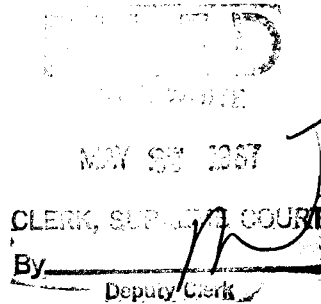
IN THE SUPREME COURT OF FLORIDA

CASE NO. 70,344



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

Petitioners,

v.

GENERAL MOTORS CORPORATION and FEDERATED DEPARTMENT STORES, INC.,

Respondents.

BRIEF OF RESPONDENT
GENERAL MOTORS CORPORATION

On Review of a Decision of
The District Court of Appeal
Third District

M. STEPHEN SMITH, III
WENDY F. LUMISH
RUMBERGER, WECHSLER & KIRK
One Biscayne Tower, Suite 3410
2 South Biscayne Boulevard
(305) 358-5577
Attorneys for GENERAL MOTORS CORPORATION

MICHELLE FISHER
GENERAL MOTORS CORPORATION
3031 West Grand Boulevard
Detroit, Michigan 48232

OF COUNSEL

TABLE OF CONTENTS

TABLE OF CITATIONS.. iii

INTRODUCTION.. 1

STATEMENT OF THE CASE AND FACTS.. 2

SUMMARY OF THE ARGUMENT.. 7

ARGUMENT.. 9

I. THE LEGISLATIVE AMENDMENT TO SECTION 95.031(2), FLORIDA STATUTES (1986 SUPP.) CAN NOT BE APPLIED TO A CAUSE OF ACTION WHICH ACCRUED PRIOR TO THE EFFECTIVE DATE OF THE AMENDMENT...... 9

A. Section 95.031(2), Florida Statutes (1986 Supp.) falls Within the General Rule that Statutes are Presumed to be "Prospective Only"..................... 9

B. Chapter 86-272 is not a Repeal nor is it "Remedial" Legislation so as to Permit Retroactive Operation........ 12

C. Prospective Only Application is Consistent With the Numerous Cases on Statutes of Limitations and Repose.. 15

II. SECTION 95.031(2), FLORIDA STATUTES (1985), AS INTERPRETED BY PULLUM IS AN ABSOLUTE BAR TO THE PLAINTIFF'S CLAIM................ 17

A. A Decision Overruling a Prior Decision of Unconstitutionality Renders the Statute Valid From the Date of its Enactment.................. 18

B. Plaintiffs do not Have a Vested Property Right in an Accrued Cause of Action............................. 24

CONCLUSION.. 30

CERTIFICATE OF SERVICE.. 31

TABLE OF CITATIONS

Acton v. Ft. Lauderdale Hosp.,
418 So.2d 1099 (Fla. 1st DCA 1982),
aff'd, 440 So.2d 1282 (Fla. 1983)................ 24

Adair v. Koppers Co., Inc.,
541 F.Supp. 1120 (N.D. Ohio 1982)................ 27

American Liberty Insurance Co. v. West,
491 So.2d 573 (Fla. 2d DCA 1986)................. 6

Anderson v. Fred Wagner and Roy Anderson, Jr., Inc.,
402 So.2d 320 (Miss. 1981)....................... 27

Barnes v. Kyle,
202 Tenn. 529, 306 S.W.3d 1 (1957)............... 26

Battilla v. Allis Chalmers Mfg. Co.,
392 So.2d 874 (Fla. 1980)........................2,3,12, 22,23,26, 27

Bauld v. J.A. Jones Construction Co.,
357 So.2d 401 (Fla. 1978)........................ 25

Brackenridge v. Ametek, Inc.,
12 F.L.W. 479 (Fla. 3d DCA
February 20, 1987)............................... 5

Brinkenhoff-Faris v. Hill,
280 U.S. 673 (1930).............................. 28

Burmaster v. Gravity Drainage
District No. 2 of St. Charles Parish,
366 So.2d 1381 (La. 1978)........................ 27

Carr v. Crosby Builders Supply Co., Inc.,
283 So.2d 60 (Fla. 4th DCA 1973)................. 12

Cassidy v. Firestone Tire & Rubber Co.,
495 So.2d 801 (Fla. 1st DCA 1986)................ 5,20

CBS Inc. v. Garrod,
622 F. Supp. 532 (M.D. Fla. 1985)................ 17

Cheswold Volunteer Fire Co. v.
Lambertson Construction Co.,
489 A.2d 413 (Del. 1984)......................... 26

Chevron Oil Co. v. Huson,
404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d
296 (1971).. 19

Christopher v. Mungen,
61 Fla. 513, 55 So. 273 (1911).................... 18

City of Orlando v. Desjardins,
493 So.2d 1027 (Fla. 1986)........................ 14

Colony Hill Condo I Ass'n. v. Colony Co.,
320 S.E.2d 273 (N.C. App. 1984)................... 26

Colton v. Dewey,
212 Neb. 126, 321 N.W.2d 913 (1982)............... 26

Dominquez v. Bucyrus-Erie Co.,
12 F.L.W. 546 (Fla. 3d DCA February 11, 1987).... 5

Eddings v. Volkswagenwerk,
635 F. Supp. 45 (N.D. Fla. 1986).................. 6,22

Florida Forest & Park Service v. Strickland,
154 Fla. 472, 18 So.2d 251 (1944)................. 19,21

Florida Patient's Compensation Fund v. Von Stetina,
474 So.2d 273 (Fla. 1985)......................... 14

Foley v. Morris,
339 So.2d 215 (Fla. 1976)......................... 9,10,15

Garafalo v. Community Hosp. of South Broward,
382 So.2d 722 (Fla. 4th DCA 1980)................. 15

Goodfriend v. Druck,
289 So.2d 710 (Fla. 1974)......................... 14

Harrison v. Hyster Co.,
12 F.L.W. 540 (Fla. 2d DCA
February 13, 1987)................................ 6

Hartman v. Westinghouse Electric Corporation,
No. 83-517-CIV-ORL (M.D. Fla., Dec. 10, 1985)
aff'd., No. 85-3967 (11th Cir., June 20, 1986)... 22

Hicks v. Miranda,
422 U.S. 332, 95 S.Ct. 2281
45 L.Ed.2d 223 (1975)............................. 20

