a legal wrong, and the resulting damages. Florida Department of Transportation v. Knowles, 402 So. 2d 1155, 1157 n.3 (Fla. 1981).

An accrued cause of action is a species of property, protected by the due process clause of the Fourteenth Amendment. Logan v. Zimmerman Brush Co., 455 U.S. 422, 428 (1982); accord Pritchard v. Norton, 106 U.S. 124 (1882). It is vested property, through which Patricia Ann is guaranteed, if not a particular remedy, then at minimum the preservation of her substantial right to redress through some effective procedure. See Gibbes v. Zimmerman, 290 U.S. 326, 332 (1933). Forced, as she is, to settle her cause of action of right and duty only through the judicial process, Patricia Ann must be given a meaningful opportunity to be heard. See Logan, 455 U.S. at 430 n.5.

It is fundamental that retroactive application of a legislative act is invalid under procedural due process principles where, as a result, vested rights are adversely affected or destroyed. The violation is no less clear when that result is accomplished by the state judiciary in the course of construing an otherwise valid state statute. The guarantee of procedural due process extends to state action through its judicial, as well as through

its legislative, executive or administrative branches of government. Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673, 680 (1930); accord Robinson v. Ariyoshi, 441 F. Supp. 559, 580 (D. Hawaii 1977).

In Brinkerhoff-Faris Trust & Savings Co., the plaintiff brought a suit in equity against the treasurer of Henry County, Missouri, for alleged discriminatory tax-valuation practices. As grounds for equity jurisdiction, the plaintiff alleged that no other remedy was available, either legal or administrative. The defendant opposed equitable relief on the ground that certain administrative relief was available and had not been pursued, and that the plaintiff was, therefore, guilty of laches. The trial court dismissed the complaint without opinion or findings of fact.

The Missouri Supreme Court found that, although the administrative relief alleged by the defendant was not available, relief could, in fact, have been had from the state tax commission at any time before the tax books were delivered to the collector. The Missouri Supreme Court held that the plaintiff, having failed to timely complain to the state tax commission, was guilty of laches, and affirmed the judgment of the trial court. Brinkerhoff-Faris Trust & Savings Co., 281 U.S. at 674-76.

Six years prior to the suit against the county treasurer, the Missouri Supreme Court had been required, in another case, to determine whether the state tax commission had, by statute, the power to grant the relief sought against the county treasurer.

On that occasion, the Missouri Supreme Court had concluded that it was "preposterous" and "unthinkable" that the state tax commission had such power, and that the statute, if so construed, would violate the Missouri Constitution.

No one doubted the authority of the earlier case until it was expressly overruled by the Missouri Supreme Court in Brinkerhoff-Faris Trust & Savings Co. The possibility of relief before the state tax commission was not suggested by anyone in the entire litigation until the Missouri Supreme Court filed its opinion. The plaintiff's motion for rehearing alleged that retroactive application of the new construction of the statute violated the due process clause. The motion was denied without opinion. Id. at 676-78.

The United States Supreme Court stated, "We are of opinion that the judgment of the supreme court of Missouri must be reversed, because it has denied to the plaintiff due process of law--using that term in its primary sense of an opportunity to be heard and to defend its substantive right," id. at 678, and, "It is plain that the practical effect of the judgment of the Missouri court is to deprive the plaintiff of property without affording it at any time an opportunity to be heard in its defense," id.

The Supreme Court further stated, "Our present concern is solely with the question whether the plaintiff has been accorded due process in the primary sense,--whether it has had an opportunity to present its case and be heard in its support. . . . [W]hile it is for the state courts to determine the adjective as well

as the substantive law of the state, they must, in so doing, accord the parties due process of law," id. at 681-82.

