SUPREME COURT OF FLORIDA

CASE NO. 71,106

J. I. CASE COMPANY, a foreign corporation,

Defendant/Petitioner

v.

SHEILA HENLEY, as Personal Representative of the Estate of NATHANIEL HENLEY, SR., Deceased,

Plaintiff/Respondent.

ON REVIEW OF A DECISION OF THE DISTRICT COURT OF APPEAL, THIRD DISTRICT

INITIAL BRIEF OF PETITIONER

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INTRODUCTION

The J. I. Case Company, Petitioner, (hereinafter referred to as "Case"), seeks affirmation of a summary judgment entered on its behalf on statute of repose grounds. The summary judgment was reversed by the Third District Court of Appeals on rehearing in Henley v. J. I. Case, Co., 12 FLW 1726 (Fla. 3DCA July 14, 1987) and the following question was certified as being of great public importance:

> DOES THE STATUTE OF REPOSE BAR A WRONGFUL DEATH ACTION WHERE THE DEATH OCCURRED MORE THAN TWELVE YEARS AFTER THE ORIGINAL PURCHASE OF THE PRODUCT WHICH ALLEGEDLY CAUSED THE DEATH?

This brief concludes by requesting that the court answer the certified question affirmatively, quash the decision of the District Court of Appeal and remand with instructions that the District Court affirm the trial court's decision. [1]

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[1]Reference to the record on appeal will be by the symbol ("R") while references to the appendix will be by the symbol ("App").

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STATEMENT OF THE CASE AND FACTS

NATHANIEL HENLEY died on March 7, 1985 when he was struck by a Travelift, a large crane-like machine used to transport heavy concrete forms from one location to another. The Travelift involved in this case was manufactured by the Petitioner CASE and was sold and delivered to its original purchaser in 1971 (R.16). Mr. Henley was survived by his wife, two year old son and parents.

On June 12, 1985 Mr. Henley's wife, (hereinafter referred to as "Henley"), as personal representative, filed a wrongful death suit, grounded in products liability, against CASE. (R.1-7). The respondent alleged, among other things, that the Travelift lacked adequate safety devices, including but not limited to, wheel guards. On September 16, 1985, CASE filed a motion for summary judgment (R.11) based on the Supreme Court's decision in Pullum v. Cincinnati, 476 So.2d 657 (Fla. 1985). CASE argued that since the Travelift crane was more than twelve years old at the time of the accident, the plaintiff was precluded from filing the wrongful death action. This motion was eventually denied on April 23, 1986. (R.42-43).

On October 3, 1986 CASE filed a renewed motion for summary judgment (R.55-56) which was subsequently granted by the

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court on November 19, 1986. (R.58). Henley then appealed to the Third District Court of Appeals. (R.59).

On May 26, 1987, the Court, in a per curiam opinion, affirmed the summary judgment entered for Petitioner CASE. (App.1). The court specifically relied on the authority of Shaw v. General Motors Corp., 503 So.2d 362 (Fla. 3DCA 1987) and in addition certified to the Florida Supreme Court as questions of great importance the three questions certified in Clausell v. Hobart Corp., 506 So.2d 1160 (Fla. 3DCA 1987).

On May 28, 1987, two days after the Third District's original opinion, this court issued its opinion in Nissan Motor Company Limited v. Phlieger, 508 So.2d 713 (Fla. 1987). Based on that authority, Henley subsequently asked the Third District for a rehearing, contending that pursuant to Phlieger, the statute of repose had no application to wrongful death actions. CASE, in reply to the motion for rehearing, asserted that since the wrongful death statute gives to the decedent's beneficiaries only those rights which the decedent had before death, and that since the statute of repose would have barred Henley's product liability claim had he lived, the wrongful death claim was similarly barred. On July 14, 1987 the court granted Henley's motion for rehearing (App.2-4), reversed the summary judgment entered on behalf of CASE and, as indicated, certified to this

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court the following question as being one of great public importance;

> DOES THE STATUTE OF REPOSE BAR A WRONGFUL DEATH ACTION WHERE THE DEATH OCCURRED MORE THAN TWELVE YEARS AFTER THE ORIGINAL PURCHASE OF THE PRODUCT WHICH ALLEGEDLY CAUSED THE DEFECT.

