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## JURISDICTIONAL ARGUMENT

### I.

There is no jurisdictional conflict with Pullum. In Pullum, this Court reconstitutionalized §95.031(2), Florida Statutes (1975). Here, the Fifth District did not hold the statute unconstitutional. The Fifth District found the statute inapplicable by its express terms. The twelve year cap applies only to personal injury claims. It does not, by its terms, apply to wrongful death actions. The only relevance of the twelve year cap on personal injury claims for products liability is in the determination whether the decedent, at the moment of his death, would have been able to maintain a personal injury action but for his death. The Fifth District was correct when it concluded:

Nissan's argument that Mrs. Phlieger's action was barred would have merit only if her husband had been killed more than twelve years after the delivery of the truck and he himself was barred from filing suit. . . . Here, as was noted above, the twelve year statute of repose had not expired when the cause of action, for wrongful death, accrued. [487 So.2d at 1098-9].

### II.

There is no express or direct conflict with Ash v. Stella. This becomes obvious with a reading of the Fifth District's treatment of Ash v. Stella:

In Ash, the Florida supreme court held that wrongful death actions based on medical malpractice would be governed by the medical malpractice statute of limitations. The medical malpractice statute, however, specifically defined an action

for medical malpractice as including a claim in tort for damages because of death. Based on this language, the court concluded that the legislature had clearly intended the section to apply to wrongful death actions in cases where the basis for the action is medical malpractice. In contrast, here section 95.031(2) does not define a products liability action as including claims for damages because of death. [487 So.2d at 1098].

### III.

There is no express or direct conflict with Perkins. As recognized by the Fifth District in its opinion, Perkins held a wrongful death action barred where the decedent, during his lifetime, had filed a personal injury action against the tortfeasor and had fully recovered. In so holding, this Court reasoned:

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 by the Fifth District, 487 So.2d at 1098].

Here, the twelve year limitation had not yet expired at the moment of death, the time when the cause of action for wrongful death accrued. 487 So.2d at 1098-9.

### IV.

It is evident from Nissan's jurisdictional brief that it wishes to reargue the merits of the Fifth District decision, but

is unable to find a legitimate jurisdictional basis for doing so. On the merits, the Fifth District followed the clear precedent set by this Court in Parker v. City of Jacksonville, 82 So.2d 131 (Fla. 1955). In Parker, the decedent's cause of action would have been barred - if he had lived - by a twelve month statute of limitation applicable to personal injury claims against municipalities. This Court held that the wrongful death action was governed by the two year statute of limitation applicable to wrongful death claims and that the statutory beneficiaries could proceed against the municipality, even though their decedent's suit, had he lived and filed suit on the same date, would have been barred.

The statute of limitations on medical negligence claims 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 malpractice was not included within the malpractice statute until May 20, 1975, the effective date of Chapter 75-9, Laws of Florida, which for the first time defined an action for medical malpractice as including a claim for death. Although the case was reversed on other grounds in Dober v. Worrell, 401 So.2d 1322 (Fla. 1981), this Court agreed with the district court's construction of the statute of limitation. 401 So.2d at 1323.

Just as the prior 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. The products liability statute is not amenable to judicial amendment to include claims for wrongful death. Parker v. City of Jacksonville.

CONCLUSION

The petition for review should be denied.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Jurisdictional 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, Cabaniss & Burke, Post office Box 1873, Orlando, Florida 32802, this 26th day of June, 1986.

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