

IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

CASE NO: 70,814

DCA CASE NO: 85-2734

TERESA CARROLL,

Petitioner,

v.

VOLKSWAGEN OF AMERICA, INC.,
etc., et al.,

Respondents.

CLERK

BRIEF OF PETITIONER

LAW OFFICES OF PHILLIP C. HOUSTON
1645 Palm Beach Lakes Boulevard
Suite 420
West Palm Beach, FL 33401
and
EDNA L. CARUSO, P.A.
Suite 4B-Barristers Bldg.
1615 Forum Place
West Palm Beach, FL 33401
305-686-8010
Attorneys for Petitioner

INDEX

	<u>PAGE</u>
CITATIONS OF AUTHORITY	i
PREFACE	1
STATEMENT OF THE CASE AND FACTS	1-5
POINTS ON APPEAL	5
SUMMARY OF ARGUMENT	5
ARGUMENT	6-28

POINT I

THE PULLUM DECISION SHOULD NOT BE APPLIED RETROACTIVELY TO BAR A CAUSE OF ACTION THAT ACCRUED PRIOR TO THE DATE OF THAT DECISION AND THEREFORE THE FIRST CERTIFIED QUESTION SHOULD BE ANSWERED IN THE NEGATIVE.	6-25
---	------

POINT II

THE FLORIDA LEGISLATURE'S REPEAL OF THE STATUTE OF REPOSE CONTAINED IN FLA. STAT §95.031(2) APPLIES TO THIS CASE AND, THEREFORE, THE ACTION IS NOT BARRED AND THE SECOND CERTIFIED QUESTION SHOULD BE ANSWERED IN THE AFFIRMATIVE.	25-28
---	-------

CONCLUSION	28
CERTIFICATE OF SERVICE	29
PETITIONER'S APPENDIX	A1-2

CITATIONS OF AUTHORITY

ADAMS v. SNEAD 25 So. 893 (Fla. 1899)	8
BATTILLA v. ALLIS CHALMERS MFG. CO. 392 So.2d 874 (Fla. 1980)	1
CHEVRON OIL COMPANY v. HUSON 404 U.S. 97 (1971)	21
CHRISTOPHER v. MUNGEN 55 So.2d 274 (Fla. 1911)	5
CIPRIANO v. CITY OF HOUMA 395 U.S. 701 (1969)	11
CITY OF PHOENIX v. KOLODZIEJSKI 399 U.S. 204 (1970)	11
DELTONA CORP. v. BAILEY 336 So.2d 1163 (Fla. 1976)	10

FLORIDA FOREST AND PARK SERVICE v. STRICKLAND	
18 So.2d 251 (Fla. 1944)	14
FRANKLIN v. STATE	
257 So.2d 21 (Fla. 1971)	11
GULESIAN v. DADE COUNTY SCHOOL BOARD	
281 So.2d 325 (Fla. 1973)	12
INDIANA ex rel ANDERSON v. BRAND	
303 U.S. 95 (1938)	14
INTERLACHEN LAKE ESTATES, INC. v. SNYDER	
304 So.2d 433 (Fla. 1973)	10
INTERNATIONAL STUDIO APARTMENT ASSOC. v. LOCKWOOD	
421 So.2d 1119, 1122 (fla. 4th DCA 1982)	12
L. ROSS, INC. v. R. W. ROBERTS CONSTRUCTION CO., INC.	
466 So.2d 1096 (Fla. 5th DCA 1985)	
aff'd 482 So.2d 484 (Fla. 1986)	18
LEMON v. KURTZMAN	
411 U.S. 192, 199 (1973)	12
PULLUM v. CINCINNATI, INC.	
476 So.2d 657 (Fla. 1985)	3
RODRIGUE v. AETNA CASUALTY & SURETY CO.	
395 U.S. 352 (1969)	21
SIMMONS v. CITY OF CORAL GABLES	
186 So.2d 493 (Fla. 1966)	19
STATE v. BARQUET	
262 So.2d 431 (Fla. 1972)	11
STATE ex rel NUVEEN v. GREER	
102 So. 739 (Fla. 1924)	9
TIGERTAIL QUARRIES, INC. v. WARD	
16 So.2d 812 (Fla. 1944)	14
WEBB'S FABULOUS PHARMACIES, INC. v. BECKWITH	
449 U.S. 155 (1980)	23
YAFFEE v. INTERNATIONAL COMPANY, INC.	
80 So.2d 910 (Fla. 1955)	27
§95.031(2)	
Sutherland, Statutory Construction	
§41.02 4th Ed. 1985	13

PREFACE

This is an appeal by the Plaintiff from a Final Summary Judgment entered on behalf of the Defendants, Volkswagen of America, Inc. and Volkswagenwerk Aktiengesellschaft. The Plaintiff will be referred to by her proper name and the Defendant/Appellees will be referred to in the following manner: Volkswagen of America, Inc. - Volkswagen, Volkswagenwerk Aktiengesellschaft - Volkswagen A.G. The following designation will be used:

(R) Record-On-Appeal

(A) Petitioner's Appendix

STATEMENT OF THE CASE AND FACTS

Plaintiff, Theresa Carroll, filed her Complaint on June 28, 1985 naming as Defendants Volkswagen of America, Inc. (hereinafter "Volkswagen", the retailer), Volkswagen Aktiengesellschaft (hereinafter "Volkswagen A.G.", the manufacturer), and Herman L. Sherrod (the tortfeasor/driver) (R1-13). Plaintiff's claims against the Defendants arose out of an automobile accident that occurred on January 22, 1985. At the time of the accident and the filing of the complaint the Florida Supreme Court decision in BATTILLA v. ALLIS CHALMERS MFG. CO., 392 So.2d 874 (Fla. 1980), was controlling precedent and it held that the twelve year statute of repose contained in Fla. Stat.

