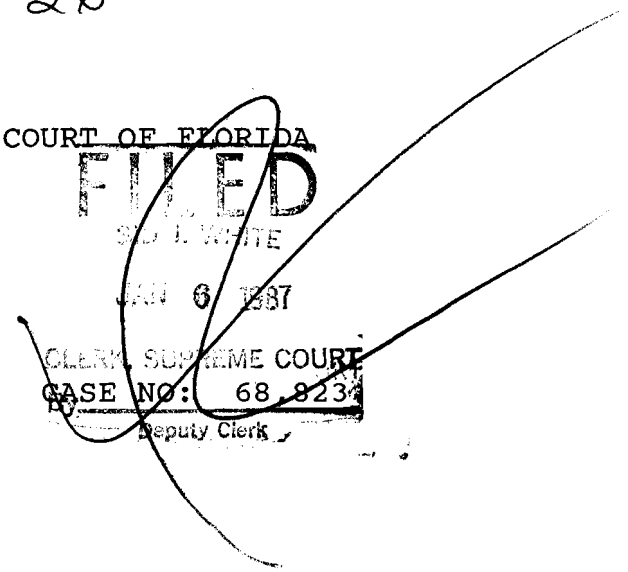
O/A 1-26-87

SUPREME COURT OF FLORIDA



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

Petitioners/Appellees,

v.

LYNN PHLIEGER,

Respondent/Appellant.

_____/

PETITIONERS' REPLY BRIEF ON THE MERITS

SHARON LEE STEDMAN
Attorney at Law
RUMBERGER, KIRK, CALDWELL,
CABANISS & BURKE
A Professional Association
11 East Pine Street
Post Office Box 1873
Orlando, Florida 32802
(305) 425-1802
Attorneys for Petitioners/
Appellees, Nissan Motor
Co., Ltd., Nissan Motor
Co. in USA, and Bob
Restina Import Center,
Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER AUTHORITIES:

PREFACE TO ISSUES ON APPEAL

In its initial brief, Nissan has alleged two points on appeal:

ISSUE I

> WHETHER 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,

and

ISSUE II

> WHETHER 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.

In her answer brief, Phlieger has raised four issues on appeal, none of which correspond to Nissan's two issues raised on appeal. Consequently, it is extremely difficult for Nissan to properly respond to Phlieger's answer brief without causing mass confusion. In order to prevent confusion brought on by the respondent, Nissan will respond to Phlieger's four points raised on appeal in the order that she has raised them. It must be noted, however, that it is normally the petitioner who raises the points on appeal since it is the petitioner's appeal.

STATEMENT OF THE CASE AND FACTS

The petitioners rely on the statement of the case and facts as set forth in their initial brief on the merits.

ARGUMENT

ISSUE I

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

Since this Honorable Court has already accepted jurisdiction based on conflict, the petitioners will only briefly point out that the opinion of the Fifth District Court of Appeal is in conflict with *Pullum v. Cincinnati, Inc.*, 476 So.2d 657 (Fla. 1985) in that *Pullum* held that an action for products liability must be begun within twelve (12) years after date of delivery of the completed product to its original purchaser. The court below held, however, that the instant action for products liability need not be begun within twelve (12) years after date of delivery of the completed product to its original purchaser by holding that the personal representative had an additional two (2) years within which to file. The respondent's allegation has evidenced a total misconception of the difference between the right of action accorded a decedent's survivors and a products liability cause of action.

The Florida Wrongful Death Act creates a right to a cause of action. *Klepper v. Breslin*, 83 So.2d 587, 591 (Fla. 1955). Consequently, section 768.19 gives the respondent a right to bring a lawsuit, but section 95.031(2) abolishes her products liability cause of action against Nissan as the

manufacturer of the vehicle. Therefore, although Phlieger has a right to bring an action, her products liability cause of action against Nissan is non-existent since it expired twelve (12) years after delivery of the Nissan to its original purchaser. The purpose of the Wrongful Death Act is to authorize suits when there was no common law authorization for such a suit, but does not give a cause of action. *See Nolan v. Moore*, 88 So. 601, 606 (Fla. 1920) (Florida's Wrongful Death Act changes a common law rule in Florida and gives a right of action for death and affords a remedy where there was none at common law).

