IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 70,814

SEP 1987
CLERK, SUPREME COURT
By
Deputy Clerk

THERESA CARROLL,

Petitioner,

v.

VOLKSWAGENWERK AKTIENGESELLSCHAFT,
a German corporation; and
VOLKSWAGEN OF AMERICA, INC.,

Respondents.

BRIEF OF RESPONDENTS

VOLKSWAGENWERK AKTIENGESELLSCHAFT,
VOLKSWAGEN OF AMERICA, INC.

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

RUMBERGER, WECHSLER & KIRK
One Biscayne Tower, Suite 3410
2 South Biscayne Boulevard
Miami, Florida 33131
Attorneys for Respondents
By: PETER L. WECHSLER
MYRON SHAPIRO
WENDY F. LUMISH

HERZFELD and RUBIN P.C.
40 Wall Street
New York, New York 10005
By: MICHAEL HOENIG
Of Counsel

TABLE OF CONTENTS

TABLE OF CITATIONS iii

PRELIMINARY STATEMENT viii

STATEMENT OF THE ISSUES 1

STATEMENT OF THE CASE AND FACTS 2

SUMMARY OF ARGUMENT 7

ARGUMENT

I. SECTION 95.031(2), FLORIDA STATUTES, IS AN ABSOLUTE BAR TO THE APPELLANT'S CLAIM AS NO PRODUCTS LIABILITY CAUSE OF ACTION EXISTED WHEN THE PLAINTIFF'S ALLEGED INJURY OCCURRED 10

A. Battilla Did Not Effectuate a Complete Abolition of the Statute of Repose 11

B. A Decision Overruling a Prior Decision of Unconstitutionality Renders the Statute Valid from the Date of its Original Enactment 12

C. Plaintiff Does Not Have a Vested Property Right by Virtue of Battilla 20

D. Chevron Oil v. Huson has no Application Since it Involves the Retroactive Effect of a Federal Judicial Pronouncement 26

II. THE LEGISLATIVE AMENDMENT TO SECTION 95.031(2), FLORIDA STATUTES (1986 SUPP.) CAN NOT BE APPLIED TO A CAUSE OF ACTION WHICH ACCRUED PRIOR TO THE EFFECTIVE DATE OF THE AMENDMENT 28

A. Section 95.031(2), Florida Statutes (1986 Supp.) falls Within the General Rule that Statutes are Presumed to be "Prospective Only" 28

B. Chapter 86-272 is not a Repeal so as to Permit Retroactive Operation 31

C. Prospective Only Application is Consistent With the Numerous Cases on Statutes of Limitations and Repose. 32

CONCLUSION 35

CERTIFICATE OF SERVICE 36

TABLE OF CITATIONS

CASES

Adair v. Koppers Co., Inc.,
541 F. Supp. 1120 (N.D. Ohio 1982). 23

American Liberty Insurance Co. v. West,
491 So.2d 573 (Fla. 2d DCA 1986) 6

Anderson v. Fred Wagner and Roy Anderson, Jr., Inc.,
402 So.2d 320 (Miss. 1981). 23

Barnes v. Kyle,
202 Tenn. 529, 306 S.W.3d 1 (1957). 23

Battilla v. Allis Chalmers Mfg. Co.,
392 So.2d 874 (Fla. 1980). 3, 7, 8
10, 11, 17
18, 19, 20
24, 27

Bauld v. J.A. Jones Construction Co.,
357 So.2d 401 (Fla. 1978). 20

Braziel v. Stokes Automatic Molding Equip.,
12 F.L.W. 1841 (Fla. 4th DCA July 29, 1987). 6

Burmaster v. Gravity Drainage
District No. 2 of St. Charles Parish,
366 So.2d 1381 (La. 1978). 23

Cassidy v. Firestone Tire & Rubber Co.,
495 So.2d 801 (Fla. 1st DCA 1986),
rev. denied, No. 69,668 (Fla. March 27, 1987). 6

CBS Inc. v. Garrod,
622 F. Supp. 532 (M.D. Fla. 1985). 34

Cheswold Volunteer Fire Co. v.
Lambertson Construction Co.,
489 A.2d 413 (Del. 1984). 21

Chevron Oil Co. v. Huson,
404 U.S. 97, 92 S. Ct. 349,
30 L.Ed. 2d 296 (1971). 5, 10, 26, 27

Christopher v. Mungen,
61 Fla. 513, 55 So. 273 (1911). 12, 13

Colony Hill Condo I Ass'n. v. Colony Co.,
320 S.E.2d 273 (N.C. App. 1984). 22

Colton v. Dewey,
212 Neb. 126, 321 N.W.2d 913 (1982). 21

Eddings v. Volkswagenwerk,
635 F. Supp. 45 (N.D. Fla. 1986). 6, 17, 22

Florida Forest & Park Service v. Strickland,
154 Fla. 472, 18 So.2d 251 (1944). 14, 16

Foley v. Morris,
339 So.2d 215 (Fla. 1976). 28, 29, 32

Garafalo v. Community Hospital of South Broward,
382 So.2d 722 (Fla. 4th DCA 1980). 33

Halliday v. United States,
394 U.S. 831, 89 S. Ct. 1498,
23 L.Ed. 2d 16 (1969) .27

Hampton v. A. Duda & Sons, Inc.,
12 F.L.W. 2124 (Fla. 5th DCA, September 3, 1987). 18

Hartman v. Westinghouse Electric Corporation,
No. 83-517-CIV-ORL (M.D. Fla., Dec. 10, 1985)
aff'd., Case No. 85-3967
(11th Cir., June 20, 1986). 17, 18, 19

Hicks v. Miranda,
422 U.S. 332, 95 S. Ct. 2281
45 L.Ed. 2d 223 (1975) 5, 16

Homemakers Inc. v. Gonzales,
400 So.2d 965 (Fla. 1981). 33

In re Will of Martell,
457 So.2d 1064 (Fla. 2d DCA 1984). 24

International Studio Apartment Assoc.
v. Lockwood,
421 So.2d 1119 (Fla. 4th DCA 1982). 19, 27

Klein v. Catalano,
386 Mass. 701, 437 N.E.2d 514 (1982). 23

Kluger v. White,
281 So.2d 1 (Fla. 1973). 5

L. Ross, Inc. v. Roberts Construction Co.,
466 So.2d 1096 (Fla. 5th DCA 1985) 25

Lamb v. Volkswagenwerk, A.G.,
631 F. Supp. 1144 (S.D. Fla. 1986). 6, 13, 24

Lamb v. Wedgewood South Corp.,
302 S.E.2d 868 (1983). 23, 24

Linkletter v. Walker,
381 U.S. 618, 85 S. Ct. 1731,
14 L.Ed. 2d 601 (1965) 27

MacRae v. Cessna Aircraft Co.,
457 So.2d 1093 (Fla. 1st DCA 1984). 11, 14

Martz v. Riskamm,
144 So.2d 83 (Fla. 1st DCA 1962) 34

Mazda Motors of America v. S.C. Henderson & Sons, Inc.,
364 So.2d 107 (Fla. 1st DCA 1978). 33

