IN THE SUPREME COURT OF FLORIDA

CASE NO: 70,566

ALBERTO CLAUSELL and PATRICIA CLAUSELL,

Petitioners,

v.

HOBART CORPORATION,

Defendants.

ON REVIEW OF A DECISION OF THE DISTRICT COURT OF APPEAL THIRD DISTRICT

BRIEF OF RESPONDENT HOBART CORPORATION

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INTRODUCTION

This brief is filed on behalf of the Respondent, HOBART CORPORATION ("Hobart"), in support of a final summary judgment entered by the trial court and affirmed by the Third District Court of Appeal. Hobart was the defendant below and Petitioners ALBERTO CLAUSELL and PATRICIA CLAUSELL ("Petitioners" or "Clausells") were the plaintiffs. Reference to the Petitioners' brief will be indicated as (PB), and references to the record will be (R).

STATEMENT OF THE CASE AND FACTS

Hobart accepts the Petitioners' statement of the case and facts with one addition. Since the meat chopper in question was manufactured and sold by Hobart in May, 1969 (PB 1), any claim resulting from its use was barred under the applicable

twelve year statute of repose as of May, 1981. Petitioners failed to insert this critical date in their time chart (PB 1-2).

SUMMARY OF THE ARGUMENT

Pullum correctly concluded that the statute of repose was constitutional because the act was rationally related to a legitimate legislative goal. It was only essential to demonstrate a rational basis underlying this substantive condition imposed upon a plaintiff's right to bring a product liability cause of action. Even if a stricter scrutiny was appropriate, it is clear that the legislature could properly conclude that increasing insurance rates and manufacturers' indefinite exposure to liability provided compelling justifications for enacting the statute of repose. Additionally, the compelling need for a limitation period on products claims was obvious, and it was proper for the Pullum majority to confirm the constitutionality of the time period based on its reasonableness.

It was consistent with the due process clauses of both the Florida and Federal Constitutions to apply the statute of repose, as revived by Pullum, to bar the Petitioners' cause of action. Judicial decisions typically apply retroactively, and neither constitution speaks to this issue. Battilla did not confer property rights upon the Petitioners, especially since it merely invalidated a statute. Even if Battilla had conferred a property right in maintaining a tort action, any such right was

outweighed and abrogated by the statute of repose based on Florida's paramount interests in limiting a manufacturer's exposure, in halting the rise in liability insurance rates, and in fashioning its own rule of tort law.

The amendment eliminating the statute of repose was not solely remedial and hence should apply prospectively only. The statute of repose conferred vested, substantive rights upon Hobart, thus the act repealing it cannot apply retroactively.

ARGUMENT

I.

A. PULLUM WAS CORRECTLY DECIDED BECAUSE SECTION 95.031 WAS RATIONALLY RELATED TO A LEGITIMATE LEGISLATIVE GOAL.

Statutes of repose are legislatively-created devices intended both to control spiraling insurance rates, Universal Engineering Corporation v. Perez, 451 So.2d 463, 466 n.4 (Fla. 1984), and to avoid the inequities inherent in indefinite liability exposure. Pullum v. Cincinnati, Inc., 476 So.2d 657, 659 (Fla. 1985), appeal dismissed, ___ U.S. ___, 106 S.Ct. 1626, 90 L.Ed.2d 174 (1986). These are legitimate areas of legislative concern; and statutes of repose are rationally related to these policy goals. In Pullum, supra, this Court rejected a constitutional assault upon the statute of repose concluding that it "bears a rational relationship to a proper state objective." Id. at 660. The Petitioners are urging this Court to overrule

its carefully considered precedent[1/] merely to accommodate plaintiffs who seek to recover for injuries which occurred during a "window period" between the decision dates of Battilla v. Allis Chalmers Manufacturing Co., 392 So.2d 874 (Fla. 1980), and Pullum v. Cincinnati, 476 So.2d 657 (Fla. 1975), which overruled Battilla and thus confirmed the validity of the statute of repose ab initio.

Relying on Kluger v. White, 281 So.2d 1 (Fla. 1973), Petitioners contend that the statute of repose is constitutionally infirm because it denies access to the courts within the meaning of Article I, Section 21 of the Florida Constitution. (PB 7-10). Kluger does not apply here. Not every statute which restricts or even abolishes a previously recognized right of action thereby violates the Constitution's access to courts provision. Thus, the Florida "guest statute" was held not to deny potential plaintiffs access to court, even though it completely barred recovery by guest passengers for ordinary negligence of the driver. McMillan v. Nelson, 149 Fla. 334, 5 So.2d 867, 869-870 (1942). This Court has thus acknowledged that

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1/ This Court has been confronted with this issue in numerous cases in the last ten years, and has thoroughly analyzed the constitutional footings of the statute of repose. See generally Bauld v. J.A. Jones Construction Co., 357 So.2d 401 (Fla. 1978); Overland Const. Co. v. Sirmons, 369 So.2d 572 (Fla. 1979); Purk v. Federal Press Co., 387 So.2d 354 (Fla. 1980); Battilla, supra; Diamond v. E.R. Squibb & Sons, Inc., 397 So.2d 671 (Fla. 1981); Cates v. Graham, 451 So.2d 475 (Fla. 1984); Pullum v. Cincinnati, supra.

the legislature is entitled to restrict the criteria by which tort actions will be evaluated so as to preclude recovery by some plaintiffs altogether, where a complete field of tort recovery is not eliminated.

