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IN THE SUPREME COURT OF FLORIDA

CASE NO. 70,475

AQUILINA LAZO,

Petitioner,

vs.

BARING INDUSTRIES, INC.
and CHICAGO DRYER COMPANY
LAUNDRY MACHINES,

Respondents.

INITIAL BRIEF OF PETITIONER

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INTRODUCTION

Pursuant to this court's Briefing Schedule dated May 5, 1987, Petitioner, AQUILINA LAZO, hereby files her Initial Brief on the merits.

Petitioner was the Plaintiff in the trial court. Respondents BARING INDUSTRIES, INC. and CHICAGO COMPANY LAUNDRY MACHINES were the Defendants.

The symbol "R" will be used to refer to the record on appeal.

Petitioner will be referred to in this Brief as "Petitioner" or "MRS. LAZO." CHICAGO DRYER COMPANY LAUNDRY MACHINES will be referred to as "CHICAGO DRYER" or "Respondent" and BARING INDUSTRIES, INC. as "BARING" or "Respondent." All emphasis has been supplied unless otherwise indicated.

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STATEMENT OF THE CASE AND FACTS

On December 17, 1982, Petitioner, MRS. AQUILINA LAZO, was employed by Party Time and was operating an ironing machine known as a gas heated Flatwork Ironer bearing serial number 30970. (R.1-6) This Ironer was manufactured and delivered by Respondent CHICAGO DRYER to the Respondent BARING, the distributor, in September, 1967. (R.80-84) BARING in turn delivered the Ironer to its original purchaser, Sossin Gardens and Rehabilitation Center, in September, 1967. (R.80-84) While she was using the Ironer on December 17, 1982, it suddenly and without warning malfunctioned, causing her right hand to become caught and crushed in the rollers of the machine. (R.2) As a result of the injury to her hand and arm, MRS. LAZO has become permanently disabled. (R.2-3)

On September 30, 1983, MRS. LAZO timely filed a complaint against both CHICAGO DRYER and BARING for (1) strict liability, (2) breach of implied warranty of merchantability, and (3) negligence. (R.1-6) BARING answered and alleged as an affirmative defense that MRS. LAZO was contributorily negligent. (R.7-8) Subsequently, CHICAGO DRYER filed an amended motion to dismiss, raising for the first time the affirmative defense of the statute of limitations. (R.17-18) Thereafter, with leave of court, BARING on December 11, 1985, filed an amended answer and affirmative defenses also raising the statute of limitations. (R.26-27) BARING then moved for summary judgment on April 28, 1986 and basically alleged that in light of the opinion of the Florida Supreme Court in Pullum v. Cincinnati,

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Inc., 476 So.2d 657 (Fla. 1985) [which revived the 12-year statute of repose under Section 95.031(2) Florida Statutes], MRS. LAZO's accrued cause of action was now barred inasmuch as more than twelve years had passed from the date of delivery of the Ironer to the original purchaser. (R.32-71) After a hearing on the motion, the trial judge on June 24, 1986, granted BARING's motion for summary judgment, and MRS. LAZO timely filed a motion for rehearing. (R.105-109) In the interim, CHICAGO DRYER also filed a motion for summary judgment relying upon the holding in the Pullum decision. (R.80-104) On July 14, 1986, the court heard argument of counsel on CHICAGO DRYER's motion for summary judgment, at the conclusion of which the court deferred ruling and directed all counsel to appear on July 24, 1986 for the purpose of entertaining argument on MRS. LAZO's motion for rehearing on the June 24, 1986 order granting summary judgment for BARING (R.115-116) On July 24, 1986, the court again heard argument of counsel and directed the parties to submit respective memoranda of law. (R.116) On August 5, 1986, MRS. LAZO filed her memorandum of law in support of motion for rehearing and in opposition to CHICAGO DRYER's motion for summary judgment. (R.115-135) Thereafter, BARING and CHICAGO DRYER filed their respective memoranda of law. (R.141-150; 153-194) By orders dated September 8 and 23, 1986, the trial court, applying retroactively the holding in Pullum v. Cincinnati, supra, entered summary final judgment on behalf of CHICAGO DRYER and by order of September 24, 1986, denied the motion for rehearing on the order granting summary final judgment in favor of BARING. Plaintiff,

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MRS. LAZO, timely perfected an appeal from those orders to the District Court of Appeal of Florida, Third District.

