O/A 1-26-87

SUPREME COURT OF FLORIDA

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

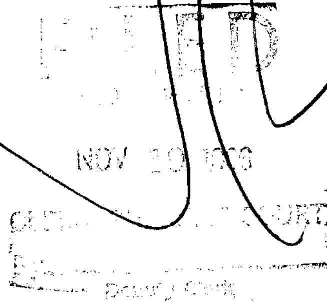
Petitioners/Appellees,

v.

CASE NO. 68,823

LYNN PHLIEGER,

Respondent/Appellant.



PETITIONERS' BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

The petitioners were the appellees and the respondent was the appellant in the Fifth District Court of Appeal. In this brief, the petitioners will be referred to as "Nissan" or "petitioners" and the respondent will be referred to as "Phlieger" or "respondent."

The following symbol will be used:

R Record on Appeal

STATEMENT OF THE CASE AND FACTS

On August 8, 1981, Jay Kirk Phlieger was killed in an automobile accident. (R. 1-9, 96-102.) On June 3, 1983, Lynn Phlieger, the wife of the decedent, brought the products liability cause of action against Nissan alleging that the truck was not crashworthy and was unreasonably dangerous in design and manufacture. (R. 1-9.) Nissan answered and asserted numerous affirmative defenses, including the statute of repose as a bar to this action. (R. 124-131.)

Nissan moved for summary judgment based on its affirmative defense that the statute of repose barred the cause of action by demonstrating that the truck was originally sold to a Floyd Currington on February 13, 1970. Therefore, section 95.031(2), Florida Statutes, barred the cause of action since the cause of action had to be brought within twelve (12) years after the date of delivery to the original purchaser (February 13, 1970) and that the instant lawsuit was not brought until after February 13, 1982. (R. 137-138, 159-180.) The trial court granted Nissan's motion for summary judgment. Phlieger appealed to the Fifth District Court of Appeal which reversed the trial court by holding that Mrs. Phlieger had two (2) years from the date of Mr. Phlieger's death to bring the instant lawsuit.

Nissan timely filed its notice to invoke discretionary jurisdiction of this Honorable Court based on conflict

jurisdiction. This Honorable Court accepted jurisdiction and the instant brief followed.

ISSUES ON APPEAL

ISSUE I

FLORIDA'S STATUTE OF REPOSE, SECTION 95.031(2), FLORIDA STATUTES, THAT WAS IN EFFECT AT THE TIME OF THE ALLEGED ACCIDENT BARRED THE INSTANT PRODUCT LIABILITY CAUSE OF ACTION THAT WAS BROUGHT MORE THAN TWELVE (12) YEARS AFTER DELIVERY OF THE AUTOMOBILE TO THE INITIAL PURCHASER.

ISSUE II

FLORIDA'S WRONGFUL DEATH ACT IS REMEDIAL IN NATURE, MERELY GIVING A SURVIVOR A RIGHT OF ACTION NOT KNOWN AT COMMON LAW AND GIVES NO GREATER RIGHTS TO THE SURVIVOR THAN THE DECEDENT WOULD HAVE HAD HAD HE SURVIVED.

SUMMARY OF THE 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 was held constitutional by this Honorable Court in *Pullum v. Cincinnati, Inc.,* 476 So.2d 657 (Fla. 1985), *appeal dismissed,* 106 S.Ct. 1626, 90 L.Ed.2d 174 (1986).

Statutes of repose do not completely abolish a cause of action but merely define a products liability cause of action in terms of a specific number of years. Therefore, statutes of repose strike a balance between the consumer and the manufacturer and its insurers. The consumer, who had no cause of action against manufacturers at common law, is given a cause of action, while the manufacturers' rights are also considered in that their liability is limited. 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 the plaintiff's cause of action was time-barred in June, 1983 when the complaint was filed since more than twelve (12) years had passed from the 1970 sale of the

vehicle. Therefore, the district court clearly erred when it held that Mrs. Phlieger had a viable cause of action.