McMacken v. State,
320 N.W.2d 131, aff'd on reh'g,
325 N.W.2d 60 (S.D. 1982). 23

Neff v. General Development Corp.,
354 So.2d 1275 (Fla. 2d DCA 1978). 34

Overland Construction Co. v. Sirmons,
369 So.2d 572 (Fla. 1979). 3

Pait v. Ford Motor Co.,
500 So.2d 743 (Fla. 5th DCA 1987). 6

Parkway General Hospital, Inc. v. Stern,
400 So.2d 166 (Fla. 3d DCA 1981). 15, 18

Pullum v. Cincinnati, Inc.,
476 So.2d 657 (Fla. 1985), reh'g denied,
appeal dismissed, 106 S. Ct. 1626 (1986) 4, 5, 6
7, 10, 11,
14, 15, 16,
23, 24, 25,
27

Purk v. Federal Press Co.,
387 So.2d 354 (Fla. 1980). 3, 11, 14

Rosenberg v. Town of North Bergen,
61 N.J. 190, 293 A.2d 662 (1972). 21

Shaw v. General Motors,
503 So.2d 362 (Fla. 3d DCA 1987). 6

Singer v. Sheppard,
464 Pa. 387, 346 A.2d 897 (1975). 24

Slatcoff v. Dezen,
76 So.2d 792 (Fla. 1954). 23

Small v. Niagara Machine & Tool Works,
502 So.2d 943 (Fla. 2d DCA 1987). 6, 30

State v. Lavazzoli,
434 So.2d 321 (Fla. 1983) 28

State v. Lee, 22 So.2d 804 (Fla. 1945) 14

State v. White, 194 So.2d 601 (Fla. 1967) 14

Stuyvesant Ins. Co. v. Square D. Co.,
399 So.2d 1102 (Fla. 3d DCA 1981) 32

Tehan v. United States,
382 U.S. 406, 86 S. Ct. 459
15 L.Ed. 2d 453 (1966) 27

Tetterton v. Long Manufacturers Co., Inc.,
332 S.E.2d 67 (1985). 23

Thornton v. Mono Manufacturing Co.,
99 Ill. App. 3d 722,
425 N.E.2d 522 (1981). 20

Village of North Palm Beach v. Mason,
167 So.2d 721 (Fla. 1964). 12

Wainwright v. Stone,
414 U.S. 26, 94 S.Ct. 190
38 L.Ed.2d 179 (1973). 23

Walter Denson & Son v. Nelson,
88 So.2d 120 (Fla. 1956) 33

Warner v. Flemings,
413 U.S. 665, 93 S. Ct. 2926,
37 L.Ed. 2d 873 (1973). 27

Wayne v. Tennessee Valley Authority,
730 F.2d 392 (5th Cir. 1984). 22

Willer v. Pierce,
505 So.2d 441 (Fla. 4th DCA 1987) 6

Yarbro v. Hilton Hotels Corp.,
655 P.2d 822 (Colo. 1982). 23

Young v. Altenhaus,
472 So.2d 1152 (Fla. 1985) 28

OTHER AUTHORITIES

Florida Constitution, article I, section 21. . . . . . . 3, 11, 24

Section 95.031(2), Florida Statutes 1, 2, 3, 4, 5, 6, 8, 12, 13, 18, 21, 23, 24, 25, 34

Section 95.11(3)(c), Florida Statutes. 3

Model Unif. Prod. Liab. Act, § 110 analysis, reprinted in 44 Fed. Reg., 62,714 at 62,733 (1979). 21

PRELIMINARY STATEMENT

This brief is filed on behalf of Respondents, VOLKSWAGEN OF AMERICA, INC. and VOLKSWAGENWERK, A.G., who were the Defendants/ Appellees below. The nature of the order appealed is a Summary Final Judgment in Defendants' favor.

The parties to this appeal will be referred to as they appeared in the trial court. The following symbols will be used in referring to the record:

"R." Record on Appeal with appropriate page reference

"A." Appendix attached to Respondent's Brief

STATEMENT OF THE ISSUES

Respondents disagree with the Points on Appeal as framed by Petitioner and instead would cast the issues before this Court on this appeal as follows:

1. Whether the trial court correctly entered summary judgment in favor of Defendants, holding that Plaintiff had no cause of action pursuant to the Florida statute of repose, section 95.031(2), Florida Statutes.

2. Whether the amendment to the statute of repose which became effective July 1, 1986, is applicable to a 1985 accident.

STATEMENT OF THE CASE AND FACTS

The trial and appellate courts found and Plaintiff has conceded that there is no genuine issue of material fact regarding the foundation for Defendants' summary judgment. The vehicle which is the subject of this lawsuit was delivered to its original purchaser on **July 12, 1968** (R. 37). The cause of action was commenced on **June 28, 1985** (R. 37). Thus, more than twelve (12) years passed between the date of delivery of the completed product to its original purchaser and the filing of the instant lawsuit. The accident giving rise to this litigation occurred on January 22, 1985, also more than twelve (12) years after the delivery of the subject vehicle to its original purchaser (R. 2).

The following history of the statute of repose is also important to the issues before the Court:

Florida's statute of repose, section 95.031(2), Florida Statutes, was initially enacted into law in 1975. This statute provides as follows:

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

Historically, this Court had held that the statute of repose applicable to liability for improvements to real property, section 95.11(3)(c), Florida Statutes (1983), was unconstitutional if applied to cases wherein an injury occurred more than twelve (12) years after the date of actual possession by the owner. Overland Constr. Co. v. Sirmons, 369 So.2d 572 (Fla. 1979). The rationale behind this holding was that the statute denied access to courts in violation of article I, section 21 of the Florida Constitution[1] when applied to a plaintiff who was injured beyond the twelve-year period. Because this Court found that the legislature had not shown an overpowering public necessity for this prohibiting provision, it determined the statute to be unconstitutional as applied.

The Court extended this analysis to the products liability statute of repose, section 95.031(2), in Battilla v. Allis Chalmers Mfg. Co., 392 So.2d 874 (Fla. 1980). In a brief per curiam opinion, the court concluded, "as applied to this case, section 95.031 denies access to courts under article I, section 21, Florida Constitution." Id. at 874.

In contrast to these decisions, in Purk v. Federal Press Co., 387 So.2d 354 (Fla. 1980), the Court upheld the constitutionality of the products liability statute of repose against a denial of access to courts analysis where the plaintiff was injured between

---

[1] Article I, section 21 provides:

> The Courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.

the eighth and twelfth year after delivery of the product. The court reasoned that the statute was not a denial of access because it did not act as an absolute bar to suit, but rather operated to shorten the time in which an action must be brought. In addition, the court rejected the plaintiff's argument that its ruling denied equal protection by distinguishing the plaintiffs whose injuries occurred prior to the twelfth year from those whose injuries occurred subsequently.

Against this backdrop, this Court decided Pullum v. Cincinnati, Inc., 476 So.2d 657 (Fla. 1985), reh'g denied, appeal dismissed, 106 S. Ct. 1626 (1986) (dismissed for want of a substantial federal question). In Pullum, the Court gave effect to the clear expression of legislative intent in section 95.031(2) and therefore receded from Battilla which had completely thwarted the purpose of that provision. In doing so, the Court expressly determined that section 95.031(2) did not constitute a denial of access to courts. Rather, the Court recognized that the legislature, in enacting the statute of repose, had reasonably decided that perpetual liability places an undue burden on the manufacturer and had decided that twelve (12) years from the date of sale was a reasonable time for exposure to liability for manufacturing of a product. Id. at 659.

