

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.

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PETITIONERS REPLY BRIEF

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## INTRODUCTION

Plaintiff/Respondent Henley, as anticipated, presents four arguments in support of the Third District's ruling. They are as follows:

1. Wrongful Death actions timely filed within the two year wrongful death statute of limitations are not barred by the twelve year statute of repose;
2. The trial court erred in retroactively applying the decision of Pullum v. Cincinnati, Inc., 476 So.2d 657 (Fla. 1985);
3. Fla. Stat. §95.031(2) The product liability statute of repose is unconstitutional and;
4. The legislative amendment of Fla. Stat. §95.031(2), abolishing the statute of repose in product liability actions should be construed to operate retrospectively to a cause of action which accrued before the effective date of the amendment.

Recently this court in Melendez v. Dreis and Krump Manufacturing Company, 12 FLW 519, October 15, 1987 held that the amendment abolishing the statute of repose does not apply retrospectively to a cause of action which accrued prior to the effective date of the amendment and additionally the Pullum decision overruling the prior decisions of the Supreme Court which had

held the statute of repose to be unconstitutional applies retrospectively so as to bar a cause of action which accrued after the first decision (Battilla v. Allis Chalmers Mfg. Co., 392 So.2d 874 (Fla. 1980) but before the second decision (Pullum). This recent ruling by the court effectively disposes of three out of the four arguments presented by Henley. Accordingly this Reply Brief will address only Henley's initial argument.

#### ARGUMENT

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.

Henley relies primarily on this court's decision in Nissan Motor Company Limited v. Phlieger, 508 So.2d 713 (Fla. 1987), in addition to Bruce v. Byer, 423 So.2d 413 (Fla. 5th DCA 1982); Estate of James v. Martin Memorial Hospital, 422 So.2d 1043 (Fla. 4th DCA 1982); Worrell v. John F. Kennedy Memorial Hospital, Inc., 384 So.2d 897 (Fla. 4th DCA 1980) and Dober v. Worrell, 401 So.2d 1322 (Fla. 1981) in support of her assertion that a wrongful death action timely filed within the two year statute of limitations is not barred by the twelve year statute of repose in spite of the fact that the death occurred more than twelve years after the original purchase of the product which allegedly caused the

injuries resulting in death. None of these cases are controlling for the simple reason that they did not deal with the situation wherein the limitation period prescribed by statute had expired at the time of the death so that the decedent would have had no cause of action for injuries or damages. This court in construing the wrongful death statute §768.19 Fla. Stat. has consistently held that if the deceased for one reason or another could not have maintained an action at the time of his death, the survivors likewise cannot maintain a wrongful death action. See Epps. v. Railway Express Agency, 40 So.2d 131 (Fla. 1949); Variety Childrens Hospital v. Perkins, 445 So.2d 1010 (Fla. 1983) and Hudson v. Keene Corp., 445 So.2d 1151 (Fla. 1st DCA 1984) aff'd 472 So.2d 1142 (Fla. 1985). These decisions represent a recognition by the court that the Florida Wrongful Death Statute means what it clearly states and that a cause of action arises only where "the event would have entitled the person injured to maintain an action and recover damages if death had not ensued." Fla. Stat. §768.19.

Each District Court which has addressed the identical issue has ruled in a similar manner. See Small v. Niagara Machine and Tool Works, 502 So.2d 943 (Fla. 2nd DCA 1987) rev. denied 70,238 (Fla. July 24, 1987); Pait v. Ford Motor Co., 500 So.2d 743 (Fla. 5th DCA 1987); Kirchner v. Aviall, Inc., 12 FLW 2075 (1st DCA Sept. 4, 1987).

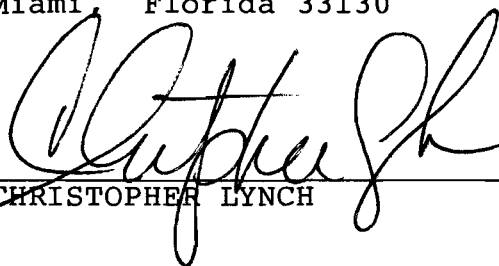
In light of the clear language of the statute and the consistent interpretations by the courts of this state, it is submitted that any deviation from this established principle should be in the form of legislative enactment.

CONCLUSION

For 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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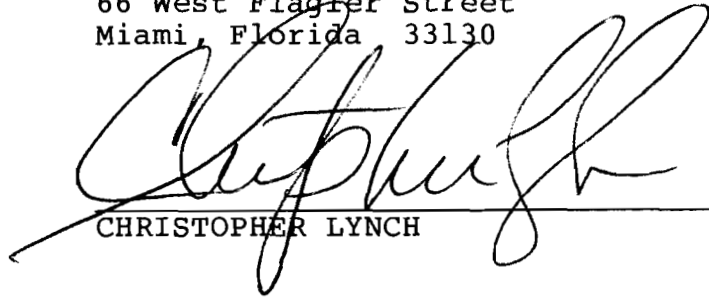


CHRISTOPHER LYNCH

CERTIFICATE OF MAILING

WE HEREBY CERTIFY that a true and correct copy of the foregoing was this 19th day of November, 1987 mailed to DAVID W. BIANCHI, ESQ., 44 West Flagler Street, Suite 1900, Miami, Florida 33130-1808.

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