IN THE SUPREME COURT OF FLORIDA
CASE NO. 65,155

OPAL F. HUDSON, as Personal Representative of the Estate of ELA HUDSON, deceased,

Plaintiff/Petitioner

vs.

KEENE CORPORATION; THE CELOTEX CORPORATION; ARMSTRONG CORK COMPANY, and RAYBESTOS-MANHATTAN, INC.,

Defendants/Respondents.
_____/

RESPONDENT THE CELOTEX CORPORATION'S BRIEF ON JURISDICTION

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TABLE OF CONTENTS

TABLE OF CITATIONS

STATEMENT OF THE CASE AND FACTS

Respondent, The Celotex Corporation adopts the statement of the case and facts set forth in the First District's opinion in this matter.

ISSUE ON APPEAL

WHETHER THIS COURT SHOULD DEFER ITS DECISION ON ACCEPTING JURISDICTION IN THIS MATTER UNTIL THE THIRD DISTRICT COURT OF APPEAL EN BANC DECISION ON THE CONFLICT ISSUE.

ARGUMENT

THIS COURT SHOULD DEFER ITS DECISION ON ACCEPTING JURISDICTION IN THIS MATTER UNTIL THE THIRD DISTRICT COURT OF APPEAL EN BANC DECISION ON THE CONFLICT ISSUE.

The opinion of the District Court of Appeal for the First District, now reported as Hudson v. Keene Corporation, 445 So. 2d 1151 (Fla. 1st DCA 1984), although not citing or discussing the opinion of the Third District, conflicts with one of the holdings in Lipshaw v. Pinosky, Pinosky, P.A., 442 So. 2d 992 (Fla. 3d DCA 1983). However, Lipshaw was based in part on an earlier decision of the Third District which was subsequently quashed by this Court. The precise question on which Hudson and Lipshaw conflict is now before the Third District on en banc consideration and oral argument has already occurred. For these reasons, and because Hudson does not conflict with any of the other cases urged by Petitioner, Celotex respectfully suggests that this Court defer its decision on jurisdiction in Hudson (and Lipshaw) until the Third District has resolved the question en banc itself, since such a resolution might well eliminate any conflict.

The First District in Hudson concluded that if an injured party allowed his cause of action for personal injury against the defendants to become barred by the running of the statute of limitations for personal injury, then his survivors could not maintain a wrongful death action. Petitioner correctly

focuses on the controlling language of the wrongful death statute which provides a cause of action to survivors for a wrongful act causing death if "the event would have entitled the person injured to maintain an action and recover if death had not ensued." §768.19, Florida Statutes. The court in Hudson found that judgment was properly entered in favor of the respondents and against Ela Hudson's survivor "because under the supreme court's interpretation of the statutory language in Perkins, Ela Hudson would not have been able to maintain an action against appellees if death had not ensued due to the running of the limitations period with regard to the personal injury suit." 445 So. 2d 1153.

This Court held recently in Variety Children's Hospital v. Perkins, 445 So. 2d 1010 (Fla. 1983) that where a deceased minor had recovered for damages due to negligently inflicted injuries that no wrongful death cause of action could subsequently be brought by his parents:

> At the moment of his death the injured party, 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. [cites omitted]

445 So.2d at 1012. Thus, there is no conflict between this Court's decision in Perkins and the First District's decision in Hudson, since Hudson follows this Court's opinion in recognizing that where the decedent through some action or inaction has allowed the underlying personal injury claim to

become satisfied or barred that no cause of action can subsequently be brought for wrongful death once the decedent dies.