The District Court by opinion filed April 14, 1987, affirmed the summary judgments entered in favor of BARING and CHICAGO DRYER and certified the following questions as being of great public importance:

> I. Should the legislative amendment of section 95.031(2), Florida Statutes (1983), abolishing the statute of repose in products liability actions, be construed to operate retrospectively as to a cause of action which accrued before the effective date of the amendment?
>
> II. If not, should the decision of Pullum v. Cincinnati, Inc., 476 So.2d 657 (Fla. 1985), appeal dismissed, ___U.S.___, 106 S.Ct. 1626, 90 L.Ed.2d 174 (1986), which overruled Battilla v. Allis Chalmers Mfg. Co., 392 So.2d 874 (Fla. 1980), appply so as to bar a cause of action that accrued after the Battilla decision but before the Pullum decision.

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POINTS ON APPEAL

I.

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

II.

WHETHER THE DECISION OF PULLUM V. CINCINNATI, INC., 467 SO.2D 657 (FLA. 1985), WHICH OVERRULED BATTILLA V. ALLIS CHALMERS MFG. CO., 392 SO.2D 874 (FLA. 1980) SHOULD NOT BE APPLIED SO AS TO BAR A CAUSE OF ACTION THAT ACCRUED AFTER THE BATTILLA DECISION BUT BEFORE THE PULLUM DECISION?

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SUMMARY OF ARGUMENT

On December 17, 1982, MRS. LAZO sustained severe and permanent injuries to her arm and hand as the result of a defective Flatwork Ironer manufactured by CHICAGO DRYER and distributed by BARING. At that time she acquired an accrued cause of action which is recognized as a vested property right protected under the due process clause of the 14th Amendment to the U.S. Constitution and Article I, Section 9 of the Florida Constitution. She timely filed a complaint on September 30, 1983. While her lawsuit was pending, the Florida Supreme Court rendered its decision in Pullum v. Cincinnati, Inc., 476 So.2d 657 (Fla. 1985), reversing its prior construction of Section 95.031(2), Florida Statutes, and upholding the validity of the twelve year period of repose in product liability actions. Subsequently, the legislature, effective July 1, 1986, repealed the statute of repose for product liability actions. Chapter 86-272, §§2 and 3, Laws of Florida. In spite of the repeal, the trial court, based upon the Pullum decision, granted the Respondents' motions for summary judgment.

The inaction on the part of the legislature to the construction of Section 95.031(2), Florida Statutes (1975), in Battilla v. Allis Chalmers Mfg. Co., 392 So.2d 874 (Fla. 1981), holding the statute of repose unconstitutional as applied to plaintiffs injured more than twelve (12) years after the date of initial delivery and the immediate repeal of the statute of repose in product liability

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actions by the legislature in reaction to the Pullum decision, evidences the legislative intent and purpose that the statute of repose not be revived. In addition, the general rule is that repealing statutes be given retrospective operation. Therefore, the repeal of the statute of repose in product liability actions should be construed to operate retrospectively as to a cause of action which accrued before the effective date of the repeal.

Inasmuch as MRS. LAZO's accrued cause of action is a vested property right recognized and protected under both Federal and Florida law, the retroactive application of the Pullum decision would result in an arbitrary taking of property prohibited by the due process clause of the Fourteenth Amendment to the U.S. Constitution and Article I, Section 9, of the Florida Constitution. Further, such action would violate the established law that rights acquired under a former construction of a statute by the Supreme Court should not be destroyed by giving a retrospective operation to a subsequent overruling decision. Florida Forest and Park Service v. Strickland, 154 Fla. 472, 18 So.2d 251 (1944).

While her claims were still pending, the legislature, effective July 1, 1986, repealed the twelve (12) year statute of repose for product liability cases. Ch. 86-272, §§2 and 3, Laws of Fla. The subsequent entry of summary judgment for Defendants results in a denial of equal protection of the law, as any plaintiff after July 1, 1986 can institute a product liability action regardless of the date of delivery to the initial purchaser.