In Logan v. Zimmerman Brush Co., the claimant filed a charge with the Illinois Fair Employment Practices Commission, as required by law, within 180 days of an alleged discriminatory act. Contrary to the law, however, the Commission failed to schedule a settlement conference within 120 days. The Illinois Supreme Court held that this divested the Commission of jurisdiction to consider the claimant's charge. The Illinois Supreme Court rejected the claimant's argument that his due process rights would be violated were the Commission's error allowed to extinguish his cause of action. Logan, 455 U.S. at 424-27.

The Supreme Court, noting that the "words of the Due Process Clause . . . at a minimum . . . require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case," Logan, 455 U.S. at 428 (quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950)), stated that a two-part inquiry must be undertaken: (1) whether the claimant was deprived of a protected interest and (2), if so, what process was due him, Logan, 455 U.S. at 428.

The Supreme Court began its inquiry by concluding that the first question was affirmatively settled in Mullane, where the Supreme Court held that "a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause," Logan, 455 U.S. at 428. The Supreme Court pointed

out that in Martinez v. California, 444 U.S. 277, 281-82 (1980), it had noted that "[a]rguably," a state tort claim is a "species of 'property' protected by the Due Process Clause," Logan, 455 U.S. at 428 n.4.

In Mullane, the beneficiaries of certain trusts had been deprived of property when their "rights to have the trustee answer for negligent or illegal impairment of their interest" had been cut off. Logan, 455 U.S. at 428-29 (quoting Mullane, 339 U.S. at 313). There was no meaningful distinction between the cause of action at issue in Mullane and the cause of action at issue in Logan. Id. at 429. "This conclusion," the Supreme Court stated, "is hardly a novel one. The Court traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances." Id.

In its more recent cases, the Supreme Court has found the hallmark of property to be "an individual entitlement grounded in state law, which cannot be removed except 'for cause.' . . . Once that characteristic is found, the types of interests protected as 'property' are varied and, as often as not, intangible, relating 'to the whole domain of social and economic fact.'" Id. at 430. The claimant in Logan, therefore, had more than an abstract desire or interest in redressing his grievance. His right to redress was guaranteed by the state, with the adequacy of his claim assessed under what is, in essence, a "for cause" standard,

based upon the substantiality of the evidence. Id. at 431.

As to the process due, the Supreme Court's decisions

> have emphasized time and again [that] the Due Process Clause grants the aggrieved party the opportunity to present his case and have its merits fairly judged. . . . To put it as plainly as possible, the State may not finally destroy a property interest without first giving the putative owner an opportunity to present his claim of entitlement.

Id. at 433-34 (emphasis added).

The party is entitled to have the merits of his claim considered, based upon the substantiality of the available evidence. See id. at 434. Although the state may erect reasonable procedural requirements for triggering the right to an adjudication, including statutes of limitation, due process requires an opportunity, granted at a meaningful time and in a meaningful manner, for a hearing appropriate to the nature of the case. Id. at 437.

It is such an opportunity that the petitioners and Griffin, like the claimant in Logan, have been denied. See id.; accord Gibbes, 290 U.S. at 332 (1933)(although plaintiff with a vested cause of action has no property interest in any particular form of remedy, he is guaranteed by the due process clause the preservation of his substantial right to redress by some effective procedure); Coombs v. Getz, 285 U.S. 434, 448 (1932)(right to enforce contractual obligation, having become vested, was within protection of due process clause); Angle v. Chicago, St. Paul, Minneapolis & Omaha Railway, 151 U.S. 1, 19 (1893)("A right of action to recover damages for an injury is property, and

