IN THE SUPREME COURT OF FLORIDA

CASE NUMBER 70,574

LAZARO DESVERGUNDT,
Plaintiff/Petitioner

vs.

KOPPERS COMPANY, INC. a/k/a HOOPER MANUFACTURER, INC.,
Defendant/Respondent

PETITION FOR DISCRETIONARY REVIEW OF A
DECISION OF THE DISTRICT COURT OF APPEAL
THIRD DISTRICT, CASE NO. 86-2833

INITIAL BRIEF OF PETITIONER ON THE MERITS

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INTRODUCTION

In this brief the parties will be referred to by name or as they stood before the circuit court: DESVERGUNDT/Plaintiff (Appellant below); KOPPERS/Defendant (Apellee below). References to the Appendix will be by the letter "A".

References to the Record before the lower tribunal will be by the letter "R" and a page number corresponding the the circuit court's pagination of the record; documents in the circuit court record will be described by name to avoid confusion. No record has yet been filed by the Clerk of the lower tribunal, nor is it due until July 20, 1987.

Numerous decisions by the District Courts are in accord with the decision presented for review. Most of those decisions contain certified questions similar, if not identical, to the questions presented in this Petition. The decisions of which the undersigned is aware are listed here, Petitioner does not know which, if any, of them have been brought to this Court for review. Unless cited in the body of this brief, the decisions listed here are not listed in the table of auathorities.

Clausell v. Hobart Corp., ___ So.2d ___, 12 FLW(D) 1224 (Fla. 3d DCA May 12, 1987); *Keyes v. Fulton Mfg. Corp.*, ___ So.2d ___, 12 FLW(D) 1164 (Fla. 3d DCA May 5, 1987); *Manuel v. E I G Cutlery, Inc.*, ___ So.2d ___, 12 FLW(D) 1161 (Fla. 3d DCA May 5, 1987); *Willer v. Pierce*, ___ So.2d ___, 12 FLW(D) 1122 (Fla. 4th DCA April 29, 1987); *Lazo v. Baring Ind., Inc.*, ___ So.2d ___, 12 FLW(D) 1021 (Fla. 3d DCA April 14, 1987); *Shaw v. General Motors Corp.*, ___ So.2d ___, 12 FLW(D) 847 (Fla. 3d DCA March 24, 1987)(substituted opinion); *Coggins v. Clark Equip. Co.*, ___ So.2d ___, 12 FLW(D) 750 (Fla. 5th DCA March 12, 1987); *Wallis v. The Grumman Corp.*, ___ So.2d ___, 12 FLW(D) 613 (Fla. 3d DCA February 24, 1987); *Melendez v. Dreis & Krump Mfg. Co.*, ___ So.2d ___, 12 FLW(D) 554 (Fla. 3d DCA February 17, 1987); *Dominguez v. Bucyrus-Erie Co.*, ___ So.2d ___, 12 FLW(D) 546 (Fla. 3d DCA February 11, 1987); *Shaw v. General Motors Corp.*, ___ So.2d ___, 12 FLW(D) 487

(Fla. 3d DCA February 10, 1987)(original opinion); *Brackenridge v. Ametek, Inc.*, ___ So.2d ___, 12 FLW(D) 479 (Fla. 3d DCA February 10, 1987); *Lane v. Koehring Co.*, ___ So.2d ___, 12 FLW(D) 478 (Fla. 3d DCA February 10, 1987); *Small v. Niaagara Machine & Tool Works*, ___ So.2d ___, 12 FLW(D) 366 (Fla. 2d DCA January 20, 1987); *Pait v. Ford Motor Co.*, 500 So.2d 743 (Fla. 5th DCA 1987); *Cassidy v. Firestone Tire & Rubber Co.*, 495 So.2d 801 (Fla. 1st DCA 1986); *American Liberty Ins. Co. v. West and Conyers*, 491 So.2d 573 (Fla. 2d DCA 1986)(decided before repeal of §95.031(2) Fla. Stat.).

STATEMENT OF THE CASE AND FACTS

Plaintiff filed a products liability suit on January 23, 1985. (R1-3) In his Complaint he alleged various products liability theories, alleging that Defendant KOPPERS manufactured a Hooper Printer Slotter which injured him on April 12, 1982. (R1-3) Defendant interposed the products liability statute of repose, §95.031(2) Florida Statutes (1983), as a defense. (R10-11)

Defendant sought summary judgment based on the statute of repose as revitalized by the decision of this Court in *Pullum v. Cincinnati, Inc.*, 476 So.2d 657 (Fla. 1985). (R12-16) The affidavit of a representative of Defendant was filed which indicated that the offending machine had been sold by Defendant on April 27, 1954, and delivered on May 7, 1954. (R12-16) The motion was granted and summary judgment entered. (R30-31) A motion for rehearing was filed (R21), and supplemented when the legislature repealed the products liability statute of repose on July 1, 1986. (R23-26) The motion for rehearing was denied. (R32)

