

IN THE SUPREME COURT OF FLORIDA

OPAL F. HUDSON, etc., :
Petitioner, :
vs. :
KEENE CORPORATION, et al., :
Respondents. :

CASE NO. 65,155

FILED

S/D J. WHITE

NOV 13 1984

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Chief Deputy Clerk

ON DISCRETIONARY REVIEW FROM THE
FIRST DISTRICT COURT OF APPEAL

ANSWER BRIEF OF RESPONDENT THE CELOTEX CORPORATION

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PRELIMINARY STATEMENT

In this brief, the Petitioner, Opal F. Hudson, who was the plaintiff below, is referred to as "Plaintiff". The Respondents, who were defendants below, are referred to as "Defendants." The Celotex Corporation is referenced to as "Celotex."

References to the record on appeal are designated by the prefix "R." References to Petitioner's initial brief on the merits are designated by the prefix "Pl Br."

STATEMENT OF THE CASE AND FACTS

Plaintiff's husband, Mr. Hudson, was diagnosed as having asbestosis in March, 1977 and commenced this action on November 12, 1980, as a personal injury action against Johns-Manville Sales Corporation (which is not a party to this appeal). (R 1-4,39) After Mr. Hudson died in July, 1981, Plaintiff was substituted as personal representative and this action was amended to join Defendants as additional defendants in the wrongful death action on November 2, 1981. (R 81,94-101)

Pursuant to the motions of Defendants, the trial court entered a final summary judgment based on its finding that Plaintiff's claim was barred by virtue of the fact that the limitations period in which Mr. Hudson could have sued

Defendants for a personal injury had run prior to his death, and thus prior to the filing of suit against the Defendants. (R 186 - 187, 200-202).

The relevant facts are undisputed and are summarized in the table below:

<u>DATE</u>	<u>EVENT</u>
March, 1977	Mr. Hudson's asbestosis diagnosed and his personal injury cause of action accrues. (R 39, interrogatory 54)
November 12, 1980	Mr. Hudson files suit against Johns-Manville. (R 1-4)
March, 1981	Four years runs from time Mr. Hudson's personal injury action accrued (\$95.11(3), Florida Statutes (1981)).
July 14, 1981	Mr. Hudson dies. (R 81)
November 2, 1981	Suit amended to join Defendants as wrongful death defendants. (R 94-101)

Since these facts are undisputed, this case presents a question of law as to whether or not a survivor can sue defendants allegedly responsible for a wrongful death when no proceeding was commenced by the decedent against those defendants for the personal injury within the personal injury statute of limitations, even though the injury was fully known to the decedent who had elected to sue only one defendant and not other possible defendants. The trial court ruled that Plaintiff could not maintain this action against these Defendants and this was affirmed by the First District

Court of Appeal in Hudson v. Keene Corporation, 445 So. 2d 1151 (Fla. 1st DCA 1984).

Plaintiff petitioned this Court for discretionary review based on conflict and Celotex agreed that Hudson conflicted with Lipshaw v. Pinosky, P.A., 442 So. 2d 992 (Fla. 3d DCA 1983). This Court accepted jurisdiction in its order of September 24, 1984. As discussed infra at page 32, pending decisions may resolve this conflict.

ISSUE ON APPEAL

CAN A DECEDENT'S SURVIVOR SUE FOR HIS
WRONGFUL DEATH RESULTING FROM A PER-
SONAL INJURY WHERE THE DECEDENT PER-
MITTED THE STATUTE OF LIMITATIONS FOR
THE PERSONAL INJURY TO RUN DURING HIS
LIFETIME?

SUMMARY OF ARGUMENT

In analyzing whether a survivor may maintain a wrongful death action when the decedent allowed the personal injury statute of limitations to run during his lifetime, Celotex initially examines the language of the wrongful death statute. Celotex next canvasses a variety of Florida decisions addressing when activities by the decedent during his lifetime affect a survivor's wrongful death claim, as well as decisions of this Court holding that spousal immunity is not a defense to a wrongful death action by the survivors of the deceased spouse. In contrast to the purpose for spousal immunity which no longer exists once a spouse is dead, Celotex considers the purposes of the personal injury statute of limitations and the fact that those purposes remain not only viable, but are accentuated by the death of the injured party. The reasons a decedent must not have let the statute of limitations run on his personal injury action, as a condition to survivors being able to sue in wrongful death, are further analyzed in numerous decisions from other jurisdictions which have construed their wrongful death statutes in the manner Defendants urge. Finally, Celotex examines the effect of this Court's recent decision in Ash v. Stella ___ So. 2d ___ (Fla.S.Ct. Case No. 63,347, October 11, 1984) (9 FLW 434) as applied to the substantive issues in the instant case, and examines how the decision in that case

and in another case pending before this Court may eliminate the basis for conflict with the instant case and thus, for discretionary review of the instant case.

