IN THE SUPREME COURT OF FLORIDA

CASE NO. 63,347

TERRENCE M. ASH, D.C.,

Petitioner,

vs.

NICHOLAS A. STELLA, etc.,

Respondent.

_____/

RESPONDENT'S BRIEF ON THE MERITS

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I.

INTRODUCTION

Respondent, Nicholas A. Stella, personal representative of the estate of Cynthia Lee Stella, deceased, and its survivors, was wrongful death/medical malpractice plaintiff in the trial court and appellant in the District Court of Appeal. Terrence M. Ash, D.C. was defendant and appellee. In the District Court of Appeal, respondent sought review of an adverse summary final "no liability" judgment rendered on time bar grounds only. That was the second appearance of this case in that court, which earlier--see STELLA v. ASH, 380 So. 2d 488 (Fla. 3 DCA 1980)--reversed a trial court order dismissing appellant's complaint with prejudice on time bar grounds only. In the instant appeal the District Court reversed the summary final judgment appealed rendering the decision sought to be reviewed. STELLA v. ASH, 425 So. 2d 123 (Fla. 3 DCA 1983).

The parties will alternately be referred to herein as they stand on certiorari and as follows: respondent as "STELLA;" and petitioner as "ASH." The symbol "R" shall stand for the record on appeal. Respondent will also make reference herein to certain depositions contained in the record by specific page number because they are paginated separately.

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

II.

STATEMENT OF CASE AND FACTS

A.

PREFACE

The "Statement of Case and Facts" contained in ASH'S brief is really just a statement of case. Such facts as stated in the argument section of ASH'S brief--particularly when arguing his Point II--are rejected as being woefully incomplete, and viewing the record in the light most favorable to the wrong party. This was after all an appeal by STELLA from an adverse summary final judgment.

STELLA will herein, immediately infra, state all of the pertinent facts reflected by a proper--summary judgment--view of the record.

B.

THE FACTS

On March 30, 1979, respondent commenced this action by filing a complaint (R. 1-6) which contained the following pertinent liability/cause of action allegations:

* * *

> "4. That at all times material hereto, the Defendant, TERRENCE M. ASH, D.C., is a chiropractor licensed to and doing business in the State of Florida.
>
> "5. That in 1975, the decedent, CYNTHIA LEE STELLA, experienced shoulder and back pains.
>
> "6. That on or about July 7, 1975, the decedent, CYNTHIA LEE STELLA, came under the care and treatment of ALBERG GERSING, M.D., and ALBERT GERSING, M.D., P.A. for treatment of her shoulder and back pains, said person and professional association being the subject of a

medical malpractice mediation complaint, which has previously been filed by the Plaintiffs.

"7. That on or about January 7, 1977, the decedent, CYNTHIA LEE STELLA, came under the care and treatment of the Defendant, TERRENCE M. ASH, D.C., for the treatment of her shoulder and back pains. [By law STELLA was not required to go to medical mediation with chiropractor ASH.]

"8. That the decedent, CYNTHIA LEE STELLA, was under the care and treatment of the Defendant, TERRENCE M. ASH, D.C., from approximately January 7, 1977, to March 5, 1977.

"9. That the decedent, CYNTHIA LEE STELLA, while under the care and treatment of the Defendant, TERRENCE M. ASH, D.C., was treated inappropriately by the Defendant by his failure to diagnose that she did not have soft tissue injury or minor injury to her shoulder and back, but suffered from malignant hermogiopericytoma of soft right post scapula area.

"10. That such treatment by the defendant, TERRENCE M. ASH, D.C., constituted negligence and malpractice, consisting of but not limited to the following:

> "(a) Failure to diagnose the malignant hemangiopericytoma of soft tissue right post scapula area.
>
> "(b) Delay in properly diagnosing the malignant hemangiopericytoma of soft tissue right post scapula area.
>
> "(c) Failure to render proper care and treatment of the decedent.
>
> "(d) Failure to take appropriate x-rays of good quality that would have diagnosed said disease.
>
> "(e) Failure to take appropriate tests and examinations of good quality that would probably have diagnosed said disease.
>
> "(f) Failure to refer the decedent to an appropriate medical specialist who would have been able to properly diagnose the said disease.

"(g) Failure to be sufficiently knowledgeable about said disease so as to have been able to properly diagnose it in the decedent.

"(h) Failure to realize that the care and treatment given was not helping or relieving the decedent.

"(i) Failure to realize that if such care and treatment did not help the decedent, then such care and treatment was improper.

"(j) Failure to realize that if such care and treatment did not help the decedent, then the original diagnosis was wrong.

"(k) Failure to make the necessary inquiries to properly diagnose the said disease.

"11. That it was not until March 23, 1977, that the aforesaid proper diagnosis was made by Robert B. Hinds, M.D. upon examination of the decedent.

"12. That as a direct and proximate result of the delay of proper diagnosis by the Defendant, TERRENCE M. ASH, D.C., of the malignant hemangiopericytoma, the disease metastasized in the decedent's lungs.

