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IN THE SUPREME COURT OF FLORIDA

CASE NO. 63,347

TERRENCE M. ASH, D.C.,

Petitioner,

vs.

NICHOLAS A. STELLA, as personal representative of the estate of CYNTHIA LEE STELLA, deceased, etc., et al,

Respondent.

_____/

BRIEF OF RESPONDENT ON JURISDICTION

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and
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TOPICAL INDEX

LIST OF CITATIONS AND AUTHORITIES

I.

INTRODUCTION

The parties will alternately be referred to herein as they stand on certiorari and as follows: petitioner as "ASH;" and respondent as "STELLA." The symbol "A" shall stand for petitioner's appendix.

All emphasis appearing in this brief is supplied by counsel unless otherwise noted.

II.

STATEMENT OF CASE AND FACTS

This is the second appellate appearance of this cause. See STELLA v. ASH, 380 So. 2d 488 (Fla. 3 DCA 1980). On previous appeal, the District Court of Appeal, Third District, reversed a trial court order dismissing respondent's complaint with prejudice on time bar grounds only. In the earlier decision, the District Court stated:

* * *

> "By this appeal, the appellant seeks review of a final order dismissing without leave to amend his comlaint alleging malpractice, the trial judge having found that it appeared on the face of the complaint that the applicable statute of limitations had run.
>
> "We reverse upon the reasoning contained in Mott v. Fort Pierce Memorial Hospital, 375 So. 2d 360 (Fla. 4th DCA 1979). The complaint alleges that the proper diagnosis of the patient's illness was made without the statute of limitations. However, the complaint is silent as to whether or not the nature of this diagnosis was conveyed to the patient.
>
> "Therefore, the final order of dismissal be and the same is hereby reversed for further proceedings."

* * *

On remand, after additional discovery and intermediate skirmishing, ASH filed a motion for summary judgment on time bar grounds only, which was granted by the trial court. On appeal from that summary judgment, the District Court of Appeal, Third District, rendered the decision sought to be reviewed, which, en toto, states and holds:

* * *

"PER CURIAM.

> "The trial court, finding that the appellants' wrongful death action was limitations-barred under Section 95.11(4)(b), Florida Statutes (1979), entered summary judgment for Dr. Ash. We reverse upon holdings that (1) a wrongful death action, when, as here, brought within two years from the time of death of the injured party, is not limitations-barred, Perkins v. Variety Children's Hospital, 413 So. 2d 760 (Fla.3d DCA 1982); see also Bruce v. Byer, --- So. 2d --- (Fla. 5th DCA 1982) (Case No. 82-88, opinion filed November 17, 1982); and (2) even if, arguendo, the action were required to be brought within two years from the time the incident giving rise to the action was discovered or should have been discovered with the exercise of due diligence, the fact that Mrs. Stella's malignancy was correctly diagnosed two years and several days prior to the commencement of the action does not conclusively establish as a matter of law that she then should have known that Dr. Ash misdiagnosed her condition in 1975, since Mrs. Stella's knowledge of her true condition is but a factor among others in evaluating whether she should have discovered the defendant's asserted malpractice. Nolen v. Sarasohn, 379 So. 2d 161 (Fla. 3d DCA 1980); Schalin v. Mount Clemens General Hospital, 83 Mich. App. 669, 267 N.W. 2d 479 (1978).
>
> "Reversed and remanded."

* * *

It should be noted that STELLA commenced this action two years and one day after he was told that his wife had an

inoperable malignant tumor. It must be emphasized that that was all he was told. It was not suggested to him that malpractice might be involved.

III.

POINTS INVOLVED ON JURISDICTION

POINT I

WHETHER THE DECISION SOUGHT TO BE REVIEWED IS IN DIRECT CONFLICT WITH THE DECISIONS RENDERED BY THE FLORIDA APPELLATE COURTS IN PERKINS v. VARIETY CHILDREN'S HOSPITAL, 413 So. 2d 760 (Fla. 3 DCA 1982); OR BRUCE v. BYER, 423 So. 2d 413 (Fla. 5 DCA 1982); OR WARREN v. COHEN, 363 So. 2d 129 (Fla. 3 DCA 1978); OR COLLINS v. HALL, 117 Fla. 282, 157 So. 646 (1934); OR DUVAL v. HUNT, 34 Fla. 85, 15 So. 876 (1894).

POINT II

WHETHER THE DECISION SOUGHT TO BE REVIEWED IS IN DIRECT CONFLICT WITH THE DECISIONS RENDERED BY THIS COURT IN--NARDONE v. REYNOLDS, 333 So. 2d 25 (Fla. 1976); AND HOMEMAKERS, INC. v. GONZALEZ, 400 So. 2d 965 (Fla. 1981).

IV.

ARGUMENT

A.