A review of the complaint filed in the instant cause unequivocally shows that Phlieger filed a products liability cause of action against Nissan. The entire thrust of the complaint is that Nissan was negligent in the design, manufacture, and assembly of the vehicle; that Nissan breached the implied warranty of merchantability; and that Nissan was strictly liable because the vehicle was sold in a defective condition. Section 95.11(3)(e) provides that an action founded on the design, manufacture, distribution, or sale of personal property that is not permanently incorporated in an improvement to real property including fixtures must be brought within four (4) years. This is precisely the section that Phlieger brought the complaint under. Florida's statute of repose provides that actions for products liability under

section 95.11(3) must be begun within twelve (12) years after the date of delivery of the completed product to its original purchaser.

The respondent has attempted to remove wrongful death actions from the statute of repose by arguing that the statute of limitations for a wrongful death action is found under section 95.11(4) and not section 95.11(3) referred to in Florida's statute of repose. However, section 768.20 refers to "when a personal injury to the decedent results in his death. . . ." Therefore, the wording of Florida's Wrongful Death Act brings actions for wrongful death precisely within Florida's statute of repose. In *Martin v. United Security Services, Inc.*, 314 So.2d 765, 770 (Fla. 1975), this court stated that the only logical construction of section 768.21 is that it expresses the legislative intent that a separate lawsuit for death-resulting personal injuries cannot be brought as a survival action under section 46.021. Consequently, the respondent's complaint, which is a products liability cause of action complaint, is barred since there was no products liability cause of action existing when she filed her complaint for the death-resulting personal injuries sustained by Jay Phlieger.

Additionally, in *Shiver v. Sessions,* 80 So.2d 905, 907 (Fla. 1955), this court was presented with the issue of whether the disability of a wife to sue her husband for torts

committed by him prevented the wife's minor children from recovering against the estate of their stepfather who had shot and killed their mother. In holding that the wife's disability to sue her husband was not a bar to a suit under the Wrongful Death Act by the wife's surviving children, this court reasoned that the wife's disability to sue her husband for his tort was personal to her, and did not inhere in the tort. In the instant case, precisely the opposite is true, *i.e.*, the statute of repose inheres in the tort itself. Of paramount importance, however, is this court's reasoning that the act creates in the named beneficiaries an entirely new right for the recovery of damages suffered by them as a consequence of the wrongful invasion of <u>their</u> legal right by the tortfeasor. That is what is meant by the named beneficiaries having a right that is separate, distinct, and independent from that which might have been sued upon by the injured person, had he or she lived; there is a distinction between these two separate and distinct <u>rights</u> of action. Consequently, the instant respondent is a person injured by the design, manufacture, distribution or sale of personal property and comes within the purview of section 95.11(3) which provides for an action for injury to a person founded on the design, manufacture, distribution or sale of personal property.

The decision below is also in conflict with *Variety Children's Hospital v. Perkins*, 445 So.2d 1010 (Fla. 1983), in

that the decision below has made the Wrongful Death Act substantive in nature. This court specifically held in *Perkins* that the right of the decedent to maintain the action at the time of his death is a condition precedent to the survivors being able to maintain a cause of action. This court, therefore, declared that a survivor's right to maintain an action is separate and distinct from the survivor's cause of action. The survivors must, as a condition precedent to maintaining a cause of action, prove that the decedent had the right to maintain the action in order to prove that the survivors had a right to maintain an action, *i.e.*, a right of action. In other words, it is a two-step process.

This court continued that, at common law, a person's right to sue for personal injuries terminated with his death. "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." *Id.* at 1012. This paradox was remedied by creating an independent cause of action for the decedent's survivors in order to prevent a tortfeasor from evading liability for his misconduct when such misconduct results in death. The decision below has created another anomaly by holding that had the survivor lived, his lawsuit would have been barred by the statute of repose but, since he was unfortunate enough to die, his survivors have a cause of

action that he would not have had. The lower court's opinion has totally changed the complexities of the Wrongful Death Act by attempting to make it substantive in nature rather than remedial as expressed by not only this court but by the Florida legislature in section 768.17 which expressly declares that the Wrongful Death Act is remedial.