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The Pullum decision contains no expression that it be applied retroactively. Moreover, even if such intent can be gleaned from the opinion, a reasonable time must be given to a party to file suit as required by the constitutional provision of "access to the courts" under Article I, Section 21 of the Florida Constitution (1968). Retroactive application of the Pullum decision would therefore be in violation of Article I, Section 21, of the Florida Constitution.

Finally, in view of the fact that the legislature has repealed the statute of repose for product liability actions and there is no longer any legitimate state objective in preventing perpetual liability in this area, Petitioner would most respectfully suggest that this Court recede from its holding in the Pullum decision.

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ARGUMENT

I.

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

The legislative history with respect to the statute of repose in product liability actions evidences a clear intent on the part of the legislature that the abolishment of said statute in product liability actions should be applied retrospectively to causes of action which accrued prior to the effective date of the amendment of Section 95.031(2), Florida Statutes (1985).

In support of this position, Petitioner would first note that unlike the criminal law, there is no per se constitutional prohibition against the retroactive application of laws pertaining to civil matters. Anderson v. Ocala, 83 Fla. 344, 91 So. 182 (1921); State ex rel Jacksonville Gas Co. v. Lee, 112 Fla. 109, 150 So. 225 (1933). In addition, the fundamental rule of statutory construction is that the legislative intent is the polestar by which the court must be guided and this intent, once ascertained, must be given full effect. Tyson v. Lanier, 156 So.2d 833 (Fla. 1963); In Re Estate of Williams, 182 So.2d 10 (Fla. 1965); State v. Webb, 398 So.2d 820, 824 (Fla. 1981); Gracie v. Deming, 213 So.2d 294 (Fla.

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2d DCA 1968). Thus, the exception to the presumption that legislation operates prospectively is well recognized where there exists a showing on the face of the law that retroactive application is intended. Yamaha Parts Distributors, Inc. v. Ehrman, 316 So.2d 557 (Fla. 1975). Furthermore, statutes which only operate in confirmation of rights already existing do not fall within the purview of the general rule against retrospective operation of statutes. City of Lakeland v. Cantinella, 129 So.2d 133 (Fla. 1961).

In attempting to ascertain the legislative intent, the courts should consider the legislative history of the statute as well as the evil to be corrected and the purpose of the enactment. State Board of Accountancy v. Webb, 51 So.2d 296 (Fla. 1951); Gay v. Canada Dry Bottling Co., 59 So.2d 788 (Fla. 1952).

The Florida legislature in 1974 enacted major revisions to the limitation of action provisions of Chapter 95 of the Florida Statutes. Chapter 74-382, Laws of Florida. Amongst those changes was the enactment of a twelve (12) year statute of repose in product liability actions. Chapter 74-382, Section 3, Laws of Florida; Section 95.031(2), Florida Statutes (1974 Supp.). Additionally, Section 7 of Chapter 74-382, Laws of Florida, for the first time provided a twelve (12) year statute of repose with respect to all actions founded on the design, planning or construction of an improvement to real property. Section 95.11(3)(c), Florida Statutes (1974 Supp.) [1]

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[1] Previous thereto, the legislature in 1967 had enacted a twelve (12) year statute of repose with respect to such actions only against professional engineers or registered architects. Chapter 67-284, Laws of Florida, Section 95.11(10), Florida Statutes (1967)

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The first challenge to the constitutionality of the statute of repose enacted by the legislature in 1974 was raised in Overland Construction Company, Inc. v. Sirmons, 369 So.2d 572 (FLa. 1979). In that case, plaintiffs in the trial court successfully sought a determination that the twelve (12) year statute of repose with respect to actions founded on the design, planning or construction of an improvement to realty [Section 95.11(3)(c), Florida Statutes (1975)] was unconstitutional. On appeal, this Court, finding that the statute of repose violated the access to the courts provision of the Florida Constitution Article I, Section 21, affirmed the trial court. In response to the decision in Overland Construction Company, the legislature immediately passed Chapter 80-322, Laws of Florida, which reenacted and lengthened the statute of repose to fifteen (15) years for actions founded on the design, planning or construction of an improvement to real property. Section 95.11(3)(c), Florida Statutes (1980 Supp.) The preamble to Chapter 80-322, Laws of Florida, set out the compelling necessity for a statute of repose in such actions.