The lower tribunal affirmed the summay judgment, *Desvergundt v. Koppers Co., Inc.*, ___ So.2d ___, 12 FLW(D) 1108 (Fla. 3d DCA, April 28, 1987). (A17-18) In

affirming, the lower tribunal certified two questions as being of great public importance:

> I. WHETHER THE LEGISLATIVE AMENDMENT OF SECTION 95.031(2) FLORIDA STATUTES (1983), ABOLISHING THE STATUTE OF REPOSE IN PRODUCTS 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 BEFORE THE PULLUM DECISION.

Accordingly, the decision of the lower tribunal is presented here for review upon the two certified questions.

ISSUES PRESENTED FOR REVIEW

I. WHETHER THE LEGISLATIVE AMENDMENT OF SECTION 95.031(2) FLORIDA STATUTES (1983), ABOLISHING THE STATUTE OF REPOSE IN PRODUCTS 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 BEFORE THE *PULLUM* DECISION.

SUMMARY OF ARGUMENT

The repeal of the products liability statute of repose, §95.031(2) Fla. Stat. (1983), on July 1, 1986, by Ch. 86-272 §2, Laws of Florida, was a legislative response to the revitalization of the statute by this Court in *Pullum v. Cincinnati, Inc.*, 476 So.2d 657 (Fla. 1985). After this Court declared that the statute violated article I, §21 of the Florida Constitution by denying access to the courts, *Battilla v. Allis Chalmers Mfg. Co.*, 392 So.2d 874 (Fla. 1980), the legislature did not respond, as it did with this Court's similar declaration as to the improvements to realty statute of repose, §95.11(3)(c) Fla. Stat., *Overland Constr. Co. v. Sirmons*, 369 So.2d 572 (Fla. 1979), by immediately re-enacting the law. Ch. 80-323, Laws of Florida. Accordingly, this Court should view the repeal as a declaration of public policy and remedial, and declare that the repeal has retrospective application, and that therefore the statute of repose cannot be imposed in the instant case.

This Court's decision in *Pullum* should not be applid retroactively to causes of

action which arose, or were filed, or both, after the decision in *Batilla*. Again, the inactivity of the legislature in response to the declaration of invalidity of the statute, and the swift repeal of the statute after it was revitalized by this Court, should guide the decision as to retroactive application *vel non* of *Pullum*.. This Court should consider the causes of action which arose after *Batilla* to be property rights which are not to be destroyed by retrospective operation of the later decision. *Florida Forest and Parks Services v. Strickland*, 154 Fla. 472, 18 So.2d 251 (1944).

ARGUMENT ON ISSUE I

Florida's product liability statute of repose was enacted in 1975 by Ch. 74-382, §3, Laws of Florida. From the time of its enactment until this Court's decision in *Pullum*, there appear to be no decisions holding it valid where it operated to cut off an action before it had accrued thus denying access to the courts. That the statute would be declared invalid under such circumstances became a virtual certainty when this Court decided *Overland Constr. Co. v. Sirmons*, 369 So.2d 572 (Fla. 1979), partially invalidating the improvements to realty statute of repose. §95.11(3)(c) Fla. Stat. In fact, at least one trial court anticipated *Battilla*.. *See, Home Ins. Co. v. Advance Machine Co.*, 500 So.2d 664 (Fla. 1st DCA 1986) (trial court refused to grant summary judgment to product liaiblity defendants).

Thus, the period of time during which sellers of products in Florida could reasonably expect to protected by a statute of repose against causes of action such as the one at bar was barely four years. Prior to 1975 there was no product liability statute of repose, and after 1979, the constitutional issue was plain. Accordingly, products manufacturers and sellers knew, except for that brief interval, that potential litigation from defective products was co-extensive in time with the useful life of their products. From

1979 (*Overland*), or, at the very latest, 1980 (*Battilla*), manufacturers and other sellers of products had no reasonable expectation of protection from claims arising more than twelve years after the original sale.

After *Battilla*, product manufacturers and sellers, including Defendant KOPPERS, were no worse off than they had been for centuries under the common law. There was no statute of repose in 1954, when KOPPERS sold and delivered the machine involved here. KOPPERS never relied on the statute of repose in its planning. The entire brief history of the statute came and went without any rights vesting in KOPPERS under the act.