"13. That as a direct and proximate result of the delay of the proper diagnosis of malignant hemangiopericytoma by the Defendant, TERRENCE M. ASH, D.D., the decedent died of severe respiratory insufficiency and pneumonia on January 31, 1978.

"14. That the Plaintiff, NICHOLAS A. STELLA, as Personal Representative of the Estate of the decedent and as husband of the decedent, was not aware that the Defendant has committed negligence and malpractice on the decedent until recently."

* * *

In chronological digest then, the complaint alleged that on:

1. July 7, 1975--STELLA'S decedent came under the care of Dr. Gersing for treatment of shoulder and back pain.

2. January 7, 1977--STELLA'S decedent came under the care of ASH for the same complaints.

3. March 5, 1977--STELLA'S decedent quit ASH.

4. March 23, 1977--Dr. Hinds made a proper diagnosis. The complaint does not suggest that STELLA or his decedent were apprised of the situation or of potential malpractice on that date. There is a great difference between knowing of a proper diagnosis and knowledge of a prior misdiagnosis.

5. January 31, 1978--STELLA'S decedent died as a result of ASH malpractice.

Upon service of the subject complaint, ASH filed a motion to dismiss on time bar grounds asserting that:

* * *

> "2. The alleged malpractice must have been known to the plaintiff no later than the date the allegedly 'correct' diagnosis was made--March 23, 1977, as alleged in paragraph 11 of the complaint. The complaint was filed two years and seven days after this date.
>
> "3. This is a medical malpractice action, which under Florida law, must be filed within two years of the date at which the plaintiff knew or should have known of the alleged malpractice."

* * *

It should be noted and emphasized that as ASH would have it, as a matter of law, the instant STELLA or the decedent got a proper diagnosis and knew that the decedent had a malignant tumor the statute of limitations started to run.

On June 1, 1979, the trial court entered an order

dismissing the complaint with prejudice. In due course, STELLA commenced his first appeal.

On that appeal STELLA contended--first, that by applying the limitation statute involved, § 95.11(4)(b), Florida Statutes, to this case, the trial court implicitly and improperly construed the statute in a manner which would render it unconstitutional; and, second, that in any event the trial court erred in dismissing the subject complaint with prejudice. On oral argument the District Court of Appeal did not seem to consider it necessary to reach the constitutional question raised by STELLA. In the decision rendered in that appeal, 380 So. 2d 488, the court did not address the question at all. The court simply stated and held:

* * *

> "By this appeal, the appellant seeks review of a final order dismissing without leave to amend his complaint 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 <u>on time</u>

bar grounds only which, inter alia, contained the following:

* * *

"1. The applicable statute of limitations in a medical malpractice case is two years from the date the Plaintiff discovers the injury.

* * *

"4. Further discovery has elicited the fact that Dr. Ronald Hinds who made the correct diagnosis on March 23, 1977 conveyed whatever diagnosis he made at that time to his patient on that day. See deposition of Ronald B. Hinds, M.D.

"A biopsy was performed on March 29, 1977 at which time Dr. Hinds informed the Plaintiff that the tumor was malignant and inoperable. A final diagnosis of the exact nature of the tumor, to wit, hemangiopericytoma, was not made until the microscopic laboratory report came back on March 30th or thereafter.

"5. The Complaint in the instant case was filed March 30, 1979. If either the March 23, 1977, diagnosis date or the March 29, 1977 confirmation of diagnosis date is used, the Complaint is barred by the statute of limitations.

* * *

"8. There are no factual questions which need to be resolved for the determination of statute of limitations issues."

* * *

In the motion for summary judgment, ASH once again strongly asserted that, as a matter of law, the instant STELLA or the decedent knew that the decedent had a malignant tumor, the statute of limitations started to run. In the motion even ASH conceded that "a final diagnosis of the exact nature of the tumor. . . was not made until the microscopic laboratory report came back on March 30 [1977] or thereafter."

At the time of hearing on ASH'S motion for summary judgment, the record--properly viewed--contained the following pertinent material:

1. Via affidavit (R. 183-184), STELLA stated:

* * *

"2. That it was not until far subsequent from March of 1977, in fact it was toward the latter part of 1977 or the beginning of 1978 that I and my wife first considered any relationship between the cancer in her body and the lack of care and treatment by TERRENCE M. ASH, D.C.

"3. That prior to that date, no doctor informed me that the failure of TERRENCE M. ASH, D.C. to diagnose my wife's condition was in any way related to her ultimate demise and/or injury.

"4. That prior to the aforestated time, to wit: late 1977 and early 1978, no lay individual had informed me and/or my wife of any connection between TERRENCE M. ASH, D.C.'s care and treatment and my wife's subsequent injury and ultimate demise."