ARGUMENT

A DECEDENT'S SURVIVOR CANNOT SUE FOR HIS WRONGFUL DEATH RESULTING FROM A PERSONAL INJURY WHERE THE DECEDENT PERMITTED THE STATUTE OF LIMITATIONS FOR THE PERSONAL INJURY TO RUN DURING HIS LIFETIME.

1. The language of Florida's wrongful death statute.

The issue of law presented is whether a decedent's survivor may maintain a wrongful death action against the party allegedly responsible for the personal injury when the decedent was aware of his right to bring a personal injury action, but did not do so within the personal injury statute of limitations period. (In the instant case the decedent did timely commence a personal injury action against one asbestos manufacturer which remains pending as that defendant is not affected by this appeal.) The determination of this issue turns on the operative language of the Florida wrongful death statute and the legislative intent behind that language.

Section 768.19, Florida Statutes (1981) 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 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 added)

Whether or not a wrongful death action may be sustained when the decedent allowed the personal injury limitation period to run is controlled by the emphasized language above. Essentially, Plaintiff and others in her position contend that this language simply means there had to be some tort by the defendant for which the injured (now deceased) person could have brought a personal injury action. That is, the actions of the defendant must constitute actionable negligence under Florida law. See, e.g., Perkins v. Variety Childrens Hospital, 413 So. 2d 760, 761 (Fla. 3d DCA 1982), reversed 445 So. 2d 1010 (Fla. 1983). Celotex contends that this language must mean more - that it must mean that the decedent could have maintained a personal injury action at the time of his death and that if he were not permitted to do so - for example, because he had previously recovered a judgment, had signed a release, or had allowed the statute of limitations to run - then, his survivors may not maintain a wrongful death action arising out of the same acts of the defendant.

To say that a wrongful death action is "new" or "independent" from the personal injury claim simply does not answer whether it is barred by a defense which would have barred an action by the decedent growing out of the same incident. Section 768.19 requires that the injured person would have been able to maintain an action if death had not

ensued. Plaintiff urges a reading of Section 768.19, that would render the portion of the statute meaningless which reads "and the event would have entitled the person injured to maintain an action and recover damages if death had not ensued." Plaintiff urges this language means that one only looks to whether or not the defendant's conduct is actionable under Florida law, without considering whether the decedent could have maintained an action (e.g. because he had already recovered a judgment or let the statute run). If Plaintiff is correct, then this language is meaningless since it is a truism that every action must state a cause of action. Yet, this is the construction necessarily urged by the district court of appeal in Perkins, and by Plaintiff, in their arguments that the wrongful death statute creates a right of action in survivors not affected by the actions, or inactions, of the decedent. 1/

Plaintiff urges that the wrongful death statute should be liberally construed to effectuate its policy. However, the statutory provisions cannot be so liberally construed as to reach a result contrary to the legislative intent. Stern v. Miller, 348 So. 2d 303, 308 (Fla. 1977) (wrongful death act could not be liberally construed to the extent of finding that a viable fetus fatally injured by a defendant's

1/ Plaintiff's construction would also negate the statutory language which limits recovery to those defendants "that would have been liable in damages if death had not ensued."

negligence was a "person" within the meaning of the act). Thus, in construing the wrongful death statute, as with any other legislation, it is a cardinal rule of statutory construction that the entire statute under consideration must be considered as a whole in determining legislative intent, and effect given to each and all parts of the statute. E.g., Cilento v. State, 377 So. 2d 663, 666 (Fla. 1979). If the above quoted language of the statute is to have any meaning, then, it must mean something more than simply a restatement of the obvious - it must mean more than that the defendant's acts were actionable when committed. It must mean that at the time the decedent died that he could have maintained a claim for the personal injury.

The Kansas Supreme Court in Mason v. Gerin Corporation, 231 Kan. 718, 647 P.2d 1340 (1982) emphasized the language of the Kansas statute (also present in the Florida Act) that the injured party be able to maintain the action if death had not ensued:

We hold in construing our wrongful death statute, K.S.A. 60-1901, that where the injured party could not have brought an action for his personal injuries because the statute of limitations had run against his claim prior to his death, a wrongful death action cannot be maintained. The condition specified in the wrongful death statute requiring that the injured party have the capacity to maintain the action had he or she lived is not fulfilled.

647 P.2d at 1345 (emphasis by the court). Obviously, when the personal injury statute runs during the decedent's life,

he could not have maintained an action, and the court held that, therefore, no wrongful death action could be maintained.