Once the respondent has shown that she has a right to bring a cause of action, the rhetorical question is what elements does she have to prove? If the Wrongful Death Act is substantive as so declared by the Fifth District, then there must be elements under the Act which, of course, there are not. The answer, rather, is that she must then prove the elements of a products liability cause of action. One of the elements of a products liability cause of action is that it must be brought within twelve (12) years of date of delivery of the completed product to its original purchaser. Since the respondent cannot satisfy this element of proof, her entire case must fail. There are simply no "wrongful death elements" to prove since section 708.19 is merely remedial.

The decision below is also in conflict with *Ash v. Stella*, 457 So.2d 1377 (Fla. 1984) in that *Ash* also makes the distinction between a right of action and a cause of action. *Ash* was likewise concerned with which statute of limitations govern a wrongful death action where the negligence complained of was medical malpractice. The instant case, however, has attempted

to use *Ash* as authority when, in fact, *Ash* is not authority for the proposition espoused by the Fifth District Court of Appeal. The issue in *Ash* was when does a statute of limitations begin to run in wrongful death actions where the negligence complained of is medical malpractice. In the instant case, there is no question as to when any statute of limitations begins to run since the instant case deals with a statute of repose that does not depend on a time of injury for the beginning of the running of the limitations period, but, rather, begins to run from the date of delivery of the completed product to its original purchaser. Consequently, the lower court's reliance on *Ash* is a misapplication of the principle of law involved in *Ash*. The lower court, like the respondent, has confused the statute of repose with statutes of limitations.

ISSUE II

SECTION 95.031(2) DOES BAR A WRONGFUL DEATH ACTION EVEN WHERE THE TWELVE (12) YEAR STATUTE OF REPOSE HAD NOT EXPIRED ON THE DATE OF DEATH AND THE WRONGFUL DEATH ACTION IS FILED WITHIN TWO YEARS FROM THE DATE OF DEATH.

The major fallacy with the respondent's asserted Point II is that section 95.031(2) is substantive and defines as an element of a products liability cause of action that it must be brought within twelve (12) years of the date of delivery of the product to its original purchaser. The petitioners agree that this is a wrongful death action and that the

applicable statute of limitations is section 95.11(4)(d). However, the instant action is a products liability cause of action wherein it must first be determined that there is a cause of action before it is determined how many years a person has to bring the action. The respondent has again confused statutes of limitations with a statute of repose.

As discussed *supra*, a wrongful death action is a lawsuit for a death-resulting personal injury. Accordingly, once it is determined that a survivor has a right of action, then it must be determined whether that survivor has a cause of action. A plain reading of the statute shows that although the respondent had a right to bring the lawsuit because the decedent had a right to maintain a suit at the moment of his death, she did not have a products liability cause of action pursuant to section 95.031(2) because the lawsuit was not filed within twelve (12) years. Therefore, the two year statute of limitations for wrongful death actions never comes into play.

The respondent's reliance on *Parker v. City of Jacksonville*, 82 So.2d 131 (Fla. 1955), is misplaced at the very least. As correctly stated by the respondent, the sole issue before this court in *Parker* was whether an action for wrongful death against a municipality was governed by the twelve (12) month statute of limitation period prescribed in section 95.21 or the two (2) year statute of limitation period

prescribed by section 95.11(6). In the instant case, however, the issue is not which statute of limitations period to apply but, rather, whether there is a products liability cause of action upon which the respondent can base her complaint. Both of the limitations periods involved in *Parker* were statutes of limitations contrary to the respondent's allegation that the statute could be viewed as a statute of limitation or repose. The statute of limitations found in section 95.24 could not, by definition, be a statute of repose as the limitation period was contingent on the running for an injury to occur. *Lamb v. Volkswagenwerk,* 631 F.Supp. 1144, 1147 (S.D. Fla. 1986). A statute of repose, on the other hand, terminates the right to bring an action after the lapse of a specified period. "The right to bring the action is foreclosed when the event giving rise to the cause of action does not transpire within this interval." *Id.* A statute of repose, therefore, is triggered once the product is delivered to its original purchaser and is not contingent on the happening of a wrong or injury.

