IN THE SUPREME COURT OF FLORIDA

CASE NO. 70,566

ALBERTO CLAUSELL and PATRICIA CLAUSELL,

Petitioners,

vs.

HOBART CORPORATION,

Respondent.

_____/

PETITIONERS' BRIEF ON THE MERITS

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I
STATEMENT OF THE CASE AND FACTS

This case presents one general question—whether the district court erred in affirming the trial court's order of summary judgment in favor of defendant Hobart Corporation (hereinafter "Hobart") on the petitioners' personal-injury complaint, on the ground that it was barred by Florida's statute of repose (quoted below), § 95.031(2), Fla. Stat. (1985). The complaint alleged that Hobart had manufactured a meat-chopping machine, which in September of 1983 was owned by appellant Alberto Clausell's employer, a Winn-Dixie Food Store in Dade County; and that it was designed in such a way that it caught Clausell's clothing in its grinder mechanism, resulting in the loss of his right hand and other serious injuries, thus subjecting Hobart to strict liability and to liability for negligence and breach of implied warranty (R. 1-7). Hobart's amended answer (R. 37-38), and its motion for summary judgment (R. 39-42), alleged that Hobart had manufactured and first delivered the meat chopper in May of 1969, more than 12 years before the action was filed, and thus that the action was barred by Florida's statute of repose, § 95.031(2), Fla. Stat. (1985). The trial court granted the motion (R. 137), and the district court affirmed.

We review below the dates which are relevant to the lower courts' determination that the Clausells' complaint was time-barred under the statute of repose:

- May, 1969: The meat chopper in question was manufactured and sold by Hobart (R. 42).

- 1975: Statute of repose (enacted in 1974) became law. Section 95.031(2), Fla. Stat. (1985) provided as follows:

> (2) Actions for products liability under s. 95.11(3) must be begun within the period prescribed in this chapter, with the period running from the time the facts giving rise to the cause of action were discovered or should have been discovered with the exercise of due diligence, instead of running from any date prescribed elsewhere in s. 95.11(3), but in any event within 12 years after the date of delivery of the completed product to its original purchaser or within 12 years after the date of the commission of the alleged fraud, regardless of the date the defect in the

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product or the fraud was or should have been discovered.

— December 11, 1980: Supreme Court decides *Battilla v. Allis Chalmers Mfg. Co.*, 392 So.2d 874 (Fla. 1980) (per curiam), holding that, as applied to a product-liability action, "section 95.031 denies access to courts under article I, section 21, Florida Constitution."

— September 1, 1983: Alberto Clausell is injured while using the machine (*see* R. 2, R. 10).

— June 7, 1985: Action filed by the Clausells against Hobart (R. 1).

— August 29, 1985: Supreme Court decides *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), receding from the *Battilla* decision, and holding that "section 95.031(2) is not unconstitutionally violative of article I, section 21 of the Florida Constitution."

— October 23, 1985: Hobart files amended answer (R. 37) and motion for summary judgment (R. 39) based upon the *Pullum* decision.

— March 19, 1986: Trial court enters final summary judgment for Hobart on the basis of the statute of repose (R. 137-38).

— April 10, 1986: Clausells file notice of appeal to district court (R. 104).

— April 21, 1986: United States Supreme Court dismisses the appeal from Florida Supreme Court's decision in *Pullum*, ___ U.S. ___, 106 S. Ct. 1626, 90 L. Ed.2d 174 (1986).

— Effective July 1, 1986: The Florida Legislature amended §95.031(2), to provide as follows:

> (2) Actions for products liability and fraud under s. 95.11(3) must be begun within the period prescribed in this chapter, with the period running from the time the facts giving rise to the cause of action were discovered or should have been discovered with the exercise of due diligence, instead of running from any date prescribed elsewhere in s. 95.11(3), but in any event an action for fraud under s. 95.11(3) must be begun within 12 years after the date of the commission of the alleged fraud, regardless of the date the fraud or should have been discovered.

Ch. 86-272, Section 2, Laws of Florida (1986).

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The new act thus repealed the statute of repose as to products-liability actions. *See Nissan Motor Co. v. Phlieger*, 12 F.L.W. 256, 257 n.2 (Fla. May 28, 1987). This amendment is contained in section 2 of the act in question. In section 1 of that act, the legislature amended various statutes of limitations not relevant here. However, section 3 of the act—establishing its effective date—provided as follows: "Section 1 of this act shall take effect October 1, 1986, and shall apply to causes of action accruing after that date, and Section 2 of this act shall take effect July 1, 1986." Thus, although the legislature explicitly provided that section 1 of the act—amending certain statutes of limitations—would apply only to causes of action accruing after that date, it made no provision regarding its repeal of the statute of repose in product-liability actions, but merely provided that the repeal would take effect July 1, 1986. Thus, at the time of the appeal to the district court, there was no statute of repose in Florida.

In light of the foregoing, the question before the district court was whether the Clausells' complaint was properly dismissed on the basis of a statute which was not in existence at the time the product in question was first made and delivered; was not enforceable, because it had been declared unconstitutional, at the time the product allegedly caused injury and the cause of action accrued; was likewise unenforceable at the time the instant action was filed; and was no longer in existence at the time of the district court's decision.

As it had done in at least six other cases presently pending before this Court, the district court affirmed the trial court's dismissal of the Clausells' complaint, on the basis of its decision in *Shaw v. General Motors Corp.*, 503 So.2d 362 (Fla. 3d DCA 1987), *review granted.* In *Shaw*, the district court had held that this Court's decision in *Pullum* had revived the statute of repose "as of its effective date," thus divesting the plaintiffs of a cause of action which was viable under *Battilla* at the time it was filed; and that the legislature's repeal of the statute of repose should not apply "retroactively" to revive the plaintiffs' action, in the absence of an explicit legislative declaration to that effect. As in *Shaw*, however, and in all of the other third-district cases which followed *Shaw*, the

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district court in the instant case certified the following two questions to this Court:

> 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. IF NOT, WHETHER 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), APPLIES SO AS TO BAR A CAUSE OF ACTION THAT ACCRUED AFTER THE *BATTILLA* DECISION BUT BEFORE THE *PULLUM* DECISION.[1/]

In the instant case, however, at the plaintiffs' urging, the district court also certified a third question to this Court—a question which had not been certified by the third-district court in *Shaw* or in any of its other decisions, and which in fact has not been addressed by any Florida district court—the question of whether the application of *Pullum* to the Clausells' cause of action would violate ***federal*** constitutional principles:

> III. WOULD THE APPLICATION OF *PULLUM*, TO BAR A CAUSE OF ACTION THAT ACCRUED AFTER THE *BATTILLA* DECISION BUT BEFORE THE *PULLUM* DECISION, DEPRIVE THE PLAINTIFF OF A RIGHT OF DUE PROCESS GUARANTEED BY THE UNITED STATES CONSTITUTION?

We will address all three questions in the course of this brief. It seems possible, however, in light of the numerous earlier district-court decisions on this general question which presently await the Court's review, that the first two certified questions will have already been decided by this Court at the time it turns to the instant case. In this context, we cannot emphasize too strongly that the instant case presents a third question—the federal constitutional question—which is not the subject of any of the other

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[1/] *See* A. 2. "A." refers to the Appendix at the end of this brief, containing the district court's opinion.

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statute-of-repose cases presently pending before the Court. Moreover, as we will note, the instant case also presents a new wrinkle on the general issue of the statute of repose, because the instant case is one of the first to arise after this Court's decision in *Smith v. Department of Insurance*, 12 F.L.W. 189 (Fla. April 23, 1987), which unquestionably overrules *Pullum sub silento*. *See infra* pp. 7-10. Thus, we respectfully submit that the Court's consideration of the briefs in this particular case is essential to its resolution of all the cases on the general issue of the statute of repose.

II
ISSUES ON APPEAL

A. WHETHER THE *PULLUM* DECISION IS WRONG, AND SHOULD BE OVERRULED.

B. WHETHER THE DISTRICT COURT ERRED IN AFFIRMING THE TRIAL COURT'S SUMMARY JUDGMENT IN FAVOR OF HOBART, ON THE BASIS OF THE STATUTE OF REPOSE.

III
SUMMARY OF THE ARGUMENT

The *Pullum* decision held that the products-liability statute of repose did not violate the access-to-courts guarantee of article I, section 21 of the Florida Constitution, because the statute was "reasonably" related to a legitimate governmental objective. In adopting this "rationality" standard, this Court radically and fundamentally departed from the invariant pre-existing standard for enforcing the access-to-courts guarantee—a standard, emphasized by the Court in *Kluger v. White*, 281 So.2d 1, 4 (Fla. 1973), under which the proponents of legislation were required to show "an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity . . . ." Indeed, it was this standard which had led the Court to overturn the statute of repose in the earlier *Battilla* decision. Thus, when *Pullum* rejected the prior standard of "overpowering necessity" in favor of a "rationality" test, it either ignored or overruled *Kluger v. White*.

Only a few months ago, however, in *Smith v. Department of Insurance*, 12 F.L.W. 189 (Fla. April 23, 1987), this Court re-affirmed *Kluger* in overturning a provision of

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Florida's Tort Reform and Insurance Act of 1986, which had imposed a limit upon non-economic damages in tort cases. The Court found that this limit violated the access-to-courts guaranty because it did not reflect "an overpowering public necessity," and in fact the Court in *Smith* ***explicitly*** rejected the "rationality" test which had formed the basis for *Pullum*. Thus, *Smith* and *Pullum* are directly inconsistent, and if *Smith* is the law in Florida, then *Pullum* has been overruled.

We will argue second that even if *Pullum* remained the law in Florida before the legislature repealed the statute of repose, *Pullum* should not have been applied to divest the Clausells and other plaintiffs like them of a cause of action which was perfectly viable at the time it arose and at the time it was filed. Under both Florida and federal law, such a cause of action is a property right of constitutional dimension, which cannot be divested without some overpowering public necessity. Especially since the statute of repose has now been repealed, it is inconceivable that *Pullum* could have reflected a governmental objective sufficiently important to override the Clausells' federal and Florida constitutional rights. And as we will demonstrate, it is no answer to say that *Pullum* resurrected the statute of repose "ab initio," because both federal and Florida law are very clear that it did so ***only*** to the extent that it did not interfere with pre-existing vested rights. In this case, the application of *Pullum* would in fact interfere with such rights, and thus would not survive either Florida or federal constitutional scrutiny.

Moreover, even if *Pullum* had been properly applied to the Clausells' pending action, that action was revived during the pendency of this case by the legislature's repeal of the statute of repose, under the well-settled rule that a court is required to apply the law in existence at the time of its decision. Thus, if *Pullum* was sufficient to divest the Clausells of a pre-existing right of constitutional dimension, then by the same token the legislature's repeal should have been sufficient to divest Hobart of any vested right (to be free of the Clausells' action) by virtue of *Pullum*. Hobart can certainly not argue that a change in the law (*Pullum*) should have been sufficient to throw out the Clausells' property rights, and yet escape the consequences of the same argument when

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the law changed again during the pendency of the same case.

That outcome is especially appropriate because the legislature's repeal of the statute of repose was a clasically-remedial act, and the law in Florida has long been that remedial legislation must apply retroactively notwithstanding the absence of an explicit legislative declaration, and notwithstanding any pre-existing vested rights. By analogy, Hobart's asserted rights under *Pullum* should not have forestalled application of the law existing during the pendency of the case (the legislative repeal), since that law was clasically-remedial in its purpose and effect.

Thus, either *Pullum* should not have been applied to divest the Clausells of their cause of action, or the repealing statute should have been applied to resurrect that cause of action. One way or the other, the Clausells must prevail.

IV
ARGUMENT

A. THE *PULLUM* DECISION IS WRONG, AND SHOULD BE OVERRULED.

In *Kluger v. White*, 281 So.2d 1, 4 (Fla. 1973), this Court held that "where a right of access to the courts for redress for a particular injury has been provided by statutory law predating the adoption of the Declaration of Rights of the Constitution of the State of Florida, or where such right has become a part of the common law of the State pursuant to Fla. Stat. §2.01, F.S.A., the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown." This obligation—of either providing a reasonable alternative or showing an overpowering public necessity—was held to be inherent in article I, §21 of our constitution, which provides that "[t]he courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay."

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

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relied upon *Kluger* in overturning a statute of repose governing actions concerning improvements to realty, which had required that such actions be brought within twelve years after construction of the improvement. The Court held that the cause of action at issue was a common-law right of action protected by article I, §21 of the Constitution; that the statute of repose in question created an absolute immunity after the passage of twelve years; that it therefore abolished the plaintiff's right of action while providing no alternative form of redress; and that the legislature had shown no overpowering public necessity for such a prohibition, or the absence of a less-restrictive alternative. The Court thus precisely followed the framework for analysis articulated in *Kluger v. White.*

In light of *Overland*, it is not surprising that in *Battilla*, 392 So.2d 894, this Court declared the products-liability statute of repose, §95.031, unconstitutional because it "denies access to courts under article I, §21, Florida Constitution." Under the *Kluger* formulation, as in *Overland*, the statute had abolished a pre-existing common-law right protected by the Florida Constitution; it had done so without creating any alternative form of redress; and it failed to reflect either an overpowering public necessity or the absence of a less-restrictive alternative. Thus, *Battilla* followed the consistent line of authority interpreting the access-to-courts provision of the Florida Constitution.