The court further held that section 95.031(2), as so interpreted, was not violative of the constitutional guarantee of equal protection of the laws, inasmuch as the classification originally established by the statute, to wit: the twelve-year period, bears a rational relationship to a proper state objective. Id. at 660.

The appellant in Pullum moved for rehearing and requested the Court to apply its decision prospectively only, relying in part on Chevron Oil Co. v. Huson, 404 U.S. 97, 92 S. Ct. 349, 30 L. Ed. 2d 296 (1971), and Kluger v. White, 281 So.2d 1 (Fla. 1973). The Court denied Pullum's motion for rehearing. 482 So.2d 1352. The plaintiff in Pullum further appealed to the United States Supreme Court. The Court dismissed the appeal for want of a substantial federal question. 106 S. Ct. at 1626. This dismissal constitutes an adjudication of the issues on their merits. See, e.g., Hicks v. Miranda, 422 U.S. 332, 95 S. Ct. 2281, 45 L. Ed. 2d 223 (1975).

In its order in this case, the trial court held that the decision of the Supreme Court of Florida in Pullum applied to the instant case. Since the action below was filed after the lapse of the twelve-year period prescribed in section 95.031(2), summary final judgment was entered in favor of Defendants (R. 106-8).

While the case was on appeal to the Fourth District, the Legislature amended section 95.031(2) and in doing so, it deleted the twelve-year statute of repose as it relates to products liability. Subsequently, the Fourth District ruled that section 95.031(2), as interpreted in Pullum, was applicable to bar the instant cause of action. Additionally, the Court concluded that the amendment to the statute would not be applied retroactively. Finally, the Fourth District certified its decision on these two points as being of great public importance.

The Fourth District has also certified the same questions in the cases of Willer v. Pierce, 505 So.2d 441 (Fla. 4th DCA 1987) and Braziel v. Stokes Automatic Molding Equip., 12 F.L.W. 1841 (Fla. 4th DCA July 29, 1987).

The Fourth District's rulings are consistent with each of the other district courts. See, e.g., Shaw v. General Motors Corp., 503 So.2d 362 (Fla. 3d DCA 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), rev. denied, No. 69,668 (Fla. March 27, 1987); Small v. Niagara Machine & Tool Works, 502 So.2d 943 (Fla. 2d DCA 1987); see also American Liberty Ins. Co. v. West & Conyers, 491 So.2d 573 (Fla. 2d DCA 1986) (applying Pullum).

Finally, the federal courts have applied the statute of repose as interpreted by Pullum. Lamb v. Volkswagenwerk, A.G., 631 F. Supp. 1144 (S.D. Fla. 1986); Eddings v. Volkswagenwerk, A.G., 635 F. Supp. 45 (N.D. Fla. 1986).

This Court's jurisdiction was invoked by the filing of an appropriate notice. VOLKSWAGEN respectfully submits that the appellate court's decision in this case and others should be affirmed.

SUMMARY OF ARGUMENT

Florida's statute of repose, section 95.031(2), Florida Statutes, sets a fixed limit after the time of a product's manufacture, sale or delivery, beyond which the manufacturer or seller is not liable for a products liability cause of action. The statute which was enacted in 1975 was held constitutional by the Florida Supreme Court in Pullum v. Cincinnati, Inc., 476 So.2d 657 (Fla. 1985), reh'g denied, appeal dismissed, 106 S. Ct. 1626 (1986) (for want of a federal question), wherein the court receded from its prior decision in Battilla v. Allis Chalmers Mfg. Co., 392 So.2d 874 (Fla. 1980), holding the statute of repose unconstitutional as applied to the facts in that case. The issues in this case are: (1) whether the statute should be applied to a pending case particularly in light of the Supreme Court decision in Pullum; and (2) whether the July, 1986 amendment to the statute of repose should be applied to an accident which occurred prior to that date.

There are separate and distinct rules of law and construction applicable to these two issues. The first involves the applicability of a statute which was once declared unconstitutional, but later declared constitutional. The second concerns the application of a legislative amendment to a statute. While Plaintiff has attempted to confuse these issues, the law as to each proposition is clear.

On the first issue, the well established law in Florida is that where a statute is judicially adjudged to be unconstitutional,

it will remain inoperative while the decision is maintained; but if the decision is subsequently reversed or overruled, the statute will be held to be valid from the first date it became effective. The only exception to the "relation-back"[2] rule is that this principle should not operate to overturn vested rights previously acquired in justified reliance upon the overruled decision. Plaintiff here did not acquire her right to sue in reliance upon the decision in Battilla. The right to sue occurred by accident, not by a conscious decision to forebear from filing suit because of Battilla. Plaintiff, at best, merely had the hope or expectation that the decisional law might continue. Consequently, when the Florida Supreme Court receded from the decision holding the statute of repose unconstitutional, the statute of repose was deemed to be effective from its enactment in 1975.

Florida's statute of repose specifically requires that in order for a products liability cause of action to lie, the lawsuit must be filed within twelve (12) years from the date of delivery of the manufactured product to its original purchaser. The undisputed material facts in the instant case show unequivocally that Plaintiff's cause of action was time-barred in 1985 when the Complaint was filed since more than twelve (12) years had passed

---

[2] The "relation-back" terminology is a misnomer in this case because Battilla did not declare the statute of repose unconstitutional entirely or on any number of grounds, but only under Florida's access to courts provision and only "as applied to this case." Therefore, the constitutionality of the statute in other regards was never suspended. Thus, "relation-back" does not apply to these grounds. However, for purposes of convenience, Defendants address the "relation-back" theory since even under that doctrine, Plaintiff's position is unavailing.

from the 1968 sale of the vehicle. Therefore, the trial court correctly granted Defendants' motion for summary judgment based on the facts of the case and established Florida law holding that a judicial determination overruling a prior decision of unconstitutionality renders the statute valid ab initio.

Plaintiff's reliance on the July 1986 amendment to the statute of repose is misplaced. By its express terms, the amendment to the statute of repose is effective July 1, 1986. This language is a clear indication that the Legislature intended prospective application only. Accordingly, the legislative amendment cannot be utilized to permit a lawsuit based on an accident which occurred prior to the effective date of the statutory amendment.

ARGUMENT

I. SECTION 95.031(2), FLORIDA STATUTES, IS AN ABSOLUTE BAR TO PLAINTIFF'S CLAIM AS NO PRODUCTS LIABILITY CAUSE OF ACTION EXISTED WHEN THE PLAINTIFF'S ALLEGED INJURY OCCURRED.