§95.031(2) was unconstitutional to the extent that it purported to extinguish a cause of action prior to its accrual.¹

In the Complaint the Plaintiff alleged that prior to January 22, 1985 she had purchased a used 1968 Volkswagen Beetle automobile that was defective in that the seat track assembly broke off upon impact. Additionally, Plaintiff alleged that on January 22, 1985 she was driving the vehicle when she was struck from the rear by another vehicle, resulting in the seat assembly breaking off and causing her to be struck by the interior portion of the vehicle resulting in catastrophic damages including quadriplegia (R1-2).

Counts I through IV were directed solely against Volkswagen and alleged that it was negligent in the manufacture, design, assembly and distribution of the vehicle in that the seat track assembly was negligently designed, that the Defendant had failed to warn purchasers of potential danger, and that it had failed to recall or otherwise repair the model after becoming aware of the defect. Count II was based on implied warranty of merchantability, crashworthiness and fitness for use. Count III

1/ §95.031(2) provided that products liability cases must be brought within the four year limitations period set forth in §95.11(3) F.S.:

. . .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 product or the fraud was or should have been discovered.

alleged strict liability in tort based on the Defendant's transfer of the vehicle in a defective condition. Count IV alleged that the Defendant knew of the defect and deliberately chose not to recall or disclose it and therefore punitive damages were justified.

Count V through VIII of the Complaint were addressed to Volkswagen A.G. They contained similar allegations to those in the first four counts and sought recovery based on negligence, implied warranty, strict liability in tort, and punitive damages. In paragraph 9 of the Complaint the Plaintiff sought attorney's fees under the MAGNUSON-MOSS act. In Count X the Plaintiff alleged negligence on the part of Defendant Sherrod in his driving of the vehicle which struck the Plaintiff.

Volkswagen filed a motion to dismiss, motion to strike and/or motion to require more definite statement (R19-21). Prior to a ruling on that motion, Volkswagen filed a motion for summary judgment relying on Fla. Stat. §95.031(2) (R37-46). While that statute had been originally declared unconstitutional in *BATTILLA, supra*, the Florida Supreme Court receded from that decision in *PULLUM v. CINCINNATI, INC.*, 476 So.2d 657 (Fla. 1985) Volkswagen claimed in its motion that *PULLUM* applied retroactively to deprive the Plaintiff of her cause of action. Volkswagen A.G. filed its motion for summary judgment adopting the Motion of Volkswagen on October 24, 1985 (R75).

At the hearing on Defendants' Motions for Summary Judgment, Plaintiff's counsel argued that *PULLUM* should not be applied retroactively because the Plaintiff's rights had vested prior to

the issuance of PULLUM (A6-8). Additionally, Plaintiff's counsel argued that it would be unfair to apply PULLUM retroactively since the Plaintiff had reasonably relied on the Supreme Court's holding in BATTILLA and had incurred substantial costs as a result (A8-9). Nonetheless, at the conclusion of the hearing, the trial judge stated that he was going to rule for the Defendants (A22).

Thereafter, the trial court entered a summary final judgment in favor of Defendants Volkswagen and Volkswagen A.G. concluding that the Plaintiff's claim was barred by Fla. Stat. §95.031 (2). The court found that it was undisputed that the Volkswagen automobile in issue had been delivered to the original purchaser on or about July 12, 1968 and that the accident which was the subject of the Complaint occurred on January 22, 1985. The court found that the subject accident and the filing of the Complaint occurred more than 12 years after the date of delivery of the vehicle. Therefore, the court held, PULLUM was applicable to the Plaintiff's claims and Fla. Stat. §95.031(2), which had been originally declared unconstitutional but subsequently declared constitutional by the Florida Supreme Court, barred the action.

The Plaintiff appealed the judgment to the Fourth District Court of Appeal. The Fourth District affirmed but stated (A1-2):

We affirm, although we have considerable sympathy for the appellant who has apparently been deprived of a cause of action even before such cause arose by reason of the operation of the 12-year statute of repose, see PULLUM v. CINCINNATI, INC., 476 So.2d 657 (Fla. 1985), which was abolished by the legislature in 1986. Notwithstanding our affirmance we certify the following questions to the Florida Supreme Court as issues of great public importance:

1. DOES THE SUPREME COURT DECISION IN PULLUM APPLY RETROACTIVELY SO AS TO BAR CAUSES OF ACTION THAT ACCRUED BEFORE THE DATE OF THAT DECISION.

2. SHOULD THE ABOLITION OF THE 12-YEAR STATUTE OF REPOSE BY THE LEGISLATURE BE CONSTRUED TO OPERATE RETROACTIVELY TO PRESERVE CAUSES OF ACTION THAT ACCRUED PRIOR THERETO?

The Plaintiff timely invoked this Court's jurisdiction.

POINTS ON APPEAL

POINT I

THE PULLUM DECISION SHOULD NOT BE APPLIED RETROACTIVELY TO BAR A CAUSE OF ACTION THAT ACCRUED PRIOR TO THE DATE OF THAT DECISION AND THEREFORE THE FIRST CERTIFIED QUESTION SHOULD BE ANSWERED IN THE NEGATIVE.

