IN THE SUPREME COURT OF FLORIDA

CASE NO. 70,566

ALBERTO CLAUSELL and PATRICIA CLAUSELL,

Petitioners,

vs.

HOBART CORPORATION,

Respondent.

_____/

PETITIONERS' REPLY BRIEF ON THE MERITS

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I
ARGUMENT

A. THE *PULLUM* DECISION IS WRONG, AND SHOULD BE OVERRULED (INITIAL BRIEF AT 7-10).

Our point is that the standard of "rationality" utilized in *Pullum*[1/] for enforcing the access-to-courts guarantee of the Florida Constitution—which departed from an invariant line of decisions requiring a showing of overpowering public necessity in the absence of a less-restrictive alternative[2/]—necessarily was overruled by *Smith v. Department of Insurance*, 12 F.L.W. 189 (Fla. April 23, 1987), *modified on other grounds upon denial of rehearing*, 12 F.L.W. 277 (Fla. April 23, 1987). Hobart's response (brief at 3-8) is that *Kluger* and its progeny do not apply in this case, because "[n]ot every statute which restricts or abolishes a previous right of action thereby violates the Constitution's access to courts provisions" (Hobart's brief at 4). In support of that position, Hobart devotes five pages to its contention that the instant case is different because this is not a case "where a complete field of tort recovery is . . . eliminated," but rather involves a mere restriction upon "the criteria by which tort actions will be evaluated so as to preclude recovery by some plaintiffs altogether . . ." (Hobart's brief at 5).

But even apart from the fact that Hobart's purported distinction was ***explicitly*** rejected by this Court in striking down a statutory cap upon compensatory damages in *Smith v. Department of Insurance*,[3/] Hobart has totally missed the point—that the

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[1/] *Pullum v. Cincinnati, Inc.*, 476 So.2d 657 (Fla. 1985), *appeal dismissed*, ___ U.S. ___, 106 S. Ct. 1626, 90 L. Ed.2d 174 (1986).

[2/] *See, e.g., Diamond v. E.R. Squibb and Sons, Inc.*, 397 So.2d 671 (Fla. 1981); *Overland Construction Co. v. Sirmons*, 369 So.2d 572 (Fla. 1979); *Kluger v. White*, 281 So.2d 1, 4 (Fla. 1973).

[3/] As the Court noted in *Smith*, 12 F.L.W. at 1291-92:

> Appellees also argue, and the trial court below agreed, that the legislature has not totally abolished a cause of action, it has only placed a cap on damages which may be recovered

standard for assessing such distinctions, as against the access-to-courts guarantee, is a standard of "compelling necessity," and ***not*** the standard of "rationality" enforced in *Pullum*. It is a fact—which Hobart cannot rebut—that every access-to-courts decision before *Pullum*, and now the *Smith* decision after *Pullum*, has applied this standard of compelling necessity. There may be lots of distinctions between the types of restrictions at issue in these cases, but the ***standard*** for appraising them is a standard of compelling necessity. And since the *Smith* decision has ***explicitly*** endorsed that standard—and in the process has ***explicitly*** repudiated a standard of mere rationality—it has necessarily overruled *Pullum*.[4/]

Hobart has utterly failed to grapple with the unavoidable reality that *Smith* and *Kluger* and the other cases prescribe a constitutional standard which is qualitatively

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> and, therefore, has not denied the right to access the courts. This reasoning focuses on the title to Article I, section 21, Access to courts," and overlooks the contents which must be read in conjunction with section 22, "Trial by jury." Access to courts is granted for the purpose of redressing injuries. A plaintiff who receives a jury verdict for, e.g. $1,000,000, has not received a constitutional redress of injuries if the legislature statutorily, and arbitrarily, caps the recovery at $450,000. Nor, we add, because the jury verdict is being arbitrarily capped, is the plaintiff receiving the constitutional benefit of a jury trial as we heretofore understood that right. Further, if the legislature may constitutionally cap recovery at $450,000, there is no discernible reason why it could not cap the recovery at some other figure, perhaps $50,000, or $1,000, or even $1. None of these caps, under the reasoning of appellees, would "totally" abolish the right of access to the courts. . . . 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.