Plaintiff's argument at the trial court and on appeal is that Pullum v. Cincinnati, Inc., 476 So.2d 657 (Fla. 1985), reh'g denied, appeal dismissed, 106 S. Ct. 1626 (1986), cannot be applied retroactively to bar Plaintiff's cause of action.[3] "Retroactivity" is a misnomer because the issue that was before the circuit court and the issue that is before this Court, is what effect a decision overruling a prior decision holding a statute unconstitutional has on said statute. The issue is not the retroactivity of a judicial decision as was the case in Chevron Oil v. Huson, 404 U.S. 97, 91 S. Ct. 349, 30 L. Ed. 2d 986 (1971), relied on by Plaintiff. However, we address the issue using such terminology because of the use of that term in Plaintiff's brief.

Plaintiff would have this Court believe that the Battilla decision in 1980 had the effect of completely obliterating the statute of repose, and the Pullum decision constituted a retroactive re-enactment of the statute. This analysis completely

---

[3] Plaintiffs raise for the first time in this brief, that in any event Pullum is not controlling in this case because Pullum was injured prior to the expiration of the twelve-year statute of repose. This argument is entirely specious. While it is true that the plaintiff in Pullum suffered the injury prior to the expiration of the twelve-year period and thus he had time to file his lawsuit before the statute of repose ran, this Court resolved Pullum's equal protection argument by finding that all products liability actions were barred if not filed within twelve years.

misconstrues the Battilla decision and ignores Florida law concerning the effect of decisions ruling on the constitutionality of statutes.

A. **Battilla did not Effectuate a Complete Abolition of the Statute of Repose.**

Battilla did not purport to declare the statute of repose unconstitutional in all respects. Rather, the Court adopted a limited holding that "as applied to this case, section 95.031 denies access to courts under article I, section 21, Florida Constitution." 392 So.2d at 874. The decision failed to even delineate the facts upon which its conclusion was based. Because of this narrow ruling, the statute continued to be viable as the other facts and against other challenges of constitutionality.

That Battilla did not effectuate an expungement of the statute in all dimensions is demonstrated by the decisions which confirmed that under other fact patterns and other issues of purported constitutional challenges, the statute was held constitutional even before the Supreme Court receded from Battilla in its Pullum decision. See, e.g., Purk v. Federal Press Co., 387 So.2d 354 (Fla. 1980) (rejecting denial of access to court argument under facts of that case and rejecting equal protection challenge); MacRae v. Cessna Aircraft Co., 457 So.2d 1093 (Fla. 1st DCA 1984) (rejecting denial of access to courts' argument under facts of that case). Since this Court in Battilla only held that in that limited factual circumstance, (which was not even described), the statute was unconstitutional as a denial of access to courts, the statute remained constitutional in other

contexts as to equal protection or due process challenges as well as some denial of access to courts' analyses. Consequently, as to these issues, Pullum effectuated no change in existing law. Pullum merely confirmed the fact and presumption of constitutionality which attaches to every legislative enactment. Village of North Palm Beach v. Mason, 167 So.2d 721 (Fla. 1964). There is absolutely no language in the decision to suggest that the court was "re-enacting" a statute that had ceased to exist. Issues of "retroactivity" are thus false issues, the language of retroactivity is a misnomer and precedents dealing with "retroactivity" are inapplicable. On the merits, however, even under so-called "retroactivity" arguments, Plaintiff's position is erroneous and contrary to established Florida law.

B. A Decision Overruling a Prior Decision of Unconstitutionality Renders the Statute Valid From the Date of its Original Enactment.

Even if the Pullum decision was interpreted as a complete abrogation of prior rulings on the constitutionality of the statute, under Florida law, it has long been established that if a decision holding a statute unconstitutional is subsequently overruled, the statute will be held valid from the date it first became effective. Christopher v. Mungen, 61 Fla. 513, 55 So. 273 (1911).

> Where a statute is judicially adjudged to be unconstitutional, it will remain inoperative while the decision is maintained; but if the decision is subsequently reversed, the statute will be valid from the date it first became effective, even though rights acquired under particular adjudications where the statute was held to be invalid will not be affected by the subsequent

> decision that the statute is constitutional.

Id. at 280 (emphasis added). On rehearing, the court further clarified its position to reflect that the statute would be applied to everyone except the parties to the decision holding the statute unconstitutional. 55 So. at 281.

Plaintiff takes issue with the Christopher v. Mungen case and argues that it is no longer good law. The basis of Plaintiff's argument is that the converse of the Christopher holding--that a decision finding a statute unconstitutional renders the statute invalid ab initio--has now been rejected in favor of an "equitable test." Thus, Plaintiff contends that Christopher is no longer a correct interpretation of the law. In arguing this position, Plaintiff has completely blurred the distinction between the two propositions. The fact that the Supreme Court no longer abides by the proposition that statutes declared unconstitutional are unconstitutional ab initio, has no effect on its prior holding that a statute later held constitutional will be valid from the date of its enactment. Moreover, these two rulings are entirely consistent with the presumption of constitutionality that every statute carries. Christopher perpetuates this presumption by holding a statute constitutional ab initio. Cases holding statutes unconstitutional prospectively only also support the presumption of constitutionality.

The court in Lamb v. Volkswagenwerk, A. G., 631 F. Supp. 1144, 1149 (S.D. Fla. 1986), utilized the Christopher decision to explain the effect of Pullum on the statute of repose:

> The import of this rule is that a law duly enacted by the legislature and later declared unconstitutional will remain dormant and inoperative but not dead. State v. Lee, 22 So.2d 804 (Fla. 1945). If the law is resurrected by a later decision the law will be valid from its inception. State v. White, 194 So.2d 601 (Fla. 1967). Applying this standard, too, it is apparent that Pullum, simply restored the right of the instant Defendants to be excused from liability for their products after the passage of twelve years.

It is significant that from the time of the Battilla ruling until well after the appeals in Pullum were exhausted, the Florida Legislature did nothing to repeal the statute of repose which "remained on the books." Indeed in the intervening period, the very same statute was applied by Florida courts to bar product liability causes of action. See Purk; MacRae.

Plaintiff relies on the decision in Florida Forest & Park Serv. v. Strickland, 154 Fla. 472, 18 So.2d 251 (1944). This reliance is misplaced. Florida Forest involved a change in the judicial interpretation of a statute governing the appeals process for a worker's compensation claim. It did not involve the constitutionality of a statute and thus, the assertion of the Florida Forest case is erroneous and the precedent is inapplicable.

Moreover, upon review of the Florida Forest case, it is evident that it can provide no relief for Plaintiff herein. The case commences with the general proposition that "ordinarily, a decision of a court of last resort overruling a former decision is retrospective as well as prospective in its operation." Id. at 253. A court can alter the general rule by specifically declaring

in the opinion that the decision will have only prospective effect. Id.; Parkway General Hosp., Inc. v. Stern, 400 So.2d 166 (Fla. 3d DCA 1981).

In Pullum, the Court did not indicate that its decision would have prospective effect only. In fact, Pullum itself was a decision being applied retroactively to Pullum. Pullum's equal protection argument was that those individuals like himself who were injured between the eighth and twelfth year were given less time to sue than one injured after the twelve-year period. The Supreme Court swept away this argument by ruling that all plaintiffs would be treated the same--after twelve years, no product liability suit can be filed.