The major fallacy with the district court's opinion is that it confused a "right of action" with a "cause of action." Section 768.19, Florida Statutes, gives survivors a remedy that they did not have at common law, that is, the statute has given them a right of action. However, once it is determined that a person has a right of action, then a determination must be made as to whether that person has a cause of action. In the instant case, although Mrs. Phlieger had a right of action, she did not have a products liability cause of action on the date that she filed her complaint since, by definition, all products liability causes of action had expired and were non-existent. Consequently, the district court's opinion expanded a non-existent cause of action for two (2) years.

ARGUMENT

ISSUE I

FLORIDA'S STATUTE OF REPOSE, SECTION 95.031(2), FLORIDA STATUTES, THAT WAS IN EFFECT AT THE TIME OF THE ALLEGED ACCIDENT BARRED THE INSTANT PRODUCT LIABILITY CAUSE OF ACTION THAT WAS BROUGHT MORE THAN TWELVE (12) YEARS AFTER DELIVERY OF THE AUTOMOBILE TO THE INITIAL PURCHASER.

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. *Bolick v. American Barmag Corporation,* 293 S.E.2d 415, 417 (N.C. 1982). 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. *Thornton v. Mono Manufacturing Company,* 425 N.E.2d 522, 525 (Ill. 2d DCA 1981).

The significance of this distinction was explained by the New Jersey Supreme Court when faced with a constitutional challenge to a ten (10) 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 ten (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 the 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's entirely at liberty to create new rights or abolish old ones as long as no right is disturbed.

Rosenberg v. Town of North Bergen, 61 N.J. 190, 199, 293 A.2d 662, 667 (1972) (emphasis added). *Accord, Cheswold Volunteer Fire Company v. Lambertson Construction Company,* 489 A.2d 413 (Del. 1984); *Colton v. Dewey,* 212 Neb. 126, 321 N.W.2d 913 (1982).

Simply put, under Florida's statute of repose, if a product liability cause of action is not begun within twelve (12) years after delivery to the original purchaser, the statute completely eliminates the cause of action for manufactured products.[1] *See Klein v. Catalano,* 386 Mass. 701, 702, 437 N.E.2d 514, 516 (1982) (interpreting the Massachusetts' statute of repose applicable to claims against architects). Consequently, the lower court's discussion and reliance on cases interpreting the Wrongful Death Act in relation to

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[1] Section 95.031(2), Florida Statutes, provides in pertinent part:

> Action for products liability under section 95.11(3) must be begun within the period prescribed in this chapter, . . . but in any event within twelve (12) years after the date of delivery of the completed product to its original purchaser. . . .

other statutes of limitation are clearly inapplicable to the instant case which involves a statute of repose. *E.g., Ash v. Stella,* 457 So.2d 1377 (Fla. 1984); *Variety Childrens Hospital v. Perkins,* 445 So.2d 1010 (Fla. 1983); *Parker v. City of Jacksonville,* 82 So.2d 131 (Fla. 1955). *Ash* and *Perkins* are important to the instant case insofar as they declare that a wrongful death action is not a separate and independent cause of action given to survivors to be discussed *infra.*

In enacting section 95.031(2), the Florida legislature defined a liability of limited duration. Filing a lawsuit 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, defendants are effectively "cleared" of any wrongdoing or obligation. *Colony Hill Condo I Ass'n v. Colony Company,* 320 S.E.2d 273 (N.C. App. 1984), *rev. den.,* 325 S.E.2d 485 (1985). Failure to file within the prescribed time period gives a defendant a vested right not to be sued. *See also Eddings v. Volkswagenwerk, A.G.,* 635 F.Supp. 45 (N.D. Fla. 1986).