Thereafter, in Battilla v. Allis Chalmers Mfg. Co., 392 So.2d 874 (Fla. 1981), this Court held that the statute of repose with respect to product liabilty actions, Section 95.031(2), Florida Statutes (1975), was also unconstitutional [as violative of Article I, Section 21, Florida Constitution (1968)] as applied to all cases where the injury was sustained more than twelve (12) years after the date of delivery to the initial purchaser. In sharp contrast to the reaction to this Court's decision in the Overland case, the

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legislature made no attempt to reenact Section 95.031(2), Florida Statutes. As this Court has held, the failure of the legislature to amend a statute that has been construed in a particular manner may amount to a legislative acceptance or approval of the construction. White v. Johnson, 59 So.2d 532 (Fla. 1952). Clearly, the inaction on the part of the legislature to the Battilla decision expressed the legislative belief that there was no requisite compelling public necessity for a statute of repose in product liability actions and, further, evidenced the legislature's acceptance of this Court's holding that persons injured after twelve (12) years from the date of delivery of the product to the initial purchaser should not be barred from filing suit.

The very next legislative pronouncement with respect to this issue comes in 1986 in swift reaction to the decision in Pullum v. Cincinnati, Inc., 476 So.2d 657 (Fla. 1985), in which this Court receded from its holding in Battilla and determined that Section 95.031(2), Florida Statutes (1975), is not violative of Article I, Section 21, of the Florida Constitution. At the ensuing legislative session, the legislature immediately enacted Chapter 86-272, Section 2, Laws of Florida, repealing outright the twelve (12) year statute of repose for product liability actions. The immediate passage of Section 95.031(2), Florida Statutes (1986 Supp.) unequivocally demonstrated the intent of the legislature that the statute of repose in product liability actions should not be revived. This intent is further illustrated by the enactment of Section 3 of

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Chapter 86-272, Laws of Florida, which mandates that the repeal of the statute of repose take effect immediately (i.e., July 1, 1986), whereas the remainder of the chapter (reducing the statute of limitations for libel and slander from four (4) years to two (2) years) became effective as of October 1, 1986, and specifically states that this shortened statute of limitations is applicable to causes of action accruing after that date.

Finally, the general rule is that repealing statutes should be given retrospective operation and the repealed statute, in regard to its operative effect, is considered as if it had never existed. Yaffee v. International Company, 80 So.2d 910 (Fla. 1955); see also 82 C.J.S. Statutes §§421, 434 (1953).

In light of the legislative history of the statute of repose and the clear intent of the legislature in repealing the statute in product liability actions and, further, in the interest of having substantial justice and right prevail,[2] compels the conclusion that this Court find that the repeal of the statute of repose is to be applied retroactively to all causes of action which accrued before July 1, 1986, the effective date of the repeal.

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[2] See Biggs v. Smith, 134 Fla. 569, 180 So. 106 (1938); and Dominguez v. Bucyrus-Erie Company, 503 So.2d 364 at 365 (Fla. 3d DCA 1987) (J. Ferguson specially concurring), holding that it is the duty of the appellate courts to see that substantial justice and right prevail as contemplated by Article I, Section 21, of the Florida Constitution.

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II.

THE DECISION OF PULLUM V. CINCINNATI, INC., 467 SO.2D 657 (FLA. 1985), WHICH OVERRULED BATTILLA V. ALLIS CHALMERS MFG. CO., 392 SO.2D 874 (FLA. 1980) SHOULD NOT BE APPLIED SO AS TO BAR A CAUSE OF ACTION THAT ACCRUED AFTER THE BATTILLA DECISION BUT BEFORE THE PULLUM DECISION

The retroactive application of Pullum v. Cincinnati to causes of action which accrued prior to that decision results in a denial of both the Florida and federal constitutional guarantees of due process and equal protection as well as a denial of the access to the courts of the Florida Constitution.

A.