* * *

2. In a deposition taken for use in companion medical mediation proceedings,* STELLA testified to the same effect as stated in his affidavit. (Depo. STELLA, 5-66) In addition, STELLA clearly described the situation where: an active woman developed pain in her back/shoulder; she visited a general physician who was unable to help her and made no decent diagnosis (depo. STELLA 41-51); after being treated by the physician for over a year she finally consulted ASH, a chiropractor (depo. STELLA 47-48); she first saw ASH in January 1977 (depo. STELLA 52); she went to see ASH at least once or twice a week for seven or eight weeks (depo. STELLA 57-58); ASH told STELLA and his wife that she suffered from a

* The depositions of STELLA, ASH, and ASH'S father were filed by STELLA in opposition to the subject motion for summary judgment. These depositions are found at (R. 183-356).

"misalignment or maladjustment" of the spinal column and "benign pinched nerves," (depo. STELLA 57-59); she was discharged by ASH in early march 1977; shortly thereafter she went to Dr. Hinds for treatment; toward the end of March 1977, Dr. Hinds told STELLA and his wife that she had an inoperable malignant tumor which had been present for quite some time (depo. STELLAS 63-64); when Dr. Hinds gave STELLA and his wife his diagnosis and prognosis for a short period of time STELLA couldn't remember anything because "the world just fell in" on him. (Depo. STELLA 66)

3. ASH'S mediation deposition is also contained in this record. It is clear from his testimony that he had absolutely no idea of what was causing Mrs. Stella's problem, and after about eight weeks of treatment, to which she really didn't respond too well, he felt he couldn't do any more for her and discharged her. (Depo. ASH 4-38)

4. On deposition, Dr. Hinds stated: he first saw Mrs. Stella on March 23, 1977 (depo. HINDS 3); on that day he told her he suspected that she had a tumor and that a biopsy should be performed as soon as possible (depo. HINDS 4); a biopsy was performed on March 29, 1977, and a frozen section was taken for immediate diagnosis by pathology; the specimen was diagnosed as being malignant (depo. HINDS 4); on March 29, 1977, Dr. Hinds told the STELLA family that Mrs. Stella had a malignant non-operable tumor (depo. HINDS 5); he was not absolutely certain of his diagnosis until he received a final pathology report on March 30, 1977, and at that time he com-

municated his final diagnosis to the STELLA family (depo. HINDS 6); HINDS clearly states that all he did was make a diagnosis and prognosis--and that he never suggested that anyone who had treated Mrs. Stella previously was guilty of malpractice (depo. HINDS 6-15); and he stated that when the family was informed of the situation it was devastated (depo. HINDS 14-15).

On the foregoing record, the trial court rendered the summary final "time bar" judgment appealed.

On appeal, the District Court of Appeal, Third District, rendered the decision sought to be reviewed, stating and holding:

* * *

> "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, 82 Mich. App. 669, 267 N.W. 2d 479 (1978).

"Reversed and remanded."

* * *

These certiorari proceedings followed in due course.

III.

POINTS INVOLVED ON THE MERITS

POINT I

WHETHER THE TRIAL COURT ERRED IN CONSTRUING THE PROVISIONS OF SECTION 95.11(4)(b), supra, AS PROVIDING THAT IN A MEDICAL MALPRACTICE DEATH CASE A CAUSE OF ACTION CAN ACCRUE PRIOR TO DEATH--THEREBY, AT THE VERY LEAST, CASTING GRAVE DOUBT ON THE CONSTITUTIONAL VALIDITY OF THE STATUTE.

STELLA has rephrased the first point raised by ASH to more accurately and less argumentatively state the question presented.

POINT II

WHETHER--ON THIS RECORD PROPERLY VIEWED--THE TRIAL COURT ERRED IN FINDING THE NON-EXISTENCE OF GENUINE ISSUES OF MATERIAL FACT, AND HOLDING THAT ASH WAS ENTITLED TO JUDGMENT AS A MATTER OF LAW ON TIME BAR GROUNDS.

STELLA has rephrased ASH'S second point as well. In stating this point ASH blatently mischaracterizes the record and the holding of the District Court of Appeal. The District Court DID NOT hold that a cause of action did not accrue here "upon discovery of misdiagnosis of cancer." To repeat, the District Court DID hold:

* * *

". . .[The] fact that Mrs. Stella's malignancy was correctly diagnosed two years and several months prior to 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."

IV.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN CONSTRUING THE PROVISIONS OF SECTION 95.11(4)(b), supra, AS PROVIDING THAT IN A MEDICAL MALPRACTICE DEATH CASE A CAUSE OF ACTION CAN ACCRUE PRIOR TO DEATH--THEREBY, AT THE VERY LEAST, CASTING GRAVE DOUBT ON THE CONSTITUTIONAL VALIDITY OF THE STATUTE.

In Volume 9A, Florida Jurisprudence, death by wrongful act, the following history of and general principles applicable to wrongful death actions are stated:

* * *

"Section 2. Right of Action, Generally.