2. Florida cases on the decedent's actions as affecting wrongful death claims.

With this precept of statutory construction in mind, an examination of the Florida decisions construing the wrongful death statute demonstrates that the proper analysis is whether the deceased could have maintained an action at the time of his death and if the purpose for a particular bar to such an action remains viable once the injured party has died. Therefore, where a party had brought a negligence action during his lifetime for personal injury and had suffered an adverse judgment on liability, his survivors may not then bring a wrongful death action arising out of the same acts of negligence once the party has died. Epps v. Railway Express Agency, 40 So. 2d 131 (Fla. 1949); Collins v. Hall, 117 Fla. 282, 157 So. 646 (1934). Similarly, a wrongful death claim is barred where during his lifetime the injured party settled his case, 2/ or obtained a favorable judgment. As this Court stated in Variety Childrens Hospital v. Perkins, 445 So. 2d 1010 (Fla. 1983):

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

2/ Warren v. Cohen, 363 So. 2d 129 (Fla. 3d DCA 1978), cert. denied, 373 So. 2d 462 (Fla. 1979)

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. See Collins v. Hall, 117 Fla. 282, 157 So. 646 (1934); Duval v. Hunt, 34 Fla. 85, 15 So. 876 (1894); Warren v. Cohen, 363 So. 2d 129 (Fla. 3d DCA 1978), cert. denied, 373 So. 2d 462 (Fla. 1979)

445 So. 2d at 1012. 3/

Plaintiff has correctly observed that the First District based its opinion in this case as following from this Court's decision in Perkins. Hudson, supra at 1153. Consequently, Plaintiff spends much of his time attempting to distinguish the holding and rationale of Perkins. It adds nothing to the analysis to describe a wrongful death action as "independent" rather than "derivative" since it is clear that wrongful death actions are not truly independent, but do indeed depend upon what the injured party does subsequent to his injury and prior to his death. If labeling is to be done, perhaps the most helpful label would be to describe the need for the

3/ In Duval v. Hunt supra at 881-2 this Court stated:

In order to warrant a recovery by any one for the death of any one caused by the wrongful act, negligence, carelessness, or default or another, the wrongful act, negligence, carelessness, or default from which the death ensues must be such as would have entitled the deceased person to maintained 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 sued 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 any one suing on that behalf.

decedent not to have allowed the statute of limitations to run as a condition or condition precedent to bringing a wrongful death action. 4/ Thus, the decedent must not have allowed the personal injury limitation period to run during his lifetime, just as he must not have litigated his action to judgment or settled his claim.

Plaintiff attempts to construe the First District's decision in Hudson as an aberration or departure from this Court's rulings determining when survivors may bring a wrongful death action in light of the decedent's actions subsequent to the alleged negligent act and prior to his death. In fact, as evidenced by an examination of the cases dealing with settlements, res judicata and other defenses, the First District's holding that the personal injury statute of limitations must not have run it is entirely consistent with this Court's decisions. The only situation to which Plaintiff attempts to analogize is the defense of spousal immunity, which does not survive the death of a spouse. However, it is evident that this is the exception rather than the rule, justified by the fact that the rationale behind the spousal immunity doctrine disappears upon the death of one

4/ As quoted above, Mason v. Gerin Corp. described the requirement that decedents have been able to "maintain" an action as a "condition." Milford Memorial Hospital, Inc. v. Elliott, 58 Del. 480, 210 A.2d 858 (1965) described the personal injury statute of limitation as a "condition precedent" to commencing the wrongful death action.

spouse. By contrast, the purposes for the statute of limitations, as well as the principles barring a subsequent action where there has been a judgment or settlement, remain equally viable although the injured party has died.

Plaintiff's primary arguments are essentially semantic exercises in which Plaintiff discusses Shiver v. Sessions' ^{5/} use of the terms "inheres in the tort", and "right of action" versus "cause of action". Plaintiff urges that the operative test should be whether the defense to the wrongful death action "inheres in the tort" (Pl Br 9-10). Plaintiff states that the statute of limitations does not inhere in the original tort and that only the decedent can create a statute of limitations defense to his own right of action which should not bar his survivors' right of action. This "analysis" simply does not withstand scrutiny. A decedent's successful pursuit of his right of action through settlement or obtaining a judgment does not inhere in the tort. These occur by subsequent actions taken by the injured party, just as the statute of limitations defense to the personal injury suit arises from subsequent inaction by the injured party.

It is also not accurate to say that the survivors' "right of action" can't be affected by the injured party's (decedent's) actions. The survivors rights are clearly affected where the decedent settles his claim (Warren v.

^{5/} 80 So. 2d 905 (Fla. 1955)

Cohen), or litigates it, whether successfully (Perkins) or unsuccessfully (Collins), or allows the statute of limitations on his claim to run so that he could not then pursue it. It is no answer to say that it is only the decedent who can create a statute of limitations defense to his own right of action, since it is only the decedent who can settle his own case or obtain a judgment while he is alive, and these actions affect not only his own right of action, but that of any survivors.

Celotex is not the only party to make this comparison. The Kansas Supreme Court stated:

The situation where a person fails to bring an action for his personal injuries within the statute of limitations period and dies is analogous to situations where the injured person settles his claim for personal injuries and releases the defendant prior to the death of the injured person, or where he pursues his personal injury claim to trial and obtains a judgment against the wrongdoer.

Mason v. Gerin Corporation, supra at 1345.

