

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.

**FILED**

S.D. J. WHITE

APR 18 1984

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JURISDICTIONAL BRIEF OF PETITIONER HUDSON

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## STATEMENT OF THE CASE AND FACTS

This proceeding seeks to invoke the discretionary jurisdiction of the Court to review a decision of the District Court of Appeal, First District, rendered March 8, 1984 (Appendix, p.1). The basis for the Court's jurisdiction is the express and direct conflict between the decision under review and decisions of this Court and those of other district courts of appeal Fla. R. App. P.9.030(a)(iv).

### The Decedent

This is an asbestos disease case. A welder the whole time, Ela Hudson worked in shipyards from 1942 through 1953. (Deposition of Ela Hudson, March 19, 1981, pp.5,10; hereinafter "Hudson 3/19/81 depo".) As a welder, he did not do insulation work, but worked near the asbestos insulation workers. (Hudson 3/19/81 depo., pp.10,11,34). And, he, personally, could recall seeing the initials "JM" on certain asbestos products used by the insulation workers (Hudson 3/19/81 depo., pp.11,36-7).

### The Lawsuit

The First District's substituted opinion accurately states that Ela Hudson's asbestosis was diagnosed in March 1977. Less than four years later, on November 12, 1980, Mr. Hudson timely brought suit against Johns-Manville Sales Corp. only. He died on July 14, 1981, and on November 2, 1981, a wrongful death claim was filed (by amended complaint) against the original defendant,

Johns-Manville Sales Corp., and respondents were named as additional defendants.

#### The Summary Judgment

The respondent asbestos-producers moved for summary judgment. They claimed the wrongful death action was barred, as against them, because the four-year personal injury statute of limitations period had run prior to Mr. Hudson's death. Johns-Manville Sales Corp., against whom Mr. Hudson had filed suit within four-years of learning of the asbestosis, did not move for summary judgment. The trial court granted summary judgment and Mrs. Hudson, as personal representative, appealed. While the appeal was pending, all Johns-Manville entities filed for reorganization and the trial and appellate level proceedings were stayed as to them only.

#### The Issue Below

The First District was asked to decide whether the running of the personal injury limitations period during the decedent's lifetime operates to bar a wrongful death action timely brought after the death. Ela Hudson's asbestosis was diagnosed in March of 1977. Within the four-year limitations period prescribed by Section 95.11(3), Florida Statutes, he sued Johns-Manville Sales Corp. but not the respondents. He died in July 1981 and less than 4 months later (with 20 months remaining on the wrongful death limitations period) this wrongful death action was filed by

amended complaint. Did the running of the personal injury limitations period against Ela Hudson himself prevent the wrongful death claim from coming into being for the benefit of his widow?

The Ruling Below

"Because of" this Court's decision in Variety Children's Hospital v. Perkins, \_\_\_\_\_ So. 2d \_\_\_\_\_ (Fla. 1983)[8 FLW 501], the First District declared:

. . . we are bound to conclude the circuit judge in the present case properly granted appellees' motion for summary judgment, because under the supreme court 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. (Slip. op. at 3.)

The First District so held, although this Court did not reach the statute of limitations issue present in Perkins, although Justices Ehrlich and Overton in their concurring opinion in Perkins advised against reading the decision too broadly, and although the Perkins court declared an intention to adopt the majority interpretation of the statutory language. On this latter point Dean Prosser, on whom Perkins majority relied, declares:

As to the defense of the statute of limitations . . . the considerable majority of the courts have held that the statute runs against the death action only from the date of death, even though at that time the decedent's own action would have been barred while he was living.

W. Prosser, Law of Torts, S. 127, p.912 (4th ed. 1971)

(footnotes omitted).

### The Statute

The statute in question is Section 768.19, Florida Statutes:

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.

The dispute over the proper interpretation of the emphasized language, in light of the remedial purpose of the Florida wrongful death act, presently forms the basis for a substantial conflict of Florida appellate decisions.

### THE GROUNDS FOR INVOKING JURISDICTION

#### The Conflicts

The First District's decision in Hudson is in express and direct conflict with Lipshaw v. Pinosky, Pinosky, P.A., 442 So. 2d 992 (Fla. 3d DCA 1984). There the personal injury cause of action for medical malpractice accrued on February 25, 1977 and became barred by the applicable two-year statute of limitations on February 25, 1979. Nearly two years later the malpractice victim died. The Third District held that the wrongful death cause of action accrued on the date of death, notwithstanding the barring of the personal injury cause of action nearly two years earlier.