This Court has upheld other statutory schemes which imposed even greater restrictions on an individual's literal "access to court". Cf. Rotwein v. Gersten, 160 Fla. 736, 36 So.2d 419 (1948) (legislature has the power to abolish a cause of action for alienation of affections). Likewise, the Third District Court of Appeal has held that the legislature had "ample basis" to totally abolish defamation claims arising out of proceedings before medical review committees. Feldman v. Glucroft, 488 So.2d 574, 575 (Fla. 3d DCA 1986). The statute of repose did not go as far as the statutes upheld in these decisions because it did not generally abolish causes of action for defective products, but merely restricted them by imposing a time limitation.

Kluger and Smith v. Department of Insurance, 12 F.L.W. 189 (Fla. April 23, 1987) (PB 7-10), are distinguishable[2/] and do

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2/ Petitioners baldly assert that the Pullum majority had either "forgotten" about Kluger or "overruled" it. (PB 9). This charge is unwarranted. The Pullum Court must have been fully aware of Kluger, because Kluger was discussed extensively in Overland, which in turn formed the basis for Battilla. It can hardly be supposed that this Court overruled Battilla without even considering the authority on which Battilla was based. Nowhere in Pullum is there any suggestion that Kluger was overruled or inconsistent with Pullum.

not mandate a showing of a compelling interest to justify the statute of repose. Kluger involved a statute which established a minimum threshold of $550 for economic damages below which the injured plaintiff would have no right to sue. Smith construed the Tort Reform Act, a recently-enacted statute which placed an absolute cap of $450,000 on noneconomic damages. Both of these statutes were found to violate the "access to courts" provision because they improperly restricted the recovery of damages at the top and at the bottom of the damages spectrum. Smith, 12 F.L.W. at 191. The statute of repose, by contrast, like a statute of limitations, merely placed a time limitation on when the action could be brought, it did not set out any minimum or maximum thresholds for the recovery of damages. This Court expressly recognized this distinction in Bauld v. J.A. Jones Construction Co., 357 So.2d 401 (Fla. 1978):

> [T]he revisions in question did not abolish any right of access to the courts; they merely laid down conditions upon the exercise of such a right. Id. at 402.

Concededly, the statute of repose does affect a litigant differently than a statute of limitation because a prospective plaintiff may not assert a product-related claim at all if the specified amount of time has passed since the date of delivery of the completed product. The operation of this restriction does not violate the "access to courts" mandate because it is merely a reasonable, substantive condition imposed on the right to bring such a claim. The New Jersey Supreme Court

has recognized that the statute of repose is a substantive condition placed on the right to sue, and has aptly stated:

> This formulation suggests a misconception of the effect of the statute [of repose]. 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 ten 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 function of the statute is thus rather to define substantive rights than to alter or modify a remedy. Rosenberg v. Town of North Bergen, 61 N.J. 190, 293 A.2d 662 (1972).

While certain people were not able to entertain a tort action that they once might have, these people were not denied any constitutional right to access to the courts within the holding of Kluger.

Since access to courts is not violated by the statute of repose, the plaintiffs' constitutional challenge is essentially one for denial of due process.[3/] In a recent decision by this Court, an analogous statute which reclassified the status of state-employed physicians and attorneys, thereby depriving them of a right to a hearing if they were dismissed without cause, was held to raise only a due process and equal protection issue. Department of Corrections v. Florida Nurses

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3/ Petitioners have devoted the bulk of their brief (PB 10-44) to support their claim that they were denied due process under both the Federal and the Florida Constitutions. Thus, they implicitly acknowledge that due process analysis is more appropriate here.

Association, 12 F.L.W. 221, 222 (Fla. May 7, 1987). Indeed, most jurisdictions have evaluated challenges to statutes of repose on the basis of due process requirements. See Hawkins v. D & J Press Co., 527 F. Supp. 386, 388 (E.D. Tenn. 1981); Scalf v. Berkel, Inc., 448 N.E.2d 1201, 1204-1205 (Ind. App. 1983).

It is well settled in this state that a claim of due process violation is to be evaluated under the "rational basis" test, as long as no suspect class is involved. Department of Corrections, supra, 12 F.L.W. at 222. See also In re Estate of Greenberg, 390 So.2d 40 (Fla. 1980), appeal dismissed, Pincus v. Estate of Greenberg, 450 U.S. 961, 101 S.Ct. 1475, 67 L.Ed.2d 610 (1981). Indeed, equal protection arguments are judged in the same manner. Gluesenkamp v. State, 391 So.2d 192, 200 (Fla. 1980), cert. denied, 454 U.S. 818, 102 S.Ct. 98, 70 L.Ed.2d 88 (1981). Because there has been no contention that litigants whose suits are barred by the statute of repose are members of a suspect class, this Court in Pullum correctly concluded that the statute of repose was constitutional because "[t]he legislature, in enacting this statute of repose, reasonably decided that perpetual liability places an undue burden on manufacturers...". Id. at 659.

B. PULLUM REACHED THE CORRECT RESULT BECAUSE THE LEGISLATURE COULD PROPERLY CONCLUDE THAT THE STATUTE OF REPOSE WAS BASED ON OVERPOWERING PUBLIC NECESSITY.