This petition, seeking an affirmative answer to the aforementioned question followed.

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ISSUES ON APPEAL

Reversal of the trial court's summary judgment entered on behalf of CASE necessitates an answer to the three questions originally certified by the Third District Court of Appeal as well as the fourth. Accordingly this brief will address the issues raised by those questions. The questions or points on appeal are as follows:

POINT I

WHETHER THE LEGISLATIVE AMENDMENT OF SECTION 95.031(2) FLA. STAT. (1983) ABOLISHING THE STATUTE OF REPOSE IN PRODUCT LIABILITY ACTIONS, SHOULD BE CONSTRUED TO OPERATE RETROSPECTIVELY AS TO A CAUSE OF ACTION WHICH ACCRUED BEFORE THE EFFECTIVE DATE OF THE AMENDMENT.

POINT II

IF NOT, WHETHER THE DECISION OF PULLUM V. CINCINNATI INC., 476 SO.2D 657 (FLA. 1985), APPEAL DISMISSED, ___US_____, 106 S.C.T. 1626, 90 L.Ed.2d 174 (1986), WHICH OVERRULED BATTILLA V. ALLIS CHALMERS MFG. CO., 392 SO.2D 874 (FLA. 1980), APPLIES SO AS TO BAR A CAUSE OF ACTION THAT ACCRUED AFTER THE BATTILLA DECISION BUT BEFORE THE PULLUM DECISION.

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POINT III

WOULD THE APPLICATION OF PULLUM, TO BAR A CAUSE OF ACTION THAT ACCRUED AFTER THE BATTILLA DECISION BUT BEFORE THE PULLUM DECISION DEPRIVE THE PLAINTIFF OF A RIGHT OF DUE PROCESS GUARANTEED BY THE UNITED STATES CONSTITUTION?

POINT IV

DOES THE STATUTE OF REPOSE BAR A WRONGFUL DEATH ACTION WHERE THE DEATH OCCURRED MORE THAN TWELVE YEARS AFTER THE ORIGINAL PURCHASE OF THE PRODUCT WHICH ALLEGEDLY CAUSED THE DEATH?

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SUMMARY OF THE ARGUMENT

The trial court's ruling granting summary judgment for the defendant CASE should be affirmed on statute of repose grounds. A retroactive application of the governing case, Pullum v. Cincinnati Inc., 476 So.2d 657 (Fla. 1985), dictates that the plaintiff's cause of action herein is barred by the twelve year statute of repose set forth in Fla. Stat. 95.031(2) (1979) since the accident in which Henley was killed occurred more than twelve years after it was sold and delivered to its original purchaser in 1971 (R.16).

Phlieger v. Nissan Motor Company, ___So.2d_____, 12 FLW at 257, does not call for a contrary result. Phlieger simply stands for the proposition that only wrongful deaths occurring prior to the expiration of the statute of repose can be sued on since the wrongful death statute gives to the decedent's beneficiaries only those rights which the decedent had before death. Since therefore, the statute of repose would have barred Henley's product liability claim had he lived, the wrongful death claim is likewise barred.

Additionally, there is no constitutional bar, state or federal, to a retroactive application of Pullum since the plaintiff has acquired no vested property or contract rights which were entitled to protection by way of the "common sense" excep-

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tions to retroactive application of overruling decisions as set forth in Florida Forest and Park Service v. Strickland, 18 So.2d 251 (1944).

Finally, the amendment of Fla. Stat. §95.0312(2) which abolishes the statute of repose in product liability actions, cannot be construed to operate retrospectively because of the absence of any express legislative declaration to that effect. In any event, since the previously existing limitation period had run at the time the amendment became effective, the amended statute cannot be applied to the facts of this case.

