IN THE SUPREME COURT OF FLORIDA

CASE NO. 65,155

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

Petitioner,

vs

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

Respondents.

PETITIONER'S REPLY BRIEF

Wayne Hogan
BROWN, TERRELL, HOGAN & ELLIS, P.A.
804 Blackstone Building
Jacksonville, FL 32202
(904) 632-2424

Attorneys for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other Authorities:

ARGUMENT

The Analysis Was By The Court

It is preposterous to suggest, as the asbestos producers do, that "[i]t adds nothing to the analysis" for the members of this Court to have emphasized in the three Perkins opinions the "independent" rather than "derivative" nature of the wrongful death action, Variety Childrens' Hospital v. Perkins, 445 So.2d 1010 (Fla. 1984). (Answer brief, p.12.) Moreover, if the asbestos producers would only apply the Court's analysis, even they might see that the running of the statute of limitations against the decedent's right of action has no effect upon the statutory survivors' right of action. The limitations defense "does not inhere in the tort itself" and the survivors' right is "separate, distinct and independent" and is "a consequence of the wrongful invasion of their legal right by the tort-feasor." Dressler v. Tubbs, 435 So.2d 792, 793 (Fla. 1983), quoting Shiver v. Sessions, 80 So.2d 905, 907 (Fla. 1955).

We have emphasized the "independent rather than derivative" nature of the wrongful death right of action only because this Court has consistently done so. In Perkins the Court had the opportunity to rule as the asbestos producers urge, 445 So.2d 1011, but true to teachings of Shiver and Dressler, did not rule the action barred by the personal injury statute of limitations. And in considering Ash v. Stella, ___ So.2d ___, 9 FLW 434 (Fla. 1984), the Court once again saw that the asbestos producers' statute of limitations argument would have been an erroneous basis for

decision, and decided the case on a different basis.

The asbestos producers claim this Court's Shiver and Dressler opinions state "the exception rather than the rule." (Answer brief, p.13.) This suggestion is unsupported and unsupportable. Neither opinion purports to be stating an exception. Indeed, Justice Roberts' Shiver opinion was careful to find and state the true meaning of the wrongful death statute:

> But we think it is unreasonable to imply that the Legislature intended to bar the "right of action" created by the Act on account of a disability to sue which is personal to a party having an entirely separate and distinct "right of action" and which does not inhere in the tort--or "cause of action"-- upon which each separate right of action is based.

80 So.2d at 908. Indeed, unlike the asbestos producers (answer brief, p.17-18), Justice Roberts was equally careful to point out that in Rodney v. Staman, 317 Pa.1, 89 A.2d 313 (1952), the Pennsylvania Supreme Court was interpreting "the Ohio Wrongful Death Act, which contained a provision almost identical with that of the Florida [Act]...." 80 So.2d at 907 (emphasis supplied). As the asbestos producers have confessed (answer brief, p.26), the courts of Ohio hold that the running of the personal injury statute of limitations does not prevent the wrongful death right of action from being enforced.

And showing that this Court's Dressler decision was not stating an "exception" but was enforcing the wrongful death statute, Justice Ehrlich found that the district court (419 So.2d 1151) had erred when it "grafted the doctrine of interspousal immunity onto the Wrongful Death Act." 435 So.2d at 793. Thus, this Court in Shiver and Dressler was not creating an exception to

the statutory rule; it was enforcing the rule. Continued enforcement of the statutory rule here will result in a rejection of the asbestos producers' attempt to "graft" the exception of the personal injury statute of limitations "onto the Wrongful Death Act."

Criticizing the Court's enforcement of the statute (answer brief, p.14), the asbestos producers suggest that our arguments are "essentially semantic exercises" because we, with continuing faith in the rule of law, have turned for guidance to this Court's repeated "use of the terms 'inheres in the tort', and 'right of action' versus 'cause of action'." Yes, we do urge that the operative test should be whether the defense to the wrongful death action "inheres in the tort." But we do not urge this out of thin air. We urge it because the Court has repeatedly said this is the test.

