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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.

PETITIONER'S BRIEF

KIMBRELL, HAMANN, JENNINGS,
WOMACK, CARLSON & KNISKERN, P. A.
SUITE 900 BRICKELL CENTRE
799 BRICKELL PLAZA
MIAMI, FLORIDA 33131

MICHAEL K. McLEMORE

Of Counsel

FILED
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DEC 7 1983
CLERK, SUPREME COURT
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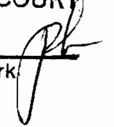

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STATEMENT OF THE CASE AND FACTS

Plaintiff's decedent, Cynthia Stella, was treated by Defendant, Dr. Terrence Ash, D.C., for "bursitis" from January 7, 1977 until March 5, 1977 (R. 1-6). Thereafter on March 23, 1977, decedent was seen by Dr. Ronald Hinds at which time she was informed that she had a malignant tumor and not "bursitis" (R. 158,163). Decedent died on January 31, 1978.

Suit was filed March 30, 1979 (R. 1), more than two years after she knew that Dr. Ash had misdiagnosed her condition. The trial court, upon a motion to dismiss by Ash, dismissed the Complaint with prejudice[1] since the face of the Complaint gave the date of correct diagnosis as March 23, 1977. The Third District Court of Appeal reversed, 380 So.2d 488, stating that it was not established by the face of the pleading that Mrs. Stella had been informed on the date of her diagnosis. Deposition was taken of Dr. Hinds, who stated that Mrs. Stella was told of her diagnosis on March 23, 1977, and that she was told at that time that the cancer was probably malignant (R. 158,163). Upon motion of Ash, summary judgment was granted by the trial court. The Third District Court of Appeal reversed on two grounds: First, that Mrs. Stella's

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1. Based on Fla.Stat. §95.11(4)(b) holding that more than two years had elapsed from the date the incident was known or should have been known.

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death within the two year limitations period created a new "cause of action" with a new two year limitations period;[2] and second, that it was a factual question as to when Plaintiff should have known of the "malpractice".[3]

This Court accepted jurisdiction for discretionary review by Order dated November 13, 1983.

12-15-83 445 So.2d 1010

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2. Citing Perkins v. Variety Childrens Hospital, 413 So. 2d 760 (Fla. 3d DCA 1982), a decision certified to be of great public importance and currently pending before this Court.

3. Citing a Michigan decision which was based on the Michigan limitation which runs from the date of discovery of the "malpractice".

ARGUMENT

I. THE DISTRICT COURT OF APPEAL ERRED IN HOLDING THAT WRONGFUL DEATH IS A NEW CAUSE OF ACTION.

A. THE WRONGFUL DEATH ACT, §768.19, FLA.STAT., STATES THAT WRONGFUL DEATH IS A "RIGHT OF ACTION," NOT A "CAUSE OF ACTION."

A wrongful death action is purely a creature of statute, and the existence of a right of action for wrongful death is determined by reference to the statute only. Stern v. Miller, 348 So.2d 303 (Fla. 1977).

The pertinent provision of the Florida Wrongful Death Act states:

> 768.19 Right of Action
>
> 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 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. (Emphasis added.)

Under the terms of the statute above, there is no right of action for wrongful death unless the decedent could have maintained an action had death not occurred.

By the time this lawsuit was filed, the decedent's injury action and survival action would have already been

barred by the two-year statute of limitations applicable to medical malpractice. §95.11(4)(b), Fla.Stat. (1975). As the malpractice limitation period had expired, the right of action for wrongful death either never arose under the language of the statute, or was itself also barred. See, Collins v. Hall, 117 Fla. 282, 157 So. 646 (Fla. 1934); Duval v. Hunt, 34 Fla. 85, 15 So. 876 (1894).

The holding that wrongful death is a "new" "cause of action" in Perkins v. Variety Children's Hospital, 413 So.2d 760 (Fla. 3d DCA 1982), and in Bruce v. Byer, 423 So.2d 413 (Fla. 5th DCA 1982), is wrong. Although cases throughout the years have inadvertently referred to wrongful death as a "cause of action," it is a "right of action" by the specific terms of the statute. See, Warren v. Cohen, 363 So.2d 129 (Fla. 3d DCA 1978).

When the legislature uses a term of art in a statute (such as "right of action" as opposed to "cause of action") it is presumed to know its meaning Goldstein v. Acme Concrete Corp., 103 So.2d 202 (Fla. 1958).

"Right of action" and "cause of action" are not synonymous. As the editors of Fla.Jur.2d observe at Volume 1, Actions §3:

> In a strict sense, however, the term 'right of action' is used in contra-distinction to cause of action. A right of action is remedial, while a cause of action is substantive.