In *Pullum*, however, 476 So.2d 657, the framework for analysis established by *Kluger v. White* disappeared. The Court explicitly overruled *Battilla*, and held that the statute of repose, as it relates to products-liability cases, "is not unconstitutionally violative of article I, section 21 of the Florida Constitution." 476 So.2d at 659. In support of this holding, the Court did not—consistent with *Kluger v. White*—hold that the statute reflected an ***overwhelming*** public necessity which could not be achievable by less-restrictive means. To the contrary, the Court simply held that the legislature had "***reasonably*** decided that perpetual liability places an undue burden on manufacturers . . ." (our emphasis). *Id.* Indeed, the *Pullum* Court relied upon Justice McDonald's dissenting opinion in *Battilla*, 392 So.2d at 874, in which Justice McDonald had found a "rational and legitimate basis for the legislature to take this action . . . ." Thus, for the

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first time, *Kluger*'s requirement of "an overpowering public necessity" and "no alternative method of meeting such public necessity," 281 So.2d at 4, disappeared. In its place, for the first time, was a new formulation for judging asserted violations of the access-to-courts provision—a standard which focused merely upon the "rationality" of the legislature's action. Unless the *Pullum* Court had simply forgotten about *Kluger* and had made a mistake, this was obviously a fundamental change in the constitutional law of Florida, which not only overruled *Kluger v. White*, but also overruled dozens and dozens of cases which had followed *Kluger v. White*. After *Pullum*, the only rational conclusion was that *Kluger v. White* was dead.

But all of that changed on April 23, 1987, with this Court's decision in *Smith v. Department of Insurance*, 12 F.L.W. 189 (Fla. April 23, 1987), which declared unconstitutional a provision of the Tort Reform and Insurance Act of 1986, which had placed a $450,000.00-cap upon non-economic damages in tort cases. The Court found that provision to be inconsistent with article I, §21 of the Florida Constitution—the access-to-courts provision. And the basis for this decision was none other than *Kluger v. White*—which this Court quoted for the explicit proposition that the legislature cannot abolish a pre-existing common-law right without showing "an overpowering public necessity," and "no alternative method . . . ." 12 F.L.W. at 191. Indeed, the Court took pains to defend the formula articulated in *Kluger*, holding that "if it were permissible to restrict the constitutional right by a legislative action, without meeting the conditions set forth in *Kluger*, the constitutional right of access to the courts for redress of injuries would be subordinated to, and a creature of, legislative grace or, as [the appellant] puts it, 'majoritarian whim.' There are political systems where constitutional rights are subordinated to the power of the executive or legislative branches, but ours is not such a system." 12 F.L.W. at 192.

Moreover, the Court in *Smith* ***explicitly*** rejected the "rationality" test which had formed the basis for *Pullum*:

> Justice Overton appears to believe that the legislature's

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> major purpose in capping noneconomic damages was to assure available and affordable insurance coverage for all citizens and that this furnishes a rational basis for the cap. This reasoning fails to recognize that we are dealing with a constitutional right which ***may not be restricted simply because the legislature deems it rational to do so.*** Rationality only becomes relevant if the legislature provides an alternative remedy or abrogates or restricts the right based upon a showing of overpowering public necessity and that no alternative method of meeting that necessity exists. Here, however, the legislature has provided nothing in the way of an alternative remedy or commensurate benefit and one can only speculate, in an act of faith, that somehow the legislative scheme will benefit the tort victim. We cannot embrace such nebulous reasoning when a constitutional right is involved. Further, the trial court below did not rely on—nor have appellees urged before this Court—that the cap is based on a legislative showing of "an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such necessity can be shown." *Kluger*, 281 So.2d at 4. 12 F.L.W. at 192 (our emphasis).

In this passage, the Court ***explicitly rejected*** the reasoning which formed the entire basis for *Pullum*, and ***explicitly endorsed*** the reasoning which formed the entire basis for *Battilla*. After *Smith*, *Kluger* lives, and if *Kluger* lives, *Battilla* lives with it, and *Pullum* dies. There is simply no way to distinguish *Smith* from *Battilla*, or to reconcile *Smith* with *Pullum*. Thus, if *Pullum* silently overruled *Kluger*, then *Smith* silently overruled *Pullum*.

The better explanation, we respectfully submit, is that *Pullum* represents an unfortunate aberration from the otherwise-invariant line of authority which can be traced from *Kluger* to *Overland* to *Battilla* to *Smith*. These cases represent the law in Florida; they create the standard—the standard of overpowering public necessity—against which to judge the constitutional right of access to courts. Against that standard, as *Battilla* held, the products-liability statute of repose cannot survive. In light of *Smith*, *Pullum* must be overruled.

> B. THE DISTRICT COURT ERRED IN AFFIRMING THE TRIAL COURT'S SUMMARY JUDGMENT IN FAVOR OF HOBART, ON THE BASIS OF THE STATUTE OF REPOSE.
>
> *1. Under Both Florida and Federal Constitutional Law, the* Pullum *Decision, Which Revived the Statute of Repose After the Injury to Alberto Clausell, and After the Instant Action was Filed Against Hobart, Should Not Have Been Applied to the*

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Clausells' Pending Complaint.

Our contention here is that under both Florida law and federal law, the Clausells' cause of action—which was perfectly viable under *Battilla* at both the time it arose and the time it was filed—was a property right of constitutional dimension, which was not subject to divestment by this Court's subsequent decision in *Pullum*. Before segregating for separate discussion the federal and Florida questions, a few preliminary observations are in order.

We should discuss at the outset the essentially-semantic question of whether the application of *Pullum* to the Clausells' action would be, strictly speaking, a "retroactive" application. In the classic sense, such an application would be retroactive, in that *Pullum* post-dated the conduct to which the trial court and the district court applied the *Pullum* decision in this case--that is, the filing of the Clausells' complaint.[2/] We must acknowledge, however, that this concept of "retroactivity" typically governs the attempted application of a new statute or judicial decision to an action which had not yet been filed at the time of that new statute or decision. In that context, it is appropriate to focus upon the operative conduct which is the subject-matter of the new law; if that conduct pre-dated the relevant legislative or judicial action, then application of the new law would indeed be "retroactive."

In the instant case, the Clausells had already filed their action at the time *Pullum* was decided, and that fact complicates the question of whether the application of *Pullum* in the instant case would be "retroactive" in the classic sense. We say this because of the well-settled judge-made rule, under both Florida and federal law, that "an appellate court, in reviewing a judgment on direct appeal, will dispose of the case according to the

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[2/] *See generally Dade County v. Ferro*, 384 So.2d 1283, 1287 (Fla. 1980); *McGlynn v. Rosen*, 387 So.2d 468 (Fla. 3d DCA 1980), *review denied*, 392 So.2d 1376 (Fla. 1981); *Nelson v. Winter Park Memorial Hospital Association*, 350 So.2d 91 (Fla. 4th DCA 1977).

law prevailing at the time of appellate disposition."[3/] It may be argued that the application of a new law or judicial decision to a pending case is not, strictly speaking, "retroactive," but rather applies the law "contemporaneously" to a controversy which has not been finally resolved because of its status on appeal: "A statute is not rendered retroactive merely because the facts or requisites upon which its subsequent action depends . . . are drawn from a time antecedent to the enactment."[4/] Indeed, the party who invokes the new law may plausibly argue "that his approach is not retroactive in any way," but instead looks "solely to the law then and thereafter in force." *Hupman v. Cook*, 640 F.2d 497, 501 (4th Cir. 1981). As this Court noted in *Corbett v. General Engineering & Machinery Co.*, 37 So.2d 161, 162 (Fla. 1948), *quoting* 34 Am. Jur. §29, at 35 (1941): "'A statute of limitations enlarging the time within which an action may be brought as to pending cases is not retroactive legislation and does not impair any vested right.'"[5/]

[3/] *Goodfriend v. Druck*, 289 So.2d 710, 711 (Fla. 1974). *Accord, Florida Patient's Compensation Fund v. Von Stetina*, 474 So.2d 783, 787 (Fla. 1985); *Lowe v. The Honorable Joseph E. Price*, 437 So.2d 142 (Fla. 1983); *Hendeles v. Sanford Auto Auction, Inc.*, 364 So.2d 467 (Fla. 1978) (per curiam); *Wheeler v. State*, 344 So.2d 244 (Fla. 1977) (per curiam); *Florida East Coast R. v. Rouse*, 194 So.2d 260 (Fla. 1966); *Yates v. St. Johns Beach Development Co.*, 122 Fla. 141, 165 So. 384 (1935); *Winter Park Golf Estates v. City of Winter Park*, 114 Fla. 350, 153 So. 842 (1934); *Seaboard System R., Inc. v. Clemente*, 467 So.2d 348, 357 (Fla. 3d DCA 1985); *Eastern Air Lines, Inc. v. Gellert*, 438 So.2d 923 (Fla. 3d DCA 1983); *Department of Administration v. Brown*, 334 So.2d 355 (Fla. 1st DCA 1976), *cert. denied*, 344 So.2d 323 (Fla. 1977); *Collins v. Wainwright*, 311 So.2d 787 (Fla. 4th DCA), *cert. dismissed*, 315 So.2d 97 (Fla. 1975); *Arick v. McTague*, 292 So.2d 31 (Fla. 1st DCA 1973); *Carr v. Crosby Builders Supply Co.*, 283 So.2d 60 (Fla. 4th DCA 1973); *Ingerson v. State Farm Mutual Automobile Ins. Co.*, 272 So.2d 862 (Fla. 3d DCA 1973). Under federal law, see *Bradley v. School Board of City of Richmond*, 416 U.S. 696, 711, 94 S. Ct. 2006, 40 L. Ed.2d 476, 488 (1974), *quoting United States v. Schooner Peggy*, 1 Cranch 103, 110 (5 U.S. 103), 2 L. Ed. 49 (1801); *Linkletter v. Walker*, 381 U.S. 618, 85 S. Ct. 1731, 14 L. Ed.2d 601 (1965); *Mineo v. Port Authority of New York and New Jersey*, 779 F.2d 939, 943 (3d Cir. 1985), *cert. denied*, ___ U.S. ___, 106 S. Ct. 3297, 92 L. Ed.2d 712 (1986); *Louviere v. Marathon Oil Co.*, 755 F.2d 428, 430 (5th Cir. 1985).

[4/] *Reynolds v. United States*, 292 U.S. 443, 449, 54 S. Ct. 800, 803, 78 L. Ed. 1353 (1934), *quoted in United States v. Village Corp.*, 298 F.2d 816, 820 (4th Cir. 1962), *and Hupman v. Cook*, 640 F.2d 497, 503 (4th Cir. 1981). *See also United States v. Jacobs*, 306 U.S. 363, 367, 59 S. Ct. 551, 83 L. Ed. 763 (1939).

[5/] *Corbett* was receded from in *Homemakers, Inc. v. Gonzales*, 400 So.2d 965 (Fla.

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Thus, the concept of "retroactivity" is muddled in the context of a change in the law during the pendency of a case, and "[n]either . . . a retroactivity argument by plaintiff, nor the contrary retroactivity argument by defendants, has much to commend it," since the notion of "[r]etroactivity, as so applied, amounts to no more than language to announce a result." *Id.* at 501 & n.9. To avoid this muddle, we are willing to assume *arguendo* that under the judge-made rule requiring enforcement of the law existing during the pendency of a case, such enforcement might best be considered neither "retroactive" nor "prospective," but rather as a "contemporaneous" application of the new law. However, if Hobart is willing to accept our concession for the purposes of this discussion, it will have to make the same concession a bit later, when we talk about the "retroactive" or "contemporaneous" application of the statute repealing the statute of repose. We do not really care which concept is utilized (since the governing substantive standards are the same), so long as it is utilized consistently.

As we have noted, the general rule in both the Florida and federal systems is that all parties are subject to any change in the law during the pendency of a case. Since *Pullum* was decided during the pendency of the Clausells' action, it might be argued—as the district courts to have addressed this issue have held—that *Pullum* governs the instant case. But that observation only begins the analysis, because both the Florida and federal systems recognize an exception to the law-at-the-time-of-appeal rule—that "[t]his rule does not apply to a new law which alters a substantive right."[6/] As we will demonstrate, under both Florida and federal law, the application of *Pullum* to the

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1981), to the extent that *Corbett* allowed the classically-retroactive extension of a statute of limitations even absent an express legislative declaration to that effect. But *Homemakers* says nothing about the application of a new law during the pendency of a case, which is the sole point for which we have quoted *Corbett* above. *See infra* note 29.

6/ *Seaboard System R., Inc. v. Clemente*, 467 So.2d 348, 357 (Fla. 3d DCA 1985), *citing State v. Lavazzoli*, 434 So.2d 321 (Fla. 1983). *See Greene v. United States*, 376 U.S. 149, 84 S. Ct. 615, 11 L. Ed.2d 576 (1964) (law-at-the-time-of-appeal rule will not apply if its enforcement would create a "manifest injustice"), *quoted in Thorpe v. Housing Authority of the City of Durham*, 393 U.S. 268, 89 S. Ct. 518, 21 L. Ed.2d 474 (1969), *and Bradley v. Richmond School Board*, 416 U.S. 696, 716-17, 94 S. Ct. 2006, 40 L. Ed.2d 476, 491 (1974).

Clausells' pending action—whether such application is termed "retroactive" or "contemporaneous" or anything else—would impermissibly interfere with the Clausells' vested substantive rights.

a. The Florida Constitutional Question.