Homemakers Inc. v. Gonzales,
400 So.2d 965 (Fla. 1981)......................... 16,17

In re Will of Martell,
457 So.2d 1064 (Fla. 2d DCA 1984)................. 28

Keyes v. Fulton Mfg. Corp.,
12 F.L.W. 1164 (Fla. 3d DCA May 5, 1987)......... 5
Klein v. Catalano,
386 Mass. 701, 437 N.E.2d 514 (1982)............. 27

Lamb v. Volkswagenwerk Aktiengesellschaft,
631 F. Supp. 1144 (S.D. Fla. 1986)............... 6,19,28

Lamb v. Wedgewood South Corp.,
302 S.E.2d 868 (1983)............................ 27,28

Lane v. Koehring Co.,
12 F.L.W. 476 (Fla. 3d DCA
February 10, 1987)............................... 5

Lazo v. Baring Industries,
12 F.L.W. 1021 (Fla. 3d DCA
April 24, 1987).................................. 5

Logan v. Zimmerman Brush Co.,
455 U.S. 422, 102 S.Ct. 1148,
71 L.Ed.2d 265 (1982)............................ 28

Manuel v. Eig Cutlery, Inc.,
12 F.L.W. 1161 (Fla. 3d DCA
May 5, 1987)..................................... 5

Martz v. Riskamm,
144 So.2d 83 (Fla. 1st DCA 1962)................. 16

Mazda Motors of America v. S.C. Henderson & Sons, Inc.,
364 So.2d 107 (Fla. 1st DCA 1978)................ 16

McMacken v. State,
320 N.W.2d 131, aff'd on reh'g.,
325 N.W.2d 60 (S.D. 1982)........................ 27

Melendez v. Dreis & Krump Mfg. Co.,
12 F.L.W. 554 (Fla. 3d DCA
February 17, 1987)............................... 5

Neff v. General Development Corp.,
354 So.2d 1275 (Fla. 2d DCA 1978)................ 16

Overland Construction Co. v. Sirmons,
369 So.2d 572 (Fla. 1979)........................ 2

Pait v. Ford Motor Co.,
500 So.2d 743 (Fla. 5th DCA 1987)................ 5,6,13

Parkway General Hospital, Inc. v. Stern,
400 So.2d 166 (Fla. 3d DCA 1981)................. 19,23

Pullum v. Cincinnati, Inc.,
476 So.2d 657 (Fla.), reh'g. denied, ... 2,3,4,5,
482 So.2d 1352 (1985) appeal dismissed, ... 7,11,12,17,
106 S.Ct. 1626 (1986) 18,19,20,21
24,27,28

Purk v. Federal Press Co.,
387 So.2d 354 (Fla. 1980) 3

Rosenberg v. Town of North Bergen,
61 N.J. 190, 293 A.2d 662 (1972) 26

Slatcoff v. Dezen,
76 So.2d 792 (Fla. 1954) 27

Singer v. Sheppard,
464 Pa. 387, 346 A.2d 897, 903 (1975) 27

Small v. Niagara Machine & Tool Works,
502 So.2d 943 (Fla. 2d DCA 1987) 5,10

State v. Lavazzoli,
434 So.2d 321 (Fla. 1983) 9

Stuyvesant Ins. Co. v. Square D. Co.,
399 So.2d 1102 (Fla. 3d DCA 1981) 15

Tehan v. United States,
382 U.S. 406, 86 S.Ct. 459
15 L.Ed.2d 453 (1966) 21

Tetterton v. Long Mfg. Co., Inc.,
332 S.E.2d 67 (1985) 27

Tel Service Co., Inc. v. General Capital Corp.,
227 So.2d 667 (Fla. 1969) 13

Thornton v. Mono Manufacturing Co.,
99 Ill. App. 3d 722,
425 N.E.2d 522 (1981) 25

Wallis v. Grumman Corp.,
12 F.L.W. 613 (Fla. 3d DCA
February 24, 1987) 5

Walter Denson & Son v. Nelson,
88 So.2d 120 (Fla. 1956) 16

Willer v. Volkswagen of America,
12 F.L.W. 1122 (Fla. 4th DCA
April 29, 1987) 5

Yarbro v. Hilton Hotels Corp.,
655 P.2d 822 (Col. 1982) 27

Young v. Altenhaus,
472 So.2d 1152 (Fla. 1985) 9

OTHER AUTHORITIES

Florida Constitution, article I, section 21 2

Section 95.031(2) Florida Statutes 2,3,4,5,7,
9,17,22,25

Section 95.11(3)(c) Florida Statutes 2

Chapter 86-272, section 1, Laws of Florida 11

Chapter 86-272, section 2, Laws of Florida 9,11

Chapter 86-272, section 3, Laws of Florida 9,11

INTRODUCTION

This brief if filed on behalf of the Respondent, GENERAL MOTORS CORPORATION ("GENERAL MOTORS"), who was a Defendant in the trial court. The nature of the order appealed is a final judgment based on the trial court's order granting Judgment on the Pleadings.

In this brief, GENERAL MOTORS CORPORATION will be referred to alternatively as GENERAL MOTORS, Defendant and Respondent. Plaintiffs in this case, as well as those in Pait v. Ford, will be referred to by their specific name or as Plaintiffs or Petitioners. The Academy of Florida Trial Lawyers who submitted an amicus brief in Pait will be referred to as "the Academy." Patricia Ann Griffin and Larry D. Griffin who filed an amicus brief in this case will be referred to as "the Griffins." The following symbol will be used to refer to the record:

"R" - Record on Appeal

STATEMENT OF THE CASE AND FACTS

GENERAL MOTORS agrees with the Statement of the Case and Facts presented by Plaintiffs, however, the following aspects of the procedural history of the statute of repose are also necessary to an understanding of the case.

Florida's statute of repose, section 95.031(2), Florida Statutes, was initially enacted in to law in 1975. Historically, this Court had held that the statute of repose applicable to liability for improvements to real property, section 95.11(3)(c), Florida Statutes (1983), was unconstitutional if applied to cases wherein an injury occurred more than twelve years after the date of actual possession by the owner. Overland Construction Co. v. Sirmons, 369 So.2d 572 (Fla. 1979). The rationale behind this holding was that the statute denied access to courts in violation of article I, section 21 of the Florida Constitution[1] when applied to a plaintiff who was injured beyond the twelve-year period. Because the Court found that the legislature had not shown an overpowering public necessity for this prohibiting provision, it determined the statute to be unconstitutional as applied.