In short, Lipshaw held that even though the decedent's own action was time-barred by the personal injury statute of limitations, the wrongful death action could be pursued; Hudson holds directly to the contrary. The conflict simply cannot be denied. Indeed, we ask the Court to take judicial notice that Lipshaw is presently pending on petition for conflict jurisdiction (Case Nos. 64,897 and 64,898) in which the petitioners assert Lipshaw's direct and express conflict with Hudson.

Another panel of the Third District decided Stella v. Ash, 425 So. 2d 122 (Fla. 3d DCA 1983), which also directly conflicts with Hudson. The court reversed a defense summary judgment on a holding that the filing of the wrongful death action within two years of the death should be permitted even if the personal injury statute limitations period had run.

The Fifth District has accepted the Third District's view that the running of the personal injury limitations period does not bar the subsequent filing of a wrongful death action. In Bruce v. Byer, 423 So. 2d 413, 415 (Fla. 5th DCA 1982), the court stated:

In Perkins v. Variety Childrens Hospital, 338 So. 2d 558 (Fla. 3d DCA 1982), the Third District construed section 95.11(4)(d), Florida Statutes (1979) (the general limitations provision for wrongful death actions), as follows:

Since the right does not exist until death occurs, the only reasonable interpretation is that wrongful death actions must be brought within two years from the time of the death of the injured party and not within two years from the time of the injuries of that party.



Id. at 764. In Perkins, the defendant hospital claimed that plaintiff's father had no right of action for wrongful death because the statute of limitations for a personal injury action had expired prior to the time of his son's death.

The conflict between the First District and the Third and Fifth Districts on this statute of limitations issue is direct, express, undeniable.

The Hudson decision does more than conflict with the decisions of other districts. It conflicts with this Court's rulings. In Dressler v. Tubbs, 435 So. 2d 792 (Fla. 1983), and in Shiver v. Sessions, 80 So. 2d 905 (Fla. 1955), this Court ruled that interspousal immunity (a waivable affirmative defense as the Hudson court termed the statute of limitations) could not be asserted to defeat a wrongful death claim brought on behalf of a decedent's statutory survivors. Quite in conflict with the Hudson decision, this Court quoted Shiver in Dressler at page 793:

Thus, it is settled law in this jurisdiction that the wife's disability to sue her husband for his tort is personal to her, and does not inhere in the tort itself.... It is also well settled that our Wrongful Death Act creates in the named beneficiaries "an entirely new cause of action, in an entirely new right, for the recovery of damages suffered by them, not the decedent, as a consequence of the wrongful invasion of their legal right by the tortfeasor." This right is "separate, distinct and independent" from that which might have been sued upon by the injured person, had he or she lived.

The First District's decision in Hudson is in direct and express conflict with the rationale of this Court's decisions in Dressler and Shiver.

Now that this Court's decision in Perkins is final, Respondents suggest that Lipshaw and Stella, which relied on the Third District's statute of limitations pronouncements in Perkins, are no longer good law, and can no longer be the basis for conflict jurisdiction.

However, fresh from deciding Dressler v. Tubbs, this Court was very careful to limit its Perkins opinion to an explanation of the paramount remedial purposes of the wrongful death act and how the unique potential in Perkins for a misuse of the act required the rejection of the attempt to hold the defendants liable a second time.

Although the Third District had squarely decided the statute of limitations question in its Perkins decision, it was unnecessary for this Court to reach that issue since the resolution of the relitigation question was dispositive. Accordingly, the Court properly left the statute of limitations issue to be resolved in an appropriate case. Hudson and Lipshaw are just such cases: they conflict on the very issue Perkins left for this Court' later decision.

#### CONCLUSION

The Court should accept jurisdiction and resolve the conflict between Dressler, Shiver, Bruce, Perkins, Stella and Lipshaw, on the one hand, and Hudson on the other.

Respectfully submitted,

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I hereby certify that a copy hereof has been furnished to the attached schedule of counsel by U. S. Mail this 16th day of April, 1984.

