

IN THE SUPREME COURT OF FLORIDA

Case No. 68,823

NISSAN MOTOR CO., LTD., :
et al., :
 :
Petitioner, :
 :
vs. :
 :
LYNN PHLIEGER, as Personal :
Representative of the Estate of :
Jay Kirk Phlieger, Deceased, :
 :
Respondent. :
 :

PETITION FOR DISCRETIONARY REVIEW OF A
DECISION OF THE DISTRICT COURT OF APPEAL
FIFTH DISTRICT OF FLORIDA

ANSWER BRIEF OF RESPONDENT, LYNN PHLIEGER

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INTRODUCTION

This is a wrongful death action brought by Lynn Phlieger ("Phlieger"), as personal representative of the estate of Jay Kirk Phlieger, deceased. The defendants are Nissan Motor Co., Ltd., Nissan Motor Company, in U.S.A., and Bob Restina Import Center, Inc., the manufacturer, importer, and distributor of the truck in which Jay Kirk Phlieger was killed. The defendant petitioners will be referred to collectively as "Nissan."

STATEMENT OF THE CASE AND FACTS

Nissan's statement of the case and facts is unacceptable because it does not fairly present the decision of the district court of appeal. Although this case has been accepted on the merits, the issue remains whether there is express and direct conflict between the published district court decision and the

decisions of this court and, if so, the correct reconciliation of those decisions. For this purpose, the district court opinion is the best source for both the factual and procedural history of this case. Cf. Reaves v. State, 485 So.2d 829 (Fla. 1986). The district court opinion, reported at 487 So.2d 1096 provides:

In August 1981, Jay Phlieger was killed as the result of a defective roof design in his Nissan truck. In June 1983, less than two years later, this wrongful death action was brought against Nissan. Nissan moved for summary judgment, claiming that §95.031(2), Florida Statutes (1983) barred the action. In support of its motion, Nissan demonstrated that the truck had been originally purchased on February 13, 1970. Although the truck was not yet twelve years old at the time of Jay Phlieger's death in August 1981, it was more than twelve years old when the wrongful death action was filed on June 3, 1983. The trial court held that the statute barred the action and the district court reversed.

For purposes of this petition, the reasoning of the district court of appeal is all important. The district court began by recognizing that this wrongful death action was brought pursuant to §768.19, Florida Statutes (1983), which gives to Mrs. Phlieger her right of action. The death of her husband was caused by the wrongful act of Nissan and would have entitled her husband to maintain an action against Nissan and recover damages if death had not ensued. The statutory predicate was met.

The district court next identified two relevant portions of the statute of limitation. Section 95.11(3)(e), Florida Statutes (1983) provides that, "an action for injury to a person founded on the design, manufacture, distribution, or sale of personal property" must be brought within four years (emphasis added). Section 95.11(4)(d), Florida Statutes (1983) provides, "an action for wrongful death" must be brought within two years.

The district court then recognized the provisions of §95.031(2), Florida Statutes (1983), upon which Nissan claimed entitlement to summary judgment. That section provides, "actions for products liability and fraud under §95.11(3) must be begun within the period described 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 §95.11(3), but in any event within 12 years after the date of delivery of the completed product to its original purchaser...." (emphasis added).

The district court duly noted the difference between a products liability action under §95.11(3), defined as "an action for injury to a person" and the separate action for wrongful death governed by §95.11(4). The district court appropriately reasoned, "Thus by its very language, section 95.031(2) does not apply and, rather, the two year statute of limitations for wrongful death actions found in §95.11(4)(d) applies." 487 So.2d

at 1097. The district court determination was supported by Parker v. City of Jacksonville, 82 So.2d 131 (Fla. 1955).

The district court went on to distinguish the several cases cited by Nissan. The district court concluded by recognizing again that at the moment of Jay Phlieger's death, the twelve years had not yet run and he did have a cause of action for personal injury against Nissan. Following Love v. Hannah, 72 So.2d 39 (Fla. 1954), Phlieger's right of action under the wrongful death statute was determined by the facts existing at the time of the death of her husband.