The Court extended this analysis to the product liability statute of repose, section 95.031(2), in Battilla v. Allis Chalmers

---

[1] Article I, section 21 provides:

> The Courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.

Mfg. Co., 392 So.2d 874 (Fla. 1980). In a brief per curiam opinion, the court concluded, "as applied to this case, section 95.031 denies access to courts under article I, section 21, Florida Constitution." Id. at 874.

In contrast to these decisions, in Purk v. Federal Press Co., 387 So.2d 354 (Fla. 1984), the Court upheld the constitutionality of the product liability statute of repose against a denial of access to courts analysis where plaintiff was injured between the eighth and twelfth year after delivery of the product. The Court reasoned that the statute was not a denial of access because it did not act as an absolute bar to suit, but rather operated to shorten the time in which an action must be brought.

Against this backdrop, the Florida Supreme Court decided Pullum v. Cincinnati, Inc., 476 So.2d 657 (Fla. 1985), reh'g denied, appeal dismissed, 106 S. Ct. 1626 (1986) (dismissed for want of a substantial federal question.). In Pullum, this Court gave effect to the clear expression of legislative intent in section 95.031(2) and therefore receded from Battilla which had completely thwarted the purpose of that provision. In doing so, the Court expressly determined that section 95.031(2) did not constitute a denial of access to courts. Rather, the Court recognized that the legislature, in enacting the statute of repose, had reasonably decided that perpetual liability places an undue burden on the manufacturer and had decided that twelve years from the date of sale was a reasonable time for exposure to liability for manufacturing of a product. Id. at 659.

The Court further held that section 95.031(2), as so interpreted, was not violative of the constitutional guarantee of equal protection of the laws, inasmuch as the classification originally established by the statute, to wit: the twelve-year period, bears a rational relationship to a proper state objective. Id. at 660.

The appellant in Pullum moved for rehearing and requested this Court to apply its decision prospectively only. Pullum's motion for rehearing was denied. 482 So.2d 1352 (1985). The Pullums further appealed to the United States Supreme Court raising federal and state constitutional issues similar to those raised here. The Court dismissed the appeal for want of a substantial federal question. 106 S. Ct. 1626 (1986).

The trial court in this case held that the Pullum decision was applicable to bar plaintiff's claim. Since the action below was filed after the lapse of the twelve-year period prescribed in section 95.031(2), final judgment was entered in favor of Defendants. (R. 142-3).

While the case was on appeal to the Third District, the legislature amended section 95.031(2) and in doing so, it deleted the twelve-year statute of repose as it relates to product liability. Subsequently, the Third District ruled that section 95.031(2) as interpreted in Pullum was applicable to bar the instant cause of action. Additionally, the court concluded that the amendment to the statute would not be applied retroactively. Finally, the District Court certified its decision on these two points as being of great public importance.

Following Shaw, the Third District has also certified the same questions in the cases of Keyes v. Fulton Mfg. Corp., 12 F.L.W. 1164 (Fla. 3d DCA May 5, 1987); Manuel v. Eig Cutlery, Inc., 12 F.L.W. 1161 (Fla. 3d DCA May 5, 1987); Lazo v. Baring Industries, 12 F.L.W. 1021 (Fla. 3d DCA April 24, 1987); Brackenridge v. Ametek, Inc., 12 F.L.W. 479 (Fla. 3d DCA February 20, 1987); Melendez v. Dreis & Krump Mfg. Co., 12 F.L.W. 554 (Fla. 3d DCA February 17, 1987); Lane v. Koehring Co., 12 F.L.W. 476 (Fla. 3d DCA February 10, 1987); Wallis v. Grumman Corp., 12 F.L.W. 613 (Fla. 3d DCA February 24, 1987); Dominguez v. Bucyrus-Erie Co., 12 F.L.W. 546 (Fla. 3d DCA February 11, 1987).

The Third District's rulings are consistent with each of the other District Courts. The Fifth District has reached the same holding and certified virtually identical questions in Pait v. Ford Motor Co., 500 So.2d 743 (Fla. 5th DCA 1987), as has the Fourth District in Willer v. Volkswagen of America, 12 F.L.W. 1122 (Fla. 4th DCA April 29, 1987).

The First District has held that Pullum applies to pending cases, and acknowledged the existence of the amendment to the statute of repose but did not certify any questions to this Court. Cassidy v. Firestone Tire & Rubber Co., 495 So.2d 801 (Fla. 1st DCA 1986). Cassidy's petition for review to this Court was denied. No. 69,668 (Fla. March 27, 1987).

The Second District has held that Pullum applies to pending cases and that the amendment to section 95.031(2), Florida Statutes, is prospective only. Small v. Niagara Machine

& Tool Works, 502 So.2d 943 (Fla. 2d DCA 1987); Harrison v. Hyster Co., 12 F.L.W. 540 (Fla. 2d DCA February 13, 1987); see also American Liberty Ins. Co. v. West & Conyers, 491 So.2d 573 (Fla. 2d DCA 1986) (applying Pullum).

Finally, the federal courts have applied the statute of repose as interpreted by Pullum. Lamb v. Volkswagenwerk A.G., 631 F. Supp. 1144 (S.D. Fla. 1986); Eddings v. Volkswagenwerk A.G., 635 F. Supp. 45 (N.D. Fla. 1986).[2]

This Court's jurisdiction was invoked by the filing of an appropriate notice. Petitioners' brief merely reincorporated the main brief and Amicus' Brief of the Academy of Florida Trial Lawyers in Pait v. Ford. In addition, the court has permitted plaintiffs from the case of Griffin v. Ford, No. 86-3103 pending before the Eleventh Circuit to file an amicus brief in this case. Respondent's brief is therefore directed to these three briefs.

GENERAL MOTORS respectfully submits that the appellate court's decision in this case and the others should be affirmed.