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The editors of Am.Jur.2d elaborate upon the distinction. They state:

> Many authorities define a cause of action as being the fact or facts which establish or give rise to a right of action the existence of which affords a party a right to judicial relief.
>
> *   *   *
>
> It has been variously stated that a cause of action is that single group of facts which is claimed to have brought about an unlawful injury to the plaintiff and which entitled him to relief; that it consists of a right belonging to one person and some wrongful act or omission by another by which that right has veen violated. . . 1 Am.Jur.2d, Actions §1.
>
> *   *   *
>
> A right of action is the right to presently enforce a cause of action -- a remedial right affording redress for the infringement of a legal right belonging to some definite person; a cause of action is the operative facts which give rise to such right of action [emphasis added] 1 Am.Jur.2d Actions §2.

In the present case the "cause of action" is medical malpractice. There is here a claim to a "right of action" for wrongful death, but that right of action has been barred by the expiration of the statute of limitations for the cause of action of medical malpractice. Compare, Eland v. Aylward, 373 So.2d 92 (Fla. 2d DCA 1979).

Even regardless of whether wrongful death be captioned a "cause of action," as Respondent contends, or a

"right of action," as the statute provides, the language of the Act itself bars a death claim where the injured person would have been barred had he lived. §768.19, Fla.Stat. (1972).

B. TO DECLARE WRONGFUL DEATH A NEW "CAUSE OF ACTION" IS TO DENY CIVIL DEFENDANTS DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAWS.

The holding that wrongful death is a new "cause of action" in Perkins, supra, and Bruce, supra, would expose civil defendants to multiple lawsuits for the same wrong and deny them access to a final adjudication of their liability. The due process clause of the Florida Constitution states:

> Due Process
>
> No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against himself. (Emphasis added). Art. I, §9, Fla.Const.

There is no provision of the due process clause limiting its applicability solely to criminal matters except the prohibition against self-incrimination. Concepts of "substantive due process" in civil matters are well recognized under the Fifth Amendment of the United States Constitution. See, Roe v. Wade, 410 U.S. 113, reh. denied, 410 U.S. 959 (1973).

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To find a civil defendant liable in tort for personal injury and then to permit a second, "new" suit for wrongful death is to expose a civil defendant to double jeopardy for the same tort. The civil defendant's property is twice put in legal jeopardy for the same offense to the same victim, contrary to any civilized understanding of due process of law. The doctrine of res judicata is so firmly and independently formed in our present legal thinking that it is hard to puzzle through its historical origin. But the protection from dual litigation inherent in res judicata is as much a part of our framework of due process as the right to confront one's accusers. Who could candidly say that trial upon trial for the same wrong to the same person would comport with due process?

The equal protection provisions of the Constitutions of both the United States (Fifth Amendment and Fourteenth Amendment) and Florida compel also the result that there be only one trial for a wrong:

> Basic Rights
>
> All natural persons are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be regarded for industry, and to acquire, possess and protect property. . . (Emphasis added) Art. I, §2, Fla.Const.

It is thoroughly inconsistent with the constitutional guarantee of the rights to defend and protect property to

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expose civil defendants to multiple actions for the same wrong to the same person.

In the Perkins opinion there is an oblique recognition of the problem of multiple recoveries for the same damages. 413 So.2d at 763. This problem was made particularly evident by the court's admission on rehearing that there had been no itemized verdict in the trial court. 413 So.2d at 766. Contrary to the optimism of the Perkins court, there is no way to segregate the damages awardable in an action by a living plaintiff from those later recoverable by his personal representative following a subsequent death. A jury in a preliminary tort action would be instructed, for example, to compensate the plaintiff for his loss of earning capacity. Fla.Std. Jury Instr. (Civ.) 6.1,6.2d. The jury would also be charged that in awarding future damages they could consider the plaintiff's life expectancy. Fla.Std. Jury Instr. 6.9a. Thus it is proper, and a frequent occurrence, for juries to award damages which will result from the projected premature death of the plaintiff caused by the defendant. Projected premature death as caused by a defendant is also a factor frequently and emotionally weighed by juries in assessing mental pain and suffering. These sorts of damages, being properly allowable in a preliminary tort trial, cannot be mathematically set off by any computable formula, no matter how sophisticated a verdict interrogatory may be used.