What is involved in the instant case is a two-step process. As correctly stated by the respondent, a plaintiff's <u>right of action</u> under the wrongful death statute must be determined by the facts existing at the time of the death of the decedent, citing to *Love v. Hannah*, 72 So.2d 39, 41 (Fla. 1954). After a determination is made that there is a

right of action, then a determination must be made whether there is a cause of action. The instant case is concerned with whether Mrs. Phlieger had a cause of action when she filed her lawsuit. In *Variety Children's Hospital v. Perkins, supra*, 445 So.2d 1010, the plaintiff was unable to maintain her right to bring an action since the decedent had no right of action against the tortfeasor at the moment of his death because his cause of action had already been litigated, proved and satisfied. In *Perkins*, therefore, there was no need to go on to the second step of the process since the plaintiff could not satisfy the first step.

In the instant case, although the respondent could satisfy the first step of the process in that she had a right to maintain an action, she could not satisfy the second step of the process because she was unable to state a cause of action against Nissan because the products liability action against the manufacturer had expired when the suit was filed. As declared by this Honorable Court in *Shiver v. Sessions, supra*, 80 So.2d at 908:

> A right of action is a remedial right affording redress for the infringement of a legal right belonging to some definite person, whereas a cause of action is the operative facts which give rise to such right of action. Where a legal right is infringed, there accrues, *ipso facto,* to the injured party a right to pursue the appropriate legal remedy against the wrongdoer. This remedial right is called a right of action.

When the instant complaint was filed, there was no legal wrong for which redress was available. So, although the respondent had a right or a remedy, there was no legal injury for which this right could attach. Since the lawsuit was filed more than twelve (12) years after delivery of the vehicle to its original purchaser, the alleged injury forms no basis for recovery. Mrs. Phlieger 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." *Rosenberg v. Town of North Bergen,* 61 N.J. 190, 199, 293 A.2d 662, 667 (1972).

Additionally, the respondent's assertion that the statute of repose does not apply to wrongful death actions since the statute refers to section 95.11(3) speaks in terms of an action for injury to a person is to no avail in light of section 768.20 which speaks in terms of personal injury to the decedent resulting in his death. Consequently, a wrongful death action does come within the purview of section 95.031(2) since it is an injury to a person, but the injury results in death. As discussed *supra*, a statute of limitations begins to run at the date of decedent's death. Section 95.031(2), however, is not a pure statute of limitations but, rather, is a hybrid statute of limitations since it begins to run at a point of time unrelated to the date of injury or death. Consequently, there is no issue as to which of two statutes

of limitations to apply since the products liability statute of repose is not a statute of limitations.

Since part of the definition of a products liability cause of action is that the lawsuit must be filed within twelve (12) years of date of delivery of the completed product to its original purchaser, if the lawsuit is not filed within said period, the court lacks subject matter jurisdiction to entertain the complaint. Accordingly, the trial court lacks subject matter jurisdiction to hear the respondent's complaint; although she had a right to bring the complaint, there was no subject matter jurisdiction. The statute of repose clearly is an additional limit on a suit brought within the existing statutes that relate to the date of injury. Therefore, the Wrongful Death Act and the statute of repose must be read in conjunction. There is simply no cause of action on which to attach the two (2) year wrongful death statute of limitations period. You simply cannot have a two (2) year statute of limitations period on a non-existent claim.

ISSUE III

PULLUM v. CINCINNATI, INC. SHOULD BE APPLIED RETROACTIVELY.