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. Following a course of development in which courts expanded the products liability of manufacturers, the Florida legislature defined a

period within which a consumer's cause of action could be asserted, thereby protecting manufacturers from "open-ended" liability. In legislating the period of liability or existence of a product liability cause of action, the legislature has chosen to define as an essential element that it be filed within twelve (12) years. Consequently, if a cause of action of action is not brought within twelve (12) years, there is no cause of action by definition and no injury for which redress is available. By definition, section 95.031(2) cannot be a denial of access to the courts as there simply is no cause of action after twelve (12) years.[2]

The statute was held constitutional by this Honorable Court in *Pullum v. Cincinnati, Inc.*, 476 So.2d 657 (Fla. 1985), *appeal dismissed,* 106 S.Ct. 1626, 90 L.Ed.2d 174 (1986) (for want of a federal question), wherein this court receded from a prior decision holding the statute of repose unconstitutional. The law in Florida is that a decision of the court of last resort overruling a former decision is retrospective as well as prospective in its operation, unless specifically declared by the opinion to have a prospective effect only. *Florida Forest and Park Service v. Strickland,*

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[2] Article I, section 21 of the Florida Constitution declares that "[t]he court 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 violation of the law that it affects him adversely. *Barnes v. Kyle,* 202 Tenn. 529, 306 S.W.2d 1 (1957).

154 Fla. 472, 18 So.2d 251, 253 (1944). The *Pullum* court did not express any intention that the holding was to be applied only prospectively. Therefore, in accordance with well-established Florida law, *Pullum* has retroactive as well as prospective effect.

More importantly, however, is the long-established rule in Florida 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). The only exception to the "relation-back" rule is where a statute has received a given construction by a court of supreme court and property or contract rights have been acquired under and in accordance with such construction, such rights should not be destroyed by giving to it a subsequent overruling decision or retrospective operation. There can be no question but that the exception to the "relation-back" rule has absolutely no application to the instant case so that at the time of the filing of the instant lawsuit, the statute was constitutional and in effect. *Eddings v. Volkswagenwerk, A.G., supra,* 635 F.Supp. at 48; *Cassidy v. The Firestone Tire & Rubber Company,* 11 F.L.W. 2023 (1st DCA Sept. 23, 1986).

The lower court's statement that "here, as was noted above, the twelve-year statute of repose had not expired when the cause of action, for wrongful death, accrued" shows a

total misunderstanding of the concept of a statute of repose. A statute of repose by its very nature means that at the end of the time period, there simply is no cause of action. As it relates to the instant case, although admittedly the statute of repose had not expired on the date of the alleged accident and death of Jay Phlieger, the fact remains that the statute of repose did, in fact, expire prior to the filing of the instant lawsuit so that when the instant lawsuit was filed, there simply was no products liability cause of action existing. Although the plaintiff had a right of action when she filed the instant lawsuit, she had no products liability cause of action on which she based her complaint. The products liability causes of action which form the basis of her complaint were simply non-existent since a products liability cause of action, by definition, must be brought within twelve (12) years as the twelve-year limitation period is an essential element of the cause of action.

ISSUE II

FLORIDA'S WRONGFUL DEATH ACT IS REMEDIAL IN NATURE, MERELY GIVING A SURVIVOR A RIGHT OF ACTION NOT KNOWN AT COMMON LAW AND GIVES NO GREATER RIGHTS TO THE SURVIVOR THAN THE DECEDENT WOULD HAVE HAD HAD HE SURVIVED.

At common law, a person's right to sue for personal injuries terminated with his death. As stated in *Variety Childrens Hospital v. Perkins,* 445 So.2d 1010, 1012 (Fla. 1983), this created the anomaly that a tortfeasor who would normally be liable for damages caused by his tortious conduct would not be liable in situations where the damages were so severe as to result in death. In order to remedy this paradox, legislatures have created a remedy by enacting wrongful death acts which give the decedent's survivors a right of action.