---

[2] Thus, contrary to the Academy's statement that there is a "hodge-podge" of retroactivity decisions, there is unanimity from all five Florida appellate courts. The Eleventh Circuit in Lamb, Eddings and others has deferred ruling pending this Court's decision in Shaw and Pait.

SUMMARY OF THE ARGUMENT

There are two separate and distinct rules of law and construction applicable to the instant case. The first concerns the application of a legislative amendment to a statute and the second involves the applicability of a statute which was once declared unconstitutional, but later declared constitutional. While Plaintiffs have attempted to confuse these issues, the law as to each proposition is clear.

First, the amendment to the statute of repose is applicable prospectively. The language of chapter 86-272 providing that the amendment is effective July 1, 1986, is a clear intention that the legislature intended prospective application. Plaintiffs' contention that the statute was "repealed" or is "remedial" is supported only by the fact that Plaintiffs have labeled it as such. A review of decisions from this Court and others reflect that statutes of limitation and repose have traditionally been only in a prospective manner. Accordingly, the amendment to the statute is irrelevant to the present cause of action and the first certified question should be answered negatively.

The second issue, regarding the Pullum decision is governed by the proposition that where a statute is judicially adjudged to be unconstitutional, it will remain inoperative while the decision is maintained; but if the decision is subsequently reversed or overruled, the statute will be held to be valid from the first date it became effective. The only exception to the "relation-back" rule is that this principle should not operate to

overturn vested rights previously acquired in justified reliance upon the overruled decision. Plaintiffs here did not acquire their right to sue in reliance upon the decision in Battilla. The right to sue occurred by accident, not be a conscious decision to forebear from filing suit because of Battilla. Plaintiffs, at best, merely had the hope or expectation that the decisional law might continue. Consequently, when the Florida Supreme Court receded from the decision holding the statute of repose unconstitutional, the statute of repose was deemed to be effective from its enactment in 1975. Thus, the second certified question should be answered in the affirmative.

ARGUMENT

I. THE LEGISLATIVE AMENDMENT TO SECTION 95.031(2), FLORIDA STATUTES (1986 SUPP.) CAN NOT BE APPLIED TO A CAUSE OF ACTION WHICH ACCRUED PRIOR TO THE EFFECTIVE DATE OF THE AMENDMENT

A. Section 95.031(2), Florida Statutes (1986 Supp.) falls Within the General Rule that Statutes are Presumed to be "Prospective Only"

The general rule in Florida concerning the effect of a legislative change is clear. Statutes are presumed to operate prospectively unless the legislature has "in clear and explicit language expressed an intention that the statute be [retroactively] applied." Foley v. Morris, 339 So.2d 215, 216 (Fla. 1976); see also Young v. Altenhaus, 472 So.2d 1152 (Fla. 1985); State v. Lavazzoli, 434 So.2d 321 (Fla. 1983).[3] Thus, the Court must look to the legislative language to determine whether retrospective application is mandated.

In the present case, the legislature has specifically provided an effective date for the amendment to section 95.031(2). Section 2 of chapter 86-272, Laws of Florida, deleted the statute of repose for product liability action. Section 3 of that chapter provided that section 2 "shall take effect July 1, 1986."

---

[3] Plaintiffs rely on the rule that the Court will decide issues in accordance with the law in effect at the time of the appeal to support their argument concerning the retroactivity of the legislative amendment. This rule applies to intervening judicial decisions and does not apply to legislative acts. Plaintiffs conveniently ignore the rule when arguing concerning the effect of the Pullum decision. This will be discussed more fully in Issue 2, infra.

This Court has specifically held that such language is indicative of prospective only application. Foley v. Morris.

Foley involved a medical malpractice action in which three years had elapsed between the accrual of the cause of action and the filing of the complaint. When the cause of action accrued, the plaintiff was subject to a four-year statute of limitation, however, prior to filing suit, the legislature reduced the statute of limitations to two years. The defendants moved for dismissal arguing that the two-year statute was retroactive. Recognizing that the presumption is against retroactive application of a statute where the Legislature has not expressed in clear and explicit language an intention that the statute be so applied, the Court looked to the language of the new statute.

The Legislature had used virtually identical language to that presented here- "this act shall take effect on July 1, 1972." Noting this language, the court held:

> Nothing in the language of the act manifests an intention by the legislature to do otherwise than prospectively apply the new two-year statute of limitations.

Thus, the court concluded,

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

Id. at 217.

Foley governs the present action. The Legislative intent as found in section 3 is clear--retroactive application was not

intended. See Small v. Niagara Machine & Tool Works, 502 So.2d 943 (Fla. 2d DCA 1987).

Despite this plain language, Plaintiffs attempt to construe a retroactive intention by the legislature, by virtue of the fact that the effective dates for the two portions of chapter 86-272 are different. Petitioners note that the amendment to the libel and slander statute (section 1) was determined to "take effect October 1, 1986, and shall apply to causes of action accruing after that date," while the amendment to the statute of repose (section 2) merely states "Section 2 of the Act shall take effect July 1, 1982." From this, Plaintiffs conclude that "section 1 is expressly given prospective application. Section 2 is not." (Pait initial brief at 9).

Separate and apart from the question of whether any inference can be drawn from this in light of the legislative history which reveals chapter 86-272 to be a conglomeration of two separate amendments, it is clear that Petitioners' argument must fail. The fact that the description of the effective dates for each section are stated differently, cannot render the latter portion retroactive when standing alone the intent is clear. In other words, as Foley held, the inclusion of a specific effective date reveales prospective only application. This does not become any less true by virtue of the fact that it has been joined with another statute that expressed prospective only application in a different manner. Both sections are clearly prospective only.

Finally, Plaintiffs rely on the legislature's failure to overcome the consequences of the Battilla decision during the five years between Battilla and Pullum as an indication of legislative intent. This ignores the contrary proposition that the legislature permitted the statute to remain on the books in the years between Battilla and Pullum indicating a continuing legislative desire to retain the statute of repose.

B. Chapter 86-272 is not a Repeal nor is it "Remedial" Legislation so as to Permit Retroactive Operation

To avoid the plain and unequivocal language of chapter 86-272, Petitioners argue two exceptions to the general rule of prospective application. First, they contend that the amendment is actually a repeal. Alternatively, they argue that the statute is remedial. Either way, Petitioners contend that retroactive application is appropriate.