Even if this Court concludes that Kluger applies here, the statute of repose satisfied the Kluger test because the

legislature which enacted it had a legitimate basis for concluding that an overpowering public necessity supported its enactment.[4/] Statutes of repose have withstood constitutional attacks in the district courts of appeal based upon the "compelling need" for such statutes. Carr v. Broward County, 12 F.L.W. 992, 995 (Fla. 4th DCA April 8, 1987); American Liberty Ins. Co. v. West and Conyers Architects and Engineers, 491 So.2d 573, 575 (Fla. 2d DCA 1986).

In Carr, supra, the court upheld the statute of repose applicable to medical malpractice claims, relying on the legislative preamble which made reference to the crisis of skyrocketing liability insurance rates. Id. at 995. Reasoning that the legislative has established an "overriding public interest meeting the Kluger test", the court found that the statute was constitutional. Id. at 995.

Similarly, in Conyers, supra, the legislative purpose in enacting the statute of repose applicable to the design, planning, and construction of real property was found to be compelling, based on its comprehensive preamble. The preamble

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4/ It should, of course, be remembered that courts will treat statutes as presumptively valid. Wright v. Board of Public Instruction of Sumter County, 48 So.2d 912, 914 (Fla. 1950). If a statute can reasonably be construed to be constitutional, it should be. Falco v. State, 407 So.2d 203, 206 (Fla. 1981). Since Petitioners assert that the statute of repose is unconstitutional, they have the burden of clearly demonstrating that it is indeed invalid. Village of North Palm Beach v. Mason, 167 So.2d 721, 726 (Fla. 1964).

cited the danger of unlimited exposure, the impossibility of defending actions brought many years after construction, and the difficulty of obtaining liability insurance. Id. at 574-575.[5/]

Justice Alderman gleaned the legislative intent underlying the statute of repose in Pullum itself by discussing the "developments in expanding the liability of manufacturers", id. at 660, and the burdens of "perpetual liability." Id. at 659. Even though the legislature has not provided a preamble to the statute of repose applicable to products liability actions, the policy behind it is clearly the same as in other Florida statutes of repose; namely, to avoid the unfair imposition of infinite liability and to control ever increasing insurance premiums.

It was proper for this Court to acknowledge the legislative intent of the statute of repose, even when it was not expressly espoused by the Legislature, because such a determination was necessary. See Perdue v. Miami Herald Publishing Company, 291 So.2d 604, 606 (Fla. 1974). District

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5/ This Court referred to the same preamble in Universal Engineering Corp., supra, at 466 n.4. Legislative intentions such as these should be taken at face value. The legislature has the last word on declarations of public policy in the insurance field. VanBibber v. Hartford Accident & Indemnity Insurance Co., 439 So.2d 880 (Fla. 1983). The courts are bound to give great weight to legislative determinations of fact. Miami Home Milk Producers Ass'n v. Milk Control Board, 124 Fla. 797, 169 So. 541, 542 (1936). It is the legislature's function to determine what is harmful or injurious to the public, and courts should not substitute their judgment for that of the collective will of the legislature. Golden v. McCarty, 337 So.2d 388, 390 (Fla. 1976).

courts confronted with similar challenges to the statute of repose have likewise inferred the legislative intent from the statute itself and from case law. See, e.g., Feldman v. Glucraft, supra, at 575. ("The public policy consideration expounded in Holly and the statute itself ... provide ample basis upon which the legislature could validly have eliminated the action"). Justice Alderman expressly acknowledged the necessity of determining the legislative intent by extrapolating from other sources and by drawing inferences from the language of the statute:

> Although the legislature ... did not make an express finding that this statute was enacted to meet an overpowering public necessity and that there is no less onerous alternative, it is apparent to me that the limitation on causes of actions imposed by this section was created to meet such a necessity. Overland, 369 So.2d at 576 (Alderman, dissenting).6/

Contrary to Petitioners' assertions (PB 9-10), the Pullum majority engaged in sound constitutional analysis when they validated the statute of repose on the basis of "reasonableness." Limitation periods are an inherent and essential part of our judicial system, and the compelling need to establish limitation periods is self-evident.7/ When a

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6/ This Court's initial reluctance to adopt this analysis prompted the legislature to insert lengthy preambles to the statute of reposes applicable to medical malpractice and the design, planning and construction of real estate. See Ch. 75-9, §7, Laws of Fla. and Ch. 80-322, Laws of Fla.

7/ Cf. Chase Securities Corp. v. Donaldson, 325 U.S. 304, (cont.)

limitations statute is challenged on constitutional grounds, the compelling need for some time bar is assumed, and the issue becomes whether the length of time provided by the limitation is reasonable.[8] As noted in Pullum, the legislature in enacting this statute of repose decided that perpetual liability places an undue burden on manufacturers, and it "decided that twelve years from the date of sale is a reasonable time for exposure to liability for manufacturing of a product." Id. at 659.[9]

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89 L.Ed. 1628, 1635 (1945) ("Statutes of limitations are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to defense after memories have faded, witnesses have died or disappeared, and evidence has been lost.")