The respondent's allegation that she had a vested right to file her lawsuit by virtue of an opinion out of this court to which she was not a party is beyond comprehension. Under the respondent's theory, a court could never admit it had

made a mistake and overrule or recede from a prior decision because it would be impairing vested rights. *Battilla v. Allis Chalmers Manufacturing Company,* 392 So.2d 894 (Fla. 1980) did not give Mrs. Phlieger a cause of action. She had a cause of action by virtue of the accident that her husband was involved in. *Battilla* was a ruling on the constitutionality of a statute and allowed litigants to file lawsuits that they never should have been allowed to file. Mrs. Phlieger did not file her lawsuit because of *Battilla,* but, rather, filed her lawsuit because her husband was killed in an accident.

A vested right is more than a mere expectation based upon an anticipated continuance of an existing rule of law. *Lamb v. Wedgewood South Corporation,* 302 S.E.2d 868 (N.C. 1983). 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). The respondent did not have a vested right based on *Battilla,* but, rather, the mere expectation that the law would continue as set forth in *Battilla.*

It has been held by the United States Supreme Court that there is no impediment -- constitutional or philosophical-- that prohibits giving a judicial decision retrospective effect. *Dejon v. United States,* 382 U.S. 406, 410, 86 S.Ct. 459, 461-462, 15 L.Ed.2d 453 (1966). In *Chevron Oil Company*

v. Huson, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971), the court was presented with a decision that it overrule long-standing precedent. The issue involved was whether a state statute of limitations applied under the Maritime Law or laches applied. The *Huson* court was concerned with a genuine new principle of law, not the overruling of a prior decision that had held a statute unconstitutional. Additionally, the court in *Huson* made clear that its ruling on retroactivity would be different if it were dealing with a diversity case. *Id.,* at 404 U.S. 103, n.5. In *Hartman v. Westinghouse Electric Corporation,* No. 83-517-CIV-ORL (M.D. Fla. 1985), *affirmed,* No. 85-3967 (11th Cir. June 20, 1986) (Appendix 1), the federal court did not and correctly so, apply *Huson.* The court instead cited to the general rule set forth in *Florida Forest and Park Service v. Strickland,* 18 So.2d 251 (Fla. 1944) and ruled *Pullum* to have retrospective as well as prospective application. The only state courts to have ruled on the issue have likewise held *Pullum* to apply retroactively. *Sharp v. Food Equipment Supply, Inc.,* No. 86-461 (Fla. 2d DCA Nov. 7, 1986) (Appendix 2); *Cassidy v. The Firestone Tire & Rubber Company,* 11 F.L.W. 2023 (1st DCA Sept. 23, 1986) (Appendix 3); *American Liberty Insurance Company v. West & Conyers, Architects and Engineers,* 491 So.2d 573 (Fla. 2d DCA 1986).

An example of when a new principle of law has been

established by this court can be found in *Hoffman v. Jones,* 280 So.2d 431 (Fla. 1973). In *Hoffman,* this court replaced the contributory negligence rule with the principles of comparative negligence. In so doing, this court analyzed certain factors in deciding whether or not *Hoffman* should be held retroactively. In *Pullum,* on the other hand, this Honorable Court did not analyze whether or not *Pullum* should be applied retroactively since *Pullum* did not involve a new principle of law. For this Honorable Court to hold that *Pullum* should not be applied retroactively, this court would have to change all of the well-established law in Florida dealing with decisions overruling prior decisions on the constitutionality of a statute. Statutes are either constitutional or unconstitutional *ab initio.* The *Pullum* court was not concerned with principles of law, but was concerned with the constitutionality of a statute.

The well-established law in Florida is that a decision of the court of last resort overruling a former decision is retrospective as well as prospective in operation, unless specifically declared by the opinion to have a prospective effect only. *Florida Forest and Park Service v. Strickland, supra,* 18 So.2d at 253. "Retroactivity" is a misnomer because 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 decision as was the situation in *Huson*.

ISSUE IV

SINCE SECTION 95.031(2) IS SUBSTANTIVE IN NATURE, THE AMENDMENT TO SAID STATUTE APPLIES ONLY TO CAUSES OF ACTION ACCRUING AFTER ITS EFFECTIVE DATE.