"At the time of his death, the decedent had a right to bring an action against Nissan and thus the subsequent wrongful death action was not barred." 487 So.2d at 1098. In so holding, the district court understood that Nissan's argument would have merit only if Jay Phlieger had been killed in a truck more than twelve years old at the time of his death. Nissan lost because "the twelve year statute of repose had not expired when the cause of action, for wrongful death, accrued." 487 So.2d at 1099.

Nissan petitioned this court for discretionary review upon claimed conflict with Pullum v. Cincinnati, Inc., 476 So.2d 657 (Fla. 1985), Ash v. Stella, 457 So.2d 1377 (Fla. 1984), and Variety Children's Hospital v. Perkins, 445 So.2d 1010 (Fla. 1983).

ISSUES

I.

WHETHER THERE IS EXPRESS AND DIRECT CONFLICT WITH PULLUM v. CINCINNATI, INC.; ASH v. STELLA; OR VARIETY CHILDREN'S HOSPITAL v. PERKINS.

II.

WHETHER SECTION 95.031(2) BARS A WRONGFUL DEATH ACTION WHERE THE TWELVE YEAR STATUTE OF REPOSE HAD NOT EXPIRED ON THE DATE OF DEATH AND THE WRONGFUL DEATH ACTION IS FILED WITHIN TWO YEARS OF THE DATE OF DEATH.

III.

WHETHER PULLUM v. CINCINNATI, INC. CAN BE RETROACTIVELY APPLIED TO BAR A WRONGFUL DEATH ACTION WHICH ACCRUED PRIOR TO ITS RENDITION.

IV.

WHETHER THE REPEAL OF SECTION 95.031(2) IS REMEDIAL.

SUMMARY OF ARGUMENT

There is no jurisdictionally significant conflict with Pullum v. Cincinnati, Inc., Ash v. Stella, or Variety Children's Hospital v. Perkins, for the simple reason that none of them involve the application of the statute of limitation for wrongful death actions in a products liability setting. The Fifth District is the first and only appellate court to expressly decide the issue presented.

This is a wrongful death action governed by the statute of limitation applicable to "actions for wrongful death." The district court corrected the trial court's misapplication of

Section 95.031(2), a section applicable only to products liability actions for "injury to a person." An action for wrongful death is not an action for personal injury, but is a separate and distinct cause of action created by statute. The right of action is determined by the facts in existence on the date of death. In this case, the twelve year statute of repose had not yet expired at the moment of death, the decedent had a viable cause of action for personal injury and therefore, his widow and child may maintain this wrongful death action.

Retrospective application of Pullum and the repeal of the statute of repose are issues unnecessary to the correct disposition of this case. They are, however, the primary issues argued by Nissan in its brief on the merits. Here, the right of action for wrongful death is a vested right immune from retrospective application of Pullum. The immediate legislative response to Pullum was the repeal of the resurrected statute of repose, a remedial action deserving of recognition and application by this court.

ARGUMENT

I.

THERE IS NO EXPRESS OR DIRECT CONFLICT WITH PULLUM v. CINCINNATI, INC.; ASH v. STELLA; OR VARIETY CHILDREN'S HOSPITAL v. PERKINS.

This court has accepted jurisdiction to review Phlieger v. Nissan Motor Co., Ltd. upon asserted conflict with Pullum v. Cincinnati, Inc., Ash v. Stella, and Variety Children's Hospital

v. Perkins. It should be determined that review was improvidently granted as there is no direct and express conflict in the decisions as required by Article V, §3(b)(3), Florida Constitution (1985). Department of Health and Rehabilitative Services v. National Adoption Counseling Service, Inc., 11 FLW 617 (Fla. November 26, 1986); Continental Video Corporation v. Honeywell, Inc., 456 So.2d 892 (Fla. 1984).

Although this case and Pullum both discuss §95.031(2), that is where any similarity ends. Pullum involves a personal injury action and the constitutionality of the statute in question. This case involves the interrelationship between the statute's effect on a personal injury action and a subsequent action for wrongful death. Constitutional questions were raised on appeal, but it was unnecessary for the district court to reach them. The district court accepted the statute without constitutional infirmity, applied it to the facts of the case, and for the reasons given found it not a bar to this wrongful death action. There is no express, direct, or even implied conflict between this court's decision in Pullum and the district court decision here.