The as yet undecided, at least by this Court, question whether *Pullum* operates to extend the "useful" life of the statute of repose to those causes of action which arose during the period of its putative invalidity, argued further below, has been mooted by the legislature. In its failure to respond to *Battilla*, as it did to *Overland*, for five legislative sessions, and in its immediate response to *Pullum* in repealing the product liability statute of repose, the legislature has declared the public policy of Florida.

Whether legislative enactments are to be given retrospective application is answered very simply: it depends. This Court has said that the presumption is against retrospective application where the legislature "has not in clear and explicit language expressed an intention that the statute be so applied." *Foley v. Morris*, 339 So.2d 215 (Fla. 1976).

This Court has also said that the repeal of an existing act is to be retrospectively applied even after judgment during appellate proceedings. *Tel Service Co., Inc. v. General Capital Corp.*, 227 So.2d 667 (Fla. 1969). In *Yaffee v. International Co., Inc.*, 80 So.2d 910 (Fla. 1955) this Court stated that the retrospective application of repealing statutes is limited to situations where a "right or remedy" has been created wholly by statute "when the statute is repealed the right or remedy created by the statute falls with it."

at 912.

There is no reason why a "right or remedy" as referred to in *Yaffee* may not be a defensive matter rather than a cause of action. In *Yaffee* this Court said that repealing statutes restorative of the common law are to be given retrospective effect. In *Carr v. Crosby Builders Supply Co., Inc.*, 283 So.2d 60 (Fla. 4th DCA 1973), the court held that the repeal of the automobile guest passenger statute, *after* trial and judgment for defendant, applied to the appeal of that cause. Repeal of the auto guest passenger statute was, of course, restorative of the common law.

Similarly, statutes of repose were unknown at common law. §95.031(2) gave product sellers a "right or remedy" unknown at common law: the right to be free of lawsuits more than twelve years after delivery of the product. Repeal of the statute took away that right found only in the statute. Accordingly, the rule of retrospective application of repealing statutes is applicable. The statute of repose was also in derogation of the right of access to the courts guaranteed by the Florida Constitution. This Court said so explicitly in *Batilla* , and implicitly in *Pullum* , although, of couse, holding in the latter decision that the statute did not *invalidly* infringe on the constitutional right.

Another basis on which this Court could, and should, determine that the repeal of §95.031(2) is retroactive is that the repeal is a remedial enactment. As noted above, the legislature was content to make no effort to reenact the product liability statute of repose after this Court's declaration of its invalidity in *Battilla*.. After this Court receded from *Battilla* in *Pullum* , the legislature, in its very next session, moved to remedy the harsh effect of the statute of repose by repealing it entirely.

In *City of Orlando v. Desjardins*, 493 So.2d 1027 (Fla. 1986) this Court retrospectively applied §119.07(3)(o) Fla. Stat. to protect the litigation file of an attorney representing the city. The court noted that the developing caselaw affording public bodies

no protection for their litigation files prompted the enactment, and that the legislation was therfore remedial and retroactive in application. In *Village of El Portal v. City of Miami Shores*, 362 So.2d 275 (Fla. 1978), this Court held the Uniform Contribution Among Tortfeasors Act to be remedial and thus applicable to causes of action which arose before its enactment. In *Grammer v. Roman*, 174 So.2d 443 (Fla. 2d DCA 1965), the court stated that a remedial act is one which confers a remedy, a remedy being "the means employed in enforcing a right or redressing an injury." The repeal of the statute of repose conferred a remedy, it provided the means for redress of injuries previously barred by the statute of repose, it also restored constitutionally mandated access to the courts. It can and should be retroactively applied.

This Court should hold squarely that Ch. 86-272, §2, Laws of Florida is a repeal of the products liability statute of repose and is to be given retrospective effect. This Court has already characterized the act as a repeal. *See, Nissan Motor Co., Ltd. v. Phlieger*, ___ So.2d ___, 12 FLW(S.Ct.) 256 (Fla. May 28, 1987), footnote 2. To give the repeal retroactive effect would be in accord with existing rules of statutory construction and application. No vested rights would be interfered with, since it is hard to fathom that products sellers came to "count" on the statute in any legally cognizable way in the eleven months between *Pullum* and the repeal. The effect of the repeal of the statute, even prospectively, points up the sophistry of any argument that product sellers would be seriously compromised by retrospective application. Any individual injured by a product on or after July 1, 1986, may maintain a suit for damages no matter the antiquity of the product. In light of that exposure, any potential harm done by retrospective application of the repeal pales into insignificance.

The decision of the lower tribunal was based on its own prior decision in *Shaw v. General Motors Corp.*, ___ So.2d ___, 12 FLW(D) 847 (Fla. 3d DCA March 24, 1987).