[4/] In a later section of its brief (p. 12 n.9), Hobart asserts that "[c]ontrary to Petitioners' assertions (PB 9-10), Smith never rejected the propriety of analyzing a limitations period on the basis of its reasonableness." In light of the quotations from *Smith* offered in our initial brief (pp. 9-10), it is difficult to understand the basis for this declaration. *Smith* says explicitly that, at least as against the constitutional right of access to courts, a standard of "rationality" is inappropriate: "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." 12 F.L.W. at 192.

different from the standard enforced in *Pullum*. In all good conscience, these inconsistent standards cannot be permitted to co-exist in the jurisprudence of our state. This is a reality which cannot be avoided by ignoring it. The doctrinal predicate for the *Pullum* decision is wrong, and *Pullum* must be overruled.

Hobart contends, however (brief at 8-12), that the statute of repose should survive even the stricter standard announced in *Kluger* and enforced in *Smith*. But that question already has been decided by this Court, in *Battilla v. Allis Chalmers Mfg. Co.*, 392 So.2d 874 (Fla. 1980) (per curiam), which held that the statute of repose did not reflect a governmental interest so compelling as to justify the deprivation of access to our courts. *Pullum* did not reject that conclusion; it merely lowered the applicable standard of review.[5/] Hobart has offered no reason for departing from this conclusion. To the contrary (brief at 12), Hobart can do no more than contend that the statute of repose should be upheld because "the length of time provided by the limitation is ***reasonable***" (our emphasis). Hobart has not even attempted to demonstrate that, wholly apart from and in addition to its imposition of a statute of limitations for products-liability cases, the legislature acted with ***compelling*** necessity in imposing a statute of repose. The *Pullum* decision applied the wrong standard, and as *Battilla* has held, the statute of repose cannot survive the right standard.

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

5/ In *Overland Construction Co. v. Sirmons*, 369 So.2d 572 (Fla. 1979), this Court reached the identical conclusion in overturning a statute of repose governing actions concerning improvements to realty, on the ground that the legislature had shown no overpowering public necessity for such a prohibition, or the absence of a less-restrictive alternative. *Accord, Diamond v. E.R. Squibb and Sons, Inc.*, 397 So.2d 671 (Fla. 1981). In contrast, a statute of repose may be valid if it does not abolish a cause of action before it even arises, but merely limits the time available to bring a cause of action after it arises, without abolishing it entirely. *Cates v. Graham*, 451 So.2d 475 (Fla. 1984); *Park v. Federal Press Co.*, 387 So.2d 354 (Fla. 1980); *Bauld v. J.A. Jones Construction Co.*, 357 So.2d 401 (Fla. 1978).

(BRIEF AT 10-47).

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 Clausells' Pending Complaint (Brief at 10-32).*

a. *The Florida Constitutional Question (Brief at 14-19).* The point here is 1) because of *Battilla*, the statute of repose did not exist at the time the Clausells' cause of action arose and was filed (brief at 14); 2) their cause of action was a constitutional property right (brief at 15-16); and 3) under both Florida and federal law, that property right could not be divested by judicial action, including a decision declaring the statute to be valid as of its effective date (brief at 16-19). We will integrate Hobart's responses into this three-part organization.

On the first point, Hobart cannot deny that there was no statute of repose in Florida at the time the Clausells' cause of action arose and was filed, because *Battilla* had declared that statute "inoperative ab initio." *State ex rel. Nuveen v. Greer*, 88 Fla. 249, 102 So. 739, 743-45 (1924). Hobart's only response (brief at 16)—that despite *Battilla* the statute of repose "remained on the books"—of course is irrelevant in light of the binding force of *Battilla*. Indeed, Hobart is estopped to declare otherwise, because Hobart itself sought no relief under the statute of repose until after *Pullum* was decided, thus conceding the dispositive force of *Battilla*. See our initial brief at p. 14 n.7.

