6-27-84

SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
JUN 4 1984
CLERK, SUPREME COURT
By _____ Deputy Clerk

NISSAN MOTOR CO., LTD., et al.,

Petitioners/Appellees,

v.

LYNN PHLIEGER,

Respondent/Appellant.
_____/

CASE NO. 68,823

PETITIONERS' JURISDICTIONAL BRIEF

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PRELIMINARY STATEMENT

The petitioners were the defendants in the trial court and the appellees in the Fifth District Court of Appeal and respondent was the plaintiff in the trial court and the appellant in the Fifth District Court of Appeal.

In this brief, the parties will be referred to as the "petitioners/appellees/defendants" and "respondent/appellant/plaintiff."

The following symbol will be used:

"A" Appendix

STATEMENT OF THE CASE AND FACTS

The facts as found by the Fifth District Court of Appeal are as follows:

In August, 1981, Jay Phlieger was killed as a result of an allegedly defective roof design in his Nissan truck. In June, 1983, less than two years later, his widow filed a wrongful death action against Nissan. In its motion for summary judgment, Nissan pointed out that the truck had been originally purchased on February 13, 1970, and that under the product liability statute of repose, which has a 12-year absolute limit of liability, its exposure to liability ended on February 13, 1982. Nissan argued that because on June 3, 1983, when Mrs. Phlieger filed her wrongful death action, a products liability action by her husband would have been barred, the wrongful death action was likewise barred. The trial court agreed and entered summary judgment in favor of Nissan.

The Fifth District Court of Appeal reversed the trial court and held that the action, although admittedly based on negligence, strict liability, and breach of warranty, was a wrongful death action pursuant to section 768.19, Florida Statutes, and that, therefore, section 95.031(2) did not apply, but, rather, the two-year statute of limitations for wrongful death actions as found in section 95.11(4)(d) applied.

Nissan timely filed its Notice to Invoke the Discretionary Jurisdiction of this Honorable Court.

SUMMARY OF ARGUMENT

As is made clear by the complaint filed in the instant case (App. A), the respondent filed a products liability cause of action based on a survivors right of action given them by virtue of section 768.19, Florida Statutes. Although the respondent may have had a "right of action" by virtue of section 768.19, Florida's Wrongful Death Act, they had no "cause of action" by virtue of section 95.031(2) since a products liability cause of action is defined in terms of twelve (12) years. Section 95.031(2) declares that a products liability cause of action must be brought within twelve (12) years after delivery of the completed product to its original purchaser. At the end of twelve (12) years, a manufacturer is effectively cleared of any alleged wrongdoing. Colony Hill Condo. I Assn. v. Colony Co., 320 N.E.2d 273 (N.C. App. 1984).

The Fifth District Court of Appeal's opinion has confused a "right of action" with a "cause of action." In order for the respondent to maintain a cause of action, they must prove the elements of a products liability cause of action, i.e., negligence, breach of warranty, and strict liability. These causes of action were non-existent in June of 1983. There are no independent and distinct elements to be proved under the Wrongful Death Act as the Wrongful Death Act simply gives

survivors a right of action which they did not have at common law.

Parker v. City of Jacksonville, 82 So.2d 131 (Fla. 1955), relied on by the Fifth District, deals with statutes of limitations and is simply not applicable to the instant opinion. Section 95.031(2) is not a statute of limitations but a hybrid of a statute of limitations, i.e., it is a statute of limitations up until twelve (12) years from date of delivery to the original purchaser, but a statute of repose at the end of twelve (12) years. As a statute of repose, rather than being directed at the remedy, it extinguishes the right of action itself because it sets a fixed limit after the time the product is manufactured beyond which the manufacturer would not be liable thereby acquiring its substantive quality. The function of the statute is thus to define substantive rights than to alter or modify a remedy.

The instant opinion is in conflict with decisions of this Honorable Court as the opinion has given survivors greater rights than a decedent would have had he survived. The opinion has further given survivors a separate and independent cause of action since the decedent's cause of action had expired on February 13, 1982.

ARGUMENT

POINT ON APPEAL

THIS HONORABLE COURT HAS JURISDICTION TO REVIEW THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL SINCE THE DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH OPINIONS OF THE FLORIDA SUPREME COURT.