There is no express, direct, or implied conflict with Ash v. Stella or Variety Children's Hospital v. Perkins, since both those decisions involve medical negligence not products liability. They are, however, supportive of the district court decision as will be demonstrated later in this brief.

The district court decision is the first and only reported appellate decision in this state to address the application and effect of §95.031(2) upon a wrongful death action where the product was less than twelve years old at the moment of death. There is no jurisdictional basis for this court to revisit the issue.

II.

SECTION 95.031(2) DOES NOT BAR A WRONGFUL DEATH ACTION WHERE THE TWELVE YEAR STATUTE OF REPOSE HAD NOT EXPIRED ON THE DATE OF DEATH AND THE WRONGFUL DEATH ACTION IS FILED WITHIN TWO YEARS OF THE DATE OF DEATH.

This is a wrongful death action and the applicable statute of limitation is Section 95.11(4)(d), Florida Statutes (1981). Under that section, an action for wrongful death must be brought within two years of the date of death. With two exceptions, all actions for wrongful death accruing in 1981 are governed by Section 95.11(4)(d). The first exception is death resulting from medical malpractice, governed by Section 95.11(4)(b), and the second exception is a wrongful death claim against the state or its agencies or subdivisions, governed by Section 768.28(11).

Section 95.031(2) does not create a third exception for products liability. The statute does not mention claims for "death" and the courts are not free to amend the statute to include claims for wrongful death. By its terms, the statute of repose is limited to actions for products liability "under

§95.11(3)." Section 95.11(3)(e) provides that, "an action for injury to a person founded on the design, manufacture, distribution, or sale of personal property" shall be commenced within four years.

Reading the two statutory provisions together, a products liability action "for injury to a person" must be brought within four years from date of discovery, but in any event within twelve years after the date of delivery of the completed product to its original purchaser. Separately or together, the statutes do not mention a limitation on actions for wrongful death. The district court was correct in its analysis.

The courts of Florida have consistently recognized an action for wrongful death as separate and distinct from an action for injury to a person when the statute of limitation is at issue. In Parker v. City of Jacksonville, 82 So.2d 131 (Fla. 1955), the sole question before this court was whether an action for wrongful death against a municipality was governed by the twelve month limitation period prescribed by Section 95.24, Florida Statutes (1953) or the two year limitation period prescribed by Section 95.11(6), Florida Statutes (1953) applicable to causes of action for wrongful death. Section 95.24 was a special statute applying to municipalities which provided:

No action shall be brought against any city or village for any negligence or wrongful injury or damage to person or property unless brought within twelve months from the time of the injury or damages.

Whether this is viewed as a statute of "limitation" or "repose," it operated as a bar to suit for injury to person.

In Parker, this court appropriately concluded that an action for wrongful death was not an action for injury to a person, but was for the death resulting from the injury, an independent and distinct cause of action created by statute. 82 So.2d at 132-3. This court held that the two year statute of limitation applied, not the one year statute, reversed and remanded for further proceedings. 82 So.2d at 133. Here, the district court held that Phlieger was entitled to precisely the same relief. The two year statute for wrongful death applies - not the special statute for products liability resulting in personal injury.

The correctness of the district court opinion is reinforced with comparison to the two statutory exceptions to the Section 95.11(4)(d) statute of limitation for wrongful death actions. The exceptions expressly apply to claims for "death." Section 768.28(1) establishes a waiver of sovereign immunity in actions for damages, "for injury or loss of property, personal injury, or death" caused by the negligence of any employee of a state agency or subdivision. Section 768.28(11) is a four year statute of limitation for claims against the state. The four year limitation in Section 768.28(11) overrides the two year limitation in Section 95.11(4)(d) because the unambiguous language of the statute so provides. DuBose v. Auto-Owners Insurance Co., 387 So.2d 461 (Fla. 1st DCA 1980).