On the second point, Hobart contends that a cause of action is not a property right under Florida law, but does not address the overwhelming Florida authority cited in our initial brief (p. 15 & n.9) that "a vested cause of action, or 'chose in action' is personal property entitled to protection from arbitrary laws." *Sunspan Engineering & Construction Co. v. Spring-Lock Scaffolding Co.*, 310 So.2d 4, 8 (1975).[6/] Moreover, we noted

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[6/] Hobart says that *Sunspan* is inapplicable (brief at 16-17) because it concerned only the

(brief at 15-16), the decision in *Homemakers, Inc. v. Gonzales*, 400 So.2d 965, 967 (Fla. 1981)—enforcing the "constitutional mandate" that a statute of limitations may not be shortened without giving prospective plaintiffs a reasonable time in which to file already-accrued actions—necessarily recognizes that such causes of action are property rights.[7/] Hobart has said nothing, and has cited no authority, to contradict this first point—that a cause of action in Florida is a property right entitled to constitutional protection.[8/]

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federal constitutional right of equal protection, but not any Florida constitutional rights. That is false. The rights at issue in *Sunspan* were the access-to-courts guarantee of the Florida Constitution, and the equal-protection guarantees of both the Florida and federal constitutions. 310 So.2d at 5. Indeed, in declaring that "a vested cause of action, or 'chose in action' is personal property entitled to protection from arbitrary laws," *Sunspan* cited both federal and Florida decisions. *Id.* at 8, *citing Pritchard v. Norton*, 106 U.S. 124, 1 S. Ct. 102, 27 L. Ed. 104 (1882), *Ross v. Gore*, 48 So.2d 412 (Fla. 1950), *and 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). We also refer the Court to the other Florida decisions cited at p. 15 n.9 of our initial brief.

[7/] Hobart responds (brief at 17 n.14) that *Homemakers* concerned the retroactivity of a new statute, while this case concerns the retroactivity of a Supreme-Court decision reversing itself on the constitutionality of an existing statute. But this purported distinction has nothing to do with the point for which we cited *Homemakers*—that a cause of action is a property right under the Florida Constitution. Hobart has offered no authority that a property right may acquire constitutional dimension in one context but not in another—and any such proposition would be absurd. Of course, such a right may give way to the relevant governmental interests in one context but not in another, but that is an entirely different point. And on that point, as we demonstrated (brief at 22-23 & n.19), Hobart's unsupported assertion is simply wrong. A state court may not constitutionally accomplish what a state legislature is forbidden to do.

[8/] Hobart contends (brief at 16), again citing no authority, that 1) a cause of action can never be considered a vested property right, since the authority for it is always subject to change; and 2) if a cause of action is viable only because of a judicial decision overruling some otherwise-prohibitive statute, that decision itself may be overruled, thus resurrecting the statute *ab initio*. But as we demonstrated (brief at 30 n.25), the mere theoretical possibility of some future change in the law is not enough to undermine any rights acquired under the pre-existing law: "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). Thus, as we are about to note in text, the unanimous rule is that a resurrected statute is valid "*ab initio*" ***only*** to the extent that it does not interfere with vested rights acquired during the period of its invalidity.

Third, we established that under Florida law, a property right cannot be divested by the "retroactive" or "contemporaneous" application of a new judicial decision. Hobart answers (brief at 13) by citing the theoretical point which we acknowledged in our initial brief (p. 16)—that *Pullum* validated the statute as of its effective date. But Hobart ignores our rejoinder (brief at 17)—that *Pullum* did so ***only*** to the extent that the statute's application would not interfere with vested rights acquired during the period of its invalidity. As this Court said explicitly 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." We also refer the Court to the other cases cited in our initial brief (p. 17 n.13)—all of them ignored by Hobart.[9/]

Hobart ignores the point. It does argue, however (brief at 17), that even if the Clausells enjoyed a property right of constitutional dimension in their cause of action, this Court was permitted to disturb it. But this Court declared precisely the opposite in

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9/ As we also demonstrated (brief at 18-19), the federal rule is the same: "[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." *Hughes v. State of Washington*, 389 U.S. 290, 296-97, 88 S. Ct. 438, 19 L. Ed.2d 530, 535-36 (1967). We cited a number of other federal authorities for this proposition. If the Court should reject this argument, depart from *Florida Forest*, and conclude that the resurrected statute of repose was valid "*ab initio*" even as against previously-acquired vested rights, then to be consistent, it must adopt the same argument regarding repeal of the statute of repose. The "*ab initio*" argument applies equally in that context. For example, regarding the repeal of usury laws in *Yaffee v. International Co.*, 80 So.2d 910, 912 (Fla. 1955), this Court held that the repeal was "restorative of the common law . . . ***as though the usury statutes never existed*** . . ." (our emphasis). *Accord*, *Pensacola & A.R. Co. v. State*, 45 Fla. 86, 33 So.2d 985, 986 (1903) ("[T]he effect of a repealing statute is to obliterate the statute repealed ***as completely as if it had never been enacted*** . . ." (our emphasis), *quoted in State ex rel. Arnold v. Revels*, 109 So.2d 1, 3 (Fla. 1959). This is precisely the "*ab initio*" argument upon which Hobart places such heavy reliance.