8/ Cf. In re Brown's Estate, 117 So.2d 478 (Fla. 1960) (Statute which barred claim against decedent's estate after three years was constitutional, and the time prescribed therein was not unreasonable); H.K.L. Realty Corporation v. Kirtley, 74 So.2d 876, 878 (Fla. 1954) (Court upholds a twenty year statute of limitations as to mortgages, reasoning that statutes of limitations which restrict suits on causes of action are constitutional as long as a reasonable time is provided for the enforcement of the cause of action).

9/ Indeed, Justice Alderman went to great lengths in Pullum to note that the collapse of the privity requirement greatly expanded defendant manufacturers' potential liability. Id. at 659-660 (quoting Overland, supra). Twelve years was a good compromise figure during which a manufacturer could be exposed to liability for its product. As a practical matter, it would be nonsensical to analyze the length of a limitations period in terms of whether it was "compelling" under Kluger analysis, as the Petitioners urge this Court to do. Contrary to Petitioners' assertions (PB 9-10), Smith never rejected the propriety of analyzing a limitations period on the basis of its reasonableness.

II.

THE PETITIONERS WERE NOT DEPRIVED OF DUE PROCESS UNDER THE FLORIDA CONSTITUTION BECAUSE THEY DID NOT HAVE ANY VESTED PROPERTY RIGHTS AS A RESULT OF BATTILLA.

A decision of a court of last resort overruling a prior decision operates retroactively unless declared by the opinion to have prospective effect only. Nissan Motor Company, Limited v. Phlieger, 12 F.L.W. 256, 258 (Fla. May 28, 1987) (Grimes, concurring); Black v. Nesmith, 475 So.2d 963 (Fla. 1st DCA 1985). When a court overrules a decision holding a statute unconsitutional, this validates the statute as of its effective date. State ex rel Gillespie v. Bay County, 112 Fla. 687, 151 So. 10, 22 (1933); Christopher v. Mungen, 61 Fla. 513, 534, 55 So. 273, 280 (1911); Shaw v. General Motors Corporation, 503 So.2d 362, 363 (Fla. 3d DCA 1987); Pait v. Ford Motor Company, 500 So.2d 743, 744 (Fla. 5th DCA 1987); Lamb v. Volkswagenwerk Aktiengesellschaft, 631 F. Supp. 1144, 1149 (S.D.Fla. 1986). Although a statute declared unconstitutional becomes inoperative, it is not dead, only dormant. State ex rel Badgett v. Lee, 156 Fla. 291, 22 So.2d 804, 806 (1945). Accordingly, once this Court receded from Battilla in Pullum, it validated the statute of repose ab initio, which properly had the effect of barring the Clausells' action.

The Petitioners' Florida Constitutional argument is facially defective because they are claiming that it is unconstitutional to apply the above-cited, settled Florida law.

Contrary to the Petitioners' assertions, there can be no vested right in an existing law so as to preclude its change or repeal. 16A Am.Jur.2d Contitutional Law §671, at 654 (1979), nor does a plaintiff have a vested right in a tort claim. Lamb, supra, at 1149.

This Court has already decided that Pullum should be applied retroactively to validate the statute of repose. In Pullum itself, in denying a motion for rehearing, this Court rejected a contention that its decision should not apply to a pending action.[10/] See Cassidy v. Firestone Rubber Company, 495 So.2d 801, 802 n.2 (Fla. 1st DCA 1986), review denied, ____ So.2d _____, No. 69, 668 (Fla. March 27, 1987). Even more recently, in Nissan, supra, in a concurring opinion, Justice Grimes again addressed the issue of whether Pullum should be applied retroactively, and concluded that it should be unless the claimant has relied on the existing statutory construction to her

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10/ Indeed, it is presumptuous for the Petitioners to assert that this Court's decision failed to consider the issue of whether retroactive application of Pullum would deprive litigants of their due process rights under the Florida Constitution. (cont.)

detriment.[11] Id. at 258. Since there is no reliance here, Pullum must be applied.

Of course, the district courts have also unanimously applied Pullum retroactively without even the slightest suggestion that their rulings would deprive the litigants of any property or vested rights. (PB 13). Cf. Pait, supra, at 744 ("It does not appear that any property or contract rights were acquired by the plaintiff here such as would make an exception to this rule applicable"); Cassidy, supra, at 802 ("appellants have shown no substantial inequity or unfairness which would result upon application of the Pullum ruling"). These persuasive authorities reject the Petitioners' constitutional claim, and this Court should adhere to their sound precedent.[12]

The above rulings are clearly correct in their explicit and implicit conclusions that the Petitioners did not acquire any

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11/ The Petitioners cannot claim that they have relied on Batilla like the claimant in Nissan. In Nissan, at the time of the allegedly wrongful death, the claimant still had six months to bring suit under the statute of repose, but did not think it was necessary to sue immediately because the statute had been declared invalid by Battilla. By contrast, the Petitioners' action here was already barred by the statute of repose prior to Clausell's injury. Thus, unlike Nissan, the present action cannot be distinguished from Pait and Cassidy, and Pullum must be applied retroactively.