If the Pullum decision applied prospectively only, those plaintiffs who were injured after twelve years and who had cases pending when Pullum was decided would still be treated more favorably than Pullum and persons in his position. Thus, the Pullum decision, if prospective only, would not have eliminated that plaintiff's equal protection argument.

On rehearing, the court was squarely faced with the issue of retroactivity when plaintiff acknowledged that the decision was being applied retroactively and argued that this would be a denial of due process. Plaintiff's motion for rehearing was denied. From the foregoing, it is clear that the Florida Supreme Court has determined there to be no constitutional impediments--denial of access to courts, equal protection or due process--in giving effect to the statute of repose as originally enacted.

The correctness of the Florida Supreme Court on its analysis of the equal protection issue as well as the due process implications of retroactive application has been confirmed by the United States Supreme Court's dismissal of Pullum's appeal for want of a substantial federal question. This constitutes an adjudication on the merits. Hicks v. Miranda, 422 U.S. 332, 95 S. Ct. 2281, 45 L. Ed. 2d 223 (1975).

In sum, both the Florida Supreme Court and the United States Supreme Court have faced the issue of whether retroactive application of the Pullum decision violates a plaintiff's constitutional rights. Those courts have determined that no violation has occurred. Since the "injury" was more direct in Pullum and the courts declined to offer relief, Plaintiff herein certainly cannot stand in any better stead.

Since the Pullum Court did not indicate prospective application, unless this case falls within an exception to the general rule, the statute is valid from its inception. The exception to the "relation-back" rule recognized by Florida Forest is 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. Id. at 253.[4] Plain-

---

[4] In Florida Forest, the plaintiff relied upon an existing interpretation of a statute in appealing a commissioner's decision directly to circuit court. An overruling decision held that a claimant must first exhaust administrative remedies before proceeding to circuit court. On those facts, the Court ruled that a

tiff argues here that she has acquired property rights, thereby triggering the exception to the "relation-back" rule. Such contention is without basis in law or fact.

The sole ground for Plaintiff's contention is that she has filed a lawsuit in alleged reliance on Battilla and expended time and money in litigation. (Petitioner's Brief at p. 16.) The District Court in Eddings v. Volkswagenwerk, et al., 635 F. Supp. 45 (N.D. Fla. 1986), appeal pending, No. 86-3068, aptly responded to this argument:

> Obviously, plaintiff has spent money in work up and of the preparation of the case. But that does not give plaintiff a property right anymore than defendant's expenditures of money in defense have given them a property right over plaintiff. Plaintiff has not received money or property, or goods or services, or any other thing of value, in reliance on the Battilla decision.
>
> Plaintiff brought a lawsuit. As with any lawsuit, he might or might not prevail. Absent the Pullum decision, there would have been no property right created in him to money spent in litigation he may have lost. The Pullum decision could not, and does not, alter that fact.

Id. at 47.

Plainly, the instant Plaintiff did not acquire her right to sue in reliance upon the decision in Battilla. "The right to sue occurred by accident, not by any conscious decision made in reliance upon judicial precedent." Hartman v. Westinghouse Elec. Corp., No. 83-517-CIV-ORL (M.D. Fla., Dec. 10, 1985) (A. 1). In an unpublished decision, the Eleventh Circuit Court of Appeals,

---

plaintiff who had proceeded along a judicially approved statutory course of procedure could not have his contract rights cut off.

per curiam affirmed, the Hartman decision for the reasons stated in the District Court's dispositive Order of December 10, 1986 (A. 1). As in Hartman, Plaintiff herein did not forebear from bringing their action within twelve (12) years after the date of delivery of the subject vehicle as required by section 95.031(2), based upon any alleged reliance on the holding in Battilla that section 95.031(2) was unconstitutional. "The only reason that the instant case was commenced after the statute of repose had run was because the injury did not occur until that time. Thus, it cannot be said that any contract or property rights were acquired in reliance upon Battilla." Hartman (A. 1 at p. 4). See also Hamptom v. A. Duda & Sons, Inc., 12 F.L.W. 2124 (Fla. 5th DCA, September 3, 1987).

In an analogous situation, the court in Parkway General Hosp., Inc. v. Stern, 400 So.2d 166 (Fla. 3d DCA 1981), rejected an argument concerning reliance in the context of a change in decisional law. The court therein faced the issue of whether its holding that a wife is liable for her husband's medical bills should be applied retroactively.

> Our holding is that a wife is liable for her husband's bills simply and solely because of the marital relationship between them. Thus, the only ways in which Mrs. Stern, or any other wife, could have averted this responsibility was to have dissolved the marriage before her husband's hospitalization or somehow prevented the illness which required it. Her failure to do either was obviously not the result of any "reliance" upon the belief that, under the present law, she would not be held responsible for his subsequently incurred bills.

Id. at 167.

Stated somewhat differently, Battilla did not induce Plaintiff to fail to take some action which might have preserved some rights she might have had. The failure to act was solely a function of the fact that the accident had not happened yet. At best, Battilla possibly induced Plaintiff to file a claim for relief to which she was not entitled in the first place and, indeed, required Defendants to defend a lawsuit against which the legislature had intended to protect it. If, in fact, Plaintiff's attorneys expended efforts in investigation and legal work, their reliance upon their own personal assessment of the law--one which was wrong when made and proven wrong by both the Florida and United States Supreme Court decisions in Pullum and the court's decision in Hartman--has been matched by Defendants' costs and legal efforts in defending against a claim which was erroneously asserted.

Because the sole cause of Plaintiff's failure to bring suit within the prescribed time was the fact that the accident had not yet occurred, the cases in which parties acted directly in reliance upon a statute are irrelevant. See, e.g., International Studio Apartment Assoc. v. Lockwood, 421 So.2d 1119 (Fla. 4th DCA 1982) (clerk of court invested funds deposited in the court's registry and retained the interest for court use in reliance upon statute).

Based on the foregoing, it is apparent the general rule which declares a statute valid from the date of its enactment is applicable to this case. When Plaintiff filed her lawsuit on June 28, 1985, more than twelve (12) years had elapsed since the delivery of the vehicle to its original purchaser and thus her

products liability cause of action had been extinguished by a viable statute which continued to be operative throughout all applicable periods involved in this case.

C. Plaintiff Does Not Have a Vested Property Right by Virtue of Battilla.

Plaintiff further argues that by virtue of the Battilla decision, she has acquired a vested property right entitled to protection. The major fallacy with this contention is that Plaintiff acquired no "rights" at all under Battilla. Battilla allowed Plaintiff to file a lawsuit conditioned upon an accident occurring, when, in fact, Plaintiff had no cause of action by virtue of section 95.031(2). An overview of the statute of repose and its operation makes this clear.

A statute such as section 95.031(2) is denominated a "statute of repose" because it sets a fixed limit after the time of the product's manufacture, sale, or delivery beyond which the manufacturer or seller would not be liable. Such statutes are distinguished from ordinary statutes of limitations that govern the time within which lawsuits may be commenced after a cause of action has accrued. Rather than being directed at the remedy, statutes of repose extinguish the right of action itself before (or after) it arises. Bauld v. J.A. Jones Constr. Co., 357 So.2d 401 (Fla. 1978); Thornton v. Mono Mfg. Co., 99 Ill. App. 3d 722, 425 N.E.2d 522, 525 (2d DCA 1981).