> 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.

Dressler, 435 So.2d at 793, quoting Shiver, 80 So.2d at 907 (emphasis supplied). The Shiver court went on to explain (at 907):

> The tortious injury to the wife "'does not cease to be an unlawful act, though the law exempts the husband from liability for the damage.'" May v. Palm Beach Chemical Company, Inc., supra [77 So.2d 470]....

Notwithstanding the asbestos producers' pejorative description of our analysis, if there is any point which is clear beyond argument, it is that the statute of limitations defense does not inhere in the original tort. Some specified statutory time must

pass after the occurrence of the tort before the defense comes into being. And, exactly as in the case of interspousal immunity, the original tort does not cease to be a tort when the statute of limitations runs; only the remedy is affected. Hoagland v. Railway Express Agency, 75 So.2d 822 (Fla. 1954); Puleston v. Alderman, 148 Fla. 353, 4 So.2d 704 (1941); Danielson v. Line, 135 Fla. 585, 185 So.332 (1938); 35 Fla. Jur. 2d, Limitations and Laches, section 4 at 9.

In the asbestos producers' rush to get past the controlling decisions of this Court in order to talk about decisions from certain other states, they curiously have ignored Moragne v. State Marine Lines, Inc., 211 So.2d 161 (Fla. 1968), which was discussed extensively in the initial brief at pages 13 through 15. Moragne, written by Justice Roberts, who also wrote Shiver, explains that in Shiver and Parker v. City of Jacksonville, 82 So.2d 131 (Fla. 1955), this Court held

> that the statutory beneficiaries could recover the damages sustained by them, even though their decedent's suit, had he lived, would have been barred. Shiver v. Sessions, supra, 80 So.2d 905; Parker v. City of Jacksonville, supra, 82 So.2d 131.

211 So.2d at 164. Also of note is that in Moragne this Court takes issue with the asbestos producers' suggestion that the Virginia statute has been interpreted like ours. Our statute creates a new right of action, and, "in direct conflict", the Virginia statute, does not. Moragne, 211 So.2d at 165. Indeed, the very case cited by the asbestos producers, Street v. Consumers Mining Corp., 185 Va. 561, 39 S.E.2d 271, 274-75 (1946), states this explicitly.

Chief Justice Boyd and Justices Alderman, Overton, McDonald

and Ehrlich made it plain in Perkins that the wrongful death action was disallowed because the cause of action itself (not just the decedent's right of action) "had already been litigated, proved and satisfied" and thus merged into the previous million dollar plus judgment, leaving "no social or legal need for the alternative remedy of a wrongful death action." Variety Children's Hospital v. Perkins, 445 So.2d 1010, 1012, 1013 (Fla. 1984). On the other hand, in Dressler it was only the dissent which argued for the statutory interpretation espoused here by the asbestos producers. The majority of this Court plainly opted to hold to the Shiver interpretation of the statutory language. The reasons: this would accord with the Courts interpretation of the wrongful death act before its 1972 reenactment and it would effectuate the statute's remedial purpose.

The Shiver Analysis Is Part Of The Wrongful Death Statute

This Court has recently reaffirmed that

> when the legislature reenacts a statute which has a judicial construction placed upon it, it is presumed that the legislature is aware of the construction and intends to adopt it, absent a clear expression to the contrary.

Gulfstream Park Rac. Ass'n v. Dept., 441 So.2d 627, 628 (Fla. 1983). In the decision which addressed the constitutionality of the 1972 revision of the wrongful death act, Justice Overton declared for a unanimous court:

> Section 768.19 of the new Act provides for a cause of action in wording similar to that of now repealed Section 768.01.

Martin v. United Security Service, Inc., 314 So.2d 765, 768 (Fla. 1975)(footnote quoting section 768.19 omitted).