12/ The analysis for assessing Petitioners' due process claim under the Florida Constitution is the same as that used to decide the due process claim under the Federal Constitution. Although Respondent has chosen to discuss these two claims under different headings, it relies on all of the arguments and authorities presented in defense of the Federal and Florida Constitutional claims for each individual issue.

vested cause of action or property rights as a result of Battilla. Battilla held that the statute of repose was unconstitutional as applied to the facts in that case, but the statute of repose remained on the books as the expression of the legislative will. A judicial decision holding that a statute is unconstitutional obviously does not confer vested rights, since the settled law is that (1) such a decision is subject to being ooverruled by the court which rendered it, and (2) if the prior decision is overruled, the statute is thereby rendered valid ab initio. See authorities cited at page 13, supra. These principles manifestly preclude the acquisition of any "vested right" in a decision which invalidates a statute.

Battilla must be distinguished from a case where this Court has created a new cause of action by judicial decision.[13/] The Petitioners simply cannot cite any Florida cases which finds a vested property right in a cause of action under any circumstances analogous to this case.

The Petitioners rely on Sunspan Engineering and Construction Company v. Spring-Lock Scaffolding Co., 310 So.2d 4 (1985), for the proposition that they have a property right entitled to constitutional protection. (PB 15). Sunspan was a decision construing the equal protection clause of the Federal

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13/ Cf. West v. Caterpillar Co., Inc., 336 So.2d 80 (Fla. 1976) (This Court adopted the doctrine of strict liability as stated by A.L.I. Restatement (Second) of Torts §402A.)

Constitution, not the due process clause of the Florida Constitution, and it is inapplicable here. Also, Sunspan held only that the cause of action is entitled to protection from "arbitrary laws". Id. at 8. Of course, the Petitioners do not, and could not, contend that the statute of repose was an arbitrary law.[14/]

Even if there was some basis to conclude that Battilla was intended to confer property rights, any such rights clearly would not be immutable. Notwithstanding its most important limitations on state action, the due process clause has never been an absolute prohibition against state action adversely affecting property rights. City of Miami v. St. Joe Paper Company, 364 So.2d 439, 444 (Fla. 1978), appeal dismissed, 441 U.S. 939, 99 S.Ct. 2153, 60 L.Ed.2d 1040 (1979). Even if the statute of repose impinges property rights, it is constitutional as long as it is based on a rational purpose. (See pages 7-8, infra). The statute of repose was a rational legislative enactment, as discussed throughout this brief, and thus it was constitutionally applied to bar the Petitioners' claims.

14/ Homemakers Inc. v. Gonzalez, 400 So.2d 965, 967 (Fla. 1981), applies to a situation where the issue is whether or not a statute should be applied retroactively, not to this case where the issue is whether a decision of a high court reversing itself on the constitutionality of an existing statute applies retroactively. Thus, contrary to Petitioners' assertions (PB 15), Homemakers does not resolve "beyond debate" the "constitutional sanctity" of any rights acquired under Battilla.

III

THE TRIAL COURT'S APPLICATION OF PULLUM TO THIS CASE DID NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FEDERAL CONSTITUTION.

Petitioners[15/] are challenging the application of the statute of repose on due process grounds, an attack which similar statutes of repose have successfully withstood in federal courts. State legislators are presumed to act constitutionally when making their laws. McDonald v. Board of Election Commissioners of Chicago, 394 U.S. 802, 809, 89 S.Ct. 1404, 1408, 22 L.Ed.2d 739 (1969). Federal courts uniformly and unequivocally hold that there is no due process violation by the application of the statute of repose. See Mathis v. Eli Lilly and Company, 719 F.2d 134 (6th Cir. 1983); Wayne v. Tennessee Valley Authority, 730 F.2d 392 (5th Cir. 1984), cert. denied. 469 U.S. 1159, 105 S.Ct. 909, 83 L.Ed.2d 922 (1985); Ducharme, supra; Hartford Fire and Insurance Company v. Lawrence, Dykes, Goodenburger, Bower and Clancey, 740 F.2d 1362 (6th Cir. 1984). Reasoning that statutes of repose counterbalance the expanded liability provided for in strict liability statutes, where

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15/ As a threshold matter, the Petitioners are clearly incorrect when they assert that they had a vested right in their cause of action (PB 21-22). There is no vested right to a tort claim for damages under state law. Ducharme v. Merrill-National Laboratories, 574 F.2d 1307, 1309 (5th Cir. 1978), cert. denied, 439 U.S. 1002, 99 S.Ct. 612, 58 L.Ed.2d 677 (1978); Jones v. Wyeth Laboratories, Inc., 457 F. Supp. 35, 37 (W.D. Ark.), affirmed, 583 F.2d 1070 (8th Cir. 1978). Rights in tort do not vest until there is a final, unreviewable judgment. Hammond v. U.S., 786 F.2d 8, 12 (1st Cir. 1986).

liabilities no longer are limited to those in contractual privity with the manufacturer, it has been held that limiting the duration of liability is a permissible public purpose under the due process clause. Hartford Fire Insurance, supra, at 1368-1369.16/

The only difference between the Petitioners' challenge to the statute of repose and the challenges in the above cases is that the Petitioners are arguing that retroactive application of Pullum, which would revive the statute of repose, would violate due process. It is well established, however, that judicial decisions ordinarily apply retroactively, and there is a built-in presumption of retroactivity. Solam v. Stumes, 465 U.S. 638, 104 S.Ct. 1338, 1341, 79 L.Ed.2d 579 (1984). Additionally, federal constitutional law has no say in the retroactivity of judicial decisions. See Wainwright v. Stone, 414 U.S. 21, 94 S.Ct. 190, 193, 38 L.Ed.2d 179 (1973); Linkletter v. Walker, 381 U.S. 618, 85 S.Ct. 1731, 1737, 14 L.Ed.2d 601 (1965); United States v. Johnson, 457 U.S. 537, 102 S.Ct. 2579, 73 L.Ed.2d 202 (1982).