As we have noted, the *Battilla* decision—declaring the statute of repose unconstitutional as applied to products-liability cases—was the law in Florida both at the time the Clausells' cause of action arose, and at the time they filed that action. At both times, because of *Battilla*, the statute of repose in Florida ***did not exist.*** As this Court noted in an analogous case:

> [T]he Constitution, by its own superior force and authority, eliminates the statute or the portion thereof that conflicts with organic law, and renders it inoperative ab initio, so that the Constitution and not the statute will be applied by the court in determining the litigated rights.
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> If the legislative enactment conflicts with an existing provision of the Constitution, such enactment does not become a law.
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> * * *
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> Where a legislative enactment authorizing a municipality to issue bonds has never been adjudged to be constitutional, and it is judicially declared to be in conflict with organic law, the Constitution by its dominant force renders the enactment inoperative ab initio, and bonds issued thereunder are void because issued without authority of law.

State ex rel. Nuveen v. Greer, 88 Fla. 249, 102 So. 739, 743-45 (1924). *See Ex Parte Messer*, 87 Fla. 92, 99 So. 330, 333 (1924) (unconstitutional statute is "void").[7/]

[7/] The federal rule is the same, *see infra* p. 21. Hobart argued below (answer brief at 19 n.16) that *Battilla* had only declared the statute of repose unconstitutional as applied in the particular *Battilla* case, and thus that the statute remained applicable to the Clausells at the time they filed their cause of action. That is incorrect. On the authority of *Overland Construction Co. v. Sirmons*, 369 So.2d 572, 575 (Fla. 1979)—which had declared an analogous statute ***facially invalid*** insofar as it provided "an absolute bar to lawsuits brought more than twelve years after events connected with the construction of improvements to real property"—*Battilla* declared the statute of repose invalid "as applied" to products liability cases in general. *Battilla*, 392 So.2d at 874. The dissent in *Battilla*, *id.* at 874-75, and the subsequent *Pullum* decision, 476 So.2d 657, leave

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Thus, not only at the time the Clausells' action arose, but also at the time they first filed their action against Hobart, the Florida statute of repose ***did not exist,*** because it was a total nullity "ab initio" by virtue of its unconstitutionality.[8/] This observation is critical, because it means that the Clausells' cause of action was perfectly-viable at the time they filed it, and it is well-settled in Florida that a viable cause of action—a "chose in action"—is a property right of constitutional dimension.[9/] As this Court stated in *Sunspan Engineering & Construction Co. v. Spring-Lock Scaffolding Co.*, 310 So.2d 4, 8 (1975): "[I]t has been held that a vested cause of action, or 'chose in action' is personal property entitled to protection from arbitrary laws."

If there were any doubt about the constitutional sanctity of a cause of action under Florida law, it is resolved beyond debate by this Court's recent decision in *Homemakers, Inc. v. Gonzales*, 400 So.2d 965, 967 (Fla. 1981), in which the Court re-affirmed the well-settled Florida rule that "to *shorten* a period of limitation, the legislature must by

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absolutely no doubt of that. Thus, it is not surprising that Hobart's initial answer to the Clausells' complaint, filed two months before the *Pullum* decision, did ***not*** raise the statute of repose as a defense (R. 10). That defense came only in the amended answer, filed after *Pullum* (R. 37), along with a motion for summary judgment in which Hobart argued that the action was now untimely because of *Pullum* (R. 39). Thus, Hobart itself acknowledged below that the statute of repose was inapplicable under *Battilla* until *Pullum* was decided, and Hobart is certainly estopped to take a contrary position on appeal.

8/ Because the statute did not exist at the time Hobart manufactured the machine, this is "not a case where the appellant's conduct would have been different" if *Battilla* had not been decided, because Hobart's original design of the product could not have been influenced in any way by "a statute of limitation for shelter from liability." *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 316, 65 S. Ct. 1137, 89 L. Ed. 1628, 1636 (1945). And in any event, a defendant "has no vested right to act negligently." *Louviere v. Marathon Oil Co.*, 755 F.2d 428, 430 (5th Cir. 1985).

9/ *See Sunspan Engineering & Construction Co. v. Spring-Lock Scaffolding Co.*, 310 So.2d 4, 8 (1975); *Ross v. Gore*, 48 So.2d 412 (Fla. 1950); *State ex rel. Vars v. Knott*, 135 Fla. 206, 184 So. 752 (1938), *appeal dismissed*, 308 U.S. 506, 60 S. Ct. 72, 84 L. Ed. 433 (1939); *In Re Will of Martell*, 457 So.2d 1064, 1067 (Fla. 2d DCA 1984); *Division of Workers' Compensation v. Brevda*, 420 So.2d 887, 891 (Fla. 1st DCA 1982). *See generally Pritchard v. Norton*, 106 U.S. 124, 1 S. Ct. 102, 27 L. Ed. 104 (1882); *Martinez v. Fox Valley Bus Lines*, 17 F. Supp. 576 (N.D. Ill. 1936); *Bush v. Reid*, 516 P.2d 1215 (Alaska 1973); *Gregory v. Colvin*, 363 S.W.2d 539 (Ark. 1963); *Faucheaux v. Alton Ochsner Medical Foundations Hospital and Clinic*, 470 So.2d 878 (La. 1985); *City of Cincinnati v. Hafer*, 49 Ohio St. 60, 30 N.E. 197 (1892).

statute allow a reasonable time to file actions already accrued,"[10] and observed that this rule reflects a "constitutional mandate . . . ." That observation is explicit confirmation by this Court that a cause of action in Florida—even if not yet reduced to judgment—is a right of constitutional dimension. It is precisely because such prospective plaintiffs have constitutional right in their causes of action that the legislature may not entirely extinguish them.[11]

In this context, there can be no question that the application of *Pullum* to the Clausells' pending case would divest them of a constitutional right under Florida law. As we have noted, that is explicitly forbidden by our constitution, as repeatedly interpreted by this Court. And in this context, it is no answer to observe—as did the third district court in the first of its decisions on this question, *Shaw v. General Motors Corp.*, 503 So.2d 362 (Fla. 3d DCA 1987), *review granted*, that the Clausells' vested rights should be subordinated "[b]ecause the overruling of a decision holding a statute unconstitutional validates the statute as of its effective date . . . ."[12] *See also Cassidy v. The Firestone Tire & Rubber Co.*, 495 So.2d 801 (Fla. 1st DCA 1986), *review denied*, ___ So.2d ___ (1987) ("decisions overruling earlier precedent are generally given retroactive effect . . . ."). What these decisions overlook is that the general principles which they recite are subject to a well-settled exception—that a judicially-resurrected statute must be

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[10] *See Griffis v. Unit Crane & Shovel Corp.*, 369 So.2d 342 (Fla. 1979); *Overland Construction Co. v. Sirmons*, 369 So.2d 572 (Fla. 1979); *Faulkner v. Allstate Ins. Co.*, 367 So.2d 214 (Fla. 1979); *Foley v. Morris*, 339 So.2d 215, 216-17 (Fla. 1976); *Sunspan Engineering Co. v. Spring-Lock Scaffolding Co.*, 310 So.2d 4 (Fla. 1975); *Kluger v. White*, 281 So.2d 1, 4 (Fla. 1973); *Buck v. Triplett*, 32 So.2d 753, 754-55 (Fla. 1947); *Robinson v. Johnson*, 110 So.2d 68, 70 (Fla. 1st DCA 1959).

[11] We are aware of only one Florida case which has concluded that "[a] plaintiff has no vested right in a tort claim," *Lamb v. Volkswagenwerk Aktiengesellschaft*, 631 F. Supp. 1144, 1149 (S.D. Fla. 1986), but that decision cites a federal case, not Florida law, and in light of the Florida cases cited above, it is simply wrong. The *Lamb* decision cannot possibly be reconciled with the well-settled constitutional principle that the legislature may not extinguish a pre-existing cause of action without allowing prospective plaintiffs a reasonable time in which to bring it.

[12] *Accord, Lamb v. Volkswagenwerk Aktiengesellsehaft*, 631 F. Supp. 1144, 1149 (S.D. Fla. 1986) (Florida law) (resurrected statute is "valid from its inception").

considered valid "as of its effective date" ***only*** to the extent that its revival does not interfere with vested rights which were acquired during the period of its invalidity.

That was the precise declaration of this Court in *Florida Forest and Park Service v. Strickland*, 18 So.2d 251, 253 (Fla. 1944): "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 retrospective operation."[13/] As the below-cited cases make clear, and contrary (we respectfully submit) to Justice Grimer's recent suggestion in *Nissan Motor Co. v. Phlieger*, 12 F.L.W. 256, 258 (Fla. May 28, 1987) (Grimes, J., concurring), there is no authority in Florida (or anywhere else) that a party must actually rely upon a ***constitutional*** right in order successfully to defeat its retroactive abolition. A property right of constitutional dimension would have very-little value if that were the case. Moreover, the Clausells ***did*** rely upon *Battilla*, in taking the

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13/ *See Nissan Motor C. v. Phlieger*, 12 F.L.W. 256, 258 (Fla. May 28, 1987) (Grimes, J., concurring); *Dade County v. Ferro*, 384 So.2d 1283 (Fla. 1980); *International Studio Apartment Association v. Lockwood*, 421 So.2d 1119, 1121 (Fla. 4th DCA 1982), *review denied*, 430 So.2d 451 (Fla.), *cert. denied*, 464 U.S. 895, 104 S. Ct. 244, 78 L. Ed.2d 233 (1983); *Department of Revenue v. Anderson*, 389 So.2d 1034 (Fla. 1st DCA 1980), *review denied*, 399 So.2d 1141 (Fla. 1981). This principle was enunciated by this Court as early as 1911 in *Christopher v. Mungen*, 61 Fla. 513, 55 So. 273, 280 (1911): "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 held to 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." Thus, the resurrected statute is valid *ab initio* ***only*** to the extent that it does not interefere with previously-acquired vested rights.

Admittedly, the notion of vested rights in Florida was somewhat more constricted in 1911 than it is today. Thus, the *Christopher* Court was concerned only with vested rights acquired "under particular adjudications" of a statute—and not with more inchoate causes of action not yet reduced to judgment. As we have noted, however, Florida law has evolved on that particular point, and there can be no question that even an inchoate cause of action is now considered to be a property right—a vested right—under Florida law. As this Court stated explicitly in *Sunspan Engineering Construction Co. v. Spring-Lock Scaffolding Co.*, 310 So.2d 4, 8 (Fla. 1975), "a vested cause of action, or 'chose in action,' is personal property entitled to protection from arbitrary laws." Indeed, as we have pointed out, if a cause of action in Florida were not a property right of constitutional dimension, then the *Homemakers* decision, 400 So.2d 965, could not have been decided the way it was. *See supra* p. 15.

time to hire a lawyer and incur the cost of bringing this lawsuit, in the belief (then entirely correct) that it was not untimely.

The federal rule is the same as the Florida rule, as Justice Stewart made clear in his concurring opinion in *Hughes v. State of Washington*, 389 U.S. 290, 296-97, 88 S. Ct. 438, 19 L. Ed.2d 530, 535-36 (1967), in which the Supreme Court reversed a state supreme-court decision interpreting the state's constitution to deny ocean-front property-owners a pre-existing common-law right of ownership in any accretions of the property built up by the ocean: "[A] State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all."

Thus in *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371, 374, 60 S. Ct. 317, 84 L. Ed. 329, 332-33 (1940), the Supreme Court rejected the notion that vested rights cannot be acquired under a statute later declared unconstitutional:

> The courts below have proceeded on the theory that the Act of Congress, having been found to be unconstitutional, was not a law; that it was inoperative, conferring no rights and imposing no duties, and hence affording no basis for the challenged decree. . . . It is quite clear, however, that such broad statements as to the effect of a determination of unconstitutionality must be taken with qualifications. The actual existence of a statute, prior to such a determination, is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be considered in various aspects,—with respect to particular relations, individual and corporate, and particular conduct, private and official. Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination.

As this Court made clear in *Florida Forest*, the converse of that proposition is equally true: where a statute has been declared unconstitutional, and property rights have become vested during the period of its invalidity, its subsequent validation cannot be permitted to destroy those previously-acquired rights. *See also Martin v. Smith*, 534 F.

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Supp. 804, 808 (W.D.N.C. 1982) ("[I]t would be unconscionable and unreasonable . . . to hold the plaintiffs barred by the statute, which did not even exist at the time the plaintiffs' decedents were killed . . .").

Thus, it is no answer that *Pullum* might properly be said to have resurrected the statute of repose *ab initio*. As this Court stated explicitly in *Florida Forest*, "[w]here 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 retrospective operation." Thus, *Pullum* resurrected the statute of repose ***only*** to the extent that it did not disturb pre-existing vested rights, and the Clausells clearly had a pre-existing vested right in their cause of action at the time they filed it, since *Battilla* was in force, and the statute of repose was ***a nullity***. In this context, it is inconceivable that *Pullum* should be held to apply "retroactively" to the Clausells' prior-filed cause of action—or even "contemporaneously" under the law-at-the-time-of-appeal principle—because such application would interfere with their vested constitutional rights. Under Florida constitutional law, *Pullum* does not apply in this case.[14/]

b. The Federal Constitutional Question.