However, more directly on point is Stern v. Miller, 348 So.2d 303 (Fla. 1977). There this Court faced the question of whether a viable but stillborn fetus was a "person" within the meaning of the act. Notwithstanding "compelling" arguments, including the decided weight of authority, in favor of allowing the wrongful death action, this Court was forced to rule that the viable fetus was not a "person".

The reason for the ruling in Stern will now certainly be applied to allow the wrongful death actions of survivors such as Mrs. Hudson. In a case interpreting the wrongful death act before the 1972 amendments; the Court had held that there was no wrongful death action for a stillborn fetus. Stokes v. Liberty Mutual Insurance Co., 213 So.2d 695 (Fla.1968). Even though there were some possible points on which to distinguish Stokes, this Court said in Stern:

> [T]he important point is that this case [Stokes] spoke to members of the legislature and to the legal community as standing for the proposition that a stillborn child was not a person entitled to bring an action for prenatal injuries or wrongful death resulting therefrom.

Stern, 348 So.2d at 307. The Court went on to say:

> With Stokes on the books in 1972, when the present Wrongful Death Statute was enacted, the legislature had the opportunity to further define the meaning of the term "person" and chose not to do so.
>
> ....
>
> Since the legislature did not materially change the language of the prior section, it must be presumed that the legislature intended to carry forward into the new section the terms "person" and "minor child" as previously construed.

348 So.2d at 307. Stern's recognition of the controlling nature of the Court's own previous decisions in interpreting the 1972 wrongful death act is perfectly in line with Dressler's refusal to graft the doctrine of interspousal immunity onto the Wrongful Death Act. 435 So.2d at 793. And, just as the Court's prior decision in Shiver would not permit the marriage between the tort victim and tortfeasor to bar the survivors' wrongful death action, Shiver will not permit the barring of the wrongful death action because of legal inaction by the tort victim. Dressler, 435 So.2d at 793, quoting Shiver, 80 So.2d at 907. As Justice Ehrlich noted in Dressler:

> The changes between the Wrongful Death Act as it existed in 1955 and as it existed in 1977 in no way affect the applicability of Shiver.

435 So.2d at 793-94.

The Wrongful Death Act
Is Remedial Legislation

In McKibben v. Mallory, 293 So.2d 48, 54 (Fla. 1974), the Court reviewed the unequivocal public policy of this State with respect to wrongful deaths.

> As expressed by the Legislature of Florida in Chapter 72-35, Laws of Florida, Section 768.17, the legislative intent in adopting these provisions is, as follows:
>
> It is the public policy of the state to shift the losses resulting when wrongful death occurs from the survivors of the decedent to the wrongdoer. Sections 768.16 through 768.27 are remedial and shall be liberally construed.

> Construing the earlier wrongful death statutes, Section 768.01-768.03, Florida Statutes, F.S.A, this Court in Garner v. Ward, 251 So.2d 2525 (Fla. 1971), declared that the statutory language makes clear the purpose of the act is to protect the family and dependents of an individual in the event of wrongful death. The public policy that there be a cause of action for wrongful death continues to exist as is clearly shown by the enactment of Chapter 72-35, Laws of Florida. (Emphasis supplied)

The McKibben court was faced with a statutory construction problem. One interpretation would have eliminated the McKibbens' wrongful death claim. The other would have allowed the claim and effectuated the above-stated policies. This Court applied the following rule of construction to give effect to the wrongful death statute:

> If a statute is susceptible of two constructions one of which will give effect to it and the other which will defeat it, the former construction is preferred.

Id. at 51 (emphasis supplied).