ARGUMENT

POINT I

THE LEGISLATIVE AMENDMENT OF SECTION 95.031(2), FLA. STAT. (1983), ABOLISHING THE STATUTE OF REPOSE IN PRODUCT LIABILITY ACTIONS, SHOULD NOT BE CONSTRUED TO OPERATE RETROSPECTIVELY AS TO A CAUSE OF ACTION WHICH ACCRUED BEFORE THE EFFECTIVE DATE OF THE AMENDMENT

Fla. Stat. §95.031(2) (1983) was recently amended by the Florida Legislature. The amended statute eliminated the twelve year statute of repose for product liability actions as of its effective date of July 1, 1986. The argument that the amended statute should be construed to operate retrospectively to the facts of this case is contrary to the great weight of authority in Florida. The presumption is against retroactive application in the absence of express manifestation of legislative intent to the contrary. Foley v. Morris, 339 So.2d 215 (Fla. 1976); Seddon v. Harpster, 403 So.2d 409 (Fla. 1981). In accordance with the general rule, Florida courts have consistently refused to apply a change in the statute of limitations retroactively absent such a clear indication of legislative intent to the contrary. See Foley v. Morris, supra; Homemakers Inc. v. Gonzales, 400 So.2d 965 (Fla. 1981); Walter

Denson & Son v. Nelson, 88 So2d 120 (Fla. 1956); Brooks v. Cerrato, 355 So.2d 119 (Fla. 4DCA 1978); Stuyvesant Insurance Company v. Square D. Company, 399 So.2d 1102 (Fla. 3DCA 1981); Garafalo v. Community Hospital of South Broward, 382 So.2d 722 (Fla. 4DCA 1980). In Dade County v. Ferro, 384 So.2d 1283 (Fla. 1980), this court once again affirmed the general rule and specifically approved of the following language from American Jurisprudence:

> Where the legislature has not sufficiently manifested its intent whether a statutue of limitations should apply restrospectively or should apply prospectively only, the question is passed on to the courts to determine as a matter of construction in which of these ways the statute should apply. In most jurisdictions, in the absence of a clear manifestation of legislative intent to the contrary, statutes of limitations are construed as prospective and not retrospective in their operation, and the presumption is against any intent on the part of the legislature to make such a statute retroactive. Thus, rights accrued, claims arising, proceedings instituted, orders made under the former law, or judgments rendered before the passage of an amended statute of limitations will not be effected by it, but will be governed by the original statute unless a contrary intention is expressed by the legislature in the new law. 384 So.2d at 1285 Citing 51 AM. JUR. 2d §57, Limitation of Actions.

Clearly, there has been no expression of an intention to apply the amended statute of repose retrospectively. In any event, the defendant/petitioner had a vested right to freedom

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from this suit because the statute of repose had run approximately three years before Mr. Henley was involved in this accident. Hence a later abolition or amendment of the statute could not destroy that vested right. The reason is that the great preponderance of authority supports the general view that after a cause of action has become barred it cannot be revived by the legislature by extending the limitation period or repealing the limitation statute. Florida is in accord with this general rule. See e.g. La Floridienne v. Seaboard Airline Railway, 59 Fla. 196, 52 So. 298 (Fla. 1910); Bahl v. Fernandina Contractors Inc., 423 So.2d 964 (Fla. 1DCA 1982); See also CBS, Inc. v. Garrod, 622 F.Supp 532 (M.D. Fla. 1985)

In sum, the presumption is against retroactive application in the absence of expressed manifestation of legislative intent to the contrary. Foley, supra. Since there is no such expression in Chapter 272, Amended Statute Section 95.0312, any argument that the provisions may be applied retrospectively must fail.

