

10-31

IN THE SUPREME COURT  
STATE OF FLORIDA

CASE NO. 71,158  
DCA No.: 86-1001

NAVISTAR INTERNATIONAL COMPANY  
formerly INTERNATIONAL HARVESTER  
COMPANY, a foreign corporation,

Petitioner,

vs.

WILLIAM F. SULLIVAN, IV, attorney  
in fact for the survivors of  
MELITON MENDEZ, and to be appointed  
personal representative of the  
Estate of MELITON MENDEZ, deceased,

Respondent.

---

BRIEF ON THE MERITS OF PETITIONER,  
NAVISTAR INTERNATIONAL COMPANY,  
formerly INTERNATIONAL HARVESTER  
COMPANY, a foreign corporation

---

SHELLEY H. LEINICKE, ESQ.  
WICKER, SMITH, BLOMQUIST, TUTAN,  
O'HARA, McCOY, GRAHAM & LANE  
ATTORNEYS FOR NAVISTAR  
POST OFFICE DRAWER 14460  
FORT LAUDERDALE, FLORIDA 33302  
(305) 467-6405

and

JOHN A. RUPP, ESQUIRE  
Senior Counsel  
Navistar International Co.  
401 N. Michigan Avenue  
Chicago, IL 60611

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF CITATIONS . . . . .	ii
STATEMENT OF THE CASE AND FACTS . . . . .	1
SUMMARY OF ARGUMENT . . . . .	3
ISSUES . . . . .	4
I. 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? . . . . .	4
II. DOES THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL PERMITTING THE PROSECUTION OF A WRONGFUL DEATH CLAIM IN CASES WHERE THE DECEASED PERSON WOULD NOT HAVE BEEN ABLE TO MAINTAIN AN ACTION FOR DAMAGES HAD DEATH NOT ENSURED CONFLICT WITH THE SETTLED LAW OF THIS STATE WHICH HOLDS THAT THE VIABILITY OF A WRONGFUL DEATH CLAIM DEPENDS UPON THE EXISTENCE OF A VALID CAUSE OF ACTION BY THE DECEDENT, AT THE MOMENT OF DEATH? . . . . .	4
ARGUMENT . . . . .	4
I. THE STATUTE OF REPOSE SHOULD 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 . . . . .	4
II. THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL PERMITTING THE PROSECUTION OF A WRONGFUL DEATH CLAIM IN CASES WHERE THE DECEASED PERSON WOULD NOT HAVE BEEN ABLE TO MAINTAIN AN ACTION FOR DAMAGES HAD DEATH NOT ENSURED CONFLICT WITH THE SETTLED LAW OF THIS STATE WHICH HOLDS THAT THE VIABILITY OF A WRONGFUL DEATH CLAIM DEPENDS UPON THE EXISTENCE OF A VALID CAUSE OF ACTION BY THE DECEDENT, AT THE MOMENT OF DEATH . . . . .	7
CONCLUSION . . . . .	12
CERTIFICATE OF SERVICE . . . . .	13

TABLE OF CITATIONS

	<u>PAGE</u>
<u>Ash v. Stella</u> 457 So.2d 1377 (Fla. 1984)	5, 9
<u>Battilla v. Allis Chalmers Manufacturing Co.</u> 392 So.2d 874 (Fla. 1980)	7
<u>Carter v. J. Ray Arnold Lumber Co.</u> 91 So. 893 (Fla. 1922)	5, 8, 9
<u>Collins v. Hall</u> 157 So. 646 (Fla. 1934)	5, 8, 9
<u>Duval v. Hunt</u> 15 So. 876 (Fla. 1894)	5, 8
<u>Epps v. Railway Express Agency</u> 40 So.2d 131 (Fla. 1949)	5, 8, 9
<u>Hampton v. A. Duda &amp; Sons, Inc.</u> ____ So.2d ____ (Fla. 5th DCA 1987)	6, 7
<u>Henley v. J.I. case</u> ____ So.2d ____ (Fla. 3rd DCA 1987) (Case No. 86-2999, opinion filed 7/14/8)	1
<u>Hudson v. Keene Corp.</u> 445 So.2d 1151 (Fla. 1st DCA 1984)	5, 9
<u>Kirchner v. Aviall, Inc.</u> ____ So.2d ____ (Fla. 1st DCA 1987) (Case No. BN-219, opinion filed 8/26/	5, 9, 11
<u>Metropolitan Life Ins. Co. v. McCarson</u> 467 So.2d 277 (Fla. 1985)	5, 9
<u>Nissan Motor Co. v. Phlieger</u> 508 So.2d 713 (Fla. 1987)	1
<u>Nissan Motor Co., Ltd. v. Phlieger</u> 508 So.2d 713 (Fla. 1987)	10

TABLE OF CITATIONS (Continued)