Shall each civil trial now ask the jury to pinpoint the expected date of the plaintiff's death, and to itemize every possible type of mental pain and suffering? Also, if wrongful death is a completely "new" cause of action vesting in the personal representative (a new party), how can the personal representative be bound by whatever set-offs are asserted from the prior litigation? Shall the individual survivors in the "new" wrongful death action be forced to forego a recovery based on a prior tort recovery of the decedent, which sum may have passed to others through the decedent's estate? Shall the defendant have to pay or not pay in the "new" wrongful death suit depending upon whether the survivors were included in the decedent's will? A plaintiff can now collect reasonable damages for a projected premature death caused by a defendant. The defendant, however, cannot protect against duplicate payments under the rationale in Perkins.

It is elementally unfair to expose a party to multiple trials for the same wrong to the same person. All concepts of due process and equal protection abhor such a result.

II. THE DISTRICT COURT OF APPEAL ERRED IN HOLDING THAT A CAUSE OF ACTION FOR MEDICAL MALPRACTICE DID NOT ACCRUE UPON DISCOVERY OF A MISDIAGNOSIS OF CANCER.

In Homemakers, Inc. v. Gonzalez, 400 So.2d 965 (Fla.

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1981), this Court held that the plaintiff's cause of action for medical malpractice accrued when the plaintiff felt pain from an injection, even though the consequences of the injection were not discovered until later.

In Wilhelm v. Traynor, 434 So.2d 1011 (Fla. 5th DCA 1983), the court held that the statute of limitations for medical malpractice commences on the date that the patient is informed of a correct diagnosis of cancer. Id. at 1013.

As the Third District observed in Steiner v. CIBA-GEIGY Corp., 364 So.2d 47 (Fla. 3d DCA 1978), it is not necessary that a plaintiff "know for a fact" that he has a cause of action before the statute begins to run. Citing Nardone v. Reynolds, 333 So.2d 25 (Fla. 1976), the court recognized that it is sufficient for a claimant to have the facts at his disposal, as in the availability of hospital records, for the statute to begin to run.

The Third District further observed in Steiner, supra, that liberal rules of pleading and liberal pretrial discovery procedures permit the early commencement of an action, followed by a fleshing out of the narrow facts and issues. 364 So.2d at 52, citing Japanese War Notes Claimants Ass'n of Philippines, Inc. v. United States, 373 F.2d 356, 359, 178 Ct.Cl. 630, 634 (1967).

The cases of MacMurray v. Board of Regents, 362 So.2d 969 (Fla. 1st DCA 1978); and Johnson v. Szymanski, 368 So.2d 370 (Fla. 2d DCA 1979), both stand for the

proposition that a cause of action accrues when the claimant has the facts at his or her disposal to bring suit, even if the claimant remains unaware of all the actual details. As stated in Johnson:

> A cause of action accrues 'when the plaintiff could first have maintained his action to a successful result . . . when the person in whose favor it arises is first entitled to institute a judicial proceeding for the enforcement of his rights." 1 Am.Jur.2d, Actions, §88 (1962). 368 So.2d at 372.

As was clearly held in Wilhelm, supra, advice to a patient of a diagnosis of cancer (coupled in this case with the advice that the cancer had probably spread) is patently sufficient to place the patient on notice of the prior misdiagnosis and the accrual of legal rights. As this information was conveyed to the decedent more than two years prior to the commencement of the action, the statute of limitations for medical malpractice had expired. §95.11(4)(b), Fla. Stat. (1975).

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CONCLUSION

Petitioner respectfully submits that the opinion of the District Court of Appeal should be reversed and this cause remanded to the trial court for reinstatement of the judgment in Petitioner's favor.

Respectfully submitted,

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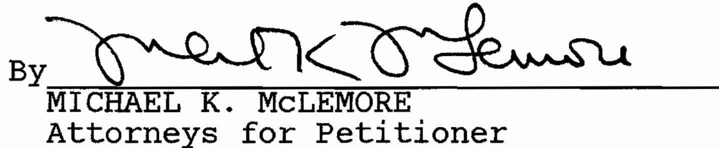
By 
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Attorneys for Petitioner

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing PETITIONER'S BRIEF has been furnished, by mail, this 5th day of November, 1983, to EDWARD A. PERSE, ESQUIRE, Horton, Perse & Ginsberg, 410 Concord Building, Miami, Florida 33130, Attorneys for Appellans, and CARROLL, HALBERT & MEYERSON, P.A., 505 Coconut Grove Bank Building, 2701 South Bayshore Drive, Miami, Florida 33133.

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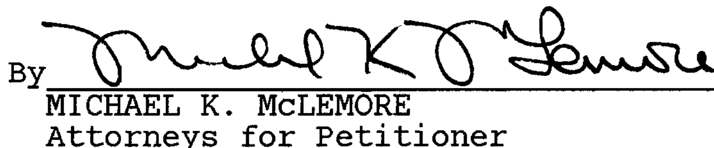
By 
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