Under federal law, there can be no question that a state-created cause of action is a vested property right entitled to the protection of the due-process clause of the Fourteenth Amendment. As the U.S. Supreme Court has stated: "[A] cause of action is a

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14/ Another route to the same conclusion under Florida law is the access-to-courts guarantee of article I, §21 of the Florida Constitution. This Court has acknowledged that if the retroactive application of its decision would deny the plaintiff a pre-existing right to pursue a theretofore-viable claim, it would violate the access-to-courts guarantee. *Davis v. Artley Construction Co.*, 154 Fla. 481, 18 So.2d 255 (1944), *citing Florida Forest. See generally Rupp v. Bryant*, 417 So.2d 658, 666 (Fla. 1982); *State Department of Transportation v. Knowles*, 402 So.2d 1155, 1158 (Fla. 1981); *Village of El Portal v. City of Miami Shores*, 362 So.2d 275 (Fla. 1978); *Ciravola v. The Florida Bar*, 361 So.2d 121, 124 (Fla. 1978); *Foley v. Morris*, 339 So.2d 215 (Fla. 1976); *McCord v. Smith*, 43 So.2d 704 (Fla. 1950); *Davis v. Artley Construction Co.*, 18 So.2d 255, 259 (Fla. 1944); *Culpepper v. Culpepper*, 3 So.2d 330, 331 (Fla. 1941). Moreover, such a "retroactive" or "contemporaneous" application of *Pullum* might also present equal-protection problems. *See infra* note 27.

species of property protected by the Fourteenth Amendment's Due Process Clause." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428, 102 S. Ct. 1148, 71 L. Ed.2d 265, 273 (1982), *citing Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950). Even before the *Logan* decision, the Supreme Court had reflected in *Martinez v. California*, 444 U.S. 277, 281-82, 100 S. Ct. 553, 62 L. Ed.2d 481 (1980), that "[a]rguably," a state tort claim is a "species of 'property' protected by the Due Process Clause," in holding that the availability of adjudicatory procedures under a state statute dealing with fair-employment practices was a federal property right no less than the right at issue in *Mullane*--which was the right of trust beneficiaries to litigate their interests in state court. Thus in *Holman v. Hilton*, 712 F.2d 854, 858 (3rd Cir. 1983), the court held explicitly that a state tort claim is a federal property right.[15/]

Even a state's constriction of a state-created cause of action--as opposed to its outright abolition--for example, the removal of established adjudicatory procedures under state law, without removing the underlying cause of action--may be "the equivalent of denying [the plaintiffs] an opportunity to be heard upon their claimed right." *Boddie v. Connecticut*, 401 U.S. 371, 380, 91 S. Ct. 780, 28 L. Ed.2d 113 (1971). Thus, *Boddie* held that "absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." 401 U.S. at 377, 91 S. Ct. 780, 28 L. Ed.2d 113. *Boddie* concerned rights incident to a divorce, which the Supreme Court acknowledged later in *Logan* "may not be a property interest in the same sense as a tort or a discrimination action." *Logan v. Zimmerman Brush Co.*, 455 U.S. at 430 n.5, 102 S.

15/ *Accord, Mathis v. Eli Lily and Co.*, 719 F.2d 134, 141 (6th Cir. 1983) (state tort claim becomes vested property right when injury occurs); *Dague v. Piper Aircraft Corp.*, 513 F. Supp. 19, 26 (N.D. Ind. 1980), *citing Chafin v. Nicosia*, 261 Ind. 698, 310 N.E.2d 867 (1974). *See also Gilmere v. City of Atlanta, Georgia*, 737 F.2d 894, 900 n.13, 910-11 n.39 (11th Cir.), *receded from on other grounds*, 774 F.2d 1495 (11th Cir. 1984) (en banc); *American Druggists Ins. Co. v. Bogart*, 707 F.2d 1229, 1236-37 (11th Cir. 1983). *Compare Ducharme v. Merrill-National Laboratories*, 574 F.2d 1307, 1310 (5th Cir.), *cert. denied*, 439 U.S. 1002, 99 S. Ct. 612, 58 L. Ed.2d 677 (1978) (no vested right in tort claim which arose after effective date of statute).

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Ct. 1148, 71 L. Ed.2d at 274 & n.5.

In enforcing the plaintiff's property right to pursue his grievance in *Logan*, the Supreme Court was unimpressed by the argument invoked in the district court by Hobart (answer brief at 18) through a single federal district-court decision[16/]--that a cause of action not yet reduced to judgment is too "inchoate" to constitute a federal property right. As the Supreme Court said in *Logan*: "A claimant has more than an abstract desire or interest in redressing his grievance: his right to redress is guaranteed by the State, with the adequacy of his claim assessed under what is, in essence, a . . . standard . . . based upon the substantiality of the evidence." 455 U.S. at 432, 102 S. Ct. 1148, 71 L. Ed.2d at 275. Such a right, the Supreme Court reasoned, "presumably can be surrendered for value," and is "at least as substantial" as the right to an education, or the right to a trainer's license, which the Supreme Court in prior cases had found to be protected. *Id. See American Druggists Ins. Co. v. Bogart*, 707 F.2d 1229, 1235-36 (11th Cir. 1983). Thus, there can simply be no question that under federal constitutional law, a state cause of action in tort is a property right, entitled to federal constitutional protection against arbitrary deprivation by the state.

Under federal law, no less than under Florida law, the Clausells had a viable cause of action at the time it arose and at the time it was filed, because *Battilla* had declared the statute of repose unconstitutional. As the U.S. Supreme Court has stated explicitly, an unconstitutional statute "confers no rights; it imposes no duty; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."[17/] Thus, the Clausells' cause of action was a vested federal right at

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16/ *Lamb v. Volkswagenwerk Aktiengesellschaft*, 631 F. Supp. 1144, 1149 (S.D. Fla. 1986).

17/ *Norton v. Shelby County*, 118 U.S. 425, 442, 6 S. Ct. 1121, 30 L. Ed. 178, 186 (1886), *quoted in Linkletter v. Walker*, 381 U.S. 618, 623, 85 S. Ct. 1731, 14 L. Ed.2d 601, 604-05 (1965). Of course, as the Supreme Court made clear in a case quoted earlier (p. 18), *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371, 374, 60 S. Ct. 317, 84 L. Ed. 329, 332-33 (1939), an unconstitutional statute may confer vested rights during the period ***before*** it is overturned. The point here is that ***after*** such a statute is

the time it arose and the time it was filed.

Of course, it is well settled that federal rights may not be divested by federal action—by a new federal statute[18/] or judicial decision. *See Prater v. United States Parole Commission*, 802 F.2d 948, 952 (7th Cir. 1986) (federal court cannot retroactively accomplish by interpreting a federal statute what the Congress could not accomplish by amending it). And it is equally settled that when state-created rights become vested ***federal*** property rights, they are no less entitled to protection against divestment by a state court or legislature. Before reviewing some of the cases on this point, we should emphasize that it applies both to the declarations of a state court and to the enactments of a state legislature. A state court cannot accomplish what a state legislature is constitutionally forbidden to do; and a state legislature cannot accomplish what a state court is constitutionally forbidden to do. The most extensive explication of this principle is found in *Shelly v. Kraemer*, 334 U.S. 1, 14-18, 68 S. Ct. 836, 92 L. Ed. 1161, 1181-83 (1947):

> That the action of state courts and judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment, is a proposition which has long been established by the decisions of this Court. [Long discussion of prior cases omitted].
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> These cases demonstrate . . . the early recognition by this Court that state action in violation of the [Fourteenth] Amendment's provisions is equally repugnant to the constitutional commands whether directed by state statute or taken by a judicial officer in the absence of statute.
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> The action of state courts in imposing penalties or depriving parties of other substantive rights without providing adequate notice and opportunity to defend, has, of course, long

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overturned, even if it remains on the books, it is "as inoperative as though it had never been passed."

18/ *See United States v. Security Industrial Bank*, 459 U.S. 70, 81, 103 S. Ct. 1107, 74 L. Ed.2d 235, 245 (1982); *Holt v. Henley*, 232 U.S. 637, 639-40, 34 S. Ct. 458, 58 L. Ed. 767 (1914).

> been regarded as a denial of the due process of law guaranteed by the Fourteenth Amendment.
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> But the examples of state judicial action which have been held by this Court to violate the Amendment's commands are not restricted to situations in which the judicial proceedings were found in some manner to be procedurally unfair. It has been recognized that the action of state courts in enforcing a substantive common-law rule formulated by those courts, may result in the denial of rights guaranteed by the Fourteenth Amendment, even though the judicial proceedings in such cases may have been in complete accord with the most rigorous conceptions of procedural due process. [Discussion of cases omitted].
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> The short of the matter is that from the time of the adoption of the Fourteenth Amendment until the present, it has been the consistent ruling of this Court that the action of the States to which the Amendment has reference, includes actions of state courts and state judicial officials. Although, in construing the terms of the Fourteenth Amendment, differences have from time to time been expressed as to whether particular types of state action may be said to offend the Amendment's prohibitory provisions, it has never been suggested that state court action is immunized from the operation of those provisions simply because the act is that of the judicial branch of the state government.[19/]

The federal rule is that neither a new state statute nor a new interpretive state judicial decision can divest a party of a pre-existing vested right, "absent a countervailing state interest of overriding significance . . . ." *Boddie v. Connecticut*, 401 U.S. 371, 377, 91 S. Ct. 780, 28 L. Ed.2d 113 (1971). Thus as early as 1863, in *Gelpcke v.*

19/ *Accord, Bouie v. Columbia*, 378 U.S. 347, 354-55, 84 S. Ct. 1697, 12 L. Ed.2d 894, 900 (1964) ("If a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result"); *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 680, 50 S. Ct. 451, 74 L. Ed. 1107, 1113 (1930) ("If the result above stated were attained by an exercise of the state's legislative power, the transgression of the due process clause of the 14th amendment would be obvious. . . . The violation is none the less clear when that result is accomplished by the state judiciary in the course of construing an otherwise valid . . . state statute"). *See also Hughes v. State of Washington*, 389 U.S. 290, 296-97, 88 S. Ct. 438, 19 L. Ed.2d 530, 535-36 (1967) (Stewart, J., concurring) (federal constitution forbids retroactive state confiscation "no less through its courts than through its legislature").

Dubuque, 1 Wall. 175, 17 L. Ed. 520 (1863), the Supreme Court held that bonds issued under apparent legislative authority were valid notwithstanding a subsequent state supreme-court decision that the legislature had no power to issue them. In *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 371, 30 S. Ct. 140, 54 L. Ed. 228, 239 (1910), Justice Holmes wrote for the court that a new state law could not interfere with contracts made under the old state law. In *Mullaney v. Wilbur*, 421 U.S. 684, 690 n.10, 95 S. Ct. 1881, 44 L. Ed.2d 508, 514-15 n.10 (1975), the Supreme Court emphasized that where a new state supreme-court decision is unexpected, "the retroactive application of the new interpretation was itself a denial of due process." And in *Bouie v. Columbia*, 378 U.S. 347, 354, 84 S. Ct. 1697, 12 L. Ed.2d 894, 900 (1964), the Supreme Court held that "[w]hen a state court overrules a consistent line of procedural decisions with the retroactive effect of denying a litigant a hearing in a pending case, it thereby deprives him of due process of law 'in its primary sense of an opportunity to be heard and to defend [his] substantive right,'" *quoting Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 678, 50 S. Ct. 451, 74 L. Ed. 1107, 1112 (1929). *Accord*, *Spencer v. Kemp*, 781 F.2d 1458, 1470-71 n.23 (11th Cir. 1986) (*quoting Bouie*); *Robinson v. Ariyoshi*, 753 F.2d 1468, 1474 (9th Cir. 1985) ("New law, however, cannot divest rights that were vested before the courts announced the new law"), *vacated on other grounds*, ___ U.S. ___, 106 S. Ct. 3269, 91 L. Ed.2d 560 (1986); *Reynolds v. State of Georgia*, 640 F.2d 702, 705 (5th Cir.) (per curiam), *cert. denied*, 454 U.S. 865, 102 S. Ct. 326, 70 L. Ed.2d 165 (1981) (citing *Brinkerhoff-Faris*).

In *Brinkerhoff-Faris*, the bank brought an action in state court to enjoin the collection of certain state taxes, which action the state supreme court ordered dismissed on the ground that the plaintiff had failed to exhaust a state administrative remedy, notwithstanding an explicit prior state supreme-court decision which had held that no such administrative remedy existed. In a unanimous decision, the Supreme Court, through Justice Brandeis, held that the retroactive interpretive decision was a denial of the bank's federal due-process rights:

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No one doubted the authority of the [earlier state supreme-court decision] until it was expressly overruled in the case at bar. . . . Then it was too late for the plaintiff to avail itself of the newly found remedy.

* * *

We are of opinion that the judgment of the supreme court of Missouri must be reversed, because it has denied the plaintiff due process of law—using that term in the primary sense of an opportunity to be heard and to defend its substantive right.

* * *

[B]y denying to it the only remedy available for the enforcement of its right to prevent the seizure of its property, the judgment deprives the plaintiff of its property.

Second. If the result above stated were attained by an exercise of the state's legislative power, the transgression of the due process clause of the 14th Amendment would be obvious. . . . The violation is none the less clear when that result is accomplished by the state judiciary in the course of construing an otherwise valid . . . state statute. The federal guaranty of due process extends to state action through its judicial, as well as through its legislative, executive, or administrative, branch of government.

It is true that the courts of a state have the supreme power to interpret and declare the written and unwritten laws of the state; that this court's power to review decisions of state courts is limited to their decisions on federal questions; and that the mere fact that a state court has rendered an erroneous decision on a question of state law, or has overruled principles or doctrines established by previous decisions on which a party relied, does not give rise to a claim under the 14th Amendment or otherwise confer appellate jurisdiction on this court.