The Delaware Supreme Court also has recognized that while its wrongful death statutes created a separate or different right, the personal injury statute of limitations must not have run, explaining:

It is settled in this jurisdiction by this line of cases, beyond the realm of further question, that the statutory right of action created by the Wrongful Death Act, while a separate and different right of action than that held by the deceased, nevertheless is held subject to the same infirmities as would have existed in a suit by the deceased if still alive.

Milford Memorial Hospital, Inc. v. Elliot, supra at 60 (emphasis added).

Finally, Plaintiff's reliance on St. Francis Hospital v. Thompson, 159 Fla. 453, 31 So. 2d 710 (1947) and Fletcher v. Dozier, 314 So. 2d 241 (Fla. 1st DCA 1975) is misplaced. In St. Francis this Court held that the two year limitation for bringing a wrongful death action commenced to run upon death, but there was simply no question presented with regard to the decedent having allowed the personal injury limitation statute to run during his lifetime. The decedent had died less than a month after the negligence, and there was a four year limitation period for his negligence action. § 95.11(4), Florida Statutes (1941). Similarly there was no discussion of the personal injury limitations statute in Fletcher, which turned on the running of the two year wrongful death limitations period.

3. Spousal immunity.

The holdings of this Court in Perkins and the First District in Hudson are easily reconciled with Dressler v. Tubbs, 435 So. 2d 792 (Fla. 1983) and Shiver v. Sessions, supra. Both Dressler and Shiver involved wrongful death actions on behalf of a spouse which this Court held were not barred by the doctrine of interspousal immunity. Quite simply, as this Court noted, where children of a deceased spouse are suing the other spouse "the reason for the rule of immunity automatically disappears from the picture

simultaneously with the accrual of the right of action under the wrongful death act." 80 So. 2d at 908. That is, once a spouse is dead, the immunity based on the preservation of marital harmony no longer makes sense. By contrast, as discussed below, the purposes for the statute of limitations for a personal injury action 6/ remain equally viable although the injured party has died.

Significantly, the court in Shiver also held that the children's cause of action was "subject to the defenses of contributory negligence and the like which the tort-feasor could have pleaded in a suit against him by the decedent during his or her lifetime, and this court has so held in many cases." 80 So. 2d at 908. Thus, it is clear that Shiver cannot be read as holding that defenses related only to the decedent's actions are irrelevant in wrongful death cases because contributory negligence is such a defense. That is, if wrongful death were truly an independent cause of action (like a passenger's cause of action in a car accident), then the contributory negligence of the deceased would not affect the claim (just as the driver's negligence does not diminish the passenger's claim).

Plaintiff cites Illinois and Pennsylvania spousal immunity cases which were cited by this Court in Shiver (Pl Br 8). However, those states also bar a survivor's

6/ I.e., preventing stale claims, faded memories, misplaced or discarded records, and missing or deceased witnesses.

wrongful death action if the decedent allowed the personal injury statute to run. Lambert v. Village of Summit, 104 Ill. App. 3d 1034, 433 N.E.2d 1016 (1982) (Ill. S.Ct. appeal denied May 28, 1982); Howard v. Bell Telephone Company of Pennsylvania, 306 Pa. 318, 160 A. 613 (1932). Shiver also cited Johnson v. Ottomeier, 45 Wash. 419, 275 P.2d 723 (1954) which allowed survivors to sue despite spousal immunity. In Johnson, the Washington Supreme Court expressly recognized its prior holding that the decedent must not have allowed the personal injury statute to run. Grant v Fisher Flouring Mill Co., 181 Wash 576, 44 P.2d 193 (1935). Thus, all three state whose spousal immunity decisions Shiver cited bar a wrongful death action if the decedent allowed the personal injury limitation to run. It is apparent that Shiver and Dressler do not support the result Plaintiff urges, but are consistent with the position of Celotex and the courts of Illinois, Pennsylvania and Washington.

4. The personal injury statute of limitations.

While the purpose of spousal immunity disappears when the injured party dies, the purposes of the statute of limitations for an injury claim become even more important. This Court has observed that "the purposes of the statutes of limitations are to protect the defendants against unusually long delays in filing of lawsuits and to prevent unexpected enforcement of stale claims concerning which interested persons have been thrown off guard for want of reasonable

prosecution." Nardone v. Reynolds. 333 So. 2d 25, 36 (Fla. 1976). After this statement, this Court quoted from another case in explaining the purpose of the statute of limitations:

As a statute of repose, they afford parties needed protection against the necessity of defending claims which, because of their antiquity, would place the defendant at a grave disadvantage. In such cases how resolutely unfair it would be to award one who has willfully or carelessly slept on his legal rights an opportunity to enforce an unfresh claim against a party who is left to shield himself from liability with nothing more than tattered or faded memories, misplaced or discarded records, and missing or deceased witnesses. Indeed, in such circumstances the quest for truth might elude even the wisest court. The statutes are predicated on the reasonable and fair presumption that valid claims which are not usually left to gather dust or remain dormant for long periods of time.