The primary purpose of Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv) is to avoid confusion and to maintain uniformity in the case law of a state and to avoid any uncertainty that might derive from situations where conflicting decisions develop in the district courts of appeal. Lake v. Lake, 103 So.2d 639 (Fla. 1958), overruled on other grounds, Foley v. Weaver Drugs, Inc., 177 So.2d 221 (Fla. 1965). A review of the opinion rendered by the Fifth District Court of Appeal in this case shows on its face there does exist a direct conflict between its decision and decisions of this court. The petitioners submit that the district court's opinion is in direct 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).

Section 95.031(2), Florida Statutes, declares that actions for products liability under section 95.11(3) must be begun within twelve years after the date of delivery of the completed product to its original purchaser. Section 95.11(3) is the statutory authority for a products liability cause of

action. In defining a products liability cause of action, therefore, the Florida legislature has chosen to define the cause of action in terms of twelve years, i.e., if the cause of action is not brought within twelve years, there simply is no products liability cause of action. In Pullum v. Cincinnati, Inc., supra, 476 So.2d at 659, this court held that the legislature, in enacting the statute of repose, reasonably decided that perpetual liability places an undue burden on manufacturers, and it decided that twelve years from the date of sale is a reasonable time for exposure to liability for manufacturers of a product. The instant opinion, therefore, is in direct conflict with Pullum as the Fifth District Court of Appeal has extended a manufacturer's exposure to liability for an additional two years if the action is one for wrongful death.

The petitioners submit that the instant opinion is also in conflict with Pullum in that this Honorable Court held that the statute of repose was not a denial of equal protection. The instant opinion holds that injured parties fall within the twelve-year statute of repose, but their survivors do not, which the petitioners submit renders the statute of repose a denial of equal protection, which this Honorable Court specifically ruled in Pullum that it is not.

The instant opinion has also given survivors greater

rights than injured parties in redefining a products liability cause of action if the injured party dies. Such also renders the opinion to be in direct conflict with Variety Children's Hospital v. Perkins, supra, 445 So.2d at 1012, wherein this Honorable Court held that it is clear that the paramount purpose of the Florida Wrongful Death Act is to prevent a tortfeasor from evading liability for his misconduct when such misconduct results in death:

> The law of a person's right to sue for personal injuries terminated with his death. This created the anamoly that a tortfeasor who would normally be liable for damages caused by tortious conduct would not be liable in situations where the damages were so severe as to result in death. This paradox was remedied by creating an independent cause of action for the decedent's survivors.

The Fifth District Court of Appeal's opinion is in direct conflict with Perkins, as in the instant opinion, the converse is true. The petitioners would not be liable to Jay Phlieger had he lived and he had filed the instant lawsuit on the date that his survivors did since no cause of action existed as twelve years had lapsed. But, however, since Jay Phlieger died, the petitioners are allegedly liable for an extra two years.

The instant opinion has rendered the Wrongful Death Act substantive in nature by redefining a products liability cause of action. The Wrongful Death Act, however, is remedial and should be construed to fulfill its remedial function. It

was designed to fill a void in the common law, not to aggregate with all the other causes of action already existing under the common law. Perkins, supra, 445 So.2d at 1013 (Ehrlich, J. concurring).

Since the instant opinion has made the Wrongful Death Act substantive in nature, it is in further conflict with Ash v. Stella, supra, 457 So.2d at 1377 by making the Wrongful Death Act a separate and independent cause of action. The petitioners submit that the Wrongful Death Act gives survivors a right of action which is different from a decedent's cause of action. The petitioners further submit that applying the wrongful death statute of limitations of two years is an impossibility since there simply was no cause of action in June, 1983, when the wrongful death action was filed, since the statute of repose, rather than being directed at the remedy, extinguished the right of action itself on February 13, 1982. The instant opinion has given survivors an additional two years to file on a non-existent claim. The instant opinion is, therefore, in direct conflict with Ash v. Stella, supra, as Ash held that a wrongful death action is not a separate and independent cause of action.

CONCLUSION

Based on the foregoing argument and authorities cited therein, the petitioners respectfully request this Honorable Court exercise its discretionary jurisdiction and accept for review the Fifth District Court of Appeal's opinion rendered in the instant case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of June, 1986, a true and correct copy of the foregoing was placed into the United States mail, first-class postage affixed thereto, properly addressed to GARY D. FOX, ESQUIRE, 44 West Flagler Street, Suite 1900, Miami, Florida 33130-1808; to THOMAS E. THOBURN, ESQUIRE, 319 River Edge Boulevard, Cocoa, Florida 32922; and to JAMES C. BLECKE, ESQUIRE, 19 West Flagler Street, Suite 705, Miami, Florida 33130.

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