	<u>PAGE</u>
<u>Pait v. Ford Motor Co.</u> 500 So.2d 743 (Fla. 5th DCA 1987)	5, 9
<u>Phlieger v. Nissan Motor Co. Ltd.</u> 487 So.2d 1097 (Fla. 5th DCA 1986)	9, 10, 11
<u>Pullum v. Cincinnati, Inc.</u> 476 So.2d 675 (Fla. 1985)	1, 7
<u>Variety Children's Hospital v. Perkins</u> 445 So.2d 1010 (Fla. 1983)	4, 5, 8, 10
 <u>OTHER AUTHORITY</u>	
Florida Statute §95.031 (2)	1, 10
Florida Statute §768.19 (1983)	4

STATEMENT OF THE CASE AND FACTS

Respondent's decedent (hereafter "Sullivan") was killed October 31, 1983 while operating a tractor manufactured and sold by Navistar International Company (hereafter "Navistar") in 1969. A wrongful death suit was filed October 29, 1983. The trial court dismissed the case with prejudice on the grounds it was time barred by the twelve year Statute of Repose set forth in Florida Statute §95.031 (2).

On appeal, the Third District Court of Appeal reversed holding that the twelve year products liability statute of repose is inapplicable in wrongful death cases.<sup>1</sup> In reaching this decision, the Third District cited to its simultaneously issued opinion in the case of Henley v. J.I. case, \_\_\_\_\_ So.2d \_\_\_\_\_ (Fla. 3rd DCA 1987) (Case No. 86-2999, opinion filed 7/14/87). Henley, in turn, relied on language in this court's factually distinguishable case of Nissan Motor Co. v. Phlieger, 508 So.2d 713 (Fla. 1987) where the death occurred within the twelve year repose period although suit under the Wrongful Death Act was filed some time thereafter.

The Third District Court of Appeal certified the following question as being one of great public importance:

---

<sup>1</sup>The repose provisions of Florida Statute §95.031 (2) were in effect at all times material to this claim, although this provision has since been repealed. Pullum v. Cincinnati, Inc., 476 So.2d 675 (Fla. 1985).

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?

Navistar also asserts that the Third District's decision conflicts with numerous decisions of this court and other district courts.

SUMMARY OF ARGUMENT

Florida law has always held that the viability of a wrongful death claim is predicated upon the existence of a valid cause of action by the injured party/decedent at the moment of his death. The Third District Court of Appeal has acknowledged that it is a question of great public importance to determine the applicability of this long-standing law to a products liability action where the injury causing the death occurs more than twelve years after the original purchase of the allegedly defective product. There is no reason to exempt a wrongful death claim arising in a products liability setting from the uniformly established law governing a survivor's right of action.

The instant decision of the Third District Court of Appeal permits a wrongful death claim to proceed in a products liability action in a circumstance where the decedent himself (had he survived) would have no valid claim because the accident occurred after the statute of repose. This decision conflicts with both the clear wording of the Wrongful Death Act and the settled law of this state.

## ISSUES

- I. 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?
  
- II. DOES THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL PERMITTING THE PROSECUTION OF A WRONGFUL DEATH CLAIM IN CASES WHERE THE DECEASED PERSON WOULD NOT HAVE BEEN ABLE TO MAINTAIN AN ACTION FOR DAMAGES HAD DEATH NOT ENSUED CONFLICT WITH THE SETTLED LAW OF THIS STATE WHICH HOLDS THAT THE VIABILITY OF A WRONGFUL DEATH CLAIM DEPENDS UPON THE EXISTENCE OF A VALID CAUSE OF ACTION BY THE DECEDENT, AT THE MOMENT OF DEATH?

## ARGUMENT

- I. THE STATUTE OF REPOSE SHOULD 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.

The Florida Wrongful Death Act creates a cause of action for a decedent's beneficiaries which did not exist at common law. Central to this cause of action is the notion that such a claim is viable only where a right of action in favor of the decedent existed at the moment of death. Variety Children's Hospital v. Perkins, 445 So.2d 1010 (Fla. 1983). The plain wording of the Wrongful Death Act leaves no doubt that in every case such a claim is proper under the Act only where the decedent, had he lived, would have a right to bring a claim.<sup>2</sup>

---

<sup>2</sup>§768.19, Florida Statute (1983) provides: 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  
(footnote continued)



The Wrongful Death Act simply permits designated persons to bring suit for a claim that, under the common law, would have terminated upon the death of the injured party. Ash v. Stella, 457 So.2d 1377 (Fla. 1984).