333 So. 2d at 36 (emphasis by Florida Supreme Court).

Consequently, when no personal injury cause of action is commenced by an injured party within the applicable statute, defendants have not had the benefits intended by the statute of limitations. Furthermore, the purpose for the statute of limitations remains viable, and in fact, is often exacerbated, after the death of the injured party. The instant case illustrates this problem. While he was still alive Mr. Hudson sued Johns-Manville within the four year personal injury limitation period, and thus, Johns-Manville was on notice and was able to conduct discovery during the pendency of the personal injury action. Defendants were not joined until after the decedent's death - after the four year

statute of limitations had run. Thus, parties in the position of Defendants are denied the opportunity of taking discovery from the decedent which could be particularly important in a case of this nature regarding, for example, where and when he worked and whether or not he could identify exposure to any of Defendants' products. 7/ Thus, in the instant case where Mr. Hudson was aware of his injury in 1977 and for whatever reasons elected to sue only Johns-Manville for that injury, 8/ the Defendants should not be subjected to a claim after the time has run in which Mr. Hudson could have maintained it and for which they would be forced to deal with "faded memories, misplaced or discarded records, and missing or deceased witnesses." For these same reasons, as discussed in the following section, several non-Florida courts have expressed serious concerns over allowing wrongful death actions many years after the incident when the decedent had not sued.

7/ Whether or not Florida will require product identification or adopt market share liability is currently pending before this Court in Celotex v. Copeland, Supreme Court No. 65,124. This type of information would be vital either way since even under a market share approach these defendants would be entitled to discovery as to when and where a plaintiff was exposed, so that they could attempt to show no exposure to their products.

8/ This may well be explained by Mr. Hudson's sworn interrogatory answers, given while still alive, that he used only Johns-Manville asbestos products (R 32, interrogatory 43).

5. Decisions from other jurisdictions.

The position urged by Celotex has been followed in numerous out of state decisions holding that beneficiaries cannot bring wrongful death actions where the injured party's action for the same negligence was barred by limitations at the time of his death. E.g., Flynn v. New York N.H. & H.R. Co., 238 U.S. 53, 75 L.Ed. 837, 51 S. Ct. 357 (1931) 9/; Mason v. Gerin Corp., supra; Lambert v. Village of Summit, supra; McDaniel v. Johns-Manville Sales Corporation, 542 F.Supp. 716 (N.D. Ill. 1982); Prink v. Rockefeller Center Inc., 48 N.Y. 2d 309, 398 N.E.2d 517, 521 (1979) (reiterating holding of Kelliher v. New York Central & Hudson Riv. R.R. Co., 212 N.Y. 207, 105 N.E. 824 (1914)); Milford Memorial Hospital Inc. v. Elliott, supra; Ellis v. Black Diamond Coal Mining Company, 268 Ala. 576, 109 So. 2d 699 (1959); Woodward Iron Co. v. Craig, 256 Ala. 37, 53 So. 2d 586 (1951); Street v. Consumers Mining Corporation, 185 Va. 561, 39 S.E. 2d 271 (1946); Piukkula v. Pillsbury Astoria Flouring Mills Co., 150 Or. 304, 42 P.2d 921 (1935); Howard v. Bell Telephone Company of Pennsylvania, supra; Hicks v. Missouri Pacific R. Co., 181 F.Supp. 648 (W.D. Ark. 1960) (applying

9/ Flynn involved a claim under the FELA which the Supreme Court previously noted was "essentially identical" to the first wrongful death act (Lord Campbell's Act). Mellon v. Goodyear, 277 U.S. 335, 340-341, 72 L.Ed 906-908, 48 S.Ct. 541 (1927) (barring recovery by survivors where the decedent had executed a release).

Arkansas law), appeal dismissed 285 F.2d 427 (8th Cir. 1960); Mathews v. Travelers Indemnity Insurance Company, 245 Ark. 247, 432 S.W. 2d 485 (1968) (citing Hicks); Myers v. United States, 162 F.Supp. 913 (N.D. N.Y. 1958); Grant v. Fisher Flouring Mills Co., supra.

A number of the cases cited immediately above involve statutes whose language is identical or nearly identical with that of Section 768.19, Florida Statutes. See, for instance, Hicks v. Missouri Pacific R. Co., supra; Lambert v. Village of Summit, supra; Mason v. Gerin Corp., supra; Kelliher v. New York Central & H. R. R. Co., supra; Myers v. United States, supra; Street v. Consumers Mining Corp., supra.

In holding that no wrongful death action could be maintained where decedent's personal injury cause of action has been permitted to lapse by running of the statute of limitations, the courts on several occasions have expressed concern that a contrary holding would permit long-dormant causes of action to be revived in direct contravention of the purposes of statutes of limitation. Thus, for instance, in Mason v. Gerin Corp., supra, the court observed:

"The possibility that the injured person may die five, ten or even twenty years after the injuries were sustained without having filed suit or otherwise settling the case would force the party responsible for the wrongful act or omission to defend acts long forgotten and for which evidence and witnesses may no longer be available."