VIOLATION OF ARTICLE I, SECTION 9 OF THE FLORIDA CONSTITUTION AND AMENDMENT 14 OF THE U.S. CONSTITUTION

The established law is that where a statute has received a given construction by a court of supreme jurisdiction and rights (including property and contract rights) have been acquired by parties under and accordance with such construction, such rights should not be destroyed by giving a retrospective operation to a subsequent overruling decision. Florida Forest and Park Service v. Strickland, 154 Fla. 472, 18 So.2d 251 (1944); Davis v. Artley Const. Co., 18 So.2d 255 (1944); Aronson v. Congregation Temple De Hirsch, 123 So.2d 408 (Fla. 3d DCA 1960); Fuller v. Riley, 124

So.2d 499 (Fla. 3d DCA 1960). Moreover, the well-recognized principle of law is that an existing right of action which has accrued to a person under the rules of the common law is a vested property right. 16A C.J.S. Const. Law §260 (1984); 10 Fla. Jur. 2d Const. Law §295 (1979); see also Talmadge v. District Sch. Bd. of Lake City, 406 So.2d 1127 (Fla. 5th DCA 1981); Meli v. Admiral Ins. Co., 413 So.2d 135 (Fla. 3d DCA 1982). Accordingly, in Florida Park Service v. Strickland, supra, at 254, this Court held that a potential right to compensation which has accrued as a result of the happening of an injury is a valuable property right which should not be cut off by a subsequent overruling court decision given a retrospective operation. Similarly, the Florida courts have continued to held both explicitly and implicitly that an accrued cause of action is a vested property right protected under Article I, Section 9 of the Florida Constitution (1968) which cannot be arbitrarily abrogated by retroactive application of a statute. State Dept. of Transp. v. Knowles, 402 So.2d 1155 (Fla. 1981); Rupp v. Bryant, 417 So.2d 658 (Fla. 1982); Talmadge v. District Sch. Bd. of Lake City, 406 So.2d 1127 (Fla. 5th DCA 1981), supra; Meli v. Admiral Ins. Co., 413 So.2d 135 (Fla. 3d DCA 1982), supra; Stillwell v. Thigpen, 426 So.2d 1267 (Fla. 1st DCA 1983); Seaboard System R.R., Inc. v. Clemente, 467 So.2d 348, 358 (Fla. 3d DCA 1985). For example, in Rupp v. Bryant, supra, Plaintiffs brought a negligence action against, inter alia, a public school principal and a faculty adviser. At the time the suit was pending, the

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legislature enacted a statute which relieved state employees from personal liabilty and provided that it be applicable to all pending lawsuits. Based on the statute, the trial court dismissed the counts against the principal and faculty adviser. The Florida Supreme Court held that prior to the enactment of the statute, the plaintiffs had a vested right to seek recovery from the principal and faculty adviser, and abolition of this right by retroactive application of the statute would be a violation of due process protected under Article I, Section 9 of the Florida Constitution.

Likewise, the United States Supreme Court in Logan v. Zimmerman Brush Co., 455 U.S. 422, 428, 102 S.Ct. 1148, 1154-55, 71 L.Ed.2d 265, 273 (1982) held that a cause of action is a species of property protected by the Fourteenth Amendment's due process clause and a litigant cannot be arbitrarily deprived of such a right by a retroactive application of a statute or a decision of the state judiciary in construing a statute. See also Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673, 50 S.Ct. 451, 74 L.Ed. 1107 (1930).

MRS. LAZO was injured on December 17, 1982. A cause of action founded on negligence accrues at the time and place when injury occurs and damage results. Luckie v. McCall Mfg. Co., 153 So.2d 31 (Fla. 1st DCA 1963). On that date, the statute of repose, Section 95.031, Florida Statutes (1975), was not effective as to MRS. LAZO under the holding in Battilla v. Allis Chalmers Mfg. Co., 392 So.2d 874 (Fla. 1980) inasmuch as she was injured more than twelve (12) years after the date of delivery to the initial purchaser. A statute

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or part of a statute like Section 95.031, Florida Statutes, which is duly declared unconstitutional by the supremacy of the Florida Constitution is inoperative from the time of its enactment. State ex rel. Nuveen v. Greer, 88 Fla. 249, 102 So. 739 (1924). Thus, it is clear that MRS. LAZO's cause of action validly accrued on December 17, 1982, when she sustained injury as a result of the negligence of the Respondents and at that time she had a right to institute a judicial proceeding. Shearn v. Orlando Funeral Home, 88 So.2d 591, 593 (Fla. 1956). Thereafter, on September 30, 1983, she filed a cause of action seeking her common law right of redress for injury to her person. The suit was timely initiated within the applicable four (4) year statute of limitation. See Section 95.11(3)(a) Florida Statutes (1983).