The whole purpose of the Wrongful Death Act was to correct an anomaly in the law. Prior to the Act, one could sue to determine of an alleged tortfeasor's liability if his actions caused personal injury but not if those same actions caused death. Variety Children's Hospital v. Perkins, supra. Until now, in every case where the viability of a wrongful death action has been challenged, the courts of this state have held that the survivors could pursue a claim only if their decedent (had he lived) could have pursued an action. Variety Children's Hospital v. Perkins, Ash v. Stella, supra. (medical malpractice claims); Metropolitan Life Ins. Co. v. McC Carson, 467 So.2d 277 (Fla. 1985) (claim against insurance carrier); Collins v. Hall, 157 So. 646 (Fla. 1934) (automobile liability); Epps v. Railway Express Agency, 40 So.2d 131 (Fla. 1949); Carter v. J. Ray Arnold Lumber Co., 91 So. 893 (Fla. 1922); Duval v. Hunt, 15 So. 876 (Fla. 1894) (railway tort feasor); Hudson v. Keene Corp., 445 So.2d 1151 (Fla. 1st DCA 1984) (asbestosis); Pait v. Ford Motor Co., 500 So.2d 743 (Fla. 5th DCA 1987), Kirchner v.

---

(footnote continued from previous page)  
**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.

Aviall, Inc., \_\_\_\_ So.2d \_\_\_\_ (Fla. 1st DCA 1987) (Case No. BN-219, opinion filed 8/26/87), Hampton v. A. Duda & Sons, Inc., \_\_\_\_ So.2d \_\_\_\_ (Fla. 5th DCA 1987) (Case No. 86-357, opinion filed 9/3/87) (products liability claims).

There is absolutely no reason to exempt manufacturers in products liability cases from this law. It serves no public interest or policy to exempt products liability claims from the express prerequisites set forth in the Florida Wrongful Death Act and all interpreting case law for a valid claim: the existence of a valid cause of action in favor of the injured party.

There is no basis for creating a cause of action in a products liability case for survivors - who, at common law never had any right of action at all no matter what the circumstance - when the injured party himself is barred from the courts. This would have the untoward result of the survivors being legally "better off" if their loved one is dead than alive. Such a concept or policy would be wholly inequitable and unfounded because the derivative claim of the survivors would exist where the injured party himself had no right of action.

II. THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL PERMITTING THE PROSECUTION OF A WRONGFUL DEATH CLAIM IN CASES WHERE THE DECEASED PERSON WOULD NOT HAVE BEEN ABLE TO MAINTAIN AN ACTION FOR DAMAGES HAD DEATH NOT ENSUED CONFLICTS WITH THE SETTLED LAW OF THIS STATE WHICH HOLDS THAT THE VIABILITY OF A WRONGFUL DEATH CLAIM DEPENDS UPON THE EXISTENCE OF A VALID CAUSE OF ACTION BY THE DECEDENT, AT THE MOMENT OF DEATH.

In the instant case, the injury and death to Sullivan occurred more than twelve years after Navistar's product was manufactured and sold. If Sullivan had been merely injured, he clearly would be precluded from suit. Pullum v. Cincinnati, Inc., supra.<sup>3</sup> Recognizing this well settled law, the trial court properly dismissed Sullivan's complaint as time barred. Despite the settled law holding the viability of a survivor's wrongful death claim is necessarily dependent upon the existence of an original right of recovery by the injured party, the Third District Court of Appeal reversed the trial court's decision and ruled that the survivors should be permitted to proceed with this wrongful death claim.

---

<sup>3</sup>At all times material to this appeal, the twelve year repose provision of §95.031 (2), Florida Statutes (1983) was in effect and has been held constitutional by this court. Pullum v. Cincinnati, Inc., supra. This statute had previously been declared unconstitutional in the case of Battilla v. Allis Chalmers Manufacturing Co., 392 So.2d 874 (Fla. 1980) but was revived by the Pullum decision. A Florida Supreme Court decision overruling a prior decision declaring the unconstitutionality of a statute is retroactive in its application and revitalizes the statute back to its effective date. Hampton v. A. Duda & Sons, Inc., supra.

The Third District's decision is in direct conflict with every other case in Florida which discusses when survivors may bring a wrongful death claim against a tortfeasor. But for the instant case, the law has always held that survivors' actions exist only where the injured party, had he lived, could have brought a suit himself.

Over ninety years ago, this court stated in the case of Duval v. Hunt, supra.:

In order to warrant a recovery by anyone for the death of anyone caused by the wrongful act, negligence, carelessness or default of another, the wrongful act, negligence carelessness or default from which the death ensues must be such as would have entitled the deceased person to maintain an action for damages had death not ensued. If, then, a case is presented wherein the deceased party would have been defeated or barred from recovery for any reason had he been alive and suing for personal injury only, then the same reason or cause for his bar or defeat will bar and defeat a recovery for his death by anyone suing on that behalf. Id. at 881-882.

This court has never waived from this principle that a survivor's right of action is inextricably tied to a right of action existing in the decedent had he been injured rather than killed. See also: Carter v. J. Ray Arnold Lumber Co., Epps v. Railway Express Agency, Collins v. Hall, supra.