Florida Forest, in holding that "such rights should not be destroyed by giving to a subsequent overruling decision retrospective operation." And that holding makes sense. Whether or not Hobart is correct (brief at 17) that "[t]he statute of repose was a rational legislative enactment," it does not follow that its ***retroactive*** (or "contemporaneous") application to ***preexisting*** vested rights reflected any rationality whatsoever, especially now that the statute of repose has been repealed. Hobart does not even bother to argue that any purpose is served by the divestment of previously-acquired vested rights—and thus has waived any such contention. Moreover, *Florida Forest* does not permit such a balancing of interests; it specifically declares that a resurrected statute should not be permitted to disturb pre-existing vested rights.[10/]

We conclude, therefore, that under Florida constitutional law, the Clausells had a vested right of constitutional dimension by virtue of *Battilla* at the time their cause of action arose and was filed; and that such a constitutional right could not permissibly be divested by the "retroactive" or "contemporaneous" application of *Pullum*. This point alone is dispositive of the appeal.[11/]

b. The Federal Constitutional Question (Brief at 19-32). First (brief at 19-21), we established that a state-created cause of action is a property right entitled to the protection of the federal due-process clause. As the Supreme Court has stated expli-

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10/ This observation also serves to answer Hobart's suggestion (brief at 14)—in reliance upon Justice Grimes' concurring opinion in *Nissan Motor Co. v. Phlieger*, 12 F.L.W. 256, 258 (Fla. May 28, 1987) (Grimes, J., concurring)—that a new state-court decision may divest a pre-existing property right if the party possessing that right has not theretofore relied upon it. The *Florida Forest* decision is inconsistent with this suggestion; *Florida Forest* indicates, as we argued (brief at 17), that a vested ***constitutional*** right is not so fragile that it may be sacrificed by judicial or legislative action at any time before it is exercised. In addition, we argued (brief at 18), the Clausells did rely upon their right of action, as permitted by *Battilla*, by taking the time and trouble to file it.

11/ Also dispositive is the point made at p. 19 n.14 of our brief—that the retroactive application of *Pullum* would deny access to courts under the Florida Constitution. Hobart has ignored and thus conceded the point, which alone warrants reversal.

citly, "a cause of action is a 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). This is true even if the cause of action has not yet been reduced to judgment, because the right of action "is guaranteed by the State," and that right "presumably can be surrendered for value . . . ." *Logan v. Zimmerman Brush Co.*, 455 U.S. at 432, 102 S. Ct. 1148, 71 L. Ed.2d at 275.

Despite a half-hearted attempt to suggest otherwise (brief at 18 n.15, 21), Hobart cannot rebut these explicit declarations of the United States Supreme Court. It's unsupported suggestion (brief at 21) that only rights created by state legislatures are entitled to protection, but not court-created rights, is not only wrong but non-sensical. A common-law right is no less entitled to protection than a statutory right. *See Holman v. Hilton*, 712 F.2d 854, 858 (3d Cir. 1983). Nor do any of the three cases relied upon by Hobart (brief at 18 n.15) suggest otherwise.[12/]

12/ In *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), which we also cited (brief at 20 n.15), the court properly held that there was no vested right in a tort claim which arose ***after*** the effective date of the new statute. The case thus supports our own position—not Hobart's. The same is true of *Jones v. Wyeth Laboratories, Inc.*, 457 F. Supp. 35, 37 (W.D. Ark.), *aff'd*, 583 F.2d 1070 (8th Cir. 1978), in which the plaintiff had not even been innoculated with the swine-flu vaccine until ***after*** the effective date of the federal statute in question, and the court properly held that his "***prospective*** cause of action could be abolished and the statutory remedy envisioned by the Swine Flu Act substituted" (our emphasis). This case too perfectly illustrates our point. And in *Hammond v. United States*, 786 F.2d 8, 12 (1st Cir. 1986), the court, quoting *Logan*, explicitly acknowledged that "the right to sue is a 'species of property.'" The *Hammond* court upheld the deprivation in question—abolition of a common-law state tort action in favor of a federal tort-claims action as the exclusive remedy—in part because "this case does not involve someone burdening or blocking plaintiff's right of access to the courts . . . . This is a matter of Congress altering her prior rights and remedies"—not abolishing them outright. *Id.* at 13.