POINT II

THE FLORIDA LEGISLATURE'S REPEAL OF THE STATUTE OF REPOSE CONTAINED IN FLA. STAT §95.031(2) APPLIES TO THIS CASE AND, THEREFORE, THE ACTION IS NOT BARRED AND THE SECOND CERTIFIED QUESTION SHOULD BE ANSWERED IN THE AFFIRMATIVE.

SUMMARY OF ARGUMENT

The first certified question should be answered "no." The Plaintiff's claim in this case accrued prior to PULLUM v. CINCINNATI, INC., 476 So.2d 657 (Fla. 1985) and, therefore, her rights were vested and cannot be extinguished retroactively. The trial court's reliance on CHRISTOPHER v. MUNGEN, 55 So.2d 274 (Fla. 1911) was erroneous because the rule stated in that case is no longer applicable. The relevant tests now applied in Florida are the vested rights test and the equitable considerations test;

and both compel the conclusion that PULLUM should not be applied retroactively.

The Florida legislature's repeal of the statute of repose should be applied to Plaintiff's case. It is clear from the language of Ch. 86-272 that the legislature intended the repeal to apply to pending cases. Additionally, this Court has held that repealing acts will be applied retroactively with respect to rights created wholly by statute. Therefore, the second certified question should be answered "yes."

ARGUMENT

POINT I

THE PULLUM DECISION SHOULD NOT BE APPLIED RETROACTIVELY TO BAR A CAUSE OF ACTION THAT ACCRUED PRIOR TO THE DATE OF THAT DECISION AND THEREFORE THE FIRST CERTIFIED QUESTION SHOULD BE ANSWERED IN THE NEGATIVE.

THE RETROACTIVITY ISSUE INVOLVED IN THE CASE SUB JUDICE WAS NEVER ADDRESSED IN PULLUM

The Defendants argued in the Fourth District that the issue of the retroactive application of PULLUM was resolved by this Court in its denial of the Petitioner's Motion for Rehearing that case. However, it should be pointed out that the facts before this Court in PULLUM differed significantly from those in the case sub judice and, therefore, the denial of the rehearing in PULLUM does not compel the conclusion that that decision should be applied retroactively in this case.

In PULLUM, the plaintiff suffered the injury prior to the expiration of the 12-year statute of repose period but he did not

file his action within that 12-year period. The application of the statute of repose in his case reduced the time within which he could file suit from the four-year period provided for in Fla. Stat. §95.11(3)(e) to a little over one and a half years (see 458 So.2d at 1138). His failure to file his action within one-and-a-half years of the accident resulted in summary judgment being entered against him by the trial court. Therefore, the holding of the Florida Supreme Court in BATTILLA v. ALLIS CHALMERS MANUFACTURING CO., 392 So.2d 874 (Fla. 1981) did not apply to Pullum's situation. His claim had not been extinguished prior to its accrual by the statute of repose. Therefore, the holding in BATTILLA that such an application of the statute violated the Florida Constitution did not apply to him. Pullum was attempting to make new law by claiming that the application of the statute of repose in his situation violated the equal protection clause of the Constitution because it limited him to one-and-a-half years in which to file his lawsuit. When Pullum filed his action, it was apparent that to prevail he would have to make new law since, under the law then existing, his claim was barred. Thus, his situation was significantly different from that of the Plaintiff sub judice whose case falls directly within the holding of BATTILLA. Therefore, the plaintiff in PULLUM did not have a vested right but pursued his lawsuit well aware of the risks being run and clearly not in reliance on the BATTILLA decision. Therefore, the Florida Supreme Court's decision not to accept the petitioner's argument on rehearing regarding retroactive application of its holding to his case involved different considerations.

CHRISTOPHER V. MUNGEN DOES NOT CONTROL AND THEREFORE RETROACTIVE APPLICATION OF PULLUM IS NOT MANDATED.

The summary judgment entered by the Circuit Court did not discuss the legal basis for the judgment other than to say that PULLUM applies to the Plaintiff's case. The only authority cited for the retroactive application of PULLUM was CHRISTOPHER v. MUNGEN, 55 So.2d 274 (Fla. 1911) (R106). However, an analysis of CHRISTOPHER and the facts of that case reveal that it is factually distinguishable and furthermore that the legal rule stated therein is not controlling as a matter of law.

In CHRISTOPHER, Jane Mungen brought an action to partition property in order to obtain real estate which she claimed under an inheritance from her father. While the plaintiff's lawsuit was pending, the statute under which the plaintiff claimed inheritance rights was declared unconstitutional in ADAMS v. SNEAD, 25 So. 893 (Fla. 1899). After that decision the legislature enacted another statute with virtually identical language and effect. The defendants contended that Mungen could not obtain the property by inheritance since the statute had been declared unconstitutional. This Court rejected this argument and overruled ADAMS to the extent that it declared the statute unconstitutional. This Court then held that Mungen could inherit the property despite the prior ruling in ADAMS stating (55 So.2d at 280):

Where a statute is judicially adjudged to be unconstitutional, it will remain inoperative while the decision is maintained; but if a decision is subsequently reversed, the statute will be held 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 unconstitutional.

Volkswagen and Volkswagen A.G. relied heavily on the language quoted above in their motions for summary judgment and argued that it controlled the disposition of this case. However, the underlying premise of the rule stated in CHRISTOPHER is no longer valid. Additionally, under the facts of CHRISTOPHER the court did not reach the issue presented in the case sub judice.