The holdings of this Court in Perkins and the First District in Hudson are easily reconciled with the Supreme Court's holdings in Dressler v. Tubbs, 435 So. 2d 792 (Fla. 1983) and Shiver v. Sessions, 80 So. 2d 905 (Fla. 1955). 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 rule of marital immunity automatically disappears from the picture simultaneously with the accrual of the right of action under the right of action under the Wrongful Death Act." Shiver, supra. at 908. That is, once a spouse is dead, immunity based on the preservation of marital harmony no longer makes sense. By contrast, the purpose for the statute of limitations (Hudson) as well as the doctrine of res judicata (Collins v. Hall) 1/ or the principles barring a subsequent action where there has been a judgment (Perkins) or settlement (Warren v. Cohen) 2/ remain equally viable although the injured party has died.

1/ 117 Fla. 282, 157 So. 646 (1934).

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

Bruce v. Byer, 423 So. 2d 413 (Fla. 5th DCA 1982) simply reversed a trial court's erroneous interpretation of the running of the statute of limitations, since in that case there was no dispute that the patient's personal injury suit was timely filed and thus the statute of limitations never ran (the trial court had erroneously assumed that the wrongful death action also had to be commenced within two years of the discovery of the negligence, even though the patient had not died). Stella v. Ash, 425 So. 2d 122 (Fla. 3d DCA 1982) relied on the quashed Third District Perkins decision and on Bruce v. Byer and also contained a factual issue as to whether the medical negligence should have been discovered within two years prior to the death. Additionally, the personal injury statute of limitations had not run at the time of the plaintiff's death - thus, the essential issue presented in Hudson is not even in Stella v. Ash.

To the extent Lipshaw relies on Bruce v. Byer and Stella v. Ash, those cases are not in conflict as discussed above. Also, to the extent Lipshaw relies on the Third District's quashed opinion in Perkins its efficacy is subject to serious question. However, Celotex recognizes that the second portion of the Lipshaw opinion does conflict with this Court's opinion in Perkins and with the Hudson decision. As

Petitioner has noted, it is on this basis that the petitioners in Lipshaw have sought discretionary review from this Court.

However, as noted above, the Court which authored Lipshaw - the Third District Court of Appeal - now has that question under consideration in two cases which have been consolidated and argued en banc before the court. By its orders of February 17, 1984, the Third District ordered en banc reconsideration in the case of Meehan v. The Celotex Corporation, Third District Case No. 82-122 and en banc argument in Nance v. Johns-Manville Sales Corporation, Third District Case No. 81-382. Supplemental briefs were filed and en banc argument before the Court took place on April 10, 1984. Meehan and Nance presented two issues. The first dealt with the operation of the Florida Borrowing Statute on causes of actions arising in other states where the plaintiffs subsequently moved to Florida and filed suit (the causes of action were barred under the borrowed state's statute of limitations, but not under the corresponding Florida statute of limitations). The second issue presented was the precise issue presented in Hudson and Lipshaw - whether survivors could bring a wrongful death action where the decedent had allowed the personal injury statute of limitation to run during his lifetime.

Thus, the Third District now has before it for en banc consideration the question presented in this case and the

Celotex Corporation would respectfully suggest that this Court should defer determining whether to accept jurisdiction in Lipshaw and Hudson pending the Third District's resolution of that question. If the Third District en banc follows the panel decision in Lipshaw then a conflict would exist with Hudson, and Celotex would urge this Court to take jurisdiction to resolve the conflict. However, should the Third District en banc adopt the rationale of Hudson then there would be no conflict. Celotex would note that not only is the Third District considering the question for the first time en banc, but it now has the opportunity to consider the question in light of the First District's decision in Hudson and this Court's decision in Perkins (which quashed the Third District's opinion which had in part formed the basis for the Lipshaw opinion).

CONCLUSION

It is apparent that the First District's opinion in Hudson does not conflict with this Court's opinion in Perkins, but rather follows it. Similarly, Hudson does not conflict with the other opinions cited by Petitioner with the exception of Lipshaw. The question presented in Hudson and Lipshaw is presently under consideration by the Third District en banc and The Celotex Corporation would urge this

Court to defer its determination on jurisdiction pending the Third District's resolution of the question.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by United States Mail to the attached Schedule of Counsel this 27th day of April, 1984.

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