The significance of the distinction between "repose" statutes and ordinary limitations statutes was explained by the New Jersey

Supreme Court when faced with a constitutional challenge to a ten-year statutory limitation upon improvements to real property:

> This formulation suggests a misconception of the effect of the statute. It does not bar a cause of action; its effect, rather, is to prevent what might otherwise be a cause of action, from ever arising. Thus injury occurring more than 10 years after the negligent act allegedly responsible for the harm, forms no basis for recovery. The injured party literally has no cause of action. The harm that has been done is damnum absque injuria--a wrong for which law affords no redress. The function of the statute is thus rather to define substantive rights than to alter or modify a remedy. The legislature is entirely at liberty to create new rights or abolish old ones as long as no vested right is disturbed.

Rosenberg v. Town of North Bergen, 61 N.J. 190, 293 A.2d 662, 667 (1972). Accord Cheswold Volunteer Fire Co. v. Lambertson Constr. Co., 489 A.2d 413 (Del. 1984); Colton v. Dewey, 212 Neb. 126, 321 N.W.2d 913 (1982).

The enactment of statutes of repose are generally intended to shield manufacturers of durable goods from "open-ended" liability created by allowing claims for an indefinite period of time after the product was first sold and distributed. 44 Fed. Reg. 62,733 (1979). In claims against manufacturers of older durable goods such as automobiles, "over 97% of product-related accidents occur within 6 years of the time the product was purchased. . . ." Model Uniform Products Liability Act § 110 Analysis, reprinted in 44 Fed. Reg. 62,714, 62,733 (1979). Additionally, nationwide data shows that most claims are filed within a six-year period. Id.

The Florida Legislature chose in 1975 to balance the competing public policy interests inherent in products liability law and practice by giving the consumer a cause of action limited to a period of twelve (12) years from the original sale of the product. Following a course of development in which courts expanded the products liability of manufacturers, the Florida Legislature defined the period within which the consumer's cause of action could be asserted, thereby protecting manufacturers from "open-ended" liability. It is interesting to note that Florida consumers have a longer period of time in which to file a products liability cause of action than consumers elsewhere in the United States since Florida has the longest statute of repose period.

In enacting section 95.031(2)[5], the Florida legislature defined a liability of limited duration. Filing within the time prescribed is a condition precedent to bringing the action. Once a time limit on the assertion of a potential plaintiff's cause of action expires, the defendants are effectively "cleared" of any wrongdoing or obligation. Colony Hill Condo I Ass'n v. Colony Co., 320 S.E.2d 273 (N.C. App. 1984). Failure to file within the prescribed time period gives the defendants a vested right not to be sued. Id. See also Eddings v. Volkswagenwerk, 635 F. Supp. 45 (N.D. Fla. 1986). Thus, contrary to Plaintiff's claim of a "vested right," it is in fact Defendants who has acquired a vested right to be free from the suit herein.

---

[5] In 1981 there were reported to be 98 statutes in 48 states that could be considered statutes of repose. Wayne v. Tennessee Valley Auth., 730 F.2d 392, 401 n.7 (5th Cir. 1984).

Even under the "access to courts" provision used in Battilla and receded from in Pullum, Plaintiff here has acquired no vested rights. Article I, section 21 of the Florida Constitution declares that "[t]he courts shall be open to every person for redress of any injury. . . ." "Any injury" necessarily means a legal injury, that is, a violation of a legal right in some way or a violation of the law that affects him adversely. Barnes v. Kyle, 202 Tenn. 529, 306 S.W.2d 1 (1957). Thus, courts are open to those who suffer an invasion of a legal right as established by constitutional, statutory or common law. Slatcoff v. Dezen, 76 So.2d 792 (Fla. 1954). Consequently, if the legislature chooses to classify some damage as outside the realm of "legal injury," it may do so, so long as no other constitutional provision is violated. Article I, section 21, therefore, is a mandate to the judiciary and not to the Legislature.[6]

In legislating the period of liability for existence of a products liability cause of action, the Legislature has chosen to define as an essential element that it be filed within twelve (12) years. Consequently, if the cause of action is not brought within

---

[6] A number of courts in other jurisdictions with an "open court" constitutional provision have sustained statutes similar to Florida's against the challenge that the statute unconstitutionally abolished the claim. These courts have held that unless the injury occurs within the statutory time period, there is no cognizable claim. Tetterton v. Long Mfg. Co., Inc., 332 S.E.2d 67, 72 (1985); Lamb v. Wedgewood South Corp., 302 S.E.2d 868, 880 (1983); Anderson v. Fred Wagner and Roy Anderson, Jr., Inc., 402 So.2d 320 (Miss. 1981); Burmaster v. Gravity Drainage Dist. No. 2 of St. Charles Parish, 366 So.2d 1381 (La. 1978). See also Adair v. Koppers Co., Inc., 541 F. Supp. 1120 (N.D. Ohio 1982); Yarbro v. Hilton Hotels Corp., 655 P.2d 822 (Col. 1982); Klein v. Catalano, 386 Mass. 701, 437 N.E.2d 514 (1982); McMacken v. State, 320 N.W.2d 131, aff'd on reh'g, 325 N.W.2d 60 (S.D. 1982).

twelve (12) years, there is no cause of action by definition and no injury for which redress is available.

Applied to the present case, it is clear that by operation of the statute of repose, at the end of the twelfth year, there was no cause of action. This the statute was permitted to do. Plaintiff simply did not and could not, by legal definition, have acquired any rights under Battilla.[7] Battilla merely declared in a limited fashion that section 95.031(2) was unconstitutional and therefore did not have to be considered under the specific facts of Battilla. 392 So.2d at 874. Battilla was a mistake of law as later acknowledged by the court in Pullum. Defendants respectfully submits that one cannot acquire a right by virtue of a mistake of law--at least not under the facts and circumstances of the instant case.

Moreover, a vested right is more than a mere expectation based upon an anticipation of the continuance of existing law. Lamb v. Wedgewood South Corp., 302 S.E.2d 868 (N.C. 1983). Lamb v. Volkswagenwerk, 631 F. Supp. 1144, 1149 (S.D. Fla. 1986). See also In re Will of Martell, 457 So.2d 1064 (Fla. 2d DCA 1984). The practical result of a contrary conclusion would be the stagnation of the law in the face of changing societal conditions. Singer v. Sheppard, 464 Pa. 387, 346 A.2d 897, 903 (1975).

---

[7] Plaintiff's argument is particularly inappropriate under the facts of the present case in that the twelve-year period expired on July 12, 1980, several months prior to the Supreme Court's decision in Battilla. Thus, there was no cause of action at the time of Battilla.

Plaintiff's reliance on L. Ross, Inc. v. R.W. Roberts Constr. Co., 466 So.2d 1096 (Fla. 5th DCA 1985), for the proposition that she has a property right in an accrued cause of action is to no avail. In Ross, the issue was whether a legislative amendment to a statute repealing a limitation on the amount of attorneys' fees recoverable in certain actions could be applied retroactively to a pending lawsuit. The principle of law involved in that situation is that there is a presumption against retroactive application of a statute where the legislature has not in clear and explicit language, expressed an intention that the statute be so applied. That issue is not before the Court. The issue here is the effect of a judicial decision reaffirming the presumption of constitutionality of a statute in effect at the time of the accident at issue. On this point, L. Ross provides no guidance.