has a legislature the power to destroy such property? An executive may pardon and thus relieve a wrongdoer from the punishment the public exacts for the wrong, but neither executive nor legislature can pardon a private wrong or relieve the wrongdoer from civil liability to the individual he has wronged."); Pritchard, 106 U.S. at 132 ("[A] vested right of action is property in the same sense in which tangible things are property . . . . Whether it springs from contract or from the principles of the common law, it is not competent for the Legislature to take it away."); Hartford Fire Insurance Co. v. Lawrence, Dykes, Goodenberger, Rower & Clancy, 740 F.2d 1362, 1367-68 (6th Cir. 1984)("In tort claims, there is no cause of action and therefore no vested property right in the claimant upon which to base a due process challenge until injury actually occurs.")(emphasis added); Mathis v. Eli Lilly & Co., 719 F.2d 134, 138 (6th Cir. 1983)(same); Pitts v. Unarco Industries, 712 F.2d 276, 279 (7th Cir.)("An accrued cause of action [in tort] is a right of property protected by the Fourteenth Amendment [citing Logan]; an unaccrued cause of action is not."), cert. denied mem., 464 U.S. 1003 (1983); Ducharme v. Merrill-National Laboratories, 574 F.2d 1307, 1309-10 (5th Cir.)(because tort cause of action did not accrue before passage of law abrogating cause of action, there was no due process violation), cert. denied mem., 439 U.S. 1002 (1978); Keller v. Dravo Corp., 441 F.2d 1239, 1241-42 (5th Cir. 1971)(same), cert. denied mem., 404 U.S. 1017 (1972); Greyhound Food Management, Inc. v. City of Dayton, 653 F. Supp. 1207,

1215-16 (S.D. Ohio 1986)("Upon the occurrence of an injury, a person acquires a vested right (i.e., a property right protected by the due process clause of the fourteenth amendment) in those causes of action arising out of the injury under the state law applicable at the time."); Harlow v. Ryland, 78 F. Supp. 488, 491 (E.D. Ark. 1948)(a right of action for a tort which may happen in the future is not property), aff'd, 172 F.2d 784 (8th Cir. 1949).

B. A Cause Of Action Is Property, Which May Not Be Destroyed Without Affording The Plaintiff His Florida Procedural Due Process Right To Present His Claim Of Entitlement.

It is equally fundamental under Florida procedural due process principles that retroactive application of a legislative act is invalid where, as a result, vested rights are adversely affected or destroyed. McCord v. Smith, 43 So. 2d 704, 708-09 (Fla. 1949). The violation is equally clear when that result is accomplished by the judiciary in the course of construing an otherwise valid state statute. Smetal Corp. v. West Lake Investment Co., 126 Fla. 595, 629, 172 So. 58, 72 (1936)(citing Brinkerhoff-Faris Trust & Savings Co., 281 U.S. at 680.).

Thus, where a statute has received a given construction by this court, and property rights have been acquired in accordance with the construction, the property rights may not be destroyed by giving a subsequent overruling decision retroactive operation. Florida Forest & Park Service v. Strickland, 154 Fla. 472, 477, 18 So. 2d 251, 253 (1944).

Under Florida's fundamental constitutional guarantee of

procedural due process, Patricia Ann's accrued cause of action against Ford may not be retroactively abolished. See Rupp v. Bryant, 417 So. 2d 658, 665-66 (Fla. 1982); Knowles, 402 So. 2d at 1157-59; Village of El Portal v. City of Miami Shores, 362 So. 2d 275, 277-78 (Fla. 1978); Sunspan Engineering & Construction Co. v. Spring-Lock Scaffolding Co., 310 So. 2d 4, 8 (Fla. 1975); Board of Commissioners v. Forbes Pioneer Boat Line, 80 Fla. 252, 258-61, 86 So. 199, 201-02 (1920), rev'd on other grounds, 258 U.S. 338 (1922).

In Knowles, the plaintiff had obtained a $70,000 jury verdict against the Florida Department of Transportation and one of its employees. While the action was before the court of appeal, the Florida Legislature enacted legislation which immunized public employees from tort liability. If applied to the plaintiff's cause of action, the legislation would have effectively reduced his judgment by $20,000, by abolishing his cause of action against the public employee. The court of appeal held that the plaintiff had a vested right to sue the public employee, which the subsequent immunization could not constitutionally abolish. Id. at 1156.