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ARGUMENT

POINT II

THE DECISION OF PULLUM V. CINCINNATI INC. WHICH OVERRULED BATTILLA V. ALLIS CHALMERS MFG.CO. APPLIES SO AS TO BAR A CAUSE OF ACTION THAT ACCRUED AFTER THE BATTILLA DECISION BUT BEFORE THE PULLUM DECISION

In Battilla v. Allis Chalmers Mfg. Co. this court struck down §93.031(2) as being contrary to the plaintiff's right of access to the courts as guaranteed by Article 1, Section 21 of the Florida Constitution. In Pullum the court reversed its prior ruling in Battilla and held that the statute was not unconstitutional. The court, citing Justice McDonald's dissent in Battilla, held that a rational and legitimate legislative basis for enacting the statutue existed "particularly in view of the relatively recent developments in expanding liability of manufacturers." In so ruling, however, the court did not specifically state what effect Pullum would have on those persons injured prior to Pullum such as Henley. Established principles of Florida law however dictate that Pullum is to be given retrospective as well as prospective effect. As early as 1911 this court held in Christopher v. Mungen, 61 Fla. 513, 55 So.273 (1911) as follows:

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> Where a statute is judicially ajudged to be unconstitutional, it will remain inoperative while the decision is maintained; but, if the decision is subsequently reversed, the statute will be held to be valid from the date it first became effective, even though rights acquired under the particular ajudications where the statute was held to be invalid will not be effected by the subsequent decision that the statute is unconstitutional. 55 So. at 280.

As this case makes clear, an incorrect decision vests no rights in anyone. Hence, a retroactive application of Pullum which validates the statute of repose as of its effective date, cannot deprive the plaintiff of a vested right because the claim or right to sue never vested.

The generally recognized exception to this rule. i.e. that where 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, is not applicable. See Florida Forest and Park Service, Strickland 18 So.2d 251 (1944). In Strickland a claimant in a workers' compensation case appealed an unfavorable order of a commissioner directly to the circuit court. At the time of the appeal the governing statute permitted such review. Following a circuit court ruling in favor of the claimant, the employer appealed to

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the Supreme Court which held that an appeal to the circuit court was not proper until after review by the Florida Industrial Commission. The employer then argued that the new procedure should be applied to the claimant but the Supreme Court rejected that position since the plaintiff had relied on the overruled decision in appealing to the circuit court and the time period for review by the Industrial Commission had expired. In contrast to the case sub judice, in Strickland, retroactive application would have deprived the claimant of both a substantive right to a compensation payment and a procedural right to review of the commissioner's order by the circuit court. The situation facing this court is dissimilar. The only case law remotely supporting plaintiff's position is the general proposition that once a parties rights have been finally determined through litigation, an attempt to reopen a question on the basis of an overruling decision would be contrary to the principles of res judicata. (See 10 ALR 3D 1371 footnote 4 and cases cited herein).

As the aforementioned authorities indicate, decisions of a court of last resort are not the law, but only evidence of what the court thinks the law is. The law as construed in an overruled case is considered as though it had never existed and the law as construed in the last case is considered as though it has always been the law. As a general rule, therefore, the law

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as construed in the last decision operates both prospectively and retrospectively expect that it will not be permitted to disturb vested rights. Clearly there can be no vested rights to a claim for damages until judgment is rendered thereon. Finally, the additional contention that the expenditure of litigation costs which occurred prior to Pullum, constitutes a detrimental change requiring the application of the "common sense exception" set forth in Strickland has been rejected by all courts that have considered it. See Cassidy v. Firestone Tire & Rubber Company, 495 So.2d 801 (Fla. 1DCA 1986); Tate v. Ford Motor Company, 500 So.2d 743 (Fla. 5DCA 1987). This argument also ignores the court's holding in Pullum. Certainly as in this case, the plaintiff in Pullum filed a cause of action based on a prior ruling of the court (Battilla). It would be inconsistent in the least to justify a reversal on the reliance argument in this case and at the same time ignore the Supreme Court precedent in Pullum. The bottom line is that there is no Florida authority to support the argument that Henley should be allowed to maintain a cause of action simply because an incorrect decision which would permit her to maintain that cause of action had not yet been overruled at the time of the filing of the action. Hence, the summary judgment on behalf CASE cannot be rejected on this basis.