* * *

Our present concern is solely with the question whether the plaintiff has been accorded due process in the primary sense—whether it has had an opportunity to present its case and be heard in its support. Undoubtedly, the state court had the power to construe the statute dealing with the state tax commission; and to re-examine and overrule the [earlier case]. Neither of these matters raises a federal question; neither is subject to our review. But, while it is for the state courts to determine the adjective as well as the substantive law of the state, they must, in so doing, accord the parties due process of law. Whether acting through its judiciary or through its legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it.[9/]

9/ Had there been no previous construction of the statute by the highest court, the plaintiff would, of course, have had to assume the risk that the ultimate interpretation by the highest court might differ from its own. Likewise, if the administrative remedy were still available to the plaintiff, there would be no denial of due process in that regard. 281 U.S. at 677-81 & n.9, 50 S. Ct. 451, 74 L. Ed.2d at 1111-14 & n.9.

Similarly in *Coombes v. Getz*, 285 U.S. 434, 52 S. Ct. 435, 76 L. Ed. 866 (1932), a corporation's creditor filed an action in state court to collect a debt from the corporation's directors, under a state statute allegedly holding them personally liable. During the pendency of an appeal to the state supreme court, the statute was repealed, and on that basis the state supreme court dismissed the appeal. But the U.S. Supreme Court reversed, because the plaintiff's right of action under the old statute had vested before the repeal:

> The corporate charter may be repealed or amended, and, within limits not necessary to define, the interrelations of state, corporation and stockholders may be changed; but neither vested property rights nor the obligation of contracts of third persons may be destroyed or impaired. . . . The right of this petitioner to enforce respondent's liability had become fully perfected and vested prior to the repeal of the liability provision. His cause of action was not purely statutory. It did not arise upon the constitutional rule of law, but upon the contractual liability created in pursuance of the rule. Although the latter derived its being from the former, it immediately acquired an independent existence competent to survive the destruction of the provision which gave it birth. The repeal put an end to the rule for the future, but it did not and could not destroy or impair the previously vested right of the creditor (which in every sense was a property right . . .) to enforce his cause of action upon the contract. 285 U.S. at 441-42, 52 S. Ct. 434, 76 L. Ed. at 871.20/

The foregoing principles were described in Justice Stewart's concurring opinion in *Hughes v. State of Washington*, 389 U.S. 290, 295-98, 88 S. Ct. 438, 19 L. Ed.2d 530, 534-

20/ *Compare Stockholders of the Peoples Banking Co. of Smithsberg, Maryland v. Sterling*, 300 U.S. 175, 183, 184, 57 S. Ct. 386, 81 L. Ed. 586, 591, 592 (1936) ("The [state bank] charter was accepted subject to the condition that the personal liability then prescribed by statute should be subject thereafter to repeal or alteration. . . . Appellants have failed to show that any debts of the corporation to be enforced in these proceedings were debts existing on June 1, 1910, when the present statute became law . . .").

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36 (1967), which we discussed *supra* p. 18:

> Surely it must be conceded as a general proposition that the law of real property is, under our Constitution, left to the individual States to develop and administer. And surely Washington or any other State is free to make changes, either legislative or judicial, in its general rules of real property law, including the rules governing the property rights of riparian owners. Nor are riparian owners who derive their title from the United States somehow immune from the changing impact of these general state rules.
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> [I]f article 17 of the Washington Constitution had unambiguously provided, in 1889, that all accretions along the Washington coast from that day forward would belong to the State rather than to private riparian owners, this case would present two questions not discussed by the court, both of which I think exceedingly difficult. . . .
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> The fact, however, is that Article 17 contained no such unambiguous provision. . . . In the present case the Supreme Court of Washington held that by [virtue of certain constitutional] language, "[l]ittoral rights of upland owners were terminated." . . . Such a conclusion by the State's highest court on a question of state law would ordinarily bind this Court, but here the state in federal questions are inextricably intertwined. For if it cannot reasonably be said that the littoral rights of upland owners were terminated in 1889, then the effect of the decision now before us is to take from these owners, without compensation, land deposited by the Pacific Ocean from 1889 to 1966.
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> [T]o the extent that [the state court's decision] constitutes a sudden change in state law, unpredictable in terms of the relevant precedents, no such deference would be appropriate. For a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all. Whether the decision here worked an unpredictable change in state law thus inevitably presents a federal question for the determination of this Court. . . . The Washington court insisted that its decision was "not startling." . . . What is at issue here is the accuracy of that characterization.
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> * * *
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> I can only conclude, as did the dissenting judge below, that the state court's most recent construction of Article 17 effected an unforeseeable change in Washington property law as expounded by the State Supreme Court.
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> There can be little doubt about the impact of that change

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> upon Mrs. Hughes: The beach she had every reason to regard as hers was declared by the state court to be in the public domain. Of course the court did not conceive of this action as a taking. . . . But the Constitution measures a taking of property not by what a State says, or by what it intends, but by what it *does*. Although the State in this case made no attempt to take the accreted lands by eminent domain, it achieved the same result by effecting a retroactive transformation of private and of public property—without paying for the privilege of doing so. Because the Due Process Clause of the Fourteenth Amendment forbid such confiscation by a State, no less through its courts than through its legislature, and no less when a taking is unintended than when it is deliberate, I join in reversing the judgment. 389 U.S. at 295-98, 88 S. Ct. 434, 19 L. Ed.2d at 534-36.

On the basis of these overwhelming authorities, there can be no question that this Court's *Pullum* decision, resurrecting the statute of repose in Florida, does not survive federal constitutional scrutiny to the extent that it might be applied by this Court to divest prospective plaintiffs of any pre-existing rights of action acquired during the *Battilla* regime. The *Battilla* decision was the unqualified law of this state at the time the Clausells' cause of action arose and was filed, and there is simply no conceivable justification grounded in Florida's policy—especially since the statute of repose now has been repealed—which the federal courts would recognize as sufficiently important to override federal constitutional rights. To the contrary, the *Pullum* decision will survive federal constitutional scrutiny only to the extent that it leaves such rights undisturbed.

One final footnote is appropriate on this point. The foregoing principles—concerning the extent to which a federal or state action (legislative or judicial) may interfere with pre-existing constitutional rights—should not be confused with the question of whether a new federal judicial decision should apply retroactively in the ***absence*** of some pre-existing right of constitutional dimension. The general rules governing such retroactivity, in the absence of federal constitutional questions, were articulated by the Supreme Court in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07, 92 S. Ct. 349, 30 L. Ed.2d 296, 306 (1971), in which the Supreme Court held that a new judicial decision should apply retroactively only if three criteria are satisfied: the new decision must have been foreshadowed by earlier decisions, so that the objecting party might

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reasonably have anticipated it; the new decision must reflect a substantive purpose which can only be served by its retroactive application; and such application must not be inequitable.

The *Chevron Oil* test remains the federal rule for considering the propriety of the retroactive application of a federal decision on a federal question in the absence of some competing constitutional right.[21/] But the *Chevron Oil* balancing test is not constitutionally mandated.[22/] Thus, when pre-existing vested rights are not implicated, the *Chevron Oil* test does not apply to a new state-court decision; to the contrary, in the absence of a competing federal constitutional right, the federal courts will apply state law in determining the retroactivity of a new state-court decision.[23/]

However, as we have noted, when a federal constitutional right is involved, the rule governing both federal and state law (legislative and judge-made) is that such laws may not interfere with pre-existing federal rights in the absence of an overwhelming justification. As we have noted, there is no such justification in this case.

Moreover, even if the more-flexible *Chevron Oil* standard did apply in the instant

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21/ *Griffith v. Kentucky*, 55 U.S.L.W. 4089, 4091 n.8 (U.S. January 13, 1987). *See generally United States v. Johnson*, 457 U.S. 537, 550 n.12, 102 S. Ct. 2579, 73 L. Ed.2d 202, 214 n.12 (1982); *Williams v. City of Atlanta*, 794 F.2d 624, 626 (11th Cir. 1986); *International Association of Machinists v. Allied Products Corp.*, 786 F.2d 1561, 1564 (11th Cir. 1986); *Equal Employment Opportunity Commission v. Atlanta Gas Light Co.*, 751 F.2d 1188, 1190 (11th Cir.), *cert. denied*, ___ U.S. ___, 106 S. Ct. 333, 88 L. Ed.2d 316 (1985).

22/ *See Linkletter v. Walker*, 381 U.S. 618, 629, 85 S. Ct. 1731, 14 L. Ed.2d 601, 608 (1965) ("[W]e believe that the Constitution neither prohibits nor requires retrospective effect. As Justice Cardozo said, 'We think the federal constitution has no voice upon the subject'"), *quoting Great Northern R. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 364, 53 S. Ct. 145, 77 L. Ed. 360, 366 (1932).

23/ *See Great Northern Ry. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 364-65, 53 S. Ct. 145, 148, 77 L. Ed. 360 (1932); *Demmer by and Through Demmer v. Patt*, 788 So.2d 1387, 1389 (8th Cir. 1986); *Cohn v. G.D. Searle & Co.*, 784 F.2d 460, 463 (3d Cir.), *cert. denied*, ___ U.S. ___, 107 S. Ct. 272, 93 L. Ed.2d 248 (1986); *Pierzga v. Ford Motor Co.*, 778 F.2d 149, 151-52 (3d Cir. 1985); *Robinson v. Ariyoshi*, 753 F.2d 1468, 1474 (9th Cir. 1985), *cert. vacated*, ___ U.S. ___, 106 S. Ct. 3269, 91 L. Ed.2d 560 (1986); *McCorkle v. United States*, 737 F.2d 957, 959-60 (11th Cir. 1984) (per curiam); *McLaughlin v. Herman & Herman*, 729 F.2d 331, 333-34 (5th Cir. 1984); *Ettinger v. Central Pennsylvania National Bank*, 634 F.2d 120, 122-24 (3d Cir. 1980).

case, the *Pullum* decision would not survive it. To begin with, the *Pullum* decision itself was totally unexpected. It represented a 360-degree change-of-mind by this Court in the space of only five years. It also represented a dramatic and radical alteration of the prior judicial standard for enforcing the access-to-courts guarantee of the Florida Constitution. *See supra* pp. 7-9. It would be difficult to imagine a more surprising turn of events.[24/] Obviously, every litigant in a general sense is on notice that the controlling law on a question may change. If that alone were enough to warrant the divestment of theretofore-vested rights, then of course the first *Chevron Oil* test would have no meaning at all.[25/] To the contrary, however, *Chevron Oil* counsels a practical assessment of the extent to which a litigant might ***reasonably*** have anticipated such a change in the law, and in the instant case there was simply no basis upon which the Clausells might have anticipated such a change.

The second *Chevron Oil* test also is not satisfied, because there is no state interest which would be threatened by this Court's holding that *Pullum* should apply only to the extent that it does not interfere with pre-existing vested rights. Any state interest reflected in the statute, as revived in *Pullum*, could be served by *Pullum*'s prospective-only application. Indeed, since the statute of repose in Florida has now been repealed, it is inconceivable that the viability of the Clausells' cause of action could be said to interfere with some important state interest. And third, there can be no question that the Clausells would suffer substantial inequity as a result of such a divestment of their

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24/ *See Smoky Greenhaw Cotton Co. v. Merrill Lynch, Pierce, Fenner and Smith, Inc.*, 785 F.2d 1274, 1278 (5th Cir. 1986) (new decision "overruled clear Fifth Circuit precedent .... [I]t is impossible to imagine clearer precedent than this Court's earlier holding . . .").

25/ "Every decision of the Supreme Court is foreshadowed to some extent by the fact that an issue is sufficiently unsettled to be litigated to the point of review before the Court. Obviously, this is not sufficient to deem the decision retroactive, or there would be no retroactivity doctrine." *Raggio v. Matunis*, 489 F. Supp. 16, 18 (E.D. Pa. 1979), *quoted in Marino v. Bowers*, 657 F.2d 1363, 1368 (3d Cir. 1981). *Compare Video Views, Inc. v. Studio 21, Ltd.*, 797 F.2d 538, 540 (7th Cir. 1986); *Williams v. City of Atlanta*, 794 F.2d 624, 626-27 (11th Cir. 1986); *McLaughlin v. Herman & Herman*, 729 F.2d 331, 334 (5th Cir. 1984).

property rights. Their cause of action was perfectly viable at the time they filed it, and the application of *Pullum* would deny them a right of recovery without any compensation.