It is equally evident that under both Florida and Federal law her accrued cause of action is a vested property right protected by the Fourteenth Amendment to the U.S. Constitution and Article I, Section 9 of the Florida Constitution. The retroactive application of the Pullum decision by this Court would improperly and arbitrarily deprive MRS. LAZO of a vested property right, resulting in a violation of her Federal and Florida constitutional "due process" rights. In addition, the retroactive application would be contrary to the long-standing Florida rule of law as expressed in Florida Forest and Park Service v. Strickland, 154 Fla. 472, 18 So.2d 251 (1944), supra, that it is not proper to apply a judicial decision retroactively if such application would deprive Plaintiff of a property right which she has acquired.

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Alternatively, Petitioner submits that under the weighing and balancing tests utilized by this Court, in State Dept. of Transp. v. Knowles, 402 So.2d 1155 (Fla. 1981) and the United States Supreme Court in Chevron Oil Company v. Huson, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971), retroactive application of the Pullum decision would be violation of Petitioner's "due process" rights. In State Dept. of Transp. v. Knowles, supra, this Court was confronted with the issue of retroactive application of a statute granting state employees immunity from tort liability to an accrued cause of action (already in litigation) naming state employees as well as the State of Florida defendants. The following three-pronged test was set out by the Court in determining whether to sustain retroactive application of the statute: (1) the strength of the public interest served by the statute; (2) the extent to which the right is abrogated; and (3) the nature of the remedy. This Court found that the statute effected an abrogation of Knowles' right to his full tort recovery, not merely a procedural adjustment to his remedies, and this abrogation clearly outweighed the public interest in the statute.[3] Likewise, the Pullum decision completely abrogates Petitioner's right to any tort recovery from the Respondents. In addition, there is little or no public interest in immunizing the Respondents, a manufacturer and distributor, from liability, particularly in light of the fact that the legislature has repealed the statute of repose in product liability actions.

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[3] Such as the unwillingness of citizens to serve in the government without immunity.

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In fact, abrogation of Petitioner's right to recovery not only outweighs but is contrary to the public interest in that Petitioner, who has been permanently disabled, would have to depend upon public assistance and welfare for her support.

The United States Supreme Court in Chevron Oil Company v. Huson, supra, was faced with the same issue presented in this case. After plaintiff had initiated his personal injury lawsuit against Chevron, the Supreme Court rendered an opinion in Rodriguez v. Aetna Casualty & Surety Co., 395 U.S. 352 (1969) that the state one-year statute of limitations was controlling rather than the admiralty doctrine of laches. Thereafter, Chevron was granted a summary judgment on the ground that plaintiff's action was barred by the statute of limitation. On appeal, the Supreme Court, in determining whether or not to apply the Rodriguez decision retroactively so as to bar plaintiff's cause of action, held that three separate factors must be considered. First, the decision to be applied nonretroactively must establish a new principle of law. Second, the court must look to the prior history of the rule, its purpose and effect and whether retrospective application will further or retard its operation. Finally, the inequity imposed by retroactive application must be weighed and if substantial inquitable results are produced by retroactive application, there should be a holding of nonretroactivity. Based upon the above factors, and the third factor in particular, the Supreme Court held that the Rodriguez decision would not be given retroactive application.

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As in the Chevron case, at the time Petitioner was injured and at the time she filed suit, the established case law held that the statute of repose was not applicable under the facts of her case. Thus, the Pullum decision established for the first time a new principle of law and overruled established precedent. Without any doubt, the inequitable results of applying Pullum retroactively are substantial. Last, retroactive application of Pullum would definitely be contrary to the intent and purpose of the legislature in not reviving the statute of repose as evidenced by its immediate repeal of the statute after the Pullum decision.

Petitioner would therefore submit that under both Florida and federal case law set out hereinabove, this Court should not apply the Pullum decision retroactively so as to bar Petitioner's accrued cause of action against the Respondents.