"At common law, no civil right of action was maintainable to recover damages for the death of a human being occasioned by the negligent, or other wrongful, act of another. The theory on which the common law denied such recovery was that by reason of the death, the civil injury was merged in the felony. The right to bring an action for damages for wrongful death exists, therefore, only by virtue of statute.

"The first act to provide for a cause of action arising out of the death of a human being was the English Act of 1846 known as Lord Campbell's Act, which authorized the executor or administrator of any person whose death was caused by the wrongful act, neglect, or default of another, in such manner as would have entitled the party injured to have maintained an action in respect thereof if death had not ensued, to bring an action for such wrongful death for the benefit of certain next of kin. The Florida Wrongful Death Statutes, as they existed prior to amend-

ment [Sections 768.01-768.03, Florida Statutes, which were repealed by Laws 1972, Chapter 72-35, effective July 1, 1972] were patterned after Lord CAmpbell's Act.

* * *

"Section 3. General Provisions Of Wrongful Death Act.

"Under those provisions to be known as the Florida Wrongful Death Act, which are applicable to deaths occurring on or after July 1, 1972, [extant Sections 768.16 et seq., 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 damages if death had not ensued, the person or watercraft that would have been liable for damages as provided in the Act, notwithstanding the death of the injured person, and although death was caused under circumstances constituting a felony. The statute further provides for maintenance of the action by the decedent's personal representative, who may recover specified damages for the benefit of the decedent's survivors, as defined in the Act, and for the decedent's estate.

* * *

"Section 5. Construction and Validity.

"Although wrongful death statutes are in derogation of the common law, and because of this would ordinarily be strictly construed, nevertheless, under both prior case law and under the terms of the Act governing deaths occurring on or after July 1, 1972, they are remedial in nature and are to be liberally construed in accordance with their objectives. The Act declares it to be the public policy of the state to shift the losses resulting when wrongful death occurs, from the survivors of the decedent to the wrongdoer.

* * *

"Section 6. Wrongful Death Action As Sole Remedy.

"Under the Florida Wrongful Death Act applying to deaths occurring on or after July 1, 1972, when a personal injury to the decedent results in his death, no action for the personal injury shall survive, and any such action pending at the time of death shall abate. Thus, the Act now provides the sole remedy for the recovery of all damages caused by an injury resulting in

> death, both for the benefit of the decedent's survivors, and of his estate."
>
> * * *

Thus, a wrongful death action is a pure creature of statute, and the existence, vel non, of a cause of action is determined by reference to the statute only. Further, the cause of action created by the statute is not in any sense a continuation of the cause of the deceased. Rather, it is an entirely new cause of action vested in the personal representative of the estate--for the benefit of the estate and its survivors--which does not even come into existence until death occurs.

The 1975 Florida Legislature--in a singular response to special interest group pressure--passed the Florida Medical Mediation Act, Section 768.44, Florida Statutes, one of the most invidiously discriminatory statutes ever held constitutional by the Supreme Court of Florida. See CARTER v. SPARKMAN, 335 So. 2d 802 (Fla. 1976), wherein this Court--even in holding the statute constitutional--was forced to admit that the prelitigation financial and practical burdens cast upon a potential plaintiff by the statute reached the "outer limits of constitutional tolerance." The statute was, expectedly, used almost exclusively as a "sword rather than a shield" by the medical profession and medical malpractice insurance industry.*

*Ultimately, reason prevailed and the Act was held unconstitutional. ALDANA v. HOLUB, 381 So. 2d 231 (Fla. 1980).

At the time the Medical Mediation Act was passed, the extant statute of limitations, Section 95.11(6), Florida Statutes (1973), contained a two-year limitation period on a wrongful death action and was silent regarding which period of limitations should apply to actions where the death allegedly resulted from a wrongful act of medical malpractice. In FLETCHER v. DOZIER, 314 So. 2d 241 (Fla. 1 DCA 1975), in construing the provisions of Section 95.11(6), supra, the District Court held that the two-year limitation period on a wrongful death action for medical malpractice ran from the date of death although in case of personal injury only, the period would not have begun to run until the plaintiff discovered or reasonably should have discovered the injury. The Court stated:

* * *

> "The statute of limitations applicable to an action arising upon account of an act causing a wrongful death, including such deaths resulting from medical malpractice, is F.S. 95.11(6), which provides for a period of two years. The cause of action accrues and the statute commences to run on the date of such death. (See 9A Fla. Jur., Death by Wrongful Act, § 26; Annotation in 97 A.L.R. 2d 1151; and Annotation in 80 A.L.R. 2d 320.) The same statute (and same time period) is applicable to actions to recover damages for injuries to the person arising from medical malpractice. However, in injury cases (which are not cases arising on account of wrongful death) the cause of action does not accrue until the plaintiff discovers, or through the use of reasonable care should have discovered the injury. (F.S. 95.11))"

Accord: cf., WARREN v. COHEN, 363 So. 2d 129 (Fla. 3 DCA 1978); SHIVER v. SESSIONS, 80 So. 2d 905 (Fla. 1955); and

MORAGNE v. STATE MARINE LINES, INC., 211 So. 2d 161 (Fla. 1968). All of the cited cases emphasize the fact that a cause of action for death does not arise until death occurs.