The statutes of limitation referable to medical negligence suffered multiple revisions during the 1970's. The impact of these changes on wrongful death claims for medical negligence is chronicled in Worrell v. John F. Kennedy Memorial Hospital, Inc., 384 So.2d 897 (Fla. 4th DCA 1980). The Fourth district concluded that death due to medical negligence was not included within the malpractice statute until May 20, 1975, the effective date of Chapter 75-9, Laws of Fla., which for the first time defined an action for medical malpractice as including a claim for "death, injury, or monetary loss to any person." Although the case was reversed on other grounds in Dober v. Worrell, 401 So.2d 1322 (Fla. 1981), this court agreed with the Fourth District in its construction of the statutes of limitation. 401 So.2d at 1323.

Just as the earlier medical malpractice statutes of limitation applied only to personal injury and not to death resulting from malpractice, so too does the products liability statute of limitation apply only to personal injury actions and not to claims for wrongful death. Had the legislature intended to include death actions within the products liability statute of limitation, it would have done so just as it did when enacting the present malpractice statute of limitation. The products liability statute is not amenable to judicial amendment to include claims for wrongful death. Parker v. City of Jacksonville, 82 So.2d at 133.

Nissan asserts express and direct conflict with Ash v. Stella, 457 So.2d 1377 (Fla. 1984), where the question before this court was:

[W]hen does the statute of limitations begin to run in wrongful death actions where the negligence complained of is medical malpractice. [457 So.2d at 1378].

This court was careful to note that the issue involved a wrongful death resulting from medical practice because the legislature had, in 1975, amended the medical malpractice statute to include for the first time claims for wrongful death. This court said:

Before [the 1975 amendment] the statute of limitations governing malpractice suits did not apply to wrongful death actions. [citations omitted]. However, by defining an 'action for medical malpractice' to include a claim in tort for damages because of death, the legislature clearly intended this section to apply to wrongful death actions in cases where the basis for the action is medical malpractice. [457 So.2d at 1379].

The holding in Ash v. Stella is consistent with the district court decision here. Prior to the 1975 amendment of the medical malpractice statute of limitation, claims for wrongful death caused by medical malpractice were governed by the two year statute of limitation applicable generally to wrongful death claims, not the malpractice statute of limitation. This is because the old malpractice statute, like the current products liability statute, did not include "death."

Unless and until the legislature revises the products liability statute of limitation to include claims for death, this and all other wrongful death actions based on products liability will continue to be governed by the two year statute of limitation applicable to death claims generally. If the legislature had intended Section 95.11(3)(e) to apply to wrongful death actions based on products liability, it would have amended the statute in precisely the same way that it changed the law for medical malpractice. They would have added the word "death." In electing not to, it must be assumed that the legislature wished to preserve the distinction between a products liability action for personal injury and claims for wrongful death.

Section 95.11(4)(d), Florida Statutes (1981), is the statute of limitation applicable to this wrongful death action. Section 95.11(3)(e) applies only to products liability actions for personal injury and, therefore, the twelve year cap provision in Section 95.031(2) does not operate as a bar to this timely filed wrongful death action.

Nissan contends that the substantive right to bring a wrongful death action is determined at the date the suit is filed. That is simply not the law.

The plaintiffs' right of action under the wrongful death statute must be determined by the facts existing at the time of the death of the decedent.

Love v. Hannah, 72 So.2d 39, 41 (Fla. 1954). Cf. Florida Power & Light Co. v. Bridgeman, 133 Fla. 195, 182 So. 911, 918 (1938);

Powell v. Gessner, 231 So.2d 50, 51 (Fla. 4th DCA 1970), writ disch., 238 So.2d 101 (Fla. 1970).

Nissan argues express and direct conflict with Variety Children's Hospital v. Perkins, 445 So.2d 1010 (Fla. 1983), yet Perkins is in full accord with the long established principle that a plaintiff's right of action under the wrongful death statute is determined at the date of death.

Anthony Perkins was malpracticed upon in July 1975. He brought suit against the hospital which went to final judgment in December 1978. Anthony Perkins died in January 1979 and a separate wrongful death action was filed against the hospital in February 1979. When Anthony Perkins died, he had no cause of action against Variety Children's Hospital for two reasons. On the date of his death he had already recovered a judgment against the hospital. Also, the two year malpractice statute of limitation had already run as of the date of his death.