In CHRISTOPHER, there was no issue as to any party's detrimental reliance on the overruled opinion of the Florida Supreme Court's decision in ADAMS, which had held the statute in question unconstitutional. The plaintiff was relying upon the statute to recover and therefore she obviously did not rely on the ADAMS decision, which had held that statute unconstitutional, in bringing her case. The defendants claimed title through Mungen's sister, who was an heir by virtue of the identical statute later enacted. Clearly none of the parties had relied in any manner on the ADAMS decision and therefore there was no issue as to the unfairness of the retroactive application of the holding in CHRISTOPHER.

More importantly, the language in CHRISTOPHER which states that the overruling of a prior decision finding a statute invalid must be retroactive to the date of enactment of the statute, is based on a legal principle which is no longer accepted in Florida. At the time of the CHRISTOPHER decision, the legal principle controlling the application of constitutional decisions regarding statutes was, as stated in STATE ex rel NUVEEN v. GREER, 102 So. 739, 745 (Fla. 1924):

The courts have no power to make a statute inoperative only from the date of an adjudicated invalidity, because the courts merely adjudge that a statute conflicts with organic law, and the constitution then operates to make the statute void from its enactment, the courts having no power to control the operation of the constitution.

Thus, in CHRISTOPHER, the converse was recognized and applied. That is, when a court overrules a prior decision determining a statute invalid, it has no power but to re-enact the statute from the date of its enactment. However, this Court has since rejected the rigid rule stated in STATE ex rel NUVEEN, supra, and has adopted a more flexible analysis based on equitable considerations.

In INTERLACHEN LAKE ESTATES, INC. v. SNYDER, 304 So.2d 433 (Fla. 1973), this Court addressed, inter alia, a certified question regarding the constitutional validity of a statute relating to the valuation of real estate for ad valorem tax purposes. This Court held that the statute at issue, Fla. Stat. §195.062(1), was invalid because it violated the Florida constitutional provision mandating just valuation of all real property. The court concluded the opinion by stating (304 So.2d at 435):

This decision operates prospectively from the date the opinion becomes final because persons relying on the state statute did so assuming it to be valid despite the new provisions of the 1968 state constitution.
[Citations omitted.]

This Court's decision to apply its holding in INTERLACHEN LAKE ESTATES prospectively only was challenged in DELTONA CORP. v. BAILEY, 336 So.2d 1163 (Fla. 1976). In that case the

plaintiff sought ad valorem tax relief based on this Court's holding that its decision in INTERLACHEN LAKE ESTATES would apply prospectively only. The trial court denied relief relying on the language quoted above from STATE ex rel NUVEEN v. GREER, supra. p. 9. The trial judge concluded that this Court was without the power to give its decision prospective effect for to do so "would be an unauthorized attempt to breathe retroactive life into an organically dead law." (336 So.2d at 1166). This Court rejected the trial court's analysis and also rejected the NUVEEN doctrine, noting numerous cases in which this Court and the United States Supreme Court had applied the principle of prospective constitutional invalidity, citing CITY OF PHOENIX v. KOLODZIEJSKI, 399 U.S. 204 (1970); CIPRIANO v. CITY OF HOUMA, 395 U.S. 701 (1969); STATE v. BARQUET, 262 So.2d 431 (Fla. 1972); FRANKLIN v. STATE, 257 So.2d 21 (Fla. 1971). This Court clearly held that it had the authority to rule that its decision as to the invalidity of the tax statute would be prospective only. This Court also noted that it was not necessary for Deltona Corporation to have been involved in a past transaction relying on the statute or to have suffered an unreasonable hardship based on such reliance in order to obtain the benefit of the prospective application of the INTERLACHEN LAKE ESTATES decision. Rather, this Court held that it had the authority to make its decision prospective and the Deltona Corporation was entitled to the benefit of that ruling.

Therefore, it is clear that it is no longer mandatory that a ruling of this Court determining unconstitutionality or

constitutionality of a statute be applied retroactively to the enactment date of the statute since it is entirely within this Court's authority to render such a decision prospective if fairness mandates such a result. This determination must be governed by equitable considerations. As stated in INTERNATIONAL STUDIO APARTMENT ASSOC. v. LOCKWOOD, 421 So.2d 1119, 1122 (Fla. 4th DCA 1982) (quoting from LEMON v. KURTZMAN, 411 U.S. 192, 199 (1973)):

[S]tatutory or even judge made rules are hard facts on which people must rely in making decisions and in shaping their conduct. This fact of legal life underpins our modern decisions recognizing the doctrine of nonretroactivity.

Equitable considerations mandated a nonretroactive holding in GULESIAN v. DADE COUNTY SCHOOL BOARD, 281 So.2d 325 (Fla. 1973). In that case this Court upheld the trial court's determination that certain tax assessments made by the Dade County School Board were based on a statute that was unconstitutional. The taxes at issue had already been collected and expended by the county. The trial court refused to apply its holding retroactively which would have required the county to refund the money collected. The trial court determined that the School Board had relied in good faith on the statute at issue and that to require a refund of the money would impose an intolerable burden on the budget and administration of the school board. The plaintiffs appealed and this Court upheld the trial court's ruling stating (281 So.2d at 327):

We agree with the reasoning of the trial judge and his resort to equitable considerations in deciding this case.

Therefore, not only this Court, but the circuit courts as well, have the authority to apply equitable principles in determining whether a holding determining the constitutionality of a statute should be retroactive or prospective. Based on the numerous constitutional decisions which this Court has held to be nonretroactive, it is clear that the rule stated in CHRISTOPHER is no longer mandatory and does not control the disposition of this case.

CONSIDERATION OF THE RELEVANT FACTORS AND EQUITABLE CONSIDERATIONS COMPEL THE CONCLUSION THAT PULLUM SHOULD NOT BE APPLIED RETROACTIVELY.