In this case, there are two constructions of the language at issue. One, Mrs. Hudson's, is not only reasonable and in line with this Court's decisions, but it also has the key advantage of effectuating the public policy represented by the wrongful death act. The other, the asbestos producers', is less reasonable, is contrary to Florida precedent, requires grafting the personal injury statute of limitations onto the wrongful death act and thwarts the policy of the act. Accordingly, the construction which allows the wrongful death action "is preferred." McKibben, supra, 293 So.2d at 51. The asbestos producers interpret the key statutory language to mean that when the decedent has permitted the personal injury statute of limitations to run before his death, the

decedent could not have maintained an action and recover damages. Therefore, the argument goes, the survivors' wrongful death action does not come into being. Besides being contrary to this Court's controlling decisions, such a reading has the fatal flaw of defeating the declared public policy of shifting the losses from the survivors to the wrongdoer. In addition, it introduces uncertainties such as when the decedent knew or should have known of his cause of action, a matter which can be the subject of considerable dispute. Compare the majority and dissenting opinions in Universal Engineering Corp v. Perez, 451 So.2d 463 (Fla. 1984), an occupational disease case. On the other hand, our interpretation was adopted by this Court in Shiver when it said:

> We also agree with the Pennsylvania Supreme Court when it [interpreted Ohio law and] said, in Rodney v. Staman, supra: "Moreover, the policy of the Wrongful Death Statute would be unreasonably defeated by adoption of the interpretation contended for by the [appellee]. Unquestionably, a wrong has been done relatives of the wife who fall within the purview of the Act. No good reason exists why a late relationship between the deceased and the tort-feasor should bar the damaged third persons from recovery."

The decedent's inaction which provided the wrongdoer with a waivable affirmative defense against him should not be permitted to defeat the legislatively mandated policy of shifting "the losses resulting when wrongful death occurs from the survivors of the decedent to the wrongdoer." McKibben, 293 So.2d at 54, quoting Section 768.17, Fla. Stat.

Decisions From Other Jurisdictions

We went from Prosser's 4th Edition to the new Prosser and Keeton on Torts 5th Edition (1984) to see if that neutral authority

still is of the opinion that the considerable majority of courts hold that the running of the statute of limitations against the decedent's right of action does not bar the survivors' right of action. It is. Id., section 127, p.957, n.35, citing cases collected 95 ALR2d 1151. But, in fairness, it cites the asbestos producers' favorites, too. Id., n.36.

And we could mention Farmers Bank and Trust Co. v. Rice, 674 S.W.2d 510 (Ky. 1984), in which the statute of limitations had run against the decedent and the Supreme Court of Kentucky, citing Prosser and its own previous decision, declared

> We elect to continue in the "considerable majority" and to reaffirm our holding in Louisville & N.R. Co. v. Simrall's Adm'r., supra, that the statute of limitations for wrongful death actions runs from the death of the decedent, even though there was no viable action for personal injury or medical negligence or malpractice at the time of death.

But, the many cases on the subject do not help either side really. What is really important is that prior to the 1972 reenactment of the wrongful death statute this Court, particularly in Shiver and Moragne, told the legislature and the legal community that, if a defense goes to the decedent's right of action rather than to the underlying cause of action, it does not bar the survivors' separate right of action. When the legislature reenacted the statute without addressing that issue it made those interpretations part of the statute. Stern, 348 So.2d at 307. This court was true to the earlier decisions in Dressler. And, instead of varying from them in Perkins, the Court simply found that the underlying cause of action itself had been merged into a prior judgment.

CONCLUSION

The conflicting district court decision in Hudson should be quashed and the summary judgment should be reversed. The wrongful death action was timely.

Respectfully submitted,

BROWN, TERRELL, HOGAN & ELLIS, P.A.

Wayne Hogan
804 Blackstone Building
Jacksonville, FL 32202
(904) 632-2424
Attorneys for Petitioner

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail this 4th day of December, 1984 to John C. Taylor, Jr., Esquire, 121 W. Forsyth Street, Jacksonville, FL 32202, Attorney for Armstrong; Robert L. Vessel, Esire, P.O. Box 345118, Coral Gables, FL 33114, Attorney for Raybestos-Manhattan; Norwood S. Wilner, Esquire, 624 Ocean Street, Jacksonville, FL 32202, Attorney for Keene and Raymond T. Elligett, Jr., Esquire, P.O. Box 3324, Tampa, FL 33601, Attorney for Celotex.

Attorney