647 P.2d at 1345.

Likewise, the court in Street v. Consumers Mining Corp., supra, observed:

"We do not think that the 1942 amendment [to the Virginia Wrongful Death Statute] was intended to allow a personal representative to bring an action for wrongful death at a time, perhaps, 10, 15, or 25 years subsequent to the date of the wrong that produced death, where, perhaps, the decedent did not, in his lifetime, deem it practical or worthwhile to assert any legal right to recover damages, or negligently failed to bring action within the time allowed him."

39 S.E.2d at 277.

These concerns are not fanciful, as is illustrated by Lambert v. Village of Summit, supra, in which the wrongful death action was brought some twenty-three years after the personal injury cause of action had accrued, decedent having survived his injury for more than twenty years. The court held that the running of the limitation period during decedent's lifetime barred any wrongful death claim under the Illinois Wrongful Death Act, since the decedent would not have been entitled to maintain an action and recover damages and the defendant would not have been liable if death had not ensued, as the Illinois statute specified. The Illinois statute, quoted at 433 N.E.2d 1018, is nearly identical to Section 768.19, Florida Statutes.

In Lambert the court analogized the limitations situation to precedent holding that execution of a release by the decedent barred a subsequent wrongful death action, just as Celotex relies on Warren v. Cohen. 433 N.E.2d at 1018.

Similarly, Lambert noted that if it allowed such a suit by survivors, the "policies promoted by statutes of limitations would be undermined." 433 N.E.2d at 1020. Finally, it observed that Illinois also allowed survivors to sue despite spousal immunity, but that those cases did not affect the defense of the statute of limitations and were not dispositive of the question presented. 433 N.E.2d at 1020.

Lambert is not the only example of the extreme delays made possible if Plaintiff's position is adopted. In Howard v. Bell Tel. Co. of Pennsylvania, supra, the decedent was injured on September 28, 1905, and died on February 27, 1926. Suit for wrongful death was commenced on February 23, 1927, nearly twenty-two years after the injuries were sustained and almost nineteen years after the statute of limitations on the personal injury action had run. The court held that no action for wrongful death would lie since the decedent had permitted the cause of action for personal injury to lapse during his lifetime by permitting the statute of limitations to run.

As stated in Street v. Consumers Mining Corp., supra:

"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.

After citing Street with approval, the Alabama Supreme Court held the wrongful death action is barred if the decedent allowed the personal injury statute to run, recognizing that this is consistent with the prior judgment or settlement situations:

We are not willing to agree that the legislature intended to approve a situation where two suits could be prosecuted to judgment for the same injury, one by the injured person in his lifetime and the other by his personal representative after his death. We think that the legislature did not intend to create a cause of action occurring at the death of the injured party, if at that time the injured party was unable to maintain a suit for personal injuries based on that occurrence by reason of the fact that either he had already sued and recovered a judgment on account of it or he had accepted full satisfaction and release of the claim, or if his contributory negligence proximately caused his injury, or if he permitted the claim to be barred by the statute of limitations.

Woodward Iron Co., supra at 593 (emphasis added).

McDaniel v. Johns-Manville Sales Corporation, supra, was an asbestos case where the court held that under the Illinois wrongful death act (which has the same pertinent language as Florida's) the wrongful death action was barred where the decedent had allowed the limitations period to run on his personal injury action.

In light of this vast authority and its compelling reasoning, it is not surprising that Plaintiff cites only two out-of-state cases which add nothing since they are spousal immunity situations consistent with Shiver, Dressler and the

analysis urged herein (Pl Br 8). ^{10/} As noted above, those cases are from jurisdictions which bar a survivor's wrongful death action if the decedent allowed the personal injury limitations statute to run.

Other than the two spousal immunity cases, Plaintiff's only reference to non-Florida authorities is to quote from Prosser that the majority of courts hold the statute of limitations runs from death even though the decedent's own action would have been barred while he was living. (Pl Br 3, 18-19). Prosser's comment does not analyze any wrongful death statutes, is questionable at best in light of the authorities discussed herein, and is not supported by the four cases he footnoted. DeHart v. Ohio Fuel Gas Co., 84 Ohio App. 62, 85 N.E. 2d 586 (1948) held not only that the personal injury limitation was not relevant, but allowed the wrongful death action although the decedent had suffered an adverse judgment. Thus, DeHart is directly contrary to this Court's decisions in Collins and Perkins. Western Union Tel. Co. v. Preston, 254 F. 229 (3d Cir. 1918) relied on an old Pennsylvania statute not containing the operative "could have maintained" language, and was effectively overruled by the Pennsylvania Supreme Court's subsequent opinion in Howard v.

