

R/S

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

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**FILED**

SID J. WHITE

MAY 7 1984

CLERK, SUPREME COURT

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ARMSTRONG CORK COMPANY'S  
ANSWER TO JURISDICTIONAL BRIEF  
OF PETITIONER HUDSON

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## STATEMENT OF THE CASE AND FACTS

Petitioner seeks to invoke the discretionary jurisdiction of this Court to review a decision of the District Court of Appeal, First District, rendered March 8, 1984 under Fla.R.App.P 9.030(a)(2)(A)(iv), asserting that said decision (hereafter referred to as the Hudson case) conflicts with decisions of this Court and those of other district courts of appeal.

Petitioner's statement of the case and facts does not accurately set forth the issue below, fails to include certain facts and improperly includes certain facts not pertinent to this Court's decision. Therefore, Respondent cannot agree with Petitioner's Statement and will set forth its own.

Petitioner's decedent's cause of action for personal injury sustained as a result of asbestosis accrued in March, 1977. On November 12, 1980, decedent filed suit against Johns-Manville for said personal injury. Prior to his death, he had never filed suit for said personal injury against Respondent. On July 14, 1981, more than four years after his personal injury action accrued, and after the limitations period on said action had run, decedent died. On November 2, 1981, Respondent was joined for the first time as a wrongful death defendant in the previously filed action against Johns-Manville. The trial court granted summary judgment for Respondent and Petitioner appealed. By Order dated December 29, 1981, the Court of Appeal, First District, stayed this action as to Johns-Manville due to the pendency of bankruptcy proceedings. Hence, Johns-Manville was not a party to the summary judgment granted by the trial court as to this respondent nor to the appeal below.

The question presented on appeal was whether, based on the language found in the wrongful death statute, specifically §768.19 Fla.Stat. (1983), the wrongful death claim failed to survive the decedent due to the running of the limitations period with regard to the decedent's personal injury suit before his death, even though

ordinarily the limitations period for a wrongful death action is two years, §95.11(4)(d), Fla.Stat. (1983).

In determining this issue, the First District focused on the below emphasized language of §768.19, which provides:

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 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.

This same language was the focus of this Court's decision in Variety Children's Hospital v. Perkins, 445 So.2d 1010 (Fla. 1983), on which the First District relied. The First District held that since Ela Hudson (the decedent) would not have been able to maintain an action and recover damages against the Respondent for the personal injury had death not ensued, because he allowed the statute of limitations to run on the personal injury action as to this Respondent before his death, the wrongful death action filed against Respondent based on this same personal injury could not be maintained since it did not survive decedent. Therefore, summary judgment was properly granted for Respondent. The First District based its holding on this Court's interpretation of the statutory language, as set forth in Perkins, supra, that where the person injured had no right of action at the time of death for said injury, under the wrongful death statute no wrongful death cause of action survives the death of the person injured.

## ARGUMENT

### POINT I: THE HUDSON DECISION DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH THE DISTRICT COURT DECISIONS RELIED ON BY PETITIONER.

Petitioner asserts that the Hudson decision here under review directly and expressly conflicts with the following district court decisions: Bruce v. Byer, 423 So.2d 413 (Fla. 5th DCA 1982); Stella v. Ash, 425 So.2d 122 (Fla. 3rd DCA 1982); and Lipshaw v. Pinosky, Pinosky, P.A., 442 So.2d 992 (Fla. 3rd DCA 1983).

This Court lacks jurisdiction based on conflict.\* In the absence of a real and embarrassing conflict of opinion and authority this Court will not extend its jurisdiction to the point of substituting its judgment on a question of law for the judgment of a district court having final appellate jurisdiction. Financial Fed. S & L Ass'n v. Burleigh House, Inc., 336 So.2d 1145 (Fla. 1976). This is because the district courts are courts primarily of final appellate jurisdiction and to allow them to become intermediate courts of appeal would be detrimental to the speedy and efficient administration of justice. Jenkins v. State, 385 So.2d 1356, 1357-58 (Fla. 1980).