Thus, even if the *Chevron Oil* balancing test were applicable to a new state-court decision implicating pre-existing federal constitutional rights, it is clear that *Pullum* could not survive that test. Indeed, *Chevron Oil* itself involved the attempted retroactive application of a newly-applied statute of limitations, which the Supreme Court found inappropriate:

> When the respondent was injured, for the next two years until he instituted his lawsuit, and for the ensuing year of pretrial proceedings, these Court of Appeals decisions represented the law governing his case. It cannot be assumed that he did or could foresee that this consistent interpretation of the Lands Act would be overturned. The most he could do was rely on the law as it then was.
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> To hold that the respondent's lawsuit is retroactively time barred would be anamolous indeed .... [R]etroactive application of the Louisiana Statute of Limitations to this case would deprive the respondent of any remedy whatsoever on the basis of superseding legal doctrine that was quite unforeseeable. To abruptly terminate this lawsuit that has proceeded through lengthy and, no doubt, costly discovery stages for a year would surely be inimical to the beneficent purposes of the Congress.
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> In Cipriano v. City of Houma, [395 U.S. 701, 89 S. Ct. 1897, 23 L. Ed.2d 647 (1969)], we invoked the doctrine of nonretroactive application to protect property interests ... and, in Allen v. State Board of Elections, [393 U.S. 544, 89 S. Ct. 817, 22 L. Ed.2d 1 (1969)], we invoked the doctrine to protect elections held under possibly discriminatory voting laws. Certainly, the respondent's potential redress for his allegedly serious injury--an injury that may significantly undercut his future earning power--is entitled to similar protection.... [N]onretroactive application here simply preserves his right to a day in court. 404 U.S. at 107-08, 92 S. Ct. 349, 30 L. Ed. 296.[26/]

[26/] This reasoning, which easily applies in the instant case, is reflected in the following recent federal decisions applying the *Chevron Oil* formula to deny the retroactive application of a new decision: *Arizona Governing Committee for Tax Deferred Annuity & Deferred Compensation Plans v. Norris*, 463 U.S. 1073, 1105-07, 103 S. Ct. 3492, 77 L. Ed.2d 1236, 1262-63 (1983); *Lemon v. Kurtzman*, 411 U.S. 192, 199, 93 S. Ct. 1463, 1468-69, 36 L. Ed.2d 151 (1977); *Cipriano v. City of Houma*, 395 U.S. 701, 706, 89 S. Ct. 1897, 23 L. Ed.2d 647, 652 (1969) (per curiam); *International Association of Machinists v. Aloha*

Thus, even if the *Chevron Oil* balancing test were applicable, it would clearly counsel against the retroactive application of *Pullum* to extinguish the Clausells' vested federal rights. As we have noted, however, the rule regarding the retroactive extinction of a constitutional right is stricter even than the *Chevron Oil* balancing test. It forbids the retroactive application of a new state law—either legislative or judge-made—in the absence of an overwhelming justification. There is no such justification for the retroactive application of *Pullum* in this case, especially since the statute of repose has now been repealed. Since the statute of repose was a nullity when Hobart's machine allegedly caused the injury in this case, and also when the Clausells filed their action, they had a vested right in that cause of action, and the "contemporaneous" or "retroactive" denial of that right would violate both the Florida and federal

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Airlines, Inc., 790 F.2d 727, 736 (9th Cir.), *cert. denied*, ___ U.S. ___, 107 S. Ct. 400, 93 L. Ed.2d 354 (1986); *Green v. McKaskle*, 788 F.2d 1116, 1122 (5th Cir. 1986); *Anton v. Lehpamer*, 787 F.2d 1141, 1143-46 (7th Cir. 1986); *Ferrell v. Pierce*, 785 F.2d 1372, 1386 (7th Cir. 1986); *Smoky Greenhaw Cotton Co. v. Merrill Lynch, Pierce, Fenner and Smith, Inc.*, 785 F.2d 1274, 1278-79 (5th Cir. 1986); *Brandt v. Stidham Tire Co.*, 251 U.S. App. D.C. 331, 785 F.2d 329, 332 (1986); *Cohn v. G.D. Searle & Co.*, 784 F.2d 460, 464 (3d Cir.), *cert. denied*, ___ U.S. ___, 107 S. Ct. 272, 93 L. Ed.2d 248 (1986); *Gibson v. United States*, 781 F.2d 1334, 1339 (9th Cir. 1986), *cert. denied*, ___ U.S. ___, 107 S. Ct. 928, 93 L. Ed.2d 979 (1987); *Sears v. Atchison, Topeka & Santa Fe R. Co.*, 779 F.2d 1450, 1453-56 (10th Cir. 1985); *Mineo v. Port Authority of New York and New Jersey*, 779 F.2d 939, 944-46 (3d Cir. 1985), *cert. denied*, ___ U.S. ___, 106 S. Ct. 3297, 92 L. Ed.2d 712 (1986); *Keith Fulton & Sons, Inc. v. New England Teamsters and Trucking Industry Pension Fund*, 762 F.2d 1124, 1137 (1st Cir. 1984), *on rehearing*, 762 F.2d 1137 (1st Cir. 1985); *United States v. State of Washington*, 761 F.2d 1404, 1409-10 (9th Cir. 1985), *cert. denied sub nom. Quinault Indian Nation v. Washington*, ___ U.S. ___, 106 S. Ct. 879, 88 L. Ed.2d 916 (1986); *Binladen BSB Landscaping v. M.V. "Nedlloyd Rotterdam"*, 759 F.2d 1006, 1016 (2d Cir.), *cert. denied*, ___ U.S. ___, 106 S. Ct. 229, 88 L. Ed.2d 229 (1985); *Robinson v. Ariyoshi*, 753 F.2d 1468, 1474 (9th Cir. 1985), *cert. vacated*, ___ U.S. ___, 106 S. Ct. 3269, 91 L. Ed.2d 560 (1986); *Litton Systems, Inc. v. American Telephone and Telegraph Co.*, 746 F.2d 168, 171-76 (2d Cir. 1984); *Exxon Corp. v. United States Department of Energy*, 744 F.2d 98, 112-14 (Temp. Emerg. Ct. App.), *cert. denied sub nom. Energy Resources Group, Inc. v. Department of Energy*, 469 U.S. 1077, 105 S. Ct. 576, 83 L. Ed.2d 515 (1984); *Snyder v. Smith*, 736 F.2d 409, 414-15 (7th Cir.), *cert. denied*, 469 U.S. 1037, 106 S. Ct. 513, 83 L. Ed.2d 403 (1984); *Equal Employment Opportunity Commission v. Gaddis*, 733 F.2d 1373, 1376-78 (10th Cir. 1984); *Marino v. Bowers*, 657 F.2d 1363, 1365-70 (3d Cir. 1981) (en banc). *Compare Gray v. Office of Personnel Management*, 248 U.S. App. D.C. 364, 771 F.2d 1504, 1512 (retroactive application would not entirely extinguish cause of action), *cert. denied*, ___ U.S. ___, 106 S. Ct. 1478, 89 L. Ed.2d 732 (1985).

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constitutions.[27/]

2. The Statute of Repose is Not a Bar to the Clausells' Action, Because the Statute Has Been Repealed.

If the Court accepts the foregoing analysis, it need proceed no further. If the Court rejects the foregoing analysis, however, that can only mean one thing--that the Court has determined that *Pullum* should apply "contemporaneously" or "retroactively" even to divest the Clausells of a pre-existing vested right of constitutional dimension. In that eventuality, our contention is that if the *Pullum* decision was sufficiently important to divest the Clausells of a vested constitutional property right during the pendency of their case, then it must follow that the legislature's repeal of the statute of repose was equally sufficient to divest Hobart of any property right (to be free of the Clausells' action) which it may have acquired under *Pullum*. In short, this Court cannot hold that *Pullum* was sufficient to divest a property right without holding that the legislative repeal of the statute was equally sufficient to divest a property right.

a. The General Rule.

At the time of this appeal, there is no statute of repose in Florida, and the general rule is that "an appellate court, in reviewing a judgment on direct appeal, will dispose of the case according to the law prevailing at the time of appellate disposition." *Goodfriend v. Druck*, 289 So.2d 710, 711 (Fla. 1974). *See supra* note 3. This rule typically applies to intervening judicial decisions, but it equally applies to intervening legislative acts. It applies "where the change was constitutional, statutory, or judicial,"

[27/] It would also violate both constitutions by depriving the Clausells of the equal protection of the laws, because it would put the Clausells and those like them—who have pending actions which cannot be dismissed and refiled because time-barred by the four-year statute of limitations governing products actions, § 95.11(3)(e), Fla. Stat. (1985)—in a different position from those who would suffer no prejudice because they can voluntarily dismiss their actions and refile them rather than suffering dismissal under the statute of repose. It is inconceivable that this Court in deciding *Pullum* could have intended such a result—that the statute of repose could be dispositive of some classes of cases, but meaningless as to others. Such a distinction has no rationality, and thus would constitute a violation of the right of equal protection. *See generally Rollins v. State*, 354 So.2d 61, 63 (Fla. 1978); *Lasky v. State Farm Ins. Co.*, 296 So.2d 9, 18 (Fla. 1974); *Georgia Southern & Fla. R. Co. v. Seven-Up Bottling Co.*, 175 So.2d 39 (Fla. 1965).

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and indeed it applies "with equal force where the change is made by an administrative agency acting pursuant to legislative authorization."[28/]

Thus in *Florida Patient's Compensation Fund v. Von Stetina*, 474 So.2d 783, 787 (Fla. 1985), this Court held enforceable an intervening legislative cap on yearly payments by the Florida Patient's Compensation Fund, because "[t]he judgment awarded in favor of Von Stetina is not final until the case has been disposed of on appeal. An appellate court is generally required to apply the law in effect at the time of its decision." And in *Royal Atlantic Association v. Royal Condominium Managers, Inc.*, 258 So.2d 39, 40 (Fla. 3d DCA 1972) (per curiam), in which the trial court had declared a condominium-management contract invalid under then-existing law, the Court reversed the judgment in light of the subsequent legislative repeal of the statute while the case was on appeal. *Royal Atlantic* is thus precisely analogous to the instant case.

As we have suggested, there is a sense in which this judge-made rule counsels a "retroactive" application of a new decision. As one court has stated the rule: "When decisional or statutory law is altered, the new, existing law controls pending cases, whether the change occurs after the events that constitute the subject matter of the case, but before trial . . . or even if the change occurs after a final judgment, during an appeal." *Brooks v. Wainwright*, 439 F. Supp. 1335, 1338 (M.D. Fla. 1977). As we have also suggested, however, the notion of "retroactivity" in this particular context is somewhat muddled, insofar as the moving party during the pendency of a case may fairly protest that he is looking "solely to the law then and thereafter in force," and the suggestion that such a perspective is "retroactive" arguably "amounts to no more than language to announce a result." *Hupman v. Cook*, 640 F.2d 497, 501 (4th Cir. 1981). In any event, as we have noted, *supra* p. 13, the distinction is more theoretical than real, in that the rules governing both the "contemporaneous" and the "retroactive" application of

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[28/] *Thorpe v. Housing Authority of the City of Durham*, 393 U.S. 268, 282, 89 S. Ct. 518, 21 L. Ed.2d 474 (1969), *quoted in Bradley v. Richmond School Board*, 416 U.S. 696, 715, 94 S. Ct. 2006, 40 L. Ed.2d 476, 490 (1974).

a new decision are essentially the same—both focusing upon the asserted vested rights at issue. In this context, we are happy to adopt whatever terminology Hobart favors, so long as Hobart is willing to acknowledge that such terminology will apply equally to its own contention (already discussed) that *Pullum* should apply "contemporaneously" or "retroactively" to the Clausells' prior-filed claims.

Under either formulation, the first essential point is that the rule invoked here is a judge-made rule, which operates of its own force, independent of any retroactive legislative intention. Thus, "we must reject the contention that a change in the law is to be given effect in a pending case only where that is the clear and stated intention of the legislature." *Bradley v. Richmond School Board*, 416 U.S. at 715, 94 S. Ct. 2006, 40 L. Ed.2d at 490. *Accord, Louviere v. Marathon Oil Co.*, 755 F.2d 428, 430 (5th Cir. 1985). To the contrary, unless the application of a statute to pending cases would produce a manifest injustice--a point we will address in a moment--the rule requiring such application will be suspended only if the legislature has explicitly declared that the statute will be prospective only, in which case the "courts generally give it that effect . . . ."[29/]

29/ *Seaboard System R., Inc. v. Clemente*, 467 So.2d 348, 357 (Fla. 3d DCA 1985). *See Bradley v. Richmond School Board*, 416 U.S. at 715 n.21, 94 S. Ct. 2006, 40 L. Ed.2d at 490 n.21 ("Where Congress has expressly provided, or the legislative history had indicated, that legislation was to be given only prospective effect, the courts, in the absence of any attendant constitutional problem, generally have followed that lead"), *citing Goldstein v. California*, 412 U.S. 546, 551-52, 93 S. Ct. 2303, 37 L. Ed.2d 163 (1973), *and United States v. Thompson*, 356 F.2d 216, 227 n.12 (2d Cir. 1965), *cert. denied*, 384 U.S. 964, 86 S. Ct. 1591, 16 L. Ed.2d 675 (1966). *See, e.g., Ciccarelli v. Carey Canadian Mines, Ltd.*, 757 F.2d 548, 552 (3d Cir. 1985) (new statute expressly provided that it would not apply to a cause of action fully barred prior to statute's effective date); *Thibodeau v. Sarasota Memorial Hospital*, 449 So.2d 297 (Fla. 1st DCA 1984) (new statute expressly prospective only).

Contrary to Hobart's suggestion below (answer brief at 6-7 n.4), the well-settled doctrine requiring application of the law existing at the time of an appeal has not been rejected by this Court in either *Homemakers, Inc. v. Gonzales*, 400 So.2d 965 (Fla. 1981), or *State Department of Revenue v. Zuckerman-Vernon Corp.*, 354 So.2d 353, 357-58 (Fla. 1977). *Homemakers* has nothing to do with the judge-made rule requiring application of the law in existence during the pendency of a case. It holds that the plaintiff's action was governed by the two-year statute of limitations in effect at the time her cause of action arose, notwithstanding intervening extensions of that statute during the next two

b. There is No Legislative Prohibition to Application of the General Rule.

In the instant case, there is no such explicit legislative requirement of prospective-only impact. To the contrary, as we have noted, section 3 of the new statute provides that "Section 1 of this act [creating a new statute of limitations for certain actions not relevant here] shall take effect October 1, 1986, and shall apply to causes of action accruing after that date," but that "Section 2 of this act [repealing the statute of repose in products cases] shall take effect July 1, 1986." Thus, while the legislature was consciously aware of its power to apply the new statute only to causes of action accruing after its effective date, because it did precisely that with respect to another provision of the same statute, it did not so provide relative to its repeal of the statute of repose. Under ordinary principles of statutory construction, that provides a powerful argument that the legislature in fact intended that its repeal of the statute of repose would apply not only to pending actions like this one, but also would apply retroactively in the classic sense.30/ At the least, however, it is clear that the legislature did not explicitly require

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years—extensions adopted ***before*** the plaintiff filed her cause of action—upon which the plaintiff relied in filing that action more than two years after the incident. Obviously the plaintiffs' action had not yet been filed at the time of the legislature's amendment of the statute, or else there would have been no timeliness question to decide. Thus, *Homemakers* has nothing to do with the judge-made rule requiring application of the law in existence at the time of an appeal.