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ARGUMENT

POINT III

THE APPLICATION OF PULLUM TO BAR A CAUSE OF ACTION THAT HAD ACCRUED AFTER THE BATTILLA DECISION BUT BEFORE THE PULLUM DECISION DOES NOT DEPRIVE THE PLAINTIFF OF A RIGHT OF DUE PROCESS GUARANTEED BY THE UNITED STATES CONSTITUTION

Any assertion that retroactive application of Pullum violates Henley's federal due process and equal protection rights is ill-founded. As a general proposition state legislatures are presumed by Federal Courts to have acted constitutionally in making laws. Hartford Fire Insurance Company v. Lawrence, Dykes, Goodenberger, 740 F.2d 1362, 1366 (6th Cir. 1984); McDonald v. Board of Election Commissioners, 394 US 802, 809, 89 S.Ct. 1404. 1408, 22 L.ed. 2d 739 (1969); Wilson v. Robinson, 668 F.2d 380, 383 (8th Cir. 1981); and Alabama State Federation of Teachers v. James, 656 F.2d 193, 195 (5th Cir. 1981).

Additionally, as the court in Hartford Fire Insurance Company recognized the United States Supreme Court has indicated that it does not perceive any violation of the United States Constitution under statutes of repose. Appeals from a state court decision that such statutes were constitutional have twice been dismissed by the Supreme Court on the grounds that no

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substantial federal question was presented. See Carter v. Hartenstein, 445 S.W.2d 918 (Ark. 1970), appeal dismissed, 401 U.S. 901, 91 S.Ct. 868, 27 L.ed. 2d 800 (1971); Ellerbe v. Otis Elevator Company, 618 S.W. 2d 870 (Tex. Civ. App. 1981), appeal dismissed, 459 U.S. 802, 103 S.Ct.24, 74, L.Ed.2d 39 (1982). The Supreme Court has emphasized that by dismissing for lack of a substantial federal question, it is deciding a case on the merits. Hicks v. Miranda, 422 U.S. 332, 334, 95 S.Ct. 2281, 2289, 45 L.Ed. 2d 223 (1975). Subsequently three state courts have taken notice have also and recognized that these dismissals stand for the proposition that the statutes of repose do not present federal constitutional problems. See Shibuya v. Architects Hawaii, Ltd., 647 P.2d 276, 288 n.15 (Ha. 1982); State Farm Fire and Casualty Company v. All Electric, Inc., 660 P.2d 995, 998 n.2 (1983); Harmon v. Angus R. Jessup, Associates, Inc. 619 S.W.2d 522, 524 (Tenn. 1981).

Finally, the two federal district courts in Florida which have faced this question have reached the same decision on similar facts. See Lamb v. Volkswagenwerk, 631 F.Supp 1144 (S.D. FLa. 1986) and Eddings v. Volkswagenwerk, 635 F.supp. 45 (N.D. Fla. 1986). The issue is clearly one of state law and as that law dictates, the application of the statute of repose to the facts of this case warrants judgment in favor of CASE.

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POINT IV

THE STATUTE OF REPOSE BARS A WRONGFUL DEATH ACTION WHERE THE DEATH OCCURRED MORE THAN TWELVE YEARS AFTER THE ORIGINAL PURCHASE OF THE PRODUCT WHICH ALLEGEDLY CAUSED THE DEATH

The final question presented in this case is whether based on the language found in the wrongful death statute, §768.19, Fla. Stat., the wrongful death claim is barred by the running of the statute of repose with regard to Nathaniel Henley's personal injury/product liability suit even though ordinarily the limitations period for a wrongful death action is two years as indicated in §95.11(4)(d), Fla. Stat. Section 768.19 provides as follows:

> [w]hen 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. (emphasis supplied)

The Third District on rehearing (App.2-4) held in essence that even though death would not revive a cause of