^{10/} Plaintiff's reply brief in the First District string-cited seven non-Florida cases, but they were either spousal immunity cases, or cases holding a settlement and release didn't bar a wrongful death action. Obviously, any further such citations should be analyzed as to their rationale and the relevant statutory language.

Bell Telephone Co. of Pennsylvania, supra. Smith v. McComb Infirmary Ass'n., 196 So. 2d 91 (Miss. 1967) held a wrongful death action for a newborn baby's death in 1964 ran from that date rather than from a negligent mistyping of the future mother's blood in 1958. The opinion did not cite or discuss the wording of Mississippi's statute, and this presumably was the result which should have been reached since it appears there was no injury until 1964 (or no discovery of the negligence which would be required under Florida law). Finally, Prosser cited Lawlor v. Cloverleaf Memorial Park, Inc., 101 N.J. Super. 134, 243 A.2d 293 (1968), which was subsequently reversed on the relevant point at 106 N.J. Super. 374, 256 A. 2d 46 (App. Div. 1969), holding the survivor cannot have let the personal injury statute run. This case was subsequently reviewed by the New Jersey Supreme Court which concluded it need not reach the issue since, in light of New Jersey's relation back rules, the personal injury statute had not run before the decedent died. Lawlor v. Cloverleaf Memorial Park, Inc., 56 N.J. 326, 266 A.2d 569 (1970). The New Jersey Supreme Court had apparently still not resolved the issue by its opinion in Alfone v. Sarno, 87 N.J. 99, 432 A.2d 857 (1981) in which it allowed a survivor to sue for wrongful death after the decedent had recovered a judgment during his lifetime. Of course, this approach was thoroughly rejected by this Court in Perkins (which cited the dissent in Alfone).

Prosser also describes the elimination of the spousal immunity defense upon death (Florida's rule) as a minority view. At the same point, he states that if a judgment for or against the injured party, or a settlement by him, bars a wrongful death action, that makes the action "derivative." Prosser, Law of Torts §127 at p. 911 (4th ed. 1971). Of course, Florida bars a wrongful death action in these prior litigation contexts, yet has characterized the action as "independent." In sum, little can be gained from such unsupported general statements in treatises or by trying to analyze this problem simply through selective labeling.

As numerous courts have observed, to adopt Plaintiff's argument would mean that there would effectively be no limitations period for a personal injury until after the potential plaintiff died - perhaps ten, twenty or fifty years after the act - even though the decedent did not, in his lifetime, deem it worthwhile to assert any legal right to recover damages, or otherwise failed to take action within the time allowed him. E.g., Mason v. Gerin Corp., supra at 1345; Street v. Consumers Mining Corp., supra at 277. 11/.

6. The impact of Ash v. Stella and Lipshaw

In her jurisdictional brief, Plaintiff asserted (at pg. 5) that the Third District's decision in Stella v. Ash,

11/ Among other obvious problems accompanying an indefinite cutoff for wrongful death actions would be the difficulty of obtaining insurance or of insurance companies being able to intelligently reserve for such claims.

425 So. 2d 122 (Fla. 3d DCA 1983), directly conflicted with Hudson. This Court recently quashed Stella v. Ash's application of the statute of limitations. Ash v. Stella, _____ So. 2d _____ (Fla. S.Ct. Case No. 63,347, October 11, 1984)(9 FLW 434). In Celotex's jurisdictional brief (at p. 5), Celotex urged that Stella v. Ash was not applicable because it had relied on the quashed Third District Perkins decision and it was alleged that the personal injury statute of limitations had not run at the time of the decedent's death. In this Court's opinion quashing the Third District's decision in Ash, it observed the reliance on Perkins and ultimately found that there was a fact question as to the running of the statute of limitations. This Court held that the medical malpractice statute of limitations applied to wrongful death actions arising from medical malpractice.

Plaintiff obviously would prefer to ignore Ash as evidenced by the cursory reference at Pl. Br. 5. Celotex recognizes that this Court's opinion in Ash v. Stella turns on an application of the medical malpractice statute of limitations so that the Court did not need to specifically address the running of the general negligence statute of limitations before the decedent's death. However, this Court did cite the portion of its opinion in Perkins which states that where the injured decedent has no right of action against the tortfeasor at the time of his death, that no

wrongful death cause of action survived the decedent. This Court then went on to state in Ash v. Stella that "in this case, we are concerned with the issue of whether a survivor can 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." Of course, this is the precise issue presented in the instant case. However, Celotex does not urge a view as restrictive to survivors as that adopted by the Court in Ash v. Stella.