16/ The Supreme Court of the United States has twice dismissed appeals from state court decisions holding that such statutes were constitutional on the ground that these appeals presented no substantial federal question. See Carter v. Hartenstein, 248 Ark. 1172, 455 S.W. 2d 918 (1970), appeal dismissed, 401 U.S. 901, 27 L.Ed 2d 800 (1971); Ellerbe v. Otis Elevator Co., 618 S.W. 2d 870 (Tex.Civ. App. 1981), appeal dismissed, 459 U.S. 802, 103 S.Ct. 24, 74 L.Ed. 2d 39 (1982). The Supreme Court has emphasized that by dismissing for lack of a substantial federal question, it is deciding a case on the merits. Hicks v. Miranda, 422 U.S. 332, 344, 95 S.Ct. 2281, 2289, 45 L.Ed. 2d 223 (1975).

Thus, under federal constitutional analysis, the distinction between this action and the above decisions is immaterial, and this case is controlled by the case law which holds that the statute of repose is consistent with the mandates of the due process clause.

Even more fundamentally, the Petitioners' claim is deficient because they have not invoked a property right cognizable under the federal due process clause. A property interest protected by the Fourteenth Amendment is usually defined by state law, see Gilmere v. City of Atlanta, Georgia, 737 F.2d 894 (11th Cir. 1984), cert. denied, ___ U.S. ___, 106 S.Ct. 1970 (1986), and its distinguishing feature is an individual entitlement grounded in state law. Logan v. Zimmerman Brush Company, 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed. 2d 265, 274 (1982).

The Battilla majority never intended to create immutable property rights by finding the statute of repose constitutionally deficient as applied to the facts before it. Even if the statute of repose was "dormant" immediately after Battilla, it certainly was not dead, cf. 16 Am.Jur.2d Constitutional Law § 258 at 731 (1979), nor was it void in the sense that it was repealed or abolished. Id. Once Pullum was decided, the statute became valid ab initio and was restored to its operative force. In summation, Battilla, a short-lived

decision[17/] construing a statute as unconstitutional, was not intended to create any vested property rights and did not do so. The statute of repose remained on the books as the manifestation of the legislative will, and became valid as of the date of its enactment under this Court's decision in Pullum.

The cases cited by the Petitioners finding a property right in state causes of action are inapposite because they involve rights created by state statute. Cf. Logan, supra (involved the denial of established adjudicatory procedures under an Illinois statute); Holman v. Hilton, 712 F.2d 854, 858 (3d Cir. 1983) (quoting Logan, supra) ("Once created, the adequacy of statutory procedures for a deprivation for a statutorily-created property interest must be analyzed in constitutional terms"). Here, by contrast, the only statute at issue was the statute of repose, which barred Petitioners' action.

Further, a court of ultimate resort is free to change its decision on the constitutionality of a law at any time. Cf. State Board of Insurance v. Todd Shipyards Corporation, 370 U.S.

17/ It is partly on this basis that Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673, 50 S.Ct. 451 (1929) (PB 24-25) is distinguishable. Brinkerhoff is also not comparable to this case because here the plaintiffs' rights were barred all along, though Battilla made it appear for a time that the claim was not barred. It is noteworthy that the portion of the Brinkerhoff-Faris case excerpted in the Petitioners' brief supports Hobart's position in stating that the mere fact that a state court overruled doctrines established by earlier decisions on which a party relied does not give rise to a claim under the 14th Amendment. (PB 25).

451, 457, 82 S.Ct. 1380, 8 L.Ed 2d 620 (1961). Litigants could have no basis for assuming that Battilla intended to establish property rights on which they could rely without the risk of a subsequent change in the law.[18/] As the Supreme Court ruled in Duke Power Company v. Carolina Enviromental Study Group, Inc., 438 U.S. 59, 98 S.Ct. 2620, 57 L.Ed.2d 595, 620 n.32 (1978), a person has no property, no vested interest, in any rule of the common law and the Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative objective despite the fact that otherwise-settled expectations may be upset thereby. Statutes limiting liability are relatively commonplace and have consistently been enforced by the courts. Id.

Relying on Boddie v. Connecticut, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971), the Petitioners claim that the application of Pullum violated due process unless there is an overwhelming justification for the statute of repose. (PB 20,23). Boddie is in no way analogous because that case involved the right of indigent parties to have free access to the only available forum with jurisdiction to dissolve marriages, which

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18/ Battilla must be contrasted with a decision which judicially establishes a cause of action, see note 13, infra, which would present a stronger argument for a judicially-created property right. Battilla was preceded by the statute of repose, and the legislative will controlled in this area. The Battilla Court acted in the area only because of a perceived constitutional deficiency in the statute of repose.

involve "interests of basic importance in our society." 28 L.Ed.2d at 118. The inability of states to close their courthouse doors to indigents unable to pay court fees for a divorce has no bearing on the right of states to impose reasonable time limitations on the right to bring a tort claim.