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B.

VIOLATION OF "EQUAL PROTECTION" GUARANTEED BY THE 14TH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I SECTION 2, FLORIDA CONSTITUTION (1968)

The Petitioner further contends that the retroactive application of the Pullum decision to the case at bar would result in a denial of her equal protection of the law under the 14th Amendment to the U.S. Constitution and Article I Section 2 of the Florida Constitution (1968) by virtue of the repeal of the statute of repose with respect to actions based upon product liability. During the time MRS. LAZO's lawsuit was pending, the legislature, effective July 1, 1986, repealed that portion of Section 95.031(2) which provided for a twelve (12) year statute of repose in product liability actions. See Ch. 86-272 §§2 & 3, Laws of Fla. Retroactive application of Pullum creates a class of persons whose pending lawsuits are extinguished although their causes of action accrued prior to the Pullum decision. In contrast, those persons who are injured after July 1, 1986, as a result of a defective product can institute suit against the manufacturer regardless of the date of delivery to the initial purchaser.

In order to withstand an equal protection challenge, the classifications created must bear a reasonable relationship to a legitimate state purpose or objective. Pinillos v. Cedars of Lebanon Hospital Corp., 403 So.2d 365 (Fla. 1981). In addition, there must be a rational distinction among the classes of persons.

Purk v. Federal Press Co., 387 So.2d 354, 357 (Fla. 1980). Inasmuch as the legislature has repealed the statute of repose for product liability actions, the classes created by retroactive application of the Pullum decision no longer have any rational distinction nor do they serve any relationship to a legitimate state object. In fact, preventing MRS. LAZO from continuing to prosecute her action is directly contrary to the legislature's intent in abolishing the statute of repose. After the decision in Battilla, holding Section 95.031(2) to be null and void where the cause of action accrues after the twelve (12) year period of repose, the legislature did not attempt to re-enact the statute. However, after the Pullum decision, the legislature immediately repealed Section 95.031(2) with respect to product liability actions. Obviously, the legislature has demonstrated that plaintiffs injured by defective products should not be barred from bringing an action against a manufacturer/distributor by the running of an arbitrary statutory period of repose. Unquestionably, MRS. LAZO would be denied her Federal and Florida constitutional guarantee of "equal protection of the laws."

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C.

VIOLATION OF ARTICLE I, SECTION 21, FLORIDA CONSTITUTION (1968)

Plaintiff would also submit that the retroactive application of the Pullum decision violates her constitutional right to access to the courts for redress of her personal injuries as provided by Article I, Section 21 of the Florida Constitution.

With respect to accrued causes of action, when a statute of limitation is first imposed or shortened, a reasonable time must be provided to allow for suit so it does not operate as a bar for the party to exercise the right to commence the action. Bauld v. J. A. Jones Const. Co., 357 So.2d 401 (Fla. 1978); Universal Engineering Corp. v. Perez, 451 So.2d 463 (Fla. 1984); Durring v. Reynolds, Smith & Hills, 471 So.2d 603 (Fla. 1st DCA 1985). Petitioner would submit that these principles of law are applicable to a decision of the state judiciary in construing a statute of repose under the circumstances presented in the case at bar. See Brinkerhoff-Faris Trust & Savings Co. v. Hill, supra. (The violation of a constitutional right by the state judiciary in construing a statute is no less a violation than if the same result was attained by an exercise of the state's legislative power.) See also Cheshire Hospital v. New Hampshire-Vermont Hospitalization Service, Inc., 689 F.2d 1112 (1st Cir. 1982).

Although this Court in the Pullum opinion overruled its former decisions in Overland and Battilla and revived Section 95.031(2),

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Florida Statutes, with respect to injuries sustained as a result of defective products after the expiration of the twelve (12) year repose period, the Court did not express or manifest any intention that the new construction reviving the effectiveness of Section 95.031(2) be given retroactive application. Furthermore, even if such an intent can be gleaned from the opinion, under the above-cited case law a reasonable time must be given to allow a party with an accrued cause of action to file suit. Failure to do so would result in a clear violation of Article I, Section 21, Florida Constitution (1968). See, e.g., Durring v. Reynolds, Smith & Hills, supra, at 607.