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action for personal injuries, it did create a new independent cause of action for wrongful death which would be governed by the wrongful death statute of limitations. In other words, the personal representative would be entitled to bring the wrongful death action after the expiration of the statute of repose but prior to the expiration of the two year wrongful death statute of limitations. This ruling by the Third District Court is contrary to holdings in a majority of the District Courts of appeal which have held that if a limitations period prescribed by statute has expired at the time of the death so that the decedent would have no cause of actions for injuries and damages, then his survivors cannot maintain a wrongful death action. Hudson v. Keene Corporation, 445 So.2d 1151 (Fla. 1DCA 1984) aff'd. 472 So.2d 1142 (Fla. 1985); Small v. Niagara Machine and Tool Works, 502 So.2d 943 (Fla. 2DCA 1987) rev. den. 70,238 Fla. July 24, 1987; Pate v. Ford Motor Company, 500 So.2d 743 (Fla. 5DCA 1987); Kirchner v. Aviall, Inc., 12 FLW 2075 (1DCA Sept. 4, 1987). [2]

In so ruling the Third District relied on this courts decision in Nissan Motor Co. Ltd. v. Phlieger, 508 So.2d 713

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As a reading of Hudson, Kirchner and Henley indicates, the cases, expressly and directly conflict. Thus conflict certiorari jurisdiction exists. Gibson v. Avis Rent-A-Car System, Inc., 386 So.2d 520 (Fla. 1980).

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(Fla. 1987). In that decision the court expressly approved the decision of the Fifth District Court of Appeal in Phlieger v. Nissan Motor Co., Ltd., 47 So.2d 1098 (Fla. 5DCA 1986). In the later case the District Court held that because the twelve year statute of repose had not run at the time of the death of a man who was killed as result of an allegedly defective truck design, his survivors could bring a wrongful death action on a products liability theory at any time within two years of the death even though the twelve year statutory period expired between the date of death and the time suit was brought. The court stated that the survivors right of action must be determined by the facts existing at the time of death. Since at the time of his death the decedent would have had a right to bring an action for personal injuries and/or products liability, the wrongful death action was not barred by the statute of repose but rather the wrongful statute of limitations would be applicable in determining whether that action was timely.

This court's decision in Phlieger is distinguishable from the present one on that basis. Under the circumstances of that case, the wrongful death did not act to revive the product liability cause of action or create a new wrongful death cause of action. Since at the time of his death the deceased would have had a right to maintain an action against the manufac-

turers, his wife as personal representative had a statutory right to bring an action for damages sustained by his survivors as a result of his death. Phlieger does not require reversal under the facts in this case since as the court in Kirchner recognized, Phlieger inplicitely holds that if the deceased would have had no cause of action at the time of his death then his survivors have no wrongful death cause of action. This is the situation facing Henley since it is undisputed that the statute of repose had expired prior to his death and thus at the time of his death he would not have been entitled to maintain an action and recover damages if death had not ensured.

This holding, that no cause of action for wrongful death ever arose since §768.19 Fla. Stat. requires as a condition precedent to maintenance of the cause of action that there be a viable cause of action existing in the decedent as of the date of his death does nothing more than give effect to the clear statutory language. As the language indicates, the statute imposes a condition precedent to the existence of a cause of action for wrongful death requiring that as of the date of death the decedent could have successfully maintained a cause of action against the defendant arising out of the wrongful act involved. Since in the instant case, the decedent was not entitled as of the date of death to "maintain an action and recover damages" against the defendant, that condition precedent

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is not met and no claim for wrongful death ever arises. This statute additionally permits recovery only against one who "would have been liable in damages if death had not ensued." Where as here, the defendant would not have been liable, there could be no wrongful death action against him. Any contrary reading of §768.19 would render that portion of the statute meaningless. As in the case of any other legislation, in construing the wrongful death statute, the entire statute must be considered in determining legislative intent and effect should be given to every part of this section and every part of the statute as a whole. See e.g. Cilento v. State, 377 So.2d 663, 666 (Fla. 1979) and State v. Gale Distributors, Inc., 349 So.2d 150, 153 (Fla. 1977).