In the first reported Perkins case (382 So.2d 331), the issue was whether a suit for personal injury abates when the injured person dies after final judgment but before completion of appellate review. The Third District held that it did not, and affirmed the personal injury judgment. In the second reported Perkins case (413 So.2d 760), the Third District considered the effect of that final judgment on the subsequently filed wrongful death action, certifying the question to this court.

In the third reported Perkins case (445 So.2d 1010), the one with which Nissan claims conflict, this court concluded:

At the moment of his death the injured minor Anthony Perkins had no right of action against the tortfeasor.... Since there was no right of action existing at the time of death, under the statute no wrongful death cause of action survived the decedent. [445 So.2d at 1012; emphasis added].

There is no conflict between this court's interpretation of the wrongful death act in Perkins and the district court decision below. As expressly recognized in Perkins, 445 So.2d at 1012, Florida is aligned with the clear majority of jurisdictions that treat wrongful death as an independent cause of action, the right to which is determined at the time of death. Here, "at the moment of her husband's death, the twelve years had not yet run and he did have a cause of action against Nissan." 487 So.2d at 1098. Therefore, since the twelve year statute of repose had not yet expired when the cause of action accrued, Mrs. Phlieger is entitled to bring this wrongful death action against Nissan.

Nissan argues that Lynn Phlieger's wrongful death action filed on June 3, 1983 is barred because Jay Phlieger would have been unable to file a personal injury action on that same date. This argument ignores the distinction between the two rights of action - that of the deceased had he lived, and that of the personal representative under the wrongful death act. This court has recognized the distinction and held that the statutory beneficiaries can recover the damages sustained by them, even

though their decedent's suit had he lived, would have been barred. Parker v. City of Jacksonville, 82 So.2d 131 (Fla. 1955); Shiver v. Sessions, 80 So.2d 905 (Fla. 1955). See, also, Moragne v. State Marine Lines, Inc., 211 So.2d 161 (Fla. 1968).

The statute of limitation applicable to wrongful death claims is two years from the date of death. It is not the lessor of two years or the unexpired portion of the limitation applicable to the fatal injury. Parker v. City of Jacksonville; St. Francis Hospital, Inc. v. Thompson, 159 Fla. 453, 31 So.2d 710 (1947); Collins v. Hall, 117 Fla. 282, 157 So. 646 (1934); Duval v. Hunt, 34 Fla. 85, 15 So. 876 (1894); Rahn v. AMP, Incorporated, 447 So.2d 929 (Fla. 3d DCA), rev. den., 456 So.2d 1182 (Fla. 1984); Walker v. Beech Aircraft Corporation, 320 So.2d 418 (Fla. 3d DCA 1975), cert. disp., 338 So.2d 843 (Fla. 1976); Fletcher v. Dozier, 314 So.2d 241 (Fla. 1st DCA 1975).

Jay Phlieger's claim for personal injury against Nissan died with him. Because of this, the Florida wrongful death act creates a separate and distinct right of action in his survivors. The Florida wrongful death act gives to Lynn Phlieger the cause of action for wrongful death against Nissan. Section 95.11(4)(d) gives her two years from the date of death within which to assert her claim. The district court was abundantly correct in first recognizing the vitality of her claim and next recognizing its timely filing. The petition for discretionary review should be discharged. Points III and IV need never be reached.

III.

PULLUM v. CINCINNATI, INC. SHOULD NOT BE RETROACTIVELY APPLIED TO BAR A WRONGFUL DEATH ACTION WHICH ACCRUED PRIOR TO ITS RENDITION.

Florida Forest and Parks Services v. Strickland, 154 Fla. 472, 18 So.2d 251 (1944) is the Florida precedent on the retrospective application of an overruling decision. Under its tenets, Phlieger's wrongful death action is a vested right protected against retrospective application of Pullum.

In Strickland, a deputy commissioner denied the respondent's worker's compensation claim. On review the trial court allowed the claim. This court's previous statutory interpretation authorized trial courts to hear such cases. One month after the trial court's judgment, this court overruled its earlier decision and issued an opinion requiring claimants to exhaust administrative remedies. This court refused to apply that opinion retroactively to Strickland, however, because his compensation right vested at the time of his injury. Sending Strickland back to exhaust administrative remedies would bar his claim because the time for appealing to the Commission had long since expired. In so holding, this court declared the rule on the operation of overruling decisions:

[W]here a statute has received a given construction by a court of supreme jurisdiction and property or contract rights have been acquired under and in accordance with such construction, such rights should not be destroyed by giving to a subsequent overruling decision a retrospective operation. [18 So.2d at 253].