As to the "repeal," Plaintiffs have done nothing more than choose the label that suits their purpose. In actuality, the Act never uses the word "repeal." Rather, chapter 272 twice refers to the amendment. This is consistent, of course, with the action taken by the legislature. The statute of repose was not abolished in toto. The change merely deleted the repose provision as it applies to product liability actions.

In contrast, the cases relied upon by Plaintiffs to support their retroactivity argument consistently use the language "repeal." For example, the guest statute which is interpreted in Carr v. Crosby Builders Supply Co., Inc., 283 So.2d 60 (Fla. 4th DCA 1973)

was specifically "repealed." Chapter 72-1, Laws of Florida, provided "Section 320.59, Chapter 320 Florida Statutes is repealed." Similarly, the usury statute at issue in Tel Service Co., Inc. v. General Capital Corp., 227 So.2d 667 (Fla. 1969) had been specifically repealed. Thus, to find that the Legislators in this instance intended a "repeal" defies logic where the precise language of the Act speaks of an "amendment."

Even if the statute itself had been labeled a "repeal," this would not be determinative of the issue of retroactivity, since it is clearly the intent of the legislature which must control, not the label. That intent, as discussed above was to provide prospective only application. Moreover, as the brief of Ford Motor Co. in Pait v. Ford painstakingly points out, the legislative history does not support Plaintiffs' contentions. See Ford's brief at 17-20.

In sum, the only support Plaintiffs can provide for their contention that chapter 86-272 is a repeal requiring retrospective operation is the fact that they have labeled it as such. The language of the Act and its legislative history reveal the fallacy of this position.

Plaintiffs' argument that this is a remedial statute is equally unavailing. The Academy seems to define a remedial statute as one which "remedies an existing problem." The simple response is if remedial statutes were defined in that manner, all amendments as well as new statutes are designed to remedy some existing problem and would be remedial. Thus, if the Academy's

definition were to be accepted as true, there would be no general rule of prospective application and all statutes would be retroactive. Obviously, the fact that Petitioners choose to label this statute as remedial does not make it so.

This becomes even more evident by a review of the decisions upon which Petitioners rely. For example, in City of Orlando v. Desjardins, 493 So.2d 1027 (Fla. 1986), the issue was whether an amendment to the Public Records Act which exempted a public entity's litigation file from disclosure was remedial. The court found the amendment to be remedial explaining:

> The statutory exemption, according temporary protection from the disclosure of sensitive documents, is addressed to precisely the type of "[r]emedial rights [arising] for the purpose of protecting or enforcing substantive rights.

Id. at 1028. Similarly, in Florida Patient's Compensation Fund v. Von Stetina, 474 So.2d 273 (Fla. 1985), this Court found that an amendment to the medical malpractice statute which prescribed the method by which a judgment was to be paid was remedial in nature. Goodfriend v. Druck, 289 So.2d 710 (Fla. 1974) also relied upon by the Academy involved the retroactivity of an amendment related to the remedies provided by the usury statute.

The common thread running through each of these decisions is that they involved the remedy or procedure incident to a substantive cause of action. Here, the issue is the substantive cause of action. As discussed in detail, infra, a statute of repose defines substantive rights. In legislating the period of liability or existence of a product liability cause of action,

the legislature has defined as an essential element that it be filed within twelve years. If no action is brought within twelve years, there is no cause of action. Since the statute of repose defines substantive rights, it clearly can not fall within the exception for remedial legislation.

C. Prospective Only Application is Consistent With the Numerous Cases on Statutes of Limitations and Repose

While Plaintiffs have chosen to rely on cases which are plainly inapplicable, the most instructive cases are those specifically determining the effect of statutes of limitations and/or repose. It is understandable that petitioners would ignore these decisions since they refute the position taken by Plaintiffs.

The Florida Supreme Court and District Courts of Appeal have consistently held that a statute of limitations or repose will not be applied retroactively. Specifically, where an amendment has been made which would operate to shorten one's time to sue, the courts have found the statutes to be prospective only. Stuyvesant Ins. Co. v. Square D. Co., 399 So.2d 1102 (Fla. 3d DCA 1981) (statute of repose applicable to improvements to real property could not be retroactively applied to shorten plaintiffs' time to sue); Foley v. Morris, 339 So.2d 215 (Fla. 1979) (new statute of limitation which shortened time to sue from four years to two years could not be applied retroactively); Garafalo v. Community Hosp. of South Broward, 382 So.2d 722 (Fla. 4th DCA 1980) (two-year statute of limitations as to suits for negligence against hospitals in their

capacity as health care provider was not to be applied retroactively).

Even more significantly, this Court in Homemakers Inc. v. Gonzales, 400 So.2d 965 (Fla. 1981) held that plaintiff was not entitled to the benefit of an amendment lengthening the statute of limitation. In that case, plaintiff was injured on April 2, 1973, as a result of defendant's alleged medical malpractice. Suit was instituted on July 9, 1976. At the time the injury occurred, the governing statute of limitation was two years and thus plaintiff's action, which was not filed until three years and three months later, would have been barred. Subsequently, as of January 1, 1975, the statute was amended in such a way that plaintiff's cause of action would not have been precluded.

The Court held that the amendment to the statute applied prospectively only and thus plaintiff could not obtain the benefit of the lengthened statute of limitations. As the dissent pointed out, this decision expands prior cases which held that if the new statute was enacted before the prior statute had run and thus before the cause of action was barred, the new statute would be applicable; otherwise the new statute would be prospective only. See Walter Denson & Son v. Nelson, 88 So.2d 120 (Fla. 1956); Mazda Motors of America v. S.C. Henderson & Sons, Inc., 364 So.2d 107 (Fla. 1st DCA 1978); Neff v. General Development Corp., 354 So.2d 1275 (Fla. 2d DCA 1978); Martz v. Riskamm, 144 So.2d 83 (Fla. 1st DCA 1962).

As a result of the Homemakers decision, the law in Florida is that an amendment to a statute of limitations or repose which would lengthen the time in which one may sue is inapplicable to pending causes of action whether or not the cause of action was barred on the effective date of the new statute.