The Florida decisions construing the wrongful death act and its predecessors have adhered to the general rule of construction and analysis and have recognized that the issue to be decided is whether the deceased could have maintained an action at the time of his death and if he could not, whether the purpose for the bar to any such action remains viable once he has died. See Epps v. Railway Express Agency, 40 So.2d 131 (Fla. 1949) where it was held that survivors could not bring a wrongful death action where the decedent prior to death had brought a negligence action based on the same operative facts as the wrongful death action and had suffered an adverse judgment

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on liability; Warren v. Cohen, 363 So.2d 129 (Fla. 3DCA 1978), cert. den. 373 So.2d 462 (Fla. 1979) wherein the court held that a release executed by a deceased barred his beneficiaries from filing a wrongful death claim; Hudson v. Keene Corporation, supra, wherein it was held that a wrongful death claim brought approximately three and a half months after the decedents death was barred, since at the time of his death his personal injury suit would have been barred, notwithstanding that ordinarily, the limitations period for wrongful death action is two years and Variety Childrens Hospital v. Perkins, 445 So.2d 1010 (Fla. 1983) wherein this court held that a wrongful death action is barred where the decedent, during his lifetime, had filed a personal injury action against the tortfeasor and had recovered.

As the case law indicates where the defendant would not have been liable in damages if death had not ensued, there can be no wrongful death action against him regardless of whether the absence of liability is due to the prior adjudication of the personal injury claim, the giving of a release or the lapse of a statutory limitation. The holdings in the aforementioned cases indicating that the "independent" wrongful death actions are barred in the case of a release, recovery or lapse of the statutory limitation period, could only logically have been reached if the so called independent right of the survivors is deriva-

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tive of that of the decedent, in the sense that the decedent must have had a viable cause of action as of the date of his death.

The one Florida case which appears to deviate from this series of decisions is Shiver v. Sessions, 80 So.2d 905 (Fla. 1955). In Shiver, a wife's surviving four minor children brought a wrongful death action after her husband had shot and killed the decedent, their mother. The lower court dismissed the complaint on the basis of interspousal immunity holding that since the decedent could not have brought the action because of the immunity, the survivors were similarly barred. The Supreme Court reversed, holding that since "the reason for the rule of immunity automatically disappears from the picture simultaneously with the approval of the right of action under the wrongful death action," the action was not barred on this basis. In contrast, consideration of the purposes of statutes of repose as well as the wrongful death action require a finding that the present action is barred. As indicated in Lamb, product liability statutes of repose are designed to encourage diligence in the prosecution of claims, eliminate the potential of abuse from a stale claim, and foster certainty and finality in liability. 631 F.supp. at 1147. If as the plaintiff/respondent asserts, a wrongful death action can be brought within two years of the decedents expiration regardless of when the alleged defective

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product was originally sold or delivered, the statutes of repose would be totally ineffective in any situation in which the tortious act could eventually lead to death. Additionally, the rule advanced by plaintiff would pervert the remedial purposes of the wrongful death statute. Prior to its creation, a tortfeasor who would be liable for damages caused by his wrongful act would not be liable if the actions were so severe as to result in death. As the Supreme Court recognized in Perkins.

> This paradox was remedied by creating an independent cause of action for the decedent's survivors. It is thus clear that the paramount purpose of the Floridas Wrongful Death Act is to prevent a tortfeasor from evading liability for his misconduct when such misconduct results in death. 445 So.2d at 1012.

In the instant case, the defendant/petitioner is evading nothing since the decedent, Nathaniel Henley, Sr., could not have recovered for his damages if he had survived. To allow recovery in this case would not further the paramount purpose of the Florida Wrongful Death Act and "instead it would create many additional problems involving lack of repose, double recovery, discovery, discouragement of settlement, the interest of unborn heirs and res judicata." Perkins v. Variety Childrens Hospital, supra, 445 So.2d at 1012 Cites omitted.