Under Strickland, Phlieger possesses a protected right. The right of action under the wrongful death statute is determined by the facts existing at the time of the death of the decedent. On August 8, 1981, Jay Phlieger was killed as the result of a defective roof design in his Nissan truck. On that date, Battilla v. Allis Chalmers Manufacturing Co., 392 So.2d 874 (Fla. 1980) was the law of Florida. Battilla declared Section 95.031(2) unconstitutional to the extent it barred an action before it accrued. Under Battilla, litigants can sue on defective products more than twelve years old.

Here of course, on August 8, 1981, the Nissan truck was not yet twelve years old and Section 95.031(2) was not a bar to suit. Nissan argues that the relevant date is not date of death, but the date when suit was filed, a time when the truck was more than twelve years old.

At the moment of his demise, Jay Phlieger, had he lived, could have pursued a personal injury action. On June 3, 1983, had he lived, Jay Phlieger could still have pursued a personal injury action under the then controlling law of Florida.

The United States Supreme Court addressed retroactivity in Chevron Oil Co. v. Huson, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971). Huson is particularly instructive because it involved an overruling decision which revitalized a statute of limitation held inapplicable by prior case law. Huson was injured in 1965. In 1968 he timely sued for damages under the then existing case law. The trial court nevertheless entered

summary judgment against him on the statute of limitation, relying upon a 1969 Supreme Court decision. The 1969 decision was an overruling decision resulting in the application of a shorter statute of limitation which had previously been held inapplicable to cases such as Huson's. The Supreme Court declined to give retroactive effect to its own decision and refused to apply the previously inapplicable shorter statute of limitation to Huson's suit, giving him the benefit of the more liberal rule established in the earlier, now overruled case law.

Long before Battilla, Article I, Section 21 of the Florida Constitution guaranteed access to courts for redress of any injury. In 1975, the legislature enacted the products liability statute of repose. Five years later, Battilla held the statute violated the long-standing right of access to courts to the extent it barred an action before it arose. Then, in Pullum, this court receded from Battilla and established a new principle of law - that the legislature could constitutionally deny access to courts for those whose cause of action arose after the twelve year period. In direct response to the Pullum decision, the legislature repealed Section 95.031(2). Chapter 86-272, Laws of Fla.

The history of the products liability statute of repose is a short one. Between its enactment in 1975 and the Battilla opinion in 1980, no reported decision applied the statute to bar actions accruing beyond the twelve year limitation. During the five years between Battilla and Pullum, the legislature made no

effort to correct the products liability statute, although it was quick to react to Overland Construction Co., Inc. v. Sirmons, 369 So.2d 572 (Fla. 1979), with the reenactment of the construction statute of repose. Chapter 80-323, Laws of Fla. During the five years between Battilla and Pullum, the trial courts, district courts of appeal, and this court consistently applied Battilla, recognizing that the products liability statute of repose would be unconstitutional in its application to a cause of action barred before it accrued. E.g. Universal Engineering Corp. v. Perez, 451 So.2d 463 (Fla. 1984).

The Florida legislature has given this court a compelling reason why Pullum should not be applied retrospectively. When this court struck down broad application of the statute of repose in Battilla, the legislature did nothing to correct the constitutional deficiency. Five legislative sessions of inaction may be taken as an indication that the legislature approved and accepted the restricted construction placed upon Section 95.031(2) by Battilla. Cf. White v. Johnson, 59 So.2d 532, 533 (Fla. 1952). Pullum markedly changed the restrictive interpretation placed upon the statute by Battilla and its progeny. The legislative response to Pullum was swift, indicative of the legislature's abandonment of the public policy considerations which concerned this court in Pullum.