The Third District there held that the repeal of §95.031(2) Fla. Stat. (1983) as it applied to the products liability statute of repose, had no effect on the plaintiff's suit there. The court cited decisions adhering to the general rule that without express legislative intent for retrospective application, amendments to statutes operate prospectively only. The court did not discuss the exception to that rule which applies where repealed statutes confer a right or remedy, and thus the repeal operates retrospectively. *Yaffee, supra*; *Carr v. Crosby Builders Supply, supra.* As argued above, an analysis of those decisions leads to the conclusion that the repeal of the product liability statute of repose should be given retrospective application.

In his special concurrence in *Dominguez v. Bucyrus-Erie Co.*, ___ So.2d ___, 12 FLW(D) 546 (Fla. 3d DCA February 11, 1987), Judge Ferguson, indicating he would dissent but for the court's precedent in *Shaw v. General Motors Corp., supra*, wrote, calling the repeal of the product liability statute of repose "a prompt legislative overruling of *Pullum.*":

> We are not paralyzed, by policy or precedent, from giving the corrective legislation retrospective application to a case which was sandwiched between *Battilla* and *Pullum*, so that substantial justice and right shall prevail as contemplated by the constitution. Our duty as an appellate court construing a statute is first to reconcile it with constitutional mandates. *See Biggs v. Smith*, 134 Fla. 569, 184 So. 106 (1938) ("The duty is on this Court to see that substantial justice and right shall prevail.")

This Court should heed Judge Ferguson's call for justice, and follow the lead of his special concurrence

ARGUMENT ON ISSUE II

If the Court should reject the argument that the repeal of the product liability statute of repose should be given retrospective effect, then the Court should hold that *Pullum* is

prospective only in application. Much of the argument above would be equally applicable here, and is adopted without being repeated. The Court should adopt the reasoning of Justice Grimes's special concurrence in *Nissan Motor Co., Ltd. v. Phlieger, supra*, to the extent that it argues for prospective only application of *Pullum*, because property rights, i.e., rights of action, acquired after the decision in *Battilla* must be honored. Justice Grimes's concurrence intimated that cases such as the one at bar "may" be distinguished from *Phlieger* because the cause of action accrued more than twelve years after the initial delivery of the product, and Mrs. Phlieger's cause of action accrued before expiration of the twelve years, although suit was filed afterwards. That distinction can, and should, be rejected by this Court.

A cause of action in tort is a property right within the broader definition of the term. Thus, Justice Grimes was correct in asserting that a property right was acquired by Mrs. Phlieger upon her husband's death by wrongful act. However, logic does not dictate that it is any more a cognizable property right because she forebore to exercise it immediately due to mistaken reliance on *Battilla.* In the first instance, the facts as related in the decision do not indicate that any reliance on *Battilla* dictated the filing date of the suit. In the second, a cause of action is either property, or it is not. That injustice would occur if suit were not allowed is no answer. Mrs. Phlieger had six months in which to sue. In *Lugo v. Ford Motor Co.*, 611 F.Supp. 789 (S.D. Fla. 1985), *affirmed* 791 F.2d 170 (11th Cir. 1986), reduction of the time within which the injured party could sue to four months was not considered unreasonable. In fact, were *Phlieger* not a death action, and thus distinguishable according to the majority there, the statute of repose would have barred the suit even prior to *Pullum.*

When Florida's constitutionally guaranteed right of access to the courts is considered along with the notion that a cause of action in tort is a property right, then

prospective only application of *Pullum* is the correct rule. This Court's own precedent in *Florida Forest & Park Service v. Strickland*, 154 Fla. 472, 18 So.2d 251 (1944) should be followed. Further authority can be found in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971).

In *Phlieger* this Court was not confronted with the question of the retroactivity *vel non* of *Pullum*. This Court has never directly answered the question. If the repeal of the product liability statute of repose by the legislature is found to be retroactive, as it should be, then the question of retroactivity of *Pullum* is moot. If not, then the Court should adhere to the reasoning of Justice Grimes's specially concurring opinion in *Phlieger* and give *Pullum* prospective application only.

CONCLUSION

The summary judgment appealed to and affirmed by the lower tribunal should be reversed with directions to reinstate Plaintiff's cause of action against Defendant KOPPERS. This should be done upon a direct holding that the repeal of the product liability statute of repose operates retrospectively as well as prospectively, or that *Pullum* operates prospectively only. Phrased another way, the first certified question should be answered in the affirmative and/or the second answered in the negative.

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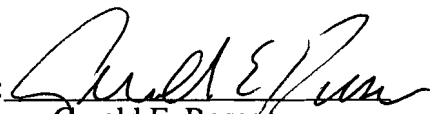
By: 
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