We also remind the Court of Hobart's earlier concession *see supra* note 6, that ***this Court*** has recognized a ***federal*** constitutional right in a cause of action, in *Sunspan*

We also demonstrated that under federal law too, the *Battilla* decision rendered the statute of repose a total nullity at the time the Clausells' cause of action arose and was filed. Hobart offers no response. And we demonstrated (brief at 22-28) that under federal constitutional law, this Court could not permissibly revive a theretofore-unconstitutional state statute in a manner divesting the Clausells of a pre-existing cause of action. We cited dozens of federal decisions—including a long history of Supreme-Court decisions—on this point.

Hobart responds (brief at 18) that as a general proposition, "there is no due process violation by the application of a statute of repose." Indeed, Hobart later devotes four pages to this argument (brief at 22-25). It may be correct, but it is totally irrelevant, because we are concerned here not with the facial validity of a statute of repose, but with its retroactive application to pre-existing vested rights. Hobart answers (brief at 19) that under federal law too, judicial decisions ordinarily apply retroactively; and that too is irrelevant in light of the federal rule that such decisions apply retroactively ***only*** to the extent that they do not interfere with pre-existing vested rights. *See, e.g., Mullaney v. Wilbur*, 421 U.S. 684, 690 n.10, 95 S. Ct. 1881, 44 L. Ed.2d 508, 514-15 n.10 (1975) ("[T]he retroactive application of the new interpretation was itself a denial of due process"). We refer the Court to the dozens of federal decisions, most of them Supreme-Court decisions, cited at pages 22-28 of our initial brief—all of them ignored by Hobart. There can simply be no question that under federal constitutional law, a state court cannot, by virtue of a new interpretive decision, retroactively divest a plaintiff of a cause of action.

Engineering and Construction Co. v. Spring-Lock Scaffolding Co., 310 So.2d 4, 8 (1975). In its earlier discussion of the Florida constitutional question (Hobart's brief at 16-17), Hobart attempted to dismiss *Sunspan Engineering* on the ground that it was based exclusively upon federal constitutional rights. As we noted, *Sunspan* was based upon both Florida and federal constitutional rights, but at the least Hobart has conceded—and is estopped now to deny—that *Sunspan* itself recognizes the ***federal*** constitutional rights which the Clausells are asserting.

Hobart also contends (brief at 20-22) that the nature of a state cause of action must be defined by state law (which of course is correct), and that the *Battilla* Court did not intend to "create immutable property rights" by its decision (Hobart's brief at 20). Indeed, Hobart observes, *Pullum* resurrected the statute of repose *ab initio*, and "a court of ultimate resort is free to change its decision on the constitutionality of a law at any time" (brief at 22). The U.S. Supreme Court itself has declared that a person has no vested property right in a given state of the law. Hobart's brief at 22, *citing Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 98 S. Ct. 2620, 57 L. Ed.2d 595, 620 n.32 (1978).

But *Duke Power* holds only that there is no entitlement to a given state of the law ***before*** a cause of action arises under that state of the law. That holding is entirely consistent with the overwhelming federal authorities which we cited for the proposition that ***vested*** rights cannot be disturbed by a change in the law. And although Hobart is correct that such rights are a creation of the state courts or legislatures—in the sense that if the state did not want to recognize a cause of action in tort it might not have to—such rights acquire federal constitutional dimension once the state chooses to create them, and cannot be divested by retroactive state action. As the Supreme Court noted in *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 677-81, 50 S. Ct. 451, 74 L. Ed. 1107, 1111-14 (1930), while "[i]t is true that the courts of a state have a supreme power to interpret and declare the written and unwritten laws of the state," "a state may not deprive a person of all existing remedies for the enforcement of a right . . . ." To the contrary, although a cause of action may derive from the state's authority to create it, "it immediately acquire[s] 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 destroy or impair the previously vested right . . . ." *Coombes v. Getz*, 285 U.S. 434, 442, 52 S. Ct. 434, 76 L. Ed. 866, 871 (1932).