The paramount purpose of the Florida Wrongful Death Act, section 768.01, *et. seq.*, Florida Statutes, is to prevent a tortfeasor from evading liability for his misconduct when such misconduct results in death. In the instant case, under the district court's decision, however, the defendant, who would not have been liable for damages caused by his alleged misconduct to the decedent if the decedent had filed the instant lawsuit in June of 1983, is held liable since the decedent died. Therefore, the district court's opinion has given survivors greater rights than the decedent. Further, the district court's opinion flies in the face of the purpose

of the Florida Wrongful Death Act as the defendant did not evade liability for alleged misconduct because the alleged misconduct resulted in death because the defendant would have not been liable even had the decedent lived because the lawsuit when filed was time-barred by virtue of section 95.031(2).

Florida's Wrongful Death Act provides as follows:

Right of Action . . .

> When the death of a person is caused by the wrongful act, negligence, default or breach of contract or warranty of any person, including those occurring on navigable waters, and the event would have entitled the person injured to maintain an action and recover damages if death had not ensued, the person or watercraft that would have been liable in damages if death had not ensued shall be liable for damages as specified in this Act, notwithstanding the death of the person injured, although death was caused under circumstances constituting a felony.

Section 768.19, Florida Statutes (emphasis added).

The provision that "and the event would have entitled the person injured to maintain an action" merely determines whether a plaintiff has a right of action as made clear by the title of the section -- "Right of Action." Since the Wrongful Death Act is to provide a remedy where, under the common law, none existed, that portion of the statute is to determine the right of action for death and declares that it exists only in cases where the injured party could himself maintain the action if he were living. As declared in *Love v. Hannah,* 72 So.2d 39, 42 (Fla. 1954), "[t]he 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". There is, however, a grave difference between a "right of action" and a "cause of action."

This distinction was made evident in *Love v. Hannah.* In *Love,* a suit was instituted by the administrators of the estate of Juan Estelle Hannah. In pertinent part, the complaint alleged that no husband, nor minor child, nor anyone dependent upon the deceased, now survived the said deceased. The question before the court was whether an administrator may maintain a suit under the Wrongful Death Statute in the absence of an affirmative showing of the non-existence of any other person having a precedent right of action under the statute. This court stated that the plaintiffs' right of action under the Wrongful Death Statute had to be determined by the facts existing at the time of the death of the decedent. This court continued that the allegations in the complaint that no husband, etc. *"now survives the decedent"* did not necessarily mean that such persons were not living at the time of death. This court then quoted to *Benoit v. Miami Beach Electric Company,* 85 Fla. 396, 400, 96 So. 158, 159 (1923) which held that:

> The <u>existence</u> or <u>non-existence</u> of anyone having <u>the precedent right of action</u> under the statute enters into the <u>very substance of the right of action itself</u> when instituted by any of the named classes of persons after the first; and, when the suit is brought by any of these different

> classes, except the widower husband, the declaration, in order to show a <u>cause of action</u>, should affirmatively show the non-existence of any other person having a precedent right of action over the plaintiff under the statute.

(Emphasis supplied.)

The court went on into a lengthy discussion of whether or not the precise question of whether the administrators had a right of action on the Wrongful Death Statute and the necessity of proving the non-existence of those having a prior right over the plaintiffs to maintain the action was not considered by the court. The facts in *Love* are that the wrongful death action was brought by the personal representatives of the deceased who were children of the deceased but of majority age. The facts established that Estelle Hannah was survived by a minor child that the defendants alleged had any supposed right of action. Of importance to the instant case is that although the personal representative of the decedent may have had a right of action, this did not necessarily mean that she could maintain a cause of action.

Nissan submits that once a determination has been made that the plaintiff has a right of action, then a determination must be made as to whether the plaintiff can maintain a cause of action. In the instant case, the plaintiff had a right of action in August of 1981, when the accident occurred, pursuant to the statutory right given by virtue of section 768.19. This is due to the fact that the event would have entitled