As discussed above, this Court has applied equitable considerations in determining whether to apply a holding determining the constitutionality of a statute retroactively. While overlapping to some degree, two types of analysis have been applied to determine whether a decision should be applied retroactively; the vested rights test and an analysis of general equitable considerations. Under either of these analyses, it is clear that the PULLUM case should not be applied retroactively to bar the Plaintiff's claim in this case.

It is generally recognized that retroactive application of statutes and case law can often cause hardship and inequity (Sutherland, Statutory Construction §41.02 4th Ed. 1985):

It is a fundamental principle of jurisprudence that retroactive application of new laws involves a high risk of being unfair. There is general consensus among all people that notice or warning of the rules that are to be applied to determine their affairs should be given in advance of the actions

whose effects are to be judged by them. The hackneyed maxim that everyone is held to know the law, itself a principle of dubious wisdom, nevertheless presupposes that the law is at least susceptible of being known. But this is not possible as to law which is not yet been made.

In order to eliminate the unfairness that often results from retroactive rulings, the Federal and Florida Constitution prohibit retroactive application of law which affect vested rights. See, e.g. INDIANA ex rel ANDERSON v. BRAND, 303 U.S. 95 (1938). Those constitutional protections apply in this case to protect Plaintiff's claim from being extinguished retroactively.

The vested rights analysis was described and applied in FLORIDA FOREST AND PARK SERVICE v. STRICKLAND, 18 So.2d 251 (Fla. 1944) (en banc). In that case, the plaintiff had filed a claim for compensation under Florida Worker's Compensation law and his claim had been denied by the deputy commissioner. The plaintiff appealed that decision to the circuit court which entered a judgment reversing the deputy commissioner's order. The employer and its insurance carrier took an appeal from that judgment and argued, inter alia, that this Court's decision in TIGERTAIL QUARRIES, INC. v. WARD, 16 So.2d 812 (Fla. 1944), which held that the circuit court did not have jurisdiction to review an order of the deputy commissioner, mandated that the judgment be reversed and the case dismissed. The TIGERTAIL QUARRIES decision had been issued subsequent to the plaintiff's appeal to the Circuit Court in FLORIDA FOREST SERVICE. In TIGERTAIL QUARRIES this Court had overruled a prior decision in which it had held that jurisdiction to review a deputy commissioner's decision was in the circuit

court. Thus, retroactive application of the TIGERTAIL QUARRIES holding would have mandated reversal of the circuit court's judgment on the basis that it lacked subject matter jurisdiction. In rejecting the employer and carrier's argument that reversal was mandated, the Supreme Court stated (18 So.2d 253):

Ordinarily, a decision of a court of last resort overruling a former decision is retrospective as well as prospective in its operation, unless specifically declared by the opinion to have a prospective effect only. [Citations omitted.] Generally speaking, therefore, a judicial construction of a statute will ordinarily be deemed to relate back to the enactment of the statute, much as though the overruling decision had been originally embodied therein. To this rule, however, there is a certain well-recognized exception that 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 a retrospective operation. [Citations omitted.] Based upon a recognition of this common sense exception to the rule, some of the courts have gone so far as to adopt a view that the rights, positions, and courses of action of parties who have acted in conformity with, and reliance upon, the construction given by a court of final decision to a statute should not be impaired or abridged by reason of a change in judicial construction of the same statute made by a subsequent decision of the same court overruling its former decision. Accordingly, such courts have given to such overruling decisions a prospective operation only, in the same manner as though the new construction had been added to the statute by legislative amendment [Citations omitted.] (Emphasis supplied.)

This Court noted in FLORIDA FOREST SERVICE that the plaintiff had pursued his claim in accordance with the prevailing interpretation of the law in good faith and should not be denied

relief on the basis of TIGERTAIL QUARRIES. The court determined that, under the circumstances of that case, the TIGERTAIL QUARRIES case must be given prospective application only.

The same circumstances are involved in the case sub judice. The Plaintiff relied on the Florida Supreme Court's holding in BATTILLA which determined that Fla. Stat. §95.031(2) was unconstitutional. Carroll pursued her existing claims against the Defendants prior to the PULLUM decision and expended substantial costs and efforts in doing so. Her causes of action against the Defendants, which indisputably existed during the time BATTILLA was controlling, constituted vested property rights which cannot be eliminated retroactively.

In the circuit court, the Defendants attempted to distinguish the FLORIDA FOREST SERVICE case through two arguments. They argued that "it is clear that in FLORIDA FOREST SERVICE, the right to compensation for injury was considered to be an aspect of the contract of employment" (R94), and that there was no contractual rights involved in this case. However, this argument misinterprets the clear language of FLORIDA FOREST SERVICE. This Court did not determine that the claimant's right constituted a contractual right because it stated (18 So.2d at 254):

A right to compensation having accrued, at least potentially, by the happening of the injury, and the compensation claimant having proceeded by a judicially-approved statutory course of proceeding to enforce the claim, such valuable potential property or contract right to compensation should not be cut off by subsequent overruling court decision given a retrospective operation. (Emphasis supplied.)

From that language it is clear that this Court did not determine that the claimant's right arose by contract but concluded that it was unnecessary to reach that issue in order to resolve the question as to the retrospective application of TIGERTAIL QUARRIES. Therefore, that argument has no merit.