The *Zuckerman-Vernon* decision does concern that rule, but fairly read, does not require an explicit legislation declaration that a new law will apply to pending cases notwithstanding the independent judge-made rule. To the contrary, *Zuckerman-Vernon* appears more likely to have been based upon the vested rights acquired by the State of Florida under the pre-existing statute, and thus upon that longstanding exception to the judge-made rule. This construction of *Zuckerman-Vernon* seems most appropriate, since that decision relies only upon earlier cases concerning retroactivity (not law-at-the-time-of-appeal), since *Zuckerman-Vernon* has never been cited by any court for any proposition, and since this Court has subsequently reiterated the rule that "[a]n appellate court is generally required to apply the law in effect at the time of its decision." *Florida Patient's Compensation Fund v. Von Stetina*, 474 So.2d 783, 787 (Fla. 1985). *See supra* note 3.

30/ *See Florida State Racing Commission v. Bourquardez*, 42 So.2d 87 (Fla. 1949); *Regency Wood Condominium, Inc. v. Bessent, Hammack and Ruckman, Inc.*, 405 So.2d 440, 443-44 (Fla. 1st DCA 1981). *Compare Goldstein v. Acme Concrete Corp.*, 103 So.2d 202 (Fla. 1958). Additional evidence of the legislature's intent is that it acted quickly, after the *Pullum* decision had revived the statute, to abolish it; that suggests that the

a prospective-only application of the new statute, and that observation precludes any contention that the legislature itself intended to circumvent the general rule requiring application of the law in effect at the time of an appeal.

c. Enforcement of the General Rule Will Not Undermine Vested Rights.

As we have noted, however, another exception to the general judge-made rule is that a new law will apply only prospectively if its application to pending cases would not create a "manifest injustice" by interfering with vested rights.[31] Hobart's contention—which has been accepted by many of the district courts to have addressed this question—is that, assuming *arguendo* that *Pullum* is properly applicable to the Clausells' cause of action, and thus divested the Clausells of that property right during the pendency of this case, *Pullum* gave Hobart a "vested right" to be free of that action, and the "contemporaneous" or "retroactive" application of the repealing statute would impermissibly interfere with that vested right. This argument is raised by analogy to those decisions in Florida holding that when a statute of limitations has fully run against

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legislature's intention was to save as many actions as it could. *See Clay v. Johns-Manville Sales Corp.*, 722 F.2d 1289 (6th Cir. 1983), *cert. denied*, 467 U.S. 1253, 104 S. Ct. 3537, 82 L. Ed.2d 842 (1984); *Hupman v. Cook*, 640 F.2d 497, 502 (4th Cir. 1981). As we have noted, the U.S. Supreme Court denied *cert.* in *Pullum* on April 21, 1986, and the Florida legislature repealed the statute within 60 days. Ch. 86-272, Section 2, Laws of Florida (1986). Thus, we think a compelling argument can be made that the legislature actually intended that the statute apply at least to pending cases, and indeed to apply retroactively in the classic sense.

31/ This consideration of "manifest injustice" would be equally applicable if the Court were to determine that the legislature actually intended that the repealing statute apply to pending cases, or even apply retroactively. *See Seaboard System R., Inc. v. Clemente*, 467 So.2d 348, 357 (Fla. 3d DCA 1985), *quoting State, Department of Environmental Protection v. Ventron*, 94 N.J. 473, 468 A.2d 150, 163 (1983). Even when the legislature does intend a retroactive effect, that intention will be honored only if such an application is not unjust. In this sense, it really does not matter whether the Court does or does not discover an explicit legislative intention to apply the repealing statute to pending cases, or even retroactively. Even the discovery of such an intention would not forestall the necessity of considering the equities of the situation. And even absent such an intention, so long as the legislature did not explicitly preclude application of the statute to pending cases, which it clearly did not, an analysis of the equities must also be undertaken under the rule requiring the application of the law in existence at the time of appeal. Thus, the equities of this issue will decide it--and not a debate over the legislature's intentions.

a prospective plaintiff, a prospective defendant acquires a vested property right to be free of that cause of action, which the legislature cannot disturb by attempting to revive it. *See* discussion *infra*. These decisions at best provide an analogy, because we are concerned here not with a statute of limitations but a statute of repose,[32/] and because we are concerned here not with a classic retroactive application, but with the law-at-the-time-of-appeal rule. Nevertheless, these decisions are the best place to start. Before discussing these Florida decisions, however, we should emphasize that there is no analogous ***federal*** constitutional doctrine, and thus no potential federal barrier to the "retroactive" or "contemporaneous" application of the repealing statute to the instant case.

(1). The Federal Constitutional Question. Under federal constitutional law, there is no inherent barrier even to the clasically-retroactive application of a new statute of limitations, and by analogy, therefore, no inherent barrier to enforcement of the rule requiring application of the law in existence at the time of an appeal. As a general proposition, there is no inequity--and certainly no federal constitutional barrier--to even the retroactive ***revival*** of a cause of action which has actually expired under the old statute of limitations. The U.S. Supreme Court made that clear as early as 1885 in *Campbell v. Holt*, 115 U.S. 483, 486-87, 115 S. Ct. 620, 627-28 (1885):

> [T]he Legislature, by providing a remedy where none exists, or removing the statutory obstruction to the use of the remedy, enables the party to enforce the contract, otherwise unobjectionable.
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> Such is the precise case before us. The implied obligation of the defendants' intestate to pay his child for the use of her property remains. It was a valid contract, implied by the law before the statute began to run in 1866. Its nature and character were not changed by the lapse of two years, though the statute made that a valid defense to a suit on it. But this defense, a purely arbitrary creation of the law, fell with the repeal of the law on which it depended.

[32/] *See Hupman v. Cook*, 640 F.2d 497, 498 (4th Cir. 1981), *quoting Federal Reserve Bank of Richmond v. Wright*, 392 F. Supp. 1126, 1129 (E.D. Va. 1975); *Lamb v. Volkswagenwerk Aktiengesellschaft*, 631 F. Supp. 1144, 1147 (S.D. Fla. 1986).

> It is much insisted that this right to defense is a vested right, and a right of property which is protected by the provisions of the Fourteenth Amendment.
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> We certainly do not understand that a right to defeat a just debt by the Statute of Limitations is a vested right, so as to be beyond legislative power in a proper case. The statutes of limitation, as often asserted, and especially by this court, are founded in public needs and public policy--are arbitrary enactments by the law-making power. . . . No man promises to pay money with any view to being released from that obligation by lapse of time. It violates no right of his, therefore, when the Legislature says, time shall be no bar, though such was the law when the contract was made. The authorities we have cited, especially in this court, show that no right is destroyed when the law restores a remedy which has been lost.

Over 50 years later, the Supreme Court endorsed this formulation in *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 311-16, 65 S. Ct. 1137, 89 L. Ed. 1628, 1634-36 (1945):

> [W]here lapse of time has not invested a party with real or personal property, a state legislature, consistently with the Fourteenth Amendment, may repeal or extend a statute of limitation, even after right of action is barred thereby, restore to the plaintiff his remedy, and divest the defendant of the statutory bar. This has long stood as a statement of the law of the Fourteenth Amendment, and we agree with the court below that its holding is applicable here and fatal to the contentions of appellant.
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> The essential holding in Campbell v. Holt, so far as it applies to this case, is sound and should not be overruled. The Fourteenth Amendment does not make an act of state legislation void merely because it has some retrospective operation. What it does forbid is taking of life, liberty or property without due process of law. . . . [C]ertainly it cannot be said that lifting the bar of a statute of limitation so as to restore a remedy lost through mere lapse of time is per se an offense against the Fourteenth Amendment.[33/]

33/ Over 30 years later, the Supreme Court reaffirmed this principle in *International Union of Electrical Workers v. Robbins & Myers, Inc.*, 429 U.S. 229, 243-44, 97 S. Ct. 441, 50 L. Ed.2d 427, 439 (1976), holding that Congress was not "without constitutional power to revive, by enactment, an action which, when filed, is already barred by the running of a limitations period," *citing Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 315-16,

As the foregoing quotations make clear, the U.S. Constitution permits even the retroactive revival of a lost cause of action despite the well-recognized principle, acknowledged in the cases quoted above, that a statute may not be applied retroactively if to do so would deprive a party of a "vested right." *See William Danzer & Co. v. Gulf & Ship Island R. Co.*, 268 U.S. 1126, 69 S. Ct. 633 (1924). The federal decisions hold that no "vested right" is implicated even by the retroactive revival of a lost cause of action, because a pre-existing statute of limitations does not confer any vested right upon a prospective defendant. As the U.S. Supreme Court explicitly held in *Chase Securities Corp. v. Donaldson*, 325 U.S. at 316, 65 S. Ct. 1137, 89 L. Ed. at 1636-37:

> Nor has the appellant pointed out special hardships or oppresive effects which result from lifting the bar in this case with retrospective force. This is not a case where appellant's conduct would have been different if the present rule had been known and the change foreseen. It does not say, and could hardly say, that it sold unregistered stock depending on a statute of limitation for shelter from liability. The nature of the defenses shows that no course of action was undertaken by appellant on the assumption that the old rule would be continued. When the action was commenced, it no doubt expected to defend by invoking Minnesota public policy that lapse of time had closed the courts to the case, and its legitimate hopes have been disappointed. But the existence of the policy at the time the action was commenced did not, under the circumstances, give the appellant a constitutional right against change of policy before final adjudication. Whatever grievance appellant may have at the change of policy to its disadvantage, it had acquired no immunity from this suit that has become a Federal constitutional right.

Thus, under the U.S. Constitution, even the ***revival*** of a cause of action which was wholly time-barred does not impair any vested rights, and therefore is permissible. It easily follows that the application of a new statute to a ***pending action***--an action which is still alive and on appeal--presents no such barrier.

(2). The Florida Constitutional Question. The Florida courts also recognize the general rule that "the due process clause does not bar retroactive application of civil

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65 S. Ct. 1137, 89 L. Ed.2d 1628 (1945). *Accord, Electrical Workers v. Robbins & Myers, Inc.*, 429 U.S. 229, 97 S. Ct. 441, 50 L. Ed. 427 (1976); *Davis v. Valley Distributing Co.*, 522 F.2d 827, 830 n.7 (8th Cir. 1975), *cert. denied*, 429 U.S. 1090, 97 S. Ct. 1099, 51 L. Ed.2d 535 (1977).

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legislation unless it operates to create new rights or to destroy vested rights . . . or its consequences are unduly harsh and oppressive."[34/] Under Florida law, however, as we have noted, *supra* p. 15, in contrast to federal law, there are certain circumstances in which a pre-existing statute of limitations will be held to have conferred a vested right which the legislature may not disturb.

When the Florida legislature prescribes a new statute of limitations, but is silent as to its retroactive or prospective application, it will not apply retroactively, because the rule in Florida is that "a statute of limitations will be prospectively applied unless the legislative intent to provide retroactive effect is express, clear and manifest." *Homemakers, Inc. v. Gonzales*, 400 So.2d 965, 967 (Fla. 1981). This rule has long been recognized in cases in which the legislature has shortened the applicable statute of limitations.[35/] More recently, in *Homemakers, Inc. v. Gonzales*, this Court applied the same rule to a legislative expansion of the applicable statute of limitations; the statute will be prospective only if the legislature has been silent.[36/] As the above-cited cases suggest, however, there is no inherent constitutional barrier to the retroactive application of a new statute of limitations, whether it expands or contracts the old one, so long as the legislature makes its intentions clear. As a general rule, therefore, a pre-existing statute of limitations in Florida does not confer any right of constitutional dimension, which the legislature cannot disturb even if it wants to. By analogy,

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[34/] *Seaboard System R., Inc. v. Clemente*, 467 So.2d 348, 357 (Fla. 3d DCA 1985), *citing City of Lakeland v. Catinella*, 129 So.2d 133 (Fla. 1961), *City of North Bay Village v. City of Miami Beach*, 365 So.2d 389 (Fla. 3d DCA 1978), *and United States Trust Co. v. New Jersey*, 431 U.S. 1, 17 n.13, 97 S. Ct. 1505, 1515 n.13, 52 L. Ed.2d 92, 106 n.13 (1977).

[35/] *See Carpenter v. Florida Central Credit Union*, 369 So.2d 935 (Fla. 1979); *Foley v. Morris*, 339 So.2d 215 (Fla. 1976); *Durring v. Reynolds, Smith & Hills*, 471 So.2d 603, 607 (Fla. 1st DCA 1985).

[36/] *Accord, Durring v. Reynolds, Smith & Hills*, 471 So.2d 603, 607 n.6 (Fla. 1st DCA 1985); *Orpheus Investments v. Ryegon Investments, Inc.*, 447 So.2d 257, 259 n.1 (Fla. 3d DCA 1983); *Alford v. Summerlin*, 423 So.2d 483, 484 (Fla. 1st DCA 1982). *See also Regency Wood Condominium, Inc. v. Bessent, Hammack and Ruckman, Inc.*, 405 So.2d 440, 443 (Fla. 1st DCA 1981) (*dictum*).

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therefore, there is no general constitutional barrier to application of the judge-made rule regarding the law in effect at the time of judicial decisionmaking.