In sum, nothing was taken away by Pullum because any cause of action Plaintiff may have had was extinguished by operation of the statute of repose. On the contrary, it was Defendants who have acquired a vested right of "no liability"--a right now confirmed in Pullum by both the Florida Supreme Court and the United States Supreme Court.

D. **<u>Chevron Oil v. Huson has no Application Since it Concerns the Retroactive Effect of a Federal Judicial Pronouncement</u>.**

Plaintiff has also relied on <u>Chevron Oil Co. v. Huson</u>, 404 U.S. 97, 92 S. Ct. 349, 30 L. Ed. 2d 986 (1971). <u>Chevron Oil</u> is inapplicable to the issues before the Court. In <u>Chevron Oil</u>, when plaintiff's lawsuit was initiated, there was a long line of federal cases which applied general admiralty law, including the equitable doctrine of laches in personal injury suits under the Outer Continental Shelf Lands Act (OCSLA). While pre-trial proceedings were underway, however, the Supreme Court issued an opinion that entirely changed the law and determined that the OCSLA incorporated the adjoining state law rather than admiralty law with regard to personal injuries on the outer continental shelf. Applying the state's one-year statute of limitations for personal injury actions instead of the admiralty doctrine of laches, the plaintiff's action was time-barred. The Supreme Court was faced with the issue of whether to apply their overruling decision retroactively.

Plaintiff has acknowledged that the standard set forth in <u>Chevron Oil</u> is used for determining the retroactivity of a <u>court</u> decision. Since the issue here is the constitutionality of a state statute, any discussion as to the standard set forth in <u>Chevron Oil</u> is totally irrelevant to the instant case.

Not only is <u>Chevron Oil</u> inapplicable to the instant case since we are not concerned here with a judicial decision, but further, <u>Chevron Oil</u> dealt with the issue of the retroactivity of a judicial opinion on a question of <u>federal</u> law. The <u>Chevron Oil</u>

standard is utilized by the federal courts when considering the retroactive impact of a court decision involving federal law. E.g., Tehan v. United States, 382 U.S. 406, 86 S. Ct. 459, 15 L. Ed. 2d 453 (1966); Linkletter v. Walker, 381 U.S. 618, 85 S. Ct. 1731, 15 L. Ed. 2d 601 (1965); Halliday v. United States, 394 U.S. 831, 89 S. Ct. 1498, 23 L. Ed. 2d 16 (1969); Warner v. Flemings, 413 U.S. 665, 93 S. Ct. 2926, 37 L. Ed. 2d 873 (1973). Since the instant case deals with the constitutionality of a state statute under the state constitution and the same having been decided by a state supreme court, any reliance on Chevron Oil is misplaced.[8]

The Florida Supreme Court in Pullum had the opportunity to utilize the Chevron Oil standard if it so desired because the plaintiff therein requested relief based on Chevron Oil in his motion for rehearing. That motion was rejected by the Florida Supreme Court. Rejection of the Chevron Oil approach by the Supreme Court in Pullum was clearly justified since the court in Pullum was dealing with the constitutionality of a state statute that had been enacted many years earlier, and remained viable, operative and "on the books" even after the Battilla holding, while the Court in Chevron Oil was dealing with a change in federal judicial law. Finally, in Pullum itself, the United States Supreme Court dismissed the appeal for want of a substantial federal ques-

---

[8] While the Chevron Oil test was discussed in International Studio Apartment Assoc. Inc. v. Lockwood, 421 So.2d 1119 (Fla. 4th DCA 1982), Lockwood involved a United States Supreme decision holding a statute unconstitutional under federal law.

tion, a "merits" dismissal at least inferentially demonstrating that Chevron Oil issues are not implicated.[9]

II. THE LEGISLATIVE AMENDMENT TO SECTION 95.031(2), FLORIDA STATUTES (1986 SUPP.) CAN NOT BE APPLIED TO A CAUSE OF ACTION WHICH ACCRUED PRIOR TO THE EFFECTIVE DATE OF THE AMENDMENT

A. Section 95.031(2), Florida Statutes (1986 Supp.) falls Within the General Rule that Statutes are Presumed to be "Prospective Only"

The fact that the statute of repose was amended in 1986 is irrelevant to the instant case. The general rule in Florida concerning the effect of a legislative change is clear. Statutes are presumed to operate prospectively unless the legislature has "in clear and explicit language expressed an intention that the statute be [retroactively] applied." Foley v. Morris, 339 So.2d 215, 216 (Fla. 1976); see also Young v. Altenhaus, 472 So.2d 1152 (Fla. 1985); State v. Lavazzoli, 434 So.2d 321 (Fla. 1983). Thus, the Court must look to the legislative language to determine whether retrospective application is mandated.

In the present case, the legislature has specifically provided an effective date for the amendment to section 95.031(2). Section 2 of chapter 86-272, Laws of Florida, deleted the statute of repose for product liability action. Section 3 of that chapter provided that section 2 "shall take effect July 1, 1986."

---

[9] While declining to apply the test set forth in Chevron Oil, the decision in Lamb v. Volkswagenwerk, A.G., 631 F. Supp. 1144 (S.D. Fla. 1986), contains a well-reasoned analysis demonstrating that even if applicable, the Chevron Oil test for retroactivity would be met.

This Court has specifically held that such language is indicative of prospective only application. Foley v. Morris.

Foley involved a medical malpractice action in which three years had elapsed between the accrual of the cause of action and the filing of the complaint. When the cause of action accrued, the plaintiff was subject to a four-year statute of limitation, however, prior to filing suit, the legislature reduced the statute of limitations to two years. The defendants moved for dismissal arguing that the two-year statute was retroactive. Recognizing that the presumption is against retroactive application of a statute where the Legislature has not expressed in clear and explicit language an intention that the statute be so applied, the Court looked to the language of the new statute.

The Legislature had used virtually identical language to that presented here- "this act shall take effect on July 1, 1972." Noting this language, the court held:

> Nothing in the language of the act manifests an intention by the legislature to do otherwise than prospectively apply the new two-year statute of limitations.

Thus, the court concluded,

> Since the legislative intent to provide retroactive effect to Section 95.11(6), Florida Statutes, is not express, clear or manifest, we conclude that it does not apply to causes of action occurring prior to its effective date.

Id. at 217.

Foley governs the present action. The Legislative intent as found in section 3 is clear--retroactive application was not

intended. See Small v. Niagara Mach. & Tool Works, 502 So.2d 943 (Fla. 2d DCA 1987).

Despite this plain language, Plaintiffs attempt to construe a retroactive intention by the legislature, by virtue of the fact that the effective dates for the two portions of chapter 86-272 are different. Petitioners note that the amendment to the libel and slander statute (section 1) was determined to "take effect October 1, 1986, and shall apply to causes of action accruing after that date," while the amendment to the statute of repose (section 2) merely states "Section 2 of the Act shall take effect July 1, 1982." From this, Plaintiffs conclude that the legislature did not intend to confine the amendment to causes of action accruing after July 1, 1986.