Alternatively, the Defendants argued that Carroll had not acquired any property right because (1) Fla. Stat. §95.031(2) was a statute of repose that cut off the right of action, and (2) to be a vested right, the Plaintiff must have "more than a mere expectation based upon an anticipated continuance of existing law". (R95). Neither of these arguments can survive scrutiny. The first argument that the statute operated to cut off the Plaintiff's right of action is logically flawed because it assumes the very question that is in issue. The issue in this case is whether PULLUM applies retroactively to deprive the Plaintiff of her cause of action. In resolving that question it cannot be assumed that the statute applies retroactively to deprive her of her rights. That is simply a circular argument.

Additionally, the Defendants' contention that Carroll did not have a vested right is contrary to Florida law. In FLORIDA FOREST, supra, the Florida Supreme Court stated that the exception exists where (11 So.2d at 253):

[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 a retrospective operation. [Emphasis supplied.]

Thus, it is obvious that the determination of the existence of a property right must be determined according to the law which existed under the overruled decision. In this case that decision is BATTILLA. Under the holding of BATTILLA, it is obvious that Carroll did have a property right since that case declared unconstitutional the statute of repose and thereby eliminated the only impediment to the accrual of the Plaintiff's cause of action.

The fact that Plaintiff's cause of action has not yet been reduced to judgment does not prevent it from being a vested right for purposes of the FLORIDA FOREST analysis. In FLORIDA FOREST the Florida Supreme Court noted that Plaintiff's "right to compensation having accrued, at least potentially. . ." (18 So.2d at 254), it was improper to cut it off through retroactive application of TIGERTAIL QUARRIES. Furthermore, Florida case law holds that the accrual of the cause of action vests the right in the plaintiff and at that point the right is deemed worthy of protection from the retroactive application of law.

In L. ROSS, INC. v. R. W. ROBERTS CONSTRUCTION COMPANY, INC., 466 So.2d 1096 (Fla. 5th DCA 1985) aff'd 482 So.2d 484 (Fla. 1986), the plaintiff subcontractor had filed an action against a surety based on a payment bond. At the time the action accrued and at the time the case was filed, a statute permitted an award of attorney's fees to a subcontractor in an action against a surety, but limited such fees to 12.5% of the judgment recovered. During the pendency of the action, that 12.5% limitation was repealed. At the conclusion of the case the

subcontractor sought attorney's fees from the surety. The subcontractor contended that it was not limited to an award that was 12.5% of the recovery since that limitation had been repealed. The trial court limited the plaintiff's recovery to 12.5% of the judgment and the plaintiff appealed.

The Fifth District, in an opinion authored by Judge Cowart, upheld the trial court noting that the attorney's fee statute created a substantive right on the part of potential plaintiffs and a correlative substantive burden on the potential defendants. The court stated that (466 So.2d at 1098) "it is a facet of constitutional due process that, after they vest, substantive rights cannot be adversely affected by the enactment of legislation." In determining when the relative rights of the parties vested, the court stated very clearly that the date on which the cause of action accrued must control (466 So.2d at 1099):

The crucial date is the date of the accrual of the particular cause of action on the particular payment bond because that is the date on which the essential facts occurred and were sealed beyond change by the surety and after that event the legislature cannot, ex post facto, constitutionally enhance the obligation or penalty that results from those facts.

The subcontractor appealed that decision to this Court which affirmed and adopted Judge Cowart's decision. While L. ROSS addressed the substantive nature of a right to attorney's fees under a statute, the identical analysis was applied regarding the accrual of a cause of action for personal injuries in *SIMMONS v. CITY OF CORAL GABLES*, 186 So.2d 493 (Fla. 1966). In that case,

this Court stated that (186 So.2d at 495) "the accident occurred on October 31, 1962 and therefore the statutory and decisional law pertinent on that date must prevail." (Emphasis supplied.)

In the case sub judice, it is undisputed that the accident in this case occurred on January 22, 1985 (R107). At that time, BATTILLA was the controlling precedent in Florida since PULLUM was not decided until August 29, 1985 and did not become final until rehearing was denied on November 4, 1985 (R106). Therefore, under the vested rights analysis in L. ROSS, Carroll's rights vested on January 22, 1985 when BATTILLA was the controlling law and her rights against the Defendants must be determined in accordance with that decision. To apply PULLUM retroactively in this situation deprives the Plaintiff of a vested right in violation of the rule stated in FLORIDA FOREST and therefore would be erroneous as a matter of law.

In the court below, the Defendants attempted to distinguish L. ROSS by arguing that it only applies to a legislative amendment of a statute and not to a change in case law. That distinction is of no legal significance because as stated in FLORIDA FOREST AND PARK SERVICE v. STRICKLAND, 18 So.2d 251, 253 (Fla. 1944), regarding judicial decisions which overruled prior precedent:

[C]ourts have given to such overruling decisions a prosecutive operation only, in the same manner as though the new construction had been added to the statute by legislative amendment. [Emphasis supplied.]

Furthermore, that distinction does not affect the analysis adopted by Florida Supreme Court in L. ROSS, supra, as to the

vesting of a right as of the time of accrual of the cause of action. The court in L. ROSS held that the legislature could not retroactively alter the substantive rights which had accrued prior to the effective date of the subsequent legislative amendment because those rights had vested as of the date of the accrual of the cause of action. Clearly, under the L. ROSS analysis, the Plaintiff had a vested right to her legal claim at the time she was injured. The plaintiff in PULLUM, however, did not have any such vested right because under the substantive law in effect at the time of his accident, the failure to file suit within one-and-a-half years barred his claim. Therefore, this Court's denial of rehearing in PULLUM does not mandate retroactive application in the case sub judice because here the Plaintiff had a vested right as defined in L. ROSS, supra.