Before this court, the plaintiff argued that he had a vested right as a result of his injuries, either in the form of an accrued cause of action, a right to sue the public employee, or in the form of a "matured" cause of action, as a result of the jury's determination of liability. Id. at 1157. This court stated that a retroactive abrogation of value has generally been deemed impermissible. It has been suggested, this court

noted, that the weighing process by which courts in fact decide whether to sustain the retroactive application of a statute involves three considerations: the strength of the public interest served by the statute, the extent to which the right affected is abrogated, and the nature of the right affected. Id. at 1158.

Finding it unnecessary to "discours[e] unduly on the point," this court "readily" concluded that the balancing of these factors favored the plaintiff, simply because the application of the statute to the plaintiff effected an abrogation of his right to full tort recovery. Id. Quoting Justice Holmes, this court stated that, "[s]tripped of conciliatory phrases the question is whether a state legislature can take away from a private party a right to recover money that is due when the act is passed," id. at 1158-59 (quoting Forbes Pioneer Boat Line v. Board of Commissioners, 258 U.S. 338, 339 (1922)). This court concluded that such a right could not be taken away. Knowles, 402 So. 2d at 1159.

In Knowles, unlike in the present case, the plaintiff had a "matured" as well as an accrued cause of action. This, however, is a distinction without a difference. In Rupp, a subsequent case, this court held that the same principles apply equally to a cause of action which was merely accrued and not "matured," and reached the same result. See Rupp, 417 So. 2d at 665-66.

The term "vested rights," in its application as a shield or protection against the abolishment of vested rights, is not

used in any narrow or technical sense, but implies a vested interest which it is right and equitable that the government should recognize and protect, and of which the individual could not be deprived arbitrarily without injustice. The moral aspect of the right claimed is always given consideration. Forbes Pioneer Boat Line, 80 Fla. at 259, 86 So. at 202.

That an accrued cause of action in tort is a vested property right, which may not be divested without a hearing on the merits of the claim, has been recognized not only by this court, but by other state courts. See, e.g., Cheswold Volunteer Fire Co. v. Lambetson Construction Co., 489 A.2d 413, 418 (Del. 1985)("[D]ue process preserves a right of action [in tort] which has accrued or vested before the effective date of the statute"); Marcel v. Louisiana State Department of Public Health (Department of Health & Human Resources), 492 So. 2d 103, 109-10 (La. Ct. App.) ("Where an injury has occurred for which the injured party has a cause of action, such cause of action is a vested property right."), cert. denied mem., 494 So. 2d 334 (La. 1986); Reeves v. Ille Electric Co., 170 Mont. 104, 110, 551 P.2d 647, 650 (1976)("Where an injury has already occurred for which the injured person has a right of action, the Legislature cannot deny him a remedy."); Rosenberg v. Town of North Bergen, 61 N.J. 190, 199-200, 293 A.2d 662, 667 (1972)("The legislature is entirely at liberty to create new rights or abolish old ones as long as no vested right is disturbed.")(emphasis added); Berry v. Beech Aircraft Corp., 717 P.2d 670, 676 (Utah 1985)("[O]nce a cause

of action under a particular rule of law accrues to a person by virtue of an injury to his rights, that person's interest in the cause of action and the law which is a basis for the legal action becomes vested, and a legislative repeal of the law cannot constitutionally divest the injured person of the right to litigate the cause of action to a judgement.").

C. In The Case Under Review, As In The Cases Of Griffin And Numerous Other Plaintiffs In The State Of Florida, A Trial Court Has Summarily Applied Pullum To Retroactively Abolish An Accrued Cause Of Action And Has, Therefore, Denied The Plaintiff's Right To Procedural Due Process.