Thus, although this Court is the final interpreter of state law, and clearly had the power to change its mind in *Pullum*, it did not have the power—as against pre-existing vested federal constitutional rights—to apply that new interpretation retroactively. In this context, it is irrelevant that "[t]he Battilla majority never intended to create immutable property rights . . ." (Hobart's brief at 20). The pre-existing property right, whether "immutable" or not, was the Clausells' common-law right to bring a tort action in Florida at a time when the statute of repose, by virtue of *Battilla*, presented no barrier to its adjudication. The viability of that state-created cause of action, at both the time it arose and the time it was filed, by virtue of the statute's invalidity under *Battilla*, is the basis of the Clausells' federal property rights at the time *Pullum* was decided. Hobart has said nothing to forestall the conclusion that federal constitutional law forbids the retroactive application of *Pullum* to those pre-existing vested rights. This point alone warrants reversal.[13/]

2. The Statute of Repose is Not a Bar to the Clausells' Action, Because the Statute Has Been Repealed (Brief at 33-47).

a. The General Rule (Brief at 33-35). The longstanding rule in Florida is that the court must apply the law existent at the time of disposition, and this rule does ***not*** depend upon any explicit legislative or judicial declaration that a newly-created law should apply to a pending case. In this context, as we demonstrated in the initial brief (p. 35), Hobart's rejoinder (brief at 25)—that "there must be a clear manifestation of legislative intent that [a new law] be given retroactive effect"—is irrelevant. The general rule is that the new law (the repeal of the statute of repose) should apply to any case which was pending at the time of its enactment.

13/ So too does the point made at p. 33 n.27 of our initial brief—that the application of *Pullum* would violate both federal and Florida equal-protection guarantees. Hobart has ignored and thus waived the point, which alone warrants reversal.

b. *There is No Legislative Prohibition to Application of General Rule (Brief at 36-37).* Hobart ignores, and thus concedes, this point.

c. *Enforcement of the General Rule Will Not Undermine Vested Rights (Brief at 37-43).* Here we established that under both Florida and federal law, the "contemporaneous" or "retroactive" application of the repealing statute will not impermissibly interfere with Hobart's pre-existing vested rights. Under federal constitutional law (brief at 38-40), there is no constitutional barrier even to the retroactive revival of a cause of action which theretofore had been wholly barred—and thus certainly no barrier to application of the law-at-the-time-of-appeal principle. Hobart offers no response.

Under Florida constitutional law—although the general rule is that if a statute of limitations has completely run at the time of a new statute's enactment, the prospective defendant has a vested right to be free of the cause of action—in this case Hobart's asserted vested right under *Pullum* must be balanced against the Clausells' pre-existing vested right in a cause of action which was viable under *Battilla* at the time it arose and was filed. Thus, we contended, if the policies underlying *Pullum* were sufficient to divest the Clausells of a constitutional right, then those same policies—as reflected in the legislative repeal of the statute—should be sufficient to divest Hobart of any rights acquired under *Pullum*. Hobart addresses this point in a single footnote (brief at 28 n.24), asserting that the key difference is that in filing their cause of action, the Clausells merely "relied on a judicial decision," while in contrast "Hobart relied on a limitations period which had already expired and which clearly conferred upon it a vested right."

Both points are wrong. The Clausells did rely upon a judicial decision, but as we demonstrated, a judge-made law is no less important than a legislatively-made law—in that both confer vested rights. And on the other hand, the notion that "Hobart relied" upon anything is absurd. The statute of repose was not even in existence when Hobart manufactured the machine in this case, and thus this is "not a case where [Hobart's]

conduct would have been different" if *Battilla* had not been decided. *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). Hobart cannot conceivably show any reliance upon the statute of repose in this case.

In contrast, assuming *arguendo* that reliance is somehow relevant, *see supra* note 10, the Clausells clearly relied upon *Battilla* in taking the time and trouble to hire a lawyer and file their claim. Thus, the Clausells' pre-existing vested rights are no less entitled to deference than the asserted vested right acquired by Hobart under *Pullum*. If *Pullum* was compelling enough to divest the Clausells of their rights, then the repeal should be compelling enough to divest Hobart of its rights—by application of the law-at-the-time-of-appeal concept. Hobart says nothing to attack the logic of this position.