Another analysis utilized for determining whether the overruling of a prior decision should be applied retroactively was discussed in CHEVRON OIL COMPANY v. HUSON, 404 U.S. 97 (1971). In CHEVRON OIL, the plaintiff was injured in December of 1965 and filed suit in January of 1968. At the time of the injury and the filing of the suit, the controlling law provided that general admiralty principles, including the equitable doctrine of laches, applied to personal injury suits such as that of the plaintiff. However, during the pendency of that case, the United States Supreme Court ruled in RODRIGUE v. AETNA CASUALTY & SURETY COMPANY, 395 U.S. 352 (1969) that the state law of the forum rather than general admiralty principles should apply to actions such as that of the plaintiffs. Relying on RODRIGUE, the

district court granted the defendant's motion for summary judgment concluding that Louisiana's one-year limitation on personal injury actions governed the case and mandated judgment for the defendant. The Fifth Circuit Court of Appeals reversed and the United States Supreme Court affirmed that decision.

In its decision, the United States Supreme Court promulgated a three-part test for determining whether a decision overruling a prior decision should be applied retroactively. The three factors to be considered in such a determination are: (1) whether the decision at issue established a new principle of law either by overruling clear past precedent or by deciding an issue of first impression; (2) the court must look at the merits and demerits of the rule in question and its prior history and determine whether retrospective operation would further or retard its operation; and (3) the court must weigh the inequity imposed by retroactive application. In applying that test in CHEVRON OIL, the Supreme Court determined that the RODRIGUE case, supra, did overrule a long line of decisions holding that admiralty law applied; and that retroactive application of the Louisiana statute of limitation would deprive the respondent of any remedy on the basis of a superseding legal doctrine that was unforeseeable. The court also determined that retroactive application would cause substantial and inequitable results since it would deprive the plaintiff of his cause of action and abruptly terminate the lawsuit that had proceeded through costly discovery stages. Therefore, based on that analysis, the court held that RODRIGUE would not be applied retroactively to mandate dismissal of the plaintiff's case.

The CHEVRON OIL test was utilized in INTERNATIONAL STUDIO APARTMENT ASSOCIATION, INC. v. LOCKWOOD, 421 So.2d 1119 (Fla. 4th DCA 1982). In that case, the plaintiffs filed a complaint seeking to recover from the clerk of the circuit court interest on money that had been deposited during litigation and which the plaintiffs became entitled to upon prevailing in that lawsuit. At the time the money was deposited, a Florida Statute permitted the clerk to invest the funds and retain the income thereon. However, upon repaying the plaintiffs their deposit, the plaintiffs received no interest or other income on that deposit. The plaintiffs filed suit to obtain that interest income relying on the decision of the United States Supreme Court in WEBB'S FABULOUS PHARMACIES, INC. v. BECKWITH, 449 U.S. 155 (1980) which held unconstitutional the portion of the statute which permitted the clerk to retain the income earned on deposited funds. After BECKWITH was remanded by the United States Supreme Court, this Court ruled that the portion of the statute permitting the clerk of the court to invest the funds was unconstitutional, BECKWITH v. WEBB'S FABULOUS PHARMACIES, INC., 394 So.2d 1009 (Fla. 1981).

In LOCKWOOD, the court found that the first two requirements of the CHEVRON OIL test had been satisfied; that there had been a clear overruling of prior precedent and that retrospective operation would neither further nor retard the rule at issue, which was described by the court as the constitutional protection against deprivation of property without due process. However, the court found that the third aspect of the CHEVRON OIL rule was not satisfied, since retroactive application of the holding of

the Florida Supreme Court and the United States Supreme Court decision would not cause an inequity. The court noted that the funds which had been retained by the clerk had been turned over to the Board of County Commissioners and expended. Additionally, the court noted that the plaintiffs would suffer no hardship since, with the statute being abolished as to the investment of the funds, they were in the identical position they would have been in had the statute never been in existence. Thus, the Plaintiffs suffered no hardship by the application of the BECKWITH decisions and, therefore, the third aspect of the CHEVRON OIL test was not present. Based on that reasoning, the Fourth District affirmed the trial court's determination that the prior decisions of the United States Supreme Court and Florida Supreme Court should be applied prospectively only.

In the case sub judice, it is clear that the first element of the CHEVRON OIL test is satisfied in that PULLUM overruled clear past precedent, i.e., the BATTILLA case, supra. There is no real issue as to that element of the test.

The second element of the CHEVRON OIL test is whether retroactive application of the operative rule would further or retard its operation. The operative rule applied in PULLUM was that the legislature can make determinations regarding the time of exposure to liability without necessarily denying access to the courts as provided in Article I, Section 21 of the Florida Constitution. Retrospective operation of that principle neither furthers nor retards that constitutional determination. Therefore, as in LOCKWOOD, supra, the second factor in the CHEVRON OIL test is satisfied.

The third consideration is whether retroactive operation of the court's decision would cause an inequitable result. In this case, that element is clearly satisfied. The Plaintiff in this case was acting in reliance on the Florida Supreme Court's decision in BATTILLA in filing this lawsuit and in expending money and incurring obligations necessary to pursue her lawsuit. To wipe out that claim retrospectively is simply unfair where the Plaintiff had a vested right and was pursuing her claim in good faith in accordance with the law as stated by the highest court in Florida. Such reliance was clearly reasonable. As noted in LOCKWOOD, courts' decisions are hard facts on which people rely in making their own decisions and that is the premise on which the doctrine of non-retroactivity is based. Those considerations mandate that PULLUM be applied prospectively only. Therefore, upon consideration of the three elements of the CHEVRON OIL test, it is clear that the Plaintiff's situation mandates that this Court's decision in PULLUM be applied prospectively only.