Applying the fundamental constitutional guarantee of procedural due process, the United States District Court for the Northern District of Florida held that this court's decision in Pullum may not be applied retroactively to extinguish an accrued cause of action. See George v. Firestone Tire & Rubber Co., No. GCA 85-0117-MMP (N.D. Fla. July 9, 1986)(corrected order denying motions for summary judgment)[hereinafter cited as George I],[20] reconsideration denied (N.D. Fla. July 31, 1986)(order denying motion for reconsideration and certifying interlocutory appeal) [hereinafter cited as George II].[21]

In George I, it was not disputed that if the products liability statute of repose had been fully effective at the time of the

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[20]George I is reproduced as Appendix C to this brief.

[21]George II is reproduced as Appendix D to this brief.

plaintiff's injury by the product, the plaintiff would have been without redress. Because the injury occurred in excess of twelve years after the date of delivery of the completed product to its original purchaser, the products liability statute of repose would have cut off the plaintiff's right of action before his cause of action accrued. See George I, slip. op. at 4. The court pointed out in George I, however, that in Battilla, this court had held that application of the products liability statute of repose to bar the cause of action of one not injured until after expiration of the period of repose, was an unconstitutional denial of access to courts. George I, slip. op. at 4-5.

Therefore, "[t]he statute of repose was null and void insofar as the causes of action of persons injured after the period expired." Id. at 5. As is the case with the petitioners, Griffin and numerous other plaintiffs, "[y]ears passed; years in which the statute of repose had only limited force and effect; years in which plaintiff was injured . . . . Then, in [Pullum], the Florida Supreme Court suddenly receded from Battilla and held that the statute of repose did not unconstitutionally prevent access to courts by persons injured more than twelve years after delivery of a product." George I, slip. op. at 5-6.

Applying Florida law, the court stated in George I "that where a statute has received a given construction by a court of supreme jurisdiction and property or contract rights have been acquired under and in accordance with such construction, such rights should not be destroyed by giving to a subsequent

overruling decision a retrospective operation." Id. at 6 (quoting Strickland, 154 Fla. at 477, 18 So. 2d at 253).

Analyzing the property interest involved, the court stated in George I,

> Plaintiff has indeed acquired a property right which would be destroyed by retrospective operation of Pullum. . . . An accrued cause of action must be carefully distinguished from the sort of generalized right to sue possessed by one who has not yet been injured. Without having been injured, one merely has a non-vested right to sue which can be legislatively withdrawn. . . . An accrued cause of action, on the other hand, is a species of property protected by the Due Process Clause, of which plaintiff may not be deprived by retroactive application of Pullum.

George I, slip. op. at 6-7.

Citing numerous Florida and federal decisions, see George I, slip. op. at 6-10, the court concluded in George I that, because the plaintiff's cause of action had accrued between the Battilla and Pullum decisions, the plaintiff's

> cause of action validly accrued and became vested when plaintiff was injured. That accrued cause of action is a property right. The law of Florida, as expressed in Strickland, is that it is not proper to apply a judicial decision retroactively if doing so would deprive plaintiff of a property right. Furthermore, retroactive application of Pullum to bar plaintiff's previously accrued cause of action would plainly violate plaintiff's federal due process rights. Thus, under both Florida and Federal law, this Court can not, should not and will not apply Pullum retroactively to extinguish plaintiff's accrued cause of action.

George I, slip. op. at 10.

In denying the defendant's motion for reconsideration, the court stated, in George II, that the due process violation caused by retroactive abolition of an accrued cause of action, is the denial of the plaintiff's opportunity to be heard. George II, slip. op. at 2 (citing Brinkerhoff-Faris Trust & Savings Co., 281 U.S. at 678). "That is the most basic due process right and it is beyond peradventure that it is still the law today." George II, slip. op. at 2.

In Cox v. Farrell-Birmingham Co., No. PCA 86-4064-WEA (N.D. Fla. Sept. 16, 1986)(order denying motion for summary judgment),[22] the court, following George I and George II, and citing Logan, stated "[A] cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause. . . . Under case law the retroactivity of Pullum could not eliminate that cause of action." Cox, slip. op. at 2. The court noted in Cox that "in several other cases" the reasoning in George I and George II had "not been applied," and concluded "that this court and other courts, in not applying [that] reasoning, were in error." Cox, slip. op. at 2-3.