There is no real and embarrassing conflict among the district court decisions in question. The Hudson court focused on certain language found in the wrongful death statute §768.19, Fla.Stat., and on this Court's interpretation of that language in Perkins, supra. Neither Lipshaw nor Stella nor Bruce addressed this language in the statute; in fact, the statute is nowhere cited in those decisions. The statutory language focused on in Hudson was crucial to its decision, as it was to this Court in Perkins. The legal principle set forth in Hudson arose from an express interpretation

\*Respondent, Armstrong, has received the brief and is thus aware of the position of co-respondent, The Celotex Corporation. Armstrong respectfully disagrees with The Celotex Corporation regarding the existence of a conflict.

of that language. Therefore, the fact that said language was not even implicitly addressed by Stella, Lipshaw, and Bruce results in a lack of direct and express conflict that is real and embarrassing on the point of law addressed by Hudson.

Moreover, the facts of Stella and Bruce vary so materially from those in Hudson that absolutely no conflict appears even from a casual reading of those decisions. In both of those cases, the limitations period for decedent's cause of action for the injury that eventually resulted in death had not run at the time of the death. Therefore, decedent would have been able to maintain an action for said injuries had death not ensued. In fact, in Bruce, the decedent had filed a timely malpractice action against the alleged tortfeasor before the decedent died, which action was converted into a wrongful death case upon his death. These facts are directly opposite of those existing in Hudson and it consequently cannot be argued that the decisions conflict in any way. Had the Hudson Court been presented with the facts of Stella and Bruce it would have reached the same result as those Courts in light of the fact that decedent would have been able to maintain an action at the time of death for the injury resulting in death, had death not ensued.

Moreover, this Court has held that where conflict jurisdiction is sought based on an apparent conflict that existed prior to the issuance of a decision of this Court that resolves the conflict, and the resolution of the conflict is in accord with the majority view in the decision under review, the decision under review will be approved and the petition seeking conflict review will be denied. S.P.J. Corp. v. Kelner, 268 So.2d 373 (Fla. 1972). Furthermore, where the decision relied upon for conflict has been expressly overruled, there is no longer a basis for conflict jurisdiction. Lipke v. Cowart, 238 So.2d 645 (Fla. 1970); State Farm Mutual Automobile Ins. Co. v. Carrico, 211 So.2d 14 (Fla. 1968).



Lipshaw, Stella and Bruce all relied on the Third District's decision in Perkins v. Variety Children's Hospital, 413 So.2d 760 (Fla. 3rd DCA 1982), which was overruled by this Court in Variety Children's Hospital v. Perkins, *supra*, (hereinafter Perkins II). Those cases were decided prior to this Court's overruling of the Third District's decision on which Lipshaw, Stella and Bruce relied. Consequently, even assuming arguendo that those cases directly and expressly conflicted with Hudson, the conflict already has been resolved by this Court's issuance of its decision in Perkins II, *supra*, since Perkins II is in accord with the holding expressed in Hudson (as will be discussed *infra*). Therefore, this Court should deny the petition for conflict review. S.P.J. Corp. v. Kelner, *supra*. Moreover, while Lipshaw, Stella and Bruce have not themselves been expressly overruled by this Court, they have been implicitly overruled since the decision they relied on was expressly overruled. Therefore, under the Court's reasoning in Cowart, *supra*, and Carrico, *supra*, there is no longer a basis for conflict jurisdiction as the conflict has been resolved.

The preceding analysis is particularly relevant to whether the asserted conflict between the First District in Hudson and the Third District's decisions in Lipshaw and Stella were resolved by this Court in Perkins II. In Perkins II, this Court concluded by stating: "Since there was no right of action existing at the time of death, under the statute (§768.19, Fla.Stat.) no wrongful death cause of action survived the decedent." This Court cited, with approval, Warren v. Cohen, 363 So.2d 129 (Fla. 3rd DCA 1978), *cert. denied*, 373 So.2d 462 (Fla. 1979), for this proposition. In Warren, decedent during her lifetime had settled her personal injury action and executed a release, whereupon the action was dismissed with prejudice. Thereafter, she died and her personal representative brought a wrongful death action arising out of the same personal injury. The Third District affirmed a summary final judgment for the

defendant, finding that decedent would not have been able to maintain an action for the personal injury at the time of death due to the prior settlement and release and therefore no wrongful death cause of action survived the decedent.