A 1974 amendment to Section 95.11(4), Florida Statutes, removed some of the statutory language on which FLETCHER was partially based. No longer did Section 95.11(4)(a), supra, confine the benefit of a postponed limitation period, in case of excusable ignorance, to claims for "injuries to the person" by malpractice. The 1974 amendment seemingly extended the benefit of a "postponed limitation period in case of excusable ignorance" to both death and personal injury cases arising from malpractice. However, then Section 95.11(4)(d) continued to provide separately, and without qualification, a two-year limitation period on an "action for wrongful death."

Whatever would have been a proper construction of the 1974 legislation, comprehensive 1975 amendments to Section 95.11(4), supra, were passed. As amended in 1974--and applicable here--Sections 94.11(4)(a) and (b) provided a two-year limitation period for:

* * *

> "(a) An action for professional malpractice, other than medical malpractice, whether founded on contract or tort; provided that the period of limitations shall run from the time the cause of action is discovered or should have been discovered with the exercise of due diligence; provided, however, that the limitation of actions herein for professional malpractice shall be limited to persons in privity with the professional.
>
> "(b) An action for medical malpractice shall be commenced within two years from the time the incident giving rise to the action occurred or

> within two years from the time the incident is discovered, or should have been discovered with the exercise of due diligence; however, in no event shall the action be commenced later than four years from the date of the incident or occurrence out of which the cause of action accrued. An 'action for medical malpractice' is defined as a claim in tort or in contract for damages because of the death, injury, or monetary loss to any person arising out of any medical, dental, or surgical diagnosis, treatment, or care by any provider of health care. The limitation of actions within this subsection shall be limited to the health care provider and persons in privity with the provider of health care. In those actions covered by this paragraph in which it can be shown that fraud, concealment, or intentional misrepresentation of fact prevented the discovery of the injury within the four-year period, the period of limitations is extended forward two years from the time that the injury is discovered or should have been discovered with the exercise of due diligence, but in no event to exceed seven years from the date of the incident giving rise to the injury occurred."
>
> * * *

The clear legislative intent in amending the statute to read as it does presently was to benefit wrongful death claimants by providing a discovery period applicable to those claimants--whose cause of action did not accrue until death occurred--by giving them a "discovery" benefit--not a detriment.

GLASS v. CAMARA, 369 So. 2d 625 (Fla. 1 DCA 1979) was a medical malpractice wrongful death action. The trial court rendered summary final judgment in favor of the defendant physician on time bar grounds. In keeping with the legislative intent--benefit to death claimant, not detriment--the court there held that a cause of action for wrongful death allegedly caused by medical malpractice should be given a time bar "discovery" benefit notwithstanding the fact that the cause of

action accrued at the time of death. The court there properly construed the amendments to Section 95.11(4), supra.

ELAND v. CAMARA, 369 So. 2d 625 (Fla. 1 DCA 1979) was an appeal in a medical malpractice wrongful death action from a summary judgment rendered in favor of the defendant physician on time bar grounds. There, "discovery" of the fact that malpractice had occurred was made by the decedent prior to death. Upon death--for the first time--a cause of action for wrongful death accrued in plaintiff's personal representative for the benefit of the survivors of the plaintiff's estate. The court there applied the "discovery" benefit provision of the subject statute to the detriment of the claimant holding that the two-year limitation period ran against the decedent's personal representative and survivors from the time the decedent "discovered," or should have discovered that malpractice had been committed, and not from the time of death--the time at which cause of action for death arose. In support of this decision, the court cited GLASS v. CAMARA, supra.

The conclusion reached by the District Court of Appeal, Second District, in ELAND was purely and simply wrong. In ELAND: the court improperly construed and applied amended statute of limitations to reach a result opposite from that intended by the Legislature; the court misapplied CAMARA in reliance on pure dicta; and the court totally ignored the fact that two separate causes of action were involved--one for personal injuries to the decedent, which cause did not survive the decedent's death, and the second, a cause for wrongful

death which did not even come into existence until the date of death. It should be noted that in ELAND the court reversed the defendant's summary judgment anyway holding that "knew or should have known" genuine issues of material fact were reflected by the record.

The decision sought to be reviewed is consistent with historical development and the common sense of the situation as explained, supra. Since rendition of the decision sought to be reviewed, several decisions have been rendered which are in accord therewith or of similar persuasion. See--PERKINS v. VARIETY CHILDREN'S HOSPITAL, 413 So. 2d 760 (Fla. 3 DCA 1982); BRUCE v. BYER, 423 So. 2d 413 (Fla. 5 DCA 1982); and LIPSHAW v. PINOSKY, Fla. 3 DCA Case Nos. 81-2263 and 82-50, opinion filed November 8, 1983, not yet reported; and cases cited therein.

