IN THE SUPREME COURT OF FLORIDA

NO. 71,577

SEARS, ROEBUCK & COMPANY,

Petitioner,

vs.

DIONISIO JESUS PINERO,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

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INTRODUCTION

This brief is filed on behalf of Sears, Roebuck & Company, the defendant in a products liability/wrongful death action brought by Dionisio Jesus Pinero on behalf of his wife's estate and her survivors.[1/] The trial court granted summary judgment in favor of Sears on the ground that the Plaintiff's action was barred by Florida's products liability statute of repose, Fla. Stat. §95.031(2). (R. 675-676). On appeal, the Third District reversed, and certified the following question as 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 death? (A. 1).

STATEMENT OF THE CASE AND FACTS

Plaintiff brought a products liability/wrongful death action against Sears alleging that the decedent was electrocuted on May 15, 1985 while using a Sears Kenmore stove. (R. 84-98). Sears asserted as an affirmative defense that the claims against it were barred because the twelve-year period of repose had expired before the fatal accident occurred. (R. 231-233).

1/ Throughout this brief the parties will be referred to by name or as they stood before the trial court. Thus, Sears, Roebuck & Company, Petitioner herein and Appellee below, will be referred to as "Defendant" or "Sears". Dionisio Jesus Pinero, Respondent herein and Appellant below, will be referred to as "Plaintiff".

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Sears thereafter moved for summary judgment on the basis of §95.031(2). (R. 258-259). In support of its motion, Sears filed two uncontroverted affidavits which established that the stove was sold and delivered to its original purchaser more than twelve years before Plaintiff's decedent was killed. (R. 278-281). The trial court rejected Plaintiff's contention that the statute of repose did not apply to his wrongful death action, and entered summary final judgment in favor of Sears. (R.263-265, 675).

On appeal, the Third District reversed the summary judgment in favor of Sears on the authority of its decision in Henley v. J. I. Case Co., 510 So.2d 342 (Fla. 3d DCA 1987)[2/] (A.1).

POINT INVOLVED

The Question Certified by the Third District Court of Appeal is as follows:

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? (A.1).

[2/] In Henley the court construed this Court's decision in Nissan Motor Co. v. Phlieger, 508 So.2d 713 (Fla. 1987), and held that the statute of repose did not bar a wrongful death action even though the death occurred more than twelve years after the original purchase of the product in question. The Third District in Henley certified to this Court the same question it certified here. Henley, 510 So.2d at 342.

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SUMMARY OF ARGUMENT

The Sears Kenmore stove -- the product which allegedly caused Plaintiff's decedent's death -- was delivered to its original purchaser more than twelve years before the death occurred. The decedent therefore had no right to maintain an action against Sears at the time of her death. It follows that the trial court properly entered summary judgment against the Plaintiff in his representative action on the basis of the statute of repose.

ARGUMENT

PLAINTIFF'S WRONGFUL DEATH ACTION WAS BARRED BY THE STATUTE OF REPOSE BECAUSE THE DECEDENT HAD NO RIGHT TO MAINTAIN AN ACTION AGAINST SEARS AT THE TIME OF HER DEATH -- THE QUESTION CERTIFIED BY THE THIRD DISTRICT COURT OF APPEAL SHOULD BE ANSWERED IN THE AFFIRMATIVE.

The Sears Kenmore stove which allegedly caused Plaintiff's decedent's death was delivered to its original purchaser more than twelve years before the fatal accident occurred. The decedent therefore clearly had no right to maintain an action for injuries and damages against Sears at the time of her death because the period of repose had already run. As Plaintiff's decedent had no cause of action against Sears at the time of her death, it follows that her survivors have no wrongful death cause of action. Pait v. Ford Motor Co., 12 F.L.W. 589 (Fla. Dec. 3 1987); Kirchner v. Aviall, Inc., 513 So.2d 1273 (Fla. 1st DCA 1987).

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This Court's decision in Pait is directly on point and, it is submitted, requires that the Third District's decision be quashed. In Pait, this Court approved the Fifth District's holding that the statute of repose barred a wrongful death action where, as in this case, the decedent was killed while using a product manufactured and delivered more than twelve years earlier by the defendant. Pait, 12 F.L.W. at 589; see Pait v. Ford Motor Co., 500 So.2d 743 (Fla. 5th DCA 1987). This Court distinguished Phlieger, 508 So.2d 713, on the ground that the decedent in that case was killed before the period of repose had run, and thus had a right to maintain an action against the defendant at the time of his death. Because the decedent in Pait was killed after the statutory period of repose had expired, this Court held:

> Mr. Pait had no right to maintain an action against Ford at the time of his death, and thus Mrs. Pait, acting as his personal representative, had no right to bring this wrongful death action.

Pait, 12 F.L.W. 589; accord Kirchner, 513 So.2d at 1274-1275.

Pait is factually and legally indistinguishable from the instant case. The question posed by the Third District therefore must be answered in the affirmative. The trial court properly entered summary judgment in favor of Sears on the basis of the statute of repose, and its judgment should be reinstated. See Pait, 12 F.L.W. 589; Melendez v. Dries & Krump Mfg. Co., 515 So.2d 735 (Fla. 1987); Brackenridge v. Ametek, Inc., 12 F.L.W. 589 (Fla. Dec. 3, 1987); Wallis v. Grumman Corp., 12 F.L.W. 590 (Fla. Dec. 3, 1987); Clausell v. Hobart Corp., 12 F.L.W. 591

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(Fla. Dec. 3, 1987).

CONCLUSION

Based upon the foregoing reasoning and authorities, it is respectfully submitted that the question certified by the Third District Court of Appeal should be answered in the affirmative, and its decision reversing the summary judgment in favor of Petitioner/ Defendant should be quashed.

Respectfully submitted,

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By 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioner's Brief on the Merits was mailed this 7th day of January, 1988 to:

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