This Court has now found, through Perkins II, that the Third District's decision in Warren clearly comports with the statutory language of §768.19, Fla.Stat. and is sound law and has further held that the Third District's decision in Perkins did not comport with the statutory language and is not good law. The Third district in Perkins declined to follow its prior decision in Warren, stating that Warren barred the wrongful death action in order to encourage the settlement of cases. By citing Warren with approval and overruling Perkins, this Court has recognized the anomaly that existed in the Third District as a result of those conflicting rulings. If an injured party sued the tortfeasor and settled the claim, Warren barred a subsequent wrongful death action. If, however, the same injured party refused to settle, and obtained a verdict, Perkins held that a subsequent wrongful death action could be maintained. Perkins II recognizes that the distinction made by the Third District, based on the encouragement of settlements, is "unconvincing as well as inconsistent". Walrod v. Southern Pacific Co., 447 F.2d 931 (9th Cir. 1971). The Third District decided Warren prior to deciding Stella or Lipshaw, which erroneously deviated therefrom by following Perkins instead of Warren. Now that this Court has approved the Warren decision and has disapproved the Perkins decision, it follows that any conflict existing in the Third District among Warren on the one hand, and Lipshaw and Stella on the other, has been resolved in favor of Warren. Since Warren and Hudson are clearly in accord with each other, there no longer exists any conflict between the Third District and the First District on this point of law.

Based on the foregoing, this Court should find that there is no basis for conflict jurisdiction due to conflict between the decision in Hudson and the decisions in Lipshaw, Stella and Bruce.

POINT II: HUDSON DOES NOT CONFLICT WITH THIS COURT'S RULINGS.

Petitioner asserts that Hudson conflicts with this Court's rulings in Dressler v. Tubbs, 435 So.2d 792 (Fla. 1983) and Shiver v. Sessions, 80 So.2d 905 (Fla. 1955). However, the unique facts existing in Dressler and Shiver compel a different result than that reached in either Hudson or Perkins II on which Hudson relied. Because of this, no conflict exists among the decisions.

In order to address this point, this Court's holding in Perkins II must be analyzed because it was on this holding that Hudson relied. In Perkins II this Court interpreted §768.19 Fla.Stat. to require that the tort victim have a right of action against the tortfeasor at the time of the victim's death, before the wrongful death action can be maintained. Hence, where the tort victim had already received a judgment against the tortfeasor for his injury prior to his death, he had no right of action left at the time of his death, that right of action already having been extinguished. Consequently, no wrongful death action could be maintained after his death under the statutory language. This Court noted that the Third District had reached the opposite result in finding that the right to recover for wrongful death is separate and independent from, rather than derivative of, the injured person's right while living to recover for personal injuries, and that the limitations period for wrongful death begins to run at the time of death, not at the time of the original incident. Upon noting this, this Court stated: "We take the view contrary to that of the district court of appeal and hold that the judgment for personal injuries rendered in favor of the injured party while living barred the subsequent wrongful death action based on the same tortious conduct." At page 1012.

Hence, this Court found that the wrongful death statute provides a remedy that is derivative of the injured person's right while living to recover for his injuries. The statute provides an independent remedy, in the sense that the statutory beneficiaries recover for their own damages as a result of the death, but they have been given no such remedy by the legislature unless the tort victim could have recovered against the tortfeasor for his injuries at the time of his death. This Court looked to the common law in interpreting the statute, stating that an anomaly then existed because a tortfeasor who would normally be liable for damages would not be liable if his tortious act was so severe as to cause death, because the victim's right to sue terminated at death. Hence, the Wrongful Death Act was passed for the paramount purpose of preventing a tortfeasor from evading liability when his misconduct results in death and the victim's death prevents him from bringing suit. It would clearly follow that where the victim's death was not immediate, and he had time to sue for the tort, that the tortfeasor would in such a case not be able to evade liability. Therefore, in such a case the paramount purpose of the act is no longer served by allowing a wrongful death remedy to the beneficiaries and they are barred from bringing the action. This Court emphasized that to allow the remedy in such a case would create problems involving, inter alia, a lack of repose.