Applying the foregoing to the present case, it is apparent that the applicable statute is section 95.031(2) Florida Statutes (1985) which provided that all product liability actions would be barred if not filed within twelve years from the delivery of the original product to the original purchaser. The fact that the legislature subsequently amended the statute so as to no longer provide a bar after twelve years cannot alter plaintiffs' or defendants' rights acquired under the prior statute. See also CBS Inc. v. Garrod, 622 F. Supp. 532 (M.D. Fla. 1985) (repeal of a statute does not divest one of a defense which arose under the former statute).

II. SECTION 95.031(2), FLORIDA STATUTES (1985), AS INTERPRETED BY PULLUM IS AN ABSOLUTE BAR TO THE PLAINTIFF'S CLAIM

Plaintiffs' argument at the trial court and on appeal is that Pullum v. Cincinnati, Inc., 476 So.2d 657 (Fla. 1985), reh'g denied, appeal dismissed, 106 S. Ct. 1626 (1986) cannot be applied retroactively to bar Plaintiffs' cause of action. "Retroactivity" is a misnomer because the issue before this Court, is whether a decision overruling a prior decision of unconstitutionality renders the statute valid from the date of its enactment. The

issue is not the retroactivity of a judicial decision. However, we address the issue using such terminology because of the use of that term in Plaintiffs' briefs.

A. A Decision Overruling a Prior Decision of Unconstitutionality Renders the Statute Valid From the Date of its Enactment

It has long been established in Florida that if a decision holding a statute unconstitutional is subsequently overruled, the statute will be held valid from the date it first became effective. Thus, in 1911, the Supreme Court in Christopher v. Mungen, 61 Fla. 513, 55 So. 273 (1911) stated the principle which is still viable today:

> Where a statute is judicially adjudged to be unconstitutional, it will remain inoperative while the decision is maintained; but if the decision is subsequently reversed, the statute will be valid from the date it first became effective, even though rights acquired under particular adjudications where the statute was held to be invalid will not be affected by the subsequent decision that the statute is constitutional.

55 So. at 280 (emphasis added). On rehearing, the court further clarified its position to reflect that the statute would be applied to everyone except the parties to the decision holding the statute unconstitutional. 55 So. at 281.

The court below correctly utilized the Christopher decision to explain the effect of the Pullum decision on the statute of repose and held that the overruling of a decision holding a statute unconstitutional validates the statute as of its effective date. This comports with the general proposition that a statute is either

constitutional or unconstitutional. If it is constitutional, it is valid from its inception. Here, section 95.031(2) is valid since 1975.

Plaintiffs ignore this long-standing proposition of law and instead rely on the decision in Florida Forest and Park Service v. Strickland, 154 Fla. 472, 18 So.2d 251 (1944).[4] This reliance is misplaced. Florida Forest involved a change in the judicial interpretation of a statute governing the appeals process for a worker's compensation claim. It did not involve the constitutionality of a statute and thus, the assertion of the Florida Forest case is erroneous and the precedent is inapplicable.

Moreover, upon review of the Florida Forest case, it is evident that it can provide no relief for Plaintiffs herein. The case commences with the general proposition that "ordinarily, a decision of a court of last resort overruling a former decision is retrospective as well as prospective in its operation." Id. at 253. A court can alter the general rule by specifically declaring in the opinion that the decision will have only prospective effect. Id. Parkway General Hosp., Inc. v. Stern, 400 So.2d 166 (Fla. 3d DCA 1981). In Pullum, the Florida Supreme Court did not indicate that its decision would have prospective effect only. In fact, Pullum itself was being applied retroactively.

---

[4] The Academy also attempts to rely on the test for retroactivity set forth in Chevron Oil Co. v. Huson, 404 U.S. 97 (1971). That test is inapplicable to a determination of state law. Lamb v. Volkswagenwerk A.G., 631 F. Supp. 144 (S.D. Fla. 1986) and even if applied it would not result in retroactive application of Pullum. Id.

Pullum's equal protection argument was that those individuals like himself who were injured between the eighth and twelfth year were given less time to sue than one injured after the twelve-year period. The Supreme Court swept away this argument by ruling that all plaintiffs would be treated the same--after twelve years, no product liability suit can be filed.

If the Pullum decision applied prospectively, only those plaintiffs who were injured after twelve years and who had cases pending when Pullum was decided would still be treated more favorably than Pullum and persons in his position. Thus, the Pullum decision, if prospective only, would not have eliminated that plaintiff's equal protection argument.

On rehearing, this Court was squarely faced with the issue of retroactivity when plaintiff acknowledged that the decision was being applied retroactively and argued that this would be a denial of due process. Plaintiff's motion for rehearing was denied. Ultimately, the United States Supreme Court when faced with this issue by way of appeal dismissed for want of a substantial federal question. This constitutes an adjudication on the merits. Hicks v. Miranda, 422 U.S. 332, 95 S. Ct. 2281, 45 L. Ed. 2d 223 (1975). Finally, this Court has denied Cassidy's petition for review which raised issues identical to those presented here. Cassidy v. Firestone Tire & Rubber Co., No. 69,668 (Fla. March 27, 1987).

In sum, both this Court and the United States Supreme Court have faced the issues of whether retroactive application of the Pullum decision violates a plaintiff's constitutional rights.

Those courts have determined that no violation has occurred.[5] Since the "injury" was more direct in Pullum and the courts declined to offer relief, Plaintiffs herein certainly cannot stand any better stead.

Plaintiffs attempt to brush aside the general rule stated in Florida Forest and rely instead on the exception to the "relation back" rule recognized by Florida Forest, to wit: 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 253.[6] Plaintiffs argue here that they have acquired property rights thereby triggering the exception to the "relation back" rule. Such contention is without basis in law or fact.

The sole ground for this and other similarly situated Plaintiffs' contention is that they have filed a lawsuit in alleged

---

[5] It has been held by the United States Supreme Court that there is no impediment-constitutional or philosophical-that prohibits giving a judicial decision retrospective effect. Tehan v. United States, 382 U.S. 406, 86 S. Ct. 459, 15 L.Ed.2d 453 (1966). Assuming that the Pullum decision, rather than constitutionality of the statute, were involved, whether or not to give the decision retroactive effect would be up to the court which rendered the decision.