It must be emphasized that there is nothing whatsoever unfair or inequitable in the holdings of the above cited cases or the rule of law that STELLA asks this Court to recognize as the rule for Florida. It must be remembered that under the prior Wrongful Death Act, then §§ 768.01 et seq, Florida Statutes, when a death occurred, an action could be maintained by the decedent's estate for the decedent's separate cause of action for suffering prior to death. Under the current Act, §§ 768.16 et seq., supra, no such "survivorship" action for pain and suffering may be maintained. Thus, a tortfeasor who causes injury which in turn causes lingering, rather than instant, death has two causes of action to be concerned about,

and rightly so. The first would be that brought personally by the injured party while still alive. This cause would be extinguished at death. The second would be the right of action for death established in the living survivors of the decedent. It would be patently inequitable and unfair to hold that this cause of action had commenced to run at a time when no cause of action existed.

Reverting to the case at Bar, for the reasons which follow, the trial court erred in entering the summary final judgment appealed and the District Court of Appeal properly reversed that judgment in the decision sought to be reviewed:

1. The trial court simply did not understand that a cause of action for death does not even come into existence until death occurs. The complaint here was filed within two years of the date of death.

2. When the legislature amended the limitation of action act to include the "discovery" proviso, it intended to benefit death claimants. The trial court here construed the statute and applied it in a manner detrimental to death claimants and the claimant STELLA. The District Court applied the statute properly.

3. The construction placed by the trial court here upon the statute, and that construction which ASH urges this Court to establish as the law of the State of Florida would render the statute clearly unconstitutional in the truest due process and equal protection sense. Such a construction of the statute would have the effect of barring malpractice cases

commenced within two years of death but without two years of alleged discovery of the existence of malpractice, and would not bar any other form of wrongful death action until two years after the date of death.

4. At the very least, the construction placed upon the subject statute by the trial court, and that which ASH urges this Court to adopt, casts grave doubt upon the statute's constitutional validity. The applicable rule of statutory construction was stated by this Court in STATE EX REL SHEVIN v. METS CONSTRUCTION CO., INC., 285 So. 2d 598, 600, to be:

* * *

> "It is elementary that a statute is clothed with a presumption of constitutional validity, and if fairly possible, a statute should be construed to avoid not only an unconstitutional interpretation, but also one which even casts grave doubts upon the statute's validity."

* * *

Accord--CARTER v. SPARKMAN, supra.

It should already be obvious that the arguments advanced by ASH under this heading are without merit. There really is no need to direct a further reply to those arguments.

POINT II

ON THIS RECORD PROPERLY VIEWED--THE TRIAL COURT ERRED IN FINDING THE NON-EXISTENCE OF GENUINE ISSUES OF MATERIAL FACT, AND HOLDING THAT ASH WAS ENTITLED TO JUDGMENT AS A MATTER OF LAW ON TIME BAR GROUNDS.

Here, ASH contended and the trial court ruled that as a matter of law, the statute of limitations for death commenced

the instant STELLA and his wife knew to a certainty that the wife had an inoperable malignant tumor. This occurred on Friday, March 30, 1977, two years and one day prior to the time STELLA commenced this action. On appeal STELLA contended that the trial court erred because, at the very least, this record reflects the existence of genuine issues of material fact regarding whether STELLA and/or his wife at that instant "discovered" or "should have discovered" with the exercise of due diligence that ASH was guilty of malpractice. As we have seen, the District Court agreed with STELLA.

Counsel for STELLA does not often commence an argument by referring to cases from other jurisdictions. Counsel must make an exception here. The single most concise and incisive statement made regarding the "discovery" time bar requirement in the misdiagnosis medical malpractice context is contained in SCHALM v. MOUNT CLEMENS GENERAL HOSPITAL, 82 Mich. App. 669, 267 N.W. 2d 479 (1978). SCHALM involved the following facts:

1. Plaintiff's decedent was treated by one group of physician defendants prior to February 1, 1971. The alleged malpractice of those defendants was the failure to run appropriate tests and properly diagnose the plaintiff's malady as cancer, rather than an ulcer, before the plaintiff was told he had cancer on February 1, 1971. None of the defendants in this group treated the plaintiff after January 14, 1971. They were made defendants in the original complaint filed April 9,1974, the first and second amended complaints filed

May 10, 1974, and September 15, 1975, respectively.

2. The alleged malpractice of the second group of defendants was the failure to note a possible second cancer or to perform an examination searching for same in February of 1971. The examination was not performed until September 1971, and then a further cancer was discovered which led to additional surgery. This group of defendants was brought into the case by the third and fourth amended complaints filed January 29, 1976, and June 15, 1976.

3. The Michigan time bar statute is quite similar to the statute involved here and provides that a malpractice action "must be brought within two years of the time when the alleged defendant discontinues treating or otherwise serving the plaintiff" or "within two years of the time when the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, the asserted malpractice, whichever is later."