Finally (brief at 44-46 & n.39), we established that even if Hobart acquired a vested right under *Pullum*, any such right must give way to the remedial legislative purposes reflected in the repeal of the statute of repose. Hobart does not deny (and thus concedes) the general principle, but argues that the legislation repealing the statute of repose was not "solely remedial." Hobart's logic (brief at 26-27) is that when *Pullum* resurrected the statute of repose, it gave Hobart a vested right to be free of the Clausells' action; and a vested right is a substantive right; and ***therefore*** the act of repealing the statute of repose necessarily affected a substantive right; and ***therefore*** the ***repealing*** statute cannot be considered purely remedial. But that reasoning is entirely circular. Indeed, it would abolish almost entirely the doctrine that remedial legislation may permissibly interfere with pre-existing vested rights.

Thus, if Hobart were correct, this Court could not have decided *Yaffee v. International Co.*, 80 So.2d 910, 912 (1955), declaring that "the repeal of a statute creating defenses of usury has been held to render valid a contract that was subject to

the defenses of the statute when made," because the repealing statute was "restorative of the common law . . . as though the usury statutes never existed . . . ." Clearly the defense created by those statutes was substantive in nature, but the repealing legislation was necessarily remedial. Similarly in *Carr v. Crosby Builders Supply Co.*, 283 So.2d 60, 62 (Fla. 4th DCA 1973), Florida's guest statute had clearly created substantive rights, but the repealing legislation nevertheless controlled, "according to the law prevailing at the time of the appellate disposition, irrespective of the law prevailing at the time of rendition of the judgment appealed." As these and many other cases make clear, a statute may be remedial in purpose, and thus retroactively applicable, notwithstanding its effect upon substantive rights. The appropriate focus is upon the intention of the legislation at issue—not upon the nature of the right affected. If the statute at issue is remedial, it may interfere with pre-existing vested rights.

As we demonstrated (brief at 46), and as the *Yaffee* and *Carr* cases illustrate, the repeal of the statute of repose was clearly remedial. As this Court has stated, "the effect of a repealing statute is to obliterate the statute repealed as completely as if it had never been enacted, except for the purpose of those actions or suits which were commenced, prosecuted, and concluded while it was an existing law, and . . . an action cannot be considered as concluded while an appeal therein is pending before an appellate court having jurisdiction to review it." *Pensacola & A.R. Co. v. State*, 45 Fla. 86, 33 So. 985, 986 (1903), *quoted in State ex rel. Arnold v. Revels*, 109 So.2d 1, 3 (Fla. 1959).

Thus, the legislation repealing the statute of repose was certainly remedial. 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. Desjardins*, 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 482, 486 (Fla. 2d DCA 1978), *rev'd on other grounds*, 368 So.2d 154 (Fla. 1980)—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 pre-existing substantive rights—that is, the common-law rights of prospective products-liability claimants in Florida. Hobart has said nothing to deny that the repealing legislation was remedial in nature—even if it interefered with pre-existing rights of a more substantive nature. For this reason alone, the repealing statute should have been applied "contemporaneously" or "retroactively" to the Clausells' pending case.

3. *Conclusion (Brief at 46-47).*

One way or another, the Clausells must prevail in this proceeding. On the one hand, *Pullum* should never have been applied to divest the Clausells of a cause of action which was perfectly viable at the time it arose and was filed, and which constituted a property right of constitutional dimension under both Florida and federal law. And if the legislative objectives reflected in *Pullum* were so compelling as to toss aside the Clausells' pre-existing vested rights of constitutional dimension, then by definition, the policies reflected in the legislative repeal of the statute of repose were equally compelling, and thus equally sufficient to divest Hobart of any rights acquired under *Pullum*. That is especially true because in repealing the statute of repose, the legislature undertook a classically-remedial act, which necessarily applies retroactively, and thus certainly applies to a pending case.

II
CONCLUSION

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

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 29th day of June, 1987, to: JAMES TRIBBLE, ESQ., Blackwell, Walker, et al., 2400 AmeriFirst Building, One S.E. Third Avenue, Miami, Florida 33131.

Respectfully submitted,

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