[6] In Florida Forest, plaintiff relied upon an existing interpretation of a statute in appealing a commissioner's decision directly to circuit court. An overruling decision held that a claimant must first exhaust administrative remedies before proceeding to circuit court. On those facts, the court ruled that a plaintiff who had proceeded along a judicially approved statutory course of procedure could not have his contract rights cut off.

reliance on Battilla and expended time and money in litigation. The District Court in Eddings v. Volkswagenwerk et al., 635 F. Supp. 45 (N.D. Fla. 1986), appeal pending, No. 86-3068, aptly responded to this argument:

> Obviously, plaintiff has spent money in work of the preparation of the case. But that does not give plaintiff a property right anymore than defendant's expenditures of money in defense have given them a property right over plaintiff. Plaintiff has not received money or property, or goods or services, or any other thing of value, in reliance on the Battilla decision.
>
> Plaintiff brought a lawsuit. As with any lawsuit, he might or might not prevail. Absent the Pullum decision, there would have been no property right created in him to money spent in litigation he may have lost. The Pullum decision could not, and does not, alter that fact.

Id. at 47.

Plainly, the instant Plaintiffs did not acquire their right to sue in reliance upon the decision in Battilla. "The right to sue occurred by accident, not by any conscious decision made in reliance upon judicial precedent." Hartman v. Westinghouse Electric Corp., No. 83-517-CIV-ORL (M.D. Fla., Dec. 10, 1985), aff'd, No. 85-3967 (11th Cir. June 20, 1986). As in Hartman, the Plaintiffs herein did not forebear from bringing their action within twelve years after the date of delivery of the subject vehicle as required by section 95.031(2), based upon any alleged reliance on the holding in Battilla that section 95.031(2) was unconstitutional. "The only reason that the instant case was commenced after the statute of repose had run was because the

injury did not occur until that time. Thus, it cannot be said that any contract or property rights were acquired in reliance upon Battilla." Hartman.

In an analogous situation, the Third District in Parkway General Hosp., Inc. v. Stern, 400 So.2d 166 (Fla. 3d DCA 1981), rejected an argument concerning reliance in the context of a change in decisional law. The court therein faced the issue of whether its holding that a wife is liable for her husband's medical bills should be applied retroactively.

> 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.

Id. at 167.

Stated somewhat differently, Battilla did not induce Plaintiffs to fail to take some action which might have preserved some rights they might have had. The failure to act was solely a function of the fact that the accident had not happened yet. At best, Battilla possibly induced Plaintiffs to file a claim for relief to which they were not entitled in the first place and, indeed, required Defendants to defend a lawsuit against which the legislature had intended to protect it. If, in fact, Plaintiffs' attorneys expended efforts in investigation and legal work, their

reliance upon their own personal assessment of the law--one which was wrong when made and proven wrong by the Florida and United States Supreme Court decisions in Pullum--has been matched by Defendants' costs and legal efforts in defending against a claim which was erroneously asserted.

Based on these decisions, it is apparent the general rule which declares a statute valid from the date of its enactment is applicable to this case. When Plaintiffs filed their lawsuit, more than twelve years had elapsed since the delivery of the product to its original purchaser and thus their product liability cause of action had been extinguished by a viable statute which continued to be operative throughout all applicable periods involved in this case.

B. Plaintiffs do not Have a Vested Property Right in an Accrued Cause of Action

The Academy argues that Plaintiffs have a "vested property right" in an accrued cause of action which cannot be taken away without violating the "due process" clause of the Florida and United States Constitutions. This argument was not asserted by petitioner below, nor has it been asserted by him in this Court. As such, this issue should not now be injected into this lawsuit by Amicus. Acton v. Ft. Lauderdale Hosp., 418 So.2d 1099 (Fla. 1st DCA 1982), aff'd, 440 So.2d 1282 (Fla. 1983). Even if this issue is considered, it can readily be disposed of.

The major fallacy with Plaintiffs' contention that they have acquired "vested rights" which are entitled to protection is that

Plaintiffs acquired no "rights" at all under Battilla. Battilla allowed Plaintiffs to file a lawsuit conditioned upon an accident occurring, when, in fact, Plaintiffs had no cause of action by virtue of section 95.031(2). An overview of the statute of repose and its operation makes this clear.

A statute such as section 95.031(2) is denominated a "statute of repose" because it sets a fixed limit after the time of the product's manufacture, sale, or delivery beyond which the manufacturer or seller would not be liable. Such statutes are distinguished from ordinary statutes of limitations that govern the time within which lawsuits may be commenced after a cause of action has accrued. Rather than being directed at the remedy, statutes of repose extinguish the right of action itself before (or after) it arises. Bauld v. J.A. Jones Construction Co., 357 So.2d 401 (Fla. 1978); Thornton v. Mono Mfg. Co., 99 Ill. App. 3d 722, 425 N.E.2d 522, 525 (2d DCA 1981).

The significance of the distinction between "repose" statutes and ordinary limitations statutes was explained by the New Jersey Supreme Court when faced with a constitutional challenge to a ten year statutory limitation upon improvements to real property:

> This formulation suggests a misconception of the effect of the statute. It does not bar a cause of action; its effect, rather, is to prevent what might otherwise be a cause of action, from ever arising. Thus injury occurring more than 10 years after the negligent act allegedly responsible for the harm, forms no basis for recovery. The injured party literally has no cause of action. The harm that has been done is damnum absque injuria - a wrong for which law affords no redress. The function of

> the statute is thus rather to define substantive rights than to alter or modify a remedy. The legislature is entirely at liberty to create new rights or abolish old ones as long as no vested right is disturbed.

Rosenberg v. Town of North Bergen, 61 N.J. 190, 293 A.2d 662, 667 (1972). Accord Cheswold Volunteer Fire Co. v. Lambertson Constr. Co., 489 A.2d 413 (Del. 1984); Colton v. Dewey, 212 Neb. 126, 321 N.W.2d 913 (1982).