Therefore, the first certified question should be answered in the negative.

POINT II

THE FLORIDA LEGISLATURE'S REPEAL OF THE STATUTE OF REPOSE CONTAINED IN FLA. STAT. §95.031(2) APPLIES TO THIS CASE AND, THEREFORE, THE ACTION IS NOT BARRED AND THE SECOND CERTIFIED QUESTION SHOULD BE ANSWERED IN THE AFFIRMATIVE.

This Court denied rehearing in PULLUM in November of 1985. Thereafter, in the 1986 legislative session, the Florida legislature repealed the statute of repose contained in Fla.

Stat. §95.013(2) and provided with respect to that repeal that "this act shall take effect July 1, 1986," Ch. 86-272, §2-3 (1986).

In Chapter 86-272, the Florida legislature amended two statutes. In section 1 of Chapter 86-272 the legislature amended Fla. Stat. §95.11. In section 2 of that Chapter, it amended Fla. Stat. §95.031(2) to repeal the statute of repose contained therein. In Section 3 of Chapter 86-272, the legislature stated with respect to the effective date of those amendments:

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.

It should be noted that with respect to section 2 the effective date of the repeal was not phrased in terms of "causes of action accruing after July 1, 1986", but simply that the repeal "shall take effect July 1, 1986."

The general rule as to the effect of repealing acts is stated in Sutherland, Statutory Construction, §23.33 (4th Ed. 1985):

The effect of the repeal of the statute having neither a saving clause nor a general saving statute to prescribe the governing rule for the effect of the repeal, is to destroy the effectiveness of the repealed act in futuro and to divest the right to proceed under the statute. Except as to proceedings past and closed, the statute is considered as if it had never existed...Under common law principles, all rights, liabilities, penalties, forfeitures and offenses which are purely statutory derivation and unknown to the common law are eliminated by the repeal of the statute which granted them, irrespective of the time of their accrual. Citing, inter alia, STATE EX REL ARNOLD v. RIVELS, 109 So.2d 1 (Fla. 1959); BUREAU OF

CRIMES COMPENSATION v. WILLIAMS, 405 So.2d 747 (Fla. 2d DCA 1981) Since the effect of a repeal is to terminate the effect of the statute and to destroy its effective operation in futuro, or to suspend the operation of the common law when it is a common law principle which is abrogated, any proceedings which have not culminated final judgment prior to the repeal are abated at the consummation of the repeal. [Footnotes deleted; Emphasis supplied].

This Court stated in YAFFEE v. INTERNATIONAL COMPANY, INC., 80 So.2d 910, 911-912 (Fla. 1955):

[T]he general rule, to the effect that repealing statutes should be given a retrospective operation, is based upon, and conferred to, the situation where a right or remedy has been created wholly by statute; it being held, in such event, that when the statute is repealed the right or remedy created by the statute falls with it. [Citations omitted.]

The statute of repose previously contained in Fla. Stat. §95.031(2) was, of course, created wholly by statute.

In Chapter 86-272, the Florida legislature repealed the statute of repose provisions contained in Fla. Stat. §95.031(2) and provided that the repeal shall take effect July 1, 1986 without limiting that effective date to causes of action accruing after July 1, 1986. The legislature did limit the effect of Section 1 of Chapter 86-272 to causes of action accruing after October 1, 1986. Thus, by implication it is clear that the legislature did not intend to confine the effect of the repeal of the statute of repose to causes of action accruing after July 1, 1986. Therefore, applying the settled rules of statutory construction noted above, the repeal must be given effect except as to proceedings that were "past and closed" i.e., cases in

which judgments have been rendered and not appealed, as of July 1, 1986. Clearly this case was not "past and closed" as of July 1, 1986.

In conclusion, the repeal of the statute of repose should be given effect in the Plaintiff's case based on the legislative intent, as reflected in Section 3 of Chapter 86-272, and this Court's holding in *YAFFEE v. INTERNATIONAL COMPANY, INC.*, supra, regarding the effect of repealing statutes on rights created wholly by statute. Therefore, the second certified question should be answered in the affirmative.

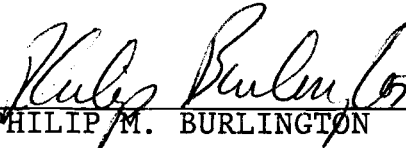
CONCLUSION

For the above stated reasons, it is respectfully submitted that the first certified question should be answered in the negative, the second certified question should be answered in the affirmative, and the summary judgment in favor of the Defendant's should be reversed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been mailed to: WENDY LUMISH, One Biscayne Tower, Suite 3410, 2 S. Biscayne Boulevard, Miami, FL 33131; and JAMES A. BONFIGLIO, 359 South County Road, #3, Palm Beach, FL 33480, CATHY JACKSON LERMAN, P. O. Box 24410, Ft. Lauderdale, FL 33307-4410 and EDWARD T. O'DONNELL, 400 S.E. Financial Center, 200 So. Biscayne Blvd., Miami, FL 33131, this 3rd day of AUGUST, 1986.

LAW OFFICES OF PHILLIP HOUSTON
1645 Palm Beach Lakes Blvd.
Suite 420
West Palm Beach, FL 33401
and
EDNA L. CARUSO, P.A.
Suite 4B-Barristers Bldg.
1615 Forum Place
West Palm Beach, FL 33401
305-686-8010
Attorneys for Petitioner

BY: 
PHILIP M. BURLINGTON

BY: 
EDNA L. CARUSO