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Shiver is further distinguishable. In Shiver this court recognized and acknowledged that defenses such as contributory negligence which are inherent in the cause of action itself, remain viable in the subsequent wrongful death action. Similarly the statute of repose does not bar a cause of action but rather its effect is prevent what otherwise may be a cause of action from ever arising. Lamb, at 1147 citing Rosenberg v. Tower of North Bergen, 293 A.2d 662, 667 (1972). Shiver then in actuality, supports petitioners position since it recognizes the availability of defenses such as the statute of repose, which inhere in the tort itself.

Finally, the position asserted by the petitioners and adopted by the court in Perkins, and Hudson, has been followed in numerous out of state decisions which hold, based on language similar to that found in the Florida Wrongful Death Statute, that survivors cannot bring wrongful death actions where the injured parties action for the same negligence was barred by the applicable statute of limitations at the time of his death. See e.g. Moore v. Stephens, 84 So.2d 752 (Ala. 1956); Hicks v. Missouri Pacific Railroad Co., 181 F.Supp. 648 (W.D. Ark. 1960, applying Arkansas law); Lambert v. Village of Summit, 433 N.E.2d 1016 (Ill. 1982); Mason v. Jerin Corp., 647 P.2d 1340 (Kan. 1982); Kelliher v. New York Central & H.R.R. Co., 105 N.E. 824 (N.Y.1914); Myers v. United States, 162 F.Supp. 913 (N.D. New

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York 1958); Street v. Consumers Mining Corp., 39 S.E.2d 271 (Va. 1946). As was stated in Street:

> Whether the right of action given the personal representative be regarded as a survival of the right of action of his decedent, as a revival of the right, as a substituted right, or as a new right, the cause of action is the same, that is, the wrongful injury to the decedent, the wrong which entitled him to maintain an action, if death had not ensued. 39 S.E.2d at 277.

Similarly, §768.19 Fla. Stat. requires that the decedent must have had a viable cause of action against the defendent at the date of his death in order for there to be an action for wrongful death. In accordance therewith, Florida courts have held that a release given by the decedent during his lifetime bars the wrongful death action, Warren v. Cohen, supra; that an adverse adjudication of the personal injury action during the decedent's lifetime bars the wrongful death action, Epps v. Railway Express Agency, Inc., supra; that a judgment for personal injury rendered in favor of injured party while living bars a subsequent wrongful death action based on the tortious conduct, Variety Childrens Hospital v. Perkins, supra; and that a wrongful death claim is barred by the running of the limitations period with regards to the decedent's personal injury not-

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withstanding that ordinarily the limitations period for the wrongful death action is two years. Hudson v. Keene Corp., supra. The same result is warranted here since the statute of repose expired prior to the death of Henley. To adopt plaintiffs argument would mean that there would be no limitations for a personal injury claim until after the potential plaintiff died even though the decedent did not in his lifetime assert any legal right to recover damages or negligently failed to take the action within the time allowed him. Aside from the case on review such a position has yet to be adopted by the courts of this state.

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CONCLUSION

For the reasons set forth above, the ruling of the District Court was error and the case should be remanded with directions that the trial court's granting of a summary judgment in favor of CASE be affirmed.

Respectfully submitted,

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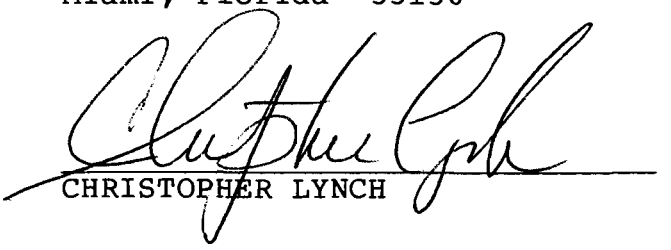

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CERTIFICATE OF MAILING

WE HEREBY CERTIFY that a copy of the above was mailed this 6 day of October, 1987 to DAVID W. BIANCHI, ESQ., 44 West Flagler Street, Suite 1900, Miami, Florida 33130-1808.

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