The enactment of statutes of repose are generally intended to shield manufacturers of durable goods from "open-ended" liability created by allowing claims for an indefinite period of time after the product was first sold and distributed. 44 Fed. Reg., at 62,733. Once a time limit on the assertion of a potential plaintiff's cause of action expires, defendants are effectively "cleared" of any wrongdoing or obligation. Colony Hill Condo I Ass'n v. Colony Co., 320 S.E.2d 273 (N.C. App. 1984). Thus, contrary to Plaintiffs' claim of a "vested right," it is in fact Defendants who have acquired a vested right to be free from the suit herein.

Even under the "access to courts" provision used in Battilla and receded from in Pullum, Plaintiffs, here have acquired no vested rights. Article I, section 21 of the Florida Constitution declares that "[t]he courts shall be open to every person for redress of any injury . . . ." "Any injury" necessarily means a legal injury, that is, a violation of a legal right in some way or a violation of the law that affects him adversely. Barnes v. Kyle, 202 Tenn. 529, 306 S.W.2d 1 (1957). Thus, courts are open to those who suffer an

invasion of a legal right as established by constitutional, statutory or common law. Slatcoff v. Dezen, 76 So.2d 792 (Fla. 1954). Consequently, if the legislature chooses to classify some damage as outside the realm of "legal injury," it may do so, so long as no other constitutional provision is violated.[7]

Applied to the present case, it is clear that by operation of the statute of repose, at the end of the twelfth year there was no cause of action. This the statute was permitted to do. Plaintiffs simply did not and could not, by legal definition, have acquired any rights under Battilla. Battilla merely declared in a limited fashion that section 95.031(2) was unconstitutional and therefore did not have to be considered under the specific facts of Battilla. 392 So.2d at 874. Battilla was a mistake of law as later acknowledged by the court in Pullum. Respondent respectfully submits that one cannot acquire a right by virtue of a mistake of law--at least not under the facts and circumstances of the instant case.

---

[7] A number of courts in other jurisdictions with an "open court" constitutional provision have sustained statutes similar to Florida's against the challenge that the statute unconstitutionally abolished the claim. These courts have held that unless the injury occurs within the statutory time period, there is no cognizable claim. Tetterton v. Long Mfg. Co., Inc., 332 S.E.2d 67, 72 (1985); Lamb v. Wedgewood South Corp., 302 S.E.2d 868, 880 (1983); Anderson v. Fred Wagner and Roy Anderson, Jr., Inc., 402 So.2d 320 (Miss. 1981); Burmaster v. Gravity Drainage District No. 2 of St. Charles Parish, 366 So.2d 1381 (La. 1978). See also Adair v. Koppers Co., Inc., 541 F. Supp. 1120 (N.D. Ohio 1982); Yarbro v. Hilton Hotels Corp., 655 P.2d 822 (Col. 1982); Klein v. Catalano, 386 Mass. 701, 437 N.E.2d 514 (1982); McMacken v. State, 320 N.W.2d 131, aff'd on reh'g, 325 N.W.2d 60 (S.D. 1982).

Moreover, a vested right is more than a mere expectation based upon an anticipation of the continuance of existing law. 631 F. Supp. at 1149. Lamb v. Volkswagenwerk A.G., 631 F. Supp. 1144 (S.D. Fla. 1986); Lamb v. Wedgewood South Corp., 302 S.E.2d 868 (N.C. 1983). See also In re Will of Martell, 457 So.2d 1064 (Fla. 2d DCA 1984). The practical result of a contrary conclusion would be the stagnation of the law in the face of changing societal conditions. Singer v. Sheppard, 464 Pa. 387, 346 A.2d 897, 903 (1975).

Griffin's reliance on Logan v. Zimmerman Brush Co., 455 U.S. 422, 102 S. Ct. 1148, 71 L. Ed. 2d 265 (1982) for the notion that they have a property right in an accrued cause of action is to no avail. The issue in Logan was:

> [w]hether a State may terminate a complainant's cause of action because a state official, for reasons beyond the complainant's control, failed to comply with a statutorily mandated procedure.

422 U.S. at 425. Logan represents an entirely different situation than that present in the instant case. Logan involved an issue of procedural due process. The holding of the Court was that where the State had recognized a right of recovery for a particular wrong, due process required that the state provide a hearing on the merits of the claim.[8]

Plaintiffs herein, unlike plaintiff in Logan, had no cause of action when they filed their lawsuit by virtue of the statute

---

[8] Similarly, in Brinkenhoff-Faris v. Hill, 280 U.S. 673 (1930), the court was concerned with the violation of procedural due process, not the rights of the plaintiff on the merits.

of repose. Plaintiffs' cause of action was terminated by the passage of time and not by any action on the part of the Florida Supreme Court. Nothing was taken away by Pullum because any cause of action Plaintiffs may have had was extinguished by operation of the statute of repose. On the contrary it was Defendant who has acquired a vested right of "no liability"--a right now confirmed in Pullum by both the Florida Supreme Court and the United States Supreme Court.

CONCLUSION

Based on the foregoing recitation of facts and law, GENERAL MOTORS respectfully submits that the decision of the Third District should be affirmed. The first certified question should be answered in the negative and the second certified question should be answered affirmatively.

Respectfully submitted,

RUMBERGER, WECHSLER & KIRK
One Biscayne Tower
Suite 3410
2 South Biscayne Boulevard
Miami, Florida 33131
(305) 358-5577

By Wendy Lumish
M. STEPHEN SMITH, III
WENDY F. LUMISH

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 26 day of May, 1987, to: FRED E. GLICKMAN, P.A., Suite 508, 9200 S. Dadeland Blvd., Miami, Florida 33156; EDWARD T. O'DONNELL, ESQ., Mershon, Sawyer, Johnston, et al., Southeast Financial Center, Suite 4500, 200 S. Biscayne Boulevard, Miami, Florida 33131-2378; DAVID L. SULLIVAN, ESQ., Usich & Sullivan, 9100 S. Dadeland Boulevard, Suite 950, Miami, Florida 33156; and ROBERT M. ERVIN, JR., ESQ., Ervin, Varn, Jacobs, et al, P.O. Drawer 1170, Tallahassee, Florida 32303.

RUMBERGER, WECHSLER & KIRK
One Biscayne Tower
Suite 3410
2 South Biscayne Boulevard
Miami, Florida 33131
(305) 358-5577

By Wendy Lumish
M. STEPHEN SMITH, III
WENDY F. LUMISH

WFL8892