Jay Phlieger to maintain an action and recover damages if death had not ensued. However, the plaintiff could not maintain a <u>cause of action</u> in June of 1983, when she filed the instant product liability cause of action by virtue of section 95.031(2), which defines a products liability cause of action in terms of twelve (12) years. When the instant products liability cause of action was commenced, more than twelve (12) years had passed since delivery of the finished product to its initial purchaser so that there simply was no existing products liability cause of action. Mrs. Phlieger had a right of action, but, unfortunately, had no cause of action. Jay Phlieger would not have been able to maintain an action against Nissan if death had not ensued due to the running of the limitations period with regard to the personal injury suit. The district court's opinion extended a non-existent cause of action for a two-year period which is an impossibility. A products liability cause of action, by definition, expires twelve (12) years after the date of delivery of the completed product to its original purchaser-period. It is totally irrelevant as to whom brings the lawsuit as the cause of action itself is defined by a term of twelve (12) years.

The district court's opinion has made the Wrongful Death Act substantive in nature. Not only is making the statute substantive in nature contrary to this court's pronouncement

that it is remedial, it is also a legal impossibility as there are no statutory elements to be proved under section 768.19. Rather, the elements to be proved are under the products liability sections, *i.e.,* sections 95.11(3) and 95.031(2). *See Westerman v. Sears, Roebuck & Co.,* 577 F.2d 873 (5th Cir. 1978), (a wrongful death action was brought and the complaint sought recovery under the theories of negligence and breach of express and implied warranties and strict liability); *Ford v. Highlands Insurance Company,* 369 So.2d 77 (Fla. 1st DCA), *cert. den.,* 378 So.2d 345 (1979) (decedent's survivor sued for a wrongful death on counts of negligence, strict liability, and implied warranties of fitness in merchantability). Mrs. Phlieger likewise alleged that there was a defective product under theories of negligence, strict liability, etc. The theories under which Mrs. Phlieger sought recovery were barred by the definition of a products liability cause of action found in section 95.031(2).

Nissan never has contested the fact that Mrs. Phlieger had a right of action but, rather, has asserted that she simply had no cause of action. Contrary to the district court's holding that *Ash v. Stella,* 457 So.2d 1377 (Fla. 1984), supports Mrs. Phlieger's position, *Ash,* in actuality, is not applicable to the instant case. *Ash* involved a medical malpractice action and a medical malpractice statute of limitations which included death actions. On the contrary,

section 95.031(2) is a definition of a products liability cause of action as there was no products liability cause of action at common law. Therefore, in order to prove a products liability cause of action, one must prove that it was brought within twelve (12) years of delivery of the finished product to its initial purchaser. The medical malpractice statute of limitations, however, is not substantive in nature and is a true statute of limitations.

An analysis of the *Ash* opinion leads to the conclusion that this court was concerned with the issue of a survivor being able to bring a wrongful death action in cases where if the decedent had survived, the decedent would have been precluded from filing suit because of the running of the statute of limitations. In other words, this court did not want to give a survivor any greater rights than a decedent since such would run counter to the paramount purpose of the Wrongful Death Act. *Accord, Taylor v. Safeco Insurance Company,* 361 So.2d 743 (Fla. 1st DCA 1978).

It simply cannot be the law that a decedent would be barred from bringing a personal injury cause of action if he lived but that if he is unfortunate enough to die, his survivors can. That is precisely what the district court held. The district court's opinion has given a survivor a separate and distinct cause of action which is in direct conflict to *Ash v. Stella,* 457 So.2d 1377, *Variety Childrens*

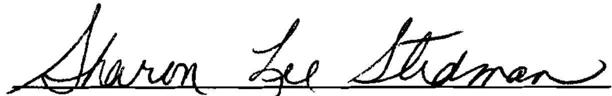
Hospital v. Perkins, supra, 445 So.2d 1010, and *Hudson v. Keene Corporation,* 445 So.2d 1151 (Fla. 1st DCA 1984), *aff'd,* 472 So.2d 1142 (Fla. 1985).

CONCLUSION

Based on the foregoing arguments and authorities cited therein, the petitioners respectfully request that this Honorable Court quash the opinion of the district court and affirm the trial court's granting of the petitioners' motion for summary judgment.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of November, 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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