APPLICABLE JURISDICTIONAL PRINCIPLES

It is now firmly established that the Florida District Courts of Appeal are courts of final appellate jurisdiction and not mere "waystations" to the Supreme Court of Florida. Supreme Court "express direct conflict" jurisdiction may only be invoked where a District Court of Appeal: (1) announces a rule of law which conflicts with a rule previously announced by another Florida appellate court; or (2) applies a rule of law to produce a different result in a case which involves substantially the same controlling facts as a prior case

precedent; or (4) misapplies and/or refuses to apply applicable law to a case under consideration. Where there are significant factual or legal distinctions between a decision sought to be reviewed and a decision with which it assertedly is in express direct conflict, this Court will not and cannot exercise jurisdiction. See Article V, § 3(b)(3), Florida Constitution 1980; JENKINS v. STATE, 385 So. 2d 1356 (Fla. 1980); DODI PUBLISHING CO. v. EDITORIAL AMERICA, S.A., 385 So. 2d 1369 (Fla. 1980); WALE v. BARNES, 278 So. 2d 601 (Fla. 1973); NIELSEN v. CITY OF SARASOTA, 177 So. 2d 731 (Fla. 1960); and, especially, ANSIN v. THURSTON, 101 So. 2d 808 (Fla. 1958).

B.

NO EXPRESS DIRECT CONFLICT WITH PETITIONER'S POINT I CASES.

Respondent addresses the following reply to the jurisdictional arguments advanced by petitioner in this regard:

1. PERKINS v. VARIETY CHILDREN'S HOSPITAL, supra, 413 So. 2d 760 cannot be held to be in direct conflict with the decision sought to be reviewed because both decisions were rendered by the same District Court of Appeal, and because what was said here is consistent with what was said there.

2. BRUCE v. BYER, supra, 423 So. 2d 213 is obviously not in direct conflict with the decision sought to be reviewed, but, rather, consistent therewith.

3. WARREN v. COHEN, supra, 363 So. 2d 129 is not in direct conflict with the decision sought to be reviewed because: the two decisions were rendered by the same District

Court of Appeal; and because WARREN v. COHEN is both legally and factually distinguishable from the case at Bar. In WARREN, the decedent signed a release during her lifetime. Here, the decedent never signed the release because she never knew she had a cause of action for malpractice in the first place.

4. COLLINS v. HALL, supra, 157 So. 646 is not in direct conflict with the decision sought to be reviewed because: in ST. FRANCIS HOSPITAL, INC. v. THOMPSON, 31 So. 2d 710 (Fla. 1947), which was decided by this Court thirteen years after it decided COLLINS, this Court, for good reason, established the rule in Florida to be that a cause of action accrues and a statute of limitation commences to run from the time of death, not from the time of the wrongful act, since there is no such cause until there has been both a wrongful act and an ensuing death; insofar as this Court's "suit during lifetime of injured person" holding in COLLINS is concerned, COLLINS is legally and factually distinguishable from the case at Bar because here there was no suit during the lifetime of the injured person.

5. DUVAL v. HUNT, supra, 15 So. 876 is not in direct conflict with the decision sought to be reviewed because in ST. FRANCIS HOSPITAL, INC. v. THOMPSON, supra, decided 53 years after DUVAL, this Court receded from what it had said in DUVAL and held that there is no cause of action for death until there has been both a wrongful act and an ensuing death.

C.

NO DIRECT CONFLICT WITH PETITIONER'S POINT II CASES

Respondent would direct the following reply to the

jurisdictional arguments advanced by petitioner in this regard:

1. It should be noted at the outset that the District Court's holding that "the fact that Mrs. Stella's malignancy was correctly diagnosed two years and several days prior to the commencement of the action does not conclusively establish as a matter of law that she should have known that Dr. Ash misdiagnosed her condition in 1975, . . ." is an alternative holding. If it is found that there is no direct conflict with petitioner's Point I cases: the District Court's alternative holding would be moot; and there could be no meaningful direct conflict with the cases relied on by petitioner under this heading.

2. NARDONE v. REYNOLDS, supra, 333 So. 2d 25 is not in direct conflict with the decision sought to be reviewed in any event because: the case at Bar, a death case where the cause of action runs from the date of death, is factually distinguishable from NARDONE which was not a death case; the case at Bar is factually and legally distinguishable from NARDONE for the reasons expressed by the District Court of Appeal, Third District, in NOLEN v. SARASOHN, supra, 379 So. 2d 161; and this Court in NARDONE did not establish the unthinkable rule that simple access to medical records per se commences the running of the statute of limitations. The NARDONE case was decided on its own peculiar facts.

3. HOMEMAKERS, INC. v. GONZALEZ, supra, 400 So. 2d 965 is not in direct conflict with the decision sought to be reviewed because: HOMEMAKERS is both legally and factually

distinguishable from the case at Bar. Here, petitioner and decedent did not get an accurate diagnosis until long after the malpractice, and even then, it was not hinted to them immediately that there might have been malpractice. This is a bad or missed diagnosis case. In HOMEMAKERS, the alleged malpractice grew out of an injection administered to the claimant's buttocks which caused immediate pain. In fact, in HOMEMAKERS, the claimant reported the incident to a hospital supervisor almost immediately.

V.

CONCLUSION

It is respectfully submitted that for the reasons stated herein, the subject petition for writ of certiorari must be denied.

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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true copy of the foregoing Brief of Respondent was mailed to the following counsel of record this 16th day of March, 1983.

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