Thus, the very court which applied Pullum to retroactively abolish Patricia Ann's cause of action, has now recognized that such a retroactive abolition of an accrued cause of action is constitutionally impermissible.

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[22]Cox is reproduced as Appendix E to this brief.

D. In The Case Under Review, As In The Cases Of Griffin And Numerous Other Plaintiffs In The State Of Florida, The Intent Of The Enactors Of The Products Liability Statute Of Repose, And The Open Courts Provision Of The Florida Constitution, Have Been Ignored.

Retroactive application of Pullum has not only denied the petitioner's, Griffin's and numerous other plaintiffs' right to procedural due process, retroactive application of Pullum runs contrary to the express intent of the enactors of the products liability statute of repose, and to the open courts provision of the Florida Constitution.[23]

The Florida Legislature intended that anyone with a previously accrued cause of action would, upon the effective date of the products liability statute of repose, have a one-year grace period within which to sue. Purk v. Federal Express Co., 387 So. 2d 354, 357 (Fla. 1980); Bauld v. J. A. Jones Construction Co., 357 So. 2d 401, 403 (Fla. 1978); ch. 74-382, § 36, Laws of Fla.[24] If the products liability statute of repose is to be applied, by way of Pullum, as the legislature intended, its application must include the one-year grace period.

Moreover, under the recently reborn open courts provision of the Florida Constitution, see Smith v. Department of Insurance, 12 F.L.W. 189, 191-92 (Fla. Apr. 23, 1987), application of a statute of repose to a plaintiff whose cause of action accrued prior to the effective date of the statute of repose, is permissible

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[23]Supra notes 5-7 and accompanying text.

[24]Supra note 10 and accompanying text.

only if the plaintiff is allowed a reasonable time after the effective date of the statute of repose within which to sue. Carr v. Broward County, 12 F.L.W. 992, 994 (Fla. 4th DCA Apr. 8, 1987).

Thus, those courts which have blindly applied Pullum retroactively have not only completely failed to consider the violation of the plaintiff's right to procedural due process, see, e.g., Shaw v. General Motors Corp., 12 F.L.W. 847 (Fla. 3d DCA Mar. 24, 1987); Small v. Niagara Machine & Tool Works, 12 F.L.W. 366 (Fla. 2d DCA Jan. 20, 1987); Pait v. Ford Motor Co., 12 F.L.W. 277 (Fla. 5th DCA Jan. 15, 1987), they have ignored the legislative intent, in accord with the requirements of procedural due process and the open courts provision of the Florida Constitution, that no accrued cause of action would be retroactively abolished. This has, of course, not gone unnoticed by the Florida Legislature. Florida's products liability statute of repose has been repealed. Ch. 86-272, § 2, Laws of Fla.

E. The Fundamental Principles Of Procedural Due Process, The Intent Of The Enactors Of The Products Liability Statute Of Repose, And The Open Courts Provision Of The Florida Constitution, Provide This Court The Legal Grounds To Reverse The Widespread Injustice That Has Resulted From Retroactive Application Of Pullum.

What has happened to Patricia Ann is this: In 1974, in an unfathomable outpouring of compassion for industrial tortfeasors, the Florida Legislature enacted a twelve-year products liability statute of repose. Under this products liability statute of repose, those persons unfortunate enough to fall victim in Florida

to the malfunction of a defectively designed or manufactured product, even if the injury occurred in excess of twelve years after delivery of the product to its original purchaser, had absolutely no legal opportunity for recompense.

In 1980, in Battilla, this court held that, under the open courts provision of the Florida Constitution, application of the products liability statute of repose to bar a cause of action which accrued after the products liability statute of repose had run, was an unconstitutional denial of access to courts.