It must initially be pointed out that section 95.031(2) was not repealed and remains on the books insofar as fraud is concerned but was merely amended to delete a portion thereof dealing with products liability. Consequently, different principles of law are involved. Additionally, the only statutory changes that are applied to pending appeals are when the statute that is changed is remedial in nature. As discussed extensively in its initial brief and *supra*, section 95.031(2) is substantive in nature in that it defined an element of a products liability cause of action. Consequently, the cases relied on by the respondent just simply are not applicable to the instant case. *See Tell Service Company, Inc. v. General Capital Corporation,* 227 So.2d 667 (Fla. 1969); *State Ex Rel Arnold v. Revel,* 109 So.2d 1 (Fla. 1959); *Yappy v. International Company, Inc.,* 80 So.2d 910 (Fla. 1955). *Carr v. Crosby Builders Supply Company, Inc.,* 283 So.2d 60 (Fla. 4th DCA 1973) is also inapplicable to the instant case as the guest statute was repealed and, therefore, taken off of the books. In the instant case, however, the legislature chose to call it an amendment and call it an amendment they must since they were dealing with a substantive

statute and they were only deleting a portion thereof.

The fact that the statute of repose was amended in 1986 is simply irrelevant and has no application to the instant case. The general rule is that a statute is presumed to be prospective only, unless the legislature has "expressly in clear and explicit language expressed an intention, that the statute be retroactively applied." *Foley v. Morris,* 339 So.2d 215, 216 (Fla. 1976). *Accord, Young v. Altenhaus,* 472 So.2d 1152 (Fla. 1985); *State v. Lavazzoli,* 434 So.2d 321 (Fla. 1983); *Stuyvesant Insurance Company v. Square D Company,* 399 So.2d 1102 (Fla. 3d DCA 1981). The only exception is that a statute which is remedial in nature may be applied retroactively.

The precise language of the amending section dealing with the statute of repose precludes a finding that the legislature's intention was to render the section retroactive. Specifically, this court in *Foley v. Morris, supra,* 399 So.2d at 215, determined that the identical language to that presented in the instant amended statute, *i.e.,* "this act shall take effect on July 1, 1972," did not manifest an intent to do otherwise and prospectively applied the new statute. *Id.* at 217. Thus, since the language used in connection with the statute of repose does not reveal a retroactive intent, the respondent' argument must fail.

This court and district courts of appeal have consistently

held that a statute of limitations or repose will not be applied retroactively. Specifically, when 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 Insurance Company v. Square D Company, supra,* 399 So.2d at 1102 (statute of repose applicable to improvements to real property cannot be retroactively applied to shorten plaintiff's time to sue); *Foley v. Morris, supra,* 399 So.2d at 215 (new statute of limitation which shortened time to sue from four years to two years could not be applied retroactively); *Garafalo v. Community Hospital of South 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 the plaintiff was not entitled to the benefit of an amendment lengthening the statute of limitations. In that case, the plaintiff was injured on April 2, 1973, as a result of the defendant's alleged medical malpractice. Suit was instituted on July 9, 1976. At the time the injury occurred, the governing statute of limitations 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 the plaintiff's

cause of action would not have been precluded. This court held that the amendment to the statute applied prospectively only and thus the plaintiff could not obtain the benefit of the lengthened statute of limitations. As the dissent pointed out, this decision expanded prior cases which had 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 Denzen & 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 Corporation,* 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 the 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 (1975), which provides that all products liability actions would be barred if not filed within twelve (12) years from the delivery of the product to the original

purchaser. The fact that the legislature subsequently amended this statute so as to no longer provide a bar after twelve (12) years cannot alter the plaintiff's or defendant's rights acquired under the prior statutes. *See also, C.B.S., Inc. v. Jarrod,* 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, 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 5th day of January, 1987, 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.

Sharon Lee Stedman

SHARON LEE STEDMAN
Attorney at Law
RUMBERGER, KIRK, CALDWELL,
CABANISS & BURKE
A Professional Association
11 East Pine Street
Post Office Box 1873
Orlando, Florida 32802
Phone: (305) 425-1802
Attorney for Petitioners/
Appellees, Nissan Motor
Co., Ltd., Nissan Motor
Co. in USA, and Bob Restina
Import Center, Inc.

SLS/cdp
1/5/87
N4-2635