There are no public policy reasons to give Pullum retrospective effect, nor are there any equitable bases. An overruling judicial decision should not be retrospectively ap-

plied to impair rights vesting under the prior overruled decision. Phlieger's wrongful death action arose, vested, and was filed at a time when Nissan was answerable for the fatal injury to Jay Phlieger and for the wrongful death claim of Lynn Phlieger. In contrast, Nissan has no vested right or justifiable reliance in a statute enacted long after its malfeasance was complete.

Nissan designed, manufactured, assembled and distributed this truck before its original sale on February 13, 1970. All of this occurred at a time when Nissan's legal liability for personal injury and wrongful death was coextensive with the useful life of its truck. In recognition of this legal liability, Nissan protected itself through insurance coverage and the pricing of its product. Jay Phlieger drove the Nissan truck ignorant of the defect that would take his life, but secure in the knowledge that he and his family had a right of redress protected by Article I, Section 21 of the Florida Constitution as then interpreted by this court. Perhaps a legal fiction, but the rights of the parties should be determined accordingly.

IV.

THE REPEAL OF SECTION 95.031(2) IS REMEDIAL.

In arguing retrospective application of Pullum, Nissan necessarily contends that no vested rights are affected and this court should apply the law as it now exists. Nissan has claimed no vested interest protected by the statute as indeed it cannot.

There was no twelve year cap on products liability claims under the common law. There was no statute of repose in 1970. Nissan manufactured, priced, and sold its truck in contemplation of liability coextensive with its useful life. The statute of repose has since come and gone without reliance by Nissan.

The rule that the appellate courts are to follow the law as it exists at the time of appeal applies to statutory change as well as decisional change, particularly when a statute is repealed. Tel Service Co., Inc. v. General Capital Corporation, 227 So.2d 667 (Fla. 1969); State ex rel. Arnold v. Revels, 109 So.2d 1 (Fla. 1959); Yaffee v. International Company, Inc., 80 So.2d 910 (Fla. 1955).

Carr v. Crosby Builders Supply Co., Inc., 283 So.2d 60 (Fla. 4th DCA 1973) is illustrative. At common law, there was no restriction upon an automobile passenger's right of recovery from a negligent driver. In 1937, Florida enacted its "guest statute," Section 320.59, protecting the driver by limiting his liability to gross negligence. Chapter 18033 §§1, 2, Laws of Fla. (1937). The guest statute was repealed in 1972. Chapter 72-1, §1, Laws of Fla. With the repeal of the guest statute, negligent drivers lost this statutory protection and were once again liable for damages caused by their simple negligence.

In Carr v. Crosby Builders, trial was held and judgment was entered for the defendant upon the application of the guest statute. The guest statute was repealed subsequent to the final judgment. The Fourth District reversed because, "We must, in

reviewing a judgment on direct appeal, dispose of the case according to the law prevailing at the time of the appellate disposition, irrespective of the law prevailing at the time of rendition of the judgment appealed." 283 So.2d at 62.

The same conclusion obtains here. At common law there was no restriction on a claim of products liability. Judgment was entered on a statute now repealed. The district court correctly reversed the judgment because the judgment was erroneous upon the statute as enacted. Repeal of the statute renders the issue moot.

In City of Orlando v. Desjardins, 11 F.L.W. 474 (Fla. September 11, 1986), this court ordered retroactive application of remedial legislation. The substantive right of access to courts granted by the constitution and preserved in Battilla was shaken by Pullum. The legislative response was repeal of the statute. It was a remedial action designed to preserve and protect the right of access to courts.

If a statute is found to be remedial in nature, it can and should be retroactively applied in order to serve its intended purposes. [11 F.L.W. at 475].

In City of Orlando v. Desjardins, as here, legislative response to case law interpretation of a statute is deserving of recognition and positive support by this court.

CONCLUSION


The petition for review should be denied. In the alternative, the district court decision should be affirmed and approved in all respects.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Respondent, Lynn Phlieger, was mailed to: GARY D. FOX, ESQ., Stewart, Tilghman, Fox & Bianchi, 1900 Courthouse Tower, 44 West Flagler Street, Miami, Florida 33130; THOMAS E. THOBURN, ESQ., 319 River Edge Boulevard, Cocoa, Florida 32922; and SHARON L. STEDMAN, ESQ., Rumberger, Kirk, Caldwell,

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