As we have noted, however, *supra* p. 15, there are circumstances in Florida in which a pre-existing statute of limitations will be held to have conferred a vested right in one party or the other, which cannot be disturbed even by explicit legislative action. From the plaintiff's perspective, the "constitutional mandate" is that "to *shorten* a period of limitation, the legislature must by statute allow a reasonable time to file actions already accrued." *Homemakers, Inc. v. Gonzales*, 400 So.2d at 967. *See supra* note 29. And from the defendant's perspective, a pre-existing statute of limitations will confer vested rights of constitutional dimension if it has already run at the time the legislature expands it, in which case the legislature may not revive a theretofore-lost cause of action, even if it attempts to do so explicitly:

> Ordinarily statutes of limitation are construed as being applicable only to the remedy and not to the substantive right. Parties to a contract, in the absence of a specific provision in the contract, have no vested interest in particular limitation laws until the period prescribed by the statute of limitations has run. The Legislature has the power to increase a prescribed period of limitation and to make it applicable to existing causes of action provided the change in the law is effective before the cause of action is extinguished by the force of a pre-existing statute.[37/]

By analogy to these Florida authorities concerning a new statute of limitations, Hobart's argument is that when *Pullum* resurrected the statute of repose during the

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37/ *Walter Denson & Son v. Nelson*, 88 So.2d 120, 122 (Fla. 1956). *Accord, Garris v. Weller Construction Co.*, 132 So.2d 553, 555-56 (Fla. 1961); *Corbett v. General Engineering & Machinery Co.*, 37 So.2d 161, 162 (Fla. 1948); *Green v. City of Tampa*, 390 So.2d 1237, 1238 (Fla. 2d DCA 1980); *Original Crispy Pizza of Miami v. Palmeri*, 377 So.2d 49, 50 (Fla. 1st DCA 1979) (per curiam); *Glass v. Camara*, 369 So.2d 625, 627 (Fla. 1st DCA 1979); *Mazda Motors of America, Inc. v. S.C. Henderson & Sons, Inc.*, 364 So.2d 107, 108 (Fla. 1st DCA 1978), *cert. denied*, 378 So.2d 348 (Fla. 1979); *Patterson v. Sodders*, 167 So.2d 789, 790 (Fla. 2d DCA 1964); *Martz v. Riskamm*, 144 So.2d 83, 87-88 (Fla. 1st DCA 1962). *See Daytona Beach Boat Works v. Spencer*, 15 So.2d 256, 257 (Fla. 1943). *See generally Carter v. Supermarkets General Corp.*, 684 F.2d 187, 191 n.10 (1st Cir. 1982) (Massachusetts law); *Stoddard v. Cockrum*, 531 F. Supp. 663, 664-65 (W.D. Mo. 1982) (Missouri law); *Dirksen v. Hynes & Howes Ins. Counselors, Inc.*, 423 F. Supp. 1290, 1293-94 (S.D. Iowa 1976); *Penry v. William Barr, Inc.*, 415 F. Supp. 126, 128 (E.D. Tex. 1976) (Texas law).

pendency of the Clausells' action, it instantly divested them of that cause of action, and created a vested right in Hobart to be free of it. That is a right of constitutional dimension, Hobart asserts, which takes precedence over the rule requiring application of the law in existence during the pendency of a case—in this case the new law repealing the statute of repose.

As the many district-court decisions on this question suggest, this argument has a surface plausibility. But its logic only serves to re-enforce our earlier contention—that the *Pullum* decision should not have been applied to divest the Clausells of their own pre-existing vested right, which (by virtue of *Battilla*) existed before Hobart had any hope of invoking the statute of repose as a bar to the action. Only in this context can the Court assess Hobart's present argument; and our response to that argument is that if the *Pullum* decision was sufficient to divest the Clausells of a pre-existing vested right by virtue of the doctrine requiring application of the law existing during the pendency of a case, then by the same token the legislature's repeal of the statute of repose, during the pendency of the same case, should be equally sufficient to divest Hobart of any vested right acquired by virtue of *Pullum*.

If Hobart can successfully invoke *Pullum* to extinguish a pre-existing right, then by the same token the repeal of the statute must be sufficient to divest Hobart of any vested rights acquired under *Pullum*. Only by freezing the flow of this ongoing litigation at a single instant in time—an entirely strained perspective by any standard of fairness—could Hobart possibly argue that it acquired a right under *Pullum* which is so inviolable as to require ignoring everything which happened both before and after its acquisition. If the policies embraced in *Pullum* are so overriding as to cast aside a property right of constitutional dimension, then the rejection of those policies—as embraced in the legislature's repudiation of *Pullum* by its revocation of the statute—must be equally sufficient to cast aside any property rights which were acquired under *Pullum*. The two arguments are a mirror image of the same essential point; one cannot exist without the other. And as we argued earlier, if the policies embraced in the

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resurrected statute of repose—or in the repeal of that statute—are insufficient to overcome a vested right, then *Pullum* should not have been applied to the Clausells' pending case. One way or the other, the Clausells must win this appeal.

On the question of which outcome should prevail, we think the stronger point—the point to which there really is no response—is that the Clausells' vested property right should not have been cast aside under *Pullum*. But if the Court should reject that contention, then even apart from the logical corollary that the repealing statute should also have been applied to this pending case, we think a strong argument can be made for application of the repealing statute under the ordinary principles in Florida governing the distinction between substantive legislation on the one hand, and remedial or procedural legislation on the other.

As a general proposition, "statutes of limitation are ordinarily considered procedural and are . . . applied to actions pending on or brought after the enactment of the new statute of limitations," *Bauer v. Johns-Manville Corp.*, 599 F. Supp. 33, 35 (D. Conn. 1984). Such statutes are held "not [to] qualify the right" "sued upon," "but only [to] affect[] the remedy." *Herm v. Stafford*, 663 F.2d 669, 681 (6th Cir. 1981). As this Court has noted: "Ordinarily statutes of limitation are construed as being applicable only to the remedy and not to the substantive right." *Walter Denson & Son v. Nelson*, 88 So.2d 120, 122 (Fla. 1956).[38/] And the general rule is that the legislature's remedial purpose takes precedence over a prior-acquired vested right:

> While it is true that in the absence of an express legislative declaration that a statute had retroactive effect, the statute will be deemed to operate prospectively only, [citations omitted], and that even a clear expression of retroactivity will be ignored if the statute impairs vested rights, creates new obligations, or imposes new penalties, [citations omitted],

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38/ *Accord Green v. City of Tampa*, 390 So.2d 1237, 1238 (Fla. 2d DCA 1980) (extension of statute which has not yet run is "not a retroactive application, does not impair a vested right, and violates no legislative mandate to the contrary"); *Mazda Motors of America, Inc. v. S.C. Henderson & Sons, Inc.*, 364 So.2d 107, 108 (Fla. 1st DCA 1978), *cert. denied*, 378 So.2d 348 (Fla. 1979) (extension of statute which has not yet run "is not retroactive legislation and does not impair a vested right").

> neither of these rules of statutory construction applies where the statute is solely remedial or procedural, *Walker & LaBerge, Inc. v. Halligan*, 344 So.2d 239 (Fla. 1977); *City of Lakeland v. Catinella*, 129 So.2d 133 (Fla. 1961); *McCord v. Smith*, 43 So.2d 704 (Fla. 1949); *Department of Transportation v. Cone Brothers Contracting Co.*, 364 So.2d 482, 486 (Fla. 2d DCA 1978), *reversed [on other grounds]*, 384 So.2d 154 (Fla. 1980) ("A curative or remedial statute is necessarily retrospective in character."); *Grammer v. Roman*, 174 So.2d 443, 446 (Fla. 2d DCA 1965) ("Remedial statutes are exceptions to the rule that statutes do not come within the legal conception of a retrospective law, or the general rule against the retrospective operation of statutes.").[39/]

A remedial statute must be applied retroactively—and thus, by analogy, must certainly be applied "contemporaneously" to a pending case—notwithstanding the absence of an explicit legislative declaration of retroactivity, and notwithstanding the presence of pre-existing vested rights. As this Court noted in *City of Orlando v. Des Jardins*, 493 So.2d 1027, 1028 (Fla. 1986):

> We find error in the lower court's refusal to apply the statutory exemption. While the procedural/substantive analysis often sheds light on the propriety of retroactively applying a statute, *Young v. Altenhaus*, 472 So.2d 1152 (Fla. 1985); *State v. Lavazzoli*, 434 So.2d 321 (Fla. 1983), the dichotomy does not in every case answer the question. Florida's courts have embraced a third alternative. If a statute is found to be remedial in nature, it can and should be retroactively applied in order to serve its intended purposes. *Village of El Portal v. City of Miami Shores*, 362 So.2d 275 (Fla. 1978); *Grammar v. Roman*, 174 So.2d 443 (Fla. 2d DCA 1965).
>
> 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," *In Re Florida*

39/ *Senfeld v. Bank of Nova Scotia Trust Co. (Cayman) Ltd.*, 450 So.2d 1157, 1164-65 (Fla. 3d DCA 1984). *Accord, City of Orlando v. Des Jardins*, 493 So.2d 1027, 1028 (Fla. 1986); *Florida Patient's Compensation Fund v. Von Stetina*, 474 So.2d 783, 788 (Fla. 1985); *Village of El Portal v. City of Miami Shores*, 362 So.2d 275 (Fla. 1978); *Walker & La Berge, Inc. v. Halligan*, 344 So.2d 239 (Fla. 1977); *City of Lakeland v. Catinella*, 129 So.2d 133 (Fla. 1961); *Rothermel v. Florida Parole and Probation Comm'n*, 441 So.2d 663 (Fla. 1st DCA 1983); *Johnson v. State*, 371 So.2d 556 (Fla. 2d DCA 1979); *North Bay Village v. Miami Beach*, 365 So.2d 389 (Fla. 3d DCA 1978); *Kawaski of Tampa, Inc. v. Calvin*, 348 So.2d 897 (Fla. 1st DCA 1977); *Grammer v. Roman*, 174 So.2d 443 (Fla. 2d DCA 1965); *Heberle v. P.R.O. Liquidating Co.*, 186 So.2d 280 (Fla. 1st DCA 1966); *Cunningham v. State Plant Board*, 112 So.2d 905 (Fla. 2d DCA), *cert. denied*, 115 So.2d 701 (Fla. 1959). *Compare Stillwell v. Thigpen*, 426 So.2d 1267 (Fla. 1st DCA 1983).

Rules of Criminal Procedure, 272 So.2d 65, 65 (Fla. 1972), which is allowed retroactive application.

There can be little question that the legislative repeal of the statute of repose was remedial in a classic sense, in that it reflected "the purpose of protecting or enforcing substantive rights"—that is, the rights of plaintiffs in products-liability cases. *In Re Florida Rules of Criminal Procedure*, 272 So.2d 65 (Fla. 1972), *quoted in City of Orlando v. Des Jardins*, 493 So.2d 1027, 1028 (Fla. 1986). *See Hupman v. Cook*, 640 F.2d 497, 502 (4th Cir. 1981). Thus, the legislature's repeal of the statute of repose was not only remedial in the sense that it was "curative," *Department of Transportation v. Cone Brothers Contracting Co.*, 364 So.2d at 486, in that it was obviously intended to "cure" the state of Florida law created by *Pullum*'s resurrection of the statute of repose. It was also remedial in a more fundamental sense—in the sense that, while it created no substantive rights, it attempted through procedural means to protect substantive rights. For this reason, the repealing statute should apply "retroactively" or "contemporaneously" notwithstanding the assertion by Hobart of any pre-existing vested rights to be free of the Clausells' action.

3. *Conclusion.*

If Hobart should contend otherwise, however—if Hobart should contend that the legislative objectives reflected in the repeal of the statute of repose are insufficient to overcome its asserted vested right, by virtue of *Pullum*, to be free of the Clausells' action—then Hobart must confront the same argument against the application of *Pullum* in the first place. For if Hobart should claim that the governmental objectives reflected in the repeal are not important enough to overcome a vested right, then Hobart cannot possibly argue that the governmental objectives reflected in *Pullum*'s resurrection of the statute of repose are sufficient to have divested the Clausells of a right of action (a vested right) which existed before *Pullum* was decided. The Clausells' cause of action—which was perfectly viable because of *Battilla* both at the time it arose and at the time it was filed—was a property right of constitutional dimension under both Florida

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and federal law. Such a right cannot be divested without compelling justification—and there is no such justification in this case. Therefore, *Pullum* should not have been applied so as to divest the Clausells of their property rights, whether one views such an application as "contemporaneous" or "retroactive." And if that contention is to be rejected—if the policies reflected in the statute of repose are sufficiently important that, as resurrected by *Pullum*, they should take precedence over a pre-existing vested right—then by the same token the remedial policies reflected in the legislative repeal of that statute should override any vested rights created in Hobart by *Pullum*.

In this context, it is clear that the district-court decisions on this issue are resting on a shaky house of cards, because they depend upon acceptance in one context of the very assumptions which undermine their conclusions in another. Thus, regardless of whether or not this Court accepts or rejects those assumptions, the Clausells' right of action must be preserved. The Clausells are either entitled to the constitutional protection of their vested rights, or they are entitled to the benefit of the legislature's remedial action. In light of the foregoing assumptions, one or the other of those entitlements must be acknowledged. The district court's decision in this case—and those of all the other district courts which agree with it—must be reversed.

V
CONCLUSION

It is respectfully submitted that the decision of the district court should be reversed, and the cause remanded for further proceedings.

VI
CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was hand-delivered this 2nd day of June, 1987, to: JAMES TRIBBLE, ESQ., Blackwell, Walker, et

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