This liability-limitations provision (the statute of repose) is a classic example of economic regulation -- legislative acts that come to the Court with a presumption of constitutionality. Duke Power, supra, 98 S.Ct. at 2336-2337. A complainant alleging a due process violation has the burden of establishing that the legislature has acted in a arbitrary and irrational way. Duke Power, supra, 57 L.Ed. 2d at 618. As stated in Logan, supra, "the State's interests in fashioning its own rules of tort law is paramount to any discernible federal interest, except perhaps an interest in protecting the individual citizen from state action that is wholly arbitrary or irrational." 71 L.Ed. 2d at 276.

Further, a state may erect reasonable procedural requirements for triggering the right for an adjudication, including the statute of limitations, id. at 279, without impinging upon a litigant's due process rights. The due process clause does not guarantee access to the courts in all instances, particularly when the "government's scheme" outweighs the private interest. Id. at 274 n.5.

Here, the statute of repose was rational, not arbitrary state action, and Florida's interest outweighed the Petitioners' individual interests. Providing for a reasonable time in which suit could be brought effectively counterbalanced the abolition of the privity requirement in products cases. It was not irrational to limit a manufacturer's potential exposure, particularly in light of the extreme difficulty of defending suits involving products manufactured many years before.

Time limitations have always been a part of our legal system, and a state's interest in a reasonable time limitation is paramount to any individual litigant's interest in bringing the suit.[19/] Thus, even if Petitioners had "property rights" which were impaired by the statute of repose, that impairment was justifiable because the government's interest outweighed the

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19/ Cf., generally, Martinez v. California, 444 U.S. 277, 100 S.Ct. 553, 62 L.Ed. 2d 481 (1980) (relying on the rule that a state's interest in fashioning its own rule of tort law is paramount to any discernible federal interest, the Court concluded that a statute granting immunity to parole officers from injuries resulting from parole decisions was not violative of due process and not wholly arbitrary or irrational); Logan, supra, at 279 (a civil litigant is not entitled to a hearing on the merits in every case and the state may erect reasonable procedural requirements for triggering the right to an adjudication, and the state certainly accords due process when it terminates a claim for failure to comply with a reasonable procedural rule).

Petitioners' individual interests.[20] Petitioners' due process rights were not unconstitutionally infringed by the application of Pullum here.[21]

IV.

THE LEGISLATURE'S REPEAL OF THE STATUTE OF REPOSE WAS NOT REMEDIAL, AND THUS ITS REPEAL SHOULD NOT BE APPLIED RETROACTIVELY.

The Petitioners ignore settled law when they contend that the amendment repealing the statute of repose should be applied retroactively. Before a statute of limitations can be applied retroactively, there must be a clear manifestation of legislative intent that it be given retroactive effect. Homemakers, Inc. v. Gonzalez, 400 So.2d 965 (Fla. 1981); Foley v. Morris, 339 So.2d 215 (Fla. 1976); Brooks v. Cerrato, 355 So.2d 119 (Fla. 4th DCA), cert. denied, 361 So.2d 831 (Fla. 1978). Homemakers involved the question of whether a statute which extended the period of limitations could be retroactively applied to resurrect a cause of action which had been untimely filed

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20/ Indeed, the Supreme Court acknowledges the paramount status of a state's interest in this area, and routinely follows state statutes of limitations and the construction of such statutes by state courts. Balkam v. Woodstock Iron Company, 154 U.S. 177, 188, 14 S.Ct. 1010, 38 L.Ed. 953 (1894).

21/ Curiously, Petitioners concede (PB 28-29), contrary to their position in the Third District, that Chevron Oil Co. v. Huson, 404 U.S. 97, 92 S.Ct. 349 (1971), does not apply, but then discuss its tests as applied to this case anyhow (PB 29-33). Hobart wholeheartedly agrees that Chevron Oil is inapplicable, as it demonstrated in its brief below.

under the old statute. Finding no legislative manifestation that the new statute could be applied retroactively, this Court declined to do so. This rule applies in the present case to preclude retroactive application of the amendment repealing the statute of repose.

In the recent decision of Nissan Motor Corporation, supra, in a concurring opinion, Justice Grimes reached the issue of whether the amending legislation pertaining to Section 95.031(2) applied retroactively, noted the absence of a manifestation of legislative intent to do so, and concluded that it did not. Id. at 258. Without exception, the District Courts of Appeal have reached the same conclusion.

Even apart from the settled law already disposing of this issue, it is evident that the act repealing Florida's statute of repose was not "solely remedial" in any sense that would permit retroactive application so as to revive actions already barred. Cf. Senfield v. Bank of Nova Scotia Trust Co., 450 So.2d 1157, 1165 (Fla. 3d DCA 1984), 344 So.2d 239 (Fla. 1977) ("solely remedial" acts may be applied retroactively). A remedial statute is one which confers a remedy, and a remedy is the means employed in enforcing a right or in redressing an injury. Grammer v. Roman, 174 So.2d 443, 446 (Fla. 2d DCA 1965). Once the statute of repose had run[22/] and barred an

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22/ Here, the statute of repose had run because the meat grinder was delivered more than twelve years prior to June 7, (cont.)

action, it conferred upon manufacturers a vested right, see Corbett v. Engineering and Machinery Co., 160 Fla. 879, 37 So.2d 161, 162 (1948)(a person has a vested right in a statute of limitations when it has completely run);[23/] and a substantive right of protection from the protracted fear of litigation. See, eg., Pearson v. Northeast Airlines, Inc., 309 F.2d 553 (2d Cir. 1962), cert. denied, 372 U.S. 912 (1963). Therefore, the act repealing the statute of repose cannot be treated as "solely remedial," because retroactive application of the repealing statute would impair Hobart's substantive, vested rights. Cf. Village of El Portal v. City of Miami Shores, 362 So.2d 275, 277 (Fla. 1978) (quoting McCord v. Smith, 43 So.2d 704 (Fla. 1950)) (retroactive provisions are constitutionally defective where they adversely affect or destroy vested rights).