Separate and apart from the question of whether any inference can be drawn from this in light of the legislative history which reveals chapter 86-272 to be a conglomeration of two separate amendments, it is clear that Petitioners' argument must fail. The fact that the description of the effective dates for each section are stated differently, cannot render the latter portion retroactive, when standing alone, the intent to be prospective is clear. In other words, as Foley held, the inclusion of a specific effective date reveals prospective only application. This does not become any less true by virtue of the fact that it has been joined with another statute that expressed prospective only application in a different manner. Both sections are clearly prospective only.

Moreover, section 1 simply changes the statute of limitations on defamation actions. Legislative intent to have the statutory change apply prospectively only is easy to express in that instance, by stating the amendment shall "apply to causes of action accruing after that date." Section 2 of chapter 86-272, on the other hand, deals with the statute of repose, not the statute of limitations. As discussed above, statutes of repose, by their very nature, do not concern themselves with when a cause action accrues. Rather, the date on which the cause of action is barred, is measured from delivery to the original purchaser regardless of the date of "accrual". Thus, concepts of "accrual" are not appropriate when a statute of repose is amended.

B. Chapter 86-272 is not a Repeal so as to Permit Retroactive Operation

To avoid the plain and unequivocal language of chapter 86-272, Petitioners argue that the amendment is actually a repeal requiring retroactive operation.

In fact, however, Plaintiffs have done nothing more than choose the label that suits their purpose. In actuality, the Act never uses the word "repeal." Rather, chapter 272 twice refers to the amendment. This is consistent, of course, with the action taken by the legislature. The statute of repose was not abolished in toto. The change merely deleted the repose provision as it applies to product liability actions. Thus, to find that the Legislators in this instance intended a "repeal" defies logic where the precise language of the Act speaks of an "amendment."

Even if the statute itself had been labeled a "repeal," this would not be determinative of the issue of retroactivity, since it is clearly the intent of the legislature which must control, not the label. That intent, as discussed above was to provide prospective only application.

In sum, the only support Plaintiffs can provide for their contention that chapter 86-272 is a repeal requiring retrospective operation is the fact that they have labeled it as such. The language of the Act and its legislative history reveal the fallacy of this position.

C. Prospective Only Application is Consistent With the Numerous Cases on Statutes of Limitations and Repose

While Plaintiffs have chosen to rely on cases which are plainly inapplicable, the most instructive cases are those specifically determining the effect of statutes of limitations and/or repose. It is understandable that Petitioners would ignore these decisions since they refute the position taken by Petitioners.

The Florida Supreme Court and District Courts of Appeal have consistently held that a statute of limitations or repose will not be applied retroactively. Specifically, where an amendment has been made which would operate to shorten one's time to sue, the courts have found the statutes to be prospective only. Stuyvesant Ins. Co. v. Square D. Co., 399 So.2d 1102 (Fla. 3d DCA 1981) (statute of repose applicable to improvements to real property could not be retroactively applied to shorten plaintiffs' time to sue); Foley v. Morris, 339 So.2d 215 (Fla. 1976) (new statute of limitation

which shortened time to sue from four years to two years could not be applied retroactively); Garafalo v. Community Hosp. of S. Broward, 382 So.2d 722 (Fla. 4th DCA 1980) (two-year statute of limitations as to suits for negligence against hospitals in their capacity as health care provider was not to be applied retroactively).

Even more significantly, this Court in Homemakers Inc. v. Gonzales, 400 So.2d 965 (Fla. 1981) held that plaintiff was not entitled to the benefit of an amendment lengthening the statute of limitation. In that case, plaintiff was injured on April 2, 1973, as a result of defendant's alleged medical malpractice. Suit was instituted on July 9, 1976. At the time the injury occurred, the governing statute of limitation was two years and thus plaintiff's action, which was not filed until three years and three months later, would have been barred. Subsequently, as of January 1, 1975, the statute was amended in such a way that plaintiff's cause of action would not have been precluded.

The Court held that the amendment to the statute applied prospectively only and thus plaintiff could not obtain the benefit of the lengthened statute of limitations. As the dissent pointed out, this decision expands prior cases which held that if the new statute was enacted before the prior statute had run and thus before the cause of action was barred, the new statute would be applicable; otherwise the new statute would be prospective only. See Walter Denson & Son v. Nelson, 88 So.2d 120 (Fla. 1956); Mazda Motors of America v. S.C. Henderson & Sons, Inc.,

364 So.2d 107 (Fla. 1st DCA 1978); Neff v. General Development Corp., 354 So.2d 1275 (Fla. 2d DCA 1978); Martz v. Riskamm, 144 So.2d 83 (Fla. 1st DCA 1962).

As a result of the Homemakers decision, the law in Florida is that an amendment to a statute of limitations or repose which would lengthen the time in which one may sue is inapplicable to pending causes of action whether or not the cause of action was barred on the effective date of the new statute.

Applying the foregoing to the present case, it is apparent that the applicable statute is section 95.031(2) Florida Statutes (1985) which provided that all product liability actions would be barred if not filed within twelve years from the delivery of the original product to the original purchaser. The fact that the legislature subsequently amended the statute so as to no longer provide a bar after twelve years cannot alter plaintiffs' or defendants' rights acquired under the prior statute. See also CBS Inc. v. Garrod, 622 F. Supp. 532 (M.D. Fla. 1985) (repeal of a statute does not divest one of a defense which arose under the former statute).

CONCLUSION

Based on the foregoing arguments and authorities cited therein, Respondents respectfully requests that this Honorable Court affirm the judgment of the trial court.

HERZFELD and RUBIN, P.C.
40 Wall Street
New York, New York 10005
By: MICHAEL HOENIG

RUMBERGER, WECHSLER & KIRK
One Biscayne Tower
Suite 3410
2 South Biscayne Boulevard
Miami, Florida 33131
(305) 358-5577
Attorneys for Appellees

By [signature]
PETER J. WECHSLER
MYRON SHAPIRO
WENDY F. LUMISH

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 23rd day of September, 1987, to JAMES BONFIGLIO, ESQ., 359 S. County Rd. #3, Palm Beach, Florida 33480; Kocha and Houston, P.O. Box 1427, West Palm Beach, Florida 33402; EDNA CARUSO, ESQ., Suite 4B, Barristers Building, 1615 Forum Place, West Palm Beach, Florida 33401; CATHY JACKSON LERMAN, ESQ., P.O. Box 24410, Fort Lauderdale, Florida 33307-4410; and EDWARD O'DONNELL, ESQ., 400 Southeast Financial Center, 200 South Biscayne Boulevard, Miami, Florida 33131.

HERZFELD and RUBIN, P.C.
40 Wall Street
New York, New York 10005
By: MICHAEL HOENIG
of Counsel

RUMBERGER, WECHSLER & KIRK
One Biscayne Tower
Suite 3410
2 South Biscayne Boulevard
Miami, Florida 33131
(305) 358-5577
Attorneys for Appellees

By [signature]
PETER L. WECHSLER
MYRON SHAPIRO
WENDY F. LUMISH

WFL10811