In the case of Variety Children's Hospital v. Perkins, supra., a minor had sued and recovered for medical malpractice. After the child's death, the parents sought to bring a wrongful death action. This court declined to permit such proceeding and said: "At the moment of his death, the injured minor, Anthony

Perkins, had no right of action against the tortfeasor because his cause of action had already been litigated, proved and satisfied. . . . Since there was no right of action existing at the time of death, under the statute no wrongful death cause of action survived the decedent." Id. at 1012.

In another medical malpractice action, Ash v. Stella, supra., this court again stated that a survivor cannot "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 statute of limitations". Id. at 1378-1379.

In the case of Metropolitan Life Ins. Co. v. McCarson, supra., the spouse of a deceased insured sued for damages against a group health insurer for breach of contract, intentional infliction of emotional distress to the decedent, and bad faith. This court, in quashing that portion of the District Court's decision which had permitted a wrongful death claim, again reiterated that a survivor has a viable cause of action only if the decedent would have been able to maintain a claim.

In ruling upon the viability of a wrongful death claim where the decedent's accident occurs beyond the statute of repose, the decisions of the other District Courts of Appeal have uniformly barred such action. Pait v. Ford Motor Co, Kirchner v. Aviall, Inc., Hudson v. Keene Corp., supra., Phlieger v. Nissan Motor Co. Ltd., 487 So.2d 1097 (Fla. 5th DCA 1986) (Phlieger I). Except for the Third District Court of

Appeal, every district court of this state has held that where a death giving rise to a potential products liability action occurs more than twelve years after the original manufacture and sale of the product, the repose provisions of §95.031 (2) bars a wrongful death claim as well as any claim for injury.

This court has recently considered the applicability of the twelve year statute of repose to a factually distinguishable wrongful death claim. In the case of Nissan Motor Co., Ltd. v. Phlieger, 508 So.2d 713 (Fla. 1987) (Phlieger II), the plaintiff was injured (unlike the instant case) within twelve years of the manufacture and sale of the product. Thereafter, a wrongful death claim was filed within two years of the injury, although more than twelve years after the manufacturing date. This court acknowledged that:

At the moment of J. Phlieger's death, the twelve years had not yet run. Therefore, unlike the decedent in Perkins, Mr. Phlieger had a right to maintain an action against Nissan at the time of his death; and thus, Mrs. Phlieger, acting as his personal representative, had a statutory right to bring an action based on injury suffered by Mr. Phlieger's survivors as a result of his death. Id. at 715.

This court then concluded that "the legislature did not intend that §95.031 (2) operate as a bar to wrongful death actions brought more than twelve years after the original purchase of the product allegedly causing death." Id. at 715. This is not a departure from settled law because the court was not giving the survivors rights that were barred to the decedent.

The facts before the court in the Phlieger II case do not dictate the result that has occurred in the instant action. Indeed, opinion in Phlieger II would be wholly consistent with the trial court's actions in the instant case because there is an acknowledgement by this court that Phlieger's survivors were able to sue only because Phlieger's injury occurred before the expiration of the statute of repose. This factual distinction has been recognized and followed by the other district courts of this state, and the case of Kirchner v. Aviall, Inc., supra., expressly acknowledges the conflict between its decision and the Third District's decision. It is respectfully submitted that a reversal of the instant opinion of the third District Court of Appeal is necessary to reestablish uniformity in the Florida case law governing the prosecution of wrongful death claims.

CONCLUSION

For the reasons set forth herein, it is respectfully suggested that the instant decision of the Third District Court of Appeal clearly conflicts with both the provisions of the Wrongful Death Act and all other decisions of this state which are cited discuss the viability of a survivor's claim under the Act. It is further submitted that the instant decision of the Third District Court of Appeal is not legally or factually supportable. It is respectfully requested that this Honorable Court quash the decision of the District Court and reinstate the dismissal with prejudice which was entered by the trial court.

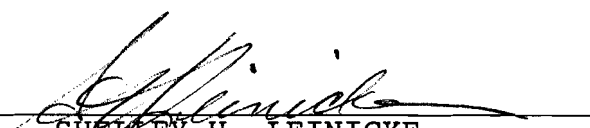
Respectfully submitted,

WICKER, SMITH, BLOMQVIST, TUTAN,  
O'HARA, McCOY, GRAHAM & LANE  
Attorneys for Navistar/Intl. Harvester  
P. O. Drawer 14460  
Fort Lauderdale, Florida 33302  
(305) 467-6405

and

JOHN A. RUPP, ESQUIRE  
Senior Counsel  
Navistar International Co.  
401 N. Michigan Avenue  
Chicago, IL 60611

BY

  
SHELLEY H. LEINICKE  
Florida Bar No. 230170