In reversing the Michigan equivalent of a summary final judgment rendered in favor of the first group of doctors which treated the decedent, the Michigan appellate court stated and held:

* * *

> "We turn our attention to the first group of doctors. None of these doctors treated plaintiff after January 14, 1971. The first complaint in this case was filed April 19, 1974. Obviously, unless there are fact questions under the 'discovery' branch of the accrual rule, accelerated judgment as to these defendants was proper.
>
> "Defendants argue there are no fact

questions. They argue that as a matter of law, plaintiff was put to inquiry about their possible malpractice in misdiagnosing his ailment when he was told he had cancer in February of 1971. Under this argument, plaintiff knew or should have known of the asserted malpractice in the incorrect diagnosis as soon as the correct diagnosis was made. Primary reliance is placed on Johnson v. Caldwell, 371 Mich. 368, 123 N.W. 2d 785 (1963) and Patterson v. Estate of Flick, 69 Mich. App. 101, 244 N.W. 2d 371 (1976), lv. granted, 399 Mich. 838 (1977) and we admit that language in these cases supports this proposition, even though neither is a true misdiagnosis case.

"Under Dyke, the question is when was the 'asserted malpractice' discovered or, when should it have been discovered in the exercise of reasonable diligence. Does the fact that plaintiff is given a correct diagnosis always require that he be charged with notice that the earlier, and now known to be incorrect, diagnosis was malpractice? We think not.

"There will be cases where no reasonable minds could differ on the discovery question and accelerated judgment would be proper in such a case. However, in this case there is some room to question whether plaintiff knew or should have known that this first group of doctors had committed malpractice when he was told of his true condition in February of 1971.

"Plaintiff's knowledge of his true condition is but one factor in evaluating the question of reasonableness of his efforts to discover the asserted malpractice. See, e.g., Cates v. Frederick W. Bald Estate, 54 Mich. App. 717, 221 N.W. 2d 474 (1974), lv. den., 394 Mich. 758 (1975), Patterson v. Estate of Flick, supra, (W.S. White, J., dissenting). Also relevant might be the plaintiff's mental state, assurances by medical personnel falling short of fraudulent concealment, and information received from others which show plaintiff was aware of the cause of action.

"On the record before us, reasonable minds could differ as to the date plaintiff must be charged with knowledge of the asserted malpractice. Accelerated judgment as to this group of defendants was improper."

* * *

Accord--cases from other jurisdictions: ABERNATHY v. SMITH, 17 Ariz. App. 363, 498 P. 2d 175 (1972); SHORT v. DOWNS, Colo. 1975, 537 P. 2d 754; YOSHIZAKA v. HILO HOSPITAL, Hawaii 1967, 433 P. 2d 220; BAINES v. BLENDERMAN, Iowa 1974, 223 N.W. 2d 200; ZENO v. LINCOLN GENERAL HOSPITAL, La. App. 1979, 376 So. 2d 1284; LEARY v. RUPP, 89 Mich. App. 145, 280 N.W. 2d 466; WHITNEY v. GALLAGHER, 64 Mich. App. 46, 235 N.W. 2d 57; ACKER v. SORENSEN, Neb. 1969, 165 N.W. 2d 74; BROWN v. MARY HITCHCOCK MEMORIAL HOSPITAL, N.H. 1977, 378 A. 2d 1138; ALFONE v. SARNO, N.J. App. 1975, 354 A. 2d 654; LOPEZ v. SWYER, N.J. 1972, 300 A. 2d 563; and OHLER v. TACOMA GENERAL HOSPITAL, 92 Wash. 2d 507, 598 P. 2d 1358.

Florida appellate thinking on the subject at hand is similar to majority thought. NOLEN v. SARASOHN, 379 So. 2d 161 (Fla. 3 DCA 1980) involved facts similar to those involved here. There was some question there as to just which version of the often amended statute of limitations applied to the NOLEN case. In NOLEN the Court stated and held:

* * *

> "It is unclear which of the above statutes [of limitations] was relied upon by the defendants in support of their motion for summary judgment and by the trial court in the entry of final summary judgment. Nevertheless, regardless of which statute may be applicable, the general principle of law is that the running of the statute is tolled until the claimant, through the exercise of reasonable diligence, is put on notice as to either the negligent act or the injury caused thereby. Nardone v. Reynolds, 333 So. 2d 25 (Fla. 1976). In fact, this principle of law is embodied in the following language of the last three statutes cited above: '. . .from the time the cause of action is discovered or

should have been discovered with the exercise of due diligence.'

