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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 ON JURISDICTION

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WOMACK, CARLSON & KNISKERN, P. A.
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SUSAN J. COLE

Of Counsel

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TABLE OF AUTHORITIES

OTHER AUTHORITIES

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STATEMENT OF NECESSARY FACTS

Plaintiff's decedent, Cynthia Stella, was treated by Defendant, Dr. Terrance Ash, D.C., for "bursitis" from January 7, 1977 until March 5, 1977. 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." She was biopsied and on March 29, 1977, was informed that her condition was terminal. Decedent died on January 31, 1978.

Suit was filed March 30, 1979, 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. Upon motion of Ash, summary judgment was granted by the trial court. The Third District Court of Appeal reversed

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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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on two grounds. First, that Mrs. Stella's 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]

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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".

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JURISDICTIONAL STATEMENT

There were two grounds for the opinion of the Third District Court of Appeal. Each ground expressly and directly conflicts with decisions of Florida courts.

First, the appellate court held that Wrongful Death is an independent "cause of action", relying upon Perkins v. Variety Childrens Hospital, 413 So.2d 760 (Fla. 3d DCA 1982) and Bruce v. Byer, 423 So.2d 413 (Fla. 5th DCA 1982). The Perkins case is presently pending before this Court upon a certified question encompassing that precise point. Byer relies expressly upon Perkins as authority. The instant case conflicts expressly with the holding of the court in Warren v. Cohen, 363 So.2d 129 (Fla. 3d DCA 1978), which held wrongful death to be a "right of action" which is extinguished by a prior release of the decedent's "cause of action" for personal injuries. The instant case expressly conflicts with two seminal decisions of this Court defining a "right of action" for wrongful death: Collins v. Hall, 117 Fla. 282, 157 So. 646 (Fla. 1934); and Duval v. Hunt, 34 Fla. 85, 15 So. 876 (Fla. 1894). In Collins this Court held that a suit during the lifetime of the injured person barred a subsequent suit for wrongful death, based upon the doctrine of estoppel by judgment. 157 So. at 647, 648. Both Duval and Collins expressly hold that suit for wrongful death cannot be

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brought when the decedent would have been barred from bringing an action.[4]

Secondly, the opinion below holds that the statute of limitations does not begin to run until the "malpractice" has been discovered. This holding is in direct and express conflict with this Court's holdings in Nardone v. Reynolds, 333 So.2d 25 (Fla. 1976) and Homemakers, Inc. v. Gonzalez, 400 So.2d 965 (Fla. 1981). Nardone held that access to medical records is sufficient to commence the statute of limitations. Gonzalez held that experiencing pain on injection is sufficient to commence the running of the statute of limitations.

The Florida cases have consistently applied the language of the Florida Statute of Limitations applicable to medical malpractice, §95.11(4)(b), Fla.Stat. The court below relied instead upon Schalm v. Mount Clemens General Hospital, 82 Mich.App. 669, 267 N.W.2d 479 (1978). The Michigan statute of limitations construed in that case does not commence until the patient discovers or should have discovered "the asserted malpractice", a standard never required under §95.11(4)(b), Fla.Stat. To apply the standard of a foreign state to the malpractice

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4. "If, for any reason, the deceased person would have been defeated or barred from recovery had he been alive and suing for personal injury only, then the same reason or cause for his bar or defeat will bar and defeat a recovery for his death by any one suing on that behalf." 15 So. at 882, cited with approval, 157 So. at 647.

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statute of limitations in Florida is expressly in conflict with Nardone and Homemakers, supra, and every other decision construing the limitation under Florida law.

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CONCLUSION

The decision of the Third District Court of Appeal directly and expressly conflicts with decisions of this Court. Petitioner respectfully submits that this Court should exercise its discretion to review the decision below.

Respectfully submitted,

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By _____
SUSAN J. COLE
Attorneys for Petitioner

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing PETITIONER'S BRIEF ON JURISDICTION has been furnished, by mail, this 10th day of March, 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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