In Hudson, Perkins II was applied in complete harmony with its holding and with the prior decisions of this Court. In Hudson, the victim not only had time to sue the alleged tortfeasor (Respondent), prior to his death, but he had so much time that the statute of limitations ran on his cause of action prior to his death. Hence, his right of action against Respondent was barred at his death and no wrongful death remedy would be necessary to fulfill the paramount purpose of the act--to prevent the tortfeasor from evading liability due to the immediacy of the victim's death. In

Hudson, Respondent did not evade liability due to the decedent's death; rather, the decedent, while alive, chose not to assert liability during the four year limitations period. Hence, as in Perkins II, a lack of repose would result if the wrongful death remedy was permitted after the victim allowed the limitations period to run. The statutory language compels that once the victim has allowed the limitations period to run, the alleged tortfeasor must be freed from the fear of future liability to another party arising from the same act against the same victim. Otherwise, ten, twenty or more years could pass between the injury and death and the alleged tortfeasor could still be subject to a wrongful death suit. This was not the purpose of the act, as held in Hudson in reliance on Perkins II.

Since Hudson is in accord with this Court's decision in Perkins II, the only way it could conflict with Dressler and Shiver is if those decisions also conflict with Perkins II. Clearly this is not the case.

In both Dressler and Shiver, a husband committed a tort against his wife resulting in her death and was himself killed. The wife's beneficiaries then sued the husband through his personal representative for wrongful death. In both cases, the personal representative argued that the statutory language would bar the action because the wife would not have been able to sue her husband at the time of death due to the doctrine of interspousal immunity. In both cases, this Court emphasized that the need for the bar of interspousal immunity disappeared at the time of the tort. Both husband and wife were dead and the purpose of the immunity--to preserve marital harmony and prevent collusion among spouses to the same lawsuit--was non-existent. Hence, the beneficiaries should not be barred by an immunity not applicable at time of the suit, and that is purely personal to the wife and does not inhere in the tort itself. This is very different from the type of bar that is occasioned by a prior

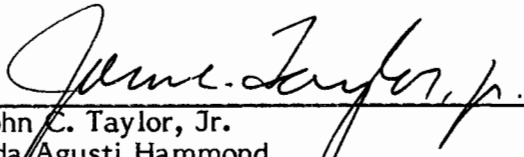
judgment or the statute of limitations, defenses which remain viable though the injured party has died and which inhere in the tort itself. Significantly, Shiver itself held that the beneficiaries' wrongful death action was subject to the defenses of contributory negligence and the like which the tortfeasor could have pled in a suit against him by the decedent during his or her lifetime. Hence, it would follow that defenses like the statute of limitations and prior judgments also would be a bar since they are not purely personal, like interspousal immunity, and inhere in the cause of action itself, barring all remedy for the tortious act. Because of their unique facts, Shiver and Dressler are exceptions to the rule followed by this Court since Duval v. Hunt, 34 Fla. 85, 15 So. 876 (1894), and Collins v. Hall, 117 Fla. 282, 157 So. 646 (1934), and most recently restated in Perkins II. Hudson has correctly followed this line of cases and does not conflict with any of this Court's decisions.

#### CONCLUSION

Hudson does not expressly and directly conflict with the district court decisions relied on by Petitioner, and even assuming some conflict can be read into them, it already has been resolved by this Court. Moreover, Hudson does not conflict with the decisions of this Court. Therefore, this Court is respectfully urged to exercise its discretion and deny Petitioner's request for conflict review.

Respectfully submitted,

TAYLOR, DAY, RIO & MERCIER

  
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail this 4th day of May, 1984 to Wayne Hogan, Esquire, 804 Blackstone Building, Jacksonville, Florida 32202; Norwood S. Wilner, Esquire, 624 Ocean Street, Jacksonville, Florida 32202; Gilbert Haddad, Esquire, P. O. Box 345118, Coral Gables, Florida 33114; Raymond T. Elligett, Jr., P. O. Box 3324, Tampa, Florida 33601.

  
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