"A perusal of the record convinces us that contrary to the contention of the defendant association, there remains a disputed question of fact as to whether Nolen knew or through the exercise of due diligence should have discovered that his 1968 x-ray had been misinterpreted by Dr. Sarasohn. First, although Dr. Fabian informed him of the abnormality in 1973, the doctor did not tell him that the abnormality appears in his 1968 x-ray. Second, in his affidavit Nolen stated that he did not understand the 1973 x-ray reports which contained many technical medical terms. There being no evidence to suggest that Nolen possessed any medical knowledge beyond that of an ordinary lay person, the contents of these reports need not as a matter of law be imputed to him. See Tetstone v. Adams, 373 So. 2d 362 (Fla. 1st DCA 1979). Last, upon being discharged from North Miami General Hospital in April 1973, Nolen was immediately admitted to the VA Hospital where he received heavy doses of radiation therapy and pain killers. Being so sedated, it may be that he had no opportunity to request his hospital records or consult an attorney. In short, if Nolen can prove that he could not have discovered until December 1975 that his 1968 x-ray was misinterpreted, then his cause of action would be within the applicable statute of limitation."

* * *

Accord and/or cf.--JOHNSON v. MULLEE, 385 So. 2d 1038 (Fla. 1 DCA 1980); MOTT v. FORT PIERCE MEMORIAL HOSPITAL, 375 So. 2d 360 (Fla. 4 DCA 1979); TETSTONE v. ADAMS, 373 So. 2d 362 (Fla. 1 DCA 1979); ALMENGOR v. DADE COUNTY, 359 So. 2d 892 (Fla. 3 DCA 1978); BROOKS v. CERRATO, 355 So. 2d 119 (Fla.4 DCA 1978); GREEN v. BARTELL, 365 So. 2d 785 (Fla. 3 DCA 1978); and ROSEN v. SPARBER, 369 So. 2d 960 (Fla. 3 DCA 1978).

Reverting to the case at Bar, this record reflects the existence of genuine issues of material fact regarding whether

STELLA and/or his wife "discovered" or "should have discovered" with the exercise of due diligence that ASH was guilty of malpractice. For example:

1. It was not until Friday, March 30, 1977--two years and one day prior to the time STELLA commenced this action--that STELLA and his wife knew to a certainty that the wife had inoperable malignant tumor.

2. Dr. Hinds--the physician who eventually made a proper diagnosis and prognosis--stated unequivocally that he never suggested that anyone who had treated Mrs. Stella previously was guilty of malpractice. He also stated that when the family was informed of the situation, it was devastated.

3. STELLA testified--via deposition and affidavit--that when Dr. Hinds gave him and his wife his diagnosis and prognosis, for a short period of time he couldn't remember anything because "the world just fell in" on him. He also testified that it was not until some time after March 30, 1977, that he and his wife began to put the pieces together and concluded that ASH might have been guilty of malpractice.

4. As pointed out by the Michigan Court in SCHALM v. MOUNT CLEMENS GENERAL HOSPITAL, supra, the knowledge of STELLA and his wife of her true condition is but one factor in evaluating the question of reasonableness of their efforts to discover the asserted malpractice. Also relevant--and particularly relevant here--is their mental state at the time this crushing news was imparted to them. Certainly it would be up to a jury, in addition to everything else that indicates

this case should be left to a jury, to determine whether or not at the instant they had a correct diagnosis, as opposed to just 24 hours later, it can be said that they "should have discovered" that malpractice had been committed.

There is one last thing to be considered in this connection. The only justification for a statute of limitations at all--let alone a two-year statute of limitations--is the thought that the potential for litigation should come to an end. Where that principle is on a collision course with the principle that causes of action which a claimant wishes to pursue should be decided on their merits in a "search for truth," the rule must be that the former must give way to the latter. STELLA is fully aware that there are some recent Florida cases--cited in ASH'S brief--which although, not directly factually in point here, indicate a set away from the type of thinking discussed by STELLA under this heading, supra. It must be apparent by now that very little can be said about these cases except that they are poorly and shallowly reasoned and productive of the most irresponsible and inequitable result conceivable.

V.

CONCLUSION

It is respectfully submitted that for the reasons stated herein, this Court should decline to further exercise jurisdiction of this cause--there really is no direct conflict jurisdiction here, after all--or, having decided to exercise jurisdiction, should confirm as the rule of law for Florida on

both points involved the rulings of the District Court in the decision sought to be reviewed. Any other decision in this state by a District Court of Appeal inconsistent therewith should be quashed. Any decision by this Court inconsistent therewith should be receded from.

Respectfully submitted,

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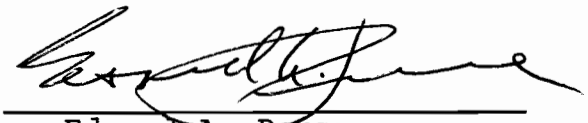
By: 
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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true copy of the foregoing Brief of Respondent on the Merits was mailed to the following counsel of record this 14 day of December, 1983.

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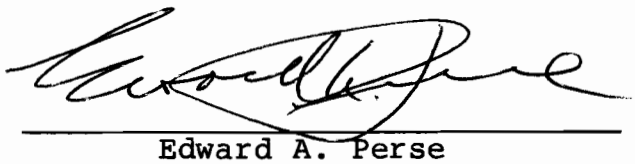
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