On January 23, 1985, Patricia Ann was horribly mangled by a defectively-designed product which, with the full knowledge of its manufacturer, had for years been injuring or killing hundreds of other victims similarly situated.

At the time of Patricia Ann's injury, over ten years had passed since the enactment of the products liability statute of repose. Yet, because of this court's decision in Battilla, the products liability statute of repose could not be applied to bar a cause of action which had accrued after the running of the statute of repose. As applied in a situation such as Patricia Ann's, the products liability statute of repose was, at the time of her injury, totally and unquestionably without effect.

On August 29, 1985, this court summarily concluded sua sponte, in Pullum, that the products liability statute of repose could be applied to bar a cause of action before the cause of action accrued. This court's decision became final on November

10, 1985, months after Griffin's complaint had been filed.

Following Pullum, the United States District Court for the Northern District of Florida applied the products liability statute of repose, which at the time of Patricia Ann's injury had already run on the 1971 Ford which injured her, to bar Patricia Ann's cause of action. The trial court retroactively applied the products liability statute of repose in a manner in which the statute of repose unquestionably could not have been applied at the time Patricia Ann's cause of action accrued.

In doing so, the trial court deprived Patricia Ann of her property without procedural due process. See, e.g., Logan, 455 U.S. at 428; Gibbes, 290 U.S. at 332; Brinkerhoff-Faris Trust & Savings Co., 281 U.S. at 680; George I, slip. op. at 10; Rupp, 417 So. 2d at 665-66; Knowles, 402 So. 2d at 1157-59. Whether acting through its judiciary or through its legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, unless that person is afforded some real opportunity to protect the right. Brinkerhoff-Faris Trust & Savings Co., 281 U.S. at 682. "To put it as plainly as possible, the State may not finally destroy a property interest without first giving the putative owner an opportunity to present his claim of entitlement." Logan, 455 U.S. at 434.

In applying Pullum retroactively to abolish Patricia Ann's cause of action, the trial court also ignored the intent of the enactors of the products liability statute of repose, see Purk, 387 So. 2d at 357; Bauld, 357 So. 2d at 403; ch. 74-382,

§ 36, Laws of Fla., and the open courts provision of the Florida Constitution, see Carr, 12 F.L.W. at 994.

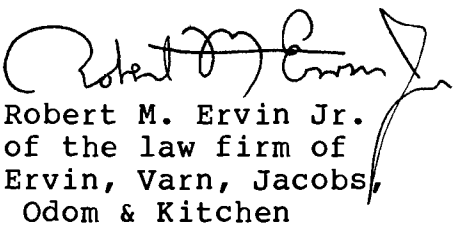
Viewed in the context of what has already befallen Patricia Ann and numerous other plaintiffs, and why, a more equitable and moral vested right could not be envisioned, nor a more inequitable and immoral deprivation. See Forbes Pioneer Boat Line, 80 Fla. at 259, 86 So. at 202. This court should now take this opportunity, which for Patricia Ann and so many others may be the last opportunity, to apply the foregoing principles of law and reverse the widespread injustice that has resulted from retroactive application of Pullum.

CONCLUSION

Since this court's decision in Pullum, numerous injured parties throughout Florida, including the petitioners and Griffin, have been denied their fundamental right to be heard on the merits of their accrued causes of action. In applying Pullum, trial courts have ignored the fundamental principles of procedural due process, the intent of the enactors of the products liability statute of repose, and the open courts provision of the Florida Constitution.

These issues are now squarely before this court. This court should, therefore, apply the foregoing principles, quash the decision of the court of appeal and remand the petitioners' action for further proceedings consistent with the foregoing principles of law. In doing so, this court will not only be correctly applying fundamental principles of law, it will be reversing the great and manifest injustice which has been committed in the name of Pullum.

Robert King High Jr.
and



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