The statute of repose established a substantive right even more clearly than the statute of limitations because it not only barred a cause of action after a certain amount of time, it extinguished all causes of action brought after twelve years, even if they had not yet arisen. See Eddings v. Volkswagenwerk,

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1985, the date that the Clausells filed their action against Hobart.

23/ See Mazda Motors of America, Inc. v. S.C. Henderson and Sons, Inc., 364 So.2d 107, 108 (Fla. 1st DCA 1978), cert. denied, 378 So.2d 348 (Fla. 1979)(same holding). See also Young v. Altenhaus, 472 So.2d 1152 (Fla. 1985)(statutes that interfere with vested rights will not be given retroactive effect); Department of Transportation v. Cone Brothers Contracting Company, 364 So.2d 482, 486 (Fla. 2d DCA 1978) (same as Young).

635 F. Supp. 45, 49 (N.D. Fla. 1986). Cf. Herm v. Stafford, 663 F.2d 669, 681 n.17 (6th Cir. 1982) (if the limitation "qualifies the right", an amendment lengthening it will not serve to alter the limitations with respect to causes of action which have already accrued). Therefore, the amendment repealing the statute of repose in products cases should not be applied retroactively.[24/]

Petitioners rely on City of Orlando v. Desjardins, 493 So.2d 1027 (Fla. 1986), in support of their argument that the amendment was remedial and should be applied retroactively. (PB 45-46). In Desjardins, it was argued that a statute recognizing an attorney-client exemption to a city's duty to produce documents under the public record acts should be applied to ongoing litigation. Reasoning that the exemption was "addressed to precisely to the type of '[r]emedial rights [arising] for the purpose of protecting or enforcing substantive rights.'", id. at 1028, and that the statutory exemption merely provided a limited

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24/ Throughout their brief, the Petitioners argue that it is anomalous that Hobart has a substantive, vested right in an already-expired statute of repose, while the Petitioners have been found not to have vested rights as a result of the Battilla decision. Respondent respectfully submits that these rulings do not present an anomaly because the parties were in materially different litigation postures. Hobart relied on a limitations period which had already expired and which clearly conferred upon it a vested right. Petitioners relied on a judicial decision. Under settled law, they could not claim a vested right in a decision of this Court declaring a statute unconstitutional because the earlier decision is always subject to being overruled by a later decision (here Pullum) validating the statute from the date of its enactment.

exception to "the harsh provisions of the Florida Public Records Act", this Court agreed that the act should be applied to on-going litigation. Id. The attorney-client exemption act before this Court in Desjardins should be distinguished from the repeal of the statute of repose, which, if given retroactive effect, would revive products liability actions already barred by the prior statute. The repeal of the statute of repose is not "solely remedial". Retroactive application of this statute, unlike the statute in Desjardins, would impair vested substantive rights, contrary to settled law and the Constitution.[25/]

25/ The cases relied on by the Petitioners largely support the Respondent, and recognize that an amended limitations period should not apply to destroy existing vested rights, cf. Walter Densen and Son v. Nelson, 88 So.2d 120, 122 (1956) (the legislature has the power to increase a prescribed period of limitation and to make it applicable to existing causes of action provided such change is made before the cause of action is extinguished under the pre-existing statute of limitations); and that a limitation period is a substantive limitation, rather than merely procedural, cf. Baurer v. Johns-Manville Corporation, 599 F. Supp 33, 35 (D. Conn. 1984) (where the right is created by statute, the statute of limitations is deemed to be a substantive limit on the right rather than a procedural limit on the remedy); Herm v. Stafford, supra, at 681 n.170 (quoting Davis v. Mills, 194 U.S. 451, 454, 24 S.Ct. 692, 693, 48 L.Ed. 1062 (1904)) (the statute of limitations may be interpreted either as going to the right or to the remedy).

In Senfeld v. Bank of Nova Scotia Trust Company (Cayman) Limited, 450 So.2d 1157 (Fla. 3d DCA 1984) (PB 45), it was only natural for the court to conclude that the statute was remedial because the legislature specifically provided that it should be construed in light of its purposes to achieve "remedial" goals.

CONCLUSION

Based on the foregoing reasons and authorities, the final summary judgment entered in favor of Hobart should be affirmed.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Answer Brief was mailed this 22nd day of June, 1987, to JOEL S. PERWIN, PODHURST, ORSECK, JOSEFSBERG, EATON, MEADOW & OLIN, P.A., Suite 800, City National Bank Building, 25 West Flagler Street, Miami, Florida 33130.

Respectfully submitted,

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