Retroactive application of Pullum would not only deny Petitioner a right to seek recovery from Respondents, but also "a remedy vouchsafed" by Article I, Section 21. Davis v. Artley Const. Co., 18 So.2d 255, 259 (Fla. 1944).

D.

As an alternative, Petitioner would most respectfully suggest that this Court consider receding from its decision in Pullum v. Cincinnati. As a result of the holding in Battilla v. Allis Chalmers Mfg. Co., 392 So.2d 874 (Fla. 1980), supra, that Section 95.031(2), Florida Statutes (1975) was unconstitutional as applied to persons like the Petitioner who were injured more than twelve (12) years after the date of delivery to the initial purchaser, there developed several classifications as to the time frame within

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which a plaintiff injured by a defective product could institute his lawsuit. Those persons injured less than eight years or more than twelve years after the date of initial delivery had four (4) years to file suit pursuant to the statute of limitations governing product liability actions [Section 95.11(3)(e), Florida Statutes]. Those individuals injured more than eight years but less than twelve years after the date of delivery of the product to the initial purchaser had less than four (4) years within which to file suit, the actual time period being computed from the date of injury until the date which is twelve years from the date of delivery to the initial purchaser.

The plaintiff in Pullum v. Cincinnati was injured by a pressbrake machine less than eleven years after the date of delivery to the initial purchaser. He filed suit more than twelve years from the original delivery date but within the applicable four-year statute of limitations. The trial court granted summary judgment in favor of the defendant based on the statute of repose, Section 95.031(2). On appeal to the District Court and this Court, plaintiff alleged that he was denied equal protection of the law because he had less than four years to file suit whereas those plaintiffs injured less than eight years or more than twelve years after the date of the original delivery have a full four years to file their action. This Court affirmed the summary judgment and found that the reduction by the statute of repose of the time within which plaintiff was required to file suit did not deny him or result in a denial of

equal protection of the laws.

Pullum clearly raised only an equal protection argument and the case was decided on that issue. In contrast to the equal protection challenge raised in Pullum, the instant cause presents the additional issues of the denials of the constitutional guarantees of due process of law and access to the courts. In addition, the legislature has now repealed the statute of repose in product liability actions. That statute of repose was the very premise upon which this Court in Pullum determined that there was a legislatively intended purpose to prevent perpetual liability and the prevention of such liability was a legitimate state objective. On the basis of this determination, this Court then receded from its decision in Battilla. With the repeal of the statute of repose, the legislature has determined that perpetual liability does not place an undue burden on the manufacturer. There is simply no longer any state objective (if, in fact, any such objective ever existed) in preventing perpetual liability with respect to product liability actions.

In light of the above, Petitioner would respectfully request that this Court recede from its decision in Pullum v. Cincinnati.

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CONCLUSION

Based upon the foregoing reasons and citations of authority, Petitioner submits that this Court should apply the repeal of the statute of repose for product liability actions retroactively to causes of action like Petitioner's which accrued prior to the effective date of the repeal or hold that the Pullum decision should be applied only prospectively. Alternatively, Petitioner suggests that this Court recede entirely from the holding in Pullum inasmuch as there is no longer any legitimate state objective to be served. Justice and equity as well as the guarantees under the Florida and Federal Constitutions require that Petitioner have her "day in court" to seek redress of her injuries.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Petitioner's Brief on Jurisdiction was mailed this 1st day of June, 1987, to the following counsel of record: STEVEN BERGER, ESQ., Suite B-5, 8525 S.W. 92nd Street, Miami, Florida 33156; and RHEA P. GROSSMAN, ESQ., 2710 Douglas Road, Miami, Florida 33133.

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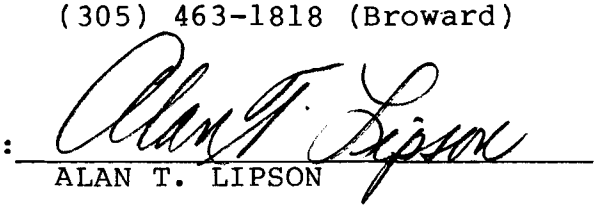
BY: 
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