In Ash v. Stella, the alleged malpractice occurred early in 1977 and Mrs. Stella died in January, 1978. The wrongful death action was commenced in March, 1979. Clearly, at the time Mrs. Stella died, the statute of limitations for her personal injury medical malpractice action had not run. Thus, but for the wording of the medical malpractice statute of limitations which specifically includes actions for death, Celotex would urge that Mrs. Stella's survivors should have had two years from her death to bring a wrongful death action. This Court's holding in Ash v. Stella is that the two year medical malpractice statute of limitations supercedes the two year wrongful death limitation, so that the statute does not run from death for medical malpractice actions, but from the time the negligent act should have been discovered. Celotex believes that in nonmedical malpractice actions, the survivors should have the full two years in which to bring the wrongful death action as long as the

personal injury statute of limitations had not run during the decedent's life. That is, in contrast to the Ash v. Stella medical malpractice situation where the survivors have only the time left on the personal injury statute, Celotex believes that survivors of a decedent who has not allowed the personal injury limitation period to run during his lifetime should have the full two years. See, e.g. Mathews v. Travelers Indemnity Insurance Company, supra.

Thus, while there is this difference between medical malpractice and ordinary negligence situations, the "issue" as worded by the court in Ash is presented in this case: whether Plaintiff can bring a wrongful death action where had the decedent survived, the decedent would have been precluded from suing these Defendants because of the statute of limitations (i.e. the decedent could not have maintained an action). The answer to that question in the instant case is irrefutably that if the Plaintiff's decedent had survived, he would have been precluded from suing the Defendants because of the personal injury statute of limitations. Therefore, Plaintiff (the survivor) should be precluded from pursuing a wrongful death action because the statute of limitations for the personal injury action had run prior to the decedent's death. There is no factual issue presented in this case as to whether or not the personal injury statute ran, and so the judgment in favor of the Defendants should be affirmed.

In its jurisdictional brief Celotex agreed that the First District's decision in Hudson conflicted with the Third District's decision in Lipshaw v. Pinosky, Pinosky, P.A., 442 So. 2d 992 (Fla. 3d DCA 1983). As Celotex observed, that issue was being reconsidered by the Third District en banc in Meehan v. The Celotex Corporation, and that if the Third District receded from Lipshaw there would no longer be a conflict. Similarly Lipshow is now pending before this Court. In light of this Court's recent decision in Ash v. Stella, it appears that Lipshaw may be resolved on the basis of the two year medical malpractice statute (as applied in Ash v. Stella) so that there would no longer be a conflict between Lipshaw and Hudson. If that conflict is resolved by either this Court's ruling in Lipshaw or the Third District's en banc ruling in Meehan, Celotex would suggest that this petition may be dismissed on the basis that there is no longer a conflict presented.

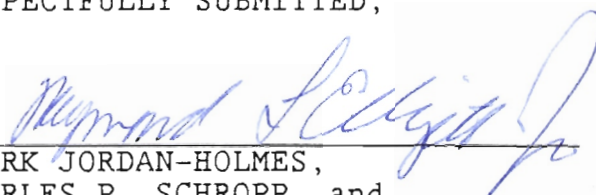
CONCLUSION

A condition for asserting a wrongful death action is that the decedent, as of the date of his death, had an existing viable claim against the tortfeasor for the same act. The statute clearly requires that "the event would have entitled the person injured to maintain an action and recover damages if death had not ensued" and makes only those persons who "would have been liable if death had not ensued" liable in a

wrongful death action. As of the date of Mr. Hudson's death, he was no longer entitled to maintain such an action and recover damages, having voluntarily permitted the statute of limitations to run as against these Defendants; these Defendants were no longer among those who "would have been liable if death had not ensued." The existence of a viable claim by the decedent at his death is a condition to maintaining a wrongful death action and is not met here.

Based on the foregoing, it is respectfully submitted that where an injured party has elected not to sue a defendant for a personal injury within the statute of limitations period for the personal injury, that his survivor may not maintain a wrongful death action after his death. Therefore, it is respectfully submitted that the First District Court of Appeals' decision was clearly correct and should be affirmed.

RESPECTFULLY SUBMITTED,

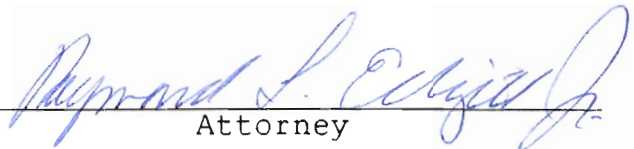


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail on this 9th day of November, 1984, to WAYNE HOGAN, ESQUIRE, Brown, Terrell & Hogan, P.A., 804 Blackstone Building, Jacksonville, Florida, 32202, Attorneys for Petitioner, H. FRANKLIN PERRITT, JR., ESQUIRE, Post Office Box 447, Jacksonville, Florida 32201, Attorney for Johns-Manville, GILBERT HADDAD, ESQUIRE, Post Office Box 345118, Coral Gables, Florida 33114, Attorney for Raybestos-Manhattan, NORWOOD S. WILNER, ESQUIRE, 303 Liberty Square, Jacksonville, Florida 32202, Attorney for Keene Corporation, JOHN C. TAYLOR, JR., ESQUIRE, 701 Fisk Street, Jacksonville, Florida 32204, Attorney for Armstrong Cork.


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